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### The Right of Nonuse

Jan G. Laitos

*University of Denver*, [jlaitos@law.du.edu](mailto:jlaitos@law.du.edu)

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## The Right of Nonuse

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# 1 The Nature of Nature

THIS BOOK WILL advance three central arguments. First, it will assert that the planet Earth is in trouble. It will note that there is growing evidence that nature, consisting of living organisms, natural resources, and environmental goods, is experiencing extinction, exhaustion, and pollution at an alarming rate. Second, the book will argue that, by and large, humans have been unsuccessful in reversing or even slowing this trend. This failure of response has been due to two mistakes: (1) the selection of the wrong normative standard by which to assess threats to natural resources, and (2) an insensitivity to an integral “nonuse” facet of nature and natural resources. Third, the book will suggest that policy makers and lawmakers should, and ultimately will need to, recognize and legitimate the intrinsic, nonanthropomorphic value of nature and its many resources when *not used* by humans. This nonuse function may be best acknowledged by conferring on natural resources a legal right of nonuse, which is basically a right to be left alone. When humans do not overuse nature, and when nature is allowed to operate without human intervention, it may then perform the natural functions that originally permitted this planet to become the platform for the rise of all living things, including humans.

A list of planetary maladies could go on and on. Such a list would include, but not be limited to, habitat loss, species extinctions, ecosystem alteration, release of vast quantities of fossil carbon that the planet took hundreds of millions of years to store away, warmer global climate, melting arctic ice and mountain glaciers, higher sea levels, increase in the amount of nitrogen fixed on land, and atmospheric carbon-dioxide levels that are expected to remain high for thousands of years.

Unlike previous planetary changes, this transformation of the natural environment has been largely brought about by one source—the humans who populate the earth. These humans are not merely residents of the planet: They are now critical to its workings. They are shaping and affecting, and affecting adversely, most every aspect of the natural world.<sup>1</sup>

Humans, particularly biologists, earth scientists, and policy makers, are not unaware of the troublesome, if not catastrophic, environmental and ecological changes that are the inevitable consequence of relentless human activity.<sup>2</sup> However, the environmental and resource-protective fixes that humans have added to their laws, rules, and legal requirements do not seem to be working. The planet still experiences anthropomorphic assaults on its natural objects, organisms, and systems. Despite a promiscuous array of both proposed and adopted government standards for saving the planet, there has been a continuous deterioration of nature, natural resources, and environmental goods.<sup>3</sup> Humans have caused the troubles with the planet's natural and environmental resources, but our legal and institutional responses have been unable to reign in our own activities that create these problems.

There are two central reasons for this failure of response. One explanation involves the normative standard that the United States and most nations have selected for judging the worth or effectiveness of these legal and institutional responses to natural resources depletion and contamination. That normative standard has been built upon an instrumentalist human welfare valuation. Resource conservation and environmental laws have traditionally been adopted only when problems with nature have negatively impacted humans in some way. Laws have been advanced and judged according to a normative stance that reflects a strong anthropocentric component—the issue has not been whether the laws have improved the health and viability of *nature*, but whether they have adequately protected the future welfare of *humans*.

<sup>1</sup> *The Anthropocene: A Man-Made World*, ECONOMIST (May 26, 2011).

<sup>2</sup> See, e.g., JAMES GUSTOVE SPETH, *THE BRIDGE AT THE END OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY* (2008); TYLER VOLK, *CO<sup>2</sup> RISING: THE WORLD'S GREATEST ENVIRONMENTAL CHALLENGE* (2008); John M. Broder, *Bigger Toolkit Needed to Manage Climate Change*, N.Y. TIMES, 11 (Dec. 11, 2011); Abby Goodnough, *Scientists Say Cod are Scant; Nets Say Otherwise*, N.Y. TIMES 20 (Dec. 11, 2011); Justin Gillis, *Forests Across the World Dying Off as Climate Warms*, N.Y. TIMES, Oct. 1, 2011; Pete Spots, *Climate Change: Species Climbing Higher and Migrating North*, *Study Says*, CHRISTIAN SCI. MONITOR, Aug. 19, 2011 (organisms are responding to human-caused climate change at a rate much faster than scientists estimated a decade ago, according to a new study in the journal *Science*); Jeremy B. Jackson et. al., *Historical Overfishing and the Recent Collapse of Coastal Ecosystems*, 293 SCI. 629 (2001); Sing S. Chew, *World Ecological Degradation: Accumulation, Urbanization, and Deforestation, 3000 B.C.–A.D. 2000* (2001).

<sup>3</sup> See, e.g., Shi-Ling Hsu, *The Case for a Carbon Tax: Getting Past Our Hang-Ups to Effective Climate Policy* (2011); Alyson C. Flournoy, *The Case for the National Environmental Legacy Act*, in *BEYOND ENVIRONMENTAL LAW* (A. Flournoy & D. Driesen eds., 2010); RICHARD P. HISKES, *THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE* (2009); TED NORDHAUS & MICHAEL SHELLENBERGER, *BREAK THROUGH: WHY WE CAN'T LEAVE SAVING THE PLANET TO ENVIRONMENTALISTS* (2009); J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, *THE LAW AND POLICY OF ECOSYSTEM SERVICES* (2007).

