

ORIGINAL

NEW APPLICATION



0000120289

1 **COMMISSIONERS**

- 2 **Kristin K. Mayes – Chairman**
- 3 **Gary Pierce**
- 4 **Paul Newman**
- 5 **Sandra D. Kennedy**
- 6 **Bob Stump**

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AZ CORP COMMISSION
DOCKET CONTROL

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 IN THE MATTER OF THE APPLICATION
 9 OF HYDRO-RESOURCES, INC. FOR A
 10 DETERMINATION THAT IT IS NOT
 11 ACTING AS PUBLIC SERVICE
 12 CORPORATION IN TUSAYAN, ARIZONA
 13 PURSUANT TO ART. 15, SECTION 2 OF
 14 THE ARIZONA CONSTITUTION

DOCKET NO. W-20770A-10-0473

Arizona Corporation Commission
DOCKETED

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14 **HYDRO-RESOURCES, INC.'S APPLICATION**
 15 **FOR A DETERMINATION THAT IT IS**
 16 **NOT ACTING AS A PUBLIC SERVICE CORPORATION**
 17 **IN TUSAYAN, ARIZONA**

18 Hydro-Resources, Inc. ("Hydro"), by and through undersigned counsel, hereby
 19 submits this Application requesting that the Arizona Corporation Commission
 20 ("Commission") determine that Hydro is not acting as a public service corporation in
 21 Tusayan, Arizona when it provides water to Tusayan Water Development Association
 22 ("TWDA"), the certificated public service corporation regulated by the Commission in
 23 Tusayan. Hydro does not fall within the definition of public service corporation in the
 24 Article 15, Section 2 of the Arizona Constitution, and also would not be considered a
 25 public service corporation under the factors outlined in *Natural Gas Service Co. v. Serv-Yu*
 26 *Cooperative*, 70 Ariz. 235, 219 P.2d 324 (1950). Therefore, the Commission should issue
 27 an order determining that Hydro is not acting as a public service corporation when it
 28 provides water to TWDA.

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 TWO NORTH CENTRAL AVENUE, SUITE 2200
 PHOENIX, ARIZONA 85004-4406
 (602) 364-7000

1 This application is made pursuant to a formal request of the Commission Legal
2 Division dated July 21, 2010. See letter to undersigned counsel from Robin R. Mitchell
3 attached as Exhibit "A" (a 30-day extension of the original deadline was granted by the
4 Legal Division in October).

5 **I. FACTUAL BACKGROUND.**

6 Hydro is an Arizona corporation created on April 7, 1994. Hydro's original
7 purpose and function was to explore for and secure additional water resources for private
8 businesses owned or operated by Hydro's ownership in Tusayan. The Commission's
9 Engineering Staff has inspected the Hydro facilities in Tusayan and is aware of the extent
10 of Hydro's physical plant and property located there. Hydro is not the certificated water
11 provider in the Tusayan area and does not provide water directly to any retail customer in
12 Tusayan. Rather, the certificated water provider in the Tusayan area is TWDA, an entity
13 that is wholly unrelated to Hydro. TWDA was formed in September 1978. TWDA holds
14 a Certificate of Convenience and Necessity ("CCN") from the Commission that was
15 granted in 1979, some 15 years before Hydro was even formed. *See* Decision No. 50492
16 (December 13, 1979). Hydro provides water, through facilities owned by Hydro and
17 Hydro's owners, to TWDA, which in turn sells water received from Hydro to certain of
18 TWDA's customers. TWDA bills its own customers for that commodity. Hydro is not the
19 only entity that sells water to TWDA; rather, on information and belief, TWDA also
20 receives water (or has in the past received water) from the National Park Service and
21 Anasazi Water Co. L.L.C.

22 Following the Commission Staff's inspection of Hydro's system in Tusayan and
23 interviews of Hydro's management, Staff requested that Hydro either apply for a CCN for
24 a service area in Tusayan (apparently, for the same area in which an existing regulated
25 public utility, TWDA, has a valid certificate) or file an application for a determination that
26 it is not operating as a public service corporation there. Since TWDA is the duly
27 certificated public service corporation in the area, and under the facts and circumstances
28

1 existing in Tusayan in the present day, Hydro now files this application to be adjudicated
2 not a public service corporation.

