

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ZOE & STELLA FOSTER, minor)
 children by and through their)
 guardians MICHAEL FOSTER and)
 MALINDA BAILEY; AJI & ADONIS)
 PIPER, minor children by and)
 through guardian HELAINA) No. 14-2-25295-1
 PIPER; WREN WAGENBACH, a minor)
 child by and through her)
 guardian MIKE WAGENBACH; LARA)
 FAIN, a minor child by and)
 through her guardian MONIQUE)
 DINH; GABRIEL MANDELL, a minor)
 child by and through his)
 guardians VALERIE and RANDY)
 MANDELL; JENNY XU, a minor)
 child by and through her)
 guardians YAN ZHANG & WENFENG)
 XU,)
)
 Petitioners,)
)
)
 v.)
)
)
 WASHINGTON DEPARTMENT OF ECOLOGY,)
)
)
 Respondent.)

ORAL ARGUMENT

The Honorable Hollis Hill Presiding

May 15, 2015

TRANSCRIBED BY: Amber Murray, CCR
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A P P E A R A N C E S

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May 15, 2015

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4 THE CLERK: In session. The Honorable Hollis Hill
5 presiding.

6

7 THE COURT: Please be seated. Good morning, everyone.
8 All right. We are here this morning on petition for review.
9 Petitioners are Zoe and Stella Foster and numerous other
10 kids versus the Washington Department of Ecology, Cause No.
11 14-2-25295-1.

12

13 Good morning. I am Judge Hill. And I'm first going to
14 start off by telling you what I have reviewed. I've read
15 the petition for review. I've read the answer to the
16 petition. I have looked at the thousand-page record. I've
17 read parts of it. I haven't read the entire -- the entirety
18 of the record, simply because I haven't had the time to do
19 that. I have read petitioner's opening brief and the
20 exhibits attached to that, respondent's response,
21 petitioners' reply. I've read the motion to strike new
22 evidence and the response and reply, and the motion for
23 overlength brief.

24

25 I will grant the motion for overlength brief at this time.
I'm not willing to hear -- I'm willing to hear argument on
the motion to strike the new evidence. So let me ask the
parties' attorneys to identify themselves for the record.

1 And if you'd like to introduce all your clients to the
2 Court, that would be fine.

3 MS. RODGERS: Thank you. Good morning, Your Honor. My
4 name is Andrea Rodgers, and I represent the petitioners.
5 And here we have all of our petitioners, Your Honor. We
6 have Zoe, Stella, Aji, Adonis, Wren, Lara, Gabe, and Jenny.

7 THE COURT: Okay. Welcome to court.

8 MS. SHIREY: Hi. I'm Katharine Shirey. I represent the
9 Washington State Department of Ecology.

10 THE COURT: Good morning. All right. Let me tell you in
11 advance that we have -- we have the morning for argument if
12 we need it. I'll probably ask a lot of questions. I don't
13 want you to expect a ruling from the bench today, because my
14 guess is that because of the voluminous nature of the record
15 in this case and the complexity of the issues, I'll probably
16 have to -- I'll have to deliberate in chambers about it.

17 I may even need to call -- to call the counsel back in for
18 a second argument. I'm just not sure at this point.
19 Because the reading that I have done has raised a lot of
20 questions in my mind.

21 So let's start with Ms. Rodgers. You can stand, if you
22 like, or you can sit. Whatever's more comfortable.

23 MS. RODGERS: I would prefer to stand, Your Honor.

24 THE COURT: Okay.

25 MS. RODGERS: If I can move this.

1 MS. SHIREY: May I ask a question?

2 THE COURT: Yes.

3 MS. SHIREY: I am willing to waive oral argument on the
4 motion to strike if opposing counsel is as well. I assumed
5 that we would do that first.

6 THE COURT: Yes, yes.

7 MS. SHIREY: And I brought the motion to strike. So I
8 just wondered if we should take care of that ahead of time
9 or how you want to --

10 THE COURT: We can take care of the motion to strike, yes.
11 Did you want to waive argument? Or...

12 MS. RODGERS: That's fine. I'm fine with resting on the
13 briefs, Your Honor.

14 THE COURT: Okay. Well, as far as the motion to strike is
15 concerned, I do -- I do have a question for you Ms. -- is it
16 Shirey or Shirey?

17 MS. SHIREY: Shirey.

18 THE COURT: Shirey. Ms. Shirey, if I strike -- if I
19 strike those documents, I'm inclined to remand the matter to
20 the department to review those documents and reconsider its
21 opinion. I think particularly the December 2014 report is
22 an essential part of this record.

23 MS. SHIREY: I would say that the 2014 report is not part
24 of the record. It was issued four months after the decision
25 on this case. It has not been challenged in this case and

1 it couldn't be challenged in this case. This is not the
2 mechanism for challenging that document. There is no record
3 on that document.

4 If petitioners wish to challenge that document, they would
5 need to bring another case challenging that document. To
6 the extent you believe it's relevant to this particular
7 case, I don't see how it is. But then you would deny the
8 motion to strike.

9 THE COURT: Mm-hmm. Okay. I'm going to reserve ruling on
10 the motion to strike at this point and go ahead and hear
11 arguments, understanding that some of petitioners' brief
12 relies on the 2014 report, and I'm aware of the references
13 to the 2014 report and where they are in the brief.

14 MS. RODGERS: Am I positioned --

15 THE COURT: Yes, that's fine.

16 MS. RODGERS: -- okay? Well, thank you, Your Honor.

17 Again, my name is Andrea Rodgers, and I represent the Youth
18 Petitioners in this matter. Your Honor, we are at an
19 unprecedented time in the history of humankind. It is
20 undisputed in the voluminous record before you that human
21 activities have increased atmospheric levels of greenhouse
22 gases to levels unprecedented in at least the past 800,000
23 years.

24 What this means is that the climate system is warming, sea
25 level is rising, snow and ice are declining, oceans are

1 becoming highly acidic, and climatic events are becoming
2 more extreme. Your Honor, this is called climate change and
3 this is what this case is all about. To quote the
4 Washington Department of Ecology, the respondent in this
5 case, Global climate change is the economic and
6 environmental issue of our lifetime. The science is clear
7 that we must move forward quickly to reduce greenhouse gas
8 emission in order to mitigate its effects.

9 While the science is clear in regards to what needs to be
10 done, the law is clear as well. The legislature has
11 directed to the state to, quote, Do its part to reach global
12 climate stabilization levels, end quote. And to, quote,
13 Preserve, protect, and enhance the air quality for current
14 and future generations, end quote.

15 This case concerns Ecology's failure to fulfill its
16 statutory mandate to regulate carbon dioxide emissions and
17 how Ecology's failure to do their job has violated the Youth
18 Petitioners' fundamental and inalienable rights.

19 Your Honor, we respectfully request that you reverse
20 Ecology's decision denying the petition for rulemaking and
21 that you remand with instructions to initiate rulemaking on
22 mandatory reductions for carbon dioxide emissions in the
23 state of Washington.

24 Ecology's decision to -- rejecting the petition for
25 rulemaking should be overturned for three reasons. The

1 first is that it's outside of their statutory authority.
2 The second is that it's unconstitutional. And the third is
3 that it's arbitrary and capricious.

4 I want to start with the statutory framework that we're
5 working in, Your Honor. And the first statute I'd like to
6 discuss is the Washington Clean Air Act. This statute is
7 very important because Ecology admits under this statute
8 that it has the authority to regulate carbon dioxide
9 emissions. And that makes sense given the plain language of
10 the statute, which is in RCW 94 -- 70.94.331, Ecology shall
11 adopt rules establishing air quality objectives and air
12 quality standards and shall adopt emission standards which
13 shall constitute minimum emission standards throughout the
14 state.

15 "Shall" is -- indicates that this is a mandatory duty.
16 The legislature could have used the permissive term, "may,"
17 but it declined not to do so [sic]. Ecology justifies its
18 decision not to undertake rulemaking by arguing that while
19 they're authorized to promulgate rules under this statute,
20 they're not required to do so. That position is flawed for
21 really two reasons, Your Honor. The first is a factual
22 reason. And the second is a legal reason.

23 First, to start with the factual premise of that, it's
24 simply untenable, given the record before you in this case.
25 And I'd really like to draw your attention to the Rios case

1 v. Department of Labor and Industries. Because that case is
2 very similar to the situation we're presented with here. In
3 that case there was a similar mandatory duty. And that was
4 imposed upon the Department of Labor and Industries to
5 mand- -- they had a mandatory duty to promulgate health and
6 safety standards and working conditions.

7 Now, what's different with that statutory duty in that
8 case is that it had a limiting factor that they had to
9 promulgate standards to the extent feasible. Here in the
10 Clean Air Act, we don't have that limiting factor, Your
11 Honor. And, furthermore, in Rios, the main report, the
12 scientific report that was underlying the agency's decision,
13 made it clear that the -- what they were proposing in the
14 rulemaking was a mandatory blood testing for pesticide
15 handlers. The report in the agency record made it clear
16 that that was what should be done. There wasn't any dispute
17 that that's what the scientific report promulgated by their
18 own agency said.

19 Similarly here, Your Honor, in every document that is
20 contained within this administrative record, it is clear
21 that we must draw down our carbon dioxide emissions if we're
22 going to have any hope of dealing with climate change. And
23 more importantly, if we're going to comply with RCW 70.235's
24 obligation to achieve global climate stability, put us on a
25 path towards global climate stability.

