

## COURT REJECTS AHCCCS CHALLENGE

**O**n December 6, 2011, the Arizona Court of Appeals issued its decision rejecting the Center's claim that Proposition 204, a voter enacted initiative expanding eligibility for the AHCCCS program, prohibited the state from imposing a freeze on enrollment in the AHCCCS program for adults without dependent children.

Proposition 204 was enacted by Arizona voters in 2000. It expanded eligibility for the state's Medicaid program called AHCCCS to all individuals at or below the federal poverty level. Additionally, Proposition 204 prohibited the legislative or executive departments of state government from imposing any caps on enrollment. Finally, the Proposition set aside Tobacco Settlement Litigation monies for the expansion but to ensure that sufficient funds were available, directed the legislature to provide supplemental funding "as necessary, by any other available sources including legislative appropriations and federal monies."

In 2011, the Arizona legislature and the Governor decided to reduce the number of individuals being provided health care benefits through the AHCCCS pro-

gram in order to save the state some money. As a result of receiving federal funds for the AHCCCS program, Arizona is obligated to serve certain populations but adults without dependent children is not one of them. The legislature and Governor decided to prohibit the enrollment of any new participants in that category as of last July.

The Center filed a lawsuit challenging the cuts to the AHCCCS program as violating Proposition 204 and the Voter Protection Act. The Voter Protection Act is a constitutional provision that prohibits the legislature from amending or repealing measures approved by Arizona voters. The state and the legislature defended the lawsuit primarily by claiming that the voters could not require the legislature to enact an appropriation. They additionally claimed that the wording of the initiative allowed the legislature to make the exclusive determination about whether funding was "available."

Maricopa County Superior Court Judge Mark Brain ruled in favor of the state and the legislature holding that voters could not require the legislature through an initiated law to enact an appropriation. Therefore, according to

Judge Brain, the voter's directive to the legislature in Proposition 204 was nothing more than a request as opposed to a requirement that the legislature supplement the funding as necessary. The Center appealed that decision to the Arizona Court of Appeals.

In the opinion issued by the Court of Appeals, Judge Patricia Norris agreed with us that the obligation to provide supplemental funding was mandatory. The Court stated that "we read the supplemental funding provision to mean what it says: if supplemental funding is needed, the legislature shall provide it from any other available sources."

However, the Court went on to hold that it was not within its power to judge the legislature's determination that no other funds were "available" to provide the necessary supplemental funding. The Court held that the question was non-justiciable, meaning that it involves a political question and that the matter of determining whether funding was available had been committed under the language of Proposition 204 to the legislature. The Court rejected our argument that there was an objective standard by which to judge whether the legislature had com-

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## AHCCCS continued...

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plied. The standard for compliance is that Proposition 204 required all eligible individuals to receive health care benefits through the AHCCCS program and the legislature and Governor were prohibited from limiting that enrollment. The Court rejected that argument saying that it begged the question of whether the legislature had correctly determined that other funding sources were available, a question that the Court was unable to review because it would involve assessing the soundness of the state's financial priorities.

This was a head scratching conclusion to the proponents of Proposition 204 who had previously tried to expand health care coverage through a similar initiative in 1996. That initiative, however, provided wiggle room to the state because it made the expansion contingent upon federal approval of the program. The Governor at the time saw to it that the federal government would not approve the program because the state's proposal included caps on enrollment. The drafters of Proposition 204 thought they had eliminated any wiggle room for the state by establishing eligibility at expanded levels and prohibiting the imposition of any caps on enrollment. The notion that they would have provided the legislature with discretion to determine whether funds were available would be laughable were the result not so tragic.

As a result of the Court's decision, over 150,000 Arizonans will be deprived of health care benefits. Many of those individuals are suffering from life threatening illnesses and may not be able to get the health care that they need in order to survive.

The final irony is that at about the time the Court issued its decision, the Governor and the legislature were crowing about how state revenues had increased and that there would be a surplus in the treasury. Of course, none of them have proposed any legislation to restore the health care cuts that we were told were absolutely vital to the state's financial health. We know that they have far more important things to do like discussing whether they should require presidential candidates to prove that they are United States' citizens.

