GUST ROSENFELD
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NEWSLETTER
SPRING 2012

JUDGE KIBBEY VITAL TO TERRITORY, STATE

Founding Member's Ties to Centennial

Trailblazing attorney. Sage jurist. Territorial governor. **Joseph Henry Kibbey** was all of these and more. We are most proud of his contributions to the history of early Arizona and of his service to his private practice clients in his role as a founding partner of Gust Rosenfeld.

Kibbey served as Associate Justice of the Arizona Territorial Supreme Court from 1889 to 1893 and as Governor of the Arizona Territory from 1905 to 1909. His legal career is most remembered for his efforts in the area of water law.

Arizona Territorial Governor and Gust Rosenfeld founding member Joseph Henry Kibbey.

Although he had been a governor, he preferred to be known as Judge Kibbey. His decision in the case of *Wormser et al v. Salt River Canal Company*, Case No. 708 (1892), set an important precedent in the territory that continues to the present.

President Theodore Roosevelt appointed Judge Kibbey Governor of the Arizona Territory on February 27, 1905, renominating him for a second term on December 16, 1908. Mining interests and other political opponents delayed confirmation of the second term until after Roosevelt left office, and succeeding **President William Taft** appointed **Richard Sloan** instead. Kibbey stepped down as governor on May 1, 1909.

Judge Kibbey returned to private legal practice and served as counsel for the Salt River Valley Water Users' Association, part of today's Salt River Project (SRP). Judge Kibbey died in Phoenix on June 14, 1924, at the age of 71, leaving behind a firm footprint in Arizona's history.

THE 'KIBBEY' DECISION: LANDMARK CASE ON WATER RIGHTS

The *Wormser* case involved a dispute in which the Salt River Valley Canal Company was accused of considering water from the Salt River as corporate property and delivering it in times of drought to customers with ownership interest in the company—in preference to customers who had historically used the water.

The ruling, which became known as the "Kibbey Decision," established the principle that "water belongs to the land" and could not be used as "floating" property to be divided by decision of the canal company. Water rights were thus linked to parcels of land and not to the owner of land. As a result of the decision, the role of the canal company became that of a delivery agent: water was allocated to the various tracts of land based upon the principle of *prior appropriation.*

The decision was not appealed and the canal companies instead attempted to ignore the Kibbey Decision. It was later upheld by the Arizona Territorial Supreme Court and became the basis for a decision which settled water rights in the Salt River Valley in anticipation of the completion of Roosevelt Dam.

SEE **KIBBEY** ON PAGE 2

Gust Rosenfeld: Growing to Meet the Needs of Arizona and Our Clients

With Judge Kibbey's experience in water rights and governmental issues, Gust Rosenfeld's early work centered on public law and public finance, two practice areas which today continue to provide core services to our clients.

Over the years, Gust Rosenfeld has grown to meet the ever-expanding needs of Arizona and our clients, including these practice areas:

Alternative Dispute Resolution

Bankruptcy and Creditors' Rights

Business/Corporate Law

Commercial Finance

Education Law

Environmental Law

Franchises and Franchising

Insurance

Intellectual Property

Labor and Employment

Litigation

Natural Resources

Public Finance

Public and School Law

Real Estate

Taxation

Trusts and Estates

KIBBEY

FROM PAGE 1

President Teddy Roosevelt commemorates the opening of Roosevelt Dam.

DROUGHTS AND FLOODS

While living in the Arizona Territory, Judge Kibbey had experienced both prolonged droughts and devastating floods.

In February 1891, the Salt River flood washed out the railroad bridge at Tempe and caused damage in Phoenix as far north as Jefferson Street. The flood was followed by a drought that killed livestock, forced a third of the farmland in the Salt River valley out of cultivation, and caused many residents in the area to abandon their homes.

To control flood waters and provide water in times of drought, construction of a storage dam was proposed on the Salt River; a suitable site was located as early as 1889. There was, however, no source of funds within the territory to finance the estimated $2 million to $5 million in construction costs.

In 1902, the Newlands Reclamation Act addressed the financing of construction costs, but the act also required the involvement of a second party that would be capable of repaying the loan.

In response to this requirement, Kibbey helped form the Salt River Valley Water Users' Association. Members of the association took mortgages on the land to be irrigated when Roosevelt Dam was completed in order to pay back the United States for the cost of Roosevelt Dam.

As attorney for the water users' association, Kibbey wrote the Articles of Incorporation; the articles balanced the interests of the Salt River Valley's existing and future residents. The articles and the association served as a model for other federal water projects and later became what we now know as SRP.