3 **II. ARGUMENT.**

4 **A. Introduction.**

5 Arizona courts have recognized that “Determining whether an entity is a public
6 service corporation requires a two-step analysis.” *Southwest Transmission Cooperative,*
7 *Inc. v. Arizona Corporation Commission*, 213 Ariz. 427, 430, 142 P.3d 1240, 1243 (App.
8 2006); *see also Southwest Gas Corporation v. Arizona Corporation Commission*, 169
9 Ariz. 279, 285-88, 818 P.2d 714, 720-23 (App. 1991)(using the two-step process). The
10 Commission also uses the same two-step analysis. *See In the Matter of the Application of*
11 *Solar City, Arizona Corporation Commission*, Docket No. E-20690A-09-0346, Decision
12 71795 (July 12, 2010).

13 First, “we consider whether the entity satisfies the literal and textual definition of a
14 public service corporation under Article 15, Section 2 of the Arizona Constitution.”
15 *Southwest Transmission*, 213 Ariz. at 430, 142 P.3d at 1243. “Second, we evaluate
16 whether the entity’s business and activity are such as to make its rates, charges and
17 methods of operations a matter of public concern, by considering the eight factors
18 articulated” in *Serv-Yu. Id.* at 430, 142 P.3d at 1243 (quotation marks omitted). As held in
19 *Southwest Transmission*, “Merely meeting the textual definition [in Article 15, Section 2]
20 does not establish an entity as a ‘public service corporation.’” *Id.* at 431, 142 P.3d at 1244.
21 Rather, “To be a public service corporation, and entity’s business and activities must be
22 such as to make its rates, charges and methods of operation, a matter of public concern,
23 clothed with a public interest to the extent contemplated by law which subjects it to
24 governmental control – its business must be of such nature that competition might lead to
25 abuse detrimental to the public interest.” *Id.* at 431-32, 142 P.3d at 1244-45 (quotation
26 marks omitted); *see also Solar City, Decision 71795* at 27 (*Serv-Yu* factors “inform the
27 necessary public interest analysis required under the Constitution and by Arizona courts”).
28

1 **B. Hydro Does Not Meet the Textual Definition of a Public Service Corporation In Tusayan Under the Arizona Constitution.**

2 The Arizona Constitution defines “public service corporation” as including “all
3 corporations other than municipal engaged . . . in furnishing water for irrigation, fire
4 protection, or other public purposes” Ariz. Const., Art. 15, sec. 2. The word
5 “furnish” in the constitutional provision “connoted a transfer of possession.” *Southwest*
6 *Transmission*, 213 Ariz. at 431, 142 Ariz. at 1244; *see also Williams v. Pipe Trades*
7 *Industry Program of Arizona*, 100 Ariz. 14, 20, 409 P.2d 720, 724 (1966)(“furnish . . .
8 connotes a transfer of possession”); Decision 71795 at 22 (same). Because the definition
9 concerns public service corporations, the constitutional provision requires a transfer of
10 possession of the relevant commodity to the public. “It was never contemplated that the
11 definition of public service corporations as defined in our constitution be so elastic as to
12 fan out and include businesses in which the public might be incidentally interested.”
13 *Arizona Corporation Commission v. Nicholson*, 108 Ariz. 317, 321, 497 P.2d 815, 819
14 (1972).

15 Hydro, which provides water to TWDA, albeit through facilities owned by Hydro
16 and Hydro’s ownership, does not fall within this constitutional definition. Hydro does not
17 directly sell water to the public in Tusayan; rather, the regulated CCN holder, TWDA,
18 fulfills the functions of a public service corporation by selling the water to the public.
19 Because Hydro does not transfer possession of water to the public, it does not fall within
20 the definition of a “public service corporation” in Article 15, section 2 of the Arizona
21 Constitution.

