

COURT OF APPEALS REVERSES ANSAC'S LOWER SALT RIVER DECISION

On April 27, 2010, the Arizona Court of Appeals ruled that the Arizona Navigable Streambed Adjudication Commission (ANSAC) used the wrong legal standard when it determined that the Lower Salt River was not navigable at the time Arizona became a state. Whether or not the river was “navigable” at the time of statehood determines who owns the riverbed. If the river was “navigable”—that is, susceptible to use for trade and travel in its “ordinary and natural condition”—then the river and the land beneath it belong to the state to be held in trust for all of the citizens of Arizona.

In the proceedings before the ANSAC, both the State Land Commissioner and the Center had urged a finding of navigability for the Lower Salt River. The ANSAC, however, decided otherwise. The principal issue on appeal was what consideration should be given to human impacts (i.e. dams, diversions and pumping) when determining the “ordinary and natural condition” of a river at the time of statehood. In its opinion, the Court of Appeals agreed with the Appellants that the ANSAC cannot base its decision on the river’s

actual condition in 1912, but must attempt to determine what the river would have been like in its “natural” condition if there had not been all of the man-made diversions of water. The Court declined to hold outright that the river was navigable, and instead remanded to ANSAC to reconsider its decision using the proper standard.

This important victory is just the latest chapter in the Center’s long battle to protect Arizona’s rivers. The controversy began in the 1980’s when the state first asserted its trust interest in river and streambeds. The problem then, as now, is that a number of corporate interests like sand and gravel companies have been tearing up property in and along rivers and streams throughout the state with no claim to the title of those lands.

The Legislature, anxious to bestow title to these lands on their corporate friends, enacted legislation disclaiming any interest on the part of the state in lands that were already occupied and providing for the sale of all remaining river and stream lands at \$25 an acre. The Center sued the state to invalidate the giveaway asserting that under the public trust doctrine, Arizona acquired title to

all property underlying rivers and streams that were navigable at the time Arizona was admitted to the Union in 1912. Since Arizona had a trust interest in the riverbeds, the Center argued that it was a violation of the constitutional ban on gifts of public property to private interests for the Legislature to give those lands away.

In 1991, the Arizona Court of Appeals issued its first decision agreeing with the Center and invalidating the 1987 legislation, *Arizona Center for Law in the Public Interest v. Hassell*. The *Hassell* decision confirmed that Arizona held title to all navigable streambeds in public trust for its citizens’ enjoyment and recreation. Any disposition of those lands could only be made if consistent with trust purposes.

In response to the *Hassell* decision, the Legislature enacted a new law in 1992 that established the ANSAC. Former Governor Symington made the initial appointments to the Commission and the Commission set about doing its work of making navigability determinations. Of course, it was Governor Symington’s and the Legislature’s fondest hope that the Commission would determine that all of Arizona’s rivers and streams were nonnavigable and therefore capable of being

(Continued on page 2)

Arizona Center for Law in the Public Interest

202 East McDowell Road
Suite 153
Phoenix, Arizona 85004
(602) 258-8850
FAX (602) 258-8757

2205 East Speedway Blvd.
Tucson, Arizona 85719
(520) 529-1798
FAX (520) 529-2927
www.aclpi.org

Phoenix Staff

Timothy M. Hogan
Executive Director

Anne Ronan
Staff Attorney

Tucson Staff

Joy E. Herr-Cardillo
Staff Attorney

Board of Directors

Bruce Samuels, *President*
Michelle Johnson, *President-Elect*
Sue McAleavey, *Secretary*
Eugene M. Kadish, *Treasurer*
Daniel J. Adelman
Robert Bartels
Dustin M. Brazeal
Michael J. Brown
Garry Bryant
Roopali Hardin Desai
Stanley G. Feldman
Dorothy Garcia
Peter Kozinets
John Lewis
Enrique A. Lopezlira
Linda C. McNulty
Shefali Milczarek-Desai
Joel W. Nomkin
David J. Ouimette
Dennis Shields
Sharon B. Shively
Kristina L. Sitton
Cornelius Steelink
Lee Stein
Geoffrey M. T. Sturr
Barry A. Willits

The Centerline is a quarterly newsletter published by the Arizona Center for Law in the Public Interest.

ANSAC cont...

given away to private interests. However, the Commission actually decided it was going to follow the law and, in 1993, made preliminary findings that the Salt River was navigable at the time of statehood and therefore subject to the public trust. That's not exactly what the Legislature had in mind so in a matter of months it passed new legislation that made the Commission an advisory body and provided that the Legislature itself would make all navigability determinations. Additionally, the 1994 legislation established burdens of proof, exclusions of evidence and presumptions against navigability that made it virtually impossible for the Commission to recommend that any river or stream was navigable.

