

# Should anyone "own" the forest?

**Frameworks and examples of commons land tenure for healing all our relations.**

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## *Abstract*

*From the "Rights of Nature" legal movement, to community forestry, and resurgent indigenous sovereignty, a wealth of approaches seek to undermine capitalist extraction as the primary human relation with land. Decentralizing the "bundle of rights" associated with "ownership" can create pockets of relative freedom within capitalist empire, for richer, more local, more ecosystemic interaction between humans and the rest of life. We will summarize highlights of such practices, with specific examples locally and around the world. May the forest "own" the forest!*

For more details and background regarding this approach, see

<https://tryonfarm.org/wild.property.tlcfarm.0.3.pdf>

## **Introduction: Who will own the forest?**

[A prayer of connection with land, and the Multnomah Chinook whose villages lined this river and who still tend these lands, and the descendants calling all of us to be the ancestors they need to become peoples of the earth once again.]

For us as revolutionaries, as people of the earth, what matters is the living practice of relations with land. Listening, dancing, praying, tending, harvesting, burning, seeding, singing. The law constructs fictions that make it easier or harder for men with guns (police and others) to escort bulldozers and fellerbunchers, uprooting the complexity of the forests, including those of us relearning to be of the land.

This talk is about making it harder for those men with guns. So we talk about laws and property rights. But we don't forget what really matters: living relations.

Indeed, Empire's law in general follows social and political struggle. Constantly evolving, to manage and domesticate resistance -- but also traces of victories from those that have gone before[1-8].

We cannot rely on Empire's law, but can use tools (old and new) as part of overall struggle for new relations with land.

## **Frameworks of land as "property"**

Two contrasting approaches to "real property" [7]:

1. Derived from Roman (imperial) law: land is like material goods or domestic animals, and can be held by single individual human with full control (to use, waste, exclude, etc.);

2. In many different ways, earthbound customary laws (such as various Indigenous protocols, and early English common law courts): land is profoundly different, with many different human (and often more-than-human) rights and responsibilities overlapping.

Reinforces and reflects two contrasting cosmologies:

1. Monoculture, individuality, all value convertible into money, land as transient commodity
2. Ecosystem, relationality, wealth through density of interconnections, land as roots & responsibilities

Most common way of speaking of real property these days: bundle of sticks[9]. Version 1), the sticks are kept together, or at most a simple relationship between landlord and tenant. Version 2), the sticks are spread widely among different persons and kinds of relationship.

History of English/American legal tradition:

- Saxon law, land was held in common, no "property". [7]
- Anglo-Norman -- formal introduction of Roman civil law, but in practice "common lawyers lavished their attention on the multiplicity of estates, tenures, and customary arrangements that could concern an imperishable and enduringly productive tract of land". [7,8]
- 15th-16th centuries -- simplification to one idea of property, the Roman version, in large part to support enclosures and emergent agricultural capitalism. [7,8]
- 18th-19th centuries -- colonial property, treaties, "extinguishing" aboriginal title, prioritizing rights of tenants, etc. [1-6, 10]
- 20th-21st centuries -- emergence of legal rights encouraging the commons and the rights of non-human life [11-14]

## **The benefits of overlapping relationships**

Splitting up the "bundle of sticks" allows multiple parties to a) notice problematic action or inaction; b) have the wherewithal to do something about it; c) track the needs and rights of the land itself, from different perspectives.

Conventionally, it's assumed that one "person" should own land to be more efficient. But indecision and exhaustion can affect both natural persons (via illness, distraction, or ambivalence) and corporate ones (internal dissension, loss of institutional memory, fading away). Indeed, while it's true that multiple parties can have difficult conflicts over land use, with skillful structures this can serve the interests of the land and all relations involved -- after all, lack of harmful human action through conflict is not always the worst outcome for the land!

Example techniques: explicitly including the interests of the land through: interests granted to organizations focused on land wellbeing; conflict-management arbitration clauses that require arbiters prioritizing the land; terms in contracts and deeds that make explicit the land's own interests.

# Example approaches to the new commons

## "Rights of Nature" movement

Granting standing to trees, rivers, mountains -- has exploded in 2010s.[12-14] Frequently introduced via Christopher Stone's "Should Trees Have Standing" in 1972, and a township in Pennsylvania ... but really the movement has gained legal teeth in places with resurgent Indigenous struggles. Bolivia, Colombia, Ecuador.

And New Zealand -- three entities granted personhood through acts of parliament. This to resolve ongoing suits brought by Maori groups, and reflects the incomplete "hybridization" of New Zealand law with Indigenous approaches coexisting uneasily with English.

