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ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

6 **John G. Gliege (#003644)**
7 **Stephanie J. Gliege (#022465)**
8 **Attorney for Fred B. Krafczyk & Michael Greer**

9 **BEFORE THE ARIZONA CORPORATION COMMISSION**

10 **IN THE MATTER OF THE APPLICATION**
11 **OF PINE WATER COMPANY FOR**
12 **APPROVAL TO (1) ENCUMBER A PART**
13 **OF ITS PLANT AND SYSTEM PURSUANT**
14 **TO A.R.S. §40-285(A); AND (2) ISSUE**
15 **EVIDENCE OF INDEBTEDNESS**
16 **PURSUANT TO A.R.S. §40-302(A).**

DOCKET NO. W-03512A-07-0362
INTERVENORS REPLY BRIEF

Arizona Corporation Commission
DOCKETED
MAR - 3 2008

DOCKETED BY [Signature]

17 COMES NOW Fred B. Krafczyk and Michael Greer, Intervenors, in the above captioned and number
18 matter and hereby submit their *Reply Brief* to the Arizona Corporation Commission. Despite the fact
19 that the local newspaper, the Payson Roundup, has announced the decision of the Arizona Corporation
20 Commission in this matter already {See Exhibit A}, the Intervenors are asserting that the application of
21 Pine Water Company in this instance should be denied by the Commission for a number of reasons set
22 forth herein.

23 **I. THE CONSTITUTION OF THE STATE OF ARIZONA MUST BE READ AND**
24 **INTERPRETED IN ITS PLAIN AND ORDINARY LANGUAGE.**

25 A principle issue which must be looked at in this case concerns the interpretation of provisions of the
26 Constitution of the State of Arizona. The principal guideline in Constitutional interpretation is that the
27 Constitution must be interpreted in its plain, unambiguous and ordinary language. *See Fairfield v.*
28 *Foster, 25 Ariz. 146, 214 P.319 (1923); County of Greenlee v. Frank B. Laine, 20 Ariz. 296, 180 P.*
29 *151 (1919). Article 9 Section 10 of the Constitution of the State of Arizona* which states:

1 Section 10. No tax shall be laid or appropriation of public money made in
2 aid of any church, or private or sectarian school, or any public service
3 corporation.

4 clearly prohibits the advance of public money in aid of a public service corporation. No more, no less.
5 Interpretation not needed. *See Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952)*

6 But, both the Staff and Pine Water Company would prefer instead to take the Commissioners
7 down the yellow brick road to Oz in attempting to avoid the direct and plain reading of the *Constitution*
8 *of the State of Arizona.*

10 II. THE ROAD TO OZ

11 Look closely at what the Staff and Pine Water Company are arguing. They are arguing that
12 despite the provisions of the *Constitution of the State of Arizona* these provisions do not apply to this
13 case. In response to that the Intervenor's would argue that the convoluted interpretation of the
14 *Constitution of the State of Arizona* being urged by the Staff and by Pine Water Company is akin to the
15 interpretation of the Small Birds Act made by the fictional court in *Regina v. Ojibway, 8 Criminal Law*
16 *Quarterly 137 (Toronto 1965)* ¹ in which the question presented was whether a pony which bore a
17 feather pillow on its back for the comfort of the rider was a small bird under the provisions of the Small
18 Birds Act. This case was set forth in full by the Kentucky Court of Appeals in *R. J. STEVENS et al.,*
19 *v. CITY OF LOUISVILLE 511 S.W.2d 228; 1974 Ky. LEXIS 483 (Cl. App. 1974)*, a copy of which is
20 attached hereto as Exhibit B for your reading pleasure.

21 Some of the highlights of that opinion are:

22
23 "Counsel for the accused made several ingenious arguments to which,
24 in fairness, I must address myself. He submitted that the evidence of
25 the expert clearly concluded that the animal in question was a pony
26 and not a bird, but this is not the issue. We are not interested in
27 whether the animal in question is a bird or not in fact, but whether it is
28 one in law. Statutory interpretation has forced many a horse to eat
29 birdseed for the rest of its life.

"Counsel also contended that the neighing noise emitted by the animal
could not possibly be produced by a bird. With respect, the sounds
emitted by [**7] an animal are irrelevant to its nature, for a bird is no
less a bird because it is silent.

1 [*231] "Counsel contends that the iron shoes found on the animal
2 decisively disqualify it from being a bird. I must inform counsel,
3 however, that how an animal dresses is of no concern to this court.
4 "It remains then to state my reason for judgment which, simply, is as
5 follows: Different things may take on the same meaning for different
6 purposes. For the purpose of The Small Birds Act, all two-legged,
7 feather-covered animals are birds. This, of course, does not imply that
8 only two-legged animals qualify, for the legislative intent is to make
9 two legs merely the minimum requirement. The statute therefore
10 contemplated multilegged animals with feathers as well. Counsel
11 submits that having regard to the purpose of the statute only small
12 animals 'naturally covered' with feathers could have been
13 contemplated. However, had this been the intention of the legislature,
14 I am certain that the phrase 'naturally covered' would have been
15 expressly inserted just as 'Long' was inserted in the Longshoreman's
16 Act

17 In order for this Commission to decide that the Constitution of the State of Arizona does not apply to
18 this proceeding it will have to obfuscate the *Constitution of the State of Arizona* to the extent that it too
19 can turn horses into small birds.

