

**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. CV 2004-020078
(corrected case number)

RESPONSE TO
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

This case is based on the failure by the State of Arizona to comply with a decision of the United States Supreme Court for nearly forty years. It is not as though the State was unaware of the decision or its implication on the management of state trust lands. Arizona was a party to the case.

In *Lassen v. Arizona ex rel Arizona Highway Dept.*, 385 U.S. 458 (1967) the United States Supreme Court held that under the terms of the Arizona-New Mexico Enabling Act, the State of Arizona must compensate the school trust for any easements or materials that the state obtains on or over state trust lands. *Id.* This decision reversed the state's policy for over 50 years of not requiring compensation for rights of way granted to governmental entities. Although the State Land Department enforced the *Lassen* decision on a going forward basis, it never obtained compensation for the trust for easements granted prior to the Supreme Court's decision despite the fact that the grantees continue to use them. Thus, for the past thirty-nine years, the State Land Department has allowed the state and county governments to use state trust lands without compensation. This lawsuit was brought to remedy that ongoing violation of the Enabling Act.

The State seeks to avoid its responsibility to the trust beneficiaries - - Arizona's schools - - by asserting that the statute of limitations bars their

claim. On August 1, 2005, the trial court denied the State's Motion to Dismiss and now, more than nine months later, the State has filed this special action challenging the trial court's ruling.

STATEMENT OF ISSUE

Petitioners misstate the issue in this case. They characterize the Plaintiffs' claims as whether the Defendants' breach of their trust obligations "over 40 years ago by granting easements to other governmental entities without payment" is barred by the statute of limitations. Petition at 7. Plaintiffs' complaint is not that the state breached its trust obligations over 40 years ago but that it has breached its trust obligations each and every day since the easements were issued by failing to recover compensation for easements that are null and void.

STATEMENT OF FACTS

Under the Arizona-New Mexico Enabling Act of 1910, approximately 10 million acres of federal land in Arizona were conveyed to the state upon its admission to the Union. The Enabling Act provided that the land was conveyed to Arizona to be held in trust for the benefit of Arizona's public schools, universities and other public institutions. Approximately 8 million acres of state trust land are the subject of grazing leases. The remaining trust land is used for various purposes including agricultural, commercial and

mineral extraction applications. Appendix to Petition for Special Action (“App.”), Exhibit 8, ¶9.

Beginning in 1929, the Arizona State Land Department began issuing perpetual easements on State Trust Lands to governmental entities mostly for the purposes of road construction. The majority of the easements have been issued to the Arizona Department of Transportation. However, a substantial number of easements have been issued to other governmental entities like cities and counties for road construction. A few have been issued to other entities like flood control districts. App., Exhibit 8, ¶15.

Up until 1967, the state took the view that compensation for such easements was not required because the value of trust lands was enhanced by highway access thus constituting an overall benefit to the trust in negating any requirement of compensation. *State v. Lassen*, 99 Ariz. 161, 166 (1965). The state’s position was explicitly rejected by the U.S. Supreme Court in 1967 in *Lassen v. Arizona*, 385 U.S. 458, 470 (1967) in which the Court held that “Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands.” App., Exhibit 8, ¶¶17 and 18.

After *Lassen*, the state complied with the Enabling Act on a prospective basis by requiring compensation for any new easements issued

after the decision in *Lassen*. However, with respect to pre-*Lassen* easements and rights of way, the state made no effort to recover compensation until 2001.

On October 11, 2001, the State Land Commissioner informed the Flood Control District of Maricopa County that the easements previously granted to the District violated the Enabling Act because they were made without any financial consideration and were therefore “void from their inception.” Exhibit 1, Letter from Michael E. Anable to Michael Ellegood dated October 11, 2001 at 1. The Commissioner emphasized that no disposition of state trust land could be made for less than true value and “the legal title shall not be deemed to have passed until the consideration shall have been paid.” *Id.* at 2 citing Enabling Act, §28, ¶4. He concluded that “appropriate action should be taken to bring the District’s continuing use of such lands into compliance with the Enabling Act, and the District should pay the trust appropriate compensation for its past, present and future use of such state trust lands.” *Id.* at 3.

The Flood Control District is just one of over 900 easements and rights-of-way that had already been issued to governmental entities in 1967 when *Lassen* was decided. All of the pre-*Lassen* easements remain in effect today. App., Exhibit 8, ¶19.

