WHERE *JULIANA* WENT WRONG

Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level

*By Matthew Schneider**

Federal action on climate change is a nonstarter in the current political environment. In light of this reality, the common law—and in particular the public trust doctrine—is an attractive alternative for readying the nation for the impact of climate change. This article outlines how the public trust doctrine may be applied to regulatory regimes and climate change adaptation at the state level. First, it will outline the basics of climate change and climate change adaptation. Second, it will chart the contours of the public trust doctrine, particularly as it is applied in the state of Oregon. Third, it will discuss the limitations of the approach articulated in Juliana v. United States, a headline-making case currently winding its way through the courts, as compared to a similar claim in state court. Finally, it will detail a hypothetical claim under Oregon law, alleging a violation of the public trust for failure of the state to adapt to climate change, and explain how state level may possess a greater potential to engender real action on mitigating the effects of climate change.

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I. INTRODUCTION

"There's one issue that will define the contours of this century more dramatically than any other, and that is the urgent and growing threat of a changing climate."

— President Barack Obama, UN Climate Change Summit, September 23, 2014[1]

Proponents of action on climate change face an existential crisis. In the wake of the 2016 presidential election, there appears to be little hope of targeted federal legislation to address climate change. Federal regulations as a course of action are almost certainly foreclosed. Accordingly, the channel by which meaningful change might occur will likely be outside of the political arena.

Climate change is an extremely divisive topic in the United States. Clear lines are drawn between political parties.[2] Deep-seated disagreements exist on every element of the issue—from the causes of climate change, to the gravity of the impacts, to the possible solutions.[3] Indeed, discontinuity has impeded action to address the problem. Even when the political party committed to addressing the issue had control of the White House and both houses of Congress, no meaningful measure could be passed.[4] Unsurprisingly, when the controlling political party is steadfastly opposed to taking action—as exists at the start of the Trump Administration—there is little prospect of a federal statutory solution.[5]

[1] President Barack Obama, Address at the UN Climate Change Summit (Sept. 23, 2014) (transcript available at https://www.whitehouse.gov/the-press-office/2014/09/23/remarks-president-un-climate-change-summit).

[2] *See* Cary Funk & Brian Kennedy, *The Politics of Climate*, PEW RESEARCH CENTER, Oct. 4, 2016, at 4, 31, http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/10/14080900/PS_2016.10.04_Politics-of-Climate_FINAL.pdf (noting that 79% of liberal Democrats compared to only 15% of conservative Republicans, believe the Earth is warming due to human activity).

[3] *Id.*

[4] *See generally* Ryan Lizza, *As the World Burns*, NEW YORKER Oct. 11, 2010, at 70 (detailing the failure to pass comprehensive climate change legislation in the first two years of the Obama Administration).

[5] *See* Republican National Committee, *2016 Republican Platform*, GOP 22 (last visited Oct.

Heeding this federal statutory infeasibility, where else might legal changes occur? One particularly attractive option to would appear to be the common law.[6] The common law's elasticity allows:

> [T]hose who administer it to adapt to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generations to which it is immediately applied.[7]

However, this note does not seek to address the full range of common law claims that could potentially affect action on climate change.[8] Instead, it seeks to refine the public trust doctrine approach recently utilized in *Juliana v. United States*[9] to force governmental action and drive regulatory change at the state level. First, this note will briefly discuss the basics of the climate change problem and climate change adaptation. Second, it will chart the contours of the public trust doctrine, particularly as it is applied in the state of Oregon. Third, it will explain the flaws in the approach articulated in *Juliana*, when compared to a claim in state court. Finally, it will detail a hypothetical claim under Oregon law, alleging a violation of the public trust for failing to adapt to climate change.

II. THE CLIMATE CHANGE PROBLEM

A. The Basics of Climate Change

Since there is a great deal of scientific literature on climate change, this article will not discuss the underlying evidence at length. Instead, it will only summarize the basic elements.[10] Contrary to some colloquial usage, climate does

31, 2017), https://prod-cdn-static.gop.com/static/home/data/platform.pdf ("We reject the agendas of both the Kyoto Protocol and the Paris Agreement, which represent only the personal commitments of their signatories.").

[6] A common law approach to environmentalism is attractive because it can avoid the political quagmires in the legislative process. Under this approach, a judge is insulated from political influence. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970) ("Inconsistency in legislative response and administrative action is one reason why private citizens have felt compelled to go to court and to devise such a pastiche of legal claims."); *see generally* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 523 (2001) (finding that the common law strengthens property rights and contract enforcement, which in turn speeds economic growth).

[7] Wason v. Walter [1868] 4 QB 73 at 93 (Eng.).

[8] *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) (rejecting a negligence claim brought against a power company for emitting greenhouse gases).

[9] *See* Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. Nov. 10, 2016) (denying the government's motion to dismiss a public trust claim and other claims for relief that were brought by a group of young environmental activists).

[10] *See generally* B.D. Santer et.al., *Contributions of Anthropogenic and Natural Forcing to*

not mean weather—it is defined as "long term averages and variation in weather measured over a period of several decades."[11] At its core, climate change refers to changes in the global energy budget.[12] Emissions[13] resulting from burning fossil fuels put more "heat-trapping gases" into the atmosphere than are being sequestered by natural sinks.[14] The higher the concentration of these gases in the atmosphere, the more insolation (heat from the sun) is absorbed by the atmosphere rather than escaping to space.[15]

Even small levels of emissions can have a huge impact. An increase in heat-trapping gases drives other processes that increase the amount of heat is retained.[16] This creates a positive feedback loop, leading to warmer average global temperatures.[17] Above all, the scientific community widely accepts that climate change is occurring because of human activity—the result of burning fossil fuels on a massive scale.[18]

B. Adaptation vs. Mitigation

The changes in average global temperatures are expected to do more than just change the thermometer.[19] Climate change will have myriad impacts on our everyday life. Indeed, the Third National Climate Assessment predicts that climate change will cause sea level rise, more frequent and intense storms, a higher frequency of flooding, longer and harsher droughts, and changes in geographic ranges of disease, among other effects.[20]

The common response to climate change has been a focus on mitigation—i.e., reducing the amount of greenhouse gases released into the atmosphere.[21]

Recent Tropopause Height Changes, SCIENCE, July 25, 2003 at 479; V. Ramaswamy et.al., *Anthropogenic and Natural Influences in the Evolution of Lower Stratospheric Cooling*, SCIENCE, Feb. 24, 2006 at 1138.

[11] U.S. GLOB. CHANGE RES. PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES, THE THIRD NATIONAL CLIMATE ASSESSMENT 22 (2014) [hereinafter NCA].

[12] *See id.* at 799; s*ee also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), SUMMARY FOR POLICY MAKERS 4, 13 (2013) (noting that the "warming of the climate system is unequivocal," and "natural and anthropogenic substances and processes that alter the Earth's energy budget are drivers of climate change").

