

**ARIZONA COURT OF APPEALS
DIVISION ONE**

STATE OF ARIZONA, the ARIZONA
STATE LAND DEPARTMENT, an
agency of the State of Arizona, and
MARK WINKLEMAN, in his official
capacity as State Land Commissioner,

Petitioners,

v.

THE HON. RUTH HILLIARD, Judge
of the SUPERIOR COURT OF THE
STATE OF ARIZONA, in and for the
County of MARICOPA,

Respondent Judge,

and

MAYER UNIFIED SCHOOL
DISTRICT, GADSDEN
ELEMENTARY SCHOOL DISTRICT,
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

1 CA-SA 06-0098

Maricopa County
Superior Court
No. CV2004-020078
(corrected case number)

PETITION FOR SPECIAL
ACTION

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1 CA-SA 06-0098

Maricopa County
Superior Court
No. CV2002-11759

PETITION FOR SPECIAL
ACTION

IRRIGATION DISTRICT, CITY OF
TUCSON, CITY OF FLAGSTAFF,
TOWN OF GILA BEND, CITY OF
GLENDALE, CITY OF GLOBE,
MAGMA FLOOD CONTROL
DISTRICT, TOWN OF MARANA,
CITY OF PEORIA, CITY OF
PHOENIX, TOWN OF PRESCOTT,
CITY OF SCOTTSDALE, CITY OF
SIERRA VISTA, UNION PACIFIC
RAILROAD CO., CITY OF TEMPE,
AND U.S. BUREAU OF
RECLAMATION,

Real Parties in
Interest.

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INTRODUCTION

From 1929 until 1967, the State of Arizona granted rights of way over state trust land to more than thirty political subdivisions for public roads and flood control purposes. State statutes specifically authorized this practice and the Arizona Supreme Court upheld it. But the State discontinued the practice in 1967 when the U.S. Supreme Court upheld, as consistent with the Arizona-New Mexico Enabling Act, an Arizona State Land Department rule providing that the trust be compensated in money for the full appraised value of any interest in trust lands, including rights of way. *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 469 (1967).

Although *Lassen* clarified the meaning and effect of the Enabling Act, it did not decide the legal status of any rights of way that the State previously granted. *Id.* at 469 n. 22. Now, almost forty years later, the school district Real Parties in Interest that were the plaintiffs below (“Plaintiffs”) seek a judgment declaring all such rights of way void, awarding damages for “breach of trust,” and compelling the Petitioners (“State Defendants”) to render an “accounting” and either prevent the public from using these rights of way (including portions of I-10 and I-40) or force the governmental entities to which they were granted to pay the present value of property interests that were granted decades ago.

The State Defendants sought dismissal of this action pursuant to A.R.S. § 12-821, the one-year statute of limitations on claims against the State and A.R.S. § 12-821.01(A), the Notice of Claim statute. The trial court denied the motion to dismiss, but correctly concluded that the status of these easements should not be adjudicated in the absence of the grantees, and ordered Plaintiffs to join all grantees. If this case proceeds, it will consume the scarce resources of the court and more than thirty governmental entities claiming an interest in almost one thousand easements and will affect approximately fifty thousand acres of state trust land.

This Petition seeks special action relief to determine the correctness of the trial court's ruling that Plaintiffs' claims are not barred by the statute of limitations before more than thirty governmental entities (the grantees of the challenged easements) are required to litigate complicated questions of property rights and valuations. Early resolution of this legal issue is appropriate because it is purely legal and would avoid unnecessarily plunging the status of public roads throughout the State into uncertainty and burdening the State Defendants, numerous other public agencies, and the courts with cumbersome and costly litigation.

JURISDICTIONAL STATEMENT

The State Defendants and other governmental entities that are to be added as defendants should not have to undergo a long and costly trial process when the Plaintiffs' claims are time barred. The superior court abused its discretion when it denied the State Defendants' Motion to Dismiss and allowed Plaintiffs' claims to proceed despite the bar of A.R.S. § 12-821, the one-year statute of limitations applicable to claims against the State, and A.R.S. § 12-821.01, the Notice of Claims statute. The court now threatens "to proceed without or in excess of [its] jurisdiction or legal authority." *See* Rules 3(b) and 3(c), Ariz. R. P. Special Actions. The State Defendants have no other equally plain, speedy remedy adequate to redress the superior court's error. *See* Rule 1(a), Ariz. R. P. Special Actions. This Court therefore has jurisdiction to grant relief by special action pursuant to A.R.S. § 12-120.21(A)(4).

A trial court abuses its discretion when it misapplies the law, and relief by special action is appropriate to correct abuses of discretion. Rule 3(b), Ariz. R. P. Special Actions; *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985). The refusal to dismiss a claim that is barred by the statute of limitations is an abuse of discretion. *See, e.g.,*

Harris Trust Bank v. Superior Court, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App. 1996) (Court accepted special action jurisdiction to reverse trial court ruling striking statute of limitations defense because allowing action “to proceed to trial without addressing the error presented by [the] petition would ultimately result in reversal” and waste judicial resources).

