

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 No. 161109273

Court of Appeals No. A159826

Supreme Court No. S066564

Petitioners' Brief on the Merits

Appeal of decision of the Court of Appeals on appeal from a judgment of the
Circuit Court for Lane County, Honorable Karsten Rasmussen, Judge

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I. INTRODUCTION

Plaintiffs are two young¹ Oregonians asking this court to apply its existing precedents confirming the role of the sovereign in protecting the public's interest in essential natural resources. Oregon's public trust cases declare the state's role as trustee to manage and protect resources in which the public has an interest, as necessary to preserve those key assets for the shared beneficial use of all Oregonians. Prior cases have addressed interference with the public's rights by private occupation of tidelands or waterways, and the taking of wild game or fish. This case seeks to mitigate and avoid the permanent harm to these resources and the atmosphere caused by greenhouse gas emissions. The appellate court's decision below, if upheld, would mean there is no judicial backstop in the face of legislative and regulatory inaction to address this existential threat to the state's natural resources that sustain our economy, health, recreation and navigation. Consequently, plaintiffs request reversal and remand of that decision for the reasons set forth below.

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

A. Questions Presented:

1. Does the public trust doctrine include waters of the state, fish, wildlife, and the atmosphere, in addition to submerged and submersible lands?

¹ Ollie and Kelsey were 11 and 15 years of age, respectively, when this case was filed.

2. Does the public trust doctrine impose an affirmative duty or responsibility upon the state to protect the public interest in trust resources from substantial impairment?

B. Proposed Rules of Law:

1. The public trust doctrine applies to natural resources that are of fundamental importance to society and includes the state's waters, fish, wildlife, and atmosphere.
2. The public trust doctrine requires the state to protect the public's use of trust resources from substantial impairment.

III. LEGAL FRAMEWORK

The trial court granted defendants' motion for summary judgment and therefore this court must determine whether "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." ORCP 47 C. This court reviews the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to plaintiffs as the party opposing the motion. *See, Jones v. General Motor Co.*, 325 Or 404, 408, 939 P2d 608 (1997).

Under the public trust doctrine, the State of Oregon, as sovereign trustee, holds essential natural resources *in trust* for the benefit of all Oregonians. *See, e.g., Corvallis Sand & Gravel Co. v. State Land Bd.*, 250 Or 319, 335, 439 P2d 575 (1968) ("[T]he lands underlying the navigable waters of the state are held by the state in trust for the benefit of the whole people of the state."); *State v. Hume*, 52 Or 1, 5, 95 P 808 (1908) (title to fish and wildlife is held "by the state, in its sovereign capacity, in trust for all its citizens"). *See also, Illinois*

Cent. R.R. Co. v. Ill., 146 U.S. 387, 455, 13 S Ct 110 (1892) (“such property is held by the state, by virtue of its sovereignty, in trust for the public.”). Oregon’s public trust² doctrine is grounded in preservation, in perpetuity, of the “paramount” rights of the public to access and use shared natural resources. See *Shively v. Bowlby*, 152 US 1, 52, 14 S Ct 548 (1894) (“By the law of the State of Oregon * * * the State has the title in [tide]lands * * * subject only to the paramount right of navigation inherent in the public.”). The focus of the doctrine is the protection of the public’s interest in those resources that are of fundamental importance to society.

Oregon courts have repeatedly imposed a trust responsibility on the state to protect public rights with respect to submerged lands (*Winston Bros. Co. v. State Tax Com.*, 156 Or 505, 511, 62 P2d 7 (1936)), state waters (*Morse v. Or. Div. of State Lands*, 285 Or 197, 201, 590 P2d 709 (1979)), and fish and wildlife (*State v. Dickerson*, 356 Or 822, 834, 345 P3d 447 (2015) (“...wildlife is the corpus of the trust, the state is the trustee, and the public is the beneficiary.”)). The state manages these resources for the public interest and beneficial use that includes navigation, commerce, fishing, hunting, and

² The public trust aspect of state ownership is also referred to as the *jus publicum*. See, e.g., *Morse v. Or. Div. State Lands*, 34 Or App 853, 859, 581 P2d 520 (1978), *aff’d*, 285 Or 195 (1979) (explaining that the state’s ownership “was qualified by a public trust or *jus publicum*.”).

recreation. *Oregon Shores Cons. Coal. v. Or. Fish and Wildlife Comm'n*, 62 Or App 481, 493, 662 P2d 356 (1983).

This management and control of trust resources is a fundamental obligation that the state may not abandon or surrender:

“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 * * * Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.”

Illinois Cent. R.R. Co., 146 US at 453, 460. The state must maintain control of the public trust resource so as to prevent “substantial impairment” of the public’s interest in the resource. *Morse*, 285 Or at 201-202; *see also*, *Cook v. Dabney*, 70 Or 529, 532, 139 P 721 (1914) (“To all intents and purposes the title of the state was burdened with a trust, so to speak, in favor of [the public rights of navigation and fishery]. It would have no right or authority so to dispose of the subjacent lands in a manner calculated to prejudice or impede the exercise of those rights.”). In *Morse v. Ore. Div. of State Lands*, addressing the state’s role in issuing permits for filling of tidelands, this court explained that the public trust doctrine limits “the power of the state to permit alienation of the use of its waters” to situations where that partial alienation “can be done without substantial impairment of the interest of the public in such waters” and subject to the overriding interest of navigation and commerce. 285 Or at 201-

202 (quoting *Shively v. Bowlby*, 152 US 1, 47, 14 S Ct 548 (1894)). In the same case the Court of Appeals explained the state's trustee role:

“Because the trust is for the public benefit, the state's trustee obligation is commonly described as the protection of specified public usages, *e.g.*, navigation, fishery and, in more recent cases, recreation. The severe restriction upon the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands, but upon the exhaustible and irreplaceable nature of the resources and their fundamental importance to our society and our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.”

34 Or App 853, 860, 581 P2d 520 (1978) *aff'd*, 285 Or 197 (1979).

The responsibility of the trustee inherent in the public trust doctrine not only restrains the state from alienating essential natural resources, but also imposes a duty to protect them with whatever legal means necessary so the beneficial uses derived therefrom will continue to benefit all Oregonians. *See, Brusco Towboat Co. v. State*, 30 Or App 509, 517, 567 P2d 1037 (1977) (“As representative of the people, the sovereign bears the responsibility to preserve these rights.”), *aff'd*, 284 Or 627, 589 P2d 712 (1978). Otherwise, the doctrine will be rendered meaningless and the trust resources degraded beyond repair in the face of unprecedented threat.

