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August 10, 2001

Arizona Corporation Commission

DOCKETED

AUG 10 2001

VIA FACSIMILE AND U.S. MAIL

Gila County Board of Supervisors  
1400 East Ash Street  
Globe, AZ 85501

DOCKETED BY	<i>mc</i>
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Re: Petition for the Establishment of the Strawberry Hollow Domestic Water Improvement District; Mr. Loren Peterson

To the Honorable Supervisors of Gila County:

We are the attorneys for Pine Water Company, Inc. ("Pine Water"). We write today on behalf of Pine Water in opposition to Loren Peterson's petition to establish the Strawberry Hollow Domestic Water Improvement District ("Strawberry Hollow District").<sup>1</sup> Establishment of the Strawberry Hollow District is unnecessary and will not promote the public convenience, necessity or welfare.<sup>2</sup> To the contrary, if the Board establishes the Strawberry Hollow District, it will exacerbate a significant water shortage, thereby compromising the public's ability to receive adequate water service in the Pine area. Put simply, Mr. Peterson's petition constitutes a desperate attempt to circumvent various long-standing water service moratoria enacted by the Arizona Corporation Commission ("Commission"). Those moratoria protect the public interest, which the Board should not forsake for one developer's financial gain.

**Background**

Pine Water is a public service corporation providing domestic water utility service to customers in the areas of Pine and Strawberry, Arizona.<sup>3</sup> Pine Water has approximately 2000 customers. Mr. Peterson is the president and a shareholder in Strawberry Hollow Development,

<sup>1</sup> Although we have been unable to obtain a copy of any petition to establish the Strawberry Hollow District, and were informed by your clerk that a petition has not yet been filed, we note that discussion of such a petition is scheduled as item 5 on the Board of Supervisor's ("Board") August 14, 2001 Regular Meeting Agenda. See Tab A attached hereto.

<sup>2</sup> This represents the minimum showing required of Mr. Peterson under A.R.S. § 48-906.

<sup>3</sup> As the holder of a certificate of convenience and necessity ("CC&N") for domestic water utility service, Pine Water is both obligated and entitled to provide domestic water utility service in its certificated area. See, e.g., James P. Paul Water Co. v. Arizona Corporation Commission, 137 Ariz. 426, 429 (1983); A.R.S. §§ 40-281 through 284.

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Inc. ("SHD"), an Arizona corporation organized to acquire, plan, develop, improve, market and sell residential real property in Arizona. Together with Strawberry Hollow Properties, LLC, SHD's sister company, Mr. Peterson is attempting to develop 71 lots within the territory now served by Pine Water under its certificate of convenience and necessity ("CC&N").

## **The Petition is Contrary to the Public Interest.**

The Pine area has historically experienced water shortages, and in the late 1980s, the Commission ordered various moratoria on new connections and/or main extensions in the area previously served by Pine Water's predecessor.<sup>4</sup> In July, 1996, the Commission limited that entity to connecting one single family residential connection per month on a first come first served basis. The complete moratorium on new main extensions remains in place today. SHD previously approached Pine Water for service. However, Pine Water was prohibited from establishing service to SHD's development based on the Commission's moratoria.<sup>5</sup>

Now, having no legal alternative, Mr. Peterson seeks to establish the Strawberry Hollow District to circumvent limitations imposed by the Commission designed to protect the public from purchasing lands with inadequate water supplies.<sup>6</sup> However, this Board's approval of yet another district in Pine will not change the hydrologic reality there. The Strawberry Hollow District will inevitably face the same circumstances that led the Commission to enact its moratoria. There is simply not enough water to meet existing demand, and the Strawberry Hollow District can do nothing but exacerbate to the problem.

The Commission is tasked with protecting the public by regulating service of commodities vested with the public interest. Having thoroughly investigated water availability in Pine, the Commission has determined that further development of the region's scarce resources would compromise the ability of the existing public utility to adequately serve its customers. The Commission derives its powers from the Arizona Constitution and the Legislature. Its determinations concerning the propriety of water service are actions of the State and are, at a minimum, entitled to the Board's deference. If the Board does not defer to the prior Commission determinations, the Board will jeopardize the public by facilitating Mr. Peterson's circumvention of the State's moratoria.

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<sup>4</sup> See Commission Decision Nos. 56539, 56654, and 59753.

<sup>5</sup> Pine Water is willing and able to serve the Property in the event the moratoria are lifted.

