Case No. 18-36082

In the United States Court of Appeals for the Ninth Circuit

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon (No. 6:15-cv-01517-AA)

BRIEF OF AMICUS CURIAE NISKANEN CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Niskanen Center states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Niskanen Center is a 501(c)(3) libertarian think tank with a strong interest in securing Americans' rights to their property, and the question whether the public trust doctrine applies to the federal government seriously implicates those rights.[2]

The United States concedes that the health and real property of all Americans is threatened by global warming, and that global warming is due to human emissions of greenhouse gasses. Answer, ¶¶ 5-8. But having abrogated private property interests in the atmosphere and declared it instead to be public property, the federal government nevertheless disclaims any trusteeship duty to properly manage and preserve it. Admitting that atmospheric degradation is a grave threat to all Americans, while denying that it has any responsibility to preserve this publicly-owned resource, is a complete abdication of the federal government's sovereign responsibilities.

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[1] All parties have consented to the filing of this brief, and no counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than Niskanen has made a monetary contribution intended to fund its preparation or submission.

[2] This brief addresses only the public trust doctrine issue, and Niskanen takes no position on other issues raised in this proceeding.

SUMMARY OF ARGUMENT

The District Court correctly held that the United States is subject to a public trust duty to protect the atmosphere, and that this remedy is not displaced by the Clean Air Act.

During the 19th and early 20th centuries the Supreme Court was confronted with the federal government's management of the quintessential public trust property – submerged land under tidewaters and navigable waterways – in the territories that were later to become states. Because the original 13 states held all such lands as public trust property, and the Constitution (Article 4, § 3) requires that new states be admitted "on equal footing" with their predecessors, the Court held that new states must enjoy the same rights to those submerged lands within their borders.

Since new states were formed out of federal territories, the only way for them to stand on "equal footing" with the original 13 states was to impose on the federal government an affirmative trust duty to deliver territorial submerged lands – intact and unencumbered – to those new states when Congress admitted them (U.S. Constitution, Article IV, § 3) to the Union.

Holding title to property while under legal obligation to manage it on behalf of, and transfer intact title to, a subsequent owner is, indeed, the very essence of trusteeship. The Supreme Court repeatedly held the federal government to precisely that standard, *e.g.*: "Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; *but with respect to the former they held it only in trust for the future States that might be erected out of such territory*." *Knight v. United States Land Association*, 141 U.S. 161, 183 (1891)(emphasis added).

Such federal trust responsibility leaves only the question of whether there is a similar responsibility for the atmosphere. The common-law property right of ownership *cujus est solum ejus est usque ad coelum* ("whoever's is the soil, it is theirs all the way to the heavens") was abolished by Congress, which declared as early as 1926 that the federal government has "complete sovereignty" over all airspace, along with a "public right of freedom" to navigate through it. 44 Stat. 568, §§ 6(a), 10. Since both are expressly based on the public's rights to make use of a natural resource, there is no principled way to distinguish

between the federal government's trust responsibilities for submerged lands and for the atmosphere.

Nor is this trust responsibility displaced by the Clean Air Act. At an absolute minimum, whatever else the Clean Air Act applies to, it does not govern emissions *outside of the United States* resulting from burning fossil fuels either exported from the U.S. under federal authorization, or extracted overseas as a result of the U.S. encouraging and subsidizing foreign fossil-fuel development. Those emissions injure the Plaintiffs just as domestic emissions do, and Defendants offer no basis for finding that Congress had displaced any remedy as to those federal actions.

ARGUMENT

I. THE FEDERAL GOVERNMENT HOLDS THE ATMOSPHERE AS A PUBLIC TRUST.

A. The Supreme Court Has Recognized the Federal Government's Public Trust Duties for More Than 170 Years.

Each of the original thirteen states held title to all land beneath navigable waters; after the Revolution, "the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soils under them, for their own

common use, subject only to the rights since surrendered by the Constitution." *Martin v. Waddell's Lessee,* 41 U.S. 367, 410 (1842). The roots of this lay in the common law (*id.* at 414):

> [F]rom the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters for the same purposes, and to the same extent, that they have been used and enjoyed for centuries in England.

In *Pollard's Lessee v. Hagen*, 44 U.S. 212 (1845), the Supreme Court was confronted with competing claims for land below the high-water mark in Mobile Bay, Alabama, which became U.S. territory as part of the Louisiana Purchase.[3] *Id.* at 228. In 1824 and 1836 Congress had confirmed title to the parcel in question to Pollard, (*id.* p. 219), but when ownership was later disputed, the dispositive issue was whether the grant from the United States was valid.

