No. 03-12-00555-CV

THIRD DISTRICT COURT OF APPEALS
AT AUSTIN

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Appellant,

v.

ANGELA BONSER-LAIN; KARIN ASCOTT, as next friend on behalf of TVH and AVH, minor children; and BRIGID SHEA, as next friend on behalf of EBU, a minor child,

Appellees.

BRIEF OF AMICI CURIAE TEXAS ASSOCIATION OF BUSINESS, TEXAS OIL & GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS

BAKER BOTTS L.L.P.

Samara L. Kline
Texas Bar No. 11786920
Matthew Eagan
Texas Bar No. 24069657
2001 Ross Avenue, Suite 600
Dallas, Texas 75201
Phone: 214.953.6500
samara.kline@bakerbotts.com
matthew.eagan@bakerbotts.com

Attorneys for Amici Texas Association of Business, Texas Oil & Gas Association, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI

This brief is tendered on behalf of the Texas Association of Business ("TAB"), Texas Oil & Gas Association ("TXOGA"), American Petroleum Institute ("API"), and American Fuel & Petrochemical Manufacturers ("AFPM"), who have paid for preparation of this brief.

TAB is a broad-based, bipartisan organization representing more than 3,000 businesses and 200 local chambers of commerce in Texas. TAB's mission is to improve the business climate in Texas and ensure the strength and viability of the Texas economy, with a particular emphasis on representing the interests of member companies subject to environmental regulations and requirements. TAB's members are strongly affected by laws and regulations governing development and manufacturing. Regulation of greenhouse gas emissions is therefore of great concern to TAB.

TXOGA is the largest and oldest petroleum organization in Texas, representing more than 5,000 members. The membership of TXOGA produces in excess of 90 percent of Texas' crude oil and natural gas, operates 100 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. According to the most recent data, the oil and gas industry employs 352,000 Texans, providing payroll and benefits of over $41 billion in Texas alone. In addition, large associated capital investments by the oil and gas industry

generate significant secondary economic benefits for Texas. TXOGA member companies produce a quarter of the nation's oil, a third of its natural gas and account for one-fourth of the U.S. refining capacity.

API is a non-profit national trade association representing all aspects of America's oil and natural gas industry. API has over 500 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

AFPM is a national trade association of more than 400 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. AFPM members supply consumers with a wide variety of products and services that are used in homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine and computers. AFPM's members are strongly committed to clean air, water and

waste reduction, have an outstanding record of compliance, and have invested hundreds of billions of dollars to reduce emissions.

STATEMENT OF FACTS

The underlying administrative proceeding. Appellees petitioned for rulemaking by the Texas Commission on Environmental Quality, seeking promulgation of rules requiring that statewide emissions of carbon dioxide be immediately reduced by 6% annually for an indefinite time period. Petition for Rulemaking, TCEQ Dkt. No. 2011-0720-RUL, at 26. Among other things, they contended in their petition that TCEQ "must regulate . . . CO_2 under its fiduciary duties under the Public Trust Doctrine." *Id.* at 28. After a hearing, TCEQ denied the rulemaking petition. R. 18 (decision at 1). TCEQ's written decision based denial on six independent grounds, including the pendency of federal litigation relating to greenhouse gas regulation. R. 18. TCEQ's decision also stated that "the public trust doctrine in Texas has been limited to waters of the state and does not extend to the regulations of GHGs [greenhouse gases] in the atmosphere." *Id.* at 19.

The underlying district court appeal. Appellees then appealed TCEQ's decision to the district court. TCEQ filed a plea to the jurisdiction, which the district court denied. On the merits, the district court affirmed TCEQ's decision. R. 138. The district court ruled that "in light of other state and federal

litigation, . . . it is a reasonable exercise of [TCEQ's] rulemaking discretion not to proceed with the requested petition." *Id.*

The Final Judgment, however, also includes "findings" adverse to TCEQ regarding the public trust doctrine. The district court "found," for example, that the public trust doctrine "includes . . . the air and atmosphere" and "is not simply a common-law doctrine but was incorporated into the Texas Constitution." R. at 136. The district court did not cite any legal precedent for these statements. *Id.*

Appellees did not appeal the Final Judgment, so it is undisputed in this Court that TCEQ acted within its authority and discretion in denying the petition for rulemaking. TCEQ's appeal challenges denial of its plea to the jurisdiction and requests that the Court vacate the Final Judgment and render judgment dismissing the district court appeal. Alternatively, TCEQ requests that this Court vacate the district court's extraneous findings regarding the public trust doctrine.

Amici Texas Association of Business et al. take no position on the jurisdictional issue. If the Court upholds denial of the plea to the jurisdiction, however, Amici support TCEQ's request for vacatur of the extraneous findings regarding the public trust doctrine. At a minimum, the Court should make clear that those findings have no legal effect.

SUMMARY OF ARGUMENT

The district court affirmed TCEQ's decision. Additional advisory "findings" adverse to TCEQ regarding the scope of the public trust doctrine were completely independent of, and not a condition precedent for, the court's affirmance of TCEQ's denial. If those findings are appealable, the Court should vacate them. *See Brooks v. Northglen Assoc.*, 141 S.W.3d 158, 164 (Tex. 2004) (vacating portion of lower courts' judgments concerning hypothetical future controversy as "purely advisory"). Alternatively, the Court should make clear that these findings have no precedential value and are not binding in any future proceedings. *See Longoria v. Rutland*, No. 03-09-00392-CV, 2010 WL 3810835, at *2 (Tex. App.—Austin Sept. 30, 2010, no pet.) (unpublished); *Central Power & Light Co. v. Pub. Util. Comm'n of Texas*, 36 S.W.3d 547, 562 (Tex. App.—Austin 2000, pet. denied).

It is important to vacate these findings, or clarify their non-precedential status, because they represent a dramatic departure from established law. Contrary to the district court's findings, the public trust doctrine in Texas simply limits private ownership and use of submerged land and navigable waters. It has never been applied to greenhouse gases specifically or even air emissions generally. Nor has any Texas court interpreted the public trust doctrine to compel an administrative agency to adopt regulation advocated by a private litigant. The

Texas Constitution also does not support a private right of action to compel regulation of greenhouse gases. The theory the district court espoused also has been rejected consistently in other states and by a federal district court. *See, e.g.*, *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-16 (D.D.C. 2012).

Because the district court's statements regarding the public trust doctrine are procedurally extraneous and substantively erroneous, this Court should vacate those findings or clarify that they are without legal effect.

ARGUMENT

I. The District Court's Extraneous "Findings" Regarding The Public Trust Doctrine Have No Legal Effect.

A district court's extraneous findings of fact and conclusions of law, like dicta in an appellate court opinion, have no precedential value and are not binding in future proceedings. *See Longoria*, 2010 WL 3810835, at *2.

In *Longoria*, the district court initially granted turnover relief against a judgment debtor. In seeking reconsideration, the debtor argued that the judgment had become dormant. Alternatively, the debtor argued that even if a writ of execution had extended the judgment's effective date, the judgment creditor had assigned his judgment interest and therefore could not enforce it. The district court granted the motion to reconsider, concluding that the creditor's failure to establish that he owned the judgment barred turnover relief. In addition, however, the court made fact findings and legal conclusions that the judgment was not dormant, which

the debtor tried to appeal. This Court concluded that the extraneous findings had "no legal effect." *Id.* In particular, "these findings and conclusions have no res judicata or collateral estoppel effect" and "would not be binding in any future proceedings." *Id*. at n.4. Accordingly, the judgment debtor was not aggrieved by the district court's order denying turnover relief, and the Court dismissed his appeal.

In *Central Power and Light v. PUC,* the Court gave the same treatment to superfluous findings in an administrative order governing a rate-making proceeding. 36 S.W.3d at 562. A power company challenged PUC findings regarding the company's constitutional right to recover stranded costs if the legislature deregulated the retail sale of electricity and did not provide for recovery of those costs. It was uncontested that these findings were superfluous, and this Court confirmed that even if the Commission's findings were wrong, they "would . . . have no res judicata or collateral estoppel effect in future proceedings." *Id.*

> A challenge to superfluous findings is tantamount to appealing dicta in a court opinion. It is well settled that, as a general rule, dicta has no precedential value.

Id. (citations omitted).

Alternatively, a district court's findings that purport to bind parties in a hypothetical future controversy are advisory and should be vacated. *See Brooks*, 141 S.W.3d at 164. In *Brooks*, homeowners sued their homeowner's association,

arguing that the association did not have the power to raise assessments in certain areas covered by its charter. *Id.* at 161. The trial and appeals courts entered judgments limiting the association's authority to raise assessments in some areas but not in others. On a petition for review, the Supreme Court vacated the portions of the lower courts' judgments that limited the association's authority to raise assessments in two areas where none of the plaintiffs resided. *Id.* at 164. The court held that these portions of the judgment purported to fix rights in a hypothetical future controversy, and were therefore "purely advisory." *Id.*

Here, the district court also made advisory findings that were unnecessary to support its judgment. The judgment affirms TCEQ's decision to deny the underlying petition for rulemaking. The district court concluded that, "in light of other state and federal litigation, . . . it is a reasonable exercise of Defendant's rulemaking discretion not to proceed with the requested petition." R. 138. The basis for the affirmance was thus completely independent of any question regarding the scope of the public trust doctrine. Answering that question was not a condition precedent to affirming TCEQ's denial. Regardless of the scope of the public trust doctrine, TCEQ undisputedly had authority (and discretion) to deny Bonser-Lain's petition for rulemaking. That was the issue decided by the judgment, and no party on appeal contests that finding. The district court's

additional findings regarding the scope of the public trust doctrine as applied to greenhouse gas regulation are not necessary to the judgment and do not support it.

