

# Climate Change & The Public Trust Doctrine: An Analysis of Atmospheric Trust Litigation

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## I. INTRODUCTION

According to the Intergovernmental Panel on Climate Change (IPCC), the Earth's temperature has increased by 0.85 degrees Celsius since 1880.<sup>1</sup> This rise in temperature is best explained by the increased amount of greenhouse gases (GHGs) in the atmosphere.<sup>2</sup> In fact, United States GHG emissions have increased by about 5% since 1990.<sup>3</sup> The Environmental Protection Agency (EPA) reports that increased GHGs in the atmosphere can be attributed to anthropogenic causes such as the accelerated consumption of fossil fuels in the electricity production through burning coal and natural gas, as well as an increase in burning petroleum based fuel for transportation.<sup>4</sup> These uses produce excessive amounts of carbon dioxide, as current levels of carbon dioxide in the atmosphere are at an all-time high.<sup>5</sup> The United States, a global economic powerhouse, produces more than 19% of the Earth's total GHG emissions, second only to China.<sup>6</sup> As the amount of GHGs in the atmosphere continues to increase, the threat of climate change has become a prevalent public concern.

While skeptics regard the rise in global temperature as a mere natural and periodical increase and posit that the climate will eventually stabilize itself, climate change science starkly disagrees.<sup>7</sup> Climate change has been largely attributed to a rise in anthropogenic GHG emissions. As such, the United Nations has become a key resource to explore appropriate avenues to address the problem. GHG emissions reductions have been the hot topic for the United Nations Framework Convention on Climate Change

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1. Lisa V. Alexander, et. al., *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1, 5 (2013), <http://www.ipcc.ch/report/ar5/wg1/> (last visited Oct. 27, 2014).

2. *See id.* at 13, 15.

3. *Sources of Greenhouse Gas Emissions*, ENVTL. PROT. AGENCY (Aug. 8, 2014), <http://www.epa.gov/climatechange/ghgemissions/sources.html>.

4. *See id.*

5. *National Greenhouse Gas Emissions Data*, ENVTL. PROT. AGENCY (Sept. 11, 2013), <http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html>.

6. *Global Greenhouse Gas Emissions Data*, ENVTL. PROT. AGENCY (Sept. 9, 2013), <http://www.epa.gov/climatechange/ghgemissions/global.html>.

7. *See id.*

(UNFCCC).<sup>8</sup> The UNFCCC's framework-protocol model encourages developed countries that are major GHG emitters, such as the United States and the European Union, to take the lead in reducing the amount of GHGs in the atmosphere.<sup>9</sup> In a treaty agreement founded upon concepts of international law, both developed and developing nations have adopted differentiated responsibilities to address the issue of climate change on a global scale.<sup>10</sup> However, much like many issues of international public concern, the varying level of commitment to reduce GHG emissions is disconcerting.

The Kyoto Protocol, an international treaty adopted in 1997, "represents the most significant, specific commitments that major emitters have taken on climate change."<sup>11</sup> The Kyoto Protocol included a broad range of signatories and contained specific, numerical emissions reductions targets aimed at combating climate change.<sup>12</sup> However, despite its participation in commitment negotiations as well as the commitment of other industrialized nations to reduce their emissions, the United States never brought the treaty to the Senate for ratification, ultimately limiting the Kyoto Protocol's power, reach, and impact.<sup>13</sup> Since the international realm of GHG emissions reductions is a difficult avenue to address climate change, the increasing public concern for a healthy and habitable environment hinges upon the efforts of domestic leaders and policymakers.

In recent years, the United States federal government has begun addressing climate change through GHG emissions regulations.<sup>14</sup> The U.S. has considered various economic tactics to reduce the amount of GHGs in the atmosphere, including implementing a cap-and-trade system that would create a carbon market requiring GHG emitters to pay a price for their carbon consumption. Instead of drafting new statutes to regulate GHGs in the atmosphere, the United States started developing regulation under the Clean Air Act of 1970.<sup>15</sup> In the 2007 Supreme Court case

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8. GHG Inventory Data, United Nations Framework Convention on Climate Change, *available at* [http://unfccc.int/ghg\\_data/items/3800.php](http://unfccc.int/ghg_data/items/3800.php).

9. See HARI M. OSOFSKY & LESLEY K. MCALLISTER, CLIMATE CHANGE LAW AND POLICY 69 (Vicki Been et al. eds., 2012).

10. See *id.* at 70.

11. *Id.* at 80.

12. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1998, 37 I.L.M. 32.

13. See HARI M. OSOFSKY & LESLEY K. MCALLISTER, *supra* note 9, at 80.

14. See *National Greenhouse Gas Emissions Data*, *supra* note 5 at 1.

15. 42 U.S.C.A. §§ 7401–7671 (West 2014).

*Massachusetts v. EPA*, the Court held that the Clean Air Act authorized the EPA to regulate GHGs emitted from motor vehicles.”<sup>16</sup> In *American Electric Power v. Connecticut* (2011), the high Court reinforced *Massachusetts v. EPA* by holding that regulatory suits under the Clean Air Act were an appropriate way of influencing the current federal approach to climate change.<sup>17</sup> Because these landmark cases have paved the way for addressing climate change through litigation strategies, they have also given rise to many other legal claims that have lead to stricter GHG emissions regulations. One such legal claim is the right to a habitable and clean atmosphere, which arises under the common law public trust doctrine.

## II. THE PUBLIC TRUST DOCTRINE

The concept of communal ownership of public spaces dates back to the Roman Empire, where Emperor Justinian wrote, “By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. . . All rivers and ports are public: hence the right of fishing in a port, or in rivers, is common to all men.”<sup>18</sup> Professor Mary Christina Wood describes the public trust doctrine to be “a declaration of public property rights as originally and inherently reserved through the peoples’ social contract with their sovereign governments.”<sup>19</sup> This social contract creates a fiduciary relationship between the public and their government, and requires the government, as trustee, to protect natural assets for the beneficiaries of the trust: present and future generations of citizens.<sup>20</sup> As the United States Supreme Court held in *Geer v. Connecticut*, the legislature is the primary trustee of the public trust doctrine.<sup>21</sup> Therefore, the judiciary, whose role is to determine the constitutionality of the ’legislation, must ensure that the legislature fulfills its duty to maintain the public trust for the beneficiary. The maintenance and protection of natural assets within the public trust must rank high amongst the essential purposes of government because of the benefit that these assets provide to society.<sup>22</sup> Because these assets are scarce in nature,

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16. *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007).

