IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

AKILAH SANDERS-REED,
by and through her parents Carol
and John Sanders-Reed, and
WILDEARTH GUARDIANS,

Plaintiffs/Appellants,

vs. Ct. Ap. No. 33,110

SUSANA MARTINEZ,
in her official capacity as Governor
of New Mexico, and
STATE OF NEW MEXICO,

Defendants/Appellees.

On appeal from: *Sanders Reed v. Martinez*, Case No. D-0101-CV-2011-01514

APPELLANTS' REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. JUDICIAL RECOGNITION AND INTERPRETATION OF THE PUBLIC TRUST DOCTRINE WILL NOT ALTER OR EXPAND THE CONSTITUTIONALLY-ASSIGNED ROLES OF THE GOVERNMENT BRANCHES 3

A. The Relationship Between the New Mexico Constitution and the Public Trust Doctrine 3

B. Application of the Doctrine Would Not Violate Separation of Powers Because the Doctrine Does Not Expand the Judicial Branch's Role Beyond Reviewing the Legality of the Other Branches' Actions. 6

II. JUDICIAL RECOGNITION OF THE PUBLIC TRUST DOCTRINE WILL NOT UNDERMINE EXISTING STATUTES, REGULATIONS, OR ADMINISTRATIVE PROCEDURES 10

III. RECOGNITION OF THE ATMOSPHERE AS A PUBLIC TRUST RESOURCE DOES NOT ALTER THE REGULATORY FRAMEWORK FOR AIR QUALITY 13

IV. IMPOSING A CONDITIONAL TEST FOR APPLICATION OF THE DOCTRINE IS CONTRARY TO THE PRINCIPLE THAT IT IS AN INHERENT ATTRIBUTE OF SOVEREIGNTY 15

V. CITIZEN BENEFICIARIES CAN ENFORCE THE DOCTRINE 16

CONCLUSION 18

TABLE OF AUTHORITIES

New Mexico State Cases

Forest Guardians v. Powell, 2001-NMCA-028 .....16, 17
Gonzalez v. Whitaker, 1982-NMCA-050 11
New Energy Economy Inc, v. Shoobridge, 2010-NMSC-049 12
New Mexico ex rel. Clark v. Johnson, 1995-NMSC-048 7
Norvell v. Az. Public Service Co., 1973-NMSC-051 12
Santa Fe Custom Shutters & Doors v. Home Depot, 2005-NMCA-51.....11
Sims v. Sims, 1996-NMSC-078 11
State vs. Fifth Judicial District Court, 1932-NMSC-023.....7

Cases

Ariz. Ctr. for Law in the Pub. Interest v. Hassel,
837 P.2d 155 (Ariz. Ct. App. 1991) 8
Aronow v. State, 2012 Minn. App. Unpub. LEXIS 961 (Oct. 1, 2012) 14
Butler v. Brewer, 2013 Ariz. App. Unpub. LEXIS 272 (March 14, 2013) 15
Ctr. for Biol. Diversity v. FPL Group, Inc.,
83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008) 8
Filippone v. Iowa Dep't of Natural Resources,
2013 Iowa App. LEXIS 279 (March 13, 2013) 14
Geer v. Connecticut, 161 U.S. 519 (1896) 11
Hughes v. Okla., 441 U.S. 322 (1979).....11
Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892) 4, 5, 10, 14
Kelly v. 1250 Oceanside Partners, 140 P.3d 985 (Haw. 2006).....6
Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club,
671 P.2d 1085 (Idaho 1983).....8, 9
Lawrence v. Clark County, 254 P.3d 606 (Nev. 2011) 4, 10
Marbury v. Madison, 5 U.S. 137 (1803) 3
Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cty.,
658 P.2d 709 (Cal. 1983) 9, 13, 17
Nixon v. Administrator of Gen. Services, 433 U.S. 425 (1977) 7
Robinson Twp. et al. v. Commonwealth of Pa., 83 A.3d 901 (Pa. 2013) 6, 13
San Carlos Apache Tribe v. Superior Court, 972 P.2d 179 (Ariz. 1999) 8
Svitak v. Washington, 2013 Wash. App. Unpub. LEXIS 2836 (Dec. 16, 2013) 15
U. S. v. 1.58 Acres of Land, 532 F. Supp. 120 (D. Mass. 1981).....4

