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2008 FEB 29 P 3: 53

AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

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

DOCKET NO: W-03512A-07-0362

**PINE WATER COMPANY'S
REPLY BRIEF**

Arizona Corporation Commission

DOCKETED

FEB 29 2008

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1 PSWID from application of the gift clause. Interveners also misrepresent Article 9,
2 Section 10 of the Arizona Constitution as an “absolute prohibition” against a transaction
3 between a private utility and a political subdivision. Interveners Br. at 9. The Arizona
4 Supreme Court was very clear that Article 9, Section 10 does not absolutely bar the use of
5 public money, provided the funds are expended to further a legitimate purpose of the
6 public entity and the use is not intended to advantage one religion, private school or public
7 service corporation over another. *See Cmty. Council v. Jordan*, 102 Ariz. 448, 452, 432
8 P.2d 460, 464 (1967). Similarly, *Yuma Gas, Light and Water Company v. City of Yuma*,
9 20 Ariz. 153, 178 P. 26 (1919), does not hold that no constitutional provision or law
10 adopted by the legislature “precludes the Commission from looking at the impact of the
11 K2 well upon the other wells in the Strawberry and Pine areas” as asserted by the
12 Interveners. Interveners’ Br. at 6. The *Yuma Gas* case only holds that no general law
13 exists to take “from the Corporation Commission the power to regulate rates and charges
14 of public service corporations and grant[] such power to incorporated cities and towns.”
15 20 Ariz. at 156, 178 P. at 28

16 Put bluntly, either the Interveners have essentially conceded that the law and facts
17 do not support their arguments, or they do not have respect for these proceedings and the
18 public and private resources that are being expended. Whatever the explanation,
19 Interveners’ lack of evidence, lack of authority, and lack of candor eliminate any basis to
20 deny the relief requested.

21 PINE WATER’S REPLY

22 A. PWCo Should Be Allowed To Encumber A Portion Of Its Assets

23 PWCo reiterates that there is no evidence that the lien on the K2 well site and well
24 will impair the Company’s ability to serve. Staff found that no impairment would occur
25 as a result of the transaction. *See Staff Report, Ex. S-1 at 4-5.* The Interveners agreed that
26 approval of a lien on the well and well site would not impair the Company’s ability to

1 serve. TR at 136 (Krafczyk); 155 (Greer). Despite this admission, Interveners now argue
2 that the property is not owned by PWCo so it has nothing to encumber. Interveners' Br.
3 at 7. This argument is nonsensical. If the property isn't owned by PWCo, approval under
4 ARS § 40-285.A isn't required. But, the property is owned by PWCo. See Special
5 Warranty Deed, recorded February 12, 2008, attached to PWCo's Notice of Late Filed
6 Exhibit dated February 20, 2008. Under a strict reading of the statute, PWCo doesn't
7 appear to need approval to issue a lien because the well does not yet exist and the well site
8 is not used and necessary in the provision of service. See A.R.S. § 40-285(A). Still,
9 PWCo is seeking approval in an "abundance of caution." TR at 49 (Hardcastle).

10 Interveners' second argument against approval to issue the lien also fails. PWCo
11 has not sought approval to encumber the well and well site as a "contingency."
12 Interveners Br. at 7. PWCo filed this application in good faith and has already awaited
13 financing approval for 9 months. Meanwhile, the deep well project contemplated in the
14 JDWA has been moving forward with the goal of getting more water to PWCo's
15 customers at the earliest possible date. E.g., TR at 95, 106, 239, 255 (Hardcastle). In
16 furtherance of that goal, the District recently chose to approve the Escrow Instructions
17 (Interveners' Br. at Exhibit A, hereinafter referred to as "Escrow Instructions") and to
18 waive receipt of Commission approvals prior to depositing its investment funds in escrow.
19 This does not mean that PSWID or PWCo are ignoring the Commission's regulatory
20 authority. Instead, the District determined that a delay in funding the test well would
21 eliminate any remaining chance of obtaining additional water supplies for this coming
22 summer, and chose to accept a lien that *might not yet* be effective in order to move the K2

