

## Transcript of *Frontiers of Commoning*, Podcast #40

Interview with Thomas Linzey  
Senior Legal Counsel, Center for Democratic and Environmental Rights  
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**Thomas Linzey:** [00:00:00] [A] landowner came in the door from Nova Scotia, who owns forty acres of some of the last remaining old growth forest in Nova Scotia. And he said to us that he wanted to find a way for the land to own itself. And we said, “That's crazy.” And he said, “Well, find a way to do it.” So we went back and we thought about the process. And we began to come up with a model by which land could legally hold title to itself.

**Announcer:** This is *Frontiers of Commoning* with David Bollier.

**David Bollier:** My guest today is Thomas Linzey, a fiercely creative lawyer who has pioneered breakthrough concepts in law that challenge conventional Western views of property, nature, and human life. Among the innovations Linzey has helped develop are the legal doctrines of community rights, the rights of nature, and more recently the idea [00:01:00] of self-owned land.

Today we'll be talking with Linzey about his attempts to protect ecosystems and empower commoners through bold innovations in law. We'll be discussing the limits of law in protecting the environment, the political priorities hidden in the very language of law, and the rare art form of introducing and operationalizing transformational, new legal doctrines.

Linzey pursues his distinctive brand of legal advocacy as senior legal counsel for the Center for Democratic and Environmental Rights, work that follows a trajectory started at the Community Environmental Legal Defense Fund, which he co-founded. Linzey was an early driving force in the community rights movement, which has been responsible for hundreds of municipal laws that give local communities greater rights to self-determination to protect them from corporate abuses such as fracking.

Thomas, welcome to *Frontiers of Commoning*.

**Linzey:** Thanks for having us, David.

**Bollier:** Well, you know, let me just start by asking how does a freshly minted attorney come to [00:02:00] get into this kind of a slipstream, developing, novel, underdog legal strategies that aren't exactly lucrative or even promising in court?

How did you get into this line of work?

**Linzey:** Yeah, definitely not lucrative. I would highlight that point. Coming out of law school way back in 1995, we had been approached while I was a third-year law student in Pennsylvania by a bunch of grassroots groups that were fighting things like factory farms and large scale water withdrawals and land development that the community didn't want. And basically, a whole spectrum of different issues, locally unwanted projects for various reasons, including the fact that those projects would threaten to harm those communities through the taking out of large amounts of water or putting in a 20,000-head [chicken or pig] factory farm, those types of things.

And the reason why those groups were approaching us in law school was [00:03:00] because the cost of legal services was sky high at that point in time and still is today. Couple that with the fact that there are only 200 full-time public interest environmental lawyers that work in the United States, and the numbers are pretty much the same today as they were back then.

And it's no surprise why these groups that, you know, weren't well-resourced were coming to us to assist them to appeal permits and do that kind of stuff that conventional environmental law has become. And I think that concept of trying to provide free legal services to grassroots-based conservation groups was basically what gave me the idea of creating a nonprofit law firm whose sole purpose was really to assist those grassroots groups to try to fight those projects.

And so, long story short, for about ten years, we did what I call conventional, traditional environmental law, which today consists [00:04:00] of sitting in a room; taking a permit application that's been made by some, usually, large corporation to put in some big project that the community doesn't want; comparing it against the environmental regulations that have been adopted that control the issuance of that permit; trying to find gaps, omissions, and deficiencies in what the corporation has submitted to the state for that particular permit; and then going into court and arguing over whether something was missing or not, that the agency made a mistake by issuing the permit. And the straw that broke the camel's back was really that after ten years of doing these projects, we found that we weren't really stopping anything.

We would find something missing. We would go to court. We would win that court case. The corporation would then simply come back with a new and improved permit application and run that through. The community group would come to us and say, you know, 'Mr. Linzey, we need you to do that jujitsu again that you did the first time around to stop this project.' And we said, 'Well, we can't; we have no [00:05:00] tools left because the corporation has now submitted an application that's administratively complete and meets the regulations.'

And I had some of the lawyers for some of the biggest law firms in the country come up to me and thank me after these hearings for finding these gaps and omissions and deficiencies because it allowed them to bill more hours to the corporation to then do a new and improved permit application that they could then put in to actually put the project in.

And after about ten years of doing that work, we realized that we weren't really stopping anything. We were delaying some things. We would win the cases, but eventually the corporation would simply come back in this wild game of whack-a-mole where you're constantly trying to

stop things, new things are popping up, and corporations are simply coming back and putting the same projects in. [And] we found that we were being very ineffective and so we kind of quit the practice at that point.

We gave up conventional environmental law and we kind of began exploring what's next [00:06:00] instead of just, you know, going to work at Kinko's or Denny's, how do we put these law licenses to work?

**Bollier:** So essentially you were dealing with what was once a triumphant set of laws in the 1960s and 1970s that gave a fresh way to defend the environment and give people a say, you were dealing with maybe, say, a dated or misguided structure for resolving these disputes. And I know much of your work focuses on the limits or deficiencies of the regulatory system and corporate power. So were these kind of motive forces in your moving to a different way of dealing with it?