On June 4, 2003 counsel for plaintiffs contacted the State Land Department and inquired about any action the Land Department had taken to comply with the *Lassen* decision. App., Exhibit 2 at Exhibit B. The Commissioner first responded by letter dated August 26, 2003. *Id.* at Exhibit C. In that letter, the Commissioner advised plaintiffs' counsel that he was "committed to take appropriate action to resolve the questions surrounding the '09' easements" and described efforts the Department had undertaken with respect to the easement granted to the Flood Control District of Maricopa County. *Id.* The Commissioner further advised that with respect to the remaining easements, he had requested staff to review the easement records and prepare a status report which he would provide to plaintiffs' counsel when it was complete. *Id.*

The report was provided on September 23, 2003. After reviewing the report, plaintiffs' counsel again contacted the Commissioner. In a letter dated October 23, 2003, counsel stated,

[N]ow that the Department has full and corrected records regarding the '09 easements and rights of way, I would appreciate knowing the Department's plan of action with respect to securing appropriate compensation. Each day that passes without appropriate compensation is another day that income is lost for the Trust beneficiaries.

Exhibit 2, letter from Timothy M. Hogan to Mark Winkleman, dated October 23, 2003. Plaintiffs' counsel advised the Commissioner that, "the

Center is currently considering legal action concerning the easements and rights of way” and “[w]hether we pursue this matter further depends on how the Department plans to address the problem.” *Id.*

In response to the October 23, 2003 letter, the Commissioner, his counsel and staff met with Plaintiffs’ counsel in December 2003. In that meeting, it was determined that the Land Department would consider whether to pursue claims with regard to the easements and contact plaintiffs’ counsel when a decision had been made. In January 2004, the Attorney General’s office advised counsel that the Department planned to pursue the ’09 easements granted to the Arizona Department of Transportation (ADOT),¹ but that internal issues needed to be resolved before any action could be taken. Counsel continued to follow up with the Attorney General’s office and was advised that progress was being made. It wasn’t until June 2004 that it became clear from discussions at the Arizona legislature that the Commissioner did not intend to take any action on the ’09 easements. This action was then filed on October 15, 2004.

¹ ADOT’s predecessor the Arizona Department of Highways was a party in *Lassen*. The case was brought by the Department to challenge a rule adopted by the State Land Commissioner requiring the highway department to pay the appraised value of property taken when acquiring rights of way and material sites in federally donated lands held in trust by the state. *Lassen v. Arizona* 385 U.S. 458; 459 (1967)

SUMMARY OF ARGUMENT

The only way the state can make a statute of limitations argument is by misinterpreting the claims asserted by the Plaintiffs. The key to understanding this issue is the language of the Enabling Act itself. The Enabling Act provides that every conveyance “not made in substantial conformity with the provisions of this act shall be null and void...” Enabling Act, §28, ¶8. The Act further provides that all lands shall be appraised at their “true value” and that no sale or other disposition shall be made for a consideration less than the value so ascertained. *Id.*, ¶2. The Act explicitly provides that “legal title shall not be deemed to have passed until the consideration shall have been paid.” *Id.*, ¶4.

The Plaintiffs’ claims are simple. As a result of the foregoing provisions of the Enabling Act, the easements and rights of way issued by the state are null and void and were not effective to transfer legal title. As a result, the state retains legal title to the easement property yet allows the putative easement holders the use and benefit of that property without compensation to the trust. By failing to recover that compensation, the state breaches its fiduciary duty every single day.

The state’s fiduciary duty as trustee is well established. The state is under a duty to make the trust property productive and manage it so that it

will produce income. *Forest Guardians v. Wells*, 201 Ariz. 255, 260, 34 P. 3d 364, 371 (2001). If the easements issued prior to 1967 were made in violation of the Enabling Act, then they were void *ab initio* and the state remains the holder of legal title to the property. By failing to reissue the easements and rights of way for the current true value, the state breaches its duty to the beneficiaries of the trust to make it productive. The state violates that duty every day that it does not reissue the easements and rights of way for their current true value.

The state seeks to avoid its fiduciary responsibility by claiming that the Plaintiffs should have filed this action when the first illegal easement was issued 77 years ago. Petition at 14. Apparently, the Plaintiffs should have filed an action each of the 900 times that the state violated the Enabling Act since the first easement was issued in 1929.

As a fallback position, the state asserts that the claims accrued no later than 1967 when the *Lassen* decision was issued by the U.S. Supreme Court. But that is illogical. If the easements were null and void, they were null and void at the time they were issued and, according to the state, the Plaintiffs' cause of action accrued at that time. In effect, the state argues that the Plaintiffs should have been the ones to bring the *Lassen* action the very first time an easement was issued without compensation in 1929.

The state's argument ignores the fact that the easements did not stop being null and void a year after they were issued. They are still null and void today and the Plaintiffs are entitled to a declaration to that effect. The fact that the easements are null and void today is what triggers the state's fiduciary obligation to reissue the easements in compliance with the Enabling Act and obtain true value for them. The daily failure to do so constitutes a breach of the state's fiduciary duty.

