

IN THE SUPREME COURT 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,
Petitioners on Review*

v.

KATE BROWN, in her official capacity as Governor of the State of
Oregon; and **STATE OF OREGON**,

*Defendants-Respondents,
Respondents on Review.*

Lane County Circuit Court Case No. 161109273
CA No. A159826
Supreme Court No. S066564

**BRIEF OF *AMICI CURIAE* EUGENE/SPRINGFIELD NAACP,
REPRESENTATIVE HELM, ET AL., IN SUPPORT OF
PETITIONERS' PETITION FOR REVIEW**

Petition for review of the decision of the Court of Appeals on appeal from a
judgment of the Circuit Court for Lane County, Honorable Rasmussen,
Judge.

Opinion Filed: January 9, 2019

Author of Opinion: Armstrong
Concurring Judges: Shorr, Garrett

***AMICI CURIAE* INTEND TO FILE A BRIEF ON THE MERITS**

Continued...

March 2019

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TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES..... | ii |
| I. IDENTITY AND INTERESTS OF <i>AMICI CURIAE</i> | 1 |
| II. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS | 2 |
| III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW ... | 2 |
| IV. THE QUESTIONS PRESENTED HERE HAVE EXTRAORDINARY IMPORTANCE BEYOND THIS CASE, IMPACTING ALL OREGONIANS AND FUTURE GENERATIONS | 3 |
| A. Climate Change is Already Impacting Oregon and the Impacts Will Get Dramatically Worse in the Future Without Immediate Action to Reduce GHG Emissions | 4 |
| 1. Altered Precipitation Patterns, Reduced Snowpack, Reduced Stream flows, and Increasing Drought | 7 |
| 2. Impacts to Forests: Wildfires, Pests, and Disease | 10 |
| 3. Climate Change and Ocean Acidification: Impacts to Marine Life | 11 |
| 4. Sea Level Rise and Coastal Erosion | 13 |
| 5. Human Health Impacts | 14 |
| 6. Tribal and Cultural Impacts | 17 |
| B. Defendants Have Not Taken Sufficient Actions to Prevent the Substantial Impairment of Oregon’s Public Trust Resources, Despite Having Ample Opportunity to do so | 19 |
| V. CONCLUSION | 23 |
| COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS, AND CERTIFICATES OF FILING AND SERVICE..... | 25 |

TABLE OF AUTHORITIES

CASES

| | |
|--|----|
| <i>Chernaik v. Brown</i> , 295 Or App 584 ___ P3d ___ (2019)..... | 3 |
| <i>Marbury v. Madison</i> , 5 U.S. 137 (1803) | 23 |

OTHER AUTHORITIES

| | |
|--|--|
| Dennis Wall, <i>Tribal Climate Change Profile: Fisheries Impacts</i> (2008) | 19 |
| Governor Kate Brown Inaugural Address 2019 (Jan. 14, 2019)..... | 21 |
| Kate Our Governor, Environment | 20 |
| Mabarby B., et al., <i>The U.S. West Coast Shellfish Industry’s Perception of and Response to Ocean Acidification</i> (2016)..... | 12 |
| National Oceanic and Atmospheric Administration, Trends in Atmospheric Carbon Dioxide (last visited Mar. 18, 2019)..... | 4 |
| Natural Resources Economics, <i>Paying for Oregon’s Future: Costs Climate Change will Impose on Oregon’s Households</i> (2018) | 7 |
| NOAA, U.S. Secretary of Commerce Declares Commercial Fishery Disasters for West Coast Salmon and Sardines (Sept. 25, 2018)..... | 13 |
| Oregon Climate Change Research Institute, <i>Climate Change in the Northwest: Implications for our Landscapes, Waters, and Communities</i> (2013) | 10, 17 |
| Oregon Climate Change Research Institute, <i>Fourth Oregon Climate Assessment Report: State of the Science: 2019</i> (2019) | 7 |
| Oregon Climate Change Research Institute, <i>Oregon Climate Assessment Report</i> (2010) | 18 |
| Oregon Climate Change Research Institute, <i>The Third Oregon Climate Assessment Report</i> (2017) | 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 |
| Oregon Global Warming Commission, <i>2018 Biennial Report to the</i> | |

| | |
|---|---------------------------------|
| <i>Legislature</i> (2018) | 10, 11, 12, 14, 16, 20, 24 |
| Oregon Health Authority, <i>Climate Change and Public Health in Oregon</i> (2018) | 15 |
| Oregon Health Authority, <i>Oregon Climate and Healthy Profile Report</i> (2014) | 15 |
| Oregon Legislative Information System, 2017 Regular Session, SB 557, Measure History | 22 |
| Oregon Legislative Information System, 2009 Regular Session, SB 80, Measure History | 21 |
| Oregon Legislative Information System, 2015 Regular Session, HB 3470, Measure History | 21 |
| Oregon Legislative Information System, 2016 Regular Session, SB 1574, Measure History | 22 |
| Oregon Legislative Information System, 2017 Regular Session, HB 2135, Measure History | 22 |
| Oregon Legislative Information System, 2018 Regular Session, HB 4001, Measure History | 22 |
| Oregon Legislative Information System, 2018 Regular Session, SB 1507, Measure History | 22 |
| Solomon, C. G. & LaRocque R. C., <i>Climate Change – A Health Emergency</i> , N. Engl. J. Med. 380:3 (2019) | 15 |
| U.S. Global Change Research Program, <i>Northwest</i> , in <i>Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II</i> (2018) | 6, 8, 9, 10, 11, 12, 13, 16, 17 |
| Watts, N., et al., <i>The 2018 report of the Lancet Countdown on health and climate change: shaping the health of nations for centuries to come</i> 2482, Lancet, Vol. 392 (2018) | 17 |
| RULES | |
| ORAP 9.07(3) | 4 |

