

TO: **Duncan, J.**  
FROM: Sean Moore  
DATE: September 13, 2023  
RE: Climate Litigation in State Courts

### **QUESTION PRESENTED**

1. What types of climate litigation might emerge in state courts?

### **BRIEF ANSWER**

1. State courts should expect suits against the "Carbon Majors" (*i.e.*, companies in the energy, utilities, and materials sectors of the economy), the state, and insurance companies. Court should expect water rights, takings, wildfire, fraud, insurance, and contractual claims in the near future. Public trust, shareholder, and property valuations suits may emerge in the longer term. Suits against energy companies brought by states and trade organizations will likely be fewer in number and proceed on a slower timeframe but may generate additional insurance suits. State courts have rejected suits seeking court-imposed remedial plans to limit greenhouse gas ("GHGs") emissions.

### **DISCUSSION**

This memo is meant to survey some of the climate change-related claims that have emerged and are likely to soon emerge at the state level in Oregon.

#### *A. Suits Brought Against Energy Companies*

Energy companies and their products caused the majority of global carbon emissions.<sup>1</sup> Numerous entities now seek damages from the resulting climatic changes. States, counties, and municipalities have filed tort claims under a number of theories: damages arising from extreme weather events and the cost of future remedial measures;

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<sup>1</sup> *New report shows just 100 companies are source of over 70% of emissions*, CDP (July 10, 2017), <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions>

misrepresentations made by the energy companies to impede the transition away from fossil fuels; and potentially misleading statements made to investors. Additionally, at least one Oregon-based trade organization has sued the energy companies for damage to their industry.

Although these cases are the most high-profile and the most directly linked to climate change, they are likely to be infrequent and will be mired in procedural fights for the foreseeable future. However, similar claims may become more common if a state, county, or trade organization eventually prevails.

1. *Tort claims brought by governments*

Beginning in 2017, states, counties, and municipalities have sued energy companies based on state common law and statutory tort claims relating to the physical consequences of climate change. These cases argue that GHG emissions and their consequences amount to nuisance, trespass, and negligence. *See, e.g.*, Complaint at 169-74, *Cnty. of Multnomah v. Exxon Mobil Corp.*, No 23CV25164 (Or Cir Ct June 22, 2023). Although not a tort, municipalities in Puerto Rico have also sought restitution under its common law for the medical expenses accrued during Hurricane Maria. Complaint at 244, *Muns. of Puerto Rico v. Exxon Mobil Corp.*, No 3:22-cv-01550 (DPR Nov 22, 2022). However, procedural fights over whether federal courts have subject-matter jurisdiction have held up these cases and will likely continue to do so. *See Cnty. of San Mateo v. Chevron Corp.*, 32 F4th 733, 744 (9th Cir 2022) (determining that federal courts lacked subject matter jurisdiction over the common law tort claims alleged against the energy companies); *see also* Notice of Removal at 9-12, *Cnty of Multnomah v.*

*Exxon Mobil Corp*, 3:23-cv-01213, (D Or Aug 18, 2023) (removing Multnomah County's lawsuit to federal court under several new theories of federal question jurisdiction).

Although each state's tort law varies significantly, the energy companies have asserted nearly the same defenses and procedural arguments in every jurisdiction. First, that the Clean Air Act and federal common law preempt any state tort claim relating to the emission of GHG.<sup>2</sup> See Motion to Dismiss at 23, *City of Hoboken v. Exxon Mobil Corp*, HUD-L-003179-20, (NJ Super Ct July 7, 2023). Second, that a state law claim cannot be constitutionally applied to out-of-state conduct. *Id.* at 13. Third, that the political question doctrine bars all tort claims related to climate change. *Id.* at 28. Fourth, GHGs were an open and obvious danger. *Id.* at 42-58.

Because many of these cases are procedurally further along than the Multnomah case, those cases will likely resolve the preemption question before Oregon's court can -- especially, in light of the ongoing procedural fight over subject matter jurisdiction in the Multnomah case. However, if the cases do proceed to the merits, it is worth noting that Oregon's negligence analysis diverges significantly from most states. See *Solberg v. Johnson*, 306 Or 484, 490-91 (1988) (relying on a foreseeability analysis rather than a duty analysis).

## 2. *Misrepresentations and deceptions*

States and local governments, including Multnomah County, have also

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<sup>2</sup> Cf. *Int'l Paper Co. v. Ouellette*, 479 US 481, 494 (1987) (determining that the federal Clean Water Act preempts state common law tort claims related to water pollution from out-of-state polluters).

pursued fraud and misrepresentation claims -- that the energy companies knew of the harms of fossil fuels by the 1960s, intentionally misrepresented the fuel's potential harm to the public, and discredited scientists suggesting the fuels were dangerous. *See, e.g.,* Complaint at 171-73, *Cnty. of Multnomah v. Exxon Mobil Corp.*, No 23CV25164 (Or Cir Ct June 22, 2023).

