

TRIBAL TRUSTEES IN CLIMATE CRISIS

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INTRODUCTION

Tribes have managed and protected resources on this land for millennia, characteristically safeguarding natural bounty for future generations. Yet, the very *cornerstone* of federal Indian law, the Indian trust doctrine, fails to describe tribes as the trustees of vast natural wealth.¹ Tribes clearly were, and still are, trustees for their people of retained natural resources, but the Indian trust doctrine describes tribes as beneficiaries of a trust managed by the federal government.² While certainly important, the Indian trust fails to convey the full picture of the tribes' position as sovereigns in the modern framework of ecological management.

This article suggests a focus on tribes as trustees in their own right. As the failures of federal and state management become frightfully evident

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¹ See *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) ("The fiduciary relationship has been described as 'one of the primary cornerstones of Indian law,' and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus." (quoting FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 221 (1982) (citation omitted)).

² See *Klamath Water Users Protective Ass'n*, 532 U.S. at 1.

through destroyed ecosystems across the nation, there is renewed interest in holding those governments accountable through the public trust doctrine, an ancient principle having continuing vitality today. The public trust framework can position tribes as co-trustees of shared resources, uniquely situated to assert claims against state and federal trustees in both policy and legal realms.³ Such co-trustee standing does not diminish, but should enhance, the protection otherwise provided by the Indian trust obligation.

This discussion begins with a brief description of a sovereign trust framework that includes both the Indian trust and public trust doctrines. It next describes the failure of environmental statutory law and the systemic dysfunction that pervades regulatory regimes on the federal, state, and local levels. It then turns to the public trust doctrine as an approach that holds potential to reconstitute and re-boot environmental law by infusing government decision-making with the legal obligation of a fiduciary. Next, it characterizes tribes as co-trustees within this public trust framework. The article closes by observing that climate change, the most imminent and all-encompassing crisis facing our planet, calls for tribes to exert leadership in the policy realms, and potentially assert claims under the law, as co-trustees of the atmospheric trust.

I. A DUAL SOVEREIGN TRUST FRAMEWORK

The public trust doctrine and Indian trust doctrine form a sovereign framework with dual property-based obligations. The Indian trust doctrine requires federal agencies to protect tribal lands and interests held in trust.⁴ Courts imposed such a duty of protection as an obligation founded in property law—a sovereign covenant, so to speak—in consideration of the vast cessions of land made by tribes to the federal government.⁵ The

³ While setting forth a framework, it is beyond the scope of this article to address procedural barriers relevant to such claims.

⁴ See generally Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

⁵ U.S. DEP'T OF INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 18-19 (2013), www.doi.gov/.../commission/.../Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf (last visited

overriding concept was that the federal government should protect the ability of tribes to live on their diminished territories.⁶ Courts, however, have winnowed this obligation so much that it has often proved ineffective in protecting crucial tribal resources. After the surge of environmental statutory law in the 1970s, courts began to erroneously interpret the Indian trust obligation as nearly indistinguishable from requirements imposed by statute.⁷ Several courts have found the Indian trust obligation satisfied so long as statutory requirements are met, and others have held that a trust claim must find an explicit basis in statutory law.⁸ Either way, the Indian trust has largely collapsed into a statutory analysis.

Such an approach wholly disregards the purposes served by the Indian trust doctrine.⁹ Statutory law, passed with the interests of the majority society in mind, typically ignores unique tribal concerns. But even apart from that, statutory law has become dysfunctional in its own right, often not carried out to benefit even the majority society. The protection it once offered has withered as a result of relentless political pressure mounted by industry and private interests seeking to influence agency decisions.¹⁰ Because tribes are highly reliant on a functional natural resource base, the widespread failure of statutory law affects them in acute and often cruel ways, threatening traditions that they have sustained

June 12, 2014) [hereinafter TRUST COMMISSION REPORT] (explaining history and purpose of Indian trust responsibility).

⁶ *Id.*

⁷ See Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Though Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 356 (2003).

⁸ See, e.g., *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (“[U]nless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (“We recognize that there is a ‘distinctive obligation of trust incumbent upon the Government in its dealings with [tribes].’ That alone, however, does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations.”) (citation omitted). *But see* TRUST COMMISSION REPORT, *supra* note 5, at 23-24 (recommending shift in U.S. litigation position to carry out trust responsibility).

⁹ See TRUST COMMISSION REPORT, *supra* note 5, at 23-24.

¹⁰ For discussion and analysis, see MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 3-120 (Part I) (2013).

since time immemorial. By interpreting the Indian trust doctrine as offering no more protection than statutory law, courts bring tribes full circle to the failure of statutory law in protecting Indian resources. While judicial abdication of the Indian trust responsibility demands attention and correction, the other sovereign trust, the public trust, also warrants consideration as a framework that can protect resources important to tribes.

The public trust doctrine springs from the logic that people never give their government the power to destroy resources crucial to their survival and well-being.¹¹ The public trust principle requires government officials to protect vital resources as a trust for the sustaining benefit of present and future generations of citizens.¹² While courts frequently trace the principle back to Roman law, its concern for future generations manifests across traditional indigenous systems.¹³ Although tribes may not have used the term trust, they managed resources for the continued benefit of future generations, which is the defining feature of a perpetual trust. It has become clear that if we are to protect the habitability of this nation and planet, we must infuse public trust principles into environmental decision-making carried out through statutes.

The public trust doctrine not only has potential for holding state and federal officials accountable to their citizens, but it also re-positions tribes in a sovereign framework that affirms their historic and continuing role in natural resources management, as trustees. The public trust arises from sovereignty, forming a principle found in many other nations across the world.¹⁴ By drawing on a property-based framework, the public trust can describe the obligations of multiple sovereigns in their relationship to

¹¹ See *infra* note 52 and accompanying text (discussion of social compact).

¹² For cases and materials on the public trust doctrine, see MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* (2013).

¹³ See WOOD, *NATURE'S TRUST*, *supra* note 10, at 126. See also Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 385-86 (2008).

¹⁴ See BLUMM & WOOD, *supra* note 12, at 305-32 (discussing the public trust doctrine abroad).

shared resources. Nations, states, and tribes that share a migratory fishery or a trans-national waterway, or the planet's atmosphere, are logically situated as co-trustees of a shared asset, with mutual obligations towards one another.¹⁵ This construct focuses on tribes not as beneficiaries of a trust (as does the Indian trust doctrine), but as trustees positioned to assert leadership and make sovereign demands addressing the ecological crises of our time.

II. THE FAILURE OF ENVIRONMENTAL LAW AND REGULATORY SCHEMES

The colossal failure of environmental law, and the urgency in transforming it, becomes evident when we take stock of the world we live in. We live in a new ecological age.¹⁶ The environmental issues of yesterday now stand utterly eclipsed by threats to the web of life itself. The International Union for Conservation of Nature (IUCN) warns that more than a one-third (thirty-six percent) of assessed species face possible extinction.¹⁷ Conservation biologists now say that humanity has triggered the planet's sixth major extinction.¹⁸

The state of the world's seas epitomizes planetary illness as a whole. Industrial society has toppled the oceans' balance. Human carbon dioxide pollution has accumulated in the marine waters so much so that they are thirty percent more acidic today than before the Industrial Revolution.¹⁹ For instance, off the coast of Oregon, acidic ocean water can kill larval oysters by corroding their shells before they fully form.²⁰ There are now over four hundred *dead zones* in the world's seas,

¹⁵ See *id.* at 333-71 (describing co-trustees of global assets).