ARGUMENT

I. The Statute of Limitations Does Not Bar Plaintiffs' Action Because Plaintiffs' Claims Are Based on the Ongoing Conduct of the Trustee.

Plaintiffs' Second Amended Complaint contains three counts - - declaratory judgment, breach of fiduciary duty and a demand for an accounting. App., Exhibit 8. Each claim must be analyzed separately to determine whether the statute of limitations acts as a bar to the requested relief.

A. The Statute of Limitations Does Not Bar This Action Because the Trustee's Failure to Recover Compensation for the '09 Easements Is a Continuing Breach of Its Fiduciary Duty

Plaintiffs' claim for breach of fiduciary duty is timely because the breach continues as long as the Commissioner allows the grantees to use the '09 easements without providing the trust with adequate compensation. In

asserting the statute of limitations as a defense, the Petitioners improperly focus their argument on the date that the '09 easements were granted and/or the *Lassen* case was decided. Petition at 14. For the purposes of this lawsuit, however, those dates are largely irrelevant. The plaintiffs do not seek an order setting aside the '09 easements; rather, they seek an order compelling the State Land Commissioner, as trustee of the State Trust Lands, to comply with the Enabling Act by, among other things, obtaining compensation for the use of trust land. App., Exhibit 8, ¶29. Plaintiffs brought this action because, despite his assurances to the contrary, the Commissioner has failed and continues to fail to take action to recover compensation for the '09 easements.

There can be no serious dispute that it is the obligation of the Commissioner, as trustee, to protect and preserve the value of the trust, and to ensure that adequate compensation is received for trust property. RESTATEMENT (SECOND) TRUSTS §181. The United States Supreme Court ruled in 1967 that easements granted without compensation violated the Enabling Act and were void. *Lassen v. Arizona* 385 U.S. 458; (1967). Yet, despite that ruling, the grantees of the '09 easements have never been required to compensate the trust and they continue to make use of the easements to this day. The Commissioner is in a position to rectify that

situation by recovering compensation for future, current and past use of the easements. Every day that he, as trustee, fails to act is another day that he breaches his fiduciary duty

The plaintiffs seek to compel the Commissioner to perform his duty to the trust because he is the person best situated to obtain compensation. It is well-established that the lack of compensation rendered the easements void *ab initio* and a void deed cannot be enforced through the application of the statute of limitations against the state. *See e.g Bigler v. Graham County*, 128 Ariz. 474, 626 P. 2d 1106 (App. 1981)(adverse possession does not run against the state). The Arizona legislature has decreed that no statute of limitation shall run against the state. Ariz. Rev. Stat. §12-510. Therefore, the statute of limitations defense would not be available to the grantees in an action brought by the Commissioner and there is nothing that precludes the Commissioner from pursuing the compensation owed to the trust. In light of this fact, his failure to act is a clear violation of his duty to the trust and constitutes an ongoing breach.

The state cites *Mitchell v. United States* for the proposition that for a continuing breach to occur there must be additional overt breaches of like kind, not the continuing failure to remedy the initial breach. 13 Cl. Ct. 474, 480-482 (1987). In *Mitchell*, claims were brought against the United States

by allottees of an Indian Reservation alleging mismanagement of their forest resources by the United States, the statutory trustee. The applicable statute provided that the grant of a right-of could not be made without the payment of such compensation as the Secretary of the Interior determines to be just. 13 Cl. Ct. at 480 citing 25 U.S.C. § 325 (1982). The court rejected the allottees' claim that the U.S. Government had a continuing duty to secure compensation from logging companies as timber was hauled over the allottees' lands.

The *Mitchell* case, like the others cited by the state, is inapplicable to this case where violations of the trust are declared by the Enabling Act to be null and void. That was not the case in *Mitchell* or in any other case cited by the state. It is that critical fact which gives rise to the state's continuing duty because the state remains the legal title holder but allows others to benefit from the use of the property without compensation. That creates a new violation of the trust.

The *Mitchell* case recognized as much when it rejected another claim by the plaintiffs that the government had a duty to revoke road use permits under certain circumstances. The court noted that the flaw in that argument was that the statute did not make revocation of road use permits mandatory, but discretionary. As a result, the court held that the nonrevocation of the

permits could only be viewed as an exercise of discretion and not as a breach of an ongoing duty giving rise to a continuing claim.

But that is not the situation in this case. The state has no discretion because the Enabling Act expressly declares that dispositions made in violation of the Act are null and void. That being the case, the state has a duty as the trustee to do something about it. Its failure to do so gives rise to a continuing claim that is actionable without regard to the statute of limitations.

