
COMMENTS

THE SKY'S THE LIMIT: APPLYING THE PUBLIC TRUST DOCTRINE TO THE ATMOSPHERE*

I. INTRODUCTION

Extreme weather is becoming the norm. Nationwide, 2013 was the twenty-first wettest year on record, following the fifteenth driest year in 2012.¹ A late-season burst of tornadoes resulted in six fatalities in Illinois.² And Colorado was deluged by floods that crippled much of the state's infrastructure.³ The United States was off to a similar start in 2014. In early January, much of the country was in the grip of a "polar vortex" that made the air temperature so cold that exposed flesh would freeze in five minutes.⁴ Shortly after a storm in the Northeast set records for snow accumulation,⁵ snowfall in Atlanta, Georgia, crippled the city for a day.⁶

Scientific evidence increasingly points to the conclusion that these extreme weather patterns are the products of man-made global warming.⁷ Human activities such

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1. Nat'l Oceanic & Atmospheric Admin., *National Overview for Annual 2013*, NAT'L CLIMATIC DATA CTR. (2013), <https://www.ncdc.noaa.gov/sotc/national/2013/13>; Nat'l Oceanic & Atmospheric Admin., *National Overview for Annual 2012*, NAT'L CLIMATIC DATA CTR. (2012), <https://www.ncdc.noaa.gov/sotc/national/2012/13>.

2. Nat'l Oceanic & Atmospheric Admin., *Tornadoes for Annual 2013*, NAT'L CLIMATIC DATA CTR. (2013), <https://www.ncdc.noaa.gov/sotc/tornadoes/2013/13>.

3. Monte Whaley, *Colorado To Drain Its \$100 Million Road Contingency Fund To Pay for Flood Fixes*, DENVER POST, Sept. 18, 2013, http://www.denverpost.com/breakingnews/ci_24121274/feds-chip-30-million-repair-road-damaged-colorado#.

4. Stephanie K. Baer & Kim Geiger, *Chicago Bracing for Second Deep-Freeze in a Month*, CHI. TRIB., Jan. 26, 2014, http://articles.chicagotribune.com/2014-01-26/news/chi-chicago-bracing-for-second-deepfreeze-in-a-month-20140126_1_area-ski-resorts-chills-chicago-park-district.

5. Frank Kummer & Emily Babay, *Record 13-inch Snowfall, Bitter Temps Slow Region for 2nd Day*, PHILLY.COM (Jan. 22, 2014, 2:10 PM), http://www.philly.com/philly/news/13_snowfall_bitter_temps_cripple_region_for_second_day.html.

6. Cameron McWhirter et al., *Winter Storm Hits Atlanta Harder Than Expected, Stopping City Cold*, WALL ST. J. (Jan 30, 2014, 11:02 AM), <http://online.wsj.com/news/articles/SB1000142405270230327704579349860295826336>.

7. See Complaint for Declaratory and Injunctive Relief at 7–8, *Aronow v. State*, No. 62-CV-11-3952 (Minn. Dist. Ct. Jan. 31, 2012) [hereinafter Minnesota Complaint] (citing the Intergovernmental Panel on Climate Change, the National Academy of Sciences, the science academies of eleven nations, and the U.S. Department of Interior as organizations that have all recognized that "[w]arming of the climate system is unequivocal" and that there is "very high confidence" that this warming is due to human activities"); JAMES

as deforestation and the burning of fossil fuels have caused massive quantities of carbon dioxide and other gases to accumulate in the atmosphere.⁸ These gases trap heat that would otherwise escape into space.⁹ As a result, the planet's temperature has risen by about 0.8° Celsius (1.4° Fahrenheit) over the past century, altering the global ecosystem and at least contributing to the slew of environmental catastrophes that we have witnessed recently.¹⁰

While state and national governments, as well as international organizations, have at least attempted to address global warming, many people feel that they have not done enough.¹¹ As a result, concerned citizens have occasionally turned to the courts for relief, suing state and federal governments under various statutes and common law doctrines in an attempt to achieve immediate change.¹² These measures have mostly failed.¹³

In the spring of 2011, groups of environmental activists tried a new approach, filing lawsuits against the federal government and a dozen state governments for their failure to protect the atmosphere under the public trust doctrine.¹⁴ The public trust doctrine is an ancient property law that requires sovereign governments to protect important natural resources on the public's behalf.¹⁵ The plaintiffs in these cases argued that by failing to prevent the release of greenhouse gases into the atmosphere, state and federal governments had violated their fiduciary duties to protect a public trust resource.¹⁶ As a remedy, the plaintiffs asked the courts to compel their respective governments to implement new emissions reductions guidelines.¹⁷

The problem is that while the atmosphere is an inherently public resource to which all people have access, no court had ever explicitly applied the public trust doctrine to the atmosphere before 2012. As a result, courts have dismissed twelve of the fourteen cases filed to date.¹⁸ Although several courts suggested, implied, or

HANSEN ET AL., SCIENTIFIC CASE FOR AVOIDING DANGEROUS CLIMATE CHANGE TO PROTECT YOUNG PEOPLE AND NATURE 1 (2012), available at <http://arxiv.org/ftp/arxiv/papers/1110/1110.1365.pdf> ("Humanity is now the dominant force driving changes of Earth's atmospheric composition and thus future climate. The principal climate forcing is carbon dioxide (CO₂) from fossil fuel emissions, much of which will remain in the atmosphere for millennia.").

8. See HANSEN ET AL., *supra* note 7, at 9.

9. *Id.* at 7.

10. *Id.* at 26.

11. See e.g., Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, in THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 350, 351 (2013) (recounting the failure of the Copenhagen Accord and Congress's failure to pass domestic legislation regarding this pressing global climate crisis).

12. *Id.*; see also Edgar Washburn & Alejandra Núñez, *Is the Public Trust a Viable Mechanism To Regulate Climate Change?*, 27 NAT. RESOURCES & ENV'T 23, 26–27 (2012) (describing past climate change cases brought under the federal Clean Air Act, Clean Water Act, and nuisance law).

13. Wood, *supra* note 11, at 351–52.

14. See *infra* Part III.A for a discussion of the atmospheric trust litigation.

15. See *infra* Section II for a discussion of the public trust doctrine.

16. See *infra* Part III.A for a discussion of the plaintiffs' arguments.

17. See *infra* Part III.A for a discussion of the arguments in atmospheric trust cases in state and federal courts.

18. See *infra* Part III.B for a discussion of the litigation results to date. A new complaint was recently

assumed that the public trust doctrine applies to the atmosphere, none have explicitly held as much.¹⁹

This Comment argues that courts should apply the public trust doctrine to the atmosphere. Courts have previously applied the public trust doctrine to natural resources in order to accommodate society's changing interests, promote commerce, and protect public access to and use of water resources.²⁰ Protecting the atmosphere has become increasingly important to society,²¹ and a healthy atmosphere is essential to commerce and continued access to clean, safe water.²² Therefore, the public trust doctrine should apply to the atmosphere. This Comment also argues, however, that courts cannot use the public trust doctrine to compel their states to correct past atmospheric damage due to their failure to prevent it. For one, courts only use the public trust doctrine to correct state actions, not states' failures to act.²³ Second, ordering states to correct their failure to protect the atmosphere would require the courts to engage in scientific and political decision making for which they are ill equipped.²⁴

This Comment is organized as follows. Section II provides an overview of the public trust doctrine, focusing specifically on the resources to which courts have applied it and its uses within the courts. Part II.A describes the origins of the public trust doctrine and its initial application to navigable waters. It goes on to discuss the flexibility of the public trust doctrine and its expansion by the courts to include water resources generally and resources that preserve public access to them. It also discusses courts' application of the public trust doctrine to natural resources that serve the public's interests in environmental protection and commerce. Finally, Part II.A discusses several state constitutional provisions that provide for the expansion of the public trust doctrine to natural resources generally.

Part II.B describes the judiciary's uses of the public trust doctrine, specifically courts' reliance on the doctrine to validate and invalidate legislative actions that affect public resources. This Part also explains that courts have not used the public trust doctrine to address states' failure to affirmatively protect natural resources. In order to do so, courts would be required to insert themselves into political and scientific discussions for which other government branches are better suited. Lastly, Part II.B discusses the duty that the public trust doctrine imposes on states to consider

filed in Massachusetts, and the Oregon Court of Appeals reversed the trial court's dismissal of the plaintiff's claims and remanded for further proceedings. See Complaint, *Kain v. Mass. Dep't of Envtl. Prot.*, No. 14-2551, 2014 WL 3924998 (Mass. Sup. Ct. filed Aug. 11, 2014) [hereinafter *Massachusetts Complaint*]; *Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. Ct. App. 2014).

19. See *infra* Part III.B for a discussion of the litigation results to date.

20. See *infra* Part II.A for a discussion of the resources to which courts have applied the public trust doctrine and why.

21. See *infra* Parts II.A.1-4 for a discussion of the rationale behind the application of the public trust doctrine to various resources.

22. See *infra* Parts II.A.1-4 for a discussion of why the public trust doctrine is necessary to support the public's interest in waterways, commerce, and environmental protection.

23. See *infra* Part II.B for a discussion of judicial uses of the public trust doctrine.

24. See *infra* Part II.B.2 for a discussion of courts' reluctance to engage in agency-like decision making in public trust cases.

potentially adverse consequences of their decisions on trust resources and to mitigate those consequences before acting.

Section III discusses at greater length the recent atmospheric trust litigation that started in the spring of 2011. Part III.A summarizes the complaints as well as the rationale behind them. Part III.B addresses the courts' reactions to these cases.

Section IV argues that courts should apply the public trust doctrine to the atmosphere because: (1) preserving the atmosphere has become a matter of public interest; (2) applying the public trust doctrine to the atmosphere would serve the traditional public interest of protecting commerce; (3) the atmosphere is inextricably linked to the public's ability to access water resources; and (4) several state constitutions have already implicitly expanded the public trust doctrine to the atmosphere.

Section V, however, argues that while the courts can and should apply the public trust doctrine to the atmosphere, they cannot rely on the doctrine as a basis for injunctive relief against the states for allegedly failing to protect it. First, courts can only use the public trust doctrine to correct state actions; because no state has actively deprived the public of its right to use the atmosphere, the public trust doctrine provides no basis for relief. Second, ordering states to implement corrective measures to remedy their failures to protect the atmosphere would require the courts to engage in political and scientific decision making that is beyond the scope of their authority. In this regard, all of the state courts that have handed down a decision on the atmospheric trust issue properly declined to rely on the public trust doctrine to compel state action, regardless of whether they recognized an atmospheric trust.

Lastly, Part V.C argues that the public trust doctrine requires state governments to consider and address the impact that their actions will have on the atmosphere before acting. Thus, although the doctrine does not offer a mechanism for litigants to correct states' past failures to prevent damage to the atmosphere, it nonetheless helps to ensure future environmental protection.

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine is an ancient legal mandate that requires sovereign governments to hold essential natural resources in trust for the public good.²⁵ The concept of the state as sovereign trustee is based on the notion that the public owns common property interests in a state's natural resources.²⁶ As such, each state has a fiduciary duty to protect both the resources and public access to them on the public's behalf.²⁷

25. Mary Christina Wood, *Advancing the Sovereign Trust of Government To Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 45 (2009); see also Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980) ("The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles.").

26. Wood, *supra* note 25, at 67.

27. *Id.*; see also *Geer v. Connecticut*, 161 U.S. 519, 534 (1896) ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the

A. *Resources to Which the Public Trust Doctrine Applies*

The public trust doctrine initially applied to navigable waters and the lands beneath them in order to protect the public's interest in navigation, fishing, and commerce.²⁸ However, the scope of the public trust doctrine has broadened over time in different states to include water resources generally, access to and use of water for specific purposes, conservation of important environmental resources, and preservation of natural resources that are essential to economic productivity.²⁹ Several states have also expanded the scope of their public trust doctrines through constitutional provisions to a variety of natural resources.³⁰

1. Traditional Application to Navigable Waters

Scholars trace the public trust doctrine back to Roman law.³¹ The Roman Emperor Justinian most clearly declared: “[B]y the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea.”³² English common law adopted this principle with respect to navigable tidal waters, giving the king title to the shoreline and navigable waters in trust for the people to serve their interests in commerce, navigation, and fishing.³³ From England, public trust principles were incorporated into American jurisprudence through colonial and early congressional legislation, state court holdings, and United States Supreme Court holdings.³⁴ These sources established state ownership of navigable waters and the lands beneath them for public use.³⁵

The Supreme Court established the fundamental parameters of the American public trust doctrine in *Illinois Central Railroad Co. v. Illinois*.³⁶ This seminal case required the Supreme Court to assess the Illinois legislature's attempt to revoke its

people of the State.”).

28. See *infra* Part II.A.1 for a discussion of the resources to which the public trust doctrine has traditionally applied.

29. See *infra* Parts II.A.2–4 for a discussion of the nontraditional resources to which courts have applied the public trust doctrine and why.

30. See *infra* Part II.A.5 for a discussion of the state constitutional provisions that have codified the public trust doctrine.

31. Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL. L. 287, 303 (2010).

32. *Id.* (quoting JUSTINIAN'S INSTITUTES, § 2.1.1, at 55 (Paul Birks & Grant McLeod trans., 1987)).

33. *Id.*; see also *City of New Whatcom v. Fairhaven Land Co.*, 64 P. 735, 737 (Wash. 1901) (explaining that submerged lands were vested in the king as sovereign to “protect the public right to use them as a common highway for commerce, trade, and intercourse,” and that grants of public lands were “subject to the paramount right of the public” to use them); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 14–15 (1765) (“[T]here are some few things, which . . . must still unavoidably remain in common . . . [including] the elements of light, air, and water . . .”).

34. Coplan, *supra* note 31, at 305–07.

35. See, e.g., *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842) (explaining that “when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use”); *Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821) (explaining that the state of New Jersey held the land beneath navigable waters in trust for the public good because the king had done the same).

36. 146 U.S. 387 (1892).

earlier grant of 1,000 acres of submerged land beneath Lake Michigan to the Illinois Central Railroad Company.³⁷ The Court held that the grant was revocable because the legislature did not have the authority to grant the land in the first place.³⁸ It explained that the title to navigable waters and the lands beneath them was “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.”³⁹ According to the Court, a state could grant parcels of public land for private development as long as this decision added to the public’s enjoyment and use of common resources.⁴⁰ However, the Court added, a state could not “abdicate its trust over property in which the whole people are interested . . . so as to leave [the property] entirely under the use and control of private parties.”⁴¹

Illinois Central established two basic tenets of the American public trust doctrine. First, the public trust doctrine applies to navigable waters and the lands beneath them, protecting the public’s right to use these resources for navigation, commerce, and fishing.⁴² Second, the doctrine is primarily a restraint on alienation, limiting each state’s ability to convey public waters or lands to private parties for private purposes.⁴³ Thus, the public trust doctrine functions primarily as an easement that restricts the state from managing public resources in a manner that will adversely affect the public.⁴⁴ Relying on *Illinois Central*, most states have since applied the public trust doctrine to the navigable waters within their borders.⁴⁵

2. Expansion to New Resources

Although the public trust doctrine applies first and foremost to navigable waters for the purposes of navigation, fishing, and commerce, many courts have recognized

37. *Illinois Central*, 146 U.S. at 433–34.