It is one of the central theses of this book that this anthropocentric standard is too limited. An alternative ethical imperative is now needed, one that gives equal countervailing weight to the needs and intrinsic nonanthropocentric value of nature and natural resources. The normative standard by which to judge legal and governmental responses to environmental problems should also reflect the worth of nature and natural systems *irrespective of humans*.<sup>4</sup>

Another explanation for the failure of laws and government initiatives to address the problems of natural resource loss and pollution lies in a stubborn refusal to decipher the codebook of nature. To understand the workings of this planet, one must recognize a heretofore-ignored universal law of nature: All natural resources—the atmosphere, the waters, the wildlife, the vegetation, the land—have two essential components, a use and nonuse function.

Humans have, historically, only been interested in the “use” component of resources. From the time that *Homo sapiens* emerged on this earth, nature’s wealth has been perceived to have value only if it is used. This strictly utilitarian view carried into our laws. The law of private property, for example, holds that one of the most essential features of the property right is the right for the owner to use the property.<sup>5</sup> Nonuse, by contrast, was grounds to divest the owner of a property interest.<sup>6</sup> Even environmental protective laws were adopted because we began to realize that environmental goods had human health value when we used them as something other than a sink in which to dump our garbage. Resource protective laws were similarly adopted to regulate human activities that depleted commodity goods, such as forests, or destroyed preservation landscapes, such as wilderness. In both cases, humans wanted to use the now-safeguarded resource, either for future development or aesthetic purposes.

But what has been overlooked in most of the legal responses to environmental damage or resource eradication has been the equally important *nonuse* component of natural resources. This dimension of all resources is vital to the planet when humans do not actively use the resource. When we leave them alone, natural resources perform services and play roles essential to the earth’s vitality. In other words, when humans do not use a resource, it is not without worth; it is then able to serve functions essential to the viability of the natural world. It is, after all, the future of this natural world that is at risk, and this world should be our focus, not just the humans who now happen to inhabit it.

The earth’s workings created the virtual Garden of Eden that *Homo sapiens* encountered when they emerged as the planet’s dominant species. It was the nonuse component that created the conditions that allowed all life to come forth. One reason for the failure of our legal response to combat resource and environmental

<sup>4</sup> MARK SAGOFF, PRICE, PRINCIPLE, AND THE ENVIRONMENT (2004); FREDERIC L. BENDER, THE CULTURE OF EXTINCTION: TOWARD A PHILOSOPHY OF DEEP ECOLOGY (2003); Arne Naess, *The Shallow and the Deep, Long-Range Ecology Movement: A Summary*, 16 INQUIRY 95 (1973).

<sup>5</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 138 (1765–1769).

<sup>6</sup> See e.g., *Jenkins v. State, Dep’t. of Water Resources*, 647 P.2d 1256 (Idaho 1982).

assaults has been the absence of laws that first acknowledge and then empower this nonuse part of all natural resources.<sup>7</sup>

If the twin causes of a persistent failure to address serious threats to natural and environmental resources are (1) our traditional anthropocentric focus when legal responses are fashioned, and (2) our omission of the nonuse component of resources when considering how best to protect the planet, then what is needed now would be a nonanthropocentric response that legitimates the nonuse value of natural resources. What is needed, and what is proposed in this book, is the creation of a legally recognized *right of nonuse*, held not by humans, but by the natural resources themselves.<sup>8</sup> The purpose of this book is to lay out, through multiple disciplines, the reasons for, and the operation of, such an unprecedented right.

Part II below considers the social and economic history of how natural resources have traditionally been used by humans, and how lately humans have valued resource nonuse when it suits their limited anthropocentric purpose. Part II relies on game theory to explain why and how humans used resources, protected resource nonuse when it suited their anthropogenic purposes, and should now legitimate purely eco-centric resource nonuse values. Part III is a history of how laws, legal institutions, and government bodies have responded first to resource use demands, and then to calls for resource nonuse when humans will be benefited. Part IV argues, using the disciplines of evolutionary biology, science, and economics (primarily game theory) that the nonuse component of natural resources is not only an inherent part of all natural resources, but a feature of nature that may bring about a more optimal result for the planet, if it is recognized and legitimated by legal institutions. Part V discusses the practical parameters of such a right of nonuse. The chapters in Part V review how current laws are beginning to reflect nonanthropocentric nonuse values, how a workable “right” of nonuse might be created, and how natural resources would be empowered to assert their own right of nonuse.

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<sup>7</sup> See, e.g. Jan G. Laitos & Andrew Swan, *The Growing Role of Nonuse Values in Land Use Planning and Environmental Law*, 63 PLANNING & ENVIR. LAW 3 (Jan. 2011).

<sup>8</sup> See, e.g. Jan G. Laitos & Catherine M.H. Keske, *The Right of Nonuse*, 25 J. ENVTL. LAW & LITIG. (2011); Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 SO. CAL. L. REV. 450 (1972); *Sierra Club v. Morton*, 405 U.S. 727, 749 (1972) (Douglas, J. dissenting); Clare Kendall, *A New Law of Nature*, GUARDIAN, Sept. 24, 2008.