IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

AKILAH SANDERS-REED,
by and through her parents Carol
and John Sanders-Reed, and
WILDEARTH GUARDIANS,

Plaintiffs/Appellants,

vs.

Ct. Ap. No. 33,110

SUSANA MARTINEZ,
in her official capacity as Governor
of New Mexico, and
STATE OF NEW MEXICO,

Defendants/Appellees.

On appeal from: *Sanders Reed v. Martinez*, Case No. D-0101-CV-2011-01514

APPELLANTS' BRIEF-IN-CHIEF

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Appellants Akilah Sanders-Reed and WildEarth Guardians filed suit in the First Judicial District, Santa Fe County, seeking a declaratory judgment that Appellees Governor Susana Martinez and the State of New Mexico (collectively, "the State") had violated their duties under the Public Trust Doctrine to manage the atmosphere as a trust asset and protect it from substantial impairment due to the impacts of unlimited greenhouse gas emissions from in-state sources. **1 RP 185 ¶¶ 80-87**. Appellants also requested that the district court order the State to comply with its public trust obligation to protect the atmosphere by assessing the current degree of impairment to the atmosphere from New Mexico's greenhouse gas emission levels and producing a plan to redress this impairment and mitigate the concomitant climate change impacts. **1 RP 186-87**.

Application of the Public Trust Doctrine in New Mexico is an issue of first impression in the state's jurisprudence. The Public Trust Doctrine holds that certain natural resources are the common property of all citizens of a state, cannot be subject to private ownership, and must be preserved and protected by state governments. *See Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892). The Doctrine is an attribute of state sovereignty and, as such, cannot be abdicated by the state. *Id*. at 460. Other State Supreme Courts have called the Doctrine an

inalienable, inviolate, inherent, natural, and fundamental right and a sovereign obligation of governments. *See, e.g., Robinson Twp. et al. v. Commonwealth of Pa*., 83 A.3d 901, 947 n.35, 948 n.36 (Pa. 2013) (finding public trust rights "are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution").

As the sovereign trustee of their natural resources, states have a fiduciary obligation to protect these natural assets for the beneficiaries of the trust, which include present and future generations of citizens. *See Ill. Cent. R.R. v. Illinois*, 146 U.S. at 460. Although the legislative and executive branches are the trustees of public resources, "[t]he interests encompassed by the public trust undoubtedly are protected by public agencies acting pursuant to their police power and explicit statutory authorization." *Ctr. for Biol. Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008) (discussing Public Trust obligations of "public agencies").

The atmosphere, essential to human existence, is an asset that belongs to all people. **1 RP 160 ¶ 2**. Appellants alleged that the State, by causing, approving and allowing excessive greenhouse gas emissions into the Earth's atmosphere, breached its public trust duty to prevent substantial impairment of the atmosphere, thereby contributing to climate change impacts in New Mexico. **1 RP 185 ¶ 85**. The impacts include shorter and warmer winters, an abbreviated ski season, more

wildfires, droughts, and impacts to our water resources. **1 RP 180-81 ¶¶ 61-67**. Despite reports produced by agencies such as the Office of the State Engineer and the U.S. Bureau of Reclamation acknowledging the impacts of climate change in New Mexico that result from human-caused greenhouse gas emissions, the State was taking no measures to address the human causes of climate change in New Mexico and in fact repealed New Mexico's existing greenhouse gas regulations. **3 RP 613, 3 RP 698**.

The State maintained that the Public Trust Doctrine does not exist in New Mexico, and moved for summary judgment on the grounds that even if the Doctrine existed under New Mexico law it would be "improper" to apply the Doctrine in Appellants' case. **2 RP 268, 275**. The State argued that it was not subject to the Public Trust Doctrine with respect to protecting New Mexico's atmosphere because the New Mexico Environmental Improvement Board ("EIB") gave due weight to both environmental and economic factors when it *repealed* New Mexico's then-existing greenhouse gas regulations. **2 RP 278-79**. To deflect attention away from its failure to fulfill its duty as trustee of the atmosphere, the State attempted to reframe Appellants' case as an improper collateral challenge to the EIB's decision to repeal New Mexico's greenhouse gas regulations, and asserted that the Court of Appeals was the proper venue to challenge repeal of state regulations. **2 RP 280**.

In their response to the State's Motion, Appellants denied challenging, either directly or indirectly, the EIB's legal authority to promulgate or repeal greenhouse gas regulations or the process that the EIB followed in repealing the greenhouse gas regulations. **4 RP 794**. Appellants pointed out that regardless of whether the State complied with the procedural requirements in repealing New Mexico's greenhouse gas regulations, the Public Trust Doctrine imposes a substantive duty on the State "to exercise continuous supervision and control" over trust resources. **4 RP 787** (citing *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 712 (Cal. 1983)).

