

# The Common Property Resource Digest

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## CPR FORUM

### Negotiating Conflict in the Commons

#### COMMENTARY

Seeking Common Cause in the Commons:  
Opportunities and Challenges in Resolving  
Environmental Conflicts  
Larry Fisher.....3

#### RESPONSES

Conflict Resolution in South Africa's  
Tenure Reform Program  
Ben Cousins .....6

Creating Dialogue Between Decision-Makers  
and Communities: Community Resource  
Mapping in Northern New Mexico  
Lucy Moore .....8

Alternative Dispute Resolution in Costa Rica  
Franklin Paniagua & Amy Sabbadini .....10

Book Review .....11

Courses .....17

Bibliographic Materials .....18

1996/97 Membership Renewal .....19

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of the CPR Digest will be accepted until  
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## OLD VOICES FOR NEW COMMONS

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*Presidential Address delivered to The Sixth Annual Common Property Conference of the  
International Association for the Study of Common Property, organized on the theme  
"Voices from the Commons." 6 - 9 June 1996, Berkeley, California, USA*

I'd like to begin with a couple of stories.

### Story One

Imagine a pair of villages, A and B, that share the use of a commons actually owned by Village A. Village A has for years granted secondary access rights to its commons to Village B. Village A retains for itself the first right of entry after it opens the commons each year, and on the next day Village B is entitled to enter the commons as well. One year, thirteen overeager members of Village B enter the commons on opening day rather than waiting until the next day, so Village A threatens to burn the possessions of the Village B early-birds. Angry members of Village B file suit against Village A to protest the threats. The magistrate finds for ..(hmmm, I wonder which one....).... Village A. Village A was trying only to enforce the rules on the commons rather than deny Village B its rights, and Village A's use of threats for purposes of enforcement was appropriate. Thus the court validates the primacy of the rules and property rights on the commons and the contractual terms of exchange between the two villages.

### Story Two

Imagine a landowner who owns a huge slope with forest and meadow on it, more than he could possibly need for himself. So he sells the grass-cutting rights on his land to the village of which he is a member. He still retains the rights to timber and firewood. A dispute develops when the village wants to expand its rights beyond grass and he tries to continue collecting as much grass as he wants, on the grounds that it is his land and his grass in the first place. But the village's allocation rule is to award grass to members in accordance with the size of the fields they cultivate, including tenants. The court produces a settlement validating ... (hmmm, I wonder which side....).... the village's claim to grass but *only* to the grass, and *limiting* the landowner's harvest of grass to the fairly *small* amount that he is entitled to as a village member. The court gives him *no* special break because he owns the land. He cannot repossess the grass-cutting rights that he has already sold (unless he were to buy them back at a mutually satisfactory price). Both sides must live up to the agreement they made earlier. Two of the landowner's tenants (who lease more arable fields from the landowner than he retains for his own use) are actually entitled to more grass than he is. Thus the court validates the village's ownership of grass-cutting rights and its rules for dividing those rights amongst its members.

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## OLD VOICES FOR A NEW COMMONS (continued from page 1)

In both of these stories, the courts see nothing peculiar about communities having property rights, and are perfectly willing to defend these rights, the rule-making autonomy of the rights-owning communities, and the contracts between communities. Wouldn't it be wonderful if these were true stories?

Well, they are. I didn't make these stories up. Those who know me know where I get most of my stories. Both are from the Ina valley in the province of Shinano (now Nagano prefecture) in the central Japan Alps. Story One occurred in 1677 when the village of Kashiwahara was trying to enforce the rules on the commons while the village of Chikuhira hoped to sneak around the rules to expand its access. The magistrate who dismissed Chikuhira's suit was Shidara Tarôbei of Iijima<sup>1</sup>. Story Two occurred in 1839 and comes from Shimo village near Iida city. The forgetful landowner who wanted to sell his grass and keep it too was Fujimoto Denzaemon (whose diary is a wonderful complement to the public record). The magistrate who crafted the settlement was Atori no Mashizaemon<sup>2</sup>. Both stories come from the period when Japan was a military dictatorship dominated by the Tokugawa shogunate (1600- 1867).

John Bruce said the other day that it is very hard to find an example in the countries that have recently legalized communal rights in which courts actually uphold these rights when they are challenged. But here are two among countless examples from Tokugawa Japan. Indeed, it is quite striking that the Tokugawa regime — which disapproved of rural rebellion and treated rioters with swift punishment (frequently execution) — never treated parties to a common property dispute as rioters. Most of the people at this meeting are concerned about the desperate environmental resource problems faced by living people. That is probably an appropriate emphasis. But a few of us, I've noticed, are interested in dead people. We study long-established long-enduring commons in once-developing but now-developed countries. What I hope to do tonight is make the case that dead people can teach us a few design tricks for creating new commons.

### Similarities and Differences Between Japan and LDCs

How can a comparison between Japan and LDCs today possibly be of practical use in coping with the problems of now-developing countries? What similarities do we find between Japan's experience and LDCs today? In both we find many traditions of common property management on environmentally crucial resources. In both LDCs and in Japan since 1868, *after* the Tokugawa period, governments tried to nationalize land — particularly high-grade timber forest — and created political and legal mechanisms to facilitate the transfer of commons into government land. Land grabbing seems to be a developmental phase in most nation-states. In both LDCs and Japan after 1868 we find that the assault on traditional arrangements leads to a ransacking of the commons. This is no surprise to us here. But many who observe this tragic ransacking turn the facts upside down to conclude that this tragedy of the no-longer-owned commons is the ultimate proof that people can't manage their own resources and need top-down supervision. In fact, of course, it is the top-down makeover of institutions that has destroyed security of tenure and the incentives to protect resources. In both we find that these observations produce a self-propelling cycle for quite a while, of institutional change, environmental destruction, more institutional change, more environmental destruction. Eventually someone begins to wonder if the kinds of changes being promoted are in fact what's responsible for the destruction.