ORAP 9.07(14)(a) 4

ORAP 9.07(14)(b) 4

I. IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae include: Eugene/Springfield NAACP, Representative Ken Helm, Representative Pam Marsh, Senator Jeff Golden, The City of Milwaukie, Mayor Lucy Vinis, Oregon Physicians for Social Responsibility, Oregon League of Conservation Voters, Earth Guardians 350 Club, Oregon Youth Legislative Initiative on Climate Justice, Portland Youth Climate Council, Multnomah Youth Commission, Climate Justice League, Churchill Climate Action Club, The Raven Corps, The Green Energy Institute at Lewis & Clark Law School, The Center for Sustainable Economy, Coconut Bliss, Hummingbird Wholesale, Royal Blue Organics, Indow Windows, Eric Strid, Reverend Cecil Prescod, Reverend Dr. Marilyn Sewell, Reverend John Shuck, Ecumenical Ministries of Oregon, Riverside Community Church United Church of Christ, Interfaith Earthkeepers, Oregon Unitarian Universalist Voices for Justice, Unitarian Universalist Church of Eugene Earth Action Committee, Temple Beth Israel, Oregon Environmental Council, Rogue Climate, Thrive Hood River, Mount Pisgah Arboretum, Friends of the Columbia Gorge, Climate Action Coalition, Hair on Fire Oregon, Indivisible North Coast Oregon, ORD2 Indivisible, OPAL Environmental Justice Oregon, 350 Eugene, 350 Corvallis, 350 Deschutes, 350 PDX, Stop Fracked Gas/PDX, Cascadia Wildlands, Cascadia Action Network, Climate Reality Project: Portland, Beyond Toxics, Partners for

Sustainable Schools, The Village School, and the Sierra Club and its Oregon Chapter (collectively “*amici*”).

Amici are individuals and organizations that live, work, and recreate in the State of Oregon and represent a wide variety of interests, including government, communities of color, public health, youth, faith, business, conservation, and education. The individuals, organizations, members, and constituents represent hundreds of thousands of Oregonians from across the State. *Amici* have a profound interest in this case because they depend upon Oregon’s public trust resources for their well-being and survival. Whether or not Governor Brown and the State of Oregon have a fiduciary obligation to protect Oregon’s public trust resources will impact *amici*’s organizational, spiritual, economic, recreational, and health interests.¹

II. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Amici rely on Plaintiffs’ statement of historical and procedural facts of the case.

III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Amici rely on Plaintiffs’ questions presented and proposed rules of law.

¹ For additional information about *amici*, see the motion to appear as *amici curiae*, filed concurrently with this brief.

IV. THE QUESTIONS PRESENTED HERE HAVE EXTRAORDINARY IMPORTANCE BEYOND THIS CASE, IMPACTING ALL OREGONIANS AND FUTURE GENERATIONS

The Court of Appeals' opinion, *Chernaik v. Brown*, 295 Or App 584, 600, ___ P3d ___ (2019), erroneously held that Governor Brown and the State of Oregon ("Defendants") do not have a fiduciary duty to affirmatively protect Oregon's public trust resources from the effects of climate change. The consequences of that decision cannot be underestimated, as the holding, if not corrected by this Court, will gravely harm Plaintiffs, as well as all Oregonians and the essential public trust resources that they depend on for their well-being and survival, making it legal for Defendants to continue allowing catastrophic climate change to substantially impair Oregon's public trust resources. Accordingly, this *amicus curiae* brief is submitted in support of Plaintiffs' Petition for Review urging this Court to review the Court of Appeals opinion, and to eventually reverse the Court of Appeals, and hold that Governor Brown and the State of Oregon, as trustees, have a fiduciary obligation to protect Oregon's public trust resources from catastrophic climate change.

Amici submit to the Court a current summary of what state and federal agencies and top experts report the climate change impacts in Oregon are today, and will be in the future, to illustrate how the Court of Appeals' opinion is of great consequence to the public, that many people are affected,

and that it will result in a serious and irreversible injustice.² *Amici* also explain that Defendants have not taken adequate steps to address climate change and its effects on Oregonians despite numerous opportunities to do so, and accordingly, it is critical that this Court clarify that Defendants have an affirmative obligation to protect Oregon’s public trust assets from greenhouse gas emissions (“GHG”) and climate change, now, before it is too late.³

A. Climate Change is Already Impacting Oregon and the Impacts Will Get Dramatically Worse in the Future Without Immediate Action to Reduce GHG Emissions

The best available climate science says that in order to prevent the worst impacts of climate change, impacts that would be irreversible on a timescale relevant to humans (for example sea level rise and species extinctions), the concentration of carbon dioxide (“CO₂”) in the atmosphere must be reduced to no more 350 parts per million (“ppm”) by 2100. A concentration of CO₂ in the atmosphere exceeding 350 ppm constitutes substantial impairment to the atmosphere and other public trust resources. The current atmospheric CO₂ concentration is over 410 ppm, well above the substantial impairment threshold.⁴ To date, Oregon does not have a plan to

² ORAP 9.07(3), (14)(a).

³ ORAP 9.07(14)(b).

