By Carolyn Raffensperger

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Precaution And A Theory Of Property

In the April issue of *Conservation Biology*, University of Illinois law professor Eric Freyfogle asks, "Where's the conservationist's view of private property?" Freyfogle points out that the destruction of the landscape is part and parcel of interlocking beliefs about liberty (the right of a person to develop the good life in isolation), democracy (the rule of the individual through the market), private property (a core civil right), and equality (inequality results, for example, when one person is prohibited from building on a wetland while another is allowed to build on dry land).

The conservationist view of property might be summed up this way: Property may be held privately but some resources, by their nature, must be held in the public trust. The public interest is best upheld by public trustees (government entities), who ensure that certain resources are maintained for society and future generations of humans and other species. These resources may be held largely in the public domain, such as national parks, national forests, and navigable waterways in which a certain amount of private economic activity may be permitted.

In addition, some types of largely private property and activity will require a certain amount of public stewardship, such as privately owned wetlands or research on human embryos or the human genome. (In Europe, most private agricultural land falls into this category.) The conservationist view is that the fairest, most environmentally and economically sound approach is for the public (in the person of its representatives) to govern these resources.

This theory of property is most concretely expressed in the public trust doctrine, which began in Roman law, and threaded through British law and carried over to the American colonies, particularly regarding navigable waters and tidelands. The doctrine has been developed as state common law with a few references in federal law. An example is Superfund, which contains a provision authorizing a cause of action in tort brought by the public trustee against the party charged with damaging a natural resource.

In addition to the rich body of common law developed at the state level, the logic of the public trust doctrine has been ensconced in numerous state constitutions. Hawaii's constitution says it this way, "For the benefit of present and future generations, the state and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state. All public natural resources are held in trust by the state for the benefit of the people."

Regardless of whether it is common law or state constitutional law, as a matter of the public trust, states must use due diligence to protect natural resources for society and future generations. A cogent expression of this mandate is the Hawaii Supreme Court's *Waiahole Ditch* decision, which said, "The duty to protect public water resources is a categorical imperative and the precondition to all subsequent considerations, for without such underlying protection the natural environment could, at some point, be irrevocably harmed and the duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses could be endangered."

Waiahole Ditch was an appeal brought by small family farmers and Native Hawaiians challenging the Commission on Water Resource Management's decision to allocate water from the ditch that had been diverted for 80 years by central Oahu sugar plantations. This points to a key reason for the need for including strong public trust provisions in property theory: Private owners are likely to externalize the costs of developing resources, thereby foisting the costs of exploitation and damage onto the public. And privatized resources are more likely to exclude wide access to the benefits of those resources.

The public trust theory of property is consonant with a precautionary approach to science. The Court in Hawaii adopted the essence of the precautionary principle as the method for implementing the doctrine: "The absence of firm scientific proof should not tie the commission's hands in adopting reasonable measures designed to further the public interest," the Court said. "Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt 'precautionary principles' in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."

The Court also shifted the burden to the party that wished to privatize and commercially exploit the water. Shifting the burden of proof, establishing an affirmative duty for the trustee to protect the resource, adopting the precautionary principle to guide decisions under uncertainty, and, as some have argued under Superfund, using restoration costs instead of diminution of value as the measure of damages, all add up to robust protection of the environment. A wonderful theory of property, indeed.

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