THE PLANET ON YOUR DOCKET

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Montana Trial Lawyers Association Annual Meeting
Flathead Lake, Montana

August 7, 2008

I. INTRODUCTION

I feel very privileged to be here at this meeting and really want to thank you for inviting me. I might seem a little out of place here, because I'm not a trial lawyer, and I gather most of you are not environmental lawyers. But I know we share one thing in common: that is, we all like the planet we live on, and not one of us is very well equipped to live on a different planet. Yet, that is how scientists actually describe Earth -- a "different planet" [1] -- if we don't begin slashing our carbon pollution very soon. It's very easy at this wonderful resort to put global warming out of our minds, but the fact is, climate change looms as a horrifying threat to all of us, from the farm worker to the emergency room doctor, to the Montana trial lawyer and to the families of all. I've taught environmental law for 17 years, and I will be the first to say, don't count on the environmental lawyers to solve this problem. As Ross Gelbspan has said, climate crisis is not an environmental issue, it's a "civilizational issue." The only way we have a shot at solving this problem is if all of us work in our various capacities to achieve climate stability.

[1] James Hansen et al., *Climate Change and Trace Gases*, PHIL. TRANS. R. SOC. A, 1925, 1939 (2007) [hereinafter *Climate Change and Trace Gases*], *available at* http://www.planetwork.net/climate/Hansen2007.pdf.

But I imagine that, for most of you, climate crisis is not yet your issue. Your docket is already full of pressing matters. My father was a successful trial lawyer in Portland, so I understand the pressures you face every day. But I'd like to share a short story about his practice. My dad specialized in admiralty cases – mainly ship crashes and longshoreman injuries. He was also an avid fly fisherman and a third-generation Oregonian. Long before I was even born, a power company proposed to put a huge hydroelectric dam in on the Deschutes River, which was a wild river with enormous steelhead runs – it was a river my Dad had fished a lot. That dam would block the steelhead's entire upper habitat and would devastate the runs. The government was all for this dam. In the 1950s, that sort of thing was considered progress.

After hearing about this proposed dam, my dad literally walked into law his office and turned all of his cases over to his partners – so that he could take a year off to fight against this dam. Another fly fisherman/ lawyer in town, Borden Beck, did the same thing, and they teamed up. For a year, every day, Dad and Borden poured all of their legal talent and personal energy into fighting for those fish. At every step of the way they were outnumbered by dozens of high-paid hydropower company lawyers. Years later, when my Dad told me this story, I asked him – "Dad, why did you and Borden have to take a year off from your law practices to fight for these fish?" He said, "Mary, no one else was doing it. Those fish needed a lawyer."

Trial lawyers of Montana, I've come here hoping to put the planet on your docket. If I can be blunt, this is Humanity's big habitat case. At stake is not whether your children or grandchildren will see historic runs of fish – they won't – it's whether your children and grandchildren will even have the natural habitat and resources they will need

to survive. Mark Lynas, the author of *Six Degrees* puts it this way: "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." James Speth, the Dean of the Yale School of Forestry, has written in his new book, *Bridge at the Edge of the World*: "If we continue to do exactly what we are doing, [even] with no growth in the human population or the world economy, the world in the latter part of this century will be unfit to live in."

Scientists are using every forum they can find to warn Humanity about the urgency of our climate imbalance. A year ago, the leading climate scientists published a report stating that Earth is in "imminent peril."[2] The paper states, we must control greenhouse gas emissions today in order to "preserv[e] a planet resembling the one on which civilization developed."[3] It does seem unbelievable, but what we do today will determine the world that our young children will live in about the time they reach middle age. Less than 50 years from now. Quite frankly, their position right now isn't much better than that of the Deschutes River steelhead 50 years ago.

In this time with you I'd like to explain this climate emergency in more detail, explain how our much of our government is just sitting idle in face of it, and then turn to a legal principle that I hope lawyers can use to catalyze the kind of paradigm shift needed to confront this crisis.

II. THE PRECIPICE

[2] *Id.* at 1949.
[3] *Id.* at 1926.

Let's start with a broad view of the problem. As many of you already know, global heating is caused largely by greenhouse gas pollution that we emit into the Earth's atmosphere. Gases like carbon dioxide and methane literally trap much of the heat from Earth that should naturally be escaping into space. The more we pollute the atmosphere with these heat-trapping gases, the hotter Earth gets. It's as if, through our pollution, we are constructing a greenhouse roof around the entire Earth and locking it down. Carbon levels in the atmosphere are now higher than they have been for the last 650,000 years. Every day, humans put another 70 million tons of carbon dioxide into the atmosphere,[4] and emissions are increasing by nearly 3% a year.[5] Once in the atmosphere, carbon persists for 100 to 1,000 years. This means our own children and generations to come will be trapped under the greenhouse roof that we are making on this very day.

The global heating caused by our pollution threatens to destroy major planetary fixtures, including the polar ice sheets, Greenland, the coral reefs, the Amazon forest, and even the glaciers in Montana's Glacier National Park, which scientists think will all melt away within 23 years from now.[6]

The Earth has already heated nearly 1.8°F from pre-Industrial average temperatures.[7] And because of the carbon already in the atmosphere, a total average 3.6°F rise is now inevitable.[8] Now that may not sound like much to you, but this irrevocable temperature rise is what scientists consider to be the threshold of catastrophic,

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[4] *See* Al Gore, *Moving Beyond Kyoto*, NEW YORK TIMES (July 1, 2007), http://www.nytimes.com/2007/07/01/opinion/01gore.html.