⁴ National Oceanic and Atmospheric Administration, Trends in Atmospheric Carbon Dioxide (last visited Mar. 18, 2019), *available at* <https://www.esrl.noaa.gov/gmd/ccgg/trends/index.html>.

ensure the State does its part to return the CO₂ concentration in the atmosphere to 350 ppm by the end of the century. Plaintiffs' lawsuit seeks to force Defendants to address its concerns.

Defendants have never disputed that atmospheric concentrations of CO₂ must be reduced to 350 ppm, that they do not have a plan to ensure that the State protects public trust resources, or that climate change has already substantially impaired Oregon's public trust resources. For example, in their Answer to Plaintiffs' Complaint, which Defendants filed in 2014, Defendants admitted that:

- "Plaintiffs are children and their families who live in Oregon, and that their personal and economic well-being is dependent upon the health of natural resources in this State including water resources, submerged and submersible lands, coastal lands, forests, and wildlife. . . . Defendants further admit that these natural resources are currently threatened by the impacts of global climate change." Excerpt of Record ("ER") 26.
- "Defendants admit that global climate change is likely to result in some changes in water availability, drought, pests, rising temperatures, and weather changes" ER 27.
- "[G]lobal climate change is causing, and is likely to continue to cause, significant adverse effects such as disruption of natural ecosystems, displacement or disappearance of some animal species, increases in the frequency and intensity of storms and other extreme weather events, increases in the frequency and severity of droughts in some areas, warmer and more frequent periods of intense heat, rising sea levels, decreased agricultural productivity in some areas, sea level rise and coastal erosion." ER 30-31.

- “Human-caused fossil fuel burning and the resulting climate change are already contributing to numerous adverse impacts to public health, including increased rates of asthma, cancer, cardiovascular disease and stroke, heat-related morbidity and mortality, food borne diseases, and neurological diseases and disorders.” ER 31.
- “If the atmosphere passes certain thresholds or tipping points of energy imbalance and planetary heating, the existing climatic conditions that exist today cannot be restored.” ER 31.

More recent climate change reports prepared by Oregon and the federal government confirm what Defendants already admitted, and strengthen Plaintiffs’ claims. Oregon’s mean temperature has already warmed 2.2°F since 1895, with the warming trend accelerating since the 1970s.⁵ The most recent science predicts that, even with concerted action, average temperature increases between 4.6°F and 8.2°F by 2080 (only sixty years from now) can be expected.⁶ Extreme heat events are expected to increase in frequency, duration, and intensity, with hotter temperatures both in the summer and winter.⁷ As described below, rising temperatures are already dramatically altering Oregon’s landscape and natural resources and, without the State’s swift and strong action, will continue to fundamentally

⁵ Oregon Climate Change Research Institute, *The Third Oregon Climate Assessment Report* 6 (2017) (hereinafter “OCCRI, *Third Oregon Climate Assessment Report*”); U.S. Global Change Research Program (“USGCRP”), *Northwest, in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 1041 (2018) (hereinafter “USGCRP, *Northwest*”).

⁶ OCCRI, *Third Oregon Climate Assessment Report* at 8.

⁷ *Id.*

change the character and economy in our state.⁸ According to one report, the costs of climate change will be \$15,000 per household per year in the near future.⁹

1. Altered Precipitation Patterns, Reduced Snowpack, Reduced Stream flows, and Increasing Drought

Climate change is altering Oregon's precipitation patterns, with winter, spring, and fall becoming wetter, and summer becoming drier.¹⁰ Additionally, more of Oregon's winter precipitation is falling as rain, not snow, which is problematic because a robust winter snowpack in the Cascades is crucial for Oregon's rivers and summertime water supply. Between 1950 and 2000, the level of snowpack on April 1st of each year has been declining and by 2080 (sixty years from now), almost all of Oregon is expected to become rain-dominant (with the sole exception being parts of

⁸ In 2019, the *Fourth Oregon Climate Assessment Report* was released. Oregon Climate Change Research Institute, *Fourth Oregon Climate Assessment Report: State of the Science: 2019* (2019). That report provides minimal updates to the *Third Oregon Climate Assessment Report* and incorporates in full the Northwest chapter of the *Fourth National Climate Assessment*. Unless otherwise indicated, *amici's* brief relies on the more detailed *Third Oregon Climate Assessment Report* and the original *Fourth National Climate Assessment*.

⁹ Natural Resources Economics, *Paying for Oregon's Future: Costs Climate Change will Impose on Oregon's Households* 12 (2018), available at <http://oregon-stream-protection-coalition.com/wp-content/uploads/2018/08/climate-costs-natural-reource-economics.pdf>.

¹⁰ OCCRI, *Third Oregon Climate Assessment Report* at 9, 11.

the Blue Mountains).¹¹ In 2015, Oregon's snowpack in April was at record lows across the State, which led to significant adverse impacts across the State during the summer of 2015.¹² Peak snowpack in the Cascades has shifted to earlier in the year, increasing stream flows in March and reducing stream flows in June and the rest of the summer.¹³ Declining snowpack and stream flows have a direct impact on Oregon's outdoor recreation industry, which in 2017, supported 451,000 jobs and generated \$51 billion.¹⁴

Rising temperatures, combined with declining snowpack and stream flows, are already increasing drought conditions in the summer months.¹⁵ The impact on hydropower operations is that production may increase slightly in the winter months when flows are higher, but will decrease in the summer months and be at its lowest between July and September, when seasonal air conditioning load usage is at its peak. Drought conditions and rising temperatures are also impacting Oregon's agriculture.¹⁶ Roughly 42% of Oregon's farms are irrigated, but with declining snowpack and increasing water demand, water scarcity is becoming a problem.¹⁷ Farms that do not rely on irrigation face problems associated with declining summer

¹¹ *Id.* at 12, 18.

