

ORIGINAL

OPEN MEETING AGENDA ITEM



0000094818

BEFORE THE ARIZONA CORPORATION COMMISSION

KRISTIN K. MAYES

Chairman

GARY PIERCE

Commissioner

SANDRA D. KENNEDY

Commissioner

PAUL NEWMAN

Commissioner

BOB STUMP

Commissioner

Arizona Corporation Commission

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MAR 24 2009

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AZ CORP COMMISSION  
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RECEIVED

IN THE MATTER OF THE APPLICATION OF  
WEST END WATER CO. FOR AN  
EXTENSION OF ITS CERTIFICATE OF  
CONVENIENCE AND NECESSITY.

DOCKET NO. W-01157A-05-0706

WEST END WATER CO.'S  
RESPONSE AND OBJECTION  
TO EXCEPTION OF THE CITY  
OF SURPRISE

West End Water Co. ("West End") hereby responds and objects to the Exception ("Exception") of the City of Surprise ("Surprise") to the March 11, 2008, Recommended Opinion and Order recommending a 22-month extension of West End's final administrative requirement for the previously-approved expansion of its certificated area. West End respectfully requests that the Arizona Corporation Commission (the "Commission") reject the Exception as an untimely and inappropriate attempt to appeal the Commission's prior decision to extend West End's certificated area so West End can serve part of Walden Ranch, a planned subdivision.

The reasons for Surprise's Exception are entirely unrelated to the undisputed purpose of the requested extension: to afford the Arizona Department of Water Resources ("ADWR") sufficient time to complete a general review of its valuation

1 methodology for the Hassayampa basin, a process that must be completed before ADWR  
2 can review and consider the Walden Ranch developer's application for a Certificate of  
3 Assured Water Supply ("CAWS"). Filing the developer's CAWS will fulfill West End's  
4 final administrative requirement for its service area extension. The Commission  
5 approved said expansion on June 28, 2007, through Order 69672. This extension request  
6 concerns a review process that another governmental agency (ADWR) has undertaken  
7 and, thus, that is outside the control of either West End or the developer.

8 Surprise's Exception does not provide a single reason why the Commission should  
9 not afford West End additional time to allow ADWR to complete its work. In fact, the  
10 Exception does not even mention ADWR or the sole basis of the extension request. The  
11 Exception merely presents opportunistic arguments, which are substantially similar to  
12 arguments it raised in its opposition to West End's original request to expand its service  
13 area. Such arguments, made at least 18 months after expiration of the time for appeal, are  
14 inappropriate. They deserve no weight in the Commission's decision on this request for  
15 an extension of time.

## 16 **BACKGROUND**

17 In October 2005, West End submitted an Application for an Extension of  
18 Certificate of Convenience and Necessity requesting that its service area be expanded to  
19 cover approximately 30% of a planned development called Walden Ranch. The  
20 remaining 70% of Walden Ranch were already within West End's existing service area.  
21 In March, 2006, Surprise moved to intervene on the grounds that it, not West End, should  
22 provide water to the expansion area.

23 After three days of hearings, followed by extensive briefings and arguments before  
24 the Commission, on June 28, 2007, the Commission issued Order 69672, which granted  
25 West End's extension application subject to certain administrative requirements to be  
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1 completed thereafter. *West End has completed each such administrative requirement*  
2 *except that the Walden Ranch developer has not yet obtained a CAWS from ADWR.* The  
3 request now at issue before the Commission would extend the deadline for filing the  
4 developer's CAWS by 22 months. This time period is necessary and reasonable because  
5 ADWR is in the process of changing its methodology for determining adequate water  
6 supply in the Hassayampa basin. That shift in methodology is the prerogative of ADWR  
7 and is outside the control of either the developer or West End. Its impact on this case,  
8 however, is undisputed -- it will cause substantial delay in ADWR's consideration of the  
9 Walden Ranch developer's application for a CAWS.

10 The Exception, however, does not even address the sole basis for the current  
11 request. The Exception is, instead, a thinly disguised attempt to open the door for the  
12 Commission to reconsider Order 69672. In fact, Surprise's true purpose is clearly stated  
13 in the Exception: Surprise desires an opportunity to argue its "competing interests" with  
14 West End and the developer, in a hope to obtain a reversal of Order 69672. (*See*  
15 *Exception, at 3.*)

16 The time for Surprise to request a rehearing and appeal Order 69672 expired 18  
17 months ago. (*See A.A.C R14-3-11; A.R.S. § 40-254.*) Surprise understood and acted on  
18 those time restrictions. On July 18, 2007, Surprise moved for a rehearing of Decision  
19 69672. On September 6, 2007, Surprise filed a Complaint in Maricopa County Superior  
20 Court challenging the decision. Less than three weeks later (on September 25, 2007),  
21 Surprise voluntarily dismissed the Complaint. Surprise should not now be allowed a  
22 second bite at the apple. The sole legitimate issue currently before the Commission is  
23 whether West End's request for extension should be granted in accordance with the  
24 recommendations of the Staff and the Administrative Law Judge.

