

UNITED STATES: Combatting climate change with the public trust doctrine

Summary

A group of children brought a petition to Washington's Department of Ecology, asking them to adopt a rule to limit carbon emissions in their state. After being denied and then ignored they appealed against the Department's rulemaking process claiming that, to be effective, it would have to be in line with up-to-date climate science.

Background

In 2011 [a series of cases](#) were brought against state governments in the US by groups of children, suing the authorities for refusing to effectively combat [climate change](#). These took place across the US and also [included a case against the federal government](#).

During their childhoods the science [behind climate change](#) had become undeniable, yet American children saw their government failing to act at every level to protect their future and the planet they would eventually inherit.

While the most obvious effect of climate change is a slow and steady increase in the planet's average temperature, this is leading to a rise in sea levels, changes in global weather patterns and a growing risk of disasters like [wildfires and hurricanes](#).

The rise in global temperature will also contribute to an increasing number of droughts in the global south, [giving rise to famine and conflict](#), while providing a more suitable climate for [diseases like malaria](#) to spread into formerly temperate regions.

In Washington the effects of ocean acidification, another process driven by carbon pollution, were already visible through [damage to the state's shellfish industry](#) and the untimely deaths of [hundreds of thousands of salmon](#) due to unusually hot water temperatures.

The initial case in Washington state was brought by a group of young people in May 2011 together with the [Western Environmental Law Center](#) (WELC) and [Our Children's Trust](#) (OCT). [They filed a case](#) against the governor's office in the State of Washington, the Department of Ecology, the Commissioner of Public Lands and the Department of Fisheries and Wildlife. They asked the judge to declare that the atmosphere was a public trust and to direct the departments to reduce carbon emissions in the state of Washington in line with recommendations based on the most up-to-date climate science.

In their own words they brought the case to “force Washington to halt the climate catastrophe and reduce carbon dioxide emissions in order to protect Washington’s natural resources as required by the public trust doctrine”, [as had already happened in Texas and New Mexico](#).

The public trust doctrine was established in law by the ancient Romans, cemented in common law in the US in the case of [Illinois Central Railroad Co. v. Illinois \(1892\)](#), and in Washington, by the State’s Constitution. This legal principle means that the government must ensure the protection of navigable waters, lakes, streams, tidelands, shorelands, public lands, fish, wildlife and shellfish - all of which are endangered by pollution and climate change.

In July 2011 the state filed an answer, admitting that manmade climate change was real and a threat but asked the court to dismiss the initial motion, which it duly did in February 2012. Undeterred, the petitioners appealed against the dismissal to the Washington Supreme Court with an expert declaration from climate scientist and campaigner Dr. James Hansen.

Despite their evidence the case was dismissed, but the door was left open for another challenge. The judge explained that the kind of declaration in law the children were demanding was not within the power of the court to grant, but added that they could follow up by asking the departments directly to create the rules they wanted.

Bringing the second petition

In the first year of his first term the new governor of Washington Jay Inslee [issued an executive order](#), requiring Washington’s Department of Ecology to review the state’s current greenhouse gas emission limits. His order demanded that the review be accompanied by recommendations for updating the limits no later than 15 July 2014.

A new group of children, all members of a Washington [Plant-for-the-Planet](#) group, decided that the new limits ordered by governor Inslee could be another way to follow up the initial case if they demanded that Ecology use the most up-to-date science when making its recommendations.

The Department of Ecology was created in 1970 to act as “[a single state agency](#)” to “manage and develop [the State of Washington’s] air and water resources”. On that basis it seemed clear that the responsibility for reducing carbon emissions in the air was the department’s duty. Attorney for the petitioners in both cases Andrea Rodgers explained that

although they were not suing on the basis that Ecology had violated the public trust doctrine, they believed that a lack of concrete action on climate change, or action not based on science would constitute such a breach.

Washington seemed like a particularly good place to bring the case as the first bill signed by recently elected governor Inslee was a [climate action bill](#), demanding an independent evaluation of pollution reduction programs in other states and Canadian provinces, and of opportunities for investments in Washington related to clean energy and efficiency. Governor Inslee described the bill as a step towards addressing climate change and preserving [“the legacy of stewardship we owe our children”](#) and has been lauded more than once for his [forward-thinking stance on climate change](#).

