



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 the attempted climate necessity defenses that Climate Defense Project is aware of, 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. *Minnesota v. Holiday (Fourth Jud. Dist. Ct. Hennepin Cty., Minn., No. 27-CR-17-2097, May 14, 2018)*

Facts: Two activists dropped from a truss at U.S. Bank Stadium in Minneapolis during a professional football game and held a banner calling on the bank to divest from the Dakota Access Pipeline.

Defendants: Sen Holiday, Karl Scogin Zimmerman

Attorneys: Tim Phillips, Robert Tiffany

Charges: 1) Fourth degree burglary; 2) Public Nuisance; 3) Trespass

Outcome: Necessity defense denied; trial pending

Procedure: The state filed a motion in limine to bar the necessity defense, to which the defendants responded. In an extensive opinion, the court ruled that because there was no imminent threat and no direct connection between the protest and the avoidance of climate harms, and because legal alternatives were available, the necessity defense was not appropriate. Trial outcome is pending.

Case documents (see Appendix): 1) State's Memorandum in Support of its Motion in Limine; 2) Defendants' Response to State's Motion in Limine to Prohibit Evidence on the Defense of Necessity; 3) Order Granting the State's Motion in Limine

2. "Shut It Down" – *Minnesota v. Klapstein* (Ninth Jud. Dist. Ct. Clearwater Cty., Minn., No. 15-CR-16-413, April 23, 2018)

Facts: Activists and supporters in coordination with Shut It Down actions in Montana, North Dakota, and Washington cut a chain-link fence and turned a valve to shut off tar sands oil flowing from Canada through a Spectra Express pipeline.

Defendant: Annette Marie Klapstein, Emily Nesbitt Johnston, Steven Robert Liptay, Benjamin Joldersma

Attorneys: Tim M. Phillips

Charges: 1) Criminal damage to property of critical public service facilities, utilities and pipelines; 2) Aiding and abetting criminal damage to property of critical public service facilities, utilities and pipelines; 3) Trespass on a critical public service facility, utility or pipeline; 4) abetting trespass on a critical public service facility, utility or pipeline

Outcome: Necessity defense allowed by trial court and Court of Appeals; trial and potential further review pending

Procedure: The defense filed a notice of intent to use the necessity defense. The prosecution filed a memorandum objecting to use of the defense. The defense filed a response and attached affidavits from three expert witnesses on climate science and the efficacy of civil disobedience. In a written order, the judge allowed presentation of the necessity defense. The state appealed based on an alleged "critical impact" to its case. The defendants responded and provided an amicus brief in support signed by over one hundred law professors. The Court of Appeals denied the state's appeal and ordered the case to proceed.

Case documents (see Appendix): 1) State's Memorandum in Opposition to Defendant's Affirmative Defense of Necessity; 2) Defense Response to State's Memorandum in Opposition to Defendant's Affirmative Defense of Necessity; 3) Order Regarding Necessity Defense; 4) Appellant's Pretrial Appeal Brief and Addendum; 5) Respondents' Pretrial Appeal Brief and Addendum; 6) Brief of Law Professors and Legal Education Organizations as *Amici Curiae* in Support of Respondents; 7) Court of Appeals Order Dismissing Appeal

3. *North Dakota v. Iron Eyes* (Fourth Jud. Dist. Ct. Hennepin Cty., Minn., No. 27-CR-17-2097, April 5, 2018)

Facts: The defendant, along with 73 others, was arrested in February 2017 after erecting teepees in the area where Energy Transfer Partners was attempting to run the Dakota Access Pipeline after extended clashes between police and protesters associated with the Standing Rock resistance to the pipeline. The state targeted Iron Eyes, a member of the Standing Rock Sioux, as a protest organizer.