B. Plaintiffs' Request for Declaratory Judgment Is Not Barred Because The '09 Easements Were Void Ab Initio and The Statute of Limitations Cannot Validate a Transfer That the State Was Not Authorized to Make.

The plaintiffs' request for a declaratory judgment that easements granted without compensation are void under the Enabling Act is not barred by the statute of limitations because "property held by the state in trust for the people cannot be lost through adverse possession." *People v. Shirokow* 26 Cal.3d 301, 311, 162 Cal. Rptr. 30, 605 P.2d 859 (1980) *citing Hoadley v. San Francisco* 50 Cal. 265 (1875) It is a well-recognized rule that the statute of limitations cannot bar the recovery of public-use property that the state had no authority to alienate. *See, e.g., Sixth District Etc. Assoc. v. Wright*, 154 Cal. 119, 129-130, 97 P. 144. (1908); *see also Bigler v. Graham*

County, 128 Ariz. 474, 626 P.2 d 1106 (App. 1981)(adverse possession does not run against the state).

As beneficiaries of the trust, plaintiffs seek a declaration that the state could not lawfully transfer the '09 easements without consideration. App., Exhibit 8, ¶32. That principle, which should not be controversial, was established by the Supreme Court in *Lassen*. 385 U.S. 458 (1967) The plaintiffs recognize, as acknowledged in counsel's letter of October 23, 2003, that particular facts and circumstances may affect the application of this principle to the individual '09 easements. Exhibit 2. However, that complicating factor does not excuse the Commissioner's failure to act at all. As noted above, in bringing this action, plaintiffs are not asking this Court to set aside the '09 easements; plaintiffs simply seek an order directing the Commissioner to do his job as trustee and obtain the required compensation for the easements on behalf of the trust.

C. The Plaintiffs' Request for An Accounting Is Not Barred Because A Beneficiary of an Existing Trust May Request An Accounting At Any Time.

The statute of limitations does not bar the plaintiffs' request for an accounting because a trustee has a continuing duty to account and the State Land Commissioner has failed to provide an accounting of the '09 easements. It is well-established under Arizona law that with respect to state

trust lands “[t]he duties imposed upon the state [are] the duties of a trustee and not simply the duties of a good business manager.” *Kadish v. Arizona State Land Dept.*, 155 Ariz. 484, 747 P.2d 1183, (Ariz. 1987) *aff’d* *ASARCO v. Kadish*, 490 U.S. 605 (1989); *Forest Guardians v. Wells*, 201 Ariz. 255, 260, 34 P.3d 364, 371 (2001). Specifically, the Commissioner is subject to the same fiduciary obligations as any private trustee. *Kadish*, 155 Ariz. at 487, 747 P. 2d at 1186 (citing *County of Skamania v. State*, 102 Wn.2d 127, 685 P.2d 576 (Wash. 1984)). In addressing the responsibilities of the State Land Commissioner as trustee of state trust lands, Arizona courts and U.S. Supreme Court have looked to the well-established body of trust law to define and clarify the State’s duties. *See, e.g. Forest Guardians*, 201 Ariz. at 260, 34 P.3d at 371. Citing the Restatement of Trusts, the Arizona Court has expressly held that “[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.” *Id.*, citing RESTATEMENT (SECOND) OF TRUSTS §176 (1959). In addition, “the trustee is under a duty ... to use reasonable care and skill to make the trust property productive.” *Id.* citing §181. “A trustee of land is normally under a duty to lease it or manage it so that it will produce income.” *Id.* citing §181 cmt. a.

According to the Restatement, a trustee is also under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust. RESTATEMENT (SECOND) OF TRUSTS, §172. Moreover, the Restatement recognizes that a beneficiary may bring a proceeding in court to compel the trustee to render an account of the administration of the trust. *Id.* cmt.c. Thus, as long as the trust remains active, the obligation of a trustee to account is a continuing duty. *See e.g. In re Schneider*, 95 Cal. App. 3d 55; 60 156 Cal. Rptr. 838; 840 (Ct. App. 1979) Because the beneficiary's right to demand an accounting runs with that duty, the right may be asserted so long as that duty remains unperformed. *Id.* Here, the State Land Commissioner has made no accounting of the '09 easements and plaintiffs are fully within their rights to request one.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that the Court decline to accept jurisdiction of the special action. Alternatively, plaintiffs request that if the Court accepts jurisdiction that it deny relief and affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 15th day of May, 2006.

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Timothy M. Hogan
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CERTIFICATE OF COMPLIANCE

Pursuant to R.P.S.A. 7, I certify that the foregoing Response uses proportionately spaced type of 14 points or more, is double spaced using a roman font and the body (pp. 1-16) contains 3595 words.

DATED: May 15, 2006.

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