

Public Commons, Private Property, and the Evolution of the American Public Trust Doctrine



THE PUBLIC TRUST DOCTRINE, PRIVATE WATER
ALLOCATION, & MONO LAKE: THE HISTORIC SAGA OF
NATIONAL AUDUBON SOCIETY V. SUPERIOR CT.
(45 Environmental Law 561 (2015))

THE PUBLIC TRUST DOCTRINE, PRIVATE RIGHTS IN
WATER, AND THE MONO LAKE STORY
(Cambridge University Press, 2019)

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Presentation Objectives



- ▶ Introduce: American Public Trust Doctrine
 - Historical roots in Roman & British Common Law

- ▶ Share Classic Stories of U.S. Property & Env'tl. Law
 - *Illinois Central Railroad vs. IL, National Audubon Society*

- ▶ Foreshadow New PTD Developments in the U.S.
 - Scott River groundwater, Pennsylvania fracking, *Juliana v. US*

- ▶ Raise Questions about the Scope of the PTD
 - How does it arbitrate between public and private rights?

Ranger Erin & Mono Lake, @ 1996

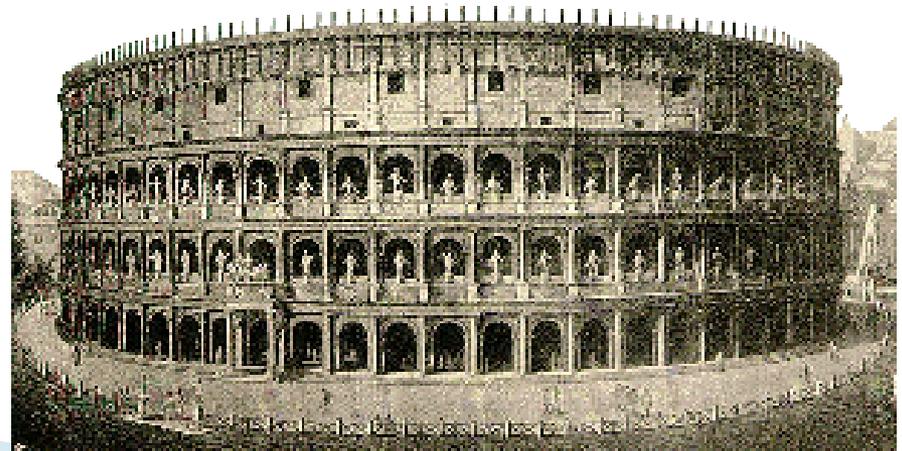


Mono Lake District, Inyo National Forest, USFS

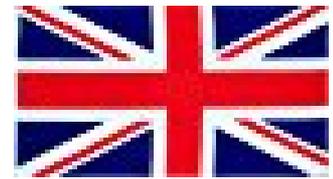
PTD Origins: Ancient Roman Law

▶ Institutes of Justinian (535 C.E.):

- Byzantine Emperor Justinian I codifies the “Jus Publicum” principle of ancient Roman law:
- *“By natural law, these things are common property of all: air, running water, the sea, and with it, shores of the sea”.*



PTD Origins: British Law



▶ Magna Carta (1215): Sovereign/public rights to resources (?)

- Ch. 33: Required removal of all weirs in Thames, Medway, and ‘throughout all of England’ that interfered with fishing or navigation
- Forest Charter (added in 1217): Guaranteed common rights to graze animals, forage, plant crops, collect lumber on lands under Forest Law (e.g., New Forest)

▶ British Common Law: Sovereign rights (& resp?) re: tidelands

- Royal Fishery of River Banne (K.B. 1611): Navigable waters were owned by the sovereign for public use; beds of nonnavigable waterways were private
- Sir Matthew Hale’s Treatise on English Maritime Law (1670, *De Jure Maris*): Describing sovereign ownership of tidelands in 3 kinds of coastal land: (1) under royal right or police power, (2) public navigational access, (3) privately owned

▶ Critique (Huffman): Ch. 33 protected barons only, not general public; King’s prerogatives didn’t include “trust” responsibilities until 19th century

US: Received *re* All Navigable Water



- ▶ *Arnold v. Mundy* (NJ 1821): Quoting Justinian and limitations on English Crown, held land beneath navigable W= common P
 - “The sovereign... cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.”
- ▶ *Martin v. Wadell* (US 1842): Affirming sovereign ownership of navigable waters and submerged resources (here, oyster beds):
 - “The land under the navigable waters within the limits of the charter passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England and the soils under them are held by the Crown.
 - **The policy of England since Magna Carta—for the last six hundred years—has been carefully preserved to secure the common right of piscary for the benefit of the public.** It would require plain language in the letters patent to the Duke of York to persuade the Court that the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away.”

