

No. 87198-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

***AMICUS CURIAE* MEMORANDUM
IN SUPPORT OF PETITIONERS**

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici curiae are law professors and scholars (listed on the signature page) who teach, research and write about environmental law, climate law, and the public trust doctrine, including two who teach courses devoted solely to the public trust. *Amici* have an interest in informing the Court about the role of the public trust doctrine in defining sovereign legal obligations to protect the atmosphere from greenhouse gas pollution. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.¹

SUMMARY OF THE ARGUMENT

The public trust doctrine is an inalienable attribute of sovereignty that requires government to act to prevent irrevocable harm to crucial natural resources owned in trust on behalf of the people. State governments are sovereign co-trustees of the nation's atmosphere and bear the fiduciary obligation to take expedient action to protect the atmosphere from dangerous greenhouse gas pollution so that it will continue to support the survival and welfare of present and future generations of citizens. A court's role under the public trust doctrine is to require agencies to protect the trust asset over which they exercise management authority. In this case, the scientific prescription for greenhouse gas

¹ The parties have consented to the filing of this brief. No person or party has made a monetary contribution towards the preparation or submission of this brief.

reduction necessary to preserve a habitable planet is set forth in the Declaration of Dr. James Hansen in support of Plaintiffs’ petition to the Washington Supreme Court for direct review of the superior court decision.

ARGUMENT

I. The Public Trust Doctrine as an Attribute of Sovereignty

The public trust doctrine holds that certain crucial natural resources are the shared, common property of all citizens, cannot be subject to private ownership, and must be preserved and protected by the government. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). As sovereign trustee of such resources, government has a fiduciary obligation to protect these natural assets for the beneficiaries of the trust, which include both present and future generations of citizens. *See Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892) (“The 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. The trust with which they are held, therefore, is governmental, and cannot be alienated”); *Geer v. Connecticut*, 161 U.S. 519, 534 (1896) (“[T]he ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will

best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.”) (quoting *Magner v. People*, 97 Ill. 320, 334 (Ill. 1881)); *In re Water Use Permit Applications (Waihole Ditch)*, 9 P.3d 409, 455 (Haw. 2000) (quoting *Ariz. Cent. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) (“The beneficiaries of the public trust are not just present generations but those to come.”)).

The public trust doctrine speaks to one of the most essential purposes of government: protecting natural resource assets for the common benefit of the citizenry. As Professor Joseph Sax suggested over four decades ago, the public trust responsibility underpins democracy itself, demarcating a “society as one of citizens rather than of serfs.” See Sax, *supra*, at 484. As recently as 2012, in *PPL Montana, LLC v. Montana*, the Supreme Court recognized that the public trust doctrine “is of ancient origin” dating back to Roman civil law; that the public trust doctrine is found in state laws throughout our nation; and that federalist principles of our nation affirm the state’s rights and duties over public trust resources within their borders. *PPL Montana, LLC v. Montana*, 565 U.S. --, 132 S. Ct. 1215, 1235-36 (2012). The public trust is also a central principle in legal systems of many other countries throughout the world. Professor Michael Blumm concludes in a recent article that the doctrine

internationally “incorporates the principles of precaution, sustainable development, and intergeneration equity in the process.”²

The public trust doctrine is as an attribute of sovereignty itself. *See, e.g., Geer*, 161 U.S. at 527 (describing the sovereign trust over wildlife resources as an “attribute of government”); *Ill. Cent. R.R.*, 146 U.S. at 455; *Arnold v. Mundy*, 6 N.J.L. 1, 76-77 (N.J. 1821); *Waihole Ditch*, 9 P.3d at 443 (“[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority”); *see also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?* 35 Colum. J. Envtl. L. 287, 311 (2010) (“The idea that public trust limits and powers inhere in the very nature of sovereignty is one consistent thread in public trust cases.”); 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, 69 (2009) (describing the public trust as a “fundamental, organic attribute of sovereignty itself.”). As a limitation on sovereignty, the trust “can only be

