IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

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 CATHY JULIANA, guardian of Kelsey Juliana, Plaintiffs, v. JOHN KITZHABER, in his official capacity as Governor of the State of Oregon; and the STATE OF OREGON, Defendants.	Case No. 16-11-09273 OPINION AND ORDER

THIS MATTER came before the Court on The State of Oregon and Governor's Motion to Dismiss (filed October 18, 2011). The Court heard oral argument on Defendants' motion on January 23, 2012. Tanya Sanerib and Christopher Winter of Crag Law Firm represented Plaintiffs and Roger Dehoog of the Department of Justice represented Defendants (the "State") at oral argument. Mr. Dehoog also filed the State's Motion to Dismiss and William Sherlock of Hutchinson, Cox, Coons, DuPriest, Orr, & Sherlock, P.C. and Mr. Winter filed Plaintiffs' Response to Defendants' Motion to Dismiss (filed December 2, 2011).

I. BACKGROUND

On May 19, 2011, Plaintiffs filed an Amended Complaint for Declaratory Judgment and Equitable Relief. In summary, Plaintiffs are children and their families who live in Oregon and

allege that their personal and economic well being is directly dependent upon the health of the state's natural resources held in trust for the benefit of its citizens, including water resources, submerged and submersible lands, coastal lands, forests, and wildlife. Plaintiffs allege that all of these assets are currently threatened by the impacts of climate change. Specifically, Plaintiffs allege that the interests of Plaintiffs will be adversely and irreparably injured by Defendants' failure to establish and enforee adequate limitations on the levels of greenhouse gas ("GHG") emissions that will reduce the level of carbon dioxide concentrations in the atmosphere. (Am. Compl. ¶ 11.) In the prayer for relief, Plaintiffs seek:

(1) A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere.

(2) A declaration that water resources, navigable waters, submerged and submersible lands, islands, shore lands, coastal areas, wildlife and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets.

(3) A declaration that Defendants have failed to uphold their fiduciary obligations to protect these trust assets for the benefit of Plaintiffs as well as current and future generations of Oregonians by failing to adequately regulate and reduce carbon dioxide emissions in the State of Oregon.

(4) An order requiring Defendants to prepare, or cause to be prepared, a full and accurate accounting of Oregon's current carbon dioxide emissions and to do so annually thereafter.

(5) An order requiring Defendants to develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science.

(6) A declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by six percent each year until at least 2050.[1]

[1] Plaintiffs, in the Amended Complaint, include a section entitled "Science Documenting the Climate Crisis." This section sets forth the Plaintiffs' claims regarding the impact of fossil fuels and carbon dioxide on the environment and global temperatures. Plaintiffs allege that "to limit average surface heating to no more than 1°C (1.8°F) above pre-industrial temperatures, and to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million."

Climate change has been an issue of concern in Oregon for over three decades.[2] More recently, and more relevant to the case at bar, in 2004, then-Governor Ted Kulongoski appointed the Governor's Advisory Group on Global Warming ("Governor's Advisory Group"). In December 2004, the Governor's Advisory Group issued its report entitled *Oregon Strategy for Greenhouse Gas Reductions.* which recommended the following GHG reduction goals for Oregon:

> (1) By 2010, arrest the growth of, and begin to reduce, statewide GHG emissions.
>
> (2) By 2020, the state's total GHG emissions should not exceed a level 10 percent below the levels emitted in 1990.
>
> (3) By 2050, the state's total GHG emissions should be reduced to a level of at least 75 percent below 1990 levels. GOVERNOR'S ADVISORY GROUP ON GLOBAL WARMING, OREGON STRATEGY FOR GREENHOUSE GAS REDUCTIONS (2004), http://oregon.gov/ENERGY/GBLWRM/docs/GWReport-Final.pdf.

