

Core Principles of Ecological Law

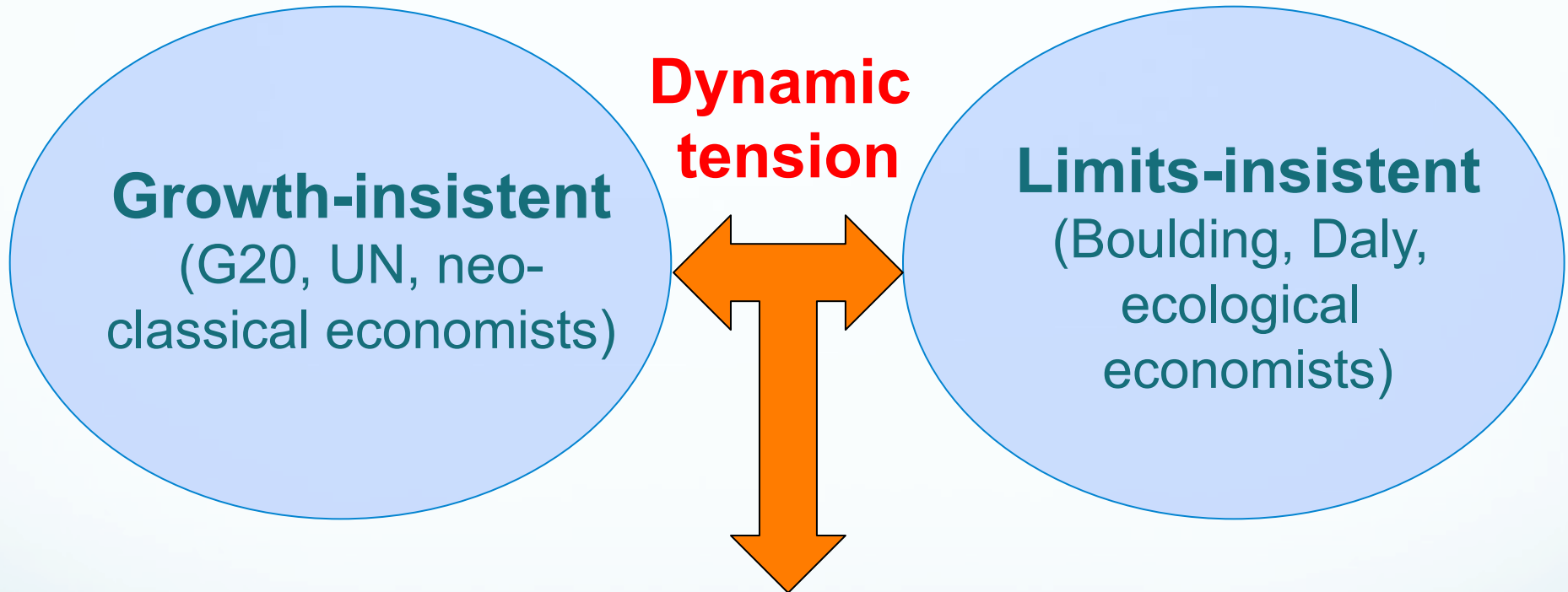


Geoff Garver

**AELA Symposium – “Exploring our legal relationship with
the living world”**

October 26, 2018

Mutually exclusive narratives



Mutually enhancing human-Earth relationship
Primacy of ecological limits
Interhuman, interspecies and intergenerational fairness
Ecological economics and degrowth
Ecological law and governance

Configurations of law and morality

LEGAL AND MORAL

Recycling?

LEGAL AND IMMORAL

Coal-ash disposal in U.S.?
Industrial agriculture?

ILLEGAL AND MORAL

Undercover investigation
and reporting of animal
cruelty on livestock farms in
several U.S. States (“Ag-
gag” laws)?

ILLEGAL AND IMMORAL

Killing endangered species?