Numerous Arizona cases have held that special action relief is appropriate when the statute of limitations defense has been raised and a trial court has incorrectly rejected that defense. *See, e.g., Levinson v. Jarrett ex rel. County of Maricopa*, 207 Ariz. 472, 474, 88 P.3d 186, 188 (App. 2004); *Flood Control District v. Gaines*, 202 Ariz. 248, 250, 43 P.3d 196, 198 (App. 2002) (special action reversing trial court’s denial of motion for summary judgment, holding that claims were barred by A.R.S. § 12-821); *Mantano v. Browning*, 202 Ariz. 544, 545, 48 P.3d 494, 495 (App. 2002) (special action reversing trial court’s denial of motion to dismiss, holding that statute of limitations on minor’s claim was not tolled until the minor reached majority); *State Compensation Fund v. Superior Court*, 190 Ariz. 371, 948 P.2d 499 (App. 1997) (special action reversed denial of State Compensation Fund’s summary judgment motion, determining that Fund is “public entity” for purposes of notice-of-claim statute and one-year limitations period governing suits against public entities). The rationale underlying this line of

cases is the avoidance of “as much further needless expense and delay as possible.” *Safeway Stores, Inc. v. Maricopa County Superior Court*, 19 Ariz.App. 210, 212, 505 P.2d 1383, 1385 (1973) (special action reversing denial of a motion for summary judgment based on statute of limitations).

Special action review also is appropriate because resolution of this litigation is itself an issue of statewide importance affecting significant public interests. *See, e.g., P & P Mehta LLC v. Jones*, 211 Ariz. 505, 506, 123 P.3d 1142, 1143 (App. 2005) (special action relief granted to determine the meaning of "good cause" in A.R.S. § 12-911(A)(1), an undecided question of law having statewide importance); *Hull v. Albrecht*, 192 Ariz. 34, 36, 960 P.2d 634, 636 (1998) (special action granted to terminate litigation concerning the constitutionality of school finance legislation); *State v. Velasco*, 165 Ariz. 480, 482, 799 P.2d 821, 823 (1990) (special action relief granted to decide “in a single proceeding and as quickly as possible” an attack on the reliability of the silica gel method of breath preservation in DUI cases, a legal issue of statewide importance affecting many litigants). In this case prompt review is necessary to allow the governmental entities to “know where they stand,” *Hull*, 192 Ariz. at 36, 960 P.2d at 636, and to avoid leaving the challenged easements in “governmental limbo” pending a later appeal of the same issues. *City of Phoenix v. Superior*

Court, 158 Ariz. 214, 216, 762 P.2d 128, 130 (App. 1988) (special action jurisdiction granted to review injunction against an annexation, to avoid leaving annexed territory in a "governmental limbo" pending an appeal).

Additional litigation will not further illuminate the issues presented in this Petition. The relevant facts are undisputed and fully apparent from the face of the Complaint.¹ The Petition presents a purely legal issue of first impression: whether a claim against the State for an alleged failure to remedy a breach of trust that occurred more than forty years ago is barred by the statute of limitations. *See, e.g., Sanchez v. Coxon*, 175 Ariz. 93, 94, 854 P.2d 126, 127 (1993) (special action jurisdiction accepted to review denial of motion to dismiss that raised immunity defense); *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 210, 841 P.2d 198, 205 (1992) (special action jurisdiction accepted to determine the availability of a deficiency judgment, a purely legal issue that could dispose of the litigation). In reviewing the denial of a motion to dismiss, this Court may draw its own legal conclusions, assuming the truth of the allegations of the Complaint. *Forum Dev't, L.C. v. Arizona Dep't of Revenue*, 192 Ariz. 90, 93, 961 P.2d 1038, 1041 (App. 1997). This Court reviews *de novo* the determination of the

¹ Because the claims alleged in the Complaint, the Amended Complaint, and the Second Amended Complaint are substantively identical except as to the parties, State Defendants refer generically to the Complaint unless the context requires otherwise.

applicability of the statute of limitations when it hinges solely on the determination of a question of law. *Mantano*, 202 Ariz. at 546, 48 P.3d at 496.

By addressing the legal issue raised here, this Court may completely resolve this suit before dozens of governmental entities are required to litigate complicated questions of property rights and valuations.

STATEMENT OF ISSUE

Are Plaintiffs' claims that the State Defendants breached their trust obligations over forty years ago by granting easements to other governmental entities without payment barred by the statute of limitations?

STATEMENT OF FACTS

Congress set forth the terms of the compact by which New Mexico and Arizona would be admitted to the Union in the Arizona-New Mexico Enabling Act. Act of June 20, 1910, Pub. L. No. 219, ch. 310, 36 Stat.557.

As part of that compact the federal government granted Arizona 10,790,000 acres of land "in trust for the use and benefit of *designated public activities* within the State" including the common schools, universities, agricultural and mechanical colleges, a school of mines, military institutes, penitentiaries, insane asylums, schools for the deaf, dumb, and blind, miners' hospitals, normal schools, and state charitable, penal, and

reformatory institutions. *Lassen*, 385 U.S. at 463, 460 (referring to the Enabling Act, §§ 24 and 25)(emphasis added).

