

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

OLIVIA CHERNAIK, a minor and resident
of Lane County, Oregon; LISA CHERNAIK,
guardian of Olivia Chernaik; KELSEY
CASCADIA ROSE JULIANA, a minor and
resident of Lane County, Oregon; and
CATIA JULIANA, guardian of Kelsey
Juliana,

Plaintiffs-Appellants,

v.

JOHN KITZHABER, in his official capacity
as Governor of the State of Oregon; and the
STATE OF OREGON,

Defendants-Respondents.

Lane County Circuit Court
Case No. 16-11-09273

CA No. A151856

PLAINTIFFS-APPELLANTS' OPENING BRIEF AND EXCERPTS OF RECORD

Appeal from the Judgment of the Circuit Court for Lane County;
Honorable Karsten H. Rasmussen, Judge.

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I. STATEMENT OF THE CASE

A. *Nature of the Case*

This appeal seeks review of a general judgment of dismissal of an amended complaint for declaratory judgment and equitable relief. Plaintiffs Olivia Chernaik, her mother and guardian Lisa Chernaik, Kelsey Juliana, and her mother and guardian Catia Juliana are beneficiaries of a trust. Through this action they seek a declaration that the trustee has failed to meet its fiduciary obligations under the trust, and equitable relief in the form of an accounting of trust resources and a plan to recover lost resources.

This appeal calls upon this Court to enforce State law and address the most pressing issue of the day: climate change. Plaintiffs seek a declaration that Governor Kitzhaber and the State of Oregon are violating the Public Trust Doctrine—an ancient doctrine long recognized by the United States Supreme Court and Oregon Courts. *See, e.g., Ill. Cent. R.R. v. Illinois*, 146 US 387, 453 (1892) (discussing doctrine); *Brusco Towboat Co. v. Oregon*, 30 Or App 509, 517, 567 P2d 1037 (1977) *rev'd in part on other grounds* 284 Or 627, 634-35, 589 P2d 712 (1978) (same). Plaintiffs allege Defendants are allowing substantial impairment of trust resources—water, submerged and submersible lands, shorelines, and wildlife, as well as the atmosphere itself—by failing to adequately combat climate change. Plaintiffs seek an accounting of Oregon's

carbon dioxide emissions and a plan to protect trust resources from the harmful effects of those emissions.

Defendants have acknowledged that climate change is a serious threat in Oregon and yet they are failing to take the steps necessary to safeguard the futures of the youth who seek redress in this court, as well as the futures of generations to come. *See* Global Warming Statute, House Bill 3543 (HB 3543), Or Laws 2007, ch 907, §§ 1-14 (codified, in part, as ORS 468A.200 to .260) (hereafter “Global Warming Statute, HB 3543”) (setting non-binding “targets” for emissions reductions). Defendants have developed a plan to reduce greenhouse gas emissions in Oregon and identified measures to be implemented to meet emissions reduction goals set for 2020 and 2050. Defendants, however, are falling far behind even these out-of-date targets. Unless Defendants make meaningful progress towards combating the growing emergency of climate change, the youth Plaintiffs here and future generations will have to survive in a State with greatly impaired public trust natural resources.

Nonetheless, Defendants moved to dismiss this action for lack of subject matter jurisdiction on October 18, 2011. ER 20. Committing clear legal error and foreclosing future enforcement of the Public Trust Doctrine, the trial court granted the motion on April 5, 2012. Plaintiffs seek reversal of the trial court’s decision that it lacked jurisdiction under the Declaratory Judgment Act, and that sovereign immunity, separation of powers, and the political question doctrine

barred resolution of this case. That this case pertains to climate change does not deprive Oregon State Courts of subject matter jurisdiction to address Plaintiffs' claims. Defendants should not be permitted to skirt their responsibilities to the people of Oregon under the Public Trust Doctrine as the trial court's decision allows.

B. *Nature of the Judgment*

Plaintiffs appeal the judgment entered by the trial court on June 6, 2012, granting Defendants' motion to dismiss. ER 38.

C. *Basis for Appellate Jurisdiction*

The judgment is subject to appeal pursuant to ORS 28.070 and ORS 19.270.

D. *Date of Judgment and Notice of Appeal*

The judgment was entered on June 6, 2012. ER 38. The notice of appeal was served on Defendants and filed on July 3, 2012.

E. *Questions Presented on Appeal*

1. Did the trial court err in ruling that it would first have to create a duty under the Public Trust Doctrine and extend the law to be able to declare Plaintiffs' rights?

2. Did the trial court err in dismissing the case where it found that only a portion of Plaintiffs' requested relief exceeded its authority under the Declaratory Judgment Act?

3. Did the trial court err in dismissing Plaintiffs' case on sovereign immunity grounds by holding that Plaintiffs' allegations that Defendants are violating their Public Trust obligations were not sufficient to overcome Defendants' immunity?

4. Did the trial court err in dismissing Plaintiffs' case on separation of powers grounds by considering only part of Plaintiffs' requested relief to find a violation of separation of powers?

5. Did the trial court err in ruling that Defendants' common law obligations would negate statutory law and violate the separation of powers doctrine when common law and statutory law are complementary and compliance with the Public Trust Doctrine would not put an undue burden on other branches of government or meddle with their functions?

6. Did the trial court err in ruling that compliance with the Public Trust Doctrine raises a political question because Plaintiffs challenge Defendants' failure to protect the public trust from climate change?

F. *Summary of the Argument*

This case calls for judicial action to protect Oregon's natural resources for present and future generations. Oregon has made strides toward addressing human-caused climate change through its Global Warming Statute, HB 3543, however, today our State is not on track to meet even the outdated goals set in that statute. As a result, essential natural resources, like water, are being

substantially impaired in this State. Plaintiffs seek a ruling from this Court to ensure that Defendants protect Oregon's natural resources from human-induced climatic changes pursuant to the Public Trust Doctrine. Plaintiffs are harmed by the failure to fulfill these obligations now and will suffer increasing harm in the future. Thus, Plaintiffs submit that:

1. The trial court committed legal error in ruling that Plaintiffs sought to impose a new legal obligation upon Defendants with this action. The question of Defendants' obligations under the Public Trust Doctrine was not before the court for resolution. Defendants expressly stipulated that their motion to dismiss did not address the scope or applicability of the doctrine.

2. The trial court erred in dismissing this case in its entirety where it found that only some of Plaintiffs' requested relief exceeds the court's authority under the Declaratory Judgment Act without discussion of Plaintiffs' case as a whole, which presents a justiciable controversy ripe for review under the Act.

3. The trial court erroneously dismissed this action on sovereign immunity grounds by concluding that Plaintiffs' allegations of Defendants' violations of the Public Trust Doctrine were not sufficient to maintain the action. Immunity does not bar review when Defendants' immunity and Public Trust obligations are both a function of Defendants' sovereignty. Defendants cannot claim immunity for actions inconsistent with their sovereign obligations,

because the Public Trust Doctrine would be rendered meaningless without a means of judicial enforcement.

