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Who Owns the Air?

Clean Air Act Implementation as a Negotiation of Common Property Rights

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Negotiation of “use claims” in the establishment or maintenance of common property rights has recently been the subject of much scholarly attention (Ostrom 1990; Rose, 1994; Fortmann, 1995; Peluso, 1992, 1996). As these studies have noted, the final product of these negotiations – a common property rights “regime” -- depends heavily on the political and institutional context in which they take place. A number of scholars have examined the role of institutions in negotiating property rights regimes for water, land, endangered species and other natural resources (Ostrom, 1990). Other studies, taking a more historical approach, have examined how political and economic inequalities have led to the development of property rights regimes that further promote these inequities (Vandergeest, 1995; Cronon, 1984). In many cases, these historical studies tell the story of how commons were enclosed for private interests, from the first enclosure movements in England in the 15th century to the State or private takings of indigenous lands today. In a contemporary context, many of these studies describe how traditional common property regimes are being challenged by powerful external forces, such as the State and multinationals (Hecht and Cockburn, 1989). The nature of that power is clarified by intensive studies of how property rights claims are made, negotiated, resolved and enforced.

The air is commonly mentioned in economics textbooks as a classic “public good” indivisible in terms of its use and therefore non-appropriable by any private party. The relationship between public goods and common goods, while not identical, can be quite close under particular institutional conditions such as common law (Ostrom, 1990). As one commentator describes it: “Once provided by community agreement, public goods are like a commons, a shared resource that can be maintained or abused. In that sense, the problem of public nuisance [like pollution] is partly a problem of the commons and how it is managed so as to maximize collective wealth” (Yandle, 1992: 530). As this study will show, states treat the air

as common property, but most do not specifically claim ownership. In contrast, states do claim water and coastal resources as under their ownership in trust for the public.

Even newer state constitutions do not generally include air resources under the aegis of common property. However, as the following case studies will show, state implementation of the Clean Air Act Amendments of 1990 (CAAA) can best be understood as a creation of common property boundaries and the negotiation of use “rights” by various user groups within these boundaries. By looking at CAAA state implementation in this light, the politics of air regulation becomes clearer. This study will therefore describe in detail a history of negotiations over rights of air use in one case study of CAAA implementation: the Emission Reduction Credit Program under New Source Review. In this case, potential users of air property have negotiated rights of use through processes set up by the CAAA. Different user interests have made property rights “claims” in the political arena and state institutions have had to respond to those claims with new property rights regimes.

The nature of these property rights regimes share many characteristics with other natural resource property rights struggle in this case mirrors struggles that are more commonly analyzed under a common property framework. Looking closely at the negotiation of air use as a struggle over property rights -- and air use “management” as an institutional attempt to resolve those struggles -- can shed new light on the politics of air pollution control policy.

WHO OWNS THE AIR?

Before looking at specific issues of use rights in air pollution control policy, it is necessary to review the legal background related to air regulation and property regimes. The gray area between environmental policy and property rights derives from two different, and

somewhat contra-interpretable, parts of the Constitution. The first is Fifth Amendment in the Bill of Rights, which provides that “no person shall, among other things, be deprived of certain rights. . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” This section of the Bill of Rights is commonly known as the “Takings Clause.” However, it also is the source of authority for the law of “eminent domain” which holds that states may take property, with compensation, if taking that property promotes the public interest. No court has attempted to put strict legal boundaries on the definition of “the public interest” and courts have generally held that environmental regulation is part of the public interest.

