EPA's Protection of Tribal Harvests: Braiding the Agency's Mission

Mary Christina Wood[1]

INTRODUCTION

The theme of this summit is "Protecting Our Tribal Harvests." I cannot think of a matter that strikes more at the core of the sovereign compact between the federal government and the native nations. Tribes throughout the Pacific Northwest and Alaska are struggling to protect their traditional lifestyles, which rely on fish, game, roots, berries, and medicines. Theirs is a way of life that has lasted on this landscape for literally millennia. Yet, tribal people are now finding that, among all of the other threats to these resources, the pollution that EPA[2] and state agencies preside over is ending up in their traditional food supply. A 2001 report produced by the National Environmental Justice Advisory Council for EPA describes it this way:

> The waters to which . . . tribes look to meet their . . . needs . . . have become vectors of toxins. Contamination now renders . . . their ways of living – a source of exposure to . . . substances toxic to humans and other living things. . . . Yet toxic chemicals . . . continue to be permitted . . . [in] the air, water, soils, and sediments that together make up home to all life.[3]

The problem is pervasive, faced by every tribe across this region. In Alaska, some native people fish in areas where transformers leak PCBs.[4, 5] The Suquamish

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[1] Mary Christina Wood, Professor of Law and Dean's Distinguished Faculty Fellow; Resident Scholar, Morse Center for Law and Politics; Faculty Leader, Native Environmental Sovereignty Project, University of Oregon School of Law. This address was presented to the U.S. Environmental Protection Agency (EPA) Region 10-Tribal Leader's Summit held at the Umatilla Indian Reservation, August 22, 2006. Footnotes have been added to provide reference citations. The author greatly appreciates the comments of Professors Catherine O'Neill, Zygmunt J.B. Plater, Oliver A. Houck, John Bonine, Patrick A. Parenteau, and William Rodgers, as well as those of Jaime Pinkham, Patti Howard, Kathleen Feehan, and Carl Merkle on an earlier draft of this address. The author also appreciates the research assistance of Faye Miller and Zach Welcker, University of Oregon School of Law, and the editorial assistance of the Ecology Law Quarterly staff.

[2] Environmental Protection Agency.

[3] NATIONAL ENVTL JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE, 10-11 (rev. Nov. 2002) [hereinafter NEJAC].

[4] Polychlorinated biphenyls.

Indian Tribe takes its fish near eleven Superfund sites.[6] In the Spokane River, lead contaminates the water potatoes gathered by the Coeur d'Alene Tribe.[7] The Columbia River, which provides fish for the Umatilla, Yakama, Warm Springs, and Nez Perce Tribes, carries heavy metals, agricultural chemicals, radionuclides, PCBs, and many other toxins.[8] Once dangerous chemicals enter the water or air, they can persist, accumulating in the tissues of fish and wildlife, their quantities increasing higher up the food chain, and eventually they end up in the bodies of the people who eat these foods.[9] Consumption of contaminated fish is a major route of exposure to PCBs, mercury, chlordane, dioxins, DDT,[10] toxaphene, and at least forty other contaminants.[11] These toxins wreak havoc on a human body. People who ingest them risk cancer, neurological damage, endocrine disruption, birth defects and developmental problems.[12] In 2003, the Affiliated Tribes of Northwest Indians passed a resolution calling upon EPA and the states to address this problem.[13]

And so you all come here today—tribal leaders and EPA officials—in one room to talk about the pollution that poisons traditional harvest resources, and it is my role to set the context for your discussions. I would like to describe for you three separate sources of law that impose obligations on the EPA. My point will be that EPA needs to braid its mission to make each strand of law reinforce the other. Most of those at EPA

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[5] *Id.* at 12. [3]
[6] *Id.* at 13. [3]
[7] *Id.* at 67. [3]
[8] U.S. ENVTL PROT. AGENCY REGION 10, DOC. NO. EPA-910-R-02-006, COLUMBIA RIVER BASIN FISH CONTAMINANT SURVEY 1996-1998, p. E-1 (1998) [hereinafter CONTAMINANT SURVEY], *available at* http://yosemite.epa.gov/r10/oea.nsf (follow "REPORTS" hyperlink; then follow "Columbia River Basin Fish Contaminant Survey" hyperlink; then follow "Entire Document" (PDF) hyperlink).
[9] *See* NEJAC, *supra* note 3, at 11.
[10] Dichloro-diphenyl-trichlorethane.
[11] NEJAC, *supra* note 3, at 13.
[12] *Id.* at 18, 73. [3]
[13] Affiliated Tribes of Northwest Indians, Resolution #03-84 (Sept. 25, 2003) (on file with author).

think about only one source of law, consisting of the statutes they administer—like the Clean Air Act[14] and the Clean Water Act.[15] This is somewhat interesting, because these statutes are only about thirty-five years old.[16] But almost like an invasive species that takes over a landscape of older plants, these statutes have dominated the agency's focus to the exclusion of the other two, much older, obligations.

Both of these other obligations are characterized as trust obligations. One is the Indian trust doctrine, and the other is the public trust doctrine. Later, you will see how these strands come together with statutes in the area of traditional harvest.

I. GOVERNMENT AS A TRUSTEE OF NATURAL RESOURCES

Let us begin by closing the statute books and imagining the resources important for present and future generations. They are the air, the waters, the streambeds, the wildlife, the fisheries, and other elements needed to sustain life. The courts of this country characterize vital natural resources as being in a trust managed by government for future generations.[17] A trust is an ancient legal concept[18] in which one manages property for the benefit of another.[19] For example, if you were a trustee of a college account for your niece, you would not be able to profit from it yourself. You would manage it for her benefit. She is the beneficiary. There are always three parts to any

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[14] Clean Air Act, 42 U.S.C. §§ 7401-7671 (2000).
[15] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2000).
[16] *See id.* [15]
[17] For discussion of how courts have applied the trust obligation to natural resources, see Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 636-56 (1986); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558-66 (1970).
[18] *See e.g.*, Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 425-26 (1989).
[19] GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUST & TRUSTEES, ch. 1 § 1 (2d revised ed. 1984).

trust: there is the trustee, the beneficiary, and the corpus. The corpus is the property of the trust[20]—the money in the college account.

Because the government is the only enduring institution with control over human actions that affect natural resources, courts characterize it as the trustee of these resources.[21] That means government holds the corpus—the waters and wildlife—as its property that it must manage for the citizens, the beneficiaries. With every trust concept there is a core duty of protection. The trustee must protect the trust asset for the beneficiary as if it were his own.[22] This means taking action to defend the corpus against injury, and where it has been damaged, taking action to restore the corpus of the trust. In the case of a natural trust that lasts in perpetuity, this obligation lies at the very heart of government's purpose. The amount of natural wealth passed to future generations depends entirely on how well the governmental trustees defend the trust.

A. Indian Trust Doctrine

This background frames the Indian trust doctrine—EPA's first obligation. Before the United States formed, the native nations controlled vast aboriginal territory. They were the sovereigns that managed the natural trust on this land. Because their survival hinged on nature's resources, the tribes developed a system, perfected over thousands of years of governance, to ensure that those resources would be available in the same

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[20] *Id.* [19]

[21] *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 434-35 (1892); Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs, 742 F.Supp. 441, 444-45 (N.D. Ill. 1990).

