

A Blued Trees Policy

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Abstract

Sustainable development today depends on realistic environmental policies. Arguably, ecocide has been a fit subject for artmaking and research since 1968, when Anne and Paul Erlich published *The Population Bomb*. Today, the Intergovernmental Panel on Climate Change (IPCC) demands attention to crucial issues such as ecocidal climate change effected by fossil fuel use. *The Blued Trees Symphony* is a project that engages art with the legal aspects of current policies on the proliferation of natural gas and its infrastructures. *Blued Trees* asks, can art forestall ecocide by natural gas pipelines by reasserting an originalist definition of public good? *The Blued Trees Symphony* reinvents how art might contribute to pragmatic public policy decisions and be an alternate model for sustainable justice. It addresses sustainable human relationships to other life and arts relationship to environmental policies grounded in Earth rights, a reconsideration of the Visual Artists Rights Act of copyright law and an originalist interpretation of eminent domain law: to protect the sacred home. The premises of this project agree with findings from the IPCC that cultural aspirations, often entwined with spiritual values, must be given equal consideration to economic well-being as we search for solutions to climate change. A priori, the *Blued Trees* project presumes that ecocide is indefensible on any grounds; that art is a fit response to ecocide by fossil fuel hegemonies; that we might partner with trees to develop sustainable policy systems to protect human civilization. *The Blued Trees Symphony* emerged from the *Blued Trees* project. *Blued Trees* began in 2015 as a series of copyrighted 1/3 mile long synesthetically conceived measures of an aerial score-in-

progress. The intercontinental work was registered as sonified biogeographic sculpture and proposed a new legal category of art under the Visual Artists Rights Act (VARA). In all its phases, the project asserts that the world has never needed the input of artists more to effect a sane response to ecocide and trees can be part of that discourse.

This paper examines the theoretical implications, development and production of *The Blued Trees Symphony*, artwork installed in forest corridors and implemented by local communities where natural gas pipelines are proposed. The intention was to create a transdisciplinary, art-based model for sustainable relationships with other species and across demographics. Legally redefining public good this way transects copyright, eminent domain and environmental law with public policy determinations. Bridging that transect is at the heart of the *Blued Trees* ecological art project. It was litigated in a Mock Trial April 25, 2018 and adjudicated for an injunction against the pipelines by Bronx Supreme Court Justice April Neubauer at the Cardozo School of Law. *The Blued Trees Symphony* evolved from *Blued Trees* as five movements conceptually based on the c.18 discursive sonata form. Each note of this work is identified with a nontoxic painted vertical sine wave on its trunk. Chordal relationships are determined by localized biogeographic features identified from Google Earth satellite mapping. The musical structure narrates the contest between Earth rights and globalized greed. *Blued Trees* was conceived to model how humanity could survive ecocide with environmental policies more appropriate to the Anthropocene.

Introduction

Could art effect environmental justice and avert ecocide? *The Blued Trees Symphony* was conceived in part to test the limits of applying formal artistic ideas to leverage policy change for the Anthropocene.

The engagement of artists in public policy revives an older model of civic discourse. In c. 17 Europe artists, such as the painter Peter Paul Rubens (1577-1640), exercised diplomatic influence on international policies. Since that time, art has been crowded into silos of limited discourse and marginal political influence to make room for economic power. Capitalism reached a crescendo during the industrial revolution, paving the way for today's fossil fuel hegemonies and opening policy doors to climate change and the present the

spectre of global ecocide. In the United States, ecocidal public policies are increasingly and putatively defended as bastions of survival level necessity. As the devastating impacts of anthropocentric behaviors have unrolled with the Anthropocene, the spectre of globalized ecocide has emerged and invites radical rethinking. In the past, ecocide hid in the darkness of colonial incursions. Today, ecocide by fossil fuel hegemonies is flourishing in full view of the world.