1 THE COURT: What do you say to Ecology's argument that the
2 Rios case doesn't apply because the statutory duty under --
3 for the Ecology department is a general one versus a
4 specific mandatory one in Rios?

5 MS. RODGERS: Your Honor, I was looking at that this
6 morning. And I think if you compare the statutory language
7 between the statutory section that was in Rios and the
8 statutory section that's in the Clean Air Act, they're
9 actually very similar. And like I said, I think actually
10 the Clean Air Act, the language in the Clean Air Act,
11 provides a more precise duty than was at issue in the Rios
12 case. Because in the Rios case, the agency just needed to
13 promulgate regulations to the extent feasible.

14 And there's a substantial discussion in the Rios case in
15 terms of what does that mean, "to the extent feasible." And
16 there's a tremendous amount of federal and state case law
17 saying you take into account costs, feasibility of different
18 kinds of measures. That is not what's in the Clean Air Act.
19 They don't have those -- similar kind of limiting language.

20 Now, what Ecology says is because there aren't, you know,
21 very specific directives in the Clean Air Act and there
22 weren't specific directives at issue in the Rios case as
23 well, that they then have the discretion not to exercise
24 their authority. And that is contradicted in the Rios case.

25 THE COURT: What is the meaning of the word "standards"?

1 MS. RODGERS: Air emissions standards, it's the same
2 meaning, Your Honor, as air emissions limitations and it's a
3 statutory term that's defined. I don't have the definition
4 in front of me, but it's in RCW 70.9 -- 94, but we can
5 certainly get that for you if you would like the precise --

6 THE COURT: Okay. But in any event, it means setting a
7 limit?

8 MS. RODGERS: Yes, yes.

9 THE COURT: Okay. Okay.

10 MS. RODGERS: Absolutely. And I wanted to also say in
11 terms of -- Ecology just doesn't have the discretion not to
12 act in this case. Because of what is in the factual records
13 saying that urgent action is needed now to reduce our carbon
14 dioxide emissions.

15 And I think Justice Alex- -- Chief Justice Alexander in
16 his concurring opinion in the Rios case, which is cited in
17 both of our briefs says, The fact that an agency has
18 discretion over the manner in which it carries out its
19 statutorily prescribed duties does not mean that the agency
20 has the discretion to refuse to carry out those duties.

21 So in this case, it's the same situation where
22 Ecology's -- they do not have the discretion not to engage
23 in this mandatory duty to promulgate air emission standards
24 for carbon dioxide. That's their -- because the facts in
25 the record, and also because they're failing to promulgate a

1 proposed rulemaking that we're asking for violates the
2 intent and language of other parts of the Clean Air Act.

3 For example, the intent of the Clean Air Act, and I want
4 to point out that we're not arguing that this section, the
5 intent section, is what is -- commands them to promulgate
6 the proposed rule.

7 THE COURT: I understand that.

8 MS. RODGERS: But the intent section is very important.
9 Because that's the -- that's where we get the standards that
10 guides Ecology's determination in how and when to promulgate
11 air emission standards and limitations. They need do so in
12 a manner that complies with all provisions of the statute,
13 including the intent.

14 And the intent is to preserve, protect, and enhance the
15 air quality for current and future generations. It is the
16 intent of this chapter to secure and maintain levels of air
17 quality that protect human health and safety, including the
18 most sensitive members of the population; to prevent injury
19 to plant, animal life, and property; to foster the comfort
20 and convenience of Washington's inhabitants; to promote the
21 economic and social development of the state; and to
22 facilitate the enjoyment of the natural attractions of the
23 state.

24 And I tell you, Your Honor, I think the most important
25 document contained within the administrative record is found

1 at Administrative Record 12. And that's the University of
2 Washington Climate Impacts Group most recent assessment of
3 climate impacts. They have sections on global impacts. But
4 I would like to draw your attention to the section on the
5 impacts in the Pacific Northwest. That's where they're
6 predicting by the 2050s, which is within many of our
7 lifetimes, and is within particularly the lifetime of these
8 Youth Petitioners, they're expecting temperatures to rise
9 anywhere from 5 to 8 degrees Fahrenheit. And the
10 consequences of those temperature's increase are
11 significantly detailed in that report.

12 So the record in this case makes it very clear that the
13 intent of the legislature that's reflected in the Clean Air
14 Act is -- cannot be fulfilled absent additional actions to
15 draw down our carbon dioxide emissions. And it's important
16 to note, Your Honor, Ecology is the only agency with the
17 delegated authority to do just that. And that's in the
18 Washington Clean Air Act.

19 The other statutory violation we have here, Your Honor, is
20 RCW 70.235. In this statute, Congress -- or the legislature
21 has stated that the state will, quote, Do its part to reach
22 global climate stabilization levels by reducing overall
23 greenhouse gas emissions. And they say it's the intent of
24 the legislature that the state will limit and reduce green
25 -- the emissions of greenhouse gases consistence --

1 consistent with the emission reductions established in RCW
2 70.235.020; minimize the potential for -- to export
3 pollution, jobs, and economic opportunities; and reduce
4 emissions at the lowest cost to Washington's economy,
5 consumers, and businesses.

6 It's undisputed in the record, Your Honor, that this is
7 not occurring. In Ecology's brief, they admit that the
8 state is not on track to meet the emission reductions that
9 are set forth in RCW 70.235. And it's replete in the
10 administrative record.

11 I turn your attention to Administrative Record 15.
12 Ecology projects that the policies the state has already
13 implemented to reduce greenhouse gas emissions will result
14 in relatively constant emissions between now and 2020.
15 Unfortunately, this means that the state is not on track to
16 meet its statutory reduction limit for 2020 and beyond.
17 That was from 2010.

18 2013, The state will not meet its statutory reductions for
19 2020, 2035, and 2050 with current state and federal
20 policies. Without -- from another -- without action,
21 climate will negatively affect nearly every part of
22 Washington's economy, through changes in temperature, sea
23 level, and water availability. And the legislature tells us
24 in RCW 70.235 that we need to be drawing down our carbon
25 emissions at the lowest cost to society. And by delaying,

1 it simply increases the cost and that's what's replete --
2 again, many references to that throughout the administrative
3 record.

4 From the December 2014 report, If we delay action by even
5 a few years, the rate of reduction needed to stabilize the
6 global climate would be -- be beyond anything achieved
7 historically and would be more costly. And in
8 Administrative Record 22, Governor Inslee tells us that the
9 effects of climate change will cost Washington almost
10 \$10 billion per year after 2020, unless we take additional
11 actions to mitigate these effects.

12 And the additional actions are quite clear, it's reducing
13 greenhouse gas emissions and most specifically carbon
14 dioxide emissions. And I think it's important to note, Your
15 Honor, that the provisions of RCW 70.235 don't preempt the
16 provisions of the Washington Clean Air Act. And it says
17 that twice in the statute. At RCW 70.235.020(c) and at
18 Section 900, Except where explicitly stated otherwise,
19 nothing in this chapter limits any state agency's
20 authorities as they existed prior to June 12, 2008.

21 Well, Your Honor, I think we -- I believe the Washington
22 Clean Air Act predated that. And so these statutes are to
23 be read in conjunction with one another and the proposed
24 rule is necessary to comply with both of these statutes,
25 Your Honor. And their decision not to promulgate and

1 undertake a rulemaking violates both of those statutes,
2 which is one of the reasons why their decision should be
3 remanded back to the agency.

4 I wanted to turn, Your Honor, to the constitutional and
5 public trust claims as well. In many ways this case is a
6 run-of-the-mill APA case. You know, they come before
7 superior courts frequently. I think oftentimes most
8 frequently in Thurston County, not necessarily in King, but
9 I'm sure that this court gets its fair share of APA cases
10 that set forth the standard of review and how you analyze
11 the agency's actions and the evidence in the record.

12 But this case is unique, Your Honor, not because,
13 necessarily, it concerns climate change, but because it
14 implicates fundamental constitutional rights of these Youth
15 Petitioners.

16 THE COURT: Is there any case that you can cite either in
17 Washington or across the United States where the Public
18 Trust Doctrine has been applied to something other than
19 navigable waters?

20 MS. RODGERS: Absolutely, Your Honor. I would direct you
21 to a precedent in this state, the Washington geoduck case
22 has held that Public Trust Doctrine applies to shellfish
23 resources in this state. They are not -- you know, that's
24 a -- they're not shorelands, tidelands, or navigable waters.
25 It also has been extended in other states. California

1 recently issued a decision extending it to ground water.

2 The --

3 THE COURT: Is that in your brief? I apologize if I --

4 MS. RODGERS: The California decision?

5 THE COURT: Yeah.

6 MS. RODGERS: I don't believe it is, Your Honor.

7 THE COURT: Okay. And what about the geoduck decision?

8 MS. RODGERS: Yes.

9 THE COURT: Can you give me that name?

10 MS. RODGERS: Yes, it's Washington geoduck.

11 THE COURT: Is that in your brief?

12 MS. RODGERS: It is in my brief, Your Honor.

13 THE COURT: Okay.

14 MS. RODGERS: And I think that's a very important
15 decision. And that's the case that held that state agencies
16 with delegated natural resource management authority have a
17 mandatory duty to, quote, Protect various public interests
18 in state-owned tidelands, shorelands, and navigable water
19 beds, end quote. The other quote is, Shellfish embedded on
20 public property are resources that invoke a public right
21 under the Public Trust Doctrine.

