

ATMOSPHERIC TRUST LITIGATION: PROMPTING
CLIMATE ACTION THROUGH THE COURTS

by

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Over the last two decades, frustration with government inaction on climate change has catalyzed a surge of litigation to prompt policy action. Although climate change litigation is constrained by justiciability doctrines and a hostile legal opportunity structure, environmental non-governmental organizations (NGOs) are still pursuing lawsuits. This paper investigates atmospheric trust litigation (ATL), a national litigation campaign coordinated by Our Children's Trust, which uses the public trust doctrine to enforce what they allege is the government's fiduciary obligation to protect the atmosphere in trust for the public. Specifically, I examine the Oregon court proceedings in *Chernaik v Kitzhaber* as a case study of how both parties strategically frame their arguments to influence case outcomes. Although ATL is still in its infancy, previous research has assessed the viability of the legal arguments underlying atmospheric trust litigation and analyzed case outcomes. However, this paper contributes to a discussion of the practical application of these arguments by investigating how Our Children's Trust (OCT) employs various strategies to influence case outcomes, and addresses the broader research question of how Our Children's Trust creates their own opportunities in a hostile legal environment. To answer, I draw from legal briefs, court decisions,

interviews, and newspaper coverage to explain how counsel framed and refined the problems and solutions in court, provided a roadmap for case proceedings, and sensationalized a “doom and gloom” future to influence case outcomes. My findings indicate that by agreeing to bifurcate their case, strategically framing their appeal, and rewording their requests on remand, OCT helped create legal opportunities that resulted in a justiciability win. This research underscores the importance of giving agency to social movement actors and understanding the broader socio-legal context within which atmospheric trust litigation operates.

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List of Abbreviations

Document	Citation
Our Children’s Trust’s Amended Complaint	Am Complaint
State of Oregon’s Motion to Dismiss	OR Mtn to Dismiss
OCT’s Response to State’s Motion to Dismiss	OCT Resp I
State’s Reply in Support of Motion to Dismiss	OR Repl I
Trial Court decision	Trial Decision
OCT’s Opening Brief (on Appeal)	OCT App Brief
State’s Answering Brief	OR App Brief
OCT’s Reply Brief	OCT Repl Brief
Appeals Court decision	Appeals Decision
OCT’s Motion for Partial Summary Judgment for Declaratory Relief	OCT Mtn
State’s Motion for Summary Judgment	OR Mtn
OCT’s Response in Opposition to State’s Motion for Summary Judgment	OCT Resp
State’s Memo in Opposition to OCT’s Motion for Partial Summary Judgment	OR Resp
OCT’s Reply in Support of their Motion for Partial Summary Judgment	OCT Repl for Mtn
State’s Reply in Support of their Motion for Summary Judgment	OR Repl for Mtn
Trial Court Oral Arguments	Oral arguments
Trial Court Decision	Trial Decision II

Frequently Employed Acronyms

Term	Abbreviation
Our Children's Trust	OCT
Atmospheric Trust Litigation	ATL
Public Trust Doctrine	PTD
Public Trust Resource	PTR
Oregon's Uniform Declaratory Judgment Act	UDJA
Political Question Doctrine	PQD
Legal Opportunity Structure	LOS

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Introduction

Over the last two decades, frustration with government inaction on climate change has catalyzed a surge of litigation to prompt policy action. As climate rose on the international agenda and Congress failed to ratify the Kyoto Protocol, environmentalists stopped looking to international treaties and started turning to the courts (Vanhala and Hilson 2013; Osofsky 2008). This “legal mobilization” has prompted important questions about the role of the judiciary in enforcing climate policy. It also begs a simpler question: what is climate change litigation, and how successful has it been?

Both Meltz (2008) and Gerrard (2008) recognize 1990 as the beginning of climate change litigation (CCL), though others note that CCL did not gain steam until 2006 (Markell and Ruhl 2010: 10650). In an empirical study of the field, Markell and Ruhl (2012) identify a total of 131 CCL cases filed through 2009, and 201 cases through 2010. They define climate change litigation as “any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts” (*Id* 27). This definition is limited in that it excludes petitions for rulemaking (including many of OCT’s legal actions) or notices of intent to sue. However, this definition still captures a picture of climate change litigation that presents intriguing questions about the opportunities and constraints of the legal landscape.

In their earlier paper, Markell and Ruhl (2010) found that a majority of climate change cases shared a common narrative. Almost two thirds of the cases brought

through 2009 are suits that environmental nongovernmental organizations (NGOs) have brought against the federal or state government. Markell and Ruhl also identify stark differences in the sources of law that are brought for claims. They find that statutes make up 86% of CCL claims, constitutional provisions makes up 8% of claims, and common law claims amount to only 6%. Other surveyors of CCL (Meltz 2008; Pidot 2006; and Gerrard 2015) have similar findings. They each categorized CCL claims as falling under seven sources of law: 1) Clean Air Act, 2) Wildlife Protection Statutes, 3) Energy Statutes, 4) Information Statutes, 5) Common Law Torts, 6) Federal preemption cases, and 7) State utility laws. What do these all have in common? Five of the seven sources of law are exclusively statutory, and usually align with the paradigm of environmental NGOs bringing a claim against a government agency.

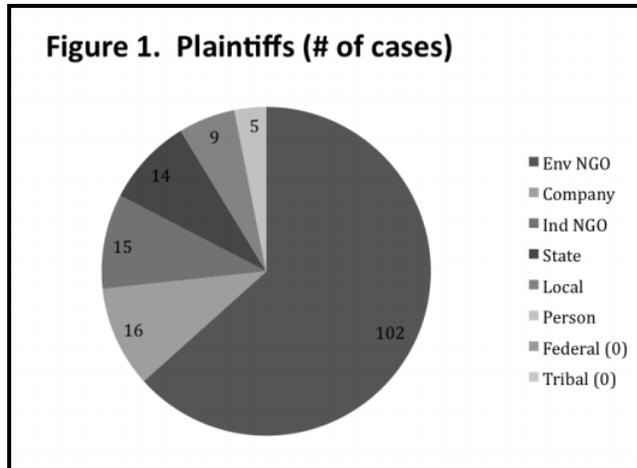


Figure 1: Types of Plaintiffs in an Empirical Survey of Climate Change Litigation
 Source: Markell and Ruhl 2010: 10652

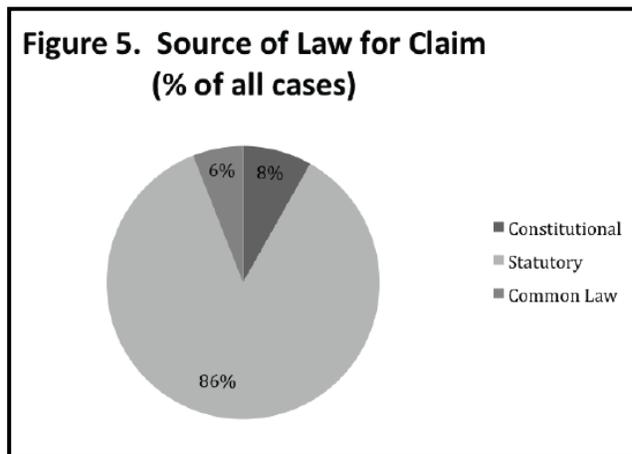


Figure 2: Sources of Law for Climate Change Litigation claims
 Source: Markell and Ruhl 2010: 10653

Atmospheric Trust Litigation

My research investigates atmospheric trust litigation (ATL), a national litigation campaign which uses the public trust doctrine to enforce what the plaintiffs allege is the government's fiduciary obligation to protect the atmosphere in trust for all present and future generations. How does atmospheric trust litigation compare with the types of litigation mentioned above? ATL is similar in that it aligns with the familiar story of an

environmental law NGO challenging state and federal governments for failing to act on climate change (Markell and Ruhl 2010). The litigation is coordinated by Our Children's Trust (OCT), a small environmental law nonprofit based in Eugene, Oregon. In only four years, OCT has filed over 39 petitions for rulemaking and 16 lawsuits suing state governors and agencies. However, the similarities stop there. Our Children's Trust uses the public trust doctrine (PTD), a common law doctrine with roots in constitutional and pre-constitutional principles of sovereign obligation to enforce their claims. While they did rely on statutes to bring this case (Oregon's Uniform Declaratory Judgment Act), those statutes are not directly connected to the substantive obligations OCT is trying to enforce. Additionally, almost all the atmospheric trust litigation cases are filed in state courts, so OCT primarily relies on state statutes rather than federal ones.

Atmospheric trust litigation varies most substantially in the way its legal arguments are framed. A key tenet of this litigation is its focus on intergenerational justice. ATL recognizes that government has obligations to protect critical natural resources not only for present generations, but for all future generations as well. This long term view is both a strength and another challenge for the success of ATL. Lastly, ATL cases are unique in that the plaintiffs are all youth climate activists, whom OCT supports by providing the legal services for them to sue their state governors or agencies. This choice of plaintiffs is intentional and strategic on OCT's part: Young people and future (unborn) generations have the most to lose from climate change, and the least means of changing policy (no voting rights, no independent income, etc.). OCT argues that the government's failure to act is destroying nature—the trust *res*—and that it must start radically reducing carbon emissions in order to protect our children's trust.

Legal Opportunity Structures

This paper draws on social movement theory, which recognizes the “hostile legal opportunity structures” environmental NGOs face in litigation. The term legal opportunity structure (LOS) describes the structural and contingent constraints and opportunities within the legal system (Hilson 2002). LOS factors are usually grouped under two headings: “access to the courts” and “judicial receptivity” to policy arguments (Hilson 2002, Andersen 2006). Accessibility is influenced by justiciability rules, the financial burdens of going to court, as well as which legal claims and remedies (including injunctive) are allowed to be brought under laws (Vanhala 2012; Hilson 2002, Andersen 2006). “Judicial receptivity” has been described in terms of how open/closed and weak/strong judicial systems are, but these distinctions are not compelling. This paper instead looks at the “fragility of the courts” and judicial willingness to make controversial decisions.

While justiciability, financial burdens, and judicial receptivity are significant constraints, Vanhala (2012) critiques the notion of LOS for failing to discuss the agency of movement activists and their active role “in creating their own legal opportunities” (Vanhala 2012: 525). Instead of focusing on why NGOs litigate rather than other forms of political action, she explores “why groups mobilize the law in the face of constraints... to elucidate a key part of the larger story of how movements shape the opportunity structures within which they are situated” (*Id* 529). To investigate, Vanhala conducted a study that examined 35 legal actions filed by four environmental NGOs in England over the course of 1990-2010. She found that “despite substantive losses, many of the cases involve procedural victories and legal and political benefits” that can

contribute broader benefits for other environmental campaigns (*Id* 525). By procedural victories, Vanhala refers to campaigns that successfully pass justiciability tests which make courts more accessible for other environmental issues.

Atmospheric trust litigation's track record certainly parallels Vanhala's findings. In four years, OCT has filed over 39 petitions for rulemaking and 16 lawsuits, covering jurisdictions in all fifty states, as well as Uganda and the Ukraine (Wager 2014: 79-80). Of all the state petitions/suits filed, all were denied. Of these, nine were litigated in a state trial court. Of those nine, all were dismissed, six due to justiciability issues. Six of those trial court cases were appealed to a higher state court. Of these cases, only three were deemed justiciable. Two of those three cases were resolved without granting any of OCT's requested injunctive relief. The other was sent back to the trial court on remand. However, despite these losses, OCT has still won some victories. The trial court in the Texas ATL case declared all natural resources to be trust resources, pursuant to the Texas Constitution.¹ An Appeals court in New Mexico also recognized that the public trust duty extends to protect the atmosphere pursuant to their state Constitution.² These wins were only made possible because both of these cases passed the justiciability tests and were decided on the merits. This presents an even more interesting question: what strategies did OCT employ to convince the court their case was justiciable and increase their legal opportunities?

¹ *Bonser-Lain v Texas Commission on Environmental Quality*, 2012 WL 3164561 (Tex Dist. 2012), reversed on jurisdictional grounds, 438 SW3d 887 (Tex App 2014).

² *Sanders-Reed v Martinez* (New Mex App 2015). "We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state." (Appeals Decision 10).

Case Selection

I use Vanhala's framework to describe how OCT, despite various constraints, employs a number of strategies to help create legal opportunities in one of their cases, which resulted in a justiciability win. The case study I chose was the Oregon ATL case *Chernaik v Kitzhaber*, the only case that was declared justiciable by any Appeals Court and remanded back to the trial court to be heard on the merits. *Chernaik* is an appropriate case study because it was declared justiciable, yet was still pending. This presented me with an opportunity to study which strategies OCT employed to help bring not only a justiciable case, but potentially other more substantive victories. Although trial Judge Rasmussen's newest decision (issued May 11, 2015) did not grant OCT any substantive victories, the examination remains relevant, and OCT's plan to appeal the case means that the strategies may eventually bear more tangible fruit.

However, my research diverges from Vanhala's study in important ways. First, the scope is much smaller. I'm focusing closely on only one case, from one organization, which has filed sixteen lawsuits over four years. Second, my argument assumes that by passing justiciability requirements in one case, OCT can more easily win on justiciability arguments elsewhere. One key difference is that the legal opportunities OCT creates will only be significant if they successfully transfer to cases in other state jurisdictions, which is presumably harder than transfers within the single federal jurisdiction of England, as in Vanhala's case study. Even though it is still too early to quantify the influence of these precedents, there is reason to believe OCT's legal opportunities will transfer out-of-state. First, the relief requested in each ATL case is almost identical. Second, ATL lawsuits against the Governor are almost always

brought under Uniform Declaratory Judgment Acts. Even though each state may have its own slightly different version of the Act, the purpose is essentially the same: to declare what the law is. Third, OCT frequently cites to precedent from other cases in their own legal briefs to guide the court towards a more favorable decision. For these reasons, any legal opportunities OCT creates by expanding standing and justiciability are theoretically precedential.