A LEGACY OF EXPERTISE IN WATER RIGHTS, PUBLIC & SCHOOL LAW, PUBLIC FINANCE

Judge Kibbey left a legacy that continues to this day within Gust Rosenfeld and throughout Arizona. The firm's practice areas in public finance and in water law are a testament to that legacy. Throughout our history, just as with the creation of the Salt River Valley Water Users' Association, Gust Rosenfeld has been instrumental in creating precedent for financing municipal and public projects that are vital to Arizona's development.

Upon Kibbey's death, Gust Rosenfeld's water expertise was carried forward by attorneys **John L. Gust** and **Scott Norviel**. John Gust–the first of three generations of Gusts associated with our firm–represented the water users' association as it continued to build, control and conserve the Salt River's abundant water.

First Kibbey and then John Gust guided the financing for the construction of the dams that formed Apache, Canyon and Saguaro Lakes below Roosevelt Dam.

Gust was hired by local banks to review and approve bonds issued by municipal corporations in Arizona. He combined his expertise with the firm's knowledge of water law to form, advise and act as the bond attorney to finance almost all of Arizona's irrigation, drainage and electrical districts.

Gust Rosenfeld continues as bond counsel for many of these same districts. Gust Rosenfeld served as bond counsel for the Central Arizona Water Conservation District's financing of 'Plan 6,' the Arizona share of the Central Arizona Project (CAP), which is to the financing of the CAP what the water users were to the financing of the Roosevelt Dam and the lower dams on the Salt River.

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20 YEARS LATER: CHANGES TO THE AMERICANS WITH DISABILITIES ACT

The statement that "we are all one accident away from disability" is an apt one. More than 50 million Americans – 18% of our population – have disabilities. The original 1990 Americans with Disabilities Act (ADA) attempted to deal with accommodations for the disabled.

Congress passed substantial changes to the ADA in 2010 with changes effective on March 15, 2011, or March 15, 2012, including:

1) Ticket sales – Public and private venues are now required to sell tickets for wheelchair accessible seats and non-accessible seats in the same manner. Tickets must be sold during the same hours and through the same methods of purchase. Accessible seating is for people a) with mobility disability, b) who, because of their disability, cannot sit in a straight-back chair, or c) whose service animal cannot fit under a non-accessible seat or lie safely in the aisle. Venues cannot charge higher prices for accessible seats than non-accessible seats in the same seating section.
2) Access – Use of wheelchairs and other manual or power-drive mobility devices must be allowed in all areas where the general public is allowed.
3) Communication – Entities must implement effective communication policies (auxiliary aids and services) for persons of low vision or who are hard of hearing.
4) Service animals – Only dogs, or miniature horses, trained to perform tasks for a person with a disability are recognized (regrets to the Washington man with a boa constrictor or the Missouri woman with a pet monkey both claiming their pet as service animals). Entities must allow service animals to accompany people with disabilities in all areas where the general public is allowed. Staff can only ask a) whether the animal is a service animal required because of a disability and b) what task the animal has been trained to perform. Staff cannot ask about the person's disability or require any medical documentation.
5) Hotel reservation policies – Reservation staff is required to identify accessible features in guest room door width and availability of roll-in showers and other hotel amenities.
6) 2010 ADA standards for access designs – As of March 15, 2012, all new construction and alterations must use the 2010 Standards. Some noticeable changes in the 2010 Standards include a) added technical requirements for children, b) required visible and audible alarms, and c) an increase in the amount of accessible public entrances to 60% up from the 50% under the 1991 Standards (e.g., if a store has four entrances, then three must be accessible under the 2010 Standards).

This serves as a brief overview of the 2010 ADA changes. Please visit the ADA website **www.ada.gov** for more information.

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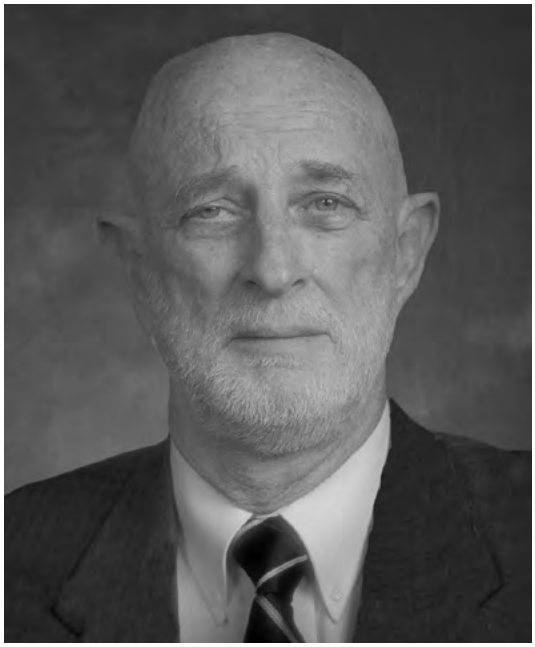

Attorney profile: Fred H. Rosenfeld

Fred H. Rosenfeld, a second generation lawyer, started his career with our firm in 1964 in the area of governmental law, with a special emphasis on municipal finance and legislative matters.

