

OUTLOOK

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The Public Trust Doctrine, Climate Change and Future Generations

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Introduction

Whether or not you believe that climate change is a real and developing problem, the methods that various entities around the world are using to attempt to address this problem are of interest. While the world attempts to deal with the problem through the Copenhagen talks or through various types of suits, Congress here in the United States is also wrestling with the issue.

Use of the public trust doctrine is a proposed method for litigating climate change issues, as is an emphasis on the rights of future generations. Another method used to address such environmental problems is to work as an individual to bring about change. As environmental lawyers, we have a duty to examine the climate change issue and determine where we stand on it. Further, while some of us may bring

suits in the future related to climate change, others of us will be defending such suits. Understanding the underpinnings of the climate change issue will probably become more and more important in the future for individuals, organizations and states.

In this issue of the *Outlook*, we cover a variety of topics related to climate change, the public trust doctrine, and the rights of future generations. Some of the articles are from a global perspective, while others are more related to what is happening in the United States or in the heart of the individual.

The opinions expressed are those of the authors, not necessarily of their respective organization, their clients, the Oregon State Bar, the Environmental and Natural Resources Section, or the editor of this issue.

How to Sue for Climate Change: The Public Trust Doctrine

By Professor Mary Wood, University of Oregon School of Law and Susan O'Toole, Executive Committee and Issue Editor, Environmental and Natural Resources Section, Oregon State Bar.

Climate change is upon us, and there seems to be a dearth of legal methods available to address this monumental environmental problem. The public trust doctrine provides a method whereby environmental lawyers can bring suit against governments on behalf of current and future generations.

Deriving from the common law of property, the public trust doctrine is the most fundamental legal mechanism to ensure that government safeguards natural resources necessary for public welfare and survival. In the context of the climate crisis, which threatens the life of innumerable human beings into the future, the public trust doctrine functions as a judicial tool

to ensure that the political branches of government protect the basic right to life held by citizens. An ancient yet enduring legal principle, it underlies modern statutory law. At the core of the doctrine is the principle that every sovereign government holds vital natural resources in “trust” for the public. As trustee, government must protect the natural trust for present and future generations. It must not allow irrevocable harm to critical resources by private interests.

The public trust doctrine defines certain natural resources as quantifiable assets that the government holds for the benefit of its citizens. Those assets are the “res” or “corpus” that the government holds for the beneficiaries, present and future citizen generations. The assets constituting the res of the public trust have been expanded by courts to meet society’s changing needs. The original cases focused on submersible lands as trust assets. As society industrialized, a much broader array of resources became critical. Over time, the doctrine has reached new geographic areas including water, wetlands, dry sand beaches, and non-navigable waterways. The doctrine has also pushed beyond the original societal interests of fishing, navigation, and commerce to protect modern concerns such as biodiversity, wildlife habitat, aesthetics, and recreation.

Guided by the essential doctrinal purposes expressed by the Supreme Court in foundational public trust cases, it is no great leap to recognize the atmosphere as one of the crucial assets of the public trust. Atmospheric health is essential to all facets of civilization and human survival. As such, it falls within the core of the purpose of the public trust doctrine: to protect human assets crucial to human survival and welfare.

The trust construct positions all nations of the Earth as sovereign co-tenant trustees of a shared atmosphere. In addition to a fiduciary obligation owed to their citizens to protect the atmosphere, all nations have duties to prevent waste arising from their co-tenancy relationship with each other. Courts are positioned to define these duties by tying them directly to scientists’ concrete prescription for carbon reduction. The Union of Concerned Scientists has developed such a prescription—called the Target for U.S. Emission Reductions—based on the extensive body of climate science. The Target maps

a climate stabilization pathway whereby the industrialized nations on Earth must collectively: 1) arrest the rising trajectory of carbon emissions by 2010; 2) reduce emissions by an average of 4% per year starting in 2010; and 3) reduce carbon by at least 80% below 2000 levels by 2050.

The scientifically established structure reflected in the Target for U.S. Emissions Reductions, as adapted to comport with changed scientific understanding, can be invoked as a generic standard of fiduciary obligation applicable to each industrialized nation. Such targets can also be “scaled down” to each sub-national jurisdictional level as well. Each nation and sub-national level is responsible for its fair share of carbon reduction, and each would bear the same proportionate reduction of carbon emissions over the same time frame.

Atmospheric trust litigation is a novel concept. However, atmospheric trust litigation has two substantial collateral benefits missing from other strategies for dealing with the climate crisis. First, as a macro strategy, trust litigation speaks directly to government’s obligation to address the climate crisis—in quantitative terms applicable to any jurisdiction. So far, government’s approach to the climate crisis has been perceived as a matter of political discretion, not obligation. The trust approach applies a logical, obligatory framework to a situation dangerously devoid of any standards for government behavior. Statutory claims, by contrast, fail to address government’s full obligation in face of the climate crisis. Such claims are geared toward isolated instances of government action, such as approvals of air permits or programs, or listing decisions under the ESA. While valuable in many other ways and worthy of pursuit, they nevertheless embrace an approach of incremental change rather than the rapid overhaul necessary to combat climate change.

Second, atmospheric trust litigation harnesses strength from the economic, moral, and political realms. Perhaps the most dangerous aspect of global warming is that there is no overarching paradigm to turn governmental, economic, or individual choices away from the business-as-usual approach that has led the world to the threshold of climate catastrophe. In order to accomplish the massive shift that society must make in the short time frame remaining, there needs to be an encompassing moral, political, spiritual,

economic, and legal framework that draws from a common well-spring of human thought and experience. From this perspective, the major drawback of most statutory legal claims is that they are often divorced from any unifying framework that reaches across other realms. Claims brought under the ESA, Clean Air Act, and various other statutes are mired in complexity and beyond the understanding of most citizens. Such claims do serve as good vehicles for expression of values and do not speak to the experience of citizens in the non-legal realm. They therefore often lack much-needed fortification on economic or moral grounds.

Trust litigation, by contrast, draws upon fundamental principles that are increasingly invoked by today’s visionaries. In economic terms, the trust doctrine dovetails with principles of natural capitalism. On the moral level, trust principles reflect an ethic toward children and underscore the strong urge of human beings to pass estates along to future generations. On a political level, by defining the atmosphere as common property, the trust positions all nations of the world in a logical relationship to each other and towards Nature. The trust framework defines respective sovereign obligations in quantifiable, straightforward terms, and once presented in U.S. courts could be invoked by citizens of other countries. By defining the trust obligation in a litigation venue, courts may play a tremendous role in harnessing the collective momentum from various other realms in which a paradigm shift is necessary and already taking place.

This issue explores various aspects of the public trust doctrine, climate change, and future generations, and also offers insights into one lawyer’s choice to work for sustainability and the environment. As lawyers we have a tremendous ability to bring about change, and the public trust doctrine offers a powerful tool for addressing the complex issue of climate change facing all of humanity.

This article is adapted from *Atmospheric Trust Litigation*, chapter in *Adjudicating Climate Change: Sub-National, National, And Supra-National Approaches* (William C.G. Burns & Hari M. Osofsky, eds. (2009, Cambridge University Press).

Further information available at <http://www.law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf>

Enforcing the Atmospheric Fiduciary Obligation

By Professor Mary Wood and Susan O'Toole

Types of Actions Available

The Public Trust framework presents two causes of action, available to different classes of parties, to enforce the atmospheric fiduciary obligation. The first is action by citizen beneficiaries against their governmental trustees for failing to protect their natural trust. It is well settled that beneficiaries may sue their trustee to protect their property. Citizens are positioned to bring trust actions against their cities, counties, states or the federal government. The second is an action brought by one sovereign trustee against another for failure to maintain common property. Co-tenants have a right against other co-tenants for waste and for failing to pay necessary expenses. Thus, states may bring an action for waste against other states or the federal government and tribal sovereigns may also bring actions. Waste and breach of trust claims find grounding within the same basic property network.

Declaratory Judgments and Injunctive Relief

It is important to design a remedy with a view toward providing the macro relief imperative to addressing the climate crisis. A declaratory judgment setting forth the trust framework for atmospheric obligations worldwide will greatly advance society's task of clarifying the responsibilities of governments worldwide. Declaratory relief should be accompanied by suitable injunctive relief that allows courts to provide a remedy on a macro level without invading the province of the political branches.

Courts have it well within their power to force carbon reduction through discrete injunctive measures tailored toward obvious carbon sources. An injunction may contain "backstops" that consist of measures that the court will mandate if the measures to reduce carbon emissions are not carried out. The broad realm of environmental and land use litigation provides precedent for measures that may serve as effective backstops. Such measures might include, for example, injunctions prohibiting new coal-fired plants, and injunctions against large-scale logging, recreational vehicle use on public lands, airport expansions, sewer hook-ups, issuance of air pollution permits, and

a myriad of other activities. Of course, the ultimate enforcement mechanism is to hold government officials personally in contempt of court for failure to carry out court-ordered fiduciary duties.