[5] Peter N. Spotts, *Global Carbon Emissions in Overdrive*, THE CHRISTIAN SCIENCE MONITOR (May 22, 2007), http://www.csmonitor.com/2007/0522/p01s03-wogi.html.

[6] *See* U.S. Geological Survey, *Melting Glaciers Signal Change in National Parks*, *available at* http://www.nwrc.usgs.gov/world/content/land5.html (last modified Jan. 29, 2007).

[7] U.S. Geological Survey, *Sea Level and Climate*, http://pubs.usgs.gov/fs/fs2-00/.

[8] Cahal Milmo, "*Too Late to Avoid Global Warming," Say Scientists*, THE INDEPENDENT UK September 19 2007), http://www.independent.co.uk/environment/climate-change/too-late-to-avoid-global-warming-say-scientists-402800.html.

runaway heating.[9] Exceeding this would make it warmer on Earth than it has been for half a million years, and scientists believe, at that point, "Many things could become unstoppable."[10]

The UN projects that this irrevocable temperature rise will put up to 30% of plant and animal species at risk of extinction.[11] Coral reefs worldwide are already bleaching and dying.[12] Climate heating is driving relentless drought in Australia and the Southwest. It's shrinking the Great Lakes, reservoirs in the West,[13] and Lake Chad in Africa. It's causing severe water shortages in Tibet and Tennessee, floods in Texas and Jakarta, mega-fires in California, Greece and Idaho, and killer hurricanes in New Orleans and Honduras. In the forests of British Columbia, beetle infestations have killed millions of acres of trees, and U.S. foresters now predict that every large, mature lodge-pole pine forest in Colorado and southern Wyoming will be dead within five years.[14] Climate change is delivering heat waves that killed 35,000 people in Europe in 2003, and sent thousands of Americans to cooling centers in 2006 and 2007. It's spiking summer temperatures in Death Valley to 125°F[15] and warming New York City to 72°F in the

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[9] *Id.*

[10] Jim Hansen, *Climate Change: On the Edge*, THE INDEPENDENT, Feb. 17, 2006, http://environment.independent.co.uk/article345926.ece.

[11] *See* Milmo, *supra* note 8 (estimate calibrated to stabilization at 1.5C to 2.5C).

[12] Sean Markey, *Global Warming Has Devastating Effect on Coral Reefs, Study Shows*, NATIONAL GEOGRAPHIC (May 16, 2006), http://news.nationalgeographic.com/news/2006/05/warming-coral_2.html.

[13] Researchers estimate a 50 percent chance Lake Mead, which supplies water to millions of people in the southwestern United States, will be dry by 2021 if climate changes as expected and future water usage is not curtailed. http://www.sciencedaily.com/releases/2008/02/080212141424.htm.

[14] Todd Hartman, *Deaths of Trees 'Catastrophic,' Lodge-Pole Die Offs Imperil Recreation, Supplies of Water,* ROCKY MOUNTAIN NEWS (Jan. 15, 2008), http://www.rockymountainnews.com/news/2008/jan/15/beetle-infestation-get-much-worse/.

[15] Jennifer Steinhauer, *Nation Sweats as Heat Hits Triple Digets*, THE NEW YORK TIMES (July 8, 2006), http://www.nytimes.com/2006/07/18/us/18sizzle.html.

middle of winter.[16] As one UN scientist put it: "Ten years ago we were talking about these impacts affecting our children and our grandchildren. Now it is happening to us."[17]

Things are accelerating. A year and a half ago scientists made a stunning prediction that the Arctic might have no summer ice left by 2040.[18] Six months ago, when scientists looked at the most recent ice melt data, they revised that date to 2012.[19] Sea levels are rising.[20] The head of the UN's climate panel (IPCC) has asked scientists to look at what he called the "frightening" possibility that ice sheets in Greenland and Antarctica could melt rapidly at the same time.[21] Melting of the West Antarctic and Greenland ice sheets would add up to a sea level rise of 10 or more meters.[22] A 10 meter

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[16] Manny Fernandez, *72 Degree Day Breaks Record in New York,* THE NEW YORK TIMES (Jan. 7, 2007), http://www.nytimes.com/2007/01/07/nyregion/07heat.html.

[17] Milmo, *supra* note 8.

[18] *See* Seth Borenstein, *Artic Sea Ice Gone in Summer within Five Years?* ASSOCIATED PRESS (Dec. 12, 2007), http://news.nationalgeographic.com/news/2007/12/071212-AP-arctic-melt.html. *See also* Holland, M. M., C. M. Bitz, & B. Tremblay (2006), *Future Abrupt Reductions in the Summer Arctic Sea Ice,* GEOPHYS. RES. LETT., 33, L23503, doi:10.1029/2006GL028024, (Dec. 12, 2006), http://www.agu.org/pubs/crossref/2006/2006GL028024.shtml; Doug Struck, *At Poles, Melting Occurring at an Alarming Rate*, WASHINGTON POST (Oct. 22, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/21/AR2007102100761.html (The artic sea ice now reaches only half as far as it did just 50 years ago).

