

IN THE SUPREME COURT OF THE STATE OF OREGON

OLIVIA CHERNAIK, A MINOR AND RESIDENT OF LANE COUNTY, OREGON; LISA CHERNAIK, GUARDIAN OF OLIVIA CHERNAIK; KELSEY CASCADIA ROSE JULIANA, A MINOR AND RESIDENT OF LANE COUNTY, OREGON; AND CATIA JULIANA, GUARDIAN OF KELSEY JULIANA,

*Petitioners on Review,*

v.

KATE BROWN, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF OREGON; AND STATE OF OREGON,

*Respondents on Review.*

Lane County Circuit Court Case No. 161109273

A159826

---

**PETITION FOR REVIEW OF OLIVIA CHERNAIK, LISA CHERNAIK,  
KELSEY CASCADIA ROSE JULIANA AND CATIA JULIANA.**

---

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Lane County, Honorable Rasmussen, Judge.

Opinion Filed: January 9, 2019

Author of Opinion: Armstrong  
Concurring Judges: Shorr, Garrett

**PETITIONERS ON REVIEW  
INTEND TO FILE A BRIEF ON THE MERITS**

Courtney B. Johnson, OSB No. 077221  
**CRAG LAW CENTER**  
3141 E. Burnside St.  
Portland Oregon, 97214  
(503) 525-2728  
[courtney@crag.org](mailto:courtney@crag.org)

William H. Sherlock, OSB No. 903816  
**HUTCHINSON COX**  
940 Willamette Street, Suite 400  
Eugene, Oregon 97401  
(541) 686-9160  
[lsherlock@eugenelaw.com](mailto:lsherlock@eugenelaw.com)

*Attorneys for Petitioners on Review*

Ellen F. Rosenblum, OSB No. 753239  
**Attorney General**  
Benjamin Gutman, OSB No. 160599  
Solicitor General  
Carson L. Whitehead, OSB No. 105404  
Assistant Attorney General  
1162 Court St. NE  
Salem, Oregon 97301  
(503) 378-4402  
[Carson.l.whitehead@doj.state.or.us](mailto:Carson.l.whitehead@doj.state.or.us)

*Attorneys for Respondents on Review*

## TABLE OF CONTENTS

<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS .....</b>	<b>2</b>
A. The Factual Record on Climate Change .....	2
B. Prior Proceedings in Chernaik I.....	4
C. The Circuit Court Action.....	5
D. The Court of Appeals Decision .....	6
<b>III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW .....</b>	<b>7</b>
A. Questions Presented .....	7
B. Proposed Rule of Law .....	7
<b>IV. IMPORTANCE OF LEGAL QUESTIONS PRESENTED .....</b>	<b>7</b>
<b>V. ARGUMENT IN SUPPORT OF QUESTIONS PRESENTED .....</b>	<b>9</b>
1. The Oregon Public Trust Doctrine .....	9
2. The Supreme Court Can, and Should, Adapt the Common Law to Current Circumstances. ....	12
3. The State has taken inconsistent positions regarding what natural resources are protected under the public trust and the scope of its fiduciary duty to protect those resources.....	15
<b>CONCLUSION.....</b>	<b>17</b>

## TABLE OF AUTHORITIES

### Cases

<i>Alsos v. Kendall</i> , 111 Or 359, 371, 227 P 286 (1924) .....	11
<i>Brusco Towboat v. State</i> , 284 Or 627, 589 P2d 712 (1978) .....	10
<i>Chernaik v. Brown</i> , 295 Or App 584, 600, ___ P3d ___ (2019) (emphasis in original) (“ <i>Chernaik IP</i> ”).....	6, 7
<i>Chernaik, et al. v. Kate Brown, et al.</i> , 16-11-09273 (May 11, 2015).....	2, 3
<i>Chernaik v. Kitzhaber</i> , 263 Or App 463, 328 P3d 799 (2014) ( <i>Chernaik I</i> ) .....	5
<i>Clackamas County v. Holmes</i> , 265 Or 193, 508 P2d 190 (1973), .....	13
<i>Cook v. Dabney</i> , 70 Or 529, 532, 139 P 721 (1914) .....	10
<i>Corvallis Sand &amp; Gravel Co. v. State Land Bd.</i> , 250 Or 319, 439 P2d 575 (1968) .....	10
<i>Friends of Yamhill County v. Bd. Of Comm'rs</i> , 351 Or 219, 264 P3d 1265 (2011) .....	13, 14
<i>Hume and Monroe</i> , 242 Or App 287, 301, 255 P3d 565 (2011).....	12
<i>Hinish v. Meier &amp; Frank</i> , 166 Or 482, 504, 113 P2d 438 (1941) .....	2, 9, 12, 13, 14, 15
<i>Monroe v. Withycomb</i> , 84 Or 328, 165 P 227 (1917) .....	11, 12
<i>Morse v. Or. Div. of State Lands</i> , 285 Or 197, 590 P2d 709 (1979) .....	10
<i>Nees v. Hocks</i> , 272 Or 210, 215, 536 P2d 512 (1975) .....	14
<i>Shively v. Bowlby</i> , 152 U.S. 1, 11, 14 S Ct 548 (1892) (affirming <i>Bowlby v. Shively</i> , 22 Or 410, 30 P 154 (1892)) .....	10
<i>State ex rel. Thornton v. Hay</i> , 254 Or 584, 597, 462 P2d 671 (1969) .....	14
<i>State of Oregon v. Monsanto Co., et al.</i> , Mult. Co. Circuit Court No. 18-cv-00540 (Jan. 4. 2018) .....	16

<i>State v. Dickerson</i> , 356 Or 822, 345 P3d 447 (2015) .....	11
<i>State v. Hume</i> , 52 Or 1, 5, 95 P 808 (1908) .....	10, 12

**Statutes**

ORS 468A.200-.260) .....	4
ORS 468A.200(1). .....	4
ORS 468A.205(1) .....	4
ORS 468A.205(1)(e) .....	4
ORS 537.334(2) .....	11

**Other Authorities**

<i>Institutes of Justinian</i> , 2.1.1 (J. Moyles trans, 3d ed 1896) .....	10
Order Taking Judicial Notice (Armstrong, J.) (Jan. 17, 2018) .....	16

**Rules**

ORAP 9.07 .....	1, 7
ORAP 9.07(1)(g), (4), (5) .....	7
ORAP 9.07(3) .....	8
ORAP 9.07(5) .....	9
ORAP 9.07(7), (15) .....	8
ORAP 9.07(8) .....	8
ORAP 9.07(10) .....	9
ORAP 9.07(11), (16) .....	9

**Constitutional Provisions**

Or Const, Art VIII § 5(2) .....	11
---------------------------------	----

## I. INTRODUCTION

This case raises essential questions—as yet unaddressed by this Court—regarding interpretation of the common law public trust doctrine. The public trust doctrine adopted by the Oregon Supreme Court provides that the state, by virtue of its sovereignty, holds certain natural resources in trust for the public. Defendants do not dispute that climate change is damaging Oregon’s natural resources and substantially interfering with established public uses of those resources. Plaintiffs seek a declaration that the State of Oregon, as trustee of those resources on behalf of its citizens, has an obligation to protect its natural resources including waters, wildlife, and the atmosphere from the effects of climate change. The Court of Appeals held that the common law public trust doctrine does not impose fiduciary duties on the state to affirmatively act to protect public trust resources from the effects of climate change.

Supreme Court review is warranted because this case meets many of the Court’s criteria for review set forth in ORAP 9.07. This case presents a significant issue of first impression in this Court regarding application of the common law of this state, the legality of government action or inaction to address climate change, and the scope of the public trust doctrine. Resolution of the questions presented in this case will have broad implications for current and future generations of Oregonians and their shared health, prosperity, and safety.

