nma **Nevada Manufacturers Association**

963 Topsy Lane, #306-182

Carson City, NV 89705

775-882-6662 fax 775-267-4747

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Colleen Kripps / Mike Elges
Nevada Division of Environmental Protection
901 South Stewart Street
Carson City, NV 89701

In re Citizen Petition of Kids v. Global Warming

Dear Sir/Madam:

The Nevada Manufacturers Association respectfully submits that the above-captioned petition should be dismissed without further proceedings and this letter should be submitted to the State Environmental Commission at the meeting on the 16th of June. At the outset, we believe strongly that any opportunity to advance children's health must be considered with the utmost seriousness and pursued to the fullest extent possible. However, the respective petition will not realize environmental benefits for children or anyone else in Nevada. Instead, Petitioners seek an extraordinary rule and unachievable goal that would "strictly limit and regulate fossil fuel carbon dioxide emissions," and "establish an effective emissions reduction strategy" to achieve a world-wide atmospheric concentration of "no greater than 350 ppm of carbon dioxide by 2100." Petn. at 1. No action by Nevada—no matter how dramatic or extreme—can realize such an unattainable goal of reducing the world's greenhouse gas emissions to levels not seen since the start of the Industrial Revolution. And no statute authorizes the Department to adopt such an extraordinary regulatory scheme. Instead, while Petitioners predicate their request for such a scheme on the so-called "public trust" doctrine, that arcane doctrine is neither an independent nor supplemental source of authority for the Department and, in all events, provides no basis for the unprecedented rule petitioners seek.

INTRODUCTION

This petition is brought by a non-profit organization, Kids Versus Global Warming. Kids Versus Global Warming is a project of the Earth Island Institute, which is a California-based environmental non-governmental organization.

Petitioners ask the Department to "[a]dopt a carbon dioxide emissions reduction plan that . . . reduces state-wide fossil fuel carbon dioxide emissions by at least 6% annually until at least 2050," and to "[a]dopt any necessary policies or regulations to implement" this plan. Petn at 2.

These drastic targets are based on the petition's goal of achieving an atmospheric concentration of 350 ppm of carbon dioxide. Even if everyone in the world immediately ceased emitting carbon dioxide, it would take 70 years for the global concentration of carbon dioxide to fall to 350 ppm, a level it reached over 20 years ago, because carbon dioxide is very long lived in the atmosphere.[1] Despite that fact that climate change is truly a global issue and that no one state or even nation could ever realize the goals Petitioners seek, Petitioners nonetheless urge Nevada to implement this plan include a wide-ranging and dramatic series of regulations including, among other things:

- "increasingly stringent efficiency standards for buildings, appliances, and motor vehicles;"
- "banning new coal-fired power plants;"
- "carbon-free state, local, and federal governments;" and
- "adoption of a gradually increasing renewable portfolio standard for electricity until it reaches 100 percent by about 2050."

Petn. ¶ 56.

Petitioners cite no state law authorizing the relief they seek, which would alter virtually every aspect of life in the state. Instead, they rely on a generalized "public trust doctrine," which they say "holds government responsible, as perpetual trustee, for the protection and preservation of the atmosphere for the benefit of both present and future generations." Petn. ¶ 102. Petitioners assert that "[t]he public trust imposes a legal obligation on the State of Nevada to affirmatively preserve and protect the citizen's trust assets from damage or loss." Petn. ¶ 104. Furthermore, the contours of the state's duty, they contend, "is defined by scientists' concrete prescriptions for carbon reductions." Petn. ¶ 105.

Many of the scientific assertions petitioners rely on to justify their extraordinary request are hotly contested. The Department need not delve into these contentious issues, however, because, as we explain next, it is clear that the Department has no authority to grant the petition and requested relief. The petition should therefore be dismissed at the outset, without any hearing or further proceedings.[2]

ARGUMENT

I. The Department Lacks The Authority To Grant The Requested Relief.

The Department, like all agencies, is a creature of statute. It possesses only those powers that the legislature has delegated to it by statute. This basic aspect of our governmental structure is fatal to petitioners' request. They cite no statute that empowers the Department to adopt the extraordinary greenhouse gas reduction plan that petitioners propose. Thus, even if the State had a "fiduciary responsibility" to adopt the regulatory scheme petitioners demand—and it does not, *see infra*, § II—the Department lacks statutory authority to assume or discharge such a responsibility.

