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IN THE SUPREME COURT OF THE STATE OF ALASKA

NELSON KANUK, a minor, by and through his guardian, SHARON KANUK; ADI DAVIS, a minor, by and through her guardian, JULIE DAVIS; KATHERINE DOLMA, a minor, by and through her guardian, BRENDA DOLMA; ANANDA ROSE AHTAHKEE LANKARD, a minor, by and through her guardian, GLEN "DUNE" LANKARD; and AVERY and OWEN MOZEN, minors, by and through their guardian, HOWARD MOZEN;

Appellants,

v.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Appellee.

Supreme Court No. S-14776
Superior Court No. 3AN-11-07474 CI

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

**APPELLANTS' REPLY BRIEF**

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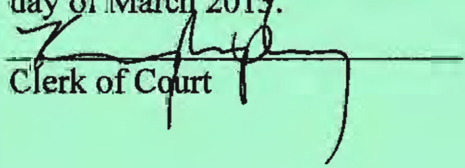
Filed in the Supreme Court of the State of Alaska, this 28th day of March 2013.



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### Alaska Constitution

**Article VIII, Section 2**
The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

# I. INTRODUCTION

The superior court erred by dismissing Our Children's complaint. As set forth in Our Children's opening brief and herein, the political question doctrine does not bar their constitutional public trust doctrine claims. Our Children's public trust claims are squarely for the superior court to decide and not for the political branches. Nor can the State avoid its responsibility for protecting and preserving the atmospheric resource by asserting immunity from Our Children's lawsuit or claiming Our Children lack standing to assert such claims. Rather, the purposes of and the policies behind the public trust doctrine mandate that the State fulfill its obligations thereunder to preserve and protect the atmosphere for the benefit of Our Children, future generations, and all beneficiaries of the public trust. Accordingly, this Court should reverse the superior court's decision and allow Our Children's public trust claims to be determined on the merits.

# II. ARGUMENT

## A. The Political Question Doctrine Does Not Bar Judicial Review Of Our Children's Complaint.

### 1. Our Children's Public Trust Claims Have Not Been Constitutionally Committed To A Political Department.

The State asserts that the Alaska Constitution expressly commits natural resource management decisions to the legislature and therefore the first *Baker* factor precludes judicial review of the issues raised in Our Children's complaint. State's Brief, p. 15. However, the test is not whether the legislature is charged with regulating natural resources -- a test that would make all natural resource decisions made by the State exempt from judicial review. Rather, the question is

whether there is a textually demonstrable constitutional commitment of the specific issue to be decided to a coordinate political department. *Zivotofsky v. Clinton*, 571 F.3d 1227, 1238 (D.C. Cir. 2009).

The first *Baker* factor has been described as the "dominant consideration in any political question inquiry." *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991). This factor "recognizes that, under the separation of powers doctrine, certain decisions have been exclusively committed to the legislative and executive branches and therefore are not subject to judicial review." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358-59 (11th Cir. 2007). The political question doctrine bars judicial review "only when the precise matter to be decided has been constitutionally committed to the exclusive authority of a political branch of government." *Zivotofsky*, 571 F.3d at 1238.

The Alaska Constitution clearly does not commit to the legislature exclusive authority over public trust resources, but, rather, obligates the legislature to perform certain duties, which must be subject to judicial oversight to effectuate the democratic principle of separation of powers. AK Const. Art. VIII §2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."). Therefore, the first *Baker* factor does not preclude judicial review.

That this case implicates greenhouse gas ("GHG) emissions does not change the analysis. In *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325 (2d Cir. 2009), the Second Circuit concluded that there has not been a textual constitutional commitment granting the political branches responsibility to resolve issues concerning carbon dioxide emissions.[1] Likewise, in *Comer v. Murphy Oil USA*, 585 F.3d 855, 874, 879 (5th Cir. 2009), the Fifth Circuit determined that, even though Congress has the authority to regulate GHG emissions under the Clean Air Act ("CAA"), such issues had not been "wholly and indivisibly" committed to a political branch. Although these were federal cases involving the U.S. Constitution, the Alaska Constitution also does not wholly and indivisibly vest the legislature with exclusive authority to regulate GHG emissions.

Moreover, the fact that Our Children's complaint regarding GHG emissions arises from a constitutional public trust claim further militates against barring judicial review based upon the first *Baker* factor. Whether or not the government is fulfilling its fiduciary obligation to protect public trust resources lies at the heart of public trust jurisprudence. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983); *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991); *see also Butler v. Brewer*, No. 1CA-CV-12-0347, slip op. at * 12 (Ariz. Ct. App.

[1] This part of the holding was affirmed by an evenly divided U.S. Supreme Court. *American Electric Power Co., Inc. v. Connecticut,* 131 S.Ct. 2527, 2535 (2011)("*AEP*").

2013)(attached hereto as Appendix C). Judicial review of legislative and executive actions regarding public trust resources forms the bedrock of the separation of powers doctrine. The judiciary's responsibility for reviewing legislative and executive actions under the public trust doctrine is rooted in their "constitutional commitment to the checks and balances of a government of divided powers" and provides a crucial and exclusive remedy for the public when the legislative or executive branches violate their duties as trustee of public trust resources. *Ariz. Ctr. for Law in the Pub. Interest,* 837 P.2d at 168; *Butler* at *12.

This Court itself refused to find that the legislature has exclusive law-making power with respect to natural resources, holding that there was "little support in the public trust line of cases for the proposition that the common use clause of Article VIII grants the legislature exclusive power to make laws dealing with natural resource management." *Brooks v. Wright*, 971 P.2d 1025, 1033 (Alaska 1999); *see also Pullen v. Ulmer,* 923 P.2d 54 (Alaska 1996) (declining to hold that the public trust doctrine gives the legislature exclusive law-making authority over the subject matter of Article VIII).

Consequently, there is no textual constitutional commitment of public trust claims involving GHG emissions to the legislature and therefore the first *Baker* factor does not bar judicial review.

### 2. There Are Judicially Discoverable And Manageable Standards For Resolving Our Children's Complaint.

#### a. The State's Interpretation Of The Substantial Impairment Standard Has No Basis In Law Or Reason.

Focusing solely on Our Children's claim that the State breached its fiduciary duty, the State asserts that there are no judicially discoverable and manageable standards to resolve this claim. State's Brief, p. 18. The State asserts that the "substantial impairment" test set forth in *Illinois Central* and adopted in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), "simply means that a state cannot convey interests in land in a way that would substantially restrict public access to resources." *Id.* at 19. However, this Court's treatment of the public trust doctrine, and common sense, demonstrate the fallacy of the State's restrictive interpretation and the existence of judicially discoverable and manageable standards, which the superior court can apply to address all of Our Children's claims.

The substantial impairment standard as enunciated in *Illinois Central* and adopted in *CWC Fisheries, Inc.* is not limited solely to preventing conveyances in land that would substantially restrict public access to natural resources as the State argues. Although the U.S. Supreme Court in *Illinois Central* specifically addressed the alienation of land beneath navigable waterways, it also acknowledged that the public trust doctrine applies to "property of a special

character." *Illinois Central Railroad Co. v. Illinois*, 146 U.S 387, 454 (1892). In *Owsichek v. State*, 763 P.2d 488, 495 (Alaska 1988), this Court stated that the State had a trust duty to *manage* the fish, wildlife, and water resources of the state for the benefit of all people. In *Brooks*, this Court stated that the State acts as a trustee over wolves and wildlife "not so much to avoid *public* misuse of these resources as to avoid the *state's* improvident use or conveyance of them."[2] *Brooks*, 971 P.2d at 1031. In *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1212 (Alaska 2010), this Court recognized that the public trust doctrine had more applications than just to a State conveyance of land.[3]

As these cases clearly demonstrate, the substantial impairment standard goes well beyond the State's restrictive interpretation. It applies to: property of a special character, not just conveyances of land; the State's management of natural resources; the State's use of natural resources; and the public's interest in natural resources. Moreover, there is no rational reason why the application of the substantial impairment standard would be limited to the public's ability to physically access natural resources. The substantial impairment can and should be applied to the public's interest in the resource and future availability thereof. If

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[2] "Improvident" is defined as "lacking foresight or thrift." Webster's New World Dictionary 297 (Warner Books Ed. 1990). "Thrift" is further defined as "economy, frugality." *Id.* at 614.

[3] Indeed, in that case, the State argued that it had the "authority as sovereign to exercise a continuous supervision and control over navigable waterways of the state and the land underlying the waters." *Id.* The State had found that restricting public access to a lease parcel would not "substantially impair the public's interest in trust resources." *Id.* at 1212.

the State improvidently uses the natural resources, *i.e.*, wastes the resources, the public's interest therein and access thereto is also impaired. If that impairment is substantial, the State has violated its duty under the public trust doctrine. Furthermore, by applying the substantial impairment standard to the State's use of a resource, it protects the interests of Our Children and future beneficiaries of the public trust by ensuring they will have access to such resource. Consequently, the State's interpretation that the substantial impairment standard only means the State cannot convey interests in land in a way that would substantially restrict public access to resources is without basis in law or reason.

**b. There Are Judicially Discoverable And Manageable Standards To Resolve Our Children's Claims.**

In determining whether there are judicially discoverable and manageable standards to apply to resolve Our Children's claims, the focus is "not whether the case is unmanageable in the sense of being large, complicated or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin v. Vatican Bank*, 40 F.3d 532, 547 (9th. Cir. 2005). The relevant inquiry is whether the judiciary is "capable of granting relief in a reasoned fashion." *Lobato v. State*, 218 P.3d 358, 369 (Colo. 2009). Given the ancient origins of the public trust doctrine, the more than 100 years of American jurisprudence construing and applying the doctrine, the general applicability of trust law to natural resources, and the availability of a clear

scientific standard necessary to preserve and protect the atmosphere, it is clear that there are judicially discoverable and manageable standards which the superior court can apply to resolve Our Children's claims.

