The Arizona Center for Law in the Public Interest
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THE CENTERLINE

The Center Succeeds in Stopping the Legislature's Unlawful Fund Sweeps

This fall we saw two victories in litigation brought by the Center to challenge unlawful fund sweeps by the legislature.

The first victory was in *Paisley v. Darwin,* where the Center challenged the legislature's decision to stop using lottery proceeds to fund transit, and redirect that money to the general fund. On September 2, 2011, the same day that he heard oral argument on the parties' Motions for Summary Judgment, Judge David Campbell issued an order ruling in favor of the Center and declaring the legislature's action a violation of federal law.

This case started back in early 2010 when the Arizona legislature decided that in these tough economic times clean air was something the state simply could not afford, so it repealed a 1993 statute directing a significant percentage of lottery proceeds to expand and support public transit. The 1993 statute, which directed lottery funds to a "Local Transportation Assistance Fund" ("LTAF") was adopted in response to the 1990 Clean Air Act Amendments and was included in the state's implementation plan ("SIP") for Maricopa County as a control measure that would reduce carbon monoxide, ozone and particulate matter. Once EPA approved that SIP, the funding commitment became federally enforceable by citizen suit under the Clean Air Act. Therefore, shortly after the legislature stripped the funding, the Center sent the state a required 60-day notice stating that the repeal of the LTAF violated Arizona's SIP and demanding that the state restore the transit funding at least for Maricopa County. When Governor Brewer and the Arizona Department of Environmental Quality refused to act, the Center filed a lawsuit in federal court.

Although the case took some time to work its way through the judicial system, in early September 2011, the district court ruled that federal law preempted state law and the legislature was prohibited from sweeping the funds earmarked for Maricopa County. A few weeks later, the court entered a permanent injunction ordering the state to restore the funding. The ruling means that approximately $10 million in lottery income will be restored annually to the Maricopa County transit authority.

The second case also involved a sweep of about $10 million dollars. This time it was state trust land sales proceeds that were unlawfully appropriated by the legislature to fund the State Land Department. It started in 2009. when the legislature enacted a law that allowed the Arizona State Land Commissioner to divert up to 10% of state trust land proceeds each year to fund the Department.

The Center challenged the new statute in *Rumery v. Baier,* and last fall, the trial court ruled that the use of trust sale proceeds to cover administrative costs violated the unambiguous provisions of the Arizona Constitution. The Commissioner appealed the lower court's decision, but this month, the Arizona Court of Appeals affirmed. On November 10, 2011, the Court of Appeals held that the Arizona Constitution prohibits the state from using state trust land proceeds to fund the State Land Department. The court held that under the Arizona Constitution, those funds are supposed to be deposited into accounts for the benefit of the beneficiaries of state trust lands, principally Arizona's public schools. The Commissioner has not yet indicated whether she will seek review by Arizona Supreme Court

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COURT HEARS APPEAL ON AHCCCS CUTS

On October 19, the Arizona Court of Appeals heard arguments in a special action filed by the Center regarding the state's decision to ignore a citizen initiative and deny health care benefits to eligible individuals.

The petition for special action was filed by the Center, the William E. Morris Institute for Justice and the Arizona Center for Disability Law from the decision of Maricopa County Superior Court Judge Mark Brain on August 10, 2011. Judge Brain ruled that the requirements in Proposition 204 enacted by Arizona voters in 2000 extending health care benefits to all individuals below 100% of the federal poverty level and requiring the legislature to appropriate supplemental funds was merely wishful thinking on the part of Arizona voters. Judge Brain determined that because the Proposition itself did not appropriate funds, Arizona voters could not require the legislature to appropriate the necessary funds to support expanded health care benefits from the Arizona Health Care Cost Containment System ("AHCCCS").

The language of Proposition 204 became the topic of substantial discussion at the argument in front of the Court of Appeals. The Proposition provides that "to ensure that sufficient monies are available to provide benefits to all persons who are eligible" funding would come from the Arizona Tobacco Litigation Settlement Fund and "shall be supplemented, as necessary, by any other available sources including legislative appropriations and federal monies." The state and AHCCCS argue that use of the word "available" means that it is entirely within the legislature's discretion to determine whether it would provide supplemental funding to support the entire low income population. In this case, AHCCCS determined that because of the legislature's funding reductions that it would stop enrolling adults without dependent children.

The Center argued that couldn't be a reasonable interpretation of the provision because the initiative also expressly prohibited the executive and legislative branches of government from establishing a cap on the number of eligible persons who could enroll in the AHCCCS system. Additionally, if it was up to the legislature to determine whether funding would be provided, then the funding provision of the initiative would not "ensure" much of anything. In effect, if the state and AHCCCS's interpretation of the initiative language was correct, the initiative and its requirement to provide health care to low income people would be meaningless. The Court is expected to issue a decision in the near future.