In 2007, the Legislative Assembly enacted House Bill 3543 (HB 3543), which was largely codified in ORS 468A.200 to ORS 468A.260. In relevant part, ORS 468A.200 to ORS 468A.260 did three things. First, it legislatively found that global warming "poses a serious threat to the economie well-being, public health, natural resources and the environment of Oregon." ORS 468A.200(3).[3] Second, it adopted the GHG reduetion goals recommended by the Governor's Advisory Group in its 2004 report. ORS 468A.205(1). Third, it created the Oregon Global

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[2] In 1988. then-Governor Neil Goldschmidt created the Oregon Task Force on Global Warming. Based on the task force's recommendations, the Legislature passed Senate Bill 576, which established Oregon's first earbon emissions reduetion goals. http://www.oregon.gov/ENERGY/GBLWRM/Portal.shtml (Last accessed March 30, 2012).

[3] That global warming poses a "serious threat" is a "legislative finding" in the sense that the Legislature believes it is true and has, accordingly, decided to act upon that finding. As a former legislator, this Court understands the importance of legislative findings. which are not findings of truth in the same sense that judicial findings seek to be. In the eontext of the case at bar, this Court wishes to make clear that it makes no commcnt about the aetual truth, or lack thereof, of global warming.

Warming Commission (the "Commission"). ORS 468A.215(1). The Commission is comprised of 25 members[4] whose pertinent duties include:

(1) Recommending ways to coordinate with state and local efforts to reduce GHG emissions consistent with ORS 468A.205;

(2) Recommending statutory and administrative changes, policy measures and other recommendations to be earried out by state and local governments, businesses, nonprofit organizations and residents to further the goals established in ORS 468A.205;

(3) Examining GHG cap-and trade systems as a means of achieving the goals established in ORS 468A.205;

(4) Examining funding mechanisms to obtain low-cost GHG emissions reduetion; and

(5) Collaborating with state and local governments, the State Department of Energy, Department of Education, and State Board of Higher Education to develop and implement an outreach strategy to edueate Oregonians about the impacts of global warming and to inform Oregonians of ways to reduce GHG emissions. ORS 468A.235 to ORS 468A.245.

Additionally, the Office of the Governor and other state agencies working to reduce GHG emissions must inform the Commission of their efforts and consider input from the Commission for such efforts. ORS 468A.235.

Essentially, Plaintiffs seek a judgment from the Court that the actions undertaken by the Governor and the Legislature to address climate change are inadequate. Plaintiffs, in the Amended Complaint, allege that in order to protect Oregon's public trust assets, the best available seience concludes that concentrations of atmospherie earbon dioxide cannot exeeed 350 parts per million. (Am. Compl. ¶ 26.) To reduce carbon dioxide to 350 parts per million by the end of the century, Plaintiffs allege that the best available science coneludes that carbon

[4] The Commission is comprised of twenty-five members, eleven of whom are "voting members." The voting members must have "significant experience" in the following fields: manufacturing, energy, transportation, forestry, agriculture, environmental policy. Additionally, two members of the Senate, not from the same political party, and two members of the House of Representatives, not from the same political party, shall serve as nonvoting members. ORS 468A.215.

dioxide emissions must not increase and must begin to decline at a global average of at least six percent each year, beginning in 2013, through 2050, then deeline at a global average of five pereent a year. (Am. Compl. ¶ 27.) Plaintiffs allege that the GHG emission goals established in ORS 468A.205 fail to achieve the necessary GHG reductions according to the best available seience. (Am. Compl. ¶ 36.) Furthermore, Plaintiffs allege that even if the goals established by the Legislature were adequate, Oregon has fallen far short of those goals. *Id.*

II. DISCUSSION

A. The Seope of Oregon's Uniform Declaratory Judgments Act

The State argues that the relief Plaintiffs seek exeeeds the Court's authority under Oregon's Uniform Declaratory Judgments Act, ORS 28.010 to 28.160. The Declaratory Judgment Act confers on Oregon eourts the "power to deelare rights, status, and other legal relations, whether or not further relief is or could be elaimed." ORS 28.010. The purpose of the Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." *Id.* The State argues that Plaintiffs do not ask the Court to interpret a specific statute or provision of thc Constitution, and do not allege that Defendants have violated any such provision, but rather ask the Court to impose a new affirmative duty on Defendants. Plaintiffs argue that they simply ask the Court to make declarations under the Act regarding Defendants' authority to protect public trust assets identified in both statutes and the Constitution.

