

# Atmospheric Litigation: The Public Trust Approach to Climate Change

By: Holly Bannerman

## *Introduction*

In a series of lawsuits filed against the federal government and twelve states this past May, Wild Earth Advocates and Our Children's Trust — a group of children — allege that the government has breached its public trust duties to protect the atmosphere by failing to properly regulate greenhouse gases (GHG).<sup>1</sup> Frustrated with the politics governing climate change regulation, the groups are urging the courts to require the federal government to uphold its fiduciary duty to protect our natural resources by developing plans to meet carbon reduction targets based on science *not* politics.<sup>2</sup> In the federal complaint, parties have named as defendants the current Secretaries of the: Department of Interior, Department of Commerce, Department of Energy, Department of Agriculture, Department of Defense, and the Environmental Protection Agency while the state complaints name their respective current state governors. Our Children's Trust allege that the defendants and their predecessors have violated, and continue to violate, their fiduciary duties to protect the atmosphere for them personally, for other children across the country, and for future generations.<sup>3</sup>

The atmosphere has never before been subject to trust litigation. Though seen by many as an unprecedented new strategy, legal professors and commentators have been discussing this seemingly novel approach to climate change litigation for years.<sup>4</sup> In his 1970 article, Joseph L.

---

<sup>1</sup> OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/legal-action/lawsuits> (last visited Oct. 27, 2011). This website contains copies of the federal complaint and the complaints filed in Alaska, Arizona, California, Colorado, Iowa, Minnesota, Montana, New Jersey, New Mexico, Oregon, Texas, and Washington.

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

<sup>3</sup> *Id.*

<sup>4</sup> See generally Mary C. Wood, *Atmospheric Trust Litigations*, in ADJUDICATING CLIMATE CHANGE: SUB-NATIONAL, NATIONAL, AND SUPRA-NATIONAL APPROACHES 99, 99-125 (William C.G. Burns & Hari M. Osofsky, eds., 2009) available at <http://www.law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf>; Tim Eichenberg, et al.,

Sax proposes that “of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”<sup>5</sup> Yet, never before has a nationwide initiative been undertaken which looks to the courts to use the public trust doctrine as a tool to force the executive and legislative branches to act. “While these claims raise standing and causation issues present in other common law climate change litigation, the use of the public trust doctrine also raises a number of novel legal questions.”<sup>6</sup> This paper examines some of them in light of the Supreme Court’s rulings in *Massachusetts v. EPA*<sup>7</sup> and *Am. Elec. Power Co. v. Connecticut*.<sup>8</sup>

### *The Public Trust Doctrine*

The public trust doctrine is a legal principle which derives from English common law and dates back to ancient Roman law.<sup>9</sup> Under English common law, the sovereign held the navigable waterways and submerged lands “as trustee of a public trust for the benefit of the people” for uses such as commerce, navigation and fishing.<sup>10</sup> In response to the narrow language of the traditional doctrine, in recent decades a number of lawsuits across the country

---

*Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE U. ENVTL. L.J. 243, 243-82 (2010); George P. Smith, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 22 B.C. ENVTL. AFF. L. REV. 307, 307-343 (2006) (discussing the Public Trust Doctrine in Natural Resource Law).

<sup>5</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

<sup>6</sup> Kevin A. Gaynor, et al., *The Trouble with Atmospheric Public Trust Claims*, LAW 360, available at <http://www.velaw.com/uploadedFiles/VEsite/Resources/TheTroubleAtmosphericPublicTrustClaimsLaw360.pdf>.

<sup>7</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>8</sup> *Am. Elec. Power Co. v. Conn.*, 131 S.Ct. 2527 (West 2011).

<sup>9</sup> Institutes of Justinian 2.1.1 (529 A.D.). The earliest known written formulation of the public trust doctrine was by the Roman Emperor Justinian: “By the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea.” This concept of the commons developed in England and was later transported into the United States. See also Lynda L. Butler, *The Commons Concept: An Historical Concept With Modern Relevance*, 23 WM. & MARY L. REV. 835, 849-850 (1982), available at <http://scholarship.law.wm.edu/wmlr/vol23/iss4/8>.

