

THE PUBLIC TRUST DOCTRINE IN ARIZONA'S STREAMBEDS

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I. INTRODUCTION

In recent decades, states have increasingly faced a common challenge with respect to their lands and waters: balancing traditional private property rights with a more active recognition of the public interest in these natural resources.¹ In many ways, this challenge involves reconciling the past with the future. This has been especially true in the West.²

One of the most important and longstanding legal doctrines addressing the preservation and protection of the public's interest in natural resources is the public trust doctrine.³ By any standards, the public trust doctrine is a complex, amorphous, and remarkable legal construct.⁴ Although it has its roots in ancient civilizations,⁵ the doctrine lay relatively dormant until recently, as courts and legislatures have increasingly invoked the doctrine to resolve resource conflicts.⁶ While originally the public trust rationale served to protect the three traditional uses of public resources—navigation, commerce, and fishing⁷—by establishing public rights to navigable waters, the doctrine has been expanded in recent years to include recreational and environmental purposes.⁸

1. See generally Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701 (1995). Blumm and Schwartz trace the expansion of the public trust doctrine in recent decades from the Mono Lake decision to its progeny.

2. See generally Bruce Babbitt, *Essay: The Public Interest in Western Water*, 23 ENVTL. L. 933 (1993); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989); Blumm & Schwartz, *supra* note 1; Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENVTL. L.J. 343 (1995).

3. See generally Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516 (1989) (Professor Dunning writes that "[t]he public trust is a fundamental doctrine in American property law and should be recognized much more widely than it is today.").

4. See Blumm, *supra* note 2, at 575. Professor Blumm writes that the public trust doctrine "sometimes seems as if it's all things to all people."

5. See *infra* notes 24–26 and accompanying text.

6. See Blumm & Schwartz, *supra* note 1. See generally Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423 (1995) (discussing the increased use of the public trust doctrine under a takings clause analysis).

7. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

8. See *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal.) (doctrine may restrict appropriations of non-navigable waters impacting the environmental

The expansion of the scope and prominence of the public trust doctrine, however, has not occurred absent widespread debate and controversy.⁹ In recent years, the doctrine has gained increased attention in Arizona. Ironically, the public trust doctrine has rarely been applied in Arizona courts,¹⁰ yet the state faces the paradigm challenge among western states to reconcile extraordinary urban and industrial growth with environmental and public use concerns.¹¹

The particular controversy in Arizona centers on the legal title to the beds of certain streams in the state.¹² Currently, many of these riverbeds are privately held by individuals and businesses.¹³ Under the public trust doctrine, however, these lands may rightfully belong to the state.¹⁴ Although the state has never asserted its ownership to many of these streambeds,¹⁵ they were arguably

integrity of navigable waters) *cert. denied sub nom.* Los Angeles Dep't of Water & Power v. National Audubon Soc'y, 464 U.S. 977 (1983); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (trust purposes include swimming and bathing); Orion Corp. v. State, 747 P.2d 1062, 1073 (Wash. 1987) (quoting Wilbour v. Gallagher, 462 P.2d 232, 239 (Wash. 1969) (holding that public trust rights include "swimming, water skiing, and other related recreational purposes") *cert. denied*, 400 U.S. 878 (1970)); Menzer v. Village of Elkhart Lake, 186 N.W.2d 290, 296 (Wis. 1971) (purposes of trust include "all public uses of water") (footnote omitted).

9. See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) (Professor Wilkinson explains some of the reasons for the controversy surrounding the public trust doctrine and notes the large amount of scholarly attention given to the doctrine in recent years.). See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (Professor Sax predicted the expansion of the public trust doctrine beyond its historical applications in his seminal article.).

10. Although the Arizona Supreme Court acknowledged the doctrine in 1931, in Maricopa County Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), the doctrine had not been applied before 1991, in Arizona Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App. 1991). As the Hassell court noted, however, this lack of development of public trust law in Arizona is largely explained by the state's lack of assertion of its "equal footing claim[s]" until 1985. *Id.* at 360, 837 P.2d at 162.

11. Between 1970 and 1980, Arizona's population grew 52%. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION NUMBER OF INHABITANTS, UNITED STATES SUMMARY 18-19 (1983). This rapid growth, however, occurred in a state with a strikingly complex spectrum of land ownership among the federal government, state government, national parks, trust lands, Native American reservations, and private landowners.

12. Hassell, 172 Ariz. at 361, 837 P.2d at 163. Arguably, the streambed controversy concerns any watercourse that was potentially navigable at the time of statehood, but in the Hassell litigation, only the claims to ownership along the Gila, Salt, and Verde Rivers were at issue.

13. See, e.g., Chris Coppola, *Arizona's Claim Leaves Landowners Floundering*, MESA TRIB., Dec. 5, 1993, at A6. The article indicates that the State Land Department mailed 6135 notices to private individuals and businesses along the Salt River regarding the question of streambed ownership. *Id.* See also *Joint Statement by Governor Fife Symington and Speaker of the House Mark Killian Regarding Salt River Navigability Issue*, Dec. 9, 1993 (News Release) (on file with author). Governor Symington and Speaker Killian recognized there may be a legal question about the title to the lands where private homes and businesses are currently located, but assured Arizonans that "the State [of Arizona] will not be confiscating their homes, their businesses or their lands which they have purchased, owned, improved, and paid taxes on." *Id.*

14. Hassell, 172 Ariz. at 363, 837 P.2d at 165. The Arizona Court of Appeals found that there was "substantial evidence from which a factfinder might conclude that portions of rivers and streams other than the Colorado met the applicable standard of navigability at the time that Arizona became a state," thus triggering the public trust claims of the state. *Id.* (footnote omitted).

15. *Id.* at 360, 837 P.2d at 162. Until 1985, the Colorado River was the only watercourse in which the state asserted an equal footing claim. *Id.*

lands underlying navigable watercourses when Arizona gained statehood in 1912.¹⁶ Under the public trust and the equal footing doctrines,¹⁷ title to navigable waters and their underlying streambeds passed from the federal government to each state upon its entrance to the Union.¹⁸ The state acts as a trustee in holding the lands for the benefit and use of the public as a whole, and cannot freely alienate these lands to private entities.¹⁹

The question over streambed ownership has sparked controversy among Arizona's ranchers, cities, businesses, counties, private landowners, environmentalists, and recreationalists.²⁰ The public sector has also been heavily involved in the debate as the legislative, executive, and judicial branches have all taken action to resolve the issue.²¹ At present, however, the streambed controversy is far from over, and interested parties on all sides of the issue are jockeying for position vis à vis the public trust doctrine, realizing that the resolution of the issue will have lasting ramifications on the ownership scheme of Arizona's natural resources.

Although this Note focuses on the Arizona controversy rather than the public trust doctrine in general, Part II of the Note summarizes the basic legal evolution of the public trust doctrine, from its roots in the English common law to its development in the United States. This Note discusses some of the traditional uses associated with the doctrine, its expansion in recent years, and some concepts intertwined with the public trust issue—especially, navigability. Part II also discusses the equal footing doctrine and the public trust's application to Arizona. Part III surveys the legislative, executive, and judicial responses to the Arizona streambed controversy, focusing on the Arizona Court of Appeals' decision regarding the public trust, in *Arizona Center for Law in the Public Interest v. Hassell*.²² Part IV analyzes Arizona's most recent legislation affecting the streambeds issue, focusing on the constitutionality of the legislation's bar on judicial determinations, some of its standards and presumptions for determining navigability, its relinquishment of certain lands arguably protected under the public trust, and its private landowner compensation scheme. Part IV also discusses the legislation's conflicts with *Hassell*. Finally, Part V concludes this Note with some predictions for the future of the public trust doctrine issue in Arizona.

16. *Id.* at 363, 837 P.2d at 165.

17. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

18. *See infra* notes 43–48 and accompanying text; *Montana v. United States*, 450 U.S. 544 (1981) (holding that as a general principle ownership of land under navigable waters is held in trust by the federal government for future states when they enter the Union); *Land Dep't v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (App. 1987) (finding that when Arizona entered the Union in 1912, public trust lands immediately passed to the state by virtue of the equal footing doctrine).

19. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452–55 (1892); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 416 (1842); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983) (“[A] state, as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.”). *But see infra* notes 100–05 and accompanying text.

20. *See generally* Mike McCloy, *Panel Moves to Ease Riverbed Flap*, PHOENIX GAZETTE, Jan. 20, 1994, at A11; David S. Baron, *Issue of Riverbed Confused by Scare Tactics*, ARIZ. REPUBLIC, Feb. 14, 1994, at B5.

21. *See infra* notes 73–129 and accompanying text.

22. 172 Ariz. 356, 837 P.2d 158 (App. 1991).