In *Pendleton School District 16R v. State of Oregon*, 345 Or 596, 599 (2009), Plaintiffs – eighteen school districts and seven public school students – filed an action against the State of Oregon "seeking a declaratory judgment that Article VII, section 8, of the Oregon Constitution requires that the legislature fund the Oregon public school system at a level sufficicnt to meet

certain quality educational goals established by law." Plaintiffs also sought an injunction directing the Legislature to appropriate the necessary funds. *Id.* The Court held that the courts could grant a declaratory judgment that the Legislature failed to fully fund the public school system, if that is the case, as required by Article VIII, section 8, of the Oregon Constitution. *Id.* at 610. In other words, the Court held that courts could grant a declaratory judgment that the Legislature violated a constitutional provision.

Here, unlike in *Pendleton School District*, Plaintiffs have not alleged that Defendants have failed to adhere to a specific constitutional provision or statute. Instead, Plaintiffs ask the Court to create and impose an affirmative duty on Defendants. Then, Plaintiffs argue that the Court should find that Defendants failed to meet this obligation. Plaintiffs argue that they are not asking the Court to *create* a new duty but merely to recognize a duty well supported by "state sovereignty, the common law of Oregon, as well as in its statutes and the state Constitution." (Pls.' Resp. to Defs.' Mot. to Dismiss 10). However, the many statutes, cases, and constitutional provisions Plaintiffs cite to do not support their argument. In this case, the only clear duty is the one already enunciated by the Legislature in ORS 468A.200 to ORS 468A.260. Thus, the Court concludes that Plaintiffs' requested relief asks this Court to extend the law by creating a new duty rather than interpret a pre-existing law. Therefore, the Court concludes that the relief Plaintiffs seek exceeds the Court's authority under Oregon's Declaratory Judgment Act.

B. Sovereign Immunity

Defendants argue that sovereign immunity bars suits against the state except in those limited instances in which the state has expressly waived its immunity. Thus, Defendants argue, Plaintiffs must either show that their claim avoids invoking immunity, or that immunity has been expressly waived. Article IV, section 24, of the Oregon Constitution incorporates the doctrine of

sovereign immunity from suit. In *Lucas v. Banfield*, 180 Or 437, 441 (1947), the Court recognized that "a deelaratory judgment proceeding must be dismissed when relief is sought against the State and when it has not consented to be sued." In some circumstanees, howcver, the courts have found that declaratory judgment actions implicating the state were nonetheless not actions against the state. In *Hanson v. Mosser*, 247 Or 1, 7 (1967), *overruled on other grounds by Smith v. Cooper*, 256 Or 485 (1970), the Court held that when state 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."

Plaintiffs argue that the courts have the authority to declare legal rights and relations,[5] regardless of whether the state is a party. In other words, Plaintiffs argue, the rights of beneficiaries to enforce a trust cannot be abrogated, even by the doctrine of sovereign immunity. Plaintiffs, citing *United States v. Mitchell,* 463 U.S. 206, 225-26 (1983), argue that sovereign immunity does not har this suit because this is simply a case where the beneficiaries (Plaintiffs) of a trust seek a declaration, among other relief, against the trustee for wasting trust resources.

