IN THE SUPREME COURT OF THE STATE OF ALASKA

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;	)
Appellants,	)
v.	)
STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,	)
Appellee.	) Supreme Court No. S-14776
	) Superior Court No. 3AN-11-07474 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE SEN K. TAN, PRESIDING

APPELLANTS' EXCERPTS OF RECORD
VOLUME 1 OF 1

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Filed in the Supreme Court of the State of Alaska, this 23rd day of November 2012.

Cindy Croom

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

ADI DAVIS, a minor, by and through her guardian, JULIE DAVIS; KATHERINE DOLMA, a minor, by and through her guardian, BRENDA DOLMA; ANANDA ROSE AHTAHLEE 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,

v.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Case No. 3AN-11-7474 CI

COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF

COME NOW Plaintiffs, by and through their counsel, and hereby seek declaratory and equitable relief against

Defendant State of Alaska, Department of Natural Resources for breach of its public trust obligations in Article VIII of the Alaska Constitution and to protect the atmosphere from the effects of climate change and secure a future for Plaintiffs and Alaska's children. For their complaint, Plaintiffs allege as follows:

NATURE OF THE CASE

1. Article VIII of the Alaska Constitution provides that Alaska's natural resources shall be developed consistent with the public interest; for the maximum benefit of the people of Alaska; to reserve fish, wildlife, and waters to the people for their common use; and to maintain these resources on a sustained yield basis. The Alaska courts have found that Article VIII requires the State to hold public resources in trust for public use and that the State has a fiduciary duty to manage such resources for the common good with the public as beneficiaries.

2. The atmosphere is a public trust resource under Alaska law and subject to and afforded the same protections, consideration, and process as other natural resources, such as fish, wildlife and waters.

3. Defendant has violated Article VIII by failing to carry out its public trust obligations to present and

future Alaskan citizens with respect to its atmospheric resource. Specifically, the State has failed to ensure the protection and preservation of its atmospheric resource from the impacts of climate change.

4. Plaintiffs seek a declaration that the atmosphere is a public trust resource under Alaska law, that Defendant has an affirmative and fiduciary duty 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, that Defendant violated Article VIII by breaching its obligations to protect and preserve this public trust resource, and that Defendant is obligated to protect and preserve the atmosphere by establishing and enforcing limitations on the levels of greenhouse gases (GHG) emissions as necessary to significantly slow the rate and magnitude of global warming so as to prevent climate change from denying Plaintiffs and Alaskans a livable future.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction under AS 22.10.020.

6. Venue is proper in this Court under Civil Rule 3 and AS 22.10.030.

PLAINTIFFS

7. Plaintiff Adi Davis, a minor, is 15 years old and lives in Homer, Alaska. Adi is represented in this action by her guardian and mother, Julie Davis.

8. Adi has always been interested in the environment and really cares about the Earth. Adi has been actively promoting recycling and composting to reduce the amount of trash that goes into the Homer landfill since the less material that goes into a landfill causes less carbon dioxide and methane to be emitted from the landfill into the atmosphere.

9. Adi believes that climate change is affecting everyone in different ways. In her area, rising temperatures are especially important because of the Spruce Bark Beetle infestation. The higher summer temperatures allow more Spruce Bark Beetles to hatch and infest trees. This has caused the destruction of more than one million mature spruce trees on the Kenai Peninsula. This has led to a rise in forest fires in her area. Adi also fears that climate change will wipe out the polar bears before she has the chance to see them in the wild and cause glaciers to disappear before her children and grandchildren are able to touch and see them as she has.

10. Plaintiff Katherine Dolma, a minor, is 15 years old and lives in Homer, Alaska. Katherine is represented in this action by her guardian and mother, Brenda Dolma.

11. Katherine is very concerned about the environment and climate change. Katherine believes people are either too stubborn or too lazy to change their ways yet the world is changing around them. Years ago, beluga whales used to come into nearby Kachemak Bay but now they no longer come. Katherine has not seen the whales in Kachemak Bay and fears that, due to the careless ways of the older generations, she and her generation will not have the joy of seeing the whales.

12. Katherine believes climate change is a very big problem and sees it clearly impacting water. As the atmosphere heats up, the water heats and the ice melts. As the water heats, species have a harder time surviving. The salmon population is decreasing because of the rising temperatures and salmon is a main food source in Alaska. With rising sea levels comes erosion which leaves less land for a growing population. Katherine believes we need to listen, stop being lazy, and do something about climate change.

13. Plaintiff Ananda Rose Ahtahkee Lankard, a minor,

is almost 1 year old and lives in Anchorage, Alaska. Ananda is represented in this action by her guardian and father, Glen "Dune" Lankard, a Copper River fisherman and Eyak Athabaskan Native on the Copper River Delta and Prince William Sound regions of Alaska. Ananda is an Alaskan Native and a member of the Eyak Athabaskan Tribe.

14. Ananda and her family and others in the Eyak community have been personally affected by climate change due to erosion from ice melt and flooding from increased temperatures, as well as the forests dying. In the past decade there have been numerous floods in Alaska and Cordova, Ananda's traditional homelands. These floods, melting glaciers, dying forests and increased temperatures threaten Ananda's village, wild Copper River salmon and other food sources, native traditions, culture, and livelihood.

15. Although Ananda is an infant, she has seen glaciers receding, decline of wild salmon stocks in the Copper River and Prince William Sound, the loss of salmon habitat and the decline of animals. Alaska is very important to Ananda because it is essential to her family's history, traditions and culture.

16. Plaintiffs Avery and Owen Mozen, minors, are siblings whose ages are 10 and 7, respectively, and

who live in McCarthy and Anchorage, Alaska. Avery and Owen are represented in this action by their guardian and father, Howard Mozen.

17. Avery and Owen are really mad about climate change and worried for the Earth. Owen and Avery believe that people do not think or care about what the Earth used to be like and that people tear things down and make things ugly. People also drive vehicles which use oil which turns into exhaust which goes into the atmosphere which becomes so thick that the heat cannot get out which makes the Earth hotter and hotter.

18. Avery and Owen think global warming is bad because the North Pole is melting. It used to be huge and now it is tiny. The polar bears now have to swim a long ways to get food. It has also caused the glacier that they live next to, the Kennicott Glacier, to shrink. It used to be a lot bigger which makes Avery and Owen sad.

DEFENDANT

19. Defendant State of Alaska, Department of Natural Resources is a department of the State of Alaska created by AS 44.17.005(10).

20. Defendant manages all state-owned land, water and natural resources, except for fish and game, on behalf of the people of Alaska.

21. Defendant's goal is to contribute to Alaska's economic health and quality of life by protecting and maintaining Alaska's natural resources and encouraging wise development of these resources by making them available for public use.

LEGAL BACKGROUND

22. Article VIII of the Alaska Constitution ensures the protection, balanced development, and conservation of the Alaska's natural resources. Article VIII also codifies the public trust doctrine in Alaska. The public trust doctrine provides that the State holds certain resources, including, but not limited to, fish, wildlife, minerals, and water in trust for public use, and that the State owes a fiduciary duty to manage these publicly held resources for the common good of the beneficiaries, present and future generations of Alaskans. The public trust doctrine is applicable to the State's management, use, and disposal of resources held in trust for the citizens of the State of Alaska.

23. Article VIII, § 1 of the Alaska Constitution states: "It 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."

24. Article VIII, § 2 of the Alaska Constitution states: "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."

25. Article VIII, § 3 of the Alaska Constitution states: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

26. Article VIII, § 4 of the Alaska Constitution states that "fish, forests, wildlife, grasslands and all other replenishable resources belonging to the State shall be utilized, developed and maintained on a sustained yield principle, subject to preferences among beneficial uses."

27. Article VIII, § 6 of the Alaska Constitution states that "lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the public domain."

28. The doctrine imposes a fiduciary obligation on the government to hold natural resources in trust for its present and future generations of citizens and to ensure that trust resources are not irrevocably harmed. Public trust resources such things "which are naturally

everybody's are: air, flowing water, the sea, and the sea-shore" or, "the elements of light, air, and water ...." *Geer v. State of Connecticut*, 161 U.S. 519, 668 (1896)

29. The United States Supreme Court has recognized that the public trust doctrine was needed as a bulwark to protect resources too valuable to be disposed of at the whim of the legislature and that it "is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."

30. The public trust doctrine is flexible in order to conform to the changing concerns of society. Original American public trust doctrine cases focused on navigable waters and submersible lands, however as society industrialized, the doctrine expanded accordingly to different geographic areas and to other modern concerns. Courts have emphasized the flexibility of the doctrine to meet changing societal concerns. The public trust by its very nature, does not remain fixed for all time but is to be "molded and extended to meet changing conditions and needs of the public it was created to benefit" and applied "as a flexible method for judicial protection of public interests...."

31. A state's public trust responsibilities with

regards to water also impose public trust duties on the entire ecological system, including the atmosphere. "The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust."

FACTUAL BACKGROUND

32. For more than 200 years, the burning of fossil fuels, such as coal and oil, together with massive deforestation have caused a substantial increase in the atmospheric concentrations of heat-trapping greenhouse gases or "GHGs." These gases prevent heat from escaping to space, like the glass panels of a greenhouse. The extent of these gases in the atmosphere have changed and fluctuated over geologic time but have reached an equilibrium -- Earth's safe climate-zone -- which is necessary to life as we know it. However, as the concentrations of these gases continue to increase in the atmosphere, the Earth's temperature is climbing above Earth's safe climate-zone. According to data from the National Oceanic and Atmospheric Administration ("NOAA") and the National Aeronautics and Space Administration ("NASA"), the Earth's average surface temperature has increased by about 0.8°C (1.4°F) in the last 100-150 years. In fact, the eight warmest years on record (since 1850)

have all occurred since 1998. Coupled with the increase in the temperature of the earth, other aspects of the climate are also changing, such as rainfall patterns, snow and ice cover, and sea levels.

33. Climate changes are currently occurring faster than even the most pessimistic scenarios presented in the 2007 Intergovernmental Panel on Climate Change. Depending on the future rate of GHG emissions, the future is likely to bring increases of 3 to 11 degrees Fahrenheit above current levels if our government does not accept its public trust obligations and take immediate action. Once we pass certain tipping points of energy imbalance and planetary heating, we will not be able to prevent the ensuing harm. A failure to act soon will ensure the collapse of the earth's natural systems resulting in a planet that is largely unfit for human life.

34. The best available science shows that if the planet once again sends as much energy into space as it absorbs from the sun, this will restore the planet's climate equilibrium. Scientists have accurately calculated how Earth's energy balance will change if we reduce long-lived greenhouse gases such as carbon dioxide. Humans are currently causing a planetary energy imbalance of approximately six-tenths of one watt. We would need to

reduce carbon dioxide by about 40 ppm to increase Earth's heat radiation to space by six-tenths of one watt, if the net non-CO_2 forcing continues to be roughly zero. That reduction would bring the atmospheric carbon dioxide amount back to about 350 ppm.

35. The best available science also shows that to protect Earth's natural systems, average global peak surface temperature must not exceed 1° C above pre-industrial temperatures this century. To prevent global heating greater than 1° C and to protect Earth's oceans (an essential harbor of countless life forms and absorber of GHGs), concentrations of atmospheric CO2 must decline to less than 350 ppm by the end of this century. However, today's atmospheric CO2 levels exceed 390 ppm and are steadily rising.

36. To limit average surface heating to no more than 1° C (1.8° F) above pre-industrial temperatures, and to protect Alaska's public trust resources, concentrations of atmospheric carbon dioxide should be no more than 350 ppm. Today, carbon dioxide concentrations have already exceeded 390 ppm and are currently on a path to reach over 400 ppm by 2020. Current atmospheric greenhouse gas concentrations are likely the highest in at least 800,000 years. Absent immediate action to reduce CO2 emissions, atmospheric CO2

could reach levels as high as about 1000 ppm and a temperature increase of up to 5° C by 2100.

37. Even if global CO2 emissions were instantaneously halted - i.e., if fossil fuel emissions and deforestation were abruptly terminated in 2011 -- it would still take until around 2060 before CO_2 levels would decline to below 350 ppm. If global fossil fuel CO2 emissions continue to grow at the rate of the past decade (about two percent per year) up until the time that emissions are terminated, and termination does not occur until 2030, when CO2 levels have reached about 450 ppm, CO_2 would not return to 350 ppm until about 2250, even if deforestation emissions were halted in 2011. With a 40-year delay (to 2050), CO_2 levels would surpass 500 ppm, and would not return to 350 ppm until around year 3000.

38. Even restoring the planet's energy balance will not immediately stop warming and sea level rise that is already in the pipeline, but it would help keep those rises relatively under control, and subject to the control of human investment and ingenuity. It would also prevent climate change from becoming a huge force for species extinction and ecosystem collapse.

39. Fossil fuel emissions must decrease rapidly if

atmospheric CO2 is to be returned to a safe level (below 350 ppm) in this century. Improved forestry and agricultural practices, for example, can provide a net drawdown of atmospheric CO_2, primarily via reforestation of degraded lands that are of little or no value for agricultural purposes, returning us to 350 ppm somewhat sooner.

40. To have the best chance of reducing the concentration of CO2 in the atmosphere to 350 ppm by the end of the century and avoid heating over 1 degree Celsius over pre-industrial temperatures, the best available science concludes that atmospheric carbon dioxide emissions need to peak in 2012 and then begin to decline at a global average of 6% per year through 2050 an 5% per year through 2100. In addition carbon sequestering forest and soils must be preserved and replanted to sequester an additional 100 gigatons of carbon through the end of the century. These reductions are necessary to draw down the excessive CO2 from the atmosphere and to fulfill every government's public trust responsibilities.

41. If sovereign governments, including the State of Alaska, do not immediately react to this crisis and act swiftly to reduce human-caused carbon dioxide emissions into the atmosphere, the environment in which humans and

other life have thrived will be dramatically, and possibly catastrophically, damaged. If sovereign governments do not act immediately to reduce carbon emissions into the atmosphere, present and future generations of children will face mass suffering on a planet that may be largely uninhabitable. We must protect and preserve the planet for them. Without our action, the catastrophic collapse of natural systems is inevitable.

42. The actions of Defendant to address greenhouse gas emissions and the resulting climate change has been limited to Administrative Order 238, signed on September 14, 2007 by then-Governor Sarah Palin, establishing the Alaska Climate Change Sub-Cabinet and the actions taken thereby.

43. The purpose of this Sub-Cabinet was "to advise the Office of the Governor on the preparation and implementation of an Alaska climate change strategy. This strategy should include building the state's knowledge of the actual and foreseeable effects of climate warming in Alaska, developing appropriate measures and policies to prepare communities in Alaska for the anticipated impacts from climate change, and providing guidance regarding Alaska's participation in regional and national efforts addressing the causes and effects of climate change."

44. Governor Palin further described the purpose of the Alaskan Climate Change Strategy as: "serv[ing] as a guide for a thoughtful, practical, timely, state of Alaska response to climate change. It [should] identify priorities needing immediate attention along with longer-term steps we can take as a state to best serve all Alaskans and to do our part in the global response to this global phenomenon."

45. The Alaska Climate Change Sub-Cabinet released several reports outlining recommendations to the Governor regarding the adaptation and mitigation of climate change. Additionally, the Sub-Cabinet completed a greenhouse gas inventory for the State of Alaska, outlining the sources of Alaska's greenhouse gas emissions and projected emissions for future years. To date, no further significant affirmative action has been taken by the Alaskan government to fulfill its public trust responsibilities by addressing increasing greenhouse gas emissions in an effort to combat the effects of climate change in Alaska.

46. The Alaska Climate Change Sub-Cabinet Mitigation Advisory Group issued a number of policy recommendations to address climate change including: energy transmission optimization and expansion; energy efficiencies for residential, commercial, and industrial customers; renewable energy implementation; building standards; and

energy efficiency for industrial installations; forest management and reforestation strategies for carbon sequestration in coastal and boreal forests; community wildfire risk reduction plans; expanded use of biomass feedstocks for energy production (heat, power, alternative fuels); and advanced waste reduction and recycling; oil & gas conservation practices; reducing fugitive methane emissions; electrification of North Slope operations with centralized power; improved equipment efficiency; renewable energy in O&G operations; carbon capture, sequestration, and enhanced oil recovery strategies within and away from known geologic traps; greater commuter choices; heavy-duty vehicle idling; transportation system management; efficient development patterns; promotion of alternative-fuel vehicles; vehicle-miles-traveled and greenhouse gas reduction goals; efficiency improvements in heavy-duty vehicles and marine vessels; aviation emission reduction strategies; alternative fuels research and development; establishing an Alaska greenhouse gas emission reporting program; establishing goals for statewide greenhouse gas emission reductions; encouraging the state government to lead by example; integrating this Climate Change Mitigation Strategy with Alaska's Energy Plan; and exploring market-based systems to manage greenhouse gas emissions. These

recommendations have not been implemented in Alaska despite the Mitigation Advisory Group's estimation that these recommendations would reduce greenhouse gas emissions in Alaska by approximately 19% by 2025.

47. The Alaska Department of Environmental Conservation (ADEC) estimated that, in 2005, gross Alaskan emissions of greenhouse gases were 52.82 million metric tons of carbon dioxide equivalent ("MTCO2e"), a rise of more than 23% from 1990 emissions levels. ADEC also projected that by 2020, gross Alaskan emissions of greenhouse gases would rise to 61.5 MTCO2e. Alaska's annual emissions are similar to those of Oregon, Nevada, and Connecticut -- all states that have 3.5-7 times the population of Alaska.

48. The Alaska Climate Change Sub-Cabinet Mitigation Advisory Group recommended that the State of Alaska establish greenhouse gas emissions goals of 20% below 1990 greenhouse gas emission levels by 2020 and 80% below 1990 levels by 2050. According to the Mitigation Advisory Group, these recommendations corresponded to the best available science at the time, however they do not correspond to the current best available science, which requires peak greenhouse gas emissions to occur in 2012,

followed by at least a 6% annual reduction in greenhouse gases per year thereafter.

49. The Alaska Department of Environmental Conservation has outlined several expected impacts of climate change on Alaska:

a. Increased coastal erosion and displacement of coastal communities;

b. Melting of arctic tundra and taiga resulting in the damage of Alaska's infrastructure;

c. Warmer summers resulting in insect infestations, more frequent and larger forest fires, and the alteration of Alaska's boreal forests;

d. Decrease in arctic ice cover resulting in loss of habitat and prey species for marine mammals;

e. Changes in terrestrial and oceanic species abundance and diversity resulting in the disruption of the subsistence way of life, among other adverse impacts.

50. The impacts of climate change have already been felt throughout Alaska, especially coastal communities. These impacts include, but are not limited, to displacement of people and villages, melting sea ice, endangered and threatened species, receding glaciers,

thawing tundra, record forest fires, and invasive species and erosion. Erosion is especially critical, with more than 160 rural communities threatened by erosion according to the U.S. Corps of Engineers.

COUNT 1
Violation of the Public Trust Doctrine
Alaska Constitution, Article VIII

51. Paragraphs 1 through 50 are incorporated herein by reference.

52. Per Article VIII, Defendant holds certain natural resources in trust for the benefit of present and future Alaskans. In Alaska, the public trust res explicitly includes, but is not limited to, water, mineral, wildlife and fish resources.

53. The atmosphere is also a part of the public trust res and is therefore held in trust by the Defendant for the benefit of present and future Alaskans. Like the other resources constituting the public trust res, the atmosphere does not lend itself to private ownership and is necessary for human survival.

54. The atmosphere is also inextricably linked with these constitutionally recognized public trust resources. Harm to the atmosphere negatively affects water, wildlife, and fish resources. Harm to the atmosphere also harms the public's ability to use public trust resources.

55. Defendant, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of public trust resources for these recognized purposes.

56. Defendant 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 fiduciary duty to protect the trust asset means that the Defendant must develop trust assets consistent with the public interest, conserve trust assets for the maximum benefit of its people, allow the common use of trust assets by Alaskans, and ensure the continued availability and existence of healthy trust resources consistent with the purposes for which they are held in trust for present and future generations.

57. Defendant's failure to regulate and reduce carbon dioxide emissions violates its affirmative fiduciary obligation to protect the atmosphere and other public trust assets from harm.

58. Defendant's failure to preserve and protect carbon sinks such as forests and soils violates its affirmative fiduciary obligation to protect the atmosphere and other public trust assets from harm.

59. Defendant's failure to implement any significant

measures to combat climate change and protect the health of the atmosphere violates their affirmative fiduciary obligation to protect the atmosphere and other public trust assets from harm.

60. Defendant's waste of and failure to preserve and protect the atmospheric trust and additional trust assets has caused, and will continue to cause, the injuries described above.

61. Defendant's failure to protect the atmosphere and other public trust assets has interfered and will interfere with Plaintiffs' as well as present and future generations of Alaskans' use of public trust assets for their own survival, maintenance and enhancement of water resources, maintenance and enhancement of fish and wildlife resources, conservation, pollution abatement, ecological values, in-stream flows, commerce, navigation, fishing, recreation, and energy production.

62. Defendant's failure to uphold their public trust obligations threatens the health, safety, and welfare of Plaintiffs, as well as all present and future generations of Alaskans.

63. Defendant's foregoing actions and inaction

violate Article VIII's requirement that public trust assets be utilized, developed and conserved consistent with the public trust doctrine.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the 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 and thereby violated Article VIII of the Alaska Constitution;

4. Declare that the fiduciary obligation related to the atmosphere 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;

8. Retain continuing jurisdiction over this matter for the purposes of enforcing the relief awarded;

9. Declare Plaintiffs are the prevailing party and award them all costs and attorney's fees to which they are entitled to pursuant to Civil Rule 79 and AS 09.06.010(c)(1); and

10. Award Plaintiffs such other and further relief as the Court deems just and equitable.

Respectfully submitted this 6th day of May 2011.

