FILE COPY

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

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

APPELLEE'S EXCERPT OF RECORD
VOLUME I OF I

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ATTORNEY GENERAL

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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' SUBMISSION OF ATMOSPHERIC TRUST LITIGATION CASES

COMES NOW Plaintiffs, by and through their counsel, and, pursuant to the Court's request that the parties submit the decisions from other state courts that have

addressed the issues or similar issues that the Court is presented with in this case, hereby submit the following summary of the decisions and copies thereof.

Montana. In Montana, the Montana Supreme Court declined to take up the petition to review the question of whether the atmosphere is a public trust resource under Montana's constitution because it concluded that the case "does not involve purely legal questions." Barhaugh, et al. v. Montana, No. OP 11-0258, p. 2 (Montana Supreme Court, June 15, 2011). The Court held that the case should begin at the trial court and work its way through the normal appeal process. The court made no substantive ruling on the atmosphere as a trust resource or any other jurisdictional issue. Id. Plaintiffs are preparing a new case to be filed at the trial court. The Montana decision is attached hereto as Ex. 1.

Colorado. In Colorado, the trial court dismissed the case by holding that plaintiffs had failed to state a valid claim for relief. On the public trust doctrine, the court held that "the Public Trust Doctrine has never been recognized by the Colorado courts. . . This Court is not inclined to create new law." Martinez, et al. v. Colorado, et al., No. 11CV4377, p. 4 (Dist. Ct. Colorado, Nov. 7, 2011). The Colorado decision is attached hereto as Ex. 2.

Iowa. In Iowa, the trial court reviewed a petition for judicial review of an agency denial of a petition for rulemaking to set emissions reductions for carbon dioxide and standards for atmospheric protection. In ruling for the agency, upholding the decision not to initiate rulemaking on reducing CO2 emissions, the court "decline[d] to expand the public trust doctrine to include the atmosphere." Filippone, et al. v. Iowa Dep't of Natural Resources, No. CVCV008748, p.4 (Dist. Ct. Iowa, Jan. 30, 2012). Plaintiffs are

appealing the decision to the Iowa Supreme Court. The Iowa decision is attached hereto as Ex. 3.

Minnesota. In Minnesota, the trial court dismissed the public trust claim by stating that the court could not locate "a Minnesota case supporting broadening the Public Trust Doctrine to include the atmosphere." Aronow v. Minn. Dep't of Pollution Control, et al., No. 62-CV-11-3952, p. 6 (Dist. Ct. Minn., Jan. 31, 2012). The court found that the judiciary had only previously recognized the public trust doctrine as applied to navigable waters. However, the court did not evaluate whether the doctrine could or *should* apply to the atmosphere. Plaintiffs are preparing to appeal the decision. The Minnesota decision is attached hereto as Ex. 4.

Arizona. In Arizona, the trial court granted the government's motion to dismiss in one sentence without issuing an opinion in support of the decision. Jamescita Peshlakai v. Janet Brewer, No. CV 2011-010106, p. 1 (Superior Ct. of Ariz., Feb. 10, 2012). Plaintiffs are preparing to appeal the decision. The Arizona decision is attached hereto as Ex. 5.

New Mexico. In New Mexico, in response to the government's motion to dismiss, the trial court *sua sponte* granted plaintiffs leave to amend their complaint to address more specifically the relief sought to remedy the state's violations of the public trust doctrine. Plaintiffs' amended complaint was filed on February 16, 2012. During oral argument on the motion to dismiss, the judge stated that she thought the public trust would apply to the atmosphere in NM should the court find that the other branches of government were causing harm/breaching their duty. Hearing Transcript for Sanders-Reed, et al. v. Martinez, et al., No. D-101-CV-2011-01514 (Dist. Ct. N.M., Jan. 26, 2012)

("I believe in the appropriate case, were [the appellate courts] convinced that the legislature—the agencies had been ignoring the atmosphere, they would apply—they would apply the public trust doctrine to the atmosphere."). Id. at TR-49. The New Mexico decision and transcript are attached hereto as Ex. 6.

Oregon. In Oregon, the county circuit court heard oral argument on January 23, 2012 on the State's motion to dismiss. At the end of the hearing, the court requested supplemental briefing from plaintiffs. The matter is under submission. Olivia Chernaik v. John Kitzhaber, No. 16-11-09273. Plaintiffs' supplemental letter brief is attached hereto as Exhibit 7.

Washington. In Washington, on February 17, 2012, the Washington trial court held a hearing on the State's motion to dismiss. The court has taken the matter under submission and will issue a written decision in the coming weeks. Adora Svitak v. State of Washington, No. 11-2-16008-4 SEA.

Texas. In Texas, petitioners have submitted their opening brief on judicial review of an agency denial of a rulemaking petition. Angela Bonser-Lain v. Texas Commission on Environmental Quality, No. D-1-GN-11-002194.

Federal. The federal case was transferred from the U.S. District Court for the Northern District of California to the District of D.C. There are three motions pending in that matter: plaintiffs' motion for a preliminary injunction, federal defendants' motion to dismiss and the National Association of Manufacturer's motion to intervene. There is an upcoming status conference to address how the case will proceed in the new court. Alec L. v. Lisa Jackson, No. 1:11-cv-02235-RLW (D. D.C.)

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

Attorney for Plaintiffs

Brad D. De Noble
Alaska Bar No. 9806009

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 11-0258

KIP BARHAUGH; TIMOTHY BECHTOLD as natural parent and on behalf of S.B. and B.B.; RYAN BUSSE as natural parent and on behalf of L.B. and B.B.; GRADEN HAHN and JAMUL F. HAHN as natural parents and on behalf of A.H. and A.H.; EMILY HOWELL; LARRY HOWELL as natural parent and on behalf of S.H.; MAYLINN SMITH as natural parent and on behalf of W.F. and M.F.; and JOHN THIEBES,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

ORDER

Petitioners ask us to enter judgment in this original proceeding to declare that the State of Montana (State) holds the atmosphere in trust for the present and future citizens of the State of Montana. Petitioners further contend that this trust imposes on the State the affirmative duty to protect and preserve the atmosphere, including establishing and enforcing limitations on the levels of greenhouse gas emissions as necessary to mitigate human-caused climate change. At our request, the office of the Attorney General of the State of Montana has filed a summary response to the petition on behalf of the State.

A group that refers to itself as "Legislative Leaders" has moved for leave to file an amicus brief. A second group, the first identified member of which is a non-profit association called Climate Physics Institute, has moved for leave to intervene. Both of these groups state that their motions are opposed by both the Petitioners and the State.

An original proceeding in the form of a declaratory judgment may be commenced before this Court under limited circumstances. The circumstances include the presence of

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

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

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

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

Therefore,

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

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

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

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

DATED this 15th day of June, 2011.

Justices

Y DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202	
Plaintiff(s): XIUHTEZCATL MARTINEZ, et al., v. **Defendant(s):** STATE OF COLORADO, et al.	**▲COURT USE ONLY▲** Case Number: 11CV4377 Courtroom: 275

ORDER RE: DEFENDANTS' AND INTERVENOR'S MOTIONS TO DISMISS

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

LEGAL STANDARD

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

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

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

FACTUAL BACKGROUND

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

LEGAL ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

SO ORDERED this 7th day of November, 2011.

BY THE COURT:

R. Michael Mullins
District Court Judge

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GLORI DEI FILIPPONE, a Minor, by and through her Mother and Next Friend, MARIA FILIPPONE, **Petitioner,** **vs.** **IOWA DEPARTMENT OF NATURAL RESOURCES,** **Respondent.**	**CASE NO. CVCV008748** **RULING ON PETITION FOR JUDICIAL REVIEW**

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

ANALYSIS AND CONCLUSIONS OF LAW

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

1. Consideration of Filippone's Petition for Rulemaking

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

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

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

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

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

2. The Public Trust Doctrine

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

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

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

ORDER

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

Dated this 30th day of January, 2012.

D. J. STOVALL, JUDGE
FIFTH JUDICIAL DISTRICT

Copy to:

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State of Minnesota
Ramsey County

District Court
Second Judicial District
Court File Number: **62-CV-11-3952**
Case Type: Civil Other/Misc.

Notice of Entry of Judgment

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

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

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

Dated: January 31, 2012

cc :Jilian Elizabeth Clearman; Robert Britt Roche

Lynae K. E. Olson
Court Administrator
By: Linda Draske
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102

62-CV-11-3952

NOENJUDG

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Reed Aronow,

Plaintiff,

v.

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

Defendants.

ORDER

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

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

ORDER

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

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

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

Dated: January 30, 2012

BY THE COURT:

JUDGMENT

The foregoing shall constitute the judgment of the court.

Entered: 1/31/12 LYNAE K.E. OLSON Court Administrator

By Linda Thoste Deputy Clerk

John H. Guthmann
Judge of District Court

MEMORANDUM

I. INTRODUCTION AND STATEMENT OF FACTS

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

II. STANDARD OF REVIEW

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

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

III. DISCUSSION

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

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

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

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

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

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

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

B. Common Law Public Trust Doctrine

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

C. CLAIMS UNDER MERA

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

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

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

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

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

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

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

Id. § 116B.10, subd. 1.[2] To the extent plaintiff's Complaint arguably asserts a claim under both MERA causes of action, the Court will address the viability of each.

1. Minn. Stat. § 116B.03.

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

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

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

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

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

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

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

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

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

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

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

2. Minn. Stat. § 116B.10

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

specifically pleads a claim under section 116B.10.[3] To determine whether the claim survives a Rule 12.02(e) challenge, the Court must determine if the Complaint alleges something that section 116B.10 declares actionable. The plain language of section 116B.10 does not permit a private cause of action by every citizen who is unhappy that the Legislature failed to go far enough to protect the environment. To be viable, plaintiff's "action [must] challenge . . . an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof." Minn. Stat. § 116B.10, subd. 1 (2010).

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

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

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

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

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

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

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

JHG

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/14/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-010106

02/10/2012

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

JAMESCITA PESHLAKAI

ERIK RYBERG

v.

JANET BREWER, et al.

LESLIE KYMAN COOPER

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

ORAL ARGUMENT

Courtroom ECB-814

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

Court Reporter, Lisa Bradley, is present.

Argument is heard on Defendants' Motion to Dismiss.

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

IT IS ORDERED granting Defendants' Motion to Dismiss.

2:40 p.m. Hearing concludes.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-010106 02/10/2012

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

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

STATE OF NEW MEXICO
SANTA FE COUNTY
FIRST JUDICIAL DISTRICT

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

Plaintiff

v. No. D-101-CV-2011-01514

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

Defendants.

ORDER ON MOTION TO DISMISS

THIS MATTER came before the Court on Defendants' Motion to Dismiss. The Court having reviewed the parties' briefing and having considered the arguments of counsel at the hearing on Thursday, January 26, 2012, and finding good cause therefor,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is well taken and is hereby **GRANTED**.

Plaintiffs shall have ten (10) business days from the date of this order to file an amended complaint, should they elect to do so. If Plaintiffs do not file an amended complaint by that time, this Order shall become a final appealable order, with a notice of appeal, if any, due within thirty (30) days of the entry of this Order.

THE HONORABLE SARAH M. SINGLETON
DISTRICT COURT JUDGE

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2011-01514

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

Plaintiffs,

vs.

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

Defendants.