<sup>10</sup> *Colberg, Inc. v. California*, 67 Cal.2d 408, 416 (1967).

have attempted to expand the scope of the doctrine, for, as Joseph L. Sax put it, “Certainly the principle of the public trust is broader than its traditional application indicates.”<sup>11</sup> Some states, such as Hawaii, have included in their Constitution that “all natural resources are to be held in trust by the State for the benefit of the people.”<sup>12</sup> Likewise, in cases brought in a number of states such as Iowa and California, courts have expanded their public trust doctrine to include wildlife, parks, and even oil fields.<sup>13</sup>

In *Am. Elec. Power Co.*, the Supreme Court recognized that “public nuisance law, like common law generally, adapts to changing scientific and factual circumstances.”<sup>14</sup> And in *Illinois Cent. Railroad Co. v. Illinois* the Court emphasized that the public trust doctrine is designed to protect resources of “special character” that serve purposes in which the whole people are interested . . . .”<sup>15</sup> Therefore, as Professor Wood suggests, it would be “no great leap to recognize the atmosphere as one of the crucial assets of the public trust.”<sup>16</sup>

However, a “living” public trust is the minority view in most states.<sup>17</sup> To establish whether the atmosphere is a public trust asset the courts may need to determine whether the duties of the federal government can, through common law, evolve broadly enough to include the atmosphere. To answer this question, it is worthwhile to assess whether the foundations of atmospheric public trust can be found in common law.<sup>18</sup>

### *Standing*

---

<sup>11</sup> Sax, *supra* note 5, at 557.

<sup>12</sup> Haw. Const. amend. XI, § 1.

<sup>13</sup> Paul M. Bray, *Public Trust Doctrine*, P.M.BRAY LLC, <http://www.braypapers.com/PTD.html> (last visited Oct. 27, 2011).

<sup>14</sup> *Am. Elec. Power Co.*, 131 S.Ct. at 2536.

<sup>15</sup> *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 454 (1892).

<sup>16</sup> Wood, *supra* note 4, at 108.

<sup>17</sup> Gaynor, *supra* note 6.

<sup>18</sup> *Id.*

Under Article III, to gain standing in federal court there must be a “case”<sup>19</sup> or “controversy.”<sup>20</sup> More specifically, Article III requires that plaintiffs demonstrate injury-in fact, that the injury in question is fairly traceable to the defendant’s challenged action, and that the injury is one that could be redressed by a favorable decision.<sup>21</sup> As seen in *Massachusetts*, the EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming, nor does it refuse to acknowledge that at minimum, failure to regulate GHG “contributes” to the injuries.<sup>22</sup> Therefore, plaintiffs should easily be able to show both injury-in-fact and causation. However, the central issue at play in these complaints is that the atmosphere has not been explicitly listed as a resource covered by the public trust doctrine. It may then be argued that plaintiffs are seeking adjudication of a political question – is the atmosphere a public trust asset? - which presents no “controversy” for the court to hear.

Yet there are further issues with the question of standing in these particular claims. Given the interstate and global nature of climate change, and the fact that greenhouse gases are globally mixed pollutants, the injuries alleged to have resulted from the government’s failure to protect the atmosphere may not be redressed by the declaratory relief sought by the plaintiffs. This is supported by the belief that “no state acting alone can attain GHG reductions significant enough to measurably alter the impacts of global warming.”<sup>23</sup> Along those same lines, in *Am. Elec. Power Co.* several justices raised questions about whether there are even “judicially discoverable and manageable standards for climate change claims.”<sup>24</sup> Despite these potential

---

<sup>19</sup> U.S. CONST. art. III, § 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

<sup>22</sup> *Massachusetts*, 549 U.S. at 499.

<sup>23</sup> Gaynor, *supra* note 4.

<sup>24</sup> *Id.*

hurdles, the Supreme Court's granting of standing in *Massachusetts* and *Am. Elec. Power Co* suggests that such hurdles may not be as prohibitive as they once were.

In *Massachusetts*, the Court found, in a 5-4 decision, that Massachusetts had standing to challenge the EPA's refusal to regulate carbon dioxide and other greenhouse gases.<sup>25</sup> The Court declared that the states are entitled to "special solicitude"<sup>26</sup> when it comes to standing issues, thereby determining that the state's alleged injury to its citizens and its natural resources were caused by the failure of the agency to limit greenhouse emissions, which was thus a sufficient basis for standing. Similarly, in an equally divided opinion, the Court in *Am. Elec. Power Co.* granted standing to the various states and organizations that alleged that by contributing to global warming, the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance.<sup>27</sup> While these two cases provide examples of the Court relaxing standing requirements in environmental lawsuits, the narrow split in the opinions may suggest that such leniency may not last forever.

### *Role of the Courts*

In their federal complaint, Wild Earth Advocates requests that the courts declare: 1) that the atmosphere is a public trust resource, 2) that the government has a fiduciary duty, as trustee, to protect the atmosphere as a commonly shared public trust asset and 3) that as trustees they must collaboratively take action to draw down on carbon dioxide levels.<sup>28</sup> While the plaintiffs assert that they are not asking the court to tell Congress or any federal agencies *how* to protect

---

<sup>25</sup> *Massachusetts*, 549 U.S. at 526.

<sup>26</sup> *Id.* at 520 ("Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

<sup>27</sup> *Am. Elec. Power Co.*, 131 S.Ct. at 2534.