20 The Staff and Pine Water Company are essentially saying that *Article IX Section 10 of the Constitution*
21 *of the State of Arizona* does not apply because if a number of reasons. These are:

- 22 1. Pine Water Company Ratepayers are not at risk to lose a single penny because the company
23 does not lose a single penny.
- 24 2. No aid is being given to Pine Water Company.
- 25 3. By giving the money to Pine Water Company there is no preference where one public service
26 corporation is benefited or given a preference greater than any other.
- 27 4. The customers of Pine Water Company have no choice except to accept service from Pine,
28 therefore there is nothing advantageous to Pine.
- 29 5. The Commission cannot pass upon the validity of contracts.
6. While stating that *Article XIII Section 7 of the Constitution of the State of Arizona*
 expressly exempts the Pine Strawberry Water Improvement District from the provisions of
 the Gift Clause, *Article IX Section 7 of the Constitution of the State of Arizona* because of
 its plain language, Pine attempts to spin an interpretation *onto Article IX Section 10 of the*
 Constitution of the State of Arizona based upon decisions concerning the very provision,
 Article XIII Section 7 from which they claim PSWID is exempt.
7. The use of the Pine Strawberry Water Improvement District's money is for a public purpose.
8. The value of the public money is not so much greater than the value of the benefit received
 by the public that the exchange of one for the other is not disproportionate.
9. Pine Strawberry Water Improvement District is not a domestic water improvement district
 and not in a position to sell its water to the persons in the district boundaries.

1 **III. WHOSE INTEREST IS BEING SERVED, THE PUBLIC OR PINE WATER**
2 **COMPANY BY PINE STRAWBERRY WATER IMPROVEMENT DISTRICT**
3 **ADVANCING \$300,000?**

4 Staff argues that since Pine Water Company has put up nothing and takes no risk in the drilling
5 of this well that it is a good project for the company. But Staff fails to look at the good for the public
6 interest in its analysis. If the project fails the company has no loss, but the public now owns a \$300,000
7 dry hole not useful for the project. Only if the test hole is successful according to the criteria set forth in
8 the contract will Pine Water Company be obligated to construct a production well and then and only then
9 can Pine Water Company request that it be included in the rate base. Once that happens, the District gets
10 its money back. So the question is whose interest is being served? Definitely the company. Definitely
11 not the public.

12 Staff tries to make an issue out of the fact that the money of the District is only assumed to be
13 public monies. The District is a unit of local government. To whom else can the money in the District
14 treasury belong? The District's sources of funding have been the local tax base. It is not the recipient of
15 any private donations of funds. Staff does concede for purposes of their brief that it is in fact public
16 money. Now, this public money is to be expended to construct a test well. The public money is at risk if
17 the project is not successful.

18 Who is this public? Within the District it is in fact the property owners of the District. They are
19 subject to the initial taxes to raise the money and to subsequent taxes if this fund needs to be replenished
20 because the risk that is too great for Pine Water Company proves to also be too great a risk for the Pine
21 Strawberry Water Improvement District. The Arizona Courts have clearly recognized that within a
22 District formed under Title 48 Chapter 6, Arizona Revised Statutes, which includes the PSWID, the
23 expenditures of the District are in essence the expenditures of the property owners themselves. *See Blue*
24 *Ridge Sewer Improvement District v. Lowry, 149 Ariz. 373, 718 P.2d 1026 (Az. Ct. App. 1986).* So
25 applying this analysis to the expenditure of the District, while the staff is correct in stating that "PWCo
26 **has much to gain and nothing to lose,**" the Staff is promoting the interests of Pine Water Company
27 over and above the public interest which can be damaged to the extent of \$300,000 if this project is not a
28 success.
29

1 Even if it is successful the project will cost the taxpayers of Pine twice; once to raise the initial
2 taxes to provide the funds, and then when they repay this amount in their water rates if the project is
3 included in the rate base of Pine Water Company. So it is not a \$300,000 risk, but rather a \$600,000 risk
4 to the public.

5
6 **IV. A SUBSTANTIAL AMOUNT OF AID IS BEING GIVEN TO PINE WATER COMPANY.**

7 If for any reason the concept of what is "Aid" needs to be addressed perhaps the first place to look is the
8 dictionary. Merriam Webster defines "Aid" as:

9 "To provide with what is useful or necessary in achieving an end; to give assistance."

10 Staff has argued that no aid is given to Pine Water Company. Just looking at Staff's brief it is full of
11 references from which the concept that aid is being given is in fact the basis of the agreement. Further
12 the test the Staff created about it is only aid if it prefers one public service corporation to another is
13 totally without merit.

14 For example Staff in its brief notes:

- 15 1. Pine only has to invest its own funds in this project if the test well produces a long term
16 sustainable water supply of at least 150 gallons per minute.
- 17 2. Pine can ill afford to drill unsuccessfully.
- 18 3. The risk is high enough here that I think it is reasonable and prudent that Pine Water
19 Company mitigate its risk to the extent of this agreement.
- 20 4. Pine Water Company is relying on funding from its parent company, Brooke Utilities, to
21 provide its portion of the project costs, but Brooke Utilities is not a part of the agreement.
- 22 5. PWCo Ratepayers do not lose a single penny because the company does not lose a single
23 penny.
- 24 6. Pine has much to gain and nothing to lose.

25 None of this is evidence of aid being given? That is as logical as the horse which suddenly for purposes
26 of the law became a small bird.