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## COURT DISMISSES CASE AGAINST CLEAN ELECTIONS

**O**n March 21, 2012, Maricopa County Superior Court Judge Mark Brain dismissed a case filed by the Goldwater Institute that challenged certain expenditures by the Arizona Citizens Clean Elections Commission and sought to prohibit commissioners from communicating with “special interest groups” about any activities to promote the Citizens Clean Elections Commission or public funding for political campaigns. The plaintiffs represented by the Goldwater Institute included something called No Taxpayer Money for Politicians, a group led by former legislator Jonathan Paton that wants to repeal public funding for political campaigns in Arizona.

The plaintiffs challenged the Commission’s expenditure of funds for voter education efforts. The relevant statute provides that the Commission shall apply 10% of the citizens clean election fund for the reasonable and necessary expenses associated with voter education. The plaintiffs complained that the Commission’s expenditures on voter education, were, in effect, an effort to influence the repeal of public funding. Judge Brain rejected that contention because the statute allows the Commission to spend in excess of 10% if adjustments are made in subsequent years.

Additionally, the plaintiffs sought a broad injunction against the Clean Elections commissioners that would prohibit them and the executive director of the Commission from communicating with any member of the Arizona Advocacy Network Foundation and other “special interest groups” that take a position on public funding for political candidate campaigns about any activity to promote the Citizens Clean Elections Commission or public funding for political campaigns or that opposes the repeal of public funding for political campaigns.

*“...the criticism generally leveled at government is that it is not responsive to the members of the public, not that it responds to them.”*

The Center filed an amicus brief on behalf of the Arizona Advocacy Network contending that the relief sought by the plaintiffs would violate the First Amendment and prohibit citizens from speaking to their government about a system of campaign finance that the government agency is charged with implementing. We addi-

tionally argued that the relief sought by the Goldwater Institute would effectively impose a system of prior restraint on the free speech rights of the Arizona Advocacy Network and other groups seeking to communicate with the Clean Elections Commission.

In rejecting the injunction, Judge Brain observed that he was unaware of “any other situation in which a person or entity has sought to preclude a government commission from communicating with the citizenry - that’s not how government works. Indeed the criticism generally leveled at government is that it is not responsive to the members of the public, not that it responds to them.”

The Court rejected the plaintiffs’ argument on First Amendment grounds and said that the relief sought by the plaintiffs would require the Court to micromanage the Commission “because of things plaintiffs fear it might do.”

The Goldwater Institute announced that it will appeal this decision. Notwithstanding that fact, the Center will continue to support the Citizens Clean Elections Commission and its voter education efforts in this case.

## Annual Event: May 19th at the Children's Museum of Phoenix

### *Featuring Quetzal Guerrero and Honoring Andrew Morrill and AEA*

**T**his year, the Center's annual event will be held on Saturday, May 19th at the Children's Museum of Phoenix from 6:00 p.m. to 10:00 p.m. Once again we will have a hosted bar and food from Arizona Taste. Instead of a sit down dinner, we will have passed hors d'oeuvres and elegant food stations set up throughout the museum.

There will be live music by Quetzal Guerrero and entertainment by Epik Dance Company. And of course, we will once again have our auctions. Last year's silent auction featured over 100 items, ranging from original artwork to one-of-a-kind jewelry pieces. Guests also bid on wines from all over the world, musical instru-

ments, and golf outings. This year's live auction will once again feature fabulous vacation packages. To see pictures of some of the auction items that will be up for bid, see [www.aclpi.org](http://www.aclpi.org). We plan to keep updating the website as the event gets closer and exciting auction items are donated.

We will also be presenting our Public Interest Award to Andrew Morrill and the Arizona Education Association in recognition of the important work that they do for children in Arizona, and for the support that they have extended to the Center over the years on state trust land issues, the Flores case, vouchers and other issues affecting public education.

