

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

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25th Annual Public Interest Environmental Law Conference
University of Oregon School of Law
Eugene, Oregon
March 4, 2007

I.

It is a real privilege to make this address at the 25th Public Interest Environmental Law Conference, and I want to thank the students of University of Oregon School of Law for bringing us together. I am going to focus my remarks today on climate crisis.

Let us reflect back on some of the headlines over the past few years:

Melting icecaps. Raging wildfires. Widespread drought. 35,000 Europeans, dead from a heat wave. Jakarta, underwater. Drowning polar bears. West Nile virus. Species in mass exodus towards the poles. Hurricane Katrina.

Yet, many Americans are still asleep to climate crisis. They are in for quite a shock when they wake up to realize the consequences from ignoring this threat. Climate is the invisible currency of our lives. It supports our food supplies, water sources, private property, businesses, and recreation. Yet, for most of us, it has been an overlooked source of our security and comfort.

That is about to change.

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Many of you, like me, have spent your careers working on environmental protection. For others of you, protecting Nature has become a second job with no pay. One might have thought the work would be over by now. The environmental movement had its genesis back on Earth Day, 1970 – 37 years ago – and yet here we are still pouring time, energy and resources into protecting Nature, and, frankly, losing ground on nearly every scale. The laws that held so much hope back then no longer speak to the American people. They are ignored, violated, ridiculed, and bend all too easily against a rising tide of waste and destruction. And now, we face climate crisis. No matter what the focus of your particular work is— forests, fish, wildlife, oceans, air quality, urban environments -- global warming is the looming catastrophe that eclipses all others. It may not have been your issue before, but it is all of ours now.

We stand together at a pivotal moment. In this decade, humanity will decide whether to hand over a world far less habitable or a world on its way towards rebuilding the natural abundance that once was. Global warming, if nothing else, forces us to search for the soul in environmental law. Our need to define government’s obligations towards Nature and towards future generations has perhaps never been as profound. But we lack a legal beacon to guide us through this crucial time. Environmental law has become so adrift from its moorings that citizens no longer know what they should expect from their federal, state, and local leaders. Today I hope to offer an approach to climate crisis that draws on timeless principles of sovereign property law to characterize natural inheritance belonging to the future generations.

II.

To begin with, though I imagine that most of you understand well the dynamics of global warming, it is nevertheless a challenge to present it in terms that the average American understands. Through our emissions of greenhouse gases, we are literally creating a heat trap for ourselves and for all living things on Earth. The sun sends massive energy that warms our planet. The energy then radiates back into space as heat. But some heat is held captive by heat trapping gases in the atmosphere. These gases (including carbon dioxide and methane) regulate the temperature of Earth. Before the Industrial Revolution, Nature had maintained a balance in the gases to keep the Earth's average surface temperature at 59 degrees F. It may be hard to appreciate the remarkability of a 59-degree average until you consider that the ecosystems we know and defend today evolved against this average temperature. So 59 degrees F. is for Earth what 98.7 degrees F. is for our bodies.

Since the Industrial Revolution, we have burned massive quantities of fossil fuels, and in doing so, we literally have changed the composition of the atmosphere so less heat can escape into space. It is no great mystery why the great ice sheets of this planet are melting. Just as an ice cube will melt in a warm room, so is the Polar Ice Cap, Greenland, and every major glacier of the world melting on our warming Earth. Glacier National Park in Montana is losing its glaciers so fast that it will have none left 15 to 30 years from now.

Carbon dioxide, the gas emitted from cars, coal fire plants, gas heating, and deforestation, has climbed to levels unknown in the past 650,000 years and we are still pumping it out at an annual increase of over 2% per year. According to the United Nations Intergovernmental Panel on Climate Change, the average surface temperature on

Earth will rise between 2.5 degrees and 10.4 degrees Fahrenheit within the next 100 years if our greenhouse gas emissions do not head downward soon enough.

