Trust Issues: The Limits of the Public Trust Doctrine in the Fight Against Climate Change After *Chernaik v. Brown*

INTRODUCTION

On October 22, 2020, as record-breaking wildfires raged across the state,[1] Oregon's Supreme Court handed down its ruling in *Chernaik v. Brown*.[2] The court ruled against the two young plaintiffs and their guardians who had sued the state in an attempt to compel Oregon's government to increase its efforts to fight the climate crisis.[3] The plaintiffs submitted research showing that Oregon would be inundated with drought, disease, rising sea levels, coastal erosion, and more existential threats to its population if the burning of fossil fuels continued at significant levels.[4] But after eight years of litigation, the court held 6-1 that it would not extend Oregon's public trust doctrine to encompass the state's atmosphere or fish and wildlife.[5] Crucially, the court also held that Oregon's public trust doctrine did not impose an affirmative obligation on the state to act to protect the resources that the state already holds in public trust.[6] In short, the court undercut the potential of the public trust doctrine by saying it lacks an essential component of common law private trusts: the fiduciary duty to act. Under *Chernaik v. Brown*, the state of Oregon has no duty to protect the resources it holds in trust for the public, unlike the obligation that trustees of private trusts owe to trust beneficiaries.[7]

The court's reasoning in *Chernaik v. Brown* illustrates the limits of the public trust doctrine as a legal tool to address the climate crisis. Many

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1. Lee van der Voo, *Heat, Wind and a Cruel Twist of Nature Inside Oregon's Nightmarish Wildfire Season*, GUARDIAN (Dec. 22, 2020), https://www.theguardian.com/world/2020/dec/22/oregon-2020-fire-season-smoke-coronaviruus.
2. Chernaik v. Brown, 473 P.3d 68, 72 (Or. 2020).
3. *Id*.
4. Opening Brief of Plaintiffs-Appellants and Excerpts of Record at 8-9, *Cherniak v. Brown*, No. A151856 (Or. Ct. App. Dec. 10, 2012).
5. *Chernaik*, 473 P.3d. at 72.
6. Including navigable waterways and underlying lands. *Id*.
7. *Id*.; *see also* Sean Lyness, *2021 Public Trust Doctrine Update*, WATER L. INST., ROCKY MOUNTAIN MIN. L. FOUND. at 5-1, 5-5, 5-6 (2021).

environmental law scholars have argued that the public trust doctrine is a "vital tool" in the environmental lawyer's toolbox, and it certainly has been successfully deployed to protect certain contaminated resources.[8] However, in reasoning that Oregon does not have an affirmative duty to act to protect resources in a public trust, the court revealed how the public trust doctrine is a weak tool for fighting the existential threat of climate change, which requires affirmative, multi-jurisdictional government action.[9] Ultimately, a new legal doctrine is necessary to compel the government to address the climate crisis and protect the public from the harms of an increasingly unstable and inhospitable climate.

I. THE PUBLIC TRUST DOCTRINE IN *CHERNAIK*

The public trust doctrine is a long-standing legal principle that establishes certain natural resources as common property which the government must preserve and maintain for public use.[10] The concept is rooted in Roman and early English law, but resurfaced in U.S. law in the 1970s due to a seminal paper by Professor Joseph Sax.[11] In a traditional trust, one party (the trustor) gives another party (the trustee) control of its property to manage for the benefit of a third party (the beneficiary).[12] While common law trust doctrines can vary across jurisdictions, in general, the trustee has a fiduciary duty to exercise reasonable care, skill, and caution to protect trust assets from damage or destruction.[13] Under the public trust doctrine, each state government is a trustee, appointed by the public to manage the assets of certain natural resources in the state for the benefit of the public.[14] In 1892, the Supreme Court's opinion in *Illinois Central Railroad Co. v. Illinois* articulated two core principles of the public trust doctrine: 1) the resources held in the public trust are navigable waters and their underlying lands, and 2) the government's trustee role "cannot be alienated" such that the government can only sell or lease off public resources if it would not have a detrimental effect on the public.[15]

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8. Lyness, *supra* note 7, at 5-1, 5-2, 5-4.