**Linzey:** Yeah, what we saw was this kind of unholy alliance between the corporations, the agencies, [and] the legislature. I worked on the Hill for a number of years in Pennsylvania, in the capitol, Harrisburg, and watched as legislation was drafted by the same corporate interests that were ostensibly [00:07:00] supposed to be regulated by the regulations in the first place.

And so we kind of came to this point where somebody said something to me that resonated back then. She said that "The only thing that environmental regulations regulate are environmentalists," because they make us predictable as to how we fight when these projects come in. We're essentially enforcing the corporations' own regulations against them and hoping that there's something within that regulatory framework that actually allows us to veto the project.

But if you're the corporation and the dominant industry, why would you ever write something into the regulations that allows the community to actually veto the permit issuance in the first place? You wouldn't because you're in control of the tools. And, in all of this, you know, getting to the work that we do today, it became apparent to me that not only were we not stopping anything, that conventional environmental law was not stopping anything, but that nature was not a party to any of those proceedings. So even if a factory farm [00:08:00] was coming in and was going to dump wastes or have runoff into a local river, the river didn't have a say. The neighbors kind of had a say through the permit process trying to stop it or trying to insert themselves. But the ecosystem itself had no say.

And that seemed to us to be kind of strange; that a system of environmental law that was ostensibly set up to protect the environment didn't recognize the environment itself as a party to the proceedings to carry out or implement those environmental laws. And that seemed like a weird thing to me.

**Bollier:** But let's be blunt, you didn't seem to have many options within the way the law or the political system or corporate power was arrayed. How does one begin to break the frame or get beyond that, using conventional legal tools or doctrines?

**Linzey:** Yeah, so we had zero options, but that doesn't stop groups from simply doing the same thing over and over again and fundraising for that.

You know, we were getting the awards, we were getting the [00:09:00] recognition. We were invited to the White House one year as one of the most effective environmental law firms in the country. So we had all that stuff that people crave, the career stuff, the awards, and the recognition. We could have kept doing that forever, but we found that we, at that point, couldn't do that honestly; that we needed to find a different way to do things.

And I think that different way started when we came across a 1972 US Supreme Court's dissenting opinion in a case dealing with a ski resort that the Sierra Club was trying to stop in California, in which, Justice Douglas, one of the most progressive Supreme Court justice we've had on the Supreme Court, issued a dissenting opinion in this case, in which he said that instead of the Sierra Club suing as individual people against a ski resort, that nature itself should be a party to the proceedings; that the valley itself in which the ski resort was being developed should actually be able to be a plaintiff in the [00:10:00] case.

And I think at that point my brain kind of blew a circuit. Because it said to me that this was not so farfetched that nature should have a seat at the table, or in fact, should own the table, and we should be the ones with seats. But that, to answer your question more succinctly, that the existing conventional system did not allow us to do that kind of law; that we actually had to create a new system of law or begin to create a new system of law that actually allowed us to litigate within that new system to represent those ecosystems that were not being currently represented within the permit regulatory system.

**Bollier:** Just curious, was that inspired in part by that famous 1968, I believe [Editor's Note: The article, in fact, appeared in 1972] law review article, *Should Trees Have Standing?* Was Douglas citing that?

**Linzey:** Yes, and I was fortunate enough to meet Christopher Stone, the law professor who wrote that law article *Should Trees Have Standing?*. And Justice Douglas used his law review article in that decision. And so that was kind of [00:11:00] the line of thought that we started to follow. But it's interesting people trace it back, you know, this concept of legally enforceable rights for ecosystems back to that 1972 court decision.

But, of course, rights of nature and the concept of seeing nature as something other than property has long been an indigenous cultural value, long before 1972, going back millennia. And so it's almost like waking up of sorts of a Western legal system to this concept that nature should be something other than property.

When we're stuck in this Western legal system right now, in most places, where nature as property to be owned is so deeply embedded in the Western legal system that most people can't even imagine what it looks like not to have that embedded in the legal system.

**Bollier:** Precisely and in fact, the way law is structured as something distinct from the economy and social life as this kind of abstraction with universal application [00:12:00] as opposed to something grounded in a local geography or something.

My mind is boggled in trying to think how you start to make progress in introducing non-Western or pre-enlightenment ideas of relations with nature to the Western jurisprudence.

**Linzey:** Yeah, so it kind of befuddled us for a little while, but we were in a lucky position where we had clients coming to us asking for new approaches, and one of those clients was a small borough government, northwest of Philadelphia, a town borough of about 7,000 people called Tamaqua Borough.

And they were slated to receive shipments of sewage sludge, this toxic kind of sludge stuff to be shipped into their community. One of the poorest communities in the state, they'd had all the coal ripped out, because they're a coal community, [that] left a bunch of pits in the community that then the bright idea was to fill those with toxic sludge.

They didn't want that to happen. They approached us about drafting a local law. So [00:13:00] we're talking municipal law, municipal ordinances, this kind of vast undiscovered country by most environmental groups in the United States because they eschew that kind of local level and instead go to the state and federal level.