Our past carbon pollution has already locked us into an irrevocable 2 degree temperature rise. Two degrees doesn't sound like much at all until you realize that the Earth's average temperature hasn't varied by more than 1.8 F in the last 10,000 years. Even just a few degrees of average temperature change makes the difference between an ice age and our climate today. Temperatures only 5-9 degrees F. cooler than those today marked the end of the last Ice Age when the Northeast United States was under 3,000 feet of ice, so, extrapolate a 10 degree difference on the hot side. Once we understand the climate premium that every single degree Fahrenheit carries, we'd no more dismiss a 10-degree temperature rise for Earth than we would dismiss a 108 degree fever in our bodies.

So, what does all of this mean for us? In effect, you and I – along with all of the other people and species on this Earth – have moved into a greenhouse with climbing temperatures. And this situation is bound to create hostility, as we Americans account for 30 percent of the world's greenhouse gas emissions. Unfortunately, there's no magic Tylenol that will cure this temperature rise overnight, because carbon dioxide persists in the atmosphere for up to a few centuries.

Hurricane Katrina signaled what we can expect from the global warming already underway as a result of the carbon emissions that we can't call back. Scientists across multiple disciplines warn of crop losses, food shortages, flooding, coastal loss, wildfire, drought, pests, hurricanes, tornadoes, heat waves, landslides, species extinctions, vanishing snow pack, increased disease vectors, and other harms.

If we do nothing to curb carbon emissions, we will commit ourselves to a future that most Americans cannot even imagine. Jim Hansen, the leading climate scientist for NASA, presents the 10 degree F. scenario: it will send 50% or more species into extinction. That's equivalent to the mass extinction that occurred 55 million years ago. In his words, "Life will survive, but it will do so on a transformed planet." A mere 5 degree F. temperature increase will cause an 80-foot rise in sea level. Hansen points out: "In that case, the United States would lose most East coast cities: Boston, New York, Philadelphia, Washington, and Miami; indeed, practically the entire state of Florida would be under water. Fifty million people in the U.S. live below that sea level. . . ."

We could go on detailing on how climate crisis will affect the lives of every human on Earth. What I've mentioned is just the tip of the iceberg (that's a phrase on its way out). British commentator Mark Lynas, author of High Tide, summarizes it this way:

Let me put it simply: if we go on emitting greenhouse gases at anything like the current rate, most of the surface of the globe will be rendered inhabitable within the lifetimes of most readers of this article.

III.

As a group, Americans yearn to have peace of mind over the future for themselves and their children. Entire industries are premised on the inclination of Americans to sacrifice a little now in order to buy security in the future. We simply would not have insurance, estate planning, retirement accounts, or social security were it not for that strongly held preference on the part of Americans to pay for disaster avoidance.

As a society, we are now in the position of buying climate insurance. By most scientific accounts, we still have the ability to stabilize the Earth's temperature increase at 2 degrees – remember that 2 degrees, because it's the benchmark of your future. As Jim Hansen puts it, “further global warming exceeding two degrees Fahrenheit will be dangerous.” Here is the purchase price of that climate insurance: we have to drastically curb our greenhouse gas emissions, beginning now.

As a planet, we have been at a similar danger point before. When it was discovered in the 1970s that CFCs were putting a hole in the atmosphere's ozone layer, we stopped using them, and the hole is now repairing. While, at the time, the CFC industry tried to convince us that western civilization would crumble without spray canisters, that proved not to be the case. You may know, the ozone layer is crucial, as it shields us all from the harmful ultraviolet light coming from the Sun. Looking back, are we not grateful that the decision-makers at the time decided not to trade out our Earth's ozone layer for CFCs?

Transitioning to a carbon-free society is more complicated because it involves nearly every sector of society. This is not going to be easy. Carbon is emitted all over the place. But the basic choice is still the same as that presented to us by the ozone hole discovery: do we take bold action now in order to buy climate security in the future? Or do we continue on our business-as-usual course with the knowledge that it could ultimately lead to catastrophe for ourselves and/or our children – that it will drain our descendants of the natural abundance and security that we all took for granted? This choice cannot be characterized as another environmental issue. As author Ross Gelbspan puts it, “[C]limate crisis is . . . a civilizational issue.”

