

**ARIZONA COURT OF APPEALS
DIVISION ONE**

MAYER UNIFIED SCHOOL DISTRICT AND
GADSDEN ELEMENTARY SCHOOL DISTRICT,

Plaintiffs/Appellants

vs.

MARK WINKLEMAN, in his capacity as State Land
Commissioner, THE ARIZONA STATE LAND
DEPARTMENT, the State of Arizona; APACHE
COUNTY, COCHISE COUNTY, COCONINO
COUNTY, GRAHAM COUNTY, GREENLEE
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, 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, CITY OF SCOTTSDALE, CITY OF
SIERRA VISTA, and CITY OF TEMPE.

Defendants/Appellees

MAYER UNIFIED SCHOOL DISTRICT AND
GADSDEN ELEMENTARY SCHOOL DISTRICT,

Plaintiffs/Appellants/Cross-
Appellees

vs.

CITY OF PEORIA and CITY OF SCOTTSDALE,.

Defendants/Appellees/Cross-
Appellants.

No. 1 CA-CV 07-0412

Maricopa County Superior Court
No. CV 2004-020078

**APPELLANTS' OPENING
BRIEF**

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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. Ariz. ex rel. Ariz. Hwy. Dept.*, 385 U.S. 458 (1967) the United States Supreme Court held that under the terms of the Enabling Act, the State of Arizona must compensate the trust for any easements or materials that it 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 forty years, the State Land Department has allowed the state and county governments to use State Trust Lands without compensation. It continues to do so today. This lawsuit simply seeks to remedy that ongoing violation of the Enabling Act.

STATEMENT OF THE CASE

On October 15, 2004, Plaintiffs filed a Complaint seeking to compel the State Land Commissioner to obtain compensation for dispositions of state trust land that were made in violation of the Enabling Act. (R. 1) The state defendants filed a motion to dismiss plaintiffs' complaint on the grounds of statute of limitations and standing (R.10) and a motion to compel the joinder of the easement holders or in the alternative to dismiss. (R.9). Plaintiffs opposed the first motion on the grounds that the actions by the Commissioner constituted an ongoing violation of the trust, and plaintiffs had only recently discovered the violation and brought the action within a year of learning that the Commissioner did not intend to take action to correct the violation. (R. 23) Plaintiffs opposed the second motion asserting that because their claims focused on the obligations of the Commissioner as trustee, the easement holders were not necessary parties. In the alternative, plaintiffs argued that if the trial court deemed the easement holders "necessary" then joinder, not dismissal, was the appropriate remedy. (R. 24)

In response to the first motion, the trial court held that plaintiffs' claims were not barred by the statute of limitations, but that the original plaintiffs lacked standing to assert claims on behalf of the state trust lands beneficiaries. (R. 47) However, because in response to the defendants'

standing arguments the plaintiffs had amended their complaint to include school district plaintiffs (R. 19), the court's ruling regarding standing did not result in a dismissal of the case. In response to the state's motion regarding the joinder of necessary parties, the Court ordered that the easement holders be joined as defendants. (R. 47)

On April 20, 2006, the Plaintiffs filed a second amended complaint that asserted the exact same claims against the state defendants based on their failure to obtain compensation for the pre-*Lassen* easements (referred to by the state as "'09 easements"), but also included as Defendants those entities identified by the State Land Department as '09 easement holders ("easement defendants") (R. 52). A few weeks later, on May 5, 2006, the state filed a Petition for Special Action with this Court seeking review of the trial court's denial of the motion to dismiss on August 1, 2005. (See Petition for Special Action, 1 CA-SA 06-0098) This Court declined jurisdiction on June 2, 2006.