But they came to us and said, "What can we do?" And we said, "Well, first of all, you need to draft a law that bans that dumping from taking place." But second of all, you know, I'd been reading this stuff about should trees have standing and ecosystem rights and they were very concerned about the impact of the dumping on the rivers and the waterways within their community, which are part of the drinking water supply for Philadelphia.

I suggested to them that they work this rights of nature concept into their local law. And they agreed, made it into the draft, went to the city council, the borough council, a tie vote, had to be broken by the mayor. That was 2006: the first rights of nature law adopted in the world, at least in Western system of law, which recognized that waterways within the borough of [00:14:00] Tamaqua had the right to exist, flourish, thrive – basically independent, legally enforceable rights for the ecosystems themselves, separate from people's rights within the community. We're talking ecosystem rights. So that was the first real break with this Western legal tradition in terms of making law.

**Bollier:** Although of course that raises a host of other complications, like who is the designated representative for nature and how do we assure that its proper representation and so on.

First of all, was that law ever challenged or is it still on the books?

**Linzey:** Still on the books in Tamaqua as the first one. It's been there for a while. The other questions that you raised. What's fascinating to us is that when you work legislatively, which we rarely work because we rarely have the kind of in or the tools or the heft to do that at the state or federal level, we don't have the influence; we don't have the, you know, we're not at the table.

But at the local level, when you can legislatively craft these [00:15:00] things, you can begin to answer the questions that you just asked. So in Tamaqua Borough, any resident of the community of Tamaqua has the legal authority under that law to step into the shoes of the ecosystem as a plaintiff to bring a lawsuit to protect or defend the ecosystem's rights.

So that kind of blows people's brains as well to think of ecosystems as plaintiffs. But it's happened quite a bit now in the enforcement cases, both in the US as well as internationally, and internationally, of course, the rights of nature work has picked up more speed and has moved quicker than the work in the US.

But for these ordinances, these local laws, it allows you to get into the weeds and actually begin to design that new legal system that I, for one, at least think that we need. We need something that either replaces this existing environmental regulatory nature as property system with something else, or augments and strengthens it with these additional [00:16:00] protections, which allow nature to actually defend itself.

Because after all, in the end, we're talking about humanity's or human ability to voluntarily restrain ourselves from exploiting nature. That's in essence what the regulatory stuff is about in some ways. This is about a different system, about the entity itself that's actually being impacted, having the rights and the ability to step into court, to defend and enforce itself, that's a huge shift from where we are now.

**Bollier:** Was this explicitly allied with your notion of community rights at the time? And second, what about the whole notion of state law or federal law preempting a municipality because of the superior authority they had? How did you overcome something like that? Or was this simply intended to provoke publicity or a test case?

**Linzey:** Well, a little of both, but the important part about the community rights stuff is that we had been working on [00:17:00] community rights for a while, like a right to clean air and clean water as an ability of a community to then use those rights to ban a frack wastewater injection well, or a "frackweller."

The rights of nature kind of was a separate program area at that point about thinking to ourselves: if you're trying to stop something from coming in that you don't want, you have to amass the rights kind of levy as powerful as possible. And how do you do that? Well, you do it with human rights, which is the highest way of protecting certain values in our system.

But we thought we could build a bridge with the rights of nature to also build a whole new rights basis that could be used to fight off these projects as well. So it was kind of Machiavellian at the beginning about how do you build that rights bridge for the entities that are affected to have the most effect in a judicial proceeding to push back against that project with those rights? Today, I actually see the two as kind of the same.

When we say the word [00:18:00] 'community,' I think we mean more than just the two-legged people that are moving in the community. When we say community, we also mean the biosphere and the ecosystems and all that kind of stuff. That seems to be a little far for some people to go. They still see community as the human community and then nature as the nature community. But I think we're getting there.

And as for preemption, part of the work has evolved into a challenge to preemption as we know it; that preemption itself is an anti-democratic tool. It's been used in different states to ban prohibitions on Styrofoam and bans on single-use straws and in Florida to ban communities that want to stop large cruise ships from coming into their community and upsetting the local economy.

So preemption is often used by industry as a way of harnessing legislatures to actually make it easier for them to drive projects forward. Because instead of having to chase each individual community around [00:19:00] lawsuit by lawsuit, They're able to lodge preemptive standards in the law that actually clear the playing field for them to move forward with these individual projects.

**Bollier:** But it's remediable to challenge that; it's not something that's constitutionally or through court decisions embedded...it can be displaced?

**Linzey:** Surprisingly not constitutionally embedded. It is, of course, [and] has been case law embedded, but that's a much 'easier,' you know, in quotes because all of this is very difficult, but much easier to challenge.

But we have to think about whether we have to challenge it or not, because we're in a position where we're always deferring to higher governments to tell us what we can and can't do at the community level, then we're kind of cooked. Because the state and federal level is so tightly controlled by entities with different value systems than we have at the community level. We have no choice but to actually challenge that preemptive stuff.