Natural gas corporations argue for expansion claiming that profits and jobs from fracking gas and installing pipelines for its transport would benefit local economies, representing “public good.” However, the deleterious impacts of fracked natural gas were documented in Josh Fox’s 2010 film “Gasland.”¹ In addition to killing many thousands of trees that mitigate climate change and protect water systems, damage from methane has been detailed by the Union of Concerned Scientists.² Nonetheless, private land was condemned and taken under the auspices of eminent domain law, under a current, novel definition of public good that conservative judges have deemed “perverse.”³

Ecocide caused by fossil fuel corporations producing climate change, fragmentation, and degradation of landscapes is arguably humanity’s most important challenge today. That is a challenge I would argue art can meet by contesting conventional assumptions about the role of art.

Gatekeepers in science, policy and justice often guard a cultural assumption that the role of art is to be a useful handmaiden, illustrating or interpreting more “important” ideas. British lawyer Polly Higgins warns international jurists of ecocide.⁴ Litigation on behalf of Earth

¹ “Gasland,” written and directed by Josh Fox, edited by Matthew Sanchez, released January 24, 2010, video, 104 minutes.

² “Environmental Impacts of Natural Gas,” Energy, Coal and Other Fossil Fuels, Union of Concerned Scientists, accessed February 18, 2018, <https://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/environmental-impacts-of-natural-gas#.Wom4na2ZPos>.

³ Conservatives objected that eminent domain was meant to protect the “sanctity” of the home, not wealthy companies. “Kelo Eminent Domain,” Eminent Domain Without Limits?: U.S. Supreme Court Asked to Curb Nationwide Abuses, Institute for Justice, accessed July 21, 2018, <https://ij.org/case/kelo/>.

⁴ Polly Higgins, *Eradicating Ecocide: Exposing the Corporate and Political Practices* (London: Shephard-Walwyn, 2010).

rights at the Hague before the United Nations serves to protect biological complexity from ecocide.⁵

The Blued Trees Symphony launched in 2015 in the corridor of Spectra Energy's then proposed natural gas pipeline expansion project in Peekskill, New York and was copyrighted under the Visual Artists Rights Act (VARA). The project subsequently expanded across the North American continent and the copyright was registered as sonified biogeographic sculpture.

Project History and Context

Blued Trees began in 2015 when several New York anti- fracking activists, hoping to arrest the Constitution natural gas pipeline expansion in that state connected with the artist. They were inspired by Peter von Teisenhausen, a sculptor in Alberta, Canada who copyrighted his entire ranch to prevent natural gas companies from building pipelines on his property. On that occasion, the corporations voluntarily retreated under the pressure of local public opinion. However, his premise was never tested in the Canadian courts or any other court.

The activists initially asked if trees in the pipelines path could be copyrighted? I replied “no, but we might be able to copyright relationships to the trees.”⁶ What evolved sought to replace anthropocentric, extractive models with one that recognizes human interdependence with other species and a plan to test von Teisenhausens’ legal premise in international courts. From the beginning, the strategy was conceived as “culture jamming,” turning conventional socio-economic models and conservative legal assumptions around to serve a progressive.⁷

⁵ “International Court of Justice,” Wikipedia, last edited July 21, 2018, https://en.wikipedia.org/wiki/International_Court_of_Justice.

⁶ Stephen Keefe, “This Canadian Artist Halted Pipeline Development by Copyrighting His Land as a Work of Art,” November 6, 2014, VICE, https://www.vice.com/en_us/article/5gk4jz/this-canadian-artist-halted-pipeline-development-by-copyrighting-his-land-as-a-work-of-art-983.

⁷ This assertion is based on the original definition of copyright law, established during the French revolution to protect the “spirit” of the art.