(continued on page 12)

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## OLD VOICES FOR A NEW COMMONS (continued from page 2)

There are three important differences to be careful about as we draw lessons from Japan. (1) **international contact**. Japan closed itself to almost all foreign trade and immigration from 1639 to 1856 so that it experienced no transfers of environmental resources or substitutes in or out of the country. Japan's autarky during this period is quite different from LDCs today, but it keeps Tokugawa Japan as a laboratory specimen uncontaminated. (2) **population trends**. Japan experienced population growth rates like other proto-industrializing countries before 1720 and after 1850, but in between was a period of Zero Population Growth that is not yet understood. This is quite different from all LDCs. But there may be some equivalence between the fact that many LDCs are already suffering from having damaged their environmental resources, and the fact that Japan had no access to anybody else's environmental resources during isolation. In both settings, people were living at the environmental edge. (3) **law**. The difference that is particularly useful is that Japan's commons have always had better legal protection than those of LDCs, even while the government was busily attacking and enclosing commons after 1873. Whether inconsistent, forgetful, or politically trapped (I have not studied the motivations involved), the lawgivers of the late 1800s in Japan wrote protection for traditional commons into the modern civil code, and those clauses have stood unchanged since 1890.

### The Japanese Experience: A Capsule History

I need to run quickly through the environmental and institutional history of Japan so you can keep straight when ecological conditions were good and bad, and when common property

regimes flourished and when they were attacked. Japan experienced horrible civil war from 1467 to 1600, but the peace that followed turned out to be more damaging to forest cover than war had been. The demand for timber during the building of great cities led to deforestation on all kinds of land regardless of ownership<sup>4</sup>.

This deforestation crisis was largely responsible for the *creation* of sturdy common property rights regimes in Japan (I'll say that again to make sure you get the causal sequence right: deforestation *caused* common property, *not* the reverse!). The crisis proved to everyone that deforestation can really happen and created commitment thereafter to worry about it. After all, nobody tries hard to avoid a problem they don't believe exists. The result of deforestation was such serious soil erosion and siltation of rivers (followed by the construction of levees alongside the rivers) that river bottoms became higher than the surrounding fields. These "ceiling rivers" [tenjōgawa] not only caused damage of their own but were obvious evidence of the state of forest cover upstream.

The national and domain governments developed scientific silviculture and launched massive afforestation programs in the latter half of the 1600s<sup>5</sup>. The experience of deforestation and subsequent efforts at afforestation led directly to increasingly clear ownership of the commons and increasing elaboration of operational rules on the commons<sup>5</sup>. Japan's common property regimes all developed on land that was originally owned by governmental units or by individuals, who needed help protecting their investment in valuable new timber from poachers and thieves. The way these owners did this was to offer special use

rights to the villages nearest the land in question, as payment for keeping other people out. Common property rights solved the enforcement problem. In the early years of the Tokugawa shogunate, the national government moved its vassals and many of the smaller military houses around from domain to domain to keep them nervous and to prevent them from becoming locally powerful. Gradually, particularly when the government or the household of the mighty landlord might disappear but the land and the village did not, the land in question became village-owned. The villagers were not just hired guards any more, but co-owners, who used and paid taxes on what they owned.

Villages could acquire common property of two forms. (1) Villages might possess essentially fee-simple ownership of their commons (e.g., use rights and full decision-making rights about the land, with full transferability). Individuals had non-tradable shares of this but the village's rights were tradable. (2) Or villagers might own access and use rights on land formally owned by someone else (government, a huge individual landowner, or another village). Thus the Japanese experience may offer parallels and suggestions (1) for full ownership of common-pool resources by communities and (2) for situations where owners and resource users are not the same people — co-management.

The combination of afforestation and common property rights regimes to solve enforcement problems thus led to national environmental recovery in the 1700s. I'll say that again because you'll think you heard me wrong: the creation of village-owned common property rights coincided with the march toward forest recovery. Regional failures, indicated by the appearance of "bald mountains" upstream and "ceiling rivers" downstream, did occasionally occur thereafter, with two consequences: some commons were parcelled into individual property and some were able to restore their commons to health by tightening up their rules<sup>6</sup>.

Great change occurred with the political turmoil of the mid-19th century, called the Meiji restoration or the Meiji revolution. The Tokugawa regime fell and the young hotheaded patriots who took the reins of power almost immediately became pragmatic modernizers. Like nationalists everywhere, they wanted to mobilize the resources of the country for industrialization and the fuzzier "modernization," plus of course a for themselves and their friends.... This mobilization apparently included, as elsewhere, nationalizing as much of the nation's forest as possible. The lands they were able to confiscate from the collapsed Tokugawa shogunate and the domains weren't enough — they also wanted the 12 million hectares of village commons (one third of Japan). Although Japan had had national registration of lands and persons since the late 1500s, the new regime of Meiji modernizers conducted another wave of land registration as a foundation for a new agricultural tax. This 1873 land tax and registration drive is sometimes called the Japanese enclosure movement because so

many commons were nationalized or individualized. The amalgamation of traditional villages into new municipalities was also used as a method of putting village communal land into municipal, thus governmental, hands and vaporizing the use rights that had existed on top of the land. These campaigns caused immense uncertainty for several decades.

Predictably, the new insecurity of tenure led to massive degradation of land and a second wave of deforestation in Japan. Some of this was intentional: when villagers realized they were losing their commons, they sometimes burned it down in order to make sure the recipients didn't get much. And sometimes they were actually able to elicit a better outcome with a little well-planned arson.

But even during this period legal protection of the commons (those that were well documented) was eventually written into Japan's modern law codes. This sounds contradictory and it was: the modern civil code preserved rights to the commons, but the government made it enormously difficult to register land as commons and was thereby able to nationalize or individualize much land where villages could not satisfy tests of documentary proof. Given frequent fire, a serious famine in the 1830s, political disruption in the 1860s, and heavy urban migration, many villages didn't have the documentation or the political energy to do this in time. Thus 9 of the 12 million hectares of Tokugawa commons were nationalized or individualized.

But that means that 3 million hectares *survived* because some villages did have enough political energy to win. For example, there were four sequential decisions in 1878, 1880, 1883, and 1884 in which the courts (the Supreme Court, or Daishin'in, in the last instance) continually confirmed the existence of a multi-village commons centered on Noike mountain in central Japan because the documentary record made sole ownership by the village of Noike too obvious to deny<sup>7</sup>. Similarly, the citizens of Korakari village in Gifu prefecture fought legal battles since 1873 (every time the government tried to amalgamate villages) to win confirmation of their commons<sup>8</sup>.

