

Fourth Annual Florida A&M Environmental Law and Justice Symposium

Empowering Environmental Justice Communities Locally and Globally

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(25 min.)

Two weeks ago, a brief was filed in a case pending in the D.C. Circuit Court of Appeals. It was filed on behalf of youth plaintiffs in this country who stand for themselves and future generations. I will quote just one line from it: “If Government does not act immediately to rapidly reduce carbon emissions and protect and restore the balance of the atmosphere, Youth will face irrevocable harm: the collapse of natural resource systems and a largely uninhabitable Nation.”

I.

Sometimes the world encounters situations that have never before been contemplated in the law, situations that past lawyers have never litigated and that past judges have never ruled on. These test the basic agility of our legal system. But even more, they may test whether law remains relevant at all. Climate crisis presents such a situation. It requires judges to draw compelling logic from the precedent that exists and apply it to the unregulated carbon dioxide spewing from sources across our country -- pollution that threatens irreparable damage to our planet’s atmosphere. In the short time today I will describe a global legal campaign known as Atmospheric Trust Litigation that invokes the public trust doctrine to hold federal and state governments in the U.S responsible for reducing this carbon pollution. Atmospheric Trust Litigation (ATL) suits

or administrative petitions are now pending in every single state in this country, and an appeal is pending in the D.C. Circuit against the Obama Administration.

II.

In 1872, the U.S. Supreme Court decided a case called *Illinois Central Railroad*, in which it set forth the public trust doctrine as foundational law. In *Illinois Central*, the Court confronted a situation it had never before seen. The Illinois legislature had conveyed the entire Chicago shoreline of Lake Michigan to a private railroad company. This was shoreline that the citizens needed for fishing, navigation and commerce. The Court held that the legislature didn't have power to make that conveyance. It said, "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 . . . [has] been allowed to pass into the control of any private corporations. 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." Conveyance of crucial resources, it said, would be "a grievance which never could be long borne by a free people."

The public trust principle has resided at the core of our sovereign understanding since the beginning of this nation, an understanding twin-born with democracy itself: that citizens never confer to their government the power to substantially impair resources crucial to their survival and welfare. Such resources form a perpetual trust to sustain future generations of citizens. By enforcing a trust over crucial resources, courts prevent any one set of legislators from wielding so much power over ecology as to cripple future legislatures in meeting their citizens' needs. The public trust has often been explained as an attribute of sovereignty that government cannot shed. As the *Illinois Central* court

declared, “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 government” Professor Gerald Torres describes the trust as the slate on which “all constitutions and laws are written.” This is judge-made law holding constitutional force.

With roots extending as far back as Roman law, the public trust has manifested in countless forms of government through the ages. It is evident in many other nations besides the United States. The reasoning of the public trust puts it on par with the highest liberties of citizens living in a free society. As Professor Joseph Sax once said, the public trust demarcates a society of “citizens rather than of serfs.”

These rights protect our core interest in survival. In a landmark public trust case arising 20 years ago in the Philippines, that country’s Supreme Court declared in words that would prove prescient: “[T]he right to a balanced ecology . . . concerns nothing less than self-preservation and self-perpetuation” Without this right, the court said, “the day would not be too far when all else would be lost not only for the present generation, but also for those to come – *generations which stand to inherit nothing but parched earth incapable of sustaining life.*” That day has arrived in court.

Climate crisis threatens our paramount interest in human survival. Dr. James Hansen, one of the world’s leading climate scientists and the former head of NASA’s Goddard Center for Space Studies, submitted an amicus brief in the D.C. ATL litigation, in which he said, “*failure to act with all deliberate speed . . . functionally becomes a decision to eliminate the option of preserving a habitable climate system.*” We can no longer say that these climate impacts are postponed for future generations to deal with. As Gus Speth, the former Dean of the Yale School of Forestry, writes, if we continue

Business as Usual, the world “won’t be fit to live in” by mid-century. If you are a young person in this room, take a moment to calculate how old you will be at mid-century, say 2050. Then ask yourself if you had expected a world fit to live in 37 years from now.