[22] BOGERT, *supra* note 19 (2d revised ed. 1980), at ch. 29, § 582 ("The trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust.").

abundance for beneficiaries in distant generations.[23] Though tribes did not describe their laws in Western legal terms, the sovereign mandate governing all tribes of this region was, and still is, a trust concept. Tribal leaders speak of natural law, which designates them as stewards of the land, plants, animals, waters, and air.[24]

With conquest, the United States government forced a massive cession of land and left tribes with very small remnants of their homelands. The United States became a new sovereign ruler on the land,[25] and, along with the states, became the new trustee over natural resources in the ceded territory. But this tribal cession of land was based on a promise that the federal government would protect the tribes' life ways, which incorporated traditional harvest.[26] The tribes relied on this promise in ceding their land, and courts have enforced it through a trust concept.[27]

As part of this, the federal government is deemed trustee of all Indian lands and resources, including those off the reservation that support traditional harvest. In a 2001 Supreme Court decision involving the Klamath Tribe's water rights, the Court described the trust doctrine as "'one of the primary cornerstones of Indian law,' . . . with the United States as trustee, the Indian tribes . . . as beneficiaries, and the property and natural resources managed by the United States as the trust corpus."[28] Courts apply the trust obligation to every federal agency, not just the Bureau of

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[23] Mary Christina Wood, *The Politics of Abundance: Towards a Future of Tribal-State Relations*, 83 OR. L. REV. 1331, 1336-37 (2004).
[24] DAN LANDEEN & ALLEN PICKHAM, SALMON AND HIS PEOPLE: FISH AND FISHING IN NEZ PERCE CULTURE, 110-12 (Confluence Press, 1999).
[25] *See* Johnson v. McIntosh, 21 U.S. 543, 584-85, 587 (1823).
[26] *See* Wood, *supra* note 23, at 1337.
[27] *See generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, UTAH L. REV. 1471 (1994) (discussing the role of the trust doctrine in federal Indian jurisprudence); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, UTAH L. REV. 109 (1995).
[28] Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (Rennard Strickland et al. eds., 3d ed. 1982)).

Indian Affairs.[29] Courts have directly applied the trust duty to EPA. In fact in 1984, EPA developed the first agency trust policy that served as a model for other agencies.[30]

So, the trust duty of protection towards Indian interests is one clear strand of EPA's obligation. It is embedded in federal Indian law and predates statutory law by 120 years.

B. Public Trust Doctrine

EPA's public trust responsibility is another form of trust obligation that has direct bearing on traditional foods. This is a duty to preserve the natural resources for current populations as well as for future generations. This too is a property concept deeply rooted in our doctrinal law. Beginning in 1892, with the landmark case called *Illinois Central Railroad v. Illinois*,[31] the Supreme Court has maintained that the government holds wildlife and navigable waterways in trust for the people so that they may fish, have a food supply, and meet other basic needs. This public trust doctrine is the first and oldest environmental principle of this nation. It is such a fundamental doctrine of government that it precedes this country, reaching back, literally, to Justinian times.[32] My colleague, Charles Wilkinson, has traced the doctrine to the ancient societies of Europe, the Orients, Africa, Moslem Countries and Native America.[33] As he puts it,

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[29] *See* Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 753-59 (1995).

[30] U.S. ENVTL PROT. AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984) (on file with author), *available at* http://www.epa.gov/superfund/tools/topics/relocation/policy.htm.

[31] Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892); *see also* Geer v. Connecticut, 161 U.S. 519 (1896).

[32] Geer, 161 U.S. at 527.

[33] Wilkinson, *supra* note 18, at 429.

"The real headwaters of the public trust doctrine . . . arise in rivulets from all reaches of the basin that holds the societies of the world."[34] And as the world has understood since time immemorial, a government that fails to protect its natural resources sentences its people to misery.

You all might wonder, who in our government is responsible for carrying out this ancient public trust obligation? The trustees of today are housed in vast agencies, but they are real, live people. They are right here in this room. EPA manages our natural trust.[35] EPA is not like the Social Security Administration or the Internal Revenue Service. Those federal agencies deal with transitory human and business relationships. As public trustees, EPA officials are charged with protecting the crucial survival resources of this nation—the fish, wildlife, water, and air. They are in the highest calling of federal government. They are the trustees of Nature's Trust.

C. Statutory Law

Accordingly, two trust doctrines impose separate strands of obligation on EPA. The Indian trust doctrine protects resources such as traditional foods that are necessary to maintaining the tribal way of life. The public trust doctrine protects crucial resources that are held in trust for the general population. The third strand of EPA's obligation derives

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[34] *Id.* at 431. [18]

[35] While most public trust cases involve states, the doctrine, as an attribute of sovereignty, logically applies to the federal government as well. *See* Complaint of Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (applying doctrine to federal government); United States v. 1.58 Acres, 523 F. Supp. 120, 124 (D. Mass. 1981) (applying doctrine to federal government); *see also* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1103 (Erwin Chemerinsky et al., eds., Aspen Publishers, 3d Ed. 2004) ("In several cases, courts have asserted that the federal government is equally accountable and restricted under the terms of the public trust doctrine. . . . [Since] the federal government is a creature of the states by delegation through the Act of Union and the federal Constitution[,] . . . the federal government is therefore exercising delegated powers . . . [and] cannot have greater rights and fewer limitations than the entities that created it.").

from statutory law. The environmental statutes were passed in the 1970s with high aspirations. They were passed as tools for use by governmental trustees to restore the natural trust. The opening words of the Clean Water Act illustrate this point. Section 101 says, "It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."[36] Section 402 does allow permits to pollute,[37] but Congress designed this permit system to be a transition tool to achieve the goal of no pollution by 1985.[38] Permits were to be temporary.[39] The entire permit system, in fact, was called and is still called the National Pollution Discharge *Elimination* System.[40] Industry was supposed to use the time during which it held permits to transition to a pollution-free state by employing new technology as it developed.[41] The Act was intended to be technology forcing in order to achieve zero discharge by 1985.[42]

But here we are in 2006—a good twenty years after we were to have pollution-free rivers—and pollution remains a threat to the wild food supply of the native nations and the nation as a whole. How could this have happened? The reason is that EPA took the permit system off course early on and never steered it back on course. Rather than phasing out permits, EPA has enshrined them.[43] Even though the Clean Water Act says

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[36] Clean Water Act, § 101, 33 U.S.C. § 1251(a)(1) (2000).
[37] *Id.*, § 402, 33 U.S.C. § 1342(a) (2000).
[38] *See e.g.* Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1007-08 (4th Cir. 1976) ("[T]he Act establishes a series of steps which impose progressively stricter standards until the final elimination of all pollutant discharges is achieved, that being envisioned for the year 1985.").
[39] *See* 33 U.S.C. § 1342(b)(1)(B) ([P]ermits . . . are for fixed terms not exceeding five years . . . .").
[40] *Id.* § 1342. [39]
[41] *See id.* § 301, 33 U.S.C. § 1311(b) (2000); Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REFORM 863-64 (1986).
[42] *See* Van Putten, *supra* note 41, at 866-69, 889-91.
[43] *See* U.S. ENVTL PROT. AGENCY, NPDES FREQUENTLY ASKED QUESTIONS, *available at* http://cfpub.epa.gov/npdes/allfaqs.cfm?program_id=0#80: "The Clean Water Act specifies that NPDES permits may not be issued for a term longer than five years. Permittees that wish to continue discharging beyond the five year term must submit a complete application for permit renewal . . . . If the permitting authority receives a complete application, but does not reissue the permit prior to the expiration date, the permit may be 'administratively continued.' Permits that have been administratively continued beyond

that a permit only lasts five years,[44] industry now expects to keep its permits. The permits have become the end-all of regulation. When tribes have asked businesses to stop dumping toxic effluent where they fish, the businesses simply say, "We have a permit to discharge." And if tribes go to state officials or EPA, they hear, "Oh that business is in compliance because they have a permit." As one tribal analyst told me, "It's like a regulatory merry go round and you can't get off."

All of the agency's energy is consumed by a system that perpetuates these permits. No one is trying to carry out the plain, expressed Congressional intent or the basic trust duties owed to Indian tribes or the public as a whole. In effect, a statute that was designed to *restore* the trust is being used to institutionalize continued damage to the trust.[45] Where has this brought us? To a perilous point in time. EPA's Strategic Plan, issued in year 2000, warns: "Polluted water and degraded aquatic ecosystems threaten the viability of all living things . . . ."[46] The Clean Air Act presents a similar story. In 2002, sources emitted 4.6 million tons of air toxics, and EPA's data indicates that 95% of all Americans now face an increased likelihood of cancer just from breathing toxins in outdoor air.[47]

And what of the interaction between the statutes and the agency's unique trust obligation towards tribes? Even though several early cases said that the statutory duties and trust duties are two separate mandates, the Justice Department is now arguing that if

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their expiration date are considered to be 'backlogged.'" As of July 31, 2000, only 68 % of NPDES permits were current. *Id.*

[44] *See supra* note 39.