38. *Id.* at 453, 460.

39. *Id.* at 452.

40. *Id.* at 452–53.

41. *Id.* at 453.

42. *Id.* at 452.

43. *Id.* at 453; see also *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083–84 (D.C. Cir. 1984) (observing that the public trust doctrine was originally a restraint on alienation).

44. Sarah Jackson et al., *Lessons from an Ancient Concept: How the Public Trust Doctrine Will Meet Obligations To Protect the Environment and the Public Interest in Canadian Water Management and Governance in the 21st Century*, 23 J. ENVTL. L. & PRAC. 175, 180 (2012); see also *City of New Whatcom v. Fairhaven Land Co.* 64 P. 735, 739 (Wash. 1901) (“[T]he public has an easement in such waters for the purposes of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable and gives to the state the right to use, regulate, and control the waters for the purposes of navigation. . . .”).

45. See, e.g., *Lawrence v. Clark Cnty.*, 254 P.3d 606, 608–613 (Nev. 2011) (reviewing the origins of the public trust doctrine, explaining its legal bases in Nevada, and formally acknowledging its applications to bodies of water); see generally Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrine: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. L. REV. 1 (2007) [hereinafter Craig, *Eastern States*] (discussing the eastern states’ constitutional, statutory, and common law expressions of the public trust doctrine); Robin K. Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010) [hereinafter Craig, *Western States*] (discussing the western states’ constitutional, statutory, and common law expressions of the public trust doctrine).

that it is flexible enough to encompass other resources as well.⁴⁶ Since the 1970s litigants have successfully invoked the public trust doctrine in hundreds of cases⁴⁷ to protect resources such as marine life, sand, gravel, beaches, parks, a historic battlefield, wildlife, and archaeological remains.⁴⁸ Additionally, many state courts have held that the public trust doctrine protects the use of water for specific recreational purposes such as swimming and boating.⁴⁹

Courts have been especially willing to expand the reach of the public trust doctrine from navigable waters to other types of water resources.⁵⁰ For example, as discussed further below, the California Supreme Court has held that the public trust doctrine applies to the tributary streams of navigable lakes.⁵¹ The Hawaii Supreme Court has also declared that the public trust doctrine applies to groundwater.⁵² As the court explained, water is an essential resource, and the public trust doctrine “was intended to guarantee public rights to *all water*, regardless of its immediate source.”⁵³

Courts have also applied the public trust doctrine to resources that allow for public access to water. For example, the New Jersey Supreme Court has held that the public trust doctrine applies to dry-sand beaches because the use of beaches is a

46. See, e.g., *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (stating that “[i]n administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization [of trust resources] over another”); *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000) (noting that the public trust doctrine “must conform to [the public’s] changing needs and circumstances”); *Sec’y of State v. Wiesenberg*, 633 So. 2d 983, 989 (Miss. 1994) (stating “the purposes of the trust have evolved with the needs and sensitivities of the people”) (quoting *Cinque Bambini P’ship v. State*, 491 So. 2d 508, 512 (Miss. 1986)); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (stating that the public trust doctrine “should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit”).

47. See, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 644–45 n.77 (1986) (listing cases by state that have invoked the public trust doctrine); Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 ENVTL. L. & LITIG. 107, 116–21 (1986) (same). The expansion of the public trust doctrine was largely inspired by Professor Joseph Sax’s article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Sax argued for greater use of the public trust doctrine “as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.” *Id.* at 474.

48. Lazarus, *supra* note 47, at 649–50. However, courts have also declined to extend public trust protections to other resources, including the waters of non-navigable lakes, archeological resources on private lands, and lakefront property protected by a seawall above the high-water mark. WILLIAM H. RODGERS, JR., *RODGERS’ ENVIRONMENTAL LAW* § 2:20(A) (2013).

49. Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 819–26 (2010); see also, e.g., *Marks*, 491 P.2d at 380 (finding that trust purposes include hunting, bathing, and swimming); *Borough of Neptune City*, 294 A.2d at 54 (holding that recreational use of beaches falls within the public trust); *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1998) (stating that the public trust doctrine “has been expanded to safeguard the public’s use of navigable waters for enjoyment of natural scenic beauty, as well as for recreational and nonpecuniary purposes”).

50. See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 671–77 (2012) (discussing courts’ application of the public trust doctrine to non-navigable waters, water rights, water quality, and access to water).

51. *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 721 (Cal. 1983).

52. *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000).

53. *Id.* (emphasis added).

necessary part of the right guaranteed by the public trust doctrine to access public waters.⁵⁴

3. Expansion To Accommodate the Public's Interest in Environmental Protection

When considering the reach of the public trust doctrine, courts are guided by the present interests and values of society.⁵⁵ Thus, as the public has become increasingly interested in environmental protection,⁵⁶ courts have applied the public trust doctrine to resources because of their importance to the ecosystem. For example, in *Just v. Marinette County*,⁵⁷ the Wisconsin Supreme Court held that a county ordinance that prohibited the filling of wetlands was not an unconstitutional taking.⁵⁸ In so holding, the court explained that society had recently come to appreciate that wetlands play a “vital role” in the environment.⁵⁹ It also explained that they are “a necessary part of the ecological creation and . . . possess their own beauty in nature.”⁶⁰ Consequently, the court found that because Wisconsin’s public trust duties required the state to protect its waters, the ordinance was lawful and consistent with the state’s duties to preserve the environment “from the despoilage and harm resulting from [human activities].”⁶¹ Similarly, in upholding another ordinance that prohibited the filling of wetlands, one New York district court noted that the wetlands “are presently regarded as valuable national natural resources” and that “[t]he public interest demands” that they be preserved.⁶²

54. *Matthews v. Bayhead Improvement Ass’n*, 471 A.2d 355, 365–66 (N.J. 1984); see also *Borough of Neptune City*, 294 A.2d at 54 (holding that the public trust doctrine requires that municipally owned beaches be open to the entire public on equal terms).

55. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–53 (1892) (explaining that abdication of the state’s control over public waters is incompatible with the state’s duty “to preserve such waters for the use of the public” and that the state’s control over trust resources “can never be lost,” except when control is relinquished to promote public interests or when no “substantial impairment of the public interest” will occur); Wood, *supra* note 11, at 352 (“Courts have recognized an increasing variety of assets held in public trust on the rationale that such assets are necessary to meet society’s changing needs.”).

56. National legislation reflects the public’s increasing interest in protecting the natural resources. See, e.g., Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 (2012) (protecting the “chemical, physical and biological integrity of [our] Nation’s waters”); Air Pollution Control Act (Clean Air Act), 42 U.S.C. § 7401 (2012) (protecting air quality and promoting public health); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (2012) (authorizing the EPA to respond to the release of hazardous chemicals to protect public health). The public’s concern for the environment also appears in increased media attention on environmental issues. See, e.g., Elizabeth Kolbert, *The Climate of Man—I*, NEW YORKER, Apr. 25, 2005, at 56 (discussing scientists’ efforts to understand global warming and their findings); Sarah Lyall, *Heat, Flood or Icy Cold, Extreme Weather Rages Worldwide*, N.Y. TIMES, Jan. 10, 2013, at A4 (describing disastrous weather events around the globe); David Remnick, *No More Magical Thinking*, NEW YORKER (Nov. 19, 2012), <http://www.newyorker.com/magazine/2012/11/19/no-more-magical-thinking> (discussing the U.S. government’s need to address global warming).

57. 201 N.W.2d 761 (Wis. 1972).

58. *Just*, 201 N.W.2d at 771.

59. *Id.* at 768.

60. *Id.*

61. *Id.* at 768, 771.

62. *Smithtown v. Poveromo*, 336 N.Y.S.2d 764, 775 (Dist. Ct. 1972), *rev’d on other grounds*, 359

The California Supreme Court in particular has expanded the scope of the public trust doctrine to accommodate the public's interest in environmental preservation. In *Marks v. Whitney*,⁶³ for example, the court held that the public trust doctrine applies to tidelands.⁶⁴ In reaching this conclusion, it noted that “[t]here is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state.”⁶⁵ It also explained that tidelands are valuable ecological resources that serve many functions and “favorably affect the scenery and climate of the area.”⁶⁶

More significantly, the California Supreme Court applied the public trust doctrine to tributary streams in order to protect the public's interest in the environment generally. In *National Audubon Society v. Superior Court*,⁶⁷ the court sought to reconcile the state's public trust obligations to protect the waters of Mono Lake with a water appropriation scheme that permitted diversions of the lake's tributaries.⁶⁸ The diversions had significantly reduced the lake's freshwater inflows, threatening its entire ecosystem by increasing the lake's salinity and reducing the populations of many plant and animal species in the area.⁶⁹ With these facts in mind, the court explained that Mono Lake was “a scenic and ecological treasure of national significance.”⁷⁰ It added that “[t]he principal values plaintiffs [sought] to protect . . . [were] recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds.”⁷¹ The court reasoned that because the protection of these values—not just the lake itself—was among the purposes of the public trust, the doctrine applied to Mono Lake as well as all of its tributary streams.⁷²

Similarly, one New York court has accounted for environmental interests in its application of the public trust doctrine to nontraditional trust resources. In *W.J.F. Realty Corp. v. State*,⁷³ the court held that because the public trust doctrine imposed limitations on individuals' property rights, a state law that prohibited the development of a forest on private property was not an unconstitutional taking.⁷⁴ In reaching this conclusion, the court explained that “the conservation of resources is intrinsically good and necessary for the continuance of society,” and that the court had a duty to enact society's environmental mandates.⁷⁵ The court speculated that future generations may

N.Y.S.2d 848 (N.Y. App. Div. 1973).

63. 491 P.2d 374 (Cal. 1971).

64. *Marks*, 491 P.2d at 378. Tideland is the land exposed at low tide and submerged at high tide by tidal waters. *Id.*

65. *Id.* at 380.

66. *Id.*

67. 658 P.2d 709 (Cal. 1983).

68. *Nat'l Audubon Soc'y*, 658 P.2d at 712.

69. *Id.* at 715–16.

70. *Id.* at 712.

71. *Id.* at 719.

72. *Id.*

73. 672 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1998).

74. *W.J.F. Realty Corp.*, 672 N.Y.S.2d at 1012.

75. *Id.*

pass legislation that reflected different attitudes toward the environment.⁷⁶ However, the ordinance was not an unconstitutional taking because it satisfied “[t]his generation’s” interest in preserving land under the public trust.⁷⁷

4. Application to Resources That Are Essential to Commerce

In addition to extending the public trust doctrine to new resources because of their environmental significance, courts have applied the public trust doctrine to natural resources because of their importance to commerce.⁷⁸ The public’s ability to engage in commerce is one of the original public interests that the Supreme Court sought to protect. The *Illinois Central* Court compared Chicago’s harbor on Lake Michigan—which the state had effectively sold in its entirety to a private company—to other major shipping hubs around the world, listing the relative number of vessel arrivals and departures on a yearly basis and the tonnage shipped from the port.⁷⁹ All of these facts supported the Court’s conclusion that the harbor had “immense value to the people . . . in the facilities it affords to its vast and constantly increasing commerce.”⁸⁰ This, in turn, significantly influenced the Court’s finding that “ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. . . . [that] cannot be alienated.”⁸¹

State courts’ public trust decisions reflect the *Illinois Central* Court’s concern for the relationship between natural resources and economic interests. In *Avenal v. State*,⁸² the Louisiana Supreme Court found that a state-sponsored coastal construction project fit “precisely within [the scope of] the public trust doctrine.”⁸³ The court explained that continued erosion of the coastline—which the project sought to repair—would “result in the loss of the very land on which Louisianians reside and work, not to mention the loss of businesses that rely on the coastal region as a transportation infrastructure vital to the region’s industry and commerce.”⁸⁴ Consequently, even though the construction project interfered with private oyster farming, it did not create an unconstitutional taking.⁸⁵ Similarly, in *National Audubon Society*, threats to the shrimp-farming industry due to the reduced water level and increased salinity of Mono Lake all factored into the California Supreme Court’s decision to apply the public trust doctrine to the lake’s

76. *Id.*

77. *Id.*; see also *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1055 (N.Y. 2001) (stating that parks are “impressed with a public trust for the benefit of the people”).

78. See, e.g., *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1998) (stating that “the public trust doctrine was originally designed to protect commercial navigation”).

79. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892).

80. *Id.*

81. *Id.* at 455; see also *People ex rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773, 781 (Ill. 1976) (holding that a grant of approximately two hundred acres of land beneath Lake Michigan to a steel company violated the public trust doctrine because the economic value derived from the grant would mostly benefit private interests).

82. 886 So. 2d 1085 (La. 2004).

83. *Avenal*, 886 So. 2d at 1101.

84. *Id.* at 1101–02.

85. *Id.* at 1109–10.

freshwater tributaries.⁸⁶

5. Expansion Through Constitutional Provisions

Beyond the judiciary's expansion of the public trust doctrine, several state legislatures have expanded the scope of the public trust doctrine through constitutional provisions that encompass *all* natural resources.⁸⁷ For example, the Texas Constitution provides that "the preservation and conservation of all . . . natural resources of the State are each and all hereby declared public rights and duties."⁸⁸ Likewise, Pennsylvania's Constitution declares that the commonwealth's "public natural resources are the common property of all the people," and that "[a]s trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."⁸⁹ The courts in Alaska,⁹⁰ Hawaii,⁹¹ Louisiana,⁹² Pennsylvania,⁹³ and Wisconsin⁹⁴ have

86. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 715–16 (Cal. 1983).

87. See Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 167–70 (2005) (stating that forty-two state constitutions at least mention the environment or natural resource conservation, of which eight articulate clear environmental rights, and eleven provide policy statements on environmental protection); Matthew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L. J. 1169, 1173 (1997) (arguing that courts in states with constitutional environmental protection provisions have interpreted them as evocations of the public trust). Successful provisions invoke "some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship." *Id.*

88. TEX. CONST. art. XVI, § 59(a).

89. PA. CONST. art. I, § 27.

90. See *Owsichuk v. State*, 763 P.2d 488, 493–96 (Alaska 1988) (finding that the common use clause in the state constitution "was intended to engraft . . . trust principles guaranteeing access to the fish, wildlife and water resources of the state"). *But see Brooks v. Wright*, 971 P.2d 1025, 1033 (Alaska 1999) (holding that "the wholesale application of private trust law principles to the trust-like relationship described in Article VIII [of the Alaska constitution] is inappropriate and potentially antithetical to the goals of conservation"). The Alaska Constitution states: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use," and "all . . . replenishable resources belonging to the State shall be utilized, developed, and maintained . . . subject to preferences among beneficial uses." ALASKA CONST. art. VIII, §§ 3–4.

