

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.

**STATEMENT OF GROUNDS IN SUPPORT OF DIRECT REVIEW
BY THE WASHINGTON SUPREME COURT**

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I. NATURE OF THE CASE & DECISION

This is an action for declaratory and injunctive relief under the Uniform Declaratory Judgment Act, RCW 7.24, for breach of the state's fiduciary obligation to protect the atmosphere and other public trust resources from the effects of climate change. The appellants seek a declaration that (1) the State of Washington holds the atmosphere in trust for the present and future citizens of the state of Washington pursuant to the public trust doctrine; (2) the state of Washington has an affirmative fiduciary duty to protect and preserve public trust resources (navigable waters, lakes, streams, tidelands, shorelands, public lands, fish, wildlife and shellfish), including the atmosphere; (3) the state of Washington's fiduciary duty to protect public trust resources is defined by the best available science; and (4) the state of Washington is not complying with its responsibilities to protect public trust resources from the harm caused by climate change. The appellants also seek injunctive relief directing the respondents to exercise and implement their fiduciary duties to protect public trust resources, including the atmosphere, by developing a plan to protect trust resources from substantial impairment.

On May 18, 2011, the youth appellants filed an amended complaint. On June 24, 2011 the state respondents filed their answer to the amended complaint. On September 16, 2011, the state defendants

moved to dismiss the case for lack of subject matter jurisdiction and for failing to state a claim for which relief can be granted. After briefing was complete, the superior court heard oral argument on February 17, 2012. At the hearing, the superior court did not issue a ruling from the bench nor did it make oral findings of fact or conclusions of law on the record. The court did, however, note that “[i]t’s obviously a very important case for everyone.” Transcript of Oral Argument at 31:9, *Svitak et al. v. State et al.* (No. 11-2-16008-4)¹ (attached to this statement as Appendix A). The court then asked the parties whether “any thought [had] been given, regardless of the outcome, to certifying this matter up . . . to a higher court for a determination on the special issues regardless of which way the Court goes?” *Id.* at p. 32: 5-8.

On February 29, 2012, the superior court issued a written order dismissing the case, again without making any findings of fact or conclusions of law setting forth the reason(s) for the dismissal. A true and correct copy of the superior court’s decision is attached to this statement as Appendix B. A notice of appeal was filed on March 29, 2012. This statement of grounds is supported by the attached declaration of Dr. James Hansen, which is attached to this statement as Appendix C, and is submitted solely to support the appellants’ claim that this case presents a

¹ A full copy of the transcript of the hearing on the motion to dismiss will be provided to the Court at a later date. RAP 9.5.

“fundamental and urgent issue of broad public import” that demands direct review by this Court. RAP 4.2(a)(4).

II. ISSUES PRESENTED FOR REVIEW

A. This Court in *Caminiti v. Boyle*, 107 Wash.2d 662, 732 P.2d 989 (1987), held that under the public trust doctrine, the State exerts sovereignty and dominion over the tidelands and shorelands in the State and holds such resources in trust for the public. Does the public trust doctrine also apply to the atmosphere as an essential, common natural resource?

B. In *Caminiti*, 107 Wash.2d. at 670, 732 P.2d at 994-95, this Court clarified that compliance with the public trust doctrine requires the State to retain adequate control of the trust resource in a way that prevents substantial impairment to the resource and that ensures public access for trust purposes. Does this standard require the State to take affirmative action to protect trust resources (shorelands, tidelands, shellfish, atmosphere, etc.) from the harmful effects of climate change?

C. Does the requested injunctive relief violate the separation of powers doctrine?

D. Does the UDJA confer jurisdiction on the superior court to hear a public trust suit against the state respondents?

III. GROUNDS FOR DIRECT REVIEW

Direct review is proper because this case involves “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” RAP 4.2(a)(4). There is no more fundamental and urgent issue facing the present and future generations of Washington citizens than climate change. As the state legislature itself has recognized, “emissions must be reduced significantly below current levels to avert catastrophic climate change.”²

In spite of this recognition of the impending catastrophe, our sovereign government has taken no meaningful action to require the reduction of emissions in a way that prevents substantial impairment of the essential natural resources held in trust for the public. This case presents the only opportunity for the judicial branch, as the branch of government charged with interpreting and applying the public trust doctrine, to address the scope of the State respondents’ legal obligations to take action to protect present and future generations of Washingtonians from harm due to climate change. Prompt relief through the courts is the only chance for the appellants – youth without voting rights -- to assert their rights as public trust beneficiaries and ensure that the State

² RCW 80.80.005(1)(b).

respondents do not deprive them of their present and future interests in the public trust resources of this state.

