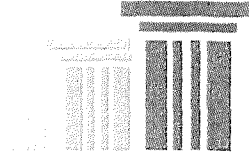


GEORGE MASON UNIVERSITY SCHOOL OF LAW



THE JOURNAL OF
**LAW, ECONOMICS
& POLICY**

THE LIABILITY ENGINE THAT COULD NOT:
WHY THE DECADES-LONG LITIGATION PURSUIT OF NATURAL
RESOURCE SUPPLIERS SHOULD GRIND TO A HALT

Phil Goldberg, Christopher E. Appel, & Victor E. Schwartz

VOLUME 12

WINTER 2016

NUMBER 1

THE LIABILITY ENGINE THAT COULD NOT: WHY THE DECADES-
LONG LITIGATION PURSUIT OF NATURAL RESOURCE SUPPLIERS
SHOULD GRIND TO A HALT

Phil Goldberg, Christopher E. Appel,** & Victor E. Schwartz****

A country's natural resources are a vital public asset. How these resources are extracted and used are valuable social and economic drivers.¹ Consider fossil fuels and their ability over the past century to generate affordable domestic sources of electricity. These resources have dramatically elevated the standard of living in the United States.² Extracting and using natural resources for purposes such as energy production, though, also comes with risks.³ While natural resources are limited in supply and have great value, they can cause environmental, property, and personal harms even when properly used.⁴ Establishing national policies for the extraction, supply, and use of natural resources takes delicate, deliberative balancing of benefits and risks.

For much of American history, this balancing has been placed in the hands of Congress, state legislatures, and regulators pursuant to legislative

* Phil Goldberg is a partner in the Public Policy Group in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. Mr. Goldberg received his B.A. *cum laude* from Tufts University and his J.D. from The George Washington University School of Law, where he was a member of the Order of the Coif. He is a member of the American Law Institute and is the Director of the Progressive Policy Institute's Center for Civil Justice.

** Christopher E. Appel is an associate in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. He received his B.S. from the University of Virginia's McIntire School of Commerce and his J.D. from Wake Forest University School of Law.

*** Victor E. Schwartz co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. He coauthors the most widely-used torts casebook in the United States, PROSSER, WADE & SCHWARTZ'S TORTS (13th ed. 2015). He has served on the Advisory Committees of the American Law Institute's Restatement of the Law (Third) Torts: Products Liability, Apportionment of Liability, General Principles, and Liability for Physical and Emotional Harm projects. Mr. Schwartz received his B.A. *summa cum laude* from Boston University and his J.D. *magna cum laude* from Columbia University.

¹ See *infra* Part I.

² See GEORGE CONSTABLE & BOB SOMERVILLE, A CENTURY OF INNOVATION: TWENTY ENGINEERING ACHIEVEMENTS THAT TRANSFORMED OUR LIVES 2-5 (Joseph Henry Press 2003) (calling societal electrification the "greatest engineering achievement" of the past century).

³ See Peter S. Glaser et al., *Managing Coal: How to Achieve Reasonable Risk with an Essential Resource*, 13 VT. J. ENVTL. L. 177, 187-201 (2011) (discussing natural resource risks in energy production).

⁴ See *id.*

authority.⁵ This makes sense. These bodies have the capacity to carefully weigh competing considerations and determine the path they believe is in the best interests of the American public. Nevertheless, the exclusivity of this governance has been under attack for decades by those who believe that private litigation is a necessary path for regulation. Since the 1970s, litigation has grown as a tactic for regulating the supply and use of natural resources. These lawsuits would have courts make energy policy while looking solely at the plaintiffs' environmental allegations. Some of these suits are nakedly political with the plaintiffs fully acknowledging that their goals are to regulate or reduce the use of natural resources, such as the consumption of fossil fuels.⁶ Other suits are brought by profit-motivated lawyers simply hoping to tap into funds generated by the sale of natural resources.⁷

This article examines the varied attempts to subject to liability those who extract, sell, or use natural resources beyond the legislative and regulatory regimes adopted by policymakers. It explains how this decades-long pursuit of natural resource liability has historically failed. However, rather than come to an end, this litigation has taken a page from *The Little Engine that Could*, following the credo that if you persist at something long enough, you will succeed.⁸ Indeed, over the past decade there have been several new waves of litigation offering creative theories to regulate natural resource development and use through expanded liability.⁹ This article analyzes these attempts and the public policy reasons why such pursuits should be the engine that "could not."

Part I provides an historical overview of how Congress has carefully managed risks associated with natural resources. Part II explains attempts to subject producers of natural resources to liability under products liability theories. This litigation "engine" was the first to be derailed. Part III discusses efforts to sue both producers and industrial users of natural resources under conduct-based torts, such as public nuisance. While these tracks have not reached the plaintiffs' desired destinations, they also have not yet reached their terminus. Finally, part IV examines litigation engines directed at government regulators to force them to adopt the plaintiffs' desired political agendas. The article concludes that turning the extraction and use of natural resources into liability-causing events are unwise "regulation through litigation."¹⁰

⁵ See generally EVOLUTION OF NATURAL RESOURCES LAW AND POLICY, Natural Resources Law Center, University of Colorado Law School (MacDonnell and Bates, eds., 2010).

⁶ See *infra* notes 129 through 130 and accompanying text; see also *infra* Part IV.B.

⁷ See *infra* Part II.

⁸ See WATTY PIPER, *THE LITTLE ENGINE THAT COULD* (1930).

⁹ See *infra* Parts III and IV.

¹⁰ See Victor E. Schwartz & Christopher E. Appel, *Government Regulations and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. PUB. INT. L.J. 185, 189-95 (2014) (discussing various lawyer-driven "regulation through litigation" attempts, including climate change litigation).

Courts should continue rejecting litigation that attempts to regulate America's supply and use of natural resources. Natural resources are important public goods. How they are extracted and used has broad impacts on society, and balancing their benefits and risks are decisions best left in the hands of elected representatives in Congress. Congress, along with the federal regulators they authorize, unlike courts, have the institutional tools to properly balance broad stakeholder interests and set natural resource policy for the entire country.

I. THE EVOLUTION OF NATURAL RESOURCES LAW

Society's modern development, both in the United States and abroad, is inexorably tied to the development and use of a country's natural resources.¹¹ Natural resources—which include water, soil, forestry, fish, wildlife, minerals, oil, and natural gas, among many other raw materials¹²—provide key ingredients for governments to meet the food, shelter and quality of life needs of its citizenry. The development and use of these resources have spurred economic and societal growth. The production of these resources have generated commerce and led to the building of nations' infrastructure. In particular, the extraction and use of fossil fuels—namely coal, oil, petroleum and natural gas—over the past 200 years have fueled the industrial and information revolutions that have driven world economies.¹³ The result has been a global rise in standards of living, healthier human populations, and longer lifespans.¹⁴ Modern society would not have happened without the ability of governments to harness their natural resources.

The United States has developed into one of the world's most advanced societies in large part because it is endowed with vast natural re-

¹¹ See Adam I. Davis, *Ecosystem Services and the Value of Law*, 20 DUKE ENVTL. L. & POL'Y F. 339, 340 (2010) (“the principle that we can own land, build on it, and take resources from it is still a rock on which the world economy stands”); see also *Sustainability*, EPA, (last updated Sep. 21, 2015), <http://www2.epa.gov/sustainability/learn-about-sustainability#what> (“Everything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment.”).

¹² See, e.g., MINN. STAT. ANN. § 116B.02, subdiv. 4 (defining natural resources to include “all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources”); HAW. CONST. ART. XI, § 1 (stating objective to “conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources”).

¹³ See *Fossil Fuel Energy Consumption*, WORLD BANK, <http://data.worldbank.org/indicator/EG.USE.COMM.FO.ZS> (reporting fossil fuel consumption as a percentage of total energy consumption for industrialized nations); see also Alfred D. Chandler, Jr., *Anthracite Coal and the Beginnings of the Industrial Revolution in the United States*, 46 BUS. HISTORY REV. 141, 142 (1972) (discussing importance of coal production in U.S. Industrial Revolution).

¹⁴ See Peter S. Glaser et al., *supra* note 3, at 178; see also Robert Mann, *Another Day Older and Deeper in Debt: How Tax Incentives Encourage Burning Coal and The Consequences for Global Warming*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 111 (2008) (stating that coal has “kept us warm, fired our factories, fed our trains and lit our world”).

sources. The nation has access to water via natural rivers and oceans,¹⁵ approximately 670 million forested acres, and 450 million acres of cropland.¹⁶ The United States additionally contains natural deposits of more than ninety nonfuel minerals that include key commodity reserves of gold, copper, iron ore, and zinc.¹⁷ It also boasts a reserve base of roughly 480 billion short tons of coal, which is enough for the country to provide 35% of the world's coal supply for more than 250 years,¹⁸ an estimated 354 trillion cubic feet (Tcf) natural gas reserve, and strategic reserves of more than thirty-six billion barrels of crude oil.¹⁹ The aggregate value of these natural resource reserves has been estimated at \$45 trillion.²⁰

Given the importance and abundance of the nation's resources, the federal government has long promoted, and profited from, their extraction and use. Starting in the 19th century, Congress enacted laws to encourage westward expansion, greater land use, and exploration.²¹ In 1866, Congress enacted the first federal mining laws to facilitate the discovery of minerals and precious metals such as gold, silver, and copper.²² These laws assured property rights for those who extracted the minerals. The General Mining Law of 1872, which is still in effect today,²³ proclaimed that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to [such] exploration and purchase."²⁴ To facilitate this exploration and generate public revenue, the government leased public land for private sector companies to extract the deposits.²⁵

¹⁵ See *Water Sense: Tomorrow & Beyond*, EPA (last updated Oct. 16, 2015) http://www.epa.gov/watersense/our_water/tomorrow_beyond.html (explaining that "Earth might seem like it has abundant water, but in fact less than 1 percent is available for human use").

