

# The Centerline

## ***U.S. SUPREME COURT TO HEAR ENGLISH LANGUAGE LEARNER CASE***

**O**n January 9, 2009, the United States Supreme Court agreed to review the Ninth Circuit Court of Appeals' decision that the State of Arizona is still not adequately funding English language learner programs in public schools. Superintendent of Public Instruction Tom Horne and the President of the Arizona Senate and Speaker of the Arizona House had asked the Court to review the Ninth Circuit decision on the grounds that they believe the state should no longer be required to comply with the judgment that was issued in January 2000 declaring that Arizona was in violation of the Equal Educational Opportunities Act because its funding for ELL programs was arbitrary and inadequate.

The U.S. Supreme Court will hear argument in the case on April 20<sup>th</sup> and issue a decision by the end of June. The principal arguments made by Horne and the legislators are that Arizona has increased its education spending since the judgment was entered in 2000 and that even though the

amount of increased spending was not dedicated to English language learner programs, school districts now have sufficient funding to implement effective ELL programs. Essentially, the Defendants argue that if separate funding for ELL programs is insufficient, school districts should take money away from other programs and even basic education funding for other students in order to implement effective ELL programs in their school districts. This is simply another way of arguing the District Court judge was wrong in 2000 when he determined that the state was violating the EEOA, a judgment that the state failed to appeal.

Horne and the legislators also argued that because the state is in compliance with No Child Left Behind that it must therefore also be in compliance with the Equal Educational Opportunities Act. The EEOA upon which the judgment is based in the *Flores* case requires the state to take "appropriate action" to help students overcome language barriers so that they can participate on an equal basis in

public school education. It is a civil rights law that was passed in 1974 and protects individuals from discrimination based on their language. No Child Left Behind was passed in 2001 and is a voluntary program by which states agree to certain accountability standards in exchange for federal funding. In effect, Horne and the legislators argue that No Child Left Behind somehow removes civil rights protections and an individual's right to vindicate violations of the EEOA even though Congress explicitly stated in the NCLB that it had no intention of affecting previously enacted civil rights legislation.

Educational and civil rights groups around the country became concerned after the U.S. Supreme Court agreed to review the *Flores* case. Numerous groups including the NAACP Legal Defense Fund, the Mexican-American Legal Defense Fund, the National School Boards Association and the National Education Association will file briefs supporting the Ninth Circuit Court of Appeals' decision.

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## **AZ CORPORATION COMMISSION SET TO HEAR APS RATE CASE**

**O**n March 30, 2009, the Arizona Corporation Commission will begin hearings on the application of Arizona Public Service Company (“APS”) to increase its rates to customers by 10.5%. The Center has intervened in the case on behalf of the Southwest Energy Efficiency Project and Western Resource Advocates in order to increase APS’s energy efficiency and renewable energy efforts. The Center is also representing the Arizona School Boards Association and the Arizona Association of School Business Officials.

APS faces increasing demand for electricity and up until now the conventional response to increasing demand has been to build new power plants. In recent years, however, there has been a growing consensus that the best and most cost effective way to meet increasing demand is through energy efficiency. It costs about two to four cents per kilowatt hour, far less than the cost of building and operating a new power plant. Thanks to the efforts of SWEEP in previous APS rate cases, the Company is now spending \$25 million a year to support energy efficiency applications in the commercial and residential sector.

That’s a good start but it’s not enough. In the current rate case, SWEEP is recommending that the Commission establish annual energy efficiency goals for the Company to meet. If APS achieves energy savings of 1.5% of its sales each year for the next ten years, then by 2020 a total of 20% of APS’s demand will be met by energy efficiency if the effects of new building codes and appliance standards are included.

This approach is similar to what the Commission has done in the area of renewable energy. In 2006, the Commission adopted rules requiring utility companies to derive a certain percentage of their sales each year from renewable energy so that by the year 2025, at least 15% of total kilowatt hours sold by utilities will come from renewable resources.