22 **C. Hydro is Not a Public Service Corporation In Tusayan Under the Eight**
23 ***Serv-Yu* Factors.**

24 **1. Hydro’s Actions Affecting the Public.**

25 Concerning the first *Serv-Yu* factor, “a court considers whether a company’s actions
26 affect ‘so considerable a fraction of the public that it is public in the same sense in which
27 any other may be called so.’” *Southwest Transmission*, 213 Ariz. at 432, 142 P.3d at 1245
28

1 (quoting *Serv-Yu*, 70 Ariz. at 240, 219 P.2d at 327). Thus, in *Southwest Gas Corporation*
2 *v. Arizona Corporation Commission*, 169 Ariz. 279, 818 P.2d 714 (App. 1991), the Court
3 of Appeals found that a company which sold natural gas to only “ten direct consumers of
4 natural gas in Arizona” was not a public service corporation subject to regulation by the
5 Commission. *Id.* at 287, 818 P.2d at 722. The Commission has noted that “the analysis
6 should focus on the substance of what an entity does, not the form.” Decision 71795 at 30.

7 Hydro provides water to the certificated water utility in the area, TWDA, which in
8 turn sells the water received from Hydro to TWDA’s customers in Tusayan. These factors
9 do not convert Hydro into a public service corporation requiring regulation by the
10 Commission. Moreover, the fact that the Commission already has the power to regulate
11 TWDA, the public service corporation to which Hydro is providing some of its water
12 supply, indicates that the Commission already has the means in place to meet the interests
13 of the public in Tusayan, and strongly supports a finding that Hydro is not a public service
14 corporation.

15 **2. A Dedication to the Public.**

16 As held by the Court of Appeals, “whether a company has dedicated its property to
17 public use is a question of intent shown by the circumstances of the individual case. . . .
18 An owner . . . must at least have undertaken to engage in business and supply at least some
19 of his commodity to some of the public.” *Southwest Transmission*, 213 Ariz. at 432, 142
20 P.3d at 1245 (citations, quotation marks and brackets omitted); *see also* Decision 71795 at
21 34 (same).

22 In this instance, Hydro has not “dedicated” any of its property to the public use.
23 Rather, it maintains its water production and distribution assets for a private purpose, and
24 sells a commodity to the TWDA (as do other sellers). TWDA in turn sells the commodity
25 to the public. Hydro is not the public service corporation providing water utility service in
26 Tusayan; TWDA is.

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3. Articles of Incorporation, Authorization, and Purposes.

Hydro's Articles of Incorporation (attached as Exhibit "B") do not provide for activities related to a public service corporation. As stated above, Hydro was formed to explore for and secure additional water resources for its ownership's private businesses; Article III "Purpose" is consistent with this corporate mission, and the recited "Initial Business" in Article IV of "drilling of a well" speaks entirely to supplementing a private water supply rather than becoming a public water utility. This *Serv-Yu* factor also favors a finding that Hydro is not a public service corporation.

4. Dealing with the Service of a Commodity in Which the Public Has Been Generally Held to Have an Interest.

To the extent that Hydro deals with water, it is dealing with a commodity in which the public has an interest, but this factor standing alone does not render Hydro a public service corporation. See *Arizona Corporation Commission v. Nicholson*, 108 Ariz. 317, 320, 497 P.2d 815, 818 (1972) ("this alone does not carry the presumption that all use of service in connection with such water is a dedication to the public use").

5. Monopolizing or Intending to Monopolize a Territory with a Public Service Commodity.

As the Commission noted, "Existence of a traditional monopoly may be one indication that there is a need to regulate an entity that is providing an essential public commodity" Decision 71795 at 45. Hydro has never monopolized or intended to monopolize any territory for the provision of water. Rather, TWDA holds the CCN from the Commission for Tusayan, not Hydro. Hydro does not even have a monopoly among water suppliers to TWDA, which also receives water, upon information and belief, from the Anasazi Water Co., LLC and previously from the National Park Service. This lack of a monopoly or intent to monopolize favors a finding that Hydro is not a public service corporation in Tusayan. See *Southwest Transmission*, 213 Ariz. at 433, 142 P.3d at 1246; *Southwest Gas*, 169 Ariz. at 287, 818 P.2d at 722.

1 **6. Acceptance of Substantially All Requests for Service.**

2 As noted by the Commission, “The sixth *Serv-Yu* factor looks to whether [an entity]
3 accepts essentially all requests for service.” Decision 71795 at 48. Hydro does not accept
4 any requests for service from the public, but rather sells water to TWDA. Any member of
5 the public seeking water service within the CCN area of TWDA would request service
6 from TWDA, not Hydro. This factor also favors finding that Hydro is not a public service
7 corporation.

