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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,

Plaintiffs/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 & Wildlife,

Defendants/Respondents.

STATE'S RESPONSE BRIEF

ROBERT M. MCKENNA
Attorney General

MARY SUE WILSON, WSBA #19257
Sr. Assistant Attorney General
LESLIE R. SEFFERN, WSBA #19503
JOSEPH V. PANESKO, WSBA #25289
Assistant Attorneys General
P.O. Box 40117, Olympia, WA 98504-0117
(360) 586-6770
Attorneys for Respondents

ORIGINAL

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I. INTRODUCTION

Through an unprecedented common law theory, Plaintiffs request that the Court legislate new climate change policy in Washington and impose that policy on the legislative and executive branches. For reasons that fall into three categories, Plaintiffs have not carried their burden to state a claim for relief and cannot invoke the Court's subject matter jurisdiction.

First, Plaintiffs have failed to state a claim because their public trust doctrine theory is not based on existing law. Washington's public trust doctrine applies only to navigable waters and lands beneath them, not the atmosphere. Even if it applied to the atmosphere, the doctrine only limits state actions that alienate the public's interest in the use of the resource. The doctrine cannot be used to compel affirmative state action to reduce carbon dioxide emissions.

Second, Plaintiffs' request fails to state a claim because it violates the separation of powers doctrine. Plaintiffs ask the Court to create a new regulatory program that would either require the Legislature to enact new laws or involve the Court in making legislative decisions. In the absence of a constitutional mandate compelling legislative action, a judicial order granting the requested relief improperly invades the role of the legislative branch.

Third, Plaintiffs' claims are not actionable under the Uniform Declaratory Judgment Act (UDJA). They do not seek a declaration of rights under existing law, but instead complain of the government's "failure to act." Such claims must be brought under the Administrative Procedure Act and the mandamus statute. Additionally, the relief sought would not redress their alleged harms, and they fail to join indispensable parties, thereby failing to properly invoke the Court's subject matter jurisdiction.

At its core, Plaintiffs' complaint is that the State is not doing enough to remedy global climate change impacts. By arguing that Plaintiffs' claim should be dismissed, the State does not minimize the seriousness of global climate change. Indeed, the Legislature has enacted numerous statutes establishing standards and reductions for carbon dioxide emissions. The Governor has issued executive orders declaring the State's response to climate change a priority for the State and state agencies are taking a number of actions to respond to climate change. However, Plaintiffs' declaratory judgment action is not the correct vehicle to address their grievance. Because Plaintiffs fail to state a claim for relief and fail to properly invoke the Court's subject matter jurisdiction, the trial court did not abuse its discretion when it declined to exercise jurisdiction over this case. The Court should affirm the trial court's dismissal.

II. ISSUES PRESENTED

1. Do Plaintiffs fail to state a claim for relief where the public trust doctrine does not apply to the atmosphere or require that the State take affirmative actions to protect the atmosphere?

2. Do Plaintiffs fail to state a claim for relief under the separation of powers doctrine where they ask the Court to create a new carbon dioxide emissions reduction program?

3. Did the trial court act within its discretion when it dismissed Plaintiffs' declaratory judgment action because the case seeks to compel government action, the requested judicial relief cannot redress the complained-of injuries, and Plaintiffs do not join indispensable parties?

III. STATEMENT OF THE CASE

The State has taken numerous actions to respond to global climate change. The Legislature has enacted statutes and the Governor has issued executive orders addressing Washington's carbon dioxide emissions.¹ A 2008 statute established greenhouse gas emission reduction levels for Washington intended to achieve emissions equal to 1990 levels by 2020, 25 percent below 1990 levels by 2035, and 50 percent below 1990 levels

¹ See, e.g., RCW 70.235; RCW 70.120A; RCW 47.01; Executive Orders 07-02 and 09-05, available at http://www.governor.wa.gov/execorders/eo_07-02.pdf and http://www.governor.wa.gov/execorders/eo_09-05.pdf (last visited Sept. 26, 2012).

by 2050.² As a result, Department of Ecology (Ecology) adopted a plan describing actions necessary to achieve these reductions and adopted rules to require greenhouse gas sources to report their annual emissions.³ Ecology uses these emissions reports to monitor and track progress toward meeting the statewide reductions.⁴ Every other year, Ecology also compiles an inventory of greenhouse gas emissions from all significant sectors in Washington.⁵

In addition, Washington's state agencies have taken other actions to respond to climate change. For example, Ecology and the Department of Licensing have implemented motor vehicle greenhouse gas emissions standards for certain passenger cars and trucks to address the transportation sector (the sector with the largest amount of greenhouse gas emissions in Washington).⁶ The Department of Transportation has also developed strategies to reduce vehicle miles traveled under statutory benchmarks.⁷ To address major industrial source emissions, Ecology and the Energy Facility Site Evaluation Council have implemented a federally

² RCW 70.235.020(1)(a).

³ RCW 70.235.020(1)(b), (1)(d)(i); RCW 70.94.151(5)(a); WAC 173-441.

⁴ RCW 70.235.020(1)(d)(ii).

⁵ RCW 70.235.020(2).

⁶ See RCW 70.120A.010; WAC 173-423. Transportation emissions represent 44.8 percent of Washington's 2008 greenhouse gas emissions. See Ecology, *Washington State Greenhouse Gas Emissions Inventory 1990-2008*, December 2010, available at <https://fortress.wa.gov/ecy/publications/publications/1002046.pdf> (last visited Sept. 26, 2012).

⁷ See RCW 47.01.078(4), .440; RCW 47.80.023(1); RCW 47.38.070.

delegated program that requires major new or modified stationary sources of carbon dioxide (and other pollutants) to obtain permits and reduce emissions using best available control technology.⁸ Ecology has also adopted a regulatory program to ensure new energy plants meet strict greenhouse gas emissions performance standards.⁹ These standards include a schedule for substantially reducing emissions from the Centralia Coal Plant, Washington's largest single source of carbon dioxide emissions.¹⁰

Plaintiffs brought their case because they believe that these (and other) state actions are insufficient and because they want the Court to remedy climate change impacts in Washington State. Plaintiffs allege that the State has failed to implement existing laws and failed to enact new laws. Yet, their case does not directly challenge any specific state action or inaction.

Instead, Plaintiffs filed a declaratory judgment action against the Governor, the directors of the state Departments of Ecology and Fish and Wildlife, the Commissioner of Public Lands, and the State of Washington. CP 1.¹¹ In their UDJA case, Plaintiffs seek a declaration that the public

⁸ See RCW 70.94.860; WAC 173-400-720; WAC 463-78-005.

⁹ RCW 80.80.040.

¹⁰ RCW 80.80.040(3)(c).

¹¹ Plaintiffs also intend to seek relief against the State Legislature. Opening Brief at 47.

trust doctrine applies to the atmosphere. They also seek a holding that the State has a fiduciary duty to reduce carbon dioxide emissions according to best available science by 6 percent per year to achieve global atmospheric carbon dioxide concentrations of 350 parts per million (ppm) by the year 2100.¹² CP 35–36, ¶ E. Because they believe the State has breached the fiduciary duty they describe, Plaintiffs seek creation of a regulatory program to achieve these reductions, with the court retaining continuing jurisdiction over the matter for the next 88 years. CP 35–36, ¶¶ E, G.

The State moved to dismiss Plaintiffs’ declaratory judgment action for failure to state a claim and for lack of subject matter jurisdiction. The superior court granted the State’s motion to dismiss without explicitly stating which of the State’s arguments it had adopted, and Plaintiffs seek direct review in this Court. CP 57.

¹² In the complaint, Plaintiffs use “carbon”, “carbon dioxide” (or “CO₂”), and “greenhouse gases” (or “GHG”) interchangeably when referring to emissions and/or atmospheric concentrations. For simplicity’s sake and because the distinction is not relevant to the legal arguments made herein, we uniformly use “carbon dioxide” when referring to emissions and atmospheric concentrations. Plaintiffs describe their requested relief in two different ways. *Compare* CP 2, ¶ 1 (seeking carbon dioxide emissions reductions of 6 percent per year through 2100) with CP 20, ¶ 44 (seeking carbon dioxide emissions reductions of 6 percent per year through 2050, and 5 percent per year through 2100). Again, for simplicity’s sake and because the distinction is not relevant to the legal arguments made herein, we uniformly describe Plaintiffs’ requested relief as seeking 6 percent per year reductions through 2100.

IV. ARGUMENT

A. Standard Of Review

A trial court's dismissal for failure to state a claim upon which relief under CR 12(b)(6) can be granted is a question of law reviewed de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is also reviewed de novo. *Todric Corp. v. Dep't of Revenue*, 109 Wn. App. 785, 788 n.2, 37 P.3d 1238 (2002).

Under the UDJA, courts have discretion to determine whether to entertain a declaratory judgment action. A trial court's decision not to consider such an action is reviewed for an abuse of discretion, except that questions of law are reviewed de novo. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001); *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). An abuse of discretion exists only when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Gildon*, 158 Wn.2d at 493.

B. The Public Trust Doctrine Does Not Apply To The Atmosphere Or Require The State To Take Affirmative Actions To Regulate Carbon Dioxide Emissions

Plaintiffs assert that Washington's public trust doctrine is the source of law that warrants declaratory judgment in their favor. They claim that the public trust doctrine applies to all "essential natural

resources,” in particular the atmosphere, and that the doctrine further requires state “protection for natural resources” in America. Opening Brief at 1–4. This claim fails as a matter of law for several reasons. First, in making their sweeping assertion that the doctrine applies to every natural resource in Washington, Plaintiffs ignore controlling precedent that applies the public trust doctrine only to navigable waters and lands beneath them. *Caminiti v. Boyle*, 107 Wn.2d 662, 668–70, 732 P.2d 989 (1987). Second, where it applies, the doctrine operates only to restrict alienation of the resource where alienation impairs the public’s traditional interest in using the resource. It does not create an affirmative or fiduciary duty for the State to act. It does not impose obligations to ensure a particular quality of the resource and it does not provide authority for executive branch officials to act in reliance on the doctrine, absent express statutory authority. Because the public trust doctrine cannot support their claim, Plaintiffs have failed to state a claim for declaratory and injunctive relief.

1. The Public Trust Doctrine Exists Purely As A Matter Of State Law, Requiring A Focus On The Origin Of The Doctrine In Washington State

Over the past 100 years, the United States Supreme Court has repeated the principle that the public trust doctrine develops on a state-by-state basis, subject only to the paramount “federal power to regulate

vessels and navigation under the Commerce Clause and admiralty power.” *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012). All fifty states “have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.” *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) (citing *Shively v. Bowlby*, 152 U.S. 1, 26, 14 S. Ct. 548, 38 L. Ed. 331 (1894)). Because the public trust doctrine is defined on a state-by-state basis, the scope of the public trust doctrine in Washington depends solely on the Washington Constitution, Washington statutes, and Washington case law.

The origins of the public trust doctrine in Washington begin with adoption of the state constitution. Policy choices over the management, control, and disposition of harbors and tidelands presented the “most vexing and politically sensitive problem confronting the [constitutional] convention.” *Hughes v. State*, 67 Wn.2d 799, 804, 410 P.2d 20 (1966), *rev'd on other grounds*, 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967).

Delegates to the constitutional convention were presented with the option of preserving in perpetuity the State’s title in all tidelands and shorelands to manage in trust for the public, or allowing the sale of such lands into private ownership to expand the local tax base, and for

reclamation and development.¹³ *State v. Sturtevant*, 76 Wash. 158, 171, 135 P. 1035 (1913), *rehearing denied twice in reported opinions* at 78 Wash. 158 (1914), and 86 Wash. 1 (1915). The delegates first reached agreement on Article XV regarding harbor areas. Section 1 directs the Legislature to provide for the appointment of a commission whose duty is to designate harbor areas wherever navigable waters lie in front of the corporate limits of any city.¹⁴ This section contains an absolute restriction: “The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines” Const. art. XV, § 1. Sale or relinquishment of the state’s control of the water area inside the harbor is similarly prohibited, and “forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce”, *id.*, except that harbor areas may be leased for up to 30 years for purposes of navigation or commerce. Const. art. XV, § 2.¹⁵

For all other aquatic lands not in and beyond harbor areas (extending out into the water along harbor lines), the delegates ultimately

¹³ For a more detailed analysis of these debates see Charles K. Wiggins, *The Battle for the Tidelands in the Constitutional Convention* (three-part article), 44 Wash. St. B. News 15 (Mar. 1990), 44 Wash. St. B. News 15 (Apr. 1990), 44 Wash. St. B. News 47 (May 1990).

¹⁴ The Harbor Line Commission designates a harbor area by drawing an inner harbor line closer to the shore and an outer harbor line further out in the water. RCW 79.115.010.

¹⁵ See diagram attached as Appendix A describing lands in and beyond harbor areas.

agreed upon a compromise in Article XVII. *Hughes*, 67 Wn.2d at 805. Article XVII, section 1 asserts the State’s ownership of beds and shores of navigable waters, but does not place any restrictions on the State’s disposition of these lands, leaving that policy determination up to future legislatures. *Id.* Thus, the only constitutional limit on the Legislature’s ability to alienate the public’s interest in navigable waters relates only to harbor areas and is found in Article XV.

Early Washington courts considering the State’s management of aquatic lands established that “[t]he *only right* which the state has ever undertaken to maintain in trust for the whole people is the right of navigation.” *See Sturtevant*, 76 Wash. at 165 (emphasis added) (citing *Dawson v. McMillan*, 34 Wash. 269, 75 P. 807 (1904)); *see also City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 503, 64 P. 735 (1901) (the State reserved the right to regulate the waters of Lake Whatcom and to grant the bed of the lake to private ownership, “subject to the paramount right of public use for navigation”).¹⁶ These early cases

¹⁶ In cases where private or public projects complied with existing statutory limits, large areas of navigable waters have been developed and reclaimed to the exclusion of the public without relinquishing the public’s overall navigational rights. *See, e.g., Hill v. Newell*, 86 Wash. 227, 231–32, 149 P. 951 (1915) (the State’s abandonment of a section of the former Duwamish River bed after a river straightening project extinguished the public’s ability to navigate the former river section); *Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 776, 505 P.2d 457 (1973) (allowing the filling of private tidelands in front of abutting landowner’s property blocking access over that property to the water and explaining “[t]he notion that all tidelands must be left in their

set the stage for more modern cases discussing the public trust doctrine in Washington State. As explained below, Plaintiffs' arguments that Washington's public trust doctrine already includes, or should be extended to include, the atmosphere (Opening Brief at 12) ignore this established body of case law.

2. The Public Trust Doctrine In Washington Applies Only To Navigable Waters And Underlying Lands

a. Washington's Case Law And Statutes Apply The Public Trust Doctrine Exclusively To Navigable Waters And Underlying Lands

Washington's public trust doctrine provides that the public has an interest in the use of navigable waters and underlying lands for navigation, and the State, as sovereign over those waters and lands, holds the public's interest in trust and (in most cases) cannot alienate it. *Caminiti*, 107 Wn.2d at 669. In recognizing that the doctrine applies exclusively to this public interest, *Caminiti* also acknowledged that the doctrine applies to activities incidental to navigation, including fishing, boating, swimming, water skiing, and other recreation corollary to navigation and the use of public waters. *Caminiti*, 107 Wn.2d at 669 (citing *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969)). *Caminiti's* reference to activities incidental and corollary to navigation

natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood").

did not, however, expand the doctrine beyond its central focus on navigable waters and underlying lands. It simply described the traditional public uses of such waters and lands. Neither *Caminiti* nor *Wilbour* referenced, or in any way hinted, that the doctrine applies outside the singular context of navigable waters and underlying lands.

No Washington cases support expanding the public trust doctrine beyond navigable waters and underlying lands. With one exception, all of the Washington cases cited by Plaintiffs involve navigable waters, including geoduck clams that are part of the fishery corollary to the public's interest in navigation. Opening Brief at 11–18. In the single cited case not involving navigable waters, the Court refused to extend the doctrine, finding that the public trust doctrine was not germane to regulation of non-navigable water or groundwater. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993) (invalidating Ecology's regulatory enforcement order to irrigators to stop groundwater withdrawals that impaired ranchers' senior water rights). Further, in a case not cited by Plaintiffs in the relevant section of their brief, the court of appeals declined to extend the public trust doctrine beyond its specific focus on navigable waters, stating that no case in Washington had applied the public trust doctrine to terrestrial wildlife or resources. *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d

203 (2004). Plaintiffs point to no Washington authority for applying the public trust doctrine beyond navigable waters and underlying lands.

Beyond case law, none of the state statutes cited by Plaintiffs are evidence of a public trust doctrine that includes the atmosphere. The purpose section of the State Environmental Policy Act expresses the Legislature's desire to coordinate actions so "that the state and its citizens may . . . [f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations." RCW 43.21C.020(2)(a). This aspirational statement does not reference the public trust doctrine and cannot be said to evince legislative intent to extend the doctrine to the atmosphere.

The legislative findings and policies section of the Shoreline Management Act (SMA) recites goals related to limiting reduction of public rights in navigable waters. RCW 90.58.020. The SMA, however, solely regulates state shorelines. *See* RCW 90.58.080, .140. The SMA has no findings or policies that extend the public trust doctrine to the atmosphere, and the atmosphere is nowhere addressed in the Act.

Similarly, the Legislature's declaration of public policies and purpose in the Washington Clean Air Act establishes the policy goal of preserving, protecting, and enhancing air quality. RCW 70.94.011. However, the Act implements those policies through, among other things,

regulatory permitting and the application of air quality and emission standards. *See, e.g.*, RCW 70.94.331(2), .152. Not one of the state statutes cited by Plaintiffs mentions the public trust doctrine, let alone assigns to any state agency a specific responsibility to apply the public trust doctrine to the atmosphere.¹⁷ Nor do any of the cited statutes include language creating a cause of action under the public trust doctrine.¹⁸

Plaintiffs argue that the State's alleged dominion and control over "essential natural resources" supports the public trust doctrine's application to those resources. Opening Brief at 12–18. Plaintiffs' argument is based on a misconception of the doctrine and fails for two reasons. First, the doctrine hinges on the State's ownership of particular state resources (navigable waters and underlying lands) that the State holds in trust for the public. *Caminiti*, 107 Wn.2d at 668–69. No case in Washington holds that the public trust doctrine applies to a resource based upon the State's dominion and control of the resource. Second, Plaintiffs fail to point to any authority in Washington suggesting the State

¹⁷ Another statute Plaintiffs cite, RCW 77.04.012, creates general mandates for the Fish and Wildlife Commission to provide for conservation of wildlife and fish, to authorize taking of these resources at specified times and places, and to maximize fishing and hunting opportunities. There is no mention of the public trust doctrine or creation of claims under the doctrine applicable to the atmosphere.

¹⁸ If these statutes were a viable source of authority for applying the public trust doctrine to the atmosphere in Washington, Plaintiffs would need to plead their case under the statutory provisions.

has ownership of the global atmosphere.¹⁹

In sum, there are no cases or statutes in Washington that authorize the public trust doctrine's application to the atmosphere.

b. Out-Of-State Sources Are Not Relevant To The Scope Of Washington's Public Trust Doctrine, And Even If They Were, None Of The Cited Sources Supports Plaintiffs' Argument

As discussed above, each state independently defines the scope of its own public trust doctrine subject only to federal navigational interests. *See supra* section IV.B.1. Given this principle, the out-of-state sources cited by Plaintiffs warrant no attention.²⁰ Even if these sources had

¹⁹ Because the global atmosphere is shared by the entire world, the State questions whether any state can claim ownership of the atmosphere in a manner similar to its ownership of navigable lands and waters (or other natural resources) within the State's jurisdiction.

²⁰ Plaintiffs cite United States Supreme Court cases, federal statutes, state cases from other jurisdictions, law review articles, and the United Nations Framework Convention on Climate Change (UNFCCC) in support of their argument that the public trust doctrine applies to the atmosphere. Two cited Supreme Court cases from the 1800s focus on the doctrine's restrictions on colonial and statutory grants of tidelands in other states. Opening Brief at 2, 11, 13. Another addresses Connecticut's authority to regulate wild game. *Id.* at 2. These cases do not address the recent history, development, and scope of the doctrine in Washington. Nor do they mandate a particular application of the doctrine in Washington. Similarly, Federal Clean Water Act, 33 U.S.C. § 1370, and federal Clean Air Act, 42 U.S.C. § 7416, savings clauses do not mention the public trust doctrine, or determine the scope of state common law claims. In addition, none of the law review articles cited appear to point to a single published case that has applied the public trust doctrine to the atmosphere. *See In re Marriage of Pape*, 139 Wn.2d 694, 721 n.2, 989 P.2d 1120 (1999) (Madsen, J., dissenting) (while treatises, law review articles, and reports "may make for interesting reading, they are certainly not law"). Finally, the UNFCCC applies to the United States, imposes no binding greenhouse gas reduction requirements, and makes no statements that would support extending Washington's unique common law public trust doctrine to the atmosphere. UNFCCC, adopted May 9, 1992, 31 I.L.M. 849.

precedential value (which they do not), none of the sources applies the public trust doctrine to the atmosphere.²¹

Plaintiffs do not cite a single appellate case applying the public trust doctrine to the atmosphere. Instead, Plaintiffs cite a recent letter ruling by the 201st District Court in Texas that affirmed the dismissal of a rulemaking petition seeking to have Texas respond to climate change in a particular manner. *See Bonser-Lain v. Texas Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194 (Dist. Ct. Tex. Aug. 2, 2012) (200th Dist. Ct. Judge G. Triana presiding). Opening Brief, Appendix B. There, *Bonser-Lain* requested that the Texas Commission on Environmental Quality adopt a regulation under Texas's public trust doctrine that would reduce carbon dioxide emissions by at least 6 percent per year. *Bonser-Lain* Plaintiffs' Original Petition at 2, attached as Appendix B. The district court found the commission's refusal to rulemake a reasonable exercise of discretion. But in its letter ruling, the court opined, based upon a Texas constitutional provision, that the scope of Texas's public trust doctrine covered all of the state's natural resources (not just water). *Bonser-Lain*, No. D-1-GN-11-002194 at 1.

