The Inside Story by Dawn Reeves

Judge Rules Atmosphere 'Public Trust'

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A Texas district court judge has issued a first-time ruling that the atmosphere is a public trust in activists' suit seeking to use the public trust doctrine to force cuts in greenhouse gases (GHGs) and protect the atmosphere, though the ruling for other reasons backs the Texas Commission on Environmental Quality's (TCEQ) refusal to issue GHG rules.

The finding by Texas 200th District Court Judge Gisela Triana is the first to side with plaintiffs on the public trust doctrine issue. Attorneys representing youth plaintiffs are pursuing public trust doctrine claims in a bid to force action to reduce GHG emissions in all 50 states and by the federal government. The cases claim the trust doctrine requires government to protect and maintain the atmosphere and other resources fundamental for human health and survival.

Activists filed their GHG public trust lawsuit against TCEQ July 21, 2011, seeking court review of the commission's denial of their petition for a GHG rulemaking.

Triana said in a July 9 letter to Texas and other groups involved in the district court case, Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality, that, "The court will find that the commission's conclusion, that the public trust doctrine is exclusively limited to the conservation of water, is legally invalid. The doctrine includes all natural resources of the state. This doctrine is not simply a common law doctrine but was incorporated into the Texas Constitution."

The judge also rejects TCEQ's claims "that it is prohibited from protecting the air quality because of the federal requirements of the federal Clean Air Act. . . . The court will find that the [air law] requirement is a floor, not a ceiling, for the protection of air quality."

However, Triana ultimately backs TCEQ's "refusal to exercise its authority" to regulate GHG emissions as a "reasonable exercise of its discretion," citing the likelihood that the state will appeal to the Supreme Court its separate loss of its challenge to EPA's GHG permit rule and other climate programs in the case Coalition for Responsible Regulation, et. al v. EPA.

The group Our Children's Trust -- which is coordinating the litigation including the federal case dismissed this spring -- is hailing Triana's decision. "This is a blockbuster move for a Texas judge to take the position that all natural resources should be protected under the public trust doctrine," the group says in a July 10 statement. "This may well be one of those judicial actions like Brown v. Board of Education that future generations will look to as a turning point for our planet."

But industry sources are downplaying the ruling, with one source calling it "all symbolic" since the claims were rejected. "It's a single trial judge commenting on an issue that needn't and shouldn't have been addressed, and was dismissed anyway," the source says, adding the ruling is "contrary" to what every other court has found when asked to consider public trust climate suits.

The decision was also based on the "uniquely expansive nature of Texas law, founded on provisions unique to Texas. I can't see this kind of decision being precedential in any sense. In fact it is pure dicta and not persuasive to other judges in Texas or judges" elsewhere, the source says.

Similar lawsuits and appeals remain pending in 11 other states, where most have not gotten past procedural arguments. However, a New Mexico judge most recently agreed to hear the public trust doctrine claim on substantive grounds. The First Judicial Circuit of New Mexico June 29 rejected that state's motion to dismiss the claim.

Our Children's Trust June 28 also filed a motion asking U.S. District Court for the District of Columbia Judge Robert Wilkins to reconsider his May 31 dismissal of its federal public trust case, Alec L. et al v. Jackson. Wilkins has yet to respond to that request.
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