1. The Atmospheric Emergency: Urgent Action is Required

Today our planet's atmosphere is out of balance. Our atmosphere is being degraded and we are experiencing a warmer climate than any on this planet for the last 800,000 years. The atmosphere is now precariously close to "tipping points," like the melting of ice sheets and defrosting of tundra. According to the best available science, if a tipping point is reached, it will trigger the release of even more greenhouse gases making warming and harm to the atmosphere and other public trust resources irreparable and irreversible for the youth appellants and future generations of this State. *See* Declaration of Dr. James Hansen ("Hansen Decl.") ¶ 9 ("Earth's climate system will be pressed toward and past points of no return. Effective action remains possible, but delay in undertaking sharp reductions in emissions will undermine any realistic chance of preserving a habitable climate system.").

For the past 200 years, starting with the industrial revolution, the burning of fossil fuels, such as coal and oil, together with worldwide, massive deforestation have caused an enormous increase in the atmospheric concentrations of heat-trapping greenhouse gases or "GHGs." These gases prevent heat from escaping to space, like the glass panels of a

greenhouse. As the concentrations of these gases have continued to increase in the atmosphere, the Earth's temperature is climbing above Earth's safe climate zone. According to data from the National Oceanic and Atmospheric Administration ("NOAA") and the National Aeronautics and Space Administration ("NASA"), the Earth's average surface temperature has increased by about .67° to .8°C (1.2 to 1.4°F) in the last 100 years. However, the acceleration of that increase has intensified over the last thirty (30) years. In fact, the ten (10) warmest years on record (since 1850) have all occurred since 1995. To prevent atmospheric carbon dioxide concentrations from reaching dangerous levels that would be extremely difficult to reverse,³ it is essential that the State respondents act now to reduce emissions and draw down carbon dioxide from the atmosphere. *See* Hansen Decl. ¶ 10 ("Unless action is undertaken without further delay to return the atmospheric concentration of CO₂ to 350 ppm by 2100, Earth's climate system will be pressed toward and past points of no return.").

Climate change is a global phenomenon, but each sovereign government has an urgent, fundamental and inalienable responsibility to take action to protect the Earth's natural systems to allow human

³ *See* Hansen Decl. ¶ 6 ("The CO₂ concentration in the atmosphere, approximately 390 parts per million (ppm), is now at a level not seen on Earth for at least 3 million years.").

civilization to enjoy the climate it needs and that it has always enjoyed. *See* Hansen Decl. ¶ 4 (“Unless arrested by effective and immediate action, climate change will produce calamitous consequences for humanity and nature alike, as tipping points are reached and points of no return are crossed.”). In Washington, the public trust doctrine serves as the exclusive source of legal authority to ensure that the State of Washington acts to reduce its annual carbon dioxide emissions to draw down atmospheric carbon dioxide to the level necessary to prevent irreversible change. *See* Hansen Decl. ¶ 10. This is what is legally required to prevent substantial impairment, and potentially destruction, of many of the State’s judicially-recognized public trust resources.

Additional delay necessarily binds the hands of future representatives of the legislative branch, which is what the public trust doctrine is designed to prevent.⁴ This underscores the urgency of the

⁴ As a fundamental attribute of sovereignty, the public trust doctrine is reflected as a limitation on the government’s power to allow damage to a public trust asset. *See* Douglas L. Grant, Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad, 33 *Ariz. St. L. J.* 849 (2001). The public trust doctrine reflects an allocation of “power temporally within the legislative branch by preventing one legislature from impairing essential powers of a later legislature.” *Id.* at 872. The Supreme Court’s opinion in *Newton v. Commissioners* provided a foundation for the U.S. Supreme Court’s lodestar public trust opinion, *Illinois Central*, and stated: “Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying

crisis and the need for Supreme Court review without delay. It is undisputed that emissions reductions are required to avoid “catastrophic climate change,”⁵ but the required rate of emissions reductions increases every year the State respondents fail to take meaningful action. For example, “the required rate of emissions reduction would have been about 3.5% per year if reductions had started in 2005, while the required rate of reduction, if commenced in 2020 will be approximately 15% per year.” Hansen Decl. ¶ 16. In essence, not only are the State respondents kicking the can down the road for future generations to address, the can is getting so heavy that future generations will not be able to kick the can at all. This outcome violates the public trust doctrine because it constitutes an abdication of the State respondents sovereign dominion and control over public trust resources.

