



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 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. "Shut It Down" - *Washington v. Ward* (Skagit Co. Sup. Ct., Wash., No. 16-1-01001-5, Dec. 9, 2020)

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: Cooper Brinson, Ralph Hurvitz, Lauren Regan, 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; on appeal, the Washington Court of Appeals ruled that Mr. Ward has sufficiently raised the defense, that the climate

necessity defense was valid, and that his Sixth Amendment right to present a defense had been violated. The Washington Supreme Court denied the state's petition to review, establishing the defense as a matter of law in Washington. The state announced its intention to re-try Ward for a third time; after substantial trial delays due to the COVID-19 pandemic, Ward decided to accept a guilty plea to second degree criminal trespass.

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.

On appeal, the court of appeals ruled that the trial court had improperly excluded Mr. Ward's proposed defense and proffered evidence, holding that a defendant could meet the common law standard for necessity in a case involving climate change disobedience. The state petitioned the state Supreme Court for review, which was denied. The state noted its intent to re-try the case. After repeated trial delays due to the COVID-19 pandemic, Ward decided to plead guilty to second degree criminal trespass, with no additional jail time.

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.

The Court of Appeals' ruling and the Supreme Court's denial of the state's petition for review clearly established for the first time in the United States the validity of the climate necessity defense. The Court of Appeals' findings on each element are significant: "(1) 'Ward presented sufficient evidence that he reasonably believed the crimes he committed were necessary to minimize the harms that he perceived[;]' (2) 'Ward's past successes in effectuating change through civil disobedience in conjunction with the proposed expert witnesses and testimony about Ward's beliefs were sufficient evidence to persuade a fair minded, rational juror that Ward's beliefs were reasonable[;]' (3) 'Ward...offered sufficient evidence to show that the harms of global climate change were greater than the harm of breaking into Kinder Morgan's property[;]' and (4) that 'Ward...offered sufficient evidence to create a question of fact on whether there were reasonable legal alternatives.'"

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 Appellate Brief; 10) State’s Response to Petitioner’s Opening Brief; 11) Court of Appeals Decision; 12) Supreme Court Order Denying Petition

2. *Washington v. Zepeda* (Wash. Ct. App., No. 80593-2-I, Nov. 16, 2020)

Facts: An activist attempted to turn off the Kinder Morgan tar sands pipeline in Mount Vernon, Washington in 2017

Defendant: Donald Zepeda

Attorney: Elizabeth Neidzowski

Charges: 1) Burglary; 2) Criminal sabotage; 3) Malicious mischief

Outcome: Necessity defense allowed; defendant convicted by jury and sentenced to 60 days in jail; conviction upheld by Court of Appeals

Procedure: The defendant was allowed to present a necessity defense and called climate scientist Richard Gammon, oil industry research Eric de Place, and nonviolent direct action scholar Tom Hastings as expert witnesses. The jury convicted the defendant after deliberation, apparently due to a belief that a lack of legal alternatives had not been proven. The Court of Appeals upheld the conviction.

Case documents (see Appendix): Court of Appeals Opinion

3. *People v. Berlin* (N.Y. Sup. Ct., N.Y. Slip. Op. 20271, Oct. 8, 2020)

Facts: Activists with Resist Spectra acting in solidarity with Standing Rock water protectors crawled into a steel pipe to block construction of the Spectra Algonquin Incremental Market pipeline in Cortlandt, New York.