And I think you're seeing [00:20:00] some give to the preemption stuff. Like, recently in Florida, a judge peeled back part of a gun control preemptive law, tossing parts of it. And in Ohio, preemption doctrine has been peeled back even more to say that the state legislature can't just step in and say, you can't pass laws that the state legislature has to legislate in that particular area at the same time they're doing that.

So courts themselves are beginning to kind of peel back some of these preemptive layers. It's nothing total at this point, but it's a progressive way of trying to begin to peel back some of the preemptive power.

**Bollier:** It's a domain specific peel back, not an across the board one.

**Linzey:** Well, actually in Ohio and in a couple other places, it has been across the board in terms of assigning general rules to when preemption can be used and when preemption can't. But it's also, it's fascinating to note, that this concept of local community, self-government, which is where we came to rest as a right of people at the local level to govern themselves, [00:21:00] subject to the fact that they don't drop below state and federal standards, but only legislate above, so state and federal law becomes a floor, not a ceiling. Right now, it's treated as a ceiling in some respects that that concept of local community self-government was actually the law in the United States up until the early 1900s. This thing called the Cooley Doctrine, which was a legal doctrine developed by Thomas Cooley, chief Justice of the Michigan Supreme Court, which was adopted in a dozen other states, which held that there was a right of local community, self-government that the state could not touch; that the state could not interfere with.

So the Cooley Doctrine rose [and] a different doctrine, run by the railroad companies, rose called Dylan's rule. This is getting a little bit in the weeds, but those two did battle. The Supreme Court picked a winner. The winner was Dylan's rule, not the Cooley Doctrine. But part of our work has been to go back and resuscitate that Cooley Doctrine because we think that the universe is starting to bend that way in terms of courts looking for prior [00:22:00] precedent that they can use to peel back preemptive doctrine.

**Bollier:** Of course, from a perspective of the commons, that's an enormously important idea because the idea of subsidiarity; that responsibility and authority should be at the lowest possible level; that power should be distributed so that it's not centralized, consolidated, and, usually, or often, corrupted. You know, this is very important as well as the fact that commons, being place-based and, let's just say, adapted to their geography and circumstances, need to have an authority over doing things as opposed to the one size fits all approach that Washington bureaucracies tend to favor.

That's why as a commoner, I'm very interested in the success of these kinds of efforts.

**Linzey:** Yeah, and I think that what you're saying is also an intersection of these community rights, rights of nature laws with a democracy movement because it's really about broadening the portal of local lawmaking. Because right now that authority is fairly narrow.

It's about widening that portal out, which means that [00:23:00] the democracy work is just as big a part of this as recognizing rights for nature or community rights because both of those rest on the widening of the portal to get these laws through and enforced in line with that, the rights of



nature laws. A lot of our clients are tribes; they're tribal governments, indigenous communities in the US.

We're finding that tribal courts may be the place where this rights of nature jurisprudence really takes hold. In other words, tribal jurisprudence first, and then using that to try to leverage it into Western court jurisprudence after that – kind of a pathway to actually create the laws, find a place to enforce the laws, and then use that precedent on enforcement to begin to influence other courts who are not in the tribal court system.

**Bollier:** Do you envision this as a tough climb up a sheer rock wall or something that might open up with the proper test case?

**Linzey:** So before we thought it was a sheer wall. It turns [00:24:00] out the sheer wall has some cracks in it, enough to get your fingers in and actually begin to climb. And one of the keys to that is the lawmaking ability of municipalities.

Just two years ago now, Orange County, Florida became the largest municipality to pass the rights of nature law. So that's 1.5 million people. They passed it by 89% of the vote. It recognized the Wekiva and Econlockhatchee rivers as having certain rights. Immediately, Ron DeSantis and the Florida legislature jumped in to pass a preemption law to try to preempt other municipalities from passing rights of nature laws.

So while sometimes our allies and colleagues find it difficult to get their brains around rights of nature, the other side knows perfectly well how dangerous the concept is. So it's almost like this weird thing where we're trying to have conversations with our friends to say, this is the potential for this work. On the other side, they know perfectly well what the potential is and we don't have to convince them. They're moving forward to use their tools to do it already. So I think it's this, you know, democracy movement. Preemption is [00:25:00] unconstitutional when exercised in certain ways, unconstitutional because it violates this right of local community, self-government.

But it's all kind of making the path by walking it. The first three enforcement cases were filed in the US around rights of nature. Just this past year or two were tribal, one in Western Court, and so it's all brand new. It's still evolving, but for my money, it's the thing that has the chance to make the difference here if it's not too late.

**Bollier:** So is it focusing on preemption per se, or is it focusing on these alternative doctrines like rights of nature or community rights that's going to push it ahead?

**Linzey:** I think that it's based on the value-system lawmaking that's represented by the community rights material and by the rights of nature material.

Preemption just gets in the way. You have to find a way to mow down preemptive doctrine. What's interesting, tribal courts, they don't have to deal with preemption because state preemption and federal preemption laws don't apply in the tribal courts. So they have a kind of free [00:26:00] pass around some of that stuff.