In June 2014 the youth petitioners submitted their [petition for rulemaking](#) with support from OCT, WELC and Plant for the Planet. They also asked the department to inform the state’s legislature that the current levels of statutory greenhouse gas reductions would need to be revised based on current climate science.

In August 2014, Ecology denied the petition without trying to challenge the science underpinning the children’s requests. This denial came despite the fact that in December 2014 the department [published a report](#) stating that “climate science is increasingly clear” and that climate change was “not a far-off risk”. Agreeing that the case had to go further and that they all had a right to a healthy environment, the petitioners [filed an appeal against the rejection](#) with the King County court system.

When the judgment came in June 2015 the team was pleasantly surprised when Judge Hollis Hill came down in their favour, [ordering Ecology to review the rules](#) using the most up-to-date climate science and to report back no later than 8 July.

Ecology opted to negotiate with the youth petitioners at first, trying to find common ground in a settlement meeting on 8 July, and the children allowed them a 30-day extension to reach an agreement.

In the meantime the petitioners took the opportunity to contact governor Inslee, pleading with him to put his foot down with the agency to ensure that they would comply with the judgment, and conduct the review in the most effective way.

Governor Inslee [met with five of the young petitioners](#) and listened to their concerns. He said that he took their worries seriously and [released a statement](#) two weeks later directing Ecology to take serious action.

He wrote: “This is not the comprehensive approach we could have had with legislative action. But Senate Republicans and the oil industry have made it clear that they will not accede to any meaningful action on carbon pollution so I will use my authority under the state Clean Air Act to take these meaningful first steps.”

Unfortunately for the petitioners he fell short of demanding that the review was carried out with up-to-date science, instead allowing them to use evidence from 2008. The 2008 emissions guidelines recommend cutting carbon emissions by 50 percent by 2050, whereas the petitioners' more recent research, summarised [in a sworn statement from a climate expert](#), calls for a cut as high as 85 percent.

Although some hailed it as a win for the petitioners it was not enough to achieve their objectives. Rodgers explained: "He ended up directing Ecology to do the rule, he just did not feel like he had the authority to direct them to make the reductions based on the most recent science."

"Instead they're based on these very outdated emission limitations which even the agency thinks are not worth the paper they're written on. She added: "They don't understand that if you don't take drastic action you won't get where you need to go."

A day after governor Inslee's statement the negotiations between the petitioners and the head of Ecology took place. No agreement was reached but the children were determined that the case could not end there.

The youth petitioners opted to appeal against the agency's refusal to use the most up-to-date climate science, which they saw as a breach of the law, to the King County court system to try to guarantee that the department's review would be conducted with due consideration to the facts about climate change.

Bringing the appeal

When the case returned to court on 3 November the petitioners came, [permission slips in hand](#), and were joined by a class from a local school and several other members of the public who turned up to watch. Local newspapers and TV stations also covered the day, broadcasting the story [to local and online audiences](#).

Rodgers recalled how Judge Hill had asked to be left with the case, despite the fact that judges are often shuffled around during cases such as this one. She claimed that within five seconds of her opening argument Judge Hill jumped in with a question, asking why she felt the petitioners still had a case after Ecology began the rulemaking.

"They're doing something, but our answer is that [Ecology's] answer is not based on science and won't protect the rights of these kids," explained Rodgers.

After the initial comments from the Attorney General representing the state, Rodgers was given a chance to reply. She recounted how the state's argument was largely the same as their written evidence, stressing that the agency was 'doing the best it could' in the face of other pressures.

“I have to say I was emotional when I got to do my rebuttal,” said Rodgers, “I just threw away my outline, because here they are telling these kids yet again ‘well just participate in the next rulemaking process, you’ll be OK’.

“And here are these kids who spent so much time and effort on this rulemaking process and they need to know whether or not the court will protect their rights. We made it clear to the judge that these kids deserve some sort of protection, and it needs to be done now.”

