

In Atmosphere We Trust: Atmospheric Trust Litigation and the Environmental Advocate’s Toolkit

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*J.D. Candidate, 2019, University of Colorado Law School. The author would like to thank her family and friends for their boundless support and encouragement as well as the editors and staff of the *Colorado Natural Resources, Energy & Environmental Law Review* for their hard work preparing this Note for publication.

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INTRODUCTION

In May 2018, carbon dioxide in the atmosphere averaged 411.24 parts per million, representing the highest concentration ever recorded.¹ Greenhouse gases like carbon dioxide, largely produced by human activities, have led to increasing global temperatures that will likely continue to rise for decades.² As a result of climate change, glaciers are shrinking, ice on rivers and lakes is melting earlier in the season, trees are flowering sooner, heat waves are longer and more intense, and sea levels are rising.³ Drought, hurricanes, wildfires, and flooding are becoming more severe.⁴ The detrimental effects of climate change are being felt around the globe, and weather-related disasters displaced an estimated 23.5 million people in 2016 alone.⁵

Despite hard science evidencing severe present and future impacts of climate change⁶ and over 15,000 scientists calling for a “more environmentally sustainable alternative to business as usual,”⁷ U.S. President Donald Trump denies the climate reality⁸ and seems unphased by the crisis

¹ *Earth System Research Laboratory*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., ftp://aftp.cmdl.noaa.gov/products/trends/co2/co2_mm_mlo.txt (last visited Jan. 15, 2019); *see also Global Climate Change: Carbon Dioxide*, NASA, <https://climate.nasa.gov/vital-signs/carbon-dioxide> (last visited Jan. 15, 2019).

² *Climate Change: Effects*, NASA, <https://climate.nasa.gov/effects> (last visited Jan. 15, 2019).

³ *Id.*

⁴ *Global Warming Impacts*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/our-work/global-warming/science-and-impacts/global-warming-impacts> (last visited Jan. 15, 2019).

⁵ JULIE-ANNE RICHARDS & SIMON BRADSHAW, *UPROOTED BY CLIMATE CHANGE: RESPONDING TO THE GROWING RISK OF DISPLACEMENT 12* (2017), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-uprooted-climate-change-displacement-021117-en.pdf.

⁶ *See generally* U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT (Donald J. Wuebbles et al., eds. 2017), https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf (assessing the science of climate change and its physical impacts).

⁷ William J. Ripple et al., *World Scientists’ Warning to Humanity: A Second Notice*, 67 *BIOSCIENCE* 1026 (Dec. 2017), <https://doi.org/10.1093/biosci/bix125>.

⁸ *See* Seth Borenstein, *AP Fact Check: Data Melt Trump’s Cooling, Ice Claims*, ASSOCIATED PRESS (Jan. 27, 2018), <https://www.apnews.com/4a89b1accf89460097fb52fb7e307f90/AP-FACT-CHECK:-Data-melt-Trump’s-cooling,-ice-claim; Trump on>

it presents. In the void left by the federal government's inaction, individuals and governments around the world are stepping up to fight climate change with various tools and approaches. One of these approaches, dubbed "atmospheric trust litigation," is a fairly new concept attracting growing media attention.⁹ This global litigation campaign seeks to utilize the concept of a public trust, as well as constitutional claims, to hold governments accountable for climate damage that has endangered current and future generations.

This Note is focused on the United States and argues that while atmospheric trust litigation ("ATL") is a potentially workable tactic for securing better climate outcomes, alternatives to ATL are equally necessary and may work better than ATL in some states. Whether ATL will be successful at the federal level remains to be seen, but there is certainly reason to be hopeful since federal courts have denied government attempts to delay and dismiss the main ATL lawsuit.¹⁰ Regardless of the outcome of that case, environmental advocates should recognize that the best attempts to ensure a healthy environment for future generations will utilize fragmented approaches that employ tools appropriate for the location and issues involved in a given case.

This Note examines ATL and alternative approaches to environmental advocacy. Part I focuses on ATL. It provides a brief overview of the public trust doctrine, examines the legal arguments of ATL in detail, surveys atmospheric trust cases to date, and discusses the critiques of ATL. Part II discusses alternatives to ATL, their respective strengths and weaknesses, and their ability to achieve the main goal of ATL: secure a right to a healthy environment for future generations. This Part analyzes petitions for rulemaking and connected lawsuits, governors' executive orders, and constitutional amendments. Part III briefly highlights additional tools that environmental advocates and local governments may utilize to effect change. Finally, this Note concludes that a comprehensive effort is the best path forward for environmental protection and quality improvement, whether ATL proves successful or not.

Climate Change Report: "I Don't Believe It", BRITISH BROAD. CORP. (Nov. 26, 2018), <https://www.bbc.com/news/world-us-canada-46351940>.

⁹ See, e.g., Mark Buchanan, *Want to Stop Climate Change? Take 'Em to Court!*, BLOOMBERG (Mar. 19, 2018) <https://www.bloomberg.com/view/articles/2018-03-19/climate-change-is-a-threat-even-a-child-can-see>; Amy Westervelt, *The Climate is Changing for Climate Skeptics*, HUFFINGTON POST (Mar. 23, 2018), https://www.huffingtonpost.com/entry/climate-change-trial-california_us_5ab53d0ce4b054d118e2a0d9; Michael Bastasch, *The Ninth Circuit Just Allowed Children to Sue Trump Over Global Warming*, THE DAILY CALLER (Mar. 7, 2018), <http://dailycaller.com/2018/03/07/global-warming-ninth-circuit-oregon>.

¹⁰ See *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

I. ATMOSPHERIC TRUST LITIGATION

Atmospheric trust litigation is grounded in the public trust doctrine.¹¹ The public trust principle is longstanding, and as its name suggests, advances the notion that certain resources be held by a government in trust for the public. The doctrine has not traditionally been understood to encompass air and the atmosphere, and efforts to expand the doctrine present unique challenges.

A. *The Public Trust Doctrine*

The origins of the public trust doctrine are nebulous at best. Most articles and judicial opinions on the topic rely on a “mythological history,” claiming that Roman law protected certain inalienable, common rights from which our present understanding of the public trust evolved.¹² Writers on this topic generally rest their arguments on this vague historical ground.¹³

Despite the uncertain source of the doctrine, the public trust concept has been utilized in American legal decisions since the early nineteenth century. The New Jersey Supreme Court is typically credited with being the first American court to apply the public trust doctrine.¹⁴ In *Arnold v. Mundy*, an 1821 case involving a trespass action concerning oysters,¹⁵ the plaintiff claimed an exclusive right to an oyster bed he had planted and tended.¹⁶ The defendant argued that the property at issue was a public, navigable river in which oysters naturally grew and from which all citizens of the state had a right to take oysters.¹⁷ The defendant’s lawyers maintained that the plaintiff’s property boundary was the high water mark, and that the river was not granted by King Charles but rather held in trust for the public.¹⁸ The court agreed:

I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water,

¹¹ See Mary Christina Wood & Charles W. Woodward, *New Law for a New Normal: Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL’Y 633, 643–44 (2016).

¹² James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 1–2 (2007).