[45] For discussion, see Van Putten, *supra* note 41, at 891-93 (discussing the Clean Water Act and the anti-backsliding principle).

[46] U.S. ENVTL PROT. AGENCY, DOC. NO. EPA-190-R-00-002, STRATEGIC PLAN (Sept. 2000), *available at* http://www.epa.gov/cfo/plan/2000strategicplan.pdf.

[47] GENERAL ACCOUNTABILITY OFFICE, DOC. NO. GAO-06-669, REPORT TO CONGRESSIONAL REQUESTERS, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM 1 (June, 2006), *available at* http://www.gao.gov/new.items/d06669.pdf.

an agency complies with its general environmental statutes, it necessarily fulfills its unique obligation towards tribes.[48] In essence, the federal trustee is using environmental statutory law as a tool of assimilation.

II. REGULATING AWAY TRIBAL TRUST OBLIGATIONS IN THE COLUMBIA RIVER BASIN

To illustrate these dynamics in the area of traditional harvest, I want to highlight the Columbia River tribal fish consumption and Oregon state water quality standards. This issue demonstrates both the need and opportunity to braid EPA's three strands of obligation together.

To understand any traditional harvest issue, one must begin with historical context. Until 150 years ago, the tribes of the Columbia River Basin were the sole trustees of the fish and waters.[49] At the core of their governance was a powerful cultural and religious mandate of self-restraint. Even during times of starvation, the tribal leaders—the trustees—would not allow more harvest than the resource could sustain.[50] Under their stewardship, 10-16 million salmon returned to the Columbia River every year.[51] As one Indian fisherman said, the Columbia River was a "great table" where many tribes would come together and partake.[52]

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[48] *See* Gros Ventre Tribe v. United States, 344 F. Supp. 2d 1221, 1226-27 (D. Mont. 2004); Pac. Coast Fed'n of Fisherman's Ass'ns v. U.S. Bureau of Reclamation, No. C 02-02006 SBA, Order, slip op. at 1 (N.D. Cal. Mar. 7, 2005). For discussion, see Mary Christina Wood, *Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery*, 36 ENVTL. L. REP. 10163 (2006); Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Though Claims of Injunctive Relief Against Federal Agencies,* 39 TULSA L. REV. 101 (2004).

[49] Wood, *supra* note 23, at 1337.

[50] *Id.* at 1336. [23]

[51] Wood, *supra* note 48, at 10164.

[52] Seufert Bros. Co. v. United States, 249 U.S. 194, 197 (1919).

When the federal government came to the these tribes 150 years ago asking for land cessions, the tribal leaders expressly reserved in the treaties a right to fish forever at their fishing grounds off the reservations.[53] The Columbia River tribes relied on this treaty provision when they ceded 38 million acres of land in the Pacific Northwest to the federal government.[54] The Supreme Court has recognized this reliance and enforced treaty rights as easements across the ceded territory.[55] These easements are superior to all property rights because they are the oldest in the land.

A Yakama Tribal Council member once described the federal trust obligation that attaches to these rights: "My ancestor . . . who signed the treaty, accepted the word of the United States that this treaty would protect not only the Indian way of life for those then living, but also for generations yet unborn . . ."[56] Those leaders of long ago relied on the federal promise of protection just so that their descendants sitting here today could take fish. These descendants are the living beneficiaries of the Indian trust doctrine.

When the tribes ceded their lands, the federal government and the states of Oregon, Washington and Idaho became new sovereign trustees of the rivers and fish across ceded territory in the Columbia River Basin.[57] The tribes' direct authority over these resources diminished with their reduced jurisdiction. But because of their harvest property rights, tribes remain co-trustees of the salmon fisheries, and their fiduciary *will* to protect the resource has never diminished. The tribal leaders sitting here today are on

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[53] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 (1979).
[54] Wood, *supra* note 23, at 1337.
[55] United States v. Winans, 198 U.S. 371 (1905).
[56] *See* Hearings Before the Columbia River Fisheries Task Force 5 (Oct. 28, 1992) (testimony of Jerry Meninick**,** Yakama Nation), quoted in Wood, *supra* note 23, at 1338.
[57] *See* Wood, *supra* note 23, at 1337.

one hand beneficiaries of the Indian trust obligation, and on the other hand, sovereign co-trustees of natural resources in their own right.

The federal and state trustees that took jurisdiction over ceded lands 150 years ago were infant governments. They had no experience at all in managing a natural trust. You might say it was like putting a child in charge of a cookie jar. These new trustees allowed unprecedented human indulgence, with little concern for the sustainability of fish populations. Federal dams now kill over 90% of the population of certain salmon species.[58] Roughly half of the historic range of Pacific salmon has been extirpated.[59] The National Marine Fisheries Service has declared that "few examples of naturally functioning aquatic systems now remain in the Pacific Northwest."[60] As a result of federal and state trustees presiding over the Great Table of the Columbia River, wild salmon runs in the basin are at 2% of their historic levels.[61] In just 150 years since the treaties were signed, the federal and state trustees have depleted the salmon trust which tribal trustees had maintained for 10,000 years.

And now, in addition to the low salmon runs, the fish are contaminated by toxic chemicals present in the waters and sediments of the Columbia River Basin. In 2002, EPA published a study in which it presented the results of a two-year survey of toxic chemicals in fish from the Columbia River Basin.[62] Two hundred eighty-one fish samples from various species were collected at twenty-four sites in the Columbia River

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[58] Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 789 (9th Cir. 2005).
[59] Wood, *supra* note 23, at 1337.
[60] NAT'L MARINE FISHERIES SERV., PROPOSED RECOVERY PLAN FOR SNAKE RIVER SALMON, V-1-2, V-1-3 (Mar. 1995) (cited in Wood, *supra* note 29, at 767.)
[61] Wood, *supra* note 23, at 1337.
[62] CONTAMINANT SURVEY, *supra* note 8.

Basin between 1996 and 1997.[63] Every fish sampled had at least one of ninety-two chemicals in varying concentrations.[64] These include chlorinated dioxins and furans, PCBs, arsenic, chlordane, mercury, and DDT.[65]

The Clean Water Act is supposed to protect the waters so that it is safe to eat fish. The tool that directs the regulatory process is water quality standards.[66] These standards are the driving force for cutting back the permitted pollution from point sources on the Columbia River, and they are the driving force for cleanup standards at Superfund sites, and they are the driving force for plans to address non-point source pollution such as agricultural and urban runoff. Water quality standards are the baseline to which all of the regulatory tools are calibrated. They are the goals to which the trustee openly aspires in restoring a very damaged natural trust. EPA even has a little magnet that you can order that reads, "Healthy waters start with WATER QUALITY STANDARDS."[67] So if you want to start protecting people's health and making fish safe to eat again, you begin by establishing stringent water quality standards. The states are the ones that set these standards, but EPA is in the position of approving or disapproving them.[68] Oregon has

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[63] *Id.* at p. E-3. [8]
[64] *See id.* [8]
[65] *Id.* at pp. E-3, E-4. [8]
[66] *See* Clean Water Act, § 303, 33 U.S.C. § 1313 (2000). *See also* William C. Galloway, *Tribal Water Quality Standards Under the Clean Water Act: Protecting Traditional Cultural Uses*, 70 WASH. L. REV. 177, 177 (1995) (commentary on state and tribal water quality standards).
[67] U.S. ENVTL PROT. AGENCY, HEALTHY WATERS START WITH WATER QUALITY STANDARDS (magnet) (on file with author) (directing viewer to www.epa.gov/waterscience/standards); *see also* U.S. ENVTL PROT. AGENCY, DOC. NO. EPA-823-E-05-002, HEALTHY WATERS START WITH WATER QUALITY STANDARDS, (crossword puzzle), *available at* http://www.epa.gov/waterscience/standards/crossword.pdf.
[68] 33 U.S.C. § 1313(a)(1).

revised its water quality standards, and those standards are sitting at EPA Headquarters right now awaiting approval or disapproval.[69]

In setting those standards, Oregon has to look at the risk to people of eating contaminated fish. To assess this risk, and thereby to set water quality standards based on that risk, Oregon has to know much fish people eat.[70] So the fish consumption rate is very important because it drives the water quality standard, which in turn drives all of the permits and cleanups that ultimately determine how clean the water will be.

