

# ARIZONA WATER LAW: A PARCHED PUBLIC INTEREST

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*Water is an essential and increasingly scarce resource in the west. Such scarcity has revealed the importance of considering the public interest in allocating water rights. Many states, including Arizona, apply the doctrine of prior appropriation to allocate water rights. Arizona, through the Arizona Department of Water Resources, is statutorily required to review all water allocations with the public interest and welfare in mind during its initial appropriation of water rights. However, in reality, the majority of Arizona surface water has already been initially appropriated—increasing the popularity of severance and transfer agreements to change the use of water. Arizona’s water rights transfer statute does not explicitly include a public interest consideration, but allows for objections from “interested persons.” In Arizona Department of Water Resources v. McClennen, the Arizona Supreme Court narrowly construed this language in a manner that precludes the Department from considering the public interest in water rights transfers. This Note considers the implications of McClennen, and examines litigation and transaction models for incorporating the public interest back into Arizona water law.*

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### INTRODUCTION

A 2015 article from the *Arizona Daily Star* declared that a recent Arizona Supreme Court water law decision “could pave the way for rich corporations to buy up water rights and leave communities in the state with no say in the matter.”<sup>1</sup> According to the article, this ruling, in the context of a multi-year drought, will “adversely impact” citizens of Arizona, and local governments will be helpless to protect them.<sup>2</sup> The article was referring to *Arizona Department of Water Resources v. McClennen*, in which the Arizona Supreme Court held that Mohave County (“County”) could not object to Freeport Minerals’ (“Freeport’s”)<sup>3</sup> application to transfer water rights from land within County boundaries.<sup>4</sup>

In Arizona, the surface waters of the state belong to the people and are subject to appropriation—i.e., diversion for beneficial use.<sup>5</sup> Those who wish to appropriate water must submit an application to the Arizona Department of Water Resources (the “ADWR”).<sup>6</sup> Before approving or rejecting the application, the ADWR must consider the “interests and welfare of the public.”<sup>7</sup> If the ADWR finds that the proposed use for the water is against those interests, “the application shall be rejected.”<sup>8</sup> Importantly, however, most of the surface waters in Arizona and other western states were appropriated prior to the adoption of a public interest consideration.<sup>9</sup> Yet, after *McClennen*, the initial appropriation stage is the only

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1. Howard Fischer, *Water Rights Ruling Could Leave Ariz. Communities Parched*, ARIZ. DAILY STAR (Nov. 12, 2015, 7:46 PM), [http://tucson.com/news/state-and-regional/water-rights-ruling-could-leave-ariz-communities-parched/article\\_ceb612d2-ae9c-51f4-bde0-a2a7ce24c64d.html](http://tucson.com/news/state-and-regional/water-rights-ruling-could-leave-ariz-communities-parched/article_ceb612d2-ae9c-51f4-bde0-a2a7ce24c64d.html).

2. *Id.*

3. Freeport is headquartered in Phoenix, Arizona, and operates five mines in the state. It is one of the world’s leading producers of copper and other minerals with over 13,300 employees in the United States. *Bill Williams River Water Rights Settlement Act of 2014: Hearing on H.R. 4924 Before the H. Comm. on Nat. Res., Subcomm. of Water & Power*, 113th Cong. 1–2 (2014) (testimony of Francis McAllister, Vice President of Land & Water, Freeport Minerals Corp.) [hereinafter *Freeport Testimony*].

4. 360 P.3d 1023, 1029 (Ariz. 2015).

5. ARIZ. REV. STAT. ANN. § 45-141(A) (2012).

6. *Id.* § 45-153(A) (2012).

7. *Id.*

8. ARIZ. REV. STAT. ANN. § 45-153(A).

9. See Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29

time the ADWR can evaluate the proposed use of water against the interests and welfare of the public.<sup>10</sup> This is true even though the ADWR evaluates every application to sever and transfer a water right, because *McClennen* prohibits the ADWR from considering a general public interest during that process. Thus, given the realities of Arizona water appropriation, the *McClennen* decision leaves the ADWR without the ability to consider the public interest except to the extent that the public interest is represented by an “interested person” as that term is defined in *McClennen*.

Like other states, Arizona does not clearly define the public interest within the context of its public interest requirement.<sup>11</sup> Broad examples of public interests in water might include societal considerations like aesthetics, recreation, environmental protection, public health, economic benefits, and water security.<sup>12</sup> Some of these values are protected by vested water rights, such as instream flow rights for environmental interests. More general societal considerations often do not have vested rights. For the purposes of this Note, the public interest is composed of all public values, independent of a vested water right. In particular, the public interest contemplates the effect of water uses on the community at large.

After *McClennen*, alternative mechanisms are necessary to incorporate the public interest into water transfers. Settlement agreements—multi-stakeholder agreements entered into to settle water claims—are emerging as alternatives to litigation in states that use prior appropriation to define water rights.<sup>13</sup> Such agreements can accommodate diverse parties with various interests in a

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NAT. RESOURCES J. 347, 356 (1989) (“The only considerations were the order in which the applications were made and amount of water available, or potentially available, in the water source.”); Lawrence J. Macdonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 235 (2015) (“Despite the warnings . . . and the efforts of people . . . to insert public considerations into the decision process, states focused on encouraging development and use of their waters in support of economic growth . . . until well into the twentieth century. By that time, most rivers had been fully appropriated, and the appropriation of aquifers was not far behind.”); see also W. GOVERNORS’ ASS’N & W. STATES WATER COUNCIL, *WATER TRANSFERS IN THE WEST*, at viii–ix (2012) [hereinafter W. GOVERNORS’ ASS’N] (recognizing the significance of transfers).

10. *Id.*; *McClennen*, 360 P.3d at 1027.

11. Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and “Public Interest” Review Can Protect the Public Trust in Water Law*, 32 STAN. ENVTL. L.J. 283, 314 (2013) (“Several state water codes use the phrase ‘public interest,’ ‘public purpose,’ or ‘public welfare’ without defining the term.”). Cf. Amber L. Weeks, Note, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest*, 50 NAT. RESOURCES J. 255, 260 (2010) (defining public interest review as a way “to allocate limited water resources to the uses that society values most.”).

12. See discussion *infra* Section II.B.i.

13. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 775 (2001) (describing how prior appropriation will need to evolve to solve water allocation issues by basin or watershed-wide agreements that incorporate public and private rights); see also W. GOVERNORS’ ASS’N, *supra* note 9, at 42–44 (discussing the Deschutes Water Alliance a grassroots coalition of stakeholders that works together using water transfer statutes to ensure adequate water resources to Deschutes basin users).

transactional environment, avoiding the uncertainties of litigation.<sup>14</sup> These agreements offer opportunities to negotiate and compromise in the re-allocation of water rights, using funding, land, and other releases and commitments as bargaining chips.<sup>15</sup> Going forward, these agreements may be the best way to consider the public interest in Arizona's water transfers.

Following *McClennen*, Freeport finalized a "Settlement Agreement" with a number of parties, including the Department of the Interior, the Arizona Game and Fish Department, and the Hualapai Tribe that clarified and cemented each party's rights to water.<sup>16</sup> Public officials lauded the Settlement Agreement as a "win-win" for Arizona and the County.<sup>17</sup> Indeed, while the Settlement Agreement exhibits the possible advantages of the settlement process—most notably, the representation of diverse objectives—it also exhibits the shortcomings—namely, the County did not participate in the Settlement Agreement negotiations at all.<sup>18</sup> The County's interest in the water stemmed not from a prior appropriated right, but from a fear that the transfer would negatively affect the County's groundwater supply and tax base. These are public interests that the Settlement Agreement ignored. Therefore, in considering alternatives that allow the public interest—as a whole—to be addressed, there may be serious deficits in relying solely on the current settlement process to accommodate all affected parties.