9. While other states have expanded their public trust doctrines to include an affirmative duty for states to act to protect the resources it holds in trust, the nature of the climate crisis is such that all levels of government must be mobilized. *See* U.N. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS 31 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [hereinafter IPPC].

10. Michael C. Blumm & Zachary A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, 44 PUB. LAND & RES. L. REV. 1, 1 (2021).

11. J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 126 (2020); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

12. GEORGE GLEASON BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 541 (2022 update).

13. *Id.* § 582.

14. *See* Richard M. Frank, *The Public Trust Doctrine Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680 (2012).

15. *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 455 (1892).

Since 1892, and more dramatically after the doctrine's resurgence in 1970, the public trust doctrine has evolved in a piecemeal fashion across jurisdictions.[16] Today, each state construes its public trust doctrine differently. For example, Pennsylvania has its public trust doctrine codified into statutes, while Oregon's exists under common law.[17] States also hold different resources in the public trust. For example, California and Nevada courts have recently expanded their states' public trusts to include groundwater,[18] while Minnesota's Supreme Court decided in 2020 against adding groundwater to the state's public trust.[19] Additionally, because the federal government has traditionally delegated to states the job of managing resources, there is a potential cause of action under a federal common-law public trust doctrine, though this has been contested in federal courts.[20] In general, states have split into two distinct groups: 1) the majority approach, where states hold the public trust doctrine only provides a limit to the actions the government can take that affect the resources it holds in trust, and 2) the minority approach, where states impose an affirmative duty on the government to "guard, maintain, and restore trust resources actively."[21] Courts in majority-approach states, such as Oregon's Supreme Court in *Chernaik*, continue to reinforce the more restrictive approach to the public trust doctrine, refusing to impose an affirmative duty on the government to protect resources held in public trust.[22]

Despite the recent focus on the public trust doctrine, its influence on the courts may be overstated.[23] A 2012 report on California's court rulings on the public trust doctrine found that, from 1983 to 2012, "no [California] court has cited the public trust doctrine as a reason for ordering anyone to do anything."[24] This report is particularly notable, as it studied the period after the 1983 Mono Lake Case.[25] That case, *National Audubon Society v. Superior Court,* is heralded for expanding California's public trust doctrine; it held that Los Angeles' property rights to Mono Lake's water did not trump the state's public trust

16. Lyness, *supra* note 7, at 5-4–5-11.

17. *See* PA. CONST. art. I, § 27; *Chernaik v. Brown*, 473 P.3d 68, 71 (Or. 2020).

18. Frank, *supra* note 14; *Env't L. Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 410-11 (2018); *Min. Cnty. v. Lyon Cnty.*, 473 P.3d 418, 421 (2020).

19. *See White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373 (Minn. 2020).

20. Caroline Cress, *It's Time to Let Go Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236, 248 (2013). *See also Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (which did not overturn the district court's holding that there was a federal cause of action under the public trust doctrine); *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (holding there was no federal cause of action under the public trust doctrine because resource management had been delegated to states).

21. *Id*. at 248-49. Hawaii is a prominent state following this minority approach.

22. *Id*.; *see also Iowa Citizens for Cmty. Improvement v. State*, 962 N.W 2d 780, 799 (Iowa 2021) (citing *Chernaik* in holding that the public trust doctrine does not include an affirmative duty on Iowa to protect nitrogen and phosphorus-contaminated rivers).

23. Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U. C. DAVIS L. REV. 1099, 1107 (2012).

24. *Id*. at 1104.

25. *Id*. at 1103.

obligation to maintain the water in the lake.[26] Despite this landmark case, California courts have since treated the public trust doctrine as only "marginally relevant."[27] While there are no similar studies on Oregon courts, it is clear that even landmark rulings expanding the public trust doctrine do not always translate into resources being sufficiently protected.