However, yet another set of evolving law does in fact deal with the idea of states holding property rights “in trust” for the public. Most states, in their constitutions, originally adopted forms of Roman Justinian Law. Justinian law held that “By the law of nature these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea.” Most U.S. state law retains for the public only the shoreline and other waters, and with varying legal strengths. The trust nature of state waters is, perhaps more importantly, upheld in the Commerce Clause of the Constitution, with a long-standing body of law that upholds the State’s interest in navigable waters as part of its authority to regulate interstate commerce. Therefore, there is a wide body of state law in most states which holds that waters and coastlines within State boundaries are held by states in public trust. However, a cursory review of state constitutions indicates that most do not include air specifically as held in trust by states. This makes sense, in that air does not contain itself to state boundaries but moves around with the weather, a fact that will become more important as we consider air pollution control regulation. However, a survey of US state court cases to 1986 found that 29 state courts had expanded the

Public Trust Doctrine beyond navigable waters to include trust applicability to areas such as non-navigable waters and non-aquatic resources (Lawler and Parle, 1989:142).

Neither the Fifth Amendment nor any other part of the US Constitution specifically gives property ownership to common good resources. States hold this right through a separate set of legal precedents that do not specifically deal with the state ownership of public good resources. The first of these is common law, which holds that state judiciaries are enabled to deprive property owners of certain “rights” if the use of these rights harm others, commonly known as “nuisance law.” The second is state police power, which gives states the right to regulate the use of private property if those uses are contrary to the public interest. This right is protected under the Fourteenth Amendment to the Constitution.

On the other hand, common property law also relies heavily on the principle known as “first possession.” Developed from precedent cases resolving disputes over the possession of wild animals in the case of hunting (in which more than one hunter “put labor into” tracking down an animal, but only one killed it and took it) the courts have traditionally decided in favor of the individual who held the resource. The idea of first possession is important in environmental law, because it creates a rights claim to those who have been historically using these resources, i.e. the polluters themselves. From a first possession point of view, air resources are already private property, owned by those who have used them. From this perspective, any attempt to remove that right is thereby considered a “taking” under the Fifth Amendment.

Notably, EPA has not tried to defend its authority to restrict the use of air resources based on public trust notions. EPA did not, and has never, cited the public trust doctrine in its defense of regulatory actions over air as it has for water. EPA is thereby following the legal tradition of American adoption of Justinian Law (which restricted public trust resources to water), and the

Commerce Clause, that give governments dominion over waters but which does not mention air. Yet, is there really any difference, besides the quirk of history?

One answer is Carol Rose's discussion of the relationship between governmental claims over property based on references to its police power and those based on references to the public trust doctrine. Her point, simply, is that they are mostly the same. "Nineteenth century jurists had a propensity to slide easily between police power and public property terminology" she states, making a close connection between "publicly created rents and public rights." She notes that the classic police power case, *Munn vs. Illinois* relied greatly on water rights law, with the result that "[p]olice power regulation thus mirrored public property doctrine" (1994: 145). Both police power and public property "concerned a kind of 'easement' over things otherwise thought private – an easement to which the public is entitled and that cannot be bargained away to private individuals by governments or anyone else" (1994: 145). The publicness of the property had to do with the fact that "value in a sense is created by the very publicness of the practices in question" (1994; 145) such as is created by the easement of property to create railroad and electric systems.

Yet, EPA has never cited public trust doctrine in its regulation of air resources. As the recent Supreme Court decision in *American Truckers' Assn. Vs. EPA* brings to the fore, EPA is not the institution with the right to claim these powers. Truckers declared EPA's new stricter air standards to be unconstitutional. The decision relies on the principle of "non-delegation" upheld in legal precedent, that state agencies cannot be delegated the powers of Congress. In this case, it is Congress as a legislative body that is responsible for determining the public safety; it cannot delegate to EPA the determination of safety and harm, and therefore the air standards necessary

to protect the public. In other words, the public trust is held within the federal and state legislative bodies and their constitutions; it is not held by state agencies.