Shortly thereafter, several of the easement defendants filed motions to dismiss asserting, *inter alia*, that the doctrine of laches bars the Plaintiffs' complaint, that the complaint fails to state a claim because the decision in *Lassen* applies only prospectively and not retroactively, and that plaintiffs lacked standing. (R. 86, 103, 120) The State defendants joined in the

Motion to Dismiss based on laches. (R. 136) The trial court granted the Motion to Dismiss with respect to laches and denied the others. (R. 171) Plaintiffs timely filed their Notice of Appeal. (R. 196)

SUMMARY OF FACTS.¹

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. (R. 52, ¶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

¹ This is an appeal of the grant of a motion to dismiss. It is fundamental that for purposes of a Motion to Dismiss, the allegations of the Complaint must be accepted as true. *Carillo v. State*, 169 Ariz. 126, 817 P. 2d 493 (App. 1991).

entities like cities and counties for road construction. A few have been issued to other entities like flood control districts. (R. 52, ¶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. Ariz. ex rel. Ariz. Hwy. Dept.*, 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." (R. 52, ¶¶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, and then with respect to only one easement. (R. 52, ¶ 19; R. 134, Exhibit 1)

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.” Letter from Michael E. Anable to Michael Ellegood dated October 11, 2001 at 1. (R. 134, Exhibit 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 *Arizona-New Mexico Enabling Act*, Pub. L. No. 219, ch. 310, 36 U.S. Stat. 557, 568-579 (1910) §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 approximately 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. (R. 52 ¶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 with respect to all of the '09 easements. (R. 10, Exhibit B.) The Commissioner first responded by letter dated August 26, 2003. (R. 10, 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.

Letter from Timothy M. Hogan to Mark Winkleman, dated October 23, 2003 (R. 20, Exhibit A) 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),² 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 while at the Arizona legislature that the Commissioner did not intend to take any action on the '09 easements. (R. 20, p. 4)

ISSUE PRESENTED FOR REVIEW

The Enabling Act provides that the state must obtain compensation for any transfer of state trust lands and that any transfer made in violation of this requirement is null and void. Where the Department has granted easements but failed to obtain consideration for those easements as required by the

² 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 on federally donated lands held in trust by the state. *Lassen*, 385 U.S. at 459.

Enabling Act and continues to allow use of those easements without obtaining compensation, can an action against the Department to compel it to comply with the Act be barred by laches?

STANDARD OF REVIEW

In reviewing a trial court's dismissal of a claim under Rule 12(b)(6), Ariz. R. Civ. P., this Court must accept the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. *Wallace v. Casa Grande Union High Sch. Dist.* 82, 184 Ariz. 419, 909 P. 2d 486 (App. 1995). The Court will affirm a dismissal only if it is certain that the plaintiff cannot prove any set of facts that would entitle it to relief. *Id.* Questions of law are reviewed de novo. *Phoenix Newsps. Inc. v. Dept. of Corrections*, 188 Ariz. 237, 934 P.2d 801 (App. 1997)

ARGUMENT

I. THE DOCTRINE OF LACHES DOES NOT APPLY BECAUSE THE PLAINTIFFS' CLAIMS ARE BASED UPON A CONTINUING VIOLATION OF THE ENABLING ACT.

A. The Enabling Act Imposes Restrictions on the Disposition of State Trust Lands and Any Conveyance that Fails to Comply With Those Restrictions Is Null and Void.

The easements at the heart of this dispute are null and void because the State Land Department has never obtained compensation for them, and that failure continues to this day. The Arizona-New Mexico Enabling Act

was enacted by Congress in 1910 to allow for the admission of Arizona into the Union. *Arizona-New Mexico Enabling Act*, Pub. L. No. 219, ch. 310, 36 U.S. Stat. 557, 568-579 (1910) (“Enabling Act”). The Enabling Act conveyed title to approximately 10 million acres of federal land to Arizona to be held in trust for public schools in the state. “To ensure that Arizona and New Mexico would not dissipate the assets granted, Congress required that they hold the granted land in trust and enacted the restrictive provisions of Section 28 of the Enabling Act . . .” *Kadish v. Ariz. St. Land Dept.*, 155 Ariz. 484, 487, 747 P.2d 1183, 1186 (1987). The general intent of Congress was clear. It intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust.