In spite of this protection in the civil code, the government really wanted to get rid of the commons, and the courts between 1873 and 1945 consistently ruled that no common use rights could exist on government land or land owned by newly created municipalities. In the government's view, common property rights on government land was a legal and theoretical impossibility having nothing to do with evidence or documentation or actual practice. Thus until 1945, the only commons that still existed were the commons that villages had protected from confiscation. All the common usufruct rights that had existed on top of the land that the government nationalized instantly vaporized.

Then came the 1947 constitution with explicit provisions protecting private property. In Japanese legal tradition, the common property of villages has gradually come to be regarded as private property (as opposed to public property or state property). I'll say that again because it will sound odd to many people: Japanese legal scholarship today holds that common property rights are shared private rights with the same protection as individual private property rights. Thus the constitution offered new protection to the commons. What is required to obtain this protection in any particular case is simply (a) to demonstrate that common rights once existed on a particular piece of land (this then renders the clauses in the civil code applicable to this land), (b) to show that these rights were never voluntarily surrendered, and (c) to show that heirs of the original rights-holders still want to claim their rights. With a Supreme Court decision of 1973, postwar courts must now acknowledge common property rights to former commons that were nationalized in the previous century. In other words, the courts now recognize communal use rights on government land if the communities concerned can demonstrate that they used to use that land as a commons.

### Lessons from Old Voices

Now that you've got a capsule history of the Japanese commons, how can we exploit this record — these old voices — to help us in the understanding and design of new commons? What can we see if we look into the Japanese laboratory of experience?

First, we can learn about the ways that not very democratic governments can still become interested in local control and recognizing and enforcing community property rights. Apparently even dictatorships can be persuaded that healthy resources are good and local control is tolerable. We should draw an optimistic message from this for our work today. I'm sure democratization is a good idea — better to have it than not — but if a nasty autocratic military dictatorship could acknowledge common property rights, autonomous rule-making, and community contracting, then we should expect at least this much from modern governments *even* if they're not very democratic either. At the very least it should be possible to *humiliate* today's governments when they do not come up to Tokugawa standards of justice for resource users.

Second, where the commons survived attempts to change and weaken their legal status during "legal modernization," we can learn about integrating these traditional rights into legal reform. Here Japan offers both positive and negative guidance. This is an immensely intriguing project, yet to be done.

Third, examining the kinds of resources on which common property regimes survive over long periods of time helps us figure out which resources are efficiently handled this way even within a context of capitalism and individual property.

Fourth, what I will concentrate on in the rest of my remarks, we can learn about building resilience and flexibility into common property regimes. No society is completely without change for centuries. We may find secrets of resilience and adaptability in the face of change by studying these long-enduring commons. In Japan, for instance, the commons evolved during a time of technological change in agriculture, population mobility, urbanization, and proto-industrialization.

I'd like to finish up by talking about two features of Tokugawa commons that seem to have contributed to their resilience and adaptability. These are both issues that are hardly explored at all in the literature but strike me as crucial in the design of new commons.

### Evolution of Institutions to Match Ecology and Terrain

The first of these is the evolution of institutions to match ecology and terrain. There was a tendency during the Tokugawa period for multi-village commons to be subdivided into single-village commons (to reduce transactions costs and conflict and to improve cooperation on the resource). But multi-village commons routinely survived, even with nasty squabbles taking place periodically, in areas where terrain and ecosystem made inter-village coordination advantageous and included a village with a comparative advantage in enforcement.

On huge mountain slopes, villages at different altitudes would need to coordinate with each other. The upper villages tended to occupy a privileged position near the best forest. The lower villages needed occasional access to the wood but also needed to make sure that the uphill forests (called *mizunome hayashi* or water-source forests) remained intact for watershed protection. The result was usually multi-village coordination over commons on the entire slope.

In large river valleys the land might slope upward like a stairway in a series of "shelves" from the river, with a village and arable land on each of the relatively flat shelves (treads). But the slopes connecting the shelves (risers) would be shared by the villages above and below.

It is noteworthy that villages low on the slope had more grassland, villages high on the slope or on upper shelves had more kindling forest and timber forest, so there was need of exchange and sharing between them. But simple trading of products would not have been adequate to control externalities that the upper villages could impose on the lower villages. This interdependence on the slope or on the shelves thus gave rise to combinations of single-village commons for some uses or products and multi-village commons for other products.

The only research I know of on the fit between ecological conditions and institutional scale is being sponsored by the Beijer

International Institute of Ecological Economics - - if there is more. I welcome it. But in building new common property regimes we need to know how to *skip* centuries of evolution and get the scale issues right, or closer to right, on the first attempt. I think dead people can tell us a lot about how to do this.

### Tradable Common Property Rights

The second issue I want to highlight is the notion of trading common property rights. Common property arrangements can become quite formalized and sturdy, and common property rights can even be marketed and traded if that's what it takes to adapt to situations where agricultural needs fluctuate and populations are migrating a good deal. Japan's population grew at the beginning of this period and still moved around a lot even after the total quantity stabilized at ZPG. This remained a period of urbanization and proto-industrialization of the countryside<sup>9</sup>. New villages were created, and many pre-existing villages grew. Complex property relations among villages and among villagers developed to accommodate changing needs for the commons.

### Trading Among Villages

In large parts of Japan (e.g., I've now read about this in the central alps and in the horse-breeding regions of the northeast), villages made contractual arrangements with each other to buy and sell (or rent?) rights.

The village immediately adjacent to the commons, having the physical advantage of gatekeeper position, was usually the registered tax-paying owner (the *jimoto* [origin of the land] or *jizuke* [attached to the land] village) of the land or of the primary use rights. This village usually gave itself first access and first cut, using more tools, a longer time period of use, and rights to more products. This village might let itself store cut grass on the commons (so it could cut, dry, and accumulate dried grass and take much more grass off the mountain) and allow itself to remove products from the commons on horseback. This village made or had veto power over the rules on the commons.

Beyond or below this village were others that negotiated and *bought* use rights with regularity, but these would be lesser rights, and the rules or at least the limits on extraction would be negotiated with the owning village. These villages (called the *iriai* [enter-meet] villages) would have second entry, no place to store grass [*kusaokiba*] and no permission to use horses for hauling, so they could cut only what they could carry and before drying it to reduce its weight.