22 And the reason I think this is the most important case in
23 this -- in regards to the Public Trust Doctrine is because
24 it concerns shellfish. And in terms of the facts in the
25 record, Your Honor, ocean acidification is the most alarming

1 issue that this region is going through right now. There's
2 a report at Administrative Record 19 that -- I don't think
3 there's any other way to characterize it except as alarming.

4 And in that report it concludes that by 2100, our marine
5 waters in the Pacific Northwest will become up to
6 109 percent more acidic than they are today. And what that
7 means is by 2050 -- again within our lifetime -- models are
8 showing that more than half of the marine waters in our
9 region will be corrosive to oyster larva and other
10 calcifying species. It will likely eliminate up to
11 30 percent of Puget Sound's marine species including crabs,
12 oysters, clams, scallops, muscles, abalone, geoducks,
13 barnacles, sea urchins, sand dollars, sea stars, and sea
14 cucumbers. Potentially --

15 THE COURT: I need to narrow my question. I agree with
16 you, the reports are alarming. So we take that as a given.
17 Is there a case where the Public Trust Doctrine was applied
18 outside the areas having to do with seawater, creatures,
19 navigable --

20 MS. RODGERS: Yes.

21 THE COURT: -- et cetera? And same question as to air?

22 MS. RODGERS: Yeah, absolutely, Your Honor, and that's --

23 THE COURT: -- where public trust has been applied to air?

24 MS. RODGERS: Yes.

25 THE COURT: And I understand your argument that global

1 warming affects all of -- affects all the waters on the
2 earth. I understand that argument. But I'm asking a more
3 specific question here.

4 MS. RODGERS: Yeah. It's the Court of New Mexico, Your
5 Honor. New Mexico Court of Appeals held that the Public
6 Trust Doctrine would apply to the atmosphere and all
7 essential natural resources. And I think --

8 THE COURT: Is that the Sanders-Reed case?

9 MS. RODGERS: Yes, Your Honor. And that --

10 THE COURT: Oh, so you're citing for that purpose, not for
11 the -- not for the holding, which is that separation of
12 powers -- because separation of powers of judicial branch
13 should not be regulating this.

14 MS. RODGERS: Well, actually, you know, what the
15 Sanders-Reed case -- we're sort of -- we're doing exactly
16 what the Court of Appeals said needed to be done. And that
17 was you need to go to the agency who has delegated authority
18 to regulate --

19 THE COURT: Okay. Understood.

20 MS. RODGERS: Yeah.

21 THE COURT: I see. I see.

22 MS. RODGERS: So that case is actually squarely on point
23 with what we're proceeding here. And the last point I
24 wanted to reference is that the seminal case on Public Trust
25 Doctrine here in Washington State, *Caminiti v. Boyle*, you

1 know, it cites as authority for the Public Trust Doctrine,
2 it comes from the Code of Justinian, ancient Roman law,
3 which we don't normally cite in our briefs.

4 THE COURT: Never heard that. I don't think I heard that
5 in law school.

6 MS. RODGERS: We haven't cited the Code of Hammurabi, Your
7 Honor. But...

8 THE COURT: We'll get to that.

9 MS. RODGERS: Give us a chance. No. What's important
10 about the Code of Justinian, Your Honor, is in that case it
11 wasn't about navigable shorelands and tidelands. It was
12 that -- the notion comes from all essential natural
13 resources including air, land, and water are held in trust.

14 And so that's where that comes from. And my position is
15 because -- in my reading of the Caminiti case is because
16 they cite that as the authority, then I think that's what --
17 what makes it clear that it applies to other natural
18 resources other than -- in addition to in our case law, when
19 we cite the constitutional provision that the state holds
20 tidelands and shorelands and that that's -- they say that
21 that partially encapsulates the Public Trust Doctrine. It
22 does not fully encapsulate that. And the geoduck case talks
23 about that being partially encapsulated as does the Caminiti
24 case and Rettkowski as well.

25 THE COURT: So remind me what the facts are in Caminiti.

1 MS. RODGERS: Caminiti case involved, Your Honor, a
2 challenge to legislation regarding the regulation of the
3 private construction of docks on shorelands and tidelands.
4 And the court held that that legislation complied with the
5 Public Trust Doctrine because they did not give up their
6 control of the resource. They kept control and they
7 regulated the resource and did not allow substantial
8 impairment by -- through the legislative enactment.

9 THE COURT: Okay. So that had to do with docks on open
10 water?

11 MS. RODGERS: Yes.

12 THE COURT: Okay. But you're looking at the dictum that
13 refers to the court of -- Code of Justinian?

14 MS. RODGERS: Code of Justinian.

15 THE COURT: Code of Justinian and the language that the
16 constitutional provision only partially encapsulates public
17 trust.

18 MS. RODGERS: That's correct, Your Honor.

19 THE COURT: Okay.

20 MS. RODGERS: And Caminiti is the first court in the state
21 of Washington that applies the Public Trust Doctrine. And
22 it says even though this is the first time we're applying it
23 in 1989, it has always existed in Washington State.

24 The other -- you know, and I think why these
25 constitutional elements are important in this case, again,

1 we're not arguing that the constitution directs Ecology to
2 promulgate a proposed rule. We're not arguing that the
3 Public Trust Doctrine requires Ecology to promulgate this
4 specific rule.

5 But these are important because when Ecology undertakes --
6 or makes a final agency action, they need to do so in a way
7 that doesn't violate the constitution. And that's clear in
8 the language of the Administrative Procedures Act, which
9 allows you to review an administrative decision to determine
10 whether it is or not unconstitutional.

11 And I think why this is factually important here is
12 because of the consequences of failing to act now will most
13 be felt by the Youth Petitioners and the future generations
14 of this case. Ecology has recognized that continuing on the
15 path we are on is, quote, Imposing risks on future
16 generations and causing intergenerational inequities, Your
17 Honor. I believe that's an admission of a violation of
18 these Youth Petitioners' fundamental and inalienable rights.
19 And these rights do not appear to be disputed by Ecology in
20 this case.

21 The legislature recognized the existence of these rights
22 when they created the Department of Ecology, that it's the
23 fundamental and inalienable right of the people of the State
24 of Washington to live in a healthful and pleasant
25 environment and to benefit from the proper development and

1 use of its natural resources. This right is recognized in
2 RCW 42.21A.010. It's also in other statutes as well.

3 And the legislature, Your Honor, has protected this right
4 in part by enacting the Washington Clean Air Act and RCW
5 70.235 because they recognize that future generations will
6 be most harmed from climate change and that there's an
7 immediate need to draw down our greenhouse gas emissions.

8 I think, Your Honor, again, turning to the record as to
9 what is our proof that their rights are being violated, I'm
10 not going to go through the administrative record. I'm just
11 going to say that the proof of substantial impairment to the
12 natural resources, which is what the standard generally is
13 in a public trust case, I think is more than clear as you go
14 into the administrative record.

15 We've talked about ocean acidification and I think the
16 other facts speak for themselves in terms of flooding, sea
17 level rise, increasing temperatures, and the associated
18 effects, which we've briefly discussed. But I think it's
19 important to recognize that this violation is occurring
20 today. This is not a violation that we're anticipating to
21 happen in 20 years, in 30 years. It's happening today.

22 For example, the glacier on Mt. Adams today is 49 percent
23 of what it once was. The drought we're seeing in the Yakima
24 Valley today has been predicted to happen on a much more
25 frequent basis. And by failing to implement their statutory

1 authority to regulate and draw down carbon dioxide
2 emissions, Ecology is permitting this impairment to occur.
3 And they have a duty to protect and prevent that impairment,
4 and that squarely comes in the Washington geoduck case, Your
5 Honor. They have a duty to protect the resources.

6 And abdicating their duty -- and, in fact, Your Honor, I
7 think why the December 2014 report is relative -- is
8 relevant to this case is they're actively facilitating the
9 impairment to these resources by telling the legislature not
10 to update their greenhouse gas emissions until Paris. Your
11 Honor, that contradicts the contents of that report, but
12 most importantly, the contents of the entire administrative
13 record in this case. And I submit to you, Your Honor,
14 waiting for Paris is not an appropriate remedy to fulfill
15 and protect these Youth Petitioners' rights. Paris will be
16 the 21st --

17 THE COURT: What is -- yeah. Excuse me for interrupting.
18 But what do you say to the argument that a rulemaking
19 process would take longer? Just that it's more definite
20 or...

21 MS. RODGERS: Will take longer than Paris?

22 THE COURT: Well, Paris is in December, a few months away.
23 And a rulemaking process would probably take longer than
24 that.

25 MS. RODGERS: Yeah. I disagree with that, Your Honor, for

1 several reasons. First, Paris is the 21st international
2 climate negotiations that has occurred. So to assume that
3 something substantive is going to come out of Paris is --
4 there's no basis for that. It took 30 years, Your Honor,
5 for international governments to negotiate the Law of the
6 Sea.

