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13 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
14 **IN AND FOR THE COUNTY OF MARICOPA**

15 **MAYER UNIFIED SCHOOL DISTRICT and )**  
16 **GADSDEN ELEMENTARY SCHOOL ) CV 2004-020078**  
17 **DISTRICT, )**  
18 **)**  
19 **Plaintiffs, )**  
20 **)**  
21 **v. ) (Assigned to the Honorable Ruth Hilliard)**  
22 **)**  
23 **)**  
24 **MARK WINKELMAN, in his capacity as ) (Oral Argument Requested)**  
25 **State Land Commissioner; THE ARIZONA )**  
**STATE LAND DEPARTMENT; THE )**  
**STATE OF ARIZONA; APACHE COUNTY;) )**  
**COCHISE COUNTY; COCONINO )**  
**COUNTY; GILA COUNTY; GRAHAM )**  
**COUNTY; GREENLEE COUNTY; LA PAZ )**  
**COUNTY; MARICOPA COUNTY; )**  
**MOHAVE COUNTY; NAVAJO COUNTY; )**  
**PIMA COUNTY; PINAL COUNTY; SANTA )**  
**CRUZ COUNTY; YAVAPAI COUNTY; )**  
**YUMA COUNTY; MARICOPA COUNTY )**  
**FLOOD CONTROL DISTRICT; ARIZONA )**  
**DEPARTMENT OF TRANSPORTATION; )**  
**TOWN OF CAREFREE; CHINO VALLEY )**  
**IRRIGATION DISTRICT; CITY OF )**  
**TUCSON; CITY OF FLAGSTAFF; TOWN )**

1 OF GILA BEND; CITY OF GLENDALE; )  
 2 CITY OF GLOBE; MAGMA FLOOD )  
 3 CONTROL DISTRICT; TOWN OF )  
 4 MARANA; CITY OF PEORIA; CITY OF )  
 5 PHOENIX; TOWN OF PRESCOTT; CITY )  
 6 OF SCOTTSDALE; CITY OF SIERRA )  
 7 VISTA; UNION PACIFIC RAILROAD CO.; )  
 8 CITYOF TEMPE; and U.S. BUREAU OF )  
 9 RECLAMATION, )  
 10 )  
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Defendants.

Defendants Town of Carefree, Town of Gila Bend, City of Globe, Town of Marana, City of Phoenix, City of Sierra Vista, City of Glendale, City of Flagstaff and City of Tempe (“Defendants”), by and through their attorney undersigned, hereby moves the Court to dismiss this action pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure, for failing to state a claim upon which relief can be granted. Specifically, Plaintiff is barred by the doctrine of laches from bringing suit, and fails to state a claim because the decision in *Lassen v. Arizona*, 99 Ariz. 161 (1967), upon which Plaintiffs’ prayer for relief relies, applies only prospectively and not retroactively. The following Memorandum of Points and Authorities supports this motion.

DATED this \_\_\_\_\_ day of July, 2006.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. FACTS**

3 For the purpose of this Motion, it is assumed that the allegations in the Complaint  
4 are true. Specifically, the lawsuit is brought against the State of Arizona, the Arizona  
5 State Land Department, and the State Land Commissioner for an alleged breach of their  
6 fiduciary duties regarding the previous issuance of easements and rights-of-way to  
7 governmental entities and others on state trust lands without obtaining any compensation  
8 from them. (Plaintiffs' Second Amended Complaint filed April 20, 2006  
9 ["**Complaint**"]), ¶ 1). The governmental entities currently holding easements that are the  
10 subject of this action were added to the lawsuit as necessary parties by order of this court  
11 dated August 23, 2005, and include those municipalities represented by undersigned  
12 counsel. (Complaint, ¶ 8.)

13 The gravamen of the Complaint is as follows: Upon statehood, Congress granted  
14 Arizona approximately 10 million acres of federal land pursuant to the Arizona-New  
15 Mexico Enabling Act of 1910, to be held in trust for the benefit of Arizona's public  
16 schools, universities and other public institutions. (Complaint, ¶ 9.) The Arizona  
17 Constitution, as detailed in the Complaint, requires that the land received from the federal  
18 government would be held in trust and disposed of as provided for in the Enabling Act  
19 and the Constitution, and that disposition of trust lands in a manner contrary to the  
20 Enabling act is a breach of the trust, and shall be null and void. (Complaint, ¶¶ 10-13.)  
21 The State Land Department was created in 1915. (Complaint, ¶ 14.) Beginning in 1929  
22 and until at least 1960, the State Land Department began issuing perpetual easements to  
23 governmental entities mostly for the purposes of road construction, as well as granting  
24 sand and gravel to governmental entities for the purpose of road construction.  
25 (Complaint, ¶¶ 15-16.) Until 1967, the Arizona Supreme Court had held that monetary