Statutes

NMSA 1978 § 44-6-2 12
NMSA 1978 § 72-1-1 4
NMSA 1978 § 72-11-1 4
NMSA 1978 § 72-12-1 4
NMSA 1978 § 75-3-3 4

Secondary Sources

Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA,* 4:2 Wake Forest J. L. & Pol'y 101 (2014) 5

Constitutional Provisions

N.M. Const. art. II, § 4 4
N.M. Const. art. III, § 1 6
N.M. Const. art. XX § 21 ..... 4, 5

INTRODUCTION

Before addressing the specific legal issue of whether the district court erred as a matter of law when it imposed threshold criteria governing the applicability of the Public Trust Doctrine, Appellants have asked the Court to declare that: (1) the Public Trust Doctrine is operative in New Mexico; and (2) the atmosphere is a public trust resource. In its Answering Brief, the State did not respond to Appellants' arguments that the district court erred in fashioning this conditional test, which contravenes longstanding Public Trust Doctrine jurisprudence and is unsupported by existing law. Rather, the State assumes that the district court's conditional test will apply if this Court declares the atmosphere is a trust resource and, based on this erroneous assumption, argues that none of the district court's conditions for application of the Doctrine has been met here. The State fails to provide any basis for why this Court should accept the district court's novel test conditioning application of the Doctrine on a showing of the political process going astray with respect to managing the atmospheric resource.

Instead, the State argues the Public Trust Doctrine is not operative in New Mexico and, even if it is, the atmosphere is not a trust resource—relying chiefly on the separation of powers doctrine. The State's arguments, however, are based on a faulty premise stemming from a misunderstanding of the nature of relief in a public trust case. Throughout its Brief, the State consistently refers to "greenhouse gas"

or "air quality" regulation as the relief in this case, and implies that Appellants are asking the court to step into the role of regulator, a role which the New Mexico Constitution has assigned to the legislative branch. The State uses this misconception of Appellants' case to argue that Appellants are asking the judicial branch to do what the Environmental Improvement Board ("EIB") has not done. Finally, the State argues that Appellants' case is nothing more than a collateral challenge to the EIB's decision to repeal New Mexico's greenhouse gas regulations, a challenge properly brought in the New Mexico Court of Appeals. All of these arguments lack merit because they are all premised on the State's misconstruction of the relief Appellants seek.

In their Amended Complaint, Appellants do not ask the district court to establish its own regulatory scheme for greenhouse gases, nor to order the state to initiate a rulemaking process for greenhouse gas emissions. Instead, Appellants ask for declaratory relief on several legal issues pertaining to the Public Trust Doctrine. Appellants also ask the court to order the State to produce, within a reasonable timeframe, an assessment of the degree of impairment to the atmosphere from current greenhouse gas levels in New Mexico and a plan for redressing and preventing further atmospheric impairment from greenhouse gas emissions that includes measures for mitigating climate change impacts to New

Mexico's trust resources. **1 RP 186-87**. This is appropriate relief in a public trust case. The district court did not disagree. *See* **1-26-12 Tr. 50:7-11**.

Application of the Public Trust Doctrine and the relief that a court could impose on the State if a plaintiff prevails will not change the duties assigned to any of the three branches of government under the New Mexico Constitution. The Doctrine maintains the role of the judicial branch in reviewing the lawfulness of action or inaction by the other branches, and will not place the judicial branch in the role of managing public trust resources. In deciding whether the State has breached its duty as trustee of the atmosphere, courts make neither law nor regulation. Instead, the court performs its constitutional role "to say what the law is" with respect to the Public Trust Doctrine. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

ARGUMENT

I. JUDICIAL RECOGNITION AND INTERPRETATION OF THE PUBLIC TRUST DOCTRINE WILL NOT ALTER OR EXPAND THE CONSTITUTIONALLY-ASSIGNED ROLES OF THE GOVERNMENT BRANCHES

