IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon; LISA CHERNAIK, guardian of Olivia Chernaik; KELSEY CASCADIA ROSE JULIANA, a minor and resident of Lane County, Oregon; and CATHY JULIANA, guardian of Kelsey Juliana, Plaintiffs, vs. KATE BROWN, in her official capacity as Governor of the State of Oregon; and the STATE OF OREGON, Defendants.	Case No. 16-11-09273 OPINION and ORDER

THIS MATTER comes before the Court on Plaintiffs Olivia Chernaik, Lisa Chernaik, Kelsey Cascadia Rose Juliana, and Cathy Juliana's ("Plaintiffs") *Motion for Partial Summary Judgment for Declaratory Relief* (filed January 9, 2015) and Defendants Kate Brown[1] and the State of Oregon's ("Defendants") *Motion for Summary Judgment* (filed January 9, 2015). The Court heard oral argument on the parties' motions on April 7, 2015. Christopher Winter of Brag Law Center, William Sherlock of Hutchinson, Cox, Coons, Orr & Sherlock, P.C., and John Mellgren of Western Environmental Law Center represented Plaintiffs. Renee Stineman, Rachel Weisshaar and Paul Garrahan of the Department of Justice represented Defendants.

[1] Defendant Kate Brown, in her official capacity as Governor of the State of Oregon, filed a notice to substitute for former Governor John Kitzhaber on March 11, 2015.

Background

This case's history dates back to 2011.[2] On May 19, 2011, Plaintiffs filed an Amended Complaint for Declaratory Judgment and Equitable Relief. In summary, Plaintiffs are children and their families who live in Oregon and allege that their personal and economic well being is directly dependent upon the health of the state's natural resources held in trust for the benefit of its citizens, including water resources, submerged and submersible lands, coastal lands, forests, and wildlife. Plaintiffs allege that all of these assets are currently threatened by the impacts of climate change. Specifically, Plaintiffs allege that the interests of Plaintiffs will be adversely and irreparably injured by Defendants' failure to establish and enforce adequate limitations on the levels of greenhouse gas ("GHG") emissions that will reduce the level of carbon dioxide concentrations in the atmosphere. (Am. Compl. ¶ 11.) In the prayer for relief, Plaintiffs seek:

(1) A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere.

(2) A declaration that water resources, navigable waters, submerged and submersible lands, islands, shore lands, coastal areas, wildlife and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets.

(3) A declaration that Defendants have failed to uphold their fiduciary obligations to protect these trust assets for the benefit of Plaintiffs as well as current and future generations of Oregonians by failing to adequately regulate and reduce carbon dioxide emissions in the State of Oregon.

(4) An order requiring Defendants to prepare, or cause to be prepared, a full and accurate accounting of Oregon's current carbon dioxide emissions and to do so annually thereafter.

(5) An order requiring Defendants to develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science.

[2] This opinion borrows heavily from this Court's original opinion filed April 5, 2012, particularly in the "Background" and "Separation of Powers Doctrine" sections.

(6) A declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by six percent each year until at least 2050.[3]

Climate change has been an issue of concern in Oregon for over three decades.[4] More recently, and more relevant to the case at bar, in 2004, then-Governor Ted Kulongoski appointed the Governor's Advisory Group on Global Warming ("Governor's Advisory Group"). In December 2004, the Governor's Advisory Group issued its report entitled *Oregon Strategy for Greenhouse Gas Reductions,* which recommended the following GHG reduction goals for Oregon:

(1) By 2010, arrest the growth of, and begin to reduce, statewide GHG emissions.

(2) By 2020, the state's total GHG emissions should not exceed a level 10 percent below the levels emitted in 1990.

(3) By 2050, the state's total GHG emissions should be reduced to a level of at least 75 percent below 1990 levels.

GOVERNOR'S ADVISORY GROUP ON GLOBAL WARMING, OREGON STRATEGY FOR GREENHOUSE GAS REDUCTIONS (2004), http://oregon.gov/ENERGY/GBLWRM/docs/GWReport-Final.pdf.

In 2007, the Legislative Assembly enacted House Bill 3543 (HB 3543), which was largely codified in ORS 468A.200 to ORS 468A.260. In relevant part, ORS 468A.200 to ORS 468A.260 did three things. First, it legislatively found that global warming "poses a serious threat to the economic well-being, public health, natural resources and the environment of

[3] Plaintiffs, in the Amended Complaint, include a section entitled "Science Documenting the Climate Crisis." This section sets forth the Plaintiffs' claims regarding the impact of fossil fuels and carbon dioxide on the environment and global temperatures. Plaintiffs allege that "to limit average surface heating to no more than 1°C (1.8°F) above pre-industrial temperatures, and to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million."

