

[Per the New York Times this morning](#), a group of environmental organizations called *Our Children's Trust* has filed a lawsuit against the state of California, arguing for protection of the atmosphere under the public trust doctrine (about which I blogged a couple of days ago). A few preliminary reactions after having read the complaint quickly:

1. Not much of a surprise concerning the cause of action: public trust theories about atmospheric protection have been bouncing around for quite a while now.
2. This is a *state* claim, based upon California public trust doctrine. That's why I'm not sure I quite agree with our friend Michael Gerrard of [Columbia's climate change law center](#), who is quoted as saying that courts will be influenced by whatever happens *Connecticut v. AEP*: there is no doctrinal reason why they should be unless the Supremes decide that Clean Air Act authority for greenhouse gas regulation not only pre-empts state nuisance law, but pretty much *all* state law. Possibly, it's about a "judicial mood" or some such, but it's not doctrinally required — at least not yet.
3. The plaintiffs are at this stage asking only for declaratory relief. This seems wise to me. Get the declaration and then try to figure out remedies afterwards. Don't scare the judiciary with the prospect of making them supervise all environmental regulation in the state (if not more). This was the strategy of the plaintiffs in the *Williams* case concerning public school facilities.
4. Although it seems to me to be a pretty strong claim that the atmosphere is covered under the public trust, it is quite another thing to argue that the state of California has not fulfilled those responsibilities. The central California public trust case, *National Audubon Society v. Superior Court* (1983), better known as the Mono Lake case, held that surface water is covered under the public trust, but pointedly did *not* hold that that meant that no one could appropriate surface water, or even set forth specific standards about how far water law should be guided by public trust values. Essentially, it kicked it back to the State Water Resources Control Board ("concurrent jurisdiction"), and state courts have often deferred to state judgments about the extent of necessary public trust protection. Given the continuing implementation of AB 32 and the recent decision by the [Brown Administration to increase the state's renewable energy portfolio](#), it's significantly harder to argue that the state is violating its responsibilities.
5. Although the complaint notes that every state has a public trust doctrine, that hardly means that each state's doctrine is as expansive as California's. Idaho's legislature even passed a law purporting to abrogate it ([which may violate its Constitution](#)). The plaintiffs will most likely bring suits in 50 states, but the results will vary. And depending upon any remedies, there could be Dormant Commerce Clause problems down the road. But that's *far* down the road.