¹⁶ See *Major Land Uses*, U.S. DEPT. OF AGRICULTURE, <http://ers.usda.gov/data-products/major-land-uses.aspx#25972>.

¹⁷ See *Mineral Commodity Summaries 2014*, U.S. Geological Survey, U.S. DEPT. OF INTERIOR, <http://minerals.usgs.gov/minerals/pubs/mcs/2014/mcs2014.pdf>.

¹⁸ See *U.S. Coal Reserves*, U.S. ENERGY INFORMATION ADMIN., <http://www.eia.gov/coal/reserves/>; Coal Facts, Coal News, <http://www.coalnews.net/facts.php>.

¹⁹ See *U.S. Crude Oil and Natural Gas Proved Reserves*, U.S. ENERGY INFORMATION ADMIN. (Nov. 23, 2015), <http://www.eia.gov/naturalgas/crudeoilreserves/index.cfm>.

²⁰ See *The World's Most Resource-Rich Countries*, 24/7 WALL STREET (Apr. 18, 2012), <http://247wallst.com/special-report/2012/04/18/the-worlds-most-resource-rich-countries/>.

²¹ *Supra* note 5.

²² See Mining Law of 1866, 14 Stat. 251 (1866); Robert B. Comer, *Introduction to Federal Mining Law*, in AMERICAN LAW OF MINING § 30.01 (2nd ed.); John C. Lacy, *The Historic Origins of the U.S. Mining Laws and Proposals for Change*, 10 NAT. RESOURCES & ENV'T 13 (1995) (providing an early history of mining law).

²³ See Ch. 152 § 9, 17 Stat. 91 (codified as amended at 30 U.S.C. § 22-54 and §§ 611-615); see also George C. Coggins et al., FEDERAL PUBLIC LAND AND RESOURCES LAW 85-86 (5th ed. 2002) (discussing early federal mining laws).

²⁴ 30 U.S.C. § 22.

²⁵ The first federal mineral leasing act was passed in 1807, but was "never adequately administered and was ineffectual in its scope and effect." Wells S. Parker, *Mining on Federal Lands*, Rocky Mountain Mineral Law Foundation, Public Land Law, Regulation, and Management, Paper 5 (2014). It

Congress then adopted several federal land leasing laws leading up to the Mineral Leasing Act of 1920, which established a comprehensive leasing system for minerals within federal lands.²⁶ This structure for natural resource development is still in effect today. The government now has leases for royalty payments tied to the extraction of nearly 70 different types of minerals.²⁷

Across this time, Congress has actively managed risks associated with the exploration, extraction, and use of these natural resources.²⁸ Worker safety, public health, and environmental protection have all been addressed through federal laws.²⁹ In 1891, Congress enacted the first federal mine safety law, which, among other things, established minimum ventilation requirements at underground coal mines and prohibited operators from employing children under age 12.³⁰ That same year, Congress passed the Forest Reserve Act to enable the President to set aside “forest reserves” for conserving lands that might have been used for commercial purposes.³¹ At the beginning of the 20th Century, President Roosevelt set aside more than 230 million acres of land during his presidency, including inaugurating five national parks and fifty-five wildlife refuges.³² In 1910, Congress created the Bureau of Mines within the Department of the Interior to identify ways to reduce worker accidents.³³

In the late 1940s and 1950s, Congress laid the foundation for the modern network of worker safety and environmental laws to assure both the

was not until the adoption of series of mining acts, beginning in 1866 and culminating with the Mining Law of 1872, that the federal government began to take a more active role in leasing its land. *See id.*; *see also* Coggins et al., *supra* note 23, at 85 (stating that the federal government’s interest in the acquisition of minerals and mineral rights extends as far back as the Congress of the Confederation in the 1780s).

²⁶ *See* Ch. 85, 41 Stat. 437 (1920); *see also* Parker, *supra* note 25 (characterizing The Mineral Leasing Act of 1920 as “the most comprehensive federal mineral development legislation”).

²⁷ *See Leasing Minerals on Federal and Indian Lands: Briefing for Congressional Requestors*, Government Accountability Office, GAO-13-45R Mineral Resources (June 2012), at 11, <http://www.gao.gov/products/GAO-13-45R>.

²⁸ *See* Alexandra B. Klass, *Property Rights on the New Frontier: Climate Change, Natural Resource Development, and Renewable Energy*, 38 *ECOLOGY L. Q.* 63, 77 (2011); *see also* Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 743-46 (2011) (explaining distinct purposes and goals behind seminal federal environmental laws relating to natural resource development).

²⁹ *See id.*

³⁰ *See History of Mine Safety and Health Legislation*, MINE SAFETY AND HEALTH ADMIN., U.S. DEPT. OF LABOR, <http://www.msha.gov/MSHAINFO/MSHAINFO2.HTM>.

³¹ *See* Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1103 (repealed 1976); *see also Our History*, U.S. FORESTRY SERV., <http://www.fs.fed.us/learn/our-history>.

³² *See* Robert Brown, *A Conservation Timeline*, THE WILDLIFE PROFESSIONAL (Fall 2010), [https://www.wildlifedepartment.com/aboutodwc/A%20Conservation%20Timeline\[1\].pdf](https://www.wildlifedepartment.com/aboutodwc/A%20Conservation%20Timeline[1].pdf).

³³ *See* Bureau of Mines Act, Pub. L. No. 61-179, ch. 240, 36 Stat. 369 (1910); *see also supra* note 30.

sustainability of America's natural resources and a reduction of adverse impacts associated with extracting and using them. These early efforts included the first code of federal regulations for mine safety in 1947,³⁴ the Federal Water Pollution Control Act of 1948,³⁵ and the Air Pollution Control Act of 1955.³⁶ In the 1960s and 1970s, society significantly increased awareness of workplace and environmental risks, and Congress acted accordingly, enacting an array of laws to manage these risks, whether they came from the extraction of natural resources, man-made chemicals, or other sources.

For environmental risks, Congress established the Environmental Protection Agency (EPA) in 1970 and enacted a series of laws aimed at balancing society's interests in commercial development and being responsible stewards of the environment.³⁷ The cornerstones of this effort were the Clean Water Act (CWA),³⁸ Clean Air Act (CAA),³⁹ National Environmental Policy Act (NEPA),⁴⁰ and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴¹ The CWA and CAA create permitting programs, such as the National Pollutant Discharge Elimination System (NPDES), to regulate the release of pollutants.⁴² Under NEPA, Environmental Impact Statements are required for any action that can significantly affect the environment.⁴³ Also, CERCLA provides a remedy for the release of hazardous substances above permitted amounts.⁴⁴ While each of these laws has broad applicability, they have directly regulated the extraction and use of natural resources, particularly fossil fuels.

Complementing this system are laws that target risks associated with specific natural resources. For example, the National Forest Management

³⁴ Act of Aug. 4, 1947, Pub. L. No. 80-328, 61 Stat. 725; The Federal Mine Safety Code, 32 C.F.R. Part 304 (1947), reprinted in 11 Fed. Reg. 9017 (1946); see also *supra* note 30.

³⁵ Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948); see also History of the Clean Water Act, Law & Regulations, EPA, <http://www2.epa.gov/laws-regulations/history-clean-water-act> ("The Federal Water Pollution Control Act of 1948 was the first major U.S. law to address water pollution.").

³⁶ Air Pollution Control Act of 1955, Pub. Law No. 84-159, 69 Stat. 322 (1955).

³⁷ See Latham et al., *supra* note 28, at 743-46; Michael C. Blumm & David H. Becker, *From Martz to the Twenty-First Century: A Half-Century of Natural Resources Law Casebooks and Pedagogy*, 78 U. COLO. L. REV. 647, 651 (2007) (discussing "regulatory explosion of the late 1960s and 1970s" of environmental law); Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 410 (1995).

³⁸ 33 U.S.C. § 1251(a).

³⁹ 42 U.S.C. §§ 7401 et seq.

⁴⁰ 42 U.S.C. §§ 4321-4370(f).

⁴¹ 42 U.S.C. §§ 9601-9675.

⁴² See *Water Permitting 101*, OFFICE OF WASTEWATER MANAGEMENT, EPA, <http://water.epa.gov/polwaste/npdes/basics/upload/101pape.pdf>.

⁴³ 42 U.S.C. § 4332(2)(C); see also *National Environmental Policy Act (NEPA)*, *Basic Information*, EPA, <http://www.epa.gov/Compliance/basics/nepa.html>.

⁴⁴ 42 U.S.C. §§ 9606-9609; Latham et al, *supra* note 29, at 743-46.

Act gives the Department of Agriculture the responsibility and tools to manage the nation's forests, including the use of timber for logging.⁴⁵ The Surface Mining Control and Reclamation Act, which the Department of Interior administers, regulates all aspects of mining operations and reclamation projects, including the standards mine operators must follow for mountain top mining.⁴⁶ The Oil Pollution Act requires companies to develop detailed contingency plans to contain spills, establishes a trust fund for cleaning up spills where the responsible party cannot do so, and sets forth guidance for how liability and damages are to be measured in the event of such a spill.⁴⁷

This integrated approach of general and highly specific laws has been remarkably successful in reducing impacts of natural resource commerce on both the environment and the American public. For example, under this regime aggregate emissions of common air pollutants have been reduced by 68 percent since 1970.⁴⁸ Much of the early focus was on coal production. New technologies at coal-fired power plants that were encouraged by these laws are now capable of reducing emissions of sulfur dioxide by 98 percent, particulate matter by 99.8 percent, and nitrous oxides by 86 percent.⁴⁹ As a result, while coal use has tripled since the 1970s, regulated emissions from coal-based electricity have decreased by 40 percent.⁵⁰ Other regulatory regimes have met similar successes. In Moab, Utah, an Environmental Impact Statement developed pursuant to NEPA identified potential contamination of the Colorado River from 16 million tons of uranium mine tailings situated near the river's floodplain, allowing the development of a plan to transport this material to a safer place.⁵¹ Further, CERCLA has been used to clean up hundreds of mines.⁵²

Congress has used this same approach to tightly control risks associated with worker safety. In the 1970s, Congress established the Occupational

⁴⁵ 16 U.S.C. §§ 1600–1614.