TRANSCRIPT OF PROCEEDINGS

On the 26th day of January, 2012, at approximately 8:58 a.m., this matter came on for hearing on a MOTION TO DISMISS before the HONORABLE SARAH M. SINGLETON, Judge of the First Judicial District, State of New Mexico, Division II.

The Plaintiff, AKILAH SANDERS-REED, et al., appeared in person and by Counsel of Record, SAMANTHA RUSCAVAGE-BARZ, Attorney at Law, WildEarth Guardians, 312 Montezuma Avenue, Santa Fe, New Mexico 87501.

The Defendant, SUSANA MARTINEZ, et al., appeared by Counsel of Record, JUDITH ANN MOORE AND STEPHEN R. FARRIS, Attorneys at Law, Office of the Attorney

General, 111 Lomas Boulevard, Northwest, Suite 300, Albuquerque, New Mexico 87102.

The Defendant, SUSANA MARTINEZ, appeared by Counsel of Record, GARY J. VAN LUCHENE, Attorney at Law, Keleher & McLeod, PA, 201 Third Street, Northwest, 12th Floor, Albuquerque, New Mexico 87102.

At which time the following proceedings were had:

JANUARY 26, 2012

(Note: In Open Court.)

THE COURT: We're here today in the matter of Akilah Sanders-Reed, through her parents, Carol and John Sanders-Reed and WildEarth Guardians, versus Susana Martinez and the State of New Mexico. It's D-101-CV-2011-01514.

And if I mispronounced your name, I apologize. Will counsel for plaintiff state their appearance, please.

MS. RUSCAVAGE-BARZ: Samantha Ruscavage-Barz for plaintiff Akilah Sanders-Reed and WildEarth Guardians.

THE COURT: Could you say your name for me again, because it's another one I'll probably mispronounce.

MS. RUSCAVAGE-BARZ: Ruscavage-Barz.

THE COURT: Thank you. And for the defendants?

MS. MOORE: Judith Ann Moore, assistant attorney general.

MR. FARRIS: Stephen Farris, assistant attorney general.

MR. VAN LUCHENE: And Gary Van Luchene. I'm here for Governor Susana Martinez.

THE COURT: All right. We're here on the motion to dismiss. Who's going to argue for the State?

MS. MOORE: I am, Your Honor, Judith Ann Moore.

THE COURT: Okay. I think each side should take about a half an hour. So if you want to save some for rebuttal, you should do so. I'll let you know when you have about five minutes left.

MS. MOORE: I don't know if it will take the entire time. Am I coming through all right, Your Honor?

THE COURT: Yeah, you're fine.

MS. MOORE: Okay.

THE COURT: We'll let you know if we can't hear you.

MS. MOORE: Okay. Thank you, Your Honor. I'm Judith Ann Moore, appearing for the defendants in this case. May it please the Court. I'm here today to basically ask you to uphold the will of the people of New Mexico and the way they have chosen to regulate greenhouse gas emissions. That's really what we have --

THE COURT: Why don't you tell me what that is. What procedures do we have in place for --

MS. MOORE: Okay. The procedures we have in place, first of all, starting with the New Mexico

Constitution, which section 20 -- or article 20, section 21, I think is the operative section. It provides that the protection of the State's beautiful and healthful environment is hereby declared to be a fundamental importance to the public interest, health, safety, and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water, and other natural resources of the State, consistent with the use and development of these resources for the maximum benefit of the people.

THE COURT: That's almost always the case, that the legislature is supposed to do that.

MS. MOORE: Okay.

THE COURT: So I don't think that really gets us to where I was asking you about. Do we have in place a statutory scheme to protect the environment from greenhouse gas emissions?

MS. MOORE: Yes, Your Honor, we do.

THE COURT: All right. That's what I want you to explain to me.

MS. MOORE: Yeah. That is -- with the Air Quality Act, in the 74-2 sections of the statute, establishes the Environmental Improvement Board. It -- the duty of the board and the department states that the

duty is to prevent and abate air pollution. As of right now, that has been construed, at least by the EIB, to include greenhouse gas emissions. In regulating --

THE COURT: And what have they done to do that?

MS. MOORE: Okay. To date, what has happened, there have been hearings on cap and trade regulation, a cap and a reporting and verification.

THE COURT: Hearings on that?

MS. MOORE: Yes. There were hearings in 2010, possibly starting into '09, and there were rulings issued. Those rulings were after a bit of procedural maneuvering. They were published in the New Mexico equivalent of the register, and they are in force right now. Those rulings were appealed. At the moment, the appeals have been stayed, and the matter has been remanded back to the EIB.

THE COURT: And why is that?

MS. MOORE: Persons who felt themselves adversely effected by the rulings, primarily utilities, other carbon emitters, were dissatisfied with the rulings and appealed them to the Court of Appeals. And the Court of --

THE COURT: And they obtained a stay?

MS. MOORE: Yeah.

THE COURT: But you said it was remanded back. Why is that?

MS. MOORE: It was remanded back thinking that, perhaps, the matter could be resolved, again, at the EIB.

THE COURT: Well, is there any -- we're here on a motion to dismiss.

MS. MOORE: We are.

THE COURT: Is there any claim in the complaint that that process was not open to all interested parties?

MS. MOORE: No, there is no such allegation in the complaint.

THE COURT: All right. Is there any claim that those regulations were the product of some kind of corruption?

MS. MOORE: No.

THE COURT: Or anything of that nature?

MS. MOORE: No, there is no such thing, Your Honor.

THE COURT: I mean, did the *Illinois Railroad* come in and buy those regulations?

MS. MOORE: No. Nobody bought the regulations, to my knowledge.

THE COURT: Okay. All right.

MS. MOORE: It wasn't opened -- it was all online. All of the filings, testimony, everything is accessible -- at least it was the last time I looked.

THE COURT: Are citizens allowed to participate in that?

MS. MOORE: Yes.

THE COURT: Are young citizens allowed to participate in that?

MS. MOORE: As far as I know, they are. I don't think they have to be any particular -- well, you have to be able to conduct yourself accordingly, but I do not believe that there is a age limit for appearing.

THE COURT: How about WildEarth Guardians? Are they able to participate?

MS. MOORE: Yes, they are able to participate. I think they did, to some extent in one ruling, and then they dropped out. I may be wrong. I may be corrected on that.

THE COURT: Okay. Go ahead. I interrupted you, but go on.

MS. MOORE: Okay. We were discussing the posture of things at the moment. Right now, Tri-State Generation and Transmission co-op, I think joined by the other utilities, have filed a petition for a repeal of the rules that were promulgated in 2010. That rule is

currently being heard and actually is almost teed up for a decision.

In checking the status, I believe the commission is to -- I'm sorry, the board. I worked before for too many commissions; they called them all commissions. The board is to deliberate, I believe on February 6th on one of the rules; and on March 12th, I think, on the other two rules.

THE COURT: Well, are there people participating in that who believe that the State has not gone far enough in regulating greenhouse gas emissions?

MS. MOORE: I don't -- I have not really looked at the list of participants. I would imagine there are. They are certainly -- they can. There's no bar for them to participate.

THE COURT: Well, does the EIB -- what is its duty when it looks at things like greenhouse gas emissions? Does it weigh that against what the cost would be, in terms of jobs or, government, natural resources or anything like that, where it passes the regulations?

MS. MOORE: Yes, your Honor, it does. And that is pursuant to its statutory authority. It must, by statute, weigh three categories of factors. One of those factors is the harm that's being caused; you know,

the problems it's causing to the environment and to the citizens. That's weighed against what is called, broadly, "public interest," to include the societal benefit of the sources of the emissions or any type of pollution and also the technical feasibility of meeting any type of proposed standard; including experience in the past with any particular kind of technology is also taken into account, Your Honor.

THE COURT: Okay. All right. Go ahead with your argument.

MS. MOORE: Okay. That is actually what I was going to go through in my argument, is the -- what I think plenary way that New Mexico does regulate these emissions, including all parties who may have an interest; parties who would, perhaps, incur a detriment by regulation; parties who may want stronger regulation. Anybody is able to appear, and the board must explain its reasons and how it has weighed.

Like any administrative agency, its decisions are subject to appeal. Any person aggrieved by a decision of the board may appeal to the Court of Appeals. Unlike some statutes that require one to be a party in the administrative procedure, the statute governing appeals in this case, which I believe is 74-2-9, provides any party aggrieved by something the

board has done; thus, any claims, including claims that the plaintiffs are raising in this case, could, and we feel should, go to the Court of Appeals.

I mean, they are aggrieved by the way New Mexico regulates, or as they say, we do not reduce carbon emissions far enough. They would not even have to appear before the EIB, in the way I read the statute, in order to take their case to the Court of Appeals. It would then be looked at as against the statutory structure, which is the will of the people, expressed through their legislature.

Instead, they've come to this Court, seeking a declaratory judgment on this theory they call the public trust doctrine. And I do think it's important to recognize that it is against a statutory scheme, a plenary statutory scheme, that this relatively-new doctrine is being introduced --

THE COURT: Well, relative to what?

MS. MOORE: Okay.

THE COURT: I mean, I think it's a relatively-old doctrine being applied to new situations -- or trying to be applied.

MS. MOORE: Well, yes and no, Your Honor. The old doctrine relates to navigable -- or beds under navigable waters. That's what it relates to. Black

letter law, even *Black's Law Dictionary*, actually says "water," navigable waters. Most courts have construed it to mean submerged lands -- originally tidelands in England. In this country, it was broadened to include lands under all navigable waters, because we are a large country, with a lot of inland navigable waterways.

That was the doctrine that was the public trust doctrine. That was the doctrine that the colonies essentially inherited as common law. Those lands were, when -- after the revolution, the 13 colonies then became owners of those submerged lands.

THE COURT: Well, let me stop you for just a minute. Because I understand what the historic use of the public trust doctrine was. You don't have to educate me on that. I get that.

MS. MOORE: Okay.

THE COURT: So what I'm really interested in is modern use of the doctrine in areas outside of things dealing with these -- this kind of tideland, and even outside of divestiture of lands held in trust by the government for the public; so it's in these new areas. So why don't you skip right to that, and tell me what you think the law is or should be.

MS. MOORE: Okay. Basically the law is whatever the State wants it to be. There is nothing

commanding any state to do anything with the public trust doctrine. In some states, I believe most notably California and Hawaii, the public trust doctrine has been, you might say, expanded, generally in the '80s and '90s, I would say, after our statutory scheme was enacted. It has been expanded to cover other, what you might call "public values" or "trust values." Even in California, however, except for one case, it is still basically tied to water. It has been expanded to include, for example, uses and values of water, other than boating on them or commerce on them or carting logs down the stream, that sort of thing.

I know plaintiffs site purity of the air as an air value. That is actually -- in the relevant case, that is a public value of protecting the water. The famous case, *National Audubon Society* concerned a lake. What it did, it expanded it to include, I believe, tributaries that feed into the lake, because the lake was having bad problems.

THE COURT: Well, can you give me a principle reason why, if we're going to adopt this doctrine in New Mexico, we should limit it to water? That sounds like what you're arguing.

MS. MOORE: Well, I'm arguing that. I'm arguing, for one thing, that it isn't currently existent

in New Mexico.

THE COURT: Well --

MS. MOORE: Which I think is what plaintiffs are arguing, in order to essentially have it, like, be there at the time the statute was enacted.

