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The Honorable Michael Scott
Department 9

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

AJI P., a minor child by and through his
guardian HELAINA PIPER, et al.,

Plaintiffs

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. 18-2-04448-1 SEA

AMICUS CURIAE BRIEF OF
CENTER FOR ENVIRONMENTAL
LAW & POLICY, SIERRA CLUB,
PUGET SOUNDKEEPER, FRIENDS
OF TOPPENISH CREEK, AND 350
SEATTLE

AMICUS BRIEF OF ENVIRONMENTAL
GROUPS.

Center for Environmental Law and
Policy
85 South Washington Street
Suite 301
Seattle, Washington 98104
206-829-8299

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TABLE OF CONTENTS

Table of Authorities iii

I. INTRODUCTION 1

II. IDENTITY AND INTERESTS OF THE AMICI 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 2

 A. The Public Trust Doctrine has ancient roots, but its vitality has been reaffirmed by modern Washington Courts. 2

 B. The Public Trust Doctrine continues to develop along with our understanding of the public’s interest in natural resources. 4

 C. The public trust logically includes the atmosphere 8

 D. With respect to climate, protection of navigable waters cannot be fully separated from protection of the atmosphere. 10

 1. Higher sea levels threaten the public’s interest in navigable waters. . . 10

 2. Climate change will disrupt streamflows in the state’s rivers. 11

 3. Ocean acidification threatens the oceanic food web and the public’s interest in fisheries. 12

 4. Climate change poses a severe threat to Washington’s iconic salmon runs. 13

 E. State agencies have authority and obligations to act under the Public Trust Doctrine. 14

 1. The State has an affirmative duty to protect trust resources 14

1
2
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4
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6
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8
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10
11
12
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14
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16
17
18
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20
21
22
23
24
25
26

2. State action must not violate the Public Trust Doctrine16

V. CONCLUSION 17

VI. CERTIFICATE OF SERVICE 18

1
2
3
4
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15
16
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I. INTRODUCTION

Amici Center for Environmental Law & Policy, Sierra Club, Puget Soundkeeper, Friends of Toppenish Creek and 350 Seattle (collectively “Amici”) respectfully offer the following information and argument regarding Washington’s Public Trust Doctrine and its application to protection of natural resources. Amici discuss the constitutional basis for Washington’s Public Trust Doctrine, the evolving nature of the Doctrine in light of improving knowledge of the State’s interconnected natural resources, and how the Doctrine requires that the State, including State agencies, protect Washington’s water and atmospheric resources.

Amici concur with Plaintiffs’ views that the Doctrine requires the State to protect the public’s interest in and access to a healthy atmosphere and that protection of the “traditional” public trust resources in Washington’s navigable waters requires that greenhouse gas emissions be brought under control.

II. IDENTITY AND INTERESTS OF THE AMICI

Amici incorporate their statements of interest as set forth in the Motion for Leave to File Brief of Amicus Curiae, filed concurrently with this brief.

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III. STATEMENT OF THE CASE

Amici adopt the statement of the case as set forth in Plaintiffs’ Complaint for Declaratory and Injunctive Relief, filed in this matter February 16, 2018 (hereinafter “Complaint”).

IV. ARGUMENT

A. The Public Trust Doctrine has ancient roots, but its vitality has been reaffirmed by modern Washington Courts.

The Public Trust Doctrine is an ancient law, first codified in the 6th century C.E., and provides that the sea, tidelands, shorelands, air, and running water are commonly held resources available for everyone’s use. *Caminiti v. Boyle*, 107 Wn.2d 662, 668-69 (1987) (recognizing that the Public Trust Doctrine dates to the Code of Justinian and English Common law); *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 240, 858 P.2d 232 (1993) (Guy, J., dissenting) (“The Institutes of Justinian, a compilation and restatement of the Roman law first published in 533 A.D., states: ‘[T]he following things are by natural law common to all – the air, running water, the sea and consequently the sea-shore.’”). The Doctrine was adopted into the common law of England and became the law of the thirteen colonies and eventually, each of the United States. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 283-87, 138 L. Ed. 438 (1997) (explaining origins of public ownership of navigable waters); *Orion Corp. v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987).