Plaintiffs completely mischaracterize the law. In *Mitchell*, the Court found that owners of interests in allotments on Indian tribal lands could sue the United States only *after* finding the United States had waived sovereign immunity. *Id.* at 212. Specifically, the Court held, "It is axiomatic that the United States may not be sued without its consent and that the existence of

[5] Plaintiffs argue that pursuant to the plain text of Oregon's Uniform Declaratory Judgment Act, the Court has the ability to deelare the rights of benefieiaries and the duties of trustees. ORS 28.040. However, even if the Deelaratory Judgment Act fails to offer an adequate remedy, Plaintiffs argue that Article I, seetion 10, of the Oregon Constitution (the "Remedy Clause") mandates that Plaintiffs have a remedy available for their alleged injury. Plaintiffs' argument is flawed. The Remedy Clause states, "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." It generally serves as a limit on the Legislature's ability to abolish common law remedies available to individuals at the time the Oregon Constitution was adopted. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 118-19 (2001). Thus, where no remedy ever existed at common law, there can be no violation of this provision. *Id.* at 118-19. Because Plaintiffs did not have the right to sue the State of Oregon and the Governor for violating their fiduciary obligations with respect to certain public trust assets at the time the Oregon Constitution was adopted, no provision of the Remedy Clause has been violated.

consent is a prerequisite for jurisdiction ... we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the Unitcd States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." *Id.* Contrary to Plaintiffs' contention, the *Mitchell* Court in no way held that the rights of beneficiaries to enforce a trust superseded the doctrine of sovercign immunity. In fact, the Court did just the opposite.

Here, Plaintiffs' elaim is against the State of Oregon and Governor Kitzhaber. Thus, unless Plaintiffs' elaim cither avoids invoking immunity or the State has waived immunity, Plaintiffs' claim is barred by sovereign immunity and the Court has no jurisdiction to hear the ease. As to Defendant State of Oregon, Plaintiffs' claim is barred by sovereign immunity. Plaintiffs' Amended Complaint does not suggest that Defendant State of Oregon has acted "beyond or in abuse of its delegated authority," and Defendant State of Oregon has not waived immunity. Likewise, Plaintiffs' elaim as to Defendant Kitzhaber is also barred by sovereign immunity. Plaintiffs' Amended Complaint does not suggest that Governor Kitzhaber has acted "bcyond or in abuse of his delegated authority," and Governor Kitzhaber has not waived immunity.[6] Thus, the Court concludes that Plaintiffs' claims are barred by sovereign immunity and the Court docs not have jurisdiction to hear the case.

[6] To be clcar, Plaintiffs do allege that both the State and Governor have violated their fiduciary obligations with respect to certain public trust assets. Nevertheless, this case is distinguishable from *Hanson.* In *Hanson,* the plaintiffs alleged that defendants acted illegally when they awarded a contract to a bidder other than the lowest bidder. In other words, plaintiffs alleged that defendants acted in clear violation of an established law. Here, Plaintiffs first ask this Court to declare, or create, the obligations allegedly owed by Defendants. Then, Plaintiffs ask the Court to find that Defendants are in violation of these newly created obligations. Because the Court would first have to declare, or create, these fiduciary obligations, the Court concludes that this case is distinguishable from *Hanson* and thus barred by sovereign immunity.

C. The Separation of Powers Doctrine

i. Separation of Powers Doctrine

Defendants argue that Plaintiffs' requested relief violates the Separation of Powers Doctrine as it requires the Court to substitute its own standards for those standards developed through the legislative process. The Separation of Powers Doctrine stems from Article III, section 1, of the Oregon Constitution. It provides,

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, exeept as in this Constitution expressly provided. Or Const, Art III, §1.

Although the Separation of Powers Doctrine mandates three separate and distinet branches of government, that separation is not always complete as some interaction bctween the branehcs remains desirable. *Rooney v. Kulongoski*, 322 Or 15, 28 (1995), *citing* The Federalist No 51 (A. Hamilton or J. Madison) (stating that separation of powcrs is deemed "essential to the prescrvation of liberty"); *Monaghan v. School District No. 1*, 211 Or 360, 364 (1957). Thus, a violation of separation of powers will be found only if the violation is elear. *Rooney,* 322 Or at 28. To determine whether there has been a clear violation of the Separation of Powcrs Doctrine, the court makes two inquiries: (1) the "unduc burden" inquiry; and (2) the "functions" inquiry. *Id.*

