

ORIGINAL



0000122020

BEFORE THE ARIZONA CORPORATION COMMISSION
RECEIVED

Arizona Corporation Commission

DOCKETED

JAN 14 2011

2011 JAN 14 P 3:23

AZ CORP COMMISSION
DOCKET CONTROL

DOCKETED BY

COMMISSIONERS

GARY PIERCE, Chairman
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP
BRENDA BURNS

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS AGAINST
RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**NOTICE OF FILING
REPLY BRIEF OF THE ESTATE OF CHARLES J. DAINS**

The Estate of Charles J. Dains hereby files its Reply Brief in the above-captioned docket.
RESPECTFULLY SUBMITTED on January 14, 2011.

Craig A. Marks
Craig A. Marks, PLC
10645 N. Tatum Blvd
Suite 200-676
Phoenix, Arizona 85028
(480) 367-1956
Craig.Marks@azbar.org
Attorney for the Estate of Charles J. Dains

1
2
3
4
5
6
7
8
9
10
11
12
13
14

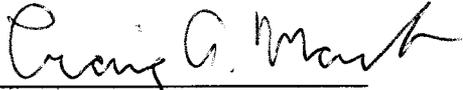
1 Original and 13 copies **filed**
2 on January 14, 2011, with:

3
4 Docket Control
5 Arizona Corporation Commission
6 1200 West Washington
7 Phoenix, Arizona 85007

8
9 Copy **mailed and e-mailed**
10 on January 14, 2011, to:

11
12 Stephen A. Hirsch/Stanley B. Lutz
13 Bryan Cave LLP
14 Two N. Central Avenue, Suite 2200
15 Phoenix, AZ 85004-4406

16
17 Robin Mitchell
18 Staff Counsel
19 Arizona Corporation Commission
20 1200 West Washington
21 Phoenix, AZ 85007

22
23
24
25 By: 
26 Craig A. Marks

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

GARY PIERCE, Chairman
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP
BRENDA BURNS

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS AGAINST
RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

REPLY BRIEF OF THE ESTATE OF CHARLES J. DAINS

1
2 The Estate of Charles J. Dains (“Dains Estate”) hereby replies to briefs filed on
3 December 15, 2011, by Utilities Division Staff (“Staff”) and Rigby Water Company (“Rigby”) in
4 the above-captioned docket.

5 **I. REPLY TO STAFF**

6 The Dains Estate appreciates and agrees with Staff’s conclusion that “Rigby should
7 refund the advance less any refunds already made.”¹ Essentially, Staff concluded that it was
8 Rigby’s obligation to file the Main Extension Agreement between Rigby and Mr. Dains
9 (“MXA”) as required by A.A.C. R14-2-406 (“Rule”).² Rigby did not comply with the Rule, so
10 A.A.C. R14-2-406(M) applies. Staff concluded that: “Rigby should refund the advance less any
11 refunds already made.”³

12 However, there is one misconception that should be cleared up. Staff states:

13 Staff witness Bradley Morton testified that there are a number of items and documents
14 that must be provided prior to approval of an MXA. Unfortunately, according to the
15 evidence presented in this matter, certain items on the checklist could not be presented to
16 Staff.

17 In fact, Rigby had all the information it was required to submit to Staff.

¹ Staff Brief at 3:7:8.

² For convenience, a copy of the MXA is attached to this Reply Brief as Exhibit A. The MXA was admitted into evidence as Exhibit RWC-5 to Hearing Exhibit R-1.

³ *Id.*

1 Mr. Morton testified concerning the information that Staff requires to process an MXA.
 2 He provided (Exhibit S-2) a copy of Staff's current checklist to determine whether a filed MXA
 3 satisfies the requirements of R14-2-406.⁴

4 The following table lists each requirement on Staff's checklist and then shows that Rigby
 5 could easily have satisfied each applicable requirement.

6 **Table 1 – MXA Filing Requirements**

	Requirement	Available to Rigby?	Reference
1	Name and Address of Applicant	Yes.	Rigby presumably knew its own address. The address was also on file with the Commission.
2	Proposed Service Address	Yes.	MXA Exhibit A shows that the development was located at the intersection of 107 th Avenue and Roeser Road.
3	Description of Requested Service	Yes.	Domestic Water Service to Tierra Mobile Ranchettes Estates. (MXA, p.1 and ¶ 15.).
4	Description and Map of Line Extension	Yes.	MXA Exhibit A.
5	Itemized Cost Estimate to Include materials, Labor and Other Costs as Needed	Yes.	MXA Exhibit B.
6	Payment terms	Yes.	The MXA provides that the developer will fund all construction.
7	A Clear, Concise Statement of Refunding Provisions, If Applicable	Yes.	MXA ¶ 16.
8	Utilities' Estimated Start and Completion Dates	Yes.	The construction was complete and Rigby was providing water service at the time the MXA was executed. Rigby knew when it started and when it was complete.
9	Signature from Both Parties	Yes.	MXA, signature pages.
10	Water Use Data Sheet	Yes.	This was Rigby's requirement to prepare and file. Rigby had all the information it required concerning the development's expected water usage. See Exhibit RWC-8 to R-1.

⁴ See Exhibit S-2.

	Requirement	Available to Rigby?	Reference
11	DEQ Plan or Approval to Construct or Compliance Report	Yes.	See Exhibits Dains-12 and Dains 13. The Approval to Construct was originally issued on August 28, 1985, and was reinstated on May 2, 1996. Because Rigby never asked for a copy, the reasonable conclusion is that Rigby already had a copy of this document. Further, a copy of the ATC was readily available from Maricopa County.
12	Confirm within CC&N	Yes.	MXA, page 1, recital 3.
13	Hook Up Fee	Not Applicable.	

1 There can be no doubt that Rigby had everything it needed to file the MXA with Commission
2 Staff.

3 There was a great deal of testimony concerning whether Mr. Dains provided copies of
4 invoices and as-built drawings, as required by the MXA. Mr. Dains' son, Charles D. Dains,
5 testified that their construction lender, Hilton Financial provided copies of invoices to Rigby.⁵
6 Rigby disagreed.⁶ However, this testimony is largely irrelevant. The Commission's regulations
7 do not require that a water utility submit copies of invoices as part of its filing to get an MXA
8 approved. Further, as shown above, paid invoices are not on Staff's checklist of information
9 required for it to approve the MXA.

10 In conclusion, Rigby had everything it needed to submit the executed MXA for approval
11 in 1999. Rigby failed to do so. Therefore, A.A.C. R14-2-406(M) requires that Rigby
12 immediately refund \$209,737.25 to the Dains Estate; the total amount advanced (\$236,998.68),
13 less actual refunds made (\$27,261.43).⁷

14 **II. REPLY TO RIGBY**

15 **A. Introduction**

16 This complaint was originally brought by Mr. Charles J. Dains, who unfortunately died
17 before justice could be done. Rigby's Brief is now filled with the same blend of misstatements,

⁵ Tr. at 45:9-16.