The full provisions of the Enabling Act are part of the organic law of this state. Ariz. Const., art. 20, ¶12; *Kadish*, 155 Ariz. at 486. Because federal law is supreme in this regard, the Arizona courts, legislature, and people are without power to alter or amend the trust provisions contained in the Enabling Act without congressional approval. *Kadish*, 155 Ariz. at 486; *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336 (1947).

In general, the Enabling Act provides that the lands granted pursuant to the Act “shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided . . .” Enabling Act, §28 at ¶1.

The Act further provides that any disposition of land from the trust in a manner contrary to the provisions of the trust “shall be deemed a breach of trust.” *Id.* at ¶2. Generally, lands in the trust cannot be sold or leased except to the highest and best bidder at a public auction and for not less than their true value as established by appraisal. *Id.* at ¶¶3 and 4. With specific application to this case, the Enabling Act provides that no sale shall be made for a consideration less than the true value as established by appraisal and “*legal title shall not be deemed to have passed until the consideration shall have been paid.*” *Id.* at ¶4 (emphasis added). Finally, every conveyance “not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding.” *Id.* at ¶8.

In 1967, the U.S. Supreme Court resolved a dispute between the Arizona Highway Department and the Commissioner for the Arizona State Land Department about whether the Enabling Act required the Highway Department to compensate the trust for rights-of-way and material sites in state trust lands. *Lassen*, 385 U.S. at 469. The Commissioner had adopted new rules requiring compensation for right of ways and material sites which the Arizona Supreme Court had vacated. *Id.* The Arizona Supreme Court had held that it could be conclusively presumed that highways constructed

across trust lands enhanced the value of the remaining trust lands in amounts at least equal to the value of the areas taken and that therefore no compensation was required. *Id.*

The U.S. Supreme Court reversed that decision and 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 state trust lands.” *Id.* Thus, the law is clear: the State Land Department is obligated to obtain compensation for every conveyance of state land, even easements to governmental entities for road and other improvements, and failure to do so renders the purported transfer null and void.

At the time that *Lassen* was decided, the State was fully aware of the problem that the '09 easements presented if compensation were required for rights-of-way. In fact, it raised the issue with the United States Supreme Court, presumably as an argument that the state should not have to provide compensation to the trust. This led the Court to include the following footnote in its opinion:

We are informed by counsel that over a period of years Arizona has obtained the use of large areas of trust lands on bases that may not have accorded with those set forth in this opinion. We wish to make it plain that we do not reach either the validity of any such transfers or the obligations of the State, if any, with respect thereto.

Lassen, 385 U.S. at 469, n. 22. The easement defendants and trial court attempt to read too much into this footnote, however.³ There is nothing in the footnote to suggest that the reasoning of the Court's decision did not extend to the '09 easements or that the state's noncompliance with the requirements of the Enabling Act before the Court's decision in *Lassen* was somehow excused. Rather, the Court simply stated the obvious: the issues presented in *Lassen* were limited to what the Enabling Act required and did not extend to what the appropriate remedy would be for a previous failure to comply. As the Court stated at the outset:

The Act describes with particularity the disposition Arizona may make of the lands and of the funds derived from them, but it does not directly refer to the conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant. Of the issues which may arise from the Act's silence, we need now reach only two: first, whether Arizona is permitted to obtain trust lands for such uses without first satisfying the Act's restrictions on disposition of the land; and second, what standard of compensation Arizona must employ to recompense the trust for the land it uses.

Id. at 461.

³ Although the trial court did not expressly rule that the '09 easements were not null and void, it entertained that possibility when, citing footnote 22, it engaged in an analysis to determine whether *Lassen* should be applied retroactively. See R. 171, p. 5. As discussed *infra*, although the trial court's analysis was inconclusive, the fact that the trial court undertook it in the first instance was error.

