

Planetary Patriotism

Professor Mary Wood Formulates Public Trust Doctrine Litigation Strategy to Stem Global Warming

Renowned environmental law expert Professor **Mary Wood** is spreading the word about her new litigation approach to the climate crisis: the public trust doctrine. Professor Wood's theory focuses on the existence of a public trust over nature's assets — "Nature's Trust" — as a tool to engage courts in the urgent protection of the atmosphere and other resources. A trust is a fundamental type of ownership whereby one party, the trustee, manages property for the benefit of another. Government is the trustee of the assets held in Nature's Trust, including the water, wildlife, and air — and all people are the beneficiaries. The government trustees do not have discretion to allow irrevocable damage to the trust's assets. As Professor Wood puts it, "Everyone holds a common property interest in Nature's Trust, and we need that trust in order to sustain human survival and promote human welfare. Our imperiled atmosphere is one of the most crucial assets in our trust."

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

levels — local, state, and federal — must be engaged."

Professor Wood points out that, instead of protecting the atmosphere, government is driving the world towards greenhouse gas emissions by approving subdivision

developments, timber sales, and new coal-fired plants. According to Professor Wood, the U.S. Environmental Protection Agency is "using all of our taxpayer money and doing everything in its power to abdicate its responsibility to the public." Her work, portraying Nature as a trust rather than as an "ill-defined commons," seeks to "vest citizens with expectations of enduring property rights. We start thinking, 'Hey, that's my air, even if I share it with others.' Pollution of that air become an infringement upon American property rights."

As trustee, under this theory, the government has a fiduciary obligation to slash carbon pollution, measured by a fiduciary standard of care. The courts would be empowered to ensure that government does not bankrupt the trust and impair the productivity of the atmosphere so that it can no longer sustain human civilization. The key to the solution, says Professor Wood, is to find legal levers to force government to do its job. "It is clear the political branches are not going to



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act in time," she says. "Only swift injunctive relief carries hope of holding government to its obligation in the time we have left. The window is closing fast. The unparalleled force of the trust doctrine is that it draws upon a duty organic to every level of government. Atmospheric trust litigation is a macro strategy. The statutes won't get us where we need to be in time," she explained.

Professor Wood envisions a role for the courts that would obviate existing barriers in nuisance litigation. In recent years, two lawsuits against major carbon polluters — coal-fired plants and automobile companies —

have failed because courts said they invoked "political questions" inappropriate for judicial review. The trust approach, Professor Wood notes, "turns the table on the political question defense. The very essence of the public trust is to allow the courts to police the legislature's and agency's disposition of public assets. A government trustee has no political discretion to allow irrevocable damage to a natural asset needed by citizens for their survival."

The public trust theory, in the context of climate change litigation, also provides a remedy: the traditional trust remedy of an accounting. In a climate change case, a court could order a "carbon accounting," to inform the court as to whether the government defendant is reducing pollution adequately, as measured by appropriate scientific targets. Government agencies would retain the latitude to decide how to reduce pollution. Narrowly tailored injunctive relief, such as temporary prohibitions on coal-fired plants, road construction or new pollution permits, could serve as a "backstop" in the event the government fails to make adequate progress.

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

For more information about Professor Wood's work and Nature's Trust, visit <http://law.uoregon.edu/faculty/mwood/publications.php>.

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