Using an Accounting to Monitor Carbon Reductions

An accounting is a traditional remedy springing from the equitable powers of the court in both the co-tenancy and trust contexts. It is a judicial process whereby co-tenants or trustees must account for expenses and/or profits in connection with the property. In the context of atmospheric trust litigation, an accounting would take the form of quantifying carbon emissions and tracking their reduction over time. This form of accounting is an extrapolation from the traditional remedy in two ways. First, it is applied against a sovereign trustee, not a private trustee. It is well-established, however, that a sovereign defendant may be subject to an accounting for mismanagement of a trust. In the Indian law context, for example, the federal government is currently subject to a multi-billion dollar accounting action for its mismanagement of tribal trust funds. Second, a carbon accounting invokes a tool developed in the financial context and extends it to the natural context. Such a leap should be well within the imagination of judges. Modern natural resource management increasingly imports concepts from the financial world. Approaches recognizing "natural capital" and "environmental services" draw upon financial constructs to organize human demands on a natural resource.

Atmospheric trust litigation may call forth municipal judges, state court judges, and federal judges to enforce the fiduciary obligation against various levels of government. This is because, for reductions to truly add up to the "carbon math" in time, each jurisdiction must be accountable for reducing carbon. Accordingly, the atmospheric trust obligation must be viewed as a general mandate capable of multijurisdictional enforcement. This in turn presents a need for coordination among various courts.

Carbon Budgets

At a very simple level, each jurisdiction must carry out reduction of carbon pollution through a "budget" for carbon reduction over time that sets forth quantifiable mileposts. The jurisdiction must also develop an asset recovery plan containing measures calibrated to bring about such reduction. Seattle, Washington has undertaken an initiative that provides an example of a template for such action. Under the leadership of Mayor Greg Nickles, the City set a goal for reducing its greenhouse emissions to 7% below 1990 by 2012. This goal requires reducing current emissions by 680,000 metric tons a year. The city then created a plan that divided the overall emissions into sectors such as city lighting, coal, heating, cars and trucks, airports, maritime, and other. The plan sets forth specific action items designed to reduce carbon from the various sectors.

Courts can require governments' trustees at any jurisdictional level to establish a budget and asset recovery plan calibrated to the uniform fiduciary standard set forth in the Target for U.S. Emissions Reductions. The contemplated injunctive relief does not invade the prerogatives of the other branches of government because it does not dictate to the trustee how to accomplish the carbon reduction. It simply spurs action where the political branches fail to carry out their fiduciary responsibility. Cities, counties and states have wide latitude in devising plans that are tailored to the unique circumstances of their jurisdiction. Periodic reports provided to the court through the accounting process inform the court and the beneficiaries whether the trustee is making adequate progress in accordance with the budget and plan. In this respect, the trust remedy may strike the ideal balance between necessarily potent, macro judicial enforcement and traditional deference to the political branches.

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Further information available at <http://www.law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf>

Climate Change Conference Update

By Dallas DeLuca, Markowitz Herbold Glade & Mehlhaf, PC

The 15th United Nations Climate Change Conference (COP 15) reached an accord after two weeks of talks in Copenhagen, Denmark. Technically, the summit did not even endorse or adopt the accord agreed to and hammered out by the U.S., China, South Africa, Brazil and India on the last night of the two weeks of the summit. Instead, the 193 countries “took note” of the 12-paragraph accord. The UN Secretary General Ban Ki-moon summed it up with the statement that, “Many will say it lacks ambition.”

Before the start of the summit, participants abandoned the goal of a comprehensive binding treaty to replace the Kyoto Protocol, and instead the COP15 negotiations attempted to reach agreements on a broad variety of areas, from commitments to emissions reductions in developed countries to reductions in deforestation. (The simultaneous CPM5 negotiations among parties to the Kyoto Protocol addressed future developments under that agreement.) The key COP15 issues according to the UNFCCC were (1) new commitments by industrialized countries to reduce emissions; (2) commitments to aid to developing nations to mitigate greenhouse gas (“GHG”) emissions and to adjust to the impact of climate change; (3) paying developing nations to protect forests to reduce emissions from deforestation; (4) monitoring pledges from all signatories to the new agreement; and (5) deciding whether the new deal should be a “legally binding” international framework or just voluntary goals.

The accord fell short of most of these goals and punted hard decisions to further meetings, including to next year’s conference in Mexico. The brief accord was a statement of intention without clear agreement on steps and obligations of the signatories. On the first

issue, there was an agreement to cap the temperature increase to two degrees Celsius (2° C) above pre-Industrial Revolution levels, but no binding agreement on national emissions reduction goals for all participants. That is sort of like picking a wedding date before you have a girlfriend or boyfriend in mind as the likely spouse.

On the second issue, it provides the goal that developed countries (Annex I countries) will fund mitigation and adaptation measures in developing countries (non-Annex I countries). The Accord calls for funding of \$30 billion from 2010 to 2012, and \$100 billion per year by 2020. The US, Australia, France, Japan, Norway and Britain committed to \$3.5 billion of that first \$30 billion to prevent deforestation. The negotiations on deforestation, the third issue, proceeded much further than negotiations in other areas. There is no agreement or framework for the funding of the eventual \$100 billion per year.

On issue four, a big stumbling block for China, the accord’s provision that “Mitigation actions taken by Non-Annex I Parties will be subject to their domestic measurement,” allowed China to sign without compromising its “sovereignty” position, that it was not subject to monitoring by outside parties, and allowed the developed nations, who insisted on monitoring, to agree as well. China’s verbal commitment to reduce its energy intensity per unit of GDP requires measurement and monitoring of both emissions and GDP, a doubly difficult task.

On issue five, all nations have until a January 31, 2010, deadline that is sure to slip, to commit to emissions reduction targets and mitigation measures. Because the accord does not provide that nations must reduce

emissions by any set amount, the final commitments and mitigation measures cannot be reconciled with the 2-degrees Celsius goal.

The 11-days of negotiations were beset by demonstrations, both inside of the convention hall and outside. On Wednesday December 16, the UNFCCC Executive Secretary announced that there was a “stop” to negotiations, setting back negotiations yet again, after a half-day walk-out by developing countries on Monday.

In addition to conflicts about monitoring, overall reduction commitments and transfers of money from developed to developing nations, another deadlock involved the number one and two greenhouse gas emitters, China and the U.S. Both are resisting efforts to legally bind themselves in an agreement now. It is reported that the U.S. is resisting efforts to bind it to reductions until after the U.S. Congress passes legislation with firm emissions reductions. China, which earlier verbally pledged to reduce its greenhouse gas intensity (*i.e.* emissions of GHG per unit of GDP), is resisting a written commitment to any reduction, likely until the U.S. and other developed nations have committed to binding reductions. The deadlock issues remain money, verification, and commitments to emissions reductions, and little progress between China and the U.S. accord in Copenhagen on those topics.

Earlier in the summit, negotiators decided not to include carbon capture and storage (CCS) technology in any agreement in COP 15 or in the Clean Development Mechanism (CDM). While the U.S. and U.K. strongly backed it, many other countries had reservations about the technology and liability. CSS will be discussed at future summits.

Participants also made some progress on funding “green” technology transfer from rich to poor nations. The United States announced that it and Australia, Britain, Netherlands, Norway and Switzerland committed to providing \$350 million (\$85 million from the U.S.), managed by the World Bank, over five years to distribute solar power equipment and energy efficient appliances to “the world’s poorer nations.”

While the big disputes about emissions and money centered on carbon dioxide, negotiations were progressing

faster on reaching agreements on the other GHGs that constitute 50% of total GHG emissions in terms of CO₂ equivalent. Negotiators reported progress on drafting agreements concerning methane, hydro fluorocarbons, and soot, apparently basing the texts on the successful Montreal Protocol. Some pundits have argued that a series of gas-specific and issue-specific treaties, negotiated by the major emitters and developing emitters for each gas instead of by the entire world, would achieve more success than a watered-down global commitment addressing every

GHG and all funding issues in one comprehensive agreement. The current negotiation process led to the Kyoto Protocol in 1997, flawed by the absence of the United States and the entire developing world, and the Copenhagen Accord in 2009, a non-binding agreement without firm plans for funding or firm commitments for emissions reductions. The climate likely does not have 12 more years to wait for another incomplete agreement.

For further information see <http://en.cop15.dk/> or <http://unfccc.int>.