¹³ See *id.*

¹⁴ *Arnold v. Mundy*, 6 N.J.L. 1 (1821); Huffman, *supra* note 12, at 37.

¹⁵ *Arnold*, 6 N.J.L. 1.

¹⁶ *Id.*; Huffman, *supra* note 12, at 37.

¹⁷ Huffman, *supra* note 12, at 37–38.

¹⁸ *Arnold*, 6 N.J.L. at 2–3.

for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.¹⁹

While many public trust doctrine commentaries cite *Arnold v. Mundy*, most fail to mention that the New Jersey Supreme Court overruled the case less than thirty years later in *Gough v. Bell*.²⁰ In *Gough*, the court held that the legislature, as representatives of the people rather than trustee, may dispose of common property, similar to the way it may dispose of private property through eminent domain.²¹

The U.S. Supreme Court's 1892 decision in *Illinois Central Railroad Company v. Illinois* established the public trust doctrine on a national level.²² The dispute in the case centered around the Chicago lakefront and submerged lands constituting the bed of Lake Michigan.²³ In 1869, the Illinois legislature awarded the Illinois Central Railroad Company a portion of Lake Michigan's shore and over one thousand acres of submerged land for the development of a harbor.²⁴ The act granting the property to the company was repealed in 1873, so the Court analyzed both the validity of the act and the effect of its repeal.²⁵ The Court held that the State had no power to alienate the land in the first place:

Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels

¹⁹ *Arnold*, 6 N.J.L. at 12.

²⁰ *Gough v. Bell*, 22 N.J.L. 441 (1850); Huffman, *supra* note 12, at 50.

²¹ *Gough*, 22 N.J.L. at 457.

²² Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800 (2004).

²³ *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 433 (1892).

²⁴ *Id.* at 438; Kearney & Merrill, *supra* note 22, at 800–01.

²⁵ *Ill. Cent. R.R.*, 146 U.S. at 449.

mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.²⁶

The public trust doctrine was thus born of an understanding that certain resources—here, submerged land—held by the sovereign cannot be completely alienated and are held in trust for the benefit of the public.

Despite its imprecise origin, the public trust doctrine has some influence in American courtrooms today. However, several ambiguities remain regarding what resources are covered by the doctrine, whether the doctrine rests on federal or state law, and to what degree the doctrine is absolute.²⁷ The notion of an atmospheric trust—a public trust in the air we all share—arose in this context of uncertain boundaries and is still developing today.

B. Atmospheric Trust Concept

Proponents of the public trust doctrine generally see the public trust as an inherent property right, held by the public and reserved by the people, whether enumerated in their federal or state constitutions or not.²⁸ Since property is generally understood as a tangible, transferrable commodity, it is reasonable that air is not understood to be property like land and water. As a result of the atmosphere's intangible and nontransferable properties, traditional concepts of the public trust—ownership and protection—might be difficult to apply. Despite these challenges and the history of original public trust cases dealing with navigable waters, fisheries, and wildlife, modern courts have nevertheless demonstrated a willingness to expand the doctrine to encompass a wider array of contemporary concerns.²⁹ Atmospheric trust advocates argue that the air and atmosphere are public trust assets.³⁰ Though the concept is not yet well established, a handful of legal actions have legitimized it and brought hope to those that agree with this contention.

²⁶ *Id.* at 453.

²⁷ Kearney & Merrill, *supra* note 22, at 803.

²⁸ Mary Wood, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENVTL. L. 259, 276 (2015).

²⁹ *Id.* at 285; *see, e.g.*, *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 367 (N.J. 1984) (finding a public trust interest in dry sand beaches); *Waiahole Ditch*, 9 P.3d 409, 448 (Haw. 2000) (noting that in other states the purposes of the public trust “have evolved with changing public values and needs”).

³⁰ Wood, *supra* note 28, at 300–02.

C. Atmospheric Trust Cases

In early May 2011, young people throughout the country invoked the public trust doctrine when they filed lawsuits and administrative petitions in all fifty states.³¹ This effort was organized by Oregon-based nonprofit Our Children's Trust, which seeks to force a new approach to the problem of global climate change.³² The legal campaign demands enforceable climate recovery plans from government trustees that will bring down emissions at the rate called for by scientific experts.³³ Our Children's Trust "elevates the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and future generations."³⁴ The organization is guided by a focus on youth and future generations, and advocates for science-based climate recovery policies.³⁵ Since the legal campaign is progressing and evolving, this subsection serves as an update of both the main federal lawsuit and various state lawsuits.

1. Federal Lawsuit: *Juliana v. United States*

The main legal action in the ATL movement, *Juliana v. United States*, was filed in United States District Court for the District of Oregon on International Youth Day in 2015.³⁶ Twenty-one youth plaintiffs filed suit against the United States, Barack Obama in his official capacity as President, and several department heads and agency directors.³⁷ They claim that the United States government has known for over fifty years that burning fossil fuels causes global warming and dangerous climate change, and that the destabilization of the climate system will endanger the plaintiffs and future generations.³⁸

³¹ Wood & Woodward, *supra* note 11, at 643; *see generally* OUR CHILDREN'S TR., <https://www.ourchildrenstrust.org/> (last visited Jan. 15, 2019).

³² *See generally* OUR CHILDREN'S TR., *supra* note 31.

³³ *See Mission*, OUR CHILDREN'S TR., <https://www.ourchildrenstrust.org/mission-statement/> (last visited Jan. 15, 2019).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Complaint for Declaratory and Injunctive Relief, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. Aug. 12, 2015), ECF No. 1 [*hereinafter* Complaint]; *Details of Proceedings*, OUR CHILDREN'S TR., <https://www.ourchildrenstrust.org/federal-proceedings> (last visited Jan. 15, 2019).

³⁷ Complaint, *supra* note 36, at 2–3.

³⁸ *Id.* at 3.

In their Complaint, plaintiffs argue that the court has jurisdiction to hear the case because it presents a federal question and asks for the creation of a remedy and further relief.³⁹ They assert four claims for relief.⁴⁰ First, they allege that the government defendants, by permitting fossil fuel production and consumption and its associated pollution, violated the Due Process Clause of the Fifth Amendment by harming the climate system critical to plaintiffs' rights to life, liberty, and property.⁴¹ Plaintiffs claim defendants have restrained plaintiffs' liberties to care for themselves and have imposed limitations on their freedom to act on their own behalf to secure a stable climate.⁴² They go on to argue that sea level rise caused by defendants' aggregate actions will constitute a taking of plaintiffs' property, and that specific actions taken by the United States through the Department of Energy have deprived them of their Fifth Amendment rights.⁴³

The second claim for relief asserts that defendants have violated the equal protection principles "embedded in the Fifth Amendment."⁴⁴ Plaintiffs argue that the government defendants' harmful acts have denied them the "same protection of fundamental rights afforded to prior and present generations of adult citizens."⁴⁵ As children, plaintiffs assert that they deserve special protection, along with future generations.⁴⁶ They argue that by favoring the present economic benefits of older citizens who will not be around for the worst climate impacts, defendants are unconstitutionally depriving the plaintiffs of their rights, since the full impacts of defendants' actions will be uniquely experienced by children and future generations.⁴⁷

Third, plaintiffs allege that the Ninth Amendment's⁴⁸ guarantee of protection from government intrusion includes the "right to be sustained by our country's vital natural systems, including our climate system."⁴⁹ They argue that the nation's founders intended that the federal government

³⁹ *Id.* at 7 (citing 28 U.S.C. §§ 1331, 2201, 2202).

