

## GREEN JUSTICE REVISITED: DICK BROOKS ON THE LAWS OF NATURE AND THE NATURE OF LAW

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In *Green Justice: The Environment and the Courts*, first published in 1987 and updated in 1996, Richard Oliver (Dick) Brooks and his longtime collaborator Thomas More Hoban set out to explore the interrelationship between the legal system and the environment.<sup>1</sup> The authors use key environmental law cases on topics as population, the public trust doctrine (PTD), biodiversity conservation, and sustainability. *Green Justice*, for undergraduate and non-law graduate courses in environmental law and policy, as well as public administration and planning, traces the origins and foundational principles of environmental law. These principles are drawn from our English common law heritage and overlain by an elaborate architecture of statutory and regulatory laws at every level of government. The authors undertook the ambitious task of explaining the American legal system, the nature of environmental regulation, theories of jurisprudence, and principles of ecology, all in 219 pages.

Some might say the authors bit off more than they could chew. But the book has proven prescient in identifying a number of issues that have become the hot button issues of today. These issues include: global warming, species extinction, access to justice, constitutional rights to a healthy environment, and recognition of the “rights of nature.” The book also highlights a resurgence of common law remedies such as public nuisance to look at the failure of the other branches of government to address the most pressing threats to public health and safety.

Brooks and Hoban chose to focus on a period they dubbed “the environmental decades” between 1970 and 1990. They selected 14 case studies with precedential judicial decisions to illustrate the major features of environmental litigation, as well as the role of the courts in adjudicating disputes and determining rights and responsibilities.<sup>2</sup> A lot has happened since these cases were decided. In this essay I will pick out a few of the more interesting developments in the law and offer some observations on where things might be headed.

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1. THOMAS M. HOBAN & RICHARD O. BROOKS, *GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS* 16 (2d ed. 1996).

2. *Id.*

### From Endangered Species Protection to the Rights of Nature

In *Green Justice*, Brooks and Hoban picked the *Palila* case<sup>3</sup> to illustrate how litigation could be brought in the name of an endangered species to challenge governmental action that threatened to eradicate its habitat. The case involved a small, finch-like bird living in the montane forests of Hawaii. The bird's habitat was rapidly disappearing as a result of the introduction, by the Hawaii Department of Natural Resources, of two exotic species of wild sheep and goats highly prized by sport hunters.<sup>4</sup> The issue was whether the destruction of the bird's habitat by the exotics constituted a "take" in violation of the Endangered Species Act (ESA).<sup>5</sup> The Ninth Circuit Court of Appeals held it was a "take" and ordered the state agency to remove the offending animals and allow the habitat to recover.<sup>6</sup> Today, the Palila clings to life in a tiny patch of habitat on the upper slopes of Mauna Kea Volcano on the Big Island.<sup>7</sup>

It is widely recognized that the ESA's species by species approach to conservation is inadequate and inefficient—too little, too late. Ecosystem based approaches that seek to reconnect fragmented habitats and overcome the patchwork management regimes created by political boundaries are the preferred methodology. But even that approach may not be enough to slow the accelerating mass extinction of plants and animals worldwide.<sup>8</sup> Wildlife advocates have long argued for a broader concept of conservation, recognizing that nature itself ought to have enforceable rights.<sup>9</sup>

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3. *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988). The court initially said that the "palila has legal status and wings its way into federal court as a plaintiff in its own right." *Id.* at 1107. In a subsequent case the Ninth Circuit clarified its holding that cases could be brought in the name of the species provided there was also a human plaintiff with standing to bring the case as "next friend[.]" *see Cetacean Community v Bush*, 386 F.3d 1169, 1173-74 (9th Cir. 2004).

4. *Id.* at 1107.

5. *Palila*, *supra* note 4, at 1108 ("The Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved'...") (citing Endangered Species Act, 16 U.S.C. § 1531(b)).

6. *Id.* at 1110.

7. *Palila*, American Bird Conservancy, <https://abcbirds.org/bird/palila/> (last visited Mar. 1, 2019).

8. *See* EDWARD O. WILSON, *HALF EARTH: OUR PLANET'S FIGHT FOR LIFE* 54 (2016) (applying the significance of mass extinction of living things globally).

9. *See* RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 4 (1989) (arguing that morality should include the relationship between humans and nature and that ethics should expand from not only the preoccupation with humans and their Gods, but also animals, plants, rocks, and nature); *see* CORMAC CULLINAN, *WILD LAW: A MANIFESTO*

What has come to be known as the rights of nature movement is gaining ground in courts and international tribunals around the world.<sup>10</sup> In Ecuador, in a case brought on behalf of the Vilcabamba River,<sup>11</sup> the Provincial Court of Loja handed down a path-breaking decision interpreting the Ecuadorian Constitution.<sup>12</sup> The Court held that the Constitution requires the Provincial Government to redo a road-widening project that was damaging the river and to apologize for not undertaking more detailed studies of the projects potential harm.<sup>13</sup> Also, New Zealand's Parliament passed the Te Awa Tupua Act, giving the Whanganui River and ecosystem legal standing in its own right to guarantee its "health and well-being."<sup>14</sup>

In Bolivia, in response to the impacts of climate change on the nation's economic and community health, the National Congress enacted "The Law of Mother Earth." The purpose of the law is to protect the natural world—its resources, sustainability, and value—as essential to the common good and well-being of its citizens.<sup>15</sup>

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FOR EARTH JUSTICE 101 (2d ed. 2011) (quoting THOMAS BERRY, EVENING THOUGHTS: REFLECTING ON EARTH AS A SACRED COMMUNITY 149 (2006)) ("Every component of the Earth Community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing process of the Earth Community."); see CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT 3 (3d ed. 2010) (reiterating the author's original thesis that "we give legal rights to forests, oceans, rivers, and other so called 'natural objects' in the environment—indeed, to the natural environment as a whole."); see DAVID R. BOYD, THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD XXXV (2017) (arguing that protecting Earth's life-support systems requires a new set of rights for non-human animals, other species, and ecosystems).