Defendants: Rebecca Berlin, Janet González, David Publow

Attorneys: David Dorfman

Charges: Misdemeanor trespass

Outcome: Necessity defense denied and defendants convicted; decision upheld by appellate court

Procedure: The defendants were tried in a bench trial without a jury. Prior to trial, they filed a motion in limine to allow the necessity defense, which was granted. At trial, the judge dismissed charges against three defendants after the prosecution closed its case. The defense put on expert witnesses Paul Blanch, a nuclear engineer who testified to the pipeline’s dangerous

proximity to a nuclear plant; Robert Howarth, professor of Ecology and Environmental Biology at Cornell University, who testified on the dangers of climate change; and Dr. Larysa Dyrszka, a pediatrician who spoke of the pipeline's health risks. The judge ruled that the defendants had not exhausted all legal remedies, including filing as intervenors with the Federal Energy Regulatory Commission. She convicted the defendants and granted them unconditional release and no fines. On appeal, the New York Supreme Court, an intermediate court, upheld the decision, finding that the defendants did not face an immediate threat and that their actions were not calculated to avert an emergency.

Case documents (see Appendix): 1) Motion in Limine; 2) Brief for Defendants-Appellants; 3) Supreme Court Opinion

4. *Washington v. Taylor* (Wash. Ct. App., No. 36506-9-III, June 9, 2020)

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: Rachael Osborn, Andrea Rodgers, Eric M. Christianson

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

Outcome: Necessity defense allowed; prior to trial, the state filed for a writ of review to the county Superior Court, which reverse the trial court's ruling; the defense then sought a commissioner's ruling in the Court of Appeals, which affirmed the county Superior Court's decision; the defense then filed a motion to modify that ruling in the Court of Appeals, which was granted. The Court of Appeals denied Taylor's defense. An appeal to the state Supreme Court 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 then petitioned for a writ of review to the Spokane County Superior Court, which in November 2018 reversed the trial court's ruling, finding that Mr. Taylor had legal alternatives. In January 2018 the defense filed a Motion for Discretionary Review in the state Court of Appeals, which was granted. In April 2019, the Court of Appeals issued a Commissioner's Ruling affirming the Superior Court decision. The defense filed a motion with

the Court of Appeals to modify this ruling, which was granting, setting the stage for further briefing. In January 2020, Climate Defense Project filed an amicus brief on behalf of 122 law professor stressing the value of courts as free speech forums and the importance of protest defenses. In June 2020, the Court of Appeals denied Taylor’s necessity defense, finding that a person engaging in civil disobedience does not face an emergency situation and that Taylor had “intentionally placed himself in conflict with the law.” An appeal to the state Supreme Court is pending.

Case documents (see Appendix): 1) Defense Motion to Allow Affirmative Defense and to Call Expert Witnesses at Trial; 2) Necessity Hearing Transcript; 3) Superior Court Order Reversing Trial Court Grant of Necessity Defense; 4) Defense Motion for Discretionary Review; 5) Court of Appeals Commissioner’s Ruling; 6) Court of Appeals Order Granting Motion to Modify Commissioner’s Ruling; 7) Court of Appeals Opinion

5. “Shut It Down” – *Montana v. Higgins* (Mont. Sup. Ct., 2020 MT 52, Mar. 3, 2020)

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: Lauren Regan, Kelsey Skaggs, Herman Watson

Charges: 1) Trespass; 2) Criminal mischief

Outcome: Necessity defense denied; defendant convicted

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. He filed his appeal with the state Supreme Court in February 2019. In 2020, the Supreme Court upheld the conviction, finding that Mr. Higgins could not avail himself of the common law necessity defense because his action constituted “indirect” civil disobedience and because the state has a statutory defense of coercion into which common law necessity has been merged.

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) Trial Transcript; 7) Opening Brief of Appellant; 8) Brief of Appellee; 9) Reply Brief of Appellant; 10) Supreme Court Opinion

6. *Oregon v. Butler* (Multnomah Cty. Cir. Ct., Ore. No., 19-CR-28017, Feb. 27, 2020)

Facts: In April 2019 a group of activists with Extinction Rebellion blockaded railroad tracks and built a garden to prevent the transport of tar sands oil for export to Zenith Energy’s facility in Portland, Oregon

Defendants: Margaret Butler, Jan Zuckerman, Ken Ward, Emily Carl, Michael Horner

Attorneys: Lauren Regan, Cooper Brinson, Kenneth Kreuzscher

Charges: Trespass

Outcome: Choice of evils defense allowed; hung jury and mistrial

Procedure: After pretrial briefing, the defense was allowed to present the “choice of evils” defense, Oregon’s version of necessity that allows defendants to argue that they were justified in averting a “public emergency.” The defense called environmental scientist Deke Gundersen and attorney and environmental science professor Nicholas Caleb to testify about the dangers of climate change and the absence of effective legal alternatives. Five of the six jurors voted to acquit, but the failure of the jury to reach a verdict led to a mistrial. The state later dismissed the charges.

