



CLIMATE DEFENSE
PROJECT

CLIMATE NECESSITY DEFENSE CASE GUIDE

A Guide for Activists and Attorneys

The climate necessity defense is a political-legal tool used by climate activists to justify and draw attention to protest actions taken in defense of the climate. The defense uses the procedures and language of the legal system to educate the public about the risks of climate change, the inaction and corruption of state and federal governments, and the need for citizen action to change our energy politics.

The requirements of a necessity defense vary by jurisdiction but usually require a showing that the defendant a) faced an imminent danger, b) took action to prevent that danger through less harmful means, c) reasonably anticipated that the action would prevent the danger, and d) had no reasonable legal alternative to the action. In most instances, courts have prevented presentation of the defense prior to trial, depriving juries of the opportunity to hear defendant's justifications.

The following is a list of attempted climate necessity defenses, along with an appendix listing useful filings and court opinions. *Please contact info@climatedefenseproject.org for the listed materials.* This guide is intended as an educational resource and is not legal advice. Because this area of the law is developing rapidly, please check ClimateDefenseProject.org for updates.

UNITED STATES

- 1. "Shut It Down" – *State v. Ward* (Skagit Co. Sup. Ct., Wash., No. 16-1-01001-5, Feb. 1, 2017)**

Facts: An activist in coordination with Shut It Down actions in Montana, North Dakota, and Minnesota cut a chain-link fence and turned a valve to shut off tar sands oil flowing from Canada through a Kinder Morgan pipeline

Defendant: Ken Ward

Attorneys: Ralph Hurvitz, Lauren Regan, Cooper Brinson

Charges: 1) Second degree burglary; 2) Criminal sabotage

Outcome: Hung jury; prosecution may retry

Procedure: The defense served notice of intent to present a necessity defense, after which the prosecution filed a motion to preclude the defense and to strike witnesses with expertise in climate change, energy policy, and civil disobedience. The defense filed a response brief. At the pre-trial hearing, the judge called the science of climate change and its causes issues of “tremendous controversy,” found that the defendant had legal alternatives, and denied the defense.

The defendant was the only witness in his own defense, testifying about his activist experience, his turn to civil disobedience, and the science and effects of climate change (the judge granted judicial notice of several charts depicting the effects of global warming).

The jury deliberated for several hours before reaching a deadlock on both charges, resulting in a mistrial. The prosecution has 90 days to decide whether to retry the case.

Notes: The defendant faced a maximum of twenty years in prison. Although necessity evidence and instructions were barred, the court granted latitude to the defendant to testify about his beliefs and motivations over the prosecution’s objections.

Case documents (see Appendix): 1) Response to State’s Motion to Preclude Necessity Defense and to Strike Witnesses

2. “Montrose 9” – *People v. Bucci* (Town of Cortlandt Justice Ct., No. 15110183, Dec. 1, 2016)

Facts: Activists associated with Resist AIM blockaded the entrance to a construction lot for the Spectra Energy Algonquin Incremental Market pipeline project to draw attention to the pipeline’s risks for the climate and the nearby Indian Point nuclear power plant

Defendants: Linda Snider, Susan Rutman, Michael Bucci, Kim Fraczek, Melissa Freedman, Monica Hunken, George Packard, Andy Ryan, Kathleen Thomas

Attorney: Martin Stolar

Charges: Disorderly conduct

Outcome: Judge found the defendants guilty in a bench trial; defendants plan to appeal

Procedure: The defense offered a trial memorandum presenting a First Amendment defense and a necessity defense based on New York’s justification statute. In a bench trial, local councilmember Seth Freach testified to the town council’s unanimous opposition to the pipeline and to attempts to alert FERC to public health and safety risks, nuclear engineer Paul Blanch testified about the dangers posed to the Indian Point nuclear plant, and physicist Paul Merkowitz testified about FERC’s denial of existing science on pipeline risks and the inexistence of adequate legal alternatives to stop the pipeline.

The judge’s decision deferred to the findings of the Federal Energy Regulatory Commission that there was no imminent threat of harm from the pipeline, found no direct link

between the blocking of a parking lot and halting construction, and concluded that the defendant's celebratory response to their arrests demonstrated the absence of danger.

Notes: The necessity defense was based both on climate change harms and on the risk that the pipeline posed to a nearby nuclear power plant. As such, much of the testimony focused on efforts to alert regulatory agencies to the risk of radioactivity and the exhaustion of legal remedies to stop the pipeline.

