

ORIGINAL

OPEN MEETING ITEM



COMMISSIONERS  
MIKE GLEASON - Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE



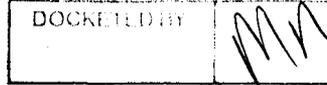
ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission  
**DOCKETED**

DATE: NOVEMBER 5, 2007

NOV 05 2007

DOCKET NO: W-20512A-07-0103



TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Yvette B. Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

EQUESTRIAN ESTATES AT WHITE HILLS  
WATER COOPERATIVE HOMEOWNERS ASSOCIATION  
(ADJUDICATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

NOVEMBER 14, 2007

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

NOVEMBER 27, 2007 AND NOVEMBER 28, 2007

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

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AZ CORP COMMISSION  
DOCKET CONTROL

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MIKE GLEASON, Chairman  
4 WILLIAM A. MUNDELL  
5 JEFF HATCH-MILLER  
6 KRISTIN K. MAYES  
7 GARY PIERCE

8 IN THE MATTER OF THE APPLICATION OF  
9 EQUESTRIAN ESTATES AT WHITE HILLS  
10 WATER COOPERATIVE HOMEOWNERS  
11 ASSOCIATION FOR AN ADJUDICATION THAT  
12 IT IS NOT A PUBLIC SERVICE CORPORATION.

DOCKET NO. W-20512A-07-0103

DECISION NO. \_\_\_\_\_

**OPINION AND ORDER**

10 DATE OF HEARING: July 30, 2007  
11 PLACE OF HEARING: Phoenix, Arizona  
12 ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey  
13 APPEARANCES: Mr. William H. Anger, ENGELMAN BERGER, P.C.,  
14 on behalf of Equestrian Estates at White Hills Water  
15 Cooperative Homeowners Association;  
16 Ms. Robin R. Mitchell, Staff Attorney, Legal Division,  
17 on behalf of the Utilities Division of the Arizona  
18 Corporation Commission.

17 **BY THE COMMISSION:**

18 On February 17, 2007, Equestrian Estates at White Hills Water Cooperative Homeowners  
19 Association (the "Association" or "Applicant"), filed with the Arizona Corporation Commission  
20 ("Commission" or "ACC") an application for adjudication that it is not a public service corporation  
21 under Arizona law. The Association seeks to provide water service to an area known as Equestrian  
22 Estates at White Hills Subdivision ("Subdivision").

23 On March 9, 2007, the Commission's Utilities Division ("Staff") filed an Insufficiency Letter  
24 in this docket stating that the Association's application had not met the sufficiency requirements as  
25 outlined in the Arizona Administrative Code ("A.A.C.").

26 On April 10, 2007, Applicant filed an amended application, Amended Covenants, Conditions  
27 and Restrictions ("CC&Rs") and Amended By-laws in this docket.  
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On May 7, 2007, Staff filed a Sufficiency Letter indicating the Association’s application had met the sufficiency requirements as outlined in the A.A.C.

On June 6, 2007, a Procedural Order was issued setting the matter for hearing and setting associated procedural deadlines.

On June 27, 2007, Staff filed its Staff Report recommending approval of the Association’s application with conditions.

On June 29, 2007, the Applicant filed its Certificate of Mailing and Publication.

On July 17, 2007, Staff filed an Amended Staff Report in this matter.

On July 30, 2007, a full public hearing was held before a duly authorized Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Association and Staff appeared through counsel at the hearing and presented evidence and testimony. No members of the public appeared to give public comment. At the conclusion of the hearing, the matter was taken under advisement pending submission of a Recommended Opinion and Order to the Commission.

On August 2, 2007, Staff filed a late-filed exhibit clarifying its testimony in this matter.

On August 30, 2007, the Association filed as a late-filed exhibit a Notice of Filing Affidavit of Ralph J. McGrath Re: Ownership of Water System.

\* \* \* \* \*

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

**FINDINGS OF FACT**

1. The Association is an Arizona non-profit corporation incorporated on September 20, 2006. The Association was formed for the purpose of providing potable water, operating and maintaining a water supply and distribution system for the future homeowners of Equestrian Estates at White Hills Subdivision (“Subdivision”), located in Mohave County.

1           2.     The Subdivision is located in the high desert of northern Arizona, approximately 21  
2 miles east of the Hoover Dam and nine miles north of the Town of Dolan. The Subdivision will  
3 consist of 116 five-acre parcels.

4           3.     The requested service area is approximately one square mile in size and is more fully  
5 described in Exhibit A, attached hereto and incorporated herein by reference.