7 THE COURT: So why do you think they put that in their
8 brief?

9 MS. RODGERS: What --

10 THE COURT: Or in their denial -- or, I'm sorry, in their
11 recommendation to the legislature?

12 MS. RODGERS: Yeah, Your Honor, to use a colloquial term,
13 I think they're punting. I don't think they want to exert
14 their authority because of the political consequences of
15 doing that.

16 THE COURT: Okay. Thank you.

17 MS. RODGERS: And that's just not acceptable, Your Honor.
18 Because of -- the record is clear. Their own experts say
19 the time to act is now. It has to be urgently done.

20 And finally, Your Honor, I wanted to conclude with an
21 issue that we frequently talk about in Administrative
22 Procedure Act cases and that's that Ecology's decision is
23 arbitrary and capricious.

24 This case is a little bit unique in that the science is
25 undisputed. However, again, the Rios case, I think is

1 squarely on point here. Ecology ignores the recommendations
2 and findings of its own experts in the administrative
3 records. These findings make it clear that substantial
4 impairment to the state's natural resources is happening and
5 will continue to get worse.

6 According to Administrative Record 12, All scenarios
7 project warming for the 21st century. Additional action is
8 required to draw down our carbon dioxide emissions. That
9 comes in nearly all of the administrative records, but most
10 precisely Administrative Record 14 and 22, and that urgent,
11 not delayed, action is required.

12 According to Administrative Record 14, The science is
13 clear that we must move forward quickly to reduce greenhouse
14 gas emissions. Administrative Record 15, We believe moving
15 forward now is critical for Washington State.

16 Administrative Record 19, It is time to coordinate and
17 harness these resources and start tackling the many
18 challenges that will come with ocean acidification. It is
19 time to act. So, Your Honor, the urgency comes in the
20 science, and -- the undisputed science in this case.

21 In addition, Your Honor, we know where our carbon dioxide
22 emissions are coming from. That's in Administrative Record
23 16 and 17. Ecology calculate -- or collects that data, yet
24 Ecology does not regulate these sources in a way that will
25 achieve global climate stability. That's undisputed in this

1 case.

2 Finally, Your Honor, there are strategies that Ecology can
3 implement in order to regulate carbon dioxide emissions
4 using its existing authorities under RCW 70.235 and the
5 Clean Air Act. Some of those strategies are discussed in
6 Administrative Record 21. And more need to be developed and
7 implemented through the rulemaking process. The agency has
8 set greenhouse gas limits -- emissions limits for petroleum
9 refineries. So it clearly has the authority, and admits
10 that it does, but it's refusing to implement it in terms of
11 other sources other than for petroleum refineries.

12 It's simply arbitrary and capricious for Ecology not to
13 exercise their statutory authority to regulate carbon
14 dioxides in the face of this undisputed scientific
15 information that calls for immediate action to draw down
16 carbon dioxide emissions to achieve global climate
17 stability. And, again, that global climate stability
18 standard, Your Honor, is not something that we have made up.
19 That comes from the plain language of RCW 70.235.

20 And, again, I draw your attention to the Rios case, and
21 where the evidence in the record showed that action was
22 required. And the same thing is here. And remand to
23 Ecology with instructions to initiate a rulemaking is
24 appropriate.

25 Your Honor, I said this probably way too many times. But

1 the record in this case makes it clear that the time to act
2 is now. We cannot afford to wait any longer. As Governor
3 Inslee said in his administrative record, Washington needs
4 to take additional actions now to meet our statutory
5 commitment to do our part in preventing further climate
6 change, to capture job growth opportunities of a clean
7 energy economy, and to meet our obligation to our children
8 and our future generations. Urgent action is required, not
9 the continued delay sanctioned by Ecology and actually asked
10 for by Ecology in their recommendations to the legislature,
11 telling the legislature to wait in spite of what the science
12 says.

13 And, you know, Your Honor, we are not asking you to order
14 Ecology to do the impossible. Fortunately, the legislature
15 has provided Ecology with the statutory authority to reduce
16 the state's emissions of carbon dioxide and that's what we
17 are asking Ecology to do in this case.

18 You know, I think it needs to be said that while this case
19 concerns climate change, an issue many courts have been
20 loathe to get involved in -- whether it's political
21 question, as you mentioned briefly before, standing, other
22 issues, separation of powers, those questions aren't before
23 you today, Your Honor.

24 This is an Administrative Procedure Act case. We aren't
25 asking you to change the world. But we are asking you to

1 protect the fundamental and inherent rights of these Youth
2 Petitioners and future generations that are being abridged
3 today and in the future will be significantly impaired.

4 Even Ecology says in its Administrative Record 14 at Page
5 8, We must challenge ourselves to find the political will to
6 look ahead, work together, and act on their behalf. And
7 they're speaking of future generations. But, Your Honor, I
8 tell you, it's not political will that's missing in this
9 case. It's the administrative will from the executive
10 branch that's lacking.

11 We ask you to find that Ecology's decision denying the
12 petition for rulemaking exceeds their statutory authority,
13 is unconstitutional, violative of the Public Trust Doctrine,
14 and is arbitrary and capricious. We're asking that you
15 remand the decision back to Ecology with instructions to
16 undertake a rulemaking to implement their admitted statutory
17 authority to regulate carbon dioxide emissions.

18 The legislature has given Ecology statutory tools to
19 address climate change and it's now that the agency be held
20 accountable to implementing those tools, Your Honor. And I
21 would like to reserve about five minutes of rebuttal time
22 after Ecology.

23 THE COURT: That's fine. Let me just go through my notes
24 and see whether I have any questions for you at this point.

25 MS. RODGERS: Please, Your Honor.

1 THE COURT: Are you in agreement that the law gives the
2 agency wide discretion (inaudible) foregoing rulemaking?

3 MS. RODGERS: No, I do not, Your Honor. I think the law
4 uses the term "shall." And, therefore, that specific use of
5 that term limits Ecology's discretion to forego rulemaking
6 in this case.

7 THE COURT: Okay.

8 MS. RODGERS: And furthermore, I think the factual record
9 also serves as a limit. Because the factual record shows
10 that we have ongoing statutory violations occurring. So
11 they don't have the discretion to continue the statutory
12 violations.

13 THE COURT: Okay. How do you reconcile the cases in which
14 our Supreme Court rejected expansion of the Public Trust
15 Doctrine, the Okanogan case, cases having to do with ground
16 water?

17 MS. RODGERS: Those cases, Your Honor, are not relevant
18 here today because we are not asking you to interpret the
19 scope of the Public Trust Doctrine. Furthermore, I disagree
20 strongly with Ecology's interpretation of those cases
21 because they were decided on other grounds. The Court said
22 that -- I'm speaking specifically of Rettkowski in this --
23 that they did not apply the Public Trust Doctrine to give as
24 a means for Ecology to regulate ground water.

25 I think it's interesting to note that Ecology was making

1 that argument, that they could use it as an additional
2 authority to regulate ground water. But the court didn't go
3 through because they said the answer to this question lies
4 in the statute. And that's exactly what we're arguing
5 today.

6 The answer to this question comes in the Washington Clean
7 Air Act and RCW 70.235. And why the Public Trust Doctrine
8 is relevant is because their failure to implement their
9 statutory authority causes substantial impairment of the
10 resources in violation of the Public Trust Doctrine.

11 THE COURT: Okay. Okay. I don't have any other questions
12 for you at this point. Thank you very much.

13 MS. RODGERS: Thank you, Your Honor.

14 THE COURT: All right. Let me hear from Ms. Shirey.

15 MS. SHIREY: Good morning.

16 THE COURT: Good morning.

17 MS. SHIREY: Kate Shirey representing the Department of
18 Ecology. I would like to start by looking at the rule that
19 petitioners have proposed and asked Ecology to adopt versus
20 the requirements in RCW 70.235, and I have put them -- I
21 don't know if you can see this -- can you see this?

22 THE COURT: No. Maybe you can just move it up closer to
23 the bar and then I'll be able to see it. Okay.

24 MS. SHIREY: Okay. And for --

25 THE COURT: It's a little low. Teresa, can you help out?

1 We just got a new one of those and it's supposed to not fall
2 down, but...

3 MS. SHIREY: Okay. And so -- so they -- I'm going to show
4 it to these folks so they can see what I've got.

5 THE COURT: Sure.

6 MS. SHIREY: I have just put side by side, the emission
7 reduction requirements in RCW 70.235.020 and the reduction
8 requirements in petitioners' proposal. So as you can see, I
9 have put side by side the requirements -- I wish there was
10 some way to raise this.

11 THE COURT: No, I can see them.

12 MS. SHIREY: The requirements in 70.235 and the
13 requirements in the petitioners' proposed rule. 70.235.020
14 provides for -- requires reductions in greenhouse gas
15 emission in the state of Washington to 99 -- 1990 levels by
16 2020, to 25 percent below 1990 levels by 2035, and to
17 50 percent below 1990 levels by 2050. The rule that
18 petitioners have proposed and asked Ecology to adopt would
19 require reductions in carbon dioxide emissions, and carbon
20 dioxide is a greenhouse gas.

21 THE COURT: Right.

22 MS. SHIREY: It's a subset -- the largest subset. To
23 reduce emissions to 31 percent below 1990 levels by 2020,
24 62 percent below 1990 levels by 2035, and 80 percent below
25 1990 levels by 2050.