8 **7. Service Under Contracts and Reserving the Right to Discriminate.**

9 As noted by the Commission, “If the service is rendered pursuant to contract or
10 limited membership, it is difficult to hold that one has expressly held himself out as ready
11 to serve the public generally.” *Solar City*, Decision 71795 at 49 (quoting *Serv-Yu*, 70 Ariz.
12 at 239, 219 P.2d at 327). A “highly detailed and individually tailored contract” also
13 supports a finding that an entity is not acting as a public service corporation. *Id.* Hydro
14 does not have contacts with the Tusayan public for the direct delivery of potable water
15 there; the billing arrangements for such water go through TWDA. Nothing prevents Hydro
16 from refusing to provide water to any member of the public requesting water service;
17 instead TWDA’s CCN grants TWDA the right (indeed, the obligation) to provide water
18 service to any customer requesting water service. Hydro does not advertise for customers
19 for the sale of water. Hydro does not hold itself out as being ready, willing or able to serve
20 the general public. These facts favor a finding that Hydro is not a public service
21 corporation.

22 **8. Actual or Potential Competition with Public Service**
23 **Corporations.**

24 According to the Commission, “The concern under this factor is that entities that
25 take business away from public service utilities should be under like regulatory restrictions
26 if effective governmental supervision is to be maintained.” *Solar City*, Decision 71795 at
27 52. In this instance, this last *Serv-Yu* factor also supports a finding that Hydro is not a
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1 public service corporation in Tusayan. There is no actual or potential competition between
2 Hydro and TWDA, the certificated water provider in the Tusayan area. Rather, Hydro is
3 one of a number of water suppliers to TWDA, but does not provide retail service in any
4 competitive manner. This factor also strongly favors a finding that Hydro is not a public
5 service corporation in Tusayan.

6 **III. CONCLUSION.**

7 Hydro does not fall within the constitutional definition of a “public service
8 corporation” in Tusayan because it does not transfer possession of water to any member of
9 the public, but rather to a certificated water utility, TWDA. Moreover, consideration of the
10 eight *Serv-Yu* factors supports a finding that Hydro is not a public service corporation in
11 Tusayan, and the public interest does not favor regulating it as one. For the foregoing
12 reasons, the Commission should find that Hydro is not acting as public service corporation
13 when it provides water to TWDA, a regulated public service corporation which provides
14 water to customers within in TWDA’s Tusayan, Arizona CCN area.

15 RESPECTFULLY SUBMITTED this 19th day of November, 2010.

16 BRYAN CAVE LLP

17 By 
18 _____
19 Steven A. Hirsch, #006360
20 Rodney W. Ott, #016686
21 Two N. Central Avenue, Suite 2200
22 Phoenix, AZ 85004-4406
23 Attorneys for Hydro-Resources, Inc.

24 **ORIGINAL and 13 COPIES** of the foregoing
25 filed this 19th day of November, 2010, with:

26 Docket Control Division
27 Arizona Corporation Commission
28 1200 W. Washington
Phoenix, AZ 85007

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

1 **COPY** of the foregoing hand-delivered this
2 19th day of November, 2010, to:

3 Hearing Division
4 Arizona Corporation Commission
5 1200 W. Washington
6 Phoenix, AZ 85007

6 Ernest G. Johnson
7 Director, Utilities Division
8 Arizona Corporation Commission
9 1200 W. Washington
10 Phoenix, AZ 85007

10 Janice Alward, Esq.
11 Chief Counsel, Legal Division
12 Arizona Corporation Commission
13 1200 W. Washington
14 Phoenix, AZ 85007

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Exhibit A

COMMISSIONERS
KRISTIN K. MAYES – Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



ERNEST G. JOHNSON
Executive Director

ARIZONA CORPORATION COMMISSION

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July 21, 2010

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Bryan Cave, LLP
One Renaissance Square
Two North Central Ave., Suite 2200
Phoenix, AZ 85004-4406

Re: Hydro Resources, Inc.
(Tusayan Water Development Association, Inc. – Docket No. W-02350A-10-0163)

Dear Steve:

Thank you for taking the time to talk with Arizona Corporation Commission Utilities Division Staff ("Staff") on July 12, 2010, regarding Hydro Resources, Inc. ("Hydro") and its relationship with Tusayan Water District Association ("TWDA"). Certain statements made by TWDA in its rate application filed on April 29, 2010¹ prompted Staff to seek more information concerning the arrangement between TWDA and Hydro.