4. The trial court erred in dismissing this action on separation of powers grounds by relying on only part of Plaintiffs' requested relief to find a violation and by failing to recognize that Defendants' common law and statutory obligations are complementary.

5. The trial court erred in finding a violation of separation of powers principles where this action would neither place an undue burden on other branches of government nor meddle with their functions, and comports with the sovereign duty of Defendants to protect natural resources under the Public Trust Doctrine.

6. The trial court erred in ruling that this action is barred by the political question doctrine. In fact, Plaintiffs' requested relief does not ask the Court to effectively legislate or regulate this area, but seeks what the legislature has already recognized as necessary to address the problem—measures to lower carbon dioxide emissions and a plan for making those reductions. *Compare* ER 17-18 (praying for an order requiring Defendants to prepare an accounting of Oregon's current carbon dioxide emissions and to implement a carbon reduction plan) *with* ORS 468A.200(7) (discussing the need to assess emissions and make reductions).

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G. *Statement of Facts*

1. *Background on Climate Change*

Historically, the earth's temperature is regulated by the blanket of gases in the atmosphere around our planet that restrict heat energy from escaping to space. ER 7. Over a period of geologic time, the atmosphere has reached a state of equilibrium or energy balance in which the amount of these gases dictates our climate, maintaining conditions necessary for life as we know it.

Id. But for more than 200 years, the burning of fossil fuels has caused a substantial increase in the emissions of carbon dioxide and other heat-trapping greenhouse gases. *Id.* At the same time, massive deforestation has further contributed to the increasing concentration of greenhouse gases in our atmosphere. *Id.*

As the concentration of greenhouse gases increases, the Earth's temperature is rising. ER 7. In 2011, atmospheric carbon dioxide concentrations were at least 390 parts per million (ppm) and projected to exceed 400 ppm by 2020. ER 9. These concentrations are the highest they have been in at least 650,000 years. *Id.* Given the increase in greenhouse gases, it is no surprise that the Earth has experienced a casually related rise in average temperatures. ER 8. 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 0.8°C (1.4°F) in the last 100-150 years. *Id.* The eight warmest years on record (since 1850) have all occurred since 1998. *Id.*

Rising temperatures threaten to bring about further atmospheric changes. Temperature increases create feedback loops that alter the energy balance of our atmosphere. ER 8-9. These feedback loops threaten to push our atmosphere beyond certain tipping points. *Id.* One example is the melting of sea ice due to increased temperatures. *Id.* When sea ice melts, the reflective capacity of the ice is lost, and the ocean absorbs more heat energy, thus increasing global warming. *Id.* Once triggered, these tipping points can result in rapid, uncontrollable warming. *Id.*

2. *Climate Change in Oregon*

Here in Oregon, research supported by the State has concluded that warming temperatures and changes in weather patterns could cause dramatic and widespread alterations to our environment that would impose unprecedented adverse impacts on our economy and way of life. ER 10. Among the impacts the State of Oregon has identified are reductions “in Cascade snow packs of 50 percent by mid-century” and reduced summer precipitation with consequential decreases in summer stream flows and water supply; drought, disease, and water limitations that will impact Oregon’s agricultural industry; increasing sea levels of two to four feet; greater storm intensity resulting in severe coastal erosion, flooding, loss of beaches and

coastal wetlands, and inundation of coastal infrastructure; changes to ocean temperature, salinity, acidity and resulting impacts to the formation of calcium carbonate shell and skeletons in marine organisms; and increases in pests and diseases affecting Oregon forest species. ER 10-11.

Climate change and resulting weather extremes also present direct threats to human health for all Oregonians. ER 11. Changes to natural systems from climate change can result in an increase or emergence of “vector-, water-, and food-borne diseases in areas where they either have not existed, or where their presence may have been limited.” *Id.* Air pollution and pollen counts may “increase cases of allergies, asthma and other respiratory conditions,” and exposure to smoke from fires and increased air pollution may exacerbate lung disease and other respiratory ailments. *Id.*

3. *The Best Available Scientific Solution*

While current levels of greenhouse gases have already started to cause widespread changes, the scientific community has provided concrete guidance on how to avoid the worst affects of rapidly accelerating climate change. ER 9. In particular, numerous studies suggest that an increase in average temperatures of two degrees Celsius (3.6°F) would cause severe, widespread, and irreversible impacts. ER 8. Based upon the future rate of greenhouse gas emissions, temperature increases are likely to be three to 11°F above current levels, which

could result in catastrophic changes to weather, agricultural systems, water supplies, and coastal communities. *Id.*

According to the world's leading climate scientists, including Dr. James Hansen of NASA, average global peak surface temperature must not exceed one degree Celsius above pre-industrial temperatures for humanity to preserve a planet similar to which life on Earth is adapted. ER 9-10. To limit the warming of the planet, scientists advise that we reduce the concentration of atmospheric carbon dioxide from current levels to 350 ppm or less. ER 9.

To reach 350 ppm by the end of the century, the best available science indicates that carbon dioxide emissions must begin to decline at least 6 percent each year, beginning in 2013, through 2050. ER 9-10. In addition, carbon sequestration must also be enhanced and protected by preserving and replanting forests and conserving soils, protecting oceans, and improving agricultural practices to capture excess carbon dioxide from the atmosphere. ER 10.

4. *Oregon's Climate Change Solution*

In 2007, the Oregon Legislature enacted the Global Warming Statute, HB 3543, in response to a report from the Governor's Advisory Group on Global Warming that called for "immediate and significant action to address global warming * * * and to begin to prepare for the effects of global warming." ORS 468A.200(1). At that time, the Legislature recognized that climate change "poses a serious threat to the economic well-being, public health, natural

resources and environment of Oregon.” ORS 468A.200(3). The Legislature emphasized the “detrimental effects” to Oregon’s industries, ORS 468A.200(6), and found that “[r]educed snowpack, changes in the timing of stream flows, extreme or unusual weather events, rising sea levels, increased occurrences of vector-borne diseases and impacts on forest health,” could cause severe impacts on “the economy, environment and quality of life in Oregon.” ORS 468A.200(4).

Oregon’s approach was to “assess the current level of greenhouse gas emissions” in the State, “monitor” them, and “begin reducing greenhouse gas emissions in order to prevent disruption of Oregon’s economy and quality of life and to meet Oregon’s responsibility to reduce the impacts and the pace of global warming.” ORS 468A.200(7). The Legislature set three non-mandatory goals: 1) “By 2010, arrest the growth of Oregon’s greenhouse gas emissions and begin to reduce greenhouse gas emissions;” 2.) “By 2020, achieve greenhouse gas levels that are 10 percent below 1990 levels;” and 3.) “By 2050, achieve greenhouse gas levels that are at least 75 percent below 1990 levels.” ORS 468A.205.

