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SUPREME COURT OF THE STATE OF WASHINGTON

ADORA SVITAK, a minor child by and through her guardian,
JOYCE SVITAK; TALLYN LORD, a minor child by and through his
guardians JUSTIN LORD and SARA WETSTONE; HARPER
LORD, a minor child by and through his guardians JUSTIN LORD
and SARA WETSTONE; ANNA IGLITZIN, a minor child by and
through her guardians DMITRI IGLITZIN and EILEEN QUIGLEY;
JACOB IGLITZIN, a minor child by and through his guardians
DMITRI IGLITZIN and EILEEN QUIGLEY; COLIN SACKETT, a
minor child by and through his guardians BJ CUMMINGS and TOM
SACKETT,

Petitioners,

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her
official capacity as Governor of Washington state; TED
STURDEVANT, in his official capacity as Director of the Department
of Ecology; PETER GOLDMARK, in his official capacity as
Commissioner of Public Lands; PHIL ANDERSON, in his official
capacity as Director of the Department of Fish and Wildlife,
Respondents.

APPELLANT'S
PETITIONERS' OPENING BRIEF

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- B. *Bonser-Lain v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-11-002194, slip op. (Dist. Ct. Tex., July 9, 2012).
- C. *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514, slip op. (Dist. Ct. N.M., July 14, 2012).
- D. *Filippone v. Iowa Dep't of Natural Res.*, No. CVCV008748 (Dist. Ct. Iowa, Jan. 30, 2012), *appeal docketed*, No. 12-0444 (Iowa Sup. Ct. Feb. 29, 2012).
- E. *Aronow v. Minnesota*, No. 62-CV-11-3952, slip. op. (Dist. Ct. Minn., Jan. 30, 2012), *appeal docketed*, No. A12-0585 (Minn. Ct. App. April 3, 2012).

I. INTRODUCTION

The public trust doctrine is an ancient legal mandate establishing a sovereign's obligation to hold essential natural resources in trust for the benefit of its citizens. The doctrine is "rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles." Charles L. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 315 (1980). The Petitioners contend that the doctrine applies to the atmosphere and that the State is failing to satisfy obligations the doctrine imposes.

The principle underlying the public trust doctrine can be traced from Roman Law through the Magna Carta to present-day jurisprudence. Published in 533, the Romans codified the right of public ownership of important natural resources: "The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore." Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). Likewise, under English common law: "There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water" 2 William Blackstone, *Commentaries on the Laws of England* 4 (1766).

These elements of the English common law were incorporated into the first American colonial charters, thereby providing the same protection for natural resources in America as was provided by the Crown of England. *Martin v. Waddell*, 41 U.S. 367, 413 (1842). Following the American Revolution, the public trust doctrine was incorporated into the American common law. *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499, 64 P. 735 (1901). More than a century ago, the United States Supreme Court recognized the public trust doctrine functioned as a bulwark to protect resources too valuable to be disposed of at the whim of any state legislative body. *See Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892) (“The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”); *see also Geer v. Connecticut*, 161 U.S. 519, 534 (1896) (“The ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.”), *rev’d on other grounds, Hughes v. Oklahoma*, 441 U.S. 322 (1979); *see also Caminiti v. Boyle*, 107 Wash. 2d 662, 666, 732 P.2d 989 (1987) (“The Legislature has never had the

authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.”).

In 1987, this Court recognized that the public trust doctrine that Petitioners seek to enforce in this case has always existed in Washington law. *Caminiti*, 107 Wash. 2d at 670. Petitioners Adora Svitak, Tallyn Lord, Harper Lord, Anna Iglitzin, Jacob Iglitzin, and Colin Sacket, by and through their respective guardians (collectively “Our Children”) filed this action against the named State Respondents (collectively “State”) seeking declaratory relief that (1) the atmosphere is a public trust resource; (2) the State has a legal obligation, defined by best available science, to take affirmative action to protect the atmosphere and other public trust resources from the greenhouse gas (“GHG”) emissions; and (3) the State is breaching its fiduciary duty to protect public trust resources. Our Children also are seeking injunctive relief directing the State to fulfill its public trust responsibilities.

Without making any findings of fact or conclusions of law, the superior court dismissed the case for lack of jurisdiction and/or failing to state a claim for which relief can be granted. CP 176-178, Order Granting Defendants’ Mot. to Dismiss. In doing so, the superior court erroneously departed from the public trust jurisprudence in Washington and misapplied an ancient legal mandate. These errors are fundamental and

deprive Our Children of their day in court to prove that the State is actively violating their sovereign public trust responsibilities by failing to take meaningful action to address climate change.

II. ASSIGNMENTS OF ERROR

The trial court erred in dismissing the case for lack of jurisdiction and/or failing to state a claim for which relief can be granted.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. This Court in *Caminiti*, 107 Wash. 2d 662, held that under the public trust doctrine, the State exerts sovereignty and dominion over the tidelands and shorelands in the State and holds such resources in trust for the public. Does the public trust doctrine also apply to the atmosphere as an essential, common natural resource?

B. In *Caminiti*, 107 Wash. 2d at 670, this Court clarified that compliance with the public trust doctrine requires the State to retain adequate control of the trust resource to prevent substantial impairment to the resource and ensure public access for trust purposes. Does this standard require the State to take affirmative action to protect trust resources (shorelands, tidelands, shellfish, atmosphere, etc.) from the harmful effects of climate change?

C. Does the requested injunctive relief violate the separation of powers doctrine?

D. Does the Uniform Declaratory Judgment Act (“UDJA”), RCW 7.24, confer jurisdiction on the superior court to hear a public trust suit against the State?

IV. STATEMENT OF THE CASE

Humanity, especially Our Children and future generations of this state, faces a climatic crisis that threatens life as we know it. Our planet is now within 1.8°F (1° C) of its highest temperature in the past one million years. Clerk’s Papers (“CP”) 9, Am. Compl. ¶18. The United States Supreme Court has recognized that “emissions resulting from human activities are substantially increasing the atmospheric concentrations of . . . greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth’s surface.” *Massachusetts v. EPA*, 549 US. 497, 508-09 (2007) (citing IPCC, *Climate Change: The IPCC Scientific Assessment*, p. xi (J. Houghton, G. Jenkins, & J. Ephraums eds. 1991)).

Climate change will affect nearly every part of Washington’s economy and environment. CP 12, Am. Compl. ¶25. Current and historic levels of greenhouse gas emissions are destroying the natural resources held in trust for the citizens of Washington State, and these damages will increase if the State continues to condone a business-as-usual approach to GHG emissions. Scientists project that temperatures in the Pacific

Northwest will rise 3.2°F by 2040. CP 13, Am. Compl. ¶28. Consequences of these rising temperatures include decreased snow pack, ocean acidification, decreased water availability, reduced freshwater salmon habitat, increased risk of wildfires, adverse effects to forest productivity, and reduced food resources for wildlife. *Id.*, CP 5, Am. Compl. ¶6. All of these impacts result from substantial impairment to the public trust resources of this state caused by GHG emissions and climate change.

There is no dispute in this case that climate change is occurring or that the citizens of this state will be impacted significantly. CP 38-39, 45, Answer ¶¶3-4, 22; CP 225, Verbatim Rpt. Of Proceedings (Counsel for State stating that “The legislature has recognized the need for Washington State to do its part to address climate change.”). Respondent Governor Gregoire has declared that “effective and immediate action to reduce greenhouse gas emissions . . . is essential to the future well being of all Washingtonians.” CP 13, Am. Compl. ¶27. This sentiment echoes Respondent Washington Department of Ecology’s warning that “[w]ithout action, climate change will negatively affect nearly every part of Washington’s economy through changes in temperature, sea level, and water availability.” CP 12, Am. Compl. ¶25. Despite these statements and

the consensus that immediate action is required, the State has taken no meaningful action to protect the essential natural resources in this state.

The consequences of the State's inaction are devastating. "If carbon dioxide continues to increase, [there is] no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late." *Massachusetts*, 549 U.S. at 508 (quotations omitted). Dr. James Hansen,¹ a leading climate scientist with the NASA Goddard Institute for Space Studies and Columbia University Earth Institute, has warned that "[c]ontinued growth of greenhouse gas emissions, for just another decade, practically eliminates the possibility of near-term return of atmospheric composition beneath the tipping level for catastrophic effect." CP 10, Am. Compl. at ¶ 21.

According to a 2006 report by Ecology, climate change will negatively affect Washington State citizens with increased water prices, decreased dairy revenue, and increased state expenditures to fight wildfires. CP 14-15, Am. Compl. ¶30. Melting glaciers will cause rising sea levels likely to adversely affect low-lying agricultural areas, such as the Skagit River Delta, and Washington communities that sit just above sea level, such as Tacoma and Olympia. *Id.* Commerce flowing through

¹ The State recognized that "Dr. Hansen has been at the leading edge of climate science for a long time" CP 45, Defs.' Answer, ¶19.

the ports and recreational activities will be affected by these changes too. *Id.* Our Children will be forced to address these unprecedented crises since their sovereign government has failed to take meaningful action to protect their interests in the critical natural resources of this state.

Washington's total GHG emissions for 2008 equaled 10.1 million metric tons of carbon dioxide. CP 12-13, Am. Compl. ¶¶26. That was nine percent greater than 1990 GHG emissions. *Id.* The State must take the action scientifically deemed necessary to prevent substantial impairment to the State's public trust resources by drawing down the excessive carbon dioxide from the atmosphere. CP 14-15, Am. Compl. ¶¶30.

In spite of this pending pessimism, there is still time to take action protect the public's interest in the public trust resources of this State. CP 20, Am. Compl. ¶¶ 42-44. But time is of the essence. Every day the State kicks the can down the road for future generations to address the climate crisis, it gets more likely that the public trust resources of this State will continue to be impaired to the point of destruction. *Id.* The time for the State to act is now, and the public trust doctrine is the source of law that requires the State to act.

V. STANDARD OF REVIEW

This Court reviews legal issues and the trial court's conclusions of law *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash. 2d

873, 879-80, 73 P.3d 369 (2003). Dismissal of a case under CR 12 is warranted only in the limited and unusual circumstance of when “it appears beyond doubt that the plaintiff cannot prove any set of facts to justify recovery.” *Tenore v. AT&T Wireless Servs.*, 136 Wash. 2d 322, 330, 962 P.2d 104 (1998). For the Court’s review, “a plaintiff’s allegations are presumed to be true and a court may consider hypothetical facts not included in the record.” *Id.*

VI. ARGUMENT

A. THE PUBLIC TRUST DOCTRINE IN WASHINGTON STATE

The Washington Supreme Court has recognized that the public trust obligation has always existed in Washington law as an attribute of state sovereignty, even though it was not judicially applied until 1987. *Caminiti*, 107 Wash. 2d at 670. The public trust doctrine is a common law doctrine that reflects the “rights which our new state possessed by virtue of its sovereignty.” *Id.* at 666. Some of these public rights, those with respect to tidelands and shorelands, were formally recognized and incorporated into article 17, section 1 of the Washington State Constitution:

The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including

the line of ordinary high water within the banks of all navigable rivers and lakes.

Wash. Const. art. XVII, §1; *Caminiti*, 107 Wash. 2d at 666. This “formal declaration” of the public’s pre-existing rights “had the effect of vesting title to such lands in the state.” *Id.* at 666-67.

The State’s ownership of state shorelands and tidelands has two aspects: the *jus privatum* and the *jus publicum*. *Id.* at 668. The *jus privatum*, or private property interest, is that “the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands.” *Id.* The *jus publicum*, or public authority interest, reflects “the principle that the public has an overriding interest in navigable waterways and lands under them” *Id.* It is the *jus publicum* interest that is particularly relevant in this case because it embodies the public trust doctrine. *Id.* at 669-670 (defining the public trust doctrine as the principle that “the sovereignty and dominion over this state’s tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public.”).

This Court has recognized that the public authority interest, i.e. the public trust doctrine, “is at least as old as the Code of Justinian, promulgated in Rome in the 5th Century A.D.” *Id.* at 668-69. As discussed above, the *Institutes of Justinian* provided that “the things which

are naturally everybody's are: air, flowing water, the sea, and the sea-shore." Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). In the context of tidelands and shorelands, this Court has defined the *jus publicum* interest as "the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Caminiti*, 107 Wash. 2d at 669 (quoting *Wilbour v. Gallagher*, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969)).

Relying on the seminal public trust opinion of *Illinois Central Railroad*, 146 U.S. at 453, this Court has established a two-part test to evaluate whether the State has violated the public trust doctrine:

- (1) Whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and
- (2) if so, whether by so doing the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.

