Hidden Resources

Author : Yael Lifshitz

Date : December 17, 2021

Monika Ehrman, [Application of Natural Resources Property Theory to Hidden Resources](#), 14 **Int'l J. of the Commons** 627 (2020).

Property law scholarship is often framed in resource-agnostic terms. The field of Property is concerned, fundamentally of course, with governing "things." But the conceptual or theoretical frameworks often assume they can apply equally to any and all resources.

Monika Ehrman challenges this notion in her recent work, *Application of Natural Resources Property Theory to Hidden Resources*. The key contribution of her article is in underscoring just how important the *visibility* of a resource (or actually, lack thereof) can be to the formation of property.

Ehrman hones in, specifically, on hidden resources. What are "hidden" resources? They are resources we can't see with our naked human eye. This can include resources that are concealed from us because of their physical location. For example, subsurface reservoirs of oil, gas, and groundwater are all examples of hidden resources.

The category can also include resources that are not immediately apparent to us such as migration paths, solar radiation, and wind. The same category could also encompass property rights that are not evident to a casual viewer such as, potentially, security interests.

The common thread in all these cases, as Ehrman points out, is that we tend to treat the hidden resources as if they were visible. This, in turn, creates a host of problems, many of which are familiar to property scholars, including premature exploitation, increased aggregation costs, increased property conflicts, and more generally, difficulties in conserving resources.

While others have (rightly) pointed to and analyzed the inefficiencies embedded in those allocation patterns (for instance in the case of oil and gas, groundwater, and informal title), what Ehrman does in this article is explain—at least with regards to a particular category of resources—why we end up with inefficient resource management. Her answer to this important question is: because we can't see them. This intuitive feature turns out to have strong explanatory force.

So why is sight so important? As a species, we are highly dependent on our sight. It thus makes sense, argues Ehrman, that concepts of property are likewise informed by our visual sight. Sight also tends to bring with it an increased understanding of the resource.

Understanding the scientific properties of a resource, in turn, improves its governance. "Resource blindness," as Ehrman calls it, causes us to apply a regime that is inapt for that particular resource.

Of course, humans can, and often do, rely on various instruments to help them understand what is going on underneath the surface, far up in the air or within a habitat. Over time, as technology evolves and our knowledge base increases, we gain a better understanding and ultimately can come to "see" resources that were previously hidden. But the point is that what we can easily see with our own eyes, at the get-go, has an intuitive pull, and ends up being influential in the way property forms.

The example of petroleum rights and their development in the United States is illustrative of how "resource blindness"

Property
The Journal of Things We Like (Lots)
https://property.jotwell.com

impacted the development of property. At the time when the law governing subsurface resources began developing, it was almost impossible for scientists, not to mention lawmakers, to understand the behavior of the subsurface resources.

The result was that the property system that developed basically treated them as if they were above-ground surface resources. The inability to see—and hence to understand—the reservoirs led to the application of a regime that was inapt.

It was inapt because it ignored the natural boundaries of the reservoirs, which extend over large pancake-like areas, and instead, applied to them what are essentially silo-like surface rights. This in turn led to the problems of premature and over exploitation, which have been studied by property scholars and policymakers alike.

We can also find converse examples of "resource sight." Riparianism, which allocates water rights to those abutting the water-body, is an example of how seeing something close by helps inform the allocation.

Another example of how "resource sight" can positively influence governance comes from mining districts. As Ehrman explains, once the early miners opened up the earth, they were able to visually observe the veins and lodes.

They developed resource sight, in the sense that they became aware of the characteristics of the resource. This led to the creation of the doctrine of extralateral rights. Importantly, what the mining communities were able to do is adapt the doctrine to the resource and its extraction paths, rather than adapting the extraction to the doctrine.

Sight also allows the owners and the communities around them to better define and comprehend the boundaries. Boundaries that can be easily recognized are typically more likely to be respected by others (non-owners), which is another reason why sight turns out to be useful for property governance.

The issue of sight is just as important today as it was in the early days of resource exploration. Informal rights and visible boundary recognition continue to be significant factors in property law. New technologies and new resources such as wind or deep-sea mining, are constantly posing challenges for policymakers and scholars.

In this piece, Ehrman articulates an intuition that underlies many of our familiar natural resource stories: what we see, physically, is what we get. Importantly, she opens the door for further exploring the role of sight in property, and more broadly, the connection between resource attributes and the formation of rights in them.

Cite as: Yael Lifshitz, *Hidden Resources*, JOTWELL (December 17, 2021) (reviewing Monika Ehrman, *Application of Natural Resources Property Theory to Hidden Resources*, 14 **Int'l J. of the Commons** 627 (2020)), https://property.jotwell.com/hidden-resources/.