

**THE CHILDREN’S CLIMATE CRUSADE:
ATMOSPHERIC TRUST LITIGATION IN THE COURTS
LEAGUE OF CONSERVATION VOTERS
OREGON/WASHINGTON JOINT COUNCIL SESSION**

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I.

Good evening.

The theme of this conference is Meet at the Columbia River, so I will begin my remarks there. I grew up on the banks of the Columbia River several miles upstream from here on land my great-grandfather bought from a farmer in 1889. That place we call Wood’s Landing molded my sense of belonging, and my deep love of the natural world.

Our home was also home to chum salmon. These magnificent fish go out to the ocean and then come back to the exact place where they were born to spawn. As a child, I would hide in the tall grasses by the river, enthralled by the sight of hundreds of fins slicing through the water’s surface as these salmon carried out their ancient spawning rituals. It’s a massive physical struggle for them and a race against time to find mates and create their nests in the gravel, and then to deposit eggs before they perish. Just days

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after spawning, you see their corpses scattered all along the river bank. Yet embedded in that cobbled shore rests a whole new generation of life. In the spring, the juvenile fish emerge and travel down with the high flood waters of the Columbia River to the ocean, and three years later, only a fraction will survive and journey back to Wood's Landing to repeat this display of tenacious life.

When I was growing up, it never occurred to me that our civilization would assault such a wondrous river basin and its life forms. Justice Holmes famously said, "a river is more than an amenity, it is a treasure." To people who are drawn to rivers, I would say, a river is more than a treasure, it is sacred. For it not only flows through space, it flows through time. It is the great connector between our ancestors, us, and our descendants. The waters themselves seem to carry a covenant of obligation through the lineage of humanity to protect such priceless legacy.

You have heard the old Indian proverb, "We do not inherit the Earth from our ancestors; we borrow it from our children." Tribal people have inhabited this Basin for thousands of years, and their survival was entirely dependent on the salmon surviving. So tribal leaders managed the salmon as a natural endowment, a trust if you will, that would continue to feed future generations. Fishing was carefully managed within each community to ensure ample spawning to perpetuate the species. Under this tribal trusteeship, ten to sixteen million salmon returned to the basin every year -- for 10,000 years. To sustain a natural trust over millennia, as the tribes of the Columbia River Basin did, requires extraordinary fiduciary stewardship.

But natural resources management on the Great Columbia River changed radically when new sovereigns took control of the land. The states of Oregon and

Washington were novice governments with no experience managing a natural resource. State leaders presumed that the huge salmon runs were inexhaustible, and so they allowed gluttonous commercial harvest to serve an insatiable global food market. Salmon runs started collapsing. And then in the 20th Century, a surge of industrialization and urbanization took the Pacific Northwest by siege, affecting virtually every watershed used by salmon. The story of the Columbia River Basin is the story of every major river basin in America. It is a story of massive and cavalier destruction. The great Columbia and its tributaries have been dammed and diverted and polluted. The waters now run through huge scabs of urban sprawl. Up in the higher reaches of the basin, remnant ancient forests bear immense scars of clear cuts. Toxins in the river remain so persistent in places that our great-great grandchildren will find them in their fish, all because multiple factories have used and still use the river as a free dumping ground for their industrial effluent. In 1995, the National Marine Fisheries Service declared that “Few examples of naturally functioning aquatic systems now remain in the Pacific Northwest.”

Basically, the new sovereign trustees upon this land devastated in a mere century what the native trustees had managed with fiduciary care for millennia. Today’s wild salmon runs are about 2% of historic populations, and the fish that have inhabited the Columbia River in some form for 5 million years now swim in lethal waters through a gauntlet of dams towards their extinction.

The area around Wood’s Landing was a microcosm of this destruction as thousands of acres of farmland in the county became wall-to-wall suburbia in an all-out development frenzy. The lumber mill upstream spewed toxic air emissions that hung stagnant over the entire area, and pollution froth floated across the salmon spawning

grounds, all day, every day. This ruin occurred with the blessing of federal, state, and local agencies. Permits from these jurisdictions issued like rows of falling dominoes. It seemed to me that environmental law wasn't stopping much at all; in fact it was legalizing harm.

Today's environmental losses boggle the mind and sicken the soul, everything from mountaintop removal, strip mining, fracking, deep sea drilling, species extinction, dried up rivers, drinking water pollution, ocean acidification, ocean dead zones, wetlands destruction, nuclear waste, and now, climate crisis. In Appalachia, the coal industry has mutilated the landscape, blowing the tops off of over 500 mountains in the quest for coal. They've dumped those mountaintops into the valleys below, obliterating over 2,000 miles of stream. I talked to a friend who lives in West Virginia who described the area as a moonscape. She said, "I flew over it a couple of times. I couldn't even talk. How could this possibly be legal?"

