

And a Child Shall Sue Them: Ambitious New Climate Lawsuit Filed
Against Obama Administration | 1



Attorney Joe Cotchett, Cotchett, Pitre & McCarthy, lead counsel for plaintiffs in the Juliana litigation

Late last week, attorneys representing children from around the nation filed a provocative new lawsuit in federal court, arguing that the Obama Administration is violating the children's constitutional rights by not taking far more dramatic steps to curb greenhouse gas emissions and address climate change concerns.

The [newly-filed complaint in the lawsuit, *Juliana ex rel. Loznak v. United States of America*](#), seeks a sweeping judicial order directing the federal government "to swiftly phase-down CO2 emissions aimed at atmospheric CO2 concentrations that are no more than 350 [parts per million] by 2100, develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system."



The proposed Jordan Cove LNG terminal in Coos Bay, Oregon

The gravamen of the lawsuit is that the Obama Administration has “continued [its] policies and practices of allowing the exploitation of fossil fuels,” thus facilitating increased ambient concentrations of greenhouse gasses in the atmosphere.” (A key example cited in the complaint is the U.S. Department of Energy’s recent approval of a new liquefied natural gas (LNG) terminal on the Oregon coast.) And while congressional and industry critics have lambasted President Obama’s recently-announced Clean Power Plan to reduce GHG emissions from American power plants as unlawful and excessive, this litigation goes so far as to cite the same plan as “another example of EPA’s failure even to seek future CO2 emissions reductions at anything near the rate required to preserve a habitable climate system.”

The lawsuit alleges that the federal government’s sins of climate change commission and omission violate the plaintiff children’s constitutional rights of due process, equal protection and unenumerated rights protected under the Ninth Amendment. A final claim raised in the complaint is that the federal government has an affirmative duty to refrain from substantial impairment of the earth’s atmosphere, and that the government’s failure to carry out that duty violates public trust principles.

If this last legal theory sounds familiar, it should: it’s the same “atmospheric trust” argument advanced by environmental advocates a couple of years ago, in lawsuits filed against the federal government and each of the 50 states. That earlier atmospheric trust litigation foundered badly, with courts in virtually every jurisdiction dismissing the cases on a variety of threshold procedural grounds.

So why should anyone expect a different result in the newly-filed *Juliana* case?



Climate scientist Dr. James Hansen, former head of

NASA's Goddard Institute for Space Studies

There are actually two reasons why this new lawsuit warrants close attention. First, the plaintiffs are represented by Cotchett, Pitre & McCarthy, a prominent Northern California law firm that has won a number of innovative lawsuits—including environmental cases—that were similarly criticized as meritless when they were originally filed. (One example is the firm's recent victory at trial in a public nuisance action it brought on behalf of California local governments against the former manufacturers and sellers of lead paint.) Founding partner Joe Cotchett and his firm are smart, savvy and aggressive, with an impressive record of success in this type of "impact" public interest litigation.

The second and even more compelling reason this new litigation may achieve a more favorable result than the earlier atmospheric trust litigation is the prominent role being played on behalf of the plaintiffs by Dr. James Hansen, America's most prominent climate scientist. For many years, Dr. Hansen was employed by NASA as head of its Goddard Institute for Space Studies. In that capacity, he was a compelling spokesperson regarding the looming perils of climate change—often to the considerable discomfort of his federal bosses in both Democratic and Republican administrations. Hansen has now retired from his government post, leaving him free to participate in the newly-filed *Juliana* litigation as a named "guardian" of several of the named children plaintiffs. And Hansen's handiwork is prominently reflected in the newly-filed complaint: one of its most noteworthy features is the extensive and systematic discussion of climate science. I have little doubt that Dr. Hansen himself authored those portions of the complaint, and that he will serve as the plaintiffs' lead expert witness if the lawsuit is allowed to proceed on its merits.

To be sure, this litigation remains a legal longshot. The federal government can and undoubtedly will avail itself of a variety of formidable procedural and substantive defenses. And it seems doubtful that a federal court judge could feasibly grant the relief the plaintiffs are seeking even if s/he were inclined to do so.

As a political statement, however, the newly-filed complaint makes for powerful and compelling reading. If nothing else, it provides a substantive counterpoint to the industry- and Republican party-led campaign against the modest steps the Obama Administration has taken to date to curb the nation's GHG emissions.

Finally, legal historians will note that the *Brown v. Board of Education* and same-sex marriage cases seemed equally far-fetched when they were initially filed. So I, for one, am not ready to dismiss out of hand the legal arguments advanced by James Hansen, Joe Cotchett and the children they're representing in federal court.

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Stay tuned.