⁴⁶ 30 U.S.C. §§ 1201–1328.

⁴⁷ 33 U.S.C. § 2701 et seq. The Act also created a trust fund financed by a tax on oil to clean up spills when a responsible party is incapable or unwilling to do so.

⁴⁸ See The U.S. Clean Air Act and the Economy, Benefits and Costs of Clean Air Act, U.S. Env'tl. Prot. Agency, <http://www.epa.gov/air/oaqps/permits/basic.html>.

⁴⁹ See The Facts About Air Quality and Coal-Fired Power Plants, Institute for Energy Research, <http://instituteforenergyresearch.org/studies/the-facts-about-air-quality-and-coal-fired-power-plants/>.

⁵⁰ See National Mining Ass'n, Clean Coal Technology, http://www.nma.org/pdf/fact_sheets/cct.pdf (citing findings of the National Energy Technology Laboratory).

⁵¹ See The National Environmental Policy Act 40th Anniversary Symposium, 40 Env'tl. L. Rep. News & Analysis 11183, 11189 (2010) (statement of Mary O'Brien, Utah Forests Project Manager for the Grand Canyon Trust); see also Moab UMTRA Project, <http://moabtailings.org/> (reporting that removal of uranium tailings from the banks of the Colorado River is about 45% complete).

⁵² See Stuart Buck & David Gerard, *Cleaning Up Mining Waste*, Political Economic Research Center (Nov. 2011), at 4, http://www.perc.org/sites/default/files/rs01_1.pdf (discussing use of CERCLA to clean up abandoned mines); see also Abandoned Mine Lands, Superfund, <http://www.epa.gov/superfund/programs/aml/index.htm>.

Safety and Health Administration⁵³ and the Federal Mine Safety and Health Administration.⁵⁴ These agencies have coordinated their respective regulatory and enforcement roles to eliminate potential inconsistency in mine operator safety standards and reduce any regulatory gaps.⁵⁵ Together, they have promulgated thousands of regulations governing workplace issues such as the appropriate head gear and footwear for mineworkers, as well as requiring safety features on the tools that mineworkers use.⁵⁶ Their regulations have helped reduce workplace fatalities by more than 65% and occupational injury and illness by 67%.⁵⁷ Overall, mineworker injuries in the United States have dropped from a peak of 3,242 work-related fatalities in 1907, when the nation had its single deadliest mine disaster,⁵⁸ to only twenty work-related fatalities in 2013.⁵⁹ Overall, mining has become “one of the most heavily regulated industries in the United States.”⁶⁰

Congress’s response to today’s new energy sources demonstrates its ongoing commitment to manage these benefits and risks.⁶¹ A new method for extracting oil and natural gas is hydraulic fracturing, commonly referred to as “fracking,” which involves blasting a pressurized liquid made of water, sand, and chemicals deep underground to release the oil and gas in subterranean rocks. EPA is studying fracking “to provide oversight, guidance and, where appropriate, rulemaking” to reduce any potential impacts on drinking water, surface and ground water, and air pollution.⁶² Government

⁵³ See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596 (codified at 29 U.S.C. § 651 et seq).

⁵⁴ See Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-173, § 2.

⁵⁵ See Interagency Agreement Between the Mine Safety and Health Administration, U.S. Department of Labor, and Occupational Safety and Health Administration, OSHA, https://www.osha.gov/pls/owadisp.show_document?p_table=MOU&p_id=222.

⁵⁶ See *OSHA Law & Regulations*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPT. OF LABOR, <https://www.osha.gov/law-regs.html>.

⁵⁷ See *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPT. OF LABOR, <https://www.osha.gov/oshstats/commonstats.html>.

⁵⁸ See Assoc. Press, *Deadliest Recent U.S. Mine Accidents*, msnbc.msn.com, (Apr. 6, 2010), http://www.msnbc.msn.com/id/36192868/ns/us_news-life/t/deadliest-recent-us-mine-accidents/ (noting that 362 miners were killed in an explosion near Monongah, West Virginia in 1907).

⁵⁹ See *Coal Fatalities for 1900 Through 2014*, MINE SAFETY & HEALTH ADMIN, <http://www.msha.gov/stats/centurystats/coalstats.asp>.

⁶⁰ A. Brooke Rubenstein & David Winkowski, *A Mine is a Terrible Thing to Waste: Past, Present and Future Reclamation Efforts to Correct the Environmentally Damaging Effects of Coal Mines*, 13 VILL. ENV'T L.J. 189 (2002) (discussing regulation of the coal industry).

⁶¹ See Eugene E. Smary et al., *The Convergence of Mining Law and Environmental Law*, Rocky Mountain Mineral Law Foundation, International Mining and Oil & Gas Law, Development, and Investment, Paper No. 8B (2011) (discussing integration of natural resource extraction laws with modern environmental laws).

⁶² Natural Gas Extraction – Hydraulic Fracturing, Env'tl. Prot. Agency, <http://www2.epa.gov/hydraulicfracturing>; see also Effluent Limitations Guidelines and New Source Performance Standards for the Oil and Gas Extraction Point Source Category, 40 C.F.R. Parts 9 and 435 (2001), <http://www.gpo.gov/fdsys/pkg/FR-2001-01-22/pdf/01-361.pdf>; Oil and Gas Extraction Effluent

agencies are also managing risks posed by renewable energy sources such as solar energy production and wind farms.⁶³ Solar energy installations, for example, can strain water resources, and wind farms can adversely impact wildlife.⁶⁴ When such new risks arise, they are initially governed under the general guidelines provided by the CWA, CAA, NEPA, and CERCLA. Should these regulatory regimes prove insufficient, Congress can enact tailored regulations to manage them.

Over the years, the American people have directly benefited from this active partnership between their government and the private sector over how best to manage the nation's natural resources. The federal government owns about 28% of the country's total land,⁶⁵ about two-thirds of which is available for the extraction or harvesting of natural resources.⁶⁶ As indicted, the government has entered lease agreements for royalty payments tied to the extraction of dozens of minerals, which produces more than \$11 billion annually for the federal government.⁶⁷ Fossil fuels used for energy production—namely oil, gas, natural gas liquids, and coal—account for approximately 98% of these royalties.⁶⁸ The result has been a highly advanced economy, high standards of living for the American people, and a comprehensive risk management system for America's natural resources.

The question then is whether regulation through litigation is needed beyond government oversight and control. This article will next explore the value of private lawsuits seeking to regulate the extraction and use of natural resources through litigation.

Guidelines, Env'tl. Prot. Agency, <http://water.epa.gov/scitech/wastetech/guide/oilandgas/> (stating that EPA is developing rules to address wastewater discharges produced by "unconventional extraction").

⁶³ See Glaser et al., *supra* note 3, at 198-200 (discussing impacts of wind and solar energy production).

⁶⁴ See *id.*; *Renewable Electricity Generation*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, <http://energy.gov/eere/renewables>.

⁶⁵ See *Federal Land Ownership: Overview and Data*, Congressional Research Service (Feb. 8, 2012), at 1, <https://www.fas.org/sgp/crs/misc/R42346.pdf>.

⁶⁶ See Davis, *supra* note 11, at 340 (estimating percentage of federally managed land available for resource extraction and related activities based on data published by General Accounting Office); see also *Land Ownership: Information on the Acreage, Management and Use of Federal and Other Lands*, U.S. Gen. Accounting Office (1996), at 2, <http://www.gao.gov/archive/1996/rc96040.pdf>.

⁶⁷ See *Leasing Minerals on Federal and Indian Lands: Briefing for Congressional Requestors*, Government Accountability Office, GAO-13-45R Mineral Resources (June 2012), at 11, <http://www.gao.gov/products/GAO-13-45R> ("The resulting revenue from mineral leasing activity on federal and Indian lands in fiscal years 2010 and 2011 was \$11.3 billion and \$11.4 billion, respectively.")

⁶⁸ See *id.* at 37.

II. ENGINE NO. 1 – LIABILITY FOR NATURAL RESOURCE “PRODUCTS”

Groups opposed to the use of certain natural resources, as well as individuals alleging injury from their use, have sought to impose liability against the companies that extract, supply, or use natural resources.⁶⁹ In the 1960s, when courts were first developing the doctrine of strict products liability, lawsuits sought to take advantage of the law’s early malleability by alleging injury related to natural resource “products.”⁷⁰

The American Law Institute’s (ALI) *Restatement (Second) of Torts* provided the blueprint from which a majority of state high courts have recognized strict products liability.⁷¹ Under Section 402A of this Restatement, a manufacturer can be subject to liability for defects in a product’s manufacture, design, or warning.⁷² The ALI did not specifically address the application of this liability regime to suppliers of naturally occurring raw materials.⁷³ The only issue Section 402A spoke to with respect to natural resources was the inappropriateness of liability where a raw material is incorporated into a product as a component part.⁷⁴

In its origins, the focus of product liability was on manufactured products, not natural resources.⁷⁵ Unlike manufactured products, there is no

⁶⁹ See Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 553-54 (2011) (discussing history of strict products liability law); Latham et al., *supra* note 29, at 743-46 (discussing history of “watershed” environmental laws).

⁷⁰ See William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); see also William Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

⁷¹ See Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute’s Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 745-46 (1998) (discussing influence of § 402A); see also John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 829 (1973).

⁷² See Restatement (Second) of Torts § 402A. In adopting § 402A, the American Law Institute (ALI) principally relied on the California Supreme Court’s decision in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). This decision was authored by the court’s chief justice, Roger Traynor, who was also an Advisor to the ALI project. See Schwartz & Appel, *supra* note 69, at 554.

⁷³ See Restatement (Second) of Torts § 402A caveat (stating that the ALI expresses no opinion on whether strict liability applies to the seller of a product “expected to be processed or otherwise substantially changed before it reaches the user or consumer”); see also Restatement (Second) of Torts § 388 (discussing liability of suppliers).

