

THE CASE AGAINST CORPORATE CONSTITUTIONAL RIGHTS
How Corporate Constitutional Rights Harm You, Your Family, Your Community,
Your Environment, and Your Democracy

Part III: How Corporate Rule Fueled the Climate Crisis

Corporate Constitutional Rights and Global Warming—Corporate Climate Coverup

This is Part 3 in a series by the Law and Research Committee of Move to Amend to demonstrate the harm caused by corporate constitutional rights (CCRs). The prior parts may be accessed at <https://www.movetoamend.org/corporate-constitutional-rights>

The purpose of this paper is not to recount the lies and misrepresentations by oil corporations concerning climate change or to review the numerous cases filed against oil corporations for damages alleged and nefarious conduct related to their climate change coverup. Instead it illustrates how the oil corporations have used CCRs to defend against efforts to prevent climate-damaging activities. [1]

Global Warming and Climate Change have harmed and will continue to harm the planet and us

The science is clear: global warming is real, mostly caused by human activity, and is having a devastating impact on the climate, the environment and us which will only continue and worsen. We are at a tipping point. Absent immediate and sustained emergency action, our near future will see irreversible harm including rising and warming seas, destruction of coastal cities, massive storms, soil degradation, food shortages, heat waves, water shortages, system failures, and mass extinction of species. (See Appendix.) Some of these harms have already occurred. Without concerted remediation they will only increase, ultimately rendering our planet uninhabitable for many species, including humans.

A History of Corporate Deceit about Climate Change

Since the late 1970's oil producing corporations and their industry trade group the American Petroleum Institute knew of the science of global warming and knew of its potential "catastrophic consequences." Their response? Spending millions to confuse and misinform the public. [2]

Oil corporations no longer dispute the validity of climate science. Nor do the court decisions, even when they dismiss cases against oil corporations for climate misinformation and/or damages. [3]

Oil Corporations Invoke Numerous CCRs to Defend Against Their Climate Coverup and/or Resulting Damages

To date oil corporations have used one or more of the following CCRs as defenses in numerous lawsuits based on their climate cover up: First Amendment, Fourth Amendment (overbroad subpoena), Fifth Amendment (takings clause), Fourteenth Amendment, Commerce Clause, Equal Protection Clause, and Contracts (“Impairments”) Clause. [4]

Oil Company Wins Lawsuit to Allow Fracking Based on CCRs Despite Ordinance Prohibiting It
SWEPI, LP v. Mora County, 81 F.Supp.3D 1075 (D.N.M. 2015)

SWEPI, Limited Partnership [5], entered into an oil-and-gas lease with the State of New Mexico in 2010. In 2013 the Mora County (New Mexico) Board of Commissioners adopted an Ordinance titled “Mora County Community Water Rights and Local Self-Government Ordinance” (Ordinance). In relevant part the Ordinance sought to protect the land, water, and rights of Mora County and its residents by prohibiting corporations from extracting water for use in the extraction of fossil fuels, depositing waste water, and maintaining infrastructure related to fossil fuel extraction. In other words, the Ordinance tried to ban hydraulic fracturing (“fracking”).

If corporations violated the Ordinance, it denied them the rights of persons afforded under the New Mexico and U.S. Constitutions. Further, the Ordinance refused to recognize the validity of a permit issued by any federal or state agency if it interfered with these rights. Preemption by state or federal law was recognized only if those laws expressly preempted County ordinances and charters, and provided greater protection for the health, safety, and welfare of Mora County’s people than County ordinances. Violation of the Ordinance was a crime. SWEPI filed a complaint in 2014 seeking an injunction against the Ordinance.

In 2015 the federal District Court ruled, in relevant part, that the Ordinance violated the Supremacy Clause and First Amendment rights of SWEPI, and invalidated the entire Ordinance. The Court reasoned that, because the Supreme Court had established (actually, invented) the doctrine that corporations are persons under the Equal Protection Clause of the 14th Amendment they are entitled to its protections, including under the First and Fifth Amendments. The Ordinance violated the Supremacy Clause because federal law supersedes a local ordinance and such an ordinance cannot nullify a constitutional right. The Ordinance violated the First Amendment because it was overbroad in that it absolutely prohibited all of SWEPI’s First Amendment rights.

