

[New Theory Emerges in Climate Change Litigation](#)

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Just as many eyes are focused on the climate change/global warming [cases pending](#) in the appellate courts, a group of activist environmentalists have enrolled new plaintiffs to bring an old legal theory into the climate change litigation mix. A case filed last week alleges that the atmosphere is a "public trust resource" and, as such, the government has a duty to act to protect it. See [Loorz v. Jackson](#), No. CV11-2203 (N.D. Cal., 5/4/11).

Plaintiffs are youths, alleged to be "beneficiaries" of the "public trust," including the teenage head of the group, Kids v. Global Warming, which is also a named plaintiff. Defendants are the EPA and numerous federal agencies who allegedly could act to curb greenhouse gas emissions allegedly linked to global warming.

Plaintiffs' complaint contains the well-known litany of alleged effects of global warming, including rising seas, melting glaciers, warming oceans, changing precipitation, all as an alleged result of increasing CO2 levels. It takes short term readings and phenomena and raises them to the level of global climactic changes, hypotheses into alleged scientific proof.

The plaintiffs seek declaratory and injunctive relief, on the theory that the atmosphere is a public trust; that under the public trust doctrine, the federal government has a fiduciary duty as trustee to protect the trust for the benefit of the beneficiaries (plaintiffs); and that therefore the agencies should be ordered to act to reduce CO2 emissions by 6% a year beginning in 2013.

Thus, the claim moves beyond environmental statutes, such as the Clean Air Act, and tort doctrines such as public nuisance, both of which have been recognized as not applicable by most courts, to an even less applicable theory, the so-called public trust doctrine. This notion has a far more limited reach, with lakes and navigable streams being maintained for drinking, commerce, and recreation purposes under a public-trust doctrine -- or tidal and submerged lands not being given over to private ownership.

Media reports that similar lawsuits are being filed in several other courts, and that petitions for rulemakings by state administrative agencies will be filed in other states.

The cynical use of youthful plaintiffs (aren't we all "beneficiaries"?) may illustrate how clearly the environmental activists sees the challenges of persuading courts on the science and the law, that human emissions of carbon dioxide which comprises less than 0.04 percent of the atmosphere is somehow responsible for hurricanes and every other weather event we experience.

Whatever the theory alleged, it seems likely that these cases will run headlong into the same issues that derail so much of the global warming agenda, the fact that these cases raise political questions that should be reserved for the political branches of government, not an individual judge. Indeed, the legislative branch, acting within the confines of the common law public trust doctrine, is recognized in the case law as the ultimate administrator of the trust and often is described as the ultimate arbiter of permissible uses of trust lands.