Canonized by U.S. Supreme Court

▶ *Shively v. Bowlby* (US 1894): Definitive statement of the U.S. doctrine of sovereign ownership, tracing history from U.K. forward, holding:

- “[T]hese submerged lands, of singular value for commerce, navigation, and fishery, were held by the English King for the benefit of the public, that those rights survived the settlement of the colonies, and upon the American Revolution, became vested in the original States.
- **When territory came into the U.S. by whatever means**, the same public ownership of **submerged lands** below the mean high-water mark passed to the U.S., **held “for the benefit of the whole people and in trust”** for the new states that would be carved from this territory.”

▶ *Illinois Central Railroad v. IL* (US 1892): Classic statement of the PTD:

“The state holds the title to the lands under navigable waters... in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”

▶ Acts as limit on sovereign power, enforceable by citizens in Ct.



Leading Case: *IL Central RR (US 1892)*

Chicago Harbor, Lake Michigan



- ▶ In 1869, state legislators gave Chicago Harbor to a private railroad, and then they were promptly voted out of office. The new legislature repealed conveyance; litigation ensued.
- ▶ ***Railroad:*** ‘*No backsies!*’
- ▶ ***State:*** *No problem... because there was never any gift.*

Public vs. Private Rights in Water



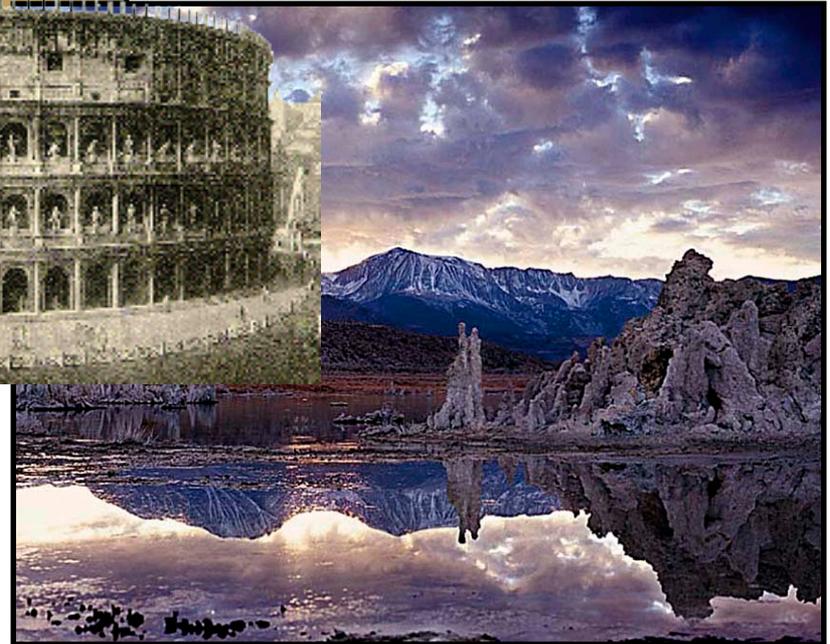
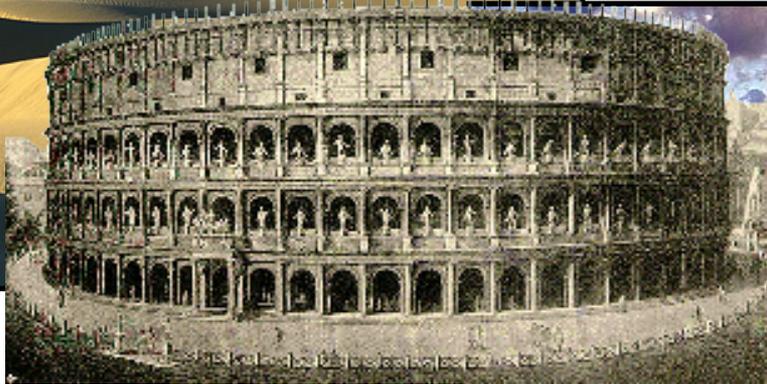
- ▶ Eastern U.S.: Riparian Rights (UK rule)