A. The Relationship Between the New Mexico Constitution and the Public Trust Doctrine.

The Public Trust Doctrine is more than a common law doctrine with ancient origins and is fundamentally different from the traditional corpus of judge-made common law. The Doctrine is an inalienable attribute of state sovereignty,

reflected in many state constitutions. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892); *see also Lawrence v. Clark County*, 254 P.3d 606, 613 (Nev. 2011) (recognizing that "although the public trust doctrine has roots in the common law, it is distinct from other common law principles because it is based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power, as recognized by *Illinois Central*."). Similar to a state's inherent police powers, a state's public trust responsibility "can only be destroyed by the destruction of the sovereign," not by legislation. *U. S. v. 1.58 Acres of Land*, 532 F. Supp. 120, 124 (D. Mass. 1981); *Ill. Cent. R.R.*, 146 U.S. at 460. The primary public trust principle—that the State holds the natural resources within its boundaries in trust for its citizens—is inherent in Article XX, section 21 of the New Mexico Constitution and in statutes governing protection of the state's natural resources. *See*, *e.g.*, NMSA 1978 §§ 72-1-1, 72-11-1, 72-12-1, 75-3-3.

The public trust principles embodied in New Mexico's Constitution do not elevate the Doctrine above the Constitution, as the State argues, AB 23, any more than the Constitution's express policy direction to legislatively protect natural resources diminishes the inherent rights of New Mexicans to their essential public trust resources. N.M. Const. art. II, § 4. One of the inherent rights of New Mexicans is the right to protection of their public natural resources, such as the State's atmosphere and waters. Thus, New Mexico's Constitution is firmly

grounded in the Public Trust Doctrine, a doctrine that is inseparable from State sovereignty.[1] Appellants do not contend that, and this Court need not consider whether, common law trumps the Constitution.

The State fails to recognize that public trust principles are validated, rather than superseded, by the New Mexico Constitution. Article XX, § 21 confirms the State's public trust obligations by declaring "protection of the state's beautiful and healthful environment . . . to be of fundamental importance" to the state's citizens and directing the legislature to "provide for control of pollution and control of despoilment of the air . . . consistent with the use and development of these resources for the maximum benefit of the people."[2] This provision echoes the public trust principle that as the sovereign trustee of its natural resources, the State has a fiduciary obligation to protect these natural assets for present and future generations of trust beneficiaries. *See Ill. Cent. R.R.*, 146 U.S. at 455. The duty to protect has been defined as: "the duty to ensure the continued availability and existence of [trust] resources for present and future generations," and "incorporates the duty to promote the development and utilization of [trust] resources in a

---

[1] *See* Gerald Torres & Nathan Bellinger*, The Public Trust: The Law's DNA,* 4:2 Wake Forest J. L. & Pol'y 101, 108-115 (2014) (noting the Public Trust Doctrine is the blackboard on which constitutions are written); *see also* Brief for Law Professors as Amici Curiae Supporting Appellants, *Sanders-Reed v. Martinez*, (N.M. Ct. App. Mar. 27, 2014).

[2] Although the State denies that public trust principles are inherent in Art. XX, § 21, the State admits that this provision imposes on the legislature a "constitutional duty to protect natural resources." AB 17 n.1.

manner consistent with their conservation and in furtherance of the self-sufficiency of the state." *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1003 (Haw. 2006). Because the State's duty to protect trust resources allows for "legitimate development tending to improve upon the lot of [a state's] citizenry" rather than preventing any and all uses of trust resources, the Public Trust Doctrine is consistent with and reflected in Section 21's allowance for a balance between protection and reasonable use of the atmospheric resource.[3] *Robinson Twp. et al. v. Commonwealth of Pa*., 83 A.3d 901, 958 (Pa. 2013).

B. Application of the Doctrine Would Not Violate Separation of Powers Because the Doctrine Does Not Expand the Judicial Branch's Role Beyond Reviewing the Legality of the Other Branches' Actions.