Although the principle of the public trust doctrine is firmly established in this Court's jurisprudence, no prior decisions of the courts of this state have considered whether the state must protect its natural resources from the impacts of climate change. But the common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is "one of its cardinal virtues." *Hinish v. Meier & Frank*, 166 Or 482, 504, 113 P2d 438 (1941). Plaintiffs submit that consideration of this case leads "to the conclusion that natural justice and the needs of the society in which we live should prevail over objections based upon the novelty of the asserted cause of action." *Id.* at 503.

## **II. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS**

This action arises out of the Lane County Circuit Court order in *Chernaik, et al. v. Kate Brown, et al.*, 16-11-09273 (May 11, 2015). Plaintiffs Olivia (Ollie) Chernaik, Kelsey Juliana, and their guardians sought declaratory and injunctive relief against Governor Kate Brown and the State of Oregon to enforce the state's fiduciary obligation under the public trust doctrine to protect the atmosphere, the waters, and the wildlife in this state from the impacts of climate change, as well as the economic, recreational, and aesthetic benefits that flow from those resources.

### ***A. The Factual Record on Climate Change***

The record in this case illuminates the threats to Oregon from catastrophic climate change. Experts, including Dr. Phil Mote, the Director of the Oregon

Climate Change Research Institute at Oregon State University, and Dr. James Hansen, former Director of the NASA Goddard Institute for Space Studies, presented an extensive factual and scientific record on the impacts of climate change. Defendants, in their answer to the amended complaint, admitted virtually all of the material facts and conceded “global climate change poses risks to the health of all Oregonians.” Excerpt of Record (“ER”)<sup>1</sup> 32.

Defendants further admit that global climate change is causing, and is likely to continue to cause, significant adverse effects such as disruption of natural ecosystems, displacement or disappearance of some animal species, increases in the frequency and intensity of storm events and other extreme weather events, increases in the frequency and severity of droughts in some areas, warmer and more frequent periods of intense heat, rising sea levels, decreased agricultural productivity in some areas, sea level rise and coastal erosion.

ER 30.

Defendants also admitted that greenhouse gas emissions have caused, and are causing, climate change. *Id.* Plaintiffs presented evidence to support a plan for reduction of greenhouse gases to restore our atmosphere. Defendants did not dispute plaintiffs’ allegations as to the safe maximum concentrations of greenhouse gases in our atmosphere or refute plaintiffs’ expert declarations on this issue. ER 31.

---

<sup>1</sup> Filed with Plaintiffs-Appellants Opening Brief (Feb. 25, 2016).



In 2007, the Oregon Legislature enacted the Global Warming Statute, (HB 3543 codified, in part, as ORS 468A.200-.260) in response to a report from the Governor's Advisory Group on Global Warming that called for "immediate and significant action to address global warming and to begin to prepare for the effects of global warming." ORS 468A.200(1). The statute sets non-binding targets for greenhouse gas reductions. ORS 468A.205(1). The legislature also created the Oregon Global Warming Commission with authority to track and evaluate progress towards the state's greenhouse gas reduction goals. ORS 468A.205(1)(e). Based on the findings of the Global Warming Commission, the state admitted in its Answer that "Oregon is likely to fall well short of the targets set by its greenhouse gas reduction and mitigation plan." ER 34. While plaintiffs do not agree that these targets are adequate to prevent the catastrophic effects of climate change and ocean acidification, and the summary judgment record supports this conclusion, the record is clear that the state is failing to meet its targets.

***B. Prior Proceedings in Chernaik I***

In 2012, following the first hearing on cross motions for summary judgment, the circuit court dismissed plaintiffs' claims, granting defendants' motion for summary judgment. Kelsey and Ollie appealed the circuit court's judgment and the Court of Appeals reversed and remanded the circuit court's decision. *Chernaik v.*

*Kitzhaber*, 263 Or App 463, 328 P3d 799 (2014) (*Chernaik I*). The appellate court found, in part:

“It follows that the trial court erred by not entering declarations regarding *whether*, as plaintiffs allege, under the public trust doctrine:

- ‘the atmosphere is a trust resource, and \* \* \* the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere as a commonly shared public trust resource from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians’; and
- ‘water resources, navigable waters, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, and fish are trust resources, and \* \* \* the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets as commonly shared public trust resources from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.’”

*Chernaik I*, 263 Or App at 479 (emphasis and alterations in original).

Consequently, the appellate court ordered:

“In short, 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. The answers to those questions necessarily will inform the court’s determination whether plaintiffs are entitled to any of the other relief they request.”

*Id.* at 481. The Court of Appeals remanded the case to the circuit court.

### ***C. The Circuit Court Action***

On remand, the parties each moved for summary judgment on the issue of whether the atmosphere, waters, shorelines and fish and wildlife are public trust

resources that the state has a duty to protect. The circuit court concluded that waters, shorelines, fish and wildlife, and the atmosphere are not encompassed by the public trust doctrine, and that the public trust doctrine “merely prevent[s] the State from entirely alienating submerged and submersible lands under navigable waters.” ER 16. The circuit court dismissed plaintiffs’ claims. Plaintiffs appealed the circuit court judgment to the Court of Appeals.

***D. The Court of Appeals Decision***

Respondents, in their appellate response brief, conceded that the circuit court erred in finding that the public trust doctrine does not include waters of the state. Ans. Br. at 13-15 & n.4. The Court of Appeals concluded, however, that it did not need to address whether the circuit court erred in narrowly defining the scope of the public trust natural resources to only include submerged and submersible lands. The court declined to declare whether the public trust doctrine encompasses waters of the state, wildlife, and the atmosphere.

Regarding the state’s obligations under the public trust doctrine, the court determined that “the state is *restrained* from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources,” but has no duty “to affirmatively act to protect public-trust resources from the effects of climate change.” *Chernaik v. Brown*, 295 Or App 584, 600, \_\_\_ P3d \_\_\_ (2019) (emphasis in original) (“*Chernaik II*”). The Court of Appeals

vacated and remanded the decision on procedural grounds with direction for the trial court to enter a judgment declaring the parties' respective rights. *Id.* at 601.

### **III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW**

#### ***A. Questions Presented:***

The public trust doctrine applies to natural resources in which the whole people are interested. Oregon cases have held that the state holds navigable waters, fish and wildlife, in trust for the people. Does the public trust doctrine include protection of the state's natural resources in addition to submerged and submersible lands?

Under the public trust doctrine, the state holds certain natural resources in trust for the public. Climate change is damaging these resources and substantially impairing the public's use of these resources. Does the common law public trust doctrine impose a fiduciary duty upon the state to protect trust resources from the negative impacts of climate change?

#### ***B. Proposed Rule of Law:***

Yes. Under the common law public trust doctrine, the state has a fiduciary duty to protect all trust resources, including but not limited to waters of the state, fish, wildlife, and the atmosphere, from the negative impacts of climate change.

### **IV. IMPORTANCE OF LEGAL QUESTIONS PRESENTED**

The case meets the Court's criteria for review set forth in ORAP 9.07. The issue presented is a matter of first impression before this Court regarding the application and proposed modification of a principle of Oregon common law. ORAP 9.07(1)(g), (4), (5). All Oregonians are affected by the decision in the case, and the consequence of the decision is important to the public as a whole because it

involves the protection of shared natural resources. ORAP 9.07(3). This case involves questions of how the state must manage resources that are a subject of concern to all Oregonians in the face of the climate change impacts, occurring now, which are significantly impairing the public interest in and use of those resources. *Id.*

A case from the Federal District of Oregon presenting similar issues is currently pending before the Ninth Circuit Court of Appeals. *Juliana v. U.S.*, No. 6:15cv-01517-TC-AA (D. Or. Oct. 15, 2018) (order on motions for summary judgment and for judgement on the pleadings), *on interlocutory appeal*, No. 18-36082 (9th Cir. Dec. 27, 2018). In *Juliana*, 21 youth plaintiffs from across the country allege the federal government is violating the public trust doctrine and the youth's Constitutional right to a stable climate. The plaintiffs in *Juliana* include two young people from Oregon. However, the *Juliana* plaintiffs do not assert any claims of state law, and resolution of the federal case will not address or resolve the matters of Oregon common law presented here.

