

# **NATURE’S TRUST: RECLAIMING AN ENVIRONMENTAL DISCOURSE**

2006 Bioneers Conference  
Keynote Address

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## I. INTRODUCTION

The term “Bioneers” suggests a new kind of community – an intentioned, innovative, diverse group of people who share a commitment to the future of this planet. Collectively, we Bioneers are finding ways to reduce our own individual footprint on the Earth, and we hope that our innovations will spread to others. That is a worthwhile endeavor. Gandhi said we must be the change we want to see in the world.

But reducing our footprint is not nearly enough. We must also expand our imprint. Specifically, we need to engage our government to reverse the most encompassing destruction society has ever amassed against this Earth. It is a challenge unparalleled in the history of human civilization. To meet this challenge, citizens must re-conceive their government’s role in environmental protection.

Let me begin by taking stock of where our civilization sits on the trajectory of environmental loss. Then I will suggest why government is essential and yet why it is

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not working. Finally, I will suggest a new discourse that we could all use to engage our government in protecting Nature.

Let us first confront the big picture. We are rapidly losing life on this planet. Just a few statistics speak volumes. In this country alone, at least 9,000 species are at risk of extinction.<sup>2</sup> Fish advisories for toxic contamination are in effect for 25% of all rivers, 35% of all lakes, and 71% of all coastal estuaries in this country, as well as 100% of the Great Lakes.<sup>3</sup> The United States has lost over 53% of its wetlands<sup>4</sup> and 90% of its old growth forests.<sup>5</sup> California has lost 99% of its native grassland.<sup>6</sup> The amount of urban land development has quadrupled between 1954 and 1997.<sup>7</sup> According to the Environmental Protection Agency, 95% of all Americans now have an increased risk of

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<sup>2</sup> See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY, 21ST ANNUAL REPORT 137 (1990) (reporting 9,000 species at risk of extinction and noting, "The problem is national in scope, with every region of the country reporting losses of native species . . . more than species are being lost. Whole plant and animal communities -- integrated, resilient systems -- are threatened.").

<sup>3</sup> See <http://epa.gov/waterscience/fish/advisories/2004questions.html#findings>; U.S. ENVTL. PROT. AGENCY, DOC. NO. EPA-823-F-01-010, EPA FACT SHEET UPDATE: NATIONAL LISTING OF FISH AND WILDLIFE ADVISORIES 1 (Apr. 2001), cited in NATIONAL ENVTL JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE, 19 (rev. Nov. 2002) [hereinafter NEJAC]. In 2003, 48 states had fish advisories, totaling 3,089. U.S. ENVTL. PROT. AGENCY, DOC. NO. EPA-823-F-04-016, EPA FACT SHEET: NATIONAL LISTING OF FISH ADVISORIES (Aug. 2004), available at <http://www.epa.gov/waterscience/fish/advisories/factsheet.pdf>. EPA has also found that 42% of all Wadeable streams are in "poor" condition. See U.S. Environmental Protection Agency, Wadeable Streams Assessment Fact Sheet, available at [http://www.epa.gov/owow/monitoring/wsa/WSAfactsheet\\_0506.pdf](http://www.epa.gov/owow/monitoring/wsa/WSAfactsheet_0506.pdf); see also *More Than Half of U.S. Streams Polluted*, REUTERS WORLD ENVIRONMENT NEWS, (May 8, 2006), available at <http://www.planetark.com/dailynewsstory.cfm/newsid/36266/story.htm> (citing EPA data).

<sup>4</sup> William B. Meyer, *Consequences: The Nature and Implications of Environmental Change*, PRESENT LAND USE AND LAND COVER IN THE USA 24-33 (1995), excerpted in JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD, & DAN H. COLE, NATURAL RESOURCES LAW 730 (West Publishing, 2006); see also REED NOSS, ET AL., ENDANGERED ECOSYSTEMS OF THE UNITED STATES: A PRELIMINARY ASSESSMENT OF LOSS AND DEGRADATION, Appendix 1 (citing Dahl 1990), available at <http://biology.usgs.gov/pubs/ecosys.htm>.

<sup>5</sup> NOSS ET AL, *supra* note 4 (citing World Resources Institute 1992).

<sup>6</sup> NOSS ET AL, *supra* note 4 (citing Kreissman 1991).

<sup>7</sup> U.S. Env'tl. Protection Agency, E.P.A. 231-R-01-002, *Our Built and Natural Environments: A Technical Review of the Interactions Between Land Use, Transportation, and Environmental Quality* 4 (2001), available at: <http://www.smartgrowth.org/library/built.html>. The amount of developed acreage during that time period grew from 18.6 million acres to about 74.0 million acres in the contiguous 48 states. *Id.*

lung cancer, just from breathing toxins in outdoor air.<sup>8</sup> EPA estimates that 8% of women of childbearing age have unsafe blood mercury concentrations, and more than 300,000 newborns each year risk learning disabilities due to fetal exposure to methylmercury.<sup>9</sup> Babies in the United States are being born polluted.<sup>10</sup>

On the global level, approximately half of the world's original forest is gone, and another 30% is degraded or fragmented.<sup>11</sup> There are now 200 "dead zones" in the world's oceans, covering tens of thousands of square miles.<sup>12</sup> Nearly one-third of the sea fisheries have collapsed, with the rate of decline accelerating towards complete loss of wild seafood just four decades from now.<sup>13</sup> The World Conservation Union has found that globally, 30% of all fishes, 20% of all amphibians, and 25% of all reptile species are threatened.<sup>14</sup> The World Wildlife Fund 2000 report found that the Earth's natural ecosystems have declined by 33% over the last 30 years.<sup>15</sup>

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<sup>8</sup> GENERAL ACCOUNTABILITY OFFICE, DOC. NO. GAO-06-669, REPORT TO CONGRESSIONAL REQUESTERS, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM 1 (June, 2006), available at <http://www.gao.gov/new.items/d06669.pdf>.

<sup>9</sup> Environmental Protection Agency, Methylmercury Exposure, <http://www.epa.gov/mercury/about.htm>.

<sup>10</sup> See Douglas Fischer, *Babies Born Polluted*, OAKLAND TRIBUNE (July 18, 2005).

<sup>11</sup> THE WORLDWIDE INSTITUTE, VITAL SIGNS 2002 104 (2002), cited in LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at 441.

<sup>12</sup> 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.*

<sup>13</sup> 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*.

<sup>14</sup> Consult [www.iucn.org](http://www.iucn.org). E.O. Wilson, re-known Harvard biologist, estimates that the world is losing 27,000 species per year (3 per hour). E.O WILSON, THE DIVERSITY OF LIFE 280 (1992).

<sup>15</sup> WWF LIVING PLANET REPORT 2000, 1, available at [www.worldwildlife.org](http://www.worldwildlife.org). World Wildlife Fund (WWF) examines ecosystems on a global scale and presents trends in species loss. The 2000 report

Global warming is a threat that eclipses all others, and it is accelerating. 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<sup>16</sup> and is rising at a rate of 2% each year.<sup>17</sup> Scientists warn that temperature increases worldwide may send more than a third of the planet's species into extinction within the next 44 years.<sup>18</sup> The Polar ice cap and almost all of the glaciers of the world are melting rapidly – they include the Swiss Alps, the Himalayas and the Andes.<sup>19</sup> Glacier National Park will likely have no more glaciers in 15 years.<sup>20</sup> Greenland is melting.<sup>21</sup> On October 30, 2006, British Prime Minister Tony

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concludes that "the ecological pressure of humanity on the Earth has increased by about 50 per cent over the same [30-year] period." *Id.* WWF presents indexes to measure changes in species abundance over time in three separate categories: forest species, freshwater species, and marine species. Its 2000 report presents a dramatic decline in all three categories over the period 1970-99: freshwater species (-50%), marine species (-35%), and forest species (-12%). Similarly, the MILLENNIUM ECOSYSTEM ASSESSMENT OF 2005, conducted by 1,300 experts from 95 countries, concludes: "60 percent of the economic system services that support life on Earth – such as fresh water, fisheries, air and water regulation, and the regulation of regional climate, natural hazards and pests – are being degraded or used unsustainably." MILLENNIUM ECOSYSTEM ASSESSMENT SYNTHESIS REPORT, <http://www.millenniumassessment.org/en/index.aspx>, discussed in LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at 84.