The energy companies have countered with several arguments. First, as a threshold matter, the energy companies assert that the Clean Air Act and federal common law preempt any fraud or misrepresentation claims based on the emission of GHGs. *See* Joint Memorandum in Support of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction at 22, *City & Cnty of Honolulu v. Sunoco LP*, No 1CCV-20-0000380 (Haw Cir Ct June 2, 2021). Second, energy companies also assert that the majority of the forum states lack specific jurisdiction to hear these misrepresentation claims -- specifically, that claims related to the promotion of fossil fuels are unrelated to the alleged harm (climatic changes resulting from third parties' combustion of that fuel). *See Id.* at 3; *see also Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 141 S Ct 1017 (2021) (requiring a plaintiff's case to "arise out of or relate to" the alleged injury). Ostensibly, only one court has ruled on the energy companies' arguments so far -- a Hawaiian trial court who denied the energy companies' motion to dismiss on both those theories. Defendants sought interlocutory review, and the Supreme Court of Hawaii heard oral argument on both arguments last month.

Even if those arguments are unavailing, the energy companies assert, third, that anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes bar plaintiff's

misrepresentation claims. *See* Special Motion to Strike and/or Dismiss the Complaint Pursuant to California's Anti-SLAPP Law at 9, *City & Cnty of Honolulu v. Sunoco LP*, No 1CCV-20-0000380 (Haw Cir Ct June 2, 2021). And if a particular state's anti-SLAPP statute does not bar the claim, the energy companies assert California's anti-SLAPP statute controls under the doctrine of *dépeçage* (severable choice of law). *Id.* Under California's anti-SLAPP statute, defendants effectively have qualified immunity from suits that arise from the furtherance of the defendant's right to petition the government or in connection with a public issue. *See DC Comics v. Pac. Pictures Corp.*, 706 F3d 1009, 1013 (9th Cir 2013) ("California's anti-SLAPP statute functions as an immunity from suit, and not merely as a defense against liability").<sup>3</sup>

Oregon's anti-SLAPP statute is modeled on California's. *Handy v. Lane Cnty.*, 360 Or 605, 618 (2016). However, because Oregon's legislators modified the statute, Oregon interprets its anti-SLAPP statute independently of California. *Id.* at 619.

Finally, energy companies assert that they are immune under the *Noerr-Pennington* doctrine. *See* Special Motion to Strike and/or Dismiss the Complaint Pursuant to California's Anti-SLAPP Law, *City & Cnty of Honolulu v. Sunoco LP*, No 1CCV-20-0000380 (Haw Cir Ct June 2, 2021). That doctrine immunizes defendants from liability from "a publicity campaign directed at the general public and seeking

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<sup>3</sup> Other courts have rejected anti-SLAPP statutes' applicability in other contexts. The Massachusetts Supreme Judicial Court held that its anti-SLAPP statute did not apply to Exxon's conduct related to investors based on the statutory language, Massachusetts's rules of construction, and the legislative history and purpose of its anti-SLAPP statute. *Massachusetts v. Exxon Mobil Corp.*, 489 Mass 724, 725 (2022).

government action" under the First Amendment's Petition Clause. *Manistee Town Ctr. v. City of Glendale*, 227 F3d 1090, 1091–92 (9th Cir 2000). No court has ruled on the energy companies' *Noerr-Pennington* argument yet.

### 3. *Consumer protection acts*

In some states, states and local governments have also alleged claims under their state's consumer protection acts. *See, e.g.*, Complaint at 187-90, *Platkins v. Exxon Mobil Corp.*, MER-L-001797-22 (NJ Super Ct Oct 10, 2022). Although no plaintiff in Oregon has alleged a similar claim, Oregon does have a comparable statute: The Oregon Unlawful Trade Practices Act (UTPA). ORS 646.605. The statute allows for both private and public enforcement. ORS 646.636; ORS 646.638.

### 4. *Securities and investor-related litigation*

At this time, few states have pursued securities fraud cases at the state level related to climate change. The most notable is *New York v. Exxon Mobil Corp.* which went to trial in 2019. No 452044, 2019 WL 6795771, at \*29-30 (NY Sup Ct 2019). New York challenged Exxon over its disclosures related to GHG emissions and claimed Exxon misled its investors about the risks posed by climate change. *Id.* The court determined that Exxon was not liable because the information was not materially misleading. *Id.*