The Legislature created the Oregon Global Warming Commission and the Oregon Climate Change Research Institute (OCCRI). The Global Warming Commission was tasked with recommending ways to coordinate state and local efforts to reduce greenhouse gas emissions in Oregon consistent with the goals

in the statute. ORS 468A.235. The OCCRI was created to “[f]acilitate research * * * on climate change and its effect on natural and human systems in Oregon” and to “[s]upport the Oregon Global Warming Commission in developing strategies to prepare for and to mitigate the effects of climate change on natural and human systems.” ORS 352.247(2)(a) and (d).

Oregon has created a plan for reducing greenhouse gas emissions in the State. Through the work of the OCCRI and the Global Warming Commission, numerous measures have been identified for use in Oregon to combat climate change. Despite this fact, Oregon has fallen far behind in its efforts to reduce greenhouse gas emissions. As the Global Warming Commission found in 2009, “the state will *likely fall well short of meeting its 2020 emission reduction goal*, and by extrapolation, *clearly is not on track to meet its 2050 goal*.” ER 13 (emphasis added). In 2011, the Commission released another report confirming that the State is falling far behind in its efforts to meet the 2020 and 2050 goals.¹

5. *This Action*

In May of 2011, this action was filed. ER 1. Plaintiffs seek declarations that: Defendants have an obligation to protect long recognized public trust

¹ Oregon Global Warming Commission, *Report to the Legislature 2011 – Including Key Action and Results from the Commission’s Interim Roadmap to 2020* (Feb 2011) (available at <http://www.keeporegoncool.org/sites/default/files/ogwc-standard-documents/2011Report.pdf>) (last viewed December 7, 2012).

resources; Defendants have violated their fiduciary duty under the Public Trust Doctrine to protect those resources; the atmosphere is a trust resource; Defendants must use the best available science to protect trust resources under the Public Trust Doctrine; and that the best available science requires six percent reductions of carbon dioxide emissions per year until at least 2050. ER 17-18. Plaintiffs further seek an order requiring Defendants to undertake an accounting of trust resources on an annual basis; and an order requiring Defendants to prepare a plan to protect trust resources. *Id.*

Defendants moved to dismiss this case. ER 20. In so doing, counsel for Defendants represented that their motion to dismiss did not “address the existence of the public trust, the question of whether the state has met its duties under any such trust, or whether plaintiffs have effectively stated a claim that requires the state to decide those issues at all.” ER 21.

II. FIRST ASSIGNMENT OF ERROR

The trial court committed reversible error by holding that “Plaintiffs ask the Court to create and impose an affirmative duty on Defendants” to protect trust resources under the Public Trust Doctrine and that Plaintiffs ask the “Court to extend the law by creating a new duty rather than interpret a pre-existing law.” ER 27.

//

A. *Preservation of Error*

The issue of whether Plaintiffs ask the court to create and impose a new duty upon Defendants was not raised in Defendants' motion or briefed by the Parties. It is preserved only inasmuch as it was pled in Plaintiffs' Amended Complaint and decided by the trial court.

B. *Standard of Review*

On appeal, this Court "review[s] the trial court's dismissal of the action on jurisdictional grounds for legal error." *Krohn v. Hood River Sch. Dist.*, 250 Or App 8, 10, 279 P3d 295 (2012). "Because this action was dismissed at the pleading stage, we liberally construe the pleadings and consider as true the facts alleged in plaintiff's complaint and all reasonable inferences that may be drawn from those facts." *Smith v. Truck Ins. Exch., Inc.*, 242 Or App 202, 204, 255 P3d 615 (2011).

C. *Argument on the First Assignment of Error*

The trial court's ruling that "Plaintiffs ask the Court to create and impose" a new duty upon Defendants, ER 27, is in error for two reasons. First, this issue was not put before the trial court. Defendants expressly did not question the existence or scope of the Public Trust Doctrine in the motion to dismiss. Second, if the Court decides to address this issue, the Public Trust Doctrine and its obligation to prevent substantial impairment of trust resources

are not new, but have existed in Oregon since statehood and long been enforced by Oregon courts.

1. *Neither the Existence nor the Scope of the Public Trust Doctrine Were Raised by Defendants' Motion*

Defendants' motion did not question the existence or scope of the Public Trust Doctrine. ER 21. Defendants expressly agreed and represented in their motion that it does not "address the existence of the public trust, the question of whether the state has met its duties under any such trust, or whether plaintiffs have effectively stated a claim that requires the state to decide those issues at all." *Id.* Therefore, because this issue was not raised by Defendants' motion or briefed by the parties, it was erroneous for the trial court to reach the decision it did on the record before it.

2. *The Common Law Provides a Basis for a Declaratory Judgment*

The Public Trust Doctrine is sufficiently defined in Oregon law to provide the basis for a declaratory judgment. The trial court erred in concluding that the State does not have a clear legal duty under the Public Trust Doctrine.

In Oregon, the Public Trust Doctrine is an attribute of the State's sovereignty. *Corvallis Sand & Gravel Co. v. State Land Bd.*, 250 Or 319, 333, 439 P2d 575 (1968) ("When, therefore, Oregon was admitted into the Union, it acquired title to the submerged lands not by grant from the United States, but by

virtue of its sovereignty.”). As this Court explained in *Brusco Towboat v.*

Oregon:

The *jus publicum* aspect of the state’s ownership [of property] is rooted in a philosophical conception of natural law. The principle that the public has an overriding interest in navigable waterways and lands underlying them is as old as the waterways themselves, traceable at least to the Code of Justinian in the Fifth Century A.D. Navigable waterways are a valuable and essential natural resource and as such all people have an interest in maintaining them for commerce, fishing and recreation. The right of the public to use the waterways for these purposes has always been recognized at common law. As representative of the people, the sovereign bears the responsibility to preserve these rights. Unlike the state’s *jus privatum* interest, the *jus publicum* cannot be alienated.

30 Or App at 517-18 (internal citations omitted). As trustee of Oregon’s natural resources, the State must protect them from “substantial impairment.” *See Morse v. Or. Div. of State Lands*, 285 Or 197, 203, 590 P2d 709 (1979) (holding that the State may not make a grant to “a private party which results in such substantial impairment of the public’s interest as would be beyond the power of the legislature to authorize”); *Shively v. Bowlby*, 152 US 1, 47 (1894) (same).