Defendants: Chase Alone Iron Eyes

Attorneys: Alexander Reichert, Daniel Sheehan, Lanny Sinkin

Charges: 1) Felony inciting a riot; 2) Misdemeanor criminal trespass

Outcome: Necessity decision pending

Procedure: In October 2017, the defense filed a notice of intent to assert the necessity defense, along with an extensive memorandum describing a series of federal violations of treaties with the Sioux, various legal violations related to the construction of the Dakota Access Pipeline, the various climate harms related to fossil fuel extraction, and an extended campaign by state officials and private military contractors to surveil and target Iron Eyes and other Standing Rock activists. In April 2018, the court ordered the state and TigerSwan, a private military contractor that surveilled protesters at Standing Rock, to turn over extensive discovery materials to the defense.

Case documents (see Appendix): Memorandum in Support of Notice of Intent to Argue an Affirmative Defense Rooted in Necessity

4. *Massachusetts v. Gore* (Boston Mun. Ct., Mass., No. 1606CR000923, Mar. 27, 2018)

Facts: Thirteen activists were arrested in a 2016 action against the West Roxbury Lateral Pipeline in Boston in which they lay down in the pipeline construction trench to represent deaths from climate change, part of a long campaign of civil disobedience against the pipeline.

Defendants: Karenna Gore, Mike Bucci, Nora Collins, Tim DeChristopher, Catherine Hoffman, Diane Martin, Patricia Martin, Nathan Phillips, Dave Publow, Brown Pulliam, Warren Senders, Callista Womick

Attorneys: Alice Cherry, Jack Corrigan, Jeff Feuer, Andrew Fischer, Benjie Hiller, Josh Raisler-Cohn, Kelsey Skaggs

Charges: 1) Trespass; 2) Disorderly conduct; charges later reduced to civil infractions

Outcome: Defendants were acquitted by reason of necessity in a bench hearing after the prosecution dropped charges to civil infractions

Procedure: Pre-trial argument and briefing focused on discovery issues and the contested existence of a pipeline company safety plan. The state filed a motion in limine to exclude the necessity defense, which the defense successfully challenged. A week before trial, at which the defendants were prepared to call experts Bill McKibben and James Hansen in support of their

necessity defense, the prosecution reduced the charges to civil infractions in order to avoid a jury trial. At the civil infraction hearing, the judge found all defendants not responsible and acceded to a defense request to note that the ruling was by reason of necessity.

Case documents (see [Appendix](#)): 1) Memorandum in Opposition to Commonwealth's Motion in Limine to Exclude Necessity Defense; 2) [Audio](#) of hearing

5. “Shut It Down” – *Montana v. Higgins* (Twelfth Jud. Dist. Ct. Choteau Cty., Mont., No. DC-16-18, Nov. 22, 2017)

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

Defendant: Leonard Higgins

Attorneys: Herman Watson

Charges: 1) Trespass; 2) Criminal mischief

Outcome: Necessity defense denied; defendant convicted and plans to appeal

Procedure: The defense served notice of intent to present a necessity defense and filed a memorandum and offer of proof. The state filed a reply, to which the defense replied with an additional memorandum. In a cursory decision, the court denied the defense based on the defendant's alleged desire to attract publicity and to “shift responsibility” to the government. The defense filed a petition for a writ of supervisory control with the Supreme Court, arguing that the trial court's failure to hold a hearing on the necessity defense and its failure to provide conclusions of law in its denial merited intervention by the higher court. The Supreme Court denied the petition, finding that there was no gross injustice in proceeding in the District Court.

At trial, Mr. Higgins made a limited presentation related to his motivations and offered testimony by expert Dr. Anthony Ingraffea of Cornell University supporting the defense's contention that his protest activist posed no serious safety risk. Mr. Higgins was convicted and was sentenced to three years' deferred imprisonment and ordered to pay \$3,755 to Spectra Energy. Mr. Higgins plans to appeal.

Case documents (see [Appendix](#)): 1) Defendant's Memorandum on Necessity; 2) State's Reply to Defense Response Re: Defense of Necessity and Defense Witnesses; 3) Order Denying Defendant's Defense of Necessity; 4) Petition for Writ of Supervisory Control and Motion for Stay of Proceedings; 5) Order Denying Supervisory Control

6. *Washington v. Taylor* (Spokane Cty. D. Ct., Wash, No. 6Z0117975, Oct. 16, 2017)

Facts: Activists associated with the Raging Grannies and Veterans for Peace blocked a rail line on a Burlington Northern Santa Fe railyard in Spokane, Washington to protest against the safety risks of oil and coal train transport and its impact on global climate change.