Questions - who speaks for the land? Setting up advisory committees or entities with formal control.

Two versions:

- allowing some people (or anyone) to file court cases on behalf of natural beings;
- establishing natural beings as legal persons with all related rights, including civil and commercial.

## Aboriginal title and Indigenous resurgence

Throughout the history of colonization (Turtle Island, Australia, Oceania, Africa, Asia) there has been resistance. Despite some narratives, Indigenous people were successful at forcing colonial regimes to make compromises and to were able to assert rights to land. While this has ebbed and flowed during the apocalypse of the last 500 years, it has never disappeared, and is now resurgent. Example forms this struggle takes include negotiating treaty rights, new and old (current negotiations in Canada) -- and then struggling to force colonial regimes to honor those rights. Treaty rights in many cases cover wide territories far outside reservations. Moreover, indigenous people contest land tenure of unceded lands, including direct action blockades, legal actions, and more. (Alcatraz and AIM as key example.)

Land Back! [1-6,15,16]

## Community land trusts

From 30s to 60s, drew explicitly from pre-capitalist commons, and from colonized sites of struggle.

Original CLT in Georgia by civil rights movements to support cooperative land tenure. [11]

Typical version: separates land title from improvements and/or use rights. Longterm lease of rights to land require limits on speculative sale of the land (caps on profit)

Has been adapted to keep land for farming uses, and for more complex agreements on overlapping uses.

## Community forestry

Burgeoned in 70s through now as a way to link community wellbeing with ecological conservation. In tropical and Global South contexts, has had mixed success, especially when nominal tenure is insecure

(which makes extracting short-term benefits more attractive). Recent focus on how to ensure confidence in long-term local control. [17]

Includes: ownership by tribes/bands; ownership by community organizations, local governments, cooperatives; ownership by local individuals; more or less powerful advisory boards; formal and informal protocols for sharing use of forests.

## **Easements, profits, covenants, and servitudes**

These are remnants of the plethora of overlapping customary tenures from common law, and have become increasingly common. (Think of condos and HOAs as well as conservation easements.) [18]

Legally, they are rights (and responsibilities) that pass with the land, not the specific parties to a contract.

Have wide latitude on what sorts of agreements can be formalized.

## **Cooperatives**

These can be legally incorporated as coop corporations, as LLCs, and more. Can also be unincorporated. Very traditional use as a way to coordinate shared use of natural resources. Key questions: how are decisions made? How do people enter and leave? Can rights be purchased and sold, and how?

## **Nonprofits**

Often used as a way to structure community-based ownership. Most nonprofits do not have members; how is participation and accountability ensured?

## **Adverse possession**

Ancient right emphasizes the importance of ongoing relationship with land. Peculiar as it seems, enshrined in contemporary US law.[19] Critiqued as a vehicle prioritizing capitalist and extractive uses of land over conservation[20], it nonetheless has been and could be used as a way to question-through-direct-action the plausibility of distant Wall Street fractional "landowners". Direct action gets the goods!

## **Specific Examples:**

### **Land Back: Sogorea Te' Land Trust and Movement Generation rematriating land in East Bay.**

The land trust is Indigenous/Ohlone-led, and holds title to a variety of parcels that host community projects. The land trust creates a vehicle for Indigenous rights to the land, and wisdom from elders, to be a primary tool. [15, 16]

In this case, Movement Generation (a Black and Brown organization focused on land-based liberation) partnered to pay for a 43-acre parcel including both structures and landtending. An agreement between

the two entities describes ways to use the land, giving multiple entities the rights to enforce with wellbeing of the land itself. [21]

Also, this embodies a vision of landtending not separate from human occupation and use.

## **Glendale Estate: reversing Enclosures and Clearances in Skye, Scotland**

Clearances of indigenous Scottish highlanders in 1700s and 1800s followed similar patterns to Indigenous peoples in Turtle Island -- forced removals by military force, forced marches to dense & poor reserved lands, long-distance transfers (in Scottish case, via repurposed slaving ships with high death tolls to North America).

The movement to end the evictions began in Glendale, Skye, in late 19th century, where local residents took direct action to face down 600 Royal Marines and refuse removals. After years of struggle that sparked uprisings throughout Scotland, evictions were formally ceased. [

Glendale community forced the state to subsidize a 50-year low-interest mortgage for a cooperative to purchase the "Estate" of the former landlord. Still manage it collectively 100 years later, though under pressure from young folk lacking interest in crofting, and gentrification by Londoners.