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## ARGUMENT

**I. The Request for Extension is Based on Reasons Out of West End's Control.**

The Exception fails to address *at all* the sole basis for West End's request for an extension of its time to comply with the requirement of Decision 69672 (and a subsequent extension granted by Decision 70475) to file a copy of the Walden Ranch developer's CAWS. Therefore, as discussed above, the Exception is an attempt to achieve an inappropriate ancillary avenue of appeal that the Commission should not allow.

West End has requested an extension for reasons outside of its control. Specifically, as stated in its letter of December 23, 2008 (which West End filed in the docket on the same date), West End was required to request an extension because of ADWR's decision to re-evaluate its preferred model for determining assured water supplies in the Hassayampa basin. West End played no role in the developer's request for a CAWS, nor in ADWR's methodology decision.

The chronology attached to West End's letter of December 23, 2008, demonstrates that the developer first applied for a CAWS in September 2007. The developer originally proceeded under the modeling technique that ADWR formerly approved (the Thwells analytical model). In July 2008 --ten months after the developer had submitted its CAWS application-- ADWR informed the developer for the first time that a different modeling technique would henceforth be required (the Modflow numeric model). This change led to discussions between the developer and ADWR, including a request by the developer that ADWR consider its application under the previously accepted Thwells model. ADWR did not give the developer definitive notice until October 2008, that it would not accept a Thwells model analysis. At the same time, ADWR also informed the

1 developer that ADWR would have to complete a numeric modeling of the entire  
2 Hassayampa basin, in order to develop data that the developer would need before it could  
3 amend its CAWS application under the Modflow model. Discussions then continued  
4 between the developer and ADWR until December 2008, when ADWR reaffirmed its  
5 decision to require use of the Modflow model and informed the developer that ADWR  
6 would not complete its own numeric analysis of the Hassayampa basin for at least one  
7 year.

8 Thus, because the developer will not be able to do its own revised analysis until  
9 *after ADWR completes its own basin-wide analysis*, there is nothing the developer (or, by  
10 extension, West End) can do, except to wait for ADWR. That is the reason, and the sole  
11 reason, for West End's current extension request.

12 After receiving West End's request letter of December 23, 2008, Staff contacted  
13 ADWR and, in its docketed report dated January 30, 2009, stated:

14 The ADWR verified the Company's account of the meeting  
15 and the expected time for provision of the data. If the data is  
16 received in one year as expected, the developer will still need  
17 to complete the model, submit it to ADWR and wait for  
approval.

18 Surprise has not offered (and could not offer) any evidence to contravene the facts  
19 set forth above. Nor has Surprise offered any argument as to why the Commission  
20 should disregard such facts.

21 Thus, this request for extension was filed because another State agency has  
22 undertaken a change in methodology, which change has caused delay in the issuance of  
23 the developer's CAWS. Neither the developer nor West End have been dilatory in  
24 seeking the CAWS. The delay is beyond their control. Therefore, even if Surprise's

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1 Exception was not substantively deficient (which it is), West End's request for a 22-  
2 month extension is reasonable.

3 **II. Surprise's Arguments Related to its Annexation Plans Are Misleading,**  
4 **Irrelevant and a Red Herring.**

5 The Exception relies almost entirely on Surprise's bold predictions of its eventual  
6 ability to annex Walden Ranch. Surprise, unsuccessfully, made many similar arguments  
7 in its original intervention. Little has changed since the hearings in 2006. A comparison  
8 of the map of Surprise's current corporate boundaries, as depicted on Surprise's web site  
9 (*see* Exhibit "A" hereto), to Exhibit COS-9 to the 2006 hearing, appears to confirm that  
10 the only relevant annexations that have occurred since 2006 were either already set for  
11 City Council approval in 2006, or were a single subdivision for which the landowner, in  
12 2006, had already "aggressively requested annexation into the City." (*See* Hearing  
13 Transcript of 5/22/2006, at 73, lines 14-20.) Other than those annexations, which were  
14 already pending in 2006, Surprise made bold predictions that were substantially similar to  
15 the predictions it now makes in the Exception. Surprise's optimism in 2006 has not  
16 proven accurate. There is no reason to assume, therefore, that its current optimism will  
17 be any more accurate.