Defendants: George Taylor, Lewis Nelson, Gaea Maeve Aeolus, Nancy Nelson, Margaret Heller, Denna Romoff

Attorney: Eric M. Christianson

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

Outcome: Necessity defense allowed; state's petition for writ of review is pending

Procedure: The defendants filed a pretrial motion to allow the defense of necessity, with a preliminary offer of proof from expert witnesses on climate science, the risks of rail transport, and the effectiveness of civil disobedience. Five of the six defendants pled guilty to trespass, with Taylor proceeding to trial. At a bifurcated pre-trial hearing, Professor Steven Running testified about the science of climate change and its effects in Washington, Professor Tom Hastings testified about the effectiveness of civil resistance, and Taylor testified about his experience and motivations. After this preliminary showing, the court allowed the necessity defense. The state petitioned for a writ of review to the Spokane County Superior Court; the petition is pending.

Case documents (see Appendix): 1) Defense Motion to Allow Affirmative Defense and to Call Expert Witnesses at Trial; 2) Necessity Hearing Transcript

7. “Shut It Down” – *North Dakota v. Foster* (Northeast Jud. Dist. Ct. Pembina Cty., N.D., No. 34-2016-CR-00186, Oct. 6, 2017)

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

Defendants: Michael Foster, Samuel Jessup

Attorneys: William Kirschner, Michael Hoffman, Alice Cherry

Charges: 1) Criminal conspiracy to commit criminal mischief; 2) Criminal conspiracy to commit reckless endangerment; 3) Criminal trespass; 4) Theft of property; 5) Theft of services; 6) Criminal mischief

Outcome: Necessity defense denied; Foster convicted of criminal mischief, criminal conspiracy to commit mischief, and criminal trespass; Jessup convicted of conspiracy to commit criminal mischief and conspiracy to commit trespass

Procedure: Shortly before trial, the prosecution indicated that it intended to call a pipeline expert, triggering the defense's obligation to present a list of experts (generally, defendants in North Dakota are not obliged to alert the court or prosecution of an intent to use the necessity defense). The prosecution then filed a motion in limine to block the defense, to which the defense replied. The court issued a written opinion granting the motion in limine, finding that legal alternatives were available, that climate change and harms from the pipeline were not imminent, and that there was no direct, causal relationship between the action and avoidance of the harm. The defense attempted to preserve its expert testimony as relevant to the defendant's

state of mind, but after jury selection the judge barred testimony from all experts, including Dr. Jim Hansen. Both defendants were convicted by the jury.

Case documents (see Appendix): 1) State’s Brief in Support of Motion in Limine; 2) Defense Response to Motion in Limine; 3) Memoranda Decision and Order Granting Motion in Limine

8. “Shut It Down” - *Washington v. Ward* (Skagit Co. Sup. Ct., Wash., No. 16-1-01001-5, Feb. 1, 2017, June 7, 2017)

Facts: An activist in coordination with Shut It Down actions in Minnesota, Montana, and North Dakota 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, Kelsey Skaggs

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

Outcome: Necessity defense was denied; in the first trial, hung jury on both counts; second trial, a hung jury on sabotage and conviction on burglary; appeal pending

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 decided to retry the case. The defense filed a motion to reconsider the court’s denial of the necessity defense, to which the state responded. The court denied the motion. After a second, similar trial, the defendant was convicted of burglary and the jury hung on the sabotage charge. An appeal is currently before the Court of Appeals.