Indeed, petitioners themselves do not suggest otherwise. Instead, they cite a rarely-invoked and vague common law concept known as the "public trust doctrine" as the supposed source of the Department's authority to adopt the measures they propose. Petn. ¶¶ 100-10.

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[1] Ackerman *et al*., The Economics of 350: The Benefits and Costs of Climate Stabilization, http://www.e3network.org/papers/Economics_of_350.pdf at 17.

[2] Of course, should the Department decide to conduct further proceedings, [name of submitting entity] reserves the right to submit additional comments in any such proceedings.

Contrary to petitioners' apparent assumption, however, the Department is not a common law-making arm of the judiciary. It cannot invoke the public trust doctrine—or any other common law doctrine—and thereby grant itself new and sweeping regulatory powers that the state legislature has not seen fit to confer upon it.

At most, the Department, like other executive branch agencies, has authority to engage in policy-making to resolve ambiguities in a duly enacted statute that it administers. Petitioners, however, do not rely on any such theory here—and for good reason: It is utterly untenable to suggest that authority to adopt regulations that would, as noted above, affect virtually every aspect of life within the state could be found in any statutory ambiguity. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001) (the legislature does not alter the "fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

In short, because the legislature has not granted the Department the authority to adopt the relief petitioners seek, their petition must be denied.

II. The Petition Rests On An Unprecedented And Wholly Impermissible Expansion Of The Public Trust Doctrine.

In all events, the public trust doctrine does not justify—much less compel—adoption of the sweeping regulatory scheme petitioners demand. At its core, this doctrine is a restriction on the authority of a state to alienate lands covered by navigable waters, not an affirmative grant of authority to implement extraordinary novel regulatory regimes. As the United States Supreme Court has explained, "[t]he doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 439 (1892). Historically, the doctrine protected the public's right to use navigable water for navigation, commerce, and fishing. *Id.* at 452. Under no circumstances has any court even hinted at the doctrine possibly being invoked affirmatively to authorize a new regulatory regime.

Some state courts have incrementally expanded the doctrine, mostly by protecting additional public uses of navigable water, such as recreational uses and aesthetic enjoyment. No state, however, has ever extended the doctrine from navigable waters to the entire "atmosphere," let alone invoked the doctrine as authority for courts to regulate a sweeping array of private activities affecting the atmosphere. To the contrary, the petition is modeled on—and seeks to implement—a strategy proposed by a law professor who urges litigants to use the public trust doctrine in a concededly unprecedented manner. In a forthcoming law review article, Professor Mary Christina Wood asserts that the environmental statutes under which agencies like this one operate are in fact "engine[s] of environmental destruction," and argues that litigants around the world should instead invoke the public trust doctrine in a campaign that "calls upon the judicial branches of governments world-wide to force carbon reduction," and in this way "accomplish, through decentralized domestic litigation across the globe, what has thus far eluded the centralized, international treaty-making process." Wood, *Atmosphere Trust Litigation Across The World*," at 2-3, 6 (draft attached). Professor Wood acknowledges, as she must, that "this is new terrain for courts and for society in general," and that "[a]s yet, no precedent" has extended public trust doctrine to the atmosphere. *Id.* at 13. Nevertheless, she urges litigants to pursue this extraordinary campaign by "draw[ing] upon and extrapolate[ing] from" public trust principles. *Id.*; *see also id.* at 43 ("the public trust doctrine and the primordial rights that infuse it are part of a populist manifesto that surfaces through the generations of Humanity, no less revolutionary for

our time and our crisis than was the forcing of the Magna Carta on the English monarchy in 1215, or Mahatma Ghandi's great Salt March to the sea in 1930").

Of course, because such an expansion of common law legal doctrine is beyond the authority of this and other executive branch agencies, the petition should be denied. But the expansion that petitioners and Professor Wood seek is impermissible for more fundamental reasons. It is predicated on the untenable theory that the public trust doctrine can be used by private parties to compel a state to exercise its discretionary police powers, and to exercise that discretion in the manner prescribed by judicial decree.

