

## VOTERS APPROVE PROPOSITION 123

**O**n May 17, Arizona voters narrowly approved Proposition 123 which was referred to the ballot as a settlement of the years' long school inflation funding litigation. School organizations and districts had sued the state in 2010 for failing to annually increase funding to Arizona schools by the rate of inflation or 2% whichever is less. The Center and co-counsel Don Peters are representing the Plaintiffs in the case.

The immediate impact of voter approval is that nearly \$260 million is required to be distributed to schools by the end of June. Initially, the State Treasurer raised questions about whether the State Board of Investment can lawfully distribute the funds and whether any of the members of the State Board can be personally liable if it turns out that the distribution is unlawful. On June 8, the Arizona Attorney General issued an opinion stating that Investment Board members had no personal liability but declining to give an opinion about whether distribution of trust funds violates federal law because the higher distribution rate has not been approved by Congress.

The Attorney General declined to give an opinion on that issue because, on election night, a lawsuit was filed in federal court challenging any increased distribution from the trust fund as a result of Proposition

123 on the grounds that Congress needs to approve the change before it can become effective. The State Treasurer had made the same argument about Proposition 123 in the months leading up to the election and formed at least part of the basis for his opposition to the Proposition. The Attorney General ordinarily declines to issue opinions on matters that are in litigation.

The legislation implementing Proposition 123 provides that the funding requirements of Proposition 123 remain in effect unless and until there is a "final adjudication" from the courts declaring the Proposition invalid. That means that even if a lawsuit is filed that preliminarily stops the distribution of funds from the trust, the state is still obligated to pay the required inflation funds every year until the court's decision is final after any appeals.

Separate and apart from any lawsuits challenging Proposition 123, the original lawsuit is still pending in Maricopa County Superior Court and the Arizona Court of Appeals. The parties to that case, including the Plaintiffs, filed an agreement with the Court stipulating to a dismissal of the case contingent upon voter approval of Proposition 123. Maricopa County Superior Court Judge Dawn Bergin who is now

assigned to the case has scheduled a status conference in July to establish a process for considering the stipulation to dismiss the case.

Given the narrow margin of victory for Proposition 123 and strong feelings on both sides of the issue, it should come as no surprise that there are still some potential obstacles to implementation. However, now that voters have approved Proposition 123, Arizona's public schools are that much closer to receiving desperately needed funding.

Of course, Proposition 123 does not even begin to resolve school funding issues in Arizona. It was never designed to do that. It addresses only the very specific requirement that the legislature annually inflate school funding. It does not restore other funding cuts to education over the previous years.

Nor does Proposition 123 address capital funding issues in Arizona's public schools. In 2013, the legislature basically repealed legislation that was enacted in 1998 to provide a dedicated stream of capital funding so that lower property wealth school districts could repair and renovate their schools without resorting to expensive bonds. The Center is currently developing litigation to address that issue.

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## Ninth Circuit Hears Challenge to Phoenix Area PM 10 Plan

**O**n June 17, 2016 the Ninth Circuit Court of Appeals finally heard argument on the Petition for Review that the Center filed in July 2015 challenging EPA's approval of a revision to the Arizona State Implementation Plan under the Clean Air Act. Because the Phoenix metropolitan nonattainment area failed to attain the National Ambient Air Quality Standard for PM-10 by December 31, 2006, section 189(d) of the Clean Air Act requires the state to submit "plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area."

Arizona initially submitted a 5% plan in 2007, but when EPA proposed a partial disapproval, the state withdrew the plan to avoid the sanctions

clock that the proposed disapproval would trigger. The state then submitted a substitute plan in May 2012, which EPA has now approved.

Although we raised several issues with the 2012 Plan, the most significant issue is the state's reliance upon the Act's exceptional events rule to demonstrate that it has "attained" the standard. The 24 hour standard for PM-10 is 150  $\mu\text{g}/\text{m}^3$ , not to be exceeded more than once per year on average over 3 years. According to the monitors located throughout the nonattainment area, however, the area continues to record values far in excess of that standard, particularly during the monsoon season. In the 5% plan, the state was only able to "attain" the standard if 135 exceedances (readings over 150  $\mu\text{g}/\text{m}^3$ ) that occurred over 25 days in 2011 and 2012 are excluded from the data as "exceptional events." If these exceedances were not excluded, 15 sites would be violating the standard by a significant measure.

In our briefs, we argued that the state's claim that the massive dust storms that caused most of the exceedances are not "reasonably preventable" ignores the fact that the sources of the dust, particularly agricultural sources, are not reasonably controlled. We argued that the State should be working to achieve true attainment by adopting stringent control measures that would prevent or reduce the magnitude of the dust storms caused by seasonal high winds, and protect the public health.

Now that the Petition has been argued and submitted, the Ninth Circuit should issue its decision within the coming months.

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

## APS FILES FOR A RATE INCREASE FROM THE ARIZONA CORPORATION COMMISSION

**O**n June 1, Arizona Public Service Company ("APS") filed an application for a rate increase with the Arizona Corporation Commission. The application seeks an overall 5.74% increase in rates that would generate an additional \$165.9 million for the company.

The proposed increase for residential customers will be even larger. The average annual bill impact for a typical APS residential customer would be approximately 8%. APS claims that residential rates need to increase more than the overall average increase due to what APS characterizes as a cost shift from rooftop solar customers to other residential customers.

Aside from the significant rate increase for residential customers, APS is also proposing to require

almost all residential customers to pay a demand charge each month based on the customers' highest demand for electricity during the peak period from 3 p.m. to 8 p.m. during the summer. The demand charge would be a fixed dollar charge multiplied by the highest metered demand each month during the five hour peak period. If approved, APS residential customers would pay three billing elements for each month: a basic service charge, a charge based on the number of kilowatt hours consumed and a charge based on peak demand.

APS claims that the new demand charges sought by the company represent a "modernization" of its residential rate plans and that these new charges will make substantial progress towards recovering APS' fixed costs as well as addressing the cross-subsidization of rooftop solar

customers. APS contends that rooftop solar customers are currently paying only 38% of the costs to serve them.

Of course, many others contend otherwise and believe that APS simply wants to make the installation of rooftop solar for residential customers uneconomical. The Arizona Corporation Commission is currently conducting proceedings in order to determine the value that rooftop solar adds to the electric system.

The Center will be representing numerous intervenors in the APS rate case including organizations that advocate for renewable energy, energy efficiency, low income customers and public schools. It is expected the hearings will begin on the application in early 2017.

## Arizona Court of Appeals Hears Argument in San Pedro Groundwater Challenge

**O**n April 28, 2016, the Arizona Court of Appeals heard oral argument in *Silver v. Pueblo del Sol*, a case challenging the Arizona Department of Water Resources' (ADWR) decision to grant an adequate water supply designation to Pueblo del Sol, a private water company that is proposing to deliver groundwater to a massive master planned community planned for Sierra Vista. The Center represents Tricia Gerrodette, a resident of Sierra Vista who objected to PDS's application. Other objectors include Robin Silver and the Bureau of Land Management (BLM).

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 the BLM for the San Pedro Riparian National Conservation Area (SPRNCA) 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 June 2014 the Superior Court ruled in favor of the objectors and vacated the agency's finding of adequate water supply. Both ADWR and Pueblo del Sol appealed that ruling. It was no coincidence that shortly after the argument, the Arizona legislature passed two bills designed to undermine the case, but fortunately Governor Ducey vetoed both bills. The court should issue its decision in the coming months.

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