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v.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Case No. 3AN-11-07474 CI

Dismissed per order dated 5-1-12

FIRST AMENDED COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF

COME NOW Plaintiffs, by and through their counsel, and hereby seek declaratory and equitable relief against Defendant State of Alaska, Department of Natural Resources for breach of its public trust obligations in Article VIII of the Alaska Constitution and to protect the atmosphere from the effects of climate change and secure a future for Plaintiffs and Alaska's children. For their complaint, Plaintiffs allege as follows:

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4. Plaintiffs seek a declaration that the atmosphere is a public trust resource under Alaska law, that Defendant has an affirmative and fiduciary duty 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, that Defendant violated Article VIII by breaching its obligations to protect and preserve this public trust resource, and that Defendant is obligated to protect and preserve the atmosphere by establishing and enforcing limitations on the levels of greenhouse gases (GHG) emissions as necessary to significantly slow the rate and magnitude of global warming so as to prevent climate change from denying Plaintiffs and Alaskans a livable future.

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5. The Court has subject matter jurisdiction under AS 22.10.020.

6. Venue is proper in this Court under Civil Rule 3 and AS 22.10.030.

PLAINTIFFS

7. Plaintiff Nelson Kanuk, a minor, is 16 years old and lives in Kipnuk, Alaska. Nelson is represented in this action b his guardian and mother, Sharon Kanuk. Nelson is an Alaskan Native and a member of the Yup'ik Eskimo Tribe.

8. Nelson has been personally affected by climate change due to erosion from ice melt and flooding from increased temperatures. In December 2008, ice and water flooded the village, causing Nelson and his family as well as many others in his village to have to evacuate their homes. This erosion, flood, melting ice and increased temperatures threaten the foundation of Nelson's home, village, native traditions, food sources, culture, and annual subsistence hunts.

9. There are many places in Alaska that Nelson has seen change. He has seen glaciers receding greatly and the loss of other ice. Nelson has already seen the decline of animals. Alaska is very important to Nelson

because it is essential to his family's history, traditions and culture. When Nelson gets older and has his own family, he wants to be able to share those traditions and natural resources with his own children. Nelson wants his children and grandchildren to be able to see bears, seals, moose, and other Alaskan animals when they are old. Nelson worries about the animals' ability to survive climate change. Nelson views climate change as a serious problem and does not want to leave the generations after him with problems and disasters.

10. Plaintiff Adi Davis, a minor, is 15 years old and lives in Homer, Alaska. Adi is represented in this action by her guardian and mother, Julie Davis.

11. Adi has always been interested in the environment and really cares about the Earth. Adi has been actively promoting recycling and composting to reduce the amount of trash that goes into the Homer landfill since the less material that goes into a landfill causes less carbon dioxide and methane to be emitted from the landfill into the atmosphere.

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Bark Beetle infestation. The higher summer temperatures allow more Spruce Bark Beetles to hatch and infest trees. This has caused the destruction of more than one million mature spruce trees on the Kenai Peninsula. This has led to a rise in forest fires in her area. Adi also fears that climate change will wipe out the polar bears before she has the chance to see them in the wild and cause glaciers to disappear before her children and grandchildren are able to touch and see them as she has.

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15. Katherine believes climate change is a very big problem and sees it clearly impacting water. As the

atmosphere heats up, the water heats and the ice melts. As the water heats, species have a harder time surviving. The salmon population is decreasing because of the rising temperatures and salmon is a main food source in Alaska. With rising sea levels comes erosion which leaves less land for a growing population. Katherine believes we need to listen, stop being lazy, and do something about climate change.

16. Plaintiff Ananda Rose Ahtahkee Lankard, a minor, is almost 1 year old and lives in Anchorage, Alaska. Ananda is represented in this action by her guardian and father, Glen "Dune" Lankard, a Copper River fisherman and Eyak Athabaskan Native on the Copper River Delta and Prince William Sound regions of Alaska. Ananda is an Alaskan Native and a member of the Eyak Athabaskan Tribe.

17. Ananda and her family and others in the Eyak community have been personally affected by climate change due to erosion from ice melt and flooding from increased temperatures, as well as the forests dying. In the past decade there have been numerous floods in Alaska and Cordova, Ananda's traditional homelands. These floods, melting glaciers, dying forests and increased temperatures threaten Ananda's village, wild Copper River salmon and

other food sources, native traditions, culture, and livelihood.

18. Although Ananda is an infant, she has seen glaciers receding, decline of wild salmon stocks in the Copper River and Prince William Sound, the loss of salmon habitat and the decline of animals. Alaska is very important to Ananda because it is essential to her family's history, traditions and culture.

19. Plaintiffs Avery and Owen Mozen, minors, are siblings whose ages are 10 and 7, respectively, and who live in McCarthy and Anchorage, Alaska. Avery and Owen are represented in this action by their guardian and father, Howard Mozen.

20. Avery and Owen are really mad about climate change and worried for the Earth. Owen and Avery believe that people do not think or care about what the Earth used to be like and that people tear things down and make things ugly. People also drive vehicles which use oil which turns into exhaust which goes into the atmosphere which becomes so thick that the heat cannot get out which makes the Earth hotter and hotter.

21. Avery and Owen think global warming is bad because the North Pole is melting. It used to be huge and

now it is tiny. The polar bears now have to swim a long ways to get food. It has also caused the glacier that they live next to, the Kennicott Glacier, to shrink. It used to be a lot bigger which makes Avery and Owen sad.

DEFENDANT

22. Defendant State of Alaska, Department of Natural Resources is a department of the State of Alaska created by AS 44.17.005(10).

23. Defendant manages all state-owned land, water and natural resources, except for fish and game, on behalf of the people of Alaska.

24. Defendant's goal is to contribute to Alaska's economic health and quality of life by protecting and maintaining Alaska's natural resources and encouraging wise development of these resources by making them available for public use.

LEGAL BACKGROUND

25. Article VIII of the Alaska Constitution ensures the protection, balanced development, and conservation of the Alaska's natural resources. Article VIII also codifies the public trust doctrine in Alaska. The public trust doctrine provides that the State holds certain resources, including, but not limited to, fish, wildlife, minerals,

and water in trust for public use, and that the State owes a fiduciary duty to manage these publicly held resources for the common good of the beneficiaries, present and future generations of Alaskans. The public trust doctrine is applicable to the State's management, use, and disposal of resources held in trust for the citizens of the State of Alaska.

26. Article VIII, § 1 of the Alaska Constitution states: "It 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."

27. Article VIII, § 2 of the Alaska Constitution states: "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."

28. Article VIII, § 3 of the Alaska Constitution states: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

29. Article VIII, § 4 of the Alaska Constitution

states that "fish, forests, wildlife, grasslands and all other replenishable resources belonging to the State shall be utilized, developed and maintained on a sustained yield principle, subject to preferences among beneficial uses."

30. Article VIII, § 6 of the Alaska Constitution states that "lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the public domain."

31. The public trust doctrine imposes a fiduciary obligation on the government to hold natural resources in trust for its present and future generations of citizens and to ensure that trust resources are not irrevocably harmed. The United States Supreme Court has stated that the public trust resources, "which are naturally everybody's are: air, flowing water, the sea, and the sea-shore" or, "the elements of light, air, and water ...."

32. The United States Supreme Court has also recognized that the public trust doctrine was needed as a bulwark to protect resources too valuable to be disposed of at the whim of the legislature and that it "is the duty of the legislature to enact such laws as will best preserve

the subject of the trust, and secure its beneficial use in the future to the people of the state."

33. The public trust doctrine is flexible in order to conform to the changing concerns of society. Original American public trust doctrine cases focused on navigable waters and submersible lands, however as society industrialized, the doctrine expanded accordingly to different geographic areas and to other modern concerns. Courts have emphasized the flexibility of the doctrine to meet changing societal concerns. The public trust by its very nature, does not remain fixed for all time but is to be "molded and extended to meet changing conditions and needs of the public it was created to benefit" and applied "as a flexible method for judicial protection of public interests...."

34. A state's public trust responsibilities with regards to water also impose public trust duties on the entire ecological system, including the atmosphere. "The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust."

FACTUAL BACKGROUND

35. For more than 200 years, the burning of fossil

fuels, such as coal and oil, together with massive deforestation, have caused a substantial increase in the atmospheric concentrations of heat-trapping greenhouse gases or "GHGs." These gases prevent heat from escaping to space, like the glass panels of a greenhouse. The extent of these gases in the atmosphere have changed and fluctuated over geologic time but have reached an equilibrium -- Earth's safe climate-zone -- which is necessary to life as we know it. However, as the concentrations of these gases continue to increase in the atmosphere, the Earth's temperature is climbing above Earth's safe climate-zone. According to data from the National Oceanic and Atmospheric Administration ("NOAA") and the National Aeronautics and Space Administration ("NASA"), the Earth's average surface temperature has increased by about 0.8°C (1.4°F) in the last 100-150 years. In fact, the eight warmest years on record (since 1850) have all occurred since 1998. Coupled with the increase in the temperature of the earth, other aspects of the climate are also changing, such as rainfall patterns, snow and ice cover, and sea levels.

36. Climate changes are currently occurring faster

than even the most pessimistic scenarios presented in the 2007 Intergovernmental Panel on Climate Change. Depending on the future rate of GHG emissions, the future is likely to bring increases of 3 to 11 degrees Fahrenheit above current levels if our government does not accept its public trust obligations and take immediate action. Once we pass certain tipping points of energy imbalance and planetary heating, we will not be able to prevent the ensuing harm. A failure to act soon will ensure the collapse of the earth's natural systems resulting in a planet that is largely unfit for human life.

37. The best available science shows that if the planet once again sends as much energy into space as it absorbs from the sun, this will restore the planet's climate equilibrium. Scientists have accurately calculated how Earth's energy balance will change if we reduce long-lived greenhouse gases such as carbon dioxide. Humans are currently causing a planetary energy imbalance of approximately six-tenths of one watt. We would need to reduce carbon dioxide by about 40 ppm to increase Earth's heat radiation to space by six-tenths of one watt, if the net non-CO_2 forcing continues to be roughly zero. That

reduction would bring the atmospheric carbon dioxide amount back to about 350 ppm.

38. The best available science also shows that to protect Earth's natural systems, average global peak surface temperature must not exceed 1° C above pre-industrial temperatures this century. To prevent global heating greater than 1° C and to protect Earth's oceans (an essential harbor of countless life forms and absorber of GHGs), concentrations of atmospheric CO2 must decline to less than 350 ppm by the end of this century. However, today's atmospheric CO2 levels exceed 390 ppm and are steadily rising.

39. To limit average surface heating to no more than 1° C (1.8° F) above pre-industrial temperatures, and to protect Alaska's public trust resources, concentrations of atmospheric carbon dioxide should be no more than 350 ppm. Today, carbon dioxide concentrations have already exceeded 390 ppm and are currently on a path to reach over 400 ppm by 2020. Current atmospheric greenhouse gas concentrations are likely the highest in at least 800,000 years. Absent immediate action to reduce CO2 emissions, atmospheric CO2 could reach levels as high as about 1000 ppm and a temperature increase of up to 5° C by 2100.

40. Even if global CO2 emissions were instantaneously halted - i.e., if fossil fuel emissions and deforestation were abruptly terminated in 2011 -- it would still take until around 2060 before CO_2 levels would decline to below 350 ppm. If global fossil fuel CO2 emissions continue to grow at the rate of the past decade (about two percent per year) up until the time that emissions are terminated, and termination does not occur until 2030, when CO2 levels have reached about 450 ppm, CO_2 would not return to 350 ppm until about 2250, even if deforestation emissions were halted in 2011. With a 40-year delay (to 2050), CO_2 levels would surpass 500 ppm, and would not return to 350 ppm until around year 3000.

41. Even restoring the planet's energy balance will not immediately stop warming and sea level rise that is already in the pipeline, but it would help keep those rises relatively under control, and subject to the control of human investment and ingenuity. It would also prevent climate change from becoming a huge force for species extinction and ecosystem collapse.

42. Fossil fuel emissions must decrease rapidly if atmospheric CO2 is to be returned to a safe level (below 350 ppm) in this century. Improved forestry and

agricultural practices, for example, can provide a net drawdown of atmospheric CO_2, primarily via reforestation of degraded lands that are of little or no value for agricultural purposes, returning us to 350 ppm somewhat sooner.

43. To have the best chance of reducing the concentration of CO2 in the atmosphere to 350 ppm by the end of the century and avoid heating over 1 degree Celsius over pre-industrial temperatures, the best available science concludes that atmospheric carbon dioxide emissions need to peak in 2012 and then begin to decline at a global average of 6% per year through 2050 an 5% per year through 2100. In addition carbon sequestering forest and soils must be preserved and replanted to sequester an additional 100 gigatons of carbon through the end of the century. These reductions are necessary to draw down the excessive CO2 from the atmosphere and to fulfill every government's public trust responsibilities.

44. If sovereign governments, including the State of Alaska, do not immediately react to this crisis and act swiftly to reduce human-caused carbon dioxide emissions into the atmosphere, the environment in which humans and other life have thrived will be dramatically, and possibly

catastrophically, damaged. If sovereign governments do not act immediately to reduce carbon emissions into the atmosphere, present and future generations of children will face mass suffering on a planet that may be largely uninhabitable. We must protect and preserve the planet for them. Without our action, the catastrophic collapse of natural systems is inevitable.

45. The actions of Defendant to address greenhouse gas emissions and the resulting climate change has been limited to Administrative Order 238, signed on September 14, 2007 by then-Governor Sarah Palin, establishing the Alaska Climate Change Sub-Cabinet and the actions taken thereby.

46. The purpose of this Sub-Cabinet was "to advise the Office of the Governor on the preparation and implementation of an Alaska climate change strategy. This strategy should include building the state's knowledge of the actual and foreseeable effects of climate warming in Alaska, developing appropriate measures and policies to prepare communities in Alaska for the anticipated impacts from climate change, and providing guidance regarding Alaska's participation in regional and national efforts addressing the causes and effects of climate change."

47. Governor Palin further described the purpose of the Alaskan Climate Change Strategy as: "serv[ing] as a guide for a thoughtful, practical, timely, state of Alaska response to climate change. It [should] identify priorities needing immediate attention along with longer-term steps we can take as a state to best serve all Alaskans and to do our part in the global response to this global phenomenon."

48. The Alaska Climate Change Sub-Cabinet released several reports outlining recommendations to the Governor regarding the adaptation and mitigation of climate change. Additionally, the Sub-Cabinet completed a greenhouse gas inventory for the State of Alaska, outlining the sources of Alaska's greenhouse gas emissions and projected emissions for future years. To date, no further significant affirmative action has been taken by the Alaskan government to fulfill its public trust responsibilities by addressing increasing greenhouse gas emissions in an effort to combat the effects of climate change in Alaska.

49. The Alaska Climate Change Sub-Cabinet Mitigation Advisory Group issued a number of policy recommendations to address climate change including: energy transmission optimization and expansion; energy efficiencies for residential, commercial, and industrial customers;

renewable energy implementation; building standards; and energy efficiency for industrial installations; forest management and reforestation strategies for carbon sequestration in coastal and boreal forests; community wildfire risk reduction plans; expanded use of biomass feedstocks for energy production (heat, power, alternative fuels); and advanced waste reduction and recycling; oil & gas conservation practices; reducing fugitive methane emissions; electrification of North Slope operations with centralized power; improved equipment efficiency; renewable energy in O&G operations; carbon capture, sequestration, and enhanced oil recovery strategies within and away from known geologic traps; greater commuter choices; heavy-duty vehicle idling; transportation system management; efficient development patterns; promotion of alternative-fuel vehicles; vehicle-miles-traveled and greenhouse gas reduction goals; efficiency improvements in heavy-duty vehicles and marine vessels; aviation emission reduction strategies; alternative fuels research and development; establishing an Alaska greenhouse gas emission reporting program; establishing goals for statewide greenhouse gas emission reductions; encouraging the state government to lead by example; integrating this Climate Change Mitigation

Strategy with Alaska's Energy Plan; and exploring market-based systems to manage greenhouse gas emissions. These recommendations have not been implemented in Alaska despite the Mitigation Advisory Group's estimation that these recommendations would reduce greenhouse gas emissions in Alaska by approximately 19% by 2025.

50. The Alaska Department of Environmental Conservation (ADEC) estimated that, in 2005, gross Alaskan emissions of greenhouse gases were 52.82 million metric tons of carbon dioxide equivalent ("MTCO2e"), a rise of more than 23% from 1990 emissions levels. ADEC also projected that by 2020, gross Alaskan emissions of greenhouse gases would rise to 61.5 MTCO2e. Alaska's annual emissions are similar to those of Oregon, Nevada, and Connecticut -- all states that have 3.5-7 times the population of Alaska.

51. The Alaska Climate Change Sub-Cabinet Mitigation Advisory Group recommended that the State of Alaska establish greenhouse gas emissions goals of 20% below 1990 greenhouse gas emission levels by 2020 and 80% below 1990 levels by 2050. According to the Mitigation Advisory Group, these recommendations corresponded to the best available science at the time, however they do not

correspond to the current best available science, which requires peak greenhouse gas emissions to occur in 2012, followed by at least a 6% annual reduction in greenhouse gases per year thereafter.

52. The Alaska Department of Environmental Conservation has outlined several expected impacts of climate change on Alaska:

a. Increased coastal erosion and displacement of coastal communities;

b. Melting of arctic tundra and taiga resulting in the damage of Alaska's infrastructure;

c. Warmer summers resulting in insect infestations, more frequent and larger forest fires, and the alteration of Alaska's boreal forests;

d. Decrease in arctic ice cover resulting in loss of habitat and prey species for marine mammals;

e. Changes in terrestrial and oceanic species abundance and diversity resulting in the disruption of the subsistence way of life, among other adverse impacts.

53. The impacts of climate change have already

been felt throughout Alaska, especially coastal communities. These impacts include, but are not limited, to displacement of people and villages, melting sea ice, endangered and threatened species, receding glaciers, thawing tundra, record forest fires, and invasive species and erosion. Erosion is especially critical, with more than 160 rural communities threatened by erosion according to the U.S. Corps of Engineers.

COUNT 1
Violation of the Public Trust Doctrine
Alaska Constitution, Article VIII

54. Paragraphs 1 through 53 are incorporated herein by reference.

55. Per Article VIII, Defendant holds certain natural resources in trust for the benefit of present and future Alaskans. In Alaska, the public trust res explicitly includes, but is not limited to, water, mineral, wildlife and fish resources.

56. The atmosphere is also a part of the public trust res and is therefore held in trust by the Defendant for the benefit of present and future Alaskans. Like the other resources constituting the public trust res, the atmosphere does not lend itself to private ownership and is necessary for human survival.

57. The atmosphere is also inextricably linked with these constitutionally recognized public trust resources. Harm to the atmosphere negatively affects water, wildlife, and fish resources. Harm to the atmosphere also harms the public's ability to use public trust resources.

58. Defendant, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of public trust resources for these recognized purposes.

59. Defendant 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 fiduciary duty to protect the trust asset means that the Defendant must develop trust assets consistent with the public interest, conserve trust assets for the maximum benefit of its people, allow the common use of trust assets by Alaskans, and ensure the continued availability and existence of healthy trust resources consistent with the purposes for which they are held in trust for present and future generations.

60. Defendant's failure to regulate and reduce carbon

dioxide emissions violates its affirmative fiduciary obligation to protect the atmosphere and other public trust assets from harm.

61. Defendant's failure to preserve and protect carbon sinks such as forests and soils violates its affirmative fiduciary obligation to protect the atmosphere and other public trust assets from harm.

62. Defendant's failure to implement any significant measures to combat climate change and protect the health of the atmosphere violates their affirmative fiduciary obligation to protect the atmosphere and other public trust assets from harm.

63. Defendant's waste of and failure to preserve and protect the atmospheric trust and additional trust assets has caused, and will continue to cause, the injuries described above.

64. Defendant's failure to protect the atmosphere and other public trust assets has interfered and will interfere with Plaintiffs' as well as present and future generations of Alaskans' use of public trust assets for their own survival, maintenance and enhancement of water resources, maintenance and enhancement of fish and wildlife resources, conservation, pollution abatement, ecological values, in-

stream flows, commerce, navigation, fishing, recreation, and energy production.

65. Defendant's failure to uphold their public trust obligations threatens the health, safety, and welfare of Plaintiffs, as well as all present and future generations of Alaskans.

66. Defendant's foregoing actions and inaction violate Article VIII's requirement that public trust assets be utilized, developed and conserved consistent with the public trust doctrine.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the 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 and thereby violated Article VIII of the Alaska Constitution;

4. Declare that the fiduciary obligation related to the atmosphere 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;

8. Retain continuing jurisdiction over this matter for the purposes of enforcing the relief awarded;

9. Declare Plaintiffs are the prevailing party and award them all costs and attorney's fees to which they are entitled to pursuant to Civil Rule 79 and AS 09.06.010(c)(1); and

10. Award Plaintiffs such other and further relief as the Court deems just and equitable.

Respectfully submitted this 21st day of July 2011.

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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; AMANDA 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.

Case No. 3AN-11-07474 CI

MOTION TO DISMISS

Defendant, State of Alaska, Department of Natural Resources, by and through the Office of the Attorney General, moves to dismiss Plaintiffs' Amended Complaint pursuant to Alaska Rules of Civil Procedure 12(b)(1) & (6). A Brief in support of this Motion to Dismiss is filed herewith.

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DATED this 12th day of August, 2011.

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Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Case No. 3AN-11-07474 CI

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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STATEMENT OF FACTS

I. The Complaint[1]

Five minors living in Alaska ("Plaintiffs") filed the First Amended Complaint ("Complaint") by and through their guardians. Plaintiffs are concerned about climate change. (Compl. ¶¶ 7-21.) They claim that more than 200 years of burning fossil fuels has caused a substantial increase in the atmospheric concentration of heat-trapping greenhouse gases ("GHGs"), such as carbon dioxide ("CO_2"). (*Id.* ¶ 35.) Failing to act soon to reduce the global concentration of GHGs, they say, "will ensure the collapse of the earth's natural systems resulting in a planet that is largely unfit for human life." (*Id.* ¶ 36.)