91. See *In re Water Use Permit Applications*, 9 P.3d 409, 443–44 (Haw. 2000) (holding that article XI, sections 1 and 7 of the Hawaii Constitution "adopt the public trust doctrine as a fundamental principle of constitutional law"). The Hawaii Constitution provides in part: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources," and that "[a]ll public natural resources are held in trust by the State for the benefit of the people." HAW. CONST. art. XI, § 1.

92. See *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984) (stating that Louisiana's constitution incorporates the public trust doctrine, and "specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy"); *La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 719 So. 2d 119, 124 (La. Ct. App. 1998) (stating that article IX, section 1 of the Louisiana constitution sets forth the state's public trust doctrine).

93. See *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) ("There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people . . ."). The Pennsylvania Constitution states in part: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall

found that their respective constitutions provide a legal basis for the public trust doctrine in their states.⁹⁵ More broadly, the Illinois Supreme Court has explained that article I of the state constitution reflects a strong interest in conserving the environment, and that the public has become “more sensitive to the value and . . . irreplaceability of natural resources.”⁹⁶ Provisions like these therefore provide a legal basis for the extension of the common law public trust doctrine well beyond the traditional *Illinois Central* uses and resources.⁹⁷

To summarize, the Supreme Court originally recognized the application of the public trust doctrine in the United States to navigable waters and the lands beneath them in order to guarantee public access to those resources for fishing, navigation, and commerce. Over the past fifty years, courts have expanded the scope of the public trust doctrine to water resources generally, specific uses such as recreation, and other natural resources such as sand and beaches that ensure access to public waters. Courts have also applied the public trust doctrine to important environmental resources such as wetlands, a natural forest, and a lake ecosystem to reflect the public’s increasing interest in environmental protection. Other decisions reflect courts’ reliance on the public trust doctrine to preserve natural resources that are essential to commerce. Finally, several states have codified public trust principles in constitutional provisions that expand protections to many if not all of a state’s natural resources. In this way, the public trust doctrine has expanded from its narrow application to navigable waters for specific uses to a variety of natural resources for many purposes.

B. *The Judiciary’s Use of the Public Trust Doctrine*

Courts primarily invoke the public trust doctrine either to invalidate legislation that will relinquish state control over public resources, or to defend state actions that will protect natural resources. Either way, courts rely on the public trust doctrine only to evaluate state actions, not state *inaction*. Additionally, courts will not rely on the public trust doctrine to compel states to remedy perceived failures to protect natural resources. Such orders would require courts to make political and scientific decisions

conserve and maintain them for the benefit of all the people.” PA. CONS. art. I, § 27.

94. *See* State v. Bleck, 338 N.W.2d 492, 497 (Wis. 1983) (“The public trust doctrine is rooted in art. IX, sec. 1 of the Wisconsin Constitution.”). The Washington Constitution provides: “The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state . . . [and they] shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States.” WASH. CONS. art. IX, § 1.

95. Craig, *supra* note 49, at 831–46 (describing the constitutional bases for “ecological public trust doctrines” in several states); *see generally* Craig, *Eastern States*, *supra* note 45 (discussing the eastern states’ constitutional, statutory, and common law expressions of the public trust doctrine); Craig, *Western States*, *supra* note 45 (discussing the western states’ constitutional, statutory, and common law expressions of the public trust doctrine).

96. *People ex rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976). The Illinois Constitution provides: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations,” and that “[e]ach person has the right to a healthful environment.” ILL. CONST. art. XI, §§ 1–2.

97. *See* Gregory S. Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L. REV. 123, 146 (2012) (arguing that the state’s constitution provides a basis for the application of the common law public trust doctrine to the air).

for which they are ill suited and that exceed the scope of their authority. Although the public trust doctrine does not require state governments to correct past damage to natural resources from their alleged failures to protect them, the doctrine nonetheless requires state governments to consider how their actions will affect public resources before they act.

1. Courts' Application of the Public Trust Doctrine to State Action but Not State Inaction

The public trust doctrine is a creature of state law,⁹⁸ the contours of which have been determined primarily by state courts.⁹⁹ Although the legislature is best suited to respond to the interests and concerns of a state's citizens, it is also subject to current political demands that may not reflect the interests of future generations.¹⁰⁰ Rather, the judiciary is "the ultimate guardian of the trust" and has an obligation to determine whether legislative actions comply with the state's trust duties to protect present as well as future generations.¹⁰¹ As the Idaho Supreme Court explained:

Final determination [of] whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.¹⁰²

Judicial enforcement of the public trust doctrine helps to maintain the checks and balances of a democracy.¹⁰³ It also provides a level of protection against the destruction

98. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012) (stating that "the public trust doctrine [is] a matter of state law . . . [and] the States retain residual power to determine the scope of the public trust over waters within their borders"); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (stating that each state has "the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit" (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894))); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083–1084 (D.C. Cir. 1984) (noting that only two federal district court cases have held that the public trust doctrine applied to the federal government as well as to the states). The legal basis for enforcement of the public trust doctrine is unclear and varies from state to state. Frank, *supra* note 50, at 685. Some states find a foundation for the public trust doctrine in their individual constitutions. *Id.* Others have adopted and applied the doctrine to specific resources through legislation. *Id.* Still other states trace their reliance on public trust principles to the Supreme Court's recognition of the limitations on the state's sovereign power. *Id.*; see also *In re Water Use Permit Applications*, 9 P.3d 409, 443 (Haw. 2000) (finding that "history and precedent have established the public trust as an inherent attribute of sovereign authority").

99. Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 524–25 (1992) ("[T]he [public trust] doctrine is created, developed, and enforced by the judiciary. While the doctrine is fully binding law on state government, it stems from the courts rather than the legislature.").

100. See Wood, *supra* note 25, at 57–61 (discussing the pressures placed on state legislatures and administrative agencies by corporations and other interest groups to relax environmental regulations).

101. *Id.* at 75.

102. *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983).

103. See *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991) (explaining that one basis for the Arizona public trust doctrine is in the state's "constitutional commitment to the checks and balances of a government of divided powers").

of irreplaceable public resources.¹⁰⁴

One way in which courts rely on the public trust doctrine is to invalidate state actions that may endanger public resources or their use by the public.¹⁰⁵ *Illinois Central* is a primary example of a case in which the judiciary struck down a state legislature's attempt to abdicate its duties as trustee over public waters.¹⁰⁶ More recently, the Arizona Court of Appeals found that legislation intended to relinquish state control over several riverbeds violated Arizona's public trust duties.¹⁰⁷ It explained that the state "may not dispose of trust resources except for purposes consistent with the public's right of use and enjoyment of those resources."¹⁰⁸ Because the statute at issue failed to adhere to this requirement, the court held that it was invalid in violation of Arizona's public trust doctrine.¹⁰⁹

Courts also rely on the public trust doctrine to defend the legality of state actions that protect natural resources. In *Avenal v. State*, the Louisiana Supreme Court found that a coastal restoration project that interfered with oyster harvesting businesses did not amount to an unconstitutional taking because the public trust doctrine required the state to protect the coastline.¹¹⁰ The following year, the Louisiana Court of Appeals held that the public trust doctrine supported the state's decision to reduce the water levels of a lake for the purpose of improving its ecology.¹¹¹ In so holding, the court recognized Louisiana's public trust duty to protect its environment, even at the expense of "temporary negative impact[s]" to business owners who relied on the lake for their livelihood.¹¹² Similarly, in *Weden v. San Juan County*,¹¹³ the Washington Supreme Court relied on the public trust doctrine to uphold an ordinance that banned the use of motorized watercrafts on a lake.¹¹⁴ The court reasoned in part that even though the state's public trust doctrine allows for the use of waters for recreational activities, the ordinance only prohibited one form of recreation, not the public's use of the lake in general.¹¹⁵

Although some courts have expressed the belief that the public trust doctrine imposes an affirmative duty on states to protect public resources,¹¹⁶ no court has found

104. *Id.* at 169.

105. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 729 (2006).

106. See *supra* notes 36–45 and accompanying text for a discussion of *Illinois Central*.

107. *Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 173.

108. *Id.* at 170.

109. *Id.* at 173; see also *San Carlos Apache Tribe v. Superior Court ex rel. Cnty. of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people.").

110. 886 So. 2d 1085, 1101–02 (La. 2004).

111. *Lake Bistineau Pres. Soc'y, Inc. v. Wildlife & Fisheries Comm'n*, 895 So. 2d 821, 827 (La. Ct. App. 2005).

112. *Id.*

113. 958 P.2d 273 (Wash. 1998).

114. *Weden*, 958 P.2d at 283–84.

115. *Id.* The court further noted that "it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of [the] state." *Id.* at 284.

116. *Lazarus*, *supra* note 47, at 650; see also *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083–84 (D.C. Cir. 1984) (observing that the public trust doctrine has evolved from a primarily negative restraint on

that a state's failure to protect public resources in the absence of state action violates the public trust doctrine. For example, in *Township of Neptune v. State of New Jersey Department of Environmental Protection*,¹¹⁷ the New Jersey Superior Court dismissed a claim by the township seeking an order against the state to dredge parts of the Shark River Bay.¹¹⁸ The township alleged that the state's failure to prevent the accumulation of pollutants in the bay violated the state's public trust doctrine and asked the court to compel the state to dredge the river channel as a remedial measure.¹¹⁹ The court recognized that the public trust doctrine ensures access to water resources; however, it held that it does not require the state to dredge river channels, nor does it provide a legal basis to compel the state to do so.¹²⁰

Even where the public trust doctrine requires state actors to affirmatively protect natural resources, courts look to state actions rather than state inaction to determine whether a violation has occurred. In *Kelly v. 1250 Oceanside Partners*,¹²¹ the Hawaii Supreme Court considered whether a county agency had violated the state's public trust doctrine by failing to prevent a development company from releasing pollutants into public waters.¹²² The court held that the county had a duty to conserve and protect public waters under the public trust doctrine.¹²³ However, it found that evidence presented at trial was insufficient to establish that the county issued construction permits without first conducting appropriate assessments.¹²⁴ Additionally, the court held that under the public trust doctrine a county may issue construction permits only where it has thoroughly assessed possible adverse impacts on natural resources and taken measures to ensure that the permits are implemented in compliance with state regulations.¹²⁵ The court again regarded the evidence as insufficient to show that the county had failed to conduct proper assessments before issuing construction permits, or that it had authorized construction activities that contributed to pollution.¹²⁶ In other words, even though the court expressly recognized state actors' public trust duties, its evidentiary analysis focused on the propriety of the county's actions—the issuance of permits and other authorizations—rather than the actions that the county did *not* take to better protect the state's natural resources.¹²⁷

alienation into "a source of positive state duties"); *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) ("The trust . . . is not a passive trust; it is governmental, active, and administrative. . . . [T]he trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it."). Each of these cases is based on an alleged state action rather than an alleged failure to act.

117. 41 A.3d 792 (N.J. Super. Ct. App. Div. 2012).

118. *Neptune*, 41 A.3d at 795.

119. *Id.* at 795, 802.

120. *Id.* at 802.

121. 140 P.3d 985 (Haw. 2006).

122. *Kelly*, 140 P.3d at 991–92.

123. *Id.* at 1003–05.

124. *Id.* at 1008.

125. *Id.* at 1008–11.

126. *Id.* at 1013–14.

127. *Id.*

Washington's test for evaluating potential violations of the public trust doctrine illustrates particularly well the doctrine's applicability to state legislative actions rather than states' failures to act. In *Caminiti v. Boyle*,¹²⁸ the Washington Supreme Court laid out the two-part test based on *Illinois Central* that it would follow when evaluating possible violations of the public trust doctrine.¹²⁹ First, the court determined that it must consider "whether the state, by the questioned legislation, has given up its right of control over [public resources]."¹³⁰ If so, it must then consider whether the state "has promoted the interests of the public" or "has not substantially impaired it."¹³¹ Simply put, the focus of the test is legislative action, not legislative inaction.

2. Courts' Refusal To Use the Public Trust Doctrine To Compel State Action

Many courts have declared that they will not rely on the public trust doctrine or similarly amorphous legal concepts to compel state action where a state has failed to act. They generally reason that, in order to compel state action, courts would be required to make decisions based on complex data that they lack the authority and resources to properly evaluate. For example, in *Center for Biological Diversity, Inc. v. FPL Group, Inc.*,¹³² the plaintiffs sought injunctive relief against a windmill farm whose operations allegedly violated the public trust doctrine by killing flocks of birds.¹³³ The Court of Appeals for California dismissed the action for failure to identify the state as the proper defendant.¹³⁴ However, it stated that even if a cause of action existed, it would not have been proper for the court to issue injunctive relief against the windmill operators.¹³⁵ The court explained that "abstention is appropriate when granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency."¹³⁶ Evaluating the practices of the windmill farm would have involved exactly this type of involvement and was therefore not permissible.¹³⁷

Similarly, the United States Supreme Court has found that courts need not issue injunctions against parties where relief would require the courts to stand in for regulatory agencies. In *American Electric Power Co. v. Connecticut*,¹³⁸ several states

128. 732 P.2d 989 (Wash. 1987).

129. *Caminiti*, 732 P.2d at 994; see also *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) ("The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.").

130. *Caminiti*, 732 P.2d at 994 (emphasis added).

131. *Id.* at 994–95; see also *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092–93 (Idaho 1983) (listing the various factors the court will consider when determining whether an *action* has violated the public trust doctrine).

132. 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).

133. *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 592.

134. *Id.* at 606.

135. *Id.* at 605.

136. *Id.* at 606 (quoting *Alvarado v. Selma Convalescent Hosp.*, 64 Cal. Rptr. 3d 250, 254 (Cal. Ct. App. 2007)).

137. *Id.* at 605–06.