10. See COUNCIL OF CANADIANS, THE RIGHTS OF NATURE: THE CASE FOR A UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH (2011) (discussing the movement to recognize the Rights of Nature following the 2010 World People's Conference in Bolivia); see *Our Mission*, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, <http://therightsofnature.org/fundamental-principles/> (last visited Mar. 2, 2019) ([The Alliance] is a network of organizations and individuals committed to the universal adoption and implementation of legal systems that recognize, respect and enforce "Rights of Nature[.]"); see *Champion The Rights of Nature*, COMMUNITY ENVTL. LEGAL DEF. FUND (Aug. 4, 2015), <https://celdf.org/rights/rights-of-nature/> (discussing the work in advocating for Rights of Mother Earth in courts and international tribunals).

11. See *id.* (explaining how the case was brought by an American couple, Richard Frederick Wheeler and Eleanor Geer Huddle, who own property on the Vilcabamba River).

12. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR DE 2008, [CONSTITUTION] title 2, chap. 7, art. 7, translated in Georgetown University Political Database of the Americas, [pdba.georgetown.edu/Constitutions/Ecuador/english08.html](http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html) (stating that nature "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.").

13. Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE <http://therightsofnature.org/first-ron-case-ecuador/> (last visited Mar. 2, 2019).

14. Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016, pt. 2, cls 12–14 (N.Z.). The legislation settled a centuries old lawsuit brought by the Wanganui iwi in the name of the river. The law entrusts custodianship of the river to the Wanganui iwi and the government and sets up an elaborate management structure.

15. Peter Neil, *Law of Mother Earth: A Vision From Bolivia* HUFFINGTON POST (Jan. 18, 2015), [https://www.huffingtonpost.com/peter-neill/law-of-mother-earth-a-vis\\_b\\_6180446.html](https://www.huffingtonpost.com/peter-neill/law-of-mother-earth-a-vis_b_6180446.html).

In Colombia, the Constitutional Court declared that the heavily polluted Atrato River is “a living entity, subject to rights related to protection, conservation, maintenance and restoration at the hands of the state and the indigenous communities . . .”<sup>16</sup> Later, in a case brought by 25 youth plaintiffs, the Supreme Court of Colombia, in a more sweeping decision, ruled that the “Colombian Amazon is recognized as an entity, a subject of rights” including the right to “legal protection, preservation, maintenance and restoration.”<sup>17</sup>

The United States (U.S.) courts have yet to embrace the rights of nature doctrine.<sup>18</sup> A case brought in the name of the Colorado River against the State of Colorado was quickly withdrawn after the plaintiffs were threatened with sanctions under Rule 11 of the Federal Rules of Civil Procedure for bringing a “frivolous” case.<sup>19</sup> That may have been a prudent move. In January 2018, a federal judge in Pennsylvania ordered Thomas Linzey, co-founder of the Community Environmental Legal Defense Fund (CELDF), and a colleague to pay \$52,000 in legal fees incurred by a company that wanted to install a fracking waste injection well in Grant Township.<sup>20</sup> The Township had adopted an ordinance drafted by CELDF banning such wells. Magistrate Judge, Susan Baxter, accused Linzey of using a “frivolous” legal argument, i.e. the right to local self-government and the rights of nature, including “rivers, streams, and aquifers,” to “exist, flourish, and naturally evolve,” to defend the ordinance.<sup>21</sup> The judge

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16. World Conscious Pact, *The Constitutional Court Recognizes the Atrato River as a Subject of Rights* (Sep. 8, 2017) <https://worldconsciouspact.org/news/the-constitutional-court-recognizes-the-atrato-river-as-subject-of-rights/>.

17. *Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court’s Decision*, DEJUSTICIA (April 4, 2018), <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/> (“[T]he fundamental rights of life, health, liberty, and human dignity are determined by the environment and ecosystems. Without a clean environment, the plaintiffs and human beings, in general, can’t survive, much less protect those rights for the children or future generations.”).

18. See generally Hope M. Babcock, *A Brook With Legal Rights: The Rights of Nature in Court*, 43 *ECOLOGY L. Q.* 1, 11, 13–14 (2016) (discussing the Court’s rejection of the Rights of Nature to have standing in Court).

19. Lindsay Fendt, *Colorado River ‘personhood’ case pulled by proponents*, ASPEN JOURNALISM (Dec. 5, 2017), <https://www.aspenjournalism.org/2017/12/05/colorado-river-personhood-case-pulled-by-proponents/>; See generally FED.R.CIV.P. 11 (discussing representations to the court and sections against lawyers who violation Rule 11).

20. Grant Township Supervisors, *Grant Township, PA: Sanctions Against Our Lawyers ‘Badge of Courage’*, COMMUNITY ENVTL. LEGAL DEFENSE FUND (Jan. 12, 2018), <http://celdf.org/2018/01/grant-township-pa-sanctions-lawyers-badge-courage/>.

21. Seth Whitehead, *Judge Reprimands CELDF Lawyers for ‘Bad Faith’ Efforts to Ban Pa. Wastewater Well*, MOUNTAIN STATES (Jan. 09, 2018), <https://www.energyindepth.org/judge-reprimands-celdf-lawyers-for-bad-faith-efforts-to-ban-pa-wastewater-well/> (“An attorney’s zealous advocacy for the protection of a client’s interests is certainly appropriate; however, the legitimate pursuit of justice imposes important obligations on counsel to ensure that the Court is not a mechanism of harassment or unbridled obstruction. The continued pursuit of frivolous claims and defenses, despite

excoriated Linzey for pressing arguments that had been rejected numerous times in previous cases that Linzey was involved.<sup>22</sup> The decision is sure to have a chilling effect on lawyers' thinking of bringing novel rights of nature claims.