27 Aid takes on many definitions. In the business world if someone else bears the risk and you have
28 the chance of making the profit on the result, certainly you have been aided in your quest. Here the Pine
29 Water Company is offering to provide indicia of indebtedness, a security interest in real property,
another questionable legal process, if it were receiving no aid, then what is the consideration for the
evidence of indebtedness? The K2 Agreement clearly provides that the obligation to issue the evidence

1 of indebtedness is in consideration of the advance of \$300,000. That consideration is clearly an "aid" to
2 Pine Water Company. *See Also: Arizona Revised Statutes § 47-3303*

3
4 **V. Giving the money to Pine there is no preference where one public service corporation is benefited or given a preference greater than any other.**

5 Staff next argues based upon *Community Council v. Jordan 102 Ariz. 448, 432 P.2d 460 (S. Ct. 1967)*
6 that aid means preferring one public service corporation over another. Yet in their brief they also point
7 out that Pine Water Company is "the only game in town," and no one else can provide the service. If no
8 one else can provide the service, it is not like aid to competing religious institutions, but rather one must
9 look elsewhere to find evidence of aid being given.

10 **VI. The customers of the community of Pine have no choice except to accept service from Pine Water Company, therefore there is nothing advantageous to Pine Water Company by virtue of the Agreement.**

11
12 Staff correctly points out that in the regulated monopoly of public service corporations that the
13 customers of the community of Pine have no choice, they must accept service from Pine Water
14 Company. This is not a correct statement. Members of this community have chosen to try to be
15 removed from the Certificated area of Pine Water Company, which clearly indicates that under the right
16 circumstances there is not the situation of "no choice" but there are a few choices remaining. So then
17 the issue becomes, because of the monopoly position it holds can Pine Water Company be exempt from
18 *Article IX Section 10 of the Constitution of the State of Arizona* and in fact receive aid from a unit of
19 local government? The Constitution clearly does not say so.

20 Now the District likewise had a choice. It could proceed to drill a well similar to the K2 well on
21 its own and then sell the water to Pine Water Company, or it could even consider going through the
22 procedure of becoming the water provider in the community as it is empowered to be pursuant to *Title*
23 *48 Chapter 6 Arizona Revised Statutes*, so long as it complies with the appropriate statutory sections
24 and purchases the interest of Pine Water Company within the District.

25 Given such possibilities, clearly the advancement of money to bear the risk of locating water for
26 the Pine Water Company is the granting of Aid to the Company.

27 **VII. The Commission cannot pass upon the validity of contracts.**

1 ***Trico Electric Cooperative, Inc. v. Ralston, 67 Ariz. 358, 196 P.2d 470 (1948)*** cited by Pine
2 Water Company indicates that the Commission cannot pass upon the validity of contracts. But that is
3 not what is being asked of the Commission in these proceedings. Rather, the Commission is being asked
4 to approve Pine Water Company entering into the agreement and issuing evidence of indebtedness. The
5 objection being raised is that the Pine Water Company, a public service corporation, is not
6 constitutionally allowed to receive aid from a unit of local government. The Commission does not have
7 to look at the contract to make this determination, only look at the facts presented and it can reach a
8 conclusion. Clearly the Commission cannot authorize the Pine Water Company to do something which
9 is prohibited by the ***Constitution of the State of Arizona***

10
11 **VIII. While stating that Article XIII Section 7 of the Constitution of the State of Arizona**
12 **expressly exempts the Pine Strawberry Water Improvement District from the**
13 **provisions of the Gift Clause, Article IX Section 7 of the Constitution of the State of**
14 **Arizona because of its plain language, Pine attempts to spin an interpretation onto**
15 **Article 9 Section 10 of the Constitution of the State of Arizona based upon decisions**
16 **concerning the provision from which they claim PSWID is exempt.**

17 Assuming for purpose of argument that the Staff and Pine Water Company are correct that the Pine
18 Strawberry Water Improvement District is exempt from the provisions of ***Article IX Section 7 of the***
19 ***Constitution of the State of Arizona***, then the question comes up, how can Staff and Pine Water
20 Company attempt to interpret ***Article IX § 10*** with court opinions which are concerned with ***Article IX §***
21 ***7*** which they claim is not applicable to the Pine Strawberry Water Improvement District?

22 ***Article IX § 10 states:***

23 Section 10. No tax shall be laid or appropriation of public money made in
24 aid of any church, or private or sectarian school, or any public service
25 corporation.

26 This is a very clear provision. It is not a prohibition directed to the Pine Strawberry Water Improvement
27 District, rather it is a uniform prohibition against using any public monies to aid a public service
28 corporation. While it is correct that the PSWID can join with "any other person" in exercising its
29 powers, ***Arizona Revised Statutes § 48-909 B 2***, this statutory authorization does not supersede the
Constitution of the State of Arizona and allow it to give money to a public service corporation.

1 As for the lack of precedent interpreting *Article IX § 10 of the Constitution of the State of*
2 *Arizona*, it could well be that there is none because the clause so plainly speaks for itself that it is not
3 necessary to have the courts interpret the same.

4 Instead Pine Water Company and Staff wants the Commission to look at cases concerned with
5 *Article IX Section 7* to interpret *Article IX § 10* which on its face needs no interpretation. The test they
6 wish to apply is the test set forth in *Maricopa County v. State, 187 Ariz. 275, 928 P.2d 699 (Ct. App.*
7 *1996)* where in the court did establish a test that public funds could be "gifted" to private entities if: 1)
8 the use was for a public purpose; and 2) the value of the public money or property is not so much greater
9 than the value of the benefit received by the public that the exchange of one for the other is
10 disproportionate.

11 Recalling that this test is concerned with a constitutional provision, *Article IX § 7*, which Staff
12 and Pine Water Company both say is not applicable to this case, still they are seeking to use this
13 argument to interpret the validity of another constitutional provision, *Article IX § 10*. Looking at the
14 test, is the advancement of funds by the District to take all the risk in the construction of a well, not on
15 District Property, but on Pine Water Company's property {though totally insufficient in size} a public
16 purpose? If the well works it is the property of Pine Water, if it does not work, the District now owns
17 2500 square feet of land, hardly worth \$300,000.00. Yes, if water is discovered, there is a remote
18 contingent possibility that the District may recover its funds, but in that case the well belongs to a private
19 company profiting off of providing water service. Public purpose, or public subsidy; Subsidy is more
20 the answer.