⁴⁰ *Id.* at 84–94.

⁴¹ *Id.* at 84–89.

⁴² Complaint, *supra* note 36, at 87.

⁴³ *Id.* at 88.

⁴⁴ *Id.* at 89.

⁴⁵ *Id.*

⁴⁶ *Id.* at 90.

⁴⁷ *Id.* at 90–91.

⁴⁸ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

⁴⁹ Complaint, *supra* note 36, at 92.

have the authority and responsibility to be a steward of the natural resources of the nation, evidenced by its delegated power to manage lands and authority to address challenges facing the country.⁵⁰

Invoking the notion of an atmospheric trust, the fourth and final claim for relief contends that plaintiffs are beneficiaries of rights under the public trust doctrine.⁵¹ These rights are secured by the Ninth Amendment and embodied in the reserved powers doctrines of the Tenth Amendment⁵² and the Vesting,⁵³ Nobility,⁵⁴ and Posterity⁵⁵ Clauses of the Constitution.⁵⁶ They assert that the atmosphere is one of several vital natural resources that defendants must act to protect.⁵⁷

Plaintiffs' alleged harms are numerous and varied.⁵⁸ Unsurprisingly, the lawsuit quickly attracted the attention of major oil companies, and three trade associations asked to intervene in opposition and filed a motion to dismiss.⁵⁹ The court granted their motion to intervene on January 14,

⁵⁰ *Id.*

⁵¹ *Id.* at 93.

⁵² "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

⁵³ "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1; "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1; "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

⁵⁴ "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. I, § 9, cl. 8.

⁵⁵ "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America." U.S. CONST. pmb1.

⁵⁶ Complaint, *supra* note 36, at 93.

⁵⁷ *Id.*

⁵⁸ *See id.* at 8–38.

⁵⁹ Motion to Intervene, *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. Nov. 12, 2015) (No. 6:15-cv-01517-TC), ECF No. 14; Motion to Dismiss for Failure to State a Claim, *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. Nov. 12, 2015) (No. 6:15-cv-01517-TC), ECF No. 19; *see also* Press Release, Our Children's Tr., World's Largest Petroleum Companies Call Youth's Landmark Climate Lawsuit "a Direct Threat to [Their] Businesses" (Nov. 12, 2015), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/575adc844c2f8523de7283b7/1465572487750/15.11.12.IntervenerPressRelease.pdf>.

2016, naming the three fossil fuel groups—American Fuel and Petrochemical Manufacturers, the American Petroleum Institute, and the National Association of Manufacturers—as defendants in the lawsuit.⁶⁰ In a powerfully written order, District Judge Ann Aiken adopted Magistrate Judge Thomas Coffin’s findings and recommendation and denied defendants’ motion to dismiss.⁶¹

After assuming office, President Trump replaced President Obama as a defendant per federal rules,⁶² and the case is ongoing. All three fossil fuel groups, despite intervening in the case because of the serious threat it posed to their members, withdrew from the case in late May 2017.⁶³ Some have speculated that this withdrawal was motivated by the three groups’ differing views on climate change, since they withdrew after being ordered to submit a joint filing outlining their consensus regarding the effects of human activity and greenhouse gas emissions on global warming.⁶⁴

On June 8, 2017, Judge Aiken denied defendants’ motion for an interlocutory appeal.⁶⁵ The next day, the government filed a writ of mandamus petition in the Ninth Circuit Court of Appeals, requesting a stay of district court proceedings.⁶⁶ Later that month, the district court scheduled trial for February 5, 2018.⁶⁷ One month later, however, the Ninth Circuit ordered a temporary stay of the district court proceedings, and ordered the

⁶⁰ Order Granting Motion to Intervene, *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. Jan. 14, 2016) (No. 6:15-cv-01517-TC), ECF No. 50; Press Release, Our Children’s Tr., Fossil Fuel Industry Becomes Named Defendant in Youths’ Landmark Constitutional Climate Lawsuit (Jan. 14, 2016), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/575ad9d5746fb99233a57c47/1465571800302/16.01.14MTIGrantedPR.pdf>.

⁶¹ Order Granting Findings and Recommendations at 54, *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. Nov. 10, 2016) (No. 6:15-cv-01517-TC), ECF No. 83 (“Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”).

⁶² Fed. R. Civ. P. 25(d).

⁶³ Order Granting Motions to Withdraw, *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. June 28, 2017) (No. 6:15-cv-01517-TC), ECF No. 182.

⁶⁴ John Bonazzo, *Kids’ Lawsuit Scares Off Big Oil Lobbyists Who Can’t Disprove Climate Change*, OBSERVER (May 26, 2017), <http://observer.com/2017/05/climate-change-kids-lawsuit-fossil-fuels-big-oil>.

⁶⁵ Order Adopting Findings and Recommendations of Magistrate Judge Coffin and Denying Motion for Interlocutory Appeal, *Julianna v. United States*, 217 F. Supp. 3d 1224 (D. Or. June 8, 2017) (No. 6:15-cv-01517-TC), ECF No. 172; *Details of Proceedings, supra* note 36.

⁶⁶ Petition for Writ of Mandamus, *Julianna v. United States*, No. 17-71692 (9th Cir. June 9, 2017).

⁶⁷ Order Granting Motions to Withdraw, *supra* note 63.

plaintiffs to respond to defendants' mandamus petition.⁶⁸ In late August, plaintiffs filed their answer,⁶⁹ and eight amicus curiae briefs were filed shortly thereafter.⁷⁰ The Ninth Circuit heard oral argument on the mandamus petition on December 11, 2017.⁷¹

In the Ninth Circuit proceedings, the government argued that allowing the case to proceed would result in burdensome discovery obligations, even though the district court had yet to order any discovery.⁷² On March 7, 2018, the Ninth Circuit denied the mandamus petition, holding that it was premature.⁷³

In April, following the Ninth Circuit's denial, Magistrate Judge Coffin set trial for October 29, 2018.⁷⁴ In May, Judge Coffin denied defendants' motion for a protective order and stay of all discovery in the case.⁷⁵ Defendants then made multiple unsuccessful attempts to avoid trial. On July 18, U.S. District Judge Aiken heard oral arguments on defendants' motions for judgment on the pleadings and summary judgment.⁷⁶ On July 20, the Ninth Circuit denied defendants' second petition for a writ of mandamus.⁷⁷ Days later, on July 30, the U.S. Supreme Court denied the government's application for a stay and its "premature" request to review the case, preserving the October 29, 2018 trial date.⁷⁸

In a bold move, the government filed yet another motion to stay discovery and trial in October 2018.⁷⁹ It also filed a third writ of mandamus

⁶⁸ Order Staying Proceedings, *Juliana v. United States*, No. 17-71692 (9th Cir. July 25, 2017).

⁶⁹ Answer, *Juliana v. United States*, No. 17-71692 (9th Cir. Aug. 28, 2017).