Appellees' brief underscores the extraneous nature of the district court's findings regarding the public trust doctrine. They do not argue that the findings on the public trust doctrine were necessary to resolve the district court appeal. Instead, Appellees contend that the findings might be useful in some hypothetical, ill-defined, future administrative action.[1] Deciding issues that "depend on the occurrence of contingent future events that may not occur as anticipated or may not occur at all"—i.e., "advising what the law would be on a hypothetical set of facts"—is the essence of an advisory opinion prohibited by the separation of powers doctrine.[2] *Patterson v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 971 S.W.2d 439, 444 (Tex. 1998).

As in *Longoria*, *Central Power and Light*, and *Brooks*, the district court's findings regarding the public trust doctrine in this case are immaterial, advisory,

---

[1] *See* Appellees' Br. at 2 (arguing that district court "clear[ed] the way for the TCEQ to commence rulemaking *as soon as it becomes prudent to do so*," by "decid[ing] . . . whether the TCEQ can regulate greenhouse gases"); *id.* at 18 (district court's statements address "TCEQ's ongoing duty *once rulemaking is appropriate*"); *id.* (district court statements "protect[] against agency inaction *in the event* the TCEQ refuses to regulate harmful contaminants *going forward*").

[2] Appellees' argument that the district court's findings on the public trust doctrine "protect[] against agency inaction" in a hypothetical future administrative proceeding, Appellees' Br. at 18, further confirms that these statements are advisory. Here, the district court *affirmed* TCEQ's decision not to act, which means that any statement it made purporting to define TCEQ's future action was purely advisory and without legal effect.

and have no legal effect. In this case, the Court has jurisdiction over TCEQ's appeal, so (as in *Brooks* and in contrast to *Longoria* and *Central Power*), the Court can vacate the findings.[3] *See Brooks*, 141 S.W.3d at 164 (vacating "purely advisory" portion of judgment). Alternatively, if as in *Longoria*, the Court determines that as the prevailing party, TCEQ cannot appeal such findings because they did not cause rendition of an improper judgment, the Court can and should clarify that the findings are dicta. *See* TEX. R. APP. P. 44.1.

Any other result would encourage strategic behavior that effectively could insulate findings adverse to a winning party from review. Here, for example, Appellees argue that TCEQ cannot challenge the findings adverse to its position because it "has not suffered any harm by the district court's decision." Appellees' Br. at 22. If the Court did not clarify that those findings are without future effect, Appellees' choice not to appeal the Final Judgment would reward them with an improper advisory opinion that cannot be reviewed on appeal.

Finally, Appellees and amici Lon Burnam, et al. miscite *A.W. Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411 (Tex. 1961), as supporting the proposition that "[i]n judicial review of administrative actions, the reviewing court may substitute its own judgment for that of the agency on questions inherently judicial

---

[3] If as TCEQ asserts, the district court lacked jurisdiction, it should have dismissed the appeal, and the Final Judgment is void and should be vacated entirely. Regardless of resolution of the jurisdictional issue, however, the advisory language regarding the public trust doctrine must be vacated.

in nature." Appellees' Br. at 13; Burnam Br. at 18. *Gregg* did *not* involve judicial review of any administrative action. Instead, it was a lawsuit by mineral interest owners to enjoin an alleged subsurface trespass caused by fracturing of a well on neighboring property. *Gregg*, 344 S.W.2d at 412. The Supreme Court upheld this Court's decision that the district court had jurisdiction over the trespass case and that the doctrine of primary jurisdiction was inapplicable. *Id.* at 415-419. That case says nothing about the status of extraneous findings such as those in the district court's Final Judgment.

II. The Public Trust Findings Are Substantively Erroneous Because The Doctrine Applies Only To Submerged Land And Navigable Waters.

If the Court reviews the merits of the district court's findings regarding the public trust doctrine, it will conclude that the findings are unprecedented and inconsistent with Texas law and should be vacated on that basis also. As is detailed below, the public trust doctrine in Texas is simply a presumption that the State holds title to submerged land and navigable waters for the benefit of the public and has not conveyed title absent clear legislative action.[4] No Texas court has ever applied the public trust doctrine to the air or atmosphere. No Texas court

[4] *See, e.g., TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182–83 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). This principle is codified in the Texas Water Code. *See* Tex. Water Code Ann. § 11.021(a) (West 2013) ("The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.").

has ever held that the public trust doctrine *compels* regulation of any sort. And no Texas court has ever interpreted the doctrine as providing a private right of action to litigants to force administrative action. Accordingly, TCEQ's decision correctly summarized the state of the law: "the public trust doctrine in Texas has been limited to waters of the state and does not extend to the regulation of GHGs in the atmosphere." R. 19.

Neither Appellees nor amici Burnam, et al. provide any Texas authority to support the district court's finding that "the public trust doctrine includes . . . the air and atmosphere." R. 136. Instead, all the Texas cases Appellees cited in the district court and in this Court involve disputes concerning the ownership and use of submerged lands subject to the presumption of state ownership.[5]

In *Maufrais v. State*, 180 S.W.2d 144 (Tex. 1944), the Court addressed whether an owner lost title to a portion of his land when the Colorado River cut a new channel through his property. *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410 (Tex. 1943), concerned ownership of an oyster house located on a man-made island in a bay of the Gulf of Mexico. *Parker v. El Paso County Water*

[5] The presumptions arising from the public trust doctrine can be overcome by a clear showing that the Legislature acted to transfer submerged lands or waters to private hands. *See Severance v. Patterson*, 370 S.W.3d 705, 716 (Tex. 2012) ("[O]nly the Legislature can grant to private parties title to submerged lands that are part of the public trust."); *State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932) ("[L]and under navigable waters passes by grant or sale only when so expressly provided for by the sovereign authority . . . .").

Improvement District No. 1, 297 S.W. 737 (Tex. 1927), involved riparian rights in land in a conservation district on the Rio Grande River. *Landry v. Robison*, 219 S.W. 819 (Tex. 1920), addressed whether a private individual acquired from the State oil and gas drilling rights in the bed of the San Jacinto River. *De Meritt v. Robison Land Commissioner*, 116 S.W. 796 (Tex. 1909), was a suit to compel sale of land submerged at high tide under San Jacinto Bay. In *Cummins v. Travis County Water Control and Improvement District No. 17*, 175 S.W.3d 34 (Tex. App.—Austin 2005, pet. denied), plaintiffs claimed rights to use waterfront property. In *City of Galveston v. Mann*, 143 S.W.2d 1028 (Tex. 1940) (orig. proceeding), the city filed a mandamus petition seeking approval to build a recreational pier extending into the Gulf of Mexico.[6]

In other cases, Texas courts have used the presumption to decide a dispute between private fishermen and a private lake club over fishing rights in a lake bounded by land owned by the club, *see Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935), and whether the state possesses a "rolling easement" for public

---

[6] The nineteenth-century era U.S. Supreme Court cases that Appellees and amici Burnam et al. cited likewise do not apply the public trust doctrine to air or the atmosphere. *See Geer v. Connecticut*, 161 U.S. 519 (1896), overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (addressing whether a state law prohibiting the possession of wild game caught in a state for transportation outside the state violates the Commerce Clause); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (addressing the validity of a legislative grant of submerged lands on the Chicago waterfront).

beach access along the shoreline of the Gulf of Mexico. *Severance*, 370 S.W.3d at 728.

None of these cases supports the district court's expansive and unnecessary "finding," which extends the public trust doctrine far beyond its previously recognized, narrow boundaries.

The Conservation Amendment, Tex. Const. art. XVI, § 59(a), also does not reference air or the atmosphere and has never been interpreted to address them. The Amendment was adopted in response to severe droughts in 1910 and 1917 to mandate the conservation of "public waters." *See In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 440 (Tex. 1982); *see also Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) ("The State, in administering its water resources, is under a constitutional duty to conserve water as a precious resource . . . ."). The Amendment refers to "conservation" and "development" of the state's "natural resources" and "development of parks and recreational facilities." Tex. Const. art. XVI, § 59(a). The Amendment authorizes the Legislature to create conservation and reclamation districts and to fund those districts through the sale of bonds. *Id.* § 59(b)–(c-1). Neither the language of the Amendment nor case law interpreting it creates any mandatory duty on the state to regulate carbon dioxide emissions, let

alone allows private citizens to compel specific emissions limitations through the courts.

Further, the Conservation Amendment simply authorizes the Legislature to pass laws "as may be appropriate." *Id.* § 59(a). Implementation of the Conservation Amendment "belongs exclusively to the legislative branch of government" and is not "delegated to the courts." *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955); *see also Neely v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 782 (Tex. 2005) (noting that the Conservation Amendment is not "self-executing" and therefore does not authorize the courts to impose specific requirements in place of legislative action). Accordingly, the Conservation Amendment provides no basis for private citizens or the courts to impose a regulatory regime contrary to TCEQ's reasoned judgment.

