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978-0-521-19513-3 - Nature's Trust: Environmental Law for a New Ecological Age

Mary Christina Wood

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## NATURE'S TRUST

Environmental law has failed us all. As ecosystems collapse across the globe and the climate crisis intensifies, environmental agencies worldwide use their authority to permit the very harm that they are supposed to prevent. Growing numbers of citizens now realize they must act before it is too late. This book exposes what is wrong with environmental law and offers transformational change based on the public trust doctrine. An ancient and enduring principle, the trust doctrine asserts public property rights to crucial resources. Its core logic compels government, as trustee, to protect natural inheritance such as air and water for all humanity. Propelled by populist impulses and democratic imperatives, the public trust surfaces at epic times in history as a manifest human right. But until now it has lacked the precision necessary for citizens, government employees, legislators, and judges to fully safeguard the natural resources we rely on for survival and prosperity. The Nature's Trust approach empowers citizens worldwide to protect their inalienable ecological rights for generations to come.

Mary Christina Wood is the Philip H. Knight Professor of Law and Faculty Director of the Environmental and Natural Resources Law Center at the University of Oregon School of Law. She has taught law for more than twenty years, specializing in property law, environmental law, and federal Indian law. She founded the school's top-ranked Environmental and Natural Resources Law Program and initiated several of the program's interdisciplinary research projects, including the Native Environmental Sovereignty Project and the Food Resiliency Project. She is the coauthor of a textbook on natural resources law and one on public trust law. She has also authored many articles and book chapters on the federal Indian trust obligation, wildlife law, and climate crisis.

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# Nature's Trust

ENVIRONMENTAL LAW FOR A  
NEW ECOLOGICAL AGE

MARY CHRISTINA WOOD

University of Oregon School of Law



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*To Sage, Cam, and Nick  
and all children of this world*

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## Preface

*Drawn home over thousands of miles, by instinct honed over thousands of years, the fish circled together to shape loose sands into nests where they would lay their eggs. Clouds hung above them, darkly bruised with shades of winter. Hundreds of fins sliced through the water's surface, leaving soft ripples in the shallows. They were tired, but worked tirelessly, in the natal waters where they were born.*

*Within a few days these chum salmon would be corpses scattered along the tidelands, their descendants safely nestled in the ancient river cobble of the Columbia River. Their only legacy would be a continuous strand of life – here, and at no other place on Earth. These fish shunned other spawning grounds for one simple reason: they were not born there. What more perfect deed could they have to this land?*

I grew up watching these salmon at a place we called Wood's Landing, located on the Columbia River in the state of Washington. This spot had existed as an Indian fishing camp when Lewis and Clark floated by in dugout canoes on November 5, 1805. Nature thrived plentifully during that time. Salmon crowded by the hundreds into small creeks along the river to spawn. Meadows, wetlands, and red cedar groves provided rich cover for migratory birds and deer, which supplemented the Indians' fish diet. Squaw grasses gave sturdy raw material for nets and baskets. Stringy bark from cedar trees provided fiber for canoes, clothing, and huts. Camas root and thimbleberries proliferated.

Early in my childhood, I became aware that tribal life ran ancient in the region and that the non-Indians were newcomers. The Indian fishermen had left a clear imprint of their life at Wood's Landing. The high waters that work away at the riverbank every spring occasionally exposed stone "sinkers" that tribal people chiseled and used to weigh down fishing nets to capture the salmon coming up the stream. Years later, as I embarked on a career teaching environmental law, I held the memory of those ancient anchors embedded in the sediments at the place where I grew up.

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As I began to focus my legal scholarship on Indian management of salmon, I realized that these sinkers gave clues to a remarkable story of environmental management. Tribes of the Columbia River perfected a system of harvest regulation that allowed return of 10 million–16 million fish a year to the basin. Oral history recounts that, even during times of food scarcity, Indian leaders exercised restraint so as not to diminish the species' capacity to support future runs. Under native stewardship, and even with concentrated human use, these populations were sustained for 10,000 years. Western environmental management fails to fathom such a time frame.

I began to think of tribal fishery management, having endured since time immemorial, as resembling a trust – guided by the interests of beneficiaries positioned several generations into the future. In Western property law, a trust bifurcates ownership between a trustee and a beneficiary. The trustee holds legal ownership and must manage the assets strictly for the advantage of the beneficiaries, who hold beneficial ownership. While the tribes would not have described their management in exact trust terminology, the old Indian proverb, “We do not inherit the Earth from our ancestors; we borrow it from our children,” resonates as a trust in the deepest sense, both legally and culturally. To sustain a natural trust over many millennia, as the tribes of the Columbia River Basin did, requires extraordinary fiduciary stewardship. The “environmental law” emerging from tribal governance integrated the laws handed down by Nature itself.

