



# Atmospheric Trust Litigation – Looking Back, Looking Forward

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“And is not peace, in the last analysis, basically a matter of human rights – the right to live out our lives without fear of devastation –



the right to breathe air as nature provided it – the right of future generations to a healthy existence?” – John F. Kennedy, 1963

# #youthvgov

- **2011:** Our Children's Trust, Crag Law Center and other kids and attorneys across the country launch a legal strategy to protect the rights of kids and future generations to a stable climate.
  - May 4, 2011 – First Federal Case is launched in N.D. Cal. – *Alec L. (Loorz) v. McCarthy*
  - May 4, 2011 – Oregon Atmospheric Trust Case is filed in Lane County Circuit Court – *Chernaik v. Kitzhaber*

# #youthvgov – *Alec L. v. McCarthy*

- Single Claim for Relief based on the Federal Public Trust Doctrine
  - Transferred to DC District Court
  - May 31, 2012 – Motion to Dismiss Granted – 863 F. Supp. 2d 11.
    - No federal public trust doctrine and therefore no jurisdiction
    - Displacement by CAA – *American Elec. Power Co.*
  - June 5, 2014 - Affirmed by D.C. Circuit Court - 561 Fed. Appx. 7
  - Dec. 8, 2014 – Petition for Certiorari Denied – 135 S. Ct. 774.

# #youthvgov – *Chernaik v. Kitzhaber*

- Declaratory Judgment Action, ORS Chapter 28.
- Youth seeking declarations that:
  - Atmosphere is a trust resource
  - State has fiduciary obligation to protect atmosphere, water resources, fish and wildlife, and submerged and submersible lands from impacts of climate change to benefit kids and future generations
  - State has failed to uphold its fiduciary obligations by failing to regulate and reduce carbon dioxide emissions in the State of Oregon

# #youthvgov – *Chernaik v. Kitzhaber*

*State stipulates to move to dismiss case for lack of jurisdiction without contesting substance of public trust doctrine.*

- April 5, 2012 – Judge Rasmussen Issues Opinion and Order granting MTD.
- June 11, 2014 – Court of Appeals Issues Unanimous Opinion Reversing and Remanding (Hadlock, Devor and Schuman) – 263 Or App 463
  - Trial court has jurisdiction under ORS Chapter 28 to issue a declaration of rights premised on the PTD.
  - "Bare requests for declaration" are justiciable because the declarations would provide plaintiffs "meaningful relief."
  - Separation of powers and political question doctrines are premature until court defines scope of PTD and entertains a request for injunctive relief – if any.

# #youthvgov – *Chernaik v. Brown*

*State does not seek review by Supreme Court. Case returns to Lane County Circuit Court for resolution of merits.*

- Jan. 9, 2015 – Youth file MSJ. Supported by declarations from leading experts:
  - Dr. Phil Mote – Dir. of Oregon Climate Change Research Institute (“OCCRI”) at OSU
  - Dr. Burke Hales – Expert in Ocean Acidification – OSU
  - Dr. James E. Hansen – past Dir. Of NASA Goddard Inst. for Space Studies
  - Ernie Niemi – Expert natural resources economist – predicts annual costs to Oregon of \$3.6 billion per year by 2040.

# #youthvgov – *Chernaik v. Brown*

- May 11, 2015 – Judge Rasmussen Issues Order Granting State’s Motion for Summary Judgment
  - Submerged and submersible lands are only trust resource. Atmosphere is not a trust resource. Waters of the state are not a trust resource. Wildlife is not a trust resource.
  - There are no affirmative duties under the PTD. The PTD only restricts the State from alienating real property – submerged and submersible lands.
  - Doubles down on separation of powers and political question in advisory opinion even though issue of injunctive relief not presented.
  - Youth appeal for a second time.

# #youthvgov – *Chernaik v. Brown*

- Dec. 9, 2016 – Case argued to Court of Appeals by Courtney Johnson (Armstrong, Tookey and Schor). Still pending. <https://crag.org/oregon-youth-climate-case-cher-naik-v-brown-atmospheric-trust-litigation/>
  - State concedes Judge Rasmussen was wrong on the scope of the PTD – navigable waters are included.
  - State insists it has no affirmative fiduciary duties under PTD owed to beneficiaries. State can never be compelled to protect trust resources.
- The Oregon case has now been pending for 7.5 years. Longest running ATL action in the country. Kelsey and Ollie have literally grown up with this case.



# #youthvgov – *Juliana v. U.S.*

- Aug. 12, 2015 – Second federal case filed in District of Oregon, Eugene Div. Kelsey files in her home venue. Joined by approximately 20 other youth from around the country.
  - Claims for Relief: Due Process, Equal Protection, PTD
  - Relief Requested: Declarations of law, injunction against further violations of Constitutional rights, order Gov. to prepare an inventory of GHG emissions, order Gov. to prepare and implement a national remedial plan to phase out fossil fuels and stabilize climate system

# #youthvgov – *Juliana v. U.S.*

- Nov. 10, 2016 – Judge Aiken Issues Opinion and Order Denying Motion to Dismiss. 217 F. Supp. 3d 1224.
  - Rejecting abstention under political question doctrine – courts are competent and within their authority to rule on the question
  - Plaintiffs have standing – Injuries are concrete and particularized, imminent. Causation – emissions at issue are sig. share of global emissions. Redressability – Plaintiffs ask for a remedial plan to phase out fossil fuels.

# #youthvgov – *Juliana v. U.S.*

- Nov. 10, 2016 – Judge Aiken Issues Opinion and Order Denying Motion to Dismiss. 217 F. Supp. 3d 1224.
  - “The right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”
  - Plaintiffs have properly alleged a “danger creation” by Gov and therefore can seek an order imposing duty on government to remediate the danger.
  - The PTD applies to the Federal Govt. “I am not persuaded by the *Alec L.* courts.”

## #youthvgov – *Juliana v. U.S.*

- Judge Aiken’s order denying the MTD set off a rare and aggressive appellate strategy by the federal government that has so far failed at all levels of the federal court system.
- Trial is scheduled to start October 29, 2018 in Eugene.
- Dispositive motions are pending
- Government filed renewed request to stay case and intends to again seek relief from Sup Ct.

# #youthvgov

- Youth have been seeking to utilize the court system – the third branch of government – to protect their rights in a stable climate for approximately 7.5 years. Since 2011.
- Our understanding of the threat has changed in the past 5 years. What will we say to our kids in 20 years? Climate change isn't real? It's a political question? Go talk to you legislators?
- Our window to retool our economy to avoid the most catastrophic effects of climate change is rapidly closing. Courts must respond now – October 29<sup>th</sup>.

## #youthvgov – *Acknowledgments*

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THANK YOU

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