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ENVIRONMENTAL AND NATURAL RESOURCES LAW AT THE UNIVERSITY OF OREGON SPRING 2014

The Revival of the Public Trust in Environmental Law

By Rance Shaw

Environmental statutory law has arisen only in the past few decades, but natural resource protection has been present since the inception of the law. The public trust is an ancient doctrine that has roots dating back to the Institutes of Justinian (529 CE). Though less active in the past seventy-five years, the doctrine is reemerging as a powerful legal framework for environmental protection at the macro level. The trust imposes an inalienable duty on government to protect vital natural resources to ensure the survival and welfare of the people.¹

The Public Trust Doctrine as an Inherent Attribute of Sovereignty

As an inherent attribute of sovereignty, the public trust exists independent of legislative expression.² Professor Gerald Torres describes the trust as “the law’s DNA.” Every cell within an organism contains identical DNA. So too is each division of government ingrained with the public trust.³ This genetic code perpetuates both governmental

authority to manage natural resources and a concomitant duty to protect those resources.⁴

Duties of Government as Trustee

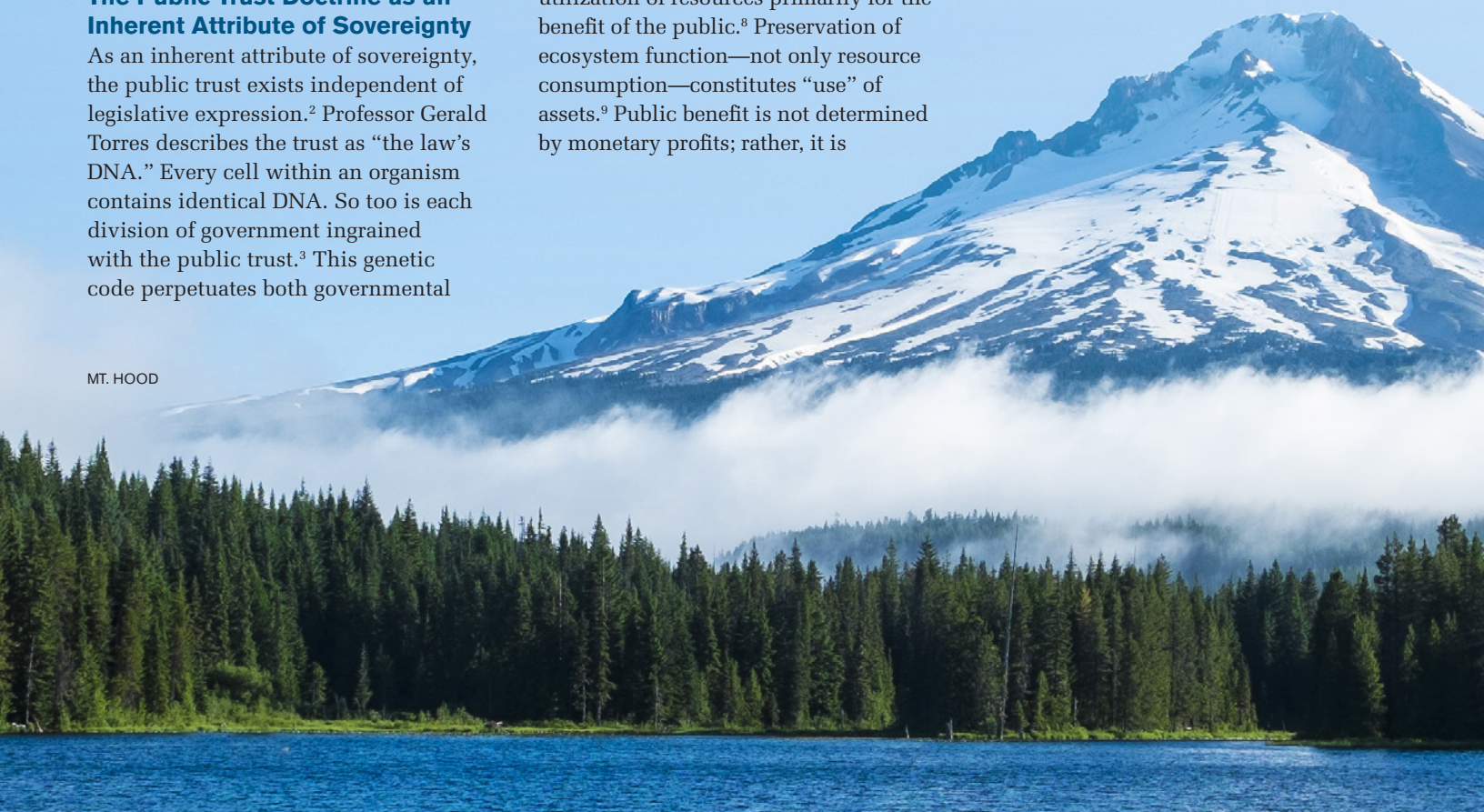
Pursuant to the public trust doctrine, the capacity of government is trustee of natural resources rather than business manager.⁵ Trustees must perform fiduciary duties exclusively for the benefit of the people.⁶ Public interests in natural resources are distinct and superior to competing private interests.⁷ The public trust imposes affirmative fiduciary duties that mandate protection of natural resources to prevent substantial impairment, as well as utilization of resources primarily for the benefit of the public.⁸ Preservation of ecosystem function—not only resource consumption—constitutes “use” of assets.⁹ Public benefit is not determined by monetary profits; rather, it is

