

'Up to the courts': The 50-state climate change strategy:

Benjamin Hulac, E&E News reporter

11/20/18

In the summer of 2011, Des Moines teenager Glori Dei Filippone sued state agencies in Iowa over climate change.

Filippone demanded that a state court declare the atmosphere vital to the residents under Iowa law and order the Department of Natural Resources to protect it by cutting carbon dioxide emissions.

"The atmosphere is a public trust resource," she told the court through her lawyers, adding that the agency "has a duty to protect it and prevent harm to it for present and future generations."

For seven years, Filippone and other American youth have engaged in a full-court-press strategy nationwide to hammer home the idea that state governments should value and protect the atmosphere as a public trust, and that by failing to do so they are unlawfully breaking their obligations to their residents.

The 50-state strategy is a lesser-known prong of attack from Our Children's Trust, a legal nonprofit group locked in a high-profile fight with the Trump administration over its landmark climate change case, *Juliana v. United States*.

Both *Juliana* and the state cases were drawn from a similar blueprint: The plaintiffs are children or young adults, and they raise public trust arguments.

Yet while the federal case — which has been repeatedly stayed and unstayed — has attracted national and international attention, these state-level legal challenges have drawn much less notice, despite the fact they've delivered significant results.

"There were seeds of victory in, I would say, every case," said Mary Wood, a University of Oregon law professor known for her application of the public trust doctrine to atmospheric protection.

Our Children's Trust began filing lawsuits and submitting petitions in all 50 states in 2011. The idea was to sue in states with strong public trust histories and petition everywhere else. And if state agencies ignored or disputed the petition, OCT would file a case, as it did in Iowa.

"Right out of the gate, in the first few months, there were stunning victories," Wood said.

In Texas, Travis County Judge Gisela Triana, for example, issued a sweeping decision in 2012 in favor of the plaintiffs. She called the state's argument that public trust protections don't apply to the atmosphere "legally invalid."

"The public trust doctrine includes all natural resources of the State including the air and

atmosphere," Triana ruled.

In New Mexico, state District Judge Sarah Singleton, who retired last year, allowed a case to proceed — a procedural victory for the youth plaintiffs — but then ruled in favor of the government. The New Mexico Court of Appeals later issued a mixed ruling, finding that although the atmosphere is protected under the public trust doctrine, the state had done its duty by complying with state air pollution laws.

In 2017, the Colorado Court of Appeals also ruled for the youth plaintiffs in their case against the state Oil and Gas Conservation Commission, finding that the panel has a duty to protect locals from emissions. (An appeal is pending before the Colorado Supreme Court.)

Filippone appealed her case up the Iowa judicial rungs, repeatedly losing, until it was ultimately bounced from court in 2013. But Judge Richard Doyle of the Court of Appeals of Iowa saw some logic in her argument.

While there was "no Iowa case law for extending the public trust doctrine to include the atmosphere," Doyle wrote that there is firm ground under state policy to consider the atmosphere a public resource.

"The legislature, the voice of the people, has spoken in terms as clear as a crisp, cloudless, autumn Iowa sky," the judge wrote.

The 's-word'

Making gains on the legal arguments, though, is just the start.

"Even if you get wins, it may be a long time coming before the remedy," Wood said.

That's a fact Andrea Rodgers, a lawyer for Our Children's Trust, acknowledged in an interview.

Governors and state politicians want control over how to address climate change within their borders, said Rodgers, who lives in Washington, where Gov. Jay Inslee (D) has framed himself as a climate champion.

Democratic and Republican governors alike have defended these legal challenges in equally aggressive tones, Rodgers said.

Between Inslee and Florida Republican Gov. Rick Scott, who has censored government officials from using the term "climate change," she sees scant difference.

"I see very little difference between them other than political rhetoric," Rodgers said. "It's been frustrating with the states.

"And we're working with the national 'climate leader,'" she added of Inslee.

Still, perhaps the biggest breakthrough in the legal strategy emerged from Washington state in April 2016, when King County Judge Hollis Hill ordered the state to enact a rule to limit greenhouse gas emissions before the year's end.

The plaintiffs' "very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming," Hill ruled a few months prior, "before doing so becomes first too costly and then too late."

Hill's text was read globally, according to Wood. "It created ripple effects around the world," she said. "She used the s-word."

Charlie Tebbutt, an environmental lawyer in Oregon, pointed to her ruling as courageous.

"Most of the courts have been unwilling and dare I say afraid to address the problem," Tebbutt said.

Washington ultimately adopted a greenhouse gas rule, but Hill retired and a higher state court eventually granted Washington's motion to dismiss follow-up litigation brought by the kids.

In Alaska, the youth plaintiffs haven't fared as well. Earlier this month, state Judge Gregory Miller threw out their case, which claimed violations of both the public trust doctrine and state constitution. Miller wrote that it could have usurped the duties of state lawmakers or the governor's administration.

Judges hear cases and rule on them based on what they've experienced, said Chris Winter, an attorney with the Crag Law Center in Portland, Ore., who filed a complaint on behalf of kids in 2011. In 2014, an appeals court reversed a lower court ruling to side with his clients.

"They're humans," he said of judges. "It's really up to the courts to turn the tide."

'The hammer'

As for the kids, they've stumbled upon the litigation themselves, according to attorneys behind these cases. There's some overlap between the plaintiffs involved in the state cases and the federal Juliana lawsuit. The lead plaintiff in the federal case is suing the Oregon state government too.

"Kids are so sophisticated these days," Rodgers said. "They're finding us."

The Washington plaintiffs, she added, are "the only ones on Earth who know what a Rule 61-B motion is." (It's a motion for a court to relieve a party of its obligations under a final order.)

Supporters of the legal strategy see states as key in addressing climate change. While the federal Juliana case currently stalled in the 9th U.S. Circuit Court of Appeals brings "it all together," as Tebbutt put it, states will have to implement the plans needed to address climate change.

"Each government bears a responsibility," he said. Once state lawmakers grow serious about climate change, they will roll out and embrace climate plans swiftly, he predicted.

"The states can drive the process," he went on, adding that just as states have embraced marijuana legalization and gay marriage, "it will flip, and it will flip fast."

Zach Corrigan, an attorney with Food & Water Watch, said the one-two-punch routine of petitioning state agencies, and then suing, can be effective.

A clear-cut and strong case can be disregarded without public pressure, he said. "If you don't have people asserting themselves against fossil fuel interests, it is very easy for courts to ignore it.

"I don't think that's a bug in their approach," Corrigan said. "I think that's a strong feature."

Legal pressure from Our Children's Trust in Massachusetts, in fact, prompted Gov. Charlie Baker (R) to sign an executive order on climate change.

"Some of this litigation is the hammer," Corrigan said.