

## The Ninth Circuit to Hear *Flores* Appeals in July

**O**n July 25<sup>th</sup>, the U.S. Court of Appeals for the Ninth Circuit in San Francisco will hear arguments on appeals filed by the Superintendent of Public Instruction, Tom Horne, and the Arizona legislature in *Flores v. State of Arizona*. Horne and the legislature have filed three appeals from orders issued by U.S. District Court Judge Ramer Collins.

The first appeal challenges Judge Collins' order prohibiting the state from requiring English language learners to pass the AIMS test as a graduation requirement until the state has adequately funded English language learner programs for a sufficient period of time. Judge Collins' order was stayed by the Ninth Circuit so that ELL students must still pass the AIMS test in order to graduate from high school at least until the appeal is decided.

The second appeal challenges Judge Collins' order approving the distribution of \$21 million in fines that had accumulated to school districts in

Arizona based on their number of ELL students. Horne and the legislature claim that Judge Collins exceeded his authority and that the fines should have been applied to defray the funding necessary for whatever legislation was ultimately enacted to satisfy the judgment in *Flores*. That judgment requires the state adequately fund English language learner programs in Arizona's public schools.

The final appeal challenges Judge Collins' order rejecting legislation enacted in March. Judge Collins determined that

the legislation failed to comply with the judgment and violated federal law.

All three appeals have been consolidated by the Ninth Circuit and will be heard at the same time. Briefing and argument have been accelerated, so we're hopeful that the Court will issue a prompt decision affirming Judge Collins' orders. In that event, it will be necessary for the legislature to reconvene and enact legislation that provides funding based on the costs of educating English language learners.

## *Center Elects New Officers*

**T**he Center's Board of Directors elected new officers at its annual meeting in June. Danny Adelman of the law firm Adelman German, P.L.C., was elected President of the Board. Danny replaces Sharon Shively with the law firm Sacks Tierney, P.A., who had served two terms as President beginning in 2002. Sharon will remain a member of the Board.

The Board also elected Bruce Samuels with Lewis & Roca LLP as the President-elect. Paul Johnson with Jennings, Strouss & Salmon, P.L.C. will continue to serve as Secretary and Carolyn Matthews with Mohr, Hackett, Pederson, Blakley & Randolph, P.C., will continue as Treasurer.

**Arizona Center for Law  
in the Public Interest**

202 East McDowell Road  
Suite 153

Phoenix, Arizona 85004  
(602) 258-8850  
FAX (602) 258-8757

2205 East Speedway Blvd.  
Tucson, Arizona 85719  
(520) 529-1798  
FAX (520) 529-2927

www.aclpi.org

**Phoenix Staff**

Timothy M. Hogan  
Executive Director

Anne Ronan  
Staff Attorney

**Tucson Staff**

Joy E. Herr-Cardillo  
Staff Attorney

**Board of Directors**

Daniel J. Adelman, *President*  
Bruce Samuels, *President-Elect*  
Paul G. Johnson, *Secretary*  
Carolyn R. Matthews, *Treasurer*

Robert Bartels  
Charles A. Davis  
Linda L. Glenn  
Diane M. Johnsen  
Michelle D. Johnson  
Eugene M. Kadish  
Peter Kozinets  
John Lewis  
Sue McAleavey  
Linda C. McNulty  
Joel W. Nomkin  
David J. Ouimette  
John Ryley  
Sharon B. Shively  
Cornelius Steelink  
Bradley J. Stevens  
Carole A. Summers  
Geoffrey M. T. Sturr

The Centerline is a quarterly  
newsletter published by the Ari-  
zona Center for Law in the  
Public Interest.

## *The Center Represent Sierra Club to Oppose Transmission Line*

**T**he Center is representing the Sierra Club, Grand Canyon Chapter, in front of the Arizona Power Plant & Transmission Line Siting Committee to oppose the application of Southern California Edison to construct a 500 kv transmission line from the West Valley to Southern California. There is already one transmission line in place that was built 20 years ago and now Southern California Edison wants to build another to take advantage of low-cost power from generating facilities that have been constructed in the West Valley.

The proposed transmission line would cut through the Kofa National Wildlife Refuge on its way to Southern California and will result in additional environmental damage. The Kofa National Wildlife Refuge is home to bighorn sheep, desert tortoises and many other species that will be disrupted by construction of the transmission line. Aside from the effects

on wildlife and vegetation, a second transmission line will obviously have an adverse visual impact for recreational visitors to the Refuge.