¹⁶ WOOD, NATURE'S TRUST, *supra* note 10, at 3-17.

¹⁷ International Union for Conservation of Nature, *Extinction Crisis Continues Apace*, IUCN (Nov. 3, 2009), <http://www.iucn.org/?4143/Extinction-crisis-continues-apace> (last visited Apr. 17, 2014).

¹⁸ See generally ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014).

¹⁹ See Lauren Morello, *Oceans Turn More Acidic than Last 800,000 Years*, *Sci. Am.* (Feb. 22, 2010), <http://www.scientificamerican.com/article/acidic-oceans/> (last visited June 12, 2014).

²⁰ See Earthfix, *Acidifying Water Takes Toll on Northwest Shellfish*, *OPB* (Nov. 27, 2012), <http://earthfix.opb.org/water/article/acid-water-take-toll-on-puget-sound-shellfish/> (last visited June 12, 2014).

collectively spanning tens of thousands of square miles.²¹ Worldwide, nearly one-third of the sea fisheries have collapsed, and big fish populations have dropped ninety percent.²² Marine biologists project the complete loss of wild seafood just four decades from now: that would mark the end of an entire food source that humans have relied on since time immemorial.²³

Climate crisis looms on a nearly unimaginable scale. Leading climate scientists warn that our pollution has placed the Earth in “imminent peril” and that continued carbon emissions threaten to cause “dramatic climate change that *could run out of our control.*”²⁴ Due to Nature’s own feedbacks, we stand on the verge of an irreversible tipping point that would impose catastrophic conditions from which there is no realistic recovery.²⁵ This is not some matter that we can address slowly or incrementally at our usual bureaucratic pace.

Environmental law has failed its basic purpose of protecting the planet’s resources. Its continued legalization of damage through the permitting process, explained more fully below, now brings unthinkable

²¹ See Randolph E. Schmid, *Ocean Dead Zones Become a Worldwide Problem*, BOSTON GLOBE (Aug. 14, 2008), http://www.huffingtonpost.com/2008/08/14/ocean-dead-zones-become-w_n_119077.html (last visited June 12, 2014).

²² See MICHAEL W. BECK *ET AL.*, SHELLFISH REEFS AT RISK: A GLOBAL ANALYSIS OF PROBLEMS AND SOLUTIONS 11 (2009), *available at* <file:///C:/Users/Adastras/Downloads/Shellfish%20Reefs%20at%20Risk-06.18.09-Pages.pdf> (last visited Apr. 19 2014); Kenneth R. Weiss, *A Primeval Tide of Toxins*, L.A. TIMES (July 30, 2006), <http://articles.latimes.com/2006/jul/30/local/me-ocean30> (last visited June 12, 2014); Boris Worm *et al.*, *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCI. 787, 790 (2006).

²³ John Roach, *Seafood May Be Gone by 2048, Study Says*, NAT’L GEOGRAPHIC NEWS (Nov. 2, 2006), <http://news.nationalgeographic.com/news/2006/11/061102-seafood-threat.html> (last visited June 12, 2014).

²⁴ Steve Connor, *The Earth Today Stands in Imminent Peril*, THE INDEPENDENT (June 19, 2007) (emphasis added), <http://www.belfasttelegraph.co.uk/news/environment/earth-today-stands-in-imminent-peril-28467122.html> (last visited June 12, 2014); *see also* James Hansen *et al.*, *Climate Change and Trace Gases*, 365 PHIL. TRANSACTIONS ROYAL SOC’Y. A, 1925, 1949 (2007), *available at* <http://rsta.royalsocietypublishing.org/content/365/1856/1925.full.pdf> (last visited June 12, 2014).

²⁵ For explanation of tipping points, see FRED PEARCE, WITH SPEED AND VIOLENCE: WHY SCIENTISTS FEAR TIPPING POINTS IN CLIMATE CHANGE 74, 238–39 (2007).

threats to future civilization. Yet, the legal system still pushes the same disastrous course that has brought us to this point. Global multinational corporations still gain free license under existing environmental law to cause irreparable harm to our planet's atmosphere and other life systems. For example, development of Canadian tar sands finds fervent political support among United States and Canadian governmental officials—even though, in the words of a leading climate scientist, the resulting carbon emissions would amount to “game over for the climate.”²⁶ Citizens should recognize something deeply, and terrifyingly, wrong with their government.

And in fact, they have. These extraordinary failures of environmental law have undermined its core legitimacy. This has become quite obvious by rising demonstrations of peaceful civil disobedience in this country and across the globe.²⁷ Protests have erupted world-wide against fossil fuels, demanding a rapid transition to renewable energy.²⁸ Over 94,000 people in this country have taken a pledge to engage in civil disobedience if the Keystone Pipeline is approved, and hundreds of arrests have already occurred over just that one proposal.²⁹ The groundswell is spreading across Indian Country, both in the United States

²⁶ James Hansen, Opinion Editorial, *Game Over for the Climate*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/opinion/game-over-for-the-climate.html?_r=0 (last visited June 12, 2014).

²⁷ See Jeremy Brecher, *Climate Protection: The New Insurgency*, FOREIGN POLICY IN FOCUS (Dec. 10, 2013), <http://fpif.org/wanted-global-insurgency-protect-climate/> (last visited Apr. 19, 2014); Michael Klare, *Will Natural Disasters Fuel an Environmental Movement?*, MOTHER JONES (Nov. 19, 2013), <http://www.motherjones.com/environment/2013/11/climate-change-protest-environment-public-disaster> (last visited June 12, 2014). See also Emily Saari, *Photos: US Grassroots Draw a Line in the Sand Against Fossil Fuel Interests*, TCKTCKTCK (July 31, 2013), <http://tcktcktck.org/2013/07/us-grassroots-draw-a-line-in-the-sand/55418> (last visited June 12, 2014).

²⁸ See Connor, *supra* note 24.

²⁹ Credo Action, *Sign the Keystone XL Pledge of Resistance*, CREDO ACTION, http://act.credoaction.com/sign/kxl_pledge (last visited Apr. 17, 2014) (providing count of activists who have signed the pledge). For commentary, see Ken Butigan, *The Keystone XL Pledge of Resistance Takes Off*, WAGING NONVIOLENCE (June 21, 2013), <http://wagingnonviolence.org/feature/the-keystone-xl-pledge-of-resistance-takes-off/> (last visited June 12, 2014).

and in Canada.³⁰ In September 2013, Nez Perce Tribal Council members stood in solidarity with 250 others, at the border of the Tribe's reservation, and formed a human blockade in front of a megaload, carrying equipment to the tar sands of Canada.³¹ This movement is gaining tremendous momentum because people know that something is very, very wrong.

Each demonstration reflects the sense of the people that environmental law has veered from the limited sphere of power delegated by citizens to their government—that delegation being the only, legitimate basis of authority in a constitutional democracy. Scholars of social movements often observe that civil protests are necessary for dislodging entrenched power structures.³² But there must also be promising ideas positioned at the edge of faltering power structures so that when the

³⁰ See Jorge Barrera, *Keystone XL 'Black Snake' Pipeline to Face 'Epic' Opposition from Native American Alliance*, APTN (Jan. 31, 2014), <http://aptn.ca/news/2014/01/31/keystone-xl-black-snake-pipeline-face-epic-opposition-native-american-alliance/> (last visited June 12, 2014); Steven Mufson, *Keystone XL Pipeline Raises Tribal Concerns*, WASH. POST (Sept. 17, 2012), http://www.washingtonpost.com/business/economy/keystone-xl-pipeline-raises-tribal-concerns/2012/09/17/3d1ada3a-f097-11e1-adc6-87dfa8eff430_story.html (last visited June 12, 2014).