Recent cases — including *Chernaik* and its counterpart addressing the federal public trust doctrine in the federal courts, *Juliana v. United States*[28] — have brought the public trust doctrine into prominence as a potential judicial lever to address climate change. *Chernaik* was an 8-year battle that dragged on long enough for its plaintiffs to age into adulthood.[29] From the start, the plaintiffs argued the public trust doctrine should include the state's atmosphere, fish, and wildlife.[30] The plaintiffs proposed a two-part test for determining whether or not a resource fell under the public trust: 1) the resource is not easily "held or improved," meaning it is not easily possessed or protected from harm, and 2) the resource is of great value to the public for uses such as "navigation, commerce, fishing or recreation."[31] However, the court refused to adopt the test, reasoning it was "so broad that it is difficult to conceive of a natural resource that would not satisfy it."[32] The court reasoned the plaintiff's two-part test was insufficient because it would expand the "current scope" of the public trust doctrine too far.[33] The court ultimately ruled not to include the atmosphere, fish, or wildlife in the state's public trust doctrine because the plaintiffs had "not developed a legal theory" that was acceptable to the court.[34]

The *Juliana* plaintiffs faced similar issues as in *Chernaik*. In *Juliana*, the plaintiffs argued that the federal government was violating its duty to refrain from damaging the natural resources it holds in trust, as the government continues to consume fossil fuels and promote greenhouse-gas-producing industries.[35] Though the Ninth Circuit held that the child plaintiffs in *Juliana* were suffering "particularized injuries" due to CO_2-driven climate change, the court "reluctantly" held that ordering the government to take action to prevent climate change was "beyond [its] constitutional power."[36]

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26. *Id*. at 1101.
27. *Id*. at 1152.
28. Kelsey Cascadia Rose Juliana is a plaintiff in both *Chernaik* and *Juliana*. Also, both *Chernaik* and *Juliana* were brought to the courts by the nonprofit Our Children's Trust. *See Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).
29. *See Chernaik v. Brown*, 473 P.3d 68, 72 (Or. 2020).
30. *Id.* at 73.
31. *Id.* at 81.
32. *Id*. It is worth noting that the court likely would not have reasoned in this manner if Oregon had codified its public trust doctrine into law like Pennsylvania. *See* Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ENV'T L. REP. 11022, 11033 (2020).
33. *Chernaik*, 473 P.3d at 166.
34. *Id*. at 84.
35. *Juliana v. United States*, 947 F.3d 1159, 1164-65 (9th Cir. 2020).
36. *Id*. at 1165, 1168.

Since *Chernaik*'s first filings in 2012, the effects of climate change have become more visible and dire across the United States and the world.[37] When the Oregon Supreme Court handed down its ruling in *Chernaik* on October 22, 2020, the state was in the middle of one of its worst wildfire seasons on record, a season that experts agree was exacerbated by the climate crisis.[38] In total, the damage caused by the 2020 Oregon wildfires collectively made them the worst natural disaster in the state's history.[39] Still, the court made no mention of the disaster in its ruling.[40] The majority opinion barely discussed the realities of climate change — perhaps because both the plaintiff and state agreed that climate change was a threat to the state's resources — and entertained almost no mention of the individual plaintiffs and the harms they faced.[41]

The recent failures of *Chernaik* and *Juliana* to convince the courts to apply the public trust doctrine in the climate change context illustrates the limits of public trust jurisprudence. The two-part test proposed in *Chernaik* was precisely the sort of test that, if adopted, would have strengthened the public trust doctrine to address the far-reaching consequences of climate change,[42] and yet its very broadness contributed to the plaintiffs' downfall.[43] While the public trust doctrine remains useful in more traditional environmental law contexts,[44] judiciaries have balked at expanding it enough to compel the government to act on the climate crisis.

II. ANALYSIS

The ruling in *Chernaik* illustrates how the public trust doctrine's theoretical foundation is rooted in a flawed analogy, rendering it ineffective for compelling government action to address climate change. A new or adapted doctrine is needed to convince the judiciary to push for government action on climate change.

