

Sustainability

and the Law



**Do our laws
and case law
help or hinder**

**a transition
to a sustainable
future?**

Challenges Facing the World Today

- Habitat degradation and biodiversity loss
- Energy challenges and climate change
- Population growth
- Globalization
- Urbanization
- Water – quantity and quality
- Food – land and ocean

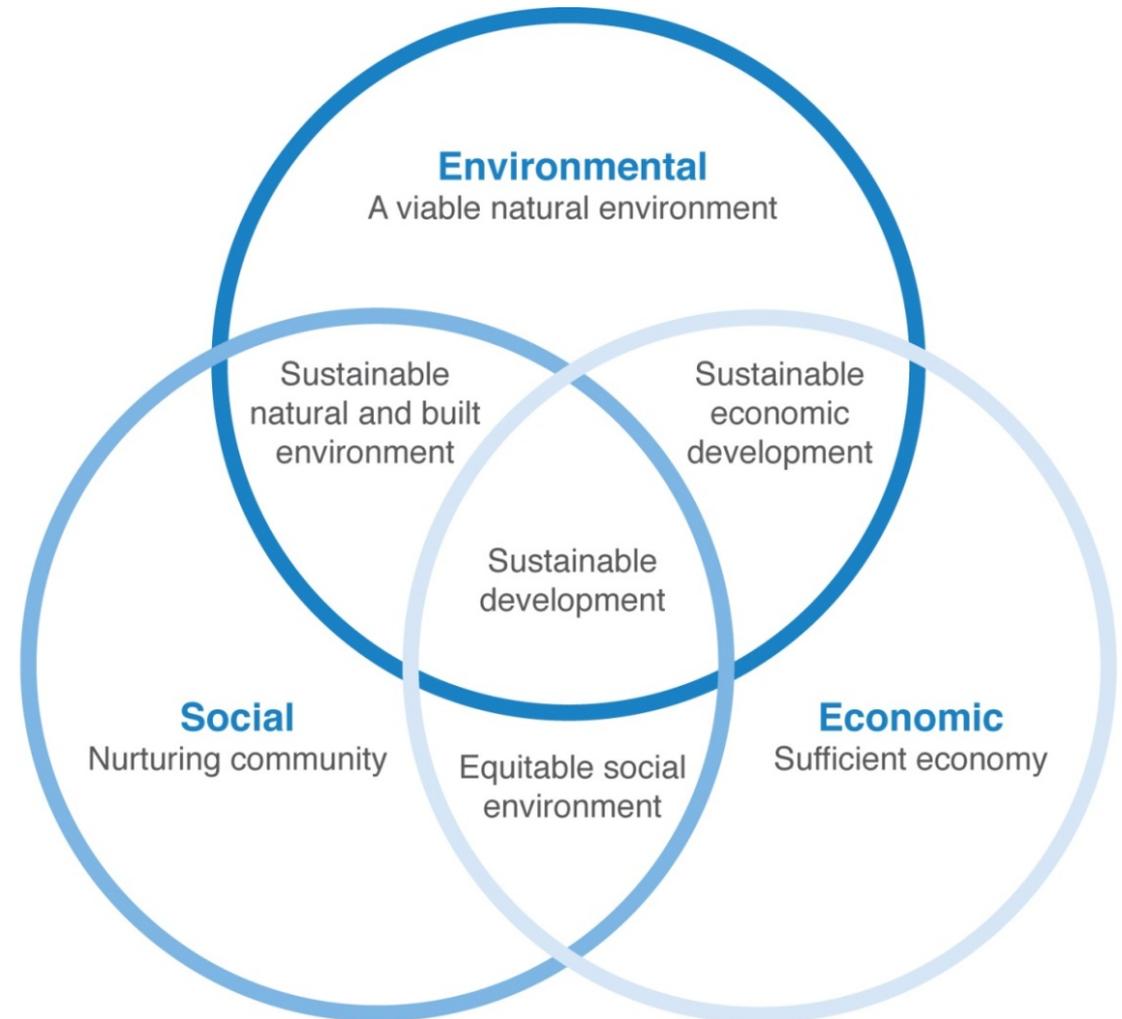


These specific problems lead to 2 general problems:

- Environmental degradation and depletion of natural resources
- Growing inequity

What is Sustainability?