Beyond these were the lowest rights holders, who had the right to buy rights of entry when they wanted entry, but not when they didn't need entry. These villages (*irikata* [enter-type] or *irikomi* [enter-enter] villages) were far enough from the commons so that using it was a a nuisance, though sometimes

necessary. They paid for use rights when they wanted them, in accordance with the amount of use they made. Arrangements might be negotiated each year. Basically, they got the "left-overs"— the margin of use that the commons could tolerate that its principal users did not need.

Payment could be in cash, silk, tobacco, days of work, crackers, fish, clams, paper, fans, lacquer boxes, tatami mats: whatever was available that payer and recipient agreed on<sup>10</sup>. Negotiations and payment took place at the village level, between villages. The negotiations would set a fee for the whole village — the paying village could draw that fee from its own members as it wished (equally from all, proportional to arable, proportional to use of the commons, only on users and not on everyone, etc.) Similarly, the fee-receiving village could allocate receipts among its members as it saw fit (equally to all, proportional to arable, or retained intact for community investment). Thus owning a commons, particularly more commons than a village might need, could be a money-making proposition. A village might have a sliding fee schedule for prospective users: high fees for those who wanted to enter the commons to graze horses on it or use horses to carry off grass and discounts for those willing to go in without animals and carry out their harvest themselves. This user fee was called mountain-rent (*yamate, yamadaka*). It is interesting to note while we're at it that villages located on rivers at bridges or fords charged river-rent (*kawate*) to individual and commercial travellers who crossed there, and used the fees to keep up the bridge.)

Naturally, these relationships among owning and renting villages were not always smooth. We can find many instances of disagreement (just as we would expect to find between landlords and tenants today), particularly when owning villages decided to retain rather than sell/rent rights on their commons to other villages because their needs had changed and grown. Such conflict was quite severe in northern Japan where there was a steady transformation in agricultural land uses from pasturage for horses to cultivation, afforestation, and the creation of fuelwood coppices. Conflict often broke out between owning villages and the villages to which they had rented out meadows as fodder sources for many years. However, the result of such conflict was not to eliminate or parcel the commons, but simply to renegotiate the terms of the lease<sup>11</sup>.

### Trading Among Villagers

In Tokugawa times, villagers with common property rights were never allowed to buy and sell those rights individually. They could choose whether to exercise their rights or not, but they could not sell them to someone else if they did not use them, and they could not take them away with them if they moved. However, individual farmers could easily own fields in more than one village. Farmers moved around, bought and sold fields as their fortunes waxed and waned, and thus their need for access to

the commons fluctuated too. Keep in mind that Japan had national population registers at this time, and every single person "belonged" in a place — Big Brother Tokugawa Japan tried to use these registers almost the way we can use social security numbers in the US today (but without computers and almost certainly with less success). Generally, only farmers who were members of the village had rights to commons. Farmers who bought fields in another village were called visitor-cultivators (*irisakusha*) and did not *automatically* receive access to the commons where they were visitors. Since a village owned its common access rights collectively, it was up to the assembly of village co-owners to decide when and how much of those rights to allocate to visitor-cultivators. Visitor-cultivators usually received low-level rights to the commons belonging to the village where they held fields, without having to pay the fees that that village might have owed to another village for its use of commons. Over time, visitor-cultivators could *eventually* negotiate to acquire higher rights to the commons, at which point they would probably have to begin paying an appropriate share of any fees that the village where they were visitors might owe for rights to the commons. Once they were paying fees for use of the commons, visitor-cultivators usually acquired political rights in the decision-making body that managed the commons. Thus when Noike in central Japan, after 20 years of troublesome disputes with its neighbors, wrote down a book of rules in 1761, the visitor-cultivators in Noike participated in making these rules. When Noike published a revised version of its rule book in 1783, tenant farmers (*hikan*) also participate<sup>12</sup>

This flexibility allowed for accommodating new villages; arriving at arrangements among multiple villages with different needs; accommodating newcomers to villages; accommodating changing needs of villagers; and it made common property compatible with a market economy as long as members of a village could agree with each other on how to use the commons.

Essentially, then, there was a market in long-term and short-term contracts for use of the commons. Disputes that went to the courts often had to do with the breaking of these contracts, boundaries, or the *kinds* of rights a village was eligible for in different locations. We usually hear that marketization and commodification of products from the commons bring ruin to common property regimes and to community solidarity — and Japanese scholars say this too. But I'm pretty sure we're looking here at a market in common property rights, tradable at the village level. Of course it was an imperfect market with limited numbers of interested buyers and sellers. Walmart, Sheraton hotels, golf-course developers, residential builders, ski resort planners, and Fuji paper and pulp were not among the potential buyers a village had for its commons in the Tokugawa period or even anytime before 1965. I am of mixed mind about common property rights that are alienable for cash when buyers like these loom on the scene. But otherwise, it may be that the market, or some limited or constrained marketability, does not spell doom for common property regimes if

they have been established on the right resources at the right scale and incorporate mechanisms for resilience and adaptability. And of course some products of the commons are only worth extracting for the market — it is market demand that gives rise to the creation of property rights in some natural resources.

Again, I think dead people have a lot to tell us that may actually be counterintuitive, and help us in the design of *resilient* common property regimes, *where we need them, today*.

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10. Hirasawa, *Kinsei iriai kankô no seiritsu to tenkai*, 54-55.
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12. Hirasawa, *Kinsei iriai kankô no seiritsu to tenkai*, 90-93.

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## OLD VOICES FOR NEW COMMONS

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### I. TWO STORIES

I'd like to begin with a couple of stories.

#### Story One.

Imagine a pair of villages, A and B, that share the use of a commons actually owned by Village A. Village A has for years granted secondary access rights to its commons to Village B. Village A retains for itself the first right of entry after it opens the commons each year, and on the next day Village B is entitled to enter the commons as well. One year, thirteen overeager members of Village B enter the commons on opening day rather than waiting until the next day, so Village A threatens to burn the possessions of the Village B earlybirds. Angry members of Village B file suit against Village A to protest the threats. The magistrate finds for ..(hmmm, I wonder which one....).... Village A. Village A was trying only to enforce the rules on the commons rather than deny Village B its rights, and Village A's use of threats for purposes of enforcement was appropriate. Thus the court validates the primacy of the rules and property rights on the commons and the contractual terms of exchange between the two villages.