[4] In 1988, then-Governor Neil Goldschmidt created the Oregon Task Force on Global Warming. Based on the task force's recommendations, the Legislature passed Senate Bill 576, which established Oregon's first carbon emissions reduction goals. http://www.oregon.gov/ENERGY/GBLWRM/Portal.shtml (Last accessed March 30, 2012).

Oregon." ORS 468A.200(3).[5] Second, it adopted the GHG reduction goals recommended by the Governor's Advisory Group in its 2004 report. ORS 468A.205(1). Third, it created the Oregon Global Warming Commission (the "Commission"). ORS 468A.215(1). The Commission is comprised of 25 members[6] whose pertinent duties include:

> (1) Recommending ways to coordinate with state and local efforts to reduce GHG emissions consistent with ORS 468A.205;
>
> (2) Recommending statutory and administrative changes, policy measures and other recommendations to be carried out by state and local governments, businesses, nonprofit organizations and residents to further the goals established in ORS 468A.205;
>
> (3) Examining GHG cap-and trade systems as a means of achieving the goals established in ORS 468A.205;
>
> (4) Examining funding mechanisms to obtain low-cost GHG emissions reduction; and
>
> (5) Collaborating with state and local governments, the State Department of Energy, Department of Education, and State Board of Higher Education to develop and implement an outreach strategy to educate Oregonians about the impacts of global warming and to inform Oregonians of ways to reduce GHG emissions.

ORS 468A.235 to ORS 468A.245.

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[5] That global warming poses a "serious threat" is a "legislative finding" in the sense that the Legislature believes it is true and has, accordingly, decided to act upon that finding. Legislative facts or findings "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Chartrand v. Coos Bay Tavern*, 298 Or 689, 693 (1985) (internal quotation marks omitted). "Judicial notice of legislative facts is not subject to the Oregon Evidence Code, and parties are not entitled as a matter of right to present evidence to demonstrate such facts." *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm'n*, 318 Or 551, 558 (1994). As a former legislator, this Court understands the importance of legislative findings, which are not findings of fact in the same sense that judicial findings are. In the context of the case at bar, this Court wishes to make clear that it makes no comment at this juncture about the actual facts, or lack thereof, related to global warming.

[6] The Commission is comprised of twenty-five members, eleven of whom are "voting members." The voting members must have "significant experience" in the following fields: manufacturing, energy, transportation, forestry, agriculture, environmental policy. Additionally, two members of the Senate, not from the same political party, and two members of the House of Representatives, not from the same political party, shall serve as nonvoting members. ORS 468A.215.

Additionally, the statutes require that the Office of the Governor and other state agencies that are assigned the task of working to reduce GHG emissions must inform the Commission of their efforts and consider input from the Commission for such efforts. ORS 468A.235.

Plaintiffs, in the Amended Complaint, allege that in order to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million. (Am. Compl. ¶ 26.) To reduce carbon dioxide to 350 parts per million by the end of the century, Plaintiffs allege that the best available science concludes that carbon dioxide emissions must not increase and must begin to decline at a global average of at least six percent each year, beginning in 2013, through 2050, then decline at a global average of five percent a year. (Am. Compl. ¶ 27.) Plaintiffs allege that the GHG emission goals established in ORS 468A.205 fail to achieve the necessary GHG reductions according to the best available science. (Am. Compl. ¶ 36.) Furthermore, Plaintiffs allege that even if the goals established by the Legislature were adequate, Oregon has fallen far short of those goals. *Id.*

In October 2011, Defendants filed a motion to dismiss for lack of subject matter jurisdiction. This Court heard oral argument in January 2012 and issued an Opinion and Order on April 5, 2012, granting Defendants' motion to dismiss.

Plaintiffs appealed on July 9, 2012. The Court of Appeals issued an Opinion on June 11, 2014, reversing and remanding the case. On remand, the Court of Appeals has instructed this Court that the Plaintiffs "are entitled to a judicial declaration of whether, as they allege, the atmosphere 'is a trust resource' that 'the State of Oregon, as a trustee, has a fiduciary obligation to protect * * * from the impacts of climate change,' and whether the other natural resources identified in plaintiffs' complaint also 'are trust resources' that the state has a fiduciary obligation to protect." *Chernaik v. Kitzhaber*, 263 Or App 463, 481 (2014).