2. Substantial Impairment to Public Trust Resources in Washington: An Issue of Broad Public Import

Climate change is substantially impairing the public trust resources of our state. *See* Hansen Decl. ¶ 4 (“Global climate change is a

circumstances and present exigencies touching the subject involved may require.” 100 U.S. 548, 559 (1879). Therefore, one legislature cannot bind a future legislature in matters of crucial public concern. *See Ill. Central. R.R.*, 146 U.S. at 455. By continuing to abdicate its public trust duties, the state respondents will no longer have the ability to fulfill their sovereign obligation to protect public trust assets and the public’s interest in those assets because those assets will substantially impaired, if not destroyed if nothing is done to address climate change.

⁵ RCW 80.80.005(1)(b).

phenomenon that is already undermining human and natural systems, causing loss of life, and pressing species to extinction.”). In *Caminiti*, this court made it clear that the state holds the tidelands and shorelands in trust for the people of the State under the public trust doctrine. The Court acknowledged that the public trust doctrine is inherent in Washington law and has ancient origins: “the principle . . . is at least as old as the Code of Justinian, promulgated in Rome in the 5th Century AD.” *Caminiti*, 107 Wash.2d at 668-69, 732 P.2d at 989. Subsequent Washington judicial decisions have recognized that the public trust doctrine is a flexible legal doctrine designed to ensure that the State does not give up its dominion or control over critical natural resources. *See, e.g., Weden v. San Juan County*, 135 Wash.2d 678, 698, 958 P.2d 273 (1998) (quoting Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L.Rev. at 524) (“Since as early as 1821, the public trust doctrine has been applied throughout the United States ‘as a flexible method for judicial protection of public interests’”). In this State, the doctrine has been expanded from protection of societal uses of commerce and navigation to fisheries, recreation and environmental quality. *Weden v. San Juan County*, 135 Wash.2d, 678, 698, 958 P.2d 273 (1998). The Supreme Court is the appropriate body to judge the application of this flexible doctrine to the atmosphere in the face of the climate crisis.

The State respondents do not dispute the severity and urgency of the climate change crisis. Respondent Gregoire has proclaimed, “the effects of climate change are already being felt in the state of Washington in the form of average yearly temperatures rising faster over the 20th Century than the global average, mountain glaciers in the North Cascades losing up to a third of their area since 1950, snow pack in the Cascades declining by 35%, peak spring river runoff occurring ten to thirty days earlier and the proportion of stream flow that arrives in summer decreasing as much as 34% in sensitive river basins.”⁶ Respondent Gregoire has also declared that “Washington is particularly vulnerable to the impacts of climate change, and without additional action to reduce carbon emissions, the severity of the impacts will negatively affect nearly every part of Washington’s economy and environment.”⁷ The Washington Department of Ecology (“Ecology”) has warned that “the science is clear that we must move forward quickly to reduce greenhouse gas (GHG) emissions in order to mitigate its effects. Without action, climate change will negatively affect nearly every part of Washington’s economy through changes in temperature, sea level, and water availability.”⁸ More

⁶ Washington Executive Order 07-02 (Feb. 7, 2007).

⁷ Washington Executive Order 09-05 (May 21, 2009).

⁸ Department of Ecology Climate Policy Group, *Path to a Low Carbon Economy: An Interim Plan to Address Washington’s Greenhouse Gas*

recently, these generic concerns over climate change have been reframed as a growing moment of desperation for Washington waters and the shellfish growing there.⁹

To date, in spite of this recognition of the urgent need to address the climate crisis, as recent as December 2010, defendant Ecology concluded that “total GHG emissions in Washington for 2008 were 101.1 million metric tons carbon dioxide equivalent (CO₂e), 9 percent more than 1990 emissions. Ecology projects that the policies the state has already implemented to reduce GHG emissions will result in relatively constant emissions between now and 2020.” *Id.* Permitting the State to proceed under this “business as usual” scenario of constant, or increased, GHG emissions is causing the substantial impairment of the State’s critical natural resources in violation of the public trust doctrine. “Effective action remains possible, but delay in undertaking sharp reductions in emissions will undermine any realistic chance of preserving a habitable climate system.” Hansen Decl. ¶ 10.

The existing and predicted environmental and human impacts of climate change in Washington are severe and well documented. In its

Emissions, available at www.ecy.wa.gov/biblio/1001011.html (December 2010) (last visited April 11, 2012).