Oregon’s courts have long recognized the Public Trust Doctrine and enforced its requirements. *See, e.g., Or. Shores Conservation Coal. v. Or. Fish & Wildlife Comm’n*, 62 Or App 481, 493, 662 P2d 356 (1983) *rev den*, 295 Or 259 (1983) (“The state, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters [for

navigation, fishing and recreation].”); *Corvallis & E. R. Co. v. Benson*, 61 Or 359, 370, 121 P 418 *rev den* (1912) (“The State, however, cannot abdicate or grant away the other element of its title to tidelands—the *jus publicum*, or public authority over them. This is the dominion of government or sovereignty in the State, by which it prevents any use of lands bordering on the navigable waters within the State which will materially interfere with navigation and commerce thereon.”); *State v. Hume*, 52 Or 1, 5, 95 P 808 (1908) (“It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens[.]”).

Today, the doctrine is also reflected in the statutory and constitutional law of Oregon. *See, e.g.*, ORS 468A.010(1)(a) (“[I]t is declared to be the public policy of the State of Oregon [to] restore and maintain the quality of the air resources of the state in a condition as free from air pollution as is practicable.”); ORS 537.525 (the “right to reasonable control of all water within the state from all sources of water supply belongs to the public”); ORS 537.334(2) (recognizing the “public trust” inherent in “the waters of this state”); ORS 537.341 (designating the “Water Resources Department as trustee for the people of the State of Oregon”); Or Const, Art VIII, § 5(2) (the State Land Board “shall manage its lands under its jurisdiction with the object of obtaining

the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.”).

In light of these articulations of the Public Trust Doctrine, the trial court erred in reaching two conclusions. First, by concluding that “the many statutes, cases, and constitutional provisions Plaintiffs cite do not support their argument.” ER 27. Second, by concluding that “the only clear duty is the one already enunciated by the Legislature” in Oregon’s Global Warming Statute.

Id. The Public Trust Doctrine imposes a duty that exists separate and independent from the limited goals established by the Legislature in Oregon’s Global Warming Statute or any other State Statute. *Ill. Cent. R.R. Co.*, 146 US at 460 (“The legislature could not give away nor sell the discretion of its successors” and must “exercise the power of the State in the execution of the trust devolved upon it.”).²

² The question of whether the Public Trust Doctrine encompasses the atmosphere was not briefed below or decided in the trial court’s order. Defendants explicitly waived their right to raise this issue in their motion to dismiss. Plaintiffs respectfully request that if this Court wishes to address this legal question, it allow for supplemental briefing. There is extensive authority for the proposition that the air is a trust resource. *See, e.g., Georgia v. Tenn. Copper Co.*, 206 US 230, 237 (1907) (“the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain”); Justinian, *Institutes*, 1.2.1, 2.1.1 (533) (T. Sandars trans. 1st Am. ed. 1876) (“By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”); *Angela Bonser-Lain, et al. v Tex. Comm’n on Env’tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex Dist Ct, Aug 2, 2012) (holding that the Public Trust Doctrine “includes all natural resources of the State including the air and atmosphere.”).

III. SECOND ASSIGNMENT OF ERROR

The trial court committed reversible error by holding that “the relief Plaintiffs seek exceeds the Court’s authority under Oregon’s Declaratory Judgment Act.” ER 27.

A. *Preservation of Error*

This issue was preserved in the briefing before the trial court in response to Defendants’ motion to dismiss. Pls.’ Resp. to Mot. to Dismiss at 13-17.

B. *Standard of Review*

On appeal, this Court “review[s] the trial court’s dismissal of the action on jurisdictional grounds for legal error.” *Krohn*, 250 Or App at 10. “Because this action was dismissed at the pleading stage, we liberally construe the pleadings and consider as true the facts alleged in plaintiff’s complaint and all reasonable inferences that may be drawn from those facts.” *Smith*, 242 Or App at 204.

C. *Argument on the Second Assignment of Error*

The trial court erred in finding that the Declaratory Judgment Act does not provide jurisdiction to resolve Plaintiffs’ claims. ER 27. If allowed to stand, this ruling leaves public trust beneficiaries without recourse under the law. As this Court has held, “[a] complaint for declaratory relief is legally sufficient if it alleges the existence of an actual controversy relating to the legal rights and duties of the parties.” *Goose Hollow v. City of Portland*, 58 Or App

722, 726, 650 P2d 135 (1982); *see also Beldt v. Leise*, 185 Or App 572, 576, 60 P3d 1119 (2003) (“If there is a justiciable controversy [between the parties], the plaintiff is entitled to a declaration of its rights”) (internal citations omitted).

In the proceedings below, the trial court focused on only a small portion of Plaintiffs’ requested relief, namely the request for a declaration that the atmosphere is a trust resource. But that declaration is one for which the court is well-suited, and it is unlikely to alter the scope of relief that may be issued in this action.

The plain language of the Declaratory Judgment Act affords courts in Oregon the authority to declare the law. *See* ORS 28.010 (granting the court “power to declare rights, status, and other legal relations”); ORS 28.040 and .040(3) (“Any person interested * * * in the administration of a trust * * * may have a declaration of rights or legal relations in respect thereto * * * To determine any question arising in the administration of the * * * trust”); ORS 28.120 (the act “is to be liberally construed and administered”). Since the Public Trust Doctrine’s initial recognition in American law, court after court has delineated the scope of the obligation, including identification of those essential natural resources that must be protected for the benefit of the public. *See, e.g., Baxley v. Alaska*, 1998 Alaska Lexis 90, 36, 958 P2d 422, 434 (1998) (“wildlife, minerals, and water rights”); *In re Water Use Applications (Waihole I)*, 94 Haw 97, 133-35, 9 P3d 409, 445-47 (2000) (groundwater); *Just v.*

Marinette Co., 56 Wis 2d 7, 201 NW 2d 761 (1972) (swamps and wetlands); *Marks v. Whitney*, 6 Cal 3d 251, 491 P2d 374 (1971) (tidelands); *Friends of Van Cortlandt Park v. City of New York*, 95 NY 2d 623, 750 NE 2d 1050, 1050 (2001) (dedicated parklands); *Nat’l Audubon Soc’y v. Superior Court of Alpine Co.*, 33 Cal 3d 419, 437, 658 P2d 709, 721 (1985) (non-navigable waterways).

Moreover, Defendants did not dispute that Plaintiffs’ other claims for relief raised a justiciable issue and the trial court did not find one was lacking. Thus, it was clear legal error to dismiss Plaintiffs’ *entire case* instead of striking some claims and allowing others to proceed. *See, e.g., Goose Hollow*, 58 Or App at 726 (“Counts one and two clearly allege a justiciable controversy; defendants do not contend otherwise. The dismissal of counts one and two of the original complaint and the striking of those counts from the amended complaint was error.”).