After remand, the parties filed cross motions for summary judgment on January 9, 2015. Plaintiffs, in their motion for partial summary judgment, request the following relief:

(1) A declaration of law that the State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public assets and to protect them from substantial impairment caused by the emissions of greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification;

(2) A declaration that atmospheric concentrations of carbon dioxide exceeding 350 parts per million constitutes substantial impairment to the atmosphere and thereby the other public trust assets;

(3) A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of carbon dioxide necessary to return atmospheric concentrations of carbon dioxide to 350 parts per million by the year 2100; and

(4) A declaration that Defendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon.

(Pls.' Mot. Partial Summ. J. 1.) Plaintiffs intend, following entry of the requested declaratory judgment, to petition for supplemental relief in the form of an injunction that:

(A) Requires Defendants to prepare, or cause to be prepared, a full and accurate accounting of Oregon's greenhouse gas emissions and to do so annually thereafter while this Court retains jurisdiction; and

(B) Requires Defendants to develop and implement a greenhouse gas reduction plan, based on the best available science, to achieve reductions in emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon necessary to protect public trust assets and return atmospheric concentrations of carbon dioxide to 350 parts per million by the year 2100.

(Pls.' Mot. Partial Summ. J. 1, n.1.)

Defendants request that the Court make the following six rulings:

(1) The common law public trust doctrine does not extend to the atmosphere.

(2) The common law public trust doctrine does not impose the particular affirmative actions associated with traditional legal trusts (i.e., fiduciary obligations or duties). Instead, Oregon courts have applied it only as a restraint on alienation.

(3) Because there are no fiduciary duties associated with the common law public trust doctrine, any declaratory or injunctive relief based on an alleged violation of such duties must be denied.

(4) Even if this Court recognizes new fiduciary duties under the public trust doctrine, injunctive relief is not warranted, because the Court must presume that the State will comply with the new law as announced, and therefore, that no future violation of law is likely.

(5) This Court is without authority to grant injunctive or further relief, because doing so would violate the principle of separation of powers.

(6) Finally, this Court lacks authority to grant injunctive relief, because such relief would cause the Court to decide a political question that our constitutional system entrusts to the other branches of government.

(State's Mot. Summ. J. 1-2.) This Court heard oral argument on the cross motions referenced above on April 7, 2015 and now issues its opinion.

Standard of Review

Pursuant to ORCP 47, the "court shall grant the motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law."

Discussion

I. Public Trust Doctrine

The public trust doctrine originates, in part, from Roman civil law. *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1234 (2012). Traditionally, the doctrine stands for the legal principle that the ownership of and sovereignty over lands underlying navigable waters belong to

the respective States within which they are found. *Illinois Cent. R. Co. v. State of Illinois*, 13 S Ct 110, 111 (1892); *Id.* at 1235. The States' interest in lands underlying navigable waters, however, included a public trust in which the lands underlying navigable waters are to be preserved for the public's use in navigation and fishing. *Shively v. Bowlby*, 14 S Ct 548, 551-52 (1894); *Cook v. Dabney*, 70 Or 529, 532 (1914). Despite the aforementioned limitation, and pursuant to accepted principles of federalism, the States retain residual power to determine the scope of the public trust over navigable waters. *PPL Montana*, *supra*, 132 S Ct at 1235. Therefore, the public trust doctrine is a matter of state law, subject to the federal power to regulate navigation under the Commerce Clause and admiralty power. *Id.* This Court therefore turns to the question of what resources are encompassed by Oregon's public trust doctrine.

II. Natural Resources Encompassed by the Public Trust Doctrine

Plaintiffs argue that the public trust doctrine, in Oregon, applies to submerged and submersible lands, waters of the State, beaches and shorelands, fish and wildlife, and the atmosphere. Defendants argue that Oregon's public trust doctrine only encompasses submerged and submersible lands.

A. Submerged and Submersible Lands are Encompassed by the Public Trust Doctrine

> "It is true that upon admission of the state into the Union, it was vested with the title to the lands under navigable waters, subject, however, at all times to the rights of navigation and fishery. To all intents and purposes the title of the state was burdened with a trust, so to speak, in favor of those two occupations. It would have no right or authority so to dispose of the subjacent lands in a manner calculated to prejudice or impede the exercise of those rights."

