

# The Centerline

## CENTER TO SUE OVER LEGISLATURE'S RAID ON STATE TRUST LAND FUNDS

**O**n August 21, 2009, Governor Brewer signed into law House Bill 2014. Among other things, the legislation takes approximately \$10 million from the sale of state trust lands and gives it to the Arizona State Land Department for the purpose of managing state trust lands. This reverses almost 100 years of state history in which the Legislature believed, correctly, that it could not divert state trust land proceeds for any purpose. Ordinarily, sales from state trust lands would be deposited into the Permanent State School Fund. It is the income from the Permanent State School Fund that helps support the Classroom Site Fund and educate Arizona's public school students.

The legislation allows the State Land Commissioner to designate up to 10% of state trust land proceeds each year to pay for the State Land Department to manage state trust lands. Up until now, such

funds were appropriated by the legislature from the state's general fund. Now, in order to help reduce the state's budget deficit, the Legislature has decided to take it out of the classroom instead.

On October 27, 2009, the Center sent a letter to Attorney General Terry Goddard requesting that he institute an action under Arizona law to enjoin the illegal payment of public monies that HB 2014 requires. In our letter to the Attorney General, we identified several reasons why the transfer of funds is unconstitutional. First, HB 2014 diverts funds from the Permanent State School Fund in violation of Arizona constitutional provisions that prohibit the Legislature from diverting funds that are allocated to a specific purpose by an initiative or referendum measure. In 2002, Arizona voters approved Proposition 300 which reenacted and amended the statutory provisions regarding the Permanent State School Fund and requires that earnings above the 2000-2001

level were to be deposited into the Classroom Site Fund.

Second, HB 2014 violates the Enabling Act, the federal law that provided for Arizona's admission into the Union. The Enabling Act expressly provides that all proceeds generated from state trust lands shall be directly provided to the beneficiaries of those lands. No other use of those funds is permitted by the Enabling Act.

Finally, the legislation violates several provisions of the Arizona Constitution which provide that no money shall ever be taken from a permanent fund for any object other than that for which the land producing the fund was granted.

Under Arizona law, the Center must wait to file a lawsuit until the Attorney General either declines to take action or 60 days from the date of our letter, whichever occurs sooner. The Center is working closely with the Arizona

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## *Center to Sue EPA To Take Action on the Phoenix Area 5% Plan*

Once again the United States Environmental Protection Agency (EPA) has failed to meet a mandatory deadline to take action on the Phoenix air quality plan for PM-10 (particles of 10 micrometers or less) and the Center will, once again, be suing to enforce it. In 1996, the Phoenix area was classified as a serious PM-10 nonattainment area under the Clean Air Act and was required to develop a nonattainment plan that provided for expeditious attainment of the national standards. Since that time, Arizona has made several plan submittals and adopted various control measures but continues to violate the standard

The first serious area PM-10 plan was submitted on July 8, 1999. In November 1999, EPA notified the state that additional work needed to be done in order for EPA to approve it. Consequently, in February, 2000, the state submitted a revised Serious Area PM-10 plan. In April 2000, EPA proposed to approve the plan for one of the two PM-10 standards, the annual standard, but took no action on the 24 hour standard. Conse-

quently, in May 2001, the Center filed a citizen suit in U.S. District Court to compel EPA to take action.

The parties entered into a Consent Decree requiring EPA to take action on the 24 hour standard on or before September 14, 2001, and to approve or disapprove the entire plan by January 14, 2002.

On July 25, 2002, EPA published its final approval of the Serious Area Plan. The approval also granted the Phoenix area the maximum five year extension of the attainment deadline, giving the area until December 31, 2006 to come into compliance with the national air quality standards for PM-10. However, EPA had approved the plan without requiring the area to adopt the “most stringent measures” included in other plans elsewhere in the country, an express condition of any extension of the attainment deadline.

Because the approved plan did not include the control measure of low emission or “CARB” diesel—a control

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## Governor's Proposal Falls Short

In early January 2009, the Court Monitor in *Arnold v. ADHS* submitted her 2008 Independent Review, which documented a pattern of noncompliance with court-ordered treatment standards for the seriously mentally ill. The Governor, Arizona Department of Health Services and the Center advised the Court that they had agreed to immediately develop a process for "finding solutions to the issues raised in the Review." As a result, despite noting its "serious concern and frustration," the Court continued the status conference until May 18, 2009 in order to afford the State additional time to report on their activities.

At the May court hearing, the Governor's attorney explained that over the summer the Governor would create a task force that included various legislative and local leaders to come up with a consensus on what needed to be done to improve the system. Based upon these

assurances, the Court agreed to the Governor's request for a further extension to develop solutions to the behavioral health crisis in Maricopa County.

Yet, even with the extension, no task force was ever appointed. As a result, class members are in exactly the same precarious position they were ten months ago when the Monitor conducted her 2008 Independent Review.

In September, the Governor asked for a further extension to respond to the Court's nine month old directive. The Court granted the extension but instructed the Governor to submit a substantive proposal – not merely a description of a process or the creation of a task force – that described in reasonable detail the structural reforms that the Governor believes are necessary to facilitate prompt compliance with the Court's existing orders and with current

Arizona law for persons with serious mental illness.

On October 20, 2009, the Governor finally submitted her proposal to change the behavioral health system. Unfortunately, it is completely inadequate. Specifically, the Governor has proposed moving the funding and responsibility for mental health services for Medicaid eligible individuals who are **not** members of the class in *Arnold* to the AHCCCS Health Plans.

