

COURT HOLDS THAT STATE CAN'T USE SALES PROCEEDS TO FUND LAND DEPARTMENT

On October 1, Maricopa County Superior Court Judge Gary Donahoe ruled that the legislature's attempt last year to take a portion of the sales from state trust lands to fund the Arizona State Land Department is unconstitutional. Arizona State Land Commissioner Maria Baier has vowed to appeal the decision.

In 2009, the Arizona legislature enacted House Bill 2014 which was signed into law by Governor Brewer on August 21, 2009. The legislation allowed the Arizona State Land Commissioner to designate up to 10% of the proceeds from the sale of state trust lands every year to fund the Arizona State Land Department. For last fiscal year, that amounted to about \$10 million with another \$10 million to be transferred this fiscal year. Those are funds that would have otherwise been deposited into the permanent school land trust and provided income to school districts across the state.

The legislature has been anxious to get at this money for some time. In 2000, a so-called state trust land reform provision was put on the ballot by the legislature that would have amended

the Arizona Constitution to allow exactly what the legislature did last year. Voters rejected the measure. That didn't deter the legislature from deciding that the Constitution allowed them to take the money anyway.

In his ruling, Judge Donahoe strictly interpreted the provisions of the Arizona Constitution. The relevant constitutional provision provides that whenever any monies "shall be in any manner derived from any of said lands, the same shall be deposited by the state treasurer in the permanent fund..." The Land Commissioner argued that even though this provision seems clear on its face, the state had the implicit authority to deduct sufficient funds from the trust to pay for the cost of administering state trust lands which constitutes almost the entire State Land Department budget. Judge Donahoe rejected the argument saying it "would be contrary to Arizona law because the language of the Arizona Constitution is unambigu-

ous and does not require interpretation."

Judge Donahoe further determined that House Bill 2014 violated the Voter Protection Act because it diverts money from the permanent state school fund specified in a state statute that was approved by Arizona voters in 2002. Under the voter protection provisions of the Arizona Constitution, the legislature does not have the power to appropriate or divert funds allocated to a specific purpose by an initiative measure unless the appropriation or diversion furthers the purposes of the initiative and at least 3/4th of the members of each house vote to appropriate or divert the money. In this case, Judge Donahoe noted that House Bill 2014 was passed with less than a 3/4 vote and therefore violated voter protection provisions in the Arizona Constitution.

The Center filed this lawsuit in February of this year on behalf of two individual school teachers and the Cartwright Elementary School District.

**We've redesigned our website and have case updates
to help you keep track of what the Center is doing.
Check us out at: WWW.ACLPI.ORG**

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Message from the President of the Board

By Bruce Samuels



The main mission of the Board of Directors is to keep the Center alive and kicking, which we can only do through financial support from so many people. Sure, the Board has a meaningful role in approving litigation and other objectives. We enjoy regular reports by our three amazingly talented lawyers on the progress in each of those matters, which, remarkably, are mostly successful, even though typically opposed by organizations with much greater legal resources. But mostly what we do as a Board is ensure that the Center's legal team can continue to challenge efforts by government and other powerful interests to ignore the law. If it weren't for the Center, these causes would likely have no voice in the legal system. Without the Center, our public school children in impoverished communities would have even more dilapidated facilities and a terribly unfair school funding system. Our skies would be much

more polluted. Our legislature would have successfully given away public trust lands and dispensed with constitutionally protected revenue that our State's founders targeted to benefit our public schools. Our utility rates would be higher. And all those who suffer from mental illness would have many fewer resources available to them. Some of these battles have lasted over a decade. And they continue, through perseverance by our lawyers, and your unflinching willingness to support the Center's efforts. Thanks to all of our supporters who answer the calls, write the checks, or donate through our website. The Center would cease to exist without you.

AIR QUALITY CONT.

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sions, like transit expansion or bike and pedestrian improvements. Moreover, the disapproval only starts a sanctions clock and the sanctions may not even be implemented. In 1999, when EPA notified the state that an earlier version of its PM-10 plan was not approvable, the state corrected the plan and re-submitted it in time to avoid sanctions. Let's hope that the state and MAG take advantage of this most recent "wake up call," and, instead of complaining about EPA and threatening to litigate, focus on solving the Phoenix area PM-10 problem once and for all.

