IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 3/14/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

JAIME LYNN BUTLER, a minor, by and through her guardian, JAMESCITA PESHLAKAI, and others similarly situated,	1 CA-CV 12-0347
	DEPARTMENT D
	MEMORANDUM DECISION
Plaintiff/Appellant,	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY; HENRY R. DARWIN, in his official capacity as director, Arizona Department of Environmental Quality,	
Defendants/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-010106

The Honorable Mark H. Brain, Judge

AFFIRMED

Erik Ryberg, Attorney at Law — Tucson

and

Western Environmental Law Center — Eugene, OR
By Peter M. Frost
Attorneys for Plaintiff/Appellant

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K E S S L E R, Judge

¶1 Appellant, Jaime Lynn Butler ("Butler") appeals the superior court's dismissal pursuant to Arizona Rule of Civil Procedure 12(b)(6) of her complaint seeking declaratory and injunctive relief against Arizona Governor, Janice K. Brewer, in her official capacity, the Arizona Department of Environmental Quality ("ADEQ"), and ADEQ director, Henry R. Darwin, in his official capacity (collectively "the Defendants"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

I. Butler's complaint

¶2 Butler filed a complaint for declaratory and injunctive relief on the basis of the Public Trust Doctrine ("the Doctrine") requesting the superior court to declare the: (1) atmosphere is a public trust asset; (2) Defendants have a fiduciary obligation as trustees to take affirmative action to preserve the atmosphere and other trust assets from impacts associated with climate change; and (3) Defendants' fiduciary obligation is defined by what the best available science has determined is necessary to preserve the atmospheric trust. Butler also sought an order mandating that the Defendants

institute reductions in Carbon Dioxide (CO2) emissions in Arizona of at least six percent on an annual basis, and that the superior court retain jurisdiction over the matter to ensure the Defendants comply.[1]

II. The Defendants' motion to dismiss[2]

¶3 The Defendants moved to dismiss Butler's complaint arguing that: (1) Butler lacks standing because she does not allege distinct harm; (2) Butler lacks standing under the Uniform Declaratory Judgments Act ("UDJA"), Arizona Revised Statutes ("A.R.S.") sections 12-1831 to -1846 (2003 & Supp. 2012), because she has not identified a protectable interest or that the Defendants have the power to redress her grievances and have denied her right to relief; (3) A.R.S. § 49-191 (Supp. 2012) prohibits agency action relating to greenhouse gas ("GHG") emissions; (4) Arizona's Comprehensive Air Quality Act ("CAQA"), A.R.S. §§ 49-401 to -593 (2005 & Supp. 2012), displaces common law rights; (5) the Doctrine in Arizona applies only to navigable streambeds; (6) Butler's complaint raises a non-justiciable political question and she fails to identify

[1] Butler's complaint is similar to numerous other actions currently being pursued around the nation. *See* Edgar Washburn and Alejandra Nunez, *Is the Public Trust a Viable Mechanism to Regulate Climate Change?*, 27 Nat. Resources & Env't 23, 24 (Fall 2012).

[2] Butler amended her complaint just after the Defendants filed the motion to dismiss. The amendments were non-substantive insofar as they related to the motion to dismiss.

judicially discoverable and manageable standards for resolving her claim; and (7) ADEQ is a non-jural entity.

¶4 In addition to asserting that she has standing under the UDJA and that her claim does not raise non-justiciable political questions, Butler asserted in opposition that: (1) she has suffered particularized injuries, but even generalized harms do not defeat her standing and, in any event, the court should waive standing requirements because of the importance of the issue involved; (2) A.R.S. § 49-191 does not prevent Defendants from redressing Butler's claims because the statute is limited in scope and the State cannot abdicate its public trust obligations; and (3) public trust claims are not subject to displacement because the Doctrine is an "attribute of sovereignty itself" and Arizona's CAQA complements rather than displaces the Doctrine.

¶5 At oral argument, the superior court requested that the parties present arguments regarding justiciability because the court was concerned that it lacked the authority to issue the requested relief. Butler argued that in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 187 (1999), the Arizona Supreme Court "did not consider the public trust doctrine . . . to be limited exclusively to the disposition of lands under Navajo waterways." She maintained that *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497

(2007) and *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), support her position because in those cases the Supreme Court and the Ninth Circuit Court of Appeals, respectively, considered arguments regarding an agency's responsibility to assess the effect of its actions on global warming despite the fact that climate change is largely a global issue. Butler acknowledged, however, that neither case involved the Doctrine, but instead involved Congressional directives to an agency to act when the agency had failed to do so.

