



By Carolyn Raffensperger

A Doctrine We Can All Live With

After seven years of covering topics as diverse as toxic chemicals, pollinators, mining, grizzly bears, oceans, and the politics of peer review in the *SCIENCE FOR LAWYERS* column, it was slowly evolving into something else: a bimonthly essay articulating the public trust. This new beat thus provides an opportunity to go beyond science alone to lay out a clear vision of how law, both existing and new, can be woven into a coherent safety net for the Earth and all her beings.

As I see it, four basic ideas provide the pillars of a politically sane and ecologically reverent legal framework: the commonwealth and common health are the foundation of the economy and personal well-being; government has a pivotal role to play as trustee of the commons; each generation has an obligation to the next to pass on the commons unimpaired; the precautionary principle is an essential tool for each generation, through government, to fulfill its responsibilities. All four of these ideas have strong roots in American law. I will address the first three in this column and the precautionary principle in the next.

Many of the earth's resources, such as the atmosphere, oceans, public lands, wildlife, even our genetic heritage, are managed as commons. As these resources come under greater stress, we are called on to develop new and better ways of managing them.

Our existing legal structure is premised on the idea that private

ownership in a market economy leads to the most efficient use of (most) resources. Ownership implies excluding non-owners from free access to those resources. Because non-owners have to pay, owners reap benefits. The presumption is that owners will seek to maximize their benefits by most efficiently transforming their resources into goods and services for the benefit of others. Society as a whole, the argument thus goes, benefits from the multiplication of private benefit. This argument is leading to proposals to privatize vast areas of what have always been commons.

Experience, however, demonstrates several shortcomings in this argument.

The market model leads to valuation of resources over too short a time frame, since owners see little reward in creating or preserving benefits that will accrue to future generations. Thus, the market leads to exhaustion of resources.

The market is designed to maximize economic activity and contains no mechanism for limiting its impact on commons of limited size and scope. Even the planet has its limits, we are discovering, as we run up against them.

The market model does not promote cooperation and equity, even when those modes create value. It is an important generator of value but it is not the only one. Organizing our lives to cooperate and share often serves us better in the long run, collectively *and* individually. If we follow the market/efficiency philosophy exclusively, we lose the value created by cooperation and equity and the value of our common wealth. We cheat ourselves and future generations, to say nothing of the earth. For both practical and ethical reasons, therefore, we must strengthen the law of sharing.

One of the oldest foundations of the law of sharing is the public trust doctrine, which is part of the common law in most states. The public trust doctrine stands for the principle that government holds the Earth's resources in trust, for the benefit of all. Historically, this doctrine has most often applied to tidal waters

and shores, but the core values and interests are capable of much broader application.

Under the public trust doctrine, the state does not own the commons outright, even publicly owned commons like the national parks; rather, it holds them in trust. The government serves as the trustee, managing them on behalf of the public, providing for equitable access, and protecting them for the future. Under that ancient doctrine, the air, the water, agricultural seeds, wildlife, the Great Lakes, all belong wholly and indivisibly to the public, both present and future.

Many legal rulings and state constitutions assert the government's trustee role. One of the clearest statements can be found in the Hawaii Constitution: "All public natural resources are held in trust by the state for the benefit of the people."

Other constitutions, for example Montana's, make clear what the trustee must do: "In order to protect and maintain the commons of the natural world," the legislature is charged with "administration and enforcement of this duty." This means providing "adequate remedies for the protection of the environmental life support system from degradation" and "adequate remedies to prevent unreasonable depletion and degradation of natural resources."

The interests of later generations have been explicitly established in some state constitutional provisions as well as statutory language in both state and federal law. The Montana Constitution says that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Similarly, the goal of the National Park Service's Organic Act is to promote and regulate the use of the parks "by such means as will leave them unimpaired for the enjoyment of future generations."

These provisions express the key building blocks of a law of sharing. We can build on them.

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