¹² *Id.* at 12.

¹³ *Id.*

¹⁴ USGCRP, *Northwest* at 1043.

¹⁵ OCCRI, *Third Oregon Climate Assessment Report* at 19.

¹⁶ *Id.* at 64.

¹⁷ *Id.* at 65.

precipitation and increasing drought conditions.¹⁸ If Oregon experiences the predicted warming of 4.6°F to 8.2°F by 2080 our state’s irrigation demands will skyrocket, and farms not reliant on irrigation will face dire circumstances, which would have devastating economic impacts on our farmers and our economy as a whole.

Oregon’s agriculture, forestry, and fishing sectors are key components of Oregon’s economy, collectively accounting for over 256,000 jobs and \$48.5 billion in sales revenues in 2015.¹⁹ In 2012, the agriculture industry alone generated nearly \$4.9 billion in gross agricultural products and was linked to 14% of Oregon’s jobs.²⁰ However, growing zones for certain agricultural products and trees are already shifting with a warming climate. For instance, climate change is already impacting the growing season for grape growers and if temperatures continue to rise, wine growers in Oregon may need to move north, or to higher elevations, to continue their robust contribution to our state’s economy.²¹ As warming continues, the lack of winter dormancy could also cause problems for Oregon’s perennial crops like fruit orchards, as it has already done in California, where the number of “chilling hours” of winter have declined, causing the demise of certain

¹⁸ *Id.*

¹⁹ USGCRP, *Northwest* at 1043.

²⁰ OCCRI, *Third Oregon Climate Assessment Report* at 64.

²¹ *Id.* at 69; USGCRP, *Northwest* at 1046.

orchard crops.²² Oregon's beef, dairy, fruit, vegetable, and grain industries are also vulnerable to the impacts of climate change.²³

2. Impacts to Forests: Wildfires, Pests, and Disease

While wildfires are a natural part of forest ecosystem health, wildfires are exacerbated by climate change, as are the presence of forest pests, such as the mountain pine beetle.²⁴ Climate change is causing warmer and drier summer conditions (which increases fuel aridity) and has led to larger fires, increased the total area burned, and led to a longer fire season.²⁵ The length of the fire season has increased fully *five times* its historical length from 23 days in the 1970s to 116 days in the 2000s.²⁶ Fuel aridity is expected to increase in the coming decades, increasing the annual burn area by a staggering 140% in the 21st century compared to the 20th century.²⁷ According to the Oregon Department of Forestry, Oregon's firefighting costs between 2013-2018 have averaged almost \$40 million a year, *five*

²² OCCRI, *Third Oregon Climate Assessment Report* at 68-9.

²³ *Id.* at 67-70.

²⁴ USGCRP, *Northwest* at 1045; OCCRI, *Third Oregon Climate Assessment Report* at 46-50; see also OCCRI, *Climate Change in the Northwest: Implications for our Landscapes, Waters, and Communities* 110-135 (2013).

²⁵ OCCRI, *Third Oregon Climate Assessment Report* at 46; see also Oregon Global Warming Commission, *2018 Biennial Report to the Legislature* 5 (2018) (hereinafter "OGWC, 2018 Biennial Report").

²⁶ OCCRI, *Third Oregon Climate Assessment Report* at 46-50.

²⁷ *Id.* at 47.

times the average from the preceding five years.²⁸ Wildfires also cost Oregon roughly \$51 million in lost tourism revenue in 2017 alone.²⁹

Additionally, rising temperatures and more frequent drought conditions are making trees more vulnerable to insects and pathogens, including the mountain pine beetle and western spruce budworm.³⁰ Oregon's trees are also having direct physiological responses to climate change, including drought and rising temperatures, which impacts the growth of trees, causes trees stress, and can lead to tree mortality.³¹

3. Climate Change and Ocean Acidification: Impacts to Marine Life

Ocean warming and ocean acidification are already having a significant impact on Northwest fisheries and marine life.³² The tandem impacts of ocean warming and acidification not only affect shellfish, but the entire food web, including birds that prey on shellfish and other animals that use abandoned shells for homes.³³ Warming off the Oregon coast is also contributing to harmful algal blooms, which has repeated adverse impacts on the Dungeness crab fishing season (worth \$70 million annually), salmon,

²⁸ OGWC, *2018 Biennial Report* at 15.

²⁹ *Id.* at 30.

³⁰ OCCRI, *Third Oregon Climate Assessment Report* at 49-51.

³¹ *Id.* at 51-3.

³² USGCRP, *Northwest* at 1048; OCCRI, *Third Oregon Climate Assessment Report* at 31, 35.

³³ USGCRP, *Northwest* at 1048.

and other marine life.³⁴

The *Fourth National Climate Assessment* warns that ocean warming, acidification, and algal blooms are expected to increase and could result in “extensive fisheries closures . . . with severe economic and cultural effects on commercial and subsistence shellfish industries.”³⁵ Importantly, ocean acidification is not a distant threat, in fact, “the West Coast has already reached a threshold and negative impacts are already evident, such as dissolved shells in pteropod populations . . . and impaired oyster hatchery . . .”³⁶ At current rates of CO₂ emissions, the average acidity of the ocean’s surface is expected to double by the end of the century compared with pre-industrial levels.³⁷ One 2016 study found that about half of the West Coast shellfish industry has already experienced negative impacts of ocean acidification.³⁸

Climate change and ocean acidification also affect salmon populations in all their life stages, including their journeys through streams, estuaries, and the ocean.³⁹ The climate change induced alterations in stream flow water

³⁴ OGWC, *2018 Biennial Report* at 28.