This Note explores the absence of public interest consideration in Arizona water transfers through litigation and transactional frameworks. Part I summarizes Arizona water law governing surface water appropriation and transfer. It then introduces the Settlement Agreement and lawsuit that serve as a case study for this Note. Part II looks at the failures of litigation as a means of incorporating the public interest in Arizona water transfers. It also comments on the potential of relying on the public trust in Arizona to protect similar interests. Finally, Part III analyzes the Settlement Agreement as an example of a transactional approach. Part III also provides recommendations for Arizona to better incorporate the public interest into the water rights transfer process, specifically through negotiated agreements. Ultimately, the public interest is "far-ranging, highly discretionary,

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14. ELIZABETH HARTWELL RICHARDS, *OVER-ALLOCATION AND THE DOCTRINE OF PRIOR APPROPRIATION: WATER RIGHTS SETTLEMENTS AGREEMENTS IN NEW MEXICO*, at v (2008).

15. *Id.* at vi.

16. *See infra* Section III.A.

17. *The Facts on the Bill Williams River Water Rights Settlement Act*, CONGRESSMAN PAUL GOSAR (Nov. 12, 2015), <http://gosar.house.gov/the-truth-about-bill-williams-water-settlement> (claiming that the Bill Williams River Water Rights Settlement Act of 2014, 113 Pub. L. No. 223, 128 Stat. 2096 "is about private property rights" and calling it "a win for all involved, especially Mohave County").

18. The County has recently been invited to participate in Phase Two of the water settlement negotiations. *See* Press Release, Mohave Cty. Admin., County to Participate in Water Settlement Negotiations (Jan. 5, 2016) [hereinafter Mohave Cty. Press Release], <http://resources.mohavecounty.us/Repository/PressReleaseDocuments/PRNonDisclosed5f2fa7-0f79-4692-970f-03facdecacc6.pdf>. Effectively, the negotiations that resulted in the first Settlement Agreement are Phase One of the settlement process. The Hualapai Tribe, United States, Freeport, Central Arizona Project, Arizona State Land Department, ADWR, and Mohave County are parties to the Phase Two negotiations. *Id.*

and responsive to changing political, economic, and social priorities,”<sup>19</sup> and it contemplates the impact on third parties of water use. After *McClennen*, however, there is effectively no place for a consideration of the public interest in litigation. As a result, the transactional approach may prove to be the best solution.

## I. STATUTES, SETTLEMENT, AND SUIT

### A. Arizona Water Law

Arizona water law divides water into two categories: surface water and groundwater.<sup>20</sup> The water at issue in *McClennen* is surface water. Under Arizona law, surface water is subject to the doctrine of prior appropriation.<sup>21</sup> Prior appropriation allows an individual or entity to appropriate water rights so long as the individual puts the water to beneficial use.<sup>22</sup> In this system, water rights are treated more akin to property rights separate from the land to which the water is attached.<sup>23</sup>

An individual or entity that wishes to appropriate water must file an application with the ADWR.<sup>24</sup> The ADWR then considers whether the appropriation’s “proposed use conflicts with vested rights, is a menace to public safety, or is against the interests and welfare of the public.”<sup>25</sup> If any of these three conditions are present, the ADWR rejects the application.<sup>26</sup> If none of these conditions are present, the ADWR issues a permit that allows the appropriator to divert the water to a beneficial use as described in the application.<sup>27</sup>

Because a vast majority of the surface water in Arizona has been through the initial appropriation process, new acquisitions involve the transfer of water rights.<sup>28</sup> Water is transferred when there is a “voluntary agreement that results in a temporary or permanent change in the type, time or place of use of water and/or a water right.”<sup>29</sup> Under Arizona’s transfer statute,<sup>30</sup> rights to water may be

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19. Mudd, *supra* note 11, at 310.

20. Mark A. McGinnis & R. Jeffrey Heilman, *Don't Be Left Out to Dry: Recognizing and Addressing Water Supply Issues in Arizona Real Estate Transactions*, 46 ARIZ. ST. L.J. 577, 579 (2014).

21. *Id.*; see also ARIZ. REV. STAT. ANN. §§ 45-141 to -190 (2012 & Supp. 2015) (stating that Arizona law provides that the surface waters of the state “belong to the public and are subject to appropriation and beneficial use”). Relevant later in this Note will be the inadequacy of the arbitrary division between surface water and groundwater; all water is connected and use of one type of water affects the others. See ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA’S FRESH WATERS 35–47 (2002) [hereinafter GLENNON, WATER FOLLIES]; see also Section III.A.

22. BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 169 (5th ed. 2013).

23. W. GOVERNORS’ ASS’N, *supra* note 9, at 3.

24. ARIZ. REV. STAT. ANN. § 45-152(A) (2012).

25. *Id.* § 45-153(A) (2012).

26. *Id.*

27. *Id.* § 45-153(C) (2012).

28. W. GOVERNORS’ ASS’N, *supra* note 9, at 7.

29. *Id.* at 1.

30. ARIZ. REV. STAT. ANN. § 45-172 (2012).

transferred subject to the following limitations and conditions: (1) the ADWR director must approve the transfer;<sup>31</sup> (2) the transfer may not affect vested or existing rights to the use of the water;<sup>32</sup> (3) the water rights to be transferred must have been lawfully appropriated and cannot have been abandoned or forfeited;<sup>33</sup> and (4) the ADWR must publish a notice stating that “any interested person” may file an objection to the transfer.<sup>34</sup> Notably absent from the transfer statute is explicit language regarding a public interest or public welfare review.

### ***B. Freeport’s Deal Making***

In 1984, the City of Scottsdale bought Planet Ranch<sup>35</sup> for \$11.4 million as a backup to dwindling municipal water supplies.<sup>36</sup> After the city realized that moving water from the property to Scottsdale was impractical, it put the land up for sale.<sup>37</sup> In 2011, the city sold the land to Freeport.<sup>38</sup> In exchange, Freeport gave Scottsdale \$10.15 million in cash and 50,000 acre-feet of water from the Salt Water River Project, worth up to \$18 million.<sup>39</sup>

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31. *Id.* § 45-172(A)(1).

32. *Id.* § 45-172(A)(2). Also known as the “no injury” rule, it ensures that users to the stream system are not upset by the actions of other users; this rule creates excessive transaction costs in litigating water rights transfers. *See* Mark Squillace, *The Water Marketing Solution*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10800, 10802 (2012).

33. ARIZ. REV. STAT. ANN. § 45-172(A)(3) (2012).

34. *Id.* § 45-172(A)(7). The statute also contains several limitations and conditions specifically related to the transfer of rights from irrigation districts, which is beyond the scope of this Note. *See id.* § 45-172(A)(4)–(6).

35. Planet Ranch is the common name describing property in Arizona’s Mohave and La Paz counties that rests upon the north and south sides of the Bill Williams River. It encompasses 8,388.73 acres, and it is adjacent to the Bill Williams National Wildlife Refuge. BUREAU OF RECLAMATION, U.S. DEP’T OF THE INTERIOR, PLANET RANCH LEASE APPENDIX B, 37 (2015), <http://www.usbr.gov/lc/region/g2000/envdocs/AppendixB.pdf> [hereinafter PLANET RANCH LEASE APPENDIX B].

36. Michelle Rushlo, *In Arizona Water Ranches Serve as Insurance Policy for Cities*, L.A. TIMES (Mar. 29, 1998), <http://articles.latimes.com/1998/mar/29/local/me-33849>. Urban centers across Arizona purchased many “water ranches” in an attempt to secure water for the future. Robert Lindsey, *Arid Farm Areas Grow Apprehensive; Booming Cities Buy up “Water Ranches” in Southwest*, N.Y. TIMES (Aug. 16, 1987), <http://www.nytimes.com/1987/08/16/weekinreview/arid-farm-areas-grow-apprehensive-booming-cities-buy-up-water-ranches-southwest.html>. In order to maintain its water rights, the city leased the land to alfalfa farmers. Peter Corbett, *Mining Company Agrees to Acquire Planet Ranch*, AZCENTRAL (Dec. 23, 2011, 5:20 AM), <http://www.azcentral.com/community/scottsdale/articles/2011/12/21/20111221mining-company-agrees-acquire-scottsdale-planet-ranch.html>; *see also*, THOMPSON ET AL., *supra* note 22, at 170 (discussing the doctrine of abandonment for failure to put water to a beneficial use).