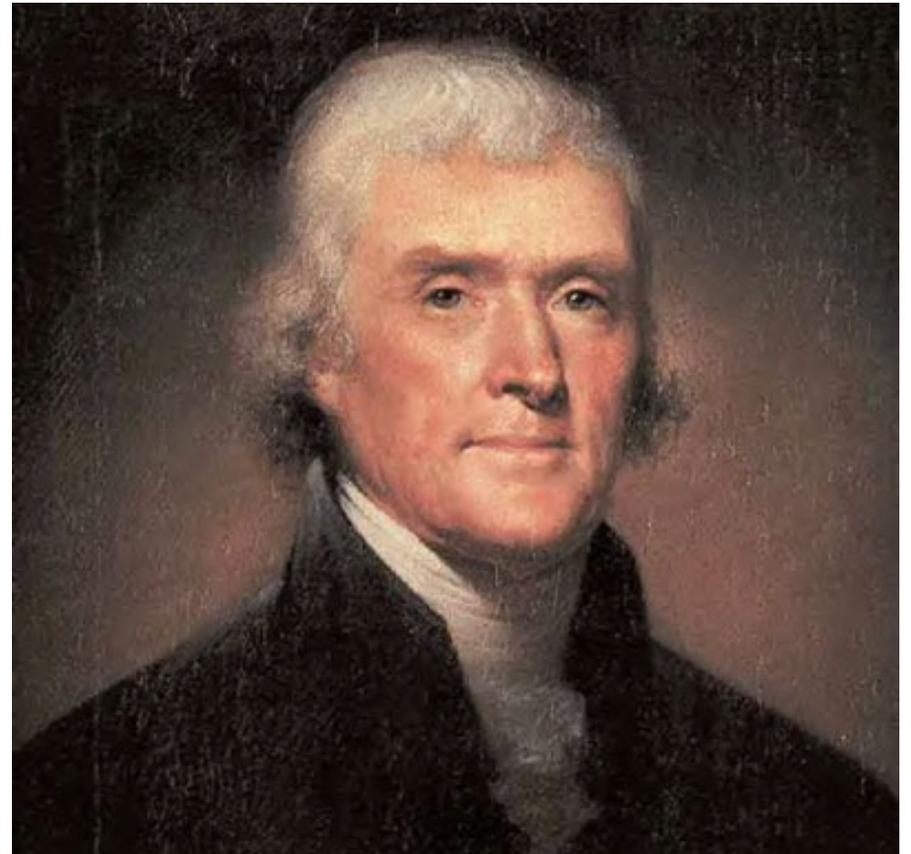
- Not Environmental Science
- Sustainability includes, but goes far beyond, environmental science.
- It addresses the compromises and tradeoffs needed to solve real world problems.
- Sustainability is not only about preserving our environment, but about the preservation of the conditions for survival of our society. The environment will continue to exist even if our society disintegrates.



Sustainability is Not a New Idea

“[T]he earth belongs to each generation during its course, fully and in its own right, no generation can contract debts greater than may be paid during the course of its own existence.”