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

Case documents (see Appendix): 1) State’s Response to Defense of Necessity and Defense Witnesses; 2) Response to State’s Motion to Preclude Necessity Defense and to Strike Witnesses; 3) State’s Reply to Defense Response Re: Defense of Necessity and Defense Witnesses; 4) Defendant’s Trial Memorandum; 5) Trial Transcript; 6) Defense Motion to Reconsider; 7) State’s Response to Defendant’s Motion to Reconsider; 8) State’s Supplemental

Response to Defendant’s Motion to Reconsider; 9) Petitioner’s Opening Brief; 10) State’s Response to Petitioner’s Opening Brief

9. “Wawayanda Six” – *New York v. Cromwell* (Town of Wawayanda Justice Court, N.Y., No. 15120561, May 20, 2017)

Facts: Activists blocked traffic at a construction site for the Competitive Power Ventures fracked gas power plant in Wawayanda, New York.

Defendants: James Cromwell, Madeline Shaw, Maureen Murphy-Smolka, Teresa Sigler Klemm, Naomi Miller, Pramilla Malik

Attorney: Michael H. Sussman, Valeria A. Gheorghiu

Charges: Disorderly conduct

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

Procedure: The defendants filed a trial memorandum with an initial offer of proof based on necessity and asked for acquittal in the bench trial by reason of justification. The state moved to preclude the defense. In a written decision, the court found that the defense had offered sufficient preliminary proof to warrant a “complete proffer” of evidence of necessity at trial, reserving a final decision on the motion.

At trial, the defense presented testimony by public health and climate science experts. In a written decision, the court found that the protesters’ actions were not reasonably calculated to prevent harm caused by construction of the plant, found that there was at least one legal alternative in the form of an ongoing proceeding, and that the targeted harm was not imminent.

Notes: In its decision, the court noted that “the pollution expected to be caused by this power plant once it is operational would be significant and contrary to New York State’s policies on global warming.”

Case documents (see Appendix): 1) Defense Motion to Allow Affirmative Defense and to Call Expert Witnesses at Trial; 2) Trial Memorandum of Law; 3) Decision

10. *Washington v. Claydon* (Skagit Co. Sup. Ct., Wash., No. 6Z0595647, Mar. 23, 2017)

Facts: Activists associated with Break Free From Fossil Fuels occupied a BNSF rail yard in Anacortes, Washington to prevent export of crude oil.

Defendants: Elizabeth Anne Claydon, Clara Cleve, Kaya Masler, Randy Meier, Joelle Robinson, Caitlyn Taylor

Attorney: Larry Hildes

Charges: Criminal trespass

Outcome: Necessity defense denied; defendants convicted

Procedure: The defense filed a notice of intent to present the necessity defense, which the state opposed. The judge ruled orally that the defense had failed to satisfy the defense's elements and barred evidence related to necessity. The jury convicted all defendants.

Notes: This trial was part of a series of trials against 52 Break Free defendants involved in the Anacortes action. After the protest, Shell withdrew a proposal for a rail spur leading to an oil refinery. Although none of the defendants were permitted to present a necessity defense, one group of six defendants successfully secured a hung jury after testifying to their motivations for the protest.

Case documents (see Appendix): 1) Defendants' Reply Brief in Support of Use of Necessity Defense; 2) State's Response to Defense of Necessity and Defense Witnesses

Note: In some of the other Break Free trials, defendants attempted unsuccessfully to present the climate necessity defense; further details are currently not available.

11. Vermont v. Gardner (Chittenden Sup. Ct., Vt., No. 2700-7-16, Feb. 28, 2017)

Facts: Activists associated with 350.org Vermont chained themselves to construction equipment at a worksite for the Vermont Gas Systems natural gas pipeline.

Defendants: Geoffrey Gardner, Karen Bixler

Attorney: None (self-represented)

Charges: Criminal trespass

Outcome: Necessity defense denied; trial outcome pending

Procedure: The defendants filed a motion in limine asking the court to allow them to defend themselves "on the basis of the Public Trust doctrine," asserting that the state Public Service Board had violated its public trust duties in issuing a Certificate of Public Good to Vermont Gas Systems despite the deleterious global warming consequences of methane leakage from natural gas fracking. The motion cited multiple scientific sources and argued that the state's agencies and legislatures had failed to prevent impending environmental catastrophe, concluding that the defendants acted out of necessity to cure this governmental failure. The defendants offered expert testimony by four witnesses.