³¹ Kirk Johnson, *Fight Over Energy Finds a New Front in a Corner of Idaho*, N.Y. TIMES (Sept. 25, 2013), <http://www.nytimes.com/2013/09/26/us/fight-over-energy-finds-a-new-front-in-a-corner-of-idaho.html> (last visited June 12, 2014). A federal court later enjoined another megaload shipment that would have affected tribal resources in the Wild and Scenic River corridor. See *Nez Perce Tribe v. U.S. Forest Serv.*, No. 3:13-CV-348-BLW (D. Idaho 2013) ("Overarching this statutory duty, is the Government's duty as trustee over the Tribe. The Supreme Court has held that the constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's unique obligation toward the Indians.") (citation omitted). See also Kirk Johnson, *Judge Blocks Shipment of Oil Equipment Through Idaho Forest*, N.Y. TIMES (Sept. 13, 2013), <http://www.nytimes.com/2013/09/14/us/judge-blocks-shipment-of-oil-equipment-through-idaho-forest.html> (last visited June 12, 2014). With the megaload route blocked in Idaho, the company, Omega Morgan, re-routed through Oregon. Members of the Umatilla Tribe and others protested the shipment. For reporting, see Rachael Stoeve, *Movement to Resist Tar Sands "Megaloads" Brings Together Northwest Tribal Members, Environmentalists*, YES! MAGAZINE (Jan. 08, 2014), <http://www.yesmagazine.org/planet/megaloads-of-tar-sands-equipment-met-by-new-alliances-between-tribal-members-and-environmentalists> (last visited June 12, 2014).

³² See Francis Fox Piven, *Occupy's Protest is Not Over. It Has Barely Begun*, THE GUARDIAN (Sept. 17, 2012), <http://www.theguardian.com/commentisfree/2012/sep/17/occupy-protest-not-over> (last visited June 12, 2014).

people do force change, a new equitable structure will be poised to replace the former regime. It has become clear that we need a principle that can transform—not merely reform—environmental law. We no longer have the ability to fix environmental law and restore its legitimacy through incremental reform. Environmental groups and tribes are doing the best they can to challenge government decision-making on a case by case basis, but they are losing the battle because they are not addressing the systemic forces that drive our government to make environmentally damaging decisions across the board. As the journalist Ross Gelbspan wrote, “These groups are running around trying to put out all these fires, but nobody’s going after the pyromaniac.”³³ We can pass any new statutes that we want, but if we don’t address the dysfunction of today’s government, we won’t have solved anything. What we need is a frame change that offers a new account of what is legitimate and what is not: one that asks new questions of, and makes new demands on, an old system, and one that builds the foundation for a new system.

A. *Environmental Laws Violating Nature’s Laws*

The very starting point—indeed the *only* starting point—to any legal structure purporting to protect the environment is the basic recognition that humans are under the primary jurisdiction of Nature’s Laws. This concept lies at the core of indigenous thinking but remains a world away from industrial thinking.³⁴ Oren Lyons, a leader and faith-keeper of the Onondaga Nation, explained the concept when describing a massive beetle kill that wiped out Canadian forests due to warmer winters brought on by climate change. He said simply,

You can’t negotiate with a beetle. You are now dealing with natural law. And if you don’t understand natural law, you will

³³ ROSS GELBSPAN, *BOILING POINT: HOW POLITICIANS, BIG OIL AND COAL, JOURNALISTS, AND ACTIVISTS HAVE FUELED THE CLIMATE CRISIS—AND WHAT WE CAN DO TO AVERT DISASTER* 132 (2004) (quoting Dianne Dumanoski).

³⁴ See Winona LaDuke, *Our Home on Earth*, *ON THE COMMONS* (May 16, 2012), <http://onthecommons.org/magazine/our-home-earth> (last visited June 12, 2014).

soon.³⁵ [If] you don't abide by that law, you will suffer the consequence. Whether you agree with it, understand it, comprehend it, it doesn't make any difference. You're going to suffer the consequence, and that's right where we're headed right now.³⁶

In other words, Nature implements the real Supremacy Clause.

While natural law remains central to traditional tribal society, the majority society rarely thinks about it as its overriding reality. Instead, media and politicians persistently project political and economic circumstances as the *reality*. We are told that we cannot stem carbon dioxide pollution because the politics won't support it, and because it will cost jobs. But our current path, scientists warn, will provoke ecological collapse. Nature's mandate preempts all political and economic circumstances, because social systems cannot endure if climate crisis renders the nation uninhabitable.³⁷ In other words, transformational change is inevitable either way.

The majority's environmental law is not natural law—it is human-

³⁵ Oren Lyons, *The Ice Is Melting*, Twenty-Fourth Annual E. F. Schumacher Lectures (Oct. 2004).

³⁶ Tim Knauss, *Onondaga Faithkeeper Oren Lyons Speaks Out on the Environment: "Business as Usual Is Over,"* SYRACUSE.COM (Feb. 09, 2008) (quoting Oren Lyons), http://www.syracuse.com/progress/index.ssf/2008/02/onondaga_faithkeeper_oren_lyon.html (last visited June 12, 2014).

³⁷ Dr. James Hansen, one of the world's leading climate scientists and the former head of the National Aeronautics and Space Administration's (NASA) Goddard Institute for Space Studies, submitted an amicus brief in the D.C. ATL litigation, in which he said, "failure to act with all deliberate speed in the face of the clear scientific evidence of the danger functionally becomes a decision to eliminate the option of preserving a habitable climate system." Brief for James Hansen as Amicus Curiae Supporting Plaintiffs-Appellants at 7, *Alec L. v. McCarthy*, no. 3:11-cv-02203-EMC (Dist. D.C. Nov. 14, 2011), *available at* <http://ourchildrenstrust.org/sites/default/files/Hansen%20Amicus%20.pdf>. (last visited June 12, 2014). *See also* Brief of Petitioner-Appellant at 6-7, *Alec L. v. McCarthy*, no. 13-5192 (D.C. Cir. Oct. 22, 2013), *available at* <http://ourchildrenstrust.org/sites/default/files/FiledOpeningBrief.pdf> (last visited June 12, 2014) (summarizing relevant climate science and asserting, "If Government does not act immediately to rapidly reduce carbon emissions and protect and restore the balance of the atmosphere, Youth will face irrevocable harm: the collapse of natural resource systems and a largely uninhabitable Nation.").

made law. Its whole purpose is to keep us in compliance with Nature's laws so that we don't suffer as a society. The United States has the most elaborate system of environmental laws in the world—literally thousands of pages of statutes and regulations covering nearly every conceivable aspect of ecology. Yet, these laws have not stopped toxic pollution, nuclear waste, clear-cutting, strip mining, wetlands destruction, species extinction, and carbon dioxide pollution. The most destructive onslaught to Earth has taken place since the 1970s when Congress enacted major environmental laws. Analysts point out that, from 1970 to 2000, the Earth's natural ecosystems have declined by thirty-three percent, and humanity has consumed or destroyed one-third of the planet's natural resources.³⁸

It turns out that environmental law has not prevented damage; it has hastened it. In searching for the dysfunction that drives this perverse result, we should start from a common denominator of all statutes: the vast discretionary power vested in agencies. Nature, in its entirety, has been partitioned among various bureaucracies—many thousands in all—spanning the federal, state, and local levels. Under these statutes, agencies exert tremendous dominion over Nature.