Rodgers’ response called on Judge Hill to rule in favour of the children’s fundamental rights to avoid ‘intergenerational inequality’ which would result from the devastating impacts of climate change in the future. After the oral arguments were concluded both sides gave interviews about the case, with stories running in local papers and TV stations, spreading the word about the changes the case could bring to the state, the country and the world.

Outcome

When [the judgment](#) was handed down on 19 November it seemed counter-intuitive upon first reading. Judge Hill agreed with the petitioners’ reasoning and validated their arguments at every turn before finally denying their appeal.

She maintained that while everything they said was true, and proven by experts the world over, she could not force Ecology to begin a new rulemaking process - as governor Inslee had already directed the department to begin one on the petitioners’ behalf.

Despite what seemed like a blow to the cause, Judge Hill did give the youth one big win. In a first for Washington, Judge Hill declared in her judgment that “current scientific evidence establishes that rapidly increasing global warming causes an unprecedented risk to earth, including land, sea, the atmosphere and all living plants and creatures.”

“In fact, as petitioners assert and this court finds, their very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming by accelerating the reduction of emission of GHGs [greenhouse gases] before doing so becomes first too costly and then too late.”

Judge Hill went on to explain that Ecology had a statutory duty to adopt rules limiting emissions in a manner which protects the environment for future generations and explicitly linked the atmosphere and greenhouse gases to the public trust doctrine.

She continued: “Ecology argues that since the Public Trust Doctrine has not been expanded by the courts beyond protection of navigable waters it cannot be applied to protection of the “atmosphere”.

“But this misses the point since current science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, thus endangering the bounty of our navigable waters.

“The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical. Therefore, the Public Trust Doctrine mandates that the State act through its designated agency to protect what it holds in trust.”

Impact

Julia Olson, executive director of Our Children’s Trust, explained the significance of the outcome in an interview shortly after the decision. She said: “When a district court or a lower court makes a decision, it’s not a binding precedent on other courts or on other states, but it is really persuasive to other judges to see how a court in a particular jurisdiction has addressed the issues.

“The fact is that this court has been really clear that the young people’s survival is at stake, that you can’t protect navigable waters of a state if you’re not also looking at the connectivity between the atmosphere and carbon pollution and its impact on those waters. She’s made some very powerful rulings in her decision and that will be persuasive to other courts across the country, and the world.”

At first Rodgers was disappointed that Judge Hill had not supported their hopes for the rulemaking, but soon realised that the declaration of the atmosphere as a public trust was a huge win and a very progressive move compared to the rest of the world.

She said: “Julia was my first call and we were both thrilled with the language in the decision. My next call was to one of my mentors, Rachael Osborn, who is a public trust expert.

“When we started with ATL [atmospheric trust litigation] five years ago, people doubted our ability to be successful because it is a novel legal theory that is asking for a shift in how we deal with environmental problems. But you must be bold and courageous when dealing with a crisis like climate change.”

Rodgers added that the team would work to ensure Ecology lives up to its obligations and would take further legal action if necessary. As well as the rulemaking there are challenges ahead from the State legislature, which plans to take power away from Ecology and could potentially disrupt their case, in convincing the Gates Foundation to divest of fossil fuels and in getting the City of Seattle to put warnings about the effects of fossil fuels on petrol pumps.

“This case is about so much more than just the law and legal precedent, it is about saving humanity and protecting these kids’ fundamental rights to a healthy future. Sometimes all it takes is one decision to change the course of history,” she explained.

“Brown v. Board of Education, gay marriage, Roe v. Wade. All of these major civil rights issues were moved by courageous judges protecting citizens’ rights. Hopefully this case can be one of those.”

Further information

- Read CRIN's case summary of [Zoe and Stella Foster, et al. v. Washington Department of Ecology](#)
- Find out more about [strategic litigation](#)
- See CRIN's country page on the [United States](#)
- Read CRIN's report on [access to justice for children in the United States](#)

CRIN's collection of case studies illustrates how strategic litigation works in practice by asking the people involved about their experiences. By sharing these stories we hope to encourage advocates around the world to consider strategic litigation to challenge children's rights violations. For more information, please visit:

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