

Staking a Claim in Nature's Trust

Mary Christina Wood¹

Central Oregon Landwatch
June 16, 2007
Bend, Oregon

*Dedicated to the memory of William H. Boyer, a champion of Nature
who epitomized the intergenerational spirit of humanity.*

I.

It is a such an honor to give a talk on this occasion and I thank Central Oregon Landwatch for sponsoring it, and for their work in this area. I am a fourth-generation Oregonian, and I've been privileged to spend part of every summer of my life on the banks of the Metolius River at our Wood family camp below Wizard Falls. I have found that, no matter where I am, the waters of the Metolius flow through my work and inspire me always to take a distant look, back into the past and far into the future.

As Paul has said, we are gathered here tonight to honor Bill Boyer with the dedication of the William H. Boyer Policy Center of Central Oregon LandWatch. In his decades of work to protect Central Oregon, Bill emphasized the need to take the long view in land use planning, to consider the carrying capacity of our natural resources of the area, and to apply the precautionary principle to our assumptions regarding the environment. Bill Boyer epitomized the inter-generational spirit of humanity, which may

¹ Mary Christina Wood, Philip H. Knight Professor of Law and Morse Center for Law and Politics Resident Scholar 2006-07. This address will be posted at <http://www.law.uoregon.edu/faculty/mwood/>. The concepts in this keynote address are further considered in a footnoted essay, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 Virginia L. J. 431 (2007), available on Professor Wood's website.

be the most powerful and hopeful aspect of our lives. I dedicate my remarks this evening to his memory.

Much of my talk is about how we can re-conceive of our government's role towards Nature. When people think about environmental concerns these days, they often focus on how they can reduce their own footprint on Nature. That, of course, is very important. We can all do so much, like recycle, use less energy, drive less, and so forth. But at the same time we citizens are making great efforts to reduce our individual footprints, our government is doling out permits on a daily basis to pollute and deplete our resources.

So if citizens want to shape their future, they must not only reduce their own footprint, but they must expand their political imprint to steer their government in a different direction. Tonight I will explain why government is not working to protect our resources, and then suggest how we can all reframe our government's role to engage our agencies in protecting Nature. When I use the term "reframe" I don't mean throw out our environmental statutes. I mean, rather, taking control of the language we use to hold government accountable. For too long, special interests have controlled the framework and the language. This has led to devastating natural losses that affect each and every one of us.

Before delving into this broad discussion of environmental law, I wanted to make three observations about the Central Oregon community.

First, I think there is a unique intelligence here among the core, rooted, local citizens. By intelligence I don't mean I.Q. I mean how you decide what to do every day, where you spend your energy, how you spend your money, how you plan your future –

essentially your mental paradigm. Your intelligence, I think, is shaped by your close proximity to the backcountry.

Imagine you are on a backpack trip in the Three Sisters wilderness. You wake up out there one morning miles away by trail from civilization. I will bet that anyone of you who has engaged in backcountry experience would say that your daily energy out there focuses on the four elements of survival: food, water, shelter, and health. There's nothing more basic than that. And if you fail at one for too long, you will die. Every backcountry person respects Nature's Law. When your mental approach to life focuses on these four things, I would say you have environmental intelligence. What I have observed about a core group of Central Oregon people – and that certainly does not include everyone – is that there is a shared environmental intelligence. Many or most of you really understand how dependant human survival is on Nature. Oddly enough, you share this outlook with the homeless people of all major urban areas. You share it with many Indians across the United States. You share it with ranchers and farmers. You share it with the survivors of Hurricane Katrina – who are some of the first victims of present day global heating. The writings of Bill Boyer presented survival as a true compass for human thinking.

Let me move to the other extreme to provide a contrast. There are many people who seem to have nearly no environmental intelligence, and again, I don't mean I.Q. Many of these people have never faced survival situations, and they are so disconnected from Nature that they really don't seem to realize that our future is dependant on natural infrastructure. Many have been insulated by our economic system and their own wealth. They have no clue where drinking water comes from. They only know water from a

plastic bottle. These people also exist in Central Oregon. The classic example is the family that hauls a freightliner RV into the Forest Service campgrounds -- complete with satellite dishes and 8 ATVs hanging off the end. If you talk to these people and get to know them, you see that the vectors of their minds are much different from the people I just described with environmental intelligence. Their four vectors are: luxury, convenience, leisure, and status. Most of their time, money, and planning energy goes into sustaining those four things. In short, survival is just not part of their outlook. They are not bad people. But they have little sense of the importance of natural infrastructure because the market economy has always provided for their four needs.