While Congress and state legislatures passed statutes to prevent further damage to the environment, nearly all of them have provisions allowing the agencies to permit some amount of damage. These permit provisions were never supposed to subvert the statutes' protective purposes, but that is in fact what has happened. Agencies regularly use these provisions to permit harm to air, water, soils, forests, grasslands, wetlands, riparian areas, species, and whatever other resources they control.³⁹ At every level of government, agencies have turned environmental law inside out.

With few exceptions, the bureaucratic mindset of agencies today is that they should issue permits. This approach yields absurdly low denial

³⁸ See MARTIN JENKINS *ET AL.*, LIVING PLANET REPORT 2000, at 1 (2000).

³⁹ For discussion, see WOOD, NATURE'S TRUST, *supra* note 10, at 68-81.

rates.⁴⁰ Agencies often defend such low denial rates by saying that most of these permits carry mitigating conditions that lessen the damage that would otherwise occur.⁴¹ While true, the cumulative effect nevertheless tallies inexorable, mounting losses. As the saying goes, it all adds up. This environmental oppression affects each one of us.

The time has long since arrived to stop pretending that environmental law is protective. As a whole, it clearly is not. In fact, it has become dangerous. But next, we have to ask why agencies behave the way they do. If they are not carrying out the purposes of statutes, what are they doing? We know, on one hand, that agencies employ many good people who sincerely want to do the right thing. But we know on the other hand, that is not enough. We must try to understand some of the systemic forces at work in these agencies.

B. The Politicization of Agency Discretion

One very basic problem lies in the discretion that agencies enjoy under the environmental statutes. Congress trusted agencies and gave them wide latitude, because environmental decisions are often technical, and agencies build up vast expertise. But this discretion rests on one assumption: that agencies exercise their judgment objectively, for the good of the public, and in accordance with protective statutory goals. That assumption now collides with reality. Nearly across the board, agencies have turned against the very public that empowers them. Agency discretion now drives the demise of Nature.

This downfall has resulted from industry groups exerting relentless pressure on agencies to ease regulation. Industry learned long ago that that agency discretion determines whether regulatory outcomes will serve the public or polluters, so it created broad anti-regulatory campaigns.⁴² After years of industry-generated political pressure, an agency often falls

⁴⁰ See *id.* at 60-63.

⁴¹ See discussion *id.* at 9.

⁴² See generally NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* (2010).

captive to the industry it regulates.⁴³ At that point, government officials look at the industry in a different light—as a client the agency must serve.⁴⁴ Discretion then becomes a legal conduit through which the agency delivers public resources into corporate hands through permits. Well-intentioned government employees are caught in this political cage, and eventually they start to doubt that they even have authority under the law to say no to a permit.⁴⁵ The deeper they get into this morass of environmental law, the more they shed accountability to the public. It is at that point that you hear people in the agencies make excuses: “It’s not my job,” or, “There is nothing I can do.” And then it becomes, “I don’t have the authority,” even if the authority is plainly and clearly present in the statute. And then it becomes, “I have the authority, but *politically* I can’t do it.” When you start to hear that last statement “*politically I can’t do it*”—and we have heard it a lot lately—you know that the agency’s legitimacy has imploded, because all of our administrative law is premised on the assumption that agencies are neutral creatures that are supposed to carry out the statutes.⁴⁶

Discretion has been the bane of environmental law for decades. But environmental advocates have never confronted the problem in a transformative way. Perhaps they hold out hope that, once political winds shift, discretion will work in their favor. However, this is false hope; industry pressure on agencies never lets up, no matter what administration holds office. Consider the shift from the Bush Administration to the Obama Administration: the Obama Administration still has not managed to pass a comprehensive regulation to reduce carbon emissions, even after six years of holding office.⁴⁷

⁴³ See WOOD, NATURE’S TRUST, *supra* note 10, at 84-101.

⁴⁴ See *id.* at 68-83 (explaining the politics of discretion).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ In June, 2014, President Barack Obama proposed regulations to cut emissions from existing coal-fired plants. For a summary, see EPA, *Press Release: EPA Proposes First Guidelines to Cut Carbon Pollution from Existing Power Plants* (June 2, 2014). While his boldest step yet, the approach poses significant risk of delay and gaping enforcement pitfalls. The proposal, which would not become final for another year at the earliest, takes a complex approach that requires state development and implementation of

C. Agencies Under Siege

The fact is that the most elaborate environmental law system in the world cannot protect our natural assets as long as an alliance exists between industries and regulatory agencies. So let us take a moment to look at how that alliance plays out. We start with the premise that defeating or delaying regulation has become a central part of corporate business—it's called regulatory affairs. Industry's anti-regulatory campaigns work like a well-oiled machine, each part creating powerful torque. They often start with industry leaders donating huge amounts of campaign money to the president and to state governors. Then these leaders pay back the favor by placing industry loyalists in the highest ranks of agencies. When a particular industry has well-placed political operatives working within an agency, industry takes a hand in regulating itself.

With political operatives installed at the highest bureaucratic levels, it becomes nearly impossible for agency staffers, however well intentioned, to carry out the purpose of the statutes. The boss, after all, has firing power, and this sends a chilling effect across the bureaucracy. The Union of Concerned Scientists (UCS) conducted surveys of agency scientists across numerous environmental agencies and documented rampant pressure to issue permits to benefit industries. The UCS described the Environmental Protection Agency (EPA) as an agency *under siege* from such political interference.⁴⁸

D. Inadequate Checks over Agency Power

Additionally, there does not seem to be any meaningful check on these agencies. We have three branches of government, and they are

individualized plans. Such plans would not be developed until June 30, 2016, and many states may attempt to obstruct the process. For analysis of the proposed rule, see Ben Adler, *Obama's Proposed Power Plant Rules Fall Slightly Short of Environmentalists' Hopes*, GRIST (June 1, 2014).

⁴⁸ UNION OF CONCERNED SCIENTISTS, INTERFERENCE AT THE EPA: SCIENCE AND POLITICS AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2008), available at http://www.ucsusa.org/scientific_integrity/abuses_of_science/interference-at-the-epa.html (last visited June 12, 2014).

supposed to exert checks and balances so that any one branch doesn't grab tyrannical power. But the checks and balances, particularly in environmental law, have largely disintegrated. Congress is all but missing in action, as it has been for years—undoubtedly because industry has purchased so many legislators through campaign contributions. Furthermore, citizens rarely discover the influence of politics, because officials use science as a façade for their political decisions. Professor Wendy Wagner refers to this dynamic as the “science charade.”⁴⁹ That leaves the courts. The judiciary seems oblivious towards the politicization of agencies. Courts still defer to agency decisions, believing that agencies are experts and act in neutral fashion.⁵⁰ This deference allows officials to escape scrutiny for their most disingenuous actions—political decisions intentionally masked as neutral technical findings.