[19] Borenstein, *supra* note 18. *See also* Stroeve, J., M. M. Holland, W. Meier, T. Scambos, and M. Serreze (2007), *Arctic Sea Ice Decline: Faster Than Forecast,* GEOPHYS. RES. LETT., 34, L09501, doi:10.1029/2007GL029703 (2007), http://www.agu.org/pubs/crossref/2007/2007GL029703.shtml (abstract). In West Antarctica, ice loss increased by 59 percent over the past decade. Marc Kaufman, *Scientists See Rapid Ice Loss in Western Antarctica,* THE WASHINGTON POST (Jan. 14, 2008). In Greenland, ice loss doubled over about the same period. *Greenland Ice Melting Faster than Thought* (Feb. 17, 2006), http://www.physorg.com/news10948.html; *Greenland Melt "Speeding Up"* http://news.bbc.co.uk/2/hi/science/nature/4783199.stm (Aug. 11, 2006) (discussing period between 1996 and 2005).

[20] *See* U.S. Environmental Protection Agency, *Coastal Zones and Sea Level Rise,* http://www.epa.gov/climatechange/effects/coastal/index.html#ref (summarizing UN IPCC conclusions). *See also Glaciers and Ice Caps to Dominate Sea Level Rise This Century, Says Study*, SCIENCE DAILY (July 20, 2007) (noting that one foot sea level rise typically causes retreat of 100 feet or more of shoreline).

[21] Kaufman, *supra* note 19. Many scientists are focusing on the West Antarctic ice sheet, which is especially vulnerable, because much of it is grounded below sea level. As the U.S. Geological Survey states, "Small changes in global sea level or a rise in ocean temperatures could cause a breakup of . . . ice shelves. The resulting surge of the West Antarctic ice sheet would lead to a rapid rise in global sea level." *Sea Level and Climate*, *supra* note 7.

[22] *Id*.

rise would flood about 25 percent of the U.S. population.[23] If the entire Antarctic ice sheet and Greenland melt, the world faces a sea-level rise of about 80 meters.[24]

As climate disaster strikes various areas, people start to move in desperate search of survival resources. The UN has alerted nations to prepare for 50 million environmental refugees by 2010.[25] A world security report co-authored by a former head of the CIA, a former Chief of Staff, a former Deputy Assistant Secretary of Defense and others, describes the scenario of a 2.6 C° average increase in global temperature by 2040. In their words:

> [N]ations around the world will be overwhelmed by the scale of change. . . . The social consequences range from increased religious fervor to outright chaos.[26]

The darkest outlook comes from James Lovelock, long thought of as a prophet of climate science, who predicts, by the end of the century, most of Earth's current population of 6.6 billion people will be wiped out, leaving only about 500 million hanging on at the far latitudes of the planet.[27] We can only hope he is dead wrong.

The question is whether we will cut our carbon emissions in time to prevent runaway heating. NASA scientist Jim Hansen, widely regarded as the "preeminent climate scientist of our time,"[28] has said, "We are now on the hairy edge."

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[23] *Id*.

[24] *Id*.

[25] *Millions Will Flee 'Degradation,'* BBC NEWS (Oct. 11, 2005), http://news.bbc.co.uk/2/hi/science/nature/4326666.stm.

[26] CENTER FOR STRATEGIC AN INTERNATIONAL STUDIES, *The Age of Consequences: The Foreign Policy and National Security Implications of Global Climate Change* 9 (Nov. 2007).

[27] *Fiddling With Figures While the Earth Burns*, THE SUNDAY TIMES (May 6, 2007), http://www.timesonline.co.uk/tol/news/uk/science/article1751509.ece; Jeff Goodell, *The Prophet of Climate Change, James Lovelock,* ROLLING STONES MAGAZINE, (Oct. 17, 2007) http://www.rollingstone.com/politics/story/16956300/the_prophet_of_climate_change_james_lovelock/2.

[28] MARK BOWEN, CENSORING SCIENCE 3 (2008).

There is no doubt that Humanity is in for much more severe climate punishment from the heating already in the pipeline that we can no longer call back. But the consequences will be unthinkably worse if we don't slash emissions now. If we continue on the present course, the UN projects an average temperature rise of up to 11° F by century's end.[29] That's not habitable. To understand the excruciating consequences every degree would bring to our children, you can read a book entitled SIX DEGREES, by Mark Lynas.

We are now dangerously near a climate tripwire -- a point of no return that climate scientists call the tipping point.[30] At such point, our enormous carbon pollution could kick in powerful feedbacks in Nature that are capable of unraveling the planet's climate system, causing runaway heating despite any subsequent carbon reductions achieved by Humanity.[31] There are several dangerous feedbacks. One is the albedo flip. When ice melts and turns to water, like it is doing rapidly now at the poles, this causes further heating, because water absorbs heat and ice reflects heat.[32] So, melting begets more melting. Another feedback is the failure of Earth's natural sinks to absorb more carbon to compensate for our pollution.[33] The Amazon Rainforest is drying and burning, releasing more carbon that its remaining vegetation can absorb.[34] The oceans are

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[29] UN INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT, CLIMATE CHANGE 2007: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS (hereafter SYNTHESIS REPORT), Table SPM.1, http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf. The UN predicts runaway heating will put 70% of the world's species into extinction. Arthur Max, *UN Panel Gives Dire Warming Forecast,* ASSOCIATED PRESS (Nov. 17, 2007), http://news.nationalgeographic.com/news/2007/11/071119-AP-climate-change_2.html.