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1 project forward.¹

2 In an apparent third argument against lien approval, Interveners assert, without
3 citation to any competent evidence in the record, that PWCo is still having difficulty with
4 easements. Interveners Br. at 7. Later, Interveners assert that failure to resolve these
5 easement issues is contrary to the public interest. *Id.* at 11. Apparently, Interveners
6 believe that if these easement issues are not resolved the K2 well will not be drilled and
7 the public will suffer because a new water source will not be obtained. Yet, the
8 Interveners are clearly opposed to the K2 project. Moreover, if the Company lacks the
9 necessary easements, then the well won't be drilled, the well and well site will never be
10 used nor necessary and no approval is needed. *See* A.R.S. § 40-285(A). In any case,
11 PWCo is working to obtain any needed easements and expects a "successful conclusion."
12 TR at 95, 106 (Hardcastle). But, PWCo's need for easements has nothing to do with
13 whether the requested financing approvals should be issued.

14 **B. PWCo Should Be Allowed To Issue Evidence Of Indebtedness**

15 Interveners reason only that the Commission should not allow evidence of
16 indebtedness because the underlying agreement is illegal. Interveners Br. at 7. Once
17 again, Interveners provide no basis for this argument, no evidence, and no legal support.
18 As discussed in the Company's closing brief and in more detail below, the legality of the
19 JDWA is not a decision within the Commission's jurisdiction. Not that the District has
20 done anything illegal. The District may join with any person in the construction,
21 operation, or maintenance of a well. A.R.S. 48-909(B)(2). PSWID may also acquire by
22 "gift, purchase, condemnation or otherwise in the name of the district and own, control,

23 ¹ *See* District Letter to the Commission docketed February 22, 2008. PWCo asks that the
24 Commission either admit the District's letter as evidence or take administrative notice of the
25 authorized representations of another political subdivision, as the document is appropriately
26 considered in response to Interveners' reliance on the Escrow Instructions in their closing brief.
Notably, the copy attached to Interveners' brief is unexecuted. As a result, by separate notice of
filing, the Company will docket a fully executed copy of the Escrow Instructions and PWCo has
no objection to admission of the Escrow Instructions as an exhibit in this docket.

1 manage and dispose of any real or personal property or interest in such property necessary
2 or convenient for the construction, operation and maintenance” of the well. A.R.S. § 48-
3 909(B)(1). Nor has the District run afoul of the Arizona Constitution. *See* PWCo Closing
4 Br. at 5-9; Staff Br. at 6-8. *See also* PWCo Reply Br., *infra* at 8-11.

5 **C. Interveners Would Have The Commission Exceed Its Jurisdiction**

6 The Commission’s rules for intervention are intended to prevent the issues from
7 being unduly broadened by Interveners. *See* AAC R14-3-105. Having been granted
8 intervention, the Interveners have done just that. But, the Commission is not the
9 reviewing court for decisions made by the elected officials of the PSWID. “No judicial
10 power is vested in or can be exercised by the corporation commission unless that power is
11 expressly granted by the Constitution.” *Trico Elec. Co-op v. Ralston*, 67 Ariz. 358, 363,
12 196 P.2d 470, 473 (1948).