But I think in the end it means 1,000, 2,000, 3,000 communities passing local laws and actually forcing this change. It's less about a test case because I think we're at a point where for the US Supreme Court personnel and other things, a test case brings a lot of attention to stuff but isn't necessarily going to win the day.

You have to build up this grassroots pressure force that eventually busts the system open. It's been done in the past before around civil rights issues, suffragists, abolitionists – they had to go and change the constitution. I, for one, think, and this is probably the most radical work that we do, that the US Constitution needs to be rewritten.

That it has a lot of good stuff in it, the Bill of Rights, but there's a lot of bad stuff in it. It's like a Word version 1.0 that was adopted back in the 1780s. It doesn't recognize limitations on the Earth; it doesn't recognize climate change; the founding fathers didn't know anything about ocean acidification.

We need a document that kind [00:27:00] of reflects where we are, and we don't have that right now. And I think these municipal laws eventually push state constitutional changes. There's a state constitutional amendment currently circulating in Florida where the rights of nature stuff is slowly moving up to the state level.

But I think what you're looking for is a movement, kind of neither left nor right because a lot of these communities doing some of this work are not liberal, progressive communities. The work started in rural south central Pennsylvania, which is about as red as it gets, and pushing upwards with that to force the change into those other levels, eventually with the federal constitution being on the target.

**Bollier:** Give me an idea of the scope and diversity of rights of nature. I know that you had worked with the government of Ecuador for a constitutional version of that, but of course municipalities as well. Tell me the variety and different nations that might be involved in this activity.

**Linzey:** Yeah, so the first big leap that took place with the rights of nature laws was that folks in Ecuador had read about what had happened in [00:28:00] Tamaqua Borough. So very small world, you know. Ecuadorians going in to write a new constitution had news clippings from articles from this small 7,000-person community in Pennsylvania, and they asked us to come in to help them draft new language for that new national constitution.

This was 2008 and eventually that language made it in the new Ecuadorian constitution has that as provisions in it. The first enforcement cases were brought beginning in 2011 where you had rivers as plaintiffs. So, kind of blows the brain, but again, you look at these cases and the river itself was a plaintiff in the first enforcement case.

Probably the most famous one is the Los Cedros Cloud Forest case that came out a little while ago, about a year ago, in which mining permits in the Los Cedros Cloud Forest in Ecuador were overturned on the basis that they violated the rights of nature, rights of ecosystems in that area.

And I think probably the most surprising twist to all this was that [00:29:00] we assumed that the rights of nature work would move forward through written law, that there would be new constitutions, new municipal laws, local laws, state laws, but they would be written. But what happened next surprised us in some ways. In India and Colombia, judges grabbed the Ecuadorian precedent and brought it into their courts without any written law in place in those countries.

Holding that the Ganges River has certain rights that the Amazon Basin has certain rights. These are actual rulings that were made by these courts in these countries. And so the work began to travel, not just through written law, but also through jurisprudential law where judges began just grabbing these concepts and bringing them in.

To date there are twelve countries where laws have been passed at the local, the state, and the national level with this rights of nature concept embedded within them and in the US we have over three dozen communities now that have passed rights of nature laws, including the city of Pittsburgh, which is one of the oldest ones where the city council [00:30:00] unanimously adopted a law banning fracking within the city, boundaries, hydrofracking for natural gas, but also recognizing the rights of the three rivers.

So when you drive through Pittsburgh, think to yourself, the three rivers that run through the city actually have legally enforceable rights within that community. And so this concept is spreading. It's kind of hot right now. Panama just passed a rights of sea turtles national law on the back of their national decision to pass another rights of nature law at the national level.

And so stuff is moving. Northern Ireland, Ireland, we're making a trip to the UK in a couple months. There's first couple rights of nature laws there. Australia's passed a couple resolutions dealing with land use, planning, rights of nature, but it's this rapidly expanding kind of body of law that promises, I think, to supplant some of the existing environmental stuff.

**Bollier:** Do answer the question for me how a forest or a river hires an attorney. How does that work? Is there legal aid for rivers and forests, or [00:31:00] do courts appoint them or what?

**Linzey:** Not yet. In terms of...although it's an excellent idea, which has been bounced around in certain circles, but these, it all goes back to the text of the law.

So in Ecuador, the text of the law allows certain representatives to bring lawsuits in the name of those ecosystems. They now have an ombudsman in Ecuador that handles rights of nature cases. So kind of like the legal aid concept that you just raised, in Ecuador, they have a state funded agency that actually hears complaints, has a 1-800 number, whatever, in Ecuador – it's not 800 - but has a toll free number to call to actually file those complaints with the state through the ombudsman.

But more importantly than that, because we don't think that state governments will ever be aggressive enforcers of rights of nature laws or local governments. It's important that that right be given to individual people, members of the community.

The first case in Ecuador was brought by two American expats who lived along the river, the Bill Vilcabamba River in Ecuador, who brought the lawsuit. So it's important to [00:32:00] us to maximize the number of people that can step into the shoes of ecosystems to bring these cases, but also, watching the precedent very carefully coming out of Ecuador and other places where these laws are actually winning in court, and I think the US is trailing [in] that right now, but eventually, hopefully we'll get into that mix.