Southern California Edison admits that the purpose of the line is to provide low-cost power to customers in Southern California. The company claims that it wants to take advantage of idle generating capacity in Arizona, but the effect in Arizona will be to increase energy prices for consumers. Local utilities, like Arizona Public Service Company, will have to compete with Southern California Edison for the power, thus increasing the price of the power. Additionally, Arizona utilities project that they will grow into the excess power in the West Valley in the 2011-12 timeframe. If the power has been purchased by Southern California Edison, then additional generating plants will have to be built here in Arizona.

*(Continued on page 5)*

### **THANK YOU**

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

---

## *The Center Celebrates its Thirty-Second Anniversary*

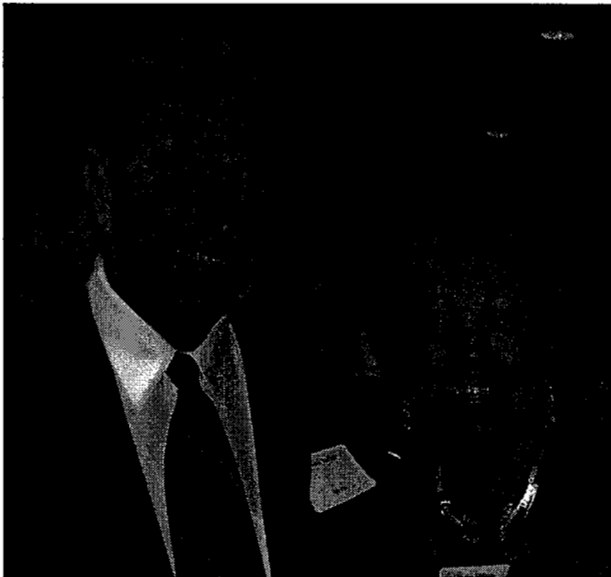


Mike and Janet Valder, Public Interest Award Recipients (left)

Janet Valder and Helen Zandler (below)



Board President Sharon Shively with Mike Valder (left)



The Center celebrated its 32<sup>nd</sup> anniversary at its annual dinner on May 6<sup>th</sup> at the Pointe Squaw Peak Resort in Phoenix. Over 200 Center supporters were treated to a great evening with a silent auction and a wonderfully entertaining talk from E.J. Montini. The Center also took the occasion to honor Mike and Janet Valder for all of their efforts and hard work to make Arizona a better place for us to live.

## *ANSAC Proceedings Move to Judicial Review Phase*

**O**n June 19, 2006, the State of Arizona filed a complaint for judicial review challenging the Arizona Navigable Stream Adjudication Commission's (ANSAC) finding that the Lower Salt River was non-navigable at the time of statehood. Both the State Land Commissioner and the Center submitted legal memoranda urging a finding of navigability for the Lower Salt River. The Commission, however, decided otherwise. It appears that the principal issue on appeal will be what consideration should be given to human impacts (i.e., dams, diversions and pumping) when determining the "ordinary and natural condition" of a river at the time of statehood. Obviously, this is an issue for many of the major water-courses in Arizona that were already being depleted by dams, diversions and pumping by the time Arizona became a state in 1912.

This appeal is just the latest chapter in a long battle to protect Arizona's riverbeds. The controversy began in the 1980s when the State first asserted its trust interest in river and streambeds. The problem then, as now, is that a number of corporate inter-

ests, like sand and gravel companies, have been tearing up property in and along rivers and streams throughout the state with no claim to the title of those lands.

The legislature, anxious to bestow title to these lands on their corporate friends, enacted legislation disclaiming any interest on the part of the State in lands that were already occupied and providing for the sale of all remaining river and stream lands at \$25 an acre. The Center sued the State to invalidate the giveaway based on the public trust doctrine. Under that doctrine, Arizona acquired title to all property underlying rivers and streams that were navigable at the time Arizona was admitted to the Union in 1912. Since Arizona had a trust interest in the river and streambeds, the Center argued that it was a violation of the constitutional ban on gifts of public property to private interests for the legislature to give those lands away.

In 1991, the Arizona Court of Appeals issued its first decision agreeing with the Center and invalidating the 1987 legislation, *Arizona Center for Law in the Public Interest v. Hassell*. The decision confirmed that Arizona held title

to all river and streambeds that were navigable at the time of statehood in public trust for its citizens' enjoyment and recreation. Any disposition of those lands could only be made if consistent with trust purposes.