This leaves one branch of government exercising administrative tyranny over Nature with no adequate check from the other two branches or the public. We need a new frame that transforms the discretion into obligation, enforceable within the system of checks and balances that our Constitution offers. This article focuses on the public trust doctrine as such a principle. Rather than representing anything novel, the public trust is a foundational principle of environmental law that has grounded Supreme Court jurisprudence since the beginning of this country.⁵¹ But the morass of statutory law has buried it. The public trust doctrine incorporates discernable, clear standards of behavior that can lead the transformation of environmental law.⁵²

⁴⁹ Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995).

⁵⁰ See WOOD, NATURE'S TRUST, *supra* note 10, at 110-12.

⁵¹ See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

⁵² See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. Dec. 19, 2013) (plurality opinion) (applying fiduciary standards from private context to evaluate government behavior in public trust context, noting, “As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct.”).

III. THE PROTECTIVE FORCE OF THE PUBLIC TRUST DOCTRINE

The public trust derives from concepts of public rights that trace back to Roman law and thus far predate the Constitution. As Chief Justice Castille of Supreme Court of Pennsylvania made clear in the plurality opinion in a landmark case overturning a pro-fracking statute, environmental rights are inherent and engrained in the social contract citizens make with their governments.⁵³ These understandings form the very constitutional contours of government's obligation. We can conceive of all of the resources essential to our human welfare and survival—including the waters, wildlife, air and atmosphere—as being held together in one legal bundle, a sovereign trust endowment purposed to support generations of citizens in perpetuity. Government, as the only enduring institution with control over human actions, holds this natural wealth in trust for its citizens. The beneficiaries of this great natural trust are all generations of citizens—past, present, and future. Our grandparents were beneficiaries. We are beneficiaries. Our great-grandchildren are beneficiaries.

At the core of this trust lies the sovereign duty of asset protection and a limit on privatization or license that could threaten public assets. The landmark case in this area is *Illinois Central*, decided in 1892.⁵⁴ That case arose after the Illinois legislature had conveyed the Chicago shoreline along Lake Michigan to a private railroad for its profitable use.⁵⁵ This was shoreline that the citizens needed for fishing, navigation, and

⁵³ *Id.* The plurality opinion (representing three justices) explained the constitutional basis of the public trust doctrine. While the Pennsylvania constitution was amended in 1971 to include a specific provision announcing the public trust, PA. CONST. art. I, § 27, the opinion explicitly lodges environmental rights in the fundamental constitutional structure that reserves the “inherent and inalienable rights” of citizens. See PA CONST. art. I, §1 (setting forth “Inherent Rights of Mankind” to include “certain inherent and inalienable rights”); *Robinson*, 83 A.3d at 948-49. See also *id.* at 947-48 (“Article I is the Commonwealth’s Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such ‘general, great and essential’ quality as to be ensconced as ‘inviolable.’” (citing PA. CONST. art. I, pmbl. and PA. CONST. art. I, §25).

⁵⁴ *Ill. Cent.*, 146 U.S. at 387. See also Blumm & Wood, *supra* note 12, at 22 (describing origin of public trust doctrine and its adoption in U.S. jurisprudence).

⁵⁵ *Ill. Cent.* 146 U.S. at 433-34.

commerce.⁵⁶ The Court held that the legislature did not have power to make that conveyance,⁵⁷ stating:

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city . . . [has] been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public.⁵⁸

Conveyance of crucial resources, it said, would be “a grievance which never could be long borne by a free people.”⁵⁹

A. The Public Trust as an Attribute of Sovereignty

Courts have described the trust principle as engrained in government itself and flowing through its agencies.⁶⁰ Quite simply, government doesn’t have the power to rid itself of the trust—it remains a constitutive principle that government cannot shed.⁶¹ The Supreme Court proclaimed in *Illinois Central Railroad v. Illinois* that “[t]he state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration

⁵⁶ *Id.* at 452 (describing the ownership of the shoreline: “It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”).

⁵⁷ *Id.* at 453 (“The trust devolving upon the State for the public . . . cannot be relinquished by a transfer of the property.”).

⁵⁸ *Id.* at 455.

⁵⁹ *Id.* at 456 (quoting *Arnold v. Mundy*, 6 N.J.L.1 (1821)).

⁶⁰ See *In re Water Use Permit Applications (Waiahole Ditch)*, 9 P.3d 409, 443 (Haw. 2000) (characterizing the trust as “an inherent attribute of sovereign authority that the government ‘ought not, and ergo, . . . cannot surrender.’” (citation omitted); *Center for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 603, 607 (Cal. Ct. App. 2008) (applying the trust duty to “agencies that are responsible for regulating [the harmful] activities” and noting a right held by the public “to insist that the state, through its appropriate subdivisions and agencies, protect and preserve public trust property. . .”).

⁶¹ See *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) (holding that “[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.”).

of government. . . .”⁶² As Professor Gerald Torres describes, the trust comprises the slate on which “all constitutions and laws are written.”⁶³

The trust is the ultimate expression of popular sovereignty, manifesting the idea that the people empower government and can therefore restrain the power of government.⁶⁴ In a very basic sense, the federal and state governments must abide by the public trust to maintain their legitimacy in environmental law. The public trust doctrine makes clear that, as trustees, state and federal governments do not have unilateral power as a monarchy or dictator would. The original citizens and founders of this nation never gave our governments the power to destroy what is essential for our collective survival and prosperity. As beneficiaries of this trust, we share enduring public property rights in those resources, rights that hold constitutional force.⁶⁵ Professor Joseph Sax observed more than four decades ago that the public trust demarcates a society of “citizens rather than of serfs.”⁶⁶

Significant parallels exist between the public trust and the Indian trust in terms of restraining government. The public trust requires government to act for the benefit of the people, not singular private interests. A government not acting in that manner trespasses boundaries of power set by the people in the social contract. A restraint of power also underlies the Indian trust. The Supreme Court imposed that trust on the

⁶² *Ill. Cent.*, 146 U.S. at 453.

⁶³ WOOD, NATURE’S TRUST, *supra* note 10, at 129 (quoting Professor Gerald Torres).

⁶⁴ *See id.* at 125-42.

⁶⁵ For a full explanation of the constitutional basis of the trust, see Brief for Amicus Law Professors as Amici Curiae Supporting Petitioner-Appellants at 13, *Alec L. v. McCarthy*, No. 13-5192 (D.C. Cir. Dec. 11, 2013), *available at* <http://ourchildrenstrust.org/US/Federal-Lawsuit> (last visited Apr. 30, 2014) (the constitutional reserved powers doctrine in conjunction with the public trust prevents any one legislature from depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens. . . . Through the [public trust doctrine], the Constitution governs for the perpetual preservation of the Nation.); *see also* JOHN EDWARD DAVIDSON, *ET AL.*, DRAFT ATMOSPHERIC TRUST LITIGATION AMICUS BRIEF (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361780 (providing more in-depth analysis of the constitutional federal trust framework (last visited Apr. 9, 2014).