In a Pennsylvania case, the Court invalidated a similar ordinance but also found the arguments supporting it to be “frivolous” and ordered two attorneys for the environmental group representing the township to pay an energy limited liability company \$52,000 in legal fees! [6]

Conclusion

This SWEPI case demonstrates three principles. First, corporations have used their invented constitutional rights to continue the same activities that have caused global warming. Unless the Supreme Court has a change of heart (unlikely) or the People pass a constitutional

amendment eliminating CCRs, corporations will also attempt to evade liability for their decades-old climate cover up as evidenced by the cases cited in endnote 4.

Second, this case illustrates that CCRs allow unelected judges and justices to effectively override the authority of elected officials to carry out their duty to use the police power to protect the health, safety, and welfare of their residents. [7]

Third, local communities that lose control over their land can suffer very real harm. CCRs unjustly allow corporations to override the ability of local governments to care for the people of their communities. Mora County's Ordinance challenged the CCR doctrine, a legal fiction that threatened to contaminate the local community with highly toxic fracking wastewater. Some would say that the court made the correct decision because its ruling followed precedent. In response, all CCR cases rest upon a so-called foundation unsupported by history, legal authority, or logic. [8] Further, as *SWEPI* illustrates, the CCR doctrine, by elevating the profit-making interests of corporations over the health and safety of natural persons, protects property at the expense of the actual human beings who created the corporations. This is inherently unjust and "in the face of injustice, all people have the right and moral duty to peacefully protest unjust laws." [9]

The solution to CCRs is Move to Amend's We The People Amendment, HJR 48:
<https://www.movetoamend.org/amendment>

End Notes

[1] According to the 2017 Carbon Majors Report, p.8, "The distribution of emissions is concentrated: 25 corporate and state producing entities account for 51% of global industrial GHG emissions. All 100 producers account for 71% of global industrial emissions."
<https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499691240>

2] Exhibit A to *The County of San Mateo v. Chevron Corp.*, et al, Superior Court of the State of California, County of San Mateo, Case No. 17CIV03222;
"Exxon, The Road Not Taken," nine articles between September and December, 2015, Inside Climate News (ICN) by Neela Banerjee, Lisa Song and David Hasemyer;
"Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today," by David Hasemyer, ICN, updated 1/17/2020;
https://www.huffpost.com/entry/philippines-commission-on-human-rights-fossil-fuelcompanies-liable-climate-change_n_5df1698de4b01e0f29597ad8?ncid=tweetlnkushpimg00000067

[3] See, e.g., Judge Alsup's ruling in *Oakland v. BP, et al*, U.S. District Court (Northern CA), Case No. 3:17-CV-0612-WHA, at p.15: "In sum, this order accepts the science behind climate change. So do both sides." https://www.eenews.net/assets/2018/06/26/document_cw_02.pdf

[4] <http://climatecasechart.com/us-climate-change-litigation/?cn-reloaded=1>

[5] For our purposes, a limited partnership is one in which the limited partner's liability is limited to his/her investment, as in a corporation. According to the Ordinance, "corporations" included limited partnerships.

[6]

<https://stateimpact.npr.org/pennsylvania/2018/01/12/judge-fines-environmental-attorneys-52000-for-frivolous-injection-well-suit/> ;

<https://www.documentcloud.org/documents/4349265-Sanctions-Decision-Grant.html>

[7] The Supreme Court has defined the "police power" as being coextensive with **inherent** state sovereignty, *Nebbia v. New York*, 291 U.S. 502, 524 (1934). States often use the police power to legislate protections for public health, safety, and morality.)

[8] In dissent, several notable Supreme Court Justices have forcefully argued against CCRs. "There was no history, logic, or reason given to support that view. Nor was the result so obvious

that exposition was unnecessary." *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)(J. Douglas, dissent. opin.). Justice Black made similar arguments to Justice Douglas in an earlier dissent: "I do not believe the word 'person' in the Fourteenth Amendment includes corporations." *Connecticut General Life Insurance Company v. Johnson*, 303 U.S. 77 (1938). Justice (later Chief Justice) Rehnquist shared this view. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) at pp. 822, 825-826,828.