According to Plaintiffs, article VIII of the Alaska Constitution "requires the State to hold public resources in trust for public use and ... the State has a fiduciary duty to manage such resources for the common good with the public as beneficiaries." (*Id.* ¶ 1.) They claim the atmosphere is a public trust resource under article VIII and that the State of Alaska, Department of Natural Resources ("DNR" or the "State"), has breached its fiduciary duty to protect and preserve the atmosphere. (*Id.* ¶¶ 2-4.)

At the same time, Plaintiffs acknowledge that climate change is a global problem requiring global action. They claim the "best available science ... shows that to protect Earth's natural systems, average global peak surface temperature must not exceed 1° C

[1] The State assumes the truth of the allegations in Plaintiffs' Complaint only for purposes of this motion to dismiss. *See, e.g., Clemensen v. Providence Alaska Med. Ctr.*, 203 P.3d 1148, 1150 n.2 (Alaska 2009).

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above pre-industrial temperatures this century." (*Id.* ¶ 38.) To prevent this, concentrations of global atmospheric CO_2 purportedly must decline to less than 350 parts per million ("ppm") by the end of this century. (*Id.*) Today's atmospheric CO_2 levels exceed 390 ppm and are steadily rising. (*Id.*) According to Plaintiffs, to have the "best chance of reducing the concentration of CO_2 in the atmosphere to 350 ppm by the end of the century..., the best available science concludes that atmospheric [CO_2] emissions need to peak in 2012 and then begin to decline at a global average of 6% per year through 2050 an[d] 5% per year through 2100." (*Id.* ¶ 43.) Plaintiffs claim that "[i]f sovereign governments do not act immediately to reduce carbon emissions into the atmosphere, present and future generations of children will face mass suffering on a planet that may be largely uninhabitable." (*Id.* ¶ 44.)

Plaintiffs note that Alaska's executive branch has studied ways to reduce GHG emissions and adapt to climate change. On September 14, 2007, then-Governor Sarah Palin signed Administrative Order 238, which established the Alaska Climate Change Sub-Cabinet to advise the Governor on the preparation and implementation of an Alaska climate change strategy. (*Id.* ¶¶ 45-46.) Among other things, the Administrative Order stated that Alaska's "climate change strategy must be built on sound science and the best available facts and must recognize Alaska's interest in economic growth and the development of its resources."[2] The Climate Change Sub-Cabinet eventually released

[2] *See* http://www.gov.state.ak.us/admin-orders/238.html. The Court may consider documents referenced in the Complaint on a motion to dismiss. *See, e.g., Ahwinona v. State*, 922 P.2d 884, 886 (Alaska 1996).

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several reports regarding mitigation of GHG emissions and adaption to climate change.[3] (Compl. ¶ 45.)

In support of its mission, the Sub-Cabinet formed several work groups and advisory groups including the Alaska Climate Change Sub-Cabinet Mitigation Advisory Group ("MAG"). Although Plaintiffs allege that the MAG issued "policy recommendations to address climate change" (Compl. ¶ 49), in fact the MAG was tasked "with preparing recommendations on measures that might be included in a strategy to mitigate (i.e. reduce) greenhouse gas emissions in Alaska ... [and] [i]t was not within the scope of the MAG's charge to evaluate what affect any recommended measure, if developed and implemented in Alaska, might have on climate in Alaska."[4] The MAG's report stated that "no 'recommendation' discussed in this report should be included in the set of recommendations provided by the Sub-Cabinet to the Governor for his consideration without first evaluating the economic impacts that adoption of the recommendation would have in Alaska." *Id.* In addition to the work of the Sub-Cabinet, the Alaska Department of Environmental Conservation ("DEC") has issued a report on expected impacts of climate change in Alaska. (Compl. ¶ 52.)

The State legislature has also been studying climate change and ways to reduce GHG emissions. In 2006 the legislature established the Alaska Climate Impact

[3] All of the reports issued by the Sub-Cabinet and its work groups and advisory groups can be found through links on Alaska's climate change website, http://www.climate change.alaska.gov/. These are public records that may be judicially noticed. *See, e.g., F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993); Alaska R. Evid. 201.

[4] Alaska Climate Change Strategy Mitigation Advisory Group Executive Summary at 1 (found at http://www.akclimatechange.us/ewebeditpro/items/O97F21941.pdf).

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Assessment Commission to study climate change and hold public hearings on the issue. After numerous public hearings, the Commission issued its final report on March 17, 2008.[5]

Alaska has also joined the Western Climate Initiative ("WCI"), which is an initiative by several western U.S. states and Canadian provinces to "reduce regional GHG emissions to 15 percent below 2005 levels by 2020 and spur investment in and development of clean-energy technologies, create green jobs, and protect public health."[6] Thus far, Alaska has joined the WCI only as an observer.

Plaintiffs are apparently unimpressed by all of these efforts. They complain that, to date, no further significant affirmative action has been taken by the State to address increasing GHG emissions. (Compl. ¶ 48.)

II. Federal Efforts To Reduce GHG Emissions And Address Climate Change[7]

The federal government has been studying climate change and ways to reduce GHG emissions for more than thirty years. In 1978, Congress established a "national climate program," with the purpose of improving understanding of global climate change through research and international cooperation.[8] Through the 1980s and 1990s, Congress enacted a series of statutes mandating further study of the impact of GHGs and trends in

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5 *See* http://www.housemajority.org/coms/cli/cli_finalreport_20080301.pdf.

6 *See* http://www.westernclimateinitiative.org/designing-the-program.

7 The efforts of the federal government to reduce GHG emissions and address climate change are largely a matter of public record and may be judicially noticed. *See, e.g., F.T.*, 862 P.2d at 864; Alaska R. Evid. 201.

8 National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601.

climate change,[9] and directing executive officials to coordinate international negotiations concerning global climate change.[10]

More recently, in 2007, Congress established nationwide GHG reduction targets to be satisfied through modified biofuel production methods, as implemented by the Environmental Protection Agency ("EPA").[11] In 2008, Congress formally directed EPA to "develop and publish a ... rule ... to require mandatory reporting of [GHG] emissions above appropriate thresholds in all sectors of the economy of the United States."[12]

EPA has been pursuing GHG regulation under the Clean Air Act, 42 U.S.C. § 7401 et seq., (the "Act"). The Act is "a lengthy, detailed, technical, complex, and comprehensive response" to air pollution in the United States. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984). It governs the regulation of "air pollutants," defined broadly to encompass "any physical, chemical, [or] biological ... substance ... [which] enters the ambient air." 42 U.S.C. § 7602(g). In *Massachusetts v. EPA*, the United States Supreme Court held that GHGs, including CO_2, qualify as "air pollutants" under the Act. 549 U.S. 497, 528-29, 532 (2007).

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[9] Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75.

[10] Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407.

[11] Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492.

[12] Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128.

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Three parts of the Act – Titles I, II, and V – are particularly relevant for regulating GHGs. Title I addresses the regulation of emissions of air pollutants from stationary sources. For any category of stationary sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA issues a "standard of performance" requiring "the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a) & (b). EPA may then, in appropriate circumstances, require states to submit plans to control designated pollutants at existing facilities in light of those standards. *Id.* § 7411(d).

Title II of the Act addresses the regulation of mobile sources of air pollutants. It requires EPA to determine whether emissions of a pollutant from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). If EPA makes an affirmative "endangerment" determination, it prescribes standards controlling these emissions. *Id.*

Title V sets forth permit requirements for operating major sources of air pollutants. It requires states to administer a comprehensive permit program for sources emitting air pollutants, as necessary to satisfy applicable requirements for each source under the Act. *Id.* § 7661c; *see also id.* § 7661a. Permits must indicate how much of which regulated air pollutants a source is allowed to emit, and the standards to which it is subject. *Id.* A source must prepare a compliance plan and certify compliance with applicable requirements. *Id.* § 7661b. In compliance with the Act, Alaska has adopted an Emission Control Permit Program. *See* AS 46.14.120 – 46.14.285.

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Over the last two years, and in response to the United States Supreme Court's holding in *Massachusetts* that GHGs are air pollutants under the Act, EPA has issued a series of findings and rules regarding GHG emissions. EPA formally found in 2009 that GHG emissions from new motor vehicles contribute to air pollution that "endangers" public health and welfare and should be regulated under the Clean Air Act. 74 Fed. Reg. 66496 (Dec. 15, 2009). It then issued a final rule establishing GHG emissions standards for certain model-year light-duty motor vehicles. 75 Fed. Reg. 25324 (May 7, 2010). Since then, EPA has announced its intent to issue further, more stringent standards for other model-year light-duty vehicles, 75 Fed. Reg. 62739 (Oct. 13, 2010), and proposed GHG emissions standards for certain heavy-duty vehicles, 75 Fed. Reg. 74152 (Nov. 30, 2010).

EPA has also issued rules addressing GHG emissions by new or modified major stationary sources. 75 Fed. Reg. 31514 (June 3, 2010). Those rules would potentially impose new Clean Air Act obligations on millions of sources throughout the United States. *Id.* However, in recognition of the massive economic impact of such action, EPA included "tailoring" provisions intended to "phase-in" the regulatory scheme over five years. *Id.* Under this tailoring scheme, as sources are phased in they are required to obtain construction and operating permits from EPA or the appropriate state authority and otherwise to comply with relevant emissions restrictions. *Id.* On March 11, 2011, EPA approved a revised state implementation plan submitted by DEC that incorporated the new EPA tailoring provisions concerning GHG emissions.

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76 Fed. Reg. 7116 (Feb. 9, 2011). Thus, DEC has begun to regulate GHG emissions in Alaska. *See* 18 AAC 50 040 (h).[13]

In recent years, Congress has considered additional GHG legislation. The House of Representatives passed GHG "cap-and-trade" legislation in 2009, *see* H.R. 2454, 111th Cong. (2009), but the Senate did not vote on the measure. More recently, several bills have been offered that would modify EPA's authority to regulate GHGs. *See, e.g.*, S. 3072, 111th Cong. (2010). None of these proposals has been adopted.

II. International Efforts To Reduce GHG Emissions And Address Climate Change

In addition to these domestic efforts, the United States has worked with other nations to develop a worldwide approach to reduce GHG emissions and address climate change. The United States is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), adopted May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38, which established a multinational coalition to develop a coordinated approach to these issues. In 1997, member nations negotiated the Kyoto Protocol, adopted Dec. 11, 1997, 37 I.L.M. 22, which called for mandatory reductions in GHG emissions by developed nations. The protocol was not, however, formally joined by the United States. *See* S. Res. 98, 105th Cong. (1997).

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[13] Alaska has intervened in the matter *Coalition For Responsible Regulation v. EPA*, No. 09-1322, pending before the United States Court of Appeals for the District of Columbia Circuit, which challenges on procedural and other grounds the EPA's rules concerning GHG emissions. On May 20, 2011, an opening brief was filed in that matter on behalf of Alaska and numerous other petitioners and interveners.

More recently, as a result of meetings in Copenhagen in 2009, the United States pledged to reduce nationwide GHG emissions by 17 percent from 2005 levels by the year 2020, and by more than 80 percent by the year 2050.[14] Additional negotiations were held in December 2010 in Cancún, Mexico, and more talks are scheduled for December 2011 in Durban, South Africa.[15]

IV. Plaintiffs' Seek A Judicial Remedy For Allegedly Inadequate Political Efforts To Reduce GHG Emissions And Address Climate Change

Plaintiffs want to bypass these political efforts to reduce GHG emissions and address climate change in favor of a judicial remedy. Alleging that the State has breached its fiduciary duty to manage the atmosphere for the common good, they seek as a remedy an injunction requiring the State to, among other things, reduce CO_2 emissions in Alaska by at least 6% each year from 2013 until 2050, and prepare a full and accurate annual accounting of Alaska's CO_2 emissions. They do so even though they acknowledge that GHG emissions from Alaska have not caused dangerous concentrations of GHGs or climate change, admitting instead that climate change is caused by *global* atmospheric concentrations of GHGs, which in turn have been caused by more than 200 years of burning fossil fuels. (Compl. ¶ 35.) Plaintiffs also acknowledge that reducing GHG emissions from Alaska will not prevent further climate change, admitting instead that preventing further climate change requires lowering *global* atmospheric

[14] *See* Remarks of President Barack Obama at Copenhagen Summit, available at http://geneva.usmission.gov/2009/12/18/obama-cop-15.

[15] *See* Juliet Eilperin & William Booth, 193 Nations Sign Climate-Change Package, Wash. Post, Dec. 12, 2010.

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concentrations of GHGs, which Plaintiffs say can be done only if there is immediate global action by "sovereign governments." (*Id.* ¶¶ 43-44.)

Reducing GHG emissions is one of the most complex and consequential policy issues now before the country, requiring the balancing of competing environmental, economic, and other interests. The political branches of the state and federal governments are clearly aware of the dangers of GHG emissions and working on solutions (as are many other nations). As explained below, whether the State's approach to reducing GHG emissions is appropriate is a non-justiciable political question. The State's approach also involves acts of planning that are immune from breach-of-fiduciary-duty tort claims under the discretionary-function doctrine. Independent of these deficiencies, Plaintiffs' Complaint should be dismissed because it is based on a flawed understanding of the public trust doctrine. Finally, the Complaint should be dismissed because Plaintiffs lack standing to pursue their claim.

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ARGUMENT

I. STANDARD OF REVIEW

This Court applies a similar standard of review to motions to dismiss under Alaska Civil Rules 12(b)(1) and (b)(6). *See, e.g., Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*, 210 P.3d 1213, 1217-18 (Alaska 2009); *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). For both motions the Court should "presume all factual allegations of the complaint to be true and make all reasonable inferences in favor of the non-moving party." *Neese*, 210 P.2d at 1217. To survive the motion to dismiss the Complaint must "set forth allegations of fact consistent with and appropriate to some enforceable cause of action." *Id.*

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs' Complaint should be dismissed on the merits for three reasons. First, it is well-established that certain questions are political as opposed to legal, and as a result, must be resolved by the political branches rather than by the judiciary. How to reduce Alaska's GHG emissions is clearly a political question that cannot be resolved by the judiciary. Second, the State's approach to reduce GHG emissions is a discretionary act for which the State enjoys sovereign immunity because it involves questions of policy and requires an evaluation of factors such as the financial, political, economic, environmental, and social effects of any particular approach. Third, the Complaint should be dismissed because it is based on a flawed understanding of the public trust doctrine.

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A. The Complaint Seeks To Resolve Non-justiciable Political Questions

Rooted in the separation of powers doctrine is the principle that political questions are non-justiciable. *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336 (Alaska 1987). To identify political questions, the Alaska Supreme Court has adopted the approach used by the United States Supreme Court in *Baker v. Carr*, which identified the following six factors, "one or more of which is [p]rominent on the surface of any case held to involve a political question":

> [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.

Abood, 743 P.2d at 336-37 (quotations omitted); *Baker v. Carr*, 369 U.S. 186, 217 (1962). The presence of any of the *Baker* factors indicates a political question; here, at least four factors are present.

The first *Baker* factor is present because the Alaska Constitution, in article VIII, section 2, expressly commits to the legislature the authority to "provide for the utilization, development, and conservation of all natural resources belonging to the State." The State contends that the air is not the type of natural resource covered by Article VIII in that the air does not belong to the State. *See infra* at 25-27. However, even if Plaintiffs are correct, and the air is a natural resource covered by article VIII, then it follows that article VIII expressly commits to the legislature the authority to "provide

for the utilization, development, and conservation" of the air. The legislature directed DEC to regulate air quality in the State. AS 46.14.010. Plaintiffs could have petitioned DEC to adopt the GHG emissions standards they desire; had they done so, DEC's response would have been judicially reviewable, at least for compliance with due process. *See* AS 44.62.230 (setting forth procedure for petitioning an agency to adopt a regulation); *Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d 334, 339 (Alaska 1985) (holding that an agency's response to a petition for rulemaking was reviewable for compliance with due process). The judiciary cannot, however, review the State's policy determinations concerning GHG emissions because, to the extent the air is covered by article VIII, the Alaska Constitution has committed the relevant policymaking authority to the legislature.

The second *Baker* factor is present because there are no judicially discoverable and manageable standards to guide the Court in reviewing the State's policy concerning GHG emissions. Article VIII does not provide any standard. Nor do any of the Alaska cases that discuss the public trust doctrine in other contexts. For this reason also, Plaintiffs concerns should be directed to Alaska's political branches. *Cf. Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) (holding that a nuisance claim against defendants accused of emitting GHGs involved a political question in part because of a lack of judicially discoverable and manageable standards).

The third *Baker* factor is present because the Court cannot decide this matter without making an initial policy determination of a kind clearly for non-judicial discretion. This factor is aimed at preventing a court from "removing an important policy

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determination from the Legislature." *Kivalina*, 663 F. Supp. 2d at 876 (quotations omitted). At its essence, this case is about Plaintiffs' dissatisfaction with the efforts of Alaska's political branches to reduce GHG emissions and their desire for the Court to mandate a different approach. Plaintiffs would have this Court require, as a matter of Alaska constitutional law, specific reductions in GHG emissions over several decades, rendering the other branches of government powerless to govern in this area absent a constitutional amendment. Making policy in this important and complicated area should be left to the political branches, which are better equipped for the task than judges. *Cf. Am. Elec. Power Co. v. Connecticut ("AEP")*, 131 S. Ct. 2527, 2539 (2011) ("The expert agency is surely better equipped to do the job [of regulating GHGs] than individual district judges issuing ad hoc, case-by-case injunctions.") *Light v. United States*, 220 U.S. 523, 537 (1911) (recognizing that the United States holds public lands in trust for the people, but "it is not for the courts to say how that trust shall be administered. That is for Congress to determine.").

The fourth *Baker* factor is present because the court cannot undertake an independent assessment of the State's policy concerning GHG emissions without expressing a lack of respect for decisions made by Alaska political branches. As explained above, Alaska's political branches have taken several steps to address GHG emissions. The executive and legislative branches have studied the subject and issued several reports. *See supra* at 2-3. Alaska chose to join a regional initiative formed to reduce GHG emissions, the WCI, albeit at present as an observer only. *Id.* DEC, the agency with statutory authority to regulate air quality in the State, has begun regulating

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GHG emissions in line with EPA's tailoring approach. *Id.* at 7. Although DEC can issue standards more stringent than EPA's, *see* AS 46.14.015, thus far DEC has chosen to simply follow EPA's approach. *See* 76 Fed. Reg. 7116 (Feb. 9, 2011). Plaintiffs would have this Court overturn or ignore all of these policy decisions, bypass DEC's rulemaking procedure, and mandate different standards. Doing so would obviously convey a lack of the respect that is due to Alaska's political branches. *Cf. Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971) (holding that courts should not examine the wisdom of agency regulations). Plaintiffs' remedy for what they perceive as insufficient State efforts to reduce GHG emissions is through the rulemaking petition process, or ultimately, at the ballot box.

In the recent *AEP* decision, involving a federal common law nuisance claim by several states against several major GHG emitters, the United States Supreme Court explained some of the reasons why courts should refrain from setting GHG emission standards. Although the Supreme Court's decision dismissing the nuisance claim rested on a displacement-of-federal-common-law theory, rather than on political question grounds, the unanimous opinion makes it clear that the Supreme Court believed GHG emission standards should be set not by the courts but by agencies, subject to appropriate judicial review of the agency's action.

The Supreme Court noted that setting GHG emission standards requires an "informed assessment of competing interests" and "[a]long with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 131 S. Ct. at 2539. "The Clean Air Act

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entrusts such complex balancing to EPA in the first instance, in combination with state regulators." *Id.* "Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 2539-40. Trial judges are also handicapped, compared to agencies, in that they "are confined by a record comprising the evidence the parties present," and can bind the parties before them but no one else, not even other judges. *Id.* at 2540.

Agencies, on the other hand, can "commission scientific studies or convene groups of experts for advice, ... issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of [other] regulators." *Id.* Also, agency regulations properly promulgated have the force of law and can bind more than just the parties to a lawsuit. Accordingly, the Supreme Court concluded that it was "altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions." *Id.* at 2539.

The foregoing discussion applies with equal weight to Plaintiffs' public trust doctrine claims. State courts are as equally inept as federal courts at making policy in the area of GHG emissions. Accordingly, in light of the *Baker* factors, and for the reasons outlined in *AEP*, GHG emission standards in Alaska should be set by DEC or EPA through regulations, and not by individual judges in cases such as this. Plaintiffs' Complaint should be dismissed.

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B. The Doctrine Of Discretionary-Function Immunity Also Requires Dismissal Of The Complaint

Even if Plaintiffs' claim were not barred by the political question doctrine, it should still be dismissed on grounds of sovereign immunity. Plaintiffs frame their claim against the State as one for breach of fiduciary duty, which is a tort claim. *See Clemensen*, 203 P.3d at 1151 n.12. Under Alaska's Tort Claims Act, Alaska enjoys sovereign immunity with respect to tort actions "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency." AS 09.50.250(1). This exception to the State's waiver of sovereign immunity is known as discretionary-function immunity. *See, e.g., Brady v. State*, 965 P.2d 1, 16 (Alaska 1998). Because the State's approach to reduce GHG emissions is a discretionary act or omission it is immune from tort liability.

In *State v. Abbott*, the Alaska Supreme Court adopted the planning-operational test to determine whether a state act or omission was discretionary. 498 P.2d 712, 718 (Alaska 1972). Acts that involve planning, which are entitled to discretionary immunity, are "decisions involving questions of policy" determined by an "evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy." *Id.* at 720. Operational acts, which are not entitled to immunity, are "decisions relating to the normal day-by-day operations of the government." *Id.*; *see also Brady*, 965 P.2d at 16 (holding that the State's "policy-level decisions ... about whether to undertake activities" are immune); *Freeman v. State*, 705 P.2d 918, 920 (Alaska 1985) (holding that

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even though the State had a duty to maintain the Dalton Highway in a safe condition, the State's decision how to do that was a exercise of discretion immune from tort liability).