Towards Substantive Sustainability Law: The Climate Legacy Initiative’s 16 Legal Mechanisms to Promote Intergenerational Justice

By Jacqueline M. Bishop, Roberts Kaplan LLP

What would the legal system look like if governing bodies not only adopted the UN World Commission on Environment and Development’s (Brundtland Commission’s) definition of sustainability but took matters one step further and made it a legal duty, as a member of the present generation, to avoid compromising the ability of future generations to meet their own needs? What if every court of law had access to guardians *ad litem* to represent the ecological rights of subsequent generations? What if there were a cause of action, and individuals with standing, to protect the interests of future generations in the quantity and quality of their nation’s natural resources? Professors Burns H. Weston and Tracy Bach, together with the Climate Legacy Initiative, recommend sixteen legal mechanisms to promote and enforce sustainability in their 2009 report titled *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (the “CLI Policy Paper”). While some of the

recommendations champion the adoption of aspirational statements, others champion the adoption of concrete substantive law that, if adopted by local, state, national, and international governing bodies, would create enforceable duties to protect the ecological interests of future generations.

This article briefly introduces the topics covered in the CLI Policy Paper, summarizes the sixteen recommended legal mechanisms, provides examples of mechanisms already adopted by a variety of political bodies, and asks readers to consider which of the recommended legal mechanisms governing bodies in Oregon can adopt or enhance.

In the CLI Policy Paper, the authors relate fundamental arguments supporting intergenerational ecological justice and share legal mechanisms specifically designed to arm national and international legal systems with tools to respond to the threats of climate change. The authors describe the existing United States legal system

as a product of an industrial society with abundant natural resources and that a new legal framework is necessary for addressing the adverse impacts of climate change and for protecting the interests of future generations on a planet with scarce natural resources. The authors make the case that sustainability and intergenerational ecological justice are synonymous (people adopt sustainable practices in order to make the world a better, more livable place for their children and their children’s children). The authors also adopt key definitions, describe examples of existing laws that conserve options, quality, and access to natural resources for future generations, and address challenges to intergenerational justice (such as cost benefit methodology and the ability of generations that are not yet in existence to have enforceable legal rights).

The CLI Policy Paper is ultimately a recommendation that local, state,

Continued on next page

federal, and international governing bodies adopt an adaptive management approach for finding legal solutions to protect the environment for future generations. The authors argue that initiation of multiple legal experiments, and observation of which approaches work best, will result in further development and adoption of the most effective legal tools. With active legal experimentation governmental bodies can begin to provide answers for how to “address our long-ignored obligations to future generations.” *CLI Policy Paper*, 64. The CLI Policy Paper contains sixteen example legal initiatives that local, state, national, and international governing bodies can adopt as initial steps towards creating comprehensive legal protection for the interests of future generations. The Policy Paper presents the mechanisms for discussion, analysis, and implementation by legal practitioners and politicians as part of the adaptive management approach for achieving sustainability. In many cases, a recommendation is accompanied by model statutory language and commentary. Many of the recommendations are applicable to state, national, and international systems; some are easily adaptable for use in local government and the private sector, while others focus exclusively on contributing to the body of international law.

The following paragraphs contain very short summaries of the sixteen legal initiatives proposed by the Climate Legacy Initiative. Each recommendation is authored separately from the main body of the Policy Paper and included in Exhibit B of the Policy Paper. Complete texts of each recommendation are available at: http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/Climate_Legacy_Initiative/Publications.htm

1 – Define and Develop a Law of the Commons for Present and Future Generations. This recommendation describes some of the key tenets

behind providing legal protection for the ecological commons. The primary tenet is that a “life-sustaining, community-nourishing, and dignity-enhancing ecological commons is or should be a fundamental human right for all people everywhere.” Some of the other tenets include the principle that the commons (e.g. the atmosphere, rivers, oceans, and public lands) belong to all people (present and future), and that it is the responsibility of governments to act as trustee of these resources for the benefit of all people.

2 – Adopt Model State Constitutional Provisions to Implement an Environmental Right for Present and Future Generations. This recommendation includes a model state constitutional provision, with related commentary. The model provision provides future generations with a fundamental right to an ecologically healthy environment, it provides standing to individuals, charges the attorney general with enforcement on behalf of present and future generations, establishes the state as trustee of natural resources for the benefit of future generations, and adopts a precautionary principle for use of natural resources and development and proliferation of new technologies.

3 – Adopt Model State Statute to Implement Environmental Rights for Future Generations. The authors of recommendation #3 designed their model state statute to accompany the model state constitutional provision in recommendation #2. The model statute is designed for adoption by a wide range of governing bodies, from city councils to state legislatures. The model statute provides for the creation of an ombudsman for future generations so as to provide an independent assessment of the impact of proposed laws and decisions on future generations. The model statute also transfers the burden of proof to permit applicants to demonstrate that their proposed acts are not likely to cause or contribute to degradation of ecological

health. Most notably, the model statute creates a cause of action against acts that may cause or contribute to the degradation of the ecological health of the environment as it pertains to future generations.

4 – Adopt Model State Environmental Act. The author of this recommendation advocates an overhaul of the National Environmental Policy Act and state environmental policy acts in order to take into account recent developments in approaches to environmental decision making. This recommendation requires that the state give preference to ecologically regenerative alternatives over neutral alternatives or alternatives that degrade the environment.

5 – Enact a National Environmental Legacy Act (NELA) to Preserve a Public Natural Resources Legacy for Future Generations. In a NELA, the federal government identifies the legacy it wishes to leave to future generations and provides guidance for achieving that goal. The authors’ recommendations include prohibitions on impermissible levels of environmental degradation or depletion, and provisions for collection and measurement of scientific data, regulation implementation, and enforcement.

6 – Institute Cap and Trade Strategies for Allocations to Energy Efficiency. The authors of recommendation #6 propose that cap and trade style emission regulation programs focus on setting greenhouse gas emissions at levels actually low enough to avoid anthropogenic climate change (as opposed to limiting production to historical levels). With respect to carbon-taxation schemes, the authors point out that taxation alone is unlikely to sufficiently reduce demand for the right to emit greenhouse gases, and therefore recommend that any carbon-taxation scheme dedicate its revenues to investments in demand reduction (such as mass transit, reflective roofs, insulation, and improved lighting). Recommendation #6 contains oppor-

tunities for private enterprise, utility districts, cities, counties, and states to participate in creating and implementing efficiency programs for the jurisdictions they serve.

7 – Create Sky Trusts and Other Environmental Stakeholder Trusts to Sustain and Safeguard Common Assets. The author of recommendation #7 proposes that federal and state governments create trusts to protect and manage environmental commons for the commons' intrinsic value as well as for the benefit of current and future generations. These trusts could protect and regulate resources such as the atmosphere, regional watersheds, and the carbon cycle. Local examples of environmental stakeholder trusts include the Three Rivers Land Conservancy and the Columbia Land Trust.

8 – Advance the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations. This recommendation identifies the bureaucratic, political, and procedural failures of modern environmental law and proposes a transition away from a system of environmental laws based on "political discretion" towards a system based on public trust principles. As co-trustee (with other sovereign nations) of global environmental commons (such as atmosphere, migratory species, and the oceans) the federal government would have a duty to establish and enforce protections for global commons on behalf of the trust beneficiaries (present and future generations). The public trust concept also creates standing for beneficiaries to compel the trustee to carry out its duties.

9 – Foster Diagonal Regulatory Initiatives. This recommendation relates to comprehensively integrating and coordinating inter-agency efforts to produce climate change regulation and other regulation designed to protect future generations.

10 – Adopt a Model Executive Order Establishing an Office of Legal Guardian for Future Generations and Provide for the Training and Certification of Legal Guardians.

Here, the authors of recommendation #10 provide a model executive order for designation of a legal guardian for future generations. Presidents, tribal leaders, administrative officers, governors, and mayors can use a form of the model executive order to appoint, for their own jurisdictions, a legal guardian to protect the interests of future generations during the political process. The authors promote training and certification for all legal guardians.

11 – Build Environmental Values into the Law, Including the Common Law. The author of recommendation #11 proposes to establish a new tort of "environmental degradation" thereby creating a cause of action against activities that contribute to "significant ecological despoliation and destruction." This new tort provides an affirmative defense for defendants who can prove to have seriously sought less damaging alternatives.

12 – Arrange for Court-Appointed Special Masters and Experts: A Unique Role for Legal Guardians of Future Generations. Building on recommendation # 10, the authors of recommendation #12 propose to have legal guardians available in the courtroom to protect the interests of future generations. The U.S. legal system already has experience confronting the technical difficulties inherent in protecting the interests of those who are unable to represent themselves in the appointment of guardians *ad litem* to represent children in court proceedings. The authors of recommendation #12 predict that the need for legal guardians to protect the ecological interests of future generations will increase with the proliferation of cases related to climate change regulation, or the lack thereof.

13 – Adopt UN General Assembly Declarations. Here, the authors recommend that the UN General Assembly adopt declarations related to the "Ecological Rights and Responsibilities of Present and Future Generations," the "Right to a Clean, Healthy, Ecologically Balanced, and Sustainable Environment," and "Recognition of the Atmosphere as a Global Commons for Present and Future Generations." The goal of these declarations is to signal to the global community the high priority given to the cooperation necessary to foster global ecological sustainability.