The district court granted the State's summary judgment motion finding that the Public Trust Doctrine should not apply in this case because in repealing New Mexico's greenhouse gas regulations, the EIB made "a broader statement about the need or lack of need for greenhouse gas regulations." **6-26-13 Tr. 40:5-7**. The district court considered the EIB's finding, that greenhouse gas regulation in New Mexico would not impact climate change, to be sufficient consideration of impacts to the atmosphere to preclude application of the Public Trust Doctrine. *Id*. at **Tr. 39:22 – Tr. 40:13**. As discussed in detail in Argument Section II below, the district court's grant of summary judgment to the State is based on the erroneous premise that the threshold inquiry in a public trust case is whether the Doctrine

applies rather than whether the State is fulfilling its substantive duty as trustee of the natural resource at issue.

Appellants are challenging the district court's grant of summary judgment to the State.

II. COURSE OF THE DISTRICT COURT PROCEEDINGS

Appellants filed their Complaint on May 4, 2011. **1 RP 1**. On August 5, 2011, the State moved to dismiss Appellants' original Complaint. **1 RP 62**. During a hearing on the Motion held on January 26, 2012, the district court granted Appellants leave to amend their Complaint to state a case that was more consistent with how the district court believed the Public Trust Doctrine would be applied in New Mexico. **1-26-12 Tr. 50:22 – Tr. 51:5**. The court also provided guidance regarding the context in which it believed the New Mexico Supreme Court would apply the Public Trust Doctrine to the atmosphere: (1) where the legislature had failed to enact a statutory scheme to deal with the atmosphere; (2) where the agency assigned to deal with the atmosphere was not following an existing statutory scheme; or (3) where the public was excluded from the legislative or administrative process. *Id*. at **Tr. 48:22 – Tr. 49:22**.

Appellants filed an Amended Complaint on February 16, 2012. **1 RP 159**. On March 30, 2012, the State moved to dismiss Appellants' Amended Complaint on the grounds that Appellants had not amended their complaint consistent with

the court's guidance. **1 RP 193-95**. During a hearing on the Motion held on June 29, 2012, the court determined that Appellants had made allegations sufficient to overcome a 12(b)(6) motion. **6-29-12 Tr. 23:20 – Tr. 24:11**. Based on the sufficiency of Appellants' allegations in their Amended Complaint, the court denied the Motion to Dismiss to the extent that Appellants had made a substantive allegation that the state was ignoring the atmosphere with respect to greenhouse gas emissions. *Id*.

On January 11, 2013, the State filed a Motion for Summary Judgment asserting that application of the Public Trust Doctrine was not appropriate because the Environmental Improvement Board determined there would be no appreciable benefit to New Mexico from greenhouse gas regulation. **2 RP 268**. On February 19, 2013, Appellants filed a Cross Motion for Summary Judgment asserting that the Public Trust Doctrine did apply to the State and that the State's inaction on greenhouse gas emissions constituted a breach of the State's fiduciary duty to protect the atmosphere from substantial impairment under the Public Trust Doctrine. **4 RP 800**. After briefing was complete, the court heard oral argument on June 26, 2013. At the hearing, the court issued a ruling from the bench. The court granted the State's Motion for Summary Judgment and denied Appellants'

Motion for Summary Judgment.[1] **6-26-16 Tr. 42:3-10**. On July 4, 2013, the court issued an order formalizing its ruling from the bench. **4 RP 915**. On July 24, 2013 Appellants filed a Notice of Appeal of the Summary Judgment ruling granting summary judgment to the State. **4 RP 927**.

LEGAL BACKGROUND FOR THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine is "[a]n ancient doctrine of common law [that] restricts the sovereign's ability to dispose of resources held in public trust." *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 166 (Ariz. Ct. App. 1991). "The genesis of this principle is found in Roman jurisprudence, which held that 'by the law of nature' 'the air, running water, the sea, and consequently the shores of the sea' were 'common to mankind.'" *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 360 (N.J. 1984) (quoting J. Inst. 2.1.1 (T. Sandars trans. 1st Am. Ed. 1876)). The Public Trust Doctrine developed through English common law and was incorporated into the first American colonial charters. *See Martin v. Waddell*, 41 U.S. 367, 413 (1842) (discussing the Public Trust Doctrine in colonial charters).