This genetic code perpetuates both governmental authority to manage natural resources and a concomitant duty to protect those resources.

determined by the “quality, quantity, and well-being of [the] natural resources.”¹⁰ The public trust grants absolute authority to control common natural resources only insofar as that power is exercised for the benefit of the people.¹¹

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MT. HOOD



The Revival of the Public Trust in Environmental Law

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MCKENZIE RIVER

Present and Future Generations of Citizens as Beneficiaries

Present and future generations of citizens are cobeneficiaries.¹² As a perpetual trust, the public trust embodies the idea that “the earth belongs in usufruct to the living.”¹³ Present cobeneficiaries may receive the yield (or “profits”) but not the capital of a perpetual financial trust. Present cobeneficiaries may not violate the rights of future cobeneficiaries to enjoy the yield from undiminished capital. Think of the trust as a fruit-bearing tree. Each generation possesses the right to harvest the fruits from this tree, but none may sever branches or fell the tree.¹⁴

Natural Assets Comprising the Res

Historically, the public trust has been largely concerned with wildlife, water and stream beds.¹⁵ However, the scope of the trust extends to all resources that are a “subject of public concern to the whole people.”¹⁶ The public trust must be dynamic to extend protection in response to changing public needs.¹⁷ The atmosphere, for example, has not

traditionally been protected as a trust asset. However, a plethora of adverse effects are inextricable to climate change.¹⁸ One of the oldest purposes of the public trust—protection of tidal lands—will be frustrated if sea level rise from planetary heating permanently submerges those lands. The res must preserve and protect entire ecosystems rather than only isolated assets.

Think of the trust as a fruit-bearing tree. Each generation possesses the right to harvest the fruits from this tree, but none may sever branches or fell the tree.

The Public Trust Doctrine in 2014

- In *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, 959 (2013), the Pennsylvania Supreme Court ruled that the public trust doctrine provides equal protection against severe imminent ramifications and actions that result in minimal present harm, but that are likely to cause significant or irreparable harm.

- The nonprofit organization Our Children’s Trust is pursuing atmospheric trust litigation in all fifty states and the District of Columbia. *Alec L. v. Perciasepe*, 2013 U.S. Dist. LEXIS 72301, is currently on appeal to the United States District Court of Appeals for the District of Columbia Circuit. This litigation seeks to establish the applicability of the public trust doctrine to both state and federal governments, to declare the atmosphere as a trust asset, and to require trustees to perform an accounting and develop a plan for reduction of atmospheric carbon dioxide concentrations.

- In her newest book, *Nature’s Trust: Environmental Law for a New Ecological Age*, Oregon law professor Mary C. Wood proposes a modern framework for the public trust doctrine, which she calls “Nature’s Trust.” She challenges the paradigm of the public trust as strictly a state doctrine that is confined to only certain natural resources.

Professors Michael C. Blumm and Mary Christina Wood published the textbook *The Public Trust Doctrine in Environmental and Natural Resources Law* (Carolina Academic Press, 2013), the first legal textbook of its kind.

- The University of Oregon Environmental and Natural Resources Law Center’s Conservation Trust Project examined potential policy initiatives for the incorporation of the public trust doctrine into environmental decision-making at various levels of government. The project is now drafting model language for local, state, and federal efforts to incorporate the doctrine. White paper forthcoming.

