

Arizona Supreme Court Agrees: The Legislature's Attempt to Fund the State Land Department with State Land Trust Funds was Unconstitutional.

On January 9, 2013, the Arizona Supreme Court published its opinion affirming the Court of Appeals and establishing in no uncertain terms that the Court will continue to protect the trust created by the Enabling Act. In *Rumery v. Baier*, the Arizona Supreme Court struck down as unconstitutional the legislature's attempt to use state trust land proceeds to fund the State Land Department.

In 2009, the legislature passed a bill funneling state trust land proceeds, which formerly went straight to fund education, into administrative costs. Because the Center successfully challenged that bill, those dollars will be put back where they belong.

House Bill 2014 allowed up to 10% of state trust land proceeds - \$10 million per year - to be used for administrative costs of running the State Land Department. The Court, however, agreed with the Center that this was illegal because Arizona's Constitution specifically requires state trust land proceeds to be deposited into the state's permanent school land trust to benefit

Arizona schools. In February 2010, the Center filed a lawsuit on behalf of two school teachers and the Cartwright Elementary School District challenging the legislature's bill.

In October 2010, Maricopa County Superior Court Judge Gary Donahoe ruled that House Bill 2014 violated the Arizona Constitution. In his ruling, Judge Donahoe strictly interpreted the Arizona Constitution's provision stating that whenever any monies "shall be in any manner derived from [state trust lands], the same shall be deposited by the state treasurer in the permanent fund . . ." The State Land Department 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 fund administration of state trust lands, which expense constitutes almost the entire State Land Department budget. In other words, the State Land Department argued that it should be able to fund nearly all of its budget from a pot of money specifically set aside for education by the Arizona Constitution.

The state appealed to the Arizona Court of Appeals. In late

November 2010, the state also asked the appeals court to stay Judge Donahoe's ruling so that the Land Department could continue to use the illegal funds through the end of the appeals process. Although the court of appeals stayed Judge Donahoe's ruling until June 30, 2010, it refused to provide a blanket stay until the appeal is resolved.

On June 30, the court of appeals lifted the stay, thereby forbidding the Land Department from using any more state trust fund monies to fund its administrative costs. The Court of Appeals affirmed the trial court's decision on November 10, 2011.

The Commissioner filed a Petition for Review and the Supreme Court granted. Although the Supreme Court vacated the court of appeals decision, it affirmed the result, and issued its own unanimous decision which unequivocally held that because the Arizona Constitution expressly directed that all sales proceeds deposited into the permanent fund, neither the Court nor the Commissioner could "infer unstated exceptions" to the restrictions.

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CENTER APPEALS MORTGAGE SETTLEMENT DECISION TO SUPREME COURT

On March 12, the Arizona Court of Appeals issued its decision in a case the Center filed challenging the Attorney General's transfer of \$50 million dollars from a settlement fund intended to provide support and benefits to homeowners in foreclosure. The settlement funds came to Arizona as part of a National Mortgage Settlement with five banks accused of violating various consumer protection statutes relating to mortgages and foreclosures. Last year, the legislature required that the Attorney General pay \$50 million from the settlement fund to the state's general fund. For his part, the Attorney General stated that he would voluntarily transfer the funds because if he did not do so, the legislature would simply reduce his office's budget by the same amount.

The Center filed an action challenging the legislation requiring the transfer and the Attorney General's decision to "voluntarily" transfer the funds. We asserted that the legislation requiring the transfer of the \$50 million into the general fund was unconstitutional because it was contained in an appropriations bill. Additionally, we claimed that the funds were beyond the legislature's authority because the National Mortgage Settlement Provision affecting Arizona created a court-ordered trust fund with the

Attorney General as trustee. Funds that are held by the state as trustee or custodian are not available for appropriation by the legislature under state law.