[3] Perhaps. Claiming it as part of the Louisiana Purchase, the U.S. first asserted sovereignty over it in the "Mobile Act" of 1804 (2 Stat. 251, § 11), a claim disputed by the three previous possessors of the Territory, Britain, Spain, and France (as well as by the short-lived Republic of West Florida). Matters were finally settled only after the 1813 military occupation of Mobile, formal annexation in 1814 (2 Stat. 734), and the 1819 Adams-Onis Treaty between the U.S. and Spain (8 Stat. 252).

Under the "equal footing" doctrine, the disputed land belonged to the State of Alabama:

> In the case of *Martin and others v. Waddell*, 16 Peters, 410, the present chief justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

Id. at 229. And because the Constitution required the U.S. to ensure that Alabama had the same sovereign rights over "navigable waters and the soils lying under them" as the original thirteen states, the U.S. necessarily held the Louisiana Territory *in trust* for the states that would eventually be formed from it: "When the United States accepted the cession of the territory, they took upon themselves *the trust to hold the municipal eminent domain* for the new states, and to invest them with it[.]" *Id.* at 222 (emphasis added).[4] As a consequence, "[t]he right of

[4] "Municipal eminent domain", was shorthand for state sovereignty: "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions[.]" *Id.* at 230.

the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case." *Id.* at 230. *Pollard's Lessee v. Hagen* established that, until sovereignty is transferred to a state, the U.S. is trustee over the same public resources, and in the same manner, as states are after the transfer.

The Supreme Court has repeatedly affirmed this doctrine, *e.g.*, *Weber v. Board of Harbor Commissioners,* 85 U.S. 57, 65 (1873)(emphasis added)("Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, *they held it only in trust* for the future State"); *Knight v. United States Land Association*, 141 U.S. 161, 183 (1891)(emphasis added):

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. [Citations omitted.] Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; *but with respect to the former they held it only in trust for the future States that might be erected out of such territory*.

In *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) the Court reaffirmed that, "[t]he rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned", and noting that *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935) had again reiterated "that if the patent purported to convey lands which were part of the tidelands, the patent would be invalid to that extent since *the Federal Government has no power to convey* lands which are rightfully the State's under the equal-footing doctrine." *Id.* at 375 (emphasis added).

In fact, the very cases cited by the Defendants for the proposition that "The Supreme Court has without exception treated public trust doctrine as a matter of state law" (U.S. Brief 48-49) actually confirm the existence of the federal public trust doctrine. The Court applied state law to each of those cases because every one of them dealt with actions that took place *after* the state received the public trust property from the federal government. And, in applying state law, the Court explicitly acknowledged the state public trust *followed on the heels of the previous federal public trust obligation*, *e.g.,* "Upon the acquisition of a

Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, *and in trust for the several States to be ultimately created out of the Territory*." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)(emphasis added); "The importance of these lands to state sovereignty explains our longstanding commitment to the principle that the United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1977).[5]

It is also worth noting that state courts have also recognized this federal trust responsibility:

> It was settled long ago that the ownership of the navigable waters and the soil under them in all the territory embraced in the Louisiana Purchase *was held in trust by the federal government*, and, as each of the states was created, such ownership, within the boundaries of such state, passed to it, and the absolute right to the soil under such waters is in the state subject to the public rights

[5] In *Appleby v. City of New York*, 271 U.S. 364, 381 (1926), the issue was a dispute over public trust land in one of the 13 original colonies, and thus there was no period of time when it was held by the federal government: "Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several States."

> and the paramount power of Congress over navigation, and that such ownership extends to the high water mark.

City of Tulsa v. Comm'rs of the Land Office, 101 P.2d 246, 248 (Oklahoma 1940) (emphasis added).

That *PPL Montana v. Montana*, 565 U.S. 576, 603 (2012), referred to the public trust doctrine as a matter of state law is entirely consistent with these cases, because *none* of the relevant events in *PPL Montana* took place before the federal government transferred sovereignty over the riverbeds at issue to the State of Montana. *PPL Montana* concerned actions that began in 1891 (*id.* at 586), two years after Montana became a state in 1889 (Presidential Proclamation No. 293, Nov. 8, 1889). Because PPL did not claim that the federal government had granted it any rights to the riverbeds while administering the Territory of Montana, the question of the federal government's public trust responsibilities was never at issue.