The legal issue in this case is properly preserved and clearly presented in the briefing. ORAP 9.07(7), (15). The Court of Appeals decision resolved motions for summary judgment; no trial has yet occurred in this case. The facts in the record establish the issue presented for appeal. ORAP 9.07(8). The Oregon Department of Justice, as counsel to all Oregon agencies, has taken inconsistent positions causing

confusion on the issue of the state's duties under the public trust doctrine. ORAP 9.07(10). The Court of Appeals issued a written decision, and *amici* are available to advise the court. ORAP 9.07(11), (16).

This case will determine whether the courts are powerless to grant redress for conduct shown to be injurious to a plaintiff's rights simply because no prior case has addressed the specific violation alleged, or whether the courts may "supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require." *Hinish*, 166 Or at 504. The Court of Appeals read the common law narrowly and was unwilling to adapt the interpretation of the common law public trust doctrine. It is solely the province of the Supreme Court to determine the application of the common law public trust doctrine to the current circumstances presented in this case. ORAP 9.07(5).

## **V. ARGUMENT IN SUPPORT OF QUESTIONS PRESENTED**

### *1. The Oregon Public Trust Doctrine*

The public trust doctrine is well-established in the jurisprudence of this Court. First adopted in Oregon in *Bowlby v. Shively* and subsequently affirmed by the Supreme Court of the United States, the doctrine is grounded in the common law of England:

“By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of

all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, ... are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects.”

*Shively v. Bowlby*, 152 U.S. 1, 11, 14 S Ct 548 (1892) (affirming *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892)).<sup>2</sup>

This Court's jurisprudence articulating the public trust involved the disposition of beds and banks of waterways and the regulation of fishing and hunting wild game. *See, e.g., Cook v. Dabney*, 70 Or 529, 532, 139 P 721 (1914) (holding that the state could not convey title to a riverbed “without violating the trust under which it holds the title to such property,”); *Corvallis Sand & Gravel Co. v. State Land Bd.*, 250 Or 319, 439 P2d 575 (1968) (“[T]he lands underlying the navigable waters of the state are held by the state in trust for the benefit of the whole people of the state.”); *Morse v. Or. Div. of State Lands*, 285 Or 197, 590 P2d 709 (1979) (addressing state regulation of fill in waterways); *Brusco Towboat v. State*, 284 Or 627, 589 P2d 712 (1978) (addressing state leasing of submerged and submersible lands); *State v. Hume*, 52 Or 1, 5, 95 P 808 (1908) (title to fish

---

<sup>2</sup> These inalienable obligations of the trustee date back to the times of Roman Law. “By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.” *Institutes of Justinian*, 2.1.1 (J. Moyles trans, 3d ed 1896).

and wildlife is held “by the state, in its sovereign capacity, in trust for all its citizens”); *Alsos v. Kendall*, 111 Or 359, 371, 227 P 286 (1924) (recognizing state’s right to regulate fishing because state holds “in trust for its own citizens, title to and ownership of the fish in such waters, so far as they are capable of ownership while in a state of freedom,”); *Monroe v. Withycomb*, 84 Or 328, 165 P 227 (1917) (state ownership of fish is “in its sovereign capacity for the benefit of and in trust for its people in common”); *State v. Dickerson*, 356 Or 822, 345 P3d 447 (2015) (same).

The Oregon legislature and agencies have adopted various statutes and regulations enshrining and implementing the state’s public trust doctrine. *See, e.g.*, Or Const, Art VIII § 5(2) (“The [State Land] board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.”); ORS 537.334(2) (recognizing the “public trust” inherent in the “waters of this state”). Oregon courts have often interpreted statutes to be consistent with common law principles, and consider pre-existing common law as relevant context for statutory interpretation. For example, in *Simpson v. Dep’t of Fish & Wildlife*, the Court of Appeals reviewed prior cases interpreting game hunting laws and found that the court “viewed the statutory declaration of a state’s property interest in wildlife as being consistent with the common-law principles



expressed in *Hume and Monroe*.” 242 Or App 287, 301, 255 P3d 565 (2011) (referring to *State v. Hume*, 52 Or 1 (1908) and *Monroe v. Withycombe*, 84 Or 328 (1917)).

In sum, this Court has articulated and applied the public trust doctrine for more than a century. The doctrine is grounded in the duty of the sovereign to protect those shared resources that are a matter of concern to all Oregonians for the good of the public as a whole. The resources that are the subject of this case (waters, fish and wildlife, and the atmosphere) are equally as important to plaintiffs and the public as the resources at issue in this Court’s prior public trust cases. The primary difference presented here is the nature of the threat to the state’s natural resources and the public’s use of the same.

*2. The Supreme Court Can, and Should, Adapt the Common Law to Current Circumstances.*

It is true that no case has previously considered whether the public trust doctrine requires the state to protect trust resources from climate-changing actions which substantially impair the recognized public use of those resources. But this is not the first time this Court has faced a novel claim for which the specific relief had not yet been articulated.

In *Hinish*, an employee sought damages for invasion of privacy where his name was signed onto a political action by his employer. 166 Or 482. The court assessed whether the right of privacy should be accepted by the courts and a

violation of the right held actionable. *Id.* at 502. The court was cognizant of the changes to public broadcasting that had occurred recently in society, and recognized the common law's capacity for growth and expansion:

“We are called upon, as Mr. Justice Holmes says somewhere, ‘to exercise the sovereign prerogative of choice’ between the view that the courts for want of a precedent are impotent to grant redress for injury resulting from conduct which universal opinion in a state of civilized society would unhesitatingly condemn as indecent and outrageous, and the view that that common law, with its capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, contains within itself the resources of principle upon which relief in such a case can be founded.”

*Id.* at 503.

This Court acknowledged the adaptability of the common law to changing circumstances more recently in *Friends of Yamhill County v. Bd. Of Comm'rs*, when interpreting Measure 49's reference to a “common law vested right.” 351 Or 219, 264 P3d 1265 (2011). The court noted that the case of *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973), provides the six-factor test for a common law vested right. However, the court also noted that “almost 40 years have passed since this court decided *Holmes*,” and that conditions have changed during that time. *Friends*, 351 Or at 237. “We cannot lose sight of those changes in

applying the factors identified in *Holmes* to current conditions.” *Id.* at 238. The same is true in the present case.<sup>3</sup>

That climate change was unknown at the time the early public trust doctrine cases were decided in Oregon does not render the common law incapable of addressing the current condition.

Courts may, and indeed must, supplement and enlarge the law from time to time. *Hinish*, 166 Or at 504. As the court in *Nees v. Hocks* noted, “[t]his court has not felt unduly restricted by the boundaries of pre-existing common-law remedies. We have not hesitated to create or recognize new torts when confronted with conduct causing injuries which we feel should be compensable.” 272 Or 210, 215, 536 P2d 512 (1975). Plaintiffs here do not ask this Court to create a new tort, but rather to declare that the public trust doctrine contains within it a duty incumbent

---

<sup>3</sup> In *State ex rel. Thornton v. Hay*, the majority applied the doctrine of custom to confer a public right to use the dry sands of Oregon’s beaches. 254 Or 584, 597, 462 P2d 671 (1969). Justice Denecke concurred with the result, but would have applied the public trust doctrine. Quoting a treatise on waters and water rights, Justice Denecke explained that courts must not confuse the application of a principle under given circumstances with the principle itself:

“The law regarding the public use of property held in part for the benefit of the public must change as the public need changes. The words of Justice Cardozo, expressed in a different context nearly a half-century ago, are relevant today in our application of this law: ‘We may not suffer it to petrify at the cost of its animating principle.’”