1 compensation for the easements and material sites was not required because of the  
2 increase in value of the trust land by highway access, which constituted an overall benefit  
3 to the trust. (Complaint, ¶ 17, citing *State v. Lassen*, 99 Ariz. 161 (1965); accord  
4 *Grossetta v. Choate*, 51 Ariz. 248 (1938); *State ex rel. Conway v. State Land Department*,  
5 62 Ariz. 248 (1945).) The Complaint alleges that in 1967, the United States Supreme  
6 Court rejected the prior decisions of the Arizona Supreme Court, and held that “Arizona  
7 must actually compensate the trust in money for the full appraised value of any material  
8 sites or rights-of-way which it obtains on or over trust lands.” (Complaint, ¶ 18; citing  
9 *Lassen v. Arizona*, 385 U.S. 458, 470 (1967).) When the U.S. Supreme Court issued the  
10 *Lassen* decision, over 900 easement and rights-of-way (referred to as the “09 easements”)  
11 had already been issued, and to date the state has not received compensation in money for  
12 those 09 easements issued prior to Lassen, which is the subject of this suit. (Complaint,  
13 ¶¶ 1 and 19.)

## 14 II. LAW

### 15 A. Plaintiffs are barred by the equitable doctrine of laches from bringing 16 this suit.

17 Plaintiffs in this lawsuit are asking the Court, *inter alia*, to require the State to  
18 “recover adequate compensation for the 09 easements” (Complaint ¶ 29(B), Second  
19 Claim for Relief alleging Breach of Fiduciary Duty). Plaintiffs are also requesting that  
20 this Court declare the conveyances null and void because they fail to substantially  
21 conform to the provisions of the Enabling Act. (Complaint, ¶ 32(A), Third Claim for  
22 Relief, Declaratory Judgment.) Plaintiffs ask this court for equitable relief through  
23 rescission and restitution. They seem to be claiming that the various grantee Defendants  
24 have been unjustly enriched, which also sounds in equity. The basis for these requests  
25 for relief is the Supreme Court’s decision in *Lassen v. Arizona*, *supra*, which was decided

1 over 39 years ago. According to the Complaint, the “09 easements” complained of all  
2 predated the *Lassen* opinion. (Complaint, ¶¶ 15, 16 and 19.) There is no allegation in the  
3 Complaint of any action by Plaintiffs or Defendants in the intervening years. If ever  
4 there was a case which cried out for relief under the laches defense, this is it.

5 Laches is a form of estoppel that applies when the party asserting the defense  
6 shows that, because of delay or lapse of time, he/she is injured or has changed position in  
7 reliance on the other party’s inaction. *State of AZ, ex rel. the Dept. of Economic Security*  
8 *v. Vallejo*, 194 Ariz. 201, 204, 979 P.2d 529, 532 (1999); *See also AZ Laborers,*  
9 *Teamsters, and Cement Masons Local 395 Health and Welfare Trust Fund v. Hanlin*, 148  
10 Ariz. 23, 712 P.2d 936 (1985). The essential elements of the defense of laches are  
11 (1) unreasonable delay, and (2) disadvantage or prejudice to the party asserting the  
12 defense. *Tovrea v. Umphress*, 27 Ariz.App. 513, 556 P.2d 814 (1976).

13 Both elements of laches are met in this case. First, there has been an inexplicable  
14 39 year delay in bringing this lawsuit. While a lapse of time alone is not controlling, *Day*  
15 *v. Estate of Wiswal*, 93 Ariz. 400, 381 P.2d 217 (1963), the delay in this case is  
16 unreasonable due to no excuse whatsoever given by Plaintiffs for the delay. Certainly  
17 this Court can impute knowledge of the relevant law to the Plaintiffs. Assuming a valid  
18 cause of action for either restitution or rescission existed and accrued at the time the  
19 *Lassen* decision was issued in 1967, it is patently unreasonable for Plaintiffs to sit on  
20 their rights to the detriment of the Defendants. The purpose of the laches defense is to  
21 discourage dilatory conduct, and in Arizona even a delay as short as 2 months in filing a  
22 complaint has been held to be plainly unreasonable. *Sotomayor v. Burns*, 199 Ariz. 81,  
23 83, 13 P.3d 1198, 1200 (2000).

