

Staking a Claim in Nature's Trust

Mary Christina Wood¹

Nell Tobias McCall Arts and Humanities Speech

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Dedicated to the memory of Nell Tobias, a McCall citizen and champion of Nature who epitomized the intergenerational spirit of humanity.

I.

It is a real pleasure and honor to give this talk and I thank the McCall Arts and Humanities Council for sponsoring it, and the church for welcoming us here tonight. As many of you know, I live here part time with my family and spent last year on sabbatical here working on a book called Nature's Trust. And while I didn't study McCall issues in particular, my experience here has helped shape my thinking about how different people relate to the environment, and how environmental law determines their future. The abundant Nature surrounding us here has been a source of unparalleled inspiration in my work. So I feel I am indebted to this community, and I am privileged to share with you some of the thinking that is going into my book.

One of the people I came to know when I lived in McCall during my first sabbatical here eight years ago was Nell Tobias, who many of you knew. Nell was a beloved member of this community, a friend to many of you, a friend of this church, and, perhaps above all, a real friend to Nature. She played a major role in securing the vast

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/> and on file at the Nell Tobias Research Center and the Nell Tobias Room at the McCall Public Library.

Frank Church Wilderness that anchors this community. My visits with Nell over the years were in her home. Inevitably the conversation began with talking about my work in environmental law, but it always ended with the future of McCall. Even in the very last chapter of her life, Nell's paramount concern was with the future of McCall. She saw the for-sale signs on huge ranches, and she was worried. She wanted the coming generations to experience and cherish what she had enjoyed in her life. Nell Tobias epitomized the inter-generational spirit of humanity, which may be the most powerful and hopeful aspect of our lives, and so I want to dedicate my remarks this evening to her memory, and present this book to the Church in her name. It's a rather remarkable book called *The Creation*, by E.O. Wilson, Harvard professor and no doubt the most prominent conservation biologist in the world. The subtitle of this book is "An Appeal to Save Life on Earth" – that says it all.

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, stop using Styrofoam and wasteful packaging, 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 own future, they must not only reduce their own footprint, but they must expand their political imprint to steer their government in a different direction. So 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

these 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, leading to devastating natural loss that affects each and every one of us.

Before delving into this broad discussion of environmental law, I wanted to make three observations about this 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 more the CIA type of intelligence. I mean how you decide what to do every day, where you spend your energy, where 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 three-week backpack trip traversing the Frank Church wilderness. You wake up out there one morning 50 miles away from any civilization. What do you focus on? Where do you spend your energy? I will bet that anyone of you who has engaged in backcountry experience would say that your daily energy 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 McCall 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 warming.

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 think Pepsi Cola makes water, because they only know water from a plastic bottle. These people also exist in McCall. The classic example is the family that hauls a freightliner RV into Ponderosa Park -- 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 in the room here don't fall at either extreme end of the spectrum. We are all to some extent a composite of both types. But overall, I think it's safe to say that the core community still present in McCall 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 environmental turning point. A land rush grips Long Valley. If you just open the newspaper you are hit with an onslaught of proposals and issues. The endless subdivision projects, the 35 foot height limit, the asphalt plant permits, the Payette lake motor boat use, the roadless policy, the mining waste issues, the sewer treatment plant expansion, the salmon decline, and on.

A high growth scenario projects McCall's population at 42,000 peak residents by 2033 – that's just 26 years from now, and that number doesn't include the tourist population. You need only look at other towns in the West with a similar population explosion to see that the future brings on air pollution, water pollution, subdivision sprawl, traffic, toxic waste disposal, water depletion, species extinctions, and a host of other problems. For McCall citizens, you will essentially be moving to a different city – one that looks very much like Bend, Oregon -- and you'll make this move without ever leaving your home. That is, unless you steer government towards securing a more abundant future on your behalf. Decisions made by governmental officials today will determine the quality of life here for you and your children into the far distant future. So this community is at an environmental turning point – unlike any that it has faced before.

The third characteristic of this community, however, is that it seems to be taking the reins to steer its own future. When the construction of Tamarack unleashed the land rush a couple of years ago, these local people were caught unorganized. That is so typical of a community blindsided by a barrage of development proposals. But that is

changing. A critical mass of citizens seems to be organizing 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 citizens here with environmental intelligence and motivation to determine their own future. But how do citizens accomplish this? Well, they have 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 Council, the County Commissioners, the Planning and Zoning Commission, the State Dept. of Environmental Quality, the State Lands Department, the Forest Service, and the list goes on and on.