Caminiti, 107 Wash. 2d at 670. Since *Caminiti*, there have been scores of Washington court decisions interpreting, applying and expanding the public trust doctrine in a variety of contexts. *See, e.g., Chelan Basis Conservancy v. GBI Holding*, No. 11-2-01267-S, letter op. (Chelan Superior Court filed May 30, 2012); *Wash. Geoduck Harvest Ass'n v. Dep't of Natural Res.*, 124 Wash. App. 441, 101 P.3d 891 (2004). It is

against these well-developed and oft-applied legal standards that Our Children assert their public trust claim against the State.

B. THE PUBLIC TRUST DOCTRINE APPLIES TO THE ATMOSPHERE

The atmosphere is the envelope of gases surrounding the earth that controls our climatic system – our “air resource.” CP 87, Pls.’ Resp. to Defs.’ Mot. To Dismiss. Our atmosphere naturally has allowed the earth’s climate to remain in balance so that our planet is not too hot or too cold, thus enabling the development of human civilization and earth’s biodiversity. CP 7, Am. Compl. ¶11. The public trust doctrine imposes a duty on the sovereign trustee to prevent harm to, protect, promote and preserve our critical natural resources, including the atmosphere.² The State incorrectly argued in superior court that Our Children’s case should be dismissed because the public trust doctrine applies exclusively to tidelands, shorelands and beds of navigable waters in this state. CP 62-64, State’s Mot. to Dismiss. However, the State has sovereign dominion and control over all essential natural resources, and this necessarily includes

² It is important to note that rejection of Our Children’s claim that the atmosphere is a public trust resource cannot be the superior court’s sole basis for dismissal of this suit because Our Children also have alleged harm to the public’s interest in other judicially-recognized public trust resources, such as tidelands, shorelands and navigable waters. *See* CP 2, Amended Complaint ¶1. Therefore, even if this Court were to find that the atmosphere is not a public trust resource, the Petitioners’ claims alleging harm to public trust resources such as shorelands, tidelands and shellfish should be allowed to go forward.

the atmosphere. *See Caminiti*, 107 Wash. 2d at 668-669 (tracing the public trust doctrine back to the Code of Justinian and English common law, both of which included air as a public trust resource). In addition, several courts, including those in Washington state, have expanded the scope of the public trust doctrine to protect public interests beyond the traditional concerns of navigation and commerce. Finally, “[t]hat generations of trustees have slept on public rights does not foreclose their successors from awakening.” *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 171 (Ariz. Ct. App. 1991).

1. The Public Trust Doctrine Applies to Critical Natural Resources Over Which The State Has Sovereign Dominion And Control.

In its seminal application of the public trust doctrine, the United States Supreme Court explained that public trust duties arise when the asset in question is “property of a special character.” *Ill. Cent. R.R. Co.*, 146 U.S. at 454. While *Illinois Central* dealt specifically with the alienation of land beneath navigable waters, the Supreme Court’s broad language in the decision applies equally to the atmosphere, especially since the acknowledged source of the doctrine, Roman and English law, included air as a public resource. Much like the public trust asset discussed in *Illinois Central*, the atmosphere is “property of a special character” “in which the whole people are interested” that should not be

left “entirely under the use and control of private parties.”³ *Id.* at 453. That American public trust jurisprudence has to date focused primarily on the doctrine’s protection of navigable waters does not mean that water, as opposed to air, is the only resource over which the state was vested dominion upon its admission to the Union. It simply means that water is the first essential, common natural resource that society recognized could be harmed or hoarded absent some form of sovereign control. *See Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 232, 858 P.2d 232 (1993).

Sources of Washington law confirm the State’s sovereignty and dominion over a variety of critical natural resources, including air.⁴ As discussed above, article 17, section 1 of the Washington State Constitution contains a formal declaration of public trust rights regarding shorelands and tidelands of navigable waters created “by virtue of [the state’s]

³ *See* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 *Envtl. L.* 43 (2009).

⁴ The United Nations Framework Convention on Climate Change, to which the United States is a party, also reflects this application: “The Parties should protect the climate system for the benefit of present and future generations of humankind” *United Nations Framework Convention on Climate Change* art. 3, ¶1 May 9, 1982, 1771 U.N.T.S. 107, 165. “Climate system” means the “totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.” *Id.* art. 1, ¶3. This treaty is the “supreme law of the land,” to which judges in every state are bound. U.S. Const. art. VI, cl. 2.

sovereignty.”⁵ *Caminiti*, 107 Wash. 2d at 666. Specifically mindful of the State’s inherent sovereign and dominion control over essential natural resources in addition to shorelands and tidelands, the Washington legislature adopted the State Environmental Policy Act (“SEPA”), recognizing that:

(2) It is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may: (a) *Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations* (3) *The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.*

RCW 43.21C.020(2), (3) (emphasis added). The Washington Supreme Court has also recognized that public trust principles are reflected in the Shoreline Management Act’s (“SMA”) underlying policy of preserving the state’s shorelines while protecting the public’s right to use and enjoy the natural resources associated with shorelines. RCW 90.58.020; *Orion Corp. v. State*, 109 Wash. 2d 621, 641 n. 11, 747 P.2d 1062 (1987). The SMA provides that state shoreline management policy “contemplates

⁵ The fact that the Washington Constitution does not mention air or other public trust resources does not support the State’s claim that the atmosphere is not a public trust resource. See *Rettkowski*, 122 Wash.2d at 232 (stating that the public trust doctrine is only “partially encapsulated” in article XVII, section 1).

protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.” RCW 90.58.020.

To implement its public trust responsibilities in regards to wildlife, the Washington legislature has asserted dominion, and even ownership, over wildlife found within the state:

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters. The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource.

RCW 77.04.012; *see also Nelson Alaska Seafoods, Inc. v. Dep’t of Revenue*, 143 Wash. App. 455, 462, 177 P.3d 1161 (2008) (“DNR regulates the commercial geoduck harvest for the public good”); *Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources*, 143 Wash. App. 644, 658, 179 P.3d 844 (2008) (quoting former RCW 79.90.450 (“To implement this public trust, the Legislature expressly delegated authority to the DNR to manage state-owned aquatic lands for “the benefit of the public”); *Wash. Geoduck Harvest Ass’n v. Dep’t of Natural Res.*, 124 Wash. App. at 449.

Most importantly to the issue at bar, the State has unequivocally

asserted its sovereign dominion and control over the air resources of this state:

It is declared to be the public policy to preserve, protect, and enhance the air quality for current and future generations. *Air is an essential resource that must be protected from harmful levels of pollution. Improving air quality is a matter of statewide concern and is in the public interest.* It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state. It is further the intent of this chapter to protect the public welfare, to preserve visibility, to protect scenic, aesthetic, historic, and cultural values, and to prevent air pollution problems that interfere with the enjoyment of life, property, or natural attractions.

RCW 70.94.011 (emphasis added). These constitutional and statutory provisions, in conjunction with the state public trust common law, demonstrate that the State is vested with a sovereign obligation that arises from its dominion and control over not just state shorelands and tidelands, but all essential natural resources of this state, including the atmosphere.

The notion of state sovereign control over critical natural resources within its boundaries is bolstered by the major federal environmental laws. For example, the Clean Water Act explicitly recognizes the existence of state common law authority to regulate all aspects of waters of the state.

33 U.S.C. § 1370. Similarly, the Clean Air Act plainly reaffirms inherent state common law authority to regulate air quality. 42 U.S.C. § 7416. For the State to claim that the atmosphere should be excluded as a public trust resource in the face of statutory authority to the contrary is disingenuous at best.

2. Courts Have Expanded the Scope of the Public Trust Doctrine

Several courts, including those in this state, have expanded the public trust doctrine beyond original societal concerns of commerce and navigation to protect other modern public interests such as biodiversity, wildlife, recreation, and environmental quality. *See, e.g., Wash. Geoduck Harvest Ass'n*, 124 Wash. App. at 449; *Nelson Alaska Seafoods*, 143 Wash. App. at 462; *Weden v. San Juan County*, 135 Wash. 2d 678, 698, 958 P.2d 273 (1998); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 719 (Cal. 1983); *Ctr. for Biological Diversity v. FPL Grp.*, 83 Cal. Rptr. 3d 588, 597, 599 (Cal. Ct. App. 2008) (stating that “it has long been recognized that wildlife are protected by the public trust doctrine” and that “it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions.”).

“Since as early as 1821, the public trust doctrine has been applied throughout the United States ‘as a flexible method for judicial protection of public interests in coastal lands and waters.’” *Weden*, 135 Wash. 2d at 698 (quoting Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)). Indeed, courts have “perceiv[ed] the public trust doctrine not to be ‘fixed or static,’ but one to be ‘molded and extended to meet changing conditions and needs of the public it was created to benefit.’” *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d. 355, 365 (N.J. 1984) (characterizing the public trust doctrine as “dynamic”); *see also Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (“In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.”). Therefore, the public trust doctrine is perfectly suited to address the unique environmental catastrophe caused by climate change.

The notion of applying the public trust doctrine to the atmosphere is also justified in light of the primary need for the protection of critical natural resources - to maintain social stability.

As explained by the leading commentator on the public trust doctrine, Professor Joseph Sax, the doctrine is closely tied to one of the most basic concerns of the legal system, namely, the protection and maintenance of social stability. Just as the law of property rights protects stability in ownership, and the criminal law protects stability within a community, just so, explains Professor Sax, ‘[t]he central

idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.’ In other words, the public trust doctrine requires the protection and perpetuation of natural resources. This functions to prevent social crises that otherwise would arise due to the sudden depletion of those natural resources necessary for the stable functioning of society. In short, at its most basic level, the scope of the public trust doctrine is defined by the public’s needs in those natural resources necessary for social stability.

Rettkowski, 122 Wash.2d at 234 (dissenting opinion, Guy, J.) (citations omitted). Arguably nothing is more critical to human survival and welfare than stemming the tide of climate change.⁶

In Texas, a district court recently concluded that the Texas Commission on Environmental Quality’s determination that the public trust doctrine is limited to the conservation of water is “legally invalid” and that “all natural resources” are protected under the public trust doctrine, including the atmosphere. *Bonser-Lain v. Texas Comm’n on*

⁶ The same test used by courts for over a century to determine whether a particular waterway is protected by the public trust doctrine - navigability - is equally applicable to the atmosphere to determine if it too is subject to the public trust doctrine. Much like navigable waterways, the atmosphere also is navigable and therefore not subject to exclusive private ownership. See *Claassen v. City & Cnty. of Denver*, 30 P.3d 710, 712 (Colo. App. 2000) (“Navigable airspace is in the public domain, and the surface owner’s property interest in airspace above his or her land is generally limited to the airspace which is below navigable limits.”); *United States v. Causby*, 328 U.S. 256, 261 (1946) (“To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.”).

Envtl. Quality, No. D-1-GN-11-002194, slip op. at *1 (Dist. Ct. Tex., July 9, 2012), attached as Appendix B. In New Mexico, a court found that it had jurisdiction to determine whether the state defendants complied with their public trust obligations to protect the atmosphere from harm due to climate change. *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514, slip. op. at *2 (Dist. Ct. N.M., July 14, 2012), attached as Appendix C. *But see Filippone v. Iowa Dep't of Natural Res.*, No. CVCV008748, slip. op. at *4 (Dist. Ct. Iowa, Jan. 30, 2012), *appeal docketed* No. 12-0444 (Iowa Sup. Ct. Feb. 29, 2012), attached as Appendix D (upholding agency's decision not to initiate rulemaking to reduce CO₂ emissions); *Aronow v. Minnesota*, No. 62-CV-11-3952, slip. op. at 5 (Dist. Ct. Minn., Jan. 30, 2012), *appeal docketed*, No. A12-0585 (Minn. Ct. App. April 3, 2012), attached as Appendix E (dismissing public trust claim in one paragraph without analysis).

The atmosphere is the most prominent example of a resource so vital to society that, without its protection, civilization would cease to exist. Therefore, it is a fundamental natural resource necessarily entrusted to the care of our State, in trust, for its preservation and protection as a common property interest. To allow carbon emissions to clog the atmosphere and destabilize the climate is no different than allowing the transfer of the atmospheric resource into private ownership or use in a way

that has substantially impaired the resource and has not promoted the public interests in the resource. *See Caminiti*, 107 Wash.2d at 670.

C. THE PUBLIC TRUST DOCTRINE REQUIRES THE STATE TO TAKE AFFIRMATIVE ACTION TO PROTECT TRUST RESOURCES

1. Our Children Have Alleged The State Has Failed To Maintain Control Over Public Trust Resources

As discussed above, in *Caminiti*, this Court established the test to be applied in public trust cases. The first element requires the Court to assess “whether the state, by the questioned legislation, has given up its right of control over the *jus publicum*” 107 Wash. 2d at 670. Here, Petitioners have alleged that the state has indeed given up its right of control over public trust resources. *See* CP 2, 33, 34, Am. Compl. ¶¶1, 93 (“The Defendants have breached their fiduciary duty to protect public trust resources by failing to exercise and by abdicating its sovereign right of control over these critical natural resources in a manner that promotes the public’s interest in these natural resources and does not substantially impair the resources.”), ¶ 96. At this stage in the litigation, these allegations are deemed true and are sufficient to defeat a CR 12 motion to dismiss for failing to state a claim for which relief can be granted. *Tenore*, 136 Wash. 2d at 330. Whether the State has in fact given up its right of control as alleged is ultimately a question of fact that goes to the merits of

the case and will be addressed by the parties at trial or on summary judgment. *See, e.g., Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash. App. 566, 572-575, 103 P.3d 203 (2004) (analyzing the merits of whether the State retained adequate control of the public trust resources in question).