More than a century ago, in what has become the seminal public trust case, the U. S. Supreme Court recognized the Public Trust Doctrine was needed as a

[1] Appellants do not challenge the district court's denial of Appellants' summary judgment motion and the district court's holding with respect to Appellants' motion is not relevant to resolution of the issues before this Court.

bulwark to protect resources too valuable to be disposed of at the whim of the legislature. *See Ill. Cent. R.R. v. Illinois*, 146 U.S. at 453 ("The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."); *see also Geer v. Connecticut*, 161 U.S. 519, 534 (1896) ("The ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."), *rev'd on other grounds*, *Hughes v. Okla*., 441 U.S. 322 (1979).

Over time, courts have expanded the Public Trust Doctrine beyond original societal concerns of commerce and navigation to other modern concerns such as biodiversity, wildlife, and recreation. *See, e.g., Nat'l Audubon Soc'y*, 658 P.2d at 719; *Ctr. for Biol. Diversity*, 83 Cal. Rptr. 3d at 599; *Matthews*, 471 A.2d at 363. Indeed, courts have "perceiv[ed] the public trust doctrine, not to be 'fixed or static,' but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Matthews*, 471 A.2d at 365. From its Roman origins through early United States treatises and case law, the Doctrine has applied to air. *Id*. at 360, *Nat'l Audubon Soc'y*, 658 P.2d at 720. In the context of climate change, a state district court in Texas found that the atmosphere was a

public trust resource. *Bonser-Lain v. Texas Comm'n on Envtl. Quality*, 2012 WL 3164561 (Tex., Aug. 2, 2012).

The beneficiaries of a trust hold the beneficial title to all assets in the trust. The trustee holds legal title, encumbered with the responsibility to manage the trust strictly for the beneficiaries. *See* G. G. Bogert & G. T. Bogert, The Law of Trusts and Trustees § 582, at 346 (rev. 2d ed. 1980) ("The trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust *res*[.]"); *see also* Restatement (Third) of Trusts § 76, at 71 (2007) ("The trustee also owes to the beneficiaries a duty to act with prudence – that is, to use reasonable care and skill . . . to preserve trust property. This duty includes the use of reasonable care to protect trust property from loss or damage . . . .") (internal cross references omitted). This construct imposes a responsibility on government, as the trustee, to protect the assets (also called the *res*, or *corpus*) in the interests of the beneficiary class. In the case of the public trust, the citizens are the trust beneficiaries. Any beneficiary of the public trust has "standing to sue to protect the public trust." *Nat'l Audubon Soc'y*, 658 P.2d at 716 n.11; *see also Ctr. for Biological Diversity, Inc.*, 83 Cal. Rptr. 3d at 600-02; *Kapiolani Park Preservation Soc'y v. City & Cnty. of Honolulu*, 751 P.2d 1022, 1025 (Haw. 1989).

STANDARD OF REVIEW

"Summary judgment is reviewed on appeal de novo." *Juneau v. Intel Corp.,* 2006-NMSC-002, ¶ 8, 139 N.M. 12, 15. The Court "construe[s] reasonable inferences from the record in favor of the party opposing the motion." *Celaya v. Hall*, 2004-NMSC-005, ¶ 7, 135 N.M 115, 118.

This appeal raises issues of first impression in New Mexico with respect to the operation and scope of the Public Trust Doctrine. These issues, however, have been addressed by other jurisdictions. When dealing with issues of first impression, New Mexico courts have routinely looked to case law from other states. *See, e.g. Romero v. Byers*, 1994-NMSC-031 ¶ 7, 117 N.M. 422, 425 (in deciding whether court should recognize a new common law claim for loss of spousal consortium, the Court looked to precedent from other jurisdictions on the same issue). Hawaii and California have the most comprehensive public trust jurisprudence. *See, e.g.*, *In re Water Use Permit Applications I*, 9 P.3d 409 (Haw. 2000); *Ctr. for Biological Diversity, Inc.*, 83 Cal. Rptr. 3d at 596. Other jurisdictions have also addressed issues related to the Public Trust Doctrine in the natural resources context. *See, e.g.*, *Robinson Twp.* 83 A.3d. 901; *Hassell*, 837 P.2d 158; *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Id. 1983).