Cook, supra, 70 Or at 532.

The parties agree, and this Court declares, that the public trust doctrine encompasses submerged and submersible lands.

B. Waters of the State are not Encompassed by the Public Trust Doctrine

Oregon case law addressing the public trust doctrine has differentiated between the State's title to the lands under navigable waters and navigable waters themselves. Similarly to the aforementioned wording in *Cook*, the Oregon Supreme Court stated in regard to the lands underlying navigable waters that

> "although the title passed to the state by virtue of its sovereignty, its rights were merely those of a trustee for the public. In its ownership thereof, the state represents the people, and the ownership is that of the people in their united sovereignty, while the waters themselves remain public so that all persons may use the same for navigation and fishing. These lands are held in trust for the public uses of navigation and fishery . . . Being subject to this trust, they are *publici juris*; in other words, they are held for the use of the people at large. It was therefore concluded that the state can make no sale or disposal of the soil underlying its navigable waters so as to prevent the use by the public of such waters for the purposes of navigation and fishing."

Corvallis Sand & Gravel Co. v. State Land Bd., 250 Or 319, 334 (1968) (quotations and citations omitted).

The public trust doctrine, described in detail by the Court of Appeals, was predicated on title transferring to the State and the fee simple interest that was included therein. *Morse v. Oregon Division of State Lands*, 34 Or App 853, 859-62 (1978), *aff'd* 285 Or 197 (1979). As discussed above in *Corvallis Sand*, title to submerged and submersible lands transferred to the State of Oregon upon its admission to the Union. *Corvallis Sand*, *supra*, 250 Or at 334. Unlike submerged and submersible lands, title to navigable waters themselves did not pass to the State. Therefore, this Court declares that the public trust doctrine does not encompass waters of the State.

C. Beaches and Shorelands are not Encompassed by the Public Trust Doctrine

Plaintiffs acknowledge that "no Oregon case has held explicitly that the Public Trust Doctrine applies to Oregon's iconic beaches." (Pls.' Mot. for Partial Summ. J. 10.) After

reviewing the limited case law addressing the public trust doctrine, it appears that Oregon's public trust doctrine has not traditionally incorporated lands adjacent to but not underlying navigable waters. Therefore, this Court declares that the public trust doctrine does not apply to beaches, shorelands, or islands.

D. Fish and Wildlife are not Encompassed by the Public Trust Doctrine

Although the title of migratory fish and game "is held by the state, in its sovereign capacity in trust for all its citizens," these natural resources are regulated pursuant to laws that have been "upheld as legitimate exercises of the police power employed by a state to protect the welfare of all its citizens." *See State v. Hume*, 52 Or 1, 6 (1908) (demonstrating principle); *Monroe v. Withycombe*, 84 Or 328, 334-35 (1917). Plaintiffs acknowledge that courts "have always treated the Public Trust Doctrine as distinct from the State's police power authority." (Pls.' Resp. in Opp'n to State's Mot. for Summ. J. 18.) Based on that acknowledged distinction (which the Court finds to be appropriate) between the State's police power and the public trust doctrine, and considering the narrow scope of the public trust doctrine, this Court declares that the public trust doctrine does not apply to fish and wildlife.

E. The Atmosphere is not Encompassed by the Public Trust Doctrine

In their arguments addressing whether or not the public trust doctrine encompasses the atmosphere, the parties rely on cases from other states because no Oregon court has ever addressed the issue. Although case law from other states is perhaps informative, the public trust doctrine, as it is applied in each state, is a matter of that state's law. Oregon's public trust doctrine is a construct developed through Oregon's common law and its general principles have long been settled.

This particular natural resource, the atmosphere, is unique among all other natural resources that Plaintiffs allege are encompassed by the public trust doctrine. This Court first

questions whether the atmosphere is a "natural resource" at all, much less one to which the public trust doctrine applies. *Merriam-Webster* defines "resource" as "a natural feature or phenomenon that enhances the quality of human life." MERRIAM-WEBSTER (2015). Although the atmosphere perhaps may be said to fall within this broad definition of "resource," the atmosphere does not fit into the structure and legal reasoning which underpins Oregon's public trust doctrine for the following reasons:

> First, the State does not hold title to the atmosphere. Title to
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> "land underlying navigable waters devolved on the state upon its admission to the union. Such title included a full fee simple interest, historically called *jus privatum*, which was qualified by a public trust or *jus publicum*. By the terms of the public trust, submerged and submersible lands were to be preserved for public use in navigation, fishing and recreation . . . The severe restriction upon the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands, but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never by restored to the public and, accordingly, has required the highest degree of protection from the public trustee."