**Bollier:** From the perspective of many indigenous people, I'm sure they feel a certain ambivalence, if not a certain eyerolling ridicule of it. From their perspective over millennia, the idea of working with the norms of Western jurisprudence probably feels ridiculous or an insult to their traditional relationships with nature, and yet, of course, it is a functional improvement over what they did have.

Tell me, what are some of your experiences in dealing with indigenous clients?

**Linzey:** Yeah, so there's a fascinating case that just got resolved in Washington State that I think brings out or highlights a lot of that question; what that question is about. Which is the Sauk-Suiattle [00:33:00] tribe in Washington state, one of the smallest tribes in the state has been fighting for a number of years against the city of Seattle. City of Seattle operates hydroelectric dams along the Skagit River in the state. Those dams were built so long ago that they don't have fish passage for salmon to get past the dams, which is a big reason why salmon runs have gone to almost zero in most parts of the Pacific Northwest.

So for a number of years, the tribe has been fighting to get that fish passage. Other tribes have been fighting as well. But last year, the Sauk-Suiattle tribe filed a rights of nature case in the name of salmon. So salmon as the plaintiff against the city of Seattle to try to force the city to amend its FERC, the Federal Energy Regulatory Commission, its FERC license to add fish passage to those hydroelectric dams so that salmon could get around the dams. Lawsuit was filed not on the basis of written law – the tribe had not passed a rights of nature law – but instead recognizes rights of nature as a [00:34:00] customary law or unwritten law within the tribe.

And they actually used that unwritten law to bring the lawsuit. So they rejected this concept of written law because they find that European emphasis on written law actually undermines their interpretation or expansiveness of their customary or unwritten law at the tribal level. The reason why I'm telling you this story is that a couple weeks ago, the city of Seattle settled that case and agreed to put fish passage in around the hydroelectric dams.

So rights of nature case filed by the tribe in their own way in terms of unwritten, customary law, city of Seattle, basically bowing down at the end, at least, to this demand and putting it into their FERC license to achieve this fish passage. So that's happened with the Sauk-Suiattle tribe, with other tribes, they don't have much of an issue with the written law part because frankly, they've been screwed for centuries trying to use conventional [00:35:00] tools.

They understand that this is about indigenous value systems being involuntarily forced into a Western legal system, and that the only way to do that is through written law.

**Bollier:** I'm excited to hear all of that because of course, customary law lies at the heart of the commons as well, and has usually been superseded by positive law, so-called, or legislatively made law.

But I've always been curious about how customary law can be honored while still respecting some of the more positive things we like about liberal jurisprudence. There's a lot of customary practices that are arguably antisocial or inhuman, the kind of bigotry that we saw in the pre-civil rights movement; that was customary.

Do you have any ideas about how custom can and should be honored and maybe not honored?

**Linzey:** Yeah, I think it depends on, on what the custom is, what the value is. So there's always a substantive component to this. It's not all just rules about what elevates [00:36:00] itself over what, but I think there are two real issues that emerge. With tribal communities, it's about the fact that even the use of the word rights is really a European concept. That rights themselves are a European concept, so we have to kind of navigate that, that the concept itself is just another colonizer to the tribe that they're forced to use this language of rights. But I think we've navigated that and the tribes themselves have navigated it by thinking to themselves that their rights are just another way of explaining the relationship that tribes have, at least in part, with nature that's different from the Western stuff.

With the Western municipalities, we run into confrontation and friction with progressive groups who say, well, what you're talking about is states' rights all over again. You're talking about setting these localities adrift to do whatever they want to do, and that's not the case. What we're talking about is a local self-government power, which is couched in a very specific way that communities can [00:37:00] actually expand rights. But can only do so above the floor of what's already protected by state and federal law.

So it's like a one-way pipe that's running. So communities want to recognize right to clean air and clean water, which unbelievably are not protected by federal or state law at this point. It's just a fact. It's not a constitutional right of people to have clean air and clean water. But when you're establishing those things, you're building on the floor of state and federal law, not from a perspective of a state and federal law as a ceiling, or being preemptive.

So it's always important to recognize that fact that we're not talking about localities becoming their own countries. What we're talking about is localities widening the portal of lawmaking to allow for an expansion of rights towards sustainability. Because unless we have that ability, we can't pass the kind of laws that we need to pass.

**Bollier:** Tell me why certain existing legal doctrines, such as the very venerable public trust doctrine was not an adequate vehicle for moving this forward. Why you saw something that was utterly novel as a more [00:38:00] promising way than this well-established public trust doctrine?

**Linzey:** Yeah, so we went through a year or two playing around with these various other mechanisms like public trust.

But the problem with public trust doctrine is it doesn't shift nature out of that property category. It continues to treat nature and land as property. It just treats it as kind of commonly held property or owned by more than one person kind of property by the public at large or public as a whole. The problem with that in the comparison I always use to the 1840s, if you were a African-American slave in the 1840s, you didn't really care whether you were owned by one person or by five people or owned by the community for that matter.