The State's approach to reduce GHG emissions involves discretionary acts or omissions that are immune from tort liability. Indeed, in *Brady* the Alaska Supreme Court concluded that the State enjoyed discretionary-immunity from a tort claim very similar to the one brought by Plaintiffs in this case. The plaintiffs in *Brady* alleged that the State was negligent in failing to stop a northern spruce bark beetle epidemic that was decimating the State's forests. *Brady*, 965 P.2d at 16. The *Brady* plaintiffs, citing the same provisions of article VIII that Plaintiffs cite, argued that the State held Alaska's forests in trust, and was wasting that public resource by failing to stop the epidemic. *Id.* at 16-17. They sought damages and an injunction requiring the State to protect the forests. *Id.* at 16.[16]

The Alaska Supreme Court had "little difficulty" finding the State immune from these public trust doctrine claims under AS 09.50.250(1). *Id.* The Supreme Court held that while the line between acts of policymaking and operational acts was sometimes "vague and wavering," "the broad failures that the Bradys attribute to the State fall well on the immune 'planning' side of the line." *Id.* Although the statutes and constitutional provisions cited by the plaintiffs obligated the State, as a general matter, to protect the forests, the plaintiffs' claims failed in *Brady* in part because they could not point to "statutes, regulations or policies prescribing *specific* courses of conduct that the State has

[16] Plaintiffs allege that climate change has caused a bark beetle epidemic and seek to compel the State to protect Alaska's forests. (Compl. ¶¶ 12, 61.) Thus, Plaintiffs' breach of fiduciary duty claim in part mirrors the claim dismissed in *Brady*.

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neglected or violated." *Id.* The Supreme Court held that "[p]lanning how to translate those broad commands [from article VIII and other sources] into policies, programs, and allocations of money and personnel is a quintessential 'discretionary function'" that is immune from tort liability:

> The prospect of having to apply the passages that the Bradys cite as tort standards reminds us of why we treat choices involving the assessment of competing priorities and allocation of scarce resources as discretionary functions. The DNR commissioner and his or her subordinates have a duty to make those policy-level decisions, but the Bradys cannot sue the State in tort over the decisions they make. *The proper remedies for unwise or unduly timid decisionmaking at that level are electoral, not judicial.* We thus conclude that the State is immune from the Bradys' tort claims regarding its management of its forests and response to the beetle epidemic.

Id. at 17 (emphasis added).

The Supreme Court's decision in *Brady* is controlling here. Just like in *Brady*, Plaintiffs claim that article VIII imposes a fiduciary duty on the State to protect public resources, fault the State for failing to adequately protect a public resource (here, the atmosphere), and ask this Court to order the State to comply with article VIII. But "[p]lanning how to translate th[e] broad commands [in article VIII] into policies, programs, and allocations of money and personnel is a quintessential 'discretionary function'" that is immune from tort liability. *Id.* Accordingly, Plaintiffs' Complaint should be dismissed.

C. Plaintiffs' Public Trust Doctrine Claim Is Meritless

The Complaint should also be dismissed because it relies on a flawed understanding of the public trust doctrine. Plaintiffs claim the public trust doctrine imposes an affirmative fiduciary duty on the State to protect and preserve natural

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resources held in the trust. They claim the atmosphere is a public trust resource of the type covered by article VIII and that the State has breached its fiduciary duty to protect and preserve it. Plaintiffs are wrong.

In Alaska, the common-law public trust doctrine, which has been incorporated into article VIII, is best understood as a doctrine of property law that can prevent the State from denying public access to certain natural resources. While Alaska courts have occasionally cited the doctrine to restrict State actions, they have not done so to impose specific affirmative duties on the State. Indeed, the Alaska Supreme Court has held that private trust principles, such as the fiduciary duty of a trustee, cannot be applied wholesale to the public trust doctrine embodied in article VIII. Furthermore, even if, as Plaintiffs claim, the State had an affirmative fiduciary duty to prevent the misuse of natural resources, that duty would not require the State to reduce GHG emissions because

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the atmosphere is not a public trust resource of the type covered by article VIII. For all of these reasons, the Complaint should be dismissed.[17]

(i) The public trust doctrine does not impose a fiduciary duty on the State to prevent public misuse of natural resources

The public trust doctrine appears to have been first judicially recognized in Alaska in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988). In *CWC Fisheries*, DNR conveyed a tideland lot to a company that in turn conveyed the lot to CWC Fisheries, Inc. ("CWC"). CWC brought an action alleging that Mr. Bunker was trespassing on its property by fishing the waters above the lot. *Id.* at 1116-17. The Court dismissed that claim, holding that the State holds title to tidelands and lands beneath navigable waterways within its borders "in trust for the people of the State that they may

[17] In support of their public trust doctrine claim, Plaintiffs' Complaint quotes dicta, taken out of context, from a few non-Alaska cases, none of which has any bearing on this case. Each case assessed a government's *authority* to take certain actions in light of the public trust doctrine; none imposed a *duty* on the government to act. For example, in Paragraphs 31 and 32 of the Complaint, Plaintiffs appear to quote dicta from the United States Supreme Court's decision in *Greer v. Connecticut*, apparently for the proposition that the "air" is a public trust resource, and that the state has a duty to "enact such laws as will best preserve the subject of the trust." 161 U.S. 519, 534 (1896). *Greer*, however, merely assessed a state's authority to restrict the transporting of wild game outside the state. The quotations in Paragraph 33 appear to originate from a New Jersey Supreme Court case, *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972), and a Washington Supreme Court case, *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998). *Neptune City* assessed an oceanfront municipality's authority to charge non-residents higher fees than residents for the use of its beach area. *Neptune City*, 294 A.2d at 298. *Weden* assessed a county's authority to ban the use of motorized personal watercraft, subject to certain limited exceptions, on all marine waters and one lake in that county. *Weden*, 958 P.2d at 276. The quotation in Paragraph 34 appears to originate from a New York district court case, *Town of Smithtown v. Poveromo*, 336 N.Y.S.2d 764, 775 (N.Y. Dist. Ct. 1972). *Poveromo* assessed a town's authority to outlaw the dumping of fill on wetlands owned by the defendant. *Poveromo*, 336 N.Y.S.2d at 767.

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enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* (quoting *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)). "The control of the State [over such lands and waters] for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* In all other cases, the State conveys lands beneath waterways "subject to continuing public easements for purposes of navigation, commerce, and fishery." *Id.* at 1118.

In subsequent cases the Alaska Supreme Court has consistently interpreted the public trust doctrine as a recognition in article VIII of a nontransferable public right of access to certain resources (usually waterways). *See, e.g., State, Dep't of Natural Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010) (holding that "[u]nder the public trust doctrine, the state holds title to the beds of navigable waters 'in trust for the people of the State'"); *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009) (holding that the State "has a 'property-like interest' in the waters of the [S]tate"); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994) (holding the public trust doctrine under article VIII limits that State's power to restrict a group's access to certain natural resources).

In other cases, the Court has rejected attempts to use the public trust doctrine to impose affirmative duties on the State. For example, in *Greenpeace, Inc. v. State Office of Mgmt. & Budget, Div. of Gov't Coordination & Alaska Coastal Policy Council*, an

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environmental group asked the Court to hold that article VIII required the State to broadly assess the cumulative environmental impacts of a proposal to develop an oilfield in the Beaufort Sea before allowing the project to go forward. 79 P.3d 591, 593 (Alaska 2003). Alaska statutes required the State to subject the project to a comprehensive review to determine its consistency with Alaska's coastal management standards; the environmental group argued article VIII imposed a "'public trust' responsibility" on the State to do more. *Id.* at 597. Specifically, the group claimed the State could not approve the project without requiring something akin to an environmental impact statement under the National Environmental Policy Act. *Id.* at 593. The Court rejected that invitation to extend the public trust doctrine, holding that nothing in article VIII "directly or indirectly suggests the need for such an analysis." *Id.* at 597. Similarly, article VIII does not require the State to prepare a full and accurate annual accounting of Alaska's CO_2 emissions.

In *Brooks v. Wright* the Court also made it clear that the public trust doctrine and article VIII do not impose affirmative fiduciary duties on the State. In that case, a group of citizens and community organizations argued that the Court "should apply basic principles of private trust law to the trust-like relationship described in article VIII," but the Court rejected that invitation. 971 P.2d 1025, 1031 (Alaska 1999). Instead, the Court 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. The Court further stated that "the purpose of the public trust doctrine was not to grant the legislature ultimate authority over

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natural resource management, but rather to prevent the state from giving out 'exclusive grants or special privilege as was so frequently the case in ancient royal tradition.'" *Id.* (quoting *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493 (Alaska 1988)). Thus, the State acts as "trustee" over certain natural resources "not so much to avoid *public* misuse of these resources as to avoid the state's improvident use or conveyance of them." *Id.*[18]

Here, Plaintiffs make the same argument the Alaska Supreme Court rejected in *Brooks*. Namely, they claim that under article VIII the State has "an affirmative and fiduciary duty to protect and preserve the atmosphere as a commonly shared public trust resource ... by establishing and enforcing limitations on the levels of [GHG] emissions." (Compl. ¶ 4.) But in *Brooks* the Court rejected the notion that the public trust doctrine imposes affirmative fiduciary duties on the State, holding instead that the doctrine merely "prevent[s] the state from giving out 'exclusive grants or special privilege[s]'" in certain natural resources. *Brooks*, 971 P.2d at 1033. Plaintiffs do not claim that the State has granted anyone an exclusive grant or special privilege to use the atmosphere or emit GHGs. Instead they ask this Court to extend the public trust doctrine and impose

[18] In the past the Court has characterized the State's duty with respect to natural resources as a "fiduciary duty." *See, e.g., Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998). However, in *Brooks* the Court made it clear that the State's "fiduciary duty" does not include an affirmative duty to prevent public misuse of natural resources. *Brooks*, 971 P.2d at 1033. The Court stated that applying general trust law principles to the public trust doctrine can limit or destroy the democratic process: "It would be a strict violation of democratic principle for the original voters and legislators of a state to limit, through a trust, the choices of the voters and legislators of today." *Id.* (quoting James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 Envtl. L. Rev. 527, 544 (1989)).

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affirmative fiduciary duties that the Alaska Supreme Court has rejected. As a result, Plaintiffs' Complaint should be dismissed.

(ii) The atmosphere is not the type of public trust resource covered by article VIII

Even if article VIII did impose an affirmative fiduciary duty on the State to prevent misuse of natural resources, Plaintiffs' claim would still have no merit because the atmosphere is not the type of public trust resource covered by article VIII. The sections of article VIII that Plaintiffs cite in the Complaint refer to several natural resources, including "land," "water," "fish," "forests," "wildlife," and "grasslands," but do not mention the atmosphere. (Compl. ¶¶ 25-30.) The legislature recognized this distinction when it created DNR, assigning it the task of "administer[ing] the state program for the conservation and development of natural resources," and mentioning several resources specifically but not the atmosphere. AS 44.37.020. Instead, the legislature directed DEC to implement the State's air quality program. AS 46.14.010.

Only sections 2 and 4 of article VIII appear to leave any room for additional, unmentioned resources. Section 2 states that "[t]he 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." (emphasis added). The minutes from the constitutional convention make it clear this section was only intended to apply to resources "over which the state has a proprietary interest." Minutes of the Constitutional Convention, January 18, 1956. The atmosphere above Alaska does

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not fit into this category because Alaska does not possess the atmosphere and has no control over its composition.

Air continuously circulates around the world. The air over the State on one day will be over another part of the world on another. Thus, the State cannot be said to possess the atmosphere in the way it possesses the lands and navigable waterways of the State. The State also has little to no control over the composition of Alaska's atmosphere with respect to the concentration of GHGs. GHGs are somewhat unique in that they are both well-mixed and long-lived in the atmosphere, so that concentrations of GHG at a given time are determined by the emissions of all GHG sources worldwide over centuries, rather than by emissions from local, contemporaneous sources. *See* 75 Fed. Reg. 31514, 31529 (June 3, 2010). Even if Alaska were to ban all GHG emissions, that would have little to no effect on the concentration of GHGs in Alaska's atmosphere. For these reasons, the atmosphere is not the type of resource that the constitutional Framers intended to be managed under article VIII, section 2, as a resource "belonging to the State."

Section 4 of article VIII also does not apply to the atmosphere. Section 4 provides that "*replenishable resources belonging to the State* shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." (emphasis added). Like section 2, section 4 only applies to resources "belonging to the State," which does not include the atmosphere. Moreover, section 4 only applies to "replenishable resources." The composition of the atmosphere can be altered, but the quantity of air is largely fixed and cannot reasonably be "replenished" in the way that fish

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and timber can be. For these reasons, the atmosphere is not a public trust resource, at least not in the same way as are the natural resources enumerated in article VIII.

III. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIM

Even if Plaintiffs' public trust doctrine claim had any merit, which it does not for the reasons discussed above, the Complaint should still be dismissed for lack of standing. First of all, Plaintiffs have not alleged that they have a sufficient personal stake in the outcome of the debate over how to address climate change. Second, Plaintiffs admit that GHG emissions in Alaska have not caused climate change. Third, Plaintiffs admit that reducing GHG emissions in Alaska will not prevent further climate change. For all of the reasons, Plaintiffs lack standing to pursue their claim.

A. Applicable Legal Principles

Alaska law recognizes two different theories of standing: interest-injury standing and citizen-taxpayer standing. *See Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987). Only interest-injury standing is at issue here. "Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of." *Id.* This means the plaintiff must have a "sufficient personal stake in the outcome of the controversy," sometimes called the "injury-in-fact" requirement. *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1040 (Alaska 2004). The interest adversely affected may be economic, or intangible, such as an aesthetic or environmental interest. *Trustees*, 736 P.2d at 327. "However, while Alaska's standing rules are liberal this court should not issue advisory opinions or resolve abstract questions of law." *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097-98 (Alaska 1988). The court "should only

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hear cases in which a genuine adversarial relationship exists regarding an interest-injury." *Id.*

B. Plaintiffs Lack A Sufficient Personal Stake In This Case

In *Wagstaff v. Superior Court*, the Alaska Supreme Court explained that the "injury-in-fact" requirement "serves to distinguish a person with a direct stake in the outcome of litigation-even though small-from a person with a mere interest in the problem." 535 P.2d 1220, 1225 (Alaska 1975) (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)). In Alaska, "[w]hile the injury-in-fact requirement has been relaxed, it has not been abandoned, as it is necessary to assure the adversity which is fundamental to judicial proceedings." *Id.* If there ever were a case brought by plaintiffs with a mere interest in a problem, as opposed to a direct stake in the outcome of litigation, this is that case. Based on their allegations, Plaintiffs certainly appear concerned about climate change. But that concern is not enough to satisfy the "injury-in-fact" requirement. If it were, then every person in Alaska could bring this case. A standing requirement that does not distinguish Plaintiffs from any other person in Alaska is no requirement at all.

In *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466 (D.C. Cir. 2009), the Court of Appeals for the District of Columbia Circuit dismissed, on standing grounds, a claim alleging harm based on climate change. In that case, an environmental group challenged a decision by the United States Department of Interior to approve expanded leasing areas within the outer continental shelf off the coast of Alaska for offshore oil and gas development in part on the ground that the decision failed to

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consider the effects of expanded development on climate change. 563 F.3d at 471. The court dismissed the petition in part because the plaintiff could not meet the injury-in-fact requirement:

> [C]limate change is a harm that is shared by humanity at large, and the redress that Petitioners seek-to prevent an increase in global temperature-is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore Petitioners' alleged injury is too generalized to establish standing.

Id. at 478.

This Court should find that Plaintiffs also do not meet the injury-in-fact requirement. Although that requirement is relaxed in Alaska, it remains a prerequisite for standing. Allowing Plaintiffs to bring this suit based only on their concern about climate change – a concern undoubtedly shared by everyone if Plaintiffs' allegations prove true – would constitute an abandonment of a requirement that is "necessary to assure the

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adversity which is fundamental to judicial proceedings." *Wagstaff*, 535 P.2d at 1225. Thus, Plaintiffs' Complaint should be dismissed.[19]

C. Plaintiffs Admit That GHG Emissions From Alaska Have Not Caused Climate Change

Plaintiffs' Complaint should also be dismissed because Plaintiffs do not allege that emissions from Alaska have caused or will cause any harm. Instead, Plaintiffs believe climate change is caused by the "substantial increase in the atmospheric concentrations of heat-trapping greenhouse gases," which has been caused by "more than 200 years" of burning fossil fuels. (Compl. ¶ 35.) The State is obviously not responsible for centuries of GHG emissions from around the globe. Because Plaintiffs do not allege that the State has caused their harms, they lack standing to sue the State. *See, e.g., Neese*, 210 P.3d at 1219 (holding that the plaintiffs lacked standing to sue automobile dealerships that caused them no harm); *Kivalina*, 663 F. Supp. 2d at 878-82 (holding that an Alaskan

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[19] Were the Court to find that Plaintiffs have alleged an injury-in-fact, then the Complaint should be dismissed for failure to join indispensable parties. *See* Alaska Civil Rules 19(a) & (b). If Plaintiffs can bring this suit, then so can every other Alaskan. Some absent Alaskans might agree with Plaintiffs that GHG emissions should be reduced by 6% on a yearly basis; others might view that reduction as too high or low. Unless they were added as parties to this case, all of these absent Alaskans would be unable to protect their interest in having what they believe to be the appropriate level of GHG emissions determined by a court. Accordingly, these absent Alaskans are "persons to be joined if feasible." Alaska Civil Rule 19(a). Every other Alaskan must also be joined because in their absence the State would be subject to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations" relating to GHG emissions. *Id.* Absent Alaskans dissatisfied with the Court's judgment in this case would not be collaterally estopped from bringing a subsequent case to determine the appropriate level of GHG emissions in Alaska (such cases could be filed over and over again). Because it is not possible to join every Alaskan in this case, and because Plaintiffs have an adequate alternative remedy – namely, the ability to seek reductions in GHG emissions through the political process – this case should be dismissed. *See* Alaska Civil Rule 19(b).

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native village did not have standing to sue energy and utility companies for damages related to GHG emissions because its alleged injuries were due to global warming and were not traceable to the defendants).

D. Plaintiffs Admit That The Relief They Request Will Not Redress Their Harms

Plaintiffs also lack standing because they acknowledge that reducing GHG emissions in Alaska will not prevent or reverse climate change. Rather, Plaintiffs rightly concede that reducing atmospheric GHG concentrations and preventing further climate change requires global action. They allege the "best available science" shows that harmful climate change can only be prevented if "sovereign governments" take immediate action to reduce the concentration of atmospheric CO_2 from 390 to 350 ppm by the end of this century. (Compl. ¶¶ 38-44.) Because the injunctive relief Plaintiffs request would serve only to reduce GHG emissions from Alaska, and would not redress or prevent any of Plaintiffs' alleged harms, Plaintiffs lack standing. *See Peter A. v. State, Dep't of Health & Social Servs., Office of Children's Servs.*, 146 P.3d 991, 996 (Alaska 2006) (holding that appellant lacked standing to request relief that would not have redressed his alleged injury); *Shearer v. Mundt*, 36 P.3d 1196, 1199 (Alaska 2001) (same); *cf. U.S. ex rel. Greathouse v. Dern*, 289 U.S. 352, 360 (1933) (holding that a court of equity should not "compel the doing of an idle act").

Plaintiffs' proposal to impose mandatory reductions on GHG emissions in Alaska may even prove counterproductive. Courts and commentators agree that regulating GHGs in only one region may actually increase global emissions. This phenomenon,

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called "carbon leakage," occurs when carbon emitters shift their operations to less-regulated regions. *See, e.g., North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010) ("Indeed, a patchwork of nuisance injunctions could well lead to increased air pollution."); Rachel Brewster, *Stepping Stone Or Stumbling Block: Incrementalism & National Climate Change Legislation*, 28 Yale L. & Policy Rev. 245, 270-71 (2010) (explaining carbon leakage).

In sum, while Plaintiffs identify aesthetic and environmental harms they have suffered, these harms are common to all Alaskans. Plaintiffs therefore do not have a sufficient personal stake in the outcome of this case. Also, the State has not caused those harms. Nor can the State remedy these harms because it cannot, by itself, reduce atmospheric concentrations of GHGs. Most commentators agree with Plaintiffs that preventing climate change requires global action. *See, e.g.*, Brewster, *supra* at 277 ("In sum, policymakers and academics alike acknowledge that the only means of successfully addressing the threat of climate change is an international agreement that includes the major greenhouse gas producers and most of the potential major greenhouse gas producers."). Finally, the injunction that Plaintiffs seek may lead to increased global GHG emissions and cause Plaintiffs more harms. For all of these reasons, there is no adversarial relationship between the State and Plaintiffs.

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CONCLUSION

For all of these reasons, Plaintiffs' Complaint should be dismissed.

DATED August 12, 2011.

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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,

v.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Case No. 3AN-11-07474 CI

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs Nelson Kanuk, Adi Davis, Katherine Dolma, Ananda Rose Ahtahkee Lankard, Avery and Owen Mozen, by and through their respective guardians (collectively "Our Children") respectfully submit this response to the motion to dismiss filed by Defendant State of Alaska ("State") Through their complaint, Our Children seek a declaration that the atmosphere is a public trust resource, that the State has breached its public trust obligations under Article VIII of the Alaska Constitution, and that the State is obligated to protect and preserve the atmosphere by establishing and enforcing limitations on the levels of greenhouse gas ("GHG") emissions as necessary to slow the rate and magnitude of global warming so as to prevent climate change from denying Our Children and Alaskans a livable future. Complaint at ¶ 4.

Humanity, and especially Our Children and future generations, face an atmospheric crisis of epic proportions. Id. at ¶¶ 35-44. According to data from the National Oceanic and Atmospheric Administration ("NOAA") and the National Aeronautics and Space Administration ("NASA"), the Earth's average surface temperature has increased by about 0.8°C (1.4°F) in the last 100-150 years. Id. at ¶ 35. In fact, the eight warmest years on record (since 1850) have all occurred since 1998. Id. Coupled with the increase in the temperature of the earth, other aspects of the climate are also changing, such as rainfall patterns, snow and ice cover, and sea levels. Id.