Structural features of legal systems

- **Context:** Ecological, social, political, cultural and economic
- **Worldviews and ethics**
- **Law variables:** entitlements, obligations, freedoms, constraints
- **Actors, agents, institutions and power structures**
- **Arenas**
 - Rights for humans, “juridical” persons (e.g. corporations) and nonhuman nature
 - Economy, financial and monetary systems, contracts, commerce, trade
 - Property and the commons
 - Energy, food, water, land use

Key features of ecological law

- **Humans as part of Earth's life systems**
- **Primacy of ecological boundaries over socio-economic spheres**
- **Full integration of ecological limits in rules and policy**
- **Focus on reducing material and energy throughput**
- **Global, but distributed according to subsidiarity (diversity)**
- **Binding and supranational rules**
- **Fair sharing among present and future generations of life**
- **Greatly expanded research and monitoring**
- **Precaution about crossing boundaries**
- **Adaptive**

Notions aligned with ecological law

- ecological integrity
- rights of nature
- 'Mother Earth' rights
- Earth jurisprudence
- eco-feminism
- ecological legal theory
- green legal theory
- ecological human rights
- 'Pachamama'
- ecocide
- global commons theory
- eco-constitutionalism
- global environmental constitutionalism
- human-inclusive ecocentrism

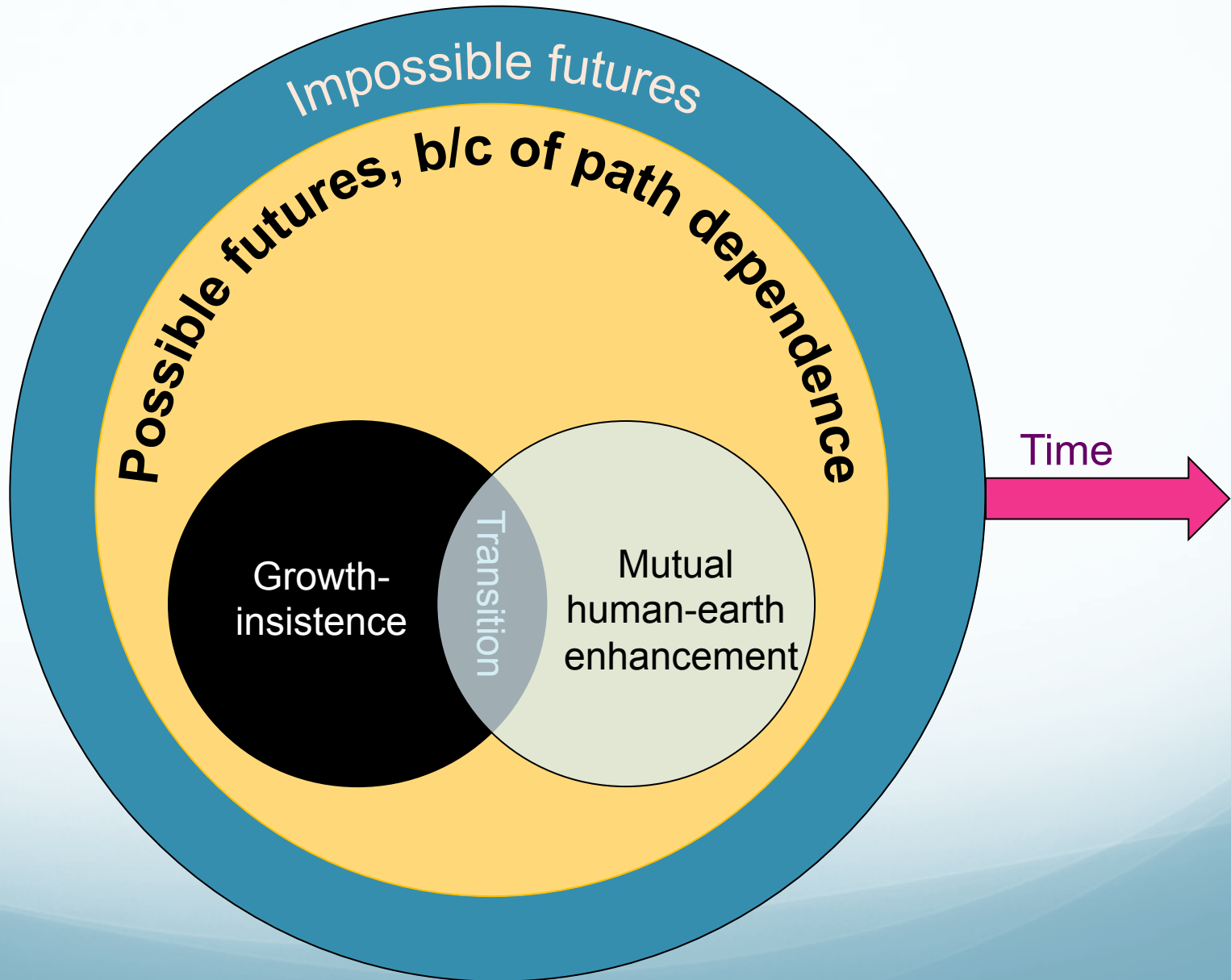
Environmental vs. Ecological Law

Feature	Environmental law	Ecological law
Human-nature relationship	Humans separate from and superior to nature	Mutually enhancing human-Earth relationship; humans part of nature
Enforceable enviro/eco limits	Reductionist, end-of-pipe, subordinate to economic growth, property rights, etc.	Holistic, integrated, systems-based; primacy over economic concerns; open to de-growth/steady state econ
