

COURT ORDERS THAT SCHOOL FUNDING BE INCREASED

On July 11, 2014, Maricopa County Superior Court Judge Katherine Cooper issued a ruling requiring that school funding for this year be reset to what it would have been had the legislature made the legally required adjustments for inflation since 2009.

The ruling came in connection with a lawsuit that was filed in 2010 by individuals, school districts, the Arizona School Boards Association and the Arizona Education Association to require the legislature to comply with a measure that was approved by voters in 2000. That proposition required the legislature to annually increase base level funding for public schools by the lesser of 2% or actual inflation. The legislature provided the required funding until the 2009-2010 school year and then failed to do so for the following five years.

In 2013, the Arizona Supreme Court ruled that voters could constitutionally require the legislature to appropriate the necessary funds and that any effort to legislatively change the requirement was subject to the Voter Protection Act. The Voter Protection Act is a constitutional provision that only allows amendments to voter approved measures that further the purposes of the measure and are enacted with a three-fourths majority in each house of the legislature.

The Supreme Court remanded the case to the Superior Court earlier this year. In the ruling issued July 11, Judge Cooper determined that the base level funding for this fiscal

year should be changed to account for the fact that the legislature failed to appropriately increase it for the last five years. That means that funding for this year will need to be increased by \$317 million. In fact, that \$317 million as adjusted for inflation will need to be provided in each succeeding year as well.

With regard to the five years for which no inflation funding was provided, the Judge determined that an evidentiary hearing would be held on two issues. First, the court would determine whether the facts support the disbursement of “yesterday’s funds today.” The Plaintiffs have argued that school districts will put the money, as much as \$1.3 billion, to good use to purchase things such as text book adoptions, computers and technology and building improvements.

Second, the Judge determined a hearing was necessary on the state’s claim that it simply does not have the money to pay the past amounts. In response, the Plaintiffs have suggested that the \$1.3 billion could be paid out over five years. The Judge recognized that impossibility on the part of the state to pay the past amounts would be a recognized defense but that mere financial hardship is not.

Judge Cooper has scheduled an evidentiary hearing to begin on October 27, 2014. The hearing is expected to last a week. In the meantime, the Governor has an-

nounced her intention to appeal the Judge’s decision. Unfortunately, the state has every incentive to prolong this litigation as much as possible. Hopefully, the appeal will not delay the long overdue funding that the Judge has required for this year.

CENTER ATTORNEY RECEIVES AWARD FROM STATE BAR FOUNDATION



*Anne Ronan with
Hon. Joseph Kreamer*

Center attorney Anne Ronan was this year’s recipient of the Foundation for Justice Award presented by the Arizona Foundation for Legal Services & Education. The award was presented to Anne at the Arizona State Bar Convention in June.

The Foundation for Justice Award is presented to an attorney who has devoted expertise and time

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A Big Win for the San Pedro River!

On June 10, 2014, the Maricopa County Superior Court vacated a finding of adequate water supply by the Arizona Department of Water Resources for a proposed development of 7000 homes in Sierra Vista. The judge held that ADWR abused its discretion and acted contrary to law when, in its assessment of the water's legal availability for 100 years, it refused to consider the federal reserved rights held by the Bureau of Land Management (BLM) for the San Pedro Riparian National Conservation Area.

The Center filed the lawsuit in May, 2013, on behalf of Patricia Gerrodette seeking judicial review of the ADWR's decision to grant an adequate water supply (AWS) designation to Pueblo del Sol, (PDS) a private water company that is proposing to deliver groundwater to a massive master planned community planned for Sierra Vista. Ms. Gerrodette objected to PDS's application when it was first submitted to ADWR, and appealed the decision in an administrative proceeding. The Center became involved at the judicial review phase because her attorney at the administrative level, ASU Professor Joe Feller, was tragically killed in April, 2013.

The case raises a critical issue that involves an intersection of federal and state law. Under state law, when deciding whether to grant an application for an AWS designation, ADWR must determine whether the proposed water supply will be physically, legally and continuously available for at least 100 years. In evaluating PDS's application, however, ADWR refused to consider the effect that federal water rights held

by BLM would have on the "legal availability" of the proposed water supply. However, federal law protects federal surface water rights from the adverse effects of groundwater pumping. Thus, if the pumping from the new development were to impair BLM's surface water rights -- which it most certainly will do given the current overdraft of the aquifer -- then BLM would have the right to enjoin the pumping, thereby making the water legally unavailable.

In holding in favor the Gerrodette and also the BLM and Robin Silver, Judge Crane McClennen held that ADWR could not ignore BLM's superior water rights in determining the legal availability of groundwater for the proposed development. The prevailing parties have submitted a proposed form of judgment which likely won't be signed before this fall.

AWARD continued

(Continued from page 1)

to changing the justice system to promote access and opportunity for those most vulnerable. The Foundation recognized Anne for her efforts representing children and adults with disabilities in obtaining necessary and appropriate medical and mental health services.

Anne began her legal service career when she graduated from law school in 1979. She worked for Community Legal Services from 1979 to 1990 and then at the Center until 1995. She then worked at the Arizona Center for Disability Law until 2004 when she rejoined the Center.

The Center congratulates Anne on this prestigious and well-deserved award.

The Neverending Effort to Protect Arizona's Navigable Rivers

They say the third time is the charm—let's hope that's true for the Arizona Navigability Adjudication Commission (ANSAC), although early signs are not encouraging. For the third time since the legislature tried to disclaim all interest in the title to the streambeds of Arizona's navigable rivers, ANSAC is once again holding evidentiary hearings on the navigability of Arizona's major rivers.

The controversy over Arizona riverbeds 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 had 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 based on the public trust doctrine. Under that 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 river and streambeds, 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 river and streambeds that were navigable at the time of statehood 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 that decision, the Legislature created ANSAC to determine which rivers were navigable in 1912. Making that determination has been a challenge for the Commission because the rivers must be evaluated in their "ordinary and natural condition," which the courts have interpreted to mean unaltered by human activity. In Arizona, all of our rivers had been altered by human activity by 1912.

ANSAC first began holding hearings shortly after it was created in 1992. When in 1993, it looked like the Commission might find the Salt River navigable, the Legislature passed new legislation that made the Commission an advisory body and provided that the Legislature itself would make all navigability determinations. The new legislation also 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 *Defenders of Wildlife v. Hull*, decided in February 2001, the Arizona Court of Appeals held that the Arizona Legislature's attempt to de facto "give away" the State's right in the land underlying navigable waters by narrowly defining "navigability" was a violation of both Arizona's gift clause and the public trust doctrine.

As a result of that second 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.

Consequently, in late 2001, ANSAC reconvened and began reholding 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. Once again the Center sued and once again, in *Winkelman v. ANSAC*, the court remanded the matter back to ANSAC.

On remand, the Commission decided to reopen the evidentiary record for five major rivers: San Pedro, Santa Cruz, Gila, Salt, and Verde.

The hearing on the San Pedro River commenced in June 2013, and concluded in November. With no discussion of its reasoning, the Commission voted to find the river non-navigable but has not yet issued its Report, which presumably will explain the basis for its decision. The hearing on the Santa Cruz River was held in March 2014 and the parties have submitted post hearing briefs; however, and decision has been made.

Hearings on the Gila River began in June 2014, and will resume this August. The Prescott hearing on the Verde River was held in Prescott in June 2014, and many citizens turned out to urge navigability. Verde hearings will continue in Phoenix in October. The Salt River hearing is set for December.

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