Critics argue the rights of nature concept proves too much and asserts a claim to higher morality that ignores practical and political reality of allocating scarce resources needed to support a global population approaching 9 billion.<sup>23</sup> But it also has the support of prominent environmental law scholars like Tulane law professor, Oliver Houck, who has written a deeply personal, but also intellectually rigorous critique of the concept.<sup>24</sup> Houck poses the essential question whether the rights of nature is just an abstract idea or whether it is law to apply. Here is his answer:

Nature and natural things can be recognized as a party in interest, if and as we say so, which would by itself add an element of candor to many proceedings and help to balance the scales. Nor is there a problem of practicability; lawyers represent nonhuman interests every day, including corporations that we have simply declared to be persons. As for more substantive rights, why not those too if their principles can be reasonably determined? Similar rights for selected species and ecosystems already exist.<sup>25</sup>

Professor Houck acknowledges the “stiff challenges in science and ethics” that await the actual implementation of the rights of nature.<sup>26</sup> But after noting the failure of conventional environmental law to arrest the massive ecological degradation taking place across the globe—deforestation, wetlands loss, mass extinction, coral bleaching, ocean acidification, melting ice sheets and glaciers, etc.—he ends with a plea to recognize that the “Rights of nature tap into a place that anthropomorphism

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[attorney] Linzey's first-hand knowledge of their insufficiency, and the refusal to retract each upon reasonable request, substantially and inappropriately prolonged this litigation, and required the Court and PGE to expend significant time and resources eliminating these baseless claims.”)

22. Dave Hasemeyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today*, INSIDE CLIMATE NEWS (May 9, 2018),

<https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general> (“This Court determined that Attorneys Linzey and Dunne have pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, each was on notice of the legal implausibility of the arguments previously advanced.”).

23. James L. Huffman, *Do Species and Nature Have Rights?* 13, PUB. LAND L. REV. 51 (1992); Daniel Worster, *The Rights of Nature: Has Deep Ecology Gone Too Far?* FOREIGN AFFAIRS, November/December, 1995 (Magazine), at 111.

24. Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENVTL. L.J. 1, 44 (2017).

25. *Id.* at 44.

26. See Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENVTL. L.J. 1, 44 (2017) (identifying the challenges that apply to nothing of “the colossus of climate change”).

and its pragmatism, for all its importance, cannot touch: A powerful link to the human heart.”<sup>27</sup>

### From the Shores to the Atmosphere: The Elusive Promise of the Public Trust Doctrine

Brooks and Hoban chose the iconic Mono Lake case<sup>28</sup> for their discussion of the Public Trust Doctrine (PTD) as a force for nature preservation. Mono Lake, the second largest lake in California, is situated to the east of Yosemite National Park at the base of the steep eastern escarpment of the Sierra Nevada.<sup>29</sup> The lake sits in an ancient caldera that traps all of the snowmelt and rainfall. Mono Lake, a desert lake, has an unusually productive ecosystem based on brine shrimp that thrive in its waters.<sup>30</sup> The brine shrimp ecosystem provides critical nesting habitat for two million migratory birds that feed on the shrimp.<sup>31</sup> The lake also has provided boating, commercial brine shrimp harvesting, and is a major tourist attraction.<sup>32</sup> The threat to public trust values at Mono Lake arises because in most years four of the lake's five freshwater tributaries are entirely diverted to meet the municipal and industrial needs of the City of Los Angeles (LA).<sup>33</sup> LA's unquenchable thirst for water previously led to the dewatering of the Owens Valley as depicted in the movie *Chinatown*.<sup>34</sup>

In its landmark *Mono Lake* decision, the Supreme Court of California ruled that water rights are subject to limitations protecting the public trust in navigable waters.<sup>35</sup> The Court held that the state, under the PTD, had a continuing responsibility for the state's navigable waters and that the PTD

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27. *Id.* at 50.

28. Nat'l Audubon Soc'y v. Super. Ct. of Alpine City, 658 P.2d 709, 711 (Cal. 1983) [hereinafter *Mono Lake*].

29. *Visit Mono Lake*, MONO LAKE COMMITTEE, <https://www.monolake.org/visit/> (last visited Mar. 2, 2019).

30. *About Mono Lake*, MONO LAKE COMMITTEE, <https://www.monolake.org/about/stats> (last visited Mar. 2, 2019).

31. *See Mono Lake Committee, About Mono Lake*, <https://www.monolake.org/about/stats> (last visited Mar. 2, 2019) (reporting the population numbers of specific birds at Mono Lake).

32. Mono Lake Committee, *Restoration*, <https://www.monolake.org/mlc/restoration> (last visited Mar. 2, 2019); *see also* Mono Lake Committee, *Science*, <https://www.monolake.org/mlc/science> (last visited Mar. 2, 2019).

33. *Historic Mono Basin Agreement to Settle Decades of Fighting Over Mono Lake Water*, CALIFORNIA TROUT INC. (Aug. 27, 2013), <https://caltrout.org/2013/08/historic-mono-basin-agreement-to-settle-decades-of-fighting-over-mono-lake-water/>.

34. *See* Louis Sahagun, *L.A. took their water and land a century ago. Now the Owens Valley is fighting back*, L.A. Times (July 13, 2017), <http://www.latimes.com/local/california/la-me-owens-valley-eminant-domain-20170712-story.html> (discussing the history of Owens Valley water rights, and efforts by Los Angeles officials to appropriate water for city use).

35. *Mono Lake*, 658 P.2d at 719.

prevented any party from appropriating water in a manner that harmed the public trust interests.<sup>36</sup> The Court said the state as a sovereign has the authority and the duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands."<sup>37</sup> This ruling established that the PTD and appropriative water rights are "part of an integrated system of water law."<sup>38</sup> Both must be considered when determining appropriate use of water in California.<sup>39</sup> The *Mono Lake* decision is regarded as a classic in the annals of environmental and natural resources law.<sup>40</sup> However, some commentators have questioned how much impact the decision has had on the development of water law in California and elsewhere.<sup>41</sup> Nevertheless, the decision is credited with saving Mono Lake from almost certain ecological collapse. On the 20th anniversary of the decision, respected water law scholar, Professor Emeritus Hap Dunning wrote that but for the decision: "The lake's surface area would be 30% smaller in size. But ecologically things would be far worse than that: salinity would be up by 60%, pushing the unique Mono Lake ecosystem into collapse."<sup>42</sup>

Fast forward and the PTD is now at the center of what has been dubbed "the trial of the century."<sup>43</sup> The case, *Juliana v. United States*,<sup>44</sup> involves a novel claim filed by 21 youth plaintiffs asserting a constitutional right to a stable climate and a livable planet.<sup>45</sup> The case asserts that the atmosphere is a public trust resource and that the government has a fiduciary obligation to protect it from the effects of carbon pollution.<sup>46</sup> According to plaintiffs, the government has for many decades ignored the growing body of science

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36. *Id.* at 732.