21 The second portion of the test is concerned with the value received by the public versus the cost.
22 This test does not talk in terms of contingent possibilities of recovering funds or value; it talks about
23 balancing the value of the public funds against the benefit recovered by the public. Again the issue of
24 the contingency looms greatly. The District may advance funds and recover at best a very small parcel
25 of property which would have to be worth more than \$120 per square foot to balance the District's
26 investment. This is an unlikely situation and in fact the District is betting on a poor horse with a weak
27 track history to carry off this project. The District may be better off betting on the small bird which the
28 horse may be.

1 **IX. Pine is not a domestic water improvement district and not in a position to sell its water**
2 **to the persons in the district boundaries. Use Strict construction case Pinal SD v. Gila**
3 **county. Then what is it.**

4 On page 8 lines 8 and 9 Pine Water Company argues that the Pine Strawberry Water Improvement
5 District is not a Domestic Water Improvement District, and therefore cannot sell water directly to the
6 residents within its boundaries. At the same time Pine Water Company argues that the District can only
7 exercise powers granted under *Title 48 Chapter 6, Arizona Revised Statutes*, which statutes create
8 county improvement districts and domestic water improvement districts. A close reading of those
9 statutes can lead one only to the conclusion that in fact the PSWID is a Domestic Water Improvement
10 District, governed by an independent board of directors pursuant to *Article 4, Chapter 6 Title 48*
11 *Arizona Revised Statutes*. If the District chooses to comply with *ARS § 48-909 D*, it can in fact provide
12 water to the resident's of the District.

13 **X. The money being supplied by the District constitutes Aid to a public Service**
14 **Corporation.**

15 Pine Water Company asserts the position that *Article 9 § 10 of the Constitution of the State of Arizona*
16 does not stand for the proposition that no public money may be channeled to public service
17 corporations, citing *Community Council v. Jordan 102 Ariz. 448, 432 P.2d 460 (S. Ct. 1967)*. Pine
18 Water Company has seriously misread this opinion. There is no discussion of providing aid to public
19 service corporations in this opinion. Instead the opinion is concerned with whether or not granting aid to
20 the Salvation Army, a group which provides food, lodging, and other assistance to others constitutes aid
21 to a religious organization. The test applied in this case is whether or not granting aid to one religious
22 group over another constitutes a preference which is not allowed. But the court found that the aid was
23 entirely given to third parties and in fact was less than the cost of the aid actually being provided, thus no
24 preference was shown. This case is about as instructive in this matter as the question of horses and
25 feathers earlier visited.

26 **XI. IMPACT OF CONVEYANCE OF LOT TO PINE WATER COMPANY WITHOUT**
27 **CORPORATION COMMISSION APPROVAL.**

28 Recently in a late filed exhibit Pine Water Company filed a deed purporting to convey the property for
29 the K2 wellsite from the Strawberry Water Company to the Pine Water Company. This deed was

1 apparently granted without compliance with *Arizona Revised Statutes § 40-285* which requires
2 commission approval of the conveyance of property. For Pine Water Company to argue that property on
3 which a well, touted as the savior of the water problems in Pine is to be drilled, is not being not
4 necessary or useful property is ludicrous. A careful reading of the exhibit will indicate that the parcel is
5 2,251 square feet in size. The dimensions of the property show both the width at being between 15 and
6 20 feet and the length of the same. {See late filed exhibit of Pine Water Company}. This is the parcel
7 subject to the security interest purportedly in favor of the PSWID. In light of the size of the drilling
8 equipment needed to construct a deep well, common sense will indicate that the drilling operations
9 cannot be confined to just this small parcel of property. Even for repair and maintenance service in the
10 future, the size of this parcel is dwarfed by the size of the equipment needed to remove the well stem and
11 motor from a deep well.

12
13 **XII. The District is not merely fulfilling its purpose to find more water. It is subjecting itself**
14 **to the control of the Public Service corporation because if Pine doesn't approve, the**
15 **money cannot be spent, whereas if the District did this on its own there would be public**
16 **bidding for the contract for the work and there would be the District's complete control**
17 **over the expenditures. In addition there would be payment and performance bonds on**
18 **the contractor to guarantee payment and performance, which this escrow does not**
19 **require. So the public is not protected.**

20 Once the escrow is funded under the agreement, the District, while it may be fulfilling one public
21 purpose, finding water, is damaging the public interest because it is giving up control over the
22 expenditure of District funds to the control of a third party, the Pine Water Company. District funds are
23 held by the County Treasurer, *Arizona Revised Statutes § 48-901* and are to be expended upon
24 authorization of the District Board of Directors. The board is required to make annual statements and
25 estimates of fees and expenses *Arizona Revised Statutes § 48-954 §48-910 and Title 42, Chapter 17,*
26 *Article 3* and conduct public hearings where appropriate. All of this is also lost under the agreement.
27 Last, it should be noted that pursuant to *Title 34, Chapter 2, Arizona Revised Statutes*, it is required that
28 public projects be built after public bidding and that the contracts contain provisions for payment and
29 performance bonds. That too is lost under this agreement. There are many ways to solve problems, the
method chosen by Pine Water Company to resolve the water problems in Pine reeks havoc with the
protection of the public. They are not protected and the public interest is not being served.