ATL Literature Review

The field of atmospheric trust is still in its infancy (Wager 2014). It was developed by UO Law Professor Mary Wood, who, since 2007, has published a number of articles that famously culminated in her recent book *Nature's Trust* (2013). Many legal scholars have debated the viability of successful litigation and the theoretical underpinnings of using the public trust doctrine to protect the atmosphere. Advocates support expanding the public trust doctrine (PTD) to the atmosphere for a number of reasons: because the atmosphere protects other recognized public trust resources (Munro 2012, Ellis 2014); because it facilitates protection of the public's rights to airspace navigation (Ellis 2014); because a healthy environment is a human right (Fox-Decent 2012, Feaver 2012); and because each State agreed to these obligations upon becoming a state (Redgwell 2000, Wood 2013; Babcock 2009, Grant 2001; more on this later). Opponents list legal arguments that would thwart this expansion: the lack of the PTD's legitimacy in courts (Finn 2012, Sampford 2012); the doctrine's ability to be "abused for personal or party political gain" (Sampford 2012); the fundamental belief that fiduciary duties only apply to private, financial trusts (Glover 2012). Whatever the

views of scholars, the opinions of judges and lawmakers will ultimately prove most influential.

However, only a few authors have delved into the results of the relevant litigation, the subject of this paper. Wager (2014) and Ellis (2014), both university law students at the time, analyzed federal and state ATL outcomes to inform the viability of courts extending the PTD to the atmosphere. While Wager primarily relies on one sentence case summaries to argue for the extension of the PTD in Hawaii courts, Ellis provides more comprehensive analysis of the national litigation. He argues more broadly that the PTD should apply to the atmosphere, but that judges will only use it to correct state actions that affirmatively inhibit the public's interest, rather than to correct state inaction. By providing quotes from each state court decision and some written dismissals from agencies, he interrogates the judicial and administrative rationales for dismissing the complaints and petitions for rulemaking. While this careful analysis contextualizes Ellis's argument, the evidence for these rationales does not tell the whole story. My research delves into the arguments and actions by litigators that aren't mentioned in judicial decisions or agency complaints. In effect, it will take Ellis's analysis one step further—explaining the rationale behind the judge's words on paper, and how OCT's lawyers, the social movement agents working in a constrained legal environment, contributed to a successfully justiciable case in Oregon.

Many legal scholars are willing to debate the viability of successful litigation and the theoretical underpinnings for using the public trust doctrine to protect the atmosphere. However, two things have been lacking: a discussion of the constraints of the legal landscape, and how these legal arguments play out in the courtroom. By

analyzing the court proceedings of the Oregon litigation, this paper reveals how OCT employs various strategies to create their own opportunities in a hostile legal environment.

Statement of Purpose

This paper asks: How does Our Children’s Trust create their own opportunities in a hostile legal environment? To answer this question, this paper uses the court proceedings of the Oregon case, *Chernaik v Kitzhaber*, as a case study. This paper analyzes the sixteen legal briefs and decisions submitted by Our Children’s Trust (OCT) and the State of Oregon (State) to the Lane County Trial Court and Oregon Court of Appeals. It also draws on informal interviews with OCT staff, litigators, and observations from two of the public trial hearings. This analysis identifies four rhetorical devices that both parties use to organize their arguments. Two relate to how parties frame the problem and solution. The last two focus on the future—how parties provide the judge a “roadmap” of case proceedings, and offer a “doom and gloom” future if the case is resolved unfavorably. The analysis is organized by the three stages of court proceedings: the Trial Court, the Appeals Court, and the Trial Court on remand. My findings indicate that by agreeing to bifurcate their case, strategically framing their appeal, and rewording their requests on remand, OCT helped create legal opportunities that resulted in a justiciability win and an appealable record.

My paper is divided into four parts. Section I will provide an overview of the legal opportunity structure for climate change litigation and ATL in particular. Section II contextualizes the legal arguments of ATL by analyzing the literature on the public trust doctrine. Section III introduces OCT’s and the State’s positions on the scope and

extent of the PTD in Oregon. Section IV analyzes the court proceedings of *Chernaik v Kitzhaber* to identify counsels' use of the four rhetorical devices to influence case outcomes. In the conclusion, I identify the biggest obstacles for this case, how OCT responded, and provide detailed analyses of the legal holdings of this case and how OCT helped influence these outcomes. This paper ends by discussing how legal strategies operate within a broader socio-legal context, and the efficacy of litigation as a response to climate change.

Section I: Legal Constraints for Climate Change Litigation

Surveys of CCL show that almost two thirds of the cases brought through 2009 follow the familiar story of environmental nongovernmental organizations (NGOs) bringing suit against a federal or state agency (Markell and Ruhl 2010). What's surprising is the win/loss record.

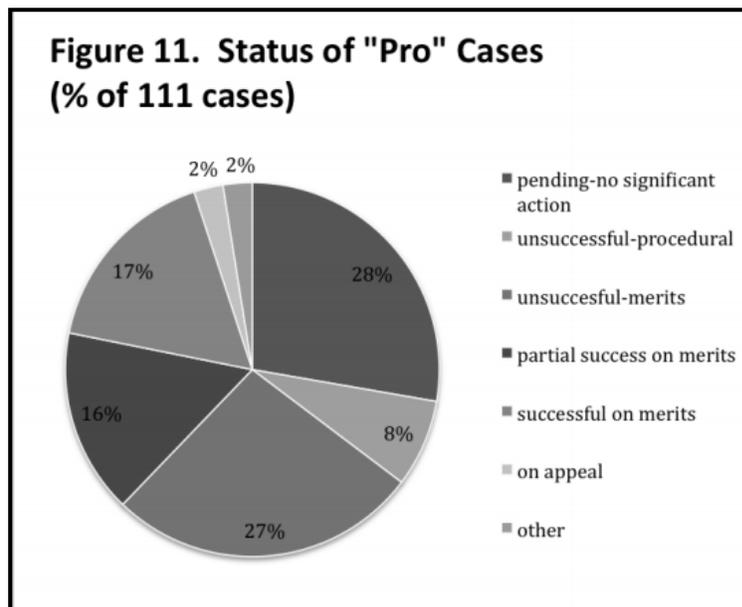


Figure 3: Success Rate for “Pro-Environmental Regulation” Climate Change Litigation

Source: Markell and Ruhl 2010: 10654

Thirty five percent of the “pro-environmental regulation” cases ended unsuccessfully, either procedurally or on the merits. At the same time, twenty eight percent of the cases were still pending; in total, only seventeen percent of cases were successful on the merits. These numbers add up to create a discomfoting yet common narrative. So far, most CCL has been environmental NGOs suing government agencies over statutes and only winning seventeen percent of the time. Why? This section explores how justiciability rules, the financial costs of litigation, and judicial receptivity

create a legal environment with severe constraints for climate change litigation, and ATL in particular.

Justiciability

The largest procedural obstacle for cases is the doctrine of justiciability, which provides judges some guiding questions about whether the case in front of them is appropriate to rule on. Of the nine ATL cases that went to trial court, six were dismissed for justiciability. New Mexico, Colorado, and Texas were the only cases that were declared justiciable, but even then the Texas Court of Appeals dismissed the case for lack of jurisdiction later on. While familiar tests have developed over time to help determine whether cases meet these requirements, legal scholars note that many of these tests are incoherent and inconsistently applied (Chemerinsky 1991: 677; Winter 1988: 1373).³ These tests, described below, are organized into five tenets: 1) Adversity, 2) Standing, 3) Ripeness, 4) Mootness, and 5) the Political Question Doctrine.

The adversity rule requires that both parties to a case represent adverse interests. This rule functions to limit cases in which litigants try to *test the waters* of legality, by requiring that a case present a genuine issue or conflict. Courts cannot issue “advisory opinions” for cases that lack adversity, only rulings of law on cases in which both parties are properly adverse. Interestingly, this rule came into play in Judge Rasmussen’s latest ruling of the Oregon case. During oral arguments, he pondered whether adversity barred the case because both parties agreed to the facts of the case, namely, the facts of climate change.

³ Winter writes that “[realists] have concluded that the doctrine of standing is either a judicial mask for the exercise of prudence to avoid decisionmaking or a sophisticated manipulation for the sub rosa decision of cases on their merits.”

The doctrine of standing has evolved to require plaintiffs to prove three things: 1) that they have suffered an injury and have a personal stake in the controversy, 2) that they can trace the cause of their injury to the party they're suing, and 3) that a favorable decision would result in an appropriate remedy. Standing is by far the biggest obstacle for climate change cases, because climate change may cause many indirect harms that are not easily traceable to one corporation's emissions, for example. Luckily, ATL cases have not been dismissed for lack of standing thus far, even though State counsels in the Oregon and New Mexico cases have raised those concerns.

The next two rules ensure that cases are brought before the court at the appropriate time. The ripeness rule ensures that a case is not brought too early, and the mootness rule requires that a case must not be brought too late, after no meaningful remedy can be offered.

Lastly, the political question doctrine developed as a way for courts to use discretion when answering questions that would be better left to the "political branches" of government. If a judge found that a case presented a "political question," it usually means that a judge would find the requested relief in violation of the separation of powers doctrine, which distinguishes law-making as a legislative power, law enforcement as the executive's role, and interpretation of the law as the responsibility of the judicial branch.

This rule, as well as the closely related separation of powers doctrine, has to do with the relationships between the three branches of government. It may be politically uncomfortable for a judge to issue a legal ruling that the government has failed to fulfill its obligations. One consideration the judicial branch has, according to Oregon Supreme

Court Justice Walters, is to protect against “the fragility of the courts” (Personal communication, February 23, 2015). This term represents the fear that the rule of law will falter if the court issues a ruling that puts into question its authority and neutrality as an arbiter. The result is that the rule will not be enforced. A classic example is from the 1830s, when President Jackson refused to enforce rulings by the U.S. Supreme Court to stop taking Indian lands. In this same vein, OCT’s injunctive relief, which asks the court to direct the executive branch to implement a carbon reduction plan, places the onus (and the risk) on the courts to enforce the rules they make.

The political question doctrine (PQD) was the culprit behind the dismissal of at least three of the nine trial court cases. This is because judges have interpreted OCT’s requests for injunctive relief to require judges to cause the Executive branch to prepare a state-wide carbon inventory and emissions reduction plan as a political issue, not a judicial one. As we will see, in the Oregon court proceedings, the trial court judge again held that OCT’s requested relief violates the closely related separation of powers doctrine. These rules severely limit OCT’s ability to, as Vanhala notes, “obtain adequate and effective remedies (including injunctive relief) for environmental offences” (Vanhala 2012: 525).

Financial Resources for Litigation

This section introduces both parties to the litigation, focusing on the difference in their financial resources. While money does not win lawsuits, successful litigation campaigns require long years of litigation and hefty attorney’s fees. The takeaway here is that as far as money goes, the State always has the upper hand over environmental NGOs.

Our Children’s Trust is a small nonprofit that was founded in 2010. They have seven paid staff, only two of whom are paid full time. Over half of the staff works out of a small office in Eugene, the others work remotely from San Francisco or Portland. These seven staff are responsible for coordinating and supervising the over fifty legal actions for the entire litigation campaign, as well as community organizing and public education events. The actual litigation is carried out by a network of pro bono environmental attorneys that have partnered with OCT. While the attorneys work for free, an OCT staff member admitted that timesheets kept for the lawyers amounted to “over one million dollars” of work. OCT partner lawyers are allowed to petition a court to pay their attorney’s fees if they win their case, and may be on payroll for their own environmental law firm. However, the burden is on OCT’s own fundraising efforts to support their organizational needs to even be able to recruit pro bono attorneys.

The Defendants in this case have radically different resources. The lawyers representing the Governor and the State of Oregon are from the Attorney General’s office. The Attorney General and her team of attorneys are housed within the Oregon Department of Justice, and are state employees. Over the four year course of the Oregon litigation, five lawyers were assigned to represent this case from the Trial and Appellate divisions. For a total of 152 employees, the combined budget for the Trial Court and Appeals Court division for FY 2013-2015 was \$44,450,000 (OR Justice Department 2015-17 Agency Request).

Judicial Receptivity

Professor Wood, a law professor and the architect of ATL, argues that the “era of environmental statutes” has transformed the role of the courts and “skews the balance

of power among the three branches of government” (Wood 2013: 16).⁴ Surveyors of CCL show that most claims are brought through federal statutes from environmental NGOs suing state or federal agencies. This may have developed for two reasons: First, climate change is a global issue, so it can be strategic to litigate in federal jurisdictions if parties desire federally binding relief. Second, the promulgation of federal environmental statutes in the 1960s and 1970s created a mechanism for citizens to enforce regulations and challenge agencies if they didn’t fulfill their responsibilities. This, in turn, catalyzed legal activism that became the foundation of the CCL movement (Percival 2007; Vanhala and Hilson 2013: 142). At the same time, Wood (2013) argues, these statutes have developed into a frame with limited opportunities for climate litigation.

One of the biggest constraints of the current legal landscape is the judicial branch’s “distaste and fatigue at the prospect of managing the complex details of a meaningful remedy” (*Id* 256). More aggressively, Wood claims that the judicial branch has become complacent, and has delegated away their powers as a co-equal branch of government. According to her, the role of the judge under modern environmental law has become simple: narrowly interpret statutes and decide whether agencies followed the rules well enough or make them try again. She argues that by limiting judicial review of environmental cases to interpreting the agency’s behavior through the administrative record, “judges give deference to agencies, assuming them to be neutral institutions endowed with superior technical expertise.” (*Id* 232).

⁴ See also Wood 2007:456. “Modern environmental law does one, and perhaps only one, thing well: it informs people of the destruction of their common property and tells them what agencies are permitting it.

She argues that the legal system needs to operate in a new frame in order to respond to the “erratic dysfunction” of the current statutory landscape (*Id* 14). Atmospheric Trust Litigation is her litigation strategy to enforce the government’s “ecological obligation” to recognize that “some natural resources remain so vital to public welfare and human survival that they should not fall exclusively to private property ownership and control” (*Id* 14). The obligations under the atmospheric trust ask grander questions about the purpose of agencies and environmental protections and ask the courts to regain an equal footing with governmental branches.