The State contends that not only does a plaintiff bringing a public trust suit need to allege that the State has given up its right of control over a public trust resource, but it also must allege that the State has done so by taking some form of discrete, particularized, and presumably final, action. This argument misstates the plain language of the test that this Court established in *Caminiti* to review public trust claims. This Court made it quite clear that the relevant issue is *whether* the State has given up its right of control over the *jus publicum*, not *how* the State has given up its right of control. *Caminiti*, 107 Wash. 2d at 670. Other courts have recognized that a critical component of any public trust analysis is the question of control over the resource in question. *Ill. Cent. R.R. Co.*, 146 U.S. at 454 (“So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.”); *Nat’l Audubon Soc’y*, 658 P.2d at 727 (“The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those

waters” and stating that “[t]his principle, fundamental to the concept of the public trust”).

Perhaps the best example of an abdication of control is what is presented in this case: when the State takes no meaningful action to protect public trust resources from harm due to climate change. The State, as trustee, has the ultimate fiduciary responsibility to ensure that the public trust resources of this state exist for future generations to use and enjoy. Because the Petitioners have alleged that the State has failed to exercise its sovereign duty of control over essential natural resources, and these allegations are deemed true at this stage, dismissal under CR 12 for failing to state a claim for which relief may be granted is not justified.

2. The Public Trust Doctrine Includes an Affirmative Duty to Protect the Public’s Interest in Public Trust Resources

That the State has an affirmative duty to protect and promote the public’s interest in public trust resources comes directly from the test set forth in *Caminiti*, where the court looks at whether in relinquishing control of the resource “the state (a) has *promoted* the interests of the public in the *jus publicum*, or (b) has *not substantially impaired it*.” 107 Wash. 2d at 670 (emphasis added). The Washington Court of Appeals has recognized that the public trust doctrine, as defined by this Court, includes an active duty to protect public trust resources. *Wash. State Geoduck Harvesting*

Ass'n, 124 Wash.App. at 449 (“This necessarily obligates the state to balance the protection of the public right to use resources on public land with the protection of the resources that enable these activities.”). A duty to protect public trust resources is necessary if the public interests in those resources are to be maintained and promoted. *Citizens for Responsible Wildlife Mgmt.*, 124 Wash. App. at 577 (Seinfeld, J.P.T, Quinn-Brintnall, C.J. concurring) (“Thus, the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of future generations.”).

There are many public trust cases that illustrate that the sovereign trustee has an *affirmative* obligation to take action to promote and protect trust resources when such action is necessary. See *Dist. of Columbia v. Air Florida*, 750 F.2d 1077, 1083 (D.C. Cir. 1984) (“[The public trust doctrine] has evolved from a primarily negative restraint on states’ ability to alienate trust lands into a source of positive state duties.”); *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (“We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public’s loss occasioned by the negligent acts of those who damage such property An action against those whose conduct damages or destroys such property, which is a

natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs.”); *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) (“[T]he trust reposed in this state is not a passive trust; it is governmental, active, and administrative The equitable title to these submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.”); *N.J. Dep’t of Env’tl. Protection v. Jersey Cent. Power & Light Co.*, 336 A.2d 750, 759 (N.J. 1975) (“The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.”); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1011 (Haw. 2006) (quoting *In re: Water Use Permit Applications*, 9 P.3d 409, 451 (Haw. 2000) (“The duty to protect includes the duty to ‘ensure the continued availability and existence of its water resources for present and future generations.’”).

Applying the public trust doctrine in a case in which it is alleged that the State has given up its control over public trust resources by failing to take meaningful action to protect those resources is a reasonable and

logical application of existing Washington precedent. *See Wilbour*, 77 Wash. 2d at 313 (“While this is a matter of first impression and no exactly comparable case has been found, our holding represents the logical extension of establish[ed] law in somewhat comparable situations.”).

That the public trust doctrine can be used to challenge a sovereign’s failure to take action to protect and promote a trust resource is bolstered by the application of general principles of trust law. Some courts have imported explicitly the principles of private trust law when defining a sovereign’s duty to protect public trust assets, which can be useful in that they more specifically and precisely define a trustee’s fiduciary obligations. *See Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 738 (Idaho 1987); *see also Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 169 (“Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust.” (citations omitted)); *Baxley v. Alaska*, 958 P.2d 422, 434 (Alaska 1998) (stating that “[w]e apply basic principles of trust law to public land trusts”); *but see Brooks v. Wright*, 971 P.2d 1025, 1032 (Alaska 1999).

Under general trust law, a trustee has a duty to take affirmative action to protect trust resources. *See* George T. Bogert, *Trusts* § 99, at 358

(6th ed. West Pub. Co., 1987) (“The trustee has a duty to take whatever steps are necessary . . . to protect and preserve the trust property from loss or damage.”); 76 Am Jur. 2d *Trusts* § 656 (2012). If a trustee breaches that fiduciary duty, a beneficiary can bring suit regardless of whether the suit is filed to challenge a trustee’s active mismanagement of trust resources, or their failure to take affirmative action to protect the trust resource. Because this court has already recognized that the public trust doctrine imposes a trust obligation on the State, the principles of general trust law can be applied to the case at bar to support Our Children’s theory that the public trust doctrine can be used to ensure the State takes action deemed necessary to protect public trust resources.

In the Amended Complaint, Our Children allege that the State has given up its right of control over the *jus publicum* in a manner that substantially impairs the public’s interest in the public trust resources of this state. CP 2, 33, Am. Compl. ¶¶ 1, 93. *Caminiti* makes it clear that this is all that is needed for purposes of defeating a CR 12 motion for failing to state a claim. *Caminiti*, 107 Wash. 2d at 670. The superior court’s dismissal cannot be upheld on this ground.

D. OUR CHILDREN'S CLAIMS DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

1. The Judiciary has Jurisdiction to Hear Public Trust Claims.

In superior court, the State argued that Our Children's case should be dismissed because the claims raised violate the separation of powers, or political question, doctrine.⁷ CP 68, Defs.' Mot. to Dismiss. No public trust case has ever been dismissed on separation of powers grounds. Contrary to the State's arguments below, Our Children are not asking this Court "to create a new governmental duty." CP 68, Defs.' Mot. to Dismiss. Rather, Our Children are seeking judicial application of an ancient legal doctrine that always has existed in Washington law. *Caminiti*, 107 Wash. 2d at 668-69. Washington courts have historically resolved claims that the State has violated its duties under the public trust doctrine. *See, e.g., Caminiti*, 107 Wash. 2d. at 994-95; *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearing Bd.*, 92 Wash. 2d 1, 4, 593 P.2d 151 (1979). There is no question that Washington courts continue to have the authority to decide public trust cases. *See Chelan Basis Conservancy*, No. 11-2-01267-S, slip. op. (attached as Appendix A). Indeed, whether the State has violated the mandates of the public trust

⁷ Washington uses an analysis "similar to the federal political question doctrine." *Brown v. Owen*, 165 Wash. 2d 706, 718, 206 P.3d 310 (2009).

doctrine is a question long committed to the judicial branch.⁸ See Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. at 524-25 (“the [public trust] doctrine is created, developed and enforced by the judiciary. While the doctrine is fully binding law on state government, it stems from the courts rather than the

⁸ The foundation of public trust law is built upon the understanding that “the judiciary [has] a responsibility to examine whether the legislature has acted within the bounds of its regulatory power [and] to examine whether the state [as trustee] has acted in conformity with its ‘special obligation to maintain the public trust.’” See Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 Eco. L. Quarterly 135, 146 (2000) (quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 511 (1970)). Such is the nature of a court’s role in any case involving a fiduciary relationship. See, e.g., *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983). Judicial review of legislative and executive actions forms the bedrock of the separation of powers doctrine that protects the public from political abuses and violations of law. This is especially true in the context of the public trust doctrine, where the sovereign is inherently responsible for the management and protection of critical natural resources. See *Kootenai Env’tl. Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1092 (Idaho 1983). Far from a violation of the separation of powers doctrine, the judiciary’s responsibility for reviewing legislative and executive actions under the public doctrine is rooted in our “constitutional commitment to the checks and balances of a government of divided powers.” *Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 168. This fundamental constitutional principle provides a crucial, and exclusive, remedy for the public where the legislative or executive branches behave in violation of the state’s duties as trustee of natural resources. *Id.* at 169 (“The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res”).

legislature.”). The separation of powers doctrine should not now, for the first time, be used to deny Our Children their day in court.

In superior court, the State mischaracterized Our Children’s claims as legislative policy questions that are improper for judicial review simply because the claims involve climate change, which invokes “fundamental policy considerations and public questions.” CP 69-70, Defs.’ Mot. to Dismiss. This argument has been made before in other cases and has been soundly rejected. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2nd Cir. 2009), *rev’d on other grounds by Am. Elec. Power Co. v. Connecticut*, ___ U.S. ___, 131 S.Ct. 2527 (2011)⁹ (. . . “the political question doctrine must be cautiously invoked, and simply because an issue may have political implications does not make it non-justiciable . . .”) (internal citations and quotations omitted); *Alperin v. Vatican Bank*, 410

⁹ As the Second Circuit recognized in *Connecticut*, “courts have successfully adjudicated complex common law . . . cases for over a century,” 582 F.3d at 326, and nothing about the relief sought by Our Children here makes this case any different. The Supreme Court in *AEP* explicitly left open for consideration the question of whether state common law claims may be used to address climate change, 131 S. Ct. at 2540, and did not disturb the Second Circuit’s ruling in *Connecticut* that common law nuisance claims related to climate change did not present nonjusticiable political questions. 582 F.3d at 332. In *Connecticut*, the Second Circuit found it impossible to identify any specific textual commitment of climate change questions to the political branches that would preclude resolution by the judiciary, highlighting that in a common law nuisance case “[t]he department to whom this issue has been ‘constitutionally committed’ is none other than our own—the judiciary. *Id.* at 325.

F.3d 532, 548 (9th Cir. 2005) (“Simply because . . . the case arises out of a ‘politically charged’ context does not transform the [] [c]laims into political questions.”). While the legislature has the right to legislate on matters implicating public trust resources and duties, the judiciary is vested with the important task of reviewing and enforcing the public’s claims that the state has violated its fiduciary duties as trustee. *Caminiti*, 107 Wash. 2d at 670; *see also Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 169. It is for the courts to decide whether the State has acted in compliance with its public trust obligations.

2. The Separation of Powers Doctrine does not Apply

The public trust doctrine acts as a constitutional limitation on legislative power. *See Wash. State Geoduck Harvesting Ass’n*, 124 Wash. App. at 451 (applying a “heightened scrutiny” in a public trust case “as the statutes are essentially being measured against constitutional protections for public access to unique resources.”); *see also San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa*, 972 P.2d 179, 199 (Ariz. 1999)¹⁰ (holding that the state legislature cannot remove public trust restraints on its powers by passing a bill to eliminate application of public trust doctrine in water rights adjudication); Johnson, *The Public Trust Doctrine and Coastal Zone*

¹⁰ *Lummi Indian Nation v. State*, 170 Wash. 2d 247, 269, 241 P.3d 1220 (2010) (interpreting *San Carlos* as holding that the Arizona legislature “unconstitutionally denied courts the power to consider the public trust doctrine.”).

Management in Washington State, 67 Wash. L. Rev. at 526-27 (“In using the public trust doctrine, courts review legislation almost as if they were measuring that legislation against constitutional protections It might be labeled a quasi-constitutional doctrine.”). This case involves the State’s inalienable sovereign obligations under the public trust doctrine, which is “subject only to the paramount public right[s]” and subject to judicial review. *Caminiti*, 107 Wash. 2d at 667.

The State’s sovereign obligation to hold essential natural resources in trust for the public is akin to a positive constitutional right: a right that flows from a constitutionally imposed duty on the State and one that the State cannot “invade[] or impair[].” *McCleary v. State*, 173 Wash. 2d 477, 518, 269 P.3d 227 (2012). This Court recently has held that the separation of powers doctrine simply does not apply in this context:

Positive constitutional rights do not restrain government action; they require it. The typical inquiry whether the State has overstepped its bounds therefore does little to further the important normative goals expressed in positive rights provisions. Moreover, federal limits on judicial review such as the political question doctrine or rationality review are inappropriate.