A similar lawsuit is proceeding in Massachusetts alleging that Exxon's communications with investors and consumers related to climate change constituted unfair and deceptive practices. *Massachusetts v. Exxon Mobil Corp.*, 489 Mass 724, 725 (2022). The Massachusetts Supreme Judicial Court ruled in favor of the commonwealth allowing their attorney general to proceed with the action. No similar suit has been filed

in Oregon, but Oregon does have a securities fraud statute. ORS 59.135.<sup>4</sup>

Further, securities litigation related to climate change might also become more common as the SEC plans to issue new disclosure requirements that require disclosure of climate-related risks.<sup>5</sup>

### 5. *Suits by trade organizations*

Unlike the surge in suits brought by counties and states, few businesses and trade associations have sued the energy companies for their role in climate change. However, fisherman in California and Oregon filed suit in California Superior Court against several energy companies in 2018 for their role in heating the Pacific Ocean. The association alleged claims of public nuisance, failure to warn, design defects, and negligence arising from the harm to crustaceans caused by rising ocean temperatures and a toxic acid buildup in crustaceans caused by warmer waters that rendered the

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<sup>4</sup> It does not appear any shareholders in the United States -- outside of one "idiosyncratic" case -- have sued an energy company for their role in climate change. Emily Strauss, *Climate Change and Shareholder Lawsuits*, Duke L School Pub L & Legal Theory Series No 2022-41, 6 n 19 (2022). However, institutional investors recently brought a shareholder suit against Shell in England. The suit alleges Shell's board mismanaged climate risks, breached the company's law by failing to implement an energy transition strategy consistent with the 2015 Paris Agreement, and failed to comply with a Dutch court's order to reduce emissions by 45% by the end of the decade. Maria Antonia Tigre & Cynthia Hanawalt, *The Fiduciary Duty of Directors to Manage Climate Risk: An expansion of corporate liability through litigation?*, Sabin Ctr (Feb 15, 2023), <https://blogs.law.columbia.edu/climatechange/2023/02/15/the-fiduciary-duty-of-directors-to-manage-climate-risk-an-expansion-of-corporate-liability-through-litigation/>

<sup>5</sup> Virginia Milstead & Sophie M. Mancall-bitel, *Climate-related securities suits may increase with new SEC standards*, Reuters (Jan 31, 2022, 7:30 AM), <https://www.reuters.com/legal/legalindustry/climate-related-securities-suits-may-increase-with-new-sec-standards-2022-01-31/>

crustaceans unmarketable. Complaint at 76-88, *Pac. Coast Fed'n of Fishermen's Ass'ns Inc. v. Chevron Corp.*, CGC-18-571285 (Cal Super Ct Nov 18, 2018). Defendants removed the case to federal court based on several theories of federal question jurisdiction. Recently, the association filed a motion to remand to California Superior Court. Motion to Remand at 2, *Pac. Coast Fed'n of Fishermen's Ass'ns Inc. v. Chevron Corp.*, 3:18-cv-07477-VC (ND Cal July 18, 2023).

B: *Wildfires*

Climate change has exacerbated the number of wildfires in Oregon. Nationwide, the number of wildfires varies significantly year to year.<sup>6</sup> However, there has been a clear upward trend in Oregon. Between 1992–2001, fires burned on average 198,000 acres per year in Oregon. That increased to an average of 650,000 acres between 2012–2021.<sup>7</sup>

Victims of the fires have sued utility companies for the companies' alleged role in these fires. Unlike claims brought against other "Carbon Majors," claims related to wildfires do not allege that the utility companies caused climate change but rather that the utility companies failed to prepare for climate change and the increased risk of wildfires. A recent class-action suit against an Oregon utility company returned a \$90

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<sup>6</sup> Cong Rsch Servs, *Wildfire Statistics*, 2 (2023), <https://sgp.fas.org/crs/misc/IF10244.pdf>

<sup>7</sup> Zach Urness, *Oregon's 2020 wildfire season brought a new level of destruction. It could be just the beginning*, Statesman J (May 6, 2021, 5:32 PM), <https://www.statesmanjournal.com/story/news/2020/10/30/climate-change-oregon-wildfires-2020/6056170002/>

million verdict for the named plaintiffs in June.<sup>8</sup> The company is potentially liable for another \$11 billion to the entire class.<sup>9</sup> In that case, the plaintiffs alleged the utility company was negligent because it knew "its history of vegetation management violations, unsafe equipment and operations, and years of indifference" meant a storm would cause its equipment to ignite wildfires -- especially, in light of climate change. Second Amended Class Action Complaint at 63-74, *James v. PacifiCorp*, No 20CV33885 (Or Cir Ct 2023). Notably, the attorneys directly mentioned climate change during the trial.<sup>10</sup> Families of wildfire victims have also sued PacifiCorp for wrongful deaths.<sup>11</sup>

The government may also be exposed to liability. Following the recent Maui fires, one family filed a wrongful death action against the local utility companies along with the state of Hawaii and the county of Maui alleging that the Hawaiian officials