⁷⁴ *Id.* at cmt. p (“[T]he manufacturer of pigiron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child’s tricycle into which it is finally made by a remote buyer.”).

⁷⁵ See M. Stuart Madden, *Liability of Suppliers of Natural Raw Materials and the Restatement (Third) of Torts: Products Liability – A First Step Towards Sound Public Policy*, 30 U. MICH. J.L. REF. 281, 295-96 (1997); Charles E. Cantu, *The Illusive Meaning of the Term “Product” Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 656, 658 (1994) (discussing “unusual results” by courts in interpreting definition of “product” under § 402A).

“human judgment” that goes into making natural resources.⁷⁶ Courts concluded that natural resources cannot be “mis-manufactured” or differently “designed,” so there can be no manufacture or design defect.⁷⁷ Iron is iron, coal is coal, and sand is sand.

To the extent raw materials were included in products or sold themselves, courts found their risks were better addressed by concepts reflected in comment *i* of Section 402A, which states that liability, shall not be imposed for inherent product characteristics.⁷⁸ A comparable limit on liability for inherent characteristics is set forth in the *Restatement of Torts, Third: Products Liability* with respect to category liability.⁷⁹ These are lawful products which have no reasonable alternative design, and cannot be made reasonably safe through instructions or warnings.

Typically, raw material suppliers send their materials either to industrial users of raw materials or manufacturers of products that incorporate raw materials.⁸⁰ The supplier’s warnings obligation has traditionally been to adequately warn these corporate customers of risks that may not be generally known, though courts appreciated early on that it can be infeasible to attach warnings to certain raw materials, such as a lump of coal or grain of sand.⁸¹ Further, under the sophisticated purchaser doctrine, a supplier owes no duty to warn where the recipient knows or should know of these risks.⁸² Consider the example of sand, which can pose a health hazard if reduced to a respirable state during manufacturing.⁸³ Industrial workers have brought

⁷⁶ See *id.*; cf. *Wyrulec Co. v. Schutt*, 866 P.2d 756, 760 (Wyo. 1993) (holding strict liability doctrine inapplicable against electrical utility because electricity was not “a product”).

⁷⁷ See *id.* at 285; see also *Restatement (Third) of Torts: Product Liability* § 5 cmt. c (“[A] basic raw material such as sand, gravel, or kerosene cannot be defectively designed.”); Victor E. Schwartz, *Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment K*, 42 WASH. & LEE L. REV. 1139 (1985).

⁷⁸ See *Restatement (Second) of Torts* § 402A cmt. i (1965).

⁷⁹ See *Restatement (Third) of Torts: Product Liability* § 2 cmt. e (1998).

⁸⁰ See Victor E. Schwartz & Christopher E. Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 MO. L. REV. 1, 4-9 (2008) (discussing practical impediments to communicating effective warnings); Victor Schwartz & Russell Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 39 (1983).

⁸¹ See *id.*; see also *Bond v. E.I. DuPont De Nemours & Co.*, 868 P.2d 1114, 1120-21 (Colo. Ct. App. 1993) (“[T]here is little social utility in placing the burden on a manufacturer of component parts or supplier of raw materials of guarding against injuries caused by the final product when the component parts or raw materials themselves were not unreasonably dangerous.”).

⁸² See, e.g., *Jodway v. Kennametal, Inc.*, 525 N.W.2d 883 (Mich. Ct. App. 1994) (purchaser of raw cobalt was “sophisticated user” such that material supplier did not have duty to warn of risks involved with use of product). The sophisticated user doctrine is also referred to by some courts as the “knowledgeable” or “responsible” user/intermediary doctrine. See, e.g., *Rivers v. AT & T Techs., Inc.*, 554 N.Y.S.2d 401, 403 (1990) (employing the term “responsible intermediary”).

⁸³ See, e.g., *Bergfeld v. Unimin Corp.*, 319 F.3d 350, 352 (8th Cir. 2003); *Haase v. Badger Mining Corp.*, 682 N.W.2d 389, 392 (Wis. 2004); *Diamond v. Avondale Indus., Inc.*, 773 So. 2d 266, 267 (La. Ct. App. 2000).

personal injury claims against sand providers, and some courts have determined that a sand supplier must provide warnings to employees of raw material purchasers where the supplier knows how the sand will be processed.⁸⁴ Other examples of such liability involving plant workers include suppliers of metals,⁸⁵ raw asbestos,⁸⁶ and other substances that can cause harm depending on how used.⁸⁷

Courts have found that a raw material supplier's obligation to warn does not extend to ordinary consumers of products that may include its materials. In these situations, the supplier generally lacks control over, or may not know, how the raw material will be used and may not be able to identify or communicate with its end user.⁸⁸ Several legal doctrines have emerged to place the responsibility to provide warnings to downstream product users with the manufacturer in the "best position" to effectively warn.⁸⁹ For ex-

⁸⁴ See, e.g., *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 194 (Tex. 2004) (remanding case for new trial to determine whether sand supplier owed duty to warn their customers' employees); *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 271 (Minn. 2004) (finding genuine issues of material fact existed as to whether sand supplier's warnings to intermediary were adequate).

⁸⁵ See, e.g., *Whitehead v. St. Joe Lead Co., Inc.*, 729 F.2d 238, 249-250, 254 (3rd Cir. 1984) (rejecting substantial change in condition and open and obvious risk doctrines alleged by supplier of lead to industrial plant); *Skinner v. Derr Const. Co.*, 937 So. 2d 430, 437 (La. Ct. App. 2006) (denying summary judgment to supplier of fabricated steel alleged to have caused construction accident).

⁸⁶ See, e.g., *Arena v. Owens Corning Fiberglas Corp.*, 74 Cal. Rptr. 2d 580, 582 (Cal. Ct. App. 1998) ("We conclude that a supplier of raw asbestos is subject to strict products liability."); *Jenkins v. T & N PLC*, 53 Cal.Rptr.2d 642, 647 (Cal. App. Ct. 1996) ("As a matter of law, a bulk supplier of raw asbestos fiber incorporated into a finished product can be subject to strict products liability to an individual suffering from a disease caused by exposure to the supplier's asbestos."); *but see Cimino v. Raymark Indus., Inc.* 151 F.3d 297, 335 (5th Cir. 1998) (holding that it would create an unbearable burden on the manufacturer of the raw asbestos "building block" material later incorporated into insulating sheets by requiring the purchaser/employer to warn on every possible use); *Riggs v. Asbestos Corp. Ltd.*, 304 P.3d 61, 69 (Utah Ct. App. 2013) (stating that supplier's asbestos "product could not be defectively designed or manufactured because it is a raw, unadulterated material").

⁸⁷ See, e.g., *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1012 (8th Cir. 1989) (affirming jury verdict against a bulk supplier of liquid propane); *Jones v. Hittle Serv., Inc.*, 549 P.2d 1383, 1395 (Kan. 1976) (finding bulk supplier of liquid propane only fulfills his duty to warn consumers "when he ascertains that the distributor to whom he sells is adequately trained" and "capable of passing his knowledge on to his customers"); *Messer Griesheim Indus., Inc. v. Eastman Chem. Co.*, 194 S.W.3d 466, 483 (Tenn. Ct. App. 2005) (vacating trial court's grant of summary judgment to supplier of liquid carbon dioxide on negligence and product liability claims made by distributor); *but see York v. Union Carbide Corp.*, 586 N.E.2d 861 (Ind. Ct. App. 1992) (rejecting negligence and strict product liability claims against supplier of argon gas); *Jackson v. Reliable Paste & Chem. Co.*, 483 N.E.2d 939, 942-43 (Ill. App. Ct. 1985) (finding supplier of methanol owed no duty to warn purchaser of chemical's explosive and flammable propensities).

⁸⁸ See, e.g., *Maxton v. Western States Metals*, 136 Cal. Rptr. 3d 630, 632-33 (Cal. Ct. App. 2012) ("Generally suppliers of raw materials to manufacturers cannot be liable for negligence or under a strict products liability theory to the manufacturers' employees who sustain personal injuries as a result of using the raw materials in the manufacturing process.").

⁸⁹ See *id.*; *Madden*, *supra* note 75, at 291 ("In the thirty years following publication of section 402A, judicial decisions have followed two paths toward excluding raw materials sellers from design or

ample, the raw material supplier doctrine discharges the supplier's duty to warn consumers or other downstream product users where the immediate purchaser of the raw material receives an adequate warning.⁹⁰ Also, the "substantial change in condition" doctrine states that a supplier's duty to warn end users is discharged if the product or material undergoes a substantial change after leaving a supplier's hands.⁹¹ Further, a natural resource supplier does not have a duty to warn downstream users of "open and obvious" dangers.⁹²

Despite these bedrock principles, individuals and interest groups have sometimes doggedly pursued suppliers of raw materials in their litigations. One such instance occurred in the 1990s with silicone, which was used as a component part for medical implants.⁹³ While the raw material suppliers were ultimately not subject to liability, they had to incur significant legal costs to defend the onslaught of cases. When some suppliers stopped making the material available for medical devices in order to avoid being sued, Congress enacted the Biomaterials Access Assurance Act of 1998⁹⁴ to clarify that suppliers of raw materials in medical implants are not subject to liability.⁹⁵ The legislation worked, and extractors of raw materials once again supplied those materials to manufacturers of medical devices.

warnings liability – de jure immunity or de facto immunity.”); Edward M. Mansfield, *Reflections on Current Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement*, 84 KY. L.J. 221, 241-45 (1995-96) (discussing reasons courts developed doctrines limiting product liability for raw material suppliers).

⁹⁰ See *id.*

⁹¹ Restatement (Second) of Torts § 402A(1)(b); see *id.* at cmt. p; see also *Walker v. Stauffer Chem. Corp.*, 96 Cal. Rptr. 803, 806 (Cal. Ct. App. 1971) (holding that substantial changes made by purchaser of sulfuric acid supplied in bulk discharged supplier duty to warn); cf. *Haase*, 682 N.W.2d at 392 (finding silica sand supplier not subject to liability for worker's silicosis because sand underwent a substantial change after leaving supplier's possession).