17. *See Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

18. Caesar Flavius Justinian, *Book II, Title I, Of the Different Kind of Things; And The Acquisition of Property*, THE INSTITUTES OF JUSTINIAN 50 (William Grapel trans., The Law Book Exchange Ltd. 2008).

19. Mary C. Wood, *Atmospheric Trust Litigation Across the World*, FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 106 (Ken Goghil, Chalres Samford, Tim Smith, eds., Ashgate Pub (Aust.) 2012), available at <http://law.uoregon.edu/assets/facultydocs/mwood/atmo.pdf>.

20. *See id.*

21. *Geer v. Connecticut*, 161 U.S. 519, 529, 533–34 (1896).

22. *See Wood, supra* note 19, at 107.

if left unprotected, they may be subject to selfish exploitation by private parties, ultimately leading to chaos and societal collapse.<sup>23</sup>

The Supreme Court, through its interpretation in *Illinois Central Railroad v. Illinois*, has acknowledged and upheld the applicability of the public trust doctrine, but has largely left it up to the states to implement.<sup>24</sup> Though rooted and often litigated in the context of lands beneath navigable waters within the boundaries of particular states, the scope of the public trust doctrine may be expanded and applied to a variety of states' natural resources. With the steady rise of the Earth's global temperature over the past century, the threat of climate change has raised concerns regarding the stability of the Earth's atmosphere for future generations. Thus, propositions to include the environment as a natural resource to be held within the public trust have been frequently considered. This paper will discuss current legal claims that seek to expand the public trust doctrine's scope to include the Earth's atmosphere and evaluate the ability of these claims to hold the government responsible, as a trustee, for maintaining a habitable atmosphere for the public as well as for future generations. Through analyzing the viability of public trust doctrine claims at the federal level, as well as examining current litigation in the state of New Mexico, this paper concludes that the task of including the atmosphere in the public trust doctrine is an uphill battle with many legal challenges.

Although the Supreme Court has entertained public trust doctrine claims, it has also allowed the states discretion to determine whether particular resources could be included within the definition of the public trust.<sup>25</sup> Because each state has its own constitutional language regarding its public trust, the likelihood of expanding the public trust doctrine to protect the atmosphere varies considerably. Thus, the viability of legal claims pursued in civil litigation requires a case-by-case analysis. One particular instance of ongoing atmospheric trust litigation at the state level is currently occurring in New Mexico. This paper analyzes the arguments presented during litigation, and concludes that plaintiffs must restructure their appeal to show sufficient causation in order to expand the public trust to include the atmosphere.

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23. See *id.* at 107.

24. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453, 455–56 (1892).

25. See *infra* note 31.

### III. BASIS FOR EXPANDING THE PUBLIC TRUST DOCTRINE

#### A. *The Public Trust Doctrine at the Federal Level*

The common law public trust doctrine was first recognized by the Supreme Court in its 1892 decision *Illinois Central Railroad v. Illinois*.<sup>26</sup> In this case, at issue was the private possession of lands beneath navigable waters in the state of Michigan.<sup>27</sup> Often utilized for public interstate commerce, these waters were held under the license of the crown, which exercised exclusive dominion over them and insured freedom in their use.<sup>28</sup> The Court applied the common law public trust doctrine and held that when property is public in nature and used for purposes in which the entire public is interested, such property becomes part of the public trust for the enjoyment of the people and shall be free from interference with private parties.<sup>29</sup> In this sweeping decision, the Supreme Court entrusted the state governments to hold all navigable waters and the land beneath them in a public trust for the benefit of the people.<sup>30</sup>

The Court considered the public trust doctrine again in *Geer v. Connecticut*, with regard to state ownership of wild game animals. As part of its discussion of the state's authority to enact preservation regulations, the Court reasoned:

[T]he development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.<sup>31</sup>

While the common law public trust doctrine has been acknowledged at the federal level, the Supreme Court in *PPL v. Montana* recently noted that in the public trust case of *Illinois Central Railroad v. Illinois*, the Court was interpreting and applying Illinois state law, thus concluding that “the public trust doctrine remains a matter of state law.”<sup>32</sup> Furthermore, the *Montana* Court held that “[u]nder accepted principles of federalism, the

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26. See *Illinois*, *supra* note 24, at 453–54.

27. See *id.* at 433.

28. See *id.* at 457.

29. See *id.* at 459.

30. See *id.* at 450, 458.

31. *Geer v. Connecticut*, 161 U.S. at 525; *but see* *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (overruling *Geer v. Connecticut* by holding that the general rule that applied to state regulation of natural resources should be similarly applied to the ownership of wild animals); *cf.* *Missouri v. Holland*, 252 U.S. 416 (1920) (denying the state's claimed ownership of migratory bird under international treaty).