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<sup>8</sup> Ryan Haas, *Oregon jury finds electric utility PacifiCorp liable in devastating wildfires*, Nat'l Pub Radio (June 15, 2023, 5:04 AM), <https://www.npr.org/2023/06/15/1182377213/oregon-jury-finds-electric-utility-pacificorp-liable-in-devastating-wildfires>

<sup>9</sup> Joel Rosenblatt, *Berkshire Hathaway's PacifiCorp Loses Bid to Delay Trial Over Final Payout for Fires*, Yahoo! Fin (Sept 8, 2023 5:56 PM), <https://finance.yahoo.com/news/berkshire-hathaway-pacificorp-loses-bid-005658929.html>

<sup>10</sup> Peter Blumberg and Joel Rosenblatt, *Berkshire unit liable for millions in damages over Oregon fires*, Bloomberg (June 12, 2023, 6:03 PM), <https://www.bloomberg.com/news/articles/2023-06-12/berkshire-energy-unit-loses-trial-over-oregon-wildfires>

<sup>11</sup> Capi Lynn, *Families of 4 killed in Santiam Canyon wildfires file wrongful death lawsuits*, Statesman J (Sept 12, 2021, 9:35 AM), (<https://www.statesmanjournal.com/story/news/2021/09/12/oregon-families-cook-tofte-beachie-creek-wildfires-lawsuits-pacificorp-pacific-power-marion/8262721002/>)

failed to take action to prevent or mitigate the risk of fires after the 2018 wildfires in Maui.<sup>12</sup>

C: *Suits Brought Against Governments*

Limitations in the Oregon Tort Claim Act (OCTA) likely bar most tort claims against the government seeking monetary damages for the promotion or distribution of fossil fuels. *See* ORS 30.265(2) (OCTA is the "sole" right of action against public bodies and employees); *see also* ORS 30.265(6)(c) (granting public bodies immunity for discretionary decisions). Likewise, cases seeking to impose remedial plans or seeking to expand the public trust doctrine to regulate GHGs have been unsuccessful in most states and Oregon. Hence, litigation against the government will likely center around keeping carbon producing resources in the ground, preventing the approval of carbon producing facilities, challenging the allocation of resources like water, seeking monetary damages for takings, and challenging the states' regulations of GHGs and investment strategies.

1. *Land use*

Land use is one of the areas of the law most directly implicated by climate change. However, the impact is likely limited to specialized board members on the Land Use Board of Appeals (LUBA) as the circuit courts generally lack jurisdiction over land

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<sup>12</sup> Nadine El-Bawab, *Father files first-of-its-kind wrongful death lawsuit against Maui, Hawaii over wildfires*, ABC (Sept 6, 2023, 1:52 PM), <https://abcnews.go.com/US/father-files-kind-wrongful-death-lawsuit-maui-hawaii/story?id=102966429>

use decisions. *See* ORS 197.825(1) (granting LUBA exclusive jurisdiction over substantive land use decisions).

## 2. *Constitutional*

The legislature's and municipalities' efforts to regulate GHG emissions will likely implicate several limits on Oregon's constitutional powers. For example, a Washington-based oil refinery filed a lawsuit in state court alleging that Oregon's plans to control GHG emissions with a credit scheme violated equal protection, due process, and the Dormant Commerce Clause.<sup>13</sup> Although unlikely to reach a state trial court, it is worth noting that companies have also challenged land use decisions in LUBA and the Court of Appeals under the Dormant Commerce Clause. *Columbia Pac. Bldg. Trades Council v. City of Portland*, 289 Or App 739, 742 (2018).<sup>14</sup>

## 3. *Water rights*

Water rights are a specialized and nuanced area of the law -- but are among the most likely to appear in state court. Shifting precipitation patterns could generate significant litigation in Oregon. Irrigation and agricultural interests have already sued the state over its allocation decisions -- such as successfully contesting the state's decision to

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<sup>13</sup> Pete Danko, *HF Sinclair takes Oregon DEQ to court again in high-stakes climate program battle*, Portland Bus J (June 5, 2023), <https://www.bizjournals.com/portland/news/2023/06/05/hf-sinclair-judicial-review-oregon-deq.html>

<sup>14</sup> In federal court, Montana sued both Oregon and Washington under the Dormant Commerce Clause for Washington's decision to prevent access to their ports for shipments of coal and Oregon's decision to prohibit new fuel-export infrastructure in Portland.

release water stored in a reservoir to boost salmon populations.<sup>15</sup> Tribes have also successfully sued the state claiming its tribal treaty rights afforded them increased water allocations to sustain the tribes' fisheries.<sup>16</sup> Environmentalist groups have also challenged water allocation plans in Oregon as inadequate to protect certain endangered species of fish -- albeit in federal court.<sup>17</sup>

Oregon also has over 1100 dams. A prolonged decline in precipitation could affect the viability of a dam's power generation, water rights for the reservoir, and potentially leave dam operators unable to meet their contractual demands. Conversely, an increase in precipitation could cause dam failures, as happened in Michigan,<sup>18</sup> exposing both the state and private parties to liability.