[13] *See* The Royal Society, *The Basics of Climate Change*, (last visited November 30, 2017), https://royal-society.org/topics-policy/projects/climate-change-evidence-causes/basics-of-climate-change/ (noting that emissions are the result of both natural and human causes)*; see also* NCA, *supra* note 11, at 799.

[14] *See id.*

[15] *See id.*

[16] *See The Basics of Climate Change*, *supra* note 13.

[17] *See* NCA, *supra* note 11, at 799.

[18] *See id.* at 23.

[19] *See id.* at 22-67.

[20] *See id.*

[21] *See* E. Lisa F. Schipper and Ian Burton, *Understanding Adaptation: Origins, Concepts, Practice and Policy*, in THE EARTHSCAN READER ON ADAPTATION TO CLIMATE CHANGE 1, at 7 (E.

Although mitigation is a laudable objective, emissions already released will cause a significant impact independent of even the most commendable mitigation efforts.[22] Even if all anthropogenic sources of greenhouse gases were suddenly eliminated, the Earth would still be expected to warm 0.5 degrees Fahrenheit in the decades following the zeroing of global emissions.[23] Accordingly, adaptation to new climatic conditions is requisite to the global response to climate change.[24]

Adaptation "refers to the adjustments that societies or ecosystems make to limit the negative effects of climate change or to take advantage of opportunities provided by a changing climate."[25] Unlike mitigation, adaptation does not seek to address the underlying emissions levels. In effect, "[a]daptation can range from a farmer planting more drought-resistant crops to a coastal community evaluating how to best protect its infrastructure and coastal resources from rising sea level."[26] This note will focus on adaptation rather than mitigation actions. As mentioned above, adaptation has largely been ignored in the political debate over climate change. Adaptation nonetheless may represent an opportunity under the common law to achieve progress toward addressing the causes and effects of climate change.

III. THE PUBLIC TRUST DOCTRINE

A. Historical Roots of the Doctrine

The public trust doctrine—a common law principle—provides the best chance for making meaningful progress toward meeting climate change adaptation objectives. It provides that certain lands are public and held in trust by the

Lisa F. Schipper & Ian Burton eds., 2009) ("[I]nterest in adaptation was overwhelmed by concern about the need to reduce greenhouse gas emissions and stabilize atmospheric greenhouse gas concentrations. Proponents of adaptation faced two obstacles that were attributed to adaptation: reducing the apparent need for mitigation; and playing down the urgency for action. For one, 'adaptationists' were distrusted because their proposals seemed to undermine the need for mitigation. Critics felt that belief in the potential value of adaptation would soften the resolve of governments to grasp the nettle of mitigation and thus play into the hands of the fossil fuels interests and the climate change [skeptics]. In addition, because climate change was popularly perceived as a gradual process, adaptation was not considered urgent as there would be time to adapt when climate change and its impacts became manifest. These views dominated in the mid and late 1990s.").

[22] NCA, *supra* note 10, at 25.

[23] *Id.* (citing H. Damon Matthew & Kirsten Zickfeld, *Climate Response to Zeroed Emissions of Greenhouse Gases and Aerosols*, 2 NATURE CLIMATE CHANGE 338 (2012) (noting that "choices made now and in the next few decades will determine the amount of additional future warming.")).

[24] *See* NCA, *supra* note 11, at 813.

[25] *Adapting to Climate Change*, U.S. EPA (January 19, 2017), https://www.epa.gov/climatechange/adapting-climate-change [https://19january2017snapshot.epa.gov/climatechange/adapting-climate-change_.html].

[26] *Adapting to Climate Change*, *supra* note 25.

sovereign to be managed for the public good.[27] Its potential flows from its historical foundations. The doctrine derives from ancient principles of Roman and English Law.[28] Roman law, as codified by Justinian, held that "the air, running water, the sea and consequently the shores of the sea," are "common to all mankind."[29] Similarly, the English public trust doctrine includes:

> [T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the people, and that each has a right to use.[30]

These concepts were transported to the United States in the nineteenth century where the doctrine's reach expanded from beyond coastal areas affected by the tides to large inland waterways.[31] As traditionally formulated, the American doctrine created a trust over lands below the low water mark on the coasts of seas and inland water bodies, the waters over these lands, and the waters within navigable rivers and waterways.[32]

The government's obligation under the public trust doctrine operates as a fiduciary duty, which is fundamental to trust law.[33] It requires a trustee "to do all acts necessary for the preservation of the [object held in trust] which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust."[34] The Supreme Court has characterized the fiduciary duty under the public trust doctrine as "the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state."[35]

At its root, the duty creates a responsibility to protect the trust, to prevent waste, and to maximize the value of trust assets.[36] It prohibits decay and

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[27] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–7 (1970) [hereinafter Sax].

[28] *See* PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) ("Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country."); *see also* Sax, *supra* note 27 at 475.

[29] J. INST., PROEMIUM 2.1.1 (T. Sandars trans. 4th ed. 1867).

[30] Arnold v. Mundy, 6 N.J.L. 1, 12 (1821).

[31] MICHAEL C. BLUMM AND MARY C. WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3 (2013).

[32] Sax, *supra* note 27, at 556.

[33] MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 167 (2014).

[34] 12 GEORGE G. BOGERT & AMY MORRIS HESS, BOGERT TRUSTS AND TRUSTEES § 583 (2d ed. 1980).

[35] Geer v. Connecticut., 161 U.S. 519, 534 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

[36] *See* WOOD, *supra* note 33, at 168.

establishes an active duty, which requires *affirmative* actions to prevent harm to assets.[37] Specifically, "the active duty requires both legislatures and agencies to respond to threats before they transpire into calamity."[38] The trustee is also charged with preventing waste to preserve assets for future beneficiaries. A central concept of trust law, waste is "the consumption of things belonging to the inheritance."[39] Courts have applied this duty to avoid waste in the public trust context, noting that it cannot be relieved by a legislature.[40] Finally, the trustee has a responsibility to maximize the value for the beneficiary.[41] This includes an increased scrutiny of private uses because the beneficiary is the public at large, not specific individuals.[42] It ensures that the trust is "for the benefit of the people, and not . . . for the benefit of private individuals as distinguished from the public good."[43]

The seminal case on the public trust doctrine, *Illinois Central Railroad Company v. Illinois*,[44] explicates how the trust relationship imposes a broad fiduciary duty on the sovereign to manage trust lands. The Court held that the submerged lands near Chicago's business district (i.e., Chicago's harbor) were:

> different in character from that which the state holds in lands intended for sale . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties.[45]

In effect, the trust relationship prevented the State's disposition of submerged lands to a private party.[46] Thus, as Professor Joseph L. Sax explained, a court might look with considerable skepticism upon any governmental conduct that either relocates or restricts public use of a resource in favor of private parties.[47] The *Illinois Central* Court stated that "the state can no more abdicate its trust

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[37] *Id.*

[38] *Id.* at 169.

[39] *Id.* at 170.