Case documents (see Appendix): 1) Defense Trial Memorandum; 2) Decision & Order

3. Coast Guard Cases - Coast Guard Assessments Against Chiara D'Angelo (Activity No. 5169347, May 17, 2016) and Matthew Fuller (Activity No. 5169346, June 13, 2016)

Facts: Activists associated with Shell No! hung from the anchor chain of the Arctic Challenger support vessel in Bellingham, WA for more than three days to prevent the departure of an Arctic oil drilling fleet

Defendants: Chiara D'Angelo, Matthew Fuller

Attorney: Amanda Schemkes

Charges: Civil penalties of \$20,000 and \$10,000 for unauthorized entry into a Coast Guard safety zone

Outcome: The hearing officer considered and rejected the defense, imposing penalties of \$5,000 and \$4,750

Procedure: The Coast Guard created special "safety zone" around Shell's Arctic fleet and published their existence in the Federal Register. After the protest, the Coast Guard sent defendants Preliminary Assessment Letters seeking penalties of \$20,000 and \$10,000. Pre-hearing communications between defense counsel and the Coast Guard Hearing Office discussed issues to be raised at the hearings, including the necessity defense. The administrative hearings were before a Coast Guard Hearing Officer and without a jury.

The hearing officer considered the necessity defense over objections from the Coast Guard charging unit, based on defense counsel's analogy to "public necessity" trespassing cases in other civil penalty proceedings. However, the officer found that none of the defense's four elements as defined by the Ninth Circuit had been met.

Notes: The defense framed its necessity around the public or atmospheric trust doctrine, arguing that the state has an affirmative duty to protect the climate as a resource held in trust for the people. When the state fails in this duty, individuals have a right to enforce the trust.

Case documents: 1) Final Assessment Letter against D'Angelo; 2) Final Assessment Letter against Fuller

4. “Delta 5” - *Washington v. Brockway* (Snohomish Co. Dist. Ct., Wash., No. 5053A-14D, Jan. 13, 2016)

Facts: Activists affiliated with Rising Tide Seattle and 350 Washington erected a tripod over tracks in a BNSF Railway yard in Everett, Washington, blocking trains carrying Bakken crude oil

Defendants: Abby Brockway, Michael LaPointe, Jack Minchew, Elizabeth Spoeri, Patrick Mazza (pro se)

Attorneys: Bob Goldsmith, Mary Joyce McCallum, Bridge Joyce, E. Craig Hay

Charges: 1) Second-degree criminal trespass; 2) Obstructing or delaying a train

Outcome: The jury convicted the defendants of trespass and acquitted them of obstruction of the train; defendants are considering appeal

Procedure: The defense filed an initial motion to allow the defense, as well as a reply to the prosecution’s opposition. The court denied the motion, holding that the protest’s impact was “pure speculation” and that legal alternatives were available. The defense moved to reconsider the order, arguing that the connection between the protest action and global warming harms and the existence of alternatives were questions of fact for the jury. After a hearing, the judge reversed himself and allowed testimony on the theory of necessity.

At trial, the defense presented six witnesses to testify to both the climate consequences of burning crude oil as well as the environmental and health risks of crude oil transport by rail and BNSF’s history of safety violations and punishment of whistleblowers. The defendants testified to past, fruitless attempts at legal advocacy, and defense counsel argued that no legal alternatives were available given industry capture of state agencies and legislatures.

At the close of testimony the prosecution made a renewed motion to withhold jury instruction on the necessity defense. The judge granted the motion, holding that there were reasonable alternatives to civil disobedience. The jury convicted the defendants of trespass and acquitted them of obstruction. The trespass convictions are currently being appealed.

Notes: The defendants offered a two-prong necessity defense based upon both climate change and the health and safety consequences of crude oil transport in Washington. As such, much of their witnesses’ testimony focused on the known risks of BNSF’s transport methods and on the company’s efforts to stifle attempts to regulate them.

Because necessity testimony was presented to the jury, the defendants were able to use their trial to educate jurors and the public on the necessity of direct action to combat climate change and crude oil transport, despite the fact that the possibility of acquittal by necessity was denied at the last opportunity.