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<sup>15</sup> George Plaven, *Klamath Irrigation District scores victory in water rights case*, The Bull (Sept 9, 2021), [https://www.bendbulletin.com/business/klamath-irrigation-district-scores-victory-in-water-rights-case/article\\_488bafc7-5516-50e2-99a1-9669ee582e70.html](https://www.bendbulletin.com/business/klamath-irrigation-district-scores-victory-in-water-rights-case/article_488bafc7-5516-50e2-99a1-9669ee582e70.html)

<sup>16</sup> Alex Schwartz, *Oregon tribe wins ruling on water rights but Klamath Basin irrigators challenge allocation*, Oregon Live (Mar 03, 2021, 8:58 AM), <https://www.oregonlive.com/environment/2021/03/oregon-tribe-wins-ruling-on-water-rights-but-klamath-basin-irrigators-challenge-allocation.html>

<sup>17</sup> Mateusz Perkowski, *Lawsuit may complicate boost in available Oregon dam water*, Cap Press (Mar 20, 2020), [https://www.capitalpress.com/state/oregon/lawsuit-may-complicate-boost-in-available-oregon-dam-water/article\\_74b011a2-6ac1-11ea-9763-4723846e2ae8.html](https://www.capitalpress.com/state/oregon/lawsuit-may-complicate-boost-in-available-oregon-dam-water/article_74b011a2-6ac1-11ea-9763-4723846e2ae8.html)

<sup>18</sup> Ed White, *Victims of Michigan dam collapse win key ruling in state lawsuits*, ABC 12 (Sept 10, 2023), [https://www.abc12.com/news/dam-recovery/victims-of-michigan-dam-collapse-win-key-ruling-in-state-lawsuits/article\\_37f8a1f3-1776-5948-8144-505fb9f7d05f.html](https://www.abc12.com/news/dam-recovery/victims-of-michigan-dam-collapse-win-key-ruling-in-state-lawsuits/article_37f8a1f3-1776-5948-8144-505fb9f7d05f.html)

#### 4. *Public trust*

Oregon has rejected suits seeking a declaration that the state has an obligation to protect the atmosphere as part of the public trust doctrine and to regulate GHGs. *Chernaik v. Brown*, 367 Or 143, 148 (2020). However, in Hawaii, a case arguing that the Hawaiian Department of Transportation violated Hawaii's public trust doctrine by promoting GHGs emissions survived a motion to dismiss and is proceeding to trial.<sup>19</sup>

The public trust doctrine is also likely still relevant to water rights, lakes, and coastal property -- especially, if shifting weather patterns cause bodies of water to shrink or expand. Recently, plaintiffs filed suit in Utah against the state for failing to ensure the adequate flow of water into the now-disappearing Great Salt Lake and to preserve it as part of the public trust.<sup>20</sup> California has long recognized a similar duty under its public trust doctrine. In 1983, the California Supreme Court forced the state to reconsider Los Angeles's water diversions from the Mono Basin to protect Mono Lake in light of the public trust doctrine. *Nat'l. Audubon Soc'y. v. Superior Court*, 33 Cal 3d 419, 452 (1983). Similarly, the California Court of Appeals recognized a duty under the

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<sup>19</sup> Press Release, Earthjustice, Judge Rules in Favor of Hawai'i Youth Plaintiffs in Climate Case *Navahine F. v. Hawai'i Department of Transportation*; Case Will Proceed to Trial (Apr 6, 2023), <https://earthjustice.org/press/2023/judge-rules-in-favor-of-hawaii-youth-plaintiffs-in-climate-case-navahine-f-v-hawaii-department-of-transportation-case-will-proceed-to-trial>

<sup>20</sup> Leia Larsen, *Groups sue Utah, trying to save Great Salt Lake with the public trust doctrine*, The Salt Lake Trib (Sept 6, 2023, 4:01 PM), <https://www.sltrib.com/news/environment/2023/09/06/groups-sue-utah-try-save-great/>

public trust doctrine to regulate the extractions of groundwater that affected the use of rivers. *Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal App 5th 844 (2018).

## 5. Takings

Although the state is likely immune from most climate-related tort claims, a plaintiff could seek "just compensation" under a takings claim. Generally, Eleventh Amendment immunity means a takings suit against a state or an arm of the state can only be brought in state court. *Jachetta v. United States*, 653 F3d 898, 909 (9th Cir 2011). Though, suits against counties and municipalities may potentially be brought in federal court. *Williams v. Utah Dept. of Corr.*, 928 F3d 1209, 1213 (10th Cir 2019).