²¹ Four of the five cases cited involve issues related to the navigational water resource. Opening Brief at 13, 18–19. The fifth relates to the applicability of California's public trust doctrine to wildlife. *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 597, 599, 166 Cal. App. 4th 1349 (2008) (dismissing action for declaratory and injunctive relief against a windfarm for wind turbines' impacts on birds).

Plaintiffs seize upon the *Bonser-Lain* opinion as purported support for this case. However, the Washington Constitution nowhere establishes a state duty to protect the state's natural resources. In sharp contrast, the Texas constitution contains an express positive mandate to the Texas legislature to pass laws to develop, conserve, and preserve the public's right in *all* natural resources. *See* Texas Const. art. XVI, § 59(a).

Other recent out-of-state trial court decisions that address legal theories similar to those advanced here do not persuasively support Plaintiffs' claims in this case. Those decisions have either dismissed the comparable claims or the trial court has not made a final determination, and, therefore, they do not support application of Washington's public trust doctrine to the atmosphere.²²

3. The Public Trust Doctrine Operates Only To Restrict Alienation That Impairs The Public's Interest In Using The Resource

Even if the public trust doctrine were to apply to the atmosphere, Plaintiffs still cannot state a claim for relief. The doctrine operates to restrict alienation that impairs the public's interest in use of the resource. But, it does not impose an affirmative or fiduciary duty upon the State to

²² The State is aware of 13 actions seeking application of the public trust doctrine to the atmosphere where a court has issued a decision. Though none of these cases have precedential value in Washington, and all but one of them resulted in dismissal of plaintiffs' claims, a summary of those cases is attached to provide a complete picture of the current legal landscape for these claims. *See* Appendix C.

act. It does not impose obligations to ensure a particular quality of the resource, and executive branch Defendants cannot act under the doctrine absent express statutory authority.

a. The Public Trust Doctrine Does Not Create An Affirmative Duty For State Officials To Act To Protect The Resource

The public trust doctrine is a *limitation on state and private action* that would alienate (*e.g.*, transfer the State’s ownership interest in) navigable waters and their underlying lands and, in so doing, impair the public interest in the use of those resources for navigation. *Caminiti*, 107 Wn.2d at 670. The doctrine does not create an affirmative duty to act. Nor does it create a cause of action against the State based on an alleged failure to take such affirmative action. Indeed, under the controlling test for whether the doctrine has been violated, the Court analyzes:

(1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* [right of navigation and the fishery] 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.

Id. at 670 (emphasis added).

Plaintiffs argue the *Caminiti* test applies to the State’s alleged failure to act because the test focuses on “whether” the State has given up control, not “how” the State has given up control. Opening Brief at 23.

This argument distorts the plain language of the test. The test asks “whether the state, *by the questioned legislation*, has given up its right of control” *Caminiti*, 107 Wn.2d at 670 (emphasis added). Therefore, to apply the test, the Court must ask whether the State’s *action* has given up the State’s right of control over the public’s interest in navigation.

In *Caminiti*, the Court scrutinized a specific state action—a statute that allowed private docks to be installed over public tidelands without payment of rent—and determined that the State had not given up its right of control. *Id.* at 665–66. All of the other Washington cases cited by Plaintiffs similarly apply the test to an action that allegedly forfeits control over the public interest, not to an alleged *failure* of the State to act. *See, e.g., Orion Corp. v. State*, 109 Wn.2d 621, 641–42, 747 P.2d 1062 (1987) (holding a private developer’s proposal to fill second class tidelands could have violated the public trust doctrine); *Wilbour*, 77 Wn.2d at 309 (private landowner’s filling shorelands on Lake Chelan);²³ *Wash. State Geoduck Harvest Ass’n v. Dep’t of Natural Res.*,

²³ Plaintiffs rely on *Wilbour* to encourage this court to engage in a “logical extension of establish[ed] law” to create an affirmative State duty. Opening Brief at 26–27. However, apart from noting the doctrine’s application to incidental activities related to navigation, *Wilbour* did not extend established law. *Wilbour* required removal of fill from shorelands that blocked access to Lake Chelan across the shorelands. *Wilbour*, 77 Wn.2d at 313–16. There is nothing in *Wilbour* that provides a basis for extending Washington’s public trust doctrine to require the State to affirmatively act to protect the atmosphere. And even if applied to the atmosphere, *Wilbour* might at most support a suit against entities blocking the use of navigable airspace, but it would not support a suit seeking to compel affirmative State action to address climate pollution.

124 Wn. App. 441, 444, 101 P.3d 891 (2004) (State's affirmative management of geoduck harvests). Opening Brief at 24–25.

Similarly, cases Plaintiffs cite from other jurisdictions do not support use of the public trust doctrine as a basis for a failure to act claim. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–54, 13 S. Ct. 110, 36 L. Ed. 1018 (1892) (reviewing the State of Illinois' statutory grant of the entire harbor fronting Chicago to a railroad company); *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty.*, 33 Cal. 3d 419, 452, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (reviewing a state agency's water right permit approvals and finding the state was required to consider public trust doctrine restrictions when making water allocation decisions).²⁴ In sum, even if Washington's public trust doctrine applied to the atmosphere, Plaintiffs fail to point to any authority for applying the doctrine to require affirmative state actions based upon the State's alleged failure to act.

²⁴ Cases cited at pages 24–27 of Plaintiff's Opening Brief have no precedential value in Washington because they do not address Washington's public trust doctrine nor do they support use of the public trust doctrine to require the State to take affirmative acts to protect the atmosphere. Of those cited cases, only one involved a claim against governmental entities seeking to require action under the public trust doctrine. *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006). In *Kelly*, the plaintiffs argued that the state agency failed to enforce its water quality permit and violated the public trust doctrine by allowing a development company to discharge pollutants into the water. *Id.* at 211–12. Even there, in finding for the state because of a lack of evidence, the court appeared to focus on the affirmative permitting actions of the agency instead of relying on the public trust principles uniquely embodied in Hawaii's constitution. *Id.* at 228–34.

b. General Principles Of Trust Law Do Not Apply To Washington's Public Trust Doctrine

The affirmative financial obligations and fiduciary duties embodied in general trust principles do not apply to the public trust doctrine. *See* Opening Brief at 27. The common law doctrine, for instance, does not create financial obligations that might give rise to a failure to act claim. The doctrine does not require the State to maximize income for the benefit of the public or to refrain from imprudent or speculative investments, as is the case in other settings where the State's fiduciary duties derive from explicit laws. *See, e.g.*, Washington's Enabling Act, ch. 180, 25 Stat. 676, § 11 (1889), and Const. art. XVI (requiring the state to manage school and grant lands in trust and prohibiting disposal of trust lands below market value). *See also Skamania Cnty. v. State*, 102 Wn.2d 127, 132–33, 136, 685 P.2d 576 (1984) (finding the Legislature violated its trust obligations imposed by the Enabling Act, Const. art. XVI, and RCW 76.12.030 when it enacted legislation that excused defaulting timber purchase contracts). No Washington law mandates that the State manage the atmosphere as a fiduciary or maximize the profit from use of the atmosphere.²⁵ Thus,

²⁵ One other state that considered this question recognized the inherent conflict between a general trustee's fiduciary obligation to maximize profit versus the public's interest in using natural resources subject to a public trust. *See, e.g., Brooks v. Wright*, 971 P.2d 1025, 1032–33 (Alaska 1999) (finding general trust principles do not control

there is no legal support to conclude that Washington's public trust doctrine imposes a fiduciary duty or somehow invokes general trust principles.²⁶

c. The Public Trust Doctrine Does Not Impose Obligations To Ensure A Particular Quality Of The Resource

Even if the public trust doctrine applied to the atmosphere, the doctrine protects the public's interest in the *use* of the navigational resource. There are no cases in Washington that apply the doctrine to protect the *chemical contents or quality* of a resource. So, even if the doctrine applied to the atmosphere (and it does not), it would presumably apply in the same way it applies to navigable waters and underlying lands. It would limit alienation of the use of the navigable airspace, but it would not impose obligations to ensure a particular quality of the state's air resources. *Caminiti*, 107 Wn.2d at 670.

Alaska's management of natural resources, which must be managed for the benefit of all people under the state constitution).

²⁶ Neither of the two cited out-of-state cases actually applied general trust law principles to the issues before those courts. *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 739-40 (Idaho 1987) (remanding action against state to determine whether the public trust doctrine applied and making only passing reference to trust administration principles); *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169, 174 (Ariz. Ct. App. 1991) (in action to invalidate portions of a statute allowing the sale of river bed lands, court compared state duty to that of private trustee to emphasize that the actions of both are judicially reviewable, but made no reference to positive fiduciary duties).

d. The Public Trust Doctrine Does Not Provide Independent Authority For Agency Heads To Regulate Emissions Absent Express Statutory Authority To Do So

Absent express statutory authority, the public trust doctrine does not provide independent authority for state officials to act. Thus, it cannot provide a basis for a failure to act claim in this case.

The executive branch Defendants have only those powers granted them by the constitution or statute.²⁷ *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 813, 6 P.3d 30 (2000) (citing *Young v. State*, 19 Wash. 634, 637, 54 P. 36 (1898)); *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993). This Court has repeatedly recognized that state agencies cannot rely on the public trust doctrine as an independent source of regulatory authority, absent express statutory authorization. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 98–99, 11 P.3d 726 (2000) (finding public trust doctrine did not authorize Ecology's denial of groundwater appropriation permits independent of code provisions governing the appropriations; and, resolving the case based upon those code provisions); *R.D. Merrill Co. v. State*, 137 Wn.2d 118, 133–34, 969 P.2d

²⁷ The Commissioner of Public Lands is a statewide-elected position created by the Constitution, but his powers are defined by the Legislature just as with the other Defendant state agency heads. See Const. art. III, § 23. The Commissioner acts as the administrator of the Department of Natural Resources. See RCW 43.30.105¶¶.

458 (1999) (finding public trust doctrine provides no guidance on Ecology’s authority to render decisions regarding water right change applications because the only allowable guidance is that found in the water code); *Rettkowski*, 122 Wn.2d at 231–33 (finding Ecology’s order precluding groundwater appropriation is not supported by public trust doctrine where enabling statute does not give Ecology statutory authority to assume the state’s public trust duties and regulate in order to protect the public trust). This conclusion is further supported by the principle that absent an express statutory statement to the contrary, “the duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof.” *Id.* at 232.

Plaintiffs have pointed to no constitutional or statutory authority directing the Governor or agency heads to regulate carbon dioxide emissions under the public trust doctrine. Absent such authority, Plaintiffs have failed to state a claim against Governor Gregoire, Commissioner Goldmark, Director Anderson, or Director Sturdevant.

4. Plaintiffs’ Allegations Do Not State A Claim Under The Test In *Caminiti*

Recognizing the public trust doctrine has not been applied to the atmosphere, Plaintiffs try to fit their claim under the traditional doctrine. They allege that sea level rise, attendant changes to shorelines, and ocean

acidification, which are caused by global warming, harm the public's interest in the traditional navigational resources. CP 93; Opening Brief at 37. However, these alleged harms to navigation fail to warrant relief under *Caminiti* for two reasons. First, *Caminiti* allows relief only if the State has given up control of the public's interest in navigable waters, and then only if the State's giving up that control impairs the public's interest *in navigation*. *Caminiti*, 107 Wn.2d at 670. Plaintiffs baldly assert adverse impacts to commerce and recreation, CP 15, ¶ 30, but they fail to allege that the State has given up control of the public's interest in the use of navigational resources. Second, even if Plaintiffs had alleged some State action that gives up control, they do not allege how sea level rise or acidification would impair the public's ability to use the waters for navigation. Plaintiffs' allegations are not sufficient to state a claim for relief under the traditional public trust doctrine.

Even if *Caminiti* applied to a broader scope of resources, Plaintiffs' legal theory that the State has given up control of air resources by failing to act is not supported by their factual allegations. Plaintiffs acknowledge in their complaint that the Legislature has in fact established statewide carbon dioxide reduction levels, and the Governor and state agencies are taking actions to control sources of carbon dioxide emissions in Washington. CP 21, ¶ 45; 12, ¶ 25. Rather than show that

the state has relinquished control over Washington's air resources, these actions illustrate the opposite—the exercise of state control. *See Citizens for Responsible Wildlife Mgmt.*, 124 Wn. App. at 568, 570 (finding that even if the public trust doctrine did apply to state wildlife, the State did not give up control because the initiatives and numerous other statutes and regulations showed the State's exercise of control).

Plaintiffs point to no legislative or executive action that has transferred ownership or control to private parties of the State's air resources, let alone the Earth's atmosphere, as required by the test in *Caminiti*. Therefore, as a matter of law, they have failed to state a claim for relief, and the trial court's decision should be affirmed.

C. The Declaration And Relief Sought Would Violate The Separation Of Powers Doctrine

Plaintiffs' declaratory judgment action asks the Court to create a new regulatory program that would either require the Legislature to enact new laws, or involve the Court making legislative decisions. The trial court did not err when it dismissed Plaintiffs' case because the requested declaration and relief would violate the separation of powers doctrine.

1. No Language In The State Constitution Compels The Legislature To Take Specific Actions To Protect The Atmosphere

Plaintiffs ask the Court to create a new climate change program—

one that requires 6 percent annual reductions of carbon dioxide emissions in Washington State. The nature of the declaration and relief sought anticipates either that the Court itself will create this new program, or the Court will somehow order the Legislature to create the new program. Either way, Plaintiffs' requested declaration and relief are precluded by the separation of powers doctrine.

The power of the Legislature is "practically absolute," except where either the United States Constitution or state constitution imposes limits on legislative power. *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 225, 191 P.2d 241 (1948) (quoting Thomas Cooley, 1 *A Treatise on the Constitutional Limitations* 345 (8th ed. Carrington 1927)). The judiciary's role over the Legislature is limited to ensuring *constitutional* compliance:

The courts are not the guardians of the rights of the people of the State, *except as those rights are secured by some constitutional provision which comes within the judicial cognizance*. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when its conflicts with the Constitution.

Id. (quoting 1 *Constitutional Limitations* 345) (emphasis added); *see also State ex rel. Webster v. Super. Ct. of King Cnty.*, 67 Wash. 37, 46, 120 P.

861 (1912) (“Within the limits of its constitutional warrant the Legislature is supreme.”).

Judicial authority to *compel* legislative action is certainly no broader than the authority to limit action. Thus, in order to avoid encroaching on the legislative role, courts do not order the Legislature to take action on a matter unless the constitution requires such legislative action, and even then, judicial relief is narrowly tailored. *See McCleary v. State*, 173 Wn.2d 477, 541, 269 P.3d 227 (2012) (finding the trial court’s remedy “crosses the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty”). In order for Plaintiffs’ case against the Legislature to proceed, this Court must find some language expressed in the constitution, or necessarily implied, requiring the Legislature to take action to protect the atmosphere against climate change. *Cf. McCray v. United States*, 195 U.S. 27, 54, 24 S. Ct. 769, 49 L. Ed. 78 (1904) (a court striking down constitutionally compliant legislation on the basis of it being unwise or unjust would be an “act of judicial usurpation”).

No language in the state constitution compels the Legislature to take specific actions to protect the atmosphere. Plaintiffs argue that the Legislature’s alleged public trust duty to protect the atmosphere “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[].’ ” Opening Brief at 33 (quoting *McCleary*, 173 Wn.2d at 518). Plaintiffs’ attempted analogy to the State’s public education duty fails. While the Washington Constitution imposes an affirmative and “paramount” duty on the Legislature to make “ample provision” for public education under article IX, section 1, it imposes no duty on the Legislature to manage the atmosphere as a public trust asset. Because Plaintiffs’ proposed declaration finds no constitutional origins, granting Plaintiffs’ proposed remedy would violate the separation of powers doctrine.

2. Plaintiffs’ Requested Relief Invades The Legislature’s Policy-Making Role

Even in cases where plaintiffs have raised actual constitutional issues, courts have invoked the separation of powers doctrine in refusing to “be drawn into tasks more appropriate to another branch[.]” *Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009) (declining to interfere with the lieutenant governor’s parliamentary and discretionary ruling regarding a supermajority vote requirement). “The legislature’s role is to set policy and to draft and enact laws. The drafting of a statute is a legislative, not a judicial, function.” *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (internal quotations and citations omitted). Thus, separation of powers is violated when the court

overtakes the Legislature's discretionary and policy-setting function carried out through lawmaking, and this Court has appropriately been cautious so as to avoid intruding upon the Legislature's authority. *See id.*; *see also Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994) (refusing to issue mandamus to compel a public official's discretionary acts because doing so would usurp the authority of a coordinate branch of government).

Similarly, when an issue presented to the court involves matters of political and governmental concern, courts have considered such questions to be "political questions" which are nonjusticiable. *Brown*, 165 Wn.2d at 712 (citing *Walker*, 124 Wn.2d at 411). Courts have declined to intervene in legal challenges to legislative actions that invoked fundamental public policy considerations and political questions. For example, in *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), plaintiffs claimed that legislation authorizing gambling on horse races, but not on dog races, was unconstitutional. The court recognized that the requested relief "is primarily a political question in an area of almost complete legislative discretion and in an area vitally affecting public safety and morals." *Id.* at 321. The plaintiffs' lawsuit raised "a legislative policy question concerning how wide the door should be opened to professional gambling. . . . That question is not for the courts

and is not justiciable.” *Id.* (citation omitted). More recently, on a similar basis, the court declined to hear a lawsuit by animal rights activists who challenged the legality of the exemptions contained within the animal cruelty statutes. *See Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 239, 242 P.3d 891 (2010). The court held it had “no authority to conduct [its] own balancing of the pros and cons stemming from the criminalization of various activities involving animals” and that it was “‘not the role of the judiciary to second-guess the wisdom of the legislature.’” *Id.* at 245 (quoting *Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010)). *See also Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997) (the Legislature, not the court, determines legislative policy and the wisdom of that policy).

The judiciary is likewise not well-situated to balance the competing social, governmental, and business concerns involved in responding to global climate change. “[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.” *Burkhart v. Harrod*, 110 Wn.2d 381, 385, 755 P.2d 759 (1988) (quoting *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987) (internal quotation marks omitted)).

In sum, the state constitution does not address state responsibility for climate change. Therefore, it is up to the Legislature to decide whether to act as a matter of public policy. Asking the Court to create a climate change response program as requested by Plaintiffs violates the political question doctrine.

3. Plaintiffs’ Proposed Judicial Relief Conflicts With Existing Statutes, Further Violating The Separation Of Powers

In 2008, the Legislature enacted RCW 70.235 to address climate change.²⁸ RCW 70.235.020(1)(a) establishes specific emission reduction levels for total statewide greenhouse gas emissions at: (1) 1990 levels by 2020; (2) 25 percent below 1990 levels by 2035; and (3) 50 percent below 1990 levels, or 75 percent below expected emissions that year, by 2050. These reduction levels may be revised in the future based on updated science. RCW 70.235.040. Plaintiffs’ complaint asks the Court to establish statewide carbon dioxide emissions reductions that are different from these emissions reductions. *See* CP 28, ¶ 67 (alleging State has failed to “mandate additional laws”).²⁹ If the Legislature had intended to

²⁸ This chapter is one of many statutes enacted by the Legislature to address climate change issues. *See supra* section III.

²⁹ Specifically, Plaintiffs seek carbon dioxide emissions reductions of 6 percent per year—using 2012 as the peak year to count from—until 2100 in order to achieve a global atmospheric carbon dioxide concentration of 350 ppm by 2100. CP 34, ¶ 101. Plaintiffs’ requested relief differs from RCW 70.235 by using a different year to measure against (2012 compared to 1990), by requiring different reduction standards (6 percent per year compared to specified reductions by 2020, 2035, and 2050), and by specifying a

require 6 percent per year reductions until the year 2100, it would have said so. Because Plaintiffs' requested relief differs from the emissions reductions scheme set forth in RCW 70.235, a court order granting such relief would effectively invalidate or revise existing statutes.