## **Mt Adams Community Forest and Klickitat Canyon Community Forest**

Two examples:

MARS is a nonprofit, directly owns 965 acres (purchased 2011-2020), runs for forestry, recreation, conservation uses. Community involved through the actions of the self-perpetuating nonprofit. [22]

Neighboring KCCF is 2405 acres, purchased by state DNF (2017), with funds from Columbia Land Trust and federal programs. Administered through a management plan developed by advisory council including Yakama tribal rep, community (MARS), ranchers and loggers, hunters and fishers, government reps, etc. MARS plan was used as a guide. [23]

## **TLC Farm**

Land trust owns 99-year renewable ground lease, requiring sustainable agriculture. City and State own conservations easements in exchange for funding. Nonprofit and residential worker cooperative share management of the land, through both contractual agreement and tenancy-in-common of the ground leasehold. One of the two collectives on the land is Indigenous-led, and an Indigenous-led elder's council has helped address conflicts. Contracts include an arbitration clause in which the interests of the land are explicitly prioritized, when deciding a dispute. Practices include asking individuals or groups to actively listen to the land (or specific beings of the land), and as respectfully as possible speak for them in discussions. [25]

## **MST (*Movimento dos Trabalhadores Rurais Sem Terra*)**

Since 80s, perhaps the largest land-based social movement in the Americas, with 1.5 million participants. Core tactic is direct seizure of land, both to live on, and to force the hand of landowners and governments to enact policy change. Controversial to some, but successful over decades not only at

permanently securing land for thousands of people, but "building a new way of life" rooted in sharing and cooperation -- and which does not presume that the primary site of struggle is the legislature or court. [26]

This is both a form of adverse possession, and a reclaiming of direct relations with land.

## Who will own the forest?

The forest "owns" itself, not via legal writs, but through the web of relationships that embody it. Human relationships too -- not dominant or transcendent, but humble and respectful and dignified.

Through struggle, the Empire's law can be forced to recognize aspects of this -- bit by bit.

### References:

1. McNeil, Kent, The Factual Basis for Indigenous Land Rights (April 2021). Osgoode Legal Studies Research Paper, Available at SSRN: <https://ssrn.com/abstract=3822713> or <http://dx.doi.org/10.2139/ssrn.3822713>
2. Atleo, C.; Boron, J. Land Is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada. *Land* **2022**, *11*, 609. <https://doi.org/10.3390/land11050609>
3. Robert A. Fligg, Derek T. Robinson, Reviewing First Nation land management regimes in Canada and exploring their relationship to community well-being, *Land Use Policy*, Volume 90, 2020, 104245, ISSN 0264-8377, <https://doi.org/10.1016/j.landusepol.2019.104245>. (<https://www.sciencedirect.com/science/article/pii/S026483771930451X>)
4. Louise Fortmann, Locality and custom: Non-aboriginal claims to customary usufructuary rights as a source of rural protest, *Journal of Rural Studies*, Volume 6, Issue 2, 1990, Pages 195-208, ISSN 0743-0167, [https://doi.org/10.1016/0743-0167\(90\)90006-T](https://doi.org/10.1016/0743-0167(90)90006-T). (<https://www.sciencedirect.com/science/article/pii/074301679090006T>)
5. Robert A. Fligg, Derek T. Robinson, Reviewing First Nation land management regimes in Canada and exploring their relationship to community well-being, *Land Use Policy*, Volume 90, 2020, 104245, ISSN 0264-8377, <https://doi.org/10.1016/j.landusepol.2019.104245>. (<https://www.sciencedirect.com/science/article/pii/S026483771930451X>)
6. Watts, Vanessa. "Indigenous place-thought and agency amongst humans and non humans (First Woman and Sky Woman go on a European world tour!)." *Decolonization: Indigeneity, Education & Society* 2.1 (2013). <https://jps.library.utoronto.ca/index.php/des/article/download/19145/16234>
7. David Siepp, The Concept of Property in the Early Common Law, *Law and History Review*, Spring 1994, Vol. 12, No 1. Specific quote at p. 87. [https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2610&context=faculty\\_scholarship](https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2610&context=faculty_scholarship)