The State's Department of Environmental Conservation ("DEC") estimated that, in 2005, gross Alaskan emissions of greenhouse gases were 52.82 million metric tons of carbon dioxide equivalent ("MTCO2e"), a rise of more than 23% from 1990 emissions

levels. Id. at ¶ 50. ADEC also projected that by 2020, gross Alaskan emissions of greenhouse gases would rise to 61.5 MTCO2e. Id. Alaska's annual emissions are similar to those of Oregon, Nevada, and Connecticut -- all states that have 3.5-7 times the population of Alaska. Id. DEC has also identified many significant, life-altering impacts, such as increased coastal erosion and displacement of coastal communities, melting of arctic tundra and taiga resulting in the damage of Alaska's infrastructure, warmer summers resulting in insect infestations, more frequent and larger forest fires, the alteration of Alaska's boreal forests, decreased arctic ice cover resulting in loss of habitat and prey species for marine mammals, and changes in terrestrial and oceanic species abundance and diversity resulting in the disruption of the subsistence way of life. Id. at ¶ 52.

The best available science shows that to protect Earth's natural systems, average global peak surface temperature must not exceed 1° C above pre-industrial temperatures this century. Id. at ¶ 38. To prevent global heating greater than 1° C and to protect Earth's oceans (an essential harbor of countless life forms and absorber of GHGs), concentrations of atmospheric CO2 must decline to less than 350 ppm by the end of this century. Id. However, today's atmospheric CO2 levels exceed 390 ppm and are steadily rising. Id.

Despite this scientific data and its own departments' dire forecast, the State has done next to nothing to address GHG emissions. Id. at ¶¶ 45-49. Other than forming a sub-cabinet to study climate change and the sub-cabinet's publication of a couple of reports recommending a number of measures to address climate change, the State has not

taken any affirmative action to control and reduce GHG emissions. Id. Our Children, whose ages range from an infant to teenagers, seek to change this through application of the public trust doctrine as provided for in Article VIII of the Alaska Constitution to the atmosphere. Id. at ¶ 25. The public trust doctrine is a legal mandate establishing a sovereign obligation in states to hold critical natural resources in trust for the benefit of its citizens. Id. The theory underlying the public trust doctrine can be traced to ancient times, where the things which are naturally everybody's, such as "air, flowing water, the sea, and the sea-shore" were codified in Roman law. Caesar Flavius Justinian, The Institutes of Justinian, Book II, Title I, Of the Different Kind of Things (533). The public trust doctrine has since evolved and been judicially enforced, beginning in the United States with the U.S. Supreme Court's seminal case on the subject, Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

Yet, the State wishes to deny Our Children the right to have their complaint heard by this Court. The State asserts that Our Children's complaint should be dismissed for allegedly failing to state a claim upon which relief can be granted and lack of standing. However, for the reasons that follow, the Court should allow Our Children's complaint to move forward.

II. ARGUMENT

A. Our Children State a Claim Upon Which Relief Can be Granted

1. Standard of Review

Alaska courts view motions to dismiss for failure to state a claim upon which relief can be granted with disfavor and should only grant them on rare occasions. Neese

v. Lithia Chrysler Jeep of Anchorage, Inc., 210 P.3d 1213, 1217 (Alaska 2009) citing Angnaboorguk v. State, 26 P.3d 447, 451 (Alaska 2001)(internal quotation marks omitted). In reviewing a motion to dismiss, Alaska courts broadly construe the complaint, treat all factual allegations in the complaint as true, and make all reasonable inferences in favor of the non-moving party. Jacob v. State, 177 P.3d 1181, 1184 (Alaska 2008); Rathke v. Corr. Corp. of America, Inc., 153 P.3d 303, 308 (Alaska 2007). It is only appropriate to grant such motions where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief. Clemensen v. Providence Alaska Medical Center, 203 P.3d 1148, 1151 (Alaska 2009). In other words, "the complaint need only allege a set of facts consistent with and appropriate to some enforceable cause of action." Odom v. Fairbanks Mem'l Hosp., 999 P.2d 123, 128 (Alaska 2000)(internal quotation marks omitted).

2. Our Children's Complaint Is Justiciable

The State asserts that Our Children's complaint seeks to resolve a nonjusticiable political question -- that "[h]ow to reduce Alaska's GHG emissions is clearly a political question that cannot be resolved by the judiciary." State's Motion, pp. 11-12. The State reasons that four of the six factors indicative of a nonjusticiable political question that were identified in Baker v. Carr, 369 U.S. 186, 217 (1962) are present in this case. Id. at 12-15. However, in applying these factors, the State mischaracterizes Our Children's complaint and the requests made therein. Our Children are not asking the Court to dictate "how" the State is to reduce GHG emissions. Rather, Our Children seek application of the long-established public trust doctrine, embodied in the Alaska Constitution, to the

atmosphere. Our Children also seek a determination that the State has violated its fiduciary obligation to preserve and protect the atmosphere as a public trust resource. Simply because the complaint concerns a politically contentious and controversial issue does not make it a nonjusticiable political question. See Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2nd Cir. 2009) (". . . the political question doctrine must be cautiously invoked, and simply because an issue may have political implications does not make it non-justiciable . . .") (internal citations and quotations omitted); Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. Cal. 2005) ("Simply because . . . the case arises out of a 'politically charged' context does not transform the [] [c]laims into political questions.").

The political question doctrine is based on separation of powers concerns and addresses those extraordinary situations where courts must defer from exercising their constitutional role. Baker, 369 U.S. at 216. It serves to prevent courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch. Koohi v. U.S., 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 W. Coal Co., 400 F.3d 774, 785 (9th Cir. 2005). Precisely defining the contours of the doctrine of justiciability is inherently difficult and requires considering "the actual hardship to the litigants of denying them the relief sought." Abood v. League of Women Voters of Alaska, 743 P.2d 333, 336 (Alaska 1987) citing Poe v. Ullman, 367 U.S. 497, 508-09 (1961).

Nor will merely characterizing a case as political in nature render it immune from judicial scrutiny. Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982). To identify those rare nonjusticiable political questions, Alaska courts utilize the approach adopted in Baker. Abood, 743 P.2d at 336-37. In Baker, the U.S. Supreme Court identified six factors, the presence of which demonstrates the existence of a nonjusticiable political question:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 216. Unless one of the six formulations identified therein "is inextricable from the case at bar, there should be no dismissal for nonjusticiablity on the ground of a political question's presence." Baker, 369 U.S. at 217. This is a high bar that the State has failed to meet here.

a. There Is No Textually Demonstrable Commitment Of The Issue To A Coordinate Political Department.

The State asserts that the first Baker factor is present because Article VIII, Section 2 of the Alaska Constitution "expressly commits to the legislature the authority to 'provide for the utilization, development, and conservation of all natural resources belonging to the State.'" State's Motion, p. 13. Relying on this language, the State argues its policy determinations concerning GHG emissions are exempt from judicial

review. Id. However, Our Children are not seeking judicial review of the State's policy determinations. The State does not even have a climate change policy that can be reviewed. Rather, Our Children are asking the Court to review and enforce their claims that the State has violated its fiduciary duties as trustee of the public trust concerning the atmosphere. Complaint at ¶ 4. While the legislature may be charged with enacting laws regarding the utilization, development and conservation of natural resources within the State, the foundation of public trust law is built upon the understanding that the "judiciary has a responsibility to examine whether the legislature has acted within the bounds of its regulatory power [and] to examine whether the state [as trustee] has acted in conformity with its 'special obligation to maintain the public trust.'" See Melissa Kwaterski Scanlan, The Evolution of the Public Trust Doctrine and the Degradation of Public Trust Resources: Courts, Trustees and Political Power in Wisconsin, 27 Eco. L. Quarterly 135. 146 (200)(quoting Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 511 (1970)). As the court in Native Village of Kivalina v. Exxonmobil Corp., 663 F.Supp.2d 863, 871 (N.D. Cal. 2009) stated, a mandate to regulate a certain area of law is not the equivalent of delegating exclusive power to resolve that issue to another branch.

Judicial review of legislative and executive actions regarding public trust resources forms the bedrock of the separation of powers doctrine that protects the public from the abuses and violations of law. Pursuant to the public trust doctrine, the sovereign is inherently responsible for the management and protection of critical natural resources. See Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, 671 P.2d 1085, 1092 (Idaho

1983). The judiciary's responsibility for reviewing legislative and executive actions under the public trust doctrine is rooted in their "constitutional commitment to the checks and balances of a government of divided powers" and provides a crucial and exclusive remedy for the public when the legislative or executive branches violate their duties as trustee of natural resources. Ariz. Ctr. for Law in the Pub. Interest v. Hassel, 837 P.2d 145, 168 (Ariz. Ct. App. 1991).

Moreover, the Alaska Constitution does not vest the legislature with exclusive authority over natural resource decisions. In Brooks v. Wright, 971 P.2d 1025 (Alaska 1999), then Lieutenant Governor Fran Ulmer certified a citizen ballot initiative which, if passed, would have prohibited the use of snares to trap wolves. Id. at 1026. Two citizens and community organizations subsequently sued the State challenging the constitutionality of the initiative, arguing that the legislature had exclusive law-making power with respect to wildlife management issues. Id. However, the Brooks Court rejected that argument, holding that there was "little support in the public trust line of cases for the proposition that the common use clause of Article VIII grants the legislature exclusive power to make laws dealing with natural resource management,"-and refused to decertify the initiative. Id. at 1033. See also Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996) (declining to hold that the public trust doctrine gives the legislature exclusive law-making authority over the subject matter of Article VIII).

The State's argument erroneously attempts to equate its public trust obligations with its police power to manage and regulate natural resources. Several public trust cases make it very clear that the State's public trust responsibilities are more than a restatement

of the State's police powers. Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1010 (Haw. 2006)("[t]he king's reservation of his sovereign prerogatives respecting water constituted much more than a restatement of police powers, rather we find that it retained on behalf of the people interest in the waters of the kingdom which the state has an obligation to enforce...."); Ill. Central R.R. Co., 146 U.S. at 453 ("The state can no more convey or give away this jus publicum interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.' "). Indeed, some courts have invalidated legislative action that, while taken pursuant to police power, violated the public trust. Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs, 742 F. Supp. 441, 445 (N.D. Ill. 1990) (invalidating legislative land grant). The public trust doctrine acts as constitutional limitation on legislative power. San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (holding that the state legislature cannot remove public trust restraints on its powers by passing a bill to eliminate public trust doctrine from applying to water rights adjudication); see also State v. Bowens, 953 P.2d 888, 896 n. 12 (Alaska 1998)("It is within the province of this court to determine constitutional issues and deprivation of constitutional rights"); Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 (Alaska 1992) (holding court would determine whether the procedures employed by hospital conformed to Alaska Constitution and were in accordance with basic principles of fairness and due process of law). Accordingly, the Alaska Constitution does not vest the legislature with exclusive authority concerning natural resource decisions and the first Baker factor is not present in this case.

b. Lack Of Judicially Discoverable And Manageable Standards

The State also claims that there are no judicially discoverable and manageable standards to guide the Court's review of the State's policy concerning GHG emissions. State's Motion, p. 13. The State narrowly asserts neither Article VIII of the Alaska Constitution nor Alaska cases provide any standards and therefore Our Children's concerns should be directed to Alaska's political branches. Id. The State is correct that the Alaska Constitution and Alaska cases do not provide any standards to guide the Court in "reviewing the State's policy concerning GHG emissions." However, this case is not about reviewing State policy concerning GHGs. Rather, it is about applying the long-standing and well-established public trust doctrine. Simply because Our Children are asking the Court to declare the atmosphere a public trust resource -- a case of first impression in Alaska -- does not mean that there are no judicially discoverable and manageable standards to resolve this issue. On the contrary, the public trust doctrine is of ancient origin and courts have been adjudicating such cases ever since both in Alaska and elsewhere. As such, judicially discoverable and manageable standards are available to enable the Court to resolve this matter.

The focus of the second Baker 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, rational, and based upon reasoned distinctions.'" Alperin, 410 F.3d at 547; see also Lobato v. State, 218 P.3d 358, 369 (Colo. 2009) ("most important constitutional provisions, including ones that courts have never hesitated to interpret, are written in broad, open-textured language and certainly do not include judicially

discoverable and manageable standards"). Thus, "[i]nstead of focusing on the logistical obstacles," the relevant inquiry is whether the judiciary is granting relief in a reasoned fashion versus allowing the claims to proceed such that they "merely provide 'hope' without a substantive legal basis for a ruling." Id. This Court can do just that.

The main thrust of this case is the determination of whether the public trust doctrine applies to the atmosphere. In making such a determination, the Court can look at the evolution of the doctrine from ancient Roman law, where it was determined that "[t]he things which are naturally everybody's are: air, flowing water, the sea and the sea-shore" to English common law, where it was determined that "[t]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common ... [s]uch (among others) are the elements of light, air, and water..." to early American law recognizing the public trust doctrine was needed as bulwark to protect resources too valuable to be disposed of at the whim of the legislature. See, respectively, Caesar Flavius Justinian, The Institutes of Justinian, Book II, Title I, Of the Different Kind of Things (533); 2 William Blackstone, Commentaries on the Laws of England 4 (1766); and Ill. Cent. R.R., 146 at 453. American courts have been adjudicating public trust cases ever since. Accordingly, there is long-standing precedent that can guide this Court in determining whether the atmosphere is a "property of special character" evoking the protection of the public trust doctrine and grant relief in a reasoned fashion. See Ill. Cent. R.R., 146 U.S. at 454.

c. This Court Need Not Make Any Initial Policy Determinations.

The State asserts that the Court cannot decide this matter without making an initial policy determination of a kind clearly for non-judicial discretion. State Motion, p. 13. The State argues that Our Children "would have this Court require, as a matter of Alaska constitutional law, specific reductions in GHG emissions over decades, rendering the other branches of government powerless to govern in this area absent a constitutional amendment." Id. at p. 14. Such argument goes too far. Our Children are asking this Court to apply the public trust doctrine to the atmosphere and to determine that the State has violated its fiduciary duty to protect this public trust asset. Our Children's request for relief is actually the opposite of what the State argues. Our Children are not asking the Court to prevent the legislative and executive branches from acting. Rather, Our Children seek to force the other branches of government to exercise their sovereign authority to address the climate change crisis.

As set forth in the complaint's allegations, which must be accepted as true for purposes of the State's motion to dismiss, Our Children assert that the State has failed to act to protect the atmosphere in violation of its duties under the public trust doctrine. Complaint at ¶ 4. In Connecticut, 582 F.3d at 330, the court addressed Congress's refusal to regulate carbon dioxide emissions.[1] The Second Circuit held that "Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the

[1] The State unconvincingly relies upon the U.S. Supreme Court's decision is Am. Elec. Power Co. v. Connecticut, ___ U.S. ___, 131 S.Ct. 2527 (2011)("AEP") to undermine the authority of this Court to fashion an appropriate remedy in this case. However, AEP explicitly left open for consideration the question of whether state common law claims may be used to address climate change, 131 S.Ct. at 2540, and did not disturb the Second Circuit's ruling that common law nuisance claims related to climate change did not present nonjusticiable political questions. 582 F.3d at 332.

existing common law in that area." Id. (citation omitted.) The Second Circuit reasoned that "if regulatory gaps exist, common law fills those interstices." Id. As support, the Second Circuit cited the U.S. Supreme Court's decision in Illinois v. City of Milwaukee, 406 U.S. 91 (1972), in which Illinois sought a pollution abatement remedy that was not covered by the numerous laws touching interstate waters. Id. In that case, the U.S. Supreme Court stated:

> It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

Illinois, 406 U.S. at 107. Illinois thus stands for the proposition that

> if the extant statutes governing water pollution do not cover a plaintiff's claim and provide a remedy, a plaintiff is free to bring its claim under the federal common law of nuisance; a plaintiff is not obliged to await the fashioning of a comprehensive approach to domestic water pollution before it can bring an in action to invoke the remedy it seeks.

Connecticut, 582 F.2d at 330. Accordingly, the Second Circuit held that

> [s]imilarly, the fact that the Clean Air Act or other air pollution statutes, as they now exist, do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a 'comprehensive' global solution to global warming. Rather, Plaintiffs here may seek their remedies under federal common law. They need not wait an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century.

Id. at 331. Likewise, in the present case, Our Children need not wait to bring an action under the public trust doctrine until the State crafts a strategy for addressing GHG emissions.

Accordingly, Our Children are not asking the Court to make an initial policy determination or tell the State how to address GHG emissions. They are not trying to prevent the State's legislative and executive branches from acting. On the contrary, they are asking the Court to apply the long-standing public trust doctrine to the atmosphere and require the State to take action to protect it as they are required to do other public trust resources. Thus, the third Baker factor is not implicated here.

d. The Court May Undertake Independent Resolution Of The Case Without Expressing Lack Of Respect Due Coordinate Branches Of Government.

The State asserts that the fourth Baker factor is present because the Court "cannot undertake an independent assessment of the State's policy concerning GHG emissions without expressing a lack of respect for decisions made by Alaska political branches." State's Motion, p. 14. The State claims that "the executive and legislative branches have studied the subject and issued several reports," that the State has joined a regional initiative formed to reduce GHG emissions albeit as an observer only, and that the State has begun regulating GHG emissions by following the approach of the federal Environmental Protection Agency ("EPA"). Id. at pp. 14-15. However, none of Alaska's political branches have treated the atmosphere as a public trust resource or sought to protect the atmosphere for the benefit of present and future generations. By determining the atmosphere is a public trust resource and finding the State has violated its fiduciary duty to protect such asset, the Court would not be expressing a lack of respect due the State's legislative and executive branches where the State has only issued a couple of reports and joined an initiative as an observer. Likewise, such action by the Court would

not disrespect the State's decision to regulate GHG emissions when the EPA has determined that GHG emissions contribute to air pollution which endangers the public health and welfare.

In Connecticut, the Second Circuit stated that the fourth Baker factor appears "to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." Connecticut, 582 F.3d at 331. This is simply not the case here. As Our Children allege in their complaint, the only action taken by the State to address GHG emissions is the formation of the Alaska Climate Change Sub-Cabinet in 2007 and the few reports it has produced.[2] See Complaint at ¶¶ 45-47. Moreover, this sub-cabinet made many recommendations to address climate change, from energy transmission optimization to reducing fugitive methane emissions to carbon capture to establishing an Alaska GHG emission reporting program. Id. at ¶ 49. The State has not implemented these recommendations. Id. Moreover, the DEC outlined several expected impacts of climate change on Alaska, such as increased coastal erosion to melting arctic tundra to increased forest fires to a decrease in arctic ice resulting in the loss of habitat and prey species for marine mammals. Id. at ¶ 52. The actions that Our Children ask this Court to take certainly do not contradict such pronouncements or amount to a lack of respect for the State's legislative and executive branches.

[2] Again, it is important to note that, for the purposes of the State's motion to dismiss, the allegations set forth in Our Children's complaint are to be treated as true and all reasonable inferences are to be made in favor of the non-moving party.

3. The State's Discretionary-Function Immunity Does Not Apply

The State asserts that Our Children's claim is a tort claim and therefore should be dismissed on the grounds of sovereign immunity. State's Motion, p. 17. Since Our Children framed their claim as a breach of fiduciary duty under the Alaska Constitution to protect trust resources, the State contends it is a tort claim. Id. As such, the State argues the Alaska Tort Claims Act immunizes it from tort actions based upon the exercise or failure to exercise a discretionary function or duty on the part of a state agency. Id. However, Our Children's claims do not lie in tort. Rather, Our Children's claims are based on the public trust doctrine which is *sui generis,* and arises from property law with constitutional and sovereignty elements. Thus, the State's claim that it is immune from Our Children's public trust challenge is without merit.

As an initial matter, Our Children, beneficiaries of the public trust, must be allowed to bring a suit to protect trust resources. The State's claim that it is immune from public trust challenges would render the public trust doctrine meaningless if beneficiaries were unable to sue the trustee to ensure protection of public trust assets. Such a defense also flies in the face of the judiciary's historical treatment of the public trust doctrine, both in Alaska and elsewhere. See Owsichek v. State, 763 P.2d 488 (Alaska 1988)(applying the public trust doctrine to the State's assignment of exclusive guide areas); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 716 (Cal. 1983)(any beneficiary of the public trust has "standing to sue to protect the trust"); Ctr. for Biological Diversity, Inc. v. FPL Group, Inc. 166 Cal. App. 4th 1349, 1366 (Cal. Dist. Ct. App. 2008)(the suggestion that members of the public have no right to object if agencies

entrusted with the preservation of wildlife fail to discharge their responsibilities is contrary to the holding in Nat'l Audubon Society and to the entire tenor of cases recognizing the public trust doctrine); see Kapiolani Park Preservation Soc'y v. City & Cnty. of Honolulu, 751 P.2d 1022, 1025 (Haw. 1989)("the citizens of the state would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the [public] trust, have standing to bring the matter to the attention of the court"). Accordingly, Our Children have the right to sue the State for violation of the public trust doctrine.

Because Our Children's claims do not lie in tort, the State's discretionary function immunity is not implicated. The Alaska Tort Claim Act provides that a person may bring a contract, quasi-contract or tort claim against the State unless it is 1) an action for tort and 2) based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency. AS 09.50.250. As such, the discretionary function immunity exception to the State's liability does not apply to claims that are not based in tort. As noted supra, Our Children's claim is based upon the public trust doctrine which is *sui generis* and rooted in property law with constitutional and sovereignty elements. "The public trust is a fundamental doctrine of American property Law...." Harrison C. Dunning, The Public Trust: A Fundamental Doctrine of American Property Law, 19 Envtl. L. 515, 516 (1989); see also D. Slade et al., Coastal States Organization, Inc., Putting the Public Trust Doctrine to Work (1997)("Public trust lands are special in nature ... Because of the 'public' nature of trust lands, the title to them is not a singular title in the manner of most other real estate titles. Rather, public trust land

is vested with two titles: the jus publicum, the public's right to use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes, and the jus privatum, or the private proprietary rights in the use and possession of trust lands."); Pebble Ltd. P'ship v. Parnell, 215 P.3d 1064, 1074 (Alaska 2009)(public trust responsibilities imposed by Article VIII of the Alaska Constitution create a property-like interest in natural resources); Owsichek, 763 P.2d at 493 (the "common use" clause in the Alaska Constitution emanates from the ancient traditions in property rights which recognized that title to wildlife and natural resources remained with the sovereign and, in the American system of governance with its concept of popular sovereignty, title is reserved on behalf of the people); Weden v. San Juan County, 958 P.2d 273283 (Wash. 1998)(the public trust doctrine "reserves a public property interest, the jus publicum, in tidelands and the waters flowing over them"). Indeed, the State itself stated the public trust doctrine "is best understood as a doctrine of property law." State's Motion, p. 20.