Legal Challenges for Atmospheric Trust Litigation

At the same time, the paradigm shifts inherent in ATL are the most difficult for judges to sign on to. According to Professor Davidson, who authored the amicus brief for OCT’s federal case, the state ATL cases asks for three difficult rulings at the same time, even one of which would be a substantial victory. Even though the specific requests change, OCT’s relief consistently requires the courts to recognize three issues: First, that the atmosphere is a public trust resource (PTR); Second, that the government has affirmative responsibility to protect PTRs, rather than a negative duty not to harm them; and Third, that the Public Trust Doctrine derives from a supra-statutory authority. The next paragraph describes in more detail why these are difficult asks.

OCT’s first request is difficult for Oregon courts to do because, among other reasons, submerged and submersible waters historically have been the only widely recognized public trust resources. Second, recognizing affirmative duties in the legislature is practically unheard of. The U.S. Constitution, the “supreme law of the land,” as well as the Oregon Constitution, functions as a limit on government power.

The Bill of Rights, for instance, only dictates what the government may *not* do. For example, the fourth amendment of the US Constitution restricts the federal government from conducting unwarranted searches and seizures on citizens. Finding that governments must act proactively to fulfill their responsibilities also creates all sorts of liability for them. Needless to say, state governments are loathe to sign up for affirmative obligations. The State vehemently opposed them in *Chernaik*, and Judge Rasmussen just as vehemently refused to recognize such a burden.

The last difficult ask that ATL requests courts to recognize is the supra-statutory nature of the Public Trust Doctrine. In its briefs, the State refers to the PTD exclusively as the “common law public trust doctrine.” This is because common law doctrines are the lowest level laws in the hierarchy of judicial authorities. This hierarchy is split into at least three levels: 1) Constitutional law, which is “the supreme law of the land,” (U.S. Constitution. Art 6.2); 2) Statutes passed by democratically elected legislators; and 3) common law, a body of customary law that includes precedents set by judges and the traditions US courts picked up from England.

The takeaway is that under this hierarchy, common law can be displaced by statutory law every time. If a court recognizes the public trust doctrine as a tenet of sovereignty, it means that the weight of those obligations cannot be diminished by statutes. This is one reason why the PTD is so confusing. It is widely recognized in courts as a “common law doctrine,” but is also used to displace statutory responsibilities or legislative grants, which only supra-statutory laws are supposed to be able to do.

Thus, identifying the connections the PTD has to sovereignty is strategically useful for those advocates of its expansion, just as denying them is for opponents. This will be covered in greater detail in the following section, which introduces the PTD.

Section II: The Public Trust Doctrine

The Origins of the Public Trust Doctrine

The Public Trust Doctrine (PTD) is a legal doctrine that dates back to Roman and English common law. The PTD holds that government has a fiduciary duty to manage certain natural resources in trust for the benefit of the public. A fiduciary duty is a legal duty “to act solely in another party's interests” (Cornell Legal Dictionary). This type of duty exists, for example, between a lawyer and her client whom she is representing in court. The lawyer is legally bound to act in the best interest of her client, and not for her own gain. The public trust doctrine, in a sense, describes an unwritten clause in the social contract: the public “trusts” the government to protect critical natural resources in the public’s best interests.

Another useful analogy as to how the PTD operates is that of a private trust, which is much more common in U.S. courts. A private (i.e. financial) trust is set up when a settlor (the original property owner,) grants property to a trustee to manage for the benefit of present or future beneficiaries. Public trusts, on the other hand, do not dictate management of private property (*jus privatum*), but public property (*jus publicum*). Thus, the beneficiaries are the public, and the relevant public property is to be managed in the public’s best interests. In some respects, the public trust doctrine acts more like a charitable trust. A charitable trust is managed by a private party for public (charitable) interests. It exists in perpetuity, which is another reason advocates like this analogy. In other words, it requires the present protection of future interests. The responsibility of the government as public trustees exists forever—it does not fade.

The PTD has been hailed as the savior of environmental law as early as early as 1970, when Joseph Sax published an influential article that was once among the most cited law review articles in history. Sagarin and Turnipseed (2012) note that the public trust doctrine is “appealing for environmental law and policy scholars on both philosophical and practical grounds.” Philosophically, the PTD provides an intergenerational framework from which lawyers can apply a “long term view” of environmental issues. Additionally, the PTD sets up protections for both current and future generations, because trust resources may be managed for beneficiaries that do not exist yet. Practically, the fiduciary duties of the PTD have been well established in U.S. Courts. Additionally, the obligations to act in the public’s best interest are recognized in perpetuity. As with financial trust, the obligations of the public trust do not sunset, even if the trustee changes.

But what is the public’s best interest? Who gets to decide? And what standards are used? These questions get to the core of what the responsibilities under the public trust doctrine are, and who is responsible for fulfilling them. Ultimately these questions are up to government to decide, and for citizens to challenge if they don’t agree. However, this leaves judges as the primary enforcers of the public trust, a role which some courts are loathe to take on.

One complication that arises in the judicial arena around trusts and ATL particularly may be a conflict of terminology. Some authors, like Wood (2013), use the term “public trust” to refer to an obligation that government has to protect critical natural resources in the interest of the public. As this paper will discuss below, court cases from all levels of courts have designated various resources as trust assets that

must be protected “in trust” for the public. For example, in *State v Hume*, 52 Or 1 (1908), the Oregon Supreme Court found that “title to fish and wildlife is held ‘by the state, in its sovereign capacity, in trust for all its citizens’” (OCT Mtn). However, many legal scholars (and litigators, like counsel for the State of Oregon in this case,) do not recognize this “trust” as a blanket responsibility that the government must fulfil. Rather, they interpret the “trust” as discrete resources that legislators have determined warrant extra protections. The novelty of OCT’s litigation, besides recognizing the rights of future generations and applying the PTD to the atmosphere, lies in their efforts to “connect the dots” between all the commonly known trust resources to recognize the underlying stewardship principles protecting them.

The Public Trust Doctrine and Sovereignty

While the literature does not dispute the common law origins of the PTD, authors (and litigators) dispute how the PTD operates today. Some commenters ground the PTD in sovereign (constitutional) law (Redgwell 2000; Wood 2013; Babcock 2009, Grant 2001). The doctrine represents “the foundation for standards of governmental conduct,” and “carries critical information about how government will [and should] function” (Torres 283). In this view, the PTD, as it operated in English common law, obligated the sovereign (the Crown) to protect common-held resources in trust for the public. In England, the Crown held both the private rights (*jus privatum*) and public rights (*jus publicum*) of the land. The Crown was responsible for managing the land in a way that preserved the public’s rights to use it. After the Revolutionary War, the public trust obligations transferred to the federal government and the newly created 13 sovereign states. These authors posit that by virtue of being a sovereign, a state owned

all resources in its domain. But, this natural endowment came with strings attached—namely, the obligation to manage critical natural resources for the public’s benefit. Thus, the sovereign states, and all newly created states Congress granted statehood to, implicitly agreed to these terms, which derive from their capacities as sovereign trustees.

Others disagree with the sovereign roots of the PTD (Huffman 2007; Cress 2013). They attribute the public trust obligations to the sovereign’s grant of title at statehood. When the U.S. Congress approved a state for statehood, it vested the state with perpetual title to the lands. In this view, the expansion of public trust resources is limited to resources to which the state continues to hold title. Still others distinguish public trust obligations as subordinate to private property rights (Huffman 2007). As the main opponent of the sovereign-trust association, Professor Huffman argues that the underlying assumption about the Roman understanding of common property is wrong. He claims the Romans only considered the shorelines and other lands “common to all” until an individual claimed ownership to them. Thus, any public trust obligations were historically subordinate to laws of private property ownership (and still are). This represents a constant tension in public trust literature—whether and how much private rights are subject to public rights. Does the “police power” of states to regulate and enforce *public* rights extend to actions that “encroach” on *individual’s* rights? Or, does it, as Cress argues, function as a protection of “the exercise and enjoyment of individuals’ private rights to the extent they do not interfere with the private rights of others?” (Cress 2013: 266). These different theoretical approaches result in substantially different applications of the doctrine. Before getting into how counsel for OCT and the

State applied the PTD in *Chernaik*, the next section will provide a brief overview of widely recognized public trust resources.

Public Trust Resources and Uses

Submerged and submersible lands are the most well-known PTRs. The doctrine also serves as a protection for the public's rights for specific, judicially-recognized uses in such lands. Jan Stevens, a former Deputy Attorney General of California, notes that "for reasons largely historical, [the] public trust has commonly been associated with the sovereign's ownership of the beds of navigable waters, and its purposes have been traditionally delineated as those of 'commerce, navigation and fisheries.'" *City of Long Beach v. Mansell*, 476 P.2d 423, (Cal 1960).

A landmark case that illustrates the public trust beginnings in the U.S is *Illinois Central Railroad Company v Illinois* 146 U.S. 387 (1892). In this case, the Illinois legislature had granted a railroad company title to lands around the Chicago harbor in perpetuity. Citizens, who could no longer access the harbor, challenged the grant. Justice Fields interpreted the PTD as a prohibition against the state "to barter and sell the lands." Even though the state legislature had granted Illinois Central the land around Chicago harbor, he held that the public has rights to "lands covered by the waters of Lake Michigan for the purposes of navigation and fishery." He held that the legislature needs to protect the public's right to pursue these purposes, and privatizing the land would subvert them. Underneath the waters of Lake Michigan, these submerged and submersible lands, as Oregon courts refer to them today, were the first resources recognized under the public trust doctrine to be managed for the public's use of navigation and fishing.

The Expansion of the Public Trust Doctrine

Over time, both the number of resources and the number of uses that the public trust conserves have increased. A major catalyst was Joseph Sax, who wrote an influential article in 1970 reviving the public trust doctrine in the environmental law community. His lasting contribution was applying the public trust obligations not just to the tidelands or beds of navigable waters, but to dry land as well. One year after Sax's article was published, the California Supreme Court issued a decision that expanded the trust uses from the original trilogy. As described by Frank (2011), the court in *Marks v Whitney*, 480 P.2d 374 (Cal 1971) "used a seemingly-mundane property dispute between neighboring Tomales Bay neighbors to declare that public trust uses extend beyond the traditionally-stated trilogy of commerce, navigation and fishing, to encompass environmental values and protection" (Frank 2011: 668).

One year after that, a New Jersey Supreme Court cited Sax's article and declared that the PTD may protect recreational uses of trust resources such as coastal beaches. The court held, "In this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities." *Borough of Neptune City v Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972). In that same year, the Wisconsin Supreme Court relied on Sax's article to hold that PTD "could be asserted to bar the filling of privately-owned wetlands, in order to preserve those wetlands in their natural condition" (Frank 668). *Just v Marinette County*, 201 N.W. 2d 761 (Wisconsin 1972).

These are just a handful of cases from different states that have designated certain resources as “public trust resources.” As Professor Wood points out, “While traditionally applied to water-based resources, the public trust doctrine has expanded its reach over time, and commentators increasingly point out the logic of a trust approach to climate crisis” (Wood 2013: 111).

Section III: The Legal Arguments for the Oregon Public Trust

Doctrine

This section will transition from discussing the broader constraints of the current legal landscape and theoretical arguments about the PTD to introduce the practical, legal arguments presented in *Chernaik v Kitzhaber*. In the second round of trial court proceedings, the legal issues boiled down to two questions: 1) What resources does the Public Trust Doctrine encompass? 2) What obligations does the PTD impose? It is important to note that the legal arguments of both parties do not hinge on minute differences in interpretations of law. This litigation poses more fundamental questions about the role of government, including the responsibilities of each branch of government and their duties to protect the environment. Each party has its own story to tell, with their own assumptions about what climate change means for present and future generations. They present vastly different narratives about how laws influence climate change, what the role of the courts is, and what responsibilities government has. That being said, each party has access to the same facts and case law as the other: the trick for attorneys on both sides is to frame the evidence and precedents in their clients' best interests.

Each party refers to the handful of Oregon cases that designate specific resources that are “held by the State....in trust.”

Trust Resource	Quote	Case
Submerged and Submersible lands	From OCT Mtn: “Article VIII, § 5(2) of the Oregon Constitution “is a constitutional expression of the jus publicum or public trust aspect of the state’s ownership” of submerged and submersible lands.	<i>Brusco Towboat v Oregon</i> , 30 Or App 509 (1977)
Tidelands	From OCT Mtn: “[The] statute regulating fill of tidelands is “a codification of the public trust doctrine”	<i>Morse v Division of State Lands</i> , 34 Or App 853 (1978)
Lands under navigable waters	“[T]he lands underlying the navigable waters of the state are held by the State in trust for the benefit of the whole people of the state.”	<i>Corvallis Sand & Gravel Co. v State Land Board</i> , 250 Or 319 (1968)
Fish and Wildlife	From OCT Mtn: “Title to fish and wildlife is held ‘by the state, in its sovereign capacity, in trust for all its citizens.’”	<i>State v Hume</i> , 52 Or 1 (1908)

Table 1: Selected Oregon Public Trust Case Law

Source: OCT’s Motion for Partial Summary Judgement for Declaratory Relief

However, each party uses this information differently. OCT’s believes the PTD imposes an overarching fiduciary obligation on the government to protect all essential natural resources in trust for all present and future generations. Their job is to convince the court that each of these resources is connected to this underlying responsibility that requires substantial protection on the State’s part.

The State lawyers have different considerations. The Attorney General is the State’s lawyer, responsible for representing the State of Oregon in all cases when it is sued. Besides protecting the State’s assets, another consideration the Attorney General

has is ensuring that the “State, by and through the people's elected representatives, must act at all times exclusively in the public interest.” (OR Mtn 1). Working for both the people of Oregon, and for Oregon’s elected representatives, the AG is committed to “pursuing justice and upholding the rule of law,” which means that they are acutely aware of what the law is and whether the State is appropriately enforcing it (Oregon Department of Justice website). The AG’s role is to make sure the State is complying with all the laws it needs to, and reduce the liability of the state. Their task is simple: they want to reduce the obligations of the doctrine in order to preserve the separation of powers between branches of government and limit the liability of the State. This means downplaying any idea that the state has an affirmative responsibility to do something. Thus, their main strategy is to narrowly define the PTD and draw as many lines in the sand as possible to contain their trust obligations.