He is now the senior partner in our bond department, working on all types of municipal finance—tasks, he notes, that are "just as hard to arrange for a small town's public park as they are for a multimillion dollar water system in Phoenix."

Highlights in Fred's career include arguing—and winning—a voting rights case in front of the United States Supreme Court in 1970 and acting as special counsel for the Arizona House of Representatives during impeachment hearings concerning the Arizona Corporation Commission in 1964.

Fred earned his bachelor's degree in 1959 and his law degree in 1961 from the University of Arizona. Before joining our firm, he was in private practice in the Phoenix area.

Fred and his wife, **Marilyn**, currently reside in Phoenix. They have three children, **Ann**, **Bill** and **Lisa**, all of whom live in Phoenix.

Do you have to dwell to make a house a dwelling?

When mortgage debt exceeds the fair market value of a property sold at a foreclosure auction, the shortfall created by the unpaid loan balance is called a "deficiency."

In general, a borrower is personally liable to the lender for the full balance of the loan, including any deficiency after foreclosure. In certain situations, however, Arizona's "anti-deficiency" statutes shield borrowers from such liability.

Several elements come into play in determining whether the borrower is protected. In broad strokes, a borrower escapes personal liability for a deficiency following a non-judicial trustee's sale foreclosure if: 1) the property is 2-1/2 acres or less; 2) the property is limited to and utilized for either a single one-family or a single two-family *dwelling*; and 3) the loan was used to purchase that property itself, i.e., not to buy other property.

Defining "dwelling" is key. A few years ago, the Arizona Supreme Court stated that a house being built by a commercial borrower for ultimate resale to its first resident was not a dwelling within the protected ambit. A broad proposition could be extracted from the case that a house must actually be lived in (by anyone) for it to be considered a dwelling under this statute.

Highlighting the practical and perhaps inequitable effect of this proposition, consider the quite different liability exposure of two otherwise identical borrowers under home construction loans, where one house was finished and lived in (perhaps even for just a short period), and the other was not. The former would not be personally liable for the loan, while the latter would.

However, in facts similar to those of the unfortunate borrower described above, a recent Arizona Court of Appeals case held that the individual borrower's "intent" to dwell in the not-quite-finished foreclosed house was sufficient to avoid liability for the deficiency.

Although it may be a result that reflects more the policy than the letter of the statutes, and perhaps also meshing with the realities of the lender's initial underwriting of the loan, the decision does raise a host of thorny issues about the boundaries of the always subjective element of intent.

Stayed tuned. The Arizona Supreme Court, or perhaps the Arizona Legislature, may yet speak again on this issue.

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ET·Y·MOL·O·GY COR·NER Arizona

State Historian Knows Best

Betty Reid, in an article entitled "Solving the puzzle of Arizona's name" in the February 14, 2012, edition of *The Arizona Republic*, Special Centennial Section, provided an entertaining discussion of possible alternative derivations of the name "Arizona" from the Desert People's dialect for "small stream" to Basque for "good oak tree". In my search, I found one not mentioned: the Spanish interpretation of "Arizuma," an Aztec word meaning "silver bearing." However, I'll go with **Marshall Trimble** and the Tohono O'odham "Ali-Shonak" – "place of small springs." He is our official state historian!

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PERSONAL NOTES

Kent E. Cammack, Christopher M. McNichol, Sean P. O'Brien and **Madeleine C. Wanslee** hosted the Creditors' Rights Seminar, "What's Hot in 2012" in January.

Tom Chauncey II and **Christopher M. McNichol** were featured in *Commercial Executive Magazine* as "Leaders in Real Estate Law."

James T. Giel presented on "Elections Dos and Don'ts" to school district officials at an elections seminar in Phoenix.

Martin T. Jones spoke at the National Conference of the Environmental Information Association on March 24 in San Diego on "Legal Issues: Hydraulic Fracturing." Marty presented locally to the Maricopa County Association of Paralegals in March on "Renewable Energy vs. Fossil Fuels."