32. *P.P.L v. Montana*, 132 S. Ct. 1215, 1235 (2012).

states retain residual power to determine the scope of the public trust over water within their borders.”<sup>33</sup> Therefore, the applicability of the common law public trust doctrine is ultimately left to the states to implement and adjudicate.<sup>34</sup>

### *B. The Public Trust Doctrine at the State Level*

Many states have directly incorporated the public trust doctrine into their state Constitutions, guaranteeing citizens public ownership of certain public areas and recognizing the state’s responsibility to protect the air, land, and water within its boundaries. These states effectively expanded the common law public trust doctrine to encompass natural resources that were not explicitly addressed at the federal level. For example, Article I, § 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>35</sup>

Similarly, Article IX, § 1 of the Louisiana Constitution provides:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.<sup>36</sup>

Perhaps most explicit, is the language in Article XI, § 1 of the Hawaii Constitution, which provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.<sup>37</sup>

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33. *Id.*

34. *See id.*

35. PA. CONST., art. I, § 27.

36. LA. CONST., art. IX, § 1

37. HAW. CONST., art. XI, § 1.

While some states incorporate the public trust doctrine into their State Constitutions, others provide for the public trust through legislative enactments to fit the needs of the public. Maine explicitly acknowledges the public trust doctrine as “a doctrine reflective of the customs, traditions, heritage and habits of the Maine people,” emphasizing the doctrine’s far-reaching scope.<sup>38</sup> Maine also requires the government to protect natural resources that are “essential to the health and welfare of the Maine people.”<sup>39</sup> In Florida, the state legislature guarantees that citizens “shall be assured public ownership of natural areas for purposes of maintaining this state’s unique natural resources; protecting air, land and water quality.”<sup>40</sup>

Whereas those states have codified the public trust doctrine into legislation, others have looked to the state judiciary to elucidate the doctrine’s reach and potential for expansion. While some states limit the doctrine’s applicability to land beneath navigable waters, many jurisdictions allow for its expansion to other common resources that benefit the public. For example, the Hawaii Supreme Court held that “[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.”<sup>41</sup> Similarly, a New Jersey court held that “the public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”<sup>42</sup> Even the Supreme Court of California made the explicit determination to expand the scope of the public trust to include “the purity of the air.”<sup>43</sup> Given the flexible nature of the doctrine, and the lack of federal authority limiting the scope of the public trust, the public trust doctrine has become an avenue to hold state governments accountable for protecting the natural resources within its boundaries.

With the growing concern for climate change and its potential harms, many environmental advocates have pursued legal action to coerce state governments into taking a more active role in regulating GHGs emissions, especially since the failure of the Kyoto Protocol. As such, this article argues that civil litigation under the common law public trust doctrine is a viable legal mechanism to prompt governments to more adequately address climate change. If litigants successfully prove a basis for expanding the public trust doctrine to include the atmosphere, they may thus create

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38. ME. REV. STAT. tit. 12, § 571 (2014).

39. *Id.*

40. FLA. STAT. ANN. § 259.032 (West 2014).

41. *In re* Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000).

42. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

43. *Nat’l Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 704, 719 (Cal 1983).



a fiduciary duty in the state government to protect the atmosphere from GHGs that strongly contribute to the rise in global temperature. Through atmospheric trust litigation, state judiciaries have the power to determine whether their legislative and executive branches have breached their duty to maintain the public trust, and if breached, require state legislatures and executives to create and implement effective environmental policies that will ensure the protection of the earth's atmosphere for generations to come.

#### IV. THE ATMOSPHERIC TRUST: ANALYSIS ON THE CURRENT LITIGATION IN NEW MEXICO

A notable example of current atmospheric trust litigation is taking place in New Mexico. Akilah Sanders-Reed, through her parents Carol and John-Sanders Reed, brought suit against the State of New Mexico and Governor of New Mexico for breaching their duties to maintain the public trust with respect to the atmosphere.<sup>44</sup> In their complaint, the aggrieved plaintiffs requested that the court declare the public trust doctrine operative in the State of New Mexico and to further declare the atmosphere's inclusion within the public trust.<sup>45</sup> With hopes in establishing such a duty, plaintiffs sought to create an enforceable cause of action against State officials who failed to limit GHG emissions within the state.<sup>46</sup>

This section is an in-depth analysis of *Sanders-Reed v. Martinez*, as it is recent, pivotal and potentially influential case that can determine the future of atmospheric trust litigation. First, this section will provide an overview of Plaintiff's allegations in *Sanders v. Martinez* and discuss the current New Mexico Environmental Improvement Board regulations that apply to Plaintiff's claims. Next, this section will discuss New Mexico's denial of plaintiffs' allegations and its responses in litigation. Finally, because the New Mexico government was ultimately granted summary judgment, this section will also analyze Plaintiff's ability to appeal.

##### A. Plaintiff's Allegations

The New Mexico Constitution, Art. XX, § 21 provides:

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44. Amended Complaint for Declaratory and Injunctive Relief at 8, *Sanders-Reed v. Martinez* (N.M. Dist. Feb. 16, 2012), 2012 WL 8898923 [hereinafter *Sanders-Reed*].

45. *Id.*

46. *Id.*

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.<sup>47</sup>

The above language illustrates that the quality of the air would be regulated by the government for the maximum benefit of the people. While there is no direct reference to a doctrine of public trust, the New Mexico Constitution iterates the ideals behind the common law doctrine by entrusting the state with protecting the natural resources within its boundaries for the public's benefit. The use of the word "shall" is significant because it delegates significant responsibility to New Mexico's state government to control and regulate air pollution. Thus, if the legislature fails to adequately regulate the quality of the atmosphere to the point where poor air quality or increased global temperature causes harm to citizens, the government breaches its duty to maintain the public trust. While no New Mexico court has interpreted this particular provision of its Constitution to either expand or limit its interpretational reach, the plaintiffs argued that the legislature's intent was obvious: New Mexico has a vested interest in protecting the state's natural resources for public benefit, and therefore has required the state to regulate, maintain and control the air.<sup>48</sup>

In *Sanders-Reed v. Martinez*, plaintiffs asserted that the public trust doctrine is inherently recognized in Article XX, § 21 of the New Mexico Constitution, which requires the legislature to protect the state's natural resources for the benefit of the people.<sup>49</sup> They also contended that the legislature had implicitly recognized the public trust doctrine through its statutes by declaring that surface waters within the state belong to the public for its beneficial use.<sup>50</sup> Furthermore, Plaintiffs asserted that "New Mexico's constitution and statutes mandating protection of the state's natural resources and the environment leave no doubt that the atmosphere is squarely within the domain of the public trust."<sup>51</sup> Plaintiffs alleged that due to the rising threat of climate change in New Mexico, government action was necessary to avoid catastrophic climate change impacts to New Mexico's water resources, infrastructure, agriculture, natural systems, outdoor recreation and related tourism, environmental quality and health and environmental justice and native peoples.<sup>52</sup> Because New Mexico

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47. N.M. CONST. art. XX, § 21.