OCT’s Legal Arguments to Expand the PTD

Needless to say, Our Children’s Trust had the much trickier job. Their first job was to establish that each resource they mention (atmosphere, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife, and fish) are all within a single class of trust resources. Their second job was to establish the legal background of the doctrine to show that the PTD is really an obligation all states agreed to follow when they became a state to protect essential natural resources from substantial impairment. To make their case, OCT builds the story of the Public Trust Doctrine with whatever authority they can: federal cases, Oregon cases, other state cases, Oregon statutes, and provisions from Oregon and other states’ constitutions.

First, OCT cited the Oregon case law that identifies “trust resources” (some of which is shown in the table above). Next, they explained how the obligations of the trustee date back to Roman common law, citing the Institutes of Justinian, which reads “By the law of nature, these things are common to mankind—the air, running water, the sea and consequently the shores of the sea” (*Id* 5). Then, they cited ten US Supreme Court cases that recognize resources held “in trust for all the people” (*US v State of California* 332 US 19, (1947), for example). To bring their point back home, OCT returned to the specific Oregon trust resources and attached constitutional, statutory, or other judicial authorities to them. For example, while OCT admits that “no Oregon case has held explicitly that the PTD applies to Oregon’s iconic beaches,” Oregon’s Beach Bill (1967) was passed by the legislature “to forever preserve and maintain the sovereignty...and ocean beaches of the state...so that the public may have the free and uninterrupted use thereof” (codified as ORS 390.610(1); OCT Mtn 10).

With regards to the atmosphere, OCT presented three main arguments: First, that “by any test, the atmosphere is a public trust resource that is so essential to public welfare as to warrant placing upon the sovereign the authority and duty to protect and preserve that asset in perpetuity for present and future generations” (OCT Mtn 12).⁵ Moreover, “to preserve all other public trust assets...the sovereign must protect the integrity of the atmosphere” (*Id* 12). Lastly, they list cases or constitutions from other states which they allege have “recognized the atmosphere as a public trust resource” (*Id*

⁵ OCT mentions that the “tests” used to determine the scope of the PTD are considerations such as whether the natural resource are “of inestimable value to the community as a whole,” or are “transient in nature,” (Center for Biological Diversity, *166 Cal App 4th at 1359-64*), “or whether they are of “vital importance ...to the public welfare” (*In re Water Use Permit Applications*, 94 Haw at 135.)” (OCT Mtn 12).

14). OCT included the Texas ATL case, which held that the “PTD includes all natural resources of the State,” pursuant to Texas's Constitution.

OCT's next move was to support its argument that the PTD obligates the State to protect resources from “substantial impairment,” and does not just function as a restraint on alienation, as the State alleged. The standard of “substantial impairment” derives from two fundamental PTD cases: 1) *Illinois Central* (“the State must exercise control of PTRs to avoid ‘substantial impairment of the public interest in the lands and water’”); and 2) *Morse* (“the State may not make a grant to a ‘private party which results in such substantial impairment of the public’s interests as would be beyond the power of the legislature to authorize’”). Then, rather than relying on more cases to support their point, OCT presents the scientific consensus about the danger of climate change. The way in which they present this information is important. All the facts OCT presents were included in their amended complaint, filed back during the first round of trial court proceedings. The allegations list the effects of climate change such as “increased rates of asthma, cancer,” “heat-related mortality,” and others (OCT Mtn 17). These facts of climate change are also the “facts of the case,” which the State was allowed to dispute in its briefs. However, the State agreed with OCT about the facts on climate change, so they did not dispute them vigorously. This allowed OCT to frame its argument with relatively straightforward logic: the State must protect PTRs from substantial impairment. Over 350 ppm of carbon in the atmosphere constitutes substantial impairment. Thus, the State has violated its duty. OCT even showed that the state ‘conceded’ the substantial impairment standard, when its attorneys stipulated that (the “public trust doctrine ... operates as restraint on the State’s authority to either

alienate or divest itself ...where such alienation or divestment would substantially impair the public's right to use the [trust resource] ...for ... [trust purposes]"(State Mtn 11, emphasis in original).

The State's Legal Argument to Limit the PTD

The State, in contrast, narrowly defines the extent of the Doctrine and their responsibilities under it. The resources that Oregon courts have declared are "held by the State...in trust" are not really public trust resources, connected to the doctrine. They argue that courts merely use the term "trust" as a "shorthand" (OR Resp 8). They disagree with OCT's characterization that each of these "'public trusts' that were created for different purposes...create one overarching 'public trust' to be expanded and applied as plaintiffs see fit" (*Id* 8). They claim that the PTD only applied to resources that the State of Oregon was granted ownership upon admission to the Union. Because Oregon, "like other states, acquired ownership of all submerged and submersible land beneath bodies of water that were navigable at the time of statehood," they were obligated to protect the public's right to use the waters underlying those lands for purposes of "navigation and fishery" (OR Mtn 12, citing *Cook v. Dabney*, 70 Or 529, 532 (1914); *Northwest Steelheaders Ass 'n v. Simantel*, 199 Or App 471, (2005)). The State claimed that unlike submerged and submersible lands, Oregon "was not granted 'title' to the atmosphere" or any other resource "at statehood under the equal footing doctrine (or at any other time)," and thus has no other public trust resources (OR Mtn 15).

According to the State, PTD obligations only restrict the state's ability to completely privatize a resource (or otherwise alienate it). The State claims that the PTD

has “rarely, if ever,” been used to limit state action in order to protect the resource itself. The one instance in which the Oregon Supreme Court negated state action was in *Cook v. Dabney*, in which the court reversed a land grant that the legislature authorized because it “directly impaired navigation” (Or Mtn 13). However, the court also cited other reasons for doing so, including that the grant mischaracterized the nature of the land and was counter to the Legislature’s intent (*Id* 13).

They also cite two other cases, *Brusco Towboat Co. v. State*, 284 Or 627(1978) and *Morse v. Oregon Div. of State Lands*, 285 Or 197 (1979), which rejected challenges to the State's indirect impairment of the relevant resources. In *Brusco*, the Supreme Court upheld the State Land Board's program to lease the submerged and submersible lands, and in *Morse* held that the PTD “does not prohibit” the State from issuing a permit to fill a 32 acre estuary to build an airport. Apparently, the Supreme Court in *Morse* justified this decision by citing a law review article that said that “diminishing the quantum of traditional trust resources” does not constitute impairment of trust resources (OR Mtn 13). Basically, the State argues that the PTD only operates to prohibit the state from privatizing resources, and nothing more. The State can grant permits, make laws, and do as it likes to regulate the trust resources under its police power. The State ends its arguments about the narrow scope of the PTD by urging the court to consider that since no “written conveyance” identifies “the atmosphere as a trust asset and the State as a trustee, there is no basis to infer any obligation beyond those expressly stated in the duly enacted laws and Constitution” (OR Mtn 25).

OCT's Response

In response, OCT criticizes the State's narrow definition of the doctrine, specifically the requirement that the State have "title" to a resource in order for it to be a PTR. They cite *Hume v Oregon* to show that the Oregon Supreme Court designated fish and wildlife as resources "held in trust by the State of Oregon" even though wildlife are not always located on state-owned lands. They claim that there are different kinds of ownership. The State's ownership of wildlife is "not as a proprietor, but in its sovereign capacity for the benefit of an in trust for its people in common" (*Simpson v Department of Wildlife*, 242 Or App 287 (2011)) (OCT Resp 8). This is an issue that Judge Rasmussen returned to during round two of oral arguments. During OCT's presentation, he asked "what is the title to the atmosphere?" OCT's lead litigator made a distinction between "a possessory title, which really applies to real property, and what courts have said is the sovereign interest, the sovereign title. There's no title to wildlife either, and it's not a possessory one, either" (Oral Arguments, 7:50, April 7, 2015). Judge Rasmussen ultimately sided with the State's narrow interpretation that the PTR only encompasses resources in which the State holds title.

Section IV: Court Proceedings & Rhetorical Devices in *Chernaik v Kitzhaber*

This research investigates *Chernaik v Kitzhaber* as a case study to show how OCT employed various strategies to help secure a justiciable case, and thus expand their legal opportunities in a constrained legal landscape. *Chernaik* is the only ATL case that was declared justiciable in the Appeals Court and remanded back to the trial court. In a “nationally significant decision,” (as praised by staff from OCT), the Court of Appeals remanded to Judge Rasmussen of the Lane County Court with instructions to hear the case again and issue declarations regarding the extent of public trust obligations. This gave OCT another chance to present their arguments that the long established public trust doctrine applies not only to traditional trust resources like submerged and submersible lands, but others, including the atmosphere.

On May 11th, 2015, Judge Karsten Rasmussen issued his second decision. He sided with the State and narrowly interpreted the public trust doctrine to not apply to the atmosphere or any other of the resources OCT listed. “In retrospect,” a *Eugene Register Guard* editor reflects, “it’s clear that the plaintiffs in a high-profile lawsuit seeking more vigorous action by the state to combat climate change won no victory when the Oregon Court of Appeals remanded their case to Lane County Circuit Court. [Judge] Rasmussen exercised jurisdiction as instructed, and demolished the plaintiffs’ legal claims” (*Register Guard* 5/13/2015). Although the case currently stands in an unpromising posture, a closer analysis of court proceedings shows how OCT contributed to the wins that they have obtained thus far.

Drawing on the sixteen legal briefs submitted to the courts, this analysis identifies four rhetorical devices that both parties use to organize their arguments. Two relate to how parties frame the problem and solution. The last two focus on the future—how parties provide the judge a “roadmap” of case proceedings, and offer a “doom and gloom” future if the case is resolved unfavorably. The analysis is organized by the three stages of court proceedings: the Trial Court, the Appeals Court, and the Trial Court on remand. My findings indicate that by agreeing to bifurcate their case, strategically framing their appeal, and rewording their requests on remand, OCT helped create legal opportunities that resulted in a justiciability win and an appealable record. The next section describes relevant laws, including the statute OCT brought its claim under and the climate change policies that the State used to displace their PTD obligations.

Relevant Oregon Laws

Oregon’s Uniform Declaratory Judgment Act

OCT filed their complaint under Oregon’s Uniform Declaratory Judgment Act (UDJA). The UDJA is a law that allows courts to declare the “rights, status, and other legal relations,” (ORS 28.010) of parties to “terminate controversy or remove uncertainty” (ORS 28.050). It authorizes “any person, whose rights, status, or other legal relations” are affected by a “constitution, statute, municipal charter, ordinance, contract or franchise” to petition the court for a declaration to clarify what the law is (ORS 28.010, 28.020). The UDJA also states that this enumeration does not restrict courts from issuing declarations that may terminate uncertainty (ORS 28.050), that courts may issue supplemental relief in the form of injunctions (ORS 28.080), and that

court have discretion to refuse to issue a declaration if it would not terminate uncertainty (ORS 28.060)

The plain language of Oregon’s Declaratory Judgment Act states that:

“Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a judgment.” ORS 28.010

“Any person * * * whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such * * * constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” ORS 28.020

* * *

“The enumeration in ORS 28.010 (Power of courts) to 28.040 (Declaratory judgments on trusts or estates) does not limit or restrict the exercise of the general powers conferred in ORS 28.010 (Power of courts), in any proceedings where declaratory relief is sought, in which a judgment will terminate the controversy or remove an uncertainty.” ORS 28.050

“The court may refuse to render or enter a declaratory judgment where such judgment, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” ORS 28.060

* * *

“Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application thereof shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause why further relief should not be granted forthwith.” ORS 28.080

Under a past UDJA case that served as the model for OCT’s requests for relief, the Oregon Supreme Court was asked to declare that the State of Oregon had failed to uphold its constitutional responsibility to adequately fund public education *Pendleton*

School District I v Oregon, 345 Or 596 (2009). The plaintiffs in *Pendleton* requested the above declaration, and a court order (injunction) to mandate that the State increase funding for schools. In that case, the Oregon Supreme Court narrowly interpreted the UDJA to only allow declaratory relief, and not injunctive relief. Even with this limitation, OCT partner lawyers for Oregon determined the UDJA was still “the best instrument” for this litigation (Personal Communication, April 21, 2015).

Oregon Strategy for Greenhouse Gas Reductions

In 2004, then-Governor Kulongoski appointed the Governor’s Advisory Group on Global Warming. In December 2004, the Governor’s Advisory Group issued its report entitled *Oregon Strategy for Greenhouse Gas Reductions*. The report issued three GHG reductions goals for Oregon:

- 1) By 2010, arrest the growth of, and begin to reduce, statewide GHG emissions.
- 2) By 2020, the state’s total GHG emissions should not exceed a level 10 percent below the levels emitted in 1990.
- 3) By 2050, the state’s total GHG emissions should be reduced to a level of at least 75 percent below 1990 levels.

ORS 468A.200 through ORS 468A.260

In 2007, the Legislature passed HB 3543, which was largely codified in ORS 468A.200 through ORS 468A.260. These statutes did three things. First, the statutes established a legislative finding that climate change “poses a serious threat to the economic well-being, public health, natural resources and the environment of Oregon.” ORS 468A.200(3). Second, they adopted the GHG reduction goals recommended by the Governor’s Advisory group in its 2004 report. Third, they created the Oregon Global Warming Commission, comprised of 25 experts in natural resources fields and

nonvoting members of the legislature. The Commission's obligations include "recommend[ing] ways to coordinate state and local efforts to reduce greenhouse gas emissions in Oregon consistent with the greenhouse gas emissions reduction goals" established by the 2004 Report. Additionally, the Governor and other state agencies are required to report to the Commission about their progress reducing GHG emissions. In 2009 the Commission produced a report that stated "the state will likely fall well short of meeting its 2020 emission reduction goal, and, by extrapolation, clearly is not on track to meet its 2050 goal" (quoted in Am Complaint 13).