⁹² Restatement (Second) of Torts § 402A cmt. j (stating there is no duty to warn “when the danger, or potentiality of danger, is generally known and recognized”).

⁹³ See Daniel Q. Posin, *Silicone Breast Implant Litigation and My Father-in-Law: A Neo-Coasen Analysis*, 70 TUL. L. REV. 2565, 2571-72 (1996). The types of medical implants featuring silicone as the primary component include: heart pacemakers, mechanical valves, heart-lung oxygenators used during open-heart surgery, chin and cheek implants for accident victims, certain contact lenses, devices used for brain surgery, urological surgery instruments, and prosthetic joints all feature silicone plastics. See *id.* at 2572 n.30; see also W. Snyder, *Silicone Breast Implants: Can Emerging Medical, Legal, and Scientific Concepts Be Reconciled?*, 18 J. LEGAL MED. 133, 136 (1997) (stating that “over 500 medical products contain measurable amounts of silicone”).

⁹⁴ See Pub. L. 105-230 (Aug. 13, 1998), 112 Stat. 1519 (codified at 21 U.S.C. §§ 1601-1606); see also *Artiglio v. Gen. Elec. Co.*, 71 Cal. Rptr. 2d 817, 822 (Cal. Ct. App. 1998) (granting summary judgment to supplier of silicone used in medical breast implants).

⁹⁵ See *id.*; see also FDA, *Medical Devices Draft Guidance for the Implementation of the Biomaterials Access Assurance Act*, 66 Fed. Reg. 17562 (Apr. 2, 2001); Ann M. Murphy, *The Biomaterials Access Assurance Act of 1998 and Corporate Supplier Liability: Who You Gonna Sue?*, 25 DEL. J. CORP. L. 715 (2000).

Around the same time, the American Law Institute published the *Restatement of Torts Third: Products Liability*.⁹⁶ The Restatement Third addressed this issue head on, making clear that “decisions regarding the use of such [raw] materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use.”⁹⁷ The Restatement further recognizes that “a basic raw material such as sand, gravel, or kerosene cannot be defectively designed” and that “[t]o impose a duty to warn would require the seller to develop expertise regarding a multitude of different end products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control.”⁹⁸ The Restatement concluded that courts should not “impose such an onerous duty to warn.”⁹⁹ Thus, attempts to subject suppliers of natural resources to product liability have generally failed.

III. ENGINE NO. 2 – LIABILITY FOR NATURAL RESOURCE EXTERNALITIES

A second engine of litigation against suppliers of raw materials has focused on conduct-based theories, such as public nuisance, for the externalities associated with the use of natural resources.¹⁰⁰ This effort is still going on today, with a number of suits directed at burning fossil fuels to produce energy.¹⁰¹ Environmental groups often sponsor these lawsuits as agenda-driven efforts to regulate the use of fossil fuels through the courts. They combine ideological-based arguments with creative tort theories in the hopes of persuading judges to circumvent, or put pressure on, Congressional decisions regarding the use of natural resources.¹⁰²

As with product cases, this effort also had its roots in the 1960s. When the Restatement (Second) of Torts was being drafted, environmental lawyers started a campaign to transform public nuisance from a restrained government tort into a tool for requiring businesses to remediate environ-

⁹⁶ See Restatement (Third) of Torts: Products Liability § 5 (1997) (liability of sellers of component products integrated into a finished product).

⁹⁷ *Id.* at cmt. c.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 940-45 (2009) (discussing use of public nuisance theory in lawsuits seeking to impose liability against private companies for external risks associated with product uses).

¹⁰¹ See Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 VAL. U. L. REV. 369, 369-70 (2012) (discussing public nuisance climate change litigation).

¹⁰² See *id.* at 379-80 (explaining how climate change litigation is a result of frustrations by environmental advocates over incremental approach to regulating fossil fuel emissions).

mental conditions, regardless of wrongdoing or causation.¹⁰³ In essence, they sought to capitalize on the amorphous nature of the word “nuisance.” As prominent legal observers have noted, “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people.”¹⁰⁴ The first act of these environmental lawyers was to pursue changes to public nuisance chapters of the Restatement in hopes of breaking “the bounds of traditional public nuisance.”¹⁰⁵ Among other things, they lobbied to remove wrongful conduct requirements so claims could be brought even when defendants engaged in lawful commerce.

Although fully presented, none of their changes were adopted in the black letter of the Restatement. The law of public nuisance has developed clear elements and standards over the course of centuries of jurisprudence.¹⁰⁶ The tort is designed to address quasi-criminal conduct that, while not illegal, is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right.¹⁰⁷ Traditional examples of public nuisances include blocking a public roadway, dumping sewage into a public river, or blasting a stereo when people are picnicking in a public park.¹⁰⁸ Thus, natural resource providers engaging in lawful commerce were not the intended targets of public nuisance liability. Nevertheless, the efforts to turn public nuisance into a “super tort” for regulating environmental policy through the courts focused on the use of fossil fuels for energy production.¹⁰⁹

The first test case for these theories, *Diamond v. General Motors Corp.*, was brought in the early 1970s. The plaintiffs were environmentalists and pursued hundreds of companies that sold products or engaged in activities that they claimed collectively caused smog to form in and around

¹⁰³ See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOL. L.Q. 755, 838 (2001).

¹⁰⁴ W. Page Keeton et. al., *Prosser & Keeton on Torts* 616 (5th ed. 1984); see also F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949) (calling public nuisance a “mongrel” tort for being “intractable to definition”).

¹⁰⁵ Antolini, *supra* note 103, at 838.

¹⁰⁶ See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 562-70 (2006) (discussing traditional elements of public nuisance).

¹⁰⁷ See *id.* at 564-65; see also Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745-46 (2003) (“Historically, public nuisance most often was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct. Only in limited circumstances was a tort remedy available to an individual, and apparently never to the state or municipality.”).

¹⁰⁸ See *id.* at 541-42; see also Restatement (Second) of Torts § 821A cmt. b (1979).

¹⁰⁹ See Schwartz & Goldberg, *supra* note 106, at 522 (“The reason personal injury lawyers have been lured by the elixir of public nuisance theory is because, if successful, it acts as a ‘super tort.’ As with products liability, public nuisance theory offers [essentially] strict liability.”); see also Gifford, *supra* note 107, at 741.

Los Angeles for injunctive relief and billions of dollars in damages.¹¹⁰ The California court dismissed the claims, concluding that such rudderless use of liability without appreciable standards was inconsistent with public nuisance law. As the court stated, a “system of statutes and administrative rules” governed emissions, and the plaintiffs were “simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court.”¹¹¹ The court further addressed the unsound public policy implications of the requested relief: “The immediate effect of . . . an injunction would be to halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent.”¹¹²

For a couple of decades after this ruling, most efforts to expand public nuisance liability focused on potentially harmful products, such as tobacco, guns, lead paint, and MTBE.¹¹³ In the last decade, though, two new waves of public nuisance actions have targeted environmental policy. These lawsuits have sought to subject private businesses to tort liability for risks allegedly associated with using natural resources, namely allegations related to global climate change and regional impacts from EPA-permitted power plants.

A. *Global Climate Change Litigation*

In the early 2000s, plaintiffs’ lawyers and environmental advocates frustrated with their inability to achieve carbon dioxide emission limits through Congress turned to the courts. They filed four major lawsuits against private-sector entities—namely the nation’s largest utility, energy, and automobile companies—to impose emission requirements through tort law.¹¹⁴ These suits generally claimed that the defendants caused or will cause climate change injuries by engaging in operations that contribute to

¹¹⁰ See *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639, 641 (Ct. App. 1971) (seeking an injunction against 293 named corporations and municipalities, as well as 1,000 unnamed defendants, for air pollution).

¹¹¹ *Id.* at 645.

¹¹² *Id.* at 644.

¹¹³ See *Schwartz & Goldberg*, *supra* note 106, at 554–61.

¹¹⁴ See generally *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (“Comer I”); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013) (“Comer II”).

the build-up of greenhouse gases (GHGs) in the atmosphere, which they classified as a public nuisance under American tort law.¹¹⁵ Federal district court judges in each case dismissed the claims as non-justiciable.¹¹⁶ They concluded that balancing emission levels with energy needs was an inherently political function.¹¹⁷

The most prominent of the suits was *Connecticut v. American Electric Power, Co.*, where several state attorneys general sued six major electric utilities to force them to reduce emissions of carbon dioxide and other so-called greenhouse gases (GHG).¹¹⁸ Specifically, the suit sought to use the injunctive relief and abatement remedies under public nuisance theory to impose court ordered emission reductions for each year over a ten year period. In 2011, the Supreme Court of the United States unanimously rejected the suit on federal displacement grounds, concluding that Congress delegated the authority to regulate emissions to EPA in the Clean Air Act and displaced any federal common law causes of action related to these emission standards.

The Court, in an opinion written by Justice Ginsburg, directly addressed the driving force behind these lawsuits. It stated that there is “no room for a parallel track” of tort litigation for GHG emissions.¹¹⁹ As the Court explained, the judiciary does not have the institutional competence to determine “[t]he appropriate amount of regulation” for carbon dioxide emissions or undertake the “complex balancing” required to weigh the impact of that decision on the “energy needs” of the American people.¹²⁰ Unlike Congress, courts are “confined by a record comprising the evidence the parties present,” and “may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators” that would facilitate an objective, comprehensive evaluation of GHG emissions.¹²¹ Thus, “judges lack the scientific, economic, and technological resources” to manage these issues.¹²² The Court concluded that setting GHG emission levels “is undoubtedly an area ‘within national legislative power.’”¹²³

¹¹⁵ See Schwartz et al., *supra* note 101, at 382-83.