13 Improvement districts are comparable to municipalities and other political entities
14 in that the “people of Arizona, through the constitution, and the legislature, and by statute,
15 have granted powers to irrigation and water conservation districts comparable to those of
16 municipalities and other political subdivisions of the state.” *Maricopa County v.*
17 *Maricopa County Mun. Water Conservation Dist. No. 1*, 171 Ariz. 325, 328, 830 P.2d
18 846, 849 (Ariz. Ct. App. 1991); *see* Ariz. Const. art. XIII, § 7; A.R.S. § 48-2978(15).
19 Municipalities are excluded from the jurisdiction and supervision of the Commission.
20 *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 551, 20 P.3d 590, 594 (Ariz. Ct.
21 App. 2001); Ariz. Const. art. XV, §§ 2, 3; *see State ex rel. Bullard v. Jones*, 15 Ariz. 215,
22 137 P. 544 (1914) (stating only public service corporations are subject to regulation by the
23 corporation commission); Ariz. Op. Att’y. Gen. 62-7 (stating Commission does not have
24 jurisdiction over municipality’s determination of feasibility, desirability, or consideration
25 to be paid). Thus, the Commission does not have jurisdiction over districts and the
26 decisions that they make, something two Commissioners and Judge Nodes made clear

1 from the outset. *See* Transcript, October 26, 2007, at 33-34 (Nodes), 44-45 (Mundell), 59-
2 60 (Gleason).

3 Interveners also argue that the Commission should receive all evidence “before it
4 makes a determination as to whether or not it should approve Pine Water Company
5 entering into the contract.” Interveners Br. at 6. As Staff recognized early on, this docket
6 is not about the Commission’s approval of the JDWA itself. *See* Staff’s Response to
7 Motion to Expedite Application, Docket No. W-03512A-07-0301 (May 29, 2007); Motion
8 to Withdraw Application (June 11, 2007). None of the constitutional provisions that vest
9 powers in the Commission “confer upon the commission the jurisdiction to pass upon the
10 construction and validity of contracts.” *Trico Elec. Co-op.*, 67 Ariz. at 363, 196 P.2d at
11 473. The Commission may not determine whether a valid contract exists or either party’s
12 rights under the contract in this docket. *Id.* But it can and should resolve the two narrow
13 issues presented and grant the relief requested.

14 **D. Interveners Overstate The Breadth Of The Commission’s Power And**
15 **Authority, And They Do Not Provide Any Evidence Of Well Impacts**

16 PWCo is well aware of the Commission’s broad powers to regulate public service
17 corporations, including the four pages of constitutionally granted powers that introduce
18 Interveners’ arguments. Interveners Br. at 1-5. But, “it is not the purpose of regulatory
19 bodies to manage the affairs of the corporation.” *Southern Pac. Co. v. Ariz. Corp.*
20 *Comm’n*, 98 Ariz. 339, 343, 404 P.2d 692, 694 (1965). “It must never be forgotten that,
21 while the state may regulate with a view to enforcing reasonable rates and charges, it is
22 not the owner of the property of public utility companies, and is not clothed with the
23 general power of management incident to ownership.” *Id.* at 343, 404 P.2d at 694-695.

24 In asking the Commission to regulate well impacts, Interveners cling to the
25 argument that the Commission has the “obligation to protect the public interest in general
26 from the actions of a regulated public service corporation.” Interveners Br. at 7. How can

1 it be contrary to the public interest for the Company to follow the laws of the State of
2 Arizona? A.R.S. § 45-108; TR at 311 (Olea). What the Interveners are asking the
3 Commission to do is akin to directing a public service corporation not to exercise its
4 power of eminent domain because a landowner will be impacted. It is not within the
5 Commission's power to take away the legal rights of the entities subject to its regulation.
6 *See Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65, 73-74, 216 P.2d 404,
7 410 (Ariz.1950).

8 The Commission's purpose is to "protect our citizens from the results of
9 speculation, mismanagement, and abuse of power." *Ariz. Corp. Comm'n v. State ex rel.*
10 *Woods*, 171 Ariz. 286, 296, 830 P.2d 807, 817 (1992). The public should be protected
11 from companies involved in such behavior, but that is not what is happening in this case.
12 PWCo is a water company operating in a desert in a drought, and they are looking for
13 more water in a joint effort with the local improvement district, also charged with the duty
14 to find more water. The risk of impacting other wells, if it exists at all, exists wherever
15 the Company drills for more water. TR at 291-92 (Olea). However, there is not a shred
16 of evidence that the Company has done or intends to do anything to harm the public. It
17 follows that the over-regulation sought by the Interveners is not in the public interest.