37. *Id.* at 724.

38. *Nat. Audubon Soc. v. Super. Ct. of Alpine City*, 658 P.2d 709,732 (Cal.1983) *modified*, (Apr.14, 1983).

39. *Mono Lake*, 658 P.2d at 732.

40. *See, e.g.* Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1101 (2012) (discussing the importance of the Mono Lake Case in western water law).

41. Hasemeyer, *supra* note 22 ("This Court determined that Attorneys Linzey and Dunne have pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, each was on notice of the legal implausibility of the arguments previously advanced.")

42. Hap Dunning, *On saving Mono Lake, 20 years later*, MONO LAKE NEWS LETTER 3, Winter and Spring 2014, <http://monolake.org/today/wp-content/uploads/2014/11/On-saving-Mono-Lake-20-years-later-by-Hap-Dunning.pdf>.

43. *See* Chelsea Harvey, WASH. POST, *Trump Could Face the 'Biggest Trial of the Century' - Over Climate Change* (Dec. 1, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/12/01/trump-could-face-the-biggest-trial-of-the-century-over-climate-change/?noredirect=on&utm\\_term=.1415a526d550](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/01/trump-could-face-the-biggest-trial-of-the-century-over-climate-change/?noredirect=on&utm_term=.1415a526d550) (discussing the *Our Children's Trust* case relying on the public trust doctrine for part of its legal claim).

44. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1224 (D. Or. 2016).

45. *Id.*

46. *See id.* at 1233,1274 (stating the United States government knew about fossil fuels negatively affecting climate and the government has a sovereign interest over the atmosphere).

warning of catastrophic effects of climate change. Also, plaintiffs argue the government has either failed to take meaningful action to regulate and reduce Greenhouse Gas (GHG) emissions or made matters worse by subsidizing fossil fuels; promoting production of oil, gas, and coal from public lands and waters; and licensing construction of pipelines, terminals, railroads, and other fossil fuel infrastructure.<sup>47</sup> The plaintiffs further argue the government's actions or inactions have violated their constitutional rights to life, liberty, and property as protected under the Fifth Amendment to the US Constitution.<sup>48</sup>

Environmental lawyers and scholars view with skepticism these claims of a constitutional right to a stable or "safe" climate grounded on a theory of a substantive federal public trust obligation.<sup>49</sup> Indeed, the first attempt to make a Constitutional claim failed to make it past a motion to dismiss.<sup>50</sup> But the youth plaintiffs in *Juliana* found a more receptive forum in the Federal District Court of Oregon. On November 10, 2016, Judge Ann Aiken issued a blockbuster opinion denying the government's motion to dismiss.<sup>51</sup> Recognizing the novel and perhaps historic nature of the case Judge Aiken said, "This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty."<sup>52</sup>

Judge Aiken then set about to address each of the arguments advanced by the government challenging the court's jurisdiction to hear the case. First, the court rejected the "political question" argument the case presented, which created an issue of separation of powers.<sup>53</sup> Rather, the plaintiffs were seeking a declaration of their rights under the Constitution, which has been a core function of the courts since *Marbury v. Madison*.<sup>54</sup> Then, the court's disposal of standing was not a problem at this stage of the case because the plaintiffs had alleged facts that if proven would establish injuries that were "concrete, particularized and actual or imminent"; that

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47. *Id.* at 1263.

48. *Id.* at 1241.

49. See Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 NW. ENVTL. L. 561, 620 (2015) (arguing that environmental protections should not be controlled by federal agencies).

50. Alec L. v. Jackson, 863 F. Supp. 2d 11, 13 (D.D.C. 2012); *aff'd per curiam sub nom.*, Alec L. v. McCarthy, 561 Fed. Appx. 7 (D.C. Cir. 2012), cert. denied, 135 S. Ct. 774 (2014) (mem.).

51. *Juliana*, 217 F. Supp.3d at 1225.

52. *Id.* at 1261.

53. *Id.* at 1241.

54. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is.").

were “fairly traceable” to the actions and inactions of defendants; and that were redressable by the relief sought.<sup>55</sup> In terms of potential remedies, Judge Aiken noted the limits of judicial authority to order the government to adopt specific policies. But Judge Akins said issuing a declaratory judgment clarifying the rights and responsibilities of the parties and requiring the government to develop a plan to deal with the threat of runaway climate change would constitute meaningful relief.<sup>56</sup>

Turning to the substantive issues, Judge Aiken first determined that the plaintiffs properly alleged a violation of their “fundamental rights” under the Due Process Clause of the Fifth Amendment:

[T]his Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation[.]<sup>57</sup>

Judge Aiken then found the plaintiffs had adequately alleged the government had knowingly created a danger to public health and safety, thereby triggering an affirmative duty under the Constitution to take action to ameliorate the threat.<sup>58</sup> Judge Aiken summed up the due process portion of her opinion by stating, “Exercising my ‘reasoned judgment,’ I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>59</sup>

Judge Aiken then turned her attention to the PTD. Though plaintiffs alleged the atmosphere itself was a public trust resource, the Court chose to focus on the effects of carbon pollution on the oceans and coastal resources.<sup>60</sup> Further, Judge Aiken noted a long line of Supreme Court cases recognizing the plenary power of the federal government over submerged tidal lands. She concluded: “Because a number of plaintiffs' injuries relate

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55. *Juliana*, 217 F. Supp.3d at 1244.

56. *Id.* at 1247 (“If plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO<sub>2</sub> and slow climate change, then plaintiffs' requested relief would redress their injuries.”).

57. *Id.* at 1250.

58. *Id.* at 1251–52 (“[D]efendants played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendant[.]”).

59. *Id.* at 1250 (citation omitted).