¹¹⁶ See *Kivalina*, 663 F. Supp. 2d at 883; *Gen. Motors Corp.*, 2007 WL 2726871, at *16; *Comer I*, 2007 WL 6942285, at *1; *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

¹¹⁷ See *id.*

¹¹⁸ *Am. Elec. Power Co.*, 131 S. Ct. at 2534 (noting that the plaintiffs sought injunctive relief requiring the defendants to reduce their carbon dioxide emissions for “at least a decade”) (internal quotation marks omitted).

¹¹⁹ *Id.* at 2538.

¹²⁰ *Id.* at 2527, 2539.

¹²¹ *Id.*

¹²² *Id.* at 2539-40.

¹²³ *Id.* at 2535 (emphasis added) (quoting Henry J. Friendly, *In Praise of Erie- And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964)).

The other global climate change tort cases, while seeking the same result, were packaged differently. Two of them sought monetary damages for individuals claiming climate change injuries. In *Native Village of Kivalina v. ExxonMobil Corp.*,¹²⁴ the Alaskan Village of Kivalina sued dozens of oil, gas and coal producers for “causing” global climate change and, accordingly, the polar ice wall protecting their village in the Arctic Sea to melt. They were suing for the cost of moving their village to a less vulnerable area. The U.S. Court of Appeals for the Ninth Circuit dismissed the case in 2012, the year after the Supreme Court ruled in *AEP v. Connecticut*. The Ninth Circuit explained that if the Supreme Court has determined that Congress’s delegation of GHG emission regulations to EPA did not leave room for a federal common law cause of action, then “it would be incongruous to allow it to be revived in another form.”¹²⁵

In *Comer v. Murphy Oil USA, Inc.*,¹²⁶ Mississippi homeowners filed a purported class action arguing that a group of energy companies should have to pay for Hurricane Katrina’s damage to their properties. Their theory was that global climate change made Hurricane Katrina more intense and the companies should have to pay for the damage caused by that increased intensity. The U.S. Court of Appeals for the Fifth Circuit dismissed the case in 2013 after several procedural oddities.

The final case was *California v. General Motors Corp.*, where the California attorney general sought to subject car manufacturers to liability for making cars that emit GHGs through vehicle exhaust.¹²⁷ This case was dismissed after the trial court held that it was inappropriate to expose automakers to liability “for doing nothing more than lawfully engaging in their respective spheres of commerce.”¹²⁸

An interesting aspect of these cases is that the plaintiffs’ lawyers generally acknowledged that their goals were, in fact, political and that they were intentionally trying to circumvent Congress and regulate GHG emissions in the courts. Then-Connecticut Attorney General Richard Blumenthal said his suit against *American Electric Power Co.* was based on his “gut feeling [and] emotion, that CO₂ pollution and global warming were problems that needed to be addressed,” that action “wasn’t coming from the federal government,” and several people were “brainstorming about what could be done.”¹²⁹ The lead plaintiffs’ attorney in *Comer* said that his “primary goal was to say [to the defendants that] you are at risk within the legal

¹²⁴ *Kivalina*, 663 F. Supp. 2d at 868-69.

¹²⁵ *Kivalina*, 696 F.3d at 857.

¹²⁶ See *Comer I*, 2007 WL 6942285, at *1; *Comer II*, 839 F. Supp. 2d at 853-54.

¹²⁷ 2007 WL 2726871, at *1.

¹²⁸ *Id.* at *14 (citation omitted).

¹²⁹ Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 339 (2005).

system and you should be cooperating with Congress, the White House and the Kyoto Protocol.”¹³⁰

In all four cases, the courts recognized that a key problem with these cases is that in order to fashion a remedy to the allegations, courts would have to set emission levels for each defendant. America’s energy policy, they concluded, should not be haphazardly set on a case-by-case basis based solely on whomever the plaintiffs named and over a narrow set of environmental allegations. These decisions belonged in Congress, which can hear from the many stakeholders and weigh the many factors that go into setting the nation’s energy policy. Environmental policy is important, but so too, for example, are affordability and energy independence. Thus, regardless of the tort, whether plaintiffs are public or private entities, and whether the remedies sought are injunctive relief or monetary damages, courts should not regulate emissions through tort law.

B. *Litigation Targeted at Local Impacts of Natural Resource Use*

The past decade has also seen lawsuits where plaintiffs’ lawyers and environmentalists sue power plants over allegations related to the local impact of traditional emissions. These emissions are highly regulated under EPA’s permitting programs. Power plants are allowed certain emissions, and setting these emission levels is part of the balancing that Congress has empowered to federal regulators. In these lawsuits, though, communities around the power plants are asking the courts to second guess the EPA and make their own determination as to what levels of emissions are “unreasonable” such that they can give rise to liability. The result of these lawsuits, therefore, would be the same as with the climate change suits: courts would have the ultimate decision on setting emission levels critical to America’s energy policy.

The first major case of this nature was *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,¹³¹ where North Carolina’s attorney general sought an injunction against the Tennessee Valley Authority (TVA) related to its operation of eleven coal-fired power plants.¹³² The suit alleged that emissions from these plants, several of which were located in neighboring Alabama and Tennessee within 100 miles of the North Carolina border, “contributed significantly” to air pollution in North Carolina and constitut-

¹³⁰ Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009, at 3, available at 2009 WLNR 20528599; see also Chris Joyner, *Lawsuits Place Global Warming on More Dockets*, USA TODAY (Nov. 23, 2009) at 5A, available at 2009 WLNR 23599365 (reporting Mr. Maples as conceding the legality of the defendants’ conduct).

¹³¹ *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812 (W.D. N.C. 2009), *rev’d*, 615 F.3d 291 (4th Cir. 2010), *cert. denied*, 132 S. Ct. 46 (2011).

¹³² See *id.* at 815.

ed a public nuisance.¹³³ The injunction would require the TVA to implement more than \$1 billion in technology improvements to reduce emissions.¹³⁴

In 2010, the U.S. Court of Appeals for the Fourth Circuit rejected this lawsuit, holding that the Clean Air Act's permitting program preempted these state tort claims.¹³⁵ In issuing its ruling, the court detailed the complex regulatory regime under the Clean Air Act governing these emissions. The Fourth Circuit explained that under the National Ambient Air Quality Standards (NAAQS), EPA works closely with states to develop State Implementation Plans (SIPs) to determine how much of which substances plants of all types in their states can emit. EPA then issues site-specific permits that establish the reasonable, allowable emissions for each plant. Thus, as part of this process, EPA involved state regulators, meaning that state and local communities already contributed to the determination of how such risks were to be handled. These regulations represent "decades of thought by legislative bodies and agencies" and are designed to facilitate commerce while reducing emissions over time.¹³⁶

The Fourth Circuit concluded that were it to rule otherwise, courts could "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air."¹³⁷ "TVA's plants cannot logically be public nuisances under Alabama and Tennessee law where TVA is in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them."¹³⁸ "If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern."¹³⁹ The result would be "multiple and conflicting standards," and "[e]nergy policy cannot be set, and the environment cannot prosper, in this way."¹⁴⁰

¹³³ North Carolina ex rel. Cooper, 615 F.3d at 298.

¹³⁴ See *id.* (noting that "even North Carolina admits [the cost] will be over a billion dollars, while TVA estimates that the actual cost will be even higher"). The Federal District court acknowledged that the "ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance," but nevertheless decided that it could adopt a "plant-by-plant analysis" of whether regulated emissions amounted to an unreasonable interference on North Carolina's citizens. The court made its own determination that, despite the fact that the TVA was operating pursuant to Clean Air Act permits, emissions from four of the plants produced sufficient "negative effects on human health" to constitute a violation of public nuisance law of the state in which the power plants were located. It then issued an injunction against these four power plants, which were located in Alabama and Tennessee.

¹³⁵ See *id.*

¹³⁶ *Id.* at 298.

¹³⁷ *Id.*

¹³⁸ *Id.* at 310.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 298, 302 ("a patchwork of nuisance injunctions could well lead to increased air pollution").

In 2012, property owners within one mile of a coal-fired power plant in Pennsylvania brought a putative class action against the facility also for local impacts of the power plant.¹⁴¹ As with the TVA case, the plaintiffs in this case, in *Bell v. Cheswick Generating Station*, sought injunctive relief that would allow the plant to operate so long as it implemented more advanced pollution-control technologies.¹⁴² The *Bell* plaintiffs also sought compensatory and punitive damages.¹⁴³ The district court followed *TVA*. It held that the claim was preempted by the Clean Air Act because “federal, state, and local authorities extensively regulate and comprehensively oversee the operations” of the power plant and that the “claims impermissibly encroach on and interfere with that regulatory scheme.”¹⁴⁴

The U.S. Court of Appeals for the Third Circuit disagreed.¹⁴⁵ It determined that the Clean Air Act did not prohibit a state from adopting pollution control standards “more stringent than those specified by the federal requirements.”¹⁴⁶ The power plant appealed to the Supreme Court, which denied review.¹⁴⁷ In May 2015, the district judge dismissed the case after the lead plaintiffs reportedly failed to establish that the power plant damaged anyone’s property and did not respond to court orders.¹⁴⁸ Thus, it remains unclear how a court could determine an appropriate remedy for these claims without interfering with the federal regulatory regime.

An Iowa lawsuit also failed to provide these answers. In *Freeman v. Grain Processing Corp.*, property owners did not pursue a power plant, but rather a grain processing plant.¹⁴⁹ The Supreme Court of Iowa allowed the case to proceed, reasoning that merely bringing public and private nuisance claims for the effects of a local operation did not in themselves conflict with the Clean Air Act. It put off, however, a determination of whether the remedy in response to the claim would be preempted. “We simply cannot evaluate the lawfulness of injunctive relief that has not yet been entered. Such an evaluation must await the development of a full record and the shaping of any injunctive relief by the district court.”¹⁵⁰ The court did not provide any guidance as to what remedy may be available to the courts that

¹⁴¹ *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012), *rev’d*, 734 F. 3d 188 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

¹⁴² *See id.* at 315-16.

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 318-19.