IV. NATURE OF PROCEEDING AND MATERIAL FACTS

A. Nature of Action and Relief Sought

This action arises out of the Lane County Circuit Court's general judgment entered in *Chernaik, et al. v. Brown, et al.*, 161109273 (June 23, 2015), based on the court's May 11, 2015 order granting defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment for declaratory relief. ER³ 4-22. Plaintiffs originally filed this declaratory judgment action eight years ago against defendants Governor Kitzhaber (currently Governor Brown) and the State of Oregon, seeking a declaration that defendants have a duty under the public trust doctrine to prevent the substantial impairment of public trust assets, including waters of the state, submerged and submersible lands, fish and wildlife, and the atmosphere. ER 1-3. Plaintiffs also seek a declaration that defendants have breached their duty by allowing entities to emit dangerous levels of carbon dioxide emissions in the State of Oregon in a manner that is causing the substantial impairment of Oregon's public trust resources. ER 3.

B. Material Facts

The parties agree on the material facts related to (1) the human causes of climate change, (2) its impacts on Oregon's natural resources, (3) plaintiffs' reliance on Oregon's natural resources for personal and economic well-being,

³ This brief refers to the Excerpt of Record filed in the Court of Appeals. *See* ORAP 9.20(5).

and (4) defendants' failure to meet their own greenhouse gas emissions targets. In their Answer to Plaintiffs' First Amended Complaint, defendants "agree that global climate change is a very serious problem that is causing, and will continue to cause, harm to our planet and the State of Oregon, if global greenhouse gas emissions are not curtailed." ER 25-26. Defendants admit that "anthropogenic greenhouse gas emissions have caused, and are causing, global climate change." ER 30. As to specific impacts, defendants concede:

"[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 storm events 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 31.

Defendants admit that "the air or atmosphere is necessary for health, welfare and commerce in Oregon." ER 30. Defendants further admit that plaintiffs' "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." ER 26. And finally, defendants acknowledge that "Oregon is likely to fall well short of the targets set by its greenhouse gas reduction and mitigation plan." ER 34. The record below contains additional evidence from multiple experts as to the causes, impacts, and solutions to climate change, and how climate change is causing

substantial impairment to the public's use of trust resources.⁴ *See* ER 78-82.

Impacts to trust resources and the public's use of those resources include:

- Increasing acidification of ocean waters, is hindering the ability of shellfish to build shells and skeletons and altering key ecological processes, threatening coastal marine ecosystems, fisheries, and aquaculture;
- Changes in hydrologic flow regimes and warming stream and lake temperatures pose significant threats to aquatic ecosystems and are expected to alter key habitat conditions for salmon and other aquatic species;
- Water-dependent recreation will be affected by dry conditions, low flows, impaired water quality and reduced reservoir storage; and,
- Increasing incidence of heat-related illness and respiratory disorders from air quality, wildfire, and allergenic changes.

Id. Defendants did not contest the admissibility of this expert evidence or submit any evidence to contradict the conclusions of plaintiffs' experts.

⁴ These experts include:

- Dr. James Hansen, former Director of the NASA Goddard Institute for Space Studies;
- Dr. Phil Mote, Director of the Oregon Climate Change Research Institute at Oregon State University;
- Dr. Burke Hales, Professor of Ocean Ecology and Biogeochemistry at Oregon State University; and
- Mr. Ernie Niemi, economist and founder of Natural Resource Economics, Inc.

C. Prior Court Proceedings

In their complaint filed in 2011, plaintiffs asserted that under the public trust doctrine, certain state natural resources (including waters of the state, fish, wildlife, and the atmosphere) are “trust resources” of which defendants are trustees. ER 3. Plaintiffs alleged that defendants have a fiduciary obligation to protect those resources and have failed to do so, with the result that increased greenhouse gas emissions are causing potentially irreversible climate change. *Id.* Plaintiffs sought declarations consistent with their assertions, as well as orders requiring defendants to take specific actions aimed at reducing greenhouse gas emissions. *Id.*

Defendants moved to dismiss, arguing that the trial court lacked authority to grant the requested relief. The parties agreed to abstain litigating the merits of plaintiffs’ public trust theory or plaintiffs’ claim that defendants have breached their duties under the public trust doctrine. Rather, defendants limited their dismissal motion to the question of whether the trial court had authority to grant the requested declaratory and injunctive relief. The trial court granted defendants’ motion on the basis that it lacked statutory authority to grant relief that was not based on a constitutional or statutory provision, and that it would violate separation-of-powers and political-question principles if it granted any other declaratory relief or injunctive relief requiring defendants to take specific actions to combat greenhouse gas emissions.

Plaintiffs appealed this ruling, and the Court of Appeals reversed and remanded the lower court's decision, holding that:

“[I]t must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine. Plaintiffs' requests for 'bare' declarations regarding the scope of the state's present obligations, if any, under that doctrine are, therefore, justiciable.”

Chernaik v. Kitzhaber, 263 Or App 463, 479, 328 P3d 799 (2014), (*Chernaik I*).

The court explained what determinations should be made on remand: “plaintiffs are entitled to a judicial declaration of whether the [] natural resources identified in plaintiffs' complaint also 'are trust resources' that the state has a fiduciary obligation to protect. The answers to those questions necessarily will inform the court's determination whether plaintiffs are entitled to any of the other relief they request.” *Id.* at 481.

On remand, defendants moved for summary judgment and plaintiffs moved for partial summary judgment on declaratory relief. On May 11, 2015, the circuit court granted defendants' motion for summary judgment, finding that the public trust doctrine encompasses only submerged and submersible lands, and that the state does not have a fiduciary obligation to protect public trust resources from substantial impairment caused by climate change. ER 11-17. The court denied plaintiffs' motion for summary judgment for declaratory relief and dismissed the case. The circuit court entered final judgment for defendants on June 23, 2015.

Plaintiffs appealed the summary judgment decision. In their response brief, defendants agreed with plaintiffs that “the trial court erred in stating the doctrine too narrowly” when it concluded that the public trust doctrine applies only to submerged and submersible lands, and not to waters themselves. Respondent’s Answering Brief at 15 n.4, *Chernaik v. Brown*, 295 Or App 584 (CA A159826). Nevertheless, the Court of Appeals did not address the scope of the public trust, holding only that the public trust doctrine does not impose a fiduciary obligation on the state to take affirmative action to protect public trust resources from the effects of climate change. *Chernaik v. Brown*, 295 Or App 584, 600, 436 P3d 26 (2019) (*Chernaik II*).

The appellate court began its analysis by characterizing the “historical underpinnings” of Oregon’s public trust doctrine as starting with the equal-footing doctrine vesting title to submerged and submersible lands under title-navigable waters in the state by virtue of its sovereignty. *Id.* at 592. The court identified cases based on the public trust doctrine in Oregon as being “focused on the extent to which the state can alienate the lands held in trust, or on the power of the state to regulate activity with respect to title-navigable waterways.” *Id.* at 594 (citing *Kramer v. City of Lake Oswego*, 285 Or App 181, 395 P3d 592, *rev. accepted*, 362 Or 38, 403 P3d 776 (2017)).

