

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION*December 2016***IN THIS ISSUE**

An Oregon federal district court recently held that there is a fundamental constitutional right to a climate system capable of sustaining human life, and has allowed a lawsuit to proceed against the US government which seeks relief regarding carbon dioxide emissions on public trust and due process grounds.

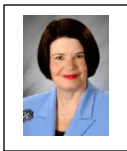
Reopening the Door to Climate Change Litigation – Oregon Federal Judge Finds That the Right to a Climate System Capable of Sustaining Human Life is a Fundamental Constitutional Right

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The Supreme Court substantially closed the door to federal climate change tort litigation in *American Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), holding that the Clean Air Act displaces any federal common-law right to seek abatement of carbon dioxide emissions from power plants. But Judge Ann Aiken, an Oregon federal district court judge, has reopened the door to climate change litigation on federal constitutional grounds. In an Opinion issued on November 10, 2016, Judge Aiken found that there is a fundamental constitutional right to a climate system capable of sustaining human life, and has allowed the lawsuit described below to proceed against the US government.

Plaintiffs' Allegations and Claims

Plaintiffs are a group of young people between the ages of 8 and 19, an association of young environmental activists, and Dr. James Hansen, acting as guardian for future generations. Plaintiffs sued the United States, President Barack Obama, and numerous executive agencies. Plaintiffs allege that defendants have known for more than fifty years that carbon dioxide (CO₂) produced by burning fossil fuels was destabilizing the climate in a way that would significantly endanger plaintiffs. Plaintiffs assert that defendants permitted, encouraged, and otherwise enabled the continued exploitation, production, and combustion of fossil fuels, and deliberately allowed atmospheric CO₂ concentrations to escalate. Plaintiffs argue that defendants' "actions violate their substantive due

process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations." *Id.* at *1.

Plaintiffs sought "(1) a declaration [that] their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO₂ emissions." *Id.* In particular, Plaintiffs seek a declaration that defendants violated plaintiffs' fundamental constitutional rights to life, liberty, and property by causing dangerous CO₂ concentrations in the atmosphere and dangerous government interference with a stable climate system. Plaintiffs also asked the Court to order defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂.

Defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The Magistrate Judge recommended denying the motions to dismiss, and referred the matter to District Judge Aiken for review. *Id.*

The Court began its analysis by noting that "[t]his is no ordinary lawsuit." "The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate

change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.” *Id.* at *2. The Court reviewed whether the political question doctrine barred plaintiffs’ claims, whether plaintiffs had standing to sue, and whether plaintiffs’ public trust and due process claims stated a claim upon which relief can be granted.

Political Question Doctrine

Under the political question doctrine, “[i]f a case presents a political question, federal courts lack subject matter jurisdiction to decide that question.” *Id.* at 3 (citation omitted). The Court analyzed the political question doctrine under the six criteria the Supreme Court identified in *Baker v. Carr*, 369 U.S. 186 (1962).¹ *Id.* at *4. After considering the six criteria, the Court found that the case did not raise a nonjusticiable political question.

“There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have

violated plaintiffs’ constitutional rights. That question is squarely within the purview of the judiciary Should plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs’ injuries but limit its ability to specify precisely how to do so.” *Id.* at *8-9 (citations omitted).

Standing to Sue

“To demonstrate standing, a plaintiff must show (1) she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant’s challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.” *Id.* at *9 (citation omitted).

The Court found that the “injury in fact” requirement was satisfied because “[a]pplying the correct formulation of the generalized grievance rule,² plaintiffs’ alleged injuries – harm to their personal, economic and aesthetic interests – are

¹ The six criteria identified in *Baker* are “(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of

embarrassment from multifarious pronouncements by various departments on one question. *Id.* at *4, quoting *Baker*, 369 U.S. at 217.

² Under the generalized grievance rule, injuries that are not particular to the plaintiff are nonjusticiable generalized grievances. But the Court found that under Ninth Circuit precedence, the fact that a harm is widely shared does not render it a generalized grievance, as long as the “shared experience caused an injury that is concrete and particular **to the plaintiff**.” *Id.* at *10-11 (citations omitted).

concrete and particularized, not abstract or indefinite.” *Id.* at *10.

The Court found that the causation requirement was satisfied because plaintiffs alleged a plausible causal relationship between their injuries and defendants’ conduct, and that, on a Rule 12(b) (6) motion, the Court was bound to accept those allegations as true. *Id.* at *12. The alleged chain of causation is “fossil fuel combustion accounts for the lion’s share of greenhouse gas emissions produced in the United States; defendants have the power to increase or decrease those emissions; and defendants use that power to engage in a variety of activities that actively cause and promote higher levels of fossil fuel combustion.” *Id.* at *12.

The Court found that the redressability requirement was satisfied. “Plaintiffs ask this Court to ‘order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO₂ emissions, as well as take such other action necessary to ensure that atmospheric CO₂ is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system.’ Construing the complaint in plaintiffs’ favor, they allege that this relief would at least partially redress their asserted injuries.” *Id.* at *14.

Due Process Claims

“When a plaintiff challenges affirmative government action under the due process clause, the threshold inquiry is the applicable level of judicial scrutiny.” *Id.* (citation omitted). It was undisputed that defendants’ actions would survive rational basis review, so the Court considered whether plaintiffs have alleged infringement of a fundamental right. *Id.*

The Court found that “[f]undamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) ‘deeply rooted in this Nation’s history and tradition’ or (2) ‘fundamental to our scheme of ordered liberty.’” *Id.* at *15 (citation omitted). “In determining whether a right is fundamental, courts must exercise ‘reasoned judgment,’ keeping in mind that ‘[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.’” *Id.*

Exercising its “reasoned judgment,” the Court concluded “that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the ‘foundation of the family,’³ a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress’ In this opinion, this Court simply holds that where a complaint alleges

³ The Court cited *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 2598 (2015), in support of its reasoning.

governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right." *Id.* at *15-16.