Case documents: 1) Defense Motion to Allow Affirmative Defense of Necessity and to Call Expert Witnesses; 2) State Opposition Memorandum; 3) Joint Defense Reply in Support of Motion 4) Court Order Denying Defense Motion; 5) Defense Motion To Reconsider Order on

Expert Witnesses; 6) Defense Motion to Reconsider Order on Expert Witnesses; 7) Trial excerpts related to necessity defense

5. “Flood Wall Street 10” - *People v. Shalauder* (N.Y.C. Crim. Ct., No. 2014NY076969, Mar. 5, 2015)

Facts: Activists affiliated with Flood Wall Street blocked Broadway in New York City to protest Wall Street’s fossil fuel funding and refused a police order to leave

Defendants: William Shalauder, John Tarleton

Attorneys: Martin Stolar, Jonathan Wallace

Charge: Disorderly conduct

Outcome: The judge denied presentation of the defense but acquitted the defendant on First Amendment grounds.

Procedure: The defense offered a trial memorandum with a First Amendment defense and a necessity defense based on New York’s justification statute, as well as a lengthy discussion of the value of civil disobedience. After testimony related to necessity, the judge denied presentation of the defense. After a bench trial, the defendant was acquitted based on a First Amendment defense that a police order to vacate the area was not narrowly tailored.

Notes: Although the judge denied the necessity defense, his comments from the bench regarding the severity of climate change and the need for citizen action provided favorable dicta for future legal actions. Most notably, the judge took judicial notice of climate change in an evidentiary ruling, obviating the need to prove the facts of climate change’s harms

Case documents: 1) Defense Trial Memorandum of Law; 2) Trial transcript excerpt

6. *State v. Johnson* (Atoka Dist. Ct., Okla., Oct. 23, 2014)

Facts: An activist associated with Great Plains Tar Sands Resistance locked himself to construction equipment on the Gulf Coast Pipeline (southern leg of the Keystone XL) route in Tushka, Oklahoma.

Defendants: Alec Johnson

Attorney: Doug Parr

Charges: Two counts of misdemeanor obstructing an officer

Outcome: The judge denied presentation of the defense and restricted testimony during trial. The defendant was convicted of both counts by a jury and received a \$1,000 fine.

Procedure: The defense gave only oral notice prior to trial of its intent to present the defense, and filed a trial brief on the defense; the judge denied presentation on necessity. During voir dire and cross examination the issue of necessity was approached indirectly before the judge restricted testimony, including the exclusion of an affidavit on the climate change consequences of the Keystone XL pipeline by Dr. James Hansen. Because Oklahoma has jury sentencing, the defense was again able to obliquely approach the issue of necessity through arguing for

mitigation. The jury convicted the defendant on both counts, but sentenced him to no jail time even though each charge carried a maximum penalty of one year in jail. The judge imposed the maximum fine.

Notes: The defense framed its necessity argument in part around the public or atmospheric trust doctrine, arguing that the state has an affirmative duty to protect the climate as a resource held in trust for the people. When the state fails in this duty, individuals have a right to enforce the trust.

Case documents: Defense Trial Brief Regarding the Necessity Defense

7. “The Lobster Boat Blockade” - *Commonwealth v. O’Hara* (Fall River Dist. Ct., MA, No. 1332CR593, Sep. 8, 2014)

Facts: Activists associated with 350.org anchored a lobster boat named the “Henry David T.” into the shipping channel of the Brayton Point coal-fired power plant in Somerset, Massachusetts, blocking a shipment of West Virginia mountaintop coal.

Defendants: Jay O’Hara, Ken Ward

Attorneys: Joan Fund, Matt Pawa

Charges: 1) Disturbing the peace, 2) Conspiracy, 3) Failure to act to avoid a collision, 4) Negligent operation of a motor vehicle

Outcome: On the day of trial, the district attorney dropped the charges (agreeing instead to \$2,000 in restitution from each defendant) and gave a speech to supporters outside the courthouse supporting increased action on climate change

Procedure: Prior to trial, the prosecution moved to reserve and report the admissibility of the necessity defense to the state appeals court. The motion was denied. Defendants were prepared to present the defense with expert testimony from Dr. James Hansen, Bill McKibben, and attorney David Bookbinder before charges were dropped.

Notes: The district attorney’s exceptional out-of-court statements endorsing the actions of the defendants, while providing no precedent for necessity outcomes, are persuasive arguments in favor of the “no legal alternatives” element of the defense.