Unfortunately, we have no latitude for indecision. Jim Hansen states: “[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.” You might wonder why the atmosphere is giving us so little time. It is because we have already pumped so much carbon into it that we are likely nearing a “tipping point” that will trigger irreversible dynamics. After that tipping point, our subsequent carbon reductions, no matter how impressive, will not thwart long-term catastrophe. Let me be clear. I do not mean to imply that all climate catastrophe will visit us on January 1 of Year 11 from now. The tipping point concept means this: if we continue business as usual, then at some point within this coming decade, and probably sooner rather than later, we will effectively place a lock on the door of our heating greenhouse and throw out the key. Our children and future generations are trapped in that greenhouse with rising temperatures and they will have no way to get out. This 10-year action window we are now looking through means that, if we pour resources into the wrong strategy, we won’t have time to go back and chart another course before this tipping point has come and gone.

State legislatures, federal agencies, and governors across the country should be burning the midnight oil (or, maybe, florescent lights) figuring out solutions to get us to a carbon free society in the short time we have left. But, with few exceptions, our government is still sleeping through climate crisis. So scientists are trying new ways – any ways they can think of -- to wake people up to this urgency. In January, the Harvard Medical School Center for Health and Global Environment convened top climate scientists to hold a press conference in Washington D.C. with national Evangelical Christian leaders to jointly deliver an “Urgent Call to Action” to the President of the

United States to “protect Creation.” How many times have you seen scientists and Evangelicals holding a press conference together to protect Creation? In their words: “Earth . . . is seriously imperiled. . . . [W]e are . . . destroying the . . . community of life on which all living things on Earth depend. . . . [E]very sector of our nation’s leadership . . . must act now . . . before it is too late. . . . Business as usual cannot continue yet one more day.” And the international community is sounding the same alarm: Three months ago British Prime Minister Tony Blair said to the world: “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.”

These are not the voices of Chicken Little and Henny Penny. If someone dismisses climate warming to you as “Sky is Falling” kind of talk, go back and read the book, Chicken Little, and see if you can find any intelligent comparison between mounting atmospheric heat-trapping gasses and an acorn falling on a little chicken’s head. To be sure, there are those few global warming “contrarians” dismissing the threat, but before you place the future of your children in their hands, check out their affiliations with the fossil fuel industry. When the United Nations report came out last month ending any debate on whether global warming existed, the Exxon-funded American Enterprise Institute responded with an ad for \$25,000 to any scientist who could refute it. Let’s think about a logical way to process these contrarian views. If several doctors diagnosed your child with life threatening bacterial meningitis, I don’t suppose you would waste time going back to debate the germ theory of medicine with them. You would start the antibiotics and hope or pray for the best.

The urgent warnings coming from all directions of science are intended to focus society on a decision, now. This global warming crisis, encompassing as it is, can be confronted by setting a firm national timeline for greenhouse gas reduction. You can think of this timeline as Nature's Carbon Mandate. Scientists have defined it very clearly. First, we must reverse the climbing trajectory of greenhouse gas emissions within the decade. Second, over the longer term, we must reduce emissions 80% below 1990 levels by 2050. Other countries, and some of our own state governments, are adopting these reduction goals. But it is one thing to set goals. It is another thing to meet them.

Let us be clear. These goals are quantitative, not progressive. Making progress towards meeting Nature's Mandate is not enough. This is carbon math, and falling short means risking a temperature rise of up to 10 degrees. Somehow, if Americans are to secure the future for themselves and their children, they must understand this carbon math as readily as they understand that four quarters equals a dollar.

The carbon problem transcends all societal sectors – including transport, energy, housing, and industry. We simply cannot meet Nature's Mandate without governmental leadership. Government is the huge engine that propels our society. We have thousands of agencies -- indeed more than any other nation in the world. If every one of these agencies made global warming a top priority, we might stand a chance of meeting Nature's Mandate head on. But to implement programs necessary to reverse our carbon emissions within 10 years, government has to start now. As Tony Blair said last November: "There is nothing more serious, more urgent, more demanding of leadership. . . in the global community."