37. Corbett, *supra* note 36.

38. *Id.* The company entered into an agreement in 2006 and finalized it in 2011. *See Freeport Testimony*, *supra* note 3, at 2.

39. Corbett, *supra* note 36. Per the terms of the agreement, Scottsdale will be able to use 500 acre-feet of water from the Salt Water River Project annually for the next 100 years, enough to serve 800 households a year. *Id.*

In the negotiations leading up to its purchase, Freeport filed an application with the ADWR to sever water rights from Planet Ranch and transfer them to the Wikieup Wellfield (approximately 70 miles north of Planet Ranch) to support its Bagdad Mining Complex.<sup>40</sup> Three parties with vested water rights immediately objected to the transfer: (1) the Hualapai Tribe (the “Tribe”);<sup>41</sup> (2) the Department of the Interior on behalf of the Bureau of Land Management and the Fish and Wildlife Service (collectively, the “DOI”); and (3) the Arizona Game and Fish Department (“AGFD”). The Tribe objected due to unresolved water claims.<sup>42</sup> The DOI objected as it possessed water rights in the Bill Williams River basin associated with ownership of the Bill Williams River National Wildlife Refuge, which was immediately downstream of Planet Ranch.<sup>43</sup> The Arizona Game and Fish Department (the “AGFD”) filed an objection pursuant to its water rights to the Bill Williams River.<sup>44</sup>

In 2013, the parties decided upon the terms of the Settlement Agreement.<sup>45</sup> Freeport agreed to provide the Tribe \$1 million to support a study necessary to settle claims to the Colorado River.<sup>46</sup> Freeport also agreed to make a substantial (unspecified) contribution to the Tribe’s Economic Development

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40. *Freeport Testimony*, *supra* note 3, at 2. Freeport’s Bagdad mining complex is a large, open-pit copper and molybdenum mine 100 miles northwest of Phoenix. In 2013, production at the Bagdad mine totaled 216 million pounds of copper and 8 million pounds of molybdenum. In 2013, it contributed approximately \$339.1 million to the Arizona economy. *Id.*

41. The Tribe claims rights to the Bill Williams River. *S. 2503, Bill Williams River Water Rights Settlement Act of 2014: Hearing on H.R. 4924 Before the S. Comm. on Indian Affairs*, 113th Cong. 1 (2014) (testimony of Michael Black, Director, Bureau of Indian Aff., U.S. Dep’t of the Interior) [hereinafter *BIA Testimony*], <http://www.bia.gov/cs/groups/xocf/documents/text/idc1-027238.pdf>. The DOI objected on the Tribe’s behalf, but the Tribe’s interests were distinct from those of the BLM and the FWS.

42. *See id.*

43. *Id.* Such rights are called Federal Reserved Water Rights, and they are the only kind of water right that is not subject to state water law. *See THOMPSON ET AL.*, *supra* note 22, at 1027–31.

44. PLANET RANCH LEASE APPENDIX B, *supra* note 35, at 287.

45. *Freeport Testimony*, *supra* note 3, at 3. There are actually two settlement agreements. The first agreement is the Big Sandy River–Planet Ranch Water Rights Settlement Agreement, which settled claims of the United States as trustee for the BLM and FWS, as well as the AGFD. The second agreement is the Hualapai Tribe Bill Williams Water Rights Settlement Agreement, which settled the claims of the Hualapai Tribe along with the United States (as trustee for the tribe). Both agreements are enacted by the Bill Williams Water Rights Settlement Act. Bill Williams River Water Rights Settlement Act of 2014, 113 Pub. L. No. 223, 128 Stat. 2096. Congressional action is required to enact all settlement agreements related to Indian tribes. 25 U.S.C. § 177 (2012) (invalidating any “purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians” unless that conveyance is “made by treaty or convention entered into pursuant to the Constitution”). *See generally* United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 336–38 (9th Cir. 1956) (implying that a conveyance of water is covered by the Non-Intercourse Act).

46. Bill Williams River Water Rights Settlement Act of 2014 § 2(7); *BIA Testimony*, *supra* note 41, at 3.

Fund.<sup>47</sup> Freeport further granted the Tribe a “right of first refusal” to purchase land in Banegas Ranch.<sup>48</sup> In exchange, the Tribe (and the United States as trustee for the Tribe) agreed to release claims against Freeport for possible injuries to water rights sustained from Freeport’s diversion of water to the Wikieup Wellfield.<sup>49</sup> The Tribe also agreed to waive claims against Freeport for water rights in excess of 300 acre-feet on Parcel 3 of the Planet Ranch land.<sup>50</sup>

For the DOI and AGFD, Freeport agreed to a 50-year lease of 3,400 acres of private land at Planet Ranch, for the purpose of maintaining a conservation area under the management of the Arizona Lower Colorado Multi-Species Conservation Program (“LCCP”).<sup>51</sup> One of the objectives was to move this leased portion to public ownership for the public benefit.<sup>52</sup> Freeport also agreed to set limits on the extent and use of the transferred water rights at its historic maximum pumping rate of 10,055 acre-feet per year.<sup>53</sup> In return, the DOI released certain water claims,<sup>54</sup> and, along with the AGFD, dropped their objections to Freeport’s application to transfer water rights.<sup>55</sup> Finally, the enabling act required the terms of

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47. *Id.* § 5(d); *see also*, *The Bill Williams River Water Rights Settlement Act of 2014: In Support of S.2503 Before the Senate Indian Affs. Comm.* 113th Cong. 4–5 (2014) (testimony by Sherry Counts, Chairwoman, Hualapai Tribe) <http://www.indian.senate.gov/sites/default/files/upload/files/7.9.14%20SCIA%20Testimony%20-%20Sherry%20J.%20Counts%20-%20Hualapai%20Tribe.pdf> [hereinafter *Hualapai Tribe Testimony*] (stating that the money will go towards securing Colorado River rights). The Tribe’s Economic Development Fund focuses on expanding economic opportunities within the Reservation, or in support of the Tribe. *See Highlights of the Draft Economic Development Element of Hualapai Tribe’s Master Plan*, GAMYU, Oct. 26, 2012, at 5–7, <http://hualapai-nsn.gov/wp-content/uploads/2013/08/Gamyu201222.pdf>.

48. BUREAU OF RECLAMATION, U.S. DEP’T OF THE INTERIOR, PLANET RANCH LEASE APPENDIX C 32–41 (2015) [hereinafter PLANET RANCH LEASE APPENDIX C], <http://www.usbr.gov/lc/region/g2000/envdocs/AppendixC-Final.pdf>; *Hualapai Tribe Testimony*, *supra* note 47, at 4 (describing the rights of first refusal Freeport will grant the Tribe to land in Banegas Ranch). Banegas Ranch is located within Mohave County, off of SR 93, and just south of the Wikieup Wellfield. *See* PLANET RANCH LEASE APPENDIX C, *supra*.

49. Bill Williams River Water Rights Settlement Act of 2014 § 6(a)(1)(A).

50. *Id.* § 6(b)(1)(A).

51. PLANET RANCH LEASE APPENDIX B, *supra* note 35, at 164–73; *The Facts on the Bill Williams River Water Rights Settlement Act*, *supra* note 17. Founded in 1995, the LCCP program focuses on making use of the Colorado River consistent with the Endangered Species Act, thereby protecting the habitat and species in the Colorado River Basin. *Lower Colorado Multi-Species Conservation Program*, ARIZ. GAME & FISH DEP’T, [http://www.azgfd.gov/w\\_c/LowerColoradoRiverMulti-speciesConservationPrograms.shtml](http://www.azgfd.gov/w_c/LowerColoradoRiverMulti-speciesConservationPrograms.shtml) (last visited Feb. 1, 2016).