ARGUMENT

Appellants challenge the district court's grant of summary judgment to the State because the district court's decision misconstrues the Public Trust Doctrine and its application. Rather than focus on the issue of whether the State's failure to protect New Mexico's atmospheric trust resource from unlimited greenhouse gas emissions from in-state sources violated the Public Trust Doctrine, the district court instead created a novel test for determining whether the Doctrine should be applied to the State in the first place. The district court held that the Doctrine would only apply if the political process had gone astray in one of three ways: (1) where the legislature had failed to enact a statutory scheme to protect the atmosphere; (2) where the applicable agencies were not complying with an existing regulatory scheme; or (3) where the public was excluded from the legislative or administrative process dealing with protection of the atmosphere. **6-26-13 Tr. 38:17-25**. The district court erred as a matter of law in conditioning application of the Doctrine on the presence of one of these three prerequisites. Although Appellants' case is the first of its kind in New Mexico, there is no support in Public Trust Doctrine jurisprudence from other states or the U.S. Supreme Court for the district court's creation of this test for beneficiaries to seek redress for violations of their rights.

Because this is the first case asking a New Mexico court to recognize and apply the Public Trust Doctrine, there is no existing New Mexico precedent interpreting application of the Doctrine in New Mexico. As discussed in detail below, the New Mexico Constitution and statutes implicitly recognize the Public Trust Doctrine even if the judicial branch has not yet had the opportunity to recognize the Doctrine. But this is a moment when so much is at stake for current and future generations of New Mexicans with respect to a healthy climate that judicial recognition, interpretation, and redress are essential. Therefore, before the Court considers whether the district court erred in imposing criteria governing applicability of the Doctrine, Appellants first ask the Court to formally recognize that the Doctrine is operative in New Mexico and also to recognize that the atmosphere is a public trust resource.[2]

I. THE PUBLIC TRUST DOCTRINE IS OPERATIVE IN NEW MEXICO AND THE ATMOSPHERE IS A PUBLIC TRUST RESOURCE

A. The Public Trust Doctrine is Inherent in the New Mexico Constitution and New Mexico Law.

Unlike state courts in California, Hawaii, Pennsylvania, and Arizona, New Mexico state courts have not been asked to adjudicate issues related to the Public Trust Doctrine and its application to natural resources in New Mexico. This does

[2] The district court recognized the existence of the Public Trust Doctrine in New Mexico and that the atmosphere could be a public trust resource. **6-26-13 Tr. 38:7-9.**

not mean, however, that the Public Trust Doctrine is not operative in New Mexico. *See Hassell*, 837 P.2d at 171 ("That generations of trustees have slept on public rights does not foreclose their successors from awakening."). Indeed, the Public Trust Doctrine is inherent in New Mexico law. The Public Trust Doctrine is expressed in the New Mexico Constitution. *See* N.M. Const. art. XX, § 21 ("The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare."). The New Mexico legislature also has implicitly recognized the Public Trust Doctrine with respect to surface water, groundwater, moisture in the atmosphere, and salt lakes. *See* NMSA §§ 72-1-1, 72-12-1, 75-3-3, 72-11-1 (1978). These constitutional and statutory provisions are informed by the Public Trust Doctrine and provide Appellants, along with all New Mexico citizens, with a legally protected interest as beneficiaries of the public trust.[3]

Moreover, the State has previously declared that it holds the State's groundwater in trust for New Mexico citizens. *See New Mexico v. General Electric Co.*, 335 F. Supp. 2d 1185, 1195 (D.N.M. 2004) (State argued that

[3] Similarly, the Louisiana Constitution declares that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. IX, § 1. The Louisiana Court of Appeals has identified this provision as the state's Public Trust Doctrine. *See La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 719 So. 2d 119, 124 (La. Ct. App. 1998).

"pursuant to the New Mexico Constitution and laws, the State holds [] groundwater in trust for the purpose of making it available for appropriation[.]"; *see also id*. at 1195 n.6 (citing to Joint Pre-Trial Order in which State argued that it "has standing to pursue this case based on the public trust doctrine and its role as sovereign." (citing *State ex rel. New Mexico Water Quality Control Comm'n v. Molybdenum Corp. of Am.*, 1976-NMCA-087 ¶ 7, 89 N.M. 552, 554)). The Tenth Circuit has recognized that the State had standing to bring a "state law action for harm to the public interest in its capacity as trustee of the State's groundwaters." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 (10th Cir. 2006). The Tenth Circuit also recognized NMSA § 72-12-18 as "codification of the public trust doctrine as to groundwaters." *Id*. (also noting that "[t]he State makes much ado over its supposed ability to pursue this action . . . in its capacity as public trustee of the State's groundwaters[.]"). Although a New Mexico court has not been asked to recognize the Public Trust Doctrine or decide a claim based on the Doctrine, the State has previously recognized its public trust obligation with respect to New Mexico's water resources.