¹⁴⁵ *Bell v. Cheswick Generating Station*, 734 F. 3d 188 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

¹⁴⁶ *Id.* at 190, 198.

¹⁴⁷ *Bell v. Cheswick Generating Station*, 134 S. Ct. 2696 (2014).

¹⁴⁸ *See* Brian Bowling, *Suit vs. Cheswick Power Plan Dropped*, PITTSBURGH TRIBUNE REVIEW (May 11, 2015).

¹⁴⁹ *See* *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014).

¹⁵⁰ *Id.* at 85.

would not improperly encroach on the Clean Air Act and its detailed permitting system.

Another problem with these lawsuits is that, if allowed, plants would have no notice as to which levels of emissions could lead to liability. EPA permits would allow certain emissions, but the plants could be subject to liability even if operating in compliance with those permits. In *TVA*, the Fourth Circuit pointedly explained that “no matter how well-meaning, [a plant] would be simply unable to determine its obligations.”¹⁵¹ Judges from court to court and case to case could second-guess levels allowed under EPA permits and issue rulings that are entirely unpredictable and completely inconsistent with each other.

While this engine for litigation has not been foreclosed, it has stalled and should remain so in order to not interfere with Congress’s careful management of America’s natural resources.

IV. ENGINE NO. 3 – SUING THE GOVERNMENT TO REGULATE NATURAL RESOURCES

In addition to trying to change industry behavior through the threat of massive liability, environmentalists have also turned their litigation sights on the government. In these lawsuits, environmentalists sue government regulators to force them to change government standards or programs to advance the environmentalists’ own private agendas. These efforts produced a major success in 2007 with *Massachusetts v. EPA* over the regulation of carbon dioxide.¹⁵²

In *Massachusetts*, several state attorneys general and environmental groups sued EPA over the agency’s 2003 denial to regulate CO₂ and other GHG emissions from motor vehicles.¹⁵³ The Supreme Court held that GHGs could be considered “pollutants” under the Clean Air Act definition section for the purpose of regulating emission in cars.¹⁵⁴ The Court con-

¹⁵¹ North Carolina ex rel. Cooper, 615 F.3d at 306.

¹⁵² *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

¹⁵³ Petitioners included twelve states, local governments, and trade associations. See *id.* at 505, n. 2. The action included many private organizations, such as the Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group. See *id.* at 505, n. 3-4.

¹⁵⁴ See *id.* (stating that the questions before the Court included “whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute”); see also 42 U.S.C. § 7521(a)(1) (2006). Section 202(a)(1) of the CAA provides the EPA Administrator with authority to: [P]rescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new

cluded, therefore, that “EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”¹⁵⁵ Pursuant to this ruling, EPA issued an Endangerment Rule and new Corporate Average Fuel Economy (CAFE) standards to reduce GHG emissions from cars.¹⁵⁶ The Court did not address how that ruling would pervade the Clean Air Act’s other programs, such as the NAAQS that were designed to address traditional pollutants. This ruling has sparked heated debate as to the extent Congress authorized EPA to regulate GHGs and whether EPA has overreached its authority in extending this ruling to other EPA programs.¹⁵⁷

Massachusetts also has empowered environmentalists to find other methods for suing government officials. Two prominent agenda-driven efforts related to natural resources are “sue and settle” actions, where environmentalists seek to have EPA impose new legal obligations outside of the normal regulatory process,¹⁵⁸ and “public trust” claims, which are intended to circumvent Congress on climate change policy.

A. *The Rise of “Sue and Settle” Regulations*

“Sue and settle” is the term given to certain lawsuits brought by advocacy groups to challenge an agency action or rule. In settling the case, the agency agrees to effectively adopt the advocacy group’s position. The suit and the consent decree enforcing the settlement are all done outside of the safeguards of the Administrative Procedure Act (APA) rulemaking, without

motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. *Id.*

¹⁵⁵ *Massachusetts*, 549 U.S. at 532; *see also* *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 570–71 (2007) (concerning whether an energy company violated the Clean Water Act when it modified its coal power plants without first obtaining a permit); *Nw. Env’tl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 959–60 (D. Or. 2006) (alleging a violation of the CAA for constructing a GHG-producing facility without a permit); James L. Arnone et al., *Global Climate Change Litigation*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 11–12 (Cary R. Perlman ed., 2009) (stating that the CAA empowers EPA to set National Ambient Air Quality Standards (NAAQS) to protect public health and the environment).

¹⁵⁶ Endangerment Rule, 74 Fed. Reg. 66496 (Dec. 15, 2009); Auto Rule, 75 Fed. Reg. 25324 (May 7, 2010).

¹⁵⁷ *See, e.g.*, *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427 (2014).

¹⁵⁸ *See Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COMMERCE (May 2014), at 3, <http://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors> [hereinafter *Regulating Behind Closed Doors*]. Commentators have described “sue and settle” as follows: “In this situation, ‘arrangements’ are made for an entity to institute a legal action to achieve a desired outcome. The ‘government’ makes the decision to settle the case and thereby effects a change in policy—well below the radar of public accountability. If political flack does ensue, the answer is something akin to ‘the devil (i.e., the courts) made me do it.’” Jack W. Thomas & Alex Sienkiewicz, *The Relationship Between Science and Democracy: Public Land Policies, Regulation and Management*, 26 PUB. LAND & RESOURCES L. REV. 39, 63–64 (2005).

Office of Management and Budget (OMB) oversight, and absent any input from other stakeholders.¹⁵⁹

The sue-and-settle process is not unique to EPA, but reports suggest that the use of such agreements by EPA has increased in recent years.¹⁶⁰ In 2014, the U.S. Chamber of Commerce found that more than a hundred EPA rules, resulting in billions in annual compliance costs, were the product of sue-and-settle agreements.¹⁶¹ In about sixty cases between 2009 and 2014, EPA did not defend itself in the lawsuits, leading some to call these actions “friendship suits” that were purposefully designed to allow EPA to regulate outside of the scrutiny of Congress, state officials, the regulated industry and the public at large.¹⁶² For example, environmentalists sue EPA to start or advance a rulemaking or enforce a statutory deadline and EPA willingly agrees to a “settlement” to do just that.¹⁶³ Because these settlements are enforced through court order, they have the same effect at law, both in getting EPA to act and in governing industry.

One check on this system is to allow trade groups or other interested parties to intervene in the cases so they can assert their rights to be heard should a consent decree result in new regulations affecting their interests.¹⁶⁴ In 2013, such an intervenor successfully challenged a sue-and-settle arrangement to the U.S. Court of Appeals for the Ninth Circuit.¹⁶⁵ This case, *Conservation Northwest v. Sherman*, involved an agreement between environmental groups and the Bureau of Land Management to alter the method of assessing the impact of logging on wildlife as part of the Northwest Forest Plan.¹⁶⁶

The Northwest Forest Plan was formed in the 1990s to balance conservation of the Pacific Northwest forests with commercial logging.¹⁶⁷ The decree set aside that compromise and required changes the environmentalists sought to species classifications and several new management require-

¹⁵⁹ See Pub. L. No. 79-404, 60 Stat. 237 (1946); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 18, 2001); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

¹⁶⁰ See *Regulating Behind Closed Doors*, *supra* note 158, at 14.

¹⁶¹ *Id.* at 14-15.

¹⁶² See *id.*; see also Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Appeals Court Rebuffs Federal Agency's Attempt at Sue and Settle Regulation*, 22 Legal Opinion Letter (Wash. Legal Found., Washington, D.C.), July 19, 2013, at 1.

¹⁶³ See *id.*

¹⁶⁴ Some courts have allowed intervention, while others have found that the would-be intervenors lack judicial standing to participate in the cases, which has perpetuated this practice. See, e.g., *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1 (D.D.C. 2012); *Center for Biologic Diversity v. EPA*, No. C-11-06059, 2012 WL 909831 (N.D. Cal. Mar. 16, 2012); *Center for Biologic Diversity v. EPA*, 274 F.R.D. 305 (D.D.C. 2011).

¹⁶⁵ *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1181 (9th Cir. 2013).

¹⁶⁶ See *id.* at 1184-85.

¹⁶⁷ See *id.* at 1183-84.

ments for species that had never been part of the Plan.¹⁶⁸ The district court approved the consent decree, stating that these provisions were to take effect absent any “public-participation procedures.”¹⁶⁹ The court reasoned that “because the consent decree was a ‘judicial act,’ procedural requirements that would otherwise govern agency action [were] inapplicable.”¹⁷⁰

The lumber company that intervened in the case appealed the decision. The Ninth Circuit reversed, concluding the agency effectively promulgated “a substantial and permanent amendment” to an existing regulation without following statutory notice-and-comment rulemaking procedures.¹⁷¹ The court held that it was “indisputable that the Agencies would have had to go through formal procedures if they had sought to implement the changes to [the Northwest Forest Plan] contained in the consent decree on their own.”¹⁷² Therefore, “the public should have been afforded an opportunity to comment on all alternatives that the Agencies were required by law to consider.”¹⁷³ This case helped prompt heightened scrutiny over sue-and-settle practices, including congressional hearings and potential legislative reforms.¹⁷⁴ In response, EPA has begun posting on its website Notices of Intent to Sue (i.e. notices of potential “sue and settle” actions) filed by private plaintiffs against the agency.¹⁷⁵

An additional wrinkle in these cases is that several federal statutes, including the Equal Access to Justice Act (EAJA), can require the government to pay the attorney fees of the interest groups that sue the agencies.¹⁷⁶ Many environmental groups have collected such funds when suing EPA, either under sue-and-settle arrangements or otherwise.¹⁷⁷ It has been esti-

¹⁶⁸ *See id.* at 1187.

¹⁶⁹ *Id.* at 1185.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1188.

¹⁷² *Id.* at 1187-88.