14 – Strengthen Kyoto Institutions and Mechanisms to Reduce Greenhouse Gas Emissions. The author of this recommendation proposes to strengthen and fix the Kyoto Protocol's Clean Development Mechanism and international emissions trading system in order to increase their functioning and engage the private sector in countries with weaker regulatory institutions.

15 – Make Trade Rules Attuned to the Ecological Needs and Interest of Future Generations. The author of this recommendation advocates potential strategies to promote climate protection in future international trade negotiations. The author discusses strategies such as elimination of climate-degrading subsidies, liberalization of trade in climate-friendly goods and services, and the promotion of climate-friendly investments.

16 – Give the International Court of Justice Compulsory Advisory Jurisdiction on Matters Concerning Climate Change and the Needs and Interests of Future Generations. The author of recommendation #16 suggests that the United Nations General Assembly establish a "Judicial Organ" with the power to refer cases to the International Court of Justice for advisory opinions concerning climate change and the interests of future generations. The goal behind this recommendation is to settle international law regarding allocation of the burdens of climate change between countries and generations.

OUTLOOK

Environmental & Natural Resources Section

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We are also seeking volunteers to write case summaries of leading environmental and natural resources cases. If interested, please contact Micah Micah Steinhilb at steinhmr@yahoo.com

Those wishing to follow up on topics addressed in *Outlook* should consider purchasing the 2006 Supplement to the Environmental and Natural Resources Law Deskbook. With 43 chapters of detailed information, the Deskbook and Supplement present discussions on national and Oregon environmental statutes, rules, and cases. Contact OSB CLE Publications or an ENR Executive Committee Member for more information.

Attorneys using *Outlook* should also research original and other sources.

There are many governing bodies that already implement a form of some of the sixteen recommendations made in the CLI Policy Paper. For those governing bodies, each recommendation can represent ideas for improvement to the legal mechanism or encouragement for wider adoption. There are currently thousands of individuals all over the nation and throughout the world who, in some cases, have been working for years to actively implement versions of the recommended strategies in the jurisdictions they influence. For example, the constitutions for the states of Hawaii and Montana both contain provisions that create rights to a clean and healthful environment. In New Zealand, the Resource Management Amendment Act expressly requires that the government manage natural resources in such a way as to meet the reasonably foreseeable needs of future generations. In the Philippines, the country's Supreme Court interpreted the Declaration of Principles and State Policies of the Constitution to provide future generations with standing to enforce rights in courts of law. In Hungary, the Parliament established a Commissioner for Future Generations with some powers to safeguard the needs of future generations. The CLI Policy Paper describes dozens more examples, including examples in domestic environmental and property law, of initial steps governments are taking to protect the ecological interests of future generations.

To be sure, the authors of the CLI Policy Paper do not promise that all of the recommendations will achieve sustainability; instead, the recommendations are starting points from which the legal community and governing bodies can begin coming up with truly effective legal solutions to problems, such as climate change, that threaten future generations. Which of the Climate Legacy Initiative recommendations can Oregon adopt? How can lawyers and legislators use the ideas presented in the recommendations to enhance existing laws? Which of the recommendations will help your clients? Which ones could enhance your legal practice? If Oregon can effectively implement some of the recommended mechanisms will it help promote recruitment

of green tech and sustainable industries to the state? Perhaps answering some of these questions can be a joint undertaking of the Oregon State Bar's Natural Resources Section and the newly formed Sustainable Future Section.

The CLI Policy Paper contains extensive citations to examples of legal mechanisms adopted domestically and internationally in connection with intergenerational justice and is an excellent resource for policy makers, environmental lawyers, and lawyers serving clients with sustainability goals. To access the CLI Policy Paper visit: http://www.vermontlaw.edu/Documents/CLI%20Policy%20Paper/CLI_Policy_Paper.pdf

Winds of Change? A Review of International Climate Change Litigation

By Marianne Dellinger

I. Introduction

Two recent landmark decisions by American courts may signal new beginnings to climate change litigation in this country. In *Massachusetts v. EPA*, the Supreme Court held that the Clean Air Act does indeed give the United States Environmental Protection Agency the authority to regulate greenhouse gases.¹ In late September 2009, the well-respected United States Court of Appeals for the Second Circuit held - as the first court in the USA - that cases involving the Clean Air Act and climate change issues cannot simply be dismissed based on the political question doctrine or because of the complexity of the lawsuit.² In the latter instance, suit was brought on a common law public nuisance theory.³ Human rights violations based on climate change have been actively asserted, but not met much success so far. In fact, a recent United Nations report on the relationship between climate change and human rights concluded that while in theory, global warming may infringe on certain fundamental rights, individual human rights-based climate lawsuits are not likely to be successful.⁴

Perhaps because of past failures in successfully litigating climate change issues, another legal camp believes that climate change litigation is unlikely to play a significant role in arresting global climate change altogether. Instead, these scholars are of the opinion that the bulk of the work in reducing greenhouse gases must be undertaken by nation states in the form of international agreements.

This article examines the middle road approach seen from an international perspective. Whereas national and international agreements are, of

course, an extremely important tool in the fight against climate change, litigation plays a valuable role as well. This is so because lawsuits may not only result in judicial mandates, but also because the attention they cause may produce a spill-over effect in the legislative and international agreement arenas, thus converging what might otherwise be seen as two competitive approaches.

The article will examine select international lawsuits most of which were successful in the sense that they either reached settlements or were heard by a tribunal the outcome of which the environmental associations were satisfied. As valuable lessons may also be learned from ideas for lawsuits that have not (yet) come to fruition, the article will also briefly analyze a few such examples.

II. Successful Attempts

Germany: Climate Impacts of Export Credits to be Disclosed

In what has been said to be the first European instance of taking legal action to combat climate change, two major German NGOs filed suit against the German Federal Ministry of Economics and Labour in 2004.⁵ The suit was launched to force the German government to disclose its contribution to climate change via projects supported by the government's export credit agency Euler Hermes AG ("Hermes"). Hermes provides government-backed guarantees and insurance to German corporations seeking to do business in developing countries. Through these programs, billions of dollars are funneled into projects that support traditional energy, mining and transportation projects, thus contributing

to climate change. Germanwatch and Friends of the Earth Germany initially asked the German government to disclose certain information about these projects after 1997, the year of adoption of the Kyoto Protocol. The request was based on German laws modeled after European Union legislation on the freedom of environmental information. The government rejected the request, stating that some of the information had already been published and that the request was thus unnecessary, claiming that the German government is not subject to the European Environmental Information Act and thus does not have to fulfill any direct mandate of environmental protection, and citing to the need to prevent the publication of trade and business secrets.

In 2006, the case was settled by the Berlin Administrative Court.⁶ The court rejected the German government's arguments that its export credit activities were not subject to European environmental information laws and that the credits did not affect climate change and the environment.

Transparency in government funding is thus a viable litigation method in Germany and may work in other EU-nations too. These are all subject to the same Directive that formed the underlying basis of the suit. Further, most have ratified the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which may be and, as shown, has been used as an argument for public access to what governments otherwise may classify as non-accessible information. A similar line of attack

Continued on next page

may perceivably work in the United States under, inter alia, the Freedom of Information Act.⁷

The United Kingdom: “Lawful Excuse” to Bailing out Banks

Because of the closeness of the American and English legal systems and their historical connectedness, it is relative to examine climate change suits in the United Kingdom. In October 2007, a group of six Greenpeace climate protesters scaled a chimney at the Kingsnorth power station in Kent in an attempt to shut down the plant because of its daily emissions of 20,000 tons of carbon dioxide. In court, the defendant protesters pleaded “lawful excuse,” claiming that they shut down the power station in order to defend property of greater value from the global impact of climate change.⁸ The defendants cited to known climate change hot spots such as the Arctic ice sheet, the coastal areas of Bangladesh, the city of New Orleans and the Pacific island nation of Tuvalu, but also argued that the local Kent neighborhood was in immediate need of protection. The jury heard testimony from such diverse witnesses as Professor James Hansen, one of the world’s leading climate scientists, and an Inuit leader stating that climate change is already seriously affecting life in that region. By majority vote, the jury of nine found the protesters not guilty, thus signaling that action was justified in the context of damage caused around the world caused by CO₂ emissions from the power plant.⁹

In a first-of-its-kind case, a group of non-profit organizations brought suit against the British Treasury in June 2009, accusing the government of breaking its own promises to combat climate change and human rights violations when bailing out the Royal Bank of Scotland (“RBS”).¹⁰ RBS has financed a host of non-renewable energy companies in controversial or politically and environmentally sensitive regions since the recent rounds of financial rescue packages. In the six months

following the initial bailout of the banks, RBS lent close to the equivalent of \$16 billion to traditional coal, oil and gas companies; more than a quarter of the amount the bank received via taxpayer funds at that point in time. The suit is in part based on the British government’s own economic guidelines which require the government to undertake a comprehensive assessment of all new policies, programmes and projects so as to best promote the public interest when using government resources. The legal argument is that using public money to finance new fossil fuel projects in spite of the threat of climate change flies in the face of public interest and is contrary to the government’s posturing in the international political arena as a “global leader on climate change.” Although the “UK Financial Investments” – the Treasury’s framework for public investment in recapitalized banks – makes no reference to the need to consider social and environmental criteria, nor to support or even be consistent with other public policy objectives, the legal challenge lies in successfully arguing that the government has an affirmative responsibility to ensure that the public is not paying to expand further fossil fuel developments. The Treasury relied on its alleged need to maximize the financial return for the taxpayer. The court held that the Treasury had acted within the law to protect the interests of its shareholders, and the case is currently on appeal.¹¹

These examples show quite a bit of ingenuity on the part of British individuals and groups in attempting to hold private parties and even the British government accountable for climate change. At any rate, the suits exemplify new litigative strategies in a legal system not too dissimilar from that of the United States.