The Court of Appeals concluded there is no duty akin to a trust relationship included in the public trust doctrine:

“There is nothing in our examination of Oregon’s common-law public-trust doctrine that suggests that the doctrine imposes ‘fiduciary obligations’ analogous to a legal ‘trust’ to which trust law would apply, such as advocated by plaintiffs and amici law professors. Rather, the public-trust doctrine uses the word ‘trust’ as an imperfect metaphor to capture the idea that the state is restrained from substantially impairing the common-law public right to use public-trust resource for certain purposes. *Brusco Towboat*, 30 Or App at 517 (‘The right of the public to use the waterways for these purposes has always been recognized at common law. As representative of the people, the sovereign bears the responsibility to preserve these rights.’ (Citation omitted).)”

Chernaik II, 295 Or App at 600. In reaching its decision, instead of focusing on the impact on the public’s right to use trust resources, the Court of Appeals drew a distinction between restraining the state from allowing substantial impairment and requiring the state to affirmatively act to protect public trust resources:

“[T]he Oregon public-trust doctrine is rooted in the idea that that the state is restrained from disposing or allowing uses of public-trust resource that substantially impair the recognized public use of those resources. We can find no source under the Oregon conception of the public-trust doctrine for imposing fiduciary duties on the state to affirmatively act to protect public-trust resources from the effects from climate change.”

Id.

Based on that conclusion, the court declined to decide whether the lower court erred in its ruling that public trust doctrine only concerns submerged and submersible lands. The Court of Appeals vacated and remanded the trial court’s judgment dismissing plaintiffs’ suit for declaratory relief, with instructions for

the trial court to enter a judgment consistent with the Court of Appeals opinion declaring the parties' rights. *Id.* at 601.

V. SUMMARY OF ARGUMENT

The appellate court's decision severely narrows the longstanding common law doctrine recognizing that the state's ownership of trust resources is defined by its duty to protect and preserve those resources for the benefit of the people as a whole. The courts of this state have consistently described the relationship of the state to these essential resources including waters, fish, wildlife, submerged and submersible lands, as a "trust." The term "trust" has legal import, and imposes an affirmative obligation that rises above and beyond the bare limitation on alienation of submerged lands. Public trust doctrine cases have therefore focused on whether the public's paramount interests are being substantially interfered with, and not on an arbitrary and artificial distinction between a restraint on alienation or an affirmative duty to protect trust resources.

The judicial inquiry hinges on the impacts to the beneficiaries of the trust. If the public trust doctrine imposes nothing more than the narrow restraint found by the appellate court, the beneficiaries of this trust have no legal rights to protect their interests, and the courts would be powerless to serve as any kind of check on the decision of the state to simply sit by and allow substantial impairment of the beneficiaries' interest. And here, there would be no judicial

recourse available to plaintiffs to arrest and reverse the depletion of these natural resources as climate change continues to take its toll.

VI. ARGUMENT

A. The Public Trust Doctrine in Oregon Is Grounded in Protecting the Paramount Interest of the Public in Shared Essential Resources.

Oregon’s public trust doctrine protects the paramount rights of the public to use commonly held natural resources. The Court of Appeals incorrectly described the “historical underpinnings” of the public trust doctrine as beginning with statehood and the state’s title to submerged lands granted by virtue of the equal-footing doctrine. *Chernaik II*, 295 Or App at 592 (citing *Kramer v. Lake Oswego*, 285 Or App 181).⁵ However, the equal footing doctrine is distinct from, and narrower than, the public trust doctrine.

As explained by the U.S. Supreme Court in *PPL Montana LLC v. Montana*, the equal footing doctrine is federal law, founded in the Constitution, that gave states control over title-navigable waters, determined by their use for navigation at statehood. 565 US 576, 603-04, 132 S Ct 1215 (2012). In contrast, the public trust doctrine is a matter of state law. “Its roots trace to Roman civil law and its principles can be found in the English common law on public

⁵In *Kramer*, the Court of Appeals described the public trust doctrine *per se*, as it has been applied to title-navigable waterways as being grounded in state “sovereignty and its admission as a state under the equal-footing doctrine.” 285 Or App at 201.

navigation and fishing rights over tidal lands and in the state laws of this country.” 565 US at 603. The foundation of the public trust doctrine is not state’s property rights, but rather the public’s rights to use crucial natural resources for navigation, commerce, and fishing. In *Brusco Towboat v. State*, the Court of Appeals reviewed the long history of the public trust doctrine and the *jus publicum* aspect of state ownership of submerged lands as rooted “in a philosophical conception of natural law.” 30 Or App at 517. *See also Shively*, 152 US at 52 (“By the law of the State of Oregon * * * the State has the title in [tide]lands * * * subject only to the paramount right of navigation inherent in the public.”).

The continuing interests of the people as a whole are dominant because in our system of government, the people are sovereign. The Oregon Constitution recognizes that “all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness[.]” Or Const, Art I, § 1. The legislatures, executives and courts “are simply agents of the people to exercise certain sovereign powers for them, and they are ultimately responsible to the people.” Hugh Willis, *The Doctrine of Sovereignty under the United States Constitution*, 15 Virginia L Rev 437, 462 (1929). In other words, the “State is society politically organized as a unit for the protection of social interests.” *Id.* at 445. Therefore, when the state controls a public trust resource (e.g. tidelands, fish, or wildlife) it does so subject to the

public interest in maintaining that resource. These principles apply to both the scope and the substance of the public trust doctrine.

B. The Natural Resources Identified in the Complaint are Public Trust Resources.

1. Public Trust Resources Are Both Incapable of Cultivation or Improvement and of Great Value to the Public as a Whole.

In one of Oregon's earliest public trust doctrine cases, *Bowlby v. Shively*, this court reviewed whether a landowner adjacent to the Columbia River could claim ownership of tide lands. 22 Or 410, 30 P 154 (1892), *aff'd*, *Shively v. Bowlby*, 152 US 1 (1894). This court reviewed prior decisions in Oregon and concluded that the state holds title to tide lands with "state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce." *Bowlby*, 22 Or at 427. In affirming the Oregon court's decision denying the landowners' claims, the U.S. Supreme Court held that Oregon's law governs and explained the reasons for the sovereign's control of the tide lands:

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people."

Shively v. Bowlby, 152 US at 57.

Since *Shively*, both the trust resources themselves and the public's interests therein have evolved under the public trust doctrine. *See, e.g., Morse*, 34 Or App at 860 (noting that the trustee's obligation has been extended to include protection of "in more recent cases, recreation"). What endures is "the paramount responsibility of the state to preserve and protect the public interest." *Id.* at 860. The public trust resources have at least two features in common: (1) they are not easily held or improved, and (2) they are of great value to the public for uses such as commerce, navigation, hunting, and fisheries.