¶6 Butler also acknowledged that there was no judicial precedent extending the Doctrine to the atmosphere as a public trust resource. She noted however, that the Michigan legislature had created a private right of action for degradation of the public trust, and other states have determined that the public trust applies to minerals, surface waters, wildlife, and ground water.

¶7 With respect to the State's arguments regarding displacement of the Doctrine and separation of powers, Butler maintained that the Defendants were only arguing that there was existing legislation on the topic, "not that anything is being done [about] it."

¶8 The Defendants argued that in light of existing legislation, separation of powers prevents the court from making the policy determinations necessary to resolve Butler's case.

¶9 The superior court was "completely unconvinced" by Butler's argument and "[did not] think it is [the court's] job to declare policy for the State." The court stated that Butler's remedies are with the legislature or Congress and granted the Defendants' motion to dismiss.

¶10 Butler timely filed a notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

ISSUES ON APPEAL

¶11 Butler frames the sole issue on appeal as "[w]hether the [Doctrine] in Arizona includes the atmosphere" and asks this Court to answer that question in the affirmative and remand to the superior court for further proceedings.

¶12 Mirroring their arguments in the superior court, the Defendants assert that: (1) the Doctrine does not include the atmosphere; (2) Arizona's CAQA displaces the Doctrine with respect to air quality regulation; (3) Butler lacks standing to pursue her claim and she specifically lacks standing and fails to state a claim under the UDJA; (4) the complaint raises a non-justiciable political question; and (5) ADEQ is a non-jural entity.

¶13 Because we conclude that Butler does not challenge an affirmative state action or the state's failure to undertake a duty to act as unconstitutional, and her claims cannot be redressed by the Defendants, we need not reach or separately address all of these issues. Rather, we hold that while it is up to the judiciary to determine the scope of the Doctrine, Butler's complaint fails as a matter of law because she does not point to any constitutional provision violated by state inaction on the atmosphere, does not challenge any state statute as unconstitutional and, absent the unconstitutionality of A.R.S. § 49-191, cannot obtain a remedy under the UDJA.

STANDARD OF REVIEW

¶14 We review *de novo* a dismissal of a complaint under Arizona Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We accept as true the well-pleaded facts alleged in the complaint and will affirm the dismissal only if the plaintiff "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). We will affirm the superior court if its ruling is correct for any reason. *Magma Flood Control Dist. v. Palmer*, 4 Ariz. App. 137, 140, 418 P.2d 157, 160 (1966).

¶15 We also apply a *de novo* standard of review to issues of law, *San Carlos*, 193 Ariz. at 203, ¶ 9, 972 P.2d at 187, including those involving statutory and constitutional interpretation, as well as those involving mixed questions of law and fact, *In re U.S. Currency in Amount of $26,980.00*, 193 Ariz. 427, 429, ¶ 5, 973 P.2d 1184, 1186 (App. 1998).

DISCUSSION

I. The basis of the Doctrine and separation of powers

¶16 The Doctrine is "[a]n ancient doctrine of common law [that] restricts the sovereign's ability to dispose of resources held in public trust." *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 364, 837 P.2d 158, 166 (App. 1991); *see generally* William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. Davis L. Rev. 693 (Feb. 2012) (discussing history of the Doctrine); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Envtl. L.J. 711, 713-15 (2008) (same). Although Arizona law establishes the legal framework for the Doctrine, public trust jurisprudence in Arizona remains almost as nascent as when this Court described the legal

landscape over twenty years ago.[3] *See Hassell*, 172 Ariz. at 365, 837 P.2d at 167 (stating that "as an attribute of federalism,

[3] Although there has been some debate as to whether the legal basis for the Doctrine stems from federal or state law, *see Defenders of Wildlife v. Hull*, 199 Ariz. 411, 418 n.5, ¶ 12, 18 P.3d 722, 729 n.5 (App. 2001), neither party challenges Arizona courts' previous treatment of the Doctrine as arising under and being governed by state law and both parties cite *Hassell*, as controlling precedent. United States Supreme Court precedent also supports the determination that the Doctrine arises under state law. *See PPL Mont. v. Montana*, 132 S.Ct. 1215, 1235 (2012) (stating "the public trust doctrine remains a matter of state law"); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) (stating that the conclusion reached in *Illinois Central*, a Supreme Court public trust case, was a statement of Illinois law).

