In suit, minors challenge Texas environmental agency

*Argument rests on linking public trust doctrine to future generations*

By **Asher Price**

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Sixteen-year-old Eamon Umphress aims to make the varsity baseball team as a pitcher or third baseman at McCallum High School. He recently picked up steel drum and likes Latin enough to have joined the school's Latin club.

Not least, he's serving as a litigant in one of a novel set of lawsuits across the country that pit environmentally minded minors against state environmental agencies that have been slow to regulate greenhouse gases.

The case started as a national publicity stunt for environmental causes. But in the background of the Texas suit lie profound questions about how society values what's left for future generations.

Umphress is one of three minors who sued the Texas Commission on Environmental Quality last year after the state agency shrugged off a request that it set about reducing carbon dioxide emissions in Texas.

The argument at the heart of the minors' effort — that the state should regulate air emissions as part of its duty to guard the public trust for current and future generations — won a sympathetic boost last week from a Travis County district judge.

The agency had argued that the common law public trust doctrine has been exclusively limited to the conservation of water.

Judge Gisela Triana wrote a letter last week to attorneys in advance of her ruling that said the claim is "legally invalid."

"The doctrine includes all natural resources of the state," Triana said.

Yet because a slew of other cases in federal courts between the state commission and the U.S. Environmental Protection Agency are likely to trump this one, the judge ultimately found that the commission's "refusal to exercise its authority" is "a reasonable exercise of its discretion."

In the short term, in other words, the state prevails. Once the dust settles in the federal cases, which might be a year or more away, the judge's ruling could at least temporarily saddle the agency with public trust considerations in air emissions cases.

Should the agency then end up appealing the judge's ruling, it stands a fair chance of success as it wends its way to the Texas Supreme Court. Ten or so similar suits in other states are largely unresolved or have been dismissed.

The minors filed their original challenge to Texas' environmental policies in 2011 as part of a concerted advocacy effort by West Coast-based Kids Versus Global Warming and Our Children's Trust, as well as other groups, to challenge state environmental policies. The Texas petition requested that the commission adopt a plan that would cut carbon dioxide emissions at least 6 percent a year, beginning in January 2013, and publish annual progress reports, among other things.

Commissioners rejected the proposal, arguing that the petition's proposed rules were inconsistent with
federal law, that they were based on a misreading of the public trust doctrine and that they would shut down business in Texas. (None of the other rule-making petitions has been successful, said Julia Olson, executive director of Our Children’s Trust.)

"While I don't discount sincerity on the part of petitioners," commission Chairman Bryan Shaw said last year, "I believe the proposed measures would actually largely just shift emissions of greenhouse gases out of Texas into other states and other countries."

The children sued.

With Adam Abrams of the Texas Environmental Law Center representing them, they argued the public trust doctrine, a notion with roots in Roman law that posits that states hold vital natural resources in trust for the benefit of their citizens.

"The atmosphere, including the air, is one of the most crucial assets of our public trust," says the lawsuit, which claims the doctrine extends to include future generations.

Umphress is the son of Brigid Shea, an environmentalist and a former Austin City Council member. Also named in the suit, by their initials only, are two young children of Karin Ascot, another environmental activist.

TVH, 3 years old at the time of the filing, was baptized in Barton Springs and "has already spent many hours hiking in the Barton Creek greenbelt," the suit says. "He loves to walk in the flowing water as he watches the birds, dragonflies, fish, and other living things.

"Global climate change threatens to dry up most of these waters, turning them from gorgeous, life-giving springs into dangerous flash-flooding drainages when the rare, heavy rains do come," the suit continues. "The outdoors will be inhospitable and the children will have few places to recreate in nature as the climate changes. They will be living in a world of drought, water shortages and restrictions, and desertification."

A fourth named plaintiff, Angela Bosner-Lain of Williamson County, was 25 at the time of the filing. The suit says that Bosner-Lain is interested in becoming a professional outdoor photographer but that "much of what she loves and what she would use to build her photography career are quickly disappearing due to the effects of the severe drought patterns."

The state environmental commission has not decided what, if any, action to take.

"It appears that the court intends to uphold the agency's decision to deny the petition for rulemaking," spokeswoman Andrea Morrow said. "Once the court signs an order or final judgment, we will continue to evaluate the ruling."

The influence of Triana's ruling is quite narrow. It's not binding on other courts and is limitedly persuasive.

Still, the public trust dispute points to larger economic and environmental questions.

"A lot of times when we think of climate change and the harms it's going to present, we don't look long term and are kind of nearsighted," Abrams said in an interview. "The youth are the ones who are going to have to deal with our actions now."

"Climate Matters," a new book by Oxford economist and philosopher John Broome, makes a similar point. A central question in the taxing or regulation of greenhouse gas emissions or individual decision-making, he writes, is: "How do increases in future well-being weigh against sacrifices of present well-being?"

For Umphress, the answer appears clear.

"I really feel like the environment is a nonrenewable resource we have to protect," he said in an interview, "in a way we can't comprehend right now."
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