1 The essence of the Public Trust Doctrine is that the state, acting through the
2 legislature or the executive and its agencies, cannot abdicate control over or
3 substantially impair public rights to public resources (traditionally referred to as the *jus*
4 *publicum*). These public rights pre-existed the time of statehood, and are “partially
5 encapsulated” in Article XVII, Section 1 of the Washington Constitution, which asserts
6 public ownership over all navigable waters of the state, including harbors, rivers and
7 lakes. *Rettkowski*, 122 Wn.2d at 232; Utter, R.F. & H. D. Spitzer, THE WASHINGTON
8 STATE CONSTITUTION: A REFERENCE GUIDE, at 212-17 (Greenwood Press 2002).

10 The constitutionally-reserved and recognized public rights protected by the
11 Public Trust Doctrine are an attribute of the essential sovereignty of the people of the
12 state of Washington. *See Illinois Central R.R. v. Illinois*, 146 U.S. 387, 455, 459-60, 36
13 L. Ed. 1018 (1892) (the navigable waters of the Chicago harbor and the underlying
14 lands are “a subject of concern to the whole people of the state” and must be held “in
15 trust for their common use and of common right, as an incident of their sovereignty.”).
16 The public trust may not be abdicated; as one Federal court phrased it, “the trust is of
17 such a nature that it can be held only by the sovereign, and can only be destroyed by the
18 destruction of the sovereign.” *United States v. 1.58 Acres of Land*, 523 F. Supp. 120,
19 123 (D. Mass. 1981).

22 The Washington Supreme Court protects this sovereignty through its oversight,
23 development, enforcement and application of the Public Trust Doctrine, thereby
24 ensuring that public resources are protected in perpetuity for public use. J. L. Sax, *The*

1 *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68
2 Mich. L. Rev. 471, 557-65 (1970).

3 The value and significance of the lands, air, and waters protected by the Public
4 Trust Doctrine has ensured the doctrine’s continuing vitality from antiquity to its
5 modern-day use by the courts of Washington, along with most other states in the United
6 States. Slade, D.C., THE PUBLIC TRUST DOCTRINE IN MOTION (PTDIM 2008). The
7 Public Trust Doctrine was pivotal in the resolution of *Wilbour v. Gallagher*, 77 Wn.2d
8 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878, 91 S.Ct. 119, 27 L.Ed.2d 115
9 (1970).¹ In 1987, the Washington Supreme Court formally acknowledged that the
10 Public Trust Doctrine has always been a part of Washington law in a case involving the
11 Aquatic Lands Act, Ch. 79.105 RCW, stating that “[a]lthough not always clearly
12 labeled or articulated as such, our review of Washington law establishes that the
13 doctrine has always existed in the State of Washington.” *Caminiti*, 107 Wn.2d at 670.
14
15

16 **B. The Public Trust Doctrine continues to develop along with our**
17 **understanding of the public’s interest in natural resources.**

18 It is important to recognize the Public Trust Doctrine’s vitality and flexibility, as
19 courts in Washington and in other states continue to expand its contours to address
20 changing public interests in trust resources. The potential breadth of the Doctrine’s
21 applicability to natural resources was suggested even in very early American case law.
22

23 _____
24 ¹ *Wilbour* did not utilize the term “Public Trust Doctrine,” which only came into common usage
after publication of Joseph Sax’s seminal article, *supra*.

