**‘Utterly unprecedented’: A brief guide to America’s most important climate change lawsuit.**

Their lawyers fought it every step of the way, but now the US President, Secretary of State, Defence Secretary and nine federal agencies, including the Environmental Protection Agency, will have to answer in court for the simple but far-reaching legal question posed by a group of young people from Oregon: ‘Do we have a right to life in a sustainable climate?’

Kelsey Cascadia Rose Juliana, who gives her name to the case, is joined by 20 other individual plaintiffs, all aged 19 or younger, who filed their lawsuit in the federal district court for the District of Oregon alleging the defendants had known for decades of the dangers of carbon dioxide pollution and had nonetheless taken actions that increased emissions.

“Defendants also knew the harmful impacts of their actions would significantly endanger Plaintiffs, with the damage persisting for millennia,” stated the complaint. [Insert PDF complaint2] “Despite this knowledge, Defendants continued their policies and practices of allowing the exploitation of fossil fuels.”

The complaint seeks not only declaratory relief against the US government, but also the securing by the court of what it states are the plaintiffs’ “fundamental rights under the Constitution” to a “habitable climate system”. This, it argues, requires the defendants to “swiftly phase-down CO2 emissions aimed at atmospheric CO2 concentrations that are no more than 350 ppm by 2100” and to, “develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilise the climate system.”

Filed in August 2015, the plaintiffs are joined by the non-profit organisation Earth Guardian and a plaintiff identified as ‘Future Generations’, which is represented by James Hansen, a climate scientist and former director of the NASA Goddard Institute for Space Studies, who also submitted a declaration in support of the complaint [Insert PDF complaint1], and is the grandfather of one of the youngsters.

Dismissed by the Attorney General’s office as an “unlawful exercise of [the court’s] jurisdiction” based on “utterly unprecedented legal theories” [Insert PDF petition], and challenged by interventions from the fossil fuel industry [Insert PDF answer] seeking to undermine the factual basis of the claim, the case has nevertheless survived and the trial is set to begin on February 5, 2018.

Below are outlines of the key claims for relief and the responses of the defendants and the court:

**A violation of the due process clause of the Fifth Amendment?**

The plaintiffs alleged that the “nation’s climate system” was critical to their Constitutional rights to life, liberty, and property, and that the defendants had violated their substantive due process rights, as set out in the Fifth Amendment, by allowing fossil fuel production, consumption, and combustion at “dangerous levels.” They argue that, as set out in the Preamble of the Constitution, these rights belong to present generations as well to “Posterity” (future generations). In their June 2016 petition to dismiss, the government’s lawyers argued for the “consistent and long-standing refusal of courts to accept a due process right to environmental quality”.

However, in November 2016 the Oregon Federal Court determined the plaintiffs had adequately alleged a due process claim. The court said the plaintiffs had asserted a fundamental right “to a climate system capable of sustaining human life” and that the plaintiffs’ allegations regarding the defendants’ role in creating the climate crisis, the defendants’ knowledge of the consequences of their actions, and the defendants’ deliberate indifference in failing to act to prevent the harm were sufficient to state a “danger-creation” due process claim. In March 2017, the federal defendants again sought review of the legal question of whether plaintiffs had adequately alleged “invasion of a legally protected and judicially-cognizable interest in maintaining a climate system capable of sustaining human life”.

**A violation of equal protection principles?**

The plaintiffs asserted defendants had violated the equal protection principles of the Fourteenth Amendment, embedded in the Due Process Clause of the Fifth Amendment. “The affirmative aggregate acts of Defendants in the areas of fossil fuel production and consumption have caused and are causing irreversible climate change. As a result, the harm caused by Defendants has denied Plaintiffs the same protection of fundamental rights afforded to prior and present generations of adult citizens.” The US contended that the plaintiffs lacked standing because they had not alleged a particularised harm that was traceable to defendants’ actions. The US also said the alleged injuries were not redressable and that the plaintiffs’ claims raised separation of powers issues. The US also argued that Future Generations had alleged no injury in fact.

The court found that the plaintiffs had established that action or inaction contributing to climate change had injured the plaintiffs in “a concrete and personal way” and that plaintiffs “differentiated the impacts by alleging greater harm to youth and future generations.” With respect to redressability, the judge said that it could not say, “without the record being developed, that it is speculation to posit that a court order to undertake regulation of greenhouse gas emissions to protect the public health will not effectively redress the alleged resulting harm.”