European countries are well on the way to reducing carbon. But, what is our government doing? It is driving this country towards *runaway* greenhouse gas emissions. County commissioners are approving trophy home subdivisions as if global warming didn't exist. State environmental agencies are approving permits for asphalt plants as if global warming didn't exist. The U.S. Forest Service is delivering timber sales, as if global warming didn't exist. Magnify this by the hundreds on a daily basis across the country. And consider this: the electric power industry is racing to build more than 150 new coal fired power plants across the United States. The industry investment in these plants reflects an assumption that our U.S. Environmental Protection Agency (EPA) will grant permits under environmental statutes allowing them spew forth "hundreds of millions of tons of carbon dioxide into the atmosphere each year for decades to come"—as if global warming didn't exist. You see, nearly every agency in America is acting as if global warming did not exist.

Political will grows overnight when citizens demand action. But those Americans who *are* awake to this crisis are focusing their energy on reducing their own carbon footprint rather than holding their leaders accountable. Our voluntary efforts are vitally important. But, they also conceal a state of national chaos. Voluntary efforts alone will not get us into compliance with Nature's Mandate in the very short time we have left.

The other day I saw a man on a commuter bike peddling through a downpour here in Eugene. A black Hummer (as a matter of fact, it was a *stretch* black Hummer!) roared by him, and that cyclist raised his fist and started yelling. And no wonder! That Hummer negated the carbon reduction that he had peddled so hard for. That is precisely

why we need government -- to regulate carbon sources and make sure that the carbon math adds up to meet Nature's Mandate in time. But did the cyclist call his state legislators, Congressmen, or the EPA Regional Administrator when he got to work? Probably not. The fact that Americans are trying to solve global warming exclusively on their own tells us that we have lost our sense of governmental accountability in environmental issues. So in the remaining time I will address how we can frame the climate crisis to clarify our government's duties.

IV.

As we all know, to analyze a problem, we often need to go back to its roots. For the past three decades we have looked to environmental law to address environmental problems, such as air pollution. Environmental law consists of hundreds of statutes and regulations passed since the 1970s to protect our natural resources. Statutes give tremendous authority to officials at all levels of government to control just about any environmental harm you can think of.

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

The heart of the problem is this: while the purpose of every local, state and federal environmental law is to protect natural resources, nearly every law has also provided authority to the agencies to permit, in their *discretion*, the very pollution or land

damage that the statutes were designed to prevent. Of course, the permit systems were never intended to subvert the goals of environmental statutes. But most agencies today spend nearly all of their resources to *permit*, rather than prohibit, environmental destruction. Essentially, our agencies have taken the discretion in the law and have used it to destroy Nature, including its atmosphere.

Why would public servants who draw their salaries from the taxpayers do such a thing? It is because the call of private property rights is sounded in the halls of nearly every agency, nearly every day. Asphalt plant operators and chemical manufacturers, land developers and timber companies, auto makers and coal-fired plant investors, industrialists and individuals of all sorts scream out to these agencies not to draw that regulatory line on their activity – because doing so would hurt their economic goals. This private property rights rhetoric has cowered officials at every level of government. Most officials are good, dedicated individuals, but as a group, they dread saying no to permits. So it's really no surprise that nearly every agency in America is still acting as if global warming didn't exist.

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

discretion not to regulate greenhouse gas emissions under the Clean Air Act. A compromised judicial check skews the Constitutional balance of power over the environment. Without that third branch of government fulfilling its function, our democracy becomes an administrative tyranny over Nature, with dangerous results for our future.

V.