TWDA stated the following in its rate application:

There have been two separate water distribution systems in Tusayan. The water supply that TWDA's customers receive is dictated by the customer's location and the water system to which they are connected. TWDA purchases water from the two water companies and bills the customers for the water used. The cost of the water is passed on to the customer... TWDA does not own the distribution systems, lines or any other property, plant and equipment. TWDA has no ownership or rights to the distribution lines. Those are owned and maintained by the two water companies.

As you have discussed with Staff, Hydro is one the two water companies from which TWDA purchases its water. Hydro also owns the plant, distribution systems and other property that is used to supply water. These facts suggest to Staff that Hydro may be acting as a public service corporation within the meaning of Article 15, section 2 of the Arizona Constitution.

Article 15, section 2, in relevant part, defines the term "public service corporation" as "[a]ll corporations other than municipal engaged in furnishing..... water for irrigation, fire protection, or other public purposes..." Arizona Revised Statute Section 40-281 requires that all

¹ Docket No. 10-0163

Steven A. Hirsch

July 21, 2010

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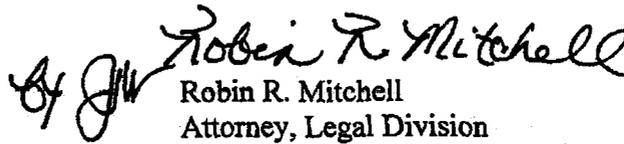
public service corporations first obtain a Certificate of Convenience and Necessity prior to installing any facilities.

Staff requests that Hydro submit an application for a Certificate of Convenience and Necessity ("CC&N"). For your convenience, an application form for a new Certificate of Convenience and Necessity may be found on the Commission's website at <http://www.azcc.gov>. In the alternative, Hydro may file a request to be adjudicated not a public service corporation. Staff would further request that an application be made for either within ninety (90) days from the date of this letter.

Any failure to take action as suggested above may result in the filing of a complaint and a petition for an order to show cause why Hydro should not be subject to Commission regulation.

The Commission Staff appreciates your prompt attention to this matter. If you have any questions regarding this issue, please feel free to contact me at (602) 542-3402.

Sincerely,


Robin R. Mitchell
Attorney, Legal Division

RRM:ah

cc: Chris Brainard, Tusayan Water Development Association, Inc.
Garry D. Hays, Esq., Attorneys for Tusayan Ventures LLC

Exhibit B

1 2 9 0 7

STATE OF ARIZONA
ACC/FAX
DATE FILED

ARTICLES OF INCORPORATION
OF
HYDRO-RESOURCES, INC.

APR 07 1994
DATE APPR 4-7-94
TERM
BY Christine O'Neil
715536-6

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, having associated ourselves together for the purpose of forming a corporation under and by virtue of the laws of the State of Arizona, do hereby adopt the following Articles of Incorporation:

ARTICLE I - NAME

The name of this corporation shall be:
Hydro-Resources, Inc. *OK EWA*

ARTICLE II - INCORPORATORS

The names and addresses of the incorporators are:
Elling Halvorson
12515 Willows Road NE, Suite 200
Kirkland, Washington 98034

John Seibold
241 East Reno Avenue
Las Vegas, Nevada 89119

ARTICLE III - PURPOSE

The purpose for which this corporation has been organized is to transact any or all lawful business for which corporations may be incorporated under the laws of the State of Arizona, as they may be amended from time to time.

ARTICLE IV - INITIAL BUSINESS

The character of the business the corporation initially intends to engage in Arizona is the drilling of a well.

ARTICLE V - AUTHORIZED CAPITAL

The corporation is hereby authorized to issue One Million (1,000,000) shares of common stock, having a no par value per share.