[40] *See, e.g.*, Robinson Twp. v. Commonwealth, 623 Pa. 564, 655 (2013) (striking down a state law preventing local oil and gas ordinances, the court stated that "[a]s trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." (citations omitted)).

[41] *See* Wood, *supra* note 33, at 175.

[42] *See id.* at 179.

[43] *Id.* at 179 (citing Geer v. Connecticut, 161 U.S. 519, 529 (1896)).

[44] Ill. C. R. Co. v. Ill., 146 U.S. 387 (1892).

[45] *Id.* at 452.

[46] *See id.* at 453.

[47] Sax, *supra* note 27, at 490.

over property in which the whole people are interested . . . than it can abdicate its police powers."[48] This pivotal statement provides the baseline for the government's public trust obligation as a trustee.

The classic iteration of the American public trust doctrine creates two very obvious legal tools.[49] First, the doctrine serves to limit state governments' ability to undermine public interests in submerged lands and navigable waters within their borders.[50] Second, the trust relationship provides a legal mechanism and standard for judicial review of state decision-making or lack thereof.[51] But beyond these apparent legal tools lurks a third element that may make the doctrine particularly well-suited to the climate change issue. The public trust doctrine has not remained stagnant.[52] It has endured individualized state expansions of the classic recitation, resembling a patchwork of different characterizations.[53] This development according to some commentators reveals the true legal power of the doctrine—its flexibility.[54]

The doctrine has evolved from a mechanism promoting navigation and commercial fishing to one protecting recreation and ecological integrity.[55] The modern form applies traditional trust concepts to the relationship between the government and the public to ensure proper management of a broader array of natural resources.[56] In 1970, Professor Sax contemplated a doctrine where "the beneficiaries are the citizens, both present and future generations."[57] The doctrine aims to "ensure that [the] government safeguards the natural resources necessary for public welfare and survival."[58] Today, his vision is coming to fruition—a number of states have adopted an expansive version.[59]

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[48] *Ill. C. R. Co.*, 146 U.S. at 453.

[49] *See* Robin Kundis Craig, *Adapting to the Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 784-5 (2009) (describing the public trust doctrine's potential usefulness in the area of water rights and resources).

[50] *Id*. at 784.

[51] *Id*.

[52] *See id.*

[53] *See id.*

[54] *See id.*

[55] Carol M. Rose, *Joseph Sax and the Public Trust Doctrine*, 25 ECOLOGY L.Q. 351, 355 (1999) ("While other authors diverged in a number of ways from Sax's vision of the public trust, many followed his lead in generalizing the concept beyond its historic confines, using the idea of the public trust to discuss not only traditional waterways, but also upland beaches, water policy more generally, public lands management, wildlife, ecological resources in general, and of course the takings issue.").

[56] *See id.*

[57] Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations*, 39 ENVIRONMENTAL LAW 43, 67 (2009), https://law.lclark.edu/live/files/17401-39-1woodpt1.

[58] Mary Christina Wood, *"You Can't Negotiate with A Beetle": Environmental Law for A New Ecological Age*, *50* NAT. RESOURCES J. 167, 200 (2010).

[59] Craig, *supra* note 49, at 784 ("[T]he individualized state expansions of the classic public trust doctrine and several states' characterizations of their public trust doctrines as adaptable and

Ultimately, this legal flexibility may make the public trust doctrine uniquely suited to address climate change.[60] Uncertainties remain about when climate change impacts will occur, the scale at which they will occur, and the efficacy of potential solutions to adapt to specific impacts.[61] A legal tool that can itself adapt might allow policymakers to overcome this uncertainty. As the climate changes, so too might the potential obligations under the trust relationship. And unlike a potential statutory appropriation to build a wall, if sea levels continue to rise and an initial adaptation measure becomes ineffective, the trustee's duty requires further action.

B. The Doctrine in Oregon

Before assessing the weaknesses in the national approach adopted by the *Juliana* court, it is worthwhile to explain the state law alternatives that might applicable to plaintiffs.[62] As is the case in many states, the public trust doctrine in Oregon has protected traditional beneficiary rights since early statehood.[63] Oregon courts have long held that the doctrine encompasses a public right to navigable waters,[64] as well as rights to navigation, fishing, and commerce in "navigable-in-fact waterways."[65] As such, the state has a fiduciary duty to ensure the public's continued ability to exercise these rights in areas governed by the trust.

By extension, the scope of Oregon's public trust doctrine has gradually widened, both in terms of activities protected and the types of water bodies covered. In *Guilliams v. Beaver Lake Club*, the Oregon Supreme Court expanded the doctrine to include the right to use navigable waterways for

evolutionary that give these doctrines their legal power in a world where climate change adaptation is and will become increasingly necessary.").

[60] *Id*.

[61] *Id*.

[62] While the plaintiffs in *Juliana* did file a state public trust claim, it called only for mitigation and not for adaptive measures. *See* Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016); *see also* Chernaik v. Brown, WL 12591229 (Or. Cir. 2015).

[63] Shively v. Bowlby, 152 U.S. 1, 11 (1894) (upholding an Oregon Supreme Court decision and citing to English law to uphold the principle that "title and domination of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all lands below the high water mark" are vested with the sovereign).

[64] *See* Weise v. Smith, 3 Or. 445, 450 (1869) (stating that navigable waterways are "public highways" that each person has "an undoubted right to use ... for all legitimate purposes of trade and transportation").

[65] Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936) (quoting Guilliams v. Beaver Lake Club, 175 P. 437, 439 (Or. 1918)) (explaining that the public had the right to use privately owned lakes because "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters . . . for the purpose of transportation and commerce," including transportation for pleasure (citations omitted)); *see also* Hume v. Rogue River Packing Co., 83 P. 391, 392 (Or. 1907) (explaining that the public has the right to fish in waters over privately owned beds).

recreational purposes.[66] Additionally, the court extended the trust beyond the traditional "navigable-in-fact" waters to include intermittent, or non-permanent, bodies as trust assets.[67] Accordingly, a private landowner violates the public's navigational rights when he attempts to build a dam on an intermittently navigable lagoon.[68] The court has since reiterated that the public trust doctrine imposes a right of use even on privately owned water bodies.[69] It has yet to directly address whether the public trust doctrine applies to wildlife, wetlands, groundwater or upland areas as some states have.[70] Arguably, the doctrine, when coupled with other supporting or complementary statutes, could include such categories within the obligations it creates.[71] The doctrine's flexibility and consistent focus on ensuring the protection of public resources provide ample support for the inclusion of these assets in the trust.