Therefore, while, as Rose states, there is a strong relationship between police power and the public trust, these two institutions are located in a different “place” in American government. Even Congress is not the primary location for holding air property. Clean Air Act begins by declaring, “air pollution control at its source is the primary responsibility of States and local governments” (CAA Section 101 (a) (3)). Therefore, like water’s explicit public trust, the control over other resources within their boundaries is the responsibility of states, whether or not their state constitutions explicitly hold these resources in trust for the public. The history of the Clean Air Acts themselves are a story of how the boundaries between states and Congress were eventually negotiated, giving Congress powers due to “rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States” (CAA Section 101 (a) (1)). Note that the interstate jurisdiction is based *not* on the fact that air pollution crosses state borders, but that the *sources* of air pollution extend over state borders. Even in their interstate jurisdictional claims, Congress is not taking possession of what are deemed to be state resources.

In contrast, the “declaration of goals” which begins the Clean Water Act speaks specifically of “The Nation’s Waters” and repeatedly declares improved water quality to be a “national goal.” This is despite the fact that states are the real holder of waters in the public trust. Federal law bases its authority on the interstate transport of waters. Yet, this is to some extent true also for air. But, because states do not generally claim the ownership of air in the public trust, it is more difficult for federal law to claim a national trust as well. In its imposition of air quality standards and national controls, such as technology, to meet those standards, it

refers only to its police powers to protect against emissions that scientific evidence shows to produce “an adverse effect of public health and welfare” (CAA Section 108 (2) (a) (B)). No claims for air as a national resource are made.

Interestingly, the major sanction which the federal government threatens to impose on states for not meeting clean air regulatory requirements is the withholding of federal highway monies, a sanction over which it has undeniable authority.

Therefore, for both public trust and public interest/police power reasons, states act as if they have the legally constituted authority to hold the air in public trust, in ways similar to the doctrine of public trust ownership for water. As a result, despite weather flows, the air has become treated as state-managed “common property” within state boundaries.

How does the state become the manager of air resources without claiming absolute ownership? As Carol Rose has argued, property is “a kind of assertion or story, told within a culture that shapes the story’s content and meaning. That is, the would-be ‘possessor’ has to send a message that others in the culture understand and that they find persuasive as grounds for the claim asserted” (1994: 25). Yet, recent studies of forestry and other common property resources show that these stories are sometimes contested, and that under some circumstances, struggles over resources become conflicting messages, or stories, about various groups’ rights to use (Peluso, 1992; Vandergeest, 1995; Fortman, 1992). As the following case studies will show, the story of clean air regulation has been an attempt to bound the commons to a permitted set of users, to allocate the use of this bounded set of resources among various claims-makers, and to claim ultimate governmental rights over this resource.

Air regulations treat industrial and other “stationary” sources as common property users – through their emissions into the air -- and have regulated them in ways that attempt to prevent

these sources from creating a “tragedy of the commons” through overuse. Areas which have illegal amounts of air pollution are switched into a non-compliance mode that makes air into a common property resource with increasingly restrictive boundaries. Much like the ideal management of fisheries, the Clean Air Act Amendments of 1990 (CAAA) set a maximum amount of air that stationary sources can use (a “budget”) in areas that are not “in attainment.” This budget was capped first at a state’s 1990 emissions, and then has been reduced over time according to various regulatory measures, as chosen by states. Included in this are the emissions from “mobile sources” (cars and other forms of transport), which together form the major air use activities which the state manages. In effect, the CAAA sets the common property boundaries at various steps down from 1990 emissions (% reductions in X years), and then leaves the state to negotiate with various air users exactly how much each user group will gain rights to use. The story of the struggles to implement state laws mandated by the CAAA can be therefore seen as struggles over who will use the state’s air commons, and how much.

The CAAA sets some initial boundaries on who can use the air commons. Primarily, the CAAA mandates EPA to determine what technologies stationary and mobile sources must be required to use in order to be allowed into the commons. Sources that do not use these technologies are denied the right to emit into the air, either through denial of a pollution control permit or through the denial of a car registration.

EPA does not directly create the boundaries of air use. The agency sets the standards at which it deems air to be “safe” and then gives states the authority to create regulatory regimes which include calculating the amount of pollution sources can emit into the air while still meeting these standards. The states then, through modelling, create budgets of emissions which they predict will enable the state to meet air standards.

