

*Nature's Trust:
A Legal, Political and Moral Frame for Global Warming*

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I.

I feel the same urgency that many of you must feel knowing we have so little time to reverse greenhouse gas emissions. Jim Hansen, head climate scientist for NASA, gave a quote that haunts me daily: “[W]e have at most ten years – not ten years to decide upon action, but ten years to alter fundamentally the trajectory of global greenhouse emissions.”² If we pour resources into the wrong strategy, we won’t have time to go back and chart another course before a tipping point has come and gone.

This problem, encompassing as it is, can be confronted by setting a very clear national goal. We should think of that goal as Nature’s Mandate. Scientists have defined that mandate for us. European countries are passing legislation to accomplish a 70% reduction of greenhouse gas emissions by 2050. We must do at least that much in America.

Much of the momentum following AN INCONVENIENT TRUTH is about reducing our own individual carbon footprint. While these voluntary efforts are vitally important,

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² Jim Hansen, *The Threat to the Planet*, THE NEW YORK TIMES REVIEW 12 (July 13, 2006).

they also conceal a state of national chaos. There is no reason to believe that our voluntary efforts will have us comply with Nature's Mandate in the very short time we have left.

We need our government to take leadership to ensure the Mandate is met. As British Prime Minister Tony Blair recently said: "There is nothing more serious, more urgent, more demanding of leadership. . . in the global community."³ Yet our government still has not acted. So I urge people, as they are *reducing* their carbon footprint, to *expand* their political imprint and demand governmental action before it is too late.

This morning I will suggest why our system of law, as currently framed by government, will not respond to the climate crisis. And then I will propose how the American public can reframe our environmental law to demand the regulation necessary to meet Nature's Mandate.

II.

To begin with, government is the huge engine that propels our society. We have thousands of agencies -- indeed more than any other nation in the world. They exist at the federal, state, and local levels. Collectively, these agencies hold immense expertise, authority, and staffing to solve environmental problems. If every one of these agencies made global warming a top priority, we might stand a chance of meeting Nature's Mandate head on. But instead, this massive engine of government is driving our society towards runaway greenhouse gas emissions. For example, here in Idaho, county commissioners are approving trophy home subdivisions as if global warming didn't exist.

³ Simon Hooper, *Report Sets Climate Change Challenge*, CCC.COM (Oct. 30, 2006).

The Idaho Dept. of Environmental Quality is approving air permits for asphalt plants as if global warming didn't exist. The U.S. Forest Service is delivering timber sales, as if global warming didn't exist. Magnify this by the hundreds on a daily basis across the country. And consider this: the electric power industry is racing to build more than 150 new coal fired power plants across the United States. The industry investment in these plants reflects an assumption that our U.S. Environmental Protection Agency (EPA) will grant permits under environmental statutes allowing them spew forth "hundreds of millions of tons of carbon dioxide into the atmosphere each year for decades to come"⁴— as if global warming didn't exist. You see, nearly every agency in America is acting as if global warming did not exist.

III.

For the past three decades we have looked to environmental law to address environmental problems. Environmental law consists of hundreds of statutes and regulations passed since the 1970s to protect our natural resources. Statutes give tremendous authority to officials at all levels of government to control just about any environmental harm you can think of.

But before we turn to our environmental law to address global warming, we need to face one fact. Had environmental law worked, we would not have an ecological crisis on our hands. Environmental law delivered global warming and resource scarcity to our doorstep. Environmental law is crippled by enormous dysfunction, and if we fail to acknowledge this dysfunction, we'll be looking for a solution in the same system that brought us this crisis.

⁴ See Jeff Goodell, *Big Coal's Dirty Move*, ROLLING STONE (Jan. 25, 2007).

The heart of the problem is this: while the purpose of every local, state and federal environmental law is to protect natural resources, nearly every law has also provided authority to the agencies to permit, in their *discretion*, the very pollution or land damage that the statutes were designed to prevent. Of course, the permit systems were never intended to subvert the goals of environmental statutes. But most agencies today spend nearly all of their resources to *permit*, rather than prohibit, environmental destruction. Essentially, our agencies have taken the discretion in the law and have used it to destroy Nature, including its atmosphere.