Oregon courts have also recognized that a public trust creates several obligations for the sovereign. First, its courts have found that the public trust doctrine limits the ability of the state to alienate lands. In *Shively v. Bowlby*, the U.S. Supreme Court upheld an Oregon Supreme Court decision that limited transfers of tidelands due to the "paramount right of navigation."[72] The doctrine has also been used to limit a state agency's action.[73] In *Morse v. Department of State Lands*, the court remanded a decision authorizing a permit for filling a water body to extend an airport runway.[74] The *Morse* court affirmed the appellate decision, which had determined that the permit violated the public trust as incorporated into the statute at issue.[75] The lower court held that the state fill and removal statute codified the historical public trust doctrine and was motivated by the same underlying purpose: to protect navigational, commercial,

[66] Guilliams v. Beaver Lake Club, 175 P. 437, 441–42 (1918) (holding that all waters in the state capable of navigation by small craft can be used for recreational purposes).

[67] *See id.* at 442.

[68] *See id.* at 442–43.

[69] *See Luscher*, 56 P.2d at 1162 ("[R]egardless of the ownership of the bed, the public has the paramount right to the use of the waters . . . for the purpose of transportation and commerce.").

[70] *But see* Weise v. Smith, 3 Or. 445, 450 (1869) (noting navigational rights extended to upland areas necessary to access the recreational waters). Oregon's doctrine is narrow compared to California's broad scope. *See* National Audubon Society v. Super. Court of Alpine County (Mono Lake), 658 P.2d 709, 724 (Cal. 1983).

[71] *See, e.g.*, Or. Rev. Stat. § 390.835 (2010) (directing the Commission to deny a groundwater use application upon a finding that such use "will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish, and wildlife" unless the application provides for "mitigation" of all effects on the waterway); Or. Rev. Stat. § 196.805 (2010) (holding that preventing interference with navigation, fishing and recreation is purpose behind the Submerged and Submersible Land Act which requires a permit in order to dredge or fill).

[72] Shively v. Bowlby, 152 U.S. 1, 56–57 (1894).

[73] *See* Morse v. Or. Div. of State Lands (*Morse II*), 590 P.2d 709, 715 (Or. 1979).

[74] *Id.*

[75] *Id.*

and recreational interests.[76] As a result, the court held that state agencies have an affirmative duty to account for public trust concerns when taking actions under the statute.[77] The permit decision must therefore acknowledge an ongoing duty to manage trust lands for future generations. Consequently, permit decisions could create an affirmative duty to incorporate climate change concerns in managing trust lands.

IV. *JULIANA V. UNITED STATES* – RIGHT IDEA, WRONG EXECUTION

The public trust doctrine has been viewed as an attractive option to pursue environmental objectives because it creates an affirmative duty for the trustee (the state) to manage the lands on behalf of the beneficiaries (the public). Unsurprisingly, litigants have used it to address as prevalent an issue as climate change. Unfortunately, the plaintiffs in *Juliana v. United States* made three strategic errors that have weakened their claim. In particular, their claim attempts to find the public trust doctrine in federal common law rather than on a state level. In addition, it argues for an atmospheric trust, and it omits adaptation measures—focusing instead on use of the doctrine to advance mitigation objectives. For all of these reasons, the claim misses opportunities that may be more readily available under a state law approach.

The *Juliana* plaintiffs are twenty-one children, ranging in age from nine to twenty, alleging a number of claims against the President and United States government agencies.[78] Their complaint lists four claims for relief, including a public trust doctrine claim.[79] Specifically, it alleges a violation of a "duty to refrain from substantial impairment" of natural resources by virtue of the "affirmative aggregate acts of Defendants in the areas of fossil fuel production and consumption."[80] The call for relief seeks an injunction to prevent further violations of the trust as well as affirmative actions to implement a "phase out [of] fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[81] The plaintiffs requested that a court retain jurisdiction to administer such actions, effectively creating a national remediation plan.[82] The District Court judge denied the defendants' motion to dismiss, allowing this novel public

[76] Morse v. Or. Div. of State Lands (*Morse I*), 581 P.2d 520, 525 (Or. Ct. App. 1979) ("The legislative history reflects that the legislature was aware of the historical public trust, was motivated by the same concerns that underlie the trust, and chose language which would best perpetuate it.").

[77] *Morse II*, 590 P.2d at 713 ("weigh the extent of the public need for the fill as compared with the public interest in the preservation of the water for navigation, fishing and public recreation and that after doing so he should grant the permit accordingly.").

[78] First Amended Complaint for Declaratory and Injunctive Relief at 6-36, Juliana v. United States, 217 F. Supp. 3d 1224 (2016) [hereinafter Complaint].

[79] *Id.* at 84, 88, 91–92.

[80] *Id.* at 93.

[81] *Id.* at 94.

[82] *See id.*

trust claim to go to trial.[83] Despite Judge Aiken's acceptance of these arguments, this attempt to stretch the public trust doctrine into a "cure-all" for climate change represents a missed opportunity to effect action on climate change at the state level. In short, by alleging claims further from the historical foundations of the doctrine, the plaintiffs may have inserted serious risks to the viability of the case.

A. A Federal Public Trust Claim Compared to State Public Trust Claims

The decision in *Juliana* to advance a federal public trust claim ultimately weakens the plaintiffs' position and thus may reduce the prospects for developing climate change adaptation measures. There is no doubt that the claim is innovative and potentially powerful. Still, the plaintiffs' argument, alleging that federal agencies violated a federal public trust derived from federal common law,[84] is flawed on a number of fronts.

Simply put, the argument runs contrary to Supreme Court precedent. Indeed, the Court in *Illinois Central*—the seminal case on the doctrine—explained the public trust doctrine was "necessarily a statement of Illinois law."[85] Similarly, in *PPL Montana*, the Court declared, "the public trust doctrine remains a matter of state law."[86] Judge Aiken sought to dismiss this language by straining the holdings of two district court opinions dealing with eminent domain.[87] She concluded that because there is no reason why the precepts of *Illinois Central* cannot be applied to the federal government, it therefore must apply.[88] But that argument is not grounded in case law and is circular on its face. Even if one were to consider the Supreme Court's language dicta, lower courts still generally treat it as precedent-setting.[89] In a case that parallels the facts of *Juliana*, the

[83] Juliana v. United States, 217 F. Supp. 3d 1224, 1263 (2016).

[84] *See* Complaint, *supra* note 78, at 50 ("Plaintiffs' rights as beneficiaries of the federal public trust."); *id.* at 92 ("Plaintiffs are beneficiaries of rights under the public trust doctrine, rights that are secured by the Ninth Amendment and embodied in the reserved powers doctrines of the Tenth Amendment and the Vesting, Nobility, and Posterity Clauses of the Constitution.").

[85] Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 285 (1997) (quoting Appleby v. City of New York, 271 U.S. 364, 395 (1926)) ("While Illinois Central was "necessarily a statement of Illinois law, it invoked the principle in American law recognizing the weighty public interests in submerged lands." (citations omitted)).

[86] PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012).

[87] *See Juliana*, 217 F. Supp. 3d at 1258 (citing United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cnty., Mass., 523 F. Supp. 120, 124 (D. Mass. 1981); City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986)). However, these cases have been sparsely cited and have a narrow set of facts as the trust obligation the courts reference flows from land the federal government obtained via eminent domain.

