

## *Center Wins "Round 2" in Greer Land Exchange*

**O**n March 1, 2007, Judge Mary H. Murgia held that the Forest Service's approval of the Black River Land Exchange ("BRLE") was arbitrary and capricious because the Service failed to take a "hard look" at the impact that potential development of the property involving multiple shallow wells would have on the area. The Court also found that because the impact of numerous shallow wells was uncertain, the Service should have performed an Environmental Impact Statement. Finally, with respect to the valuation of the federal land to be exchanged, the court found it "puzzling" that the appraiser failed to address a previous land exchange in the Greer area that was completed in 1994. As plaintiffs, the Greer Coalition and Center for Biological Diversity (CBD), pointed out in their Motion, the value assigned to the land in that exchange was essentially the same value assigned to the federal land in the proposed BRLE more than ten years later. Yet,

even when this information was provided to the appraiser by the Coalition, it was ignored. The Court found that this omission rendered the valuation arbitrary and capricious.

The BRLE is a proposal to exchange 337.2 acres of federal land north of Greer for 400 acres of private land in Apache and Greenlee counties. The federal land being proposed for exchange is located in the heart of Greer and consists of two tracts; Tract A and Tract B that are currently part of the Apache-Sitgreaves National Forest. The private land consists of three parcels of land. These include two parcels of land located on the West Fork of the Black River known as the Rancho Allegre parcel and the Thompson Ranch parcel and a parcel of land located on the upper Blue River known as the Blue River Ranch parcel.

When the proposed exchange was first announced in October 2002, a number of Greer residents expressed concern

that the exchange will lead to the development of the property that is currently federal land and is located in the heart of Greer. However, in evaluating the BRLE, the Forest Service first refused to consider the impact that development of the exchanged land would have on the surrounding area. The Forest Service claimed that any future development of the property was speculative because the proponent of the exchange had provided the agency with a non-binding written statement that he has no current plans to develop the property. The Center successfully appealed the first "finding of no significant impact" on behalf of the Coalition and CBD at the administrative level.

On remand, the Forest Service prepared a revised Environmental Assessment which purported to have considered the potential development of the federal properties. However, in the revised EA, the Forest Service considered only a single development scenario involving a large

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## ***LINE SITING COMMITTEE APPROVES TRANSMISSION LINE THROUGH KOFA***

**O**n February 28<sup>th</sup>, the Arizona Power Plant and Transmission and Line Siting Committee approved construction of a high voltage electric transmission line through the Kofa National Wildlife Refuge. The Committee granted the application of Southern California Edison to construct the transmission line from the Palo Verde Nuclear Plant to Southern California. The Committee voted 8 – 3 in favor of the transmission line.

The Center, on behalf of the Sierra Club – Grand Canyon Chapter, opposed construction of the line because it is unnecessary and the environmental damage it will cause far outweighs any possible benefits. The only reason Edison wants to construct the line is to provide Southern California with power from the generating plants in the West Valley that is cheaper than what Edison can produce itself. The transmission line provides no benefits for Arizona and will cause irrevocable damage to the Kofa National Wildlife Refuge.

The transmission line will go through about 23 miles of the Kofa which is home to a large population of desert bighorn sheep as well as other sensi-

tive and rare species of plant and wildlife. The visual impacts of the line will be permanent and unmitigable according to the Environmental Impact Statement.

Nevertheless, the Committee reasoned that since a transmission line had already been constructed across the Kofa twenty years ago, the construction of a second parallel transmission line would not cause too much additional damage. Of course, that's like saying the first line was bad so we may as well make it worse.

At least one agency got it right. The U.S. Fish and Wildlife Service, which has jurisdiction over the Kofa, has denied the necessary right-of-way to Edison finding that the construction of the transmission line is incompatible with the mission and purpose of the Kofa National Wildlife Refuge. Unless and until that determination is reversed, Edison cannot build the line. We're not going to take any chances, however, and will ask the Arizona Corporation Commission to reverse the Committee's decision and deny a Certificate of Environmental Compatibility to Edison.

