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Atmospheric Trust Litigation: "The Kids Can't Wait"

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Two days after the recent presidential election, Judge Ann Aiken of the U.S. District Court for the District of Oregon denied motions to dismiss an action brought by a group of young people, aged 9 to 20, against the U.S. Environmental Protection Agency (EPA) and other federal agencies, asserting constitutional and public trust rights to a lifetime in a stable climate.

Plaintiffs seek an order directing the agencies to develop a comprehensive plan to drastically reduce current and future greenhouse gas (GHG) levels as the atmosphere nears what climate science considers the "tipping point" into catastrophic warming. Barring interlocutory appeal, the precise outline of such a plan and of its implementation must await trial on the merits. *Juliana v. United States*, No. 6:15-cv-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016).

The action is one of a number brought by youth plaintiffs worldwide, spearheaded by the nonprofit Our Children's Trust, looking to the judiciary to catalyze radically expanded efforts to curb GHG. Executive agencies, such as EPA, they assert, have thus far pursued only small-bore measures that are piecemeal and ineffectual. Legislative paralysis, induced by climate-change deniers, compounds the problem.

Meanwhile, in the words of Superior Court Judge Hollis Hill, ruling from the bench recently against Washington State's Department of Ecology in *Foster vs. DOE*, a Children's Trust rulemaking petition: "The kids can't wait." *See* Wood and Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 *Wash. J. Envtl. L. & Pol'y* 635, 680 (2016).

The *Juliana* plaintiffs have advanced two theories, both accepted by Judge Aiken for pleading purposes. One is a technical—and innovative—constitutional claim that governmental inaction in the face of a long-known climate hazard from GHG emissions violates young people's fundamental, constitutionally protected rights under the Fifth Amendment. The second, easier to grasp and perhaps jurisprudentially more engaging, is that the air, as a vital part of the terrestrial and oceanic ecosystem, is a public trust asset that government everywhere must protect as a fiduciary.

On the latter claim, the plaintiffs are riding a wave of recent state court decisions from, e.g., Pennsylvania, Arizona, and New Mexico, extending the public trust doctrine—confined in older cases to state titles to submerged lands—to new environmental contexts, including the air. In *Sanders-Reed v. Martinez*, for example, the New Mexico Court of Appeals said "our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state." 350 P.3d 1221, 1225. *See also Kain v. State Dep't of Envtl. Prot.*, 49 N.E.3d 1124 (Mass. 2016), ordering agency promulgation of GHG regulations under the Massachusetts Global Warming Solutions Act. *See also United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981), recognizing the existence of a federal public trust doctrine.

On either theory, atmospheric trust litigation posits the shedding by the judiciary of its current subordinate and marginal role in agency-dominated GHG control in favor of a full and co-equal partnership with the other branches of government. Only courts can compel meaningful action by legislatures or executive agencies when either fails in its duty to adequately protect natural resources that are the common heritage of generations.

Courts, in this view, no less than the other branches, are commanded by the Constitution to protect public trust rights grounded in the social contract upon which democratic government is based. These rights, essential to life, liberty, and the pursuit of happiness, pre-date the Constitution itself. They are not displaced by statutes like the Clean Air Act but are, in Judge Aiken's words, "related . . . to inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives." 2016 WL 6661146, at *25.

Critics contend that the scope and complexity of GHG reduction are inherently beyond the capacity of judges to oversee. Because her *Juliana* order was only on motions to dismiss, Judge Aiken had little say on this score, only that "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy." 2016 WL 6661146, at *9. In the oral argument on the motions, however, there was lengthy colloquy about this, the judge at one point remarking to government counsel:

> I am kind of surprised you aren't asking for the courts to help you move that forward and, instead, actually giving imaginary horribles about what we might do by intervening because I think you know better than that how the courts can fundamentally play a role without intervening over the boundaries of our three-branched obligation, our third branch obligation.

Transcript of Proceedings, No. 6:15-cv-01517-TC, Sept. 13, 2016, at 70.

In fact, and as noted by Judge Aiken, there are abundant examples of practical judicial supervision of remedies for complex constitutional violations. In environmental law, these include the Pacific Northwest Treaty Rights and Columbia River salmon litigation, both involving long-term court

oversight of agency-developed remedies.

Regardless of the fate of the *Juliana* case itself, the likely rollback of federal GHG reduction efforts may spur more action at the state level. The public trust doctrine appears to be growing and spreading, in various forms, to all 50 states. It may be surmised that, like any hardy species, its dispersion will assure its survival.

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