The New Mexico Constitution explicitly recognizes separation of powers among the three branches of state government:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1. "The Legislature makes, the executive executes, and the

[3] The State argues that allowing citizen beneficiaries to bring a case for breach of duty as trustee would be "an impermissible intrusion" on Section 21's balancing test for protection and use of natural resources. AB 19-20. Given that other jurisdictions have recognized the Doctrine does not preclude reasonable use of a trust resource, and the State has not explained how this Court's recognition of the Doctrine could produce such a result, this argument is without merit.

judiciary construes, the laws." *State vs. Fifth Judicial District Court*, 1932-NMSC-023 ¶ 9, 36 N.M. 151, 153. The test for disruption of the balance of power among the three branches is whether "the action by one branch prevents another branch from accomplishing its constitutionally assigned functions." *New Mexico ex rel. Clark v. Johnson*, 1995-NMSC-048 ¶ 34, 120 N.M. 562, 573 (quoting *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 443 (1977)).

The State argues that application of the public trust doctrine would violate the separation of powers doctrine because the Constitution assigned protection of air quality to the legislature, which enacted the Air Quality Control Act ("AQCA") and delegated rulemaking to the EIB. AB 16. This argument misperceives the role of the judicial branch in reviewing public trust cases and, as a result, creates the mistaken perception that the Doctrine places the judiciary in the role of making and enforcing law and regulations to protect the atmosphere. *See* AB 13 (mischaracterizing the declaratory relief Appellants seek as establishing authority for courts to regulate greenhouse gas emissions).

The Public Trust Doctrine does not transfer constitutionally-assigned duties of rulemaking to the judicial branch. Whether the State has violated the mandates of the Doctrine is a question long committed to the judicial branch. While the Constitution assigns the legislative branch the role of developing rules and regulations for the protection of natural resources (such as the atmosphere), the

foundation of public trust law is built upon the understanding that "[i]t is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority." *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 Ariz. 1999).

Judicial review of legislative and executive actions forms the bedrock of the separation of powers doctrine that protects the public from political abuses and violations of law. This is *especially* true in the context of the Public Trust Doctrine, where the sovereign[4] is inherently responsible for the management and protection of critical natural resources. *See Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1092 (Idaho 1983). Far from a violation of the separation of powers doctrine, the judiciary's responsibility for reviewing legislative and executive actions under the Doctrine is rooted in the "constitutional commitment to the checks and balances of a government of divided powers." *Ariz. Ctr. for Law in the Pub. Interest v. Hassel*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991). This fundamental constitutional principle provides the public with a

[4] The legislature is the primary trustee, and the executive branch, as an agent of the trustee, is vested with the same Public Trust obligation. *See Ctr. for Biol. Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008) (discussing Public Trust obligations of "public agencies"). However, the State persists in its mistaken belief that Appellants' seek to put the judicial branch in the role of protecting the atmosphere through regulation rather than recognizing that Appellants are asking the court to determine whether the State has complied with the law in its role as trustee. *See* AB at 18 n.4 (suggesting the State and Governor are not proper defendants in a public trust case, an issue not raised on appeal).

crucial, and exclusive, remedy in the courts when the legislative or executive branches behave in violation of the state's duties as trustee of natural resources. *Id.* (recognizing that "[t]he check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res").

Courts have historically played a crucial role in resolving claims that a state has violated the Doctrine without stepping into the role of legislator or executive. For example, *Kootenai* articulated the scope of the court's authority in public trust cases:

> Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.

Kootenai, 671 P.2d at 629; *see also Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cty.*, 658 P.2d 709, 732 (Cal. 1983) (Although the court held that the state had violated the Public Trust Doctrine, the court recognized that "[t]his opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water."). Therefore, while the legislature has the right to legislate on matters implicating public trust resources and the EIB may promulgate regulations to carry out such legislation, the judiciary is vested with the important task of reviewing the public's claims that the State has violated its

fiduciary duties as trustee. Contrary to the State's perception of this case, resolution of a public trust claim does not put courts in the position of making policy determinations as to who should be regulated and to what extent.