Now obviously, most of us are to some extent a composite of both types. But overall, I think it's safe to say that the core community still present in Central Oregon has a sense that Nature is important for survival -- that it's not just a playground. And that sense will motivate these local people to engage the political system to secure their environmental future, even on problems so encompassing as global warming.

The second observation I've made is that this community is at an ecological turning point. A land rush grips Oregon's scenic heartland. Deschutes County is not only the fastest growing county in the State but one of the fastest growing counties in the nation. In 2000, it had about 116,000 people. That is expected to nearly double by 2020. The City of Bend recently had the distinction of issuing more building permits in a year than the City of San Diego. Giant destination resorts -- city-scale developments larger than the City of Sisters -- are proposed for Central Oregon. A 7,000-acre development in the Skyline Forest northwest of Bend would have twice the acreage of Sunriver. Two destination resorts proposed for the Metolius Basin would bring

thousands of homes and lodging units and a city-sized population to a river that has flowed in quietude for eons.

We stand at a moment in time where Nature's Endowment is at the verge of being liquidated, cashed in, for all time to come. We should not fool ourselves by thinking life will be the same around here. You need only look at other towns in the West with a similar population explosion to see that the future brings air pollution, water pollution, subdivision sprawl, traffic, toxic waste disposal, water depletion, species extinctions, and frankly, lots of people with very little environmental intelligence. For Central Oregon citizens, you will essentially be moving to a different place – and yet you'll make this move without ever leaving your home. That is, unless you steer government in a direction that rebuilds, rather than bankrupts, your natural wealth. Decisions made by governmental officials today will determine what you will enjoy, or what you will miss, about this area, years from now. You face an environmental turning point.

The third characteristic of this community, however, is that it seems to be taking the reins to steer its own future. So often, communities are blindsided by a barrage of development proposals. But in this area there are a mass of citizens trying to secure their own environmental future here.

So you have, on one hand, a land rush – the same kind of rush that is gripping the entire West -- and on the other hand many citizens here with environmental intelligence and motivation to determine their own future. But how do citizens accomplish this? Well, they have no choice but to engage their government, because agencies hold the power to permit immense destruction of natural resources. These agencies exist at three different levels of government – local, state, and federal. They include the City Councils,

the County Commissions, the planning departments and planning commissions for the cities and counties, the State Dept. of Environmental Quality, the Oregon Water Resources Dept., the Forest Service, the BLM, and more. That's a mouthful, but it's necessary for us to take a bite into this bureaucracy because each one of those agencies has people sitting behind desks holding your ecological future in their hands.

It's not my intention to talk about local issues tonight, but rather to give people here a really broad perspective on environmental law, because environmental law provides the interface between all of these agencies and the public. Citizens often feel bullied by their own governmental agencies and feel that their government is not working for them, the public. They find that they are spending all of their free time writing letters, showing up at hearings, testifying, calling agencies, reviewing documents – it's like a second career! -- all because their government is not protecting the resources so basic to our lives. So tonight I will talk about these general dynamics of environmental law with the hope that you may be able to take some broad points and apply them locally.

Let me begin by taking stock of our environmental loss. As Harvard biologist E.O. Wilson documents, we are rapidly losing life on this planet. In this country alone, the Council of Environmental Quality estimates that 9,000 species are imperiled. Toxic fish advisories are in effect for 25% of all rivers, 35% of all lakes, 71% of all estuaries in this country, and 100% of the Great Lakes. That means you can still fish, but you can't eat the fish you catch because they are contaminated with toxins. And according to your Environmental Protection Agency, 95% of all Americans now have an increased risk of lung cancer just from breathing outdoor air.

On the global level, the World Conservation Union reports that Earth’s natural ecosystems have declined by 33% over the last 30 years. There are now 200 “dead zones” in the world’s oceans, covering tens of thousands of square miles. Nearly one-third of the sea fisheries have collapsed, and that rate of decline means complete loss of wild seafood just four decades from now. If this collapse isn’t arrested, a child born here today will not see crabs, canned tuna, shrimp, or any seafood at the market when he or she is 40 years old.

Global warming is a threat that eclipses all others. Carbon dioxide, the main contributor to global warming, has reached a level in the atmosphere higher than at any time in the last 650,000 years. The Polar ice cap and glaciers throughout the world are melting. Glacier National Park in Montana is projected to have no more glaciers in 15-20 years.² Even Greenland is melting.³ I’ve left a short article in the back of the church that I urge you to read. It is written by Jim Hansen, leading climate scientist for NASA, and he clearly explains the consequence of melting the great ice masses of the world. If society does not cap and reverse its greenhouse gas emissions, there will be an significant sea level rise that will inundate major U.S. cities along coastlines –including Boston, New York, and practically all of Florida. Temperature increases worldwide would send more than a third of the planet’s species to extinction within the next 44 years. This is the scale of mass extinction that hasn’t been seen on Earth for 55 million years. If you are one of those people in this room with environmental intelligence, you can’t fail to see the consequence of mass extinction to the web of human survival.