[30] For general explanation, *see* Goddard Institute for Space Studies, *Research Finds that Earth's Climate is Approaching 'Dangerous' Point* (May 30, 2007), http://www.nasa.gov/centers/goddard/news/topstory/2007/danger_point.html.

[31] *See* FRED PEARCE, WITH SPEED AND VIOLENCE (BEACON PRESS 2007).

[32] *See* Steve Connor, *The Earth Today Stands in Imminent Peril*, THE INDEPENDENT (June 22, 2007).

[33] SYNTHESIS REPORT, *supra* note 31 at 7 ("Warming reduces terrestrial and ocean uptake of atmospheric CO2, increasing the fraction of anthropogenic emissions remaining in the atmosphere.").

[34] PEARCE, *supra* note 33, at 65.

becoming saturated with carbon.[35] These places are now on the verge of turning from carbon sink to carbon source. Another feedback results from vast expanses of permafrost melting in Siberia and Alaska. This alone has the capacity to release enormous amounts of carbon and methane – a scenario described by one science writer as an "atmospheric tsunami."[36]

These feedbacks all lead us closer to a precipice.[37] Even two years ago it was thought that we might have 8-10 years left before the climate tipping point, but more recent data shows we are on its doorstep now.[38] To quote a leading study, "Earth [is] perilously close to dramatic climate change that could run out of our control. . . ."[39] The head of the UN's climate panel recently told the world, "What we do in the next two to three years will determine our future. This is the defining moment."[40]

Two-three years. This deadline has not registered with Americans, though many other countries are taking extraordinary action to cut carbon emissions. The United States continues to produce nearly 30% of the world's greenhouse pollution. Our society is nowhere near decarbonizing.

III. AN IDLE GOVERNMENT

So let's review the big picture. We face a problem that is unprecedented in terms of its consequences; a problem that is caused by virtually everyone on Earth; a problem that, to solve, requires us to overhaul our sectors and lifestyles; and, as if that were not enough, a problem that requires us to act before Nature passes a critical tipping point

[35] *Id.* at 87.
[36] *Id.* at 78.
[37] *Id.* at xxiv.
[38] Milmo, *supra* note 8.
[39] *Climate Change and Trace Gases*, *supra* note 1, at 1925.
[40] *UN Panel: World Has 5 Years to Avert Climate 'Disaster,'* NEW YORK TIMES (Nov. 18, 2007).

looming right in front of us. Climate thinkers agree: nothing less than a massive, global effort surpassing the scale of World War II will provide hope of stabilizing climate at this point.

But this is no time to get discouraged. We must save our despair for better times. We have tremendous ability to mount an atmospheric defense effort. The biggest limiting force is our imagination of what is possible. We must remember the great wartime mobilization of WWII. People didn't just sit by. They took initiative. They brought whatever skills and resources they had to the effort. Key to mobilizing this huge nation were the Victory Speakers, as they were called. These were citizens would give five-minute speeches at theatres, clubs, town halls, schools -- any forum they could find -- to explain the nature of the threat and the need for citizen support. And our leaders inspired urgent action. President Roosevelt told America: "Let no man say it cannot be done . . . . Speed will save lives; speed will save this Nation which is in peril; speed will save . . . our civilization--. . . slowness has never been an American characteristic."[41]

Generations later, how is this same country responding to the perils of climate crisis? The reality today is that most Americans are too distracted to make time for global warming. To be sure, there are some Americans responding with changes in their lives. But small progress can give us a dangerous sense of security. Climate defense entails carbon math. We lose this world we know if we can't get our total planetary carbon levels down before the tipping point. Each day that passes, our narrow window of opportunity closes that much more.

[41]President Roosevelt, 1942 State of the Union Address, http://janda.org/politxts/state%20of%20union%20addresses/1934-1945%20Roosevelt/FDR42.html.

Here is the hopeful part. We have the human imagination, the resources, the legal tools, and the bureaucracy to cut carbon. We can do so without harming our citizens – in fact these efforts could vastly improve our quality of life. But, we, as lawyers, know that this is clearly a task for government. We have thousands of agencies—more than any other nation in the world. If every one of them made global warming a top priority, we might stand a chance of meeting this crisis head on.

Yet, do you see mayors, city councils, state legislatures, Congress, and the President convening task forces and meeting daily and working late to address this problem? No, in fact, our government is *driving* this world towards runaway greenhouse gas emissions. County commissioners are approving trophy home subdivisions and destination resorts. State environmental agencies are approving air permits. The Forest Service is approving huge timber sales.[42] The U.S. Environmental Protection Agency is permitting coal-fired plants and expanding mountaintop coal mining.