18 Close examination of the letter of March 27, 2009, from Janice A. See to Danielle  
19 D. Janitsch (attached to the Exception) reveals that, notwithstanding the letter's hopeful  
20 tone, Surprise's ability to predict annexation is still speculative at best. For example, Ms.  
21 See admits that Walden Ranch is merely listed on the city's annexation plan as  
22 "possible." In addition, Ms. See tacitly concedes the fact that obtaining the landowners'  
23 agreement to any annexation may be difficult to obtain: "Any delay in annexation is due  
24 to *the complexity in trying to assemble property owners willing to annex ....*" (Emphasis  
25 added.)  
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1           In addition, although the See letter at first appears to announce that the City has  
2 virtually reached the edge of Walden Ranch, it appears there is only a single neighboring  
3 property owner who wants to “discuss annexation.” Even assuming that discussions with  
4 that one landowner will one day bear fruit, such discussions will not lead to an actual  
5 annexation of that owner’s property *unless* the owners of other parcels between that  
6 property and the current city boundary are *also* interested in annexation. In that respect,  
7 Ms. See offers only a weak statement that “the city is working ... [to]assemble other  
8 property owners within the proposed annexation area.” All told, the situation described in  
9 the Exception falls far short of a pending annexation.

10           Even if annexation petitions were advancing inexorably toward Walden Ranch,  
11 however, Surprise fails to acknowledge that no annexation of Walden Ranch could occur  
12 without the Walden Ranch developer’s agreement. The Exception is devoid of any  
13 reference to any discussion with that developer about annexation.

14           Finally, because West End’s extension was granted subject only to fulfillment of  
15 administrative formalities, the issue of an eventual annexation of Walden Ranch is a red  
16 herring. If, eventually, Surprise overcomes its contiguity barriers and obtains a sufficient  
17 number of landowner agreements to annexation, Surprise will then be free to discuss  
18 annexation with the Walden Ranch developer. That situation (if it ever occurs) is now,  
19 and will remain, irrelevant to the issue of the developers’ efforts to obtain a CAWS.  
20 West End’s request for an extension of time of sufficient length to allow ADWR to  
21 complete its data collection, and for the developer then to use that new data to prepare its  
22 application for a CAWS, has nothing to do with Surprise’s annexation efforts.

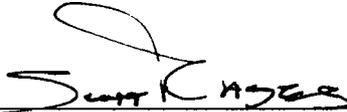
23           Surprise’s extensive discussion of annexation serves only to prove that Surprise’s  
24 true intent in the Exception is to avoid the absolute bar (by rule and statute) against a  
25 further appeal of Decision 69672. In the guise of an Exception, Surprise has merely  
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1 raised again the same arguments that it raised in 2006. Those arguments are  
2 inappropriate at this point (being more than 18 months late) and are irrelevant to the only  
3 issue now before the Commission: the reasonableness of West End's request for an  
4 extension.

5 For these reasons, West End respectfully requests that the Commission approve its  
6 requested extension, as recommended by the Staff and Administrative Law Judge.

7 DATED this 24th day of March, 2009.

8 JENNINGS, STROUSS & SALMON, P.L.C.

9  
10 By 

11 J. Scott Rhodes  
12 The Collier Center, 11th Floor  
13 201 East Washington Street  
14 Phoenix, Arizona 85004-2385  
Attorneys for Applicant, West End Water  
Company

15 ORIGINAL and 13 copies filed this 24th  
16 day of March, 2009, with:

17 Docket Control  
18 ARIZONA CORPORATION COMMISSION  
19 1200 West Washington Street  
Phoenix, Arizona 85007

20 COPY delivered this 24th day of  
21 March, 2009:

22 Marc E. Stern  
23 Administrative Law Judge  
24 Hearing Division  
25 ARIZONA CORPORATION COMMISSION  
26 1200 West Washington Street  
Phoenix, Arizona 85007

///

1 Ernest G. Johnson, Director  
2 Utilities Division  
3 ARIZONA CORPORATION COMMISSION  
4 1200 West Washington Street  
5 Phoenix, Arizona 85007

6 Blessing Chukwu  
7 ARIZONA CORPORATION COMMISSION  
8 1200 West Washington Street  
9 Phoenix, Arizona 85007

10 Janice Alward, Chief Counsel  
11 Legal Division  
12 ARIZONA CORPORATION COMMISSION  
13 1200 West Washington Street  
14 Phoenix, Arizona 85007