Indeed, a multitude of scholarly material discusses the evolution of the Doctrine in the various states and the substantial differences of the Doctrine in each jurisdiction depending on the individual state bases for the Doctrine, including constitutional, statutory, and common law. *See generally* Richard M. Frank, *The Public Trust Doctrine: Assessing its Recent Past & Charting its Future*, 45 U.C. Davis L. Rev. 665 (Feb. 2012); Dr. Sharon Megdal et al., *The Forgotten Sector: Arizona Water Law and the Environment*, 1 Ariz. J. Envtl. L. & Pol'y 243 (Spring 2011); Jordan Browning, *Unearthing Subterranean Water Rights: The Environmental Law Foundation's Efforts to Extend California's Public Trust Doctrine*, 34 Environs Envtl. L. & Pol'y J. 231, 238-39 (Spring 2011); Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. Envtl. L.J. 412, 441 (2010); Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 113 (Winter 2010).

each state must develop its own jurisprudence for the administration of the lands it holds in public trust" and noting that "[o]ur supreme court long ago acknowledged the doctrine[,] [but] the doctrine has not yet been applied" (citing *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 39 Ariz. 65, 73, 4 P.2d 369, 372 (1931), *modified*, 39 Ariz. 367, 7 P.2d 254 (1932)); *see also San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199 (stating the Doctrine, at least as enforced through the gift clause and separation of powers, is a "constitutional limitation on legislative power to give away [public trust] resources").

For instance, some states' recognition of the public trust doctrine or its concepts are constitutionally based, such as in Hawaii, while other states have codified public trust concepts through legislation. *See generally* Robin Kundis Craig, *A Comparative Guide to Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 88 (2010); *see also generally* Frank, *The Public Trust Doctrine: Assessing its Recent Past & Charting its Future*, 45 U.C. Davis L. Rev. at 685 (citing examples of states that rely on constitutions and those that rely on legislation for the source of the Doctrine and stating that "[s]tate courts around the country have characterized the source . . . in varying ways"); Christopher Brown, *A Litigious Proposal: A Citizen's Duty to Challenge Climate Change, Lessons from Recent Federal Standing Analysis, and Possible State-Level Remedies Private Citizens Can Pursue*, 25 J. Envtl. L. & Litig. 385, 451-54 (2010); William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. Rev. 385, 438 n.244 (Dec. 1997) (citing constitutions of approximately two-thirds of the fifty states that in some way aim to protect natural resources); *id.* at 451 n.307-11 (categorizing and citing state constitutional provisions).

¶17 In *Hassell*, individuals and organizations challenged a legislative enactment that relinquished the state's interest in navigable riverbed lands in Arizona. 172 Ariz. at 359, 837 P.2d at 161. On appeal, this Court explained that the state's title to such lands existed as a result of the Constitutional reservation of the several states' watercourse sovereignty and the federal equal footing doctrine. *Id.* at 359-60, 837 P.2d at 161-62. The state's title however, "is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 364, 837 P.2d at 166 (quoting *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)); *see also* A.R.S. § 37-1101 (2003) (for purposes of public lands and state claims to streambeds, "public trust purposes" or "public trust values" are defined as commerce, navigation, and fishing).

¶18 In exploring the groundings "for an Arizona law of public trust," *Hassell* first acknowledged the seminal United States Supreme Court case, *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, from which "[w]e develop[ed] our analysis." 172 Ariz. at 366, 837 P.2d at 168. "From *Illinois Central* we derive[d] the proposition[s] that the state's

responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself. . . . [and that] the state must administer its interest in lands subject to the public trust consistently with trust purposes." *Id.*

¶19 "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." *Id.* ("Judicial review of public trust dispensations complements the concept of a public trust."); *see* Ariz. Const. art. 3. *Hassell* approvingly quoted the Idaho Supreme Court's characterization of the role of the judiciary with respect to the public trust which acknowledges that the judiciary will not substitute its judgment for that of the legislature, but recognizes the "[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary." *Id.* at 367, 837 P.2d at 169. Such a determination requires the courts to "take a 'close look' at the action to determine if it complies with the public trust doctrine." *Id.*

¶20 "The third point of reference for development of public trust jurisprudence in Arizona [was] art. IX, § 7, of the Arizona Constitution . . . known as the gift clause," *id.*, which *Hassell* determined "provide[d] an appropriate framework for

judicial review" of the state's attempt to "divest the state of a portion of its public trust," *id.* at 364, 837 P.2d at 166.