Morse, supra, 34 Or App at 859-60. As described in the Court's discussion regarding waters of the State, the public trust doctrine originated when title to the lands beneath navigable waters transferred to the State. Unlike submerged and submersible lands (and similar to the waters of the State) the State has not been granted title to the atmosphere.[7]

[7] The atmosphere is not acquired and sold or traded for economic value and hence is not a commodity. Concepts of title generally are based expressly or impliedly on property concepts which, by their nature, reflect commodity concepts; namely, that a thing can be measured or divided and used.

The Court notes that the harnessing of wind energy does produce mechanical energy and ultimately electricity. However, wind is not traded and sold amongst individuals as water, land, and fish and wildlife are. Rather, turbines sit, for example in Eastern Oregon, and absorb wind,

Second, the atmosphere does not present the same concern of being "exhaustible and irreplaceable" in nature, as the Court of Appeals referenced above in *Morse*.[8] The atmosphere is not the type of resource that "can only be spent once," although it certainly can be polluted or otherwise changed.

This Court, based on its understanding of the history of the public trust doctrine in Oregon, cannot conclude that the atmosphere is a "resource" to which the public trust doctrine is applicable. The Court is constrained by, among other things, the aspirational, rather than imperative, nature of the legislative response to the problem of global warming, as discussed earlier. Therefore, this Court declares that the public trust doctrine does not apply to the atmosphere.[9]

III. Duties Imposed by the Public Trust Doctrine

Plaintiffs argue that the State has a fiduciary obligation to protect the atmosphere and other public trust resources from impairment. Plaintiffs argue that in order to uphold its obligation under the public trust doctrine to manage and preserve essential natural resources in trust for the benefit of the citizenry, the State of Oregon must take action as soon as possible to achieve the reductions necessary to meet its obligation to return atmospheric concentrations of carbon dioxide to 350 parts per million by the year 2100. Defendants argue that even if the atmosphere or other resources are deemed assets encompassed by the public trust doctrine, the

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converting the energy from the wind into electricity. Similarly, solar panels sit and absorb sunlight, converting the energy from the sun into electricity.

[8] The Court is not suggesting that the atmosphere cannot be harmed. The remedy for the harm, if there is to be one, cannot be based on the public trust doctrine.

[9] Defendants argue, and this Court agrees, that the State has the authority, under its police power, to enact laws and take other actions to protect the atmosphere regardless of whether this Court declares that the public trust doctrine encompasses the atmosphere. (State's Mem. In Supp. of Mot. Summ. J. 6.)

obligations associated with the trust are not fiduciary. Defendants argue that the public trust doctrine imposes a restraint on alienation rather than affirmative duties.[10]

> "[I]t was recognized as the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with consequent right to use or dispose of any portion thereof, **when that can be done without substantial impairment of the interest of the public in such waters**, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce."

Morse, *supra*, 285 Or at 201-02 (emphasis added). In *Morse*, the Court concluded that there was no grant to a private party that resulted in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize and held that the public trust doctrine does not prevent all fills for other than water-related uses. The Court of Appeals similarly noted that although petitioners argued that the public trust doctrine prohibited the issuance of a gravel removal permit, the grant to a private party in that case did not involve a substantial impairment of the public interest as would be beyond the power of the legislature to authorize. *Kalmiopsis Audubon Society v. Division of State Lands*, 66 Or App 810, 820 n.11 (1984).

Reviewing the relevant case law, it appears to this Court that, historically, courts applying the public trust doctrine have merely prevented the State from entirely alienating submerged and submersible lands under navigable waters. Here, similar to the Oregon cases cited herein, there has been no grant to a private party alienating the atmosphere.[11] Again, this Court does not

[10] Defendants further argue that if the Court were to determine that the State owes fiduciary duties to the atmosphere, the Court should decline to issue a declaration concluding that the State has failed to uphold those duties because those duties would constitute newly-recognized obligations and the State is entitled to the presumption that it will comply with the law, as declared. This Court concurs. As the Court of Appeals stated in its opinion, "it must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine." *Chernaik*, *supra*, 263 Or App at 479.