So how much fish do people eat? That is the driving question. There is a little math at work here—the less fish Oregon assumes people eat, the less Oregon will have to clean up its waters. EPA has developed a document to tell states how to develop water quality criteria and in doing so, what to assume in terms of how much fish people eat. This document is called the *EPA Methodology for Deriving Ambient Water Quality Criteria 2000*.[71] In this document, EPA has set a standard national fish consumption average of 17.5 grams fish consumption per day.[72]

You might be wondering, how much is 17.5 grams of fish a day? It is about the amount that fits on one cracker. A can of tuna holds 170 grams of fish,[73] so according to EPA, there are about ten servings in one can. Officials in the State of Washington have an even lighter appetite. Their water quality standards are still tiered to EPA's old

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[69] Letter from Stephanie Hallock, Dir., Or. Dep't of Envtl. Quality, to John Iani, Adm'r, Envt.. Prot. Agency Region 10 (July 8, 2004) (regarding Oregon submission of revisions to state water quality standards) (on file with author).
[70] *See* NEJAC, *supra* note 3, at 21.
[71] U.S. ENVTL PROT. AGENCY, DOC. NO. EPA-822-B-00-004, METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH (Oct. 2000) [hereinafter EPA METHODOLOGY], *available at* http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf.
[72] *Id.* § 4.3.3.1 (Rates Protective of Human Health from Chronic Exposure). [71]
[73] STARKIST CHUNKLIGHT TUNA, BAR CODE 802450 (on file with author).

assumption of 6.5 grams of fish consumption a day.[74] So, if you are eating a can of tuna in the State of Washington, you would figure that it holds twenty-six servings. Or at least water quality standards will not provide protection for you if you eat any more than that per day. Do you generally share a can of tuna with twenty-five other people?

In this EPA Methodology document, EPA has told states that, in setting their own water quality standards, they should not just defer to the national average of 17.5 grams per day, but rather, they should consider local conditions.[75] Anyone who is at all familiar with tribal people in the Northwest knows that tribal people consume more fish per day than what fits in one-tenth of a tuna can. Salmon is the staple of their daily diet and used for all ceremonies. And tribal people consume many other fish as well—lamprey, white sturgeon, large-scale sucker, rainbow trout, and walleye.[76] So fifteen years ago, back in 1991, the Columbia River Inter-Tribal Fish Commission undertook a study with EPA to determine how much fish tribal members eat.[77] This was done so that tribes could inform the State of Oregon of their actual fish consumption and the State of Oregon could protect that level of consumption through its water quality standards. This study found, not surprisingly, that tribal fish consumption is far greater than what EPA assumes is the national average. The tribes have clearly said that the majority of their people consume up to 389 grams of fish per day (at the 99th percentile), as opposed to 17.5 grams, and that

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[74] CONTAMINANT SURVEY, *supra* note 8, § 1.2 & n.5. Washington is subject to the National Toxics Rule (NTR), promulgated by EPA in 1992. *See* 56 Fed. Reg. 58420 (Dec. 22, 1992), 40 C.F.R. 131.36; WAC 173-2-1A-240 (5)("Human health-based water quality criteria used by the state are contained in 40 C.F.R. 131.36 (known as the National Toxics Rule))." The NTR criteria values are based on an assumed fish consumption rate of 6.5 g/day. 40 C.F.R. 131.36.

[75] EPA METHODOLOGY, *supra* note 71, § 4.3.3.1 ("EPA strongly emphasizes that States . . . should consider developing criteria to protect highly exposed population groups and use local or regional data over the default values as more representative of their target population group(s).").

[76] CONTAMINANT SURVEY, *supra* note 8, § 1.5.

[77] *See id.* at p. E-1, § 4.5.2. [8]

maximum tribal consumption is up to 972 grams per day.[78] The EPA follow-up study looked at this consumption and concluded that tribal members who consume high amounts of some types of fish face cancer risks 100 times the risk that are confronted by members of the general population who consume fish about once a month.[79]

The tribes have been appealing to the states of Oregon and Washington and EPA for years now to protect the water quality that supports their fish. How has Oregon responded? In revising its water quality standards, it chose to go with the national fish consumption average.[80] Tribal people will be protected to the extent they eat a daily amount of fish that fits on a cracker. That is what ceding 38 million acres of land across the Columbia River Basin has brought them.

A great irony in all of this is that the State of Oregon has joined with the tribes in court to force the federal government to let water through the dams to help baby salmon get to the ocean.[81] Yet the State would allow these same salmon to swim in waters that continue to be poisoned with toxic pollutants.[82] And while the State of Oregon has given much praise to the Umatilla Tribe for bringing fish back to the Umatilla Basin after 100

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[78] *See id.* § 4.5.2 [8] (describing Columbia River Intertribal Fish Commission (CRITFC) 1994 Fish Consumption Survey); Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, STAN. ENVT'L. L. REV. 52-53 (2000) (citing CRITFC study).

[79] *See* CONTAMINANT SURVEY, *supra* note 8, § 6.2.3, tbls. 6-19, 6-22.

[80] *See* Letter from Stephanie Hallock, *supra* note 69, (adopting human health criteria based on fish consumption rate of 17.5 grams/day); *see also* ENVT'L QUALITY COMM'N, OREGON WATER QUALITY CRITERIA SUMMARY, tbls. 33A and 33B n.B (May 20, 2004) ("Human Health criteria values were calculated using a fish consumption rate of 17.5 grams per day . . . unless otherwise noted."), *available at* http://www.deq.state.or.us/wq/wqrules/wqrules.htm (follow "Division 41" hyperlink; then follow "Table 33A" and "Table 33B" hyperlinks).

[81] Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-640-RE, 2005 WL 1278878, at (D. Or. May 26, 2005).

[82] *See* CONTAMINANT SURVEY, *supra* note 8, at p. E-3.

years of extirpation,[83] ironically, the State of Oregon will not protect that restored natural wealth at tribal fish consumption rates.

This failure may be explained by a wide gap between the Indian and non-Indian culture. Regulators from non-Indian society may not realize the crucial role of traditional food harvest to Indian people and their culture. They may wrongly assume that such harvest is a disposable aspect of Indian life. An example revealing this mindset comes from the U.S. Department of Agriculture's program to eliminate a noxious weed (common crupina) in Idaho in 1991. The Department planned to spray herbicides on the Nez Perce reservation where tribal people still gathered roots and medicines. In commenting on the Environmental Assessment prepared for this program, the Nez Perce Tribe told the Department that its people use these areas for gathering roots and medicines, and that the spraying could contaminate the plants and thereby harm the people. Section III. B.14 of the Environmental Assesment, which discussed the effects of the program, demonstrates how the federal government dealt with the Nez Perce concerns—two sentences that sum up the culture gap:

> [The] public may be exposed on a repeated basis to residues on plant materials gathered in the treatment areas. However, public use would decrease because each treatment should result in fewer plants surviving that are commonly collected.[84]

In other words, if this herbicide works, it's going to kill everything, not just the noxious weeds, so the tribe won't be out there gathering traditional plants much longer--therefore, there is no exposure problem.

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[83] This extirpation occurred as a result of the state's over-appropriation of water. *See* Wood, *supra* note 23, at 1343.

[84] U.S. DEP'T OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., ERADICATION OF THE COMMON CRUPINA, ENVIRONMENTAL ASSESSMENT 41 (March 1991).