1 In 1821, the Supreme Court of New Jersey stated that title to certain resources,
2 including “the air, the running water, the sea, the fish, and the wild beasts,” was placed
3 “in the hands of the sovereign power, to be held, protected, and regulated for the
4 common use and benefit.” *Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J.H. 1821). In *Geer v.*
5 *Connecticut*, the United States Supreme Court’s discussion of property that remained in
6 common ownership included “the air, the water which runs in the rivers, the sea and its
7 shores . . .”. 161 U.S. 519, 525, 40 L. Ed. 793 (1896) (*quoting Pothier, Traite du Droit*
8 *de Propriete, Nos. 27-28*) (*overruled on other grounds by Hughes v. Oklahoma*, 441
9 U.S. 322, 60 L. Ed. 250 (1979)).² A decade after *Geer*, the Court noted in *Georgia v.*
10 *Tennessee Copper Co.* that “the State has an interest independent of and behind the
11 titles of its citizens, in all the earth and air within its domain. It has the last word as to
12 whether its mountains shall be stripped of their forests and its inhabitants shall breathe
13 pure air.” 206 U.S. 230, 237, 51 L. Ed. 1038 (1907)

16 One of the first modern cases applying an expanded scope of the Public Trust
17 involved proposed development in the fjord-like Tomales Bay, north of San Francisco.
18 The California Supreme Court explained the rationale for an expanded definition of
19 trust uses to include environmental needs:

21 The public uses to which tidelands are subject are sufficiently flexible to
22 encompass changing public needs. In administering the trust the state is not
burdened with an outmoded classification favoring one mode of utilization

23 _____
24 ² *Hughes* overruled *Geer*’s definition of “interstate commerce,” but did not address the reasoning
regarding state ownership of public trust resources.

1 over another. There is a growing public recognition that one of the most
2 important public uses of the tidelands—a use encompassed within the
3 tidelands trust—is the preservation of those lands in their natural state, so
4 that they may serve as ecological units for scientific study, as open space,
5 and as environments which provide food and habitat for birds and marine
6 life, and which favorably affect the scenery and climate of the area. It is not
7 necessary to here define precisely all the public uses which encumber
8 tidelands.

9 *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 379 (CA 1971); *see also Nat'l Audubon*
10 *Soc'y v. Superior Court*, 33 Cal. 3d 419, 434-35, 658 P.2d 709 (1983).

11 Washington decisions have likewise brought environmental protection within
12 the ambit of the Public Trust Doctrine, referencing recreational and wildlife uses that
13 require a high degree of environmental quality. *See Esplanade Properties v. Seattle*,
14 307 F.3d 978, 980 (9th Cir. 2002) (“because Esplanade's tideland property is navigable
15 for the purpose of public recreation (used for fishing and general recreation, including
16 by Tribes), and located just 700 feet from Discovery Park, the development would have
17 interfered with those uses, and thus would have been inconsistent with the Public Trust
18 Doctrine”); *Weden v. San Juan County*, 135 Wn.2d 678, 698, 700 958 P.2d 273 (1998)
19 (“it would be an odd use of the Public Trust Doctrine to sanction an activity that
20 actually harms and damages the waters and wildlife of this state”); *Orion Corp.*, 109
21 Wn.2d at 626, 640 (Padilla Bay “. . . is the most diverse, least disturbed, and most
22 biologically productive of all major estuaries on Puget Sound. The Bay sustains a
23 diverse and densely populated ecology, intensely important to a variety of life forms,
24

1 including endangered species and a wide variety of commercially harvested species,
2 such as juvenile salmon and Dungeness crab” and “[t]he public trust doctrine resembles
3 ‘a covenant running with the land (or lake or marsh or shore) for the benefit of the
4 public and the land's dependent wildlife.’); *Wash. Geoduck Harvest Ass’n v. Dep’t of*
5 *Natural Res.*, 124 Wn. App. 441, 449, 101 P.3d 891 (2004) (“shellfish embedded on
6 public property are resources that invoke a public right under the public trust
7 doctrine.”).