COMMISSION GRANTS REHEARING ON WASTE INCINERATOR

About a year ago, Mohave Electric Cooperative, a utility serving northwestern Arizona, filed an application with the Arizona Corporation Commission for approval of a waste-to-energy facility as a pilot program under the Commission's renewable energy rules. The renewable energy rules require Arizona utilities to secure a certain percentage of their sales from renewable energy resources like solar, wind and geothermal. Instead of doing that, Mohave wants the Commission's approval to deviate from the rule and substitute energy from a facility that would burn garbage to produce electricity.

The Center intervened in the proceeding on behalf of the Sierra Club-Grand Canyon Chapter. We opposed Mohave's application because a determination by the Commission that garbage incineration qualifies as "renewable energy" would undermine the Commission's renewable energy rules. At the time those rules were passed in 2007, the Commission explicitly decided to exclude garbage incineration as a renewable energy resource. It was a hotly debated issue with opponents of garbage incineration contending that because typical municipal waste includes petroleum based products and hazardous material, its incineration should not be included with other clean renewable energy resources like solar, wind and geothermal. The Commission's rules do recognize biomass as a renewable energy resource but only because the definition is limited to non-petroleum based biogenic material like wood and plant matter. As a result, the Commission determined that garbage incineration would not be included in the definition of a renewable energy resource.

That didn't stop Mohave from filing an application to have a proposed waste incinerator designated as renewable energy. The designation is important because without it, the proposed facility would not be economically viable. Mohave is working with a company called Reclamation Power Group who proposes to build a 12 megawatt facility near Surprise, Arizona. The facility would likely burn municipal waste from the city of Glendale and would require approximately 500 tons of garbage per day. Burning 500 tons of garbage every day is not going to help the Valley's air quality. Nor is it going to help promote recycling programs.

When the matter was considered at the Commission's open meeting in July, we requested an evidentiary hearing. The Commission gave us one on less than 24 hours notice which made it impossible to produce the evidence necessary to oppose the application. Even with the abbreviated evidentiary hearing granted by the Commission, we were prohibited from examining any witness for more than ten minutes.

On July 25, the Commission approved the company's application by a 3 – 2 vote and we filed an application for rehearing based upon the irregularities in the initial hearing conducted by the Commission. In August, the Commission granted our application for rehearing and has scheduled a week long hearing to consider the application beginning November 28, 2011. If the Commission determines that burning garbage qualifies as renewable energy, then it's kind of hard to imagine what wouldn't qualify.

THANK YOU

The Center would like to thank **LEXIS-NEXIS** for its continuing grant of computerized legal research services.

Center to Appeal Grazing Lease Decision

Ten years after securing the right of environmental organizations to file applications for grazing leases, the Arizona State Land Department is still protecting ranchers from competition even though the State School Land Trust could benefit from the additional revenues that healthy competition for grazing leases could produce. There are over 8 million acres of state trust land in Arizona under grazing leases; yet, those leases produce only $2.5 million annually for the Trust.

In 2006, Wildearth Guardians, an environmental group based in New Mexico whose mission is protection of wild places and riparian areas, applied for a grazing lease near Springerville, Arizona. The lease covers about 6,000 acres and is rated for 87 cattle by the Land Department. That means that at an annual monthly rental rate of $2.40 per head of cattle, the lease was costing the rancher about $200 a month. In the application Wildearth Guardians submitted to the Land Department, it indicated it would pay about four times the minimum amount that was being paid by the rancher.

The Commissioner initially decided to receive sealed bids and Wildearth Guardians and the rancher each submitted one. However, before the Commissioner could open the bids, the rancher appealed his decision to even request them. After a three day hearing, an administrative law judge ("ALJ") recommended that the Commissioner reverse his decision to require bids and suggested he simply award the lease to the rancher at the minimum rate. The decision was based almost exclusively on the testimony of Land Department staff who claimed that the rancher would be a superior leasee. Inexplicably, the Land Commissioner agreed with the ALJ and awarded the lease to the rancher at the minimum rate without ever opening the submitted bids.

The Center challenged the Commissioner's decision in Maricopa County Superior Court and argued that the Commissioner had violated the Enabling Act, a federal law creating the land trust when Arizona was admitted to the Union in 1912, and the Arizona Constitution. Both require that no state trust land can be sold or leased "except to the highest and best bidder " We argued that the Commissioner had violated this requirement by failing to consider, much less open, the sealed bids that had been submitted. We further argued that it was irresponsible of the Commissioner as trustee to settle for the minimum rental rate when it was obvious that it could obtain greater revenue from either Wildearth Guardians or the rancher for the leased property.