² Michael C. Blumm & Rachel D. Guthrie, *Internationalization of the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. Davis L. Rev. 741, 807 (2012); *see also* Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C. Blumm, Patrick Parenteau, & Peter H. Sand, *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, Env’t, Sept./Oct. 2010, at 12 (functional equivalents of public trusteeship are evident in many civil law systems); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Envtl. L. J. 711, 746 (2008).

destroyed by the destruction of the sovereign.” *U.S. v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981). In its seminal public trust case, *Illinois Central*, the Supreme Court emphasized that, like the police power, the public trust doctrine is a foundational principle of government. It declared that legislatures may not repudiate, abridge, or surrender their trust obligation:

The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.

Ill. Cent. R.R., 146 U.S. at 453, 460. Thus the Court recognized that the trust doctrine imposed governmental duties as well as governmental authority.

The public trust doctrine assumes Constitutional force as an inherent attribute of sovereignty. By analogy, courts have made clear that the police power is an essential Constitutional element, whether explicitly expressed or not. *State ex. rel. City of Minot v. Gronna*, 59 N.W.2d 514,

531–32 (N.D. 1953) (“The police power is an attribute of sovereignty inherent in the states of the American union, and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society. The constitution supposes the pre-existence of the police power, and must be construed with reference to that fact.”) (citations omitted) (internal quotation marks omitted); *see also City of New Orleans v. Bd. of Comm’rs of Orleans Levee Dist.*, 640 So.2d 237, 249 (La. 1994) (“The principle of constitutional law that a state cannot surrender, abdicate, or abridge its police power has been recognized without exception by the state and federal courts.”).

The essence of the trust responsibility is the sovereign fiduciary duty to protect the public’s crucial assets from irrevocable damage. *See Geer*, 161 U.S. at 534 (quoting *Magner v. People*, 97 Ill. 320, 334 (Ill. 1881)) (“[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 people of the state.”); *see also State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (“[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of the trust property.”); *Nat’l Audubon Soc’y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 724 (Cal. 1983)

(describing the public trust as “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands”). Under well-established core principles of trust law, trustees have a basic duty not to sit idle and allow damage to the trust property. As one leading treatise explains, “[t]he trustee has a duty to protect the trust property against damage or destruction.” George G. Bogert, et al., *Bogert’s Trusts and Trustees*, § 582 (2011); see also *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) (“The trust reposed in the state is not a passive trust; it is governmental, active, and administrative [and] . . . requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.”); *Just v. Marinette Cnty.*, 201 N.W.2d 761, 768 (Wisc. 1972) (emphasizing an “active public trust duty” on the part of the state, including the duties “to eradicate the present pollution and prevent further pollution” and “to protect and preserve” the natural resource held in trust). Notably, these obligatory fiduciary duties differ from the permissive nature of administrative discretion under statutory law. By sitting idle in the face of calamitous planetary ecological crisis, state governments are abdicating their Constitutional responsibilities as sovereign trustees to protect the climate for today’s citizens and for future generations.

II. The Air and Atmosphere as Public Trust Assets

The history, principles, and intent of the public trust doctrine compel this court’s recognition of the atmosphere as one of the crucial assets of the public trust. The public trust doctrine requires the state to protect those ecological resources necessary for public survival and welfare. Stemming from the “public character of the property,” *Ill. Cent. R.R.*, 146 U.S. at 456, these resources are owned in common by the people and must be maintained, protected, and preserved by the state for the public interest. The resources that fall within the protective scope of the public trust are traditionally those that “are so central to the well-being of the community that they must be protected by distinctive, judge-made principles.”³ Rather than restrictively delimiting the covered assets, courts have articulated principles that have guided the evolution of public trust property over time.