6           4.     In Commission Decision No. 55568 (May 7, 1987), the Commission issued a policy  
7 directive regarding applications for adjudication not a public service corporation, and provided the  
8 following seven criteria for evaluation of such applications:

- 9           (i).    The application must be submitted by a non-profit homeowners association;
- 10          (ii).   The application must be a bona fide request by a majority of the membership  
11 of the association through a petition signed by 51 percent or more of the then  
12 existing members;
- 13          (iii).  All associations making an application must have complete ownership of the  
14 system and necessary assets;
- 15          (iv).  Every customer must be an owner/member with equal voting rights and each  
16 member is or will be a customer;
- 17          (v).   The service area involved encompasses a fixed territory, which is not within  
18 the service area of a municipal utility or public service corporation, or if it is,  
19 the municipal utility or public service corporation is unable to serve;
- 20          (vi).  There is a prohibition against further sub-division evidenced by deed  
21 restrictions, zoning, water restrictions, or other enforceable governmental  
22 regulations; and
- 23          (vii).  The membership is restricted to a fixed number of customers, actual or  
24 potential.

25           5.     Applicant is a non-profit homeowner's association.

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1           6.     The Declarant for the Association's CC&Rs is the current owner and developer for the  
2 property to be served.<sup>1</sup>

3           7.     No lots have been sold in the Subdivision and as result the current membership of the  
4 Association is represented by its Board of Directors ("the Board"). On March 23, 2007, the Board  
5 adopted a resolution that approved and supported the Association's application for adjudication not a  
6 public service corporation.

7           8.     According to the Association's Amended CC&Rs on pg. 1, complete ownership of the  
8 water system and necessary assets will be conveyed to the Association upon a Decision by the ACC  
9 adjudicating the Association not a public service corporation.

10          9.     Staff recommends that the Association file with Docket Control, as a compliance item  
11 in this docket, a copy of the executed agreement which conveys ownership of the water system to the  
12 Association within 18 months of a Decision in this matter.

13          10.    Staff further recommends that a Commission Decision granting Equestrian's  
14 adjudication not a public service corporation be considered null and void should Equestrian fail to file  
15 the required documentation conveying ownership of the water system to the Association, within  
16 eighteen (18) months of a Decision in this matter.

17          11.    On August 30, 2007, the Association filed a Notice of a fully executed agreement  
18 conveying ownership of the water system from White Hills Land Development, LLC to the  
19 Association and therefore satisfying Staff's condition.

20          12.    The Association's Amended CC&Rs provide that every customer is a member/owner  
21 with equal voting rights with respect to water system matters, regardless of the number of lots owned,  
22 and that each member/owner is or will be a customer of the water system and is entitled to vote.

23          13.    The Association's Amended CC&Rs provide that the Association's service area is  
24 limited or fixed to the "membership property" as described in the legal description for the service  
25 area. Further, the Association's Amended CC&Rs provide that the service area is not within a  
26 municipal utility or public service corporation.

27 \_\_\_\_\_  
28 <sup>1</sup> Mr. Ralph J. McGrath is President of White Hills Land Development LLC, which owns the White Hills Subdivision.

1 14. The Association's Amended CC&Rs at No. 12, provide that "no portion of the  
2 property shall be divided, redivided, or conveyed into parcels containing less than the land included  
3 in the lots or parcels as of January 1, 2005<sup>2</sup>.

4 15. The Association's witness testified that in addition to the CC&Rs restriction against  
5 further lot subdivision the Association has entered into an agreement with Mohave County that  
6 prohibits further subdivision of the existing lots. (Tr. Pg. 11, lines 2-10)

7 16. The Association's Amended CC&Rs restrict membership to a fixed number of actual  
8 or potential customers and therefore membership is limited to 116 members.

9 17. The Association's Amended By-laws provide that the Association's By-laws may be  
10 amended by an affirmative vote for such amendment by members owning at least fifty (50) percent of  
11 all membership parcels of the Association.

12 18. The Association's witness testified that wastewater service will be provided to the  
13 subdivision through the use of individual septic tanks. Staff concluded that the septic tank system is  
14 adequate to serve each of the five-acre lot in the Subdivision.

15 **Proposed Water System**

16 19. The proposed Association water system will consist of one well producing 75 gallons  
17 per minute ("GPM"), a McPhee's ArsenX treatment plant, a chlorinator, one storage tank  
18 (approximately 83,000 gallons in size), a three pump booster station (including two fire flow pumps),  
19 four 220-gallon pressure tanks and a distribution system to serve the 116 customers at final build out.

20 20. The proposed Association water system meets fire flow demand per Lake Mohave  
21 Fire Department requirements.

22 21. The proposed water system will have adequate capacity to serve the proposed area.

23 22. The Association's estimated \$1.1 million cost for installing the proposed water system  
24 is reasonable.

25 23. On January 23, 2006, the U.S. Environmental Protection Agency ("EPA") reduced the  
26 arsenic maximum containment level ("MCL") from 50 parts per billion ("ppb") to 10 ppb. Tests for  
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28 <sup>2</sup> As of January 1, 2005, there were 116 lots or five-acre parcels in the White Hills Subdivision.