1 THE COURT: You might be interested to know that I made
2 that same chart yesterday in chambers.

3 MS. SHIREY: All right. It just wasn't in our briefing
4 and I wanted to set them out there like that. When the
5 legislature adopted the requirements -- the reduction --
6 emission reduction requirements, they also adopted a process
7 for revisiting those reduction requirements. And that
8 process was that Ecology should consult with the University
9 of Washington Climate Impacts Group, report to the
10 legislature and make recommendations if -- for if -- or --
11 if the legislature should change those requirements.

12 THE COURT: And are they supposed to do that every two
13 years or every --

14 MS. SHIREY: It's --

15 THE COURT: -- it's open?

16 MS. SHIREY: I believe it's within 18 months --

17 THE COURT: 18 months, I wasn't sure --

18 MS. SHIREY: -- of new science.

19 THE COURT: 18 months of?

20 MS. SHIREY: Of new scientific findings.

21 THE COURT: So whenever the UW group issues new findings,
22 they have 18 months? I'm not quite clear on that.

23 MS. SHIREY: No, it's whenever -- I think they go off the
24 International Panel for Climate Change, the IPCC.

25 THE COURT: Okay.

1 MS. SHIREY: I could be wrong on that, but --

2 THE COURT: All right. But in any event, UW issued them
3 December of 2013; is that right?

4 MS. SHIREY: I am not certain.

5 THE COURT: Issued a report in December 2013. All right.

6 MS. SHIREY: But the IPCC issued a report in April of 2014
7 and Ecology's December 2014 report, reports on those
8 findings.

9 THE COURT: So what's the part about consulting with UW,
10 then?

11 MS. SHIREY: That's part of the process. Whenever new
12 science comes out, Ecology's supposed to go to the
13 University of Washington Climate Impacts Group, consult with
14 them, and then take what they get out from that consultation
15 back and put it into a report for the legislature.

16 THE COURT: All right.

17 MS. SHIREY: So petitioners' proposed rule does two things
18 with these proposed emission require- -- reductions. First
19 thing it does is require Ecology to adopt a rule
20 recommending these emission reductions to the legislature.

21 Second thing they ask is that Ecology adopt a rule
22 adopting and implementing these emission reduction
23 requirements regardless of any action taken by the
24 legislature. And Ecology declined to adopt these proposals.

25 As opposing counsel has stated, the petitioners have the

1 burden of proof under the APA and a court can overturn
2 Ecology's decision not to adopt a rule only if the decision
3 is outside the agency's authority, unconstitutional, or
4 arbitrary or capricious. Ecology's denial -- decision to
5 deny the rulemaking here and defer -- it defers to the
6 legislature, with the process the legislature has set up and
7 the reductions the legislature has set up. And I -- it was
8 not outside Ecology's authority to defer to the legislature.
9 It was not unconstitutional for Ecology to defer to the
10 legislature, and it was not arbitrary or capricious for
11 Ecology to defer to the legislature.

12 So I want to start by -- or move next to their proposal
13 that Ecology adopt a rulemaking recommendation to the
14 legislature. There is nothing in RCW 70.235 that indicates
15 that Ecology's recommendations to the legislature should be
16 made by rule. And in our brief, we discussed why it is --
17 why the legislation makes it look specifically like, no,
18 they're not supposed to go through a public process that's
19 involved in rulemaking. They're supposed to go to the
20 Climate Impacts Group at the University of Washington.

21 And we also noted that the recommendation of the
22 legislature did not fit the definition of a rule because it
23 is a recommendation to the legislature, and it does not
24 create any duties or confer any benefits on anybody.

25 Petitioners came back and said that, well, Failor's

1 Pharmacy case governs here, and I would say that that case
2 does not govern because Ecology's recommendations to the
3 legislature do not impose a mandatory duty on anyone,
4 including a legislature and (inaudible) no benefits
5 (inaudible). And, likewise, they raise Simpson Tacoma
6 Kraft. And, again, that case said that a particular Ecology
7 standard was of general applicability, but here Ecology's
8 recommendations to the legislature are not of general
9 applicability. They provide advice to the legislature,
10 which the legislature may or may not act on.

11 So the first request, the first requirement of the rule
12 that petitioners seek, there's no -- no basis for it and no
13 requirement that those recommendations be made to the
14 legislature (inaudible).

15 So I want to move on to the second portion of petitioners'
16 proposed rule that would require Ecology to adopt
17 petitioners' emission reduction requirements regardless of
18 actions by the legislature.

19 As you heard, petitioners have invoked the Public Trust
20 Doctrine. They -- discuss Sanders-Reed v. Martinez, and I'm
21 going to discuss it as well. And as required by King County
22 Local Rule 75(b)(d). I have copies with some highlighting.

23 THE COURT: Okay. I have a copy with highlighting
24 already.

25 MS. SHIREY: I don't know if the highlighting is the same.

1 THE COURT: Okay. I'll take your highlighting as well.

2 The one I have mostly highlights the term Public Trust

3 Doctrine. In fact, I think that's the --

4 MS. SHIREY: Okay.

5 THE COURT: -- extent of the highlighting on mine.

6 MS. SHIREY: I have -- I have five copies. Does anybody
7 else need a copy? You have a copy. What I have highlighted
8 in here is that, yes -- it's on page -- the bottom of Page
9 5, I believe it starts there.

10 Yes, the New Mexico court recognized a Public Trust
11 Doctrine applies to the atmosphere in New Mexico, but it did
12 so on the basis of a provision in the New Mexico
13 constitution, Article 20, Section 21, which I won't read to
14 you. But Washington's constitution does not have any
15 provisions similar to that, requiring protection of the
16 state's -- let's see -- requiring the protection of the
17 state's --

18 THE COURT: Atmosphere.

19 MS. SHIREY: -- natural resources in the same way that New
20 Mexico has. I would also say that -- point out that on Page
21 6 of this document, I -- the bottom of that first paragraph
22 on the left, the New Mexico court, while it recognized a
23 public trust duty in the state of New Mexico to protect the
24 atmosphere, it also said that that Public Trust Doctrine, as
25 you pointed out, did not serve as a basis for a cause of

1 action. And I want to read this because I think what the
2 Court said is very -- put it very well.

3 The Court said a separate common law cause of action under
4 the Public Trust Doctrine would circumvent and render a
5 nullity the process under the Air Quality Control Act that
6 has established how competing interests are addressed and
7 decisions are made regarding regulation of the atmosphere.

8 And the last thing I want to point out that I highlighted
9 in this document on Page 7, the New Mexico court cites a
10 case that states that reducing greenhouse gas emissions
11 involves complex social, economic, and environmental issues
12 that should be left to the legislature. That case, which is
13 named Svitak is a Washington state case, it's Svitak v.
14 State. It's a Department of -- I mean, a Court of Appeals
15 case, an unpublished case. And I have not raised it in this
16 case, but the Court of Appeals in New Mexico raised it, so I
17 thought I would point that out.

18 So like the New Mexico Court of Appeals, the Washington
19 State Supreme Court has found that the Public Trust Doctrine
20 does not provide independent authority for Ecology action.
21 We briefed that in Rettkowski. The Court said even assuming
22 for the sake of argument that the Public Trust Doctrine
23 places on Ecology some affirmative duty to protect and
24 preserve the waters of this state, the doctrine could
25 provide no guidance as to how Ecology is to protect those

1 waters. That guidance, which is crucial that a decision be
2 reached today is found only in the water code.

3 Petitioners here have -- have argued that Ecology's duty
4 under RCW 70.94.331 should be informed by the Public Trust
5 Doctrine. And I would point out that the Washington State
6 Supreme Court in R.D. Merrill rejected that argument,
7 refused to use the Public Trust Doctrine as a canon of
8 construction in interpreting the state (inaudible).

9 The next -- a lot of the argument that petitioners have
10 made involve RCW 70.94.331 and Ecology's duty to adopt
11 emission reduction -- emission limits under that statute.
12 First, I want to state that that argument was not made in
13 the petition for rulemaking. It came up for the first time
14 in their opening brief in this case.

15 THE COURT: Can you give me that statute again, please?

16 MS. SHIREY: RCW 70.94.331.

17 THE COURT: Okay.

18 MS. SHIREY: And Ecology responded to that argument by
19 noting that Ecology has adopted emission limits for
20 greenhouse gases. They -- and petitioners claim that the
21 emissions standards for greenhouse gases that Ecology has
22 adopted only reach a small number of sources, and I just
23 want to say that's not the case.

24 Ecology is requiring the best available control technology
25 for the control of greenhouse gas emissions from stationary

1 sources that are required to go through what's called PSD
2 permitting, Prevention of Significant Deterioration. And as
3 the U.S. Supreme Court noted in Utility Air Regulatory
4 Group, those requirements reach 83 percent of the greenhouse
5 gas emissions from stationary sources in the United States.
6 And, again, under your local rule, I have copies of the U.S.
7 Supreme Court Case.