⁶⁶ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).

federal government as a counterweight to the breathtaking power the United States government exerted over Indian affairs.⁶⁷ Such unilateral power did not comport with a new democracy. Also, the solemn promises made by federal negotiators to native leaders to gain cession of nearly all land in America had to be secured by a principle of duty towards the tribes.⁶⁸ So the courts created the Indian trust obligation to hold government to certain moral and legal obligations in protecting the tribal way of life and property.⁶⁹ When government fails in this protection, the power it wields loses legitimacy. Courts impose fiduciary obligations in both trust contexts in order to limit the power of government over crucial natural resources—though the beneficiaries of the two trusts comprise very different legal categories.⁷⁰

While judges penned public trust principles long ago as the first environmental law of this nation, such principles have been ignored in the modern era of statutory law. All too often, environmental officials make decisions to benefit their own political self-interest rather than the interests of the public beneficiaries for whom they serve as legal trustees. The fundamental objection today is not only that government is making disastrous decisions, but that it is making decisions under the guise of environmental law to benefit itself and allied corporations instead of the public.⁷¹

The basic expectation we have about governance is that it should be for the people. The trust draws from this expectation a strictly enforced

⁶⁷ See TRUST COMMISSION REPORT, *supra* note 5, at 17-19 (explaining background of trust and stating that “the law of nations mandated that the Indian tribes were owed a duty of protection from incursions on tribal governmental authority and independence within the newly formed nation.”).

⁶⁸ *Id.* at 18 (noting, “The Supreme Court has concluded that the United States ‘has charged itself with moral obligations of the highest responsibility and trust.’”) (no citation in original).

⁶⁹ *Id.* (describing Indian trust as consisting of “promises of permanent homelands, access to natural resources, and recognition of the right to continue to exist as distinct sovereign peoples.”).

⁷⁰ The beneficiaries of the federal public trust are all citizens of the United States. The beneficiaries of the federal Indian trust are the generations of tribal people and the tribes themselves.

⁷¹ See WOOD, NATURE’S TRUST, *supra* note 10, at 84-101.

legal principle known as the duty of loyalty.⁷² Trustees must avoid any self-serving bias or conflict of interest in making decisions, and they must always make decisions in the sole interest of the beneficiary.⁷³ What we see today in our environmental decision-makers is just the opposite—profound disloyalty to the citizen beneficiaries.

B. Re-Framing Government's Role

Albert Einstein once said, “We can’t solve problems by using the same kind of thinking we used when we created them.”⁷⁴ The trust takes us to a deeper level to the core dysfunction that infects nearly every permit proceeding. This is not to suggest that citizens and tribes should ignore environmental standards—they must speak to those too. But when we also call forth the trust principle, we put government behavior in the spotlight. We start dismantling the political frame that legitimizes outcomes serving industry over the public, and we start “changing what counts as common sense.”⁷⁵ And, instead of speaking in acronyms and techno-jargon as the statutes have us do we speak with a vocabulary that inspires our fellow citizens.⁷⁶

⁷² See *id.* at 189-90. The Supreme Court of Pennsylvania underscored the duty of loyalty in the public trust context. See *Robinson Twp. v. Commonwealth*, 83 A.3d. 901, 957 (2013) (plurality opinion) (“As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.”).

⁷³ See WOOD, *NATURE’S TRUST*, *supra* note 10, at 189 (“[C]ourts require the trustees to avoid all conflicts of interest so as to eliminate even the *possibility* for any temptation to enter into decisions concerning the trust.”).

⁷⁴ David Mielach, *5 Business Tips from Albert Einstein*, *BUSINESS NEWS DAILY* (Apr. 18, 2012), available at <http://www.businessnewsdaily.com/2381-albert-einstein-business-tips.html> (last visited June 12, 2014).

⁷⁵ GEORGE LAKOFF *ET AL.*, *DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* xv (2004).

⁷⁶ Julia Olson, director of the non-profit organization, Our Children’s Trust, describes her experience conveying the public trust doctrine to general audiences:

I love telling people about the Public Trust Doctrine, [and] its ancient origins . . . and its very practical and logical role in our system of law. The Public Trust Doctrine transcends legal complexities that have become the norm. People get it. They like it. Of course we would protect essential natural resources that we need for our survival. Of course the government can’t allow anyone to irreparably harm those

Applied to the modern framework of environmental law, the public trust presents the antithesis of the discretion model that has bred dysfunction and disloyalty across government. We see that the principle repositions all players in their relationship to ecology. It conceives of government officials as public trustees, rather than as political actors. It imposes on them, as trustees, a strict fiduciary duty of loyalty to the beneficiaries—and only the beneficiaries. It characterizes our natural resources as a priceless endowment comprised of tangible and quantifiable assets, instead of a vague *environment* with amorphous value. The American citizens stand as beneficiaries holding a clear public property interest in these natural resources, rather than as weakened political constituents with increasingly desperate appeals to bring to their environmental officials. Trust principles require government actors to manage and restore ecosystems in order to protect the functionality and continued abundance of the resources over time.⁷⁷ This approach views polluters in a very different way. Rather than as *stakeholders* controlling the political sphere, they are identified as despoilers of the trust. Finally, the trust positions courts as active enforcers of fiduciary duties in managing this property. Rather than invoke the extreme deference that courts give in the statutory realm, the trust framework calls for vigorous judicial review, now urgently needed to restore the balance of power in our government.

IV. THE ROLE OF TRIBES AS CO-TRUSTEES WITHIN A PUBLIC TRUST FRAMEWORK

Tribes can position themselves in this trust frame as co-trustees of shared natural resources. Courts describe the trust as an attribute of

resources. . . . Of course we would pass our natural heritage down to future generations. Of course . . . it's not being done.

Julia Olson, *Blogging from Barrow*, DAILY KOS (Oct. 8, 2013, 3:53 PM), <http://www.dailykos.com/story/2013/10/08/1245371/-Blogging-from-Barrow> (last visited June 12, 2014).

⁷⁷ For explanation of the duty of protection and restoration, see WOOD, NATURE'S TRUST, *supra* note 10, at 167-169, 182-85.

sovereignty.⁷⁸ As the first sovereigns on this continent, tribes represent the original trustees. Their remarkable long-term stewardship of resources—sometimes sustained over the course of millennia—provides a supreme example of ecological fiduciary care. When the United States became a nation and states formed, the states became co-trustees by virtue of their sovereignty. However, state sovereignty did not extinguish the tribes' role over shared resources. While tribal jurisdiction (in terms of police power) was reduced to the boundaries of the reservation, tribes retained property rights to some resources off the reservation, as clearly expressed in the Pacific Northwest fishing treaties, for example.⁷⁹ The endurance of property rights to natural bounty positioned tribes in a mutual relationship with the other sovereign trustees (subject to the plenary power of the United States, as the courts have made clear).⁸⁰ In the Pacific Northwest treaty fishing cases, courts have described tribes and states as analogous to “cotenants” of a common asset (their shared fishery).⁸¹ Using the same logic, we could think of tribes as co-trustees with respect to all shared resources, including migratory fish and wildlife, atmosphere, and waters that flow into the reservation.

A bedrock principle in any co-tenancy is the correlative duty not to waste the common asset.⁸² Acts that cause permanent damage to the common property constitute waste.⁸³ A clear example of the mutual duty of protection comes from the Pacific Northwest Indian fishing cases, in which the Ninth Circuit, after characterizing the tribes and states as “cotenants” in the fishery, said,

⁷⁸ See, e.g., *In re Water Use Permit Applications*, 9 P.3d 409, 443 (Haw. 2000) (“[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority. . .”).

⁷⁹ See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

⁸⁰ See *id.*

⁸¹ *Puget Sound Gillnetters Ass'n v. United States*, 573 F.2d 1123, 1126 (9th Cir. 1978) (explaining that the treaty established “something analogous to a cotenancy, with the tribes as one cotenant and all citizens of the Territory (and later of the state) as the other.”).