B. The Public Trust Doctrine in New Mexico Has Not Been Abrogated by Statute.

The existence of a state statutory and regulatory framework for air pollution does not abrogate the Public Trust Doctrine or release the State from its duty as trustee of the atmosphere. The State incorrectly posits that it cannot be held to a

duty to protect the atmosphere under the Public Trust Doctrine because it already has a duty to protect air quality under the New Mexico Air Quality Control Act. **2 RP 276-77**. However, as Appellants argued below, public trust jurisprudence from around the country recognizes that the Doctrine and natural resource protection statutes complement rather than supplant each other. **4 RP 791-92**. There is no support in the body of public trust jurisprudence for the State's argument that the Doctrine does not apply if a statutory or regulatory scheme exists for the protection of a trust resource.

The Public Trust Doctrine is constitutionally and statutorily enshrined, but it is also a common law doctrine, and common law doctrines are judicially created. *See Hicks v. State,* 1975-NMSC-056 ¶ 4, 88 N.M. 588, 589 (common law doctrine of sovereign immunity is judicially created). Generally, "the common law as recognized by the United States is the rule of practice and decision in New Mexico, except if it has been superseded or abrogated by statute or constitution or held to be inapplicable to conditions in New Mexico." *Lopez v. Maez*, 1982-NMSC-103 ¶ 6, 98 N.M. 625, 629 (citation omitted). Because the Public Trust Doctrine can never be abrogated, the fact that it is also a common law doctrine does not risk abrogation by statute. Even if it did, the New Mexico rule is that "the common law must be expressly abrogated by a statute[.]" *Sims v. Sims*, 1996-NMSC-078 ¶ 23, 122 N.M. 618, 623. Even if the Public Trust Doctrine were just an ordinary

common law doctrine, which it is not because it is implicit in the New Mexico Constitution and statutes, "[r]epeal by implication is not favored and will not be resorted to unless necessary to give effect to an obvious legislative intent." *Gonzalez v. Whitaker*, 1982-NMCA-050 ¶ 18, 97 N.M 710, 714.

Neither the New Mexico Air Quality Control Act nor its implementing regulations abrogate the Pubic Trust Doctrine. The New Mexico Air Quality Control Act imposes the duty on the Environmental Improvement Board "to prevent or abate air pollution." NMSA § 74-2-5A. The State's duties under the Doctrine and the air quality statute, however, are not mutually exclusive. Neither the Doctrine nor the statute limits the other. Instead, both "embody important precepts which make the law more responsive to diverse needs and interests involved in the planning and allocation of [trust] resources." *Natl. Audubon Soc'y,* 658 P.2d at 727. In *Natl. Audubon Soc'y*, the California Court of Appeals sought to reconcile what it described as two legal systems seemingly in tension—the public trust and appropriative water rights system. *Id*. at 732. The court determined that both played a complementary role in managing and protecting the state's water resources:

> To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.

Id. at 727. In reaching "an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system," the court concluded that "[t]he state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters" and, as such, "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id*. at 727-28. On this basis, the Court of Appeals vacated the lower court's decision holding that the Public Trust Doctrine did not offer an independent basis for challenging a water diversion decision reached through the existing statutory process.

Other courts have similarly held that the Public Trust Doctrine and state statutory schemes complement, rather than supplant, each other. The Hawaii Supreme Court rejected the argument that the state's water code supplanted the Public Trust Doctrine, finding the suggestion "that such a statute could extinguish the public trust . . . contradicts the doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate." *In Re Water Use Permit Applications* I, 9 P.3d at 442-43. The court went on to explain:

> The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible "outer limits," and justify its existence. To this end, although we regard the public trust and Code as

> sharing similar core principles, *we hold that the Code does not supplant the protections of the public trust doctrine*.

Id. at 445 (emphasis added); *see also Lawrence v. Clark County*, 254 P.3d 606, 611 (Nev. 2011) (holding that "the Public Trust Doctrine operates simultaneously with the [state] system of prior appropriation"); *Parks v. Cooper*, 676 N.W.2d 823, 837 (S.D. 2004) (holding that while a state statute "certainly displaces common law rules . . . where effective, it does not override the public trust doctrine or render it superfluous."); *Rettkowski v. Dept. of Ecology*, 858 P.2d 232, 239-40 (Wash. 1993) (holding that the Public Trust Doctrine places an "affirmative duty" on the state to protect its waters while the state water code provides guidance as to how the state is to protect its waters to comply with the Doctrine). Furthermore, "mere compliance by [state agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine." *Kootenai Envtl. Alliance*, 671 P.2d at 1095. Accordingly, existence of a statutory and regulatory scheme for protecting a Trust resource does not override the Public Trust Doctrine or the State's duty as trustee of the natural resources within its borders.