⁶ Tr. at 103:3-12.

⁷ See Initial Brief at pp. 3-4.

1 mischaracterizations, and obfuscations that filled its testimony. Mr. Charles D. Dains, Mr.
2 Dains' son, accurately characterized Rigby's misguided litigation strategy as "Blame the dead
3 guy."⁸

4 Despite Rigby's attempts to blame the dead guy for its own failures, the Dains Estate set
5 the record straight in its Initial Brief:

- 6 1. Through much of 1985 through 1997, Rigby was out of compliance with County
7 water standards.
- 8 2. Rigby's non-compliance caused the Dains Partnership to incur significant delay costs.
- 9 3. Rigby demanded that the Dains Partnership oversize, without compensation, a water-
10 storage facility.
- 11 4. Mr. Dains did his best to provide Rigby all documents that it claimed were needed.
- 12 5. The Dains Partnership completed all required facilities, including the oversized
13 water-storage facility, by July 1997.
- 14 6. Rigby accepted the required facilities and began providing water service in July 1997.
- 15 7. Rigby and Mr. Dains agreed that Rigby would purchase the Dains-built facilities—
16 including the over-sized storage facilities—for approximately \$240,000, to be paid
17 through refunds over 20 years.
- 18 8. In 1998, Rigby prepared and sent to Mr. Dains an estimated refund schedule showing
19 that refunds made over 20 years would be approximately \$244,000.
- 20 9. Rigby did not send Mr. Dains a draft MXA for review until 1998, one year after
21 Rigby had accepted the Dains facilities.
- 22 10. The MXA was not executed until May 1999, approximately two years after Rigby
23 began service to the Dains development.
- 24 11. The MXA stipulates that the exact cost of the advanced facilities to be refunded was
25 \$236,998.68.

⁸ Tr. at 24:25 – 25:2. "... Complainant actively precluded compliance with the Commission's regulations, despite being fully informed of those regulations. Rigby Brief at 1:26-27.

1 12. Rigby had everything it needed to file the MXA for approval.

2 13. Although it was required by law to do so, Rigby never filed the MXA for approval.

3 14. Rigby has only refunded \$27,261.43 over the first 11 years of the MXA, far less than
4 promised to Mr. Dains.

5 15. Rigby has agreed to be acquired by the City of Avondale for \$2,560,000, a huge
6 windfall.

7 16. As required by law and equity, Rigby should immediately refund \$209,737.25 to the
8 Dains Estate, the total amount advanced (\$236,998.68), less actual refunds made
9 (\$27,261.43).⁹

10 17. As required by A.A.C. R14-2-406(M), Rigby should have provided the refund no
11 later than the year 2000. Therefore, to compensate the Dains Estate for the lost time-
12 value of the money, Rigby should also provide interest on the unrefunded balance.

13 **B. Rigby's Brief Is Full of Misstatements, Misrepresentations, and Obfuscations**

14 As discussed, Rigby's Brief is full of misstatements, misrepresentations, and
15 obfuscations. The Dains Estate replies as follows:¹⁰

16 **Rigby Statement:** *"While Mr. Dains' estate now alleges that Terra Ranchettes was not*
17 *developed until the mid-1990s due to Rigby's non-compliance with certain regulations, the*
18 *evidence at the hearing demonstrated that Mr. Dains never actually requested service at that*
19 *time.*¹¹

20 **Dains Response:** It would have been a waste of time to request service when Rigby was
21 out of compliance. Rigby's water quality was not compliant with the Arizona Safe Drinking
22 Water Act, beginning in 1985 and continuing for an undetermined time. Rigby was again out of

⁹ See Initial Brief at pp. 3-4.

¹⁰ The Dains Estate will not reply to every one of Rigby's erroneous statements. This would unnecessarily increase the size of this Reply Brief. If the Dains Estate's does not reply to a particular statement, it does not mean the Dains Estate agrees that the statement is accurate or relevant.

¹¹ Rigby Brief at 2:11-15.

1 compliance because of inadequate storage capacity, beginning in early 1994 and continuing for
2 several years.¹²

3 **Rigby Statement:** “*Mr. Dains’ estate now claims that no request was made because*
4 *Rigby was not in compliance with all applicable regulatory requirements. However, the evidence*
5 *actually reveals that Rigby’s compliance status was irrelevant to development.*¹³

6 **Dains Response:** There is no evidence to support Rigby’s amazing statement.

7 Rigby suggests that its March 19, 1985, will-serve letter somehow supports its view.¹⁴

8 First, this makes no sense, because the 1985 will-serve letter was obviously issued in response to
9 a request for service by Mr. Dains. Second, Rigby’s commitment was expressly conditioned on
10 approval by, among others, the Arizona Department of Health Services and Maricopa County.¹⁵

11 Then, one month later on April 22, 1985, the Maricopa County Health Department told Mr.
12 Dains that he could not develop his subdivision because Rigby was not compliant with the
13 Arizona Safe Drinking Water Act.¹⁶ Rigby’s compliance status was not only relevant; it actually
14 prevented development for many years.

15 **Rigby Statement:** *Mr. Dains simply chose not to develop the subdivision, and*
16 *subsequently chose not to do anything with the parcel for approximately ten years, including*
17 *numerous years when Rigby was fully compliant.*¹⁷

18 **Dains Response:** The record does not reveal when Rigby was fully compliant. There is
19 no evidence when Rigby resolved its 1985 compliance issue. Rigby’s witness also had no
20 knowledge as to Rigby’s water-compliance status from 1991 through 1994.¹⁸ In 1994, Rigby
21 was again out of compliance, continuing for several years thereafter. Overall, it appears that
22 Rigby was out of compliance for many if not most of the years from 1985 through 1997.

¹² Exhibit Dains-1 at 2, CDD-2; Exhibit Dains-9.

¹³ Rigby Brief at 2:15-18

¹⁴ Exhibit RWC-16.

¹⁵ Exhibit R-16.

¹⁶ Exhibit Dains-1 at CDD-2.

¹⁷ Rigby Brief at 2:22 – 3:2.

¹⁸ Tr. at 135:21 – 136:8.