138. 131 S. Ct. 2527 (2011).

and nonprofit organizations sued five power companies on the grounds that their greenhouse gas emissions violated federal nuisance law by contributing to global warming.¹³⁹ As a remedy, the plaintiffs sought a judicial decree that would cap the annual carbon dioxide emissions allowed by these companies.¹⁴⁰ The Court found that the federal Clean Air Act, administered by the Environmental Protection Agency (EPA), displaced federal common law nuisance claims of air pollution.¹⁴¹ The Clean Air Act, not federal nuisance law, therefore provided the plaintiffs with the proper legal mechanism to address their complaints.¹⁴² In so holding, the Court explained that the EPA, not the judiciary, was best suited to regulate greenhouse gas emissions because judges “lack the scientific, economic, and technological resources [of] an agency,” and cannot commission studies, or seek expert advice.¹⁴³ Otherwise, the Court warned, judges would be tasked with determining reasonable emission levels as well as reasonable reduction amounts.¹⁴⁴

Furthermore, because the public trust doctrine is a general mandate and not a well-defined regulatory framework, courts will not rely on it to compel injunctive relief against states for their failures to act. Such orders would require courts to engage in political discussions that are better left to the other branches of government. For example, in *Citizens Legal Enforcement and Restoration v. Connor*,¹⁴⁵ a nonprofit organization sued the U.S. Bureau of Reclamation under the federal Administrative Procedure Act (APA)¹⁴⁶ in part for violating California’s public trust doctrine.¹⁴⁷ The plaintiff alleged that the Bureau had violated the public trust doctrine by failing to protect the quality of the state’s water resources during construction in and around the Colorado River bed.¹⁴⁸ The court dismissed the public trust claim, finding that the public trust doctrine was too vague to provide a basis for relief.¹⁴⁹ Relying heavily on Supreme Court language, the court explained that a claim based on a state’s failure to

139. *Am. Elec. Power Co.*, 131 S. Ct. at 2534.

140. *Id.*

141. *Id.* at 2537.

142. *Id.* at 2538.

143. *Id.* at 2539–40.

144. *Id.* at 2540.

145. 762 F. Supp. 2d 1214 (S.D. Cal. 2011), *aff’d*, 540 F. App’x 587 (9th Cir. 2013).

146. 5 U.S.C. § 702 (2012).

147. *Citizens Legal Enforcement & Restoration*, 762 F. Supp. 2d at 1228. The APA allows individuals to sue federal agencies for injunctive relief when they have failed to execute their duties. *Id.* at 1222. Most states have laws that closely resemble the federal APA. Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 297–303 (1986). Therefore, judicial interpretation of the federal APA as it pertains to the public trust doctrine is instructive. See *Citizens Legal Enforcement & Restoration*, 762 F. Supp. 2d at 1221 (evaluating plaintiff’s claims under the APA that a federal agency violated California’s public trust doctrine).

148. *Citizens Legal Enforcement & Restoration*, 762 F. Supp. 2d at 1228. Specifically, these causes of action were framed as violations of section 8 of the Federal Reclamation Act, which required the Bureau of Reclamation to comply with the state’s water laws. *Id.* The plaintiffs argued that the Bureau violated section 8 by violating California’s Fish and Game Code section 5937, article X, section 2 of its Constitution, and its public trust doctrine. *Id.* at 1230. This failure allegedly violated the state’s duty “to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” *Id.* at 1231 (quoting *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983)).

149. *Id.*

act can only proceed “where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is required to take.”¹⁵⁰ Although the court found that California’s public trust doctrine imposes an affirmative duty on the state to “take the public trust into account . . . whenever feasible,”¹⁵¹ that mandate left too much discretion to state agencies and would lead to “judicial entanglement in abstract policy disagreements that courts lack both expertise and information to resolve.”¹⁵²

The Court of Appeals for the Ninth Circuit affirmed, reiterating that the claims against the Bureau for its alleged failure to comply with the “broad mandates” of the public trust doctrine did not seek to enforce discrete actions.¹⁵³ The court specifically recognized the Bureau’s failure to live up to its promises to mitigate the negative impacts on wildlife and recreational resources resulting from the construction.¹⁵⁴ Nonetheless, the court stated that it was “powerless . . . to compel” the Bureau to do what plaintiff asked.¹⁵⁵

These cases demonstrate that courts will likely not use the public trust doctrine to compel remedial state action where a state has allegedly failed to protect a trust resource. To do so would require the courts to evaluate complex scientific and technological data that are better left to state agencies. Because the public trust doctrine is nebulous, it would also require the courts to determine when a failure to act constitutes a violation of the public trust. This is a political discussion better left to other branches of the government. Courts have therefore been unwilling to rely on the public trust doctrine as a legal basis to order states to correct their failures to affirmatively protect public resources.¹⁵⁶

3. States’ Public Trust Duties To Consider and Minimize Harm to Trust Resources

As discussed above, the public trust doctrine generally does not impose a duty on states to affirmatively protect resources in the absence of adverse action. Nonetheless, it does require state legislatures and agencies to at least consider the adverse effects of their actions on trust resources and attempt to avoid or minimize those effects before acting. For example, as noted above, the California Supreme Court has found that “[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”¹⁵⁷ This means that the state may act in ways that adversely affect trust

150. *Id.* (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)).

151. *Id.* (quoting *Nat’l Audubon Soc’y*, 658 P.2d at 728).

152. *Id.* (quoting *Norton*, 542 U.S. at 66).

153. *Citizens Legal Enforcement & Restoration v. Connor*, 540 F. App’x 587, 589 (9th Cir. 2013).

154. *Id.*

155. *Id.*; see also *Twp. of Neptune v. State of N.J. Dep’t of Env’tl. Prot.*, 41 A.3d 792, 802 (N.J. Super. Ct. App. Div. 2012) (holding that the public trust doctrine did not “provide a legal basis” for the court to compel state agencies to dredge polluted river channels because the legislature had already delegated “broad discretion” to the agencies “to determine when and how to undertake such projects”).

156. See *infra* Part III.B.4 for a discussion of why courts are inclined to rely on the other branches of government to affirmatively protect public resources.

157. *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983); see also *In re Water Use Permit Applications*, 9 P.3d 409, 455 (Haw. 2000) (noting that “the state may compromise public rights in the

resources as long it has considered the impact of its decisions and acted as a matter of practical necessity.¹⁵⁸ Similarly, the Washington Court of Appeals has found that the public trust doctrine requires the state “to balance the protection of the public’s right to use resources on public land with the protection of the resources that enable these activities.”¹⁵⁹

The Louisiana Supreme Court has most clearly articulated that the public trust doctrine requires state governments to weigh the potential benefits of an action against its environmental harms before making any decisions concerning the use of natural resources. As the court explained in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,¹⁶⁰ the public trust doctrine

is a rule of reasonableness [that] requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. [It] does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.¹⁶¹

In this way the public trust doctrine requires state legislatures and agencies to consider how their actions will affect public access to and use of trust resources in the future. Furthermore, it reinforces legislation designed to protect the environment by requiring state actors to consider the future impacts of their actions.¹⁶²

To summarize once again, courts will only use the public trust doctrine to correct state actions—not states’ failure to act—that may potentially harm public resources. Even if the public trust doctrine required states to protect resources in the absence of adverse action, courts would not rely on it as a basis for injunctive relief. Doing so would require them to engage in complex scientific and political considerations that are beyond the scope of their expertise and authority. Still, although the public trust doctrine cannot be used to correct past damage to trust resources resulting from states’ failures to protect them, it nonetheless requires state legislatures and agencies to consider the future impacts of their actions on public resources before acting.

resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state”).

158. *Nat’l Audubon Soc’y*, 658 P.2d at 728.

159. *Wash. State Geoduck Harvesting Ass’n v. Wash. State Dep’t of Natural Res.*, 101 P.3d 891, 895 (Wash. Ct. App. 2004).

160. 452 So. 2d 1152 (La. 1984).

161. *Save Ourselves, Inc.*, 452 So. 2d at 1157. Citing this passage, the Hawaii Supreme Court further explained that “the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” *In re Water Use Permit Applications*, 9 P.3d at 455.

162. The National Environmental Policy Act, for example, requires state agencies to prepare environmental impact statements for every “recommendation or report on proposals for legislation and other major Federal actions [that significantly affect] the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2012). As a result, the statute requires agencies to consider the effects of their actions on the environment and to consider reasonable alternatives before taking any action. JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY* 258 (2d ed. 2009). Fifteen states also have statutes that resemble the federal law. *Id.*

III. APPLYING THE PUBLIC TRUST DOCTRINE TO THE ATMOSPHERE

While courts have applied the public trust doctrine to a variety of natural resources,¹⁶³ several have recently been asked for the first time to extend it to the atmosphere itself. This Section describes activists' recent efforts to have state and federal courts declare that the atmosphere is a public trust resource and compel their respective states to implement new emissions-reductions guidelines in response to their alleged failures to protect it.

A. Atmospheric Trust Litigation

On May 4, 2011, individuals and environmentalist groups—coordinated by the Oregon-based nonprofit Our Children's Trust (OCT)—began to file rulemaking petitions with dozens of state environmental agencies.¹⁶⁴ The petitions asked the agencies to implement goals to reduce greenhouse gases to specific levels.¹⁶⁵ OCT also helped to orchestrate the filing of lawsuits in federal court¹⁶⁶ and in fourteen states: Alaska,¹⁶⁷ Arizona,¹⁶⁸ California,¹⁶⁹ Colorado,¹⁷⁰ Iowa,¹⁷¹ Kansas,¹⁷² Massachusetts,¹⁷³ Minnesota,¹⁷⁴ Montana,¹⁷⁵ New Mexico,¹⁷⁶ Oregon,¹⁷⁷ Texas,¹⁷⁸ and Washington.¹⁷⁹

163. See *supra* Part II.A.2 for examples of nontraditional resources to which courts have applied the public trust doctrine.

164. *E.g.*, ALEC LOORZ & VICTORIA LOORZ, PETITION OF KIDS VS GLOBAL WARMING FOR THE ADOPTION OF RULES RELATING TO CARBON DIOXIDE EMISSIONS (May 2011), available at http://ourchildrenstrust.org/sites/default/files/Iowa%20Petition%20_0.pdf.

165. *Id.* at 3–4.

166. First Amended Complaint for Declaratory and Injunctive Relief, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012) (No. C11-02203 EMC) (filed July 27, 2011) [hereinafter Federal Court Complaint].

167. First Amended Complaint for Declaratory and Equitable Relief, *Kanuk v. State of Alaska*, Dep't of Natural Res., No. 3AN-11-07474, 2012 WL 8262431 (Alaska Super. Ct. filed May 6, 2012) [hereinafter Alaska Complaint].

168. Amended Complaint for Declaratory and Injunctive Relief, *Butler ex rel. Peshlakai v. Brewer*, No. CV-2011-010106 (Ariz. Super. Ct. filed Oct. 20, 2011) [hereinafter Arizona Complaint].

169. Complaint, *Blades v. State*, No. CGC-11-510725 (Cal. Super. Ct. filed May 4, 2011) [hereinafter California Complaint]. In February 2012, the California plaintiffs voluntarily dismissed their case without prejudice in order to refile it. *California: Legal Updates*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/state/California> (last visited Nov. 4, 2014).

170. Plaintiff's First Amended Complaint for Declaratory Judgment, *Martinez v. State*, No. 2011-CV-491, 2011 WL 11552495 (Colo. Dist. Ct. filed May 20, 2011) [hereinafter Colorado Complaint].

171. Petition for Judicial Review, *Filippone ex rel. Filippone v. Iowa Dep't of Natural Res.*, No. 05771 CV-CV-008748 (Iowa Dist. Ct. filed July 21, 2011) [hereinafter Iowa Complaint].

172. Petition for Declaratory Judgment, for Writ of Mandamus and Application for Injunctive Relief, *Farb v. State*, No. 12-C-1133 (Kan. Dist. Ct. filed Oct. 18, 2012) [hereinafter Kansas Complaint].

173. Massachusetts Complaint, *supra* note 18 (filed Aug. 11, 2014).

174. Minnesota Complaint, *supra* note 7 (filed May 4, 2011).

175. Petition for Original Jurisdiction, *Barhaugh v. State*, No. OP 11-0258 (Mont. filed May 4, 2011) [hereinafter Montana Complaint].

176. Amended Complaint for Declaratory and Injunctive Relief, *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514 (N.M. Dist. Ct. filed May 4, 2011) [hereinafter New Mexico Complaint].

177. Complaint for Declaratory Judgment and Equitable Relief, *Chernaik v. Kitzhaber*, No. 16-11-09273, 2012 WL 10205018 (Or. Cir. Ct. filed May 4, 2011) [hereinafter Oregon Complaint].

178. Plaintiffs' Original Petition, *Bonser-Lain v. Tex. Comm'n on Envtl. Quality*, No. D-1-GN-11-

These efforts relied on the findings of NASA scientist James Hansen, among others, that the Earth is in a state of planetary emergency.¹⁸⁰ The plaintiffs each argued that global warming has gradually caused the planet's average surface temperature to increase and that scientific findings indicate that an increase of 1° C will trigger an irreversible chain reaction of environmental catastrophes.¹⁸¹ In order to prevent the temperature rise, the plaintiffs argued, the concentration of carbon dioxide in the atmosphere must be reduced to under 350 parts per million (ppm) before the end of this century.¹⁸² Only then can the planet return to a state of equilibrium and avoid the catastrophic tipping point.¹⁸³ The carbon dioxide concentration in the atmosphere is currently 390 ppm.¹⁸⁴ To reduce the concentration to 350 ppm by the end of this century, the plaintiffs urged that global carbon emissions must begin to decline by six percent annually between 2013 and 2050, and then five percent per year thereafter.¹⁸⁵ The responsibility of setting and achieving this goal would largely rest with state regulatory agencies. Having failed to persuade their respective state agencies to adopt new emissions regulations, the plaintiffs resorted to the courts.¹⁸⁶

Although the plaintiffs' legal arguments rested on a mix of constitutional, statutory, and common law theories, the central proposition of each complaint was that the state had violated its fiduciary duty under the public trust doctrine to protect the atmosphere.¹⁸⁷ As a remedy, the plaintiffs asked the courts to declare that the atmosphere is a public trust resource that the state has a fiduciary duty to protect.¹⁸⁸

002194, 2012 WL 3164561 (Tex. Dist. Ct. filed July 21, 2011) [hereinafter Texas Complaint].

179. Complaint for Declaratory & Injunctive Relief, *Svitak v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. filed May 4, 2011) [hereinafter Washington Complaint].

180. *E.g.*, Arizona Complaint, *supra* note, at 168; Washington Complaint, *supra* note 179, at 9–11. Wood, *supra* note 11, at 357; *see generally* HANSEN ET AL., *supra* note 7.

181. *E.g.*, Colorado Complaint, *supra* note 170, at 15–20; New Mexico Complaint, *supra* note 176, at 15–19; *see also* HANSEN ET AL., *supra* note 7, at 4 (stating that expanding fossil fuel extraction may “push the climate system beyond tipping points such that amplifying feedbacks drive further climate change beyond humanity’s control”).

182. *E.g.*, California Complaint, *supra* note 169, at 19; Oregon Complaint, *supra* note 177, ¶ 27; *see also* HANSEN ET AL., *supra* note 7, at 8–9.

183. *E.g.*, Alaska Complaint, *supra* note 167, ¶¶ 39–44; Texas Complaint, *supra* note 178, at 6; *see also* HANSEN ET AL., *supra* note 7, at 8.