Plaintiffs allege that between 1929 and 1967 (the year *Lassen* was decided) Defendant Arizona State Land Department (“ASLD” or “the Department”) granted certain rights of way to various governmental entities without the payment of monetary consideration (the “09 Easements”).² (Second Amended Complaint [App. 8] at ¶¶ 15-19). The State complied with applicable state statutes and state court decisions in effect when it made the grants. *Id.* at ¶ 17; *see also* A.R.S. § 37-461, and historical and statutory notes thereto; *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938) (holding that auction was not required to dispose of highway right of way); *State ex rel. Conway v. State Land Dep’t*, 62 Ariz. 248, 156 P.2d 901 (1945) (holding that the State need not compensate the Trust when acquiring rights of way for the state highway system).

In 1967, *Lassen* reversed *State ex rel. Arizona Highway Dep’t v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965), an Arizona Supreme Court decision that had interpreted Section 11-601 of the 1939 Code (now A.R.S. § 37-461) to authorize the state highway department to acquire highway

² The number “09” signifies a two digit code that ASLD assigned to identify easements affecting state trust lands that were granted to governmental entities without payment to the state land trust (“the Trust”).

easements across school trust land without payment and invalidated an ASLD rule that required consideration for such an easement. *Lassen*, 385 U.S. at 469. The U.S. Supreme Court concluded that the State must actually compensate the Trust in money for the full appraised value of any material sites or rights of way that it obtains on or over Trust lands. *Id.* As to previously granted “09” Easements, the Court did not reach “either the validity of any such transfers or the obligations of the State, if any, with respect thereto.” *Id.* at n. 22. In the thirty-nine years since *Lassen*, there has been no reported decision addressing the validity of any “09” Easements.

In this action, two common school districts³ are suing ASLD, the Commissioner, the State, and more than thirty other governmental entities that allegedly were granted “09” Easements (“the Defendant Grantees”), seeking relief based upon their allegation that “09” Easements granted over forty years ago—the same easements that *Lassen* addressed but did not specifically invalidate—did not substantially comply with the Enabling Act and Article X of the Arizona Constitution. (App. 8 at ¶¶ 9-18, 26, 31, 32.)

³ Rob Smith and other persons alleged to be taxpayers and parents of school children began this action and added the present Plaintiffs (school districts) in the First Amended Complaint. The superior court correctly concluded that the individual Plaintiffs were only “incidental beneficiaries” who lacked standing to sue. (August 1, 2005 Minute Entry (attached to this Petition) and Judgment dated August 23, 2005 [App. 6].)

Plaintiffs demand an accounting as to these grants. (App. 8 at First Claim for Relief, ¶ A.) They also seek a declaration that the grants constituted a breach of trust and an order that the State pay the Trust the fair market value of the trust property improperly granted, together with interest. (App. 8 at Second Claim for Relief, ¶¶ A, B.) Plaintiffs also demand a declaration that all such grants are null and void. (App. 8 at Third Claim for Relief, ¶ A). Finally, Plaintiffs demand payment of their costs and attorney's fees. (App. 8 at First Claim for Relief ¶ B, Second Claim for Relief ¶ C, Third Claim for Relief ¶ B.)

Plaintiffs did not allege that they served a notice of claim on the State Defendants and impliedly concede that they did not. (App. 8; Plaintiffs' Response to Defendants' Motion to Dismiss [App. 4] at 10.) The State Defendants did not receive any notice of claim. (Motion to Dismiss [App. 2] at 4.)

A year and a half before Plaintiffs filed this action, their counsel requested, and was provided access to, all public records relating to the "09" Easements. (App. 2 at Exhibit A.) On June 4, 2003, Plaintiffs' counsel wrote to the Commissioner, expressing his opinion that the "09" Easements are void and demanding to know what action ASLD had taken to collect compensation for the grants. (App. 2 at Exhibit B.) The Commissioner

responded in writing on August 26, 2003, explaining the complexity of individually addressing each of the “09” Easements and stating that ASLD intended to address the most significant easements first. (App. 2 at Exhibit C.) Plaintiffs do not allege that any other developments relevant to their claims occurred after August 26, 2003, except that the State Defendants have “failed to recover adequate compensation” for easements granted prior to *Lassen*, and allowed the Defendant Grantees to continue using the easements without compensation. (App. 8 at 27, 28.) Plaintiffs claim that “it became clear” to them “that the Commissioner did not intend to take any action” on the “09” Easements in June of 2004. (App. 4 at 4.) Although plainly aware of the facts giving rise to their claims in June of 2003, Plaintiffs did not file their Complaint until October 15, 2004. (Minute Entry at 2.)