"Danger Creation" Challenge to Inaction

The general rule is that "the Due Process Clause does not impose on the government an affirmative obligation to act, even when 'such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual,'" but this rule is subject to two exceptions: "(1) the 'special relationship' exception; and (2) the 'danger creation' exception." *Id.* (citation omitted). The "special relationship" exception did not apply because it involves the government's responsibility to ensure the safety of individuals it takes into custody. "The 'danger creation' exception permits a substantive due process claim when government conduct 'places a person in peril in deliberate indifference to their safety.'" *Id.* (citation omitted). Plaintiffs alleged that the 'danger creation' exception applied because the government failed to limit third-party CO₂ emissions. *Id.*

The Court found that plaintiffs satisfied the danger creation exception because "plaintiffs allege defendants played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions. Accepting the allegations of the complaint as true, plaintiffs has adequately alleged a danger creation claim." *Id.* at *17.

Public Trust Claims

"In its broadest sense, the term 'public trust' refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers." *Id.* at *18 (citation omitted). The Court found that the public trust doctrine has its origins in Roman law, and that the doctrine came to the United States through English common law.

"Plaintiffs' public trust claims arise from the particular application of the public trust doctrine to essential natural resources. With respect to these core resources, the sovereign's public trust obligations prevent it from 'depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.' Application of the public trust doctrine to natural resources predates the United States

of America. Its roots are in the Institutes of Justinian, part of the Corpus Juris Civilis, the body of Roman law that is the ‘foundation for modern civil law systems.’ ... The doctrine made its way to the United States through the English common law.”⁴ *Id.* (citations omitted).

The Court noted that “[t]his lawsuit is part of a wave of recent environmental cases asserting state and national governments have abdicated their responsibilities under the public trust doctrine.” *Id.* at *19. Defendants argued the public trust doctrine for four reasons: “(1) the atmosphere, the central natural resource at issue in this lawsuit, is not a public trust asset; (2) the federal government, unlike the states, has no public trust obligations; (3) any common-law public trust claims have been displaced by federal statutes; and (4) even if there is a federal public trust, plaintiffs lack a right of action to enforce it.” *Id.* at *20. The Court addressed each of these contentions.

First, the Court found that the federal government owns title to the submerged lands between three and twelve miles from the coastlines of the United States, the public trust doctrine applies to these lands, and that plaintiff adequately alleged harm to public assets because their injuries relate to the effects of ocean acidification and rising ocean temperatures. *Id.* at *21.

Second, following of lengthy analysis of several cases, the Court found that “can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government The federal government, like the states, holds public assets – at a minimum, the territorial seas – in trust for the people. Plaintiffs’ federal public trust claims are cognizable in federal court.” *Id.* at *23-24.

Third, the Court rejected defendants’ contention that any common-law public trust claims have been displaced by a variety of acts of Congress, including the Clean Air Act and the Clean Water Act. “Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away. Because of the nature of public trust claims, a displacement analysis simply does not apply.” *Id.* at *24.

Fourth, the Court rejected defendant’s argument that plaintiffs lack a cause of action to enforce public trust obligations. “I conclude plaintiffs’ public trust rights both predated the Constitution and are secured by it Although the public trust predates the Constitution, plaintiffs’ right of action to

⁴ The Court cited *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 453 (1892), for the proposition that “[t]he state can no more abdicate its trust over property in which the whole people are interested,

like navigable waters and soils under them ... than it can abdicate its police powers in the administration of government and the preservation of the peace.”

enforce the government's obligations as trustee arises from the Constitution [P]laintiffs' public trust claims are properly categorized as substantive due process claims [T]he Due Process Clause's substantive component safeguards fundamental rights that are 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition' Plaintiffs' public trust rights, related as they are to inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives, satisfy both tests. Because the public trust is not enumerated in the Constitution, substantive due process protection also derives from the Ninth Amendment. But it is the Fifth Amendment that provides the right of action." *Id.* at *24-25.

The Court adopted the Magistrate Judge's findings and recommendations and denied defendants' motion to dismiss. In doing so, the Court found as follows: "This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions – whether or not they violate any specific statutory duty – have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to

dismiss. Indeed, the seriousness of plaintiffs' allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly. Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.

Conclusion

Reaction to Judge Aikens' opinion split along ideological lines. A commentator in *Slate* wrote that the decision "couldn't have come soon enough. President-elect Trump does not believe climate change is real, and the information we currently have about how we would address the global crisis suggests his actions would be both woefully inadequate and possibly devastating."⁵ On the other hand, a commentator in *National Review* called the decision "perhaps the most pervasively lunatic ruling I have ever seen."⁶

More objectively, Judge Aiken's Opinion seemingly allows courts to determine the extent to which the government must regulate CO₂ emissions. Judge Aiken's finding that there is a fundamental constitutional right to a climate system capable of sustaining human life is controversial new ground, and will likely ultimately be appealed.

⁵ Eric Holthaus, The Kids Suing the Government Over Climate Change Are Our best Hope Now, *Slate*, Nov. 14, 2016, http://www.slate.com/articles/health_and_science/science/2016/11/the_kids_lawsuit_over_climate_change_is_our_best_hope_now.html.

⁶ Ed Whelan, 'Groundbreaking' Means 'Insane?', *National Review Online*, Nov. 15, 2016, <http://www.nationalreview.com/bench-memos/442201/aiken-oregon-climate-change-ruling-juliana>.

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