<sup>16</sup> AL GORE, AN INCONVENIENT TRUTH 66-67 (2006).

<sup>17</sup> Jim Hansen, *The Threat to the Planet*, THE NEW YORK TIMES REVIEW 12 (July 13, 2006). Hansen, the leading climate scientist for NASA, warns that, if such growth continues for even another decade, the emissions in 2015 will be 35% greater than the 2000 levels. This could cause a projected rise in temperature of about five degrees Fahrenheit during this century. This warming, in turn, could cause a disastrous 80-foot rise in sea level:

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 US live below that sea level. . . . China would have 250 million displaced persons. Bangladesh would produce 120 million refugees, practically the entire nation. India would lose the land of 150 million people. *Id.* at 13.

<sup>18</sup> ROSS GELBSPAN, BOILING POINT 1, 36 (Basic Books, 2004) (projecting extinction of one third of the world's species by 2050). Fifty percent or more of the species currently on earth may be extinct by the end of the century if current global warming factors continue. Hansen, *supra* note 17, at 12.

<sup>19</sup> GORE, *supra* note 16, at 48-59. In 2003 the United Nations Environment Programme (UNEP) released a study predicting the ruin of many low-level ski resorts world wide as a result of global warming. See *Global Warming Threatens Many Low-Level Ski Resorts with Ruin – UN Study*, UN NEWS SERVICE, Dec. 2, 2003, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=9035>. Under a worst-case scenario, none of Australia's ski resorts will be economically viable by 2070 if current warming trends continue.

<sup>20</sup> GORE, *supra* note 16, at 47. In the last 150 years the glaciated area of the Waterton-Glacier International Peace Park (a World Heritage Site) has decreased by 73%. Of the 150 glaciers that were present in 1850, only 27 remain today. *Waterton-Glacier National Park Petition*, 16 NRLI NEWS 11-12 (Spring/Summer 2006). A coalition of non-governmental organizations has petitioned the World Heritage Committee to list the Park as a World Heritage Site in Danger due to Climate Change. *Id.* at 11.

Blair unveiled a landmark report on global warming and 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

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<sup>21</sup> GORE, *supra* note 16, at 195. The mass of Greenland decreased by 50 cubic miles of ice in 2005. Hansen, *supra* note 17, at 13.

community.”<sup>22</sup> As Pulitzer Prize winner Ross Gelbspan puts it, “[C]limate crisis is . . . a civilizational issue.”<sup>23</sup>

It would be sheer fantasy to believe that these statistics are end-points. Rather, they are mileposts along a road that leads to a very clear dead end for all of us. The 25% will turn into 75% and then 100%. At some point, and perhaps very soon, there will be

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<sup>22</sup> 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](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 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>.

<sup>23</sup> Gelbspan, *supra* note 17, at 1. Gelbspan points to scientific agreement that climate stabilization requires, at the very least, a 70% decrease in fossil fuel consumption. *Id.* at xi. While Gelbspan describes technologies and conservation strategies that can achieve such a shift, he also points out the “persistent and pathological denial” of Americans on this issue. He urges citizens to view the threat as “an unprecedented opportunity to use the climate crisis as the foundation for a . . . common global project that would create the basis for a far wealthier, more equitable, and ultimately, much more peaceful world.” *Id.* at xiv.

mere fragments of a natural system left, and it will not support abundant life on this planet.<sup>24</sup> If you take a hard look at the pace of change, you see that such an end-point could be within our lifetimes. We therefore need an immediate, massive shift in the way our society conducts itself. We have been saying that for years now, and yet the problems have only worsened.

If you are a strategic thinker, and devoted to the cause of environmental health, you might be thinking right now, what is my part in accomplishing such a massive shift? In assessing what you can do from this point on, think about what you have done during the last two decades to protect Nature. It is during this recent time period that many losses have accelerated. Many Americans have been recycling, composting, buying organic products, using less paper, converting to rechargeable batteries, driving less, and trying to convince their family members, friends and neighbors to do the same. These are important changes to make, because they serve as examples to show others that we can make adjustments without society collapsing. But, these collective efforts on the part of dedicated citizens have not been enough. Sadly, they have barely made a dent in the way the broader mass of people goes about everyday living. For every person switching to hybrid cars, I can show you ten driving SUVs. For every 10 people that turn off lights

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<sup>24</sup> Harvard professor E.O. Wilson, one of the world's leading scientists and a Pulitzer Prize recipient, has produced an urgent manifesto, E.O. WILSON, THE FUTURE OF LIFE (2002). He concludes that, if the current environmental destruction continues:

The most memorable heritage of the twenty-first century will be the Age of Loneliness that lies before humanity. The testament we will have left in launching it might read as follows:

*We bequeath to you the synthetic jungles of Hawaii and a scrubland where once thrived the prodigious Amazon forest, along with some remnants of wild environments here and there we chose not to lay waste. Your challenge is to create new kinds of plants and animals by genetic engineering and somehow fit them together into free-living artificial ecosystems. We understand that this feat may prove impossible. We are certain that for many of you even the thought of doing so will be repugnant. We wish you luck. And if you go ahead and succeed in the attempt, we regret that what you manufacture can never be as satisfying as the original creation. Accept our apologies and this audiovisual library that illustrates the wondrous world that used to be.*

*Id.* at 77-78 (italics in original).

to save electricity, I can show you a hundred that leave lights on when they leave home. For every hundred people that painstakingly recycle their plastic milk jugs, I can show you a thousand that just do not bother. At some point, environmental strategy must acknowledge simple mathematics: if the rate of voluntary conversion to eco-friendly behavior is not outpacing the rate of destructive behavior – and outpacing it enough on the macro scale to turn the tide of the environmental parameters we must pay attention to, like species loss, climate change, deforestation, toxic pollution, and such – then we are not reversing environmental losses; we are just slowing them by some indeterminate amount. As you know, an indication of insanity is doing the same thing 1,000 times over with the same result and expecting a different result on the next attempt. We now must rethink our strategies for protecting Nature, and we must do so urgently. The net losses over the past two decades make one thing very clear: environmental responsibility cannot be left solely to volunteerism.

## II. THE ROLE OF GOVERNMENT

Certainly, if we were looking for the most creative and rewarding ways to improve environmental conditions, we would not look to government. We would effectuate change through education, art, religion, and the marketplace. We would plant the seeds of a new environmental ethic, as Aldo Leopold suggested decades ago,<sup>25</sup> and hope that those seeds might blossom into a new way of relating to the Earth. But, is there something about environmental harm that inherently requires the strong hand of government? I would suggest that there is.

The global warming crisis demonstrates the problem. Most Americans continue to drive their cars, despite the fact that these cars emit carbon dioxide to the atmosphere,

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<sup>25</sup> ALDO LEOPOLD, *The Land Ethic*, A SAND COUNTY ALMANAC 237-264 (1966 ed.).

and that carbon dioxide is the most significant contributor to greenhouse gasses,<sup>26</sup> and that global warming, if unchecked, could end *our* life on Earth as we know it. Why have individuals not radically changed their driving behavior? Because they lack the necessary feedback loops to account for environmental harm in their rational decision-making. First, they have no idea what it will take on their individual part to address global warming. They do not know if they should reduce car trips only when it is convenient for them, or if they should reduce their driving by 50%, or give up driving altogether. They do not know what their individual responsibility is to solve this global problem. Second, even if they do reduce their car trips, they cannot control the actions of all of the other millions of people who drive; there is an immediate offset to their positive behavior.