Case documents (see Appendix): Defendant’s Notice, Offer of Proof and Memorandum in Support of Presentation of “Choice of Evils Defense”

7. “Four Necessity Valve Turners” – *Minnesota v. Yildirim* (Ninth Jud. Dist. Ct., Minn., Itasca Cty., No. 31-CR-19-395, Aug. 21, 2019)

Facts: Four Catholic Worker activists turned valves on a pipeline near Blackberry, Minnesota to stop the flow of tar sands oil through Enbridge Lines 3 and 4.

Defendants: Brenna Cussen-Anglada; Michele Naar-Obed; Allyson Polman; Daniel Yildirim

Attorneys: Alice Cherry, Jennifer McEwen, Tim Phillips, Kelsey Skaggs

Charges: 1) Felony aiding and abetting attempted damage to pipeline property; 2) Misdemeanor fourth degree aiding and abetting criminal damage to property

Outcome: Necessity defense partly excluded prior to trial; trial scheduled for 2021

Procedure: In May 2019, in anticipation of an attempted necessity defense, the state filed a motion in limine to exclude necessity evidence. The court then held a hearing in which

defendants proffered necessity evidence. In July 2019, the state and the defense filed opposing briefs on the necessity issue. On August 21, 2019, the court granted the state’s motion in part, finding that the defendants had legal alternatives and that they had failed to show that the harms of climate change were imminent, but that they had provided sufficient evidence of a direct causal connection between breaking the law and preventing harm. The court excluded expert testimony but allowed the defendants to assert a “limited” justification defense. Trial is scheduled for 2021.

Case documents (see Appendix): 1) State Notice of Motion and Motion in Limine; 2) Pre-trial Hearing Transcript; 3) Memorandum in Opposition to State’s Motion in Limine to Exclude Necessity Defense; 4) State’s Memorandum Opposing Defendant’s Request to Proceed with the Affirmative Defense of Necessity; 5) Order Excluding Necessity Defense

8. “Wawayanda Six” – *New York v. Cromwell* (Town of Wawayanda Justice Court, N.Y., No. 15120561, June 13, 2019)

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: Valeria A. Gheorghiu, Michael H. Sussman

Charges: Disorderly conduct

Outcome: Judge found the defendants guilty in a bench trial; state Supreme Court (an appellate court) upheld the ruling

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.

On appeal, the Supreme Court (an appellate court) ruled that the standard for assessing necessity is objective, not subjective; that the defendants’ actions were too remote to mitigate global warming; and that “imminence” entails “immediacy,” which does not characterize the threat of global warming.

Notes: In its decision, the trial 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) Trial Court Decision; 4) Supreme Court Opinion

9. *Michigan v. Alpert (Ingham Cir. Ct., Mich., No. 18—6143-SM, May 10, 2019)*

Facts: Activists with the Poor People’s Campaign surrounded a Michigan Department of Environmental Quality building in Lansing on June 4, 2018 to protest the agency’s pattern of ignoring threats to public health and safety and encouraging corporate harms, including its mismanagement of the Flint water crisis and its permitting of the Enbridge Line 5 project, which threatens the Great Lakes and the climate.