THE COURT: Well, it's kind of like natural law, isn't it? It's there, or it's not there.

MS. MOORE: I don't think it is. I really don't think it is.

THE COURT: You don't think that's its origin? That's its doctrinary origin?

MS. MOORE: I don't think that's its origin. I mean, I'm not a student of government, Your Honor, that's not my background. But it arose basically from how the King held titles, and it was thought that some things, like waterways, should they have common use, that they should not be given or in any way alienated to a private party. I mean, that is the source of the doctrine, and that's how it came to the 13 colonies. The other states got it simply to be put on an equal footing with the 13 colonies. Thus, one -- each state joined the union; by virtue of joining the union, it took ownership of the submerged lands under navigable waters. That's -- I mean, that is the historical doctrine.

And then if the State chooses to either continue the doctrine -- some states, Texas jurisprudence basically does not. Some states do expand it to cover other trust uses. In no state that I have found is it actually a font of authority for the judiciary to do something that actually contradicts the state's statute, which I think is the result of plaintiffs' request here. It's something that an agency is told to take into account; that's what the courts do.

There is a *Center for Biological Diversity* against *FPL* case. I believe it's a case concerning birds and getting stuck in wind turbines and such. The Court did not, itself, decide whether the public trust doctrine was violated or not. The Court said it was the agency's duty to do it; and in fact, in that case, I believe the Court found the agency had done it. The plaintiffs were trying to get the Court to make the decision. The Court did not. In fact, I think they missed their chance to appeal -- perhaps strategically, perhaps not, I don't know.

But the Court declined to, itself, take the case and make a decision as to whether it was -- whether the regulations were proper or not. The Court said it was the agency's duty to take that value into account. And that value can be taken into account in our scheme of

regulating air pollution, including greenhouse gases.

THE COURT: Well, that would be -- if the agency failed to do that, that would be something that would be raised in the Court of Appeals, though, right?

MS. MOORE: Yes, Your Honor. Yes.

THE COURT: But then what you're saying is the public trust doctrine is nothing more than the -- what's already involved in the statute. It doesn't seem like a very evolutionary doctrine.

MS. MOORE: Well, to me, that is what the actual cases say. When you cut through some of the soar and rhetoric about sovereigns and this and that and protection of interests, yes, what it is, it is a use, a value, or a sort of set of uses and values that decision-makers have to take into account. That is how it is in California. To my knowledge, that's how it is in Hawaii. The Hawaii constitution specifically provides that natural resources are held in trust for the benefit of the public. But that's how they use it.

THE COURT: Well, let me ask you, before you leave Hawaii for a minute, if -- describe, briefly, in a thumbnail, the Hawaii approach to this. I know that it starts in their constitution. But after that, what do the courts do? They don't just jump in willy-nilly to every environmental issue that's raised.

MS. MOORE: No. Actually, I have read just a couple of Hawaii cases. One of them is -- well, I think they're all called "Re: Water Use Permit Applications." One has very soaring language about the public trust doctrine and the obligations of the sovereign. The later one, though, says that the court will not substitute its judgment for that of the agency. I honestly forget what Hawaii calls their water board. It says, however, that in light of the public trust doctrine, the courts will take a close look. They will make sure that the agency has, in fact, taken into account public trust values, conservation values, those types of values that the public trust, in those states, that interpret it that way.

THE COURT: Yeah. But Hawaii also has the same sort of -- it might not be exactly like our scheme, but it's a comparable scheme for, you know, administrative proceedings, then appeals, and they still have a place for this public trust doctrine. So what is it? What is the place for it?

MS. MOORE: To my -- in the cases I have read, all I can say, it is -- what I've been trying to explain. It's something that the courts -- well, courts, if it's a court case; agency, if it is an agency, they have to keep in mind that there is a duty

to conserve resources and to protect resources. It is certainly one of the things that is looked at on appeal, whether they have done that or not.

But I've never seen it used as a font of authority for a court to actually come in and say -- like is being requested here -- you are going to look at this by best available science, for example. I have not seen a case, in any jurisdiction, that does that.

THE COURT: Okay. All right.

MS. MOORE: Okay. Actually, in the discussion we've had, we have covered most of what I wanted to say. I wanted to make sure that Your Honor knew it was evident from the dates on the cases that the use of a public trust doctrine for natural resources protection is of recent vintage, basically the '80s, forward. Until then, it was lots of cases on public access to water, that sort of thing. It's been in the recent years that the doctrine has been expanded, when it has been expanded. And that supercedes, that is, after the enactment of our statutory scheme. So any question as to whether the statute abrogated the common law in existence, I believe, is irrelevant.

What I think is going on is -- what plaintiffs are requesting is essentially trying to abrogate the statute by asking the Court to determine, basically,

that the State's duty to the plaintiffs is measured by best available science. That doesn't allow for the balancing that our statutory scheme requires. And that, we believe, is an intrusion on a legislative policy provision.

Certainly the EIB can take into account public trust values. There's nothing in the statute, there's nothing in their procedures, in their rules to say they can't do that. They can do that.

THE COURT: Okay.

MS. MOORE: So I believe in some way, we believe that a declaratory judgment --

THE COURT: All right. I have one question for you. You're at the motion to dismiss stage.

MS. MOORE: Yes.

THE COURT: Would it be more appropriate, under the cases dealing with public trust, to build a record as to -- what would show that there -- that the process by which the agency has looked at these issues has been open and has considered public trust values, as opposed to dismissing at the pleading stage?

MS. MOORE: That's hard to answer. Everything the agencies have done is on record. It's public.

THE COURT: Well, I know it's on record, but it hasn't been proven here. That's all I'm saying. Right now we're at the dismissal stage.

MS. MOORE: Right. I'm not -- so -- may I consult with my co-counsel?

THE COURT: Sure.

(Note: Discussion held off the Record.)

MS. MOORE: After consulting with co-counsel, Your Honor, I would say that we believe you can take judicial notice of the proceedings in those cases, and we believe that those cases are, themselves -- we know those cases are, themselves, subject to judicial review in the Court of Appeals.

THE COURT: Well, I can't take judicial notice in a vacuum. Somebody has to bring me something to notice, and you have to prove it up, if it's a record in another -- in a different forum, which hasn't been done and which I don't think really could be done on a motion to dismiss. So your answer is you think I can go ahead and dismiss at this stage, but it would be pretty easy for you to prove it if I didn't, is I think what you're telling me, to be a matter of judicial notice.

MS. MOORE: I think we could proffer the record in the other cases, the statement for reasons for the existing rules, and the statement of reasons for any

proceeding that may be occurring in the next couple of months.

THE COURT: Okay. Thank you.

MS. MOORE: Okay. Whatever time I have left, I would reserve for rebuttal.

THE COURT: Okay. Eight minutes.

MS. MOORE: Okay. Okay. Thank you, Your Honor.

THE COURT: Sure. Who is arguing for you?

MS. RUSCAVAGE-BARZ: Good morning, Your Honor. I'm Samantha Ruscavage-Barz and I'd just like to introduce the plaintiffs, Akilah Sanders-Reed, her mother Carol, and John Horning with WildEarth Guardians.

THE COURT: He's a plaintiff, or he's a lawyer?

MS. RUSCAVAGE-BARZ: He's a plaintiff. He's the executive director of WildEarth Guardians.

THE COURT: Well, they had a lawyer, too.

MS. RUSCAVAGE-BARZ: I'm the attorney.

THE COURT: But there was another attorney.

MS. RUSCAVAGE-BARZ: James Tutchton. He's in Colorado. He's not here today.

THE COURT: Okay. Please proceed.

MS. RUSCAVAGE-BARZ: Thank you, Your

Honor. I would like to begin by saying that this is not a case about the greenhouse gas regulations, whether they are adequate and whether the State is somehow -- this is not a collateral attack on the greenhouse gas regulations. This is a case brought pursuant to the public trust doctrine. The plaintiffs have asked the Court to declare their rights under the public trust doctrine and to also declare that the legal relationship between --

THE COURT: What do you want me to do? Start at the end. If you won, what would you want?

MS. RUSCAVAGE-BARZ: We would like you to declare that the State has to come into compliance with its public trust duty to protect the atmosphere; that the State has to --

THE COURT: So if I issued an order that said that, that would be meaningless. You have to be more specific than that.

MS. RUSCAVAGE-BARZ: Okay.

THE COURT: Come in compliance and keep the air clean. Well, that's not a valid order. So what is it exactly you want me to do?

MS. RUSCAVAGE-BARZ: Well, there are several steps that would get us there. What is most meaningful is for this Court to formally recognize the

existence of the public trust doctrine.
THE COURT: Well, I want you to start at the end and tell me what relief you want. Don't tell me how you're going to get there through what judicial doctrine; tell me what relief you want.
MS. RUSCAVAGE-BARZ: We are asking the Court to compel the State to protect the atmosphere and trust resource by ensuring that the various actions that the State takes do not cause any kind of substantial impairment or damage to the resource, such that it will not be available for future generations.
Now, it is up to the State to decide the specific actions that it will take to ultimately fulfill its trust duty to protect the resources. That can be something like limits on greenhouse gas emissions, but it certainly is not limited to that. There are many different actions the State can take, and that would be up to the State. This Court would not be setting any kind of regulations of greenhouse gases or anything else.
THE COURT: So are you saying, then, that what I have to tell the State is they have to assume that protection of the atmosphere is the most compelling State interest and, therefore, they have to do whatever it takes to protect that?

MS. RUSCAVAGE-BARZ: The public trust jurisprudence from other states have said that it is not as extreme as the most compelling State interest. The State has to actually balance the different interest in that particular resource, the atmospheric resource.
THE COURT: Well, that's what you're saying; they have to balance the atmospheric resources. What about all the other resources? Can they balance them off against the atmosphere? Can the State make a rational decision that is allowed to stand under this doctrine, that it's more important to give people jobs than to have clean air? Can they make that decision?
MS. RUSCAVAGE-BARZ: Yes, Your Honor, the State can make that decision, because the State determines what the uses of the particular trust resource at issue are. And so the State can recognize, for example, that industries that need to generate electricity is going to result in a certain level of emissions. And the State, itself, has the authority to decide -- to do the balancing between, for example, the economic need to have emissions in the atmosphere, versus other sorts of interests, like health interests, recreational interest, and having clean air.
THE COURT: All right. Why isn't our current statutory scheme doing this?

MS. RUSCAVAGE-BARZ: The public trust duty is an affirmative duty that the State must take to ensure that its actions are not impairing the trust. The current regulatory scheme is only part of the way the State manages the atmosphere. So there are various other things that the State can do. Policy -- policy decisions, policymaking, regulation is one way to manage the atmosphere. The public trust --
THE COURT: Well, tell me what is wrong with the current statutory scheme for assuring that all of these things are not considered.
MS. RUSCAVAGE-BARZ: The current statutory scheme only applies to -- well, right now, the greenhouse gas emission limits do not take effect for another couple of years, and it's possible that they are going to be repealed. The public trust doctrine is not about cleaning up a particular statutory scheme or making it more effective.
THE COURT: But there is something about it, it seems to me in looking at these cases -- well, let's step back a minute. It seems very antidemocratic. Why should some high school student get to come in and tell everybody in the State of New Mexico that her values are the values the State has to look at? Explain to me.