The common "ownership" of these resources by the people has been articulated since Roman times: "By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea." Institutes of Justinian, 2.1.1 (J. Moyles trans, 3d ed 1896). *See Brusco Towboat Co.*, 30 Or App at 517 ("The principle that the public has an overriding interest in navigable waterways and lands underlying them is as old as the waterways themselves, traceable at least to the Code of Justinian in the Fifth Century A.D.").

Oregon has further recognized that the trust extends to waters and wild fish:

"[T]he state, in its sovereign capacity, has not only the absolute ownership in and dominion over the bed and soil which underlies the tidal waters of the state, but of the waters themselves, subject only to the public right of navigation, and also has in trust for its own citizens, title to and ownership of the fish in such waters, so

far as they are capable of ownership while in a state of freedom * *
* .”

Alsos v. Kendall, 111 Or 359, 371, 227 P 286 (1924). Based on the common ownership of the people of the state, the state may deny citizens of other states the right to take fish within its borders. *Id.* Fish, while in a state of freedom, are not easily controlled or held, and are of great value to the public as a resource. “The title to the fish, before they are captured, is in the state in its sovereign capacity, in trust for all its citizens, and the right to fish is subject to such laws as the legislature may enact tending to protect them from extinction by exhaustive methods of capture.” *Portland Fish Co. v. Benson*, 56 Or 147, 154, 108 P 122 (1910) (noting that salmon fishing is a very extensive industry in Oregon).

Likewise, in *State v. Hume*, Oregon adopted the English common law view that property rights in wild animals lie with the sovereign in trust for its citizens. 52 Or at 5-6.⁶ In *Hume* this court explained that game within the borders of the state “are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is

⁶ Defendants argued below that the cases articulating the state’s ownership of fish and wildlife as being in trust for the people of the state are not public trust doctrine cases, but rather fall under a separate “wildlife trust” category. Respondent’s Answering Brief at 19-20, *Chernaik v. Brown*, 295 Or App 584 (CA A159826). Whether or not they all bear the same label, the legal concept is analogous: a resource of fundamental importance to all, and that cannot be held by anyone is owned by the state in trust for everyone.

held by the state, in its sovereign capacity in trust for all its citizens” and the state may enact laws to protect the species from injury or extinction. *Id.* This court more recently reaffirmed this view in *State v. Dickerson*, 356 Or 822 (2015). The *Dickerson* court noted that the state’s control is not as proprietor, but in its sovereign capacity for the benefit of, and in trust for, its people in common. *Id.* at 832 (quoting *Monroe v. Withycombe*, 84 Or 328, 334-35, 165 P 227 (1917)).⁷ Wild animals, before they are captured, are incapable of control, and are of great value to the people as a whole.

Plaintiffs have alleged impairment to the public’s use of already-recognized trust resources including waters and fish. For example, plaintiffs provided evidence that ocean acidification caused by global warming is already impacting Oregon’s shellfish industry, requiring mitigation measures be taken in an effort to protect that public use. ER 56-59. And plaintiffs provided evidence that higher stream temperatures will affect habitat quality for salmon in all of their freshwater life stages. ER 50. Therefore, while plaintiffs ask this court to declare that the air, or the atmosphere, is likewise a trust resource, this declaration is not essential for the court to find in favor of plaintiffs.

⁷ This distinction between proprietary and sovereign ownership is consistent with the U.S. Supreme Court’s public trust discussion in *Illinois Central*, 146 US at 457-59.

2. This Court Should Declare the Atmosphere a Public Trust Resource.

Like previously recognized trust resources, the atmosphere is both not easily held or improved and is essential to public welfare and economy, warranting extension of the sovereign's authority and duty to protect and preserve that asset in perpetuity for all Oregonians.

The air, synonymous with atmosphere, from the days of Roman, and then English, common law has been considered a public resource benefiting all people. 1 William Blackstone, *Commentaries on the Laws of England* 2, 14 (1766) (“[T]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common * * *. Such (among others) are the elements of light, air, and water * * *.”). “The airspace, apart from the immediate reaches above the land, is part of the public domain.” *U.S. v. Causby*, 328 US 256, 266, 66 S Ct 1062 (1946). To recognize private claims of ownership to the air would “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.” *Id.* at 262.

The United States Supreme Court has upheld the states' interests as sovereigns in protecting the air within their domains. In *Georgia v. Tennessee Copper Co.*, Georgia sued in its sovereign capacity for injury to its air and land from the discharge of noxious gases from the company's copper works in Tennessee. 206 US 230, 236, 27 S Ct 618 (1907). The Court explained that as a

sovereign, the state “has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” *Id.* at 237. The Court concluded that the state was entitled to an injunction to protect its air:

“It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.”

Id. at 238.

In the present case, plaintiffs’ evidence shows that the emissions of greenhouse gases are similarly threatening the forests, waterways, and livelihoods of present and future Oregonians. ER 48-54. The atmosphere is intricately linked with other trust assets, such as waters. *See* ER 55-58; *see also*, *Juliana v. U.S.*, 217 F Supp 3d 1224, 1255 n 10 (D. Or. 2016) (“Even Supreme Court case law suggests the atmosphere may properly be deemed part of the public trust *res.*”). To preserve all other public trust assets—from Oregon’s coastal tidelands to the fresh water that runs off Oregon’s mountains and feeds our salmon and trout streams—the state must protect the integrity of the atmosphere.

This court can extend and adapt the common law to recognize rights and duties not previously recognized. *See, Hinish v. Meier & Frank*, 166 Or 482, 504, 113 P2d 438 (1941) (courts may “supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require.”). The atmosphere is arguably the most essential public trust resource because the health and endurance of the other trust resources already recognized by Oregon courts are inextricably dependent upon the integrity of the atmosphere. Because the atmosphere is not capable of private ownership or improvement and is of utmost importance to the people as a whole, this court should declare that the state in its sovereign capacity holds the atmosphere within its domain in trust for Oregonians, present and future.

C. The Court of Appeals Misconstrued the Basis and Requirements of the Public Trust.

1. The Public Trust Doctrine Requires the State to Protect the People’s Interest in Trust Resources from Substantial Impairment.

In the long line of Oregon precedent articulating the public trust doctrine, no case supports the Court of Appeals’ distinction between the duty to protect trust resources and the duty to refrain from allowing interference with those resources. It is a distinction without a difference – the state cannot undertake or allow actions that impair the public’s interest in trust uses any more than it can stand idly by while the resources vanish. The purpose of the limitation on alienation or interference *is* the protection of the resources and the public

interest therein. The trust imposes an obligation on the state that is protective, or fiduciary, in nature because the people have placed their confidence in the state to manage and control the resources which are common to all Oregonians.