II. BACKGROUND

A. The Public Trust Doctrine

The public trust doctrine is based on the principle that certain natural resources, because of their unique significance to the general population, are protected against incompatible uses by a sovereign's fiduciary duty.²³ Values associated with the public trust doctrine can be traced back to Roman law and the writings of the Emperor Justinian,²⁴ which declared natural law communal rights in the most basic of resources: air, running water, the sea, and its shores.²⁵ Similar public interest values in natural resources were evident in other early cultures as well.²⁶ The public trust doctrine became a part of the American legal system, however, through the English common law.²⁷

Under the British Crown, title to public lands was held in trust by the King to preserve the public's interest in navigation, commerce, and fishing.²⁸ The public trust attached to "both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark."²⁹ Although the King could grant these lands to private landowners, the grant was always subject to the public's paramount rights in the resources—a right the King could neither ignore or destroy.³⁰ If the grant interfered with the public's access or was incompatible with the public's interest in these resources, the grant was rendered void.³¹

In 1842, the United States Supreme Court first applied the public trust in *Martin v. Waddell*.³² In *Martin*, the Supreme Court held that the public trust doctrine applied to lands affected by the ebb and flow of tides by virtue of adoption of the English common law.³³ Later, in *Barney v. Keokuk*,³⁴ the Court extended the state's public trust lands to include inland navigable waters and streams.³⁵

Perhaps the leading case in developing the public trust doctrine in the

23. Victor J. Yannacone, *Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law*, 51 N.D. L. REV. 615, 621 (1975).

24. See THE INSTITUTES OF JUSTINIAN bk. 2, tit. 1, pts. 1-6 (J. Thomas trans., 1975). See generally Johanna Searle, Note, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897 (1990), for a survey of the public trust doctrine's origins in Roman law and philosophy.

25. THE INSTITUTES OF JUSTINIAN, *supra* note 24, at 65.

26. See Wilkinson, *supra* note 9.

27. See Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 409 (1986).

28. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

29. *Id.*

30. *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 76 (1877).

31. *Id.*

32. 41 U.S. (16 Pet.) 367 (1842).

33. *Id.* at 412.

34. 94 U.S. 324 (1876).

35. *Id.* at 338. While most courts have recognized the public trust doctrine's applicability to lands under navigable waters, some courts in recent years have included natural resources adjacent to these waters, such as dry sand beaches. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

American legal system, however, was *Illinois Central R.R. v. Illinois*.³⁶ In that case, the Court found there was no constitutional violation when the Illinois legislature repealed a land grant made years earlier to the Illinois Central Railroad Company.³⁷ Because the land grant involved tidelands and other submerged lands in the Chicago harbor area, the Court found that the grant included public trust resources, and thus, the grant was voidable.³⁸ The case laid an important foundation for the later development of the state's enforcement capabilities in preserving its public trust duties and responsibilities.³⁹

Although the public trust doctrine prohibits a state from completely surrendering control over public trust resources, some courts suggest that the doctrine does not entirely prevent conveying some portions of property to private persons.⁴⁰ States can transfer some property to promote trust purposes or improve the public's use of the resources, as long as the grantee's use of the public trust property does not impair or interfere with the public interest.⁴¹ Other courts, in contrast, have imposed a stricter duty upon states in transfers of public trust property.⁴²

B. The Equal Footing Doctrine

The equal footing doctrine, as announced by the United States Supreme Court in *Pollard's Lessee v. Hagan*⁴³ provides that any future state enters the Union on an equal basis with the original thirteen states.⁴⁴ Under *Martin and Barney*, one of the rights of the original thirteen states was the right of sovereignty over navigable waters and their streambeds by virtue of the public trust doctrine.⁴⁵ Thus, under the equal footing doctrine, the public trust doctrine granted these rights to states automatically upon their entrance into the Union.⁴⁶ While prior to statehood the federal government held these lands in trust for future states,⁴⁷ upon a state's admission to the Union, the title to these public trust lands and waters automatically vested in the respective state.⁴⁸ The Supreme Court found the basis for states' sovereignty over these resources in

36. 146 U.S. 387 (1892).

37. *Id.*

38. See *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 779 (Ill. 1976).

39. See Dunning, *supra* note 3, at 522.

40. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892).

41. See Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1, 17-12 (1984).

42. See Blumm, *supra* note 2, at 591-93. Professor Blumm writes that the highest courts of California, Oregon, Idaho, and North Dakota have all required a "hard look" approach at the alienation or transfer of public trust property. This "hard look" approach imposes administrative standards and procedural requirements to further govern the transfer of trust property. *Id.* at 593.

43. 44 U.S. (3 How.) 212 (1845).

44. *Id.*

45. *Barney v. Keokuk*, 94 U.S. 324 (1876); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

46. *Barney*, 94 U.S. at 324; *Pollard's Lessee*, 44 U.S. (3 How.) at 212; *Martin*, 41 U.S. (16 Pet.) at 367.

47. See Jeffrey S. Silvyn, *Protecting Public Trust Values in California's Waters: The Constitutional Alternative*, 10 UCLA J. ENVTL. L. & POL'Y 355 (1992).

48. *Montana v. United States*, 450 U.S. 544 (1981); *Pollard's Lessee*, 44 U.S. (3 How.) at 223, 229; *Land Dep't v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (App. 1987).

the United States Constitution, rather than as a matter of federal common law or federal legislation.⁴⁹ Finally, as applied by the Court, the equal footing doctrine anticipates that in order for the states to guarantee full public access and use of navigable watercourses, a state's title to the bed of a navigable river follows the river's gradual changes in course.⁵⁰

C. Navigability

The concept of navigability is essentially intertwined with any discussion of public trust resources.⁵¹ The navigability question often resolves whether any public trust interest exists in the resource at all.⁵² Thus, the standards for determining navigability greatly influence the legal framework to which particular waters and lands are subject.⁵³

The standard of navigability for equal footing claims is established by federal law.⁵⁴ However, whether a particular watercourse is navigable in law depends on whether it was navigable in fact.⁵⁵ Navigability is determined by reference to the ordinary and natural condition of the watercourse at the time of statehood.⁵⁶ Thus, ownership of title and the applicability of the public trust doctrine does not depend on the present condition of the watercourse. If a particular river was navigable at the time of statehood, it remains legally so, for public trust doctrine classification.⁵⁷

Although reference to the "natural condition" of a particular watercourse may suggest that the effects of man-made diversions and improvements are irrelevant to the navigability determination, the Supreme Court has suggested this may not be so.⁵⁸ In examining the physical characteristics of a waterway, it is erroneous to evaluate navigability based solely on its natural condition.⁵⁹ A river may be susceptible to navigation upon improvement.⁶⁰

The general test of navigability, however, is whether a river is capable of being used in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in customary modes of trade and travel.⁶¹ The Supreme Court has indicated that historical use by Native Americans, fur traders, explorers, surveyors, recreational boaters, travelers, and use in connection with mining, transporting supplies and lumber are all

49. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (States' "title to lands underlying navigable waters within [their] boundaries is conferred...by the [United States] Constitution itself."); *Pollard's Lessee*, 44 U.S. (3 How.) at 230.

50. See *Oklahoma v. Texas*, 268 U.S. 252 (1925).

51. See Dunning, *supra* note 3, at 517.

52. *Id.*

53. *Id.*

54. *Utah v. United States*, 403 U.S. 9, 10 (1971); see also *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 362, 837 P.2d 158, 164 (App. 1991).

55. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); accord *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 403 (1940); *Arizona v. California*, 283 U.S. 423, 452 (1931); *United States v. Utah*, 283 U.S. 64, 76, 87 (1931).

56. *Appalachian Electric*, 311 U.S. at 408; *United States v. Utah*, 283 U.S. at 75.

57. *Appalachian Electric*, 311 U.S. at 408.

58. *Id.* at 407, 417-18.

59. *Id.*

60. *Id.*; *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122-24 (1921).

61. *United States v. Utah*, 283 U.S. 64, 76 (1931).

persuasive evidence of navigability.⁶² Additionally, rivers have not been determined navigable when their use for transportation was exceptional or only practical in times of temporary high water.⁶³

Most importantly, while navigability has been a historic trigger for determining sovereignty over public trust lands, in recent years courts have not required navigability to attach the public trust doctrine.⁶⁴ This has been one of the most important expansions of the doctrine.⁶⁵

III. ARIZONA'S STREAMBED CONTROVERSY

In 1985, Arizona officials upset longstanding assumptions about title to riverbed lands by asserting equal footing and public trust claims to certain streams and streambeds in the state.⁶⁶ That year, the Arizona Attorney General's office asserted the state's claim to the Verde River in order to limit the activities of sand and gravel operations on the river near Dead Horse Ranch State Park.⁶⁷ Under the equal footing doctrine, Arizona acquired title to the land below the high water mark in all navigable watercourses within its borders upon statehood in 1912.⁶⁸ With the exception of the Colorado River, however, the state had never asserted its equal footing claim to any other stream or streambed prior to 1985.⁶⁹

The state's claims in 1985 opened the floodgates of controversy as private landowners along the river complained that the action resulted in clouded titles, cancelled property sales, and the unavailability of title insurance.⁷⁰ Moreover, the state's potential equal footing claim to many of Arizona's streams and riverbeds seemed especially counterintuitive. Although there were several rivers that were potentially "navigable" at the time of statehood, many of these watercourses have since become dry riverbeds due to the extensive damming, irrigation, and diversion projects that channel Arizona's water resources to its sprawling desert cities.⁷¹ The notion of such dry beds being deemed "navigable" was difficult for many affected landowners to accept and comprehend.⁷²

In 1986, Arizona legislators responded to the state's use of the public

62. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 410-19 (1940); *Economy Light*, 256 U.S. at 117-18.

63. *United States v. Utah*, 283 U.S. at 87.

64. *See supra* note 8 and accompanying text.

65. *See supra* note 8 and accompanying text.

66. *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 360, 837 P.2d 158, 162 (App. 1991).

67. Although the Verde River is incapable of navigation today, it could nevertheless be protected under the public trust doctrine if it was navigable at the time of statehood in 1912.

68. *Hassell*, 172 Ariz. at 360, 837 P.2d at 162. *See also supra* notes 43-49 and accompanying text. Arizona achieved statehood on February 14, 1912.