FLORES TRIAL TAKING LONGER THAN EXPECTED

After last year's decision by the U.S. Supreme Court, the issue in the *Flores* case now is whether the Nogales Unified School District and the state of Arizona have established programs that comply with the Equal Educational Opportunities Act. The Plaintiffs, Miriam Flores and the class of Nogales parents and children, have asserted that the programs do not comply with federal law because they unlawfully segregate English language learners for four hours every school day for the purpose of learning English. As a result, ELL students are denied access to the academic curriculum while they are learning English and the academic content that they miss while learning English is never taught to them. Consequently, ELL students are not able to participate equally in the public school programs contrary to the requirements of the EEOA.

In the trial presided over by U. S. District Court Judge Raner Collins that began on September 1, the state called 11 witnesses and took 15 days to finish presentation of their evidence. The whole hearing had been scheduled to conclude on September 24th but given the fact that the Defendants took all of the allotted time to present evidence, the trial has been extended for another 11 days in November and January.

The Defendants - - Tom Horne and the President and Speaker from the Arizona Legislature - -

presented witnesses from the Arizona Department of Education and the Arizona English Language Learners Task Force to defend the four hour segregation requirement. The Defendants generally claim that spending more time each school day learning English will help English language learners acquire the language faster and give those students access to the same academic content English proficient students have. The problem with the theory is that in the Nogales School District at least, students in the four hour model are not acquiring English at an appreciably faster rate than they did when they were in classes with English-proficient students. The Department acknowledges that Nogales had an effective English language learner program prior to implementation of the four hour models in the 2008-2009 school year but claims that the District could do even better by providing four hours of daily English instruction.

Although the goal in state law is for students to become proficient within a year when they are provided the four hours of intensive daily instruction, it hasn't quite worked out that way. Even though it's a goal in state law, the State Department of Education has failed to track the length of time it takes for students to become proficient in English. However, data

that will be provided to the Court by the Plaintiffs shows that in the Nogales and Tucson Unified School Districts it takes approximately three years for students to become proficient. While it might be defensible to limit access to academic courses for one year, there is no rationale that justifies excluding English language learners from academic courses for three years. That's a deficit that English language learners would simply never be able to overcome.

The trial continues on November 22nd when representatives from the Nogales School District will testify on behalf of the Plaintiffs. In January, the Plaintiffs will present witnesses from the Phoenix Union High School District, Tucson Unified School District, Osborn Elementary School District and the Cartwright Elementary School District. The trial is expected to conclude on January 14th with a decision from Judge Collins to follow.

THANK YOU

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

The Center Helps EPA Keep the Pressure on the State to Improve Phoenix Air Quality

On September 3, 2010, the U.S. Environmental Protection Agency proposed to disapprove Maricopa County's air quality plan because it does not adequately control emissions of coarse particulate matter. EPA agreed to issue its findings by that date as part of the settlement it reached with the Center in the deadline suit we brought last December. EPA reclassified the Maricopa area as a serious PM-10 nonattainment area back in 1996. Under the Clean Air Act, the Maricopa area had until December 31, 2001 to reach attainment. However, the state missed that deadline, and sought a five-year extension that gave it an attainment deadline of December 31, 2006.

Unfortunately, the state missed that deadline too, so on June 6, 2007, EPA found that the Maricopa area failed to attain by December 31, 2006 and required the state to submit a new, more stringent plan by December 31, 2007. On December 19, 2007, the Maricopa Association of Governments (MAG) adopted the "MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area." EPA had until June 2009 to approve or disapprove the 5% plan, but failed to act by that date largely because it was still analyzing the state's claim that its continued exceedances of the PM-10 standard was due to "exceptional events."

Under the 5% plan that the state submitted to EPA, the area was supposed to achieve attainment of the NAAQS—which essentially requires three years of clean data—by December 2010. However, shortly after the plan was submitted, it was clear that the area would not be able to achieve that. Specifically, in 2008, there were 11 recorded exceedances of the PM-10 standard in area and in 2009, there were 22 exceedances. The state took the position that 10 of the exceedances recorded in 2008 and all of the exceedances recorded in 2009 were the result of "exceptional events" under EPA's Exceptional Events Rule (EER). Under the EER, EPA may exclude monitored exceedances if a state can demonstrate that an exceptional event caused the exceedance. After carefully reviewing the data submitted by the state, however, EPA determined that a significant number of the 2008 exceedances were not caused by "exceptional events." Once those exceedances were included, it was clear that the attainment demonstration included in the 5% plan was flawed.