184. *E.g.*, Arizona Complaint, *supra* note 168, at 8; New Mexico Complaint, *supra* note 176, at 16; *see also* HANSEN ET AL., *supra* note 7, at 9. The preindustrial level was 275 ppm. HANSEN ET AL., *supra* note 7, at 9.

185. *E.g.*, Minnesota Complaint, *supra* note 7, at 15; Oregon Complaint, *supra* note 177, ¶ 27.

186. *Legal Action, OUR CHILDREN’S TRUST*, <http://ourchildrenstrust.org/Legal> (last visited Nov. 4, 2012). The website for Our Children’s Trust lists only two states with active petitions pending. *Pending Administrative Petitions, OUR CHILDREN’S TRUST*, [http://ourchildrenstrust.org/US/StateAdministrative Petitions](http://ourchildrenstrust.org/US/StateAdministrativePetitions) (last visited Nov. 4, 2014).

187. *See, e.g.*, Kansas Complaint, *supra* note 172, at 1 (“Plaintiff . . . petitions for declaratory relief . . . for breach of the defendants’ fiduciary obligation to protect the atmosphere from the effects of human-caused greenhouse gas emissions in violation of the public trust . . .”).

188. *See, e.g.*, Alaska Complaint, *supra* note 167, at 26 (requesting that the court declare “that the atmosphere is a public trust resource” and that the state “as trustee, has an affirmative fiduciary obligation to protect and preserve the atmosphere as a commonly shared public trust resource for present and future generations”).

Additionally, plaintiffs in six of the fourteen state cases asked for a court order requiring their respective states to reduce their carbon dioxide emissions by at least six percent per year beginning in 2013 for the duration of the century.¹⁸⁹ Plaintiffs in four other cases asked the courts more generally to order their respective states to significantly reduce emissions, engage in emissions rulemaking, and limit greenhouse gases.¹⁹⁰ The Texas and New Mexico complaints were the least exacting. The Texas plaintiffs asked the court to have the Texas Commission on Environmental Quality reconsider their rulemaking petition to reduce greenhouse gas emissions.¹⁹¹ And the New Mexico plaintiffs asked the court to declare only that the state's allowance of greenhouse gas emissions at current levels violated the public trust.¹⁹²

B. *Litigation Results*

The OCT plaintiffs' efforts have mostly been unsuccessful. Of the approximately forty petitions for rulemaking filed with state agencies, at least twenty-seven were denied.¹⁹³ Additionally, to date, nine state courts and the District Court for the District of Columbia have failed to recognize the atmosphere as a public trust asset. Many of these cases were dismissed on procedural grounds and did not even reach the merits of the claim.¹⁹⁴ Others were dismissed on constitutional grounds such as lack of standing or justiciability.¹⁹⁵ Many courts also specifically explained that determining whether a state had violated an alleged duty to protect the atmosphere and how to address it were political questions beyond the authority of the judicial branch.¹⁹⁶ Nonetheless, several courts either assumed, implied, stated in dicta, or otherwise left the door open for the atmosphere to be recognized as a public trust asset.¹⁹⁷ No court, however, has relied on the public trust doctrine to require a state to implement new emissions regulations.¹⁹⁸

189. Alaska Complaint, *supra* note 167, at 27; Arizona Complaint, *supra* note 168, at 10; Kansas Complaint, *supra* note 172, at 7; Minnesota Complaint, *supra* note 7, at 22; Oregon Complaint, *supra* note 177, at 18; Washington Complaint, *supra* note 179, at 31.

190. Colorado Complaint, *supra* note 170, at 30; Iowa Complaint, *supra* note 171, at 7–8; Massachusetts Complaint, *supra* note 18, at 9–10; Montana Complaint, *supra* note 175, at 16.

191. Texas Complaint, *supra* note 178, at 13–14.

192. New Mexico Complaint, *supra* note 176, at 28–29.

193. J. Wylie Donald, Aronow v. Minnesota *Is Dismissed: Public Trust Doctrine Not Extended to the Atmosphere in Minnesota*, CLIMATELAWYERS (Feb. 4, 2012, 9:58 PM), <http://climatelawyers.com/post/2012/02/04/Aronow-v-Minnesota-is-Dismissed-Public-Trust-Doctrine-Not-Extended-to-the-Atmosphere-in-Minnesota.aspx>.

194. See *infra* Parts III.B.1–2 for a discussion of the different procedural requirements that led several courts to dismiss their respective atmospheric trust claims.

195. See *infra* Part III.B.3 for a discussion of several courts' reasoning that the atmospheric trust plaintiffs raised claims that could not be addressed due to constitutional limitations.

196. See *infra* Part III.B.4 for a discussion of several courts' findings that the atmospheric trust claims raised political issues that were not properly before them.

197. See *infra* Part III.B.3 for a discussion of several courts' consideration of the application of the public trust doctrine to the atmosphere.

198. See *infra* Part III.B.4 for a discussion of courts' unwillingness to rely on the public trust doctrine to compel their respective states to implement new emissions regulations.

1. Procedural Dismissals

Several of the atmospheric trust cases were dismissed on procedural grounds. The Montana plaintiffs sought original jurisdiction from the state supreme court. Their claim was denied because, according to the court, it did not involve purely legal questions, and there was no emergency sufficient to bypass the trial court.¹⁹⁹ The district court in Kansas dismissed the plaintiff's case because the plaintiff had neglected to first petition the state to institute new emissions restrictions and had therefore failed to exhaust her administrative remedies.²⁰⁰ By dismissing on procedural grounds, both courts avoided the merits of the claims entirely. The District Court for the District of Columbia dismissed the lone federal claim for lack of jurisdiction.²⁰¹ The court found that the public trust doctrine was a matter of state, not federal, law and that it therefore could not preside over a case based solely on a violation of the public trust doctrine.²⁰² And the Minnesota Court of Appeals found that because "no Minnesota appellate court has held that the public-trust doctrine applies to the atmosphere," the district court properly dismissed the case for failure to state a claim.²⁰³

2. Judicial Review of Rulemaking Petitions

Two of the atmospheric trust cases hinged on their respective states' denial of rulemaking petitions. In Iowa the plaintiffs sought judicial review after the state's Department of Natural Resources denied their petition for rulemaking.²⁰⁴ The district court affirmed the Department's decision, finding that the denial "was not unreasonable, arbitrary, capricious, or an abuse of discretion."²⁰⁵ Additionally, the court declined to expand the scope of Iowa's public trust doctrine to encompass the atmosphere.²⁰⁶

199. Barhaugh v. State, No. OP 11-0258, slip op. at 2 (Mont. June 15, 2011) (order denying Plaintiffs' Petition for Original Jurisdiction).

200. Press Release, Our Children's Trust, Kansas Teenager Pledges To Petition Department of Health and Environment for Climate Change Regulations After Court Tells Her To Go to Agency (June 13, 2013), available at <http://ourchildrenstrust.org/sites/default/files/2013.06.13-KansasPR.pdf>.

201. Alec L. v. Jackson, 863 F. Supp. 2d 11, 15 (D.D.C. 2012), *aff'd sub nom.* Alec L. v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014).

202. *Id.*

203. Aronow v. State, No. A12-0585, 2012 WL 4476642, at *3 (Minn. Ct. App. Oct. 1, 2012). More specifically, the district court dismissed the claim on the grounds that no prior cases had applied the public trust doctrine to the atmosphere and that it would not "recognize an entirely new common law cause of action." Aronow v. State, No. 62-CV-11-3952, slip op. at 5 (Minn. Dist. Ct. Jan. 30, 2012). In reaching this conclusion, the court cited case law explaining that Minnesota's public trust doctrine applies only to navigable waters and that the court of appeals had previously declined to extend the public trust doctrine to land "partly because the cases cited by the parties applied only to waterways." *Id.*

204. Filippone *ex rel.* Filippone v. Iowa Dep't of Natural Res., No. 12-0444, 2013 WL 988627, at *1 (Iowa Ct. App. Mar. 13, 2013).

205. *Id.*

206. *Id.*

The Iowa Court of Appeals affirmed the Department's denial of the rulemaking petition.²⁰⁷ It explained that the Department gave fair consideration to the proposed rules by holding a public hearing, hearing presentations both for and against the proposed rule, voting unanimously to deny the petition, and then issuing a written denial of the petition citing to specific reasons for its decision.²⁰⁸ The court therefore affirmed that the Department's denial "was not unreasonable, arbitrary, capricious, or an abuse of discretion."²⁰⁹

Regarding the public trust doctrine specifically, the court affirmed the district court's decision not to apply it to the atmosphere.²¹⁰ Finding that "[t]he public trust doctrine in Iowa has a narrow scope," the court explained that the doctrine, as expressed in Iowa, traditionally only applied to navigable waterbeds and lakes.²¹¹ The Supreme Court of Iowa had also previously declined to extend the doctrine to cover forested areas or to a public alleyway that did not provide public access to a river or lake.²¹² Due to the lack of precedent for applying the public trust doctrine to nontraditional trust resources, the court found that the Department did not have a duty under the public trust doctrine to protect the atmosphere and that its denial of the proposed greenhouse gas restrictions was therefore not unreasonable.²¹³

Concurring in the judgment, Judge Doyle wrote separately to explain that there was a "sound public policy basis" for extending the public trust doctrine to the atmosphere.²¹⁴ Citing two statutory provisions that recognized the importance of preserving the state's air and the ecosystem for future generations, he found that "[t]he legislature, the voice of the people, has spoken in terms as clear as a crisp, cloudless, autumn Iowa sky."²¹⁵ Nonetheless, in light of the Iowa Supreme Court's past reluctance to extend the public trust doctrine, he felt it would not be "appropriate for a three-judge panel" to hold otherwise.²¹⁶

Unlike the other eleven courts that considered the application of the public trust doctrine to the atmosphere, in *Bonser-Lain v. Texas Commission on Environmental Quality*, the Travis County District Court of Texas stated in dicta that "the public trust doctrine includes all natural resources of the State including the air and atmosphere."²¹⁷

207. *Id.* at *3.

208. *Id.*

209. *Id.* at *1. The court also found that the plaintiff's first argument—that the department's denial violated the state's constitutional duty to provide a life-sustaining atmosphere—was not properly before the court because it was neither raised before nor addressed by the district court. *Id.* at *2.

210. *Id.* at *3.

211. *Id.* at *2.

212. *Id.* (citing *Fencil v. City of Harpers Ferry*, 620 N.W.2d 808, 814 (Iowa 2000)).

213. *Id.* at *3. The Iowa Supreme Court declined the plaintiff's appeal for further review. Press Release, Our Children's Trust, Iowa Supreme Court Declines To Review Climate Case (May 10, 2013), available at http://ourchildrenstrust.org/sites/default/files/13.05.09-IowaSC-Decision_0.pdf.

214. *Filippone*, 2013 WL 988627, at *3 (Doyle, J., concurring specially).

215. *Id.* at *3–4 (citing IOWA CODE ANN. §§ 455A.15–16 (West 2014)).

216. *Id.* at *4.

217. *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated sub nom. Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 428 S.W.3d 887 (Tex. Ct. App. 2014).

The case was brought before the court after the defendant denied plaintiffs' petition to adopt rules for limiting greenhouse gas emissions.²¹⁸ Over the defendant's objection, the court found that it had jurisdiction to hear the case.²¹⁹ It then affirmed the TCEQ's denial of the plaintiff's original petition for rulemaking "in light of other state and federal litigation."²²⁰ In its brief, the defendant noted that the outcome of two cases then in the U.S. Court of Appeals for the District of Columbia challenging federal environmental regulations would affect any greenhouse gas regulations that the Commission would want to adopt.²²¹ The defendant argued that the "unsettled nature of the issues raised in the lawsuits would make it difficult for the Commission to comply" with both state and federal law as required.²²² The final judgment honored this argument, and a letter opinion issued before the final opinion elaborated that "the Commission's refusal to exercise its authority based on current litigation is a reasonable exercise of its discretion."²²³

Nonetheless, as to the merits of the case, the trial court found that article XVI, section 59 of the Texas Constitution incorporated the public trust doctrine.²²⁴ It went on to find that the Texas Clean Air Act required the state to protect the quality of the air.²²⁵ Additionally, the court agreed with the plaintiffs that the federal Clean Air Act did not preempt the Texas Commission on Environmental Quality (TCEQ) from enacting rules to protect the state's air quality.²²⁶ It reasoned that federal law created baseline requirements that the state could exceed if desired.²²⁷ With this opinion, Texas became the first state to expressly recognize the atmosphere as a public trust resource.

The plaintiffs' "victory" was short lived, however. Even though the court ruled in its favor, the TCEQ appealed the trial court's decision on the grounds that the trial court had lacked jurisdiction to hear the case.²²⁸ Ultimately the court of appeals agreed that the state's statutory regime did not permit judicial review of agency decisions on petitions for rulemaking or on agencies' refusal to adopt rules.²²⁹ The court of appeals therefore vacated the trial court's holding and dismissed the case for lack of subject matter jurisdiction.²³⁰ The court's holding rendered the trial court's opinion—including its analysis of the scope of the public trust doctrine—void.²³¹

218. Texas Comm'n on Env'tl. Quality v. Bonser-Lain, 428 S.W.3d 887, 890 (Tex. Ct. App. 2014).

219. *Bonser-Lain*, 2012 WL 3164561.

220. *Id.*

221. Response Brief of Defendant, Texas Commission on Environmental Quality at 14-15, *Bonser-Lain*, 2012 WL 3164561.

222. *Id.* at 15.

223. Letter from Gisela D. Triana, Judge, 200th District Court of Texas, to Adam R. Abrams & Cynthia Woelk, Counsel in *Bonser-Lain v. Texas Commission on Environmental Quality*, at 2 (July 9, 2012).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Texas Comm'n on Env'tl. Quality v. Bonser-Lain, 428 S.W.3d 887, 890 (Tex. Ct. App. 2014).

229. *Id.* at 894.

230. *Id.* at 895.