Federal law recognizes three types of takings. First, a regulation that imposes a permanent physical occupation, no matter how minor. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 427 (1982). Second, a regulation that leaves property without any economically beneficial use. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1017 (1992). Third, a regulation that diminishes value -- which is determined by balancing the economic impact of the regulation, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Penn Cent. Transp. Co. v. New York City*, 438 US 104, 124 (1988).

Oregon's narrow interpretation of its takings clause may limit Oregon's court's ability to interpret these claims. Article I, section 18, of the Oregon Constitution recognizes takings based on physical occupation but there are no reported cases in which plaintiffs have successfully demonstrated that a regulation has denied them all

economically viable use under the Oregon Constitution. Patrick M. Ebbett, et al., *Oregon Constitution Law* § 15.7-2(c) (2d ed 2022). Likewise, the Oregon appellate courts have held that partial or temporary losses in value caused by a government regulation are insufficient to support a takings claim under the Oregon Constitution. *See Coast Range Conifers, LLC v. State*, 339 Or 136, 151 (2005).

Rising sea levels, floods, and accelerated coastal erosion will likely implicate the takings clause in several ways -- and state courts should expect a number of lawsuits. The most straightforward is if the government's mitigation efforts prevent the complete use of coastal property. *See Lucas*, 505 US at 1017 (determining that a total prohibition on coastal construction constituted a regulatory taking). However, the Massachusetts Supreme Judicial Court rejected a takings claim based on a zoning board's decision to ban construction on a coastal flood plain. *Gove v. Zoning Bd. of Appeals*, 444 Mass 754, 755 (2005) (determining that a zoning regulation that banned home construction in a coastal flood plain due to rising sea levels was not a taking under *Lucas* because the property retained some value or under *Penn Central* because petitioner could not demonstrate that they had any intention to sell or use the property).

Plaintiffs have also brought takings claims based on the government preventing a plaintiff from undertaking a mitigation effort or based on the unintended consequences of a government's mitigation effort. However, those claims largely have not been successful. The California Court of Appeals rejected a takings claim based on the state preventing a private party from constructing a seawall to forestall coastal erosion. *Lindstrom v. California Coastal Com.*, 40 Cal App 5th 73, 105 (2019) (requiring

landowners to waive any future rights to build a seawall structure was not a taking despite the likelihood that petitioner's home on a bluff would become uninhabitable in several decades due to accelerated coastal erosion and a likely eventual bluff failure). Coastal businesses have also pursued takings claims resulting from mitigation efforts that harm their business. *See Avenal v. Louisiana*, 886 So 2d 1085, 1088 (La 2004) (determining that a government project to preserve the Mississippi Delta's wetlands which unintentionally altered the salinity of the water causing petitioner's oysters to die off was not a taking).

State courts should also expect inverse condemnation cases, a subset of takings. In Michigan, a dam failed due to increased rainfall. The Michigan Court of Appeals determined that the government's encouragement of a private operator to keep the water level high in that dam was sufficient to support a *prima facie* inverse condemnation case against the government. *Krieger v. Dept. of Env't., Great Lakes, & Energy*, No 359895, 2023 WL 5808605, at \*4 (Mich Ct App Sept 7, 2023); *see also City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 427-28 (2002) (determining that the water control district's decision not to release water in an overfilled reservoir that eventually caused flooding and damages in a nearby city was sufficient to support the city's inverse condemnation claim under the Oregon Constitution).

#### 6. *Challenges to state retirement systems*

Government retirement systems and pension funds, such as Oregon's Public Employees Retirement System, are facing pressure from activists and legislators to divest

themselves of companies involved in fossil fuels.<sup>21</sup> As more government investment systems and private systems divest themselves from fossil fuels, conservative groups have challenged the decisions. In New York City, several public employees and a nonprofit organization filed a suit against the city's public employee retirement systems alleging that the city breached its fiduciary duties by divesting from companies involved in fossil fuel extraction.<sup>22</sup> Employees have also sued private retirement funds under the same theory.<sup>23</sup>

### 7. *Suits seeking remedial plans*

State courts have consistently rejected declaratory and injunctive relief seeking remedial plans to reduce GHG emissions under the political question doctrine "given the scale and complexity of the climate challenge." *Aji P. v. Washington*, 16 Wash App 2d 177, 191 (2021); *Sagoonick v. Alaska*, 503 P3d 777 (Alaska 2022). Even the court in *Held* granted Montana's motion to dismiss on that issue. Order on Motion to Dismiss at 21, *Held v. Montana*, No CDV-2020-307 (Mont Dist Ct 2023).