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

Consider how our federal government is using this discretion frame to justify inaction in the face of climate crisis. The EPA is the only federal agency charged by Congress to control air pollution. Even though the Clean Air Act clearly provides EPA the authority to regulate carbon dioxide, EPA refuses to regulate. Viewed through the frame that EPA has put to the American public, the air is simply an object of regulation, a nebulous commons, and EPA can use its discretion to permit pollution by the oil, gas,

coal, and automobile industries -- no matter that this legalized pollution will degrade the atmosphere so much that it will no longer support human civilization as we know it. Because the discretion frame never characterizes natural resources as quantified property assets, it allows government to damage the resources until they are all gone.

VI.

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

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

When Dr. Martin Luther King Jr. urged Americans to take down another destructive frame in our history, he called out for all citizens to recognize the "fierce urgency of now." Unbelievable as it may seem, the habitability of our planet rests on our generation being able to reframe government's obligation towards Nature.

VII.

We can reframe environmental law by looking to timeless principles that reach far back on this and other continents. Indeed, such principles have grounded Supreme Court jurisprudence since the beginning of this country. But our agencies have lost sight of

them in the last 30 years. In just that short period, these principles have been pushed under by thousands of pages of complex statutes and regulations that have proliferated across the legal landscape like an invasive species.

These foundational principles are as crucial today in the face of global warming as they were two hundred years ago because they clearly define government's responsibility towards Nature and towards future generations. They do so by drawing upon ancient trust concepts originating in property law, not statutory law.

A trust is a fundamental type of ownership whereby one manages property for the benefit of another. Long ago, the Supreme Court said that government is a trustee of Nature's resources, because it is the only enduring institution with control over human actions. You can imagine all of the resources essential to our human welfare and survival – including the waters, wildlife, and air -- as being packaged together in a legal endowment, which I call Nature's Trust. Our imperiled atmosphere is one of the assets in that trust. Government holds this great natural trust for all generations of citizens. All of us here in this room are beneficiaries of this trust. Our great-grandparents were beneficiaries. Our great-grandchildren are beneficiaries, even though they are not yet born. We all hold a common property interest in Nature's Trust. You could think of this as Nature's treasure to be passed down through all generations of humankind.

With every trust there is a core duty of protection. The trustee must defend the trust against injury. Where it has been damaged, the trustee must restore the property in the trust. Protecting our natural trust is more consequential than anything else government does. More consequential than jobs, health care, social security, education,

or even defense, for this duty carries the weight not only of the present generation of citizens, but of all citizens to come.

So it's not surprising that Nature's Trust principles were penned by judges long ago as the first environmental law of the United States of America. This ancient strand of law threads together all of our modern environmental statutes. In the opening provision of the National Environmental Policy Act (NEPA), Congress declared a national duty to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." When we invoke the trust to call upon government to protect our natural resources – and safeguard our atmosphere-- we are not creating anything new.

As Robert Kennedy said last night, this fundamental doctrine of governance reaches back literally, to Justinian times and Roman law. But on this continent it reaches back even further, as much as 10,000 years. Until just 150 years ago, the native nations controlled this vast territory. They were the sovereigns who managed the natural trust across all of this land. Their governing laws ensured that resources would be available in the same abundance for their beneficiaries in distant generations. Though tribes did not describe their laws in western legal terms, the governing sovereign mandate across all of Native America was, and still is, a trust concept. Tribal leaders evoke natural law, which designates them as stewards of the plants, the animals, the waters, and the air. That is the original environmental law of this land.

And indeed, this sovereign trust over natural resources is so basic to governance that it is found in many other countries today. For example, 13 years ago, the Philippines Supreme Court invoked the trust to halt rainforest logging. The Philippines government contended that it had complete discretion – remember discretion? -- to allow private

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

These trust principles are inherent in, and are inextricable from, the institution of government itself. Back in 1892, our Supreme Court said: "The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government. . . ." People, the national chaos over global warming today is a direct result of our government abdicating its trust over our atmosphere.

VIII.

Let's take a look at how the two frames I've described differ and their implications for climate stability. In contrast to the discretion frame, the four sides of the trust frame are: obligation, obligation, obligation, obligation. We can take the very same set of environmental laws, and without changing a word of them, reframe our government's role towards Nature on a policy, legal, and moral level. By reframing, we

can turn government's *discretion* to destroy Nature into an *obligation* to protect Nature – including its atmosphere. But this principle works in reverse as well. We can pass any new climate law we want, and no matter what it says, if it is pressed through that discretion frame, government will continue to impoverish natural resources until our society can no longer sustain itself.