3 2 9 0 3

ARTICLE VI - BOARD OF DIRECTORS

The affairs of the corporation shall be conducted by an initial Board of Directors consisting of two directors. Each member of the Board of Directors after the initial Board of Directors shall be elected by the shareholder(s) at the annual meeting and each member shall serve until such member's successor is elected and qualified. Until the first annual meeting or until their successors are elected and qualified, the following persons shall be the initial members of the Board of Directors:

Elling Halvorson
12515 Willows Road NE, Suite 200
Kirkland, Washington 98034

John Seibold
241 East Reno Avenue
Las Vegas, Nevada 89119

The number of persons to serve on the Board of Directors shall be fixed by the Bylaws.

ARTICLE VII - STATUTORY AGENT

This corporation does hereby appoint Tom Chauncey II, 201 North Central Avenue, Suite 3300, Phoenix, Arizona 84073, who has been a bona fide resident of Arizona for at least three years, as its initial statutory agent.

ARTICLE VIII - KNOWN PLACE OF BUSINESS

The address of the corporation's known place of business in Arizona is Highways 64 and 180, Grand Canyon, Arizona 86023.

ARTICLE IX - STOCK RIGHTS AND OPTIONS

The corporation shall have authority, as provided under the laws of the State of Arizona, to create and issue rights and options entitling the holders thereof to purchase shares of stock of the corporation. The issuance of such rights and options, whether or not to directors, officers or employees of the corporation or of any affiliate thereof and not to the shareholders generally, need not be approved or ratified by the shareholders of the corporation or be authorized by or be consistent with a plan approved or ratified by the shareholders of the corporation.

3 2 3 0 3

ARTICLE X - DISTRIBUTIONS FROM CAPITAL SURPLUS

The Board of Directors may from time to time, without shareholder approval, distribute on a pro rata basis to the shareholders, from and to the extent of the capital surplus of the corporation, a portion of the corporation's assets, in cash or property.

ARTICLE XI - DIRECTOR'S LIABILITY

Except as hereinafter provided in this Article, the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as director is eliminated. Nothing in this Article shall eliminate or limit the liability of a director for any of the following:

(a) Any breach of the director's duty of loyalty to the corporation or its shareholders;

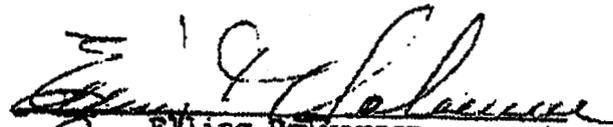
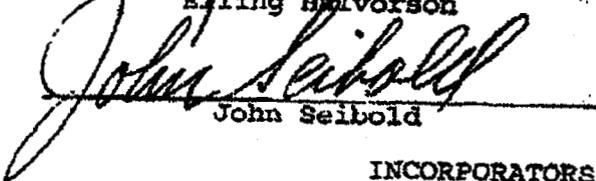
(b) Acts or omissions which are not in good faith or which involve intentional misconduct or a knowing violation of law;

(c) Authorizing the unlawful payment of a dividend or other distribution on the corporation's capital stock or the unlawful purchase of its capital stock;

(d) Any transaction from which the director derived an improper personal benefit; or

(e) A violation of Section 10-041, Arizona Revised Statutes, as amended from time to time, regarding director conflicts of interest.

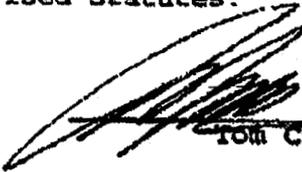
In witness whereof, we have hereunto set our hands this 3rd day of March, 1994.


Eling Halvorson

John Seibold

INCORPORATORS

DATE: April 7, 1994
TO: ARIZONA CORPORATION COMMISSION
INCORPORATING DIVISION
1300 WEST WASHINGTON
PHOENIX, ARIZONA 85007
RE: HYDRO-RESOURCES, INC.

Please be advised that Tom Chauncey II, having been designated the statutory agent for the above-referenced corporation, approves of such designation and consents to act in such capacity. However, Tom Chauncey II specifically reserves the right to resign as statutory agent in accordance with the provisions of the Arizona Revised Statutes.


Tom Chauncey II