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<sup>21</sup> Alex Baumhardt, *Lawmakers, environmentalists want state pension fund divested of fossil fuels*, Oregon Cap Chron (Feb 16, 2023, 4:33 PM), <https://oregoncapitalchronicle.com/2023/02/16/lawmakers-environmentalists-want-state-pension-fund-divested-of-fossil-fuels/>

<sup>22</sup> Sajjel Kishan & Martin Z. Braun, *3 New York City pension funds are being sued for divesting from fossil fuels as Republican politicians take aim at anti-ESG investing*, Fortune (May 12, 2023, 1:36 PM), <https://fortune.com/2023/05/12/new-york-pension-fund-lawsuit-anti-esg/>

<sup>23</sup> Austin R. Ramsey, *American Airlines 401(k) Suit Over ESG Following Uncharted Path*, Bloomberg (June 6, 2023, 12:10 PM), <https://news.bloomberglaw.com/daily-labor-report/american-airlines-401k-suit-over-esg-following-uncharted-path>

D: *Contractual Claims*

Force majeure clauses can often excuse parties of their contractual obligations in cases of extreme weather or other "acts of god" -- and as a result, are among the most likely aspects of contract law to be implicated by climate change. Increasingly frequent extreme and unusual weather events could complicate many contracts and generate significant litigation. *See, e.g., J.P. Morgan Ventures Energy Corp. v. Miami Wind I, LLC*, No 652094, 2022 WL 17957452, at \*6 (NY Sup Ct 2022) (denying plaintiff's, an energy trading company's, motion for summary judgment on plaintiff's breach of contract claim against a windfarm relating to the sale of electricity because a winter storm in Texas froze defendant's wind turbines potentially triggering their contract's force majeure provisions). Long term shifts in weather patterns, such as a decline in precipitation or drought, could also generate litigation in the agricultural sector. *See, e.g., Paymaster Oil Mill Co. v. Mitchell*, 319 So 2d 652, 658 (Miss 1975) (determining that drought conditions absolved defendant, a farmer, of their contractual obligations to sell their crops under Mississippi's force majeure statute).

Legal academics have also speculated that aggressive decarbonization efforts could by itself trigger force majeure clauses. Anatole Boute, *Environmental Force Majeure: Relief from Fossil Energy Contracts in the Decarbonisation Era*, 33 J Envtl L 339, 339-40 (2021).

E: *Impact on The Criminal Justice System and Family Law*

Although climate change's impact on criminal law and family law is not as direct, academics have noted several trends. Following climatic disasters, crimes such as

looting, sexual assault, and child abuse rise. Laurie L. Levenson, *Climate Change and The Criminal Justice System*, 51 *Env'tl L* 333, 347-53 (detailing such trends following hurricanes). State courts should expect an accompanying rise in criminal prosecutions related to those crimes, ODHS interventions in child abuse cases, and other similar related claims as climate disasters such as wildfires or floods become more common in Oregon.

Extreme weather events like heat domes or disasters like wildfires could complicate criminal proceedings. Courts will likely need to determine whether ordinary procedural rules apply during a disaster. *Id.* at 351. Courts may be forced to address where to house criminals in disasters or extreme weather events. *Id.* at 351. Extreme heat in prisons is also an on-going issue. However, prisoners tend to litigate those claims in federal court under 42 USC section 1983. *See, e.g., Foust v. Faust*, No 2:23-CV-00168-MK, 2023 WL 2499594, at \*1 (D Or Mar 13, 2023) (denying in part Superintendent's motion to dismiss plaintiff's, a prisoner's, section 1983 claim alleging that two correctional officers ignored her medical emergency onset by extreme heat during the 2021 heat dome in Oregon).

Fraud also frequently accompanies disaster relief and carries both civil and criminal penalties. *Id.* at 354-357. In California, the state prosecuted at least one case of criminal fraud by a contractor in the Tubbs wildfire recovery efforts.<sup>24</sup> Fraud is also

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<sup>24</sup> Colin Atagi & Austin Murphy, *Tulare contractors plead no contest in major Tubbs Fire fraud case*, *Visalia Times Delta* (May 3, 2022 11:08 AM),

widespread in disaster relief in Oregon. An estimated 41% of FEMA applications following the 2020 fires in Oregon were fraudulent.<sup>25</sup>

F: *Insurance Litigation*

Insurance companies have acted as both plaintiffs and defendants in climate litigation. At least one insurance company, Farmers Insurance, sued a water reclamation district and other municipalities in Illinois alleging that the municipalities' failures to implement reasonable stormwater management practices and capacity in light of climate change resulted in increased payouts to the plaintiffs' insureds after heavy rain.<sup>26</sup> The case ultimately settled.