The case cited by the trial court to support dismissal furthers Plaintiffs’ position. ER 26. In *Pendelton School District 16R v. Oregon*, the Plaintiffs sought a declaration that “the Oregon Constitution requires that the legislature fund the Oregon public school system at a level” sufficient to meet educational goals. 345 Or 596, 599, 200 P3d 133 (2009). The Court concluded the trial court had authority to declare that the Legislature failed to fully fund the public school system. ER 27.

Likewise, here the trial court has the authority to declare that Defendants have an obligation to protect Oregon’s water supply and other public trust resources from substantial impairment due to greenhouse gas emissions. Oregon courts have the authority to enforce the common law without reference to “a specific constitutional provision or statute.” ER 27. The Declaratory Judgment Act is the proper, and only, vehicle to enforce the Public Trust Doctrine. Thus, Plaintiffs must be allowed to pursue their well-pled claims pursuant to the Declaratory Judgment Act.

IV. THIRD ASSIGNMENT OF ERROR

The trial court committed reversible error by concluding this action is barred by sovereign immunity. ER 27-29.

A. Preservation of Error

Sovereign immunity was preserved as an issue in the briefing on Defendants’ motion to dismiss. Pls.’ Resp. to Mot. to Dismiss at 17-20.

B. Standard of Review

On appeal, this Court “review[s] the trial court’s dismissal of the action on jurisdictional grounds for legal error.” *Krohn*, 250 Or App at 10. “Because this action was dismissed at the pleading stage, we liberally construe the pleadings and consider as true the facts alleged in plaintiff’s complaint and all reasonable inferences that may be drawn from those facts.” *Smith*, 242 Or App at 204.

C. *Argument on the Third Assignment of Error*

The trial court's ruling that Plaintiffs' action is barred by sovereign immunity is in error. Defendants acted in abuse of their authority making their conduct judicially reviewable, and without judicial review of Defendants' actions the trust will cease to function.

1. *Defendants Have Acted Beyond or in Abuse of Their Authority*

The trial court erred in concluding that "Plaintiffs' Amended Complaint does not suggest" that Defendants "acted 'beyond or in abuse of [their] delegated authority.'" ER 29. This ruling is based upon the trial court's conclusion that "Plaintiffs first ask this Court to declare, or create, the obligations allegedly owed by Defendants" and then find a violation, instead of alleging "defendants acted in clear violation of an established law." *Id.*

As previously discussed, *supra* at 16-18, Plaintiffs have alleged a violation of law. Pursuant to the Public Trust Doctrine, Defendants cannot allow substantial impairment of trust resources, *Morse*, 285 Or at 203, and by failing to adequately curtail greenhouse gas emissions in the State, Defendants are violating the doctrine. ER 17-18. In *Hanson v. Mosser*, the Oregon Supreme Court explained that:

acts done by officials of the state without authority or in excess or abuse of authority are done without the sanction of the state and may be enjoined. It is the theory of such suits that public officers hold and can exercise only the authority lawfully delegated to them. Where, then, officers act beyond or in abuse of their

delegated authority they act as individuals, and a suit to enjoin their wrongful acts is not one against the state.

247 Or 1, 7, 427 P2d 97 (1967) *overruled on other grounds by Smith v. Cooper*, 256 Or 485, 488, 475 P2d 78 (1970). Here, by failing to protect trust resources from substantial impairment, Defendants are acting beyond or in abuse of their public trust obligations. Whether the atmosphere is among the resources the State must protect, does not alter Defendants' need to meet its obligation under the law or transform Plaintiffs' entire case into one that is barred by sovereign immunity.

2. *The Public Trust Cannot Exist Without the Ability of Courts to Enforce It*

The trial court erred in ruling that sovereign immunity could bar beneficiaries from seeking to enforce the Public Trust Doctrine. It is well-established that “[a] settlor who attempts to create a trust without court accountability in the trustee is contradicting himself. A trust necessarily means rights in the *cestui*, enforceable [sic] in equity.” *Wood v. Honeyman*, 178 Or 484, 561, 169 P2d 131 (1946) (internal citation omitted). Thus, sovereign immunity does not apply in a suit against a sovereign trustee by the citizen beneficiaries of the trust because the judicial branch remains the ultimate guardian of the trust. *See Ctr. for Biological Diversity v. FPL Grp.*, 166 Cal App 4th 1349, 1366, 83 Cal Rptr 3d 588 (2008) (“the public retains the right to bring actions to enforce the trust when the public agencies fail to discharge their

duties”); Cohen, *The Constitution, The Public Trust Doctrine, and the Environment* 1970 Utah L Rev 388, 392 (1970) (“The failure to carry out the obligations of the trust amounts to a breach of constitutionally protected rights which no court can permit.”). The trial court failed to cite a single case in which sovereign immunity barred review of Public Trust Doctrine claims.³

Indeed, Oregon’s public trust responsibilities and its ability to claim immunity are both attributes of its sovereignty. *Compare Corvallis Sand & Gravel*, 250 Or at 333 (Oregon holds title to submerged lands “by virtue of its sovereignty”); *Nat’l Audubon Soc’y*, 33 Cal 3d at 425, 658 P2d at 712 (“the core of the public trust doctrine is the state’s authority as sovereign”) *with* Or Const, Art IV, § 24 (discussing State’s immunity). Thus, the sovereign’s immunity cannot be wielded as a shield to protect the State from the very obligations that arise from its sovereignty.⁴

³ The trial court distinguished *United States v. Mitchell*, 463 US 206 (1983), from this case because there the government had waived its sovereign immunity. ER 28-29. However, *Mitchell* does not stand for the idea that if sovereign immunity is not waived it serves as a bar to a trust claim. Rather, the ruling specifies that where “a trust relationship” exists, that relationship “includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust.” *Mitchell*, 463 US at 225-26.

⁴ The Oregon Constitution mandates that “every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” Or Const, Art I, §10; *Jensen v. Whitlow*, 334 Or 412, 418, 51 P3d 599 (2002) (discussing remedy clause). The trial court concluded that because “no remedy ever existed at common law, there can be no violation” of the Remedy Clause. ER 28. This conclusion is directly contrary to Oregon’s common law and the

V. FOURTH ASSIGNMENT OF ERROR

The trial court erred by relying on only part of Plaintiffs’ requested relief to find that Plaintiffs’ entire case violated the separation of powers doctrine. In so ruling, the trial court failed to consider the rest of Plaintiffs’ case or accept “all well-pleaded allegations of the complaint as true” or give “plaintiffs the benefit of all favorable inferences that may be drawn from the facts alleged.” *Stringer v. Car Data Systems, Inc.*, 314 Or 576, 584, 841 P2d 1183 (1992) *adh’d to on recon*, 315 Or 308, 844 P2d 905 (1993).

A. *Preservation of Error*

This issue was preserved for appeal in the briefing on Defendants’ motion to dismiss. Pls.’ Resp. to Mot. to Dismiss at 23-26.