Canada: Kyoto Protocol Compliance a Non-Justiciable Issue

In 2008, two environmental organizations as well as several pro

bono lawyers brought suit against the Canadian government for violating the 2007 Canadian Kyoto Protocol Implementation Act (“KPIA”).¹² The KPIA establishes mandatory legal obligations and deadlines including the publication of a climate change plan and the enactment of regulations to ensure that Canada takes effective and timely action to meet its obligations under the Kyoto Protocol.¹³ The government was sued for failing to publish the required climate change plan, for failing to publish the required proposed regulations and for failing to establish the greenhouse gas emissions reductions reasonably expected under proposed.¹⁴ After months of deliberation, Canada’s Federal Court ruled that the KPIA is non-justiciable.¹⁵ The case is now under appeal.

In another internationally relevant case, the Canadian Supreme Court has already proved willing to apply domestic Canadian law extraterritorially to private United States defendants.¹⁶ In *British Columbia v. Imperial Tobacco*, the Court upheld a judgment against American tobacco manufacturers for the health care costs incurred by British Columbia in caring for people stricken by tobacco-related diseases. Although this was not a climate change case, it may prove applicable to future cross-border cases based on global warming costs caused by American power companies and car manufacturers.

Australia: Can Coal Really be “Clean” and Should Intergenerational Justice Form Part of Power Plant Permitting Processes?

Turning to the world down under, two recent suits stand out. In one, the Australian Climate Justice Program and Greenpeace lodged a complaint against the energy company HRL with the Australian Competition and Consumer Commission (“ACCC”).¹⁷ The suit alleged that HRL engaged in false, misleading and/or deceptive conduct within the meaning of the

Australian Trade Practices Act by referring to its proposed coal-fired power plant as a “New Clean Coal Power Station” and touting its production as “Low Greenhouse Power from Brown Coal” when in reality, “clean coal” is but a euphemism for what is still a heavily polluting source of energy. The proposed power plant will add more than three times more greenhouse gases to the atmosphere than will be saved under the Australian Federal Government’s plan to phase out incandescent light bulbs in Australia. The controversial statements were presented both on the plant’s website and in promotional media releases. HRL also used the same terminology in connection with its applications for state and federal funding.

The plaintiffs argued that HRL’s use of the term “clean coal” is not only contrary to the law, but also has serious infrastructural and economic consequences since consumers believing they are buying energy from “clean” sources are less likely to buy energy that is truly green and since taxpayer funds are being shifted away from renewable energy projects. Plaintiffs further argued that just as the ACCC did not let tobacco companies get away with claiming that mild cigarettes were “healthy,” neither should HRL now be allowed to get away with using the phrase “clean coal,” which plaintiff saw as a mere “smokescreen.”

In somewhat a technical decision, the ACCC held that the use of the terminology had not breached the Trade Practices Act.¹⁸ First, the Commission found that the media releases were merely “promotional” and not an “act of trade and commerce.” Thus, the Trade Practices Act was held not to apply. The ACCC further found that whereas HRL’s applications for funding may have been of a commercial or trading nature under the Act, given the nature of the “technical material” provided and the “sophistication” of the target audience – power generation specialists, investors and government scientists – no evidence of misleading or deceptive conduct by HRL could be established. Nonetheless, the ACCC also expressed its willingness to continue to pursue questionable green power and “clean coal” claims in connection with marketing efforts and has released a set of guidelines governing the use of those phrases.

In another case, conservation groups sought judicial review of the exclusion of the impacts of greenhouse gases from brown coal in connection with the possible permission of the expansion of a coal mine in Victoria.¹⁹ The Victorian Civil and Administrative Tribunal (“VCAT”) found that the local government’s planning panel must consider greenhouse gas impacts in power plant planning processes. The decision is said to be important because it not only emphasizes the fact that the environmental goals and processes of the Victorian planning system are designed to ensure thorough,

Federal Climate Change Legislation Status Report

By Diane Henkels, Past Chair, Environment and Natural Resources Section.

Federal legislation is making its way through Congress. On June 26, 2009 the U.S. House of Representatives passed H.R. 2454, the American Clean Energy and Security Act of 2009, sponsored by Representative Henry Waxman (CA), with a 219-212 vote. The related Senate bill, S. 1733, Clean Energy Jobs and American Power Act, sponsored by Senators John Kerry (MA), Barbara Boxer (CA), and Paul Grattan Kirk (MA), passed the Senate Committee on Environment and Public Works on November 5, 2009, after several hearings and revisions.

Both bills set goals to limit greenhouse gas emissions using 2005 levels as a baseline measure. The Senate bill identifies a more stringent 20 percent reduction by 2020 compared with the 17 percent in the House bill. The other targets are the same: a 3 percent reduction from 2005 levels in 2012; 42 percent reduction in 2030; and an 83 percent reduction in 2050. Significantly, unlike the House bill, the Senate bill establishes an auction for 10 percent of the emissions allowances. Also, the House and Senate bill differ in their treatment of EPA standards on new and existing sources. Both bill include provisions for protecting forests in developing countries using forest sequestration. The Senate bill designates the Secretary of Agriculture as the lead agency for implementation of offset programs pertaining to agriculture and forestry.

The House bill is broad in that in addition to setting the greenhouse gas limits, and a cap and trade regime, it also includes provisions addressing transmission, Smart Grid technology and planning, net metering for federal facilities, setting up a carbon sequestration framework, regulating coal energy technologies, establishing a framework for cap and trade for greenhouse gas emissions, offsets and related forestry regulation, and adaptive management response to climate change. Also H.R. 2454 establishes State Energy and Environment Accounts, funded by proceeds of sales of emissions allowances, to serve as a state-level repository for managing and accounting for emission allowances provided to states designated for renewable energy and energy efficiency purposes. The House bill amends the Public Utility Regulatory Policies Act of 1978 to include a combined energy efficiency and renewable electricity standard requires a minimum retail electricity to meet 20% of demand through renewables by 2020. The Senate bill provides grants within the states’ individual frameworks, favoring states with renewable portfolio standards.

For more information on the two bills, see <http://www.pewclimate.org/> or thomas.loc.gov.

Continued on next page

independent assessment of environmental impacts, but also because it underscores the legal right of community members to have a say about how their environment is treated by government planning bodies.

Incidentally, the VCAT decisional language bears a resemblance to the Philippine Supreme Court case *Oposa v. Factoran* in which children from all over the country filed suit to compel the government to protect the nation's forests for "generations yet unborn" based on the then-novel theory of "intergenerational justice."²⁰ Although *Oposa* won much international legal fame, it has also been criticized for being a pyrrhic victory because, among other things, the part of the Supreme Court holding that incorporated these phrases was just dictum and not precedential, because the case would purportedly have been decided the same way had the children only filed suit on their own behalf since the environment cannot be protected for *future* generations without also protecting *present* ones, and because the protection of future generations already formed part of Philippine jurisprudence before the case.²¹

New Zealand: Climate Change is "Relevant" in Power Plant Permitting

Traditional coal-fired power plants frequently seem to take quite a bit of heat when it comes to global warming. So too in New Zealand, where Greenpeace protesters recently occupied the roof of a power plant for nine days protesting the plant's application for permission to run on coal. When the permit was granted, Greenpeace and others appealed to New Zealand's Environment Court arguing that climate change impacts should be considered in any approval of the reconfiguration of the plant. The Environment Court held that climate change was an "irrelevant consideration" in the approval process.²² However, the High Court of New

Zealand overturned that decision, ruling that climate change was a relevant factor to be considered.²³

Coming out completely differently in another case, the same Environmental Court held that greenhouse gas reductions and climate change *are* relevant when considering the permit to build even small wind farms of 63 MW and 19 turbines.²⁴

III. The Ones That Did Not Fly

Finally, inspiration may perhaps also come from examples of ideas of climate change suits that never came to fruition. After the extreme heat wave that scorched several European nations in 2003, claiming an estimated 35,000 lives (almost 15,000 in France alone), it was expected that individuals or organizations would file the first major European climate change suit to involve families whose relatives perished because of the heat wave. But to date, no such suit has been brought. Similarly, contemplated actions by Alpine ski resorts bringing suit for snowpack losses or suits against European automobile manufacturers were never brought.