Thus, in determining that the Commissioner's rules were valid and the Enabling Act required full compensation by the state to the trust, it was not necessary for the Court to address the state's previous noncompliance. Moreover, as the footnote makes clear, the only "evidence" actually before the Court regarding the '09 easements was simply information provided by counsel and even that information was noncommittal. *Id.* at 469, fn. 22 ("We are informed by counsel that over a period of years Arizona has obtained the use of large areas of trust lands on bases that *may not* have accorded with those set forth in this opinion")(emphasis added).

While the *Lassen* Court may not have reached the precise issue of the '09 easements, its holding regarding the requirements of the Enabling Act, when combined with the plain language of the Act compel but one conclusion: to the extent the state land department granted right of way easements without compensation, those easements violated the Enabling Act and by its express terms are "null and void." The fact that the state having been advised of its error chose to ignore the problem until 2001 and then only addressed it with respect to one easement, does not excuse its obligation to address it now.

B. The Doctrine of Laches Does Not Apply Where the Original Conveyance Is Null and Void, the Purported Easement Holder Continues to Use the Property, and the State Allows that Use Without Obtaining the Required Compensation.

In holding that the defense of laches could apply to this case, the trial court failed to understand the nature of the plaintiffs' claims and the legal effect of the state's ongoing failure to comply with the Enabling Act. The state's conveyance of easements and rights-of-way to the '09 Easement holders was without consideration; therefore, those conveyances are null and void under the express terms of the Enabling Act. No legal interest in the property ever passed to the putative easement and right-of-way holders. Yet, these putative easement holders continue to use the property without having ever paid for that privilege. From the outset, the Plaintiffs' action has sought to require that *the state* exact appropriate compensation from the easement holders if they are to continue their use of the properties.

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) of Trusts* §181. Nor is there any question that failure to obtain the required compensation is a

breach of the trust. Enabling Act, §28 ¶2 (“Disposition of any of said lands...in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.”) The United States Supreme Court ruled in 1967 that the Enabling Act required the Commissioner to obtain compensation for the trust when he granted right-of-way easements. *Lassen*, 385 U.S. 458. The Act provides that any conveyances made contrary to its provisions are “null and void.” Yet, the grantees of the ‘09 easements have never been required to compensate the trust *even though 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 obtain that compensation is another day that he allows a disposition of trust property in a manner contrary to the provisions of the Act and, thus, breaches the trust.

Because the plaintiffs seek to compel the Commissioner to comply with an ongoing obligation to the trust, the doctrine of laches cannot bar their action against him. “[T]here is a well established principle of law that laches can not be urged as a defense to a suit to enjoin a wrong which is continuing in its nature.” *Pacific Greyhound Lines v. Sun Valley Bus Lines, Inc.*, 70 Ariz. 65, 72, 216 P.2d 404, 409 (1950) In this case, the lands that were conveyed to the Defendants are held by the state pursuant to an explicit

trust imposed by the United States government for the benefit of Arizona's common public schools. The Commissioner's continuing failure to exact compensation for those easements is a continuing breach of his trust duty and actionable by the plaintiffs for as long as it continues

The plaintiffs seek to compel the Commissioner to perform his duty to the trust because he is the person best situated to obtain compensation. State law is clear that neither the doctrine of laches nor a statute of limitations can be allowed to defeat the state's sovereign title to trust lands. *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 415 n.1, 18 P.3d 722, 726 n.1 (App. 2001).⁴ 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 Dist. Agric. Assoc. v. Wright*, 154 Cal. 119, 129-130, 97 P. 144, 148 (1908); *see also Bigler v. Graham County*, 128 Ariz. 474, 626 P.2d 1106 (App. 1981)(adverse possession does not run against the state); *People v. Shirokow*, 26 Cal.3d 301, 311, 162 Cal. Rptr. 30, 605 P.2d 859 (1980)

⁴ In *Defenders*, Arizona officials began to assert the state's right of ownership over all bed lands under navigable water courses after the state's claims had lain dormant for some 73 years. The state had acquired ownership of bed land property under navigable water courses as a result of its admission into the Union under the "equal footing" doctrine. As a result, the law provides that the state holds those lands in public trust for the benefit of its citizens. *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 364, 837 P.2d 158, 166 (App. 1991).

citing Hoadley v. San Francisco 50 Cal. 265 (1875) ("property held by the state in trust for the people cannot be lost through adverse possession.").