*Id.* at 602 (Denecke, J., concurring) (quoting 1 Clark (ed-in-chief), *Waters and Water Rights*, at 202 (1976)).

on the state to protect our shared natural resources from the current threats of climate change. In other words, in light of the accelerating impacts from changing atmospheric conditions, the Court can adapt the common law doctrine of public trust to include the duty on the state to protect trust resources from that threat.

In finding that the state has no inherent duty to protect our shared natural resources from the impacts of climate change, the Court of Appeals has fallen exactly into the trap that the *Hinish* court was so wary of when it noted, “unless we establish a right in the plaintiff we establish a privilege or immunity in the defendant.” *Id.* at 503 (quoting *Clark v. Associated Retail Credit Men*, 105 F2d 62, 64 (DC Cir 1939)). The appellate holding at issue here, finding no state duty to protect trust resources, has the equivalent effect of finding the state may sit idly by and allow those resources and the associated public use of those resources to be substantially impaired, and eventually to waste away. Review by this Court will clarify the duty incumbent upon the state inherent in the public trust doctrine with respect to those resources in which all Oregonians share an interest.

*3. The State has taken inconsistent positions regarding what natural resources are protected under the public trust and the scope of its fiduciary duty to protect those resources.*

Following oral argument, plaintiffs moved the Court of Appeals to take judicial notice pursuant to OEC 201(b) of a recent complaint filed by the State of Oregon. *See* Pl. Mot. For Judicial Notice (Jan. 5, 2018) (referring court to

complaint filed in *State of Oregon v. Monsanto Co., et al.*, Mult. Co. Circuit Court No. 18-cv-00540 (Jan. 4, 2018) (“*State of Oregon v. Monsanto*”). The court granted the motion,<sup>4</sup> which brought to the court’s attention the glaring discrepancy between the state’s position in the present case and its allegations in *State of Oregon v. Monsanto*:

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

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

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

Mot. For Judicial Notice at 2 (emphasis added). In its decision here, the appellate court did not address *Monsanto* nor the inconsistent position adopted by the state with respect to both the scope of the natural resources under the public trust doctrine and its fiduciary role to protect those resources. By taking review, this

---

<sup>4</sup> Order Taking Judicial Notice (Armstrong, J.) (Jan. 17, 2018).

Court can help resolve the confusion within the state by clarifying the scope and substance of the public trust doctrine in Oregon.

## **CONCLUSION**

By accepting review of this case, the Court can clarify Oregon's common law public trust doctrine in light of the current circumstances of climate change and its impacts in Oregon. The question is a matter of importance to all Oregonians—present and future. And the answer will guide the sovereign's actions with respect to the public's economic, recreational, and aesthetic uses of the natural resources of this state. For the foregoing reasons, Petitioners respectfully request that the Court accept this Petition for Review.

DATED this 8th day of March, 2019.

*s/ Courtney Johnson*

---

Courtney Johnson, OSB No. 077221  
Crag Law Center  
3141 E. Burnside St.  
Portland, Oregon 97214  
[courtney@crag.org](mailto:courtney@crag.org)  
(503) 525-2728

William H. Sherlock, OSB No. 903816  
HUTCHINSON COX  
940 Willamette Street, Suite 400  
Eugene, Oregon 97401  
[lsherlock@eugenelaw.com](mailto:lsherlock@eugenelaw.com)  
(541) 686-9160

*Attorneys for Petitioners on Review*

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND  
TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this petition for review complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(d)(i)) is 4193 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(b)(2).

By: s/ Courtney Johnson  
Courtney Johnson, OSB No. 077221

## CERTIFICATE OF FILING

I hereby certify that on March 8, 2019, I directed the original PETITION FOR REVIEW OF OLIVIA CHERNAIK, LISA CHERNAIK, KELSEY CASCADIA ROSE JULIANA AND CATIA JULIANA to be electronically filed with the Appellate Court Administrator via the ECF filing system.

By: s/ Courtney Johnson  
Courtney Johnson, OSB No. 077221

## CERTIFICATE SERVICE

I hereby certify that on March 8, 2019 I served a certified copy of this PETITION FOR REVIEW OF OLIVIA CHERNAIK, LISA CHERNAIK, KELSEY CASCADIA ROSE JULIANA AND CATIA JULIANA by the court's electronic filing system on:

Ellen F. Rosenblum, OSB No. 753239  
**Attorney General**  
Benjamin Gutman, OSB No. 160599  
Solicitor General  
Carson L. Whitehead, OSB No. 105404  
Assistant Attorney General  
1162 Court St. NE  
Salem, Oregon 97301  
(503) 378-4402  
[Carson.l.whitehead@doj.state.or.us](mailto:Carson.l.whitehead@doj.state.or.us)

*Attorneys for Respondents on Review*



FILED: January 09, 2019

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon;  
LISA CHERNAIK, guardian of Olivia Chernaik;  
KELSEY CASCADIA ROSE JULIANA, a minor and resident of  
Lane County, Oregon; and CATIA JULIANA, guardian of Kelsey Juliana,  
Plaintiffs-Appellants,

v.

KATE BROWN, in her official capacity as Governor of the State of Oregon;  
and STATE OF OREGON,  
Defendants-Respondents.

Lane County Circuit Court  
161109273

A159826

Karsten H. Rasmussen, Judge.

Argued and submitted on December 09, 2016.

Courtney B. Johnson argued the cause for appellants. On the briefs were William H. Sherlock and Hutchinson Cox.

Carson L. Whitehead, Assistant Attorney General, argued the cause for respondents. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Steven M. Thiel filed the brief *amici curiae* for Law Professors.

Elisabeth A. Holmes and Blue River Law, P. C., filed the brief *amici curiae* for Mayor Kitty Piercy, Representative Peter Buckley, Councilor Peter Cornelison, Oregon Physicians for Social Responsibility, Oregon Environmental Council, Climate Solutions, Policy Interactive, Tom Bowerman, Earth Guardians 350 Club, 350 PDX, 350 Eugene, Rogue Climate, Columbia Gorge Climate Action Network, Southern Oregon Climate Action Now, Hair on Fire, Douglas County Global Warming Coalition, Indow Windows, Eric Strid, Oregon Unitarian Universalist Voices for Justice, Interfaith Earthkeepers, Climate Justice Committee of the Unitarian Universalist Fellowship of Corvallis, League of Women Voters of Oregon, and Coalition of Communities of Color.

Before Armstrong, Presiding Judge, and Shorr, Judge, and Garrett, Judge pro tempore.

ARMSTRONG, P. J.

Vacated and remanded.

---

**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondents

- No costs allowed.  
 Costs allowed, payable by Appellants.  
 Costs allowed, to abide the outcome on remand, payable by
-

1 ARMSTRONG, P. J.

2 Plaintiffs<sup>1</sup> sued defendants the State of Oregon and Governor Kate Brown<sup>2</sup>

3 (collectively, the state) for declaratory and equitable relief related to the state's alleged

4 failure to take sufficient steps to protect the state's public-trust resources from the effects

5 of climate change. This case is before us for a second time. In the first appeal, we

6 reversed the trial court's dismissal of the case on justiciability grounds and remanded for

7 the trial court to determine whether plaintiffs were entitled to declarations that the

8 atmosphere and other natural resources are trust resources that the state has a fiduciary

9 obligation to protect. *Chernaik v. Kitzhaber*, 263 Or App 463, 481, 328 P3d 799 (2014)

10 (*Chernaik I*). On remand, the trial court denied plaintiffs' motion for partial summary

11 judgment and granted the state's motion for summary judgment, concluding that (1) only

12 state submerged and submersible lands are resources encompassed by the common-law

13 public-trust doctrine and (2) the state does not have a fiduciary obligation to protect

14 public-trust resources from the effects of climate change. Based on those conclusions,

15 the trial court entered a judgment dismissing plaintiffs' case. Plaintiffs appeal, arguing

16 that they are entitled to the declarations that they sought in their motion. On appeal, we

17 conclude that the public-trust doctrine does not impose a fiduciary obligation on the state

---

<sup>1</sup> Plaintiffs were minor children who, through their guardians *ad litem*, sued defendants in 2011. However, we note that, since that time, plaintiffs have attained the age of majority.