69. *Hassell*, 172 Ariz. at 360, 837 P.2d at 162.

70. *See generally Navigable Streambeds: Hearings on H.B. 2324 Before the Arizona House of Representatives Committee on Natural Resources, Agriculture, and Rural Development*, 41st Leg., 2d Reg. Sess. (Jan. 19, 1994) (minutes).

71. *See A Definition of Navigability for Arizona Streams*, in ARIZ. FLOODPLAIN MANAGEMENT ASS'N NEWSLETTER, Sept. 1993 (on file with author). These watercourses flow only occasionally in response to heavy precipitation and flooding.

72. *See Jeff Bruce, Nonsense Not Extinct: Archaic Law May Swamp River Landowners*, MESA TRIB., Dec. 5, 1993, Commentary.

trust doctrine with Senate Bill 1308 (S.B. 1308).⁷³ The legislation proposed that persons who had paid taxes on a property for the most recent five-year period were the rightful owners of the property.⁷⁴ Governor Bruce Babbitt⁷⁵ subsequently vetoed this bill, concluding that it was heavily influenced by powerful, corporate lobbies which had little concern for other affected parties or the state's public trust duties.⁷⁶ The Governor described the bill as an improper effort "to convey public assets to private parties."⁷⁷

After Governor Babbitt's veto of S.B. 1308, the legislature enacted the Navigable Streambed Act (H.B. 2017) in 1987.⁷⁸ Eventually becoming law, the bill automatically disclaimed the state's interest in all watercourses in the state except for the Gila, Verde, and Salt Rivers.⁷⁹ In the Act, the Arizona legislature described the state's claims as vague, uncertain, and likely to cause "economic displacement."⁸⁰ The legislature also stated its purpose in enacting the legislation:

The purpose of this act is to avoid a lengthy, difficult and expensive fact-finding effort and to resolve this state's claim by recognizing the titleholders' accrued equity in taxes, improvements and family and social ties and confirming titles of private parties and political subdivisions to lands in the beds of waters other than the Colorado river and to compensate this state for relinquishing the claim in those areas where the state's claim may be more viable. Monies received by this state as compensation will be used to acquire riparian lands for public benefit. This act provides for public recreational use of surface water in navigable watercourses.⁸¹

H.B. 2017 provided for the uncompensated quitclaim of the state's equal footing interest in all watercourses except the Colorado, Gila, Salt, and Verde Rivers, and in all lands formerly within those riverbeds.⁸² Additionally, the bill provided for the quitclaim of the state's interest in the Gila, Salt, and Verde Rivers for \$25 per acre, which could be obtained by any affected landowner through the State Land Commissioner.⁸³

In 1991, however, the Center for Law in the Public Interest challenged the constitutionality of the Navigable Streambed Act, charging it violated the public trust doctrine and the gift clause of the Arizona Constitution.⁸⁴ Eight western states, including California, Utah, Nevada, and Idaho, filed an amicus

73. S.B. 1308, 37th Leg., 2d Sess., Arizona State Legislature (1986).

74. *Id.*

75. Bruce Babbitt was Governor of Arizona from 1978 to 1987. At the time of this writing, he holds the position of Secretary of the Interior.

76. See Governor Babbitt's veto message regarding Senate Bill 1308, May 7, 1986 (on file with author).

77. *Id.*

78. Act of Apr. 21, 1987, ch. 127, 1987 Ariz. Legis. Serv. 293-98 (West).

79. *Id.*

80. *Id.* § 1(A); Arizona Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356, 360, 837 P.2d 158, 162 (App. 1991).

81. Act of Apr. 21, 1987, *supra* note 78, § 1(B); Hassell, 172 Ariz. at 360, 837 P.2d at 162.

82. Act of Apr. 21, 1987, *supra* note 78, § 37-1102(A), (B); Hassell, 172 Ariz. at 360, 837 P.2d at 162.

83. Act of Apr. 21, 1987, *supra* note 78, § 37-1103; Hassell, 172 Ariz. 360, 837 P.2d at 162.

84. See Hassell, 172 Ariz. at 356, 837 P.2d at 158.

curiae brief in support of the challenge of H.B. 2017.⁸⁵ Their action stemmed from concern that the public trust lands in those states might be subjected to a challenge by private entities if Arizona was allowed to automatically disclaim lands arguably under public trust protection.⁸⁶

In 1991, in *Arizona Center for Law in the Public Interest v. Hassell*, the Arizona Court of Appeals determined that the Navigable Streambed Act was unconstitutional.⁸⁷ The court held that the law violated the gift clause, which prohibits the alienation of public property absent certain conditions.⁸⁸ Moreover, the court found that if these lands were indeed reserved for a public purpose, the Act violated the public trust doctrine.⁸⁹

Contrary to the state's argument, the *Hassell* court found that the state's equal footing claim to public trust lands was neither vague nor indefinite.⁹⁰ Although the state's sovereignty over particular rivers and beds depended on whether that particular watercourse was navigable at the time of statehood, the state's basic right to acquire title to those navigable waters was not subject to debate.⁹¹ Thus, based on the sufficiency of the evidence which suggested that many of the streams involved in H.B. 2017 were navigable at statehood, the legislation's attempted disposition warranted review under the gift clause and the public trust doctrine.⁹²

The gift clause of the Arizona Constitution states, "[n]either the State, nor any county, city, town, municipality, or other subdivision of the State shall ever...make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation...."⁹³ The *Hassell* court further reasoned that the gift clause establishes a constitutional framework for judicial review of an attempted legislative transfer of property under the public trust.⁹⁴ Under its gift clause analysis, the *Hassell* court held that the disposition of public trust property, like any other state property, required the elements of public purpose and fair consideration.⁹⁵ Additionally, the court concluded that the disposition of public trust property in particular is subject to further restrictions imposed by the state's fiduciary duty in preserving these resources for the general public.⁹⁶

Although the *Hassell* court found that H.B. 2017 was enacted for a legitimate public purpose in response to the unsettling of title to these lands,⁹⁷ the court found that the statutory scheme did not adequately provide for fair

85. See Baron, *supra* note 20, at B5.

86. *Id.*

87. *Hassell*, 172 Ariz. at 356, 837 P.2d at 158.

88. *Id.*; see also *infra* notes 93–96 and accompanying text.

89. *Hassell*, 172 Ariz. at 356, 837 P.2d at 158.

90. *Id.* at 364, 837 P.2d at 166.

91. *Id.* ("Arizona was invested with absolute title at statehood to a presently undefined quantity of riverbed land.")

92. *Id.*

93. ARIZ. CONST. art. IX, § 7.

94. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170.

95. *Id.*; see also *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984).

96. *Hassell*, 172 Ariz. at 370, 837 P.2d at 172.

97. *Id.* at 369, 837 P.2d at 171.

compensation and did not address public trust concerns.⁹⁸ While the court recognized that a transfer of state property may be supported by moral considerations, it did not find the state's neglect in asserting its equal footing claims prior to 1985 sufficient to create a moral obligation upon the state to release its interests.⁹⁹

Regarding the public trust concerns, the *Hassell* court held that equal footing lands were not entirely inalienable.¹⁰⁰ The court quoted *Illinois Central R.R. v. Illinois*:¹⁰¹

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.¹⁰²

Whether a disposition of public trust property meets the above criteria, the court continued, is not a matter of federal law, but is instead determined by each state's jurisprudence for the administration of its public trust lands.¹⁰³ Accordingly, the court found the legislation overstepped its bounds in alienating public trust lands without providing mechanisms to estimate fair consideration or address public trust values.¹⁰⁴ Specifically, the court held that H.B. 2017 provided no method for assessment of: (1) the validity of the equal footing claims that it relinquished; (2) the continuing value of land subject to such claims for purposes consistent with the public trust; (3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; or (4) conditions that may be necessary to any transfer to assure that public trust interests remain protected.¹⁰⁵

Although the *Hassell* court found that the Arizona Navigable Streambed Act was unconstitutional, the opinion provided guidelines for an acceptable adjudication of the streambed issue.¹⁰⁶ In sum, the court stated that there must be a determination of what watercourses were navigable in 1912 in order to determine the state's equal footing claims, and an evaluation of the public's current interest in those resources.¹⁰⁷ *Hassell* led to the enactment of House Bill 2594 (H.B. 2594), and the creation of the Arizona Navigable Streambed Adjudication Commission (ANSAC) in 1992.¹⁰⁸ The Commission was charged with determining the state's equal footing claims by conducting a fact-finding study through an administrative procedure, and making a factual determination of the navigability or nonnavigability of watercourses at the time of

98. *Id.*

99. *Id.*; see also *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988).

100. *Hassell*, 172 Ariz. at 365, 837 P.2d at 167.

101. 146 U.S. 387 (1892).

102. *Id.* at 453.

103. *Hassell*, 172 Ariz. at 365, 837 P.2d at 167; cf. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977) (declaring that the equal footing doctrine is not a source of federal common law, and that although it operates to vest the state with sovereignty over certain watercourse land upon admission to the Union, thereafter, "the land is subject to the laws of the State").

104. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170.

105. *Id.* at 371, 837 P.2d at 173.

106. *Id.* at 370-71, 837 P.2d at 172-73.