Why would public servants who draw their salaries from the taxpayers do such a thing? It is because the call of private property rights is sounded in the halls of nearly every agency, nearly every day. Asphalt plant operators and chemical manufacturers, land developers and timber companies, auto makers and coal-fired plant investors, industrialists and individuals of all sorts scream out to these agencies not to draw that regulatory line on their activity – because doing so would hurt their economic goals. This private property rights movement has cowered officials at every level of government. Officials dread saying no to permits.

Moreover, agencies have created so much complexity in their regulations, with meaningless acronyms and technojargon, that citizens are not speaking in the clear and forceful terms they need to in order to pose a counterweight to private property rights in this vast realm of agency discretion. Our environmental law has created a thick veil of complexity behind which agencies serve private interests at the expense of the public. And our third branch of government -- the judiciary – has been been indifferent towards the politicization of agencies. Court often defer to agency decisions on the false premise

that agencies are neutral. A compromised judicial check skews the Constitutional balance of power over the environment. Without that third branch of government fulfilling its function, our democracy becomes an administrative tyranny over Nature, with dangerous results for our future.

IV.

You may be wondering, how could this subversion of environmental law happen? I think the explanation lies in how government and industry has framed those laws. You can think of our environmental law, with all of its complicated statutes and regulations, as one big picture. The private property rights movement and agencies themselves have constructed a frame for that picture. The four sides of that frame are: discretion, discretion, discretion, and discretion -- to allow damage to our natural resources. And so, though our statutes have aspirational goals of protecting our environment, when they are carried out through the discretion frame, these laws are used as tools to legalize damage to our resources. That is why we have species extinctions, air pollution, rivers running dry, dead zones in our oceans, toxic fish advisories -- and global warming. Too much agency discretion can be a very dangerous thing.

Consider how our federal government is using this discretion frame to justify inaction in the face of climate crisis. The EPA is the only federal agency charged by Congress to control air pollution. Even though the Clean Air Act clearly provides EPA the authority to regulate carbon dioxide,⁵ EPA refuses to regulate.⁶ Viewed through the

⁵ For example, the Clean Air Act states, in section 202(a)(1): “The [EPA] shall prescribe standards [for] any air pollutant from . . . new motor vehicles . . . which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 33 U.S.C. 7521(a)(1).

⁶ See *Massachusetts v. U.S. Environmental Protection Agency*, 415 F.3d 50 (2005) (reviewing EPA’s denial of petition to regulate greenhouse gasses from new automobiles). Twelve states have taken the EPA to court over its recalcitrance, arguing that EPA should regulate carbon dioxide emissions from new cars

frame that EPA has put to the American public, the air is simply an object of regulation, a nebulous commons, and EPA can use its discretion to permit pollution by the oil, gas, coal, and automobile industries -- no matter that this legalized pollution will degrade the atmosphere so much that it will no longer support human civilization as we know it. Because the discretion frame never characterizes natural resources as quantified property assets, it allows government to damage the resources until they are all gone.

IV.

So how do we turn these agencies around and convince agency officials to use all of their authority to meet Nature's Mandate? Or, put another way, convince officials to do what they currently consider to be political suicide? The public has to find a new frame for our existing statutes. Reframing environmental law does not mean throwing out our environmental statutes. Again, those statutes give us a tremendous bureaucracy that we can steer back on course. Reframing means taking control of the language we use to hold government accountable under those statutes.

As author George Lakoff says: "Reframing is changing the way the public sees the world. It is changing what counts as common sense."⁷ Social frames can be destructive and oppressive, or they can embolden and inspire.

When Dr. Martin Luther King Jr. urged Americans to take down another destructive frame in our history, he called out for all citizens to recognize the "fierce

under the Clean Air Act. These states lost in the D.C. Circuit court, which said that EPA has the *discretion* to decide not to use authority under the Clean Air Act to regulate greenhouse gasses. *Id.* at 58 (opinion by Judge Randolph, noting that EPA does not have to base its decision on solely scientific evidence, but may make "policy judgments."). The case is now on appeal before the United States Supreme Court.

⁷ GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE (Chelsea Green Publishing 2004).

urgency of now.”⁸ People, unbelievable as it may seem, the future of humanity rests on our generation being able to reframe government’s obligation towards Nature.

V.