1 Rigby's continual non-compliance prevented development, which had terrible
2 consequences for the Dains family:

3 My father and I were not big developers, but we did think that we had a chance to help
4 provide for his retirement and our family. The first consequence of Rigby Water's
5 noncompliance was that our partners backed out. They took 50 acres for later development
6 and we retained 30 acres. We were ready to immediately begin developing our 30-acre parcel
7 in 1993, but are plans were thwarted by Rigby Water's inability to provide water service. We
8 were forced to carry a high-interest note and pay real estate taxes for more than ten years
9 before we could move forward. This was a huge financial set-back for us.¹⁹

10 *Rigby Statement:* "Rigby was required to enter into a mainline extension agreement with
11 Mr. Dains."²⁰

12 **Dains Response:** This is true, but irrelevant. Rigby was required to draft an agreement,
13 provide it to Mr. Dains for review and editing, and then finalize and file the executed agreement
14 with Staff, all before construction began. Instead, Rigby did not even begin negotiating an MXA
15 until 1998, a year after construction was completed in 1997.²¹

16 *Rigby Statement:* "Mr. Wilkinson provided Mr. Dains with a blank mainline extension
17 agreement within weeks of being notified that construction had started."²²

18 **Dains Response:** There is simply no credible evidence to support this statement. Both
19 parties endeavored to supply all documentary evidence for review, but there is no documentary
20 evidence that any draft MXA was provided before July 21, 1998, when Rigby then sent the
21 Dains Partnership a draft Main Extension Agreement ("MXA") for review.²³ Mr. Wilkinson
22 provided prefiled direct testimony on behalf of Rigby.²⁴ In Mr. Wilkinson's direct testimony, he
23 never claims that he provided a draft MXA before July 21, 1998. Mr. Wilkinson was
24 specifically asked on cross-examination about his supposed efforts to get an MXA finalized:

25 Q. Now, how did you attempt to get a mainline extension agreement finalized before
26 construction began?

¹⁹ Dains-1 at 3:1-7.

²⁰ Rigby Brief at 3:22-23.

²¹ Tr. at 84:25 – 85:4; 96:9-13; Exhibit R-1 at RWC-3.

²² Rigby Brief at 4:5-7.

²³ Exhibit R-1 at RWC-3.

²⁴ Exhibit R-1.

1 A. By talking to Charlie, sending him the rules.²⁵

2 All Mr. Wilkinson could offer was a vague memory that he might have sent a draft to Mr. Dains
3 at some time before 1998.

4 Q. But you never ever in that time period actually provided Mr. Dains a copy of, or at
5 least we can't find it in writing, that you provided Mr. Dains a copy of a main extension
6 agreement during that time frame?

7 A. I believe I did.

8 Q. You don't have any evidence in writing of that though, do you?

9 A. Just my memory.

10 Q. And if you had found that in your review of the files, you would probably have
11 attached it to your testimony?

12 A. I would have.

13 Q. And in fact, the first letter that you found attaching the main extension agreement was
14 in 1998; is that correct?

15 A. Yes.²⁶

16 Further, all this so-called evidence about alleged difficulties getting an MXA finalized is
17 just obfuscation. Any alleged difficulties are irrelevant. The relevant facts are clear. As
18 discussed in Section I, *supra*: the parties did ultimately execute an MXA; Rigby had everything
19 it needed to file the MXA for approval; and Rigby inexcusably failed to make the filing.

20 *Rigby Statement: "Despite the numerous follow up discussions outlined by Mr. Wilkinson*
21 *at the hearing, Mr. Dains did not respond to Rigby's requests to enter into a mainline extension*
22 *agreement."*²⁷

23 **Dains Response:** This is more obfuscation. As discussed in the previous response, there
24 is no credible evidence that Mr. Wilkinson sent Mr. Dains a draft MXA for review before July
25 21, 1998. There is no evidence at all of any problems finalizing and executing the draft after that
26 date.

27 The July 21, 1998, cover letter is very short and clear:

28 Dear Charlie:

²⁵ Tr. at 137:13-15.

²⁶ Tr. at 141:6-21.

²⁷ Rigby Brief at 4:10-12.

1 Enclosed for your review is a draft copy of the Main Extension Agreement applicable to
2 your Terra Ranchettes Estates Subdivision. Please review the agreement and offer any
3 comments you may have.

4 I have not included any of the exhibits as yet. Upon your review and receipt of your
5 comments, I will proceed with the exhibits and finalize the agreement for signature.

6 Sincerely,

7
8 Fred T. Wilkinson

9 President²⁸

10 There is no hint of any history of previous negotiation difficulties or any references to previous
11 drafts having been supplied.

12 Again, any alleged difficulties are irrelevant. The relevant facts are clear. As discussed
13 in Section I, *supra*: the parties did ultimately execute an MXA; Rigby had everything it needed
14 to file the MXA for approval; and Rigby inexcusably failed to make the filing.

15 Rigby Statement: “Instead, in or about March 1996, Mr. Dains proceeded with the
16 unilateral development of Terra Ranchettes, including installation of the water infrastructure.”²⁹

17 Dains Response: The evidence contradicts this statement. Rigby specified the
18 infrastructure to be constructed—including the oversized storage tank—required Mr. Dains to
19 build and pay for it, and accepted the completed construction.³⁰ Development was hardly
20 unilateral.

21 Again, any alleged development difficulties are irrelevant. The relevant facts are clear.
22 As discussed in Section I, *supra*: the parties did ultimately execute an MXA; Rigby had
23 everything it needed to file the MXA for approval; and Rigby inexcusably failed to make the
24 filing.

²⁸ Exhibit R-1 at RCW-3.

²⁹ Rigby Brief at 4:15-17.

³⁰ Exhibit Dains-1 at 3:8-17; MXA (Exhibit R-1 at RCW-5); Tr. at 116:10 – 117:9.

1 Rigby Statement: “As conclusively demonstrated at the hearing, the infrastructure
2 installed by Mr. Dains was necessary to meet the projected water demands of the Terra
3 Ranchettes subdivision, not to benefit Rigby.”³¹

4 Dains Response: This is simply false. Mr. Dains was required to fund and construct
5 50,000 gallons of storage capacity even though Rigby actually only needed 20,000 gallons of
6 new storage to serve the Terra Ranchettes development.

7 Mr. Wilkinson agreed that his opinion relied on a study by Samer and Associates
8 prepared in 1985 or 1986.³² Mr. Wilkinson also agreed that the Samer study calculated required
9 storage capacity of 100,000 gallons based on the assumed water demands for two developments,
10 83 customers at Terra Ranchettes and 351 customers at Terra Twin Lakes Mobile Home Park.³³
11 Only about 20,000 gallons of storage capacity was needed to serve Terra Ranchettes.³⁴

12 Rigby Statement: “After construction was complete, Mr. Dains began selling lots to the
13 public, and requested that Rigby begin providing water service to those lots. Because consumers
14 were requesting service, Rigby began providing service to the subdivision despite Mr. Dains’
15 refusal to enter into a mainline extension agreement. Rigby had no ability to force Mr. Dains to
16 enter into a mainline extension agreement.”³⁵

17 Dains Response: This is a series of puzzling non sequiturs. Mr. Dains would certainly
18 want to sell lots once construction was complete. Lot purchasers would then call Rigby to ask
19 for water service, which Rigby provided in the normal course of business. The facilities were
20 operational and customers were requesting service. Accordingly, Rigby was required to provide
21 water service under the terms of its certificate of convenience and necessity

³¹ Rigby Brief at 4:19-21.