#### Story Two.

Imagine a landowner who owns a huge slope with forest and meadow on it, more than he could possibly need for himself. So he sells the grass-cutting rights on his land to the village of which he is a member. He still retains the rights to timber and firewood. A dispute develops when the village wants to expand its rights beyond grass and he tries to continue collecting as much grass as he wants, on the grounds that it is his land and his grass in the first place. But the village's allocation rule is to award grass to members in accordance with the size of the fields they cultivate, including tenants. The court produces a settlement validating ...(hmmm, I wonder which side....).... the village's claim to grass but **only** to the grass, and **limiting** the landowner's harvest of grass to the fairly **small** amount that he is entitled to as a village member. The court gives him **no** special break because he owns the land. He cannot repossess the grass-cutting rights that he has already sold (unless he were to buy them back at a mutually satisfactory price). Both sides must live up to the agreement they made earlier. Two of the landowner's tenants (who lease more arable fields from the landowner than he retains for his own use) are actually entitled to more grass than he is. Thus the court validates the village's ownership of grass-cutting rights and its rules for dividing those rights amongst its members.



In both of these stories, the courts see nothing peculiar about communities having property rights, and are perfectly willing to defend these rights, the rule-making autonomy of the rights-owning communities, and the contracts between communities. Wouldn't it be wonderful if these were true stories?

Well, they are. I didn't make these stories up. Those who know me know where I get most of my stories. Both are from the Ina valley in the province of Shinano (now Nagano prefecture) in the central Japan Alps. Story One occurred in 1677 when the village of Kashiwahara was trying to enforce the rules on the commons while the village of Chikuhira hoped to sneak around the rules to expand its access. The magistrate who dismissed Chikuhira's suit was Shidara Tarôbei of Iijima.<sup>1</sup> Story Two occurred in 1839 and comes from Shimo village near Iida city. The forgetful landowner who wanted to sell his grass and keep it too was Fujimoto Denzaemon (whose diary is a wonderful complement to the public record). The magistrate who crafted the settlement was Atori no Mashizaemon.<sup>2</sup> Both stories come from the period when Japan was a military dictatorship dominated by the Tokugawa shogunate (1600-1867).

John Bruce said the other day that it is very hard to find an example in the countries that have recently legalized communal rights in which courts actually uphold these rights when they are challenged. But here are two among countless examples from Tokugawa Japan. Indeed, it is quite striking that the Tokugawa regime -- which disapproved of rural rebellion and treated rioters with swift punishment (frequently execution) -- never treated parties to a common property dispute as rioters.

Most of the people at this meeting are concerned about the desperate environmental resource problems faced by living people. That is probably an appropriate emphasis. But a few of us, I've noticed, are interested in dead people. We study long-established long-enduring commons in once-developing but now-developed countries. What I hope to do tonight is make the case that dead people can teach us a few design tricks for creating new commons.

## II. SIMILARITIES AND DIFFERENCES BETWEEN JAPAN AND LDCs

How can a comparison between Japan and LDCs today possibly be of practical use in coping with the problems of now-developing countries? What similarities do we find between Japan's experience and LDCs today? In both we find many traditions of common property management on environmentally crucial resources. In both LDCs and in Japan since 1868, **after** the Tokugawa period, governments tried to nationalize land --

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<sup>1</sup> Hirasawa Kiyoto, Kinsei iriai kankô no seiritsu to tenkai [The establishment and development of common access customs in the early modern period] (Tokyo: Ochanomizu shobô, 1978), 237-239.

<sup>2</sup> Hirasawa, Kinsei iriai kankô no seiritsu to tenkai, 21-22.

particularly high-grade timber forest -- and created political and legal mechanisms to facilitate the transfer of commons into government land. Land grabbing seems to be a developmental phase in most nation-states. In both LDCs and Japan after 1868 we find that the assault on traditional arrangements leads to a ransacking of the commons. This is no surprise to us here. But many who observe this tragic ransacking turn the facts upside down to conclude that this tragedy of the no-longer-owned commons is the ultimate proof that people can't manage their own resources and need top-down supervision. In fact, of course, it is the top-down makeover of institutions that has destroyed security of tenure and the incentives to protect resources. In both we find that these observations produce a self-propelling cycle for quite a while, of institutional change, environmental destruction, more institutional change, more environmental destruction. Eventually someone begins to wonder if the kinds of changes being promoted are in fact what's responsible for the destruction.

There are three important differences to be careful about as we draw lessons from Japan.

**(1) international contact.** Japan closed itself to almost all foreign trade and immigration from 1639 to 1856 so that it experienced no transfers of environmental resources or substitutes in or out of the country. Japan's autarky during this period is quite different from LDCs today, but it keeps Tokugawa Japan as a laboratory specimen uncontaminated. **(2) population trends.** Japan experienced population growth rates like other proto-industrializing countries before 1720 and after 1850, but in between was a period of Zero Population Growth that is not yet understood. This is quite different from all LDCs. But there may be some equivalence between the fact that many LDCs are already suffering from having damaged their environmental resources, and the fact that Japan had no access to anybody else's environmental resources during isolation. In both settings, people were living at the environmental edge. **(3) law.** The difference that is particularly useful is that Japan's commons have always had better legal protection than those of LDCs, even while the government was busily attacking and enclosing commons after 1873. Whether inconsistent, forgetful, or politically trapped (I have not studied the motivations involved), the lawgivers of the late 1800s in Japan wrote protection for traditional commons into the modern civil code, and those clauses have stood unchanged since 1890.

### III. THE JAPANESE EXPERIENCE: A CAPSULE HISTORY

I need to run quickly through the environmental and institutional history of Japan so you can keep straight when ecological conditions were good and bad, and when common property regimes flourished and when they were attacked.

Japan experienced horrible civil war from 1467 to 1600, but the peace that followed turned out to be more damaging to forest cover than war had been. The demand for timber during the building of great cities led to deforestation on all kinds of land regardless of ownership.<sup>3</sup> This deforestation crisis was largely responsible for the **creation** of sturdy

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<sup>3</sup> Conrad Totman, The Green Archipelago: Forestry in Preindustrial Japan (Berkeley:

common property rights regimes in Japan (I'll say that again to make sure you get the causal sequence right: deforestation **caused** common property, **not** the reverse!). The crisis proved to everyone that deforestation can really happen and created commitment thereafter to worry about it. After all, nobody tries hard to avoid a problem they don't believe exists. The result of deforestation was such serious soil erosion and siltation of rivers (followed by the construction of levees alongside the rivers) that river bottoms became higher than the surrounding fields. These "ceiling rivers" [*tenjôgawa*] not only caused damage of their own but were obvious evidence of the state of forest cover upstream.