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## COURT HEARS EVIDENCE IN FLORES CASE

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**B**eginning on January 9<sup>th</sup>, U.S. District Court Judge Raner

Collins heard evidence in the *Flores* case. The hearing was held because the Ninth Circuit Court of Appeals determined that the state legislature and Superintendent of Public Instruction Tom Horne were entitled to present evidence on their claim that the state had satisfied its obligation to provide adequate funding for English language learner programs in public schools. The District Court had determined in January 2000 that the state was violating the Equal Educational Opportunities Act because funding for ELL programs was arbitrary and inadequate.

The evidentiary hearing lasted eight days and ended on January 25<sup>th</sup>. The legislature and Superintendent presented witnesses who testified that because of increased federal funding from the No Child Left Behind Act, school districts now had sufficient funds to maintain their ELL programs. They also testified that the problems found by the Court when it entered judgment in January 2000 had been addressed and that therefore the judgment

should be deemed satisfied and case should be terminated.

The Center represents the plaintiffs in the case who are a class of parents and children from the Nogales Unified School District. We presented evidence from the school district showing that Nogales is actually spending an additional \$1,570 per ELL student for ELL services even though the state is providing only \$365 in additional ELL funding for each of those students. Nogales has to take both state and federal funding away from its other students in order to provide adequate ELL programs in the district. We also submitted evidence from Glendale Union High School District, Tucson Unified School District, Murphy Elementary School District and Scottsdale Unified School District which spend anywhere from an additional \$2,750 to \$4000 per ELL student.

Closing briefs were filed on March 13 after which we hope the Judge will issue a prompt decision in the plaintiffs' favor. We have

requested that Judge Collins require the state to provide districts with ELL funding that is no less than the \$1,570 per ELL student that Nogales is actually spending because current funding levels are based on the additional amount that Nogales was spending on ELL students seven years ago, at least according to the defendants. We are also asking that the Court enjoin certain provisions of legislation enacted last year which subtracts federal funding from the amount that the state provides to school districts for their ELL programs. Also, we have asked the Court to enjoin another provision of that legislation that terminates state funding for any ELL student who has been classified as an ELL for longer than two years, since the evidence overwhelmingly established that even when a district has all of the resources it needs, it often takes students longer than two years to become proficient in English and federal law is very clear that the state is obligated to provide language services for as long as the student needs them.

### **THANK YOU**

The Center would like to thank LEXIS-NEXIS for its continuing grant of computerized legal research services.

## *No Rest for the Weary in the Struggle for Clean Air*

**I**t was no surprise when EPA announced this month that Phoenix had failed to meet the December 2006 attainment deadline for PM-10. Particulate pollution has been a serious problem in the Valley for the past two decades and throughout that time, the Center has pushed for more stringent enforcement by EPA. Yet, every step of the way, our efforts have met with resistance. Since they were first adopted, the Phoenix metropolitan area has never attained the PM-10 standards and has a long history of proposing inadequate plans to address the problem.

On March 15, 1991, portions of Maricopa County, including Phoenix and adjacent cities, were designated nonattainment for PM-10. Since that time, the Center has been actively involved trying to make sure that both the state and EPA do everything required under the Clean Air Act in the hope that the Phoenix area will some day soon attain the national standard.

For example, in the early 1990s, when EPA delayed taking action on the woefully inadequate plan sub-

mitted by the state, the Center filed suit in U.S. District Court to require EPA to either approve or disapprove the submitted plan.

When EPA finally approved the plan along with the State's claim that timely attainment of the standards was impracticable, the Center filed a Petition for Review with the Ninth Circuit challenging that approval. The Court agreed with the Center and held that EPA had acted illegally in approving the Phoenix plan because, among other things, it failed to address the 24 hour standard.

