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Alec L. and Federal Atmospheric Trust Litigation: Conceptual and Political Gains Amidst Legal Defeat?

INTRODUCTION

In the past few years, a number of lawsuits have argued that the public trust doctrine (PTD) requires state and federal agencies to regulate greenhouse gas emissions.¹ The nonprofit Our Children's Trust is the primary organizer of such suits, called "atmospheric trust litigation," and has organized actions in all fifty states with teenagers as plaintiffs.² On June 5, 2014, the D.C. Circuit affirmed the dismissal of one such suit, *Alec L. ex rel. Loorz v. McCarthy*.³ Finding that the PTD is entirely a matter of state law, the court held it lacked federal subject matter jurisdiction.⁴ The plaintiffs in *Alec L.*, a coalition of teenagers and two nonprofits, WildEarth Guardians and Kids vs. Global Warming, filed suit against the heads of various federal agencies.⁵ Their suit sought declaratory and injunctive relief establishing the atmosphere as a resource managed in the public trust, which would create a fiduciary duty in the federal government to reduce greenhouse gas emissions.⁶ The Supreme Court denied certiorari on December 8, 2014, allowing the D.C. Circuit's dismissal to stand.⁷ Still, although *Alec L.* failed to establish any federal PTD rights, the

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1. *Legal Action*, OUR CHILDREN'S TR., <http://www.ourchildrenstrust.org/Legal> (last visited Jan. 20, 2015).

2. *Id.*; OUR CHILDREN'S TR., <http://www.ourchildrenstrust.org/> (last visited Apr. 19, 2015); *Atmospheric Trust Litigation*, OUR CHILDREN'S TR., <http://ourchildrenstrust.org/atl> (last visited Apr. 19, 2015) (Our Children's Trust organizes youth plaintiffs to highlight their message that "current generations cannot continue on their destructive path and leave the planet damaged for future generations."); *Status of Actions in Other States - Alphabetical List*, OUR CHILDREN'S TR., <http://ourchildrenstrust.org/US/StateSummaryAlphabetical> (last visited Mar. 10, 2015).

3. *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir.), *cert. denied*, 135 S. Ct. 774 (2014) (mem.).

4. *Id.* at 8.

5. *Id.*; *Federal Lawsuit*, OUR CHILDREN'S TR., <http://www.ourchildrenstrust.org/US/Federal-Lawsuit> (last visited Apr. 20, 2015).

6. First Amended Complaint for Declaratory and Injunctive Relief, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir.), *cert denied*, 135 S. Ct. 774 (2014) (mem.) (No. 1:11-cv-02235 (RLW)).

7. *Alec L. ex rel. Loorz v. McCarthy*, 135 S. Ct. 774 (2014) (mem.), *denying cert. to* 561 Fed. Appx. 7 (D.C. Cir.), *aff'g Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012).

case served a valuable role by garnering public attention and contributing legal and political momentum to the movement to address climate change.

I. BACKGROUND

A. Public Trust Background

The public trust is a common law doctrine that preserves navigable waters and tidal lands for public use, and establishes a duty in governments to protect such public use.⁸ The PTD's origins date back to the fifth century, when the laws of the Roman emperor Justinian declared, "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore."⁹ The doctrine was later adopted in European common law.¹⁰ Hence, the United States' version of the PTD, being derived from English common law, generally protects public access to waterways and establishes a fiduciary duty of care in sovereign states to manage navigable waterways and shoreline resources for the public benefit.¹¹

Traditionally, most American PTD common law has concerned tidal areas, navigable waters, and submerged lands.¹² Attempts to expand the PTD beyond these areas have had mixed results. In the 1970s and 1980s, Professor Joseph Sax's scholarship played a key role in influencing California courts to expand the PTD to inland water resources, water rights, and water quality.¹³ Yet the limited attempts to expand the doctrine to wildlife and terrestrial resources have proved largely unsuccessful.¹⁴ As environmental PTD litigation expanded in the 1970s during a phase of broad public support for environmental issues,¹⁵ a handful of states added public trust principles to their constitutions to codify

8. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485–89 (1969); BLACK'S LAW DICTIONARY 1427 (10th ed. 2014) (defining "public-trust doctrine" as "the principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use").

9. J. INST. 2.1.1. (J.B. Moyle trans.).

10. Charles F. Wilkinson, *The Headwaters of the Public Trust Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429–31 (1989).

11. Patricia Kameri-Mbote, *The Use of the Public Trust Doctrine in Environmental Law*, 3 LAW ENV'T & DEV. J. 195, 198 (2007); Sax, *supra* note 8, at 476.

12. Kameri-Mbote, *supra* note 11; Sax, *supra* note 8, at 476; *see, e.g.*, Ill. Cent. R.R. Co. v. State of Illinois, 146 U.S. 387, 435 (1892).

13. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 n.16 (Cal. 1983); Marks v. Whitney, 491 P.2d 374, 378 n.4 (Cal. 1971); United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161 (Ct. App. 1986); Richard M. Frank, *The Public Trust Doctrine Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 669–77 (2012) (describing influence of Joseph Sax's PTD scholarship and the subsequent expansion of the doctrine in the following decades); Holly Doremus, *Groundwater and the Public Trust Doctrine, California Style*, LEGAL PLANET (July 21, 2014), <http://legal-planet.org/2014/07/21/groundwater-and-the-public-trust-doctrine-california-style>.

14. Frank, *supra* note 13, at 677–79.

15. Riley E. Dunlap & Angela G. Mertig, *The Evolution of the U.S. Environmental Movement from 1970 to 1990 An Overview*, 4 SOC'Y & NAT. RESOURCES 209, 210–11 (1991).

environmental protections by enabling common law PTD actions.¹⁶ However, there is no federal analog to those explicit codifications.

PTD expansion has found similarly limited success in federal courts. Although past rulings applied the PTD to federal lands,¹⁷ more recent decisions have found it inapplicable to federal lands or officials.¹⁸ Furthermore, courts have found that federal agencies have no obligation to comply with states' PTD responsibilities.¹⁹ Some scholars have argued that judicial restraint, rather than an inherent limitation of the PTD to state-controlled resources, is responsible for the lack of application of the PTD to federal resources.²⁰ This may be overly optimistic. The case law in support of a federal PTD is sparse and is directly contravened by the recent unanimous Supreme Court decision in *PPL Montana, LLC v. Montana*, which found that the PTD is entirely a matter of state law.²¹

B. Case Summary

The *Alec L.* plaintiffs argued that federal subject matter jurisdiction existed because the federal government has inherent public trust obligations over national resources.²² Maintaining that the application of the PTD to the federal government was a matter of first impression, the plaintiffs construed past decisions of the D.C. Circuit and Supreme Court as addressing PTD issues within states' borders, and thus not limiting the recognition of a federal PTD.²³ However, in reviewing the district court's dismissal of *Alec L.*, the D.C. Circuit rebuffed these general arguments and stated that "the Plaintiffs point to no case . . . [that stands] for the proposition that the public trust doctrine—or claims based upon violations of that doctrine—arise under the Constitution or

16. See generally Matthew T. Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169 (1997).

17. See, e.g., *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) (finding that the federal government has the authority to administer the public trust with respect to federal matters).

18. *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1081–86 (D.C. Cir. 1984) (declining to consider whether the PTD authorizes federal recovery of costs after airline disaster in riverbed); *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980) (rejecting the PTD as basis for establishing federal water rights); Frank, *supra* note 13, at 680.

19. Frank, *supra* note 13, at 680–81; *Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1232 (S.D. Cal. 2011), *aff'd*, 540 Fed. Appx. 587 (9th Cir. 2013).

20. Gerald Torres & Nathan Bellinger, *The Public Trust The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 295 (2014).

21. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012).

22. Reply Brief for Youth Appellants at 4–5, *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 12 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Looz v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir.), *cert denied*, 135 S. Ct. 774 (2014) (mem.) (No. No. 13-5192 (RLW)); First Amended Complaint for Declaratory and Injunctive Relief at ¶ 19, *Alec L.*, 863 F. Supp. 2d 11 (No. 1:11-cv-02235 (RLW)).

23. Reply Brief for Youth Appellants at 3-4, *Alec L.*, 863 F. Supp. 2d 11 (No. 1:11-cv-02235 (RLW)).

laws of the United States, as would be necessary to establish federal question jurisdiction.”²⁴

The district and circuit courts also pointed to the Supreme Court’s holding in *PPL Montana* as decisive precedent determining that there is no federal jurisdiction for PTD claims.²⁵ *PPL Montana* concerned a dispute over an electric utility’s use of state-owned riverbeds for hydroelectric facilities without paying fees.²⁶ Justice Kennedy’s majority opinion chose not to address the PTD, stating, “the public trust doctrine remains a matter of state law” and that “the States retain residual power to determine the scope of the public trust over waters within their borders.”²⁷ In their petition to the Supreme Court, the *Alec L.* plaintiffs characterized *PPL Montana*’s treatment of the PTD as dictum.²⁸ Plaintiffs also cited several cases from multiple circuits containing language referring to the federal government’s role as a trustee of public lands.²⁹ Yet, the Supreme Court’s denial of certiorari³⁰ supports the D.C. Circuit’s stricter view that *PPL Montana* “directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation.”³¹

Finally, even had *Alec L.* been considered on the merits, the district court questioned the federal government’s responsibility to recognize a PTD claim in the wake of *American Electric Power Co. v. Connecticut*.³² There, the Supreme Court found that the Clean Air Act “displace[d] any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power

24. *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir.), *cert. denied*, 135 S. Ct. 774 (2014) (mem.).