Courts will not grant relief when a plaintiff seeks to rewrite a statute. *See Pasado's Safe Haven v. State*, 162 Wn. App. 746, 754–55, 259 P.3d 280 (2011). In *Pasado's*, the court of appeals refused to declare unconstitutional provisions of an animal cruelty statute that exempted from its restrictions slaughters performed for religious rituals. *Id.* at 761–62. The court found that excising those portions of the statute would encroach upon the Legislature's authority by criminalizing a means of slaughter that the Legislature expressly defined as lawful, and would bring about a result that the Legislature never contemplated nor intended to accomplish. *Id.* at 755, 759.

Plaintiffs' requested relief would rewrite existing statutes in the very manner rejected in *Pasado's*. Because Plaintiffs seek the creation of an emissions reduction scheme that is significantly different from the

different end date (annual reductions through 2100 compared to the Legislature's end goal of 2050). Plaintiffs acknowledge that their approach requires greater carbon dioxide emissions reductions than the statutory reductions. CP 21, ¶ 46. Further, Plaintiffs' predetermined endpoint for reductions fails to include flexibility to revise reduction levels (CP 19, ¶ 40), whereas the Legislature calls for future adjustments of reduction levels based on updated science. *See* RCW 70.235.040.

scheme established under existing statutes, their request violates the separation of powers doctrine.

D. Plaintiffs' Case May Not Be Pursued Under The UDJA Because It Seeks To Compel Government Action, The Requested Judicial Relief Cannot Redress The Complained-Of Injuries, And Plaintiffs Fail To Join Indispensable Parties

A court lacks jurisdiction under the UDJA if no justiciable controversy exists. *To-Ro Trade Shows*, 144 Wn.2d at 411. A justiciable controversy requires that the following four factors be present:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involve interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

Id. (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Courts also decline to exercise jurisdiction under the UDJA when another remedy is available to a plaintiff, *Seattle-King Cnty. Council of Camp Fire v. Dep't of Revenue*, 105 Wn.2d 55, 57-58, 711 P.2d 300 (1985); when the case does not raise a question regarding the construction or validity of a law, RCW 7.24.010; *Bainbridge Citizens United v. Dep't of Natural Resources*, 147 Wn. App. 365, 375, 198 P.3d 1033 (2008); or when a plaintiff fails to join indispensable parties. RCW 7.24.110.

A decision to decline UDJA jurisdiction is reviewed under an abuse of discretion standard except that legal determinations are reviewed de novo. *To-Ro Trade Shows*, 144 Wn.2d at 410; *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990); *see also Gildon*, 158 Wn.2d at 493 (dismissal for failure to join indispensable party reviewed for abuse of discretion, except legal conclusions underlying decision reviewed de novo).

Independent of the public trust and separation of powers arguments, Plaintiffs' case is not actionable under the UDJA for three reasons. First, Plaintiffs ask the Court to create new laws and to compel the State's exercise of discretion in administering existing laws. The nature of Plaintiffs' case is to compel government action. If it can be pursued at all, Plaintiffs case must be pursued in the context of a writ of mandamus or an Administrative Procedure Act (APA), RCW 34.05, "failure to act" case.³⁰ Second, Plaintiffs' case is not justiciable under the UDJA because Plaintiffs do not articulate how the relief they seek would redress their alleged harms. In particular, they do not allege that carbon dioxide emissions reductions from sources *in Washington* can either reduce the *global atmospheric concentration* of carbon dioxide or remedy

³⁰ RCW 34.05.570(4)(b) authorizes judicial review of a state agency's "failure to perform a duty that is required by law" (referred to as an APA "failure to act" claim throughout this section).

local climate change impacts. Third, Plaintiffs have failed to join the individuals and businesses that would be required to implement the judicial relief they seek. In light of these defects, the trial court neither abused its discretion nor erred when it declined to exercise jurisdiction over Plaintiffs' declaratory judgment action.

1. The True Nature Of Plaintiffs' Claim Is Not A Declaratory Judgment Action But A "Failure To Act" Claim

Declaratory judgment actions are intended to declare legal rights and responsibilities; they are not meant to compel governmental action. RCW 7.24.010; *Bainbridge Citizens United*, 147 Wn. App. at 375. A claim addressing the State's failure to act should be pled either as an APA "failure to act" claim or as a mandamus action under RCW 7.16. While declaratory judgment actions are intended to declare rights under a law or other legal instrument, they are not intended to determine whether a governmental entity or official, in the exercise of discretion, has correctly applied or administered the law. *Council of Camp Fire*, 105 Wn.2d at 58; *Bainbridge Citizens United*, 147 Wn. App. at 374–75.

Plaintiffs contend that their complaint does not seek to compel a mandatory duty, but instead seeks only a declaration of rights, making the UDJA an appropriate vehicle to seek judicial relief. Opening Brief at 48. However, Plaintiffs' case is not a simple request that the Court declare

legal rights. Plaintiffs expressly allege that the State has failed to implement existing laws and that the State (through the Legislature) should be required to enact additional laws. CP 28, ¶ 67. Plaintiffs seek a precise declaration: that the atmosphere is a public trust resource; that the State has a duty to take affirmative action to protect the atmosphere from impacts associated with climate change; that this duty is defined by best available science; and that the State has violated this duty. CP 35, ¶¶ A–D. Plaintiffs also seek specific relief: a court order determining that best available science requires the State to identify and require 6 percent annual reductions of Washington’s carbon dioxide emissions in order to achieve a global atmospheric concentration of 350 ppm carbon dioxide by the year 2100. CP 34, ¶ 101.

Plaintiffs make these allegations and seek this relief despite failing to point to any law or legal instrument that establishes the legal right or duty they allege. *See generally* section IV.B, *supra* (no Washington constitution, statute, or common law theory confers the legal right pled); *Bainbridge Citizens United*, 147 Wn. App. at 374 (case that does not question the construction or validity of a law falls outside scope of UDJA). Plaintiffs’ allegation that the State has failed both to implement

existing laws and to enact new laws is not appropriately pursued in a declaratory judgment action.³¹

Plaintiffs argue that the State's objection to the nature of this case can be boiled down to an argument that injunctive relief is not appropriate under the UDJA. Opening Brief at 46–47. Plaintiffs miss the point of the State's argument. Injunctive relief is certainly available in a *properly-pled* UDJA case, where the true nature of a plaintiff's case is declaratory rather than mandamus. However, where, as here, Plaintiffs' action seeks to compel enactment of new laws as well as implementation of existing laws in a particular manner (CP 28, ¶ 67), the case is not a proper declaratory judgment case. *Bainbridge Citizens United*, 147 Wn. App. at 374–75 (finding UDJA action did not lie where sole question presented was whether agency properly applied or administered law through its exercise of discretion).

Finally, Plaintiffs try to justify their use of the UDJA by saying that an APA “failure to act” claim would not be available against either the Governor or the Legislature. RCW 34.05.010(2) (Governor and Legislature not considered state agencies under APA). Opening Brief at

³¹ The State does not contend that a court may never grant declaratory relief interpreting issues of common law. Opening Brief at 43–45. Here, however, a UDJA action does not lie because the nature of Plaintiffs' case is not declaratory. Plaintiffs do not seek construction or interpretation of common law. Rather, they unabashedly ask the Court to create new law and to compel the exercise of discretion in administering the law.

47. While an APA “failure to act” case does not lie against the Governor or the Legislature, Plaintiffs do not explain why such a case does not lie against the three agency heads they named as Defendants.³² Nor do they address the fact that the UDJA expressly recognizes the APA as the exclusive avenue for challenges to agency action *and* inaction. RCW 34.05.510; RCW 7.24.146.

Furthermore, mandamus is the proper action within which to bring Plaintiffs’ claims against the Governor and the Legislature. *Council of Camp Fire*, 105 Wn.2d at 58 (plaintiff not entitled to relief by way of declaratory judgment if other adequate remedy available). Plaintiffs’ argument that their case could not be pursued in a mandamus action, Opening Brief at 48, ignores the core allegations and requested relief in the complaint.³³ Because they ask the Court to order the Legislature to create new laws and to compel the Governor’s exercise of discretion in

³² Plaintiffs suggest an APA action against the agency head Defendants would not lie because Plaintiffs “are not appealing any discrete agency action.” Opening Br. at 47. Plaintiffs’ complaint reveals otherwise. *See, e.g.*, CP 21, ¶ 46 (alleging that strategies adopted by the State to meet RCW 70.235 are inadequate); 28, ¶ 67 (alleging State Defendant failed to implement existing laws); 28–30, ¶¶ 69–71 (alleging Defendants director of State Department of Ecology, Commissioner of Public Lands, and director of State Department of Fish and Wildlife have failed to implement existing laws). These allegations expressly relate to actions and alleged inaction by state agencies.

³³ As with the allegations involving the state agency heads, Plaintiffs’ allegations against the Governor and the Legislature also reveal that they are complaining about specific actions and alleged inaction by the Governor and the Legislature rather than construction or interpretation of common law. *See, e.g.*, CP 21, ¶¶ 45–46 (alleging provisions of RCW 70.235 are inadequate); 21, ¶ 46 (alleging that strategies adopted by the State to meet RCW 70.235 are inadequate); 28, ¶ 67 (alleging State Defendant failed to implement existing laws and failed to enact new laws).

administering existing laws, the nature of Plaintiffs' claim is to compel government action. If their case can be pursued at all, it must be pursued as a writ of mandamus.

Plaintiffs may have chosen to pursue a UDJA claim because they recognize that both traditional mandamus and APA "failure to act" claims may only be used to compel *non-discretionary* duties and their case asks the Court to compel the exercise of discretion. As explained in section IV.C.2 *supra*, any form of action (UDJA or otherwise) that seeks to compel *discretionary* government action offends the separation of powers doctrine. While separation of powers would ultimately preclude the Court from granting the requested remedy no matter the chosen procedural path, it is also true that a UDJA action is purely unavailable here because the UDJA may not be used to compel enactment of new laws or require implementation of existing laws in a particular manner. Therefore, the trial court neither abused its discretion nor erred when it dismissed this case.

2. Plaintiffs' Claim Is Not Justiciable Because Plaintiffs' Requested Relief Will Not Remedy The Complained-Of Injury

Plaintiffs' case is not justiciable because a judicial determination will not be final and conclusive. For a case to be justiciable, the language of the UDJA and case law both require that a court be able to provide

relief that will address the complained-of harms. RCW 7.24.060 (the court may refuse a request for declaratory judgment if it “would not terminate the uncertainty or controversy giving rise to the proceeding”); *To-Ro Trade Shows*, 144 Wn.2d at 411 (fourth justiciability factor requires that judicial determination be final and conclusive).³⁴

Plaintiffs’ case is not justiciable because they have failed to allege how the judicial relief they seek can remedy the harm about which they complain. The State does not dispute that global climate change impacts natural resources, including natural resources within the state of Washington. Nor does the State dispute that carbon dioxide emissions from Washington sources contribute to global climate change.³⁵ The flaw in Plaintiffs’ case, however, is that Plaintiffs ask the Court to assume that *Washington* emissions have caused climate change related impacts in Washington, and reductions of *Washington* emissions will lead to reductions in *global atmospheric* concentrations that will remedy those

³⁴ In the superior court proceedings, Plaintiffs cited *State ex rel. Yakima Amusement Co. v. Yakima Cnty.*, 192 Wash. 179, 183, 73 P.2d 759 (1937), *overruled on other grounds, Schneidmiller & Faires, Inc. v. Farr*, 56 Wn.2d 891, 355 P.2d 824 (1960), a case involving the mootness doctrine, for the proposition that courts may overlook certain justiciability defects if a case presents a matter of great public interest. CP 110-11. Whereas consideration of a moot case involving a matter of broad public import might be appropriate where the issue is likely to recur, the same cannot be said for matters that are not justiciable because a court order cannot finally resolve the dispute.

³⁵Statements made by executive and legislative branch officials explaining decisions to take action to respond to climate change have no bearing on whether Plaintiffs’ *judicial* cause of action is justiciable under the UDJA. Opening Brief at 41-42.

impacts (like snow pack loss) in Washington. Plaintiffs' case is not justiciable because Plaintiffs present no allegations in support of their assumptions.³⁶

As Plaintiffs recognize in the allegations they do make, climate change, including global atmospheric concentrations of carbon dioxide and local Washington-specific impacts from climate change such as decreased snowpack, increased temperatures, and salmon habitat reductions, are a result of natural and man-made actions *across the globe*, including emissions of carbon dioxide from sources located *throughout the world*. CP 5–8, 16, ¶¶ 7, 8, 12, 16, 34. Plaintiffs also recognize that climate change can only be addressed through *global steps*. *See, e.g.*, CP 11, ¶ 23; 23, ¶ 38.

While the science of climate change and the possible responses thereto are indeed complex, the State is not arguing that the complexity of the issues is what renders this case non-justiciable. Opening Brief at 43 n.16. What renders this case non-justiciable are the core facts alleged by Plaintiffs in their complaint, including: the global character of the

³⁶ Plaintiffs contend that it is irrelevant that the vast majority of sources of climate change are outside of Washington because the source of the harm, they argue, is immaterial to their case and because Plaintiffs are not asking the Court to resolve global climate change. Opening Brief at 42. The flaw with these arguments is that the harm Plaintiffs seek to address (Washington State impacts) and the remedy they propose (change in the global atmospheric concentration of carbon dioxide) would require actions across the globe. *See, e.g.*, CP 19–20, ¶¶ 39, 40, 44. For purposes of determining whether a judicial action in Washington State can address the harms complained of, the nature of the alleged problem and alleged solutions are material.

atmosphere, the non-localized nature of the mechanisms that have given rise to climate change, and the non-localized nature of the actions that are projected to be necessary to address climate change impacts. CP 8–11, ¶¶ 17–24; 15–16, ¶¶ 31–34; 20, ¶¶ 43–44. Given these allegations, the relief sought (6 percent annual reductions in Washington) could not terminate the controversy or avert the complained of harms. Because Plaintiffs have failed to allege that their requested relief will remedy their complained-of injuries (global atmospheric concentrations of carbon dioxide and Washington-specific impacts), Plaintiffs’ case is not actionable under the UDJA.

3. Plaintiffs’ Claim Is Not Justiciable Under The UDJA Because They Have Not Joined Indispensible Parties

A party seeking declaratory relief must join “all persons . . . who have or claim any interest which would be affected by the declaration” RCW 7.24.110. A trial court lacks jurisdiction over a declaratory judgment action if all necessary parties are not joined. *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998); *Branson v. Port of Seattle*, 152 Wn.2d 862, 878 n.9, 101 P.3d 67 (2004).

Courts engage in a three-step analysis when applying the civil rules related to “necessary” and “indispensable” parties.³⁷ *Auto. United Trades*

³⁷ Indispensable party analysis under CR 19 is provided, although consideration of the issue in declaratory judgment actions may involve application of a more relaxed

Org. v. State, No. 85661-3, 2012 WL 3756308, at *2, ¶ 10 (Wash. Aug. 30, 2012). First, the court determines whether absent parties are “necessary” for a just adjudication. *Id.* Second, if the absent parties are “necessary,” the court determines whether it is feasible to join them. *Id.* Third, if joining the necessary parties is not feasible, the court determines “whether, ‘in equity and good conscience,’ the action should still proceed without the absentees” *Id.*

An absentee is “necessary” when “he claims an interest relating to the subject of an action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest” CR 19(a)(2)(A). Here, Plaintiffs ask the Court to order statewide carbon dioxide emissions reductions of 6 percent per year until the year 2100, yet they name only state officials and the State (including the Legislature) as Defendants. They do not specify who would make the reductions. However, the emissions reductions Plaintiffs seek could impact activities in any sector of the state’s economy. *See* CP 8, ¶ 13 (“burning fossil fuels, driving cars, raising livestock . . . , and cutting down forests” all alleged to impact the atmosphere); 11, ¶ 23 (alleging that the remaining fossil fuel carbon on this planet should not be emitted into

standard under RCW 7.24.110. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 155, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977) (“courts may refuse declaratory relief for nonjoinder of interested parties who are not, technically speaking, indispensable”).

the atmosphere). Businesses and individuals that emit carbon dioxide through their activities (such as through power generation, farming, and driving cars) would be impacted by the court order Plaintiffs seek. Because a judgment in favor of Plaintiffs would impair or impede at least some of these businesses' and individuals' ability to protect their interests, those who would be impacted are necessary parties.

When joinder of necessary parties is not feasible, the court next determines whether the absentees are "indispensable" considering the following factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the absent party or current parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. CR 19(b).

Indispensable parties "not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Auto. United Trades*, 2012 WL 3756308, at *5, ¶ 31 (citation omitted). Parties who are merely necessary are those whose

“interest[s] are separable from those of the parties before the court, so that the court can proceed to a decree, and *do complete and final justice*, without affecting [absentees].” *Id.* (citations omitted).

As to the first “indispensable party” factor (extent of prejudice), because businesses and individuals that emit carbon dioxide through their activities (such as through power generation, farming, and driving cars) would be impacted by the court order Plaintiffs seek, these individuals would be directly prejudiced by an order they would have no opportunity to defend against. CR 19(b)(1); *Nw. Animal Rights Network*, 158 Wn. App. at 244 (declaratory relief denied where constitutional challenge to animal cruelty statute would criminalize actions by ranchers, veterinarians, fishermen, and others who were not parties to the action).

Plaintiffs argue that these other parties’ interests can be considered after the Court issues its ruling when the State implements the Court’s order. Opening Brief at 49–50. This argument addresses the second factor under CR 19(b)(2) that examines whether a court’s relief can avoid prejudice to the absent parties. *Auto. United Trades*, 2012 WL 3756308, at *7, ¶ 40. The premise of Plaintiffs’ argument is that, if the Court were to grant the requested relief, the State will have discretion regarding what actions it will require to implement a plan ordered by the Court. Yet the court order Plaintiffs seek would leave state decision-makers little, if any,

discretion. Had Plaintiffs pled a case that sought a court order directing only that the State develop a plan, leaving the State the discretion to determine the level and timing of emissions reductions, Plaintiffs' argument might have traction. But, because the court order Plaintiffs seek asks for very specific relief (6 percent annual reductions in Washington State carbon dioxide emissions), the obligations of absent parties would be determined by the Court's order, and after-the-fact participation in the state's implementation of such a court order would be meaningless.

The third and fourth factors of CR 19(b) (adequacy of a judgment without the absent parties; absence of remedy for Plaintiffs) also weigh in favor of concluding that Plaintiffs' failure to join absent parties justifies dismissal of their case. As to the adequacy of a judgment, the Court cannot grant the relief sought because those citizens whose activities contribute to greenhouse gas emissions would necessarily be impacted by a court-mandated emissions reduction plan. As to the absence of a remedy, as discussed in section IV.D.2 *supra*, to the extent Plaintiffs desire to challenge a specific governmental action or inaction, they are not without a remedy (they can pursue relief under the APA or under the mandamus statute).

For all of these reasons, Plaintiffs' failure to join these absent

parties supports the trial court's dismissal of this case.³⁸

In sum, the Court lacks jurisdiction to grant Plaintiffs the declaratory judgment they seek. The UDJA cannot be used to compel government action or compel the exercise of government discretion in a particular way, the relief the Plaintiffs seek would not resolve the controversy, and Plaintiffs have not joined indispensable parties.

V. CONCLUSION

The State respectfully asks this Court to affirm the superior court's dismissal of Plaintiffs' complaint. The public trust doctrine does not apply to the atmosphere, and the requested declaration and remedy would require the Court to violate separation of powers and is outside the Court's UDJA jurisdiction.

RESPECTFULLY SUBMITTED this 28th day of September 2012.

ROBERT M. MCKENNA
Attorney General


MARY SUE WILSON, WSBA #19257
Sr. Assistant Attorney General
LESLIE R. SEFFERN, WSBA #19503
JOSEPH V. PANESKO, WSBA #25289
Assistant Attorneys General
Attorneys for Respondents

³⁸ Nor can the State effectively represent the interests of these absent parties. Opening Brief at 50. Because one of the State's functions is to regulate sources of air pollution (*see, e.g.*, RCW 70.94.331), the interests of the State and these absent parties cannot be presumed to be aligned.