Further, the Arizona legislature has decreed that no statute of limitation shall run against the state. Ariz. Rev. Stat. §12-510 (2007). *See also Tucson Unified Sch. Dist. v. Owens-Corning Fiberglass Corp.*, 174 Ariz. 336, 337, 849 P.2d 790, 791(1993) (purpose of statute excepting the state from limitations periods is to protect public from negligence of public officers that might deprive public of its right to redress against wrongdoers).

Just as the statute of limitations does not bar the state from seeking compensation, the doctrine of laches does not do so either.

The government, which holds its interest here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of government property cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 39-40 (1947). *See also Mohave*

County v. Mohave-Kingman Estates, 120 Ariz. 417, 586 P. 2d 978

(1978)(equitable defenses such as estoppel and laches will not lie against state in matters affecting governmental or sovereign functions); *George v.*

Arizona Corp. Commission, 83 Ariz. 387, 322 P. 2d 369 (1958) (where

public interest is involved, neither estoppel nor laches can override that interest).

This is particularly true in cases like this one that involve conveyances made in violation of the Enabling Act which are, by the express terms of the Act, “null and void.” The relevant case explaining the distinction between dispositions that are void under the Enabling Act and those that are merely voidable and subject to rescission is *Princess Plaza Partners v. State*, 187 Ariz. 214, 928 P.2d 638 (App. 1995). In that case, the plaintiff sought to have its lease declared void because there was not an appraisal signed by the Land Commissioner as required by state statute. This Court held that a lease “cannot be found void *ab initio* unless there has been no substantial conformity” with the Enabling Act. 187 Ariz. at 220.

Because there was an appraisal as required by the Enabling Act but it was not signed as required by state law, the lease substantially complied with the Enabling Act and was not void. The Court further held that a court could hold that a sale or lease was “‘voidable’ thus allowing it to be rescinded” for violations of statutory provisions. 187 Ariz. at 221-222. The Court noted, however, that although a voidable agreement is subject to rescission or ratification, a *void* agreement is incapable of ratification on disaffirmance. 107 Ariz. at 222, n.5.

This distinction between void and voidable conveyances was also recognized by the Arizona Supreme Court in *Fain Land and Cattle Co. v. Hassell*, 163 Ariz. 587, 790 P.2d 242 (1990). In *Fain*, the Supreme Court held that the exchange of private lands for state trust lands violated the Arizona Constitution even though such exchanges were explicitly authorized by the Enabling Act. The Court asked “[w]hat is the result if trust land is disposed of in a way that does not violate provisions of the Enabling Act but does violate the Arizona Constitution?” 163 Ariz. at 596. The Court noted that dispositions that violate the Enabling Act are *null and void* but that the Arizona Constitution “contains an important difference” because although it independently limits dispositions of trust land, it only expressly nullifies dispositions not made in conformity with the Enabling Act. The Court held:

These provisions of our Constitution do not nullify all dispositions of trust land not made in strict compliance with art. 10 of our Constitution. *The only dispositions of trust land that are nullified are those that do not comply with the Enabling Act.* (emphasis in original).

Id. Because the Enabling Act authorizes Arizona to provide for exchanges of trust land and Arizona had done so, the exchanges at issue in *Fain* complied with the Enabling Act – they just failed to comply with the Arizona Constitution. Consequently, the Court held that it was not “required

by the text of our Constitution to nullify *past* exchanges.” 163 Ariz. at 596, 790 P.2d at 251 (emphasis added).⁵

The unique nature of a “null and void” conveyance made in violation of the Enabling Act was also the basis of the Arizona Supreme Court’s holding in *Murphy v. State*, 65 Ariz. 338, 181 P. 2d 336 (1947). In *Murphy*, the issue before the Court was title to state trust land⁶ that had been conveyed as part of a land exchange that did not comply with the requirements of the Enabling Act. After the exchange, the transferee