60. *Id.* at 1256.

to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets.”<sup>61</sup> She then addressed the question whether the PTD applies to the federal government or only to the states.<sup>62</sup> This issue turns on the meaning of some ambiguous language in the Supreme Court’s decision in *PPL Montana, LLC v. Montana*.<sup>63</sup> The case involved a question of ownership of the beds of three rivers in Montana under the equal footing doctrine.<sup>64</sup> Montana argued that the rivers were navigable under state law and that denying the state title to the riverbeds in dispute would “undermine the public trust doctrine.”<sup>65</sup> The Court disagreed, holding that navigability had to be determined under federal law.<sup>66</sup> In the course of explaining its decision, the Court said that “unlike the equal-footing doctrine, . . . which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law. . . .”<sup>67</sup> The Court further noted that “under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”<sup>68</sup>

To Judge Aiken, this language was mere dicta and did not constitute a holding that the PTD was exclusively a state law doctrine:

The Court was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana's public trust obligations. PPL Montana said nothing at all about the viability of federal public trust claims with respect to federally-owned trust assets.<sup>69</sup>

Judge Aiken also rejected the alternative argument that even if the PTD applied to the federal government it has been displaced by the enactment of

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61. *Id.* (citation omitted).

62. *Id.* at 1256 (articulating that the public trust doctrine does not have to only apply to states).

63. *See P.P.L. Montana, LLC., v. Montana*, 565 U.S. 576, 593 (2012) (holding that the trial court must acknowledge if the rivers were navigable under the equal footing doctrine).

64. *PPL Montana, LLC*, 565 U.S. at 581.

65. *Id.* at 603.

66. *Id.* at 589–90.

67. *Id.* at 603.

68. *Id.* at 604.

69. *Juliana*, 217 F. Supp.3d at 1257.

the Clean Water Act and the Clean Air Act.<sup>70</sup> This argument rests on the decision in *American Electric Power Company, Inc. v. Connecticut*.<sup>71</sup> Here, the Supreme Court held that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”<sup>72</sup> Judge Aiken rejected the conclusion of the District Court in the *Alec L*<sup>73</sup> case saying that this holding meant that any claim based on a federal PTD theory had also been displaced. After noting that the *American Electric Power* Court “did not have public trust claims before it and so it had no cause to consider the differences between public trust claims and other types of claims,” Judge Aiken observed that public trust claims are unique because they “concern attributes of sovereignty.”<sup>74</sup> She elaborated: “The public trust imposes on the government an obligation to protect the rest of the trust. A defining feature of that obligation is that it cannot be legislated away. Because of the nature of public trust claims, a displacement analysis simply does not apply.”<sup>75</sup>

Having found that the Supreme Court had neither disowned nor displaced the PTD as a feature of federal law, Judge Aiken concluded that “plaintiffs’ public trust rights both predated the Constitution and are secured by it” through the substantive due process guarantees of the Fifth Amendment.<sup>76</sup> She capped her remarkable opinion with a pointed critique of the judicial timidity in the face of an existential environmental threat: “Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”<sup>77</sup>

The trial of the century is now set to begin on October 29, 2018 in Eugene, Oregon.<sup>78</sup> It promises to be quite a show. In many ways it will be the Trump administration’s anti-science, anti-regulatory policies on trial. In *Green Justice*, Brooks and Hoban argued strongly against portraying

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70. *See id.* at 1260 (“Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the rest of the trust.”).

71. *Id.* at 1259; *see Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (holding a nuisance claim does not proceed because “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emission from fossil-fuel fired power plants.”).

72. *Am. Elec. Power Co.*, 564 U.S. at 424.

73. *Juliana*, 217 F. Supp.3d. at 1224.

74. *Id.* at 1260.

75. *Id.*

76. *Id.*

77. *Id.* at 1262

78. *See United States v. U.S. Dist. Court for the Dist. of Oregon*, 884 F.3d 830, 833 (9th Cir. 2018) (denying the Trump administration’s attempt to block the trial through a writ of mandamus was rejected by the Ninth Circuit).

environmental issues as good vs. evil.<sup>79</sup> But in this case it is hard to see it any other way. It may be an exaggeration to say the fate of the world hangs in the balance, but not by much.

### The Common Law Meets the Anthropocene

The roots of modern U.S. environmental law lie in the common law inherited from England. In *Green Justice*, Brooks and Hoban chose the iconic *Boomer v. Atlantic Cement Co.*<sup>80</sup> case to illustrate how the common law of nuisance is used to address conflicts between property owners over polluting activities.<sup>81</sup> The case is familiar to every first-year student and shows up in the texts for torts, property, and civil procedure. The facts are straightforward. Defendant operated a large cement plant near Albany, New York.<sup>82</sup> The plaintiffs were neighboring property owners who lived there when the plant was built. The plaintiffs filed suit seeking an injunction and damages for injury to property from smoke, dirt, and vibrations.<sup>83</sup> The trial court found a nuisance but declined to issue an injunction citing the social utility of a plant that employed more than 300 people, as well as the lack of any readily available pollution control technologies that would eliminate the nuisance conditions.<sup>84</sup> The Court of Appeals agreed a permanent injunction resulting in closure of the plant was an unnecessarily harsh remedy. Instead, opted for awarding permanent damages based on the actual economic losses suffered by the plaintiffs.<sup>85</sup> The damage award would be a one-time payment that would in effect impose a servitude on the neighbor's property that would run with the land and bind future owners.<sup>86</sup> The Court of Appeals considered, but rejected as too speculative, the option of enjoining the operation for a period of time to see if abatement technologies could be developed.<sup>87</sup> Instead, the Court found the payment of permanent damages to be the fairest resolution of the dispute between the parties:

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79. See THOMAS M. HOBAN & RICHARD O. BROOKS, *supra* note 1 at 219 (“[W]e must remember that if no one’s motives are pure, no one’s motives are totally corrupt either. The enemy is us, after all, and now we must determine some way to set matters right.”).

80. *Boomer v. Atl. Cement Co.*, 257 N.E. 2d, 870, 871 (1970).

81. *Id.* at 873.

82. *Id.* at 871.

83. *Id.*

84. *Id.* at 870.

85. *Id.* at 875.

86. *Id.* at 873.

87. *Id.* (“One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance.”).