Determining whether or not the atmosphere should be considered a public trust resource, whether the State has an affirmative duty to protect and preserve the atmosphere, and whether the State has breached its fiduciary duty can all be determined in a reasoned manner by the court. The superior court can look to Roman and English law, which considered air to be a public trust resource, and *Illinois Central's* special character test. *See* Exc. 106. The superior court can look at the litany of cases Our Children cited that have expanded the public trust doctrine to include new resources and the reasons for doing so, including the recent Texas district court case holding that the public trust doctrine "includes all natural resources of the State including the air and atmosphere." *See* Exc. 120-122, Appellants' Appendix A; *see also Filippone v. Iowa Dep't of Natural Resources*, No. 2-1005/12-0444, slip op. at *8 (Ct. App. Iowa 2013) (Doyle, J. concurring) (deferring the ultimate question to the state Supreme Court but reasoning that there is a strong public policy basis for including the atmosphere as a public trust resource since the well-being and future of Iowa depend on air and the air, waters, soils and biota of Iowa are interdependent and form a complex ecosystem that Iowans have the right to inherit in a sustainable condition without severe or irreparable damages caused by human activities) (attached hereto as Appendix B).

The superior court can also look to general principles of trust law which both *Baxley* and *Brooks* stated could be applied to the public trust doctrine. *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998); *Brooks*, 971 P.2d at 1031-1033. Furthermore, Our Children provided the scientific standard necessary to protect and preserve the atmosphere from substantial impairment. *See* Exc. 37-42. Consequently, the superior court could have looked to and relied upon any of the foregoing to make a reasoned decision concerning Our Children's claims.

**c. The Superior Court Erred By Determining There Are No Judicially Discoverable And Manageable Standards.**

Given the foregoing, the superior court erred by relying upon *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D.Ca. 2009), to determine there are no judicially discoverable and manageable standards to apply in GHG emission cases. Although the *Kivalina* court addressed the justiciability of a claim based on harm resulting from global warming, it did so in the context of a federal common law nuisance claim for damages against private polluters. As Our Children explained in their opening brief, their public trust claims are fundamentally different from nuisance claims and, therefore, *Kivalina* is not instructive.[4]

[4] It should be noted that the Ninth Circuit declined to adopt the district court's justiciability analysis and instead affirmed the decision on displacement grounds. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). It should be further noted that, in another federal common law nuisance claim involving GHG emissions, *AEP*, the United States Supreme Court did not conclude GHG cases were non-justiciable, explicitly left open for consideration

Factually speaking, *Kivalina* is readily distinguishable from the case at bar. In *Kivalina*, the plaintiffs brought nuisance claims against private defendants. 663 F.Supp.2d at 867. They sought millions of dollars in damages from the defendants based upon their alleged contributions to GHG emissions. *Id.* at 869. In the case at bar, Our Children did not name private companies as defendants nor do they seek to obtain monetary damages. Rather, they seek declaratory and injunctive relief against the State to fulfill its duty as trustee by protecting a public trust asset and preventing it from being further impaired and destroyed. As such, the two cases have few similarities other than involving climate change.

Moreover, from a legal perspective, courts look at different factors and apply different standards to achieve different results when evaluating a public nuisance and public trust claims. A public nuisance claim is a tort claim against a private party that seeks to prevent unreasonable interferences with a right common to the public at the present time. Restatement (Second) of Torts §821B (1979). Courts evaluate public nuisance claims by balancing policy, economic, social, and equitable factors. *Id.* at cmt. e, § 827-828; *AEP*, 131 S.Ct. at 2539; *Kivalina*, 663 F. Supp. 2d at 874. A public trust claim, on the other hand, involves sovereign obligations to protect and preserve critical natural resources for both current and

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whether state common law nuisance claims could be used to address climate change, and did not disturb the Second Circuit's decision finding that common law nuisance claims did not present non-justiciable political questions. *See AEP*, 131 S. Ct. at 2540; *see also Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 332 (2d Cir. 2009).

future beneficiaries of the trust, and courts determine what is necessary to prevent substantial impairment to the resource, which requires looking at science and facts. *See Kootenai Environmental Alliance, Inc.*, 671 P.2d at 1092 (courts must take a close look at the action to determine if it complies with the public trust doctrine). Further, in *Kivalina*, in order to determine the money damages each defendant would be responsible for, the court would have had to determine the amount of each defendant's emissions, what damages each defendant's emissions caused, and the correct apportionment thereof. No such inquiries must be made here.

Consequently, the superior court's reliance on *Kivalina* was misplaced and its determination that no judicially discoverable and manageable standards exist to resolve Our Children's public trust claims was erroneous.

### 3. The Third *Baker* Factor Does Not Preclude Judicial Review Of Our Children's Public Trust Claims.

#### a. Our Children's Public Trust Claims Can Be Resolved Through Legal And Factual Analysis.

For the third *Baker* factor to preclude judicial review, it must be *impossible* to decide the question without an initial policy determination of a kind *clearly* for non-judicial discretion. *Baker v. Carr*, 369 U.S. 186, 217 (1962). This factor applies if a court must make a policy judgment of a legislative nature rather than resolving the dispute through legal and factual analysis. *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005). The State asserts this factor is

present because regulating GHG emissions requires the balancing of competing environmental, economic and other interests. State's Brief, p. 26. The State also asserts that how the State fulfills its fiduciary duty and the amount of GHG emissions are questions for the political branches. *Id.* at 27-29. However, the State's arguments are based on a misinterpretation and mischaracterization of Our Children's claims. The superior court can resolve Our Children's claims through legal and factual analysis without implicating the third *Baker* factor.

Whether or not the atmosphere is a public trust resource and whether the legislature has an affirmative fiduciary duty to protect public trust resources are legal questions. The legislature does not get to determine whether a resource is a public trust resource and whether they have an affirmative duty to protect it under the constitution. *See Butler* at *7 (it is up to the judiciary to determine the scope of the public trust doctrine). Similarly, the legislature does not get to determine what that duty is or what the legal standard is for determining whether it has satisfied its duty. It takes little imagination to see how the legislature could eviscerate the public trust doctrine if it were allowed to determine these questions. Moreover, whether or not the State is protecting and preserving a public trust resource in accordance with its duties and the applicable standard is a factual question. The only policy determination that needs to be made is how the State is going to satisfy the standard, once articulated by the court – a determination that is squarely for the political branches. Thus, Our Children's claims can be resolved

through legal and factual analysis without making any initial policy determinations.

**b. The State's Cited Cases Do Not Stand For The Proposition That Any Case Involving GHG Emissions Requires Policy Determinations.**

The State claims that regulating GHG emissions requires a balancing of competing interests and this decision is best suited for the political branches. State's Brief, p. 26. The State cites *Massachusetts v. EPA*, 549 U.S. 497 (2007), for the proposition that "any decision to regulate greenhouse gas emissions involves 'policy judgments.'" State's Brief, p. 27. The State also proposes that *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), "makes it clear that when fulfilling its public trust duties a state should consider 'the cost both in terms of money and environmental impact' of any decision.'" *Id.* The State further cites *Holmes v. Wolf*, 243 P.3d 584, 599 (Alaska 2010), for the proposition that determining whether a fiduciary has acted with reasonable care concerning the trust asset in a claim for breach of fiduciary duty triggers a cost-benefit analysis, which requires policy determinations. State's Brief, p. 27-28. However, none of these cases stands for such propositions asserted by the State.

In *Massachusetts*, the U.S. Supreme Court did not refuse to mandate that the U.S. EPA regulate GHG emissions because doing so would necessarily involve policy judgments. Rather, the questions in that case were whether the CAA authorizes the EPA to regulate GHG emissions from new cars and whether

the EPA could avoid taking regulatory action for the reasons it had propounded.[5] *Massachusetts*, 549 U.S. at 528-34. The U.S Supreme Court determined that the EPA did have the authority to regulate GHG emissions as pollutants. *Id* at 528-29. As for the EPA's policy reasons for refusing to regulate GHGs, the U.S. Supreme Court stated it did not have the expertise or authority to evaluate those reasons but determined such reasons had nothing to do with whether GHG emissions contribute to climate change. *Id.* at 533. Accordingly, the U.S. Supreme Court remanded the matter and did not reach the question of whether the EPA must make an endangerment finding but only that the EPA must ground its reasons for action or inaction in the CAA. *Id.* at 534. As such, the U.S. Supreme Court did not refuse to order the EPA to make an endangerment finding on grounds that any decision to regulate GHGs involved policy decisions as the State asserts.

Concerning *National Audubon Soc'y*, the court stated that any decisions regarding the allocation of the resource in question (water) must take into consideration the city's need for water, its reliance on the 1940 water board decision, and the costs both in terms of money and environmental impact of obtaining the water elsewhere. *National Audubon Soc'y*, 658 P.2d at 729. However, these factors were to be considered when determining how to allocate the resource. Our Children do not dispute that the State must make policy

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[5] Under the CAA, the EPA must determine whether an air pollutant causes air pollution which may be reasonably anticipated to endanger public health or welfare. If the EPA determines GHGs contribute to climate change, then the EPA must regulate. *Massachusetts*, 549 U.S. at 533.

decisions about how to allocate the atmospheric resource, such as what industries can emit GHGs and how much, but that such decisions are constrained by the constitutional duty to protect public resources for future generations. Rather, Our Children assert that the superior court does not need to make initial policy decisions when determining whether the State has satisfied its fiduciary duty to preserve and protect the atmospheric resource. However, the superior court does have an obligation to determine whether the trust resource has been substantially impaired and by how much, and to order the State to remedy the impairment. A cost-benefit analysis may be relevant to the State's evaluation, but when a trust resource is substantially impaired, the predominant inquiry must be how to rectify the impairment.