<sup>2</sup> The trial court substituted Governor Brown, in her official capacity as Governor of the State of Oregon, as a party for former Governor John Kitzhaber, M.D., after Governor Brown took office.

1 to take affirmative action to protect public-trust resources from the effects of climate  
2 change. Because that conclusion resolves the controversy between the parties, we do not  
3 address the other declarations sought by plaintiffs. Accordingly, the trial court did not err  
4 in its rulings on the parties' summary judgment motions. However, because the trial  
5 court dismissed the case rather than entering a judgment declaring the parties' rights, we  
6 vacate and remand for the trial court to enter the requisite declaratory judgment.

7           We begin by discussing plaintiffs' amended complaint and our opinion in  
8 *Chernaik I* because the remand order in that case set up the parties' motions for summary  
9 judgment that are now on review. Plaintiffs sued the state in 2011 for declaratory and  
10 injunctive relief based on plaintiffs' conception of "the public-trust doctrine." In their  
11 amended complaint, plaintiffs assert that the state holds "vital natural resources" of the  
12 state in trust for the benefit of its citizens, including the waters of the state, submerged  
13 and submersible lands, islands, shorelands, coastal areas, wildlife, fish, and the  
14 atmosphere. Plaintiffs further allege that the state has a fiduciary obligation to protect  
15 and preserve those resources for purposes of "conservation, pollution abatement,  
16 maintenance and enhancement of aquatic and fish life, habitat for fish and wildlife,  
17 ecological values, in-stream flows, commerce, navigation, fishing, recreation, energy  
18 production, and the transport of natural resources."

19           Plaintiffs also set forth allegations related to the effects from climate  
20 change worldwide and, more specifically, effects from climate change on Oregon's  
21 natural resources, citizens, and economy, and allege that "[a] failure to take appropriate

1 action will result in the severe alteration and potentially the collapse of the earth's natural  
2 systems leaving a planet that is largely unfit for human life." Plaintiffs further allege that  
3 "Oregon has the ability to curtail greenhouse gas emissions, increase carbon  
4 sequestration, and take the steps necessary to protect the public trust assets of the State  
5 from the adverse [effects] of climate change." Plaintiffs recognize that the state has taken  
6 some steps meant to combat the effects of climate change; however, plaintiffs allege that  
7 the goals that the state has set are inadequate and, "[d]espite having a concrete  
8 greenhouse gas reduction and mitigation plan in place, Oregon is falling significantly  
9 behind the targets set by that plan."

10 Plaintiffs allege a single claim for declaratory relief based on the public-  
11 trust doctrine. For that claim, plaintiffs assert that the state has failed "to uphold [its]  
12 public trust obligations" with respect to the resources that plaintiffs allege are part of the  
13 public trust, and that failure "threatens the health, safety, and welfare of Plaintiffs, as well  
14 as present and future generations of Oregon citizens." In their prayer for relief, plaintiffs  
15 request both declaratory and injunctive relief:

16 "[1.] A declaration that the atmosphere is a trust resource, and that  
17 the State of Oregon, as a trustee, has a fiduciary obligation to protect the  
18 atmosphere as a commonly shared public trust resource from the [effects]  
19 of climate change for Plaintiffs and for present and future generations of  
20 Oregonians.

21 "[2.] A declaration that water resources, navigable waters,  
22 submerged and submersible lands, islands, shorelands, coastal areas,  
23 wildlife, and fish are trust resources, and that the State of Oregon, as a  
24 trustee, has a fiduciary obligation to protect these assets as commonly  
25 shared public trust resources from the [effects] of climate change for  
26 Plaintiffs and for present and future generations of Oregonians.

1            "[3.] A declaration that Defendants have failed to uphold their  
2            fiduciary obligations to protect these trust assets for the benefits of  
3            Plaintiffs as well as current and future generations of Oregonians by failing  
4            adequately to regulate and reduce carbon dioxide emissions in the State of  
5            Oregon.

6            "[4.] An order requiring Defendants to prepare, or cause to be  
7            prepared, a full and accurate accounting of Oregon's current carbon dioxide  
8            emissions and to do so annually thereafter.

9            "[5.] An order requiring Defendants to develop and implement a  
10           carbon reduction plan that will protect trust assets by abiding by the best  
11           available science.

12           "[6.] A declaration that the best available science requires carbon  
13           dioxide emissions to peak in 2012 and to be reduced by at least six per cent  
14           each year until at least 2050."

15           In response to plaintiffs' amended complaint, the state filed a motion to  
16           dismiss based on a lack of subject matter jurisdiction, arguing that the trial court lacked  
17           the authority to grant the relief that plaintiffs sought. The trial court granted that motion,  
18           and plaintiffs appealed.

19           On appeal, we reversed the trial court's dismissal of plaintiffs' amended  
20           complaint. *Chernaik I*, 263 Or App at 481. We concluded that plaintiffs' first two  
21           requests for declaratory relief, on which plaintiffs focused in that appeal, were cognizable  
22           under the Uniform Declaratory Judgments Act, and that those requests presented a  
23           justiciable controversy under the act. *Id.* at 475, 479. Thus, we concluded that

24           "the trial court erred by not entering declarations regarding *whether*, as  
25           plaintiffs allege, under the public trust doctrine:

26           "• 'the atmosphere is a trust resource, and \* \* \* the State of Oregon,  
27           as a trustee, has a fiduciary obligation to protect the atmosphere as a  
28           commonly shared public trust resource from the impacts of climate

1 change for Plaintiffs and for present and future generations of  
2 Oregonians'; and

3 "• 'water resources, navigable waters, submerged and submersible  
4 lands, islands, shorelands, coastal areas, wildlife, and fish are trust  
5 resources, and \* \* \* the State of Oregon, as a trustee, has a fiduciary  
6 obligation to protect these assets as commonly shared public trust  
7 resources from the impacts of climate change for Plaintiffs and for  
.8 present and future generations of Oregonians.'"

9 *Id.* at 479 (emphasis and ellipses in original). We then declined "to address whether  
10 plaintiffs' remaining requests for declaratory and injunctive relief are nonjusticiable  
11 because a court would violate separation-of-powers or political-question principles if it  
12 granted the requests" because "[t]hat question cannot be answered until a court declares  
13 the scope of the public trust doctrine and defendants' obligations, if any, under it." *Id.* at  
14 480.

15 On remand, the state answered plaintiffs' amended complaint. The trial  
16 court then entered a scheduling order for the parties to file simultaneous motions for  
17 summary judgment or partial summary judgment that addressed the merits of plaintiffs'  
18 requested relief.

19 Plaintiffs moved for partial summary judgment, requesting that the trial  
20 court issue the following declarations:

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

1                   "2. A declaration that atmospheric concentrations of carbon dioxide  
2 (CO<sub>2</sub>) exceeding 350 parts per million (ppm) constitutes substantial  
3 impairment to the atmosphere and thereby the other public trust assets;

4                   "3. A declaration that to protect these public trust assets from  
5 substantial impairment, Oregon must contribute to global reduction in  
6 emissions of CO<sub>2</sub> necessary to return atmospheric concentrations of carbon  
7 dioxide to 350 ppm by the year 2100; and

8                   "4. A declaration that Defendants have failed, and are failing, to  
9 uphold their fiduciary obligations to protect these trust assets from  
10 substantial impairment by not adequately reducing and limiting emissions  
11 of carbon dioxide and other greenhouse gases in, or within the control of,  
12 the State of Oregon."<sup>3</sup>

13 Plaintiffs specifically did not seek a ruling on summary judgment with respect to their  
14 requests for injunctive relief set out in the amended complaint.