We can reframe environmental law by looking to timeless principles that reach far back on this and other continents. Indeed, such principles have grounded Supreme Court jurisprudence since the beginning of this country. But our agencies have lost sight of them in the last 30 years. In just that short period, these principles have been pushed under by thousands of pages of complex statutes and regulations that have proliferated across the legal landscape like an invasive species.

I propose reframing our environmental law with what I call Nature’s Trust.⁹ A trust is an ancient legal concept that emerges from property law, not statutory law. It is a fundamental type of ownership whereby one manages property for the benefit of another.

Long ago, the Supreme Court said that government, as the only enduring institution with control over human actions, is a trustee of Nature’s resources. What does this mean? You can imagine all of the resources essential to our human welfare and survival – including the waters, wildlife, and air -- as being packaged together in a legal endowment which I call Nature’s Trust. Government holds this great natural trust for all generations of citizens -- past, present, and future. All of us here in this room are beneficiaries of this trust. Our great-grandparents were beneficiaries. Our great-grandchildren are beneficiaries, even though they are not yet born. We all hold a

⁸ Dr. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963): “We have . . . come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism.

⁹ See Mary Christina Wood, *Nature’s Trust: Reclaiming an Environmental Discourse*, 25 VIRGINIA ENVIRONMENTAL LAW JOURNAL (forthcoming January 2007).

common property interest in Nature's Trust. You could think of this as Nature's treasure to be passed down through all generations of humankind.

With every trust there is a core duty of protection. The trustee must defend the trust against injury. Where it has been damaged, the trustee must restore the property in the trust. Protecting our natural trust is more consequential than anything else government does. More consequential than jobs, health care, social security, education, or even defense, for this duty carries the weight not only of the present generation of citizens, but of all citizens to come.

So it's not surprising that Nature's Trust principles were penned by judges long ago as the first environmental law of this nation.¹⁰ This ancient strand of law threads together all of our modern environmental statutes. 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."¹¹ When we invoke the trust to call upon government to protect our natural resources, we are not creating anything new.

The sovereign trust over natural resources is so basic to governance that it is found in many other countries. For example, 13 years ago, the Philippines Supreme

¹⁰See *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 393 (1892); *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."). The body of law known as the "public trust doctrine" is analyzed in JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD, & DAN H. COLE, *NATURAL RESOURCES LAW*, Ch. 8.II (West Publishing, 2006).

¹¹ National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4331(b)(1). Federal pollution laws also designate sovereigns (federal, tribal and state governments) as trustees of natural resources for purposes of collecting natural resource damages.

Court invoked the trust to halt rainforest logging.¹² The Philippines government contended that it had complete discretion – remember discretion? -- to allow private companies to cut the last 2.8 percent of remaining forest. You see, every government that is captured by special interests invokes the discretion frame, because it conveniently and invisibly delivers the natural wealth of the nation to those interests. The Philippines Supreme Court enforced the peoples’ trust and halted logging, saying, “Every generation has a responsibility to the next to preserve that . . . harmony [of Nature] *** The right to a balanced ecology . . . concerns nothing less than self-preservation and self-perpetuation . . . -- the advancement of which may even be said to predate all governments and constitutions. . . . [T]hey are assumed to exist from the inception of humankind.” In other words, the trust frame forces government to hand down the endowment to future generations and not give it away to private interests that happen to be knocking loudly at government’s door this generation.

These trust principles are engrained in government itself. Back in 1892, our 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. . . .”¹³ People, the national chaos over global warming today is a direct result of our government abdicating its trust over our atmosphere.

VI.

¹² Juan Antonio Oposa et. al. v. The Honorable Fulgencio S. Factoran, Jr., G.R., No. 101083 (S. C. Philippines, July 30, 1993). This opinion is excerpted in LAITOS, ZELLMER, WOOD & COLE, *supra* note 10, at 441-44.

¹³ Illinois Central Railroad v. Illinois, 146 U.S. 387, 393 (1892). And it said this: “Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved on it.” *Id.* at 460.

Let's take a look at how the two frames I've described differ and their implications for humanity. In contrast to the discretion frame, the four sides of the trust frame are: obligation, obligation, obligation, obligation. We can take the very same set of environmental laws, and without changing a word of them, reframe our government's role towards Nature on a policy, legal, and moral level. By reframing, we can turn government's *discretion* to destroy Nature into an *obligation* to protect Nature. 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 that discretion frame, government will continue to impoverish natural resources until our society can no longer sustain itself.