Now consider the mind-blowing urgency posed by Nature’s tipping points. Scientists warn that if we continue polluting the atmosphere, we will pass a threshold of no return and launch a path of irreversible, runaway heating.¹ Our narrow window of opportunity to respond is closing fast and will soon slam shut on us. In 2007 the head of the United Nations climate panel told the world, “*What we do in the next two to three years will determine our future. This is the defining moment.*”²

So what is our American government doing about the matter? Not only is the federal government not comprehensively regulating carbon dioxide, it is madly pushing through fossil fuel projects such as natural gas fracking, off-shore oil drilling, and massive strip mining of coal. John Holdren, President Obama’s top science advisor, told reporters a few years ago, “The current situation of the world in relation to the climate problem is that we’re in a car with bad brakes driving toward a cliff in the fog” But worse, our government has taken its hands off the steering wheel and is pushing down on the gas pedal.

If the law is relevant at all, one would expect that it would protect the rights of citizens against governmental policies driving our planet towards catastrophe. Reading

¹ See Dr. Nafeez Ahmed, *James Hansen: Fossil Fuel Addiction Could Trigger Runaway Global Warming*, THE GUARDIAN (July 10, 2013), <http://www.theguardian.com/environment/earth-insight/2013/jul/10/james-hansen-fossil-fuels-runaway-global-warming>

² Rajendra Pachauri, head of the UN IPCC, 2007.

the *Illinois Central* opinion, one senses that this would have been an easy case for those Justices, that they would have had no hesitation to hold government accountable under the very same public trust doctrine that they invoked to protect the Chicago shoreline. The judges back then said, “It would not be listened to that the control and management of the harbor of that great city – a subject of concern to the whole people of the state – should thus be placed elsewhere than the state itself” into the hands of a private corporation. You can practically hear those justices saying today, “It would not be listened to” that government would let fossil fuel profiteers pollute our air and heat up our atmosphere, threatening the future of this Nation and all life on Earth. “It would not be listened to.”

III.

To restore climate stability, the world must launch an all-out atmospheric defense effort geared towards full de-carbonization. Commentators describe the necessary scale of effort as surpassing even WWII. Needless to say, we individuals must do our part to change our lifestyles and consume less. But we also need government to exercise leadership. And this is precisely why we have government – to take on massive, collective problems. But when we look around the country, we see most states sitting idle and EPA addressing the problem in piecemeal fashion at a snail’s pace. It’s been six full years since the U.S. Supreme Court told EPA that it could not just make a political choice not to regulate carbon. We are now well into President Obama’s second term, yet we still don’t have comprehensive regulation of carbon dioxide emissions. True, there have been some initiatives. There are new automobile standards, solar projects planned for public lands, some renewable energy incentives, proposed coal fired plant regulations,

and we should mention too that the White House has solar panels back on its roof, but these initiatives remain scattered and incremental. They don't nearly add up to what the scientists call for.

We must recognize that, when it comes to climate, we are under the supreme jurisdiction of Nature's Laws. I am reminded of a statement that Oren Lyons, a leader and faithkeeper of the Onondaga Nation, made when describing a massive beetle kill that wiped out Canadian forests as a consequence of warmer winters brought on by climate change. He said, "You can't negotiate with a beetle. You are now dealing with natural law. . . . The thing that you have to understand about nature and natural law is, there's no mercy. . . . There's only law. . . . Whether you agree with it, understand it, comprehend it, it doesn't make any difference. You're going to suffer the consequence. . . ." We have to apply this truth to U.S. climate policy. It doesn't matter what carbon politics says. Nature's carbon math will rule.

Now, it's not as if we don't have enough bureaucrats or technical resources to address this problem. We have plenty. We have more environmental agencies than any other country in the world. They have enormous resources, expertise, and authority. And we have precedent for responding urgently to a collective threat. Seventy years ago, this nation mounted a heroic war effort almost overnight. But our government was on the side of its citizens then.

Today, our politicians and leaders find themselves beholden to the fossil fuel industry. Big oil and coal corporations have contaminated our democracy with campaign financing, and this is causing our leaders to hold back the nation's vast

resources and expertise that could be used to mount an atmospheric defense effort. It's as if our house is on fire, our children are trapped inside, twenty fire trucks are in the driveway with hoses drawn, and the fire chief is saying, "hold off everyone" because his politics won't support the rescue.

We need a legal approach that imposes clear responsibility for achieving the necessary reduction across virtually all states and the federal government. No state can be left on the sidelines, because even one state's failure to take carbon responsibility leaves an "orphan share" of pollution that can create a deficit in the reduction needed. So we need a macro approach that imposes an organic obligation on every sovereign. ATL seeks to do just that.