48. *See Sanders-Reed*, *supra* note 44.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

currently has no regulatory structure in place to protect its citizens from the detrimental impacts of climate change, Plaintiffs alleged that the government is in violation of the public trust doctrine. Plaintiffs prayed that the Court declare the State's fiduciary duty to protect the atmosphere that it holds in trust for the benefit of the citizens of New Mexico.<sup>53</sup>

The New Mexico District Court initially dismissed Plaintiffs' complaint for failure to make substantive allegations, but "state[d] the belief that there is a place for the public trust and provided leave for the Plaintiffs to amend their Complaint."<sup>54</sup> The court also provided for the contours of an amended complaint and held that if Plaintiffs could show that the New Mexico legislature and government agencies had been ignoring the atmosphere, the Court would apply the public trust doctrine to the atmosphere.<sup>55</sup> Plaintiffs amended their complaint, asserting that the Governor of New Mexico, Susana Martinez ("Governor Martinez"), actively worked to repeal the New Mexico Environmental Improvement Board's ("EIB") that established GHG emissions reduction regulations.<sup>56</sup> The EIB's regulations required annual reporting of GHG emissions to the New Mexico Environmental Department ("NMED").<sup>57</sup>

In their amended complaint, Plaintiffs alleged that: (i) Governor Martinez announced that she would keep New Mexico from joining a regional cap-and-trade program aimed at reducing GHG emissions; (ii) the NMED repealed the EIB's GHG emissions reduction regulations; (iii) the state preferred climate change issues to be addressed at the Federal level due to the increased operating costs associated with enforcing EIB's regulations; (iv) Governor Martinez and the State of New Mexico "have no comprehensive plan to reduce the State's [GHG] emissions or otherwise mitigate its contribution to climate change;" (v) Governor Martinez failed "to prevent substantial impairment to the atmosphere and failed to effectively implement and enforce the [public trust] laws under her jurisdiction; (vi) the State, as trustee, "holds all natural resources within the State's borders, including the atmosphere, in trust for the people of New Mexico;" and (vii) the State "failed in its fiduciary duty to recognize

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53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

and prevent substantial impairment to the atmospheric public trust resource.”<sup>58</sup>

### *B. New Mexico’s 2010 Environmental Regulations*

Pursuant to the New Mexico Air Quality Control Act (“AQCA”), the New Mexico EIB became the state government agency charged with the responsibility of regulating and protecting the atmosphere.<sup>59</sup> On November 2, 2010, the EIB enacted the Greenhouse Gas Reduction Program, which established GHG reduction requirements and focused on the reduction of carbon dioxide emissions.<sup>60</sup> The Greenhouse Gas Reduction Program applied to stationary sources that emitted at least 25,000 metric tons of carbon dioxide, mainly coal and gas fired power plants, and oil and gas operations, and required these facilities to reduce their emissions by 3% per year.<sup>61</sup> Additionally, the EIB enacted a cap-and-trade program as part of their participation in the Western Climate Initiative.<sup>62</sup> This program sought to create a carbon market in New Mexico, and shared the EIB’s ultimate goal of reducing carbon dioxide emissions.<sup>63</sup> AQCA determined a procedure for promulgating the Greenhouse Gas Reduction Program and cap-and-trade program’s (collectively “the Programs”) regulations. The Programs specified that any implementation would be subject to public hearing and notice.<sup>64</sup> Particularly, AQCA allowed “all interested persons reasonable opportunity to submit data, views, or arguments orally or in writing, and to examine witnesses testifying at the hearing.”<sup>65</sup>

Immediately following the enactment of these regulations, the New Mexico Oil and Gas Association, the Independent Petroleum Association of New Mexico, the City of Farmington and the Farmington Electric Utility System appealed the EIB’s regulatory requirements to the New Mexico Court of Appeals.<sup>66</sup> The Court granted the appeal and required the EIB to review their regulatory scheme.<sup>67</sup> In December of 2010, Governor Martinez appointed new members to the EIB.<sup>68</sup> After the EIB balanced the health, welfare, and interest of the public against the technical

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58. *See id.*

59. N.M. STAT. ANN. § 74-1-8 (2014).

60. N.M. ADMIN. CODE § 20.2.100 (West 2014).

61. *See id.*

62. N.M. ADMIN. CODE § 20.2.350 (West 2011).

63. *See id.*

64. *See* N.M. STAT. ANN. § 74-1-8, *supra* note 59, at 3.

65. *See id.*

66. Susan Montoya Bryan, *Petitions Filed to Repeal NM GHG Rules*, BLOOMBERG BUS.WK., July 21, 2011, at 1.

67. *See id.*

68. *See id.*

practicability and economic reasonableness of the Programs, the NMED petitioned the new EIB to repeal the regulations.<sup>69</sup> To the State, it seemed as if the NMED and EIB agreed that the Programs' costs far outweighed any benefits to New Mexico residents.

By June of 2012, the Programs were repealed by the EIB, leaving the state with no means of measuring, regulating, reporting, or verifying the amount of GHGs in the atmosphere. The EIB's decision to repeal also left the state with no existing statutory framework for the regulation of the atmosphere.<sup>70</sup>

### C. Defendant's Response and Motion to Dismiss

In response to Plaintiff's allegations, the State of New Mexico moved to dismiss Plaintiff's amended complaint, making the following arguments: first, the State contended that the Court's dismissal of Plaintiff's original complaint created a heavy burden of proof on Plaintiff.<sup>71</sup> The State argued that without some indication that the citizens of New Mexico were being excluded from the legislative or administrative political process, the Court may not bypass and override the current political process as set forth in New Mexico's Constitution.<sup>72</sup> Thus, the State contended that under the Court's instruction, Plaintiff must prove that the political process of electing a legislative body to be held responsible for enacting a regulatory scheme to protect the atmosphere had gone astray.<sup>73</sup> Second, the State argued that the duty and authority to protect the State's natural resources lies within the legislature, not the judiciary.<sup>74</sup> Lastly, the State contends that under New Mexico's Rules of Civil Procedure, Plaintiff failed to state a claim upon which relief can be granted and that he relief sought is improper in a public trust case because it goes beyond the criteria set by the court.<sup>75</sup>

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69. See *id.*

70. See N.M. ADMIN. CODE § 20.2.100, *supra* note 60.

71. Defendant's Motion to Dismiss, *Sanders v. Martinez*, No. D010CV20111514, 2012 WL 8898920 (N.M. Dist., Mar. 30, 2012).