² *Id.* at 47.

³ *Id.* at 195.

Last fall, British Prime Minister Tony Blair went on the media around the world to say: “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.”

And yet it is as if the majority of Americans, including perhaps most people in Central Oregon, are treating these circumstances as if they *are* merely a science fiction movie. We see motorized recreation everywhere, massive waste, and Jefferson County commissioners zoning for giant destination resorts in the Metolius Basin as if we had no global warming. Ross Gelbspan, author of *Boiling Point*, a leading book on global warming, says: “It is an excruciating experience to watch the planet fall apart piece by piece in the face of persistent and pathological denial.”

II.

Obviously, government has a role in this environmental collapse. The most fundamental duty of government is to provide for the health and welfare of the citizens. That duty has encompassed, since ancient times, the protection of natural resources. Government’s most important job is to keep us in compliance with Nature’s Law.

So, the next question is, where is government these days? Well, your government is hard at work. In the 1970s, Congress passed a set of statutes that boldly addressed environmental damage. As a result, we have more environmental law than any other country in the world. And, we have more environmental officials than any other nation on Earth. Billions of dollars of our taxpayer money funds their work.

So why, then, is our environment spiraling towards disaster? The problem is not that these officials lack authority. These statutes give tremendous authority to federal, state, and local officials to control just about any environmental harm you can think of. The problem is that, along with this authority, these laws also give discretion to the agencies to permit the same damage that the statutes were designed to prevent. Of course, the permit systems were never intended to subvert the goals of environmental statutes. They were never intended to be the end-all of regulation. But most agencies today spend nearly all of their resources to permit, rather than prohibit, environmental destruction. I understand that one of Bill Boyer's favorite refrains was that the planning agencies here are merely accommodating growth, not actually planning it. Whether you are talking about the EPA, or the U.S. Fish and Wildlife Service or a state water agency or a city planning agency, or just about any other, these agencies simply are not saying no. Most agencies deny only 1% of the permit applications they receive. The overarching mindset of nearly all agencies is that permits are there to be granted.

Let's look at the Clean Water Act as an example. When Congress passed the act in 1972, it said clearly: "It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Congress allowed five-year permits so that businesses could use the transition time to put in new technology to eliminate their discharges. But EPA and the state agencies grabbed hold of this permit system and started issuing permit after permit, and soon it became the agencies' way of doing business. We are now 22 years beyond the date Congress set for no more pollution in our rivers, and yet pollution is now worse than ever. Toxic chemicals never heard of back in the 1970s discharge to the waters, bioaccumulate in the entire food chain, and end

up in our bodies. We have so much pollution that EPA's 2000 Strategic Plan warns: "[P]olluted water and degraded aquatic ecosystems threaten the viability of all living things"

Environmental law was not supposed to work this way. The entire premise of administrative law is that agencies are neutral and will use their discretion to serve the public interest. In reality, though, the discretion built into the law works as a political club. Public servants in these agencies are stormed by developers, vetoed by their supervisors, taken to the mat by Senators and often risk losing their jobs if they say no. Drawing the line against environmental harm is often career suicide.

The framework agencies have constructed offers no value system to serve as a counterweight to this political pressure. While Congress wanted us to have clean air, pure water, and recovered species, the agencies have substituted an entirely new focus: how much pollution and resource scarcity can we impose on society. It is rather like starting with a just-say-no approach to drugs and then asking how many drugs we should give the addict. The addict will never want us to draw the line. That is precisely why we are reaching an endpoint with so many resources. Agencies keep doling out those permits until they have the sense that the next one would break the camel's back. But you can see the problem with that approach: you are left with a very diminished camel. So it is with all of Nature. That is why we have deforestation, species extinctions, rivers running dry, dead zones in our oceans, an atmosphere dangerously heating up – and why the most prominent conservation biologist in the world has written a book subtitled: "An Appeal to Save Life on Earth."

The situation with toxic pollution is now so extreme that we are seeing soaring cancer rates in our communities. Among children aged 1-14, cancer now causes more death in the United States than any other disease and, overall, cancer in children has climbed 10% in the past decade alone. Yet these agencies continue to allow more and more toxic pollution into our airs and waters. You see, at the time the permits are granted, the victims don't have faces or names, so the agencies are telling us telling us it's o.k. to cause cancer to a modeled number of people. This sniper regulation sanctions calculated death.

