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# Public Trust Litigation and Administrative Petitions: An Update

US Climate Partnership Association

October 24, 2011

Tim Webster

# Public Trust Petitions and Litigation

- Our Children's Trust initiated litigation and administrative petitions seeking reductions in GHG emissions based on the “public trust doctrine” on May 5, 2011
  - Lawsuits initially filed against U.S. & nearly a dozen states
  - Administrative petitions initially filed in 39 states & DC (presumably to exhaust administrative remedies)
- Most challenges demand radical 6% cut in GHG emissions each year, beginning 2013

# What is Our Children's Trust?

Our Children's Trust is an Oregon nonprofit. Its purpose is to protect earth's natural systems for current and future generations. We are here to empower and support youth as they stand up for their lawful inheritance: a healthy planet. We are mothers, fathers, grandparents, aunts, uncles, teachers. We are adults, part of the ruling generation, and we care about the future of our children--and their children's children.

We stand on the brink of human-induced climate catastrophe. We will one day have to answer to our children and grandchildren for the choices we make at this pivotal moment. Will they ask us, "Why did you stand by and do nothing as the ice melted, as the wildfires burned?" Or will they thank us for safeguarding their planetary inheritance?

President Obama has acknowledged the danger posed by global warming (as did his predecessor, George W. Bush), but he has failed to show leadership on the issue. Congress is deadlocked, and the agencies tasked with protecting the environment have been co-opted by the very industries they are meant to regulate. Unless swift, coordinated action is taken to reduce atmospheric CO2 levels, it will be too late to stop runaway climate change.

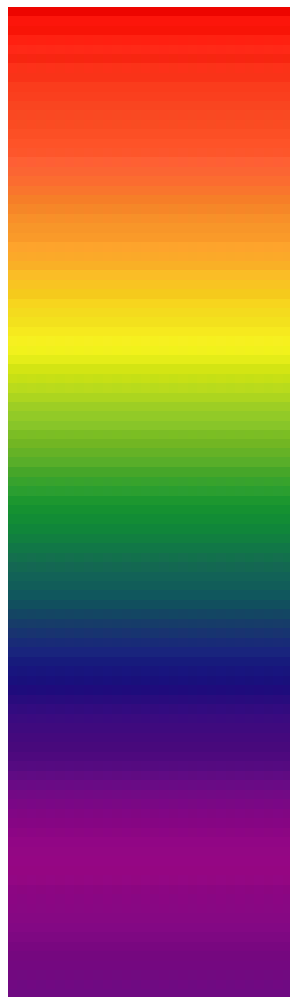
According to the Intergovernmental Panel on Climate Change's ("IPCC") Chairman, Rajendra Pachauri, "[i]f there's no action before 2012, that's too late . . . What we do in the next two to three years will determine our future. This is the defining moment." To avoid planetary disasters for our children and for future generations, the scientific imperative is to stabilize the climate, which requires restoring our planet's energy balance.

<http://ourchildrenstrust.org/about>

# What is the Public Trust Doctrine?

- Public trust doctrine reflects a common law principle that sovereign governments hold title to the lands under navigable waterways “in trust” for their citizens
  - They may not convey title to that land in ways that impair the public’s ability to use the waterways for transportation, fishing, commerce, and in some cases for other uses like bathing and recreation
- In some jurisdictions, the public trust doctrine has been expanded, through constitutional provisions, statutes, and judicial decision-making
  - Non-navigable waterways
  - Other natural resources
- OCT urges a radical re-interpretation and extension of the public trust doctrine
  - The atmosphere would be considered part of the public trust
  - The United States and individual states would have a fiduciary duty to ensure that this public resource is not used in ways that contribute to climate-change-related injuries allegedly resulting from GHG emissions

# Where Does It Fit In the GHG Spectrum?



## - GHG regulatory litigation

- Seeking to compel issuance of GHG regulation
- Challenging GHG regulations

## - GHG project and program litigation

- Challenging specific projects (power plants, pipelines, etc.) with NEPA, ESA, CAA, state laws, etc.

## - Common law nuisances cases

- Injunctive relief and damages under federal and state common law (AEP, Comer, Kivalina)

## - Public trust petitions and litigation

- Administrative petition for GHG regulation
- Injunctive relief under federal and state “public trust” doctrine

# Status of Public Trust Petitions



- Of the 40 original petitions
  - 29 states have denied the petition (AR, CT, FL, GA, HI, ID, IL, IA, LA, ME, MD, MI, MO, NE, NV, NH, NC, ND, OH, OK, RI, SC, SD, TN, TX, UT, VA, WI, WY)
  - 2 states have indicated they do not believe they have a legal obligation to decide the petition and do not intend to do so (MS, WV)
  - 2 states have held the petition in abeyance at the request of petitioner (AL, VT)
  - 1 state deemed the petition administratively incomplete (PA; the petition has not been corrected and re-filed)
  - 1 state has not been able to locate the petition (IN)
  - Several are pending
  - None have been granted

# Status of State Public Trust Litigation

- Subsequent to the denial of several petitions, litigation has been filed in several additional states (IA and TX; others are possible)
- Besides the federal case, litigation is now pending in the following states: AK, AZ, CA, CO, IA, MN, MT, NM, OR, TX, WA
- Litigation is progressing in several matters
  - 2 defendants have filed a motion to dismiss for failure of service (Federal, AZ)
  - 5 defendants have filed a substantive motion to dismiss (AK, CA, CO, MN, NM)
  - 3 defendants have answered the complaint (IA, TX, WA)
  - 1 case (MT) was dismissed but was subsequently re-filed
  - Other cases are pending