⁷⁰ Press Release, Our Children's Tr., Groups Supporting Plaintiffs in *Juliana v. U.S. Urge Dismissal of Trump's Mandamus Petition* (Sept. 5, 2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/59b0287d9f8dced99c50013b/1504716927618/17.09.05+Amicus+Briefs+in+Support+of+Juliana+PR.pdf>.

⁷¹ Oral Argument, *Juliana v. United States*, No. 17-71692 (9th Cir. Dec. 11, 2017).

⁷² *In re United States*, 884 F.3d 830, 833–35 (9th Cir. 2018).

⁷³ *Id.* at 838.

⁷⁴ Press Release, Our Children's Tr., *Juliana v. United States Climate Trial Set for October 29, 2018* (Apr. 12, 2018), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5acfb356562fa7b5ec6156da/1523561303604/2018.04.12+Trial+Date+Set+in+Juliana+v.+US++Press+Release.pdf>

⁷⁵ Order Denying Motion for Protective Order and Motion for Stay, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. May 25, 2018), ECF No. 212.

⁷⁶ Oral Argument, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. July 18, 2018).

⁷⁷ *In re United States*, 895 F.3d 1101 (9th Cir. 2018).

⁷⁸ *United States v. U.S. Dist. Court for Dist. of Or.*, 139 S. Ct. 1 (2018) (mem.).

⁷⁹ Motion for Stay of Discovery and Trial Pending Supreme Court Review, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. Oct. 5, 2018), ECF No. 361.

petition in the Ninth Circuit, seeking a stay pending another petition to the Supreme Court.⁸⁰ On October 15, District Judge Aiken granted the government's request, in part, by limiting the scope of discovery and dismissing President Trump from the case.⁸¹ The government filed its petition with the Supreme Court on October 18, claiming harmful litigation costs and again requesting a stay. Plaintiffs responded on October 22, requesting that the Court allow trial to proceed on October 29. The Supreme Court denied defendants' request for a stay on November 2, pointing to the fact that mandamus relief might be available at the Court of Appeals.⁸² Days later, the government filed another motion to stay the district court proceedings. The Ninth Circuit granted a stay of trial (though not trial preparations) on November 8, pending that court's consideration of the defendants' latest petition for a writ of mandamus.⁸³ The District Court certified the case pending interlocutory appeal to the Ninth Circuit on November 21.⁸⁴

The Ninth Circuit Court of Appeals granted the government's petition for interlocutory appeal in the *Juliana* case on December 26, 2018.⁸⁵ On January 7, 2019, the court granted plaintiffs' request to expedite briefing in the interlocutory appeal.⁸⁶ As of this writing, all briefs have been filed⁸⁷ and the court has scheduled oral arguments for June 4, 2019 in Portland, Oregon.⁸⁸

2. *Alaska*

In addition to the federal *Juliana* lawsuit, atmospheric trust actions have been brought in state courts around the country. In Alaska, six young citizens from across the state brought an action in 2011 against Alaska's

⁸⁰ *United States v. U.S. Dist. Court for Dist. of Or.*, No. 18-72776 (9th Cir. Oct. 12, 2018).

⁸¹ Order, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. Oct. 15, 2018), ECF No. 369.

⁸² *In re United States*, 139 S. Ct. 452 (2018) (mem.).

⁸³ See *Details of Proceedings*, *supra* note 36.

⁸⁴ Order, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. Nov. 21, 2018), ECF No. 444.

⁸⁵ *Juliana v. United States*, No. 18-80176 (9th Cir. Dec. 26, 2018).

⁸⁶ *Juliana v. United States*, No. 18-36082 (9th Cir. Jan 7, 2019).

⁸⁷ See Appellant's Opening Brief, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 1, 2019); Plaintiffs-Appellees' Answering Brief, *Juliana v. United States*, No. 18-36082 (Feb. 22, 2019); Appellant's Reply Brief, *Juliana v. United States*, No. 18-36082 (Mar. 8, 2019).

⁸⁸ Notice of Oral Argument on Tuesday, June 4, 2019, *Juliana v. United States*, No. 18-36082 (9th Cir. Mar. 24, 2019).

Department of Natural Resources.⁸⁹ They sought declaratory and injunctive relief for the department's alleged breach of its public trust obligations in Article VIII of the Alaska Constitution.⁹⁰ The plaintiffs sought a declaration that the constitution's protection of natural resources held in trust for the public includes the atmosphere.⁹¹ They asserted that the Department of Natural Resources "is obligated to protect and preserve the atmosphere by establishing and enforcing limitations on the levels of greenhouse gases ("GHG") emissions as necessary to significantly slow the rate and magnitude of global warming so as to prevent climate change from denying Plaintiffs and Alaskans a livable future."⁹²

In March 2012, the state trial court granted the Department's motion to dismiss, holding that the issues raised in the complaint were nonjusticiable.⁹³ The court reasoned that there was a lack of judicially discoverable and manageable standards upon which to review the state's policy concerning GHG emissions, and that even if the public trust doctrine applied to the atmosphere, it was unclear what legal standards the court would apply.⁹⁴ The court noted that the Alaska Supreme Court "has acknowledged that Article VIII does not set up a trust per se and that the wholesale application of private trust law to public trust doctrine is inappropriate."⁹⁵ Additionally, the court stated that the decision to reduce GHG emissions turns

⁸⁹ Amended Complaint, *Kanuk v. Alaska Dep't of Nat. Res.*, No. 3AN-11-07474 CI (Alaska Super. Ct. July 21, 2011).

⁹⁰ *Id.* at 2; *see infra* Part II.D. Article VIII of the Alaska Constitution states:

Section 1. Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest. Section 2. General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people. Section 3. Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use. Section 4. Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

ALASKA CONST. art. VIII.

⁹¹ Amended Complaint, *supra* note 89, at 3.

⁹² *Id.* at 3.

⁹³ *Kanuk v. Alaska Dep't of Nat. Res.*, No. 3AN-11-07474 CI, at 4 (Alaska Super. Ct. Mar. 16, 2012).

⁹⁴ *Id.* at 8–9.

⁹⁵ *Id.* at 9.

on more than science alone, involving other competing interests like energy needs and economic disruption.⁹⁶ Accordingly, it concluded this decision was a matter of policy best decided by elected officials, rather than the court.⁹⁷

The plaintiffs appealed to the state supreme court,⁹⁸ which issued an opinion in September 2014.⁹⁹ The court held that the youth plaintiffs had standing, and that their standing was not lost because climate change affects others as well.¹⁰⁰ Though the court found that some of the plaintiffs' claims were nonjusticiable, it held that the claims seeking a declaratory judgment on the nature of the public trust doctrine did not present political questions and were therefore justiciable.¹⁰¹ It also noted, however, that the declaratory relief sought by the plaintiffs would not necessarily "advance the plaintiffs' interests any more than it will shape the future conduct of the State," and so there were valid prudential reasons to dismiss the complaint; the court affirmed the dismissal.¹⁰²

The plaintiffs' petition for rehearing was denied the next month.¹⁰³ Moving away from seeking redress in court, fifteen Alaska youth filed a petition for state-level rulemaking in August 2017.¹⁰⁴ This approach generally, as well as the specific fate of this petition, is discussed more fully below in Part II.A.