And yet, when you talk to individuals working in agencies, you find that most are very good, well-intentioned, hardworking people. They are caught up in institutional dysfunction. But we can't just drop the problem because it is institutional. Institutions are made up of individuals, and no one is taking initiative within the agencies to make change. To borrow Bill Boyer's phrase, "Moral neutrality permits a person to be merely a technician." In our agencies today, we have too many technicians, and too few moral leaders.

Unfortunately, there are few citizens at the gates of environmental law clamoring for a new set of values. Quite the contrary. The population today is passive. Part of the reason for that is people have lost their environmental intelligence. Attention to survival is just not a priority in their lives. And, for those who think about survival, many take false comfort because we do have the most developed set of environmental laws in the world – they think the laws must be working.

Finally, for those who know it's not working, the complexity of environmental law has largely muted their voices. The agencies have created a monster from their statutory

authorities. Every regulation is so weighted down by acronyms and technojargon that we hardly know what they mean. We have ARARs and TMDLs and TSDs and SIPs and Biops and RPAs and PRPs and EFHs and ESUs and hundreds, yes hundreds, of other acronyms. We even have antonym acronyms. And if the public wants to advocate for pollution control, it should know the obvious differences between Best Control Technology, Best Available Technology, Best Available Control Technology, Best Available Control Measures, Best Available Demonstrated Technology, Best Available Retrofit Technology, Best Demonstrated Achievable Technology, Best Demonstrated Control Technology, and Best Demonstrated Technology, among others. Great. We can't expect people to fight pollution using this language. The agencies have so complexified⁴ their permit systems that the average American is left at the gates. Complexity operates as a wonderful shield from public scrutiny.

III.

Without an engaged public voicing core environmental values on a regular basis, a very different set of values steers the agencies' discretion. The call of private property rights is heard in the halls of almost every agency every day. Resort developers and timber companies, chemical manufacturers, auto manufacturers and computer chip makers, 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.

⁴ Yes, that's *our* new word.

And when this bureaucratic oppression continues long enough, it changes the mindset of the agencies. The people working within them get mind-numb and develop tunnel vision. The bureaucratic processes become the end-all of their work, and they fail to see the big picture. Then they start to doubt that they even have authority under the law to say no to a permit, and they create a new reality. The deeper they get into this morass of environmental law, the more they shed accountability to the public and to the core value of protecting resources. It is at that point that you hear people in the agencies saying, “It’s not my job,” or, “There’s nothing I can do.” And then it becomes, “I don’t have the authority,” even if the authority is plain and clear in the statute. And then it becomes, “I have the authority, but *politically* I can’t do it.” And when you start to hear this last statement – and we’ve heard it a lot lately -- you know the agency has collapsed from the inside out. Agencies are supposed to be neutral creatures that carry out statutes. So when they start prioritizing their political standing over long-term public welfare, that is a clear signal that the legal mechanism has shut down, and government is not serving its purpose. That is a dangerous situation for all of us.

These dynamics drive the most catastrophic danger we face -- global warming. Just two years ago, 48 Nobel-Prize winning scientists warned: “By ignoring scientific consensus on . . . global climate change, [our government is] threatening the Earth’s future.” The top NASA climate scientist, Jim Hanson, says: “We have reached a critical tipping point. . . . [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.”

Yet EPA has still not regulated greenhouse gas emissions. In fact, top government lawyers have squandered the last several years claiming that EPA -- the only federal

agency charged by Congress to control air pollution -- can sit back and do nothing about this monumental problem that threatens us all. Rather than using its authority to *avert* global warming, EPA is spending its time telling us all to get used to it. Last summer, EPA released this guide, the Excessive Heat Events Guidebook. Its cover has a picture of a small human hand held up in vain trying to block the beating sun. The first line of the guidebook says, "Excessive heat events . . . are and will continue to be a *fact of life* in the United States." For our convenience, EPA has given this new "fact of life" an acronym – EHE (Excessive Heat Event). And just a few lines later, the guidebook says, "EHE conditions can increase the incidence of mortality . . . in affected populations." Well, that's certainly true. In the summer of 2003, 35,000 Europeans died from a massive heat wave. But EPA won't regulate. Get used to your new facts of life, Americans. Unchecked, global warming will unravel our social and economic systems through food scarcity, droughts, decreased water supplies, flooding, frequent and intense natural disasters and massive environmental dislocation. No area, not even Central Oregon, can escape climate crisis if we don't act now.

IV.

So let's summarize all of this. You can think of environmental law, with all of its 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. As Bill Boyer noted, "The way in which one frames a problem limits the possibilities of its solution." This discretion frame straightjackets those good officials within our agencies. It leads them to continually serve short-term profit interests at the

expense of the general public. It is time to frankly admit that vesting so much discretion in the agencies was an experiment in administrative law that had 35 years to yield results, and we are now running out of time to reverse the damage. We must find ways and words to reclaim environmental law. We do not need yet another set of statutes. Agencies have plenty of authority. We just have to convince them to use it. To do that, we have to find a new frame for our existing statutes.