In *Illinois Central*, the Supreme Court established the analytical framework with its seminal characterization of public trust assets as those that present “a subject of public concern to the whole people of the state.” 146 U.S. at 455. Describing public trust assets as “public property, or property of a special character,” the Court said they “cannot be placed entirely beyond the direction and control of the state” and, for the sake of

³ Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 315 (1980).

public welfare, should not be subject to private ownership. *Id.* at 454.

Courts look to the needs of the public in defining the scope of the trust resources.

In the late 1800s, at the time of *Illinois Central*, the natural resources deemed to be of greatest threat and in scarcest supply were principally water-based – ones implicating fishing, navigation, and commerce interests at the economic heart of a westward expanding American economy. The specter of corporate privatization of the Chicago harbor led Justice Field in *Illinois Central* to characterize submerged lands as “a subject of concern to the whole people” clothed with sovereign trust interests compelling protection. *Id.* at 455.

Consistent with *Illinois Central*, over time courts have expanded the reach of the public trust doctrine to protect other categories of public resources as their integrity has come under threat.⁴ In the 19th century, courts expanded public navigation rights from tidal waters to inland waters that were navigable-in-fact. *See The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851); *see also* Michael C. Blumm, *The Public Trust Doctrine – A Twenty-First Century Concept*, 16 *Hastings W.-Nw. J. Envtl. L. & Pol’y* 105 (2010) (describing evolution of the trust). As the New Jersey Supreme Court noted, the doctrine of the public trust is not “fixed or

⁴ Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 *Envtl. L.* 425, 465-66 (1989) (noting expansion of the public trust doctrine).

static,’ but one to be ‘molded and extended to meet changing conditions and needs of the public it was created to benefit.’” *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984) (citation omitted); *see also Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (“In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.”). Courts have mobilized the doctrine to respond to new sets of societal concerns, including ecological and recreational interests. *See, e.g., Nat’l Audubon Soc’y*, 658 P.2d at 719. In the process, they have recognized public trust assets beyond the navigable waterways at issue in *Illinois Central* to protect resources as diverse as non-navigable tributaries, groundwater, wetlands, dry sand areas, and wildlife.⁵

Despite the sheer novelty of climate change as an imminent threat to human survival – and ultimately, to civilization itself – the notion of air as a public trust resource is as old as the ancient foundations of our legal system. The Roman originators of the public trust doctrine classified air – along with water, wildlife, and the sea – as “res communes,” or “things which remain common.” *Geer*, 161 U.S. at 525 (““These things are those

⁵ *See, e.g., Nat’l Audubon Soc’y*, 658 P.2d at 721 (non-navigable tributaries); *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (state holds wildlife in trust “for all citizens”); *State v. Gillette*, 621 P.2d 764, 767 (Wash. Ct. App. 1980) (food fish held in trust “for the common good”); *Matthews*, 471 A.2d at 365 (dry sand area); *Robinson v. Ariyoshi*, 658 P.2d 287, 311 (Haw. 1982) (groundwater); *Just*, 201 N.W.2d at 769 (wetlands).

which the juriconsults called ‘res communes’ . . . the air, the water which runs in the rivers, the sea, and its shores. . . . [and] wild animals.”); *see also Matthews*, 471 A.2d at 360 (N.J. 1986) (quoting Justinian, *Institutes* 2.1.1 (533) (T. Sandars trans. 1st Am. ed. 1876) (“The genesis of [the public trust doctrine] is found in Roman jurisprudence, which held that ‘[b]y the law of nature’ ‘the air, running water, the sea, and consequently the shores of the sea,’ were ‘common to mankind.’”).

Roman law recognized that “[i]ndividual control of some resources would run counter to what the Romans conceived of as their natural purpose, and this property could not therefore be subject to private ownership.”⁶ In *Geer*, the Court relied on this ancient Roman law classification of “res communes” to find the public trust doctrine applicable to wildlife. 161 U.S. at 523-525. Just a few years later, the Court similarly recognized the states’ sovereign property interests in air and found such interests supreme to private title. In *Georgia v. Tennessee Copper Co.*, the Court upheld an action by the State of Georgia against Tennessee copper companies for transboundary air pollution, declaring that “the state has an interest independent of and behind the titles of its citizens, in all the earth *and air* within its domain.” 206 U.S. 230, 237

⁶ Gerald Torres, *Who Owns the Sky?*, 19 Pace Envtl. L. Rev. 515, 529 (2002).

