IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

NELSON KANUK, a minor, by and through his guardian, SHARON KANUK; ADI DAVIS, a minor, by and through her guardian, JULIE DAVIS; KATHERINE DOLMA, a minor, by and through her guardian, BRENDA DOLMA; ANANDA ROSE AHTAHKEE LANKARD, a minor, by and through her guardian, GLEN "DUNE" LANKARD; and AVERY and OWEN MOZEN, minors, by and through their guardian, HOWARD MOZEN;

Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES ,

Defendant.

Case No. 3AN-11-07474CI

ORDER RE: MOTION TO DISMISS

INTRODUCTION

This is a lawsuit about climate change. Before the court is Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion to Dismiss"). Defendant moves this court to dismiss Plaintiffs' Amended Complaint pursuant to Civil Rule 12(b)(6) on the grounds that Plaintiffs' claims are nonjusticiable; that the State is immune from suit for discretionary actions; and that the public trust doctrine will not support plaintiffs' claim.

FACTS

Plaintiffs, five minors living in Alaska, filed suit against Defendant, the State of Alaska Department of Natural Resources, by and through their guardians, seeking declaratory and equitable relief against defendant for breach of its public trust obligations stemming from Article VIII of the Alaska Constitution.

Specifically, Plaintiffs request that this court 1) declare that the atmosphere is a public trust resource under Article VIII of the Alaska Constitution; 2) declare that Defendant, as trustee, "has an affirmative fiduciary obligation to protect and preserve the atmosphere as a commonly shared public trust resource for present and future generations of Alaskans under Article VIII of the Alaska Constitution"; 3) declare that Defendant has failed to uphold its fiduciary obligations to protect and preserve the atmosphere as a public trust resource, in violation of Article VIII of the Alaska Constitution; 4) declare that the fiduciary obligation regarding the atmosphere as a public trust resource "is dictated by the best available science and that said science requires carbon dioxide emissions to peak in 2012 and be reduced by at least 6% each year until 2050"; 5) "order Defendant to reduce the carbon dioxide emissions from Alaska by at least 6% per year from 2013 through at least 2050"; 6) "order Defendant to prepare a full and accurate accounting of Alaska's current carbon dioxide emissions and to do so annually thereafter"; 7) "declare that Defendant's fiduciary obligation related to the atmosphere is

enforceable by citizen beneficiaries of the public trust"; and 8) award Plaintiffs any other relief this court deems just and equitable.

In the Amended Complaint, each Plaintiff alleges that he or she has been affected by climate change and/or global warming. For example, Nelson Kanuk from Kipnuk alleges that he has been personally affected by climate change in the form of erosion from ice melt and flooding from increased temperatures, because his village was flooded in 2008, causing his family and others to have to evacuate their homes. Mr. Kanuk also alleges that he has been harmed because the decline of animal life and receding glaciers negatively impact his ability to enjoy and pass on his family's history, traditions, and culture.

DISCUSSION

Standard of Review

Under Alaska Rule of Civil Procedure 12(b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint's allegations. *Dworkin v. First Nat'l Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968). "Because complaints must be liberally construed, a motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted." *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253-54 (Alaska 2000). In determining the sufficiency of a stated claim, a complaint survives a motion to dismiss if it alleges facts that would support a viable cause of action. *J & S Services, Inc. v. Tomter*, 139 P.3d 544, 550 (Alaska 2006); *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 263 (Alaska 2000). A court will not dismiss a complaint unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle the plaintiff to relief. *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001); *Shooshanian v. Wagner*, 672 P.2d 455, 461 (Alaska 1983) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Normally, a Civil Rule 12(b)(6) motion to dismiss is determined solely on the basis of the pleadings. *Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1974). If the court considers matters outside the pleadings when ruling on a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the motion is treated as a Civil Rule 56 motion for summary judgment. *See* Civil Rule 12(b). However, the court may properly consider matters of public record, such as court files, without converting the motion to dismiss into a motion for summary judgment. *Id.*

In support of their opposition, Plaintiffs submitted numerous declarations, including a DVD. If the court were to consider those declarations, it would have to convert the present motion into a motion for summary judgment. Given that the justiciability issues are matters of law and are dispositive in this case, the court need not consider the declarations and therefore will not convert the motion into one for summary judgment.

Because this court finds that the issues raised in Plaintiffs' Amended Complaint are non-justiciable, the court need not reach the other issues raised by the Plaintiffs.