Some may be quick to criticize people who drive SUVs, because their gas-guzzling vehicles contribute more to global warming than smaller vehicles do. Yet we must ask ourselves, are these SUV drivers simply crazy? No, they are quite rational. That's the problem. Absent that feedback loop, people cannot calculate their environmental footprint, and they cannot factor long-term environmental harm into the equation of their everyday lives. So they go about doing the things that are most convenient to them in the short-term. They may not be acting intelligently over the long-term, but they are acting rationally in the short-term. Whether we are talking about global warming, or use of chemicals, or destruction of land or any other environmental issue, we are led to one clear and haunting prospect: the rational behavior of the 300 million citizens of the United States of America is not likely to change in the massive and urgent way it must in order to address the environmental crises of today. And that is

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<sup>26</sup> See Hansen, *supra* note 17, at 13.

precisely why such destruction will continue if environmental strategies rely on volunteerism alone.

Instead, we must call upon government to step in and address the environmental collapse around us. Government is constituted for the purpose of assigning individuals certain responsibilities as part of a collective society. That is a major part of its function. Consider how seamlessly the tax system works. We need roads, schools, parks, and a defense system. Government takes a huge chunk of our paychecks to meet these needs. We need government to allocate responsibility when it comes to the environment. Have we forgotten, amidst the anti-government mindset that pervades America right now, that 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 for present and future generations. There is nothing more basic than that.

Does this mean government must impose draconian measures? Perhaps not. The hopeful aspect about a society built on massive waste is that a good deal of belt-tightening can occur without any effects being noticed on an every-day level. Would we notice if our toilet paper were unbleached rather than bleached? Or if our kids' bubblegum were not packaged up as Sponge Bob Square Pants? Or if Styrofoam suddenly disappeared from fast food stores? Probably not. And for the changes we do notice, perhaps we would not resent government regulation if it were more clear what purpose it serves. People might suffer a few dandelions in their yards if a ban on pesticides kept their kids out of cancer wards. We welcomed a ban on asbestos when we saw exposed workers dying of lung cancer all across America. We supported a ban on leaded gasoline when we learned that lead caused mental retardation and nerve damage in

our children. We embraced a ban on CFCs<sup>27</sup> to address the hole in the globe's ozone layer. But in all of these instances, we needed government to step into the market, because our so called "free" market gives consumers no real freedom of choice. To have real choice, consumers must have real information, which, for the most part, they lack.

In many instances, government could simply ban environmentally destructive products or behavior without the citizens blinking twice. But we must also realize that, the closer we get to environmental collapse, the more extreme the regulatory measures will have to be to provide for the survival of the maximum numbers of people. Freedom didn't reign in New Orleans in the aftermath of Hurricane Katrina, and there was not a lot of consumer choice either. In the end, we are all subject to Nature's jurisdiction, and government's most important job is to keep us in compliance with Nature's Law.

### III. THE FAILED PARADIGM OF ENVIRONMENTAL LAW

So, the next question is, where is government these days? Well, government is hard at work. In the 1970s, at the height of the environmental movement, Congress passed a set of statutes that boldly addressed environmental damage. These statutes included the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Toxic Substances Control Act, and many, many others. As a result of these statutes, we have more environmental law than any other country in the world. We have hundreds of thousands of pages of federal and state statutes, regulations, and court cases. And, we have more environmental officials than any other nation on Earth. They work in federal, state, and local agencies that are charged by law with protecting our environment. Billions of dollars of taxpayer money funds their work.

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<sup>27</sup> Chlorofluoro-carbons.

So why, then, is our environment spiraling towards disaster? The problem is not that these officials lack authority to control environmental harm. 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 very pollution or land destruction 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 agencies have used their discretion to enshrine a permit system that inevitably sinks the statutory goals. The majority of agencies spend nearly all of their resources to permit, rather than prohibit, environmental destruction. Agency discretion has bred institutionalized permissiveness. Whether we are talking about the U.S. Environmental Protection Agency (EPA), or the U.S. Fish and Wildlife Service, or a state water agency, or a city planning agency, or just about any other agency, most simply are not saying no.<sup>28</sup> And now, the overarching mindset of nearly all agencies is that permits are there to be granted.

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<sup>28</sup> See generally ROBERT F. KENNEDY JR., CRIMES AGAINST NATURE 32-33 (federal agencies in Bush II administration “have given quick permit approvals and doled out waivers that exempt campaign contributors and polluters from rules or regulations.”). For a discussion of decision-making under the Endangered Species Act (ESA), see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 319 (1993)(“[T]he number of projects actually arrested by the ESA is nearly nonexistent. . . .”); Daniel J. Rohlf, *Jeopardy Under Endangered Species Act: Playing A Game Protected Species Can’t Win*, 41 WASHBURN L.J. 114, 151, n.153 (2001)(citing FWS study finding that in a six-year period, jeopardy opinions blocked only 54 activities out of 2,719 formal FWS consultations). For a discussion in the context of the EPA programs, see Mary Christina Wood, *EPA’s Protection of Tribal Harvests: Braiding the Agency’s Mission*, 34 ECOLOGY LAW QUARTERLY (forthcoming, March, 2007); see also David Schoenbrod, *The EPA’s Faustian Bargain*, REGULATION 36 (Fall, 2006). For an account of the U.S. Army Corps of Engineers’ permitting record under section 404 of the Clean Water Act, see LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at 815 (noting that less than 0.2 percent of permits are denied).

The problem is not limited to the United States. As the former Executive Director of the United Nations Environment Program noted:

The field of law has, in many ways, been the poor relation in the world-wide effort to deliver a cleaner, healthier and ultimately fairer world. We have over 500 international and regional agreements, treaties and deals covering everything from the protection of the ozone layer to the

Let us take the Clean Water Act as an example. Congress passed the act in 1972, and declared the national goal of ending – yes, *ending* -- all pollution to navigable waters by 1985.<sup>29</sup> Permits to discharge pollution were to be issued for just five-year terms,<sup>30</sup> and businesses were to adopt new technology in the transition time to eliminate their discharges.<sup>31</sup> But EPA and the state agencies started issuing permit after permit, and soon it became the agencies' way of doing business.<sup>32</sup> We are now 20 years beyond the date by which we were to have no more pollution in our rivers, and yet pollution is now worse than ever.<sup>33</sup> Of course, rivers are not catching on fire anymore, but do not let that fool you. There are toxic chemicals never heard of back in the 1970s discharging to the waters, bioaccumulating in the entire food chain, and ending up in our bodies.<sup>34</sup> Now we

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conservation of the oceans and seas. Almost all, if not all, countries have national environmental laws too. But unless these are complied with, unless they are enforced, then they are little more than symbols, tokens, paper tigers. This is an issue affecting billions of people who are effectively being denied their rights and one of not only national but regional and global concern.

Klaus Topfer, Executive Director of the United Nations Environment Program on the adoption of the Judges' Johannesburg Principles on the Role of Law and Sustainable Development (Aug. 2002), *available at* <http://www.climatelaw.org> (viewed 10.31.06).

<sup>29</sup> Clean Water Act, § 101, 33 U.S.C. § 1251(a)(1) (2000) (“It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”).

<sup>30</sup> *See* 33 U.S.C. § 1342(b)(1)(B) ([P]ermits . . . are for fixed terms not exceeding five years . . . .”). The permit system is called the National Pollution Discharge *Elimination* System, reflecting Congressional intent to phase out pollution to waterways. *Id.* § 1342.

<sup>31</sup> *See* Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1007-08 (4th Cir. 1976) (“[T]he Act establishes a series of steps which impose progressively stricter standards until the final elimination of all pollutant discharges is achieved, that being envisioned for the year 1985.”); Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REFORM 863-69, 889-91 (1986).

<sup>32</sup> Many permits are automatically renewed at the end of the five-year term. *See* U.S. ENVTL PROT. AGENCY, NPDES FREQUENTLY ASKED QUESTIONS, *available at* [http://cfpub.epa.gov/npdes/allfaqs.cfm?program\\_id=0#80](http://cfpub.epa.gov/npdes/allfaqs.cfm?program_id=0#80); *see also* Wood, *Braiding the Agency's Mission*, *supra* note 28, at n.43.