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 28th day of September 2012, I caused to be served State’s Response Brief in the above-captioned matter upon the parties herein as indicated below:

ANDREA K. RODGERS HARRIS
MATTHEW MATTSO
MATTSO RODGERS, PLLC
149 NE 52ND STREET
SEATTLE, WA 98105
Attorneys for Plaintiffs/Petitioners

U.S. Mail
 Hand Delivered
 Overnight Express
 By Fax
 Electronic Mail:
akrodgersharris@yahoo.com
matt@mattsonrodgers.com

RICHARD A. SMITH
KNOLL LOWNEY
SMITH & LOWNEY, PLLC
2317 E. JOHN STREET
SEATTLE, WA 98112
Attorneys for Plaintiffs/Petitioners

U.S. Mail
 Hand Delivered
 Overnight Express
 By Fax
 Electronic Mail:
rasmithwa@igc.org
knoll@igc.org

JENNIFER J. MARLOW
JENNIFER K. BARCELOS
THREE DEGREES PROJECT
UNIV. OF WA SCHOOL OF LAW
WILLIAM H. GATES HALL
BOX 353020
SEATTLE, WA 98195
Attorneys for Amici Curiae United Methodist Church, et al.

U.S. Mail
 Hand Delivered
 Overnight Express
 By Fax
 Electronic Mail:
jen@threedegreeswarmer.org
jeni@threedegreeswarmer.org

GREG COSTELLO
WESTERN ENVIRONMENTAL
LAW CENTER
3421 SW HOLLY STREET
SEATTLE, WA 98126
Attorneys for Amici Curiae Law Professors

U.S. Mail
 Hand Delivered
 Overnight Express
 By Fax
 Electronic Mail:
costello@westernlaw.org

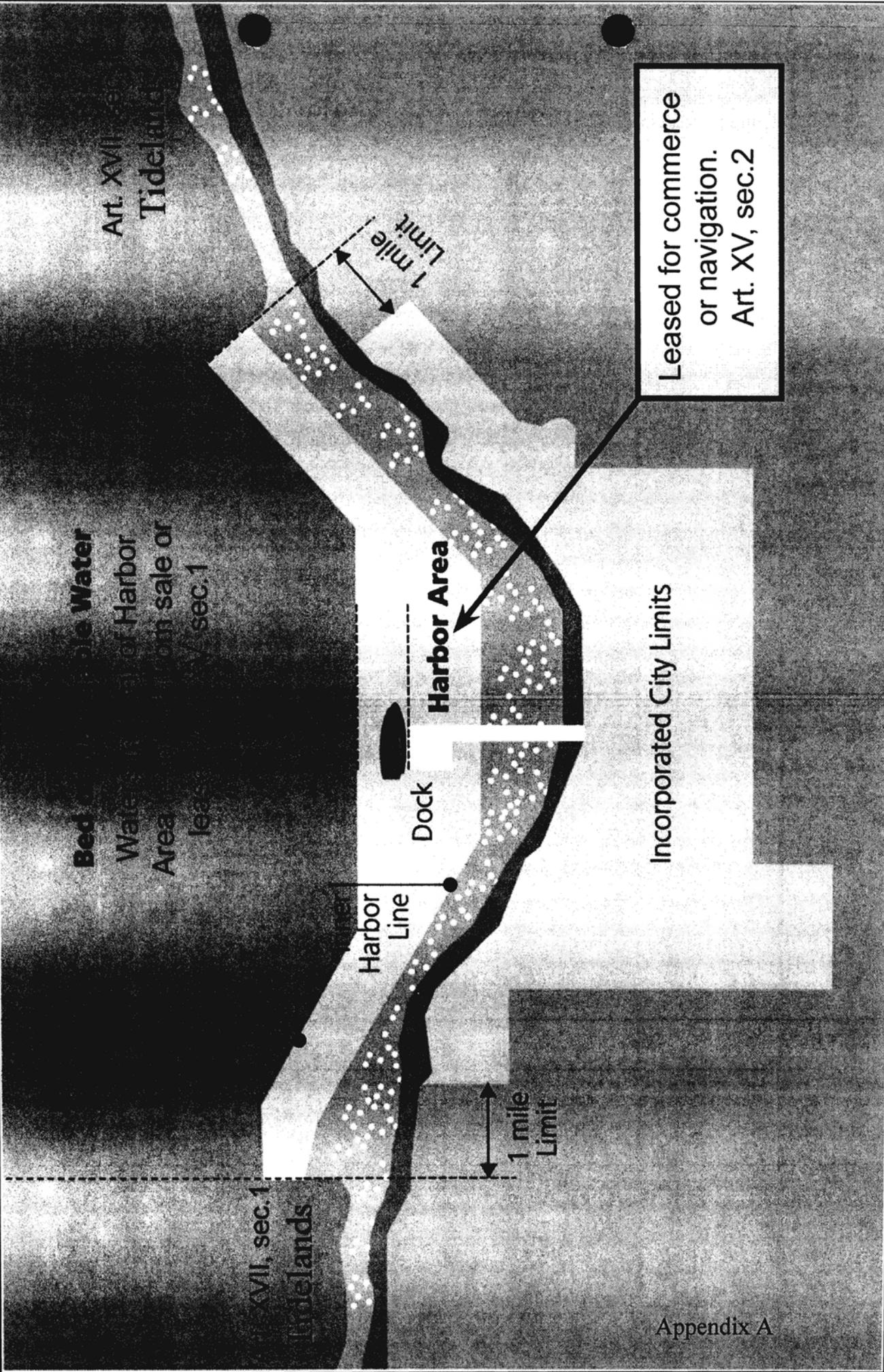
the foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of September 2012 in Olympia, Washington.


DANIELLE FRENCH, Legal Assistant

Appendix A



Art. XVII, sec.1
Tidelands

Bed of the Water
Water of Harbor
Area from sale of
Art. XV, sec.1

Harbor Area

Dock

Harbor Line

Incorporated City Limits

Leased for commerce
or navigation.
Art. XV, sec.2

Art. XVII, sec.1
Tidelands

1 mile
Limit

1 mile
Limit



Appendix B

CAUSE NO. D-1-GN-11-002194

ANGELA BONSER-LAIN,	§	IN THE DISTRICT COURT OF
KARIN ASCOT, as next friend on	§	
behalf of TVH and AVH, minor	§	
children, BRIGID SHEA, as next	§	
friend on behalf of EAMON	§	
BRENNAN UMPHRESS,	§	
a minor child,	§	
	§	
PLAINTIFFS	§	TRAVIS COUNTY, TEXAS
	§	
VS.	§	
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
	§	
DEFENDANT	§	<u>201st</u> JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

COME NOW Angela Bonser-Lain, Karin Ascot, as next friend on behalf of TVH and AVH, minor children, Brigid Shea, as next friend on behalf of Eamon Brennan Umphress, a minor child, ("Plaintiffs") and file this Original Petition, seeking judicial review of a final decision entered by the Texas Commission on Environmental Quality ("TCEQ" or "Defendant") denying Plaintiffs' Petition requesting promulgation of a comprehensive rule to reduce carbon dioxide (CO₂) emissions in this state and that would mandate the tracking of such reductions.

I. DISCOVERY

1. This case is an appeal of an administrative agency's action. If discovery becomes necessary, it should be controlled by Level 2. TEX. R. CIV. PROC. § 190.3.



II. CASE OVERVIEW

2. Plaintiffs seek review of Defendant's June 22, 2011 final decision in Docket No. 2011-0720-RUL. (*See Exhibit "A": Defendant's Decision*). The final decision denied Plaintiffs' petition for rulemaking (Petition) which requested the Defendant adopt by January 1, 2012 a CO₂ reduction plan that would result in peak CO₂ emissions from fossil fuels in Texas in 2012 and beginning in January 2013, reduce fossil fuel CO₂ emission by at least 6% a year. The petition also requested the Defendant take the following actions: (1) publish annual progress reports on statewide greenhouse gas (GHG) emissions, which include an accounting and inventory for each and every source of GHG emissions within the state, verification by an independent third party to be made publicly available on Defendant's website no later than December 31 of each year beginning in 2012; (2) track progress toward meeting the emission reductions, including current and future policies and rules, and report on the progress annually and (3) by December 31, 2011 and annually thereafter, report to the governor and appropriate House and Senate committees the total emissions of GHG for the preceding year for each major source sector. The annual reporting rules must allow development of a comprehensive inventory of GHG emissions for all sectors of the state economy. Last, where conflicts between the proposed rule and any other rule in effect exist, the more stringent rule, favoring full disclosure of emissions and protection of the atmosphere, would govern.

3. Plaintiffs' Petition cited Defendant's legal authority to control air contaminants to protect against the adverse effects of climate changes, including global warming. TEX. HEALTH & SAFETY CODE § 382.0205. In addition, Plaintiffs' Petition also cited



Defendant's legal and permanent duty to protect the environment, *and specifically the atmosphere*, under the common law Public Trust Doctrine.

4. Plaintiffs' Petition provided scientific evidence in support of the emission reductions proposed by the rule to redress harm being caused to the atmosphere, earth's trust resources and present and future generations of Texans.

III. JURISDICTION AND VENUE

5. Jurisdiction of this action lies in this Court pursuant to TEX. WATER CODE § 5.351 allowing for judicial review of Defendant's rulings, orders, decisions or other acts. Venue is proper in this Court pursuant to TEX. WATER CODE § 5.354.

IV. PARTIES

6. Angela Bosner-Lain is 25-years old and is a resident of Williamson County, Texas. Angela is concerned about the severe droughts that southern states, such as Texas, are experiencing. She enjoys swimming, hiking and is interested in becoming a professional outdoor photographer. However, with the severe droughts taking place, much of what she loves and what she would use to build her photography career are quickly disappearing due to the effects of the severe drought patterns--lack of regional water and sweeping wildfires. She also believes future generations should have the opportunity to experience Texas and the rest of the southern region without the damage to the natural environment that is currently taking place.

7. Karin Ascot brings this action as next friend on behalf of her minor children TVH and AVH (*TVH and AVH's full names are withheld for privacy*). TVH and AVH



are 3.5 years and 11 months of age respectively, and are residents of Travis County, Texas. TVH and AVH were both baptized in Barton Springs. TVH has already spent many hours hiking in the Barton Creek greenbelt. He loves to walk in the flowing water as he watches the birds, dragonflies, fish, and other living things. Global climate change threatens to dry up most of these waters, turning them from gorgeous, life-giving springs into dangerous flash-flooding drainages when the rare, heavy rains do come. The summers will become increasingly unbearably hot and dry. The outdoors will be inhospitable and the children will have fewer places to recreate in nature as the climate changes. They will be living in a world of drought, water shortages and restrictions, and desertification.

8. Brigid Shea brings this action, as next friend on behalf of her minor child Eamon Brennan Umphress. Eamon is 15 years old and is a resident of Travis County, Texas. Eamon is very concerned that the impacts of climate change will dramatically harm his future. He enjoys swimming at Barton Springs and in the area lakes and creeks. The increasing effects of drought and high temperatures due to climate change are threatening these water resources, and his use of them. He worries that the springs and the creeks may dry up. In addition to the loss of something he loves to do, he fears that the species that live in Barton Springs would be harmed and the region might suffer from a loss of drinking water.

9. In sum, the Plaintiffs are youth and young adults, who represent a living generation of public trust beneficiaries who have a profound interest in ensuring that the climate remains stable enough to ensure their rights to a livable future. A livable future includes the opportunity to drink clean water and abate thirst, to grow food that will abate



hunger, to be free from imminent property damage caused by extreme weather events, and to enjoy the abundant resources and rich biodiversity of Texas.

10. Defendant TCEQ is the state administrative agency charged with the responsibility for protecting the state's environment and air quality under the Texas Water Code, the Texas Clean Air Act and Texas' Public Trust Doctrine. Defendant may be served service of process on its Executive Director, Mr. Mark Vickery, at 12100 Park 35 Circle, MC-109, Austin, Texas 78753.

V. FACTUAL AND LEGAL BACKGROUND

A) Overview of Evidence and Facts Supporting Plaintiffs' Proposed Rule As Submitted in Administrative Proceeding Below

11. Plaintiffs' Petition was supported by comprehensive and credible authority explaining the causes of global climate change, which confirm the worldwide consensus that global warming is a result of human activity, specifically the unabated burning of fossil fuels. These cited works included reports and studies from both international and federal agencies, as well as peer-reviewed papers from leading experts in their fields.

12. In addition, the Petition highlighted adverse affects that are likely to occur in Texas if CO₂ emissions are not reduced significantly. For example, a sea level rise of 1.5 meters could displace approximately 100,000 households and create more that \$12 billion in infrastructure losses in and around the Galveston area alone. The Petition also cited studies and quoted experts indicating that climate change will reduce Texas' water supply, result in conditions ripe for the proliferation of wildfires, and harm the states' agricultural industry.



13. Finally, Plaintiffs submitted a paper by Dr. James Hansen, one of the world's top climate change scientists. This paper discusses the harms of climate change, the primary and secondary effects of global warming, impacts to both the natural environment and human populations and cites to human activity as the cause of the imbalance of CO₂ in the atmosphere. Dr. Hansen and fellow prominent climate experts find that 350 parts per million (ppm) (from 390 ppm currently) is the target level of atmospheric CO₂ we need to achieve by the end of the century in order to begin to stabilize the atmosphere and slow the effects of climate change. The Petition's requested relief is consistent with best available science.

B) Legal Authority Supporting Plaintiffs' Proposed Rule

14. Defendant TCEQ has both the authority and duty to protect against climate change under the Public Trust Doctrine. The public trust duty resides in all three branches of government.

15. The Texas Water Code declares that "[TCEQ] is the agency of the state given primary responsibility for implementing the constitution and the laws of this state relating to the conservation of natural resources and the protection of the environment." TEX. WATER CODE § 5.012. The Public Trust Doctrine is one such law that the TCEQ is responsible for implementing.

16. The Texas Clean Air Act (TCAA) also confers on Defendant TCEQ the authority to regulate CO₂. In the TCAA Section titled "General Powers and Duties," the Legislature expressly provided that "[t]he commission shall: (1) administer this chapter; (2) establish the level of quality to be maintained in the state's air; and (3) control the quality of the state's air." TEX. HEALTH & SAFETY CODE § 382.011(a).



17. “Air contaminants” is a defined phrase in the TCAA: “‘Air contaminant’ means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.” TEX. HEALTH & SAFETY CODE § 382.003(2) (emphasis added). This means that, by plain statutory language, CO₂ is an “air contaminant” when generated by non-natural processes.

18. The Texas Legislature further specifically defined “air pollution” under the TCAA: “‘Air pollution’ means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property.” TEX. HEALTH & SAFETY CODE § 382.003(3).

19. Defendant by rule may control air contaminants as necessary to protect against adverse effects related to “climatic changes, including global warming.” TEX. HEALTH & SAFETY CODE § 382.0205(3).

20. The atmosphere, essential to human existence, is an asset that belongs to all people. The Public Trust Doctrine requires that the Defendant hold vital natural resources in trust, for both present and future generations of Texas citizens. Such resources are so vital to the well being of all people, including the citizens of Texas, that they must be protected by this distinctive, long-standing judicial principle. The atmosphere, including the air, is one of the most crucial assets of our public trust and each sovereign government shares a co-tenant trustee duty to protect it.



21. The Public Trust Doctrine holds government responsible, as perpetual trustee, for the protection and preservation of the atmosphere for the benefit of both present and future generations.

22. Today the citizens of Texas are confronted with an atmospheric emergency. The Defendant must regulate and account for CO₂ through its fiduciary duties under the Public Trust Doctrine. The Defendant is responsible for preserving and protecting the atmosphere, as a public resource for future generations.

23. The Public Trust Doctrine is an ancient legal mandate originating in Roman law that establishes a sovereign obligation in states to hold vital natural resources in trust for the benefit of their citizens. "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 . . . must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water . . ." *Geer v. State of Connecticut*, 161 U.S. 519, 668 (1896) (citing William Blackstone, 2 BL Comm).

24. The Public Trust Doctrine was incorporated into the colonial charters when the American colonies were first established. *Martin v. Waddell*, 41 U.S. 367, 413 (1842). Following the American Revolution, the doctrine was likewise adopted into the American common law as a flexible mechanism to protect integral public interests.

25. The Texas Supreme Court acknowledged the state maintains ownership over public resources, such as the submerged lands and waters, as trustee for the public. *See, e.g. Maufrais v. State*, 142 Tex. 559 (Tex. 1944). Texas courts have also recognized that the



State can take action to prevent pollution of trust resources. *Cummins v. Travis County Water Control and Improvement Dist*, 175 S.W. 3d 34, 49 (Tex. App. 2005). *Cummins*, discussed the rights of landowners against the rights of the public where trust resources are concerned. The opinion acknowledged 'Texas courts have weighed in favor of regulating resources for the public benefit "especially when the regulation affecting the owners' property is essential or material for the prosperity of the community, and is one in which all of the landowners have to a certain extent a common interest" *Id.* (citing *Parker v. El Paso Water Improvement Dist. No. 1*, 297 S.W.737, 740-42 (1927) (internal citations omitted)). Texas courts have also discussed the Public Trust Doctrine as a law that does not remain static or fixed. *See Severance v. Patterson*, 54 Tex Sup. Ct. J. 172 (2010) (boundary-line demarcations of wet and dry sand when it comes to determining what is part of the public trust and what is private property is an ever-changing determination).

26. The importance of Defendant's fiduciary duty to protect its natural resources, including the atmosphere, is evident in the Texas Constitution, which states, in pertinent part, that "[t]he preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties." Tex. Const. art. XVI §59. The public, including present and future generations, have a right in the preservation and conservation of their natural resources, including the atmosphere.

27. Because the atmosphere is necessary for humanity's very survival, it logically follows that the Public Trust Doctrine extends to the atmosphere, and Defendant, as trustee of the atmosphere for the people of Texas, holds this resource in trust for present and future generations of Texans.



28. Just as in traditional trusts, the Public Trust Doctrine imposes a duty on the Defendant to affirmatively preserve and protect the public's trust assets from damage or loss, and to avoid using the asset in a manner that causes injury to the trust beneficiaries, present and future. The trustee has an affirmative fiduciary duty to prevent waste, to use reasonable skill and care to preserve the trust property and to maintain trust assets. The duty to protect the trust asset means that the sovereign ensures the continued availability and existence of healthy trust resources for present and future generations. The duty mandates the development and utilization of the trust resource in a manner consistent with its conservation and in furtherance of the self-sufficiency of Texas.

29. The fiduciary's duty in this instance is defined by scientists' concrete prescriptions for carbon reductions. As indicated in the Petition, Scientists have clearly opined as to the minimum CO₂ reductions needed to restore the Earth's equilibrium, and the requisite timelines for implementation of those reductions. Defendant may not disclaim this fiduciary duty and is subject to an ongoing mandatory duty to preserve these resources.

C) Summary of Defendant's Decision

30. In rejecting the Petition, the Defendant cited that it does not have control over air permits necessary to meet the Petition's requested emission reductions. Citing the Defendant refusal to regulate GHGs, the Environmental Protection Agency (EPA), pursuant to its federal Clean Air Act (FCAA) authority, issued a Federal Implementation Plan (FIP) to authorize the EPA to issue permits in Texas to GHG sources until Texas' required State Implementation Plan (SIP) revision for GHG permitting is submitted and approved by the EPA.



31. Additionally, the Defendant cited a fundamental disagreement with the EPA over how and whether Congress intended GHG emissions should be regulated. This fundamental disagreement has resulted in Texas suing EPA regarding the legality of the Federal GHG rules.

32. Defendant's decision failed to address, or deny, whether CO₂ is an air contaminant as defined by TEX. HEALTH & SAFETY CODE § 382.002(2), and as alleged in the Petition. Nor did Defendant refute the scientific basis underlying the proposed rule.

33. Next, Defendant's decision attempts to limit and put parameters on the common law Public Trust Doctrine, without any basis in law. Defendant's decision unequivocally states "*...the public trust doctrine does not extend to the regulation of GHG's in the atmosphere.*"

34. Finally, Defendant's decision suggests that the Public Trust Doctrine is preempted by Section 109 of the FCAA, which illustrates its fundamental misunderstanding of its duties under the Public Trust Doctrine.

VI. CAUSES OF ACTION:

REQUEST FOR RELIEF PURSUANT TO THE TEXAS WATER CODE

35. Defendant's decision as described above was unreasonable, based on an error of law, and deserves review under the Texas Water Code for the following reasons:

Error No. 1: The Defendant Committed an Error of Law by Limiting the Scope of the Public Trust Doctrine.



36. Plaintiffs incorporate by reference herein paragraphs 20-29 and 33.

37. The Public Trust Doctrine includes the atmosphere as a public trust resource. As discussed above, the Public Trust Doctrine protects certain resources as assets of the trust. These resources, such as water, submerged lands and air all share certain properties: they are valued resources of the natural environment, vital to both the continued use and enjoyment of the natural environment and vital to the health of the human population. These resources are common to all people and as public property, the state, as trustee, has the duty of protecting and managing these resources for the benefit of the people of the state and for future generations of Texans.

38. In the alternative, the atmosphere must also be protected under the Public Trust Doctrine because of its impact on other well-recognized trust assets such as waterways and coastlands. As discussed above and in greater detail in the Petition, climate change is already impacting water supplies in navigable waterways as well as for drinking water in many parts of the country, including Texas. It will cause drought, which will create secondary impacts including but not limited to wildfires. Additionally, sea level rise as a result of climate change could potentially result in human, ecological and financial devastation for Texas' coastal communities.