C. The Atmosphere is a Public Trust Resource.

Whether a particular resource is part of the public trust is typically treated as a question of state law. *See Montana v. United States*, 450 U.S. 544, 551 (1981). In its seminal recognition of the Public Trust Doctrine, the United States Supreme

Court explained public trust duties arise when the asset in question is "property of a special character." *Ill. Cent. R.R. v. Illinois*, 146 U.S. at 454. While *Illinois Central* dealt specifically with the alienation of land beneath navigable waters, the Supreme Court's broad language in the decision is applicable to the atmosphere. Much like the public trust asset discussed in *Illinois Central*, the atmosphere is "property of a special character" "in which the whole people are interested" that should not be left "entirely under the use and control of private parties." *Id*. at 453, 456. The atmosphere is undeniably "a subject of public concern to the whole people of the state." *Id.* at 455. Therefore, it is a fundamental natural resource necessarily entrusted to the care of the State, in trust, for its preservation and protection as a common property interest.

The same test—navigability—used by courts for over a century to determine whether a particular waterway is protected by the Public Trust Doctrine is equally applicable to the atmosphere to determine if it too is subject to the Public Trust Doctrine. Much like navigable waterways, the atmosphere also is navigable and therefore not subject to private ownership. *See Claassen v. City & Cnty. of Denver*, 30 P.3d 710, 712 (Colo. App. 2000) ("Navigable airspace is in the public domain, and the surface owner's property interest in airspace above his or her land is generally limited to the airspace which is below navigable limits."); *United States v. Causby*, 328 U.S. 256, 261 (1946) ("To recognize such private claims to

the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."). Because the atmosphere is navigable and in the public domain, the Public Trust Doctrine requires the sovereign trustee to protect the public's interest in it. To allow carbon emissions from New Mexico sources to clog the atmosphere and destabilize the climate is the equivalent of allowing the transfer of the atmospheric resource into private ownership for the exclusive use of greenhouse gas emitters.

Although the question of whether the atmosphere is a public trust resource is an issue of first impression in New Mexico, other states have recognized the applicability of the Public Trust Doctrine to air generally in their case law and constitutions. *See Robinson Twp*., 83 A.3d at 913; *Bonser-Lain*, 2012 WL 3164561 at *1 (recognizing that the atmosphere is a public trust resource); *Nat'l Audubon Soc'y*, 658 P.2d at 718 (recognizing that air is part of the public trust); *Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (public trust includes air, water and other natural resources); Haw. Const. art. XI, §1 (stating, "[T]he State and all it political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources . . . All public natural resources are held in trust by the State for the benefit of the people."); Pa. Const. art. I, §27 (declaring public trust duty to conserve

natural resources, and expressing citizens' right to clean air). Accordingly, this Court should similarly find that the Public Trust Doctrine applies to the atmospheric resource.

II. THE STATE IS ALWAYS SUBJECT TO THE PUBLIC TRUST DOCTRINE AND APPLICATION OF THE DOCTRINE SHOULD NOT BE CONDITIONAL

In granting the State's motion for summary judgment, the district court held that there was "no indication that the Public Trust Doctrine should be applied in this case." **6-26-13 Tr. 41:14-15**. This holding is in error because it is based on the incorrect premise that the first issue for a court to decide in a public trust case is whether or not the Doctrine applies. Rather, once the district court decided that the Public Trust Doctrine was operative in New Mexico and that the atmosphere was a public trust resource, **1-26-12 Tr. 48:22 – Tr. 48:8**, the proper question for the district court to resolve was whether the State violated the Doctrine, not whether the Doctrine applied in this case. However, the district court explicitly articulated the question of the applicability of the public trust as the starting point:

> So then the issue would be, has there been the type of inaction by the legislative body that would warrant application of the Public Trust Doctrine? Has the State forgotten its role in protecting the atmosphere?

6-26-13 Tr. 39:12-15.

To answer the question of whether the Public Trust Doctrine should be applied to the State in the case at bar, the district court set out the following criteria:

> if there was an indication that the political process had gone astray, that [the State] had ignored what they were supposed to do, or if the agency was not attempting to apply the statutory scheme [for protecting air quality], or if the public was excluded from the processes.