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

Let me show you how citizens over in McCall, Idaho took down the discretion frame and put up the trust frame to protect their airshed. A few months ago, the Idaho Department of Environmental Quality proposed to issue a permit for an asphalt plant that spews so much air pollution into neighborhoods that mothers pull their kids inside day after day. This permit, delivered by the hand of environmental law, would legalize the emission of 54 toxins right into the mountain air – toxins like lead, mercury, Chromium 6, dioxin, arsenic, and formaldehyde – as well as more carbon pollution. If you read the DEQ analysis of this proposed permit, you would be hard-pressed to find any sort of statement that this pollution would damage the airshed or the people living there or exacerbate the global warming problem. Instead, the analysis is filled with charts and incomprehensible technical statements. The reader is hit in the face with AACs, AACCs, TAP analysis, T-RACT, HAPs, NESHAPs, SIP, MACT and more. Amidst this gibberish, there is no core value driving governmental action.

There was a hearing on this asphalt plant permit. Normally such hearings are filled with empty seats, and no wonder. But someone up there in McCall handed out

flyers that said, quite simply, “Air for Sale,” and the hearing room was packed with angry citizens. These were not environmentalists. There is no environmental group in McCall, Idaho. (Did I mention Idaho is a red state?) These were people whose only connection to each other was that airshed – these were doctors, school kids, cancer victims, retired people, mill workers, ski team coaches, Forest Service employees, real estate brokers, teachers, mothers and fathers. When you translate the agency technojargon into “Air for Sale,” you replace the discretion frame with the trust frame. Citizens suddenly feel that their property is being trampled by their own government. They start thinking, “Hey, that’s my air. Even if I share it with others.” Pollution of that air becomes an infringement on American property. The frame makes a difference. It expresses our core expectations of government towards Nature.

Those of us in the audience last night were practically reeling from detailed accounts of environmental devastation worldwide, ranging from crop losses in India to mercury contamination of fish in rivers across America. One man stood up and asked the question, “What can we do?” You can bring a new voice to government and change the paradigm. If citizens of Idaho can do it, so can you. The private property rights rhetoric we hear all over the place grew from living rooms, churches, town hall meetings, radio talk shows and chat rooms. A public property rights discourse will grow in the same way but it will spread more rapidly because Nature’s impoverishment has now reached doorsteps across America.

IX.

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

coalescing force to confront climate crisis and perhaps every other environmental problem.

A.

My first point has to do with Americans' feeling of entitlement towards Nature. The discretion frame, with all of its technojargon, gives no hint of environmental loss. The ARARs, and TMDLs and TSDs, and SIPs and HMPs, and RPAs and PRPs, and the hundreds of other acronyms that our agencies use to hospice a dying planet really don't sound out any alarms to the public. These are neutral terms *because* they are incomprehensible. The public, then, is simply led to accept our degraded environment as a nebulous state of affairs. We never imagine that resources could be all spent down, all used up, no longer there for us at some point in time. We seem unbothered even when our government leads us into global climate catastrophe.

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

The trust frame has particular empowerment for youth, because it recognizes a property right to natural inheritance for the children of the world. It gives children an entitlement, as beneficiaries with no lesser standing than our own, to natural wealth, even though they are not yet old enough to exercise any voting power over their government.

Children get angry when they think of our generation spending down a trust that they are entitled to take in the same abundance we have enjoyed.

B.

Second, when we invoke the trust frame to explain global warming, we may be better able to overcome denial. Again, the most disastrous manifestations of global warming may not occur until after our window of opportunity to avert the crisis has closed. A daunting obstacle we must confront is that most citizens do not perceive global warming as an immediate threat. For many Americans, the predictions are so extreme -- there's even talk of an ice age! -- that they must seem like a science fiction movie. Indeed, the more dire the environmental issue, the less likely it seems to be taken seriously in the United States of America. Many simply mock the messenger as Chicken Little spreading doomsday gloom.