Id. at 519. Therefore, this Court should decline the State’s invitation to apply the separation of powers doctrine because “[t]his approach ultimately provides the wrong lens for analyzing positive constitutional

rights, where the court is concerned not with whether the state has done too much, but with whether the state has done enough.” *Id.*

3. Our Children’s Requested Injunctive Relief does not Violate Separation of Powers Doctrine.

In superior court, the State argued that Our Children’s requested injunctive relief violated the separation of powers doctrine because it requires “judicial intervention in the exercise of governmental discretion.” CP 74, Defs.’ Mot. to Dismiss. Procedurally, the mere fact that Our Children have requested injunctive relief in the form of an emissions reduction plan does not render this Court without jurisdiction to hear the entirety of Our Children’s claims. If the Court were to find it was without jurisdiction to order the requested injunctive relief, it would have the discretion not to grant it. Only where all of “[t]he relief sought cannot be obtained, and the relief that can be obtained is not sought” is full dismissal appropriate. *Pasado’s Safe Haven v. State*, 162 Wash. App. 746, 761, 259 P.3d 280 (2011). That is not the situation here.

Substantively, however, this Court has the power to grant Our Children’s request for injunctive relief. When developing an emissions reduction plan that protects public trust resources from the harms caused by climate change, the State will certainly have discretion about the specific strategies contained in the plan. Our Children do not ask the

Court to undertake legislative-type activities such as identifying the sources responsible for reducing emissions and determining how emissions should be reduced to meet necessary targets.¹¹ *Rettkowski*, 122 Wash. 2d at 232-33 (“Even assuming for the sake of argument that the public trust doctrine places on Ecology some affirmative duty to protect and preserve the waters of this state, the doctrine could provide no guidance as to *how* Ecology is to protect those waters.”). Rather, Our Children seek an order directing the State to develop a plan to fulfill fiduciary responsibilities under the public trust doctrine. To date, that has not been done. An exercise of continuing jurisdiction by the court may be appropriate to ensure that the plan is done within a specific time period and that it is actually implemented, but this kind of relief is hardly unique when a court is faced with problems of this nature.¹² *See, e.g., McCleary*,

¹¹ In fact, some of these activities have already been done in the reports Ecology has prepared pursuant to RCW 70.235, thereby defeating the State’s warning that this Court will be called upon to decide broad public policy questions. *See, e.g.,* Department of Ecology Climate Policy Group, *Path to a Low Carbon Economy: An Interim Plan to Address Washington’s Greenhouse Gas Emissions*, available at www.ecy.wa.gov/biblio/1001011.html (December 2010) (last visited July 27, 2012). These reports, however, do not fulfill the State’s public trust responsibilities because they do not require any action that will prevent substantial impairment to the public’s interest in the essential natural resources of this state.

¹² Historically courts have frequently been asked to resolve many of the most important environmental and social issues of our time. *See, e.g., Puget Sound Gillnetters Ass’n v. U.S. D. W.D. of Wash.*, 573 F.2d 1123, 1133 (9th Cir. 1978) (supervising tribal and state salmon harvesting as part of the treaty fish wars and creating a judicially supervised and enforceable

173 Wash. 2d at 545-46 (rejecting the State’s invitation to defer to its implementation of legislation designed to remedy constitutional violation and stating that “[a] better way to move forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State’s compliance with its paramount duty.”).

Undoubtedly this form of requested relief requires a careful balancing on the part of the judiciary. *McCleary*, 173 Wash. 2d at 540 (holding that the State violated its constitutional duty to fund education and noting that “[f]inding the appropriate remedy . . . has always proved elusive” and that the remedy requires “delicate balancing of powers and responsibilities among coordinate branches of government”). But it can and must be done in the face of this climate crisis that threatens Our Children’s ability to access, use and enjoy the public trust resources of this state. *Id.* at 541 (“What we have learned from experience is that this court

plan for future harvesting); *S. Burlington County, NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (after town failed to provide adequate housing as a basic human need, court ordered detailed remedies including governmental subsidies, incentive zoning and mandatory set-asides). The climate change crisis deserves no less and the public trust doctrine creates a legal framework which enables the judiciary to craft remedies that can address the problem by enforcing sovereign governments’ fiduciary obligation to protect public trust resources, while not violating the separation of powers doctrine.

cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education.”); Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. at 540 (“Rather than deferring solely to legislative judgment about coastal management, the [public trust] doctrine enables courts to compare the judgment with public trust values.”).

The climate crisis is the same kind of predicament justifying this type of injunctive relief. Several authorities, including the State, have all proclaimed the climate crisis to be an emergency that demands far-reaching and immediate action. CP 12-13, Am. Compl. ¶¶ 25, 27. The Governor’s warning that “Washington is particularly vulnerable to the impacts of climate change” is best exemplified by ocean acidification. CP 5, 12, Am. Compl. ¶¶ 6, 25. Recently, “[s]cientists from the University of Washington and the National Oceanic and Atmospheric Administration (NOAA) warned [] that the changing pH of the seas [i.e. ocean acidification] is hitting Puget Sound harder and faster than many other marine waters.”¹³ This is a very serious matter that justifies the type of injunctive relief requested in this case. The relief ordered in *McCleary* is an excellent illustration that the Court can fashion relief in a manner that

¹³ Craig Welch, *Shellfish at Risk: Puget Sound Becoming Acidified*, The Seattle Times, July 12, 2010, available at http://seattletimes.nwsourc.com/html/localnews/2012338264_acidificatio n13m.html (last visited July 29, 2012).

does not violate the separation of powers doctrine. Therefore, Our Children's requested relief does not divest this Court of jurisdiction to hear this case.

4. Our Children's Requested Injunctive Relief is not Precluded by Existing Law.

The legislature's enactment of RCW 70.235¹⁴ does not render this case nonjusticiable. As this case proceeds to the merits, the State can certainly argue that the passage of RCW 70.235 fulfills their public trust responsibilities (though it does not), but the mere existence of RCW 70.235 does not render this case nonjusticiable. In *McCleary*, that the legislature had enacted "comprehensive education reform" by the passage of ESHB 2261 did not divest this Court with the power to hear the plaintiffs' case. 173 Wash. 2d at 505.

Our Children's Amended Complaint focuses on the current state of the atmosphere's imbalance and presents the legal issue of whether the State has a fiduciary obligation under the public trust doctrine to act to

¹⁴ The relevant portion of the statute reads:

(1)(a) The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state: (i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels; (ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels; (iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions that year.
RCW 70.235.020.

protect the atmosphere and other public trust resources, and if so, whether they have violated that obligation. CP 2, Am. Compl. ¶1. This type of claim is not unique. See *McCleary*, 173 Wash. 2d at 515, 529 (characterizing the case as a “broad challenge to the State’s alleged failure to comply with article IX, section 1” and addressing “the nature of the State’s duty under article IX, section 1” and turning “to the question whether the State has complied with its constitutional obligation to amply provide for the education of all children.”). Our Children have the right to ask the Court to interpret the scope of the public trust doctrine and the rights and obligations of the parties under the UDJA, RCW 7.24, just as the plaintiffs in *McCleary* had the right to ask this Court to interpret the scope of Article IX, Section 1 of the Washington State Constitution. 173 Wash. 2d at 514 (citing *Seattle School Dist. v. State*, 90 Wash. 2d 476, 520, 585 P.2d 71 (1978) (“More than 30 years ago, we held that article IX, section 1 imposes a judicially enforceable affirmative duty on the state to make ample provision for the education of all children.”). Therefore, the fact that RCW 70.235 is on the books does not divest this court of jurisdiction to hear Our Children’s public trust claims.

E. THE CASE IS JUSTICIABLE UNDER THE UDJA

This case raises the fundamental issue of how a “stand alone” public trust suit against the State can be brought. It is undisputed that the

public trust doctrine is a state common law doctrine and Our Children, as beneficiaries of the public trust, ask this Court to interpret the scope of the State's public trust obligations and to find that the State has breached those obligations. In superior court, the State argued that the UDJA cannot be the vehicle to bring this suit for three reasons, all of which this Court should find unavailing. CP 74-80, State's Mot. to Dismiss.

1. A Judicial Decision Will Resolve Our Children's Claims

A justiciable controversy must exist for the court to have jurisdiction under the UDJA. *Pasado's Safe Haven*, 162 Wash. App. at 761. In superior court, the State argued that Our Children's claims were not justiciable because a judicial determination would not be final and conclusive.¹⁵ *DiNino v. State*, 102 Wash. 2d 327, 330-31, 684 P.2d 1297 (1984). The finality requirement "is satisfied where a judicial determination of the issue raised will resolve the parties' dispute." *Pasado's Safe Haven*, 162 Wash. App. at 761.

A judicial controversy exists in this case concerning the public's right to hold the State accountable for abdicating its fiduciary

¹⁵ To be justiciable under the UDJA, the case must present: "(1) parties must have existing and genuine rights or interests; (2) these rights or interests must be direct and substantial; (3) the determination will be a final judgment that extinguishes the dispute; (4) the proceeding must be adversarial in nature." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash. 2d 173, 186, 157 P.3d 847 (2007). At this stage in the proceedings, the State has only argued that a judicial ruling in this case would not be final and conclusive. CP 75, State's Mot. To Dismiss. As discussed herein, Our Children have fulfilled the remaining requirements.

responsibilities for resources it holds in trust for the public. There is no question that the rights implicated in this case, Our Children’s right to access, use and enjoy the public trust resources of this State, are direct and substantial. This Court can successfully resolve this controversy by interpreting the scope of the State’s public trust duty, finding that the State has violated its duty, and by requiring the State to fulfill their trust obligations to protect public trust resources. *Nelson*, 160 Wash. 2d at 186.

The global nature of climate change and the actions taken by other parties do not absolve the State of its inalienable sovereign responsibility to protect public trust resources in Washington State. *Ill. Cent. R.R. Co.*, 146 U.S. at 453 (holding that a state’s responsibility to administer a trust resource for the public benefit is an essential attribute of sovereignty and explaining that “[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

The State has declared that even though climate change may be a global problem, state action to reduce carbon dioxide emissions in Washington is necessary and proper to address this unprecedented crisis. *See, e.g.*, Washington Executive Order 07-02 (Feb. 7, 2007) (announcing Washington’s “commitment to address climate change”); RCW 70.235

(finding that Washington State should be a leader in climate change policy and that reductions of GHG within the State are necessary). Moreover, in this case, the State has admitted that Washington contributes to global emissions of greenhouse gases, CP 39, Answer ¶4, and that these global concentrations of greenhouses gases must be reduced. CP 41, Answer ¶9. Although the State recognizes the climate crisis and Washington’s obligation to find a solution, it has abdicated its duty as trustee of essential public trust resources by failing to take steps to protect the public’s interest in these trust resources from harm caused by climate change. For purposes of the public trust doctrine, it is legally irrelevant that there are sources that contribute to climate change that are not within the State’s regulatory reach. The source of the harm to public trust resources is immaterial because the State has the inalienable sovereign obligation to protect and promote public trust resources, regardless of the source of the harm. *See, Nat’l Audubon Soc’y*, 658 P.2d at 721 (finding that the public trust doctrine “protects navigable waters from harm caused by diversion of nonnavigable tributaries . . .”).

Our Children’s request for a declaratory judgment does not require this Court to resolve the global climate crisis or to order specific GHG emissions reduction measures. Rather Our Children seek a declaration that the State has an affirmative and ongoing duty to protect and preserve

the atmosphere as well as other public trust resources for the benefit of all present and future generation of Washington citizens. As the California Supreme Court noted in the seminal public trust case involving Mono Lake: “[I]t is in the interest of the parties and the public that a determination be made; even if that determination be but one step in the process, it is a useful one.” *Nat’l Audubon Soc’y*, 658 P.2d at 718 n.14 (internal quotation omitted). Judicial recognition of the State’s responsibility to protect the atmosphere as a public trust resource is a necessary and important step in addressing the climate change crisis. Such recognition is squarely in the province of this Court’s power under the UDJA when dealing with common law issues such as the public trust doctrine.¹⁶

2. Common Law Claims Can be Brought Under the UDJA.

The UDJA broadly declares:

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An

¹⁶ The fact that climate change is a complex environmental conundrum should not render this case nonjusticiable. In *McCleary*, this court noted that remedying the State’s violation of its paramount duty to fund K-12 education “proved elusive.” 173 Wash.2d at 540. It would be hard to believe that either party in that case, or any citizen in this State for that matter, would contend that the education funding crisis in this state has been resolved. But, “[a]s a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1.” *Id.* at 544.

action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

RCW 7.24.010. The UDJA can be invoked to seek a declaration of rights under the common law. *See Wash. Fed'n of State Employees v. State Pers. Bd.*, 23 Wash. App. 142, 148, 594 P.2d 1375 (1979) (“[I]n order to invoke the declaratory judgment remedy, the plaintiff must assert a legal right capable of judicial protection which exists in a statute, constitution or *common law*.”) (emphasis added) (citing 1 W. Anderson, *Actions for Declaratory Judgment* §§ 185-87 (1951)).