24 Second, the disadvantage or prejudice to the Defendants is apparent from the  
25 Complaint. Plaintiffs are asking this Court in the Second Claim for Relief for restitution,

1 to require a fair market value compensation in actual dollars to the trust for easements  
2 which were conveyed decades ago, at a time when the law in Arizona clearly allowed  
3 such conveyances to occur without any monetary compensation. (Complaint, ¶¶ 15-19  
4 and 24-29.) These Defendants thus were innocent grantees, acting pursuant to the law at  
5 the time. To now require in 2006 payment is a severe financial hardship the Court can  
6 certainly take notice of. Laches is appropriate to defeat a claim for restitution. *Maricopa*  
7 *County v. The Cities and Towns of Avondale, et al.*, 12 Ariz.App. 109, 113, 467 P.2d 949,  
8 953 (1970). This case is particularly instructive to the present suit. In *Maricopa County*,  
9 the county had mistakenly distributed 1/3 of its use fuel tax revenues to numerous cities  
10 and towns located in Maricopa County. *Id.*, 12 Ariz.App. at 113, 467 P.2d at 953. The  
11 County discovered the error in 1963, but did not bring suit for restitution until 1966. *Id.*,  
12 12 Ariz.App. at 114, 467 P.2d at 954. The various cities and towns who received the  
13 funds did so with no knowledge of the mistake, and used the monies to improve and  
14 maintain street systems. *Id.* The court, while acknowledging the enrichment to the cities  
15 and towns, weighed the equities and determined that restitution should not lie, noting the  
16 three-year delay, the fact that the funds erroneously disbursed by the County were already  
17 expended, and stating “[a] holding to the contrary would be tantamount to sanctioning the  
18 County’s leading its municipalities into a fiscal trap . . . [t]he momentum built up by 16  
19 years of customary practice demands a faster foot on the brake.” *Id.* Likewise, the fiscal  
20 trap posed by Plaintiffs’ lawsuit is potentially immense, involving 900 easements spread  
21 around the state, with no foot on the brake whatsoever for 39 plus years.

22 Laches is also appropriate as a complete defense to Plaintiffs request for rescission  
23 in the Third Claim for Relief. The request to declare a contract “null and void” is  
24 rescission. *Berry v. McLeod*, 124 Ariz. 346, 604 P.2d 610 (1979). Rescission is an  
25 equitable remedy. *Mortensen v. Berzell Investment Co.*, 102 Ariz. 348, 429 P.2d 945

1 (1967). As such, laches is relevant to balance the equities in this case. The request to  
2 rescind all 900 09 easements would undo 39 plus years of reliance upon their validity.  
3 As alleged, these easements were primarily for the construction of roads (Complaint  
4 ¶¶ 15-16), which means that the public has depended on them for use over the years as  
5 well. Defendants materially relied upon these easements to build roads, and to the extent  
6 such building has already been completed, Defendants have a vested right in the  
7 continued possession and use of these easements. *See, e.g. Town of Paradise Valley v.*  
8 *Gulf Leisure Corp.*, 27 Ariz.App. 600, 557 P.2d 532 (1976) (property owner who  
9 materially relies on a permit from the town may continue to act in conformance  
10 therewith, notwithstanding arbitrary withdrawal or cancellation of the permit). It would  
11 be inequitable, and work a serious public injustice against the innocent grantee  
12 defendants, to rescind or force payment for these easements. Would the State Land  
13 Department, upon reversion of the 09 easements to it, keep the roads built open for the  
14 public, or would they close them off and render the adjacent state trust lands valueless?  
15 Would they maintain the roads for the safe use of the public? These types of questions  
16 underscore the absurdity of Plaintiffs' lawsuit.

17 **B. *Lassen v. Arizona* only applies prospectively, and thus does not apply to**  
18 **any of the easements at issue in this case.**

19 Plaintiffs' Complaint turns on the applicability of the U.S. Supreme Court's  
20 decision in *Lassen v. Arizona, supra*. Although not expressly pled in the Complaint, in  
21 order for the 09 easements at issue to be either rescinded or for the state trust to be  
22 entitled to restitution, the *Lassen* decision undoing some 50 plus years of practice and  
23 judicial opinions in Arizona would have to be applied retroactively to the 09 easements,  
24 because none of the easements at issue in this lawsuit were granted after the opinion in  
25 *Lassen* was rendered. (Complaint, ¶¶ 15-19.) Under both state and federal law, however,

1 the decision should only be given prospective effect, which means that Plaintiffs would  
2 not be entitled to any relief for acts taking place prior to the 1967 decision.