18 Interveners provide no evidence that the K2 well will impact any other wells in the
19 surrounding area, and they continue to ignore facts that are in evidence concerning the
20 Company's own experience drilling wells in the region and its consultation with
21 hydrologists who concluded that no impact is expected to occur because all existing wells
22 in the vicinity are drilled to shallow depths and not in the R aquifer. TR at 45-46, 100,
23 214-15 (Hardcastle); 274-76 (Olea). If for some reason "dewatering" occurs, then the
24 drillers would "simply seal the well" off from the C aquifer. *Id.* at 243-44 (Hardcastle).
25 PWCo also has significant incentive to ensure that no impacts occur since its affiliate,
26 SWCo, owns many of the shallow wells in Strawberry. *Id.* at 47, 102-103 (Hardcastle).

1 In order to deflect attention away from their lack of evidence, Interveners argue
2 that PWCo has the burden of proof. Interveners Br. at 7. However, in both federal and
3 state courts, the moving party, or the party asserting the affirmative of an issue, has the
4 burden of proof. *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-73 (1994).
5 The mere fact that PWCo has requested approvals by the Commission does not make it
6 the proponent of all issues with the burden of proof. *Newport News Shipbuilding and Dry*
7 *Dock Co. v. Loxley*, 934 F.2d 511, 517 (4th Cir. 1991). It follows that there is simply no
8 reason for the Commission to exercise questionable jurisdiction by conditioning its
9 financing approval on some sort of well impact legislation.²

10 **E. The K2 Agreement Does Not Violate The Constitution**

11 Interveners fail to provide any authority that the Commission can pass upon the
12 construction and validity of contracts” or second guess the actions of other elected
13 officials. Nor do the Interveners recognize authority that shows that the Commission does
14 not have such powers. *See, e.g., Trico Elec. Co-op*, 67 Ariz. at 363, 196 P.2d at 473; *City*
15 *of Casa Grande v. Ariz. Water Co.*, 199 Ariz. at 551, 20 P.3d at 594. Nevertheless, PWCo
16 will address the constitutional arguments laid out by Interveners. The District has the
17 capacity to enter into the JDWA because doing so does not violate any provision in the
18 Constitution.

19 **1. Article 9, Section 7 does not Apply to the District**

20 As mentioned above, Interveners attempt to hang their hat on Article 9, Section 7
21 of the Arizona Constitution. However, the District is expressly exempt from the
22 prohibitions of the “gift clause” in Section 7. *See Ariz. Const. art. XIII, § 7.* Despite this,

23
24 ² Staff's recommendation that the Company seek an opinion letter from ADWR of the projected
25 sustainability of a well at the K2 site based on the test well data is intended to “put all parties of
26 notice” concerning information Staff would want to see in a later prudency review. TR at 269-70
(Olea). The ADWR letter was not related to well impacts, nor does it appear that Staff intended it
to be a condition of the requested financing approval. *Id.* Hardcastle Rebuttal Testimony,
Ex. A-2, at 2-3.

1 Interveners attempt to lead the Commission astray by citing cases that do not actually
2 stand for the arguments put forth.

3 First, Interveners cite *Wistuber v. Paradise Valley Unified School Dist.*, for two
4 propositions: (1) the governmental authority must be paid more in consideration than the
5 value of the expenditure of public funds, and (2) the gift clause prohibits giving
6 advantages to special interests. Interveners Br. at 8. In fact, the governmental entity does
7 not have to be “paid” anything other than public benefit, and the “value to be received by
8 the public [may not be] *far exceeded* by the consideration being paid by the public.”
9 *Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357
10 (1984). “In reviewing such questions, the courts must not be overly technical and must
11 give appropriate deference to the findings of the governmental body.” *Id.* The supreme
12 court also held that private entities may receive some benefits under the gift clause if there
13 is proportionality. *Id.* at 350, 687 P.2d at 358.