Use of materials and energy	Promotes efficiency, core faith in decoupling of throughput from impacts	Promotes sufficiency and drastic reduction in throughput to keep economy within ecological bounds
Scale	Strong commitment to state sovereignty: weak international/global regimes, trade impedes strong domestic regimes	Core commitment to subsidiarity principle: strict global regime for global issues, respect for local regimes per Ostrom's criteria
Fairness	Core belief in fairness of markets, with some need for correction (e.g. polluter pays, externalities); tendency to monetize	Strong limits on market mechanism; bigger role for non-market decision-making; Interhuman, interspecies and intergenerational fairness
Research, monitoring and adaptation	Effects on human health paramount, environmental effects studied but not determinative; weak precautionary approach; few mechanisms to adjust rules based on monitoring	Planetary boundaries and "safe operating space" are key basis of research, monitoring and adaptation; strong precautionary approach

From environmental to ecological law

- **The problem:** The need to move from environmental to ecological law
- **The solution:** The meaning of ecological law
- **Getting there:** The challenge of transition from environmental to ecological law

Path dependence



Core foundations of dominant regime that law currently serves

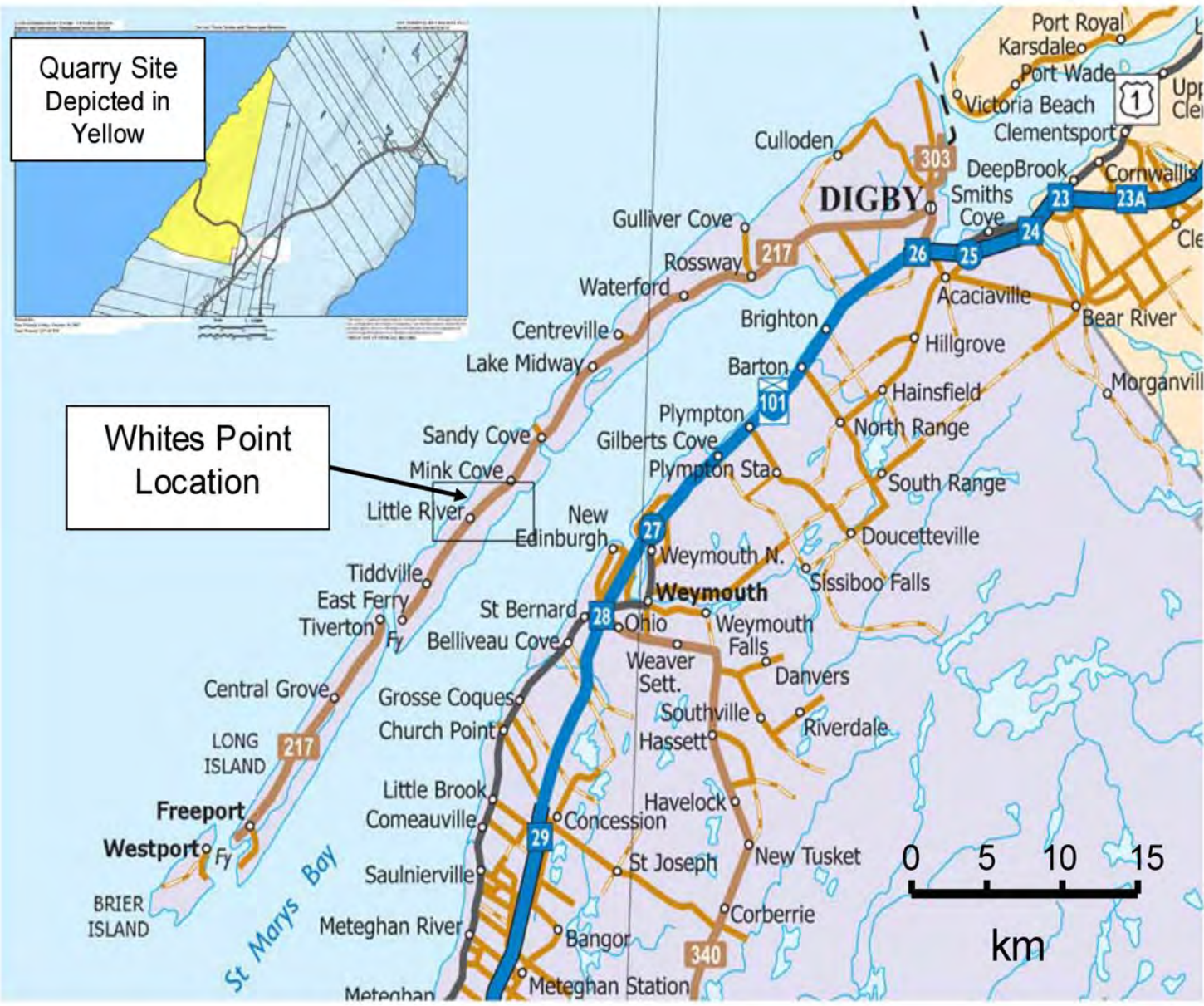
- Strong commitment to infinite economic growth
- State sovereignty – but cf. investors' rights under trade laws to climate change commitments
- Privatization and strong protection of private property rights
- Monetization and commodification, e.g. valuation of “ecosystem services”
- Capitalism and protection of corporations