The courts have consistently defined the state's relationship to the public and our shared natural resources as a "trust." This is a word that has legal meaning.⁸ A trust is a "fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations towards the property and the beneficiary." Trust, *Black's Law Dictionary* 1740 (10th ed 2014). The common law in Oregon similarly defines a trust as "an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him to apply or deal with property for the benefit of some other person * * *." *Templeton v. Bockler*, 73 Or 494, 506, 144 P 405 (1914). Accordingly, a basic element of a trust is the trustee's affirmative obligation toward the property and the beneficiary. *See, White v. Public Employees Retirement Bd.*, 351 Or 426, 438, 268 P3d 600 (2011)

⁸ *See, Davidson v. Oregon Government Ethics Commission*, 74 Or App 160, 164-65, 702 P2d 417, *aff'd en banc*, 300 Or 415, 712 P2d 87 (1985) ("Labeling public office as a public trust was no accident. It was intended, in a general way, to define the limits of acceptable behavior. One's duty with respect to a public trust, or any other kind of trust for that matter, must be in accordance with the highest standards the law can impose.").

(“common-law trust principles recognize that a trustee must consider * * * the need to protect and preserve the corpus of the trust itself”).

Whether or not that obligation exactly mirrors the fiduciary roles under private trust law (including duties of loyalty and confidence) is not essential to the resolution of plaintiffs’ claims. Plaintiffs ask this court to declare that the public trust doctrine imposes an obligation on the state to protect and preserve trust resources. Absent such a duty, the public’s interest in vital natural resources could be extinguished.

In every Oregon case since *Shively*, courts have balanced the state’s ability to allow some private use of public trust resources with its duty to preserve the resource for the benefit of the whole people. Those cases have primarily considered the limits of the state’s authority to lease or permit fill of waters. The issue presented has often been the alienation of the resource. However, no court has ever declared that the trust duty is limited to a restraint on alienation and many cases have recognized that a duty to protect is an aspect of sovereign public trust responsibilities.

The trust responsibility is imperative to ensure public rights in these important resources persist. In *Winston Bros. Co.*, the Oregon Supreme Court further articulated the state’s role in managing tide lands and waters for the benefit of the public:

“As to * * * lands underlying the navigable waters of the state, although the title passed to the state by virtue of its

sovereignty, its rights were merely those of a trustee for the public. In its ownership thereof, the state represents the people, and the ownership is that of the people in their united sovereignty, while the waters themselves remain public so that all persons may use the same for navigation and fishing.”

Winston Bros. Co. v. State Tax Com., 156 Or at 511. Thus, while the submerged lands, “belong” to the state, the state only holds such title in the role of trustee for the benefit of the public, and the waters themselves remain public. The public trust doctrine “generally requires the state to protect the public’s use of these waterways for navigation, recreation, commerce and fisheries.” Op Atty Gen 8281 at 15 (2005) (addressing State Land Board questions about ownership and use of waterways in the state).

In *Morse v. Or. Div. of State Lands*, the Court of Appeals reviewed the history of the *jus publicum* and explained that, “all submerged and submersible lands are subject to the paramount responsibility of the state to preserve and protect the public interest.” 34 Or App at 859. *Morse* addressed whether a permit to allow fill in a portion of Coos Bay for the purpose of extending a runway at the municipal airport violated the public trust doctrine. *Id.* at 855. “Because the trust is for the public benefit, the state’s trustee obligation is commonly described as the protection of specified public usages [navigation, fishery, recreation].” *Id.* at 859. The Oregon Supreme Court affirmed on different grounds, finding that the waters to be filled were not “used for other than very causal navigation of the recreational kind.” 285 Or at 201. This court

concluded that the permit did not violate the public trust doctrine because there was “no grant here to a private party which results in such substantial impairment of the public’s interest as would be beyond the power of the legislature to authorize.” *Id.* at 203. In so holding, this court affirmed the “substantial impairment” standard of protection and left intact the Court of Appeals’ statement regarding the state’s trustee *obligation* to protect specified public use.

In *Oregon Shores Conservation Coalition v. Oregon Fish & Wildlife Commission*, the Court of Appeals summarized the doctrine as providing that “submerged and submersible lands are preserved for public use in navigation, fishing and recreation. The state, as trustee for the people, bears the *responsibility of preserving and protecting* the right of the public to the use of the waters for those purposes.” 62 Or App at 493 (internal citation omitted) (emphasis added). In *Oregon Shores*, the petitioner challenged a permit allowing oyster growers to use insecticide in their oyster beds as failing to comply with the public trust doctrine. *Id.* at 483. The court determined that it was unnecessary to apply the common law doctrine because statutory law applied to the issue. *Id.* at 493.

Oregon Shores is doubly instructive in that it confirms not only that, contrary to the *Chernaik II* decision, the state bears affirmative duties to protect public trust resources, but also that in many cases, regulatory or statutory

frameworks exist to address a particular threat to those resources. The state (and federal government) has in place enforceable water quality standards to prevent undue harm to the public's marine resources caused by insecticides. If these standards are not enforced by the state, there are citizens suit provisions that provide a mechanism for private parties and/or non-profit organizations to step into the shoes of the state to enforce those standards.

No such statutory or regulatory protections or enforceable standards exist when it comes to climate change emissions. The legislature's actions on greenhouse gas emissions merely set non-binding, unenforceable targets for reduction, which the state has regularly found are not on track to be met. In 2007, the Oregon Legislature enacted the Global Warming Statute (HB 3543 codified in part as ORS 468A.200-.260), in response to a report from the Governor's Advisory Group on Global Warming that called for "immediate and significant action to address global warming, to reduce Oregon's exposure to the risks of global warming and to begin to prepare for the effects of global warming." ORS 468A.200(1). ORS 468A.205(1) sets non-binding goals for reductions in greenhouse gases including, by 2020 reductions to 10% below 1990 levels and by 2050, reductions to 75% below 1990 levels. The Global Warming Commission has found, and defendants admitted in their answer, that "Oregon is likely to fall well short of these targets set by its greenhouse gas reduction and mitigation plan." ER 34. In the absence of a binding and

enforceable regulatory scheme sufficient to protect the beneficiaries' interests, the public trust doctrine remains the final backstop for protection of the public's interest in trust resources from substantial impairment by climate change.⁹

In *Brusco Towboat v. State*, a challenge to the state's leasing program for submerged lands, the Court of Appeals summarized the trust: "Navigable waterways are a valuable and essential natural resource and as such all people have an interest in maintaining them for commerce, fishing, and recreation* * * . As representative of the people, the sovereign bears the responsibility to preserve these rights." 30 Or App at 517. The court also noted that the state's public trust role is non-delegable:

"In essence, the *jus publicum* is a nondelegable government obligation. Regardless of how the state may choose to convey its private title to submerged and submersible lands, such title, even in the hands of a private party, remains subject to the paramount power of the state to intervene on behalf of the public interest."