<sup>33</sup> *See id.*

<sup>34</sup> *See* David Ewing Duncan, *The Pollution Within*, NATIONAL GEOGRAPHIC (October, 2006). In fact, EPA reviews, under 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.*

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 . . . ." <sup>35</sup>

Environmental law was not supposed to work this way. The entire premise of administrative law is that agencies are neutral creatures and will use their discretion to serve the interests of the public. <sup>36</sup> In reality, though, most agencies today use their discretion to further political ends. <sup>37</sup> And the politics of the day make it hard for them to say no to pollution. The discretion that is 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.

Moreover, this line-drawing paradigm is devoid of any human 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 line-drawing paradigm we have slipped into substitutes an entirely new focus: how much

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<sup>35</sup> 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>.

<sup>36</sup> Professor Schoenbrod notes "the assumption upon which the EPA's rulemaking power is based – that only an expert agency insulated from politics can do the right thing." Schoenbrod, *supra* note 28 at 39.

<sup>37</sup> See Schoenbrod, *supra* note 28 at 39 ("The EPA was supposed to insulate environmental rules from politics. But it did not; it insulated the politicians from responsibility."). Professor Wendy E. Wagner conducted an extensive study of EPA's decision-making and revealed a "science charade" that serves to hide the political motivations behind regulatory decisions. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COL. L. REV. 1613, 1653 (1995) (observing, "Public officials faced with resolving . . . conflicting demands [of economic goals and public health] thus must resort to the science charade out of sheer political necessity."). The Forest Service provides another example of extreme politicization of decision-making. For discussion, see Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, (1997) (noting the "contorting influence on agency life of economic interests and politics. . . . [W]hen it comes to decisions that will affect large amounts of real estate, these pressures are always on."); *Sierra Club v. Espy*, 822 F.Supp. 356, 370 (E.D. Tex. 1993) *rev'd* 38 F.3d 792 (5<sup>th</sup> Cir. 1994) (noting "statutory violations by excessively self-aggrandized, run-amok executive agencies" in context of Forest Service management); *Sierra Club v. Thomas*, 105 3d 248, 251 (6<sup>th</sup> Cir. 1997), *rev'd on other grounds* *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998) ("[R]ather than being a neutral process which determines how the national forests can best meet the needs of the American people, forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse.").

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 desertification, deforestation, a hole in the ozone layer, dead zones in our oceans, and an atmosphere dangerously heating up.

To illustrate how detached environmental law is from any human value system today, consider the way in which EPA looks at human exposure to toxins. With every pollution scenario, EPA tries to draw a line at how much pollution will impose an unacceptable risk to society. In decision after decision, it allows toxic pollution that carries a certain probability of causing cancer cases. Those probabilities range from one in a million ( $10^{-6}$ ) to one in 10,000 ( $10^{-4}$ ).<sup>38</sup> And everyone knows this is a shell game – the real body burden of toxic chemicals is far greater because we all get assaulted on a daily basis with a number of chemicals, each of which carries a risk factor. EPA spends a huge amount of our money in its struggle to determine whether to allow a risk of  $10^{-4}$  or  $10^{-6}$ , but let us face it, there is no value difference between the two unless you want to count coffins. It does not take a toxicology Ph.D. to figure out that the toxins EPA permits are contributing to soaring cancer rates in our communities. Show me a family today that does not have some member -- a brother, or sister, or cousin, or parent or

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<sup>38</sup> U.S. ENVTL PROT. AGENCY, DOC. NO. EPA-822-B-00-004, METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH (Oct. 2000) § 2.4, *available at* <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf>. (“EPA believes that both  $10^{-6}$  and  $10^{-5}$  may be acceptable for the general population and that highly exposed populations should not exceed a  $10^{-4}$  risk level.”).

grandparent -- diagnosed with cancer. Breast cancer rose 26% in just fifteen years from 1973 to 1988.<sup>39</sup> Among children aged 1-14, cancer now causes more death in the United States than any other disease<sup>40</sup> and, overall, cancer in children has climbed 10% in the past decade alone.<sup>41</sup> Yet EPA continues to allow more and more toxic pollution into our airs and waters, telling us it is fine to cause cancer to a modeled number of people. This sniper-style of regulation is never questioned. There is no discussion of whether the human sacrifice implicit in these numbers is justified by any social good resulting from the particular industry and its products. EPA's approach makes it a participant in a discretionary chain of death.

Unfortunately, there are few citizens at the gates of environmental law clamoring for a new set of values. Quite the contrary. We have a very passive population today. It is precisely because we have the most developed set of environmental laws in the world that our citizens believe it must be working. Moreover, for those who know it is not working, the impenetrable complexity of environmental law has largely muted their voices. The agencies have created a linguistic 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, TMDLs and TSDs, SIPs and HMPs, RPAs and PRPs, EFHs and ESUs, and hundreds, yes hundreds, of other acronyms.<sup>42</sup> And if the

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<sup>39</sup> American Cancer Society, *Cancer Facts & Figures 1996*. American women now have a one-in-eight chance of developing breast cancer at some point in their lives. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Miller, B.A., et al (eds.), *SEER Cancer Statistics Review 1973-1990*, National Cancer Institute, NIH pub. no.93-2789 (1993).

<sup>42</sup> ARAR: "applicable or relevant and appropriate requirement." TMDL: "total maximum daily load." TSD: "treatment, storage, and disposal facility." SIP: "state implementation plan." HMP: "habitat management plan." RPA: "reasonable and prudent alternative." PRP: "potentially responsible party." EFH: "essential fish habitat." ESU: "evolutionary significant unit." Acronym dictionaries abound on the web. For some examples, see <http://www.epa.gov/OCEPAterms/aterms.html>;

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.<sup>43</sup> Great. We cannot expect people to fight pollution using this language. As one judge aptly described, the legal framework is “mind-numbing.”<sup>44</sup> The agencies have so complexified<sup>45</sup> their permit systems that the average American is left at the gates. Complexity operates as a wonderful shield from scrutiny.<sup>46</sup>

#### IV. THE POLITICIZATION OF AGENCY DECISION-MAKING

Without an engaged public voicing core environmental values on a regular basis, a very different set of values steers the agencies’ discretion. The shrill 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 impair their property rights or hurt their economic goals. This private property rights movement has cowered officials at every level of government.

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[http://library.fws.gov/ccps/rc/20\\_Acronyms&BackCover.pdf](http://library.fws.gov/ccps/rc/20_Acronyms&BackCover.pdf);

<http://acronyms.thefreedictionary.com/Essential+Fish+Habitat>.

<sup>43</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, TERMS OF ENVIRONMENT: GLOSSARY, ABBREVIATIONS, AND ACRONYMS, *available at* <http://www.epa.gov/glossary/aaad.html>.

<sup>44</sup> American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

<sup>45</sup> Yes, that’s *our* new word.

<sup>46</sup> See Wagner, *supra* note 37 at 1640-44 (describing EPA’s development of the ozone standard under the Clean Air Act, noting that EPA’s “mind-numbing scientific justification” masked the policy forces driving the rule, leaving the public with the impression that the standard was purely based on scientific evidence.).

And when this bureaucratic oppression continues long enough, the status quo takes hold and changes the mindset of the agencies. The people working within them 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 environmental values of protecting resources. It is at that point that you hear people in the agencies saying, “It’s not my job,” or, “There is nothing I can do.” And then it becomes, “I do not 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 cannot do it.” When you start to hear this last statement – and we have heard it a lot lately -- you know the agency has collapsed from the inside out. All of our administrative law is premised on the assumption that agencies are neutral creatures that are supposed to carry out statutes. So when the agencies 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 no longer serving its intended purpose. That is a dangerous situation for all of us.

Indeed, these dynamics are driving 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.”<sup>47</sup> The United States is responsible for 30% of the greenhouse gasses causing global warming,<sup>48</sup> yet EPA has still not regulated greenhouse gas emissions from

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<sup>47</sup> GORE, *supra* note 16, at 269. Gore characterizes global warming as a “planetary emergency.” *Id.* at 8.