The national and domain governments developed scientific silviculture and launched massive afforestation programs in the latter half of the 1600s.<sup>4</sup> The experience of deforestation and subsequent efforts at afforestation led directly to increasingly clear ownership of the commons and increasing elaboration of operational rules on the commons.<sup>5</sup> Japan's common property regimes all developed on land that was originally owned by governmental units or by individuals, who needed help protecting their investment in valuable new timber from poachers and thieves. The way these owners did this was to offer special use rights to the villages nearest the land in question, as payment for keeping other people out. Common property rights solved the enforcement problem. In the early years of the Tokugawa shogunate, the national government moved its vassals and many of the smaller military houses around from domain to domain to keep them nervous and to prevent them from becoming locally powerful. Gradually, particularly when the government or the household of the mighty landlord might disappear but the land and the village did not, the land in question became village-owned. The villagers were not just hired guards any more, but co-owners, who used and paid taxes on what they owned.

Villages could acquire common property of two forms. (1) Villages might possess essentially fee-simple ownership of their commons (e.g., use rights and full decision-making rights about the land, with full transferability). Individuals had non-tradable shares of this but the village's rights were tradable. (2) Or villagers might own access and use

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University of California Press, 1989), 50-80.

<sup>4</sup> Totman, The Green Archipelago, 116-169.

<sup>5</sup> Margaret A. McKean, "Management of Traditional Common Lands -(iriaichi) in Japan," Proceedings of the Conference on Common Property Resource Management: April 21-26, 1985, Annapolis, Maryland, edited by with (in alphabetical order) Daniel Bromley, David Feeny, Jere Gilles, Margaret A. McKean, Ronald Oakerson, Elinor Ostrom, Pauline Peters, C. Ford Runge, and James Thomson (Washington, D.C.: National Academy of Sciences, 1986), 533-579. See also Chiba Tokuji, Hageyama no bunka (Tokyo: Gakuseisha, 15 December 1973), 155-160.

rights on land formally owned by someone else (government, a huge individual landowner, or **another** village). Thus the Japanese experience may offer parallels and suggestions (1) for full ownership of common-pool resources by communities **and** (2) for situations where owners and resource users are not the same people -- co-management.

The combination of afforestation and common property rights regimes to solve enforcement problems thus led to national environmental recovery in the 1700s. I'll say that again because you'll think you heard me wrong: the creation of village-owned common property rights coincided with the march toward forest recovery. Regional failures, indicated by the appearance of "bald mountains" upstream and "ceiling rivers" downstream, did occasionally occur thereafter, with two consequences: some commons were parcelled into individual property and some were able to restore their commons to health by tightening up their rules.<sup>6</sup>

Great change occurred with the political turmoil of the mid-19th century, called the Meiji restoration or the Meiji revolution. The Tokugawa regime fell and the young hotheaded patriots who took the reins of power almost immediately became pragmatic modernizers. Like nationalists everywhere, they wanted to mobilize the resources of the country for industrialization and the fuzzier "modernization," plus of course a bit for themselves and their friends.... This mobilization apparently included, as elsewhere, nationalizing as much of the nation's forest as possible. The lands they were able to confiscate from the collapsed Tokugawa shogunate and the domains weren't enough -- they also wanted the 12 million hectares of village commons (one third of Japan). Although Japan had had national registration of lands and persons since the late 1500s, the new regime of Meiji modernizers conducted another wave of land registration as a foundation for a new agricultural tax. This 1873 land tax and registration drive is sometimes called the Japanese enclosure movement because so many commons were nationalized or individualized. The amalgamation of traditional villages into new municipalities was also used as a method of putting village communal land into municipal, thus governmental, hands and vaporizing the use rights that had existed on top of the land. These campaigns caused immense uncertainty for several decades.

Predictably, the new insecurity of tenure led to massive degradation of land and a second

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<sup>6</sup> There was some parcelling (enclosure) of commons during the Tokugawa period, but it appears that mismanagement and overuse of the commons did not loom large as a cause of parcelling until after the disruptions of the mid-19th century (discussed below). See Margaret A. McKean, "Collective Action and the Environment in Tokugawa Japan: Success and Failure in Management of the Commons," paper presented at the Association of Asian Studies, San Francisco, 23 March 1988; Kären Wigen [Lewis], "Common Losses: Transformations of Commonland and Peasant Livelihood in Tokugawa Japan, 1603-1868" (M.A. Thesis in Geography, University of California at Berkeley, 1985); and Chiba Tokuji, Hageyama no bunka [The Culture of Bald Mountains] (Tokyo: Gakuseisha, 1970), 60. See also Chiba's earlier Hageyama no kenkyû [Research on Bald Mountains] (Tokyo: Nôrin kyôkai, 1956).

wave of deforestation in Japan. Some of this was intentional: when villagers realized they were losing their commons, they sometimes burned it down in order to make sure the recipients didn't get much. And sometimes they were actually able to elicit a better outcome with a little well-planned arson.

But even during this period legal protection of the commons (those that were well documented) was eventually written into Japan's modern law codes. This sounds contradictory and it was: the modern civil code preserved rights to the commons, but the government made it enormously difficult to register land **as** commons and was thereby able to nationalize or individualize much land where villages could not satisfy tests of documentary proof. Given frequent fire, a serious famine in the 1830s, political disruption in the 1860s, and heavy urban migration, many villages didn't have the documentation or the political energy to do this in time. Thus 9 of the 12 million hectares of Tokugawa commons were nationalized or individualized.

But that means that 3 million hectares **survived** because some villages **did** have enough political energy to win. For example, there were four sequential decisions in 1878, 1880, 1883, and 1884 in which the courts (the Supreme Court, or Daishin'in, in the last instance) continually confirmed the existence of a multivillage commons centered on Noike mountain in central Japan because the documentary record made sole ownership by the village of Noike too obvious to deny.<sup>7</sup> Similarly, the citizens of Kotokari village in Gifu prefecture fought legal battles since 1873 (every time the government tried to amalgamate villages) to win confirmation of their commons.<sup>8</sup>

In spite of this protection in the civil code, the government really wanted to get rid of the commons, and the courts between 1873 and 1945 consistently ruled that no common use rights could exist on government land or land owned by newly created municipalities. In the government's view, common property rights on government land was a legal and theoretical impossibility having nothing to do with evidence or documentation or actual practice. Thus until 1945, the only commons that still existed were the commons that villages had protected from confiscation. All the common usufruct rights that had existed on top of the land that the government nationalized instantly vaporized.