The State Defendants moved to dismiss the Complaint, arguing that (1) Plaintiffs’ claims are barred by the applicable statute of limitations; (2) Plaintiffs failed to timely file and serve a notice of claim; (3) Plaintiffs do not have standing; and (4) Plaintiffs do not present a justiciable controversy. (App. 2.) The State Defendants also argued that Plaintiffs failed to join as parties all persons whose presence is needed for a just adjudication (the grantees of the “09” Easements) and therefore the Court should order Plaintiffs to join such persons as defendants or, in the alternative, dismiss the

action. (Motion to Compel Joinder [App. 3].) Thereafter on January 14, 2005, Plaintiffs filed an Amended Complaint adding the School Districts. (App. 1.)

The superior court dismissed the individual Plaintiffs for lack of standing and granted the State Defendants' Motion to Compel Joinder of Indispensable Parties. (Minute Entry at 3; App. 6.) The Court rejected the State Defendants' other arguments. (Minute Entry at 3.) With respect to the statute of limitations issue, the Court accepted Plaintiffs' assertion that they were not aware until June, 2004, that "ASLD did not intend to take any action on the 09 Easements" and, "therefore, the Statute of Limitations had not run when the action was filed." (*Id.* at 2.) In addition, the court found that because Plaintiffs sought an accounting from the State Land Commissioner, that duty is on-going." (*Id.* at 2.) The court rejected the argument that the failure to serve a Notice of Claim within 180 days of accrual of said claim, as required by A.R.S. § 12-821.01(A), for the same reasons. (*Id.* at 2.)⁴ On March 7, 2006, after it appeared that settlement was

⁴ There is no dispute that Plaintiffs have never served a Notice of Claim on the State Defendants. Because the superior court rejected State Defendants' argument that this failure barred Plaintiffs complaint for the same reasons that the court rejected the argument that the complaint was barred by the statute of limitations, the arguments in this Petition relating to the statute of limitations are intended to apply to, and preserve, State Defendants' arguments relating to the Notice of Claim.

unlikely, Plaintiffs moved to place the action on the active calendar to allow Plaintiffs time to file and serve on the thirty-four grantees a Second Amended Complaint. (Motion to Place Case on Active Calendar, March 7, 2006 [App. 7] at 2.) The Plaintiffs filed their Second Amended Complaint adding the Defendant Grantees on April 24, 2006. (App. 8.)⁵

ARGUMENT

The Superior Court Abused Its Discretion in Denying State Defendants' Motion to Dismiss Because the Statute of Limitations Bars the Complaint.

A. The Complaint is Barred Because the State Granted the Easements Without Compensation More Than Forty Years Ago and Plaintiffs Knew or Should Have Known of the Alleged Breaches More Than a Year Before They Filed This Lawsuit.

Plaintiffs do not dispute that the statute of limitations applicable to their claims is A.R.S. § 12-821,⁶ which provides: “All actions against any public entity or public employee shall be brought within one year after the

⁵As of the date of filing this Petition Plaintiffs are in the process of serving the Defendant Grantees, but only the Defendant Grantee City of Tucson has entered an appearance. State Defendants have served copies of this Petition and the Appendix on all entities named as Defendant Grantees in anticipation that each of them will shortly be made parties to the proceeding below and may wish to participate in this special action.

⁶In response to the Motion to Dismiss Plaintiffs argued that their claims did not accrue until June of 2004 (App. 4 at 9) and that the State Defendants' conduct amounted to a continuing breach of duty (App. 4 at 5-9). Plaintiffs never argued that some statute of limitations other than A.R.S. § 12-821 was applicable to their claims. (App. 4.)

cause of action accrues and not afterward.” Thus, Plaintiffs’ claims are time-barred and should be dismissed unless their claims accrued on or after November 15, 2003 (one year prior to the date the complaint was filed).

Here, Plaintiffs’ claims relate to specific easements that the State granted without payment as long as seventy-seven years ago. The acts for which the Plaintiffs seek redress are the State’s grants of the “09” Easements without compensation. The claim that such grants amounted to a breach of trust accrued when the State granted the easements and thus the Complaint is barred by A.R.S. § 12-821.

Generally, the statute-of-limitations period begins to run and the cause of action accrues when one party may sue another. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). In this case, when a trustee allegedly “violates one or more of his obligations to the beneficiary . . . a cause of action exists against the trustee, and the statute of limitations is applicable.” *Harris Trust Bank*, 188 Ariz. at 163, 933 P.2d at 1231.

Even assuming, *arguendo*, that Plaintiffs’ claims did not accrue until *Lassen* was decided, the claims accrued no later than 1967, when the U.S.

Supreme Court announced its decision in *Lassen*.⁷ Under the discovery rule applicable to A.R.S. § 12-821, a limitations period begins to run “when the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause.” *Gust, Rosenfeld*, 182 Ariz. at 588, 898 P.2d at 966; *Sato v. Van Denburgh*, 123 Ariz. 225, 227, 599 P.2d 181, 183 (1979); *Republic Nat’l Bank of New York v. Pima County*, 200 Ariz. 199, 204, 25 P.3d 1, 6 (App. 2001).