Id. at **Tr. 38:19-23**. In setting out these criteria for making a determination as to whether the State was subject to the Public Trust Doctrine (which is not the appropriate inquiry for a public trust case in the first place), the court mentions only a single public trust case as informing its establishment of the "test" for application of the Public Trust Doctrine. The district court cited only to *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1101 (Haw. 2006), for the proposition that:

> the State may compromise public rights in the resource only when the decision is made with a level of openness, diligence, and foresight that is commensurate with the high priorities that the rights command under the laws of the state.

6-26-13 Tr. 39:1-5. By focusing on the requirement that state decisionmaking about public trust resources must be made in a public forum, the district court reduced the Public Trust Doctrine from a substantive legal doctrine protective of the rights of future generations to something akin to a set of procedural regulations. *See id*. at **Tr. 40:17-20** (holding that "before a court should jump in to apply a

doctrine like the Public Trust Doctrine, there should be some showing that the process was tainted or that the public was foreclosed from pursuing the issue."). For the reasons discussed below, the district court's conception of the Public Trust Doctrine as applying to the State only where the State has not followed an existing statutory or regulatory framework for a particular natural resource is simply wrong.

This test would allow sovereign trustees to decide to dispose of, or allow, the complete impairment of public trust resources so long as there was some public hearing, and the trustee considered the resource in some way. The test defeats the very purpose of the Public Trust Doctrine to ensure the perpetuation of trust resources for present and future generations. Those future generations cannot participate in public hearings today and today's trustees cannot make policy decisions to disregard the very resources they are charged with protecting for current and future generations.

A. The Public Trust Doctrine is an Attribute of State Sovereignty.

First, the Public Trust Doctrine is an attribute of state sovereignty, therefore the State is always subject to a public trust obligation to protect its natural resources regardless of whether the political process for regulation of those resources has "gone astray." The U.S. Supreme Court has held, and courts in other states have recognized, that the Public Trust Doctrine is an attribute of state sovereignty. *See, e.g., Geer*, 161 U.S. at 527 (the sovereign trust over wildlife

resources is an "attribute of government"); *Ill. Cent. R.R. v. Illinois*, 146 U.S. at 455; *In Re Waihole Ditch*, 9 P.3d 409, 443 (Haw. 2000) ("[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority. . . ."). As such, the State's trust duty "can only be destroyed by the destruction of the sovereign." *U.S. v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981). The U.S. Supreme Court first recognized this inalienable aspect of a state's public trust responsibility in *Illinois Central*:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of peace.

Ill. Cent. R.R. v. Illinois, 146 U.S. at 453. Therefore, the district court's conception of the Public Trust Doctrine as something that would apply to the State only where the State has not first acted in accordance with some threshold conditions, such as following a regulatory scheme in place for a particular natural resource, is inconsistent with the long line of precedent from the U.S. Supreme Court and case law from other states recognizing the public trust as an inherent attribute of state sovereignty.

B. The Public Trust Doctrine "Applies" Regardless of the Existence of a Statutory Scheme for Protecting Air Quality.

Second, and as discussed in detail in Section I.B above, although the State may use its authority under an existing statute to manage a trust resource,

substantive and procedural compliance with a statute does not equate to compliance with the requirements of the Public Trust Doctrine, nor does such compliance preclude application of the Public Trust Doctrine. *See e.g., Kootenai Envtl. Alliance*, 671 P.2d at 1095. Moreover, in *Kelly v. 1250 Oceanside Partners*—a case cited by the district court—the Hawaii Supreme Court found that although the state water quality statute provided the state with broad discretion in its management of water resources, "such discretionary authority is circumscribed by the public trust doctrine." 140 P.3d at 1010. Accordingly, even where the state was following the regulatory scheme for water quality permitting, the court held that the state was still subject to the Public Trust Doctrine because its role as trustee of the state's waters required the state to affirmatively protect citizens' rights in the resource beyond the permitting stage. *Id*. at 1011. *Kelly* and similar cases from other states have made clear that the state's public trust and statutory duties are not one and the same. The district court's reasoning that compliance with a statutory or regulatory scheme precludes application of the Public Trust Doctrine conflicts with the public trust case law.

C. Separation of Powers is not at Issue Here.

Finally, the district court's implication that application of the Public Trust Doctrine in this case somehow runs afoul of the separation of powers doctrine is

misplaced. In discussing the holding that the Public Trust Doctrine "should not be applied in this case" the district court stated:

> I think the courts of New Mexico have long recognized the importance of separation of powers. And given the case presented to me today, I cannot believe, given those concerns, the things that were expressed in cases like *Shoobridge* and others, that . . . an appellate court would decide that the Public Trust Doctrine should be applied.