However, the CAAA also allows states a great deal of flexibility in determining who will use their air resources and how. State regulatory processes thereby become arenas in which various stakeholders in the use of this resource make claims over their rights of use. State regulations are therefore use rights regimes that are a negotiated product of this claims-making process. As the following case study will show, it is the very space created by the ambiguities in property law regarding air resources which creates the “space” for various rights claims over air use.

CASE STUDY: CONTESTING ERCs IN NY STATE

One air regulatory arena which has dealt specifically with the issue of air property rights is pollution control trading. There are a number of pollution control trading programs in Clean Air Act law and regulation. The most developed of these is the sulfur allowance trading program created to provide a market-based solution to acid rain problems.¹ California’s Reclaim program is the most comprehensive, enabling sources to comply with regulations by trading and covering both precursors to smog: the nitrates of oxygen (NO_x) and the volatile organic compounds (VOCs). The newest is the Open Market Trading Rule, which allows sources to trade temporary reductions from one year to the next.

This case study involves another trading program, the creation and trading of Emission Reduction Credits, also known as emission “offsets.” The offset program is part of the Clean Air Act known as “New Source Review,” the part of the program that considers the permitting of new larger polluting facilities in a state. The offset program was created to deal with the creation of a “cap” on facility emissions in areas not in compliance with air quality standards for smog, or “ground-level ozone.” Smog is the product of the combination, on hot days, of two ozone

“precursors”: the nitrates of oxygen (NO_x) and the volatile organic compounds (VOCs). CAA regulations put a cap on the emissions of these pollutants from “stationary sources” basically industrial facilities and power plants. The cap on stationary source emissions, while only numerically managed starting in 1990, was set in theory with the creation of the emission offsets regulations of New Source Review in the 1970s. In theory, each new large stationary source was required to find an “offset” – an equivalent reduction in the amount of emissions the source would add to the atmosphere from an existing source.

Exactly how new large facilities seeking to site in states with non-attainment areas would go about finding these offsets was not spelled out for many years. Many states complained that these requirements posed unworkable siting requirements, thereby reducing economic development in non-attainment areas, which were often urban areas in need of new employment. In response, the Clean Air Act Amendments of 1990 (CAAA) called for states to set up certification programs for Emission Reduction Credits which would be legally acceptable to use as offsets to get new operating permits.

The history of the creation, public review and implementation of this program in New York State is an example of the negotiation on common property “rights” in air at work. Citing the CAAA language on sulfur allowances, many states declared that emission reduction credits were not a private property right but, as with allowances, “a limited authorization to emit [sulfur dioxide]” (42 U.S.C. 7651b). In other words, neither federal nor state law declares air use to be a specific property of the state yet they both declare that air use is not private property. As a related proposed rule on another form of air trading noted, “Congress included this requirement [the limited authorization to emit for sulfur dioxide] to ensure that allowance holders understood that they were barred from claiming a government taking under the 5th Amendment of the U.S.

¹ Note recent conclusions that this program not working.

Constitution. Like the acid rain SO₂ allowances, DER's [another type of air credit trading described below] would not be property, but would be limited authorizations to emit the regulated pollutant" (proposed OMTR 8/3/95 pg 33).

The extent to which the state could "limit authorizations to emit," however, was not infinite, as the history of Emission Reduction Credit policy in New York State will illustrate. The first proposal for a revised Emission Reduction Credit program was filed for public comment in September, 1992.² This proposal was based on an expansive idea of the nature of state control over Emission Reduction Credits that would be created under this program, including:

1. The retention by the State of 10% of all credits created.
2. The retention of all credits from sources creating reductions simply by shutting down the facility.
3. The reversion of credits not used after three years to the State.

The state proposed using a portion of these credits to distribute itself to certain categories of economically beneficial or disadvantaged sources. The State also reserved the right to use credits for meeting CAAA attainment requirements, if necessary.