<sup>6</sup> On September 12, 2000, the Arizona Department of Water Resources informed the Arizona Department of Real Estate that "[b]ecause a 100-year adequate water supply has not been demonstrated, the Department of Water Resources must find the water supply to be inadequate." (Emphasis in original.) Letter from Greg Wallace, Chief Hydrologist, Arizona Department of Water Resources to Roy Tanney, Department of Real Estate, copy attached at Tab B.

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## The Strawberry Hollow District Cannot Legally Operate.

Significantly, Mr. Peterson also attempted to negotiate with representatives of the Pine Strawberry Domestic Water Improvement District ("PSWID") to obtain domestic water service for his property, but that attempt was unsuccessful. Pine Water has always maintained its position that any district cannot initiate water utility service to Mr. Peterson's property unless it first acquired, through purchase or condemnation, Pine Water's certificated service area rights. Presumably, this is why PSWID has elected not to provide such service to Mr. Peterson's property. Now, Mr. Peterson seeks to form yet another district. Like PSWID, Mr. Peterson's Strawberry Hollow District will also be required to condemn Pine Water's certificated rights before it can serve water in the area. Mr. Peterson, however, cannot meet the legal requirements allowing for condemnation. Accordingly, approval of Mr. Peterson's petition would be a meaningless exercise.

Arizona law requires that improvement districts proposing to supply domestic water service within the certificated service area of a public service corporation comply with A.R.S. § 9-516.<sup>7</sup> In construing A.R.S. § 9-516, Arizona courts have held that a certificate of convenience and necessity ("CC&N") is a property right,<sup>8</sup> and any governmental entity seeking to obtain any part of a public service corporation's CC&N must first obtain the certificated service area rights from the provider.<sup>9</sup> However, to succeed in an eminent domain action, the Strawberry Hollow District would be required to prove that its public use of the condemned property (Pine Water's CC&N) is "a more necessary public use" than the public use already made.<sup>10</sup>

In determining whether a public use is necessary, the following considerations are relevant: (1) controlling the supply of water; (2) the desirability of having an integrated water system throughout the area for such things as fire protection; (3) equalizing the supply and demand in different parts of the service area; and (4) anticipating the natural flow of growth in a service area.<sup>11</sup> Given the area's extreme water storage and the continued moratorium on new service connections, it is not in the public interest to permit the Strawberry Hollow District to condemn parts of Pine Water's service area for new subdivision development. This is particularly true considering that 243 individuals are awaiting service from Pine Water, some for over 4 years. Allowing newcomers to "leap-frog" those individuals is not a "more necessary public use." It is a means of disenfranchising those entitled to priority distribution of a scarce

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<sup>7</sup> A.R.S. § 48-909.

<sup>8</sup> See Sende Vista Water Co. v. City of Phoenix, 127 Ariz. App. 42, 45, 617 P.2d 1158, 1161 (1980).

<sup>9</sup> See A.R.S. § 48-909(D); Sende Vista, 127 Ariz. App. at 45.

<sup>10</sup> See A.R.S. § 12-1112(3).

<sup>11</sup> See Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296, 300, 497 P.2d 55, 59 (1972).

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VIA FACSIMILE AND MAIL

Gila County Board of Supervisors

August 10, 2001

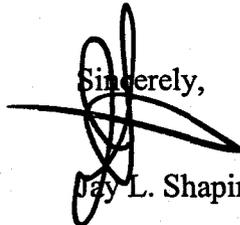
Page 4

resource to fatten the purse of a developer who understood the risks associated with his development but elected to purchase his property despite them.

Moreover, as explained above, Pine Water remains willing to serve Mr. Peterson's property in the event the moratoria are lifted. This is not a case in which Pine Water has simply failed to provide service at a reasonable rate to its consumers. Any restrictions and moratoria placed on water service in the Pine area are a result of conditions outside the company's control. The Commission has sought to ameliorate the problem and maintain adequate service to existing customers under Pine Water's management. Allowing the Strawberry Hollow District to form so it can attempt to acquire part of Pine Water's certificated area will not augment the scarce water supplies in Pine. It will, however, facilitate a further draw on the region's resources and compromise Pine Water's ability to serve existing customers. The Commission has recognized this, and Pine Water asks that the Board now do the same.

For these important reasons, Pine Water respectfully requests that the Board deny Mr. Peterson's petition to form the Strawberry Hollow District as unnecessary and contrary to the public convenience, necessity or welfare. In the event that the Board proceeds to approve the petition, Pine Water will be forced to pursue all remedies available to it under the law. Thank you for your consideration.