So how do citizens reframe their government's role towards Nature at this pivotal time? They must expand their political imprint and use new words. They must speak in clear terms to their public officials at all levels of government.

Let me show you how, just last week, citizens up in McCall, Idaho took down the discretion frame and put up the trust frame to protect their airshed. A few months ago, the Idaho Department of Environmental Quality – your very own DEQ -- proposed to issue an air permit for an asphalt plant that spews so much pollution into neighborhoods that mothers pull their kids inside day after day. This permit, delivered by the hand of environmental law, would legalize the emission of 54 toxins right into the mountain air – toxins like lead, mercury, Chromium 6, dioxin, arsenic, formaldehyde, and more. Now, if you read the DEQ analysis of this proposed permit, you would be hard-pressed to find any sort of statement that this pollution would damage the airshed or the people living there. Instead, the analysis is filled with charts and incomprehensible technical statements. The reader is hit in the face with AACs, AACCs, TAP analysis, T-RACT,

HAPs, NESHAPs, SIP, MACT and more. Do any of you know what those terms mean? Amidst this gibberish, there is no core value driving governmental action.

There was a hearing last week on this asphalt plant permit. Normally such hearings are filled with empty seats, and no wonder. But someone up there in McCall handed out flyers that said, quite simply, “Air for Sale,” and the hearing room was packed with angry citizens. When you translate the technojargon into “Air for Sale,” you are replace the discretion frame with the trust frame. Citizens suddenly feel that their property is being trampled by their own government. They 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 frame makes a difference. It expresses our core expectations of government towards Nature.

VII.

In the time remaining, I would like to suggest how this trust frame helps in getting the American mind around the issue of global warming and thus how it becomes a coalescing force to confront climate crisis.

A.

The first point has to do with Americans’ feeling of entitlement towards Nature. The discretion frame, with all of its technojargon, gives no hint of environmental loss. The ARARs, and TMDLs and TSDs, and SIPs and HMPs, and RPAs and PRPs, and the hundreds of other acronyms that our agencies use to hospice a dying planet really don’t sound out any alarms to the public. These are neutral terms *because* they are incomprehensible. The public, then, is simply led to accept our degraded environment as a nebulous state of affairs. We never imagine that resources could be all spent down, all

used up, no longer there for us at some point in time. We seem unbothered even when our government leads us into global environmental catastrophe.

Yet when we portray Nature as a trust rather than an ill-defined commons, we vest citizens with expectations of enduring property rights to a defined, bounded asset. Any loss of the trust becomes manifest. This frame resonates with and motivates the public because it taps into concepts that are familiar and important to Americans. Most people have heard of a trust. Kids know about college accounts. Adults know about retirement accounts. Americans are ferociously protective of their property rights. Once they understand they have a property right in something, they are inclined to protect it.

The trust frame has particular empowerment for youth, because it recognizes a property right to natural inheritance for the children of the world. It gives children an entitlement, as beneficiaries with no lesser standing than our own, to natural wealth, even though they are not yet old enough to exercise any voting power over their government. Children get angry when they think of our generation spending down a trust that they are entitled to take in the same abundance we have enjoyed.

B.

Second, when we invoke the trust frame to explain global warming, we may be better able to overcome denial. The cruel irony is that the most disastrous manifestations of global warming may not occur until after our window of opportunity to avert the crisis has closed. A daunting obstacle we must confront is that most citizens do not perceive global warming as an immediate threat. For many Americans, the predictions are so extreme – like an ice age – that they must seem like a science fiction movie. Indeed, the more dire the environmental issue, the less likely it seems to be taken seriously in the

United States of America. Many simply mock the messenger for spreading gloom. Global warming science is passed off as another doomsday scenario, and for some Americans that is all they need to hear in order to not take it seriously.

Without a sense of immediate loss, the public will not feel the urgency to demand government to take leadership in the short time frame we have left. Harvard professor Daniel Gilbert suggests that humans are hard-wired by evolution to ignore threats like global warming. Humans evolved to respond to immediate threats, like enemies coming over the hillside.