And worse, our federal government has actively suppressed climate information from the public in an orchestrated cover-up to serve the fossil fuel industry. One high-ranking environmental official in the Bush administration who resigned recently told Congress that Vice President Chaney's office suppressed critical testimony by the head of the Center for Disease Control regarding the deadly effects of climate heating on American citizens. The former chief of staff of the White House Council on Environmental Quality, who was a former climate lobbyist with the American Petroleum Institute, edited government climate reports to emphasize doubts about climate change. After doing that, he left government to join Exxon. And the head of the federal EPA --

[42] For discussion of forest harvest impacts on climate, *see* Union of Concerned Scientists, *Recognizing Forests Role in Climate Change*, http://www.ucsusa.org/global_warming/solutions/recognizing-forests-role-in-climate-change.html.

the only agency charged by Congress to protect the air and atmosphere -- is spending the agency's legal talent and taxpayer money to *resist* protecting the atmosphere. EPA lawyers went all the way to the United States Supreme Court in the Massachusetts v. EPA case to argue that the agency did not have to regulate carbon dioxide pollution.[43] The lawyers characterized the protection of our atmosphere as a political choice. No matter that this legalized pollution threatens to destroy the climate stability that has supported human civilization for 12,000 years. EPA lost that case, and some courageous career staffers within the agency have now compiled a huge document setting forth a legal roadmap as to how they can regulate carbon and create a net benefit to society in excess of $2 trillion -- but as reported by the Wall Street Journal on June 30, 2008, the White House initially blocked release of the document and "asked the EPA to delete sections . . . that say [greenhouse gas] emissions endanger public welfare. . . ."

People, it is as if our home is on fire, twenty fire trucks are in the driveway with hoses drawn, and the fire chief claims discretion to sit idle and watch our house burn down.

As lawyers, we have to have faith that in a system of democracy, citizens do hold the levers of government. Government will act if citizens demand it. But our leaders will not act if citizens do not demand them to. As Abraham Lincoln once said, "Public sentiment is everything. With [it], nothing can fail. Without it, nothing can succeed."[44] The heart of the problem is this: Americans seem to have lost their understanding that government is obligated to protect their atmosphere. And when the public loses its sense

[43] Massachusetts v. EPA, 127 S.Ct. 1438, 1454 (2007).
[44] *See* http://www.brainyquote.com/quotes/authors/a/abraham_lincoln.html.

of government responsibility, believe me, government officials quickly lose their sense of responsibility towards the public.

Unless we Americans quickly gain a fierce national sense that our leaders are responsible for addressing this crisis, we won't force them to take the bold action necessary within that narrow two year window of time we have left. Our leaders will continue to fiddle in Rome as this country is pulled over the tipping point into a terrifying world of runaway heating.

IV. Environmental Law Gone Astray

In order to solve the problem, we must understand its cause. How have Americans lost sight of their government's basic obligation to protect our crucial natural resources? Ironically, the explanation lies in an unintended consequence of our modern environmental law. In the 1970s, Congress passed a set of ambitious environmental statutes, among them the Clean Water Act, the Clean Air Act, the Endangered Species Act, and many others. These statutes provide tremendous authority to federal, state, and local officials to control just about any environmental harm you can think of. The problem is that, along with this authority, these laws also gave discretion to 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 the environmental statutes. But the majority of agencies now spend nearly all of their resources to permit, rather than prohibit, environmental destruction and they do so primarily to serve singular and corporate interests. They have used their discretion to enshrine a permit system that inevitably sinks the statutory goals. Whether you are talking about the EPA, or the U.S. Fish and Wildlife Service, a state water agency, or a

city planning agency, most agencies simply are not saying no.[45] And now, the overarching mindset of nearly all agencies is that permits are there to be granted.

Because of these permit systems, society has lapsed into assuming that government must have nearly unbridled discretion to destroy our natural assets. And courts aggravate this problem because they fail to examine whether the agency decision is politicized. They operate on this false assumption that all agency decisions are neutral. This neutrality, of course, is often a charade, but courts invariably give deference to the agency decisions. Can you imagine a judge beginning a torts trial by saying the court will give weight to only the experts hired by the defendant?

The danger is this: we have relegated climate to the political playing field. There is no umpire on this field. There's just discretion. Citizens now find it normal to have to go lobby government for their own survival!

The scientist, James Lovelock, has characterized climate crisis this way: *"Our future, . . . is like that of the passengers on a small pleasure boat sailing quietly above the Niagara Falls, not knowing that the engines are about to fail."* We can think of the law as that vessel holding the citizens. In this country, the vessel has been pirated by huge industry interests. Democracy is no longer at the helm – it has been gagged and

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[45] The problem is not limited to the United States. As the former Executive Director of the United Nations Environment Program noted:

> The field of law has, in many ways, been the poor relation in the world-wide effort to deliver a cleaner, healthier and ultimately fairer world. We have over 500 international and regional agreements, treaties and deals covering everything from the protection of the ozone layer to the conservation of the oceans and seas. Almost all, if not all, countries have national environmental laws too. But unless these are complied with, unless they are enforced, then they are little more than symbols, tokens, paper tigers. This is an issue affecting billions of people who are effectively being denied their rights and one of not only national but regional and global concern.

Klaus Topfer, Executive Director of the United Nations Environment Program on the adoption of the Judges' Johannesburg Principles on the Role of Law and Sustainable Development (Aug. 2002), at http://www.climatelaw.org (viewed 10.31.06).

handcuffed and it's lying limp in the back of the boat. Scientists can tell us how bad things are, that the engines are about to fail, that we need to cut carbon immediately, and they have done that. But it is the lawyers who know just how the vessel of government works – its steering mechanisms, its capacity, its structure. Right now only a handful of lawyers are working on climate issues. We need every able-minded lawyer we can find to grab those levers of government and steer us out of the horrifying predicament our children face.