39. Defendant committed an error of law by limiting the scope of the Public Trust Doctrine, asserting that it did not extend to the protection of the atmosphere. While no court has expressly stated that the public trust protects atmospheric resources, it is implicit in the purpose of the Doctrine. Also, no court has expressly stated that the Public Trust Doctrine does not protect atmospheric resources. It is, therefore, a legal issue that



this Court may review, and it was an error of law for the Defendant to attempt to limit the common law Public Trust Doctrine, which is outside its authority.

Error No. 2: The Defendant Committed an Error of Law by Deciding that the Public Trust Doctrine Is Preempted by Section 109 of the FCAA.

40. Plaintiffs incorporate by reference herein paragraphs 20-29 and 34.

41. The Public Trust Doctrine is an independent authority that operates concurrently with the State's other responsibilities and duties delineated by statute. The mere existence of another statute regulating the same resource does not extinguish the State's other duties in regards to that resource. If that were true, other resources such as navigable waters in Texas would not be protected under the Public Trust Doctrine because of the existence of the Clean Water Act and other water protection laws.

42. Plaintiffs contend that Section 109 does not and cannot preempt the Public Trust Doctrine. In addition, to the extent the Defendant believes that the Public Trust Doctrine is preempted by Section 109, then its decision is internally inconsistent. Defendant can only assert that the Public Trust Doctrine is preempted by a federal Clean Air Act provision for National Ambient Air Quality Standards if they also believe that the Public Trust Doctrine extends to the protection of the atmosphere. Defendant's two statements are inconsistent and express a clear error of law.

VII. CONCLUSION AND PRAYER FOR RELIEF

For all reason set forth above, Defendant's decision is unreasonable, exceeds Defendant's authority, and is affected by other errors of law. Accordingly, the Court should reverse errors 1 and 2 above, and remand the case, if appropriate, for further proceedings pursuant to the Court's authority under the Texas Water Code.



WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court 1) reverse TCEQ's decision, 2) remand this case to TCEQ for further proceedings consistent with the Court's opinion, if appropriate, 3) assess all costs of these proceedings to Defendant, and 4) grant all other relief in law or equity to which Plaintiffs may be entitled.

Respectfully Submitted,

TEXAS ENVIRONMENTAL LAW
CENTER

By: \s\ Adam R. Abrams
Adam R. Abrams
TBN: 24053064
P.O. Box 685244
Austin, Texas 78768
Phone: (713) 444-2252
aabrams@texaselc.org

ATTORNEY FOR PLAINTIFFS

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk,
Travis County, Texas, do hereby certify that this
is a true and correct copy as same appears of
record in my office. Witness my hand and seal
of office on 07-21-11

AMALIA RODRIGUEZ-MENDOZA



DISTRICT CLERK

By Deputy: *Lydia Ann Mack*



Appendix C

APPENDIX C

Table of out of state cases addressing atmospheric public trust claims. Orders described below that are not attached to Plaintiffs' opening brief are attached to this table, in order.

State	Caption & Cause No.	Cause of Action	Disposition
AK	Kanuk v. State, Super. Ct., 3 rd Dist. at Anchorage, No. 3AN-11-07474 Cl.	Complaint for declaratory judgment and equitable relief, relying on Alaska Constitution, Art. VIII, which addresses the state's "natural resources"	Motion to dismiss granted March 16, 2012, finding no support for the claim that Alaska's public trust doctrine applies to the atmosphere, and finding that the case is non-justiciable because it presents a political question.
AZ	Peshlakai v. Brewer, Maricopa Cy. Super. Ct., No. CV 2011-010106	Complaint for declaratory judgment and injunctive relief	Motion to dismiss granted February 10, 2012, without explanation. Appeal filed.
CA	Blades v. State, San Francisco Cy. Super. Ct. No. CGC-11-510725	Complaint for declaratory judgment	Voluntarily dismissed February 7, 2012, without prejudice.
CO	Martinez v. State, Denver Cy. Dist. Ct. No. 11CV4377	Complaint for declaratory judgment	Motion to dismiss granted November 7, 2011, finding no existence of the public trust doctrine in Colorado cases, statutes, or constitution, thus failing to state a claim upon which relief can be granted.
GA	Petition of Kids Vs. Global Warming to the GA Dep't of Natural Resources	Petition for rulemaking	Petition for rulemaking denied June 17, 2011, finding the relief requested was more appropriately addressed on the national level, not state level.
ID	Smith v. Idaho Dep't of Environmental Quality, Bd. of Environmental Quality No. 0101-11-03	Petition for rulemaking	Petition for rulemaking denied June 29, 2011, finding Idaho's public trust doctrine as enumerated in statute applies only to beds of navigable waters, and finding that the requested rules would not resolve global atmospheric levels of greenhouse gasses.
IA	Filippone v. Iowa Dep't of Natural Resources, Polk Cy. Dist. Ct. No. CVCV008748	Petition for rulemaking (denied) and subsequent appeal	On January 30, 2012, the court upheld the agency decision denying a petition for rulemaking, finding that Iowa's public trust doctrine does not extend beyond its traditional parameter of navigable waters to the atmosphere. Appeal filed.

MN	Arnow v. Minn. Dep't of Pollution Control, Ramsey Cy. Dist. Ct. No. 62-CV-11-3952	Complaint for declaratory judgment	Motion to dismiss granted January 30, 2012, finding Minnesota's public trust doctrine applies only to navigable waters and does not extend to the atmosphere. Appeal filed.
MT	Barhaugh v. State, Supreme Court No. OP 11-0258	Original proceeding to Supreme Court seeking declaratory judgment	Motion to dismiss granted June 15, 2011, finding insufficient basis to trigger the court's original jurisdiction.
NM	Sanders-Reed v. Martinez, Santa Fe Cy. 1 st Judicial Dist. No. D-101-CV-2011-01514	Complaint for declaratory judgment	Motion to Dismiss Amended Complaint granted in part on July 14, 2012, finding no cause of action against the state legislature's "failure to act with respect to the atmosphere," but denying dismissal of the allegation that the State is "ignoring the atmosphere with respect to greenhouse gas emissions."
OR	Chernaik v. Kitzhaber, 16-11-09273	Complaint for declaratory judgment and injunction	Motion to dismiss granted April 5, 2012, finding that the relief requested exceeds the courts authority under the state declaratory judgment act, the state has not waived sovereign immunity, the case violates the separation of powers doctrine, and the case presents a nonjusticiable political question. Appeal filed.
TX	Bonser-Lain v. Comm'n on Env'l Quality, Travis Cy. Dist. Ct. No. D-1-GN-11-002194	Petition for rulemaking	Trial court affirmed agency denial of rulemaking petition. Court's letter ruling dated July 9, 2012, finds that Texas's public trust doctrine is incorporated into the state constitution, art. XVI, Sec. 59, which addresses "natural resources," and includes the atmosphere, but finds that the agency's denial of a petition for rulemaking was a reasonable exercise of its discretion because the agency's authority to regulate greenhouse gasses is at issue in a separate case presently on appeal. (final judgment entered August 2, 2012).

Federal	Alec L. v. Jackson, (originally filed in N.D. Cal., but transferred to D. D.C., No. 1:11-cv-02235 (RLW)).	Complaint for declaratory judgment and injunction	Motion to dismiss granted May 31, 2012, finding the public trust doctrine is a matter of state law, not federal law, thus failing to properly invoke the federal court's jurisdiction, and finding alternatively that the relief requested under a common law theory is preempted by the Clean Air Act.
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Mulder-AGO

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

NELSON KANUK, a minor, by and)
 through his guardian, SHARON KANUK;)
 ADI DAVIS, a minor, by and through)
 her guardian, JULIE DAVIS; KATHERINE)
 DOLMA, a minor, by and through her)
 guardian, BRENDA DOLMA;)
 ANANDA ROSE AHTAHKEE LANKARD,)
 a minor, by and through her guardian,)
 GLEN "DUNE" LANKARD; and AVERY)
 and OWEN MOZEN, minors,)
 by and through their guardian,)
 HOWARD MOZEN;)
)
 Plaintiffs,)
)
 vs.)
)
 STATE OF ALASKA, DEPARTMENT OF)
 NATURAL RESOURCES,)
)
 Defendant.)

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) Case No. 3AN-11-07474CI

ORDER RE: MOTION TO DISMISS

INTRODUCTION

This is a lawsuit about climate change. Before the court is Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion to Dismiss"). Defendant moves this court to dismiss Plaintiffs' Amended Complaint pursuant to Civil Rule 12(b)(6) on the grounds that Plaintiffs' claims are nonjusticiable; that the State is immune from suit for discretionary actions; and that the public trust doctrine will not support plaintiffs' claim.

FACTS

Plaintiffs, five minors living in Alaska, filed suit against Defendant, the State of Alaska Department of Natural Resources, by and through their guardians, seeking declaratory and equitable relief against defendant for breach of its public trust obligations stemming from Article VIII of the Alaska Constitution.

Specifically, Plaintiffs request that this court 1) declare that the atmosphere is a public trust resource under Article VIII of the Alaska Constitution; 2) declare that Defendant, as trustee, “has an affirmative fiduciary obligation to protect and preserve the atmosphere as a commonly shared public trust resource for present and future generations of Alaskans under Article VIII of the Alaska Constitution”; 3) declare that Defendant has failed to uphold its fiduciary obligations to protect and preserve the atmosphere as a public trust resource, in violation of Article VIII of the Alaska Constitution; 4) declare that the fiduciary obligation regarding the atmosphere as a public trust resource “is dictated by the best available science and that said science requires carbon dioxide emissions to peak in 2012 and be reduced by at least 6% each year until 2050”; 5) “order Defendant to reduce the carbon dioxide emissions from Alaska by at least 6% per year from 2013 through at least 2050”; 6) “order Defendant to prepare a full and accurate accounting of Alaska’s current carbon dioxide emissions and to do so annually thereafter”; 7) “declare that Defendant’s fiduciary obligation related to the atmosphere is

enforceable by citizen beneficiaries of the public trust”; and 8) award Plaintiffs any other relief this court deems just and equitable.

In the Amended Complaint, each Plaintiff alleges that he or she has been affected by climate change and/or global warming. For example, Nelson Kanuk from Kipnuk alleges that he has been personally affected by climate change in the form of erosion from ice melt and flooding from increased temperatures, because his village was flooded in 2008, causing his family and others to have to evacuate their homes. Mr. Kanuk also alleges that he has been harmed because the decline of animal life and receding glaciers negatively impact his ability to enjoy and pass on his family’s history, traditions, and culture.

DISCUSSION

Standard of Review

Under Alaska Rule of Civil Procedure 12(b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint’s allegations. *Dworkin v. First Nat’l Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968). “Because complaints must be liberally construed, a motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted.” *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253-54 (Alaska 2000). In determining the sufficiency of a stated claim, a complaint survives a motion to dismiss if it alleges facts that would support a viable cause of action. *J & S Services, Inc. v. Tomter*, 139 P.3d 544, 550 (Alaska 2006); *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 263 (Alaska 2000). A court will not dismiss a complaint unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle the plaintiff to relief. *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001); *Shooshanian v. Wagner*, 672 P.2d 455, 461 (Alaska 1983) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Normally, a Civil Rule 12(b)(6) motion to dismiss is determined solely on the basis of the pleadings. *Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1974). If the court considers matters outside the pleadings when ruling on a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the motion is treated as a Civil Rule 56 motion for summary judgment. See Civil Rule 12(b). However, the court may properly consider matters of public record, such as court files, without converting the motion to dismiss into a motion for summary judgment. *Id.*

In support of their opposition, Plaintiffs submitted numerous declarations, including a DVD. If the court were to consider those declarations, it would have to convert the present motion into a motion for summary judgment. Given that the justiciability issues are matters of law and are dispositive in this case, the court need not consider the declarations and therefore will not convert the motion into one for summary judgment.

Because this court finds that the issues raised in Plaintiffs' Amended Complaint are non-justiciable, the court need not reach the other issues raised by the Plaintiffs.

Justiciability – Political Question

Stemming primarily from the separation of powers doctrine is the “established principle that courts should not attempt to adjudicate ‘political questions’...” *Malone v. Meekins*, 650 P.2d 352, 356 (Alaska 1982). The political question doctrine “provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary.” *Native Village of Kivalina v. ExxonMobil Corporation, et al.*, 663 F.Supp.2d 863, 871 (N.D.Ca. 2009) (citing *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007)). “A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.” *E.E.O.C v. Peabody Western Coal Co.*, 400 F.3d 774, 785 (9th Cir.2005).

However, “merely characterizing a case as nonjusticiable or political in nature” will not render it immune from judicial scrutiny. *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336 (Alaska 1987) (quoting *Malone v. Meekins*, 650 P.2d at 356). Rather, Alaska courts adhere to the approach for identifying “political questions” that was adopted by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L.Ed.2d 663, 682 (1962). *Abood v. League of Women Voters of Alaska*, 743 P.2d at 336.

In *Baker*, the Court held that, unless one of the following factors “is inextricable from the case at bar, there should be no dismissal for non-

justiciability on the ground of a political question's presence." *Baker v. Carr*, 369 U.S. at 217. Specifically, the Court held that,

[p]rominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.*

This court finds the United States District Court's decision in *Kivalina* is instructive in that it specifically addresses the justiciability of a claim based on harm resulting from global warming.¹ In *Kivalina*, the Native Village of Kivalina ("the Village") brought suit against twenty-four defendants, all oil, energy, and utilities companies, seeking damages under the federal common law of nuisance for the defendants' alleged contributions to "excessive emission of carbon dioxide and other greenhouse gases" alleged to be causing global warming. 663 F.Supp.2d at 868. In that case, the court dismissed the Village's claims, holding that the Village "lacked standing both on the basis of the political question doctrine and based on their inability to establish causation under Article III." *Id.* at 882.

In analyzing the *Baker* factors, the court found that both the second (lack of judicially discoverable and manageable standards) and third

¹ Although the court in *Kivalina* dealt with a claim under the federal common law of nuisance, it addressed the *Baker* factors, which is exactly how Alaska courts determine whether a claim raises a non-justiciable political question. *Kivalina*, 663 F.Supp.2d at 863. See e.g. *Malone v. Meekins*, 650 P.2d at 357.
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(impossibility of deciding without an initial policy determination) *Baker* factors militated in favor of dismissal. *Id.* at 874-77. Although the Village asserted that there were “judicially discoverable and manageable standards” inherent in the federal common law of nuisance, the court pointed out that, in resolving a claim for nuisance, the factfinder would also have to “balance the utility and benefit of the alleged nuisance against the harm caused.” *Id.* at 874. And, given the unique nature of global warming claims, which are “based on the emission of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere,” and which are significantly distinct from nuisance claims based on discreet instances of water or air pollution, the court concluded that it could discern no judicially discoverable and manageable standards to apply in resolving the claim in a “reasoned” manner and that neither party had presented any such standards. *Id.* at 875-76. Accordingly, the court held that the second *Baker* factor precluded judicial consideration of the Village’s claim. *Id.* at 876.

With respect to the third factor, the court held, because resolution of the Village’s nuisance claim required the court to “make a policy decision about *who* should bear the cost of global warming,” and because the “allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch...,” the third *Baker* factor also militated in favor of dismissal. *Id.* at 876-77.

Applying the *Baker* factors in this case, there is clearly a lack of judicially discoverable and manageable standards. The parties agree that neither Article

VIII of the Alaska Constitution nor Alaska cases provide any standards by which to guide the court in reviewing the State's policy concerning GHG emissions. Plaintiffs assert that they are not asking the court to review the State's policy concerning GHG emissions. Instead, they argue that the "main thrust of this case is the determination of whether the public trust doctrine applies to the atmosphere." However, in addition to seeking declaratory relief, Plaintiffs specifically ask this court to *order* the Defendant to "reduce the carbon dioxide emissions from Alaska by at least 6% per year from 2013 through at least 2050" and "to prepare a full and accurate accounting of Alaska's current carbon dioxide emissions and to do so annually thereafter." Accordingly, Plaintiffs are not just asking the court to review the State's policy concerning GHG emissions; they are asking the court to *dictate* the State's policy with respect to GHG emissions. They base this request on the application of the "public trust doctrine."

According to the public trust doctrine, the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, and "owes a fiduciary duty to manage such resources for the common good of the public as beneficiary." *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998) (quoting *McDowell v. State*, 785 P.2d 1, 16 n. 9 (Alaska 1989)).² Plaintiffs have not cited

² According to Section 1 of Article VIII of the Alaska Constitution, "[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Section 2 provides that "the legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." According to Section 3, "wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Section 4 states that: "fish, forests, wildlife, *Kanuk et al., v. SOA, DNR*
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any legal authority for the proposition that the atmosphere or air, given its gaseous composition, can be subject to a public trust. Historically, the public trust doctrine has been applied to things that are corporeal, such as land, minerals, wildlife, and water. Even assuming that the public trust doctrine applies, it is even less clear what legal standards would be applied.

“Instead of recognizing the creation of a public trust in these clauses *per se*,” (emphasis added), the Alaska Supreme Court has “noted that ‘the common use clause was intended to engraft in our constitution certain *trust principles* guaranteeing access to the fish, wildlife and water resources of the state.” (emphasis added) *Brooks v. Wright*, 971 P.2d 1025, 1031 (Alaska 1999). The purpose of the public trust doctrine was “to *prevent* the state from giving out ‘exclusive grants or special privileges as was so frequently the case in ancient roman tradition.’” *Id.* Recognizing that the “application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources,” the Alaska Supreme Court has held that “the wholesale application of private trust law principles to the trust-like relationship described in Article VIII is inappropriate and potentially antithetical to the goals of conservation and universal use.” *Id.* at 1033.

Given that the Alaska Supreme Court has acknowledged that Article VIII does not set up a trust *per se* and that the wholesale application of private trust law to public trust doctrine is inappropriate, there is a lack of “judicially

grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”

discoverable and manageable standards.” As the Plaintiffs have failed to provide any such standards to this court, the second *Baker* factor cautions against judicial consideration of the claims.

The third *Baker* factor addresses the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion. Currently, no Alaska court (or any other court) has recognized the atmosphere as a public trust resource. Even if this court were to declare the atmosphere a public trust resource, however, it would still have to determine whether the Defendant breached its fiduciary duty to protect and preserve the atmosphere under the public trust doctrine. Such a determination *necessarily* involves a policy determination about how the State should “fulfill” its fiduciary duty under the public trust doctrine (to the extent that the public trust doctrine imposes any such affirmative fiduciary duty upon the state at all) with respect to the atmosphere. Although Plaintiffs seem to suggest that this court can be guided by the “best available science,” science is not the only consideration involved in a decision to reduce GHG emissions. As recognized by other courts, competing interests such as energy needs and potential economic disruption must also be considered. See *e.g. American Elec. Power Co., Inc.*, 131 S.Ct. 2527, 72 ERC 1609, 180 L.Ed.2d 435 (2011); *Kivalina*, 663 F.Supp.2d at 874.

It is not the judiciary’s role to determine whether the State of Alaska should reduce carbon dioxide emissions by 6% each year from 2013 till 2050. As recognized by other courts, the judiciary is ill-equipped to make such policy decisions, especially when plaintiffs urge this court to base its decision solely

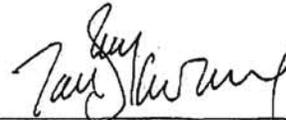
on the "best available science," rather than on a consideration of numerous competing factors. As the United States Supreme Court acknowledged in *American Elec. Power Co., Inc.*, questions about solutions to far-reaching environmental issues that implicate numerous and often-times competing state and national interests are best left to agency expertise. 131 S.Ct. at 2539. Unlike courts, which are limited to "the record," agencies have access to more and better information. Indeed, through the rulemaking process, agencies regularly solicit information and advice from experts in sectors of the community that may be potentially affected.

Thus, because resolution of Plaintiffs' claims necessarily requires policy decisions, the third *Baker* factor also weighs in favor of dismissal. And, considering that the presence of even one *Baker* factor is dispositive, given that the court has identified two of the six *Baker* factors, in this case, the court need not analyze the remaining factors.

CONCLUSION

This court concludes that the causes of action in the Plaintiffs' Amended Complaint are non-justiciable. Accordingly, Defendant's Motion to Dismiss is GRANTED.

DATED this 16 day of March 2012 at Anchorage, Alaska.



SEN K. TAN

Superior Court Judge

3-19-12

I certify that on 3-19-12
a copy of the original was personally
handed to each of the following:
M. Lucas
Secretary/Deputy Clerk

B. Denoble
D. Kruse
S. Mulder-AGO

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-010106

02/10/2012

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

JAMESCITA PESHAKAI

ERIK RYBERG

v.

JANET BREWER, et al.