In a memo to the Governor's Office environmental staff, DEC Commissioner Thomas Jorling admitted that "[t]aking this position has certain legal and political risks. My position is based on the legal argument that offsets are permissions conferred by the State for a limited period of time and subject to certain restrictions, not a property right to pollute." However, he takes the counter-argument seriously, that "CAAA offsets are property rights, and that any

² Public Hearing Proposal, November/December 1992, "Repeal 6 NYCRR Part 231 and Adopt New 6 NYCRR Part 231 "New Source Review in Nonattainment Areas and Ozone Transport Regions."

restrictions we place on them will be considered a taking for which the owner must be compensated. Courts have not ruled specifically on this issue, and EPA has waffled on it.”³

The response of the Business Council of New York State – representing the majority of potential ERC creators – was to “strongly oppose any state taking of emission offsets generated by the private sector.”⁴ It is important to note that the short letter used the word “taking” three times. Although the Business Council did not openly claim ownership of emissions reduction credits, the repeated reference to the idea of “takings” was a strategic threat to bring formal questioning of property issues into the public realm if the state proposal went forth with the retention and reversion provisions listed above.

The Business Council claim that retention of credits was a “takings” was based in the property argument based on first possession. The very fact that existing facilities were “grandfathered in” to the Emission Reduction Credit program reflects an acceptance of the first possession claim. When the program started, facilities did not start at square one and have to find credits to run their facilities. Facilities with permits were given the potential to create credits based on the amount of pollution they emitted. The polluters, in other words, were given the opportunity to create another valuable asset simply because of their history of polluting. Environmentalists, in response, have critiqued the program as giving “a license to pollute.”

Not only have environmentalists found this “first possession” aspect of Emission Reduction Credits hard to swallow. Economists have argued that the grandfathering of existing facilities into the program is economically inefficient. As Hahn and Noll state:

³ Memo from Thomas Jorling, DEC Commissioner, to Joseph Martens, New York State Governor’s Office, August 21, 1992, pg. 3.

⁴ Letter from Business Council to Thomas Jorling, Commissioner, Department of Environmental Conservation, April 21, 1993

“The current approach, which uses existing standards as the baseline from which trades can be made, is politically attractive because it grandfathers the wealth position of current permit holders. Unfortunately, simply to grandfather permits and to let polluters arrange trades is not the most efficient way to organize a market, because (1) it requires bilateral negotiations; (2) it does not incorporate a mechanism whereby transaction terms become matters of public record . . . (3) it can cause severe market structure problems: (1983: 74).”

At the same time as the Business Council was stating its objections to DEC, the New York State Senate introduced a bill that would have created property rights to pollute the air and would have prohibited DEC from “confiscating” emission reduction credits.⁵ EPA responded forcefully in a letter to Commissioner Thomas Jorling, with a formal legal analysis of formal state rights over regulating air use.⁶ In this letter, Acting Assistant Administrator Michael Shapiro expressed “strong opposition” to this bill as “inconsistent with the legal status traditionally accorded to air pollution.” He argued that this body of law has established that air pollution is “not a property right” and that governments had the right to “abate it as a nuisance without compensation.” Shapiro defended this ground based on “the State’s police power to protect the health and safety of its citizens” as well as “common law in interstate pollution disputes to hold that air and other pollution may be abated as a nuisance” (pg. 2). He also cites a decision that held that rights created by governmental regulatory schemes were not property. While this letter formally addresses the property rights issue, EPA begs the question of air as community property under public trust by addressing only the question of whether emission reduction credits – air pollution rights specifically created by sources – are property.

Yet, this does not avoid the prickly problem of air credits as property. On the one hand, emission reduction credits fit the Lockean notion of property upon which Western notions of property are based (Rose, 1994). A source creates an emission reduction credit by investing in

⁵ S-4720 – Skelos – “Prohibition of State Retention of Air Emissions Offsets.”

equipment that goes beyond federal technology standards, (or by shutting down a source of emissions, when allowable). This action very much mirrors Locke's idea of property as that which you add labor to. Unlike the air a source pollutes, a source is creating clean air by overcontrolling emissions. There is no labor added to air polluted, while air cleaned up involves the addition of labor (and capital). There is a strong Lockean argument, therefore, for the idea that cleaned air should be property.