Our Children's claims also differ from tort claims due to their equitable, non-compensatory nature and purposes for which they are brought. Our Children do not seek damages for individual injuries. Our Children do not seek to recover damages from past harm resulting from the State's failure to protect public trust assets. Rather, they seek declaratory relief to establish that the atmosphere is a public trust resource and that the State has an obligation under the public trust doctrine to protect the atmosphere for their benefit, future generations, and all Alaskans as beneficiaries of the public trust. The purpose of the declaratory relief is to prevent further harm by resolving the legal dispute

between the parties as to the State's continuing legal obligation to protect the atmosphere as a public trust resource.

The State claims Brady v. State, 965 P.2d 1 (Alaska 1998), in which the Court determined that the discretionary immunity function exception precluded the plaintiffs from suing the State in tort for its policy to allow beetle-killed spruce to stand and not be removed, is controlling. However, the Brady Court held that the plaintiffs could not sue the State for negligence due to its decision to allow the dead and dying trees to stand rather than removing the trees as the plaintiffs advocated. Id. at 16, 17. The Brady Court also held that the State could not be held liable in damages under the public trust doctrine for allowing the beetles to destroy the arboreal corpus of the public trust. Id. at 17.[3]

However, Our Children's public trust doctrine claims are not "very similar" to those raised in Brady as the State asserts. In Brady, the plaintiffs sued the State for its policy decision choosing one course of action over another. In the case at hand, the State has not made a policy decision. Our Children are not suing the State in negligence for its policy decision that a certain way is more effective way to reduce GHG emissions and protect the atmosphere as a public trust resource than another. Nor is Our Children seeking damages from the State for such policy decision. On the contrary, Our Children are asking the Court to declare the atmosphere is a public trust resource and that the State has a fiduciary obligation to protect this resource. Thus, Brady is not controlling.

[3] The Brady plaintiffs also made a slew of other claims against the State which the Court rejected, including breach of contract, unjust enrichment, fraud and others.

Accordingly, Our Children's public trust doctrine claim does not lie in tort and the discretionary function immunity doctrine is not applicable.

4. The Atmosphere Is A Public Trust Resource That The State Has An Affirmative Duty To Protect

The State asserts that Our Children's public trust doctrine claim is without merit. State's Motion, p. 20. The State reasons that it does not have an affirmative duty to prevent the misuse of public resources and that, even if it did, the atmosphere is not a public trust resource of the type covered by Article VIII of the Alaska Constitution. Id. at 20-21. The State cites Greenpeace, Inc. v. State, 79 P.3d 591 (Alaska 2003) and Brooks v. Wright, 971 P.2d 1025 (Alaska 1999) for the proposition that courts have rejected attempts to impose affirmative duties on the State. Id. at 22-24. The State further reasons that the atmosphere was not specifically referenced in the Alaska Constitution nor does it have the attributes of the natural resources that were and therefore the public trust doctrine cannot be extended thereto. Id. at 25-26. However, the cited cases do not preclude the imposition of affirmative duties on the State to protect public trust resources nor is the public trust doctrine as codified by the Alaska Constitution limited to the named resources.

a. The Public Trust Doctrine Imposes An Affirmative Fiduciary Duty On The State To Protect Public Trust Resources

Many courts have specifically recognized that the sovereign trustee has an affirmative obligation to take action to promote and protect trust resources when such action is necessary. See Dist. of Columbia v. Air Florida, 750 F.2d 1077, 1083 (D.C. Cir. 1984)("[The public trust doctrine] has evolved from a primarily negative restraint on

states' ability to alienate trust lands into a source of positive state duties."); N.J. Dep't of Envtl. Protection v. Jersey Central Power & Light Co., 336 A.2d 750, 759 (N.J. 1975)("The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus."); State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974)("We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has an obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property.... An action against those whose conduct damages or destroys such property, which is a natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs."); City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1927)("the trust reposed in this state is not a passive trust; it is governmental, active and administrative ....The equitable title to these submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it."); Kelly, 140 P.3d at 1011)(as guardian of water quality, the Department of Health then "must not relegate itself to the role of a 'mere umpire' ... but instead must take the initiative in considering, protecting, and advancing public rights in the resource at *every stage* of the planning and decision-making process")(emphasis in original)(citation omitted).

Courts in other states, including Alaska, apply general principles of trust law to the public trust doctrine when defining a sovereign's duty to protect public trust assets. See Baxley v. Alaska, 958 P.2d 422, 434 (Alaska 1998)("The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary" and that "[w]e apply basic principles of trust law to public land trusts." (citations omitted)); Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 738 (Idaho 1987)(importing the principles of private trust law and reasoning that they can be useful in that they specifically and precisely define a trustee's fiduciary obligations); see also Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991)("Just as private trustees are judicially accountable to their beneficiaries for their dispositions of the public trust.")(citations omitted)).

The State, however, asserts that the Alaska courts have "made it clear" that the public trust doctrine does not impose affirmative duties on the State. State's Motion at 22-23. The State first cites Greenpeace, Inc. v. State, 79 P.3d 591 (Alaska 2003), and how that court refused to use the public trust responsibility implicit in the Alaska Constitution to require the State to perform a NEPA like cumulative impacts analysis. Id. at 23. Although the Greenpeace court did hold that nothing in the Alaska Constitution directly or indirectly suggested the need for such an analysis, it dismissed Greenpeace's "cursory argument" out-of-hand, citing its' failure to set out any meaningful discussion of the language in the Constitution or the contextual significance thereof. Greenpeace, 79

P.3d at 597 n. 39, 40. Such holding, based upon Greenpeace's cursory argument without any meaningful discussion can hardly be said to be dispositive.

Similarly, the holding in Brooks v. Wright did not make "it clear that the public trust doctrine and Article VIII do not impose affirmative fiduciary duties on the State" as the State asserts. In fact, the issue of whether or not the State has an affirmative fiduciary duty to protect public trust resources was not even before the Brooks court. Rather, as noted supra, the issues in that case were whether or not wildlife management was an appropriate subject for a ballot initiative and, if so, whether the legislature had exclusive law-making powers over wildlife management by virtue of its trustee duties under Article VIII of the Alaska Constitution thereby precluding the use of a ballot initiative to address wildlife management. Brooks, 971 P.2d at 1028, 1030. Yet, the State cherry picks dicta from the Brooks court's summary of cases involving exclusive grants of natural resources by the State to claim that the court "rejected the notion that the public trust doctrine imposes affirmative duties on the State, holding instead that the doctrine merely 'prevent[s] the state from giving out 'exclusive grants or special privilege[s]' in certain natural resources."[5]

Contrary to the State's assertion, Alaska courts have not held that the State does not have an affirmative fiduciary obligation to protect public trust resources.

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[5] As noted supra, the Brooks court ultimately concluded that natural resource management was not "clearly inappropriate" to the initiative process and that the public trust doctrine did not stand for the proposition that Article VIII granted the legislature exclusive power to make laws dealing with natural resource management, thereby allowing the ballot initiative. Brooks, 971 P.2d at 1030, 1033.

Accordingly, this Court should conclude as others addressing this issue have that the State, as sovereign, has an affirmative fiduciary duty to protect public trust resources.

b. The Atmosphere Is A Public Trust Resource

The State asserts that the atmosphere is not the type of public trust resource covered by Article VIII of the Alaska Constitution because it is not explicitly named therein. State's Motion, p. 25. However, the public trust doctrine is not a static concept. Rather, it is fluid and must evolve to meet the changing conditions and needs of the public it was created to benefit and protect. The fact that the atmosphere is not specifically mentioned in Article VIII does not preclude it from being included within the public trust doctrine and afforded the protections thereof.

The U.S. Supreme Court first recognized the public trust doctrine in Ill. Cent. R.R. Co. v. Illinois, 146 U.S. U.S. 387 (1892), wherein the Court held that the shoreline of Lake Michigan was held in public trust by the state of Illinois and could not be transferred out of public ownership to a private corporation. The Illinois Central Court held that the ownership of the navigable waters of the harbor and the lands underneath them were a "subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated...." Id. at 455. Although the Illinois Central Court specifically addressed the alienation of land beneath navigable waters, it acknowledged that the public trust doctrine applies to not just lands under navigable waters but to other "property of a special character." Id. at 454. The atmosphere is just that -- it is a "property of special character." Indeed, as noted supra, inclusion of the atmosphere (our air) within the public trust doctrine can be traced back to

the doctrine's ancient roots in Roman Law where "air, flowing water, the sea, and the sea-shore" were considered to be everybody's and English common law where "light, air, and water" were to unavoidably remain in common.

That there have been no federal or Alaskan cases to date extending the public trust doctrine to the atmosphere does not mean it is not deserving of the protection afforded public trust resources.[6] In fact, many courts have acknowledged that the public trust doctrine is fluid and should evolve to meet modern societal concerns. See Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984)("[W]e perceive the public trust doctrine not to be 'fixed or static,' but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit."); Weden v. San Juan County, 958 P.2d 273 (Wash. 1998)("Since as early as 1821, the public trust doctrine has been applied throughout the United States 'as a flexible method for judicial protection of public interest...."); In re Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000)("The public trust by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances"); R.W. Docks & Slips v. Wisconsin, 628 N.W. 2d 781, 787-88(Wis. 2001)("Although the public trust doctrine originally existed to protect commercial navigation, it has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty."); Ctr. for Biological Diversity v. FPL Group, Inc., 166 Cal. App. 4th 1349, 1360(Cal. Dist. App.

[6] It is important to note that, although no cases have yet applied the public trust doctrine to the atmosphere, there are no cases that have held it does not apply.

2008)("While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited."); see also Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 719 (Cal. 1983)(applying the public trust doctrine to non-navigable streams); District of Columbia v. Air Florida, 705 F.2d 1077, 1083 (D.C. Cir. 1984)(finding that the public trust doctrine has been expanded to protect additional water-related uses and to preserve flora and fauna indigenous to public trust lands).

There are also strong policy reasons for applying the public trust doctrine to the atmosphere. Like water, land and wildlife, protecting the atmosphere is critical to maintain social stability.

> As explained by the leading commentator on the public trust doctrine, Professor Joseph Sax, the doctrine is closely tied to one of the most basic concerns of the legal system, namely, the protection and maintenance of social stability. Just as the law of property rights protects stability in ownership, and the criminal law protects stability within a community, just so, explains Professor Sax, '[t]he central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.' In other words, the public trust doctrine requires the protection and perpetuation of natural resources. This functions to prevent social crises that otherwise would arise due to the sudden depletion of those natural resources necessary for the stable functioning society. In short, at its most basic level, the scope of the public trust doctrine is defined by the public needs in those natural resources necessary for social stability.

Rettkowski v. Dep't of Ecology, 858 P.2d 232 (Wash. 1993) (dissenting opinion, Guy, J.)(citations omitted).

Furthermore, harm to the atmosphere causes harm to the traditional public trust resources. The State has an inalienable sovereign obligation to protect the public's interest in navigable waterways, underlying aquatic lands, and recreational activities

related to the use of public waters. It is indisputable that traditional public trust resources are being degraded due to the impacts of human-induced climate change. Since climate change is causing harm to resources protected by the public trust doctrine, the State's obligation to protect public trust resources must extend to the atmosphere since that is where the harm originates. See Matthews, 471 A.2d at 363 ("The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches."); Nat'l Audubon Soc'y, 658 P.2d at 721 (concluding that "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by nonnavigable tributaries."); see also In re Water Use Permit Applications, 9 P.3d at 445-447 (holding that diversions from groundwater which reduced surface flows were subject to regulation and protection by the state pursuant to the public trust doctrine). Just as nonnavigable streams were subject to protection under the public trust doctrine in Nat'l Audubon Soc'y case, the atmosphere should be protected here. The health of the atmosphere necessarily affects the public's interest in the traditional public trust resources protected by Alaska courts pursuant to the public trust doctrine, namely the water, shorelines, and aquatic wildlife. Complaint at ¶ 34.

In light of the foregoing, this Court should not restrict the application of the public trust doctrine to only those natural resources as identified in Article VIII as the State advocates. First, Alaska cases do not so limit the application of the public trust doctrine to those resources that the doctrine has been historically applied. In Baxley, the Court stated that "[t]he public trust doctrine provides that the State holds certain

resources (such as wildlife, *minerals*, and water rights) in trust for public use 'and that the government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.'" 958 P.2d at 434 (citation omitted)(emphasis added). In Brooks, the Court stated that "the state holds natural resources *such as* fish, wildlife and water in 'trust' for the benefit of all Alaskans." 971 P.2d at 1031 (emphasis added). In CWC Fisheries, Inc., the Court noted approvingly that other courts have expanded the public trust doctrine but that it was concerned in that case only with the traditionally recognized fishery interest. 755 P.2d at 1118. Accordingly, all of these cases imply that the public trust doctrine is not necessarily limited to the named natural resources or the historical application of the public trust doctrine.

Moreover, the State's reasons for limiting the application of the public trust doctrine do little to support its claim that the atmosphere is not a public trust resource. Citing AS 44.37.020 and AS 46.14.010, the State asserts DNR is to oversee the conservation and development of such resources as land, water, fish, forests, wildlife and grasslands and DEC is to oversee its' air program. By tasking DNR to handle certain natural resources and DEC to handle air, the State claims that the legislature recognized a distinction between such resources and therefore did not intend the atmosphere to be a public trust resource covered by Article VIII. However, simply because the legislature did not assign DNR to regulate all natural resources does not mean that those resources they are not tasked with regulating are not public trust resources.[7]

[7] Indeed, following the State's reasoning, fish and game would not be considered natural resources since those resources are regulated by the Department of Fish and Game.

The State also asserts that the atmosphere above Alaska does not belong to the State claiming that it has no control over its composition and that it cannot be considered to be a natural resource for purposes of section 2 of Article VIII. However, there is no practical difference between air and water for purposes of inclusion within this section yet the State would have this Court extend the protections afforded by the public trust doctrine to water but not air. For example, the State does not "possess" the waters of Kachemak Bay nor can it control its composition. Water that is present one day, like the air, will flow out of the bay. Yet, the State is charged with regulating the use and ensuring the protection thereof. And while the State cannot control the complete composition of the water or the air, it can contribute adversely to its composition of gases or pollutants and prevent such ongoing harm.

Consequently, the atmosphere should be considered a public trust resource and be afforded the protections thereof for the benefit of the public.

B. Our Children Have Standing To Pursue Their Claims

The State asserts that Our Children's complaint must be dismissed because they lack standing. State's Motion, p. 27. The State claims that Our Children have not alleged that they have a sufficient personal stake in the outcome, that Our Children admit GHG emissions in Alaska have not caused climate change, and that Our Children admits reducing GHG emissions in Alaska will not prevent further climate change. Id. However, such claims misrepresent the allegations set forth in Our Children's complaint. Our Children are currently suffering, will continue to suffer, and are the very people who will suffer the most from the State's failure to protect the atmosphere and the allegations

contained in their complaint identify numerous examples of the injuries that they are currently experiencing. Complaint at ¶¶ 8, 9, 12, 14, 15, 17, 18, 24; see also Exhibits A-E, Plaintiffs' Declarations.[8] To dismiss the complaint as the State requests for lack of standing would be a travesty of justice and contravene the Alaska's long-standing liberal policy of allowing access to the courts.

1. Applicable Legal Principles

The basic requirement for standing in Alaska is adversity. Trustees for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987). Alaska Courts interpret the concept of standing broadly, having departed from a restrictive interpretation of the standing requirement to adopting instead an approach favoring increased accessibility to judicial forums. Id.; see also Moore v. State, 553 P.2d 8, 23 (Alaska 1976); State v. Lewis, 559 P.2d 630, 634 n.7 (Alaska 1997). To achieve interest-injury standing, a plaintiff must have an interest adversely affected by the conduct complained of. Trustees for Alaska, 736 P.2d at 327. Such an interest may be economic or it may be intangible, such as an aesthetic or environmental interest. Moore, 553 P.2d at 24; Lewis, 559 P.2d at 635. The degree of injury need not be much -- "the basic idea ... is that an identifiable trifle is enough for

[8] The Declaration of Nelson Kanuk is attached hereto as Ex. A. Also included with Nelson's declaration is a DVD of the film about Nelson, called Trust Alaska. The Declaration of Adi Davis is attached hereto as Ex. B. Adi's declaration is in a PFD format, the original of which will be submitted upon receipt by the undersigned. The Declaration of Katherine Dolma is attached hereto as Ex. C. The Declaration of Glen "Dune" Lankard, on behalf of his daughter, Ananda Rose Ahtahkee Lankard, is attached hereto as Ex. D. Mr. Lankard's declaration is in a PFD format, the original of which will be submitted upon receipt by the undersigned. The Declaration of Howard Mozen, on behalf of his children Avery and Owen Mozen, is attached hereto as Ex. E. Mr. Mozen's declaration is a facsimile copy, the original of which will be submitted upon receipt by the undersigned.

standing to fight out a question of principle; the trifle is the basis for standing and the principle that supplies the motivation." Trustees for Alaska, 736 P.2d at 327 citing Wagstaff v. Superior Court, 535 P.2d 1220, 1225 & n. 7 (Alaska 1975).

2. Plaintiffs Have A Sufficient Personal Stake In This Case

The State incredulously asserts that Our Children do not have a direct stake in the outcome of this litigation. State's Motion, p. 28. Not only do Our Children have a direct stake, they stand to suffer the most from the State's failure to protect the atmosphere. As noted above, the degree of injury necessary to provide standing need only be a trifle. The injury complained of can be to any number of interests, such as economic, aesthetic, environmental, health and safety. Nelson Kanuk, a Alaskan Native who lives near the western coast of Alaska, alleged that climate change is causing erosion, melting ice, and flooding. Complaint at ¶ 8. In fact, in December 2008, ice and water flooded his village and forced him, his family and other villagers to evacuate their homes. Id. Such erosion, flooding and increased temperatures are affecting the foundation of his home, his native traditions, food sources, culture and subsistence hunts. Id. Should these phenomena continue and worsen, which the best available science unquestionably concludes will happen if GHG emissions are not reduced, Nelson's way of life will be forever lost. If this is not a sufficient personal stake in this litigation as the State would have this Court believe, then no one will be able to access the courts. See also Ex. A.

Likewise, Adi Davis, Katherine Dolma, Ananda Rose Ahtahkee Lankard, Avery and Owen Mozen all have alleged significant personal stakes in this litigation. Complaint at ¶¶ 10-21. They have alleged increased forest fires, disappearing glaciers, declining

animal populations, whittling food supplies, and more. Id. These are not hypothetical or future harms – these are injuries that are real and happening right now.[9] See also Exs. B - E.

Moreover, such injuries are exactly the type of injury that is sufficient to confer standing. In Center for Biological Diversity v. U.S. Dept. of Interior, 563 F.3d 466 (D.C. Cir. 2009), a case the State wrongly claims was dismissed for lack of standing, the District of Columbia Court of Appeals conferred standing to the petitioners with lesser injuries. The court held that "Petitioners may bring both their OCSLA- and NEPA-based climate change claims under their procedural standing theory. Petitioners have shown that they possess a threatened particularized interest, namely their enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program." Id. at 479. The court cited the U.S. Supreme Court's decision in Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-563 (1992) wherein the Court noted that "the desire to use or observe an animal species, even purely for aesthetic purposes, is undeniably a cognizable interest for purpose of standing." Id.

Consequently, Our Children have alleged a sufficient personal stake to confer standing in this litigation, especially given Alaska court's liberal construction of standing requirements.

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[9] Additionally, each and every one of the plaintiffs comprising Our Children come from cities and villages that have been identified in the U.S. Army Corps of Engineers as having significant erosion issues – Cordova, Homer, Kipnuk, McCarthy, and Anchorage. To see the U.S. Army Corps of Engineers' full report, go to www.climatechange.alaska.gov/docs/iaw_usace_erosion_rpt.pdf.

3. Failure To Join Indispensable Parties

The state argues, in a footnote, that the case should be dismissed under Alaska Civil Rules 19(a) and (b) because Plaintiffs have not joined every citizen of Alaska in the litigation. In so arguing, the state misconstrues and significantly broadens Alaska's joinder rule to effectively require joinder of every citizen in any case involving public resources. Under Civil Rule 19(a)(1), certain persons must be joined as a party if "in the person's absence complete relief cannot be accorded among those already parties." Under Civil Rule 19(a)(2), certain person must be joined if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Moreover, Civil Rule 19(a) requires Plaintiffs to join certain persons only "if feasible." Where joinder is not feasible, dismissal of the case is only proper where the non-joined party is deemed "indispensable." Civil Rule 19(b). In determining whether a party is indispensable, the factors to be considered by the court include:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, 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; third, whether a judgment entered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

Arguably, every citizen has an interest in the environment and in public resources. Under the state's expansive interpretation of Civil Rule 19, joinder of every citizen would be required in every case where there is a general public interest in the subject of the litigation. This would effectively bar most environmental litigation, all public trust litigation, and many other public interest cases.

The state argues that other Alaska citizens could potentially bring the same or similar case, and that allowing this case to proceed could subject the state to multiple or competing judgments. The fact, however, that several people could have the option of litigating an environmental injury does not automatically mean that they are all indispensable parties to the litigation. The state's position would expand Civil Rule 19 to make any person with standing in an environmental case an indispensible party, for fear that not including every potential plaintiff could subject the state to multiple cases. Civil Rule 19 requires something more. An indispensable party is not just someone with standing, but "one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party." State, Dep't of Highways v. Crosby, 410 P.2d 724, 725–26 (Alaska 1966).