[9]

<https://www.tennessean.com/story/opinion/2020/03/10/civil-disobedience-takes-place-when-injustice-trumps-citizens-rights/5004070002/>

Appendix on Global Warming and Climate Change

Definitions: "The term climate change is sometimes used interchangeably with the term global warming. However, the terms do not refer entirely to the same thing. Global warming refers to the recent and ongoing rise in global average temperature near Earth's surface. It is caused mostly by increasing concentrations of greenhouse gases in the atmosphere. Global warming is causing climate patterns to change. However, global warming itself represents only one aspect of climate change. Climate change refers to any significant change in the measures of climate lasting for an extended period of time. In other words, climate change includes major changes in temperature, precipitation, or wind patterns, among others, that occur over several decades or longer. Climate change can occur at the global, continental, regional, and local levels. Climate change may refer to natural changes in climate, or changes caused by human activities."

https://19january2017snapshot.epa.gov/climate-change-science/overview-climate-change-science_.html

Evidence of Global Warming and Climate Change (from <https://climate.nasa.gov/evidence/>)

Global Temperature Rise

The planet's average surface temperature has risen about 1.62 degrees Fahrenheit (0.9 degrees Celsius) since the late 19th century, a change driven largely by increased carbon dioxide and other human-made emissions into the atmosphere.⁴ Most of the warming occurred in the past 35 years, with the six warmest years on record taking place since 2014. Not only was 2016 the warmest year on record, but eight of the 12 months that make up the year — from January through September, with the exception of June — were the warmest on record for those respective months.

Warming Oceans

The oceans have absorbed much of this increased heat, with the top 700 meters (about 2,300 feet) of ocean showing warming of more than 0.4 degrees Fahrenheit since 1969.

Shrinking Ice Sheets

The Greenland and Antarctic ice sheets have decreased in mass. Data from NASA's Gravity Recovery and Climate Experiment show Greenland lost an average of 286 billion tons of ice per year between 1993 and 2016, while Antarctica lost about 127 billion tons of ice per year during the same time period. The rate of Antarctica ice mass loss has tripled in the last decade.

Glacial Retreat

Glaciers are retreating almost everywhere around the world — including in the Alps, Himalayas, Andes, Rockies, Alaska and Africa.

Decreased Snow Cover

Satellite observations reveal that the amount of spring snow cover in the Northern Hemisphere has decreased over the past five decades and that the snow is melting earlier.

Sea Level Rise

Global sea level rose about 8 inches in the last century. The rate in the last two decades, however, is nearly double that of the last century and is accelerating slightly every year.

Declining Arctic Sea Ice

Both the extent and thickness of Arctic sea ice has declined rapidly over the last several decades.¹¹

Extreme Events

The number of record high temperature events in the United States has been increasing, while the number of record low temperature events has been decreasing, since 1950. The U.S. has also witnessed increasing numbers of intense rainfall events.

Ocean Acidification

Since the beginning of the Industrial Revolution, the acidity of surface ocean waters has increased by about 30 percent. This increase is the result of humans emitting more carbon dioxide into the atmosphere and hence more being absorbed into the oceans. The amount of

carbon dioxide absorbed by the upper layer of the oceans is increasing by about 2 billion tons per year.

The Role of Human Activity

In its Fifth Assessment Report, the Intergovernmental Panel on Climate Change, a group of 1,300 independent scientific experts from countries all over the world under the auspices of the United Nations, concluded there's a more than 95 percent probability that human activities over the past 50 years have warmed our planet.

The industrial activities that our modern civilization depends upon have raised atmospheric carbon dioxide levels from 280 parts per million to 412 parts per million in the last 150 years. The panel also concluded there's a better than 95 percent probability that human-produced greenhouse gases such as carbon dioxide, methane and nitrous oxide have caused much of the observed increase in Earth's temperatures over the past 50 years.

The panel's full Summary for Policymakers report is online at https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_summary-for-policymakers.pdf.

Future Effects (from <https://climate.nasa.gov/effects/>)

“Some of the long-term effects of global climate change in the United States are as follows, according to the [Third](#) and [Fourth](#) National Climate Assessment Reports:

Change Will Continue Through This Century and Beyond

Global climate is projected to continue to change over this century and beyond. The magnitude of climate change beyond the next few decades depends primarily on the amount of heat-trapping gases emitted globally, and how sensitive the Earth's climate is to those emissions.