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37. *See generally* IPPC, *supra* note 9; *Fourth National Climate Assessment, Volume II Impacts, Risks, and Adaptation in the United States*, U.S. GLOB. CHANGE RSCH. PROGRAM, https://nca2018.globalchange.gov/ (last visited Mar. 15, 2022).

38. Zach Urness, *Oregon's 2020 Wildfire Season Brought a New Level of Destruction. It Could Be Just the Beginning*, SALEM STATESMAN J. (Oct. 30, 2020), https://www.statesmanjournal.com/story/news/2020/10/30/climate-change-oregon-wildfires-2020/6056170002/.

39. Van der Voo, *supra* note 1.

40. *See generally Chernaik v. Brown*, 473 P.3d 68, 72 (Or. 2020).

41. *Id*. In contrast, Chief Justice Martha Walters' lone dissent included vivid rhetoric on the reality of climate change and the urgency required to address it. She cited Pennsylvania and Hawaii, saying "the purpose of the public trust doctrine is to ensure the public's rights to use and enjoy public trust resources now and into the future." *Id*. at 86.

42. *See generally* IPPC, *supra* note 9. https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

43. *See Chernaik*, 475 P.3d at 81.

44. Lyness, *supra* note 7, at 5-1.

A. The Public Trust Doctrine's Foundation Is a Flawed Analogy

The court's reasoning in *Chernaik* illustrates how trusts are an illogical model for understanding the government's duty to act on climate. Under a traditional trust, the trustee has an affirmative duty to protect trust resources from financial disaster.[45] However, most states, including Oregon, do not impose an affirmative duty on the government to protect the resources it holds in trust from climate disaster.[46] Clearly, the public trust doctrine is a particularly weak tool in climate cases because its underlying principles make it ill-suited to address the particular challenges of the climate crisis.

There are three reasons why the underlying principles of the public trust doctrine are incompatible with compelling government action on climate change: 1) the scale of action needed to fight climate change is beyond the conception of a traditional trust, 2) the courts are unwilling to impose an affirmative duty on the government to protect resources from climate disaster, even if the state's public trust doctrine includes an affirmative government duty, and 3) the existential threat of climate change complicates the role of the public as trust beneficiary.

First, to address the climate crisis and preserve a habitable planet for both current and future generations as the plaintiffs in *Chernaik* wanted, Oregon's government needs to act aggressively in coordination with other jurisdictions across the world to slow the release of greenhouse gasses into the atmosphere.[47] This is different from a traditional public trust doctrine case that concerns, for example, a contaminated river or an over-tapped lake.[48] Remediating contamination or conserving resources often requires only state-wide action or coordination between a few government agencies.[49] On the other hand, fighting climate change requires large-scale jurisdictional coordination to rework the global economy to prioritize human life over growth and profit.[50] Consider how the logic and language of a financial trust might apply in a case to compel government remediation of a contaminated lake versus a case to compel government action on the climate crisis. In the remediation case, the government would perhaps be required as trustee to stop any up-river pollution or install remediation equipment at the lake — similar to how a financial trust manager might have a duty to sell off depreciating property and reinvest in a more profitable sector.[51] On the other hand, in the case of climate change, the government as trustee has to take *significantly* more drastic measures to protect trust resources — measures akin to demanding that a trust fund manager with

45. BOGERT ET AL., *supra* note 12, § 582.
46. *Chernaik*, 475 P.3d at 72; Cress, *supra* note 20.
47. IPPC, *supra* note 9.
48. Lyness, *supra* note 7, at 5-1.
49. *See generally* Zhang et al. *Control and Remediation Methods for Eutrophic Lakes in the Past 30 Years*, 81 WATER SCI. & TECH. 1099 (2020).
50. *See* IPPC, *supra* note 9, at 30.
51. *See* Zhang et al., *supra* note 49.

depreciating investments storm into the boardroom of fifty companies in decline, oust its managers, install new CEOs, and join with other trustees to completely reinvent the company's profit-making scheme.[52]