Defendants: Alana Alpert, Carolyn Baker, Debra Jo Hansen, S. Baxter Jones, Richard Levey, Claire McClinton, Sylvia Orduno, Edwin Rowe, James Justin Sledge, Elizabeth Theoharis, Carlos Santacruz-Cardenas, Leah Wiste, William Wylie-Keller

Attorneys: Julie Hurwitz, Stephen Milks, and Allison Kriger

Charges: Felony resisting and obstructing an officer, later downgraded to misdemeanor disturbance of a public meeting

Outcome: Prosecutors dropped charges after defendants presented necessity evidence

Procedure: Prior to trial, the defense submitted a brief outlining the various environmental emergencies that the state environmental agency had actively encouraged, including the climate crisis, and cited a variety of evidence to support the elements of the defense. Shortly after the judge postponed the trial to take the issue of necessity under advisement, the prosecutor dropped all charges.

Notes: The decision to drop charges after a strong showing of necessity by the defense continues a trend seen in *North Dakota v. Iron Eyes*, *Massachusetts v. Gore*, and *Massachusetts v. O’Hara*.

Case documents (see Appendix): 1) Defendants’ Joint Memorandum of Law in Support of Necessity Defense; 2) Defendants’ Proposed Jury Instruction on Necessity

10. *Minnesota v. Bol (Sixth Jud. Dist. Ct., St. Louis Cty., Minn., No. 69DU-CR-18-166, Dec. 14, 2018)*

Facts: Activists protesting Enbridge Line 3 blocked access to a Wells Fargo branch in Duluth for three hours

Defendants: Scott Andrew Bol, Ernest Burbank, Michael Walfred Neimi

Attorneys: J.T. Haines, Jennifer McEwen

Charges: Petty misdemeanor trespass

Outcome: Necessity defense denied and defendants convicted

Procedure: The defendants were tried in a bench trial before a “referee,” or magistrate judge. Defense expert witnesses included Tara Houska, National Campaigns Director for Honor the Earth, who spoke of the efficacy of civil disobedience; Dr. Christina Gallup, professor of Earth and Environmental Science at the University of Minnesota, Duluth, who testified about the harms of climate change and the lack of legal alternatives; and Ryan Jones-Casey, an investment professional, on the effect of civil disobedience on the behavior of financial institutions. The defense then submitted a closing argument on the necessity defense via letter brief. The referee found that the defendants had reasonable legal alternatives, although he recognized the seriousness of climate change; the defendants were convicted and ordered to pay \$135 each.

Case documents (see Appendix): 1) Trial transcript; 2) Defense Closing Argument Letter Brief; 3) Order Following Court Trial

11. “Shut It Down” – *Minnesota v. Klapstein* (Ninth Jud. Dist. Ct. Clearwater Cty., Minn., No. 15-CR-16-413, Oct. 9, 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.

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

Attorneys: Tim M. Phillips, Lauren Regan, Kelsey Skaggs

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 initially allowed by trial court, with state Court of Appeals and Supreme Court upholding the decision against prosecutor appeal; trial court partly reversed itself and barred some necessity evidence but then dismissed all charges

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. The prosecution appealed again and the state Supreme Court upheld the Court of Appeals’ decision. Prior to trial, the trial court partly reversed itself and barred necessity and climate change evidence, an order it partly modified while reserving some evidentiary rulings for trial. After the prosecution closed its case (having previously dropped the trespass charges), the defense moved

for acquittal based on insufficiency of the evidence and the court granted the motion, dismissing all charges.

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; 8) State's Petition for Review to the Supreme Court; 9) Supreme Court Order Denying State's Petition for Review; 10) District Court Order Following Pretrial Settlement/Conference; 11) Defense Motion to Reconsider Pretrial Rulings

12. *North Dakota v. Iron Eyes* (Fourth Jud. Dist. Ct. Hennepin Cty., Minn., No. 27-CR-17-2097, Aug. 21, 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: Plea agreement resulting in no jail time

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. In August 2018, Iron Eyes pled guilty to a Class B misdemeanor of disorderly conduct, serving no jail time and keeping his law license.