Sincerely,



Jay L. Shapiro

cc: Docket in the Matter of the Formal Complaint of Pine Water Company against  
Strawberry Hollow Development, Inc. (Docket No.W-013512A-01-0464)  
Chairman William Mundell  
Commissioner James Irvin  
Commissioner Mark Spitzer  
Hercules Dellas, aide to Commissioner Mundell  
Patrick Black, Esq., aide to Commissioner Irvin  
Paul Walker, aide to Commissioner Spitzer  
Steve Olea, Acting Director, Utility Division  
Teena Wolfe, Esq.  
Jeffrey W. Crockett, Esq.

A

PURSUANT TO A.R.S. SECTION 38-431 THE GILA COUNTY BOARD OF SUPERVISORS WILL HOLD AN OPEN MEETING IN THE SUPERVISORS' AUDITORIUM, 1400 EAST ASH STREET, GLOBE, ARIZONA, AND THE AGENDA IS AS FOLLOWS:

**REGULAR MEETING - TUESDAY, AUGUST 14, 2001**

<u>Time</u>	<u>Item #</u>	<u>Item of Business</u>	<u>Pages</u>
10:00 a.m.		Call to Order - Pledge of Allegiance - Invocation	
	1	Presentation of August 2001 I'MAGE Awards. (Juley Bocardo-Homan)	1
	2	Review/approval of finance reports/demands/transfers	-
	3	Review/approval of personnel reports/actions	-
	4	Presentation of services provided by the Tonto Basin Ranger District for the Roosevelt Lake area. (Gary Smith, District Ranger)	2-3
	5	Information/Discussion/Action to review a petition for the establishment of the Strawberry Hollow Domestic Water Improvement District and to approve the Order establishing said District. (Loren Peterson)	4-20
	6	Information/Discussion/Action to review a bid to purchase land held by the State of Arizona under tax parcel number 208-03-290. (Steve Besich)	21-23
	7	Information/Discussion/Action requesting permission to advertise a Notice of Public Hearing to consider the adoption of a Countywide dog leash law and to discuss the pros and cons for the possible future adoption of an ordinance pertaining to barking dogs within unincorporated Gila County. (Martin Hetrick)	24-26
	8	Information/Discussion/Action to authorize the addition of a full-time regular status position within the Clerk of the Superior Court's Department that will be paid by grant funds. (Margaret Toot/Annie Escobedo)	27
	9	Information/Discussion/Action to accept a citizen's petition to establish Tonto Creek Drive located in Tonto Creek Shores, Gisela, Arizona, as a County road. (John Trujillo)	28-34
	10	Information/Discussion/Action to authorize the Chairman's signature on Drug Control and System Improvement Grant Agreement No. PC-080-02 between the Arizona Criminal Justice Commission and Gila County Attorney's Office in the amount of \$70,570 with a \$16,816 cash matching fund requirement. (Diana Jones)	35-41
	11	Information/Discussion/Action requesting the Chairman's signature on Amendment No. 1 of Contract No. 194-01 between the Arizona Dept. of Commerce Energy Office and Gila County to include Health and Safety Allowable Measures under General Requirements and Budget for the Low-Income Weatherization Assistance Program. (Emma Yeoman)	42-47

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## REGULAR MEETING - TUESDAY, AUGUST 14, 2001

<u>Time</u>	<u>Item #</u>	<u>Item of Business</u>	<u>Pages</u>
	12	Information/Discussion/Action requesting the Chairman's signature on Amendment No. 1 of Contract No. 185-01 between the Arizona Dept. of Commerce Energy Office and Gila County to increase the Low-Income Weatherization Assistance Program 2001-2002 fiscal year budget amount from \$47,832 to \$66,683 (Emma Yeoman)	48-52
	13	Information/Discussion/Action requesting the Chairman's signature on Amendment No. 1 to the General Services Contract between Gila County and Central Arizona Association of Governments extending the contract termination date to 6-30-02 to provide Title I Youth Services to eligible youth in Gila and Pinal Counties. (Emma Yeoman)	53-58
	14	Information/Discussion/Action requesting the Chairman's signature on Amendment No. 1 to the General Services Contract between Gila County and Central Arizona Association of Governments extending the contract termination date to 6-30-02 to provide Title I Adult Services to eligible adults in Gila and Pinal Counties. (Emma Yeoman)	59-64
	15	Information/Discussion/Action to approve a request submitted by the Payson Seventh-day Adventist Church to utilize the Payson County Complex on September 16, 2001 for its annual charity rummage sale event. (Vice-Chairman Ron Christensen)	65-66
	16	Information/Discussion/Action to approve the Consent Agenda consisting of July 24, 2001 and July 31, 2001 meeting minutes, and monthly departmental activity reports.	67-83
	17	County Administrator's projects report workshop	
	a.	Presentation of July 2001 monthly reports:	
		• Administration/Clerk of the Board - Steve Besich	84-88
		• Finance Division - John Nelson	89-93
		• Emergency Services Division - Carmen Corso	94-96
		• Engineering Services Division - John Trujillo	97-102
		• Community Services Division - Emma Yeoman	103-106
		• Health & Human Services Division - Martin Hetrick	107-108
		• Community Development Division - Joe Mendoza	109-111