³⁵ USGCRP, *Northwest* at 1045.

³⁶ OCCRI, *Third Oregon Climate Assessment Report* at 36, 40.

³⁷ *Id.* at 35.

³⁸ Mabarby B., et al., *The U.S. West Coast Shellfish Industry’s Perception of and Response to Ocean Acidification* (2016), available at <https://seagrant.oregonstate.edu/sgpubs/us-west-coast-shellfish-industrys-perception-and-response-ocean-acidification>.

³⁹ OCCRI, *Third Oregon Climate Assessment Report* at 23-6.

levels, increasing temperatures of Oregon streams, and warmer ocean temperatures are reducing the extent and quality of salmon habitat, causing thermal stress, making salmon more susceptible to disease and predation, and disrupting their food supplies.⁴⁰ Even under low human CO₂ emissions scenarios, the prospects for many Pacific Northwest salmon stocks look dismal.⁴¹ Indeed, in September, 2018, the U.S. Secretary of Commerce declared a fishery disaster for West Coast salmon, noting that between 2015 and 2017 there were commercial fishery failures for salmon in Oregon, Washington, and California.⁴² Commercial fishing in Oregon accounted for over \$614 million in sales in 2013 and disruptions to the fishing industry due to ocean warming and ocean acidification have significant impacts on Oregon's jobs and economy.⁴³

4. Sea Level Rise and Coastal Erosion

Sea levels are rising as a result of ocean thermal expansion (as the ocean warms, the water expands) and due to the melting of glaciers and ice sheets.⁴⁴ On the Oregon coast, seas have already been rising and are

⁴⁰ *Id.* at 38-9.

⁴¹ USGCRP, *Northwest* at 1049.

⁴² NOAA, U.S. Secretary of Commerce Declares Commercial Fishery Disasters for West Coast Salmon and Sardines (Sept. 25, 2018), *available at* <https://www.fisheries.noaa.gov/media-release/us-secretary-commerce-declares-commercial-fishery-disasters-west-coast-salmon-and>.

⁴³ OCCRI, *Third Oregon Climate Assessment Report* at 37.

⁴⁴ *Id.* at 31.

expected to rise by at least another 2 to 4 feet this century.⁴⁵ These sea level rise estimates are conservative and without immediate action to reduce GHG emissions, current science suggests upwards of 40 feet of sea level rise will become locked in.⁴⁶ Rising seas, combined with greater storm intensity, are resulting in greater coastal erosion, flooding, loss of beach areas and elevation, loss of coastal wetlands, and inundation and damage of coastal infrastructure.⁴⁷ The financial cost of responding to the impacts of sea level rise in Oregon is, moderately estimated to be \$1.5 billion through 2100.⁴⁸ By taking action now to stop GHG emissions and curb the effects of decades of GHG emissions, Oregon may be able to minimize the devastating impacts of rising sea levels and protect Oregon's magnificent beaches and dunes, one of our greatest public resources.

5. Human Health Impacts

Climate change is already impacting the health of Oregonians in various ways, but current science confirms the impacts will get much worse without immediate steps to address the climate crisis. Doctors have called climate change a "health emergency" and noted that the "effects of climate disruption are fundamentally health issues, and they pose existential risks to

⁴⁵ *Id.* at 32.

⁴⁶ *Id.*

⁴⁷ *Id.* at 31, 33-34, 39.

⁴⁸ OGWC, *2018 Biennial Report* at 26.

all of us.”⁴⁹ The Oregon Health Authority published the *Oregon Climate Health Profile Report* in 2014, and in 2018 published *Climate Change and Public Health in Oregon*, both of which sound the alarm on the impacts of climate change on the health of Oregonians.⁵⁰ The impacts include: heat related death, respiratory illness from worsening air quality and wildfires, physical harm from landslides and flooding, and increases in food-borne diseases and vector-borne diseases (see **Figure 1** below).⁵¹ In addition to physical harm, climate impacts can cause mental health impacts, ranging from stress to suicide, due to displacement, loss of income, chronic stress, and other impacts of climate change.⁵²

During Oregon’s abnormally hot 2015 summer, emergency room visits for heat-related medical conditions spiked, and during the summer of 2017, there was a 29% increase in emergency room visits for people with

⁴⁹ Solomon, C. G. & LaRocque R. C., *Climate Change – A Health Emergency*, N. Engl. J. Med. 380:3 (2019); see also OCCRI, *Third Oregon Climate Assessment Report* at 74-82.

⁵⁰ Oregon Health Authority, *Oregon Climate and Healthy Profile Report* (2014), available at <https://public.health.oregon.gov/climatechange/Documents/oregon-climate-and-health-profile-report.pdf>; Oregon Health Authority, *Climate Change and Public Health in Oregon* (2018), available at <https://www.oregon.gov/oha/PH/HEALTHYENVIRONMENTS/CLIMATECHANGE/Documents/2018/2018-OHA-Climate-and-Health-Policy-Paper.pdf>.