107. *Id.*

108. Act of July 7, 1992, ch. 297, 1992 Ariz. Legis. Serv. 1601-13 (West). House Bill 2594 replaced the provisions of H.B. 2017 and created the ANSAC.

statehood.¹⁰⁹ Originally, the Commission consisted of five members appointed by the Governor.¹¹⁰ The State Land Department provided assistance to the Commission and gathered information on the navigability question.¹¹¹

In part, the determination of navigability centers on a substantial amount of historical, and sometimes informal, data.¹¹² In many cases, the types of information available to determine whether a particular watercourse was navigable in 1912 include documentation of historical river uses, photographs of historical river uses or stream conditions, hydrologic/hydraulic reports regarding normal or flood flow conditions, maps of channels, personal diaries, miners' accounts, and even military operation logs.¹¹³ While data compiled by archaeologists, historians, and cultural anthropologists will help determine whether a particular watercourse was actually used for navigation, research by hydrologists and geomorphologists regarding flow conditions may determine whether a river was at least susceptible to navigation at the time of statehood.¹¹⁴

The Salt River was the first river targeted by the Arizona Navigable Streambed Adjudication Commission.¹¹⁵ Because the Salt River not only traverses ranching and rural properties in eastern Arizona, but also intersects the large metropolitan areas of Phoenix, Mesa, and Tempe, the Commission's study gained much attention.¹¹⁶ Property owners along existing waterbeds as well as those along historic courses and floodplains of the river were given notice of the issue and of the Commission's study.¹¹⁷ Arizona officials assured property owners that even if a particular river was found navigable, the state would only claim the existing riverbed as public trust property.¹¹⁸ Despite this assurance, property owners were outraged.¹¹⁹ They alleged that the question of property ownership along the Salt River resulted in encumbered titles, cancelled property deals, and the unavailability of title insurance.¹²⁰

IV. HOUSE BILL 2589

After an outpouring of response from angry constituents regarding the uncertainty of streambed ownership along the Salt River,¹²¹ the legislature

109. *Id.* § 1(E).

110. *Id.* § 37-1121(A).

111. *Id.* § 37-1123(A).

112. *See A Definition of Navigability for Arizona Streams*, *supra* note 71.

113. *Id.*

114. *Id.*

115. *See* Howard Fischer, *Lawyer Threatens to Go to Court over River-land Ownership*, ARIZ. DAILY STAR, Mar. 28, 1994, at 1B.

116. *See* Coppola, *supra* note 13, at A6.

117. *Id.*

118. *Joint Statement by Governor Fife Symington and Speaker of the House Mark Killian*, *supra* note 13.

119. *See, e.g.*, Chris Coppola & Lynn DeBruin, *Anger Floods Lands Meeting*, MESA TRIB., Dec. 10, 1993, at A1; Ed Foster, *River-land Owners Fear for Property: Possible Loss Leaves Some Crying 'Fascism'*, ARIZ. REPUBLIC, Dec. 10, 1993, at B1.

120. *See* Coppola & DeBruin, *supra* note 119; Foster, *supra* note 119.

121. *See, e.g.*, Coppola & DeBruin, *supra* note 120; Howard Fischer, *Lawmaker Seeks to Abolish Panel Looking into Riverbed Ownership*, ARIZ. DAILY STAR, Jan. 13, 1994, at B2; Foster, *supra* note 120; Bob Schuster, *Riverbed Landowners in Legal Quagmire: Flood of Litigation*, MESA TRIB., Dec. 5, 1993, Editorial; Anthony Sommer, *State Doesn't Want the Land, but Court Battles are Nearly Certain*, ARIZ. REPUBLIC, Apr. 25, 1994, at 3.

again attempted to resolve the issue.¹²² In 1994, the legislature passed House Bill 2589 (H.B. 2589),¹²³ which sought to impose stricter conditions in order for the Commission to determine a river navigable at the time of statehood.¹²⁴ The law required legislative approval of any determination of navigability,¹²⁵ and contrary to common law doctrine, required the use of the low water mark for determining public trust attachment.¹²⁶ The bill also made the ANSAC independent from the State Land Department,¹²⁷ and established an ombudsman to protect private property rights.¹²⁸

H.B. 2589 was indeed controversial.¹²⁹ In many ways, its predecessor, H.B. 2594,¹³⁰ was viewed as a compromise between lawmakers and the Arizona Center for Law in the Public Interest, the original challengers to H.B. 2017 in the *Hassell* litigation.¹³¹ David Baron, the Assistant Director for the Center who had headed the litigation in *Hassell*, openly stated that the Center agreed not to challenge H.B. 2594 as long as the legislation remained intact.¹³² Thus, during the passage of H.B. 2589 in the Arizona legislature, both participants and onlookers questioned whether the bill would hamper final resolution of the controversy.¹³³

A. Basic Provisions of H.B. 2589

The basic provisions of H.B. 2589 of significance to this Note include the following areas: 1) the role of decision-making between the legislature and other bodies, such as the courts, regarding the determination of navigability and public trust values; 2) presumptive standards for determining the navigability of a watercourse; 3) the relinquishment of lands lying above the ordinary low water mark; and finally, 4) the proposed compensation scheme to landowners affected by a determination of navigability. This Note will discuss these provisions in turn and then analyze the constitutionality of each.

I. Decision-Making and Judicial Review

After the adoption of H.B. 2589, the Arizona Navigable Streambed Adjudication Commission (ANSAC) became a separate state agency, independent from the State Land Department and the Attorney General.¹³⁴ Under the legislation, the State Land Department, rather than ANSAC, acts as

122. See Fischer, *supra* note 115.

123. ARIZ. REV. STAT. ANN. §§ 37-1101, 37-1121 to 37-1132, 37-1151, 37-1154, 37-1156 (1995).

124. *Id.* § 37-1128.

125. *Id.* § 37-1128(H), (I).

126. *Id.* §§ 37-1101(2), 37-1128(I), (J).

127. *Id.* § 37-1121(A).

128. *Id.* § 41-1312.

129. See, e.g., Baron, *supra* note 20; Fischer, *supra* note 115.

130. See Act of July 7, 1992, *supra* note 108.

131. See Fischer, *supra* note 115.

132. See David S. Baron, Letter to the Arizona House of Representatives Committee on Natural Resources, Agriculture, and Rural Development Re: H.B. 2589—streambeds, Feb. 15, 1994 (on file with author).

133. *Id.*; see *State Claims to Streambeds; Ombudsman: Hearings on H.B. 2589 Before the Arizona House of Representatives Committee on Natural Resources, Agriculture, and Rural Development*, 41st Leg., 2d Reg. Sess. (Feb. 16, 1994) (minutes).

134. ARIZ. REV. STAT. ANN. § 37-1121(A) (1995).

an advocate for the public trust and may present evidence to the Commission regarding the navigability or nonnavigability of watercourses at the time of statehood.¹³⁵ The legislation also limits the Commission to strictly an advisory role, eliminating the ANSAC's adjudicatory powers established by the previous legislation.¹³⁶ Under H.B. 2589, any findings the Commission makes with respect to the navigability of a watercourse or public trust values associated with a particular watercourse are merely recommendations, with final determination reserved for the legislature.¹³⁷

The most important provision, however, affecting the role of decision-making on the streambed issue is the legislation's prohibition of any judicial action to establish the navigability or nonnavigability of a watercourse, the ownership of land associated with a watercourse, or any public trust values associated with such resources, *until* the legislature itself has made a determination of navigability or nonnavigability.¹³⁸ H.B. 2589 also prohibits the ANSAC's recommendations and the legislature's findings from being used in any action to quiet title in support of the state's public trust claim.¹³⁹ On the other hand, condemnation actions by the state are allowed to proceed without a determination of the state's public trust claim to property associated with a watercourse.¹⁴⁰ In any condemnation action, however, the court is prohibited from considering or deciding the navigability of a watercourse.¹⁴¹ Finally, H.B. 2589 separates the Commission's findings of navigability or nonnavigability from its findings regarding the current public trust values of a particular watercourse, if found navigable.¹⁴²

2. Presumptions and Evidentiary Guidelines for Determining Navigability

The current legislation sets up various presumptions and evidentiary guidelines for the determination of navigability and thus, public trust attachment.¹⁴³ In sum, these guidelines are intended to create a presumption of nonnavigability.¹⁴⁴ Proponents of the legislation conceded that these guidelines place the burden on the state to affirmatively prove the navigability of a particular watercourse.¹⁴⁵ H.B. 2589's presumptions and evidentiary guidelines for determining navigability follow:

- 1) If at any time there was a legal or administrative decision of nonnavigability of a watercourse at the time of statehood, the Commission *shall* find the entire watercourse nonnavigable unless there

135. *Id.* § 37-1123(D).

136. *Id.* §§ 37-1123(A)(1), 37-1125.

137. *Id.*

138. *Id.* § 37-1123(G) (emphasis added).

139. *Id.* § 37-1128(J)(1).

140. *Id.* § 37-1123(H).

141. *Id.*

142. *Id.* § 37-1123(A)(3).

143. *Id.* § 37-1128; *see also supra* notes 51-65 and accompanying text.

144. *See State Claims to Streambeds; Ombudsman: Hearings on H.B. 2589, supra* note 133, at 7 (statement of Don Jansen, Policy Advisor and Special Counsel to Majority).