In response to that legislation, the Center sued the state once again in 1998. In the 2001 decision *Defenders of Wildlife v. Hull*, the Arizona Court of Appeals held that the Arizona Legislature's narrow definition of "navigability" was a "de facto" give away of the riverbeds and, thus, a violation of both Arizona's gift clause and the public trust doctrine. As a result of that decision, the 2001 Arizona Legislature adopted new legislation that reconstituted ANSAC, gave the commission final authority to determine navigability of rivers (as of 1912), subject to judicial review, and adopted the federal definition of navigability: whether the river was used or was susceptible to being used,

in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

Consequently, in late 2001, ANSAC reconvened and began re-holding the navigability hearings for Arizona's many watercourses. By January 2006, ANSAC completed all of the hearings and, as of May 2006, found ALL of rivers in Arizona nonnavigable, despite historical and modern accounts of boating on several major rivers. In sending the issue back to the ANSAC, the Court addressed what should be the test for the river's "natural" condition: "The obvious answer is that it was in its natural condition before the Hohokam people arrived many centuries ago and developed canals and other diversions." However, because there is little evidence from that period, the Court said the next best period to satisfy the test would be the 1800s, before farming began in the Valley, after the Hohokam diversions disappeared and the river returned to its natural state.

Although the Lower Salt River was the first adjudication appealed, the ruling will impact other major watercourse adjudications as well. Those actions, involving the Verde, Gila, Santa Cruz, San Pedro, and Upper Salt rivers, have all been stayed pending resolution of the Lower Salt. The ANSAC, Salt River Project, and the other Appellees have filed Petitions for Review with the Supreme Court.

CENTER SUPPORTS CHALLENGE TO EDUCATION BUDGET

On June 15, education groups, school districts and individuals filed a lawsuit in the Arizona Supreme Court challenging the Legislature's failure to provide the funding to K-12 public schools in Arizona as required by a measure enacted by Arizona voters ten years ago. The measure, known as Proposition 301, requires the Legislature to annually adjust K-12 funding in Arizona to keep pace with inflation.

The Legislature did not make an adjustment for inflation to the base support level for public education for the fiscal year 2011 budget as required by Proposition 301. Instead, the Legislature applied an inflationary adjustment

to only one extremely small component of the school funding formula - student transportation route miles. In an effort to address the state's budget problems, the Legislature gave Proposition 301 a hyper technical reading that it claims allows it to pick and choose which component of school funding it must adjust for inflation. Naturally, the Legislature chose the smallest component it could find.

This is the first time in the ten years since the passage of Proposition 301 that the Legislature has taken such a position. The intent of the voters, the legislative history and the whole meaning of the law make it clear that the Legislature cannot pick

and choose but must adjust the base level funding and the other components for K-12 funding. The difference is significant. In 2011, the Legislature's new interpretation of the law means an adjustment of less than \$5 million. If the adjustment had been calculated as previously interpreted by the Legislature, and intended by the voters, the inflation adjustment would have been \$61 million.

The Arizona Supreme Court will decide whether to accept jurisdiction in the case on September 21. The Plaintiffs in the case are represented by Don Peters at the law firm of LaSota & Peters PLC, who are lead counsel. The Center is acting as co-counsel for the Plaintiffs in the case.

CENTER SUES TO RESTORE TRANSIT FUNDING

In June, the Center filed a lawsuit challenging the state legislature's sweep of lottery funding that was designated for local transportation assistance. Because the funding has long been part of the state's commitment to implement and fund transportation control measures under the Clean Air Act, the legislature did not have the authority to divert the funding.

In March, the Arizona legislature passed a budget bill that repealed the statute that directed a significant percentage of lottery proceeds to the Local Transit Assistance Fund (LTAF). The statute

directing the use of lottery funds to expand transit was passed by the legislature in 1993 during a special session to address the Clean Air Act Amendments of 1990. It was subsequently included in the state's implementation plan (SIP) for carbon monoxide and later the ozone and particulate matter SIPs. Once those SIPs were approved by EPA, the measures in them become federally enforceable by citizen suit under the Act.

In April, the Center sent the required 60 day notice to the state advising the Governor and the Arizona Department of Environmental

Quality that the diversion of funds violated the SIP and it intended to sue to enforce the SIP commitment unless the funding was restored. The state refused to act, so when the 60 notice period expired, the Center brought suit. The action, *Paisley v. Brewer*, was filed on June 15 in federal district court.

The state's failure to comply with the SIP not only subjects it to suit, but also jeopardizes EPA approval of its pending submissions, including the 5% plan. Disapproval of that plan, which appears underway, could lead to sanctions including loss of highway funds.

Another Successful Annual Event, this year at the Phoenix Art Museum

The Center's annual dinner, held May 1, 2010 at the Phoenix Art Museum, was, once again, a great success. From a fundraising perspective, it was our most successful event yet. But it was also a special night because we were able to honor the many contributions of Paul Bender. This year, in addition to the silent and live auctions, guests were entertained by music from Night Groove and a lively performance by Epik Dance Company. The event was catered by Arizona Taste. We were also fortunate to have many generous sponsors who helped underwrite the cost of the event. We would like to express our thanks to all of them again.