14 Interveners next cite *State ex rel. Corbin v. Superior Court* as also holding that a
15 governmental authority must be paid more in consideration than what is expended.
16 Interveners Br. at 8. Here again, the court actually holds that an expenditure “may be
17 constitutionally permissible, even if some private individual or organization thereby
18 derives a special benefit, as long as the . . . value to be received by the public [is not] far
19 exceeded by the consideration being paid by the public.” *Corbin*, 159 Ariz. 307, 310-311,
20 767 P.2d 30, 33-34 (Ariz. Ct. App. 1988). Not only do Interveners misinterpret the law,
21 they misconstrue the JDWA. PSWID is not taking money from its general fund and
22 turning it over to PWCo. The District was formed in order to find water for the Pine and
23 Strawberry communities, and the JDWA encompasses an agreement to find water by first
24 investing in a test well. No money is transferred or given to PWCo for its use, and
25 PSWID retains control over expenditures of its \$300,000 even when placed in escrow.
26 *See Escrow Instructions at § 2(c).*

1 *Wistuber* is actually fairly analogous to the current situation between PSWID and
2 PWCo. Taxpayers brought an action against the school district to have declared invalid a
3 portion of an agreement between the district and a teacher. 141 Ariz. at 348, 687 P.2d at
4 356. The school district had released the Classroom Teachers' Association president from
5 teaching duties, but then continued to pay a portion of the president's salary. *Id.* The
6 supreme court held that using tax money to pay a portion of the salary accomplished a
7 public purpose since the president's activity aided the school district in "performing its
8 obligations." *Id.*

9 Similarly, the JDWA is for a public purpose and the benefit anticipated to be
10 received by the public outweighs the public expenditure. The District's and the JDWA's
11 purpose is to find water for the community. PWCo provides a well site and other
12 necessary storage, transmission and distribution infrastructure while capping the District's
13 costs. The District benefits by accomplishing its purpose of finding water and the public
14 receives the greatest benefit by having a much needed water source. Surely the
15 expenditure of \$300,000 with the possibility of full reimbursement plus interest does not
16 "far exceed" the benefit anticipated to be received by the public. Rather, the Interveners
17 simply refuse to recognize both the nature of the transaction and the flow of the
18 anticipated benefits.

19 2. Article 9, Section 10 of the Arizona Constitution

20 Article 9, Section 10 states: "No tax shall be laid or appropriation of public money
21 made in aid of any . . . public service corporation." Interveners' only argument under this
22 section is that it is an "absolute prohibition," but they offer absolutely no basis or
23 authority for such an assertion. Again, the supreme court was very clear in holding that
24 Article 9, Section 10 is not an absolute prohibition because it does not stand for the
25 proposition that no public money may be channeled to public service corporations. *See*
26 *Cnty. Council v. Jordan*, 102 Ariz. 448, 452, 432 P.2d 460, 464 (1967). The appropriate

1 question is whether the District can choose to do business with and discharge part of its
2 duties in an agreement with PWCo without contravening this constitutional prohibition.
3 The supreme court has developed two tests to help in answering this question.

4 First, the Partial Matching Plan test exists where the state encourages actions by
5 partial reimbursement. *Id.* at 454, 432 P.2d at 466. Encouraging “any person or
6 organization to spend more than it will receive is hardly ‘aiding’ that person or
7 organization on to a healthy financial future.” *Id.* Aid for “actual costs and materials
8 given entirely to third parties” and not to the public service corporation itself “is not the
9 type of aid prohibited by our constitution.” *Id.* The agreement between PSWID and
10 PWCo involves \$300,000 placed into escrow to pay well drillers and other contractors,
11 never given to PWCo, and never placed outside the control of the District. *See* JDWA at
12 §§ 4.2.1, 4.2.1.3, 4.2.1.5; Escrow Instructions at § 2(c); TR at 123-124 (Hardcastle). In
13 addition, this money is only used for the costs of the K2 project, and any funds remaining
14 in the escrow will be immediately returned to PSWID. JDWA at § 4.2.1.4. This
15 agreement goes beyond the Partial Matching test because PWCo will spend \$1 million
16 more than the initial investment, plus reimburse the District for its investment if the
17 project is successful.