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. They often 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 – all because their government is not protecting the resources so basic to their human welfare. Many citizens have unwillingly assumed a second career just to maintain their community's natural infrastructure. 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 where our civilization as a whole sits on the trajectory of environmental loss. As 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.² 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.³ If this collapse isn't arrested, a child born here today will not see crabs, canned tuna, shrimp, or any seafood at Paul's 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 almost all of the glaciers of the

² See John Heilprin, *U.N.: Number of Ocean "Dead Zones" Rise*, ASSOCIATED PRESS (Oct. 19, 2006). The dead zones are as far-flung as Finland, Ghana, China, Britain, Greece, Peru, Portugal, Uruguay, the western Indian Ocean, the Gulf of Mexico, and the Pacific Northwest in the United States. *Id.*

³ This was the finding of an international team of researchers, which published its results in the journal SCIENCE. See Richard Black, "Only 50 Years Left" for Sea Fish, BBC NEWS ON-LINE (Nov. 2, 2006), available at <http://news.bbc.co.uk/2/hi/science/nature/6108414.stm>. The team found that the fish decline was closely tied to broad loss of marine biodiversity and concluded that "[t]here will be virtually nothing left to fish from the seas by the middle of the century if current trends continue" *Id.* (paraphrasing study). Lead author Boris Worm of Dalhousie University in Halifax, Nova Scotia, stated: "At this point 29 percent of fish and seafood species have collapsed -- that is, their catch has declined by 90 percent. It is a very clear trend, and it is accelerating. . . . If the long-term trend continues, all fish and seafood species are projected to collapse within my lifetime -- by 2048." *Report: Seafood Faces Collapse by 2048*, CNN.COM (Nov. 2, 2006). Researcher Steve Palumbi, Stanford University, commented: "Unless we fundamentally change the way we manage all the ocean species together, as working ecosystems, then this century is the last century of wild seafood." BBC ON-LINE, *supra*.

world are melting rapidly. Glacier National Park, just 417 miles to the Northeast of us, is projected to have no more glaciers in 15-20 years.⁴ Greenland is melting.⁵ I've left a short article in the back of the church that I urge you to read. It is 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 80-foot sea level rise that will inundate private property and major cities along United States coastlines. Temperature increases worldwide are projected to send more than a third of the planet's species to extinction within the next 44 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.

Two months ago, British Prime Minister Tony Blair went on the media around the world to unveil a landmark report on global warming. He 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."⁶

⁴ *Id.* at 47.

⁵ *Id.* at 195.

⁶ 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 is available at

http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm. See also Elsa McLaren, *Global Warming Report Calls for Immediate Action*, TIMES ONLINE (Oct. 30, 2006); Sarah Clarke, *The World Today*, ABC ON-LINE (Oct. 30, 2006), available at <http://www.abc.net.au/worldtoday/content/2006/s1776868.htm>. The STERN REVIEW concludes:

The scientific evidence is now overwhelming: climate change is a serious global threat, and it demands an urgent global response. . . . Climate change will affect the basic elements of life for people around the world – access to water, food production, health, and the environment. Hundreds of millions of people could suffer hunger, water shortages and coastal flooding as the world warms. . . . [I]f we do not act, the overall costs and risks of climate change will be equivalent to losing at least 5% of the global GDP [Gross Domestic Product] each year, now and forever. If a wider range of

And yet it is as if the majority of Americans, including perhaps most people in McCall, Idaho, are treating these circumstances as if they *are* merely a science fiction movie. We see luxury second homes popping up everywhere, motorized recreation everywhere, and massive waste, as if we had no global warming. The American population is not doing what it needs to do. 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.

III.

risks and impacts is taken into account, the estimates of damage could rise to 20% of GDP or more. . . . If no action is taken to reduce emissions, the concentration of greenhouse gases in the atmosphere could reach double its pre-industrial level as early as 2035, virtually committing us to a global average temperature rise of over 2 degrees C. In the longer term, there would be more than a 50% chance that the temperature rise would exceed 5 degrees C. This rise would be very dangerous indeed; it is equivalent to the change in average temperatures from the last ice age to today. . . . All countries will be affected. STERN REVIEW, *supra*, Summary of Conclusions, at vi.-vii.

The STERN REVIEW projects a narrow window of time – 10 to 15 years – in which to curb greenhouse gasses. *See* Clarke, *supra*.