In this case, the court can accord complete relief without the joinder of every Alaska citizen. The fact that other citizens may have an interest in the litigation – or even standing in the litigation – does not prevent the court from reaching the merits of Plaintiffs' claim.

4. Defendant's Failure To Protect The Atmosphere As A Public Trust Resource Is Causing Harm To Plaintiffs And The Requested Relief Will Redress That Harm.

The State argues that the complaint should be dismissed because "Plaintiffs do not allege that emissions from Alaska have caused or will cause any harm," and because "reducing GHG emissions in Alaska will not prevent or reverse climate change." State's Motion, pp. 30-31. The State is wrong. Plaintiffs have specifically alleged, "if sovereign governments, *including the State of Alaska*, do not immediately react to this crisis and act swiftly to reduce human-caused carbon dioxide emissions in the atmosphere, the environment in which humans and other life have thrived will be dramatically, and possibly catastrophically, damaged." Complaint at ¶ 41 (emphasis added); see also Id. at ¶¶ 7-18, 57-63. With a motion to dismiss, and as the State concedes, the Court should "presume all factual allegations of the complaint to be true and make all reasonable inferences in favor of the non-moving party." State's Motion, p. 11.

The fact that there are other sources of GHGs besides Alaska does not prevent Plaintiffs from establishing causation and redressability. In Massachusetts v. E.P.A., 549 U.S. 497, 127 S.Ct. 1438 (2007), the Supreme Court rejected an argument similar to the one made here by the State, which:

> Rest[ed] on the erroneous assumption that a small, incremental step, because it is incremental, can never be attacked in a judicial forum. Yet accepting that premise would doom most challenges to a regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . They instead whittle away at them over time . .

Massachusetts, 549 U.S. at 524 (finding standing even though coastal erosion is not geographically tied to failure of EPA to regulate cars); see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) ("[T]he fact that climate change is largely a global phenomenon that includes actions that

are outside of the agency's control does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming." (emphasis in original)); Pub. Interest Research Grp. of N.J. v. Powell Duffryn Terminals, 913 F.2d 64, 72 (3d Cir. 1990) (in water pollution cases, plaintiff does not need to demonstrate "to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by plaintiffs.").

In Massachusetts, the Supreme Court concluded that EPA's refusal to regulate GHG emissions presented an imminent and direct risk of harm, sufficient to establish standing for the plaintiffs. Although EPA's role in the climate change crisis is simply that of a regulator who has failed to do what is necessary to protect the environment from the impacts associated with climate change, the Court found injury based upon failure to take action to regulate GHG emissions. See Id. at 524. Similarly here, Our Children's injury in fact is caused by the State's failure to take affirmative, legally mandated action to protect public trust resources, including the atmosphere. The U.S. Supreme Court has made it very clear that courts are under no obligation to solve the global climate change crisis in order for plaintiffs to have standing to challenge the government's failure to take action to address the crisis. See Id. at 526 (finding that the "risk of catastrophic harm" from climate change "would be reduced to some extent if petitioners received the relief they seek" and noting that "a reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.").

The declaratory relief requested by Our Children would also resolve their claims, by informing all parties of their rights and legal obligations, even though "countless third

parties" are also contributing to the climate crisis by discharging GHGs into the atmosphere. See Id. at 522 ("That these climate change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation.")

III. CONCLUSION

For the foregoing reasons, Our Children respectfully request that the Court deny the State's motion to dismiss.

DATED this 14th day of November 2011 at Eagle River, Alaska.

Attorney for Plaintiffs

Brad D. De Noble
Alaska Bar No. 9806009

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; AMANDA 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.

Case No. 3AN-11-07474 CI

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

This case is part of a nationwide hunt for a court willing to assume the role of both the legislature and executive and make policy concerning greenhouse gas emissions. Complaints or petitions for rulemaking have been filed in all fifty states, and in a federal district court, all espousing the theory that under the public trust doctrine, governments have an affirmative duty to reduce CO_2 emissions.[1] Plaintiffs' theory borrows from private trust law: it asserts that Plaintiffs are beneficiaries of a public trust who can sue to protect trust resources, with the State as trustee and the atmosphere a natural resource held in trust. Plaintiffs would have this court order the State to reduce greenhouse gas emissions in Alaska by a six percent every year through 2050. But, Plaintiffs' public trust doctrine theory has already been rejected by the Alaska Supreme Court, which has called Plaintiffs' theory a "violation of democratic principle"[2] with no support in article VIII of the Alaska Constitution.[3]

In *Brooks v. Wright*, the Alaska Supreme Court, in holding that private trust principles do not apply to the public trust doctrine, cited a New York Supreme Court case

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[1] Our Children's Trust is an organization supporting and coordinating this legal effort. *See* www.ourchildrenstrust.org/legal-action. According to the Our Children's Trust website, it appears that at least twenty-five of the petitions for rulemaking have been denied, motions to dismiss are pending in several of the lawsuits, and no court or state agency has accepted the public trust doctrine theory put forward by Plaintiffs.

[2] *Brooks v. Wright*, 971 P.2d 1025, 1033 (Alaska 1999).

[3] *Greenpeace, Inc. v. State Office of Mgmt. & Budget, Div. of Gov't Coordination & Alaska Coastal Policy Council*, 79 P.3d 591, 597 (Alaska 2003).

as one authority.[4] That New York case had dismissed a claim similar to the one Plaintiffs bring, using language that could have been written with this case in mind:

> [Plaintiffs] attempt to use the private trust standard, i.e., that trustees must use trust assets in a reasonable fashion. This standard must be rejected. While the use of the name "public trust" may suggest duties similar to those under a private trust, that interpretation is not feasible. If the court could reverse executive action concerning natural resources merely because the action was deemed unreasonable, then the court would be a superexecutive body. It is not the duty of the courts to review executive action in such a manner.[5]

As explained in the State's Opening Brief, Plaintiffs' Complaint suffers from numerous deficiencies. It misapprehends the public trust doctrine, asks this court to overrule legislative and executive choices in a way that would violate the separation of powers doctrine, and disregards the State's immunity from challenges to State acts of planning and policy. To even consider the merits of this case the court would have to overlook Alaska's standing requirements, which Plaintiffs cannot meet. Plaintiffs' Complaint should be dismissed.

ARGUMENT

I. PLAINTIFFS' PUBLIC TRUST DOCTRINE THEORY IS FATALLY FLAWED

The State explained in its Opening Brief that the Complaint should be dismissed because it relies on a flawed understanding of the public trust doctrine. (*See* Op. Br. at 19-27.) Plaintiffs believe the public trust doctrine imposes an affirmative fiduciary duty

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[4] *Brooks*, 971 P.2d at 1033.

[5] *Evans v City of Johnstown*, 410 N.Y.S.2d 199, 207-08 (N.Y. Sup. Ct. 1978) (cited in *Brooks*, 971 P.2d at 1033).

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on the State to protect the atmosphere from public misuse. They are wrong. The Alaska Supreme Court has held that the public trust doctrine is a property law doctrine that prevents the State from "giving out 'exclusive grants or special privilege[s]'" in certain natural resources, usually navigable waterways, and is not akin to a private trust whereby the State has an affirmative duty to protect natural resources from public misuse.[6] Even if the private trust principles did apply to the doctrine, Plaintiffs' public trust doctrine claim would still have no merit because the atmosphere is not the type of public trust resource covered by article VIII of the Alaska Constitution. (*See* Op. Br. at 25-27.)

A. Private Trust Principles Do Not Apply To The Public Trust Doctrine In Alaska

Curiously, Plaintiffs rely on *Baxley v. State*[7] to posit that Alaska courts apply principles of private trust law to the public trust doctrine (Pl.'s Br. at 23), even though in *Brooks* the Alaska Supreme Court said that was an "overbroad interpretation" of *Baxley*.[8] In *Brooks* the court went on to explain 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,"[9] and that "[i]t

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[6] *Brooks*, 971 P.2d at 1031 (holding that "the State of Alaska acts as 'trustee' over wolves and other wildlife not so much to avoid *public* misuse of these resources as to avoid the *state's* improvident use or conveyance of them").

[7] 958 P.2d 422 (Alaska 1998).

[8] *Brooks*, 971 P.2d at 1032.

[9] *Id.* at 1033 (emphasis added).

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would be a strict violation of democratic principle for the original voters and legislators of a state to limit, through a trust, the choices of the voters and legislators of today."[10]

Plaintiffs' only response to *Brooks* is to call its holding dicta. (Pl.'s Br. at 24.) They are wrong. In *Brooks*, the issue was whether the legislature had exclusive lawmaking authority concerning wildlife management; if so, a ballot initiative that would prohibit the use of snares to trap wolves was improper.[11] Opponents of the initiative contended that article VIII creates a public trust for the management of Alaska's wildlife, with the State as trustee and the people as beneficiaries.[12] They argued that the State, as trustee, has "exclusive law-making authority over natural resource issues," meaning such issues could not be included on a ballot initiative.[13] The court, however, rejected the private trust analogy and sustained the ballot initiative.[14] That private trust principles do not apply to the public trust doctrine is therefore part of the holding in *Brooks*.

In *Greenpeace*, the court again rejected the notion that article VIII or the public trust doctrine imposes affirmative duties on the State.[15] Plaintiffs only response to *Greenpeace* is to suggest that case "can hardly be considered dispositive" because Greenpeace's public trust doctrine claim was described by the court as "cursory." (Pl.'s

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10 *Id.* (quoting James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 Envtl. L. Rev. 527, 544 (1989)).

11 *Id.* at 1025.

12 *Id.* at 1031.

13 *Id.*

14 *Id.* at 1031-33.

15 79 P.3d at 597.

Br. at 23-24.) Plaintiffs' attempts to diminish *Brooks* and *Greenpeace* should be rejected. Those cases are binding on this court and compel the dismissal of Plaintiffs' Complaint.[16]

B. The Atmosphere Is Not The Type Of Public Trust Resource Covered By Article VIII

Plaintiffs acknowledge that no federal or Alaska case has ever extended the public trust doctrine to the atmosphere.[17] (Pl.'s Br. at 26.) Still, they argue that the doctrine is fluid, and suggest that this court should be the first in the county to extend the doctrine to the atmosphere. (*Id.*) In many jurisdictions, the public trust doctrine is derived from the common law and, perhaps for that reason, sometimes is described as fluid. (*See* Pl.'s Br. at 26-27.) In Alaska, however, the public trust doctrine is rooted in article VIII of the

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[16] As if these holdings of the Alaska Supreme Court were not enough to warrant dismissal of Plaintiffs' Complaint, it is worth noting that, with one exception, none of the courts that Plaintiffs say "specifically recognized" an affirmative duty as part of the public trust doctrine (Pl.'s Br. at 21-22) did anything of the sort. In *Dist. of Columbia v. Air Florida, Inc.*, the court declined to even reach the public trust claims made by the District of Columbia because of its failure to brief those claims in the lower court. 750 F.2d 1077, 1084-85 (D.C. Cir. 1984). In *State, Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co.*, the court merely found that the State of New Jersey could sue a nuclear power plant operator for causing fish deaths in a river. 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975). In *State v. City of Bowling Green*, the court assessed whether a municipality could assert sovereign immunity against the State of Ohio. 313 N.E.2d 409, 411 (Ohio 1974). *City of Milwaukee v. State* is a classic public trust doctrine case: there the court assessed the ability of the State of Wisconsin to convey submerged land beneath navigable waters to a private corporation. 214 N.W. 820, 826 (Wis. 1927). The only exception is *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985 (Hawaii 2006). In that case the court concluded that the State of Hawaii has affirmative public trust duties, but the court's holding was based on unique provisions of the Hawaiian Constitution. *Id.* at 1005-06 (holding that the framers of the Hawaiian Constitution "intended to impose upon the State and its political subdivision an affirmative duty to preserve and protect the State's water resources").

[17] The State is not aware of *any* state or federal case to do so.

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Alaska Constitution and is not so fluid.[18] Indeed, the Alaska Supreme Court has stated that expansion of the public trust doctrine is "inappropriate."[19] Plaintiffs' reliance on cases from outside Alaska is therefore misplaced.[20]

II. THE COMPLAINT IS BARRED BY THE POLITICAL QUESTION DOCTRINE

The State explained in its Opening Brief that, in Alaska, courts utilize the six-factor approach in *Baker v. Carr*[21] to determine whether a complaint is justiciable. (Op. Br. at 12.) The State went on to show that, even though the presence of just one *Baker* factor indicates a nonjusticiable political question, here four of the factors are present. (*Id.* at 12-16.) Plaintiffs agree that *Baker* is the correct approach, but disagree about the application of the *Baker* factors. (Pl.'s Br. at 5-16.) Plaintiffs are wrong.

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[18] *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009) (noting that the public trust doctrine "relie[s] on article VIII of the Alaska Constitution"); *Pullen v. Ulmer*, 923 P.2d 54, 60 (Alaska 1996) ("common law principles incorporated in the common use clause [in article VIII]" create the public trust doctrine); *see also Arizona Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 167 n.13 (Ariz. Ct. App. 1991) (noting that while thirty-eight states recognize the public trust doctrine under the common law, in Alaska the doctrine is constitutionally based).

[19] *Brooks*, 971 P.2d at 1031.

[20] The suggestion that in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988) the Alaska Supreme Court "noted approvingly" that other courts have expanded the public trust doctrine (Pl.'s Br. at 29), is wrong. The court took note of several cases that had expanded the doctrine, but in no way did it indicate its "approval" of those cases.

[21] 369 U.S. 186 (1962).

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A. Article VIII Expressly Commits Authority Over Natural Resource Management To The Legislature

The first *Baker* factor asks whether there is an express constitutional commitment of authority over the issue to the legislature.[22] Here, article VIII, section two contains that express commitment of authority.[23] Plaintiffs contend there is no commitment of authority because, in *Brooks*, the Alaska Supreme Court held that Alaska's citizens can participate in natural resource management through the ballot initiative process. (Pl.'s Br. at 9.) Plaintiffs have it backwards. If anything, the fact that natural resource management issues can be included on a ballot initiative is evidence that the first *Baker* factor applies. Under the Alaska Constitution, an issue can only be included on a ballot initiative if the issue involves "the law-making powers assigned to the legislature."[24] Plaintiffs' reliance on *Brooks* is therefore misplaced.

Plaintiffs' argument about the role of the judiciary fares no better. (Pl.'s Br. at 7-10.) The whole point of the political question doctrine is that some constitutional issues, particularly those that "respect the nation, not individual rights," are inappropriate for judicial resolution.[25] There is no doubt that one political issue that concerns the whole

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[22] *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 337 (Alaska 1987) (citing *Baker*, 369 U.S. at 217).

[23] Alaska Const. art. VIII, § 2 ("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.").

[24] Alaska Const. art. XII, § 11.

[25] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803). Plaintiffs cite several cases, such as *State, Dep't of Military & Veterans Affairs v. Bowen*, 953 P.2d 888 (Alaska 1998) and *Kiester v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219 (Alaska 1992), that concern the constitutional rights of individuals and have no bearing on this case.

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state (indeed, the whole world), and not individual rights, is the regulation of greenhouse gas emissions.

B. Article VIII Does Not Contain Any Judicially Discoverable And Manageable Standards To Guide The Court

As to the second *Baker* factor, Plaintiffs concede that article VIII and Alaska caselaw contain no standards to guide the court in assessing the State's greenhouse gas emission policy. (Pl.'s Br. at 11.) That concession should mark the end of this case. If there are no standards to guide the court, the second *Baker* factor compels dismissal of the Complaint.

Plaintiffs attempt to avoid dismissal by suggesting the court can somehow find manageable standards in the writings of the Roman Emperor Justinian or Blackstone. (Pl.'s Br. at 12.) They argue that the "main thrust" of this case is to determine, by way of a declaratory judgment, whether the public trust doctrine applies to the atmosphere, and that these ancient writings can provide guidance. (*Id.*) This argument suffers from several flaws. First, it overlooks the fact that, in Alaska, the public trust doctrine is grounded in the Alaska Constitution; these ancient writings therefore have little or no relevance. More fundamentally, Plaintiffs' argument is flawed because it suggests the court has jurisdiction to render a declaratory judgment, while conceding an action to enforce that judgment would be barred by the political question doctrine because there are no standards to guide the court. Such a declaratory judgment would be an

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impermissible advisory opinion as it would not be capable of remedying any of Plaintiffs' claimed injuries.[26]

C. The Regulation Of Greenhouse Gas Emissions Requires An Initial Policy Determination Of A Kind Clearly For Non-Judicial Discretion

The third *Baker* factor requires dismissal because the court cannot decide this case without making a policy determination of a kind clearly reserved for executive or legislative discretion. This factor aims to prevent a court from "removing an important policy determination from the Legislature."[27] Regulating greenhouse gas emissions requires balancing competing environmental, economic, and other interests.[28] Plaintiffs would have this court perform the required balancing even though that is the role of the political branches.[29]

For example, in *Massachusetts v. EPA*,[30] after holding that the Clean Air Act authorized the Environmental Protection Agency ("EPA") to regulate greenhouse gas

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[26] *State v. ACLU of Alaska*, 204 P.3d 364, 368–69 (Alaska 2009) ("[W]hile Alaska's standing rules are liberal this court should not issue advisory opinions or resolve abstract questions of law.") (quoting *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097–98 (Alaska 1988)).

[27] *See, e.g., Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009) (quotations omitted).

[28] *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539-40 (2011) ("The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.").

[29] *Cf. CWC Fisheries*, 755 P.2d at 1121 n.15 ("[T]he legislature will generally be afforded broad authority to make policy choices favoring one [public] trust use over another.").

[30] 549 U.S. 497 (2007).

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emissions, the United States Supreme Court declined to address whether EPA should exercise its discretion and regulate such emissions on the grounds that doing so would involve "policy judgments" that the courts have "neither the expertise nor the authority to evaluate."[31] This court should also refrain from making policy concerning the regulation of greenhouse gas emissions.[32]

D. Overturning The State's Policy Decisions Would Express A Lack Of Respect For The State's Political Branches

The State explained in its Opening Brief that the State has taken several steps to address greenhouse gas emissions, including studying the problem, issuing several reports, and beginning to regulate emissions in line with EPA's tailoring approach. (Op. Br. at 14-15.) Plaintiffs say those steps are inadequate, and seek injunctive and other relief that would dictate the level of greenhouse gas emissions in Alaska through 2050. It is hard to imagine how the judiciary could show a greater "lack of respect" for Alaska's political branches than by issuing, as Plaintiffs request, an order that not only supersedes their considered judgment concerning matters within their constitutional and statutory authority,[33] but also suggests that they are incapable of exercising that authority without

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31 *Id.* at 533-34.

32 Plaintiffs cite a number of cases that concern the ability of states to assert common law nuisance claims against other entities. (Pl.'s Br. at 13-14.) Those cases, of course, have nothing to do with this one, which is an attempt to force a state to take specific acts to regulate greenhouse gas emissions.

33 *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971) (holding that courts should not examine the wisdom of agency regulations).

continuing supervision by this court for the next several decades.[34] In any event, the judiciary has no authority to order the Department of Natural Resources to regulate greenhouse gas emissions.[35] For all of these reasons, the fourth *Baker* factor also compels dismissal of the Complaint.

III. THE STATE IS IMMUNE FROM PLAINTIFFS' CLAIMS

The State explained in its Opening Brief that the State's policy concerning greenhouse gas emissions cannot be challenged in court because of the State's sovereign immunity. (Op. Br. at 17-19.) State acts that "involv[e] questions of policy," determined by an "evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy," are immune.[36] Even Plaintiffs do not dispute that regulating greenhouse gas emissions involves questions of policy and requires an evaluation of those factors.

In *Brady v. State*,[37] the Alaska Supreme Court held that the State was immune from a public trust doctrine claim very similar to the one Plaintiffs bring. The plaintiffs in *Brady* cited the public trust doctrine, alleged that the State was a trustee with a duty to protect Alaska's forests, and claimed the State had "allowed waste of the trust corpus" by

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[34] *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (holding that an action asking a court "to assume continuing regulatory jurisdiction" over an executive agency was not justiciable).

[35] *Granato v. Occhipinti*, 602 P.2d 442, 443-44 (Alaska 1979) (holding that the Alaska Constitution "vests no power in the judiciary to define the specific functions of" executive agencies).

[36] *State v. Abbott*, 498 P.2d 712, 720 (Alaska 1972); AS 09.50.250(1).

[37] 965 P.2d 1 (Alaska 1998).

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failing to stop a northern spruce bark beetle epidemic that was decimating the forests.[38] The plaintiffs sought damages, an accounting, and an injunction requiring the State to protect the forests.[39]

The Alaska Supreme Court had "little difficulty" finding the State immune from these claims, holding that "[t]he proper remedies for unwise or unduly timid decisionmaking at that level are electoral, not judicial."[40] The court found the plaintiffs' request for an injunction to be meritless because the State was already obliged to follow article VIII of the Alaska Constitution.[41] The court also refused to grant an injunction on the grounds that doing so would "circumvent [the State's] discretionary-function immunity."[42] Just like the court in *Brady* rejected a request for an injunction requiring the State to protect Alaska's forests, here the court should reject Plaintiffs' request for an injunction requiring the State to protect the atmosphere.

Plaintiffs make two feeble attempts to distinguish *Brady*. First, they allege that *Brady* does not apply because the State purportedly "has not made a policy decision" concerning greenhouse gas emissions. (Pl.'s Br. at 20.) Wrong. The State explained in its Opening Brief that the Department of Environmental Conservation ("DEC"), the agency with statutory authority to regulate air quality in the State, has so far chosen to

38 *Id.* at 16.
39 *Id.*
40 *Id.* at 16-17.
41 *Id.* at 17.
42 *Id.*

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regulate greenhouse gas emissions in line with EPA's tailoring approach.[43] (Op. Br. at 14-15.) More fundamentally, Plaintiffs' suggestion that the State is not immune because it has supposedly not acted to regulate greenhouse gas emissions is meritless because the State's sovereign immunity applies to both State acts and non-acts.[44]

Plaintiffs also claim *Brady* somehow does not apply because Plaintiffs seek "equitable, non-compensatory" relief such as an injunction, declaratory judgment, and an accounting. (Pl.'s Br. at 19-20.) Wrong again. In *Brady* the plaintiffs sought an injunction and an accounting, and the Alaska Supreme Court dismissed those claims as meritless.[45] *Brady* is on point and requires that Plaintiffs' Complaint be dismissed.