At the invitation of private landowner and activist lawyer Nancy Vann, the project was initiated June 21, 2015, on the summer solstice, as an “Overture” and copyrighted.⁸ The location was 30 miles from New York City and 105’ from an ageing, often failing nuclear plant (Indian Point). Despite copyright standing and a cease and desist notice to Spectra Corporation, the company destroyed the *Blued Trees* with little notice shortly before Thanksgiving 2015 and issued a personal dark money letter replete with veiled personal threats.⁹

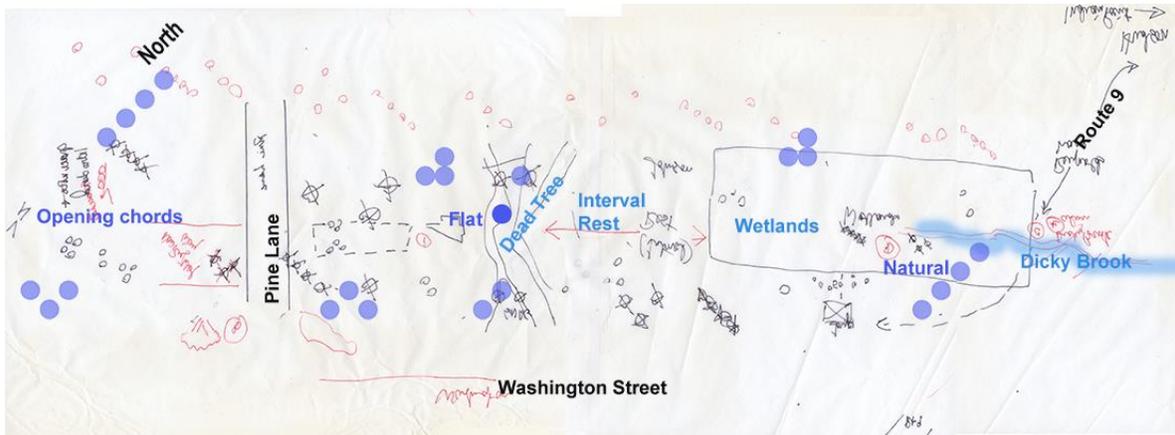


Figure 1 One of several images submitted for copyright registration, indicating one 1/3 mile installation of *The Blued Trees Symphony*. Drawing by Aviva Rahmani.

The project has provoked public conversation around *where* the spirit of art is (as protected by copyright law) and *what* is public good (as enshrined in conservative eminent domain-real estate law). This discourse has been advanced with presentations and publications, including venues in Korea, China, the UK, Japan and multiple sites in the United States.

As a symphony, it continues to explore three intertwined ideas:

1. that the classical sonata form was intended to be an abstract template for resolving dissonant relationships, as between watersheds, human communities and avaricious corporations committing ecocide.

⁸ “Blued Trees,” directed by Aviva Rahmani, edited and produced by Denise Petrizzo, documentation filmed June 21, 2015 by Denise Petrizzo in Peekskill, New York, video, 4:41, <https://vimeo.com/135290635>.

⁹ Dark money is a term for investments that are often covert and intended to silence or destroy organized or individual opposition to corporate agendas. Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (New York: Doubleday, 2016).

2. that a synesthetic perception of environmental relationships opens a door to a transdisciplinary practice, revealing novel possibilities to protect water. And all the life water depends upon.
3. that revisiting originalist legal definitions, such as a confluence between droit moral of art in copyright law, and protecting the sacred home for all life, as in the original intention of eminent domain law, can support arguments for Earth rights.¹⁰

Sonata Form in the Five Movements of *The Blued Trees Symphony*

The sonata form on which a symphony is based refers to how discourse emerged in the Age of Reason, reflecting a pre-revolutionary yearning similar to our own times, to reconcile extremes.¹¹ Then, that yearning was expressed in ideas about harmony and tempi to resolve dissonance.¹² In this project, the movements were initially expressed as protracted events in time.

¹⁰ “Originalist” is a legal and policy term that refers to focusing on the original intention of a law, as in interpreting the American constitution. “Originalism,” Wikipedia, last edited July 10, 2018, <https://en.wikipedia.org/wiki/Originalism>.

¹¹ Also known as the Age of Enlightenment, the Age of Reason was a response to accusations of abuse of power on the part of the church. It developed concurrently with revolutionary political movements.

¹² Sources have included the Juilliard School of Music, the Geology Department of Lehman College, City University of New York, Harvard Forest and the Hubbard Brook Experimental Forest in New Hampshire.