However, the notion of public trust entails, as noted earlier, "a kind of 'easement' over things otherwise thought private – an easement to which the public is entitled and that cannot be bargained away to private individuals by governments or anyone else" (Rose, 1994: 145). This inalienability of resources in the public trust makes any kind of air trading program questionable; while states can authorize sources to emit, can states allow the use of public trust resources to be sold, even if not declared official "property?"

Of course, industries like the former argument about our Lockean property heritage, while environmentalists tend more toward the strong notion of public trust. But what does "public trust" mean? Does it include the creation of policies based on some notion of allocating public trust resources to private holders, for the sake of economic efficiency?⁷ This somewhat contradictory heritage is part of what gives stakeholders "room" to contest air use rights. The state often finds itself in the middle.

The New York State controversy over the provision of credits for economic development illustrates the contradictory position of state officials in this regard. The outcome of the struggle described above gave emission sources, which include both public sources like public hospitals and prisons as well as industrial facilities, complete access to all the potential credits. The state

⁶ Letter from EPA to Thomas Jorling, Jun 22, 1993

neither retained percentages of credits for economic development or for meeting regulatory standards, nor did they revert credits to state ownership after three years.

Yet, this emission offset requirement has been criticized as a “no growth” policy for industrial states with large, urban unemployed populations. Northeastern states concerned about loss of employment and their inability to compete with Southern and Western for new – and cleaner -- industrial facilities were concerned that the offset requirements were just one more bullet competing states could use to out-compete them in the race for new industrial investment.⁸ State contradictory responsibilities for both clean air and a vibrant economy, especially for employment of populations not skilled to enter the high-wage service industry, made state control over a certain proportion of credits extremely attractive. In addition, in the transition period of several years, when facilities with the potential for creating credits were still in start-up mode, and the potential for hoarding credits was high, the non-availability of credits, even with a state-run bank, could severely impede industrial development.⁹

As a result, New York State economic development officials, once they found themselves without credits available from state retention, scrambled to create credits through certification of emission reductions caused by shutdown of state facilities. Also, during the retention struggle, the Executive moved from a Democrat, Mario Cuomo, to a Republican, George Pataki, a candidate who ran on a promise to deal with the State’s foundering industrial economy.

⁷ The rationale for the creation of pollution trading systems has been economists’ claims that more pollution would be reduced for less money.

⁸ Such opinions were expressed in the Letter from Jorling to Governor’s Office (ibid); Memo Air Management Advisory Committee, Stationary Source Subcommittee to Craig Wilson, April 22, 1993; Business Council to Thomas Jorling (ibid); Thomas Jorling to the Air Management Advisory Committee, Feb. 2, 1993; Department of Economic Development: “Comments of the New York State Department of Economic Development on Proposed 6 NYCRR Part 231 ‘New Source Review in Nonattainment Areas and Ozone Transport Regions’”, submitted April 22, 1994. However, earlier versions of New Source Performance Standard policy were criticized as being favorable to Northeastern and Midwestern states who were “trying to slow the growth of the Sunbelt states” (Hahn and Noll, 1983).

⁹ See, for example, Wald, Matthew, NYT 1/25/93 “Risk-Shy Utilities Avoid Trading Emission Credits”;

Under Pataki credits created from reduction as state facilities were offered, for free, to a glass manufacturer, Guardian Glass, as part of an package of incentives to attract the company to site a facility in the western part of the state. “We try to make it easier for manufacturers to move into New York” a spokesperson for the Department of Economic Development explained, “It was a unique and innovative idea” (in Hernandez, NYT, 5/19/97). State officials from the Department of Environmental Conservation agreed that this was a legitimate use of state credits for state purposes. “We’re reducing emissions from the state’s own facilities at the same time that we’re allowing economic growth and job creation to occur” a spokesperson from the Department of Environmental Conservation explained (in Hernandez, NYT, 5/19/97).

