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### 3 Eighteenth-century property rights for twenty-first-century environmental conditions?

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#### **Introduction**

As noted in this book's Introduction, the social and legal form of property and property rights is central to the ways that environmental resources are managed. The way property is configured establishes realms of what comes to be considered private action, and thus solely within the purview of the resource "owner" (whether that owner is an individual, a family, a tribe, a community, or some other unit which can claim an exclusive right to a resource), and public action, where the state may set rules and standards which shape private decision-making over resources.

Much of the time in law, planning and resource management property systems seem to function as stage settings – the focus of the viewer is on the more immediate play which is occurring on the stage, the words and movements of the actors. But, in fact, just as in theatre or film, the setting is immensely influential to the perception of the actors; so it is with property systems and resource management. It is only quite recently that scholars have begun systemic investigations of the relationship of property systems to climate change in particular (e.g. Adler 2009; Klass and Wilson 2010; Doremus 2011). As a contribution to this volume, this chapter adds to this investigation by examining the existing western property system and both long-standing and very contemporary arguments for and against the functionality of this system for a new era of resource management (note: this chapter expands on a blog essay, Jacobs 2015).

#### **An eighteenth-century and classical view**

The theory which gives rise to the contemporary form of property in the western world – and especially the idea of private property rights – came into being in the eighteenth century, post the American and French Revolutions. It reflected the influence of the political philosophers John Locke (most prominently influential on American founders) and Jean-Jacques Rousseau (most prominently influential on the French founders), and the political economist Adam Smith (see Jacobs 2010, 2016, for a more specific discussion of this history). These

three intellectuals were writing in a world quite different from the world of today. Most people lived rurally; at the time of the American Revolution (1776) Philadelphia, Pennsylvania was the country's largest city and its population was only about 20,000. Yet the world of today was beginning to emerge, a world of urbanization and industrialization.

Questions which link these thinkers together had to do with what today we refer to as human rights, and whether the political and economic system then current was appropriate for the emerging world. Relative to property, the European world of the 1700s was one where most land was still owned and controlled by the aristocracy. These thinkers, among others, brought forth an argument about how to create and realize democratic governance structures and market economies. Central to their thinking was the need for a strong and enforceable set of privately owned property. It was land ownership which would allow people to have political freedom and it was land ownership which would allow people to make innovative and creative (and individually and socially beneficial) decisions about land use. In fact, Ely (1992) argues that, contrary to widespread popular understanding, it was in fact conflict over property that was the central matter of contention in the American revolutionary war (not matters related to religious freedom, freedom of speech, etc.).

What was the form of property that was coming into being? It was one in which the natural world is conceptualized as a bundle of rights – where what is in actuality a whole can be treated as fragmentable. An owner owns the soil, trees, air, water, minerals, as well as the right to control access and use, and transfer land through gift (inheritance), lease or sale. The rights to use or transfer apply to land as whole as well as individual rights within the bundle. This is the basis of the idea that there are water rights, air rights, mineral rights, etc., and that these rights can be separated from the bundle. This is what gives rise to the ability to create conservation easements, carbon trading markets, water quantity markets, payments for ecological services, and so on.

The idea of the natural world and the urban world as property is widely understood as contributing to the economic, social, political and technological transformation – the progress – of the West from the eighteenth century to the world of the twenty-first century (see, e.g. Bethell 1998). Yet, the world of today is not the world of the eighteenth century – it is a world which is predominately urban, and expected to become ever more so in the next decades, and where two billion people are expected to live in slums in these cities by 2030. And in this world the evidence of climate change and its consequences are evermore apparent. Melting glaciers in Greenland, island nations in the Pacific literally disappearing, evermore severe storms impacting major coastal cities, and vanishing species are but some of the phenomena which challenge long-standing social, economic, political, cultural systems. A question that needs to be posed is whether the form of property invented in the eighteenth century, a social and legal invention which facilitated the creation of the modern world, remains appropriate for the twenty-first century, or whether it needs to change.