⁵¹ *Id.*

⁵² *Id.*; see also OCCRI, *Third Oregon Climate Assessment Report* at 74-80.

respiratory symptoms during the Eagle Creek fire.⁵³ Importantly, even under a low emissions scenario, airborne particulate levels from wildfires are expected to increase by 160% by 2050.⁵⁴ Health risks from climate change affect those who are already most vulnerable, including children, the elderly, people with pre-existing health conditions, low-income Oregonians, people with disabilities, refugees, and communities already exposed to environmental health threats.⁵⁵ Children in particular are vulnerable because they will experience “cumulative physical and mental health effects of climate change over their lifetimes” from extreme weather events (e.g., heat waves) and increased toxic exposure (e.g., polluted air).⁵⁶ Research indicates that exposure to trauma and pollution at a young age influences health and socio-economic status in later years.⁵⁷ The chart below outlines and summarizes the connections between climate change and public health.

⁵³ OGWC, *2018 Biennial Report* at 21; *see also* USGCRP, *Northwest* at 1058.

⁵⁴ USGCRP, *Northwest* at 1059.

⁵⁵ OCCRI, *Third Oregon Climate Assessment Report* at 79-81.

⁵⁶ USGCRP, *Northwest* at 1059.

⁵⁷ *Id.*

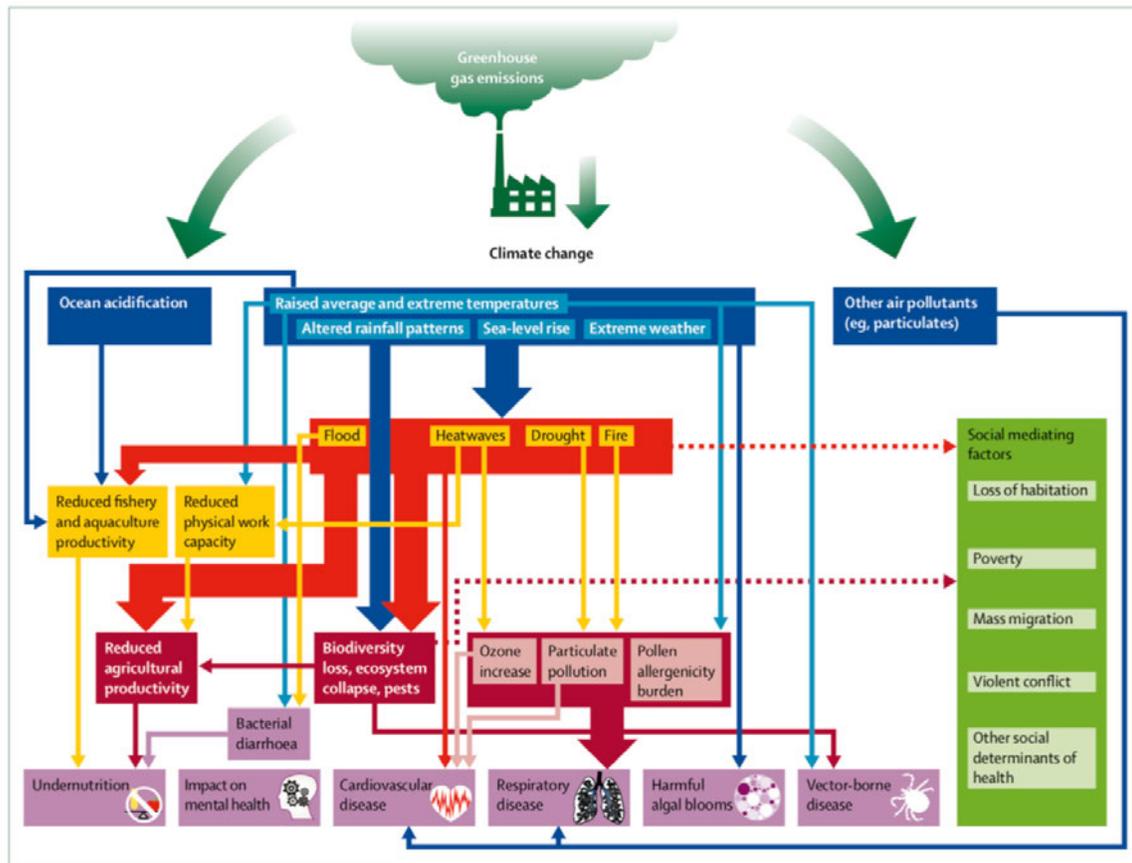


Figure 1: The pathways linking climate change and public health effects.⁵⁸

6. Tribal and Cultural Impacts

Native Tribes in particular are dependent on natural resources, and accordingly, when climate change degrades or harms such natural resources, it can threaten their culture and subsistence way of life.⁵⁹ In Oregon, 62% of tribal reservations are forested, making them vulnerable to the impacts of

⁵⁸ Watts, N., et al., *The 2018 report of the Lancet Countdown on health and climate change: shaping the health of nations for centuries to come* 2482, *Lancet*, Vol. 392 (2018).

⁵⁹ USGCRP, *Northwest* at 1041, 1048, 1051, 1062-63; see also OCCRI, *Climate Change in the Northwest: Implications for our Landscapes, Waters, and Communities* 207-225 (2013).

climate change on forests discussed above.⁶⁰ Disruption to forest ecosystems can impact tribal subsistence and ceremonial practices.⁶¹ As the *Oregon Climate Assessment Report* observed, “[c]limate change may lead to loss of native species and fundamental shifts in ecosystems that have guided and formed the culture of many tribal communities, linking future generations and their ancestors.”⁶² The loss of culturally important species and ecosystems will likely translate into economic and functionality losses.⁶³

Additionally, indigenous fishing communities are vulnerable to the impacts of climate change and ocean acidification, which disrupt their traditional harvest of marine resources for their economic and cultural livelihood.⁶⁴ Coastal tribes also risk water inundation and the loss of Oregon’s coastline to sea-level rise, which could damage burial sites and tribal infrastructure.⁶⁵

Many of the resource impacts described above have special significance to Native Tribes, like the increased risk of losing salmon populations or the decline of other wildlife adversely impacted by reduced stream flows and ocean acidification. One writer describing this situation observed that, “[t]he harvest of salmon in the Pacific Northwest, the cultural

⁶⁰ OCCRI, *Third Oregon Climate Assessment Report* at 58.