9 Recent cases have extended the Public Trust Doctrine beyond its historic
10 application to account for modern interests in public resources.³ As the *Orion* Court
11 noted, “[r]ecognizing modern science’s ability to identify the public need, state courts
12 have expanded the doctrine beyond its navigational aspects.” 109 Wn.2d at 641; *see*
13 *also In re Water Use Permit Applications*, 94 Haw. 97, 135, 9 P.3d 409 (Haw. 2000)
14 (“the ‘purposes’ or ‘uses’ of the public trust have evolved with changing public values
15 and needs.”); *Matthews v. Bay Head Imp. Ass’n*, 95 N.J. 306, 325, 471 A.2d 355 (N.J.
16 1984) (“we perceive the public trust doctrine not to be ‘fixed or static,’ but one to ‘be
17 molded and extended to meet changing conditions and needs of the public it was created
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21 ³ Because of the evolving nature of the Public Trust Doctrine, the fact that courts declined to
22 apply the Doctrine to groundwater in *Rettkowski* and *R.D. Merrill* (decided 25 and 19 years ago,
23 respectively) is no bar to now considering trust resources beyond navigable waters. *Rettkowski* and
24 *Merrill* were decided at a time when the connections between waters (particularly the oceans) and the
atmosphere were far less well-understood than at present. Consideration of other trust resources such as
the atmosphere is squarely in agreement with the *Orion*, *Water Use Permit Applications*, and *Matthews*
court’s views that the Public Trust Doctrine evolves with the public’s needs.

1 to benefit.’’).⁴ The New York Court of Appeals held that parkland “is impressed with a
2 public trust.” *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630,
3 750 N.E.2d 1050 (2001). And in Washington the 1969 *Wilbour* decision expanded the
4 Doctrine’s scope beyond the traditional areas of navigation, commerce and fishing, to
5 include corollary recreational uses of Washington’s waters. 77 Wn.2d at 316.
6

7 **C. The public trust logically includes the atmosphere.**

8 Courts in Washington and in other states have recently invoked the Public Trust
9 Doctrine as a means to protect essential environmental resources from impairment due
10 to climate change. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016)
11 (holding that plaintiffs allegation that the United States’ allowing and facilitating use of
12 fossil fuels violated Public Trust Doctrine had stated a claim for which relief could be
13 granted), *aff’d on no clear error standard, In re United States*, 884 F.3d 830 (9th Cir.
14 2018)⁵; *Foster et al v. Dept. of Ecology*, No. 14-2-25295-1, 2015 WL 7721362, at *7-*8
15 (King Cty. Super. Ct. Nov. 19, 2015) (“Foster Order”); *see* Wood, M.C. and Woodward
16 IV, C.W., *Atmospheric Trust Litigation and a Constitutional Right to a Healthy Climate*
17 *System: Judicial Recognition at Last*, 6 Wash. J. Env’tl. L. & Pol. 633 (2016).
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22 ⁴ Consideration of other trust resources such as the atmosphere is squarely in agreement with the
23 *Orion*, *Water Use Permit Applications*, and *Matthews* court’s views that the Public Trust Doctrine
24 evolves with the public’s needs.

⁵ While resting its decision on the public interest in the “territorial sea,” the *Juliana* court in no
way held that the atmosphere was not a public trust asset; in fact, it cited to the discussions of air as a
public resource from the Institutes of Justinian as well as from *Arnold* and *Causby*.

1 Inclusion of air resources in the public trust is far from a new concept. As noted
2 above, the ancient Code of Justinian included air as a resource included in the public
3 trust. *See* Section IV.A, *supra*. Over 100 years ago, the United States Supreme Court
4 cited to discussion of “the air, the water that runs in the rivers, the sea“ as common
5 property interests. *Geer*, 161 U.S. at 525. And more recently, the Court has suggested
6 that airspace is subject to a public trust servitude and may be part of the public trust *res*.
7 In *United States v. Causby*, the Court noted that by statute, the United States has
8 "complete and exclusive national sovereignty in the air space" over this country. 328
9 U.S. 256, 259, 90 L. Ed. 1206 (1946). *Causby* further pointed out that any citizen of the
10 United States has "a public right of freedom of transit in air commerce through the
11 navigable air space of the United States," and that "such navigable airspace shall be
12 subject to a public right of freedom of interstate and foreign air navigation." *Id.* (citing
13 49 U. S. C. § 403).
14