¶21 *Hassell* determined that "when a court reviews a dispensation of public trust property" two elements must be shown—"public purpose and fair consideration." *Id.* at 368, 837 P.2d at 170. Because "public trust land is not like other property . . . the state may not dispose of trust resources except for purposes consistent with the public's right of use and enjoyment of those resources, [which means that] 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." *Id.* *Hassell* ultimately held that the challenged legislative provisions were invalid under the public trust doctrine and the gift clause. *Id.* at 371, 837 P.2d at 173.

¶22 In *San Carlos*, our supreme court struck down provisions of a statutory scheme governing the adjudication of water rights. 193 Ariz. at 217, ¶¶ 62-63, 972 P.2d at 201. Specifically, the court determined that one statute was invalid because it declared that "[t]he public trust is not an element of a water right in an adjudication proceeding" and prohibited the courts from "mak[ing] a determination as to whether public trust values are associated with any or all of the river system or source." *Id.* at 215, ¶¶ 51-52, 972 P.2d at 199.

¶23 Explaining that the Doctrine "is a constitutional limitation on legislative power to give away [public trust] resources," the supreme court determined that "[t]he Legislature cannot order the courts [by statutory enactment] to make the [D]octrine inapplicable to these or any proceedings" because a determination whether the Doctrine applies to any of the claims "depends on the facts before a judge" and "[i]t is for the courts to decide whether the public trust doctrine is applicable to the facts." *Id*. at ¶ 52.

¶24 We glean three principles from *Hassell* and *San Carlos*. First, that the substance of the Doctrine, including what resources are protected by it, is from the inherent nature of Arizona's status as a sovereign state. Second, that based on separation of powers, the legislature can enact laws which might affect the resources protected by the Doctrine, but is it up the to judiciary to determine whether those laws violate the Doctrine and if there is any remedy. Third, that the constitutional dimension of the Doctrine is based on separation of powers and specific constitutional provisions which would preclude the State from violating the Doctrine, such as the gift clause.

II. Justiciability and scope of the Doctrine

¶25 Given the above principles, we reject the Defendants' argument that the determinations of what resources are included

in the Doctrine and whether the State has violated the Doctrine are non-justiciable. That argument is foreclosed by *San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199, and *Hassell*, 172 Ariz. at 367, 837 P.2d at 169. Not only is it within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the Doctrine, but the courts must also determine whether based on the facts there has been a breach of the trust. *See Hassell*, 172 Ariz. at 367, 837 P.2d at 169 ("[W]hether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary."); *see also San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199.

¶26 While public trust jurisprudence in Arizona has developed in the context of the state's interest in land under its waters, we reject Defendants' argument that such jurisprudence limits the Doctrine to water-related issues. *See Hassell*, 172 Ariz. at 364 n.11, 837 P.2d at 166 n.11 (declining to reach issue of whether the Doctrine applies to non-navigable streambeds); *see also Defenders of Wildlife v. Hull*, 199 Ariz. 411, 417-18, ¶¶ 12-13, 18 P.3d 722, 728-29 (App. 2001). The Defendants overstate the importance of the substance of the precedent discussed above, or misconstrue it, by arguing that "[i]n Arizona, the public trust doctrine applies *only* to Arizona's navigable streambeds." (Emphasis added.) Arizona

courts have never made such a pronouncement nor have the courts determined that the atmosphere, or any other particular resource, is *not* a part of the public trust. *See* Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. Envtl. L.J. 412, 441 (2010) ("Arizona courts have not issued any . . . holdings that explicitly reject the application of the public trust doctrine to the protection of a given area or interest."). The fact that the only Arizona cases directly addressing the Doctrine did so in the context of lands underlying navigable watercourses does not mean that the Doctrine in Arizona is limited to such lands. Any determination of the scope of the Doctrine depends on the facts presented in a specific case. *San Carlos,* 193 Ariz. at 215, ¶ 52, 972 P.2d at 199.[4]