In *Holmes*, this Court addressed claims from shareholders brought against directors of a corporation for failing to hold meetings, prepare certain reports and inquire into a settlement agreement. *Holmes*, 243 P.3d at 586. However, that case involved directors of a corporation not a trustee or the public trust. *Id.* Nor is there any mention of a cost-benefit analysis or policy considerations. *Id.* at 599. Rather, in the context of fiduciary duties, this Court was simply construing statutory provisions in the Alaska Corporations Code concerning duties and the standard of care directors and officers owed. *Id.* Accordingly, *Holmes* does not stand for the proposition that a claim for breach of fiduciary duty requires

determining whether a trustee has acted with reasonable care concerning the trust asset thereby triggering a cost-benefit analysis as the State claims.

Consequently, these cases do not stand for the proposition that any case addressing GHG emissions requires the superior court to make an initial policy decision.

#### c. Determining Whether The State Breached Its Fiduciary Duty Does Not Require The Superior Court To Determine How The State Should Fulfill Its Duty.

Citing the superior court's decision, the State claims that determining whether it breached its fiduciary obligation necessarily involves determinations about how it shall fulfill its duty. State's Brief, p. 28. The State reasons that Our Children are asking the superior court to choose mandatory GHG emissions reductions as opposed to forest management and other strategies for carbon sequestration. *Id.* The State further asserts that the amount of GHG emissions reductions in the coming years should be left for the political branches. *Id.* at p. 29. Although determining how the State will meets its fiduciary obligation to protect the atmospheric trust resource requires policy considerations, such considerations are not necessary in order to resolve whether the State breached its fiduciary duty.

The standard for determining whether the State has breached its fiduciary obligation centers upon the substantial impairment of the resource. The State cannot either improvidently use or convey the resource in such a manner that the

public's access thereto or interest therein is substantially impaired. *Brooks*, 971 P.2d at 1031. Whether or not there is substantial impairment of a resource does not depend upon competing uses of the resource, a balancing of the social utility of an activity, impacts on consumers or businesses, available alternatives and the like – the factors that a court must consider when determining whether an action constitutes a public nuisance. *See Kivalina*, 663 F.Supp. 2d at 874-75; *AEP*, 131 S.Ct. at 2539. The superior court is not being asked to determine how the State will fulfill its fiduciary obligation. It is not being asked to determine who should be allowed to emit GHGs and in what amounts. It is not being asked to dictate which industry should bear the brunt of climate mitigation. It is not being asked to eliminate strategies such as forest management and other forms of carbon sequestration. Rather, the superior court's responsibility is to uphold the law, which, in this case, is the State's fiduciary duty to protect and preserve the trust asset. This is a legal question distinct from a policy decision that would need to be made by a political branch.

As such, the superior court's inquiry is a factual one regarding what levels of GHGs would protect and preserve the functionality of the atmosphere and prevent substantial impairment thereto.[6] Accordingly, the superior court must decide whether the State is fulfilling its fiduciary obligation to preserve and

[6] Contrary to the State's assertion that Our Children are asking the superior court to choose mandatory emission reductions over forest management and carbon sequestration, Our Children have asserted that the best available science requires that the State do both. Exc. 42.

protect the trust asset from substantial impairment. Our Children alleged in their complaint that, in order to preserve and protect the atmosphere, the best available science dictates that $CO_2$ emissions must peak in 2012 and decline 6% annually, consistent with returning atmospheric $CO_2$ levels to 350 ppm this century. *See e.g.* Exc. 37-40, 43, 51. Given such factual allegations – ones that must be deemed true for purposes of a motion to dismiss – it is clear that the State has breached its fiduciary duty.

### 4. The Fourth *Baker* Factor Does Not Preclude Judicial Review Of Our Children's Public Trust Claims.

The State asserts that the superior court cannot adjudicate Our Children's claims without expressing a lack of respect due the political branches. State's Brief, p. 29. The State cites the steps it has taken to address GHG emissions, including forming a climate change sub-cabinet, issuing several reports, and regulating GHG emissions in line with the EPA's tailoring approach under the CAA. *Id.* However, simply because the State has taken the foregoing steps does not mean the superior court is precluded from reviewing Our Children's claims.[7]

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[7] As an initial matter, this Court should decline to consider the State's argument concerning the fourth *Baker* factor. Although this Court may affirm a judgment on any grounds supported by the record even if it was not relied upon by the superior court, that rule "applies only to issues of law that find support in settled facts. It does not extend to new theories that would normally be resolved by discretionary powers traditionally reserved for trial courts -- powers relying on case-specific consideration of disputed or disputable issues of fact." *Winterrowd v. State*, 288 P.3d 446, 449-50 (Alaska 2012) citing *Vaska v. State,* 135 P.3d 1011, 1019 (Alaska 2006). Our Children have asserted the State is not currently taking any actions to address GHG emissions in Alaska. Exc. 18-19, 22-23. The State

The fourth *Baker* factor precludes judicial review if it is *impossible* for a court to undertake independent resolution of the claim without expressing lack of respect due coordinate branches of government. *Baker*, 369 U.S. at 217. This factor is only relevant "if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). In other words, this factor is only implicated when a political branch "has reached a definitive decision on the issue in question."[8] In *Connecticut*, the Second Circuit concluded this factor was not implicated since there was no unified policy on GHG emissions in the United States. *Connecticut*, 582 F.3d at 331.

In the case at bar, it is clear that the superior court can resolve Our Children's claims without disrespecting decisions of the State's political branches. Assuming arguendo that the State could decide that the atmosphere is not a public trust resource and that it does not have an affirmative fiduciary duty to protect it, the State has not made any decision that the superior court would disrespect by resolving Our Children's public trust claims. The State does not have a unified

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asserts it has begun regulating GHGs, citing Alaska administrative regulations that adopt federal regulations that call for future action and further study. *See* 18 AAC 50.0404(h)(21) and (j)(9). Whether and to what extent the State is regulating GHGs is a defense on the merits and not settled in the record, and, therefore, this Court should decline to consider this argument.

[8] Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 Ohio N.U.L. Rev. 523, 539 (2008).

policy concerning GHG emissions. Its climate change sub-cabinet has made numerous recommendations to reduce GHG emissions, none of which have been implemented. Exc. 44-45. Moreover, the GHG emission regulations, which the State claims it has adopted through the EPA's tailoring provisions, apply only to new or major modified stationary sources and call for enforceable commitments in the future and further study. More importantly, given the State's position that climate change is affecting Alaska and it needs a strategy to identify and mitigate the effects thereof, the superior court's resolution of Our Children's claims would further such goals, not contradict them. *See* State Administrative Order No. 238 (Sep. 14, 2007). Furthermore, even if the State had adopted a GHG emissions policy, such an action could be viewed as recognition thereby of its trust duty to protect the atmosphere and it would be entirely within the purview of the superior court to evaluate whether the State's actions sufficiently protect the atmospheric resource.

Consequently, the superior court can resolve Our Children's claims without disrespecting decisions of the State's political branches.[9]

**B. The State Is Not Immune From Suit.**

The State asserts Our Children's complaint should be dismissed on grounds of sovereign immunity. State Brief, p. 31. The State argues that Our Children's

[9] The State also argues that, by adjudicating Our Children's claims, the superior court would force the State to violate state law. State's Brief, p. 30. Besides being nonsensical, the State raises this argument for the first time on appeal, and, therefore, it should not be considered by this Court.

breach of fiduciary duty is a tort claim based upon the State's exercise or performance or lack thereof of a discretionary function. *Id.* As such, it argues Alaska's Tort Claims Act bars suit against the State. *Id.* However, Our Children's public trust claims do not lie in tort nor do they involve discretionary functions of the State. Accordingly, the State is not immune from suit.

Our Children's claims, including breach of fiduciary duty, are not tort claims. Rather, their claims are based on the public trust doctrine which is *sui generis* and arises from property law and has constitutional and sovereignity underpinnings. "The public trust is a fundamental doctrine of American property Law...."[10] Indeed, the State itself stated the public trust doctrine "is best understood as property law doctrine ...."[11] State's Brief, p. 18. Moreover, Our Children's claims also differ from tort claims due to their equitable, non-compensatory nature and purposes for which they are brought. Our Children do

[10] Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 Envtl. L. 515, 516 (1989); *see also Pebble Ltd. P'ship v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009) (public trust responsibilities imposed by Article VIII of the Alaska Constitution create a property-like interest in natural resources); and *Owsichek*, 763 P.2d at 493 (the "common use" clause in the Alaska Constitution emanates from the ancient traditions in property rights which recognized that title to wildlife and natural resources remained with the sovereign and, in the American system of governance with its concept of popular sovereignty, title is reserved on behalf of the people).

[11] The State's reliance on *Clemensen v. Providence Alaska Medical Center*, 203 P.3d 1148, 1151 n. 12 (Alaska 2009) for the proposition that a claim for breach of fiduciary duty is a tort claim is misplaced. In the same footnote cited by the State, this Court stated "[w]hether a claim of fiduciary duty sounds in tort or contract depends upon the source of the fiduciary duty." As the State noted in its brief, Article VIII of the Alaska Constitution is the source of the public trust doctrine in Alaska. State's Brief, p. 15.

not seek damages for individual injuries. Our Children do not seek to recover damages from past harm resulting from the State's failure to protect public trust assets. Rather, they seek declaratory relief to establish that the atmosphere is a public trust resource and that the State has an obligation under the public trust doctrine to protect the atmosphere for their benefit, future generations, and all Alaskans as beneficiaries of the public trust. Exc. 3. The purpose of the declaratory relief is to prevent further harm by resolving the legal dispute between the parties as to the State's continuing legal obligation to protect the atmosphere as a public trust resource. Consequently, Our Children's claims are not tort claims and therefore Alaska's Tort Claims Act is not applicable.