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.<sup>88</sup>

*Boomer* involved a private nuisance claim.<sup>89</sup> The common law also recognizes claims for public nuisance.<sup>90</sup> The exact contours of the public nuisance doctrine are unclear, hotly disputed, and vary from state to state.<sup>91</sup> Tobacco, lead paint, the gasoline additive MTBE (Methyl tert-butyl ether), the industrial solvent PCE (Perchloroethylene), and other substances have all been the target of public nuisance lawsuits: some successful others not.<sup>92</sup> The immediate question is whether, and under what circumstances producers and marketers of fossil fuels can be held liable under a public nuisance theory for causing or contributing to the damages from climate change. A wave of lawsuits has been filed by cities and counties across the country seeking compensation from oil and other fossil fuel producers for the costs of dealing with the consequences of global warming.<sup>93</sup> The first cases were filed in California by the Counties of San Mateo and Santa Cruz,<sup>94</sup> followed by a separate suit initiated by the Cities of San Francisco and Oakland.<sup>95</sup> The defendants include the major oil companies such as Chevron, Exxon Mobil, Shell, and BP.<sup>96</sup> These corporations have been dubbed the “carbon majors” by virtue of their outsized contributions of CO<sub>2</sub> and other greenhouse gases to the atmosphere and the resulting damages from sea level rise, storm surge and other calamities traceable to human caused emissions.<sup>97</sup> These cases were initially removed to the U.S. District

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88. *Id.*

89. *See* RESTATEMENT (SECOND) OF TORTS § 821D (1979).

90. *Id.* at § 821B (“A public nuisance is an unreasonable interference with a right common to the general public.”).

91. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 889 n.664 (2001).

92. *See, e.g., Is the Public Nuisance Universe Expanding?*, BLOOMBERG NEWS (Jan. 31, 2017), <https://www.bna.com/public-nuisance-universe-n57982083122/>.

93. Hasemeyer, *supra* note 22.

94. *See City of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 934 (N.D. Cal. 2018) (showing that counties and cities brought actions against oil and gas companies).

95. *See generally* Complaint *People of State of California v. Chevron Corp.*, (Cal. App. Dep’t Super. Ct. 2017) (No. 17-561370) (asserting claims in a complaint of nuisances under state law).

96. *Id.* at 1.

97. *See* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 *CLIMATIC CHANGE*, 229–41 (2014 (cumulatively, ‘carbon major’ companies are the biggest contributors of ‘climate destabilization’)).

Court for the Northern District of California.<sup>98</sup> In the San Francisco cases, Judge William Alsup denied the cities' motion to remand to state court ruling that federal common law had not been entirely displaced by the Supreme Court's decision in AEP.<sup>99</sup> Common law was therefore controlling on the question whether the producers as opposed to the emitters of fossil fuels were liable.<sup>100</sup> However, in the San Mateo cases, Judge Vince Chhabria, sitting in the same courthouse as Judge Alsup, reached the opposite conclusion. He ruled that federal common law had been displaced and remanding the cases to the Superior Court of San Mateo.<sup>101</sup>

Aside from the jurisdictional squabbles, the central objection raised by the oil companies is that public nuisance is not an appropriate remedy for the global phenomenon of climate change.<sup>102</sup> They challenge the scientific and legal basis for the claims arguing that courts have no business inserting themselves into what is essentially a political question.<sup>103</sup> They argue the legislature should balance the need to provide reliable sources of electricity and transportation fuels with the need to address the growing problem of climate change.<sup>104</sup>

For the following reasons, I think the cases have merit. While the outcome is far from certain, the time may be right for the courts to hold these companies accountable for the foreseeable consequences of their actions and inaction that have contributed to the dangerous situation we find ourselves in today.

First, the latest scientific evidence underlying the public nuisance claims in these cases is rock-solid.<sup>105</sup> The claims are based on the well documented and highly visible impacts of sea level rise, coastal erosion,

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98. See *Boomer*, 257 N.Y.2d at 871–74 (affirming that here, private actors caused a permanent damage).

99. See Complaint *City of Oakland v. Chevron Corp.*, (Cal. App. Dep't Super. Ct. 2017) (No. 17-06011) (granting a motion to dismiss on the amended complaints).

100. See *The People of the State of California v. BP P.L.C. et al.*, (N.D. Cal. Feb. 27, 2017) (No. 3:17-cv-06012) (discussing how in May, Judge Alsup heard arguments on defendants' motions to dismiss the case).

101. *City of San Mateo*, 294 F. Supp.3d at 938–39.

102. See Notice of Removal at 2, *California v. BP P.L.C.* (Cal. Super. Ct. S.F. Cty., Sep. 19, 2017), (No. CGC-17-561370) (arguing that public nuisance law does not apply to GHG emissions) available at [https://imgquery.sftc.org/Sha1\\_newApp/ViewPDF.aspx](https://imgquery.sftc.org/Sha1_newApp/ViewPDF.aspx) (last visited Mar. 2, 2019).

103. Hasemeyer, *supra* note 22.

104. *Id.*

105. See, e.g. Melillo, Jerry M., Terese (T.C.) Richond & Gary W. Yohe, U.S. GLOB. CHANGE RESEARCH PROGRAM, U.S. NATIONAL CLIMATE ASSESSMENT (2014) (“Scientists who study climate change confirm that these observations are consistent with significant changes in Earth’s climatic trends. Long-term, independent records from weather stations, satellites, ocean buoys, tide gauges, and many other data sources all confirm that our nation, like the rest of the world, is warming.”).

and increased flooding in California and elsewhere.<sup>106</sup> The process is straightforward. Greenhouse gases, chiefly carbon dioxide, trap heat in the lower atmosphere. The oceans have absorbed 90 percent of this human caused warming.<sup>107</sup> As the oceans warm, the volume of the ocean increases and sea levels rise albeit not uniformly across the globe.<sup>108</sup> Rising temperatures also cause glaciers and ice sheets to melt thereby increasing the amount of water in the oceans.<sup>109</sup> In short, the relationship between GHG emissions, global warming, and sea level rise is firmly grounded in the best available science, and plaintiffs should have no problem proving this element of their case.<sup>110</sup> Further, the science of climate attribution is now able to quantify not only the degree to which human-caused climate change is contributing to sea level rise, but also the impact of heat-trapping emissions on changes in the frequency and severity of drought, wildfires, and other catastrophes.<sup>111</sup> A recent study by the Union of Concerned Scientists shows that emissions from the products of 90 major fossil fuel producers and cement manufacturers contributed nearly half of the global temperature rise and about 30 percent of global sea level rise between 1880 and 2010.<sup>112</sup>

Second, California will be especially hard hit by the accelerating melting of Greenland and Antarctica, and coastal communities will be facing enormous costs to either protect or relocate vulnerable properties and

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106. See *Our Changing Climate*, NATIONAL CLIMATE ASSESSMENT, <https://nca2014.globalchange.gov/highlights/report-findings/our-changing-climate> (last visited Mar. 2, 2019) (discussing sea level rise and coastal communities reliance on sea ice to protect against erosion and storms).

