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## **UO Law Professor Unveils Litigation Strategy to Stem Global Warming**

Professor Mary Wood will present a new litigation approach to climate crisis for the 2008 Public Interest Environmental Law Conference (PIELC) at UO in Eugene. The March 6 panel, entitled Public Trust: Tapping the Potential of the Common Law Trust, will focus on the public trust doctrine as a tool to engage courts in the urgent protection of the atmosphere and other crucial resources. Professor Wood is the Philip H. Knight Professor of Law and a co-author of a leading textbook on natural resources law. She is joined on the panel with prominent scholars and litigators who are extending the public trust doctrine into new terrain.

As the planet approaches irreversible climate thresholds, scientists warn that carbon pollution could push the world beyond the point of no return into a state of runaway heating. The world emits 70 million tons of carbon a day, and the amount is rising by about 3% a year. The United States is responsible for nearly 30% of the pollution. Professor Wood says the courts must intervene to hold government accountable for addressing this climate emergency. "Nothing less than a massive global effort on the scale of WWII can save our climate at this point. Government at all levels – local, state, and federal – must be engaged."

Wood points out that, instead of protecting the atmosphere, government is driving the world towards greenhouse gas emissions by approving subdivision developments, timber sales and new coal fired plants. The U.S. Environmental Protection Agency, charged by Congress to protect the atmosphere is "using all of our taxpayer money and doing everything in its power to abdicate its responsibility to the public," Wood says. The agency has steadfastly resisted regulating carbon dioxide and recently

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denied California's petition to establish stricter regulations for greenhouse gas pollution from automobiles.

Wood draws upon the venerable public trust doctrine to define government's duty. She characterizes the atmosphere as belonging to the people as a natural trust administered by the government. "Our imperiled atmosphere is the most vital asset in the trust," Wood said. "A government that fails to protect the atmosphere sentences its people to misery."

As trustee, government has a fiduciary obligation to slash carbon pollution. But government is approaching climate crisis as a matter of political discretion rather than obligation, Wood points out, "This is a matter of carbon math. If we fail to make adequate reductions, we pass the climate thresholds into a world of climate catastrophe. Government is putting our children in serious future peril." The Mayor of New York recently told a UN climate conference, "Global warming long-term has the potential to kill everybody."

Scientists hope the world can avert the "tipping point" if industrialized nations such as the U.S. arrest the rise in carbon emissions by 2010, then reduce carbon by 4% a year thereafter until levels approach 80% reduction or even zero emissions. Developing nations would also have to take quick action. Scientists say aggressive action is necessary as evidence by the accelerated rate of polar ice sheet melting, which may lead to complete loss of arctic summer sea ice by 2012. "We face an urgency that puts a premium on every day that passes," Wood said.

The key, she says, is finding legal levers to force government to do its job. "It is clear the political branches are not going to act in time," she said. She urges lawyers to launch "atmospheric trust litigation" in the courts that would hold government responsible for carrying out its duty to reduce carbon. "Only swift injunctive relief carries hope of holding government to its obligation in the time we have left. The window is closing fast."

“The unparalleled force of the trust doctrine is that it draws upon a duty organic to every level of government. Atmospheric trust litigation is a macro strategy. The statutes won’t get us where we need to be in time,” Wood explained.

Wood describes the existing atmospheric carbon pollution as a giant pie divided into shares held by each country, state, and city. Each contributor has a responsibility to reduce its emissions in accordance with the targets set by scientists. As Wood points out, this obligation falls to every state, and every city within every state. “We can’t excuse any orphan shares. Unless every share is accounted for, we are not going to reduce the carbon pie in the time we need to,” she said.

Wood envisions a role for courts that would obviate the barriers confronted in nuisance litigation. Two suits against major carbon polluters (coal fired plants and automobile companies) have failed because courts said they invoked “political questions” not appropriate for judicial review. The trust approach, Wood points out, “turns the table on political question defense.” She explains, “The very essence of the public trust is to allow the courts to police the legislature’s and agency’s disposition of public assets. A government trustee has no political discretion to allow irrevocable damage to a natural asset needed by citizens for their survival.”

Wood has devised a remedy that she believes will allow the courts to exercise meaningful oversight yet preserve the traditional prerogatives of the political branches to make policy decisions. She invokes a traditional trust tool called an “accounting” to compel and monitor government action. Carbon accountants are able to measure the carbon emissions of any political jurisdiction. A “carbon accounting” would inform the court as to whether the government defendant is reducing pollution adequately as measured by the scientific targets. Government agencies would have the latitude to decide how to reduce pollution. Narrowly tailored injunctive relief (such as temporary prohibitions on road construction or new pollution

permits) could serve as “backstops” in case the government fails to make adequate progress.

The greatest challenge, Wood says, is urging lawyers and judges to “think outside the box.” Most climate litigation resorts to familiar statutes that were formulated for a different time. “We face a planetary emergency in which virtually every government must act rapidly. Only by defining a duty organic to government and finding a way to enforce that duty in the courts do we stand a chance of preventing runaway climate heating. A public trust approach takes the atmosphere out of the realm of political will and puts it in the realm of fiduciary obligation.”

Wood’s Atmospheric Trust Litigation strategy dovetails with the theme of this year’s conference, Compelling a Climate of Change. The PIELC conference—distinguished as the oldest and largest event of its kind in the U.S.—is organized by Land Air Water (LAW), a UO student environmental law society. The four-day event, which draws about 3,000 attendees, includes over 125 panels and workshops. A brochure of the PIELC panels is available online at: <http://www.pielc.org/brochures/2008.pdf>. For more detailed information about the PIELC, visit: <http://www.pielc.org/2008/index.html>.

Professor Wood’s article on Atmospheric Trust Litigation will be published in a forthcoming book on climate litigation compiled by UO Law Professor Hari Osofsky, to be published by Cambridge Press. Wood’s article is available for downloading at <http://www.law.uoregon.edu/faculty/mwood/docs/atlpaper.pdf>. For additional information contact Jill Forcier, UO School of Law, (541) 346-3845, or at [jillf@law.uoregon.edu](mailto:jillf@law.uoregon.edu).