Id. at 518. The court concluded that the leasing scheme was valid because the state's exercise of proprietary rights "remains subject to the public's paramount interest in such lands and the state, as trustee of that interest, *must act accordingly.*" *Id.* (emphasis added).

⁹ An enforceable regulatory scheme that is protective of the public's interest in trust resources would not eliminate the state's duty under the trust, which is an attribute of sovereignty. See *Corvallis & E.R. Co. v. Benson*, 61 Or 359, 370, 121 P 418 (1912) (noting that the state cannot abdicate or grant away the *jus publicum* or public authority over the public trust resource).

In the most recent case to address the public trust doctrine, the Court of Appeals reviewed whether uplands adjacent to trust waters are subject to public access under the trust. *Kramer*, 285 Or App at 204.¹⁰ The court explained that the state could not “permit others to conduct operations on those lands that would substantially impair the public’s right to navigate a waterway (including for recreation) * * *.” *Id.* at 205. Thus, even if the doctrine does not guarantee upland access (a ruling that is under further review) the appellate court correctly recognized the state’s obligation under the public trust doctrine includes an affirmative duty to ensure that public trust resources are managed and protected to safeguard the public’s continuing recreational and navigational rights to those natural resources. *Id.* at 204 (“we understand the concept of public trust to protect the public’s right *to use* navigable waters * * *.”). The *Kramer* opinion also reinforced the substantial impairment standard that applies under the public trust doctrine. *Id.* at 205.

This trust obligation broadly prescribes a duty on the state to control and protect trust resources for the benefit of the people, a duty that is enforced by the courts. In the public trust, the state’s responsibility is to secure the resource

¹⁰ On the date of filing this opening brief, this court issued a Notice of Forthcoming Decision indicating that *Kramer* is expected for release the next day, August 1, 2019. Plaintiffs plan to address the *Kramer* decision to the extent it is applicable in supplemental or reply briefing.

for the public's beneficial use, including navigation, commerce, fishing and recreation. *Oregon Shores*, 62 Or App at 493.

2. The State's Duty Under the Public Trust Doctrine Is Not Discretionary, and the Methods for Meeting that Duty Are Not Prescribed in the Doctrine.

Oregon courts have not declared the singular manner in which the state must carry out its responsibility of preserving and protecting trust resources for public benefit. Regarding public duties, Oregon jurisprudence has long recognized that in carrying out a duty to the public, the state's "choice of means may be discretionary, but the decision whether or not to do so at all is, by definition, not discretionary." *Miller v. Grants Pass Irrigation Dist.*, 297 Or 312, 320, 686 P2d 324 (1984) (discussing the duty to protect the public by warning of a danger or by taking preventative measures, or both, and finding duty itself non-discretionary, regardless of whether the duty derives from statutory or from common law).

Applying the public trust doctrine, where the benefit to the people can be secured merely through retaining (or not alienating) the resource, the cases have said so. For example, in *Morse v. Div. of State Lands*, the court found that the state could issue a permit for fill in Coos Bay where the state grant did not "result in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize." *Morse*, 285 Or at 203. Where the benefit can be secured through adopting laws for the protection of the

resource, the courts have so said. For example, in *State v. Dickerson*, the court explained that acting “as a trustee, the state has the authority to manage and preserve wildlife resources and may seek compensation for damages to the trust corpus.” *Dickerson*, 356 Or at 835. And where the benefit can be secured through state action for removal, the courts have so allowed. See *Corvallis Sand & Gravel v. State Land Bd.*, 250 Or at 338 (upholding state action of ejectment and damages against corporation, and finding a defense of laches cannot attach where the government seeks to recover a public trust resource: “[A]s a matter of public policy it is necessary to preserve public rights, revenues and property from injury and loss by the negligence of public officers.’ Like reasons support the rule which makes unavailable the defense of laches against the government in a suit to enforce a public right or to protect a public interest.”).

The courts of this state have upheld a variety of approaches implemented by the state, as trustee, for the protection and preservation of the public’s interest in trust resources. Contrary to the appellate court’s decision, the restraint on alienation does not define the limits of the trust. *Contra, Chernaik II*, 295 Or App at 594. Rather, the public trust requires the state to act as necessary to preserve and protect the public interest. That action may take various forms depending on the threat to the resource and the timing of the state’s action (*i.e.* whether it is adopting regulations to limit harm, or whether it is seeking ejectment after a trust resource has been taken by a private entity).

The Court of Appeals erred in conflating the method of carrying out the trustee's duty with the trustee's responsibility to protect and preserve the public interest.

3. The State Has Reversed Its Positions Regarding the Scope of the Natural Resources Protected Under the Public Trust and Its Fiduciary Duty to Protect Those Resources.

Following oral argument below, plaintiffs moved the Court of Appeals to take judicial notice pursuant to OEC 201(b) of a recent complaint filed by the State of Oregon. *See* Motion for Judicial Notice, Filed Jan. 5, 2018, *Chernaik II* (CA 159826) (referring court to complaint filed in *State of Oregon v. Monsanto Co., et al.*, Mult. Co. Circuit Court No. 18-cv-00540 (Jan. 4, 2018) (“*State of Oregon v. Monsanto*”). The court granted the motion,¹¹ which notified the court of the stark discrepancy between the state's position in the present case and its allegations in *State of Oregon v. Monsanto*, where the state seeks damages to clean up the toxic contamination that Monsanto Corporation, the sole manufacturer of Polychlorinated Biphenyls (commonly known as PCBs), created across the state:

“In *Oregon v. Monsanto*, the State has asserted a legal position regarding the scope and applicability of the public trust doctrine that appears to conflict directly with the arguments made by the State to this Court in the pending appeal.

Specifically, the State alleges in the *State of Oregon v. Monsanto* that:

¹¹ Order Taking Judicial Notice, Entered Jan. 17, 2018, *Chernaik II* (CA 159826).

‘The State holds in trust for the public the bed and banks, and waters between the bed and banks, of all waterways within the State. By virtue of its public trust responsibilities, all such lands are to be preserved for public use in navigation, fishing and recreation. *The State is also the trustee of all natural resources—including land, water, wildlife, and habitat areas—within its borders. As trustee, the State holds these natural resources in trust for all Oregonians—preserving, protecting, and making them available to all Oregonians to use and enjoy for recreational, commercial, cultural, and aesthetic purposes.*’”

Mot for Judicial Notice at 2 (emphasis added). In the decision under review, the appellate court did not address *Monsanto* or the inconsistent position adopted by the state with respect to both the scope of the natural resources under the public trust doctrine and its role to protect those resources.

