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BEFORE THE ARIZONA CORPORATION

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COMMISSIONERS

GARY PIERCE, Chairman
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AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED

JAN 23 2012

DOCKETED BY

IN THE MATTER OF THE APPLICATION)	DOCKET NO. W-03783A-10-0172
OF MICHAEL W. SCHULTZ AND)	
PAMELA J. SCHULTZ DBA RINCON)	MOTION TO (i) WITHDRAW
CREEK WATER COMPANY, FOR)	APPLICATION, (ii)
APPROVAL OF SALE OF ASSETS AND)	ADMINISTRATIVELY CLOSE
TRANSFER CERTIFICATE OF)	DOCKET AND (iii) TRANSFER
CONVENIENCE AND NECESSITY.)	PLEADINGS AND HEARING
	RECORD TO NEW DOCKET

Pursuant to A.A.C. R14-3-106(k), Michael W. Schultz and Pamela J. Schultz d/b/a Rincon Creek Water Company, (collectively "Schultz") and William Shirley and Gretchen Shirley (collectively "Shirley") hereby move for an appropriate order or orders of the Commission (i) authorizing the withdrawal of Schultz's May 3, 2010 Application in the above-captioned and above-docketed proceeding ("Instant Proceeding"), (ii) administratively closing the Instant Proceeding, and (iii) contemporaneously transferring the pleadings and hearing record from the Instant Proceeding into a new docketed proceeding which will be established by the contemporaneous filing by Schultz of an Application to Cancel Certificate of Convenience and Necessity ("CC&N Cancellation Application.")^{1 and 2}

I.

CIRCUMSTANCES OCCASIONING MOTION

Since the May 3, 2010 Application was filed and the December 10, 2010 evidentiary hearing was conducted in the Instant Proceeding, changed circumstances have given rise to the question of whether or not there is any reason for Rincon Creek Water Company ("Company")

¹ Attached hereto as Appendix "A" is a Limited Power of Attorney, executed by Schultz, which authorizes Shirley to act upon behalf of Schultz with respect to both this Motion and the CC&N Cancellation Application.
² Attached hereto as Appendix "B" and incorporated herein by this reference is a copy of the CC&N Cancellation Application, which is being filed contemporaneously with this Motion.

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1 to continue to possess a certificate of convenience and necessity (“CC&N”) authorizing it to
2 provide water service to the general public. First, two (2) of the previous five (5) customers of
3 the Company have since disconnected from the Company’s water system, and they now are
4 connected to private wells unrelated to the Company. Second, Shirley and the remaining two (2)
5 customers have since entered into a well-sharing agreement by means of which their respective
6 requirements for water service will be satisfied. In that regard, the well-sharing agreement does
7 not contemplate nor provide for the provision of present or future water service to additional
8 parties. Third, Shirley does not need a CC&N in order to own and operate the guest ranch
9 facilities they now own and operate,³ which ownership and operation business plan was what
10 motivated Shirley to contractually agree to acquire Shultz’s acreage and the water system
11 facilities located on that acreage. Finally, if the Commission received an application today
12 requesting a CC&N for the purpose of providing water service to five (5) or less customers, in all
13 likelihood it would deny the request.

14 In connection with the foregoing, during the briefing stage of the Instant Proceeding,
15 consideration was given as to whether or not the Company could qualify for an adjudication not
16 a public service corporation.⁴ However, a review of the pleadings and the hearing record makes
17 quite clear that the Company and Schultz cannot satisfy the criteria prescribed by the
18 Commission for that purpose in its Decision No. 55568. Moreover, it makes no financial sense
19 to require that the Company and Schultz incur the time and expense of endeavoring to
20 demonstrate that the Company is not a public service corporation under Arizona law, applying
21 the criteria articulated by the Arizona Supreme Court in the Serv-Yu decision, given that as a
22 practical matter the Company now has no customers.

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24
25
26 ³ As Judge Martin observed during the December 10, 2010 evidentiary hearing in Docket No. E-03783A-10-0172,
the water system assets and operations in question have already been transferred to Shirley for all practical purposes.
[Tr. 8, l. 21-24.]

27 ⁴ In an August 15, 2011 Procedural Order, the parties were directed to “address whether it is possible that the matter
28 might be addressed as an adjudication not a public utility pursuant to Commission Decision No. 55568 (May 7,
1987).”

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1 In that regard, and briefly summarized, Schultz (and Shirley) believe that application of
2 the Serv-Yu factors in the factual circumstances now surrounding Company would disclose the
3 following:

4 Factor No. 1 (What the Entity Actually Does): Company has no customers and no longer
5 provides water service to the public.