72. See *id.*

73. See *id.*

74. See *id.*

75. See *id.*

*1. Defendants Argued That Plaintiff Bears the Burden of Showing That New Mexico Citizens Were Excluded From the Legislative Process*

Defendants argued that Plaintiffs must bear the burden of proving that New Mexico's legislature and environmental agencies ignored the atmosphere.<sup>76</sup> To this end, Defendants contend:

Plaintiffs' Amended Complaint contains absolutely no factual allegations that the legislature failed to enact a statutory scheme to deal with the atmosphere or that the Environmental Improvement Board ("EIB"), the agency assigned to deal with the quality of the atmosphere, NMSA 1978 § 74-2-5, was not attempting to follow the statutory scheme, or that either the legislature or the EIB had failed to act in an open and inclusive manner."<sup>77</sup>

Thus, Defendants moved to dismiss for failure to show that the State ignored the atmosphere. Instead of denying the factual allegations against Governor Martinez and her attempts to block the EIB's GHG emissions regulations, Defendants instead argued that Governor Martinez's position in office is a consequence of an election by the citizens, and that the political process in New Mexico is alive and well.<sup>78</sup> Defendants justified their support for the EIB's repeal of the GHG emissions regulations while simultaneously contending that the EIB continued to follow the statutory scheme enacted by the New Mexico legislature.<sup>79</sup> Defendants accomplished this by evidencing the fact that Plaintiff participated in open EIB proceedings to oppose the repeal of the regulations.<sup>80</sup> Thus, Defendants explained, because of Plaintiff's participation in proceedings to oppose the EIB's repeal, and the EIB's considerations of the people's concerns, the citizens of New Mexico could not have been excluded from the political process.<sup>81</sup>

*2. Defendants Argued That the Legislature has the Exclusive Authority to Regulate the Atmosphere; Therefore, the District Court Lacked Jurisdiction in the Matter*

Defendants additionally contended that any finding of the District Court of New Mexico would undermine the separation of powers between the executive, legislative, and judicial bodies of the New Mexico government.<sup>82</sup> Defendants argued that the New Mexico Constitution grants exclusive

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76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

authority to protect the natural resources of New Mexico to the legislature.<sup>83</sup> By referring the State Constitution, Defendants attempted to absolve themselves of all liability from Plaintiffs' injury.<sup>84</sup> Defendants further contended that since "[p]ersons seeking GHG regulation were able to petition for rulemaking . . . [and] appeal to the Court of Appeals . . . [and] to petition the EIB to repeal the regulations," the District Court is not an appropriate venue to address their concerns.<sup>85</sup> Therefore, Defendants held that an alternative venue was available for citizens to review the EIB's decision to repeal their GHG emissions regulations—a well-established political process.<sup>86</sup> As such, Defendants argued that dismissal of Plaintiff's amended complaint is proper.<sup>87</sup>

### 3. *Defendants Argued That Plaintiffs Failed to State a Claim for Which Relief May be Granted*

Finally, Defendants argued that dismissal of a legal claim is appropriate where the plaintiff fails to state a claim upon which relief can be granted.<sup>88</sup> Defendants first summarized the court's language used in dismissing Plaintiff's original complaint: that "[it] do[es] not believe, if adopted, that the public trust doctrine would result in more than the court telling a State agency, or the State as whole, to consider certain things."<sup>89</sup> Here, Plaintiffs sought for the Court to make broad declarations regarding the state's fiduciary duties and to identify a breach of public trust. However, because Plaintiffs failed to show convincing evidence that some political process had gone astray, any such declaration would be outside the scope of allowable relief.<sup>90</sup> Lastly, Defendants argued that even if the District court were to consider another amended complaint pleading a substantive public trust issue, it lacks jurisdiction to grant Plaintiffs any of the forms of relief for which they pray, and that the action cannot be furthered.<sup>91</sup>

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83. *See id.* The language of the New Mexico Constitution states, "The legislature shall provide for control of pollution and control of despoilment of the air." N.M. CONST. art. XX, § 21, *supra* note 43.

84. *See id.*

85. *See Sanders, supra* note 71.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

#### *D. Supplemental Responses in Litigation*

In response to Defendant's Motion to Dismiss, Plaintiffs successfully invalidated many of Defendants' assertions.<sup>92</sup> First, Plaintiffs contended that their Amended Complaint comported with the instruction by the District Court, which required Plaintiffs to show:

[that] the legislature had failed to enact a statutory scheme to deal with the atmosphere, [that] the agency assigned to deal with the atmosphere was not following an existing statutory scheme, or [that] the public was excluded from the legislative or administrative process.<sup>93</sup>

Plaintiffs asserted that their Amended Complaint was consistent with the court's direction by contending that the State's decision to repeal its existing regulatory scheme to regulate GHG emissions without considering its negative impact on the public qualifies as a failure to protect the atmosphere as a resource within the public trust.<sup>94</sup> Plaintiffs also clarified that they were not asking the Court to dictate standards for GHG emissions regulations, nor were they asking the State to address the issue of climate change, but instead asked the Court to direct the State to analyze the degree of impairment that unlimited GHG emissions has on the atmosphere in New Mexico.<sup>95</sup> Thus, Plaintiffs asserted that their prayer for relief is appropriate.<sup>96</sup> Furthermore, Plaintiffs contended that granting a motion for dismissal is inappropriate because the standard for dismissal is very high.<sup>97</sup> According to the New Mexico Rules of Civil Procedure, the court must "accept all well-pled factual allegations as true and resolve all doubts in favor of the sufficiency of the complaint."<sup>98</sup> On that basis, Plaintiffs urged the court to deny Defendants' Motion to Dismiss.<sup>99</sup>

Plaintiffs justified their allegations of a cognizable public trust claim by claiming that the State actively worked to dismantle the existing regulatory scheme for controlling GHG emissions by repealing the EIB's GHG emissions regulations and subsequently failing to implement other substantive measures to address climate change.<sup>100</sup> Plaintiffs further alleged that this failure to regulate indicates that the "State is 'ignoring the atmosphere,' a situation which [the] Court suggested would lead the New

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92. Response to Defendants' Motion to Dismiss. *Sanders v. Martinez*, No. D0101CV201101514, 2012 WL 8525572 (N.M. Dist., Apr. 16, 2012).