18 Second, the True Beneficiary test focuses on who actually receives the benefits of
19 the appropriation. *Id.* at 455, 432 P.2d at 467. The supreme court held that the Salvation
20 Army was not the beneficiary from payments made to it by the state, but it was those
21 “who actually profit from the disbursements – the individuals and families who are
22 destitute and receive the emergency aid.” *Id.* The true beneficiaries of the JDWA are the
23 citizens of Pine (and hopefully Strawberry) who will receive the much needed additional
24 water supply. This agreement provides a way in which the District and PWCo could
25 reasonably and feasibly accomplish this goal.

26 In short, the JDWA does not require the District or PWCo to violate the Arizona

1 Constitution in any way. Interveners have misconstrued the law and facts in order to
2 attempt an argument, but a good faith reading of the law in this area makes it clear that no
3 constitutional violation exists.³

4 **F. Interveners' Other Unsupported and Unsupportable Arguments**

5 Unable to support denial of the relief sought in this docket with evidence or legal
6 authority, Interveners' brief contains a host of random assertions aimed at achieving their
7 goal of stopping the K2 project at all cost. As PWCo has submitted here and throughout
8 this docket, it is only seeking two narrow approvals, not approval of the JDWA itself or a
9 declaration that the District has lawfully and prudently exercised its authority, both of
10 which are beyond the Commission's jurisdiction. However, the Company understands the
11 Commission's wish to consider as broad a record as possible before issuing its decision,
12 and therefore, PWCo will attempt to respond to the Interveners' other assertions.

13 1. **The JDWA Does Not Constitute Double Taxation On The Citizens**
14 **Of Pine And Strawberry, Arizona**

15 Double taxation is an illogical argument meant to distract and prolong these
16 proceedings. The facts show that PWCo's customers are not "taxed" twice. If the project
17 is unsuccessful, the District gets the test well but does not get its money back and no part
18 of the costs of the project will be included in PWCo's rate base. JDWA at § 4.2.3. Thus,
19 there is only one tax. If the project is successful, the District will receive its full
20 investment back plus interest, putting the District in a situation better than it has today. *Id.*
21 at § 4.2.2. As for the rates paid by the Company's ratepayers, if the plant is put in rate
22 base, then the utility has borne the cost of used and useful plant and is entitled to a fair and
23 reasonable return on and of that investment. This is not a tax, it is ratemaking, and the
24 Interveners' argument is simply a disguised attempt to have the Commission regulate the

25 ³ Notably, the failure of Interveners to challenge the validity of the District's action in court raises
26 the question of whether the Interveners know that their claims lack merit and that filing a claim
would expose them to the possibility of an award of attorneys fees and/or other sanctions.

1 District's decisions about how to spend its money. The Commission does not have such
2 jurisdiction.

3 Interveners' claim that Strawberry residents are being taxed without benefit also
4 fails. No infringement of rights exists when certain premises are not benefited by a local
5 assessment. *Butters v. City of Oakland*, 263 U.S. 162, 164 (1923). Not everyone benefits
6 from every decision a governmental entity makes, and an exact mathematical relationship
7 between the benefit and assessment is not required. *Id.* Besides, PWCo will first receive
8 water under the agreement, but SWCo is intended to benefit from any water in excess of
9 PWCo's needs. JDWA at § 6.1.