B. *Standard of Review*

On appeal, this Court “review[s] the trial court’s dismissal of the action on jurisdictional grounds for legal error.” *Krohn*, 250 Or App at 10. The Court is to accept “all well-pleaded allegations of the complaint as true” and give “plaintiffs the benefit of all favorable inferences that may be drawn from the facts alleged.” *Stringer*, 314 Or at 584.

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admission that Oregon’s public trust obligations are an attribute of its sovereignty. *See supra* at 16-18 (describing the State’s public trust obligations).

C. *Argument on the Fourth Assignment of Error*

The trial court erred in dismissing Plaintiffs’ case on separation of powers grounds by failing to consider the Amended Complaint as a whole and by failing to accept Plaintiffs’ well-plead factual allegations as true and drawing inferences in Plaintiffs’ favor. ER 30-34. The Oregon Constitution divides the government into three branches and provides that “no person charged with official duties under one of these departments, shall exercise any of the functions of another * * *.” Or Const, Art III, § 1. However, “the separation of powers does not require or intend an absolute separation between the departments of the government.” *Rooney v. Kulongoski*, 322 Or 15, 28, 902 P2d 1143 (1995).

Both the trial court and Defendants focused upon only part of Plaintiffs’ case, namely, paragraphs 51 and 52 of the Amended Complaint, requesting that Defendants use the “best available science” and specifying “that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six percent per year until at least 2050.” ER 18. In accepting Defendants’ focus upon only part of Plaintiffs’ requested relief and relying solely on that relief to dismiss Plaintiffs’ case, the trial court overlooked the remainder of Plaintiffs’ case. ER 32.

This was legal error because the trial court failed to accept “*all* well-pleaded allegations of the complaint as true” and give “plaintiffs the benefit of

all favorable inferences that may be drawn from the facts alleged.” *Stringer*, 314 Or at 584 (emphasis added). The trial court was required to consider “all” of Plaintiffs’ allegations contained in the Amended Complaint, but did not do so.

Moreover, had the trial court afforded Plaintiffs’ claims the inferences they were due and found that the requests in paragraphs 51 and 52 were overstepping, in resolving the case on the merits the trial court could have denied aspects of those requests for relief and granted others. Trial courts have broad discretion to fashion appropriate relief. *See, e.g.*, ORS 28.080 (granting courts authority to issue “[f]urther relief based on a declaratory judgment * * * whenever necessary or proper”). Alternatively, the trial court could have granted leave to file an amended complaint, instead of dismissing Plaintiffs’ entire case on separation of powers grounds.⁵

⁵ The trial court acknowledges Plaintiffs’ argument that the “requested relief does not require the Court to ‘strike out’ any existing legislation” and leaves to Defendants “what is regulated” and “how.” ER 31. This acknowledgement, however, does not demonstrate that the trial court engaged in the proper analysis. Indeed, as Plaintiffs stressed below, this action would require Defendants, and not this Court or Plaintiffs, to identify and implement measures to reduce greenhouse gas emissions. The fact that Plaintiffs have asked that the best available science be used to guide Defendants’ plan does not mean Plaintiffs entire case violates separation of powers principles. Indeed, had Plaintiffs not provided a request for how the State could meet its public trust obligations, surely Defendants would have raised that criticism of Plaintiffs’ amended complaint instead.

The trial court's ruling is particularly troubling because "[p]leadings in a declaratory judgment proceeding are to be liberally construed, ORS 28.120, and a court should not grant an ORCP 21 motion against a complaint seeking a declaratory judgment if it states a justiciable controversy." *Johnson v. Miller*, 113 Or App 98, 100, 831 P2d 71 (1992).

Here the trial court does not discuss whether Plaintiffs' other claims for relief present a justiciable controversy. For instance, Plaintiffs ask the Court to declare that "water resources, navigable waters, submerged and submersible lands, islands, shorelines, coastal areas, wildlife, and fish are trust resources" and "that the State of Oregon, as a trustee, has a fiduciary obligation to protect these resources as commonly shared public trust resources from the impacts of climate change * * * ." ER17. Plaintiffs also request a declaration that Defendants have failed to uphold their fiduciary obligations to protect trust resources, *id.*, based on evidence as alleged in the complaint (and to be established at trial). By failing to address these requests, the trial court erred.

VI. FIFTH ASSIGNMENT OF ERROR

The trial court erred in finding any violations of the separation of powers principle in Plaintiffs' case. Statutory law and common law are complementary and the trial court, therefore, needed to rectify the State's statutory and public trust obligations rather than finding that certain claims in Plaintiffs' case place

an undue burden upon other branches of government and seek to impose their functions on the executive.

A. *Preservation of Error*

This issue was preserved in Plaintiffs’ responsive brief, Pls.’ Resp. to Mot. to Dismiss at 23-26, and letter brief to the Court. Plfs. Letter Brief at 2-3.

B. *Standard of Review*

This Court reviews a judgment resulting from a motion to dismiss for “errors of law.” *Brewer v. Dep’t of Fish & Wildlife*, 167 Or App 173, 176, 2 P3d 418 (2000). “In reviewing the judgment of dismissal, [the court] assumes the truth of all facts alleged in plaintiffs’ complaint, drawing all inferences in favor of plaintiffs.” *Hinkley v. Eugene Water & Elec. Bd.*, 189 Or App 181, 183, 74 P3d 1146 (2003).

C. *Argument on the Fifth Assignment of Error*

1. *Common Law and Statutory Law are Complementary*

The trial court erred in concluding that compliance with Defendants’ common law duties would amount to a decision striking the State’s Global Warming Statute. ER 31-32. Legal precedent provides that Defendants’ common law and statutory obligations are complementary. *Brown v. Transcon Lines*, 284 Or 597, 610, 588 P2d 1087 (1978) (a new statutory law and “a pre-existing common law” are “cumulative, rather than exclusive”); *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 97, 689 P.2d 1292 (1984) (“There is no

inherent inconsistency between the availability of equitable relief through a statutory suit and legal remedies through a common law action * * *.”).

Indeed, in *National Audubon Society v. Superior Court of Alpine County*, the court went so far as to reconcile two competing “systems of legal thought: the appropriative water rights system * * * and the public trust doctrine * * *.” 33 Cal 3d at 425, 658 P2d at 712. While the court noted the “two systems of legal thought have been on a collision course,” *id.*, it concluded that “before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust * * *.” 33 Cal 3d at 426, 658 P2d at 712. Moreover, after establishing this legal roadmap, the Court left to the parties the task of resolving how to allocate water, holding that:

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

33 Cal 3d at 452, 658 P2d at 732.

Oregon’s Global Warming Statute and Oregon’s Public Trust Doctrine are not on the same collision course. Both systems of legal thought call for action to reduce greenhouse gas emissions in the State and are complementary.