Over ten years ago, Chairman Antone Minthorn of the Umatilla Nation said there was a crisis in the Columbia River, and he appealed to federal and state trustees to address the collapse of salmon. He said, "It is almost impossible to describe in words the pain and suffering this has caused my people. We have been fisherman for thousands of years. It is our life. . . ."[85] Those are the words of a trustee with a will engrained in his heart to protect the corpus of the trust that his people have relied upon for millennia. The tribal leaders in this room are all trustees, and they all share this will. It is not imposed on them by some statute book. It grew within their hearts as they grew to be adults. It is nurtured by the fishing, the eating of fish, the ceremonies and the prayers. It is strengthened always by ancestral memory. The will to preserve the corpus of the trust is, to these tribal trustees, second nature.

The federal and state trustees lack this cultural embedding of their fiduciary responsibility. Some have never even been connected in a personal way with the corpus of the trust they are charged with protecting. How many have pulled a fish over the bank, brought down an elk, picked a huckleberry, sipped water from a stream? The same industrial society that churns out all of the consumer products we see in stores also manufactures a mindset. This mindset makes it hard for people who do not gather food from the environment to even imagine the link between human survival and nature. As an Inuit spokesperson said, "We go out to hunt on the sea ice to put food on the table. You go to the supermarket."[86]

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[85] *Water Spreading: Hearing on Water Use Practices on Bureau of Reclamation Projects Before the House Comm. On Natural Resources, Subcomm. On Oversight and Investigations*, 103d Cong. (1994) (statement of Antone Minthorn, Chairman, Confederated Tribes of Umatilla Indian Reservation), *quoted* in Wood, *supra* note 29, at 742.

[86] Ross Gelbspan, *Slow Death by Global Warming*, AMNESTY MAGAZINE, Fall 2004, *available at* http://www.amnestyusa.org/magazine/fall_2004/slow_death.

This same mindset skews the process of water quality standards. It may be hard for state and federal regulators to realize that, unlike people in the majority society, eating fish is not just a preference for tribal people. Despite the contamination, Indian people continue to fish and will continue to fish. It is their culture, their religion, their economy, as it has been for, quite literally, thousands of years. Professor Catherine O'Neill states it so well: "For Native peoples of the Pacific Northwest . . . the various aspects of fishing are constitutive of their identity as peoples."[87] Let me give you words from tribal people. Billy Frank, Nisqually, has said, "Fishing defines the tribes as a people."[88] Donald Sampson, Umatilla, has said, "We have to have [fishing] . . . in order to be Indians. . . ."[89] Del White, Nez Perce: "[S]almon is part of who the Nez Perce people are. It is just like a hand that is part of your body. . . . "[90] Judge Boldt said in his landmark treaty rights opinion, "The right to fish . . . is the single most highly cherished interest and concern of the present . . . tribes . . . ."[91]

It is only when you recognize that the tribal consumption in the Columbia River Basin *will* continue as it has for millennia, that you realize the consequences of an inadequate water quality standard—it is regulatory allowance to poison a people. That choice may be deeply hidden in all sorts of technical jargon, terms that are simply meaningless to the average American. In real human terms, however, it means you are consigning tribal people to ingesting poisons such as mercury and DDT and PCBs and

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[87] Catherine A. O'Neill, *Risk Avoidance, Cultural Discrimination, and Environmental Justice for Indigenous Peoples*, 30 ECOLOGY L.Q. 1, 36 (2003).
[88] *Id.* [87]
[89] *Id.* at 37. [87]
[90] *Id.* at 36. [87]
[91] U.S. v. Washington, 384 F. Supp. 312, 340 (W.D. Wash. 1974).

eighty-nine other toxins and pollutants that are now present in the fish they eat.[92] This issue puts the moral essence of the trust obligation directly in the spotlight. Some of those tribal people who face a higher cancer risk from eating fish are sitting right here in this room. Look them in the eye when you are talking about Oregon water quality standards this week, because that is where the regulatory system ends up, in their bodies.

So what is EPA's stance? After all, EPA has a federal trust obligation to protect Indian people and their way of life. EPA has the Oregon standards waiting right now, for a decision to approve, or disapprove. EPA, as I mentioned, was the leader of all the federal agencies in developing a trust policy back in 1984, to protect Indian interests. So does it have an approach to protect Indian fish consumption? Surprisingly, although EPA completed a huge study and is quite aware of the problem, it has no policy to require states to protect tribal fish consumption levels.

Here is EPA's approach. It translates fish consumption into risk levels that are expressed in cancer cases. EPA has produced a methodology document that tells states to set water quality standards to protect the general population at 10^{-6}.[93] That means people ingesting the contaminated fish will suffer an increased risk of one in a million that they will get cancer. EPA's own study shows that tribal people who consume fish at higher levels may face a much higher risk of cancer—orders of magnitude higher, such as 1 in 10,000, or 10^{-4}.[94] EPA's position is, if you protect the majority non-Indian population at

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[92] *See* CONTAMINANT SURVEY *supra* note 8, at p. E-3.

[93] EPA METHODOLOGY, *supra* note 71, § 2.4 ("For . . . promulgating water quality criteria for States and Tribes . . . EPA intends to use the 10^{-6} risk level, [which the Agency believes reflects] an appropriate risk for the general population.").

[94] *See* CONTAMINANT SURVEY, *supra* note 8, at p. E-6 (noting cancer risks of even up to "7 in 10,000 to 2 in 1,000" and "up to 2 in 100 at some sites" for adults in CRITFC member tribes consuming certain types of fish at the highest ingestion rate. Risks depended on the species consumed).

10^{-6}, that is good enough, even though it knows that some highly exposed populations, as it calls them, may be around 10^{-4}.[95] So EPA's trust obligation has come down to this. Protect the majority at 10^{-6}. Protect Indian people at just above 10^{-4}. Many would say, that is not environmental protection. That is environmental tyranny. 10^{-4}. Say it a few times. It almost has the ring of incidental take.[96]

III. EPA'S PUBLIC TRUST OBLIGATION DEGRADED TO TOXIN WARNINGS

I said earlier that the public trust responsibility dovetails with the Indian trust responsibility when you consider traditional foods like fish. Fish, after all, is a vital part of the non-Indian food supply. And these days you hear more and more about the irreplaceable health benefits of fish. We are told to eat plenty of fish to prevent cancer, heart disease, and diabetes. So we, in the general public, are out there looking for a lot of fish to eat.

But, there is a problem. It is hard to find clean fish these days. In 2004, over a third (35%) of the nation's lakes in the United States were under fish advisories.[97] Roughly a quarter (24%) of the nation's river miles were under fish advisories.[98] In year 2000, 100 percent of the Great Lakes were under fish advisories, as were 71% of coastal

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[95] EPA METHODOLOGY, *supra* note 71, § 2.4 ("EPA believes that both 10^{-6} and 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level."). EPA is well aware that certain groups of Indian people may be highly exposed populations. *See* CONTAMINANT SURVEY, *supra* note 8.

[96] Endangered Species Act of 1973 (ESA), § 10, 16 U.S.C. § 1539(a)(1)(B) (2000) (Under the ESA, an "incidental taking" is permissible when a protected species is killed as an unintentional consequence of an otherwise lawful action.)

[97] http://epa.gov/waterscience/fish/advisories/2004questions.html#findings.

[98] *Id.* [97]

waterways.[99] In 2003, forty-eight states had a total of 3,089 fish advisories.[100] According to EPA's own data, more than half of the fish in this nation's lakes and reservoirs have levels of mercury that exceed safe levels.[101]

EPA is presiding over the poisoning of an entire food group.