The State’s argument attempts to limit the text of the UDJA to one subsection, RCW 7.24.020,¹⁷ while ignoring the other applicable sections of the Act. RCW 7.24.020 affirmatively extends the UDJA to written instruments, but other language in the Act clarifies that RCW 7.24.020 does not provide a limiting principle: “The enumeration in RCW 7.24.020 and 7.24.030 *does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is*

¹⁷ RCW 7.24.020 states: “A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.”

sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.” RCW 7.24.050 (emphasis added).

The restriction the State seeks to apply in this case is contrary to the legislative intent, and the broad scope of the UDJA. See RCW 7.24.120 (“This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and *is to be liberally construed and administered.*”) (emphasis added); *Reeder v. King County*, 57 Wash. 2d 563, 564, 358 P.2d 810 (1961) (“The declaratory judgment act should be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law.”). The UDJA explicitly provides courts with broad latitude to grant the type of relief requested in this case. RCW 7.24.010.

There remains significant disagreement and uncertainty about the scope of duties imposed by the public trust doctrine and whether the State has violated its public trust obligation as it relates to climate change. A declaratory judgment will afford relief from this uncertainty and eliminate insecurity with respect to these legal relations, as intended by the UDJA. RCW 7.24.010.

3. The Relief Requested can be Granted Under the UDJA.

Our Children seek a declaration of their rights under the public trust doctrine and the requested relief can be obtained under the UDJA. In their arguments to superior court, the State essentially asserts that courts lack the authority to direct them to come into compliance with the law. CP 78-79, Defs.' Mot. to Dismiss.

RCW 7.24.080 provides courts with power to provide “further relief . . . whenever necessary or proper.” RCW 7.24.080. This Court interpreted this section as codifying the principle “that every court has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.” *Ronken v. Bd. of County Comm'rs of Snohomish County.*, 89 Wash. 2d 304, 311-12, 572 P.2d 1 (1977) (affirming declaratory judgment and injunctive relief requiring Snohomish county to use competitive bidding for public works projects).

In *Ronken*, this Court found that the continuing abuse practiced by the county “caused the trial court to find it necessary to impose injunctive relief and to retain jurisdiction to assure that the practices cease. [The] combining of declaratory and coercive relief is proper and even common . . .” *Id.* at 311; *see also McCleary*, 173 Wash. 2d at 545 (retaining continuing jurisdiction over the case and stating that “[t]his court cannot idly stand by as the legislature makes unfulfilled promises for reform.”);

United Nursing Homes v. McNutt, 35 Wash. App. 632, 640, 669 P.2d 476 (1983) (“It is generally held, under statutes similar to RCW 7.24, that declaratory and coercive relief may be combined in the same proceeding.”) (citing R.T. Kimbrough, Annotation, *May declaratory and coercive or executory relief be combined in action under Declaratory Judgment Act*, 155 A.L.R. 501, 503 (1945)). Here, it is entirely within the power of this Court to declare the State’s obligations under the public trust doctrine and to require the State to meet its fiduciary duties.

4. Our Children Have no Other way to Obtain Their Requested Relief

Contrary to the State’s arguments in superior court, the UDJA constitutes the only way of obtaining the relief that Our Children seek in this case. “[T]he UDJA establishes the sole cause of action by which a declaratory judgment may be sought.” *Pasado’s Safe Haven*, 162 Wash. App. at 752. The Administrative Procedures Act (“APA”), RCW 34.05, cannot be used to seek a declaration as to whether the State has violated its public trust obligation because the term “agency” explicitly excludes the legislative branch and the governor. RCW 34.05.010(2). Our Children are not appealing any discrete agency action. RCW 34.05.510 (stating that the APA “establishes the exclusive means of judicial review of agency action”). Moreover, since the State, not any particular agency

thereof, has the fiduciary obligation to protect public trust resources, the APA could not be used.¹⁸ RCW 34.05.010(2); *Rettkowski*, 122 Wash. 2d at 232.

Similarly, this case could not be pursued as a writ of mandamus, which

may be issued by any court, except a district or municipal court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person.

RCW 7.16.160. This action is beyond the scope of a writ of mandamus. Since this Court has not yet declared the rights of the parties under the public trust doctrine as requested herein, a writ of mandamus would be unavailable to Our Children. *See Walker v. Munro*, 124 Wash. 2d 402, 408, 879 P.2d 920 (1994); *see also McCleary*, 173 Wash. 2d at 512 (deciding that State violated its constitutional duty to fund public education in suit brought under the UDJA). Therefore, the UDJA is the only way Our Children can obtain the declaratory and injunctive relief that they seek. *Reeder*, 57 Wash. 2d at 564.

¹⁸ The reason Our Children named state agencies as defendants in this action is because those agencies have some delegated authority to manage the public trust resources at issue in this case. *See* Section B(1), above.

5. Our Children Need not Join “Every Person” in this Action

Contrary to the State’s argument in superior court,¹⁹ Our Children are not legally obligated to join “every person who would reasonably be regulated under [Our Children’s] greenhouse gas emissions reduction program.” CP 79-80, Defs.’ Mot. to Dismiss. Here, the rights of the broad class of nonparties concocted by the State would not be prejudiced or harmed should the Court grant the relief requested. First of all, much of the relief requested is declaratory in nature and clarifies the scope of the State’s obligation to protect public trust resources. Second, any contention that the injunctive relief requested would criminalize, damage, or otherwise prejudice other nonparties is speculative, at best. Those with only speculative interests need not be joined. *See Freestone Capital Partners, L.P. v. MRA Real Estate Opportunity Fund I, LLC*, 155 Wash. App. 643, 671, 230 P.3d 625 (2010); *Town of Ruston v. City of Tacoma*, 90 Wash. App. 75, 82, 951 P.2d 805 (1998).

If the Court grants the injunctive relief requested in this suit, the State will have discretion as to what actions will be required in the plan, provided that the plan complies with the public trust doctrine. The State and its agencies will need to carry out the plan in accordance with all

¹⁹ In support of its argument, the State cites RCW 7.24.110 which states that in a UDJA action a Court must join “all persons . . . who have or claim any interest which would be affected by the declaration.” CP 79, Defs.’ Mot. to Dismiss.

applicable laws, including providing all affected parties the right to participate in the development of the plan if required by law. Moreover, it is presumed that the State will act in the best interests of the public when developing a plan that complies with the mandates of the public trust doctrine. See *Smith v. Washington Ins. Guar. Ass'n*, 77 Wash. App. 250, 260, 890 P.2d 1060 (1994) (failure to join a nonparty need not result in dismissal if the interested party already has a designated representative as a party in the action); *Primark, Inc. v. Burien Gardens Ass'n*, 63 Wash. App. 900, 907, 823 P.2d 1116 (1992).²⁰ Therefore, Our Children need not join “every person” for this Court to have jurisdiction under the UDJA.

VII. CONCLUSION

For the reasons set forth herein, Our Children respectfully request that this Court overturn the superior court’s decision dismissing the case.

²⁰ The State’s standard for joinder is too broad because, if applied, it would require the Court to join every Washington state citizen, including the unborn, in all public trust cases. See *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. at 577 (concurring opinion) (“the primary beneficiaries of the . . . public trust are those who have not yet been born . . .”); see also *Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 169 (“[t]he beneficiaries of the public trust are not present generations but those to come”); *Jones v. Vermont Asbestos Corp.*, 182 A. 291, 296 (Vt. 1936) (finding that the beneficiaries of a gift of land to the public, held as a town trust, included all future generations who would use the facilities built on it). No court has held that public trust cases require all citizen beneficiaries to participate as parties.

RESPECTFULLY SUBMITTED this 30th day of July, 2012,

s/ Andrea K. Rodgers Harris

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DECLARATION OF SERVICE

I, Andrea K. Rodgers Harris, hereby declare that on this day I caused this Petitioners' Opening Brief to be served on the Respondents and Amici via electronic mail in accordance with the parties electronic service agreement.

Stated under oath this 30th day of July, 2012, in Seattle Washington.

s/ Andrea K. Rodgers Harris
Andrea K. Rodgers Harris

Superior Court of the State of Washington
For Chelan County

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T.W. Small, Judge
Department 2



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*Re: Chelan Basin Conservancy vs. GBI Holding et al.
Chelan County Superior Cause Number 11-2-01267-5*

Dear Counsel:

This matter came before the court on April 2, 2012 on various motions for summary judgment. Plaintiff Chelan Basin Conservancy ("CBC" or "plaintiff") appeared through its attorney, David Mann. Defendant GBI Holding Co. ("GBI" or "defendant") appeared through its attorney, Alexander Mackie. The City of Chelan ("city") appeared through its attorney, Allan Galbraith. The State of Washington ("state") appeared through its attorney, Terence Pruit (by telephone). The court has considered all pleadings

filed in connection with the motions, arguments of counsel and the file and records herein. This letter constitutes the court's memorandum decision.

This case involves three man-made fingers of fill in Lake Chelan, placed there by defendant in approximately 1962.¹ For nearly 50 years, no appreciable action was taken with regard to these fingers by any party. In 2010, defendant filed an application with the city for a planned development on the Three Fingers. This caused plaintiff and other members of the public to request removal of the fill. Defendant subsequently withdrew its application and then filed a second application to subdivide the filled area into six lots through a short plat process. Plaintiff and other members of the public again objected. The city ultimately approved the short plat based on certain conditions.

Both plaintiff and defendant appealed the short plat decision to the city's hearing examiner. When the hearing examiner concluded that he did not have jurisdiction to order removal of the Three Fingers fill, plaintiff withdrew its administrative appeal and filed this action. Plaintiff asserts causes of action for trespass (violation of rights of access), violation of public rights of navigation, and violation of rights secured by the public trust doctrine. The city asserted additional cross and counterclaims, including a request to stay the administrative appeal pending resolution of this case and for certain declaratory relief.

Defendant has moved for summary judgment requesting this court to dismiss all of the claims filed by plaintiff and the city. Plaintiff, in turn, has moved for summary judgment on its public trust doctrine claim. The city has also moved for summary judgment on all of its cross and counterclaims.

This brief summary of the case is intended solely to set the stage for the court's discussion of the various issues presented. The court will discuss these and additional facts in greater detail as may be required in explaining its decision.

Initially, defendant moves to dismiss certain of plaintiff's claims, arguing that plaintiff lacks the necessary standing to bring these claims. More specifically, defendant argues that plaintiff's trespass action is actually in the nature of a public nuisance claim and that plaintiff does not have standing to bring such an action. However, defendant's argument in this regard is not supported by either the facts or applicable law. Defendant relies on several older cases to support its argument, but fails to acknowledge or address the more recent pronouncements from the Supreme Court related to this issue.

First, in *Kemp v. Putnam*, 47 Wn.2d 530 (1955), the court recognized the right of an individual who regularly fished in navigable rivers to maintain an action for nuisance against adjacent landowners whose actions interfered with his fishing rights. In so doing, the court reiterated the rule that a person who has been specially injured by a public nuisance has standing to bring an action to enjoin such nuisance. *Id.* at 535. Then, in *SAVE v. Bothell*, 89 Wn.2d 862 (1978), the court held that a nonprofit corporation which

¹ This fill has also been referred to by the parties as the Three Fingers and that term may also be used herein.

shows that one or more of its members are specifically injured by government action may represent those members in proceedings for judicial review. The *SAVE* court explicitly overruled the portion of the *Kemp* decision which held that a nonprofit corporation lacked standing absent showing of direct injury to itself. *Id.* at 867. Finally, in *Caminiti v. Boyle*, 107 Wn.2d 662 (1987), the court allowed petitioner Caminiti and the Committee for Public Shorelines Rights to bring an action challenging a state statute relating to the construction of private recreational docks on state-owned tidelands. The plaintiffs in *Caminiti* claimed recreational interests in the use of public aquatic lands and water.

Taken together, these cases establish to this court's satisfaction that either an individual claiming a special injury, or a nonprofit corporation acting on behalf of one or more such individuals, has standing to bring an action to enjoin a public nuisance.

The undisputed facts of this case demonstrate that plaintiff satisfies the requirements necessary to bring this action. Plaintiff has submitted declarations from three of its members² outlining the specific injury to these members resulting from the existence and potential further development of the Three Fingers. Two of the members live within walking distance of the small public access site near defendant's fill. Two of the members regularly use the bay where the fill is located for water activities, including swimming and kayaking. These members describe the adverse effect on their activities caused by the existence of the Three Fingers. The third member does not use this small public access site even though it is the closest access to her home because of obstruction caused by the fill. Finally, one member expresses concern that further development of the fill will result in boats being anchored or docked in the immediate vicinity, further interfering with or even precluding water activities in the bay.