Temperatures Will Continue to Rise

Because human-induced warming is superimposed on a naturally varying climate, the temperature rise has not been, and will not be, uniform or smooth across the country or over time.

Frost-free Season (and Growing Season) will Lengthen

The length of the frost-free season (and the corresponding growing season) has been increasing nationally since the 1980s, with the largest increases occurring in the western United States, affecting ecosystems and agriculture. Across the United States, the growing season is projected to continue to lengthen.

In a future in which heat-trapping gas emissions continue to grow, increases of a month or more in the lengths of the frost-free and growing seasons are projected across most of the U.S. by the end of the century, with slightly smaller increases in the northern Great Plains. The largest increases in the frost-free season (more than eight weeks) are projected for the western U.S., particularly in high elevation and coastal areas. The increases will be considerably smaller if heat-trapping gas emissions are reduced.

Changes in Precipitation Patterns

Average U.S. precipitation has increased since 1900, but some areas have had increases greater than the national average, and some areas have had decreases. More winter and spring precipitation is projected for the northern United States, and less for the Southwest, over this century.

Projections of future climate over the U.S. suggest that the recent trend towards increased heavy precipitation events will continue. This trend is projected to occur even in regions where total precipitation is expected to decrease, such as the Southwest.

More Droughts and Heat Waves

Droughts in the Southwest and heat waves (periods of abnormally hot weather lasting days to weeks) everywhere are projected to become more intense, and cold waves less intense everywhere.

Summer temperatures are projected to continue rising, and a reduction of soil moisture, which exacerbates heat waves, is projected for much of the western and central U.S. in summer. By the end of this century, what have been once-in-20-year extreme heat days (one-day events) are projected to occur every two or three years over most of the nation.

Hurricanes Will Become Stronger and More Intense

The intensity, frequency and duration of North Atlantic hurricanes, as well as the frequency of the strongest (Category 4 and 5) hurricanes, have all increased since the early 1980s. The relative contributions of human and natural causes to these increases are still uncertain.

Hurricane-associated storm intensity and rainfall rates are projected to increase as the climate continues to warm.

Sea Level Will Rise 1-4 feet by 2100

Global sea level has risen by about 8 inches since reliable record keeping began in 1880. It is projected to rise another 1 to 4 feet by 2100. This is the result of added water from melting land ice and the expansion of seawater as it warms.

In the next several decades, storm surges and high tides could combine with sea level rise and land subsidence to further increase flooding in many regions. Sea level rise will continue past 2100 because the oceans take a very long time to respond to warmer conditions at the Earth's surface. Ocean waters will therefore continue to warm and sea level will continue to rise for many centuries at rates equal to or higher than those of the current century.

Arctic Likely to Become Ice-Free

The Arctic Ocean is expected to become essentially ice free in summer before mid-century.

U.S. Regional Effects

Below are some of the impacts that are currently visible throughout the U.S. and will continue to affect these regions, according to the Third and Fourth National Climate Assessment Reports, released by the [U.S. Global Change Research Program](#):

Northeast. Heat waves, heavy downpours and sea level rise pose growing challenges to many aspects of life in the Northeast. Infrastructure, agriculture, fisheries and ecosystems will be

increasingly compromised. Many states and cities are beginning to incorporate climate change into their planning.

Northwest. Changes in the timing of streamflow reduce water supplies for competing demands. Sea level rise, erosion, inundation, risks to infrastructure and increasing ocean acidity pose major threats. Increasing wildfire, insect outbreaks and tree diseases are causing widespread tree die-off.

Southeast. Sea level rise poses widespread and continuing threats to the region's economy and environment. Extreme heat will affect health, energy, agriculture and more. Decreased water availability will have economic and environmental impacts.

Midwest. Extreme heat, heavy downpours and flooding will affect infrastructure, health, agriculture, forestry, transportation, air and water quality, and more. Climate change will also exacerbate a range of risks to the Great Lakes.

Southwest. Increased heat, drought and insect outbreaks, all linked to climate change, have increased wildfires. Declining water supplies, reduced agricultural yields, health impacts in cities due to heat, and flooding and erosion in coastal areas are additional concerns.”

7/15/20