[88] *See Juliana*, 217 F. Supp. 3d at 1257.

[89] *See* Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010) ("[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (citations omitted)).

District Court for the District of Columbia found that there is no public trust doctrine as applied to the federal government.[90] A legal approach hinging on a federal public trust doctrine thus seems contrary to precedent and would be subject to the whims of the judiciary.[91] By contrast, the state law approach suggested in this article may be more firmly within the bounds of precedent and so less subject to comparable legal uncertainties.

By making a federal public trust claim, the *Juliana* plaintiffs forego the very flexibility and evolutionary capacity that has made the doctrine a possible tool to address climate change. Instead of taking a state-by-state approach that allows for local experimentation and creative problem solving, they attempt to paint with broad strokes and implement a national mitigation strategy from the courtroom in Eugene.[92] A pertinent example comes from the "Mono Lake" case in California where the state's highest court applied the public trust doctrine to address the issue of water rights in an era of water scarcity.[93] Water shortages may be an issue in California, but not in other areas of the country where water overabundance may cause problems.[94] National approaches may not adequately address climate change issues that are locally divergent. A national doctrine focused on federal agencies as a source of remedial action will particularly struggle to tackle the local issues posed by climate change.[95] In order to implement a localized solution, a potential plaintiff would have to overcome the added presumption that the standard national approach to management of a trust asset is not a reasonable exercise when applied to a particular region. While certainly possible, this might greatly increase the burden. It could provide agencies evidentiary support to argue the status quo is reasonable under the national doctrine because other communities or "prudent men" are doing it as well.[96] A national approach can create a default position that may not actually provide meaningful resilience to climate impacts.

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[90] *See* Alec L. v. Jackson, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (holding that a claim by five youth plaintiffs against the federal government was foreclosed by the language in PPL Mont., LLC, 565 U.S. 576).

[91] *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 710 (1986) (noting that generally the public trust doctrine "unjustifiably relies on the judiciary to further its environmental goals and consequently relies on a proenvironmental judicial bias that is not enduring.").

[92] *See* Complaint, *supra* note 78, at 94 (proposing remedies of a national scale).

[93] Nat'l Audubon Soc'y v. Super. Court of Alpine County (*Mono Lake*), 658 P.2d 709, 724 (Cal. 1983).

[94] *See* NCA, *supra* note 11, at 463.

[95] A federal doctrine that imposes a duty on federal agencies would arguably have no influence on the water rights granted under state law in *Mono Lake* for example. *See generally Nat'l Audubon Soc'y*, 658 P.2d at 724.

[96] For example, an agency might argue that not intervening to prevent the depletion of a reservoir constitutes reasonable management because it is not done in another jurisdiction.

Even if a federal public trust doctrine existed, the scope would be narrow and thus largely ineffective in creating measurable action on climate change. As Judge Aiken rightfully noted in her opinion, a trust under color of federal law would arguably apply only to trust assets held by the federal government.[97] Absent an evolution of the assets traditionally governed by the public trust doctrine,[98] the doctrine would cover navigable waters and submerged lands owned by the federal government.[99] The federal government would therefore have a fiduciary responsibility to waters and submerged lands three to twelve miles off the coasts of the United States and not much else.[100] It will be difficult to translate climate change impacts in these areas into measures that help coastal communities adapt to climate change.[101] Compare this to the scope of a state doctrine.[102] Even the most conservative coastal state doctrines cover a more comprehensive set of assets and might be leveraged to implement beneficial action on climate change.[103] If a new federal public trust doctrine were to create obligations over a broad set of trust assets, including upland federal properties, Congress may be inspired to respond by taking corrective action to limit the scope of the doctrine.[104] Thus, the federal doctrine approach is particularly unavailing.

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[97] *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1257 (2016) ("*PPL Montana* said nothing at all about the viability of federal public trust claims with respect to *federally-owned trust assets*.") (emphasis added).

[98] There is no precedent for its existence much less a broad interpretation of the assets covered by a federal fiduciary obligation.

[99] One would have to pile assumption upon assumption in order for the *Juliana* Plaintiffs claim to begin to have the legal force required to make meaningful change on climate change. It is this aggregate uncertainty that makes the claim so weak.

[100] United States v. Louisiana, 363 U.S. 1 (1960) (holding that under the Submerged Lands Act, 43 U.S.C § 1301, the United States holds title to the continental shelf lands beyond three nautical miles from the low water line); Proclamation No. 5928, Presidential Proclamation 5928, 54 Fed. Reg. 777 (January 9, 1989) (the breadth of the U.S. territorial sea was declared to be 12 nautical miles from the baseline, but only for international law purposes).

[101] Sea level rise, for example, will not necessarily breach a fiduciary duty four miles at sea in the same way it might along the coast. It will not necessarily result in damage to the resource as it will result in little appreciable change.

[102] *See* discussion *supra* Part III.

[103] *Cf.* Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441, 453 (2009) (establishing a narrow interpretation of the public trust doctrine in North Carolina by holding that a lake created by damming a stream was not subject to the public trust doctrine because the dammed stream had not been "'navigable in fact' for a meaningful distance both upstream of, under the surface of, and downstream from the lake.")

[104] *Cf.* Caroline Cress, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236, 271–72 (2013) (arguing that a broad expansion of the public trust doctrine in North Carolina could prompt a state legislature that is steadfastly opposed to climate change to take corrective action).

B. Claiming the Atmosphere as a Trust Asset

The extension of the public trust doctrine to encompass an atmospheric trust in *Juliana* also weakens the plaintiff's claim because it is an attackable premise and creates a relatively limited duty. Choosing to incorporate the atmosphere into the public trust requires an extension of the current doctrine. Like with the existence of a federal doctrine, there is almost no direct precedent to support the atmosphere as a trust asset.[105] Much has been written about the potential capacity of state doctrines to incorporate an atmospheric concept, so this note will not debate the point at length.[106] While the argument has some merit, it is largely untested.[107] This uncertainty stands in stark contrast to the established assets included in the traditional state law public trust doctrine.

At its core, the duty created by an atmospheric trust is limited, and this weakens the *Juliana* claim. Indeed, the risk is not worth the reward. More so than with other trust assets, the "reasonably prudent man" standard becomes a severe limitation with an atmospheric trust.[108] A trust relationship does not create a strict liability regimen,[109] but instead only requires a trustee to act "reasonabl[y]"[110] Because of the atmosphere's transboundary nature, it is uncertain what a prudent man might do to protect the trust.[111] The inaction of other countries or states, over whom the trustee has no control, can cause pollution of the atmosphere and negate measures taken by the sovereign to mitigate damage to the trust.[112] By including the atmosphere as a trust asset, the plaintiffs have added the specter of a geopolitical or interstate debate into the cause of action. Would a prudent trustee "phase out fossil fuel emissions" if such actions would avoid very little harm to the trust asset?[113] There may not be a correct answer, and the judiciary may avoid such difficult policy questions by

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[105] *See id.* at 261 (noting that "the majority of Atmospheric Trust lawsuits filed in state courts have [failed] . . . district courts have granted state defendants' motions to dismiss with prejudice in Alaska, Arizona, Colorado, Minnesota, Oregon, and Washington."); *but see* Wood, *supra* note 32, at 153 ("In a key atmospheric trust litigation case . . . [a court in Texas held] that the public trust not only includes atmosphere but 'all natural resources of the State.' . . . [T]he New Mexico district court allowed a similar atmospheric trust suit to go forward . . .").