Second, addressing the climate crisis requires active resource protection rather than passive stewardship, as human-caused climate change is the status quo that requires a dramatic intervention to reverse.[53] States that conceive of the public trust doctrine as including an affirmative duty to protect resources have a more solid theoretical ground for their courts to mandate action on climate.[54] However, in practice, this affirmative duty conception of the public trust doctrine has not yet been used to compel the government to act on climate. For example, Hawaii's public trust doctrine includes an affirmative duty that the government protect its resources, but the few atmospheric trust lawsuits that have been filed to compel the state to affirmatively protect the state's atmosphere from carbon dioxide (CO_2) emissions have so far been unsuccessful.[55]

Third, the concern with the climate crisis is not that the air or the oceans may be contaminated, but that large regions of the planet may become unlivable for humans.[56] Understanding the existential danger of climate change[57] complicates the position of the public in the analogy between the public trust doctrine and a common law trust. The public trust doctrine conceives of future generations of the public included as trust beneficiaries, but as *Chernaik* illustrates, those future generations are already here.[58] In the climate context, should the public be understood as the beneficiaries of a trust, or the asset to be protected? In the face of the climate crisis, governments should be concerned both with protecting the natural resources held in the public trust and with protecting the public from natural disasters. In the logic of a trust, this would make the public both the beneficiary and the protected resources. And then what does this mean for the government, which is itself composed of members of the public? When taken to this extreme, a public facing the existential threat of climate change is not only the beneficiary and the trustee, but also the resource. No plaintiff has yet made this argument in a public trust case.[59] However, these

52. This may be an extreme, and somewhat facetious comparison, but the underlying point stands. The burden on the government to address climate change is orders of magnitude larger than the burden on a private trust to steward its accounts, even taking into consideration the relative resources at the government's disposal.

53. IPPC, *supra* note 9, at 30.

54. James L. Huffman, *Protecting the Great Lakes The Allure and Limitations of the Public Trust Doctrine*, 93 U. DET. MERCY L. REV. 239, 240 (2016).

55. Douglas A. Codiga, *Climate Change Litigation in Hawaii,* HAW. BAR J. at 21-22 (2017).

56. DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH 28 (2019).

57. *Id*. at 36.

58. *See Chernaik v. Brown*, 473 P.3d 68, 72 (Or. 2020).

59. Three attorneys who worked with Our Children's Trust, the organization behind *Juliana* and *Chernaik*, wrote in 2022 that recent public trust doctrine rulings have been "discouraging" for plaintiffs pushing for government action on climate change. The attorneys wrote that, moving forward, developments in constitutional law and scientific evidence may support plaintiffs; however, the plaintiffs' lawyers did not examine the existential threat facing youth plaintiffs in climate change cases or the

logical inconsistencies are important to recognize when evaluating the persuasiveness of the public trust doctrine. Perhaps the courts' apprehension at expanding the public trust doctrine to address climate change, ironically, hinges on this existential threat element. Of course, courts regularly use imperfect metaphors, argue over definitions of words, and execute logical gymnastics in rulings.[60] However, *Chernaik* illustrates that the public trust doctrine has its limits — namely, that its logic does not hold when applied to cases focused on the climate crisis.

Considering the recent failures of *Chernaik* and *Juliana*, scholars have begun prescribing new strategies for how environmental lawyers might successfully wield the public trust doctrine to fight the climate crisis. For example, Professor Matthew Schneider argues that the public trust doctrine should be used in a hyper-local way, focusing on the direct harms and specific remedies of climate adaptation.[61] Similarly, Professor Caroline Cress argues that "a more targeted than blanket approach" is needed to address climate change through the public trust doctrine in concert with executive action, as adding too many resources to the doctrine may water down its effectiveness.[62] These two scholars focus on using the public trust doctrine to force governments into taking adaptive measures as the climate crisis bears down on local communities.

These new applications of the public trust doctrine illuminate its limits: It appears best-suited for compelling governments to take local, adaptive measures on climate, on a much more manageable scale than attacking the systemic root causes of the climate crisis. The public trust doctrine has historically concerned the public's right to use a natural resource and provided a *check* on government power from taking away or contaminating that resource.[63] In children's climate change cases, however, plaintiffs are attempting to use the public trust doctrine to *expand* the government's power to take action on climate and to compel it to do so. This is a subtle but key difference and illustrates the need for a new doctrine.

