Public Doctrine Lawsuit Asks For Protection Of Atmosphere As A Public Resource

Posted: 04/2/2012 5:57 pm

From Russell McLendon and Mother Nature Network:

If you enjoy public beaches, state parks or fishing piers, you can thank the sixth-century Roman emperor Justinian. He's credited with introducing the public trust doctrine, a legal concept that forbids private ownership of certain natural resources, instead preserving them for public use. This idea has spread worldwide since then, protecting everything from beaches and streams to oyster beds and fish stocks.

It was an early tenet of English common law, later encoded in the Magna Carta, and also has a long history in U.S. courts, dating back to at least 1842's Martin v. Waddell. During a 1983 case about water use at California's Mono Lake, the U.S. Supreme Court specifically quoted this section of Roman law to explain public trust:

"By the law of nature these things are common to mankind: the air, running water, the sea and consequently the shores of the sea." -- Justinian Code of Rome, c. 534

The court ultimately added its own, slightly more specific wording:

"[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage." -- U.S. Supreme Court, 1983

This is all well-established by now, leaving little doubt about the state's duty to maintain public resources. But there is still some fuzziness about what exactly counts as a public resource -- and how far a government must go to protect it.

A lawsuit in U.S. District Court, however, could soon add a little more clarity. Filed by teen and twentiesomething plaintiffs (and backed by environmental groups), the suit calls on federal agencies to protect the atmosphere as a public resource, including from excess carbon dioxide, methane and other greenhouse gases. It's part of a broad campaign to fight global warming via the public trust doctrine, and it's mirrored by similar lawsuits or administrative actions the coalition has filed in all 50 states.

Before the federal case can proceed, though, a judge will hold a hearing Monday, April 2, to decide who the defendants are. The U.S. government is already on the hook, but an unlikely ally has volunteered to jump in as a co-defendant: the National Association of Manufacturers, which bills itself as "the nation's largest industrial trade association." The group has long opposed efforts to regulate greenhouse gas emissions -- along with many other industrial pollutants -- and lobbies to that effect on Capitol Hill. It outlines a detailed energy and climate policy on its website.

The courtroom may be an odd place to fight climate change, but campaign organizers say they've lost faith in presidential or congressional leadership. "The two political branches of government are failing, so we're going to the third branch of government and saying 'hold people accountable for what they're doing,'" explains Julia Olson, executive director of Our Children's Trust, one of the groups leading the effort.

The reason children are involved, she adds, is to highlight the long-term nature of investing -- or not investing -- in the public trust. "What I'm seeing is that youth humanizes climate change," she says. "They are the generation that will be most affected. They didn't create this problem, but they're working for a solution."

Human-rights group Witness is another supporter, making a series of documentaries about how climate change is affecting kids and young adults around the U.S. (watch one below). Four have been released so far, says Witness program manager Kelly Matheson, and six more are in the works. "We started creating these films so people understand climate change is happening now," she says. "It's not something that's just going to happen down the road. Communities are being impacted today."
The idea of expanding public trust to the atmosphere is intriguing, but some legal experts have expressed doubt it will work. While past cases applied the concept to water and wildlife, those assets are more predictable and less nebulous than air, which can easily cross state or national borders. U.S. courts have also seemed reluctant to overstep the executive branch and Congress to force CO2 cuts, such as when the Supreme Court threw out a lawsuit last year that sought to label power plants' emissions a "public nuisance." Some of the state public-trust lawsuits have already been dismissed, too, although Matheson says most will be appealed.

The plaintiffs remain undaunted, arguing this is about setting a precedent -- one that would apply in most nations on Earth, since the public trust doctrine has become so widespread in the last 1,400 years. "The key is that this has been enshrined in the laws of countries worldwide," Matheson says. "The public trust approach is the only globally binding, macro approach to address climate change. It applies everywhere equally, so if the U.S. has to abide by it, then so should all countries."

While the U.S. is taking steps to curb CO2 emissions, as are many businesses, Olson and Matheson say such efforts don't match the urgency of climate forecasts. Scientists measure atmospheric CO2 in parts per million, and identify 350 ppm as a target for limiting the damage. We're nearing 400 ppm now, and most climate experts agree 450 ppm would be disastrous. It's still possible to get back to 350 ppm by 2100, Olson argues, but waiting only makes it harder. "If we had started reducing global emissions in 2005, we could have just reduced them by 3 percent per year," she says, citing data from NASA climate scientist James Hansen. "If we start in 2014, we'd have to do it 6 percent per year. And if we wait till 2020, that number is 15 percent."

Opponents of CO2 regulation typically point to the cost as a deterrent, often invoking economic frailty and the need to create jobs. It's a claim that still resonates in much of the U.S., although a recent poll found that 63 percent of Americans believe global warming is occurring, and about half believe humans are playing a role. Matheson says she hopes the lawsuits can raise awareness about the long-term benefits, both ecological and economic, of addressing the issue. "It's not only feasible, but it's wise economics, and it will save lives," she says.

Glori Dei Filipone, a 13-year-old Iowan and one of the youth plaintiffs, compares the situation with the need to clean her room: It stays manageable if she cleans a little at a time, but quickly gets out of hand if she procrastinates. "You can't just wait and sit back to save the Earth," she says. "You have to step forward and do it yourself."

Check back here for updates on the case, and see this summary for more information about the plaintiffs and defendants.