These declarations establish the special injury to three of plaintiff's members that is being sustained and/or will be sustained with future development of the fill area. Plaintiff is a nonprofit Washington corporation, organized, in part, to protect the rights of its members and the public with respect to the use and enjoyment of the navigable waters of Lake Chelan. Thus, under the reasoning of the cases discussed above, plaintiff has standing to bring this action.

The next issue to be addressed is plaintiff's claim based on the public trust doctrine. Plaintiff alleges that the fill area violates the rights of plaintiff's members to use and enjoy the submerged waters of Lake Chelan, which rights are protected by the public trust doctrine. *See* Plaintiff's Complaint, sec. VII. Defendant, in turn, alleges that the Three Fingers fill was vested in GBI by the state under RCW 90.58.270(1). Plaintiff counters that this statutory provision is unconstitutional to the extent that it purports to convey or abdicate the *jus publicum* interest in Washington's navigable waters. This disagreement is central to this case and both plaintiff and defendant have moved for summary judgment on this issue.

² *See* Declarations of William Schuldt, Tammy Hauge and John Page, Jr.

The public trust doctrine is established in Article 17, section 1 of the Washington Constitution:

The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

As explained in *Caminiti, supra*, the state's ownership of tidelands and shorelands is comprised of two distinct aspects:

The first aspect of such state ownership is historically referred to as the *jus privatum* or private property interest. As owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands. Thus, the state may convey title to tidelands and shorelands in any manner and for any purpose not forbidden by the state or federal constitutions and its grantees take title as absolutely as if the transaction were between private individuals....

The second aspect of the state's ownership of tidelands and shorelands is historically referred to as the *jus publicum* or public authority interest. ... This *jus publicum* interest as expressed in the English common law and in the common law of this state from earliest statehood, is composed of the right of navigation and the fishery. More recently, this *jus publicum* interest was more particularly expressed by this court in *Wilbour v. Gallagher*... as the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other relate recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. 107 Wn.2d at 668-69 (citations omitted).

In *Wilbour v. Gallagher*, 77 Wn.2d 306, 316 (1969), the court held that the public trust doctrine applies to protect the public's navigation rights on Lake Chelan, even when the lake level is artificially raised to the 1,100 foot mark. Conversely, when the lake level is lowered so that the adjoining property owner's land is no longer submerged, "then they are entitled to keep trespassers off their land, and may do with the land as they wish *consistent with the right of navigation when it is submerged*." *Id.* (emphasis supplied). Thus, it is indisputable that the public trust doctrine applies to the waters of Lake Chelan.

It is also clear that the state has no authority to convey or abdicate the *jus publicum*. *Orion Corp. v. State*, 109 Wn.2d 621, 639 (1987). Indeed, as noted in *Caminiti*, "the state can no more convey or give away this *jus publicum* interest than it can 'abdicate its police powers in the administration of government and the preservation of peace.'" 107 Wn.2d at 669 (citations omitted).

The issue herein, then is whether RCW 90.58.270(1) – the authority by which defendant claims the right to maintain the Three Fingers filled area – constitutes an impermissible conveyance or abdication of the *jus publicum* in the affected, previously navigable area of Lake Chelan.

In *Caminiti, supra*, the court set forth the two part test to determine whether the exercise of legislative power violates the public trust doctrine. First, the court must inquire as to whether the state, by the questioned legislation, has given up its right of control over the *jus publicum*. Second, if so, whether the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it. *Id.* at 670.

Turning to the present case, the inescapable conclusion that must be reached is that first part of the *Caminiti* test is met: that is, by granting a blanket authorization to any fills or other improvements existing as of December 4, 1969, the state has surrendered its right of control over the *jus publicum*. RCW 90.58.270(1) makes no effort at any kind of qualitative analysis as to the effect these fills and other improvements might have on the public's rights in the state's navigable waters; rather, the statute simply accepts impairment of the public's right, no matter the magnitude. The legislature simply waved the white flag and conveyed away the public's interest in contravention of the public rights doctrine.

As considered in the context of this case, the second part of the test is also met. Specifically, there is no evidence whatsoever that the surrender of the *jus publicum* to a private party vis-à-vis the Three Fingers fill in any way promotes the public interest. As persuasively noted by plaintiff, this fill area does not preserve the natural character of shoreline,³ does not protect the resources or ecology of the shoreline and does not enhance or increase public access to the shoreline or the navigable waters of Lake Chelan. To the contrary, it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterates the ability of the public to utilize that portion of the lake for navigation and recreation. The impairment can only be characterized as substantial and any benefit inures only to defendant's private interests.

Thus, the court concludes that the legislative grant in RCW 90.58.270(1) as applied under this set of circumstances violates the public trust doctrine and is therefore unconstitutional. Accordingly, the Three Fingers fill area shall be removed and plaintiff's request for an order to this effect shall be granted.

In light of this resolution, the court will not address the other issues raised by the parties, as they are moot. These include plaintiff's claims for trespass and violation of public rights of navigation and the city's request for various rulings regarding the development of the Three Fingers area.

³ The most telling evidence in this regard can be found in any of the many aerial photographs submitted by the parties.

Finally, the court will address defendant's contention that plaintiff has failed to join all necessary parties to this action under CR 19. Defendant fails to cite any authority to suggest that a party may not challenge the constitutionality of a statute without joining all persons who may ultimately be affected by the court's ruling. Clearly, such a requirement would render the possibility of ever mounting a constitutional challenge practically impossible.

Further, the relief sought by plaintiff herein – and the court's resultant ruling – is limited to the Three Fingers fill and the statute's application to that specific and unique area. Conversely, plaintiff does not seek to have any other areas of fill removed from Lake Chelan. Thus, this case is clearly distinguishable from *Bainbridge Citizens v. Dept. of Natural Resources*, 147 Wn. App. 365 (2008), relied on by defendant. In the *Bainbridge Citizens* case, the plaintiffs sought to compel the state to evict numerous vessels from state-owned aquatic lands, but did not join any of the vessel owners as parties. Here, the owner of the affected fill is the primary named defendant. Finally, it is entirely possible that other fill areas on Lake Chelan may, if challenged, be found to either promote or not substantially impair the public interest. Those interests are not adjudicated herein.

Mr. Mann shall prepare and present an appropriate order. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lesley A. Allan', with a long horizontal flourish extending to the right.

Lesley A. Allan
Superior Court judge

C: Superior Court file



200TH DISTRICT COURT

TRAVIS COUNTY COURTHOUSE
P. O. BOX 1748
AUSTIN, TEXAS 78767

GISELA D. TRIANA
Judge

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Environmental Protection Division
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Via fax to (512) 320-0052

RE: Cause No. D-1-GN-11-002194; In the 201st Judicial District Court of Travis Co., Tx.
Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality

Date: July 9, 2012

Number of pages, including this page: 3

Comments:

LETTER RULING ENCLOSED

COPY



200TH DISTRICT COURT

GISELA D. TRIANA
Judge

TRAVIS COUNTY COURTHOUSE
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July 9, 2012

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Filed in The District Court
of Travis County, Texas
JUL 09 2012 LAM
3:40 P.M.
Amalia Rodriguez-Mendoza, Clerk
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RE: Cause No. D-1-GN-11-002194; In the 201st Judicial District Court of Travis Co., Tx.
Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality

Dear Counsel,

On June 14, 2012, the Court considered and took under advisement Defendant's plea to the jurisdiction and the merits in the above-referenced cause. The Court allowed the parties to submit additional briefing to the Court by June 28, 2012. After considering all briefing, the administrative record, and the applicable law, the Court will find as follows.

Although the Commission argues that the Court must affirm the Commission's action if there exists any valid basis, the Court finds that the agency cannot base such action on grounds that are not legally valid. The Court will examine each of the Commission's grounds to determine if a valid basis does support its decision.

The Court will find that the Commission's conclusion, that the public trust doctrine is exclusively limited to the conservation of water, is legally invalid. The doctrine includes all natural resources of the State. This doctrine is not simply a common law doctrine but was incorporated into the Texas Constitution at Article XVI, Section 59, which states: "The conservation and development of all of the natural resources of this State. ... and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." The protection of air quality is mandated by the Texas Legislature in the Texas Clean Air Act (TCAA). See Health & Safety Code § 382.001 *et seq.* The Texas Legislature has provided the Commission with the authority to protect against adverse effects including global warming. See § 382.0205.

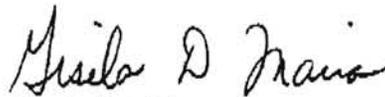
Cause No. D-1-GN-11-002194;
In the 201st Judicial District Court of Travis Co., Tx.
Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality
July 9, 2012

The Court will also find that the Commission's conclusion that it is prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act (FCAA), Section 109 is also legally erroneous. The Commission relies upon a preemption argument that the State of Texas may not enact stronger requirements than is mandated by federal law. The Court will find that the FCAA requirement is a floor, not a ceiling, for the protection of air quality, and therefore the Commission's ruling on this point is not supported by law. *See* 42 U.S.C. § 7604(e).

While the Commission states that it has no authority under the TCAA to regulate greenhouse gases, that issue is involved in separate litigation and is on appeal to the Third Court of Appeals. *See Public Citizen Inc. v. Texas Comm'n on Environmental Quality*; Cause No. D-1-GN-09-003426, in the 250th Judicial District Court of Travis County; Case No. 03-10-00296-CV (submitted on Aug. 3, 2011). Although Plaintiffs note the recent decision of the D.C. Circuit Court which involves the challenge by the State of Texas and other states to the actions of the Environmental Protection Agency, that decision is not final and it will likely be appealed to the U.S. Supreme Court. Because the legal landscape is uncertain, the Court will find, at this time, the Commission's refusal to exercise its authority based on current litigation is a reasonable exercise of its discretion.

Mr. Abrams, please draft an order that reflects the Court's ruling, circulate it to opposing counsel for approval as to form, and submit it to me for my signature. Thank you.

Sincerely,



Gisela D. Triana
Judge, 200th District Court
Travis County, Texas

STATE OF NEW MEXICO
SANTA FE COUNTY
FIRST JUDICIAL DISTRICT COURT

Imp

AKILAH SANDERS-REED,
by and through her parents Carol
and John Sanders-Reed, and
WILDEARTH GUARDIANS,

Plaintiffs,

v.

No. D-101-CV-2011-01514

SUSANA MARTINEZ,
in her official capacity as Governor
of New Mexico, and
STATE OF NEW MEXICO,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT

THIS MATTER having come before the Court on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("Motion"), the Court having considered the Motion, Plaintiffs' response thereto, Defendants' reply in support, and the arguments of counsel at a hearing on June 29, 2012,

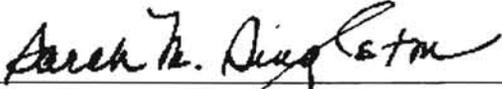
THE COURT FINDS that the Motion is well taken to the extent the Complaint attempts to assert claims based on the New Mexico Legislature's failure to act with respect to the atmosphere, but that Defendants' other arguments are not appropriate for disposition at the pleading stage.

Therefore, IT IS HEREBY ORDERED, that the Motion is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is GRANTED to the extent Plaintiffs are asserting claims based on the New Mexico Legislature's failure to act with respect to the atmosphere.

2. The Motion is DENIED to the extent that Plaintiffs have made a substantive allegation that, notwithstanding statutes enacted by the New Mexico Legislature which enable the state to set state air quality standards, the process has gone astray and the state is ignoring the atmosphere with respect to greenhouse gas emissions.

3. Defendants' oral request for certification for interlocutory appeal is DENIED at this time, but may be renewed after the Court rules on a summary judgment motion.


HON. SARAH SINGLETON
DISTRICT JUDGE

APPROVED as to form:

(Approved by email 7/10/12)
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Attorneys for Plaintiffs

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GLORI DEI FILIPPONE, a Minor, by and
through her Mother and Next Friend,
MARIA FILIPPONE,

Petitioner,

vs.

IOWA DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

CASE NO. CVCV008748

RULING ON PETITION FOR
JUDICIAL REVIEW

The parties submitted this administrative appeal on the briefs.¹ Having reviewed the court file and the applicable law, and being otherwise fully advised of the premises, the court now **AFFIRMS** the Agency decision denying the petition for rulemaking.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2011, Kids vs. Global Warming filed a petition for rulemaking with the Iowa Department of Natural Resources (“DNR”) through Alec and Victoria Looz of Oak View, California. This petition was pursuant to the Iowa Administrative Procedure Act, which states that any interested person “may petition an agency requesting the adoption, amendment, or repeal of a rule.” IOWA CODE § 17A.7(1) (2011). The petition asked the DNR to adopt new rules regulating the emission of greenhouse gases in Iowa. On June 1, 2011, an Oregon nonprofit organization called Our Children’s Trust, along with Glori Dei Filippone, a minor, and her mother, Maria Filippone, requested that Glori Dei Filippone (“Filippone”) be added as a petitioner.