III. The Public Trust Findings Contradict Separation of Powers Principles And Ignore Discretion Vested in TCEQ By Statute

The district court's findings regarding the public trust doctrine are not only unprecedented, they also intrude on legislative and executive powers. Allowing private litigants to use the public trust doctrine to trump environmental policy judgments affecting major segments of the Texas economy would turn the separation of powers doctrine on its head. The role of the judiciary is "not to judge the wisdom of the policy choices of the Legislature, or to impose a different policy

of [its] own choosing." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995); *see also Westheimer Indep. Sch. Dist. v. Brockette*, 567 S.W.2d 780, 785 (Tex. 1978) (agencies are generally "entitled to and should exercise the duties and functions conferred by statute without interference from the courts"). A concern for separation of powers is particularly relevant where, as here, the agency exercised its discretion not to initiate rulemaking.

To the extent TCEQ has authority to regulate greenhouse gases, it is discretionary, and any such regulation must be "[c]onsistent with applicable federal law." Tex. Health & Safety Code Ann. § 382.0205 (West 2013). As the Commission recognized, however, federal law in this area has been in flux. R. 18. The Environmental Protection Agency promulgated regulations concerning emissions of greenhouse gases, which the State of Texas, along with amici API, APFM, and others, challenged in a federal appeals court.[7] There also are numerous other existing and proposed federal regulations that directly or indirectly purport to

[7] The court of appeals recently dismissed these petitions. *See Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012). Several parties, including Texas, have petitioned for writ of certiorari in the United States Supreme Court to challenge the court of appeals' decision. *See* Case No. 12-1253 and consolidated cases in the United States Supreme Court. In addition, there are ongoing federal appeals regarding (i) EPA's "SIP Call" requiring 13 states, including Texas, to revise their state implementation plans ("SIPs") to accommodate new requirements for federal GHG permitting and (ii) EPA's issuance of a federal implementation plan by which EPA assumed the role of permitting authority for GHGs in Texas. *See* Case Nos. 11-1037, 11-1063, 10-1425, and 11-128 in the District of Columbia Circuit Court of Appeals.

affect greenhouse gas emissions.[8] Federal law also provides numerous incentive programs aimed at reducing greenhouse gases, including funding research and development of new approaches to reduce such emissions and industry-specific programs to encourage emissions reductions.

The Texas Legislature has followed and responded to these developments. Last year, the Lieutenant Governor charged the Texas Senate Committee on Natural Resources to study, among other things, "[g]reenhouse gas regulations under the Federal Clean Air Act." Select Interim Charges Relating to Bus. & Commerce, Natural Res. & Gov't Org., 2, 82nd Leg. (Tex. Feb. 6, 2012).

In May 2013, the Texas Legislature passed House Bill 788, which became effective when the Governor signed it in June. This act, "relating to permitting of greenhouse gas emissions" by TCEQ, provides for TCEQ regulation to the extent greenhouse gas emissions require authorization under federal law. In this context, the new law identifies TCEQ as "the preferred permitting authority," requires TCEQ to adopt rules governing greenhouse gas emissions, and provides that

[8] These include fuel efficiency standards, renewable fuel requirements, appliance and lighting efficiency standards, greenhouse gas reporting requirements, and new source performance standards for electric generating units. *See* 75 Fed. Reg. 25324 (May 7, 2010); 76 Fed. Reg. 57106 (Sept. 15, 2011); 72 Fed. Reg. 23900 (May 1, 2007); 10 C.F.R. Parts 430-31; 76 Fed. Reg. 24976 (May 3, 2011); 77 Fed. Reg. 22392 (Apr. 13, 2012); 78 Fed. Reg. 36135-01 (June 17, 2013).

TCEQ will submit those rules to EPA for approval under the federal Clean Air Act.[9]

The evolving federal regulatory background and ongoing state legislative proceedings highlight that the district court should not have gone beyond the issues necessary to reach its conclusion—that TCEQ had authority to deny Appellees' petition for rulemaking.

IV. Courts In Other States Have Refused To Expand The Public Trust Doctrine To Force Regulation of Greenhouse Gas Emissions.

Actions to compel state regulation of greenhouse gases under a public trust theory have been initiated around the country, but none has been successful.[10] Dozens of states have denied petitions for rulemaking similar to the one filed in Texas,[11] and courts consistently have rejected challenges to these administrative decisions.

---

[9] The text of House Bill 788 is attached as Exhibit A.

[10] Amici Burnam, et al., cite *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App., March 14, 2013) (mem. op.)). That case was an original action for a declaratory judgment that the atmosphere was a public trust asset in Arizona and an order mandating that Arizona's regulators institute greenhouse gas emissions reductions. In affirming the district court's dismissal of the complaint, the court noted that Arizona jurisprudence regarding the scope of the doctrine was "nascent" and "assume[d] without deciding" that the public trust doctrine applied to the atmosphere. The court held that the plaintiff lacked standing, had failed to allege that the State's inaction violated any controlling law, and was seeking a prohibited advisory opinion. *See Butler*, 2013 WL 1091209, at *3, *6.

[11] In addition to Texas, administrative petitions have been denied in Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana,

The Iowa Department of Natural Resources, for example, denied a petition for rulemaking seeking rules substantially identical to those sought in Texas. The petitioners appealed to state district court, which affirmed the Department's decision on the ground that the rulemaking petition had received a fair consideration. The court further explained that the public trust doctrine served only to restrict the state from conveying navigable waters to private parties and declined to "expand the public trust doctrine beyond its traditional parameters to include the atmosphere." *G.F. v. Iowa Dep't of Natural Res.*, No. CVC008748, at *7 (Iowa Dist. Ct. (Polk Cnty.) Jan. 30, 2012) (order affirming agency decision denying petition for rulemaking). The Iowa Court of Appeals recently affirmed the district court's decision, holding that "there is no precedent for extending the public trust doctrine to include the atmosphere." *G.F. v. Iowa Dep't of Natural Res.*, 829 N.W.2d 589, 2013 WL 988627, at *3 (Iowa Ct. App. March 13, 2013). The result was the same in Minnesota:

> Minnesota Courts have recognized the Public Trust Doctrine only as it applies to navigable waters. . . . [T]his Court cannot locate, nor did counsel for either party supply, a Minnesota case supporting broadening the Public Trust Doctrine to include the atmosphere. This Court has no authority to recognize an entirely new common law cause of action through plaintiff's proposed extension of the Public Trust Doctrine.

Maine, Maryland, Michigan, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming.

Aronow v. Minnesota, No. 62-CV-11-3952 (Minn. Dist. Ct. (2d Dist.) Jan. 31, 2012) (order dismissing complaint). The Minnesota Court of Appeals affirmed the district court's decision. *Aronow v. Minnesota*, No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012). And in Colorado:

> [T]he Public Trust Doctrine has never been recognized by the Colorado courts. . . . Even if this Court were to apply ancient law and assume that it carries through to Colorado today, Plaintiffs have been unable to point to any authority in which the government was required to protect the atmosphere. This Court is not inclined to create new law.

X.M. v. Colorado, No. 11CV4377, at *4 (Colo. Dist. Ct. (Denver Cnty.) Nov. 7, 2011) (order dismissing case for lack of standing based on the absence of a legally protected interest).

A New Mexico plaintiff fared no better when she bypassed the administrative process and filed a declaratory judgment action in state court. *See A.S.R. v. New Mexico*, No. D-101-CV-2011-01514 (Dist. Ct. [Santa Fe Cnty.], July 7, 2013) (slip op.). The court granted summary judgment for the state, expressing doubt that the public trust doctrine applied to the atmosphere, and in any event, finding no evidence that the state ignored its responsibility to protect the atmosphere. The court also observed that judicial application of the public trust

doctrine posed grave separation-of-powers concerns. *See also Butler*, 2013 WL 1091209, at *3, *6 (dismissing Arizona declaratory judgment action).[12]

An action filed in federal court was also unsuccessful. In *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-16 (D.D.C. 2012), the district court granted the defendant's motion to dismiss, holding that no federal question was presented because the public trust doctrine is a matter of state law, and alternatively, that the federal Clean Air Act preempts the federal public trust doctrine.[13]

CONCLUSION

For the reasons set forth above, the district court's findings regarding the public trust doctrine in the Final Judgment are procedurally and substantively erroneous. Amici request that the Court vacate those findings or clarify that they have no legal effect.

---

[12] The unpublished orders and decisions referenced above are attached to this brief as Exhibits B through E. No appeal has been docketed in *A.S.R. v. New Mexico* and none was taken in *X.M. v. Colorado*.

[13] The plaintiffs filed a motion for reconsideration, which the court denied on May 22, 2013. *Alec L. v. Perciasepe*, No. 1:11-cv-02235-RLW (D.D.C. May 22, 2013). Plaintiffs filed a notice of appeal to the D.C. Circuit on June 27, 2013.

Dated: July 19, 2013

Respectfully submitted,

/s/Samara L. Kline

Samara L. Kline
Texas Bar No. 11786920
Matthew Eagan
Texas Bar No. 24069657
BAKER BOTTS L.L.P.
2001 Ross Avenue
Suite 600
Dallas, Texas 75201
Phone: 214.953.6500
samara.kline@bakerbotts.com
matthew.eagan@bakerbotts.com

ATTORNEYS FOR AMICI
Texas Association of Business,
Texas Oil & Gas Association,
American Petroleum Institute,
and
American Fuel &
Petrochemical Manufacturers

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that, according to the word count of the computer program used to prepare this document, the document contains 5,297 words.