15
16 *Causby*'s description of a combination of exclusive national sovereignty and a
17 public right of transit and navigation is very similar to the “traditional” application of
18 the Public Trust Doctrine to navigable waters, which coexists with a Federal navigation
19 servitude. *See, e.g., Caminiti*, 107 Wn.2d at 666-7 (state may dispose of tidelands
20 “subject only to the paramount public right of navigation and fishery”); *Kaiser Aetna v.*
21 *United States*, 444 U.S. 164, 175-6, 62 L. Ed. 332 (1979) (title to submerged lands
22 “subordinate to . . . use consistent with . . . public right of navigation”).
23
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2 **D. With respect to climate, protection of navigable waters cannot be fully**
3 **separated from protection of the atmosphere.**

4 Whether or not the atmosphere *per se* is a public trust asset, it is clear that
5 greenhouse gas pollution of the atmosphere impermissibly harms the *jus publicum* by
6 harming navigable waters. We now understand that the atmosphere exists in equilibrium
7 with the oceans, lakes, and rivers and affects them in numerous ways. According to
8 United States Geological Survey, the atmosphere contains more than six times the
9 amount of water in all of Earth’s rivers combined.⁶ The concept that protection of the
10 “traditional” public trust in navigable waters is distinct from protection of the
11 atmosphere is based on a false dichotomy, as the very changes (chiefly elevated carbon
12 dioxide levels in the atmosphere) that are causing warming and disruption to the climate
13 overall are also damaging Washington’s public waters.⁷ As Judge Hollis Hill noted in
14 *Foster*, “the navigable waters and the atmosphere are intertwined and to argue a
15 separation of the two, or to argue that [greenhouse gas] emissions do not affect navigable
16 waters is nonsensical.” *Foster* Order at 8.
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19 **1. Higher sea levels threaten the public’s interest in navigable waters.**

20 Rising carbon dioxide levels in the atmosphere result in higher sea levels and
21 warmer temperatures. Complaint ¶ 62. The oceans absorb much of the increased heat in
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24 ⁶ *The World’s Water*, USGS, water.usgs.gov/edu/earthwherewater.html (last visited June 22,
2018).

1 the atmosphere. *Id.* at ¶ 64. This causes the planet’s large ice sheets to melt,
2 contributing to higher sea levels. *Id.* Because oceans retain heat far better than the air,
3 the warming due to increased carbon dioxide levels will remain for generations. *Id.*
4 Warmer water expands, further contributing to rising sea levels. The National
5 Oceanographic and Atmospheric Administration projects as much as 11.8 feet of sea
6 level rise by 2120. *Id.* at ¶ 67. Rising sea levels are already being detected in Puget
7 Sound. *Id.* at ¶ 72.

9
10 **2. Climate change will disrupt streamflows in the state’s rivers.**

11 A warming atmosphere reduces the percentage of precipitation falling as
12 mountain snow, and what snow does fall now melts earlier in the year. Complaint at ¶¶
13 85-6. The reduced snowpack in turn causes reduced streamflows at the critical times of
14 late summer and early fall, with resulting effects on fish and wildlife. *Id.* at ¶83. In
15 addition to reduced summer lows, climate change effects will produce larger winter
16 flows, which will lead to increased flooding. *Id.* at ¶¶ 85, 101. The increased frequency
17 and intensity of storms produced by climate change threatens to disrupt navigation. All
18 of these effects implicate traditional public trust issues in the navigable waters.
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24 ⁷ Washington’s public trust resources include the near-shore ocean, as it has asserted control
over “management of coastal and ocean resources within three miles of the coastline.” Complaint at ¶ 30.