V.

We need not search far for it. There is a proven framework of thinking that is organic to our landscape here in the Northwest. This frame is reflected in the goals of every federal environmental statute. The Supreme Court expressed it in cases rendered over a century ago. It has guided societies of the world for millennia. But, it has been all but forgotten by our agencies.

I refer to this frame of environmental law as Nature's Trust. Let's close the statute books and imagine the resources important for present and future generations. They are the air, the waters, the streambeds, the wildlife, the fisheries, and other resources. Nature's Trust characterizes these natural assets as being in a trust managed by government for future generations. A trust is an ancient concept of property law whereby one manages property for the benefit of another. There are always three parts to any trust: there is the trustee, the beneficiary, and the corpus.

You can make an analogy to college accounts. The trustee is the person who manages the college account. The college student is the beneficiary. The money in the college account is the corpus of the trust. The money belongs to the student, but he or she doesn't manage that money. I've asked high-school students how they would feel if

they had a college account worth \$100,000 and their trustee mismanaged that account and spent it down, so they'd have practically nothing left when the time came for them to come to college. They didn't like that idea. Not at all.

Our government, as the only enduring institution with control over human actions, is a trustee of our natural resources – it holds them for us. The beneficiaries of this trust are all generations of citizens -- past, present, and future. All of us in this church are beneficiaries. Our grandchildren, even those unborn, are beneficiaries. Our grandparents were beneficiaries. With every trust, whether it's a college account or a natural trust, there is a core duty of protection. This means the trustee must take action to defend the corpus against injury, and where it has been damaged, the trustee must restore the corpus of the trust. The trustee is accountable to the beneficiary, because the beneficiary has a property interest in the corpus of the trust. So, as trustee of our resources, government is accountable to us for its handling of property that belongs to the people.

In our legal system, Nature's Trust principles were penned by judges long ago as the first environmental law of this nation. Beginning in 1892 with a landmark Supreme Court case called *Illinois Central*,⁵ courts across this country have said that the government holds wildlife and navigable waterways and air in trust for the people, and government must protect these resources.⁶

This obligation to protect Nature's Trust lies at the very heart of government's purpose. The amount of natural wealth passed to future generations depends entirely on

⁵ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

⁶ The Supreme Court said in *Illinois Central*: “[T]he trust . . . requires the government . . . to preserve such waters for the use of the public. . . .” In another landmark case, *Geer v. Connecticut*, the Court characterized wildlife as owned by the people through a trust held by government. It said: “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.” *Geer*, 161 U.S. 519 (1896).

how well the governmental trustees defend the trust. As the world has learned since time immemorial, a government that fails to protect its natural resources sentences its people to misery – remember that hand blocking the sun? This trust doctrine reaches back, literally, to Justinian times and is present in many other countries of the world.

For example, back in 1993, the Phillipines Supreme Court invoked the trust on behalf of Filipino children to halt logging of the last rainforest in that country. It wrote:

Every generation has a responsibility to the next to preserve that rhythm and harmony [of Nature] *** The right to a balanced and healthful 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.

The Court explained that, without the trust, “The day would not be too far when all else would be lost not only for the present generation, but also for those to come – generations which stand to inherit nothing but parched earth incapable of sustaining life.” So there you have it – a property right to natural inheritance for the children of the world.

It is important to recognize that, for thousands of years these same principles formed the controlling law on this landscape. Until 150 years ago, the native nations managed the natural trust across all of what is now the United States. Though tribes did not describe their laws in western legal terms, the governing sovereign mandate across of Native America was, and still is, a trust concept. The very core of their governmental responsibility was preserving resources for future generations. You have heard the ancient Indian proverb: “We do not inherit the earth from our ancestors, we borrow it from our children.” And most of you may know that, in traditional native governance,

decisions are made with the voice of the Seventh Generation at the council. Perhaps you think of these native principles as poetic reflections of a noble culture, and nothing more. No, this principle of conserving resources is at the *same time* both a religious principle *and* a principle of governance. In traditional governance, there is no gap between law and religion – it is one and the same.

The Nature’s Trust paradigm has a moral imperative at its core -- the duty towards future generations. This is an environmental value that speaks universally to all cultures, all ages, and all classes. Whether you find the doctrine on the pages of a United States Supreme Court opinion, or on the pages of a Phillipines Supreme Court opinion, or hear it voiced at a tribal ceremony, or see it in the writings of Bill Boyer, this law encompasses a spiritual value that transcends all governments and cultures of the world.