¹ Upon review of the parties’ respective briefs, the court determined that the issues had been fully and well-briefed and oral argument was unnecessary.

On June 9, 2011, Jim McGraw, Environmental Program Supervisor with the DNR, drafted a proposed denial of the petition for rulemaking to present to the members of the Environmental Protection Commission, the subset of the DNR that would ultimately decide on the petition. The proposed denial cited four reasons for denying the petition, summarized as follows: (1) the DNR had already created a greenhouse gas emissions inventory similar to that requested in the petition, (2) the DNR had already enacted some rules regulating sources emitting greenhouse gases above a certain threshold, (3) the new rules requested in the petition would likely conflict with anticipated future rules from the federal Environmental Protection Agency, and (4) the DNR did not have the funding necessary to implement the proposed rules. The DNR gave members of the Environmental Protection Commission electronic copies of the petition and McGraw's proposed denial on June 17, 2011.

On June 21, 2011, the Environmental Protection Commission took comments on the petition for rulemaking at a public meeting. Filippone was present at this meeting, and spoke for approximately ten minutes about the petition and the scientific evidence suggesting a need for action to stop climate change. In the introduction to her presentation, Filippone mentioned that learning about the environmental implications of modern food production led her to become a vegetarian at a young age. After her presentation, the commissioners did not ask her any questions. Commissioner David Petty commented that he would like to urge Filippone to reconsider her vegetarianism, suggesting that it was not healthy and stating "that's when you lost me in your presentation, was when you admit that you're a vegetarian."

After Filippone's presentation and Commissioner Petty's comments, Jim McGraw of the DNR presented the proposed reasons for denying the petition. There were no questions following McGraw's presentation, and the Commission then voted 7-0 to deny the petition.

After the vote, Commissioner Dee Bruemmer commented that she had been given a lot of information about the petition, and she would have liked to have had more time to review it before voting.

The director of the DNR, Roger Lande, issued a denial of the petition for rulemaking on June 22, 2011, the day after the public meeting. The denial stated the same four reasons provided in the proposed denial McGraw presented at the Environmental Protection Commission meeting. On July 21, 2011, Filippone filed the petition for judicial review that is now before this court.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act governs judicial review of agency actions. IOWA CODE § 17A.19 (2011). The court's review of an agency's finding is at law, not de novo. *Harlan v. Iowa Dep't of Job Serv.*, 350 N.W.2d 192, 193 (Iowa 1984). "The burden of demonstrating the required prejudice and invalidity of agency action is on the party asserting invalidity[.]" and the court must apply the standards of review of Section 17A.19 to determine the validity of the agency's action. IOWA CODE § 17A.19(8)(a)–(b).

The court may grant relief from agency action that is "unreasonable, arbitrary, capricious, or an abuse of discretion." *Id.* § 17A.19(10)(n). Agency action is unreasonable when it is "clearly against reason and evidence." *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (citation omitted). It is arbitrary or capricious when "taken without regard to the law or facts of the case[.]" and "an abuse of discretion occurs when the agency action rests on grounds or reasons clearly untenable or unreasonable." *Id.* (citations omitted).

ANALYSIS AND CONCLUSIONS OF LAW

In support of her petition for judicial review, Filippone argues the denial of her petition for rulemaking was unreasonable, arbitrary, capricious, or an abuse of discretion, and therefore the court should order the DNR to reconsider. Filippone also asks the court to expand Iowa's public trust doctrine, which imposes upon government an obligation to protect certain natural resources, to include the atmosphere. The DNR claims it gave fair consideration to the petition for rulemaking, and based its denial on four reasonable grounds. Additionally, the DNR argues that Iowa's public trust doctrine is generally limited to apply to waterways, and Iowa courts have been reluctant to expand its scope. For the reasons stated below, the court agrees with the DNR that Filippone's petition for rulemaking received a fair consideration, and declines to expand the public trust doctrine to include the atmosphere.

1. Consideration of Filippone's Petition for Rulemaking

Upon submission of a petition for rulemaking, the receiving agency must act within sixty days. IOWA CODE § 17A.7(1). If the agency chooses not to initiate rulemaking procedures, it must "deny the petition in writing on the merits, stating its reasons for the denial" *Id.* The Iowa Supreme Court has interpreted the phrase "on the merits" to require agencies to "engage in a reasoned reconsideration of the existing state of the law, and to change it if, in the agencies' discretion, that seems appropriate" *Community Action v. Iowa State Commerce Comm'n*, 275 N.W.2d 217, 219 (Iowa 1979) (quoting Arthur E. Bonfield, *Iowa Administrative Procedure Act, Part I*, 60 IOWA L. REV. 731, 894 (1975)). The agency must give the petition fair consideration; it does not, however, have to take a stand on any substantive issues in the petition that might prompt it to adopt the proposed rules. *Community Action*, 275 N.W.2d at 219; *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 766 (Iowa 1998). The agency may base its final

decision on “reasons other than the actual merits of the request[,]” including “unresolved public debate on the issue” or “practical considerations”. *Litterer v. Judge*, 644 N.W.2d 357, 361 (Iowa 2002).

Filippone argues the DNR did not give the petition fair consideration or deny it “on the merits” as required by Section 17A.7(1). The court disagrees. The DNR was not required to pass judgment on the scientific evidence of climate change presented in the petition for judicial review. *See Litterer*, 644 N.W.2d at 361. The DNR complied with the Iowa Administrative Procedure Act by allowing the Environmental Protection Commission to hear presentations both for and against the petition for rulemaking at a public meeting. The Commission voted unanimously to deny the petition, and the director of the DNR issued a denial based on four fact-supported reasons. The meeting and the denial of the petition took place within the sixty days allotted for consideration of a petition for rulemaking in Section 17A.7(1).

The petition for judicial review points to comments from Commissioner Petty and Commissioner Bruemmer as evidence that the petition for rulemaking did not receive fair consideration at the June 21 meeting. Commissioner Petty commented that Philippone “lost” him in her presentation when she stated she is a vegetarian. This comment was perhaps ill-advised following a thoughtful presentation on a serious topic, but it does not change the fact that all seven commissioners voted to deny the petition after listening to two presentations on the subject. As stated above, the denial of the petition listed four sensible, acceptable reasons for denying the petition, and none of these had to do with Philippone’s diet. Similarly, the court does not believe Commissioner Bruemmer’s offhand comment about how she would have liked more time to look over the materials related to the petition illustrates a lack of fair consideration on the part of the DNR. Commissioner Bruemmer heard both Philippone’s presentation and Jim

McGraw's presentation on behalf of the DNR. She did not have any questions for either presenter, and she did not object before the vote was taken. The DNR's handling of the petition for rulemaking was not unreasonable, arbitrary, capricious, or an abuse of discretion.

2. The Public Trust Doctrine

Iowa courts recognize a "public trust" doctrine that serves to protect the public's rights to navigable waters for both commercial and non-commercial purposes. *Robert's River Rides, Inc., v. Steamboat Development Corp.*, 520 N.W.2d 294, 299 (Iowa 1994). The doctrine is "based on the idea that the public possesses inviolable rights to particular natural resources." *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 497 (Iowa 2003). It serves to prevent the state, which holds these waters as a trustee, from conveying them to private parties at the expense of the public. *Id.*

Filippone argues the court should find the DNR is obligated to consider new rules regarding greenhouse gas emissions because the public trust doctrine applies to the atmosphere as well. She cites several cases that discuss the doctrine in broad terms, applying it to resources other than navigable waters or stating that it should adapt to changing times and conditions. *See, e.g., Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (describing the doctrine as "one to be molded and extended to meet changing conditions"); *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998) (stating that, in addition to water, the doctrine applies to wildlife and minerals). However, these cases are from other jurisdictions. The Iowa Supreme Court has stated, "[T]he scope of the public-trust doctrine in Iowa is narrow, and we have cautioned against overextending the doctrine." *Bushby*, 654 N.W.2d at 498). It has refused to extend the doctrine to both forests and public alleys. *See Id.; Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813–

14 (Iowa 2000). In light of this clear precedent, the court declines Filippone's invitation to expand the public trust doctrine beyond its traditional parameters to include the atmosphere.

ORDER

IT IS THEREFORE ORDERED that the June 22, 2011, decision of the Department of Natural Resources is hereby **AFFIRMED** in its entirety. Costs are taxed to the Petitioner.

Dated this 30th day of January, 2012.

D. J. STOVALL, JUDGE
FIFTH JUDICIAL DISTRICT

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Jacob J. Larson
Assistant Attorney General
E-mail: jl Larson@ag.state.ia.us
ATTORNEY FOR RESPONDENT

State of Minnesota
Ramsey County

District Court
Second Judicial District

Court File Number: **62-CV-11-3952**

Case Type: Civil Other/Misc.

Notice of Entry of Judgment

In Re: Reed Aronow vs MN Department of Pollution Control, Mark Dayton, State of Minnesota

Pursuant to: The Order of Judge John H. Guthmann dated January 30, 2012.

You are notified that judgment was entered on January 31, 2012.

Dated: January 31, 2012

cc :Jilian Elizabeth Clearman;
Robert Britt Roche

Lynae K. E. Olson
Court Administrator

By: 
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102


62-CV-11-3952


NOENJUDG

FILED
Court Administrator

STATE OF MINNESOTA
COUNTY OF RAMSEY

JAN 30 2012

By Deputy

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Reed Aronow,
Plaintiff,
v.

Case Type: Civil Other/Misc.
File No.: 62-CV-11-3952
Judge: John H. Guthmann

State of Minnesota, Minnesota
Department of Pollution Control and
Mark Dayton,
Defendants.

ORDER

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on November 2, 2011, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue was defendants' Rule 12.02(e) motion to dismiss. Jilian E. Clearman, Esq., appeared on behalf of the plaintiff. Robert R. Roche, Esq., appeared on behalf of defendants. The matter was taken under advisement following the hearing.

Based upon all of the files, records, submissions and arguments of counsel herein, the Court issues the following:

ORDER

1. Defendants' Motion to dismiss plaintiff's Complaint pursuant to Minn. R. Civ. P. 12.02(e) is **GRANTED**.

2. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 30, 2012

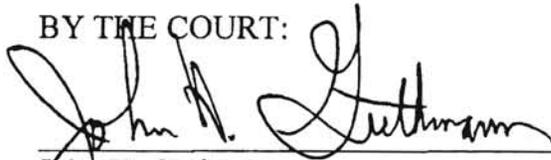
JUDGMENT

The foregoing shall constitute the judgment of the court.

Entered: 113112 LYNNE K.E. CLSON
Court Administrator

By Linda Maste
Deputy Clerk

BY THE COURT:


John H. Guthmann
Judge of District Court

MEMORANDUM

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff commenced the instant lawsuit claiming that defendants have failed to take action that will adequately protect Minnesota’s atmosphere. The claims are brought under the Public Trust Doctrine and the Minnesota Environmental Rights Act (“MERA”). The Complaint seeks a declaration “that the atmosphere is protected by the Public Trust Doctrine”, a declaration that defendants “violated and are in violation of MERA”, and an order compelling defendants “to take the necessary steps to reduce the State’s carbon dioxide output by at least 6% per year, from 2013 to 2050, in order to help stabilize and eventually reduce the amount of carbon dioxide in the atmosphere.” Finally, the Complaint seeks an award of costs, disbursements and attorney’s fees. In response to the lawsuit, defendants filed a motion to dismiss pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure.

II. STANDARD OF REVIEW

Under Rule 12.02(e) of the Minnesota Rules of Procedure, a defendant may file a motion to dismiss in lieu of a formal answer to test the legal sufficiency of a complaint. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). As such, only documents embraced by the pleadings may be considered. *In re Hennepin County Recycling Bond*

Litigation, 540 N.W.2d 494, 497 (Minn. 1995). Dismissal of a complaint is warranted when “it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963); see *Martens v. Minnesota Mining & Manufacturing Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (if the Complaint fails to state a claim upon which relief may be granted, a dismissal with prejudice is appropriate).

III. DISCUSSION

A. Governor Mark Dayton is not a Proper Party to this Action

Alleging a violation of their common law and statutory obligations, plaintiff challenges the sufficiency of defendants’ actions to protect the atmosphere. Plaintiff’s claims against Governor Dayton are based upon his assertion that Governor Dayton failed to uphold MERA. Yet, MERA simply provides private citizens with a civil remedy to seek court-ordered protection of the environment. Plaintiff makes no allegation that Governor Dayton interfered with or failed to permit civil actions under MERA.