There are two potential consequences resulting from the state’s inconsistent position in the two pending judicial proceedings. The first is that the state’s allegations in the *Monsanto* complaint that it does have a responsibility as trustee to protect a broad spectrum of natural resources may be deemed a judicial admission. As the Court of Appeals found in *Myers v. Carter*, “[s]tatements contained in the pleadings are considered conclusive judicial admissions.” 27 Or App 351, 358, 556 P.2d 703 (1976) (citing *Eldridge v. Allstate Insurance*, 256 Or 281, 473 P.2d 132 (1970); *Borgert v. Spurling et al.*, 191 Or 344, 230 P.2d 183 (1951)).

Alternatively, in *Bakker v. Baza'r, Inc.*, this court observed “The rule against taking inconsistent positions in judicial proceedings has been referred to as a rule of ‘judicial estoppel.’ Because, however, the rule is based upon reasons of judicial administration, reliance and prejudice are not required, as under the rule of equitable estoppel[.]” 275 Or 245, 272 n 15, 551 P2d 1269 (1976). *See also, Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609, 892 P.2d 683 (1995) (noting “judicial estoppel” bars a party “from assuming a position in a judicial proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding”).

In *Hampton*, this court determined that judicial estoppel “is primarily concerned with the integrity of the judicial process * * *” and “involves three issues: benefit in the earlier proceeding, different judicial proceedings, and inconsistent positions.” *Id.* at 611. Applying these principles here, the *Monsanto* case is a distinct judicial proceeding, and the state has taken a diametrically opposite position with respect to both the scope of the natural resources that comprise the public trust corpus, as well as its duty to preserve and protect those resources. The third element, whether the state has benefited from taking an inapposite position in the *Monsanto* case is arguably also met, in that the state has survived a motion to dismiss on the pleadings.

Under either theory, and as a function of fundamental fairness inherent in Oregon jurisprudence, the fact that the state has recently and unequivocally

affirmed in *Monsanto* that it has the authority and duty to seek compensatory damages to cleanup and restore the natural resources of the state as the public trustee for its citizens must be reconciled with its position in this action.

D. The Declarations of the Scope and Substance of the Public Trust Doctrine that Plaintiffs Seek are Consistent with Constitutional, Legislative and Executive Expressions of the Same.

A declaration from this court that the state has a duty to protect and preserve waters, wildlife, and the atmosphere for the benefit of all Oregonians is consistent with the Constitutional declaration of the public trust duty. The Oregon Constitution provides that the State Land Board “shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.” Or Const, Art VIII, § (5)(2). In *Brusco Towboat*, the appellate court held that this provision “is a constitutional expression of the *jus publicum* or public trust aspect of the state’s ownership” of submerged and submersible lands. 30 Or App at 520.

Further, the declarations plaintiffs seek will not conflict with any legislatively announced principles or agency regulations. To the contrary, the legislature and the executive branch have frequently articulated the state’s obligations under the public trust to preserve and protect resources for the common benefit of the people as a whole.

Statutes that partially embody the common law should be seen as a reflection of the overall common law framework of which the statute is a part, because “[s]tatutes codifying the common law are to be construed in a manner consistent with the common law.” *Hatley v. Stafford*, 284 Or 523, 526 n 1, 588 P2d 603 (1978). Statutes are often passed as “legislative recognition” regarding “important public policy.” *Delaney v. Taco Time Intern.*, 297 Or 10, 15, 681 P2d 114 (1984). Indeed, statutes can be passed to clarify the common law. *See, e.g. Zacher v. Petty*, 312 Or 590, 594, 826 P2d 619 (1992) (stating that “ORS 677.097 was intended to codify and clarify the common law of informed consent”). Because statutes are to be construed consistently with the common law and within the common law framework, statutes are one reflection of a larger common law framework under which the statute operates.

Also, because statutes reflect a public policy decision regarding an issue, statutes can be used as support for a common law claim. *McManus v. Auchincloss*, 271 Or App 765, 772, 353 P3d 17 (2015) (stating “statutes or other authority indicating a public policy to promote the reporting of employer wrongdoing may support a common-law claim of wrongful discharge under the important-public-duty exception”). When looking at a common law claim, the court can “review statutes and other authorities for evidence of a substantial public policy that would be ‘thwarted’” if the statute and common law were

inconsistent. *Id.* at 771. Therefore, a statute may provide insight into the overall common law framework and how the common law should be interpreted.

With these principals in mind, and with respect to submerged and submersible lands, the Department of State Land's implementing regulations articulate the responsibility of the agency to protect public trust resources consistent with the Constitution and common law public trust doctrine, noting that submerged and submersible lands are "managed to ensure the collective rights of the public, including riparian owners, to fully use and enjoy this resource for commerce, navigation, fishing, recreation and other public trust values. These rights are collectively referred to as 'public trust rights.'" OAR 141-145-0010(3).

Regarding state waters, ORS 537.110 provides that "[a]ll water within the state from all sources of water supply belongs to the public." Related statutes provide the structure for implementing the public ownership of waters "in order to insure the preservation of the public welfare, safety and health" through regulation of water use. ORS 537.525. For example, ORS 537.334(2) provides that an in-stream water right "shall not diminish the public's rights in the ownership and control of the waters of this state or the public trust therein." The Oregon Water Resources Department regulations likewise implement the public trust, for example by evaluating whether a proposed groundwater

withdrawal has the “potential to impair or detrimentally affect the public interest” in surface water supply. OAR 690-009-0040(5)(b).

The legislature has also declared that the “Pacific Ocean and its many resources are of environmental, economic, aesthetic, recreational, social and historic importance to the people of this state.” ORS 196.415(1). In adopting Oregon’s Territorial Sea Plan the Land Conservation and Development Commission explained:

“The State of Oregon holds the lands, waters, and living resources within its boundaries in trust for the public and, acting through local, state, and federal laws, seeks to ensure that these ocean resources, values, and benefits are conserved for the current and future generations.”

Oregon Territorial Sea Plan, Preamble to Ocean Management Goals and Policies (May 4, 2001).

While no Oregon case has explicitly held that the public trust doctrine applies to Oregon’s beaches,¹² in adopting the 1967 Beach Bill the legislature declared the policy of the state “to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state * * * so that the public may have the free and uninterrupted use thereof.” HB 1601, § 1 (1967) (codified at ORS 390.610(1)). This policy to

¹² In *State ex rel. Thornton v. Hay*, the majority applied the doctrine of custom to confer a public right to use the dry sands of Oregon’s beaches. 254 Or 584, 597, 462 P2d 671 (1969). Justice Denecke concurred with the result, but would have applied the public trust doctrine. *Id.* at 602 (Denecke, J., concurring).

preserve the resource for the public's use reflects the public trust. The legislature also "declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." ORS 390.610(4).