Many people wonder how the public’s trust ownership fits with private property rights. Public property ownership is always supreme to individual property. Long ago, when a railroad company used its private property rights to harm 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.” You can practically hear those same Justices saying today, “It would not be listened to” that government would let our waters be poisoned, our air polluted, our species eradicated, and our atmosphere dangerously warmed to serve short-term private interests.

Protecting our natural trust is not at odds with safeguarding private property rights. Let’s not fool ourselves. All private property ownership depends on natural infrastructure. I’m thinking of a colleague of mine who lived in a nice house in New

Orleans –until September, 2006. He had a deed to his property. He had raised a family in his nice home and he expected to stay there. He evacuated that home and left the deed behind when floodwaters from Hurricane Katrina delivered dead bodies to his doorstep. The Roman philosopher, Juvenal, once said, “Never does Nature say one thing and wisdom another.” Protecting Nature is essential to protecting the enjoyment of private property.

And in fact, we can use our property rights tools to protect land in perpetuity by partnering with land trusts. For example, Bill and Ann Boyer generously donated a conservation easement to the Deschutes Basin Land Trust to protect their 80-acres east of Sisters. Nature’s Endowment on that property will be held under trust in perpetuity for generations to come.

V.

I want to show you how differently we view our natural resources when we look at them through a trust frame rather than through the frame that our agencies have created. Consider the great salmon trust of the Columbia River Basin. The corpus of this trust has existed in some form for five million years. We are all the beneficiaries of this trust.

Until just 150 years ago, the Columbia River tribes were the sole trustees of the salmon trust. Even during times of starvation, the tribal leaders – the trustees -- would not allow more harvest than the trust could sustain. Under their stewardship, up to sixteen million salmon returned to the Columbia River every year. The salmon trust supported native life here for 10,000 years. That’s a paying asset.

When the tribes ceded their lands, the federal government and the states of Oregon, Washington and Idaho became new sovereign trustees in the Columbia River Basin. These new trustees were infant governments that had just come into being. They had no experience at all in managing a natural trust. They gave little thought to sustaining the fish. After just 150 years of state and federal management, wild salmon runs in the basin are now at 2% of their historic levels. Many species have gone extinct. Yet the tribal trustees are still working to rebuild natural wealth. The Warm Springs Tribe, for example, is creating fish passage at Round Butte Dam to restore historic spring Chinook and sockeye runs to the Metolius River – a river that hasn't seen salmon in about a half century. Some of those first fish will be released to the waters of the Metolius this year.

But alongside these visionary efforts by the ancient trustees, the federal and state agencies are still issuing permits and making regulatory decisions allowing toxic chemicals throughout the Columbia River Basin. Next time you cook up a fish, go on-line and find EPA's Fish Contaminant Survey for the Columbia River Basin. The fish you eat contain any number of 92 chemicals in varying concentrations.⁷ These include chlorinated dioxins and furans, PCBs, arsenic, chlordane, mercury, and DDT.⁸ They bring cancer risk to your dinner table.

So the salmon trust -- a trust asset that belongs as *property* to the Indian and non-Indian people of this region -- has been nearly fully eradicated, and what is left of it is being poisoned. Now, if you were the beneficiary of 16 million dollars in a trust account

⁷ 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), *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).

⁸ *Id.* at E-1, E-3.

and the trustee permitted this kind of phenomenal loss, you would not just sit by. Your trustee has the core duty of protecting and restoring your trust.

VI.

By now you may be wondering how citizens can use this trust frame to steer agencies in a different direction. Recall, the public is dizzied by the complexity of modern environmental law and isn't speaking in clear terms to the fundamental duty of government. Abraham Lincoln once said: "Public sentiment is everything. With public sentiment nothing can fail. Without it nothing can succeed." But I like even better a quote that came over the Internet by someone in Portland named James describing a citizens' environmental victory in which he played a minor role:

That a little guy can get together with another little guy, and another, and another to multiply influence and compete with big power and big money -- who doesn't love that idea? It's kind of like a democracy.

Members of the public – all of the "little guys" -- can begin thinking of themselves as beneficiaries with a clear property right. They can hold their government accountable under a trustee's measure of performance. With that frame of mind, all citizens, including those in Central Oregon, can go out and stake a property claim to Nature's Trust. Your trust is being destroyed all around you. You *can* define a tangible part of this trust and make its protection your responsibility, as beneficiary. It may be the Metolius River, or a wetland, or a species, or a forest, or an ocean, or maybe even, your planet's atmosphere.