231. *Id.*

3. Constitutional Questions

The disposition of several other cases involved constitutional barriers that the courts were either unable or unwilling to overcome. For example, the Colorado District Court explained that the public trust doctrine did not emanate from any constitutional, statutory, or judicially created law in the state.²³² The plaintiffs had therefore not alleged a violation of a legally protected interest and lacked standing to bring a declaratory judgment action.²³³ Likewise, the Washington Court of Appeals explained that the plaintiff did not challenge the constitutionality of a state action or the state's failure to undertake a constitutional duty.²³⁴ It therefore concluded that the claims could not be redressed and that there was "no actual dispute."²³⁵

The Court of Appeals for Arizona also dismissed the atmospheric trust claim before it based on constitutional grounds. The court explained that the plaintiff had challenged state *inaction* rather than a state action and had failed to provide "any basis to determine that the State's inaction violates any specific constitutional provision on which relief can be granted."²³⁶ The court specifically contrasted the atmospheric trust claim to two cases that each alleged constitutional violations but provided a "framework and authority for judicial review."²³⁷ The court therefore found that there was no constitutional basis for it to determine whether the state's alleged inaction violated state law and dismissed the case.²³⁸

Nonetheless, the court "assume[d] without deciding" that the atmosphere was subject to the public trust doctrine.²³⁹ Based on the principles underlying the doctrine and its evolution in Arizona, the court reasoned that it was within its power to determine whether a natural resource such as the atmosphere is subject to the public trust doctrine, as well as whether the state had violated its trust duties.²⁴⁰ It went on to state that "[w]hile public trust jurisprudence in Arizona has developed in the context of the state's interest in land under its waters," Arizona courts have never "determined that the atmosphere, or any other particular resource, is *not* a part of the public trust."²⁴¹

232. *Martinez v. State*, No. 2011-CV-491, 2011 WL 11552495, at *2-3 (Colo. Dist. Ct. Nov. 7, 2011) (order granting Defendants and Intervenor's Motions to Dismiss).

233. *Id.*

234. *Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013).

235. *Id.*

236. *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *7 (Az. Ct. App. Mar. 14, 2013).

237. *See id.* (contrasting this claim with the claims in *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991), and *San Carlos Apache Tribe v. Superior Court of Arizona ex rel. County of Maricopa*, 972 P.2d 179 (Ariz. 1999)).

238. *Id.* at *7. More artfully, the court explained that it would "be weaving a jurisprudence out of air" to hold that state inaction "is a breach of [the public] trust merely because it violates the [d]octrine" but not a specific constitutional provision or law. *Id.* (internal quotation marks omitted). The court also then briefly concluded that the plaintiff lacked standing under Arizona's Uniform Declaratory Judgments Act because she failed to challenge the constitutionality of title 49, section 191 of the Arizona Revised Statutes, which prohibits agency action relating to greenhouse gas emissions. *Id.* at *7-8 (citing ARIZ. REV. STAT. ANN. § 49-191 (West 2014)).

239. *Id.* at *6.

240. *Id.* at *5.

241. *Id.* at *6.

The court continued: “[t]he 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.”²⁴² The court, without so deciding, then adopted the assumption that the atmosphere is a public trust resource.²⁴³

The decisions in Oregon and Alaska each hinged on the justiciability of the plaintiffs’ claims. In *Chernaik v. Kitzhaber*, the Oregon District Court dismissed the case because the plaintiffs did not allege that defendants had violated a specific constitutional or statutory provision.²⁴⁴ Therefore, the court reasoned, the plaintiffs’ claims were beyond the scope of its authority under the state’s declaratory judgment act.²⁴⁵ The circuit court disagreed. It found that a declaratory judgment would establish the state’s obligations under the public trust doctrine for the state to uphold going forward.²⁴⁶ The plaintiffs’ request for declaratory relief was therefore justiciable because it would provide meaningful relief as to whether the atmosphere was a trust resource.²⁴⁷ The court reversed and remanded for the trial court to establish the scope of the public trust doctrine and determine whether the state had met its duties under the trust.²⁴⁸ It also declined to address plaintiffs’ remaining requests for relief that the state had failed to uphold its fiduciary duties and that it was required to implement a carbon reduction plan, among others.²⁴⁹ The scope of the trust, the court reasoned, would necessarily affect whether plaintiffs were entitled to such relief.²⁵⁰

In *Kanuk v. Alaska Department of Natural Resources*,²⁵¹ the superior court dismissed the atmospheric trust claim because it found that the complaint raised political issues that were more appropriately left to the legislature or executive branch to resolve.²⁵² The court’s analysis was guided by *Baker v. Carr*,²⁵³ which lists six factors for courts to use to evaluate whether an issue is a nonjusticiable political question, any one of which is dispositive.²⁵⁴ With respect to the second *Baker* factor,

242. *Id.*

243. *Id.* Presiding Judge Gemmill nonetheless expressed his own conclusion that the atmosphere is not a public trust resource. *Id.* at *8 (Gemmill, P.J., concurring). He also agreed with the trial court that “the relief sought in this action is more properly addressed to the legislative and executive branches” than the judiciary. *Id.*

244. *Chernaik v. Kitzhaber*, No. 16-11-09273, 2012 WL 10205018, at *9 (Or. Cir. Ct. Apr. 5, 2012) (order granting dismissal), *rev’d*, 328 P.3d 799 (Or. Ct. App. 2014). The court also found that the state was protected from suit by sovereign immunity. *Id.*

245. *Id.*

246. *Chernaik v. Kitzhaber*, 328 P.3d 799, 807 (Or. Ct. App. 2014).

247. *Id.*

248. *Id.* at 808.

249. *Id.*

250. *Id.*

251. No. 3AN-11-07474, 2012 WL 8262431 (Alaska Super. Ct. Mar. 16, 2012), *aff’d*, No. S-14776, 2014 WL 4494394 (Alaska Sept. 12, 2014).

252. *Kanuk*, 2012 WL 8262431, at *5.

253. 369 U.S. 186 (1962).

254. *Kanuk*, 2012 WL 8262431, at *2. The six *Baker* factors are the following:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving [the case involving a political question]; or [3] the impossibility of deciding without an initial policy

the court found that the questions before it lacked judicially discoverable and manageable standards.²⁵⁵ It explained that no legal authority in Alaska supported the argument that the air or atmosphere can be subject to a public trust.²⁵⁶ Even if the public trust doctrine applied to the atmosphere, the court continued, it was unclear what legal standards would guide it in such an application.²⁵⁷ The court went on to cite the Alaska Supreme Court's finding that article VIII of the state constitution did not create a public trust in the state's natural resources per se, but rather only engrafted "trust principles" into the constitution to guarantee access to certain natural resources.²⁵⁸

With respect to the third *Baker* factor, the court explained that the claim clearly presented political questions.²⁵⁹ It reasoned that novel issues of determining whether the atmosphere was a public trust resource, whether the state had breached its duty to protect it, and how to fulfill such a duty "necessarily involve[d] a policy determination."²⁶⁰ Because two of the *Baker* factors showed that the claim concerned a political issue, the court dismissed the plaintiffs' complaint as nonjusticiable.²⁶¹

The Alaska Supreme Court affirmed, finding that three of the plaintiffs' claims were properly dismissed as nonjusticiable, while the remaining four *were* justiciable but should nonetheless have been dismissed on prudential grounds.²⁶² With respect to plaintiff's first three claims—(1) that the state's duty to protect the atmosphere was "dictated by the best available science;" (2) that the "best available science" requires annual reductions of six percent in the state's carbon dioxide emissions; and (3) that the state must annually account for carbon dioxide emissions—the court found that these issues were better suited for state agencies or the legislature to consider.²⁶³ Therefore, the superior court properly dismissed them as nonjusticiable.²⁶⁴ However, the court found that plaintiffs' request for declaratory judgments that the atmosphere is a public trust resource and that the state has an affirmative duty to protect it were justiciable because they were grounded in the state's constitution.²⁶⁵ The *Baker* factors therefore did not apply, and the court was equipped to address them.²⁶⁶

determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. (quoting *Baker*, 369 U.S. at 217).

255. *Id.* at *3–4.

256. *Id.* at *4.

257. *Id.*

258. *Id.*

259. *Id.* at *4–5.

260. *Id.* at *4.

261. *Id.* at *5.

262. *Kanuk v. Alaska Dep't Natural Res.*, No. S-14776, 2014 WL 4494394, at * 5–11 (Alaska Sept. 12, 2014).

263. *Id.* at *7.

264. *Id.*

265. *Id.* at *7–8.

266. *Id.* at *8.

Nonetheless, the court declined to allow the claims to proceed.²⁶⁷ Concerning the plaintiffs' request for a declaration that the state had failed to uphold its fiduciary obligations under the public trust doctrine, the court explained that such relief could not be granted after it had just declined to determine the extent of the state's obligations.²⁶⁸ As for plaintiffs' remaining claims, the court admitted that they had merit since the legislature had previously "intimated that the State acts as trustee with regard to the air" and other natural resources.²⁶⁹ Nonetheless, the court reasoned that its "past application of trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources," as plaintiffs desired.²⁷⁰ Ultimately, the court explained that while declaring the atmosphere to be a public trust resource could help to clarify some legal issues,

it would certainly not "settle" them. It would have no immediate impact on greenhouse gas emissions in Alaska, it would not compel the State to take any particular action, nor would it protect the plaintiffs from the injuries they allege in their complaint. Declaratory relief would not tell the State what it needs to do in order to satisfy its trust duties and thus avoid future litigation; conversely it would not provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties as trustee.²⁷¹

In short, the court found, a declaratory judgment would not truly resolve anything.²⁷² It would only provide a general framework of a public trust to be fleshed out by the legislature, executive agencies, and future litigation.²⁷³ Thus, even though plaintiffs' request for declaratory relief was justiciable, the court found that it would be imprudent to address their claims.²⁷⁴

4. A Political Question

Regardless of how they addressed or avoided the matter of whether the public trust doctrine applies to the atmosphere, several courts each thoroughly explained that remedying a state's alleged failure to protect the atmosphere was a political question better left to members of the legislative and executive branches.

As noted above, the Superior Court of Alaska found that the matters of whether the state had breached its alleged duty to protect the atmosphere and how to fulfill such a duty "*necessarily* involve[d] a policy determination."²⁷⁵ The court explained that it was "not the judiciary's role to determine whether the State of Alaska should reduce carbon dioxide emissions by 6% each year," and that it was "ill-equipped to make such policy decisions" that consider scientific findings, but not competing interests such as

267. *Id.* at *8–11.

268. *Id.* at *9.

269. *Id.*

270. *Id.*

271. *Id.* at *10.

272. *Id.*

273. *Id.*

274. *Id.* at *11.

275. *Kanuk v. Alaska Dep't Natural Res.*, No. 3AN-11-077474, 2012 WL 8262431, at *4 (Alaska Super. Ct. Mar. 16, 2012), *aff'd*, No. S-14776, 2014 WL 4494394 (Alaska Sept. 12, 2014).

energy needs and potential economic disruption.²⁷⁶ The Alaska Supreme Court affirmed that while it had constitutional authority to decide whether the atmosphere is a public trust resource, the judiciary was the wrong branch of government to wrestle with scientific issues or enforce technical requirements.²⁷⁷

Similarly, the Washington Court of Appeals characterized the plaintiff's claim as an attempt to have the judiciary "create a new regulatory program" and impose a new duty on the state.²⁷⁸ "To create and impose this new duty," the court explained, "would necessarily involve resolution of complex social, economic, and environmental issues" that would "invade[] the prerogatives of the legislative branch."²⁷⁹ The court concluded that the state had already established greenhouse gas regulations by legislation, and that it would not entertain one individual's attempt to essentially rewrite a statute.²⁸⁰ Likewise, in dismissing its atmospheric trust claim, the Oregon Circuit Court concluded that the regulation of greenhouse gas emissions "is a policy decision that has already been addressed by the Legislature" and "[w]ith the Legislature this decision should remain."²⁸¹ The court of appeals reinforced this reasoning when it explained that courts were equipped to decide whether the atmosphere was a public trust resource, but that the state's legislatures and agencies would flesh out the state's regulatory duties going forward.²⁸²

The District Court for the District of Columbia explained that under *American Electric Power Co. v. Connecticut*, even if the public trust doctrine had once existed at federal common law, it had been displaced by the federal Clean Air Act.²⁸³ Greenhouse gas emissions were therefore subject to regulation by federal regulatory agencies "that are better equipped, and that have a Congressional mandate" to provide oversight.²⁸⁴ In so holding, the court noted that if it complied with the plaintiffs' request to engage in the regulation of greenhouse gas emissions, it would have to determine whether carbon emissions are too high, what the appropriate level of carbon emissions should be, and how to achieve that level.²⁸⁵ Such decisions, the court explained, are better left to federal agencies.²⁸⁶

276. *Id.* at *5.

277. *Kanuk v. Alaska Dep't Natural Res.*, No. S-14776, 2014 WL 4494394, at *7 (Alaska Sept. 12, 2014).

278. *Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013).

279. *Id.*

280. *Id.*

281. *Chernaik v. Kitzhaber*, No. 16-11-09273, 2012 WL 10205018, at *8 (Or. Cir. Ct. Apr. 5, 2012), *rev'd*, 328 P.3d 799 (Or. Ct. App. 2014). Additionally, the court explained: "Whether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature's [greenhouse gas] emission goals are too weak, too stringent, or are altogether unnecessary is beside the point. These determinations are not judicial functions. They are legislative functions." *Id.* at *7.

282. *Chernaik v. Kitzhaber*, 328 P.3d 799, 807 (Or. Ct. App. 2014).

283. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-16 (D.D.C. 2012) (citing *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011)), *aff'd sub nom.* *Alec L. v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014).

284. *Id.* at 17.

285. *Id.* at 16-17.

286. *Id.* The district court later denied plaintiffs' Motion for Reconsideration under Federal Rule of Civil Procedure 59(e). *Alec L. v. Perciasepe*, No. 11-CV-2235, 2013 WL 2248001, at *5 (D.D.C. May 22, 2013). In

Finally, in New Mexico, the Santa Fe First Judicial District Court declined to grant the plaintiffs' request for new emissions regulations, finding that regulatory oversight was a job for the legislature, not the judiciary.²⁸⁷ In reaching this conclusion, the court explained that the state had not ignored its role of protecting the atmosphere; "it just disagrees with what the Plaintiff thinks is needed."²⁸⁸ The court instructed "that the real remedy is to elect people who believe that greenhouse gases are a problem, that man does contribute to climate change, and that those are the people who should be making policy decisions. But that's a political decision, not a Court decision."²⁸⁹

The court also considered the importance of the political process and public participation in determining whether the judiciary was the proper branch to decide the atmospheric trust issue. Citing to *Kelly v. 1250 Oceanside Partners*,²⁹⁰ Judge Singleton surmised that the state's supreme court would allow the judicial branch to bypass the political process "if there was an indication that the political process had gone astray, that [legislators] had ignored what they were supposed to do, or if [an] agency was not attempting to apply the statutory scheme, or if the public was excluded from the processes."²⁹¹ She added that in rare circumstances "the [s]tate's action could be so wrongheaded as to invoke the Public Trust Doctrine," but that "there should be some showing that the process was tainted or that the public was foreclosed from pursuing the issue."²⁹² However, the court found that this was not the case in this instance since the plaintiff and other advocates for restricting greenhouse gas emissions had and continue to have the opportunity to participate in the discussion of New Mexico's statutes.²⁹³

IV. THE PUBLIC TRUST DOCTRINE SHOULD APPLY TO THE ATMOSPHERE

Courts should apply the public trust doctrine to the atmosphere. For one, courts have expanded the public trust doctrine to accommodate society's changing interests, and protecting the atmosphere has become increasingly important to the public. Applying the public trust doctrine to the atmosphere also appeals to the traditional use of the trust to protect the public's interest in commerce. Additionally, courts have historically expanded the public trust doctrine to resources that preserve access to public waters, and the atmosphere is inextricably linked to each state's water resources. Moreover, at least several states have already implicitly expanded the public trust doctrine to the atmosphere through constitutional provisions. Although opponents

sum, the court concluded that the plaintiffs had "either presented all of [their] arguments previously, or they failed to seize the opportunity to do so when they should have," adding that Rule 59(e) did "not operate as a judicial mulligan." *Id.*

287. *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514, slip op. at Ex. A, p. TR-4 (N.M. Dist. Ct. July 4, 2013) (order granting Defendants' Motion for Summary Judgment). Notably, the court did not actually decide whether the public trust doctrine applied to the atmosphere; it held only that the public trust doctrine should not be applied "in this case." *Id.*

288. *Id.* at Ex. A, p. TR-3.