V. A NEW FRAME: GOVERNMENT'S TRUST OBLIGATION

As lawyers, we know that when human beings can't figure out who has responsibility for solving a problem, it usually doesn't get solved. If there is one function of the law, it is to assign responsibility for a shared problem. We urgently need to present a legal paradigm to hold every government at every level responsible for taking action. We're not going to find that framework of obligation in our environmental law. We have to reframe government's role in this crisis from one of allowing environmental destruction to one of protecting natural assets. As author George Lakoff says, "Reframing is changing the way the public sees the world. It is changing what counts as common sense."[46]

There is an enduring legal framework that can hold government accountable in both the political and legal realms. It draws from the public trust doctrine, which sets forth the bedrock principle that government is trustee of our natural assets, including the waters, wildlife, and air. As you all know, a trust is a fundamental type of ownership whereby one manages property for the benefit of another. A longstanding body of Supreme Court

[46] GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE xv (2004).

and state court case law holds that citizens have a common property interest in crucial natural resources, that government is the trustee of those resources, and that present and future generations are the beneficiaries. The trust is, in effect, a natural endowment to which future generations are entitled.[47]

The lodestar public trust opinion is *Illinois Central Railroad Co. v. Illinois*, decided in 1892. In that case, the Michigan legislature had granted the entire shoreline of Lake Michigan to a private railroad company. The Supreme Court held the grant was null and void, and fully revocable, without compensation. It stated that the shoreline of Lake Michigan was held in public trust by the State of Michigan, and that, as trustee, the state could not convey the shoreline to a private railroad corporation. Justice Field wrote:

> [T]he decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated. . . .[48]

At stake today is not the shoreline of Lake Michigan, but the globe's entire atmosphere. While most public trust cases have involved water-based resources, the fundamental purpose of the doctrine is to protect the vital natural resources needed by the

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[47] Geer v. Connecticut, 161 U.S. 519 (1896) ("The power . . . resulting from this common ownership is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the benefit of private individuals as distinguished from the public good."). For discussion of the Nature's Trust paradigm as it applies to environmental law, *see* Mary Christina Wood, *Nature's Trust: Reclaiming An Environmental Discourse,* 25 VIRGINIA L. J. 431 (2007), http://www.law.uoregon.edu/faculty/mwood/docs/ntreclaiming.pdf.

[48] *Illinois Cent. RR. Co. v. Illinois,* 146 U.S. 387, 455 (1892) (but noting that parcels could be alienated "when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."). *Id.* at 453.

people. I think you would agree, our imperiled atmosphere is one of the most crucial assets in our natural trust.

With every trust, of course, there is a core duty of protection. The trustee must defend the trust against injury. Our government trustees do not have discretion to allow irrevocable damage to our trust. In *Illinois Central*, the Supreme Court said: "The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . . ."[49] When we call upon our government to defend our atmosphere, we are invoking principles engrained in sovereignty itself. As the Philippines Supreme Court said in a case known to environmental lawyers worldwide, these principles have "exist[ed] from the inception of humankind."[50]

The trust principle underlies all of our modern environmental statutes.[51] We can take our environmental laws, and without changing a word of them, reframe our government's role with respect to Nature. By reframing, we can turn the government's claimed discretion to *destroy* Nature into an obligation to *protect* Nature.

When we portray Nature as a trust, we vest citizens with expectations of lasting property rights to a defined, bounded asset. We start thinking, "Hey, that's my air, even if I share it with others." Pollution of that air becomes an infringement on American property. The failure to mount a national climate defense is as absurd a proposition as

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[49] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892). The Court also said: "Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it." *Id*. at 460.

[50] Oposa v. Factoran, G.R. No. 101083 (July 30, 1993) (Supreme Court of the Philippines), *excerpted in* JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD, & DAN H. COLE, NATURAL RESOURCES LAW, Ch. 8.II, at 441–44 (West Publishing 2006).

[51] In the opening provision of the National Environmental Policy Act (NEPA), Congress declared a national duty to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4331(b)(1).

the idea of government sitting idle during an attack on American soil. But this principle works in reverse as well. We can pass any new law we want, and no matter what it says, if it is pressed through the discretion frame, the government will continue to impoverish our natural resources until society can no longer sustain itself.

VI. THREE PRINCIPLES GOVERNING ATMOSPHERIC TRUST PROTECTION

Within this trust framework, I would now like to offer three concrete principles to direct government's climate response. If just these three principles formed the American mindset on climate, we would be well on our way to confronting this crisis.

A. CARBON MATH

The first principle is that the laws of Nature, not politics, must define the necessary action. This is really a matter of carbon math. We must realize that if various political measures do not add up to the required carbon math in time, they will be futile. A rescue rope that is too short is no good at all. The atmospheric concentration of carbon dioxide is presently 383 parts per million. Climate scientists say that we have to bring that down to 350 parts per million (ppm) to achieve climate stability.[52] We can think of this 350 number as Nature's "climate imperative."