You're still property, you're still owned. And whenever we use the word property, we're talking about this dominant subordinate relationship between nature and ecosystems that need that property to survive, and the humans that are claiming some kind of dominance over it. So we tried to shift out of that property concept [00:39:00] model.

We understood and I think we thought along the lines of how do we create a model that's philosophically consistent with the overall goal, which is to 'de-propertyfy' nature. How do we move it in a different direction than continuing to 'propertyfy' it and validate those property concepts? And that's tough, but it's also understandable to a lot of people because property is arbitrary.

We had folks discover land that was not their own, draw lines on it, and then say, 'This is yours.' And there's nothing more antithetical to bioregions or environmental protection than to see land as either developed or to be developed in the future, but not to see it as a separate or independent kind of entity with its own needs.

**Bollier:** Well maybe this is the time to segue into your newest frontier of self-owning land. One idea behind the commons is always, at least as I've just thought about it with my colleague,

[00:40:00] Silke Helfrich, relationalized property in which it's less of a thing than a set of relations that have to be honored with some perhaps physical thing like land.

What's the theory or logic behind self-owning land and how does that operate?

**Linzey:** Yeah, so we got to that concept when we were faced with communities that were not going to pass rights of nature laws. So places that love factory farming and wanted more dumps and toxic ways coming into the community, at least the elected officials did.

And so we developed something called the rights of nature conservation easement. Conservation easements, of course, are pretty common. They're about land owners who voluntarily put their land into a restriction in which they can't develop it, and which applies to the land into the future so that nobody else can develop it.

What we did was took that standard conservation easement, borrowed the rights of nature language, and embedded it into the easement so that a landowner could not only restrict use of the property, but a landowner could actually recognize [00:41:00] rights for ecosystems within that conservation easement.

There have been a couple of those filed now in the US wanting in Washington state, one in Hawaii, one in Pennsylvania, so there's still relatively few, but these are property owners that wanted to go beyond a conventional conservation easement to actually recognize rights of nature on their own without a law in place, but to do it on their property through this easement process.

We like the easements some days; we don't like the easements other days because easements still don't change the property, the land from being property, it doesn't shift the land from being property, it just says, 'I'm a landowner; I want to recognize rights for ecosystems on this piece of land, but I still own the land,' which carries with it a certain amount of voluntary restraint on behalf of the landowner to do certain things.

Plus the easements can actually allow certain development to happen that may be antithetical to the ecosystems themselves because the landowner is still the controlling figure in all that.

**Bollier:** On an easement [00:42:00] or self-owned land, the owner can still override that at will. It's not a perpetual shift of authority.

**Linzey:** So with a conventional conservation easement, not the land that owns itself model, which we'll talk about next, but with a conventional conservation easement, the landowner at the very beginning actually defines how they want to use the land, so that they can reserve a spot for building a 2,000 square foot house or reserve a spot for ag use.

But they control the scope at the beginning of that easement process. And so it's not as good a tool as we would like it to be because it allows that design upfront, which may be antithetical to

the ecosystems that are currently existing there, but also because it doesn't change the status of land as property.

The land is still property of the owner. It just has some restraints or constraints on it.

**Bollier:** Tell me, as a practical matter, how you get outside of the property paradigm, which is so deeply embedded in Western law. What's your workaround or legal hack?

**Linzey:** [00:43:00] So we struggled with that for about two years, and we didn't think about any of this stuff until a landowner came in the door from Nova Scotia who owns 40 acres of some of the last remaining old growth forest in Nova Scotia. And he said to us that he wanted to find a way for the land to own itself. And we said, that's crazy because under this Western system of law that we have, you can't do that. That was our first response to him and he said, 'Well, find a way to do it.'

And so we went back and we thought about the process. And we began to come up with a model by which land could legally hold title to itself. And it involves the creation of a legal alter ego within the law, or an avatar is one way to look at it. So what we do is we create an unincorporated association.

So under the law, it's a kind of entity reserved mostly for like card clubs and bird watching clubs. It's not incorporated. It's [00:44:00] not a corporate entity, it's an unincorporated association in which the ecosystems that comprise the land come together as associators. To actually create a legal entity and then are represented by human guardians who sign on only with certain restrictions in terms of that they're representing the ecosystem's best interest. So we lock them into a legal kind of relationship with the land in which they have legal duties only to be a voice of the ecosystems, carry out the best interests of the ecosystems. Things that you find now with, like, minors when they're in court, like, kids that aren't fully adult, who are represented in courts.

**Bollier:** It's sort of like public trust doctrine, but it's not property. It's a more general stewardship or as you mentioned, guardianship of their aggregate full bodied interests. Is that...?

**Linzey:** Kind of, it's actually ownership of the association because you're associating the ecosystems themselves, like the soil ecosystem, the water ecosystem, flora, fauna, [00:45:00] those elements are coming together to create the entity.