More recently, sixteen young people filed another climate lawsuit in Alaska in October 2017.¹⁰⁵ They alleged that the state of Alaska, Governor Bill Walker, and various state departments and commissions have systematically authorized and facilitated activities resulting in dangerous levels

⁹⁶ *Id.* at 10.

⁹⁷ *Id.* at 10–11.

⁹⁸ Press Release, Our Children's Tr., Alaska Youth Pursue Climate Case (Nov. 16, 2012), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5761f494e58c6298f3857dc2/1466037397442/12-11-16+AK+Press+Release+.pdf>.

⁹⁹ Kanuk ex rel. Kanuk v. State Dep't of Nat. Res., 335 P.3d 1088 (Alaska 2014).

¹⁰⁰ *Id.* at 1092–95.

¹⁰¹ *Id.* at 1097–1100.

¹⁰² *Id.* at 1103.

¹⁰³ *Alaska, OUR CHILDREN'S TR.*, <https://www.ourchildrenstrust.org/alaska> (last visited Jan. 17, 2019).

¹⁰⁴ Petition of Youth Petitioners and Alaska Youth for Environmental Action to the Alaska Department of Environmental Conservation (Aug. 28, 2017), https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17_Redacted.pdf.

¹⁰⁵ Complaint for Declaratory and Equitable Relief, *Sinnok v. State*, No. 3AN-17-09910 (Alaska Super. Ct. Oct. 27, 2017).

of GHG emissions and denied and delayed climate change mitigation actions in violation of their duties to reduce the state's emissions.¹⁰⁶ After hearing oral argument on Alaska's motion to dismiss in April 2018,¹⁰⁷ the court dismissed the case based on reasoning similar to that in *Kanuk*.¹⁰⁸ Plaintiffs are now in the process of appealing this decision to the Alaska Supreme Court.¹⁰⁹

3. Oregon

In 2011, two young women filed an ATL case in Oregon state court against then-governor John Kitzhaber and the State of Oregon.¹¹⁰ The complaint alleged that the

health, recreational, scientific, cultural, inspirational, educational, aesthetic, and other interests of Plaintiffs will be adversely and irreparably injured by Defendants' failure to protect public trust resources by establishing and enforcing adequate limitations on the levels of greenhouse ("GHG") emissions that will reduce the level of carbon dioxide concentrations in the atmosphere to provide a livable future for these Plaintiffs and all youth in Oregon.¹¹¹

Claiming that the public trust doctrine in Oregon stems from the common law, the state constitution,¹¹² and statutory provisions,¹¹³ plaintiffs noted that the atmosphere is "intricately linked" with other resources protected by the public trust.¹¹⁴ They asked the court to declare that the atmosphere, as well as water resources, navigable waters, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, and fish are all trust resources.¹¹⁵ The court granted the state's motion to dismiss in

¹⁰⁶ *Id.* at 4–5.

¹⁰⁷ Press Release, Our Children's Tr., Constitutional Climate Lawsuit Brought by Young Alaskans Heard in Anchorage (Apr. 30, 2018), <https://www.ourchildrenstrust.org/s/20180430-Sinnok-v-Alaska-hearing-press-release.pdf>.

¹⁰⁸ Order Granting State's Motion to Dismiss, *Sinnok v. State*, No. 3AN-17-09910 (Alaska Super. Ct. Oct. 30, 2018).

¹⁰⁹ See Appellants' Brief, *Sinnok v. State*, No. S-17297 (Alaska Mar. 26, 2019).

¹¹⁰ Amended Complaint, *Chernaik v. Kitzhaber*, No. 16-11-09273 (Or. Cir. May 19, 2011).

¹¹¹ *Id.* at 5

¹¹² OR. CONST. art. VIII, § 5.

¹¹³ OR. REV. STAT. § 537.525.

¹¹⁴ Amended Complaint, *supra* note 110, at 6–7, 15.

¹¹⁵ *Id.* at 17.

April 2012.¹¹⁶ Similar to the holding in the 2011 Alaska case, the court found that the relief requested exceeded the court's authority, the claim was barred by sovereign immunity, the requested relief violated the Separation of Powers doctrine, and the suit presented political questions.¹¹⁷

The plaintiffs appealed the decision, and asked the Oregon Court of Appeals to send the case straight to the state supreme court.¹¹⁸ Instead, the Court of Appeals reversed the lower court, ruling that the trial court misunderstood the scope of its authority and did indeed have the power to declare whether the atmosphere is a trust resource that Oregon has a fiduciary obligation to protect.¹¹⁹ On remand, the trial court again ruled in favor of the state, granting its motion for summary judgment and emphasizing that the issue belongs with the legislature.¹²⁰

Plaintiffs appealed in February 2016,¹²¹ supported by an amicus brief signed by fifty-three law professors from across the country.¹²² On January 9, 2019, the Court of Appeals ruled against plaintiffs, holding that “we can find no source under the Oregon conception of the public-trust doctrine for imposing fiduciary duties on the state to affirmatively act to protect public-trust resources from the effects of climate change. Accordingly, we conclude that the trial court correctly granted the state’s motion for summary judgment.”¹²³

4. *Washington*

Atmospheric trust litigation did not initially succeed in Washington state, either. In 2011, several youth plaintiffs filed suit against the state for violating their substantive due process rights by pursuing and implementing policies that result in dangerous climate impacts.¹²⁴ Although the state, in its answer, admitted that human activity has very likely caused most of

¹¹⁶ Opinion and Order, *Chernaik v. Kitzhaber*, No. 16-11-09273 (Or. Cir. Apr. 5, 2012).

¹¹⁷ *Id.* at 16.

¹¹⁸ Press Release, Our Children’s Tr., Youth Appeal Climate Case (Aug. 2, 2012), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760c9c7c6fc085260488947/1465960904715/12.08.02.ORAppealPressRelease.pdf>.

¹¹⁹ *Chernaik v. Kitzhaber*, 328 P.3d 799, 805, 808 (Or. Ct. App. 2014).

¹²⁰ *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229, at 15, 19 (Or. Cir. 2015).

¹²¹ Opening Brief, *Chernaik v. Brown*, No. A1519826 (Or. Ct. App. Feb. 25, 2016).

¹²² Brief of *Amici Curae* Law Professors, *Chernaik v. Brown*, No. A1519826 (Or. Ct. App. Feb. 25, 2016).

¹²³ *Chernaik v. Brown*, — P.3d —, 295 Or. App. 584, 600 (Or. Ct. App. 2019).

¹²⁴ Amended Complaint, *Svitak v. State*, No. 11-2-16008-4 (Wash. Super. Ct. May 18, 2011); see *Washington Chronology*, OUR CHILDREN’S TR., <https://www.ourchildrenstrust.org/washington-chronology> (last visited Jan. 17, 2019).

the warming over the past fifty years,¹²⁵ the trial court granted the state's motion to dismiss in March 2012.¹²⁶ The next month, plaintiffs filed a petition for direct review of the trial court's decision to the Washington Supreme Court.¹²⁷ The petition was supported by an expert declaration of Dr. James Hansen (then-Director of the NASA Goddard Institute and Adjunct Professor of Earth Sciences at Columbia University), an amicus brief submitted by several faith-based groups, and an amicus brief submitted on behalf of many law professors across the country.¹²⁸

The Washington Supreme Court transferred the case to the Court of Appeals in 2013, which affirmed the trial court's dismissal but left the door open for future state constitutional challenges.¹²⁹ Young people in Washington then went to the Washington State Department of Ecology in June 2014 and filed a petition for rulemaking, requesting that the Department make emission limit update recommendations to the state legislature.¹³⁰ The following years of agency proceedings, litigation, and court orders connected to this rulemaking petition are more fully detailed *infra*.