/s/ Samara L. Kline
Samara L. Kline

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, I served the foregoing Brief of Amicus Curiae Texas Association of Business in Support of Appellant on the following parties via certified mail, return receipt requested:

Adam R. Abrams
Texas Environmental Law Center
P.O. Box 685244
Austin, Texas 78768

Attorney for Appellees

Cynthia Woelk
Daniel C. Wiseman
Assistant Attorney General
Environmental Protection and Administrative
Law Division
P.O. Box 12548
Austin, Texas 78711-2548

Attorneys for TCEQ

/s/ Samara L. Kline
Samara L. Kline

INDEX TO APPENDIX

EXHIBIT A

AN ACT

relating to permitting of greenhouse gas emissions by the Texas Commission on Environmental Quality; limiting the amount of a fee.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that in the interest of the continued vitality and economic prosperity of this state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred permitting authority for emissions of greenhouse gases.

SECTION 2. Subchapter C, Chapter 382, Health and Safety Code, is amended by adding Section 382.05102 to read as follows:

Sec. 382.05102. PERMITTING AUTHORITY OF COMMISSION; GREENHOUSE GAS EMISSIONS. (a) In this section, "greenhouse gas emissions" means emissions of:

(1) carbon dioxide;

(2) methane;

(3) nitrous oxide;

(4) hydrofluorocarbons;

(5) perfluorocarbons; and

(6) sulfur hexafluoride.

(b) To the extent that greenhouse gas emissions require authorization under federal law, the commission may authorize greenhouse gas emissions in a manner consistent with Section

382.051.

(c) The commission shall:

(1) adopt rules to implement this section, including rules specifying the procedures to transition to review by the commission any applications pending with the United States Environmental Protection Agency for approval under 40 C.F.R. Section 52.2305; and

(2) prepare and submit appropriate federal program revisions to the United States Environmental Protection Agency for approval.

(d) The permit processes authorized by this section are not subject to the requirements relating to a contested case hearing under this chapter, Chapter 5, Water Code, or Subchapters C-G, Chapter 2001, Government Code.

(e) If authorization to emit greenhouse gas emissions is no longer required under federal law, the commission shall:

(1) repeal the rules adopted under Subsection (c); and

(2) prepare and submit appropriate federal program revisions to the United States Environmental Protection Agency for approval.

SECTION 3. Section 382.0621, Health and Safety Code, is amended by adding Subsection (f) to read as follows:

(f) The commission may impose fees for emissions of greenhouse gas only to the extent the fees are necessary to cover the commission's additional reasonably necessary direct costs of implementing Section 382.05102.

SECTION 4. This Act takes effect immediately if it receives

a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

President of the Senate

Speaker of the House

I certify that H.B. No. 788 was passed by the House on April 19, 2013, by the following vote: Yeas 114, Nays 23, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 788 on May 20, 2013, by the following vote: Yeas 139, Nays 5, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 788 was passed by the Senate, with amendments, on May 17, 2013, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

EXHIBIT B

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

[redacted], a Minor, by and through her Mother and Next Friend, MARIA FILIPPONE, **Petitioner,** **vs.** **IOWA DEPARTMENT OF NATURAL RESOURCES,** **Respondent.**	**CASE NO. CVCV008748** **RULING ON PETITION FOR JUDICIAL REVIEW**

The parties submitted this administrative appeal on the briefs.[1] Having reviewed the court file and the applicable law, and being otherwise fully advised of the premises, the court now **AFFIRMS** the Agency decision denying the petition for rulemaking.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2011, Kids vs. Global Warming filed a petition for rulemaking with the Iowa Department of Natural Resources ("DNR") through Alec and Victoria Loorz of Oak View, California. This petition was pursuant to the Iowa Administrative Procedure Act, which states that any interested person "may petition an agency requesting the adoption, amendment, or repeal of a rule." IOWA CODE § 17A.7(1) (2011). The petition asked the DNR to adopt new rules regulating the emission of greenhouse gases in Iowa. On June 1, 2011, an Oregon nonprofit organization called Our Children's Trust, along with [redacted], a minor, and her mother, Maria Filippone, requested that [redacted] ("[redacted]") be added as a petitioner.

[1] Upon review of the parties' respective briefs, the court determined that the issues had been fully and well-briefed and oral argument was unnecessary.

On June 9, 2011, Jim McGraw, Environmental Program Supervisor with the DNR, drafted a proposed denial of the petition for rulemaking to present to the members of the Environmental Protection Commission, the subset of the DNR that would ultimately decide on the petition. The proposed denial cited four reasons for denying the petition, summarized as follows: (1) the DNR had already created a greenhouse gas emissions inventory similar to that requested in the petition, (2) the DNR had already enacted some rules regulating sources emitting greenhouse gases above a certain threshold, (3) the new rules requested in the petition would likely conflict with anticipated future rules from the federal Environmental Protection Agency, and (4) the DNR did not have the funding necessary to implement the proposed rules. The DNR gave members of the Environmental Protection Commission electronic copies of the petition and McGraw's proposed denial on June 17, 2011.

On June 21, 2011, the Environmental Protection Commission took comments on the petition for rulemaking at a publ[redacted] was present at this meeting, and spoke for approximately ten minutes about the petition and the scientific evidence suggesting a need for action to stop climate change. In the introduction to her presentation, [redacted] mentioned that learning about the environmental implications of modern food production led her to become a vegetarian at a young age. After her presentation, the commissioners did not ask her any questions. Commissioner David Petty commented that he would like to urge [redacted] to reconsider her vegetarianism, suggesting that it was not healthy and stating "that's when you lost me in your presentation, was when you admit that you're a vegetarian."

After [redacted] presentation and Commissioner Petty's comments, Jim McGraw of the DNR presented the proposed reasons for denying the petition. There were no questions following McGraw's presentation, and the Commission then voted 7-0 to deny the petition.

After the vote, Commissioner Dee Bruemmer commented that she had been given a lot of information about the petition, and she would have liked to have had more time to review it before voting.

The director of the DNR, Roger Lande, issued a denial of the petition for rulemaking on June 22, 2011, the day after the public meeting. The denial stated the same four reasons provided in the proposed denial McGraw presented at the Environmental Protection Commission meeting. On July 21, 2011, [redacted] filed the petition for judicial review that is now before this court.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act governs judicial review of agency actions. IOWA CODE § 17A.19 (2011). The court's review of an agency's finding is at law, not de novo. *Harlan v. Iowa Dep't of Job Serv.*, 350 N.W.2d 192, 193 (Iowa 1984). "The burden of demonstrating the required prejudice and invalidity of agency action is on the party asserting invalidity[,]" and the court must apply the standards of review of Section 17A.19 to determine the validity of the agency's action. IOWA CODE § 17A.19(8)(a)–(b).

The court may grant relief from agency action that is "unreasonable, arbitrary, capricious, or an abuse of discretion." *Id.* § 17A.19(10)(n). Agency action is unreasonable when it is "clearly against reason and evidence." *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (citation omitted). It is arbitrary or capricious when "taken without regard to the law or facts of the case[,]" and "an abuse of discretion occurs when the agency action rests on grounds or reasons clearly untenable or unreasonable." *Id.* (citations omitted).

ANALYSIS AND CONCLUSIONS OF LAW

In support of her petition for judicial review, [redacted] argues the denial of her petition for rulemaking was unreasonable, arbitrary, capricious, or an abuse of discretion, and therefore the court should order the DNR to reconsider. [redacted] also asks the court to expand Iowa's public trust doctrine, which imposes upon government an obligation to protect certain natural resources, to include the atmosphere. The DNR claims it gave fair consideration to the petition for rulemaking, and based its denial on four reasonable grounds. Additionally, the DNR argues that Iowa's public trust doctrine is generally limited to apply to waterways, and Iowa courts have been reluctant to expand its scope. For the reasons stated below, the court agrees with the DNR tha[redacted] petition for rulemaking received a fair consideration, and declines to expand the public trust doctrine to include the atmosphere.

1. Consideration of Filippone's Petition for Rulemaking

Upon submission of a petition for rulemaking, the receiving agency must act within sixty days. IOWA CODE § 17A.7(1). If the agency chooses not to initiate rulemaking procedures, it must "deny the petition in writing on the merits, stating its reasons for the denial . . . ." *Id.* The Iowa Supreme Court has interpreted the phrase "on the merits" to require agencies to "engage in a reasoned reconsideration of the existing state of the law, and to change it if, in the agencies' discretion, that seems appropriate . . . ." *Community Action v. Iowa State Commerce Comm'n*, 275 N.W.2d 217, 219 (Iowa 1979) (quoting Arthur E. Bonfield, *Iowa Administrative Procedure Act, Part I*, 60 IOWA L. REV. 731, 894 (1975)). The agency must give the petition fair consideration; it does not, however, have to take a stand on any substantive issues in the petition that might prompt it to adopt the proposed rules. *Community Action*, 275 N.W.2d at 219; *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 766 (Iowa 1998). The agency may base its final

decision on "reasons other than the actual merits of the request[,]" including "unresolved public debate on the issue" or "practical considerations". *Litterer v. Judge*, 644 N.W.2d 357, 361 (Iowa 2002).