SILVER SPONSORS

Perkins Coie Brown & Bain Treon & Shook, PLLC

COPPER SPONSOR

Expert Insights

TURQUOISE SPONSORS

Adelman German
American Solar Electric,
Inc.

Arizona Education
Association

Arizona School Boards
Association

Augspurger Komm
Engineering, Inc.
Bank 1440

Gary Bryant and
Margy McGonagill

Jose and Frances Burruel
Canyon State Reporting
Coash & Coash, Inc.

Coppersmith Schermer &
Brockelman PLC
Debus, Kazan &
Westerhausen, Ltd

Friends from Lewis & Roca
Dorothy and Robert Garcia
Inertia Technology
Services, Inc.

Linda and Michael McNulty
Osborn Maledon
Sacks Tierney P.A.
Sandra Day O'Connor
College of Law
Steptoe & Johnson LLP
Michael and Janet Valder



Paul and Margaret Bender



Guests close out the night with dancing



Kathy Roediger and Sandy Bahr



Lee and Randie Stein

CORPORATION COMMISSION DETERMINES THAT SOLAR PROVIDERS ARE NOT PUBLIC UTILITIES

On June 30, the Arizona Corporation Commission made an important decision that solar providers are not acting as public service corporations and therefore subject to the regulation of the Corporation Commission when they enter into solar service agreements with schools, government and non-profit entities. The decision came in response to an application filed by SolarCity asking that the Commission declare that it was not acting as a public service corporation when it entered into such an agreement with the Scottsdale Unified School District.

The solar services agreements at issue in the case provide that SolarCity would install photovoltaic panels on school rooftops within the Scottsdale School District at no cost to the District. The agreements provided that Scottsdale would pay for the installation and maintenance of the solar facilities on a kWh basis. The agreements were structured this way because entities like school districts that do not pay income taxes cannot take advantage of the income tax credits available from the federal government thereby reducing the cost of installing such facilities. The agreements are a good deal for Scottsdale because it gets the benefit of solar facilities at a guaranteed rate without any upfront costs and only pays for

electricity that is actually produced by the facilities.

The Center intervened in the case on behalf of Western Resource Advocates and supported SolarCity's application. A determination that SolarCity was acting as a public utility would have impeded the growth of the solar industry in Arizona and made solar facilities largely inaccessible to school districts and other entities that cannot take advantage of the investment tax credit to reduce their costs. Other solar providers and organizations also supported the application.

So who opposed the application? Not APS, who believes that expansion of the solar industry will help it to achieve its renewable energy goals. No, the principal opponent of the application was Salt River Project, itself a governmental entity. SRP claimed that the Commission's failure to regulate solar providers could lead to catastrophe. The Commission's staff and Tucson Electric Power Company also opposed the application asserting that payment for electricity on a kWh basis brought SolarCity within the definition of a "public service corporation" under the Arizona Constitution thereby subjecting the company to regulation of its rates and charges.

The Commission's administrative law judge agreed with the Com-

mission staff that SolarCity met the definition of a public service corporation because it was "furnishing electricity" and therefore must be regulated although such regulation could take a less rigorous form than that imposed on APS, TEP and other utilities under the Commission's jurisdiction. Of course, SRP is not regulated by the Corporation Commission; it just wants everybody else to be regulated.

The Commission unanimously rejected the administrative law judge's recommended opinion and order on a 5-0 vote. The Commission noted that most other states had declined to regulate solar providers and that if Arizona were to do so, it would place a huge obstacle to expansion of the solar industry in Arizona. The Commission noted that it had already enacted one of the best renewable energy standards for utility companies in the Country and that a decision to regulate SolarCity and other providers would undermine Arizona's goal to become the solar capital of the United States and the world.

THANK YOU

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

ACLP I	dedicated to ensuring government accountability and protecting the legal rights of Arizonans
	202 EAST MC DOWELL ROAD SUITE 153 PHOENIX, ARIZONA 85004

Nonprofit Organization
U.S. Postage Paid
Phoenix, Arizona
Permit No. 1202

ADDRESS SERVICE REQUESTED

Please make any address or name changes to your mailing label and return it to the Phoenix office .
Printed on Recycled Paper

Your support helps us continue our important work

Enclosed is my contribution:
 \$1,000 \$500 \$150 \$100 \$75 \$50 Monthly \$ _____

Name: _____ Email: _____

Address: _____

City: _____ State: _____ Zip: _____

I wish my donation to remain anonymous.

Payment: Check Enclosed (payable to Arizona Center for Law in the Public Interest)
 or Charge: _____ VISA _____ Mastercard _____ American Express

Card No. _____ Exp. Date: _____

Signature: _____

Please return this form to:
 Arizona Center for Law in the Public Interest
 202 E. McDowell Rd., Suite 153, Phoenix, AZ 85004

Thank you for your support!
 Your donation is tax-deductible to the extent allowed by law.