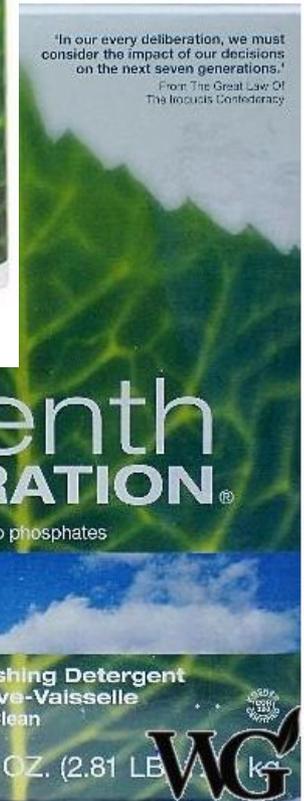
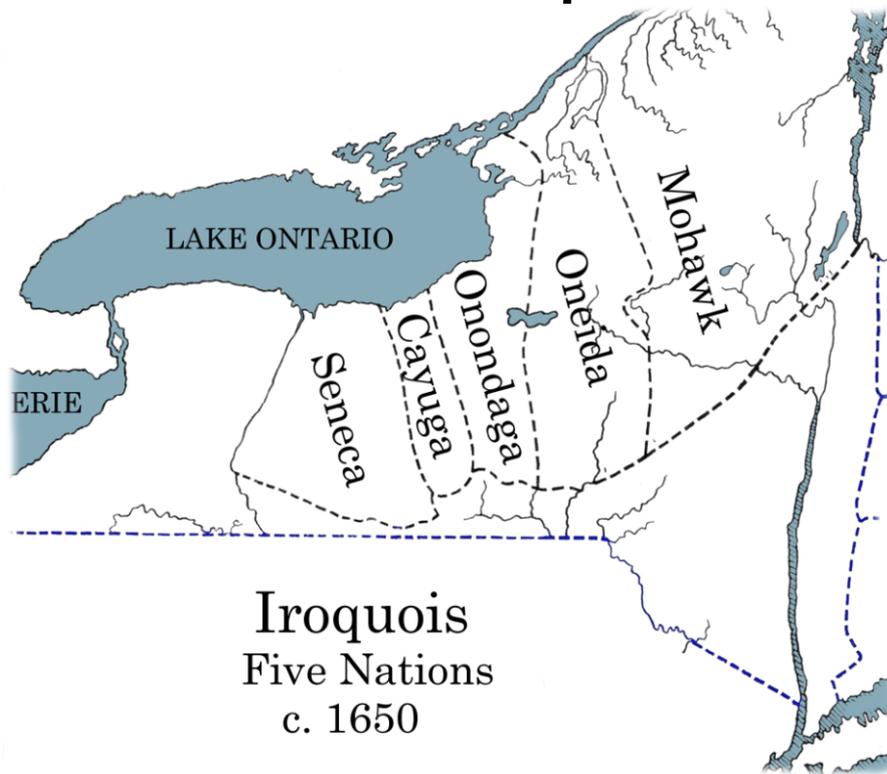
Thomas Jefferson (1789)



Even before our Founding Fathers...

“In every deliberation, we must consider the impact of our decisions on the seventh generation....”