107. Oceans, Ocean Scientists for Informed Policy, <https://www.oceanscientists.org/index.php/topics/ocean-warming> (last visited Mar. 2, 2019).

108. John A. Church et al., *Sea Level Change*. In: *Climate Change 2013: The Physical Science Basis*, 1137, 1143, [https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5\\_Chapter13\\_FINAL.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter13_FINAL.pdf) (arguing that “the mass loss from glaciers were the main contributors to the 20th century rise, that during the 21st century the rate of rise was projected to be faster than during the 20th century, that sea level will not rise uniformly around the world, and that sea level would continue to rise well after GHG emissions are reduced.”).

109. See *Our Changing Climate*, <https://nca2014.globalchange.gov/report/our-changing-climate/introduction>. (last visited Mar. 2, 2019).

110. See generally U.S. GLOB. CHANGE RESEARCH PROGRAM, U.S. NATIONAL CLIMATE ASSESSMENT (2014) (presenting a substantial body of scientific evidence to support the relationship between GHG emissions and climate change).

111. NATIONAL ACADEMIES OF SCIENCE, *Attribution of Extreme Weather Events in the Context of Climate Change* (2016), <https://www.nap.edu/read/21852/chapter/1#iv>.

112. Union of Concerned Scientists, TRACING FOSSIL FUEL COMPANIES’ CONTRIBUTIONS TO TEMPERATURE INCREASE AND SEA LEVEL RISE, <https://www.ucsusa.org/sites/default/files/attach/2017/10/gw-accountability-factsheet.pdf> (last visited Mar. 2, 2019).

populations.<sup>113</sup> For every foot of global sea-level rise caused by the loss of ice on West Antarctica, sea-level will rise approximately 1.25 feet along the California coast.<sup>114</sup> That may turn out to be a best case scenario. Any way you cut it, these communities are collectively facing billions of dollars of investments in both structural and non-structural adaptation measures.<sup>115</sup> Taxpayers will undoubtedly be called upon to shoulder much of these costs. But is it fair to saddle taxpayers with the entire bill? California has done more than any other state—and certainly more than the federal government—to enact laws and fund programs to reduce emissions and promote cleaner electricity production and cleaner vehicles.<sup>116</sup>

Third, under California law a public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right.<sup>117</sup> This principle was forcefully upheld in the landmark judgment recently affirmed by the California Court of Appeals against major manufacturers of lead paint. The court held the manufacturers responsible for the costs of abatement.<sup>118</sup> The trial court found the companies liable for creating a public nuisance by affirmatively promoting the use of lead paint in residential homes while having “actual knowledge” at the time that it could pose a danger to the public, children in particular.<sup>119</sup> The appeals court held that “the evidence, while circumstantial, was sufficient to support reasonable inferences that defendants must have known in the early 20th century that interior residential lead paint posed a serious risk of harm....”<sup>120</sup> Importantly, the appellate court rejected defendants’ argument that the decision violates constitutional separation of powers, i.e., that the legislature and not the courts should be creating public policy on lead paint and remediation.<sup>121</sup>

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113. Gary Griggs, et. al, *Rising Seas in California: An Update on Sea-Level Rise Science*, California Ocean Science Trust, Apr. 2017, at 3, <http://www.opc.ca.gov/webmaster/ftp/pdf/docs/rising-seas-in-california-an-update-on-sea-level-rise-science.pdf>.

114. *Id.*

115. *Id.* at 39.

116. See Highlights of California Climate Change, <http://www.climatechange.ca.gov/state/highlights.html> (last visited Mar. 2, 2019) (highlighting achievement of the California Climate Change Program, spanning from 2004-2015).

117. See Tom Neltner, *Historic Court Decision on Lead-Based Paint in California Court of Appeals*, ENVIRONMENTAL DEFENSE FUND (Nov. 15, 2017) <http://blogs.edf.org/health/2017/11/15/california-court-decision-on-lead-based-paint/> (discussing public nuisance law and lead based paint).

118. See *People v. ConAgra Grocery Prod. Co.*, 17 Cal.App. 5th 51, 134 (2017) (holding that the trial court err in requiring ConAgra to prefund remediation cost, finding that it was well within the trial courts discretion).

119. *People v. ConAgra Grocery Products Co.*, 277 Cal. Rptr. 3d 499, 594 (Ca. App. 2017).

120. *ConAgra*, 17 Cal.App.5th at 85.

121. *Id.* at 117.