Even if Our Children's claims could be characterized as tort claims, they are not based upon discretionary functions of the State. Whether or not the State must protect public trust resources is not discretionary. On the contrary, the State has an affirmative obligation to protect public trust resources from substantial impairment. The State has certain discretion on how it protects a public trust resource from substantial impairment but Our Children are not asking the superior court to decide whether one course of conduct is preferable to another. Rather, Our Children are asking the superior court to declare that the atmosphere is a public trust resource, that the State has an affirmative duty to protect the atmosphere as a public trust resource, and that the State has breached its obligation to do so. In that vein, the State's reliance on *Brady v. State*, 965 P.2d 1 (Alaska

1998) is misplaced. The *Brady* plaintiffs asserted the State was negligent and violated the public trust doctrine for its decision to allow dead and dying trees to stand rather than harvest them in order to stanch the spruce bark beetle epidemic and sought damages from the State on account thereof. *Id* at 16, 17. The *Brady* Court concluded the State could not be sued in tort for such policy decision. *Id.* at 17. However, Our Children did not sue the State over its policy decision that a certain way is more effective than another to reduce GHG emissions and protect the atmosphere, nor do Our Children seek damages from the State for such policy decision. Accordingly, *Brady* is not controlling.

Consequently, the State is not immune from Our Children's public trust claims.

**C. The State Has A Constitutional, Affirmative Fiduciary Duty To Protect Public Trust Resources.**

The State asserts that it does not have an affirmative fiduciary duty to protect public trust resources, citing *Brooks*. State's Brief, p. 35. The State also asserts that the superior court should not expand the public trust doctrine to include the affirmative duty to preserve and protect trust assets. *Id.* However, in making such arguments, the State misrepresents the holdings in *Brooks* and the other state court cases.

The holding in *Brooks* did not hold that the State does not have an affirmative duty to protect public trust assets.[12] In fact, that issue was not even before this Court. Nevertheless, the *Brooks* Court did make it clear that the State acts as a "trustee" over public trust resources not so much to avoid the public's misuse of the resources but to avoid the State's improvident use or conveyance of the resources. *Brooks*, 971 P.2d at 1031. If the State is prohibited from making improvident use of the resource, *i.e.*, wasting the resource, it follows that the State has a duty to protect and preserve the resource. Such a conclusion comports with the *Brooks* Court's statement that "Article VIII requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide for future generations...." *Id.* at 1032. It also comports with Article VIII, section 2 which states that the "legislature shall provide for the utilization, development and conservation of all natural resources belonging to the state ...." Similarly, as the *Baxley* Court stated, the State has a "fiduciary duty to manage such resources for the common good of the public as beneficiary." *Baxley*, 958 P.2d at 434. Managing a resource requires affirmative action in order to preserve and protect trust assets for present and future generations of public beneficiaries.

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[12] Nor did the *Brooks* Court state that the expansion of the public trust doctrine was inappropriate. Rather, the *Brooks* Court actually stated, "we suggested that expansion of the public trust doctrine to include all or most public uses merely because it has been applied to a particular public use would be inappropriate." *Brooks*, 971 P.2d at 1031.

Furthermore, other state courts routinely apply general principles of trust law to the public trust doctrine.[13] One such principle under general trust law is that a trustee has a duty to take affirmative action to protect trust resources.[14]

Accordingly, given the foregoing and considering the purposes of the Alaska Constitution and the public trust doctrine's intergenerational principles, the State has an affirmative fiduciary obligation to preserve and protect the atmospheric resource.

## D. The Atmosphere Is A Public Trust Resource.

The State asserts that the atmosphere is not a public trust resource. State's Brief, p. 41. The State reasons that the atmosphere is not explicitly mentioned in Article VIII and that the framers of the constitution meant to only include those resources "over which the state has a proprietary interest." *Id.* The State also mistakenly reasons that the superior court should not expand the public trust doctrine to include the atmosphere claiming the *Brooks* Court stated expansion thereof was inappropriate and asserting it is not for courts to say what the law

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[13] *See, e.g., Idaho Forest Indus. v. Hayden lake Watershed Improvement Dist.*, 733 P.2d 733, 738 (Idaho 1987)("[T]he administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general."); *Ariz. Ctr. for law in the Pub. Interest,* 837 P.2d at 169 ("Just as private trustees are judicially accountable to their beneficiaries for their disposition of the res, so the legislative and executive branches are judicially accountable for their disposition of the public trust. The beneficiaries of the public trust are not just present generations but those to come.").

[14] *See* George T. Bogert, *Trusts* § 99, at 358 (6th ed. West Pub. Co. 1987)("The trustee has a duty to take whatever steps are necessary . . . to protect and preserve the trust property from loss or damage.").

should be. *Id.* at 41-42. The State further argues that it cannot control the atmosphere, it is not property and, therefore, it is not a public trust resource. However, none of these are compelling reasons for excluding the atmosphere from the protections of the public trust doctrine. Indeed, five judges in four different states have ruled, indicated or assumed that the atmosphere is a public trust resource. *Bonser-Lain v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-11-002194, slip op. at *1 (Dist. Ct. Tex., July 9, 2012); *Butler*, slip op. at *20; *Filippone,* slip op. at *8; *Reed v. Martinez*, No. D-101-CV-2011-01544 (Dist. N.M. 2012)(denying state's motion to dismiss atmospheric trust claims).

Simply because the atmosphere is not mentioned in Article VIII does not mean that it should be precluded from the protections of the public trust doctrine. As the State itself acknowledged, the resources listed in Article VIII are not exhaustive. State's Brief, p. 41. The fact that the atmosphere is not explicitly stated in the Texas Constitution did not preclude the Texas district court from determining that "the public trust doctrine includes all natural resources of the State including the air and atmosphere." *Bonser-Lain* slip op. at *1. Similarly, the superior court should not exclude the atmosphere simply because the framers did not explicitly name it when they drafted the constitution nearly 60 years ago at a time when no one was aware of the threat of climate change and the crucial role the atmosphere played therein.

Moreover, the constitutional framers did not intend Article VIII to only include those resources "over which the state had a proprietary interest" as the State asserts. Rather, as the minutes from the constitutional convention clearly indicate, the framers used the quoted language to distinguish between privately and publicly owned resources. *See* Minutes of the Constitutional Convention, Day 57, p. 2499 (Jan. 18, 1956). The framers were not using the term proprietary interest as a way to distinguish between different types of natural resources.

Nor did the *Brooks* Court state that the expansion of the public trust doctrine was inappropriate as the State would have this Court believe. Rather, the *Brooks* Court stated it was inappropriate to expand the public trust doctrine to include all or most public uses merely because it has been applied to a particular public use. *Brooks*, 971 P.2d at 1031. The *Brooks* Court did not mean the public trust doctrine could not be expanded to include resources not expressly identified in the Alaska Constitution or resources so essential to the Alaska way of life.

Lastly, simply because air continuously circulates around the world and the State cannot possess and control it in the sense that it can some other natural resources, it does not mean that the atmosphere is not a public trust resource. Like air, water circulates around the world and cannot be possessed, nor can the State completely control its composition. Nevertheless, the State can contribute adversely to its composition of gases and pollutants and prevent further harm thereto. Air, like water, passes through us and cycles above us, below us and in us

in this essential web of life. To breathe, is to possess the air as intimately as a drink of water.

Consequently, the State offers no salient reason why the atmosphere should not be considered a public trust resource. On the contrary, as set forth in Our Children's opening brief, the principles and purposes underlying the public trust doctrine warrant its inclusion therein.

### E. Our Children Have Standing To Assert Their Public Trust Claims Against The State.

The State asserts that Our Children do not have standing and therefore their complaint must be dismissed. State's Brief, p. 45. The State claims Our Children do not have standing since they do not have any personal stake in the outcome of the climate change debate and because past and future actions taken in Alaska concerning GHG emissions have not caused and will not prevent climate change. *Id.* However, such allegations have no basis in fact or law and should be summarily rejected.