52. Bill Williams River Water Rights Settlement Act of 2014 § 2(6).

53. *The Facts on the Bill Williams River Water Rights Settlement Act*, *supra* note 17; *see also* Bill Williams River Water Rights Settlement Act of 2014 § 4(d).

54. Bill Williams River Water Rights Settlement Act of 2014 § 6(C)(1) (noting that DOI, acting on behalf of the Bureau of Indian Affairs also withdrew claims to claims of water for two parcels of land owned by allottees or the United States as trustee for the allottees).

55. *Id.* §§ 4(b)(3), 9(a)(3).



the Settlement Agreement to be finalized by December 15, 2015, otherwise the act would expire.<sup>56</sup>

### C. Mohave County's Objections

The Settlement Agreement could not be enacted until the ADWR approved Freeport's transfer application.<sup>57</sup> Pursuant to Arizona's transfer statute, the ADWR published notice of the transfer, and the County submitted objections.<sup>58</sup> The County claimed that Freeport's transfer of water rights to the Bagdad mine would negatively affect surface water, groundwater, and the County's tax revenue.<sup>59</sup> Specifically, the County argued that it was an interested party because the transfer of rights for use outside the County could negatively affect Colorado River reservoirs and eventually municipal water supplies when Freeport taps into the area's groundwater.<sup>60</sup> The County also objected to Freeport's grant of first refusal rights for land within the County to the Tribe, because granting the land to the Tribe would remove it from the County's tax base.<sup>61</sup>

Additionally, the County contended that the ADWR should consider its objection based on the public trust doctrine.<sup>62</sup> One model suggested by the County was an extension of the public trust doctrine to water rights, similar to California's application in *National Audubon Society v. Superior Court*.<sup>63</sup> One requirement for applying the public trust doctrine is that the waterway be navigable at statehood.<sup>64</sup>

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56. *Id.* § 9(C); *Ariz. Dep't Water Res. v. McClennen*, 360 P.3d 1023, 1025 (Ariz. 2015).

57. *McClennen*, at 1024–25.

58. *Id.* at 1025. ARIZ. REV. STAT. ANN. § 45-172 calls for the ADWR to allow “any interested person” to file objections to applications for transfer of water rights.

59. Opening Brief at 2–3, *Mohave Cty. v. Ariz. Dep't Water Res.*, LC 2014-000624-DT (2015) (No. 513) [hereinafter *Superior Court Opening Brief*].

60. *Id.* at 18 (“Mohave County is very concerned that after a 10 year drought, rampant suburban sprawl, and the Colorado River's-reservoirs sitting at less than 60% capacity that diverting this precious resources to another county for mining operations will have a negative impact on an already strained water supply.”).

61. *Id.* at 2–3, 19–20 (“The Settlement Agreements and the Act also include Freeport's promise to transfer rights in land to the Tribe. This land is situated in the jurisdictional boundary of Mohave County . . .”); *see also Hualapai Tribe Testimony*, *supra* note 47, at 4 (describing the rights of first refusal Freeport will grant the Tribe to land in Banegas Ranch); Zachary Matson, *Mohave County Supervisors to Discuss Planet Ranch 'Plan B'*, HAVASUNEW.COM (Nov. 14, 2014), [http://www.havasunews.com/news/mohave-county-supervisors-to-discuss-planet-ranch-plan-b/article\\_a5923d7e-6c91-11e4-8246-733296746c8b.html](http://www.havasunews.com/news/mohave-county-supervisors-to-discuss-planet-ranch-plan-b/article_a5923d7e-6c91-11e4-8246-733296746c8b.html).

62. Objector Mohave County's Opening Brief at 7–10, *Mohave Cty. v. Ariz. Dep't Water Res.*, LC2014-000624 (No. 14A-SW001-DWR), <http://portal.azoah.com/oedf/documents/14A-SW001-DWR-appeal/14A-SW001-DWR-0020.pdf> [hereinafter *Administrative Opening Brief*].

63. *Id.*; *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 718–21 (Cal. 1983) (finding that the public trust prevented initial diversions (appropriations) of Mono Lake based on recreation and ecological ends). For a discussion on *National Audubon Society* and the public trust doctrine, see *infra* Section II.B.2.

64. *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 166–69 (Ariz. Ct. App. 1991).

Because the Bill Williams River is a tributary to the Colorado River, the County argued that it should be considered navigable for public trust purposes.<sup>65</sup> While the County argued the applicability of the public trust doctrine before the ALJ and superior court, the Arizona Supreme Court's decision did not consider the argument.

The County's arguments reflect a greater desire to include considerations based on public interests and public needs,<sup>66</sup> as compared to the ADWR's treatment of water as solely a property right.<sup>67</sup> Moreover, the County's objections demonstrate the significance of the interconnectedness of water supplies.<sup>68</sup> According to the County's 1995, 2005, and 2015 comprehensive plans, the surface water at issue was not considered part of the County's municipal water supply because the water was committed to other users.<sup>69</sup> However, the possibility of Freeport using the water for the Bagdad mine altered the County's understanding because, according to the County, Freeport's proposed wells would adversely affect groundwater supplies.<sup>70</sup>

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65. Superior Court Opening Brief, *supra* note 59, at 23–25.

66. See, e.g., Sammy Roth, *Even in Drought, CA Water Rights Politically Toxic*, DESERT SUN (Oct. 5, 2015, 9:47 AM), <http://www.desertsun.com/story/news/environment/2015/09/30/even-drought-ca-water-rights-politically-toxic/73065384/> (discussing the drive and pitfalls of water law changes in California); see also discussion *supra* Section I.A.

67. See ROBERT GLENNON, UNQUENCHABLE: AMERICA'S WATER CRISIS AND WHAT TO DO ABOUT IT 316 (2009) [hereinafter GLENNON, UNQUENCHABLE] (“We must begin to treat water as a valuable, exhaustible public resource. Water is a basic commodity for which there is no substitute, regardless of price.”).

68. See GLENNON, WATER FOLLIES, *supra* note 21, at 35–47; see also GLENNON, UNQUENCHABLE, *supra* note 67, at 324 (“Although we know from hydrology that surface water and groundwater are interconnected and that excessive pumping will diminish or deplete surface flows, the legal rules often allow unrestricted diversions and pumping.”).

69. See MOHAVE CTY., MOHAVE COUNTY, ARIZONA GENERAL PLAN (2005), [http://legacy.co.mohave.az.us/depts/pnz/forms/Mohave\\_County\\_General\\_Plan.pdf](http://legacy.co.mohave.az.us/depts/pnz/forms/Mohave_County_General_Plan.pdf) (identifying the Bill Williams River as one of several tributaries of the Colorado River within the County but noted that the Bill Williams River did not contribute to County water supplies as it was committed to other users); see also, MOHAVE CTY., MOHAVE COUNTY, ARIZONA GENERAL PLAN 63 (2015), <http://resources.mohavecounty.us/file/PlanningAndZoning/General%20Plan%20Document%20Update/Final%20BOS%20Approved%202015%20General%20Plan.pdf> (stating that Freeport is the second largest user of water in the County, for its Bagdad mining complex; but, as the plan noted, the County cannot “prevent, restrict, or otherwise regulate the use or occupation of land or improvements for . . . mining . . .”).

70. Superior Court Opening Brief, *supra* note 59, at 3. The County was concerned about its groundwater supplies because it is located outside of an Active Management Area. Groundwater, unlike surface water, is largely not subjected to limitations on use other than “the physical supply of groundwater.” McGinnis & Heilman, *supra* note 20, at 589–90. (discussing the formation of five active management areas in the state of Arizona, and areas outside of the active management areas are a largely have “virtually no regulatory controls . . . imposed on the withdrawal and use of groundwater in such areas”).