1 Original and thirteen copies of the foregoing
2 Mailed this 29th day of February, 2008 to:

3 Docket Control Center
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, AZ 85007

7 Copies of the foregoing
8 Mailed this 29th day of February, 2008 to:

9 Fennemore Craig, P.C.
10 Attn: Mr. Jay L. Shapiro
11 3003 North Central Ave. Ste 2600
12 Phoenix, AZ 85012-2913
13 Attorneys for Pine Water Company

14 Honorable Dwight D. Nodes
15 Assistant Chief Administrative Law Judge
16 Arizona Corporation Commission
17 1200 W. Washington Street
18 Phoenix, AZ 85007

19 Mr. Kevin Torrey, Esq.
20 Legal Division
21 Arizona Corporation Commission
22 1200 W. Washington Street
23 Phoenix, AZ 85007

24 RENSCH WALKER & HARPER, PC
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28 928-474-0322
29 Attorneys for Cindy Maack

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EXHIBIT A

**Article from Payson Roundup about
Commission having made its decision**

(February 26, 2008)

WINNERS NONETHELESS

psysouth.com



ayson senior Robert Walker holds up the runner-up trophy the team received at psysouth.com after losing to Estrella Foothills in the finals of the state 3A title game
Andy Towle/Roundup

ACC rules K2 well is within the law

Opponents claimed using public money for private use was illegal

BY MICHAEL LEIBY
ROUNDUP STAFF REPORTER

Despite rulings from the Arizona Corporation Commission that give strong support to a decision by the Pine Strawberry Water Improvement District (PSWID) to drill a controversial test well, backers of a recall drive against four district board members were unmollified in a stormy Feb. 21 meeting.

Recall backers had claimed in PSWID board meetings that governing nonprofit boards violated rules much district boards and spent too sufficient money on a well that didn't recent Commission ruling supported the board's original position on both those points.

Recall supporters still maintain that the proposed new K2 well could also drain other wells in the area and drive up the district's rates and complain that the board acted without sufficient support in the district.

The recall is directed at PSWID Chairman Gary Sherlock, Treasurer Forrest McCoy and members, James M. Richey and Wesley Suhr.

The Arizona Corporation Commission backed the board on several key points in a Feb. 15 ruling submitted by commission attorney Kevin Torrey, based on the results of a Dec. 12 hearing. The commission ruling said the district board did comply with the rules governing non-

profit boards and also that authorizing the \$300,000 test well in collaboration with Brooke Utilities was a sound investment.

The hearing before Administrative Law Judge Dwight D. Nodas, Commission Chairman Mike Gleason and Commissioner Kristin Mayes, centered on allegations that the Pine Water Company had violated the state constitution regarding use of public money and receiving aid for public service companies. At that December hearing, Robert Harcastle testified on behalf of Pine Water Company, and Fred Kratzzyk and Michael Greer on behalf of opponents of the K2 well.

"Given the expensive and risky nature of drilling, it is clear that Pine Water Company reasonably needs this approval to pursue its deep well option. It is likewise certain that drilling of a deep well is a lawful purpose that is within the corporate powers of Pine Water Company," stated the Arizona Corporation Commission.

The Commission's ruling, however, did not dissuade opponents from loudly voicing their opinions at a Thursday public meeting in Pine.

According to Strawberry homeowner Sharon Stewart, residents opposing the well showed up in droves last Thursday pronouncing their disdain regarding

► See Commission, page 12A

REPORT

Forecast by the National Weather Service

PAYSONREPORT

Weather courtesy of
Bruce Rasch, Astro Computer Services

Payson Statistics

DATE	H	L	PRECIP.
Feb. 15	44	31	0.43
Feb. 16	50	30	
Feb. 17	56	29	
Feb. 18	60	25	0.01
Feb. 19	60	28	
Feb. 20	54	30	0.23
Feb. 21	44	32	0.21
Feb. 22	40	30	0.51
Feb. 23	52	31	0.01
Feb. 24	55	33	
Feb. 25	62	30	

Precipitation

2006 thru Feb.	Feb. 2006
7.64	2.63
36-Year Average	Feb. Average
9.32	8.51

Source: National Weather Service, Phoenix, Ariz.
Copyright © 2006 Bruce Rasch

DUNT FORECAST

Thursday
10.3
HIGH

Friday
10.2
HIGH

12.0 tend to affect most individuals who suffer from pollen allergies. Symptoms may become more severe.

1.0 will likely cause symptoms for many people to the predominant pollen types of the area.

1 tend to affect very few individuals among the area.

Source: Peter M. Zonakis, M.D., F.A.C.S.,
Ear, Nose & Throat of Payson, (928) 474-0500

AY BE FAR OFF, FOR IRA CONTRIBUTIONS ISN'T.

of an Edward Jones IRA, call or



Scott Flake

Financial Advisor
411 S. Beeline Hwy.,
Suite B

From page 1A

PSWID board behavior and decisions.

Among Stewart's complaints was that Hardcastle was supposed to be at the meeting with documents regarding the K2 well, but did not show up.

"There is a lot of anger now," said Stewart. Sam Schwalm, a K2 well supporter and member of the group Water For Pine Strawberry, said, "As far as I know, there was no expectation that Mr. Hardcastle was supposed to be at the meeting."

Stewart said that she and others in the crowd were also not convinced that PSWID had taken sufficient precautions to safeguard private wells in the area.

Private well owners at the meeting said they fear their wells, typically in shallow aquifers, will drain into the deep aquifer through the hole to be drilled at the K2 site. If that happens, the K2 well could cause the shallow wells to go dry.

Several PSWID board members have consistently said a sealant will be used around the K2 well casing and that will seal the shaft and prevent draining of private wells. Critics at the meeting say the casing does not go deep enough to protect shallow wells.