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3 **3. Ocean acidification threatens the oceanic food web and the public’s**
4 **interest in fisheries.**

5 Perhaps most seriously for Washington, elevated carbon dioxide levels in the
6 atmosphere directly acidify the oceans by increasing levels of dissolved carbon dioxide.
7 Complaint at ¶ 78 (acidity rising at “geologically unprecedented rate”). Ocean
8 acidification threatens the very existence of oceanic life, in part by impairing the ability
9 of numerous small organisms to construct their shells⁸. Acidification reduces the
10 availability of calcium carbonate, an essential material for shell construction.

11 Complaint at 80. Washington’s waters are particularly susceptible to acidification, and
12 effects of ocean acidification on shellfish populations, including disastrous die-offs of
13 oyster larvae, are already being seen on our coast. *Id.* at ¶ 79; R.K. Craig, *Ocean*
14 *Acidification and Current Law: Dealing with Ocean Acidification: the Problem, the*
15 *Clean Water Act, and State and Regional Approaches*, 6 Wash. J. Envtl. L. & Pol’y
16 387, 437-440 (2018). Pteropods (small snails that are a critical part of the marine food
17 web) have already been found to experience shell dissolution due to increased ocean
18 acidity. Complaint at ¶ 79. Many other small organisms that are important food
19 sources for fish are strongly susceptible to acidification, threatening the food web on
20 which our fisheries resources depend. *Id.* at ¶ 82. Climate change thus harms the
21

22 _____
23 ⁸ Organisms such as oysters, clams, crabs and corals use carbonate ions in the water to form their
24 shells. At lower pH (more acidic) conditions, concentration of carbonate in the water is reduced and
these organisms have more difficulty forming shells. Acid conditions adversely affect development and
survival of these organisms. See: Wash. State Blue Ribbon Panel on Ocean Acidification, “Ocean

1 public’s interest in fishing and in studying and enjoying the oceans. By interfering with
2 these classical public trust resources, carbon dioxide-driven climate change directly
3 implicates the Public Trust Doctrine.

4 **4. Climate change poses a severe threat to Washington’s iconic salmon**
5 **runs.**

6 Perhaps nothing is as closely associated with the Pacific Northwest, and
7 Washington in particular, as the salmon that depend on our state’s rivers. These fish are
8 a symbol of the Northwest lifestyle, an important economic driver, and a central
9 element of Northwest Tribal culture. They are a critical public trust resource,
10 implicating the public’s traditional right to fish in the public waters and the core Public
11 Trust Doctrine. *See Orion*, 109 Wn.2d at 640 (noting that the Public Trust Doctrine is
12 for the benefit of the public and “the land’s dependent wildlife.”); *Esplanade Properties*,
13 307 F.3d at 980 (development that would interfere with uses including fishing
14 inconsistent with the Public Trust Doctrine); *Commonwealth v. Alger*, 61 Mass. 53, 98-
15 100 (Mass. 1851) (discussing right of public to “have rivers kept open and free for the
16 migratory fish, such as salmon . . . to pass from the sea”).
17
18

19 Because of their unique migratory life cycle, salmon are at extreme risk from
20 climate change. Ocean acidification threatens the food web on which they depend
21 during their time at sea, and reduced streamflows and increased instream temperatures
22 will make it difficult or impossible for adult fish to migrate upstream and spawn or for
23

24 Acidification: From Knowledge to Action, Washington State’s Strategic Response” (2012) (Wash.

1 young fish to grow and successfully return to the ocean. Complaint ¶¶ 79; 82; *Id.* at ¶
2 92. By failing to control greenhouse gas emissions which harm the oceans and rivers,
3 the State fails to protect the public’s interest in these Northwest icons.
4