With respect to class members, the Governor has suggested that the state create a pilot for a small number of class members by contracting with one entity to provide both mental health and physical health services to class members who are Medicaid eligible.

The Center has advised the Governor's staff that the proposal is entirely inadequate and will be advising the Court accordingly.

## 5% Plan Suit continued...

*(Continued from page 2)*

measure included in California's plan—the Center filed a Petition for Review of the Serious Area Plan with the Ninth Circuit Court of Appeals. In ruling on that Petition, the Ninth Circuit held that EPA's approval of the Serious Area Plan was arbitrary and capricious and remanded the action to the EPA for further consideration of whether Arizona's decision to reject CARB diesel as an emissions control measure complied with the requirements of the Clean Air Act.

In June 2005, EPA proposed to reapprove the plan, still without the CARB diesel, and finalized the reapproval in July 2006. Once again, we petitioned for review; however, that action was resolved through a voluntary remand when it became apparent that the area would not be able to meet the extended attainment deadline of December 31, 2006. In March 2007, EPA filed a proposed finding of nonattainment and the final notice of nonattainment was published in June, 2007.

This failure to meet the extended deadline meant that the state was now required to submit a revised plan that showed a reduction in PM-

10 or PM-10 precursor emissions of not less than 5 percent each year until attainment. Arizona had until December 2007 to submit its 5% plan to EPA. The state submitted a plan by that date and EPA then had until June 30, 2009 to approve or disapprove the submitted plan. Unfortunately, EPA has not yet taken any action on the plan. This is largely because the area continues to violate the standard, and the plan was premised on the area having "clean" data (no violations) beginning in 2008.

Because EPA has taken no action on the 5% plan, in early August the Center sent a 60 day notice of intent to sue. Those 60 days have now expired and we will be filing an action in federal district court. The main purpose of the suit is to keep the pressure on both EPA and the state to aggressively address the continuing violations. If the plan is not approvable in its current form, EPA should disapprove it and start the sanctions clock. Historically, it has taken the threat of sanctions to get the state to seriously address the air quality problems in the Phoenix area. Given the current political climate, it appears that the threat of sanctions is needed again.

## State Lands cont...

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Education Association and is representing Rae Ann Rumery and John Skarhus, Arizona teachers and taxpayers. If the Attorney General declines to take action, the Center will file the appropriate lawsuit in state court to not only stop any future raids on state trust land proceeds but recover any amounts that have already been illegally taken.

### **THANK YOU**

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

## SRP continued...

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energy programs for schools that are tied to specific goals that allow school districts to take advantage of those programs with little or no up-front costs.

We are committed to working with SRP management to help develop a more responsible pricing proposal for submission to the Board in late December.

# ***SRP TO SUBMIT REVISED PRICING PROPOSAL***

In July, Salt River Project (“SRP”), notified its customers that it planned to increase electric rates for residential customers by over 10% effective with the November billing cycle. The Center immediately intervened in the pricing proceeding and began to submit questions and requests for documents to SRP relating to the proposed rate increase.

Based on information received by the Center, it appeared that over half of the \$215 million rate increase was to pay for the construction and operation of Springerville Unit 4, a new coal fired generating unit at the Springerville Power Plant in northeastern Arizona that cost over \$1 billion to build. The Center asserted that the power represented by the new coal plant was unneeded by SRP customers and therefore represented excess capacity. Additionally, we questioned the wisdom of going forward with a coal fire generation plant at a time when it was obvious that there would be carbon regulation.

At the same time, it was obvious that SRP had not done nearly enough to reduce its

operating costs and cut its budget just as everybody else is being required to do in these difficult economic times. Most importantly, the Center pointed out that SRP should carefully evaluate reducing the \$48 million that it had planned to provide by way of a subsidy to the cost of storing and delivering water to the Salt River Valley Water User’s Association. SRP’s water customers currently pay prices below the cost of actually storing and delivering the water and should be expected to share the burden of increased costs just as much, if not more, than SRP’s electric customers.

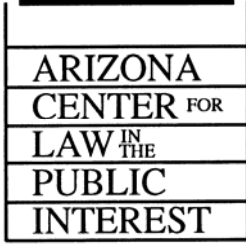
In the face of increasing pressure from its customers, SRP announced in early September that it would be withdrawing its pricing proposal and submitting a revised proposal in late December. The Center applauded SRP’s decision to postpone the pricing proceeding and provide SRP’s management with sufficient time to conduct a complete reevaluation of the proposal. The Center emphasized that SRP should be focusing on costs reductions in all areas that are not directly

related to providing reliable electric service to customers.

The Center specifically identified SRP’s advertising, lobbying, sponsorships, charitable contributions and salaries as areas that needed closer scrutiny. We also pointed out that it was more important than ever for SRP to make programs available to customers that would help them mitigate the impact of any rate increase. That means making enhanced energy efficiency programs available on a broad basis to SRP customers allowing SRP customers to manage their energy consumption more efficiently and reduce operating costs for SRP.

We also proposed that SRP establish a program for Arizona’s public schools to give them more and better tools to cope with increases in their utility costs. As the Arizona Legislature continues to cut education funding, it is more critical than ever that Arizona’s public schools lower their utility costs so they can put those savings into the classroom. Such a program for SRP should establish energy efficiency and renewable

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