Additionally, in its Feb. 15 ruling the Corporation Commission said if studies done after the well is drilled indicate any loss of water or "inconvenience" to the surrounding community, the commission may order changes in operations or even shut down the new well.

Stewart said residents at the Feb. 21 meeting were also upset about possible increases in water rates.

"They (the board) didn't want to mention that rates would go up, it took quite some hecking from the crowd to get them to say that the rates would go up," said Stewart.

The board could not provide a dollar figure for any potential rate increase, but Schwalm said that any rise in rates would be determined by the Arizona Corporation Commission, not by the PSWID board after the well goes into production.

Schwalm, however, agreed that ultimately rates would likely increase.

Schwalm said the test well is scheduled to begin supplying limited water in July, barring any serious problems with the test shaft. At that time, residents can likely stop paying the expensive hauling charges they've faced lately, but will have to pay pumping charges.

Additionally, if the test well hits water and produces a minimum of 150 gallons per minute of flow, the Pine Water Company would need to invest an additional \$1 million to drill a bigger well that could provide a long-term solution to water shortages that have plagued Pine and Strawberry in years past.

If the test well succeeds, Schwalm said full-scale delivery of water to residents in Pine and Strawberry could begin as soon as summer of 2009. Finally, Schwalm addressed allegations that the PSWID board ignores the wishes of the community regarding the K2 well.

"I asked one of the board how they could go against the wishes of their constituents, his response was that the people weren't there when they did all the work," said Stewart.

"For the board to live in a small town like this, and continue on this path just baffles me," added Stewart.

Recall ballots mailed

Recall ballots for the Pine-Strawberry Water Improvement Districts started going out on Feb. 18, according to Gila County Elections Director Dixie Mundy.

District voters may return their ballots by mail or drop them off at the Isabelle Hunt Memorial Public Library at 5124 N. Bancroft Place in Pine up to election day, said Mundy.

PSWID District voters who don't receive a ballot or need a replacement, should call the County Elections Office in Globe at (928) 425-3231 or pick one up from an election official at the library from 1-6 p.m. on any day the library is open.

Voters can drop off ballots at the library Tuesday, Wednesday and Friday from 10 a.m. to 5 p.m., Thursdays from 10 a.m. to 7 p.m. and Saturdays from 9 a.m. to 4 p.m.

The library is closed Sunday and Monday.

All ballots must be received in the mail or at the library by March 11 at 7 p.m.

"There are always two sides to every story," Schwalm said. "The side that supports the K2 well is not as vocal as those opposing it. About 80 percent of the people who attend the public meetings oppose the well, but the support (in the community) is there — they just don't show up at meetings in the same numbers."

Housing committee struggles with affordable issue

From page 1A

while the median income for a family of four in Gila County is about \$44,000.

For years, the vacancy rate for apartments in Payson has also been so low that rents remain relatively high, although anecdotal reports suggest the vacancy rate has been ris-

therefore the appreciation of the home.

That idea could contribute to a variety of approaches the housing commission has embraced already, said Owens.

Payson for years has applied for federal grants and other programs to provide housing assistance for residents. The town has more than \$500,000 in federal funds to help build

council members insisted that Mogollon Ridge Developer Michael Horton should work out something with the Housing Commission. Horton said any additional costs imposed by the council could sink the project — which has already shrunk from more than the 100 units first proposed to 83. Payson imposes about

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EXHIBIT B

Regina v. Obwigway, argue that this is the characterization which the staff makes of the case:

R. J. STEVENS et al., Appellants, v. CITY OF LOUISVILLE, Kentucky, Appellee

1
2 [NO NUMBER IN ORIGINAL]

3 Court of Appeals of Kentucky

4 511 S.W.2d 221 ; 1974 Ky. LEXIS 483

5
6 May 31, 1974

7
8 **CASE SUMMARY**

9 **PROCEDURAL POSTURE:** Appellant horseback riders challenged the judgment of the trial court (Kentucky),
10 which upheld the validity of appellee city's ordinance that prohibited horseback riding on public ways and park
11 property and dismissed the horseback riders' claim for an injunction to prevent the city from interfering with their
12 alleged right to ride horses on public ways.

13 **OVERVIEW:** The city enacted City of Louisville, Ky., Ordinance § 505.10, which prohibited horseback riding
14 on public ways and park property. The horseback riders filed an action challenging § 505.10 and seeking an
15 injunction. The horseback riders specifically wanted to enjoin the city from prohibiting them from riding on a
16 bridle path. The trial court upheld the validity of § 505.10 and dismissed the horseback riders' claim for an
17 injunction. The horseback riders appealed. The court affirmed, finding that § 505.10 was a valid exercise of the
18 city's police power. The court reasoned that § 505.10 was not discriminatory because there was a valid basis for
19 treating horses as a separate classification. The evidence indicated that there was a serious safety problem
20 presented with respect to horseback riding in areas in which vehicular traffic was heavy. Further, the court held
21 that the prohibition against horseback riding on park property was not absolute, finding that the Director of the
22 Metropolitan Park and Recreation Board of the City of Louisville (board) had the power to designate areas
23 within parks in which horses could be ridden and that full consideration by the board was not required.

24 **OUTCOME:** The court affirmed the trial court's judgment in favor of the city in the horseback riders' action
25 challenging the city's ordinance that prohibited horseback riding on public ways and park property.