Despite international scientific consensus on climate change, the Chairman of the Senate Environment and Public Works Committee, Senator James Inhofe, R-Oklahoma, gave a speech on the floor of the Senate on September 28, 2006 urging his colleagues to “start speaking out to debunk hysteria surrounding global warming [so as not to] derail the economic health of our nation.” *See* <http://speech://epw.senate.gov/speechitem.cfm?party=rep&id=264027>. As a result of the 2006 elections, Senator Barbara Boxer (D-Cal.) became chairwoman of the Senate Environment and Public Works Committee. Senator Boxer and the Chairman of the Senate Energy and Natural Resources Committee (Senator Bingaman), as well as the Chairman of the Senate Homeland Security and Governmental Affairs Committee (Senator Lieberman) have called upon President Bush “to pass an effective system of mandatory limits on greenhouse gases,” stating, “Scientists are now warning that we may be reaching a ‘tipping point’ beyond which it will be extremely difficult, or perhaps impossible, to avoid the worst consequences of climate change.” Press Release from Senator Barbara Boxer, *Boxer, Bingaman and Lieberman Ask President to Commit to Working with Congress to Fight Global Warming* (Nov. 15, 2006), available at <http://boxer.senate.gov/news/releases/record.cfm?id=265906>.

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 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. 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. Two weeks ago I asked the head of DEQ's air quality division how many air permits are denied in the state of Idaho. He answered less than 1% -- and that includes permits for toxic air pollution. And he could not even say that those 1% were flatly denied; they were sent back for more analysis. 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.”⁷ Congress allows 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.⁸ 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”⁹

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.

Consider how agencies like EPA and your state DEQ deal with human exposure to toxins. These agencies knowingly put the public at risk when they refuse to draw the line against pollution. In decision after decision, they allow toxic releases that carry a certain probability of causing cancer cases to your families. The toxins that EPA and the

⁷ Clean Water Act, § 101, 33 U.S.C. § 1251(a)(1) (2000)

⁸ David Ewing Duncan, *The Pollution Within*, NATIONAL GEOGRAPHIC (October, 2006). In fact, EPA reviews, under another law, the Toxic Substances Control Act (TSCA), about 1,700 new compounds every year and allows 90 percent of them to enter the marketplace without restriction. There are 82,000 chemicals used in the United States, and only a quarter of them have ever been tested for toxicity. *Id.*

⁹ U.S. Environmental Protection Agency, Strategic Plan, EPA doc. 190-R-00-002 (Sept., 2000), *available at* <http://www.epa.gov/cfo/plan/2000strategicplan.pdf>.

state agencies permit are causing 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, telling us it's o.k. to cause cancer to a modeled number of people. This sniper-style regulation is never questioned.

You see, this line-drawing framework that the agencies have constructed offers no value system to serve as a counterweight to political pressure. While Congress wanted us to have clean air, pure water, and recovered species – aspirations the public could identify with -- 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.”

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 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.¹⁰ Great. We can't expect people to fight pollution using this language. The agencies have so complexified¹¹ their permit systems that the average American is left at the gates. Agencies have learned that complexity operates as a wonderful shield from public scrutiny.

IV.

¹⁰ See U.S. ENVIRONMENTAL PROTECTION AGENCY, TERMS OF ENVIRONMENT: GLOSSARY, ABBREVIATIONS, AND ACRONYMS, *available at* <http://www.epa.gov/glossary/aaad.html>.

¹¹ Yes, that's *our* new word.

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. Asphalt plant operators and chemical manufacturers, land developers and timber companies, 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.

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. And 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.”¹² I’m going to quote Jim Hansen, the top NASA climate scientist I told you about, to give you an idea of the time frame we are dealing with to solve this problem. He says: [I]t will soon be impossible to avoid . . . far-ranging. . . consequences. 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.¹³

The United States is responsible for 30% of the greenhouse gasses causing global warming. Yet EPA has still not regulated greenhouse gas emissions. The Clean Air Act clearly gives EPA authority for controlling carbon dioxide. But top government lawyers are 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.¹⁴ In fact, rather than using its authority to *avert* global warming, EPA is spending its time telling us all to get used to it. In June, 2006, EPA released this guide, the Excessive Heat Events Guidebook.¹⁵ 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.”¹⁶ For our convenience, EPA has given this new “fact of life” an acronym – EHE (Excessive Heat

¹² AL GORE, AN INCONVENIENT TRUTH 269 (2006).

¹³ Hansen, *supra* note 17, at 14, 16. *See also supra* note 22 (STERN REVIEW warning of 10-15 year time frame to take action until worst disaster becomes inevitable).

¹⁴ *See Massachusetts v. U.S. Environmental Protection Agency*, 415 F.3d 50 (2005)(reviewing EPA’s denial of petition to regulate greenhouse gasses).

¹⁵ U.S. Environmental Protection Agency, The Excessive Heat Events Guidebook, EPA # 430-B-06-005 (June 2006), available at http://www.epa.gov/hiri/about/pdf/EHEguide_final.pdf.