Then came the 1947 constitution with explicit provisions protecting private property. In Japanese legal tradition, the common property of villages has gradually come to be regarded as private property (as opposed to public property or state property). I'll say that again because it will sound odd to many people: Japanese legal scholarship today holds that common property rights are shared private rights with the same protection as

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<sup>7</sup> Hirasawa, Kinsei iriai kankô no seiritsu to tenkai, 114-122.

<sup>8</sup> Fukushima Masao, Ushiomori Toshitaka, and Watanabe Yôzô, Rin'ya iriaiken no honshitsu to yôsô: Gifu-ken Yoshiki-gun Kotakari-mura no baai [The essentials and features of forest commons: the case of Kitakari village, Yoshiki county, Gifu prefecture] (Tokyo: Tôkyô daigaku shuppankai, 1966).

individual private property rights. Thus the constitution offered new protection to the commons. What is required to obtain this protection in any particular case is simply (a) to demonstrate that common rights once existed on a particular piece of land (this then renders the clauses in the civil code applicable to this land), (b) to show that these rights were never voluntarily surrendered, and (c) to show that heirs of the original rights-holders still want to claim their rights. With a Supreme Court decision of 1973, postwar courts must now acknowledge common property rights to former commons that were nationalized in the previous century. In other words, the courts now recognize communal use rights on government land if the communities concerned can demonstrate that they used to use that land as a commons.

#### IV. LESSONS FROM OLD VOICES

Now that you've got a capsule history of the Japanese commons, how can we exploit this record -- these old voices -- to help us in the understanding and design of new commons? What can we see if we look into the Japanese laboratory of experience?

First, we can learn about the ways that not very democratic governments can still become interested in local control and recognizing and enforcing community property rights. Apparently even dictatorships can be persuaded that healthy resources are good and local control is tolerable. We should draw an optimistic message from this for our work today. I'm sure democratization is a good idea -- better to have it than not -- but if a nasty autocratic military dictatorship could acknowledge common property rights, autonomous rule-making, and community contracting, then we should expect at least this much from modern governments **even** if they're not very democratic either. At the very least it should be possible to **humiliate** today's governments when they do not come up to Tokugawa standards of justice for resource users.

Second, where the commons survived attempts to change and weaken their legal status during "legal modernization", we can learn about integrating these traditional rights into legal reform. Here Japan offers both positive and negative guidance. This is an immensely intriguing project, yet to be done.

Third, examining the kinds of resources on which common property regimes survive over long periods of time helps us figure out which resources are efficiently handled this way even within a context of capitalism and individual property.

Fourth, what I will concentrate on in the rest of my remarks, we can learn about building resilience and flexibility into common property regimes. No society is completely without change for centuries. We may find secrets of resilience and adaptability in the face of change by studying these long-enduring commons. In Japan, for instance, the commons evolved during a time of technological change in agriculture, population mobility, urbanization, and proto-industrialization.

I'd like to finish up by talking about two features of Tokugawa commons that seem to

have contributed to their resilience and adaptability. These are both issues that are hardly explored at all in the literature but strike me as crucial in the design of new commons.

## VI. EVOLUTION OF INSTITUTIONS TO MATCH ECOLOGY AND TERRAIN

The first of these is the evolution of institutions to match ecology and terrain. There was a tendency during the Tokugawa period for multi-village commons to be subdivided into single-village commons (to reduce transactions costs and conflict and to improve cooperation on the resource). But multi-village commons routinely survived, even with nasty squabbles taking place periodically, in areas where terrain and ecosystem made inter-village coordination advantageous and included a village with a comparative advantage in enforcement.

On huge mountain slopes, villages at different altitudes would need to coordinate with each other. The upper villages tended to occupy a privileged position near the best forest. The lower villages needed occasional access to the wood but also needed to make sure that the uphill forests (called *mizunome hayashi* or water-source forests) remained intact for watershed protection. The result was usually multi-village coordination over commons on the entire slope.

In large river valleys the land might slope upward like a stairway in a series of "shelves" from the river, with a village and arable land on each of the relatively flat shelves (treads). But the slopes connecting the shelves (risers) would be shared by the villages above and below.

It is noteworthy that villages low on the slope had more grassland, villages high on the slope or on upper shelves had more kindling forest and timber forest, so there was need of exchange and sharing between them. But simple trading of products would not have been adequate to control externalities that the upper villages could impose on the lower villages. This interdependence on the slope or on the shelves thus gave rise to **combinations** of single-village commons for some uses or products and multi-village commons for other products.

The only research I know of on the fit between ecological conditions and institutional scale is being sponsored by the Beijer International Institute of Ecological Economics -- if there is more, I welcome it. But in building new common property regimes we need to know how to **skip** centuries of evolution and get the scale issues right, or closer to right, on the first attempt. I think dead people can tell us a lot about how to do this.

## VII. TRADABLE COMMON PROPERTY RIGHTS

The second issue I want to highlight is the notion of trading common property rights. Common property arrangements can become quite formalized and sturdy, and common

property rights can even be marketed and traded if that's what it takes to adapt to situations where agricultural needs fluctuate and populations are migrating a good deal. Japan's population grew at the beginning of this period and still moved around a lot even after the total quantity stabilized at ZPG. This remained a period of urbanization and proto-industrialization of the countryside.<sup>9</sup> New villages were created, and many pre-existing villages grew. Complex property relations among villages and among villagers developed to accommodate changing needs for the commons.

## TRADING AMONG VILLAGES

In large parts of Japan (e.g., I've now read about this in the central alps and in the horse-breeding regions of the northeast), villages made contractual arrangements with each other to buy and sell (or rent?) rights.

The village immediately adjacent to the commons, having the physical advantage of gatekeeper position, was usually the registered tax-paying owner (the *jimoto* [origin of the land] or *jizuke* [attached to the land] village) of the land or of the primary use rights. This village usually gave itself first access and first cut, using more tools, a longer time period of use, and rights to more products. This village might let itself store cut grass on the commons (so it could cut, dry, and accumulate dried grass and take much more grass off the mountain) and allow itself to remove products from the commons on horseback. This village made or had veto power over the rules on the commons.

