



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 10, 2015</p>	<p>No. I15-004 (R15-009)</p> <p>Re: Immunity for Recreational Use of Aircraft on State Trust Lands</p>
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To: David M. Gowan, Sr.
Arizona Speaker of the House

Questions Presented

1. Does the immunity offered under Arizona Revised Statute (“A.R.S.”) § 33-1551 apply to state trust lands and/or the Arizona State Land Department (the “Department”) for access to trust lands by aircraft for recreational use?
2. Does a fee in the form of a lease or a special use permit required by the Department for access to an area by aircraft and paid by (a) an individual aviator or (b) an organization on behalf of all aviators, constitute “payment of an admission fee or other consideration”?
3. What statutory changes, if any, are necessary to provide immunity for access to trust lands by aircraft for recreational use?

Summary Answers

1. Under certain conditions, A.R.S. § 33-1551 provides immunity for state trust land and the Department, and for operating recreational aircraft. However, the statute would only provide immunity to the Department for operation of an aircraft on state trust land if the Department permitted an aircraft operator to use state trust land under conditions that satisfy the definition of a “recreational user” under the statute. Accordingly, immunity would apply only if the Department permitted the aircraft operator to use state trust land without “payment of an admission fee or other consideration;” in other words, under a recreational permit or by paying only a nominal fee to offset the cost of providing access to the state trust land.

2. Yes. Payments to the Department for a lease or special use permit to use state trust land would constitute the “payment of an admission fee or other consideration” because those payments are not “nominal” and are not intended merely to offset the cost of providing access. Instead, the payments are rentals based on the appraised value of the land used and the nature of the use. Furthermore, the payments are required to generate revenue for the beneficiaries of the state land trust.

3. Attorney General Opinions answer questions relating to the current state of the law and do not make recommendations for future legislation.

Background

Recreational Use Statute.

A.R.S. § 33-1551, commonly known as the “recreational use statute,” was enacted “to encourage landowners to open their lands to the public for recreational use” by limiting the owners’ potential liability to recreational users. *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 2, ¶ 7, 66 P.3d 44, 45 (2003). Once a landowner receives an admission fee or other

consideration for allowing the recreational use on its land, the landowner loses the immunity.

A.R.S. § 33-1551 provides in relevant part:

A. A public or private owner, easement holder, lessee, tenant, manager or occupant of premises is not liable to a recreational or educational user except on a showing that the owner, easement holder, lessee, tenant, manager or occupant was guilty of willful, malicious or grossly negligent conduct that was a direct cause of the injury to the recreational or educational user.

...

C. For the purposes of this section: ...

5. "Recreational user" means a person to whom permission has been granted or implied without the payment of an admission fee or any other consideration to travel across or to enter premises to hunt, fish, trap, camp, hike, ride, engage in off-highway vehicle, off-road recreational motor vehicle or all-terrain vehicle activity, operate aircraft, exercise, swim or engage in other outdoor recreational pursuits. The purchase of a state hunting, trapping or fishing license, an off-highway vehicle user indicia or a state trust land recreational permit is not the payment of an admission fee or any other consideration as provided in this section. A nominal fee that is charged by a public entity or a nonprofit corporation to offset the cost of providing the educational or recreational premises and associated services does not constitute an admission fee or any other consideration as prescribed by this section. Recreational user does not include a student who is registered at a school during designated times that the student is allowed to be on the school grounds as determined by district personnel or who is participating in a school-sanctioned activity.

Arizona State Trust Land.

The State of Arizona owns over nine million acres of state trust land, which the United States granted to the State to hold in trust solely to assist specified beneficiary purposes, primarily public education, enumerated in the Arizona Enabling Act. *See* New Mexico-Arizona Enabling Act §§ 24-25, Pub. L. 61-219, 36 Stat. 557 (June 20, 1910). The Enabling Act and Arizona Constitution contain express restrictions on the use and disposition of the trust's assets to ensure that the beneficiaries receive "the most substantial support possible ... and that only those beneficiaries profit from the trust." *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385

U.S. 458, 467 (1967) (citing Enabling Act § 28); *see also* Ariz. Const. art. X, §§ 3-4.

Consequently, state trust lands are distinct from public lands that are managed for the use of the general public.

When the Department leases state trust land, it must receive at least appraised value and must auction all leases that are for a term greater than ten years. Enabling Act § 28; Ariz. Const. art. X, §§ 3-4. The Commissioner may also “Issue permits for short-term use of state land for specific purposes as prescribed by rule.” A.R.S. § 37-132(B)(6). Accordingly, the Department’s rules provide for “special use permits” which allow permittees “beneficial use” of state trust land “for special purposes” not appropriate for leases. Ariz. Admin. Code R 12-5-1101. Special use permittees must pay a fee no less “than appraised rental value of the land.” Ariz. Admin. Code R 12-5-1101(5). A state trust land “recreational permit,” expressly referenced in the recreational use statute, is distinct from a “special use permit” and is sold for a flat annual fee - \$15 to individuals and \$20 to families. Ariz. Admin. Code R. 12-5-1201.

Analysis

The recreational use statute grants immunity to owners of land, including state trust land, A.R.S. § 33-1551(A), who permit “recreational users” to use the land, A.R.S. § 33-1551(C)(5). Operating an aircraft is a use within the protection of the statute. *Id.* However, the statute defines a “recreational user” not only with reference to the nature of the use, but also with reference to the terms under which the landowner permits the user on the land. A “recreational user” is only a user permitted on the land “without payment of an admission fee or any other consideration.” *Id.* The statute expressly explains that purchase of “a state trust land recreational permit” or payment of a “nominal fee ... to offset the cost of providing” access to the land “does not constitute an admission fee or any other consideration.” *Id.*

In this context, fees paid by an individual aviator or an organization on behalf of all aviators to the Department to obtain a lease or a special use permit would constitute “payment of an admission fee or other consideration.” Obtaining such instruments requires payment of rental reflecting the use and appraised value of the land, and not merely the cost of providing access to the land. *See* Enabling Act § 28; Ariz. Const. art. X, §§ 3-4; Ariz. Admin. Code R. 12-5-1101(5). Moreover, the cost would likely not be considered “nominal,” since the application fee alone would be at least \$300 for a permit or \$1,000 for a lease. *See* Ariz. Admin. Code R. 12-5-1201; *see also Prince v. City of Apache Junction*, 185 Ariz. 43, 912 P.2d 47 (Ct. App. 1996) (City not permitted to claim immunity under A.R.S. §§ 33-1551 for a softball injury when the plaintiff’s team paid a \$250 entry fee to use the City’s fields), *superseded by statute on other grounds as recognized in MacKinney v. City of Tucson*, 231 Ariz. 584, 590 n5, 299 P.3d 1282, 1288 (Ct App. 2013). These instruments are plainly distinct from the Department’s recreational permits, for which the Department receives a \$15 or \$20 administrative fee. *See* Ariz. Admin. Code R. 12-5-1201.

Conclusion

Although the terms of the recreational use statute, A.R.S. § 33-1551, provide potential immunity for the State if the Department allowed aviators to use state trust land as “recreational users”, the rental charged for such use would eliminate the State’s immunity.

Mark Brnovich
Attorney General