The ADWR found that the County had no vested rights that would be affected by the transfer, and that the “ADWR was not authorized to deny the applications on the grounds that they are against the public interest or might result in an increased tax burden.”<sup>71</sup> The County appealed to an ALJ who affirmed the ADWR’s decision and held that the County failed to file a legally valid objection under A.R.S. § 45-172, the Arizona statute governing the transfer of water rights.<sup>72</sup> In addition, “[b]ecause none of the County’s objections were based on the ‘limitations and conditions’ enumerated in A.R.S. § 45-172, the ALJ determined that [the] ADWR lacked authority to deny Freeport’s application.”<sup>73</sup> The County filed an appeal to the superior court, and in June 2015, the superior court held that the ADWR’s decision was arbitrary and capricious, an abuse of discretion, and contrary to law.<sup>74</sup> The ADWR and Freeport responded with an initial appeal to the Arizona Court of Appeals; however, given the approaching settlement deadline, the parties petitioned to transfer the appeal to the Arizona Supreme Court.<sup>75</sup> The parties filed for special action jurisdiction to obtain a final, nonappealable decision by the settlement deadline.<sup>76</sup> The Court accepted the special action jurisdiction and issued an opinion on November 12, 2015.<sup>77</sup>

## II. FIGHTING FOR RIGHTS

*McClennen* represents a narrow ruling regarding the interpretation of A.R.S. § 45-172 and the rights and responsibilities of the ADWR.<sup>78</sup> It is consistent with prior appropriation and “the concept that water rights, once formed, are property rights that can be used or transferred by the owner without ongoing oversight from the ADWR, so long as the use does not infringe on the vested rights of other water users.”<sup>79</sup> However, while *McClennen* represents a case consistent with the body of Arizona water law, it also represents a missed opportunity to incorporate the public interest consideration into A.R.S. § 45-172.

This Part examines how *McClennen* reflects the limitations of litigating the public interest and public trust in the context of water transfers. Because *McClennen*’s interpretation of A.R.S. § 45-172 forecloses consideration of the public interest in Arizona water rights transfers, legislative action is required to reverse *McClennen*’s effect. The Arizona Legislature could explore how other states have included the public interest within their water transfer regimes. Alternatively, litigants may use the public trust doctrine for a basis of their claims.

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71. Ariz. Dep’t Water Res. v. McClennen, 360 P.3d 1023, 1025 (Ariz. 2015).

72. *Id.* (citing ARIZ. REV. STAT. ANN. § 45-172).

73. *Id.*

74. *Id.* (stating that the superior court did not explain its reasoning).

75. *Id.*

76. *Id.*

77. *Id.*

78. See Felicia Fonseca, *Court Rejects County’s Objection to Water Rights Transfer*, WASH. TIMES (Nov. 12, 2015) (quoting Robert Glennon), <http://www.washingtontimes.com/news/2015/nov/12/court-rejects-countys-objection-to-water-rights-tr/>.

79. Wes Strickland, *Arizona Supreme Court Clarifies Water Transfer Rules*, PRIVATE WATER LAW BLOG (Nov. 18, 2015), <http://privatewaterlaw.com/category/water-planning/>. For a discussion on prior appropriation, see *supra* Section I.A.

However, there are unique challenges to using the public trust doctrine to protect societal and environmental interests.

**A. *The McClennen Decision***

The Arizona Supreme Court considered two questions in *McClennen*: (1) whether the ADWR is authorized to consider the public interest when reviewing applications for the transfer of water rights; and (2) whether the County qualifies as an “interested person” pursuant to A.R.S. § 45-172.<sup>80</sup> The relevant provisions from A.R.S. § 45-172 at issue in *McClennen* read, in part:

A. A water right *may be severed* from the land to which it is appurtenant . . . and *may be transferred* for use . . . without losing priority theretofore established, subject to the following limitations and conditions:

. . . 7. An application for severance and transfer of a water right shall be filed with the director. The director shall give notice of the application by publication . . . in a newspaper of general circulation in the county or counties in which the watershed or drainage area is located. The notice shall state that *any interested person* may file written objections to the proposed severance and transfer with the director within thirty days after the last publication of the notice.<sup>81</sup>

The County put forth three arguments as to why the ADWR should have the authorization to consider the public interest when reviewing applications for the transfer of water rights. First, the County argued that the ADWR could consider the public interest because the use of the conditional “may” in A.R.S. § 45-172 suggests that the ADWR is allowed to consider other reasons than those laid out in the statute when assessing transfer applications.<sup>82</sup> Second, the County argued that language from other Arizona statutes requiring a consideration of the public interest should inform the court’s interpretation of A.R.S. § 45-172.<sup>83</sup> Lastly, the County argued that this transfer constituted a new appropriation because it involved “a new location, with different geography, geology, rainfall, and neighbors.”<sup>84</sup>

The court declined to follow any of these arguments, and instead held that the ADWR could not consider the public interest when approving or denying an

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80. *McClennen*, 360 P.3d at 1024.

81. ARIZ. REV. STAT. ANN. § 45-172 (emphasis added).

82. *McClennen*, 360 P.3d at 1026 (“The County notes that § 45-172(A) states that a water right ‘may be severed . . . and . . . transferred,’ and argues that the use of the conditional ‘may’ suggests that [the] ADWR has discretion to deny a transfer application for reasons other than those identified in § 45-172(A).”).

83. *Id.* at 1027 (The County pointed to § 45-141(A) which “states that surface waters ‘belong to the public’”, and the ADWR’s authority under § 45-153(A), which allows a denial based of appropriation if the proposal would be “against the interests and welfare of the public . . .”).

84. *Id.*

application for water transfer.<sup>85</sup> First, the court noted that the use of “may” in A.R.S. § 45-172 only referred to the actual ability of the ADWR to sever and transfer a water right, and not what the ADWR may consider when performing this action.<sup>86</sup> Second, the court decided that the other statutes the County referenced applied to different circumstances, and should not be applied to Freeport’s transfer application.<sup>87</sup> Third, the court established that A.R.S. § 45-172 accommodates water users going to new locations; therefore, Freeport’s application was not a new appropriation.<sup>88</sup> Additionally, the Court determined that granting or denying a transfer application was essentially a licensing decision.<sup>89</sup> Under A.R.S. § 41-1030(B), the ADWR cannot base a licensing decision on any consideration except those that are “specifically authorized by statute.”<sup>90</sup> Therefore, the ADWR’s authority to deny an application for “severance and transfer of water rights is defined by the ‘limitations of conditions’ set forth in [A.R.S.] § 45-172(A).”<sup>91</sup> Because the County could not link its objections to any of the limitations and considerations stated in A.R.S. § 45-172, the ADWR did not abuse its discretion, act arbitrarily and capriciously, or act contrary to law when it refused to consider the County’s objections before it approved Freeport’s application.<sup>92</sup>

In regards to whether the County could object as an “interested person” under A.R.S. § 45-172, the County argued that any “interested person” generally means any individual or entity having an interest in or concern about the water at issue.<sup>93</sup> In rejecting this argument, the Court stated that such a broad definition would render the word “interested” meaningless.<sup>94</sup> The Court acknowledged that the phrase “interested person” is ambiguous and not statutorily defined but looked at the phrase in the context of the larger Title 45 scheme.<sup>95</sup> Using this approach, the Court determined that “any interested person” is most reasonably interpreted as a person who has an interest that is explicitly protected by A.R.S. § 45-172, or a vested interest in the water rights.<sup>96</sup> The County admitted that it did not have any

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85. *Id.*

86. *Id.*

87. *Id.* For example, the court found that § 45-141 only described water prior to appropriation, and once appropriated, the water right belongs to the owner, with a possible reversion to the public. In considering § 45-153, the court determined the public interest condition only applied to new appropriations, and not transfers. The fact that the legislature included a public interest consideration specifically in § 45-153, demonstrated to the court, that the public interest was not meant to be considered for water rights transfers.