Case documents: 1) Commonwealth’s Motion to Reserve and Report Question to Appeals Court; 2) Defendants’ Memorandum of Law in Opposition to Commonwealth’s Motion (including Offer of Proof)

8. “MI-CATS 3” - *State v. Carter* (Ingham Cir. Ct., MI, No. 13-000917-FH, Jan. 29, 2014)

Facts: Activists affiliated with Michigan Coalition Against Tar Sands (MICATS) used a “sleeping dragon” to lock down to construction equipment at a tar sands pipeline construction site in Stockbridge, MI operated by Enbridge Energy

Defendants: Barbara Carter, Lisa Leggio, Vicci Hamlin (a fourth defendant pled guilty prior to trial)

Attorneys: Kathy H. Murphy, Joshua M. Covert, Robert K. Gaecke, Jr.

Charges: 1) Felony resisting and obstructing an officer 2) Misdemeanor trespass

Outcome: The judge denied presentation of the defense prior to trial. The defendants were convicted of both charges by a jury and sentenced to time served (one month in county jail between conviction and sentencing), more than \$34,000 in restitution, and five years of probation.

Procedure: Prior to trial, the defense moved to raise the defense; to admit Dr. James Hansen as an expert witness to testify on “the enormously deleterious effects of fossil-fuel extraction on the environment” (Def. Mot. 3); and to admit as exhibits 1) Dr. Hansen’s paper “Assessing ‘Dangerous Climate Change’ . . .” and 2) Dr. Hansen’s primer on climate change for children, “Broken Wing Butterfly.” The judge denied the motion.

After jury conviction, the defendants appealed to the Michigan Court of Appeals, asserting that the evidence was insufficient to support a conviction, that the judge had been partial in his questioning of defendant Carter, who testified on his own behalf, and that the resisting and obstructing statute was constitutionally overbroad. The appeal was denied over a vigorous dissent. Defendants Carter and Hamlin filed an application for leave to appeal to the Michigan Supreme Court, which recently ordered the Ingham County Prosecutor, who had chosen to ignore the defendants’ application for leave to appeal, to reply to the application.

Notes: The activists framed their defense as “environmental necessity” rather than “climate necessity,” arguing that in addition to climate change avoidance their actions were necessary to prevent another pipeline spill similar to the million-gallon-plus Enbridge spill on the Talmadge Creek and Kalamazoo River in 2010. This framing is similar to the safety-based necessity defense offered in addition to the strict climate necessity defense in the Delta 5 case (see above).

In its second brief to the court, the defense emphasized Enbridge’s failure to meet deadlines for clean-up of the 2010 spill or to pay for the clean-up costs. More importantly, both the EPA and the Michigan Department of Environmental Quality had failed to enforce the terms of Enbridge’s clean-up agreement, supporting the claim that activists had to act outside traditional government remedies.

Case documents: 1) Motions of Defendants to Present an Expert Witness and to Raise the Defense of Environmental Necessity; 2) Reply to People’s Response to Motion of Defendants; 3) *People v. Hamlin* (Mich. Ct. App. Case No. 321352; Mich. Sup. Ct. Case No. 153128); *People v. Carter* (Mich. Ct. App. Case No 322207, 2015; Mich. Sup. Ct. Case No. 153092)

9. *United States v. DeChristopher*, 695 F.3d 1082 (10th Cir. 2012)

Facts: Activist registered as a bidder and won fourteen bids to disrupt a Bureau of Land Management sale of drilling leases in southeastern Utah

Defendant: Tim DeChristopher

Attorneys: Ronald J. Yengich, Elizabeth Hunt, Patrick A. Shea

Charges: 1) Violation of Federal Onshore Oil and Gas Leasing Act; 2) False statement

Outcome: The court granted a government motion in limine to block the defense. The defendant was convicted on both counts by a jury, his appeal was denied, and he served 21 months of a 24-month sentence.

Procedure: The prosecution filed a motion in limine to block the defense, which generated cross-motions on the substance of the federal defense's four elements and the right to mount a defense. The District Court granted the motion in limine and the defendant was convicted on both counts by a jury. The Tenth Circuit denied an appeal based on several issues, including denial of the necessity defense.

Notes: Although denied by the prosecution and both courts, most of the BLM leases targeted by the defendant were soon canceled as a direct result of the protest action and the attention it drew to the federal government's violation of environmental assessment requirements. This precedent may be useful for proving a defendant's anticipation of a direct connection between protest and aversion of climate harms.