The Role of the Judiciary in Enforcing the Trust

Congress delegated to the Environmental Protection Agency (EPA) the authority to enforce statutes that pertain to natural resource use and protection, such as the Clean Air Act (CAA). The judiciary considerably defers to the EPA’s interpretation of statutes that it is charged with administering.¹⁹ Indeed, a court should not substitute its own judgment for that of the legislature or agency in administering statutes.²⁰ However, the government is subject to the same judicial accountability as a private trustee.²¹ Thus, governmental trustees have no discretion to allow substantial impairment to the natural resources of the res.²² As with any private trust, the judiciary determines whether fiduciary duties have been violated.²³ Rather than rubber-stamping governmental decisions, the courts must examine a myriad of factors such as the impact on individual natural resources and the degree to which public interests are displaced in favor of private interests.²⁴

Potential policy initiatives are aimed at incorporating the public trust in constitutional amendments, executive orders, statutory amendments, regulations, and local zoning ordinances.

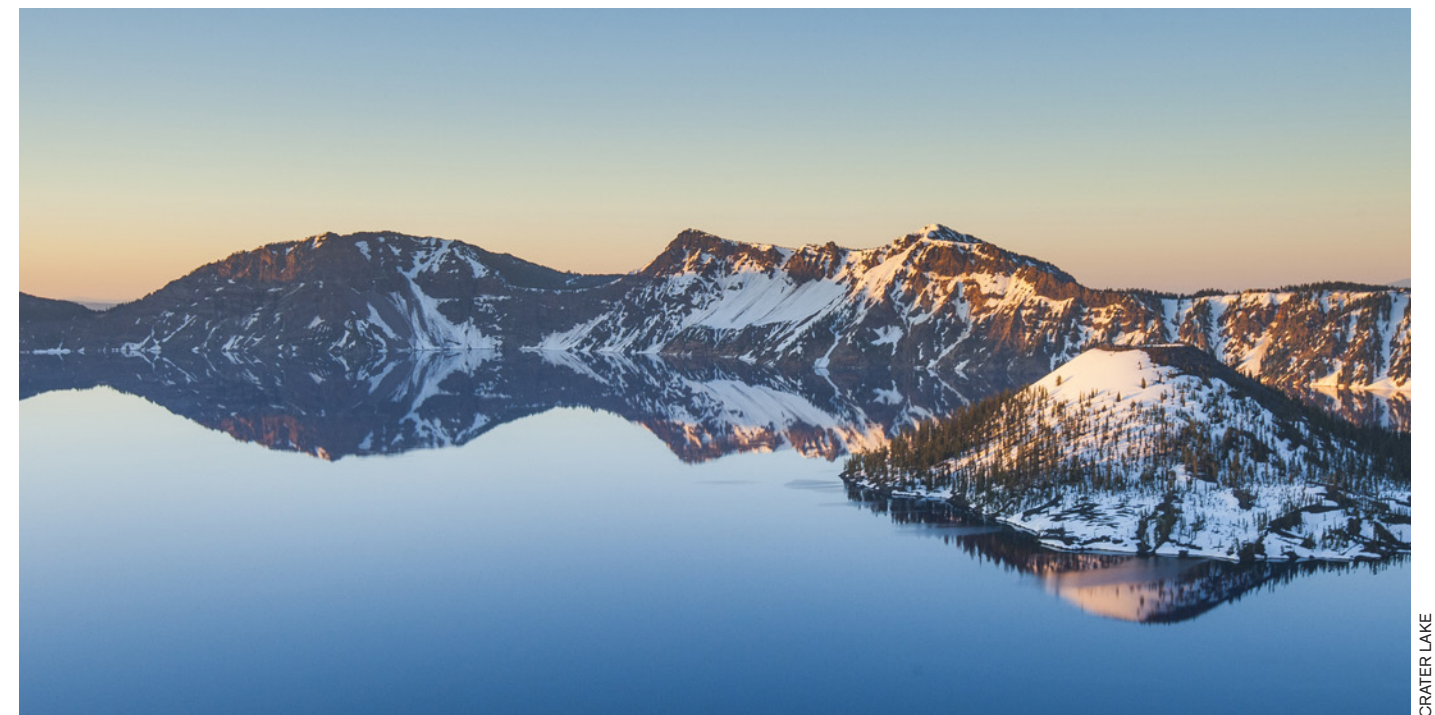
The Future of the Public Trust

The purpose and scope of the public trust have both evolved with the changing needs and interests of the people.²⁵ Ecology and recreation are now recognized as two main purposes for protection of tidal lands—which were traditionally protected for fishing, navigation, and commerce.²⁶ The modern public trust doctrine

shows flexibility and adaptability in protecting both a broader scope of assets and the public interest they secure.²⁷ Furthermore, current legal action has sought to have the atmosphere declared to be a public trust asset so that the people may enforce fiduciary obligations against the government.²⁸