B. THE CLIMATE PRESCRIPTION

The second principle builds on the first. Trustees have specific fiduciary duties that serve as standards of performance. We don't just vest trustees with priceless assets

[52] *See* JAMES HANSEN, MAKIKO SATO, PUSHKER KHARECHA, DAVID BEERLING, VALERIE MASSON-DELMOTTE, MARK PAGANI, MAUREEN RAYMO, DANA L. ROYER & JAMES C. ZACHOS, TARGET ATMOSPHERIC CO2: WHERE SHOULD HUMANITY AIM? (2008), http://arxiv.org/abs/0804.1126; Bill McKibben, *Remember This: 350 Parts Per Million*, WASHINGTON POST (Dec. 28, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/27/AR2007122701942.html.

and have no accountability. If we have a million dollars in an account and a bank is our trustee, we wouldn't just say, "Here's the account to manage on our behalf. We don't so much care whether you get a 15% yield or 2%, or even give it away –We'll just take whatever is left." We certainly would not take that approach with a trustee that manages the assets we rely on for survival. The trustee has to measure up to a fiduciary standard of care.

So what is the fiduciary standard of care for protecting the atmosphere? In September, 2007, the Union of Concerned Scientists issued an emissions target for stabilizing the climate.[53] This is a clear, quantitative prescription for action to get our planet back on the path to climate equilibrium[54] – and it is therefore a yardstick for government's fiduciary obligation. There are three things the U.S. must do: 1) arrest the growth of emissions by 2010; 2) reduce greenhouse gas emissions by 4% each year thereafter; and 3) ultimately bring emissions down to 80% below 2000 levels by 2050. The deadline to arrest the growth of emissions by 2010 is by far the most urgent and directly in line with a call by the UN to halt worldwide emissions growth by 2015.[55] The world-wide date is set out five years farther than the U.S. date because the developing nations like China and India are going to take more time to arrest emissions.

C. THE INEXCUSABILITY OF ORPHAN SHARES

[53] *See* UNION OF CONCERNED SCIENTISTS, A TARGET FOR U.S. EMISSIONS REDUCTIONS (Sept. 2007), *available at http://www.ucsusa.org/global_warming/science/emissionstarget.html.*

[54] Because the prescription is calibrated to the 450 ppm threshold, which recent data suggest may be too high to achieve climate stability, even this prescription may be too little too late. One leading thinker asserts that the United States needs to cut carbon 80% by 2020 and sets forth a plan to achieve this goal without additional reliance on nuclear energy. LESTER BROWN, PLAN B 3.0: MOBILIZING TO SAVE CIVILIZATION (Earth Policy Institute 2008).

[55] Milmo, *supra* note 8.

The third principle has to do with the responsibility of each nation, and each state within each nation, to reduce carbon. We can think of the sovereign nations on Earth as sharing the atmosphere as their common property. They are best described as sovereign co-tenant trustees of the atmosphere. The Ninth Circuit has used the co-tenancy model to describe state and tribal interests in a shared fishery and has said that all co-tenant sovereigns are bound by the basic duty to not degrade, or waste, their common asset.

You can apply this mandate to every nation of the world and create a framework for carbon responsibility. You can imagine the industrialized world's planetary carbon load as one big pie. Even though industrialized nations come in different sizes, if each reduces carbon proportionately by the same amount, the carbon pie as a whole will reduce by that amount. But the contrary is also true: if even one major industrialized nation does not accept its share of carbon reduction, does not reduce its slice of the pie, it will leave an orphan share that will sink all other planetary efforts. The carbon pie will not shrink by the amount it needs to. The U.S. is responsible for 30% of the greenhouse gas emissions on the planet. No other nation on earth is positioned, much less obligated, to adopt an orphan share left by a deadbeat sovereign – especially a share as large as ours.

So this third principle means that, as co-tenant trustees of the atmosphere, all industrial nations must carry out their share of carbon reduction as set forth in the prescription that scientists have provided. Scaling down to another level, this also means that all states, and all cities and counties within states, must carry their burden. It is their fiduciary obligation as trustee. We can look at any city in America and ask its mayor, "If you don't accept your share of carbon reduction, who will? And unless every share is accounted for, we're not going to decrease the carbon pie enough in the time we have

left." In order to save this planet, we must not excuse any orphan shares. It boils down to this thinking: our future depends on *our own city* accepting carbon responsibility – and on everyone else in the world thinking the same way.

VII. ARRESTING THE GROWTH OF EMISSIONS: GETTING THERE IN TWO YEARS

In sum, the three climate fiduciary principles are: 1) Nature, not politics, must define our response; 2) We have to arrest the growth of emissions within the next two years and then reduce carbon 4% a year thereafter; 3) every single jurisdiction must take on this responsibility. To make this happen, Americans have to start thinking and acting like beneficiaries. We must demand our government trustees to undertake and make public carbon accountings that show the results of climate initiatives. Carbon accountants are now able to measure the carbon emissions of any jurisdiction, which means they can track progress in reducing emissions. Without such a carbon accounting, we would have to simply assume our trustee is doing its job, and no smart beneficiary would do that. With carbon accounting tools, Eugene, Seattle, Portland, and other cities have already been able to meet the short-term imperative of arresting the growth of emissions for their jurisdiction. So, it can be done, with a sector-by-sector approach. But this takes focused government attention. The majority of jurisdictions are still joyriding across the atmosphere, as if we're not slipping into a very different world.