15                   The state moved for summary judgment on all of plaintiffs' requests for  
16 relief in the amended complaint. The state specifically requested that the trial court make  
17 the following rulings, and dismiss plaintiffs' amended complaint:

18                   "1) The common law public trust doctrine does not extend to the  
19 atmosphere.

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

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

---

<sup>3</sup> We recognize that the declarations plaintiffs requested in their motion differ in substantive ways from the declarations sought in their amended complaint. Because we conclude that the trial court correctly denied plaintiffs' motion for partial summary judgment, we do not address the import of those differences.



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

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

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

10           The trial court granted the state's motion for summary judgment, denied  
11 plaintiffs' motion for partial summary judgment, and entered a general judgment  
12 dismissing the action. In a letter opinion, the trial court set out its reasoning. The court  
13 first concluded that only submerged and submersible lands are resources that are  
14 encompassed by the public-trust doctrine.<sup>4</sup> In doing so, the court determined that the  
15 following resources are not public-trust resources: navigable waters of the state, beaches,  
16 shorelands, islands, fish and wildlife, and the atmosphere.

17           The court then turned to the duties that the state has under the public-trust  
18 doctrine. The court reviewed relevant case law and concluded that, historically, "courts  
19 applying the public trust doctrine have merely prevented the State from entirely  
20 alienating submerged and submersible lands under navigable waters," and noted that no  
21 such alienation is at issue in this case. Based on that history, the court concluded that

---

<sup>4</sup> "The phrase 'submersible lands' generally refers to the land lying between the high-water mark and the low-water mark of a navigable body of water, whether tidal or nontidal; the term 'submerged lands' is used to describe the land lying below the low-water mark." *Kramer v. City of Lake Oswego*, 285 Or App 181, 201, 395 P3d 592, *rev allowed*, 362 Or 38 (2017).

1 "the State does not have a fiduciary obligation to protect submerged and submersible  
2 lands from the [effects] of climate change."<sup>5</sup>

3           On appeal from that judgment, plaintiffs assign error to the trial court's  
4 denial of their motion for partial summary judgment and its grant of the state's motion for  
5 summary judgment. Both rulings are reviewable on appeal "to determine whether either  
6 party is entitled to judgment as a matter of law." *Busch v. Farmington Centers*  
7 *Beaverton*, 203 Or App 349, 352, 124 P3d 1282 (2005), *rev den*, 341 Or 216 (2006).  
8 Here, the issues presented on appeal reduce to purely legal questions.

9           Plaintiffs argue that the trial court erred (1) in concluding that the public-  
10 trust doctrine applied only to submerged and submersible lands, (2) in concluding that the  
11 public-trust doctrine does not impose affirmative obligations on the state to protect trust  
12 resources from the effects of climate change, and (3) in not reaching the question of  
13 whether the state has upheld its public-trust duty to protect public-trust resources from  
14 substantial impairment resulting from climate change.<sup>6</sup> Because our conclusion on the  
15 issue is dispositive, we address only whether the state has fiduciary obligations under the

---

<sup>5</sup> In an effort to make a complete record for appeal, the trial court also concluded that the separation-of-powers doctrine prevented it from granting the relief that plaintiffs requested. Plaintiffs argue on appeal that the trial court erred in reaching that issue. Because we affirm the trial court on other grounds, we do not address plaintiffs' argument.

<sup>6</sup> We reject without discussion plaintiffs' assertion that the trial court applied an incorrect legal standard in considering the parties' summary judgment motions based on a footnote discussion by the court about legislative findings the Oregon Legislature had made with regard to climate change.

1 public-trust doctrine to affirmatively protect public-trust resources from the effects of  
2 climate change. We conclude that it does not.

3           We start with a brief discussion of the historical underpinnings of Oregon's  
4 public-trust doctrine. Under the "equal-footing doctrine," upon admission to the union,  
5 Oregon obtained title to the submerged and submersible land underlying "title-navigable"  
6 water by virtue of the state's sovereignty.<sup>7</sup> *Kramer v. City of Lake Oswego*, 285 Or App  
7 181, 201, 395 P3d 592, *rev allowed*, 362 Or 38 (2017). The state's ownership of those  
8 lands "is comprised of an interrelationship of two distinct aspects, each possessing its  
9 own characteristics." *Brusco Towboat v. State Land Bd.*, 30 Or App 509, 516, 567 P2d  
10 1037 (1977), *rev'd in part on other grounds*, 284 Or 627, 589 P2d 712 (1978). First, the  
11 state holds full fee title in the property, called the *jus privatum*, which includes the power  
12 of alienation, *viz.*, the power to convey private interests in and use of that property for  
13 any purpose. *Id.* at 516-17; *see also Corvallis & Eastern R. Co. v. Benson*, 61 Or 359,  
14 370, 121 P 418 (1912) ("This private property in tidelands, the State by its legislative  
15 assembly, may grant to any one in any manner, or for any purpose, not forbidden by the  
16 constitution[.]").

17           "Th[e] second aspect of the state's ownership is called the *jus publicum*,"  
18 *Brusco Towboat*, 30 Or App at 516, and is rooted in the principle that "[n]avigable

---

<sup>7</sup> "Title-navigable" waters are "waterways to which the state was granted ownership of the underlying land as an incident of sovereignty under the equal-footing doctrine." *Kramer*, 285 Or App at 198. What constitutes a "title-navigable" waterway is a matter of federal law. *PPL Montana, LLC v. Montana*, 565 US 576, 591, 132 S Ct 1215, 182 L Ed 2d 77 (2012).

1 waterways are a valuable and essential resource and as such all people have an interest in  
2 maintaining them for commerce, fishing, and recreation," *id.* at 517. That aspect of the  
3 state's ownership is the common-law public-trust doctrine *per se--viz.*, the state "takes  
4 title to the submerged and submersible lands underlying navigable waters *in trust for the*  
5 *public* for purposes of navigation, fishing, and recreation." *Kramer*, 285 Or App at 201  
6 (emphasis in original); *see also Illinois Cent. R. Co. v. State of Illinois*, 146 US 387, 436,  
7 13 S Ct 110, 36 L Ed 1018 (1892) ("The doctrine is founded upon the necessity of  
8 preserving to the public the use of navigable waters from private interruption and  
9 encroachment[.]").

10           Unlike the *jus privitum*, the *jus publicum* cannot be alienated by the state.  
11 *Brusco Towboat*, 30 Or App at 517. Thus, "[r]egardless of how the state may choose to  
12 convey its private title to submerged and submersible lands, such title, even in the hands  
13 of a private party, remains subject to the paramount power of the state to intervene on  
14 behalf of the public interest." *Id.* at 518; *see also Illinois Cent. R. Co.*, 146 US at 435  
15 (The states own the land underlying navigable waters "with the consequent right to use or  
16 dispose of any portion thereof, when that can be done without substantial impairment of  
17 the interest of the public."); *Corvallis Sand & Gravel v. Land Board*, 250 Or 319, 334,  
18 439 P2d 575 (1968) ("These 'public rights' are the rights of navigation and fishery and the  
19 state has no authority to dispose of the submerged lands in such a manner as to interfere  
20 with these rights."). The public-trust doctrine is a common-law doctrine that is a matter  
21 of state law. *See, e.g., PPL Montana, LLC v. Montana*, 565 US 576, 603, 132 S Ct 1215,

1 182 L Ed 2d 77 (2012) (affirming that the doctrine is a matter of state law); *Shively v.*  
2 *Bowlby*, 152 US 1, 57-58, 14 S Ct 548, 38 L Ed 331 (1894) (describing the nature and  
3 origin of the public-trust doctrine).