[106] *See* Wood, *supra* note 33, at 153. *But see* Cress, *supra* note 98, at 271–2.

[107] *But see* Cress, *supra* note 98, at 259 (noting that the non-profit Our Children's Trust began a nationwide campaign to litigate this theory in the decade).

[108] *See* Bogert & Hess, *supra* note 34, § 582.

[109] *See* Lazarus, *supra* note 91, at 654 (noting the fiduciary standard imposed by the public trust doctrine "stops short of declaring an absolute environmental quality standard.").

[110] *Id*.

[111] *See* Cress, *supra* note 104, at 273.

[112] The United States accounted for only 13.9% of global greenhouse gas emissions in 2012, meaning that even if there is a nationwide trust, assets may still be damaged. *See* ENV'T & CLIMATE CHANGE CAN., CANADIAN ENVIRONMENTAL SUSTAINABILITY INDICATORS: GLOBAL GREENHOUSE GAS EMISSIONS 4, 8 (2016), http://www.ec.gc.ca/indicateurs-indicators/54C061B5-44F7-4A93-A3EC-5F8B253A7235/GlobalGHGEmissions_EN.pdf.

[113] *See* Complaint, *supra* note 78, at 94.

invoking the political question doctrine.[114] Thus, by including the atmosphere as a trust asset, plaintiffs may in fact be providing the court with a reason to avoid enforcing a duty at all.

In contrast, a cause of action concerning more traditional trust assets may avoid requiring the judiciary to make difficult policy choices. Instead, the reasonableness of the trustee's actions might be compared to how a private trustee might manage private property.[115] For example, a treatise on trusts declares, "if the trust property is lost or destroyed or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill."[116] Physical assets, even submerged lands, are more amenable to this type of analysis. Practically, this could make them a better fit for a public trust doctrine claim than the atmosphere.[117]

C. Focusing on Mitigation Rather than Adaptation

Finally, the plaintiffs in *Juliana* were misguided in their decision to focus their call for relief on mitigation of climate change rather than an adaption regime.[118] A mitigation remedy produces legal obstacles that adaptation measures do not. Additionally, it creates a significant preemption issue resulting from the federal statutes governing air emissions.[119] Preemption is a canon of statutory construction that establishes the supremacy of federal statutes over state ones and common law counterparts.[120] Importantly, preemption can override state law claims as well as some federal common law ones.[121] As a

[114] Arguably, this type of issue invokes the political question doctrine pronounced in *Baker v. Carr*, 369 U.S. 186, 217 (1962). *Baker* identifies six types of cases where the political question doctrine might apply. Particularly relevant to this hypothetical is the third, which applies to cases where the judiciary is faced with "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* Here the initial policy decision would concern the reasonable level of harm to the atmosphere in light of the geopolitical realities of climate change. A court is not equipped to answer such a question.

[115] There are arguably no private trust corollaries to the atmosphere because of its transboundary character.

[116] 2 A. Scott, TRUSTS 1408, 1419 (3d ed. 1967).

[117] Determining a value for reference to even claim diminished value is far easier for submerged lands than it is for the atmosphere. Submerged lands are commonly leased for resource exploration by various state and federal agencies, whereas the atmosphere is not. *See, e.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. § 1344(a)(4) ("Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government.").

[118] *See* Complaint, *supra* note 78, at 99.

[119] *See* Clean Air Act, 42 U.S.C. §§ 7401–7671 (1970).

[120] *See* Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771 (1994); *see, e.g.*, New York C. R. Co. v. Winfield, 244 U.S. 147, 148 (1917) ("[W]hen Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.").

[121] *See* Cipollone v. Liggett Grp., 505 U.S. 504, 516 (1992) (holding that federal law can preempt state statutes and common law claims); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 412 (2011) (rejecting the idea "that federal common law is not displaced until the EPA actually

result, requesting a mitigation remedy risks both derivations of the public trust doctrine. Preemption analysis focuses on the intent of Congress.[122] Courts attempt to determine if state laws are in conflict with the intent of a federal regime or if federal common laws have been displaced by Congress's action.[123] If Congress intended to design a comprehensive regulatory system to govern a particular field, a court will preempt attempts to intervene.[124] The Clean Air Act preempts federal common law claims for climate change mitigation measures.[125] Indeed, such claims are displaced by Congress's decision to provide the EPA with authority to regulate greenhouse gases.[126]

But there is a circuit split over whether the Clean Air Act similarly overrides state common law. In *N.C. ex rel. Cooper v. TVA*, the Fourth Circuit held that a common law nuisance claim from NO[x] emissions by the Tennessee Valley Authority was preempted by the Clean Air Act.[127] This could arguably be read to apply to other regulated pollutants such as carbon dioxide. Yet the Third Circuit found otherwise in *Bell v. Cheswick Generating Station*, holding that the

exercises its regulatory authority by setting emissions standards . . . ."); *see also* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 552 (2008) ("The most common form of [preemption] asks whether federal law blocks the preservation of state common law rights."). Also of note is that there are two different tests depending on whether the preempted law is federal or state common law. *See* Milwaukee v. Ill., 451 U.S. 304, 316–17 (1981).

[122] *See* Gardbaum, *supra* note 12020, at 767.

[123] *Id.* at 771 (explaining that the first question when dealing with preemption of state law is whether the "state lawmaking power [is] preempted by Congress," and if not, "whether the particular state law in question conflicts with the terms of the relevant federal law"); *Milwaukee v. Ill.*, 451 U.S. at 361 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[124] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) ("Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (quoting Fidelty Federal Savings & Loan Assn., v. De la Cuesta, 458 U.S. 141, 153 (1982)).

[125] *See* Clean Air Act, 42 U.S.C. §§ 7401–7671 (1970)*; Am. Elec. Power Co*., 564 U.S. at 412.

[126] *See Am. Elec. Power Co*., 564 U.S. at 412 ("The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; *the delegation displaces federal common law*. If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse is to seek Court of Appeals review, and, ultimately, to petition for certiorari.") (emphasis added).

[127] N.C. ex rel. Cooper v. TVA, 615 F.3d 291, 303 (4th Cir. 2010) ("A field of state law, here public nuisance law, would be preempted if 'a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' . . . Here, of course, the role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted." (quoting *Pac. Gas & Elec. Co.*, 461 U.S. at 204)).