The hopeful aspect of a society built upon waste is that we can make major cuts in carbon without compromising any basic needs. We have many legal tools. A carbon tax, for example, is a swift and effective way to achieve dramatic emissions reductions. We can also use moratoria to stop new sources of greenhouse gas emissions. The most

urgent moratorium is one against new coal fired plants. The country's leading climate scientist, Jim Hansen, recently testified that even one more coal plant with emissions of nearly 6 million tons of CO2 per year over 50 years could be the "straw that breaks the camel's back."[56] We are that close. Montana has six proposed new coal fired plants. All must be stopped. And in addition to curbing emissions, it is imperative to protect the natural resources we still have. We have to safeguard any remaining carbon sinks that have capacity to cleanse the atmosphere of carbon. This means protecting soils, wetlands, riparian areas, and forests.

I'll bet many of you are thinking right now, it's not politically feasible to stop timber sales, sprawling development, and coal-fired plants. And you are quite right. The only politically feasible course of action is to send this world into disaster. Now go look your children in the eye and tell them that. Barbara Kingsolver speaks of "the anguish of standing behind a child, looking with her at the road ahead. . . ."[57] She writes, "The truth is so horrific: we are marching ourselves to the maw of our own extinction."[58] And it is true: the destiny of our very own children comes down to actions taken by each one of us individually, and all of us collectively, today, and every day. That is why we need courageous lawyers to voice a new political and legal paradigm, one that offers real hope for the next generation.

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[56] James E. Hansen, Testimony before the Iowa Utilities Board 7, http://plainsjustice.org/files/GCU-07-1_Sutherland_Filing/Hansen%20Direct%20Testimony%20(Public).pdf (2007). He added:

> If we cannot stop the building of more coal-fired power plants, those coal trains will be death trains – no less gruesome than if they were boxcars headed to crematoria, loaded with uncountable irreplaceable species. . . . " *Id.* at 8.

[57] BARBARA KINGSOLVER, ANIMAL, VEGETABLE, MIRACLE 346 (2007).

[58] *Id*. at 345.

A thirteen year-old Canadian girl recently led a delegation of children to the United Nations and addressed world leaders on global warming.[59] She said:

> Coming here today I have no hidden agenda. I am fighting for my future. Losing my future is not like losing an election or two points on a stock market. We are your own children. You are deciding what kind of a world we are growing up in. Parents should be able to comfort their children by saying, "Everything's going to be all right. It's not the end of the world, and we're doing the best we can. But I don't think you can say that any more. . . . What you do makes me cry at night."

When I heard those words they really resonated with me, because so many times over the past two years reading endless scientific reports on Arctic melting, species extinctions, food shortages, dying oceans, I've awakened in the middle of the night haunted by the horror of what my own children will endure in their lives if our generation cavalierly pulls this world over the climate tipping point. The only way I can look my own children in the eye is if I know that I am doing everything possible, every day, to secure a livable future for them.

VIII. THE VICTORY LAWYERS

As we confront this unprecedented peril of global heating, the most profound menace facing us is the lack of any sense of responsibility to confront this crisis. Yet this is well within the capacity of lawyers to address. In World War II, it took 100,000 Victory Speakers to mobilize this nation. Today, we need Victory Lawyers in all states voicing a framework of government obligation that will catch hold in the minds of

[59] http://www.youtube.com/watch?v=xH4YCXBSz2Y&feature=email.

Americans and will motivate a great psychological leap forward to mount a global atmospheric defense effort.

We need Victory Lawyers to take those three climate fiduciary principles to the courts, the legislatures, the city councils, the editorial pages, the radio waves and the Internet. We need Victory lawyers who can speak truth to power, who can enlist the judiciary,[60] who can catalyze action in all parts of society through the sheer power of their pens and their voices. We especially need trial lawyers – because it is you who speak to the American jury in terms they understand, you who know how to awaken the sense of obligation to our precious children, and it is you who have the passion to stir the courage deep within the hearts of Americans to forge a different path. We need you trial lawyers to wake up in the middle of the night anguishing about this problem and determined to bring justice to it in the morning – for the simple reason that, as my Dad might have put it, "the world's children – and your children -- need a lawyer."

Let me close by saying that somehow fate has delivered all of us in this room into this pivotal moment on Earth. We did not live 100 years ago, when it was too early to even imagine the collapse upon us, and we won't be here 100 years from now when it will be too late to save what we still can. We can only claim our moment.

Together we have the ability to reframe what is currently government's *discretion* to destroy our atmosphere, into an *obligation* to defend our atmosphere, as a commonly held asset in the Endowment that we must hand down to our children, for their survival. If we

[60]Mary Christina Wood, *Atmospheric Trust Obligation*, in ADJUDICATING CLIMATE CHANGE: SUB-NATIONAL, NATIONAL, AND SUPRA-NATIONAL APPROACHES (William C.G. Burns & Hari M. Osofsky, eds.) (forthcoming 2008, Cambridge University Press), *available at* https://www.law.uoregon.edu/faculty/mwood/docs/atlpaper.pdf.

lawyers can succeed in defining that one *obligation* on the part of our government, we may soon find every other nation in the world engaged with us, not against us, in a massive, urgent defense effort to secure the systems of life on Earth for all generations to come.

Montana Trial Lawyers, I leave the planet on your docket.

Thank you.