Fourth, plaintiffs in the climate change cases have alleged a massive campaign by defendants and their allies in the trade associations to deceive their customers, shareholders, regulators, elected officials, and the public about the dangers of carbon pollution.<sup>122</sup> The defendant's own scientists had documented these dangers since at least 1968.<sup>123</sup> Investigators from various quarters have unearthed a trove of internal industry documents and "smoking guns" (ala' the tobacco cases). These documents showed that the companies not only knew of the dangers posed by continued production of fossil fuels but took affirmative steps to protect their own assets from effects such as sea level rise. At the same time, the companies were factoring into their business plans the opportunities to increase production in areas such as the Arctic, which were becoming more accessible as the sea ice melted.<sup>124</sup> History shows just how effective these efforts were in sowing doubts about the reality of human caused climate change. These efforts resulted in, among other things, the defeat of legislation such as the Waxman-Markey bill that would have created an economy-wide emissions trading program to avoid or mitigate the damage.<sup>125</sup> As a result of defendant's conduct, opportunities to reduce the loading of the atmosphere with CO<sub>2</sub> and ameliorate the damage that communities in California and many other places are now facing have been lost, perhaps forever.<sup>126</sup>

Fifth, contrary to the oil companies allegations, the California municipal officials have not been duplicitous in their representations to their bondholders about the linkages between climate change and sea level rise.<sup>127</sup> In a detailed report commissioned by the Counties of San Mateo,

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122. *Id.*

123. See Elliott Negin, *Documenting Fossil Fuel Companies' Climate Deception*, Union of Concerned Scientists (2015), <https://web.archive.org/web/20180310204215/https://www.ucsusa.org/publications/catalyst/su15-documenting-fossil-fuel-companies-climate-deception> (discussing the long effort by the petroleum industry to discredit climate change while possessing hard data that it actually existed) (last visited Mar. 2, 2019).

124. Amy Lieberman and Suzanne Rust, *Big Oil braced for global warming while it fought regulations*, L.A. TIMES (Dec. 31, 2015), <http://graphics.latimes.com/oil-operations/>.

125. Bryan Walsh, *Why the Climate Bill Died*, TIME (Jul. 26, 2010), <http://science.time.com/2010/07/26/why-the-climate-bill-died/> (suggesting "the threat of global warming didn't galvanize the public to the point where they would demand change," for reasons such as "disinformation campaigns by fossil fuel interests, the overblown controversy of 'climategate,' [and] a media corps that too rarely puts global warming in the right context.").

126. Complaint at ¶ 199, *County of San Mateo v. Chevron Corp.*, No. 17CIV03222, Cal. Sup. Ct. (2017) (No. 17 CIV 03222).

127. See John O'Brien, *Exon Prepares To Sue California Cities, Says They Contradict Themselves On Climate Change*, FORBES (Jan. 8, 2018), <https://www.forbes.com/sites/legalnewsline/2018/01/08/exxon-prepares-to-sue-california-cities-say-they-contradict-themselves-on-climate-change/#25a9ffa5522a> (explaining ExxonMobile's claim that the municipalities lied to investors of the bond offerings).

Santa Cruz, and Marin, the cities of Santa Cruz and Imperial Beach, and prepared by Martha Haines, the former head of the SEC's Office of Municipal Securities, the author concludes: "There is no inconsistency or conflict between the allegations in the complaints filed by the Municipal Governments in connection with their respective civil tort claims... regarding sea level rise and the disclosures made by such governments in their respective disclosure documents."<sup>128</sup> The rationale was that the maturity of the securities in question was so short that it was not reasonable to foresee any impact on their timely repayment from long-term sea level rise. She also pointed out that (a) some of the assets were on high ground and would not be affected by sea level rise; (b) many of the bond documents predated information about sea level rise risks to the community; and (c) certain of the more recent bond documents did disclose in far more detail the risks of climate change.<sup>129</sup>

No one suggests that the courts are going to solve the climate crisis. It is indeed a global problem requiring the cooperation of all the nations of the world. Sadly and foolishly, the United States, under the Trump administration, walked away from the Paris Agreement and stands alone among the community of nations committed to addressing the crisis.<sup>130</sup> The administration is also working overtime to undo the policies and actions of the previous administration that were beginning to move the nation towards cleaner, more efficient energy and transportation systems. And no one expects to see positive legislation coming out of a gridlocked Congress.

None of this matters to the climate. It will continue changing in response to anthropogenic sources of carbon pollution and the damages will continue to mount. It is certainly true that we are all responsible as fossil fuel consumers, It is also true that the law demands more of those who have profited enormously from the continued promotion of products they knew were dangerous. It is these parties who not only failed to disclose the risks or take actions to shift to cleaner sources of energy but who worked diligently and in concert to block the kinds of laws and policies that would have made a real difference in slowing the onslaught of climate related damages. Fairness, not to mention the rule of law, dictates that those who were in a position to do something about the problem, but chose to conceal

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128. MARTHA MAHAN HAINES, EXPERT REPORT OF MARTHA MAHAN HAINES 2 (2018). <https://www.documentcloud.org/documents/4449179-Bond-Analysis-Report-and-Letter-to-SEC-FINAL.html>.

129. *Id.* at 2, 8, 17.

130. Donald Trump, President of the United States, Rose Garden Statement on the Paris Climate Accord (June 1, 2017).

it, be held accountable for the foreseeable consequences of their actions. Indeed, this is exactly what the courts are for.

*Conclusion*

*Green Justice* is just one of many scholarly contributions that Dick Brooks has made to the field of environmental and land use law. He is also the author of a multi-volume treatise<sup>131</sup> on Act 250, Vermont's landmark development control law, as well as a pathbreaking book on law and ecology,<sup>132</sup> numerous articles on legal philosophy, law school pedagogy, and the design of a global environmental curriculum. Dick is truly a renaissance man with a curious mind, a scholar's attention to detail, and a commitment to truth seeking. He is a lover of good books, fine wine, and long conversations on the meaning of, well, everything. Dick has a deep respect for nature and the ideals of the law, as well as a healthy skepticism of grandiose notions of a perfect world untouched by human hands. He has been a wonderful friend and colleague for over three decades. His vision and hard work launched the Environmental Law Center in 1978 and put this little law school—the only law school in a town without a stop light as we are fond of saying—on the map.<sup>133</sup> He has left his mark not only on the literature of environmental law but on the minds and careers of hundreds of students he has taught, inspired, and sent out into the world well equipped to tackle the daunting challenges of the day.

Hats off to you, Professor Brooks.

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131. See e.g. Richard O Brooks, *Toward Community Sustainability: History, Plans, and Administration of Act 250*, I & II V.L.S. ENVTL.L.CTR. (1996).

132. See e.g. RICHARD O. BROOKS, *LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME* (2012).

133. *Honoring Professor Richard Brooks and the Environmental Law Center*, VERMONT L. SCHOOL (April 30, 2018) <https://www.vermontlaw.edu/blog/tribute/richard-brooks>.