But that is not the environmental law followed by industrialized society. Natural resources management changed radically when new sovereigns took control of the land. In the mid-1800s, the federal government forced the Columbia River tribes to relinquish most of their territory through treaties (though the tribes retained perpetual fishing rights on the lands they ceded). This huge property transfer positioned the newly created states of Washington and Oregon to control the salmon harvest. As novice governments, the states had no sovereign experience managing a natural resource. Presuming that the huge salmon runs remained inexhaustible, they allowed gluttonous harvest of the fishery by non-Indian commercial fishermen to serve a growing and insatiable global food market. Over just a few decades, these state trustees siphoned the abundance right out of the great salmon trust.

On the heels of this loss came a surge of industrialization and urbanization across the entire Pacific Northwest, affecting virtually every watershed used by salmon. Timber companies razed forests, pulp and paper mills polluted rivers, developers tore up wetlands, cities dumped sewage and toxins into waterways, and the federal government embarked on a dam-building frenzy, installing hydro facilities that posed death traps for salmon trying to migrate through the Columbia and Snake rivers. Those dams today kill more than 90 percent of the juveniles of some species.<sup>2</sup>

By 1995, the salmon's ecosystem had unraveled. The National Marine Fisheries Service declared that year, “Few examples of naturally functioning aquatic systems

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now remain in the Pacific Northwest.”<sup>3</sup> Columbia River wild salmon runs dropped to about 2 percent of their historic levels. Some species passed into extinction. Tattered ecosystems imperiled coastal salmon stocks from California to Canada.

With the salmon trust bankrupt, the “interest” from this natural asset, as measured in fish harvest, diminished to nearly zero. In 1994, not enough salmon returned to the Columbia River to supply the tribal longhouses for their First Salmon feasts held in the spring to express reverence to the Creator for giving food to the people.<sup>4</sup> The crisis stood as a poignant illustration of an inescapable fact: the colonial trustees upon this land had devastated in a mere century what the native trustees had managed with fiduciary care for millennia.

The breathtaking failure could not be blamed on any lack of environmental law. Plenty of statutes exist, along with even more regulations implementing them. Untold hours and millions of dollars have been spent on legal processes under the Endangered Species Act (ESA) in the Columbia River Basin. Yet, even after two decades, litigation to save the salmon still drags on in the courts. To this day, environmental law has forced little improvement of basin conditions. The magnificent salmon, with their survival history of 5 million years on this planet, still swim in lethal waters toward extinction.

As a child growing up in the 1960s and 1970s, I witnessed part of this natural destruction from the banks of the Columbia River. My great-grandfather had purchased Wood's Landing in 1889 from a homesteader and had used the land for a small prune orchard. Until my middle-teen years, the area for many miles to the east and north still existed as farmland, as it had for the previous hundred years. For many generations, the fields, forests, and wetlands there had enticed children to explore, and I was no exception.

But children today will not have that opportunity, or anything close to it. Everything changed within a mere decade's time. In 1982, corporations constructed the enormous I-205 bridge over the Columbia River. It reaches like a dinosaur stretching over the river as if to devour the other side. Even before the ink dried on the final engineering plans for the bridge, land speculators from California bought all the farmland they could get their hands on, anticipating hordes of commuters traveling daily from Portland, Oregon, to new homes in Southwest Washington. Within only a few years, thousands of acres of farmland in Clark County, Washington, became wall-to-wall suburbia. The land speculators' quick fortunes bankrupted the county's natural assets.

Developers tore up cherished farms with abandon. Four-lane roads razed through fields even as vegetables pushed up through the soil. Bulldozers operated from dawn to dusk demolishing wetlands, creeks, forests, springs – anything that stood in the way of a developer's asphalt kingdom. Ripping up trees, tearing into soils, and bludgeoning delicate riparian areas, the giant machinery left no reminder of the ancient

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civilization that once existed there. McMansions sprouted everywhere, as far as the eye could see, separated only by strip malls pimped with huge box stores and fast-food joints. Upstream from Wood's Landing, the lumber mill ran at peak capacity, spewing toxic air emissions that often hung stagnant over the entire area. Pollution froth floated across the salmon spawning grounds at Wood's Landing, all day, every day. This environmental annihilation continued incessantly, all with the blessing of federal, state, and local agencies. Permits issued from these jurisdictions like rows of falling dominoes.

In the mid-1990s, my academic attention inevitably turned to the regulatory system and its perpetual failures. The story of environmental ruin in the Columbia Basin was being repeated across the United States and in many other countries as well. Environmental laws had achieved some success. But the industrial machine moves fast, and its swath of wreckage far exceeds the isolated instances of protection. Across nearly all fronts of ecological assault, environmental law has failed in its basic purpose to safeguard natural resources.

