

Public Trust Doctrine - creating com law actions

Sanders-Reed ex rel. Sanders-Reed v. Martinez, 2015-NMCA-063, 350 P.3d 1221

This is one of several cases identified nationwide asking courts to recognize that states have a common law duty under the public trust doctrine to protect the atmosphere by regulating greenhouse gas emissions. Plaintiffs asked the district court to declare that the State has a public trust duty to protect the atmosphere, and that its "failure *1223 to investigate the threat posed by unlimited greenhouse gas emissions into the atmosphere, as it relates to climate change" and to devise a plan to "mitigate the effects of climate change" is a breach of the public trust duty.

in July 2011, entities involved in New Mexico's energy industry, with the support of the New Mexico Environment Department (NMED)—the department responsible for maintaining, developing, and enforcing New Mexico's air quality management regulations—petitioned the EIB to repeal the State's greenhouse gas regulations. See NMSA 1978, § 74–1–7(A)(4) (2000). After about ten months of hearings on these petitions, the EIB repealed the greenhouse gas regulations in March and May 2012. In doing so, it concluded that regulating greenhouse gas emissions in New Mexico "will have no perceptible impact on climate change or global warming." ... Plaintiffs did not appeal the EIB's decision to repeal the regulations pursuant to the process provided under Section 74–2–9(A) of the Air Quality Control Act or Rule 12–601(B), and they did not initiate a proposal for other regulations using the process provided under NMSA 1978, § 74–2–6(A) (1992) of the Air Quality Control Act. See § 74–2–6(A)–(D)

New Mexico courts have never referred to the public trust doctrine, but they have recognized that common law public trust principles apply in the context of public waters and public trust lands. See, e.g., *State ex rel. Bliss v. Dority*, 1950–NMSC–066, ¶ 11, 55 N.M. 12, 225 P.2d 1007. ... Plaintiffs have cited no cases—and we have found none—where another jurisdiction's appellate court has concluded that common law public trust principles independently apply to management of the atmosphere. ... **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.

However, we also conclude that New Mexico's constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine with regard to the process a person must follow in asserting his or her rights to protect the atmosphere. In other words, one may raise arguments concerning the duty to protect the atmosphere, **but such arguments must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action. A separate common law cause of action under the public trust doctrine would circumvent and render a nullity the process under the Air Quality Control Act that has established how competing interests are addressed** and decisions are made regarding regulation of the atmosphere. We reach this conclusion for several reasons.

- First, although the common law has been adopted in New Mexico, see NMSA 1978, § 38–1–3 (1876), the common law does not apply to the extent the subject matter of the duty or right asserted is covered by constitution, statute, or rule
- Second ... Plaintiffs neither contend that this [administrative] process [under Air Quality

Control Act 74-2-2(A) has been exhausted or] has been unavailable to them, nor do they argue that this process is inconsistent with public trust principles for implementing the protections set forth in Article XX, Section 21 of the Constitution.

- Third, our conclusion is consistent with established separation-of-powers principles. See *New Energy Econ. Inc. v. Shobridge*, 2010–NMSC–049, ¶ 10, 149 N.M. 42, 243 P.3d 746 (recognizing that "the relationship between administrative proceedings and declaratory judgment actions [is] controlled by the doctrine of separation of powers"); *Smith v. City of Santa Fe*, 2007–NMSC–055, ¶ 15, 142 N.M. 786, 171 P.3d 300 (cautioning "against using a declaratory judgment action to challenge or review administrative actions if such an approach would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative *1227 level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action").

We conclude that the courts cannot independently intervene to impose a common law public trust duty upon the State to regulate greenhouse gases in the atmosphere. The *Air Quality Control Act* has established adequate procedures to address and implement any regulation of greenhouse gases in the atmosphere. Plaintiffs do not dispute that the EIB considered the effect of greenhouse gas emissions on the atmosphere, along with all of the other factors required by our constitution and the Air Quality Control Act, when it made its recent decisions regarding New Mexico's greenhouse gas regulations. Plaintiffs had an opportunity to participate in that administrative process

N.M. Stat. Ann. § 75-4-3 (West)

The duties of the state climatologist shall include:

- A. assessing the effect of climate on the natural environment, agricultural production, land and natural resources and human health;
- B. coordinating climate impact studies and programs to improve understanding of climate processes, natural and man-induced, and of the social and economic implications of **climate change**;
- C. developing methods and procedures to enable interested state agencies and public institutions of higher education to participate in the program;
- D. disseminating climate data, information, advice and assessments to state agencies, local public bodies and the general public;
- E. establishing an effective mechanism for consultation and coordination with the federal government and other states in climate related activities; and
- F. administering the state intergovernmental climate program.

Current through the 2022 2nd Regular Session and 3rd Special Session of the 55th Legislature (2022).

N.M. Const. art. XX, § 21

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. *The legislature shall* provide for control of pollution and control of despoilment of the air, water and

other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

N.M. Stat. Ann. § 5-18-2 (West) Legislative Findings [Renewable Energy Financing Dist Act]
The legislature finds that:

A. the development of renewable energy sources will advance the security, economic well-being and public and environmental health of the state, as well as contributing to the energy independence of the nation and addressing the issue of **global climate change**;

Added by L. 2009, Ch. 180, § 2, eff. June 19, 2009.

Other states: ("*climate change*" query in *Allstates*; 317 cases) left off at #40

-largely regulatory issue cases (Clean Water Act, impact statements, endangered species, etc)

- through business litigation sessions (Mass) court dockets

- real property related c/a (inverse condemnation from polluted drinking water, nitrates in river, brackish water, (Mich, Iowa, Hawaii,);

(Permitting the Resort an indefinite license to irrigate its golf course using any water with chloride levels in excess of a given level would not adequately preserve and protect Lana'i's drinking water supply in the long term because, as technology develops and *climate change* likely fundamentally alters the availability of fresh water, "brackish" water may become needed for domestic use. It would assuredly be counter to the State's public trust obligations to permit a private commercial resort to irrigate its golf course with water that the public needs for daily living, and the 2017 LUC's special interpretation does little to prevent this outcome. Lana'ians for Sensible Growth v. Land Use Comm'n, 146 Haw. 496, 463 P.3d 1153 (2020)).

- misrepresentation to investors and consumers (Mass v. Exxon, 2022 WL 10458202)