⁵ The *Fain* court went on to conclude that *because the exchanges did not violate the Enabling Act*, the “validity of completed exchanges must turn on the question of the retroactivity of this opinion.” *Id.* Clearly, in *Fain*, the issue of retroactivity arose *only* because the court found that the “null and void” provision did not apply. It is not an issue in this case where the conveyances were made in violation of the Enabling Act and are, under federal law, null and void. For this reason, the trial court’s decision to apply the three part test used in *Fain* to determine whether the *Lassen* decision should apply retroactively to the ’09 easements was also erroneous. (A position that plaintiffs asserted below, contrary to the trial court’s statement in its opinion that plaintiffs and defendants “urge that the three part test ...must be considered.” R. 171, p. 5) However, because the trial court did not make a determination on the issue of retroactivity and did not grant the motion to dismiss on that ground, that aspect of the court’s ruling is not subject to appeal.

⁶ The land at issue in *Murphy* was not part of the original land grant, but had been acquired by the state through the foreclosure of mortgages that had secured loans of trust proceeds. Thus the Court held that because the land was acquired with trust proceeds, it had trust land status and its disposition was subject to the requirements of §28 of the Enabling Act.

encumbered the property with a mortgage, defaulted on the debt, and the mortgagee foreclosed. Many years later, when the state asserted title to the property on the grounds that the initial transfer was void based on its failure to comply with §28 of the Enabling Act, the mortgagee argued that the state was estopped from denying the validity of the mortgagee's deed where the mortgagee was, in effect, a bona fide purchaser for value. The Supreme Court, however, rejected that argument:

The state is not estopped to deny its deed against a bona fide mortgagee of its grantee where its officers were not authorized by law in the first instance to deed away its land and, as in this case, were positively prohibited from so doing without complying with the provisions of the trust agreement (Enabling Act) and the Constitution.

Id. at 355-56, 181 P. 2d at 368. Relying upon a similar case from the State of Washington, the Court explained:

"[Where] these enactments are mandatory upon the [Grantor], or are jurisdictional in effect, or conditions to be performed before power vests in it to make the conveyance, then their deed is a nullity and gives rise to no rights whatever either in the grantee or in purchasers for value from him.

* * *

[S]uch a deed, there being no jurisdiction to make it, may be compared to a judgment of a court with no summons or pleading to support it...[T]he mere deed by the right officers but without the predicate of compliance with the statutory requisites is but a scrap of paper without life and incapable of originating rights flowing from it."

Id. at 356, 181 P. 2d at 368-9 quoting extensively from *Strand v. State*, 16

Wash. 2d 107, 132 P.2d 1011, 1017 (1943). Thus, the Arizona Court concluded that the conveyance from the state to Mr. Murphy was a “nullity” and the mortgagee acquired no rights under its mortgage. *Id.* at 356-7, 181 P. 2d at 369.

As these cases make clear, the transactions described by the Plaintiffs in their complaint, conveyances of state trust land without compensation paid to the trust in violation of the Enabling Act, are null and void and resulted in no conveyance of a legal interest in the property to the easement holders as a matter of law. For this reason, neither the statute of limitations defense nor the laches defense would be available to the easement defendants in an action brought by the Commissioner. That is also why his failure to act to address both the past and current use of trust property by the '09 easement holders without compensation is a clear violation of his duty to the trust and constitutes an ongoing breach.

In granting the Motion to Dismiss, the trial court acknowledged the plaintiffs' argument that because the easements were granted without consideration, they were null and void under the Enabling Act but then made the following inexplicable “finding”:

This Court finds, however, that this is an allegation only and this allegation is not established at this state of the litigation. As a result, the Court finds that, by itself, this allegation is not sufficient to preclude consideration of the defense of laches.”