...Roughly: Everyone shares

- ▶ Western U.S.: Prior Appropriation & Beneficial Use

...First in Time, First in Right

Prior Appropriations, PTD, & Mono



Water as “Wet Gold” in S. California

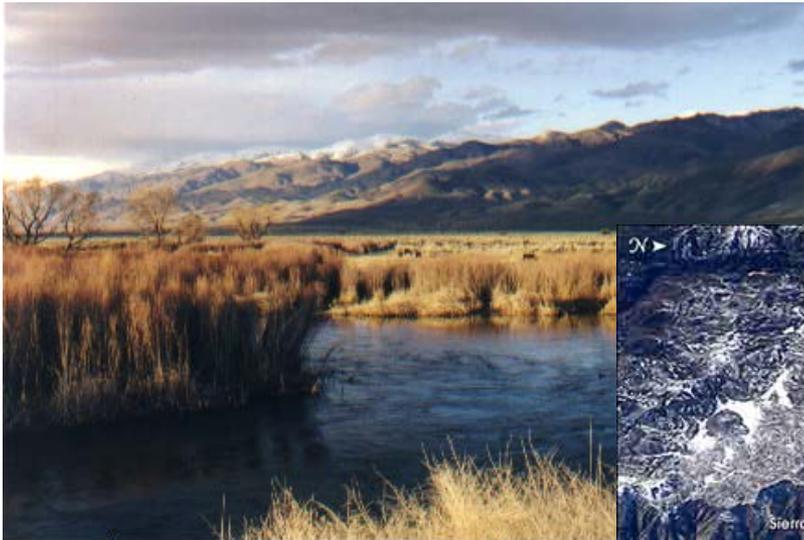


Los Angeles



LA River (channelized)

The Owens River & Valley, Owens (Toxic) Dry Lake



Mono Lake & the Yosemite-Inyo Sierra Crest

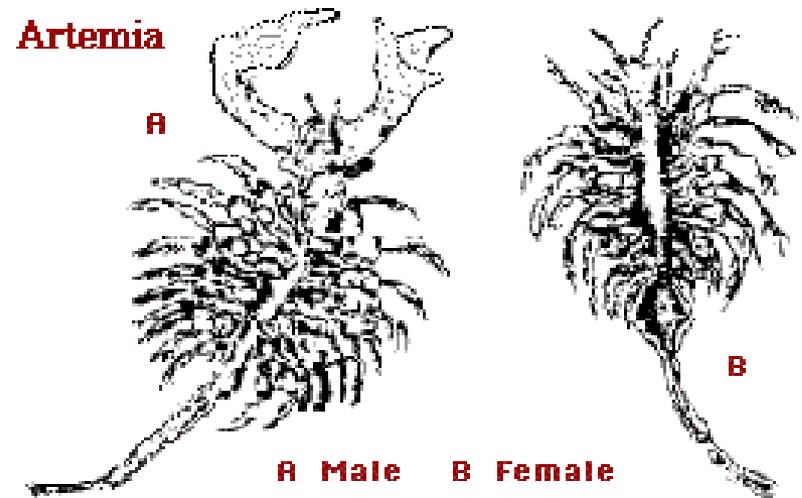


- ▶ 2x size of San Francisco
- ▶ 3 million years old
- ▶ 3x saltier than Pacific
- ▶ Unique ecosystem
- ▶ Scientific research
- ▶ Stunning natural beauty
- ▶ Culture & community

Artemia Monica: Unique Species of Mono Lake **Brine Shrimp**



Brine shrimp, known as "Sea-Monkeys" to kids who could once order them from comic books (John George photo courtesy FRIENDS of Great Salt Lake)



(Photos of a related Great Salt Lake species; Artemia Monica are only in ML.)

