

## ON THE STANDING OF LAND

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My initial reaction to the charge of presenting this address was to prepare a discourse lamenting inadequate environmental representation on public agencies which regulate the use of natural resources. However, this state of affairs is really symptomatic of a broader philosophical problem, namely, the absence of an environmental ethic in human society.

Modern Western man has never viewed himself as one part of an interdependent community, sharing with other life the right to continued existence. He envisions himself as conqueror of the environment and by extension, knows who and what is valuable and valueless in the biosphere. As scientists, we know differently. Human knowledge of biological mechanisms is very incomplete. In fact, life is so extraordinarily complex that we may never fully understand it. We do know that all natural objects in an ecosystem have value to the biotic community. Recognizing even some of these values in the ecological sense has taken years of scientific effort. The social evolution of an environmental ethic may not enjoy the luxury of an extended genesis if it is to arrive in time to help Western Civilization survive.

Human insistence on considering all co-inhabitants of this planet as chattel stands as mute testimony that we have learned nothing from the experiences of past civilizations. The eminent British historian, Arnold Toynbee, observed that 19 of 21 past civilizations died from human failure to respond positively to the challenges they received. Apathy kills civilizations. When man in his opulence and indolence does not meet the challenges facing him or when in his poverty and despair he can no longer arouse himself, his civilization dies. Lack of concern can be manifested in many ways, but a basic tragic example is man's callous abuse of his environment (Iseminger, 1969). From the Babylonians to the Mayans, man's environmental misuse is graphically read in the ruins buried by sand, in ever spreading river deltas, in silt-laden irrigation ditches and in man-made deserts. Man did not consciously set out to destroy his support system, but he simply failed to understand his true role in the scheme of nature.

There is no determinism in history. Whether Western Civilization can forestall the end that befell other civilizations remains to be seen. Historian Gordon Iseminger, a native South Dakotan, observed that each succeeding civilization surpassed previous ones by

reaching a higher plateau of learning, technology and accomplishment. Therefore, the fall of each successive civilization was a greater catastrophe than the previous one. Unless we take immediate and meaningful steps to redress the environment imbalance we have caused, Western Civilization will become another statistic in the study of civilizations. Its fall will be the greatest, the most tragic and the least necessary catastrophe in human history.

Frankly, I'm unsure of our status today. It's difficult to be optimistic about our learning a lesson from history or in the saving power of knowledge. Conversely the events of the last 50 years do offer hope that a "mutation" of ideas may be in its embryonic stage. The Conservation movement of the 1930's and the Earth Day activities of the 1970's may have represented the genesis of an intellectual change. Quoting that great naturalist Aldo Leopold, "The case for a land ethic would appear hopeless but for the minority which is in obvious revolt against modern trends" (Leopold, 1949).

How did we arrive at our present philosophical base? Throughout recorded history civilized man has ascribed ethical criteria to many areas of conduct. These can be characterized in ecological as well as philosophical terms. An ethic in ecological terms is a limitation of freedom of action in the struggle for existence while philosophically it is a perception of what is acceptable social behavior. Each ethic evolved from a need and desire for interdependent individuals or groups to evolve modes of cooperation for the common good of all.

Unfortunately, western man has never embraced an ethic which includes concern for water, soil, plants and animals. His relationship to natural objects remains basically economic, providing privileges but no obligations. This is reinforced by religious beliefs whereby man's inclinations prompt him to utilize natural resources to promote his competitive advantage in society. At the same time he cooperates with others under another set of individual and societal ethics which subjugate individual freedoms for the benefit of all societal members.

Today environmental ethics are governed primarily by economic self-interest just as social ethics were more than a century ago. For example, land owners only utilize their soil in ways which are convenient and profitable. Witness the extensive changes in South Dakota's landscape in recent years when fencerow to fence-row cultivation was encouraged. Moreover, the ecological consequences of modern agriculture are poorly understood by the public because the changes in techniques are improvements in the pump rather than the well. Mining the soil will continue until an ethical relationship to the environment is developed based on respect,

admiration and high regards for its philosophical value and man views himself as a steward rather than an owner of the land he occupies.