Research for this article did not produce any specific answers as to why these ideas did not work out. One explanation may, in general, lie in the different legal cultures between the United States and Europe. Whereas in the United States, lawsuits are an accepted method of enforcing civil rights and shifting burdens of compensation, the situation tends to be much different in Europe. There, bringing suit is not only much more unusual in general, but it could also be a costly affair since losers of suits must in many cases compensate the winning party's attorneys. Nationalized health care makes cost-shifting unnecessary, and accidents are typically seen as just that, not as a basis for suit. Furthermore, various national legal systems make it more difficult than in the United States for individuals to bring class action lawsuits. Perhaps most importantly is the cultural

antipathy against lawsuits that are often seen as a last-resort, extreme solution typically only undertaken by well-heeled corporations and other major players. However, as shown in the cases of Germany and the UK above, more indirect suits based on, for example, access to information or environmental accountability in government-backed export and other financial programs have already been successful.

IV. Conclusion

So far, climate change litigation both in the USA and around the world is in the early phase and has yet to create much in the way of results. The most significant ones so far are probably the focus on government funds being indirectly used for projects that contribute to climate change through export credits, such as in the German example, and perhaps via the bail-out of banks, such as in the upcoming case involving RBS in the UK. The focus on the importance of assessing climate change and using non-misleading terminology in power plant permitting and marketing efforts as in the Australian and New Zealand cases is also noteworthy. The budding use of the concept of intergenerational justice as shown in the Philippine and Australian cases is also of importance, although it is still too early to tell if this will truly gain enough momentum.

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Endnotes

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- 2 *Connecticut v. American Electric Power Inc.*, 2009 U.S. App. LEXIS 20873, *33 (2nd Cir. 2009).
- 3 *Id.* at *33.
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- 13 Kyoto Protocol Implementation Act Section 9, Bill C-288.
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- 19 Australian Conservation Foundation v. Minister for Planning [2004] VCAT 2029 (29 October 2004).
- 20 *Oposa v. Factoran*, G.R. No. 101083, (1993 Supreme Court of the Republic of the Philippines).
- 21 Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 Geo. Int'l Envtl. L. Rev. 457, 459 (2003).
- 22 Greenpeace New Zealand v. Northland Regional Council, http://www.bellgully.com/resources/pdfs/climate_change%20_feb08.pdf
- 23 Genesis Power Limited v. Greenpeace New Zealand, http://www.bellgully.com/resources/pdfs/climate_change%20_feb08.pdf; see also <http://www.bellgully.com/resources/resource.01594.asp>
- 24 Genesis Power Ltd. v. The Energy Efficiency & Conservation Authority & Ors - A148 of 2005.

The Public Trust Doctrine and Oregon Law

By Susan O'Toole, Environmental and Natural Resources Executive Committee and Issue Editor

Arguments have been made that two areas of Oregon law incorporate the Public Trust Doctrine. First, some have argued that ORS 537.110 provides that water in aquifers, streams and rivers belongs to the people in trust. This statute states that "All water within the state from all sources of water supply belong to the public." Other statutes have also been used to make this argument. They include:

- ORS 537.525: ". . . the right to reasonable control of all water within this state from all sources of water supply belongs to the public . . ."
- ORS 536.310(1): ". . . all the waters within this state belong to the public for use by the people for beneficial purposes without waste. . ."
- ORS 537.525(2): "Rights to appropriate ground water and priority thereof be acknowledged and protected, except when, under certain conditions, the public welfare, safety and health require otherwise."

The Water Right Act also arguably contains public trust language, in that it defines an "in stream water right" to mean "a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain in-stream for public use. . ." ORS 537.341 provides for certification for in-stream water rights, and this certification in the name of the Water Resources Department as "trustee for the people of Oregon." Various related statutes have also been cited as placing an obligation on the Water Resources Department to ensure that the "corpus" of the trust is not diminished. See, e.g., ORS 390.815, 390.835, 537.332(2) and (3), 537.341, 536.220(2)(a), 537.190, 537.153, 537.170,

537.621, 537.622, and 537.628.

As outlined above, only in-stream water rights are held expressly in trust by the Water Resources Department. Even if it were accepted that all water is held in trust, the corpus of that public trust is arguably the sum total of the usufructory rights of the public to use the waters of the state for beneficial use. Thus, this corpus is administered by the Water Resources Department through an orderly system of water rights. To the extent that it exists, the "public trust" responsibility of the Water Resources Department with regard to all water rights is arguably to ensure that water is used for beneficial purposes without waste.

There are also public trust ideas in the context of the Common School Fund in Oregon. These include the concept that the trustor's duty is to maximize income from the trust corpus. In managing the lands held by the Common School Fund, the state is bound to execute the provisions of the trust "with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management." Or. Const. VIII, § 5(2). This duty has been characterized as contemplating "a complete management responsibility of the state's land resources to make them product of income or other values depending on what will best conduce with the welfare of the people of the state and the conservation of the state's land resources. 36 Op. Atty. Gen. 150, 223 (1972). Two other Oregon Attorney General Opinions addressing the Common School Fund have indicated that a trust of the trust fund has a duty to maximize earnings from the corpus of the trust. 46 Op. Atty. Gen., n. 12 (1992); 37 Op. Atty. Gen. 569, 576 (1975).

Can Litigation Stop Climate Change?

By Patrick Rowe, Sussman Shank LLP

To date, climate change lawsuits have focused largely on: a) tort actions against private companies (e.g., large electrical utilities) seeking to enjoin actions that contribute to climate change under the premise that they constitute a public nuisance; b) suits brought under the Clean Air Act; e.g., *Massachusetts v. EPA*,¹ in which the Supreme Court held that EPA has the authority under the act to regulate greenhouse gas (“GHG”) emissions from mobile sources of emissions (cars, trucks); c) actions brought pursuant to the National Environmental Policy Act, seeking to compel federal agency consideration of the climate change effects of its actions; and d) litigation under the Endangered Species Act, asserting that private actions that emit GHGs must be constrained in order to minimize the impact of climate change on wildlife.

A number of experts, however, believe the most promising cause of action for fighting climate change through litigation is one that has yet to be brought – an action invoking the public trust doctrine.

The public trust doctrine posits that government holds natural resources in trust for the benefit of its citizens. Natural resources are the trust assets; the government is the trustee; and citizens, both present and future, are the trust beneficiaries. As with any trustee, the government is legally bound to preserve the assets; it has a fiduciary duty to manage the natural resource assets so that needs of current beneficiaries are met without sacrificing the needs of future beneficiaries. Put another way, natural resources belong to the public at large and the government is responsible to ensure that no individual parties take actions that harm them. The doctrine is largely a common law legal concept that,

in the United States, has arisen in court decisions mostly involving state governments and where the natural resource at issue is water or wildlife.

Following is a summary of a few key United States’ public trust law cases that may influence an American court’s decision, should a public trust climate change lawsuit be brought.

EARLY PUBLIC TRUST DOCTRINE DECISIONS

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

This 1892 Supreme Court case has been called “The Lodestar in American Public Trust Law.”² Numerous state courts have relied on it to apply the public trust doctrine.³

The Illinois Central Railroad Company was authorized and required by its charter to construct a railroad into Chicago. In 1852 the common council of Chicago passed an ordinance granting consent for location of the railroad within the City. The railroad was located and built in reclaimed waters of Lake Michigan. The company did not immediately occupy all the land to which it was authorized to use. In 1869 the Illinois State legislature passed legislation granting to the company the state’s right and title to over a thousand acres of land under Lake Michigan, essentially constituting all of the outer harbor of Chicago, including title to all the land the company had already reclaimed.

Four years later, the legislature repealed the legislation without compensating the railroad company. The Illinois Attorney General subsequently sued for a decree declaring the repeal was effective to return to the state any title of the railroad company in the land and requiring the company to

remove improvements it had built on the land.

The railroad company argued that the legislation repealing the grant violated the Contract Clause or the Due Process Clause. The case made its way up to the Supreme Court. The Supreme Court decided against the railroad company by a margin of 4-3.

The court found that the State, in its sovereign capacity, was the fee owner of submerged lands in the harbor and that the legislature’s modification of that sovereignty was inoperative:

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated . . .⁴

The Supreme Court explained that:

The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of the government and the preservation of the peace.⁵

Illinois Central is a critical decision in public trust doctrine law because it recognizes that government holds natural resources, in this case harbor waters, in trust for the public as a whole and that the government has a strict obligation to protect such natural

resources for the public.