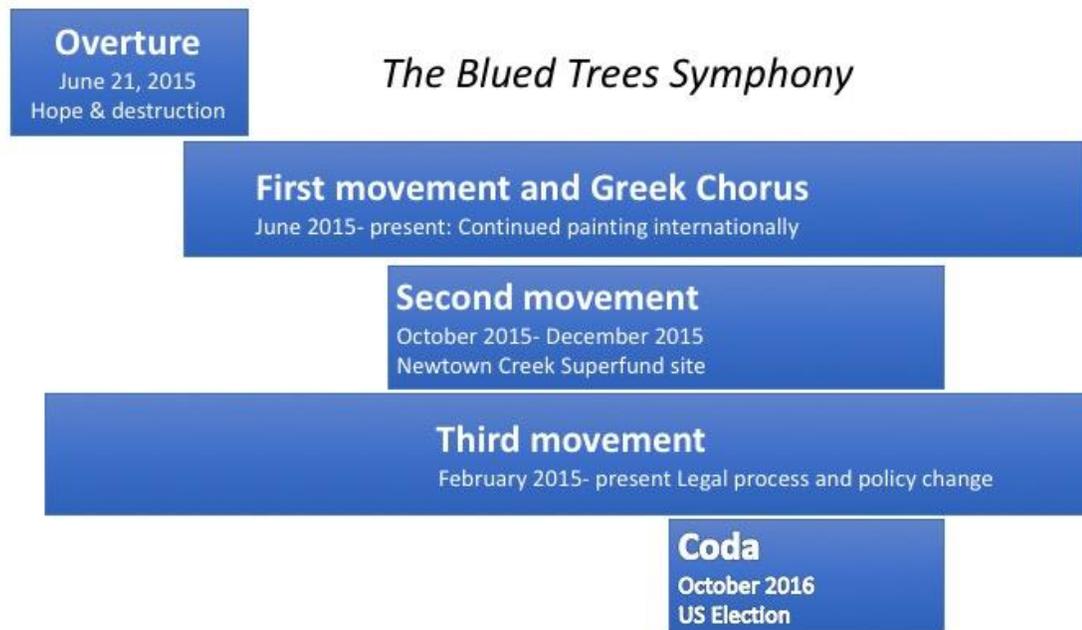


Figure 2 A schematic of the *The Blued Trees Symphony* 5-part score

The first movement then became the continued painting of measures at additional sites in New York, Virginia and West Virginia and Saskatoon, Canada. At each location, one person, usually another artist, took responsibility to organize a team. In Virginia, near Blacksburg, artist Robin Boucher personally supervised the painting of over 200 trees. Additional individual trees were painted across North America by homeowners as a “Greek Chorus.” The captured sound of birds at a single tree, and a visual projection of the terrain from google Earth satellite imagery, contributed to subsequent sonifications.

The second movement was completed in two months at an agitated tempo (*agitato*) during a residency at the International Studio and Curatorial Program (ISCP), near the Newtown Creek superfund site, in Brooklyn, New York supported by the National Endowment for the Arts (NEA). The music transposed data points for collection sites to monitor rates of toxic contamination into a score. The contaminant information was acquired from the Environmental Protection Agency (EPA). That music was electronically mixed with a recording of local traffic sounds captured by artist Dylan Gaultier for the project. Mapping compared the proposed future natural gas infrastructure plans for New York State to historical contamination at Newtown Creek: the entire state could become a toxic site if natural gas companies went forward unimpeded.

The in-progress third movement tempo has been very slow (*largo*) and may become the basis for an opera libretto for a dramatic opera sourcing legal text and case studies with unresolved sonic dissonance.

The coda is fast (*presto*) and framed the 2016 American Election. It has been presented at a number of conferences, as, *Precarious*, where it was also a sound installation, at New York University in 2018, and at Columbia University and other events. It is a requiem.