But that, in fact, is the problem. It's all made legal under environmental statutes.

So when I turned to environmental law as a scholar, I began asking some fundamental questions about the statutory system as a whole. This evening I would like to share with you both my sense of the dysfunction that lies at the core of this system but also suggest a principled way to change course before we cross irrevocable climate tipping points.

II.

Let's begin with a critical look at our environmental laws – laws like the Clean Air Act, the Endangered Species Act, the Clean Water Act and so on. These were passed in the 1970s after the first Earth Day. Enormous faith has been placed in this system of

statutory law for decades now. And if you took a snapshot of environmental law in its first decade, you might conclude that the law worked for a time. Rivers stopped catching fire. Lead was taken out of gasoline. DDT was banned. But despite these successes, the most devastating onslaught to Earth has occurred since these major statutes were passed. The industrial machine moves fast, and its swath of wreckage far exceeds the isolated instances of protection. Across nearly all fronts, environmental law has failed in its basic purpose to safeguard natural resources.

The problem is certainly not a lack of law. We have thousands of pages of statutes and regulations. The problem is that these laws gave discretion to the agencies to permit the very pollution or land destruction that the statutes were designed to prevent. Of course, the permit systems were never intended to subvert the goals of these statutes. But agencies have used their discretion to enshrine a permit system that inevitably sinks the statutory goals. With few exceptions, most agencies are simply not saying no.

Why is this? Well, agency discretion acts like a magnet for political influence by powerful industries. They exert relentless pressure on agencies to grant permits or simply not enforce the law. After years of such pressure, an agency often falls captive to the industry it regulates. Officials then look at the industry in a different light – as a client they must serve. Discretion becomes a legal conduit through which the agency delivers public resources directly into corporate hands through permits.

Environmental law was not supposed to work this way. The entire premise of administrative law is that agencies are neutral creatures that will use their discretion to serve the broad interests of the public. But the discretion that is built into the law works

as a political club. For some public servants, drawing the line against environmental harm may be career suicide.

Here in the Columbia River Basin, for more than 20 years now, the federal National Marine Fisheries Service has continuously flaunted the very statute it is charged with administering, never forcing the changes in dam operations necessary for salmon recovery. Just last month, Judge Michael Simon found that the Fisheries Service had yet again subverted the ESA and wrote that the hydro-system “‘cries out’ for . . . new thinking if wild Pacific salmon and steelhead, which have been in these waters since well before the arrival of homo sapiens, are to have any reasonable chance of surviving their encounter with modern man.”

III.

Your conference title, Meet at the Columbia River, is wonderfully poignant, for the Columbia River is really a place where two histories meet – the indigenous and the industrial -- and it is a place where two sets of politics collide. I am not talking about Republican or Democratic politics. I’m talking about the politics of scarcity and the politics of abundance – politics that reflect our core worldview.

We find ourselves imprisoned today in what I call the politics of scarcity. These politics move society towards a condition of resource collapse, and push the citizens towards a state of ever-growing misery. The politics of scarcity hover over societies that sanctify reckless indulgence and greed. These politics deliver public resources to a powerful elite at the expense of everyone else. But the rhetoric of these politicians focuses invariably on short-term jobs and local tax revenues. For communities suffering

severe economic distress from past politics of scarcity, these promises, dangled out to desperate people, can be hypnotic, ending any deeper look into alternatives. These are the politics controlling environmental statutory law today. Often it does not matter much what the law says; the politics of scarcity will circumvent it in the name of jobs, jobs, and jobs. The politics of scarcity will manage human species survival in much the same way as it manages Columbia River salmon survival – pushing inexorably towards extinction.

The politics of abundance, by contrast, arise from a community ethic of measured restraint. These politics focus on rebuilding natural wealth to sustain society into the future. Economic opportunities are designed as part of that greater enterprise. These politics reject proposals that would serve a few corporations at grave expense to our fellow citizens and future generations. President Theodore Roosevelt expressed the politics of abundance a century ago when he stood at the rim of the Grand Canyon and famously declared, “We have gotten past the stage, my fellow citizens, when we are to be pardoned if we treat any part of our country as something to be skinned for two or three years for the use of the present generation, whether it is the forest, the water, or the scenery. Whatever it is, handle it so that your children’s children will get the benefit of it.” Legal systems can support either the politics of scarcity or the politics of abundance, but Earth’s natural systems can support only the latter.