One of the obvious benefits of using energy efficiency and renewable resources is that they are environmentally clean. Continued reliance on fossil fuels like natural gas and coal have numerous environmental disadvantages including increased contributions to CO<sub>2</sub> and toxic emissions. Additionally, prices for natural gas and coal have

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## *Arizona Supreme Court Upholds Dismissal of the Easement Case*

**O**n February 13, 2009, the Arizona Supreme Court published a disappointing decision that affirmed the dismissal of our case *Mayer v. Winkleman* challenging the State Land Department's continuing failure to obtain compensation for right of way easements granted over state trust land many years ago in violation of the Enabling Act. Under the express terms of the Enabling Act, the trust must be compensated for any conveyance of state trust land. If that requirement is violated, the attempted conveyance is deemed "null and void."

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been extremely volatile and represent a significant portion of the rate increase sought by APS. Although energy efficiency and renewable energy cost a little more now, they save ratepayers in the long run because there are no associated fuel costs that are subject to spikes. The public can comment on APS's rate application by sending comments to the ACC at 1275 W. Washington, Phoenix, Arizona 85007. There will also be a public hearing in Phoenix on March 30, 2009 and at other locations throughout the state as well. You can check the website at [acc.az.gov](http://acc.az.gov) for further information.

Years ago, the Arizona Supreme Court held that this compensation requirement did not apply if the conveyance was a right of way made to either the state or another political subdivision, such as a city, town or county. As a result, from the 1940s until the 1960s, the State Land Department granted about 900 of these easements for free. Then in 1967 the U. S. Supreme in *Lassen v. Arizona* held that the Arizona court was wrong. The Court held that under the express terms of the Act, compensation was required for every conveyance, even rights of way granted for public purposes.

Since *Lassen* was decided, the State Land Department has required compensation for all rights of way and easements granted over state trust land. The problem is that the Department never went back and got compensation for the 900 easements it had issued before the *Lassen* decision. Under the Enabling Act, those 900 easements are "null and void" —it is as if they never existed—because the trust never received compensation. Yet, the easement holders—Arizona Department of Transportation chief among them—continue to use the state trust land as if they had valid easements.

When we first brought the lawsuit, the State Land Department argued that it was barred by the statute of limitations. The trial court rejected that argument, but later dismissed the case based on the doctrine of laches (a similar type of defense). The Court of Appeals disagreed with the lower court on statute of limitations and laches, but held that it would be unfair to apply *Lassen* retroactively. We sought, and obtained, review by the Arizona Supreme Court.

In its opinion, the Arizona Supreme Court didn't address the retroactivity issue at all, but held instead that the lawsuit was barred by the statute of limitations. In reaching its decision, the Court ignored entirely the "null and void" language in the Enabling Act and the effect that provision has on current use. Instead, it held that any claim on behalf of the beneficiaries of the trust based on the trustee's conveyance of the 900 easements for free had to be brought within one year of the *Lassen* decision, or by 1968. We filed a Motion for Reconsideration which was denied on March 9, 2009. We are currently weighing whether to ask the United States Supreme Court to set the record straight again.

## Hearings on Prescott's Water Transfer from the Big Chino Begin

Last month, the Office of Administrative Hearings held three days of hearings on Arizona Department of Water Resources' approval of a modification of Prescott's assured water supply designation that would allow that city to pump groundwater from the Big Chino aquifer and transport it out of the watershed via a pipeline for use by the City of Prescott and the Town of Prescott Valley. The Center is representing several appellants in the proceeding including the Center for Biological Diversity, the Sierra Club-Grand Canyon Chapter, and individual members from both organizations that live in the Prescott Active Management Area.