8 THE COURT: Okay.

9 THE CLERK: (Inaudible).

10 THE COURT: Good question. Let's do it and I'll decide
11 later. I don't think so.

12 So if you have two -- if you have an extra copy for the
13 clerk, I'd appreciate that.

14 MS. SHIREY: Okay.

15 THE COURT: And also of your -- your copy of the --

16 MS. SHIREY: New Mexico case?

17 THE COURT: -- Sanders-Reed case, since you have extras, I
18 gather.

19 MS. SHIREY: So the statement that I just quoted is on
20 Page 14 of this printout and it is highlighted.

21 THE COURT: Okay. Let's see. Let's see.

22 MS. SHIREY: The bottom of 14 over to 15. And there's a
23 lot in here about the federal Clean Air Act that you don't
24 need to know, but -- but basically that sources that require
25 PSD permits account for roughly 82 percent of American

1 stationary source greenhouse gas emissions. So it is a
2 considerable amount of emissions that this rule of
3 Ecology's, which is the same rule as the feds.

4 THE COURT: And do we know what percentage that is of the
5 total emission, given that transportation's the biggest
6 offender, right?

7 MS. SHIREY: The distribution of emissions of greenhouse
8 gas -- the sources of emissions of greenhouse gases in the
9 United States varies from region to region.

10 THE COURT: Mm-hmm.

11 MS. SHIREY: That statement was for the whole country.

12 THE COURT: Mm-hmm.

13 MS. SHIREY: And I don't know what percent that is for
14 Washington State.

15 THE COURT: Okay. Thank you.

16 MS. SHIREY: In their reply, petitioner states that
17 Ecology has agreed that it has a mandatory duty to adopt
18 emission limits for all substances listed in RCW 70.94, and
19 that's not the case. In our response brief, we stated,
20 Assuming for the sake of argument that RCW 70.94.331
21 requires Ecology to adopt emissions standards for all
22 possible substances covered in the statutory list, Ecology
23 has already adopted emissions standards for carbon dioxide.
24 I just wanted to clarify the record.

25 THE COURT: I lost the last part of your sentence there.

1 MS. SHIREY: That Ecology has already adopted emission
2 standards for carbon dioxide. So and those are the best
3 available control technology requirements and the reasonably
4 available control technology requirements.

5 THE COURT: Okay. So your -- you don't agree that there's
6 a mandatory requirement to do -- to establish emission
7 standards to the extent that the petitioner is arguing?

8 MS. SHIREY: I would say --

9 THE COURT: Or that there's no mandatory duty whatsoever?

10 MS. SHIREY: No, no, I don't say that at all.

11 THE COURT: Or that you've already complied with the
12 mandatory duty?

13 MS. SHIREY: The duty in RCW 70.94.331, Sub 2, is very
14 broad. They list an incredible number of substances or
15 categories of substances for which Ecology, as they say,
16 shall adopt emission standards. Radionuclides, dust, fumes,
17 mist, smoke, other particulate matter, vapor, gas, odorous
18 substances or any combination thereof. And that's a huge
19 universe of substances.

20 And Ecology certainly has not adopted emission standards
21 for every single one of those, and I don't think I need to
22 go into whether or not Ecology has a mandatory duty to adopt
23 standards for every single one of those. I -- and that's
24 why I said -- assuming for the sake of argument Ecology has
25 a duty to adopt standards for greenhouse gases, Ecology has

1 done so.

2 THE COURT: All right. So you're not agreeing that
3 there's an -- that there's an obligation to adopt standards
4 for greenhouse gases?

5 MS. SHIREY: I'm not -- I'm saying -- I'm saying that this
6 statute is not -- I'm -- what I'm trying to do is not say
7 that the statute poses a mandatory duty on Ecology to adopt
8 emission standards for every single substance listed in that
9 statute.

10 THE COURT: All right. What about carbon dioxide?

11 MS. SHIREY: Carbon dioxide Ecology has adopted emission
12 standards for.

13 THE COURT: All right.

14 MS. SHIREY: Petitioners also claim that Ecology's
15 emission standards for greenhouse gases don't reach
16 transportation sources. There are several reasons for that.
17 One of which, I would just say the legislature has adopted
18 the California car standards, which are stricter than
19 federal standards for reductions of greenhouse gas emissions
20 from motor vehicles.

21 And I will also point out that the Federal Clean Air Act
22 places limits on the ability of states to regulate emissions
23 from mobile sources, 42 U.S.C. 7543 talks about new motor
24 vehicles and 42 U.S.C. 7573 talks about aircraft engines.

25 Finally, the petitioners claim that Ecology's statement

1 that we have issued emission standards for greenhouse gas --
2 gases under 70.94.331 is an impermissible post hoc
3 rationalization. And I would submit that that is absolutely
4 not true. The first time that they raised the issue of RCW
5 70.94.331 was in the -- their opening brief in this case.
6 They did not raise it before -- to Ecology in their petition
7 for rulemaking. So Ecology did not address it in the
8 petition for rulemaking.

9 To the extent that they have the ability to raise this in
10 legal argument here, in this court, Ecology certainly has
11 the ability to (inaudible). They talked about In Re: Dyer,
12 the case In Re: Dyer, saying that post hoc rationalization
13 by appellate counsel is not allowed. That statement was
14 made under dissent. The actual case did what the dissent
15 said it shouldn't have done.

16 So I want to move on to the claims about the intent of the
17 legislature. There's been a lot of talk about the intent of
18 the legislature in the state Clean Air Act, and the enabling
19 statutes for the Department of Ecology. And that -- would
20 point to an Ecology duty to protect citizens' fundamental
21 rights to a healthful and pleasant environment against harms
22 caused by carbon dioxide emissions. And while that --

23 UNIDENTIFIED SPEAKER: (Inaudible).

24 THE COURT: Excuse me.

25 UNIDENTIFIED SPEAKER: I have to leave and with some of

1 the children to get them to school. Did you want to hear
2 any of them before I take them or what -- just the
3 attorneys?

4 THE COURT: I would love to hear from all of them, but it
5 wouldn't be appropriate in this particular proceeding --

6 UNIDENTIFIED SPEAKER: Okay.

7 THE COURT: -- for me to hear from the children. So thank
8 you for mentioning it and --

9 UNIDENTIFIED SPEAKER: Stella, Zoe.

10 THE COURT: -- whoever needs to go to school, should go.
11 And thank you very much for coming down to court.

12 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

13 THE COURT: Hold on just a moment, please, while -- let's
14 wait until the door closes and everybody's seated. Give you
15 a chance to grab some water and me too.

16 UNIDENTIFIED FEMALE SPEAKER: All right. While there's a
17 break in the action, is it possible to amplify the speaker?

18 THE COURT: Yes. Oh, yes, could we get the microphone up
19 on the podium there? Ms. Shirey, I'd like to ask you to
20 slow down just a little bit too. Thank you. We're getting
21 some batteries in our microphone here, and we'll put it on
22 the podium and hope that'll help.

23 MS. SHIREY: Are you having any trouble hearing me?

24 THE COURT: No, I'm not having trouble hearing you. But
25 if you speak more slowly, I'll be able to understand what

1 you're saying a little bit better.

2 MS. SHIREY: Okay. Sorry.

3 THE CLERK: The mics are having a little hard time picking
4 you up. It's fine, but if there's -- to turn it off, hit
5 the button on the bottom.

6 THE COURT: It's on. Okay.

7 MS. SHIREY: I will just say it's ironic because I'm a
8 trained opera singer.

9 THE COURT: Oh, really? That's interesting. Can you hear
10 in the back row now?

11 GROUP: No.

12 THE COURT: Okay. You know, you're going to have to hold
13 that up to your face.

14 MS. SHIREY: Oh, dear.

15 THE COURT: Yeah. Okay.

16 MS. SHIREY: Is that better?

17 THE COURT: That's much better.

18 MS. SHIREY: That's much better, all right. I would -- I
19 wanted to move on to the intent of the legislature and the
20 statements that -- that petitioners have made that it is the
21 intent of the legislature that Ecology exercise its
22 authority to protect citizen's fundamental rights to a
23 healthful and pleasant environment against the harms caused
24 by carbon dioxide emissions.

25 And I want to say that that statement is an accurate

1 discussion of a part of what the intent of the legislature
2 is, but it ignores other evidence of legislative intent
3 concerning reductions of -- reducing emissions of greenhouse
4 gases in Washington.

5 First as provided here, the legislature has enacted its
6 own emission reduction requirements as well as the process
7 for revisiting those. Second, in 2013 the legislature
8 enacted Engrossed Second Substitute Senate Bill 5802,
9 establishing the climate legislative and executive work
10 group. And I have copies of that bill here. It was passed
11 and adopted as a session law, but I could not find that it
12 was codified anywhere. And that's why I brought copies.

13 So this work group was tasked -- if you look at the
14 highlighted portions on Page 2 of the document, numbered as
15 Page 1 at the bottom of the page, this work group was
16 created to prepare a credible evaluation of approaches to
17 reducing greenhouse gas emissions. And if you look on
18 Page -- the next page, the highlighted sections show all the
19 different factors that the group was to take into account
20 when looking at possible mechanisms for reducing greenhouse
21 gas emissions. Just to show that there's a lot of
22 complexity here.