Standing requires that Our Children have a sufficient personal stake in the outcome of the controversy. *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1040 (Alaska 2004). Given Alaska's liberal approach to standing and its preference for increased accessibility to the courts, the degree of injury need not be great – it need only be an "identifiable trifle." *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) citing *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 n. 7 (Alaska 1975). Moreover, such injury can be to economic, aesthetic, or

environmental interests. *Moore v. State*, 553 P.2d 8, 24 (Alaska 1976); *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977). Our Children clearly have more than an identifiable trifle – they have alleged injury to their subsistence lifestyles, loss of land and home, diminished air quality, decreased recreational opportunities, and many other specific injuries. *See* Exc. 4-7, 275-292. Accordingly, Our Children are much more than merely concerned about climate change as the State asserts. They have suffered specific and distinct injuries and therefore have standing.[15]

Nor do the State's arguments, that GHG emissions in Alaska alone have not caused climate change and reducing such emissions will not solve climate change, deprive Our Children of standing. The State relies on *Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009) for the proposition that climate change is too far-reaching for plaintiffs such as Our Children to have standing. State's Brief, p. 47. However, the plaintiffs' substantive standing theory in *Center for Biological Diversity* is far different from the arguments upon which Our Children's bases their standing. In that case, the plaintiffs asserted that they would be injured by the expanded offshore leasing program at issue because it would bring about more oil drilling, which would, in

[15] As part of its standing argument, the State also asserts that every Alaskan has an interest in this lawsuit and therefore must be joined since they are indispensable parties. However, such expansive interpretation in the joinder rules is not supported by caselaw nor does the State cite any. Indeed, if this Court were to interpret the joinder rules as the State does, no lawsuit could ever be filed concerning any matter of public interest, there could be no public trust litigation, and most environmental litigation would be prohibited.

turn, produce more oil, which would, in turn, increase the consumption of oil, which would, in turn, increase carbon dioxide emissions, which would, in turn, cause climate change, which would, in turn, adversely impact animals and their habitat, which would, in turn, adversely affect them. *Id.* at 478-79. The court found such hypothetical and future injury too tenuous to confer standing on plaintiffs. *Id.* at 479.[16] Such future harm alleged by these plaintiffs is a far cry from the harm Our Children allege. Nelson Kanuk lost 13 feet of his property from erosion, had to evacuate his home due to flooding, and braves increasingly dangerous conditions to hunt for food due to loss of sea ice. Exc. 276-278. Adi Davis, Katherine Dolma, Ananda Lankard, and Avery and Owen Mozen breathe smoky air, recreate less, confront more safety risks, face diminished food supplies, and more. Exc. 280-292. These are real injuries to real interests that are happening right now as a direct result of GHG emissions, the substantial impairment of the trust resource and climate change, to which the State contributes.

Moreover, the fact that there are other sources of GHG emissions outside of Alaska and reducing GHG emissions within Alaska alone will not resolve the climate change crisis does not mean Our Children lack standing to bring their public trust claims. In *Massachusetts*, the U.S. Supreme Court rejected the EPA's

[16] Although the court rejected the plaintiffs' substantive standing theory, it concluded plaintiffs' could bring their climate change claims based on their procedural standing theory. *Id.*

argument that a small, incremental step, because it is incremental, can never be attacked in a judicial forum. 549 U.S. at 524. The U.S. Supreme Court reasoned that accepting such a premise would doom most challenges to a regulatory action since agencies, like legislatures, do not generally resolve massive problems in one fell swoop. *Id.* Although regulating vehicle emissions will not by itself reverse global warming, the U.S. Supreme Court stated it does not follow that courts lack jurisdiction to decide whether the EPA has a duty to slow or reduce it. *Id.* at 525. The U.S. Supreme Court went on to make it quite clear that courts are under no obligation to solve the climate change crisis in order for plaintiffs to have standing to challenge the government's failure to take action to address the crisis.[17] Accordingly, simply because Alaska GHG emissions are not solely responsible for climate change and reduction thereof by itself will not solve the climate change crisis, it does not mean Our Children lack standing to sue the State for its failure to protect the atmosphere above Alaska.

Consequently, Our Children have standing to bring their public trust complaint against the State.

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[17] *See Id.* at 526 (The harm from climate change "would be reduced to some extent if petitioners received the relief they seek," and a "reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."); *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008)("[T]he fact that climate change is largely a global phenomenon that includes actions that are outside the agency's control does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming."

## III. CONCLUSION

For the foregoing reasons, Our Children respectfully request that the Court reverse the superior court's dismissal of their public trust claims.

DATED this 22nd day of March 2013 at Eagle River, Alaska.

Attorney for Appellants

Brad D. De Noble
Alaska Bar No. 9806009

# APPENDIX B

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1005 / 12-0444
Filed March 13, 2013

**GLORI DEI FILIPPONE, A Minor By and Through her Mother and Next Friend, MARIA FILIPPONE,**
Petitioner-Appellant,

**vs.**

**IOWA DEPARTMENT OF NATURAL RESOURCES,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Douglas J. Stovall, Judge.

Glori Dei Filippone appeals the denial of her petition for rulemaking. **AFFIRMED.**

Channing L. Dutton of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, and David R. Sheridan and Jacob J. Larson, Assistant Attorneys General, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

**BOWER, J.**

Glori Dei Filippone petitioned the Iowa Department of Natural Resources (DNR) to adopt new rules regarding the emission of greenhouse gasses in Iowa. After the DNR denied the petition, she sought judicial review. The district court affirmed the DNR's denial, and now Filippone appeals.

Because Filippone failed to preserve error on her argument regarding the Inalienable Rights Clause, we do not consider it on appeal. We decline to expand the public trust doctrine to include the atmosphere. Finally, we find the DNR's denial of the petition for rulemaking was not unreasonable, arbitrary, capricious, or an abuse of discretion. Accordingly, we affirm.

***I. Background Facts and Proceedings.***

On May 4, 2011, Kids vs Global Warming filed a petition for rulemaking pursuant to Iowa Code section 17A.7(1) (2011).[1] The petition proposed that the DNR adopt new rules restricting greenhouse gas emissions. On June 1, 2011, Our Children's Trust and Glori Dei Filippone requested to be added as petitioners.

The Environmental Protection Commission considered the petition at a June 21, 2011 public meeting, at which Filippone presented oral and written comments supporting the rulemaking petition. The commission voted unanimously to deny the petition.

On June 22, 2011, the DNR denied the petition, citing its current greenhouse gas emissions requirement. It also noted that it anticipated the

[1] Section 17A.7(1) states: "An interested person may petition an agency requesting the adoption, amendment, or repeal of a rule."

Environmental Protection Agency (EPA) will likely be creating new standards, which might be inconsistent with the proposed rules in violation of Iowa Code section 455B.133(4). Finally, the DNR noted that adopting the proposed rules would require resources and funding to be designated to the program, and that without additional legislatively-appropriated funding, it would be unable to develop and administer the proposed rules.

Filippone filed a petition for judicial review on July 21, 2011. The district court affirmed the DNR's denial of the petition for rulemaking after finding the denial was not unreasonable, arbitrary, capricious, or an abuse of discretion. The court also declined Filippone's invitation to expand the public trust doctrine to include the atmosphere. Filippone filed a timely appeal.

***II. Scope and Standard of Review.***

Iowa Code section 17A.19(10) governs judicial review of agency decision making. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 255 (Iowa 2012). We apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. *Id.* If the agency action has prejudiced the substantial rights of the petitioner and meets one of the criteria enumerated in section 17A.19(10)(a) through (n), the district court may grant relief. *Id.*

Under section 17A.19(1), our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. *Id.* at 256. Where the agency has been clearly vested with the authority to make fact findings on an issue, we cannot disturb those findings unless they are not supported by substantial evidence in the record before the court when that court

reviewed the record as a whole. *Id.* If the agency has been clearly vested with the authority to make a factual determination, it follows that application of the law to those facts is likewise vested by a provision of law within the agency's discretion. *Id.* In those cases, we only disturb the agency's application of the law to the facts if that application is irrational, illogical, or wholly unjustifiable. *Id.*

An agency's decision cannot be unreasonable or involve an abuse of discretion. Iowa Code § 17A.19(10)(n); *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). Unreasonableness is defined as "action in the face of evidence as to which there is no room for difference of opinion among reasonable minds, or not based on substantial evidence." *Stephenson*, 522 N.W.2d at 831. Abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence. *Id.*

Our scope of review is for correction of errors at law. *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). When a party raises a constitutional issue in an appeal of an agency action, our review is de novo. *Insituform Techs., Inc. v. Employment Appeal Bd.*, 728 N.W.2d 781, 788 (Iowa 2007).

***III. Analysis.***

**1. Inalienable Rights Clause.**

Filippone first argues the DNR acted unreasonably in denying the proposed rule because Iowa's Inalienable Rights Clause provides Iowans with a constitutionally-protected right to a life-sustaining atmosphere. However, a

review of the record shows Filippone failed to raise this issue before the district court in her petition for judicial review, and the issue was not addressed by the court in its ruling. Ordinarily, issues must be both raised and decided by the district court before we will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Filippone has failed to preserve error on this claim.

**2. Public Trust Doctrine.**

Filippone also argues the DNR must consider new rules regarding greenhouse gas emissions because the public trust doctrine applies to the atmosphere. This doctrine, which limits the State's power to dispose of land encompassed within the public trust, is "based on the notion that the public possesses inviolable rights to certain natural resources." *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996). The doctrine originally applied to navigable-water beds, but has been expanded to embrace the public's use of lakes and rivers for recreational purposes. *Id.*

The public trust doctrine in Iowa has a narrow scope. *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813 (Iowa 2000). As our supreme court has stated, "We do not necessarily subscribe to broad applications of the doctrine, noted by one authority to include rural parklands, historic battlefields, or archaeological remains. In fact, we are cautioned against an overextension of the doctrine." *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (citations omitted). In *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 498 (Iowa 2002), our supreme court declined to extend the doctrine to cover

forested areas. It has also declined to extend the doctrine to encompass a public alleyway that did not provide access to a river or lake, finding such an extension "would be inconsistent with the rationale underlying the public trust doctrine." *Fencl*, 620 N.W.2d at 814.

In light of the case law cited, the district court declined to expand the public trust doctrine to include the atmosphere. We concur that there is no precedent for extending the public trust doctrine to include the atmosphere. Because the DNR does not have a duty under the public trust doctrine to restrict greenhouse gases to protect the atmosphere, its denial of the proposed rule was not unreasonable.

**3. Fair Consideration.**

Finally, Filippone argues the DNR acted unreasonably in denying the proposed rule because it failed to give fair consideration to the petition for rulemaking.

In *Community Action Research Group v. Iowa State Commerce Commission*, 275 N.W.2d 217, 220 (Iowa 1979), our supreme court held that section 17A.7 "requires only that an agency give fair consideration to the propriety of issuing the proposed rule. It does not require the agency to take a stand on the substantive issues that might prompt the proposal of a rule."