10 Interveners' attempt to bolster these arguments with the assertion that the money is
11 only for the benefit of PWCo is simply a misrepresentation of the facts. Interveners Br.
12 at 9. The existence of a water shortage in Pine is not in dispute. *E.g.*, TR at 50
13 (Hardcastle), 145, 149 (Krafczyk); 290 (Olea). The District was created to "investigate
14 current and potential sources of water," and is attempting to fulfill that purpose. PSWID
15 Mission Statement, Ex. A-6. If more water is located, the entire area, including Pine and
16 Strawberry, will benefit. TR at 44 (Hardcastle).

17 Finally, Interveners assert a vague question about the curtailment of another public
18 service corporation that is not a party to this matter. Interveners Br. at 10. What this has
19 to do with double or unfair taxation is unclear. It is clear, however, that SWCo's
20 curtailment tariff only precludes SWCo from using wells owned by SWCo to send water
21 to PWCo. The K2 well will be owned by PWCo.

22 2. The Commission Does Not Decide How Much Risk The District
23 Takes Or Determine The Efficacy Of Its Decisions

24 PSWID has a right to take risks it deems reasonably necessary. "One of the more
25 significant powers of an irrigation district is to decide how, when, and where physical
26 improvements will be made in the system." *Porterfield v. Van Boening*, 154 Ariz. 556,

1 558, 744 P.2d 468, 470 (Ariz. Ct. App. 1987). The plain language of Article 13, Section 7
2 of the Arizona Constitution “vests irrigation and other districts with powers and duties
3 equal to the powers and duties conferred on municipalities and political subdivisions.”
4 *Hohokam Irrigation and Drainage Dist. v. Ariz. Pub. Serv. Co.*, 204 Ariz. 394, 397, 64
5 P.3d 836, 839 (2003). The powers of the District extend to “those activities that are either
6 necessary or incidental to achieving the district’s primary purpose.” *Id.* at 400, 64 P.3d at
7 842. The primary purpose of PSWID is to “implement and formulate plans as necessary
8 to provide long-term available water to the [Pine and Strawberry] communities.” PSWID
9 Mission Statement, Ex. A-6. The purpose of the JDWA is to “search for long-term
10 permanent solutions to the chronic water supply issues,” and produce “a Sustainable Yield
11 of water.” JDWA at Recital C, Agreement § 2. The District is making an investment in
12 the future of the Pine and Strawberry communities, but along with investment comes risk,
13 “especially as it applies to well drilling.” TR at 50 (Hardcastle).

14 Apparently, the Interveners are also asserting that there is risk because PWCo may
15 not be investing its own money. Interveners Br. at 11. This is a red herring. Brooke
16 Utilities, the shareholder of PWCo, has “access to the capital needed to fund its obligation
17 to put up a million dollars in the K2 project.” TR at 47 (Hardcastle). It is common
18 practice for shareholders of utilities to fund capital investment in public service
19 corporations. PWCo and its shareholder have every intention of providing the capital
20 necessary to complete the K2 project. *Id.* at 49 (Hardcastle). In fact, the Company has
21 already made a substantial investment in the project by incurring costs for the JDWA and
22 this proceeding, and preparing the K2 well site for drilling. *E.g.*, TR at 95, 106, 239, 255
23 (Hardcastle).

24 3. PSWID Is Not Delegating Control Of Its Money To A Third Party

25 The District is not surrendering power and control of its money to a third party, nor
26 does it lose control of the money. Throughout the agreement, PSWID retains control over

1 its \$300,000 even after it is placed in escrow; the Escrow Instructions clearly state how
2 the money is to be used and disbursed consistent with the JDWA. Escrow Instructions at
3 § 2(c); JDWA at § 4.2.1.2. Any draw request is to be executed by the representatives of
4 PWCo and PSWID. Escrow Instructions at § 2(b). Additionally, the District is a
5 municipal corporation of the State of Arizona with the right to make decisions.
6 Established improvement districts “engage in many of the activities generally performed
7 by municipalities and other political subdivisions.” *Maricopa County Mun. Water*
8 *Conservation Dist. No. 1*, 171 Ariz. at 329, 830 P.2d at 850. “Express powers conferred
9 on a municipality by statute carry with them all implied powers necessary to make them
10 effective.” *Id.* This is all the District has done in the JDWA.