¹⁶ *Id.* at 5.

Event). And just a few lines later, the guidebook says, “EHE conditions can increase the incidence of mortality . . . in affected populations.”¹⁷ Well, that’s certainly true. In the summer of 2003, 35,000 Europeans died from a massive heat wave.¹⁸ 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. It will affect each area differently, but no area, not even McCall, can escape climate crisis if we don’t act now.

Twelve states have taken the EPA to court, arguing that EPA should regulate carbon dioxide emissions under the Clean Air Act.¹⁹ But these states lost in the D.C. Circuit court. The court said that EPA has the *discretion* not to regulate greenhouse gasses.²⁰ People, it is as if your house is on fire, twenty fire trucks are in the driveway with hoses drawn, and the fire chief is saying that he has discretion to not take action. And the judge agrees.

V.

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. All of environmental law is carried out through that frame. And so our aspirational statutes are carried out through that frame to serve short-term profit interests

¹⁷ *Id.*

¹⁸ AL GORE, AN INCONVENIENT TRUTH 75 (2006).

¹⁹ Massachusetts v. U.S. Environmental Protection Agency, 415 F.3d 50, 58 (D. C. Cir. 2005).

²⁰ *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.

at the expense of public welfare. 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. The good news is that this vast bureaucracy holds the tools and funding to reverse much environmental damage, and do so quickly. But we must find ways and words to reinvigorate the citizens and 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. The author George Lakoff says this about frames:

Frames . . . shape the goals we seek, the plans we make, the way we act, and what counts as good or bad outcome[s]. . . In politics our frames shape our social policies and the institutions we form to carry out our policies. To change our frames is to change all of this. Reframing is social change. Reframing is changing the way the public sees the world. It is changing what counts as common sense.

VI.

We need not search far. 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 elements. Nature's Trust characterizes these natural resources as being in a trust managed by government for future generations. A trust is an ancient concept of property law. It is a legal type of ownership 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.

I taught this concept to a high school class here a week ago, and the students really grasped it. I asked them whether they had heard of college accounts. And of course they all said yes. The trustee is the person who manages their college account. They are the beneficiaries. The money in the college account is the corpus of the trust. The money belongs to them, but they don't manage that money. I asked the students how they would feel if they had a college account worth \$100,000 and their trustee mis-managed 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. That seemed to hit home with them.

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, a retirement account, or a natural trust, there is a core duty of protection.²¹ This means the trustee must take

²¹ GEORGE GLEASON BOGERT, THE LAW OF TRUST & TRUSTEES ch. 29, § 582 (2d ed. 1980) (“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.”).

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, for 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*,²² 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.²³

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 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.

Let me give you just one example of how this trust responsibility has been applied in another country to preserve natural resources. In 1993, children in the Phillipines brought a lawsuit against their government to end logging of ancient forests in that country. The Supreme Court of the Phillipines found that the rate of logging would result

²² *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

²³ 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).

in no more rainforest by the end of the decade. This was a case of a governmental trustee allowing eradication of Nature's Trust, and the end was in sight. Not unlike the situation we face today.

Here is how the children framed their claim to the Court: "This act of [government] constitutes a misappropriation . . . of the natural resource property [it] holds in trust for the benefit of . . . succeeding generations." Quite simply, the children were saying that their government was stealing from their future, violating their property right to the natural resources held in trust for them. The Phillipines government framed the issue by saying that the rate of logging was a "political question" within its discretion. Sound familiar?

The Supreme Court adopted the trust framework. 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.

And so the Supreme Court halted further logging, noting, "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. You see, 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 hear it in the words of someone like Nell Tobias, this law encompasses a spiritual value that transcends all governments and cultures of the world.

VII.

I want to show you how different 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. How many of you fish or eat fish? You are the beneficiaries of this trust.

Until just 150 years ago, the Columbia River tribes were the sole trustees of this trust. Even during times of starvation, the tribal leaders – the trustees -- would not allow more harvest than the trust could sustain. Under their stewardship, ten to sixteen million salmon returned to the Columbia River every year. The salmon trust supported native life here for 10,000 years. Now, 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. You might say it was like putting a child in charge of a cookie jar. These new trustees gave little thought to sustaining the fish. Under 150 years of their management, wild salmon runs in the basin are now at 2% of their historic levels. And those remnant fish are contaminated by toxic chemicals present throughout the Columbia Basin. Next time you cook up a fish from the Columbia River Basin, first go on-line and find EPA's Fish Contaminant Survey for the Basin. The fish you eat contain any number of 92 chemicals in varying concentrations.²⁴ These include chlorinated dioxins and furans, PCBs, arsenic, chlordane, mercury, and DDT.²⁵

So the salmon trust -- a trust asset that belongs as *property* to the non-Indian and Indian people of this region -- has been nearly fully eradicated, and what is left of it is being poisoned. All of this is made legal by permits and regulatory decisions made by

²⁴ 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).