Environmental advocates have not given up in Washington and continue to use litigation as a tool. On February 16, 2018, thirteen youth citizens filed a new climate lawsuit against Governor Inslee and several state agencies.¹³¹ In the complaint, they asked the court to declare that plaintiffs have "fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty," and "that Defendants have constitutional duties under the Public Trust Doctrine to protect Washington's Public Trust Resources, including the atmosphere."¹³² Perhaps unsurprisingly, Washington's motion to dismiss was granted in August.¹³³

D. Criticisms of Atmospheric Trust Litigation

The ATL movement is not free from critique. Some critics contend that the public trust doctrine is not sufficient in its current form and that

¹²⁵ *Washington Chronology*, *supra* note 124.

¹²⁶ *Svitak v. State*, No. 11-2-16008-4, 2012 WL 12110237 (Wash. Super. Ct. Mar. 2, 2012).

¹²⁷ *Washington Chronology*, *supra* note 124.

¹²⁸ *Id.*

¹²⁹ *See Svitek v. State*, 178 Wash. App. 1020 (2013).

¹³⁰ *Washington Chronology*, *supra* note 124.

¹³¹ Complaint, *Aji P. v. State*, No. 18-2-04448-1 SEA (Wash. Super. Ct. Feb. 16, 2018).

¹³² *Id.* at 70.

¹³³ *Aji P. v. State*, No. 18-2-04448-1 SEA (Wash. Super. Ct. Aug. 14, 2018).

inclusion of the atmosphere is either an impossible or very difficult expansion of the public trust.¹³⁴ Others argue that ATL is a waste of time and energy in states that do not already have an expansive understanding of the public trust.¹³⁵ Critics feel that efforts to expand the doctrine could ultimately harm the understanding of the public trust as it relates to other natural resources.¹³⁶

Joseph Sax, the late Michigan and UC Berkeley law professor credited with reviving the public trust,¹³⁷ wrote in 1969 that “[o]ur legal system tends to provide specific and limited responses to particular problems.”¹³⁸ This remains true today. A court’s ruling as related to particular claims may only go so far in protecting the environment and contributing to actual, positive change. Particularly at the state level, courts will likely struggle to hand down catch-all solutions for a problem as epic as air pollution.

Lack of particularity, in both the claims raised and possible remedies, is arguably the best critique of expanding the public trust to the atmosphere. State agencies lack the authority and ability to fully manage atmospheric pollution, especially greenhouse gases, which are especially well-mixed and disrespectful of borders. While cooperative federalism schemes like that of the Clean Air Act do transfer some permitting and monitoring authority over to the states, the federal government retains a great deal of control.¹³⁹ It could be difficult for courts to find that state governments are causing specific atmospheric harms, and so the federal case, *Juliana v. United States*, may be best positioned to secure better climate outcomes.

Despite its critiques, ATL is bringing attention to one of the most critical issues of our time. Even if the legal campaign does not achieve its tangible goal of federal and state climate action plans, it will, at the very least, have increased public awareness of the threats posed by climate change. The political influence of the lawsuits will likely be vast, regardless of how they fare in court.

¹³⁴ James L. Huffman, *Why Liberating the Public Trust Doctrine is Bad for the Public*, 45 ENVTL. L. 337 (2015).

¹³⁵ Caroline Cress, Comment, *It’s Time to Let Go: Why the Atmospheric Trust Won’t Help the World Breathe Easier*, 92 N.C.L. REV. 236 (2013).

¹³⁶ See *id.*

¹³⁷ Carole M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998), https://www.law.berkeley.edu/files/CLEE/Rose_1998_ELQ_Joseph_Sax_and_the_Idea_of_the_Public_Trust.pdf.

¹³⁸ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1969).

¹³⁹ See Clean Air Act, 42 U.S.C. §§ 7401–7671 (2012).

II. ALTERNATIVES TO ATMOSPHERIC TRUST LITIGATION

Atmospheric trust litigation is unlikely to be sufficient on its own in securing a clean and healthy atmosphere for current and future generations. In states where public trust precedent is weak, it may be imprudent to proceed with cases that base the government's duty in an expanded understanding of an already weak legal principle. This Part highlights a select few advocacy tools that will be valuable in the long battle for a cleaner, better-protected atmosphere.

A. *Petitions for Rulemaking and Connected Lawsuits*

Petitions for rulemaking are importantly connected to the ATL effort led by Our Children's Trust. Many efforts to bring about change begin as rulemaking petitions and later evolve into lawsuits after agencies deny them. Those that have gone to court have proceeded under arguments similar to those made in the ATL cases that began in court. Though they are often connected to legal actions, petitions for rulemaking are nevertheless alternatives to ATL since they do not always land the agencies and petitioners in court. In the climate context, however, many rulemaking petitions have spurred litigation, as discussed below.

1. *Alaska*

After the state courts dismissed *Kanuk*,¹⁴⁰ fifteen young people filed a rulemaking petition with the Alaska Department of Environmental Conservation in August 2017.¹⁴¹ The proposed rule would require the Alaska Department of Environmental Conservation to reduce carbon dioxide emissions according to the best available science, inventory major sources of the state's GHG emissions, and adopt a Climate Action Plan.¹⁴² The petition was denied in September 2017, and sixteen youth plaintiffs have since sued Governor Walker. They filed their complaint on October 27, 2017.¹⁴³ The proceedings of this case, *Sinnok v. State*, are discussed in Part I.

¹⁴⁰ See *Kanuk ex rel. Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1099-1102 (Alaska 2014); see *infra* Part I.C.2.

¹⁴¹ ALASKA YOUTH FOR ENVIRONMENTAL ACTION TO THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION (2017), https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17_Redacted.pdf.

¹⁴² *Id.*

¹⁴³ Complaint for Declaratory and Equitable Relief, *supra* note 105.

2. Colorado

In 2013, Colorado youth filed a petition for rulemaking with the Colorado Oil and Gas Conservation Commission within the Colorado Department of Natural Resources (“COGCC”), asking it to promulgate a rule that suspended the issuance of hydraulic fracturing permits until it could be done safely and without impairing Colorado’s resources and climate system.¹⁴⁴ The COGCC denied the petition in May 2014, claiming that the request exceeded its authority.¹⁴⁵

Colorado youth appealed the COGCC’s decision to state trial court in July 2014.¹⁴⁶ After oral argument on COGCC’s motion to dismiss in November 2014, the court ruled in favor of the plaintiffs.¹⁴⁷ However, the district court eventually affirmed the COGCC’s order denying the fracking petition.¹⁴⁸

The Colorado Court of Appeals heard the youth plaintiffs’ appeal in February 2017.¹⁴⁹ The court reversed, finding that the COGCC misinterpreted the Oil and Gas Conservation Act as requiring a balance between oil and gas production and public health, safety, and welfare.¹⁵⁰ The Colorado Attorney General petitioned for a writ of certiorari, and it was granted by the Colorado Supreme Court in January 2018.¹⁵¹ In January 2019, the Colorado Supreme Court found for the state, claiming that “the Commission correctly determined that it could not, consistent with [the provisions suggested by plaintiffs], adopt such a rule.”¹⁵²

¹⁴⁴ XIUHITEZCATL MARTINEZ ET AL., PETITION TO COLO. OIL & GAS CONSERVATION COMM’N ET. AL. (2013), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d25fab48de66f7214e4d/1465963105219/COFrackingPetition.pdf>.