It matters much which politics we choose as we confront climate crisis – because it’s now coming at us like a runaway train loaded with explosive fracked oil from the Bakken oil fields. Now some of you might want to stop me right here and say “whoa, climate is not my issue. I leave that one to Cathy or Claudia, or Mary Wood.” Well, climate is not my issue either. In fact it’s no one’s issue. It is everyone’s emergency.

Most of us have taken for granted a stable climate system all our lives. Our modern lifestyle has so detached us from the sources of our own survival that most of us have rarely paused to consider that the climate system is the linchpin to all life on this planet, and provides the stable platform for all of our personal security, happiness, and freedoms. A world of runaway heating is likely unfathomable to most of us in this room. It is certainly a world we would never wish upon any children we love.

So I will describe this climate crisis and consider how the politics of scarcity delivered it to us. I will then turn to a legal principle known as the public trust doctrine that I think of as embodying the politics of abundance. I will end by describing a climate litigation campaign that invokes this public trust principle on behalf of youth seeking to force government action before it is simply too late.

IV.

To begin with, for those who are not yet familiar with climate science, humanity spews 70 million tons of greenhouse gasses such as carbon dioxide into the atmosphere every day – this is so much that we’ve literally changed the composition of Earth’s atmosphere. The carbon dioxide comes from burning fossil fuels, and it lingers in the atmosphere for hundreds and sometimes thousands of years. Atmospheric carbon dioxide has now reached levels higher than in the past 800,000 years, and we are still spewing it out faster than ever. Humanity also causes emissions of methane, another greenhouse gas, from cattle feed lots, fracking operations, and landfills.

To understand what these greenhouse gases do, we have to grasp how the planet’s energy system works. The sun sends light to Earth in the form of visible energy wavelengths. When that energy (in the form of light) hits the earth, those wavelengths

transform into longer energy wavelengths that take the form of heat. Those then radiate out to space, but when greenhouse gases accumulate in the atmosphere, they trap more and more of that heat, and less escapes into space. When we pile up greenhouse gases in the atmosphere, it's like putting blankets over the earth that it just can't shake off. 2015 closed as the hottest year on record, and 2016 is on track to be even hotter. As one climate scientist put it, "The whole system is warming up, relentlessly."

As the planet warms, a mounting energy imbalance causes severe climate disruption. Earth has already heated to 1.4 F over pre-Industrial temperatures, and scientists warn that this could increase to 11 degrees F. by the end of the century if our emissions don't head down soon enough. There is no scientist who says that this is broadly survivable. As Gus Speth, the former dean of Yale's Forestry School, writes, "[If we] keep doing exactly what we are doing today . . . the world in the latter part of this century won't be fit to live in." He's talking about 34 years from now. Parents all over the country are waking up to this nightmare that climate, literally, is posing a life and death matter for their own children later in their lifespans. If you have been sleeping well at night, I surmise that you have not been reading much climate science lately – or you've read too much and are on strong tranquilizers. At this point, scientists are screaming out danger.

We live during this astounding time in human history. Though you certainly would not know it from the rhetoric of most politicians, or the habits of most citizens, we are the first generation that faces imminent peril to the very life-sustaining systems of our planet. The oceans are now more acidic than at any time in the last 300 million years (and 30% more acidic than before the Industrial Revolution), because they have absorbed

much of the carbon dioxide that humans have emitted from burning fossil fuels, and this has literally changed the chemistry of the marine water. In places along the Oregon coast, larval shellfish can't grow the shells they need to survive because the acidic water corrodes them. At the same time, the oceans are warming steadily from the trapped heat energy on Earth. Our Pacific waters are four to five degrees Fahrenheit hotter than normal. This has devastating consequences for coral reefs. Off the coast of Australia, a recent mass bleaching event killed half of the coral in the northern part of the Great Barrier Reef. Global warming is melting the planet's major ice fixtures, including the polar ice sheets, Greenland, and glaciers around the world. Scientists now say that the disintegration of West Antarctica's ice sheet is unstoppable. Sea level rise is underway and accelerating at a rate much faster than scientists projected even a decade ago. The Quinault nation of Washington must now relocate to higher ground because of rising sea levels. In Florida a group of mayors, Republicans and Democrats, are calling for swift climate action, because the high tides are coming into communities like Miami Beach, and the maps show a huge part of Florida underwater in the future.

Climate disruption causes chaos in many forms, including drought, wildfire, floods, super-storms, and spread of insect-borne disease, like the Zika virus. In our region, raging wildfires devour huge swaths of forest and grasslands across Oregon and Washington every summer. The winter snowpack that we need to fill our rivers and streams now melts early, threatening our summer water supplies. The salmon of the Columbia face a threat from climate that eclipses all others as the waters warm and diminish in quantity. This is our new world.