The Court of Appeal's decision did not address the question of whether the legislation requiring the transfer was unconstitutional. The Court held that the legislature's intended use of the funds was consistent with the terms of the settlement which required that the funds be used "for purposes intended to avoid preventable foreclosures...and to compensate the state for costs resulting from the alleged unlawful conduct" of the five banks who were named as defendants in the national lawsuit. In so holding, the Court of Appeals failed to recognize that money in the state's general fund is not earmarked for any particular purpose but instead is used to generally support state government operations. Once money is in the general fund, it is impossible to say that it is going to be used for any specific purpose like prisons or education or, in this case, for purposes related to the settlement like helping homeowners with foreclosures.

The Center has petitioned the Supreme Court for review of the Court of Appeal's decision. We're hopeful that the Supreme Court will stop this money grab by the legislature so that people get the benefits they're entitled to under the settlement.

SCHOOL FUNDING CASE GOES TO SUPREME COURT

This past January, the Arizona Court of Appeals issued a decision holding that the legislature was required to provide inflation funding to Arizona schools. The decision means that Arizona schools may get as much as \$260 million in additional funding for the four years that the legislature has failed to comply with the law. Not surprisingly, the state of Arizona through the Attorney General's Office has decided to appeal the decision to the Arizona Supreme Court.

The Center has participated in this case as co-counsel to Don Peters of LaSota and Peters, P.L.C. who has been lead counsel since the case was filed in 2010. The case was filed on behalf of school districts, education groups and individuals to force the legislature to provide inflation funding required by Proposition 301 which was passed by Arizona voters in 2000. Although there was some question about the precise wording of the initiative, it was clear that the intent was to increase school funding each year to account for inflation. Beginning four years ago, the legislature decided that it would only inflate the smallest component of the school funding formula depriving school districts of hundreds of million dollars contrary to the mandate approved by Arizona voters.

The lawsuit asserted that the legislature's failure fully fund the

inflation adjustment violated the Voter Protection Act. The Voter Protection Act was approved by Arizona voters in 1998 and was designed to prevent the legislature from amending voter approved measures unless the amendment furthered the purpose of the measure and was approved by at least three-fourths of the members of each house of the legislature. The lawsuit claimed that the legislature had violated the Voter Protection Act because it had failed to comply with the mandate to provide the required inflationary adjustments to funding.

The Court of Appeals' decision agreed with the Plaintiffs and found that the legislature had a mandatory duty to annually provide the required inflationary funding. The state now claims in its appeal to the Supreme Court which was filed on March 13th that Arizona voters through a statutory initiative cannot require the legislature to take particular action and that only constitutional provisions can do so. The state claims that the Voter Protection Act didn't change that and therefore the legislature is free to ignore the requirements imposed by Arizona voters on the legislature when they approved Proposition 301.

The Supreme Court will decide whether to review the Court of Appeals' decision

within the next few months. We're hopeful that the Court declines to review the decision so that schools can get the funds that they have been unlawfully deprived of over the last four years.

"Without question, the legislature faces substantial challenges in preparing the state's budget, particularly during difficult economic circumstances. But our constitution does not permit the legislature to change the meaning of voter-approved statutes by shifting funds to meet other budgeting priorities."

Cave Creek Unified School District v Ducey. Case No. 1 CA-CV 11-0256 (AZ Ct. App., Div. 1, Jan. 15, 2013).

THANK YOU

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

Annual Phoenix Event: April 27 at the Bentley Projects

Featuring Vinyl Nova and Honoring Tim Schmaltz and PAFCO

This year, the Center's annual event will be held on Saturday, April 27th at Bentley Projects from 6:30 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 Vinyl Nova 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 instruments, 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. 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 Tim Schmaltz and PAFCO in recognition of the important work that they do for families in Arizona. According to Executive Director Tim Hogan, "the Center Board and staff all agreed that it was particularly appropriate this year to recognize Tim and PAFCO for their years of advocating for health and human services for Arizona's families. PAFCO has been a strong supporter of the

proposal to expand AHCCCS at the state capitol."

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!