The discretion frame put forth by our government capitalizes on this mental weakness and lures people into complacency. People operating within this frame think of air as “out there somewhere,” way beyond that hillside. But people’s perceptions change remarkably when they think of their trust being mismanaged. That is an immediate concern, even if the full effects won’t be felt for years to come. Beneficiaries don’t often sit idle when their trustee drains their trust. They hold their trustee accountable for the losses. And they worry about collapse scenarios. They understand stocks crashing. They understand a freewheeling grandfather spending down all of their rightful inheritance.

Recall that Philippines case I mentioned earlier. The Supreme Court brought forth the reality of a depleted natural trust by speaking in familiar terms of inheritance. It said simply, “The day would not be too far when all else would be lost [for] generations which stand to inherit nothing but parched earth incapable of sustaining life.”¹⁴ No

¹⁴ LAITOS, ZELLMER, WOOD & COLE, *supra* note 10, at 444.

doomsday language there. This is about inter-generational theft. We all know what theft is.

C.

Third, by defining Nature in familiar property terms, the trust frame reconciles private property rights with environmental protection. The discretion frame doesn't do this. It portrays environmental resources as nebulous features of the world we live in. Private property rights carry the day in our agencies simply because they draw upon a language of property that is so deeply embedded in our national culture. To confront any environmental crisis today, including global warming, we have to be clear on how public resources and private property rights fit together in the scheme of things.

The trust frame is itself a property concept, so rather than pitting environment against property rights, you are fitting Nature into the system of property rights. The Nature's Trust frame is not anti-property rights. To the contrary, it affirms our collective property rights in assets that support humanity.

Every Supreme Court case invoking the trust makes clear that government cannot allow private property rights to damage crucial public resources. Long ago, when private enterprise threatened the shoreline of Lake Michigan, the U.S. Supreme Court said, "It would not be listened to that the control and management of [Lake Michigan] -- a subject of concern to the whole people of the state -- should . . . be placed elsewhere than in the state itself."¹⁵ Can't you practically hear those same Justices saying today, "It would not be listened to" that government would let our atmosphere be dangerously warmed in the name of individual private property rights.

¹⁵ See *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892).

Let us not for a moment think that, just because private interests will have to be regulated and certain industries phased out entirely, the trust frame is anti-private property. In securing our public property, the trust also anchors our entire system of private property rights. All private property depends on Nature's infrastructure. When that infrastructure collapses, it causes natural disasters that make property boundaries irrelevant. Remember, private property deeds didn't account for anything in the aftermath of Hurricane Katrina. And they won't account for anything along coastlines submerged by rising sea levels.

D.

Finally, the trust frame has global reach. This is important, because global warming is, after all, a global problem. When we portray it to the American public we must be able to explain the role of foreign nations. Many people have heard about the Kyoto Protocol. They know that China is bringing massive numbers of coal-fired plants on line. When Americans are asked to make changes in their own lives, they often reply that it won't make a difference because global warming is an international issue.

The trust framework positions all nations of the world in a logical relationship towards Nature. Transboundary assets like the atmosphere are shared as property among sovereign nations of the world. These nations are co-tenant trustees of the asset. In other words, they are all trustees, but they share the resource as co-tenants. Not unlike family members might share ownership of a mountain cabin as co-tenants. Property law offers timeless principles to deal with common ownership. It has always imposed a responsibility on co-tenants to not degrade the common asset. This one concept lends

definition to international responsibilities, whether we are talking about a shared fishery, or an ocean, or the globe's atmosphere.

Moreover, by embracing principles that are native to many other countries, the trust frame can be invoked by these citizens who are calling their own governments to action. At a time when the world is so politically fractured, the trust frame offers hope that citizens across the entire planet can view Earth's resources in the same light and defend those resources in their many different languages, but with one voice.

VIII.

Let me conclude. In AN INCONVENIENT TRUTH, Al Gore presents climate crisis as a “moral and spiritual challenge” for our generation.¹⁶ The trust frame I speak of is the obligation that springs from the heart of all humanity, pressed into the institution of government. The same trust principles that flow through a judges' pen can be preached from a pulpit or spoken as the last words from a grandmother to her grandchildren anywhere in the world – because the trust encompasses a moral obligation that transcends all governments, cultures, and peoples on Earth. And that obligation is not just an attribute of this frame - it has been its enduring power through all of Time, and it will be its enduring hope for all Time to come.

¹⁶ AL GORE, AN INCONVENIENT TRUTH (Introduction)(2006).