As the September 3 deadline for EPA action under the Consent Decree neared, state and county officials asked the agency to delay its action on

the plan for six months, but EPA stood firm. In its rulemaking, EPA found that the state did not correctly inventory the sources of PM-10 and that plan over-emphasized emission reductions needed from construction-related activities and de-emphasized emission reductions from other sources. EPA also proposed to disapprove that portion of the SIP related to motor vehicle emissions allowances associated with road construction, vehicle exhaust, tire and brake wear, dust generated from unpaved roads and dust from vehicles traveling on paved roads. EPA did, however, propose limited approval of state regulations for the control of PM-10 from agricultural sources as well as other elements of the plan that will help reduce air pollution in the area, including ones regulating leaf blowers, unpaved areas, burning and other sources of particulate matter.

EPA will make its final decision on the plan in early January 2011, after reviewing public comments. If the plan is disapproved and deficiencies are not corrected in a timely manner, certain sanctions may attach. After 18 months, more stringent facility permit requirements may be imposed, and after 24 months, highway funding restrictions kick in. Notably, the transportation sanctions would not impact projects designed to reduce emis-

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ARIZONA CORPORATION COMMISSION PROHIBITS USE OF GROUNDWATER FOR POWER PLANT

On October 20, the Arizona Corporation Commission approved a certificate of environmental compatibility for a large solar power plant proposed for northwestern Arizona but prohibited the plant from using groundwater for cooling purposes. This decision marks the first time that the Commission has prohibited the use of groundwater for a thermal power plant and will hopefully establish a precedent for similar cases in the future.

The Center got involved in this case about a year ago. We were contacted by individuals in Mohave County for advice about an application filed by Hualapai Valley Solar to construct a 340 megawatt power plant north of Kingman. The applicant was proposing to use parabolic mirrors to harness solar energy and store heat in molten salt after the sun went down so power could be generated for approximately six hours after sunset. The individuals from Mohave County who contacted us were concerned about the proposed power plant's source of water for cooling purposes.

In January, the individuals attempted to intervene in the proceedings being conducted by the Arizona Power Plant and Transmission Line Siting Committee to consider Hualapai Valley Solar's

application. The Committee denied the applications of the individuals to intervene in the case and one of them contacted the Center for assistance. We appealed the Committee's decision to deny intervention to the Arizona Corporation Commission. In April, the Corporation Commission decided that our client, Denise Bensusan, should have been allowed to intervene and re-opened the case to conduct further hearings so she could participate. In June, the Commission conducted two days of hearings in Kingman to determine whether the certificate of approval issued by the Power Plant and Transmission Line Siting Committee should be confirmed, amended or rejected by the Commission.

At the hearing in June, the evidence showed that the proposed 340 megawatt power plant would use approximately 2,400 acre feet of water per year. The company was attempting to negotiate an agreement with the City of Kingman to use treated effluent from the city's expanded wastewater treatment plant but by the time of the hearing no agreement had been negotiated. As a result, the company wanted authority to be able to pump groundwater out of the Hualapai Valley Aquifer to support the project.

We provided evidence that the aquifer was in depletion as more

water was being withdrawn from the aquifer on an annual basis than was being replenished through recharge. In order to maintain the aquifer for future growth around Kingman, we proposed that the power plant be dry cooled without groundwater. Dry cooling technology is slightly more expensive and slightly less efficient but uses virtually no water. Recently, the surrounding states of California, Nevada and New Mexico have begun to require that desert solar projects be dry cooled and we proposed that the Commission do the same for this project.

The Commission considered the matter at its meeting on October 20. After several hours of discussion, Chairman Kris Mayes proposed an amendment to the certificate of environmental compatibility that would prohibit the use of groundwater at the project. That amendment was supported by Commissioners Kennedy and Stump, marking the first time that the Commission has prohibited the use of groundwater for a thermal power plant.

As a result of the Commission's ruling, the Hualapai Valley Solar project is likely going to have to use some combination of effluent and dry cooling, saving Mohave County's water supply 2,400 acre feet of water each and every year for the next 30 years.

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