Annual Tucson Event: May 3rd

At the home of Norma and Stanley Feldman and honoring John Schaefer

As the Center's Tucson supporters may recall, in the Fall of 2011, Norma and Stanley Feldman hosted a delightful event to support the Center where we presented Toni Massaro and Nina Rubin with the Center's Public Interest Award. The evening was so successful that we all agreed we should try to make it an annual event.

As Fall 2012 rolled around and we began to look at possible dates, however, it soon became apparent that with all of the election activity going on in Septem-

ber and October, finding a time that didn't conflict with other important events was going to be next to impossible. Consequently, we decided to hold the event in the spring.

The event will be Friday, May 3 from 5:30 to 7:00 p.m. Once again, the Feldmans have offered to open up their home, and the hosts of the evening will be both Norma and Stanley Feldman and Susan and Donald Pitt.

We will be presenting our Public Interest Award to John Schaefer. Dr. Schaefer is not

only President Emeritus of the University of Arizona, where he had an active, 21-year career in teaching and research, but is also a conservationist and avid bird-watcher. He helped organize the Tucson Audubon Society and found the Nature Conservancy in Arizona. Dr. Schaefer, a photographer in his own right, and Ansel Adams founded the Center for Creative Photography at the University of Arizona in 1975. We hope our Tucson supporters can join us. You can find more information about the event on our website at www.aclpi.org.

COURT HEARING SCHEDULED IN APPEAL OF THE ACC'S APPROVAL OF PROPOSED WASTE INCINERATOR AS A "RENEWABLE"

This case began in 2010 when Mohave Electric Cooperative, a utility serving northwestern Arizona, filed an application with the Commission for approval of a waste-to-energy facility as a renewable energy resource under the Commission's renewable energy standard rules. Those rules require regulated utilities to secure a certain percentage of their sales from renewable energy resources like solar, wind and geothermal. Instead of acquiring those resources, Mohave sought the Commission's approval to buy energy from a proposed facility that would burn garbage to produce electricity.

After two administrative hearings in 2011, the Commission approved Mohave's application on June 26, 2012 on a 3 - 2 vote. The majority reasoned that municipal solid waste is a "renewable" resource because garbage fits the definition of a renewable energy resource under the rules. The Commission held that garbage is "replaced rapidly by a natural, ongoing process and that is not nuclear or fossil fuel" and therefore was renewable. The Commission approved the proposed waste incinerator as both a pilot project under the Commission's rules and, alternatively, waived the Commission's rules so that the proposed project could proceed.

The Center represented the Sierra Club-Grand Canyon Chapter in these proceedings and objected to the Commission's decision on numerous grounds. First, the Commission's renewable energy standard rules explicitly excluded municipal solid waste from the definition of a renewable energy resource and if the Commission wants to now include it, it needs to change the rules. Second, municipal solid waste is not a renewable energy resource because it contains fossil fuels like plastics. Third, the Sierra Club argued that approval of a waste incinerator as renewable energy would undermine the renewable energy rules which are generally designed to promote clean energy, not the incineration of garbage which produces numerous pollutants.

After the Commission's decision, the Center filed a lawsuit against the Commission on behalf of the Sierra Club in September 2012. In January 2013, the Center filed its motion for judgment based on the record and asked the court to vacate and reverse the Commission's decision. Maricopa County Superior Court Judge Crane McClennan has now scheduled argument on the case for May 20, 2013.

ANSAC Re-Opens the Evidentiary Records for the San Pedro, Santa Cruz, Salt, Gila and Verde 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 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.

The matter was remanded back to the ANSAC, along with the other adjudications that had been stayed while the Lower Salt appeal was pending (the San Pedro, Santa Cruz, Gila, Upper Salt, and Verde Rivers). After extended consideration of how to proceed on remand, last October, ANSAC decided to re-open the evidentiary records for the remanded rivers. The first river to be reconsidered will be the San Pedro. ANSAC requested that interested parties submit evidence by March 22, 2013 (although it will continue to accept evidence after that date) and has indicated that it will hold a hearing on the San Pedro sometime in early May in Cochise County.

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