3 1. State law judicial opinion analysis.

4 Under state law, whether an opinion of the court will be given only prospective  
5 application is a policy question within the court's discretion. *Fain Land and Cattle Co. v.*  
6 *Hassell*, 163 Ariz. 587, 596, 790 P.2d 242, 251 (1990). In Arizona, unless otherwise  
7 specified, a civil opinion operates both retroactively and prospectively. *Id.* The Court  
8 uses a three-part test to determine whether the presumption of retroactivity has been  
9 overcome: (1) whether the decision establishes a new legal principle by overruling clear  
10 and reliable precedent or by deciding an issue whose resolution was not foreshadowed  
11 (the "reliance" factor"); (2) whether retroactive application will further or retard  
12 operation of the rule, considering the prior history, purpose and effect of the rule (the  
13 "purpose" factor); and (3) whether retroactive application will produce substantially  
14 inequitable results (the "inequity" factor). *Id.*

15 The Court in *Fain*, relying on a very similar set of facts and subject matter,  
16 employed the three-part test and decided in favor of prospective only application. In  
17 *Fain*, the Court was asked to determine the application of the Court's prior decision in  
18 *Deer Valley Unified School Dist. v. Superior Court*, 157 Ariz. 537, 760 P.2d 537 (1988),  
19 which held that the Arizona Constitution prohibited the use of condemnation of state trust  
20 lands by school districts. The *Fain* court determined, based on the *Deer Valley* opinion,  
21 that land exchanges were not permissible under the Arizona Constitution, but that the  
22 prohibition on exchanges would only apply prospectively from the date of the 1988 *Deer*  
23 *Valley* decision. *Fain*, 163 Ariz. at 596-598, 790 P.2d at 251-253.

24 In weighing the three factors, the *Fain* court determined that the "reliance" factor  
25 tipped against retroactivity, reasoning that the state engaged in trust land exchanges for

1 many years without the issue of their constitutionality being raised, until the *Deer Valley*  
2 decision called the practice into question, meaning that there was no clear foreshadowing  
3 of the decision prior to *Deer Valley*. *Fain*, 163 Ariz. at 597, 790 P.2d at 252. The court  
4 looked at the arguments for and against retroactivity under the “purpose” factor, and  
5 determined that it was on balance neutral. *Id.* The court then weighed the “inequity”  
6 factor, focusing on the injustice or hardship that would result from retroactive application  
7 of the new rule, and held:

8       Where a decision of this court could produce a substantially inequitable  
9 result if applied retroactively, we may avoid the injustice or hardship by  
10 applying the decision prospectively only. (Citation omitted). The balance  
11 of equities on this factor tips heavily in favor of prospective application  
12 only. Several hundred land exchanges have been completed over the years,  
13 affecting thousands of acres. If applied retroactively, this opinion might  
14 inflict great hardship on many innocent people, and perhaps disrupt the  
15 economy of the state. It would be impossible to undo all the land  
16 exchanges that have transpired and put everyone back in his original  
17 position.

18 *Id.* Application of the three-part rule to this lawsuit leads to the same conclusion. It is  
19 clear that the 09 easements were granted in reliance on a series of Arizona Court  
20 decisions upholding their validity, and that an enormous hardship would result statewide  
21 if the *Lassen* decision were applied retroactively.

22       This same jurisprudence regarding retroactivity should be applied to determine the  
23 retroactive application by Arizona courts of a federal court opinion such as *Lassen*.  
24 Plaintiffs chose to bring this action in state court, and rely heavily upon assertions made  
25 about the applicability of the Article X of the Arizona Constitution to the 09 easements,  
the same Article at issue in the *Deer Valley* opinion. Moreover, while the federal courts  
utilize a different rule in determining retroactivity, see *Harper v. Virginia Dept. of*  
*Taxation*, 509 U.S. 86 (1993), the rule still limits retroactive application to “all cases still