R. 171, p. 3. It is fundamental that in ruling on a Motion to Dismiss the court is obligated to accept all allegations of fact as true. *Sierra Madre Dev. Inc., v. Via Entrada Townhouses Assoc.*, 20 Ariz. App. 550, 514 P. 2d 503 (1973). Therefore, in responding to the Motions to Dismiss the plaintiffs had no obligation to establish the fact that no consideration had been paid for the '09 easements. The trial court was obligated to treat that fact as true.

As for as the legal implication of the alleged fact, that the easements are null and void, that is an issue of law that, as noted earlier, the trial court never actually ruled on definitively.⁷ While it was not necessary for the trial court to actually reach the issue of whether pre-*Lassen* easements granted without consideration were null and void in order to deny the Motion to Dismiss and find laches inapplicable (based on the continuing nature of the violation), the court's granting of the Motion without resolving the issue was clear error.

⁷ Although as noted earlier, the fact that the trial court attempted to apply the three-part test in *Fain* and concluded that it "could not make a determination at this time as to whether *Lassen* should be applied retroactively or not," R. 171, p. 6, reveals that the trial court fundamentally misunderstood the import of the Enabling Act's provision that declares non-complying disposition null and void "notwithstanding state constitutional provision or laws to the contrary." Enabling Act, §28 ¶8.

II. Even If the Doctrine of Laches is Applicable, It Does Not Bar the Plaintiffs' Claims Because the Defendants Failed to Establish Either Unreasonable Delay or Undue Prejudice.

Even if this Court were to conclude that the doctrine of laches can somehow be applied to an action to compel the state to comply with the ongoing requirements of a public trust, the essential elements of the defense are lacking in this case. As the trial court recognized, the essential elements of the defense of laches are (1) unreasonable delay, and (2) disadvantage or prejudice to the party asserting the defense. (R. 171 p. 2-3) In its decision, however, the trial court applied the doctrine as though the case before it was one brought by the state against the easement defendants, not the actual case asserted by plaintiffs.

For example, in considering whether the delay was “unreasonable,” the court improperly ascribed the thirty-seven year delay on the part of the state to the plaintiffs, despite the fact that all evidence in the record established that *plaintiffs* did not learn of the state’s breach of its duty as trustee until 2003 and commenced their action in 2004. (R. 171, p. 3) The unreasonable delay element focuses on the plaintiffs’ diligence in pursuing the action and the trial court had previously found that the plaintiffs were diligent in bringing their action after discovering in 2003 that the offending

conveyances had not been rectified after the *Lassen* decision was issued in 1967. (R. 40, p. 2)

Second, the court compounded this error by improperly placing the burden of proof as to the affirmative defense on the plaintiffs, holding that “plaintiffs have not provided any reasonable explanation as to why this issue was not raised for thirty seven years.” (R. 171, p. 4) It is fundamental that a party asserting an affirmative defense has the burden of pleading and proving it. *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 88-89; 138 P.3d 1210, 1215-16 (Ariz. App. 2006). Yet, here, the defendants offered no evidence whatsoever that plaintiffs were even aware of the state’s failure to obtain compensation for the ’09 easements prior to 2003, let alone for thirty-seven years!

Moreover, the court’s statement that the plaintiffs failed to offer an explanation for any delay on their part is clearly erroneous. In response to the state’s first motion to dismiss based on statute of limitations, the plaintiffs adduced uncontroverted evidence that established that they first became aware of the state’s breach of its obligations in 2003. This lack of actual knowledge certainly constitutes an explanation for why *they* did not raise the issue sooner. They are under no obligation, however, to explain why the state failed to do so, and cannot be legally responsible for the state’s

failure to act—indeed the state’s failure to act is their principal grievance against the state in this action. Thus, the trial court’s ruling can be summed up as follows: the plaintiffs cannot sue the state for failing to take action for 37 years because the state failed to take action for 37 years.

This might have some logical appeal if the state’s delay somehow impeded its ability to correct the situation today; however, as discussed above, laches is not a defense to an action by the state. The easement holders could not successfully assert such a defense against the state if the state brought an action seeking compensation. Given this state of the law, there is no basis in law or equity for barring plaintiffs’ claims *against the trustee* based on laches where that doctrine would not bar the trustee from taking the action against the grantees that plaintiffs seek to compel.