MS. RUSCAVAGE-BARZ: Akilah is not saying that her values are the only values. What she's saying is the State has an affirmative duty, under the public trust, to ensure that the atmospheric resource is not substantially impaired. If the State is taking action that could impair the resource, the public trust requires the State to take into account measures that could diminish the amount of impairment.
THE COURT: Okay. And the State has a mechanism for doing that in place already.
MS. RUSCAVAGE-BARZ: The State could use that mechanism, but right now the State is not doing that with the idea in mind that it needs to protect the atmosphere. Right now, the rule-making process, in general, is really responsive. So anyone can petition the EIB for a rule-making related to air quality. That is different from the State's affirmative duty. And the Courts have said it's a continuing duty to ensure that the State's actions are not impairing the environment. And at the planning stages of various actions, to take into account --
THE COURT: Where is this affirmative duty not to impair the environment come from?
MS. RUSCAVAGE-BARZ: This comes from the various cases that are cited in our brief.

THE COURT: Tell me one case that says that, and read me the language that says that.

MS. RUSCAVAGE-BARZ: Okay. *The National Audubon* case says that the State has an affirmative duty to protect the atmosphere. I can't find the exact quote. But the California case, *National Audubon*, talks about it. Washington case law talks about it, Oregon. The Hawaii case law talks about it; that this duty, it's an affirmative duty that the State is supposed to do. It is not simply about alienating -- not allowing the State to alienate public trust resources.

THE COURT: Well, it's -- there's a wide difference between not selling public trust and affirmative duty not to harm the environment. There is a big gulf in between there, and I don't really think those cases that you're citing stand for that proposition that you're saying they stand for. You can take language out of them that says that, but you can't look at the holdings in those cases and say that there's such a duty.

MS. RUSCAVAGE-BARZ: The Hawaii water permit cases that were talked about earlier talk about the State's continuing duty to ensure that it is not harming or substantially impairing -- a lot of courts use the language of substantial impairment of the

resource. The Hawaii cases in Re: Water use Applications talk about the continuing duty that is imposed on the State by the trust. And so certainly, it is not -- the State is not reacting. The State is supposed to take into account in its planning.

THE COURT: Okay. But you're -- all right. The State here has set up a system where it looks at what needs to be done to assure air quality, and it looks at various things, various values in making that decision. Now, why isn't that sufficient?

MS. RUSCAVAGE-BARZ: The Air Quality Act is not the only mechanism for protection of the atmosphere.

THE COURT: Well, I'm sure they could have picked something else, but they picked that. So why isn't that sufficient?

MS. RUSCAVAGE-BARZ: The issue is not whether or not that is sufficient. Because courts have found that the regulatory scheme and the public trust were --

THE COURT: Have they ever found -- have they ever applied the public trust doctrine in a way that made the State do something in an instance where the State had not failed to act openly or act where you didn't suspect there was corruption or where they

haven't been following a statutory scheme?

MS. RUSCAVAGE-BARZ: The result of the Mono Lake case, which was the *National Audubon* case, resulted in the State ultimately adding a provision to its water code that impacts to Mono Lake, as a trust resource, had to be considered. That was many years after the initial decision that laid out this relationship between statutory mechanisms and the public trust.

And so initially, that Court found that the State had not considered impacts to Mono Lake as a trust resource from continued water diversions and that it should. And after multiple years, that was the result. But the -- no court has ever ordered a state to do anything like reduce water diversions by a certain amount. The Courts have not stepped into that role of making those decisions. But the Courts have required states to consider the public trust impact, and so the Courts have overturned legislation where that was not considered.

THE COURT: Well, but are you saying that our legislation doesn't consider the public trust impact?

MS. RUSCAVAGE-BARZ: It does not. There is no provision that the State holds the atmosphere in

trust for the public and, therefore, has to consider whether a particular action is going to impair the trust.

THE COURT: Well, so what you're saying is we actually have to have that language? The "considering the public interest" wouldn't be enough?

MS. RUSCAVAGE-BARZ: I don't think it's as black and white as needing to have that language. But certainly consideration of the public trust in the atmosphere would need to be a component of any decision that the State made, particularly something like repeal of the greenhouse gas regulations, which I understand the State is supporting.

THE COURT: Well, if they repeal them, and if you have a basis for challenging that repeal, then it seems to me, that's when you should be in court, not in advance.

MS. RUSCAVAGE-BARZ: Well, the plaintiffs could certainly participate in that process, and they have participated in that process. Both WildEarth Guardians and Akiah have participated in the rule-making process.

But this is not a case about the adequacy of the greenhouse gas regulations. It's about the State's larger duty to protect the atmospheric resource, to

consider all of the different uses, and maintain the atmosphere as a viable resource.

The greenhouse gas regulations could be a way that the State could choose to do that. But right now, we allege in our complaint that the State is not doing that, and that is really an issue that we can prove during the merits phase of this case.

But the larger -- the main question on this motion to dismiss is how plaintiffs state a viable claim for relief, under the public trust doctrine.

THE COURT: Well, that's maybe the second or third issue. The first issue is, is there such a doctrine in New Mexico? And if there is, does the plaintiff state a claim under it?

MS. RUSCAVAGE-BARZ: That's correct. And we believe that the public trust doctrine does exist in New Mexico. Before the reasons that were discussed earlier with the State, the public trust doctrine is inherent in the constitutional provision that the State read and in other aspect of State statutes, like surface and ground water, where those statutes say the State holds those waters for the benefit of the public. But courts have found --

THE COURT: That would tend to tie it to water, though, wouldn't it?

MS. RUSCAVAGE-BARZ: Yes.

THE COURT: You couldn't read those statutes as saying, "Therefore, the public trust doctrine applies to air"?

MS. RUSCAVAGE-BARZ: No, Your Honor. That's correct. But what those statutes do indicate is that the public trust doctrine is inherent in New Mexico law, at least with respect to water. And what we are asking this Court to do is to also find that the public trust doctrine applies to air. Because what qualifies as the public trust resource, as the Court says in *Illinois Central*, is property of a special character or subject to public concern, to the whole people of the State.

Subsequent to that, some of the more recent cases that were discussed with the State -- the courts in California, for example, have said that the public trust is an expanding concept, and it is meant to respond to the current relationship between people and their natural resources.

And if -- the *CBD vs. FPL* case that the State's counsel discussed recognized wildlife as part of the public trust, based on language in wildlife statutes about wildlife being the property of the State. And I just want to point out that in *CBD*, the Court dismissed

that case, because the plaintiffs brought a public trust claim against private wind farm owners and said that the killing of those birds was damaging to the wildlife trust. And the reason the Court dismissed the case is because private parties are not proper defendants in a public trust case, because the State is the entity that has the responsibility to manage and protect the trust resource.

So when the Court said it's up to the agencies to decide, they were saying that it's up to the agencies to do the balancing with respect to that resource, and that plaintiffs could not bypass the agency and go directly to the private entities that were -- that they felt were destroying the trust, because private entities do not have a public trust responsibility. *CBD* did not stand for the proposition that a legislature, or any kind of statutory or regulatory scheme, somehow abolishes the existence of a public trust doctrine. That was the case about the wrong defendants, improper defendants.

THE COURT: Can you cite a case where they've applied it to -- say the State has a duty to ensure that the atmosphere would be viable for the future.

MS. RUSCAVAGE-BARZ: There are no cases

that have declared the atmosphere as a public trust resource. No court has been asked to recognize the atmosphere as a public trust resource. But the duty for protection of a trust resource, in general, is to protect it, and substantial impairment is the most common phrase the courts have used. *Illinois Central* said, "The State must assure that there is no impairment of the trust resource."

THE COURT: Can you tell me a case where the Court has told the State it must do something, where there was no indication of that, that the proceedings that the State was engaged in were not closed, or there was no feeling that people with certain ideas were not being given an adequate opportunity to be heard by the agency or the legislature?

MS. RUSCAVAGE-BARZ: I am not familiar with any cases where the basis for the public trust claim was that the State had taken action behind closed doors.

THE COURT: It sounds like what happened with the *Illinois* case, doesn't it?

MS. RUSCAVAGE-BARZ: With *Illinois Central*?

THE COURT: Yeah.

MS. RUSCAVAGE-BARZ: Well, that was

about --

THE COURT: The legislature passing the law -- it just didn't pass the smell test, what they did, right?

MS. RUSCAVAGE-BARZ: I don't recall that case being about the lack of public participation, but I could be mistaken.

THE COURT: Well, I don't know that that's what they said, but that's what it seemed drove the decision; that how could you pass a statute that would give away the whole lake shore of Lake Michigan, unless there was something that was not right. How could you give that to one private entity?

MS. RUSCAVAGE-BARZ: Well, the basis for that argument was that this is a resource that is not just used by the public, but also is managed for the public through the State. And so the idea of giving away a resource that is shared by all the citizens of the State, that was really what was troubling about that. Not that it was done behind closed doors, but that the State felt that it could just do that with the resource that was meant to be for the entire State, and give the whole thing over to a single public use.

THE COURT: All right. Do you have something more that you want to tell me?

MS. RUSCAVAGE-BARZ: Yes, Your Honor, the State has said that because its existing regulatory scheme for air exists, that somehow that cancels out the public trust. And in fact, common law doctrine is not simply cancelled out by the existence of a statutory scheme that may deal with the same issue. And the New Mexico Supreme Court has said that -- in *Sims v. Sims*, that the statute must expressly abrogate the common law. Otherwise, the common law, because it is judicially created, is in the purview of the judiciary to change or to get rid of; like the Supreme Court in *Hicks* did, with common law sovereign immunity.

THE COURT: Right. Now tell me what common law case adopted the public trust law doctrine in New Mexico.

MS. RUSCAVAGE-BARZ: There has not been any case in New Mexico that has adopted it.

THE COURT: Well, are you suggesting that it just lives in the abstract before it's adopted?

MS. RUSCAVAGE-BARZ: Before it's judicially recognized, the public trust, as a common law doctrine, is inherent in traditional statutory conditions. But courts have formally recognized it, and the Nevada -- the *Lawrence* case from Nevada is the most recent case where the Courts said, "We are, for the

first time, recognizing the existence of the public trust in Nevada and applying it to the question that is before us." But even that court recognized that the public trust was inherent in different statutory and constitutional provisions in Nevada.

And Nevada also had a water appropriations code, a water code that was regulating the resource, and the public trust claim was really brought against the same resource that was already regulated. And so the Nevada court recognized that statutory schemes in the public trust doctrine are complimentary, and they recognize this concept that the public trust duties of the State can be informed by existing regulatory structures. But that is a case where the court, for the first time, recognized the public trust doctrine in that state and defined its applicability with respect to a particular resource.

So it is certainly within this Court's purview to recognize the public trust doctrine and to decide which resources constitute the public trust. That is not something that the Environmental Improvement Board can do. For example, Akilah cannot get relief from the EIB with respect to her rights under the public trust doctrine.

Your Honor, I would just like to close by saying

that this action is properly before this Court. This Court is the proper entity to decide the public trust doctrine and its scope. And other courts have recognized that the judiciary plays an important role as a check on the other branches of government and their actions related to management of trust resources. Thank you.

THE COURT: Thank you. You have time left. Do you wish to use it?

MS. MOORE: Just a few things, Your Honor. One thing, I did note that plaintiffs' argument was substantially different from their pleadings in the relief that they wanted and the manner in which they say the Court can use the public trust doctrine. In their complaint, they are asking this Court to declare that the duty of the State is -- I think "measured" is the wrong word. I've forgotten the word they used. The duty of the state is determined by the best available science; that that is the only thing the State can look to. That was not mentioned in the argument, at all. Now they're talking about balancing things. It just somewhat confuses me that their argument is so different from their pleadings in that regard.