The situation has worsened dramatically over the last two decades. Today's environmental losses boggle the mind and sicken the soul – everything from fisheries collapse to wetlands destruction, deforestation, pesticide contamination, ozone depletion, water pollution, air pollution, endangered species, overgrazing, nuclear waste disposal, ocean acidification, biodiversity crisis, and climate change. Much of this damage stays permanent. The agencies implementing the environmental laws have become perpetrators of legalized destruction, using permit provisions contained in nearly every statute to subvert the purposes Congress and state legislatures intended.

Serious endemic flaws exist across the system as a whole. The same forces that caused the Forest Service to cut nearly all of the public's ancient forest in the Pacific Northwest also prompted the U.S. Environmental Protection Agency to allow unacceptable levels of arsenic in drinking water. The same dynamics that moved city governments to issue permits for endless outbreaks of suburban sprawl caused water agencies to overappropriate rivers until many ran dry. The same pressures that drove the Corps of Engineers to allow wetlands destruction across the United States prompted the U.S. Fish and Wildlife Service to approve projects that pushed endangered species ever closer to extinction. These same forces now keep the U.S. Environmental Protection Agency from taking bold action to regulate carbon dioxide pollution as our planet heats to dangerous levels. Most worrisome, these dynamics persist at all levels of government. And they do not disappear with changes in political administrations – although some administrations produce far worse policy than others.

We ignore the colossal failures of environmental agencies at our peril. Over just the last few decades, government has engaged in a reckless gamble with ecology.



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As James Gustave Speth wrote in his book *A Bridge at the Edge of the World*, if we continue business as usual, the world “won’t be fit to live in” by mid-century.<sup>5</sup> *Won’t be fit to live in*. The import of these words finds substantiation in countless scientific reports, as the introduction details. Time and opportunity now slip away too rapidly for incremental strategies to work. Scientists warn that only a narrow window of opportunity remains in which to address climate emergency and other environmental calamities before irrevocable tipping points forever change our planet.

Given this urgency, not enough time exists to rewrite all of environmental law. And we don’t have to. The problem rarely resides in the individual laws themselves but rather in the paradigm that frames those laws. We can pass any new environmental law we want, but no matter what it says, if it stays bounded by the frame in which we’ve operated for the last four decades, government will continue to impoverish natural resources until our society can no longer sustain itself. Environmental statutes passed to protect resources can fulfill their purpose only if the agencies act on behalf of the public they constitutionally serve. Environmental statutes do not declare a purpose of allowing rampant resource destruction, but we know from experience that they will accomplish precisely that result if the agencies stay captive to the industries they are supposed to regulate.

The political milieu in which government administers its laws matters greatly. The direction in which government chooses to devote its energy depends on whether leaders pursue the politics of scarcity or the politics of abundance. Politics of scarcity focus on creating legal mechanisms to allocate the benefits of an ever-declining natural resource. In other words, officials use the power of the state primarily to divide the last crumbs (allocating those to the most politically powerful individuals). These politics have led society to this perilous point in time. The politics of abundance, by contrast, reach persistently and undauntingly toward protecting and building natural wealth.

Management of the Columbia River salmon exemplifies the difference. When fish runs began to collapse in the late 1800s, the politics of scarcity took hold and have dominated environmental policy in the basin ever since. In the 1970s, the law focused on dividing the harvest of a fishery in freefall decline; ugly brawls broke out between fishermen locked in competition over the last fish. When regulation under the Endangered Species Act commenced in the early 1990s, instead of truly trying to rebuild the runs as the law requires, federal officials busied themselves with figuring how much death they could sanction without sending the species over the edge into extinction. Finding that magic line – between not enough death and too much death, not enough destruction and too much destruction, not enough risk and too much risk – describes the work of most environmental agencies today operating under the politics of scarcity.

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Politics of scarcity inexorably hover over societies that sanctify unlimited indulgence. Simply put, these politics arise out of the difficulty of confronting greed. Developers, industrialists, and huge corporations exert relentless pressure on governmental officials to allow unconscionable exploit of natural resources that bring them enormous profit at the expense of the community. Their pressure, constantly applied, erodes the will on the part of state and federal officials to carry out the protective mandates of the law. Often it does not matter much what the law says; the politics will circumvent it. Every devastated watershed, every new mile of sprawl, every new clear cut, every new oil pipeline, and every blasted mountaintop reflects excessive indulgence condoned by the politics of scarcity.

Politics of abundance, by contrast, arise from an ethic of measured restraint. These politics reject unnecessary indulgence bound to satisfy only a few at grave expense to present and future generations. They focus not on dividing an ever-diminishing yield but on rebuilding a base of natural capital that will produce an increasing – and ultimately sustainable – yield in the future. Tribal leaders exercised politics of abundance to keep steady the fish runs in the Columbia River Basin for 10,000 years.<sup>6</sup> In today's world, the politics of abundance must begin with the denial of destructive permits and then turn to mammoth ecological restoration on all fronts.