1 open on direct review and as to all events, regardless of whether such events predate or  
2 postdate our announcement of the rule”, *Id.*, 509 U.S. at 97. Plaintiff has alleged no cases  
3 open on direct review as of 1967 regarding any of the 09 easements, or that there were  
4 any 09 easements which postdated the *Lassen* decision. Thus, there is no retroactive  
5 effect to *Lassen* under federal law. *Accord Atkins v. Dept. of Revenue*, 320 Or. 713, 724,  
6 894 P.2d 449, 455 (1995) (*Harper* and the case whose retroactivity it determined, *Davis*  
7 *v. Michigan Department of Treasury*, 489 U.S. 803 (1989), did not require full retroactive  
8 payment of all invalidly collected taxes; retroactivity only applied to cases *pending* in  
9 state court at the time *Davis* was decided). States remain free post-*Harper* to determine  
10 the appropriate remedy and the factors weighing against retroactivity. *See Beavers v.*  
11 *Johnson Controls World Services*, 118 N.M. 391, 399, 881 P.2d 1376, 1384 (1995)  
12 (reliance interests when contract and property law are involved weigh against  
13 retroactivity).

14 2. State law statutory/administrative rule analysis.

15 The *Lassen* decision concerned a “friendly” lawsuit between two agencies of the  
16 state of Arizona, the State Land Department, through the State Land Commissioner, and  
17 the State Highway Department, over the a change in a rule adopted by the State Land  
18 Commissioner requiring full payment of the appraised value of right-of-way or material  
19 sites granted to the Highway Department. *See State v. Lassen*, 99 Ariz. 161, 407 P.2d  
20 747 (1965). The rule that was at issue, Rule No. 12 of the State Land Department, reads  
21 as follows:

22 State and County highway Rights-of-Way and Material Sites may be granted  
23 by the Department for an indefinite period for so long as used for the purpose  
24 granted after full payment of the appraised value of the Right-of-Way or  
25 Material Site has been made to the State Land Department. The appraised  
value of the Right-of-Way or Material Site shall be determined in accordance  
with the principles established in ARS 12-1122.

1 The State Land Commissioner gave notice and held a hearing to discuss the proposed rule  
2 change. *Id.* The State Highway Department appeared at the hearing and objected to Rule  
3 No. 12. *Id.* The objections were overruled and Rule No. 12 was adopted. *Id.* On the  
4 same day, the State Highway Department filed a writ of prohibition with the Arizona  
5 Supreme Court to prevent enforcement of the rule. *Id.* The Supreme Court granted an  
6 alternative writ of prohibition, which had the effect of blocking enforcement of the rule,  
7 and by their written opinion made the writ of prohibition permanent. *Id.*, 99 Ariz. at 168,  
8 407 P.2d at 752. It was from the permanent writ of prohibition that the State Land  
9 Commissioner successfully appealed to the U.S. Supreme Court, which reversed the  
10 Arizona Supreme Court and remanded back to the state court, which in a written per  
11 curiam order vacated and quashed the permanent writ of prohibition against enforcement  
12 of Rule no. 12 in accordance with the U.S. Supreme Court's mandate. *State ex rel.*  
13 *Arizona Highway Dept. v. Lassen*, 102 Ariz. 318, 428 P.2d 996 (1967). Thus, it was the  
14 rule, and not any specific easement, which was at issue in the U.S. Supreme Court's  
15 *Lassen* decision, and as such its retroactive application should be governed by the rules of  
16 retroactive application for statutes in Arizona.

17 In Arizona, the same principles of construction that apply to statutes also apply to  
18 administrative rules and regulations. *Kimble v. City of Page*, 199 Ariz. 562, 565, 20 P.3d  
19 605, 608 (App. 2001). According to A.R.S. § 1-244, no statute is retroactive unless  
20 expressly declared therein. While merely procedural statutes may be applied  
21 retroactively, it is plain that legislation may not retroactively disturb vested rights. *Cook*  
22 *v. Cook*, 209 Ariz. 487, 494, 104 P.3d 857, 865 (App. 2005). In the case at bar, the rule  
23 at issue in *Lassen* as reproduced above is clearly written prospectively only, and to the  
24 extent it would disturb the vested rights of Defendants as explained in part A *supra*, may  
25 not be given retroactive effect.



1 Original of the foregoing filed on this  
2 20<sup>th</sup> day of July, 2006, with  
the Clerk of the Court.

3 Copy of the foregoing mailed  
4 this 20<sup>th</sup> day of July, 2006, to:

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