⁸² See *infra* notes 84-85 and accompanying text.

⁸³ EARL P. HOPKINS, *HANDBOOK ON THE LAW OF REAL PROPERTY* § 214, at 342 (1896); WILLIAM F. WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* § 131, at 72 (1947).

Cotenants stand in a fiduciary relationship one to the other. Each has the right to full enjoyment of the property, but must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value. A court will enjoin the commission of waste. By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed.⁸⁴

Invoking their sovereign status, tribes have creatively used all sorts of arrangements and legal footholds to re-position themselves as active co-trustees across ceded territory. The various approaches include treaty rights litigation, co-management structures, cooperative agreements, and use of private conservation tools.⁸⁵ Through such means, tribes have called back wolves to the Idaho wilderness, returned salmon to the Umatilla Basin, and re-established cui-ui fish in Nevada's Pyramid Lake, among many other accomplishments.⁸⁶

Former Nez Perce Tribal council member Jamie Pinkham describes the remarkable recovery of walleye fish to Minnesota waters by the Red Lake Nation as an example of a tribe carrying out a public trust responsibility to its members, and restoring natural abundance—benefitting the state co-trustee (Minnesota) as well.⁸⁷ The walleye, a species of tremendous traditional importance to the Red Lake people, was slipping towards extinction in the 1990s.⁸⁸ The Red Lake Nation convinced the State of Minnesota to partner in a massive recovery effort, which resulted in a population rebound from a low of 100,000 fish to 7.5 million fish in just seven years.⁸⁹ Both Indian and non-Indian fishers now

⁸⁴ United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975).

⁸⁵ See JAN G. LAITOS, SANDI ZELLMER & MARY CHRISTINA WOOD, NATURAL RESOURCES LAW 426-34 (2006).

⁸⁶ *Id.*

⁸⁷ Jamie A. Pinkham, *Red Lake Nation Honored For Upholding "Public Trust" Walleye by Walleye*, BUSH FOUND. (Nov. 26, 2013), <http://www.bushfoundation.org/blog/red-lake-nation-honored-upholding-%E2%80%9Cpublic-trust%E2%80%9D-walleye-walleye> (last visited June 12, 2014).

⁸⁸ *Id.*

⁸⁹ *Id.*

share in the harvest benefits. As Pinkham comments:

Some tribes seem to depend on the federal government's "trust responsibility" to fix whatever problems might arise. However, I imagine hearing Red Lake leaders ask of themselves: "What of our trust responsibility to our citizens and our trust responsibility to the natural world?". . . Red Lake held the first right of refusal on a public trust doctrine. They could have left the fix to someone else. But they didn't. Sovereignty, strategic direction, institutions, leadership and culture are more than factors for success. They are also obligations. In taking those obligations seriously, from my perspective the Red Lake Nation has upheld the public trust of its citizens . . . walleye by walleye.⁹⁰

Characterizing tribes as co-trustees positions native nations for leadership in addressing the environmental crises brought about by federal and state mismanagement.

V. A PUBLIC TRUST APPROACH TO CLIMATE CHANGE

Let us consider how a trust approach confronts climate disruption, undoubtedly the most daunting ecological threat facing us today. Climate crisis represents a realm in which a trust approach is most needed, because the states and federal government treat this as a political issue that they are free, in their discretion, to ignore. Most states are doing little or nothing to stem carbon pollution, and the federal government, while taking a few scattered initiatives, has no coherent plan tied to tangible scientific parameters for what our atmosphere needs to recover from 200 years of industrial pollution.⁹¹ Stalemate also grips the international arena:

⁹⁰ *Id.*

⁹¹ While the Obama Administration has offered a climate plan, it is not tied to any scientific parameters. See OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013), available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf> (last visited June 12, 2014) ("In 2009, President Obama made a pledge that by 2020, America would reduce its greenhouse gas emissions in the range of 17 percent below 2005 levels if all other major economies agreed to limit their emissions as well."). The

for instance, China waits for the United States to take the lead, and the United States waits for China to take the lead.⁹² The world needs a clarifying framework that makes each nation responsible for the atmosphere, with corollary and mutual obligations to protect its functionality. The trust framework characterizes this crisis not as a political issue, but as a sovereign obligation that imposes an active, mutual duty of protection. A longstanding principle of trust law holds that trustees may not sit idle and let trust assets deteriorate on their watch.⁹³

A trust construct positions all sovereigns of the world in a logical relationship with respect to one another and the planet.⁹⁴ All sovereigns are co-trustees and co-tenants of the shared atmosphere. Beyond duties owed to their own citizens, they also have a duty towards the other co-tenant sovereigns to not waste the common asset. The fiduciary obligation towards the global atmosphere necessitates reducing carbon emissions. The reduction necessary to prevent catastrophic heating has been quantified by an international team of scientists led by Dr. Hansen, former head of NASA's Goddard Institute for Space Studies.⁹⁵ In a

seventeen percent goal was actually a political goal, established by President Obama to match what he felt Congress was willing to allow. See WOOD, NATURE'S TRUST, *supra* note 10, at 46. It represented only a two to four percent reduction below 1990 levels. See *id.* at 365, note 94.

⁹² By contrast, European leaders have committed twenty percent of the European Union's budget over the next seven years to build a low-carbon, resource efficient, and climate resilient economy. See European Commission, *Climate Action: One-Fifth of Total EU Budget to be Spent on Climate Action*, EUROPEAN COMM'N (Nov. 19, 2013), http://ec.europa.eu/clima/news/articles/news_2013111901_en.htm. (last visited June 12, 2014).

⁹³ See WOOD, NATURE'S TRUST, *supra* note 10, at 168, and authorities cited therein. See also *Just v. Marinette Cnty.*, 201 N.W.2d 761, 768 (Wis. 1972) (referring to "active public trust duty" to protect and preserve trust resources).

⁹⁴ For sources and authorities supporting a trust approach towards climate, see WOOD, NATURE'S TRUST, *supra* note 10, at 208-227; Mary Christina Wood, *Atmospheric Trust Litigation Around the World*, in FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST (K2012), available at <https://law.uoregon.edu/faculty/mwood/publications/> (last visited June 12, 2014).

⁹⁵ James Hansen, *et al.*, *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, PLOS ONE (Dec. 3, 2013), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0081648> (last visited June 12, 2014).

ground-breaking paper, the team calls for reducing global emissions by at least six percent *every year*, beginning in 2013, and undertaking massive soil and reforestation measures in order to draw down existing carbon in the atmosphere so as to return atmospheric carbon dioxide levels to 350 parts per million (ppm).⁹⁶

In 2011, the non-profit organization, Our Children's Trust, launched a global legal campaign called Atmospheric Trust Litigation (ATL) to enforce this prescription as a sovereign fiduciary obligation incumbent on all states and the federal government.⁹⁷ Atmospheric trust lawsuits and petitions were filed against every state in this country, against the Obama Administration, and against governments of some other countries as well, to force carbon emissions reduction according to this six percent prescription.⁹⁸ These suits and petitions were all brought on behalf of youth who assert, as beneficiaries of the atmospheric trust, the right to survive on the planet. Many of the cases now sit on appeal.⁹⁹

When we consider the nature of climate crisis—the severity, the duration, the tipping points, the fact that it threatens people living in every corner of the planet—and when we comprehend the sheer horror of uncontrollable heating, there seems no more compelling set of environmental circumstances justifying judicial relief. The law provides firm principles through the public trust. The matter now comes down to judicial courage. Back in the 1970s, when Judge Boldt and Judge Belloni issued their famous decisions upholding treaty fishing rights in the Pacific Northwest—decisions that essentially recognized native nations as co-tenants of a shared fishery—the judges exemplified judicial resolve. They were threatened, hung in effigy, ruthlessly criticized, mocked in the press,

⁹⁶ *Id.*

⁹⁷ For scholarship setting forth the public trust basis of Atmospheric Trust Litigation, see *supra* note 93.