Although the litigation against energy companies is slow moving, it is expensive and has spawned additional insurance litigation. In Hawaii, one of the defendants in the *Sunoco* case sued its insurer for failing to cover its nearly one million dollars in legal fees.<sup>27</sup> Similarly, an insurer sought a declaratory judgment that it was not

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<https://www.visaliatimesdelta.com/story/news/2022/05/03/california-wildfire-scam-tulare-county-contractors-chiaramonte-convicted-in-major-tubbs-fire-fraud/9630906002/>

<sup>25</sup> Hannah R. Lambert, *'Makes me sick': FEMA reports high level of wildfire fraud*, KOIN (Feb 23, 2021, 10:22 PM), <https://www.koin.com/news/wildfires/makes-me-sick-fema-reports-high-level-of-wildfire-fraud/>

<sup>26</sup> Aimee Picchi, *Not ready for climate change? Your town may get sued*, CBS (May 19, 2014, 1:05 PM), <https://www.cbsnews.com/news/not-ready-for-climate-change-your-town-may-get-sued/>

<sup>27</sup> Isabella Kaminski, *US fossil fuel firm sues insurer for refusing to cover climate lawsuit*, The Guardian (Aug 30, 2022, 7:33), <https://www.theguardian.com/environment/2022/aug/30/us-fossil-fuel-firm-aloha-petroleum-sues-insurer-aig-for-refusing-to-cover-climate-lawsuit>

obligated to defend or indemnify an energy company in a lawsuit alleging the energy company failed to prepare a petroleum terminal for climate change impacts. Complaint at 15, *Everest Premier Ins. Co. v. Gulf Oil LP*, No 22-1291 (Mass Super Ct 2022).

Insurance companies have also sued utility companies to recoup the cost of claims paid out to homes and businesses following a Colorado wildfire.<sup>28</sup> However, the vast majority of suits related to insurance companies will be lawsuits from typical insurance claims tied to floods,<sup>29</sup> wildfires, and other climate-related disasters. In Florida, the number of lawsuits filed against insurance companies has risen to over 100,000 per year as the number of climate disasters increase -- prompting several insurers to withdraw from the state.<sup>30</sup>

G: *Property Valuation Suits*

Property owners have filed suits alleging their property is misvalued in light of climate change. In Connecticut, several property owners successfully challenged a city's property tax valuation based on the increased flood risk and rising flood insurance

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<sup>28</sup> Colleen Slevin, *Insurance companies sue energy corporation after it was blamed for helping start Colorado wildfire*, Associated Press (July 11, 2023, 12:10 PM), <https://apnews.com/article/colorado-wildfire-xcel-energy-lawsuit-insurance-34cf1af48f88ea0e3c72c687f3f6311f>

<sup>29</sup> Almost every community in Oregon that is currently at a high risk of flooding takes part in the federal government's National Flood Insurance Program (NFIP) -- NFIP claims are litigated in federal court. However, shifting flood risks may implicate state insurers if the NFIP's covered areas grow out of date due to climate change.

<sup>30</sup> Emily Flitter, *Insurer's Retreat in Florida Signals Crisis With No Easy Fix*, New York Times (June 14, 2023), <https://www.nytimes.com/2023/07/14/business/farmers-homeowners-insurance-florida.html>

costs following Hurricane Sandy and Irene. *Lanier v. City of Stamford*, No CV146026505, 2016 WL 3392154, at \*13-14 (Conn Super Ct June 1, 2016).

That will likely be a growing trend. Estimates have found that residential properties exposed to just flood risks are currently overvalued by \$121–237 billion.<sup>31</sup> Other estimates place the overvaluation at \$520 billion.<sup>32</sup> Although it is largely speculative at this time, the ability to challenge property valuations may have widespread impacts on cases such as dissolutions, inheritances, and taxes to name a few.

### CONCLUSION

A changing climate will likely permeate every area of the law. In practical terms, state trial courts should expect a surge of water rights, takings, wildfire, fraud, insurance, and contractual suits onset by rising sea levels, floods, wildfires, shifting weather patterns, and extreme weather events. Longer term, different plaintiffs may file public trust, shareholder, and property valuations suits. Suits against energy companies brought by states and trade organizations will likely be infrequent and will be mired in procedural fights for the near future -- but may become more common if some governments eventually prevail.

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<sup>31</sup> Jesse D. Gourevitch, et al., *Unpriced climate risk and the potential consequences of overvaluation in US housing markets*, *Nature*, <https://www.nature.com/articles/s41558-023-01594-8>

<sup>32</sup> Jeff Masters, *Bubble trouble: Climate change is creating a huge and growing U.S. real estate bubble*, Yale Climate Connection (Apr 10, 2023), <https://yaleclimateconnections.org/2023/04/bubble-trouble-climate-change-is-creating-a-huge-and-growing-u-s-real-estate-bubble/>