Maricopa County Superior Court Judge John Ditsworth rejected our appeal in a terse decision issued on October 17, 2011. Judge Ditsworth affirmed the decision of the Land Commissioner to forego additional income for the trust because Wildearth Guardians had failed to provide "substantial evidence to the court to demonstrate that the decision" was arbitrary, capricious or an abuse of discretion. That constitutes the Judge's entire discussion of our argument that the Enabling Act and the Arizona Constitution had been violated. We will appeal from this decision to the Arizona Court of Appeals. The right to apply for a grazing lease that we established through a Supreme Court decision in 2001 doesn't mean much if offers to pay additional rent and benefit the school trust are simply ignored by the Land Department.

Center Files Amicus Brief in Redistricting Case

On November 10, 2011, the Center filed an Amicus Brief in the special action brought in the Arizona Supreme Court to challenge the removal of the Chair of the Independent Redistricting Commission by the Governor. The Center's Amicus Brief was filed on behalf of Ann Eschinger, Dennis Michael Burke and Bart Turner, the co-chairs of the drafting committee for Proposition 106, the proposition that established the Independent Redistricting Commission. The proponents of Proposition 106 believed that an independent commission would remove partisanship and politics from the redistricting process as much as possible.

(Continued on page 5)

Voucher Redux

Just two years after the Arizona Supreme Court struck down as unconstitutional the voucher program in *Cain v. Horne*, the Arizona legislature did it again: enacted an unconstitutional voucher program supposedly tailored to help disabled children, but really intended to ultimately lead to the defunding of public schools.

In September, the Center along with co-counsel Peters & LaSota, filed an action challenging this unlawful use of public funds. The case, Niehaus v. Huppenthal, asserts that this latest legislation violates Article 9, Section 10, of the Arizona Constitution, which has been referred to by the courts as the Aid Clause. In *Cain v. Horne,* the Arizona Supreme Court ruled that the earlier voucher statutes violated the Aid Clause because they authorized the indirect transfer of public funds to private schools. Senate Bill 1553 does the same thing. The enactment authorizes scholarships only for pupils who attend private schools. The enactment permits the scholarship funds to be used for some purposes other than paying tuition at the pupil's private school. Payment of tuition is inevitably what the scholarship funds would primarily be used for. Senate Bill 1553 is therefore invalid in light of the decision in *Cain v. Horne.*

The lawsuit also asserts that Senate Bill 1553 violates Article 2, Section 12, of the Arizona Constitution. That provision prohibits public money from being appropriated for or applied to any religious instruction. Because the scholarship funds may be used to pay tuition at religious schools and those schools do not need not alter their practices to receive the funds, the money will be both appropriated for and applied to religious instruction in violation of the Arizona Constitution. Plaintiffs have moved for a preliminary injunction, and a hearing on their Motion has been set for November 28, 2011 before Judge Maria del Mar Verdin.

Redistricting Amicus cont.

(Continued from page 4)

The initiative allowed for removal of a commissioner by the governor with the concurrence of two-thirds of the Arizona Senate. However, the drafters of Proposition 106, intended that removal could only be accomplished for serious offenses like bribery or extortion. Instead, the Governor removed the Chair based on her view that the draft maps produced by the Commission were "unconstitutional" and that the Chair had violated Arizona's open meeting law. These aren't the kinds of offenses the drafters had in mind that could be used as a basis for removal.

The Supreme Court heard arguments on November 17, 2011 and issued an order reinstating the chair later that same day with an opinion to follow.

Tucson Event to Honor Toni M. Massaro and Nina Rubin a Great Success

Thanks to all of the Center supporters who came out to our Tucson event held October 9, 2011 in the home of Stanley and Norma Feldman. The evening was a terrific success! It was one of those gorgeous fall nights Tucson is known for, and the setting couldn't have been more lovely. The Center was able to recognize two wonderful lawyers and community leaders for the important work they are doing and reconnect with our Tucson friends.

Toni Massaro was honored for the tremendous work she has done for both the legal and nonlegal community as a respected emissary for the legal profession. In accepting her award, she reminded all of us how truly inspiring she can be. Nina Rabin was honored for her work with the College of Law immigration clinic and the Bacon Immigration Law and Policy Program. Nina's work on behalf of immigrant women and their children has brought to the forefront the challenges and hardships our current immigration policy imposes on innocent victims.

The evening was such a success, we are hoping to make this an annual event!

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