Finally, regarding wildlife, the legislature has declared the "policy of the State of Oregon that wildlife shall be managed to prevent serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state." ORS 496.012. Further, the statutory scheme for the protection of wildlife provides that the state "may institute suit for the recovery of damages for the unlawful taking or killing of any of the wildlife * * * that are the property of the state." ORS 496.705.¹³

These various declarations by the Oregon legislature implement the public trust doctrine for the protection and preservation of the public's interest in and use of submerged lands, waters, and wildlife in this state. A declaration from this court that the public trust doctrine requires the state to protect and preserve trust resources would not conflict with any legislative enactments of the public trust doctrine. Instead, it would be wholly consistent with those enactments.

¹³ In *Dickerson*, this court noted the availability of damages under ORS 496.705 as a trustee power (distinguishing the public trust in wildlife from the police power regulation). 356 Or at 834.

E. The State Has Abrogated Its Obligation to Protect the Public's Interest in Trust Resources From the Impacts of Climate Change.

As discussed above, the basic requirements of the public trust require the state to protect against substantial impairment of the corpus of the trust and the people's interest therein. In the present case, greenhouse gas emissions are causing substantial impairment of the public's use of trust assets. For example, higher atmospheric carbon dioxide levels are causing ocean acidification, which is impacting Oregon's oyster growing industry. As explained by Dr. Burke Hales, "Netarts Bay has been well studied, and the increasing frequency, duration, and intensity of harmful events has negatively impacted aquaculture operations there. The oyster hatchery never had to buffer intake waters against ocean acidification a decade ago, and now this mitigation strategy is an almost permanent part of the production routine." Hales Decl. at 3 (ER 57).

And, if left unabated, Oregonians are likely to suffer significant losses of the use of trust resources. As explained by Dr. James Hansen in his expert declaration,

"We are observing impacts of the relatively small amount of warming that has already occurred, and these constitute harbingers of far more dangerous change to come. * * * the key point is that, if unabated, continued carbon emissions will initiate dynamic climate change and effects that spin out of control of future generations as the planet's energy imbalance triggers amplifying feedbacks and the climate system and biological system pass critical tipping points."

Hansen Decl. at 6 (ER 47). These impacts to trust resource have real economic consequences. For example, warmer stream temperatures resulting from increased global temperatures reduce salmon habitat and populations. “An assessment of stream temperatures indicates increased warming may reduce salmon habitat in Oregon by 13, 23, and 44 percent by 2030, 2040, and 2080 benchmark years. Adjusting these numbers to be consistent with the 2020, 2040, and 2080 benchmark years, the potential value of reduced salmon populations * * * is \$632 million, \$1.04 billion, \$1.87 billion, respectively.” Niemi Decl. at 7 (ER 66).

Defendants have admitted that “the atmosphere is linked to other natural resources, and that harm to the atmosphere can negatively affect water resources, submerged and submersible lands, * * * wildlife, and fish, and which in turn can result in harm to the public’s ability to use these enumerated resources.” ER 36. Nevertheless, defendants continue to allow the current significant impairment of the public’s interest in acknowledged trust resources and the high danger for further loss of these resources as a result of climate change. Defendants admit that according to the Oregon Global Warming Commission 2009 report, “even if all the actions now ‘in progress’ are completed by 2020, the State will likely fall well short of meeting its 2020 emissions reduction goal, and by extrapolation, clearly is not on track to meet its 2050 goal.”

ER 34. While plaintiffs do not agree that these targets are adequate to prevent the catastrophic effects of climate change and ocean acidification, and the summary judgment record supports this conclusion, the record is clear that the state is failing to meet its targets.

The best available climate science dictates that carbon dioxide must be reduced to 350 parts per million (ppm) by the end of the century to protect essential public trust resources for current and future generations. Hansen Decl. at 19-22. The sooner these reductions begin, the easier the task will be. In the 2017 legislative session, Senate Bill 1070 would have set statewide greenhouse gas emissions limits and established a cap and invest program for compliance. The legislature did not pass SB 1070. In the 2019 Legislative Session, House Bill 2020 was proposed to adopt an Oregon Climate Action Program and would have strengthened and updated greenhouse gas emissions targets, set a cap on total emissions, and created a market-based mechanism for compliance and funding for climate change resilience actions. The Oregon Legislature was unable to pass HB 2020.¹⁴ Proposed HB 2020 and Dr. Hansen's prescription for protecting the public interest are not equivalent.

¹⁴ The facts regarding 2017 SB 1070 and 2019 HB 2020 are not present in the record before the Court of Appeals. Plaintiffs ask the court to take judicial notice of proposed SB 1070 and HB 2020 and their failure to pass because these facts are generally known within the territory and not subject to reasonable dispute. OEC 201(b).

The important fact is that today the state remains without any enforceable greenhouse gas emission regulations, allowing the continued substantial interference with the public's use of trust resources.

VII. CONCLUSION

The common law public trust doctrine is rooted in judicial recognition of obligations inherent in sovereignty. Under the doctrine, this court sets the foundation—the requirement for the state to manage and protect the trust assets for the benefit of present and future Oregonians. The plaintiffs in *Brown v. Board of Education* did not ask the court to function as social scientists or administrators, and, likewise, plaintiffs are not requesting that Oregon courts act as climate scientists or engineers. Rather, the legislature and the executive will build the house around the court's legal foundation.

There is still time and opportunity to preserve a habitable climate system. As explained by Dr. Hansen, “the situation is urgent and what sovereign governments do, or do not do, today to reduce carbon pollution matters immensely.” Hansen Decl. at 6 (ER 47). By clarifying the state's obligations under the public trust doctrine, this court provides much-needed guidance to the state to take action to preserve the resources held in trust for the benefit of all Oregonians. As the Oregon courts have articulated, the public can assume that the state will act in accordance with its duties as those duties are announced by the courts. *See, Swett v.*

Bradbury, 335 Or 378, 389, 67 P3d 391 (2003); *see also*, *Chernaik I*, 263 Or App at 479 (holding “it must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine.”).

For the reasons set forth above, plaintiffs ask this court to declare that the public trust doctrine imposes a duty on the state to protect the public’s interest in waters, submerged lands, wildlife and the atmosphere from substantial impairment by climate change.

DATED this 31st day of July, 2019.

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CERTIFICATE OF FILING and SERVICE

I hereby certify that on July 31, 2019 I directed Petitioners on Review's Opening Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate records Section, and electronically served upon Carson L. Whitehead, attorneys for respondents on review; Courtney Lords, attorney for amicus curiae, Elisabeth A. Holmes, attorney for amicus curiae; Charles M. Tebbutt, attorney for amicus curiae; and Kenneth Kaufmann, attorney for amicus curiae, using the court's electronic filing system .

s/ William Sherlock

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.02(2)(a)) is 10,975.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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