In their Response to the Motion to Dismiss, Plaintiffs contended that it was not clear until June 2004 that the Commissioner did not intend to take any action against the grantees of the “09” Easements. (App. 4 at 4.) However, Plaintiffs allege no fact, circumstance, or event that supposedly led them to this conclusion, other than the passage of time.

The State Defendants did not and could not conceal the facts in any way, as they were reflected in the public records of a state agency and were the subject of a published U.S. Supreme Court opinion. Nor can the Plaintiffs argue that they did not or should not have known the facts

⁷ Although a moot point because of the lengthy passage of time, Plaintiffs also cannot rely on the reversal of precedent in *Lassen* in 1967 to shield their earlier claims from the statute of limitations. A change in the law does not revive claims already barred by a statute of limitations. *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 931 (Cal. 1988); *Kuhn v. State*, 897 P.2d 792, 798 (Colo. 1995).

underlying their claim when *Lassen* was decided. Plaintiffs cannot meet their burden to show any reason why the light bulb suddenly went on in 2003, after at least thirty-six years of not receiving the compensation they now seek. Plaintiffs' claims were barred in 1968.

In any event, on August 26, 2003, Plaintiffs were clearly notified that the State Land Department did not intend to, nor did it have the resources to, immediately resolve each of the hundreds of "09" Easements, as demanded by Plaintiffs. (App. 2 at Exhibit B; App. 4 at 4; App. 5 at 4.) Nonetheless, consistent with their thirty-six year delay in even initiating the conversation, once they learned how ASLD intended and needed to proceed, Plaintiffs waited more than a year to initiate their suit. Any claim based upon such facts is therefore time-barred.

Plaintiffs erroneously rely on the line of authority holding that a breach of trust claim does not accrue until the trustee repudiates the trust. (App. 4 at 8.) Plaintiffs' reliance on this theory is misplaced because their complaint does not allege a claim for repudiation. Repudiation is a type of breach of trust duty that occurs when the trustee wrongfully claims trust property as its own. *See Harris Trust Bank*, 188 Ariz. at 163, 933 P.2d at 1231. The authorities cited by Plaintiffs pertain to actions by trust beneficiaries for possession of trust property, and are based upon the fact

that the trustee cannot hold trust property adversely to trust beneficiaries. *Id.*, 188 Ariz. at 163-64, 933 P.2d at 1231-32; *Sumid v. Cairns* 25 Ariz. 597, 602, 220 P. 1084, 1085 (1923) (statute of limitations to determine adverse possession does not run until trustee unequivocally repudiates the trust, because possession by the trustee is legally presumed to be possession by the beneficiary). This is not an action seeking possession of trust property in the possession of the trustee. Rather, Plaintiffs allege that the State Defendants wrongfully transferred trust assets to the Defendant Grantees—a claim to which the statute of limitations applies. *Harris*, 188 Ariz. at 164, 933 P.2d at 1232.

If the repudiation doctrine were applicable to the State Defendants' conduct (the grant of "09" Easements without consideration) the transfer of a trust asset to a third party would be sufficient to commence the running of the statute of limitations. *See Jack Waite Mining Co. v. West*, 55 Ariz. 301, 305, 101 P.2d 202, 204 (1940) (holding that claim for reinstatement of stock sold for non-payment of assessment was barred by the statute of limitations, stating that "even though plaintiff may not have notice of the specific repudiation of the trust, yet if he knows facts from which a reasonable man would be put on notice that the trust has been, or is about to be, repudiated, this is equivalent to actual notice of the repudiation"); *see also In Re*

Griffin's Estate, 170 Misc. 1066, 10 N.Y.S.2d 161 (1939) (theft of trust asset amounted to repudiation sufficient to trigger limitations period); *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 P. 981 (1913); *Bell v. Bank of Whitewater*, 146 Kan. 901, 73 P.2d 1059 (1937).

Plaintiffs knew or should have known of the factual and legal basis of the claims alleged in their Complaint more than a year before they filed this lawsuit. Plaintiffs also failed to serve a Notice of Claim as required by A.R.S. § 12-821.01(A) within 180 days after their claims accrued. Plaintiffs' complaint should have been dismissed for failure to state a claim. *Blauvelt v. County of Maricopa*, 160 Ariz. 77, 80, 770 P.2d 381, 384 (App. 1988). For both reasons, Plaintiffs complaint is time-barred.

B. The State Defendants' Failure to Remedy Their Alleged Breaches Does Not Constitute a Continuing Breach of Trust.

Plaintiffs characterize their action as a claim of a "continuing" breach by the State Defendants which, by Plaintiffs' reasoning, continually renews the statute of limitations. (App. 4 at 7-9.) Plaintiffs argue that because the State Defendants' claims against the grantees remain viable (because sovereign trust property cannot be lost through adverse possession and the statute of limitations does not run against the State), their claims against the State Defendants are not and can never be time-barred. Plaintiffs' argument

fails because the failure to remedy an initial breach is not an additional or new breach of trust.