In the meantime, the December 31, 1994 attainment deadline for moderate areas had passed, and EPA reclassified Phoenix as a "serious" PM-10 nonattainment area. That reclassification required the state to adopt an even more stringent "serious area plan."

Over the years, the Center has continued to keep the pressure on both the state and EPA through district court actions to compel timely compliance with the Act, and substantive challenges to the plans at the Court of Appeals. We've won some and lost some, but throughout, we have kept up the pressure.

Recently, we filed a second challenge to EPA's approval of the serious area plan without requiring CARB diesel as a control measure; however, with EPA's intervening finding that the state failed to attain the standard by the extended deadline, the focus is now on the requirement that the state adopt what is known as a "5% plan." Under this provision of the Clean Air Act, the state is obligated to adopt additional control measures that will reduce particulate emissions by at least 5% per year and allow the state to attain the PM-10 standards by the new deadline, which is five years from the finding of failure to attain, or December 2011. In order to reach attainment, the area must have no exceedences for three straight years.

As the plan moves forward, the Center will be once again advocating for the most stringent measures possible and making sure that the resulting plan meets all of the increasingly strict requirements of the Act. If it doesn't, we won't hesitate to take the matter back to court—just ask EPA!

## ***CENTER'S ANNUAL EVENT TO BE HELD ON APRIL 21st — Sandy Bahr to be honored***

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**T**he Center's annual fundraising event will be held April 21<sup>st</sup> at the Bentley Projects in Phoenix. This year we're honoring Sandy Bahr, the Conservation Director for the Grand Canyon (Arizona) Chapter of the Sierra Club. We'll also have a silent and live auction as well as musical entertainment by long-time Phoenix jazz artists Margo and Michael Reed along with a five-piece jazz band.

We're not calling the event a "dinner" this year because it's not a dinner of the sit-down variety. Instead, heavy hors d'oeuvres will be served and the Center is hosting a beer and wine bar. The venue for the event is Bentley Projects. According to its website, Bentley Projects is the "largest art gallery in the west" located in an historic

downtown Phoenix warehouse featuring "soaring ceilings with clerestory windows and distinctive architectural details." The event will be catered by Arizona Taste.



At the event, we will present Sandy Bahr with the Center's Public Interest Award. Sandy has been the Conservation Director for the Grand Canyon Chapter of the Sierra Club for almost ten years. Sandy is the person who speaks for the envi-

ronment at the Arizona legislature. That's not the easiest job in the world but Sandy handles it with extraordinary integrity and professionalism. And she's effective. She regularly protects the rest of us from environmental disaster at the legislature and along the way has even managed to help improve environmental protection in Arizona.

So please join us for food, fun, music, and a chance to recognize one of the real environmental heroes in Arizona. The event begins at 6:00 p.m. on Saturday, April 21<sup>st</sup>. Tickets are \$150 and may be purchased by contacting the Center at (602) 258-8850. Bentley Projects is located at 215 East Grant Street in Phoenix.

### ***Court Rules Against Center in §404 Case***

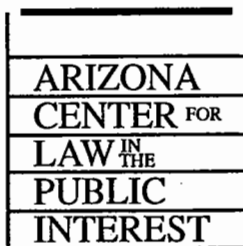
**O**n February 22, 2007, Judge Bolton ruled in favor of the Army Corps of Engineers and against the White Tanks Concerned Citizens in the case challenging the Corps' failure to consider cumulative impacts in issuing a §404 permit for Festival Ranch. The Center plans to appeal.

### ***Greer decision continued...***

*(Continued from page 1)*

subdivision with a single deep well, and refused to consider a more likely development involving numerous shallow wells. Thus, based on the single deep well scenario, the Forest Service concluded that the exchange would have "no impact" on the environment.

As the Center argued in its Motion, NEPA requires federal agencies to consider all reasonably foreseeable impacts, not simply a selected "most likely" scenario, which, as the Judge noted in her decision, the proponent acknowledged was not even economically feasible.



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