As Professor Wood herself acknowledges, the public trust doctrine is an "inherent . . . *restraint* on legislative power," and "a *limitation* on sovereignty." *Id.* at 8-9 (emphases added). Although this limitation is sometimes expressed as a "duty," it is necessarily *negative* in nature—*i.e.*, if it can fairly be described as a duty, it is a duty to refrain from doing something. Thus, the state cannot "abdicate its trust over property in which the whole people are interested in," *Illinois Central*, 146 U.S. at 453, and thus "may not allocate private rights to destroy what the people legitimately own for themselves and posterity." Wood, *supra*, at 9.

Plainly distorting such duty-based descriptions of the doctrine, Professor Wood in her article, and petitioners here, seek to obliterate the fundamental distinction between the public trust doctrine, on the one hand, and the state's historic police power, on the other. As a limitation and restraint, the public trust doctrine permits courts in certain narrow circumstances to nullify affirmative legislative acts, such as Illinois' conveyance of a vast swath of Chicago's harbor to a private railroad company.[3] The police power, in stark contrast, is an *affirmative* power that the state may use, in its discretion, to regulate, prohibit and even compel conduct by private citizens, subject to constitutional limitations.[4] As a consequence, while private individuals may sue to nullify exercises of the police power as violations of constitutional protections such as the takings or due process clauses of the federal constitution, they may not sue *to compel an exercise of the police power*. The decision to make affirmative use of the police power to address a societal problem is discretionary—one that the legislature makes subject, through the democratic process, to the will of the people.

Ignoring this crucial distinction, petitioners seek to use the public trust doctrine as a basis for private citizens, acting through the courts, to dictate that the state exercise the police power, and do so to achieve particular goals. This is made particularly clear by the fact that petitioners do not seek to nullify any conveyance or conferral of rights to any person or persons to use the atmosphere in a manner that deprives petitioners of their rights to use the atmosphere. They do not allege that the Department or state has impermissibly sold or leased any portion of the atmosphere to others. Nor do they contend that others have been granted licenses or rights to use

[3] Even in California, where courts have expanded the doctrine more than most, it is still employed in this restraining fashion. *See National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 19083 Cal. LEXIS 152 (1983) (requiring state agency to revisit decision granting Los Angeles the right to divert waters for drinking water and requiring agency to consider extent to which that diversion could be accomplished in a manner more protective of recreational and aesthetic interests in that water).

[4] In *Illinois Central*, the Supreme Court distinguished the two concepts, noting that a state "can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers." 146 U.S. at 453. Professor Wood herself has likewise recognized the distinction, characterizing the public trust doctrine as a "property-based counterweight to discretionary police power." Wood, *supra*, at 9.

the atmosphere in a manner that is depleting it, and that petitioners are now unable to use the atmosphere in ways that they formerly did.

Instead, petitioners allege that world-wide emissions have caused a change in atmospheric concentrations of greenhouse gases, and that this increased concentration is in turn allegedly causing a wide range of other harms—e.g., floods, droughts, increased heat deaths—that petitioners seek to avert. Thus, petitioners are arguing that the Department has an affirmative duty to exercise the state's police power to regulate all of the activities that, according to petitioners, will cause these harms. This is, plainly and simply, an unprecedented attempt to compel a state to exercise the police power, and indeed, to do so in a way that will require changes in the way virtually everyone in the state works and lives.

Petitioners' public trust theory has no discernable, meaningful limits, and acceptance of that theory would work a profound—and wholly impermissible—alteration in our governmental structure. If, as petitioners contend, states have a judicially enforceable "fiduciary duty" to protect the atmosphere from all activities that allegedly lead to harms to others, then courts can, at the behest of private citizens, compel states to adopt any number of laws and regulations to forestall a range of harms. Cities and counties could be compelled, through private lawsuits, to adopt zoning ordinances to prevent or reduce smog. States could likewise be compelled to enact laws that mandate expensive retrofitting of all dwellings to reduce carbon-based energy consumption; to penalize workers who do not use mass transit; or to alter their tax schemes to encourage use of renewable energy. These and other policies choices, however, entail a balancing of numerous societal interests that, under our democratic system, are properly balanced by elected officials answerable to the people they serve.

In the end, petitioners seek to use the public trust doctrine to impose their preferred policy choices on the residents of this state. However sincere their beliefs, they cannot use either this Department or the courts of this state to bypass the democratic process to obtain the relief they seek. Their petition should therefore be dismissed.

Regards,

Ray Bacon
Executive Director