But before describing ATL, let's us first pause to consider the role of our environmental statutes. You might reasonably wonder, don't all of those statutes that were passed in the 1970s, like the Clean Air Act and the Endangered Species Act, and the National Environmental Policy Act, require government to save this country from climate disaster? Well, we need to face one fact. Had environmental statutes worked, we would not find ourselves in this dreadful position. Environmental law delivered global warming and resource scarcity to our doorstep.

The problem is this. The agencies have fallen captive to the very industries they regulate. Across the board, our federal and state agencies have turned environmental law inside out. They have used their discretion to allow damage to our natural resources, including the atmosphere. Agencies rarely say no to permits. Two-thirds of the greenhouse gas pollution in this country is emitted pursuant to government permits.

But even apart from that, we have to face the fact that we are dealing with a huge problem that needs a macro response tied to the requirements of nature. The environmental statutes are inherently micro in their focus and largely procedural. Now that's not to say that regulation under the Clean Air Act wouldn't get us far if EPA would use its full authority. It would. But to become a zero-carbon society, we also need federal, state, and local initiatives in the transportation, energy, building, food, and waste sectors using all of the tools government has available, including subsidies, tax policies, infrastructure projects, shifts in uses of public property, and public education. The task at hand is not to embark on scattered measures hoping that they will all add up in time. Instead, we must assess the functional requirements of the atmosphere and then implement measures that will achieve the necessary carbon reduction before we pass climate tipping points.

Atmospheric Trust Litigation presents such an approach. First, it advances a legal duty requiring government to protect the atmosphere. Second, it calibrates that duty to the requirements of Nature. Third, it creates an integral scheme of domestic and international responsibility to share the burdens of carbon dioxide reduction.

IV.

Atmospheric Trust Litigation presents the planet's atmosphere as a single public trust asset in its entirety. It characterizes all nations on Earth, and all states in this nation, as co-trustees of that atmosphere, bound together in a property-based framework of mutual responsibilities. Trustees have the core fiduciary obligation to protect the assets of the trust they manage. This fiduciary obligation runs precisely opposite to the

assumption driving today's climate policy – that our leaders enjoy political discretion whether or not to assume climate responsibility.

ATL uses the best available science to quantify government's fiduciary obligation to restore atmospheric health. Leading scientists have developed a pathway of emissions reduction which, when combined with massive soil and reforestation measures, is designed to restore atmospheric equilibrium and limit planetary heating to 1.5 degrees Celsius. This pathway requires a 6% global annual reduction of carbon dioxide, starting this year. Such 6% annual reduction defines the federal and state fiduciary obligation to protect the atmospheric trust.³

ATL suits seek a tangible judicial remedy calling for government actors to produce carbon recovery plans that will be adequate to implement this 6% annual reduction. Climate analysts have offered a robust portfolio of policy measures, each carrying a specific amount of carbon reduction. Courts will not tell the government trustees which measures to select to bring down carbon – that is the trustees' job, after all. But the courts can force the trustees to develop a climate recovery plan and submit regular carbon accountings to the court to make sure that the emissions reduction actually occurs, under the continuing supervision of court. This is not some radical new measure. In fact, many states have already developed plans to reduce carbon dioxide emissions within their borders, but they don't have any political leadership to implement them. It's these interminable fits and starts in the political branches that bring us ever closer to catastrophic tipping points.

³ James Hansen, *et. al.*, *Scientific Prescription to Avoid Dangerous Climate Change to Protect Young People, Future Generations, and Nature*, PLOS ONE (in press 2013), abstract at: <http://pubs.giss.nasa.gov/abs/ha08510t.html>.

The longer we delay measures, the steeper the trajectory becomes to salvage a habitable planet. Had we started concerted action in 2005, scientists estimate that we could have reduced emissions just 3.5%/year in order to restore equilibrium by the end of the century. In just eight years, that figure has climbed to 6% year. The complete dithering of our elected leaders has already delivered us a huge penalty, one that increases with every day that passes. If we delay reduction until 2020, scientists project we would need to reduce emissions 15%/year. At some point, the cuts would be too big for society to accomplish. And that's when our window of opportunity slams shut and essentially leaves our children trapped inside this heating greenhouse we've created.

ATL calls upon the courts to intervene in this crisis, because only they can enforce a macro response with the urgency necessary to protect the atmospheric trust. The remedy sought in ATL cases takes a page from other broad institutional litigation such as those cases involving school bussing, prison reform, and treaty rights. In such cases, courts have stepped in to supervise recalcitrant government actors, often maintaining their jurisdiction for years or even decades.

V.