<sup>48</sup> *Id.* at 250-51.

the growing fleet of cars produced in this country. The Clean Air Act clearly says, in section 202(a)(1), “The [EPA] shall prescribe standards [for] any air pollutant from . . . new motor vehicles . . . which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>49</sup> There is the authority, right there, for controlling carbon dioxide emissions from new cars. But top government lawyers have amassed all of their legal resources to argue 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.<sup>50</sup> 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 a guide, the Excessive Heat Events Guidebook.<sup>51</sup> 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.”<sup>52</sup> For our convenience, EPA has given this new “fact of life” an acronym – EHE (Excessive Heat Event).<sup>53</sup> And just a few lines later, the guidebook says, “EHE conditions can increase the incidence of mortality and morbidity in affected populations.”<sup>54</sup> Well, that’s certainly true. In the summer of 2003, 35,000 Europeans died from a massive heat wave.<sup>55</sup> But EPA will not regulate. Get used to your new facts of life, Americans.

EPA’s political hand is closing a crucial, last window of opportunity to avert the

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<sup>49</sup> 33 U.S.C. 7521(a)(1).

<sup>50</sup> *See* Massachusetts v. U.S. Environmental Protection Agency, 415 F.3d 50 (2005) (reviewing EPA’s denial of petition to regulate greenhouse gasses from new automobiles).

<sup>51</sup> 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](http://www.epa.gov/hiri/about/pdf/EHEguide_final.pdf).

<sup>52</sup> *Id.* at 5 (emphasis added).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> GORE, *supra* note 16, at 75.

worst of climate disaster. The leading climate scientist for NASA warns:

[I]t will soon be impossible to avoid climate change with far-ranging undesirable 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. Our previous decade of inaction has made the task more difficult . . . .<sup>56</sup>

Twelve states have taken the EPA to court over its recalcitrance, arguing that EPA should regulate carbon dioxide emissions from new cars under the Clean Air Act.<sup>57</sup> But these states lost in the D.C. Circuit court. The court said that EPA has the *discretion* to decide not to use authority under the Clean Air Act to regulate greenhouse gasses.<sup>58</sup>

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. A NEW DISCOURSE

It is time to frankly admit that environmental law is built from a house of cards that rests on a faulty premise. Vesting so much discretion in the agencies was an experiment – an experiment in administrative law that has had 35 years to yield results, and we are now running out of time to reverse the damage. The good news is that in this vast bureaucracy lies the tools and funding to halt much environmental destruction, and do so quickly. But we must find ways and words to reinvigorate the citizenry and

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<sup>56</sup> 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).

<sup>57</sup> *Massachusetts v. U.S. Environmental Protection Agency*, 415 F.3d 50, 58 (D. C. Cir. 2005).

<sup>58</sup> *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.

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, citizens have to speak with a new voice.

We need not search far to find that voice. There is a proven paradigm of thinking that is organic to landscapes across the United States. This way of thinking is reflected in the goals of every major federal environmental statute. The Supreme Court expressed it as foundational doctrine in cases rendered over a century ago.<sup>59</sup> Indeed, this way of thinking has guided societies of the world for millennia.<sup>60</sup> I refer to it as Nature’s Trust. Unfortunately, this ancient paradigm of environmental law has been all but forgotten by modern agencies whose regulations spread like an invasive species across the legal landscape.

## VI. THE NATURE’S TRUST PARADIGM

To immerse yourselves in this way of thinking, let us 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 vital to life itself. Nature’s Trust characterizes these natural resources as being in a trust managed by government for future generations.<sup>61</sup> A trust is an ancient legal concept that emerges

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<sup>59</sup> See *infra* notes 61, 70 and accompanying text.

<sup>60</sup> See *infra* note 72.

<sup>61</sup> *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892) (“[T]he decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State.”); *Geer v. Connecticut*, 161 U.S. 519, 525-29 (1896) (detailing ancient and English common law principles of sovereign trust ownership of air, water, sea, shores, and wildlife and stating: “[T]he power or control pledged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people. . . . [T]he ownership is that of the people in their united sovereignty.”). This concept is detailed in a book in progress, MARY CHRISTINA WOOD, *NATURE’S TRUST: A LEGAL PARADIGM FOR PROTECTING LANDS AND NATURAL*

from property law – yes, property law, not statutory law. A trust is a legal type of ownership whereby one manages property for the benefit of another.<sup>62</sup> There are always three parts to any trust: there is the trustee, the beneficiary, and the corpus.

The corpus is the property of the trust.<sup>63</sup> The corpus of Nature’s Trust encompasses the waters, wildlife, air, and resources vital to our welfare and survival. The trustee is the person who manages the trust for the beneficiaries. Our government, as the only enduring institution with control over human actions, is a trustee of our natural resources.<sup>64</sup> The beneficiaries of this trust are all generations of citizens -- past, present, and future.<sup>65</sup> With every trust there is a core duty of protection.<sup>66</sup> This means

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RESOURCES FOR FUTURE GENERATIONS. The Nature’s Trust paradigm also proposes a meaningful judicial role in protecting the trust.

<sup>62</sup> GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUST & TRUSTEES*, ch. 1 § 1 (2d revised ed. 1984).

<sup>63</sup> *Id.*

<sup>64</sup> See *infra* notes 65-73 and sources cited therein; see also LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at 623 (“The premise of the public trust doctrine is simple: some natural resources are so important to the public’s well-being that they should not be destroyed by the present generation, but should instead be retained in ‘trust’ by the sovereign for the continued welfare of future generations. . . . The sovereign government has special trustee duties to preserve the natural trust.”); Deborah G. Musiker, et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87 (1995).

<sup>65</sup> See *Arizona Center for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 367, 837 P.2d 158, 169 (1991) (“The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.”); see also Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 611, n.20 (2004).

<sup>66</sup> BOGERT & BOGERT (2d revised ed. 1980), *supra* note 62, 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.”); Am. Jur. 2d Trusts, 76 Am. Jur. 2d Trusts §§ 656, 443 (“[I]t is within the power and duty of a trustee to . . . preserve, and protect the trust property against loss, dissipation, or diminution . . . .”); Restatement (Second) Of Trusts § 176 (1957) (“The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.”); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (recognizing that the fundamental common law duty of a trustee is to maintain trust assets); *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (“[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of the trust property.”); *State Dep’t of Env’tl. Prot. v. Jersey Cent. Power & Light*, 336 A.2d 750, 758-59 (N.J. Super. Ct. App. Div. 1975) (finding both right and duty to seek damages for harm to natural resources held in public trust), *rev’d on other grounds*, 351 A.2d 337 (1976); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991) (finding federal trust duty to protect Indian water rights because “the title to plaintiffs’ water rights constitutes the trust property, or the res, which the government, as trustee, has a duty to preserve.”).

the trustee must take action to defend the corpus against injury, and where it has been damaged, the trustee must restore the corpus of the trust.<sup>67</sup> The trustee is accountable to the beneficiary, for the beneficiary has a property interest in the corpus of the trust. So, as trustee, government is accountable to its citizens for handling natural resources that belong to the people.

Nearly every state in this country has court opinions and statutes expressing this trust ownership of natural resources for the people.<sup>68</sup> 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 Railroad v. Illinois*,<sup>69</sup> courts across this country have held that the government holds wildlife and navigable waterways in trust for the people, and government must protect these resources.<sup>70</sup> Indeed, the courts of this country viewed trust principles as so fundamental to governance that they arose as attributes of sovereignty engrained in government itself. The Supreme Court said: "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it

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<sup>67</sup> See Wood, *Protecting the Wildlife Trust*, *supra* note 65, at 612 and sources cited therein.

<sup>68</sup> This body of law draws upon the public trust doctrine and wildlife trust doctrine. For sources and materials on the public trust doctrine, see LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at Chapter 8.II; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558-66 (1970). For commentary on the wildlife trust doctrine, see Wood, *Protecting the Wildlife Trust*, *supra* note 65, section II; Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 711-719 (2005).