Forty different chemicals or groups give rise to these advisories, though five contaminants are responsible for the majority—they are mercury, PCBs, dioxins, DDT, and cholordane.[102] Some of these chemicals—like DDT and PCBs—are known as "legacy" chemicals.[103] They are now banned.[104] But others are legally dumped and spewed into the air and waters that the public owns under the express permission of the trustee, EPA. And what is EPA's response to this mounting contamination? It has not ended all discharges into the waterways as Congress told it to by 1985—instead, we just see more and more fish advisories. In fact, to remind you of the need to consult fish advisories before you eat your catch of the day, EPA offers a complimentary magnet for your refrigerator with a little blue fish that says, "Fish For Your Health."[105] EPA will send it to you in the mail just five days after you call. The little blue fish says, "Fish are a healthy source of protein, but some fish may be high in contaminants. Use EPA's

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[99] U.S. ENVTL. PROT. AGENCY, DOC. NO. EPA-823-F-01-010, EPA FACT SHEET UPDATE: NATIONAL LISTING OF FISH AND WILDLIFE ADVISORIES 1 (Apr. 2001), cited in NEJAC, *supra* note 3, at 19.
[100] U.S. ENVTL. PROT. AGENCY, DOC. NO. EPA-823-F-04-016, EPA FACT SHEET: NATIONAL LISTING OF FISH ADVISORIES (Aug. 2004), *available at* http://www.epa.gov/waterscience/fish/advisories/factsheet.pdf.
[101] Michael Janofsky, *A Study Finds Mercury Levels in Fish Exceed U.S. Standards*, N.Y. TIMES, August 4, 2004.
[102] NEJAC, *supra* note 3, at 13.
[103] Gayle Worland, *EPA Searches Lake Michigan for New Pollutants,* CHICAGO TRIB., August 10, 2003, at Metro 1.
[104] *Id.* [103]
[105] U.S. ENVTL. PROT. AGENCY, DOC. NO. EPA-823-E-05-003, FISH FOR YOUR HEALTH (magnet) *available at* http://www.epa.gov/waterscience/fish/promo.html. (These magnets are available from the National Center for Environmental Publications (ncepimal@one.net), (800) 490-9198. Specify document #EPA-823-E-05-003 when ordering.").

website to contact your health department about local fish advisories."[106] So, this is what the family tradition of going out to fish has come to—an exercise in researching toxins.

And as for pregnant women, nursing mothers, children, and any women of childbearing age, which is 16-49, they are in an extra vulnerable category because of the pervasive methylmercury that has accumulated in the fish of our country largely as a result of air pollution.[107] Methylmercury is an insidious neurotoxin that affects fetal development.[108] Forty percent of the human-caused mercury air emissions comes from the coal-fired plants that EPA has allowed to operate under the Clean Air Act.[109] EPA estimates that 8% of women of childbearing age have blood mercury concentrations greater than what the agency considers safe and that more than 300,000 newborns each year may have increased risk of learning disabilities due to fetal exposure to methylmercury.[110] Some independent scientists have estimated at least a doubling of these figures for minority groups.[111]

So what is the trustee's response? It issues a glossy brochure with a picture of a pregnant woman warning of the dangers of mercury and shellfish.[112] On one hand the brochure says, "[W]omen and young children in particular should include fish or shellfish

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[106] *Id.* [105]
[107] U.S. ENVTL. PROT. AGENCY, MERCURY: METHYLMERCURY EXPOSURE, http://www.epa.gov/mercury/exposure.htm (last updated Sept. 25, 2006) [hereinafter METHYLMERCURY].
[108] Katherine Mieszkowski, *Mercury Rising*, SALON, Apr. 18, 2005, http://dir.salon.com/story/news/feature/2005/04/18/mercury/index.html.
[109] U.S. ENVTL. PROT. AGENCY, MERCURY: BASIC INFORMATION, http://www.epa.gov/mercury/about.htm (last updated July 6, 2006).
[110] METHYLMERCURY, *supra* note 107.
[111] *See* Catherine A. O'Neill, *Mercury, Risk, and Justice*, 34 ENVTL. L. REP. 11070, 11076 nn.60-63 and accompanying text (citing Kathryn R. Mahaffey et al., *Blood Organic Mercury and Dietary Mercury Intake: National Health and Nutrition Examination Survey, 1999 and 2000*, 112 Envtl. Health Perspective 562 (2004); Kathryn R. Mahaffey, Methylmercury: Epidemiology Update, Presentation to the National Forum on Contaminants in Fish, San Diego, California (2004)).
[112] U.S. FOOD & DRUG ADMIN. & ENVTL. PROT. AGENCY, DOC. NO. EPA-823-F-04-009, WHAT YOU NEED TO KNOW ABOUT MERCURY IN FISH AND SHELLFISH, *available at* http://www.epa.gov/waterscience/fish/MethylmercuryBrochure.pdf.

in their diets due to the many nutritional benefits."[113] But on the other hand it says, "[N]early all fish and shellfish contain traces of mercury."[114] It tells them not to eat shark, swordfish, king mackerel and tile fish. It discourages them from white albacore tuna. And it goes on to tell them to consult the fish advisories before consuming fish. This vulnerable population is a huge segment of the American public. Females born today have forty-nine years—their entire childbearing years—to be under mercury warnings.[115]

So this is what has come of EPA's public trust duty—a glossy brochure and a little blue fish magnet alerting the beneficiaries that an entire food group is at risk, and it is their burden before they exercise that timeless public right of fishing to get on the web to see whether they should eat the fish they catch. Is this not a crisis for all Americans, not just Indian people?

IV. BREAKING THE BARRIERS TO PROTECTING NATURE'S TRUST

One indication of insanity is doing the same thing 1,000 times over with the same result and expecting a different result on the next attempt. EPA cannot continue to do things the same way without having us risk our health to eat fish, drink water, and breathe air. It is past time for EPA to braid its mission—to isolate its three strands of obligation (the Indian trust doctrine, the public trust doctrine, and statutory law) and weave them together with unity. This time, each strand should fortify the other, not work at cross-purposes.

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[113] *Id.* [112]
[114] *Id.* [112]
[115] *See id.* [112]

There is not a moment to waste. Global warming is threatening to undo the very life systems that support humanity and all species on this planet.[116] The North Polar ice cap and mountain glaciers across the world are melting. Native people across Alaska are seeing the foundation of their ecosystem slip away. To quote an Inuit spokesperson: "These are issues of life and death."[117] And yet, EPA, the one federal agency in charge of preventing pollution into our atmosphere, refuses to regulate the United States' greenhouse gas emissions from new motor vehicles.[118] As Al Gore cautions, "There is such a thing as being too late."[119]

So how can the agency braid its mission to, finally, employ statutory law in furtherance of its basic trust duties? And what are the barriers? In preparing these remarks I spoke with people at EPA. There are good people in the regional offices at EPA. They want to do the right thing. They are dedicated. But they feel trapped in an

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[116] For background, see Al GORE, AN INCONVENIENT TRUTH (Rodale, Inc., 2006); ROSS GELBSPAN, BOILING POINT (Basic Books, 2004). The Director of the NASA Goddard Institute for Space Studies has delivered a clear warning that a concerted response to global warming must occur in the current decade: "We have reached a critical tipping point. . . . [W]e have at most 10 years -- not ten years to decide upon action, but ten years to alter fundamentally the trajectory of global greenhouse emissions. Our previeous decade of inaction has made the task more difficult, since emissions in the developing world are accelerating." Jim Hansen *The Threat to the Planet,* The NEW YORKER, 12 July 13, 2006.

[117] Gelbspan, *supra* note 86.

[118] *See* Massachusetts v. U.S. Environmental Protection Agency, 415 F.3d 50, 53, 58 (D. C. Dir. 2005)(finding EPA discretion under Clean Air Act to refrain from regulating emissions)(on appeal before Supreme Court). For further discussion of EPA's recalcitrance, *see* Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse,* __ VIRGINIA ENV. L. J. ___ (forthcoming 2007).

[119] GORE, *supra* note 116, at 10 (quoting Dr. Martin Luther King Jr.). On October 30, 2006, British Prime Minister Tony Blair unveiled a landmark report on global warming and said: "This disaster is not set to happen in some science fiction future many years ahead, but in our lifetime. Unless we act now . . . these consequences, disastrous as they are, will be irreversible. There is nothing more serious, more urgent, more demanding of leadership. . . in the global community." Simon Hooper, *Report Sets Climate Change Challenge,* CCC.COM (Oct. 30, 2006). The British report, THE STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE (Cambridge University Press, forthcoming January, 2007), is authored by Sir Nicholas Stern, the former chief economist at the World Bank. The pre-publication version may be downloaded at http://www.hmtreasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm.

agency mindset that is locked in by inertia. The minds of many can break an agency mindset, but we have to take down the bars one by one. So what are those bars?