88. *Id.*

89. *Id.* at 1026 (referencing definition in ARIZ. REV. STAT. ANN. § 41-1001(12), (13) (2012 & Supp. 2015)).

90. *Id.*

91. *Id.* at 1027.

92. *Id.*

93. *Id.*

94. *Id.* at 1028.

95. *Id.*

96. *Id.*

legal claims to the water.<sup>97</sup> Therefore, the County lacked statutory authority to object to the transfer.<sup>98</sup>

### *B. Litigation's Limits*

#### *1. Public Interest*

Consideration of the public interest in western water law has developed over time. Until the turn of the century, western states valued water mainly for “mining, manufacturing, irrigated agriculture, domestic uses, and hydropower generation.”<sup>99</sup> When states first began to consider the public interest, courts often equated the public interest with economic interests.<sup>100</sup> However, in the second half of the twentieth century public interest considerations began to include public values such as aesthetics, public recreation, public health, harm to other persons, and loss of alternate uses of water.<sup>101</sup> For example, the District Court of New Mexico denied a water-rights transfer application because it would have been contrary to the local cultural interests of northern New Mexicans.<sup>102</sup> However, this decision was overturned on appeal because the district court overbroadly applied public interest considerations not found in the statute.<sup>103</sup>

Statutes requiring water departments to consider the public interest vary among the western states. Sixteen of eighteen western states require a public interest consideration in the initial appropriation of water, and ten of these also require a public interest consideration for a water transfer.<sup>104</sup> Most of these statutes

97. *Id.*

98. *Id.* The County used the term “standing” to describe its right to object to Freeport’s transfer. However, as the court noted, standing is a prudential doctrine used to determine whether a plaintiff has alleged sufficient injury. The court properly framed this as a question of statutory authority, not standing. *Id.*

99. Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681, 681 (1987).

100. Susanne Hoffman-Dooley, *Determining What is in the Public Welfare in Water Appropriations and Transfers: The Intel Example*, 36 NAT. RESOURCES J. 103, 105 (1996) (“Projects which had the potential of scaring away investors or impeding economic development were considered detrimental to the public interest.”).

101. *Id.* at 106–07. It is important to note that this list can vary significantly by jurisdiction. While many states require consideration of the public interest in their water laws, few states define public interest beyond the statute’s text. The California Water Code states that a water transfer can be approved only if it will not affect “fish, wildlife, or other instream beneficial uses and does not unreasonably affect the overall economy of the area from which the water is being transferred.” CAL. WATER CODE § 386.

102. See THOMPSON ET AL., *supra* note 22, at 340 (excerpting *In re Sleeper*, No. RA 84-53(C) (N.M. Dist. Ct. 1985), *overruled by* 760 P.2d 787 (N.M. Ct. App. 1988)); see also Charles Dumars & Michele Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 ARIZ. L. REV. 817, 824–26 (1989) (opining that *Sleeper* “directly pitted the economic values associated with a new ski development against the cultural values of a northern New Mexico community”).

103. *Ensenada Land & Water Ass’n v. Reynolds*, 760 P.2d 787, 791 (N.M. Ct. App. 1988).

104. Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 91 U. DENV. WATER L. REV. 485, 486 (2006); see, e.g., ARIZ. REV. STAT. ANN.

do not define the public interest, or do so with vague, open-ended factors for water departments to consider.<sup>105</sup> Two core models of the public interest have been applied over the years: the maximum benefits model and other laws model.<sup>106</sup> The maximum benefits model permits an agency to maximize the benefits to the community from a water resource even if it involves using unwritten public policy.<sup>107</sup> The other laws model allows the water agency to consider the other state laws, but not unwritten public policies.<sup>108</sup>

Courts have varied in how they have interpreted statutory public interest language. For example, in *Shokal v. Dunn*, the Idaho Supreme Court interpreted language very broadly, finding that the court's public interest consideration should extend beyond the list of factors the legislature placed in the water permit statute.<sup>109</sup> In contrast, Arizona has no water law decisions directly defining the public interest requirement.

The use of water impacts non-vested parties through economic, environmental, cultural, or supply interests.<sup>110</sup> By incorporating a public interest requirement into their water laws, western states recognized the need to consider public interest in allocating the west's "most valuable resource," and to address distributing a finite resource in times of rapid economic growth.<sup>111</sup> As discussed above, although the initial appropriation statute clearly includes the public interest, the transfer statute does much of the work in water rights decisions. Therefore, after *McClennen*, Arizona water law lacks a functioning public interest consideration for third parties such as Mohave County.

## 2. Public Trust

Absent a robust case history to inform the public interest consideration, Arizona litigants have turned to the public trust doctrine as an alternative mechanism to achieve similar objectives. The common law public trust doctrine entrusts to the state, for protection of the public interests, lands affected by the

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§ 45-153(A) ("[W]hen the application or proposed use . . . is against the interests and welfare of the public, the application shall be rejected.").

105. Grant, *supra* note 104, at 486; *see, e.g.*, ALASKA STAT. § 46.15.080 (2010) (including "benefit to the applicant . . . effect of the economic activity . . . effect on fish and game resources . . . effect on public health, the effect of loss of alternative uses of water that might be made within a reasonable time . . . harm to other persons . . ."); KAN. STAT. ANN. § 82a-711(b) (2011) (including "established minimum desirable streamflow requirements" and "the area, safe yield and recharge rate of the appropriate water supply").

106. Grant, *supra* note 104, at 488.

107. *Id.* at 488–89. *See, e.g.*, OR. REV. STAT. § 537.170(8)(a) (including "public recreation, protection of commercial and game fishing and wildlife . . . or any other beneficial use to which the water may be applied for which it may have a special value to the public").

108. Grant, *supra* note 104, at 489.

109. 707 P.2d 441, 449 (Idaho 1985); Grant *supra* note 104, at 502.

110. *See* W. GOVERNORS' ASS'N, *supra* note 9, at 23–29.

111. John F. Klein-Robbenhaar, *Balancing Efficiency with Equity: Determining the Public Welfare in Surface Water Transfers from Acequia Communities*, 36 NAT. RESOURCES J. 37, 47 (1996).

“ebb[s] and flow[s] of the tides.”<sup>112</sup> The doctrine is generally limited to the public’s interest in navigation, commerce, and fishing on tidal and navigable waters.<sup>113</sup> In Arizona, the public trust doctrine “holds in trust the beds of all watercourses located in the state determined to be navigable at statehood.”<sup>114</sup> In *San Carlos Apache Tribe v. Superior Court*, the Arizona Supreme Court invalidated the Arizona legislature’s attempt to prohibit courts from considering the public trust doctrine in state water law adjudications.<sup>115</sup> The court reasoned that the applicability of the public trust is a question for courts, not the legislature.<sup>116</sup>

Two states have expanded the doctrine to include additional ecological and societal interests. In *National Audubon Society v. Superior Court*, the California Supreme Court expanded public trust to non-navigable tributaries that feed navigable waterways and to human and environmental uses of the disputed water.<sup>117</sup> The California Supreme Court, as part of this decision, allowed the water resources department to reconsider water allocation based on the public trust periodically, rather than only at initial allocation.<sup>118</sup>

While the public trust doctrine can be powerful, its ability to protect similar ecological or societal interests in Arizona may be limited. First, the public trust is predicated on the determination of navigability of the waterway at statehood.<sup>119</sup> This is an expensive and complicated determination, and unlikely to apply to a tributary like the Bill Williams River unless Arizona adopted an approach similar to that adopted in California.<sup>120</sup> Second, the public trust would need to be expanded to consider interests outside of the traditional interests of commerce, fishing, and navigation. This is what happened in California.<sup>121</sup> Currently, Arizona applies a narrow interpretation of the public trust doctrine.<sup>122</sup> While an expanded interpretation is certainly possible, in light of the narrow *McClellan* decision and the conservative political culture of the state, it is difficult to foresee such an expansion.