145. *See Fischer, supra* note 115. Speaker Mark Killian, one of the key sponsors of House Bill 2589, conceded that the legislation was intended to revamp the entire process and place the burden on the state to prove navigability.

is clear and convincing evidence of navigability.¹⁴⁶

2) The Commission shall find a watercourse nonnavigable if, at the time of statehood, the watercourse was not used or susceptible to use for both commercial trade and travel, or flowed only as a result of precipitation and was dry at all other times.¹⁴⁷

3) Unless *clear and convincing evidence* is presented to the contrary, the Commission shall determine a watercourse nonnavigable at the time of statehood under *any* of the following conditions:¹⁴⁸

a) no sustained trade and travel occurred both upstream and downstream,¹⁴⁹

b) no profitable commercial enterprise was conducted by using the watercourse for trade and travel,¹⁵⁰

c) vessels customarily used for commerce were not used on the watercourse,¹⁵¹

d) diversions were made under the Desert Land Act of 1877, or any other federal act to provide water to lands included in a federal reclamation project or Native American reservation,¹⁵²

e) boating or fishing was not used for commercial purposes,¹⁵³

f) any floatation of logs or other material was not, and could not be, conducted regularly for commercial purposes,¹⁵⁴

g) structures such as bridges, fords, dikes, and man-made water conveyance systems constructed in or across the watercourse were impediments to navigation,¹⁵⁵

h) transportation in proximity to the watercourse was customarily accomplished by methods other than by boat,¹⁵⁶ or

i) the United States did not regulate the watercourse under the Rivers and Harbors Act of 1899.¹⁵⁷

4) The Commission is prohibited from considering the following in making a recommendation of navigability:

a) waters that have been appropriated for beneficial uses before statehood as being within the ordinary and natural condition of the watercourse,¹⁵⁸

b) the use of ferries to cross a watercourse,¹⁵⁹

146. ARIZ. REV. STAT. ANN. § 37-1128(B) (emphasis added).

147. *Id.* § 37-1128(C).

148. *Id.* § 37-1128(D) (emphasis added).

149. *Id.* § 37-1128(D)(1).

150. *Id.* § 37-1128(D)(2).

151. *Id.* § 37-1128(D)(3).

152. *Id.* § 37-1128(D)(4). The Desert Land Act of 1877, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-329 (1994)), relates to individual diversions made from a watercourse for irrigation and reclamation.

153. ARIZ. REV. STAT. ANN. § 37-1128(D)(5).

154. *Id.* § 37-1128(D)(6).

155. *Id.* § 37-1128(D)(7).

156. *Id.* § 37-1128(D)(8).

157. *Id.* § 37-1128(D)(9). The Rivers and Harbors Act of 1899, 30 Stat. 1151 § 9 (codified as amended in scattered sections of 22 U.S.C. and 33 U.S.C.), relates to those navigable watercourses over which Congress has authority to oversee interstate or foreign commerce by virtue of the Commerce Clause.

158. ARIZ. REV. STAT. ANN. § 37-1128(E)(1).

159. *Id.* § 37-1128(E)(2).

- c) fishing from the banks of a watercourse,¹⁶⁰
 - d) uses of the watercourse during flood conditions.¹⁶¹
- 5) The Commission is required to consider the existence of dams and diversions at the time of statehood as part of the ordinary and natural condition of the watercourse.¹⁶²

Again, the Commission's findings are only recommendatory in nature and ANSAC is required to forward its findings to the legislature, which may conduct its own hearings on the navigability question and make the final determination of navigability or nonnavigability.¹⁶³ If the legislature makes a final determination of nonnavigability, H.B. 2589 requires the legislature to enact legislation ratifying the Commission's findings and disclaiming title to the lands lying in the bed of the watercourse.¹⁶⁴ If, however, the legislature makes a final determination of navigability, H.B. 2589 requires the legislature to enact legislation authorizing the State Land Department to claim land in the bed of the watercourse and to file an action to quiet title to the land.¹⁶⁵

3. Use of the Low Water Mark and Relinquishment of Public Trust Lands

House Bill 2589 defines the "bed" of a watercourse as the land lying between the ordinary low water marks of a watercourse.¹⁶⁶ The legislation went on to define the "ordinary low water mark" as the line on the banks of a watercourse created when streamflow recedes at its regularly lowest stage in normal years, not including years with unusually high or low precipitation.¹⁶⁷ Thus, under the provisions of H.B. 2589, if the legislature finds a particular watercourse navigable, the state would claim title to only land that lies beneath the ordinary low water mark. Effectively, the state would relinquish any claim to those lands lying between the ordinary low and ordinary high water marks.

Once the legislature makes a determination of navigability, the State Land Department must do the following before initiating an action to quiet title to the streambed land:

- a) survey and make a determination of the boundaries of the bed of the watercourse at the time of statehood;¹⁶⁸ however, the limit of the state's claim is presumed to be the bed of the watercourse at the time of the legislature's findings,¹⁶⁹
- b) conduct a title search on each parcel to indicate how and when the parcel was conveyed in apparent violation of the trust,¹⁷⁰
- c) sue the United States for damages if the land was conveyed in apparent violation of the public trust by the United States.¹⁷¹

160. *Id.* § 37-1128(E)(3).

161. *Id.* § 37-1128(E)(4).

162. *Id.* § 37-1128(F).

163. *Id.* § 37-1128(I).

164. *Id.* § 37-1128(I)(1).

165. *Id.* § 37-1128(I)(2).

166. *Id.* § 37-1101(2).

167. *Id.* § 37-1101(7).

168. *Id.* § 37-1131(A)(1).

169. *Id.*

170. *Id.* § 37-1131(A)(2).

171. *Id.* § 37-1131(A)(3).

The law also requires the Land Department to notify each landowner of the legislature's determination of navigability within thirty days of completing the title search.¹⁷²

4. Compensation for Affected Landowners

H.B. 2589 provides a compensation scheme for landowners adversely affected by a determination of navigability.¹⁷³ Specifically, it provides that if the state's public trust claim to streambed property is confirmed in a quiet title action, the state is *required* to pay the record title owner from the state general fund the following:¹⁷⁴

- a) all property taxes ever paid on the property,¹⁷⁵
- b) compensation for all improvements to the property,¹⁷⁶
- c) a refund of the purchase price of the property paid by the person or predecessor in title, or a refund of the purchase price, plus interest, if the land was purchased from the state.¹⁷⁷

B. H.B. 2589's Constitutionality and Conflicts with Hassell

While H.B. 2589 is the most recent response by Arizona government to the streambed controversy, the legislation has not yet been subject to judicial review. However, some groups have openly challenged its constitutionality.¹⁷⁸ Below, this Note will conduct a constitutional analysis of four specific components of House Bill 2589, including a focus on conflicts between the legislation and Arizona's most recent decision on the public trust doctrine issue in *Hassell*.

1. Bar on Judicial Determinations

As mentioned above, House Bill 2589 prohibits any judicial action to establish the navigability or nonnavigability of a watercourse, the ownership of riverbed land along a particular watercourse, or any public trust values associated with those resources, unless and until the legislature itself has made a determination of navigability or nonnavigability.¹⁷⁹ Moreover, H.B. 2589 prohibits judicial review of the above factors in any pending action currently before the courts.¹⁸⁰ Finally, while the legislation allows condemnation actions by the state to proceed without a determination of the state's claim to property associated with a particular watercourse, H.B. 2589 prohibits the court in such actions from considering or deciding the navigability of a watercourse.¹⁸¹

The above provisions likely violate the separation of powers doctrine and

172. *Id.* § 37-1131(B).

173. *Id.* § 37-1132.

174. *Id.* (emphasis added).

175. *Id.* § 37-1132(A)(1).

176. *Id.* § 37-1132(A)(2).

177. *Id.* § 37-1132(A)(3).

178. See Fischer, *supra* note 115. David Baron, Assistant Director for the Arizona Center for Law in the Public Interest, stated that a future challenge to the constitutionality of H.B. 2589 was "virtually certain."

179. ARIZ. REV. STAT. ANN. § 37-1123(G).

180. *Id.*

181. *Id.* § 37-1123(H).

conflict with the Arizona Court of Appeals' decision in *Hassell*. The Arizona State Constitution provides: "The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."¹⁸² This provision basically sets forth the separation of powers doctrine.¹⁸³ The doctrine stands for the proposition that careful allocation of powers among co-equal branches of government creates a system of checks and balances and avoids dominance by any one branch over another.¹⁸⁴ Ideally, the separation of powers provides a natural check on government action.¹⁸⁵

In *Puterbaugh v. Gila County*,¹⁸⁶ the Arizona Supreme Court held that an attempt by the legislature to prohibit a court from hearing particular suits brought under statutes giving a right of action is an invasion of the functions of the judiciary in violation of the separation of powers clause of the Arizona Constitution.¹⁸⁷ While H.B. 2589 does not appear to give individuals a direct right of action in cases involving streambed ownership per se, it does provide rights to compensation if particular property is claimed under the equal footing and public trust doctrines.¹⁸⁸ Also, the legislation establishes an ombudsman for private property rights to represent private landowners in proceedings involving any governmental action regarding streambed ownership.¹⁸⁹ Arguably, these rights under the H.B. 2589 suffice in degree to question the legislature's power to prohibit the court from hearing issues involving streambed ownership or public trust values under the *Puterbaugh* standard.