[11] It is, in fact, difficult for the Court to imagine how the atmosphere can be entirely alienated.

believe that it is empowered, on the showing made by Plaintiffs, to rewrite the public trust doctrine to impose fiduciary duties. As a result, this Court declares that the State does not have a fiduciary obligation to protect submerged and submersible lands from the impacts of climate change.[12]

IV. Relief

Although the Court, in this Opinion, has made the declarations required by the Court of Appeals, the Court will further discuss relevant issues below in an attempt to make a complete record fully reviewable by the Court of Appeals.

A. Separation of Powers Doctrine

The Separation of Powers Doctrine stems from Article III, section 1, of the Oregon Constitution. It provides,

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Or Const, Art III, § 1. Although the Separation of Powers Doctrine mandates three separate and distinct branches of government, that separation is not always complete as some interaction between the branches remains desirable. *Rooney v. Kulongoski*, 322 Or 15, 28 (1995), *citing* The Federalist No 51 (A. Hamilton or J. Madison) (stating that separation of powers is deemed "essential to the preservation of liberty"); *Monaghan v. School District No. 1*, 211 Or 360, 364 (1957). Thus, a violation of separation of powers will be found only if the violation is clear. *Rooney*, *supra*, 322 Or at 28. To determine whether there has been a clear violation of the

[12] See Footnote 5, above, regarding the Court's comment on "the impact of global warming."

Separation of Powers Doctrine, the court makes two inquiries: (1) the "undue burden" inquiry; and (2) the "functions" inquiry. *Id.*

First, using the "undue burden" inquiry, the court must determine whether one department has "unduly burdened" the actions of another department in an area of responsibility or authority committed to the other department. *Id.* The "undue burden" inquiry "corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influence between governmental departments." *Id.* In *Rooney*, the Oregon Supreme Court held that their ballot title review function did not offend the Separation of Powers Doctrine. *Id.* at 29-30. The Court noted that "judicial review of the Attorney General's acts done pursuant to statute is a *well-established* role for the court and does not present the potential for the court to influence coercively the Attorney General." *Id.* at 29 (emphasis added).

Here, Plaintiffs' requested relief seeks to, among other things: (1) impose a fiduciary obligation on Defendants to protect the atmosphere from climate change;[13] (2) declare that Defendants have failed to meet this standard; and (3) compel Defendants to address the impact of climate change by reducing GHG emissions in a specific amount over an established timeframe. (Am. Compl. ¶¶ 47-52.)

Contrary to their own stated position, Plaintiffs are clearly asking this Court to substitute its judgment for that of the Legislature. Plaintiffs ask the Court to: (1) order Defendants to "develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science," and (2) issue a "declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six percent each year until

[13] While the declaration that the atmosphere is a public trust resource is only one aspect of Plaintiffs' requested relief, the atmosphere is central to the entire Amended Complaint. Plaintiffs want the atmosphere to be protected, through GHG emission reduction, in order to protect other named public trust assets.

at least 2050." (Am. Compl. ¶¶ 51, 52.) Unlike in *Rooney*, Plaintiffs ask this Court to step far outside of its well-established role – of adjudicating facts and analyzing extant law in the context of a concrete dispute – and affirmatively rule in contradiction to laws democratically established by the Legislature. That is true because, if this Court were to grant Plaintiffs' requested relief, it would effectively "strike down" HB 3543 and ORS 468A.200 to ORS 468A.260. Plaintiffs' requested relief would create a more stringent standard for GHG emission reductions and would thereby displace those goals established by the Legislature in HB 3543 and ORS 468A.200 to ORS 468A.260. It is hard to imagine a more coercive act upon the legislative department than to strike out a statutory provision and supplant it with the Court's own formulation.[14] Thus, the Court concludes that Plaintiffs' requested relief would impose an "undue burden" on the legislative branch and therefore would violate the Separation of Powers Doctrine. Indeed, it is difficult to see this case as anything other than an "undue burden" on the legislative branch when the Plaintiffs are really asking a solitary judge in one of thirty-six counties to completely subvert the legislative process and thereby subvert the elective representatives of the sovereign acting in concert with one another. The Plaintiffs effectively ask the Court to do away with the Legislature entirely on the issue of GHG emissions on the theory that the Legislature is not doing enough. If "not doing enough" were the standard for judicial action, individual judges would regularly be asked to substitute their individual judgment for the collective judgment of the Legislature, which strikes this Court as a singularly bad and undemocratic idea.