23 Third, in the intent section of the State Clean Air Act,
24 RCW 70.94.011, in addition to the intent provisions that
25 petitioners' attorney mentioned, there are also requirements

1 that Ecology -- that under the Clean Air Act, Ecology
2 provide for an appropriate distribution of responsibilities
3 and it's the policy of the state that the costs of
4 protecting the air resource shall be shared as equitably as
5 possible among all sources whose emissions cause air
6 pollution. The next -- in the Administrative Record, AR 22,
7 which is --

8 THE COURT: Excuse me just a moment. So if that reference
9 refers to distribution of responsibilities to lower
10 emissions, not to make decisions, it sounds like cost --

11 MS. SHIREY: Yes.

12 THE COURT: -- they're talking about the --

13 MS. SHIREY: Yes, it does.

14 THE COURT: -- costs of lowering emissions.

15 MS. SHIREY: Yes, yes. But in the greenhouse --
16 greenhouse gases are not -- are not pollutants like normal
17 pollutants. The Clean Air Act normally says, You, polluter;
18 you, refinery; you, power plant; you -- whatever you happen
19 to be, you're emitting these things. They are causing these
20 problems. You reduce your emissions by doing X, Y, Z.

21 Greenhouse gases are different. They -- it doesn't matter
22 where they are emitted, the effects are global. It's
23 very -- it's difficult to impossible to attribute particular
24 effects of global warming to particular emissions from a
25 particular source. That makes it a complex situation for --

1 for regulators. So in --

2 THE COURT: So certainly not an impossible situation,
3 since they're being emitted all across the board.

4 MS. SHIREY: They are, but it complicates an agency --
5 Ecology, an agency -- I mean, there are -- there are -- and
6 this is part of what I want to get to with this list of
7 things I'm going through, that there are a number of other
8 agencies with authority that can do things to reduce
9 greenhouse gas emissions that Ecology does not have the
10 authority to do, the Department of Transportation, planning
11 agencies.

12 So in the Governor's Executive Order 14-04, which is AR
13 22, the governor in 2014 created the Carbon Emissions
14 Reductions Taskforce, which was tasked with developing
15 carbon emission limits and market mechanisms program for
16 Washington. And the -- consistent with the legislature's
17 intent in the Clean Air Act, the program was -- and any
18 program -- market mechanism program that was to be developed
19 under this task force, was to be fair in allocating
20 responsibility to emission sources, minimize shifting of
21 emissions and jobs to out-of-state locations, provide clear
22 accountability for and flexibility in compliance, and
23 provide for ongoing monitoring, evaluation, and adjustment
24 of the program to secure benefits and minimize unintended
25 consequences.

1 As this -- as the Court of Appeals here in Washington
2 noted in the Svitak case and was quoted by the New Mexico
3 Court of Appeal, Regulating greenhouse gas emissions
4 involves complex social, economic, and environmental issues
5 that are best left to the legislature. I have a copy of the
6 Svitak case. You don't -- there's no requirement that it be
7 provided since it's an in-state case. It is an unpublished
8 case, but I can provide you with a copy, if you would like.

9 THE COURT: I'd be happy to take a copy. I can't rely on
10 an unpublished case, but I can certainly read it. It can
11 inform my decision making. Thank you.

12 MS. SHIREY: So in accordance with all of these
13 indications of legislative intent, Ecology is coordinating
14 with governor's office on how to best balance the interests
15 involved in addressing climate change. Petitioners claim
16 that the International Union of Operating Engineers, Local
17 No. 286 AFL-CIO v. Sand Point Country Club, they quote the
18 statement that the intent section of the statute is a key to
19 opening the understanding of the statute.

20 They fail to quote the rest of the statement, which is the
21 preamble is properly referred to when doubts or ambiguities
22 arise. It can never enlarge. It is not part of the law.
23 And in that case, the court rejected the union's argument
24 that RCW 49.32.020, which was the intent section of the
25 labor statute, required employers to bargain with the

1 AFL-CIO, even though the intent section of that statute
2 stated that the purpose of the act was to allow employees to
3 organize for the purpose of collective bargaining. And the
4 Court said, no, the intent section is not intended to and
5 does not, in fact, create legal obligations.

6 I want to move on to Rios. As you alluded, the duty in
7 Rios is different from the duty here. The agency's duty in
8 Rios was -- and I'm quoting the law, said to promulgate --
9 provide for the promulgation of health and safety standards
10 for various things, which will set a standard which most
11 adequately assures, to the extent feasible, on the basis of
12 the best available evidence that no employee will suffer
13 material impairment of health or functional capacity, even
14 if such employee has regular exposure to the hazard dealt
15 with by such standard for the period of his working life.
16 Any such standard shall require, where appropriate, the use
17 of protective devices or equipment and for monitoring or
18 measuring of any such gases, vapors, dust, or other airborne
19 particles, toxic materials or harmful physical agents.

20 That duty is very specific. It says you have to adopt
21 standards that will ensure that no employee will suffer
22 health -- impairment to health, even if the employee is
23 regularly exposed to the substance. By contrast the
24 requirement in 70.94.331, Sub 2, is, Ecology shall adopt
25 emission standards, period.

1 And as I mentioned, Ecology has adopted emission standards
2 for greenhouse gases. So the duty -- Ecology has fulfilled
3 its duty in this case. And --

4 THE COURT: So that brings me to a question. It appears
5 that both sides have agreed on the science that's been
6 presented. There doesn't seem to be a lot of disagreement
7 about the severity of the problem, the urgency of the
8 problem, the potential horrific consequences that could
9 occur because of the problem. So I guess I want to confirm
10 that with you first of all.

11 MS. SHIREY: Well, I would say I'm not in a position at
12 this point to say yea or nay on that. I would say that our
13 answer provides -- certainly we agree on a lot of it. And
14 we may agree on all of it, I just don't know. Because I'm
15 not --

16 THE COURT: Right. Maybe that's not your place to say,
17 but I think your answer indicates to me that there's
18 substantial agreement, so would it be your position, then,
19 that Ecology could adopt any standard whatsoever, it
20 wouldn't matter what it was, if it was completely, you know,
21 completely ineffective, ineffectual, not worth the paper its
22 written on, that that would be sufficient to satisfy the
23 duty to adopt a standard?

24 MS. SHIREY: I would not say that, but I would say that
25 the legislature has acted here and it was not arbitrary and

1 capricious for Ecology to defer to that at this time.

2 THE COURT: I guess the question then becomes at what
3 point does it become arbitrary and capricious not to act
4 again, given the new science that seems to be agreed to?

5 MS. SHIREY: Well, the stan- --

6 THE COURT: And the recognition that the current standards
7 are not -- are not going to be affected and only going to
8 cause greater cost to the society over time?

9 MS. SHIREY: Arbitrary and capricious standard is willful
10 and unreasoning action taken without regard to the attending
11 facts or circumstances. Here, the legislature set not only
12 the emission reduction requirements, but also a process for
13 revisiting those requirements. And Ecology, in denying the
14 petition for rulemaking, said we're going to defer to the
15 legislature's limits or their reductions and we're also
16 going to defer to the process that the legislature has set
17 up.

18 THE COURT: Okay. Which brings me to the question, what's
19 the magical thing about the Paris convention in December and
20 why choose that as the date to postpone legislative -- to
21 recommend postponing legislative action, since Ecology is
22 your -- saying deferring to the legislature and then asking
23 them to postpone under these urgent circumstances?

24 MS. SHIREY: Anything I would say would be pure
25 speculation. All I have is the report, the December 2014

1 report, which petitioners have provided.

2 THE COURT: Mm-hmm.

3 MS. SHIREY: I don't know anything further.

4 THE COURT: Okay. Because the report doesn't inform the
5 Court as to why that would be anything but arbitrary and
6 capricious or hunting down -- or kicking the can down the
7 road, as Ms. Rodgers put it.

8 MS. SHIREY: And that's the reason that this -- that
9 document should not be in this case. Because that --
10 there's no record about that document.

11 THE COURT: I see, okay. Good point. All right.

12 MS. SHIREY: So, again, I want to note that petitioner --
13 that Ecology's deferring to -- deference to the legislature
14 in this case was not unconstitutional. Petitioners have
15 cited no provision of the constitution that requires Ecology
16 to adopt their proposed rule. And as I just mentioned, it's
17 not arbitrary and capricious for the same reason.

18 And I would like to close by reiterating the standard of
19 review that agencies -- the court has recognized both
20 Northwest Sport Fishing v. Ecology and Rios. The court
21 recognized that agencies are granted wide deference in
22 deciding not to engage in rulemaking.

23 THE COURT: Okay. Thank you very much.

24 MS. SHIREY: And I would like an opportunity for
25 surrebuttal, if I may.

1 THE COURT: Okay. Well, let's take the rebuttal and then
2 see where we are, all right. All right. Ms. Rodgers.

3 MS. RODGERS: Thank you, Your Honor. I'm glad we have
4 this here because I think it's important to point out, you
5 know, here's our proposed rule, which we believe is based on
6 the best available science and we provided that science in
7 our petition for rulemaking. It was never once addressed by
8 the Department of Ecology in their denial. And in their
9 response brief, they state, quote, Science is not the issue
10 in this case, end quote.

11 Then let's look at what the legislature has done with RCW
12 70.235.020, there are those levels. Your Honor, Ecology is
13 out of compliance with 70.235.020. That's undisputed in
14 this case. They make that admission in their brief, in
15 their answer, and in nearly every document in the
16 administrative record in this case. So it's important to
17 recognize that fact that we are not proceeding -- working
18 along in compliance with that statute.