<sup>28</sup> OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/legal-action/lawsuits> (last visited Oct. 27, 2011).

the atmosphere, they are requesting that the court require the federal government to do its job.<sup>29</sup> However, there remains some skepticism as to how the courts should proceed in granting this type of declaratory relief. The role of the courts has never been to serve as a forum for policy matters, nor has it been to make policy decisions that should otherwise be delegated to Congress.<sup>30</sup> Perhaps most importantly, the Clean Air Act delegates the authority to regulate emissions to the executive branch – namely the EPA.<sup>31</sup> This is arguably because the EPA is better equipped with the resources to properly balance the various competing interests. The Act’s prescribed order of decision-making begins first with the expert agency<sup>32</sup>, thereby suggesting that matters such as expanding the public trust doctrine should not first be addressed by judges.

In *Am. Elec. Power Co.* these ideas were further reiterated when the Court held that “the Clean Air Act and the Environmental Protection Agency action the Act authorizes, . . . displace the claims the plaintiffs seek to pursue.”<sup>33</sup> Justice Scalia voiced concerns about the potential slippery slope of a holding in favor of the plaintiffs while Justice Ginsburg observed that the relief sought sets judges up to act as a kind of “super EPA.”<sup>34</sup> Similarly, Chief Justice Roberts observed in reaction to this lawsuit:

A central issue when dealing with global warming is that there are costs and benefits on both sides, and a policy maker has to determine how much to readjust

---

<sup>29</sup> *Id.*

<sup>30</sup> *Massachusetts*, 549 U.S. at 547; *see also* *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

<sup>31</sup> Clean Air Act, 42 U.S.C. § 7430 (2006) (“Within 6 months after November 15, 1990, and at least every 3 years thereafter, the Administrator shall review and, if necessary, revise, the methods (“emission factors”) used for purposes of this chapter to estimate the quantity of emissions of carbon monoxide, volatile organic compounds, and oxides of nitrogen from sources of such air pollutants (including area sources and mobile sources).”).

<sup>32</sup> 42 U.S.C. §7607(b) (2006).

<sup>33</sup> *Am. Elec. Power Co.*, 131 S.Ct. at 2532.

<sup>34</sup> Sean Wajert, *Supreme Court Hears Oral Argument in Second Circuit “Global Warming” Case*, MASS TORT DEFENSE (April 25, 2011) <http://www.masstortdefense.com/2011/04/articles/supreme-court-hears-oral-argument-in-second-circuit-global-warming-case/>. Justice Scalia wonders that if this suit could proceed, why couldn’t the states sue every farmer who owned a cow?

the world economy to address global warming. There are inevitable trade-offs. ‘I think that’s a pretty big burden to impose on a district court judge.’<sup>35</sup>

Professor Wood acknowledges the scope of judicial duties but reiterates that plaintiffs in such atmospheric trust cases are not requesting that the courts exercise outside of their designated authority,

The judicial role is to compel the political branches to meet their fiduciary obligation through whatever measures and policies they choose, as long as such measures sufficiently reduce carbon emissions within the required time frame. The courts' role is not to supplant a judge's wisdom for a legislature's approach, but rather to police the other branches to ensure fulfillment of their trust responsibility in accordance with the climate imperatives of nature.<sup>36</sup>

Overall, as Professor Wood further notes, whether the courts will enforce a fiduciary obligation to reduce carbon at all levels of government “depends largely on individual judges' perception of the urgency of climate crisis, their belief as to whether the political system will address the issue, and their view of the role of the judiciary in confronting climate change.”<sup>37</sup>

### *Conclusion*

As Lisa Heinzerling, an environmental law expert at Georgetown University put it, “[p]art of this is keeping the issue alive in lots of different settings and having all the branches, including the courts, continually react to it.”<sup>38</sup> Despite the outcome of these unprecedented lawsuits, it is evident that environmentalists, lawyers, and the public are refusing to let the issue of climate change be ignored. They seem resilient in seeing to it that the government upholds its duty to protect our natural resources, *all* of them.

---

<sup>35</sup> Sean Wajert, *Supreme Court Hears Oral Argument in Second Circuit “Global Warming” Case*, MASS TORT DEFENSE (April 25, 2011) <http://www.masstortdefense.com/2011/04/articles/supreme-court-hears-oral-argument-in-second-circuit-global-warming-case/>.

<sup>36</sup> Wood, *supra* note 4, at 100; *see also* William S. Becker, *Defending the Atmosphere*, HUFFINGTON POST (Sept. 30, 2011, 11:59AM), [http://www.huffingtonpost.com/william-s-becker/defending-the-atmosphere\\_b\\_857248.html](http://www.huffingtonpost.com/william-s-becker/defending-the-atmosphere_b_857248.html).

<sup>37</sup> Wood, *supra* note 4.

<sup>38</sup> Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES (May 4, 2011), <http://www.nytimes.com/2011/05/05/science/earth/05climate.html>.