The public trust doctrine is not merely a basis for litigation. Its purpose is also to serve as a guiding principle in governmental policy. Litigation is the last resort for citizen beneficiaries who have been disenfranchised by unfaithful government trustees. Therefore, trustees should recognize the public trust as the predicate for all decisions regarding public natural resources so that court enforcement is not necessary. Potential policy initiatives are aimed at incorporating the public trust in constitutional amendments, executive orders, statutory amendments, regulations, and local zoning ordinances.

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CRATER LAKE

The Revival of the Public Trust in Environmental Law

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It is a “fundamental mistake” to consider the sovereign right to control natural resources independent of the sovereign responsibilities of protection and preservation.²⁹ As an immutable attribute of sovereignty, the doctrine remains a source of empowerment for the people to invalidate the status quo that favors private economic interests over public interests in natural resources. The future of the public trust will inevitably be characterized by a catalytic restoration of the status of the people as “citizens rather than serfs.”³⁰

Rance Shaw is a rising second-year student at the University of Oregon School of Law. During his first year, Rance served as a dean’s distinguished environmental law fellow on the Environmental and Natural Resources Law Center’s Conservation Trust Project. He will continue his work with the project next year as a Bowerman fellow. Rance was also recently selected to serve as the 2014–15 treasurer for the student group Land Air Water.

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Notes

1. Cf. *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 453 (1892) (declaring that the State has an inalienable duty to protect “property in which the whole people are interested”).
2. See *San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa Cnty.*, 972 P.2d 179, 199 (Ariz. 1999); *Nat’l Audubon Soc’y v. Super. Ct.*, 658 P.2d 709, 728 n.27 (Cal. 1983); *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1092 (Idaho 1983).
3. See *U.S. v. 1.58 Acres of Land*, 523 F. Supp. 120, 123–24 (D. Mass. 1981).
4. *Robinson v. Ariyoshi*, 658 P.2d 287, 310 (Haw. 1982).
5. *Kadish v. Arizona State Land Dep’t*, 747 P.2d 1183, 1186 (Ariz. 1987), *aff’d*, 490 U.S. 605 (1989).
6. *Geer v. Conn.*, 161 U.S. 519, 529 (1896).
7. *In re Water Use Permit Applications*, 9 P.3d 409, 450 (Haw. 2000).
8. *Id.* at 451.
9. *Id.* at 452.
10. *Robinson Twp. v. Cm.w.*, 83 A.3d 901, 978–79 (Pa. 2013).
11. *Id.* at 978.
12. *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991)
13. Ltr. from Thomas Jefferson to John Taylor (May 28, 1816), in *Social and Political Philosophy: Readings from Plato to Gandhi* 251, 252 (John Somerville & Ronald E. Santoni eds., 1963)
14. *Mary Christina Wood, Nature’s Trust: Environmental Law for a New Ecological Age* 170 (2014).
15. See generally *Nat’l Audubon Soc’y*, 658 P.2d at 719.
16. See *Ill. Cent. R.R. Co.*, 146 U.S. at 455.
17. *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121 (N.J. 2005) (quoting *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984)).
18. See *Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability: Summary for Policymakers 2* (2014).
19. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
20. *Kootenai Envtl. Alliance*, 671 P.2d at 1092.
21. *Kadish v. Ariz. State Land Dep’t*, 747 P.2d 1183, 1186 (1987), *aff’d*, 490 U.S. 605 (1989).
22. *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003).
23. *In re Water Use Permit Applications*, 9 P.3d at 455.
24. *Kootenai Envtl. Alliance*, 671 P.2d at 1092.
25. See *Nat’l Audubon Soc’y*, 658 P.2d at 719.
26. *Id.*
27. See e.g.: *In re Complaint of Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (state and federal duty to protect and preserve wildlife); *In re Water Use Permit Applications*, 9 P.3d at 447 (water resources protected by the trust not limited to surface water).
28. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13–14 (D.D.C. 2012).
29. *In re Water Use Permit Applications*, 9 P.3d at 488.
30. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 484 (1970).