The question for the trial court is whether the State is currently violating the Public Trust Doctrine. If so, it is up to Defendants to propose protective measures for Oregon's natural resources. The possibility that these measures may require additional reductions beyond the non-mandatory statutory goals set by the Legislature does not mean Defendants can ignore their Public Trust Doctrine obligations as the court in *National Audubon Society* found.

Plaintiffs understand that the matter presented to the trial court may appear formidable, but submit that it is consistent with the separation of powers doctrine. When faced with the injustices of the civil rights era, the courts provided a similar oversight role when the other branches of government were unwilling to remedy blatant inequities in school funding. *See, e.g., Brown v. Bd. of Educ.*, 347 US 483, 490, 495 (1954) (upon finding "little in the history of the Fourteenth Amendment relating to its intended effect on public education" the Court went on to declare "in the field of public education, the doctrine of 'separate but equal' has no place"); *Rose v. Council for Better Educ.*, 1989 Ky Lexis 55, 790 SW 2d 186 (1989) (declaring an entire educational system unconstitutional, instructing the legislative and executive branches to overhaul the system, and reordering governance of education in the state).

As Oregon courts have noted, "no official can invoke either 'policy' or 'politics' to avoid review of actions not authorized by law * * * ." *Lipscomb v. State*, 305 Or 472, 478 n 4, 753 P2d 939 (1988). When a case presents an issue

“to which judicial machinery is adaptable,” the matter is constitutional for a court to resolve. *Boyle v. City of Bend*, 234 Or 91, 102, 1380 P2d 625 (1963).

Here, Oregon courts are well-adapted to declaring the law and parsing out a party’s legal obligations. Therefore, it was legal error for the trial court to rely upon a perceived conflict between common and statutory laws to dismiss Plaintiffs’ case, instead of attempting to reconcile the two laws.

2. *Plaintiffs’ Case Does Not Impose an Undue Burden or Require One Branch to Perform the Functions Assigned to Another Branch.*

Plaintiffs’ relief will not violate the separation of powers in Oregon.

Based upon “two inquiries,” “a violation of separation of powers may be found only if the problem is clear * * * .” *Rooney*, 322 Or at 28. First, the court looks to whether one branch has “‘unduly burdened’ the actions of another [] in an area of responsibility or authority committed to that other [branch].” *Id.* Second, the court looks to whether “one [branch] is,” or will be, “performing the functions committed to another [branch].” *Id.*

a. No undue burden will result from Plaintiffs’ relief.

Granting Plaintiffs some or all of their requested relief will not pose an undue burden. An undue burden results when the action of one branch of government “interferes with [another branch] in a manner which prevents or obstructs the performance of its irreducible constitutional task [].” *Circuit Court of Or, 15th Judicial Dist. v. AFSCME Local 502-A*, 295 Or 542, 550, 669

P2d 314 (1983). However, “[t]he separation of powers principle cannot in practice work absolutely; there is a necessary overlap between the governmental functions.”” *State ex rel. Acocella v. Allen*, 288 Or 175, 181-82, 604 P2d 391 (1979) (quoting *Sadler v. Oregon State Bar*, 275 Or 279, 285, 550 P2d 1218, 1222 (1976)). Thus, the undue burden inquiry “corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influence between governmental departments.” *Rooney*, 322 Or at 28.

This action need not cause a branch of government to interfere with, prevent or obstruct another branch from performing its constitutional task, because the remedy requested is merely cumulative and does not strike out the work of the legislative branch. Oregon’s Global Warming Statute is the result of the legislative branch’s decision to reduce greenhouse gas emissions. Plaintiffs’ requested relief is consistent with the goals established by the legislature in the Global Warming Statute. Plaintiffs ask that the State “develop and implement a carbon reduction plan that will protect trust resources by abiding by the best available science,” and that the court declare “that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six percent each year until at least 2050.” ER 32. Plaintiffs request declarations of law that only an Oregon court can issue regarding Oregon’s common law.

While the legislature has taken some action through the passage of the Global Warming statute, the legislature has not addressed the State's Public Trust Doctrine obligations or prevented substantial impairment of trust resources. Defendants' common law duties as cumulative to, "rather than exclusive" of its statutory obligations, require further action. *Brown*, 284 Or at 610.

- b. This action does not require one branch to perform another's functions.

Plaintiffs' requested relief allows each branch of government to perform its own functions. The functions inquiry corresponds "to the underlying principle that separation of powers seeks to avoid the potential for concentration of separate powers in one department." *Rooney*, 322 Or at 28 (internal citation omitted). Additionally, "[i]f the duty imposed calls for the performance of functions to which the judicial machinery is adaptable, there can be no constitutional objection to the delegation." *Boyle*, 234 Or at 102.

Plaintiffs request declarations of law that are well within the court's traditional function. ORS 28.010 (courts "shall have power to declare rights"). Plaintiffs request declarations that Defendants: have an obligation to protect public trust resources; and violated their fiduciary duty under the Public Trust Doctrine to protect those resources. ER 17. Such declarations do not

concentrate powers in one branch and are of the nature of judicial decisions that happen every day.

Plaintiffs request an order requiring Defendants to prepare a plan to protect trust resources. ER 18. This request leaves to Defendants to decide what that plan will entail. It also is complementary to the Legislature’s Global Warming Statute, HB 3543, that calls for assessing the current level of greenhouse gas emissions in Oregon and reducing those emissions. ORS 468A.200(7). Plaintiffs’ requested relief works in conjunction with the Legislature’s greenhouse gas emission reduction work, but it does not require the Court to perform the functions of the legislative or executive branches. The judiciary is well-suited to order the executive to prepare a plan to comply with its Public Trust Doctrine obligations—leaving it to the executive’s discretion to decide how to make the necessary reductions. *See, e.g., Brown v. Plata*, __U.S. __, 131 S. Ct. 1910, 1928 (2011) (“The court did not order the State to achieve this reduction [of the prison population] in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.”).

Moreover, Plaintiffs are requesting traditional trust remedies: a declaration that the trust was violated, an accounting, and a plan for recovery of trust resources. These types of relief have been provided in trust cases by courts for decades. *See, e.g., Wood*, 178 Or at 561 (the trustee can “be called to

account” (internal citations omitted)). Climate change threatens Oregon’s trust resources. Plaintiffs ask the court to exercise its constitutionally designated function and declare that Defendants are violating their legal duties and order the relief necessary to ensure compliance with the law. Therefore, Plaintiffs’ requested relief does not violate the Separation of Powers Doctrine.

VII. SIXTH ASSIGNMENT OF ERROR

The trial court erred in granting Defendants’ motion to dismiss Plaintiffs’ claim, because Plaintiffs’ requested relief does not require the court to address issues constitutionally reserved to the political branches of government and thus, does not violate the Political Question Doctrine.