The key that will unlock the evolutionary process toward a realistic environmental ethic is simply to think about the environment in terms other than economic. Obviously economics will always influence environmental use, but we must analyze each environmental question in terms of what is ethically and esthetically correct as well as what is economically expedient. An action is right when it tends to preserve the integrity, stability and beauty of the ecosystem and it is wrong when it tends otherwise. A system of utilization based solely on economic self-interest ignores or discriminates against many elements of the biotic community that lack commercial value but that are essential to its healthy functioning. It falsely assumes that the economic parts of the community will function without the noneconomic parts. Ecologists know that lack of diversity promotes instability which is the bellwether of environmental catastrophe. If we tactily accede to the belief that economics determines *all* environmental use our cause will be surely lost.

Environmental education must play an important role in bringing a realistic environmental ethic to fruition because the mutation of ideas differs from the mutation of genes. Change in an idea by which we have previously been unconsciously ruled becomes much more probable once the idea has been adequately exposed. It is our job to create this exposure. We have made progress but despite the proliferation of ecology courses and environmental programs, federal and state agencies and institutions including extension services teach very little that imparts an ethical obligation towards the ecosystem. The ecology-conservation movement is paved with good intentions which may prove to be futile because they lack critical understanding of either the ecosystem or of economic land use.

At the risk of appearing to place the "cart before the horse," I believe our best chance of evoking an environmental ethic in human society may be through our judicial system. Laws to be stable must be based on ethics. A philosophical rationale for an environmental ethic in our jural system was recently advanced by Christopher Stone (1974), professor of law at the University of Southern California. Stone suggested the "unthinkable," that legal rights be given to forests, streams, rivers, trees and other natural objects.

Since the beginning of man's moral development there has been a continual extension in the objects of his social instincts and sympathies. Initially it was to other individuals of his race, then to other races, then to useless members of society and finally

to "lower" animals. The history of law has had a parallel development with rightless members of early societies such as children, women and even inanimate objects gradually accorded rights. Today common law has many inanimate right holders such as corporations, municipalities, ships, etc. All enjoy an independent jural life.

Throughout legal history each extension of rights to a new entity has been unthinkable, or even frightening. We tend to consider the rightlessness of rightless things to be decreed by nature and not a legal convention acting in support of the status quo. This is partly because until a rightless thing receives rights we cannot see it as anything but a thing for the use of those who are holding rights at the time. Consequently, a circular logic exists in which we resist giving a thing "rights" until it can be seen and valued for itself but it is difficult to see the value of a thing until we give it "rights."

No one is suggesting that the environment should have the same body of rights as humans nor should everything in the environment have the same rights. However, by according legal rights to natural objects we would insure that the environment has a legally recognized worth and dignity in its own and not merely to serve as a means to benefit the contemporary right holders.

At the present time under common law, natural objects have no legal standing. If we use a stream as an example, there is no way to challenge a pollution action unless another human is able to show an invasion of his rights. Damage to the stream, its fish, its plants, its invertebrates do not count. So long as the stream *per se* is rightless these are not matters for judicial cognizance. Moreover, even if a riparian plaintiff wins a water pollution suit for damages, no money goes to benefit the stream. It all accrues to the plaintiff. Admittedly since passage of the National Environmental Policy Act it is possible to bring suit against environmentally destructive schemes that fail to follow described procedures and it is possible for state and federal agencies to sue polluters for violating water quality standards. However, these conditions refer primarily to resources that are held in public ownership and not to those on private land. Natural objects have no standing in their own right nor do their unique damages count in determining outcome of the case nor are they beneficiaries of awards. Natural objects have counted for little in law, and even when we have made an effort to conserve them we have done so for our own use and enjoyment.

Since people speak for incompetent humans, for ships, for corporations, why not for natural objects? If natural objects were accorded rights then, when friends of natural objects perceive an

environmentally destructive course of action, they could apply for legal guardianship. The guardianship concept is especially appealing since a case could probably be made for extending guardianship to natural objects on private land. If there were indications of disobedience of existing laws as so frequently occurs in water pollution, the guardian would be entitled to raise the natural object's rights on its behalf and would not have to prove aggrievement to the guardian's human membership. Also, guardians could provide many other protective services for the environment such as monitoring effluents, representing their wards at legislative and administrative hearings, etc. The guardianship concept might also help our court economy in that it should reduce class action suits since threatened natural objects would have legally appointed guardians.