Oregon's Legal Obligations on Climate

The parties in the case disagreed about what these laws meant. Our Children's Trust highlighted the fact that the State is "is failing in its efforts to meet the 2020 and 2050 goals set by the Legislature." However, they also alleged that even these goals are not sufficient to protect the atmosphere. According to their expert testimony, the best available science dictates that the atmosphere needs to return to 350 ppm of carbon by the year 2100, which would only result if global action was taken to reduce carbon 6% per year, starting in 2013 until at least 2050. While these goals are not written in any law, OCT argues that these obligations have always existed through the judicially recognized public trust doctrine. Their litigation is focused on persuading the judicial branch to recognize these obligations and ensure the Executive branch completely fulfills its responsibilities.

The State, on the other hand, feels that it has addressed climate change in various other capacities. While not all responses may be legally binding, the State argues that it is a "leader among states seeking ways to reduce greenhouse gas

emissions,” with goals that the Governor and agency heads are required to work towards every year. This is one of the major tensions of the case: Are the government’s obligations to respond to climate change legally binding or voluntary? Judge Rasmussen, in his decision for round two of trial court proceedings, indicated his support for the latter view. After declaring that the atmosphere is not a public trust resource, he noted that “the Court is constrained by, among other things, the aspirational, rather than imperative, nature of the legislative response to global warming “(Trial Decision II 12).

Finally armed with a broad understanding of each party’s legal arguments and background, the next sections outline the significant issues of each stage of litigation. After summarizing the facts of the case, the paper analyzes how both parties constructed their arguments, and what the resulting court decision was. Keeping the constraints of the legal landscape in mind, this analysis will connect the OCT’s individual strategic decisions to the broader socio-legal context in which they were operating.

1st Stage: Trial Court

In May 2011, OCT partner lawyers filed a complaint against the Governor’s Office, on behalf of youth plaintiffs Kelsey Cascadia Rose Juliana, 15; and Olivia Chernaik, 14. OCT’s prayer for relief⁶ included four declarations. They asked the Court to declare, as a matter of law, that 1) the atmosphere, as well as 2) water resources, navigable waters, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, and fish are trust resources (Am Complaint 17), which the State of Oregon has a fiduciary obligation to protect for present a future generations. OCT also requested the

⁶ See Appendix A for complete request for relief.

Court to declare 3) that the State of Oregon has failed to uphold its responsibility (*Id* 17) and 4) that the best available science requires carbon dioxide emission to peak in 2012 and to be reduced by at least six per cent each year until 2050 (*Id* 17). The prayer for relief also included requests for two injunctions. OCT asked the Court to order the State of Oregon to 1) prepare a full and accurate annual accounting of Oregon's carbon emissions, and 2) develop a carbon reduction plan that will protect trust resources based on the best available science (*Id* 17). And, OCT indicated that the best available science would dictate Oregon's duty to employ radical carbon reductions that would result in Oregon's carbon neutrality by 2050, to allow the atmosphere to return to 350 ppm.

Trial court proceedings began in October 2011 when the State of Oregon, instead of filing a response, submitted a motion to the Lane County Court to dismiss the case. In December 2011, both parties submitted briefs, OCT denying the State's motion to dismiss, and the State urging once more to deny OCT any relief they requested.

Framing the Argument

In OCT's Amended Complaint and Response to the State's motion to dismiss, they characterized climate change as a global problem caused by the burning of fossil fuels and deforestation, which has caused substantial increase in greenhouse gases (GHGs). They alleged that further increases in temperature will cause "severe, widespread, irreversible impacts" such as increased rates of "asthma, cancer, stroke, heat-related mortality ...and neurological diseases" (Am Complaint 8). They illustrated an apocalyptic future in which continued inaction would result in "the severe alteration and potentially the collapse of the earth's natural systems leaving a planet that is largely unfit for human life." (*Id* 9)

Appealing to both a “legal and moral” sense of responsibility, OCT urged the court to listen to the scientific community and recognize the State’s obligation to protect these critical natural resources (OCT Resp 6). As mentioned above, their proposed solution offered a clear roadmap for the court to follow: issue declarations stating 1) that the State has a fiduciary obligation to protect the atmosphere and various water resources in trust for the public, 2) that they’re failing to do so, and order injunctions that 3) require the State to listen to the best available science to prepare a carbon accounting and carbon reductions plan to be implemented immediately.

The State, on the other hand, framed the problem entirely differently. Its attorneys contextualized it within broad measures Oregon had already taken to “combat global warming” (State Mem 2). “Oregon is a leader among states in seeking ways to reduce GHG emissions and address the impacts of global climate change” (*Id* 1). The problem was that OCT wanted more stringent regulations, and even though democratic processes have established the rules for passing regulations, OCT’s proposed solution would “effectively take the legislature out of that process” (*Id* 1).

Their solution, by contrast, was for the court to recognize the fundamental importance of upholding these democratic processes by dismissing the case in its entirety. At the initial trial level, they presented four arguments for doing so, but only focused on issues of justiciability, and not the merits of the case. This is because on October 5th, 2011, the lawyers from both parties had met and negotiated an agreement. The terms were that the State’s initial dismissal motion would only focus on justiciability, and “not address the existence of the public trust, the question of whether the state has met its duties under any such trust, or whether plaintiffs have effectively

stated a claim that requires the state to decide those issues at all” (OR Mtn 2). In return, OCT agreed to not bar the State from presenting other arguments (on the merits) on appeal.

Agreeing to bifurcate the case took some thought on OCT’s part. Agreeing to only talk about justiciability issues now, and substantive issues later, would sign up OCT to drag this case on for years—a substantial commitment of both time and money on their part. At the same time, agreeing would limit the severity of the State’s arguments. In this case, the benefits outweighed the costs. As OCT’s lead litigator for *Chernaik* commented, “we were hoping to have jurisdiction issues resolved over getting thrown out,” so they tried for a strategy of “incremental progress” (Personal communication, April 21, 2015). Their decision also considered the precedent it would set for the other ATL cases. By exclusively dealing with justiciability in the Oregon case, “we spread out our chips,” the lead litigator said, and “I think that was an effective strategy” (*Id*).

The State’s Arguments

The State’s first argument alleged that the Court had no authority to award OCT’s requested declaratory and injunctive relief because it was “outside the scope of the UDJA” (Mtn to Dismiss 9). The State claimed that the public trust obligations OCT alleged are derived from a doctrine that “no court has previously recognized” (*Id* 9). The purpose of the UDJA is to interpret existing law, not “create laws or legal obligations in the first instance” (*Id* 9). The UDJA “does not empower courts themselves to legislate. Yet, that is effectively the relief that plaintiffs seek” (*Id* 10).

The State criticized OCT for failing to base their claim on a specific provision of written law, which they claimed is required by the UDJA.

The State's second argument to dismiss the case was that the claims against the State of Oregon and the Governor were barred by sovereign immunity. Sovereign immunity is a doctrine recognized in the 11th Amendment of the US Constitution. The gist of the doctrine is that a State, because it is sovereign, cannot be sued unless it agrees to become party in a lawsuit, or a law specifies that sovereign immunity has been waived. With this argument, the State claimed that the UDJA does not automatically waive sovereign immunity, and because the Governor has not agreed to waive it, the case should be dismissed.

The third and fourth arguments to dismiss the case drew upon two tenets of justiciability: the political question and separation of powers doctrines. The State alleged that OCT's relief "raises political questions that must be addressed by the political branches of government, and not the courts." According to *Rooney v. Kulongoski*, 322 Or. 15, 28 (1995), a case is not justiciable if it places an "undue burden" on other branches of government and requires one branch to perform the "functions" of other branches. The State alleged that OCT's relief met this description and that the case was nonjusticiable. Requesting the court to order the Executive branch to prepare a carbon accounting and a carbon reductions plan would impose an unconstitutional burden on both the State and the Legislature, and cause the court to perform "functions" of the Legislative branch, namely, by making laws.

OCT's Response

OCT rebutted each of the State's arguments in turn. However, the most crucial argument they put forth criticized the State for mischaracterizing their requested relief. The State's claim that OCT asks the court to "effectively legislate" instead of interpret existing law, OCT argued, is constructed around "the false premise that plaintiffs *only* seek a declaration that the atmosphere is a public trust asset," and that the Court does not have jurisdiction to issue a declaration on the common law, an unwritten form of law (OCT Resp I). OCT's requested relief was not just focused on a declaration that the atmosphere is a public trust resource (PTR). Instead, the Court needed to consider their entire relief, which asked for independent declarations about the State's obligations to protect multiple trust resources in trust for the public, including resources like submerged and submersible lands, coastal lands, fish and wildlife, and the atmosphere.

State's Reply

The State's reply brief reiterated their four reasons for dismissal, and pointedly tried to derail the legal underpinnings of the PTD. They attempted to undermine OCT's attempt to "establish previously-unrecognized duties...all without identifying the specific law or laws that empower the court to grant such a request" by arguing that "even the provisions they happened to identify fail to support their request for relief" (OR Reply I 3). Notably, the State continued to characterize OCT's relief as an entire package, instead of independent declarations about public trust resources. "Plaintiffs' public trust allegations regarding the other resources," they note, "must rise or fall along with their allegations regarding an atmospheric trust" (*Id* 6).

Trial Court Decision

In January 2012, Judge Karsten Rasmussen heard oral arguments in Lane County Courthouse on the State's motion to dismiss the case. In essence, he accepted every one of the State's arguments. In his "Discussion" of the issues of the case, he used the State's four reasons to justify his dismissal. He held that the requested relief by Our Children's Trust: 1) exceeded the Court's authority under the UDJA, 2) was barred by sovereign immunity, and 3) violated the Separation of Powers doctrine and 4) the political question doctrine. His holdings on the first and third reasons were two critical instances where he aggressively dismissed OCT's case.

In Judge Rasmussen's opinion, judicial authority to declare law under the UDJA only extends to written law. Because OCT could not point to any specific statutory or constitutional provision, he agreed with the State that OCT effectively "ask[s] the Court to impose a new affirmative duty on Defendants" (Trial decision 5). His rationale was based solely on *Pendleton School District I*, a case the State cited in their Motion to Dismiss to explain that the UDJA only allows courts to grant declarations that are constructed on statutory or constitutional forms of law. Additionally, Judge Rasmussen's finding that OCT's relief violates the separation of power doctrine, as well as the political question doctrine, added colorful language to OCT's dismissal. He characterized OCT's relief as "classic lawmaking," by "ask[ing] the Court to draft a similar but more stringent" standard to cap emissions. Given this characterization, he was especially critical of being asked to perform what he felt like were strictly legislative duties:

"Plaintiffs are really asking a solitary judge in one of thirty-six counties to completely subvert the legislative process and thereby subvert the

elective representatives of the sovereign acting in concert with one another. The Plaintiffs effectively ask the Court to do away with the Legislature entirely on the issues of GHG emissions on the theory that the Legislature is not doing enough. If “not doing enough” were the standard for judicial action, individual judges would regularly be asked to substitute their individual judgment for the collective judgment of the Legislature, which strikes this Court as a singularly bad and undemocratic idea.” (*Id* 11-12).

In summary, Judge Rasmussen seemed almost hostile to OCT’s arguments, and whole-heartedly agreed with the State. However, in his “Conclusion,” he toned back the volume, indicating that due to these four reasons, the Court “declines to address whether it would, in its discretion, grant or deny relief pursuant to ORS 28.060 (UDJA) at this time” (Trial Decision 16). During oral arguments during the 2nd trial court hearing on the merits, Judge Rasmussen indicated he intentionally crafted his conclusion as a package of reasons to allow the Appeals Court to easily address his issues. Certainly this effort was appreciated by both parties. The clarity of Rasmussen’s rationale for dismissal helped frame what questions needed to be addressed upon appeal.

2nd Stage: Court of Appeals

In August 2012, OCT announced its decision to appeal, and by December, submitted its opening brief to the Oregon Court of Appeals. They presented six reasons why the trial court erred in dismissing the case, including how and why their case was justiciable under the UDJA and was not barred by sovereign immunity. However, their primary arguments focused on the error in dismissing this case in its entirety when the trial court had found that only *some* of their requested relief exceeded the court’s authority under the UDJA, and presented issues with separation of powers and political question. On appeal, OCT focused their relief on only two asks: that the Court declare

that 1) the atmosphere and 2) the various water resources they list are PTRs that the State has a fiduciary obligation to protect.

The State submitted an answering brief, largely reiterating their arguments from the trial court. However, in response to OCT's six assignments of error, they instructed that the Appeals Court "need not respond" to OCT's first three claims relating to the scope of the UDJA and sovereign immunity. The State felt its "justiciability arguments under the separation of powers and political question doctrines are dispositive" (OR App Brief 2). However, this move begs the question, why did the State drop their arguments for the first two reasons (UDJA and sovereign immunity)? A guess from OCT's lead litigator explained that on sovereign immunity, "[the State] thought they were going to lose, and they didn't want to risk a court setting an unfavorable precedent" (Personal Communication, April 21, 2015). Conversely, the State may have felt that its UDJA argument (that OCT's relief required the courts to create "new law") would be less successful if the Court of Appeals believed that their agreement not to "question the existence or scope" of the PTD in the trial court would limit the court's ruling.

Regardless, the State made the fatal flaw of once more characterizing OCT's relief as one entire package, a combination of declaratory and injunctive relief. They dismissed OCT's insistence that the court could have at least granted their "bare declarations" by alleging that OCT is "not merely requesting an abstract declaration of law, as they imply. Instead, they seek a specific determination that will affect how the executive (and likely the legislative) branches prioritize certain resources, and an order that they act accordingly" (OR App Brief 25-26). The State gave only two arguments,

both procedural, against considering the relief separately: OCT's claims were "not preserved" in the record, nor would they provide the plaintiffs with meaningful relief (*Id* 26). The "preservation" rule requires that every argument you made on appeal have been first made and preserved in the record of Trial court proceedings, which OCT allegedly failed to do because they "did not request the trial court could entertain portions of their requested relief" (*Id* 26). The "meaningful relief" argument was another way of claiming that OCT's relief was nonjusticiable for failing one of the requirements for standing. (*Id* 26, emphasis added). OCT responded by simply stating that declarations would be meaningful relief—they would recognize the legal right to enforce the obligations imposed on the Executive by the public trust doctrine (OCT Resp I 9).