[redacted] argues the DNR did not give the petition fair consideration or deny it "on the merits" as required by Section 17A.7(1). The court disagrees. The DNR was not required to pass judgment on the scientific evidence of climate change presented in the petition for judicial review. *See Litterer*, 644 N.W.2d at 361. The DNR complied with the Iowa Administrative Procedure Act by allowing the Environmental Protection Commission to hear presentations both for and against the petition for rulemaking at a public meeting. The Commission voted unanimously to deny the petition, and the director of the DNR issued a denial based on four fact-supported reasons. The meeting and the denial of the petition took place within the sixty days allotted for consideration of a petition for rulemaking in Section 17A.7(1).

The petition for judicial review points to comments from Commissioner Petty and Commissioner Bruemmer as evidence that the petition for rulemaking did not receive fair consideration at the June 21 meeting. Commissioner Petty commented that [redacted] "lost" him in her presentation when she stated she is a vegetarian. This comment was perhaps ill-advised following a thoughtful presentation on a serious topic, but it does not change the fact that all seven commissioners voted to deny the petition after listening to two presentations on the subject. As stated above, the denial of the petition listed four sensible, acceptable reasons for denying the petition, and none of these had to do with [redacted] diet. Similarly, the court does not believe Commissioner Bruemmer's offhand comment about how she would have liked more time to look over the materials related to the petition illustrates a lack of fair consideration on the part of the DNR. Commissioner Bruemmer heard both [redacted] presentation and Jim

McGraw's presentation on behalf of the DNR. She did not have any questions for either presenter, and she did not object before the vote was taken. The DNR's handling of the petition for rulemaking was not unreasonable, arbitrary, capricious, or an abuse of discretion.

2. The Public Trust Doctrine

Iowa courts recognize a "public trust" doctrine that serves to protect the public's rights to navigable waters for both commercial and non-commercial purposes. *Robert's River Rides, Inc., v. Steamboat Development Corp.*, 520 N.W.2d 294, 299 (Iowa 1994). The doctrine is "based on the idea that the public possesses inviolable rights to particular natural resources." *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 497 (Iowa 2003). It serves to prevent the state, which holds these waters as a trustee, from conveying them to private parties at the expense of the public. *Id.*

[redacted] argues the court should find the DNR is obligated to consider new rules regarding greenhouse gas emissions because the public trust doctrine applies to the atmosphere as well. She cites several cases that discuss the doctrine in broad terms, applying it to resources other than navigable waters or stating that it should adapt to changing times and conditions. *See, e.g., Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (describing the doctrine as "one to be molded and extended to meet changing conditions"); *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998) (stating that, in addition to water, the doctrine applies to wildlife and minerals). However, these cases are from other jurisdictions. The Iowa Supreme Court has stated, "[T]he scope of the public-trust doctrine in Iowa is narrow, and we have cautioned against overextending the doctrine." *Bushby*, 654 N.W.2d at 498). It has refused to extend the doctrine to both forests and public alleys. *See Id.*; *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813–

14 (Iowa 2000). In light of this clear precedent, the court declines [redacted] invitation to expand the public trust doctrine beyond its traditional parameters to include the atmosphere.

ORDER

IT IS THEREFORE ORDERED that the June 22, 2011, decision of the Department of Natural Resources is hereby **AFFIRMED** in its entirety. Costs are taxed to the Petitioner.

Dated this 30th day of January, 2012.

D. J. STOVALL, JUDGE
FIFTH JUDICIAL DISTRICT

Copy to:

Channing L. Dutton
Email: cdutton@lldd.net
ATTORNEY FOR PETITIONER

Jacob J. Larson
Assistant Attorney General
E-mail: jlarson@ag.state.ia.us
ATTORNEY FOR RESPONDENT

EXHIBIT C

State of Minnesota
Ramsey County

District Court
Second Judicial District

Court File Number: **62-CV-11-3952**
Case Type: Civil Other/Misc.

Notice of Entry of Judgment

In Re: Reed Aronow vs MN Department of Pollution Control, Mark Dayton, State of Minnesota

Pursuant to: The Order of Judge John H. Guthmann dated January 30, 2012.

You are notified that judgment was entered on January 31, 2012.

Dated: January 31, 2012

cc :Jilian Elizabeth Clearman; Robert Britt Roche

Lynae K. E. Olson
Court Administrator

By: Linda Draske
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102

62-CV-11-3952

NOENJUDG

FILED
Court Administrator

JAN 30 2012

By _____ Deputy

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.
File No.: 62-CV-11-3952
Judge: John H. Guthmann

Reed Aronow,

Plaintiff,

v.

State of Minnesota, Minnesota Department of Pollution Control and Mark Dayton,

Defendants.

ORDER

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on November 2, 2011, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue was defendants' Rule 12.02(e) motion to dismiss. Jilian E. Clearman, Esq., appeared on behalf of the plaintiff. Robert R. Roche, Esq., appeared on behalf of defendants. The matter was taken under advisement following the hearing.

Based upon all of the files, records, submissions and arguments of counsel herein, the Court issues the following:

ORDER

1. Defendants' Motion to dismiss plaintiff's Complaint pursuant to Minn. R. Civ. P. 12.02(e) is **GRANTED**.

2. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 30, 2012
JUDGMENT

BY THE COURT:

John H. Guthmann
Judge of District Court

The foregoing shall constitute the judgment of the court.

Entered: 1/31/12 LYNAE K.E. OLSON
Court Administrator
By Lynae Olson
Deputy Clerk

MEMORANDUM

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff commenced the instant lawsuit claiming that defendants have failed to take action that will adequately protect Minnesota's atmosphere. The claims are brought under the Public Trust Doctrine and the Minnesota Environmental Rights Act ("MERA"). The Complaint seeks a declaration "that the atmosphere is protected by the Public Trust Doctrine", a declaration that defendants "violated and are in violation of MERA", and an order compelling defendants "to take the necessary steps to reduce the State's carbon dioxide output by at least 6% per year, from 2013 to 2050, in order to help stabilize and eventually reduce the amount of carbon dioxide in the atmosphere." Finally, the Complaint seeks an award of costs, disbursements and attorney's fees. In response to the lawsuit, defendants filed a motion to dismiss pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure.

II. STANDARD OF REVIEW

Under Rule 12.02(e) of the Minnesota Rules of Procedure, a defendant may file a motion to dismiss in lieu of a formal answer to test the legal sufficiency of a complaint. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). As such, only documents embraced by the pleadings may be considered. *In re Hennepin County Recycling Bond*

Litigation, 540 N.W.2d 494, 497 (Minn. 1995). Dismissal of a complaint is warranted when "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963); *see Martens v. Minnesota Mining & Manufacturing Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (if the Complaint fails to state a claim upon which relief may be granted, a dismissal with prejudice is appropriate).

III. DISCUSSION

A. Governor Mark Dayton is not a Proper Party to this Action

Alleging a violation of their common law and statutory obligations, plaintiff challenges the sufficiency of defendants' actions to protect the atmosphere. Plaintiff's claims against Governor Dayton are based upon his assertion that Governor Dayton failed to uphold MERA. Yet, MERA simply provides private citizens with a civil remedy to seek court-ordered protection of the environment. Plaintiff makes no allegation that Governor Dayton interfered with or failed to permit civil actions under MERA.

Plaintiff also argues that Governor Dayton has an independent obligation under either the common law Public Trust Doctrine, MERA, or both to take action protecting the atmosphere. (Compl. ¶ 13.) In essence, plaintiff argues that the Executive Branch, through the Governor and the agencies he manages, has an obligation to act in furtherance of MERA's broad purposes regardless of funding or authorizing legislation.

The remedies plaintiff seeks in his Complaint require passage of new laws and

standards by the Legislature. In addition, the remedies sought by plaintiff require a legislative appropriation. The Governor "is not vested with any legislative power, and no such power can be conferred upon him by the Legislature. As Governor, he can enforce the laws, but cannot change or suspend them." *State ex. Rel. Lichtscheidl v. Moeller*, 189 Minn. 412, 420, 249 N.W. 330, 333 (Minn. 1933); *see* Minn. Const. art. III, § 3. In other words, the Governor executes the law but he cannot create law or spend money that was not appropriated by the Legislature.

The Complaint also alleges that Governor Dayton failed to "effectively implement and enforce the laws under his jurisdiction." (Compl. ¶ 13.) However, with the exception of MERA and Minnesota Statutes section 216H.02, the Complaint does not describe or cite a statute that the Governor failed to implement or enforce. In the case of MERA and section 216H.02, the Complaint does not state, in even the vaguest terms, how the Governor failed to implement or enforce these statutes. Moreover, plaintiff failed to cite a statute that authorizes the Governor or any state agency to require the reduction of greenhouse gases at all much less at the rate sought by the Complaint. It is well established that Governor Dayton is not a proper party to an action in which he cannot "implement any of the relief that petitioners request." *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). Because Governor Dayton has no legal authority to implement the policies sought by plaintiff, he is not a proper party to the lawsuit.[1] The claims against Governor Dayton must therefore be dismissed.

[1] The same principle holds true for the Minnesota Pollution Control Agency.