In order for it to receive its requested modification to its AWS Designation, Prescott was required to show that its proposed water supply, including the water from the Big Chino aquifer, will be continuously, physically, and legally available for at least 100 years and that it has the financial capability to construct the proposed pipeline to transport the water. The appellants have challenged ADWR's approval of the modification on several grounds. At the core of sev-

eral of their legal arguments is the proposition that the negative impact that the pumping will have on the Verde River will prevent the water from being "legally and continuously available." Scientists have long concluded that ground water in the Big Chino aquifer is connected to the Verde River and that pumping affects stream flow. In fact, according to the United States Geological Survey (USGS), the Big Chino aquifer is estimated to supply approximately 80% of the base flow of the Upper Verde River. The impact of pumping in the lower Big Chino aquifer has been known since the early 1960s when a surge of pumping by land developers caused Verde River flow to drop significantly.

The hearing began on February 9 with Administrative law judge Thomas Shedden presiding and the City of Prescott presenting evidence that it claimed supported its position. The City is largely defending ADWR's decision approving the modification, but has appealed that portion of the decision that limited the amount that Prescott is allowed to transport 8067.4 acre feet per

year. Although ADWR has asserted that it is not required by law to even consider the impacts that the groundwater pumping will have on the Verde, experts for the city testified that the pumping would not affect the flow of the river. That testimony was refuted, however, by Jon Ford, a geological engineer with a Denver-based firm and expert witness for local appellants Gary Beverly, Tom Atkins, and Anthony Krzysik. Mr. Ford opined that based on USGS studies, historic data from drillers, and computer modeling, Prescott's pumping over the next 100 years would draw down the aquifer by between 600 and 700 feet and affect the springs that feed the Upper Verde River.

The hearings resume on April 13, 14 and 15th. Given the number of witnesses yet to be called, it is unlikely that the matter will be concluded even then.

### **THANK YOU**

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

## ***Flores continued***

*(Continued from page 1)*

While the case is pending in the Supreme Court, the proceedings in the U.S. District Court in Tucson to enforce the judgment and require the state to adequately fund ELL instruction have been stayed.

While it is difficult to interpret the Supreme Court's action in agreeing to review this case as a positive sign, we are hopeful that once the Court understands the extensive factual record in this case that documents the state's foot-dragging and contempt for the Court's orders that it will affirm the Ninth Circuit Court of Appeals decision. In so doing, it will confirm that ELL students across the country have the right to adequately funded programs and services that will ensure their equal participation in public schools.

## ***MARANA REFERENDUM OFF THE BALLOT; COURT HOLDS THAT CITIZENS CANNOT RELY ON ORDINANCE***

**T**he Arizona Court of Appeals reversed the lower court to toss a Marana referendum off the March 2009 ballot. In October 2007, the Marana Council approved a specific plan for a 133-acre development known as DeAnza. The ordinance approving the rezoning specified that it would not be "adopted" and the thirty days to collect signatures for a referendum would not begin to run unless the developer executed and recorded a waiver related to the Arizona Property Rights Protection Act. When the waiver was recorded, environmentalists and residents, concerned about the negative impacts of the development, gathered referendum signatures and submitted them to the Town on Monday, December 10, 2007.

When Red Point Development Inc, the developer, sued the Town for accepting the "untimely" petitions, the Center represented the proponent. Red Point asserted two arguments: first, that notwithstanding the language in the ordinance itself, the 30 day time period to collect referendum signatures began to run when the town council approved it, not when the waiver was recorded; and second, that even if the thirty days began to run on the recording date, the petitions were late because the thirtieth day fell on a Saturday and state law did not allow the proponent to submit the petitions on the following Monday, as the Town instructed.

After the trial court ruled that the petitions were timely, the developer appealed. The Court of Appeals reversed, holding that the Town did not have the authority to delay the effective date of its ordinance and that the referendum proponent was not entitled to rely upon the express language in the ordinance. Unfortunately, this result was far too predictable as the Arizona appellate courts have, in recent years, demonstrated a continuing hostility to citizens' exercise of their constitutional right to referendum.

**Save the Date!**  
**Saturday, May 9, 2009**

***The Annual Event to benefit The Center***

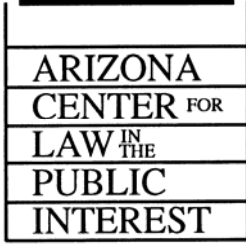
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