This is the Center's only fundraising event of the year in the Phoenix area, so please make every effort to attend and join the fun. Tickets are \$150 each and are available by contacting the Center at (602) 258-8850. If you would like to attend but the ticket price is too steep, please let us know. We often have a limited number of tickets available at no cost.

Also, let us know if you have something that you can donate for the silent and/or live auction. Popular items include frequent flier miles, vacation timeshares, sporting event tickets, sports memorabilia, wine, jewelry, or gift certificates. We hope to see you there!

## The District Court to Appoint Special Master in *JK v. Humble*

**O**n February 27, 2012 federal Judge A. Wallace Tashima, who assumed responsibility for *JK vs. Humble* after Judge Roll's tragic death, denied the state's Motion to Dismiss the case, extended the Court's jurisdiction, and, at a status conference on March 19, 2012, advised the parties that he will appoint a Special Master to resolve the issues of non compliance raised by the Center's clients. The lawsuit was originally filed in 1994 on behalf of children needing mental health services and was

resolved through a settlement agreement in 2001.

This is a very positive result for the class of children in need of mental health services from Arizona's Medicaid system. The Plaintiffs had alleged that the State failed to meet its fundamental obligations under the Settlement Agreement. Specifically, the State had failed to develop a mental health system that provided services to children and their families according to a set of well established practice principles. In addition, the State had not developed a

system for (1) identifying and serving high-needs children; (2) providing adequate substance abuse treatment; (3) serving children from the ages of 18 to 21; and (4) providing sufficient training to ensure children are served appropriately. More importantly, the State did not have a quality management system to determine whether children were being served appropriately.

The parties are in the process of identifying individuals to propose to the Court for appointment as a Special Master.

# Streambed Litigation Update

**N**ow that the determinations of five rivers—the Salt, Gila, Verde, Santa Cruz and San Pedro—have been remanded back to the Arizona Navigable Streambed Adjudication Commission (ANSAC), the first question that the Commission is addressing is procedural: where and how does it proceed on these five rivers.

On April 27, 2010, in a unanimous decision, the Arizona Court of Appeals ruled that the ANSAC had used the wrong legal standard when it determined that the Lower Salt River was not naviga-

## Disappointing Ruling from the 9th Circuit in Greer case

**A**fter a long fought battle to require the Forest Service to undertake a meaningful and thorough NEPA analysis of the proposed Black River Land Exchange, the Greer Coalition v. USFS case came to an end this month when the Ninth Circuit Court of Appeals affirmed the district court's judgment in favor of the Forest Service. Invoking the deferential standard of review required under the Administrative Procedures Act, the appellate court held that the many errors in the final Environmental Impact Statement were not significant enough to overturn the agency's approval of the land exchange.

ble 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 Commission, 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 Center and the Land Commissioner that in determining navigability, 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 the matter to ANSAC to reconsider its decision using the proper standard.

Initially, the navigability opponents all sought review of the decision by the Arizona Supreme Court, a request that was denied. Then they filed a Petition for Certiorari with the United States Supreme Court, which rejected the Petition as untimely. Once they had exhausted all of their appeal options, the matter was remanded back to the ANSAC, along with the other adjudications that had been stayed while the Lower Salt appeal was pending.

As it has pondered how to proceed, the ANSAC has requested briefings from interested parties regarding whether to re-open the evidentiary record, and what, if any, impact a recent U.S. Supreme Court decision regarding a Montana case involving navigability for title will have on the remanded matters. The Supreme Court recently reversed a decision by the Montana Supreme Court that had found several rivers navigable and based on the finding, held that power companies with facilities on those rivers owed millions of dollars to the state for past due rent. The Supreme Court held that that the state court should have applied the navigability for title test on a segment-by-segment basis instead of declaring the entire rivers navigable. It also declared that at least one of the reaches, the Great Falls, was nonnavigable. It is anticipated that the Commission will announce a decision on how the remanded cases will proceed in the near future.

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