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Sustainability & Climate Change Reporter

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Public Trust Climate Change Lawsuit Strikes Out in Montana

The U.S. Supreme Court is expected to rule any day now on the climate change public nuisance case in *AEP v. Connecticut*, in the meantime the State Supreme Court of Montana has dealt a blow to a separate lawsuit that sought to order the state to regulate greenhouse gas emissions under the public trust doctrine. The [Montana Supreme Court](#) in a three-page order issued June 15 denied a petition by Montana children asking the Court to exercise its original jurisdiction. Although similar cases are pending in eight other jurisdictions, the Montana case was the only one seeking to sidestep the trial court level entirely and have a state's highest appellate court rule. The Montana Petitioners' case was a long-shot to begin with and the justices let very little time pass before denying the petition. Even so, the narrow, procedural grounds for the Montana ruling should not adversely affect the remaining public trust cases, nor should the U.S. Supreme Court's eventual ruling in *AEP*.

Atmospheric Trust Litigation

The public trust [cases](#), organized by a non-profit called Our Children's Trust, were filed in May in state courts in Alaska, Arizona, California, Colorado, Minnesota, Montana, New Mexico, Oregon and Washington and in a federal court in northern California. Each case is brought by or on behalf of children living in those jurisdictions. The complaints allege that the respective states are trustees of the atmosphere for the benefit of their present and future citizens and that the states have an affirmative duty to establish and enforce limits on GHG emissions to mitigate human-caused climate change. Similar claims are being made in regulatory [petitions](#) in 39 other states.

The public trust doctrine primarily has been applied to cases involving tidal, shore and navigable waters, but it also has been used as a rationale for assessing natural resource damages in pollution cases. Legal scholars with various philosophical bents debate the doctrine's historical and legal underpinnings, and efforts to apply the doctrine to the atmosphere has highlighted those differences even more so.

Montana Decision

The Montana case was unique from a procedural standpoint in its use of a petition for original jurisdiction asking the state supreme court to take the case without a trial. The Montana Petitioners asserted that the issues involved purely legal matters with no factual issues to be decided by a trial court and that there is an urgent need to establish GHG regulations that could not await the two to three year process of trial and appeal. The State countered that there indeed are factual issues and that there is no emergency because the other eight similar cases filed around the country did not seek emergency relief through the appellate courts.

The Montana Supreme Court agreed with the State. The Court said the factual issues include whether the legislature has prevented the state from regulating GHGs, the role of Montana in the global problem of climate change and the effect on Montana's climate. The Court said it is "ill-equipped to resolve the factual assertions presented by Petitioners," and that the Petitioners had not established urgency or emergency factors that would preclude litigation in a trial court followed by the normal appeal process. "Petitioners have failed to establish how emergent factors exist in Montana that require this Court's immediate attention in light of the lack of original litigation in the other forty-nine states."

The justices in Montana did not address the public trust doctrine but, in dueling op-ed columns before the Court's ruling, one [commentator](#) called the claim "implausible and audacious" and argued that use of the doctrine to order the legislature to adopt particular legislation would be unprecedented. [Another](#) commentator countered that use of the public trust doctrine applied to GHG emissions has a sound basis in state law and is necessary to protect the health and lives of children.

Affect on Remaining Cases

These same arguments are likely to play out at the trial court level in the remaining eight cases, as well in the state regulatory proceedings. Since the Montana Court did not have to rule on the public trust issue, its decision to await the outcome of a trial should not have any affect on the cases pending before trial courts or on the eventual appeals.

Whatever happens with the public trust cases, the U.S. Supreme Court's ruling in *AEP*, which is expected to place some limitations on the states' right to pursue public nuisance claims against GHG emitters, also should have little affect on the public trust cases.

The states in *AEP* are not relying on the public trust doctrine and it was not an issue in the briefing. Instead, the states in *AEP* have asserted that they can pursue public nuisance claims under the doctrine of *parens patriae*, which holds that a state has standing to sue for injuries to its quasi-sovereign interests, such as the health and welfare of a substantial segment of its population. Thus, where *AEP* is a basic standing case to decide whether the states even have the right to pursue public nuisance claims, the public trust cases address whether, in the first instance, the states are trustees of the atmosphere and, if so, whether they should be compelled to regulate GHG emissions to protect the trust asset. Those questions eventually could reach the U.S. Supreme Court, but that is likely to be another day no matter how *AEP* turns out.

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