A continuing breach is the commission of additional overt breaches of like kind, not the continuing failure to remedy the initial breach. *See, e.g., Mitchell v. United States*, 13 Cl. Ct. 474, 480-482 (1987) (Claims against United States by allottees of Indian Reservation for breach of trust duty to secure compensation for a right-of-way were barred by statute of limitations, notwithstanding alleged continuing duty to make trust funds productive, as “the duty to secure compensation for a right-of-way arises only once—at the time the right of way is granted.”). “The statute of limitations begins to run at the time the act is committed, though damages continue to flow thereafter.” *Tovrea Land & Cattle Co. v Linsenmeyer*, 100 Ariz. 107, 131, 412 P.2d 47, 63 (1966) (citations omitted). “[M]ere continuing *impact* from past violations is not actionable. Continuing violations are.” *McDougal v. County of Imperial*, 942 F.2d 668, 674-75 (9th Cir. 1991) (original emphasis) (rejecting notion that county’s failure to remedy allegedly improper ordinances and permit denials constituted continuing breach). To prevent the accrual of a claim based upon a trustee’s “continuing duty” to remedy past breaches of fiduciary duty would, in effect, impermissibly extend the statute of limitations indefinitely. *See Int’l Union of Electronic, Elec.,*

Salaried, Mach. & Furniture Workers v. Murata Erie N.A., Inc., 980 F.2d 889, 899-900 (3rd Cir. 1992) (ERISA case holding that, where the initial breach of fiduciary duty was grounded in a plan amendment or benefits determination, subsequent transfers of assets claimed by plaintiffs did not constitute a “continuing breach” for purposes of extending the statute of limitations, and breach occurred when the plans were amended, rather than when the employer actually recouped excess plan funds).

The Complaint did not state a claim of continuing breach because Plaintiffs did not and could not allege that State Defendants committed any act with respect to the “09” Easements, after *Lassen* was decided in 1967, that breached a trust duty. State Defendants granted no easements without compensation after 1967. Instead, Plaintiffs alleged only that State Defendants have not redressed grants made decades ago to Plaintiffs’ liking.⁸ Plaintiffs cannot resuscitate a claim that was not brought within one year of the State Defendants’ alleged breach by alleging that the State has failed to remedy the breach.

⁸ The *Lassen* Court did not reach the issue of how to address the easements granted without compensation before 1967; the Court only directed that compensation be paid when easements were granted in the future. *See Lassen*, 385 U.S. at 469 n. 22. As Commissioner Winkleman noted in his Letter of August 26, 2003, he has an obligation prudently to manage the Trust for the benefit of the Trust, including how best to address previous grants of “09” Easements. (App. 2 at Exhibit C.)

C. The State Defendants' Failure to Provide Plaintiffs a Formal Accounting Does Not Toll the Statute of Limitations.

Plaintiffs also argued that A.R.S. § 14-7307 extends the running of the statute of limitations until after there has been an accounting. (App. 4 at 8.) This argument fails because State Defendants are not obligated to provide Plaintiffs with a formal accounting of the “09” Easements. Even if they were obligated to do so, the failure to render the accounting would not toll the statute of limitations.

The duty to account, as alleged in the Complaint, is simply a duty to keep records and render clear and accurate accounts with respect to the administration of the trust. *See* App. 8, ¶ 21; A.R.S. § 14-7303; Restatement (Second) Trusts §172 (1959); *John E. Shaffer Enterprises v. City of Yuma*, 183 Ariz. 428, 431-432, 904 P.2d 1252, 1255 - 1256 (App. 1995) (duty to account does not require the trustee to justify the reasonableness of each transaction; it merely requires the trustee to maintain proper records of the transactions). Although Plaintiffs allege that there has been no “formal accounting of the trust property conveyed, leased or otherwise disposed of without consideration prior to [Lassen]” (App. 8 at ¶ 22), there is no allegation that the State Defendants have a legal duty to render the “formal accounting” that is demanded by Plaintiffs.

This Court should conclude as a matter of law that the State Defendants have no duty to render a “formal accounting” to Plaintiffs. The trust that is the subject of this action is not a private trust with specifically identified beneficiaries who are entitled to specified distributions and who need a legal process by which to hold a private trustee accountable for its management of their property. This is a governmental trust, which generates funds to support governmental activities. The trustee is a sovereign state, acting through its designated agency. *See* A.R.S. §§37-102, 37-132; *see also Forest Guardians v. Wells*, 201 Ariz. 255, 259-60, 34 P.3d 364, 368-69 (2001) (discussing state’s fiduciary duties as delegated to the Department); *Berry v. Arizona State Land Dept.* 133 Ariz. 325, 327, 651 P.2d 853, 855 (1982) (same). The records and activities of this sovereign trustee are open, not just to the Plaintiffs, but to any member of the public. *See, e.g.*, A.R.S. § 39-121. The trustee is directly accountable to the Governor, and subject to Legislative mandate. *See generally Simms v. Napolitano*, 205 Ariz. 500, 503, 73 P.3d 631, 634 (App. 2003) (Department of Gaming and other state agencies are creatures of statute “created and maintained for the purpose of administering certain of the State's sovereign powers, and must proceed and act according to legislative authority as expressed or necessarily implied.”) The Legislature has established a process by which the Joint Legislative

Audit Committee and the State Auditor General critically review and evaluate the activities of state agencies, including the State Land Department. *See* A.R.S. §§ 41-1278 to -1279.07; *see also* *Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 330, 868 P.2d 335, 343 (App. 1993) (citing 1980 Auditor General report that identified losses in revenue due to fixed royalty provisions in state mining leases). The Legislature has not, however, decreed that the State Land Department periodically render formal accountings of its transactions to Plaintiffs or seek judicial blessing or discharge of claims. *See* Title 37, A.R.S.