IF SPECIAL ACCOMMODATIONS ARE NEEDED, PLEASE CONTACT DENISE ORDORICA AT  
(520) 425-3231 OR TDD (520) 425-0839 THE FRIDAY BEFORE EACH SESSION

PURSUANT TO A.R.S. SECTION 38-4031.03(A)(1), (A)(3), & (A)(4). THE BOARD RESERVES THE RIGHT TO MOVE INTO EXECUTIVE SESSION FOR LEGAL ADVICE FOR ANY OF THE ABOVE ITEMS

THE BOARD RESERVES THE RIGHT TO CONSIDER ANY MATTER OUT OF ORDER

B

file

ARIZONA DEPARTMENT OF WATER RESOURCES  
HYDROLOGY DIVISION

500 North Third Street, Phoenix, Arizona 85004  
Telephone 602-417-2448  
Fax 602-417-2425



JANE DEE HULL  
Governor

RITA PEARSON  
MAGUIRE  
Director

September 12, 2000

Mr. Roy Tanney  
Department of Real Estate  
2910 North 44<sup>th</sup> Street  
Phoenix, Arizona 85018

Re: Water Adequacy Report #22-400383  
Strawberry Hollow, Gila County

Pursuant to A.R.S. §45-108, Mr. Ralph Bossert, ASL Consulting Engineers, has provided the Department of Water Resources with information on the water supply for the proposed subdivision, Strawberry Hollow, Phase I, occupying a portion of Section 26, T12N, R8E, G&S R B&M.

Water for domestic use will be provided to each of the 41 lots in the subdivision by the Strawberry Hollow Development Inc.. Adequacy of the water supply was reviewed by the Department with regard to quantity, quality, and dependability.

Because a 100 year water supply could not be demonstrated as being available to each lot based on the Department's physical availability criteria, the Department of Water Resources must find the water supply to be *inadequate* for the proposed use.

A.R.S. §32-2181.F. requires a summary of the Department's report for a dry lot subdivisions or those with an inadequate water supply be included in all promotional material and contracts for sales of lots in the subdivision. We suggest the following synopsis:

"Strawberry Hollow Phase I, is being sold with the domestic water supply to be provided by the Strawberry Hollow Development, Inc. water distribution system as a homeowner's association or improvement district which has yet to be established. Groundwater is being produced from the Redwall limestone. The limited availability of data associated with this formation as an aquifer does not allow for determination of the amount of the groundwater in storage, nor the dependability of supply. Additionally, this general area has been determined to be drought-sensitive. The depth to groundwater may range from 21 to over 1200 feet below land surface depending on topography. Groundwater quality is unknown. Because a 100-year adequate water supply has not been demonstrated, the Department of Water Resources must find the water supply to be *inadequate*."

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Mr. Roy Tanney

Water Adequacy Report #22-400383

Strawberry Hollow, Gila County

September 12, 2000

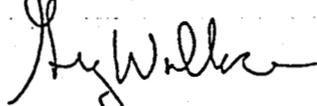
The developer, pursuant to A.R.S. §32-2181.F., may suggest a different summary of this report, but it must contain the above elements and/or the Department's findings. Any change to the above subdivision or water supply plans may invalidate this decision.

This letter constitutes the Department of Water Resources' report on the subdivision's water supply and is being forwarded to your office as required by A.R.S. §45-108. This law requires the developer to hold recordation of the above subdivision's plats until receipt of the Department's report on the subdivision's water supply. By copy of the report, the Gila County Recorder is being officially notified of the developer's compliance with the law.

This is an appealable agency action. The applicant is entitled to appeal this action. Rights to appeal are described in the Notice of Right of Appeal.

If you have any questions regarding this report, please call Andy Kurtz at 602-417-2448.

Sincerely,



Greg Wallace  
Chief Hydrologist

GW/AK/ef  
2059

cc: Ralph Bossert, ASL Consulting Engineers  
Strawberry Hollow Development, Inc.  
Linda H. Ortega, Gila County Recorder  
Robert J. Mawson, Gila Planning & Zoning  
Steve Rossi, Office of Assured & Adequate Water Supply