Consider that all of these extreme climate impacts have come from a mere 1.4 F. temperature rise. Yet scientists say if we continue business as usual, we will set in motion a temperature rise of up to 11 degrees F. by the end of the century, and some even say much earlier than that. This amount of heating would convert the Amazon rainforest into savannah and trigger the kind of mass extinction that hasn't occurred on Earth for 55 million years. So what does this hold for young people later in their lifespans? As Mark Lynas, writes in his book *High Tide*:

“Let me put it simply: if we go on emitting greenhouse gases at anything like the current rate, most of the surface of the globe will be rendered uninhabitable within the lifetimes of most readers of this article.”

We might all feel better if there was ample time to deal with this situation. And we used to have lots of time. The warnings started decades ago, but our government failed to act. We now sit on the brink of climate tipping points. These are points of no return that would cause climate change to run completely out of our control. They exist because of several feedback loops in Nature. For example, as the forests heat, they dry out and fall prey to insects, and then ignite easily from lightening. When trees go up in flames, they release their stored carbon and they cease to absorb carbon dioxide from the atmosphere. Another feedback lies in the vast permafrost spanning Siberia and Alaska, which holds huge amounts of carbon dioxide and methane. Our pollution has already heated the planet enough to start this permafrost melting and forming ponds. If this melt really gets going, it's like setting off a carbon bomb loaded with unfathomable amounts of greenhouse gases. The point scientists make is that, if we push the system too far, there is no coming back to safety, even if we subsequently slash our emissions to zero.

So when we consider the legal response, keep in mind that this is not some matter that we can address at our usual bureaucratic pace. Dr. James Hansen, formerly the nation's chief climate scientist at NASA, says, "We are at the hairy edge."

Now, it's very important to know that this existential threat did not just materialize out of nowhere. In fact, the prospect of wholesale climate disruption from fossil fuel use has been well known to our government for at least three decades. Back in 1986, members of the Senate Environment and Public Works Committee wrote a letter to the U.S. Environmental Protection Agency recognizing, "[t]here is a very real possibility that man – through ignorance or indifference or both – is irreversibly altering the ability of our atmosphere to perform basic life support functions." The letter asked EPA to develop a "plan. . . to stabilize [the U.S.] share of greenhouse gas emissions. . . ." ² EPA did develop such a plan, but it was ignored, and our leaders continued to promote the very fossil fuel regime that scientists warned would imperil our survival on this planet. Moreover, we now know that key corporate leaders in the fossil fuel industry were warned by their own scientists in the 1980s that their exploits would put our world in danger. But key industry captains pursued their own profit over our collective safety and launched an all-out public relations campaign designed to confuse the American public to the threat of climate change; they also paid hundreds of millions of dollars into political campaigns to purchase influence across government and thereby forestall any regulation. They basically institutionalized the politics of scarcity across our government. For the next three decades, our government would promote this dangerous fossil fuel regime in

² The letter is posted at:
https://law.uoregon.edu/images/uploads/entries/SG_Wood_095_KKG_Senators_Letter__EPA.pdf.

partnership with the corporations by handing out massive subsidies, easing regulations, issuing permits, not enforcing violations, leasing public lands and offshore areas, and approving export proposals. The top fossil fuel producers have collectively reaped well more than \$1 trillion in profits since just the new millennium, while the global damage and human death toll from climate chaos now escalates worldwide. These industries are the puppet masters behind the politics of scarcity.

V.

Let's now turn to law. The most basic purpose of our environmental law is to keep us in compliance with these laws of Nature. Oren Lyons, a faith keeper of the Six Nations Iroquois Confederacy, explains the concept in this way: "The thing that you have to understand about nature and natural law is, there's no mercy. . . . There's only law. . . ." If our environmental law fails to match the reality of Nature's laws, then it fails us. Now, if you ask most environmental lawyers whether the law is responding to climate crisis, they will take you on a deep dive into the Clean Air Act and talk about the President's recent Clean Power Plan. Instead, I would ask you first to define what our climate system needs to regain its energy balance. That is logical starting point – not what our law is doing, but what our climate system actually requires. Only after we define our reality can we then step back and ask whether our system of laws is meeting that reality. But this is not the approach we've taken in recent history. As Elizabeth Kolbert writes, "It may seem impossible to imagine that a technologically advanced society could choose, in essence, to destroy itself, but that is what we are now in the process of doing."