The DNR's Environmental Protection Commission held a public hearing on the proposed rulemaking and heard presentations from those both for and against the proposed rulemaking. The commission then voted unanimously to deny the petition for rulemaking. The director of the DNR then issued a written

denial of the petition for rulemaking, which cited the following reasons for its denial: current state law regulating greenhouse emissions, a potential conflict with planned EPA rules governing greenhouse emissions, and a lack of resources and funding to develop and administer the proposed rules.

Filippone cites to two comments made during the Environmental Protection Commission's public hearing to support her argument that the petition for rulemaking was not given fair consideration. At the hearing, one of the commissioners unfortunately stated that Filippone had "lost" him during her presentation when she said she was a vegetarian. The other comment came from a commissioner who stated she would have liked more time to look over the materials related to the petition. However, all seven commission members voted to deny the petition. The written denial by the DNR director then outlines specific reasons why the petition was denied.

We agree with the district court that the DNR gave fair consideration to the proposed rulemaking. Its denial of the petition was not unreasonable, arbitrary, capricious, or an abuse of discretion. Accordingly, we affirm the decision of the DNR to deny the petition for rulemaking.

**AFFIRMED.**

Mullins, J., concurs; Doyle, P.J., concurs specially.

**DOYLE, J.** (concurring specially)

I concur specially. I agree there is no Iowa case law for extending the public trust doctrine to include the atmosphere. But, I believe there is a sound public policy basis for doing so.

In 1989, in enacting the Resources Enhancement and Protection (REAP) program, the legislature stated:

> The general assembly finds that:
>
> 1. The citizens of Iowa have built and sustained their society on Iowa's *air*, soils, waters, and rich diversity of life. The well-being and future of Iowa depend on these natural resources.
>
> . . . .
>
> 4. The *air*, waters, soils, and biota of Iowa are interdependent and form a complex ecosystem. Iowans have the right to inherit this ecosystem in a sustainable condition, without severe or irreparable damage caused by human activities.

1989 Iowa Acts ch. 236, § 2 (now codified at Iowa Code § 455A.15 (2013)) (emphasis added). Furthermore,

> It is the policy of the state of Iowa to protect its natural resource heritage of *air*, soils, waters, and wildlife for the benefit of present and future citizens with the establishment of a resource enhancement program.

*Id.* § 3 (now codified at § 455A.16) (emphasis added). The legislature, the voice of the people, has spoken in terms as clear as a crisp, cloudless, autumn Iowa sky.

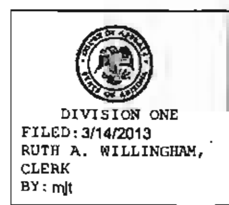
Nevertheless, in view of our supreme court's stated reluctance to extend the public trust doctrine beyond rivers, lakes, and the lands adjacent thereto, I do not feel it is appropriate for a three-judge panel of this court to take on the task of expanding the doctrine to include air. *See Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 498 (Iowa 2003) ("[T]he scope of the public-

trust doctrine in Iowa is narrow, and we have cautioned against overextending the doctrine."); *Figley v. W.S. Indus.*, 801 N.W.2d 602, 608 (Iowa Ct. App. 2011) ("[W]e are not at liberty to overturn precedent of our supreme court."). I therefore specially concur.

# APPENDIX C

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
**See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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|---|---|---|
| JAIME LYNN BUTLER, a minor, by and through her guardian, JAMESCITA PESHLAKAI, and others similarly situated,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY; HENRY R. DARWIN, in his official capacity as director, Arizona Department of Environmental Quality,<br><br>Defendants/Appellees. | ) | 1 CA-CV 12-0347<br><br>DEPARTMENT D<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-010106

The Honorable Mark H. Brain, Judge

**AFFIRMED**

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and

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**K E S S L E R**, Judge

**¶1** Appellant, Jaime Lynn Butler ("Butler") appeals the superior court's dismissal pursuant to Arizona Rule of Civil Procedure 12(b)(6) of her complaint seeking declaratory and injunctive relief against Arizona Governor, Janice K. Brewer, in her official capacity, the Arizona Department of Environmental Quality ("ADEQ"), and ADEQ director, Henry R. Darwin, in his official capacity (collectively "the Defendants"). For the following reasons, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

**I. Butler's complaint**

**¶2** Butler filed a complaint for declaratory and injunctive relief on the basis of the Public Trust Doctrine ("the Doctrine") requesting the superior court to declare the: (1) atmosphere is a public trust asset; (2) Defendants have a fiduciary obligation as trustees to take affirmative action to preserve the atmosphere and other trust assets from impacts associated with climate change; and (3) Defendants' fiduciary obligation is defined by what the best available science has determined is necessary to preserve the atmospheric trust. Butler also sought an order mandating that the Defendants

institute reductions in Carbon Dioxide (CO2) emissions in Arizona of at least six percent on an annual basis, and that the superior court retain jurisdiction over the matter to ensure the Defendants comply.[1]

## II. The Defendants' motion to dismiss[2]

¶3 The Defendants moved to dismiss Butler's complaint arguing that: (1) Butler lacks standing because she does not allege distinct harm; (2) Butler lacks standing under the Uniform Declaratory Judgments Act ("UDJA"), Arizona Revised Statutes ("A.R.S.") sections 12-1831 to -1846 (2003 & Supp. 2012), because she has not identified a protectable interest or that the Defendants have the power to redress her grievances and have denied her right to relief; (3) A.R.S. § 49-191 (Supp. 2012) prohibits agency action relating to greenhouse gas ("GHG") emissions; (4) Arizona's Comprehensive Air Quality Act ("CAQA"), A.R.S. §§ 49-401 to -593 (2005 & Supp. 2012), displaces common law rights; (5) the Doctrine in Arizona applies only to navigable streambeds; (6) Butler's complaint raises a non-justiciable political question and she fails to identify

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[1] Butler's complaint is similar to numerous other actions currently being pursued around the nation. *See* Edgar Washburn and Alejandra Nunez, *Is the Public Trust a Viable Mechanism to Regulate Climate Change?*, 27 Nat. Resources & Env't 23, 24 (Fall 2012).

[2] Butler amended her complaint just after the Defendants filed the motion to dismiss. The amendments were non-substantive insofar as they related to the motion to dismiss.

judicially discoverable and manageable standards for resolving her claim; and (7) ADEQ is a non-jural entity.

¶4 In addition to asserting that she has standing under the UDJA and that her claim does not raise non-justiciable political questions, Butler asserted in opposition that: (1) she has suffered particularized injuries, but even generalized harms do not defeat her standing and, in any event, the court should waive standing requirements because of the importance of the issue involved; (2) A.R.S. § 49-191 does not prevent Defendants from redressing Butler's claims because the statute is limited in scope and the State cannot abdicate its public trust obligations; and (3) public trust claims are not subject to displacement because the Doctrine is an "attribute of sovereignty itself" and Arizona's CAQA complements rather than displaces the Doctrine.

¶5 At oral argument, the superior court requested that the parties present arguments regarding justiciability because the court was concerned that it lacked the authority to issue the requested relief. Butler argued that in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 187 (1999), the Arizona Supreme Court "did not consider the public trust doctrine . . . to be limited exclusively to the disposition of lands under Navajo waterways." She maintained that *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497

(2007) and *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), support her position because in those cases the Supreme Court and the Ninth Circuit Court of Appeals, respectively, considered arguments regarding an agency's responsibility to assess the effect of its actions on global warming despite the fact that climate change is largely a global issue. Butler acknowledged, however, that neither case involved the Doctrine, but instead involved Congressional directives to an agency to act when the agency had failed to do so.

**¶6** Butler also acknowledged that there was no judicial precedent extending the Doctrine to the atmosphere as a public trust resource. She noted however, that the Michigan legislature had created a private right of action for degradation of the public trust, and other states have determined that the public trust applies to minerals, surface waters, wildlife, and ground water.

**¶7** With respect to the State's arguments regarding displacement of the Doctrine and separation of powers, Butler maintained that the Defendants were only arguing that there was existing legislation on the topic, "not that anything is being done [about] it."

¶8 The Defendants argued that in light of existing legislation, separation of powers prevents the court from making the policy determinations necessary to resolve Butler's case.

¶9 The superior court was "completely unconvinced" by Butler's argument and "[did not] think it is [the court's] job to declare policy for the State." The court stated that Butler's remedies are with the legislature or Congress and granted the Defendants' motion to dismiss.

¶10 Butler timely filed a notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

**ISSUES ON APPEAL**

¶11 Butler frames the sole issue on appeal as "[w]hether the [Doctrine] in Arizona includes the atmosphere" and asks this Court to answer that question in the affirmative and remand to the superior court for further proceedings.

¶12 Mirroring their arguments in the superior court, the Defendants assert that: (1) the Doctrine does not include the atmosphere; (2) Arizona's CAQA displaces the Doctrine with respect to air quality regulation; (3) Butler lacks standing to pursue her claim and she specifically lacks standing and fails to state a claim under the UDJA; (4) the complaint raises a non-justiciable political question; and (5) ADEQ is a non-jural entity.

¶13 Because we conclude that Butler does not challenge an affirmative state action or the state's failure to undertake a duty to act as unconstitutional, and her claims cannot be redressed by the Defendants, we need not reach or separately address all of these issues. Rather, we hold that while it is up to the judiciary to determine the scope of the Doctrine, Butler's complaint fails as a matter of law because she does not point to any constitutional provision violated by state inaction on the atmosphere, does not challenge any state statute as unconstitutional and, absent the unconstitutionality of A.R.S. § 49-191, cannot obtain a remedy under the UDJA.