Use of Rhetorical Devices

Because the Court of Appeals had access to each side's trial and appellate briefs, both parties were able to spend less time framing the problem that catalyzed the litigation (e.g. the causes of climate change) and more time illustrating the problem(s) (or lack thereof) of the Trial court decision. Each party only spent two to five pages framing the issue around climate change (OCT) or the numerous statutes passed to mitigate it (the State). The space dedicated to illustrations of the "doom and gloom" future was also limited and less colorful. This may be in part because of the change in venues. The Oregon Court of Appeals decides most of its cases based on briefs, usually ruling on procedural mistakes made in the lower courts, rather than the facts of the case. The nature of these rulings, as well as the slightly higher prestige of this court, lends itself to a "no nonsense rule" that tempers the usual theatricality of legal argument.

However, in the briefs, and as summarized above, each party framed their solutions differently. OCT listed six reasons why the Trial Court erred, and focused their appeal on only two asks: declarations that the atmosphere and water resources were PTRs that the State of Oregon has obligations to protect. In response, the State only relied on their separation of powers and PQD arguments to uphold the lower court's ruling, and brushed aside OCT's attempt to reduce their requested relief to two independent declarations.

The Appeals stage is really where the use of the "roadmap" as a rhetorical device came into play. By claiming they are entitled to at least "bare declarations" about what resources are encompassed within the PTD, OCT was really laying out an argument that the trial court followed the wrong procedure. They claimed, "had the trial court ...found that the [requests for injunctive relief] were overstepping," it could have "denied aspects of those requests for relief and granted others" (OCT App Brief 28). Another route the trial court could have taken was to ask OCT "to file an amended complaint, instead of dismissing Plaintiffs' entire case on separation of powers grounds" (*Id* 28). This, OCT argued, was the proper way forward.

The State's roadmap was already laid out in the trial court decision. They urged the Appeals Court to uphold all the trial court's findings and let this litigation come to an end. Otherwise, the State claimed, a favorable ruling for OCT would set very problematic precedent: plaintiffs using "the common-law public trust doctrine to legislate climate change policy in Oregon, and [imposing] that policy on the legislative and executive branches" (OR App Brief 4).

Court of Appeals Decision: Summary of the Issues

In January 2014, the Oregon Court of Appeals heard oral argument in the University of Oregon School of Law. The three judges on the case were Judge Schuman, Judge DeVore, and Judge Erika Hadlock. In the most favorable decision OCT has ever received, Judge Hadlock, writing for the court, reversed and remanded the case back down to the Trial Court. In the decision, the court held that “plaintiffs are entitled to a judicial declaration of whether, as they allege, the atmosphere ‘is a trust resource’ that ‘the State of Oregon, as a trustee, has a fiduciary obligation to protect *** from the impacts of climate change,’ and whether the other natural resources identified in plaintiffs’ complaint also ‘are trust resources’ that the states has a fiduciary obligation to protect” (Appeals decision 19). The following sections will summarize how the Court of Appeals reached that decision before stipulating why. The two issues that the Court of Appeals felt it must reach to resolve the case were whether a declaration under the UDJA is appropriate for PTD claims, and whether the case was justiciable.

Issue #1) Does the UDJA allow claims brought under the Public Trust Doctrine?

The make or break issue of this case was the scope of the Uniform Declaratory Judgment Act. The first reason for dismissal Judge Rasmussen gave in his trial court opinion held that plaintiffs requested relief “exceeds the Court’s authority under Oregon’s Declaratory Judgment Act.” The Appeals Court insisted that “in our view, this case turns entirely on a proper understanding of the scope of judicial authority under that [Uniform Declaratory Judgment] Act” (Appeals Decision 9). The first question the Court had to resolve was whether the UDJA authorizes courts to declare only “written”

law, as the State argued, or also common law doctrines with roots in constitutional and statutory law, like the PTD.

The first key factor that strengthened OCT's argument that their case was justiciable under the UDJA was that they focused their appeal on only two out of eight declarations, asserting that they are entitled to, at least, "declarations that (1) defendants 'have an obligation to protect Oregon's water supply and other public trust resources from substantial impairment due to greenhouse gas emissions' and (2) 'that the atmosphere is a trust resource.'" (Appeals decision 8). By directing the conversation to only those two declarations, the lowest hanging fruit of their collective asks, OCT created a more comfortable space for the Appeals Court to discuss the scope of the UDJA and whether or not those declarations provide the "meaningful relief" that defendants' argued was not sufficient to make this case justiciable.

When push came to shove, the Appeals Court broadly interpreted the UDJA to include public trust doctrine claims. They interpreted ORS 28.050 to grant broad authority to declare rights and legal relations from claims deriving from other sources of law than those listed explicitly in ORS 28.010. The two declarations OCT focused their appeal on were wholly within the court's authority to grant pursuant to the UDJA. However, because the UDJA authorizes courts to clarify the "legal relations" between parties, the Appeals Court commented that one of OCT's declarations did not fit the bill. The request for a declaration about what the "best available science" says about carbon reductions, according the Court, "is tightly linked to the request for" an order requiring the State to develop a carbon plan. Thus, "we view [this] request as one for

injunctive relief” (Appeals decision 5). This comment shaped the State’s argument in the third stage of litigation, which is analyzed later in the paper.

Issue #2) Is the Case Justiciable?

Once the Court determined that judicial authority extends to PTD claims brought under the UDJA, it addressed whether or not the case itself was justiciable. The Appeals Court diverged from the Trial Court’s ruling that OCT’s relief presented separation of powers and political questions because they held that those rulings were on the merits of the case, which the State’s motion to dismiss specifically did not address.

The State’s argument relied on a justiciability test stemming from *Brown v Oregon State Bar*, 293 Or 446, 449 (1982), which they claimed barred OCT’s case. This test requires that a case “must involve present facts” and involve “an actual and substantial controversy between parties having adverse legal interests” However, the Appeals Court used a different justiciability test. This test, from *Hale v State of Oregon*, 259 Or App 349 (2013) requires that a case involves “present facts” and provides “meaningful relief to plaintiffs” (Appeals decision 13). Here, the Appeals Court again diverged from the State, by deciding that “bare declarations,” as the State called it, would provide meaningful relief to OCT, even if they didn’t get their injunctions. Additionally, the court noted that while the “bare declarations” were justiciable, the declaration that the “best available science” dictates a 350 ppm carbon limit is “injunctive relief,” and did not rule on it further (Appeals Decision 5, footnote 2).

Court of Appeals Decision: Analysis

Why was this case remanded and reversed? The first level of analysis examines whether the case met all the proper procedural requirements. The conventional way of looking at this lawsuit is that the Trial Court dismissed the case for lack of justiciability and subject matter jurisdiction, and that the Court of Appeals disagreed. So, it sent the case back to the Trial Court. The issue the Court of Appeals concentrated on was the scope of the UDJA. The Court of Appeals found that the trial court erred in holding that the UDJA doesn't recognize the PTD. Further, it found that the trial court made rulings on the merits of plaintiffs' theory, when Defendants' motion to dismiss was focused on justiciability only. The Court held, "the proper disposition, after the parties have addressed the substance of plaintiffs' request for declaratory relief, would be the issuance of declarations stating what the law is, whether or not it is as plaintiffs contend." (Appeals decision 12). At the most basic level, the outcome of this case was determined by the Court of Appeals agreeing with OCT's roadmap for this case. The Appeals Court supported their rationale by applying precedents set by a similar case. *Beldt v Leise* 185 Or App 576 ("If there is a justiciable controversy, the plaintiff is entitled to a declaration of its rights, even if that declaration is directly contrary to what it believes its rights to be"). In other words, if a court thinks that giving the Plaintiff the declaration it wants would be creating new law in violation of separation of powers, then it should give then Plaintiff the declaration it doesn't want.

A strategic view of this holding reveals how decisions by both OCT and attorney general lawyers influenced the outcome of the case. First, the OCT lawyers strategically narrowed the focus of their relief on appeal. The relief from their original

amended complaint included four declarations and two Court orders to make the Governor prepare a carbon accounting and develop and implement a more stringent carbon reduction plan, which the trial court found problematic. In OCT's opening brief to the Court of Appeals, they focused on the two declarations that would be easiest for a trial court to grant: whether the atmosphere and other water resources were trust resources that the State of Oregon has a fiduciary obligation to protect. OCT indicated they were "lowering the bar" in a couple ways. The first was explicitly alleging that "the trial court erred in dismissing this case in its entirety" on separation of powers grounds or grounds for non-jurisdiction "when it found that only *some* of Plaintiffs' requested relief" violated those tests (OCT App Brief 6).

Later in their brief, OCT explicitly mentioned that the Court could dismiss the relief it found problematic, namely, the requests that Defendants use the 'best available science' and specify that the best available science requires 6% carbon reductions per year starting in 2012. "Had the trial court "found that [these] requests ... were overstepping ... the trial court could have denied aspects of those requests for relief and granted others." (OCT App Brief 28). OCT then specifically cited their declarations that "water resources..." are trust resources and that the State of Oregon "has failed to uphold their fiduciary obligations" as requests the trial court erroneously failed to address, hinting that these at least should be granted (*Id* 28).

OCT's strategic narrowing of the two least controversial declarations of their relief is significant for two reasons. The first is that by pragmatically asking for only half a loaf, their requests become less politically challenging for judges to grant. By focusing their appeal on declarations, the Court could more easily align OCT's requests

for relief with the relief the UDJA permits. “[These are] requests for a declaration of the “rights, status, and other legal relations” between the parties which... is all that is necessary to give a court authority under the UDJA to issue an appropriate declaration” (Appeals Decision 11). The court held that questions of law to be clarified under the UDJA must not necessarily be written law. “Under ORS 28.010 and ORS 28.050, a court has power to declare the rights, status, and other legal relations between the parties to a declaratory judgment action no matter what source of law gives rise to those rights and obligations” (Appeals Court at 11). The Court justifies this rationale by citing *In re Estate of Ida Dahl*, 196 Or 249, (1952), in which the Oregon Supreme Court “rejected the argument that the UDJA ‘confine[s] the courts to the interpretation and construction of written instruments and laws’” (*Id* 11). The second reason this was important is that it allowed the Court of Appeals a stronger connection with *Pendleton School District I*, an Oregon Supreme Court case in which the plaintiffs were entitled to the declarations they asked for, but not the requests for court orders.

The trial court’s first reason for dismissing the case was based on Judge Rasmussen’s interpretation that *Pendleton School District I* could be distinguished from OCT’s case because it challenged a constitutional provision, whereas OCT did not. This interpretation was identical to the State’s argument in their motion to dismiss: “However, the Court’s inquiry in *Pendleton* was limited to the specific duties imposed on the legislature by Article VIII, section 8, of the Oregon Constitution” (Trial decision 5). The Court of Appeals rejected that interpretation, and because OCT had narrowed their relief solely to declarations of whether the atmosphere and water resources were public trust resources, the Court was comfortable holding that “Plaintiffs’ requests for

‘bare’ declarations regarding the scope of the state’s present obligations, if any, under that doctrine are, therefore, justiciable.” (Appeals decision 17). After deciding that this claim was justiciable, the Court relied on *Pendleton* to conclude that OCT was entitled to a judicial declaration as to whether the atmosphere and other water resources are “trust resources” that “the State of Oregon, as a trustee, has a fiduciary obligation to protect * * * from the impacts of climate change.” (Appeals decision 19).

Is it surprising that the Court of Appeals relied so much on *Pendleton I* (spending 4 out of 19 pages in their decision) to decide the justiciability of this case? The conventional interpretation would show that the Appeals Court was only responding to the Trial Court’s use of *Pendleton I* as the sole rationale to defend the first reason for dismissal. Whether the PTD falls within the scope of the UDJA was the only issue which the Appeals court felt it needed to address. The State dropped their sovereign immunity argument upon appeal, and the Appeals Court interpreted the last two of the trial court’s reasons for dismissal to be determinations on the merits of the case, rather than the justiciability.

A strategic interpretation of the court’s reliance shows that *Pendleton* was a useful vehicle for the court to communicate broader ideals of the role of the courts. To support the idea that the case was justiciable, the Appeals Court held that a declaration would be meaningful relief because OCT must “assume that the State will act in accordance with its duties as those duties are announced by the courts” (Appeals decision 17). But is this ‘assumption’ more than a response to the State? A comment during an interview with Oregon Supreme Court Justice Walters suggests to the author that this ‘assumption’ is in reality an implicit instruction to the trial court to assert itself

as an equal branch of government. During a talk in Salem, she identified that one of the considerations the judicial branch has is to protect “the fragility of the courts.” This term represents a fear that the rule of law will falter if the court issues a ruling that puts into question its authority and neutrality as an arbiter. These fears have existed at least since the 1830s, when President Jackson refused to enforce rulings by the U.S. Supreme Court to stop taking Indian lands. However, in the context of the OCT case, Judge Hadlock is signaling both to the trial court Judge and to the State, to “act in accordance with a judicially issued declaration regarding the scope of any duties [it] may have under the PTD” (Appeals Decision 17).

Bifurcation

A second and unique factor that contributed to OCT’s success was their agreement with Defendants to limit legal arguments “that do not address the existence of the public trust, the question of whether the state has met its duties under any such trust, or whether plaintiffs have stated a claim that requires the [court] to decide those issues at all.” (Appeals decision 5-6). Their agreement to bifurcate the case (justiciability arguments now, merits arguments later) was a crucial step to keep OCT in the game. Had counsel not negotiated to bifurcate, the State’s arguments would have been more aggressive in both the Trial Court and Appeals Court. While this elongated the appeals process, expending the limited time and money of OCT lawyers, OCT’s acceptance of the State’s terms was the right choice. According to OCT’s lead litigator, they thought it would be more strategic to avoid their case being thrown out on by first establishing that their claim is justiciable. According to him, it wasn’t an easy decision, but “we hoped for incremental progress. If you look at the big picture, [our litigation]

across the country, we spread out our chips, and I think that was an effective strategy” (Personal communication, April 21, 2015). Additionally, while bifurcation limited four years of case proceedings to justiciability issues, it still allowed OCT to petition for their injunctive relief at a later date. Indeed, during the oral arguments for the second round of trial court proceedings, the OCT lawyer testified that they were prepared to have at least one more hearing to discuss the facts of the case, a requisite for the court to grant injunctions.