I would also like to comment on the *Sims* case. The *Sims* case is probably the best New Mexico case that

actually articulated the reasons why common law continues to exist, unless it is abrogated. The *Sims* case speaks of statutes being enacted against the background of the existing common law. And the common law continues, then, to fill in interest to seize -- or gaps, if you will, easier to pronounce -- that the statute may have left out or that may need construction.

I think in this case, both from what I've said and even what the plaintiffs have said, there is no common law regarding a public trust in resources at the time of the statute. The statute can't abrogate something that doesn't exist. So I don't think the *Sims* case is relevant.

All of the public trust jurisprudence regarding resources came after our statute. Our statute can very well encompass those interests. I don't know what further relief plaintiffs can really get from this Court, other than the Court saying, "The public trust doctrine is operative in New Mexico," which I simply do not think it is. Just saying that the waters are owned by the public, subject to appropriation, doesn't establish a public trust duty to do anything.

THE COURT: Well, even if there is a public trust doctrine in New Mexico, if it doesn't get you any relief, you don't get to sue, do you?

MS. MOORE: No, Your Honor. I mean, that's partly what we're saying. There's no relief that can be gotten that can't already be gotten through the statutory scheme.

And I would also say that the Nevada case, that was a submerged water case. I mean, yes, of course, the public trust doctrine, that is its classic use. It concerned whether the -- I think the State could convey submerged lands to a county. That is the classic use of the public trust doctrine. So yes, you know, of course, they may well recognize it, just as Arizona did in a case involving titles to submerged land; that is not a resource protection case.

Just in passing, it's kind of ironic, if a public trust exists, in how you enforce it. It's enforced by the attorney general. It's enforced by a State officer. It has to be classed as a charitable trust, if there is such a thing.

So again, I don't know where this gets anybody. It's back to the relief you get under the scheme that the State has provided, which does provide for anybody to come in and voice any opinion. And the Courts will review that in accordance with New Mexico law.

Unless Your Honor has further questions for me --

THE COURT: Well, I'm trying to look here at what they claim in their prayer for relief. That the public trust doctrine is operative; that the State has a fiduciary duty to protect the atmosphere; that the fiduciary duty is defined by best available science; that the fiduciary duty is enforceable by citizen beneficiaries; that the State's allowance of greenhouse gas emissions of current and increasing levels constitutes a breach of trust, and grant such other relief as the Court deems appropriate.

It doesn't seem quite like what you were telling me.

MS. MOORE: Are you speaking to me?

THE COURT: No, not you. I'm speaking to your opponent. I want to talk to her a minute.

Your request for relief doesn't seem like what you were telling me you wanted me to do when I asked you, "What relief do you want?"

MS. RUSCAVAGE-BARZ: You asked me, Your Honor, for the final relief that would come at the end of a merits phase, and that is to compel the State to protect the atmosphere and to prevent -- to prevent harm to the atmosphere.

THE COURT: Well, it seems -- that's even different than what I thought you told me. I thought

you told me that what I would do is tell the State that they have to consider it, the atmosphere, and protecting it, in whatever decision it makes.

MS. RUSCAVAGE-BARZ: That is the practical way that the public trust has worked in other states. The State is told that if -- if a state is told it has not fulfilled its duty, what the courts have said is that the state needs to go back and consider the public trust uses.

THE COURT: All right. So I don't say to the state, you have to say -- there has never been a case that has said anything comparable to -- that you have to determine whether or not your greenhouse gas emissions are appropriate by best available science.

MS. RUSCAVAGE-BARZ: Best available science is the standard that we are asking the Court to apply; however, that is an issue that would certainly be briefed and argued during the merits phase. The courts have the ability to impose standards on common law doctrines and that is the standard that we're asking for.

THE COURT: That is a lot different than sending something back to the State to balance in considering the atmosphere, in protecting the atmosphere.

MS. RUSCAVAGE-BARZ: The starting point, Your Honor, would be considering impairment to the atmosphere. And using the best available science standard would ensure that, when considering harm to the atmosphere as it could impact climate change, that the State would be considering climate change science. It could then, from that baseline of understanding the condition of the atmosphere, balance it with potential other uses.

THE COURT: And are you telling me that in adopting its greenhouse gas emissions, that the State did not consider best available science?

MS. RUSCAVAGE-BARZ: I can't answer that question, because I wasn't involved in those proceedings. Best available science would be the standard for their fiduciary duty to the atmosphere.

THE COURT: It would be one thing for them to consider, wouldn't it?

MS. RUSCAVAGE-BARZ: Correct. It would be the primary standard to determine whether the atmosphere was being impaired.

THE COURT: And if the answer was yes, then what would be the conclusion?

MS. RUSCAVAGE-BARZ: If the answer was yes, then certainly the State would have to look at the

action that was causing that impairment and would have to look for ways to mitigate that impairment.

The courts have recognized that it may not be possible to totally avoid any impairment of a trust resource, but the baseline for starting to evaluate that trust resource should be best available science, rather than political and economic considerations.

THE COURT: Say that last again.

MS. RUSCAVAGE-BARZ: The standard for determining impairment to the atmosphere should be the best available science, rather than political and economic considerations.

THE COURT: Those would come later, at step two.

MS. RUSCAVAGE-BARZ: They could, depending on what the action was. But certainly a decision about whether emissions in the atmosphere were contributing to climate change, that's a decision that should be made based on the best available science, not on an unsupported belief about climate change. It should be the science that determines the condition of the trust resource in the first instance, and we are asking the Court to set that standard.

THE COURT: And you're saying that that is something that the Court can require as a matter of

fiat; that that's not -- that that issue is not subject, at all, to the political process?

MS. RUSCAVAGE-BARZ: The problem is that that issue, when it comes to climate change, it seems to be solely subject to the political process. The Court would be setting a standard for the State's management of the public trust. That standard could be evaluated in future cases claiming that the State has not met its public trust obligation. So the plaintiff would have the burden, coming into court on a public trust case, of demonstrating that the particular trust resource -- in this case, the atmosphere -- would be substantially impaired or harmed, and the standard that the State should be using to really make that determination is what the science says.

THE COURT: And that's what I'm asking you, is whether or not you should be using best available science, something that is excluded from the political process?

MS. RUSCAVAGE-BARZ: I don't think that setting the standard for the trust resource is part of the political process.

THE COURT: Well, it's certainly not, if you have the court do it.

MS. RUSCAVAGE-BARZ: It's an issue that's

proper for this Court to determine, as it sets out the parameters of the public trust doctrine with respect to the atmosphere.

THE COURT: And can you give me a case applying a public trust doctrine, where any court has been so specific in what it directed the state to do?

MS. RUSCAVAGE-BARZ: The court set a standard in one of the public trust cases that was dealing with whether the State could sell portions of land that might be public trust resources, such as they weren't for sale.

THE COURT: What case is that?

MS. RUSCAVAGE-BARZ: And I'm sorry, Your Honor, I can present that in a letter brief. But there is a case where the court set the standard that was to be used to determine whether the land that the State was seeking to sell was part of the trust resource, and I just can't recall the details of that case.

There has not been a case where the court has set the best available science as the standard to manage the resource.

THE COURT: Okay. Thank you.

MS. RUSCAVAGE-BARZ: Thank you.

THE COURT: As a trial judge in this case, I am hampered by quite a few things. One of which is

that this -- the particular doctrine at issue, the public trust doctrine, has not specifically been adopted in New Mexico. So there is no New Mexico case law to guide me in what I think the appellate courts would do if they had a case in which the public trust doctrine was urged.

And it's also a doctrine which has been characterized, even by the California courts, as -- and I'm quoting now, "Resoundingly vague, obscure in origin, and uncertain of purpose." That's from the *Center of Biological Diversity*, which is a California appellate court case. So that makes it hard to get a grounding, particularly when you are in an area which is factually -- or unrelated to the facts that gave rise to the public trust doctrine.

In other words, I think the doctrine historically did deal with water -- land under water at the shoreline and that kind of -- and had been expanded to water-type uses. So it -- we're now not only dealing with uncertainty as to whether or not there is a public trust doctrine in New Mexico, guessing at what the appellate courts would do, but we are trying to determine whether or not the appellate courts would not only adopt such a doctrine, but would apply it in an area which it has rarely, if ever, been applied.

And I think one of the answers was that no court has applied this to the atmosphere. Now, I recognize that some of the commentators have said that there's no reason why it could not be applied to the atmosphere. It just makes it very difficult, so I am guessing.

And frankly, I have to say, I find the New Mexico authorities to be somewhat contradictory in where I think it would lead. There definitely is a recognition in the appellate cases of the importance of natural resources and the State's right to protect those natural resources. On the other hand, you say in cases like the *Forest Guardians* case, a reluctance to give standing to a person comparable to the plaintiff in this case, the non-institutional plaintiff in this case, in my opinion. So I get mixed reactions.

I also have the fact that you have to look at what the appellate courts, particularly the Supreme Court, is like today, compared to when earlier cases were decided. All of that being said, it -- which I guess is just a long-winded way of saying this is my best guess.

I do believe that if it was confronted with the issue, the Supreme Court of New Mexico would apply the public trust doctrine in New Mexico; however, I don't think that's sufficient to answer the motion to dismiss

in this case. Because saying that they would apply the public trust doctrine leads us to the next question. Would they apply it to the atmosphere? And again, there is absolutely no guidance, but I believe in the appropriate case, were they convinced that the legislature -- the agencies had been ignoring the atmosphere, they would apply -- they would apply the public trust doctrine to the atmosphere.

What I do not believe, however, is that the court would apply the public trust doctrine in a way that would grant the court the authority to bypass and override the political process, if there was no indication that somehow the political process had gone astray; in other words, if there was no indication that the legislature had failed to enact a statutory scheme that was to deal with the atmosphere; if there was no indication that the agency assigned to deal with the quality of the atmosphere was not attempting to follow the statutory scheme; if there was no -- if there were no indication that people were being excluded from either the legislative process or from the administrative process.

I do not believe that the courts of New Mexico, which have a very strong tradition of upholding the separation of powers doctrine would aggregate, unto

itself, the power to substitute its judgment for that of the State, in the absence of a failure on the part of the State to act in the area in an open manner.

So based on what I've seen in the complaint, based on what the answers and argument were today, I believe that the motion to dismiss should be granted.

I have to say one more thing. I do not believe, if adopted, that the public trust doctrine would result in more than the court telling a State agency, or the State as a whole, to consider certain things. I do not believe they would be setting the standards.

It would be -- it would be the height of arrogance for a court to say it could determine what was the best standard to apply and to totally bypass all of the State expertise at a place like the environment department, or the Environmental Improvement Board, and assume that the court could do a better job than that agency could do. So I do not believe that much of the requested relief would be the kind of relief that an appellate Court would authorize in a public trust case. For that reason, I am granting the motion to dismiss.

Now, having said that, I believe there is a place for the public trust. I believe that if the plaintiff wants to amend their complaint to state a case that is more consistent with the way I am guessing the

public trust doctrine would be applied in New Mexico, I will give them leave to do so. But if you don't want to, I understand that, also, and you can -- assuming that you're going to appeal, you can just appeal this as a final order. All right.