First, using the "undue burden" inquiry, the court must determine whether one department has "unduly burdened" the actions of another department in an area of responsibility or authority committed to the other department. *Id.* The "undue burden" inquiry "corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influcnce between governmental departments." *Id.* In *Rooney*, the Oregon Supreme

Court held that their ballot title review function did not offend the Separation of Powers Doctrine. *Id.* at 29-30. The Court noted that "judicial review of the Attorney General's acts done pursuant to statute is a *well-established* role for the court and does not present the potential for the court to influence coercively the Attorney General." *Id.* at 29 (emphasis added).

Here, Plaintiffs' requested relief seeks to, among other things: (1) impose a fiduciary obligation on Defendants to protect the atmosphere from climate change;[7] (2) declare that Defendants have failed to meet this standard; and (3) compel Defendants to address the impact of climate change by reducing GHG emissions in a specific amount over an established timeframe. (Am. Compl. ¶¶ 47-52.) Plaintiffs argue that the requested relief does not place an undue burden on the other branches of government because the requested relief leaves up to Defendants' discretion how to make the necessary reductions of GHG emissions to protect public trust assets. In other words, Plaintiffs argue that their requested relief would not impose an undue burden on the Legislature because what is regulated[8] (i.e. the sources of carbon dioxide emissions) and how it is regulated are questions largely left to Defendants' discretion. Furthermore, Plaintiffs argue that Plaintiffs' requested relief does not require the Court to "strike out" any existing legislation. Plaintiffs argue that the requested relief is "concurrent" to HB 3543 in that it "will ensure the state meets its public trust obligations, which is separate from the inquiry that led to the adoption of HB 3543, and does not require the Court to 'strike out' any existing legislation." (Pls.' Resp.

[7] While the declaration that the atmosphere is a public trust resource is only one aspect of Plaintiffs' requested relief, the atmosphere is central to the entire Amended Complaint. Plaintiffs want the atmosphere to be protected, through GHG emission reduction, in order to protect other named public trust assets.

[8] At oral argument, the Court asked Plaintiffs, "Under the Public Trust Doctrine, what would be the limit on a court's actions?" In other words, where is the line? The Court granted leave to Plaintiffs' counsel to send a letter to the Court addressing this issue after oral argument. Plaintiffs, in their letter, argue that it is not up to the Court to determine whether specific activities (like field burning in Lane County) will be allowed to occur – that decision is reserved for Defendants. But Plaintiffs fail to provide this Court with a satisfactory answer. While Plaintiffs' interpretation of the Public Trust Doctrine may not require certain activities to cease, Plaintiffs fail to realize that they, through this Court, are unconstitutionally seeking to force Defendants to protect certain resources in a specific manner contrary to the manner in which the Legislature has already chosen to act.

to Defs.' Mot. to Dismiss 25), *citing Brown v. Transcon Lines*, 284 Or 587, 610 (1978) (explaining that a new statutory law and a "pre-existing common law" can be "cumulative, rather than exclusive.").

Contrary to their own stated position, Plaintiffs are clearly asking this Court to substitute its judgment for that of the Legislature. Plaintiffs ask the Court to: (1) order Defendants to "develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science," and (2) issue a "declaration 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." (Am. Compl. ¶¶ 51, 52.) Unlike in *Rooney,* Plaintiffs ask this Court to step far outside of its well-established role – of adjudicating facts and analyzing extant law in the context of a concrete dispute – to affirmatively declare a law that is in contrast with laws established by the Legislature. If this Court were to grant Plaintiffs' requested relief, it would effectively "strike down" HB 3543 and ORS 468A.200 to ORS 468A.260. Plaintiffs' requested relief would create a more stringent standard for GHG emission reductions and would thereby displace those goals established by the Legislature in HB 3543 and ORS 468A.200 to ORS 468A.260. It is hard to imagine a more coercive act upon the legislative department than to strike out a statutory provision and supplant it with the Court's own formulation.[9] Thus, the Court concludes that Plaintiffs' requested relief would impose an "undue burden" on the legislative branch and thus violates the Separation of Powers Doctrine. Indeed, it is difficult to analyze this case as being anything other than an "undue burden" on the legislative branch when the Plaintiffs are really asking a solitary judge in one of thirty-six counties to completely subvert the legislative process