⁶¹ *Id.*

⁶² OCCRI, *Oregon Climate Assessment Report* 401 (2010) (hereinafter “OCCRI, 2010 Oregon Climate Assessment Report”).

⁶³ *Id.*

⁶⁴ OCCRI, *Third Oregon Climate Assessment Report* at 39.

⁶⁵ OCCRI, *2010 Oregon Climate Assessment Report* at 401.

lifeblood of numerous regional tribes, has declined as much as 90 percent over the past few decades. The plunge has resulted from a variety of human impacts, all of them aggravated by climate change.”⁶⁶

B. Defendants Have Not Taken Sufficient Actions to Prevent the Substantial Impairment of Oregon’s Public Trust Resources, Despite Having Ample Opportunity to do so

In 2007, Oregon adopted aspirational GHG reduction targets. The goals, as set by House Bill 3543, were to stabilize emissions in 2010, reduce emissions 10% below 1990 levels by 2020, and at least 75% below 1990 levels by 2050. These goals are now outdated and not in line with the best available climate science for the reductions actually needed to avoid the worst impacts of climate change. Nor have the goals been updated since 2007 despite significant climate science and reports published since HB 3543’s passage. Furthermore, Defendants’ Answer admits that the State has not taken sufficient action to meet even these inadequate goals:

Oregon is likely to fall well short of the targets set by its greenhouse gas reduction and mitigation plan. Defendants admit that in the 2009 report to the legislature, the Oregon Global Warming Commission reported that ‘even if all the actions now ‘in progress’ are completed by 2020, 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 34-35.

The Oregon Global Warming Commission’s *2018 Biennial Report to the*

⁶⁶ Dennis Wall, *Tribal Climate Change Profile: Fisheries Impacts* 1 (2008), available at http://www7.nau.edu/itep/main/tcc/docs/tribes/tribes_FisheriesImpacts.pdf.

Legislature affirmed as much, noting that Oregon’s GHG emissions actually *increased* from 2016 to 2017.⁶⁷ The 2018 Report also projects that Oregon’s emissions in 2050 will be roughly 60 million metric tons of carbon dioxide equivalent (“MMTCO₂e”), more than *four times greater* the HB 3543 goal of 14 MMTCO₂e (see **Figure 2**).⁶⁸

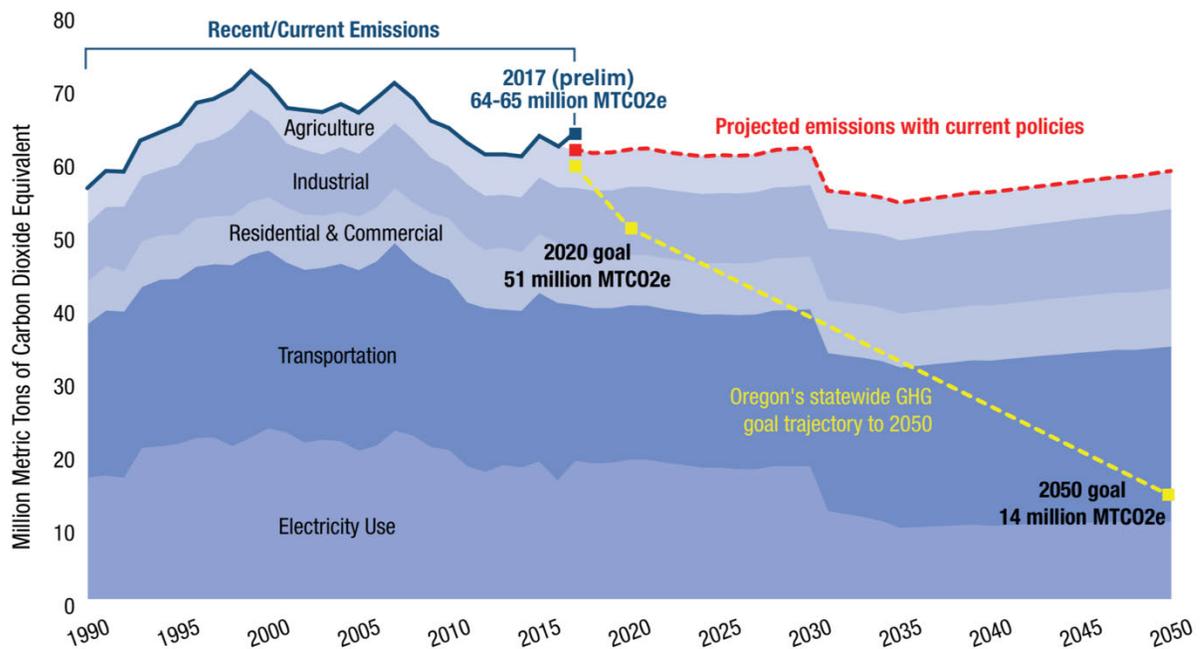


Figure 2: Oregon’s past and projected GHG emissions compared to goals.⁶⁹

According to Governor Kate Brown, “[c]limate change threatens Oregon’s economy, contributes to raging wildfires, and threatens our Oregon way of life.”⁷⁰ At her 2019 inaugural address, Governor Brown said, “[i]t is extremely painful to watch the effects of climate change on our

⁶⁷ OGWC, *2018 Biennial Report* at 5.