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plaintiff's role in the public trust doctrine logic. "Ultimate success," the attorneys wrote, "means getting the right plaintiffs and the right evidence at the right time in front of the right court." Andrea Rodgers et al., *Climate Justice and the Public Trust the Plaintiffs' Perspective,* 36 NAT. RES. & ENV'T 13, 16-17 (2022).

60. Louis J. Sirico, Jr., *Failed Constitutional Metaphors The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 459 (2011). In *Chernaik*, the court similarly plays around with the words "public trust." The majority opines that when the State of Oregon says it holds the land and atmosphere in "public trust," this is simply metaphorical speech and that it provides no support for the argument that the state's public trust doctrine includes the atmosphere. If the court can argue that when the government says the words "public trust" they do not actually mean "public trust," then the public trust doctrine appears hollow. *Chernaik*, 473 P.3d at 77-78.

61. Matthew Schneider, *Where Juliana Went Wrong Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, 41 ENVIRONS: ENV'T L. & POL'Y J. 45, 57 (2017).

62. Cress, *supra* note 20, at 276.

63. Lyness, *supra* note 7, at 5-1, 5-3.

B. The Elements Needed to Compel Governments to Address Climate Change

Without abandoning the public trust doctrine where it may be appropriate, environmental lawyers should consider other tools to compel the government to address the climate crisis. These tools should be evaluated with two issues in mind: 1) any doctrine useful in fighting climate change must take into account the collective action problem disincentivizing action on climate change, and 2) the government should be compelled not just to protect natural resources, but to protect the public from the ravages of the climate crisis — particularly those communities who have contributed least to the crisis and who bear the strongest brunt of the climate collapse.[64]

To address the collective action problem, any legal doctrine useful in the fight against climate change should focus directly on the actors promoting the climate crisis and what the government can do to regulate them. Given that fossil fuel companies and a few other large corporations are the main culprits behind global CO_2 emissions,[65] environmental lawyers should focus their energy on strategically challenging dangerous corporate behavior rather than trying to compel government to regulate business as usual.[66]

To address how the government should be compelled to protect the public from natural disaster, the new legal doctrine can look to two areas for inspiration: the public nuisance doctrine and movement lawyering.

Local governments are already using the public nuisance doctrine to take action on climate change. For example, in 2017, a collection of cities in the Bay Area filed lawsuits against fossil fuel companies, rooted in legal actions that cities more routinely take against bad corporate behavior in their jurisdiction.[67] In *City of Richmond v. Chevron*, the City of Richmond, California sued Chevron and other fossil fuel companies operating within its jurisdiction, "alleging public nuisance and negligence, and seeking the funds necessary to adapt to a climate-changed future."[68] A lawyer for Richmond told *The Guardian*, "These are the first cases to apply this approach to climate change impacts on communities, but

64. S. NAZRUL ISLAM & JOHN WINKEL, U.N. DEPT. OF ECON. & SOC. AFFAIRS, CLIMATE CHANGE AND SOCIAL INEQUALITY 1-2 (2017), https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf.

65. Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, GUARDIAN (Jul. 10, 2017), https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change.

66. Attempts to challenge fossil fuel corporations should consider that these corporations and their legal counsel are adept at avoiding existing government regulations and unfavorable court rulings. David R. Baker, *Chevron Dodges $9 Billion Bullet in Decades-Long Pollution Case*, S.F. CHRONICLE (Jun. 19, 2017), https://www.sfchronicle.com/business/article/Chevron-Shielded-From-9-Billion-Verdict-as-Court-11230787.php.

67. Benjamin Hulac, *Cities Sue Big Oil for Damages from Rising Seas*, SCI. AM. (Sept. 21, 2017), https://www.scientificamerican.com/article/cities-sue-big-oil-for-damages-from-rising-seas/; Susie Cagle, *Richmond v Chevron The California City Taking On Its Most Powerful Polluter*, GUARDIAN (Oct. 9, 2019), https://www.theguardian.com/environment/2019/oct/09/richmond-chevron-california-city-polluter-fossil-fuel.