³² Tr. at 117:18 – 118:21.

³³ Tr. at 119:4-10. Samer Study at pp. 7-8 (attached to R-1 at RCW-9).

³⁴ Tr. at 80-83. The required storage of 20,000 gallons is a simple arithmetic calculation. The Samer Study assumed that there would be 434 total customers (83 + 351 = 434). The 83 Terra Ranchettes customers represented just under 20% of total customers (83/434 x 100 = 19.1%). The Samer Study concluded that 100,000 gallons of storage were needed to serve 434 customers. Therefore, slightly less than 20,000 gallons of storage were need to serve Terra Ranchettes (19.1% of 100,000 gallons).

³⁵ Rigby Brief at 5:2-7. Citations omitted.

1 As the Commission knows, MXAs are normally negotiated, executed, and filed for
2 approval before construction commences. It is disingenuous for Rigby to blame Mr. Dains for
3 allegedly not diverting time from lot sales—which had been delayed for years by Rigby’s
4 compliance issues—to focus on an MXA, particularly when Rigby was to blame for not getting
5 this done before construction started.

6 Again, any alleged difficulties are irrelevant. The relevant facts are clear. As discussed
7 in Section I, *supra*: the parties did ultimately execute an MXA; Rigby had everything it needed
8 to file the MXA for approval; and Rigby inexcusably failed to make the filing.

9 Rigby Statement: “*Contrary to Mr. Dains’ allegations the parties did not treat this*
10 *transaction as a sale.*”³⁶

11 Dains Response: In addition to being contradicted by Mr. Dains’ son, this statement is
12 contradicted by the written evidence.³⁷ Mr. Wilkinson believed that Rigby was purchasing the
13 Dains system.

14 Exhibit Dains-11 is a copy of a letter from Mr. Wilkinson to Hilton Financial. Mr.
15 Wilkinson clearly states:

16 Rigby is required to enter into a refund agreement with Mr. Daines. The agreement is
17 established so the utility (Rigby) can purchase the system for continuous operation and
18 maintenance purposes.

19 ...

20 In order to establish the purchase price of the system, Rigby will need copies of all paid
21 invoices applicable to the construction of the water system.³⁸

22 Rigby Statement: “*Contrary to Mr. Dains’ allegations, there was no evidence presented*
23 *at the hearing that the contemplated mainline extension agreement was anything other than what*
24 *it purports to be - a Commission compliant agreement intended to facilitate the orderly*
25 *development of necessary water infrastructure.*”³⁹

³⁶ Rigby Brief at 6:8-9

³⁷ Exhibit Dains-1 at 3:8 – 4:8; Tr. at 151:1 – 153:15; Exhibit Dains 11

³⁸ Exhibit Dains 11. Emphasis added.

³⁹ Rigby Brief at 6:22 – 7:2.

1 **Dains Response:** Other than being created long after the development was completed
2 and customers were taking service, the MXA in not remarkable.

3 The issue is that the refunds being made under the MXA fall far short of the amounts
4 promised to Mr. Dains by Mr. Wilkinson on June 26, 1998.⁴⁰ Mr. Wilkinson estimated that the
5 Dains Partnership would receive 20 annual refunds of \$12,225 each, for a total of \$244,500.⁴¹
6 This was very close to the actual costs for the development, which totaled \$236,998.68.⁴²

7 **Rigby Statement:** “Although there was no evidence on this point adduced at the hearing,
8 Mr. Dains apparently obtained an ATC for the subdivision from the Maricopa County
9 Department of Health in 1983.”⁴³

10 **Dains Response:** This is incorrect. The Approval to Construct was originally issued on
11 August 28, 1985, and was reinstated by Maricopa County on May 2, 1996.⁴⁴

12 **Rigby Statement:** “As Mr. Wilkinson testified, however, that ATC was never provided to
13 Rigby, despite repeated requests.”⁴⁵

14 **Dains Response:** Again, the written record contradicts this statement. Exhibits Dains-4
15 through Dains-7 are a series of letters from Mr. Wilkinson where he identifies the remaining
16 items that must be completed or document that must be provided. The ATC is conspicuous by
17 its absence. Mr. Wilkinson never asked for a copy of the ATC.

18 The ATC is a very important document. If Mr. Dains had not already provided him a
19 copy, Mr. Wilkinson would certainly have asked for one.

20 In addition, as just discussed, Maricopa County reinstated the ATC on May 2, 1996. If
21 Mr. Wilkinson somehow could not get a copy of the ATC from Mr. Dains, he could easily have

⁴⁰ Exhibit Dains-1 at CDD-4.

⁴¹ Exhibit Dains-1 at CDD-4.

⁴² *Id.* The cover letter states unequivocally: “We have attached as Exhibit B, a summary of the actual costs.”
(Emphasis added.)

⁴³ Rigby Brief at 7:9-11.

⁴⁴ Exhibits Dains-12 and Dains 13.

⁴⁵ Rigby Brief at 7:12-13.

1 gone to the County to get a copy. Yet, Mr. Wilkinson never did this.⁴⁶ The logical inference is
2 that he already had a copy.

3 Rigby Statement: “Similarly, Mr. Dains never substantiated the costs of construction, as
4 required by Commission regulations.”⁴⁷

5 Dains Response: This statement misstates the Commission’s regulations and is
6 contradicted by Mr. Wilkinson’s own written documents.

7 Nothing in the Commission’s regulations requires a developer to substantiate the costs of
8 construction. As they relate to MXAs, all the regulations require is an: “Itemized cost estimate
9 to include materials, labor, and other costs as necessary.”⁴⁸

10 Further, Rigby had the actual construction costs no later than February 19, 1999. On that
11 date, Mr. Wilkinson mailed Mr. Rigby an execution copy of the MXA. In the cover letter, Mr.
12 Wilkinson stated: “We have attached as Exhibit B, a summary of the actual costs.”⁴⁹ The actual
13 total costs on Exhibit B were \$236,988.68.⁵⁰

14 Rigby Statement: “Instead Mr. Dains provided at least three conflicting cost
15 estimates.”⁵¹

16 Dains Response: This statement seriously misstates the record and is more obfuscation.
17 First, the \$236,988.68 amount referenced by Rigby is from Exhibit B to the MXA. It was not
18 prepared by Mr. Dains.⁵² Further, as just discussed, this was not an estimate; rather it is—
19 according to Mr. Wilkinson’s own words—“a summary of the actual costs.”⁵³ Finally, Rigby’s
20 summary of actual costs was prepared on or about February 19, 1999.⁵⁴

⁴⁶ Tr. at 115:10-18.