Time and Tempi

In the classical sonata form, a seated audience has an acoustic experience in a defined window of time to maximize an emotional experience that builds to a crescendo and harmonic catharsis in the denouement. Sound of any kind is delivered to the human ear in an envelope determined by physics. In *The Blued Trees Symphony*, time and tempo are shaped by the realities of environmental hope and disaster.

The Synesthetic Formalism of *Blued Trees* and *The Blued Trees Symphony*

The measures of *The Blued Trees Symphony* repeated a musical refrain. On the ground, individual trees were marked and painted by community teams, requiring intimate relationships with individual trees and their surfaces. At every stage, the artist and participants engaged with conventional and social media, to widen a public dialog around sustainable community values. The goal, as copyright lawyer, Patrick Reilly stated to the artist at the inception, was to win the case first in the court of public opinion.

In each proposed pipeline corridor, deciduous trees were marked with a vertical sine wave, whose width was determined by the girth of each tree trunk. A mark was made with a non-toxic moss-growing casein paint of ultramarine blue pigment and buttermilk. The casein generated acoustic interactions with each tree as other species, such as insects, consumed the buttermilk that bound the pigment creating sound beyond human hearing. Deciduous trees were chosen because the acidity of conifers may interact unpredictably with the buttermilk paint base. The material connections to living trees and critters that inhabit them

integrated the marks with each tree's ecosystem and local habitat, permanently affixing the artwork to the lifetime of the trees, the watershed and the Earth.



Figure 3 Detail of painted bark surface for one "tree-note." Photograph by Aviva Rahmani.

Participants painted “sentinel” trees (individual trees whose presence in the larger forest system are remarkable for a variety of reasons). On the ground, they identified the spacing that would iterate the spatial pattern that corresponded to the aerial melodic refrain. Each painter had to physically embrace each tree to complete the painting as a three-dimensional sigil around the trunk of the tree, rather than simply marking two-dimensional signage from paces apart from the tree. The marked trees made the aerial patterns. The designated trees that were mapped as notes created musical lines from the GPS coordinates inflected by the local terrain. That mapping became the basis for an electronic interpretation of the score and instrumental and vocal sheet music. The documentation of each tree-note with GPS and photography recorded hundreds of individually performed, crowd-sourced, painted, kinetic sculptures.



Figure 4 Work-in-progress. Photograph by Jack Baran 2015.

The Legal Trajectory

Public good is the argument for governments to seize private property if it is deemed to serve a higher community good. *The Blued Trees Symphony* argument expands the conservative interpretation of eminent domain to assert that home has to include the entire Earth, as the sole abode of the humans, trees and other animal species now endangered by climate change.

The legal theory of the project evolved in conversations with several lawyers, including copyright lawyers Patrick Reilly, Gale Elston, and Jonathan Reichman, individuals at the New York Volunteer Lawyers for the Arts, environmental lawyer Marcia Cleveland and in discussions after the artists appearances on panels at various Universities. When Spectra

couldn't be prevented from destroying the Overture, the next priority became identifying pro bono lawyers at each new site to litigate a test case in local courts.

Globally, water protection is a far broader struggle than this project alone represents, but a number of related cases are wending through American court rooms, as in activist protest events against natural gas pipelines, such as at Standing Rock.¹³ The necessity defense is gaining credence: that the imminent danger to the entire Earth posed by fossil fuels takes precedence over privileging corporate profits in the putative name of public good.

Musically, the work has become inflected by events that have unspooled since the Election. The progress of the work in exhibitions and publications established its standing as an important statement in the artworld which will be necessary if the project can be brought to court.

As of this date the legal premises have still not been tested. Lawyers believe there is not yet sufficient case law to escape the accusation of a frivolous defense, leaving them liable to counter suits. The present goal is to press a necessary discourse on the nature of public good as well as to demand an expanded legal definition of sculpture under VARA with a court precedent. That need inspired A Blade of Grass to stage a mock trial.