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112. Ariz. Ctr. for Law & Pub. Interest v. Hassell, 837 P.2d 158, 161 (Ariz. Ct. App. 1991).

113. THOMPSON ET AL., *supra* note 22, at 654.

114. Sharon Megdal et al., *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENVTL. L. & POL’Y 243, 261 (2011).

115. *San Carlos Apache Tribe v. Superior Court ex rel. Cty. of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999); *see also* Mudd, *supra* note 11, at 300.

116. *San Carlos Apache Tribe*, 972 P.2d at 199.

117. *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 719–21 (Cal. 1983).

118. *Id.* at 728. Hawaii adopted a similar approach. *See In re Water Use Permit Applications for the Waiahole Ditch*, 9 P.3d 409, 445–46, 448 (Haw. 2000) (discussing Hawaii’s expanded public trust which encompasses all the water resources of the state and encompassing a wide range of protections outside navigation, commerce, and fishing).

119. Megdal et al., *supra* note 114, at 261.

120. THOMPSON ET AL., *supra* note 22, at 685.

121. *See* Tarlock, *supra* note 13, at 780 (describing *National Audubon* as a “blockbuster,” but noting the public trust is “too open-ended, uncertain, and potentially unfair to serve as an alternative basis for water allocation”).

122. Megdal et al., *supra* note 114, at 262 (“Arizona adheres to a minimalist public trust doctrine—limited to the equal footing doctrine. Arizona owns the beds and banks of navigable water watercourse to the ordinary high watermark.”) (citations omitted).



As reflected in the discussion of the public interest and public trust, the court declined the opportunity to remedy the failure to consider the public interest in the transfer of water rights. As a result of *McClennen*, the only time the ADWR may consider the public interest (or claims not rising from a vested right) is at initial appropriation. Most of the available water in the West—particularly in Arizona—has already been appropriated.<sup>123</sup> Therefore, if consideration of public interest is valued, it will have to manifest in another manner.

### III. NEGOTIATING FOR RIGHTS

A growing emphasis is being placed on settlement agreements of water rights.<sup>124</sup> Many water law scholars see the give-and-take around the figurative (or sometimes literal) table as the appropriate method for incorporating the public interest into the prior appropriation system.<sup>125</sup> In many ways, as discussed below, Freeport's Settlement Agreement represented the balancing of several public interest concerns held by entities with vested water rights. Mainly, the water needs of the Hualapai Tribe, economic interests of the state, and environmental interests of the area. However, by excluding the County, the settlement negotiations failed to bring all affected parties to the table. As a result, the negotiations may not have addressed all significant concerns related to the use of the water.

#### A. *Winners and Losers in the Settlement Agreement*

Historically, Indian tribes have been seen as disadvantaged parties in the water appropriation scheme.<sup>126</sup> The majority of tribes' right to water derives from the seminal U.S. Supreme Court decision in *Winters v. United States*, in which the Court held that the creation of an Indian reservation carried with it a right to water.<sup>127</sup> These rights, known as federally reserved rights, date back to the year a reservation was first established.<sup>128</sup> Indian water rights are a significant consideration for all Arizona water users. Many tribes in the state hold senior appropriation rights to bodies of water in Arizona.<sup>129</sup>

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123. Macdonnell, *supra* note 9, at 235; Michael J. Pearce, *Balancing Competing Interests: The History of Federal and State Water Laws*, in ARIZONA WATER POLICY: MANAGEMENT INNOVATIONS IN AN URBANIZING, ARID REGION 27 (Bonnie G. Colby & Katharine L. Jacobs eds., 2007).

124. W. GOVERNORS' ASS'N, *supra* note 9, at 7.

125. THOMPSON ET AL., *supra* note 22, at 1117–19; Tarlock, *supra* note 13, at 775 (discussing the need to solve water allocation disputes at a basin or watershed level and noting that “it will be necessary to deal simultaneously with both private and public claims in ways other than the simple determination and enforcement of prior rights”).

126. Macdonnell, *supra* note 9, at 235.

127. 207 U.S. 564 (1908); see also THOMPSON ET AL., *supra* note 22, at 1026–30. Brett Walton, *In Drying Colorado River Basin, Indian Tribes Are Water Dealmakers*, CIRCLE BLUE (July 1, 2015), <http://www.circleofblue.org/waternews/2015/world/in-drying-colorado-river-basin-indian-tribes-are-water-dealmakers>.

128. Walton, *supra* note 127.

129. To prove senior appropriation, a tribe must be able to show usage that predates Western use. *Id.* (noting there are twenty-nine recognized tribes in the Colorado River basin).

In the Settlement Agreement, the Tribe gained definite water rights from two nonfederal contributions,<sup>130</sup> providing the Tribe greater water security. Further, the Tribe received contributions to its economic development fund and funding for studies related to securing the Tribe's rights to Colorado River water. Additionally, the Tribe received a transfer of land from Freeport.<sup>131</sup> The goal for the Tribe is to resolve all of its water rights. Yet, major infrastructure challenges, for which Freeport provided funding, prevent the Tribe from negotiating its rights to the Colorado River.<sup>132</sup> Before the Tribe can finalize those water rights, research into alternatives for water infrastructure needs to be completed. Accordingly, the Tribe, along with Freeport and the United States as trustee, committed to future negotiations to finish a comprehensive settlement of all of the Tribe's water rights.<sup>133</sup> The Tribe will now attempt to finalize its water rights claims in Phase Two of the settlement negotiation.<sup>134</sup>

Environmental interests are also served by the Settlement Agreement. In advocating for expansion of the public trust, many have pointed to the environmental value of water and surrounding land.<sup>135</sup> "Ecologically the Bill Williams River serves an important function as a wildlife corridor . . . allow[ing] wildlife to travel across the desert landscape expanding their range and establishing new territories."<sup>136</sup> The new leased area provided by the Settlement Agreement will likely serve as a wildlife area, which would enhance wildlife and habitat conservation.<sup>137</sup> This land will serve a significant role in the LCCP, which was designed to further both hydroelectric power creation and Endangered Species Act compliance efforts by the state.<sup>138</sup> Additionally, by donating land to the conservation efforts, the County will avoid a "buy and dry" scenario—the buyer abandons land after transferring the water rights, causing the land to become

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130. *The Facts on the Bill Williams River Water Rights Settlement Act*, *supra* note 17.

131. Superior Court Opening Brief, *supra* note 59, at 2–3.

132. *BIA Testimony*, *supra* note 41, at 3.

133. *Id.*

134. Mohave Cty. Press Release, *supra* note 18.

135. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 712 (Cal. 1983); Megdal et al., *supra* note 114 *passim*.

136. *East to West*, U.S. FISH & WILDLIFE: BILL WILLIAMS RIVER [http://www.fws.gov/refuge/bill\\_williams\\_river/](http://www.fws.gov/refuge/bill_williams_river/) (last visited Feb. 3, 2016).

137. Zachary Matson, *Establishing Access at Planet Ranch Could Take Most of 2015*, HAVASUNews.com (Jan. 22 2015) (quoting Arizona Game and Fish Commission regulations), [http://www.havasunews.com/news/establishing-public-access-at-planet-ranch-could-take-most-of/article\\_74bc54c0-a1fa-11e4-b2b3-c3f1d7d236c7.html](http://www.havasunews.com/news/establishing-public-access-at-planet-ranch-could-take-most-of/article_74bc54c0-a1fa-11e4-b2b3-c3f1d7d236c7.html).