15 COPY mailed and e-mailed this 24th day of  
16 March, 2009, to:

17 Joan S. Burke  
18 Danielle D. Janitch  
19 OSBORN MALEDON PA  
20 2929 North Central Avenue  
21 Suite 2100  
22 Phoenix, Arizona 85012-2793  
23 Attorneys for City of Surprise

24 COPY mailed this 24th day of  
25 March, 2009, to:

26 City Attorney  
CITY OF SURPRISE  
12425 West Bell Road  
Surprise, Arizona 85374

By: Mary Lusk

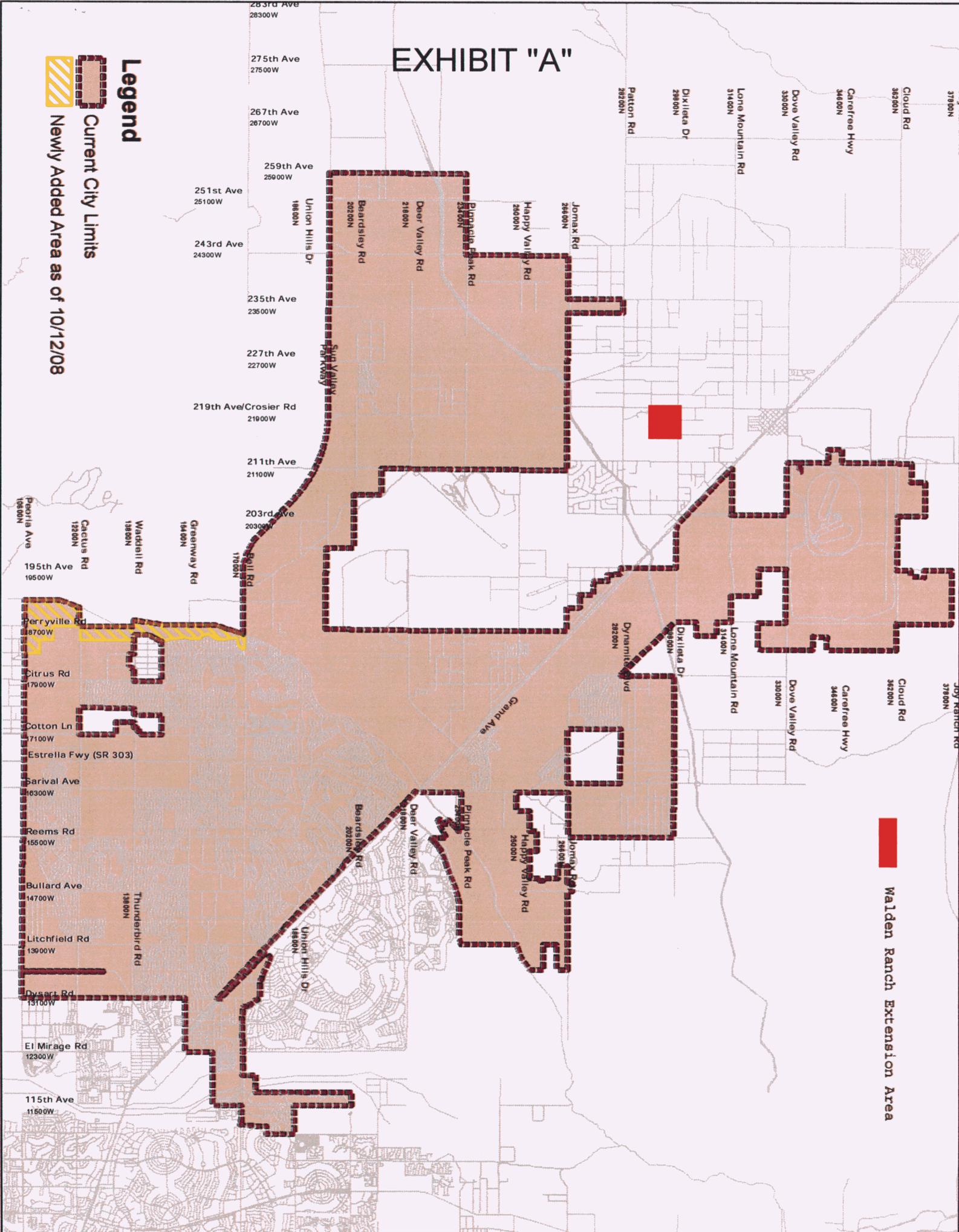
# EXHIBIT "A"

## Legend



Current City Limits

Newly Added Area as of 10/12/08



Walden Ranch Extension Area