LESLIE KYMAN COOPER

JAIME LYNN BUTLER
P O BOX 344
CAMERON AZ 86020
PETER M.K. FROST
JAMES T SKARDON

ORAL ARGUMENT

Courtroom ECB-814

2:20 p.m. This is the time set for Oral Argument. Plaintiff is represented by counsel, Erik Ryberg and Peter M.K. Frost. Defendants are represented by counsel, Leslie Kyman Cooper and James T. Skardon.

Court Reporter, Lisa Bradley, is present.

Argument is heard on Defendants' Motion to Dismiss.

Based on the written matters previously presented, the discussion, argument presented this date, and for the reasons set forth on the record,

IT IS ORDERED granting Defendants' Motion to Dismiss.

2:40 p.m. Hearing concludes.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-010106

02/10/2012

**JUDGE MARK H. BRAIN
MARICOPA COUNTY SUPERIOR COURT
EAST COURT BUILDING
101 WEST JEFFERSON
8th FLOOR, COURTROOM 814
PHOENIX, AZ 85003
602-372-1141 TEL**

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

<p>ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Sharon E. Duggan, CSB #105108 370 Grand Avenue Suite 5 Oakland, CA 94610</p> <p>TELEPHONE NO.: 510-271-0825 FAX NO. (Optional): 510-271-0829 E-MAIL ADDRESS (Optional): foxsduggan@aol.com ATTORNEY FOR (Name): Plaintiffs</p>	<p>FOR COURT USE ONLY</p> <p>ENDORSED FILED San Francisco County Superior Court</p> <p>FEB - 7 2012</p> <p>CLERK OF THE COURT By: <u>RONNIE OTERO</u> Deputy Clerk</p>
<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME:</p>	<p>CASE NUMBER: CGC-11-510725</p>
<p>PLAINTIFF/PETITIONER: Robin Blades, et al. DEFENDANT/RESPONDENT: State of California, et al.</p>	
<p style="text-align: center;">REQUEST FOR DISMISSAL</p> <p><input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Declaratory Relief</p> <p style="text-align: center;">- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -</p>	

FILED BY FAX

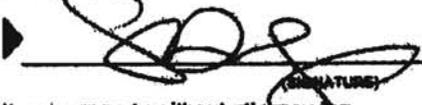
1. TO THE CLERK: Please dismiss this action as follows:

a. (1) With prejudice (2) Without prejudice

b. (1) Complaint (2) Petition
 (3) Cross-complaint filed by (name): _____ on (date): _____
 (4) Cross-complaint filed by (name): _____ on (date): _____
 (5) Entire action of all parties and all causes of action
 (6) Other (specify): *

2. (Complete in all cases except family law cases.)
 Court fees and costs were waived for a party in this case. (This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed.)

Date: February 7, 2012
 Sharon E. Duggan
(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)
*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.


 Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

3. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date: _____
(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)
** If a cross-complaint - or Response (Family Law) seeking affirmative relief - is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 881 (1) or (2).


 Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

(To be completed by clerk)

4. Dismissal entered as requested on (date): _____
 5. Dismissal entered on (date): _____ as to only (name): _____
 6. Dismissal not entered as requested for the following reasons (specify): _____
 7. a. Attorney or party without attorney notified on (date): _____
 b. Attorney or party without attorney not notified. Filing party failed to provide
 a copy to be conformed means to return conformed copy

Date: _____ Clerk, by _____, Deputy

PLAINTIFF/PETITIONER: Robin Blades, et al. DEFENDANT/RESPONDENT: State of California, et al.	CASE NUMBER: CGC-11-510725
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Declaration Concerning Waived Court Fees

The court has a statutory lien for waived fees and costs on any recovery of \$10,000 or more in value by settlement, compromise, arbitration award, mediation settlement, or other recovery. The court's lien must be paid before the court will dismiss the case.
--

1. The court waived fees and costs in this action for (name):
2. The person in item 1 (check one):
 - a. is not recovering anything of value by this action.
 - b. is recovering less than \$10,000 in value by this action.
 - c. is recovering \$10,000 or more in value by this action. (If item 2c is checked, item 3 must be completed.)
3. All court fees and costs that were waived in this action have been paid to the court (check one): Yes No

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

 (TYPE OR PRINT NAME OF ATTORNEY PARTY MAKING DECLARATION)



 (SIGNATURE)

<p>Y DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202</p> <hr/> <p>Plaintiff(s): XIUHTEZCATL MARTINEZ, et al.,</p> <p>v.</p> <p>Defendant(s): STATE OF COLORADO, et al.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 11CV4377</p> <p>Courtroom: 275</p>
<p>ORDER RE: DEFENDANTS' AND INTERVENOR'S MOTIONS TO DISMISS</p>	

THIS MATTER comes before the Court upon consideration of Defendants and Intervenor’s Motions to Dismiss, filed July 29, 2011 (the “Motion”). The Court, having reviewed the Motions, Response, Replies, case file, and applicable legal authorities, finds, concludes and orders as follows:

LEGAL STANDARD

“When a court rules on a motion to dismiss for failure to state a claim, C.R.C.P. 12(b)(5) mandates that the court analyze the merits of the plaintiff’s claims. The purpose of C.R.C.P. 12(b)(5) is to test the legal sufficiency of the complaint to determine whether the plaintiff has asserted a claim or claims upon which relief can be granted. In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), the court must accept as true all averments of material fact and must view the allegations of the complaint in the light most favorable to the plaintiff. *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo.App.2004).” *Hemmann Management Services v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo.App. 2007).

“Under C.R.C.P. 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court is authorized to make appropriate factual findings. It ‘need not treat the facts alleged

by the non-moving party as true as it would under C.R.C.P. 12(b)(5).’ Thus, whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff’s allegations as true and draw all inferences in the plaintiff’s favor, Rule 12(b)(1) permits the court ‘to weigh the evidence and satisfy itself as to the existence of its power to hear the case.’” *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citations omitted).

FACTUAL BACKGROUND

Plaintiffs are several Colorado citizens and an organization, WildEarth Guardians, concerned about the state of the atmosphere and impending global warming on Earth. They have sued the State of Colorado, the Governor, and several State Departments because it is their belief that the Defendants have failed to adequately protect the atmosphere by regulating greenhouse gas emissions. Plaintiffs ask this Court to direct the Defendants to “significantly reduce Colorado’s greenhouse gas emissions based upon the best available science.” Mountain States Legal Foundation (MSLF) was permitted to intervene on August 18, 2011, in order to present its view that no limits on greenhouse gas emissions are necessary. The Defendants and MSLF have moved to dismiss this case.

LEGAL ANALYSIS

The Court must hold that Plaintiffs have not stated a claim under Colorado law.

I. This claim is not subject to the Colorado Governmental Immunity Act.

Under the Colorado Governmental Immunity Act (CGIA), public entities are immune from liability for all claims that could lie in tort, regardless of whether the claimant calls the action a tort, and regardless of the form of relief. C.R.S. § 24-10-105. The State Defendants argue that this action is really an action in negligence or something related to negligence, because Plaintiffs state that Defendants had a duty to protect the atmosphere, that they have

breached that duty, and that this caused Plaintiffs damages. Plaintiffs argue that they are not seeking compensatory damages, and that they simply want a declaration of rights.

Whether a claim lies in tort is a vague concept. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1172 (Colo. 2000). However, “a central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory money damages in tort.” *Id.* Therefore, the CGIA grants immunity “from actions seeking compensatory damages for personal injuries.” *Id.* at 1173. “[C]laims for noncompensatory relief aimed at redressing general harms do not lie in tort.” *Skyland Metropolitan Dist. v. Mountain West Enterprise, LLC*, 184 P.3d 106, 131 (Colo.App. 2007) (citing *Conners*).

Because Plaintiffs are not seeking monetary damages, but simply a declaration that the Defendants are breaching their fiduciary trust duties to the public, this action is addressed at general harms and is not a tort action. Unlike a tort claim, no specific, one-time event or series of events underlie this claim. Plaintiffs seek to redress failures to act by the State. The CGIA does not apply, and this Court has jurisdiction to hear the claim.

II. Plaintiffs have failed to establish standing under the Declaratory Judgments Act.

To have standing to bring a declaratory judgment action, a plaintiff “must assert a legal basis on which a claim for relief can be grounded and must allege an injury in fact to a legally protected or cognizable interest.” *Ainsworth v. Colorado Ltd. Gaming Control Com'n*, 45 P.3d 768, 772 (Colo.App. 2001), citing *Farmers Insurance Exchange v. District Court*, 862 P.2d 944 (Colo.1993). Here, the problem lies in the fact that Plaintiffs are unable to identify a legally protected interest.

A legally protected interest is “an interest emanating from a constitutional, statutory, or judicially created rule of law that entitles plaintiff to some form of judicial relief.” *Dill v. Board of County Com'rs of Lincoln County*, 928 P.2d 809, 815 (Colo.App. 1996). Plaintiffs insist that the Public Trust Doctrine under which they sue was judicially created centuries ago, and that even if the Colorado courts have not expressly recognized this fact, the statutes and constitution of the State have nevertheless upheld this doctrine. This Court can find no such doctrine in existence in Colorado, either in the statutes and constitution, nor in judicial pronouncements.

First, Plaintiffs point to the general welfare clause of the Colorado Constitution. This clause says nothing about protecting the environment, as it is general in nature and does not seek to impose any particular obligation on the State. It cannot form the basis of the Public Trust Doctrine in Colorado.

Next, Plaintiffs point to C.R.S. §§ 33-10-101(1) and 33-33-102. These statutes deal with protection of recreational areas, wildlife, and certain lands and waters. They say nothing about the atmosphere. Even if the phrases “recreation areas” and “wildlife and their environment” were to be interpreted to include the atmosphere, these purpose statements do not create a public trust in the environment because they are followed by comprehensive schemes setting out exactly how the State intends to offer that protection; they do not then generally provide a cause of action for citizens who feel the state is not doing enough to protect the environment.

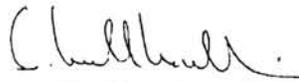
Finally, the Public Trust Doctrine has never been recognized by the Colorado courts. Plaintiffs have failed to point to a single case. Even if this Court was to apply ancient law and assume that it carries through to Colorado today, Plaintiffs have been unable to point to any authority in which the government was required to protect the atmosphere. This Court is not inclined to create new law. Therefore, Plaintiffs have failed to allege an injury to a legally protected interest.

CONCLUSION

For reasons discussed above, the Motion is **GRANTED**. This case is dismissed with prejudice.

SO ORDERED this 7th day of November, 2011.

BY THE COURT:



R. Michael Mullins
District Court Judge

RESOLUTION

**RELATED TO THE PETITION FOR RULEMAKING
KIDS VS GLOBAL WARMING**

WHEREAS, O.C.G.A. § 50-13-9 and Board Rule 391-1-1-.05 provide that any interested person may petition the Board requesting a rule be promulgated; and

WHEREAS, the Board received a petition from Kids VS Global Warming requesting the Board adopt a rule requiring a six percent (6%) reduction statewide per year of fossil fuel carbon dioxide emissions beginning in January 2013 and annual progress reports on statewide greenhouse emissions, and providing a proposed rule; and

WHEREAS, the Board has considered the petition from Kids VS Global Warming and whether or not the requested rulemaking serves the best interests of the State; and

WHEREAS, the U. S. Environmental Protection Agency (USEPA) regulates greenhouse gas emissions (GHG) under the current Clean Air Act; and

WHEREAS, the Board is of the opinion that development of regulations such as those proposed by the Petitioner are best discussed and evaluated for possible implementation on the national level in order to avoid conflicting or inconsistent regulations among the states and to provide for a uniform regulatory framework for businesses and individuals nationwide.

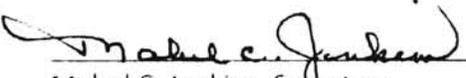
NOW THEREFORE, BE IT RESOLVED that it is the opinion of the Board of Natural Resources that it is not in the best interest of the State of Georgia to develop, adopt, and implement additional regulations of GHGs at the state level.

BE IT FURTHER RESOLVED that the Board hereby denies the petition requesting rulemaking from Kids VS Global Warming.

Adopted this 17th day of June 2011.


Earl D. Barrs, Chairman

ATTEST:


Mabel C. Jenkins, Secretary

**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO**

**EMILY RENE SMITH and
KIDS VS GLOBAL WARMING,**

Petitioners

) **Docket No. 0101-11-03**
)
) **ORDER DENYING PETITION FOR**
) **INITIATION OF RULEMAKING**
)

On May 4, 2011, Emily Smith & Kids vs Global Warming filed a Petition for Initiation of Rulemaking pursuant to Idaho Code § 67-5230 and IDAPA 58.01.23.800. The Petition seeks the adoption of a rule to strictly limit and regulate fossil fuel carbon dioxide emissions, and to establish an effective emissions reduction strategy that will achieve an atmospheric concentration no greater than 350 ppm of carbon dioxide by 2100. The Petition requests that the Board adopt a rule that (1) ensures that carbon dioxide emissions from fossil fuels peak in the year 2012, (2) includes a carbon dioxide emissions reduction plan that reduces state-wide fossil fuel carbon dioxide emissions by at least 6% annually, until at least 2050, and expands Idaho's capacity for carbon sequestration; and (3) establishes a state-wide greenhouse gas emissions accounting, verification and inventory and requires issuance of annual progress reports so that the public has access to accurate data regarding the effectiveness of Idaho's efforts to reduce fossil fuel carbon dioxide emissions.

The Board has reviewed the Petition and handouts provided by DEQ at today's Board meeting. The handouts provided by DEQ provide Idaho greenhouse gas emission background information, relevant state level greenhouse gas activities in Idaho and a brief summary of EPA's mandatory Greenhouse Gas Reporting Rule. The Board also heard testimony from the

Petitioner, the Idaho Department of Environmental Quality; Pat Barclay, ICIE; and Sam Routson, Idahoan Foods.

Based upon the above described testimony and information, the Board by unanimous vote passed a motion to deny the Petition. The Board's denial is based upon the following reasons.

1. The cost of going forward with the requested rulemaking outweighs the small benefits that potentially could be achieved by the rulemaking. DEQ is currently regulating greenhouse gasses as required under the Clean Air Act. At this time, due to the small ambient contribution of greenhouse gasses from fossil fuel sources in Idaho, and the added expense of regulating sources other than that required by federal law, the Board does not believe it is a wise use of resources to commence a rulemaking to accomplish that required in the Petition.
2. Implementation of the rulemaking requested in the Petition is impracticable and it may be impossible to achieve the requirements proposed in the Petition. The Board is uncertain whether it could reduce carbon dioxide emissions from fossil fuel sources in Idaho by 6% annually and such reductions in Idaho could in no way guarantee an ambient concentration level of 350 ppm of carbon dioxide by the year 2100.
3. Petitioners contend that the Public Trust Doctrine in Idaho extends to the atmosphere and thus the state of Idaho is obligated to act on the Petition to reduce carbon dioxide emissions from fossil fuel sources. However, "[t]he public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters as defined in this chapter." Idaho Code Section 58-1203(1). Therefore, the Public Trust Doctrine does not mandate the Board to proceed with the rulemaking.

constitutional issues of statewide importance, where the case involves purely legal questions of statutory and constitutional construction, and urgency and emergency factors make the normal appeal process inadequate. M. R. App. P. 14(4). We are persuaded by the State's response that this petition fails to satisfy these criteria.

As the State points out, the petition incorporates factual claims such as that the State "has been prevented by the Legislature from taking any action to regulate [greenhouse gas] emissions[.]" The State posits that the relief requested by Petitioners would require numerous other factual determinations, such as the role of Montana in the global problem of climate change and how emissions created in Montana ultimately affect Montana's climate.

The State further points out that in relation to urgency and emergency factors making the normal appeal process inadequate, this action is part of a nationwide effort known as the Atmospheric Trust Litigation. The State notes that Montana apparently is the only jurisdiction in which the litigation has been filed as an original proceeding in the state's highest court. *See* www.ourchildrenstrust.org.

We conclude this case does not involve purely legal questions. This Court is ill-equipped to resolve the factual assertions presented by Petitioners. We further conclude that Petitioners have not established urgency or emergency factors that would preclude litigation in a trial court followed by the normal appeal process. Petitioners have failed to establish how emergent factors exist in Montana that require this Court's immediate attention in light of the lack of original litigation in the other forty-nine states.

Therefore,

IT IS ORDERED that the Petition for Original Jurisdiction is **DENIED** and **DISMISSED**.

IT IS FURTHER ORDERED that the Legislative Leaders' Motion to File an Amicus Brief is **DENIED**.

IT IS FURTHER ORDERED that the Climate Physics Institute group's Motion to Intervene is **DENIED**.

The Clerk is directed to provide copies of this Order to all counsel of record, counsel for Legislative Leaders, and counsel for Climate Physics Institute.

DATED this 15th day of June, 2011.

Brian Moran

Patricia Cohen

Patricia Cohen

Michael Lee

Jim Rice
Justices

FILED
AT ~~8:30~~ O'CLOCKAM

APR 5 2012

Circuit Court for Lane County, Oregon
BY _____

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon; LISA CHERNAIK, guardian of Olivia Chernaik; KELSEY CASCADIA ROSE JULIANA, a minor and resident of Lane County, Oregon, and CATHY JULIANA, guardian of Kelsey Juliana,

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as Governor of the State of Oregon; and the STATE OF OREGON,

Defendants.

Case No. 16-11-09273

OPINION AND ORDER

THIS MATTER came before the Court on The State of Oregon and Governor's Motion to Dismiss (filed October 18, 2011). The Court heard oral argument on Defendants' motion on January 23, 2012. Tanya Sanerib and Christopher Winter of Crag Law Firm represented Plaintiffs and Roger Dehoog of the Department of Justice represented Defendants (the "State") at oral argument. Mr. Dehoog also filed the State's Motion to Dismiss and William Sherlock of Hutchinson, Cox, Coons, DuPriest, Orr, & Sherlock, P.C. and Mr. Winter filed Plaintiffs' Response to Defendants' Motion to Dismiss (filed December 2, 2011).

I. BACKGROUND

On May 19, 2011, Plaintiffs filed an Amended Complaint for Declaratory Judgment and Equitable Relief. In summary, Plaintiffs are children and their families who live in Oregon and

allege that their personal and economic well being is directly dependent upon the health of the state's natural resources held in trust for the benefit of its citizens, including water resources, submerged and submersible lands, coastal lands, forests, and wildlife. Plaintiffs allege that all of these assets are currently threatened by the impacts of climate change. Specifically, Plaintiffs allege that the interests of Plaintiffs will be adversely and irreparably injured by Defendants' failure to establish and enforce adequate limitations on the levels of greenhouse gas ("GHG") emissions that will reduce the level of carbon dioxide concentrations in the atmosphere. (Am. Compl. ¶ 11.) In the prayer for relief, Plaintiffs seek:

- (1) A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere.
- (2) A declaration that water resources, navigable waters, submerged and submersible lands, islands, shore lands, coastal areas, wildlife and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets.
- (3) A declaration that Defendants have failed to uphold their fiduciary obligations to protect these trust assets for the benefit of Plaintiffs as well as current and future generations of Oregonians by failing to adequately regulate and reduce carbon dioxide emissions in the State of Oregon.
- (4) An order requiring Defendants to prepare, or cause to be prepared, a full and accurate accounting of Oregon's current carbon dioxide emissions and to do so annually thereafter.
- (5) An order requiring Defendants to develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science.
- (6) A declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by six percent each year until at least 2050.¹

¹ Plaintiffs, in the Amended Complaint, include a section entitled "Science Documenting the Climate Crisis." This section sets forth the Plaintiffs' claims regarding the impact of fossil fuels and carbon dioxide on the environment and global temperatures. Plaintiffs allege that "to limit average surface heating to no more than 1°C (1.8°F) above pre-industrial temperatures, and to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million."

Climate change has been an issue of concern in Oregon for over three decades.² More recently, and more relevant to the case at bar, in 2004, then-Governor Ted Kulongoski appointed the Governor's Advisory Group on Global Warming ("Governor's Advisory Group"). In December 2004, the Governor's Advisory Group issued its report entitled *Oregon Strategy for Greenhouse Gas Reductions*, which recommended the following GHG reduction goals for Oregon:

- (1) By 2010, arrest the growth of, and begin to reduce, statewide GHG emissions.
- (2) By 2020, the state's total GHG emissions should not exceed a level 10 percent below the levels emitted in 1990.
- (3) By 2050, the state's total GHG emissions should be reduced to a level of at least 75 percent below 1990 levels. GOVERNOR'S ADVISORY GROUP ON GLOBAL WARMING, OREGON STRATEGY FOR GREENHOUSE GAS REDUCTIONS (2004), <http://oregon.gov/ENERGY/GBLWRM/docs/GWReport-Final.pdf>.