⁹ *See, e.g.,* Department of Ecology, Ocean Acidification – Science and Actions in Washington State, *available at* <http://www.ecy.wa.gov/water/marine/oceanacidification.html> (last visited April 12, 2012).

most recent report published in April 2012, the Washington Department of Ecology has warned, “If no action is taken, potential costs to Washington from climate change impacts are projected to reach nearly \$10 billion per year by 2020 from increased health costs, storm damage, coastal destruction, rising energy costs, increased wildfires, drought, and other impacts.”¹⁰ The University of Washington Climate Impacts Group estimates that temperatures in the Pacific Northwest will increase by 3.2 degrees F by 2040.¹¹ Consequences of increased temperatures include decreased snow pack, decreased water availability for agriculture, and reduced freshwater salmon habitat due to increased stream temperatures.¹² Hotter temperatures coupled with decreased precipitation will increase wildfire danger, threatening the state’s forests, delicate ecosystems, and rural populations.¹³ Shifting rainfall patterns and temperatures may adversely affect forest productivity, water availability, and food

¹⁰ Department of Ecology, *Preparing for a Changing Climate: Washington State’s Integrated Climate Change Response Strategy* (April 2012) available at <http://www.ecy.wa.gov/biblio/1201004.html> (last visited April 9, 2012).

¹¹ See University of Washington Climate Impacts Group, *Washington Climate Change Impacts Assessment 1* (2009), available at <http://cses.washington.edu/db/pdf/wacciareport681.pdf> (last visited April 11, 2012).

¹² *Id.*

¹³ *Id.*

availability for migratory birds.¹⁴ Warmer winters are already altering bird migration and scientists warn that climate change may lead to the extinction of many bird species.¹⁵

Rising temperatures have the potential to cause a public health crisis.¹⁶ The Climate Impacts Group predicts that higher summer temperatures will increase the number of heat-related deaths in Washington, especially among those over age 65.¹⁷ Under a moderate warming scenario, the greater Seattle area will experience 101 excess heat-related deaths in 2025 and 156 excess heat-related deaths annually by 2045.¹⁸ Reduced air quality due to climate change will cause an estimated 132 additional deaths annually by 2050.¹⁹

Decreased snowpack will diminish Seattle's available water supply by millions of gallons per day unless the City spends millions of dollars on conservation projects.²⁰ Rising sea levels due to melting glaciers and related effects on local substrates will likely adversely affect low-lying

¹⁴ See Washington Dep't of Ecology, *What is Climate Change*, available at <http://www.ecy.wa.gov/climatechange/whatis.htm> (last visited April 11, 2012).

¹⁵ National Audubon Society, *Bird Movements Reveal Global Warming Threat in Action*, Audubon Magazine (February 2009), available at <http://www.audubon.org/newsroom/press-releases/2009/birds-movements-reveal-global-warming-threat-action> (last visited April 11, 2012).

¹⁶ Exec. Order No. 07-02 (2007).

¹⁷ See *Washington Climate Change Impacts Assessment 1*, *supra* note 11.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 41.

agricultural areas such as the Skagit River Delta and communities such as Tacoma and Olympia that sit just above sea level.²¹ For example, Tacoma could experience a rise in sea level of two feet within fifty years.²² These rising waters will impact commerce flowing through the port as well as recreational activities.²³

The responsibility to protect the public's interest in public trust resources rests squarely on the shoulders of the State respondents. The public trust doctrine requires the government to protect and preserve that which belongs to all of its citizens (i.e. common natural resources) and to prevent uses of those assets that substantially harm and injure present and future generations' interests in public trust resources. The sovereign government is the only entity that has the power, the means and the legal duty to ensure that the public trust resources of this State persist for present and future generations. Absent immediate action, the youth appellants and future generations of our State will suffer the harms and losses to the public trust resources of this State caused by climate change.

Direct review by this Court is necessary because the State respondents are purportedly in the midst of developing their climate change policies, a time consuming and costly endeavor. A ruling that the

²¹ *Id.* at 63.

²² *Id.* at 65.

²³ *Id.*

State respondents have a fiduciary obligation to protect and preserve the atmosphere and other public trust resources from harm due to climate change has the potential to affect drastically this process.

V. **REQUEST FOR RELIEF**

For the reasons set forth above, the appellants respectfully request that the Court accept direct review of this case.

RESPECTFULLY SUBMITTED this 13th day of April, 2012,

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DECLARATION OF SERVICE

I, Andrea K. Rodgers Harris, hereby declare that on this day I caused this Statement of grounds to be served on the Respondents via electronic mail in accordance with the parties electronic service agreement.

Stated under oath this 13th day of April, 2012, in Seattle Washington.

s/ Andrea K. Rodgers Harris
Andrea K. Rodgers Harris