²⁵ *Id.* at E-1, E-3.

the National Marine Fisheries Service (NMFS) and the EPA under federal statutes that are supposed to protect our species and our waters. These agencies simply are not saying no.

Now, if you were the beneficiary of 16 million dollars in a trust account 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.

VIII.

By now you may be wondering how citizens can reconstruct the frame of environmental law to steer our agencies in a different direction. Remember, officials within these agencies prioritize the private property rights of those seeking to profit at the expense of the trust, because those are the loud voices that make themselves heard every day. 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."

Members of the public can begin thinking of themselves as beneficiaries with a clear property right that is supreme to individual private property rights. They can hold their government accountable under a trustee's measure of performance. 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: Quite the opposite – it is essential to private property rights. All private property ownership depends on natural infrastructure. I think of a colleague of mine who lived in a nice house in New Orleans – that is, up until 15 months ago. He had a deed to his property reflecting fee simple absolute ownership. He had raised a family in his nice home and had expectations of staying there. He evacuated that home and left the deed behind when floodwaters from Hurricane Katrina rose to his neighborhood and delivered dead bodies to his doorstep. So, no, protecting Nature is not incompatible with protecting private property rights.

Citizens all over the country, including those in McCall, Idaho, 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 an aquifer, or a river, or a wetland, or a species, or an airshed, or a forest, or an ocean, or just, maybe, the 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 Star News, 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 state official who is poised to permit toxic air pollution in your community and point out that the *public* owns the airshed, and that the state is a trustee 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 to public assets held in common, 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. There are already courageous officials out there, and they need public backing. I'll give you an example of one. In September, the Attorney General of California brought a federal lawsuit against General Motors, Toyota, Chrysler, Honda and Nissan, for their contribution to global warming.²⁶ The complaint said that their fleet of cars account for nine percent of the

²⁶ California v. General Motors, Complaint for Damages and Declaratory Judgment (N.D. Cal. Sept. 20, 2006).

world's carbon dioxide emissions, and that those emissions are causing a public nuisance.

The Attorney General brought this action based on his trust duties. The complaint says:

California . . . has a public trust interest in the State's natural resources [which] includ[e] water, snow pack, rivers, streams, wildlife, coastline, and air quality These [resources] have been injured by global warming

So, while the top attorneys at EPA are using all of their legal talent to avoid regulating auto emissions under the obvious statute (the Clean Air Act), the top lawyer in the State of California is using all of his legal talent to assert his trust obligation, and in doing so, he is single-handedly taking on 9% of the world's carbon dioxide emissions.

IX.

I want to end our hour together by coming a bit closer to home. We are sitting in the heart of salmon country here in McCall, Idaho. There is an organization called Ecotrust in Portland, Oregon, that promotes a concept called Salmon Nation. Essentially the concept is that, while I am a citizen of Oregon and you are all citizens of Idaho, we are all 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 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.²⁷ 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

²⁷ The development plans involved creating four single-family lots. See Pre-Application Conference Request Form for Subdivisions – Planned Development – Short Plats (Oct. 22, 2003) (on file with author).

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 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.²⁸ But the community didn't give up. (Remember, there's always more

²⁸ These agencies did, however, issue strong comments urging protection of habitat as part of a City tree permit process, see note 36 *infra*.

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.

Well, 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.²⁹ 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.³⁰ That permit denial bought enough time for the city and county to purchase the property and put it into conservation ownership.

²⁹City of Vancouver, Washington, Tree Removal Request – Denial, PRJ2002-00096/TRE2002-00015/SEP2002-00033, page 9-10 (Sept. 26, 2003).

³⁰*Id.* at 9; *see also* International Badminton Federation, The Laws of Badminton, section 1.1, http://www.worldbadminton.com/ibf_laws.htm. The denial also cited court dimensions for volleyball (USA Volleyball Association) and croquet (U.S. Croquet Association), as the developer had expressed an intention to use the court area for those recreational activities as well. *See* Tree Removal Request, *supra* note 36, at 9.

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. But 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.

X.

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.

McCall citizens, 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. 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 in Oregon. 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 grandson, Erskine, who was my father.

*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 Erskine Biddle Wood, . . .,
I give all trout in the Metolius. . .
I give him 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 Erskine's delight.

If you're great-grandchildren can wake up in the middle of the Frank Church wilderness 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 we have 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.

Thank you.