To answer the question of what our climate system needs to regain its balance, we must turn to carbon math. NASA's chief climate scientist, Dr. James Hansen, led an international team of scientists to develop a prescription for the planet designed to restore balance at 350 parts per million (ppm) atmospheric carbon dioxide. 350 ppm is widely thought to be the upper safe limit of atmospheric CO₂. We are now well into the danger zone, as CO₂ levels climb over 400 ppm. The Hansen team set a pathway of global emissions reduction to get us back to 350 ppm.³ That pathway now requires 8% reduction annually on a global basis, along with massive reforestation and soil management to draw existing carbon out of the atmosphere.⁴

This 8% annual reduction is not a figure set by our politicians. I have yet to see President Obama or most leaders asking what the climate system actually needs to restore balance. Instead, their starting point is what they think the politics will yield. And that calculus is largely controlled by the very industry that has put us all in peril.

The carbon math I just presented is not static. It's math in a minute glass. That 8% number gets bigger, and therefore our energy descent steeper, every single day of delay. Had we started even back in 2005, scientists say we could have cut emissions just 3.5%/year in order to restore climate balance by the end of the century. In just a decade

³ James Hansen et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations, and Nature*, 8 PLOS ONE 1, 4 (2013), <http://www.plosone.org/article/fetchObject.action?uri=info:doi/10.1371/journal.pone.0081648&representation=PDF>.

⁴ The prescription originally set a pathway of 6% reduction (global annual) tied to a start year of 2013. Id. For a legal strategy to seek natural resource damages from the fossil fuel industry to finance massive carbon drawdown through reforestation, soil improvements, and other projects, see Mary Christina Wood and Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 *Environmental Law* 101 (2015), <https://law.uoregon.edu/images/uploads/entries/atmospheric-recovery-litigation--making-the-fossil.pdf>.

of inaction, that 3.5% has climbed to 8% a year.⁵ If we delay reduction even four more years until 2020, scientists project that we would need to reduce emissions by 15%/year. At some point very soon, the amount of reduction is just too steep for global society to feasibly accomplish. You see that this crisis that has smoldered for decades has now erupted into mind-blowing urgency. But equally true, our legal approach must match this carbon math that Nature now imposes. For if we fail to reduce our emissions enough, it won't matter that we tried very hard. A rescue rope that is too short is no good at all. Or, as Winston Churchill famously said, "It is not enough that we do our best; sometimes we must do what is required." As Dr. Hansen has warned, "*failure to act with all deliberate speed . . . functionally becomes a decision to eliminate the option of preserving a habitable climate system.*"

So, let us ask what our government is doing in face of this emergency. We have promising technology and renewable energy, and energy experts have in fact created portfolios for every state in this county to transition away from fossil fuels to 100% renewable energy without the use of nuclear power. We have solutions, but they need government implementation. Analysis are calling for an all-out effort on the scale of WWII. But most officials are addressing climate crisis only incrementally if at all and entirely within the structure of existing statutory law. For example, President Obama has released a Clean Power Plan. What you need to know is that, even if implemented as designed, his measures would yield less than a third of the necessary reduction. That is

⁵ For the 8% figure, tied to a start year of 2016, see Our Children's Trust, Press Release, Inslee Administration Defies Court Order, Betrays Children, <http://ourchildrenstrust.org/event/753/breaking-inslee-administration-defies-court-order-betrays-children>.

not to say that that these steps are not important. But at this point, we need an overall climate recovery plan that carries out the best available science quantifying the necessary reduction. The carbon math we must pay attention to is not a political calculus.

And we cannot just look at the regulatory side of the Obama energy policy and ignore the other side, which is still pushing fossil fuels. Scientists say that to achieve climate stability we have to leave most coal, oil, and natural gas in the ground. Yet President Obama has spent most of his presidency promoting a huge expansion in U.S. fossil fuel production. He opened up public lands in the West for coal mining; he opened the Arctic and the Eastern seaboard for offshore oil exploration; and he promoted fracking all over the country. As one reporter said only two years ago, “[This] administration is . . . on a drill-baby-drill course to increase production in every way imaginable on US territory. . . .” The U.S. now produces more oil and gas than any other nation in the world.

The fossil fuel companies have enough reserves to pollute our atmosphere with five times the amount of carbon dioxide capable of causing climate disaster. Essentially, our atmosphere has a carbon budget, and the industry is planning to blow through it five times over. It’s little wonder that Bill McKibben calls the fossil fuel industry “Public Enemy Number One to the survival of our planetary civilization.” The Pacific Northwest is now on the front lines of this epic battle over the planet’s future. And that is because the fossil fuel industry and the Obama administration have targeted our region as a major fossil fuel export gateway for markets in Asia. Over the past 4 years, they have bombarded our two states with proposals for massive coal, oil, and natural gas export

facilities on the Columbia River and our coastlines. In fact the largest proposed oil terminal for North America is right here in Vancouver, Washington, and the Vancouver port commission has actually leased public shoreline to the private proponent for that terminal.