The court's decision found that the public trust doctrine was irrelevant to a criminal proceeding. Construing their arguments as a proffer of the necessity defense, the court found that the defense was generally unavailable for political defendants and deferred to the decision of the Public Service Board.

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) Defendants' Motion in Limine; 2) Decision on Motion

12. “Montrose 9” – *New York v. Bucci* (Town of Cortlandt Justice Ct., N.Y., 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 Merkwowitz 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

13. 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

14. “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. Discretionary appellate review was granted, and the appeal is currently before the Court of Appeals.

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.

Defendants sought discretionary review of their convictions for criminal trespass, which was granted. The appeal is currently before the Court of Appeals. Climate Defense Project submitted an amicus curiae brief arguing for application of the public trust doctrine to consideration of the necessity defense.

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; 8) Commissioner Grant of Discretionary Review; 9) Petitioner's Opening Brief; 10) Appellant's Opening Brief; 11) Amicus Curiae Brief of Climate Defense Project in Support of Petitioners' Opening Brief

15. "Flood Wall Street 10" – *New York v. Shalauer* (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 Shalauer, 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

16. *Oklahoma 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

17. “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)

18. “MI-CATS 3” - *Michigan 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)

19. *City of Bellingham v. Alexander (City of Bellingham Mun. Ct., Wash., No. CB0075354, March 18, 2013)*

Facts: Activists blocked the tracks at a BNSF rail yard in Bellingham, Washington to protest the export of coal.

Defendants: Ian Alexander, Bonnie Barker, Robert Burr, Michael Cragan, Alexis Garcia Silva, Herbert Goodwin, Andrew Ingram, Tamara Lee King, Jordan Quinn, Zachary Robertson, Joshua Smith, Gerald Warren

Attorneys: Larry Hildes

Charges: 1) Criminal trespass; 2) Obstructing a Public Servant

Outcome: The judge denied presentation of the defense prior to trial and the defendants were convicted by a jury.

Procedure: Prior to trial, the defense moved to raise the defense and to admit experts testifying to the effects of both global climate change and the local impacts of coal transport. The state opposed the motion.

In its ruling denying the necessity defense, the court found that the Washington defense did not require “forces of nature” and that the defense is not precluded in cases of civil disobedience. Nevertheless, the court found that there were legal alternatives to protest and that the defendants had not prevented the targeted danger. In addition to denying the defense, the court barred testimony or discussion related to the coal industry or global warming. The defense filed a motion for reconsideration, which was denied, and the defendants were convicted by a jury.

Notes: Although the court denied the necessity defense, it refrained from adopting the state’s position that the defense is never available in a case of political protest.

Case documents: 1) Defendants’ Notice of Intended Defenses; 2) Plaintiffs’ Motion in Limine; 3) Defendants’ Reply in Support of the Necessity Defense; 4) Ruling on Motions in Limine; 5) Defendants’ Motion for Reconsideration of the Court’s Order Granting the Prosecutor’s Motion in Limine as to the Necessity Defense

20. *City of Helena v. McKinlay* (Helena Mun. Ct. MT, No. 2012-NT-4385 *et seq.*, Jan. 29, 2013)

Facts: Activists protested at the state Capitol against the Land Board’s decision to lease land in the Powder River Basin to strip mine and export coal.

Defendants: Bonnie McKinlay et al.

Attorneys: Larry Hildes, Robert Gentry

Charges: Misdemeanor trespass

Outcome: The judge denied presentation of the defense and the defendants were convicted by a jury.

Procedure: Prior to trial, the defense moved to raise the defense. The city filed a motion in limine in opposition, to which the defense replied; the city filed a final brief arguing that the common law defense of necessity is unavailable in Montana. The court entered a brief order finding that the defendants had legal alternatives and barring necessity evidence. The defendants were convicted in a jury trial.

Notes: The court declined to rule definitively on the availability of the common law necessity defense in Montana.