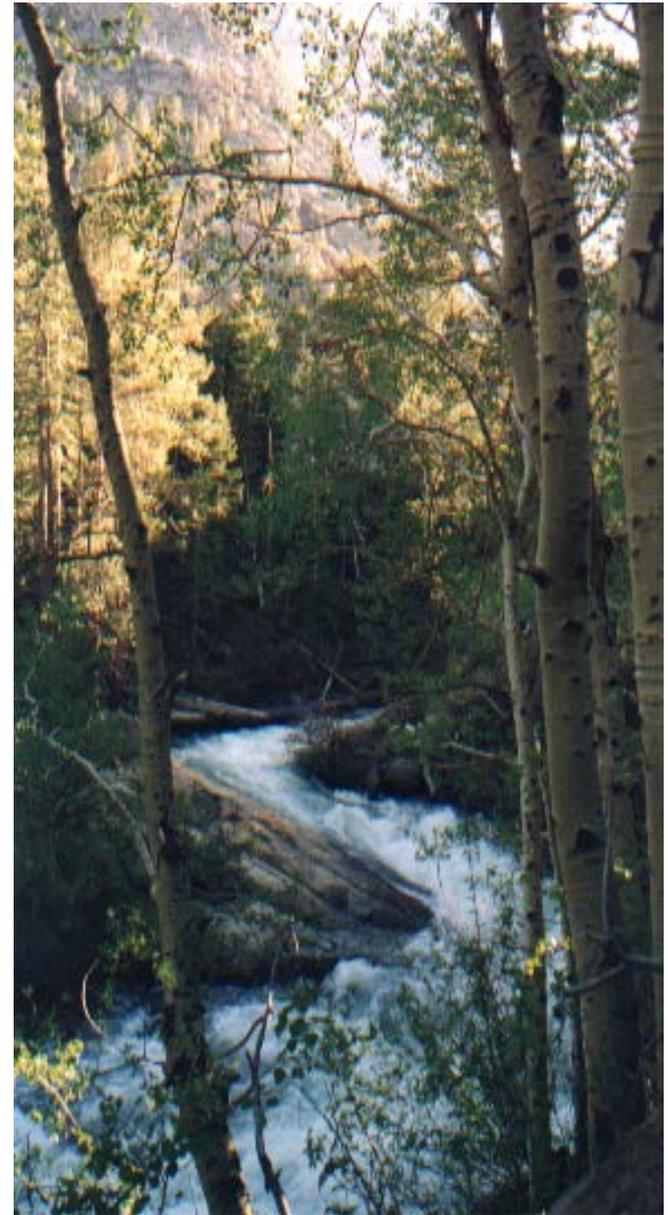
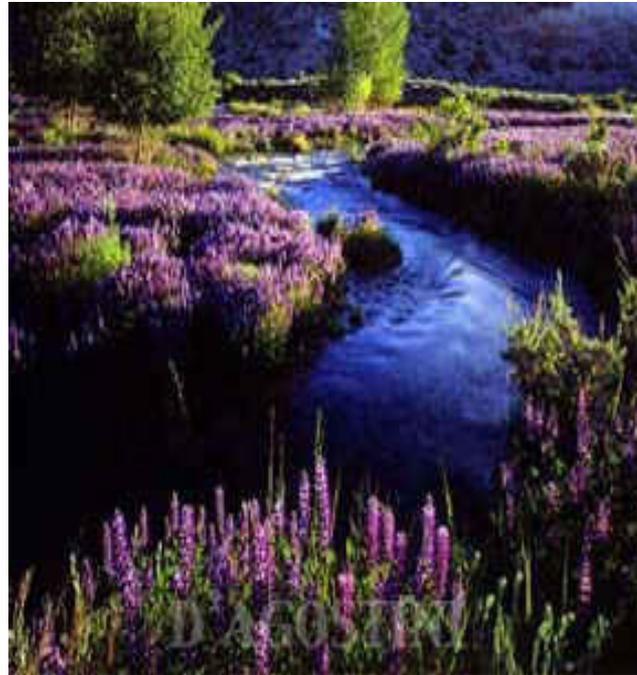
Mono Lake & The Pacific Flyway