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

13. *Wisconsin v. Good-Cane-Milk* (Douglas Cty. Cir. Ct. No. 17CM427, Aug. 13, 2018)

Facts: In August 2017, an activist protesting Enbridge's Line 3 pipeline, which would bring tar sands oil to Wisconsin export facilities, tied himself to an excavator at a pipeline construction site while another activist live-streamed the action.

Defendants: Alexander Good-Cane-Milk, Neville L. Robins, Kyla Hassig, Brandy Maxie

Attorneys: John Bachman, Patricia Hammel

Charges: Disorderly conduct, obstructing an officer

Outcome: Coercion defense denied; Good-Cane-Milk and Hassig were convicted and one other defendant was acquitted; the outcome for the fourth defendant is unknown

Procedure: The defendants filed a memorandum seeking to assert that state statutory defense of coercion (Wisconsin does not have a common-law necessity defense). The memorandum asserted a reasonable belief standard regarding legal alternatives and the necessity of direct action, connected the defense to the public trust doctrine, and included an appendix on the special dangers of tar sands oil. The trial court denied the defense and two defendants were convicted by a jury, while another was acquitted on non-coercion grounds. Hassig was sentenced to 20 days in jail and fines; Good-Cane-Milk's sentence is unknown.

Case documents (see Appendix): Memorandum in Support of Affirmative Defense of Coercion

14. *Washington v. Doerscher* (Thurston Cty. D. Ct., Wash, No. C00002726, June 2018)

Facts: Four activists participated in a blockade of the transport of fracking proppants from the Port of Olympia intended for the Bakken Shale and were arrested.

Defendants: Corey Andrew Doerscher, Sara Marie Flahaut, Kristoffer Ward Kimmel, Colleen Sue Zickler

Attorneys: Larry Hildes

Charges: Unknown

Outcome: Necessity defense denied; defendants accepted plea deal

Procedure: The defendants filed a pre-trial motion asserting the necessity defense and offering expert testimony, which was denied. The defendants accepted a plea deal.

Case documents (see Appendix): 1) Defendants' Notice of Intended Defenses; 2) Defendants' Response to Prosecutors' Motion in Limine

15. "Delta 5" - *Washington v. Brockway* (Wash. Ct. App., No. 76242-7-I, May 29, 2018)

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, E. Craig Hay, Bridge Joyce, Mary Joyce McCallum

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. On appeal, the Court of Appeals upheld the trial court's denial of the necessity defense.

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. Climate Defense Project submitted an amicus curiae brief arguing for application of the public trust doctrine to consideration of the necessity defense. The Court of Appeals found that, although the necessity defense may be available in cases of civil disobedience, the trial court had correctly ruled that the defendants had legal alternatives to pursue their political goals.

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 (see Appendix): 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; 12) Court of Appeals Opinion

16. *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

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

Outcome: Necessity defense denied; one defendant pled guilty to public nuisance

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. Prior to trial, Zimmerman pled guilty to public nuisance and received a sentence of 30 days of community service and one year of probation.

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

17. *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. A week before trial, at which the defendants were prepared to call experts Bill

McKibben, James Hansen, Martin Gilens, and others 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

18. "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: Alice Cherry, Michael Hoffman, William Kirschner

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

19. *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.

20. *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 unknown

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

21. “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 defendants were originally charged with disorderly conduct for disobeying a police officer, but the prosecution changed the charge to disorderly conduct for blocking traffic. 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

22. *New York v. Angie* (Town of Reading Court, N.Y., June 28, 2016)

Facts: An activist with We Are Seneca Lake was arrested at a protest near the main gates of the Crestwood Midstream compressor station in Reading, New York, as part of a campaign to prevent the storage of natural gas alongside Seneca Lake.