Now, may I just state the obvious. We can't become fossil free by continuing to promote fossil fuels. But beyond the climate destruction, it is timely to point out that each and every train carries ultra-hazardous cargo that poses an immediate threat to the community it passes through. If you don't believe that, you should have been in Mosier, Oregon yesterday, around noon when a train with 96 cars carrying Bakken oil partially derailed and caused a massive explosion, sending balls of fire 100 feet into the air. The Union Pacific Railroad spokesman apologized to the residents of Mosier for "any inconvenience." Inconvenience? An "inconvenience" is, say, when a public restroom is closed for cleaning. When an oil train derailed and explodes in close proximity to several homes, it presents the imminent threat of killing innocent people. These trains are called "bomb trains" for a reason. There have been multiple oil train explosions over the past four years – including one in Quebec that killed 47 residents in community. Firefighters there described actually seeing people "who stepp[ed] out of their homes and [were] vaporized by the [burning] oil." These are exceedingly dangerous schemes that are pushed by local politicians and the corporations they serve in furtherance of the politics of scarcity to benefit a very few profiteers.

Because our government is still pushing this fossil fuel regime, the youth have taken their appeal to the courts in a global climate crusade known as atmospheric trust litigation.

VI.

The litigation approach recognizes that we cannot simply keep turning to the statutes that delivered this collapse. We must look deeper to the inalienable rights held by citizens – constitutional rights that put limits on government. Those rights come embedded in a principle called the public trust, a principle so ancient and organic that its roots extend back to Roman law. This principle bores down to legal bedrock.

The public trust principle characterizes nature as a priceless endowment that holds the resources paramount to our survival and welfare – the rivers and sea and wildlife and air. The principle designates government as a trustee with the duty to protect such resources as a perpetual trust for the people, both present and future generations. The public trust operates as a common property right we all hold in common, as beneficiaries, to force protection of natural inheritance.

This trust concept embraces the unassailable logic of any democracy: that the people never give their government the right to destroy the ecology that essential to survival and welfare. Two and a half years ago the Pennsylvania Supreme Court used the public trust to overturn a statute passed by the legislature to promote fracking. Chief Justice Castille wrote that the citizens hold “inherent and inalienable rights” in ecology that are “of such ‘great and essential’ quality as to be ensconced as ‘inviolable.’”⁶ The trust announces a fundamental restraint on government, through rights that come twin-born with democracy itself.

⁶ Robinson Twp. v. Pennsylvania, 83 A.3d 901, 947-48 (Pa. 2013) (plurality opinion).

There is a bumper sticker that I see every now and then in Eugene that reads, “I’m sorry you can’t have my rights. I’m still using them.” The public trust is a right we never parted with, a right we citizens still hold which it has been all but forgotten in the din of statutory law. This is a primordial right that surfaces at epic times in human history. It stands no less revolutionary for our time and our crisis than the forcing of the Magna Charta on the English monarchy or Mahatma Gandhi’s great Salt March to the sea. What we must come to recognize is that we too live in an epic time.

This public trust resides at a much deeper level than statutory law. It has the constitutional force necessary to hold legislatures accountable. The lodestar case announcing the principle in this country was *Illinois Central Railroad*, decided in 1872.⁷ There, the U.S. Supreme Court confronted a situation it had never seen before. The Illinois legislature had conveyed the entire Chicago shoreline of Lake Michigan to a private railroad company. This was shoreline that the citizens needed for fishing, navigation and commerce. The Court held that the legislature simply did not have power to make that conveyance. Granting away such crucial resources, it said, would be “a grievance which never could be long borne by a free people.” Those port commission decisions leasing public shoreline for export proposals should be judged by the principles of that case.

VII.

The author Carolyn Raffensburger once said, “Imagine extending the public trust doctrine into a government job description.” Yes, imagine. The trust exists today in cases throughout the country. We don’t have to make anything up. It’s on the shelf

⁷ *Illinois Central R.R. v. Illinois (Illinois Central)*, 146 U.S. 387, 455 (1892).

ready to be used, but most officials have never heard of it. They know only the statutory law. The trust imposes instructions that exist outside of statutory law. These are called fiduciary obligations, and the most fundamental obligation of all is to protect and restore the natural resources in the trust. This is so basic. You would not allow a trustee to bankrupt your trust. Especially if it were your survival account. Trustees can't just sit idle and permit the assets to be destroyed on their watch either – which pretty much sums up our government's approach to climate crisis.