One bar is the politics of this administration. Here is what the good people at EPA say: "What we can do politically and what we should do are two different things." And, "We're just waiting for another administration." And, "We are waiting for the environmentalists to sue us so we can do our job." Or, "We can still do small things if we operate under the radar."[120] Great. The good people at EPA are demoralized and are giving up.

This is no time to be demoralized. This is the time for you good people at EPA to find the hero and innovator within. We need you to be the stewards and leaders now more than ever.

Here is the basic political problem. The pressure we expect from the public to preserve our natural trust has been diffused by the terms in which we speak of environmental protection. We have statutes that have grown so complex and so weighted down by acronyms that we hardly know what they mean. We are using figures, such as 10^{-4} or 10^{-6}, to describe how many cancer cases might result from eating fish. We have pages upon pages of EPA methodology for setting water quality standards based on

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[120] EPA's decisions, though typically cast as "neutral" science, are in fact often driven largely by politics. For a full analysis of EPA's politicized decision-making, see Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation,* 95 COL. L. REV. 1613, 1653 (1995) (observing, "Public officials faced with resolving . . . conflicting demands [of economic goals and public health] thus must resort to the science charade out of sheer political necessity."); *see also* David Schoenbrod, *The EPA's Faustian Bargain*, Vol. 29 REGULATION 36 (Fall, 2006) ("The EPA was supposed to insulate environmental rules from politics. But it did not; it insulated the politicians from responsibility.").

human body weights and intake rates, RfDs, TSDs and RSCs,[121] median values and high end values, geometric means and 95th percentiles and trophic level breakouts, and, my favorite—fish weight loss assumptions in cooking—that is how much fat the fish loses in the frying pan.[122] The public believes that their rivers are protected *because* we have a Clean Water Act that said quite clearly that all pollution would be eliminated by 1985. As a result of EPA's impenetrable terminology, the public has no clear images of the failed system on its political radar.[123] Without political radar, the public cannot apply the healthy pressure necessary to keep EPA from being captured by the very industries it is supposed to defend the public trust against.

Good people of EPA, rather than flying "under the radar," do everything you can to sharpen the images on the radar. Bring on the public pressure. Focus once again on the clear messages of Indian trust responsibility and public trust obligation so that communities can advocate strongly for environmental protection. The people in this room can lead the dialogue. In every coffee room, in every comment paper, in every NEPA document, in every testimonial before Congress, in every court filing, and every hiring and review process, EPA personnel at all levels *can* begin speaking in trust terms--the trust towards tribes and the trust towards the public. Changing a mindset of an entire agency is done with words, words spoken by a mass of individuals who come together as one voice. It will take everyone articulating the same values and enforcing the same

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[121] RfD refers to "reference dose." TSD refers to "Technical Support Document." RSC refers to "Relative Source Contribution." *See* EPA METHODOLOGY, *supra* note 67, List of Acronyms, at xv-svii.

[122] EPA METHODOLOGY, *supra* note 71, § 4.3.3.1.

[123] *See* Wagner, *supra* note 120, at 1641-43 (detailing EPA's development of the ozone standard under the Clean Air Act, noting that EPA presented the rationale for the standard as a "mind-numbing scientific justification" that failed to disclose to the public the true political forces that resulted in the rule).

expectations among colleagues. This is not a matter of spin. The fundamental discourse of environmental law has to change.[124] Do not wait for court cases. Do not wait for new statutes. Do not wait for a new administration. After all, the statutory distortion started long ago, before the current administration. The chemicals that you find in fish tissue today have been deposited with the trustee's permission for decades now.

Many good people at EPA say that their hands are tied in making decisions because political appointees higher up in the administration have the final say. And, of course, we all understand that. But, an agency head cannot do all of the work -- the research, the writing, the data entry, the press releases, and the hundreds of steps it takes to make a decision. People of all positions at EPA can expand their sphere of influence, expand their personal power, by speaking in clear terms. Create the sharp images to make others confront what is at stake.

Good people of EPA, ask yourselves, what if a higher-level official has the ultimate authority over a decision? Would you implement it? You are a trustee. Imagine tribal people sitting around the Great Table of the Columbia River as they have done for millennia, but now joined by non-Indians as well, including pregnant women, nursing mothers, and children. And all of them are going to eat fish. And imagine that whoever is ultimately responsible for approving the Oregon water quality standards asks you to deposit environmental toxins on each plate –76,000 ppb of zinc for one,[125] 1,500 ppb of arsenic for another,[126] 190,000 ppb aluminum for another,[127] 787 ppb DDT for another.[128]

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[124] For discussion, see Wood, *Nature's Trust*, *supra* note 118.

[125] *See* CONTAMINANT SURVEY, *supra* note 8, § 2.8, tbl. 2-12 (Basin-wide maximum concentrations of metals in composite fish tissues measured in the Columbia River Basin, 1996-1998). Note that the measurement unit ug/kg (micrograms per kilogram) reflected on the tables in this study is the equivalent of parts per billion (ppb). *Id*. at xxv.

[126] *Id.* § 2.8, tbl. 2-12. [125]

These are actual levels of contamination found in composite sampled fish and published by EPA in its report. Would you deposit those toxins on those plates? This image, not the little blue fish on your refrigerator, will hold the trustees accountable for protection of the trust. So, sharpen the radar with clear images. Every tribe here has a clear image to present.

A second barrier to change is the perception that EPA shouldn't hurt business by strongly regulating pollution or forcing cleanups. This mindset drives the rhetoric that justifies environmental damage. It has come to this: EPA often cannot say no to business. And so it keeps reissuing and approving permits, and the pollution keeps mounting as it has over the past three decades since the statutes were passed. This is why seafood markets must display mercury warnings and little kids have to download fish advisories before going out with their families to fish. This is all because the regulators don't say "no."

Good people of EPA, you are trustees, and trustees *do* say no to those who seek to damage the trust. That is the basic job of the trustee—to protect the corpus of the trust for the beneficiaries. The beneficiaries are not the businesses that foul the waters and air. As the Supreme Court said long ago in *Geer v. Connecticut*, "[T]he . . . trust [is for] the benefit of the people, and not . . . for the benefit of private individuals as distinguished from the public good."[129] Today, the very businesses EPA should defend the trust against are now considered to be "industry stakeholders." The trust responsibility has been turned inside out. Some federal agencies *do* have a mission to protect business.

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[127] *Id.* [125]
[128] *Id.* § 2.3.3, tbl. 2-4 (Basin-wide average concentrations of total DDT (DDT, DDE, DDD) in composite fish tissue samples from the Columbia River Basin, 1996-1998). [125]
[129] Geer v. Connecticut, 161 U.S. 519, 529 (1896).

EPA, however, is a trustee of Nature's Trust, and it is time to distinguish its role in government.

Does that mean that EPA should be anti-business? No. EPA should be, quite simply, business-neutral. The American system of capitalism is premised on the notion of competition. Industries and businesses are traded. They merge and they divide. Stocks go up and down. New businesses are born and old businesses fold every day. Aside from a very few industries that are crucial for public welfare, it is certainly not government's job to insulate businesses from their true costs of operation. Where businesses cannot operate without damaging the commons, they should be replaced by innovative green businesses. That is why permits under the Clean Water Act were to be issued for only five-year terms.[130] Congress wanted the act to be technology-forcing. But by protecting the industries that foul the environment, the good people at EPA are strangling the very forces of capitalism that might steer our economy towards a more sustainable existence.