<sup>69</sup> *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

<sup>70</sup> The Supreme Court declared in *Illinois Central*: "[T]he trust . . . requires the government . . . to preserve such waters for the use of the public. . . ." 146 U.S. at 453. 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). See also *supra* note 66 and sources cited therein.

can abdicate its police powers in the administration of government and the preservation of the peace. . . .”<sup>71</sup>

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? It is perhaps not surprising that such a fundamental doctrine of government precedes this country, reaching back, literally, to Justinian times. Professor Charles Wilkinson has traced the doctrine to the ancient societies of Europe, the Orient, Africa, Moslem Countries and Native America. As he puts it, “The real headwaters of the public trust doctrine . . . arise in rivulets from all reaches of the basin that holds the societies of the world.”<sup>72</sup>

Let me give you just one example of how this trust responsibility has been applied in another country to preserve natural resources. This case comes from the Supreme Court of the Philippines in 1993.<sup>73</sup> It was a lawsuit brought by Filipino children represented by their parents to end logging of ancient rain forests in that country. The high Court found that, in the 19 years between 1968 and 1987, logging allowed by the Philippine government had drastically reduced the amount of rainforest -- from 53% to 4%.<sup>74</sup> Just five years later, that figure had plummeted to 2.8%.<sup>75</sup> The Court found that,

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<sup>71</sup> *Illinois Central*, 146 U.S. at 393. And it said this: “Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved on it.” *Id.* at 460.

<sup>72</sup> Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. REV. 425, 431 (1989).

<sup>73</sup> *Juan Antonio Oposa et. al. v. The Honorable Fulgencio S. Factoran, Jr., G.R., No. 101083 (S. C. Philippines, July 30, 1993)*. This opinion is excerpted in LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at 441-44.

<sup>74</sup> *Id.* at 442.

<sup>75</sup> *Id.*

at that rate of deforestation, “The Philippines will be bereft of forest resources after the end of this ensuing decade, if not earlier.”<sup>76</sup> 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 minors – the children -- in the case characterized their claim to the Court: “The [government’s] continued allowance [of logging] will work great damage and irreparable injury to . . . minors and their successors – who may never see, use, benefit from and enjoy this rare and unique natural resource treasure. This act of [government] constitutes a misappropriation . . . of the natural resource property [it] holds in trust for the benefit of . . . minors and succeeding generations.”<sup>77</sup> 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 government of the Philippines countered by saying that the rate of logging was a “political question” for the executive or legislative branches to decide.<sup>78</sup> In other words, “Leave it to our discretion.” Sound familiar?

Here is what the Supreme Court of the Philippines 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 . . . belongs to a different category of rights . . . for it concerns nothing less than self-preservation and self-perpetuation . . . -- the advancement of which may even be

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 444.

said to predate all governments and constitutions. . . . [T]hey are assumed to exist from the inception of humankind.<sup>79</sup>

The Supreme Court of the Philippines held in favor of the children and used its authority to end further logging, noting, “[T]he 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.”<sup>80</sup> So there you have it – a doctrine of property law expressing a property right to natural inheritance for the children of the world.

It is important to recognize that, for thousands of years until the most recent blink of human time, these same principles formed the controlling legal paradigm on this landscape we now call the United States. Until about 150 years ago, the native nations controlled this vast territory. They were the sovereigns who managed the natural trust across all of this land. Because they recognized that human survival hinges on Nature’s resources, they developed a system, perfected over thousands of years of governance, to ensure that those 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 of Native America was, and still is, a trust concept. Tribal leaders speak of natural law, which designates them as stewards of the plants, the animals, the waters, and the air.<sup>81</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> DAN LANDEEN & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH AND FISHING IN NEZ PERCE CULTURE (1999) (“The salmon are an integral part of our way of life. . . . For generations our ancestors were the caretakers of the Pacific Northwest’s salmon runs and treated them as part of the world that our creator had entrusted to us.”).

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 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 protecting resources for the coming generations is at the *same time* both a religious principle *and* a principle of governance. In traditional native governing systems, there is no gap between law and religion – it is one and the same.

I mentioned earlier that our agencies’ allowance of environmental destruction occurs in a moral vacuum. It is instructive that 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, because it makes all of us direct participants in the *chain* of human life. Whether you find the doctrine on the pages of a United States Supreme Court opinion, or on the pages of a Philippines Supreme Court opinion, or hear it voiced at a tribal ceremony, this law encompasses the spiritual value that transcends all governments and cultures in the world.

## VII. THE PACIFIC SALMON TRUST

We view our natural resources very differently when we look at them through a trust lens rather than through the lens that our agencies have created in their morass of regulations. Consider the great salmon trust of the Columbia River Basin in the Pacific Northwest. The corpus of this trust has existed in some form for five million years.

Until just 150 years ago, the Columbia River tribes were the sole trustees of the fish and waters across the Basin. Their survival hinged on maintaining the natural wealth in this trust. Their core governing mandate was protecting the trust for future generations. Even during times of starvation, the tribal leaders – the trustees -- would not allow more harvest than the trust could sustain.<sup>82</sup> Under their stewardship, this salmon resource supported native life for 10,000 years.<sup>83</sup> Ten to sixteen million salmon returned to the Columbia River every year.<sup>84</sup> 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. The tribes' direct authority over the resources shrank with their reduced territory.<sup>85</sup> The federal and state trustees were infant governments – 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 allowed unprecedented human indulgence, with little thought to sustaining the fish. Under their management, roughly half of the historic range of Pacific Salmon has been extirpated.<sup>86</sup> Federal dams now kill over 90% of the juvenile salmon of some species.<sup>87</sup> Wild salmon runs in the basin are at 2% of their historic levels.<sup>88</sup> And now, in addition to the low salmon runs, the fish are contaminated by toxic chemicals present throughout the

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<sup>82</sup> Mary Christina Wood, *The Politics of Abundance: Towards a Future of Tribal-State Relations*, 83 OR. L. REV. 1331, 1336 (2004).

<sup>83</sup> See Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part 1): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 2 (2000).

<sup>84</sup> Wood, *Politics of Abundance*, *supra* note 82, at 1336.

<sup>85</sup> See *Johnson v. McIntosh*, 21 U.S. 543, 584-85, 587 (1823).

<sup>86</sup> Wood, *Politics of Abundance*, *supra* note 82, at 1337.

<sup>87</sup> *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 789 (9th Cir. 2005).

<sup>88</sup> See Wood, *Politics of Abundance*, *supra* note 82, at 1337.

waters and sediments of the Columbia River Basin.<sup>89</sup> The fish contain any number of 92 chemicals in varying concentrations.<sup>90</sup> These include chlorinated dioxins and furans, PCBs, arsenic, chlordane, mercury, and DDT.<sup>91</sup>

So the salmon trust -- a trust asset that belongs as *property* to the non-Indian and Indian people of this region, an asset that supported the world's largest commercial fishery just a few decades ago -- 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 by the National Marine Fisheries Service (NMFS) and the EPA under the Endangered Species Act (ESA) and the Clean Water Act -- statutes that are supposed to protect our species and our waters.<sup>92</sup> These agencies simply are not saying no.<sup>93</sup> The icon species of the Pacific Northwest is caught in the death spiral of modern environmental law. Even though court cases predating our modern regulations clearly say that streambeds and wildlife are trust assets belonging to the public,<sup>94</sup> the officials in these agencies do not see their duties as trust duties. In decision after decision, they allow further harm to the salmon.

NMFS now says that the ESA does not require recovery of the salmon resource: populations can just hover near extinction.<sup>95</sup> This position flies in the face of the trust

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<sup>89</sup> See Wood, *Braiding EPA's Mission*, *supra* note 28.

<sup>90</sup> 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).

<sup>91</sup> *Id.* at E-1, E-3.

<sup>92</sup> For discussion, see Mary Christina Wood, *Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery*, 36 ENV'T L. RPTR. 10163 (2006) (analyzing decisions under ESA); Wood, *Braiding EPA's Mission*, *supra* note 28 (analyzing decisions under Clean Water Act).

<sup>93</sup> See note 92 and sources cited therein.

<sup>94</sup> See *supra* notes 68-70 and accompanying text.

