

ACOEL Blog

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Do states have an independent, fiduciary obligation under the “Public Trust Doctrine” to protect air quality and to do so by regulating greenhouse gases (GHGs)?

Based on a doctrine going back to Roman times – the “Public Trust Doctrine,” a consortium of national and state environmental organizations have brought a series of lawsuits, naming minors as plaintiffs, seeking declarations that federal and state governments have an independent, fiduciary responsibility to protect the quality of air as a public natural resource and to do so by regulating GHGs. Though generally unsuccessful, they have obtained two recent rulings that have lent some credence to their efforts. These rulings raise fundamental questions regarding the bases for government regulation to protect the environment.

In *Alec L. v. Jackson*, a suit brought in D.C. district court, plaintiffs alleged federal defendant agencies, including EPA, were violating their fiduciary duties to protect the atmosphere as a commonly shared public trust resource. 2012 U.S. Dist. Lexis 75791 (May 31, 2012). Plaintiffs argued the government had both contributed to and allowed unsafe amounts of GHGs to enter the atmosphere. Plaintiffs cited no statutes or constitutional provisions. The defendants filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted, which the court granted.

Citing the Supreme Court’s decision in *PPL Montana, LLC v. Montana*, 132 S.Ct. 1213 (2012), the court found the public trust doctrine to be a matter of state law, explaining that the doctrine has functioned as a constraint on states’ ability to alienate public trust lands. In the alternative, the court concluded that even if the public trust doctrine provided a basis for a federal common law, in the case of GHGs, it has been displaced by federal regulation, specifically by EPA, citing *American Electric Power (AEP) v. Connecticut*, 131 S. Ct. 2527, 2537(2011). The court rejected plaintiffs’ attempt to distinguish AEP based on the fact that that claim was grounded in public nuisance.

Unsuccessful on the federal level, plaintiffs brought similar actions against individual states, including Alaska, Arizona, California, Colorado, Iowa, Minnesota, Montana, New Jersey, New Mexico, Oregon, Texas, and Washington, asserting that individual states had fiduciary duties under the Public Trust Doctrine that required them to regulate GHGs. As noted, though generally unsuccessful, recently plaintiffs obtained some favorable results in suits in Texas and New Mexico.

On July 9, 2012, a Travis County district court judge, in response to the plea to the jurisdiction of the Defendant Texas Commission on Environmental Quality (TCEQ), found that the agency’s “conclusion that the public trust doctrine is exclusively limited to the conservation of water is legally invalid.” *Bonser-Lain v. Texas Commission on Environmental Quality*, Case No. D-1-GN-11-002194 (201st Dist. Ct., Travis County, Tex.). According to the court, the doctrine

includes all the natural resources of the state. The court, however, also found that the agency's refusal to exercise its authority, based on current litigation by TCEQ against EPA regarding the ability of EPA to regulate GHGs, was a reasonable exercise of discretion. The plaintiffs had filed a petition for rulemaking with the agency, which the agency had denied, that would have required, among other things, that GHG emissions from fossil fuels be frozen at 2012 levels and that a plan be developed to implement the corresponding reductions.

On June 29, 2012, a New Mexico district court judge, without much explanation, denied in part that state's motion to dismiss a similar lawsuit, which sought a declaration that the state had failed to comply with its public trust obligation to protect the atmosphere. *Sanders-Reed v. Martinez*, Case No. D-101-CV-2011-01514 (Santa Fe County First Judicial District Court, NM). The court's ruling allowed the law suit to go forward.

This series of suits and the decisions in these two cases raise fundamental questions about the bases for governmental regulation to protect the environment. First, should the atmosphere be considered a public trust resource? Although air is included in the definition of a natural resource under Superfund, it is different than other natural resources, e.g., land, fish, wildlife, biota, water, groundwater, and drinking water supplies, in that it is not something that can be captured and conserved or its use managed. Even assuming air is properly categorized as a public trust resource, should an independent common law duty be imposed on states requiring them to take action to protect it? As a practical matter, all states do have extensive regulatory schemes to protect air quality. What additional benefit does the imposition of a common law duty create? If a duty is to be imposed, should it be translated into specific requirements to compel a specific result, and, if so, based on what guidance. Are not the specifics of air quality protection better left to federal and state legislatures and the agencies that implement their legislation? Finally, with regard to GHG emissions, in addition to concerns about identifying appropriate requirements, are they better managed on the federal and international level because, unlike traditional air pollutants, their impact is global rather than regional? These questions all appear to be political ones, better handled in forums other than the courts.