In 2007, the Legislative Assembly enacted House Bill 3543 (HB 3543), which was largely codified in ORS 468A.200 to ORS 468A.260. In relevant part, ORS 468A.200 to ORS 468A.260 did three things. First, it legislatively found that global warming "poses a serious threat to the economic well-being, public health, natural resources and the environment of Oregon." ORS 468A.200(3).³ Second, it adopted the GHG reduction goals recommended by the Governor's Advisory Group in its 2004 report. ORS 468A.205(1). Third, it created the Oregon Global

² In 1988, then-Governor Neil Goldschmidt created the Oregon Task Force on Global Warming. Based on the task force's recommendations, the Legislature passed Senate Bill 576, which established Oregon's first carbon emissions reduction goals. <http://www.oregon.gov/ENERGY/GBLWRM/Portal.shtml> (Last accessed March 30, 2012).

³ That global warming poses a "serious threat" is a "legislative finding" in the sense that the Legislature believes it is true and has, accordingly, decided to act upon that finding. As a former legislator, this Court understands the importance of legislative findings, which are not findings of truth in the same sense that judicial findings seek to be. In the context of the case at bar, this Court wishes to make clear that it makes no comment about the actual truth, or lack thereof, of global warming.

Warming Commission (the "Commission"). ORS 468A.215(1). The Commission is comprised of 25 members⁴ whose pertinent duties include:

- (1) Recommending ways to coordinate with state and local efforts to reduce GHG emissions consistent with ORS 468A.205;
- (2) Recommending statutory and administrative changes, policy measures and other recommendations to be carried out by state and local governments, businesses, nonprofit organizations and residents to further the goals established in ORS 468A.205;
- (3) Examining GHG cap-and trade systems as a means of achieving the goals established in ORS 468A.205;
- (4) Examining funding mechanisms to obtain low-cost GHG emissions reduction; and
- (5) Collaborating with state and local governments, the State Department of Energy, Department of Education, and State Board of Higher Education to develop and implement an outreach strategy to educate Oregonians about the impacts of global warming and to inform Oregonians of ways to reduce GHG emissions. ORS 468A.235 to ORS 468A.245.

Additionally, the Office of the Governor and other state agencies working to reduce GHG emissions must inform the Commission of their efforts and consider input from the Commission for such efforts. ORS 468A.235.

Essentially, Plaintiffs seek a judgment from the Court that the actions undertaken by the Governor and the Legislature to address climate change are inadequate. Plaintiffs, in the Amended Complaint, allege that in order to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million. (Am. Compl. ¶ 26.) To reduce carbon dioxide to 350 parts per million by the end of the century, Plaintiffs allege that the best available science concludes that carbon

⁴ The Commission is comprised of twenty-five members, eleven of whom are "voting members." The voting members must have "significant experience" in the following fields: manufacturing, energy, transportation, forestry, agriculture, environmental policy. Additionally, two members of the Senate, not from the same political party, and two members of the House of Representatives, not from the same political party, shall serve as nonvoting members. ORS 468A.215.

dioxide emissions must not increase and must begin to decline at a global average of at least six percent each year, beginning in 2013, through 2050, then decline at a global average of five percent a year. (Am. Compl. ¶ 27.) Plaintiffs allege that the GHG emission goals established in ORS 468A.205 fail to achieve the necessary GHG reductions according to the best available science. (Am. Compl. ¶ 36.) Furthermore, Plaintiffs allege that even if the goals established by the Legislature were adequate, Oregon has fallen far short of those goals. *Id.*

II. DISCUSSION

A. The Scope of Oregon's Uniform Declaratory Judgments Act

The State argues that the relief Plaintiffs seek exceeds the Court's authority under Oregon's Uniform Declaratory Judgments Act, ORS 28.010 to 28.160. The Declaratory Judgment Act confers on Oregon courts the "power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." ORS 28.010. The purpose of the Act 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." *Id.* The State argues that Plaintiffs do not ask the Court to interpret a specific statute or provision of the Constitution, and do not allege that Defendants have violated any such provision, but rather ask the Court to impose a new affirmative duty on Defendants. Plaintiffs argue that they simply ask the Court to make declarations under the Act regarding Defendants' authority to protect public trust assets identified in both statutes and the Constitution.

In *Pendleton School District 16R v. State of Oregon*, 345 Or 596, 599 (2009), Plaintiffs – eighteen school districts and seven public school students – filed an action against the State of Oregon "seeking a declaratory judgment that Article VII, section 8, of the Oregon Constitution requires that the legislature fund the Oregon public school system at a level sufficient to meet

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certain quality educational goals established by law." Plaintiffs also sought an injunction directing the Legislature to appropriate the necessary funds. *Id.* The Court held that the courts could grant a declaratory judgment that the Legislature failed to fully fund the public school system, if that is the case, as required by Article VIII, section 8, of the Oregon Constitution. *Id.* at 610. In other words, the Court held that courts could grant a declaratory judgment that the Legislature violated a constitutional provision.

Here, unlike in *Pendleton School District*, Plaintiffs have not alleged that Defendants have failed to adhere to a specific constitutional provision or statute. Instead, Plaintiffs ask the Court to create and impose an affirmative duty on Defendants. Then, Plaintiffs argue that the Court should find that Defendants failed to meet this obligation. Plaintiffs argue that they are not asking the Court to *create* a new duty but merely to recognize a duty well supported by "state sovereignty, the common law of Oregon, as well as in its statutes and the state Constitution." (Pls.' Resp. to Defs.' Mot. to Dismiss 10). However, the many statutes, cases, and constitutional provisions Plaintiffs cite to do not support their argument. In this case, the only clear duty is the one already enunciated by the Legislature in ORS 468A.200 to ORS 468A.260. Thus, the Court concludes that Plaintiffs' requested relief asks this Court to extend the law by creating a new duty rather than interpret a pre-existing law. Therefore, the Court concludes that the relief Plaintiffs seek exceeds the Court's authority under Oregon's Declaratory Judgment Act.

B. Sovereign Immunity

Defendants argue that sovereign immunity bars suits against the state except in those limited instances in which the state has expressly waived its immunity. Thus, Defendants argue, Plaintiffs must either show that their claim avoids invoking immunity, or that immunity has been expressly waived. Article IV, section 24, of the Oregon Constitution incorporates the doctrine of

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sovereign immunity from suit. In *Lucas v. Banfield*, 180 Or 437, 441 (1947), the Court recognized that “a declaratory judgment proceeding must be dismissed when relief is sought against the State and when it has not consented to be sued.” In some circumstances, however, the courts have found that declaratory judgment actions implicating the state were nonetheless not actions against the state. In *Hanson v. Mosser*, 247 Or 1, 7 (1967), *overruled on other grounds by Smith v. Cooper*, 256 Or 485 (1970), the Court held that when state officers, “act beyond or in abuse of their delegated authority they act as individuals, and a suit to enjoin their wrongful acts is not one against the state.”

Plaintiffs argue that the courts have the authority to declare legal rights and relations,⁵ regardless of whether the state is a party. In other words, Plaintiffs argue, the rights of beneficiaries to enforce a trust cannot be abrogated, even by the doctrine of sovereign immunity. Plaintiffs, citing *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983), argue that sovereign immunity does not bar this suit because this is simply a case where the beneficiaries (Plaintiffs) of a trust seek a declaration, among other relief, against the trustee for wasting trust resources.

Plaintiffs completely mischaracterize the law. In *Mitchell*, the Court found that owners of interests in allotments on Indian tribal lands could sue the United States only *after* finding the United States had waived sovereign immunity. *Id.* at 212. Specifically, the Court held, “It is axiomatic that the United States may not be sued without its consent and that the existence of

⁵ Plaintiffs argue that pursuant to the plain text of Oregon’s Uniform Declaratory Judgment Act, the Court has the ability to declare the rights of beneficiaries and the duties of trustees. ORS 28.040. However, even if the Declaratory Judgment Act fails to offer an adequate remedy, Plaintiffs argue that Article I, section 10, of the Oregon Constitution (the “Remedy Clause”) mandates that Plaintiffs have a remedy available for their alleged injury. Plaintiffs’ argument is flawed. The Remedy Clause states, “every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” It generally serves as a limit on the Legislature’s ability to abolish common law remedies available to individuals at the time the Oregon Constitution was adopted. *Smother’s v. Gresham Transfer, Inc.*, 332 Or 83, 118-19 (2001). Thus, where no remedy ever existed at common law, there can be no violation of this provision. *Id.* at 118-19. Because Plaintiffs did not have the right to sue the State of Oregon and the Governor for violating their fiduciary obligations with respect to certain public trust assets at the time the Oregon Constitution was adopted, no provision of the Remedy Clause has been violated.

consent is a prerequisite for jurisdiction ... we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." *Id.* Contrary to Plaintiffs' contention, the *Mitchell* Court in no way held that the rights of beneficiaries to enforce a trust superseded the doctrine of sovereign immunity. In fact, the Court did just the opposite.

Here, Plaintiffs' claim is against the State of Oregon and Governor Kitzhaber. Thus, unless Plaintiffs' claim either avoids invoking immunity or the State has waived immunity, Plaintiffs' claim is barred by sovereign immunity and the Court has no jurisdiction to hear the case. As to Defendant State of Oregon, Plaintiffs' claim is barred by sovereign immunity. Plaintiffs' Amended Complaint does not suggest that Defendant State of Oregon has acted "beyond or in abuse of its delegated authority," and Defendant State of Oregon has not waived immunity. Likewise, Plaintiffs' claim as to Defendant Kitzhaber is also barred by sovereign immunity. Plaintiffs' Amended Complaint does not suggest that Governor Kitzhaber has acted "beyond or in abuse of his delegated authority," and Governor Kitzhaber has not waived immunity.⁶ Thus, the Court concludes that Plaintiffs' claims are barred by sovereign immunity and the Court does not have jurisdiction to hear the case.

⁶ To be clear, Plaintiffs do allege that both the State and Governor have violated their fiduciary obligations with respect to certain public trust assets. Nevertheless, this case is distinguishable from *Hanson*. In *Hanson*, the plaintiffs alleged that defendants acted illegally when they awarded a contract to a bidder other than the lowest bidder. In other words, plaintiffs alleged that defendants acted in clear violation of an established law. Here, Plaintiffs first ask this Court to declare, or create, the obligations allegedly owed by Defendants. Then, Plaintiffs ask the Court to find that Defendants are in violation of these newly created obligations. Because the Court would first have to declare, or create, these fiduciary obligations, the Court concludes that this case is distinguishable from *Hanson* and thus barred by sovereign immunity.

C. The Separation of Powers Doctrine

i. Separation of Powers Doctrine

Defendants argue that Plaintiffs' requested relief violates the Separation of Powers Doctrine as it requires the Court to substitute its own standards for those standards developed through the legislative process. The Separation of Powers Doctrine stems from Article III, section 1, of the Oregon Constitution. It provides,

The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided. Or Const, Art III, §1.

Although the Separation of Powers Doctrine mandates three separate and distinct branches of government, that separation is not always complete as some interaction between the branches remains desirable. *Rooney v. Kulongoski*, 322 Or 15, 28 (1995), citing *The Federalist No 51* (A. Hamilton or J. Madison) (stating that separation of powers is deemed "essential to the preservation of liberty"); *Monaghan v. School District No. 1*, 211 Or 360, 364 (1957). Thus, a violation of separation of powers will be found only if the violation is clear. *Rooney*, 322 Or at 28. To determine whether there has been a clear violation of the Separation of Powers Doctrine, the court makes two inquiries: (1) the "undue burden" inquiry; and (2) the "functions" inquiry. *Id.*

First, using the "undue burden" inquiry, the court must determine whether one department has "unduly burdened" the actions of another department in an area of responsibility or authority committed to the other department. *Id.* The "undue burden" inquiry "corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influence between governmental departments." *Id.* In *Rooney*, the Oregon Supreme Order, page 9

Court held that their ballot title review function did not offend the Separation of Powers Doctrine. *Id.* at 29-30. The Court noted that “judicial review of the Attorney General’s acts done pursuant to statute is a *well-established* role for the court and does not present the potential for the court to influence coercively the Attorney General.” *Id.* at 29 (emphasis added).

Here, Plaintiffs’ requested relief seeks to, among other things: (1) impose a fiduciary obligation on Defendants to protect the atmosphere from climate change;⁷ (2) declare that Defendants have failed to meet this standard; and (3) compel Defendants to address the impact of climate change by reducing GHG emissions in a specific amount over an established timeframe. (Am. Compl. ¶¶ 47-52.) Plaintiffs argue that the requested relief does not place an undue burden on the other branches of government because the requested relief leaves up to Defendants’ discretion how to make the necessary reductions of GHG emissions to protect public trust assets. In other words, Plaintiffs argue that their requested relief would not impose an undue burden on the Legislature because what is regulated⁸ (i.e. the sources of carbon dioxide emissions) and how it is regulated are questions largely left to Defendants’ discretion. Furthermore, Plaintiffs argue that Plaintiffs’ requested relief does not require the Court to “strike out” any existing legislation. Plaintiffs argue that the requested relief is “concurrent” to HB 3543 in that it “will ensure the state meets its public trust obligations, which is separate from the inquiry that led to the adoption of HB 3543, and does not require the Court to ‘strike out’ any existing legislation.” (Pls.’ Resp.

⁷ While the declaration that the atmosphere is a public trust resource is only one aspect of Plaintiffs’ requested relief, the atmosphere is central to the entire Amended Complaint. Plaintiffs want the atmosphere to be protected, through GHG emission reduction, in order to protect other named public trust assets.

⁸ At oral argument, the Court asked Plaintiffs, “Under the Public Trust Doctrine, what would be the limit on a court’s actions?” In other words, where is the line? The Court granted leave to Plaintiffs’ counsel to send a letter to the Court addressing this issue after oral argument. Plaintiffs, in their letter, argue that it is not up to the Court to determine whether specific activities (like field burning in Lane County) will be allowed to occur – that decision is reserved for Defendants. But Plaintiffs fail to provide this Court with a satisfactory answer. While Plaintiffs’ interpretation of the Public Trust Doctrine may not require certain activities to cease, Plaintiffs fail to realize that they, through this Court, are unconstitutionally seeking to force Defendants to protect certain resources in a specific manner contrary to the manner in which the Legislature has already chosen to act.

to Defs.' Mot. to Dismiss 25), citing *Brown v. Transcon Lines*, 284 Or 587, 610 (1978) (explaining that a new statutory law and a "pre-existing common law" can be "cumulative, rather than exclusive.").

Contrary to their own stated position, Plaintiffs are clearly asking this Court to substitute its judgment for that of the Legislature. Plaintiffs ask the Court to: (1) order Defendants to "develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science," and (2) issue a "declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six percent each year until at least 2050." (Am. Compl. ¶¶ 51, 52.) Unlike in *Rooney*, Plaintiffs ask this Court to step far outside of its well-established role – of adjudicating facts and analyzing extant law in the context of a concrete dispute – to affirmatively declare a law that is in contrast with laws established by the Legislature. If this Court were to grant Plaintiffs' requested relief, it would effectively "strike down" HB 3543 and ORS 468A.200 to ORS 468A.260. Plaintiffs' requested relief would create a more stringent standard for GHG emission reductions and would thereby displace those goals established by the Legislature in HB 3543 and ORS 468A.200 to ORS 468A.260. It is hard to imagine a more coercive act upon the legislative department than to strike out a statutory provision and supplant it with the Court's own formulation.⁹ Thus, the Court concludes that Plaintiffs' requested relief would impose an "undue burden" on the legislative branch and thus violates the Separation of Powers Doctrine. Indeed, it is difficult to analyze this case as being anything other than an "undue burden" on the legislative branch when the Plaintiffs are really asking a solitary judge in one of thirty-six counties to completely subvert the legislative process

⁹ It is well within the court's established role to strike down statutes when they are unconstitutional. Here, there is no allegation of unconstitutionality.

and thereby subvert the elective representatives of the sovereign acting in concert with one another. The Plaintiffs effectively ask the Court to do away with the Legislature entirely on the issue of GHG emissions on the theory that the Legislature is not doing enough. If “not doing enough” were the standard for judicial action, individual judges would regularly be asked to substitute their individual judgment for the collective judgment of the Legislature, which strikes this Court as a singularly bad and undemocratic idea.

Second, using the “functions” inquiry, the Court must determine whether one department is, or will be, performing functions committed to another department. *Rooney*, 211 Or at 28. In Oregon, the constitutionally-mandated framework for addressing issues of statewide significance is as follows. The Governor is the chief executive of the state. Or Const, Art V, §1. In that capacity, it is his constitutional duty to see “that the Laws be faithfully executed.” *Id.* at §10. The principal responsibility for making “the Laws” lies with the Legislature. Or Const, Art IV, §1 (vesting state’s legislative power in the Legislative Assembly). However, in the course of discharging his executive duties, the Governor is required to keep the Legislature informed as to the condition of the state and he must recommend new laws to the Legislature as is appropriate. Or Const, Art V, §11. This is exactly the approach that the Governor and Legislature have taken with respect to climate change.¹⁰ The 2007 Legislative Assembly, following the recommendations from the Governor’s Advisory Group, enacted ORS 468A.200 to ORS 468A.260, which adopted specific GHG emissions goals for the state to achieve by 2010, 2020, and 2050. Plaintiffs, without arguing that ORS 468A.200 to ORS 468A.260 is unconstitutional or violates any statute, ask the Court to draft a similar but more stringent statute. This is classic lawmaking and is a function constitutionally reserved to the Legislature. One of the functions of

¹⁰ See “Background” section, above.

the Legislature is to decide politically – based upon whatever facts it deems relevant to the determination – whether or not global warming is a problem and what, if anything, ought to be done about it. Whether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature’s GHG emission goals are too weak, too stringent, or are altogether unnecessary is beside the point. These determinations are not judicial functions. They are legislative functions. Thus, the Court concludes that Plaintiffs’ requested relief violates the Separation of Powers Doctrine.

ii. Political Question Doctrine

Defendants argue that a closely-related reason that this Court lacks jurisdiction to award declaratory or injunctive relief against Defendants is the Political Question Doctrine. The doctrine provides that certain issues are not justiciable because they have been constitutionally reserved to the political branches of government. Thus, the Political Question Doctrine is a variation on the Separation of Powers Doctrine. While the Oregon Supreme Court has recognized the Political Question Doctrine,¹¹ it is not clear whether this doctrine extends more, less, or the same freedom from judicial scrutiny as the Separation of Powers Doctrine standing alone. Thus, it is instructive to look to the federal courts for their application of the doctrine under the federal Constitution.

The federal courts have developed the Political Question Doctrine much more fully than the Oregon courts. However, under federal law, the central principle remains the same – certain issues are not justiciable because they have been constitutionally reserved to the political

¹¹ In *Putnam v. Norblad*, 134 Or 433 (1930), the Oregon Supreme Court recognized the Political Question Doctrine. The Court stated that “[i]t is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provision.” *Id.* at 440. The Court acknowledged that it was “not always easy to define the phrase ‘political’ question, nor to determine which matters fall within its scope[.]” *Id.*

branches of government. In *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), the court analyzed the political question doctrine at length. The court explained,

The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches, rather than the judiciary. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007). 'The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch.' *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). 'A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.' *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 785 (9th Cir. 2005).

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth six independent factors for the courts to use in determining whether a suit raises a nonjusticiable political question. *Native Village of Kivalina*, 663 F. Supp.2d at 871, citing *Baker*, 369 U.S. 186 (1962). Defendants argue that two factors are particularly relevant to the case at issue:

- (1) A lack of judicially discoverable and manageable standards for resolving it; or
- (2) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. *Id.* at 872, citing *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005).¹²

First, Defendants argue that despite the precise GHG reductions that Plaintiffs call for, their suit lacks the sort of judicially discoverable standards necessary to resolve this dispute. The *Baker* court explained that the focus of this factor is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled,

¹² The remaining factors are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (3) an unusual need for unquestioning adherence to a political decision already made; or (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Native Village of Kivalina*, 663 F.Supp.2d at 871-72.

rational, and based upon reasoned distinctions.” *Baker*, 369 U.S. at 873-74 citing *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). In the instant case, Plaintiffs seek a declaration that Defendants have a fiduciary obligation to hold certain assets in trust and that the only way to satisfy this fiduciary obligation is to reduce GHG emissions to certain levels. Plaintiffs argue that their claims are based on the “long-recognized” public trust doctrine and that the court must only look to case law to find the judicial standards necessary to adjudicate the present dispute.

Although the cases cited by Plaintiffs discuss the Public Trust Doctrine, the manner in which the doctrine is invoked in those cases is substantially less onerous than the manner in which Plaintiffs seek to invoke the doctrine here. In fact, Plaintiffs have not pointed this Court to a single case where, in order to satisfy their fiduciary obligation, a trustee was required to harness and control GHG emissions. Even if this Court were to find that Defendants had a fiduciary obligation to hold certain assets in trust, it would be left asking what trust standards to apply. Plaintiffs’ suit would require this Court to decide whether capping GHG emissions at the levels recommended by Plaintiffs is the proper way to protect the named trust assets and how these trust assets could be meaningfully regulated in Oregon – a relatively small political unit. These are all policy questions, which would require the Court to engage in a largely unguided weighing of competing public interests for which the Court does not have judicially discoverable standards.