Furthermore, H.B. 2589's prohibitive provisions regarding the role of the courts in the streambed controversy also seem to conflict with the intent of *Hassell*. In *Hassell*, the Arizona Court of Appeals stated, "Judicial review of public trust dispensations complements the concept of a public trust."¹⁹⁰ The court held that legislative and executive branches are judicially accountable for their dispositions of the public trust.¹⁹¹ The *Hassell* court justified its authority in questioning the legislature's disposition of lands under H.B. 2017, and firmly established the court's proper role in evaluating the public trust issue and specifically, the Arizona streambed controversy: "The second grounding for an Arizona law of public trust lies in our constitutional commitment to the checks and balances of a government of divided powers."¹⁹² The court further stated, "The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res."¹⁹³ Finally, the *Hassell* court

182. ARIZ. CONST. art. 3.

183. *Id.*

184. See generally Dennis G. LaGory, *Federalism, Separation of Powers, and Individual Liberties*, 40 VAND. L. REV. 1353 (1987).

185. *Id.*

186. 45 Ariz. 557, 46 P.2d 1064 (1935).

187. *Id.*

188. ARIZ. REV. STAT. ANN. § 37-1132 (1995).

189. *Id.* § 41-1312.

190. Arizona Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356, 366, 837 P.2d 158, 168 (App. 1991).

191. *Id.* at 367, 837 P.2d at 169.

192. *Id.* at 366, 837 P.2d at 168.

193. *Id.* at 367, 837 P.2d at 169.

agreed that evaluation of a state's attempt to alienate or impair public trust resources should require a "close look" by a court and conform to a "high and demanding standard."¹⁹⁴

In using a gift clause analysis framework for its evaluation of the state's alienation of public trust lands under H.B. 2017, the *Hassell* court further established the judiciary's proper role in the streambed controversy.¹⁹⁵ Clearly, the Arizona courts are the ultimate decision-makers regarding violations of the gift clause under the Arizona Constitution. Because the Court of Appeals applied the gift clause analysis to the public trust issue in *Hassell*, the court logically extended its authority to make determinations whether the dispensation of public trust property has been improper. In fact, the *Hassell* court rejected the state's argument that an earlier Arizona Court of Appeals case had effectively ceded unreviewable authority to the legislature to determine whether a public trust dispersal meets a valid public purpose under the gift clause analysis.¹⁹⁶ Instead, the court noted,

The [*Seven Springs*] opinion nowhere addresses the question whether the legislature has unreviewable authority to determine that a valid public purpose is satisfied by disposition of a resource subject to the public trust. In gift clause cases, the Arizona courts have recognized their obligation to make an independent determination that a public purpose has been met.¹⁹⁷

The *Hassell* court thus brought public trust issues under the umbrella of the court's unquestioned authority to question dispensations of property as violations of the gift clause. As *Hassell* concluded, "[t]he gift clause offers a well-established constitutional framework for judicial review of an attempted legislative transfer of a portion of the public trust."¹⁹⁸

Other authorities also suggest that H.B. 2589's bar on judicial determinations may not survive a separation of powers challenge. Perhaps most importantly, in the Supreme Court's historic decision on the public trust doctrine, *Illinois Central R.R. v. Illinois*,¹⁹⁹ the Court addressed a situation somewhat similar to that in *Hassell*.²⁰⁰ The Court in *Illinois Central* was concerned with a legislative grant of land that was arguably included in the state's public trust lands.²⁰¹ The Court stated, "[a] grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power...."²⁰²

Later, in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, the Supreme Court of Idaho established that "[f]inal determinations whether the alienation or impairment of a public trust resource violates the

194. *Id.* (quoting *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983), and Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981)).

195. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170. The gift clause appears in the Arizona State Constitution at art. IX, § 7; see also *supra* note 93 and accompanying text.

196. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170. See *Seven Springs Ranch v. Arizona Dep't of Water Resources*, 156 Ariz. 471, 753 P.2d 161 (App. 1987).

197. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170 n.17.

198. *Id.* at 368, 837 P.2d at 170.

199. 146 U.S. 387 (1892).

200. *Id.*

201. *Id.*

202. *Id.* at 453.

public trust doctrine will be made by the judiciary.”²⁰³ Maine’s highest court, in a case known as *Opinion of the Justices*,²⁰⁴ also determined that legislative dispensations of state natural resource holdings should be held to a high standard of review by the courts.²⁰⁵

Finally, there is additional support for the proposition that Arizona courts should have judicial review over the established process for the determination of navigability and dispensation of riverbed lands. Both H.B. 2017, which was ultimately struck down in the *Hassell* decision, and H.B. 2594, which first created the Arizona Navigable Streambed Adjudication Commission, made explicit reference to the courts’ proper role in the Arizona streambed controversy.²⁰⁶ As one of the sponsors of H.B. 2017 testified, “[t]he intent of the bill [is] for the courts to determine in one lawsuit if the law is constitutional or not.”²⁰⁷ Likewise, H.B. 2594, which incorporated many of the guidelines suggested by the *Hassell* court, devoted an entire section to the role of judicial review in resolution of the issue.²⁰⁸

For the above reasons, H.B. 2589’s prohibition of judicial determinations on the navigability and public trust values associated with a particular watercourse until the legislature has made its own finding suggests a violation of the separation of powers doctrine. This conflict is especially obvious in light of *Hassell*, where the Arizona Court of Appeals made explicit reference to its power of judicial review over dispensations involving public trust lands.

2. Standards and Presumptions of Navigability and Non-Navigability

As discussed above, federal law establishes the guidelines for determinations of navigability and initial public trust attachment.²⁰⁹ Only after a state receives those lands underlying navigable waters does each state develop its own jurisprudence for the administration of the lands it holds in the public trust.²¹⁰ Thus, despite the Arizona legislature’s presumptions of navigability, ultimately the question of navigability is a federal one, and must conform to federal standards.²¹¹ Furthermore, state courts are bound by federal standards of navigability.²¹²

Again, navigability is determined by reference to the ordinary and natural condition of a watercourse at the time of statehood.²¹³ Navigability for

203. 671 P.2d 1085, 1092 (Idaho 1983).

204. 437 A.2d 597, 607 (Me. 1981).

205. *Id.*

206. See Act of Apr. 21, 1987, *supra* note 78 (H.B. 2017); Act of July 7, 1992, *supra* note 108 (H.B. 2594).

207. See *Ownership of Streambeds: Hearings on H.B. 2017 Before the Arizona Senate Committee on Natural Resources and Agriculture*, 38th Leg., 1st Reg. Sess. (Mar. 25, 1987) (minutes) (statement by Representative Denny).

208. See Act of July 7, 1992, *supra* note 108, § 37–1129.

209. See *supra* notes 54–65 and accompanying text.

210. *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 365, 837 P.2d 158, 167 (App. 1991).

211. See, e.g., *Utah v. United States*, 403 U.S. 9 (1971); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Holt State Bank*, 270 U.S. 49 (1926).

212. *Holt State Bank*, 270 U.S. at 55.

213. *Utah v. United States*, 403 U.S. at 10.

equal footing claims is navigability in fact—that is, when a watercourse was used, or susceptible to being used in its ordinary condition as highways of commerce, over which trade and travel are or may be conducted by the customary modes of trade and travel.²¹⁴

H.B. 2589's presumptions and evidentiary guidelines for the determination of navigability are contrary to federal case law in several instances. The legislation *requires* ANSAC to find a particular watercourse nonnavigable in some circumstances,²¹⁵ and in others, creates a strong presumption of nonnavigability unless there is clear and convincing evidence to the contrary.²¹⁶ There appears to be no federal case law specifically regarding legislative presumptions and guidelines for the determination of navigability such as these, although federal courts as well as *Hassell* acknowledge that the burden of proving navigability is on the party asserting the navigability of a particular watercourse.²¹⁷

Most importantly, H.B. 2589 requires a finding of nonnavigability of a watercourse if *any* one of several factors exists, unless clear and convincing evidence indicates otherwise.²¹⁸ These guidelines ignore a crucial part of the navigability test in that they exclusively address evidence of actual use of the watercourse.²¹⁹ The test for navigability, however, does not require that actual trade and travel occurred over the watercourses at the time of statehood. Navigability in fact requires only that the above activities *did* or *could* have occurred in the ordinary and natural condition of the watercourse.²²⁰ This is the so-called "susceptibility test."²²¹ Thus, where actual use is limited or infrequent, a river's susceptibility to use as a commercial highway may still be proved by evidence concerning its physical characteristics.²²²

Specifically, H.B. 2589 creates a presumption of nonnavigability if no profitable commercial enterprise was conducted by using the waterway for trade or travel.²²³ However, the Ninth Circuit Court of Appeals recently held in the case of *Alaska v. Ahtna*²²⁴ that if the river was susceptible to use as a highway of commerce, regardless of the actual use of river, such use did not have to involve transportation of water-borne freight by a carrier whose

214. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

215. ARIZ. REV. STAT. ANN. § 37-1128(B), (C) (1995).

216. *Id.* § 37-1128(D).

217. See Arizona Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356, 363, 837 P.2d 158, 165 (App. 1991); North Dakota *ex rel.* Board of Univ. & Sch. Lands v. United States, 972 F.2d 235, 238 (8th Cir. 1992); Goose Creek Hunting Club, Inc. v. United States, 518 F.2d 579, 583 (Ct. Cl. 1975).

218. ARIZ. REV. STAT. ANN. § 37-1128(D); see *supra* notes 149-58 and accompanying text.

219. See *supra* notes 149-57 and accompanying text.

220. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940); *United States v. Utah*, 283 U.S. 64, 76 (1931).

221. *United States v. Utah*, 283 U.S. at 76.

222. *Appalachian Electric*, 311 U.S. at 410-19; *United States v. Utah*, 283 U.S. at 82; *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921).