⁴⁷ Rigby Brief at 7:16-17.

⁴⁸ A.A.C. R14-2-406(c)(1)(e). Emphasis added.

⁴⁹ Exhibit R-1 at RWC-4. Emphasis added.

⁵⁰ Exhibit R-1 at RWC-5, Exhibit B.

⁵¹ Rigby Brief at 7:21 – 8:1.

⁵² Tr. at 89:8-17. Further, Mr. Wilkinson said in his July 21, 1998, letter: “I have not included any of the exhibits as yet. Upon your review and receipt of your comments, I will proceed with the exhibits and finalize the agreement for signature. (Exhibit R-1 at RWC-3.)

⁵³ Exhibit R-1 at RWC-4.

⁵⁴ *Id.*

1 Rigby also cites Exhibit RWC-13 as an example of an inconsistent estimate from Mr.
2 Dains. In this case, Rigby actually got one fact right: Mr. Dains prepared the estimate.
3 However, the estimate is dated May 13, 1998. This estimate was made more than nine months
4 before Mr. Wilkinson completed his summary of the actual costs. Further, the total estimate of
5 \$207,388.68 did not include the cost of the 50,000 gallon storage tank.⁵⁵ According to Exhibit B
6 of the MXA, the storage tank cost \$29,600. So in addition to being a preliminary estimate,
7 RWC-13 is at least \$29,600 too low.⁵⁶

8 Then, if we add the \$29,600 cost of the storage tank to Mr. Dains preliminary estimate of
9 \$207,388.68, the total is \$236,988.68. This is identical to the \$236,988.68 of actual total costs
10 provided by Mr. Wilkinson. There is no conflict at all between Mr. Dains' preliminary estimate
11 and Mr. Wilkinson's summary of actual costs.

12 Exhibit RWC-14 can be given no credence at all. First, contrary to Rigby's allegation,
13 this document was not provided by Mr. Dains. Rather, it was provided by Hilton Financial, the
14 construction lender.⁵⁷ Second, the document does not purport to be an estimate of total
15 construction costs. Rather, as the document states, it is: "a breakdown of funds paid towards the
16 construction of the Water System." Basically, it is simply a summary of funds paid until that
17 time. Third, we do not know when the summary was provided. It does not purport to be a final
18 summary of all funds paid towards construction.

19 Finally, any alleged inconsistencies in construction cost estimates are irrelevant. The
20 MXA contained a summary of actual costs. As discussed in Section I, *supra*: the parties did
21 ultimately execute an MXA; Rigby had everything it needed to file the MXA for approval; and
22 Rigby inexcusably failed to make the filing.

23 Rigby Statement: "*As a result of Mr. Dains' failure to meet his obligations under the*
24 *Agreement, Rigby was unable to obtain Commission approval of the Agreement at that time.*"⁵⁸

⁵⁵ Tr. at 86:4-9.

⁵⁶ If we add the \$29,600 cost of the storage tank to Mr. Dains preliminary estimate of \$207,388.68, the total is \$236,988.68. This is virtually identical

⁵⁷ Tr. at 45:5-16.

⁵⁸ Rigby Brief at 8:2-4.

1 **Dains Response:** Rigby was unable to obtain Commission approval of the Agreement,
2 for only one reason: it did not file it. Once again Rigby shameless tries to blame the dead guy
3 for its own failure. As discussed in Section I, *supra*: the parties executed an MXA; Rigby had
4 everything it needed to file the MXA for approval; and Rigby inexcusably failed to make the
5 filing.

6 **C. Rigby's Legal Arguments Are Meritless**

7 **a. Rigby is Not Compliant with Commission Rules**

8 As discussed in Section I, *supra*: the parties executed an MXA; Rigby had everything it
9 needed to file the MXA for approval; and Rigby inexcusably failed to make the filing.

10 Rigby should have filed the MXA in 1999. It did finally file the MXA many years later,
11 but only after it got caught. The rules are clear. A.A.C. R14-2-406(M) requires that Rigby to
12 refund the full advance less any refunds already made.

13 **b. Mr. Dains Did Not Prevent Rigby from Filing the MXA**

14 Rigby's legal discussion is interesting, but irrelevant. Rigby was unable to obtain
15 Commission approval of the Agreement, for only one reason: it did not file it. As discussed in
16 Section I, *supra*: the parties executed an MXA; Rigby had everything it needed to file the MXA
17 for approval; and Rigby inexcusably failed to make the filing.

18 Rigby cannot blame the dead guy for its failure to comply with the Commission's
19 regulations.

20 **c. The Dains Estate Does Not Have Unclean Hands**

21 Rigby should look at its own hands and stop trying to blame the dead guy. It is Rigby's
22 hands that are unclean:

- 23 • Rigby's non-compliance caused the Dains Partnership to incur significant delay
24 costs.
- 25 • Rigby demanded that the Dains Partnership oversize, without compensation, a
26 water-storage facility.

- 1 • Rigby and Mr. Dains agreed that Rigby would purchase the Dains-built
- 2 facilities—including the over-sized storage facilities—for approximately
- 3 \$240,000, to be paid through refunds over 20 years.
- 4 • The MXA stipulates that the exact cost of the advanced facilities to be refunded
- 5 was \$236,998.68.
- 6 • Rigby had everything it needed to file the MXA for approval.
- 7 • Although it was required by law to do so, Rigby never filed the MXA for
- 8 approval.
- 9 • Rigby has only refunded \$27,261.43 over the first 11 years of the MXA, far less
- 10 than promised to Mr. Dains.
- 11 • Rigby has agreed to be acquired by the City of Avondale for \$2,560,000, a huge
- 12 windfall.
- 13 • Rigby still refuses to pay the remaining \$210,000 it owes to the Dains Estate.

14 Matthew 7:4 is on point: “Hypocrite! First get rid of the log in your own eye; then you
15 will see well enough to deal with the speck in your friend's eye.”⁵⁹

16 **d. The Statute of Limitations Has Not Yet Begun to Run**

17 First, the MXA has not yet been fully performed by Rigby. Rigby does not disagree that
18 it still owes refunds under the MXA. “Ordinarily, the statute of limitations does not begin to run
19 on a contract for a continuing service until the contract has been fully performed.”⁶⁰ Rigby has
20 not fully performed its obligations under the MXA, so the statute of limitations does not apply.

21 Second, the Dains Estate’s claim does not concern excessive rates or discriminatory
22 charges. The complaint generally is that Rigby Water has not complied with the Commission’s
23 rules concerning MXAs. As such, the referenced statute of limitations does not apply.