In March 2018, the hundreds of painted trees from the first movement remained untouched in Virginia and West Virginia. The next month, just before performing the mock trial, gas companies ignored the rights of property owners to due process and warnings from scientists and began indiscriminately cutting down trees on private lands, despite on-going protests, to make way for the pipelines. Cutting the trees occurred with the support of local officials. Shortly after beginning excavations, companies were forced to suspend work because severe erosion threatened local communities. The erosion was caused by the clear cutting to install the pipelines, as had been warned in comments to the Federal Energy Regulatory Commission (FERC), a board of corporate appointees that oversees natural gas pipelines.

¹³ "Dakota Access Pipeline protests," Wikipedia, last edited July 5, 2018, https://en.wikipedia.org/wiki/Dakota_Access_Pipeline_protests.

The Mock Trial

The mock trial, April 25, 2018, tested the project's legal ideas. It was adjudicated at the Cardozo School of Law in New York City, litigated by copyright lawyers Gale Elston and Steven Honigsman arguing for the plaintiff and decided by Judge April Newbauer of the Bronx Supreme Court, with real witnesses, and a real jury. Cut remains of a painted tree were brought into the courtroom and music composed from the corridors was piped into the courtroom. The musical fragment was translated as testimony through a "tree translator." Judge Newbauer referenced the conclusive testimony of art critic Ben Davis from artnet News, to assert the important standing of the work. Davis positioned the artwork in the avante guard of discourse about the role of law and nature in contemporary art. The judgement was a cease and desist injunction against a fictitious natural gas pipeline corporation.

I think there are really two criteria that I use in order to think about the stature or importance of a work of art. And those would be precedents, and relevance. ...

In terms of relevance, what I mean by that, is, is the work part of a conversation that people are having? Is it played out, is it just something... is it doing something that has been done before... it also has to be part of a conversation that people are having. And again I think that's there's a strong case for this. That it does something original with a conversation that people are having. There is a small group of artists working in ecological work at the frontier of art and law and art and nature." –

Davis from the transcript of the mock trial 4-25-18

The mock trial was an effort to encourage lawyers to risk the defense it outlined. Beside "culture-jamming (turning one cultural trope into another to effect the opposite purpose for which it was intended)," this is a classic activist legal device to create a win-win solution to intractable problems. Even if the case should lose in a real courtroom, the conversation advances social awareness. In the case of *The Blued Trees Symphony*, until lawyers are willing to risk elements of the defense, the mock trial advances a discussion of sustainable cultural ideas. It furthers a conversation about the interpretation of case law. It blurs boundaries between the court of public opinion and can advance a progressive agenda. In

this case, it highlights the real life performance of bad corporate behavior. That countervenes the public good.



Figure 5 Tree translator as witness listening to a tree that survived a massacre at the hands of natural gas corporations in the mock trial. Photograph by Erik McGregor.

Science and the judicial system typically work more slowly than art to produce significant results but all three are pillars of civilization. Although it has not yet not established formal case law, *The Blued Trees Symphony* may still inspire suits that contest ecocide with art.

Conclusion

Historically, across all cultures, art is cultural glue, helping humans adapt to a range of challenges. Arguably, humans have never need adaptive glue more desperately. *The Blued Trees Symphony* aspires to glue together human communities and landscapes threatened by ecocidal policies and suggests replacing the arbitrary boundaries between art and Earth justice that reifies our vulnerability and interdependence with other life. It has sought to demonstrate alternative solutions to archaic legal and extractive economic policies. Most countries, as agreed in the 2016 Paris climate accord and a preponderance of scientists, as

reported by the 2018 IPCC report, already believe that the profits of private corporations can no longer take precedence over the global impacts of climate change. Since the 2016 election, the United States has defied that wisdom. It is hoped that may be a temporary aberration, albeit with cataclysmic short term collateral damage.

Cultural aspirations as much as human survival depend upon stopping the use of fossil fuels that result in global warming and instead, re-establishing landscape contiguity between non-human natural ecosystems with new, cooperative models. Another set of court events may one day hold ecocidalists accountable for their devastations. Meanwhile, *The Blued Trees Symphony* proposes a novel model that asserts a path forward in these perilous times to an alternate environmental policy, and with that assertion, it challenges the cultural norms and laws that support ecocide.