¹⁷³ *Id.*

¹⁷⁴ *See, e.g.*, Sunshine for Regulatory Decrees and Settlements Act of 2015, H.R. 712, 114th Cong. (2015); Achieving Less Excess in Regulation and Requiring Transparency Act of 2014, H.R. 2804, 113th Cong. (2014); *see also* *Hearing on Sunshine for Regulatory Decrees and Settlements Act: Hearing on H.R. 1493 Before the H. Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 113th Cong. (2013); Judgment Fund Transparency Act of 2013, H.R. 317, 113th Cong. 2 (2013); Open Book on Equal Access to Justice Act, H.R. 2919, 113th Cong. (2013).

¹⁷⁵ *See* *Notices of Intent to Sue the U.S. Environmental Protection Agency (EPA)*, EPA, <http://www.epa.gov/ogc/noi.html>.

¹⁷⁶ *See* 5 U.S.C. § 504; 28 U.S.C. § 2412; *see also* David A. Root, Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and the “English Rule,” 15 *IND. INT’L & COMP. L. REV.* 583, 588 (2005) (stating that there are over 200 federal laws providing for attorney fee shifting).

¹⁷⁷ *See* House Rep. 112-594, Government Litigation Savings Act, 112th Cong. (2012); *Hearing on Government Litigation Savings Act*, House Judiciary Subcommittee on Courts, Commercial and Administrative Law, 112th Cong. (2011) (statement of Professor Jeffrey Axelrad), *available at* 2011 WLNR 24783754.

mated that thousands of such claims are filed each year by advocacy groups, which can help fund the group along with forcing the federal agencies to direct resources to the group's agenda.¹⁷⁸

B. "Public Trust Doctrine" to Force the Regulation of GHG Emissions

In the wake of *AEP v. Connecticut* and other failed global climate change tort cases, a group called "Our Children's Trust" coordinated a number of lawsuits against state and federal regulators in an effort to force them to regulate GHG emissions under a common law theory called the "public trust doctrine."¹⁷⁹ The group claimed that these regulators have independent "public trust" obligations to protect the atmosphere and communal property under their control from global climate changes.¹⁸⁰ They sought judicial injunctions to limit total GHG emissions worldwide to 350 parts per million and then force federal and state governments to impose comprehensive regulatory regimes based on this standard.

Since 2011, such lawsuits have been filed in at least a dozen states, and petitions for rulemakings have been submitted to state regulatory agencies in each of the other states.¹⁸¹ A federal lawsuit was also filed.¹⁸² Thus far, none of the plaintiffs have prevailed in the courtroom,¹⁸³ as most of the lawsuits have been dismissed for failure to state a claim, non-justiciability, or lack of standing.¹⁸⁴ As of this writing, a few lawsuits remain pending.¹⁸⁵

¹⁷⁸ See *id.*; see also Phil Taylor, *Lawsuit Abuse Charge by Western Lawmakers Enrages Enviro Groups*, N.Y. TIMES (Nov. 19, 2009), <http://www.nytimes.com/gwire/2009/11/19/19greenwire-lawsuit-abuse-charge-by-western-lawmakers-enra-54944.html>.

¹⁷⁹ See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Lawsuit Roulette: Pursuit of the "Children's Trust" Climate Change Litigation*, 26:15 Legal Opinion Letter (Wash. Legal Found. July 8, 2011); see also Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing early development of the public trust doctrine); Allen Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 71-72 (2005)

¹⁸⁰ See, e.g., Am. Compl. for Dec. and Injunc. Relief, *Sanders-Reed v. Martinez*, Case No. D-101-CV-2011-01514 (N.M. Dist. Ct.-Santa Fe Cty. Feb. 16, 2012), available at http://ourchildrenstrust.org/sites/default/files/New_Mexico_Amended%20Complaint.pdf; Amended Complaint for Declaratory and Equitable Relief, *Chernaik v. Kitzhaber*, Case No. 16-11-09273 (Or. Cir. Ct.-Lane Cty. May 19, 2011), available at <http://ourchildrenstrust.org/sites/default/files/OregonAmendedComplaint.pdf>.

¹⁸¹ See *Alphabetical List of State Legal Actions*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/US/StateSummaryAlphabetical>.

¹⁸² See *Federal Lawsuit Legal Updates*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/US/Federal-Lawsuit>.

¹⁸³ See *US Legal Actions*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/legal/US-Action>.

¹⁸⁴ See, e.g., *Kanuk ex rel. Kanuk v. Dept. of Natural Resources*, 335 P.3d 1088 (Alaska 2014) (affirming trial court dismissal on non-justiciable political question grounds); *Butler ex rel. Peshlakai v. Brewer*, 2013 WL 1091209 (Ariz. Ct. App. May 14, 2013) (affirming trial court dismissal for failure to state a claim and on standing grounds); *Aronow v. State*, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012) (affirming trial court dismissal for failure to state a claim).

In 2014, the U.S. Court of Appeals for the D.C. Circuit dismissed the “public trust” case before it without even holding a hearing.¹⁸⁶ The court found that no such public trust cause of action exists in federal law: “plaintiffs point to no case . . . standing for the proposition that the public trust doctrine – or claims based upon violations of that doctrine – arise under the Constitution or laws of the United States.”¹⁸⁷ State cases have met the same result. In Alaska, the state Supreme Court said that in addition to being legally deficient, the claims were ill-conceived: “Although declaring the atmosphere to be subject to the public trust doctrine could serve to clarify the legal relations at issue, it would certainly not ‘settle’ them. It would have no immediate impact on greenhouse gas emissions in Alaska, it would not compel the State to take any particular action, nor would it protect the plaintiffs from the injuries they allege.”¹⁸⁸

The public trust doctrine, to the extent it has been established, is not suited for this type of action. Traditionally, it has been applied only in a narrow set of cases involving state-owned water rights as a basis to prevent states from selling public property along waterways to private interests.¹⁸⁹ For example, in *Illinois Central Railroad Company v. Illinois*, the Supreme Court of the United States found that the shoreline of Lake Michigan was held in public trust by the state and, therefore, could not be transferred out of public ownership to a private railroad.¹⁹⁰ In these cases, the remedies are straightforward, the ownership interest is decided, and the states are generally informed as to whether they can sell, lease, or license the lands. Indeed, the public trust doctrine can be important for determining land and water rights and provide a safeguard against states seeking to sell, lease, or license valuable public property to raise short-term capital. But, it is not a doctrine that can force federal and state regulation of GHG emissions.

If applied as attempted here, interest groups would be able to turn the public trust doctrine into a cause of action for imposing their own natural resource agendas whenever they believe the government is not doing enough to satisfy their subjective beliefs. For example, even when Congress has a law on point, such as with the Clean Air Act, Endangered Species Act, or Clean Water Act, anyone could bring a constitutional public trust claim that the government is not doing enough to preserve the air, species, or water for future generations. Therefore, in addition to providing endless opportunities for new natural resource litigation, this theory could dismantle Congress’s decades-long management of America’s natural resources.

¹⁸⁵ See *States with Lawsuits*, OUR CHILDREN’S TRUST, <http://ourchildrenstrust.org/LawsuitStates>.

¹⁸⁶ See *Alec L. v. Gina McCarthy*, No. 13-5192 (D.C. Cir. June 5, 2014) (unpublished).

¹⁸⁷ *Id.*

¹⁸⁸ *Kanuk*, 335 P.3d at 1102.

¹⁸⁹ See *supra* note 179.

¹⁹⁰ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

CONCLUSION: THE EXTRACTION AND USE OF NATURAL RESOURCES
SHOULD REMAIN A GOVERNANCE ISSUE FOR
LEGISLATURES, NOT COURTS

Attempts to impose liability against private and public entities related to the extraction and use of natural resources create clear conflicts with Congress's carefully developed statutory and regulatory regimes to manage natural resource risks. Starting in the 19th century, Congress erected a comprehensive framework of federal laws designed to balance the continued commercial development of the country's natural resources with other societal interests, including worker safety, public welfare, affordability, and conservation.¹⁹¹ By-and-large, this approach has worked. The United States has one of the most advanced economies and among the strongest environmental and worker safety standards in the world. The use of the country's natural resources also has led to comparably high living and public health standards.¹⁹²

Were courts to expand theories related to products liability, public nuisance, or other common law claims to address risks associated with natural resources, they would effectively be regulating how these resources can be extracted and used. As judges with both liberal and conservative views have recognized, courts do not have the tools to do this job. The civil justice system is designed to compensate people who have been wrongfully injured by another's conduct.¹⁹³ It should not be used to supplant the administrative and legislative branches of government.¹⁹⁴ Former U.S. Secretary of Labor Robert Reich has explained that such "regulation through litigation" improperly invades Congress's careful determinations about whether to regulate certain activity or conduct, and, if so, by how much. While Secretary Reich initially favored such agenda-driven litigation, he quickly realized that the suits were "faux legislation, which sacrifices democracy."¹⁹⁵

¹⁹¹ See *supra* Part I.

¹⁹² See *id.*

¹⁹³ See DAN B. DOBBS, *THE LAW OF TORTS* § 9, at 14 (2000) (characterizing the principal goal of tort law as "righting wrong").

¹⁹⁴ See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914 (2008); see also ANDREW P. MORRIS, BRUCE YANDLE & ANDREW DORCHAK, *REGULATION BY LITIGATION* 1 (2009); DANIEL P. KESSLER, Introduction, in *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 3 (Daniel P. Kessler ed., 2011).

¹⁹⁵ Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22; see also Mark A. Behrens & Rochelle M. Tedesco, *Addressing Regulation Through Litigation: Some Solutions to Government Sponsored Lawsuits*, 3 ENGAGE 109, 109 (2002); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215 (2001).

It is certainly understandable that advocates on any side of a debate can become frustrated that their views are not adopted by Congress, the President, or federal and state regulators. Political frustrations, however, are not the proper basis for litigation seeking to impose those viewpoints on the American people. Interest groups on either side of the aisle should not be able to use the courts to hijack the political process and relegate the government to be managers of their national policy directives. Members of Congress and the many stakeholders involved would be silenced by judicial decree. This is not the American system of governance.