138. Brief of the Cent. Ariz. Water Conservation Dist. & the Salt River Project Agricultural Improvement and Power Dist. as Amici Curiae in Support of the Joint Petition for Special Action Filed by the Ariz. Dep't Water Res. and Freeport Minerals Corp., 10, *Ariz. Dep't Water Res. v. McClennen*, 360 P.3d 1023 (Ariz. 2015) (No. T-15-0002), 2015 WL 5075875 \*4–7. ("One of the measures required by the [LCCP] Section 10(a)(1)(B) permit is the establishment of 8,132 acres of habitat for covered species and perpetual maintenance of that habitat. . . . [T]ransfer [of] Planet Ranch land . . . is critical to the achievement of this measure.").

infested with non-native vegetation that diminishes the land's economic and environmental value.<sup>139</sup>

In addition, the Settlement Agreement recognizes the economic interests of Arizona. According to Freeport, the mining business contributes \$339.1 million to Arizona's economy and sustains nearly 4,000 jobs.<sup>140</sup> Moreover, this scheme will likely encourage tourism and economic development by attracting visitors to the Planet Ranch space.<sup>141</sup>

Here, the Settlement Agreement accommodated the interests of entities with vested water rights. However, the Settlement Agreement left one party out: the County. For example, the Settlement Agreement does not address the County's concerns regarding the Tribe's right of first refusal to Freeport's land, which the County alleged will affect its tax base.<sup>142</sup> The Settlement Agreement does not include the projected effect of this purchase right.<sup>143</sup> Additionally, the County's concerns regarding the interconnectedness of Freeport's proposed pumped water and the County's groundwater supplies were never considered. Freeport agreed to cap its maximum usage at 10,055 acre-feet per year, which amounts to an overall

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139. Squillace, *supra* note 32, at 10802; Mark Squillace, *Water Transfers for a Changing Climate*, 53 NAT. RESOURCES J. 55, 62 (2013) (“[T]he land subject to ‘buy and dry’ practices may become infested with unattractive, opportunistic, non-native weeds that further diminish the prospects for a vibrant rural economic. It is no wonder then that many people in rural areas are hostile to water transfers and are often willing to work together to block transfers or legal reforms that make transfers easier.”).

140. *Freeport Testimony*, *supra* note 3, at 1–2; *The Facts on the Bill Williams River Water Rights Settlement Act*, *supra* note 17.

141. Matson, *supra* note 137.

142. *See supra* Section I.C (discussing the County's objections). While Congressman Paul Gosar, a chief supporter for the Settlement Agreement, did address the County's objections over the land rights in a letter to the County supervisors, the letter did not fully address the County's concerns over the possible future land loss. *See* Letter from Congressman Paul D. Gosar to Mohave County Board of Supervisors (Oct. 3, 2014) [hereinafter Letter from Congressman Gosar], <http://gosar.house.gov/sites/gosar.house.gov/files/Congressman%20Gosar%20response%20to%20Mohave%20Board%20Objections%20on%20H%20R%20%204924.pdf>.

143. When land is transferred to federal Indian tribes and held in allotment by the U.S. Government, it is no longer part of the County's taxable basis. *See* *United States v. Rickert*, 188 U.S. 432, 437 (1903). Currently, the land is still owned and undeveloped by Freeport. The County's concerns will only arise if Freeport decides to sell the land and the Tribe exercises its first refusal rights. Congressman Gosar points to another federal scheme for when a tribe seeks to put land into trust, thereby removing it from the municipal tax base. The fee-to-trust scheme contains a period of notice and comment from affected local interests. Therefore, Congressman Gosar stated that the County's objections to the Tribe's right of first refusal were premature. *See* Letter from Congressman Gosar, *supra* note 142. This interest could be considered accommodated on its basic level, but, for the County, this solution to “wait and see” likely seems too attenuated from the Settlement Agreement and the rights cemented in the present. The County's objection still centers on voicing its concerns and negotiating the rights and responsibilities that will affect land and water within the County's boundaries.

reduction in water usage.<sup>144</sup> However, there is no indication the reduction will address the County's concerns regarding interconnectedness because their concerns were never fully explained. Groundwater is interconnected, and pumping in some areas can deplete flows in others.<sup>145</sup> Therefore, the County's concerns are not unfounded.

Both of the County's concerns demonstrate public interest factors—tax revenue and groundwater supplies—missing from the Settlement Agreement. To incorporate the public interest, settling parties must revise current practices to ensure all affected parties have a chance to participate during settlement negotiations.

### ***B. Future Options for the Public Interest***

As reflected in the analysis above, settlement negotiations are about developing relationships, having conversations, and creating solutions to water issues.<sup>146</sup> But how effective are the agreements if they do not include all affected parties or resolve all of the public interest issues? How trusted can solutions be if a government body representing the public interest is not invited to the table?

One option is legislative change. The Arizona legislature could add explicit language to consider the public interest, and change the “interested party” to any party that may be affected by a water transfer. Such language could mimic states like New Mexico, Alaska, and Idaho which specifically designate the factors for courts to consider when evaluating public interest considerations.<sup>147</sup> The maximum benefits model would likely better incorporate a comprehensive review of all of the interested parties, and allow Arizona to move forward with the best practices for Arizona.<sup>148</sup>

Another option for Arizona would be to expand the public trust doctrine. As discussed above, states have expanded their public trust doctrine to better incorporate the public interest.<sup>149</sup> Expanding the public trust doctrine is a far more difficult task, because it is a constitutional provision, and has been applied so narrowly in Arizona. Moreover, the alternative approaches to the public trust doctrine have only been adopted in California and Hawaii.<sup>150</sup>

Because of the flaws in both litigation models, a better option would be to expand settlement negotiations into watershed-wide agreements that include all

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144. Bill Williams River Water Rights Settlement Act of 2014, 113 Pub. L. No. 223, § 4(d), 128 Stat. 2096; Memorandum from the Legislative Attorney to Congressman Paul Gosar, Congressional Research Service, Bill Williams River Water Rights Settlement Act of 2014, 8–9 (June 25, 2015), <http://gosar.house.gov/sites/gosar.house.gov/files/Bill%20Williams%20CRS%20Report.pdf>; *The Facts on the Bill Williams River Water Rights Settlement Act*, *supra* note 17 (estimating the overall reduction in use from current entitlements and current uses will net 40,000 acre-feet per year).

145. GLENNON, WATER FOLLIES, *supra* note 21, at 35–47.

146. Walton, *supra* note 127.

147. *See supra* Section II.B.

148. Grant, *supra* note 104, at 488–89.

149. *See supra* Section II.B.1.

150. THOMPSON ET AL., *supra* note 22, at 685.

affected parties. Settlement negotiations are capable of accommodating a multitude of interests as seen in Freeport's Settlement Agreement. But before it can be a replacement for public interest considerations, the transactional model must be expanded to ensure all affected parties are invited to the table. One method to do so would encourage basin-wide consent for such agreements. A second would require holding basin-wide public hearings regarding the water use.<sup>151</sup> Either option could provide a market-style solution to creating a maximum benefits analysis without legislative input. One possible challenge for the transactional model is enforcing a requirement to include all affected parties. However, the County's inclusion in Phase Two of the negotiations suggests relying upon parties to voluntarily invite other stakeholders is not hopeless.<sup>152</sup>

### CONCLUSION

*McClennen* is consistent with prior appropriation and Arizona water law. Nevertheless, it exposes limitations in the appropriation scheme regarding considerations of the public interest in litigation. As states increasingly rely on water transfers to secure water rights and initial appropriations decrease, the state will need to adopt alternative options for considering the public interest in water rights issues.

Many parties look to settlement agreements as a way of balancing all of the complex interests involved with water rights. While the Settlement Agreement here incorporated many public considerations, it did not include the pertinent objections made by the County. Moving forward, efforts should be made to incorporate the public interest into the transfer process. Changes can also be made to incorporate all affected parties into settlement agreements, thereby using that process to incorporate public interest considerations.

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151. W. GOVERNORS' ASS'N, *supra* note 9, at 63.

152. *See* Mohave Cty. Press Release, *supra* note 18.