¹⁴⁵ COLO. OIL & GAS CONSERVATION COMM’N, IN RE PETITION FOR RULEMAKING, ORDER NO. 1-187 (2014), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d2011d07c0ae98353947/1465963010349/COGCCWrittenDecision14.5.29.pdf>.

¹⁴⁶ Complaint, *Martinez v. Colo. Oil & Gas Conservation Comm’n*, 2014 WL 7474553 (Colo. Dist. Ct. Dec. 24, 2014) (No. 2014-CV-32637).

¹⁴⁷ *Martinez v. Colo. Oil & Gas Conservation Comm’n*, No. 2014-CV-32637, 2014 WL 7474553 (Colo. Dist. Ct. Dec. 24, 2014).

¹⁴⁸ Order on Plaintiffs’ Appeal, *Martinez v. Colo. Oil & Gas Conservation Comm’n*, 2014 WL 7474553 (Colo. Dist. Ct. Dec. 24, 2014) (No. 2014-CV-32637).

¹⁴⁹ *Colorado, OUR CHILDREN’S TR.*, <https://www.ourchildrenstrust.org/colorado> (last visited Jan. 17, 2019).

¹⁵⁰ *Martinez v. Colo. Oil & Gas Conservation Comm’n*, No. 16CA0564 (Colo. App. Mar. 23, 2017).

¹⁵¹ *Martinez v. Colo. Oil & Gas Conservation Comm’n*, No. 17SC297, 2018 WL 582105 (Colo. Jan. 29, 2018).

¹⁵² *Martinez v. Colo. Oil & Gas Conservation Comm’n*, No. 17SC297, 2019 WL 179037, ¶ 50 (Colo. Jan. 14, 2019).

3. *Washington*

Also connected to ATL efforts at the state court level is the multi-year battle over rulemaking in Washington. Youth petitioned the Washington State Department of Ecology in June 2014 for “the promulgation of a rule to recommend to the Legislature an effective emissions reductions trajectory that is based on best available climate science and will achieve safe atmospheric concentrations of carbon dioxide by 2100.”¹⁵³ The department denied the petition, and youth plaintiffs challenged the decision in court.¹⁵⁴

In June 2015, the district court ordered the Washington Department of Ecology to reconsider the petition and consider the best science available.¹⁵⁵ After failed settlement attempts and more back-and-forth in court, the case went up to the Washington Court of Appeals. In September 2017, it reversed the district court’s earlier orders commanding the department to act.¹⁵⁶ In February 2018, as discussed above in Part I, twelve youth citizens filed a related ATL case against Governor Jay Inslee.¹⁵⁷

4. *New Mexico*

In 2015, the New Mexico Court of Appeals ruled that the state has a duty to protect the atmosphere under the New Mexico Constitution.¹⁵⁸ Following this important decision, New Mexico youth filed a rulemaking petition to the Environmental Improvement Board, requesting that the state implement a GHG reduction strategy rooted in the best science.¹⁵⁹ In August 2017, the Board denied the youths’ petition for a full hearing on their rulemaking petition, saying the proposed rule was not enforceable as drafted.¹⁶⁰

¹⁵³ ANDREA RODGERS HARRIS, PETITION OF OUR CHILDREN TO WASHINGTON STATE DEPARTMENT OF ECOLOGY (2014), https://static1.squarespace.com/static/571d109b04426270152febe0/t/5785909d9de4bb340b8b75df/1468371110844/Petition.Final_.6.17.14.pdf.

¹⁵⁴ *Washington Chronology*, *supra* note 124; Petition for Review, Foster ex rel. Foster v. Wash. Dep’t of Ecology, No. 14-2-25295-1 SEA (Super. Ct. Wash. June 23, 2015).

¹⁵⁵ Foster ex rel. Foster v. Wash. Dep’t of Ecology, No. 14-2-25295-1 SEA (Super. Ct. Wash. June 23, 2015).

¹⁵⁶ *Washington Chronology*, *supra* note 124.

¹⁵⁷ Complaint, *supra* note 131.

¹⁵⁸ Sanders-Reed v. Martinez, No. 33,110, at 12 (N.M. Ct. App. Mar. 12, 2015).

¹⁵⁹ PETITION FOR REGULATORY CHANGE IN RE PROPOSED NEW REGULATION (2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5952b8642e69cf02d5fc13e/1498593381574/17.06.26+NM+Petition.pdf>.

¹⁶⁰ N.M. ENVTL. IMPROVEMENT BD., ORDER DENYING PETITION FOR HEARING, NO. EIB 17-01 (2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/>

B. Legislation Creating a Cause of Action for the Protection of the Atmosphere

Environmental advocates can also lobby for state and federal legislation that creates a cause of action to protect the air and other natural resources. The Michigan Environmental Protection Act (“MEPA”) is one result of this tactic. It was enacted in 1970, and explicitly created a cause of action for any person or entity against any other person or entity “for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction.”¹⁶¹

MEPA is a strong tool for parties seeking to sue. It “provides an umbrella of environmental protection to be superimposed over more specific environmental statutes—a template that allows private citizens to bring causes of action based on statutes that do not, in and of themselves, provide avenues of relief in civil lawsuits.”¹⁶² Plaintiffs must establish a prima facie case, but “past, continuing, and possible future conduct of the defendant are covered by the statute,” as are natural resources that are both publicly and privately owned.¹⁶³

Other state legislatures, and possibly the U.S. Congress, may be open to creating similar causes of action that lead to stronger legal activity against people and entities that cause harm to natural resources. Of course, the politics of both individual states and the federal government play a major role in the likelihood of success for this environmental advocacy tool.

C. Governors’ Executive Orders

State governors have the power to effect positive atmospheric change through executive orders, though the power varies from state to state.¹⁶⁴ Governors may choose to use their executive order authority for a variety of reasons, including to trigger emergency powers, create committees and commissions, and address issues.¹⁶⁵ Governors may utilize this power to

59a886ba579fb39e3ef9f317/1504216762776/2017.08.31+NM+EIB+order+denying+petition+for+hearing.pdf.

¹⁶¹ Michigan Environmental Protection Act, MICH. COMP. LAWS § 324.1701 (2018).

¹⁶² *Preserve the Dunes, Inc. v. Dep’t of Envtl. Quality*, 655 N.W.2d 263, 271 (2002), rev’d, N.W.2d 847 (2004).