11 4. The Available Property Is Adequate To Develop The Well Site

12 Interveners claim to rely on hearing testimony and public comment to establish that
13 the K2 well site is inadequate. Interveners Br. at 11. No hearing testimony is identified,
14 and there is no competent evidence in the record to support this claim. Comments made
15 at the public comment session are not evidence, and they certainly cannot form a basis for
16 a finding that the site is inadequate, even if such a finding were relevant in this financing
17 application. *See Corbin*, 143 Ariz. at 224, 693 P.2d at 367. Moreover, the facts in
18 evidence contradict the Interveners’ assertion. The “available property size is adequate to
19 be able to develop the well site as we believe it needs to be developed.” TR at 92
20 (Hardcastle). The expertise possessed by PWCo, the hydrologists, drillers, engineers, and
21 project managers has been depended on in the selection of a site. *Id.* at 102-103
22 (Hardcastle). This is a “management function” left to the Company, not an issue of the
23 Commission’s regulation or its decision making in a financing application, and
24 Interveners provide no evidentiary or legal basis for the Commission to conclude
25 otherwise.

26

1 it has been approved by the Commission. A.R.S. § 40-302(A). However, the JDWA
2 contemplates and does not prohibit the Company from moving forward with site
3 preparation and related transaction activities pending the conclusion of this docket.
4 JDWA Amendment at § 5. Thus, Staff's assertion that the Company does not have "a
5 single penny" at risk is overstated. Should the Commission deny the requested approvals
6 or the K2 project otherwise not succeed, the amounts the Company has spent on the
7 agreement, this proceeding and on the project to date could be lost.

8 Second, Staff's statement that the parties must agree on "the remainder of the
9 expenses" appears overstated. Certainly, agreement is required for the expenditure of the
10 District's investment in the project, specifically, the drilling of a test well. Escrow
11 Instructions at § 2(b). However, the JDWA does not require agreement of the parties
12 regarding the Company's investment in the K2 project once the test well is drilled and a
13 sustainable yield is determined.

14 Third, the Company understands that Staff is not seeking to have its
15 recommendation that the Company obtain ADWR approval be a condition of the
16 financing approval. *See* Hardcastle Rebuttal Testimony, Ex. A-2, at 2-3. *See also* TR at
17 269-70 (Olea). Therefore, Staff's statement that a production well will only be built if
18 ADWR agrees that the test well has a sustainable yield appears is not necessarily accurate.
19 Staff Br. at 2. Of course, the Company has stated that it will follow Staff's
20 recommendation and seek an opinion from ADWR. Hardcastle Rebuttal Testimony, Ex.
21 A-2, at 3.

22 Fourth, and finally, Staff's reference to the District "retaining" ownership of the
23 well and well site is in error. Staff Br. at 2. The District will have a lien on the K2 site
24 and improvements to ensure performance of the JDWA, but will not own the well and
25 well site unless development of a production well is not consummated and the test well
26 and well site are transferred to PSWID by PWCo pursuant to section 3.4 of the JDWA.

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CONCLUSION

PWCo urges the Commission to grant the requested approvals as soon as possible. Interveners have had their “day in court” but have failed to provide evidence or legal support for their efforts to stop the K2 project by soliciting the Commission’s rejection of the Company’s financing application. More water is sorely needed for the Company’s customers and the requested approvals are sought in an effort to find that water. The evidence, the law, the parties to the JDWA, and the public interest support issuing the approvals sought by PWCo in this docket.

DATED this 29th day of February, 2008.

FENNEMORE CRAIG, P.C.



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