So how long would you need to decide whether or not you want to file an amended complaint?

MS. RUSCAVAGE-BARZ: We would just need a couple of days, Your Honor.

THE COURT: Okay. Well, why don't I -- why don't we do it like this. I'm going to ask that the State draft the order granting their motion that -- and I'll give you ten days to file an amended complaint. If, within ten working days, you haven't filed -- after the order is entered, you haven't filed a working complaint, then the order will provide that it's a final, appealable order. All right? So Ms. Moore, can I get you to draft that and circulate it?

MS. MOORE: Yes, Your Honor.

THE COURT: How long will you need to do that?

MS. MOORE: Let's see. I would say since we're already toward the end of the week, I would say probably mid next week, workdays.

THE COURT: All right. Can you get it

back to me by Friday?

And this is what I would require that you do. First of all, you circulate it, obviously, to plaintiffs' counsel. If they can approve it as to form, then you e-mail it to me in Word format, so I can change it if I want to. And just indicate that people have approved it. If they can't approve it as to form, then a week from today -- and I'm willing to give you more time, if you want more time. But a week from today, you should -- the State should file a notice of filing of proposed order with their proposed order attached.

On the same day, that's a week from today, the plaintiffs should file their notice of filing of counter-proposed order as to form or objections, whichever you wish. You file that with the clerk through e-filing, so it's of record what it was you wanted me to do. But then e-mail to me, in Word format, whatever it is you file. So your proposed order should be e-mailed to me in Word format, and your objections or counter-proposal as to form should be e-mailed.

Then that -- if you don't file a -- an amended complaint within ten days of the filing of that order, then it will be a final order, and you may file your notice of appeal running from the date that order was filed. All right?

Do you have my e-mail address, or would you care for a card?

MS. RUSCAVAGE-BARZ: A card.

THE COURT: It was also published in the *Bar Bulletin*. It's the e-filing address for me. But here. I'll give you -- I'll give everybody a card.

Come forward, please. Do you mind passing it out to the other counsel?

MS. RUSCAVAGE-BARZ: Yes, Your Honor.

THE COURT: Thank you.

MS. MOORE: Your Honor, we are not clear as to the timing and the ten days. What happens when? I'm sorry.

THE COURT: All right. You need to get me your order by next Friday. Usually, but not always, I look at those the day they come in and sign and try to e-file them the same day or the next day. Particularly, on a Friday it may turn out to be Saturday. You will get a conformed copy of that order as soon as -- when it's accepted for e-filing, if you've registered for e-service. All right.

So let's just say I get it filed on Friday. So ten working days from Friday, which would be roughly, I think, two weeks from that day, the plaintiffs would either have to file an amended complaint, or if they

decide they don't want to, that they think they're going to stand on their current complaint. They think it's adequate. Then, if they file their amended complaint, we're still here, and you have to respond, as the rules require, which I think is within ten days.

If they don't file anything, then that order, which was filed on, we'll say, a week from today -- so whatever day that is, like the 3rd of February -- is that right? Okay. That will be day 1 of the appellate time. And the plaintiffs -- well, whoever wants to appeal, would have 30 days to file their notice of appeal.

Do you get it now? What's your question? Maybe I can --

MS. MOORE: I thought, when you were first giving us directions, you were talking about drafting an order and circulating to plaintiffs' counsel.

THE COURT: I am.

MS. MOORE: Okay. And is --

THE COURT: That all has to be done within --

MS. MOORE: Okay.

THE COURT: You said you would get it done mid next week. I want you to have circulated, talk to her about whether she can agree to it or not, and decide

if you can make the changes she wants or not. And if you get agreement, just get it to me whenever you get it to me. If you don't get agreement, then by a week from Friday.

Now, if you need more time, I'll be glad to give you more time, but that's what I set up today. But I'll be glad to give you more time, if you think you're going to need more time to negotiate over an order.

MS. MOORE: We think that's okay.

THE COURT: Okay. All right. Is there anything else, then, that we need to do on this case? No? I didn't hear anybody say anything.

MS. MOORE: No, Your Honor, from our perspective.

THE COURT: All right. Then we will be in recess.

(Note: Court in recess at 10:16 a.m.)

STATE OF NEW MEXICO)
)
COUNTY OF SANTA FE)

I, RACHEL M. LOPEZ, Certified Realtime Court Reporter for the First Judicial District of New Mexico, hereby certify that I reported, to the best of my ability, the proceedings, D-101-CV-2011-01514, that the pages numbered TR-1 through TR-9, inclusive, are a true and correct transcript of my stenographic notes and were reduced to typewritten transcript through Computer-Aided Transcription; that on the date I reported these proceedings, I was a New Mexico Certified Court Reporter.

Dated at Santa Fe, New Mexico, this 31st day of January, 2012.

Rachel M. Lopez, CCR, RPR, CRR
License Expires: 12/31/2012

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January 26, 2012

Via Hand Delivery
Chambers of the Honorable Judge Karsten Rasmussen
125 E. 8th Avenue,
Eugene, OR 97401

Re: *Chernaik v. Kitzhaber*, 16-11-09273

Dear Judge Rasmussen,

During the January 23, 2012 hearing, the Court asked Plaintiffs' counsel: "What could the Court not regulate under the public trust doctrine?" and "Under the Public Trust Doctrine, what would be the limit on the court's actions?" Plaintiffs provide the following responses:

By asking the Court to carry out its function of enforcing the Public Trust Doctrine, Plaintiffs are not asking the Court to regulate. Instead, Plaintiffs ask the Court to declare that: 1) Defendants have failed to uphold their fiduciary obligations to protect trust assets, (Amended Complaint ¶ 49), based on evidence as alleged in the complaint (and to be established at trial); and 2) the atmosphere is a trust resource, governed by the Public Trust Doctrine. (*Id.* ¶ 47). To remedy these legal violations, Plaintiffs request that the Court order: 1) Defendants to prepare an accounting of the public trust's assets in order to determine the extent of the breach, (*Id.* ¶ 50); and 2) develop a plan for reducing carbon dioxide emissions in Oregon to protect those public trust assets. (*Id.* ¶ 51). The requested declarations and relief fall well within the traditional role of the judiciary. Thus, this case cannot be dismissed.[1]

[1] The issues of whether the atmosphere is a trust resource and the scope of the Public Trust Doctrine are not presently before the Court because of Defendants' stipulation. Defs. Mtn at 2. Even so, a declaration that the atmosphere is a public trust resource is unlikely to open the barn door more widely. Demonstrating substantial impairment of our atmosphere is not a run of the mill common law case. Nor does counting the atmosphere among public trust assets alter the State's existing jurisdiction, which is already broad. *See e.g.*, ORS 468A.010(1)(a) ("[I]t is declared to be the public policy of the State of Oregon [to] restore and maintain the quality of the air resources of the state in a condition as free from air pollution as is practicable.").

Under the Public Trust Doctrine the Court's primary role is to determine if trust assets – essential *natural* resources – are being "substantially impaired." *See Shively v. Bowlby*, 152 U.S. 1 (1894); *Morse v. Oregon Div. of State Lands*, 285 Or 197, 203, 590 P2d 709, 712 (1979). Often there is a specific government action at issue in a public trust case. *See, e.g., Morse*, 285 Or at 199, 590 P2d at 710 (addressing "whether the Director of the Division of State Lands had authority to issue an estuarian land fill permit"). However, inaction upon the part of the trustee is also an appropriate subject for judicial review. *See, e.g., Waller v. Lane County*, 155 Or 160, 169, 63 P2d 214, 217 (1936) (discussing case in which trustee "fails to administer the property in accordance with the trust impressed upon it" and that "'the remedy is . . . by action to enforce a proper administration of the trust'" (citation omitted)); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1354-55 (Fed. Cir. 2004) (holding that tribe could pursue a trust claim over "the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts").

In either situation, the Court determines whether the trustee has properly protected trust assets, typically through an accounting. *See Wood v. Honeyman*, 178 Or 484, 557-58, 169 P2d 131, 162 (1946) ("the cestui is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use"). If a court determines trust assets have not been protected, then it must require the trustee to develop a plan to protect those assets. *See e.g., Brown v. Plata*, – U.S. –, 131 S. Ct. 1910, 1928 (2011) ("The court did not order the State to achieve this reduction [of the prison population] in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.").

Under Plaintiffs' Amended Complaint, what is regulated (*i.e.*, the sources of carbon dioxide emissions) and how it is regulated are questions largely left to Defendants' discretion. Plfs. Opp'n. to Mtn to Dismiss at 25. Defendants have already identified the primary sources of greenhouse gasses in Oregon and developed quantitative measures for addressing them. (Amended Complaint ¶¶34-35); *see, e.g.*, Governor's Advisory Group on Global Warming, *Oregon Strategy for Greenhouse Gas Reductions* at 44-116 (2004).[2] Many of those measures, however, have not been implemented, and Oregon has fallen far behind its targets. Governor's Climate Change Integration Group, *Final Report to the Governor A Framework for Addressing Rapid Climate Change* at 26-34, App. 4 (Jan. 2008);[3] OGWC, *Energy Roadmap to 2020* at 15-26 (2010);[4] (Amended Complaint ¶ 36). While these issues are technical, contrary to Defendants' assertion, this Court is well equipped as a fact finder to understand, with the aid of expert testimony, these issues and to provide appropriate judicial oversight of the State's regulatory functions.

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2 (Available at: http://www.oregon.gov/ENERGY/GBLWRM/docs/GWReport-Final.pdf) (last viewed January 25, 2012).

3 (Available at: http://www.oregon.gov/ENERGY/GBLWRM/docs/CCIGReport08Web.pdf?ga=t) (last visited January 25, 2012).

4 (Available at: http://www.keeporegoncool.org/sites/default/files/ogwc-standard-documents/2011Report.pdf) (last viewed January 25, 2012).

In that respect, this case is no different from other litigation where courts have overseen remedial plans developed and implemented by government regulators. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003) (one of several decisions pertaining to the federal government's management of the federal Columbia River power system); *McCleary v. State of Washington*, No. 84362-7, 2012 WL 19676, *1, *36-38, 2012 Wash. Lexis 3 (Wash. Jan. 5., 2012) (holding that the state violated its duty and rectifying the violation by in part ordering the preparation of a plan and retaining jurisdiction to oversee implementation of the plan); Ottem, *The General Adjudication of the Yakima River: Tributaries for the Twenty-First Century and a Changing Climate*, 23 J. Envtl. L. & Litig. 275 (2008) (discussing the Yakima basin water rights resolution). In these situations, courts are not tasked with regulating in the first instance, but rather they must, at times, oversee regulatory functions of the executive branch when it has violated the law.

During argument the Court posed the further question: "If called upon to review the adequacy of the State's plan, will the Court then be in a position of regulating?" In that event, it will be the Court, with the aid of experts, that declares whether the plan is sufficient. Defendants, and not the Court, will develop and implement the plan to ensure protection of public trust resources. The *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1985), case is instructive on this point. There, after declaring the law, the Court left to the parties the task of resolving how to allocate water, holding that:

> This opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water. Our objective is to resolve a legal conundrum in which two competing systems of thought-the public trust doctrine and the appropriative water rights system-existed independently of each other, espousing principles which seemingly suggested opposite results. We hope by integrating these two doctrines to clear away the legal barriers . . . The human and environmental uses of Mono Lake -- uses protected by the public trust doctrine -- deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them.