Plaintiffs make a few other fruitless arguments as to why discretionary-function immunity does not apply here. First, they say their public trust doctrine claim does not lie in tort, that it is *sui generis* or a creature of property law.[46] (Pl.'s Br. at 17-19.) Perhaps the best response to this argument is that in *Brady* the Alaska Supreme Court found a similar public trust doctrine claim precluded by discretionary-function immunity.

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[43] DEC has the option to pursue air quality standards more stringent than EPA's. *See* AS 46.14.010(b)(2). To do so, DEC must follow special procedures. *See* AS 46.14.015. Plaintiffs would have the State adopt, under court order, air quality standards more stringent than EPA's without complying with these required special procedures.

[44] *Brady*, 965 P.2d at 16 (holding that the State's "policy-level decisions . . . about whether to undertake activities" are immune); AS 09.50.250(1) (immunity applies to claims based on the "failure to exercise or perform a discretionary function or duty on the part of a state agency").

[45] *Brady*, 965 P.2d at 16-17.

[46] Saying their claim does not lie in tort makes things worse for Plaintiffs as they try to overcome the State's sovereign immunity. To the extent Plaintiffs' claim does not lie in contract, quasi-contract, or tort, sovereign immunity bars the Complaint. AS 09.50.250.

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In any event, to the extent Plaintiffs claim the public trust doctrine is derived from property law, the State agrees. Except that conclusion does not help Plaintiffs: as a creature of property law, the public trust doctrine merely "prevent[s] the state from giving out 'exclusive grants or special privilege[s]'" in certain natural resources, and does not impose affirmative, trust-like duties.[47] (*See* Op. Br. at 20-25.)

Finally, Plaintiffs claim that enforcing the State's sovereign immunity in this case "would render the public trust doctrine meaningless." (Pl.'s Br. at 17-18.) Not so. Dismissing this case on grounds of sovereign immunity would not disturb Alaska's public trust doctrine jurisprudence. The doctrine would still prevent the State from denying public access to certain natural resources, usually waterways.[48] Cases such as *Brady* and *Brooks* do not render the public trust doctrine meaningless; they simply forbid its expansion.

IV. PLAINTIFFS DO NOT HAVE STANDING

The State explained in its Opening Brief that the Complaint should be dismissed for lack of standing because Plaintiffs: (1) do not have a sufficient personal stake in this case; (2) admit that greenhouse gas emissions from Alaska have not caused climate change; and (3) admit that preventing climate change requires global action. (Op. Br. at 27-32.) The State also pointed out that were the court to find that Plaintiffs have alleged

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[47] *Brooks*, 971 P.2d at 1033; *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493 (Alaska 1988) (purpose of the public trust doctrine is "anti-monopoly").

[48] *See, e.g., Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994) (holding the public trust doctrine under article VIII limits the State's power to restrict a group's access to certain natural resources).

an injury-in-fact, then the Complaint should be dismissed for failure to join indispensable parties. (Op. Br. at 30 n.19.) Plaintiffs' arguments to the contrary are not convincing.

A. Plaintiffs Lack A Sufficient Personal Stake In This Case

Plaintiffs do not appear to dispute that Alaska follows federal standing law in that a plaintiff must have a personal stake in a lawsuit to have standing.[49] (Pl.'s Br. at 32-33.) Indeed, Plaintiffs cite one case in their brief, *Lujan v. Defenders of Wildlife*, in which the United States Supreme Court held that a plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large" does not have standing.[50] The Alaska Supreme Court has explained that this "injury-in-fact" requirement "serves to distinguish a person with a direct stake in the outcome of litigation—even though small—from a person with a mere interest in the problem."[51]

Plaintiffs argue in their brief that they have a personal stake in this case because they allegedly "stand to suffer the most from the State's failure to protect the atmosphere."[52] (Pl.'s Br. at 32.) But that assertion is at odds with their Complaint, where Plaintiffs allege that the planet is at a "tipping point," and that "[a] failure to act soon will . . . result[] in a planet that is largely unfit for human life." (Compl. ¶ 36.) Accepting that

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[49] *See, e.g., Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 (Alaska 1975) (citing *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)).

[50] 504 U.S. 555, 573 (1992).

[51] *Wagstaff*, 535 P.2d at 1225 (quoting *SCRAP*, 412 U.S. at 689 n.14).

[52] In support of this assertion, Plaintiffs attach declarations and even a short video attesting to the harms they fear climate change will cause. The State does not dispute that Plaintiffs have alleged that climate change might cause harm; it disputes whether Plaintiffs have shown that climate change will harm them in a materially different way than other Alaskans.

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allegation as true means that every human (not just every Alaskan) will suffer equally if Plaintiffs are not granted relief. Such a generalized harm is better redressed by appealing to the political branches that to the courts.[53] That Plaintiffs' generalized grievances do not belong in court follows from both principles of standing and the political question doctrine.[54]

B. Alternatively, The Complaint Should Be Dismissed For Failure To Join Indispensable Parties

Plaintiffs do not seriously dispute that, if climate change constitutes an injury-in-fact to Plaintiffs, then all Alaskans share this injury and are persons to be joined if feasible under Alaska Civil Rules 19(a)(2)(i) and (ii). (Pl.'s Br. at 34-35.) Nor do Plaintiffs even discuss the relevant factors (other than quoting them) in responding to the State's argument that under that scenario all other Alaskans would also be indispensable parties under Civil Rule 19(b).[55] (*Id.*) Instead, Plaintiffs merely submit that this case

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[53] *See, e.g., Sierra Club v. U.S. Defense Energy Support Ctr.*, No. 01:11–cv–41, 2011 WL 3321296, at *3 (E.D. Va. July 29, 2011) (holding that the plaintiff environmental organizations did not have standing because they "base[d] their injuries on climate changes associated with greenhouse gas emissions that have caused or purportedly will cause generalized environmental impacts"); *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (holding that plaintiffs' alleged climate change injury was "too generalized to establish standing"). Plaintiffs point out that in *Biological Diversity* the plaintiffs were deemed to have standing to assert a procedural injury. (Pl.'s Br. at 33.) As Plaintiffs do not allege any procedural injury here, that portion of the *Biological Diversity* holding does not apply.

[54] *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (noting that "closely related" to the standing requirement is the principle that courts should not decide abstract questions of wide public significance when other governmental institutions may be more competent to address the questions).

[55] The only case Plaintiffs cite, *State, Dep't of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966), was decided before Civil Rule 19(b) was even enacted.

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should not be dismissed under Civil Rule 19(b) because to do so would "effectively bar most environmental litigation." (*Id.* at 35.) Left unsaid is any environmental case that would be barred. In any event, Plaintiffs' argument is meritless.

In a lawsuit by a beneficiary against a trustee seeking broad relief, as this case purports to be, absent co-beneficiaries are both persons to be joined if feasible and indispensable parties.[56] This case makes it easy to see why. Under Plaintiffs' theory, all Alaskans are beneficiaries of the public trust. Plaintiffs want the State, as trustee, to mandate a yearly six percent reduction in greenhouse gas emissions. But other beneficiaries might view that reduction as too aggressive, especially if it would adversely affect the economy or standard of living in Alaska. Others might see a six percent reduction as too timid. Others might favor market-based solutions instead of a hard cap. Unless all of the supposed beneficiaries are added as parties, absent Alaskans will be unable to protect their interest in ensuring proper management of the purported public trust.[57] Absent Alaskans must also be joined because otherwise, they could bring case after case against the State, and court after court would have to determine the appropriate regulatory response to greenhouse gas emissions in Alaska (absent Alaskans would not be collaterally estopped by any judgment in this case).[58] To protect the interests of these absent Alaskans, prevent the State from having to defend case after case and being

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[56] *See, e.g.*, *Tick v. Cohen*, 787 F.2d 1490, 1494-95 (11th Cir. 1986); *Walsh v. Centeio*, 692 F.2d 1239, 1243 (9th Cir. 1982) ("As a general rule, all beneficiaries are persons needed for just adjudication of an action to remove trustees and require an accounting or restoration of trust assets.").

[57] *See* Alaska Civil Rule 19(a)(2)(i).

[58] *See* Alaska Civil Rule 19(a)(2)(ii).

subject to inconsistent obligations, and because Plaintiffs have an adequate alternative remedy—namely, the ability to seek reductions in greenhouse gas emissions through the political process—this case should be dismissed.[59]

C. Plaintiffs Admit That Greenhouse Gas Emissions From Alaska Have Not Caused Climate Change, And That Reducing Such Emissions Will Not Prevent Climate Change

Plaintiffs admit that they are concerned about rising levels of *global* atmospheric concentrations of CO_2. (Compl. ¶¶ 38-40.) They allege that "if sovereign governments, including the State of Alaska, do not immediately react" to reduce such concentrations, the planet will become "largely inhabitable." (Compl. ¶ 44.) Nowhere do Plaintiffs allege that greenhouse gas emissions from Alaska have caused climate change, or that reducing such emissions will prevent climate change. Those omissions are fatal to Plaintiffs' Complaint.

Plaintiffs claim *Massachusetts v. EPA* excuses their inability to show causation and redressability. (Pl.'s Br. at 36-37.) They are wrong. In *Massachusetts*, the United States Supreme Court considered whether the State of Massachusetts had standing to challenge EPA's denial of a rulemaking petition that had sought to force EPA to regulate greenhouse gas emissions under the Clean Air Act.[60] The Court upheld Massachusetts' standing because of two factors not present here. First, the Court held that it was "of considerable relevance that the party seeking review here [was] a sovereign State and not

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59 *See* Alaska Civil Rule 19(b).

60 549 U.S. at 512-14.

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. . . a private individual."[61] In light of their distinctive position in the federal union, the Court said, states are entitled to "special solicitude in [the] standing analysis."[62]

Second, the Court stressed that federal law explicitly grants a "procedural right" to challenge in federal court EPA's denial of a petition for rulemaking under the Clean Air Act.[63] In light of that statutory right of action, and because Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," Massachusetts was entitled to bring its claims "without meeting all the normal standards for redressability and immediacy [of injury]."[64]

Here, the critical factors that led the Court to uphold standing in *Massachusetts* are missing. Plaintiffs are individuals, not a sovereign entitled to special solicitude. And Plaintiffs' cause of action is based on the public trust doctrine and not any statutory right. Plaintiffs' reliance on *Massachusetts* is therefore misplaced.[65] The Complaint should be dismissed.[66]

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61 *Id.* at 518-20.

62 *Id.*

63 *Id.* at 516-18.

64 *Id.*

65 Also misplaced is Plaintiffs' reliance on *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). That case did not even discuss standing and, like *Massachusetts*, involved a procedural right where the normal standing requirements do not apply.

66 *See, e.g.*, *Kivalina*, 663 F. Supp. 2d at 878-82 (distinguishing *Massachusetts* and holding that an Alaskan native village did not have standing to sue energy and utility companies for damages related to greenhouse gas emissions because the village's alleged injuries were not traceable to the defendants). The *Kivalina* court also explained why Clean Water Act cases are of no help to those who seek judicial standing to redress harms from climate change. *Id.* at 879-880. For these same reasons, Plaintiffs' reliance on *Pub.*

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Plaintiffs' Complaint should also be dismissed because, as the State explained in its Opening Brief, imposing strict limits on greenhouse gas emissions in Alaska is just as likely to increase global emissions of greenhouse gases as reduce them. (Op. Br. at 31-32.) Major emitters of greenhouse gases, faced with strict limits in Alaska, would likely shift their operations to less-regulated areas where they could continue or increase their emissions. Plaintiffs appear to have no response to the point that reducing greenhouse gas emissions requires a global or at least national regulatory approach, and that a state-by-state approach would likely be counterproductive. For this reason also, Plaintiffs cannot show redressability.

CONCLUSION

For all of these reasons, Plaintiffs' Complaint should be dismissed.

DATED this 21st day of December, 2011.

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Interest Research Grp. of N.J. v. Powell Duffryn Terminals, 913 F.2d 64 (3d Cir. 1990), a Clean Water Act case, is misplaced.

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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,

v.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Case No. 3AN-11-07474 CI

PLAINTIFFS' SUPPLEMENTAL BRIEF

I. INTRODUCTION

At the February 15, 2012 hearing on Defendant State of Alaska's motion to dismiss, the Court noted what it thought to be was the most critical aspect of this case and that was whether the atmosphere is a public trust resource. During oral argument, the Court stated it was troubled by the idea that you cannot own or possess the atmosphere in the same manner as you can the other natural resources which are undoubtedly public trust resources. The Court questioned the undersigned about ownership and possession of the atmosphere and whether there were any cases that shed light on that particular issue. Plaintiffs, collectively referred to herein as "Our Children," provide the following responses.

II. ARGUMENT

A. Whether Or Not The Atmosphere Constitutes A Public Trust Resource Is Not Dependent Upon Possession.

Whether or not the atmosphere is a public trust resource is not dependent upon the state being able to possess it. Although the famous Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805) case made it clear that individual ownership comes about at the point of possession, sovereign ownership is not dependent upon possession. However, the sovereign can have an ownership interest therein regardless of possession. Geer v. State of Connecticut, 161 U.S. 519 (1896). Ownership in the state is not as a proprietor but in its sovereign capacity as the representative and for the benefit of all of its people. Id. at 529.

In this sense, ownership for purposes of the public trust doctrine is different from how ownership is viewed in other contexts. Ownership for public trust purposes does not require or encompass all of the sticks in the private property rights bundle. It is not

dependent upon title to the resource but rather dependent upon the state's sovereignty and dominion over the resource. In Caminiti v. Boyle, 732 P.2d 989 (Wash. 1987), the Washington Supreme Court addressed this issue in a case involving the state permitting private citizens to install and maintain private docks on state-owned tidelands and shorelands. In that case, the court discussed the two aspects of state ownership of resources, the *jus privatum* and *jus publicum*. Id. at 993-94. The court explained that the *jus privatum* or private property interest gave the state full proprietary rights in tidelands and shorelands and fee simple title to such lands and, therefore, the state could convey title thereto so long as the conveyance does not run afoul of the constitution. Id. However, the second aspect of state ownership, the *jus publicum*, is a public property interest, which the state cannot convey or give away. Id. at 994. Thus, "it is that sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public. It is this principle which is referred to as the 'public trust doctrine.'" Id. (emphasis in original)

Alaska too recognizes this distinction. In Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996), the Court addressed whether wildlife was a state asset. Therein, a sponsor of an initiative concerning the harvest of salmon claimed the state did not literally own the wildlife found within its borders, that the state's ownership thereof was merely a legal fiction, and thus not subject to the prohibition against state assets being appropriated by initiative. Id. at 59. The Court agreed with the sponsor that "the state does not own wildlife in precisely the same way that it owns ordinary property." Id. However, the Court stated that does not answer the question of whether the state's interest in wildlife is

such that it can be appropriately characterized as state property subject to appropriation. Id. The Court then explained that the state's interest in wildlife was critically important such that, "[i]nsofar as loss, use, or exploitation of wildlife directly affects Alaska's fish, it is a state 'asset.' The fact that other aspects of ownership may not be present in the state's legal relationship to its wildlife does not change this conclusion." Id. The Court concluded that fish occurring in their natural state were property of the state for purposes of its public trust responsibilities, expressly agreeing with appellants' position that

> [i]t is the authority to control naturally occurring fish which gives the state property-like interests in these resources. For that reason, naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people.

Id. at 61. The atmosphere is no different from water and wildlife in a farae naturae state. Sovereignty ownership of such resources does not have all of the incidents of ownership that one has over other natural resources. It cannot be held and possessed in the traditional sense.[1] However, such incidents of ownership are not necessary in order for the atmosphere to be considered a public trust resource. Rather, it is the state's sovereignty and dominion over these resources that make them public trust resources.[2] The state has control over the greenhouse gas emissions and other pollutants entering the atmosphere, just as it controls statewide aviation over Alaska's vast territory.[3] That there

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[1] Despite not being able to hold or possess air in the traditional sense, the Division of Air Quality is nevertheless charged with conserving clean air. See Division of Air Quality website: http://www.dec.alaska.gov/air/airinfo.htm.

[2] The State of Alaska exercises control over the atmosphere in part through the Department of Environmental Conservation and the air quality control program, AS 44.46.020 and AS 46.14.010 et seq.

[3] Aviation is a basic mode of transportation in Alaska and is regulated by the Alaska Department of Transportation & Public Facilities and the Division of Statewide Aviation. See http://dot.alaska.gov/stwdav/index.shtml.

are global sources of emissions affecting the atmosphere does not extinguish the sovereignty and dominion the state maintains over its use of the atmosphere. Consequently, the Court should conclude the atmosphere is a public trust resource.

Another test Alaska courts use to determine whether a resource is a public asset is whether the resource provides a revenue-raising function. In Pebble Limited Partnership v. Parnell, 215 P.3d 1064 (Alaska 2009), the Court addressed whether waters of the state were a public asset and therefore prohibited from appropriation by initiative. Citing Pullen, the Court first held that the public trust responsibilities are sufficient to create property-like interest in a natural resource and therefore are a public asset. Id. at 1074. The Court also held that waters of the state provided a revenue raising function. Id. Citing the Pullen case and its holding that the state receives revenue from the harvest of salmon through the collection of taxes and license fees and therefore salmon is a public asset, the Court likewise applied that same logic to water quality and concluded the state's waters were public assets since degradation thereof would have a devastating impact on Alaska's tourism and fishing industries and reduce the state's revenues from taxes and licenses This Court should not treat the atmosphere any differently. Like the waters of the state, the atmosphere provides a revenue raising function to the state. For example, a stable climate is essential for the State's wildlife resources, and those resources provide revenue from tourism and commercial harvests, just as in Pebble. Indeed, an impaired atmospheric resource is causing harm, and will worsen impacts, to Alaska's other trust resources. As alleged in the complaint, harm to the atmosphere will severely impact coastal lands, timber, wildlife, marine mammals, and terrestrial and oceanic species, all of which generate revenue for the state through fees and taxes.

Complaint, ¶¶ 52, 53. There can be no doubt that degradation of the atmosphere would seriously impact all tourism and wildlife harvesting industries, thereby reducing the state's revenues. Further, an impaired atmosphere and unstable climate is leading to enormous financial costs to the state from increased natural disasters, erosion, flooding, human health impacts and increased disease vectors. Id. Thus, the atmosphere may be one of the state's most vital assets for protecting revenues and avoiding costs. As such, the atmosphere provides a revenue raising function and should be considered a public trust resource.

There is also no meaningful reason for treating water as a public trust resource but not the atmosphere. The state policy towards both is the same: "to conserve, improve, and protect its natural resources and environment and control water, land and air pollution, in order to enhance the safety, health, and welfare of the people of the state and their overall economic and social well-being;" and "to develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations." AS 46.03.010(a), (b). The state does not possess water nor does it control its entire composition yet it is charged with regulating it. The state cannot completely control the composition of water or air because other sovereign governments and nature play a role, but the state can contribute adversely thereto through the emission of gasses or pollutants and it can prevent ongoing harm.

B. The Atmosphere Can Be Owned Or Possessed.

Although it is not necessary for a resource to be able to be owned or possessed in order to be a public trust resource, the atmosphere can in fact be both owned and

possessed. In United States v. Causby, 328 U.S. 256 (1946), the U.S. Supreme Court addressed whether the federal government's frequent and regular low-flying flights over a person's property constituted a taking. In that case, the Supreme Court stated:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense-by the erection of buildings and the like-is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Id. at 264-65 (citations omitted). Accordingly, as demonstrated by this one example, it is possible to own or have a proprietary interest in the atmosphere.[4] Moreover, although it

[4] The State asserted in its motion to dismiss that the minutes from the constitutional convention made it clear that the framers intended "natural resources" to include only those resources "over which the state has a proprietary interest." State, Motion to Dismiss, p. 25. However, the quoted language does not stand for the State's proposition. Rather, the quoted language arose from a discussion about whether a provision applied to resources on federal, state or private lands and a delegate responded that it was only to apply to resources on state lands. See Convention Minutes, p. 2499.

sounds rather basic and simplistic, the atmosphere is possessed each time we breathe. Thus, akin to the rule of capture, we possess the atmosphere by breathing the air.[5]

Consequently, the atmosphere can be both owned and possessed.

III. CONCLUSION

For the foregoing reasons, Our Children respectfully request that the Court conclude that the atmosphere is a public trust resource.

DATED this 23rd day of February 2012 at Eagle River, Alaska.

Attorney for Plaintiffs

Brad D. De Noble
Alaska Bar No. 9806009

[5] This fact underscores the importance of controlling emissions.

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.	)
	) 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.

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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.

(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,

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

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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

I certify that on 3.19.12 a copy of the original was ~~personally~~ mailed to each of the following:
B. DeNobile
D. Kruse
S. Mulder - AGO
M. Lucas
Secretary/Deputy Clerk

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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; AMANDA 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.	) Case No. 3AN-11-07474 CI

ORDER AND FINAL JUDGMENT

Upon consideration of the Motion to Dismiss filed by Defendant State of Alaska, Department of Natural Resources, and all papers filed in support thereof and opposition thereto, and for the reasons set forth in the Court's Order dated March 16, 2012, it is hereby ORDERED that Plaintiffs' Amended Complaint is DISMISSED with prejudice.

APR 11 2012

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IT IS SO ORDERED.

DATED this 11 day of May, 2012.

Hon. Sen K. Tan
Superior Court Judge

mailed I certify that on 5.11.12
a copy of the original was ~~personally handed~~ to each of the following:
M. Lucas
Secretary/Deputy Clerk

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Mulder - AGO

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