Clean Air Act did not preempt tort suits within the source state.[128] While this issue has not come before the Supreme Court, other similarly designed statutory regimes have. Referring to the Clean Water Act, the Court held "it would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure."[129] The Clean Air Act has a similarly complex statutory structure.[130] Public trust suits might arguably undermine that scheme to a greater extent than the nuisance suit at issue in *Ouellette* by creating an ongoing duty to augment emissions standards to preserve the trust asset.[131] This would create severe conflict with the federal scheme, making it "virtually impossible to predict the standard" required to comply.[132]

In contrast, adaptation measures do not necessarily create similar preemption issues. There is no comprehensive federal law addressing climate change adaptation directly. Nor is there a complex federal scheme for regulating management of state public trust lands.[133] Thus, a focus on adaptation, rather than mitigation, could avoid this legal roadblock. It presents a possible opportunity to ready communities for climate change through the common law.

V. ANATOMY OF A HYPOTHETICAL STATE LEVEL ADAPTATION TRUST CLAIM IN NESKOWIN

An alternative to the flawed claim made in *Juliana* might be a state law claim under Oregon law. This claim could allege a duty over coastal trust assets that mandates adaptation remedies. For instance, a hypothetical claim might allege a violation of the public trust doctrine in coastal Neskowin, Oregon for failing to adapt trust assets to the threats of climate change.[134]

Neskowin is a small coastal community in Tillamook County that is particularly vulnerable to the impacts of climate change. Although it is small, it

[128] Bell v. Cheswick Generating Station, 734 F.3d 188, 198 (3d Cir. 2013) (holding that a common law tort claim was not preempted by the Clean Air Act).

[129] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (holding that a common law nuisance claim was preempted by the Clean Water Act).

[130] *Bell*, 734 F.3d at 194 ("While the extent to which the Clean Air Act preempts state law tort claims against an in-state source of pollution is a matter of first impression in this Circuit, the Supreme Court has addressed this issue in the context of a similarly comprehensive environmental statute: the Clean Water Act." (referencing *Int'l Paper Co. v. Ouellette*, 479 U.S. at 497)).

[131] *See* discussion *supra* Part II (noting that a trust duty is continuing fiduciary duty).

[132] *See* Illinois v. Milwaukee, 731 F.2d 403, 414 (1984) (holding that state common law duties were precluded where a complex federal statute occupied the field).

[133] Although there is the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-64, it is easily distinguishable in complexity from the Clean Air Act and Clean Water Act.

[134] The community of Neskowin, Oregon in Tillamook County was chosen because the county has developed climate change planning documents and so data and potential adaptation options have already been outlined. The public trust doctrine could prove a useful tool in forcing such action.

has a high percentage of residents living in potential erosion areas.[135] The community has faced severe challenges due to coastal flooding and erosion in the past, which are expected to continue with climate change impacts.[136] Neskowin and communities like it are struggling to find a solution, resulting in risks to both natural resources and adjacent homeowners whose properties are eroding into the sea.[137] The community's response has been to construct "hard protection" along the shoreline to protect coastal homeowners.[138] But physical measures require maintenance and updating to ensure their continued viability.[139] The public trust doctrine could possibly serve as a legal tool to encourage action as well as the consideration of other methods, including soft protections such as beach nourishment.[140]

A. The Hypothetical Claim

First, this hypothetical claim would need to meet procedural standing requirements. The Oregon Supreme Court defines "standing" as "a legal term that identifies whether a party to a legal proceeding possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties."[141] Plaintiffs might demonstrate standing based on government interference with recreational or commercial use of a public trust resource.[142] A local resident who can demonstrate an interest in using the coastal trust assets

[135] TILLAMOOK CITY. DEP'T OF CMTY. DEV., THE NESKOWIN COASTAL EROSION ADAPTATION PLAN, at 26–27 (2013), https://services.oregon.gov/LCD/OCMP/docs/Publications/NeskowinAdaptationPlanFinal.pdf [hereinafter NESKOWIN PLAN].

[136] *See* Lori Tobias, *Pacific Ocean Threatens to Gobble up Oregon Beach Towns*, OREGONIAN (Jan. 31, 2010), http://www.oregonlive.com/news/index.ssf/2010/01/pacific_ocean_threatening_to_g.html; Stuart Tomlinson, *Hurricane Sandy-like Storm Surges, Sea-Level Rise Threaten Oregon Coast*, OREGONIAN (Jan. 28, 2014), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/11/hurricane_sandy-like_storm_sur.html; *see also* Aimee Green, *Sand, Homes and Riprap Don't Always Mix: Oregon's Tortured History of Coastal Construction*, OREGONIAN (July 3, 2016), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/07/sand_homes_and_riprap_dont_alw.html (providing historical background).

[137] TILLAMOOK CITY. DEP'T OF CMTY. DEV., ADAPTING TO COASTAL EROSION HAZARDS: A PLAN FOR THE COMMUNITY OF NESKOWIN, DRAFT, REVISION 1, at 18 (April 2012), http://www.neskowincommunity.org/neskowincoastalhazards/Neskowin%20Subplan.NCA%20post.pdf ("[H]azards that directly damage only some properties also are likely to damage streets, sewers, water lines and other infrastructure, impose significant public costs, impair local businesses, and harm natural resources – effects that would be felt throughout the community.").

[138] NESKOWIN PLAN, *supra* note 135, at 16 (noting that currently 85% of shorelines has a protective riprap).

[139] *Id.*

[140] *Id.* at 68 (summarizing the potential responses to erosion considered by the County).

[141] Kellas v. Dep't of Corr., 145 P.3d 139, 142 (Or. 2006).

[142] *See, e.g.*, Columbia River Fishermen's Protective Union v. City of Saint Helens, 87 P.2d 195 (Or. 1939) (finding that "plaintiffs, as [commercial] gill net fishermen, have a special interest, distinct from the public in fishing their drift which will be protected in a court of equity against destruction by acts of the defendants, which destroy their nets and interfere with their fishing.").

for commercial use or recreation might have standing to challenge the lack of adaptation measures in Neskowin. Specifically, someone who uses the near shore beach and waters for fishing or recreational boating could possibly qualify— the lack of government action has arguably inhibited their legal right to recreate in state waters or on state lands.

Next, to establish a valid cause of action, a hypothetical claim would need to prove the existence of a duty over specified trust assets. Establishing the public trust duty under Oregon law is more likely when the asset is within the confines of the doctrine.[143] A trickier issue would be to define the scope of the duty so as to allow adaptation, as well as the resilience of the coastal community and ecosystem to occur. To that end, hypothetical plaintiffs might allege that the Oregon public trust doctrine includes some upland shore along with the traditional submerged area. In *Weise v. Smith*, the Oregon Supreme Court held that upland areas were necessary for water-based navigation and were part of trust assets covered by the access rights of the beneficiary—the public.[144] Similarly, in coastal adaptation scenarios, coastal beaches are crucial to recreation and navigation in the waters traditionally included in the trust and so can be "subject to the rights vested in the public."[145] Even if the doctrine is not extended to upland areas, a potential plaintiff might allege that a failure to adapt coastal areas is limiting commercial and recreational use of submerged lands.