Defendant: Tom Angie

Attorney: Sujata Gibson, Joseph Heath

Charge: Trespass violation

Outcome: Mistrial

Procedure: The defense filed a pre-trial motion asserting the necessity defense, which was denied. At trial, the judge improperly declared the defendant guilty after the prosecution had presented its case but before the defense had put on any evidence. The prosecution reminded the judge of the rules of procedure — New York state judges are often not trained in law — and the judge issued a guilty verdict again. After substantial discussion, the judge agreed to recuse himself from further We Are Seneca Lake trials and declared a mistrial.

23. 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 (see Appendix): 1) Final Assessment Letter against D'Angelo; 2) Final Assessment Letter against Fuller

24. “Flood Wall Street 10” – *New York 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 (see Appendix): 1) Defense Trial Memorandum of Law; 2) Trial transcript excerpt

25. *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 (see Appendix): Defense Trial Brief Regarding the Necessity Defense

26. “The Lobster Boat Blockade” - *Massachusetts 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 (see Appendix): 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)

27. “MI-CATS 3” - *Michigan v. Carter* (Ingham Cir. Ct., Mich., 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: Joshua M. Covert, Robert K. Gaecke, Jr, Kathy H. Murphy

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 (see Appendix): 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)

28. *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 (see Appendix): 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

29. *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: Robert Gentry, Larry Hildes

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 (see Appendix): 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

30. *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: Elizabeth Hunt, Patrick A. Shea, Ronald J. Yengich

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 (see Appendix): 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

31. *Florida v. Block* (Fifteen Dist. Ct., Palm Beach Cty. Ct., Fla., 08MM003373AMB, Dec. 4, 2008)

Facts: Activists with Everglades Earth First! protested the construction of a power plant in Palm Beach County and were arrested.

Defendants: Brandon Block, Richard Halsted, Russell McSpadden, Lynne Purvis, Marc Silverstein, Panagioti Tsolkas

Attorneys: Charles Fountain II, Erich Taylor

Charges: 1) Misdemeanor unlawful assembly; 2) Misdemeanor trespass; 3) Misdemeanor resisting arrest without violence

Outcome: Necessity defense allowed; defendants convicted.

Procedure: The defendants were permitted to put on a necessity defense and put on expert testimony by Sydney Bacchus, a hydroecologist who spoke of the plant's water requirements and dangers to aquifers, and University of Miami oceanographer John Van Leer, who testified about climate change's effects in Florida, and a necessity instruction was sent to the jury. The jury convicted the defendants. Tsolkas received 60 days in jail and Purvis received 30 days in jail.

SWITZERLAND

1. *Lausanne Climate Action* (Tribunal d'Arrondissement de Lausanne, PE 19.000742, Jan. 13, 2020)

Facts: In November 2018, a group of protesters with Lausanne Climate Action occupied a Credit Suisse bank location and played a tennis game to protest its investments in fossil fuels

Defendants: Twelve unnamed defendants

Attorneys: Youri Widmer, Mireille Loroche, Annie Schnitzler, Laïla Batou, Antonella Cereghetti, Charles Munoz, Olivier Boschetti, David Raedler, Marie-Pomme Moinat, Christian Bettex, Aline Bonard, Wettstein Martin

Charges: Trespass

Outcome: Defendants acquitted by reason of necessity

Procedure: The defense called as expert witnesses a climatologist and Nobel Prize-winning biophysicist Jacques Dubochet to discuss the severity of the climate threat and the failure of governments to act. A financial expert discussed Credit Suisse's investments in fossil fuel companies. After reviewing the evidence, the judge found that the defendants had satisfied the statutory necessity defense, which resembles the U.S. common law, and acquitted them.