289. *Id.* at Ex. A., p. TR-4.

290. See *supra* notes 121–27 and accompanying text for a discussion of *Kelly*.

291. *Sanders-Reed*, No. D-101-CV-2011-01514, slip op. at Ex. A, p. TR-1.

292. *Id.* at Ex. A, p. TR-3.

293. *Id.* at Ex. A, p. TR-3–4.

argue otherwise, federal law does not supersede the potential application of the public trust doctrine to the atmosphere. Furthermore, states' treatment of rivers and the air also shows that it is not beyond their public trust duties to protect the atmosphere.

Courts should apply the public trust doctrine to the atmosphere first and foremost because public interest requires it. The values and interests of society have always shaped the scope of the public trust doctrine.²⁹⁴ The public trust doctrine is also flexible and able to adapt to the public's interests as they change over time.²⁹⁵ It is for this reason that courts have expanded the reach of the public trust doctrine from navigable waters in *Illinois Central* to scenic views and the purity of the air in *National Audubon Society*.²⁹⁶

The public has unquestionably come to recognize the importance of protecting and preserving the atmosphere. The public understands better than ever the role that the atmosphere plays in maintaining a healthy, stable environment.²⁹⁷ Articles chronicling the causes and effects of climate change attest to the increased public focus on atmospheric protection.²⁹⁸ Legislation and constitutional provisions further reflect the public interest in protecting natural resources.²⁹⁹ The atmospheric trust litigation described in this Comment specifically attests to the public's concern for the health of the atmosphere.³⁰⁰ Because protecting the atmosphere for present and future generations is clearly a matter of public concern, courts should apply the public trust doctrine to the atmosphere.

Through the recent atmospheric trust litigation, several state courts have at least entertained the idea of extending the public trust doctrine to the atmosphere because of its flexibility. The Arizona Court of Appeals assumed without deciding that the doctrine applies to the atmosphere even though it had traditionally only applied to lands beneath navigable waters.³⁰¹ The District Court of New Mexico implied that the atmosphere was a public trust resource, but that it was not necessary to invoke the trust in that case.³⁰² Judge Doyle of the Iowa Court of Appeals identified a public policy

294. See, e.g., *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–53 (1892) (explaining that abdication of the state's control over public waters is incompatible with the state's duty "to preserve such waters for the use of the public," and that the state's control over trust resources "can never be lost," except when control is relinquished in order to promote public interests or when no "substantial impairment of the public interest" will occur).

295. See *supra* Part II.A.2 for a discussion of the flexibility of the public trust doctrine.

296. See *supra* Parts II.A.2–3 for a discussion of the expansion of the public trust doctrine during the twentieth century.

297. HANSEN ET AL., *supra* note 7, at 8.

298. See *supra* note 56 for examples of recent magazine and newspaper articles related to climate change.

299. See *supra* notes 56, 88–95 and accompanying text for examples of legislation and constitutional provisions that reflect the public environmental interests.

300. See *supra* Section III for a discussion of the recent atmospheric trust litigation as a public reaction to states' failure to adequately protect the atmosphere.

301. See *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *6 (Ariz. Ct. App. Mar. 14, 2013) (explaining that "[w]hile public trust jurisprudence in Arizona has developed in the context of the state's interest in land under its waters," Arizona courts have never "determined that the atmosphere, or any other particular resource, is *not* a part of the public trust").

302. See *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514, slip op. at Ex. A, TR-1, 3–4 (N.M.

basis for extending the public trust doctrine to the atmosphere in the language of state statutes.³⁰³ The Oregon Court of Appeals remanded its atmospheric trust case to the Circuit Court because the plaintiffs' were entitled to judicial declaration of whether the public trust doctrine applied to the atmosphere.³⁰⁴ And the *Bonser-Lain* trial court found that the public trust doctrine encompasses the atmosphere in light of state statutes and constitutional provisions, notwithstanding the lack of precedent for such an action.³⁰⁵ Nonetheless, no court has held that the public trust doctrine encompasses the atmosphere.

Second, application of the public trust doctrine to the atmosphere fulfills each state's duty as sovereign trustee to preserve the public's interest in commerce. The Supreme Court's decision in *Illinois Central* was largely influenced by the Court's recognition that access to Lake Michigan was essential to commerce in Chicago.³⁰⁶ More recently, courts have also considered the importance of commerce when applying the public trust doctrine to new resources.³⁰⁷ A healthy, functioning atmosphere is an inherently public resource that is essential to commerce in and among the states.³⁰⁸ Unpredictable weather systems resulting from global warming have the potential to disrupt transportation channels as well as the production and distribution of goods.³⁰⁹ Beyond lost time and productivity, the economic effects of these disruptions can be astronomical. One insurance company estimates that weather-related disasters in North America have cost it thirty-four billion dollars each year for the past thirty years.³¹⁰ The damage that Super Storm Sandy created alone was estimated to be thirty-three billion dollars.³¹¹ Because the atmosphere is a natural resource essential to commerce, it falls within the scope of the public trust doctrine.

Third, the public trust doctrine applies to the atmosphere because it is a logical extension of states' fiduciary duties to protect the public's use of and access to public water resources. Courts have willingly expanded the public trust doctrine in the past to

Dist. Ct. June 26, 2013) (order granting Defendants' Motion for Summary Judgment) (explaining that the public trust doctrine should not be invoked "in this case," but only when the state has truly failed to fulfill its responsibilities).

303. See *supra* notes 214–16 and accompanying text for a discussion of Judge Doyle's special concurrence.

304. *Chernaik v. Kitzhaber*, 328 P.3d 799, 808 (Or. Ct. App. 2014).

305. See *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012) (finding that the public trust doctrine is flexible and applies to "all natural resources . . . including the air and atmosphere," not just water and wildlife resources as it had in the past), *vacated sub nom. Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 428 S.W.3d 887 (Tex. Ct. App. 2014).

306. See *supra* Part II.A.4 for a discussion of the emphasis that the *Illinois Central* Court placed on the public's commercial interests in applying the public trust doctrine to navigable waters.

307. See *supra* Part II.A.4 for a discussion of the emphasis that more recent decisions have placed on the public's commercial interests in applying the public trust doctrine to other resources.

308. See Wood, *supra* note 11, at 352 ("Atmospheric health is essential to all civilizations and to human survival across the globe.").

309. U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 61–70 (2009).

310. Remnick, *supra* note 56.

311. *Id.*

natural resources that guarantee public access to water.³¹² Global temperature changes due to atmospheric damage threaten the operation of the water cycle, and with it the public's access to water.³¹³ Higher surface temperatures caused by atmospheric warming lead to higher levels of evaporation from lakes and seas and allow the atmosphere to retain more moisture.³¹⁴ This in turn affects the frequency and intensity of rainfall, which contributes to flooding in some areas and drought in others.³¹⁵ These droughts and floods prevent the public from gaining access to water—at least in clean, safe, reliable and manageable flows. Just as the California Supreme Court found that Mono Lake's tributaries fell within the scope of the public trust doctrine in order to preserve both the lake and its ecosystem,³¹⁶ courts should apply the public trust doctrine to the atmosphere in order to ensure the public's continued access to clean, safe water.

Finally, several state constitutions implicitly require that the public trust doctrine apply to the atmosphere. A handful of state constitutional provisions declare that the state is responsible for the preservation of “all . . . natural resources” or “public natural resources.”³¹⁷ The atmosphere is unquestionably a natural resource that is available to the public. These provisions therefore provide a basis for the application of the public trust doctrine to the atmosphere. This is what the *Bonser-Lain* trial court recognized when it found a specific basis for the application of the public trust doctrine to the atmosphere in article XVI of the Texas constitution.³¹⁸ Similarly, the Alaska Supreme Court—though declining to consider plaintiffs' claims—acknowledged that it was equipped to consider whether the public trust doctrine applied to the atmosphere because the doctrine was grounded in article VII of the state's constitution.³¹⁹

Opponents argue that the public trust doctrine should not apply to the atmosphere because federal statutes such as the Clean Air Act preempt the public trust doctrine.³²⁰

312. See *supra* Part II.A.2 for a discussion of courts' application of the public trust doctrine to many types of water and otherwise publically-accessible resources.

313. U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 309, at 41–43.

314. *Id.* at 41.

315. *Id.* at 42–45. Over the past fifty years, for example, the severity and duration of droughts in the Southwest United States has increased markedly. *Id.* at 42. Additionally, rising temperatures in cooler regions cause snowpacks to melt earlier in the year, resulting in decreased streamflow during the hotter summer months. *Id.* at 45; see also HANSEN ET AL., *supra* note 7, at 15 (“A warmer atmosphere holds more moisture, so heavy rains become more intense, bringing more frequent and intense flooding. Higher temperatures, on the other hand, increase evaporation and intensify droughts . . .”).

316. See *supra* notes 67–72 for a discussion of the court's holding and rationale in *National Audubon Society*.

317. TEX. CONST. art. XVI, § 59 (emphasis added); PA. CONST. art. I, § 27 (emphasis added).

318. *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated sub nom. Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 428 S.W.3d 887 (Tex. Ct. App. 2014). Conversely, the Alaska Superior Court rejected this argument when it found that the state constitution did not create a public trust per se, but rather adopted certain trust principles that guaranteed public access to the state's fish, wildlife, and water resources. *Kanuk v. Alaska Dep't. of Natural Res.*, No. 3AN-11-07474, 2012 WL 8262431, at *4 (Alaska Super. Ct. Mar. 16, 2012), *aff'd*, No. S-14776, 2014 WL 4494394 (Alaska Sept. 12, 2014).

319. *Kanuk v. Alaska Dep't of Natural Res.*, No. S-14776, 2014 WL 4494394, at *7–8 (Alaska Sept. 12, 2014).

320. See, e.g., Washburn & Núñez, *supra* note 12, at 26 (arguing that federal statutes such as the Clean

However, in its evaluation of a nuisance claim concerning the effect of greenhouse gas emissions on air quality, the Supreme Court deliberately left open the question of whether federal law preempts state common law.³²¹ Because the Supreme Court did not address the issue, lower courts retain the discretion to determine the interplay between federal legislation and states' duties under the common law public trust. Accordingly—despite being expressed in what was ultimately an advisory opinion—the Texas District Court correctly explained that the federal Clean Air Act did not preempt state laws.³²² Rather, as the court explained, the Clean Air Act provides baseline requirements that the states were permitted to exceed if they so desired.³²³

Opponents also argue that while the public trust doctrine may apply to resources like lakes and rivers, it is ill suited for a resource like the atmosphere, which has no borders. For one, they contend, the public trust doctrine has never been applied to transboundary responsibilities like the atmosphere or the ocean. Furthermore, pollution of the atmosphere may come from multiple sources beyond the state and its regulatory reach.³²⁴ This argument is unpersuasive because many rivers flow through multiple states and yet are considered trust resources within individual states. More importantly, state statutes designed to protect air quality demonstrate that the atmosphere is not beyond the ability or the interest of the states to regulate. Indeed, the Louisiana Supreme Court found that the state's Environmental Affairs Act, which calls for "regulation of water control, air quality, solid and hazardous waste, scenic rivers and streams, and radiation," stems directly from Louisiana's public trust mandate.³²⁵ Similarly, the Texas Clean Air Act requires the state to "safeguard [its] air resources from pollution by controlling or abating air pollution and emissions of air contaminants."³²⁶ The *Bonser-Lain* trial court cited this legislation directly in its decision to apply the public trust doctrine to the atmosphere.³²⁷ These statutes demonstrate that legislatures are already committed to protecting resources that cannot be defined by artificial state boundaries. Applying the public trust doctrine to resources like the atmosphere would only reinforce the regulations already in place.

In sum, courts should apply the public trust doctrine to the atmosphere because it serves the public's environmental and commercial interests. Courts have also expanded the public trust doctrine in the past to resources that, like the atmosphere, are directly linked to the public's ability to access public waters. And several state constitutions

Air Act and other regulatory schemes preempt state law in the arena of the public trust doctrine).

321. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540 (2011) (leaving open for consideration the question of preemption because none of the parties had briefed the issue or otherwise addressed the availability of state nuisance law claims).

322. *Bonser-Lain*, 2012 WL 3164561.

323. *Id.*

324. Andrew J. Marks, *Climate Change Lawsuits Under the Public Trust Doctrine in the Wake of AEP v. Connecticut*, 13 A.B.A. ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL. 10, 13 (2011).

325. *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 1154–55 (La. 1984). The court construed LA. REV. STAT. ANN. § 30:1053, which has since been redesignated LA. REV. STAT. ANN. § 30:2002 (West 2014).

326. TEX. HEALTH & SAFETY CODE ANN. § 382.002 (West 2014).

327. *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated sub nom.* *Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 428 S.W.3d 887 (Tex. Ct. App. 2014).

provide a legal basis for the extension of the public trust doctrine to the atmosphere. Furthermore, federal law does not preempt the application of the public trust doctrine to the atmosphere, and states also have the demonstrated regulatory authority to protect it. For all of these reasons, the public trust doctrine should apply to the atmosphere, as several courts have hinted, implied, or assumed.

V. THE PUBLIC TRUST DOCTRINE DOES NOT REQUIRE STATES TO CORRECT ALLEGED FAILURES TO PROTECT THE ATMOSPHERE, ONLY TO CONSIDER THE FUTURE IMPACT OF THEIR ACTIONS

While courts should apply the public trust doctrine to the atmosphere, they cannot rely on the doctrine to compel states to implement remedial regulations that would reduce greenhouse gas emissions. Such an order would require courts to engage in scientific and political decisions that are beyond the scope of their authority. All of the courts that have so far decided on the atmospheric trust issue have properly recognized this. Nonetheless, extending the public trust doctrine to the atmosphere requires state governments to consider how their decisions will affect the atmosphere going forward. In this way, the public trust doctrine will help to provide future protection for the atmosphere even if it cannot be used to repair past damage.

