
MISMATCHED PROPERTY RIGHTS

An Introduction to “Overlapping Resources and Mismatched Property Rights”

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Editorial to the special feature.

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Property scholars have long explored how rights to land and resources influences their use and conservation. Over time, inquiry has turned towards the governance of competing claims. Simplistic models of rights are yielding to the social, political, and ecological realities of managing ecosystems amidst increased resource demands fueled by human population growth. Prior dichotomies between “human” and “natural” uses are dissolving. Bold new conceptions of socio-environmental models are emerging. Political scientists, ecologists, scientists, and legal scholars are working on the front lines of increasingly urgent resource conditions to update the theoretical and normative terrain of landscape governance.

In 2019, the New York University School of Law Classical Liberal Institute and the Indiana University at Bloomington Ostrom Workshop Program on Natural Resource Governance invited us to co-host a conference about emerging understandings of property rights as overlapping and nested. The organizing institutions asked us to use as a starting point *Contracting for Control of Landscape-Level Resources*, a 2015 article co-authored by Karen Bradshaw and Dean Lueck (Bradshaw & Lueck, 2015). We hosted the conference, “Mismatched Property Rights to Landscape-Level Resources: Legal and Customary Solutions,”¹ in New York over two days in March 2019. We were honored to host notable scholars, from a variety of academic disciplines and phases of their careers presenting papers, moderating panels, and acting as discussants. Billy Christmas coordinated the peer review process for this volume.

This symposium volume of the *International Journal of the Commons* reflects the proceedings of the March 2019 conference. Like the conference, this volume brings together an interdisciplinary group of international scholars to explore new areas of the role of property in addressing socio-environmental questions, and the diverse solutions to them. As guest editors, we are grateful to the authors, peer reviewers, symposium participants, discussants, and audience who jointly created this project. The contributions of this group have transformed the initial, modest set of observations about resource governance from *Contracting for Control of Landscapes* into a budding new conception of property—a vision more aligned with a modern understanding of ecological and economic realities.

Modern property theorists are exploring the coordination problems emerging from overlapping but unaligned property boundaries. Ronald Coase, Robert Ellickson, Lee Fennell, Garrett Hardin, Michael Heller, Gary Libecap, Elinor Ostrom, Carol Rose, Henry Smith, and many others laid the theoretical foundation upon which the ideas of overlapping resources and mismatched property rights are being built. In *Contracting for Control of Landscape-level Resources*, Bradshaw and Lueck specifically focused on one instrument: the formation of resource boundaries through the cooperation of private landowners. They observed the use

¹ We believe that the term “mismatched” property rights was first used by Tracy Yandle (2007).

of contract to assemble fragmented rights for resources that operated at a scale beyond that of individual land parcels, situating it as an example of blended public-private governance. Through a series of short case studies on various resources, they established the existence of contract-created boundaries and private governance in areas traditionally imagined as "public." Whereas land parcels are readily available to the public through county recording offices, many resource boundaries are not. As a result, governance solutions tend to be similarly ephemeral and diffuse.

The papers in this symposium volume expand on these observations along three dimensions. *First*, these papers situate the overlapping resources and mismatched property rights to the literature on tragedy of the commons and polycentric government. Viewing a landscape as overlapping resources with mismatched property rights holds the potential to show the tradeoffs between various property regimes. Perceived competition between public and private is often a false dichotomy. Given the multitude of resources in any space, a plethora of governance tools exist simultaneously, each scaled to the different resources. An important question posed, but not fully answered, in this volume is: Which tools are best suited to which resources, under which conditions?

Second, the authors build upon the original observation of property rights and contracting to expand the analysis to include the broader social-political-ecological context. Property rights alone are insufficient to understand a landscape. One must include a far more pluralistic—and frankly complex—set of factors including: tensions between local, state, federal, and tribal concerns; the unique geophysical, meteorological, and ecological features of the specific area; and the overlapping layers of rules and laws that govern the area. Only after having identified this multifaceted understanding of property and resources can one begin to think about the mix of public and private instruments that might work jointly to balance the various interests, including non-human interests. This takes new governance questions in property and environmental law beyond the "public or private" question and shows that the answer at a landscape-level is "both."