Justiciability – Political Question

Stemming primarily from the separation of powers doctrine is the "established principle that courts should not attempt to adjudicate 'political questions'..." *Malone v. Meekins*, 650 P.2d 352, 356 (Alaska 1982). The political question doctrine "provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary." *Native Village of Kivalina v. ExxonMobil Corporation, et al.*, 663 F.Supp.2d 863, 871 (N.D.Ca. 2009) (citing *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007)). "A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C v. Peabody Western Coal Co.*, 400 F.3d 774, 785 (9th Cir.2005).

However, "merely characterizing a case as nonjusticiable or political in nature" will not render it immune from judicial scrutiny. *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336 (Alaska 1987) (quoting *Malone v. Meekins*, 650 P.2d at 356). Rather, Alaska courts adhere to the approach for identifying "political questions" that was adopted by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L.Ed.2d 663, 682 (1962). *Abood v. League of Women Voters of Alaska*, 743 P.2d at 336.

In *Baker*, the Court held that, unless one of the following factors "is inextricable from the case at bar, there should be no dismissal for non-

justiciability on the ground of a political question's presence." *Baker v. Carr*, 369 U.S. at 217. Specifically, the Court held that,

> [p]rominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.*

This court finds the United States District Court's decision in *Kivalina* is instructive in that it specifically addresses the justiciability of a claim based on harm resulting from global warming.[1] In *Kivalina,* the Native Village of Kivalina ("the Village") brought suit against twenty-four defendants, all oil, energy, and utilities companies, seeking damages under the federal common law of nuisance for the defendants' alleged contributions to "excessive emission of carbon dioxide and other greenhouse gases" alleged to be causing global warming. 663 F.Supp.2d at 868. In that case, the court dismissed the Village's claims, holding that the Village "lacked standing both on the basis of the political question doctrine and based on their inability to establish causation under Article III." *Id.* at 882.

In analyzing the *Baker* factors, the court found that both the second (lack of judicially discoverable and manageable standards) and third

[1] Although the court in *Kivalina* dealt with a claim under the *federal* common law of *nuisance*, it addressed the *Baker* factors, which is exactly how Alaska courts determine whether a claim raises a non-justiciable political question. *Kivalina*, 663 F.Supp.2d at 863. *See e.g. Malone v. Meekins*, 650 P.2d at 357.

(impossibility of deciding without an initial policy determination) *Baker* factors militated in favor of dismissal. *Id.* at 874-77. Although the Village asserted that there were "judicially discoverable and manageable standards" inherent in the federal common law of nuisance, the court pointed out that, in resolving a claim for nuisance, the factfinder would also have to "balance the utility and benefit of the alleged nuisance against the harm caused." *Id.* at 874. And, given the unique nature of global warming claims, which are "based on the emission of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere," and which are significantly distinct from nuisance claims based on discreet instances of water or air pollution, the court concluded that it could discern no judicially discoverable and manageable standards to apply in resolving the claim in a "reasoned" manner and that neither party had presented any such standards. *Id.* at 875-76. Accordingly, the court held that the second *Baker* factor precluded judicial consideration of the Village's claim. *Id.* at 876.

With respect to the third factor, the court held, because resolution of the Village's nuisance claim required the court to "make a policy decision about *who* should bear the cost of global warming," and because the "allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch...," the third *Baker* factor also militated in favor of dismissal. *Id.* at 876-77.

Applying the *Baker* factors in this case, there is clearly a lack of judicially discoverable and manageable standards. The parties agree that neither Article

VIII of the Alaska Constitution nor Alaska cases provide any standards by which to guide the court in reviewing the State's policy concerning GHG emissions. Plaintiffs assert that they are not asking the court to review the State's policy concerning GHG emissions. Instead, they argue that the "main thrust of this case is the determination of whether the public trust doctrine applies to the atmosphere." However, in addition to seeking declaratory relief, Plaintiffs specifically ask this court to *order* the Defendant to "reduce the carbon dioxide emissions from Alaska by at least 6% per year from 2013 through at least 2050" and "to prepare a full and accurate accounting of Alaska's current carbon dioxide emissions and to do so annually thereafter." Accordingly, Plaintiffs are not just asking the court to review the State's policy concerning GHG emissions; they are asking the court *to dictate* the State's policy with respect to GHG emissions. They base this request on the application of the "public trust doctrine."