B. Common Law Public Trust Doctrine

Minnesota Courts have recognized the Public Trust Doctrine only as it applies to navigable waters. "Navigability and nonnavigability [sic] mark the distinction between public and private waters. The state, in its sovereign capacity, as trustee for the people, holds all *navigable* waters and the lands under them for public use." *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942) (emphasis added). The *Nelson* court ultimately held that a private citizen's riparian rights are subordinate to the State's needs as it manages the navigable waters that are held in the public trust. *See also Pratt v. State, Dep't of Natural Resources*, 309 N.W.2d 767, 771 (Minn. 1981). In *Larson v. Sando*, 508 N.W.2d 782 (Minn. Ct. App. 1993), *rev denied* (Jan. 21, 1994), the court declined to extend the public trust doctrine beyond "the state's management of waterways," partly because the cases cited by the parties applied only to waterways. *Id.* at 787 (declining to extend the doctrine to land). Similarly, this Court cannot locate, nor did counsel for either party supply, a Minnesota case supporting broadening the Public Trust Doctrine to include the atmosphere. This Court has no authority to recognize an entirely new common law cause of action through plaintiff's proposed extension of the Public Trust Doctrine.

C. CLAIMS UNDER MERA

As discussed above, Minnesota does not recognize a common law action by citizens to require governmental protection of the atmosphere under the Public Trust Doctrine. However, through MERA, the Minnesota Legislature has enacted legislation enabling citizen lawsuits against the state, its agencies and its subdivisions aimed at

protecting, among other things, Minnesota's atmospheric resources. Minn. Stat. §§ 116B.01-.13 (2010).

When enacting MERA, the Legislature defined the purpose of the statute:

> The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment or destruction.

Minn. Stat. § 116B.01 (2010). The statute goes on to establish two separate private causes of action. First, under section 116B.03, "any person residing within the state" may "maintain a civil action . . . in the name of the state of Minnesota against any person, for the protection of the air . . . whether publically or privately owned, from pollution, impairment, or destruction." *Id.* § 116B.03, subd. 1.

The second private cause of action created by MERA is found in section 116B.10. It permits:

> any natural person residing in the state . . . [to] maintain a civil action . . . for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license stipulation agreement or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed."

Id. § 116B.10, subd. 1.[2] To the extent plaintiff's Complaint arguably asserts a claim under both MERA causes of action, the Court will address the viability of each.

1. Minn. Stat. § 116B.03.

To be actionable under section 116B.03, the defendant must engage in "pollution, impairment or destruction" as defined by the statute. *Id.* § 116B.02, subd. 5 ("conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license stipulation agreement or permit of the state or any instrumentality, agency, or political subdivision thereof"). This conduct must be committed by a "person." MERA defines the term "person" to include "any state, municipal or other governmental or political subdivision or other public agency or instrumentality . . . ." *Id.* § 116B.02, subd. 2. It is of note that the definition does not include the State of Minnesota as an entity. *Id.*

Plaintiff's Complaint contains a section entitled "Jurisdiction and Venue", which lists only section 116B.10, subd. 1 as the basis for the Court's jurisdiction. (Compl. ¶ 15.) However, under a generous theory of notice pleading, plaintiff's Complaint arguably asserts a claim under Minn. Stat. § 116B.03. "The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (citing *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963)). "Consequently,

[2] Defendants argue that the State of Minnesota may never be a proper party to a lawsuit. (Defendants' Memorandum in Support of Motion to Dismiss, at 3-4.) However, in the case of MERA actions under section 116B.10, the statute expressly authorizes "a civil action . . . against the state." Minn. Stat. 116B.10, subd. 1 (2010).

Minnesota does not require pleadings to allege facts in support of every element of a cause of action." *Id.*

Here, plaintiff's Complaint cited cases that were filed as section 116B.03 claims. (Compl. ¶ 53.) In addition, plaintiff's "Jurisdiction and Venue" section does not mention the Public Trust Doctrine cause of action as a basis for the court's jurisdiction. Thus, plaintiff did not use the "Jurisdiction and Venue" section of the Complaint as an exclusive list of claims subject to the court's jurisdiction. Nevertheless, the Court is convinced that plaintiff did not intend to include a section 116B.03 claim in the Complaint. More important, even if the Complaint is deemed to include a section 116B.03 claim, the Court finds that the claim cannot survive Rule 12.02(e) scrutiny.

First, Minn. Stat. 116B.03 contains very specific notice requirements:

> Within seven days after commencing such action, the plaintiff shall cause a copy of the summons and complaint to be served upon the attorney general and the pollution control agency. Within 21 days after commencing such action, the plaintiff *shall* cause written notice thereof to be published in a legal newspaper in the county in which suit is commenced, specifying the names of the parties, the designation of the court in which the suit was commenced, the date of filing, the act or acts complained of, and the declaratory or equitable relief requested. The court may order such additional notice to interested persons as it may deem just and equitable.

Minn. Stat. §116B.03, subd. 2 (emphasis added). There is no evidence before the Court that plaintiff met the published notice requirement. Even if plaintiff intended to bring a section 116B.03 claim, his failure to publish a notice of claim within 21 days deprives this Court of jurisdiction over the claim. *County of Dakota (C.P. 46-06) v. City of Lakeville*, 559 N.W.2d 716, 722 (Minn. Ct. App. 1997) (because the parties failed to

comply with the statutory notice requirement, they did not properly commence their action, which prevented the district court from taking jurisdiction over the matter.) Plaintiff's failure to satisfy the notice requirement evinces his intent not to include a section 116B.03 claim in the Complaint. If plaintiff intended to include the claim, the failure to give notice is fatal. Either way, if the Complaint is deemed to include a section 116B.03 claim, it must be dismissed.

Second, section 116B.03 requires the action to be "in the name of the State of Minnesota." Minn. Stat. § 116B.03, subd. 1. Here, plaintiff sued solely in his name. Plaintiff's failure to sue in the name of the State as required by section 116B.03 demonstrates plaintiff's intent not to include such a claim in the Complaint.

Finally, plaintiff does not allege the basic prerequisite of a section 116B.03 claim. Instead, plaintiff's Complaint seeks to impose upon the State of Minnesota environmental requirements that heretofore do not exist in any statute, rule, regulation, or other form. Yet, to be actionable under section 116B.03, the plaintiff's claim must allege conduct by a defendant that constitutes "pollution, impairment or destruction" as defined by the statute. Because the Complaint does not allege anything falling within the definition of "pollution, impairment or destruction," any section 116B.03 claim must be dismissed to the extent the Court deems such a claim to have been included in the Complaint.

2. Minn. Stat. § 116B.10

As noted above, MERA creates two private causes of action that allow citizens to sue for the protection of the environment under defined circumstances. Plaintiff

specifically pleads a claim under section 116B.10.[3] To determine whether the claim survives a Rule 12.02(e) challenge, the Court must determine if the Complaint alleges something that section 116B.10 declares actionable. The plain language of section 116B.10 does not permit a private cause of action by every citizen who is unhappy that the Legislature failed to go far enough to protect the environment. To be viable, plaintiff's "action [must] challenge . . . an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof." Minn. Stat. § 116B.10, subd. 1 (2010).

Plaintiff's Complaint does not refer to or challenge a single "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." *Id.* In addition, plaintiff's Complaint does not allege that the state or any agency or instrumentality of the state has actually regulated carbon dioxide. To the contrary, the gravamen of plaintiff's Complaint is an assertion that this Court should step in and order the State of Minnesota, the Governor and the PCA to do what they have heretofore declined to do. What the plaintiff seeks goes far beyond the scope of the civil action authorized by section 116B.10.

Although the Complaint does not challenge an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit", may the plaintiff use MERA to challenge a statute? Other than MERA, the only statute referred to in the

[3] Defendants argue that plaintiff lacks standing, the Court lacks subject matter and personal jurisdiction and that the issues before the Court are not justiciable. In the absence of Minn. Stat § 116B.10, these arguments would have merit. However, the language of section 116B.10 grants the plaintiff standing to bring his claim, grants the Court jurisdiction over the subject matter, and provides for recognition of justiciable issues if the Complaint properly alleges the factual predicates to a claim.

Complaint is Article 5 of the Next Generation Energy Act of 2007 ("NGEA"). Compl. ¶ 39; *see* Act of May 22, 2007, ch 136, art. 5, 2007 Minn. Laws (codified as Minn. Stat. §§ 216H.01-.13). It is evident from reading Article 5 of the NGEA that the statute sets goals, requires the filing of reports and proposed legislation by agencies with the Legislature, and establishes a construction and energy use moratorium.[4] The statute is largely aspirational. It does not create an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." Minn. Stat. § 116B.10, subd. 1 (2010). As such, if one assumes that legislation can be challenged through a section 116B.10 lawsuit, chapter 216H does not qualify as a statute subject to challenge.

The Court also holds that the Legislature did not intend to permit citizen lawsuits under section 116B.10 against the State of Minnesota due to legislative action or inaction. Section 116B.10 claims may only challenge something that was "promulgated or issued." *Id.* Legislatures do not "promulgate or issue" anything. Rather, they "enact." Moreover, the "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit" subject to challenge must be one in "which the applicable statutory appeal period has elapsed." *Id.* There is no statutory appeal period for challenging

[4] Article 5 of the NGEA defines "statewide greenhouse gas emission" and establishes a greenhouse gas emissions reduction goal to "a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050." Minn. Stat. § 216H.02, subd. 1 (2010). The statute requires certain state agencies to submit a "climate change action plan" to the Legislature. *Id.* § 216H.02, subd. 2. The statute also requires the Pollution Control Agency to "establish a system for reporting and maintaining an inventory of greenhouse gas emissions", *id.* §§ 216H.021, subd. 1, enacts a moratorium on the construction of any "new large energy facility" or the importation of energy from any such facility, *id.* § 216H.03, requires a variety of reports to the Legislature on a periodic basis accompanied by proposed legislation, *id.* §§ 216H.07, and imposes certain reporting and disclosure requirements on the manufacturer and purchaser of a "high-GWP greenhouse gas." *Id.* §§ 216H.10-12. None of the goals, systems or plans is enforceable absent further legislation.

legislation. The "statutory appeal period" language clearly refers to the time limits that exist in the Administrative Procedure Act governing regulations that are promulgated or issued and, perhaps, the limitations periods found in local ordinances. *See, e.g.*, Minn. Stat. ch. 14 (2010) (setting forth the procedure and timeline under which rules become final). Thus, to the extent plaintiff claims that the NGEA is "inadequate to protect the air . . . from pollution, impairment, or destruction," such claims fall outside the intended scope of a section 116B.10 MERA lawsuit. The Legislature did not intend to authorize court recourse for injunctive remedies directing the Legislature to enact laws and appropriate money to realize outcomes that citizens could not achieve through the political process.