223. ARIZ. REV. STAT. ANN. § 37-1128(D)(2), (6) (1995). This would include the regular floatation of logs or other material for commercial purposes.

224. 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, *Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990).

purpose was to make money from the transportation.²²⁵

H.B. 2589 also stipulates that unless clear and convincing evidence exists otherwise, a watercourse is nonnavigable if vessels customarily used for commerce in 1912, such as keelboats, steamboats, or powered barges, were not used on the river.²²⁶ In a case known as *The Montello*, however, the Supreme Court emphasized that susceptibility to travel and trade would establish navigability, "no matter in what mode the commerce may be conducted."²²⁷ The Court explicitly applied this standard to the definition of navigability in equal footing cases in *Utah v. United States*.²²⁸ In *Utah*, the Supreme Court noted that the test of susceptibility to useful commerce does not require susceptibility to commercial activity on a large scale.²²⁹

Another factor which would create a presumption of nonnavigability under H.B. 2589 is the construction of structures in or across the watercourse as impediments to navigation.²³⁰ United States Supreme Court case law, however, suggests that this may be inconsistent with the standard test of navigability in fact.²³¹ Recently, the Supreme Court's decisions regarding the issue have been echoed in other federal courts. The Ninth Circuit Court of Appeals held in *Alaska v. Ahtna*²³² that a river was navigable in fact if the river was susceptible to use for commerce, regardless of actual use, although such use did not have to be without difficulty, extensive, or long and continuous.²³³ Also, in *Laughlin River Tours, Inc. v. Bureau of Reclamation*,²³⁴ a Nevada federal district court held that a river remains navigable in fact even though there are occasional obstructions and interruptions, because navigability need not be continuous.²³⁵

Finally, H.B. 2589 prohibits ANSAC from considering the use of ferries to cross a watercourse in the determination of navigability.²³⁶ While there appears to be no federal case law expressly prohibiting the above presumption, this provision nevertheless seems to conflict with some decisions regarding evidence of ferry use to prove navigability. In *City of Centralia v. FERC*,²³⁷

225. *Id.* at 1406.

226. ARIZ. REV. STAT. ANN. § 37-1128(D)(3).

227. 87 U.S. (20 Wall.) 430, 441-42 (1874).

228. 403 U.S. 9 (1971).

229. *Id.* at 11.

230. ARIZ. REV. STAT. ANN. § 37-1128(D)(7). These impediments could include bridges, fords, dikes, and man-made water conveyance systems.

231. *Arizona v. California*, 283 U.S. 423 (1931); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

232. 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, *Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990).

233. *Id.* at 1404.

234. 730 F. Supp. 1522 (D. Nev. 1990).

235. *Id.* at 1524. *Laughlin River Tours* dealt with the test of navigability for permissible federal regulation under the Commerce Clause. In the case, a tour boat operator attempted to compel the Bureau of Reclamation to release "sufficient" amounts of water along the Colorado River to make the river navigable, as required by the Boulder Canyon Project Act. The *Laughlin* court, however, found the river already navigable. As this case illustrates, even though some cases address navigability for admiralty jurisdiction or Commerce Clause purposes rather than title purposes, the standards for navigability are nearly identical. *See City of Centralia v. FERC*, 851 F.2d 278, 281 (9th Cir. 1988); *Alaska v. United States*, 754 F.2d 851, 853-54 (9th Cir. 1985).

236. ARIZ. REV. STAT. ANN. § 37-1128(E)(2) (1995).

237. 851 F.2d 278 (9th Cir. 1988).

the Ninth Circuit relied, in part, on evidence of ferry boat use in finding a particular river navigable.²³⁸ In *North Dakota ex rel. Board of University & School Lands v. United States*,²³⁹ the Eighth Circuit Court of Appeals affirmed the lower court's holding that a particular watercourse was nonnavigable at the time of North Dakota's statehood despite evidence of the use of ferries to provide transportation across the river.²⁴⁰ While the court of appeals affirmed the lower court's determination of nonnavigability, the decision suggests that ferry use along a particular watercourse is appropriate evidence on the navigability issue.

3. Relinquishment of Lands Between Low and High Water Mark

H.B. 2589's use of the low water mark in defining the bed of a watercourse to which it may claim title if a particular river is found navigable, or take action to disclaim title if a particular river is found nonnavigable by the legislature, may result in an improper relinquishment of public trust lands. When states received lands underlying navigable streambeds upon statehood under the equal footing doctrine, these included land located between the ordinary high water marks.²⁴¹ H.B. 2589 defines the state's public trust interest in only those lands lying between the ordinary low water marks.²⁴² Yet there is seemingly no federal case which defines the public trust lands as lying only between the low water marks of a watercourse. Instead, the overwhelming majority of federal cases establish the ordinary high water mark as the appropriate measure of the state's public trust interest in these lands.²⁴³

Generally, the high water mark refers to a natural physical characteristic imprinted upon the land alongside the watercourse by the action of the river.²⁴⁴ It is the highest line created by the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, *nor is it confined to the lowest stages of the river*.²⁴⁵ Lands lying in between ordinary high water marks and ordinary low water marks are subject to the public trust benefit.²⁴⁶ Thus, H.B. 2589 defines the bed of a watercourse in such a way to result in either claiming not enough land or disclaiming too much land depending on the legislature's finding of navigability.

238. *Id.* at 281.

239. 972 F.2d 235 (8th Cir. 1992).

240. *Id.*

241. *Barney v. Keokuk*, 94 U.S. 324, 336 (1876) ("[T]he shore between high and low water mark, as well as the bed of the river, belongs to the State."); *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 360, 837 P.2d 158, 162 (App. 1991) ("Thus, on February 14, 1912, at the instant it achieved the constitutional status of a state, Arizona acquired title to the lands below high water mark in all navigable watercourses within its boundaries.").

242. ARIZ. REV. STAT. ANN. § 37-1101(7) (1995).

243. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); see also NATIONAL PUBLIC TRUST STUDY, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (Nov. 1990) for a list of the states which use the ordinary high water mark to determine public trust application.

244. *United States v. Claridge*, 279 F. Supp. 87, 91 (D. Ariz. 1967).

245. *Id.* at 91 (emphasis added). H.B. 2594, the predecessor to H.B. 2589, defined the ordinary high water mark as "the line on the shore of a watercourse established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line.... Ordinary high watermark does not refer to the line reached by unusual floods." Act of July 7, 1992, *supra* note 108, § 37-1101(7).

246. *Barney v. Keokuk*, 94 U.S. 324, 336 (1876).

Even the legislature itself recognized that defining the bed of a river subject to the public trust by the ordinary low water mark contradicted federal law and state practice.²⁴⁷ Nevertheless, H.B. 2589, as passed by the Arizona legislature, included the ordinary low water mark as the appropriate determination for defining the bed of a watercourse and the state's sovereign ownership over the resource.²⁴⁸

Because federal case law overwhelmingly suggests that the state holds those lands lying between the ordinary high water marks of a navigable river under the equal footing doctrine, H.B. 2589's relinquishment of those lands lying in between the ordinary high and low water marks likely violates the public trust doctrine.²⁴⁹ As the Idaho Supreme Court recognized in *Kootenai*, "[t]he public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."²⁵⁰ The *Hassell* decision, as Arizona's most recent decision on the public trust doctrine, further stated, "[T]he state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself."²⁵¹ Because the state may not dispose of trust resources except for purposes consistent with the public's right to use and enjoyment of those resources, any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations.²⁵² In the seminal case on the public trust doctrine, *Illinois Central R.R.*, the United States Supreme Court stated:

The trust devolving upon the state for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining....²⁵³

Again, the Court later reaffirmed this principle in *Appleby v. New York*:²⁵⁴ "The title which the State holds and the power of disposition is an incident and part of its sovereignty that can not [sic] be surrendered, alienated,

247. The earlier version of H.B. 2589—H.B. 2324—used the ordinary high water mark for determining public trust attachment. During the hearings before the Arizona House of Representatives on the original version of the bill, in response to a question by the Committee why the state was unable to use the ordinary low water mark for defining the bed of a watercourse, Herb Guenther, a former state representative who had originally worked on the streambed issue in 1987, replied that the federal title test and the Equal Footing Doctrine give the state sovereign ownership of navigable waters between the ordinary high water mark. He also stated that he was not aware of any states using the low water mark in this application, that a thorough search had been made to determine a less "onerous" standard, but all case law generates ordinary high water mark as the determining line. See *Navigable Streambeds: Hearings on H.B. 2324*, *supra* note 70.

248. ARIZ. REV. STAT. ANN. § 37-1101(7) (1995).

249. See *infra* notes 265-71 and accompanying text.

250. *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1095 (Idaho 1983).

251. *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 366, 837 P.2d 158, 168 (App. 1991).

252. *Id.* at 368, 837 P.2d at 170.

253. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

254. 271 U.S. 364 (1926).

or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit."²⁵⁵

Clearly, then, it is a well settled principle that lands held in public trust cannot be alienated unless it is for the public benefit.