-Iroquois Nation



Sustainable Development Goes Global



1987 UN “Brundtland Report” recognized:

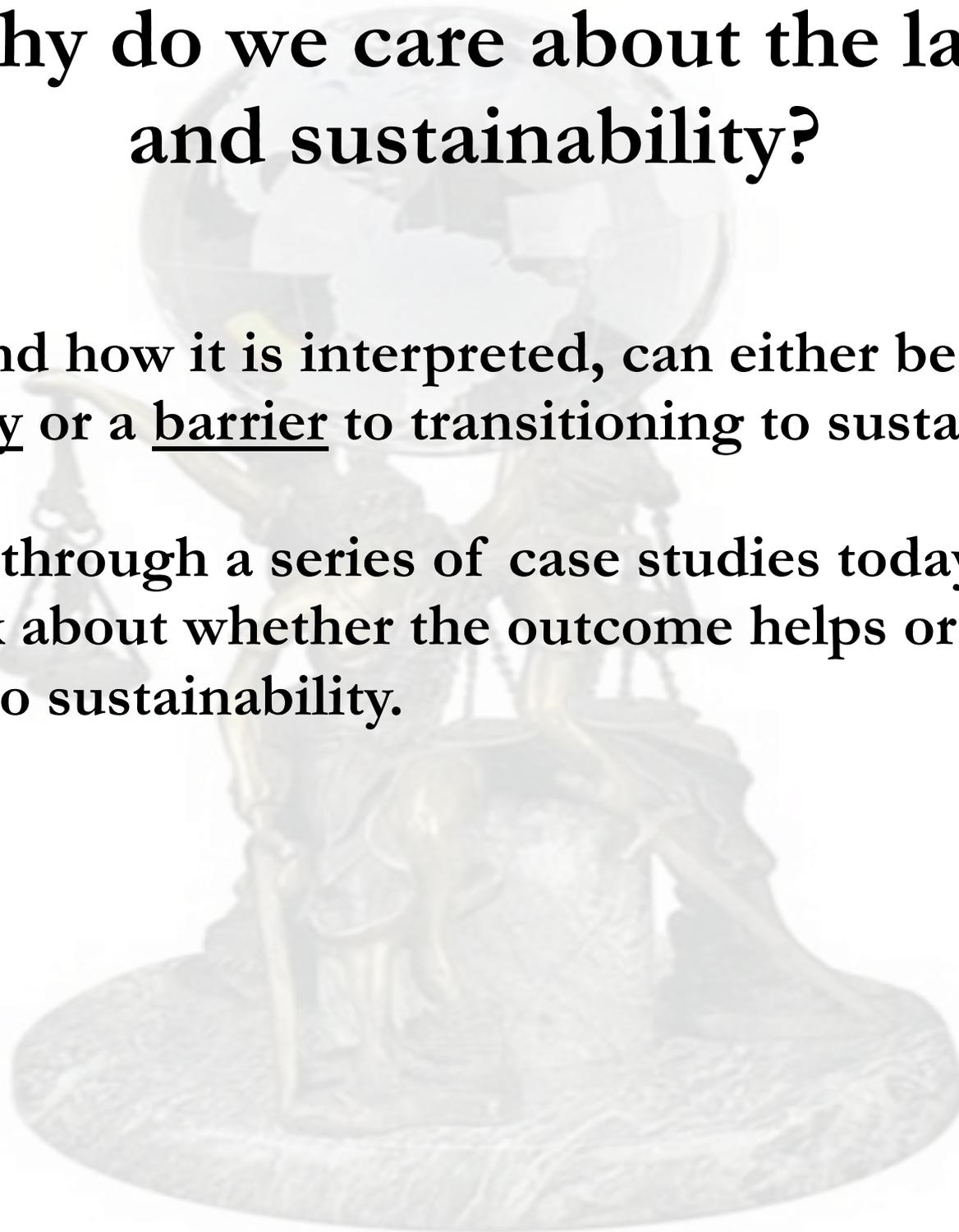
“The environment does not exist as a sphere separate from human actions, ambitions, and needs.”

Defined “sustainable development” as:

“Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Why do we care about the law and sustainability?

- The law, and how it is interpreted, can either be an opportunity or a barrier to transitioning to sustainability.
- We will go through a series of case studies today. With each, think about whether the outcome helps or hinders a transition to sustainability.



The “Raw Milk War”

Raw Food Coop raided by Federal & State Law Enforcement

- 2010 and 2011: federal and state law enforcement agents raided Rawesome Foods and seized raw milk & cheese.
- Owner of store and two others arrested & charged with conspiracy to produce and sell unpasteurized dairy products.
- Does this help or hinder a transition to sustainability?



Front Yard Gardens & Backyard Chickens



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Gardens:

- Oak Park, Ill.: “All unpaved portions of the site shall be planted with grass, ground cover, shrubbery, or other suitable live plant material.”
- Boise: No limitation except in historic districts.

Livestock:

- Boise:
 - 1 acre minimum large livestock ($\frac{1}{2}$ acre exclusive of structure dedicated to animal)
 - $\frac{1}{2}$ acre minimum for poultry & rabbits ($\frac{1}{4}$ acre exclusive of structure dedicated to animals)



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NRDC v. USFDA

- 1950, FDA approved antibiotics for growth and feed efficiency.
- 1970s, FDA recognized use of antibiotics in livestock leads to antibiotic resistant bacteria that can infect humans and is a “mounting public health problem of global significance.”
- 1977, FDA announced intent to withdraw approval of use of antibiotics for growth and feed efficiency.
- Approval was never withdrawn....