Id. at 732. Likewise, here the Court will not be called upon to decide whether specific activities in counties throughout Oregon, such as field burning in Lane County, will be allowed to occur. That decision is reserved for Defendants. Rather, the young Plaintiffs in this case ask the judicial branch of government to declare the law and in so doing oversee the executive in addressing the climate crisis with which we are presented. The Public Trust Doctrine is the Plaintiffs' umbrella insurance policy and without it we will sacrifice the future of Plaintiffs, our children, and future generations.[5]

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[5] In *National Audubon Society*, the court also held that non-navigable waters are a trust asset. That ruling, however, did not open the floodgates of public trust litigation in the State. *See* Weber, *Articulating the Public Trust: Text, Near-Text and Context*, 27 Ariz. St. L.J. 1155, 1231-32 (1995) (noting that in the first "dozen years" after the decision "the appellate courts . . . have added almost nothing to the doctrine"). Similarly, a ruling in this matter will not expand or

The task presented to this Court is not small, but it also is not insurmountable. When faced with the injustices of the civil rights era, the courts provided a similar oversight role when the other branches of government were unwilling to remedy the blatant inequities in school funding. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (upon finding "little in the history of the Fourteenth Amendment relating to its intended effect on public education" the Court went on to declare "in the field of public education, the doctrine of 'separate but equal' has no place"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (court declared an entire educational *system* unconstitutional, demanded that the legislative and executive branches overhaul the system to achieve certain goals, and thereby reordered the governance of education in the state to provide the courts with a new and decidedly more engaged role.). As Oregon courts have noted "no official can invoke either 'policy' or 'politics' to avoid review of actions not authorized by law." *Lipscomb v. State*, 305 Or 472, 478 n.4, 753 P2d 939 (1988). If a case presents an issue "to which judicial machinery is adaptable," it is not unconstitutional to resolve it. *Boyle v. City of Bend*, 234 Or 91, 102, 1380 P2d 625 (1963).

The severity of the crisis we face as a state and a nation does not defeat the jurisdiction of this Court to interpret the rights and duties of the parties who have come before it. To the contrary, these young beneficiaries surely have rights in public trust resources. Without the ability to enforce those rights and ask that their government is held accountable in a court of law, those rights are meaningless. Our democracy provides a backstop to this waste of trust assets and it lies in this court. *See, e.g.*, *McCleary*, 2012 WL 19676 at *36 ("As a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance" with the law).

Sincerely,

Tanya Sanerib
Christopher Winter
Crag Law Center

William Sherlock
Hutchinson, Cox, Coons,
DuPriest, Orr & Sherlock, P.C.

Counsel for Plaintiffs

CC:

Roger DeHoog
Oregon DOJ
Counsel for Defendants

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contract the already broad array of activities the State has previously exercised jurisdiction over in its efforts to address climate change.

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

DEFENDANT'S RESPONSE TO PLAINTIFFS' SUBMISSION OF ATMOSPHERIC TRUST LITIGATION CASES

Defendant, State of Alaska, Department of Natural Resources, by and through the Office of the Attorney General, hereby responds to Plaintiffs' Submission of Atmospheric Trust Litigation Cases. It appears that the five state courts (Colorado, Iowa, Minnesota, Arizona, and New Mexico) have dismissed, on the merits, public trust doctrine claims virtually identical to the claims Plaintiffs make. No court has accepted Plaintiffs' public trust doctrine theory. Brief highlights from the decisions follow:

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Colorado: The district court in Martinez v. Colorado dismissed the plaintiffs' public trust doctrine claim, and noted that even if the public trust doctrine applied in Colorado, "Plaintiffs have been unable to point to any authority in which the government was required to protect the atmosphere." Case No. 11CV4377, order at *4 (Dist. Ct. Colo. Nov. 7, 2011).

Iowa: In Filippone v. Iowa, the plaintiff appealed after the Iowa Department of Natural Resources denied a petition for rulemaking. The petition had asked the Iowa state agency to regulate greenhouse gas emissions in Iowa under the authority of the public trust doctrine. Case No. CVCV008748, slip op. at *4 (Iowa Dist. Ct. Jan. 30, 2012). The district court declined the "invitation to expand the public trust doctrine beyond its traditional parameters to include the atmosphere." Id. at *7.

Minnesota: The district court in Aronow v. Minnesota dismissed the plaintiff's public trust doctrine claim, and held that neither the Governor of Minnesota nor the Minnesota Pollution Control Agency had legal authority to enact the greenhouse gas emissions limits that plaintiff sought. File No. 62-CV-11-3952, mem. op. at *4-5 (Minn. Dist. Ct. Jan. 30, 2012). Among other things, the court noted that the emissions limits the plaintiff sought "require[d] passage of new laws and standards by the Legislature" and "legislative appropriation[s]." Id. at *5. The district court held that the Governor only had power to execute the laws, and could not "create law or spend money that was not appropriated by the Legislature." Id. Alternatively, the district court dismissed the plaintiff's public trust doctrine claim because it found "no authority to recognize an

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entirely new common law cause of action through plaintiff's proposed extension of the Public Trust Doctrine." Id. at *6.

Arizona: In Peshlakai v. Brewer, the superior court dismissed the plaintiff's public trust doctrine claim, stating only that "Defendants' Motion to Dismiss is well taken." No. D101-CV-2011-01514 (Ariz. Super. Ct. Feb. 5, 2012.)

New Mexico: In Sanders-Reed v. Martinez, the district court dismissed the plaintiffs' public trust doctrine claim, but gave plaintiffs leave to file an amended complaint. In dismissing the case, the district court stated that "it would be the ***height of arrogance*** for a court to say it could determine what was the best standard to apply [concerning greenhouse gas emissions] and to totally bypass all of the State expertise at a place like the environment department, or the Environmental Improvement Board, and assume that the court could do a better job than that agency could do. . . For that reason, I am granting the motion to dismiss." No. D-101-CV-2011-01514, hearing transcript at *50 (N.M. Dist. Ct. Jan. 26, 2012) (emphasis added).

The undersigned is available at the call of the court to answer any questions.

DATED: February 23, 2012.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: _____
Seth M. Beausang,
Assistant Attorney General
Alaska Bar No. 1111078

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CERTIFICATE OF SERVICE

I hereby certify that I am a Law Office Assistant at the Department of Law, Office of the Attorney General and that on this 23rd day of February, 2012, I served, by first class mail, a true and correct copy of the DEFENDANT'S RESPONSE TO PLAINTIFFS' SUBMISSION OF ATMOSPHERIC TRUST LITIGATION CASES in this proceeding on the following:

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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' MOTION TO SUBMIT SUPPLEMENTAL BRIEFING

COMES NOW Plaintiffs, collectively referred to herein as "Our Children," by and through their counsel; and hereby request that the Court allow the parties to submit

supplemental briefing on the issue of the state's ownership and possession of the atmosphere which the Court raised at the February 15, 2012 hearing on Defendant State of Alaska's Motion to Dismiss.[1] At said hearing, 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 or hold 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. This issue -- whether a natural resource must be capable of being owned or possessed to be considered a public trust resource -- was not briefed and only mentioned in passing by the State in its motion to dismiss.[2]

Given the importance of the question of whether or not the atmosphere is a public trust resource, the Court's questioning concerning whether a resource must be capable of being owned, possessed or held in order to be considered a public trust resource, and the lack of any substantive briefing on this particular aspect, supplemental briefs are warranted. Moreover, supplemental briefs are necessary to inform the Court of various issues and caselaw shedding light on this question so that it can make a fully informed and reasoned decision.

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[1] Our Children has attached their supplemental brief hereto as Exhibit 1 and request that the Court grant the instant motion and accept the supplemental brief as filed.

[2] As noted in Our Children's Supplemental Brief, the State asserted that the minutes of the constitutional convention made it clear that only those resources "over which the state has a proprietary interest" were to be given constitutional protection and the atmosphere was not one of them since it could not be possessed. See State' Motion to Dismiss, p. 25; see also Ex. 1, n. 4. However, the quoted language does not stand for the proposition that the State asserts. Ex. 1, n. 4.

Consequently, Our Children respectfully request that the Court allow the parties to submit supplemental briefing on the issues described herein and that the Court accept their supplemental brief attached hereto as filed. A proposed order is also filed herewith.

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

Attorney for Plaintiffs

Brad D. De Noble
Alaska Bar No. 9806009

Brad D. De Noble
De Noble Law Offices LLC
32323 Mount Korohusk Circle
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Attorneys for Plaintiffs

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

---

[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; 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

FILED
STATE OF ALASKA
THIRD DISTRICT
2012 FEB 29 PM 4:09
CLERK TRIAL COURTS
BY: [illegible]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO SUBMIT SUPPLEMENTAL BRIEFING

Defendant, State of Alaska, Department of Natural Resources, by and through the Office of the Attorney General, hereby submits its opposition to Plaintiffs' Motion to Submit Supplemental Briefing. Plaintiffs' argue that supplemental briefing is necessary because (1) the issue of whether a natural resource must be capable of being owned or possessed was not briefed sufficiently during briefing on Defendant's motion to dismiss;

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and (2) that issue has particular importance to Plaintiffs' public trust doctrine claim. Plaintiffs are wrong on both points. Their motion should be denied.

1. This issue was briefed during the briefing on Defendant's motion to dismiss

In Defendant's opening brief in support of its motion to dismiss, Defendant argued that the atmosphere was not the type of public trust resource covered by article VIII of the Alaska Constitution. (Op. Br. at 25-27.) Among the reasons the State gave was that the State "does not possess the atmosphere and has no control over its composition," unlike other natural resources listed in article VIII. (*Id.* at 25-26.) Plaintiffs responded by conceding that the State cannot possess the atmosphere, but maintained that the atmosphere should still be considered a public trust resource because "there is no practical difference between air and water." (Ans. Br. at 30.) Defendant countered in its reply brief that, in Alaska, the public trust doctrine is rooted in article VIII of the Alaska Constitution, which does not mention the atmosphere, and that expansion of the doctrine has been deemed "inappropriate" by the Alaska Supreme Court.[1] (Reply at 5-6.) Thus, that the doctrine traditionally applied to navigable waterways does not mean it should be expanded to apply to the atmosphere.

As set forth above, this issue was fully briefed before. The court should deny what is plainly a request by Plaintiffs for a second chance to brief their opposition to the motion to dismiss.

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[1] *Brooks v. Wright*, 971 P.2d 1025, 1031 (Alaska 1999).

2. That the atmosphere is not part of the public trust is a secondary flaw in Plaintiffs' public trust doctrine claim

Defendant explained in its opening and reply Briefs that there are two substantive flaws in Plaintiffs' public trust doctrine claim.[2] The primary flaw is that, in Alaska, just like almost everywhere else, the public trust doctrine is "a doctrine of property law that can prevent the State from denying public access to certain natural resources." (Op. Br. at 20.) Thus, even if the atmosphere were part of the public trust (which it is not), that would simply mean that the State could not deny public access to the atmosphere. It would not mean that the State has a judicially enforceable affirmative duty to protect the atmosphere.