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. N.M. R. DIST. CT RCP RULE 1-012.

99. *See Sanders, supra* note 92.

100. *See id.*



Mexico Supreme Court to ‘apply the public trust doctrine to the atmosphere.’”<sup>101</sup> Additionally, Plaintiffs emphasized the point that New Mexico has no existing legal framework, policy, or plan to protect the atmosphere from the harmful effects of unlimited and unregulated GHG emissions.<sup>102</sup> Defendants claimed that the political process in New Mexico has not gone astray because of the public’s participation in both the EIB GHG emissions regulations proceedings as well as its political elections process to elect Governor Martinez. Plaintiffs combated this argument by contending that the political process has gone astray substantively as a result of the State’s removal of all existing protections for the atmosphere.<sup>103</sup> Therefore, by alleging that the State had failed to enact a statutory scheme to deal with the atmosphere, Plaintiff’s Amended Complaint fell within the Court’s directive, and created a cognizable public trust claim, not subject to dismissal by the Court.<sup>104</sup>

Lastly, contrary to Defendants’ assertions, Plaintiffs’ request for declaratory relief does not ask the Court to assess the degree of impact GHG emissions have on the atmosphere, or to assess the future of atmospheric impairment, but instead to determine Plaintiffs’ “rights, status, and other legal relations” under the Public Trust Doctrine in New Mexico.”<sup>105</sup> Since the Court maintains jurisdiction over common law claims, Plaintiffs contend that seeking resolution of their public trust claim falls within the jurisdictional requirements for declaratory judgment under New Mexico’s Declaratory Judgment Act.<sup>106</sup> Instead of asking the Court to mandate that the State adopt a specific plan to regulate GHG emissions in response to the threat of climate change, Plaintiffs clarify that they only request that the Court order the State to consider “the degree of impairment to the atmosphere from current GHG levels in New Mexico and the concomitant climate change impacts based on current climate change science.”<sup>107</sup>

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101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. N.M. STAT. ANN. § 44-6-2 (West)

107. *See Sanders, supra* note 92.

### *E. Parties' Motions for Summary Judgment*

In January of 2013, after the Court denied Defendants' Motion to Dismiss, Defendants filed an Answer asserting a variety of affirmative defenses to Plaintiffs' Amended Complaint.<sup>108</sup> Subsequent to their Answer, Defendants moved for summary judgment to assert their lack of liability for the protection of the atmosphere by making three primary arguments, some which were iterated in their Motion to Dismiss: (1) Air quality should be regulated by the EIB, because the State legislature determined that it was the government agency "charged with adopting, promulgating, publishing, amending, and repealing regulations consistent with the Air Quality Control Act," and that the Court of Appeals is charged with reviewing the support for the factual determinations of the EIB under statute, therefore the District Court cannot exercise jurisdiction to review the EIB's actions; (2) Plaintiffs' dissatisfaction with the EIB's specific GHG emissions regulations or its implementation thereof does not indicate that the political process somehow malfunctioned "in such a way as to impermissible impede the obligations of state government to protect the air quality;" (3) Common law is subordinate to the New Mexico Constitution.<sup>109</sup> Defendants emphasized that the New Mexico Constitution tasks the *legislature*, not the judiciary, with controlling the pollution and despoilment of the air, water and other natural resources, (emphasis added).<sup>110</sup> Therefore, Defendants ultimately argued that any judicial declaration would be an intrusion into the statutory scheme enacted by the legislature.<sup>111</sup>

To further bolster their motion, Defendants also argued that even if the EIB had not repealed their GHG emissions regulations, there would be no discernible effect on rising temperatures in New Mexico.<sup>112</sup> Defendants concluded that the maintenance of the atmosphere through stricter regulation on GHG emissions do not serve any public benefit.<sup>113</sup> Furthermore, Defendants argued that Plaintiffs could not demonstrate that any degree of regulation of GHG emissions in New Mexico would have any impact on global climate change.<sup>114</sup> Therefore, Defendants concluded that the public trust doctrine should not apply, and that the

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108. Defendants' Motion for Summary Judgment, *Sanders v. Martinez*, No. D0101CV201101514, 2012 WL 8898922 (N.M. Dist., Aug. 15, 2012).

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

government has no duty to protect the atmosphere.<sup>115</sup> Finally, Defendants contended that even if the public trust doctrine were operative in New Mexico, the State had already fulfilled any duty it had to protect the atmosphere by designating the EIB to research and implement GHG emissions regulations.<sup>116</sup> Defendants referenced that the publicly held deliberations for the regulation of GHG emissions, and the fact that the decision to repeal the regulations was based on support of expert witnesses. Defendants concluded that any duty to the public was effectively fulfilled.<sup>117</sup> Defendants ultimately attributed the decision to repeal the regulations to the economic job losses the State would have incurred had the regulations been implemented.<sup>118</sup>

In February 2013, Plaintiffs moved for summary judgment, reiterated claims in prior motions, and made the following key arguments: (1) “[T]he State has breached its obligation as trustee of the atmosphere. Because it is undisputed that the State is not acting to protect the atmosphere, it is undisputed that the State has violated the Public Trust Doctrine.” (2) While climate change is a global issue that requires supplemental action outside the State’s control, this “does not release the agency from the duty of assessing the effects of its actions on global warming.” (3) The State cannot defer liability to the EPA’s regulatory program for GHG emissions, because it is not comprehensive.<sup>119</sup> Thus, Plaintiffs concluded that the State should not be excused from compliance with the public trust doctrine.<sup>120</sup>

#### *F. Result and Grounds for Appeal*

In June 2013, the District Court of New Mexico heard oral arguments based on Plaintiffs’ and Defendants’ Motions for Summary Judgment. The District Court issued a trial order granting Defendants’ Motion for Summary Judgment.<sup>121</sup> The Court found that the State produced a more compelling argument to the status of the atmospheric trust in New Mexico, and determined that the judiciary could not bypass the political

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115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. Plaintiffs’ Motion for Summary Judgment. *Sanders v. Martinez*, No. D0101CV201101514, 2012 WL 4510703 (N.M. Dist., Feb. 19, 2013).