Notes: A month after the protest, the bank announced that it would no longer finance new coal plants

Case documents (see Appendix): 1) Proces I; 2) Proces II; 3) Jugement

FRANCE

1. *State v. Delahalle (Tribunal de Grande Instance de Lyon, 1916800015, Sep. 16, 2019)*

Facts: In February 2019 the defendants, along with a large group of activists with Association Non Violente COP 21, entered a town hall in Lyon and removed the portrait of President Macron in protest of his inaction on climate

Defendants: Fanny Delahalle and Pierre Goinvic

Attorney: Thomas Fourrey

Charges: Group robbery (“vol en reunion”)

Outcome: Defendants acquitted by reason of necessity

Procedure: The defense presented as witnesses a former government minister and an ecologist, who testified that rapid action was necessary to meet the Paris Agreement’s warming target but that the French government had failed to take appropriate measures. The defendants sought “acquittal in the name of a state of necessity which renders legitimate a criminal offence that is in proportion to the need to stave off a serious and imminent danger.” The court, reviewing the evidence of governmental inaction, recognized that “faced with the State’s failure to comply with objectives which could be perceived as minimal in a vital domain, the means of expression of the citizens in a democratic country cannot be limited to voting at electoral times but other forms of participation must be invented within the framework of our duty of critical vigilance.” The defendants were acquitted by the sole judge.

Case documents (see Appendix): Judgment (original French and English translation)

CANADA

1. *Trans Mountain Pipeline ULC v. Mivasair (British Columbia Ct. App., 2020 BCCA 255, Sep. 21, 2020)*

Facts: In March and August 2018 activists blocked an access road at the Westridge Marine Terminal in British Columbia to prevent construction of the Trans Mountain Pipeline carrying tar sands oil for export.

Defendants: David Gooderham and Jennifer Nathan

Attorneys: M. Peters

Charges: Criminal contempt of court

Outcome: The necessity defence was denied and at least Gooderham was sentenced to 28 days in jail; he is current appealing

Procedure: The defendants had been charged with criminal contempt after disobeying a court injunction to stay away from the protest area. On December 3-4, 2018, the defense submitted an application for leave to raise the common law defence of necessity, focusing on the imminent peril of climate change and the federal government's anti-democratic process of approving the Trans Mountain Pipeline. On December 4, 2018, the presiding judge dismissed the application and issue a written judgment on January 17, in which he found that there was no imminent peril and that they had legal alternatives to defying the injunction.

The defendants went to trial on March 11, 2019 and presented no evidence, having been denied the right to present expert testimony related to carbon emissions and climate science. They were convicted by the judge. On appeal, the Court of Appeal upheld the trial court, finding that the defendants were not obliged to take emergency action.

Notes: The defendants' common law necessity argument was substantially similar to those offered by defendants in the United States. In addition, they offered a defense based on Canada's Charter of Rights and Freedoms.

A separate application to use the necessity defense was filed earlier by Thomas Sandborn, with the same presiding judge denying the application (2018 BCSC 874).

Case documents (see Appendix): 1) Notice of Application and Charter Notice; 2) Outline of Proposed Evidence; 3) Second Affidavit of David Gooderham; 4) Affidavit of Jennifer Nathan; 5) Reasons for Judgment; 6) Court of Appeal opinion

UNITED KINGDOM

1. *R. v. Hallam (Southwark Crown Court, Dec. 18, 2019)*

Facts: Activists with Extinction Rebellion glued themselves to a London train in April 2019 to protest government inaction on climate change

Defendants: Cathy Eastburn, Mark Ovland, Luke Watson

Attorneys: Mike Schwarz

Charges: Criminal obstruction

Outcome: Necessity defense denied; defendants convicted and sentenced to year-long conditional discharge and costs

Procedure: The judge barred the jury from considering the defendant's proffered defense of necessity, and ordered them to consider only whether the train had been blocked, not the activists' motivation in doing so. The jury convicted the defendants.

See news reports on the case [here](#) and [here](#).