⁵⁹ New Living Translation (©2007).

⁶⁰ *Gold v. Killeen*, 44 Ariz. 29, 35; 33 P.2d 595, 597 (1934), quoting *Heery v. Reed*, 80 Kan. 380, 102 P. 846, 848

1 Third, Rigby also raised this identical issue in its April 13, 2009, Motion to Dismiss. The
2 Motion was argued at a Procedural Conference held on June 2, 2009. The Commission rejected
3 the Motion to Dismiss by Procedural Order dated September 15, 2009.

4 Fourth, it is also important to note that Rigby does not claim that the statute of limitations
5 has run concerning the Dains Estate's claim under A.A.C. R14-2-406(M).

6 **e. The Commission Has Jurisdiction to Consider the Dains Estate's Claims**

7 Rigby does not deny that it is generally subject to the Commission's oversight and
8 regulation, or that it is a party to a Main Extension Agreement ("MXA") with Mr. Dains
9 concerning Terra Mobile Ranchettes Estates in Avondale, Arizona. Nor does Rigby Water deny
10 that the Commission has jurisdiction concerning disputes about MXAs, generally, or more
11 specifically over complaints to recover advances under authority of A.A.C. R14-2-406(M).
12 Therefore, the Commission has jurisdiction over this dispute.

13 Rigby also raised this identical issue in its April 13, 2009, Motion to Dismiss. The
14 Motion was argued at a Procedural Conference held on June 2, 2009. The Commission rejected
15 the Motion to Dismiss by Procedural Order dated September 15, 2009.

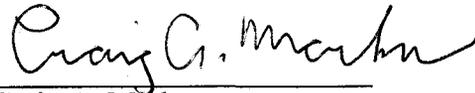
16 **f. A.A.C. R14-2-406(F) Applies**

17 Rigby argues—completely without support—that Rule 406(F) does not apply to it. Rule
18 406(F) states:

19 The Commission will not approve the transfer of any Certificate of Public Convenience
20 and Necessity where the transferor has entered into a main extension agreement, unless it
21 is demonstrated to the Commission that the transferor has agreed to satisfy the refund
22 agreement, or that the transferee has assumed and has agreed to pay the transferor's
23 obligations under such agreement.

24 Rigby maintains that Rule 406(F) only applies only to a CC&N transfer from one private
25 utility to another. If this were true—which is doubtful—it would cut against Rigby's arguments
26 in this docket. The logical inference would be that the Commission must deal with the Dains
27 Estate's claims in this docket (W-01808A-09-0137). If it does not act here, it will forever lose
28 that opportunity to provide relief to the Dains Estate.

1 RESPECTFULLY SUBMITTED on January 14, 2011.
2
3

4 
5

6 Craig A. Marks
7 Craig A. Marks, PLC
8 10645 N. Tatum Blvd
9 Suite 200-676
10 Phoenix, Arizona 85028
11 (480) 367-1956
12 Craig.Marks@azbar.org
Attorney for the Estate of Charles J. Dains

Exhibit A – Main Extension Agreement

M A I N E X T E N S I O N A G R E E M E N T

W A T E R F A C I L I T I E S

This Agreement is entered into at Mesa, Arizona on this 1st day of October, 1998, by and between Terra Mobile Ranchettes Estates, hereinafter referred to as Applicant and Rigby Water Company, an Arizona corporation, hereinafter referred to as Utility.

- 1) Applicant is the owner of the property as set forth in Exhibit A, a copy of which is attached hereto and made a part hereof and hereinafter referred to as Property.
- 2) Applicant intends to develop said Property within the property set forth in Exhibit A and will require domestic water service.
- 3) Applicant and Utility agree that said property lies within the Certificate of Convenience and Necessity of Utility and therefore Utility is obligated to provide said domestic water service in accordance with the rules and regulations of the Arizona Corporation Commission (ACC)

A G R E E M E N T

NOW THEREFORE, in consideration of the terms and conditions set forth below, the parties hereto agree:

- 1) Applicant shall cause the proposed domestic water system to be designed, constructed or installed as necessary to provide an adequate supply of domestic water to each and every dwelling unit within the property as described in Exhibit A. Said water system shall include all necessary water facilities including but not limited to mains, fittings, fire hydrants, service lines, meter assemblies, meters, storage and pumping facilities.
- 2) Applicant shall be responsible for all costs associated with the construction of the domestic water system including engineering, permits, easements, labor, materials, equipment, transportation, insurance and bonds if applicable.
- 3) Applicants cost, as set forth in Exhibit B, a copy of which is attached hereto and made a part hereof, shall be subject to refund in accordance with the rules and regulations of the ACC and further described in Section 16 of this Agreement.

ORIGINAL

4) Applicant shall cause the domestic water system to be designed and constructed with sufficient capacity to serve the water needs of the Property, including fire protection.

5) Applicant may be required by Utility to provide "oversizing" in Applicants design and construction to benefit the needs of Utility. If oversizing is required by Utility, the Utility shall be obligated to pay those costs applicable to the oversized facilities. Said payment shall be based on material costs only and shall not include any costs for labor, equipment, transportation engineering, permits, disinfection, testing or any other costs not applicable in the sole discretion of Utility. Oversizing costs are set forth in Exhibit C, a copy of which is attached hereto and made a part hereof.

6) Applicant shall obtain all applicable permits, including zoning and other necessary permits which may be required prior to construction of the Domestic water system. All domestic water system facilities shall be constructed in accordance with the plans and specifications as prepared by Applicants engineer and reviewed by Utility's engineer and approved by Utility in writing. All domestic water system facilities shall be constructed in accordance with acceptable utility construction practices and in accordance with the rules and regulations of the ACC and the Arizona Department of Environmental Quality and the requirements of all other municipal and governmental agencies having jurisdiction.

7) Applicant shall comply with Utility's requirements for inspection and testing of the domestic water facilities constructed under this Agreement. Applicant shall provide Utility adequate notice when facilities under construction are ready for inspection and/or testing. Utility shall provide said inspection within five working days of being so noticed.

8) Utility shall provide Applicant written notice of any deficiencies discovered during said inspection within 10 working days of said inspection. Utility reserves the right to withhold acceptance of the facilities unless said facilities have been constructed in accordance with the requirements set forth herein.

9) Applicant herewith agrees to diligently pursue and promptly correct all deficiencies in construction, materials and workmanship as noted in Utilities written notice of deficiencies.

10) Applicant agrees to promptly correct all defects and deficiencies in construction, materials, and workmanship upon request by Utility and for one year following Utility's acceptance of the facilities at Applicants sole cost. It is understood that inspection and / or acceptance by Utility in no way relieves or limits Applicant of any responsibility and liability for construction and installation of the facilities in accordance with the terms of this Agreement.