THORS WELL, OREGON COAST

ENR Fellows Reach Beyond the Classroom

During the 2013–14 academic year, ENR fellows jumped at the opportunity to participate in a number of presentations, projects, and conferences with important external entities.

ENR Oceans Coasts and Watersheds Project (OCWP) fellows working on the Willamette Water 2100 (WW2100) project led by Associate Professor Adell Amos were chosen to present their findings to the University of Oregon Board of Trustees. The presentation was such a success that the students were asked to present again a month later to the School of Law Dean’s Advisory Council at the White Stag Block in Portland, Oregon. Funded by the National Science Foundation, WW2100 is an interdisciplinary collaboration among the University of Oregon, Oregon State University, and Portland State University examining hydrological, ecological, and human impacts to water availability in the Willamette River Basin.

Third-year law students **Rebecca Rushton** and **Adam Walters** and first-year law student **Jill Randolph** provided legal research and writing expertise to an international team of engineers, oceanographers, ecologists, lawyers, financial consultants, and recycling experts based in the Netherlands who are working on a project known as “The Ocean Cleanup.” The Ocean Cleanup seeks to clean up the “Great Pacific Garbage Patch” by creating an economically feasible and scalable device, similar to a floating barrier or platform, that would passively collect plastic debris floating just beneath the surface and store it for later collection and recycling. For their part, Rebecca, Adam, and Jill researched and drafted a legal analysis of likely by-catch issues the project would face under international maritime laws. You can learn more about the Ocean Cleanup at www.theoceancleanup.com and watch the project’s 2012 TEDx Talk at tedxtalks.ted.com/video/How-the-oceans-can-clean-them-2.

The **Energy Law and Policy Project** hosted the Oregon Energy Storage Conference at the University of Oregon’s White Stag Block in Portland. The workshop included roughly 100 energy experts from businesses, agencies, and organizations such as Portland General Electric, the U.S. Department of Energy, PacifiCorp, the California Public Utilities Commission, AES Energy Storage, the Federal Energy Regulatory Commission, the Bonneville Power Administration, and the Clean Energy States Alliance. The purpose of the conference was to bring the industry’s highest officials together to brainstorm solutions to energy storage problems in Oregon and the nation. ENR law students played a critical role in the conference by working with Oregon Department of Energy and Oregon Public Utility Commission representatives and select industry leaders to research and summarize six of the most pressing issues surrounding energy

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The WW2100 presentation to the Dean’s Advisory Council at the White Stag Block in Portland. From left to right: Emily Johnson, ENR program manager; Heather Brinton, ENR managing director; Adell Amos, OCWP faculty lead professor; Adam Walters, third-year law student; Michael Moffitt, dean; Margaret Townsend, third-year law student; Kristina Schmunk Kraaz, third-year law student.

ENR Fellows Reach Beyond the Classroom

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storage: 1) prioritizing energy storage applications; 2) creating energy storage values; 3) developing support tools for energy storage; 4) building demonstration projects; 5) creating seamless integration into utility systems; and 6) navigating financial mechanisms and tax policy. Following the conference, law students published summaries of their respective roundtable discussions focusing on solutions for the future specific to Oregon's geographic, political, legal, and economic environments. These summaries are now available at www.oregon.gov/energy/pages/energy-storage-workshop.aspx.



From left to right: Lee Ewing, third-year law student, Rebecca Rushton, third-year law student, Will Carlon, second-year law student, Kaylie Klein, third-year law student, and Jordan Bailey, second-year law student, assist Oregon Energy Storage Conference attendees.

2013–14 First-Year Fellows Spotlight

Each year, first-year law students are given the opportunity to serve as ENR fellows under the Dean's Distinguished Environmental Law Fellowship and the Chapin Clark Fellowship. This year ENR welcomed four first-year fellows: Rance Shaw, Jill Randolph, Eric Trotta, and Tori Wilder. Rance Shaw joined the Conservation Trust Project, which focuses on public trust theory and private property tools to achieve landscape conservation. Jill Randolph, Eric Trotta, and Tori Wilder joined the Oceans Coasts and Watersheds Project, exploring urgent issues in both marine and freshwater environments.