- ▶ Over 300 species, including millions of Eared Grebes, Wilson's & Red-Necked Phalaropes, Snowy Plovers, Sandpipers, Avocets, Ibises
- ▶ Negit Island = breeding ground for 85% of CA gull population

The Freshwater Mono Basin Creeks that feed Mono Lake

- ▶ Critical regional fisheries
- ▶ Riparian Habitat
- ▶ Local Cultural Values

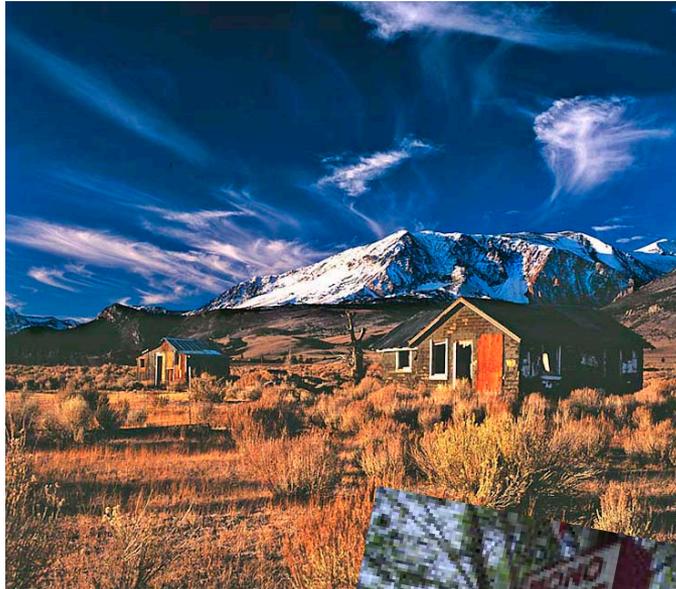


Mono Craters: **Youngest Volcanic Range in N.A.**



- ▶ Scientific research destination for studying underwater volcanism
- ▶ NASA has used Mono Lake to research extraterrestrial life

Lee Vining (elev. 6400', pop. 315)



Local Industry, Part I

Mono Craters Pumice Mine



Local Industry, Part II

The Brine Shrimp Plant



Local Industry, Part III

National & State Park Public Lands



The Hard Working Rangers of the Eastern Sierra Public Lands

Mono Basin National Forest Scenic Area



U.S.F.S. Mono Lake District Ranger Station

Across street from Mono Lake ranger station...



“City of Los Angeles Private Property”
No Trespassing!

1940s: Acquiring the Mono Basin Water Rights



- ▶ Less notorious than the Owens Valley story...
- ▶ State Water Board worries openly about the future...
- ▶ But finally concludes: “Our Hands Are Tied!”
- ▶ LA’s appropriative claim for beneficial use trumps all else.

1972: “The Second Barrel”



- ▶ *LA importing 12-20% of water supply from Mono Basin*

Mono Lake Loses Half its Volume, 45 Vertical Feet

Benchmark Tufa

In 1962...

(had already lost 25 feet)



...1968...



...1995

(by now lost 40 feet)



Mono Lake & the Mono Lake Basin, @ 1983

As the Lake Falls...

- ▶ Impacts to Ecosystem
- ▶ Salinity Doubles
- ▶ Impacts to Shrimp
- ▶ Impacts to Birds
- ▶ Landbridge to Island
- ▶ Creeks & Fisheries
- ▶ Air Quality Problems
- ▶ Local Economic Impacts



Local NGO Plaintiffs: Mono Lake Committee



Others:

Nat'l Audubon Society, Cal Trout
Sierra Club Legal Defense Fund
US Forest Service (MBNFSA)
US Fish & Wildlife Service