⁶⁸ *Id.*

⁶⁹ *Id.* at 38.

⁷⁰ Kate Our Governor, Environment, *available at* <https://katebrownfororegon.com/environment> (last visited Mar. 11 2019).

communities,” and discussed the impacts of wildfires, drought, and rising temperatures.⁷¹

However, despite acknowledging the threats posed by climate change, and the need to do something, Defendants have consistently failed to adequately respond to Oregon’s dangerous level of GHG emissions and climate change. For example, in 2009, Senate Bill 80 would have required state agencies to develop and implement plans to meet the 2020 greenhouse gas emissions reduction goal but was never presented for vote in either chamber.⁷² In 2015, House Bill 3470 (the Climate Stability and Justice Act) would have required the Environmental Quality Commission to adopt by rule statewide greenhouse gas emissions limits based on the best available science for years 2020 and 2050 and to adopt interim statewide GHG emission limits for every five years. The bill was never presented for a floor vote.⁷³ In 2016 the legislature considered Senate Bill 1574 (the Healthy Climate Act) to require the Environmental Quality Commission to adopt by rule statewide a GHG emissions goal for 2025, and limits for years 2035 and

⁷¹ Governor Kate Brown Inaugural Address 2019 (Jan. 14, 2019), *available at* <https://www.oregon.gov/gov/media/Pages/speeches/Governor-Kate-Brown-Inaugural-Address-2019.aspx>.

⁷² Oregon Legislative Information System (“OLIS”), 2009 Regular Session, SB 80, Measure History, *available at* <https://olis.leg.state.or.us/liz/2009R1/Measures/Overview/SB80>.

⁷³ OLIS, 2015 Regular Session, HB 3470, Measure History, *available at* <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB3470>.

2050. The bill was never presented for a floor vote.⁷⁴ In 2017, Senate Bill 557 (the Clean Energy Jobs Bill), and House Bill 2135 (the House's counterpart) were introduced but neither was presented for a floor vote.⁷⁵ In 2018, the Clean Energy Jobs Bill was re-introduced as Senate Bill 1507 and House Bill 4001, but despite having several hearings, the bill was never presented for a floor vote.⁷⁶

None of these bills alone would have been adequate to fulfill Oregon's fiduciary obligations to protect public trust resources, but they are an indication of the failure of the political branches of government in attempting to fulfill their fiduciary obligations to Oregonians. Moreover, Oregon's governors and executive agencies have been equally remiss in taking the requisite steps to address climate change, as evidenced by Oregon's history of dangerously high levels of GHG emissions, the fact that Oregon's emissions increased from 2016 to 2017, and that Oregon's GHG emissions are projected to remain dangerously high until 2050 and beyond (see **Figure 2** above). Given that there is uncontroverted evidence in this

⁷⁴ OLIS, 2016 Regular Session, SB 1574, Measure History, *available at* <https://olis.leg.state.or.us/liz/2016R1/Measures/Overview/SB1574>.

⁷⁵ OLIS, 2017 Regular Session, SB 557, Measure History, *available at* <https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB557>; OLIS, 2017 Regular Session, HB 2135, Measure History, *available at* <https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/HB2135>.

⁷⁶ OLIS, 2018 Regular Session, SB 1507, Measure History, *available at* <https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1507>; OLIS, 2018 Regular Session, HB 4001, Measure History, *available at* <https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4001>.

case that Oregon's public trust resources are *already substantially impaired* and that Defendants, despite ample opportunity, have failed to take sufficient actions to protect public trust resources, it is imperative that the judicial branch step in to fulfill its constitutional obligations to act as a check on the political branches of government and to protect the legal rights of Plaintiffs, and public trust beneficiaries.

Even if the legislature were to, belatedly, attempt to address the climate crisis, this Court's review is still critical to ensure that the State complies with its ongoing and future trustee obligations. If this Court does not correct the Court of Appeals' opinion, we can expect that the State will continue to fail to adequately protect Oregon's public trust resources as it has done for decades. Moreover, under the Court of Appeals' interpretation of the public trust doctrine, the State could pass legislation that allowed for continued impairment of public trust resources but that would not be reviewable by the courts. "It is emphatically the province and duty of the judicial department to say what the law is," and here, it is the duty of the courts to determine when the State is meeting, or violating, its fiduciary obligation to protect Oregon's public trust assets. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

V. CONCLUSION

As the Oregon Global Warming Commission stated in its *2018*

Biennial Report to the Legislature:

[C]limate change is occurring in real time. Its effects are being felt, in Oregon and around the world, today and not in some distant and uncertain future. . . . Our children, and theirs, will be living for decades with the worsening consequences of our failure to take timely action when we knew we should. Bad as that is, further delay only makes it worse. . . . [W]e have only begun to sense the change that our children will be called upon to cope with.⁷⁷

If not corrected, the Court of Appeals' opinion means that Defendants have no obligation to act to protect Oregon's public trust resources from the grave impacts of climate change. Because the practical consequences of that decision, as described above, impact all Oregonians and will result in serious and irreversible injustices, *amici* respectfully request that this Court grant Plaintiffs' Petition for Review and correct the erroneous opinion of the Court of Appeals.

DATED this 22nd day of March, 2019.

Respectfully submitted,

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⁷⁷ OGWC, 2018 Biennial Report at 32.

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