II. JUDICIAL RECOGNITION OF THE PUBLIC TRUST DOCTRINE WILL NOT UNDERMINE EXISTING STATUTES, REGULATIONS, OR ADMINISTRATIVE PROCEDURES

In addition, the State argues that the Doctrine would undermine or sidestep the AQCA, its implementing regulations, and the process for judicial review of EIB decisions. AB 16, 18-21. The State is simply wrong, its error on all of these points flows from its mistaken belief that relief sought in this case would consist of the Court "substitut[ing] its own judgment for the specialized agency fact finding that took place during the EIB proceedings." AB 21.

In their Brief-in-Chief, Appellants provided extensive argument and legal precedent refuting the State's proposition that existing statutes or regulations could abrogate the Public Trust Doctrine in New Mexico. BIC 14-18. These arguments can be distilled into three points. First, as an inherent attribute of state sovereignty, a state cannot abdicate its public trust obligations either implicitly or through legislation. *Ill. Cent. R.R.*, 146 U.S. at 453; *Lawrence*, 245 P.3d at 613 (holding "[t]he public trust doctrine is thus not simply common law easily abrogated by

legislation; instead, the doctrine constitutes an inseverable restraint on the state's sovereign power.").[5]

Second, even if the Doctrine were only a common law doctrine, and not constitutional, the rule from New Mexico case law is that "the common law must be expressly abrogated by statute." *Sims v. Sims*, 1996-NMSC-078 ¶ 23, 122 N.M. 618, 623. Neither the AQCA nor its implementing regulations have expressly abrogated the Doctrine.[6] BIC 16. Third, courts in other jurisdictions have expressly recognized that state statutory/regulatory schemes complement, rather than supplant, the Public Trust Doctrine. BIC 17-18 (summary of cases on this issue).

In addition to the State's cursory argment that the Doctrine has been abrogated by air quality statutes and regulations, the State also raises a non sequitur argument about the inappropriateness of declaratory relief in a public trust case, asserting that declaratory relief would be "an impermissible intrusion into . . .

---

[5] Appellants also cite to *Geer v. Connecticut*, 161 U.S. 519 (1896), for this principle. BIC 23-24. *Hughes v. Okla*., 441 U.S. 322 (1979), overruled *Geer* with respect to *Geer*'s theory that states owned wildlife within their borders. *Hughes*, 441 U.S. at 335. However, *Hughes* preserved the state's trust responsibility set forth in *Geer*. *See id*. at 338.

[6] The State's argument and reliance on *Santa Fe Custom Shutters & Doors v. Home Depot,* 2005-NMCA-51, 137 N.M. 524*,* are misplaced. AB 19. The State ignores the rule that repeal by implication is not favored and displacement must be explicit. *Gonzalez v. Whitaker*, 1982-NMCA-050 ¶ 50, 97 N.M. 710, 714. Moreover, the Public Trust Doctrine does not conflict with the Constitution or AQCA.

the statutory scheme enacted by the legislature . . . ." AB 19-20. The district court rejected the State's argument that declaratory relief is improper in a public trust case and the State has not appealed the district court's decision denying its motion to dismiss on these jurisdictional grounds. Nonetheless, Appellants' requested relief complies with the Declaratory Judgment Act because Appellants are asking the court to determine their "rights, status and other legal relations" under the Public Trust Doctrine in New Mexico. NMSA 1978 § 44-6-2.

The State cites to *New Energy Economy Inc, v. Shoobridge*, 2010-NMSC-049, 149 N.M. 42, and *Norvell v. Az. Public Service Co.*, 1973-NMSC-051, 85 N.M. 165, for support, yet neither of these cases stands for the notion that application of the Doctrine, and declaratory relief to redress a violation of the Doctrine, would supercede the regulatory scheme for air quality. As Appellants explained in their Brief-in-Chief, *Shoobridge* is inapplicable because Appellants are not seeking to "prematurely interfere[] with the administrative processes created by the Legislature." *Shoobridge*, 2010-NMSC-49 ¶ 1; BIC 27. Appellants do not ask the court to redistribute or expand the legislature's authority to make laws regarding the atmosphere or the EIB's authority to regulate and enforce those laws. *See* **1 RP 186-87** (Amended Complaint).