11) The domestic water system facilities and all parts thereof, upon acceptance by Utility as provided herein, shall become and remain the sole property of utility without the requirements of any written document of transfer to Utility. However, Applicant shall furnish such documents pertaining to ownership and title as Utility may reasonably request to evidence or confirm transfer of possession and title t Utility free and clear of liens, or containing provision for satisfaction of lien claims by Applicant, acceptable to Utility. Applicant shall cause or cause to be repaired promptly, at no cost to Utility, all damage to the facilities caused by construction operations until all construction within the property is complete whether caused by Applicant or not.

12) Applicant shall convey or cause to be conveyed to Utility by Warranty Deed free and clear title to the land upon which any well and/or storage facility pertinent to the provision of domestic water is required. Any other lands applicable to and necessary for the provision of domestic water service as set forth on Applicants plans and specifications shall also be conveyed to Utility. Said lands are described on Exhibit C, a copy of which is attached hereto and made a part hereof.

13) Applicant shall, at no cost to Utility, grant or cause to be granted to Utility, perpetual right-of-ways and easements, in a form acceptable to Utility, for the facilities and future attachments to the facilities, including, but not limited to water mains, and access to the supply, production and storage sites. If any rights of way of easements are required by Utility for attachments to developments other than Applicants development, Utility and Applicant shall mutually agree on an acceptable location for such easements or rights of way.

14) Applicant shall, within 120 days following acceptance by Utility of facilities, furnish Utility with the following described original documents.

a) Copies of all invoices and billings and other statements of expenses incurred by Applicant for the construction of the domestic water system.

b) Releases and waivers from contractors, sub-contractors and vendors for materials, equipment, supplies, labor and other costs of construction of said facilities.

15) Utility will provide domestic water service to the Property in accordance with the rates, charges and conditions set forth in the tariffs of Utility as files with the ACC and in effect from time to time. It is agreed that water service to each and every dwelling unit within the Property will be metered accordingly. Applicant acknowledges and agrees that Utility has the right to and may in the future, connect the domestic water facilities to Utility's existing and/or future domestic water system.

16) The cost of construction and installation of facilities as evidenced by invoices furnished to Utility pursuant to Section 14 shall be advances in aid of construction subject to refund by Utility to Applicant. Utility shall make refunds annually to Applicant on or before August 31 for the preceding July 1 through June 30 period. The amount to be refunded annually shall be ten percent (10%) of the revenues (excluding sales taxes and all District, Municipal, County State or Federally imposed regulatory assessments) derived from the provision of metered domestic water service to the Property. Refunds shall be payable for a period of twenty (20) years from the date metered domestic water service is initiated to the Property. In no event shall the refunds paid to Applicant exceed the amount of the advanced in aid of construction. Any balance remaining at the end of the twenty year period shall become non-refundable. No interest shall be paid on any amount(s) advanced.

17) Applicant will furnish Utility with appropriate certificates of insurance, each containing a thirty (30) day notice of cancellation clause, stating collectively that Applicant or its contractors and subcontractors has the following insurance coverage during the period of construction hereunder.

- a) Workman's Compensation Insurance in the amounts required by the laws of the state of Arizona.
- b) Comprehensive General Liability Insurance including Products/Completed operations, with limits of not less than Two Million Dollars (2,000,000.00) combined single limit for bodily injury (including death) and property damage.

18) Applicant hereby assumes the full and entire responsibility and liability for any and all incidents of injury or death of any person; or loss or damage to any property contributed to or caused by the active or passive negligence of Applicant, its agents, servants, employees, contractors or subcontractors, arising out of or in connection with the construction of the domestic water facilities prior to Utility's acceptance as set forth herein. Accordingly, Applicant will indemnify and hold harmless Utility, its officers, directors, agents and employees from and against claims or expensed, including penalties and assessments, and attorneys' fees to which they or any of them may be subjected by reason of such injury, death, loss, claim, penalty assessment of damage, and in case any suit or other proceeding shall be brought on account thereof, Applicant will assume the defense at Applicants own expense and will pay all judgements rendered therein.

19) Applicant shall furnish Utility within sixty (60) days after completion of construction "As-Built" drawings certified as to correctness by an engineer registered in the State of Arizona showing the locations and respective sizes of all supply, transmission, production, storage, pumping facilities, and distribution facilities up to the curb valve of service connections to all dwelling units and/or structures served by the domestic water system.

20) Applicant shall cause any Department of Real Estate Subdivision reports issued regarding the Property, clearly to state that water services are to be provided by Utility and that Utility shall own all facilities utilized in providing said services, other than the service connections from the curb line into the dwelling unit premises.

21) The failure of either party hereto to enforce any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision but the same shall, nevertheless, be and remain in full force and effect.

22) Communications hereunder shall be sent to the respective parties, addressed as follows:

APPLICANT: Terra Mobile Ranchettes Estates
4439 W. Glendale Boulevard
Glendale, AZ 85301

UTILITY: Rigby Water Company
P.O. Box 2899
Gilbert, AZ 85299-2899

or to other such address as the parties may advise each other in writing.

23) It is agreed that Utility is not an agent of Applicant and shall not incur any costs or expenses on behalf of Applicant and that Applicant is not an agent of Utility and shall not incur any cost or expenses on behalf of Utility.

24) This Agreement shall be governed by the laws of the State of Arizona and shall be subject to the approval of the ACC and such other regulatory agencies as may be required under the laws of said State.

25) This Agreement shall be binding upon and inure to the benefit of the parties hereto, and their respective legal representatives, successors and assigns. However, neither Applicant nor Utility shall assign its rights, obligations and interest in this Agreement without the prior written consent of the other and such consent shall not be unreasonably withheld or delayed by either Applicant or Utility. Any attempted assignment without such consent shall be void and of no effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate as of the day and year first above written.

APPLICANT

Terra Mobile Ranchettes Estates Rigby Water Company

By: Charles Dains
Charles Dains-DAINS

UTILITY

By: Fred T. Wilkinson
Fred T. Wilkinson, President

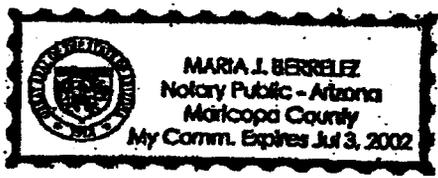
By: Judy A. Lopez
Judy A. Lopez, Secretary,
Treasurer

STATE OF ARIZONA)
County of Maricopa) SS

The foregoing instrument was acknowledged before me this ___ day of March 2nd, 1999, by Charles DAINS known to me to be the ___ of ___, and authorized by said corporation to make this acknowledgement on its behalf.