(1907) (emphasis added). State courts have likewise discussed “the purity of the air” and the climate as part of the public trust.⁷

The notion of the atmosphere as a quintessentially public resource subject to government stewardship is a settled feature of American law. Like waterways, air lends itself to navigability, which presents a classic trust interest articulated in the original public trust decisions of this nation. *See Ill. Cent. R.R.*, 146 U.S. at 452 (“It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . .”). Absent public ownership of navigable airspace, this critical resource could have been the subject of private monopolies. In *U.S. v. Causby*, the Supreme Court warned, “[t]o recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which *only the public has a just claim.*” 328 U.S. 256, 261 (1946) (emphasis added). Not surprisingly, given the crucial public interest in air, numerous state constitutions and codes explicitly recognize air as part of

⁷ *Nat’l Audubon Soc’y*, 658 P.2d at 719 (“purity of the air” protected by the public trust); *Marks*, 491 P.2d at 380 (recognizing tidelands as public trust environments “which favorably affect the scenery and climate of the area.”); *Matthews*, 471 A.2d at 361 (quoting Chief Justice Kirkpatrick) (stating that the “common property available to all citizens” includes “the air, the running water, the sea, the fish and the wild beasts”).

the *res* of the public trust.⁸ Moreover, federal statutory already includes air as a trust asset for which the federal government, states, and tribes can gain recovery of natural resource damages.⁹

Never before has the nation’s climate system been threatened. But throughout history, law has evolved as courts respond to unforeseen, often urgent, circumstances. The same fiduciary principles that have informed all historic public trust cases apply with force to protect the atmosphere. As the Supreme Court said in applying the public trust to an unprecedented set of circumstances in *Illinois Central*,

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which

⁸ See, e.g., *Her Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (citing a Michigan statute that codifies the public trust to include “air, water and other natural resources” and Mich. Const., art. IV § 52, stating, “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people.”); Haw. Const., art. XI, § 1 (“All public natural resources are held in trust by the State for the benefit of the people,” and “the State and its political subdivisions shall conserve and protect Hawaii’s . . . natural resources, including land, water, air, minerals and energy resources”); R.I. Const., art. I, § 17 (duty of legislature to protect air), interpreted as codification of Rhode Island’s public trust doctrine in *State ex. rel. Town of Westerly v. Bradley*, 877 A.2d 601, 606 (R.I. 2005).

⁹ See 42 U.S.C. § 9601 (CERCLA) (2006) (defining air as among the natural resources subject to trust claims for damages).

declare that such property is held by the state, by virtue of its sovereignty, in trust for the public.

146 U.S. at 455. Although conditions change with time, the basic task and the principles that inform judicial discretion remain constant. This court possesses solid legal rationale upon which to base recognition of the atmosphere as a vital and appropriate asset falling within the scope of the public trust doctrine.

CONCLUSION

The public trust doctrine plainly applies to protect the nation's air and atmosphere, both of which are crucial resources needed for the survival and welfare of present and future generations. Government co-trustees thus owe a fiduciary obligation under the public trust doctrine to take immediate action to abate dangerous greenhouse gas pollution that threatens the air, atmosphere, and climate system.

RESPECTFULLY SUBMITTED this 8th day of August, 2012,

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DECLARATION OF SERVICE

I, Greg Costello, hereby declare that on this day I caused this *Amici Curiae* Memorandum in Support of Petitioners to be served on the Respondents via electronic mail in accordance with the parties' electronic service agreement.

Stated under oath this 8th day of August, 2012, in Seattle Washington.

 s/ Greg Costello
Greg Costello