



The Application of the Public Trust Doctrine to the Gila River

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Potential Implications of the Public Trust Doctrine

- Sand and gravel companies and other who claim to own riverbed lands might not actually own them.
- Water rights are not immutable; state may have power and duty to curtail existing consumptive water uses in order to provide instream flows for fisheries, wildlife, and recreation.

Equal Footing Doctrine

Pollard v. Hagan (U.S. Supreme Court, 1845):

- New states admitted to the union have the same “rights of sovereignty, jurisdiction, and eminent domain” as the original thirteen.
- The attributes of sovereignty include ownership of navigable waterways.
- Title to navigable waterways within its borders passes to a state on the date of its admission to the union.

Public Trust Doctrine

Illinois Central Railroad (U.S. Supreme Court, 1892):

- Navigable waterways are not ordinary real estate that may be freely bought and sold.
- Rather, states hold title to navigable waterways as trustees for the benefit of the public.
- State may not give away public trust property except for purposes that benefit public use of the trust property for commerce, fishing, and navigation.
- Twentieth century decisions of state courts have expanded public trust uses to include recreation, environmental protection, and wildlife conservation.

The Public Trust Doctrine in Arizona

- Under the public trust doctrine, Arizona, upon admission to the union in 1912, assumed title to any rivers in the state that were navigable at the time.
- Doctrine was ignored through most of the twentieth century:
 - No determinations made as to which rivers were navigable in 1912
 - Rivers dammed and diverted
 - Riverbed lands acquired by sand and gravel companies, other industries, farmers, and developers

The Public Trust Doctrine in Arizona: Arizona Center for Law v. Hassell (1991)

- Legislature passed law giving away beds of all Arizona rivers, except Colorado, to current occupants
- Arizona Center for Law in the Public Interest alleged that the legislation violated the public trust doctrine and the “gift clause” of the Arizona Constitution.
- Arizona Court of Appeals found “substantial evidence from which a factfinder might conclude” that some of the rivers were navigable.
- Legislation giving away the riverbeds, without first investigating their navigability or possible public trust values, was void.

Unanswered question:

Which, if any, of Arizona's rivers were in fact navigable at statehood (1912)?

If none of the rivers were navigable, then Arizona Center v. Hassell, and the public trust doctrine, are moot points.

Court in Arizona Center v. Hassell found “substantial evidence from which a factfinder might conclude” that some of the rivers were navigable, but did not actually determine that they were.

Navigability of Arizona's Rivers (as of 1912)

1992: Legislature creates Arizona Navigable Stream Adjudication Commission (ANSAC) to make navigability determinations.

- ANSAC makes preliminary determination that Salt River was navigable in 1912

1994: Legislature, unhappy with ANSAC's preliminary determination, amends legislation to make criteria so strict that no river could ever be found to be navigable

- Based on these criteria, ANSAC determined all Arizona rivers (except Colorado) to be non-navigable (as of 1912), and legislature once again disclaimed title.

Defenders of Wildlife v. Hull (2001)

- Plaintiffs alleged that (impossible) criteria in 1994 legislation were unlawful.
- Arizona Court of Appeals determined that definition of “navigable” was set forth in *The Daniel Ball* (U.S. Supreme Court, 1870):

Rivers are navigable “when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”
- Restrictive criteria in 1994 AZ legislation were inconsistent with this standard, and therefore void.

Recent ANSAC Proceedings

- After *Defenders v. Hull*, statute revised and ANSAC hearings reconvened.
- Hearings conducted in each county where watercourse runs.
- First considered small and minor watercourses

Watercourses found nonnavigable by commission:

- All small and minor watercourses in Yuma, Mohave, La Paz, Santa Cruz, Cochise, Graham, and Greenlee, counties
- San Francisco River
- Blue River
- Lower Salt River (Granite Reef Dam to the confluence of the Gila River)

Watercourses with hearings closed, but no decision yet:

- San Pedro River
- Santa Cruz River
- Small and minor watercourses of Pima County
- Small and minor watercourses of Pinal County

Watercourses with hearing still open:

- Gila River (3 out of 6 counties)

Major watercourses with hearings to be scheduled:

- Aqua Fria
- Big Sandy River
- Bill Williams River
- Burro Creek
- Hassayampa River
- Little Colorado River
- Puerco River
- Santa Maria River
- Upper Salt River
- Verde River
- Virgin River

Judicial Review:

- Either Land Commissioner or any party can challenge Commissions finding.
- Appeal unlikely re minor watercourses
- Appeal likely re Lower Salt
 - Issue on appeal “ordinary and natural condition” -- what consideration should be given to human impacts (i.e. dams, diversions and pumping)?