Second, using the "functions" inquiry, the court must determine whether one department is, or will be, performing functions committed to another department. *Rooney, supra*, 322 Or at

[14] It is well within the court's established role to strike down statutes when they are unconstitutional. Here, there is no allegation of unconstitutionality – Plaintiffs simply are dissatisfied with the Legislature's choice not to go as far as Plaintiffs wish to have it go.

28. In Oregon, the constitutionally-mandated framework for addressing issues of statewide significance is as follows. The Governor is the chief executive of the state. Or Const, Art V, §1. In that capacity, it is her constitutional duty to see "that the Laws be faithfully executed." *Id.* at §10. The principal responsibility for making "the Laws," which the Governor is to "execute," lies with the Legislature. Or Const, Art IV, §1 (vesting state's legislative power in the Legislative Assembly). However, in the course of discharging her executive duties, the Governor is required to keep the Legislature informed as to the condition of the state and she must recommend new laws to the Legislature as she deems appropriate. Or Const, Art V, §11. This is exactly the approach that former Governor Kitzhaber and the Legislature have taken with respect to climate change.[15] The 2007 Legislative Assembly, following the recommendations from the Governor's Advisory Group, enacted ORS 468A.200 to ORS 468A.260, which adopted specific GHG emissions goals for the state to achieve by 2010, 2020, and 2050. Plaintiffs, without arguing that ORS 468A.200 to ORS 468A.260 is unconstitutional or violates any statute, essentially ask the Court to impose a similar but more stringent policy. This is classic lawmaking and is the core function constitutionally reserved to the Legislature. That function is to decide politically – based upon whatever facts it deems relevant to the determination – whether or not global warming is a problem and what, if anything, ought to be done about it. Whether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature's GHG emission goals are too weak, too stringent, or are altogether unnecessary is beside the point. These determinations are not judicial functions. They are legislative functions.

[15] See "Background" section, above.

Therefore, the Court concludes that if it were to grant Plaintiffs' proposed relief, the Court would violate the Separation of Powers Doctrine.

B. Political Question Doctrine

The Political Question Doctrine is a variation on the Separation of Powers Doctrine. While the Oregon Supreme Court has recognized the Political Question Doctrine,[16] it is not clear whether this doctrine extends more, less, or the same freedom from judicial scrutiny as the Separation of Powers Doctrine standing alone. The Court finds it unnecessary to discuss the political question doctrine at length because the Court's discussion regarding the separation of powers doctrine thoroughly addresses Plaintiffs' proposed relief.[17]

C. Adversity

Lastly, the Court notes its lingering concern about questions of justiciability and adversity relating to Plaintiffs' proposed relief. Defendants do not dispute that climate change is an issue. Neither Plaintiffs nor Defendants argue that the State should refrain from regulating the impacts of climate change entirely or that the State should do less than what the State is currently doing to regulate the impacts of climate change. Rather, the dispute is confined to the extent the State should regulate the impacts of climate change. Should this case be remanded, this Court's inquiry would ultimately concern the desirable level of atmospheric concentrations of carbon

[16] In *Putnam v. Norblad*, 134 Or 433 (1930), the Oregon Supreme Court recognized the Political Question Doctrine. The Court stated that "[i]t is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provision." *Id.* at 440. The Court acknowledged that it was "not always easy to define the phrase 'political' question, nor to determine which matters fall within its scope." *Id.*

[17] The decision to cap GHG emissions and the level at which GHG emissions should be capped are policy decisions that should remain with the Legislature.

dioxide and the Court may not be limited to narrow parameters of the issue presented by the parties.[18]

V. Summary Judgment Record

Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgement as a matter of law. ORCP 47. Even if, *arguendo*, the Court of Appeals were to reverse and remand the case to this Court once again, this Court explicitly notes, based on the record, that there are genuine issues of material fact preventing summary judgment under ORCP 47 regarding whether there is an appropriate level of atmospheric concentrations of carbon dioxide and if so, what the appropriate level should be. As a result, this Court would be obligated to hold trial, with the necessary experts and evidence, before determining appropriate relief.

Conclusion

Based on the foregoing reasons, Plaintiffs' motion for partial summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED.

Renee Stineman shall prepare a judgment which shall expressly incorporate this Opinion and Order therein.

Dated this 11th day of May, 2015.

/s/ Karsten H. Rasmussen

Karsten H. Rasmussen, Presiding Judge

[18] As this Court noted above, in this Court's view, this issue belongs with the Legislature.