Rance Shaw earned his bachelor of science in chemistry with an American Chemical Society–certified emphasis in biochemistry from Boise State University.

Rance was excited to become an ENR fellow because he desired firsthand experience in environmental law, and because of the wonderful culture and community that the ENR Center provides. Being a fellow has allowed Rance to immediately learn about the topics that brought him to law school.

“Being an ENR fellow has provided me a great source of motivation during the times when I’m swamped with criminal law, constitutional law, appellate briefs, and oral argument.”



Rance Shaw

As a member of the Conservation Trust Project, Rance has worked closely with Professor Mary Wood in efforts related to her book *Nature's Trust: Environmental Law for a New Ecological Age*. He has also worked with other fellows and research associate Jared Margolis to find cases and statutes for use in a forthcoming white paper on the public trust doctrine.

This summer, Rance will be working at Cascadia Wildlands on their Big Wildlife campaign.

Jill Randolph was born and raised in Boise, Idaho. She graduated from the University of Idaho, earning a degree in international relations with a focus on Western Europe. While she was growing up, her father worked for Idaho Power as head of environmental affairs, so Jill often heard about water issues and how local, state, federal, and tribal leadership interacted with each other on the subject. This was a key component in fostering Jill's current interest in natural resources law.

Jill became an ENR fellow because she knew she wanted to focus



Jill Randolph

on natural resources law in her postgraduate career. The Willamette Water 2100 project intrigued her, and meeting water law professor and associate dean, Adell Amos, at an admitted student day ignited her passion for water law. Being able to work with second- and third-year law students as they worked on more substantial research was another reason Jill was drawn to the fellows program, as she knew she could progress academically by meeting these students, interacting with them, and building off of their work. As a member of the Oceans, Coasts, and Watersheds Project (OCWP), Jill has participated in a number of ENR special events and provided legal research and writing expertise for an international ocean cleanup project. She also served as a volunteer for this year's Public Interest Environmental Law Conference (PIELC).

This summer, Jill hopes to work as an in-house intern at an organization focusing on environmental and natural resources law.

Eric Trotta was born and raised in Fort Lauderdale, Florida, and recently graduated from the University of Florida with a degree in English. Eric developed an intense love for water by fishing in lakes near his home and diving the coral reefs of south Florida. He was drawn to water law after an intense drought caused the world-class bass fishing lakes surrounding Gainesville to nearly disappear during his time as an undergraduate.

Because of his strong interests in water and fisheries law, Eric was a natural fit for the OCWP team. Since moving to Oregon and starting at the School of Law, Eric has been involved in projects and issues concerning the native trout and salmon populations of the Pacific Northwest. Being a fellow has not only allowed Eric to focus on his passion for water and fisheries law, but also to make many connections with Pacific Northwest water conservation professionals he would not have made otherwise.

Through work with PIELC and by helping to organize the film showing for *Wild Reverence*—a film by Pacific Northwest fisherman and filmmaker Shane Anderson that focuses on the plight of the steelhead on the West Coast—Eric was able to make connections with biologists, ecologists, and members of the Oregon Department of Fish and Wildlife on his specific area of interest, native fish conservation.



Eric Trotta

This summer, Eric will work with the Fisheries Law Centre based in Vancouver, Canada. He will focus on a joint project with Legal Atlas that will involve compiling and analyzing relevant fisheries laws in the United States.

Tori Wilder grew up and attended college in Fredericksburg, Virginia, where she studied philosophy and developed a strong interest in environmental ethics. Her passion for sustainability brought her to Oregon, where she plans to use her law degree as a tool for environmental protection.



Tori Wilder

As an OCWP fellow, Tori participated in project meetings and attended the Heceta Head Coastal Conference, a partnership with Oregon Sea Grant. In addition, she helped with ENR Center events and volunteered at the 2014 Public Interest Environmental Law Conference. PIELC was the highlight of her year because she had the opportunity to saturate herself in diverse ideas, perspectives, and causes from across the environmental movement. A few of the issues she learned about at the conference include rights to access justice, the global climate convergence, criminal enforcement of environmental law, and environmental civil disobedience and resistance. Looking back on the year, Tori is grateful for how her fellowship kept her connected with her fundamental motivation for coming to law school—learning more about environmental protection issues.

This summer, Tori will be working as a legal intern at Environmental Law Alliance Worldwide in Eugene, where she will support attorneys and activists across the world working for community rights and environmental justice.

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