8. Bailey, Mark. "The Transformation of Customary Tenures in Southern England, c.1350 to c.1500." *The Agricultural History Review*, vol. 62, no. 2, 2014, pp. 210–30. JSTOR, <http://www.jstor.org/stable/43697978>. Accessed 23 Sep. 2023.
9. Goldstein, R. J. (1998, December 1). Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law. *Boston College Environmental Affairs Law Review*, Vol. 25, p. 347. <https://lira.bc.edu/work/ns/ebf01af1-70d9-473f-a6e7-45a892679045>
10. Aulakh, Preetmohinder Singh, British Empire, Land Tenure and the Search for an Ideal Proprietor: 1868-1875, Dissertation at York University, 2022-08-08, <https://yorkspace.library.yorku.ca/server/api/core/bitstreams/a1e52c8e-88db-4176-93fa-88d6de324f61/content>
11. "[\*Arc of Justice: The Fall, Rise and Rebirth of a Beloved Community\*](#)". *Arc of Justice: The Rise, Fall and Rebirth of a Beloved Community*. Retrieved 9 January 2021.
12. Maneesha Deckha, *Legal Human Humility: Contending with the Representation of Trees and Other "Nature" Beings*, JOTWELL (April 29, 2021) (reviewing Alyse Bertenthal, *Standing Up for Trees: Rethinking Representation in a Multispecies Context*, 32 *L. & Literature* 355 (2020)), <https://equality.jotwell.com/legal-human-humility-contending-with-the-representation-of-trees-and-other-nature-beings/>.
13. Bertenthal, A. (2020). Standing Up for Trees: Rethinking Representation in a Multispecies Context. *Law & Literature*, 32(3), 355–373. doi:10.1080/1535685X.2019.1635355
14. Jefferson, D., Macpherson, E., & Moe, S. (2023). Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law. *Transnational Environmental Law*, 12(2), 343-365. doi:10.1017/S2047102523000079 . <https://www.cambridge.org/core/journals/transnational-environmental-law/article/experiments-with-the-extension-of-legal-personality-to-ecosystems-and-beyondhuman-organisms-challenges-and-opportunities-for-company-law/D57E73CDA9D06104FFA843BBDE83166A>
15. Sogorea Te' Land Trust, <https://sogoreate-landtrust.org/>
16. Protect Sogorea Te, <https://protectsogoreate.org/about/frequently-asked-questions/>
17. Koen Kusters, Maartje de Graaf, Nataly Ascarrunz, Charlotte Benneker, René Boot, Rudi van Kanten, John Livingstone, Alphonse Maindo, Heidi Mendoza, Edi Purwanto, Carlos Rodríguez, Richard Ssemmanda, Tran Nam Thang, Roderick Zagt, "Formalizing community forest tenure rights: A theory of change and conditions for success", *Forest Policy and Economics*, Volume 141, 2022, 102766, ISSN 1389-9341, <https://doi.org/10.1016/j.forpol.2022.102766>. (<https://www.sciencedirect.com/science/article/pii/S1389934122000788>)
18. Joan Youngman, Easements, Covenants and Servitudes: Traditional Limitations and Future Trends, *Land Lines*, Sept 2001, <https://www.lincolninst.edu/publications/articles/easements-covenants-servitudes>
19. Sun, C., & Wang, H. (2023). Legal Environment of Adverse Possession on Forestland and Empirical Evidence from the Past 200 Years. *Forest Science*, 69(5), 563–579.

doi:10.1093/forsci/fxad024 . <https://academic.oup.com/forests/advance-article-abstract/doi/10.1093/forsci/fxad024/7136657?redirectedFrom=fulltext>

20. John G. Sprankling, Environmental Critique of Adverse Possession , 79 Cornell L. Rev. 816 (1994). Available at: <http://scholarship.law.cornell.edu/clr/vol79/iss4/2>

21. Movement Generation, Free the Land Capital Campaign, <https://movementgeneration.org/freetheland/>

22. Mt. Adams Resource Stewards, <https://mtadamsstewards.org/programs/mt-adams-community-forest/>

23. Klickitat Canyon Community Forest, <https://www.dnr.wa.gov/KlickitatForest> . Management plan: [https://www.dnr.wa.gov/publications/em\\_kcf\\_management\\_plan.pdf](https://www.dnr.wa.gov/publications/em_kcf_management_plan.pdf)

24. George Macpherson, GLENDALE ESTATE An Unique Early Experiment in Crofting Ownership, <http://www.caledonia.org.uk/socialland/glendale.htm>

25. TLC Farm, "Wild Property Law: designing ecological legal relationships at TLC Farm, version 0.3", 2012, <https://tryonfarm.org/wild.property.tlcfarm.0.3.pdf>

26. Carter, Miguel. "THE LANDLESS RURAL WORKERS MOVEMENT AND DEMOCRACY IN BRAZIL." *Latin American Research Review*, vol. 45, 2010, pp. 186–217. *JSTOR*, <http://www.jstor.org/stable/27919219>. Accessed 23 Sep. 2023.