Second, yet closely related. Defendants argue that Plaintiffs’ suit requires this Court to “make an initial policy determination of a kind clearly for nonjudicial discretion” in order to decide the case before it. Plaintiffs ask this Court to cap GHG emissions at the levels recommended by Plaintiffs, rather than those already established by the Legislature. That is a policy decision that has already been addressed by the Legislature. With the Legislature this

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decision should remain. Therefore, this Court concludes that Plaintiffs' suit presents political questions, which necessarily are decided by the political branches of government, not the judiciary. Consequently, this Court lacks jurisdiction to award declaratory or injunctive relief against Defendants.

D. Court's discretion to deny relief pursuant to ORS 28.060

Because the Court finds that: (1) the relief Plaintiffs seek exceeds the Court's authority under Oregon's Declaratory Judgment Act; (2) Plaintiffs' claims are barred by sovereign immunity; (3) Plaintiffs' requested relief violates the Separation of Powers Doctrine; and (4) Plaintiffs' suit presents political questions, it declines to address whether it would, in its discretion, grant or deny relief pursuant to ORS 28.060 at this time.

III. ORDER

IT IS HEREBY ORDERED that The State of Oregon and Governor's Motion to Dismiss is GRANTED. Mr. Dehoog shall prepare the judgment which shall, by reference, incorporate this Opinion and Order.

Dated this 5th day of April, 2012.



Karsten H. Rasmussen, Circuit Court Judge

cc: Tanya Sanerib, via email
Christopher Winter, via email
William Sherlock, email
Roger Dehoog, via email

hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.”

The Court further finds that the protection of air quality has been mandated by the Texas Legislature in the Texas Clean Air Act, which states, “The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants (b) It is intended that this chapter be vigorously enforced and that violations of this chapter ... result in expeditious initiation of enforcement actions as provided by this chapter.” *See* Health & Safety Code § 382.002. The Texas Legislature has provided Defendant with statutory authority to protect the air quality by stating: “Consistent with applicable federal law, the commission by rule may control air contaminants as necessary to protect against adverse effects related to: (1) acid deposition; (2) stratospheric changes, including depletion of ozone; and (3) climatic changes, including global warming.” *See* § 382.0205.

The Court also finds that Defendant’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 legally invalid. Defendant relies upon a preemption argument that the State of Texas may not enact stronger requirements than is mandated by federal law. The Court finds that the FCAA requirement is a floor, not a ceiling, for the protection of air quality, and therefore Defendant’s ruling on this point is not supported by law. *See* 42 U.S.C. § 7604(e); *see also, Gutierrez v. Mobil Oil Company, et al.*, 798 F. Supp. 1280, 1282-84 (W.D. Tex. 1992) (J. Nowlin) (“[T]he Clean Air Act expressly permits more stringent state regulation. ... In the Clean Water Act and the Clean Air Act, Congress did not intend to preempt state authority. Congress intended to set minimum standards that

states must meet but could exceed. ... states have the right and jurisdiction to regulate activities occurring within the confines of the state.”)

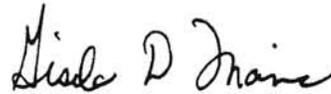
However, in light of other state and federal litigation, the Court finds that it is a reasonable exercise of Defendant’s rulemaking discretion not to proceed with the requested petition for rulemaking at this time.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant’s Plea to the Jurisdiction is DENIED, and that Defendant’s June 22, 2011 final decision in Docket No. 2011-0720-RUL denying Plaintiff’s petition for rulemaking is AFFIRMED.

It is also **ORDERED** that each party bear its own costs. All relief requested that is not expressly herein granted is DENIED.

This judgment resolves all claims of all parties and is intended to be final and appealable.

SIGNED this 2nd day of August, 2012.



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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEC L., *et al.*,

Plaintiffs,

v.

Civil Action No. 1:11-cv-02235 (RLW)

LISA P. JACKSON, *et al.*,

Defendants,

and

NATIONAL ASSOCIATION OF
MANUFACTURERS, *et al.*

Intervenors.

MEMORANDUM OPINION

Five young citizens and two organizations, Kids vs. Global Warming¹ and Wildearth Guardians², bring this action seeking declaratory and injunctive relief for Defendants' alleged failure to reduce greenhouse gas emissions. The Plaintiffs allege that Defendants have violated their fiduciary duties to preserve and protect the atmosphere as a commonly shared public trust resource under the public trust doctrine. Plaintiffs' one-count complaint does not allege that the defendants violated any specific federal law or constitutional provision, but instead alleges violations of the federal public trust doctrine.

¹ Kids vs Global Warming is a non-profit organization whose membership includes thousands of youth from around the country "who are concerned about how human-made climate change is affecting and will continue to affect them and their future." (Am. Compl. at ¶ 48). Kids vs Global Warming has brought this action on behalf of its members. Id.

² Wildearth Guardians is a non-profit conservation organization that is dedicated to "protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding Earth's climate and air quality." (Am. Compl. at ¶ 49). Wildearth Guardians has brought this action on its own behalf and on behalf of its adversely affected members. Id.

Plaintiffs bring this suit against Lisa P. Jackson in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), Kenneth L. Salazar in his official capacity as Secretary of the U.S. Department of the Interior, Thomas J. Vilsack in his official capacity as Secretary of the U.S. Department of Agriculture, Gary F. Locke in his official capacity as Secretary of the U.S. Department of Commerce, Steven Chu in his official capacity as Secretary of the U.S. Department of Energy, and Leon E. Panetta in his official capacity as Secretary of the U.S. Department of Defense. Plaintiffs allege that each of the Defendants, as agencies and officers of the federal government, "have wasted and failed to preserve and protect the atmosphere Public Trust asset." (Am. Compl. ¶¶ 138, 146). Two parties claiming an interest in this action have intervened.³

This matter is before the Court on Defendants' and the Defendant-Intervenors' Motions to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Defendants and Defendant-Intervenors move for dismissal arguing, *inter alia*, that because Plaintiffs' lone claim is grounded in state common law, the complaint does not raise a federal question to invoke this Court's jurisdiction and, therefore, warrants dismissal on jurisdictional grounds. Having considered the full briefing on these motions, and for the reasons set forth below, Defendants and Defendant-Intervenors' motions are granted and Plaintiffs' Amended Complaint is dismissed with prejudice.

³ Two groups have been allowed to intervene in this action: The National Association of Manufacturers, who represents small and large manufacturers in industrial sectors around the country; and several California companies and trade associations who own and operate, or whose members own and operate, numerous vehicles, engines and equipment that emit greenhouse gases into the atmosphere. Both groups claim that the relief requested by Plaintiffs would adversely affect them and their constituents and were permitted to intervene pursuant to Fed. R. Civ. P. 24(a).

I. BACKGROUND

A. Public Trust Doctrine

The public trust doctrine can be traced back to Roman civil law, but its principles are grounded in English common law on public navigation and fishing rights over tidal lands. PLL Montana, LLC v. Montana, 565 U.S. ----, 132 S. Ct. 1213, 1234 (2012). “At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders.” Phillips Petroleum v. Mississippi, 484 U.S. 469, 473 (1988) (quoting Shively v. Bowlby, 152 U.S. 1 (1894)). Upon entry into the Union, the states received ownership of all lands under waters subject to the ebb and flow of the tide. Id. at 476. The states’ right to use or dispose of such lands, however, is limited to the extent that it would cause “substantial impairment of the interest of the public in the waters,” and the states’ right to the water is subject to “the paramount right of [C]ongress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.” Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892). Thus, traditionally, the doctrine has functioned as a restraint on the states’ ability to alienate submerged lands in favor of public access to and enjoyment of the waters above those lands.

More recently, courts have applied the public trust doctrine in a variety of contexts. See e.g. District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) (noting that “the doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna

indigenous to public trust lands.”).⁴ And while Plaintiffs have cited authority for the application of the doctrine in numerous natural resources, including “groundwater, wetlands, dry sand beaches, non-navigable tributaries, and wildlife” (Pls.’ Opp. at 17-18), they have cited no cases, and the Court is aware of none, that have expanded the doctrine to protect the atmosphere or impose duties on the federal government. Therefore, the manner in which Plaintiffs seek to have the public trust doctrine applied in this case represents a significant departure from the doctrine as it has been traditionally applied.

B. The Relief Requested by Plaintiffs

Plaintiffs seek a variety of declaratory and injunctive relief for their public trust claim.⁵ First, Plaintiffs ask the Court to declare that the atmosphere is a public trust resource and that the United States government, as a trustee, has a fiduciary duty to refrain from taking actions that waste or damage this asset. Plaintiffs also ask the Court to declare that, to date, Defendants have violated their fiduciary duties by contributing to and allowing unsafe amounts of greenhouse gas emissions into the atmosphere. In addition, Plaintiffs ask the Court to further define Defendants’ fiduciary duties under the public trust by declaring that the six Defendant federal agencies have a duty to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during this century.

⁴ Some states have recognized the doctrine as imposing an affirmative duty on the state. See e.g. National Audubon Soc’y v. Superior Court of Alpine Cnty., 33 Cal.3d 419, 441, 189 Cal.Rptr. 346, 360-61, 658 P.2d 709, 725 (1983) (noting that the public trust doctrine “is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands . . .”).

⁵ Based upon the scope of the relief requested by Plaintiffs, Defendants have raised separation of powers and political question doctrine defenses. These defenses are clearly implicated by the totality of the relief sought by the Plaintiffs. However, to the extent that the Court, in its equitable discretion, may fashion a less expansive remedy, these doctrines would not be implicated. Therefore, the Court rules on alternative grounds.

With respect to injunctive relief, Plaintiffs have asked this Court to issue an injunction directing the six federal agencies to take all necessary actions to enable carbon dioxide emissions to peak by December 2012 and decline by at least six percent per year beginning in 2013. Plaintiffs also ask the Court to order Defendants to submit for this Court's approval: annual reports setting forth an accounting of greenhouse gas emissions originated by the United States and its citizens; annual carbon budgets that are consistent with the goal of capping carbon dioxide emissions and reducing emissions by six percent per year; and a climate recovery plan to achieve Plaintiffs' carbon dioxide emission reduction goals.⁶

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, with the ability to hear only the cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. See, e.g., Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 945 (D.C. Cir. 2005); Hunter v. District of Columbia, 384 F. Supp. 2d 257, 259 (D.D.C. 2005). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the Court has jurisdiction. See Brady Campaign to Prevent Gun Violence United with the Million Mom March v. Ashcroft, 339 F. Supp. 2d 68, 72 (D.D.C. 2004). Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court may dispose of the motion on the basis of the complaint alone, or it may consider materials beyond the pleadings "as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." Scolaro v. D.C. Board of Elections & Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); see Lopez v. Council on American-Islamic Relations Action Network, Inc., 741 F. Supp. 2d 222, 231 (D.D.C. 2010).

⁶ Plaintiffs also request that the Court retain jurisdiction over the action to ensure Defendants' compliance with the injunctive relief requested.

When determining whether a district court has federal question jurisdiction pursuant to Article III and 28 U.S.C. § 1331, the jurisdictional inquiry “depends entirely upon the allegations in the complaint” and asks whether the claim as stated in the complaint “arises under the Constitution or laws of the United States.” Carlson v. Principal Fin. Group, 320 F.3d 301, 306 (2d Cir. 2003); see also Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). If a federal claim has been alleged, the district court has subject matter jurisdiction unless the purported federal claim is clearly “immaterial and made solely for the purpose of obtaining jurisdiction” or is “wholly insubstantial and frivolous.” Carlson, 320 F.3d at 306 (quoting Bell v. Hood, 327 U.S. 678, 682–83 (1946)).

II. ANALYSIS

Plaintiffs assert that this Court has jurisdiction to review this case under the federal question statute, 28 U.S.C. § 1331, because the public trust doctrine arises from federal law. Defendants contend that the public trust doctrine does not provide a federal cause of action and, therefore, this Court lacks subject matter jurisdiction to adjudicate Plaintiffs’ claim. Thus, the key question here is whether Plaintiffs’ public trust claim is a creature of state or federal common law.

The central premise upon which Plaintiffs rely to invoke the Court’s jurisdiction is misplaced. Plaintiffs contend that the public trust doctrine presents a federal question because it “is not in any way exclusively a state law doctrine.” (Pl.’s Opp. at 13). The Supreme Court’s recent decision in PLL Montana, LLC v. Montana, appears to have foreclosed this argument. PLL Montana, LLC v. Montana, 565 U.S. ----, 132 S. Ct. 1213, 1235 (2012). In that case, the Court while distinguishing the public trust doctrine from the equal footing doctrine, stated that “the public trust doctrine *remains a matter of state law*” and its “contours . . . *do not depend upon*

the Constitution.” Id. at 1235 (emphasis added). The Court went on to state that the public trust doctrine, as a matter of state law, was “subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power.” Id.

The parties disagree as to whether the Supreme Court’s declaration regarding the public trust doctrine is part of the holding or, as Plaintiffs urge, merely dictum. The Court, however, need not resolve this issue because “‘carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.’” Overby v. Nat’l Ass’n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quoting United States v. Dorcely, 454 F.3d 366, 375 (D.C. Cir. 2006)). Thus, dicta or not, the Court’s statements regarding the public trust doctrine would nonetheless be binding on this Court.

Even if the Supreme Court’s declaration was not binding, the Court finds it persuasive. Likewise, dictum from this Circuit is also persuasive. The D.C. Circuit has had occasion to state, albeit in dictum, that “[i]n this country the public trust doctrine has developed *almost exclusively as a matter of state law*” and that “the doctrine has functioned as a constraint on states’ ability to alienate public trust lands.” District of Columbia v. Air Florida, Inc. 750 F.2d 1077, 1082 (D.C. Cir. 1984) (emphasis added). The Court also expressed its concerns that a *federal* common-law public trust doctrine would possibly be displaced by federal statutes. Id. at 1085 n.43.

Thus, it appears that Plaintiffs have not raised a federal question to invoke this Court’s jurisdiction under § 1331.⁷ As Plaintiffs’ complaint alleges no other federal cause of action to

⁷ Where no federal question is pleaded, the federal court may nevertheless have diversity jurisdiction. However, the Court lacks diversity jurisdiction in this case, as “[i]t is well established . . . that the United States is not a citizen for diversity purposes and that ‘U.S. agencies cannot be sued in diversity.’” Commercial Union Ins. v. U.S., 999 F.2d 581, 584 (D.C. Cir. 1993) (quoting General Ry. Signal Co. v. Corcoran, 921 F.2d 700, 703 (7th Cir. 1991)).

invoke this Court's original jurisdiction, there is no basis to exercise the Court's supplemental jurisdiction over Plaintiffs' state-law common law claim under 28 U.S.C. § 1367.

Alternatively, even if the public trust doctrine had been a federal common law claim at one time, it has subsequently been displaced by federal regulation, specifically the Clean Air Act. In American Electric Power Company v. Connecticut, the Supreme Court held that: "the Clean Air Act and the EPA actions it authorizes displace *any* federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." Amer. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (emphasis added).

The Plaintiffs attempt to escape the holding in the Amer. Elec. Power Co. by arguing that its holding should be limited to common law nuisance claims, while Plaintiffs are proceeding here under a common law public trust theory. Plaintiffs also attempt to distinguish the Amer. Elec. Power Co. case because that case was brought against four private companies and the Tennessee Valley Authority, a federally owned corporation, as opposed to the federal agency defendants in this case. Plaintiffs argue that this distinction is significant because, in Plaintiffs' view, the fiduciary duties of the public trust doctrine can only be imposed on the states and the federal government. According to Plaintiffs, because the plaintiffs in the Amer. Elec. Power Co. case could not bring a public trust claim against the defendants in that case, the holding in that case should be limited to those facts.

The Court views these as distinctions without a difference. The particular contours of the public nuisance doctrine did not in any way affect the Supreme Court's analysis in Amer. Elec. Power Co.. Indeed, the Court's holding makes no mention of the public nuisance doctrine at all, as the Court clearly stated that *any* federal common law right was displaced. Id. Further, there is nothing in the Court's holding to indicate that it should be limited to suits against private entities.

Indeed, the Court described in great detail the process under which federal courts may review the action, or inaction, of federal agencies with respect to their statutory obligations under the Clean Air Act. *Id.* at 2539.

Moreover, the question at issue in the Amer. Elec. Power Co. case is not appreciably different from the question presented here—whether a federal court may make determinations regarding to what extent carbon-dioxide emissions should be reduced, and thereafter order federal agencies to effectuate a policy of its own making. The Amer. Elec. Power Co. opinion expressed concern that the plaintiffs in that case were seeking to have federal courts, in the first instance, determine what amount of carbon-dioxide emissions is unreasonable and what level of reduction is practical, feasible and economically viable. Amer. Elec. Power Co., 436 U.S. at 2540. The Court explained that “the judgments the plaintiffs would commit to federal judges . . . cannot be reconciled with the decisionmaking scheme Congress enacted.” *Id.* The Court further explained that Congress designated the EPA as an agency expert to “serve as primary regulator of greenhouse gas emissions” and that this expert agency “is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.” *Id.* at 2539. The Court, in holding that the federal common law cause of action was displaced by the Clean Air Act, concluded that federal judges may not set limits on greenhouse gas emissions “in the face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action arbitrary, capricious, . . . or otherwise not in accordance with the law.” *Id.*

In the present case, Plaintiffs are asking the Court to make similar determinations regarding carbon dioxide emissions. First, in order to find that there is a violation of the public trust—at least as the Plaintiffs have pled it—the Court must make an initial determination that current levels of carbon dioxide are too high and, therefore, the federal defendants have violated

their fiduciary duties under the public trust. Then, the Court must make specific determinations as to the appropriate level of atmospheric carbon dioxide, as determine whether the climate recovery plan sought as relief will effectively attain that goal. Finally, the Court must not only retain jurisdiction of the matter, but also review and approve the Defendants' proposals for reducing greenhouse gas emissions. Ultimately, Plaintiffs are effectively seeking to have the Court mandate that federal agencies undertake specific regulatory activity, even if such regulatory activity is not required by any statute enacted by Congress.

These are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the "primary regulator of greenhouse gas emissions." *Id.* at 2539. The emissions of greenhouse gases, and specifically carbon dioxide, are subject to regulation under the Clean Air Act. Massachusetts v. E.P.A., 549 U.S. 497, 528-29 (2007). Thus, a federal common law claim directed to the reduction or regulation of carbon dioxide emissions is displaced by the Act. *Id.* at 2537 (noting that the test for legislative displacement is whether the statute "speaks directly to the question at issue"). Therefore, even if Plaintiffs allege a public trust claim that could be construed as sounding in federal common law, the Court finds that that cause of action is displaced by the Clean Air Act.

IV. CONCLUSION

Ultimately, this case is about the fundamental nature of our government and our constitutional system, just as much – if not more so – than it is about emissions, the atmosphere or the climate. Throughout history, the federal courts have served a role both essential and consequential in our form of government by resolving disputes that individual citizens and their elected representatives could not resolve without intervention. And in doing so, federal courts have occasionally been called upon to craft remedies that were seen by some as drastic to redress

those seemingly insoluble disputes. But that reality does not mean that every dispute is one for the federal courts to resolve, nor does it mean that a sweeping court-imposed remedy is the appropriate medicine for every intractable problem. While the issues presented in this case are not ones that this Court can resolve by way of this lawsuit, that circumstance does not mean that the parties involved in this litigation – the plaintiffs, the Defendant federal agencies and the Defendant-Intervenors – have to stop talking to each other once this Order hits the docket. All of the parties seem to agree that protecting and preserving the environment is a more than laudable goal, and the Court urges everyone involved to seek (and perhaps even seize) as much common ground as courage, goodwill and wisdom might allow to be discovered.

For the foregoing reasons, the Defendants' and Defendant-Intervenors' motions to dismiss are granted. The Plaintiffs' First Amended Complaint is hereby dismissed.

SO ORDERED.⁸

Date: May 31, 2012



Digitally signed by Judge Robert L. Wilkins
DN: cn=Judge Robert L. Wilkins,
o=U.S. District Court, ou=Chambers
of Honorable Robert L. Wilkins,
email=RW@dc.uscourts.gov, c=US
Date: 2012.05.31 14:30:15 -0400

ROBERT L. WILKINS
United States District Judge

⁸ An order will be issued contemporaneously with this memorandum opinion granting the Defendants' and Defendant-Intervenors' motions to dismiss Plaintiffs' Amended Complaint.

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Dear Clerk,

Please find attached for filing in Case No. 87198-1, *Svitak. v. State.*, the State's Response Brief, filed by Leslie R. Seffern, phone 360-586-4613, WSBA #19503, email leslies@atg.wa.gov.

Thank you,

Danielle French | Legal Assistant | WA Attorney General's Office - Ecology Division | (360) 586-8171 | DanielleF@atg.wa.gov

Email address for E-Service: ECYOLYEF@atg.wa.gov

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