Even if State Defendants have a duty to render a “formal accounting,” the Complaint does not allege how Plaintiffs have been harmed by the lack of a “formal accounting.” Nor do Plaintiffs allege that, in the absence of a “formal accounting,” the statute of limitations on claims against the trustee is tolled. The only conceivable basis for such an argument would be the claim that, without a “formal accounting” Plaintiffs could not have known of the alleged breaches of trust about which they complain. Such an argument is plainly unfounded, as each grant of an easement was a public act by a public official, and a matter of public record. *See generally* A.R.S. §§ 39-101 to -161. *Lassen* itself provided public notice that “09” Easements had been granted over a period of many years. *Lassen*, 385 U.S. at 469 n. 22. In

any event, the State Defendants provided Plaintiffs' counsel with access to the records and prepared a report about the easements at Plaintiffs' request, all of which Plaintiffs' counsel received by September 23, 2003. (App. 2 at Exhibit A). Even where a fiduciary has a duty to account for assets, the failure to account will not toll the statute of limitations because the beneficiary does not need to know every fact about his claim before the limitations statute begins to run. *See Estate of Kirschenbaum v.*

Kirschenbaum, 164 Ariz. 435, 438, 793 P.2d 1102, 1105 (App.1989) (citing *Tovrea, supra*, and *Coronado Development Corp. v. Superior Court*, 139 Ariz. 350, 678 P.2d 535 (App.1984) for the proposition that a claim accrues and the limitation statute begins to run when the plaintiff, by reasonable diligence, should have learned of the claim).

Plaintiffs argued below that A.R.S. § 14-7307 tolls the statute of limitations on their claims against the State Defendants until after there is a "final accounting." This argument is without merit because it is contrary to the language of A.R.S. § 14-7307. Section 14-7307 provides:

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued

a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after three years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in section 14-1403, paragraph 2.

This statutory bar “renders res judicata matters which were open to dispute, whether or not actually disputed.” Restatement (Second) of Trusts § 220 cmt. a (1959). This relatively short statute of limitations is premised on the fact that all information needed by the plaintiff to discover any claim is fully disclosed in the accounting, and the fact that a court’s approval of a trust accounting generally bars later action against the trustee on the matters so approved. *See Estrada v. Arizona Bank*, 152 Ariz. 386, 732 P.2d 1124 (App. 1987) (action against a trustee for alleged mismanagement barred by final accounting); *In re CVR 1997 Irrevocable Trust*, 202 Ariz. 174, 176-77, 42 P.3d 605, 607-08 (App. 2002) (beneficiary with notice of accounting barred from later suing trustee for breach of trust). Because it applies only to a final accounting “showing termination of the trust relationship,” it does not apply here.

Moreover, A.R.S. § 14-7307 does not purport to toll or extend otherwise applicable statutes of limitations; rather, the statute is plainly intended to cut off claims that otherwise might exist. In fact, the language

“[u]nless previously barred by adjudication, consent or limitation,” explicitly recognizes that actions brought against the trustee after the final accounting may already be barred by the statute of limitations. *See Harris Trust Bank*, 188 Ariz. at 164, 933 P.2d at 1232; *In re CVR 1997 Irrevocable Trust*, 202 Ariz. at 176, 42 P.3d at 607 (The phrase in question recognizes that “the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.”)

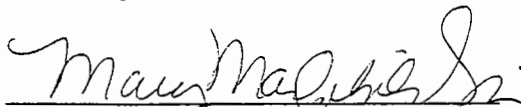
In short, State Defendants’ failure to render a formal accounting of the “09” Easements to Plaintiffs does not toll the bar of the complaint under A.R.S. § 12-821.

CONCLUSION

This Court should accept jurisdiction of this Petition and direct the superior court to dismiss the Complaint because it is barred by the statute of limitations.

RESPECTFULLY SUBMITTED this 5th day of May, 2006.

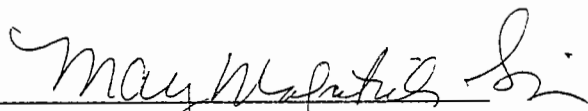
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CERTIFICATE OF COMPLIANCE

Pursuant to R.P.S.A. 7 I certify that the foregoing Petition uses proportionately spaced type of 14 points or more, is double spaced using a roman font and that the body (pp. 1-26) contains 5615 words.

DATED: May 5, 2006.