JHG

EXHIBIT D

Y DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202	
Plaintiff(s): [redacted], et al., v. **Defendant(s):** STATE OF COLORADO, et al.	▲COURT USE ONLY▲ Case Number: 11CV4377 Courtroom: 275

ORDER RE: DEFENDANTS' AND INTERVENOR'S MOTIONS TO DISMISS

THIS MATTER comes before the Court upon consideration of Defendants and Intervenor's Motions to Dismiss, filed July 29, 2011 (the "Motion"). The Court, having reviewed the Motions, Response, Replies, case file, and applicable legal authorities, finds, concludes and orders as follows:

LEGAL STANDARD

"When a court rules on a motion to dismiss for failure to state a claim, C.R.C.P. 12(b)(5) mandates that the court analyze the merits of the plaintiff's claims. The purpose of C.R.C.P. 12(b)(5) is to test the legal sufficiency of the complaint to determine whether the plaintiff has asserted a claim or claims upon which relief can be granted. In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), the court must accept as true all averments of material fact and must view the allegations of the complaint in the light most favorable to the plaintiff. *Ashton Props., Ltd. v. Overton,* 107 P.3d 1014, 1018 (Colo.App.2004)." *Hemmann Management Services v. Mediacell, Inc.,* 176 P.3d 856, 858 (Colo.App. 2007).

"Under C.R.C.P. 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court is authorized to make appropriate factual findings. It 'need not treat the facts alleged

by the non-moving party as true as it would under C.R.C.P. 12(b)(5).' Thus, whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all inferences in the plaintiff's favor, Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citations omitted).

FACTUAL BACKGROUND

Plaintiffs are several Colorado citizens and an organization, WildEarth Guardians, concerned about the state of the atmosphere and impending global warming on Earth. They have sued the State of Colorado, the Governor, and several State Departments because it is their belief that the Defendants have failed to adequately protect the atmosphere by regulating greenhouse gas emissions. Plaintiffs ask this Court to direct the Defendants to "significantly reduce Colorado's greenhouse gas emissions based upon the best available science." Mountain States Legal Foundation (MSLF) was permitted to intervene on August 18, 2011, in order to present its view that no limits on greenhouse gas emissions are necessary. The Defendants and MSLF have moved to dismiss this case.

LEGAL ANALYSIS

The Court must hold that Plaintiffs have not stated a claim under Colorado law.

I. This claim is not subject to the Colorado Governmental Immunity Act.

Under the Colorado Governmental Immunity Act (CGIA), public entities are immune from liability for all claims that could lie in tort, regardless of whether the claimant calls the action a tort, and regardless of the form of relief. C.R.S. § 24-10-105. The State Defendants argue that this action is really an action in negligence or something related to negligence, because Plaintiffs state that Defendants had a duty to protect the atmosphere, that they have

breached that duty, and that this caused Plaintiffs damages. Plaintiffs argue that they are not seeking compensatory damages, and that they simply want a declaration of rights.

Whether a claim lies in tort is a vague concept. *City of Colorado Springs v. Conners,* 993 P.2d 1167, 1172 (Colo. 2000). However, "a central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory money damages in tort." *Id.* Therefore, the CGIA grants immunity "from actions seeking compensatory damages for personal injuries." *Id.* at 1173. "[C]laims for noncompensatory relief aimed at redressing general harms do not lie in tort." *Skyland Metropolitan Dist. v. Mountain West Enterprise, LLC,* 184 P.3d 106, 131 (Colo.App. 2007) (citing *Conners*).

Because Plaintiffs are not seeking monetary damages, but simply a declaration that the Defendants are breaching their fiduciary trust duties to the public, this action is addressed at general harms and is not a tort action. Unlike a tort claim, no specific, one-time event or series of events underlie this claim. Plaintiffs seek to redress failures to act by the State. The CGIA does not apply, and this Court has jurisdiction to hear the claim.

II. Plaintiffs have failed to establish standing under the Declaratory Judgments Act.

To have standing to bring a declaratory judgment action, a plaintiff "must assert a legal basis on which a claim for relief can be grounded and must allege an injury in fact to a legally protected or cognizable interest." *Ainsworth v. Colorado Ltd. Gaming Control Com'n,* 45 P.3d 768, 772 (Colo.App. 2001), citing *Farmers Insurance Exchange v. District Court,* 862 P.2d 944 (Colo.1993). Here, the problem lies in the fact that Plaintiffs are unable to identify a legally protected interest.

A legally protected interest is "an interest emanating from a constitutional, statutory, or judicially created rule of law that entitles plaintiff to some form of judicial relief." *Dill v. Board of County Com'rs of Lincoln County,* 928 P.2d 809, 815 (Colo.App. 1996). Plaintiffs insist that the Public Trust Doctrine under which they sue was judicially created centuries ago, and that even if the Colorado courts have not expressly recognized this fact, the statutes and constitution of the State have nevertheless upheld this doctrine. This Court can find no such doctrine in existence in Colorado, either in the statutes and constitution, nor in judicial pronouncements.

First, Plaintiffs point to the general welfare clause of the Colorado Constitution. This clause says nothing about protecting the environment, as it is general in nature and does not seek to impose any particular obligation on the State. It cannot form the basis of the Public Trust Doctrine in Colorado.

Next, Plaintiffs point to C.R.S. §§ 33-10-101(1) and 33-33-102. These statutes deal with protection of recreational areas, wildlife, and certain lands and waters. They say nothing about the atmosphere. Even if the phrases "recreation areas" and "wildlife and their environment" were to be interpreted to include the atmosphere, these purpose statements do not create a public trust in the environment because they are followed by comprehensive schemes setting out exactly how the State intends to offer that protection; they do not then generally provide a cause of action for citizens who feel the state is not doing enough to protect the environment.

Finally, the Public Trust Doctrine has never been recognized by the Colorado courts. Plaintiffs have failed to point to a single case. Even if this Court was to apply ancient law and assume that it carries through to Colorado today, Plaintiffs have been unable to point to any authority in which the government was required to protect the atmosphere. This Court is not inclined to create new law. Therefore, Plaintiffs have failed to allege an injury to a legally protected interest.

CONCLUSION

For reasons discussed above, the Motion is **GRANTED**. This case is dismissed with prejudice.

SO ORDERED this 7th day of November, 2011.

BY THE COURT:

R. Michael Mullins
District Court Judge

EXHIBIT E

STATE OF NEW MEXICO
SANTA FE COUNTY
FIRST JUDICIAL DISTRICT COURT

[redacted],
by and through her parents Carol
and John Sanders-Reed, and
WILDEARTH GUARDIANS,

Plaintiffs,

v.

No. D-101-CV-2011-01514

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

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court on Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment, the Court having considered both of the motions, the responses and replies filed in relation to them, and the arguments of counsel at a hearing on June 26, 2013,

THE COURT FINDS that Defendants' Motion for Summary Judgment is well taken, and that Motion is hereby GRANTED.

THE COURT FURTHER FINDS that Plaintiffs' Motion for Summary Judgment is not well taken, and that Motion is hereby DENIED.

Accordingly, IT IS HEREBY ORDERED that summary judgment is entered in favor of Defendants and against Plaintiffs on the claims in this action.

The reasons for the Court's decisions on these motions are set forth in the transcript excerpt attached hereto as "Exhibit A."

HON. SARAH SINGLETON
DISTRICT JUDGE

APPROVED as to form:

Approved by email 06/27/13
Stephen R. Farris
Judith Ann Moore
Assistant Attorneys General
New Mexico Attorney General's Office
111 Lomas Blvd NW, Suite 300
Albuquerque, NM 87102
505-222-9024
Attorneys for Defendant State of New Mexico

/s/ Gary J. Van Luchene
Sean Olivas
Gary J. Van Luchene
Keleher & McLeod, P.A.
PO Box AA
Albuquerque, NM 87103
505-346-4646
Attorneys for Governor Martinez

Approved by email 07/01/13
Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501

-and-

James J. Tutchton
WildEarth Guardians
6439 E. Maplewood Ave
Centennial, CO 80111
Attorneys for Plaintiffs

00191474

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-201101514

[redacted], by and through her parents CAROL AND JOHN SANDERS-REED, and WILDEARTH GUARDIANS,

Plaintiffs,

vs.

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

Defendants.

PARTIAL TRANSCRIPT OF PROCEEDINGS

On the 26th day of June 2013, at approximately 1:25 p.m., this matter came for hearing on PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, before the HONORABLE SARAH M. SINGLETON, Judge of the First Judicial District, State of New Mexico, Division II.