Beyond or below this village were others that negotiated and **bought** use rights with regularity, but these would be lesser rights, and the rules or at least the limits on extraction would be negotiated with the owning village. These villages (called the *iriai* [enter-meet] villages) would have second entry, no place to store grass [*kusaokiba*] and no permission to use horses for hauling, so they could cut only what they could carry and before drying it to reduce its weight.

Beyond these were the lowest rights holders, who had the right to buy rights of entry when they wanted entry, but not when they didn't need entry. These villages (*irikata* [enter-type] or *irikomi* [enter-enter] villages) were far enough from the commons so that using it was a a nuisance, though sometimes necessary. They paid for use rights when they wanted them, in accordance with the amount of use they made. Arrangements might be negotiated each year. Basically, they got the "leftovers" -- the margin of use that the commons could tolerate that its principal users did not need.

Payment could be in cash, silk, tobacco, days of work, crackers, fish, clams, paper, fans, lacquer boxes, tatami mats: whatever was available that payer and recipient agreed on.<sup>10</sup>

<sup>9</sup> On this transformation, see Kären Wigen, The Making of a Japanese Periphery, 1750-1920 (Berkeley and Los Angeles: University of California Press, 1995).

<sup>10</sup> Hirasawa.



Negotiations and payment took place at the village level, between villages. The negotiations would set a fee for the whole village -- the paying village could draw that fee from its own members as it wished (equally from all, proportional to arable, proportional to use of the commons, only on users and not on everyone, etc.) Similarly, the fee-receiving village could allocate receipts among its members as it saw fit (equally to all, proportional to arable, or retained intact for community investment). Thus owning a commons, particularly more commons than a village might need, could be a money-making proposition. A village might have a sliding fee schedule for prospective users: high fees for those who wanted to enter the commons to graze horses on it or use horses to carry off grass and discounts for those willing to go in without animals and carry out their harvest themselves. This user fee was called mountain-rent (**yamate, yamadaka**). It is interesting to note while we're at it that villages located on rivers at bridges or fords charged river-rent (**kawate**) to individual and commercial travellers who crossed there, and used the fees to keep up the bridge.)

Naturally, these relationships among owning and renting villages were not always smooth. We can find many instances of disagreement (just as we would expect to find between landlords and tenants today), particularly when owning villages decided to retain rather than sell/rent rights on their commons to other villages because their needs had changed and grown. Such conflict was quite severe in northern Japan where there was a steady transformation in agricultural land uses from pasturage for horses to cultivation, afforestation, and the creation of fuelwood coppices. Conflict often broke out between owning villages and the villages to which they had rented out meadows as fodder sources for many years. However, the result of such conflict was not to eliminate or parcel the commons, but simply to renegotiate the terms of the lease.<sup>11</sup>

## TRADING AMONG VILLAGERS

In Tokugawa times, villagers with common property rights were never allowed to buy and sell those rights individually. They could choose whether to exercise their rights or not, but they could not sell them to someone else if they did not use them, and they could not take them away with them if they moved. However, individual farmers could easily own fields in more than one village. Farmers moved around, bought and sold fields as their fortunes waxed and waned, and thus their need for access to the commons fluctuated too. Keep in mind that Japan had national population registers at this time, and every single person "belonged" in a place -- Big Brother Tokugawa Japan tried to use these registers almost the way we can use social security numbers in the US today (but without computers and almost certainly with less success). Generally, only farmers who were members of the village had rights to commons. Farmers who bought fields in another village were called visitor-cultivators (*irisakusha*) and did not automatically receive access to the commons where they were visitors. Since a village owns its common access

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<sup>11</sup> Mori Kahei, Kinsei Ou nôgyô keiei soshiki ron [On Management and organization of agriculture in early modern Mutsu and Dewa] (Tokyo: Yûhikaku, 1953, 401pp+15pp), passim.

rights collectively, it was up to the assembly of village co-owners to decide when and how much of those rights to allocate to visitor-cultivators. Visitor-cultivators usually received low-level rights to the commons belonging to the village where they held fields, without having to pay the fees that that village might have owed to another village for its use of commons. Over time, visitor-cultivators could **eventually** negotiate to acquire higher rights to the commons, at which point they would probably have to begin paying an appropriate share of any fees that the village where they were visitors might owe for rights to the commons. Once they were paying fees for use of the commons, visitor-cultivators usually acquired political rights in the decision-making body that managed the commons. Thus when Noike in central Japan, after 20 years of troublesome disputes with its neighbors, wrote down a book of rules in 1761, the visitor-cultivators in Noike participated in making these rules. When Noike published a revised version of its rule book in 1783, tenant farmers (*hikan*) also participated.<sup>12</sup>

This flexibility allowed for accommodating new villages; arriving at arrangements among multiple villages with different needs; accommodating newcomers to villages; accommodating changing needs of villagers; and it made common property compatible with a market economy as long as members of a village could agree with each other on how to use the commons.

Essentially, then, there was a market in long-term and short-term contracts for use of the commons. Disputes that went to the courts often had to do with the breaking of these contracts, boundaries, or the **kinds** of rights a village was eligible for in different locations. We usually hear that marketization and commodification of products from the commons bring ruin to common property regimes and to community solidarity -- and Japanese scholars say this too. But I'm pretty sure we're looking here at a market in common property rights, tradable at the village level. Of course it was an imperfect market with limited numbers of interested buyers and sellers. Walmart, Sheraton hotels, golf-course developers, residential builders, ski resort planners, and Fuji paper and pulp were not among the potential buyers a village had for its commons in the Tokugawa period or even anytime before 1965. I am of mixed mind about common property rights that are alienable for cash when buyers like these loom on the scene. But otherwise, it may be that the market, or some limited or constrained marketability, does not spell doom for common property regimes if they have been established on the right resources at the right scale and incorporate mechanisms for resilience and adaptability. And of course some products of the commons are only worth extracting for the market -- it is market demand that gives rise to the creation of property rights in some natural resources.

Again, I think dead people have a lot to tell us that may actually be counterintuitive, and help us in the design of **resilient** common property regimes, **where** we need them, **today**.

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<sup>12</sup> Hirasawa, Kinsei iriai kankô no seiritsu to tenkai, 90-93.