[4] In *Seven Springs Ranch, Inc. v. State*, this Court decided that Arizona's comprehensive scheme for groundwater management and in particular the statutorily created definitional factors for determining basin boundaries displaced any consideration of public trust doctrine factors in determining basin boundaries. 156 Ariz. 471, 475-76, 753 P.2d 161, 165-66 (App. 1987) (agreeing with the superior court's determination that "the 1980 Arizona Groundwater Management Act specifies the factors to be considered when drawing basin and sub-basin boundaries; that such factors are exclusive in nature in that no other factors should be considered under the auspices of the Public Trust Doctrine; and that the Department of Water Resources was therefore correct in not considering any factors under [the public trust] doctrine"; and declining to permit a designation of boundaries that does not meet the statutory definitions). Thus, this Court has once determined that public trust claims can be displaced by a comprehensive statutory scheme, but it

¶27 As a consequence, our precedent does not address the measures by which a resource may be determined to be a part of the public trust or a framework for analyzing such contentions as Butler's that the public trust applies to the atmosphere with respect to GHG emissions and climate change. For purposes of our analysis, we assume without deciding that the atmosphere is a part of the public trust subject to the Doctrine.[5]

¶28 Despite the power of the judiciary to rule on the Doctrine's scope and enforcement, the problem with Butler's complaint centers on the alleged violations and request for relief as those issues relate to both UDJA standing and justiciability. Our public trust precedent involves situations in which the state has taken some affirmative action challenged under the Doctrine for which relief can be granted under the

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does not necessarily follow that in the absence of such a scheme the Doctrine is inapplicable.

That no Arizona court has had the occasion to apply the Doctrine in other contexts or to other resources such as the atmosphere, however, does not persuade us that Butler's claim is foreclosed under Arizona law or that the scope of the Doctrine is limited to navigable streambeds as the Defendants argue. *See San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199 ("It is for the courts to decide whether the public trust doctrine is applicable to the facts.").

[5] Without deciding the issue, we understand that the argument for including the atmosphere within the public trust is based on a definition of the public trust as applying to a resource for which all citizens depend and share and which cannot be divided for purposes of private ownership. *See generally* J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. Davis L. Rev. 915, 925-26 (Feb. 2012).

Arizona Constitution, specifically, the gift clause. *See Hassell*, 172 Ariz. at 359, 367-68, 837 P.2d at 161, 169-70 (involving challenge to a statute that relinquished the state's interest in navigable watercourse bedlands); *see also Defenders of Wildlife*, 199 Ariz. at 417-18, 428, ¶¶ 12-13, 67, 18 P.3d at 728-29, 739 (involving challenge to statute setting forth standards for determining whether a watercourse was navigable such that its bedlands were considered public trust lands and determining such statute was preempted because it conflicted with the federal standard for determining navigability).

¶29 Here, however, Butler's essential challenge is to state *inaction*. Although Butler mentions the repeal of the Clean Car Standards, which would have become effective had the regulations not been repealed in 2012, in her pleadings below

and on appeal, she does not assert that the repeal violates the Doctrine.[6]

¶30 Equally important, Butler does not give us any basis to determine that the State's inaction violates any specific constitutional provision on which relief can be granted. The gift clause and separation of powers provisions in the Arizona Constitution, which were constitutional underpinnings of the public trust analyses in *Hassell* and *San Carlos*, do not provide a constitutional basis for Butler's challenge here because she does not assert that the state improperly disposed of a public trust resource. *See Hassell*, 172 Ariz. at 366, 368, 837 P.2d at 168, 170 (stating that "to decide the public trust issues presented by this case, we need not weave a jurisprudence out of air" and proceeding to determine that "[t]he gift clause offers

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[6] Butler only discusses the history of the Clean Car Standards. According to her pleadings, the Clean Car Standards were developed after former Arizona Governor, Janet Napolitano, issued a 2002 executive order establishing a Climate Change Advisory Group because of "particular concerns about the impacts of climate change and climate variability on our environment." In 2006, the ADEQ issued the Climate Change Advisory Group's Climate Change Action Plan. The plan made numerous recommendations including the implementation of a Clean Car Program to reduce GHG emissions. In 2008, ADEQ promulgated new regulations requiring new emissions standards for vehicles. In 2010, Arizona Governor Jan Brewer issued an executive order that among other things created a Climate Change Oversight Group which was required to make a recommendation regarding whether the Clean Car Standards should become effective. Thereafter, Governor Brewer directed ADEQ Director Darwin to initiate rulemaking to repeal the Clean Car Standards and the regulations were repealed.

a well-established constitutional framework for judicial review of an attempted legislative transfer of a portion of the public trust"); *see also San Carlos*, 193 Ariz. at 215, ¶ 52, 972 P.2d at 199 (citing *Hassell* and stating "[t]he public trust doctrine is a constitutional limitation on legislative power to give away [public trust] resources . . . . The Legislature cannot by legislation destroy the constitutional limits on its authority").