Finally, the court’s conclusion that easement defendants have been prejudiced by the delay because land values have risen dramatically in Arizona since 1967, once again conflates a potential laches defense against *the state* with a laches defense against plaintiffs’ action to compel the Commissioner to act. Yet, even if we disregard that flawed premise, the trial court’s holding is not supported by Arizona law with respect to laches. It is fundamental that mere passage of time is not sufficient to establish laches. *Ivancovich v. Meier*, 122 Ariz. 346, 595 P.2d 24 (1979). The proponent of

the defense must also establish that he changed his position in good faith as a result of that delay. *Tovrea v. Umphress*, 27 Ariz.App. 513, 556 P.2d 814 (1976) Further, an increase in value in real property does not qualify as prejudice to support a laches defense to an action for specific performance. *Id.* See also *Anderson v. Dom*, 984 P. 2d 392, 397 (Utah 1999) (holding an increase or decrease in property value alone does not constitute prejudice for laches).

Moreover, any claim of prejudice must be considered in context, with consideration given to benefits received by the defendants as a result of the delay. See *Leon v. Byus*, 115 Ariz. 451; 565 P.2d 1312 (App. 1977). In that case, the Leons entered into a contract to purchase a home, but stopped making payments under the contract. Nonetheless, they continued to live in the house for twenty years. When the seller filed suit to terminate their interest in the property, they asserted the defense of laches claiming prejudice based, among other things, on the property taxes they had paid. The Arizona Court of Appeals, however, rejected the defense, observing:

The fact that the tax payments were made is not the sort of prejudice envisioned by the doctrine of laches. *They lived in the home for twenty years, in effect rent free, and the fact that they made the tax payments is not "prejudicial."* Laches deals with the situation where the rights of third persons are involved and the situation has materially changed for the defendant due to plaintiff's delay in asserting his rights. Payment of the taxes has not created such a situation.

Id. at 453, 565 P.2d at 1314 (emphasis added).

Here, the only prejudice claimed by the easement defendants was the increased value of the property interest they had obtained for free and have used for more than thirty-seven years. They offered no evidence that they had changed their position as a result of either the state's delay in seeking compensation or the plaintiffs' ostensible delay in bringing their action to compel the state to do so. Rather, like the defendant in *Leon*, they have used the trust property "rent free" for years and now are simply upset that if plaintiffs prevail that situation will not continue.

Finally, even if an increase in the value of the property were, by itself sufficient to establish prejudice, it is not even clear that the easement defendants would actually be prejudiced in an action by the state to obtain compensation. If the Plaintiffs are correct and the transactions are null and void, then the easement holders will simply have to pay for what they should have paid for decades ago. It is entirely possible that a court could find that the appropriate compensation should be calculated based on the value of the property at the time of the attempted transfer, plus interest. That is not prejudice or even disadvantage. That it might be a financial hardship for the easement defendants to make the appropriate payments to the trust does not affect the fairness of requiring them to do so. As the United States Supreme

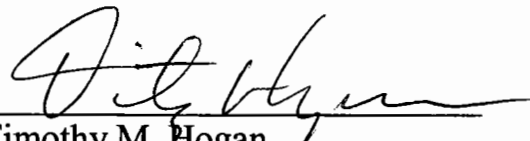
Court held in 1967, the Enabling Act is unequivocal and it requires nothing less.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court reverse the trial court. Plaintiffs also request that they be awarded their attorneys' fees pursuant to the private attorney general doctrine. *Arnold v. Ariz. Dept. of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989).

RESPECTFULLY SUBMITTED this 30th day of July, 2007.

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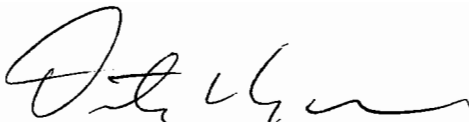
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