Core foundations of dominant regime that law currently serves

- Strong commitment to infinite economic growth
- State sovereignty – but cf. investors' rights under trade laws to climate change commitments
- The problem of remote ownership
- Monetization and commodification, e.g. valuation of “ecosystem services”
- Capitalism and protection of corporations



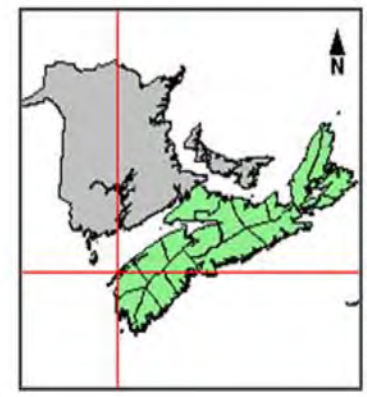
Whites Point Location



Whites Point Quarry and Marine Terminal Project Locator Map

Digby County, NS

Compiled by: Lynda Russell
 Sooriyakumaran, Map Librarian LIC - Halifax
 Service Nova Scotia
 October 2007



Case summary

- NJ rock and gravel company sought permits for basalt quarry and marine terminal on Digby Neck in early 2000s, with plans to develop 152 hectare quarry over 50 years
- Joint Panel Review (enviro impact assessment) conducted by Canada and NS
- Joint Panel concluded panel would harm Bay of Fundy and was not compatible with “core community values”
- Canada and NS rejected project in 2007
- Instead of using Canadian courts, Company sought damages (including lost profits) of US\$101 million under NAFTA Chapter 11
- In March 2015, arbitration panel ruled 2-1 in favor of company on jurisdiction and liability; damages, to be paid from public funds, TBD
- June 2018- Canada lost appeal to set aside ruling in Federal Court

FRED PEARCE

THE LAND GRABBERS

THE NEW FIGHT OVER
WHO OWNS THE EARTH

How Wall Street, Chinese billionaires, oil sheikhs,
and agribusiness are buying up huge tracts of land
in a hungry, crowded world

Ch 8 – London: *Pinstripes and Pitchforks*

- “[T]he thinking of the investors behind today’s epidemic of land grabbing is clear. With world population still soaring, land and water in short supply, and a billion middle-class people in the poor world demanding Western-style meat diets, they see food security as the next big global concern. And growing food requires more farmland. ...