**STANDARD OF REVIEW**

¶14 We review *de novo* a dismissal of a complaint under Arizona Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We accept as true the well-pleaded facts alleged in the complaint and will affirm the dismissal only if the plaintiff "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). We will affirm the superior court if its ruling is correct for any reason. *Magma Flood Control Dist. v. Palmer*, 4 Ariz. App. 137, 140, 418 P.2d 157, 160 (1966).

¶15 We also apply a *de novo* standard of review to issues of law, *San Carlos*, 193 Ariz. at 203, ¶ 9, 972 P.2d at 187, including those involving statutory and constitutional interpretation, as well as those involving mixed questions of law and fact, *In re U.S. Currency in Amount of $26,980.00*, 193 Ariz. 427, 429, ¶ 5, 973 P.2d 1184, 1186 (App. 1998).

**DISCUSSION**

**I. The basis of the Doctrine and separation of powers**

¶16 The Doctrine is "[a]n ancient doctrine of common law [that] restricts the sovereign's ability to dispose of resources held in public trust." *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 364, 837 P.2d 158, 166 (App. 1991); *see generally* William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. Davis L. Rev. 693 (Feb. 2012) (discussing history of the Doctrine); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Envtl. L.J. 711, 713-15 (2008) (same). Although Arizona law establishes the legal framework for the Doctrine, public trust jurisprudence in Arizona remains almost as nascent as when this Court described the legal

landscape over twenty years ago.[3] *See Hassell*, 172 Ariz. at 365, 837 P.2d at 167 (stating that "as an attribute of federalism,

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[3] Although there has been some debate as to whether the legal basis for the Doctrine stems from federal or state law, *see Defenders of Wildlife v. Hull*, 199 Ariz. 411, 418 n.5, ¶ 12, 18 P.3d 722, 729 n.5 (App. 2001), neither party challenges Arizona courts' previous treatment of the Doctrine as arising under and being governed by state law and both parties cite *Hassell*, as controlling precedent. United States Supreme Court precedent also supports the determination that the Doctrine arises under state law. *See PPL Mont. v. Montana*, 132 S.Ct. 1215, 1235 (2012) (stating "the public trust doctrine remains a matter of state law"); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) (stating that the conclusion reached in *Illinois Central*, a Supreme Court public trust case, was a statement of Illinois law).

Indeed, a multitude of scholarly material discusses the evolution of the Doctrine in the various states and the substantial differences of the Doctrine in each jurisdiction depending on the individual state bases for the Doctrine, including constitutional, statutory, and common law. *See generally* Richard M. Frank, *The Public Trust Doctrine: Assessing its Recent Past & Charting its Future*, 45 U.C. Davis L. Rev. 665 (Feb. 2012); Dr. Sharon Megdal et al., *The Forgotten Sector: Arizona Water Law and the Environment*, 1 Ariz. J. Envtl. L. & Pol'y 243 (Spring 2011); Jordan Browning, *Unearthing Subterranean Water Rights: The Environmental Law Foundation's Efforts to Extend California's Public Trust Doctrine*, 34 Environs Envtl. L. & Pol'y J. 231, 238-39 (Spring 2011); Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. Envtl. L.J. 412, 441 (2010); Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 113 (Winter 2010).

each state must develop its own jurisprudence for the administration of the lands it holds in public trust" and noting that "[o]ur supreme court long ago acknowledged the doctrine[,] [but] the doctrine has not yet been applied" (citing *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 39 Ariz. 65, 73, 4 P.2d 369, 372 (1931), *modified*, 39 Ariz. 367, 7 P.2d 254 (1932)); *see also San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199 (stating the Doctrine, at least as enforced through the gift clause and separation of powers, is a "constitutional limitation on legislative power to give away [public trust] resources").

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For instance, some states' recognition of the public trust doctrine or its concepts are constitutionally based, such as in Hawaii, while other states have codified public trust concepts through legislation. *See generally* Robin Kundis Craig, *A Comparative Guide to Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 88 (2010); *see also generally* Frank, *The Public Trust Doctrine: Assessing its Recent Past & Charting its Future*, 45 U.C. Davis L. Rev. at 685 (citing examples of states that rely on constitutions and those that rely on legislation for the source of the Doctrine and stating that "[s]tate courts around the country have characterized the source . . . in varying ways"); Christopher Brown, *A Litigious Proposal: A Citizen's Duty to Challenge Climate Change, Lessons from Recent Federal Standing Analysis, and Possible State-Level Remedies Private Citizens Can Pursue*, 25 J. Envtl. L. & Litig. 385, 451-54 (2010); William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. Rev. 385, 438 n.244 (Dec. 1997) (citing constitutions of approximately two-thirds of the fifty states that in some way aim to protect natural resources); *id.* at 451 n.307-11 (categorizing and citing state constitutional provisions).

¶17 In *Hassell*, individuals and organizations challenged a legislative enactment that relinquished the state's interest in navigable riverbed lands in Arizona. 172 Ariz. at 359, 837 P.2d at 161. On appeal, this Court explained that the state's title to such lands existed as a result of the Constitutional reservation of the several states' watercourse sovereignty and the federal equal footing doctrine. *Id.* at 359-60, 837 P.2d at 161-62. The state's title however, "is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 364, 837 P.2d at 166 (quoting *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)); *see also* A.R.S. § 37-1101 (2003) (for purposes of public lands and state claims to streambeds, "public trust purposes" or "public trust values" are defined as commerce, navigation, and fishing).

¶18 In exploring the groundings "for an Arizona law of public trust," *Hassell* first acknowledged the seminal United States Supreme Court case, *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, from which "[w]e develop[ed] our analysis." 172 Ariz. at 366, 837 P.2d at 168. "From *Illinois Central* we derive[d] the proposition[s] that the state's

responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself. . . . [and that] the state must administer its interest in lands subject to the public trust consistently with trust purposes." *Id.*

¶19 "The second grounding for an Arizona law of public trust lies in our constitutional commitment to the checks and balances of a government of divided powers." *Id.* ("Judicial review of public trust dispensations complements the concept of a public trust."); *see* Ariz. Const. art. 3. *Hassell* approvingly quoted the Idaho Supreme Court's characterization of the role of the judiciary with respect to the public trust which acknowledges that the judiciary will not substitute its judgment for that of the legislature, but recognizes the "[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary." *Id.* at 367, 837 P.2d at 169. Such a determination requires the courts to "take a 'close look' at the action to determine if it complies with the public trust doctrine." *Id.*

¶20 "The third point of reference for development of public trust jurisprudence in Arizona [was] art. IX, § 7, of the Arizona Constitution . . . known as the gift clause," *id.*, which *Hassell* determined "provide[d] an appropriate framework for

judicial review" of the state's attempt to "divest the state of a portion of its public trust," *id.* at 364, 837 P.2d at 166.

**¶21** *Hassell* determined that "when a court reviews a dispensation of public trust property" two elements must be shown—"public purpose and fair consideration." *Id.* at 368, 837 P.2d at 170. Because "public trust land is not like other property . . . the state may not dispose of trust resources except for purposes consistent with the public's right of use and enjoyment of those resources, [which means that] any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations." *Id.* *Hassell* ultimately held that the challenged legislative provisions were invalid under the public trust doctrine and the gift clause. *Id.* at 371, 837 P.2d at 173.

**¶22** In *San Carlos*, our supreme court struck down provisions of a statutory scheme governing the adjudication of water rights. 193 Ariz. at 217, ¶¶ 62-63, 972 P.2d at 201. Specifically, the court determined that one statute was invalid because it declared that "[t]he public trust is not an element of a water right in an adjudication proceeding" and prohibited the courts from "mak[ing] a determination as to whether public trust values are associated with any or all of the river system or source." *Id.* at 215, ¶¶ 51-52, 972 P.2d at 199.

¶23 Explaining that the Doctrine "is a constitutional limitation on legislative power to give away [public trust] resources," the supreme court determined that "[t]he Legislature cannot order the courts [by statutory enactment] to make the [D]octrine inapplicable to these or any proceedings" because a determination whether the Doctrine applies to any of the claims "depends on the facts before a judge" and "[i]t is for the courts to decide whether the public trust doctrine is applicable to the facts." *Id.* at ¶ 52.

¶24 We glean three principles from *Hassell* and *San Carlos*. First, that the substance of the Doctrine, including what resources are protected by it, is from the inherent nature of Arizona's status as a sovereign state. Second, that based on separation of powers, the legislature can enact laws which might affect the resources protected by the Doctrine, but is it up the to judiciary to determine whether those laws violate the Doctrine and if there is any remedy. Third, that the constitutional dimension of the Doctrine is based on separation of powers and specific constitutional provisions which would preclude the State from violating the Doctrine, such as the gift clause.

**II. Justiciability and scope of the Doctrine**

¶25 Given the above principles, we reject the Defendants' argument that the determinations of what resources are included

in the Doctrine and whether the State has violated the Doctrine are non-justiciable. That argument is foreclosed by *San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199, and *Hassell*, 172 Ariz. at 367, 837 P.2d at 169. Not only is it within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the Doctrine, but the courts must also determine whether based on the facts there has been a breach of the trust. *See Hassell*, 172 Ariz. at 367, 837 P.2d at 169 ("[W]hether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary."); *see also San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199.