Because the Appeals court recognized the State’s agreement to bifurcate the case, an additional determination came out of the Appeals Court’s insistence that per *Pendleton I*, OCT was entitled to at least the declarations they request. This holding separated the justiciability of the declarations from the justiciability of the injunctive relief. The court was in effect saying, ‘whether or not plaintiffs’ requests for injunctive relief are justiciable, their declarations definitely are.’ This ruling was helpful to OCT because all they had to do in the Trial Court upon remand is show the court the case law that has established water resources as PTRs and convince the court that the atmosphere should be added to the list.

3rd Stage: Trial Court II (*Chernaik v Brown*)

The second round of trial court proceedings was more complicated for two reasons. First, because the Appeals court held that the declarations are justiciable, the parties finally get to argue the merits of the case (the scope and extent of the PTD). Second, lawyers from both sides have the added task of interpreting the Appeals court decision in the most favorable light. As reviewed in Section III, counsel had only to respond to the two fundamental questions of the case: 1) What resources are

encompassed by the Public Trust Doctrine? And 2) What obligations does the doctrine impose? Both OCT and the State cite the handful of Oregon cases that describe resources held “in trust” by the State. However, they have vastly different opinions about what it means to be a trust resource. Since the beginning of the lawsuit, OCT requested the court to declare that the atmosphere, as well as water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife, and fish are trust resources (Am Complaint 17). The State, on the other hand, argued that submerged and submersible waters were the only public trust resource. Both parties agreed on this resource, yet disagreed as to why.

Facts

In March 2015, Our Children’s Trust and the State filed cross motions for summary judgment to resolve the case back where it started, in the Lane County Courthouse. OCT’s motion requested four declarations, essentially asking that the court recognize air and water resources as public trust resources that the state must protect, and their failure to do so. The State responded by asking for six rulings, explained in detail below, that basically went against everything OCT asked for. Then, each party had the opportunity to submit two more briefs: one opposing the other’s motion, and one providing additional support for their own. Oral arguments were heard on April 7th, 2015, in front of 400 people who came out in support, including students from the local middle and high schools.⁷

⁷ The oral arguments were rescheduled from March to April to give Oregon’s new Governor Brown a chance to get situated. Although I wondered what impact this would have on the State’s arguments, OCT’s lead litigator assured me, almost none. “The people in charge...the Governor’s advisor on natural resource cases... they stayed the same. When the Governor shifted, they were [still there]” (Personal Communication, April 2015).

On May 11th, 2015 Judge Rasmussen issued his decision, wholly agreeing with the State. He narrowly interpreted the PTD to apply only to submerged and submersible lands. His rationale focused on how the PTD is predicated on the grant of title, and functions only as a restriction on alienation of resources, rather than affirmative fiduciary duties imposed on the State. He also relied on his old earlier reasoning that because OCT's relief seeks to...impose fiduciary duties, declare that Defendants have failed to fulfill those duties, and compel the State to reduce GHG emissions, a favorable ruling "would violate the Separation of Powers doctrine" (Trial Decision II 18). However, it is important to understand how and why he got there. The following sections will examine how both parties framed the issues, changed their "asks" and provided a roadmap for the case in an attempt to sway the ruling. Although OCT had assumed a win on justiciability after the Appeals Court decision, they still had to fight to maintain that ruling. Even though Judge Rasmussen ultimately issued an unfavorable ruling, OCT strategically reworded their declarations to make Rasmussen go on record to explain what the PTD encompasses, an effort that will significantly contribute to their appeal.

OCT's Declarations

After the Appeals Court held that OCT was entitled to declarations as to whether the atmosphere and various water resources are public trust resources, they decided to go for gold with their requests for declaratory relief. This strategy manifested in two major changes to OCT's original declarations. First, instead of treating the atmosphere and various water resources as separate requests, OCT combined them into one. Second, OCT replaced the requirement that Oregon had to protect PTRs according to

the “best available science.” Instead, they added a new standard: that the State or Oregon must protect PTRs from “substantial impairment.” Thus, instead of defining the “best available science,” OCT’s second declaration defines “substantial impairment” as conditions in which atmospheric concentrations of CO₂ exceed 350 ppm. The third declaration dictates that in order to protect PTRs from substantial impairment, Oregon must contribute to global emissions reductions necessary to return the atmosphere to 350 ppm of GHGs by 2100. The fourth request retains language similar to that in the first trial court request: a declaration that the State of Oregon has failed, and is failing, to uphold this fiduciary obligation. A comparison of the new and old declarations is below:

	Trial Court II (New) Declarations	Trial Court I (Old) Declarations
First Declaration	A declaration of law that the State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public trust assets, and to protect them from substantial impairment caused by the emissions of greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification;	A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere as a commonly shared public trust resource from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.
Second Declaration	A declaration that atmospheric concentrations of carbon dioxide (CO2) exceeding 350 parts per million (ppm) constitutes substantial impairment to the atmosphere and thereby the other public trust assets	A declaration that water resources, navigable waters, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets as commonly shared public trust resources from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.
Third Declaration	A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of CO2 necessary to return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100; and	A declaration that Defendants have failed to uphold their fiduciary obligations to protect these trust assets for the benefits of Plaintiffs as well as current and future generations of Oregonians by failing to adequately regulate and reduce carbon dioxide emissions in the State of

		Oregon
Fourth Declaration	A declaration that Defendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon.	A declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six per cent each year until at least 2050.

Table 2: Comparison of OCT’s requested relief from Trial I to Trial II

Source: OCT’s Amended Complaint and OCT’s Motion for Partial Summary Judgement for Declaratory Relief

OCT’s strategic choice to reword and reorder their declarations has some important implications. First, by combining requests to recognize the atmosphere as well as various water resources into one declaration, OCT reinforces the similarities between these resources. Second, this ensured that Judge Rasmussen would go on record showing his rationale for why some resources made the cut and not others. Additionally, OCT’s reliance on the standard of “substantial impairment” rather than “best available science” directly addresses an earlier argument the State raised about the PTD not having “judicially enforceable standards.” The term “substantial impairment” dictates the extent (albeit vaguely) of the State’s fiduciary obligation to protect the resources in trust for the public. It derives from two fundamental PTD cases (*Illinois Central*—US and *Morse*—OR), that OCT has been using to reinforce the definition of the scope and extent of the PTD. Theoretically, this is a standard that has been around for long enough that judges would feel comfortable using it. Lastly, OCT’s reordering

of their relief signifies a departure from what they were requesting in round one. In that round, their declaration that “the best available science” requires radical carbon reductions was entered after their requests for injunctions (to prepare a carbon reductions plan based on the best available science). Thus, the declaration that the state must follow radical carbon reductions was only applicable pending the injunction. In round two, OCT attached the radical carbon reduction language to the definition of the State’s fiduciary obligation, regardless of injunctions.

Section III details OCT’s legal arguments in depth. However, I will reiterate their three arguments. The court should recognize the atmosphere as a PTR because: 1) The atmosphere passes any test previous courts have used to designate fish, wildlife, submerged and submersible lands as PTRs; 2) The atmosphere protects the other recognized PTRs; and 3) other states have recognized it as a PTR.

Of course, the State could not have disagreed more. Although the Appeals Court said that a declaration on whether air and water were PTRs was justiciable, they did not say that all the declarations were. They built upon Judge Hadlock’s comment that the “best available science” declaration was a request “for injunctive relief” (Appeals Decision 5, footnote 2). While conceding the first declaration was justiciable, the State argued that the 2nd-4th requests were “in effect, injunctions” that were barred by the separation of powers and political question doctrines. They requested Judge Rasmussen to make six legal rulings, aligning with each of OCT’s asks in the negative. While the full text of their requests are below, most of their import can be summed up as follows: 1) The PTD does not include the atmosphere, and 2) it doesn’t impose affirmative fiduciary duties. 3) Therefore, this court can’t issue any of OCT’s relief. The court

should especially find that 5) injunctive relief is barred by the separation of powers doctrine and 6) the political question doctrine.

The fourth declaration is not included in that summary because it requires a little more explanation. The State argued that even if the Court ruled that the PTD imposes affirmative fiduciary obligations, it couldn't issue injunctive relief. They claimed that in order to issue injunctions, the court would have to be sure that the State would violate their public trust duties in the future. By definition, this makes sense, because injunctions are meant to stop future action, not punish past acts. However, the State argued that the court would not be able to conclude that they would violate public trust duties in the future because the Appeals court instructed the trial court to "assume that the State will act in accordance with its duties as those duties are announced by the courts" (Appeals decision 17). So, even if the PTD required the State to act in the past, and start acting in the future, they argued that the court could not penalize them for it here.

	Trial Court II (New) Holdings	Trial Court I (Old) Holdings
First Holding	The common law public trust doctrine (PTD) does not extend to the atmosphere	OCT's requested relief is outside the scope of the Uniform Declaratory Judgments Act (UDJA)
Second Holding	The common law PTD does not impose the particular affirmative actions associated with traditional legal trusts (i.e., fiduciary obligations or duties). Instead, Oregon courts have applied it only as a restraint on alienation.	OCT's requested relief is barred by sovereign immunity
Third Holding	Because there are no fiduciary duties associated with the common law public trust doctrine, any declaratory or injunctive relief based on an alleged violation of such duties must be denied.	OCT's requested relief is barred by the Separation of Powers Doctrine
Fourth Holding	Even if this Court recognizes new fiduciary duties under the PTD, injunctive relief is not warranted, because the Court must presume that the State will comply with the new law as announced, and therefore, that no future violation of law is likely	OCT's requested relief is barred by the Political Question Doctrine
Fifth Holding	This Court is without authority to grant injunctive or further relief, because doing so would violate the principle of separation of powers.	N/A
Sixth Holding	Finally, this Court	N/A

	lacks authority to grant injunctive relief, because such relief would cause the Court to decide a political question that our constitutional system entrusts to the other branches of government (OR Mtn 2).	
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Table 3: Comparison of the State’s requested Legal Holdings

Source: State of Oregon’s Motion to Dismiss (Trial I) and State of Oregon’s Motion for Summary Judgment (Trial II)

Section III likewise discusses the State’s Arguments about the extent and scope of the PTD in Oregon. However, the main arguments are that submerged and submersible lands are the only resources encompassed by the PTD, and that the doctrine only functions as a restriction on alienation, rather than imposing affirmative duties.

The State’s Framing

In a gesture meant to soften the blow that OCT dealt by painting dire pictures of a future ravaged by climate change (featured below), the State reframed their duties to protect the atmosphere. They conceded that the State does have some affirmative obligations to protect the atmosphere. However, these fall under statutes and constitutional provisions, not the public trust doctrine (which does not derive from constitutional provisions). This reframing signaled a more supportive role than what the State had originally argued, while still handily disposing of OCT’s arguments. Additionally, by showing a nicer side, the State created a more comfortable argument that Judge Rasmussen would be willing to sign on to. Indeed, he agreed that the State has “authority to protect the atmosphere through appropriate legislation,” and mentioned that the court’s ability to grant OCT’s relief was “constrained by...the

aspirational, rather than imperative” legislative response to global warming” (OR Mtn 2; Trial Decision II 12).

Different Roadmaps

In the response briefs, each party was able to construct a roadmap to follow that would lead to a favorable ruling. OCT, by dropping their requests for injunctive relief on remand, theoretically made a straightforward ask: four declarations, which is, according to the Appeals Court, what the UDJA is supposed to provide. All they needed the trial court to do was declare that the air and water are PTRs that the government must protect from substantial impairment, define what substantial impairment was, and declare that Oregon was failing to fulfill its obligation. The absence of injunctions was supposed to rid all those thorny justiciability issues with the separation of powers and political question doctrine. Yet the State raised those issues with their last three declarations. OCT shot back, “The Court of Appeals instructed that questions relating to injunctive relief ‘cannot be answered until a court declares the scope of the public trust doctrine and defendants’ obligations, if any, under it’” (OCT Resp 4-5).

Yet, they may not have been as confident as they seemed. For, during the trial court oral arguments, OCT gave Judge Rasmussen an even easier way out. Instead of addressing whether or not the State has failed its public trust responsibilities, OCT focused their requests on only “two discrete declarations of law,” as the lead OCT litigator put it. He continued, “The first is the scope of the PTD, which is, ‘what resources does the PTD apply to?’ and the second discrete question is, ‘What is the substance of the public trust doctrine?’ So, what are the obligations and duties incumbent on the State in terms of managing public trust resources?” (Trial Court Oral

Arguments, 7:10). At this point, the fruit is hanging just inches from the ground. And while Judge Rasmussen picked it for them, it wasn't the fruit they wanted.

Judge Rasmussen ultimately agreed with the State's roadmap. While OCT tried to focus the court's attention on the first two pit stops, the State focused all their attention on the doom and gloom of the final destination. In their opening paragraph for their motion for summary judgment, the State contends,

“No threat, no matter how serious, can justify the sort of undemocratic, judicial rewriting of our laws and disregard for the very structure of government proposed by plaintiffs. Plaintiffs ask this Court to assume an activist, policymaking role; the State asks this Court to respect the structure of government enshrined in our Constitution, and to leave policymaking to the Legislature.”

During oral arguments, it was clear Judge Rasmussen was already thinking along the same lines. His response to how the court would order an injunction lets his separation of powers concerns shine through: “If the duly elected officials didn't [prepare a carbon plan], you'd be asking me to force them to do it. And if they don't do it again, then you'd be asking me to do what? (Trial Court Oral Arguments, 15:29). This quote not only indicates his opinions on a court using “force” to compel action from other branches, but reveals an earlier concern about issuing decisions that won't be followed.