NRDC v. USFDA cont.

- May 2011, NRDC sued; claimed FDA violated law requiring withdrawal of approval of drugs not shown to be “safe.”
- March 2012, federal district court granted judgment in favor of NRDC; ordered FDA to complete mandatory withdrawal procedures for penicillin and tetracycline.
- Does this court decision help or hinder a transition to sustainability?



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Massachusetts v. EPA

- Massachusetts + 11 other states + 3 cities sued EPA
- Sought injunction requiring EPA to regulate CO₂ emissions from new motor vehicles under the Clean Air Act.

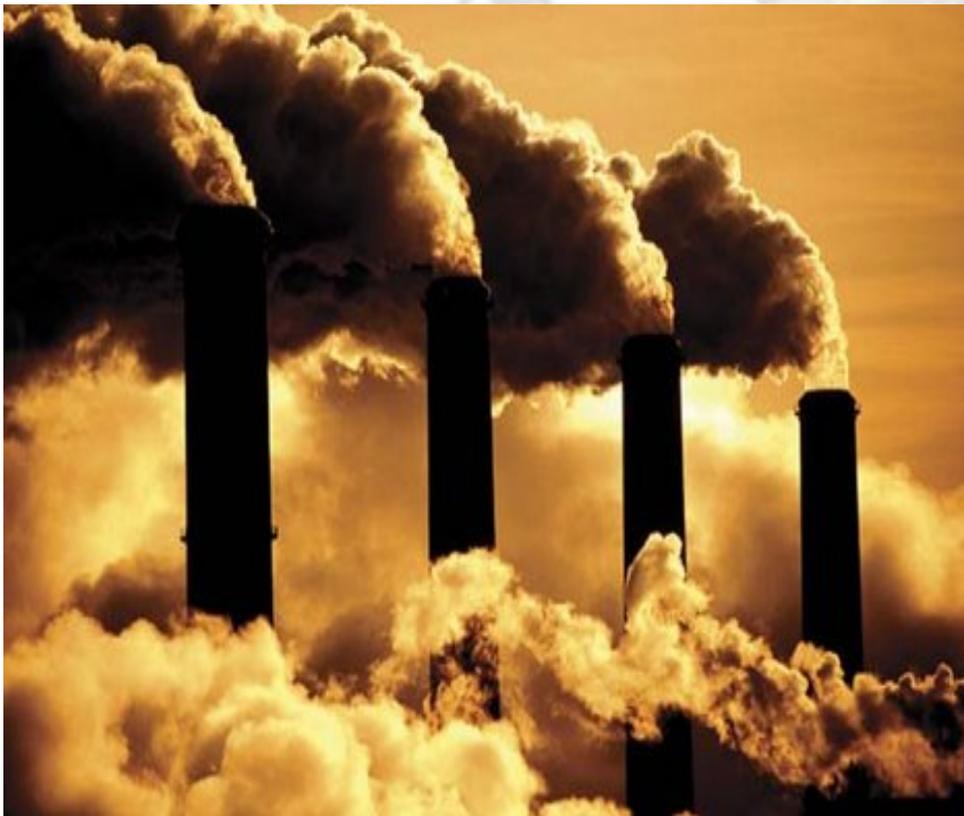
US Supreme Court held:

- Clean Air Act gives EPA authority to regulate CO₂ and other GHG emissions from new motor vehicles.
- Justifications provided by EPA for not regulating GHG emissions were inadequate.



American Electric Power v. Connecticut

- Eight states + NYC + 3 nonprofit land trusts sued 5 major electric power companies that used coal to generate power.
- Claimed defendants were biggest CO₂ emitters in nation; this led to global warming; resulting global warming violated federal public nuisance law.