Humans are an afterthought. They come in afterwards to say, 'I'll be a spokesperson for purposes of signing a contract or for purposes of going to court,' and then locking those humans into a relationship with the land in which the land is dominant, the humans are subordinate. It's really a radical shift.



And then the title itself, the deed, this is the most important part, transfers to the alter ego, that unincorporated association, so that the ecosystems that compose the land actually own the land. Title is not held by the humans. Title is actually held by nature ecosystem.

**Bollier:** And it sounds fanciful, but when you think of the legal fiction of the corporation, which has legal personhood for this collective of anonymous strangers who come together as shareholders, why not?

**Linzey:** Yeah, and it's no crazier than the fact that we take fossilized dinosaur remains and feed them into our gas tank to make cars go. I mean, you know, we live in an age [00:46:00] where we do a lot of crazy stuff. What's so crazy about de-property'fying nature?

**Bollier:** Or something even more prosaic is the securitization of water or forests, you know, that's turned into a tradable speculative security. You know, why not have these kind of progressive legal innovations?

**Linzey:** Right. And it's easy to talk about this stuff. There tends to be, at least in my opinion, a lot of talking that takes place, but not much doing, at least in most circles. And so we just finished up the beta project last week for this first land that owns itself parcel.

It's a relatively small parcel in the northern part of Washington state, but we've worked with the landowner to actually put this into existence. And now the first one exists. So now there are other entities that are approaching us because Hawaii and Idaho and different places were worried about this kind of land that owns itself model is starting to spread, but I think it's the next big thing. It's where rights of nature was back in 2006. It's the next big idea, I think. [00:47:00]

**Bollier:** And you think that it has the capacity to be recognized by a court as opposed to be treated as some fanciful fiction?

**Linzey:** Yes. At this point, actually, the IRS has granted the unincorporated association tax exempt status for the first time, which was the pioneering work that was done.

And in addition to that, once recorded at the courthouse, which is happening now. That that recording is actually kind of a state sponsored endorsement of the model itself. So we're moving rapidly through those pieces in which we're trying to use the best of what exists for enforcement purposes while embedding it into this completely new model in which the forest in this case, owns itself. It actually holds legal title to itself.

**Bollier:** Well, I mean, this is a fascinating set of vignettes for how you bring qualitatively different values into law because obviously none of these are straight up going to the legislature or going to the court as such. It's more in the most creative way possible trying to develop within

[00:48:00] the legal tools that are there a legal hack or workaround that can be recognized. Is that an accurate description of what you're doing?

**Linzey:** Yeah, it's almost like land back, except not land back to the tribes necessarily, but land back to nature. So it's a big concept in that way, but I think we need to crash this existing system, which hasn't worked very well for us up to this point with something brand new.

And I think just to take the idea further one thing we've never really talked about, but how do you make this less of a voluntary choice by landowners to do this? And how do you actually pass a law that creates some kind of fund, you know, by selling bonds or doing something else to raise capital that then purchases land to actually do this model, to move it faster, to accelerate it more than just a good landowner who wants to do the right thing or a cutting edge thing. How do we make it the default and move it forward?

**Bollier:** Let's just pivot for final moment about, you know, the need for new organizational forms. There's certain [00:49:00] experimentation going on right now with, say, B corporations or purpose driven businesses. In the online world, there's the digital autonomous organization as an attempt to get beyond some of these rigid categories of the corporation or the nonprofit, which tend to be hierarchical, tend to be market driven or oriented.

Have you given thought to what new organizational forms might be needed to try to, in sync with rights of nature, empower the stewardship or the commoning that goes on to take care of these types of "property"?

**Linzey:** Yeah. Eventually, I think there needs to be a financial incentive. Find that somehow capital-wise to actually accelerate this transition that needs to take place.

I find a lot of the B Corporation stuff to just be P.R. You know, public relations, it's about relabeling to build market share. I mean, a lot of that stuff I just don't find to be that real. But I think the tribes leading the way on [00:50:00] rights of nature stuff. I think refining these indigenous value systems on the land that owns itself; I think eventually taking humans completely out of the equation, maybe some, hey, I almost hate to use the phrase, but artificial intelligence, AI that actually is programmed to look at what the best interest of the ecosystem actually is and then mandate decisions on the best interests of that ecosystem and take humans completely out of the equation.

We've done some early kind of tentative work in that area, working with some of the blockchain folks and other folks that are at the pioneering edge of that kind of technology. So I think the sky's the limit.

We're in a failing system right now. And its proof of failing is all around us; it's going to get worse. Manhattan, you, the smoke from the wildfire is something we get every summer from the Canadian wildfires on our end. That proof of this existing system is all around us. The question

is not for us to endlessly talk about why it's failing but to actually do something to build the new models that need to come into place to [00:51:00] actually stave off the worst of what we seem to have created here.

**Bollier:** Well, Thomas, I want to thank you so much for this conversation and for being a catalyst for some important legal innovation, because I think this has been an ongoing need to develop new categories, and I'm very excited about some of these promising developments that are very hopeful.

**Linzey:** Yeah. Thanks for having us. That was a great conversation from A to Z.