2. *R. v. Hallam (Southwark Crown Court, May 9, 2019)*

Facts: Activists sprayed messages calling for fossil fuel divestment inside Kings College in January and February 2017

Defendants: Roger Hallam, Dave Durant

Attorneys: None (self-represented)

Charges: Criminal damage

Outcome: A jury acquitted by reason of “lawful excuse”

Procedure: The judge limited the defendants’ testimony regarding climate change and its urgency in an effort to focus the trial on the damage to the university facilities. The defendants elicited testimony from the prosecutions’ witnesses to the effect that the university was sympathetic to the protest and had responded accordingly. During the summing-up, the judge rejected the defendants’ arguments that the imminence of climate change harms is a matter of scientific certainty, rejected the introduction of a “necessity principle,” and told the jury to focus only on whether the defendants had a “lawful excuse” in the sense of university approval of their actions. The jury returned a unanimous verdict of not guilty.

See a summary of the case [here](#).

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

APPENDIX

Shut It Down - *Washington v. Ward*

State's Response to Defense of Necessity and Defense Witnesses
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 Appellate Brief
State's Response to Petitioner's Opening Brief
Court of Appeals Decision
Supreme Court Order Denying Petition

Washington v. Zepeda

Court of Appeals Opinion

People v. Berlin

Motion in Limine
Brief for Defendants-Appellants
Supreme Court Opinion

Washington v. Taylor

Defense Motion to Allow Affirmative Defense and to Call Expert Witnesses at Trial
Necessity Hearing Transcript
Findings of Fact and Conclusions of Law
Superior Court Order Reversing Trial Court Grant of Necessity Defense
Defense Motion for Discretionary Review
Court of Appeals Commissioner's Ruling
Court of Appeals Order Granting Motion to Modify Commissioner's Ruling
Court of Appeals Opinion

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
Trial Transcript
Appellant Opening Brief

Brief of Appellee
Reply Brief of Appellant
Supreme Court Opinion

Oregon v. Butler

Defendant’s Notice, Offer of Proof and Memorandum in Support of Presentation of “Choice of Evils Defense”

Four Necessity Valve Turners – Minnesota v. Yildirim

State Notice of Motion and Motion in Limine
Pre-trial Hearing Transcript
Memorandum in Opposition to State’s Motion in Limine to Exclude Necessity Defense
State’s Memorandum Opposing Defendant’s Request to Proceed with the Affirmative Defense of Necessity
Order Excluding Necessity Defense

Wawayanda Six – New York v. Cromwell

Defense Trial Memorandum of Law
Trial Memorandum of Law
Trial Court Decision
Supreme Court Opinion

Michigan v. Alpert

Defendants’ Joint Memorandum of Law in Support of Necessity Defense
Defendants’ Proposed Jury Instruction on Necessity

Minnesota v. Bol

Trial transcript
Defense Closing Argument Letter Brief
Order Following Court Trial

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
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Defense Motion to Allow Affirmative Defense of Necessity and to Call Expert Witnesses

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Joint Defense Reply in Support of Motion

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Defense Motion to Reconsider Order on Expert Witnesses

Trial excerpts related to necessity defense

Petitioner's Opening Brief

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Amicus Curiae Brief of Climate Defense Project in Support of Petitioners' Opening Brief

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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

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Memorandum in Opposition to Commonwealth's Motion in Limine to Exclude Necessity Defense

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State's Brief in Support of Motion in Limine

Defense Response to Motion in Limine

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Defendants' Reply Brief in Support of Use of Necessity Defense

State's Response to Defense of Necessity and Defense Witnesses

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Defense Trial Memorandum of Law
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Coast Guard Cases

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

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Defense Trial Memorandum of Law
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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)

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Motions of Defendants to Present an Expert Witness and to Raise the Defense of Environmental
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Defendants' Notice of Intended Defenses
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Reply Brief in Support of Motion *in Limine* to Exclude Testimony and Materials Re: Necessity and First Amendment Defenses
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Defense Memorandum Opposing Government's Motion

Government Reply to Defense Memorandum

Defense Written Proffer of Choice of Evils Defense and Request for Evidentiary Hearing;

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Outline of Proposed Evidence

Second Affidavit of David Gooderham

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Defence Case Statement

Transcript of Evidence of Professor Hansen

Judge's Summing-Up

Note on S.5 "Lawful excuse"