For purposes of the public trust doctrine, the traditionally recognized public interest in the navigable riverbed is as a bed for navigable waters.²⁵⁶ Once the water ceases to flow over the riverbed, other public interests might nevertheless exist in the riverbed itself.²⁵⁷ However, certain lands once protected under the public trust doctrine may eventually lose their public trust character,²⁵⁸ as in the case of an abandoned riverbed.²⁵⁹ While most of the beds of Arizona's rivers are dry, they are likely not "abandoned" riverbeds under the legal definition.²⁶⁰ Instead, many of the state's rivers are dry for one or more of the following reasons: 1) the flow is intermittent and is insufficient to be sustained on a year-round basis; 2) the rivers have been dammed upstream; and/or 3) the water has been diverted for irrigation purposes.²⁶¹ These are not abandoned riverbeds because in times of high precipitation or release of stored water from dams, water still flows in these rivers.²⁶²

Most importantly, the *Hassell* decision has created a framework to review any attempted transfer of Arizona's public trust lands.²⁶³ Because most of the state's riverbeds are likely not abandoned, these lands are still held in the public trust, and attempted transfers of these lands must conform to the standards set forth in *Hassell*.²⁶⁴ The *Hassell* court held that, at a minimum, a dispensation of public trust property must meet the gift clause requirements of public purpose and fair consideration.²⁶⁵ In addition, the transfer of public trust property must conform to strict standards imposed by the state's special obligation to maintain the trust lands for use of the public.²⁶⁶ Specifically, the Arizona Court of Appeals held that H.B. 2017 failed to make the following assessments: 1) the

255. *Id.* at 395.

256. See Tara DePuy, Comment, *Ownership of Abandoned Navigable Riverbeds: To Whom Does the Windfall Blow?*, 8 PUB. LAND L. REV. 115, 116 (1987).

257. See, e.g., *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). Courts may, however, require a balancing of these public interests with the interests of adjacent riparian landowners in the dry riverbed.

258. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170; Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1103 (Mass. 1981).

259. See DePuy, *supra* note 256.

260. See generally *id.*

261. Inter-office Memorandum from the Arizona Office of the Attorney General, Attorney General's Comments on H.B. 2017, Mar. 24, 1987, at 3.

262. *Id.*

263. *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991).

264. *Id.* *Hassell* held that beds of rivers navigable at the time of statehood which are still beds of intermittent flowing streams are not freely alienable by the state. Previous decisions of other state courts have addressed the alienability of similar lands—tidelands and beaches—which are dry for a period of time and under water at other times, in holding the same principle. See, e.g., *City of Berkeley v. Superior Court of Alameda County*, 606 P.2d 362 (Cal.), *cert. denied*, *Santa Fe Land Improvement Co. v. City of Berkeley*, 449 U.S. 840 (1980); *Morse v. Oregon Div. of State Lands*, 581 P.2d 520 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 209 (Or. 1979).

265. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170; see also *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984).

266. *Hassell*, 172 Ariz. at 368, 837 P.2d at 170.

validity of the equal footing claims it relinquished; 2) the continuing value of land subject to claims for purposes consistent with the trust; 3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; and 4) conditions that may be necessary to any transfer to assure that public trust interests remain protected.²⁶⁷

Clearly, because the public trust extends to those lands between the high water marks,²⁶⁸ H.B. 2589's relinquishment of lands in between the low and high water marks must also meet the alienation requirements of *Hassell*. However, there is simply no adjudicatory process for those lands between the ordinary high and low water marks under H.B. 2589. As required by *Hassell*, there is no investigation or determination of the public trust values associated with these lands nor is there any required consideration for their relinquishment. In fact, H.B. 2589 seeks to except these lands from any of the elements required for the alienation of public trust property by defining the pertinent bed of a watercourse in such a way so that if a particular river is found navigable in fact, the state only takes action to claim title up to the low water mark as its rightful equal footing claim.²⁶⁹ Conversely, if a river is found nonnavigable, the legislature will take action to disclaim title to those lands above the low water mark, including those public trust lands in between low and high water mark.²⁷⁰ Because the public trust attaches to those lands in between the ordinary high water marks,²⁷¹ and because H.B. 2589 exempts from the requirements set forth in *Hassell* the alienation of those lands in between the ordinary low and high water marks, the dispensation of these lands likely violates the public trust doctrine.

4. Proposed Compensation for Affected Landowners

Finally, it is a well-settled principle in public trust doctrine jurisprudence that a grant in violation of the public trust is inherently revocable.²⁷² Therefore, a state can assert its rightful claim to public trust lands without effectuating a "taking" of property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.²⁷³ Because there are no vested rights in trust property,²⁷⁴ private landowners with property burdened by the trust cannot successfully challenge state restrictions on "takings" grounds.²⁷⁵

As mentioned above, H.B. 2589 requires compensation to record title holders if the state should take action to quiet title to riverbed lands affected by the statute.²⁷⁶ The legislation requires the state to refund all property taxes,²⁷⁷

267. *Id.* at 371, 837 P.2d at 173.

268. *See supra* notes 243-48 and accompanying text.

269. ARIZ. REV. STAT. ANN. § 37-1128(I)(2) (1995).

270. *Id.* § 37-1128(I)(1).

271. *See supra* notes 243-48 and accompanying text.

272. 4 WATERS AND WATER RIGHTS § 30.02(b)(1), (d)(1) (Robert E. Beck ed., 1991).

273. *Id.* § 30.02(d)(1). *See generally* Grant, *supra* note 6.

274. National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 724 (Cal.), *cert. denied sub nom.* Los Angeles Dep't of Water & Power v. National Audubon Soc'y, 464 U.S. 977 (1983).

275. *See* Blumm, *supra* note 2, at 585.

276. ARIZ. REV. STAT. ANN. § 37-1132 (1995).

277. *Id.* § 37-1132(A)(1).

compensate for any improvements on the land,²⁷⁸ and refund the purchase price paid for the property, plus interest, if the land was originally purchased from the state.²⁷⁹ These provisions suggest a compensation structure such as would be involved in a takings claim against the state for claiming ownership of these lands outright under an eminent domain theory. However, there is no compensation required for the state's rightful assertion to its public trust lands.²⁸⁰ Under the public trust theory, because these were public trust lands at statehood, transfer of title to these lands was inherently limited.²⁸¹ In other words, private landowners' titles to property including these lands were always subject to the limitation imposed by the state's public trust obligation.²⁸² In this sense, the state has not "taken" any right from the property owner's "bundle of sticks" because there was never a right to hold these lands unconditionally and immune from the state's *jus publicum* authority.²⁸³ Because a property right must exist before it can be "taken", a private landowner never had, nor currently has, the right to impair the public's use of trust resources.²⁸⁴

In light of the above, H.B. 2589's compensation scheme for landowners who are adversely affected by the state's claim to its rightful public trust lands is likely unconstitutional and violative of the gift clause of the Arizona Constitution.²⁸⁵ Monies paid from the state general fund to compensate landowners for state action under H.B. 2589 must meet the dual requirements of public purpose and fair consideration.²⁸⁶ Although *Hassell* recognized a valid public purpose in finalizing the streambed ownership controversy,²⁸⁷ compensation under H.B. 2589 likely fails under the fair consideration prong. Because under traditional doctrine the state need not pay anything to affected landowners for quiet title action to public trust lands,²⁸⁸ H.B. 2589's compensation scheme does not seem to provide the state with any fair consideration for its reimbursement. In fact, some authorities may suggest that the state, instead of reimbursing landowners, should actually receive consideration for the past use of these public trust lands, as in any lease arrangement of state public lands. Therefore, not only is H.B. 2589's compensation structure unnecessary and likely violative of the gift clause, but there may be a legal right for the state to claim consideration from landowners for the use of these public trust lands for the past several decades.

278. *Id.* § 37-1132(A)(2).

279. *Id.* § 37-1132(A)(3).

280. See Grant, *supra* note 6.

281. See Harry R. Bader, *An Analysis of the Potential Impact of Public Trust Doctrine on the Sovereign's Use of its Eminent Domain Power*, 18 HAMLINE L. REV. 50 (1994).

282. *Id.* at 54.

283. *Id.* The state holds two distinct interests in public trust land. The first interest is the *jus privatum*, which is the state's limited interest in the title to these lands. Under the *jus privatum*, the state may transfer or lease public trust lands. The second interest, the *jus publicum*, is in the public's right of easement over these lands. The state may never alienate this interest, and all conveyances of public trust property are subject to the state's interminable obligation to hold these lands in trust for the public. *Id.*

284. *Id.*

285. The gift clause of the Arizona Constitution appears at art. IX, § 7.

286. Arizona Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356, 368, 837 P.2d 158, 170 (App. 1991); see also Wistuber v. Paradise Valley Unified Sch. Dist., 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984).

287. *Hassell*, 172 Ariz. at 369, 837 P.2d at 171.

288. See *supra* notes 272-84 and accompanying text.

V. CONCLUSION

In sum, the streambed controversy remains a controversial and complicated issue in Arizona's land ownership scheme. Although current legislation aims to tip the scales in favor of private property owners in an attempt at final resolution, the bill is likely unconstitutional in some essential aspects. Moreover, all parties agree that any resolution of the issue, whether under H.B. 2589 or otherwise, will not be a simple or expeditious one.²⁸⁹ Quite conceivably, the adjudication of streambed ownership in the state of Arizona could carry over into the next century. In fact, it may be several years before so much as an acceptable process for adjudication is promulgated. Until then, Arizona joins the ranks of other western states in attempting to determine the proper role of the public trust doctrine in the modern era.²⁹⁰

289. See Baron, Letter to the Arizona House of Representatives Committee on Natural Resources, Agriculture, and Rural Development Re: H.B. 2589, *supra* note 132; *State Claims to Streambeds; Ombudsman: Hearings on H.B. 2589*, *supra* note 144, at 8-9.

290. See generally Blumm & Schwartz, *supra* note 1, at 735-38.

