

The Trouble With Atmospheric Public Trust Claims

Law360, New York (June 2, 2011) -- Earlier this month, Wild Earth Advocates and various children-plaintiffs filed complaints in federal and state courts alleging that government officials have breached their public trust duties by failing to protect the atmosphere from the impacts of greenhouse gas emissions and resulting climate change.

In general, the state complaints seek declaratory relief to establish that the atmosphere is a protected public trust resource under state common law. Plaintiffs also seek a declaration that as a public trust resource, the states must take actions to protect the atmosphere by reducing GHG emissions.

The federal complaint names the administrator of the U.S. Environmental Protection Agency and the secretaries of Interior, Agriculture, Commerce, Energy and Defense, alleging that the federal government is a co-sovereign and trustee in the atmosphere and that the actions of these agencies have breached the federal fiduciary duty arising from the atmospheric public trust.

These recent suits are the latest claims employing common law principles in an attempt to force action to mitigate greenhouse gas emissions and address the impacts of climate change. While these claims raise standing and causation issues that are present in other common law climate change litigation, the use of the public trust doctrine also raises a number of novel legal questions. Here, we discuss the specific issues raised by the public trust challenge and also address standing concerns in light of the expected ruling in *AEP v. Connecticut*.

Is There an Atmospheric Public Trust? By Whom is it Held?

The Public Trust has its roots in the Institutes of Justinian. Recognized in English common law, the public trust established that the king held all submerged lands in trust for the people, who could use them for the common purposes of navigation, fishing and commerce. The public trust was subsequently incorporated into American common law through original colonial grants, which gave the colonies the authority and responsibility to hold the public trust on behalf of their residents. As incorporated into early American common law, the public trust covered only the public's rights of navigation, fishing and commerce in submerged lands held in the public trust.

However, as the public's use of the shoreline and waterways has grown and changed over time, some state courts have recognized the public trust as a flexible doctrine that can evolve with public use of the shores. In its broadest interpretation, some state courts have found that the public trust is expansive enough to cover all natural resources.

In these states, a public trust in the atmosphere is certainly cognizable. However, it should be noted that state public trust doctrines vary widely in the scope of the rights they recognize, and states taking an expansive view of a "living" public trust doctrine appear to be in the minority. Thus, while the concept of an atmospheric public trust is well established in the academic literature, its foundations in the common law are less certain.

If a public trust in the atmosphere can be established, the next important question is who holds that trust. Traditionally in the United States, the public trust in water resources belongs to the states. This right was granted to the colonies by the king of England and has been granted to later-admitted states under the equal footing doctrine. Thus, it would appear that any atmospheric public trust would be held by the states individually.

In the federal complaint, plaintiffs allege that the federal government is a co-sovereign and co-trustee in the atmospheric public trust. It is not clear upon what basis plaintiffs seek to establish a federal public trust in the atmosphere. Historically, the federal "public trust" has been limited to the federal navigational servitude.

The federal navigational servitude establishes the paramount right of the federal government to maintain the public trust right in navigation to promote interstate commerce. The federal government also has a fiduciary duty to act as a trustee of resources on public lands. However, it is not immediately apparent how these narrowly circumscribed federal duties will naturally evolve through the common law into the recognition of a much broader federal public trust in the atmosphere.

Could a Public Trust in the Atmosphere be Practically Enforced and Administered?

If an atmospheric public trust were to be recognized by the courts, one of the most significant practical considerations is how such a trust could be enforced and administered. As any environmental practitioner will recognize, even conventional air pollution problems often have significant interstate contributions that a single state acting alone has little ability to stop.

This challenge is magnified in the context of GHGs because of their nature as globally mixed pollutants. Thus, even if a state were to attempt to protect the atmospheric public trust by eliminating all GHG emissions within its borders, it would not be able to protect the public trust in the atmosphere unless other states and countries took similar actions.

In the context of the traditional public trust, courts have recognized that the state has an affirmative duty to both protect the corpus of the public trust and seek compensation for any harms to it. In most cases, a state that diligently enforces the public trust within its borders will be able to maintain protected resources in keeping with its obligations to protect the corpus of the trust. Because this is not the case with climate change, there are significant difficulties that may arise in crafting a judicially recognized atmospheric public trust that would be legally enforceable.

Can Plaintiffs Establish Standing to Bring Public Trust Claims for Climate Change?

There are a number of standing issues that plaintiffs must confront. Among them are the ability to satisfy the redressability argument for constitutional standing and whether the prudential standing requirements can be met.

Because of the globally mixed nature of GHGs, plaintiffs in state-level public trust cases are likely to face standing issues arising from a failure to demonstrate redressability. Because no state acting alone can attain GHG reductions significant enough to measurably alter the impacts of global warming, it is likely that plaintiffs will have difficulty establishing that they have alleged an injury that can be redressed.

We would note that certain types of public trust climate change claims, such as failure to take actions to adapt to changing availability of water, likely allege redressable injuries, but these claims are more closely tied to the traditional public trust interest and do not have a strong nexus with the atmospheric public trust.

Furthermore, the issues related to the administration of state public trusts in the atmosphere, discussed above, raise questions as to whether there are judicially discoverable and manageable standards, permitting a court to find prudential standing.

Furthermore, in the recent arguments in *AEP v. Connecticut* several justices expressed skepticism that there are judicially manageable standards for climate change claims, prompting many observers to conclude that a holding limiting common law climate change claims on prudential standing grounds is likely.

--By Kevin A. Gaynor, Benjamin S. Lippard and Margaret E. Peloso, Vinson & Elkins LLP

Kevin Gaynor and Benjamin Lippard are partners and Margaret Peloso is an associate in the environmental and climate change practice groups in the Washington, D.C., office of Vinson & Elkins.

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