ATL presents a supreme chance for synergy between the judicial and political branches, because a judicially supervised carbon accounting will provide durability and transparency to the carbon recovery plans that the political branches devise. Government attorneys could enter into consent decrees that allow for continuing judicial supervision without intrusion into the political prerogatives of the other branches. When the political branches implement measures in the carbon portfolio they design, whether it is carbon tax, cap and trade, regulation, new infrastructure, or other steps, they report the reduction

achieved as part of the carbon accounting supervised by the court. But instead of problem-solving to help structure a supervised emissions reduction plan, government attorneys are pursuing a classic litigious role, defending the do-nothing position of their client agencies.

They mount two major arguments against this litigation. First, they contend that, because the old cases involved navigable waters, the public trust doctrine must be limited to that context. But of course that's not how judge-made law works. Judges are supposed to take foundational doctrines and apply their core rationale to new circumstances. Courts have repeatedly said that the public trust must evolve with changing values and needs of society, and they have applied the trust to many resources outside of navigable waters. Two state trial court judges have already found the air to be a trust asset in ATL cases.

The second primary defense is that climate response is best suited for the executive and legislative branches. And how right that is! But those branches haven't acted, even in face of the gravest scientific warnings, and they are still allowing pollution that is bringing the planet to the brink of disaster. The public trust defines inalienable rights held by citizens in life-sustaining ecology. Defining the constitutional limits of the legislative and executive branches over that ecology has never been deemed a political question appropriate for those same branches. A court has never let any trustee be the sole judge of his own performance – that would be called a tyranny, not a trust. The fundamental pillar of any trust is judicial redress for trustee malfeasance. As the Hawaii Supreme Court emphasized, it is decidedly the job of courts to prevent “improvident disposition of an irreplaceable *res*” held in public trust. Nevertheless, most of the trial

judges in these ATL cases have dismissed the youth's claims on the basis that it's not their job to step into climate crisis.

These cases are now on appeal. Frankly, it would be hard for any of the appellate judges to read the amicus brief submitted by leading climate scientists and not realize that they have the planet on their docket. When you look at the impacts of climate crisis -- the severity, the duration, the tipping points, the fact that runaway heating would leave our nation uninhabitable -- you realize that this case is in a different league than any these judges have ever seen before. It might well call for a heavier dose of judicial commitment and creativity in managing the remedy. But we would be deluding ourselves if we did not recognize that what this really comes down to is judicial courage.

Let's for a moment indulge the U.S. Department of Justice attorneys who have joined squarely with industry interveners to attack this public trust litigation in the D.C. Circuit. Consider what happens if they win. There are virtually no other statutes or lawsuits teed up to force comprehensive carbon reduction on the federal and state levels with the urgency needed. Do these government attorneys really seek the result that they so strenuously argue for, a crisis left entirely to the whims of an erratic and dysfunctional political process? Do they really seek increased prospects of runaway climate change?

I've often wondered how law professors would explain such an impotent outcome of our legal system. Do we tell our students and other young people, "Sorry, the entire body of law that has served this country for over 200 years has no principled way of imposing responsibility to abate the pollution that will bring planetary catastrophe later in your lifespan? That the legal system is now too brittle for judges to apply with any

impact -- even though they were presented with a logical remedy structure that could force an immediate response in time?" We should at least follow such an explanation with our deepest condolences for their future.

But let's instead focus on the unparalleled potential of the American judiciary. Throughout history, judges have decided transformative cases when moved by the deepest notions of justice. This conference has gathered us all to talk about justice, of which there are so many forms. Climate justice aims to protect innocent children and youth from all-out catastrophe that is still preventable now, with no extreme hardship to our society. The first judges to declare an atmospheric trust responsibility will undoubtedly stand as heroes to the world's youth and future generations. But just as certain, there will be no avoiding a question years from now asked by young people as they confront the climate punishment already set in motion and gaining momentum as we speak. They will ask us: "Why did it take so long for you to act? When you knew back then of the horrific consequences to those of us in the future -- the floods, the food shortages, the heat waves, the fires, the super-storms, the spread of disease, the rising seas -- why did it take you so long?" We all become so immersed in our immediate lives and challenges that we often fail to step outside of our own thinking and travel the spectrum of time. We all need to make that mental journey while we still have options to act. Perhaps the most compelling words come not from any legal precedent, but from author Terry Tempest Williams, who writes, "The Eyes of the Future are looking back at us and they are praying for us to see beyond our own time."

Thank you.