The State implies that the primary jurisdiction doctrine precludes Appellants' declaratory relief, citing to *Norvell*, 1973-NMSC-051, for this

proposition. AB 21-22. This argument lacks merits because it is premised on the State's erroneous belief that Appellants asked the district court to regulate greenhouse gas emissions like the *Norvell* plaintiffs asked the court to order specific emissions reductions for a power plant. As is clear from the Amended Complaint, **1 RP 186-87**, Appellants sought no such declaration. Nor is the relief sought by Appellants within the power of the EIB, or an administrative agency like the New Mexico Environment Department, to grant. Only the Court can declare the law.

III. RECOGNITION OF THE ATMOSPHERE AS A PUBLIC TRUST RESOURCE DOES NOT ALTER THE REGULATORY FRAMEWORK FOR AIR QUALITY

All of the State's arguments opposing recognition of the atmosphere as a public trust resource are based on the State's misperception that such recognition is the equivalent of imposing "a duty on the part of the state to *regulate* air quality." AB 24 (emphasis added). However, courts have defined the "duty" to protect trust resources broadly to allow for both conservation and reasonable use. *Robinson*, 83 A.3d at 958. Although a state may use its existing authority to meet its public trust obligations, *Nat'l Audubon*, 658 P.2d at 727, courts have not ordered states to promulgate specific regulations as a remedy for a breach of a pubic trust duty.

The parties agree that whether a particular natural resource is part of the state Public Trust Doctrine is a question of state law. Therefore, it is for this Court

to decide whether the atmosphere is "property of a special character" "in which the whole people are interested" that should not be left "entirely under the use and control of private parties." *Ill. Cent. R.R.*, 146 U.S. at 453, 456. Yet, the State argues that the atmosphere cannot be a trust resource because (1) it is already managed under state statute and regulated by the EIB; (2) doing so would allow citizens to bypass the administrative process for air quality regulation; and (3) courts in other jurisdictions have not formally recognized the atmosphere as a trust resource. Appellants have refuted the State's arguments as to the first two points above. With respect to the similar public trust cases cited in their Brief, the State mischaracterizes the holdings from these cases on this issue and ignores the Texas court's holding, cited in Appellants' Brief-in-Chief, that the atmosphere is a public trust resource. BIC 9, 20.

In *Filippone v. Iowa Dep't of Natural Resources*, 2013 Iowa App. LEXIS 279 (March 13, 2013), 829 N.W.2d 589, which upheld a district court decision not to initiate rulemaking, the court declined to declare the atmosphere as a trust resource because there was no appellate precedent in Iowa for doing so. The concurring opinion explained that the Doctrine could only be extended by the Iowa Supreme Court but noted that there was "sound public policy basis" for including the atmosphere as a trust resource. *Id.* at *9 (citing Iowa statutes). In *Aronow v. State*, 2012 Minn. App. Unpub. LEXIS 961 (Oct. 1, 2012), the court held that

because no Minnesota appellate court had held the atmosphere was a public trust resource, it was up to the State Supreme Court to decide that issue. *Id.* at *6-7.

Similarly, the Arizona Court of Appeals did not "reject plaintiffs' theory" in *Butler v. Brewer*, 2013 Ariz. App. Unpub. LEXIS 272 (March 14, 2013), as the State argues. AB 26. Rather, the court found that "[n]ot only is it within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the Doctrine, but the courts must also determine whether based on the facts there has been a breach of the trust." *Id.* at *17. The court "assume[d] without deciding that the atmosphere is a part of the public trust subject to the Doctrine." *Id.* at *20. In *Svitak v. Washington*, 2013 Wash. App. Unpub. LEXIS 2836 (Dec. 16, 2013), the court did not mention the Public Trust Doctrine in its opinion beyond its description of the claim. The court's holding was similar to the holding in *Butler v. Brewer*.