68. Cagle, *supra* note 67.

far from the first to apply them to injuries to communities suffering from a wide range of bad corporate behaviour."[69] These lawsuits illustrate municipal governments taking affirmative action to protect their constituents from the actors fueling the climate crisis — and they might just win. In February 2022, the 10th Circuit ruled that the City of Boulder, Colorado's claims against fossil fuel companies may be heard in state court instead of federal courts, giving the city a "home court" advantage moving forward.[70] Whether or not these public nuisance lawsuits are successful, they are still a positive step towards developing a legal theory to give governments tools to take action on climate change because they focus on the actors directly driving climate change.

Second, climate lawyers should be rooted in the principles of movement lawyering when representing those most affected by the climate crisis. Movement lawyering is the practice of lawyering "that supports and advances social movements. . . led by the most directly impacted, to achieve systemic institutional and cultural change."[71] In *Chernaik*, there was very little consideration of the harms plaintiffs faced, and the children plaintiffs did not appear to lead the litigation.[72] However, the fossil fuel industry is currently harming millions of people directly and concretely, through adverse health conditions, unsafe working conditions, and the intentional disregard of the human costs of its business.[73] Working with the people most affected and discussing the remedies they seek for the "concrete and personal" injuries of climate change might illuminate a new path forward.[74] Similarly, hundreds of thousands of Americans are currently directly threatened by rising sea levels, losing their homes and livelihoods in states with significant low-lying areas like Florida and Louisiana.[75] Finally, supporters of the public trust doctrine might consider how the federal government has managed other assets it *does* hold under a fiduciary duty, including the 56 million acres of tribal land, stolen from Native Americans, that the government currently holds in trust to disastrous effect.[76] In order to make sure the public is protected from the effects of climate change,

69. *Id*.

70. Leslie Clark, *Oil Firms Suffer Major Setback in Colo. Climate Lawsuit*, E&E NEWS (Feb. 9, 2022), https://www.eenews.net/articles/oil-firms-suffer-major-setback-in-colo-climate-lawsuit/.

71. Betty Hung, *Movement Lawyering as Rebellious Lawyering Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 664 (2017).

72. *See generally Chernaik v. Brown*, 473 P.3d 68 (Or. 2020).

73. Oliver Milman, *Invisible Killer ' Fossil Fuels Caused 8.7m Deaths Globally in 2018, Research Finds*, GUARDIAN (Feb. 9, 2021), https://www.theguardian.com/environment/2021/feb/09/fossil-fuels-pollution-deaths-research; Daniel J. Weiss, *Fossil Fuel Industries Kill and Injure an Awful Lot of Their Workers*, GRIST (Apr. 20, 2011), https://grist.org/fossil-fuels/2011-04-19-fossil-fuel-industries-kill-injure-workers/.

74. *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020).

75. Lindsey Jacobson, *In Areas Hit Hard by Climate Change, Only the Rich Can Afford to Stay*, CNBC (Sept. 16, 2021), https://www.cnbc.com/2021/09/16/climate-change-sea-level-rise-devalue-some-homes.html.

76. Armen H. Merjian, *An Unbroken Chain of Injustice The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 610 (2011).

environmental lawyers should learn from movement lawyering strategies on how to center the actual individuals harmed by the climate crisis.

CONCLUSION

In the face of an existential crisis, alongside recalcitrant judiciaries and gridlocked legislatures, lawyers need to get creative. While the public trust doctrine is appealing because it appears to compel the government to *do something* when it would rather not, upon closer examination, the public trust doctrine is not the useful tool environmentalists may wish it was. New doctrines that address the collective action problem on climate and protect the most vulnerable members of the public are needed to adequately address the situation. Ultimately, an old Roman doctrine might not be the best tool for staving off social and environmental collapse.

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We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.