

CLI RECOMMENDATION NO. 7

Create Sky Trusts and Other Environmental Stakeholder Trusts to Sustain and Safeguard Common Assets*

This recommendation proposes the creation via national and state legislation of sky trusts and other environmental stakeholder trusts to sustain and safeguard common assets.

A. Create a National U.S. "Sky Trust"

The federal government should enact legislation to create a Federal Carbon Trust to manage the flow of carbon through the U.S. economy and into the atmosphere. This statute would require all companies that are first sellers of fossil fuels in the U.S. to buy permits from the Trust based on the carbon content of their fuels. These companies would perform an annual accounting with the Trust, to prove that they own a sufficient number of permits. If they are short, they would pay a stiff penalty. Trading of permits in secondary markets would be allowed. Revenue generated from permit sales would be distributed monthly via electronic transfers to all eligible U.S. residents, like the Alaska Permanent Fund (APF).

The Trust would be governed by a board of trustees appointed by the President and confirmed by the Senate. Trustees would serve 14-year terms. Conflict of interest rules created by the enabling legislation would exclude persons with previous ties to fossil fuel industries from serving as a trustee and bar them from work with such industries after service. Trustees would set limits on the quantity of permits based on latest scientific information regarding climate stability and the precautionary principle. Trustees' primary obligation is to future generations, who have an unalienable right to inherit a stable climate. Trustees' decisions could be challenged in court by representatives of future generations, based on the common law fiduciary obligations of trustees to beneficiaries.

Noteworthy, Robert Reich, former Labor Secretary during the Clinton Administration, has recently made the case for such a Carbon Trust while also making the analogy to the APF. Our atmosphere belongs to all of us, and polluters should have to pay to use it. The citizens of Alaska get yearly dividends from the oil companies that take away their natural resources. Why should not the same principle apply when industries use the biggest common resource of all? The money they pay for permits could be returned as yearly dividends to every American family.

Now, it stands to reason that if polluters have to pay for the right to pollute, some of these costs might be passed on to consumers in the form of higher prices. But the yearly dividend checks would offset any price increases.¹

Likewise, the debate in Congress about the pending Lieberman-Warner bill suggests that members of both parties are now aware of the costs of carbon capping and are willing to recycle substantial amounts of revenue back to the public to offset those costs. Senator Bob Corker, a Republican from Tennessee, has offered an amendment that would auction most carbon permits and return the proceeds to the American people. The rebates would be paid by check each year to all individuals earning less than \$150,000, and all couples earning less than \$300,000. Rep. Ed Markey of Massachusetts has introduced a bill in the House that would auction almost all permits and return about half the revenue to households to compensate for higher energy costs. Monthly debit card transfers would go to low-income households,

* This recommendation was authored by Peter Barnes, Senior Fellow of On the Commons (formerly Tomales Bay Institute); and author of *CAPITALISM 3.0: A GUIDE TO RECLAIMING THE COMMONS* (2006). For further detail regarding this recommendation, the author recommends especially Chapter 9 therein ("Building the Commons Sector").

¹ American Public Media, Marketplace, http://marketplace.publicradio.org/display/web/2008/05/28/reich_cap_and_trade_auction.

and refundable tax credits would go to households earning up to \$110,000. All together, about 80% of households would be covered. While the debate does not recognize the use of a trust to handle these funds, it certainly could.

B. Enact State Legislation for Chartering and Assigning Property Rights to Ecosystem Trusts

This state legislation would be like that which already exists for chartering for-profit and non-profit corporations. It would create a new class of corporation called “ecosystem trusts” or “future generations trusts.” The trusts would be responsible for managing a particular ecosystem as set forth in their charter. With respect to that ecosystem, the trusts would be allowed to acquire and manage property rights for the purpose of protecting the interests of future generations. These property rights could include fee ownership, usage rights, and conservation easements. They would blend with private property rights.

The primary beneficiaries of such trusts would be future generations. The trusts would be governed by boards of trustees chosen according to each trust’s Articles of Incorporation. These trustees would be accountable to future generations first, and all living residents served by the ecosystem second. In the event of conflict between the interests of living residents and future generations, the interests of future generations would come first. Citizens would be empowered, under the trust’s charter, to sue on behalf of future generations to enforce the trust’s responsibilities.

Charters would be issued by the state’s Department of Corporations, Environmental Protection Agency, Secretary of State, or some other appropriate state entity. Charters would be subject to renewal every ten years, unless otherwise specified. Chartered trusts would be required to file audited annual reports with the appropriate state entity, and such reports would be posted on the Internet for public inspection. These trusts would be required to hold public meetings at least once annually. They would be structured as a not-for-profit entity and exempt from state and federal taxes. Their revenue, if any, would be used in accordance with their Articles of Incorporation or Declaration of Trust.

A key feature of the legislation is that it would enable the chartering state entity to *create new property rights* that are essential to the mission of the trust. For example, in the case of an aquifer, it might be the right to withdraw water. For a forest, it might be the right to cut trees or develop land for non-forest uses. For an airshed, it might be the right to emit certain pollutants. The trust would be responsible for managing these rights in the interest of future generations. Thus, it could sell some of the rights to private entities, but only up to a limit that still protects future generations against diminishment of the natural resource asset. The trust’s charter would govern how revenues gained from these sales would be treated. (For example, they could be used to restore or protect the commons, to support the trust’s staff and operations, or be paid out in dividends.)

It is possible—maybe even probable—that these new property rights would clash with existing private property rights. For example, a private property owner might assert a right to withdraw an unlimited amount of water from an aquifer. In that case, the trust would have to be surrounded by a body of law that establishes when future generations’ rights trump those of living private property owners and vice versa.