



graphic: Matt Wuerker

Legal Commons

by Jan Edwards

The Commons include the creations of nature and culture that all creatures inherit jointly and freely, and hold in trust for future generations. It is time for legal constitutional recognition that nature is not mere property, but a living system on which all life depends. The Natural Commons are not owned by humans, humans are a part of nature.

But the Natural Commons need rights and protection from human misuse. The Commons need an expanded and clear definition, and the rights required for the Commons differ from the ones for legal persons in the Bill of Rights.

In the Constitution everything is divided into two categories: either person or property. The only way to have rights is to be a legal person. Property, the default category, has no rights. Only its owner has rights to it. First slaves were property and then they became legal persons with rights. First a corporation was property and then it became a legal person. The reason that the Commons are considered property is not because they lack rights in the Constitution, it is the other way around. The Commons lack rights because they are commodified and our value system measures the value of

nature as that of property.

Yet, without constitutional rights, the Natural Commons are unprotected. So into which category should nature fall? What are the air or water or whales or forests? Are they persons? Well certainly not legally in our Constitution. Constitutionally, they are property. It's the only choice left. And so all of nature has been treated as property—with no rights at all. The property category is the same for a chainsaw or a forest; the sky and the airplane flying through it. Surely there could be another category—one that better expresses what the Commons are, how they differ from property, a constitutional designation that gives rights and protections to the natural world. There could be a legal Commons.

In Roman law there were three types of property: *res private* (private property), which were things that could belong to a person or family; *res publicae* (public property), things like roads and public buildings; and *res communes* (Commons), things that could not be owned but were shared by all like water, fisheries, wild animals etc. The Romans realized that the Commons are deserving of a distinct classification.

The writers of the Constitution knew well the concept of the Commons: not only were the Commons enshrined in the Magna Carta, but many colonists were in America because they had been forced off the English Commons. Many early American settlements had land held communally and the term "commonwealth" remains in the names of some states. But the legal protections for the Commons are not in the federal Constitution. The framers made a decision not to include Commons rights just as they decided to legalize slavery. Their decisions were a reflection of the values they held.

Many activists who work to protect the Commons still use the "property" frame. They argue the Commons are "owned" by all the people and are part of our common "wealth." They promote democratic decisions on use of the Commons and a share of the profits generated. I support this for the Cultural Commons, since human culture belongs to humankind.

But the Natural Commons are beyond human ownership and control, however democratic. And the Natural Commons are not property or mere resources for human exploitation.

The constitutional stumbling blocks can be overcome, as with slavery, but first we must change our values. If we can see human beings as a part of a natural system and not owners of it, we could begin working to create a legal Commons with rights for nature. It could be aligned with a cultural legal Commons for ideas, inventions, art and knowledge. This project will be long and difficult, but lasting protection of the Commons may be the most important work of our times.

Rights for Nature

Tom Linzey of the The Community Environmental Legal Defense Fund points out that nature should not be called "commons" because legally that refers to common property and he advocates that nature should not be property but should have inalienable rights of its own. In *Natural Rights: Building a Real Environmental Movement* he wrote, "...under our current system of law, (nature has) no rights, no legal protections...that makes nature simply property.

So, when we work to protect nature...the law ... punishes our actions as an unlawful interference with property...

...a movement to reclaim the Commons would assume that ecosystems and communities of living creatures have inherent and inalienable rights to exist and prosper... Such a recognition of rights would require that our system of law protect, enforce, and defend natural systems and communities...

In the end, if we're serious about defending this planet of ours and its intricate web of diversity and life, we must set our sights on nothing less than eliminating the ability of the few to govern the many. That means turning our attention away from attempting to regulate harmful activities themselves, and focusing instead on limiting the power held by corporate actors...It means beginning to govern in the best interests of ourselves, our children, and all other living creatures that depend on this planet of ours.."

The complete article is available at http://bioneers.org/whoweare/linzey_7_25_5.php or contact Tom Linzey at info@celdf.org.