5 **E. STATE AGENCIES HAVE AUTHORITY AND OBLIGATIONS TO**
6 **ACT UNDER THE PUBLIC TRUST DOCTRINE**

7 As discussed above, the “traditional” public trust resources of navigable waters,
8 fish, and shellfish are strongly intertwined with the atmosphere. Protection of these
9 resources is likely impossible without addressing atmospheric greenhouse gas levels.
10 The State, whether through legislation or agency action, has an obligation to protect the
11 public trust.
12

13 **1. The State has an affirmative duty to protect trust resources.**

14 The State’s public trust duties extend beyond simply refraining from legislative
15 action violating the Doctrine. As the sovereign trustee of the public trust resources, the
16 state has a fiduciary obligation to protect trust assets for future generations. *Geer*, 161
17 U.S. at 534. Courts in Washington as well as other states have spelled out a duty to
18 affirmatively act to protect the trust. *Id.* (“it is the duty of the legislature to enact such
19 laws as will best preserve the subject of the trust and secure its beneficial use in the
20 future to the people of the State”); *Geoduck Harvest Ass’n*, 124 Wn. App. at 449
21 (“under the Public Trust Doctrine,” the Department of Natural Resources “must protect
22

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Acidification Panel Report), <https://fortress.wa.gov/ecy/publications/publications/1201015.pdf>.

1 various public interests in state-owned tidelands . . .”); *Nat’l Audubon Soc’y*, 33 Cal. 3d
2 at 446 (“state has an affirmative duty to take the public trust into account in the
3 planning and allocation of water resources, and to protect public trust uses whenever
4 feasible”); *Just v. Marinette Cnty.*, 56 Wis.2d 7, 17, 201 N.W.2d 761 (Wisc. 1972)
5 (emphasizing an “active public trust duty” on the part of the state, including the duties
6 “to eradicate the present pollution and prevent further pollution” and “to protect and
7 preserve” the natural resource held in trust). The State’s contention that the Public Trust
8 Doctrine “does not compel state action” cannot be reconciled with these decisions.
9

10 Finally, even if the State were correct that the public trust duty devolves only
11 upon the state rather than on the Governor or on any agency⁹, that would not bar its
12 application in this case. The State as an entity is one of the Defendants in this lawsuit,
13 along with the Governor and several state agencies. Legislative commands are carried
14 out by the executive branch, through the executive agencies.¹⁰ The Public Trust
15 Doctrine would be hollow indeed if no official or agency in the government actually
16 had the duty or the power to protect public trust resources.¹¹
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21 ⁹ Presumably, the State’s position is that it is the province of the Legislature to enact legislation
22 that protect the public trust. But any such legislation would have to be carried out by state agencies such
23 as Ecology.

24 ¹⁰ The State may argue that the *Rettkowski* and *R.D. Merrill* decisions strip Ecology of authority
based on the Public Trust Doctrine. This argument ignores the evolving nature of the Doctrine. *See*
Footnote 3, *supra*.

¹¹Further, the constitutional basis of the doctrine is encompassed in the Governor’s obligation to
enforce the state’s Constitution.

1 **2. State action must not violate the Public Trust Doctrine.**

2 The Public Trust Doctrine places a duty on the state, as sovereign, to protect the
3 public’s trust resources. This is essentially a limit on the power of the state; it cannot
4 give up its authority over the public trust resources unless to do so furthers the public
5 interest. Washington courts have repeatedly held that statutes implicating the public
6 trust are subject to judicial review due to the doctrine’s basis in our state’s Constitution,
7 “to determine whether that legislation comports with the State’s public trust
8 obligations.” *Chelan Basin Conservancy v. GBI Holdings Co.*, 190 Wn.2d 249, 266-7,
9 413 P.3d 549 (2018) (as amended) (*citing Caminiti*, 107 Wn.2d at 670).