Defendants' further argument that *PPL Montana* held that "a public trust doctrine would never apply to the federal government" (U.S. Brief 49) is simply wrong. The discussion in *PPL Montana* the Defendants cite for this argument in fact describes (correctly) why federal law and the Constitution do not create the scope of *state* public

trust responsibilities that states assume *after* entry into the Union. Those state responsibilities are solely matters of state law, *i.e.*, it is up to the states "to determine the scope of the public trust over waters within their borders." *PPL Montana* at 604. Notably, none of the cases that rely on the statement in *PPL Montana* that the public trust doctrine is "a matter of state law" have recognized that there was never an issue with any federal government action while it administered the Territory of Montana, and therefore no federal public trust question ever arose.

B. The Federal Government Has a Public Trust Duty to Preserve the Atmosphere After It Eliminated Private Property Rights to Airspace in Favor of Public Ownership.

Just as the public trust doctrine was grounded in the common law, so were property owners' rights to the air above their land: "The ownership of land is not confined to its surface, but extends indefinitely, downwards and upwards. *Cujus est solum, ejus est usque ad coelum*, 2 Black. Com. 18." *Den ex dem. Gilliam v. Bird*, 30 N.C. 280, 284 (1848).

While the *ad coelum* doctrine served well when aerial disputes concerned tree limbs and roof gables overhanging property lines, it did not survive the Wright Brothers. In the very first recorded U.S. case

dealing with a trespass claim against an airplane, the court rejected *ad coelum* in refusing to enjoin flights over the plaintiff's property:

> The upper air is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by an ancient artificial maxim of law. Modern progress and great public interests should not be blocked by unnecessary legal refinements.[6]

Only three years later, Congress nationalized U.S. airspace. The Air Commerce Act of 1926 declared first that the U.S. had "to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States" (44 Stat. 568, § 6(a)), defining "navigable airspace" as airspace "above the minimum safe altitudes" (as determined by the Secretary of Commerce), and declaring that such navigable airspace "shall be subject to a public right of freedom of interstate and foreign air navigation". *Id.* § 10. Henceforth, private ownership of the air would extend only up to whatever height

[6] *Johnson v. Curtiss Northwest Airplane Corp.* (Minn. Dist. Ct. 1923), reported in *Aviation Cases* (New York, Commerce Clearing House 1947 -) 1:61-63; quoted in Banner, Stuart, *Who Owns the Air*, Harvard University Press 2008, pp.123-124.

the Secretary determined was the "minimum safe altitude" for aviation, soon established at 500 feet.[7]

Even the 500-foot property limit did not survive long. In *Swetland v. Curtiss Airport Co.*, 55 F.2d 201, 203 (6th Cir. 1932), the court curtly dismissed the *ad coelum* doctrine, noting that no case "undertakes to define the term '*ad coelum*', if indeed that term is one of constancy or could be defined." Instead, ownership would extend only so far as "the surface owner may reasonably expect to occupy the air space for himself", which would "be determined upon the particular facts of each case." *Id.*

Ad coelum's ultimate demise came in *United States v. Causby*, 328 U.S. 256, 260-261(1946)(footnote omitted):

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe -- *Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. . . . To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development

[7] While the statutory limitation to "interstate and foreign air navigation" reflected Congressional concern as to the extent of its Commerce Clause power, state courts and legislatures were quick to adopt the federal rule of navigable airspace (above 500 feet) as the vertical extent of the *ad coleum* doctrine. *See Smith v. New England Aircraft Co.,* 270 Mass. 511, 519-520, 525-526 (1930).

> in the public interest, and transfer into private ownership that to which only the public has a just claim.

Instead of *ad coelum*, "[t]he airspace, apart from the immediate reaches above the land, is part of the public domain." *Id.* at 266. Echoing *Swetland*, the Court said it "need not determine at this time what those precise limits are" (*id.*), but repeated military overflights at 83 feet above Causby's chicken farm constituted a taking of his property in those "immediate reach" above his land.

In sum, the Aviation Age eliminated private ownership of the skies in favor of *public ownership,* whether that ownership is phrased as "a natural heritage common to all of the people" (*Johnson v. Curtiss Northwest, supra* at note 6), a "public right of freedom" to it (Air Commerce Act of 1926, 44 Stat. 568, § 10), a "public right of freedom to transit" in it (Civil Aeronautics Act of 1938, 52 Stat. 973, § 3), part of the "public domain" (*Causby*, supra), "exclusive sovereignty" over U.S. airspace, with a "public right of transit" (Federal Aviation Act of 1958, 49 U.S.C. § 40103(a)(1), (a)(2)), etc.

These statements just as easily describe public trust property in navigable waters: the sovereign people "hold the absolute right to all their navigable waters and the soils under them for their own common

use." *Martin v. Waddell's Lessee*, 42 U.S. at 410; "The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty", *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 459 (1892).