In response to the Court's decision, the legislature established ANSAC, whose job it was to determine which rivers and streams were navigable at the time of statehood and to preserve those lands in trust for Arizona citizens. Former Governor Symington made the initial appointments to the Commission, and the Commission set about doing its work of making navigability determinations. Of course, it was Governor Symington's and the legislature's fondest hope that the Commission would determine that all of Arizona's rivers and streams were non-navigable and therefore capable of being given away to private interests. However, the Commission actually decided it was going to follow the law and, in 1993, made preliminary findings that the Salt River was navigable at the time of statehood and therefore subject to the public trust. That's not exactly what the legislature had in mind, so in a mat-

*(Continued on page 5)*

## ANSAC continued...

(Continued from page 4)

ter of months it passed new legislation that made the Commission an advisory body and provided that the legislature itself would make all navigability determinations. Additionally, the 1994 legislation established burdens of proof, exclusions of evidence and presumptions against navigability that made it virtually impossible for the Commission to recommend that any river or stream was navigable.

The Center sued, challenging these presumptions, and in *Defenders of Wildlife v. Hull*, decided in February 2001, the Arizona Court of Appeals held that the Arizona Legislature's attempt to de facto "give away" the State's right in the land underlying navigable waters by narrowly defining "navigability" was a violation of both Arizona's gift clause and the public trust doctrine. As a result of that decision, the 2001 Arizona Legislature adopted new legislation that reconstituted ANSAC; gave the commission final authority to determine navigability of rivers (as of 1912), subject to judicial review; and adopted the federal definition of navigability: whether the river was

ed or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel re or could have been conducted in the customary modes of trade and travel on water.

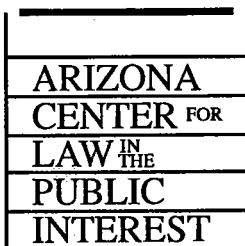
Consequently, in late 2001, ANSAC reconvened and began re-holding the navigability hearings. By January 2006, ANSAC completed all of the hearings and, as of May 2006, and found *all* of the rivers in Arizona non-navigable, essentially ignoring the Court's opinion in *Defenders*. Because the time to seek review is triggered by the issuance of a "final report," the only finding ripe for judicial review at this time is the Lower Salt River; however, as additional final reports are issued by ANSAC, it is anticipated that several parties, including the State, will challenge ANSAC's findings regarding the Upper Salt, Gila, and Verde Rivers. In addition, the Center anticipates challenging the findings on the San Pedro and Santa Cruz Rivers.

(Continued from page 2)

This application contains no benefits for Arizona, only environmental and economic costs. The Line Siting Committee will have to evaluate those benefits and costs to determine whether it will grant a Certificate of Environmental Compatibility to Southern California Edison to build the transmission line. The Committee's decision is then reviewed by the Arizona Corporation Commission. Hearings in the matter began on June 26<sup>th</sup> and 27<sup>th</sup> and will continue on August 21<sup>st</sup> and 22<sup>nd</sup> and into September. Any member of the public may provide written comments to the Committee and the Arizona Corporation Commission.

## Thanks!

This summer, Center attorneys are being assisted by summer interns. Sarah Jorantaad who just finished her first year at the Sandra Day O'Connor College of Law at ASU, is working with Tim Hogan and Anne Ronan in Phoenix. In Tucson, Kendrick Wilson, from Georgetown University Law Center, is working with Joy Herr-Cardillo. The interns provide valuable research and writing support and we appreciate the time and effort they so generously contribute.



202 East McDowell Road  
Suite 153  
Phoenix, Arizona 85004

Nonprofit Organization U.S. Postage Paid Phoenix, Arizona Permit No. 1202
--

ADDRESS SERVICE REQUESTED

Please make any address or name changes to your mailing label and return it to the Phoenix office.  
Printed on Recycled Paper

***Your support helps us continue our important work...***  
***Enclosed is my contribution...***

\$1,000     \$500     \$150     \$100     \$75     \$50     Monthly \$ \_\_\_\_\_

Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

I wish my donation to remain anonymous.

Payment: Check Enclosed (payable to Arizona Center for Law in the Public Interest)  
or Charge: \_\_\_\_\_ VISA \_\_\_\_\_ Mastercard \_\_\_\_\_ American Express  
Card No. \_\_\_\_\_ Exp. Date: \_\_\_\_\_  
Signature: \_\_\_\_\_

Please return this form to:  
Arizona Center for Law in the Public Interest  
202 E. McDowell Rd., Suite 153, Phoenix, AZ 85004

***Thank you for your support!***  
Your donation is tax-deductible to the extent allowed by law.