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

The discretion frame put forth by our government capitalizes on this mental weakness and lures people into complacency. People operating within this frame think of the atmosphere as "out there somewhere," way beyond that hillside. But people's perceptions change remarkably when they think of their trust being mismanaged. That is an immediate concern, even if the full effects won't be felt for years to come. Beneficiaries don't often sit idle when their trustee drains their trust. They hold their

trustee accountable for the losses. And they worry about collapse scenarios. They understand stocks crashing. They understand a freewheeling grandfather spending down all of their rightful inheritance.

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

C.

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

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

Every Supreme Court case invoking the trust makes clear that government cannot allow private property rights to damage crucial public resources. Back in 1907, the

Supreme Court said, “[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

And in 1892 when private enterprise threatened the shoreline of Lake Michigan, the U.S. Supreme Court said, “It would not be listened to that the control and management of [Lake Michigan] -- a subject of concern to the whole people of the state -- should . . . be placed elsewhere than in the state itself.” Can’t you practically hear those same Justices saying today, “It would not be listened to” that government would let our atmosphere be dangerously warmed in the name of individual private property rights.

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

D.

Finally, the trust frame has global reach. This is important, because global warming is, after all, a global problem. When we portray it to the American public we must be able to explain the role of foreign nations. Many people have heard about the Kyoto Protocol. They know that China is bringing massive numbers of coal-fired plants

on line. When Americans are asked to make changes in their own lives, they often reply that it won't make a difference because global warming is an international issue.

The trust framework positions all nations of the world in a logical relationship towards Nature. Transboundary assets like the atmosphere are shared as property among sovereign nations of the world. These nations are co-tenant trustees of the asset. In other words, they are all trustees, but they share the resource as co-tenants. Not unlike family members might share ownership of a mountain cabin as co-tenants, but in this case, the co-tenancy is in a greenhouse. Property law offers timeless principles to deal with common ownership. It has always imposed a responsibility on co-tenants to not degrade, or waste, the common asset. This one concept lends definition to international responsibilities, whether we are talking about a shared fishery, or an ocean, or the globe's atmosphere.

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

X.

Let me conclude. If we seek a secure climate future for ourselves and our children, citizens across the country must call upon government to take immediate action. All of us in this room can help citizens do that. The waking of America to climate crisis is bound to engender a sweeping environmental movement. But we must be careful. A

movement without a soul is only social commotion that draws our imperiled atmosphere further into the death spiral of American environmental law.

Last night, conference co-director Zach Welcker opened this conference with stirring words calling upon all of us to “create a vision for the future that is so compelling and inclusive that masses of people will wind up fighting to protect our planet without remembering when or why they even started along the path.” The paradigm shift we are all searching for may simply require illuminating something very, very old – a way of thinking that reaches from the coral reefs of Australia to the ancient forests of the Northwest and the Phillipines, to the Columbia, the Nile, the Hudson and the Amazon – a way of thinking that embraces, in exactly the same way, the smallest cluster of lupine flowers emerging from an alpine meadow and the outer limits of our atmosphere – because it is a way of thinking reflected in the web of life itself. This is the moment – *your* moment -- to be resolute and clearly frame government’s obligation as protection of generational inheritance. This is the moment – *your* moment -- to claim Nature’s Trust, Earth’s Endowment, for our descendants.

In AN INCONVENIENT TRUTH, Al Gore presents climate crisis as a “moral and spiritual challenge” for our generation. The trust frame I speak of is the obligation that springs from the heart of all Humanity, pressed into the institution of government. The same trust principles that flow through a judges’ pen can be preached from a pulpit or spoken as the last words from a grandmother to her grandchildren anywhere in the world – because the trust encompasses a moral obligation that transcends all governments, cultures, and peoples on Earth. That obligation has been its enduring power through all of Time, and it will be its enduring hope for all Time to come.