25. *Id.*; *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012), *aff’d sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir.), *cert denied*, 135 S. Ct. 774 (2014) (mem.).

26. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1221 (2012).

27. *Id.* at 1235.

28. Petition for Writ of Certiorari at 26, *Alec L. ex rel. Loorz v. McCarthy*, 135 S. Ct. 774 (2014) (mem.) (No. 14-405) (arguing that while *PPL Montana* “held that *states* were not subject to a *federal* public trust doctrine, [the case] did not hold that the *federal* government was not subject to the federal public trust doctrine”).

29. *Id.* at 17-19; *United States v. CB & I Constructors, Inc.*, 685 F.3d 827, 836 (9th Cir. 2012) (“In the public lands context, the federal government is more akin to a trustee that holds natural resources for the benefit of present and future generations.”); *United States v. Ruby Co.*, 588 F.2d 697, 704-05 (9th Cir. 1978) (“This [equity-policy] principle is a corollary to the constitutional precept that public lands are held in trust by the federal government for all of the people.”); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (“All public lands of the United States are held by it in trust for the people of the United States.”); *United States v. Miller*, 28 F.2d 846, 850-51 (8th Cir. 1928); *see also Massachusetts v. Andrus*, 594 F.2d 872, 890 (1st Cir. 1979).

30. *Alec L.*, 135 S. Ct. 774.

31. *Alec L.*, 561 Fed. Appx. at 8.

32. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16 (D.D.C. 2012), *aff’d sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir.), *cert denied*, 135 S. Ct. 774 (2014) (mem.); *see Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

plants.”³³ This suggests that atmospheric trust cases, which would bring common law claims under federal jurisdiction, will not succeed in federal courts.

II. ANALYSIS

The Supreme Court’s denial of certiorari and the lower courts’ opinions suggest that the PTD will remain a matter of state law. Yet, while a loss for the plaintiffs, *Alec L.* should not be considered futile. The suit garnered significant, if brief, media attention, and could play a role in reintroducing the public to the concept of the PTD as a tool for broad environmental protection.³⁴ Even individuals unfamiliar with the demands of federal jurisdiction or statutory preemption may intuitively analogize between protecting shorelines and atmospheric resources from private exploitation.³⁵ The degradation of both resources has undeniable negative effects on the public’s wellbeing.³⁶

Alec L. may also have raised the profile of pending state atmospheric trust litigation by attracting national media attention.³⁷ This raises the prospect that, with continued legal and political pressure, state courts could expand the PTD to include atmospheric resources. This outcome is not without precedent; a similar expansion has already happened with California’s aquatic resources.³⁸ In the 1970s and 1980s, California courts supported the expansion of the doctrine³⁹ in the context of academic and public support for environmental issues.⁴⁰ Current state judiciaries may be similarly willing to expand the PTD given contemporary academic support for extending the doctrine to atmospheric resources⁴¹ and growing public support for addressing climate

33. *Am. Elec. Power Co.*, 131 S. Ct at 2537. Some legal scholars alternatively argue that the PTD has a basis in the U.S. Constitution. See Torres & Bellinger, *supra* note 20, at 288–90; Wilkinson, *supra* note 10, at 456–59. The lack of any recognition for this argument by the D.C. District and circuit courts, as well as the denial of certiorari for *Alec L.*, suggests that such a theory currently has little traction in the federal judiciary.

34. See, e.g., Gabriel Nelson, *Young Activists Sue U.S., States Over Greenhouse Gas Emissions*, N.Y. TIMES (May 5, 2011), available at <http://www.nytimes.com/gwire/2011/05/05/greenwire-young-activists-sue-us-states-over-greenhouse-64366.html?pagewanted=all>; *Full Show The Children’s Climate Crusade*, MOYERS & CO. (Jan. 1, 2015), <http://billmoyers.com/episode/full-show-climate-crusade/>.

35. See Sax, *supra* note 8, at 556–57.

36. *Climate Change Impacts and Adapting to Change*, EPA, <http://www.epa.gov/climatechange/impacts-adaptation/> (last visited Feb. 24, 2015).

37. See *Full Show The Children’s Climate Crusade*, *supra* note 34; see also Gabriel Nelson, *supra* note 34.

38. See Frank, *supra* note 13, at 671–77.

39. *Id.* at 667–70; see, e.g., *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 718–24 & n.16 (Cal. 1983).