James W. Kaucher was selected for inclusion in the 2012 edition of *The Best Lawyers in America*® in the practice area of Professional Malpractice Law.

Jennifer N. MacLennan presented at The Arizona School Boards Association's Spring Legal Conference in March on "School Board's Role in Hiring."

Andrew J. McGuire presented on development impact fee topics in October 2011, before the following groups: Growth & Infrastructure Consortium; Government Finance Officers of Arizona Budget Forum; and the Urban Land Institute Arizona.

Christina M. Noyes and **John L. Hay** hosted our firm's annual Franchise Seminar in February. Christina also spoke at the A.B.A. Forum on Franchising's Annual Forum held in Maryland in October 2011 on "The Perils of Third Parties Selling or Servicing Your Brand: Broker, Area Representative and Area Developer Programs."

Sarah C. Smith is a new member of the Maricopa County Bar Association, Board of Directors.

Timothy A. Stratton was recently appointed to serve on the City of Scottsdale Board of Adjustments. The Board of Adjustments hears and decides zoning and code variances.

Richard H. Whitney has been honored, along with **Bert Getz** and **Newton (Betty) Rosenzweig**, as founders of the Arizona Community Foundation (ACF). In 1978, Dick headed the study committee formed by five large banks to explore starting the organization, and, as a young lawyer, performed the legal work to establish it. He went on to be the Chair for five years, following Mr. Getz in that role. ACF now consists of more than 500 component funds with total assets in excess of $500 million.

Super Lawyers

We are pleased to announce that ten of our lawyers have been selected for inclusion on the *2012 Southwest Super Lawyers* list. Each year, no more than 5 percent of the lawyers in Arizona and New Mexico receive this honor. Those selected, by practice area, are: Appellate: **Charles W. Wirken**. Bankruptcy & Creditor/Debtor Rights: **Sean P. O'Brien** and **Madeleine C. Wanslee**. Business Litigation: **Richard A. Segal**. Estate Planning & Probate: **Richard H. Whitney**. Insurance Coverage: **Peter Collins, Jr.** Real Estate: **Timothy W. Barton**; **Gerald L. Jacobs**; **Scott A. Malm**; and **Christopher M. McNichol**.

In addition, associate **Mingyi Kang** has been selected to *Southwest Rising Stars* as one of the top up-and-coming real estate attorneys in Arizona and New Mexico for 2012.

Changes To Notarizing Documents

At the behest of the Arizona Secretary of State, last year the Arizona Legislature added some new requirements to the laws regulating notaries public. One new provision of particular significance deals with the integration of the notary certificate with the main document.

Now, a separate notarial certificate attached to a document must contain a description of the document. This description should include, at a minimum, the title or type of the document, the document date, the number of pages of the document, and the names of any additional document signers other than the person whose signature was notarized.

While this requirement may be designed to address the perceived misuse of free-standing notary pages, it also may create practical issues in creating and organizing complete documents, particularly ones with multiple signers at different locations.

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Arizona court stops HOAs from abusive practice

In a recent case handled by Gust Rosenfeld, the Arizona Court of Appeals reminded Home Owners Associations (HOAs) that there are limits to their powers. Until recently, HOAs would foreclose their lien securing relatively small amounts, then argue that the foreclosure extinguished the first deed of trust securing the homeowner's typically much larger home loan.

Arizona's statutes are clear on lien status: an HOA lien holds super priority status except against certain liens including "A recorded first mortgage on the unit … or *a recorded first deed of trust on the unit,*" A.R.S. § 33-1807(B), (emphasis added). Despite such clear language, HOAs had continued to push the limits on their power.

The Arizona Court of Appeals ruled against the HOA in *Cypress on Sunland Homeowners Ass'n v. Orlandini* because it found that a fraud was perpetrated on the lower court by the HOA through its lawyers. The court stated, "The HOA's interpretations of the statute and the covenants, conditions and restrictions are not supportable on any legitimate ground. Its arguments are specious, legally and logically unsound, and are so contrived as to be little more than sophistry."

The court held that the HOA's lawyers had a duty to inform the court commissioner handling the HOA default judgment hearing about the controlling statute, even if the statute was adverse to their position. The court of appeals found the actions of the HOA's lawyers offensive, joining the lower court in referring the matter to the state bar for disciplinary consideration.

This case should put an end to bullying tactics of HOAs, at least in this particular type of situation. The case also reminds lawyers and clients that they have a duty to play by the rules of the court or else face the consequences.

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