According to the public trust doctrine, the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, and "owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.'" *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998) (quoting *McDowell v. State*, 785 P.2d 1, 16 n. 9 (Alaska 1989)). [2] Plaintiffs have not cited

[2] According to Section 1 of Article VIII of the Alaska Constitution, "[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Section 2 provides that "the legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." According to Section 3, "wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Section 4 states that: "fish, forests, wildlife,

any legal authority for the proposition that the atmosphere or air, given its gaseous composition, can be subject to a public trust. Historically, the public trust doctrine has been applied to things that are corporeal, such as land, minerals, wildlife, and water. Even assuming that the public trust doctrine applies, it is even less clear what legal standards would be applied.

"Instead of recognizing the creation of a public trust in these clauses *per se*," (emphasis added), the Alaska Supreme Court has "noted that 'the common use clause was intended to engraft in our constitution certain *trust principles* guaranteeing access to the fish, wildlife and water resources of the state." (emphasis added) *Brooks v. Wright*, 971 P.2d 1025, 1031 (Alaska 1999). The purpose of the public trust doctrine was "to *prevent* the state from giving out 'exclusive grants or special privileges as was so frequently the case in ancient roman tradition.'" *Id.* Recognizing that the "application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources," the Alaska Supreme Court has held that "the wholesale application of private trust law principles to the trust-like relationship described in Article VIII is inappropriate and potentially antithetical to the goals of conservation and universal use." *Id.* at 1033.

Given that the Alaska Supreme Court has acknowledged that Article VIII does not set up a trust *per se* and that the wholesale application of private trust law to public trust doctrine is inappropriate, there is a lack of "judicially

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grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."

discoverable and manageable standards." As the Plaintiffs have failed to provide any such standards to this court, the second *Baker* factor cautions against judicial consideration of the claims.

The third *Baker* factor addresses the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion. Currently, no Alaska court (or any other court) has recognized the atmosphere as a public trust resource. Even if this court were to declare the atmosphere a public trust resource, however, it would still have to determine whether the Defendant breached its fiduciary duty to protect and preserve the atmosphere under the public trust doctrine. Such a determination *necessarily* involves a policy determination about how the State should "fulfill" its fiduciary duty under the public trust doctrine (to the extent that the public trust doctrine imposes any such affirmative fiduciary duty upon the state at all) with respect to the atmosphere. Although Plaintiffs seem to suggest that this court can be guided by the "best available science," science is not the only consideration involved in a decision to reduce GHG emissions. As recognized by other courts, competing interests such as energy needs and potential economic disruption must also be considered. *See e.g. American Elec. Power Co., Inc.*, 131 S.Ct. 2527, 72 ERC 1609, 180 L.Ed.2d 435 (2011); *Kivalina*, 663 F.Supp.2d at 874.

It is not the judiciary's role to determine whether the State of Alaska should reduce carbon dioxide emissions by 6% each year from 2013 till 2050. As recognized by other courts, the judiciary is ill-equipped to make such policy decisions, especially when plaintiffs urge this court to base its decision solely

on the "best available science," rather than on a consideration of numerous competing factors. As the United States Supreme Court acknowledged in *American Elec. Power Co., Inc.*, questions about solutions to far-reaching environmental issues that implicate numerous and often-times competing state and national interests are best left to agency expertise. 131 S.Ct. at 2539. Unlike courts, which are limited to "the record," agencies have access to more and better information. Indeed, through the rulemaking process, agencies regularly solicit information and advice from experts in sectors of the community that may be potentially affected.

Thus, because resolution of Plaintiffs' claims necessarily requires policy decisions, the third *Baker* factor also weighs in favor of dismissal. And, considering that the presence of even one *Baker* factor is dispositive, given that the court has identified two of the six *Baker* factors, in this case, the court need not analyze the remaining factors.

CONCLUSION

This court concludes that the causes of action in the Plaintiffs' Amended Complaint are non-justiciable. Accordingly, Defendant's Motion to Dismiss is GRANTED.

DATED this 16 day of March 2012 at Anchorage, Alaska.

SEN K. TAN
Superior Court Judge

I certify that on 3.19.12 a copy of the original was ~~personally handed~~ mailed to each of the following:
B. DeNobile
D. Kruse
S. Mulder - AGO

M. Lucas
Secretary/Deputy Clerk