Africa is the place to go. The management gurus at McKinsey trumpet how agricultural growth has been more than twice that of its economies in general—around 12 percent per annum in recent years.” p96

Ch 20 – South Africa: *Green Grab*

- “It is hardly surprising that conservation and human rights come into conflict. More than a billion people live in the top twenty-five biodiversity ‘hotspots.’ Usually the people living in those hotspots are the poorest and most vulnerable, who have been squeezed to the margins of society—to the remote places where nature survives because human infrastructure is little developed. Often, too, they are indigenous people. About half of the parks and other areas protected for nature in the past forty years overlap traditional territories of indigenous people. In Latin America, the figure is 86 percent. In the cause of conservation, many have been thrown off their land.” p228

Lessons from eco-cultural restoration and research on Common Pool Resources

- Key role for human choice, intention & goal-oriented intervention
- Monitoring and adaptation
- Flexible range of options:
 - Reference to historical conditions with mutually enhancing human-Earth relationship
 - Emphasis on embedded, resilient and communal connections of people and place
 - Focus on locally-tailored options and enhancing attachment to place

Landscape Evolution

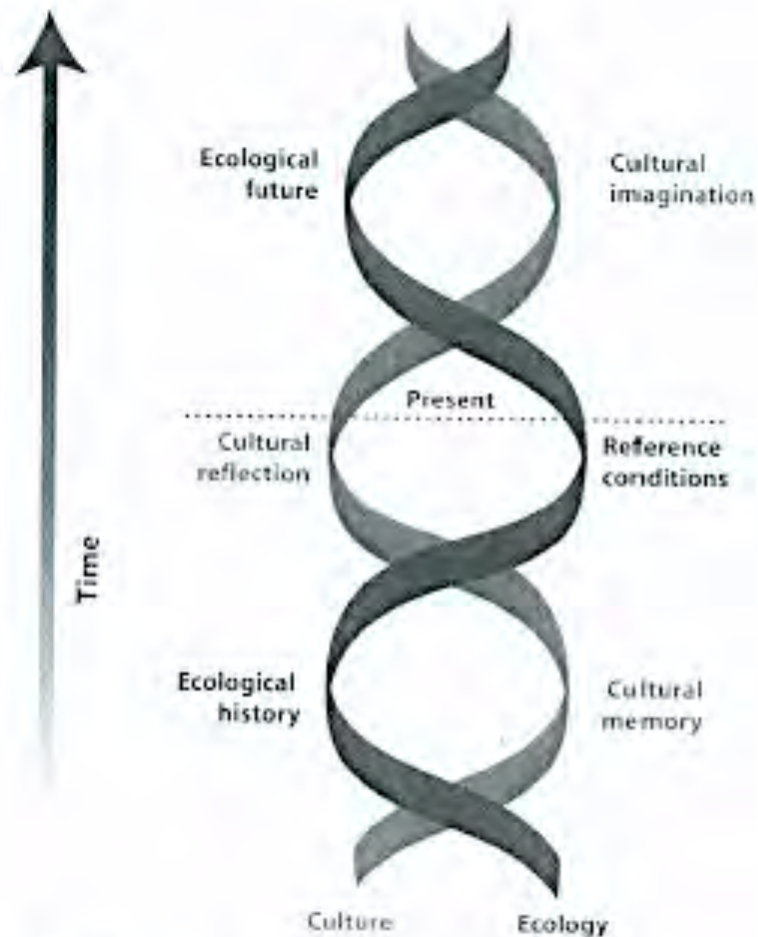


Figure 6.2

A model of landscape evolution showing how ecology and culture are knitted together through time. Historical knowledge is translated into the present through cultural reflection and knowledge of reference conditions, allowing us to make sense of the future.

Higgs (2004)

Enormous challenge

- Untangle and re-orient a massive network of interconnected systems that are hard-wired against change in many ways
- Ecological law requires not only radical transformation of environmental law, but also of entire legal system - and of the economic, cultural, social, political, governance, ethical systems it is intricately connected to

Key efforts underway

- Oslo Manifesto
- ELGA (elga.world)
- E4A/ELGA Law and Governance research - October 2017 workshop, follow up (e4a-net.org)
- Rights of Nature movement – e.g. “Earth rights” tribunals by AELA and others
- All those things Klaus Bosselmann talked about!