A. Preservation of Error

The Political Question Doctrine was preserved in briefing on Defendants’ motion to dismiss. Pls.’ Resp. to Mot. to Dismiss 27-33.

B. Standard of Review

This Court reviews a judgment resulting from a motion to dismiss for errors of law. *Brewer*, 167 Or App at 176. In reviewing the judgment of dismissal, the court assumes the truth of all facts alleged in plaintiffs’ complaint, drawing all inferences in favor of plaintiffs. *Hinkley*, 189 Or App at 183.

C. *Argument on the Sixth Assignment of Error*

The trial court erred in dismissing Plaintiffs’ case because it presents political questions. ER 34-37. “[N]o official can invoke either ‘policy’ or ‘politics’ to avoid review of actions not authorized by law * * *.” *Libscomb*, 305 Or at 478 n 4. The Political Question Doctrine, similar to the Separation of Powers Doctrine, serves to ensure that the judiciary does not unduly intrude on policy choices constitutionally committed to the other branches. *See, e.g., Ivancie v. Thornton*, 250 Or 550, 556-57, 443 P2d 612 (1968) *cert den*, 393 US 1018 (1969) (“We conclude that the wisdom of the charter provision is a political question. The only judicial question is whether the political restrictions are so inconsistent with the First Amendment as to be beyond the power of the voters to enact.”).

The legislative and executive branches have already decided that climate change is a threat to Oregon’s natural resources, and the legislature passed a law that calls for much of what Plaintiffs request here, including tracking emissions and reducing them. *See supra* at 10-11. Thus, the existence of global warming, its impacts, and the plan to reduce greenhouse gas emissions is not a political “question;” the answer has already been provided in part by the legislative and executive branches of Oregon’s government.

Additionally, “[s]imply because * * * the case arises out of a ‘politically charged’ context does not transform the [] [c]laims into political questions.”

Alperin v. Vatican Bank, 410 F3d 532, 548 (9th Cir 2005) *cert den*, 126 S Ct 1141 (2006). Both Defendants and the trial court turned to federal law for guidance in assessing political question violations and the six factors the U.S. Supreme Court established in *Baker v. Carr*, 369 US 186, 217 (1962).

Defendants raised two of the factors in this case: (1) a lack of judicially discoverable and manageable standards for resolving the matter; and (2) the impossibility of deciding the matter without an initial policy determination that is clearly for nonjudicial discretion. ER 35.

1. *Judicially Discoverable and Manageable Standards Exist for Resolving the Suit.*

Oregon caselaw provides manageable standards for deciding whether state officials are violating their public trust obligations. The issue is “not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint.” *Alperin*, 410 F3d at 552. The question is whether courts have the requisite “legal tools to reach a ruling that is ‘principled, rational, and based upon reasoned distinctions.’” *Id.* (quoting *Baker v. Carr*, 369 US at 278). The Public Trust Doctrine forbids sovereigns from disposing of or substantially impairing public trust resources. *Ill. Cent. R.R.*, 146 US at 435. Thus, common law provides manageable standards to apply.

The Second Circuit's *Am. Elec. Power Co. v. Connecticut*, decision is helpful in understanding this fact. In *AEP*, several States and non-profit land trusts brought common law nuisance and tort claims against several electric power companies for their contributions to climate change. *Am. Elec. Power Co. v. Connecticut*, 582 F3d 309, 314 (2d Cir 2009), *rev'd on other grounds* 131 S Ct 2527, 180 L Ed 2d 435 (2011) ("*AEP*"). There, the court overruled the finding of the district court on the political question issue, because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance." *AEP*, 582 F3d at 329. The Second Circuit reasoned "federal courts have successfully adjudicated complex common law public nuisance cases for over a century," and "have applied well-settled tort rules to a variety of new and complex problems." *Id.* at 326-28.

Here, Plaintiffs ask the trial court to apply well-established legal standards to a new set of facts. Courts have long held that alienation and substantial impairment of public trust resources is forbidden under the Public Trust Doctrine. *Shively v. Bowlby*, 152 US at 47; *Morse*, 285 Or at 203. As *AEP* illustrates, common law can be applied to a new set of facts without violating the Political Question Doctrine. It was error to dismiss Plaintiffs' case for a lack of judicially discoverable standards.

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2. *The Case Can Be Decided Without an Initial Policy Determination Committed to Nonjudicial Discretion.*

This case does not require the resolution of an initial policy determination before it can be decided. This factor depends not on whether another branch of government *could* address the issue but whether there is a “textually demonstrable constitutional *commitment* of the issue to a coordinate political department.” *Baker*, 369 US at 217 (emphasis added). Circumstances that have met this factor include: the need for a determination that a treaty is in effect before a court can construe the treaty’s terms upon which the plaintiffs’ claims are based, *Terlinden v. Ames*, 184 US 270, 286-290 (1902); or when the executive must first determine whether an individual holds diplomatic privilege, *Ex Parte Hitz*, 111 US 766, 767-68 (1884).

There is no textual language suggesting that a limit on greenhouse gas emissions is clearly committed to the legislative branch. Additionally, the Oregon Legislature’s policy on capping greenhouse gas emissions and the judicial relief requested in this case are in sync. In *AEP*, the Second Circuit found, as previous courts had, that “where a case ‘appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.’” *AEP*, 582 F3d at 331 (quoting *McMahon v. Presidential Airways, Inc.*, 502 F3d 1331, 1365 (11th Cir 2007)).

Furthermore, courts have addressed global warming before without finding that the issue required an initial policy decision clearly reserved for nonjudicial discretion. *Massachusetts v. EPA*, 549 US 497, 516 (2007) (ordering EPA to respond to a climate change related petition); *AEP v. Connecticut*, ___US ___, 131 S Ct 2527, 2535 (2011) (court of appeal's affirmed by a split court). While global warming is a politically charged question, that does not alter the fact that Plaintiffs' requested relief calls for the court to work in tandem with the legislature to uphold citizen beneficiaries' rights to publicly held natural resources. Therefore, Plaintiffs' suit does not present nonjusticiable political questions.

IX. CONCLUSION

The trial court improperly dismissed this case where it had subject matter jurisdiction to hear and resolve Plaintiffs' claims. Instead, the trial court impermissibly relied on parts of Plaintiffs' requested relief to dismiss all of Plaintiffs' claims and pass on to this Court or others the duty of parsing out Defendants' obligations under the Public Trust Doctrine. Oregon's natural resources face substantial impairment and Plaintiffs and the next generation of Oregonians call upon this court to remedy these legal violations before it is too late.

Respectfully submitted on December 10, 2012,

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Dated: December 10, 2012

By: /s/ Tanya M. Sanerib
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I hereby certify that on December 10, 2012, I filed PLAINTIFFS-
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