IV. IMPOSING A CONDITIONAL TEST FOR APPLICATION OF THE DOCTRINE IS CONTRARY TO THE PRINCIPLE THAT IT IS AN INHERENT ATTRIBUTE OF SOVEREIGNTY

The district court erred in making "application" of the Public Trust Doctrine "conditional" on a showing that the political process had gone astray with respect to protecting the atmosphere through a statutory or regulatory scheme. Such a test is contrary to existing public trust jurisprudence from other states and would gut the substance of the Doctrine, relegating it to a set of procedural regulations. BIC

21-22. In responding to this important issue, the State simply assumes that this test is appropriate and proceeds to argue how the political process has not gone astray. AB 34-38. For the reasons discussed in their Brief-in-Chief at 21-28, Appellants maintain that the court's conditional test -whereby application of the Doctrine is only triggered by the State's lack of compliance with one of three arbitrary conditions- is in error, without foundation, and contrary to public trust principles and case law from around the country. The Public Trust Doctrine requires the protection of essential natural resources for this and future generations of New Mexicans and cannot be relegated to a mere procedural hurdle, thereby permitting the State trustee to abdicate its duty to provide meaningful protection for trust resources, as it has done here.

V. CITIZEN BENEFICIARIES CAN ENFORCE THE DOCTRINE

The State argues that even if the Public Trust Doctrine is operative in New Mexico, state law prohibits citizen beneficiaries, such as Appellants, from enforcing it, another issue not properly raised on appeal. AB 28-29. The State bases this argument on *Forest Guardians v. Powell*, 2001-NMCA-028, 130 N.M. 368. Because this case does not stand for the principle that a citizen beneficiary cannot sue the State for violation of the Public Trust Doctrine, it is not controlling here.

The State overstates the holding of *Forest Guardians* by characterizing it as recognizing that *only* the Attorney General can enforce a charitable trust such as a school lands trust created by the Enabling Act. AB 29. In *Forest Guardians*, the Court recognized that the enabling Act allowed "any citizen" to enforce a trust created under the Act provided the citizen had "a special interest" in enforcing it. *Forest Guardians*, 2001-NMCA ¶¶ 10-11. The Court found that the plaintiffs lacked such a special interest because the Enabling Act did not guarantee a financial benefit to any individual public school attended by the plaintiffs. *Id*. at ¶ 13. For the same reason, the Court also held that the plaintiffs lacked standing because they failed to show a causal connection between their injury (less income to public schools from grazing leases on school trust lands) and the defendants' administration of those leases. *Id*. at ¶¶ 23-25.

The Public Trust Doctrine is not a "charitable trust" like the school lands trust at issue in *Forest Guardians*. The State's duty to hold natural resources in trust for present and future citizen beneficiaries is not created by the Enabling Act but instead is inherent in the Constitution and statutes. Courts have held that any beneficiary of the trust has "standing to sue to protect the public trust." *Nat'l Audubon*, 658 P.2d at 716 n.11. Therefore, there is nothing in New Mexico law that precludes citizen beneficiaries from suing the State to enforce the Public Trust Doctrine.

CONCLUSION

For the foregoing reasons, and those provided in Appellants' Brief-in-Chief, Appellants respectfully request the Court reverse the district court's grant of summary judgment to the State and remand this case to the district court.

Respectfully submitted on this 20th day of March 2014.

Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
Tel.: 505-401-4180/Fax: 505-213-1895
sruscavagebarz@wildearthguardians.org

Counsel for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 12-213.F.D

I certify that this brief complies with the type-volume limitation of Rule 12-213.F.3 because it is proportionally spaced and contains 4,364 words.

Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
(505) 988-9126 x1158
sruscavagebarz@wildearthguardians.org

CERTIFICATE OF SERVICE

I hereby certify that the Appellants' Reply Brief was mailed to the following on May 30, 2014 via U.S. First Class mail:

Sean Olivas
Gary J. Van Luchene
Keleher & McLeod
P.O. Box AA
Albuquerque, New Mexico 87103

Counsel for Defendant/Appellee Governor Martinez

Stephen R. Farris
Judith Ann Stahl Moore
Assistant Attorneys General
111 Lomas Blvd NW Ste 300
Albuquerque, NM 87102-2368

Counsel for Defendant/Appellee State of New Mexico

Erik Schlenker-Goodrich
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571

Counsel for Amici Curiae Law Professors

Steven Sugarman
347 County Road 55A
Cerrillos, New Mexico 87010

Counsel for Amici Curiae Gail Chasey et al.

Samantha Ruscavage-Barz