***Geer v. Connecticut*, 161 U.S. 519 (1896).**

The issue presented was the legality of transporting wild fowl over state lines. The defendant, a citizen of Connecticut, had lawfully killed game birds during open season on the birds, but was convicted of possessing them with the unlawful intent of transporting them out of state in violation of a Connecticut statute that prohibited such out of state transportation. The Supreme Court held that the states owned the wild animals within their borders and could strictly regulate their management and harvest.

The Supreme Court explained that, going back to Roman law certain things are not held as private property but rather are subject to common ownership by all. The Court quoted Pothier in his treatise on Property:

The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community. . . .

These things are those which the jurisconsults called *res communes*. *Marcien* refers to several kinds – the air, the water which runs in the rivers, the sea and its shores As regards wild animals, *feroe nature*, they have remained in the ancient state of negative community.⁶

With the foregoing as its legal foundation, the Supreme Court ruled that the State of Connecticut had the right to forbid individual citizens from killing wild fowl with the purpose of transporting it beyond state boundaries:

[T]he power or control pledged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.⁷

This analysis and quote are often cited by experts whom advocate applying the public trust doctrine to climate change litigation. It is an important decision because the Supreme Court again recognizes government's responsibility to exercise control over natural resources as a public trust, for the benefit of the public as a whole over any individual private interests. It is also useful because the decision cites the Pothier quote recognizing air as part of the natural resources that are assets common to all and thus entitled to public trust protection. Although the Court later overruled *Geer* as a violation of the dormant Commerce Clause, the aspect of *Geer* applying the doctrine of public trust to wildlife was not affected.⁸

***State of Ga. v. Tennessee Copper Co.*, 206 U.S. 230 (1907).**

The Court upheld an action brought by the state of Georgia against Tennessee copper companies for discharging noxious gas that drifted across state lines. The decision is notable with regard to climate change litigation because it recognizes a public trust with regard to air: "This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."⁹

MODERN DECISIONS

Subsequent to the late 19th and early 20th century decisions, the public trust doctrine fell out of favor for several decades. Beginning in the 1970's, however, it was revived and has since been

applied to protect a range of concerns, including biodiversity, wildlife habitat, and recreation. It has been applied to the federal government as well as states. Following are a few of the more significant modern-day public trust decisions.

Public trust applied to federal government

***United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 121 (D. Mass. 1981).**

The United States filed a Complaint in Condemnation to take certain Boston Harbor waterfront property in fee simple absolute for use in connection with the redevelopment and improvement of a Coast Guard Support Center.

The Commonwealth of Massachusetts denied that the United States could obtain a fee simple absolute in such portions of the land below the low water, contending that such a fee could vitiate the public trust impressed upon land below the low water mark and administered by the Commonwealth. The Commonwealth was concerned that the terms of the taking may put the submerged land forever beyond the state's control for purposes of the trust.

The United States filed a motion to dismiss the state's answer and counterclaims and the owners sought summary judgment asserting that the state did not have a compensable interest. The district court held that the United States could take the property below the low water mark in "full fee simple." The Court of Appeals similarly held that the United States may obtain full fee simple title to land below the low water mark without destroying the public trust, which is administered by both the federal and state sovereigns and that neither sovereign could alienate the land free and clear of the public trust.

[N]either the Commonwealth's nor the federal government's trust respon-

sibilities are destroyed by virtue of this taking, since neither government has the power to destroy the trust or to destroy the other sovereign.¹⁰

This decision is important to public trust climate change litigation because it demonstrates that the public trust doctrine can be applied to the federal government while at the same time holding that states continue to retain their trust responsibility.¹¹

Scope of public trust includes air

Other than *Georgia v. Tennessee Copper* (discussed above), the public trust doctrine was traditionally applied only in the context of tidal waters (and lands thereunder) and wildlife. The following decisions are important because they recognize that the scope of the public trust includes air.

National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 720 (1983) (affirming basic tenets of the public trust doctrine, including government's responsibility to protect natural resources for the benefit of the public. Although the subject was water that Los Angeles diverted prior to flowing to Mono Lake, the decision recognized that "purity of the air" is protected by the public trust);

Majesty v. City of Detroit, 874 F.2d 332, 337 (6th Cir. 1989) (citing Michigan act that codifies public trust to include "air, water, and other natural resources").

Public trust applied in criticism of wind power

Center for Biological Diversity v. FPL Group, Inc. 166 Cal. App. 4th 1349 (Cal. Ct. App. 2008)

The Center for Biological Diversity sued power companies for the operation of aging wind turbines, which kill thousands of raptors and other birds each year, on the theory that their operation violates the public trust doctrine. In a unanimous opinion, the California Court of Appeals held that the public trust doctrine extends to the protection

of birds and other wildlife and that the public has standing to bring a public trust lawsuit, but only against state agencies, not private parties.

This is an interesting case because it is a public trust doctrine lawsuit being brought with regard to wind power's impact on birds. Thus, the doctrine can be used not just to require action be taken to slow climate change but also to attack one of the sources with which the United States hopes to combat climate change (wind power). It is also noteworthy case because it confirms that the public trust doctrine does not support an action against private parties, thus confirming that public trust litigation should be brought against the government trustee, either by a private party or a governmental entity that is a co-trustee.

FINAL THOUGHTS

Because the public trust doctrine's underlying theory is that the government has a strict obligation to protect natural resources the doctrine potentially presents a more effective strategy for fighting climate change in the courts than the tort and other types of climate change actions brought to date. Political realities render it unlikely that one governmental entity within the United States would sue another over climate change. Should a public trust climate change lawsuit be brought, it seems most likely that it would involve an action by individual citizens or an environmental group against either a state government or the federal government.

To have a fighting chance at success, a public trust climate change lawsuit would require the right plaintiff. Professor Wood suggests that the most compelling action may be a class action brought by children and their parents related to climate change damage that will occur within the children's lifetime, thus compromising their ability to survive and prosper.¹² The remedy requested should be as narrow as possible in order to avoid the Court

dismissing the case on the basis of lack of jurisdiction, political question or separation of powers premises. Last, it would also require the right judge, who is confident in his or her authority to issue a ruling that is justified not necessarily in statute or regulation but upon common law principles and larger legal principles that transcend positive law.

Endnotes

- 1 549 U.S. 497 (2007)
- 2 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 489 (1970).
- 3 These courts have referred to *Illinois Central* as "the leading case" on the public trust doctrine, *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988): "the seminal modern expression of the public trust doctrine," *In re Water Use Permit Applications*, 9 P.3d 409, 439 (Haw. 2000): "the seminal case [that] remains the primary authority today," *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983); "the landmark case," *State v. Sorensen*, 436 N.W. 2d 358, 361 (Iowa 1989); and "the bellweather case," *Morse v. Oregon Div. of State Lands*, 590 P.2d 709, 711 (Or. 1979).
- 4 146 U.S. at 455 (while noting that parcels could be alienated "when parcels can be disposed of without detriment to the public interest in the lands and waters remaining").
- 5 *Id.* at 453.
- 6 161 U.S. 519 at 525
- 7 161 U.S. 519 at 529
- 8 *Hughes v. Oklahoma* 441 U.S. 322 (1979)
- 9 206 U.S. at 237.
- 10 523 F. Supp. at 125.
- 11 Other courts have recognized that two governmental trustees can have "co-tenancy" obligations not to waste a common natural resource asset. See e.g., *United States v. Washington*, 520 F.2d 685, 686, 690 (9th Cir. 1975) and *Puget Sound Gillnetters Ass'n v. US, Dist. Ct.*, 573 F.2d 1123, 1126 (9th Cir. 1978) (applying co-tenancy concept to fishing rights).
- 12 Wood, Mary Christina, *Atmospheric Trust Litigation* chapter in *Climate Change Reader*, W.H. Rodgers, Jr. and M. Robinson-Dorn, eds., Carolina Academic Press, at 48 (2009).

For The Future, the Time is Now

By Dick Roy

Editor's note: We asked Dick Roy, founder of Oregon Lawyers for a Sustainable Future, to share his thought process about leaving the practice of law in 1993 to work for future generations – a pursuit he continues today as Co-Director with his wife Jeanne of the Center for Earth Leadership.

In 1993, after practicing corporate law for 23 years, I left Stoel Rives to join my wife Jeanne as a full-time volunteer for the earth and future generations. For this article, I have retraced thoughts at key points along the way.

My decision to leave Stoel Rives.

By 1987, I was aware that many threats to the earth were global in nature. Climate change and fresh water shortages were on the horizon. The oceans were threatened by pollution and over harvesting. Biodiversity and topsoil were being lost. And the trends and momentum of ecological degradation did not bode well for my children and yet unborn grandchildren. This realization was like a pebble in my boot when I backpack in the Eagle Cap. I needed to address it head on.