1 water quality indicated high levels of arsenic and chromium in the groundwater in the proposed  
2 service area. A concentration of nine ppb was recorded for arsenic, which exceeds the "alert" level of  
3 8 ppb and test results for chromium exceeded the MCL of 100 ppb.

4 24. The Association plans to use a McPhee ArsenX treatment plant capable of removing  
5 both arsenic and chromium from the groundwater.

6 25. The Arizona Department of Environmental Quality ("ADEQ") has issued a Certificate  
7 of Approval to Construct for the proposed water system.

8 26. The Association is not within the Arizona Department of Water Resources ("ADWR")  
9 Active Management Area ("AMA").

10 27. The Association's witness testified that although the Subdivision is not within an  
11 AMA, and is not required to receive a finding of water adequacy from ADWR, the Association will  
12 have to disclose to each potential purchaser of the lots that there has not been a finding of assured  
13 water supply by ADWR for the Subdivision. (Tr. Pg. 16, lines 1-16)

14 28. Staff's witness testified that if the Association is adjudicated not a public service  
15 corporation and because the requested service area is not within an AMA, a water adequacy report  
16 would not be required for the Subdivision.

17 29. The proposed system is not yet operational and there are no ADEQ or ACC  
18 compliances issues.

19 30. Although the Association's Amended CC&Rs restrict the Association's membership  
20 to a fixed number, prohibit further subdivision, and require equal voting rights for all members, the  
21 Amended By-laws permit the CC&Rs to be amended by 50 percent of the Association's members.  
22 Therefore, if the Association's Amended CC&Rs or Amended By-laws are ever changed to allow  
23 further subdivision of the current 116 lots, to allow an increased number of memberships, to allow  
24 expansion of the property to be served by the Association, or to change the equal voting rights  
25 requirements, the adjudication granted by this Order should become null and void, after due process.  
26 If the Association makes any of the above changes, the Association will be required to file an  
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1 application for a Certificate of Convenience and Necessity within thirty days of any of the above  
2 mentioned events.

3 31. The Association meets the criteria set forth in Commission Decision No. 55568 (May  
4 7, 1987).

5 32. The Association has met the condition recommended by Staff.

6 **CONCLUSIONS OF LAW**

7 1. The Commission has jurisdiction over the subject matter of this application.

8 2. Notice of the application was provided in accordance with the law.

9 3. The Association currently satisfies the criteria for adjudication not a public service  
10 corporation and is therefore not a public service corporation within the meaning of Article XV of the  
11 Arizona Constitution.

12 4. The Association remains subject to the applicable laws, regulations, and order of other  
13 regulatory agencies, including, but not limited to ADEQ, ADWR and Mohave County.

14 **ORDER**

15 IT IS THEREFORE ORDERED that the application of Equestrian Estates at White Hills  
16 Water Cooperative Homeowners Association for adjudication not a public service corporation is  
17 hereby granted conditioned upon its compliance with the conditions set forth below.

18 IT IS FURTHER ORDERED that although Equestrian Estates at White Hills Water  
19 Cooperative Homeowners Association currently satisfies the requirements set forth in Commission  
20 Decision No. 55568 (May 7, 1987) for adjudication not a public service corporation, if at any time in  
21 the future the Recorded Covenants, Conditions and Restrictions or the By-laws for Equestrian Estates  
22 at White Hills Water Cooperative Homeowners Association are changed to allow further subdivision  
23 of the current 116 parcels in the adjudication area, to allow an increased number of memberships, to  
24 allow expansion of the property to be served, or to change the equal voting requirements, then the  
25 adjudication granted herein shall become null and void after due process, and Equestrian Estates at  
26 White Hills Water Cooperative Homeowners Association shall file an application for a Certificate of  
27 Convenience and Necessity within thirty days of any of the above mentioned events.  
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IT IS FURTHER ORDERED that Equestrian Estates at White Hills Water Cooperative Homeowners Association is hereby advised of its continuing obligations under the applicable laws, regulations and orders of other regulatory agencies, including but not limited to the Arizona Department of Environmental Quality, the Arizona Department of Water Resources and Mohave County.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN \_\_\_\_\_

COMMISSIONER \_\_\_\_\_

COMMISSIONER \_\_\_\_\_

COMMISSIONER \_\_\_\_\_

COMMISSIONER \_\_\_\_\_

IN WITNESS WHEREOF, I, DEAN S. MILLER, Interim Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
DEAN S. MILLER  
INTERIM EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

YBK:db

1 SERVICE LIST FOR:

EQUESTRIAN ESTATES AT WHITE HILLS WATER  
COOPERATIVE HOMEOWNERS ASSOCIATION

2

DOCKET NO.

W-20512A-07-0103

3

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**EXHIBIT "A"**

Equestrian Estates at White Hills, Tract 3816, a subdivision encompassing Section 5, Township 27 North, Range 19 West of the Gila and Salt River Meridian, Mohave County, Arizona.