**¶26** While public trust jurisprudence in Arizona has developed in the context of the state's interest in land under its waters, we reject Defendants' argument that such jurisprudence limits the Doctrine to water-related issues. *See Hassell*, 172 Ariz. at 364 n.11, 837 P.2d at 166 n.11 (declining to reach issue of whether the Doctrine applies to non-navigable streambeds); *see also Defenders of Wildlife v. Hull*, 199 Ariz. 411, 417-18, ¶¶ 12-13, 18 P.3d 722, 728-29 (App. 2001). The Defendants overstate the importance of the substance of the precedent discussed above, or misconstrue it, by arguing that "[i]n Arizona, the public trust doctrine applies *only* to Arizona's navigable streambeds." (Emphasis added.) Arizona

courts have never made such a pronouncement nor have the courts determined that the atmosphere, or any other particular resource, is *not* a part of the public trust. *See* Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. Envtl. L.J. 412, 441 (2010) ("Arizona courts have not issued any . . . holdings that explicitly reject the application of the public trust doctrine to the protection of a given area or interest."). The fact that the only Arizona cases directly addressing the Doctrine did so in the context of lands underlying navigable watercourses does not mean that the Doctrine in Arizona is limited to such lands. Any determination of the scope of the Doctrine depends on the facts presented in a specific case. *San Carlos,* 193 Ariz. at 215, ¶ 52, 972 P.2d at 199.[4]

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[4] In *Seven Springs Ranch, Inc.* v. *State*, this Court decided that Arizona's comprehensive scheme for groundwater management and in particular the statutorily created definitional factors for determining basin boundaries displaced any consideration of public trust doctrine factors in determining basin boundaries. 156 Ariz. 471, 475-76, 753 P.2d 161, 165-66 (App. 1987) (agreeing with the superior court's determination that "the 1980 Arizona Groundwater Management Act specifies the factors to be considered when drawing basin and sub-basin boundaries; that such factors are exclusive in nature in that no other factors should be considered under the auspices of the Public Trust Doctrine; and that the Department of Water Resources was therefore correct in not considering any factors under [the public trust] doctrine"; and declining to permit a designation of boundaries that does not meet the statutory definitions). Thus, this Court has once determined that public trust claims can be displaced by a comprehensive statutory scheme, but it

¶27 As a consequence, our precedent does not address the measures by which a resource may be determined to be a part of the public trust or a framework for analyzing such contentions as Butler's that the public trust applies to the atmosphere with respect to GHG emissions and climate change. For purposes of our analysis, we assume without deciding that the atmosphere is a part of the public trust subject to the Doctrine.[5]

¶28 Despite the power of the judiciary to rule on the Doctrine's scope and enforcement, the problem with Butler's complaint centers on the alleged violations and request for relief as those issues relate to both UDJA standing and justiciability. Our public trust precedent involves situations in which the state has taken some affirmative action challenged under the Doctrine for which relief can be granted under the

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does not necessarily follow that in the absence of such a scheme the Doctrine is inapplicable.

That no Arizona court has had the occasion to apply the Doctrine in other contexts or to other resources such as the atmosphere, however, does not persuade us that Butler's claim is foreclosed under Arizona law or that the scope of the Doctrine is limited to navigable streambeds as the Defendants argue. *See San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199 ("It is for the courts to decide whether the public trust doctrine is applicable to the facts.").

[5] Without deciding the issue, we understand that the argument for including the atmosphere within the public trust is based on a definition of the public trust as applying to a resource for which all citizens depend and share and which cannot be divided for purposes of private ownership. *See generally* J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. Davis L. Rev. 915, 925-26 (Feb. 2012).

Arizona Constitution, specifically, the gift clause. *See Hassell*, 172 Ariz. at 359, 367-68, 837 P.2d at 161, 169-70 (involving challenge to a statute that relinquished the state's interest in navigable watercourse bedlands); *see also Defenders of Wildlife*, 199 Ariz. at 417-18, 428, ¶¶ 12-13, 67, 18 P.3d at 728-29, 739 (involving challenge to statute setting forth standards for determining whether a watercourse was navigable such that its bedlands were considered public trust lands and determining such statute was preempted because it conflicted with the federal standard for determining navigability).

**¶29** Here, however, Butler's essential challenge is to state *inaction*. Although Butler mentions the repeal of the Clean Car Standards, which would have become effective had the regulations not been repealed in 2012, in her pleadings below

and on appeal, she does not assert that the repeal violates the Doctrine.[6]

¶30 Equally important, Butler does not give us any basis to determine that the State's inaction violates any specific constitutional provision on which relief can be granted. The gift clause and separation of powers provisions in the Arizona Constitution, which were constitutional underpinnings of the public trust analyses in *Hassell* and *San Carlos*, do not provide a constitutional basis for Butler's challenge here because she does not assert that the state improperly disposed of a public trust resource. *See Hassell*, 172 Ariz. at 366, 368, 837 P.2d at 168, 170 (stating that "to decide the public trust issues presented by this case, we need not weave a jurisprudence out of air" and proceeding to determine that "[t]he gift clause offers

[6] Butler only discusses the history of the Clean Car Standards. According to her pleadings, the Clean Car Standards were developed after former Arizona Governor, Janet Napolitano, issued a 2002 executive order establishing a Climate Change Advisory Group because of "particular concerns about the impacts of climate change and climate variability on our environment." In 2006, the ADEQ issued the Climate Change Advisory Group's Climate Change Action Plan. The plan made numerous recommendations including the implementation of a Clean Car Program to reduce GHG emissions. In 2008, ADEQ promulgated new regulations requiring new emissions standards for vehicles. In 2010, Arizona Governor Jan Brewer issued an executive order that among other things created a Climate Change Oversight Group which was required to make a recommendation regarding whether the Clean Car Standards should become effective. Thereafter, Governor Brewer directed ADEQ Director Darwin to initiate rulemaking to repeal the Clean Car Standards and the regulations were repealed.

a well-established constitutional framework for judicial review of an attempted legislative transfer of a portion of the public trust"); *see also San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199 (citing *Hassell* and stating "[t]he public trust doctrine is a constitutional limitation on legislative power to give away [public trust] resources . . . . The Legislature cannot by legislation destroy the constitutional limits on its authority").

**¶31** Despite the inapplicability of the gift clause here, Butler does not point to any constitutional provision from which we may derive the public trust protections and remedy she urges. In other words, whereas in *Hassell* and *San Carlos* the Arizona Constitution provided a role for the judiciary, and the framework and authority for judicial review, there are no constitutional provisions implicated here that supply the same. Thus, even assuming without deciding that the atmosphere is part of the public trust, there is no constitutional basis upon which we can determine that state action or inaction is unconstitutional, or otherwise violates any controlling law. Here, we would be weaving "a jurisprudence out of air" to hold that the atmosphere is protected by the Doctrine and that state inaction is a breach of trust merely because it violates the Doctrine without pointing to a specific constitutional provision or other law that has been violated. The Doctrine is not

freestanding law, and in any case, such a showing is a requisite for the court to act, without which we cannot hold that state action or inaction is unlawful even if a public resource is in jeopardy.

**III. UDJA Standing**

**¶32** Butler's complaint also suffers from a standing problem. We agree in part with the Defendants' argument, that A.R.S. § 49-191 precludes them from acting to redress Butler's grievances, and thus, Butler cannot establish standing under the UDJA. The statute precludes the Defendants from providing Butler's requested relief or otherwise acting to redress Butler's claim. Thus, Butler has not sufficiently asserted the Defendants have denied her rights to establish standing. "For a justiciable controversy to exist, a complaint must assert a legal relationship, status or right in which the party has a definite interest *and an assertion of the denial of it by the other party.*" *Land Dep't v. O'Toole*, 154 Ariz. 43, 47, 739 P.2d 1360, 1364 (App. 1987); *see also* A.R.S. § 12-1832 (2003). "A controversy is not justiciable when a defendant has no power to deny the plaintiff's asserted interests." *Yes on Prop 200 v.*

*Napolitano*, 215 Ariz. 458, 468, ¶ 29, 160 P.3d 1216, 1226 (App. 2007).[7]

**¶33** We cannot order the Defendants to take actions in violation of a statute unless we determine the statute is unconstitutional. Butler fails to challenge the constitutionality of the statute or to identify a constitutional basis from which we may find A.R.S. § 49-191 unconstitutional. Moreover, Butler does not request that we remand nor will we remand this case so Butler may amend her complaint to make such a challenge. The Defendants argued A.R.S. § 49-191 below and Butler did not seek to amend her complaint to assert such a claim, though she could have.

**¶34** Because we determine that relief cannot be granted, Butler is essentially requesting us to issue an advisory opinion which we will not do. *See Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App. 1991) ("Courts will not hear cases that seek declaratory judgments that are advisory or answer moot or abstract questions.").

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[7] While Butler argues the Governor is not a state agency or department subject to section 49-191, that argument is not persuasive. Butler would have the Governor direct ADEQ to violate section 49-191, a power which the Governor does not possess as long as the statute is not stricken as unconstitutional.

## IV. Attorneys' Fees

**¶35** Butler requests her attorneys' fees under the private attorney general doctrine. ` The private attorney general doctrine has been defined as "an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance." *Hassell*, 172 Ariz. at 371, 837 P.2d at 173 (quoting *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989)). Given our holding today, we will not award attorneys' fees under the private attorney general doctrine.

## CONCLUSION

**¶36** For the reasons stated above, we affirm the superior court's dismissal of Butler's complaint.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
JON W. THOMPSON, Judge

**G E M M I L L**, Presiding Judge, concurring:

**¶37** I concur with the result reached in the majority decision and the majority's explanation of the reasons why this

action was properly dismissed. I write separately to state my conclusion that the atmosphere is not subject to the public trust doctrine recognized in *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991). The State does not hold title to the atmosphere in the same sense that the State owns the riverbeds of Arizona watercourses that were navigable when Arizona was admitted to the Union. *See id.* at 356, 366, 837 P.2d at 161, 168. Additionally, I agree with the trial court that the relief sought in this action is more properly addressed to the legislative and executive branches of our government rather than the judicial branch.

/S/
JOHN C. GEMMILL, Presiding Judge