Another advantage of the guardianship approach is that by making the natural object, through its guardian, a jural entity we allow the guardian to collect fragmented and otherwise unrepresented damage claims to aggrieved human parties and to press these claims before the court where for legal or practical reasons they are not going to be pressed by traditional class action plaintiffs. In a sense, the guardian of natural objects also becomes the guardian of unborn generations.

The according of standing to natural objects will hopefully do more than gathering up loose ends in what are presently recognized as economically valid damages. The guardian could plead before the court injuries not presently recognized, such as the destruction of wilderness areas and the decimation or perhaps extirpation of a "valueless" species. Most of these "injuries" are not presently economically measureable, but if the loss of a wilderness area, for example, was made a loss of privacy to the environment per se such as is done in copyright law, then the cost to the environmental despoiler becomes expensive, perhaps even prohibitive. Damages would be difficult but not impossible to assess. For example, we might consider the damages on the basis of what it would cost to restore the environment to its totally unpolluted state or to re-establish an "aggrieved" species in another ecosystem equivalent to the one it was forced to vacate.

Assuming such a system of legal redress becomes available to the environment, how will the damage claims be handled? The best approach might be to establish trust funds administered by the legal guardian. All fees, liability claims, etc. against the environment could be paid from this fund, but more importantly the fund would be available to preserve or restore the environment to a condition similar to that which existed when the environment was made a rights holder.

Bringing the environment into society as a rights holder should not place it in a preferred position over mere mortals. Obviously there is no danger that this has happened to date, but procedural safeguards would have to be carefully defined for all actions that impinge upon the environment. A preliminary attempt at this definition is already law in the form of the National Environmental Policy Act but much more is needed to protect the environment from the private sector. One approach to this problem may be in the development of an Environmental Bill of Rights in which some absolute rights are defined for a list of preferred objects. Attempts towards this end have already been made, even in South Dakota. Several western states have considered establishing minimum in-stream flows in important streams and a bill was even introduced into the South Dakota house to accomplish this end. At the very least by extending legal rights to the environment, it would cause society to eventually legislate more environmentally protective laws.

The cost of extending legal rights to natural objects will be substantial in a hedonic context. Conveniences and material comforts we accept without regard for long-term environmental consequences will be sacrificed but no basic biological needs will want. Indeed we should be biologically enriched by the process.

Perhaps given an increasing population of humans with increasing wants and increasing technology to satisfy these wants (at an environmental cost), a change in environmental consciousness may be unable to rescue us from our problems. But as individual freedoms are submerged in the ocean of societal well being, our dependence upon institutions such as the courts increases. It is the institutions that can transcend and survive changes in the consciousness of the individuals who supposedly comprise them and whom they serve. The court may be at its best when it summons from the human intellect the worthy ideas that abound there, giving them shape, reality and legitimacy.

Recent court rulings such as favorable decisions for environmental action groups have given hope that we may be on the verge of a major change in human consciousness. This heightened awareness of the new "us" enlarges our empathy for natural objects. We are not only developing increased scientific knowledge about our environment but also the personal capacities within us to recognize how other natural objects are like us and yet understandably different.

What role might the Academy of Science play in bringing to pass the evolution of an environmental ethic in modern society? Several past presidents, most recently Drs. Kintner and Fashbender, called our attention to the environmental problem and implored us to restore "values" in our teaching of science. Public exposure

to a concept that imparts a moral obligation towards the environment is a necessary prerequisite for the evolution of an environmental ethic. Certainly sound environmental education is a role we are ideally positioned and programmed to accomplish.

However, I would also suggest that we consider doing much more. If the extension of rights to natural objects occurs as I hope it will, the Academy of Science should consider the possibility of using its considerable technical expertise in serving as legal guardian of South Dakota's environment. We have repeatedly searched for a role in service to the citizens of our state and this is one we are technically well-equipped to handle. Admittedly we would be deficient in legal advice, but there are numerous national organizations such as the Sierra Club, Environmental Defense Fund, Friends of the Earth, etc., with adequate legal council who would welcome the opportunity to join with us to protect and enhance our support system. Unquestionably there are sufficient environmental issues in the state to keep us occupied for a long time. The "heat in the kitchen" might get intense but no longer would we be anonymous to the executive, legislative, and judicial branches of state government. More importantly, however, we would be in a position to help stop the mortgaging of our descendants' environment, leaving them a legacy worth emulating.

#### LITERATURE CITED

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