19 And the reason the youth proposed this rule is that is our
20 position in terms of what the best available science says.
21 Now, Your Honor, it's my understanding that if you were to
22 remand and engage in a rulemaking process, there's a fairly
23 good chance that the exact rule that's proposed doesn't
24 necessarily get adopted by the agency because they need to
25 go through public notice, comment, a whole variety of

1 things.

2 So what we are asking you to do today is simply to remand
3 back to the agency so that they engage in the rulemaking
4 process, not necessarily that this rule is the end game.
5 We're not asking you to abrogate or contradict the
6 provisions of RCW --

7 THE COURT: I understand that.

8 MS. SHIREY: -- 70.235. She -- there was a brief
9 discussion about the December 2014 report. And I think it
10 was said that it's based on -- it was based on the
11 April 2014 IPCC science, and I don't read that report to say
12 that. It's quite clear that the report was based on the
13 recommendations from the U-Dub Climate Impacts Group that
14 were made in December of 2013. And that was well in advance
15 of the filing of our petition and Ecology's decision.

16 In addition, Your Honor, I wanted to point out that the
17 executives deadline for issuance of the 2014 report was
18 July 2014, and that's in the executive order at
19 Administrative Record 22.

20 I wanted to briefly speak about, again, the Sanders-Reed
21 case, because I think it talks about why we're here today,
22 Your Honor. I was the attorney who represented the youth in
23 the Svitak case. And the reason that case was dismissed was
24 because Svitak did not challenge an affirmative state action
25 or the state's failure to act as unconstitutional.

1 In that case the youth were not permitted to sue the state
2 for failing to take action on climate change. So we
3 followed the directive of the Court of Appeals and we're
4 here challenging a final administrative action. So any kind
5 of discussion that you hear about political question or
6 separation of powers, just isn't at issue in this case.

7 I also wanted to talk about this new discovery today that
8 we're regulating 83 percent of stationary sources. I want
9 to make it clear that's not here in Washington State.
10 There's nothing in the record in terms of what percentage of
11 carbon dioxide emissions that regulation does relate --
12 regulate.

13 But I submit to you it's not very much in this state
14 because the majority of our emissions, which are in the
15 administrative record in this case, come from transportation
16 sector, 44 percent; 5 percent, agriculture; and huge
17 categories are simply unregulated. So I think in terms of
18 the case that was submitted, those facts just don't apply in
19 this state.

20 We are a very unique state because we don't have -- we
21 have one coal-fire power plant and that's going to be
22 shutting down in 2025. So where our emissions come from are
23 very different than the rest of the United States.

24 We heard a little bit about the broad duty of Section
25 90.74.331. Well, Your Honor, if Ecology takes the position

1 that it's broad and that -- therefore, I assume they mean
2 ambiguous, well, they read the case law to you. If it's
3 ambiguous, you look to the statutory intent to construe its
4 meaning. And that's why the legislative intent that I
5 reiterated to you several times is very important. It's not
6 just talk, Your Honor. It's what the legislature said. And
7 I think I'm happy that opposing counsel also read to you
8 about the costs, equitable costs among all sources, exactly.

9 That's why we've proposed this rule, so that carbon
10 dioxide emissions are regulated across the board, so it's
11 not just major stationary sources and petroleum refineries.
12 I'm not here to defend petroleum refineries, Your Honor.
13 But they're the only ones who Ecology are regulating at this
14 point in time.

15 We heard a little bit about the things that Ecology is
16 doing. But, again, the administrative record says that
17 doesn't put us in compliance with 70.235.020, let alone
18 what's required by best available science. Ecology argued
19 for the first time that -- that we've made a post hoc
20 rationalization regarding the Clean Air Act. That was not
21 in our petition. That's wrong. We cite the Clean Air Act
22 among other statutes in our petition. It's administrative
23 record at Page 54. It's in the footnotes, where all of our
24 citations to a legal authority are, in the footnotes.

25 We also heard that greenhouse gases are not pollutants. I

1 don't think that's correct, Your Honor. I think it's quite
2 clear under several definitions of the term "pollutant." I
3 think that issue is being litigated in terms of whether
4 ocean acidification is a pollutant under the Clean Water
5 Act. There's litigation about that.

6 I think for purposes of the Clean Air Act, because they
7 are regulating carbon dioxide for certain sources, it's
8 clear that it's something they can regulate under the Clean
9 Air Act, so I don't believe there's any basis, factual,
10 legal, or otherwise, to suggest that greenhouse gases are
11 not pollutants.

12 We also heard that it's difficult to attribute effects
13 from emissions to particular sources. That's not what we're
14 here about today. We're here about regulating the sources
15 of carbon dioxide emissions. We're not asking you to find a
16 link between X emitter and Y impact. That's not what we're
17 doing here today. We understand that it may be complex for
18 the regulators, but it's in the administrative record. We
19 do know where our carbon dioxide emissions come from. Now
20 it's time to implement the statutory authority to regulate
21 them.

22 I also recognize, Your Honor, that agency -- other
23 agencies have the authority to undertake activities that may
24 reduce greenhouse gas emissions. And they should be
25 implementing those authorities in accordance with their

1 statutory directives. But only Ecology has the authority to
2 regulate carbon dioxide emissions. And, Your Honor, given
3 the facts in this case, all hands are on deck. Every single
4 agency needs to be implementing their authority in a way
5 that puts us on a path toward global climate stabilization.
6 That's what the legislature has told us.

7 Again, Your Honor, we talked a little bit about the Rios
8 case. I disagree in terms that that's a specific duty. It
9 talks about no impairment to health. But, again, we have a
10 mandatory duty to promulgate air quality emission standards
11 and that duty needs to be informed by the intent of the
12 legislature. And that's perfectly clear that we're to
13 protect, preserve, and maintain air quality for future
14 generations.

15 And I recognize, Your Honor, that the legislature has
16 acted in terms of RCW 70.235. We've had the climate
17 legislative work group. We've had a variety of different
18 work groups and talking sessions and listening circles and
19 other things that the governor has put together. But -- and
20 many of those are in the administrative record. And,
21 actually, the climate work group, they submitted their
22 findings in October 21 -- or October of 2013, and those are
23 in the administrative record. I believe it's at 21.

24 So these idea -- there's ideas in terms of what needs to
25 be done. Some of which are recommendations to the

1 legislature in the form of carbon tax and cap and trade.
2 But, Your Honor, none of that takes away Ecology's
3 authority, mandatory authority, to regulate carbon dioxide
4 emissions under the Clean Air Act. There's -- nothing has
5 abrogated that responsibility. And because of the facts
6 that we're facing, the climate change impacts, the
7 devastating catastrophic impacts that are going to -- that
8 are happening and will continue to happen throughout this
9 century, that constrains Ecology's discretion not to act in
10 this case. Thank you, Your Honor.

11 THE COURT: Thank you. So this is petitioners' petition,
12 so we can go back and forth all morning. I'm wondering --
13 and I understood the rebuttal to be strictly rebuttal. Is
14 there anything that you have to say that you feel you
15 haven't already had the opportunity to say that needs to be
16 said at this point?

17 MS. SHIREY: Yes, there are a few points I would like to
18 make.

19 THE COURT: And I am going to give the petitioner the last
20 word regardless, so...

21 MS. RODGERS: Thank you, Your Honor.

22 MS. SHIREY: I'm not taking these in any particular order.
23 Spoke of the July 15, 2014, deadline for issuing Ecology's
24 report and that Ecology missed that deadline. That deadline
25 was an executive order. An executive order, as noted by the

1 Court of Appeals in Fischer-McReynolds v. Quasim, does not
2 create obligations, responsibilities, conditions, or
3 processes having the force and effect of law. So that
4 particular deadline is not a legal deadline.

5 The 20 -- December 2014 report does refer to the 2014 IPCC
6 report on Page 15, Page 16, and Page 17. Petitioners' claim
7 that Ecology is out of compliance with RCW 70.235.020, and I
8 can't quite figure how -- where that is. I don't see that
9 we're out of compliance with that.

10 I would just point out that RCW 70.235 does not charge
11 Ecology with making sure that the reductions listed here are
12 met. So I think that's it for now.

13 THE COURT: Okay. Thank you. Okay. So, Ms. Rodgers, is
14 there anything else you want to add? You want to answer the
15 question why you feel Ecology's out of compliance one last
16 time?

17 MS. RODGERS: Yeah, just briefly, Your Honor. I went
18 through the statutory cites that show that we're not on
19 track to meet the greenhouse gas reduction requirements.

20 THE COURT: Okay.

21 MS. RODGERS: That's not at issue in this case. And why
22 it's Ecology's problem and why it's Ecology's statutory
23 violation is because they are the only agency with the
24 statutory obligation to regulate and reduce carbon dioxide
25 emissions, Your Honor. If not Ecology, who else is going to

1 put us on track to meet that compliance obligation?

2 THE COURT: Okay.

3 MS. RODGERS: Thank you, Your Honor.

4 THE COURT: Thank you very much. Okay. The arguments
5 have been very instructive to the Court. As I said at the
6 beginning of the morning, because of the volumes of
7 information here, I'm going to need to -- I'm going to need
8 to do some more --

9 (May 15, 2015 conclusion of oral argument)

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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, the undersigned, do hereby certify that the foregoing recorded statements, hearings, and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of June, 2015.

Amber J Murray

Amber Murray, CCR