VIII.

These public trust principles now drive the urgent global litigation campaign known as atmospheric trust litigation. Four years ago, the Eugene-based non-profit organization, Our Children's Trust, launched cases and administrative petitions on behalf of youth in every state in this country, and in some other countries as well. This campaign asserts a simple premise: that youth hold a constitutional public trust right to inherit a stable atmosphere necessary for their survival. And, that trustees worldwide must protect and restore this common atmospheric trust. That duty of protection boils down to carbon math – the 8% explained earlier. The cases all demand that the states and federal trustees produce science-based climate recovery plans and carry them out in their jurisdictions. The courts are not asked to develop the plans – that is the trustees' job, after all. But courts can force the trustees to do their job and devise a plan and then implement it under the court's continuing supervision according to strict time frames. This is not a usurping role for courts, but rather a supervisory role. Courts have played this role many times throughout history – in civil rights, treaty rights, and prisoner's cases, for example.

Without judicial orders, there is no reason to hope the political branches will act in time and with sufficient measures. Citizens have appealed to the political branches for years with almost no success. Those branches are still pursuing policies that would cook the planet. Or, they act utterly oblivious to the urgency.

The ATL cases are now moving through the legal system. Some of the early cases were dismissed by judges who said that climate crisis was a problem for the agencies and legislatures. And, how right that is! But those branches are shirking this duty. We cannot solve our climate crisis by continuing to treat it as a game of hot potato.

More recently, as the climate headlines worsen, judges are stepping into their role across the planet. In the Netherlands and Pakistan and just last week in Massachusetts, courts have handed sweeping victories to citizens, requiring those governments to act to slash emissions. But the leading ATL decision is from Judge Hollis Hill, a Seattle judge, in the Washington case.⁸ Judge Hill has firmly declared a constitutional public trust right to a healthy and balanced climate. And she is also the first judge to describe the survival threat faced by youth in her courtroom. She said:

[G]lobal warming causes an unprecedented risk to earth, including land, sea, the atmosphere and all living plants and creatures. . . . [A]s Petitioners assert and this court finds, *their very survival depends upon the will of their elders to act now, decisively and unequivocally*, to stem the tide of global warming. . . .

She found that Washington had not done enough to protect the youth, stating,

⁸ For an analysis of the case, see Mary Christina Wood and Charles W. Woodward IV, “Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last,” *Washington Environmental Law Review* (forthcoming 2016), to be made available at: <https://law.uoregon.edu/explore/mary-wood-publications>.

[C]urrent rates of reduction mandated by Washington law cannot achieve the GHG reductions necessary to protect our environment and *to ensure the survival of an environment in which Petitioners can grow to adulthood safely.*

But just three days ago the Inslee administration proposed what appears to be a grossly inadequate rule that would, according to Dr. Hansen's team, force just 1.7% annual reductions.⁹ A rescue rope that is too short is no good at all. Carbon math matters, so the youth will probably be back in court again.

There is another, huge case against President Obama and multiple agencies pending in the federal district court of Oregon. In that case, 21 youth plaintiffs from across the country assert constitutional rights to a stable climate system under both the public trust rights and the individual liberties guaranteed by the U.S. Constitution. They have challenged the federal government's entire fossil fuel regime, charging that federal defendants "have acted with deliberate indifference to the peril they knowingly created." The entire fossil fuel industry has intervened in the case to side with the Obama administration against the youth.

The plaintiffs asked the judge to order the administration to devise a plan to reduce greenhouse gas pollution in accordance with best available science. This is the very same thing members of Congress asked for when they wrote to EPA 30 years ago. The difference is that this time, a plan would be developed and implemented under the supervision of the third branch of government.

Despite the David and Goliath odds of 21 youth taking on the entire federal government and the fossil fuel industry, on April 8, magistrate judge Thomas Coffin

⁹ See supra note 4.

ruled in favor of the youth plaintiffs on all aspects and recommended that all claims go forward.¹⁰ What stood out for me in his opinion was a passage that reflected his understanding that the politics of scarcity have brought us this crisis. He wrote:

The intractability of the debates before Congress and state legislatures and the alleged valuing of *short term economic interest despite the cost to human life*, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.

The case is now before district court Judge Ann Aiken, who must decide whether to accept or reject the magistrate's recommendations.