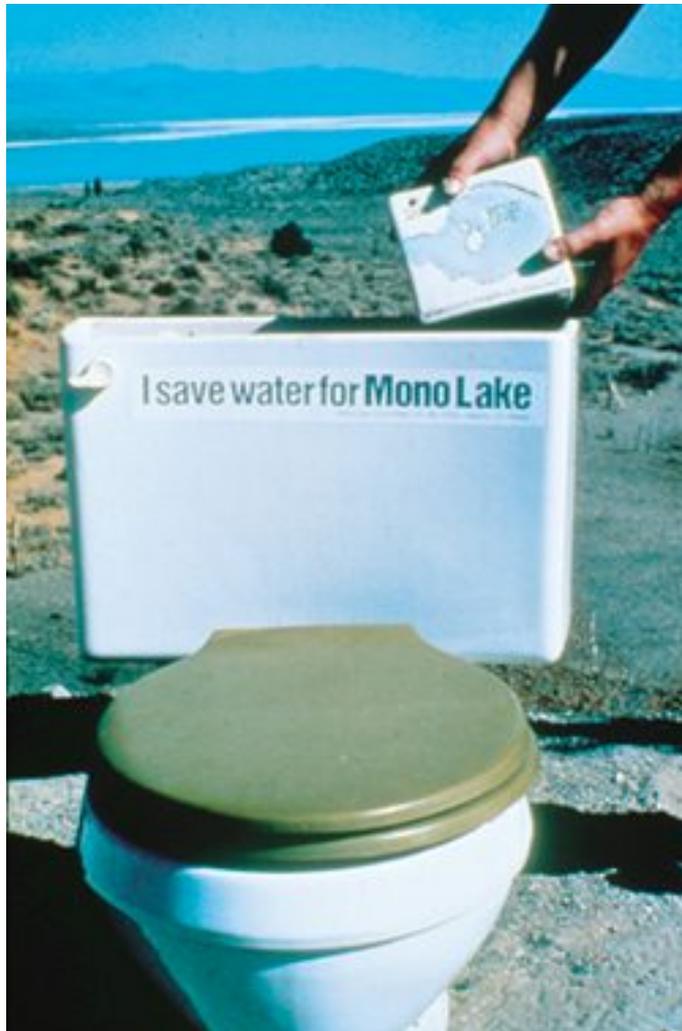
CA Dep. Fish & Game
CA Dept. Parks & Recr.
State Lands Commission
Great Basin Un. Air Polltn. Ctrl. D.
Concerned Landowners

Audubon Society v. Alpine County Superior Court

33 Cal. 3d 419 (1983) (“The Mono Lake Case”)

- ▶ **IIs’ Claim: PTD trumps all other considerations!**
 - LA’s diversion license was granted in violation of PTD, b/c state failed to even consider harmed values
- ▶ **LA’s Defense: Prior appropriation dtn trumps all!**
 - Statutory PA and beneficial use doctrines preempt the common law, and ours is highest beneficial use!
- ▶ **CA SCT: CA law merges PTD & PA; PA ≠ abrogate PTD.**
 - State cannot neglect trust duties; must reconsider licensing to weigh LA’s legitimate needs vs. Mono’s environmental values.
- ▶ **Water Bd: 10 yrs of research later: stabilizing compromise point**





Los Angeles Citizens
Force a Change:

**New City Leadership,
& A New Approach...**

...Conservation

(full Mono loss recovered)

Other Legal Innovations in *Audubon Society*

- ▶ Affirm PTD → to Env'tl. Values
 - Not just navign & commerce
 - Ecology, scenery, recreation
- ▶ Non-Navigable Tributaries
 - Mono Basin creeks
 - GW tributaries? (Scott River)
- ▶ Duty of Ongoing PTD Oversight
 - Water Board must revisit its past decision
 - Implication: may revisit other decisions, and future decisions



Public Trust and Distrust?

- ▶ The Property Rights Critique
 - Private vs. public rights
 - What limiting principle?
- ▶ The Environmental Critique
 - Property vs. stewardship model?
 - Wrong tools? Wrong vocabulary?
- ▶ The Legal Process Critique
 - Separation of powers?
 - Antidemocratic doctrine?



New Developments

- ▶ **After Mono, PTD use surges; mostly limited to waterways**
 - Application to groundwater? ▪ Hydraulic fracturing (fracking)?
- ▶ **But why not apply it to other critical commons resources also susceptible to private appropriation and monopoly?**
 - Fisheries? ▪ Biodiversity? ▪ Per Justinian, the Air?
- ▶ **The Atmospheric Trust Project (Mary Wood, et. al)**
 - State/federal PTD violations for failure to regulate GHGs?
 - Our Childrens' Trust: *Juliana v. U.S.* (US Dist. OR 2018)