Case documents: 1) Indictment; 2) Government Motion in Limine Re: Necessity Defense; 3) Defense Memorandum Opposing Government's Motion; 4) Government Reply to Defense Memorandum; 5) Defense Written Proffer of Choice of Evils Defense and Request for Evidentiary Hearing; 6) Government Response to Defense Written Proffer; 7) Reply Memorandum in Support of Written Proffer; 8) District Court Memorandum Opinion and Order; 9) Opening Brief of Appellant; 10) Tenth Circuit Opinion

UNITED KINGDOM

1. "Kingsnorth 6" - *R. v. Hewke* (Maidstone Crown Court, UK, No. T20080116, Sep. 8, 2008)

Facts: Activists associated with Greenpeace scaled a chimney at the Kingsnorth coal power plant in Hoo, Kent, England and painted the prime minister's name to protest climate change, shutting the plant for four days.

Defendants: Timothy Hewke, Kevin Drake, Ben Stewart, William Rose, Emily Hall, Huw Williams

Attorneys: Michael Wolkind, Quincy Whitaker, Mike Schwarz, Catherine Jackson

Charges: 1) Aggravated trespass, 2) Criminal damage

Outcome: A jury acquitted all defendants of all charges based on the theory of “lawful excuse.”

Procedure: The defense offered a “case statement” laying out its theory of “lawful excuse” prior to trial, after which the prosecution unsuccessfully tried to bar the question from the jury. Dr. James Hansen testified on the climate tipping point and the need to eliminate all coal power, as well as the inaction of British political leaders; Dr. Geoff Meaden testified on climate change harms to the region; Aqqaluk Lynge testified on the effects of warming on the Inuit; Zac Goldsmith testified on the lack of political efforts to address climate change.

The defense was submitted to the jury, which acquitted all defendants of all charges.

Notes: Defense counsel has noted that much of the success of the defense turned on the special latitude of the English Section 5 “lawful excuse” justification, which requires 1) that the defendant damaged property to protect property belonging to another; 2) that the defendant believed the property was in immediate need of protection; and 3) that the defendant believed the means of protection adopted were reasonable in light of the circumstances. The defendants argued that they damaged the Kingsnorth plant in order to protect polar ice caps, sensitive coastal regions in Britain and abroad, and Inuit territories, among others, from the effects of carbon dioxide emissions. The judge’s “Summing-Up” provides an excellent analysis of the competing theories of causation and political urgency.

Case documents: 1) Defence Case Statement ; 2) Transcript of Evidence of Professor Hansen; 3) Judge’s Summing-Up; 4) Note on S.5 “Lawful excuse”

APPENDIX

Montrose 9

Defense Trial Memorandum of Law
Decision & Order

Coast Guard Cases

Final Assessment Letter against Fuller
Final Assessment Letter against D'Angelo

Delta 5 - *Washington v. Brockway*

Defense Motion to Allow Affirmative Defense of Necessity and to Call Expert Witnesses
State Opposition Memorandum
Joint Defense Reply in Support of Motion
Court Order Denying Defense Motion
Defense Motion to Reconsider Order on Expert Witnesses
Defense Motion to Reconsider Order on Expert Witnesses
Trial excerpts related to necessity defense

Flood Wall Street 10 - *People v. Schlauder*

Defense Trial Memorandum of Law
Trial Transcript Excerpt

State v. Johnson

Defense Trial Brief Regarding the Necessity Defense

Lobster Boat Blockade - *Commonwealth v. O'Hara*

Commonwealth's Motion to Reserve and Report Question to Appeals Court
Defendants' Memorandum of Law in Opposition to Commonwealth's Motion (including Offer of Proof)

MI-CATS 3 - *State v. Carter*

Motions of Defendants to Present an Expert Witness and to Raise the Defense of Environmental
Necessity (with 2 exhibits)
Reply to People's Response to Motion of Defendants
People v. Hamlin (MI Ct. App., 321352, 322207, 2015)

US v. DeChristopher

Indictment
Government Motion in Limine Re: Necessity Defense
Defense Memorandum Opposing Government's Motion
Government Reply to Defense Memorandum
Defense Written Proffer of Choice of Evils Defense and Request for Evidentiary Hearing;

This guide is intended as an educational resource for lawyers, activists, and students. It is not legal advice. Please check ClimateDefeseProject.org for updates. Version of February 7, 2017.

Government Response to Defense Written Proffer
Reply Memorandum in Support of Written Proffer
District Court Memorandum Opinion and Order
Opening Brief of Appellant
Tenth Circuit Opinion

Kingsnorth 6 - R. v. Hewke

Defence Case Statement
Transcript of Evidence of Professor Hansen
Judge's Summing-Up
Note on S.5 "Lawful excuse"

10. State v. Dowling (September 2014)
Auburn case - fill in with judgment/ruling from Logan