Even the cases Plaintiffs cite make this point. For example, in *Caminiti v. Boyle*, the court explained that, under the public trust doctrine, states have title to lands beneath navigable waters, and can convey that title to private citizens, but that such a conveyance is "subject to the paramount right of the public use of navigable waters," in other words, a public "easement."[3] No Alaska court has held that the doctrine imposes affirmative, trust-like duties on the State. In fact, the Alaska Supreme Court has held the *opposite*.[4]

Cases such as *United States v. Causby*,[5] which held that the federal government can be liable under the Takings Clause for invading the immediate airspace above land

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2 These flaws are in addition to the problems that Plaintiffs' Complaint raises a non-justiciable political question, that the State is immune from Plaintiffs' claims, and that Plaintiffs do not have standing.

3 732 P.2d 989, 993 (Wash. 1987).

4 *Brooks*, 971 P.2d at 1031-33.

5 328 U.S. 256 (1946).

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owned by an individual, also do not help Plaintiffs' cause. To say that a landowner "owns" the immediate airspace above his land because he can be compensated for physical invasions thereof says nothing about whether a landowner can control the composition of all the molecules that, at any given moment, make up the atmosphere above a particular piece of property. One needs only to read Plaintiffs' Complaint to realize that ownership or possession in this sense is not possible. As Plaintiffs allege, the concentration of greenhouse gases in Alaska's atmosphere has been determined by "more than 200 years" of burning fossil fuels around the globe.[6]

Finally, Plaintiffs' point about the State having authority to regulate the atmosphere says nothing about Plaintiffs' ability to compel the State, through litigation, to regulate the atmosphere in the way Plaintiffs think best. The State has authority to regulate in many areas under its police power. For example, the State regulates the possession of illegal drugs. But, surely an individual dissatisfied with State action in that area could not sue to compel the State to increase criminal penalties for drug possession. Nor can Plaintiffs sue to compel the State to increase its regulation of greenhouse gases.

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[6] (Compl. ¶ 35.)

For all of these reasons, Plaintiffs' Motion to Submit Supplemental Briefing should be denied.

DATED: February 29, 2012.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: _____
Seth M. Beausang,
Assistant Attorney General
Alaska Bar No. 1111078

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CERTIFICATE OF SERVICE

I hereby certify that I am a Law Office Assistant at the Department of Law, Office of the Attorney General and that on this 29th day of February, 2012, I served, by first class mail, a true and correct copy of the **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO SUBMIT SUPPLEMENTAL BRIEFING** in this proceeding on the following:

Brad D. De Noble
De Noble Law Offices LLC
32323 Mount Korohusk Circle
Eagle River, Alaska 99577

Daniel Kruse
130 South Park Street
Eugene, Oregon 97401

LeiNalani Silvira
Law Office Assistant

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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

DEFENDANT'S SUBMISSION OF AN ADDITIONAL ATMOSPHERIC TRUST LITIGATION DECISION

Defendant, State of Alaska, Department of Natural Resources, by and through the Office of the Attorney General, hereby submits an additional recent order from the State of Washington dismissing the public trust doctrine case filed there.[1] It now appears that at least six of the thirteen public trust doctrine lawsuits listed on the Our Children's Trust

[1] *See* attached.

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website[2] have been dismissed on the merits (Washington, Colorado, Iowa, Minnesota, Arizona, and New Mexico). A seventh case was voluntarily dismissed by the plaintiffs (California).[3] No court has accepted Plaintiffs' public trust doctrine theory.

The undersigned is available at the call of the court to answer any questions.

DATED: March 2, 2012.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: _____
Seth M. Beausang,
Assistant Attorney General
Alaska Bar No. 1111078

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2 www.ourchildrenstrust.org/legal-action/lawsuits

3 *See* attached.

CERTIFICATE OF SERVICE

I hereby certify that I am a Law Office Assistant at the Department of Law, Office of the Attorney General and that on this 2nd day of March, 2012, I served, by first class mail, a true and correct copy of the DEFENDANT'S SUBMISSION OF AN ADDITIONAL ATMOSPHERIC TRUST LITIGATION DECISION in this proceeding on the following:

Brad D. De Noble
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Daniel Kruse
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AGO Rec'd via email 3/2/12

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

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

Plaintiffs,

v.

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

Defendants.

NO. 11-2-16008-4 SEA

(DR)

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Certain action required)

Exhibit 1
page 1 of 3

Attorney General of Washington
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

THIS MATTER came on regularly for hearing on October 28, 2011, before this Court upon Defendants' Motion to Dismiss, said Defendants, State of Washington, Governor Christine Gregoire, Ted Sturdevant, Director of Department of Ecology, Peter Goldmark, Commissioner of Public Lands, and Phil Anderson, Director of Department of Fish and Wildlife, appearing by and through Robert M. McKenna, Attorney General, and Mary Sue Wilson, Senior Assistant Attorney General, Leslie R. Seffern and Joseph V. Panesko, Assistant Attorneys General, and Plaintiffs appearing through their attorneys, Andrea K. Rodgers Harris, Matthew Mattson, Richard Smith, and Knoll Lowney. The court has heard oral arguments and has considered the pleadings, records, briefs, testimony and evidence submitted by the parties.

Having considered the above listed materials, and having further considered the written and oral arguments of the parties,

It is now, therefore, ORDERED that Defendants' Motion to Dismiss is GRANTED.

DATED: 2-23-12

HONORABLE ~~CAROL SCHAFER~~ Dean S. Lum
Judge, King County Superior Court

Presented by:

ROBERT M. McKENNA
Attorney General

s/ Leslie R. Seffern
MARY SUE WILSON, WSBA #19257
Senior Assistant Attorney General
LESLIE R. SEFFERN, WSBA #19503
JOSEPH V. PANESKO, WSBA #25289
Assistant Attorneys General
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Ted Sturdevant, Director, Department of Ecology
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Exhibit 1
page 2 of 3

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Approved as to form and
notice of presentation waived:

MATTSON RODGERS, PLLC

ANDREA K. RODGERS HARRIS, WSBA #38683
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Exhibit 1
page 3 of 3

Attorney General of Washington
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CIV-110

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Sharon E. Duggan, CSB #105108 370 Grand Avenue Suite 2 Oakland, CA 94610 TELEPHONE NO.: 510-271-0825 FAX NO.: 510-271-0829 E-MAIL ADDRESS: (Optional): seduggan@aol.com ATTORNEY FOR (Name): Plaintiffs	FOR COURT USE ONLY ENDORSED FILED San Francisco County Superior Court FEB - 7 2012 CLERK OF THE COURT By: RONNIE OTERO Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME:	
PLAINTIFF/PETITIONER: Robin Blades, et al. DEFENDANT/RESPONDENT: State of California, et al.	
REQUEST FOR DISMISSAL ☐ Personal Injury, Property Damage, or Wrongful Death ☐ Motor Vehicle ☐ Other ☐ Family Law ☐ Eminent Domain ☑ Other (specify): Declaratory Relief - A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -	CASE NUMBER: CGC-11-510725

1. TO THE CLERK: Please dismiss this action as follows:
   a. (1) ☐ With prejudice (2) ☑ Without prejudice
   b. (1) ☑ Complaint (2) ☐ Petition
      (3) ☐ Cross-complaint filed by (name): on (date):
      (4) ☐ Cross-complaint filed by (name): on (date):
      (5) ☐ Entire action of all parties and all causes of action
      (6) ☐ Other (specify):*

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

Date: February 7, 2012

Sharon E. Duggan ▶ _____
(TYPE OR PRINT NAME OF ☑ ATTORNEY ☐ PARTY WITHOUT ATTORNEY) (SIGNATURE)

*If dismissal requested is of specified parties only or of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

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

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

_____ ▶ _____
(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY) (SIGNATURE)

**If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).

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

(To be completed by clerk)
4. ☐ Dismissal entered as requested on (date):
5. ☐ Dismissal entered on (date): as to only (name):
6. ☐ Dismissal not entered as requested for the following reasons (specify):

7. a. ☐ Attorney or party without attorney notified on (date):
   b. ☐ Attorney or party without attorney not notified. Filing party failed to provide ☐ a copy to be conformed ☐ means to return conformed copy

Date: Clerk, by _____, Deputy

Exhibit 2
page 1 of 3

Form Adopted for Mandatory Use Judicial Council of California CIV-110 [Rev. July 1, 2009]

REQUEST FOR DISMISSAL

Code of Civil Procedure §§ 581 et seq., 583.250; Cal. Rules of Court, rule 3.1390; www.courtinfo.ca.gov

FILED BY FAX

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

Declaration Concerning Waived Court Fees

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

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

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

Date: _____

_____ _____

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY MAKING DECLARATION) (SIGNATURE)

Exhibit 2
page 2 of 3

DECLARATION OF SERVICE

I, SHARON E. DUGGAN, declare:

I am, and was at the time of the service hereinafter mentioned over the age of eighteen and not a party to the above-entitled cause. My business address is 370 Grand Avenue Suite 5, Oakland, California 94610 and I am a resident of or employed in the County of Alameda, California.

On February 7, 2012 I served the attached Plaintiffs' Request for Dismissal as follows:

Janill Richards Marc Melnick Deputy Attorneys General 1515 Clay Street P.O. Box 70550 Oakland, CA 94612-0550	Janill.Richards@doj.ca.gov Marc.Melnick@doj.ca.gov Telephone: 510-622-2133 Facsimile: 510-622-2100
R.S. Radford Theordore Hadzi-Antich Pacific Legal Foundation 930 G Street Sacramento, CA 95814	rsr@pacific legal.org tha@pacificlegal.org Telephone: 916-419-7111 Facsimile: 916-419-7747

XXX BY FIRST CLASS MAIL by depositing a sealed envelope in the United States Postal Service in the ordinary course of business on the same day it is collected in Oakland, California postage fully prepaid.

____ BY FACSIMILE MACHINE by personally transmitting a true copy thereof via a facsimile machine at approximately ____ a.m./p.m. on _____.

____ BY FEDERAL EXPRESS or UNITED PARCEL SERVICE overnight delivery for next business day delivery by personally depositing in a box or other facility regularly maintained by Federal Express or United Parcel Service, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents.

____ BY HAND DELIVERY by personally delivering a true copy thereof in an envelope addressed to the parties identified above at the addresses given for those parties.

XXX BY ELECTRONIC TRANSMISSION by sending on this day a pdf version of the document via the internet to the electronic addresses listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 7, 2012 in Oakland, California.

SHARON E. DUGGAN

Exhibit 3
page 3 of 3

Brad D. De Noble
De Noble Law Offices LLC
32323 Mount Korohusk Circle
Eagle River, Alaska 99577
(907) 694-4345

Daniel Kruse
Attorney at Law
130 South Park Street
Eugene, Oregon 97401
(541) 870-0605

Attorneys for Plaintiffs

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

ORDER

THIS MATTER, having come before the Court on Plaintiffs' Motion to Submit Supplemental Briefing and, having considered the merits thereof and any opposition thereto,

FEB 23 2012

the Court GRANTS Plaintiffs' motion and accepts their supplemental brief ~~attached as Exhibit 1 to their motion as filed. The Defendant shall have ____ days from the date of this order to submit supplemental briefing~~ on the issue of ownership and possession of the atmosphere.

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

The Honorable ~~Sen~~ K. Tan
Superior Court Judge

mailed I certify that on 3-19-12
a copy of the original was ~~personally handed to~~ each of the following:
M. Lucas
Secretary/Deputy Clerk
B. DeNobile
D. Kruse
S. Mulder - AGO