¹⁶³ *Substantive Statutes: The Michigan Environmental Protection Act*, NEIGHBORING PROPERTY OWNERS § 9:3 (2018).

¹⁶⁴ See COUNCIL OF STATE GOV’TS, BOOK OF THE STATES 114 tbl. 4.5 (2018), <http://knowledgecenter.csg.org/kc/system/files/4.5.2018.pdf>.

¹⁶⁵ *Governor’s Power & Authority*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/cms/management/powers-and-authority> (last visited Jan. 17, 2019).

issue orders that force state environmental agencies to issue rules related to atmospheric concentrations of GHGs.

Governors are not likely to spontaneously force state agencies to take a tougher approach to combating climate change and cleaning up polluted air. They may be more inclined to issue such orders if courts begin finding a state duty to protect the air and atmosphere. Even without court holdings, citizens should petition their governors to compel state agencies to issue strict rules that prescribe ratcheting down greenhouse gas emissions by a certain percentage each year.

There are several potential criticisms of this tactic. One is that executive orders can be undone much more easily than court orders, agency rules, and legislation. A change in gubernatorial administrations can bring in a new governor ready to swiftly undo a previous governor's directive. However, if an agency has already issued a rule that is tough on emissions, it may be more difficult to backtrack that progress. Another potential issue with this executive order tactic is that an agency may struggle to meet deadlines imposed upon it if a governor is particularly ambitious or not fully aware of the challenges that accompany a directive forcing adoption of new rule. Finally, governors might be resistant to issuing climate orders because of the nature of air pollution. Many pollutants mix and travel from state to state, and governors may not be inclined to force their own states to fix a problem actually or seemingly caused by out-of-state polluters.

The executive order tactic has been implemented in Massachusetts. In September 2016, Governor Charles Baker issued Executive Order Number 569, "Establishing an Integrated Climate Change Strategy for the Commonwealth,"¹⁶⁶ following a court order that resulted from litigation over a rulemaking petition.¹⁶⁷ The Massachusetts Supreme Court had declared that the state's Department of Ecology was not fulfilling its legal obligation and ordered it to promulgate regulations that limited emissions and became more stringent over time.¹⁶⁸

Governor Baker's order requires the implementation of a comprehensive energy plan and regulations for the reduction of Massachusetts' GHG emissions.¹⁶⁹ It orders the Secretary of Energy and Environmental Affairs to follow specific mandates to achieve GHG emissions reductions and directs secretaries to prepare a Climate Adaptation Plan.¹⁷⁰

¹⁶⁶ Mass. Exec. Order No. 569 (Sept. 16, 2016), <https://www.mass.gov/files/documents/2016/09/nl/executive-order-climate-change-strategy.pdf>.

¹⁶⁷ *Massachusetts, OUR CHILDREN'S TR.*, <https://www.ourchildrenstrust.org/massachusetts> (last visited Jan. 17, 2019).

¹⁶⁸ *Kain v. Dep't of Env'tl. Prot.*, 49 N.E. 1124 (Mass. 2016).

¹⁶⁹ Mass. Exec. Order No. 569, *supra* note 166.

¹⁷⁰ *Id.*

D. Constitutional Amendments

Amending the United States Constitution and state constitutions is perhaps one of the simplest—yet one of the most formidable—solutions for securing the right to a clean environment, including a healthy atmosphere. Proponents of “green amendments” assert that bypassing traditional legal tactics and mobilizing communities for constitutional change is a better way to advocate for the environment and pollution prevention.¹⁷¹

In some states, efforts are being made to add green amendments to state constitutions.¹⁷² In Pennsylvania, the state constitution already secures a right to a healthy environment.¹⁷³ And while the Alaska Constitution does not directly secure a right to a healthy environment, it does mention the preservation of natural resources.¹⁷⁴ Of course, some state constitutions do not mention natural resources or citizens’ rights to a clean and healthy environment in either the main text or in amendments.¹⁷⁵

The degree to which constitutional amendments can have a positive impact on environmental outcomes will of course depend on their exact language and the ways in which courts are willing to interpret them. Though it is unlikely a federal green amendment will be in the works anytime soon, state-level efforts to adopt environmental protections via constitutional amendments are promising.

¹⁷¹ *The Delaware Riverkeeper*, DEL. RIVERKEEPER NETWORK, <http://www.delaware-riverkeeper.org/delaware-riverkeeper> (last visited Jan. 17, 2019).

¹⁷² Press Release, Delaware Riverkeeper Network, Constitutional Amendment to Protect Environmental Rights Announced (Nov. 30, 2017), <http://www.delawareriverkeeper.org/sites/default/files/PR%20NJ%20Green%20Amendment%20Announcement%20%282017-11-30%29.pdf>; *A New York Environmental Rights Amendment on the Horizon*, FOR THE GENERATIONS (Mar. 16, 2018), <http://forthe generations.org/a-new-york-environmental-rights-amendment-on-the-horizon>.

¹⁷³ PA. CONST. § 27. The provision states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Id.

¹⁷⁴ ALASKA CONST. art. VII.

¹⁷⁵ DEL. RIVERKEEPER NETWORK, TOOLKIT FOR ACTION IN YOUR STATE 10–19 (2017), <http://www.delawareriverkeeper.org/sites/default/files/toolkit.pdf>. The following states’ constitutions do not explicitly protect natural resources: Connecticut, Delaware, Indiana, Iowa, Kansas, Maine, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, Oregon, South Dakota, and West Virginia. *See id.*

III. OTHER ENVIRONMENTAL ADVOCACY TOOLS

In addition to ATL, rulemaking petitions, legislation, and constitutional amendments, advocates may employ other tactics to achieve a cleaner environment for the future. These include suing fossil fuel companies for damages caused by climate change; classic, issue-specific legislative approaches; and non-legal approaches. Non-legal approaches include things like sharing relevant knowledge with peers, advocating for commercial composting, and encouraging organizations such as business and schools to implement more environmentally-friendly policies.

Of course, these other tools may not impart lasting change quite like those featured in this Note. If these various approaches are continually utilized, however, they will contribute to a cleaner future in a very meaningful way. The comprehensive use of these tactics ensures that legislation, public sentiment, and industry advancements all continue to move towards greater environmental protection and quality.

CONCLUSION

The climate reality facing the United States and the world as a whole is a dire one. Environmental advocacy work, more than ever before, is necessary and worthwhile, and environmental advocates fortunately have many tools in their kit. Atmospheric trust litigation is poised to potentially expand the understanding and application of the public trust doctrine to the air and atmosphere. Other tactics, including rulemaking petitions, legislation, governors' executive orders, and constitutional amendments should bolster efforts to achieve a healthy and protected atmosphere. Aside from these approaches, there are many others at play in the fight for a clean atmosphere. Advocates should learn about all the tools in their kit and apply them strategically, depending on the forum and issues at hand.

The separate approaches discussed in this Note are often connected. For instance, the failure of a rulemaking petition can lead to a lawsuit confirming a trust responsibility. Relatedly, a finding that a state constitution ensures the protection of the atmosphere can lead to a governor's executive order implementing that state responsibility. Since there is no one-size-fits-all approach, advocates must evaluate the variety of tools at their disposal and employ those most likely to succeed to best protect the atmosphere left for future generations.