The non-profit organization Our Children's Trust has atmospheric trust cases and petitions teed up across the country, with more planned in both the U.S. and other countries as well. The youth of this world now need the judicial dominos to keep falling in their favor, and fast enough to meet the deadlines set by Nature. In an amicus brief supporting the youth, Dr. James Hansen said that judicial relief in these cases "may be the best, the last, and, at this late stage, the only real chance to preserve a habitable planet for young people and future generations." There is no other litigation or other legal process of any sort teed up to force the carbon reduction we need, and in the time we need it. When you look at the impacts of climate crisis -- the severity, the duration, the tipping points, the fact that extreme climate change would leave our nation uninhabitable -- one can only hope that these judges recognize they have planet on their docket.

IX.

¹⁰ For press coverage, see James Conca, "Federal Court Rules on Climate Change in Favor of Today's Children, Forbes Magazine (April 10, 2016), available at: <http://ourchildrenstrust.org/sites/default/files/16.04.10Forbes.pdf>.

Let me offer now some concluding thoughts that may help you shape the role of the League of Women Voters in this climate emergency. First, while I imagine the League has historically focused on the legislative and executive branches, may I suggest the courts now deserve focused attention. The Founding Fathers created this third branch as a crucial check in the balance of powers. The main job of courts has always been to protect the fundamental rights of citizens against tyranny from the other branches. What we have today is a situation rapidly approaching ecological tyranny. The public trust is that ancient right that calls for government to protect vital natural resources for the people, not deliver them to corporations for singular profit. But the trust is only meaningful if it is enforced by courts. Organizations like the League of Women Voters can assert positions that support litigation through amicus briefs, and in fact the LWV of Oregon, along with over a dozen other organizations, filed an amicus brief in the Oregon ATL case now on appeal. And the LWV of Seattle-King County gave a boost to those 10-15 year olds who brought the landmark case in Washington by giving them a Significant Achievement Award.

Second, I want to underscore the pivotal role of this region in the global climate battle. As I mentioned before, our region has been targeted as the world gateway for fossil fuel exports to Asia. If you believe that citizens and local officials of this region have the will to withhold a crucial link in this global scheme of fossil fuel exploits, you can see the immense leverage our region alone holds over global policy. Across the Pacific Northwest, citizens are realizing that we cannot continue to burn fossil fuels and at the same time leave a habitable planet to the children we love. Literally thousands of citizens are swarming public hearings and taking to the streets, and hundreds have

protested in kayaks and blocked train tracks -- all to say NONE SHALL PASS. This region is rising, asserting its unique regional identity, in a strong fusion of both native and grassroots communities -- all lifting us out of the politics of scarcity towards the politics of abundance. Portland's mayor calls this the West Coast Green Wall against the expansion of fossil fuels. And, one by one, the projects are being blocked. Jordon Cove liquefied natural gas terminal in Oregon – permit denied. Cherry Point coal terminal up on the Salish sea – permit denied. Ambre Energy coal export facility in Boardman – permit denied.

These projects typically require about a dozen permits from various local, state, and federal agencies combined. Just one permit denial will typically be enough to block a project. A permit denial might come from the state lands board, from the governor's energy siting board, from a local land use hearing examiner, from the federal Army Corps of Engineers, from a port commission, or from a number of other agencies. If you want an impact on climate policy, I say, pay attention to the leverage this region has. Every one of those officials I mentioned has a public trust responsibility, along with the responsibility to uphold treaty rights of the tribes. But citizens need to keep showing up in the hearing rooms, in the streets, and in the kayaks and demanding a safe future for our children. And if they do, history may well look back and say that, at this crucial time in the history of human civilization, citizens of the great Pacific Northwest turned a proposed gateway into an absolute chokepoint.

In all of these legal processes, the public trust serves as a beacon of government responsibility. But beyond its legal application, the greatest potential of the public trust principle may well lie in its ability to inspire citizens to rise up in defense of Earth.

For it taps a wellspring of human understanding that remains instinctive, passion-bound, and deeply shared among people of distant cultures -- because the trust encompasses a moral covenant that transcends all governments, cultures, and peoples on Earth. That has been its enduring power through all of Time.

X.

To conclude, like the salmon, we are but one living generation in a continuous strand of life. But our generation occupies a pivotal moment in history. This moment belongs to no one else, and no other generation. Across the world, citizens are rising as a tide of humanity in urgent defense of all life on Earth. But a movement without a moral core will draw our imperiled ecology even further into the death spiral of environmental permit systems. It is time to illuminate something very, very old – a way of thinking that reaches from the Illinois prairies, to Australia’s coral reefs, to the African Serengeti; it is a way of thinking that travels down the Nile, the Mississippi, the Amazon, and the Columbia – this thinking embraces, in exactly the same way, your treasured local wetland and our planet’s vast atmosphere. This thinking asserts not the power of life, but the trust of life.

Thank you.