Mary Mangotich Grier
Attorney for Petitioners

On May 5, 2006 two copies
of the foregoing Petition were delivered to:

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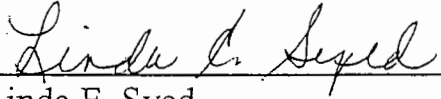
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Secretary to Mary Mangotich Grier

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-020078

08/01/2005

HONORABLE RUTH H. HILLIARD

CLERK OF THE COURT
L. Gilbert
Deputy

FILED: 08/04/2005

ROB SMITH, et al.

TIMOTHY M HOGAN

v.

MARK WINKLEMAN, et al.

MARY MANGOTICH GRIER

MINUTE ENTRY

Defendants Winkleman, Arizona State Land Department and the State of Arizona's Motion to Dismiss has been under advisement. The Court has considered all memoranda submitted and the arguments of counsel. The Court finds and orders as follows.

Defendants seek dismissal on the grounds that the claims are barred by the applicable statute of limitations, that plaintiffs failed to timely file a notice of claim required by ARS 12-821.01 and lack of standing to sue.

At issue is whether defendants have failed to modify easements granted between 1929 and 1967 over State Trust Land without payment, found to be improper in Lassen v. Arizona ex rel. Arizona Highway Department, 385 U.S. 458 (1968). Although the easements at issue, the 09 Easements, were proper at the time they were entered into, plaintiffs argue that they are invalid since Lassen was decided in 1968. Plaintiffs claim that defendants are required to provide an accounting of income from State Trust Lands and, among other claims, this duty has been breached.

Plaintiffs are alleged taxpayers and parents of Arizona school children. Plaintiffs seek an accounting as to the 09 Easements, a declaration that the grants constituted a breach of trust and an order that the State pay the Trust the fair market value of the trust property improperly granted. In addition, plaintiffs seek a declaration that the 09 Easements are null and void.

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Defendants urge that plaintiffs' claims are barred by A.R.S. §12-821, which requires an action to be brought within one year after the cause of action accrues. Defendants urge that plaintiffs were aware of the 09 Easements and the lack of payment for said easements as of June 4, 2003 when their counsel sent a letter to the Arizona State Land Commissioner seeking information as to why compensation had not been received for the 09 Easements. This suit was not filed until November 15, 2004, allegedly more than one year after plaintiffs were aware of their claims asserted in this action.

Plaintiffs, on the other hand, assert that discussions were ongoing with the Commissioner after the June 4, 2003 letter was sent to him by plaintiffs' counsel. It was not until June, 2004 that plaintiffs were advised that the State did not intend to take any action on the 09 Easements, despite earlier discussions that the Arizona State Land Department intended to pursue at least some of the 09 Easements.

The Court finds that plaintiffs were not aware of the Department's final decision about seeking payment for the 09 Easements until June, 2004 and, therefore, the Statute of Limitations had not run when the action was filed. In addition, the Court finds that plaintiffs are seeking an accounting from the State Land Commissioner and that duty is on-going.

Further, defendants claim that plaintiffs failed to serve a Notice of Claim within 180 days of the accrual of said claim. The Court is not persuaded by this argument, based on the reasoning above.

Defendants also argue that there is no justiciable controversy before the Court to be decided. Defendants argue that plaintiffs' claim for declaratory relief demands resolution of a moot, unripe or abstract question and, therefore, is not justiciable. According to defendants, the issues are not ripe at this time since the State has not determined if the Trust has actually suffered a loss. Further, defendants claim that the issues raised in this suit are abstract questions that are not justiciable; according to defendants, each 09 Easement is fact-specific and the Court should not determine the validity of each easement in the abstract. In addition, defendants take the position that if this Court decided the issues posed in this suit, such a decision would invalidate an exercise of governmental powers entrusted to another branch of government, the Executive Branch.

The Court, however, disagrees with defendants and finds that plaintiffs are entitled to bring this action to require the State Land Commissioner to fulfill his required duties regarding the 09 Easements. The Court finds that Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (Ariz.App.1991) and Kadish v. Arizona State Land Department, 155 Ariz. 484, 747 P.2d 1183 (1987) support the bringing of a claim against the State challenging its policies and/or actions.

Finally, defendants argue that plaintiffs lack standing. Relying on Forest Guardians v. Powell, 24 P.3d 803 (N.M.App.2001), defendants urge that the Enabling Act created a

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"charitable public trust": as a general rule, citizens who are taxpayers or parents of school children, do not have standing to enforce a charitable trust. Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 203 Ariz. 176, 91 P.3d 1019 (App. 2004). The Court agrees with defendants that the original named plaintiffs, parents of school children in Arizona, are only incidental beneficiaries of the Land Trust funds, based on Forest Guardians which is based on the same Enabling Act as Arizona; therefore, the New Mexico decision is persuasive as to the original plaintiffs.

However, the Court finds that Arizona law supports a finding that there is standing in light of the amendment made to plaintiffs' Complaint, adding two school districts as plaintiffs. The Court finds that these new plaintiffs do have standing to proceed.

Based on the above, it is ordered denying defendants' Motion to Dismiss.