Remember, agencies have authority to protect the environment. But they also have enormous discretion to allow its loss. Each agency is like a stadium with a huge political playing field. Companies with polluting businesses are out on those fields on a

daily basis. They are meeting face to face with the regulators and shouting their private property rights. And the beneficiaries of the trust – the public – are outside the gates and not making their voices heard. Modern environmental law does one and perhaps only one thing well: it tells people when agencies are permitting destruction of common property. You'll see these notices in the Sisters Nugget and Bend Bulletin and you can sign up with agencies like DEQ to be notified of permit decisions. So, citizens can find those stadiums, walk right through those gates, and start making their voices heard on those playing fields.

In nearly every case of environmental destruction, there are three levels of government with authority -- local, state, and federal – and there are several agencies at each level. Therefore, citizens have many stadiums to play in. Remember, citizens only need to win in one of those stadiums. But to win, you have to re-frame the government's perspective. You have to find that county commissioner or state official who is poised to issue a permit and remind them that the *public* owns the airshed, waters, and wildlife, and that the agencies are trustees with a duty of protection. Allowing further harm is not protection.

Get to know these trustees personally. Bring them to the site and show them up close the part of Nature's Trust that hangs in the balance of their decision. Do not succumb to the discourse of environmental gibberish. Above all, do not shy away from property rights. Bring them on! You are defending *your* property rights to public assets held in trust, on behalf of you and your children and your descendants along down the line.

Engaging agencies to protect Nature's Trust *will* pay off. Constant reminders of the trust framework will re-orient the agencies' perspectives and lift off the straightjacket they are operating under. There are already courageous officials out there taking their trust duty to heart. The Attorney General of California is a great example. He has sued General Motors, Toyota, Chrysler, Honda and Nissan, for their contribution to global warming.⁹ His complaint says that their fleet of cars account for nine percent of the world's carbon dioxide emissions and that those emissions are causing a public nuisance to public trust assets, which include "water, snow pack, rivers, streams, wildlife, coastline, and air quality" So, this one attorney general is asserting his trust obligation to single-handedly take on 9% of the world's carbon dioxide emissions.

VII.

I want to end our hour together by coming a bit closer to home. There is an organization called Ecotrust in Portland, Oregon, that promotes a concept called Salmon Nation. Essentially the concept is that all citizens of Oregon, Washington, and Idaho are united together in our citizenship in Salmon Nation. Salmon Nation represents a freedom to reframe your place in the world according to natural boundaries. What I have been talking about this evening is a freedom to reframe property relationships. I'd like to end this evening with a story of how ordinary people living up on the Columbia River in Vancouver, Washington staked out their claim to a salmon population and emboldened local regulators to save the last habitat for these salmon.

The story takes place at a tiny creek called Joseph's Creek. This creek and its surrounding springs have one of the last three significant spawning grounds for the

⁹ California v. General Motors, Complaint for Damages and Declaratory Judgment (N.D. Cal. Sept. 20, 2006).

Columbia River chum salmon. The generations of salmon spawning there go way back in time. They were spawning there during the year 1805, when Lewis and Clark traveled by in canoes. They were spawning thousands of years prior, when the Indian people lived at the creek. Some of the arrowheads and sinkers from that time still appear in the cobbled tidelands after the spring waters recede. But this place is a rarity. Today, all of the rest of the urban shoreline is destroyed – turned into subdivisions, industrial sites, marinas and the like. So this little place up at Joseph’s Creek is a last refuge, and nearly a third of the remaining population of Columbia River chum salmon go there to spawn every year.

Five years ago, a developer got hold of the private property on one side of Joseph’s Creek and set out to do what developers do – take out a large number of trees and put in new construction. And normally these developments go in before anyone takes much notice. Priceless habitats that have endured for millennia are snuffed out in the blink of an eye, all with the blessing of numerous local, state, and federal agency trustees that fall in line with their permits like a row of falling dominoes. The developers know how to work the system. And they usually don’t waste any time after getting those permits before they haul out the bulldozers start eradicating Nature. Their giant machinery rips up trees, tears into the soil, and bludgeons riparian areas. After a day of this there’s nothing left -- not so much as a reminder of the civilization that existed for time immemorial at these places where little streams come into the Columbia River. It’s like going into a bank and tearing into bags of money and throwing it to the winds – only, up there on the Columbia, the wealth takes the form of natural assets that have accrued over millennia. This kind of thing happens every day up there, and the people just stand

by, because they don't think of themselves as citizens of Salmon Nation. They think of themselves as citizens of Vancouver, Washington, and they have faith that there must be nothing worth protecting because their City, after all, has land use laws and wouldn't give out any permits to destroy things worth protecting. And, too, it's the developer's private property, after all.