Third, the authors suggest that the effects of climate change are causing resource boundaries to shift quickly. Climate-change induced wildfire, flooding, and biodiversity loss are demanding innovative resource solutions. Traditional ways of viewing conflict are insufficient. Several scholars apply the notion of overlapping resources to these problems, showing how this new, more complex model of understanding property can facilitate new and innovative solutions.

In *Thinking About the Commons*, Carol Rose (2020) offers an intellectual history of the ideas of resource governance and property rights underlying the recent innovations in reimagining property as overlapping systems of rights. She draws upon her decades-long scholarly conversation with Elinor Ostrom to highlight the theoretical foundations for understanding the modern relevance of overlapping resources and mismatched property rights.

In *Property Rights: Long and Skinny*, Richard Epstein (2020) extends the historical perspective back farther still, noting the Roman Law origins underlying the designation of some resources as commons, and others apportioned into several private holdings. He shows that the physical characteristics of resources that are long and skinny, as opposed to short and squat, have a tendency to become commons. Whether that commons is ordered spontaneously by its users, or exogenously by a government agency depends upon intensity of use. The article offers an analysis of these issues with respect to oil and gas pipelines in the United States.

In *Ostrom, Floods, and Mismatched Property Rights*, Nick Cowen and Charles Delmotte (2020) explore institutional choice questions surrounding governance of mismatched property rights. They argue that commons tragedies are often the result of mismatched property rights and that market processes are a robust procedure through which to select the size and scope of effective commons governance. They argue that good practices require a background context of residual claimancy and free exit. They buttress this theoretical synthesis with the example of flood management failure in Britain.

In *Virtual Parceling*, Bradshaw and Leonard (2020) overview the legal doctrines and economic drivers that fuel the four-dimensional model of property contemplated in *Contracting for Control of Landscapes*. They provide a typology of public and private governance mechanisms that facilitate the bundling and un-bundling of resources other than land. The other half of the paper offers resource-specific case studies that push the concept of mismatched property rights and overlapping resources in new and exciting directions.

In *Adaptive Management for Ecosystem Services at the Wildland-Urban Interface*, Robin Kundis Craig and J.B. Rhul (2020) analyze wildfire policy, noting linkages between ecosystem services and adaptive management. Their call for viewing wildfire as a complex adaptive social-ecological system constructively builds upon the

original notion of overlapping resources. Craig and Rhul expand the notion to include additional elements, not just property rights but also the vital important surrounding considerations of ecological and political elements. This application of overlapping resources to a pressing modern issue dovetails well with other papers seeking to show that existence of overlapping rights co-exists with interconnected social-political-ecological factors.

In *Application of Natural Resources Property Theory to Hidden Resources*, Monika Ehrman (2020) discusses the role of resource invisibility in creating property rights mismatches. Where resources are visually hidden (typically subsurface resources), the two-dimensional property framework imposed upon the surface does not facilitated efficient use of the resources within. Ehrman proposes to empower stakeholders with localized knowledge of the resource to coordinate the resources' use, where visibility cannot be achieved.

In *Liberating Split-Estates*, Tara Righetti (2020) analyses how, in the case of split estates where the surface and subsurface mineral rights are split between two or more parties—the traditional dominance of the mineral owner's rights is now engendering inefficiencies. Changes in the social attitudes around sustainability and changes in the economic use of land undermine the traditional rationale for the dominance of the mineral owner over the surface owner. Righetti argues that split estates should be organized as vertical commons, rather than as dichotomous dominant-servient interests.

In *Biodiversity Loss, Viewed through the Lens of Mis-matched Property Rights*, Challie Facemire and Karen Bradshaw (2020) consider the effects of competing claims to overlapping resources to conserving plants and wildlife. If mismatched property rights can be envisioned as a competition between overlapping rights holders, wildlife are a resource-user without formal rights. Facemire and Bradshaw consider the ways in which landowners, tribes, and government have historically integrated wildlife interests without formally affording property rights to animals. Using examples of wild horses and orcas, they explore the potential for stakeholder collaborations to overcome this problem of resource users without formal ownership rights by creating a mechanism for expression and negotiation through a government-sponsored forum.

In sum, this volume presents an intellectual history, theoretical development, normative questioning, and institutional analysis that undergirds new conceptions of property rights and physical landscapes. We hope it provides a foundation for future applications of the insight of governing complex systems of property with interrelated resources and mismatched property rights.

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Competing Interests

The authors have no competing interests to declare.

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