A. *The Public Trust Doctrine Cannot Be Used To Correct States' Failure To Protect the Atmosphere Because States Have Not Actively Deprived the Public of Its Use*

Courts cannot invoke the public trust doctrine to require their states to improve atmospheric health because no state legislature has taken affirmative steps to deprive the public of its interest in the atmosphere. The public trust doctrine is primarily a restraint on alienation—it prohibits state governments from managing public resources in ways that will deprive the public of their use.³²⁸ It also requires states only to correct *actions* that violate this mandate.³²⁹ No court has found that a state's *inaction* or failure to protect a natural resource violates the public trust doctrine such that it requires a judicial remedy.³³⁰ Nor have courts invoked the public trust doctrine to compel their respective states to maintain the quality of a natural resource.³³¹ As the Supreme Court of Alaska explained, its “past application of public trust principles has been as a restraint on the State’s ability to restrict public access to public resources, not as a theory for compelling regulation of those resources.”³³²

Thus, in the absence of an affirmative violation of state constitutional, legislative, or common law, a court will not have a legal basis for requiring the state to implement

328. See *supra* notes 36–45 and accompanying text for a discussion of the parameters of the public trust doctrine.

329. See *supra* Part II.B.1 for a discussion of courts’ use of the public trust doctrine to address state actions but not state inaction.

330. See *supra* notes 116–31 and accompanying text for a discussion of courts’ reluctance to find a violation of the public trust doctrine based on a failure to fulfill an alleged public trust duty.

331. See *supra* Part II.B.2 for a discussion of courts’ refusal to use the public trust doctrine to compel state action.

332. *Kanuk v. Alaska Dep’t of Natural Res.*, No. S-14776, 2014 WL 4494394, at *9 (Alaska Sept. 12, 2014).

regulations for improving atmospheric health. The Washington Court of Appeals dismissed the atmospheric trust claim before it for precisely this reason.³³³ Likewise, the Arizona Court of Appeals dismissed its atmospheric trust claim because the plaintiff implicated no constitutional violation and presented no basis upon which the court could determine that state inaction violated the law.³³⁴ Because no state has affirmatively inhibited the public's access to or use of the atmosphere, courts lack the authority to compel their states to act.

B. Courts Will Not Use the Public Trust Doctrine To Order States To Implement Emissions-Reductions Goals Because These Orders Would Require Courts To Engage in Scientific and Political Debates

Even if the public trust doctrine imposed an affirmative duty on states to protect the atmosphere in the absence of adverse action, courts should not use it to compel states to adopt strict emissions reductions goals. For one, such a decision would require the judiciary to evaluate complex scientific data to determine appropriate carbon emission levels and how to achieve them.³³⁵ These are exactly the types of agency-like functions that courts have found they are ill equipped to perform.³³⁶ Indeed, the *Alec L.* trial court properly concluded that the regulation of greenhouse gas emissions lay not with the judiciary, but with agencies that have the knowledge, resources, and congressional authority to regulate them.³³⁷

Second, courts will not use the public trust doctrine to implement emissions reductions goals because such actions would require them to engage in political discussions that are also beyond their scope of authority. As discussed above, the public trust doctrine is not a discrete mandate that requires states to manage natural resources in compliance with a prescribed regulatory framework.³³⁸ In order for a court to find that its state has violated the public trust doctrine through a failure to protect the atmosphere, it would have to determine: (1) what type of failure constitutes a violation, and (2) the remedy necessary to correct it.³³⁹ These are not only scientific issues but also political ones that environmental activists, oil company executives, and everyone

333. See *Svitak v. State*, No. 69710-2-1, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013) (“[T]he State’s inaction does not violate any specific constitutional provision or other law on which relief can be granted. . . . Because *Svitak* does not challenge the constitutionality of the statute or identify a constitutional basis from which we could find the State’s inaction to be unconstitutional, there is no actual dispute.”).

334. See *supra* notes 236–43 and accompanying text for a discussion of *Butler ex rel. Peshlakai v. Brewer*.

335. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16–17 (D.D.C. 2012), *aff’d sub nom. Alec L. v. McCarthy*, 561 F. App’x 7 (D.C. Cir. 2014).

336. See *supra* Part II.B.2 for a discussion of courts’ unwillingness to conduct scientific and technical inquiries.

337. *Alec L.*, 863 F. Supp. 2d at 16. The court added that not “every dispute is one for the federal courts to resolve, nor does it mean that a sweeping court-imposed remedy is the appropriate medicine for every intractable problem.” *Id.* at 17.

338. See *supra* notes 145–56 and accompanying text regarding the insufficiency of the public trust doctrine as a legal basis to support failure-to-act claims.

339. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) (explaining that imposing emissions reduction requirements on private power companies would require the Court to determine what constitutes reasonable carbon dioxide levels as well as practical and feasible reduction levels).

in between is likely to consider differently based on his or her interests.³⁴⁰ Allowing the judiciary to decide these issues would therefore entail political decision making that is better left to the legislative and executive branches.

In resolving their respective atmospheric trust claims, many courts declined to order states to revise their regulations because they recognized that environmental regulations exceeded the scope of their authority. As explained above, the Alaska Superior Court concluded that it was “not the judiciary’s role to determine whether the State of Alaska should reduce carbon dioxide emissions by 6% each year,” and that it was “ill-equipped to make such policy decisions” that consider scientific findings, but not competing interests such as energy needs and potential economic disruption.³⁴¹ The Washington Court of Appeals stated that imposing new greenhouse gas regulations on the state “would necessarily involve resolution of complex social, economic, and environmental issues” that would invade authority of the legislative branch.³⁴² The Oregon Circuit held that determining emission reduction goals is for the legislature, not the judiciary.³⁴³ And the District Court of New Mexico stated that the key to improving atmospheric health was “to elect people who believe that greenhouse gases are a problem, that man does contribute to climate change, and that those are the people who should be making policy decisions.”³⁴⁴ It stated decisively that that was “a political decision, not a Court decision.”³⁴⁵

Even the *Bonser-Lain* trial court, though finding that the atmosphere fell within the scope of the public trust doctrine, correctly declined to compel the TCEQ to adopt new environmental regulations.³⁴⁶ In denying the plaintiff’s petition for rulemaking, the court found that the defendant reasonably exercised its discretion when it denied the plaintiff’s original petition.³⁴⁷ The court implicitly recognized that compelling a state agency to implement rules as part of its public trust duties would require the courts to assume the type of agency functions that other courts have denounced.³⁴⁸

340. See *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 603–05 (Cal. Ct. App. 2008) (discussing the county’s efforts to balance the public’s interest in renewable energy against the importance of protecting wildlife before constructing a windmill farm).

341. *Kanuk v. Alaska Dep’t of Natural Res.*, No. 3AN-11-07474, 2012 WL 8262431, at *5 (Alaska Super. Ct. Mar. 16, 2012). The Alaska Supreme Court affirmed on the same grounds. *Kanuk v. Alaska Dep’t of Natural Res.*, No. S-14776, 2014 WL 4494394, at *6–7 (Alaska Sept. 12, 2014).

342. *Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013).

343. *Chernaik v. Kitzhaber*, No. 16-11-09273, 2012 WL 10205018, at *7 (Or. Cir. Ct. Apr. 5, 2012), *rev’d*, 328 P.3d 799 (Or. Ct. App. 2014). The Court of Appeals reversed on the grounds that plaintiffs’ request for declaratory relief was justiciable. *Chernaik v. Kitzhaber*, 328 P.3d 799, 807 (Or. Ct. App. 2014). Nonetheless, it explained that once the trial court determined whether the atmosphere was a public trust resource, the state would determine the extent of its duties to protect it. *Id.*

344. *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514, slip op. at Ex. A, TR-4 (N.M. Dist. Ct. June 26, 2013) (order granting Defendants’ Motion for Summary Judgment).

345. *Id.*

346. *Bonser-Lain v. Tex. Comm’n on Env’tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated sub nom. Texas Comm’n on Env’tl. Quality v. Bonser-Lain*, 428 S.W.3d 887 (Tex. Ct. App. 2014).

347. *Id.*

348. See *supra* notes 132–44 for a discussion of *Center for Biological Diversity* and *American Electric Power Co.*, which both cautioned against judicial involvement in agency-like decision making.

Thus, the atmospheric trust cases collectively show that even where the atmosphere is properly deemed a trust asset, questions such as what constitutes a violation of the duty to protect the atmosphere and how to remedy it are political and scientific issues best left to legislatures and executive agencies to resolve.

C. *The Public Trust Doctrine Will Help To Protect the Atmosphere by Requiring States To Consider and Mitigate the Impact of Their Actions in the Future*

The foregoing arguments demonstrate that while the public trust doctrine should apply to the atmosphere, courts will not use it to correct damage to the atmosphere from the state's alleged failure to protect it. The application of the public trust doctrine to the atmosphere would seem irrelevant, then, because unless a state legislature actively deprives the public of its right to use the atmosphere, the public trust doctrine will never come into play. This is not the case. State courts' application of the public trust doctrine to the atmosphere would require state governments to at least consider how their actions will affect the atmosphere before acting and to mitigate adverse consequences.³⁴⁹

Under the public trust doctrine, many states have a duty to at least weigh the costs of their actions against the benefits to society before taking action with respect to public trust resources.³⁵⁰ Applying the public trust doctrine to the atmosphere means that, going forward, legislatures and agencies would be required to weigh the benefits of their actions to society against potential harm to the atmosphere. For example, before authorizing the construction of a new power plant, legislators would be required under the public trust doctrine to consider how much pollution it would release into the atmosphere, in addition to financing costs, job creation, and the fulfillment of energy needs. This type of reflection would allow lawmakers to balance scientific findings against other social factors, a role that courts are unwilling to accept.³⁵¹ Adherence to the public trust doctrine would also require the state to reduce the plant's greenhouse gas emissions as much as possible before authorizing its operation. Litigants would likely not be able to rely on the public trust doctrine to challenge the state's failure to do more to prevent atmospheric damage or to correct past damage. Nonetheless, applying the public trust doctrine to the atmosphere would require lawmakers and regulators to consider the effects of their actions on the public's enjoyment of the atmosphere. In this way, applying the public trust doctrine to the atmosphere would support legislation procedures designed to protect environmental resources.³⁵²

349. See *supra* Part II.B.3 for a discussion of the considerations that the public trust doctrine requires the legislature to take into account before deciding on particular uses of trust resources.

350. See *supra* Part II.B.3 for a summary of the duty the public trust doctrine imposes on states to consider potentially adverse consequences of their decisions.

351. See, e.g., *Kanuk v. Alaska Dep't of Natural Res.*, No. 3AN-11-07474, 2012 WL 8262431, at *4-5 (Alaska Super. Ct. Mar. 16, 2012) (stating that the judiciary was ill-equipped to consider policy decisions that consider scientific findings, but not competing interests such as energy needs and economic effects), *aff'd*, No. S-14776, 2014 WL 4494394 (Alaska Sept. 12, 2014).

352. See *supra* note 162 for a discussion of the steps that the National Environmental Protection Act requires state actors to take before deciding how to use natural resources.

The procedures underlying Iowa's atmospheric trust case demonstrate what application of the public trust doctrine to the atmosphere might look like in practice. Before the Iowa plaintiffs resorted to the courts, they submitted a petition to the Iowa Department of Natural Resources' Environmental Protection Commission to implement new emissions reductions goals.³⁵³ At a public meeting, the Commission heard presentations from representatives both for and against the petition.³⁵⁴ The members of the Commission voted unanimously to deny the petition for rulemaking.³⁵⁵ The director of the Department then issued a written denial of the petition, citing several specific reasons for its decision.³⁵⁶ Although the Commission denied the plaintiffs' petition, they at least had a fair chance to inform the Commission of the dangers of greenhouse gas emissions. Applying the public trust doctrine to the atmosphere will ensure that other state agencies and legislatures take similarly appropriate measures to consider the ramifications of their actions when it comes to the health of the atmosphere, and decide in a public process what is in the best interests of the state.

Moreover, applying the public trust doctrine to the atmosphere would provide a means for relief in extreme cases of clearly adverse action against the atmosphere. As the New Mexico District Court explained, "if there was an indication that the political process had gone astray, that [legislators] had ignored what they were supposed to do, or if [an] agency was not attempting to apply the statutory scheme, or if the public was excluded from the processes," the public trust doctrine would permit the court to intervene and compel state action.³⁵⁷

Thus, applying the public trust doctrine to the atmosphere would help to provide a first line of defense by reinforcing regulations and procedures designed to protect the environment and to fully consider the best interests of the public. It would also bolster the last line of defense, providing plaintiffs with a legal mechanism to challenge states' misconduct or neglect of their statutory duties.

VI. CONCLUSION

Most would agree that the plaintiffs' efforts in the atmospheric trust cases were admirable. The atmosphere is an important natural resource that sustains all life on the planet. It therefore requires protection from human activities that have at least contributed to global warming.

From a legal standpoint, the public trust doctrine provides a strong mechanism for achieving such protection. Preserving the atmosphere undoubtedly serves the public interest, which is one of the public trust doctrine's main functions. It is also essential to commerce, which courts have considered when applying the public trust doctrine to new resources in the past. Furthermore, the atmosphere is inextricably linked to water,

353. *Filippone ex rel. Filippone v. Iowa Dep't of Natural Res.*, No. 12-0444, 2013 WL 988627, at *3 (Iowa Ct. App. Mar. 13, 2013).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514, slip op. at Ex. A, TR-1, 3-4 (N.M. Dist. Ct. June 26, 2013) (order granting Defendants' Motion for Summary Judgment).

access to which courts have attempted to preserve by applying the public trust doctrine to related resources such as beaches and streams. Finally, several states have already implicitly expanded the public trust doctrine to the atmosphere through constitutional provisions that apply it to all natural resources. All of these factors lead to the conclusion that the atmosphere is a public resource that each state has a duty to protect.

However, the public trust doctrine has its limits. Most importantly, it only applies to state actions, not states' failures to act. Thus, states' alleged failure to protect the atmosphere does not provide a basis for injunctive relief to correct past damage to the atmosphere. Even if the public trust doctrine imposed an affirmative duty on states to protect the atmosphere, courts will not rely on it to compel them to implement emissions reductions goals to correct past damage. Such actions would require the courts to act as agencies by venturing into scientific and political arenas beyond the scope of their authority. As a result, and as all of the courts correctly decided in their respective atmospheric trust cases, the public trust doctrine does not provide an effective mechanism for remedies. Nonetheless, it has the potential to provide a legal basis for protection of the atmosphere going forward by requiring state legislatures and agencies to account for the impact that their decisions will have on the atmosphere.

In short, the sky *is* the limit for the public trust doctrine. While courts can and should apply the public trust doctrine to the atmosphere itself, the public trust doctrine can only provide limited relief for states' failure to protect it.