But in this case, the neighbors and community people saw those salmon spawn, and they began to think of themselves in a new way. They began to think of themselves as citizens of Salmon Nation. They saw the salmon as their property, shared through the ages with the rest of the citizens of Salmon Nation. They brought their regulators out to see these salmon spawning. And they invited Columbia River tribal people out there to give blessings that those regulators heard. Those words stirred more hearts than any regulatory gibberish under the Endangered Species Act could. And pretty soon school children and retired people, local workers from Frito Lay and Hewlett Packard, historians, fishermen, educators and scientists – all the “little guys,” as James would say - - came out and spoke of protecting those salmon. And the press ran stories on this, because one of the oddest things was that people of all political persuasions and backgrounds were coming together speaking as one voice.

Well, unfortunately for the fish, it became clear that the agencies legally charged with protecting the salmon – the National Marine Fisheries Service and the Washington State Department of Fish and Wildlife – were not going to use their authority to stop this development. But the community didn't give up. (Remember, there's always more than one stadium.) They turned to their local planning department and told them that there was no other trustee left to save this chum habitat. Well, it turns out that Vancouver,

Washington has a little tree ordinance that requires a permit before you cut trees. The developer applied for a permit to cut 88 trees on this property, saying he needed to create space for an outdoor badminton court. Now this seemed a strange sort of thing – after all, how many people play outdoor badminton in Vancouver, Washington (you know it rains a lot there). But it seemed clear that the tree permit would be granted because, after all, most permits to destroy Nature are granted without much thought.

Nevertheless, the community people continued undaunted, speaking in the same voice. And they kept bringing out these local regulators and telling them, face to face, that *they* now held the fate of these salmon in *their* hands.

When the planning department finally issued a decision on the tree permit application, it surprised everyone. Buried in the 21-page document was language flatly denying the tree permit on the basis that the developer didn't need to cut so many trees to create an outdoor badminton court. And for this proposition the planning department cited the International Law of Badminton, which provided the official dimensions for a badminton court – which, if you are curious, are 20 feet by 44 feet. That permit denial bought enough time for the city and county to purchase the property and put it into conservation ownership.

So in the end, it was the International Law of Badminton, not the Endangered Species Act, that saved those salmon. And I'm guessing it was the first time in modern land use law that the Law of Badminton has saved endangered species habitat. I understand that this story would have particularly pleased Bill, who was, as many of you know, an international champion badminton player, even into the last year of his life.

What we see from this story is that local officials took personal responsibility for protecting the great salmon trust for future generations. And virtually no one, no one, will lament the absence of another subdivision along the Columbia River, even one that promised an outdoor badminton court.

VIII.

As we close this hour, we go forth in our lives knowing that *our* actions have profound consequences for our descendants. Somehow fate has delivered all of us across the world, all of us across the country, and all of us in this church -- into this position at this pivotal moment. We did not live 100 years ago, when it was too early to even imagine the collapse upon us, and we will not be here 100 years from now when it will be too late to save what we still have. We can only claim this moment.

Citizens of Central Oregon, you are, quite personally, the beneficiaries of this marvelous natural trust that surrounds you. You have the environmental intelligence and community fortitude to go out and defend your property rights in Nature's Trust for yourselves, your fellow citizens, and for the descendants of your generation. But you can't look elsewhere for others to do it for you. It's going to take the entire generation of people living upon Earth at this time.

I'd like to leave you with a few lines from a poem that my great-grandfather, Charles Erskine Scott Wood, wrote in 1921 as he was sitting on the banks of the Metolius River at our family camp. He was a lawyer, an author, and a poet, and about 70 years old when he wrote this poem. I'm going to read you just the lines where he bequeaths certain things to his grandchildren.

I Charles Erskine Scott Wood,

*Make now my last sure will and testament
For those grandchildren who share with me this solitude
And whom I must too shortly leave.*

*To [my grandchildren] . . . ,
I give all trout in the Metolius. . .
I give [you] mornings on the river-bank,
Song of the river when the new sun shines. . .
And the solemn discourse of the pines,
At evening when the melting shadows fall
And Peace sits on the bank with folded wings'
The birds all [offering] a good-night call,
And deep in dusk a yellow warbler sings.*

The river is for [your] delight.

If you're great-grandchildren can wake up in the Metolius River Basin 100 years from now and there is still snow in the winter, and fish in the waters, game in the mountains, and fresh air and vast open Western spaces, if they have to them the same natural resources that you cherish today, they will know that you -- their ancestors -- secured *their* trust at this crucial moment in time and bequeathed to them the natural wealth you rightly inherited. The trust frame I spoke of this evening is nothing other than the intergenerational spirit of Humanity manifesting itself in our environmental law.