⁹⁸ Legal documents, press coverage, and updates are available on the website of OUR CHILDREN'S TRUST, *available at* <http://ourchildrenstrust.org/> (last visited June 12, 2014). On June 5, 2014, the D.C. Circuit Court of Appeals denied the youth's appeal asserting a trust obligation against the federal government, *Alec L. v. McCarthy*, USCA Case #13-5192 Document #1496137 (D.C. Cir. June 5, 2014).

⁹⁹ For litigation developments, see *id.*

and were the subject of bumper stickers that read “screw Boldt, slice Belloni.” They nevertheless stood unwaveringly by principles of justice.¹⁰⁰

Atmospheric trust litigation will test judicial courage as few other controversies have.¹⁰¹ At the same time, ATL simply asks the courts to act within their traditional authority. The youth plaintiffs in these cases do not ask the court to tell the government how to bring down carbon—that remains the trustees’ job, after all. The proposed remedy would require trustees to develop a plan of emissions reduction that carries out the scientific trajectory of six percent reduction a year, and then perform regular carbon accountings to show that the plan is being carried out over the long term.

Government attorneys disclaim any atmospheric trust responsibility. In briefs, they typically contend that the doctrine is limited to navigable waters because the old cases (like *Illinois Central*) involved navigable waters and streambeds.¹⁰² They argue against extending the trust obligation to air, climate, and drinking water sources, for example, because the old cases did not deal with those resources. But that is not how law works. Judges are supposed to take foundational doctrines and apply their core rationale to new circumstances. You cannot suppress a galvanizing principle as logical and ancient as the public trust. As Professor Gerald Torres says, the trust is “the law’s DNA.”¹⁰³ It has as

¹⁰⁰ For background on the treaty litigation, see generally CHARLES F. WILKINSON, MESSAGES FROM FRANK’S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2000); ROBERTA ULRICH, EMPTY NETS: INDIANS, DAMS, AND THE COLUMBIA RIVER (2007).

¹⁰¹ This is particularly true since the fossil fuel industry has deliberately perpetuated uncertainty surrounding the climate disruption from human-caused carbon pollution. See UNION OF CONCERNED SCIENTISTS, SMOKE, MIRRORS, AND HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO’S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE 2 (2007).

¹⁰² See Dawn Reeves, *Plaintiffs Cite State Ruling In Bid To Preserve Novel Public Trust GHG Suit*, INSIDE EPA (Feb. 7, 2014), <http://insideepa.com/201402072460621/EPA-Daily-News/Daily-News/plaintiffs-cite-state-ruling-in-bid-to-preserve-novel-public-trust-ghg-suit/menu-id-95.html> (last visited June 12, 2014) (quoting brief filed by federal government in ATL case against the Obama administration) (“[Youth plaintiffs] seek to extend the [public trust] doctrine far beyond its historical roots [addressing tidelands and navigable waters] and apply it generally to all natural resources and directly to the federal government.”).

¹⁰³ Gerald Torres, *The Public Trust: The Law’s DNA*, Keynote Address at the University

much relevance to the ecological crisis of today as it did when first announced in this country two centuries ago in the context of navigable waters.

There is no question that society has the means, the ingenuity, and the resources to accomplish an annual six percent reduction of carbon dioxide emissions. But the United States and the nation's leaders lack political will. The recalcitrance of government trustees has already caused a huge penalty, pushing society into a zone of far greater risk. Scientists point out that, had society started emissions reduction in 2005, only three and a half percent annual emissions reduction would be necessary to achieve 350 ppm at 2100.¹⁰⁴ In just eight years, the requirement has jumped to at least six percent per year. If reduction is delayed further, until 2020, scientists project that the required emissions reduction would be fifteen percent per year to achieve 350 ppm in 2100.¹⁰⁵ At some point, the figure will be so large that it will no longer be feasible to cut the required amount every year.¹⁰⁶ That is when the window of opportunity to salvage a functional climate slams shut.

Within a trust framework, tribes can assert their standing as co-tenants and co-trustees of the atmosphere, just as they do with a shared fishery. There is no more paramount, pervasive, or urgent environmental threat facing tribes than climate change. Tribes could step into a vacuum of climate leadership by announcing the fiduciary obligation to protect the atmosphere and call for compliance with the six percent annual reduction

of Oregon School of Law (Feb. 23, 2012). See also Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4:2 Wake Forest J. L. & Pol'y 101 (2014).

¹⁰⁴ See Hansen *et al.*, *supra* note 94 ("These results emphasize the urgency of initiating emissions reduction. As discussed above, keeping global climate close to the Holocene range requires a long-term atmospheric CO₂ level of about 350 ppm or less, with other climate forcings similar to today's levels. If emissions reduction had begun in 2005, reduction at 3.5%/year would have achieved 350 ppm at 2100. Now the requirement is at least 6%/year. Delay of emissions reductions until 2020 requires a reduction rate of 15%/year to achieve 350 ppm in 2100.").

¹⁰⁵ See *supra* note 105.

¹⁰⁶ See Hansen *et al.*, *supra* note 94 ("Our analysis shows that a set of actions exists with a good chance of averting 'dangerous' climate change, if the actions begin now. However, we also show that time is running out.").

on the part of all states and the federal government. Youth plaintiffs in ATL proceedings across the country are trying to convey this responsibility to the broad public, but they cannot do so from the platform of sovereignty. Sovereignty matters. Moreover, tribes appear situated to bring legal claims against co-tenants for protection of the atmosphere or support the plaintiffs' position in ATL lawsuits. In the federal ATL case, the National Congress of American Indians submitted a brief in support of the youth plaintiffs.¹⁰⁷ Such involvement in ATL cases manifesting the climate concern of co-trustees might be key to solidifying the judicial will necessary for holding state and federal leaders accountable.

CONCLUSION

We have arrived at an unthinkable moment in time, where 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. We need all of the will and wisdom we can muster to rise to this moment. This will and wisdom will not come from the culture that brought us this crisis.

Tribal leaders can voice responsibilities that echo back through millennia. This message could not be voiced at a more crucial time. As my colleague, Rennard Strickland, wrote, "If there is to be a post-Columbian future—a future for any of us—it will be an Indian future . . . a world in which this time, . . .the superior world view . . . might even hope to compete with, if not triumph over, technology."¹⁰⁸

¹⁰⁷ Brief for the National Congress of American Indians *et al.* as Amici Curiae Supporting Plaintiffs-Appellants, *Alec L. v. McCarthy*, No. 13-5192 (D.C. Cir. 2013), *available at* <http://ourchildrenstrust.org/sites/default/files/FiledNativeAmicus.pdf> (last visited June 12, 2014).

¹⁰⁸ RENNARD STRICKLAND, *TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY* 130 (1997).