By Maria J. Berleif
Notary Public

My Commission Expires _____



STATE OF ARIZONA)

County of Maricopa)

SS

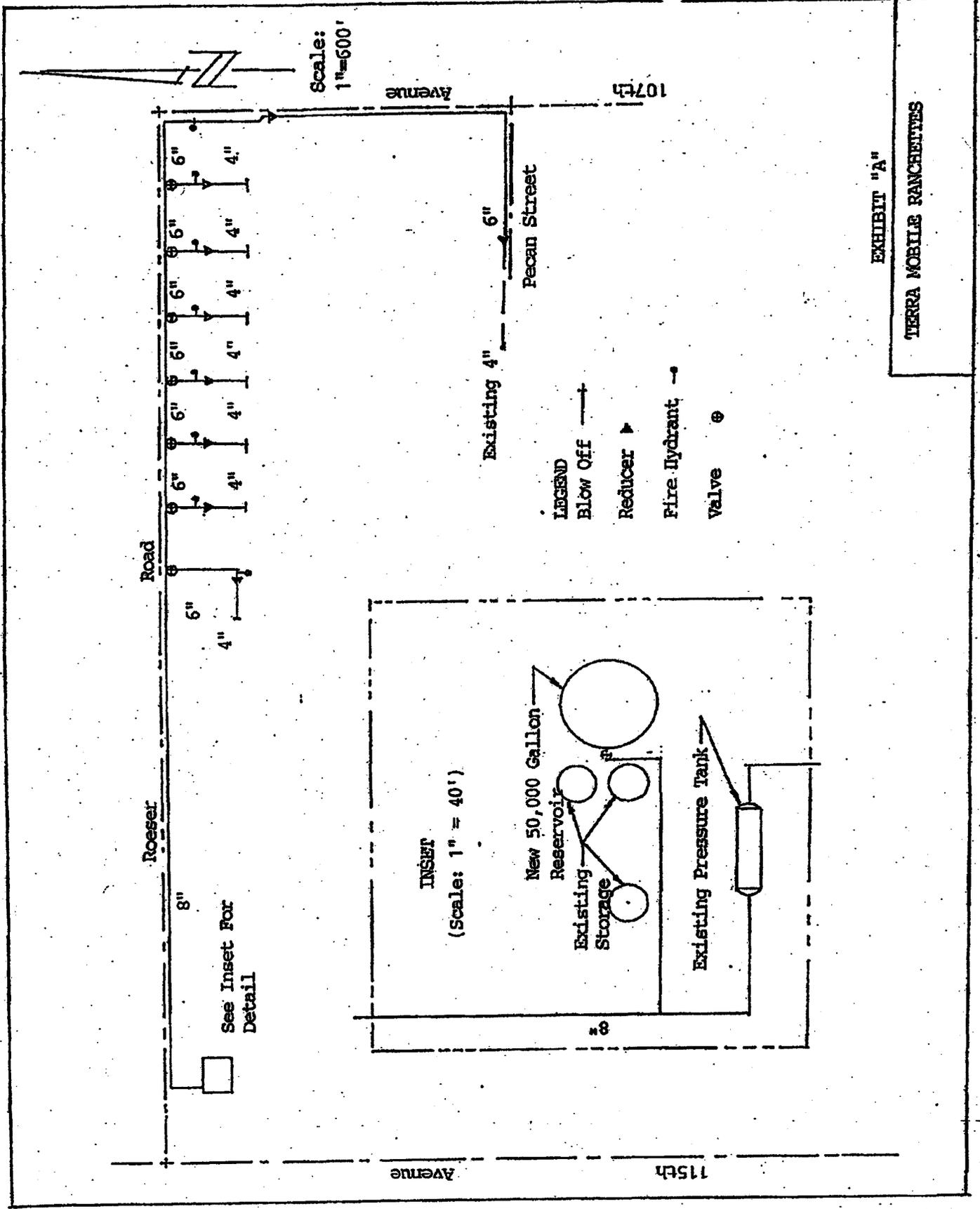
The foregoing instrument was acknowledged before me this 5th day of May, 1999, by Fred J. Wilkinson known to me to be the President of Rialty Water Company, and authorized by said corporation to make this acknowledgement on its behalf.

By Judy A. Lopez
Notary Public

My Commission Expires

6/28/02





MEC No: RWC-002

Date February 18, 1999

Applicant: Terra Mobile Ranchettes Estates
TIERRA MOBILE RANCHETTES

EXHIBIT B

Distribution System:

5,440 L/F 8" C-900 P.V.C.	\$11.20	\$60,928.00
4,400 L/F 6" C-900 P.V.C.	\$9.00	\$39,600.00
1 only 6" 90 Bend	\$87.00	\$87.00
18 each 6" Gate Valve	\$580.00	\$10,440.00
1 only 6"x6" Reducer	\$140.00	\$140.00
2 each 8" 45 Bend	\$98.00	\$196.00
8 each 8"x6" Tee	\$220.00	\$1,760.00
8 each 6" Fire Hydrant	\$890.00	\$7,120.00
2 each 8" 90 Bend	\$105.00	\$210.00
4 each 8" Gate Valve	\$780.00	\$3,120.00
7 each 6"x6" tee	\$190.00	\$1,330.00
	Sub-Total	\$124,931.00

Services:

83 each 1" Corp. Stops	\$52.00	\$4,316.00
83 each 1" Angle Meter Stops	\$48.00	\$3,984.00
83 each Meter Boxes	\$70.00	\$5,810.00
1 only 8" 22 1/2 Bend	\$158.00	\$158.00
	Sub-Total	\$14,268.00

Reservoir:

1 only 50,000 gallon Tank	\$27,000.00	\$27,000.00
Clean up and testing costs	\$2,600.00	\$2,600.00
	Sub-Total	\$29,600.00

Booster Pumps:	\$50,851.00	\$50,851.00
-----------------------	--------------------	--------------------

Easement:

Art Tobin Easement	\$16,000.00	\$16,000.00
---------------------------	--------------------	--------------------

Miscellaneous:

Bonds	\$672.00	\$672.00
--------------	-----------------	-----------------

Permits	\$666.68	\$666.68
----------------	-----------------	-----------------

Sub-Total		\$1,338.68
------------------	--	-------------------

SUMMARY:

Distribution System:	\$124,931.00
-----------------------------	---------------------

Services:	\$14,268.00
------------------	--------------------

Reservoir:	\$29,600.00
-------------------	--------------------

Booster Pumps:	\$50,851.00
-----------------------	--------------------

Easement:	\$16,000.00
------------------	--------------------

Miscellaneous:	\$1,338.68
-----------------------	-------------------

Total	\$236,988.68
--------------	---------------------

MEC No: RWC-002

Dated: February 18, 1999

Applicant: Terra Mobile Ranchettes Estates.

EXHIBIT C

OVERSIZING COSTS

No oversizing costs are required under this agreement.