We have learned from the Columbia River experience that businesses can overhaul their entire processes to eliminate chlorine bleaching, and that society can carry on quite well with *un*bleached toilet paper. But these businesses have to be prompted to think outside the box, and if they are just handed out the permits as usual, they will not reform their processes. It is amazing what people will do when held accountable for their pollution of public resources. Just take a walk on your local urban greenbelt. People, observe the indifferent manner in which dog owners pick up their dog's waste, put it in a plastic bag, and stuff it in their pockets for the duration of their walks! If dog owners from all political persuasions can be convinced to do this, surely industry can be brought

[130] See supra note 39 (citing Clean Water Act).

to task for poisoning the food supply of this nation, if only EPA would hold them accountable. The current mindset holds no one accountable.

A third barrier to change is the perception that EPA has no legal authority to provide more protection than the current regulations demand. To the contrary, the Indian trust responsibility has tremendous legal force in justifying a protective standard. Of course, an agency cannot violate a clear statutory mandate, but federal agencies have vast discretion to impose a higher standard that protects Indian interests, and where they have done this, courts have supported them. At least three well-known cases demonstrate this.[131] In the most recent case, which involved EPA, the Tenth Circuit upheld EPA's jurisdiction over a uranium mining company that sought to locate on lands in disputed Navajo territory. The court said, "[T]he federal executive is to consider its strict fiduciary obligation when interpreting regulations that directly affect . . . Indian lands."[132]

In this and other cases, the agency chose more protection to safeguard Indian interests. And when the polluter sued the agency, the courts upheld the agency's decision. So the trust obligation operates as a shield in court for agencies that fulfill their duty to tribes. But the agency has to take the first step. EPA has an agency trust policy that reflects property obligations 150 years old. Compare that to the five-year pollution permits, which were supposed to be phased out.

Let us turn to a fourth part of the mindset expressed by many at EPA: environmental problems are now too complex to solve. And yes, there are legacy chemicals, and they are complex. They would not be so complex if Congress's intent had

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[131] Nw. Sea Farms v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515 (W. D. Wash. 1996) (upholding the Corps' refusal of a permit for a fish farm because it could interfere with treaty fisheries); Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995) (upholding regulation under Magnuson Act to protect tribal fisheries); HRI, Inc. v. Envtl. Prot. Agency, 198 F.3d 1224, (10th Cir. 2000).

[132] *See* HRI, Inc., 198 F.3d at 1246.

been carried out thirty years ago. But let us consider where complexity takes us. It stymies us if we let it. And people who benefit from the status quo know that, so they bring up complexity as a barrier to change. There are strategies for dealing with our environmental problems, but they take political will to implement. Complexity is the greatest damper on will. Good people at EPA, in breaking through the mindset, do not let complexity mask the lack of will.

And finally, a fifth bar in the mindset is that there are not enough resources to carry out the mandates of the statutes. That is true if the agency keeps doing things the same way it has for thirty years. The aging model still dominating EPA policy is one based on quantitative risk assessment.[133] With every pollution scenario, EPA tries to draw a line at how much pollution will impose an unacceptable risk to society. EPA consumes vast public resources to produce studies that purport to justify that line-drawing. One just has to look at the risk assessment for fish consumption to realize how tortured this exercise is.[134] It involves the oddest symbiosis of toxicology and the culinary arts, with inputs such as the type of contaminant, where it is located within the fish, whether the fish is filleted, skinned, or whole, how the fish is cooked (fried, steamed, baked or broiled), what part of the fish is consumed, the body weight, sex, and age of the person eating it—everything short of the seasoning you might put on it (and that is probably buried in some study too). People, we cannot require the beneficiaries to use best available technology in eating their fish! No matter how hard we may try to characterize risk, we cannot avoid Nature's simple math: the pollution all adds up. Maybe we could send that message to EPA on a magnet.

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[133] *See* NEJAC, *supra* note 3, at 58-61 (comparing quantitative risk assessment with the precautionary approach to addressing risk).
[134] *See* EPA METHODOLOGY, *supra* note 71, § 2.4.

Ultimately, we can never hope to make sense out of why the line is drawn at 10^{-4}, or some other number. This line-drawing mindset forces us always to catch-up after the damage is done. And yet, we know that EPA is able to ban chemicals without society crumbling. In its early years, EPA did ban asbestos, DDT, PCBs, and CFCs.[135] Consumers did not even notice. The problem is that these chemical bans are the exception. If harmful chemicals can be banned eventually, why not ban them at the outset? The costs of cleaning up pollution are exponentially greater than the costs of prevention. The chemicals EPA permitted yesterday are the legacy chemicals of today, and those allowed by permits today will be the legacy chemicals of tomorrow.

Our approach is to allow activity that carries ecosystem risk until that risk is proven through damage.[136] Only then, *after* the damage is done, does the government address the problem, if at all. By then, we have passed the stage at which we might look at risk and avoid it. Our government does not know how to practice common risk-avoidance. We must not confuse damage assessment for risk avoidance.

Rather than pouring all of the agency's money into an impossible line-drawing exercise, we should prevent toxic pollution in the first place. For, years scientists and policy thinkers have urged the precautionary principle.[137] Good people at EPA, you do not have to wait for a new statute. Caution is an inherent part of the fiduciary duty to

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[135] Chlorofluoro-carbons.

[136] *See* Wagner, *supra* note 120, at 1683 – 1684 (explaining EPA's "science-bias," as a "practice of waiting for 'good (generally equivalent to complete) science' before undertaking regulatory action on a particular substance, even though toxic substances that are less studied may be considered by scientists to present a greater threat to human health and the environment.").

[137] For discussion of the precautionary principle, see Robert V. Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21 (Winter 2005-2006). The 1992 Rio Declaration also calls for the precautionary approach. Rio Declaration, June 3-14, 1992, *Report of the United Nations Conference on Environment and Development*, princ. 15, U.N. Doc A/CONF.151/26 (Aug. 12, 1992), *available at* http://www.un.org/cyberschoolbus/peace/earthsummit.htm.

preserve the corpus of the trust, and you can incorporate it immediately at every level of decision-making. Simply start shifting the burden of proof in favor of nature. Rather than line-drawing, reach towards absolute protection of the trust as Congress directed in the Clean Water Act.

The value of a precautionary approach extends to all resources. Forty years ago, scientists began sounding a danger signal about global warming.[138] But it would take decades to prove such a complex dynamic. We have a president who will not address this planetary crisis. The precautionary approach is the *only* way to neutralize public leaders who act at great peril to humanity.

CONCLUSION

We have arrived at that unthinkable moment in time, where entire food groups are contaminated, water carries poisons, and global climate disaster threatens to destroy nearly all of Nature's Trust. The consequences to society from actions taken by *this* generation of people are profound. Somehow fate has delivered all of us—all of us in this room—into this position at this pivotal moment. We did not live 100 years ago, when it was too early to even imagine the destruction around us, and we will not be here 100 years from now when it will be too late to save what we have today.

EPA officials, you are literally and quite personally, the guardians of this trust. We cannot look elsewhere. Citizens across this land feel the impoverishment of nature, but their destiny rests with you. If we act boldly now, the restored natural wealth will create momentum for more wealth. But only if we claim this moment.

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[138] *See e.g.*, GORE, supra note 116, at 38 (discussing research of Roger Revelle).

We need all of the will and wisdom we can muster to rise to this moment. This will and wisdom will not come from the culture that brought us this crisis. It can only come, and it will come, from the native people sitting here in this room who have carried out their trustee duties for thousands of years upon this continent, who speak always of their obligations towards nature and distant generations.

Tribal leaders here today, I urge you to reach out to your partners in state and federal government. The words you speak today echo back through millennia, but they have perhaps never been spoken at a more crucial time. You hold the *will* that is indispensable to protecting Nature's Trust. This will must now combine with the power wielded by the federal and state trustees.

My colleague, Rennard Strickland, once wrote, "If there is to be a post-Columbian future – a future for any of us – it will be an Indian future . . . a world in which this time, . . . the superior world view . . . might even hope to compete with, if not triumph over, technology."[139] EPA officials and tribal leaders in this room, may you begin braiding EPA's heroic mission together, as partners in trust.

[139]RENNARD STRICKLAND, TONTO'S REVENGE, Afterward (University of New Mexico Press 1997).