120. *See id.*

121. Order Granting Defendants’ Motion for Summary Judgment. *Sanders v. Martinez*, No. D0101CV201101514, 2012 WL 4094867 (N.M. Dist., Jul. 4, 2013).

process if there was no specific indication that the political process had gone astray.<sup>122</sup> Furthermore, the Court sided with the Defendants' argument that the New Mexico EIB's decision-making process was open to the public. Therefore the Plaintiffs' chance to participate in its findings had not been denied.<sup>123</sup> The New Mexico District Court also made the following important conclusion:

[T]he State may compromise public rights in the resource only when the decision is made with a level of openness, diligence, and foresight that is commensurate with the high priorities that the rights command under the laws of the State.<sup>124</sup>

Although the litigation in New Mexico failed to compel the District Court to grant Plaintiffs' requested relief, the fact that their Complaint survived various motions for dismissal shows legitimacy in their claim that the public trust doctrine could be expanded to include the atmosphere. In no way did the New Mexico District Court issue a finding that invalidated the expansion of the public trust doctrine's potential, nor did it deny that the language in the New Mexico Constitution limited the duty to protect the atmosphere strictly to the legislature. Instead, the Court's ruling reiterated that if Plaintiffs could show: (i) an indication that a New Mexico political process had gone astray; (ii) that a State agency was failing to apply the statutory scheme; or (iii) that members of the public were excluded from the processes, their claim would have sufficient grounds to be honored.<sup>125</sup>

Even though the public was included in the State's decision to repeal the EIB regulations, Plaintiffs may still structure an appeal based on the State's failure to enact an existing statutory scheme to protect the atmosphere. To succeed on appeal, Plaintiffs' focus must shift to Defendants' failure to carry out the EIB's GHG Reduction Program. The appeal should also highlight the Program's potential to significantly decrease the amount of carbon dioxide in the atmosphere, and the State's lackluster attempt to enforce the EIB's GHG emissions reporting standards. In addition, Plaintiffs should note the fact that the State sought immediate review of the new EIB GHG regulations, appointed new EIB members, and repealed the programs in place due to mere administrative inconveniences. By alleging that the State actively worked to nullify the Program and failed to enforce the statutory scheme, Plaintiffs should be able to show an identifiable resulting injury. Surely, such a factual showing might compel an

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122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

appellate level court to find “an indication that . . . the agency was not attempting to apply the statutory scheme.”<sup>126</sup>

However, Plaintiffs may also face difficulty on appeal, as an appeal may be denied by New Mexico’s appellate court if New Mexico’s administrative law has a principal of deference similar to federal administrative law, as set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (“*Chevron*”). In *Chevron*, the Supreme Court held:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute. . . [A] court may not substitute its own construction of a statutory provision for reasonable interpretation made by the administrator of agency.<sup>127</sup>

In order for the *Chevron* principle of deference to apply in this illustration, the New Mexico Constitution must be ambiguous, and the drafters must have explicitly left a gap for the authorized agency (the EIB) to fill. Since the New Mexico Constitution provides that the duty to protect the atmosphere lies in the legislature but does not explicitly provide for the way in which the atmosphere should be protected, Defendants could argue that the New Mexico Constitution drafters explicitly left a *Chevron* gap in its language. However, since the legislature delegated the EIB as the sole authority to regulate and protect the environment, the EIB is the agency charged with interpreting New Mexico’s Constitutional provision, provided that their interpretation is reasonable under the statute. If reasonable, the court must give deference to the EIB’s interpretation of the Constitutional language, and the EIB’s decision not to regulate may be valid.

However, Plaintiffs would have two available avenues to refute this argument. First, Plaintiffs could show that the EIB’s decision to repeal the regulations left the state with no statutory scheme to regulate GHG emissions or reduce the amount of carbon dioxide in the air. The language in the New Mexico Constitution explicitly provides that the legislature shall control the pollution and despoilment of the air. This allows Plaintiffs to argue that having no statutory scheme in place to combat the threat of climate change effectively despoils the air. An appellate court would likely find this decision to be unreasonable or impermissible, based on its

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126. See *id.*

127. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

interpretation of the New Mexico Constitution. This would negate the applicability of the *Chevron* deference principle and allow the court to reinterpret the constitutional language on appeal.

Second, Plaintiffs could assert that the EIB's decision to repeal the GHG reduction regulations was unjustified and entirely at odds with the New Mexico Constitution. *Chevron* provides that an agency's interpretation of a statute in question must not be "arbitrary, capricious or manifestly contrary" to the statute in question. Even though *Chevron* would forbid an appellate court to substitute its own construction of the New Mexico Constitution for the EIB's reasonable interpretation, it would have the power to grant Plaintiffs' appeal and require the administrator of the EIB to reconsider and reinterpret the Constitution's intent. In order to prove that the EIB's decision to repeal the regulations was "arbitrary, capricious or manifestly contrary" to the New Mexico Constitution, Plaintiffs must show that the EIB went against the will of the public, the primary beneficiary of the Constitution. Because Plaintiffs were present at these EIB hearings and indeed voiced their concerns for GHG emissions and climate change, it is clear that there was significant public interest in reducing the State's GHG emissions. However, despite public concern about the threat of climate change, the State determined that the high administrative costs to enforce the EIB's regulations outweighed any clear and present threat to the public. Instead of considering their constituents' legitimate interests in reducing GHG emissions, the EIB presented experts who testified that any reduction in GHG emissions would not have a direct impact on the rise in global temperature. By allowing this expert testimony to be a determinative factor in their decision to repeal, the EIB effectively ignored the Plaintiffs' contributions to the proceedings. Thus, Plaintiffs can craft a strong appeal asserting that the decision to repeal the EIB regulations was, arbitrary, capricious and manifestly contrary to the New Mexico Constitution.