11 It follows that agency action also must comport with the public trust doctrine.
12 First, as creatures of the legislature, agencies “may exercise only those powers
13 conferred either expressly or by necessary implication.” *Kaiser Aluminum & Chem.*
14 *Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993). The
15 legislation authorizing agency action must itself comport with the public trust doctrine;
16 any agency action that conflicts with the doctrine would necessarily be in conflict with
17 the agency’s statutory authority and therefore *ultra vires*. RCW 34.05.570(2)(c), (3)(b),
18 (4)(c)(i). Second, because of the quasi-constitutional basis of the doctrine in
19 Washington, agency action conflicting with the doctrine would be reversible under the
20 Administrative Procedure Act as unconstitutional. RCW 34.05.570(2)(c), (3)(a),
21 (4)(c)(i).
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1 **V. CONCLUSION**

2 The Public Trust Doctrine, although ancient, is perhaps more relevant now than
3 ever. The Doctrine imposes a duty upon the sovereign that cannot be abdicated, and
4 requires that the public’s interests in the seas, rivers, atmosphere and other public
5 resources be protected for the benefit of future generations. Here, the State of
6 Washington has a positive duty to protect the atmosphere, the climate, and the State’s
7 rivers and oceans. Amici respectfully request that this Court hold that the State’s duty
8 to protect climate requires swift action and greater reductions in carbon pollution than
9 the State has so far undertaken, to ensure that future Washingtonians will enjoy a
10 healthful climate.
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14 Respectfully submitted this 22d day of June, 2018.

15 I certify that this Memorandum contains 4077
16 words, in compliance with the Local Civil Rules.

17 /s/ Dan J. Von Seggern

18 Dan J. Von Seggern, WSBA #39239
19 Center for Environmental Law & Policy
20 85 S. Washington St., Suite 301
Seattle, WA 98104
21 T: (206) 829-8299
22 Email: dvonseggern@celp.org
Attorney for Amici
23
24

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CERTIFICATE OF SERVICE

I hereby certify that on the 22d day of June, 2018, I served one true and correct copy of the foregoing Proposed Brief of Amici, Motion for Leave to File Amicus Curiae Brief, and Proposed Order Granting Motion on the following individuals using electronic mail in accordance with the parties' electronic service agreement:

ECYOLYEF@ATG.WA.GOV
AHDOLYEF@ATG.WA.GOV
TPCEF@ATG.WA.GOV

Katherine G. Shirey
Christopher Reitz
Laura J. Watson
Assistant Attorneys General

Attorneys for Defendant State of Wash.
Washington, Department of Ecology
(360) 586-6769
chris.reitz@atg.wa.gov
laura.watson@atg.wa.gov
kay.shirey@atg.wa.gov
danielle.french@atg.wa.gov
meaghan.kohler@atg.wa.gov
leslieh2@atg.wa.gov

Matthew D. Huot
Assistant Attorney General
Attorney for Defendants
Wash. State Dep't of
Transportation, Washington
Transportation Comm'n,
WSDOT Sec. Roger Millar
matth4@atg.wa.gov
roberth3@atg.wa.gov
sarahs7@atg.wa.gov

1 Sandra C. Adix
2 Assistant Attorney General
3 Attorney for the State of Washington
4 Department of Commerce
5 (360) 664-4965
6 sandraa@atg.wa.gov
7 amyp4@atg.wa.gov
8 myrnap@atg.wa.gov
9 shirleyb1@atg.wa.gov

10 Andrea K. Rodgers
11 Attorney for Plaintiffs
12 3026 NW Esplanade
13 Seattle, WA 98117
14 (206) 696-2851
15 andrearodgers42@gmail.com

16 Andrew Welle
17 Attorney for Plaintiffs
18 1216 Lincoln St.
19 Eugene, OR 97401
20 (574) 315-5565
21 Andrew.welle@gmail.com

22 /s/ Dan J. Von Seggern
23 Dan J. Von Seggern, WSBA #39239
24 Attorney for Amici

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AMICUS BRIEF OF ENVIRONMENTAL
GROUPS.

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Center for Environmental Law and
Policy
85 South Washington Street
Suite 301
Seattle, Washington 98104
206-829-8299