4 In deciding cases based on the public-trust doctrine, Oregon courts have  
5 "focused on the extent to which the state can alienate the lands held in trust, or on the  
6 power of the state to regulate activity with respect to title-navigable waterways."  
7 *Kramer*, 285 Or App at 203, 203-04 (discussing cases).<sup>8</sup> Thus, historically, the public-  
8 trust doctrine has served to place restraints on state action with respect to the lands it  
9 holds underlying navigable waterways to protect the recognized public uses in those  
10 waterways. That is, the state may not convey interests in those lands or allow uses of  
11 those lands or the waters over them in a manner that causes a substantial impairment to  
12 the public's right to navigation, commerce, fishing, or recreation in those waters.

13 With that background in place, we turn to the arguments presented in this  
14 appeal. Plaintiffs' first argument, which we ultimately do not reach, is that the public-  
15 trust doctrine applies to more than just the submerged and submersible lands to which

---

<sup>8</sup> See *Morse v. Oregon Division of State Lands*, 285 Or 197, 203, 590 P2d 709 (1979) (state not prohibited by the public-trust doctrine from granting permit for estuary fill for nonwater-related uses; "[t]here is no grant here to a private party which results in such substantial impairment to the public's interest as would be beyond the power of the legislature to authorize"); *Cook v. Dabney*, 70 Or 529, 532, 139 P 721 (1914) (state had no right to convey property "in a manner and for a purpose which would act as a direct and permanent impediment to navigation"); *Corvallis & Eastern R. Co.*, 61 Or at 372 (rejecting argument that the state could convey title to tidelands only for a public benefit); *Bowlby v. Shively*, 22 Or 410, 427, 30 P 154 (1892), *aff'd*, 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894) (state may dispose of tidelands in whatever manner it deems best, "subject only to the paramount right of navigation and the uses of commerce").

1 Oregon obtained title upon statehood by virtue of its sovereignty. Plaintiffs assert that  
2 the doctrine also encompasses all "essential natural resources," including, among other  
3 things, the waters of the state, fish and wildlife, and the atmosphere. Because we do not  
4 reach the merits of that argument as unnecessary to our disposition, we proceed in this  
5 opinion to refer to "public-trust resources" in the abstract, without identifying the  
6 resources that the term necessarily encompasses.

7 Plaintiffs' second argument, which we do address, asserts that the public-  
8 trust doctrine does more than restrain state action. Plaintiffs argue that the doctrine  
9 imposes fiduciary obligations on the state to take affirmative action to prevent substantial  
10 impairment to public-trust resources and, in particular, substantial impairment from the  
11 effects of climate change. Essentially, plaintiffs argue that inherent in the public-trust  
12 doctrine is a state obligation to protect public-trust resources from substantial  
13 impairment--whatever the source of that impairment--and that we should not be  
14 constrained from applying the public-trust doctrine in a manner that upholds that  
15 principle simply because our prior case law was based on fact patterns that are not readily  
16 translatable to the issue now before the court. Plaintiffs assert that adhering to the trial  
17 court's narrow view of the public-trust doctrine renders it meaningless in the face of the  
18 existential threats to our state's resources from climate change.

19 Many law professors also have appeared in support of plaintiffs as *amici*  
20 *curiae* (*amici* law professors).<sup>9</sup> On this issue they argue that "[t]he sovereign fiduciary

---

<sup>9</sup> Several individuals and citizen organizations also filed an *amicus curiae* brief in

1 duty to protect the public's crucial assets from irrevocable damage remains the *sine qua*  
2 *non* of the public trust." They assert that we should apply the trust-law concept that  
3 requires that a trustee not sit idle and allow damage to trust property to occur. They  
4 argue that, by not taking proper action in the face of climate change, the state is  
5 "abdicat[ing] [its] sovereign public trust responsibility to protect the climate system for  
6 today's citizens and for future generations."

7           The state responds that the public-trust doctrine does not impose  
8 affirmative, fiduciary-like trust duties upon the state. Rather, the state asserts, the public-  
9 trust doctrine is a means by which to guide state action--*viz.*, it imposes a restraint on  
10 state action so that its actions do not substantially impair the public's interest in the title-  
11 navigable waters of the state--but the doctrine does not compel any particular state action  
12 in the first instance. The state points out that the "trust" in the public-trust doctrine is not  
13 the same as a "trust" over property or money covered by a trust instrument, and, thus,  
14 ordinary trust law with its attendant fiduciary duties that are imposed on trustees does not  
15 apply.<sup>10</sup>

---

support of plaintiffs. In that brief, they describe the dire effects of climate change on Oregon's resources, citizens, and economy; assert, based on the best available science, that the state is failing to take action to prevent substantial impairment to Oregon's public-trust resources from the effects of climate change; and outline the practical solutions that currently exist and could be employed by the state to address those problems.

<sup>10</sup> We note that, on appeal, the state concedes that "title-navigable" waterways themselves, in addition to submerged and submersible lands, are covered by the public-trust doctrine, and that the trial court erred in that respect. However, because our disposition obviates the need to address precisely what resources are covered by the

1           Before we address the parties' arguments, we first return to what plaintiffs  
2 are asking for in this case. As set out above, plaintiffs bring a single claim for relief  
3 under the common-law public-trust doctrine. In connection with that claim, plaintiffs  
4 seek declarations that the state has a "fiduciary obligation" to protect public-trust  
5 resources "from the [effects] of climate change for Plaintiffs and for present and future  
6 generations of Oregonians." Thus, we must answer whether, under the common-law  
7 public-trust doctrine, the state has a fiduciary obligation to affirmatively protect public-  
8 trust resources from the effects of climate change.

9           As a starting point, we reject plaintiffs' and *amici* law professors' reliance  
10 on other state's case law and on other sources of Oregon law, such as the Oregon  
11 constitution, statutes, and regulations, to support their understanding of Oregon's  
12 common-law public-trust doctrine. As discussed above, the public-trust doctrine is a  
13 matter of state common law. As such, it is the common law of this state that determines  
14 the contours of that doctrine. That the state may have other obligations under the Oregon  
15 Constitution, statutes, or regulations does not inform what obligations the public-trust  
16 doctrine itself requires of the state, which is the question that plaintiffs have put at issue.  
17 Plaintiffs chose to sue the state based solely on the common-law public-trust doctrine; as  
18 such, we must base our analysis on that doctrine. In rejecting reliance on other sources of

---

public-trust doctrine, we decline to address whether that concession is well-taken. *See Kramer*, 285 Or App at 199-200, 200 n 20 (declining to address whether the public-trust doctrine applies to all navigable-in-fact waterways because it was not necessary to the disposition of the case).



1 Oregon law, we note that plaintiffs do not provide any supporting argument that those  
2 sources represent a legislative intention to codify, expand, or modify the common-law  
3 public-trust doctrine.

4           We thus turn to the main argument raised by plaintiff--that the public-trust  
5 doctrine imposes an inherent fiduciary obligation on the state to take affirmative action to  
6 prevent substantial impairment to public-trust resources from the effects of climate  
7 change. To support that argument, plaintiffs primarily rely on statements made in *Geer v.*  
8 *Connecticut*, 161 US 519, 16 S Ct 600, 40 L Ed 793 (1896), *overruled by Hughes v.*  
9 *Oklahoma*, 441 US 322, 99 S Ct 1727, 60 L Ed 2d 250 (1979), and *State v. Dickerson*,  
10 356 Or 822, 345 P3d 447 (2015). We consider those cases in turn.<sup>11</sup>

11           In *Geer*, Connecticut had convicted the defendant of a violation of the  
12 state's game law that prohibited the possession of certain game for the purpose of  
13 transporting it outside of the state. The defendant argued that the law under which he  
14 was convicted violated the Commerce Clause of the United States Constitution. *Geer*,  
15 161 US at 522. In addressing that question, the United States Supreme Court examined  
16 "the nature of the property in game and the authority which the state had a right lawfully  
17 to exercise in relation thereto." *Id.* The Court explained that property in game is based

---

<sup>11</sup> In discussing *Geer* and *Dickerson*, which are cases based on the state's sovereign interest in wildlife, we express no opinion whether those cases are based on the public-trust doctrine, rather than on a separate "wildlife trust doctrine," as asserted by the state. Rather, we examine those cases to determine if they stand for the more general proposition advocated by plaintiffs that state sovereign interest in a resource comes with an affirmative fiduciary obligation to protect that resource.