Next, a potential plaintiff must show the sovereign has failed to uphold their fiduciary obligations to act reasonably in managing trust assets.[146] The duty under Oregon law most applicable to a failure to act on climate change is the sovereign's duty not to alienate public trust lands.[147] This is not an absolute requirement.[148] But the failure in this instance to preserve recreational rights is similar to the abdication that spurred judicial intervention in *Shively*.[149] A plaintiff could claim disposal as a result of climate change, however this is dissimilar to a sale to a private party who in turn builds a wharf blocking

[143] *See* discussion *supra* Part III; Morse v. Or. Div. of State Lands (*Morse II*), 590 P.2d 709, 715 (Or. 1979).

[144] *See* Weise v. Smith, 3 Or. 445, 450 (1869) ("Although the riparian owner has an absolute right to enjoy his land, in all proper ways, the adverse party has an absolute right, as one of the public, to navigate the stream. Neither one can justly deprive the other of his rights.").

[145] *Id.* at 451; *see also* State *ex rel.* Thornton v. Hay, 254 Or. 584, 600–01 (Or. 1969) (concurring opinion) (holding that access to beaches is justified under the public trust doctrine and not custom).

[146] *See* discussion *supra* Part II.

[147] *See* Shively v. Bowlby, 152 U.S. 1, 57 (1894); s*ee also* Ill. C. R. Co. v. Ill., 146 U.S. 387, 453 (1892).

[148] *Ill. C. R. Co.*, 146 U.S. at 453.

[149] *See* Bowlby v. Shively, 22 Or. 410, 414 (Or. 1892) (holding that state may sell its tidelands, and purchasers "take them free of any right therein of the upland owner, and subject only to the paramount right of navigation inherent in the public . . . ").

navigation.[150] It might nonetheless serve as an unacceptable interference and source of damage. By failing to properly adapt the shoreline to the effects of climate change, Oregon could be alleged to have "disposed" of sovereign lands preventing potential use for commerce, navigation, or recreation.

Oregon courts have considered such an abdication invalid if it serves as a "substantial impairment of the interest of the public in such [assets]."[151] Beach erosion and ocean flooding substantially impair navigation along the coastline by foot and make marine transportation similarly difficult by damaging ports and channels.[152] Even if upland areas are not included in the asset class of the asserted trust, the submerged lands "abdicated" by inaction are no longer available for recreation and fishing.[153] The impact of unabated sea level rise and ocean flooding could inhibit these uses by damaging coastal ecosystems.[154] In essence, the sovereign trustee must ensure that irrevocable damage does not occur and uses are maintained.[155] On that basis, a plaintiff might be able to convince a court that it constitutes an improper disposal under the public trust doctrine and requires adaptation measures.

The final element of a claim is the assertion of a judicially enforceable remedy. To establish one, a potential plaintiff might request both a declaratory judgment establishing the scope of the public trust doctrine and an injunction to prevent further damage to the submerged lands and upland beach. Plaintiffs seeking an injunction must show that the "injury complained of must be substantial, and not merely technical and inconsequential."[156] In *Columbia River*, the court enjoined a municipality and two paper mills from continuing to pollute the river in a manner that depleted fish stocks and damaged fishing

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[150] *See id.* at 413.

[151] Morse v. Or. Div. of State Lands (*Morse II*), 590 P.2d 709, 711 (Or. 1979).

[152] NESKOWIN PLAN, *supra* note 135, at D-95 ("Coastal infrastructure will come under increased risk to damage and inundation under a changing climate with impacted sectors including *transportation* and *navigation*, coastal engineering structures (seawalls, riprap, jetties, etc.) and flood control and prevention structures, water supply and waste/storm water systems, and *recreation*, travel and hospitality." (quoting Oregon Climate Change Research Institute, Oregan Climate Assessment Report 209 (K.D. Dello & P.W. Mote eds., 2010), http://pnwcirc.org/sites/pnwcirc.org/files/ocar2010.pdf) (emphasis added)).

[153] *See* Hume v. Rogue River Packing Co., 92 P. 1065, 1073 (Or. 1907) (explaining that the public has the right to fish in waters over privately owned beds); Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936) (explaining that the public had the right to use privately owned lakes because "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters . . . for the purpose of transportation and commerce," including transportation for pleasure).

[154] NESKOWIN PLAN, *supra* note 135, at D-96 ("[C]limate change and sea level rise are likely to increase salinity of estuarine waters, altering and perhaps damaging significant fish and riparian habitat.").

[155] *See* Geer v. Connecticut, 161 U.S. 519, 534 (1896) ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state." (quoting Magner v. People, 97 Ill. 320, 334 (1881)).

[156] Columbia River Fishermen's Protective Union v. St. Helens, 87 P.2d 195, 199 (1939).

equipment.[157] Here, a municipality or the state could be enjoined from harming navigational interests and thus be required to adopt sufficient adaptation measures to preserve those uses. Just as in *Columbia River*, injuries to the uses would be similarly consequential, as they will likely cease to continue absent an injunction.[158]

VI. CONCLUSION

Ultimately, the hypothetical state law claim is not a replacement for comprehensive federal legislation addressing climate change. But a state public trust claim with traditional trust assets or with a limited extension, coupled with an adaptation remedy, might be path litigants choose to attempt to mitigate the effects of climate change in light of the current political climate. It is grounded in precedent and limits potential legal pitfalls. More importantly, if repeated in communities and states across the country, this legal approach might prove the flexibility and evolutionary capacity of the doctrine—something that has enthralled scholars in the decades since Professor Sax's groundbreaking article.

Creating climate resilient communities will require local solutions and creative problem solving not possible through *Juliana's* national injunction. A District Court in Eugene, Oregon cannot possibly adjudicate a national response to climate change with sufficient granularity. It needs only to look to the local priorities at the heart of Neskowin's rejection of approaches used elsewhere to combat erosion and sea level rise.[159] Tailoring public trust claims to specific communities could allow continued evaluation and the development of creative solutions to minimize climate change impacts. A combination of ripraps and beach nourishment may work in one locale but be misguided a few miles down the coast. State courts can leverage local information, rather than issue broad remedies that may not effectuate the desired resiliency when actually applied. Measurable progress can be made through this legal approach. In today's caustic political environment, that might be considered a victory.

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[157] *Id.* ("The injuries complained of by the plaintiffs are not trivial, and, as we have endeavored to show, the fishing rights, which are alleged to have been interfered with, are of the greatest moment, and the destruction of the fishing industry will amount to thousands of dollars and prevent a large number of people from pursuing their usual vocation of fishing.").

[158] *Id.*

[159] NESKOWIN PLAN, *supra* note 135, at 33.