¶31 Despite the inapplicability of the gift clause here, Butler does not point to any constitutional provision from which we may derive the public trust protections and remedy she urges. In other words, whereas in *Hassell* and *San Carlos* the Arizona Constitution provided a role for the judiciary, and the framework and authority for judicial review, there are no constitutional provisions implicated here that supply the same. Thus, even assuming without deciding that the atmosphere is part of the public trust, there is no constitutional basis upon which we can determine that state action or inaction is unconstitutional, or otherwise violates any controlling law. Here, we would be weaving "a jurisprudence out of air" to hold that the atmosphere is protected by the Doctrine and that state inaction is a breach of trust merely because it violates the Doctrine without pointing to a specific constitutional provision or other law that has been violated. The Doctrine is not

freestanding law, and in any case, such a showing is a requisite for the court to act, without which we cannot hold that state action or inaction is unlawful even if a public resource is in jeopardy.

III. UDJA Standing

¶32 Butler's complaint also suffers from a standing problem. We agree in part with the Defendants' argument, that A.R.S. § 49-191 precludes them from acting to redress Butler's grievances, and thus, Butler cannot establish standing under the UDJA. The statute precludes the Defendants from providing Butler's requested relief or otherwise acting to redress Butler's claim. Thus, Butler has not sufficiently asserted the Defendants have denied her rights to establish standing. "For a justiciable controversy to exist, a complaint must assert a legal relationship, status or right in which the party has a definite interest *and an assertion of the denial of it by the other party.*" *Land Dep't v. O'Toole*, 154 Ariz. 43, 47, 739 P.2d 1360, 1364 (App. 1987); *see also* A.R.S. § 12-1832 (2003). "A controversy is not justiciable when a defendant has no power to deny the plaintiff's asserted interests." *Yes on Prop 200 v.*

Napolitano, 215 Ariz. 458, 468, ¶ 29, 160 P.3d 1216, 1226 (App. 2007).[7]

¶33 We cannot order the Defendants to take actions in violation of a statute unless we determine the statute is unconstitutional. Butler fails to challenge the constitutionality of the statute or to identify a constitutional basis from which we may find A.R.S. § 49-191 unconstitutional. Moreover, Butler does not request that we remand nor will we remand this case so Butler may amend her complaint to make such a challenge. The Defendants argued A.R.S. § 49-191 below and Butler did not seek to amend her complaint to assert such a claim, though she could have.

¶34 Because we determine that relief cannot be granted, Butler is essentially requesting us to issue an advisory opinion which we will not do. *See Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App. 1991) ("Courts will not hear cases that seek declaratory judgments that are advisory or answer moot or abstract questions.").

[7] While Butler argues the Governor is not a state agency or department subject to section 49-191, that argument is not persuasive. Butler would have the Governor direct ADEQ to violate section 49-191, a power which the Governor does not possess as long as the statute is not stricken as unconstitutional.

IV. Attorneys' Fees

¶35 Butler requests her attorneys' fees under the private attorney general doctrine. The private attorney general doctrine has been defined as "an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance." *Hassell*, 172 Ariz. at 371, 837 P.2d at 173 (quoting *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989)). Given our holding today, we will not award attorneys' fees under the private attorney general doctrine.

CONCLUSION

¶36 For the reasons stated above, we affirm the superior court's dismissal of Butler's complaint.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
JON W. THOMPSON, Judge

G E M M I L L, Presiding Judge, concurring:

¶37 I concur with the result reached in the majority decision and the majority's explanation of the reasons why this

action was properly dismissed. I write separately to state my conclusion that the atmosphere is not subject to the public trust doctrine recognized in *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991). The State does not hold title to the atmosphere in the same sense that the State owns the riverbeds of Arizona watercourses that were navigable when Arizona was admitted to the Union. *See id.* at 356, 366, 837 P.2d at 161, 168. Additionally, I agree with the trial court that the relief sought in this action is more properly addressed to the legislative and executive branches of our government rather than the judicial branch.

/S/
JOHN C. GEMMILL, Presiding Judge