<sup>95</sup> See Wood, *Restoring the Abundant Trust*, *supra* note 92, Part I (discussing Columbia River ESA litigation).

responsibility, which provides the backdrop for all modern environmental statutes.<sup>96</sup> The National Environmental Policy Act, for example, declares in section 101 (b) a national duty to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>97</sup> The trust responsibility frames the entire field of environmental law, but people working in the agencies have lost sight of it. The tribal trustees are the only governments speaking in these terms. They call for rebuilding the great salmon trust to harvestable populations and cleaning up the rivers so that the fish are safe to eat in large quantities again.<sup>98</sup> Amidst the tangled regulatory jungle that federal agencies have created, tribal leaders speak in a deeper voice that echoes back through millennia.

#### VIII. STAKING PUBLIC CLAIMS IN NATURE’S TRUST

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. The essential question today is, how can citizens tap these fundamental trust principles to steer our agencies in a different direction? Recall that the major dysfunction of modern environmental law is that agencies are using their statutory discretion to *permit* environmental damage. The

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<sup>96</sup> For discussion, see Wood, *Protecting the Wildlife Trust*, *supra* note 65, at 612-17.

<sup>97</sup> National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4331(b)(1). Federal pollution laws also designate sovereigns (federal, tribal and state governments) as trustees of natural resources for purposes of collecting natural resource damages. See discussion in Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VERMONT L. REV. 354, 443 (2001).

<sup>98</sup> See COLUMBIA RIVER INTER-TRIBAL FISH COMM’N, WY-KAN-USH-MI WA-KISH-WIT, SPIRIT OF THE SALMON: THE COLUMBIA RIVER ANADROMOUS FISH RESTORATION PLAN OF THE NEZ PERCE, UMATILLA, WARM SPRINGS, AND YAKAMA TRIBES, available at <http://www.critfc.org/text/trp.html>. As Ted Strong, Yakama Indian and former Executive Director of the Columbia River Inter-Tribal Fish Commission, states:

The sacred salmon runs are in decline. It is the moral duty, therefore, of the Indian people of the Columbia River to see them restored. We have to take care of them so that they can take care of us. Entwined together inextricably, no less now than ever before, are the fates of both the salmon and the Indian people. The quest for salmon recovery is about restoring what is sacred to its sacred place. □□*Id.*

regulatory technojargon provides no moral standard to guide their decisions, and so the officials within these agencies often 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 overwhelmed and dizzied by the complexity of modern environmental law and is not speaking in clear terms to the fundamental duty of government.

Members of the public should begin thinking of themselves as beneficiaries with a clear property right – a property right that is antecedent and supreme to individual private property rights.<sup>99</sup> They should begin holding their government accountable under a trustee’s measure of performance rather than under a set of incomprehensible regulations that shield agencies from real accountability. 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.”<sup>100</sup> 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 in the name of individual private property rights.

Society today needs an entire movement of Bioneers – millions of ordinary citizens -- staking property claims to Nature’s Trust on behalf of the public. The trust is

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<sup>99</sup> Sovereign servitudes that protect public trust interests are generally considered antecedent property interests and therefore superior to private property interests. Accordingly, they may defeat takings claims. See sources and materials compiled in LAITOS, ZELLMER, WOOD & COLE, *supra* note 4, at Chapter 9.II.B. (public trust defense to Fifth Amendment takings claims); John D. Echeverria & Julie Lurman, “*Perfectly Astounding*” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L. J. 331, 366-67 (2003).

<sup>100</sup> See *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892).

being destroyed nearly everywhere. One Bioneer alone cannot save all of Nature's Trust,<sup>101</sup> but any Bioneer *can* stake out a tangible part of Nature's Trust and make its protection his or her responsibility, as beneficiary. It may be an aquifer, a river, a wetland, a species, an airshed, a forest, an ocean, or maybe, just maybe, the planet's atmosphere.

We must remember that agencies have ample authority to protect and restore the environment. But they also have enormous discretion to allow its demise. Each agency is a stadium with a huge political playing field. The property rights movement knows this, and people with special interests are out there on those fields on a daily basis. They are meeting face to face with the regulators and are shouting their private property rights. And the beneficiaries of the trust – the members of the general public – are outside the gates not making their voices heard. Government officials today often complain that no one shows up at hearings, no one writes letters, and no one takes five minutes to send an email against a proposed development. Modern environmental law does one, and perhaps only one, thing well: it informs people of the destruction of their common property and tells them what agencies are permitting it.<sup>102</sup> Bioneers must find those stadiums, walk right through those gates, and start making new 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. This means that Bioneers have many stadiums to play in. Often, it takes just

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<sup>101</sup> The mere attempt will send the disillusioned Bioneer crawling into a Starbucks where he will spend the rest of his days a recluse.

<sup>102</sup> See Administrative Procedure Act, 5 U.S.C. 552 (public information requests); National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4332(2)(C) (requirement for environmental impact statement).

one agency to protect a threatened resource. Bioneers should get to know these trustees personally, befriend them, and have respectful conversations with them, face to face. They should bring officials to the site to show them the part of Nature's Trust that hangs in the balance of their decision. Above all, Bioneers should not shy away from property rights. Bring them on! If the private property rights movement steered environmental law this far to the brink of irrevocable loss, a public property rights movement can steer it back – if citizens across the country start speaking in the same voice.

Recently we have seen remarkable alliances between citizens staking out a common claim in Nature's Trust.<sup>103</sup> Soccer moms and stay-at-home dads, real estate agents and corporate presidents, Rotary Clubbers and Sierra Clubbers, SUV drivers and truck drivers, Republicans and Democrats, widows and kids, Christians and atheists, natives and newcomers – beneficiaries of all sorts are coming together in a new community around the most fundamental ties that they share. These people come to think of this work as their collective legacy for descendant generations down the line. With all of their different talents and perspectives, these citizens are finding those heroes in the agencies and convincing them to protect the survival resources we all need for our common future.

Once a few agencies begin reorienting their duties, momentum will build into a new value system that moors environmental decision-making. There are courageous officials out there in every stadium. Let me give you an example of just one. On September 20, 2006, the Attorney General of California brought a lawsuit in federal district court against General Motors, Toyota, Chrysler, Honda and Nissan, for their

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<sup>103</sup> For examples, see Matt Jenkins, *A River Once More*, HIGH COUNTRY NEWS 8 (Oct. 16, 2006) (alliance to restore Deschutes River in Oregon); Ray Ring, *Magic Valley Uprising*, HIGH COUNTRY NEWS (May 1, 2006) (citizens' grassroots alliance in Idaho defeats coal-fired plant).

contribution to global warming.<sup>104</sup> The complaint was simple. It said that these car manufacturers have produced a fleet of cars that account for nine percent of the world's carbon dioxide emissions, and that those emissions are causing a public nuisance.<sup>105</sup> The Attorney General brought this action based on his trust duties. His complaint says:

California owns the waters of the State and 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 and face a near certainty of additional future harm. These resources belong to the State . . . and are worth billions of dollars.<sup>106</sup>

So, while the top attorneys at EPA are using all of their legal resources 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. His work is part of a generational mission.<sup>107</sup>

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<sup>104</sup> California v. General Motors, Complaint for Damages and Declaratory Judgment (N.D. Cal. Sept. 20, 2006), available at [http://ag.ca.gov/newsalerts/cms06/06-082\\_0a.pdf?PHPSESSID=20c8f0f203ec80c47644276aae5437de](http://ag.ca.gov/newsalerts/cms06/06-082_0a.pdf?PHPSESSID=20c8f0f203ec80c47644276aae5437de)

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 9-10.