1 on the principle of common ownership, which the state has a right to control and regulate.  
2 *Id.* at 528. That power to control, however, "is to be exercised, like all other powers of  
3 government, as a trust for the benefit of the people, and not as a prerogative for the  
4 advantage of the government as distinct from the people, or for the benefit of private  
5 individuals as distinguished from the public good." *Id.* at 529. With regard to the statute  
6 at issue, the Court determined that it was a lawful exercise of that authority because it  
7 "confine[d] the use of such game to those who own it--the people of that state"--an  
8 exercise over internal commerce and not interstate commerce. *Id.* at 529, 532.

9           Plaintiffs rely on *Geer* for one statement in it. In the course of describing  
10 the state's ownership of game, the Court quoted from an Illinois Supreme Court case that  
11 stated:

12           "It is, perhaps, accurate to say that the ownership of the sovereign authority  
13 is in trust for all the people of the state; and hence, by implication, *it is the*  
14 *duty of the legislature to enact such laws as will best preserve the subject of*  
15 *the trust, and secure its beneficial use in the future to the people of the*  
16 *state.* But, in any view, the question of individual enjoyment is one of  
17 public policy, and not of private right."

18 *Id.* at 534 (quoting *Magner v. People*, 97 Ill 320 (1881) (emphasis to indicate portion on  
19 which plaintiffs rely)). Plaintiffs' reliance is misplaced for at least two reasons. First, the  
20 statement was not made by the Court as a comment on the nature of the public trust; the  
21 Court was quoting a much larger section from an Illinois Supreme Court case to support  
22 its point that state courts had also concluded that the states have authority "to qualify and  
23 restrict the ownership in game killed within its limits." *Id.* at 532-33. Second, the Court  
24 held only that the nature of property in game gives the state the *authority* to regulate the

1 taking of game and to prohibit its shipment out of state; it did not make any holding  
2 regarding affirmative duties of the states with respect to game or the public trust. *See*,  
3 *e.g., id.* at 534.

4           Plaintiffs also rely on the Oregon Supreme Court case of *Dickerson* for the  
5 proposition that the state has "powers and duties" over trust resources. In *Dickerson*, the  
6 defendant challenged his conviction for criminal mischief, ORS 164.354, which prohibits  
7 a person from intentionally damaging "property of another." The defendant had aided  
8 and abetted his son in shooting two state-owned deer decoys that they believed were wild  
9 deer. The issue in the case was whether wild deer are "property of another" for purposes  
10 of the criminal mischief statute. *Dickerson*, 356 Or at 823. To answer that question, the  
11 Supreme Court examined the nature of the state's sovereign interest in wild deer and  
12 concluded that "the state's sovereign interest in wild animals is in the nature of a 'legal  
13 \* \* \* interest' within the meaning of ORS 164.305(2)." *Id.* at 834 (quoting ORS  
14 164.305(2) (ellipses in original)). To reach that conclusion, the court relied in part on  
15 "the trust metaphor--sometimes referred to as the 'wildlife trust doctrine'--wildlife is the  
16 corpus of the trust, the state is the trustee, and the public is the beneficiary." *Id.* The  
17 court went on to say that

18           "[a]lthough the trust metaphor is an imperfect one \* \* \*, *the state's powers*  
19           *and duties with respect to wildlife have many of the traditional attributes of*  
20           *a trustee's duties.* Acting as a trustee, the state has the authority to manage  
21           and preserve wildlife resources and may seek compensation for damages to  
22           the trust corpus."

23 *Id.* at 835 (emphasis to indicate portion on which plaintiffs rely).

1           Plaintiffs' reliance on an excerpted statement is once again misplaced. In  
2 making that statement about the "powers and duties" of the state, the Supreme Court  
3 relied on earlier cases that had held that the state, as trustee, has *authority* to enact laws to  
4 protect wildlife. *See State v. Pulos*, 64 Or 92, 95, 129 P 128 (1913) ("[It is a] well-known  
5 principle that title to wild game is in the state, \* \* \*; that the taking of them is not a right,  
6 but is a privilege, which may be restricted, prohibited, or conditioned, as the law-making  
7 power may see fit."); *Portland Fish Co. v. Benson*, 56 Or 147, 154, 108 P 122 (1910)  
8 ("The title to the bed of all navigable rivers being in the state, the right to fish therein is  
9 subject to its control and supervision. \* \* \* The title to the fish, before they are captured,  
10 is in the state in its sovereign capacity, in trust for all its citizens, and the right to fish is  
11 subject to such laws as the legislature may enact tending to protect them from extinction  
12 by exhaustive methods of capture."); *State v. Hume*, 52 Or 1, 5-6, 95 P 808 (1908)  
13 (stating generally recognized principle that, "as an incident of the assumed [sovereign]  
14 ownership, the legislative assembly may enact such laws as tend to protect the species  
15 from injury by human means and from extinction by exhaustive methods of capture").  
16 Those cases, however, did not hold that the state has *a duty* to enact such laws. And, in  
17 *Dickerson*, the Supreme Court was not asked to determine if such a duty exists, and it did  
18 not do that.

19           There is nothing in our examination of Oregon's common-law public-trust  
20 doctrine that suggests that the doctrine imposes "fiduciary obligations" analogous to a  
21 legal "trust" to which trust law would apply, such as advocated by plaintiffs and *amici*

1 law professors. Rather, the public-trust doctrine uses the word "trust" as an imperfect  
2 metaphor to capture the idea that the state is restrained from substantially impairing the  
3 common-law public right to use public-trust resources for certain purposes. *Brusco*  
4 *Towboat*, 30 Or App at 517 ("The right of the public to use the waterways for these  
5 purposes has always been recognized at common law. As representative of the people,  
6 the sovereign bears the responsibility to preserve these rights." (Citation omitted.)).

7           As discussed above, the Oregon public-trust doctrine is rooted in the idea  
8 that the state is *restrained* from disposing or allowing uses of public-trust resources that  
9 substantially impair the recognized public use of those resources. We can find no source  
10 under the Oregon conception of the public-trust doctrine for imposing fiduciary duties on  
11 the state to affirmatively act to protect public-trust resources from the effects of climate  
12 change. Accordingly, we conclude that the trial court correctly granted the state's motion  
13 for summary judgment and denied plaintiffs' motion for partial summary judgment based  
14 on the above conclusion. Because that conclusion resolves the controversy between the  
15 parties, we do not address the other declarations sought by plaintiffs. *See* ORS 28.060  
16 ("The court may refuse to render or enter a declaratory judgment where such judgment, if  
17 rendered or entered, would not terminate the uncertainty or controversy giving rise to the  
18 proceeding."); *Kramer*, 285 Or App at 196 (holding that plaintiffs were not entitled to a  
19 declaration as to the public nature of the lake where the declaration of the scope of the  
20 public-trust doctrine resolved the controversy).

21           Finally, because this case was for declaratory relief, dismissal of the case

1 was not the correct disposition of it. The trial court should have entered a judgment  
2 declaring the parties' respective rights. *See Doe v. Medford School Dist. 549C, 232 Or*  
3 *App 38, 46, 221 P3d 787 (2009)* ("When the dismissal of a declaratory judgment action  
4 was clearly based on a determination of the merits of the claim, however, our practice has  
5 been to review that determination as a matter of law and then remand for the issuance of  
6 a judgment that declares the rights of the parties in accordance with our review of the  
7 merits."). Accordingly, we vacate and remand for the trial court to enter a judgment  
8 consistent with this opinion that declares the parties' rights.

9                   Vacated and remanded.