**A violation of the Ninth Amendment?**

Plaintiffs asserted that, “among the implicit liberties protected from government intrusion by the Ninth Amendment is the right to be sustained by our country’s vital natural systems, including our climate system.” The government’s initial response did not challenge the assertion on the Ninth Amendment directly but rather sought to hold that the action was a nonjusticiable political question, essentially one of decisions over energy policy and therefore the exclusive purview of the Executive. The Oregon court denied such motion to dismiss, holding that the action asked the court to determine whether defendants had violated the plaintiffs’ constitutional rights, a question “squarely within the purview of the judiciary.” In a later filing, the government again challenged whether plaintiffs had a “constitutionally-protected fundamental life, liberty, or property interest in a ‘climate system’ with a particular atmospheric level of CO2” that federal agencies had a duty to protect even if taking action would contravene existing statutes and regulations.

The judge said that the court would be capable of granting equitable relief that would not “micro manage” federal agencies or make policy judgments in the event the plaintiffs prevailed. The magistrate “emphatically rejected” any contention that the topic of climate change was “formed and determined by political values and is thus a non-justiciable political question” and said that climate change was “quintessentially a subject of scientific study and methodology, not solely political debate” and that courts were “particularly well-suited for the resolution of factual and expert scientific disputes.”

**A breach of the public trust doctrine?**

The plaintiffs also alleged that defendants failed to fulfill their obligations under the public trust doctrine, rights, they argued, “that are secured by the Ninth Amendment and embodied in the reserved powers doctrines of the Tenth Amendment and the Vesting, Nobility, and Posterity Clauses of the Constitution. These rights protect the rights of present and future generations to those essential natural resources that are of public concern to the citizens of our nation. These vital natural resources include at least the air (atmosphere), water, seas, the shores of the sea, and wildlife. The overarching public trust resource is our country’s life-sustaining climate system, which encompasses our atmosphere, waters, oceans, and biosphere. Defendants must take affirmative steps to protect those trust resources.”

The US argued that previous case law “found no support for the assertion that the public trust doctrine or claims based on it arise under the Constitution or laws of the United States”, arguing that claims over public trust doctrine lawsuits arise under state law only. The court rejected this argument and the argument that federal environmental statutes displaced public trust claims, indicating that the defendants were relying on an overly expansive reading of Supreme Court precedent to narrow the scope of the federal public trust obligations.

The court was also not persuaded that plaintiffs lacked a cause of action to enforce public trust obligations, concluding that the public trust claims were substantive due process claims and that the Fifth Amendment provided a right of action. The court also found it was not necessary to determine whether the atmosphere was a public trust asset because the plaintiffs had also alleged the claim in connection with the territorial sea, to which the Supreme Court had said “time and again” that the public trust doctrine applies.

**An error in fact?**

In January 2016, the court allowed the National Association of Manufacturers (NAM), the American Fuel & Petrochemical Manufacturers (AFPM), and the American Petroleum Institute (API) to intervene as of right in the lawsuit. The court found that NAM, AFPM, and API had a “significantly protectable interest” because the relief sought by the plaintiffs would “change the very nature” of their business. The court was not persuaded by the plaintiffs’ contention that the government was “essentially pro-fossil fuel industry” and would adequately represent the interests of NAM, AFPM, and API. In December 2016, the intervenor-defendants filed their answer, denying most of the complaint’s factual allegations, including those related to climate change impacts, on the ground that the intervenors lacked sufficient information to admit or deny them.

By contrast, in January 2017, the federal defendants filed an answer including admissions regarding factual allegations of climate change’s impacts, but denying that the defendants had caused climate change or specific climate change impacts such as increased temperatures, drought conditions, warmer water temperatures, rising sea levels, and ocean acidification. The judge indicated that the federal defendants’ significant admissions regarding the threats posed by human-induced climate change had, “if anything, … enhanced” the plaintiffs’ due process claim and that any appeal would be premature because the taking of evidence was necessary to “flesh out… critical issues.”

In June 2017 the court granted motions by the three trade group intervenors to withdraw from the lawsuit. The magistrate said the intervenors, “no doubt have thoroughly studied the issue at the core of this case and are in a position to tender their own scientific evidence regarding climate change if they desire to challenge Plaintiffs’ evidence or the admissions of the United States”, but noted that the intervenors had chosen to withdraw rather than take the opportunity to “put the Plaintiffs to their proof at trial.”

[ENDS]