The Plaintiffs, [redacted], by and through her parents CAROL AND JOHN SANDERS-REED, and WILDEARTH GUARDIANS, appeared by Counsel of Record, SAMANTHA RUSCAVAGE-BARZ, Wildearth Guardians Staff Attorney, 516 Alto Street, Santa Fe, New Mexico 87501.

EXHIBIT A to Order on Summary Judgment

The Defendant, SUSANA MARTINEZ, in her official capacity as Governor of New Mexico, appeared by Counsel of Record, GARY J. VAN LUCHENE, Keleher & McLeod, Attorneys at Law, Post Office Drawer AA, Albuquerque, New Mexico 87102.

The Defendant, STATE OF NEW MEXICO, appeared by Assistant Attorney General, JUDITH ANN MOORE, New Mexico Attorney General's Office, 111 Lomas Blvd NW, Suite 300, Albuquerque, New Mexico 87102.

At which time the following proceedings were had:

INDEX

EXHIBIT A to Order on Summary Judgment

JUNE 26, 2013

(Note: In Open Court at 3:05 p.m.)

(Note: Excerpt of Court's Observations, Directions, Ruling:)

THE COURT: I previously ruled that I thought that the New Mexico Supreme Court would apply the Public Trust Doctrine if the Court was convinced that the Legislature or the agencies charged with implementing environmental laws had ignored the atmosphere, that in that situation the Court would apply a Public Trust Doctrine. I have to say it's not an easy fit, because many of the cases with the Public Trust Doctrine arose in the context of water. And it's not easy, always easy to translate water or ownership of streams or stream beds to something like what to do about greenhouse gas emissions.

I think that in applying this Doctrine, as I've said before, the Court would allow -- the Supreme Court would allow the judicial branch to bypass the political process if there was an indication that the political process had gone astray, that they had ignored what they were supposed to do, or if the agency was not attempting to apply the statutory scheme, or if the public was excluded from the processes. And I think that those criteria are all criteria that I need to use in looking at this summary judgment motion.

As recognized by the Court in Hawaii, the State may compromise public rights in the resource only when the decision is

EXHIBIT A to Order on Summary Judgment

made with a level of openness, diligence, and foresight that is commensurate with the high priorities that the rights command under the laws of the state. That's somewhat of a paraphrase, but it's pretty close to what *Kelly* said.

So have any of these criteria that I identified or that *Kelly* identified been met in this case? Well, I think I've already said, in my opinion, there has been no inaction by the Legislature. The Legislature has established statutes, and has established a scheme, an administrative scheme for protecting the atmosphere. So then the issue would be, has there been the type of inaction by the legislative body that would warrant application of the Public Trust Doctrine? Has the State forgotten its role in protecting the atmosphere?

The EIB proceedings, clearly, they repealed regulations, and that clearly was done pursuant to their statutory authority. But the issue in front of me today is whether or not the EIB did something other than determine that those regulations were not appropriate. Did the EIB decide that no regulations were needed to protect the environment?

Based on the discussions with counsel and reading of the EIB decision, I believe that they did do more than simply strike down the regulations that had been previously adopted. I believe that they made findings that there was no need to regulate the State's greenhouse gas emissions, because that would have no impact on the issue of global warming or on the climate change.

EXHIBIT A to Order on Summary Judgment

And I believe they further determined that decreases simply in the state's emissions, which would after all be a goal of regulation, would have no perceptible impact on climate change. So they did make a broader statement about the need or lack of need for greenhouse gas regulations.

The issue is not today whether the Plaintiff agrees with that decision. It's not even whether I even agree with that decision. The question is whether or not the State is ignoring its role in protecting the environment or the atmosphere. The State's not ignoring it, it just disagrees with what the Plaintiff thinks is needed. So the State, in my opinion, has acted on this.

Now, is there the possibility under the Public Trust Doctrine that the State's action could be so wrongheaded as to invoke the Public Trust Doctrine? I suppose that in rare circumstances, it could. But I believe that before a court should jump in to apply a doctrine like the Public Trust Doctrine, there should be some showing that the process was tainted or that the public was foreclosed from pursuing the issue. That is not the case here.

They certainly -- the Plaintiff and others who believe that regulation of greenhouse gas emissions is appropriate, were given the opportunity to participate in the former case. And even more importantly, they are given the opportunity to participate in requesting an even broader discussion, or consideration of different regulations under 74-2-6 of the statutes.

EXHIBIT A to Order on Summary Judgment

Now, Plaintiff says, But that's not the same thing as applying the Public Trust Doctrine, because there we, the Petitioner, would bear the burden of proof. Well, I think that's a distinction without a difference, because contrary to Plaintiffs' argument, I believe they bear the burden of proof in a Public Trust Doctrine case also. They would have to prove, first of all, that there is an issue which would justify the application of the Public Trust Doctrine. Then they would have to prove that the State violated the Public Trust Doctrine by its actions. And finally, on the remedy situation, they would have to prove that the remedies they sought were appropriate.

So I believe here we have no indication that the Public Trust Doctrine should be applied in this case. I believe that what we are really talking about, at bottom, are political differences, and that the real remedy is to elect people who believe that greenhouse gases are a problem, that man does contribute to climate change, and that those are the people who should be making policy decisions. But that's a political decision, not a Court decision.

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

EXHIBIT A to Order on Summary Judgment

For that reason, I am granting the Defense Motion for Summary Judgment, given the showing that was made about what was done by the EIB on this issue. It's moot. But just as an aside, so you would know, even if I had not granted the Defendant's motion, I would not grant the Plaintiffs' motion. I believe that there are significant issues of fact that the Plaintiff has not overcome in its summary judgment pleadings before the Public Trust Doctrine could be applied.

So I would like now for an order to be prepared. Because I'm granting summary judgment, I'm going to require that the order contain the reasons that I've given you, so that they can give the Appellate Court guidance in my thinking. You may do it one of two ways: You may obtain a transcript of the hearing, and just attach that to the order, and say, By the reasons given by the Court at the hearing, the transcript of which is attached hereto, summary judgment is granted the Defense. Or you can write up what you believe to be the salient points of my ruling, and include those in the order.

Then after you do that, Mr. Van Luchene, you need to circulate it to opposing counsel, for opposing counsel to see if she is able to approve it as to form. If she has language changes to suggest, I expect you to negotiate with her over those. If you can get approval as to form, that's great. Then e-mail your proposed order indicating in the e-mail it's approved. Send it to me in Word format in case I want to make changes.

EXHIBIT A to Order on Summary Judgment

If you can't get approval as to form, then you will send me your proposed order via e-mail, in Word format. You should file objections to his proposed order, and you should send me your objections via e-mail, also in Word format, so if I wish to cut and paste from your objections, I can do so.

What amount of time do you think you will need to do all of that, drafts, circulate, negotiate?

MR. VAN LUCHENE: Your Honor, I think that your suggestion of possibly getting a transcript and attaching it is the one that's least likely to lead to any disagreements about the form of the order. And so it depends on how long it will take to get a transcript from the court reporter.

THE COURT: Of just the ruling?

MR. VAN LUCHENE: Of just the ruling.

(Note: Off the record discussion held.)

THE COURT: Well, let's say you could get it by the end of the week. After that, how long would you need?

MR. VAN LUCHENE: Five days. So a week from Friday.

THE COURT: Why don't we give you a week from Monday. All right?

MR. VAN LUCHENE: Okay.

THE COURT: And if you need more time because you're really negotiating over things, just send me an e-mail and I'll give you more time.

EXHIBIT A to
Order on Summary Judgment

All right. Is there anything else we need to do in this case?

MR. VAN LUCHENE: Your Honor, in the order, you mentioned that the Plaintiffs' summary judgment motion was moot. Do you want it denied as moot, or how do you want me to deal with that in the order? How do you want us to deal with that in the order?

THE COURT: Well, you can -- it is moot, but I'm denying it because I don't think they made a prima facie showing that there are no disputes of fact on the application of the Public Trust Doctrine to this issue and this action.

MR. VAN LUCHENE: Okay.

THE COURT: So I think you should put in both.

MR. VAN LUCHENE: Okay. Thank you, Your Honor.

THE COURT: Or, again, you can say, For the reasons given at the hearing, which will be in there. All right.

MR. VAN LUCHENE: We'll do. Thank you.

THE COURT: Then is there anything else?

MR. VAN LUCHENE: Not for Defense, Your Honor.

MS. RUSCAVAGE-BARZ: Not for Plaintiffs, Your Honor.

THE COURT: All right. We'll be in recess, then. Thank you for your presentations, for your excellent briefing on both sides.

(Note: Court in recess at 3:20 p.m.)

EXHIBIT A to Order on Summary Judgment

C E R T I F I C A T E

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, LORETTA L. BRANCH, Official Court Reporter for the First Judicial District of New Mexico, hereby certify that I reported, to the best of my ability, the proceedings, D-0101-CV-201101514; that the pages numbered TR-1 through TR-7, inclusive, are a true and correct partial transcript of my stenographic notes, and were reduced to typewritten transcript through Computer-Aided Transcription; that on the date I reported these proceedings, I was a New Mexico Certified Court Reporter.

Dated at Santa Fe, New Mexico, this 26th day of June 2013.

LORETTA L. BRANCH
New Mexico CCR No. 169
Expires: December 31, 2013

EXHIBIT A to Order on Summary Judgment