Plaintiff also argues that Governor Dayton has an independent obligation under either the common law Public Trust Doctrine, MERA, or both to take action protecting the atmosphere. (Compl. ¶ 13.) In essence, plaintiff argues that the Executive Branch, through the Governor and the agencies he manages, has an obligation to act in furtherance of MERA’s broad purposes regardless of funding or authorizing legislation.

The remedies plaintiff seeks in his Complaint require passage of new laws and

standards by the Legislature. In addition, the remedies sought by plaintiff require a legislative appropriation. The Governor “is not vested with any legislative power, and no such power can be conferred upon him by the Legislature. As Governor, he can enforce the laws, but cannot change or suspend them.” *State ex. Rel. Lichtscheidl v. Moeller*, 189 Minn. 412, 420, 249 N.W. 330, 333 (Minn. 1933); *see* Minn. Const. art. III, § 3. In other words, the Governor executes the law but he cannot create law or spend money that was not appropriated by the Legislature.

The Complaint also alleges that Governor Dayton failed to “effectively implement and enforce the laws under his jurisdiction.” (Compl. ¶ 13.) However, with the exception of MERA and Minnesota Statutes section 216H.02, the Complaint does not describe or cite a statute that the Governor failed to implement or enforce. In the case of MERA and section 216H.02, the Complaint does not state, in even the vaguest terms, how the Governor failed to implement or enforce these statutes. Moreover, plaintiff failed to cite a statute that authorizes the Governor or any state agency to require the reduction of greenhouse gases at all much less at the rate sought by the Complaint. It is well established that Governor Dayton is not a proper party to an action in which he cannot “implement any of the relief that petitioners request.” *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). Because Governor Dayton has no legal authority to implement the policies sought by plaintiff, he is not a proper party to the lawsuit.¹ The claims against Governor Dayton must therefore be dismissed.

¹ The same principle holds true for the Minnesota Pollution Control Agency.

B. Common Law Public Trust Doctrine

Minnesota Courts have recognized the Public Trust Doctrine only as it applies to navigable waters. “Navigability and nonnavigability [sic] mark the distinction between public and private waters. The state, in its sovereign capacity, as trustee for the people, holds all *navigable* waters and the lands under them for public use.” *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942) (emphasis added). The *Nelson* court ultimately held that a private citizen’s riparian rights are subordinate to the State’s needs as it manages the navigable waters that are held in the public trust. *See also Pratt v. State, Dep’t of Natural Resources*, 309 N.W.2d 767, 771 (Minn. 1981). In *Larson v. Sando*, 508 N.W.2d 782 (Minn. Ct. App. 1993), *rev denied* (Jan. 21, 1994), the court declined to extend the public trust doctrine beyond “the state’s management of waterways,” partly because the cases cited by the parties applied only to waterways. *Id.* at 787 (declining to extend the doctrine to land). Similarly, this Court cannot locate, nor did counsel for either party supply, a Minnesota case supporting broadening the Public Trust Doctrine to include the atmosphere. This Court has no authority to recognize an entirely new common law cause of action through plaintiff’s proposed extension of the Public Trust Doctrine.

C. CLAIMS UNDER MERA

As discussed above, Minnesota does not recognize a common law action by citizens to require governmental protection of the atmosphere under the Public Trust Doctrine. However, through MERA, the Minnesota Legislature has enacted legislation enabling citizen lawsuits against the state, its agencies and its subdivisions aimed at

protecting, among other things, Minnesota's atmospheric resources. Minn. Stat. §§ 116B.01-.13 (2010).

When enacting MERA, the Legislature defined the purpose of the statute:

The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment or destruction.

Minn. Stat. § 116B.01 (2010). The statute goes on to establish two separate private causes of action. First, under section 116B.03, "any person residing within the state" may "maintain a civil action . . . in the name of the state of Minnesota against any person, for the protection of the air . . . whether publically or privately owned, from pollution, impairment, or destruction." *Id.* § 116B.03, subd. 1.

The second private cause of action created by MERA is found in section 116B.10.

It permits:

any natural person residing in the state . . . [to] maintain a civil action . . . for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license stipulation agreement or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed."

Id. § 116B.10, subd. 1.² To the extent plaintiff's Complaint arguably asserts a claim under both MERA causes of action, the Court will address the viability of each.

1. Minn. Stat. § 116B.03.

To be actionable under section 116B.03, the defendant must engage in "pollution, impairment or destruction" as defined by the statute. *Id.* § 116B.02, subd. 5 ("conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license stipulation agreement or permit of the state or any instrumentality, agency, or political subdivision thereof"). This conduct must be committed by a "person." MERA defines the term "person" to include "any state, municipal or other governmental or political subdivision or other public agency or instrumentality" *Id.* § 116B.02, subd. 2. It is of note that the definition does not include the State of Minnesota as an entity. *Id.*

Plaintiff's Complaint contains a section entitled "Jurisdiction and Venue", which lists only section 116B.10, subd. 1 as the basis for the Court's jurisdiction. (Compl. ¶ 15.) However, under a generous theory of notice pleading, plaintiff's Complaint arguably asserts a claim under Minn. Stat. § 116B.03. "The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (citing *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963)). "Consequently,

² Defendants argue that the State of Minnesota may never be a proper party to a lawsuit. (Defendants' Memorandum in Support of Motion to Dismiss, at 3-4.) However, in the case of MERA actions under section 116B.10, the statute expressly authorizes "a civil action . . . against the state." Minn. Stat. 116B.10, subd. 1 (2010).

Minnesota does not require pleadings to allege facts in support of every element of a cause of action.” *Id.*

Here, plaintiff’s Complaint cited cases that were filed as section 116B.03 claims. (Compl. ¶ 53.) In addition, plaintiff’s “Jurisdiction and Venue” section does not mention the Public Trust Doctrine cause of action as a basis for the court’s jurisdiction. Thus, plaintiff did not use the “Jurisdiction and Venue” section of the Complaint as an exclusive list of claims subject to the court’s jurisdiction. Nevertheless, the Court is convinced that plaintiff did not intend to include a section 116B.03 claim in the Complaint. More important, even if the Complaint is deemed to include a section 116B.03 claim, the Court finds that the claim cannot survive Rule 12.02(e) scrutiny.

First, Minn. Stat. 116B.03 contains very specific notice requirements:

Within seven days after commencing such action, the plaintiff shall cause a copy of the summons and complaint to be served upon the attorney general and the pollution control agency. Within 21 days after commencing such action, the plaintiff *shall* cause written notice thereof to be published in a legal newspaper in the county in which suit is commenced, specifying the names of the parties, the designation of the court in which the suit was commenced, the date of filing, the act or acts complained of, and the declaratory or equitable relief requested. The court may order such additional notice to interested persons as it may deem just and equitable.

Minn. Stat. §116B.03, subd. 2 (emphasis added). There is no evidence before the Court that plaintiff met the published notice requirement. Even if plaintiff intended to bring a section 116B.03 claim, his failure to publish a notice of claim within 21 days deprives this Court of jurisdiction over the claim. *County of Dakota (C.P. 46-06) v. City of Lakeville*, 559 N.W.2d 716, 722 (Minn. Ct. App. 1997) (because the parties failed to

comply with the statutory notice requirement, they did not properly commence their action, which prevented the district court from taking jurisdiction over the matter.) Plaintiff's failure to satisfy the notice requirement evinces his intent not to include a section 116B.03 claim in the Complaint. If plaintiff intended to include the claim, the failure to give notice is fatal. Either way, if the Complaint is deemed to include a section 116B.03 claim, it must be dismissed.

Second, section 116B.03 requires the action to be "in the name of the State of Minnesota." Minn. Stat. § 116B.03, subd. 1. Here, plaintiff sued solely in his name. Plaintiff's failure to sue in the name of the State as required by section 116B.03 demonstrates plaintiff's intent not to include such a claim in the Complaint.

Finally, plaintiff does not allege the basic prerequisite of a section 116B.03 claim. Instead, plaintiff's Complaint seeks to impose upon the State of Minnesota environmental requirements that heretofore do not exist in any statute, rule, regulation, or other form. Yet, to be actionable under section 116B.03, the plaintiff's claim must allege conduct by a defendant that constitutes "pollution, impairment or destruction" as defined by the statute. Because the Complaint does not allege anything falling within the definition of "pollution, impairment or destruction," any section 116B.03 claim must be dismissed to the extent the Court deems such a claim to have been included in the Complaint.

2. Minn. Stat. § 116B.10

As noted above, MERA creates two private causes of action that allow citizens to sue for the protection of the environment under defined circumstances. Plaintiff

specifically pleads a claim under section 116B.10.³ To determine whether the claim survives a Rule 12.02(e) challenge, the Court must determine if the Complaint alleges something that section 116B.10 declares actionable. The plain language of section 116B.10 does not permit a private cause of action by every citizen who is unhappy that the Legislature failed to go far enough to protect the environment. To be viable, plaintiff's "action [must] challenge . . . an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof." Minn. Stat. § 116B.10, subd. 1 (2010).

Plaintiff's Complaint does not refer to or challenge a single "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." *Id.* In addition, plaintiff's Complaint does not allege that the state or any agency or instrumentality of the state has actually regulated carbon dioxide. To the contrary, the gravamen of plaintiff's Complaint is an assertion that this Court should step in and order the State of Minnesota, the Governor and the PCA to do what they have heretofore declined to do. What the plaintiff seeks goes far beyond the scope of the civil action authorized by section 116B.10.

Although the Complaint does not challenge an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit", may the plaintiff use MERA to challenge a statute? Other than MERA, the only statute referred to in the

³ Defendants argue that plaintiff lacks standing, the Court lacks subject matter and personal jurisdiction and that the issues before the Court are not justiciable. In the absence of Minn. Stat § 116B.10, these arguments would have merit. However, the language of section 116B.10 grants the plaintiff standing to bring his claim, grants the Court jurisdiction over the subject matter, and provides for recognition of justiciable issues if the Complaint properly alleges the factual predicates to a claim.

Complaint is Article 5 of the Next Generation Energy Act of 2007 (“NGEA”). Compl. ¶ 39; *see* Act of May 22, 2007, ch 136, art. 5, 2007 Minn. Laws (codified as Minn. Stat. §§ 216H.01-.13). It is evident from reading Article 5 of the NGEA that the statute sets goals, requires the filing of reports and proposed legislation by agencies with the Legislature, and establishes a construction and energy use moratorium.⁴ The statute is largely aspirational. It does not create an “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit.” Minn. Stat. § 116B.10, subd. 1 (2010). As such, if one assumes that legislation can be challenged through a section 116B.10 lawsuit, chapter 216H does not qualify as a statute subject to challenge.

The Court also holds that the Legislature did not intend to permit citizen lawsuits under section 116B.10 against the State of Minnesota due to legislative action or inaction. Section 116B.10 claims may only challenge something that was “promulgated or issued.” *Id.* Legislatures do not “promulgate or issue” anything. Rather, they “enact.” Moreover, the “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit” subject to challenge must be one in “which the applicable statutory appeal period has elapsed.” *Id.* There is no statutory appeal period for challenging

⁴ Article 5 of the NGEA defines “statewide greenhouse gas emission” and establishes a greenhouse gas emissions reduction goal to “a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050.” Minn. Stat. § 216H.02, subd. 1 (2010). The statute requires certain state agencies to submit a “climate change action plan” to the Legislature. *Id.* § 216H.02, subd. 2. The statute also requires the Pollution Control Agency to “establish a system for reporting and maintaining an inventory of greenhouse gas emissions”, *id.* §§ 216H.021, subd. 1, enacts a moratorium on the construction of any “new large energy facility” or the importation of energy from any such facility, *id.* § 216H.03, requires a variety of reports to the Legislature on a periodic basis accompanied by proposed legislation, *id.* §§ 216H.07, and imposes certain reporting and disclosure requirements on the manufacturer and purchaser of a “high-GWP greenhouse gas.” *Id.* §§ 216H.10-12. None of the goals, systems or plans is enforceable absent further legislation.

legislation. The “statutory appeal period” language clearly refers to the time limits that exist in the Administrative Procedure Act governing regulations that are promulgated or issued and, perhaps, the limitations periods found in local ordinances. *See, e.g.,* Minn. Stat. ch. 14 (2010) (setting forth the procedure and timeline under which rules become final).’ Thus, to the extent plaintiff claims that the NGEA is “inadequate to protect the air . . . from pollution, impairment, or destruction,” such claims fall outside the intended scope of a section 116B.10 MERA lawsuit. The Legislature did not intend to authorize court recourse for injunctive remedies directing the Legislature to enact laws and appropriate money to realize outcomes that citizens could not achieve through the political process.

JHG

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To: OFFICE RECEPTIONIST, CLERK
Cc: Richard Smith
Subject: Svitak v. State, No. 87198-1

Dear Clerk-

Attached for filing is the Petitioners' Opening Brief and Appendices A-E.

Case Name: Svitak, et al. v. State, et al.
Case Number: No. 87198

Thank you and please let me know if there are any questions,

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