[9] It is well within the court's established role to strike down statutes when they are unconstitutional. Here, there is no allegation of unconstitutionality.

and thereby subvert the elective representatives of the sovereign acting in concert with one another. The Plaintiffs effectively ask the Court to do away with the Legislature entirely on the issue of GHG emissions on the theory that the Legislature is not doing enough. If "not doing enough" were the standard for judicial action, individual judges would regularly be asked to substitute their individual judgment for the collective judgment of the Legislature, which strikes this Court as a singularly bad and undemocratic idea.

Second, using the "functions" inquiry, the Court must determine whether one department is, or will be, performing functions committed to another department. *Rooney*, 211 Or at 28. In Oregon, the constitutionally-mandated framework for addressing issues of statewide significance is as follows. The Governor is the chief executive of the state. Or Const, Art V, §1. In that capacity, it is his constitutional duty to see "that the Laws be faithfully executed." *Id.* at §10. The principal responsibility for making "the Laws" lies with the Legislature. Or Const, Art IV, §1 (vesting state's legislative power in the Legislative Assembly). However, in the course of discharging his executive duties, the Governor is required to keep the Legislature informed as to the condition of the state and he must recommend new laws to the Legislature as is appropriate. Or Const, Art V, §11. This is exactly the approach that the Governor and Legislature have taken with respect to climate change.[10] The 2007 Legislative Assembly, following the recommendations from the Governor's Advisory Group, enacted ORS 468A.200 to ORS 468A.260, which adopted specific GHG emissions goals for the state to achieve by 2010, 2020, and 2050. Plaintiffs, without arguing that ORS 468A.200 to ORS 468A.260 is unconstitutional or violates any statute, ask the Court to draft a similar but more stringent statute. This is classic lawmaking and is a function constitutionally reserved to the Legislature. One of the functions of

[10] See "Background" section, above.

the Legislature is to decide politically – based upon whatever facts it deems relevant to the determination – whether or not global warming is a problem and what, if anything, ought to be done about it. Whether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature's GHG emission goals are too weak, too stringent, or are altogether unneeessary is beside the point. These determinations are not judicial functions. They are legislative funetions. Thus, the Court concludes that Plaintiffs' requested relief violates the Separation of Powers Doetrine.

ii. Political Question Doctrine

Defendants argue that a closely-related reason that this Court lacks jurisdiction to award deelaratory or injunctive relief against Defendants is the Political Question Doctrinc. Thc doctrine provides that certain issues are not justiciable because they have been eonstitutionally reserved to the political branches of government. Thus, the Political Question Doctrine is a variation on the Separation of Powers Doctrine. While the Oregon Supreme Court has recognized the Political Question Doctrine,[11] it is not clear whether this doctrine extends morc, less, or the same freedom from judicial scrutiny as the Separation of Powers Doctrine standing alone. Thus, it is instructive to look to the federal courts for their application of the doetrine under the federal Constitution.

The federal courts have developed the Politieal Question Doctrine much more fully than the Oregon courts. However, under federal law, the central principle remains the same – certain issues are not justiciable because they havc been constitutionally reserved to the political

[11] In *Putnam v. Norblad*, 134 Or 433 (1930), the Oregon Supreme Court recognized the Political Question Doctrine. The Court stated that "[i]t is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provision." *Id.* at 440. The Court acknowledged that it was "not always easy to define the phrase 'political' question, nor to determinc which matters fall within its scope[.]" *Id.*

branches of government. In *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), the court analyzed the political question doctrine at length. The court explained,

> The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as opposed to legal, and thus, must be resolved by the politieal branches, rather than the judiciary. *Corrie v. Caterpillar, Inc*, 503 F.3d 974, 980 (9th Cir. 2007). 'The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy ehoices and value judgments that are constitutionally committed to Congress or the executive branch.' *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). 'A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.' *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 785 (9th Cir. 2005).