Plaintiffs filed an appeal to the New Mexico Court of Appeals on July 24, 2013, the results of which are still pending. The trial court documents on the grounds of the appeal have not yet been released. At this point, *Sanders v. Martinez* is the closest any plaintiff has reached to achieving success in urging the government to protect the atmosphere by expanding the public trust. *Sanders v. Martinez* is a pivotal and potentially influential case for atmospheric trust litigation because it has viable grounds for appeal. Though unsuccessful, the case still provides a framework for future atmospheric trust claims so that others injured by the increase in global temperature can pursue civil litigation in their own states. Even though it is an uphill battle to include the atmosphere in the public trust by means of civil litigation, there is great potential for successful future claims. As

such, atmospheric trust litigation serves as an effective means to force governments to address the issue of climate change.

## V. THE FUTURE OF ATMOSPHERIC TRUST LITIGATION

While litigation to expand the public trust doctrine's reach to encompass the atmosphere in New Mexico provided no avail for addressing climate change by means of the judiciary, the future of atmospheric trust litigation still remains bright. Approximately seven states are actively pursuing litigation similar to that of New Mexico. Also, environmental organizations such as Our Children's Trust, are helping to pave the way to promulgate civil litigation under the public trust doctrine as a viable legal mechanism to coerce governments into addressing the ongoing threat of climate change.<sup>128</sup> Our Children's Trust initiated the TRUST Campaign, a legal effort in 50 states against the federal government on behalf of youth.<sup>129</sup> The campaign brings suit under the public trust doctrine to compel governments to reduce carbon dioxide emissions that will counter the negative impacts of climate change.<sup>130</sup> The *Sanders* case is one of the campaign's most recent filings. The TRUST Campaign also brought civil litigation to the appellate level in Alaska, Oregon, and Washington. These states' courts of appeals are scheduled to review decisions that have denied the states' duty to protect the atmosphere as part of the public trust.<sup>131</sup> The courts of appeals will reevaluate the applicability of the public trust doctrine as operative within their states, consider the possibility of its expansion, and determine whether the district court erred in their prior determination.<sup>132</sup>

Lastly, a notable atmospheric trust case was recently litigated in the state of Texas, where a Texas trial court determined that the atmosphere is included within the state's public trust, and the state bears the responsibility to preserve and protect it for future generations.<sup>133</sup> In this 2012 case, plaintiffs sought judicial review of the Texas Commission on Environmental Quality's ("TCEQ") order denying a petition for the reduction of carbon dioxide emissions within the state. Plaintiffs contended that according to

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128. LEGAL ACTION, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/legal> (last visited Oct. 29, 2013).

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *Bonsier-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561, at \*1–2 (Tex. Dist. Ct. Aug. 2, 2012).

Texas Health and Safety Code Section 382.0205, the TCEQ had the “legal authority to control air contaminants against the adverse effects of climate changes, including global warming,” and sought for the court to review TCEQ’s denial.<sup>134</sup> Plaintiffs made a similar claim as the New Mexico plaintiffs, and contended that the state breached its duty to protect the atmosphere under the common law public trust doctrine.<sup>135</sup> While the trial court ultimately denied Plaintiffs’ petition and ruled that the state had not breached their duty, the trial court did determine that the scope of the Texas public trust doctrine would be expanded to include the atmosphere.<sup>136</sup> The Texas Environmental Protection Division, on behalf of the state, wrote a letter to the trial court claiming that the judge’s expansion of the public trust doctrine was an impermissible advisory opinion, and sought an appeal of the determination.<sup>137</sup> The state contended that Plaintiffs did not bring a valid claim for declaratory relief, and that even if Plaintiffs’ suit was valid, the declaration granted must resolve the real controversy between the parties.<sup>138</sup> The declaration that the public trust doctrine includes the atmosphere would not resolve the parties’ dispute because the doctrine’s scope was not the entire concern of the petition. Thus the State contends that the court’s determination has no authority.<sup>139</sup>

*Bonser-Lain v. TCEQ* has helped pave the way for the future of the atmospheric trust by exemplifying that even in losing cases where the court does not rule in the plaintiff’s favor, the public trust may still be expanded to include the atmosphere. The fact that Texas is still petitioning for an appeal against the trial court’s expansion of the doctrine, despite their win in *Bonser-Lain v. TCEQ*, shows that the court’s determination is crucial to the future of the environmental and atmospheric regulation in Texas. This case showcases that civil litigation under the common law public trust doctrine is a viable legal mechanism to promulgate state governments to address climate change concerns more adequately.

## VI. CONCLUSION

As Professor Charles Wilkinson explains, “The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made

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134. *See id.*

135. *See id.*

136. *See id.*

137. *See Bonser-Lain, supra* note 133.

138. *See id.*

139. *See id.*



principles.”<sup>140</sup> Because a healthy and habitable atmosphere is essential to the survival of the human race, it is imperative that the public trust doctrine be interpreted in a way to include the atmosphere within its scope. Civil litigation is an effective legal mechanism to expand the public trust doctrine’s scope by way of the judiciary. Once a state judiciary can determine the applicability of the public trust doctrine to the Earth’s atmosphere, it can affirm its government’s fiduciary responsibility to regulate the substances in the atmosphere. This will protect Earth’s habitability, and will be an appropriate way to sufficiently address climate change, at least at the state level. By utilizing civil litigation as a legal mechanism to coerce governments into regulating excessive anthropogenic GHG emissions, and ultimately in addressing and combating the harmful effects of climate change, the Earth’s atmosphere can be protected for generations to come.

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140. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. REV. 425 (1989).