40. Dunlap & Mertig, *supra* note 15, at 210–11; Frank, *supra* note 13, at 667–70; Sax, *supra* note 8, at 557–65; see *Nat’l Audubon Soc’y*, 658 P.2d at 719 n.16.

41. Frank, *supra* note 13, at 686–91; Gary D. Meyers, *Variation on a Theme Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 734–35 (1989); Torres &

change.⁴² Matters may be coming to a head. To date, state courts have decided six atmospheric trust cases without establishing the atmosphere as a public trust resource, though some courts have appeared sympathetic to the claims.⁴³ Of the six currently pending atmospheric trust cases, at least one is proceeding to trial on the merits.⁴⁴ A decision expanding the PTD to the atmosphere in any of these cases, though perhaps unlikely, would be a landmark victory for proponents of atmospheric trust litigation and would likely generate further legal and political momentum to address climate change.

The *Alec L.* plaintiffs and Our Children's Trust used media attention to underscore the inadequacy of existing statutory measures to address climate change while highlighting the potential effectiveness of establishing the atmosphere as a public trust resource.⁴⁵ Considering congressional failure to meaningfully limit greenhouse gas emissions at the federal level,⁴⁶ environmentalists should celebrate the use of PTD litigation as a means of building political momentum and public mobilization in support of climate action by states.⁴⁷ If successful, such state actions may influence a recalcitrant Congress to similarly limit greenhouse gas emissions. As such, Our Children's Trust should continue to pursue atmospheric trust cases in state courts. However, if their strategy fails to yield a favorable opinion in the coming years, their organizing and legal efforts may be better spent elsewhere in the climate movement.

Bellinger, *supra* note 20, at 300–01; Wilkinson, *supra* note 10, at 470; Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I) Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 87–88 (2009).

42. Coral Davenport & Marjorie Connelly, *Most Republicans Say They Back Climate Action*, *Poll Finds*, N.Y. TIMES (Jan. 30, 2015), available at <http://www.nytimes.com/2015/01/31/us/politics/most-americans-support-government-action-on-climate-change-poll-finds.html>.

43. *State Lawsuits*, OUR CHILDREN'S TR., <http://ourchildrenstrust.org/US/LawsuitStates> (last visited Apr. 22, 2015); see, e.g., *Kanuk ex rel. Kanuk v. Alaska Dep't of Natural Res.*, 335 P.3d 1088, 1103 (Alaska), *reh'g denied* (2014) (affirming dismissal of plaintiffs' atmospheric PTD claim for "prudential reasons" but acknowledging plaintiffs' "otherwise justiciable claims on that basis").

44. OUR CHILDREN'S TR., *supra* note 43; *Chernaik v. Kitzhaber*, 328 P.3d 799, 808 (Or. Ct. App. 2014) (remanding for "a judicial declaration of whether, as [plaintiffs] allege, the atmosphere 'is a trust resource' that 'the State of Oregon, as a trustee, has a fiduciary obligation to protect from the impacts of climate change.'").

45. See *Full Show The Children's Climate Crusade*, *supra* note 34; see also Gabriel Nelson, *supra* note 34.

46. Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES (July 22, 2010), available at <http://www.nytimes.com/2010/07/23/us/politics/23cong.html>.

47. Cf. Theda Skocpol, *Naming the Problem What It Will Take to Counter Extremism and Engage Americans in the Fight against Global Warming* 116–17 (Columbia Sch. of Journalism & Scholars Strategy Network 2013), available at http://www.scholarsstrategynetwork.org/sites/default/files/skocpol_captrade_report_january_2013_0.pdf (arguing for the "need to build a populist anti-global warming movement" to change the political tide).

CONCLUSION

Although a nominal loss, *Alec L.* played a useful messaging and political role.⁴⁸ Indeed, this may have been the plaintiffs' goal all along—*American Electric Power Co. v. Connecticut* suggests the Clean Air Act would displace any federal common law PTD claims that a favorable decision may have created.⁴⁹ Thus the principal benefit of atmospheric trust litigation for the broader climate change movement is as a demonstration of a well-organized and concerted effort to address climate change.⁵⁰ It remains to be seen whether any atmospheric trust cases will succeed in state courts. Yet regardless of any legal wins expanding the PTD, litigation may push state legislatures and Congress to meaningfully regulate greenhouse gas emissions in response to continued public mobilization and legal pressure to address climate change.⁵¹ These may be incremental and indirect gains, but considering the immediacy and gravity of climate change, any benefit wrung from atmospheric trust litigation is welcome.

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48. *Alec L. ex rel. Looorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir.), cert. denied, 135 S. Ct. 774 (2014) (mem.).

49. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

50. See Skocpol, *supra* note 47, at 116–17.

51. See *id.*

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