Legal systems can support either the politics of scarcity or the politics of abundance, but Earth's natural systems can support only the latter. The politics of scarcity will manage human species survival in much the same way as it manages salmon survival – down to extinction. As Speth makes clear, society now teeters at the edge of an abyss. If we wish to endure on this planet, we must invoke all of the creativity and skill we can to build a “bridge across the abyss” to a new world. It will not happen on its own. We have to build it.

New paradigms plank the footings for such a bridge. Fortunately, many excellent books offer creative, well-grounded paradigm shifts in the areas of economics, business, industrial design, architecture, politics, religion, consumption, education, and culture. None, however, offer transformative shifts in environmental law. We simply cannot hope for ecological security if environmental agencies keep issuing permits for destruction as they have for the last forty years.

This book builds on an ancient and extant legal tradition to offer a legal paradigm called Nature's Trust, intended to catalyze a transformation of environmental law. The framework draws from principles of environmental obligation encompassed within the public trust doctrine. Dating back to Roman law, this doctrine stands as a pillar of ordered civilization to compel sovereign stewardship of crucial natural wealth. It characterizes the ecological endowment as a trust for present and future generations of citizens. Government, deriving its authority from the people as a whole, must act as a fiduciary to protect the natural resources held in trust from damage, as well as from dangerous privatization. Judicial decisions dating from the

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beginning of the United States voice this trust, and its principles manifest in the law of many other countries as well.

This venerable doctrine has been largely overlooked because of the proliferation of statutes across the legal landscape. Passed in the 1970s, these laws produced thousands of implementing regulations. Similarly to how an invasive plant species chokes out and conceals the presence of native vegetation, so these statutes and regulations obfuscate the public trust. Most agency regulators have never heard of the public trust and remain unaware of their fiduciary obligations to protect public ecological assets. Nevertheless, lawyers, citizens, judges, and regulators have commenced to unearth these principles and apply them to environmental controversies, because these principles *still exist in the law*. Embodying the politics of abundance, trust principles announce visionary precepts waiting at the periphery of an old, destructive regime.

People most vested in the current system will surely criticize trust aspirations as politically naïve, unrealistic, or overly optimistic. Has any true paradigm shift in history ever escaped such disparagement? Speth wisely asserts that if deep proposals seem “impractical, or politically naïve,” or “radical or far-fetched” today, then wait until tomorrow. He writes, “In general, the world of practical affairs does not truly appreciate how much negative change is coming at us, nor how fast. . . . [W]e must look beyond the world of practical affairs to those who are thinking difficult and unconventional thoughts and proposing transformative change.”<sup>7</sup>

In suggesting deep change for environmental law, this book roundly criticizes the present system. For anyone engrossed in perpetuating this system, the first part of the book may prove uncomfortable reading. For a law professor who has spent more than twenty years teaching this field, I assure you, it makes uncomfortable writing. My advice is to read on – but with hope and vision, not guilt or blame. We can only forge a promising and safe path if we first acknowledge the erratic dysfunction of environmental law, pinpoint where the legal sinkholes lie, and address a daunting set of problems with visionary aim and sincere purpose.

We simply cannot hope to turn the system around in time without the full commitment, participation, and (most of all) courage of the people working in the thousands of governmental agencies, legislatures, and judicial systems around the world. They sit as the present trustees of Earth's endowment, and, in the end, much of the needed transformation rests on their shoulders because they hold the levers of government. We need them to become the heroes of our day, and in large part, this book is written for them. But it likewise calls to the 7 billion beneficiaries of Nature's Trust presently living on Earth who depend on honest fiduciary management of natural resources by their governments. These beneficiaries hold the power of the people to exert timeless, populist rights against oppressive parties that pursue a perilous agenda of greed. And, for the countless future generations that will awake

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at their appointed time in the chain of life, this book seeks to carry out an everlasting covenant that places trust in their future.

We stand in an unthinkable moment in time – when food delivers poison, water runs toxic, species vanish, and global climate disaster threatens nearly all of Nature's Trust. But despite these alarming environmental conditions, democracy still allows us the freedom to rethink and redefine our place in the world according to Nature's Law. We still hold the liberty of moving from the politics of scarcity to the politics of abundance. That opportunity, however, will not linger for much longer. Actions taken by *this* generation of people already reverberate far into the future as ghostly echoes of an ill-considered past.

I write this book realizing that fate has delivered our generation into life at a pivotal moment. Our children and grandchildren have trust that we *will* claim this moment.

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