Federalism at Work: Recent Developments in Public Trust Lawsuits to Limit Greenhouse Gas Emissions

by Alexandra Klass

In a CPRBlog post in May 2011, I discussed the lawsuits filed on behalf of children against all 50 states and several federal agencies alleging that these governmental entities have violated the common law public trust doctrine by failing to limit greenhouse gas emissions that contribute to climate change. The suits were filed by Our Children’s Trust, an Oregon-based nonprofit. The claims sought judicial declaration that states have a fiduciary duty to future generations with regard to an “atmospheric trust” and that states and the federal government must take immediate action to protect and preserve that trust. At the time, I opined that although these claims were novel and would likely have little, if any, immediate effect on state climate policy, they relied on what has proved to be a flexible and powerful common law doctrine in at least some states. As a result, I concluded there was likely to be significant variation in results between the states on creating opportunities for a new forum for consideration of climate change harms and potential legal responses. Now, just over a year later, some lower courts have issued decisions in the cases and, as expected, the results vary widely from state to state.

The public trust doctrine is a concept dating back to Roman law which holds that there are certain natural resources that are forever subject to government ownership and must be held in trust for the use and benefit of the public. In the United States, plaintiffs have used the public trust doctrine successfully to prevent states and other governmental entities from conveying public trust resources such as submerged lands or municipal harbors into private ownership, to create public beach access, and to otherwise ensure public access to water-based resources. Until the 1970s, however, the doctrine had little to do with environmental protection and instead was used almost exclusively to prevent the privatization of water-based resources or to preserve public access to fishing, boating, or commerce. Since that time, however, with the help of an influential law review article by Professor Joseph Sax, some states, like California, Louisiana, and Hawaii, have applied the common law doctrine to protect rivers, lakes, and other water-based resources as well as land-based resources such as birds and other wildlife. As I have discussed in my scholarly work on the public trust doctrine, other states have bolstered their common law public trust doctrine by relying on state constitutional provisions and state statutes mandating governmental protection of environmental resources. In this way, these states use the common law, state constitutions, and state statutes together to protect what I call generally “public trust principles.” Despite these developments, however, there are still states that have a much more limited version of the common law public trust doctrine, with courts in those states limiting the doctrine’s reach to ensuring continuing public ownership of water-based resources rather than using it for environmental protection purposes.

This brings us to the current lawsuits, which argue that the common law public trust doctrine is broad enough to encompass an "atmospheric trust" and that states have a duty to protect and preserve this trust resource for the benefit of present and future generations. As relief in the state court lawsuits, the plaintiffs sought a declaration that an atmospheric trust exists and that defendants have a duty to protect and preserve it. So how have courts responded? Not surprisingly, courts in several states, including Colorado, Oregon, Arizona, Washington, Arkansas, and Minnesota dismissed the cases early on, finding no basis for an “atmospheric trust” under state common law. Most of these states do not have a history of broad common law public trust
protection of submerged lands and access to navigable waters. In California, the plaintiffs voluntarily dismissed the case to pursue settlement talks. This too is not surprising because California has already been a leader in enacting statutes and regulations to reduce greenhouse gas emissions and is also one of the states most likely to recognize an atmospheric trust under common law doctrine. Thus, the ultimate goals of the plaintiffs and the State of California are much more aligned than in other states around the country.

Two victories for the petitioners, though, come from recent decisions in the New Mexico and Texas courts. In New Mexico, in January, on a motion to dismiss, the district court stated that the atmosphere could be recognized as within the public trust doctrine’s protection and allowed the plaintiffs leave to amend their complaint to refine the relief they sought and to specify the government actions causing harm. Then, on Monday, a district court in Austin, Texas issued a ruling rejecting the Texas Commission on Environmental Quality’s conclusion that the public trust doctrine is exclusively limited to the conservation of water in the state. Instead, the court held that the public trust doctrine is much broader, and includes all of the natural resources of the state, including air quality. In reaching this decision, the court expressly stated that the public trust doctrine “is not simply a common law doctrine” but is incorporated into the Texas Constitution, which (1) protects “the conservation and development of all the resources of the State,” (2) declares conservation of those resources “public rights and duties,” and (3) directs the Legislature to pass appropriate laws to protect these resources. The court also relied upon the Texas Clean Air Act as an additional ground of Commission authority to act in this case “to protect against adverse effects, including global warming.”

The decisions in the public trust cases to date highlight both the diversity of approaches to the public trust doctrine from state to state and the continuing ability of the doctrine to create new grounds for natural resource protection in the courts. As I noted in my post last year, it is unlikely these lawsuits will result in any quick decisions by courts to order their state agencies to set limits on greenhouse gas emissions. It is also unlikely that a majority of states will expressly recognize an atmospheric trust under state common law—the doctrine is simply not well-developed enough in most states to make such a jump. Nevertheless, the variety of approaches to this doctrine among the states in our federalist system means that some state courts may be able to shape the public trust doctrine based on their own state common law, statutes, and constitution to recognize the modern threat to natural resources caused by climate change. The decisions so far are a classic example of federalism at work as well as evidence of the continuing power and potential of the public trust doctrine to protect the natural resources when regulation fails to meet present-day environmental protection needs.