Other Rhetorical devices

OCT returned to framing the problem in colorful language to express the urgency of their request. “Most egregiously, the State's argument that it has no affirmative obligation to help stop the *irreversible* harm to Oregon's public resources caused by carbon emissions, which if left unabated, will cause death, disease, massive species extinction, water and food shortages, coastal and marine devastation, and a vastly altered environment for these young people and our posterity.” (OCT Resp 2)

The State, in turn, downplayed this problem. While both sides agreed that climate change is a problem, the plaintiffs need not fear, the State claimed, because the State does have authority to protect the atmosphere, and “a general obligation to legislate in the public interest” (OR Mtn 5). They also offered the court another way forward, besides granting their six rulings. The State suggested “that plaintiffs are not without recourse in our democratic system. If plaintiffs believe that more stringent standards or specific actions are needed, they may petition their legislators to impose such a policy, or exercise their rights as citizen-legislators to do the same through the initiative process” (OR Mtn 2). OCT responds viscerally, painting a picture of a severely broken system if the court agreed: “The State’s arguments are fundamentally undemocratic, would result in too much power being placed in the political branches of government, and deny young citizen beneficiaries fundamental rights” (OCT Resp 2).

Trial Court Decision II

Judge Rasmussen heeded the instructions of the Court of Appeals and issued declarations as to whether the atmosphere and various other resources are public trust resources, as OCT alleged. Agreeing once more with the State about everything, he answered the two questions as narrowly as possible:

Issue #1) What resources are encompassed by the Public Trust Doctrine?

Judge Rasmussen systematically went through each resource OCT listed before declaring which resource made the cut to be a public trust resource. Based on his definition that “the PTD is predicated on title transferring to the State and the fee simple interest that was included therein,” submerged and submersible lands are the only resources encompassed by the PTD. He issued declarations that the remaining

resources, “waters of the state,” “beaches and shorelands,” “fish and wildlife,” and the “atmosphere” are not encompassed by the PTD.

Issue #2) What duties are imposed by the Public Trust Doctrine?

Judge Rasmussen answered this question after drawing on most of the Oregon trust cases OCT mentioned in their motions to dismiss. He just took a more narrow interpretation of the duties that stem from those cases. He concluded that after “reviewing the relevant case law, it appears to this Court that, historically, courts applying the public trust doctrine have merely prevented the State from entirely alienating submerged and submersible lands under navigable waters” (Trial Decision II 13). By alienation, he is claiming that the PTD only restricts legislatures from completely privatizing the trust resource by granting title, in perpetuity, to a private party.

Justiciability concerns

Lastly, and most intriguingly, Judge Rasmussen ended his decision with a four page discussion of the Separation of Powers doctrine, which he admits is largely copy-and-pasted from his first decision (Trial Court Decision II, footnote 2). Because Judge Rasmussen believes that OCT is requesting more than declaratory relief, but trying to “compel Defendants to address the impact of climate change by reducing GHG emission in a specific amount over an established timeframe,” he feels like an affirmative grant of that relief would violate the Separation of Powers doctrine (*Id* 18).

Analysis of *Chernaik v Brown*: Holdings and Strategies

In four years of litigation, the Lane County Courthouse and Oregon Court of Appeals have issued four legal rulings that may affect future cases. The first two rulings were decided in favor of Our Children’s Trust by the Appeals Court. The latter two were issued in favor of the State, by Judge Rasmussen in the trial court. Even more important than the rulings, however, is how OCT employed various strategies to shape the outcomes of the case, and their own legal opportunities.

Issue #1) Does the UDJA allow claims to be brought under the Public Trust Doctrine?

Yes. The Court of Appeals broadly interpreted the judicial authority under the UDJA to allow claims to be brought even under common law doctrines like the PTD. They cited *In re Estate of Ida Dahl*, 196 Or 249, (1952) to “[reject] the argument that the UDJA” only applies to “written instruments and laws” (Appeals Decision 11). However, OCT strategically reduced their number of declarations to the two that would be easiest for a trial court to grant. By focusing on just the “bare declarations,” the Court could more easily view OCT’s requests as wholly within the scope of the UDJA. This focus also allowed the Court of Appeals to see a stronger resemblance with *Pendleton School District I*, which gave the Court a way out of not resolving the injunctions.

Issue #2) Is OCT’s request for “bare declarations” Justiciable?

Yes. The Court of Appeals relied on a justiciability test from *Hale* to favorably find that OCT’s case dealt with “present facts” and would provide “meaningful relief.” What served OCT best here was strategically agreeing to bifurcate the case before Trial court proceedings even started. The second strategic move the made was providing the

Court of Appeals with a roadmap for the case. OCT explained that the trial court should not have dismissed the case on separation of powers ground “when it found that only *some* of Plaintiffs’ requested relief” violated those tests (OCT App Brief 6). Instead, “had the trial court ...found that the [requests for injunctive relief] were overstepping,” it could have “denied aspects of those requests for relief and granted others” (OCT App Brief 28). When the State argued that these “bare declarations” would have no “practical effect” on plaintiffs’ rights, OCT urged that “even a [basic] declaration” that the state must “bear its trustee duty in mind” and “preserve...the uses protected by the trust” would aid Plaintiffs in obtaining greater carbon dioxide reductions (OCT App Resp 9). And, as mentioned above, their strategic narrowing of their relief to only two declarations helped their case to resemble *Pendleton*, a case that was declared justiciable even though the plaintiffs had only received “bare declarations.” Ultimately, the Appeals Court agreed with their roadmap, and applied a precedent from *Beltd v Leise* to support their decision.

Issue #3) What resources are encompassed by the Public Trust Doctrine?

Oregon’s public trust doctrine encompasses submerged and submersible lands. It does not encompass waters of the State, beaches and shorelands, fish and wildlife, or the atmosphere. Judge Rasmussen interpreted the doctrine to restrict its application to only resources in which the State holds title. He relied on *Morse v Oregon Division of State Lands*, 285 Or 197 (1979) and *Corvallis Sand*, 250 Or 334 (1968), for this distinction, which claimed that “unlike submerged and submersible lands, title to navigable waters,” as well as all the other resources listed, “did not pass to the State” (Trial Decision II 9). Judge Rasmussen agreed with all of the State’s arguments that

“Oregon’s common law public trust doctrine arose out of the grant, at statehood, of submerged and submersible land to the State” (OR Mtn 11; OR Resp 6-7). Yet, by combining their declarations on public trust resources into one, OCT ensured that they would receive Judge Rasmussen’s rationale on record, which they could use on appeal.

Issue #4) What are the Duties Imposed by the Public Trust Doctrine?

Oregon’s public trust doctrine imposes a restraint on alienation rather than affirmative duties. Judge Rasmussen held that as a result, “the State does not have a fiduciary obligation to protect submerged and submersible lands from the impacts of climate change” (Trial Decision II 13-14). This decision aligns completely with the State’s argument that “The common law public trust doctrine prevents the State from alienating trust resources or divesting itself of the authority to protect the public’s interest in these specified uses of those trust resources... [it] does not require more” (OR Resp 7, citing *Morse* at 202). However, because OCT reworded their declarations to specify that fiduciary duties require the State to protect PTRs from “substantial impairment,” Judge Rasmussen was required to respond as to whether this standard was valid. He relied on *Morse* to show “that there was no grant to a private property that resulted in such substantial impairment of the public’s interest as would be beyond the power of the legislature to authorize” (Trial Decision II 13).

Conclusion

This research is the first of its kind to analyze the legal arguments and rhetorical strategies presented by each party in the court proceedings for a single ATL case. While some authors draw on one or two line summaries to describe case outcomes, this research looked instead to one case as a case study of how individual arguments and strategies operate within a broader socio-legal context. My thesis discussed various factors of legal opportunity structures, such as justiciability, financial burdens, and judicial receptivity, which constrain the success of climate change litigation cases and ATL in particular. It focused on specific strategies, including how OCT agreed to bifurcate their case, strategically framed their appeal, and reworded their requests on remand, to demonstrate how OCT helped create legal opportunities that resulted in a justiciability win. This research reinforces the importance of organizations' efforts to change the law and create their own legal opportunities, despite substantial litigation losses and constraints. However, after writing extensively on the constraints of the legal landscape, a bigger question follows: Is litigation the best strategy for the climate change movement?

Climate change is a vastly complicated problem will not be solved through the courts alone. The impacts of climate change are not just biological, but social, cultural, political, economic, and spiritual. Climate change is the perfect moral storm, an intergenerational problem in which the people contributing the most are affected the least. While OCT's prescription of getting global atmospheric levels of carbon back down to 350 ppm is necessary, it veils the fact that climate change is not just about

carbon emissions. The climate debate is about power, about whose voice is heard, who is invited to the negotiating table, and who holds decision-making power.

By working within the courts, social movement actors are choosing to work within the constraints of the legal field. Laws and legal precedents shape not only the claims lawyers can bring to court but how they frame them. Justiciability requirements restrict the accessibility to the courts and require additional hoops to jump through for litigation that protects the interests of the public, rather than individuals. By using the law to address climate change, ATL also relies on the very instrument that has allowed (and allegedly encouraged) the destruction of the environment. Litigation runs the risk of failing to address the larger institutional roots of the problem and reinforcing existing power dynamics rather than addressing social justice issues.

However, OCT's involvement in community activism and their focus on public education and youth engagement makes up what litigation on its own lacks as a comprehensive response to climate change. These additional strategies elevate youth voices and alter the power relationships that maintain business as usual. OCT specifically works to empower young people by supporting plaintiffs in their litigation, and providing trainings on grassroots organizing and opportunities to get involved for kids. OCT's efforts in this regard are bittersweet, as they reflect a justice system that is broken and disconnected from public needs. The youth plaintiffs, who have the most to lose from the ruling generation's abuse of the planet, have the least means of holding them accountable. Young people can't vote, don't have the financial means to lobby, and can't even represent themselves in court. Their decisions are made for them until they are old enough to inherit a broken planet.

Given these dire constraints, why does OCT go to the courts instead of more direct forms of lawmaking? Social movement theorists explain how diminishing political opportunities may influence actors' choices to utilize legal opportunities (Hilson 2002). In other words, the current political climate makes it easier to "establish the legal rights to a healthy atmosphere" in the courts rather than in the capitol (OCT's mission statement). OCT's activism and public education events fill in the gaps of litigation by recruiting the people most affected by the problem (young people) to the negotiating table.

For example, their local campaign, YouCAN (Youth Climate Action Now), has connected activist groups around Eugene and coordinated the successful passage of the Eugene Climate Recovery Ordinance, making Eugene the first city in the country to pass a legally binding carbon reduction plan. OCT plans to use Eugene as a model for other cities to adopt their own science-based climate recovery plans. Furthermore, as of April 2015, OCT has helped introduce The Climate Stability and Justice Act (HB 3470) into the Oregon Legislature. The bill would require the Environmental Quality Commission to adopt GHG reduction goals for 2020 and 2050, along with five year goals to meet those limits. As of May 2015, it's sitting in the House Rules committee awaiting further action. On May 26, 2015, OCT staff and local activists, as well as over six hundred people, gathered in Salem to support the passage of the bill. Notably, atmospheric trust litigation asks for more than just climate legislation. It asks for courts to recognize the legal obligation of states to affirmatively protect publicly shared natural resources. But it also seeks to reinterpret the roles of judges, of government, and the

responsibility of citizens to participate in our representative democracy to help create a more just future.

This paper provides a chronicling of an important climate change case in terms that are neither too colloquial nor jargonized. Atmospheric trust litigation is developing in courts across the country and confronting judges, lawmakers, legal scholars and everyday people with significant questions about the role of government to protect present and future generations. This case, although resolved unfavorably, is doing what the legal system is supposed to do: provide a deliberative process that allows opportunities to constantly refine the way we communicate what climate change is and what needs to be done about it.

Appendices

Appendix A –OCT’s Initial Request for Relief (Amended Complaint)

- 1) A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere as a commonly shared public trust resource from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.
- 2) A declaration that water resources, navigable waters, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets as commonly shared public trust resources from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.
- 3) A declaration that Defendants have failed to uphold their fiduciary obligations to protect these trust assets for the benefits of Plaintiffs as well as current and future generations of Oregonians by failing adequately to regulate and reduce carbon dioxide emissions in the State of Oregon.
- 4) An order requiring Defendants to prepare or cause to be prepared, a full and accurate accounting of Oregon’s current carbon dioxide emissions and to do so annually thereafter.
- 5) An order requiring Defendants to develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science.
- 6) A declaration that the best available science requires carbon dioxide emission to peak in 2012 and to be reduced by at least six per cent each year until at least 2050.
- 7) That this Court retain continuing jurisdiction over this matter for purposes of enforcing the relief awarded (ER 53)
- 8) That this Court award Plaintiffs their reasonable attorneys’ fees and costs pursuant to its equitable authority, as recognized by *Deras v Myers*, 272 Or 47 (1975).

Appendix B–OCT’s Request for Relief on Appeal (OCT App Brief)

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

Appendix C–OCT’s Request for Relief in Trial Court II (OCT Mtn)

- 1) A declaration of law that the State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public trust assets, and to protect them from substantial impairment caused by the emissions of greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification;
- 2) A declaration that atmospheric concentrations of carbon dioxide (CO₂) exceeding 350 parts per million (ppm) constitutes substantial impairment to the atmosphere and thereby the other public trust assets
- 3) A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of CO₂ necessary to return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100; and
- 4) A declaration that Defendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon.

Appendix D—The State’s Requested Legal Holdings in Trial Court II (OR Mtn)

- 1) The common law public trust doctrine (PTD) does not extend to the atmosphere
- 2) The common law PTD does not impose the particular affirmative actions associated with traditional legal trusts (i.e., fiduciary obligations or duties). Instead, Oregon courts have applied it only as a restraint on alienation.
- 3) Because there are no fiduciary duties associated with the common law public trust doctrine, any declaratory or injunctive relief based on an alleged violation of such duties must be denied.
- 4) Even if this Court recognizes new fiduciary duties under the PTD, injunctive relief is not warranted, because the Court must presume that the State will comply with the new law as announced, and therefore, that no future violation of law is likely
- 5) This Court is without authority to grant injunctive or further relief, because doing so would violate the principle of separation of powers.
- 6) Finally, this Court lacks authority to grant injunctive relief, because such relief would cause the Court to decide a political question that our constitutional system entrusts to the other branches of government.

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