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth six independent factors for the courts to use in determining whether a suit raises a nonjusticiable political question. *Native Village of Kivalina*, 663 F. Supp.2d at 871, citing *Baker*, 369 U.S. 186 (1962). Defendants argue that two factors are particularly relevant to the case at issue:

(1) A laek of judicially discovcrable and manageable standards for resolving it; or

(2) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. *Id.* at 872, *citing Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005).[12]

First, Defendants argue that despite the precise GHG reductions that Plaintiffs call for, their suit lacks the sort of judicially discoverable standards necessary to resolve this dispute. The *Baker* court explained that the focus of this factor is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled,

[12] The remaining factors are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (3) an unusual need for unquestioning adherence to a political decision already made; or (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Native Village of Kivalina*, 663 F.Supp.2d at 871-72.

rational, and based upon reasoned distinctions.'" *Baker*, 369 U.S. at 873-74 *citing Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). In the instant case, Plaintiffs seek a declaration that Defendants have a fiduciary obligation to hold certain assets in trust and that the only way to satisfy this fiduciary obligation is to reduce GHG emissions to certain levels. Plaintiffs argue that their claims are based on the "long-recognized" public trust doctrine and that the court must only look to case law to find the judicial standards necessary to adjudicate the present dispute.

Although the cases cited by Plaintiffs discuss the Public Trust Doctrine, the manner in which the doctrine is invoked in those cases is substantially less onerous than the manner in which Plaintiffs seek to invoke the doctrine here. In fact, Plaintiffs have not pointed this Court to a single case where, in order to satisfy their fiduciary obligation, a trustee was required to harness and control GHG emissions. Even if this Court were to find that Defendants had a fiduciary obligation to hold certain assets in trust, it would be left asking what trust standards to apply. Plaintiffs' suit would require this Court to decide whether capping GHG emissions at the levels recommended by Plaintiffs is the proper way to protect the named trust assets and how these trust assets could be meaningfully regulated in Oregon – a relatively small political unit. These are all policy questions, which would require the Court to engage in a largely unguided weighing of competing public interests for which the Court does not have judicially discoverable standards.

Second, yet closely related, Defendants argue that Plaintiffs' suit requires this Court to "make an initial policy determination of a kind clearly for nonjudicial discretion" in order to decide the case before it. Plaintiffs ask this Court to cap GHG emissions at the levels recommended by Plaintiffs, rather than those already established by the Legislature. That is a policy decision that has already been addressed by the Legislature. With the Legislature this

decision should remain. Therefore, this Court concludes that Plaintiffs' suit presents political questions, which necessarily are decided by the political branches of government, not the judiciary. Consequently, this Court lacks jurisdiction to award declaratory or injunctive relief against Defendants.

D. Court's discretiou to deny relief pursuant to ORS 28.060

Because the Court finds that: (1) the relief Plaintiffs seek exceeds the Court's authority under Oregon's Declaratory Judgment Act; (2) Plaintiffs' claims are barred by sovereign immunity; (3) Plaintiffs' requested relief violates the Separation of Powers Doctrine; and (4) Plaintiffs' suit presents political questions, it declines to address whether it would, in its discretion, grant or deny relief pursuant to ORS 28.060 at this time.

III. ORDER

IT IS HEREBY ORDERED that The State of Oregon and Governor's Motion to Dismiss is GRANTED. Mr. Dehoog shall prepare the judgment which shall, by reference, incorporate this Opinion and Order.

Dated this 5th day of April, 2012.

Karsten H. Rasmussen, Circuit Court Judge

cc: Tanya Sanerib, via email
Christopher Winter, via email
William Sherlock. email
Roger Dehoog, via email