<sup>107</sup> See GORE, *supra* note 16, at 4. On January 30, 2006, North Carolina Attorney General Roy Cooper also filed a public nuisance claim based on the public trust to protect the air quality of his state. State of North Carolina v. Tennessee Valley Authority, Case No. D06CV20, 2 (Jan. 30, 2006, W.D. N.C.) (on file with author) ("North Carolina . . . brings this cause of action . . . to protect those natural resources held in trust by the State."). See also Elizabeth Shogren, *North Carolina Sues TVA to Clean Up Pollution*, NPR ONLINE (Nov. 2, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6417740&sc=emaf>. The action was filed against Tennessee Valley Authority (TVA), a federal operator of coal-fired plants. TVA is one of the largest air polluters in the country. *Id.* The complaint alleges that TVA pollution causes haze over the Smokey Mountains and creates conditions dangerous to citizens' health. Cooper had asked the EPA to force TVA to slash emissions, but EPA refused. In a recent interview, Cooper stated:

We know that air pollution from the Tennessee Valley Authority is making people sick. It's causing haze across our mountains, it's killing our trees, it's polluting our waters. We want it to stop. We've asked them nicely. We've tried to work with them. They've not responded. . . . When you have people being forced to go to the hospital; when you have little children with asthma who can't go outside on particularly hot, stuffy days; when seniors can't take a walk because of

## IX. A STORY OF ASSET PROTECTION

Fortunately, our democracy still allows us the freedom to rethink and redefine our place in the world according to Nature's Law. Across the Pacific Northwest, citizens are talking about "Salmon Nation,"<sup>108</sup> which represents a freedom to rethink obligations and property relationships according to the needs of the imperiled salmon. I will close with a story of how a community of ordinary people living up on the Columbia River in Vancouver, Washington declared their citizenship in Salmon Nation by laying claim to a salmon population and emboldening local regulators to use whatever authority they could muster to save the last habitat for these salmon.

The story takes place at a tiny creek called Joseph's Creek.<sup>109</sup> This creek and its surrounding springs contain one of the last three significant spawning grounds for the Columbia River chum salmon. The salmon were spawning there during the year 1805, when Lewis and Clark traveled by in canoes.<sup>110</sup> 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 reveal themselves 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

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breathing problems; when tourism dollars are being lost; that's clearly a public nuisance under the law. . . . We don't want to wait another generation for clean air here in the North Carolina mountains.

*Id.*

<sup>108</sup> "Salmon Nation" is a trademark of Ecotrust, a non-profit organization dedicated to the protection of salmon. Ecotrust uses the concept of Salmon Nation to "promote a sense of place and stewardship among the citizens of the region." <http://www.ecotrust.org/citizenship>; <http://www.salmonnation.com/>. As Ecotrust describes the concept: "[S]almon Nation's geographical boundaries are simply defined: anywhere Pacific salmon have ever run." *Id.* Ecotrust has a program by which citizens may "declare their citizenship" in Salmon Nation. See <http://www.ecotrust.org/citizenship/>.

<sup>109</sup> The author was involved in this conservation project.

<sup>110</sup> See *Lewis and Clark's Columbia River: "200 Years Later,"* THE COLUMBIA RIVER: A PHOTOGRAPHIC JOURNEY, [http://englishriverwebsite.com/LewisClarkColumbiaRiver/Regions/Places/vancouver\\_trout\\_hatchery.html](http://englishriverwebsite.com/LewisClarkColumbiaRiver/Regions/Places/vancouver_trout_hatchery.html)

– turned into subdivisions, industrial sites, marinas and the like. This little place up at Joseph’s Creek is a last refuge.

Five years ago, a developer acquired 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.<sup>111</sup> 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 waste no 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.<sup>112</sup> After a day of this there is 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 is like going into a bank and tearing into bags of money and throwing it to the winds – only, there on the Columbia, the wealth takes the form of natural assets that have accrued over millennia. This kind of thing happens every day there, and the people just stand by, because most do not 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

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<sup>111</sup> Development documents submitted in 2003 reflected plans to create four single-family lots. *See* Pre-Application Conference Request Form for Subdivisions – Planned Development – Short Plats (Oct. 22, 2003) (on file with author).

<sup>112</sup> Aldo Leopold said, “We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect.” LEOPOLD, *supra* note 25.

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 stood on the banks of the Columbia and witnessed those salmon spawn in their natal waters -- fins slicing the surface, bodies rolling in the shallows, all working tirelessly with genetic intention to continue their unique strand of life on this Earth. And the people wondered, *What more perfect deed could these salmon have to this land?* The people began to think of themselves in a new way, as citizens of Salmon Nation, with a higher purpose than they had known in their ordinary days. They began advocating for these chum salmon. They claimed the salmon as their property, shared through the ages with the rest of the citizens of Salmon Nation. They brought their regulators out to Joseph's Creek to see these salmon spawning. And they invited Columbia River tribal people out there to give blessings and speeches that those regulators heard. Those tribal voices spoke of obligation to the salmon, obligation to future generations. Those words stirred more hearts than any regulatory gibberish under the Endangered Species Act could. 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 stewardship. 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 regulatory authority

to stop this development.<sup>113</sup> But the community did not give up. (Remember, there is always more than one stadium.) So they turned to their local planning department and told them that there was no other trustee left to save this chum habitat.

It turns out that Vancouver, Washington has a tree ordinance that requires a permit to cut trees.<sup>114</sup> The developer applied for a permit to cut 88 trees on his property, saying he needed to create space for an outdoor badminton court.<sup>115</sup> 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. They kept bringing out these local regulators and telling them, face to face, that *they* now held the fate of these salmon in *their* hands.

When the planning department finally issued a decision on the tree permit application, it surprised everyone. Buried in the 21-page document was language flatly denying the tree permit on the basis that the developer did not need to cut so many trees to create an outdoor badminton court.<sup>116</sup> And for this proposition the planning department cited the International Law of Badminton, which provided the official dimensions for a badminton court – 20 feet by 44 feet, to be precise.<sup>117</sup> That permit

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<sup>113</sup> These agencies did, however, issue strong comments urging protection of habitat as part of the City tree permit process.

<sup>114</sup> City of Vancouver Tree Ordinance, Vancouver Municipal Code (VMC) § 20.96.010.

<sup>115</sup> City of Vancouver, Washington, Tree Removal Permit Decision, PRJ2002-00096/TRE2002-00015/SEP2002-00033, 1, 9 (Sept. 26, 2003). *See also* note 117, *infra*, regarding use of space for other sports.

<sup>116</sup> *Id.* at 9-10.

<sup>117</sup> *See id.* at 9; *see also* International Badminton Federation, The Laws of Badminton, section 1.1, [http://www.worldbadminton.com/ibf\\_laws.htm](http://www.worldbadminton.com/ibf_laws.htm). The decision also cited court dimensions for volleyball

denial bought enough time for the city and county to find crucial funding to purchase the property and put it into conservation ownership.<sup>118</sup>

So in the end, it was the International Law of Badminton, not the Endangered Species Act, that saved those salmon. And I would guess this 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 Nature's Trust and creatively used whatever authority they could find to safeguard the great salmon for future generations. There will be salmon in that river next year and 100 years from now because these individuals came to realize that they were, above all else, trustees of Nature's Trust. They are generational heroes because of it. And virtually no one, no one, will lament the absence of another subdivision along the Columbia River, even one that held the promised attraction of an outdoor badminton court.

## X. CONCLUSION

"Bioneers" are those citizens who have come to realize that we stand in an unthinkable moment in time, when entire food groups are contaminated, water carries poisons, and global climate disaster threatens to destroy nearly all of Nature's Trust. The consequences to society from actions taken by *this* generation of people are profound. Somehow fate has delivered all of us living on Earth into this position at this pivotal moment. We did not live 100 years ago, when it was too early to even imagine

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(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. Tree Permit Removal Decision, *supra* note 115, at 9. The permit denial tied into the language of the tree ordinance which stated, "When there are feasible and prudent location alternatives on site for proposed building structures or other site improvements, wooded areas and trees are to be preserved." VMC § 20.96.070(D)(2).

<sup>118</sup> See Erik Robinson & Jeffrey Mize, *City Donation Allows Preservation of Undisturbed Columbia Shoreline*, THE COLUMBIAN (March 1, 2005).

the destruction around us, and we will not be here 100 years from now when it will be too late to save what we still have.

Humankind must claim this moment.