As an undergraduate, I was greatly influenced by *Man's Search for Meaning* by Viktor Frankl. His thesis was that a sense of purpose is a basic human need. I adopted his positive view for myself seeing no downside should I be wrong.

To gain clarity on how I might respond to global ecological threats, during the summer of 1987 I took three-months off at the Oregon coast to ponder a series of questions. As a starting point, did I truly believe that human development had placed the earth and future generations at risk? The data at the time seemed quite clear to me.

If so, what was the root cause of this predicament? As a simple framework,

I concluded that two fundamental “disconnects” must be resolved to find a path to a sustainable future. First, the global capital markets that direct investments are the engine driving our future. Motivated by short-term objectives of growth and profit, they are totally disconnected from the long-term goal of sustainability. Second, we humans did not evolve to respond with passion to threats that seem remote in time and space. Although the coral reefs of the world may be dying, life is good in Oregon.

Realizing that I was genetically unprepared for our time, how should I respond personally and how would I find the motivation to do so? Without deciding on a specific plan, Jeanne and I decided we should work together as full-time volunteers. But several key impediments had to be overcome.

To address the financial side, that summer I simply made a declaration of financial independence, in large part because we had adopted a lifestyle with low material expectations. I recall vividly the moment of freedom when I asked myself, “What is the worst thing that could happen to me if I am incorrect?” I reasoned that starving on the street one day would be preferable to worrying about it. In other words, the declaration itself would be a grant of freedom.

Realistically, I had to deal with the fact that I would voluntarily place financial constraints on my future that might be aggravating at a later time. But I reasoned that, in a global sense, I had been privileged to live a very full life for 47 years. Looking ahead, I would simply live my life in a “state of continual completion,” which would mean I would have no unfilled material and experiential aspirations. And I could then spend the remainder of my

life in service, confident that service itself would fulfill the sense of purpose posited by Frankl in his book.

I also had to confront a professional reality. As a corporate lawyer and partner in Portland's largest firm, I had a position of prestige and my work was given the highest priority and attention by clients for economic reasons. As a volunteer, my work would receive essentially no priority through the economic lens. Moreover, I would be leaving my craft at the top of my game, only to start a new career. In retrospect, the two things I actually missed were daily contact with the community of friends and colleagues within my firm and the legal community and the Stoel Rives technical support group who could immediately assist with any question related to the electronic side of office work.

Getting on with it. Following my 1987 extended vacation, I returned to the firm but began working more directly for the earth. In 1989, to rekindle public interest in the earth that had waned in the 80s, I took the lead to organize Earth Day Oregon 1990 – the twentieth anniversary of the original Earth Day. In addition to the Earth Day celebration in April 1990, two other experiences that year clarified the path I would follow as a full-time volunteer. A friend invited me to join a group at the Unitarian Fellowship testing a discussion course that had been developed by a seminary student. It was a very detailed compilation of readings around the theme of deep ecology, an ecocentric view of the earth articulated in the 1970s by Norwegian philosopher Arne Naess. Later that year, another friend invited Jeanne and me to attend a conference in Seattle inspired by Thomas Berry's *Dream of the Earth*. That conference was a clarion call for me to get on with

my life's work.

To develop a specific plan, Jeanne and I isolated ourselves at Oregon coast during the summer of 1991, this time for four months. We considered as deeply as possible how our separate skills and expertise might be conjoined as we looked to the future. Although we recognized that many threats are global in nature, our work would be confined to the Northwest – the bioregion of our birth.

We carefully inventoried what we, as a couple, might have to offer. The list included the following: stable marriage; identical values; financial independence; deep understanding of ecological degradation; many relationships in the environmental, business, public agency, and legal communities; low-budget lifestyle; and no desire to travel so we could focus intensively on Portland and the State of Oregon.

As we considered our prior experience in public policy work, environmental advocacy, and working with businesses, we concluded that our future work must focus on changing culture from the grassroots up. Governments are constrained by the need to seek support from divergent interest groups, most with economic or social concerns that trump concern for the earth. Businesses are saddled by the relentless need to increase revenues and profits. To be sure, agencies and businesses have a key role to play. But they cannot be the advocates for radical change.

On the other hand, we citizens have far greater freedom to advocate for and seek to effect fundamental change. Although we lack the financial resources or authority of businesses, agencies, and institutions, collectively we can recreate the culture from the ground up. Moreover, a change in culture should produce progressive public policy and prompt sustainable business practices.

To guide us in our work together, we developed our highest vision.

Within the Northwest, a minority of intentional citizens would provide the leadership to a sustainable future. In doing so, we would become a model to inspire people of goodwill in other regions of the country.

In this vision, leadership is not something conferred by authority within an organization or even recognized by others within a movement. Leadership is assumed by the citizen who seeks to effect change. As a colleague Joanna Macy often says, you simply act with the authority of your 13.7 billion years.

We realized at a profound level that the key to citizen leadership would be motivation, not education. On the topic of concern for the earth, many knowledgeable people are not motivated to alter conduct or take action. Intellectually, they understand the urgent need for radical change in culture to produce a sustainable society, yet that understanding does not migrate from the head to the heart. On the other hand, a motivated person has access to all the information needed to go to work. And the role of the change agent is certainly one that can be learned.

We also held a strong belief in self-discovery, which is quite different from the traditional teacher-student mode. And we realized that self-discovery is often most profound when the exploration occurs in structured conversations among friends.

With that in mind, while still at the coast in 1991, we developed a vehicle to take participants to a deep exploration of their relationship with the earth – a nine session discussion course, *Exploring Deep Ecology*. We published a 100-page course book with interesting readings and suggested questions for discussion.

After testing and perfecting the course with small groups in homes, in 1993 I left the firm so Jeanne and I could form the Northwest Earth Institute – the first of three nonprofits

we have formed to create a sustainable culture. Essentially, in a single day I made the transition from advising corporate clients to organizing noontime *Deep Ecology* discussion courses in downtown workplaces.

The discussion courses caught on. They moved organically from workplaces to churches to neighborhoods, and from Portland to CH2M in Corvallis to EWEB in Eugene. Within a few years 20 NWEI chapters had formed in the Northwest to offer the courses, and they were offered by individuals and groups on 650 communities around the country. As they migrated, the discussion-course series grew to include *Voluntary Simplicity*, *Discovering a Sense of Place*, *Choices for Sustainable Living*, *Globalization and Its Critics*, and *Healthy Children, Healthy Planet* – all topics pertinent to our vision of a sustainable future.

In 1996, Jeanne got wind of a sustainability framework developed in Sweden, The Natural Step (TNS). After sending me to San Francisco to meet the founder, Dr. Karl Henrik Robert, Jeanne decided that NWEI should introduce the TNS framework to Oregon decision-makers. We did that through three major conferences in the summer of 1997, which provided the impetus to form the Oregon Natural Step Network. Jeanne managed the Network as an NWEI project for five years, during its rapid growth phase. In 2002, because it had become a vital organization in its own right, we spun it out into a new nonprofit. Coincidentally, about that time that my lawyer-friend Regina Hauser was considering how she might contribute to a sustainable future. In 2002, she left her firm and became the founding Executive Director, a position she holds today.

In 2006, Jeanne and I transitioned out of NWEI because we wanted the organization to have the stability of a fully paid staff. About that time, public awareness about climate change and ecological degradation was bur-

geoning as a result of *Inconvenient Truth* and other compelling information. With heightened public awareness, we founded the Center for Earth Leadership (the Center) where we now train citizens on how to be an agent of change in a sphere of influence. We also develop projects to enlist leadership within groups with unfulfilled potential.

With that goal in mind, in 2006 I formed Oregon Lawyers for a Sustainable Future (OLSF) as a vehicle encourage lawyers, law offices, and the Oregon State Bar to become more deeply engaged in the sustainability movement. In contrast to architects, we lawyers find such engagement to be somewhat awkward because it does

not align directly with fee-generating work. Over the past three years, I have observed an awakening within the Bar. On October 30, 2009, the Board of Governors (BOG) revised the Oregon State Bar Bylaws by adopting a separate sustainability article and authorized formation of a Sustainable Future Section. In doing so, the BOG wove a commitment to sustainability into the structure of the Bar, thereby stepping briskly into a national leadership role.

I am often asked, "Do you have regrets leaving your law firm at the top of your game, where your work had the highest priority and attention of clients." Clearly, this is an excellent question. And in answering it, I realize that my passion is unique and

not transferable to others. For over 16 years I have been able to spend 100% of my time doing exactly what I choose to do, so there is certainly no regret or sense of loss. To the contrary, I feel immense gratitude for this freedom and for a profession that gave me the experience, contacts, resources, and influence to participate so fully in the great human struggle to create a sustainable future.