Gila River: Evidence of Navigability

- Gila River has been a reliable source of water for a large portion of central Arizona for more than a millennium.
- Documented uses of the river include water supply for irrigation, recreational and commercial boating, fishing and recreation.
- The river has become wider and shallower since construction of the Roosevelt and San Carlos dams in the early 1900s. Prior to the dams, the river was perennial to the confluence with the Colorado.
- Early Anglo residents floated boats, canoes, logs, rafts and ferries on the river; fluctuated with seasons but boats on the river at all times during the year.

Gila River: Evidence of Navigability (cont.)

- By statehood, an extensive series of irrigation diversions in combination with the construction of the Salt River reservoirs had largely reduced flows in the Gila downstream of the Salt River confluence.
- Since 1912, the Gila river has been characterized by a normally dry channel downstream of the San Carlos reservoir except during periods of sustained high flows.
- Gila River could have and did support some types of boating during the period prior to statehood. By 1912, the use of boats on the river had declined but was still possible in some reaches during portions of some years, especially upstream of the San Carlos reservoir.

Impact of finding of navigability

- Does public trust doctrine extend to water?
 - *San Carlos Apache Tribe v. Superior Court*
- What impact does a finding of navigability have on surface water rights?
 - Does public trust doctrine impose duty upon state to protect navigable watercourses from being depleted by diversions?
 - Does it extend to protect tributaries?
 - *Mono Lake Case*

Mono Lake Case

- 1940: state issued permits for City of Los Angeles to divert water from streams that fed Mono Lake
- Consequences of diversions:
 - shrinking lake
 - increasing salinity
 - loss of aquatic life
 - loss of migratory bird habitat
 - toxic dust storms from exposed lakebed

Mono Lake Case (cont.)

Plaintiffs:

State has duty under public trust doctrine to curtail water diversions in order to protect the commercial, ecological, and recreational values of Mono Lake.

Defendants:

Diversions, authorized by 1940 permit, are vested water rights that may not be impaired without compensation.

Mono Lake Case (cont.)

California Supreme Court:

“The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.”

Mono Lake Case (cont.)

California Supreme Court:

“Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.”

Mono Lake Case (cont.)

California Supreme Court:

“It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration. We recognize the substantial concerns voiced by Los Angeles - the city's need for water, its reliance upon the 1940 board decision, the cost both in terms of money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision. We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.”

Mono Lake Case (cont.)

Result:

- Case remanded to California Water Resources Board to review Los Angeles' diversion permits in light of public trust doctrine.
- Water Resources Board (1994) revised permits to restrict diversions so as to keep lake level high enough to maintain aquatic life, migratory bird habitat, and air quality.
- Until lake reaches desired level (estimated to take 20 years), permitted diversions are a small fraction of previous diversions.

Impact of finding of navigability

- What impact does a finding of navigability have on groundwater rights?
 - Does the doctrine impose a duty upon the state to protect navigable watercourses from the adverse effects of groundwater pumping?
 - *Center for Biological Diversity v. Smith (reprise)*



The Public Trust Doctrine and Water Rights

- *Arizona Center v. Hassell* and *Defenders v. Hull* were both concerned with title to the beds of rivers, not with water flowing in the rivers.
- ANSAC claims that its proceedings affect only land titles, not water rights.
- If public trust values (fisheries, commerce, recreation, wildlife) of rivers are to be realized, water is needed.
- Most Arizona rivers, even if navigable in 1912, are now dry much of the time because of dams and diversions.
- Does the public trust doctrine protect water as well as riverbeds?

Mono Lake Case

(National Audubon Society v. Superior Court)

California Supreme Court, 1983

Background:

- Mono Lake, east of Yosemite National Park, is a navigable salt lake, fed by non-navigable freshwater streams flowing east from the Sierra Nevada
- Public trust uses of lake:
 - unusual aquatic life
 - millions of migratory birds
 - extraordinary scenery
 - popular recreation area



Mono Lake



Mono Lake



Mono Lake

Will the Mono Lake Case Come to Arizona?

Preemptive strike by legislature (1995):

Revisions to water code included provisions declaring that

- The public trust “is not an element of a water right.”
- A court adjudicating water rights “shall not make a determination as to whether public trust values are associated with any or all of the river system or source.”

Will the Mono Lake Case Come to Arizona?

Legislature foiled again!

San Carlos Apache Tribe v. Superior Court (Arizona Supreme Court, 1999):

“The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings. . . . That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority.”

Will the Mono Lake Case Come to Arizona?

But,

- No Arizona court has yet actually applied the public trust doctrine to limit consumptive water rights.
- A logical way to apply doctrine would be for a party to file an instream flow claim in the Gila River Adjudication on behalf of the public trust.
- A logical organization to bring such a claim would be the Arizona Center for Law in the Public Interest.
- Will they do it?