Defendants' reliance on decisions from state courts that have refused to extend their public trust responsibilities to the skies (U.S. Brief 56 n.3) is misplaced, for the simple reason that the federal government has *exclusive* sovereignty over airspace; there can no more exist state public trust for the skies than there could be state public trust for lands owned by the federal government.

If the U.S. or a sovereign state holds navigable waters and the lands beneath them in trust for common use, there is no plausible reason why the U.S. does not have the same trust duty over the air: there is no principled distinction between exclusive sovereignty over those submerged lands for the common use of all citizens on the one hand, and exclusive sovereignty over the air for the common use of all citizens on the other.

II. THE CLEAN AIR ACT DOES NOT DISPLACE THE FEDERAL GOVERNMENT'S ATMOSPHERIC PUBLIC TRUST DUTY.

Defendants cite *AEP v. Connecticut*, 564 U.S. 410, 423-424 (2011) for the proposition that the Clean Air Act "displaces any federal common law right to seek abatement" of carbon dioxide. U.S. Brief 54.

The decision below explains why *AEP* should not be read to displace the federal government's atmospheric public trust duties (*Juliana v. United States*, 217 F. Supp. 3d 1224, 1259-60 (D. Or. 2016), and Niskanen agrees with the arguments made by Plaintiff-Appellees as to as to why this was correct. But even assuming, *arguendo*, that the Clean Air Act applies as to the *domestic* emissions at issue here, Defendants offer no argument – nor could they – as to how the Clean Air Act displaces remedies as to federal actions resulting in *overseas* emissions, which are simply not subject to that statute, *e.g.*, Export-Import Bank financing of overseas fossil-fuel projects (Amended Complaint, "AC", ¶ 177), Department of Energy LNG export authorizations (AC ¶ 107); Department of Commerce crude oil export authorizations (AC ¶ 119(c)), etc.

These federal actions result in greenhouse gas emissions which are not subject to the Clean Air Act, and are prominently featured as

sources of Plaintiffs' injuries, *e.g.* AC ¶¶ 7, 9, 11, 22, 96, 99, 119(b), 121(b), 123(c), 127, 177, 179, 181-184, 192-201, 280, 288-289, 299. Just recently, a district court in this Circuit held that while the Clean Air Act might displace even state common law remedies over *domestic* CO2 emissions, it could not possibly be read to displace remedies relating to emissions *outside* of the U.S., because "foreign emissions are out of the EPA and Clean Air Act's reach." *California v. B.P. PLC,* 2018 U.S. Dist. LEXIS 32990 (N.D. Ca. February 27, 2018) at 13.

Overseas emissions from U.S. exported fossil fuels are significant. In 2017 alone, U.S. exported more than 3 trillion cubic feet of natural gas, 97 million tons of coal, and more than 400 million barrels of crude oil.[8] When combusted, combined these would emit hundreds of millions of tons of CO2. More importantly, these exports are expected to dramatically increase: The U.S. Energy Information Administration's

[8]https://www.eia.gov/coal/annual/pdf/table36.pdf (coal); https://www.eia.gov/dnav/ng/ng_move_expc_s1_a.htm (natural gas); https://www.eia.gov/dnav/pet/pet_move_exp_dc_NUS-Z00_mbbl_a.htm (crude oil). All last visited March 1, 2019.

reference case predicts that by 2030 both crude oil and natural gas exports will double.[9]

In addition to injuries from these fossil fuel exports, the U.S. has provided tens of billions of dollars in financing for overseas fossil fuel exploration, development and use, which will lead to approximately 2.5 *billion* tons of CO2 emissions over the next few years.[10]

In short, even if the Clean Air Act were to displace those parts of Plaintiffs' public trust claim based on U.S. emissions, a substantial portion of Plaintiffs' claims would still remain to be adjudicated.

CONCLUSION

For the reasons given herein, the Court should affirm the decision below.

Respectfully submitted,

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[9] U.S. EIA, *Annual Energy Outlook 2019*, p. 19 (natural gas); www.eia.gov/analysis/projection-data.php (crude oil; last visited 3/1/19).
[10] https://www.theguardian.com/environment/2016/nov/30/us-fossil-fuel-investment-obama-climate-change-legacy (last visited 2/28/19).

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number 18-36082

I am the attorney or self-represented party.

This brief contains 3827 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

s/David Bookbinder
David Bookbinder

CERTIFICATE OF SERVICE

I certify that on March 1, 2019, I served a copy of the foregoing Brief of Amicus Curiae Niskanen Center on counsel for all parties via the Court's CM/ECF filing system.

s/David Bookbinder
David Bookbinder