6-26-13 Tr. 41:22 – Tr. 42:2. However, the separation of powers doctrine does not preclude the judicial branch from holding the State accountable to its duty as trustee of the atmosphere. The test for disruption of the balance of power between the three branches is whether "the action by one branch prevents another branch from accomplishing its constitutionally assigned functions." *New Mexico ex rel. Clark v. Johnson*, 1995-NMSC-048 ¶ 34, 120 N.M. 562, 573 (quoting *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 443 (1977)). Judicial recognition that the State holds the atmosphere in trust for the public and has a fiduciary duty to manage that trust for the benefit of the public would not prevent the legislature from carrying out its mandate under the New Mexico Constitution to make laws "provid[ing] for control of pollution and control of despoilment of the air," N.M. Const. art. XX, § 21, or prevent the governor from enforcing such laws as is her constitutional mandate, N.M. Const. art. V, § 4.

Moreover, *New Energy Economy, Inc, v. Shoobridge*, 2010-NMSC-049, 149 N.M. 42, which the district court cited as the basis for its concern regarding

separation of powers, is inapplicable to the issues before this Court. In *Shoobridge*, the New Mexico Supreme Court was asked to decide whether a district court had improperly enjoined ongoing administrative proceedings for a *proposed* regulation. *Id*. at ¶ 51. With respect to the separation of powers doctrine, the Court held that the doctrine "forbids a court from prematurely interfering with the administrative processes created by the Legislature." *Id*. at ¶ 1. The Legislature had mandated that the Environmental Improvement Board conduct legislative fact-finding and hold public hearings before promulgating a rule, a process that was "an essential part of the legislative branch's function to make policy choices." *Id*. at ¶ 9. Here, however, Appellants are not challenging an agency's legal authority to promulgate or repeal rules, or alleging that procedural irregularities occurred in an agency rulemaking process. In fact the repeal of the greenhouse gas regulations has already occurred and there is no legislative or rulemaking process underway. Therefore, *Shoobridge* is inapplicable here.

Judicial enforcement of the State's fiduciary obligation to protect trust assets is necessary when the political branches abdicate this responsibility. *Hassell*, 837 P.2d at 169 ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust."). "The check and balance of judicial review provides a level of protection against improvident

disposition of an irreplaceable res." *In re Water Use Permit Applications I*, 9 P.3d at 455 (quoting *Hassell*, 837 P.2d at 169). The role of the courts is not to exercise direct management over trust resources, but to ensure that the political branches fulfill their trust obligation to avoid substantial impairment to an asset that must sustain generations of citizens to come.

Where public trust jurisprudence from other states has long recognized the role of the judicial branch in defining the scope of the Public Trust Doctrine and holding state governments accountable for their management of trust resources, the separation of powers doctrine cannot foreclose the judicial branch's responsibility to decide whether the State action or inaction with respect to a particular natural resource has violated the Doctrine. Here, the State has completely abdicated its trust responsibility with respect to the atmosphere, asserting that limiting greenhouse gas emissions from New Mexico sources "does not impact the climate here in New Mexico or anywhere else in the world." **2 RP 279**. In the face of this abdication, it is proper for the judicial branch to hold the State accountable for breaching its public trust duty to protect the atmosphere.

CONCLUSION

Appellants respectfully request that this Court reverse the district court's grant of summary judgment to the State, declare that the Public Trust Doctrine is operative in New Mexico, declare that the atmosphere is a public trust resource,

declare that the State has a duty as trustee to prevent substantial impairment to the atmosphere, and remand this case to the district court for further proceedings consistent with this Court's order.

ORAL ARGUMENT REQUESTED

Appellants request oral argument because this is a case of first impression in New Mexico. There is no precedent relating to the Public Trust Doctrine in New Mexico case law and no state court has previously been asked to decide a claim relating to the Public Trust Doctrine. Therefore, Appellants believe that the opportunity for the Court to engage in a dialogue with both parties on the issues raised in this Appeal will be helpful to the Court.

Respectfully submitted on this 20th day of March 2014.

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CERTIFICATE OF SERVICE

I hereby certify that the Brief-in-Chief was mailed to the following on March 20, 2014 via U.S. First Class mail:

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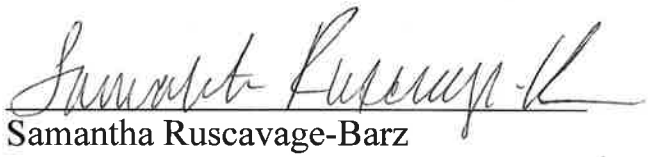

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