Environmentalists did not agree. “It’s disturbing that the state would turn around and give away pollution credits that it has accumulated by reducing its own pollution emissions” said a spokesperson for the state’s major environmental coalition. “The state should be retiring them for the public health, not giving them to business” (in Hernandez, NYT, 5/19/97). The environmentalists challenged the movement of public credits to the private sector on the grounds of the nature of public trust. Rose (1994) has noted that the issue of the public trust is in fact ambiguous: does it mean the trust as managed by government officials, supposedly on behalf of public welfare? Or, is there another kind of public trust, which belong to the people themselves, and which the people defend, sometimes against the decisions of public officials? Once again, it is the ambiguity in which US institutions define the ownership of air as public common property that provides the discursive “space” in which rights can be contested.

In defending their position, New York State’s economic development officials declared their definition of public trust, which included state efforts to provide the state’s working class population with the type of high-wage jobs once available in the state’s industrial economy. The

arena for the contest of these various positions on rights over air use were played out in an afternoon of legislative hearings called by the state's legislative democratic opposition. The State's economic development director, Charles Gargano, attacked Richard Brodsky, the Westchester county Democrat who called the hearing:

“Chairman Brodsky, did we hear you speak to the concerns of the workers who packed up rental vans and left cities like Utica, Amsterdam, Jamestown, Binghamton and Buffalo and headed to a better future in states like Virginia, North Carolina, South Carolina and points south and west?”¹⁰

The Assemblyman agreed that the plant should be built, “but not at the expense of the air we breathe.”¹¹ The rhetoric in the hearing set up a struggle over air use as workers vs. breathers, with each group representing themselves as speaking on behalf of one group of air users.

CONCLUSION

This discussion of use claim struggles in this one small part of Clean Air Act regulation demonstrates the similarities between the struggles over the use of this common property and the struggles over the use of other, more conventional common property such as fisheries, other coastal and water resources, and community forest resources. In each case, users are making a claim over their right to use a resource – or to manage a resource in the case of governments.

Challenges to these claims often work in the ambiguous and contradictory areas of ownership over the resource. The case study on Emission Reduction Credits brought two of these ambiguous areas to light. The first has to do with whether or not air is explicitly in the public trust, or whether common law rules of “first possession” prevail. The second has to do

¹⁰ McCaffrey, Shannon. 1997. *The Legislative Gazette* pg. 1.

¹¹ *Ibid*, pg 2.

with whether the definition of public trust makes government the final arbiter or whether “the public” owns resources in trust and can defend them even against government actions.

The negotiation over these claims result in some compromises. In the case of the struggle over emission reduction credits, government officials withdrew their proposal to retain and revoke credits under threat of taking by the sources who could have defended in court their rights to use by “first possession.” In the case of the struggle over state give-aways of credits from state facilities, the state successfully defended its right to using credits from its own facilities for what it decided was the State’s welfare. Yet, it has not aggressively pursued the creation of more credits for economic development purposes, in part because potential credits are small but also most likely because it does not want to invite another political controversy. It is interesting to note that the previous democratic administration was also prepared to offer credits for economic development purposes, but to do so with credits retained and revoked from industrial facilities and only if they were not needed for attaining air quality. Given the difficulty New York State has had in meeting the obligations of the Clean Air Act, those credits would not have been available for economic development.

Interestingly, New York State’s own rationale for failing to meet CAA air quality standards are part of that state’s struggle with “up-wind” states whose emissions enter over New York State borders. Because substantial emissions, particularly of large coal-burning power plants in the Midwest, affect New York State air quality, the State has sued upwind states for, essentially, using air resources within NYS jurisdiction. In other words, the struggle over air use goes on in many arenas, pitting different sets of air users against each other.

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