Case documents: 1) Defendants’ Notice of Intended Defenses; 2) Brief in Support of Motion *In Limine* to Exclude Testimony and Materials Re: Necessity and First Amendment Defenses; 3) Defendants’ Response to Plaintiffs’ Motion in Limine; 4) Reply Brief in Support of Motion *In Limine* to Exclude Testimony and Materials Re: Necessity and First Amendment Defenses; 5) Order

21. *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

Minnesota v. Holiday

State's Memorandum in Support of its Motion in Limine
Defendants' Response to State's Motion in Limine to Prohibit Evidence on the Defense of Necessity
Order Granting the State's Motion in Limine

North Dakota v. Iron Eyes

Memorandum in Support of Notice of Intent to Argue an Affirmative Defense Rooted in Necessity

Shut It Down – Minnesota v. Klapstein

State's Memorandum in Opposition to Defendant's Affirmative Defense of Necessity
Defense Response to State's Memorandum in Opposition to Defendant's Affirmative Defense of Necessity
Order Regarding Necessity Defense
Appellant's Pretrial Appeal Brief and Addendum
Respondents' Pretrial Appeal Brief and Addendum
Brief of Law Professors and Legal Education Organizations as *Amici Curiae* in Support of Respondents;
Court of Appeals Order Dismissing Appeal

Massachusetts v. Gore

Memorandum in Opposition to Commonwealth's Motion in Limine to Exclude Necessity Defense
[Audio](#) of hearing

Shut It Down – Montana v. Higgins

Defendant's Memorandum on Necessity
State's Reply to Defense Response Re: Defense of Necessity and Defense Witnesses
Order Denying Defendant's Defense of Necessity
Petition for Writ of Supervisory Control and Motion for Stay of Proceedings
Order Denying Supervisory Control

Washington v. Taylor

Defense Motion to Allow Affirmative Defense and to Call Expert Witnesses at Trial
Necessity Hearing Transcript

Shut It Down – North Dakota v. Foster

State's Brief in Support of Motion in Limine
Defense Response to Motion in Limine
Memoranda Decision and Order Granting Motion in Limine

Shut It Down - Washington v. Ward

State's Response to Defense of Necessity and Defense Witnesses

This guide is intended as an educational resource for lawyers, activists, and students. It is not legal advice. Please check ClimateDefenseProject.org for updates. Version of May 22, 2018.

Response to State’s Motion to Preclude Necessity Defense and to Strike Witnesses
State’s Reply to Defense Response Re: Defense of Necessity and Defense Witnesses
Defendant’s Trial Memorandum
Trial Transcript
Defense Motion to Reconsider
State’s Response to Defendant’s Motion to Reconsider
State’s Supplemental Response to Defendant’s Motion to Reconsider
Petitioner’s Opening Brief
State’s Response to Petitioner’s Opening Brief

Wawayanda Six – *New York v. Cromwell*

Defense Trial Memorandum of Law
Trial Memorandum of Law
Decision

Washington v. Claydon

Defendants’ Reply Brief in Support of Use of Necessity Defense
State’s Response to Defense of Necessity and Defense Witnesses

Vermont v. Gardner

Defendants’ Motion in Limine
Decision on Motion

Montrose 9 – New York v. Bucci

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
Petitioner’s Opening Brief
Appellant’s Opening Brief
Amicus Curiae Brief of Climate Defense Project in Support of Petitioners’ Opening Brief

Flood Wall Street 10 – New York v. Shalauer

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)

City of Bellingham v. Alexander

Defendants' Notice of Intended Defenses
Plaintiffs' Motion in Limine
Defendants' Reply in Support of the Necessity Defense
Ruling on Motions in Limine
Defendants' Motion for Reconsideration of the Court's Order Granting the Prosecutor's Motion in Limine as to the Necessity Defense

City of Helena v. McKinlay

Defendants' Notice of Intended Defenses
Brief in Support of Motion *In Limine* to Exclude Testimony and Materials Re: Necessity and First Amendment Defenses
Defendants' Response to Plaintiffs' Motion in Limine
Reply Brief in Support of Motion *In Limine* to Exclude Testimony and Materials Re: Necessity and First Amendment Defenses
Order

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;
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"