

The *Kelsey Cascadia Rose Juliana* decision: A Ray of Light

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On November 10, while we were all still absorbing the fact that the Republican candidate had won, Professor John Bonine of the University of Oregon School of Law and moderator of the Environmental Law Professor's listserv, posted this message:

“Professor Mary Wood's incredibly innovative legal theory about how to give a kick in the pants to the government to fight against climate change has been endorsed by the US District Court today... This is such a fine example of the link between the legal theories of law professors and practical implementation in courts. And even if it is later rejected by higher courts, it demonstrates the need and usefulness of new thinking in what will soon be a rather dark era.”

In *Kelsey Cascadia Rose Juliana v USA* Judge Aiken of the District of Oregon, Eugene Division wrote: “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.” Her decision denied motions to dismiss, and the case will now go forward. The question of whether climate change is human-caused was not in dispute.

We have been here before, and this idea will return again and again. This new development of Joseph Sax's Public Trust theory is a significant articulation of an old idea, that governments have an affirmative responsibility to future generations to protect common resources. Sax wrote to wide attention in environmental circles decades ago that it is especially needed to counter the capture of common resources by private interests. The government must act because diffuse interests fail to coalesce. Sax wanted to “unshackle” the doctrine being chained to only a few applications, such as submerged tidelands.

Laws are built on the widespread acceptance of ideas. If enough people hear and agree with this idea, more courts may follow this reasoning. The idea is simple and clear: if a government does not act to protect the environment we need to live in, what is it for? That question now resonates in the silence created by the promise of our president-elect to eliminate the EPA.

Can we expect courts to order governments to act as trustees to protect the atmosphere? The plaintiffs in *Kelsey Cascadia* are part of Our Children's Trust and others seeking such court actions, in Pennsylvania, Colorado, Washington, and other countries. Earlier this year, in *Kain v. MassDEP*, the state's highest court ordered the agency to comply with statutory obligations to reduce GHG emissions and promulgate regulations. Last year in the *Urgenda* case the District Court of the Hague cited the international climate change treaty's equity, precautionary, and sustainability principles and the country's constitution for the principle that “the state has a duty to safeguard the protection and the improvement of the living environment.” A 2014 Forbes article summed up the thinking of the trust cases:

if we believe our Constitution guarantees us a right to “live and flourish,” then forests, wildlife, soil, water, and air must be protected in order for citizens to be able to live, be

free and pursue happiness. And the government elected by the people has that duty to provide protection. If both the executive and legislative branches fail in that duty, then the judicial branch must intervene.

Unless the American people rise up now and successfully insist that the selection of our current, twice-elected chosen President be placed on the court, we are told we will get a “constitutionalist”, a term used by those who cite the Constitution as reason for government not to act. The concept that good government fosters freedom as well as general welfare will not likely be the court’s guiding principle. Lower courts may then be limited in their ability to issue such orders to other branches of government. But that prospect only means that it is of tremendous importance to witness now the majestic side of law unfolding, to see this idea as light and for the awareness of its inherent sense to spread against the darkness of an impoverished laissez-faire philosophy.

An interesting fact is that courts have avoided taking action on GHGs by noting that the EPA is developing regulations to control them, but if that is turned aside then there is no longer a “displacement” of federal common law.

However stunted may become the view of our system of laws at the top, as with civil rights, environmentalism, multiculturalism, gender equality, the ending of persecution for sexual identity, that were taken up by youth less bound by the past needing to be left behind, we may expect growth of this sensible idea. The urgency of the matter will likely play a role in accelerating attention.

Judge Aiken noted that defendants had argued “that even if the public trust doctrine applies to the federal government, plaintiffs lack a cause of action to enforce the public trust obligations... I conclude plaintiffs' public trust rights *both predated the Constitution and are secured by it.*” (Emphasis added). This is a powerful reminder that law is not just what the current party in power wants, but that it stems also from basic inherent principles of justice. She referenced a recent law review article by Gerald Tones & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 288-94 (2014), showing the role of reason alone in fostering the evolution of law.

This ruling is a new historical landmark. If temporal powers succeed in reversing it, still it will have been of value for its view of the purpose of government. That it is formed by the people to serve the people’s interest is a particularly American idea, tried and true, and greatly needing elaboration in the face of this new threat created by humanity itself. The public trust doctrine is a legal idea that can help us to pull government out of the storage closet, so it can be used to effect the changes we need.