26 **CORE TERMS:** horse, ordinance, animal, bird, small bird, bridle path, rider, pony, ridden,
27 horseback riding, feathers, public ways, ride, designate, discriminatory, designation, kangaroo,
28 elephant, mule, Large Birds Act R.S.O, Criminal Law, Canada Law Book, Act R.S.O, police power,
29 designated, hobbyhorse, authorize, acquitted, naturally, inserted

30 **LexisNexis® Headnotes Hide Headnotes**

31 Governments > Local Governments > Ordinances & Regulations

32 Governments > Local Governments > Police Power

33 Real Property Law > Torts > Nuisance > Types > Nuisance Per Se

34 ^{HN1} City of Louisville, Ky., Ordinance § 505.10(1) reads that no person shall ride a horse within the city upon
35 any public way or park property, except upon property which has been duly designated for that purpose by
36 the Director of the Metropolitan Park and Recreation Board of the City of Louisville. Section 505.10(1)
37 shall not apply to persons riding in recognized horse shows or civic events. City of Louisville, Ky.,
38 Ordinance § 505.10(2) reads that persons taking horses to places where they may be legally ridden shall
39 either transport them thereto in vans, trailers or motor vehicles from the premises whereon they are

1 stabled.

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3 **COUNSEL:** [**1] Henry A. Triplett, Hogan, Taylor, Denzer & Bennett, Louisville, for appellants.

4 James E. Thornberry, Director of Law, Herbert Van Arsdale II, Asst. Director of Law, Louisville, for
5 appellee.

6 **JUDGES:** Vance, Commissioner.

7 **OPINION BY:** VANCE

8 **OPINION**

9 [*228] This is an appeal from a judgment upholding the validity of an ordinance of the City of
10 Louisville, Kentucky, which prohibited horseback riding upon public ways and park property (with
11 certain exceptions) in [*229] the City of Louisville and which dismissed appellant's claim for an
injunction to prohibit the city from interfering with their alleged right to ride horses upon the public
ways of the city and in particular upon and along a bridle path located on Southern Parkway.

The pertinent part of the ordinance in question reads as follows:

12 "505.10 (1) No person shall ride a horse within the City upon any public way or park property, except upon property which
13 has been duly designated for that purpose by the Director of the Metropolitan Park and Recreation Board. This section shall
not apply to persons riding in recognized horse shows or civic events.

14 "(2) Persons taking horses to places where they may be legally ridden shall [**2] either transport them thereto in vans,
trailers or motor vehicles from the premises whereon they are stabled."

15 The ordinance is attacked upon the following grounds: (1) The city does not have a right to stop a
16 lawful activity which is not a nuisance per se; (2) the ordinance is discriminatory and constitutes
17 special legislation because horseback riding cannot properly be singled out as a subject for
18 legislation; (3) the ordinance grants an arbitrary power to the Director of the Metropolitan Park and
Recreation Board because no standards are prescribed therein to control the exercise of his
discretion; (4) the city has no right to regulate legitimate park uses of park property -- that power
residing solely in the Metropolitan Park and Recreation Board.

19 A threshold question is presented as to whether the ordinance purports to authorize the Director of
20 the Metropolitan Park and Recreation Board to designate certain public ways upon which horses
21 may be ridden or whether his discretion is limited to park property. We construe the ordinance to
prohibit all horseback riding upon public streets and ways and to grant discretion to the director to
designate bridle paths upon park property [**3] only.

22 The ordinance, insofar as it relates to public ways and streets, does not fall victim to the attacks
23 made upon it. We consider it a valid exercise of the police power of the city and reasonable in view
of the interest sought to be protected.

24 Appellants' brief assaults the ordinance as being discriminatory in that it applies only to horses as
follows:

25 " * * * We, therefore, assume that kangaroo riders can employ bridle paths for their purposes but horse riders cannot. An
26 elephant can be ridden on the bridle path, but a horse cannot. If a tiger could be trained, it could be ridden. Is a donkey or
27 a jackass a horse? What about a mule? Does this relate to live horses only or does it forbid a child rocking on a
28 hobbyhorse? What about a mechanical horse? Could a merry-go-round be set up? The ordinance forbids none of these but
only relates to the valiant steed who is such a major part of Kentucky's heritage. The trial Court's finding that this
ordinance is not discriminatory because it treats all horse riders the same is misfounded. If a horse rider cannot ride his
horse but can ride an animal which is not legally a horse, but similar to a horse, then the ordinance discriminates [**4]
against not only the horse but the horse rider. * * * .

29 "Saddling the descendents of Pegasus, Man O'War, Traveler, Silver, Dan Patch, Widow Maker, Trigger, Champion, Black
Beauty, Bucephalus, Rosinante and Black Bess, to name only a few, with this asinine canon is to denigrate the legacy of the

1 courser and the charger, the gigster and the stepper, the hunter and the racer, the clipper and the cob, the padnag and the
2 palfrey and capitulate at last to the gasoline powered conveyance which has contributed little to [*230] our history but
much to our ecological turning point."

3 The evidence in this case clearly indicated that horseback riding in areas in which vehicular traffic
4 was heavy presented a serious safety problem which did not exist with respect to riders of pigs,
goats, cattle, elephants or kangaroos. Thus there is a valid basis, relating to horses, and not to
other animals, for treating horses as a separate classification for the purpose of this ordinance.

5 We also note that the ordinance does not define the term "horse". That term is therefore subject to
6 judicial interpretation.

7 The extent to which the term "horse" could possibly be extended to other animals by [**5]
8 statutory construction and thus allay the fears of appellants that kangaroo and elephant riders may
9 go unpunished under the ordinance and that donkeys, mules, jackasses and hobbyhorses may not
be horses in the legal sense is aptly illustrated in Regina v. Ojibway, 8 Criminal Law Quarterly 137
(Toronto 1965) ¹ in which the question presented was whether a pony was a small bird under the
provisions of the Small Birds Act. The decision by Blue, J., held as follows:

10 "This is an appeal by the Crown by way of a stated case from a decision of the magistrate
11 acquitting the accused of a charge under the Small Birds Act, R.S.O., 1960, c724, s. 2. The facts
12 are not in dispute. Fred Ojibway, an Indian, was riding his pony through Queen's Park on January
13 2, 1965. Being impoverished, and having been forced to pledge his saddle, he substituted a downy
pillow in lieu of the said saddle. On this particular day the accused's misfortune was further
heightened by the circumstance of his pony breaking its right foreleg. In accord with current Indian
custom, the accused then shot the pony to relieve it of its awkwardness.