## Example of Legal Theories in State Cases

<b>State</b>	<b>Comm. Law</b>	<b>Const.</b>	<b>Statute</b>
<b>Alaska</b>		<b>X</b>	
<b>California</b>	<b>X</b>		
<b>Colorado</b>	<b>X</b>		
<b>Minnesota</b>	<b>X</b>		<b>X</b>
<b>Montana</b>		<b>X</b>	<b>X</b>
<b>New Mexico</b>	<b>X</b>	<b>X</b>	<b>X</b>
<b>Oregon</b>	<b>X</b>	<b>X</b>	<b>X</b>
<b>Washington</b>	<b>X</b>		

# Potential Merits Defenses to State Lawsuits

- Plaintiffs misrepresent the scope of resources covered
  - Some states have extended the public trust concept through common law decisions, statutes, or constitutional provisions
  - In most instances, however, doctrine is still tied to navigable waterways
- Plaintiffs misrepresent states' duties under the public trust doctrine
  - Public trust doctrine is a *restraint* on states' power to alienate or waste natural resources.
  - Plaintiffs argue the doctrine imposes an *affirmative duty to regulate*, which confuses the states' discretionary police powers with the limitations imposed by public trust obligations
- Plaintiffs misrepresent the harms the public trust doctrine protects against
  - The public trust doctrine protects against impairment or wasting of natural resources, not collateral consequences of using those resources

# Jurisdictional Defenses – Standing

- State standing doctrines are often less stringent than federal constitutional standing
- Plaintiffs cannot show alleged injuries are caused by individual state's actions due to atmospheric mixing of GHGs
- Plaintiffs also cannot show their alleged injuries (global climate catastrophe) will be redressed by a favorable decision
  - Worldwide action would be required

# Jurisdictional Defenses – Immunity

- States have sovereign immunity from the public trust lawsuits
  - States are generally immune from suit by citizens, but many have waived this right by statute
  - In many cases, however, states retain their immunity from suit under a “discretionary function exception”
  - Setting a state’s GHG emissions policy should be a discretionary, policymaking action

# Jurisdictional Defenses – Political Question

- Political question doctrine holds that courts should not decide policy, as opposed to legal, issues.
- Key indicia of political questions include:
  1. constitutional provisions assigning issue to political branches,
  2. lack of manageable standards for judges to decide issue,
  3. asking courts to make policy determinations that are essentially legislative, and
  4. risk of showing disrespect for political branches
- Some states will have constitutional provisions assigning public trust resource management to legislature or executive branch
- In all states, judges will lack manageable standards and will be asked to make legislative policy choices beyond their competence

# Jurisdictional Defenses – Preemption

- The federal Clean Air Act may preempt or displace state common law regulation of GHG emissions
  - Preemption doctrine holds that state law which conflicts with federal law is of no effect
    - Preemption can occur when federal law occupies an area of policy so pervasively that it is clear Congress left no room for states to supplement with their own laws (“field preemption”)
  - *AEP v. Connecticut* held that the Clean Air Act’s regulation of GHG emissions displaced *federal* common law
  - State law preemption argument is complicated by the Clean Air Act’s savings clause, which reserves the right of states to adopt and enforce their own regulations

# Federal Lawsuit

- *Alec L. v. Jackson*, No. C11-02203 (N.D. Cal.)
- Filed in Oakland, assigned to Judge Edward Chen
- Claims under “Public Trust Doctrine” and “United States Constitution”
  - Claims against EPA, DOI, USDA, DOC, DOE, DOD
- Remedies
  - Requests injunction requiring 6% annual GHG cuts & continuing jurisdiction to enforce
    - Likely measures identified
    - Declining cap on fossil fuel; ban by 2050
    - Increasingly stringent efficiency standards
    - Elimination of subsidies for fossil fuels
    - Also targets permits for fossil fuel utilities, extraction, and infrastructure

# Federal Case Timeline of Events

May	Complaint filed
July	Amended complaint filed
August	Amended complaint allegedly served
September	Motion to dismiss filed
October	Returns of service filed Motion for preliminary injunction filed Notice of curing service filed
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10/31/11	Due date for government's response to PI
11/28/11	Hearing on motion for PI, motion to dismiss

# Motion for Preliminary Injunction

- Dramatic allegations of climate emergency
  - Floods, droughts, weather extremes
  - Ocean acidification, rising sea levels
  - Human health impacts
  - Harm to other species and ecosystems
  - Agricultural impacts
  - Psychological impacts on young people
- Seeks imposition of “climate recovery plan” by January 1, 2013
  - Driven largely by “tipping point” theory
  - Ultimately seeks restoration of global CO<sub>2</sub> concentrations to 350ppm
- Supported by myriad scientific and standing declarations

Case 9:11-cv-02203-EMC Document 24 Filed 03/28/11 Page 1 of 53

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14 Attorneys for Plaintiffs

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA

17 ALBC L., et al.,  
18 Plaintiffs,  
19 vs.  
20 LISA P. JACKSON, et al.  
21 Defendants.

Case No. C11-02203 EMC  
PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
INJUNCTION AND MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF  
Date: November 21, 2011  
Time: 2:00 p.m.  
Place: Courtroom 3, 17<sup>th</sup> Floor

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PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION,  
Case No. C11-02203 EMC

# Potential Defenses to Federal Suit

- No waiver of sovereign immunity
- No Article III or prudential standing
  - E.g., Section 526 cases, and BLM case
- Claims implicate political questions
- No federal public trust cause of action
  - Plaintiffs greatly overstate the doctrine
- Federal statutes and regulations displace public trust claims
  - E.g., *American Electric Power v. Connecticut*

## Next Stop – 9<sup>th</sup> Circuit?

- The grant or denial of a preliminary injunction gives rise to a right of appeal



# Questions?

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