US Supreme Court held:

- Federal public nuisance law claims cannot be brought against utilities for their GHG emissions.
- Clean Air Act “displaced” any federal common law right to seek reduction of GHG emissions from power plants.

Kivalina v. ExxonMobil Corp., et al.

Kivalina: Inupiat Eskimo village; approximately 400 residents.



- **Defendants:** 24 oil, power, and coal companies.
- **Plaintiffs claim:**
 - Defendants contributed to excessive GHG emissions.
 - GHGs are causing global warming.
 - Global warming is causing Arctic sea ice to melt.
 - Resulting erosion & destruction will force relocation.

Kivalina v. ExxonMobil Corp., et al. cont...

- District Court dismissed the case holding:
 - Claim barred by political question doctrine: “[T]he allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.”
 - Plaintiffs could not show causation because they could not trace their injuries to a specific defendant.
- 9th Cir. affirmed on ground of “displacement”:
 - Federal common law public nuisance addressing GHG emissions had been displaced by Congressional action, relying on *Am. Elec. Power v. Connecticut*
 - Recognized the decision did not aid Kivalina, but “the solution to Kivalina’s dire circumstance must rest in the hands of the legislative and executive branches, not the common law.”

Public Trust Doctrine

A new litigation approach being used to address climate change:

- Lawsuits and rule-making petitions filed by minors based on theory government has failed in its duty to protect the atmosphere as a “public trust” for future generations.
- “By the law of nature these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea.” Emperor Justinian, 530 A.D.
- Public trust doctrine applied to protect access to and use of navigable waters, natural resources, recreational areas, and wildlife; had not previously been applied to atmosphere.



Public Trust Doctrine

- State DEQ denied rule-making: Idaho, Nevada, Utah, Wyoming, N. Dakota, S. Dakota, Oklahoma, Louisiana, Arkansas, Missouri, Illinois, Tennessee, Georgia, Florida, S. Carolina, Maryland, Ohio, Michigan, Connecticut, Maine, New Hampshire, Rhode Island, Hawaii
 - State DEQ has not yet ruled on petition: Nebraska, Wisconsin, Kentucky, Mississippi, Alabama, N. Carolina, Virginia, W. Virginia, Pennsylvania, Indiana, New York, Delaware, Vermont
 - State trial court dismissal: Washington, Oregon, Arizona, Colorado, Iowa, Minnesota, Alaska
 - Pending in state trial court: Kansas, Montana
 - State trial court allowed suits to go forward: Texas, New Mexico
- What potential do these petitions and lawsuits have?

Snowbowl Case

Navajo Nation v. U.S. Forest Service

- Snowbowl is a ski area on federal public land in N. Arizona (San Francisco Peaks).
 - Operated since 1930s under USFS special use permit.
 - Highly variable snow fall is making operation unprofitable.
 - USFS issued permit allowing Snowbowl to make artificial snow with treated wastewater.



Snowbowl Case cont...

Navajo Nation v. U.S. Forest Service

Tribal interests:

- Peaks have long-standing religious and cultural significance to Indian tribes; the Peaks are “sacred” and a “living entity.”
- Used for religious ceremonies & collect plants, water, other materials for medicinal and ceremonial purposes.
- Spraying snow made with treated sewage on the Holy Mountain was “like urinating on the altar at the Vatican....”



Snowbowl Case cont...

Navajo Nation v. U.S. Forest Service

- **Tribes sued USFS, claiming**
 - **Use of the wastewater on the Peaks would impose a substantial burden on the free exercise of their religion.**
 - **The USFS issued the permit in violation of NEPA (National Environmental Policy Act).**
- **The district court dismissed the claims, and the 9th Circuit affirmed, holding:**
 - **No substantial burden on free exercise of religion.**
 - **No NEPA violation because the USFS sufficiently complied with NEPA requirements.**
- **US Supreme Court denied certiorari.**
- **Does this decision help or hinder a transition to sustainability?**