14 ----- Footnotes -----

15 Regina v. Ojibway is entirely fictional. It was originally published in the Criminal Law Quarterly, Copyright 1966 by
Canada Law Book, Ltd., Toronto, and is reprinted here by permission of Canada Law Book, Ltd.

16 ----- End Footnotes -----

17 [**6] "The accused was then charged with having breached the Small Birds Act, s. 2 of which
states:

18 '2. Anyone maiming, injuring or killing small birds is guilty of an offense and subject to a fine not in excess of two hundred
19 dollars.'

20 "The learned magistrate acquitted the accused, holding, in fact, that he had killed his horse and not
a small bird. With respect, I cannot agree.

21 "In light of the definition section my course is quite clear. Section 1 defines 'bird' as 'a two-legged
animal covered with feathers'. There can be no doubt that this case is covered by this section.

22 "Counsel for the accused made several ingenious arguments to which, in fairness, I must address
23 myself. He submitted that the evidence of the expert clearly concluded that the animal in question
was a pony and not a bird, but this is not the issue. We are not interested in whether the animal in
24 question is a bird or not in fact, but whether it is one in law. Statutory interpretation has forced
many a horse to eat birdseed for the rest of its life.

25 "Counsel also contended that the neighing noise emitted by the animal could not possibly be
26 produced by a bird. With respect, the sounds emitted by [**7] an animal are irrelevant to its
nature, for a bird is no less a bird because it is silent.

27 "Counsel for the accused also argued that since there was evidence to show accused had ridden the
28 animal, this pointed to the fact that it could not be a bird but was actually a pony. Obviously, this
avoids the issue. The issue is not whether the animal was ridden or not, but whether it was shot or
29 not, for to ride a pony or a bird is of no offense at all. I believe that counsel now sees his mistake.

1 [*231] "Counsel contends that the iron shoes found on the animal decisively disqualify it from
2 being a bird. I must inform counsel, however, that how an animal dresses is of no concern to this
court.

3 "Counsel relied on the decision in *Re Chicadee*, where he contends that in similar circumstances the
4 accused was acquitted. However, this is a horse of a different color. A close reading of that case
5 indicates that the animal in question there was not a small bird, but, in fact, a midget of a much
larger species. Therefore, that case is inapplicable to our facts.

6 "Counsel finally submits that the word 'small' in the title Small Birds Act refers not to 'Birds' but to
7 'Act,' making it [**8] The Small Act relating to Birds. With respect, counsel did not do his
homework very well, for the Large Birds Act, R.S.O., 1960, c. 725, is just as small. If pressed, I
8 need only refer to the Small Loans Act, R.S.O., 1960, c. 727, which is twice as large as the Large
Birds Act.

9 "It remains then to state my reason for judgment which, simply, is as follows: Different things may
10 take on the same meaning for different purposes. For the purpose of The Small Birds Act, all two-
11 legged, feather-covered animals are birds. This, of course, does not imply that only two-legged
12 animals qualify, for the legislative intent is to make two legs merely the minimum requirement. The
13 statute therefore contemplated multilegged animals with feathers as well. Counsel submits that
14 having regard to the purpose of the statute only small animals 'naturally covered' with feathers
could have been contemplated. However, had this been the intention of the legislature, I am
15 certain that the phrase 'naturally covered' would have been expressly inserted just as 'Long' was
16 inserted in the Longshoreman's Act.

17 "Therefore, a horse with feathers on its back must be deemed for the purposes of this Act to be a
18 bird, [**9] and *a fortiori*, a pony with feathers on its back is a small bird.

19 "Counsel posed the following rhetorical question: If the pillow had been removed prior to the
20 shooting, would the animal still be a bird? To this let me answer rhetorically: Is a bird any less of a
21 bird without its feathers?"

22 Until the matter is squarely presented we decline to pass upon the question of the applicability of
23 the ordinance to riders of mules, goats, cattle or other animals.

24 As to park property, the prohibition against horseback riding is not absolute. The ordinance
25 authorizes the Director of the Metropolitan Park and Recreation Board to designate areas within
26 parks in which horses may be ridden. This board without doubt has the power to establish bridle
27 paths within the parks and the ordinance does not encroach upon that power. The argument that
28 the Director of the Metropolitan Park and Recreation Board, a position created by the joint
29 resolution of the city and county, is without authority to make the designation for the board upon
the ground that no standards have been established for the exercise of his discretion is too tenuous
to be given credit. He is under the direct supervision and [**10] control of the board and is
charged with such duties as the board may specify. The board can completely control the actions of
the director and it is unreasonable to conclude that full-board consideration is required for every
decision affecting the operation of the parks.

Even if we should agree that designation of bridle paths within the parks is an exclusive function of
the board rather than its director, we would be loathe to invalidate the ordinance upon that ground
for the simple reason that we fail to see that the appellants are adversely affected.

The general police power of the city extends to the parks located within the city and until there is
some designation of a bridle path within the parks all horseback riding therein is prohibited. There
is [*232] no reason to believe that the Director of the Metropolitan Park and Recreation Board
would or could refuse to designate as a bridle path an area which the majority of the board wanted
designated as such.

1 The judgment is affirmed.

2 All concur.

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