6 Factor No. 2 (Dedication of Property to A Public Use): In light of the response to Factor
7 No. 1, Company's property is no longer dedicated to a public use.

8 Factor No. 3 (Articles of Incorporation): Company is not a corporation, a limited liability
9 company, a partnership, a joint venture or any other legal or formal entity; and, as
10 a consequence, does not have any articles of incorporation, articles of
11 organization, partnership agreement or joint venture agreement. Company is
12 simply a name adopted by Schultz (and Schultz's predecessor-in-interest) for
13 business purposes when water service was being provided to members of the
14 public.

15 Factor No. 4 (Service of a Commodity in Which Public is Generally Held to Have an
16 Interest): As noted in response to Factor No. 1, Company no longer provides a
17 commodity or service in which the public might have an interest.

18 Factor No. 5 (Monopolizing or Intending to Monopolize): Company has no intent to
19 monopolize, nor does Schultz (or Shirley). To the contrary, by means of this
20 Application, Schultz seeks to have Company's current exclusive right to provide
21 water service cancelled.

22 Factor No. 6 (Acceptance of Substantially All Requests for Service): Company has not
23 received any new requests for service in recent years. To the contrary, former
24 customers have either fully disconnected from Company's water system or now
25 receive water under a well-sharing agreement which does not allow for additional
26 connections. Thus, Company is not accepting substantially all (or any) requests
27 for water service.

28 Factor No. 7 (Service Under Contracts): Company has no contracts for water service.

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The original and thirteen (13) copies of the foregoing will be mailed the 19th day of January 2012 to:

Docket Control Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

A copy of the same will be served by e-mail or first class mail on the 19th day of January 2012 to:

Steven M. Olea, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

Janice Alward, Chief Counsel
Scott Hesla Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Michael W. Schultz
Rincon Creek Water Company
1102 North Anita Avenue
Tucson, AZ 85705

William Shirley
Rincon Creek Ranch
8987 E. Tanque Verde Road, #309-213
Tucson, AZ 85749



Appendix “A”

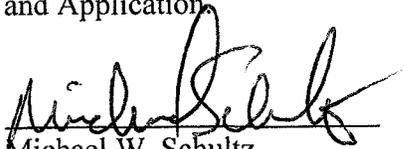
**January 18, 2012 Motion
Rincon Creek Water Company
Docket No. W-03783A-10-0172**

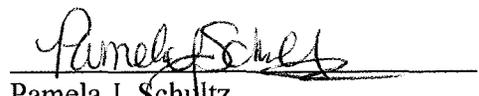
LIMITED POWER OF ATTORNEY

TO WHOM IT MAY CONCERN:

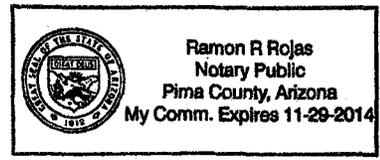
Michael W. Schultz and Pamela J. Schultz (collectively "Schultz") d/b/a/ Rincon Creek Water Company ("Company") hereby appoint William Shirley and Gretchen Shirley (collectively "Shirley") as their attorney-in-fact as to all matters relating to the filing with the Arizona Corporation Commission ("Commission") of (a) a Motion to (i) Withdraw Application, (ii) Administratively Close Docket and (iii) Transfer Pleadings and Hearing Record in Commission Docket No. W-03783A-10-0172 and (b) an Application for Order Cancelling Certificate of Convenience and Necessity in a Commission docket to be opened upon the filing of such Application with the Commission's Docket Control.

Schultz understands that Commission approval of the requests set forth in the aforesaid Motion and Application would result in cancellation of the exclusive right to provide water service previously granted to Company by the Commission in its Decision No. 31637. Schultz supports such cancellation and, by means of this Limited Power of Attorney, hereby vests Shirley with all powers and authority necessary to (a) cause the filing of the aforesaid Motion and Application with the Commission, and thereafter (b) undertake such additional actions as may be necessary or appropriate to obtain final decisions(s) by the Commission on said Motion and Application.

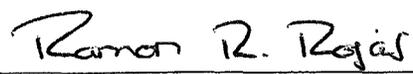

Michael W. Schultz


Pamela J. Schultz

STATE OF ARIZONA)
) SS
COUNTY OF PIMA)

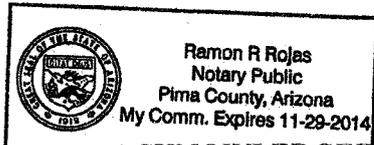


The foregoing instrument was ACKNOWLEDGED before me this 17th day of January, 2012, by Michael W. Schultz.


Notary Public

My commission expires:
11-29-2014

STATE OF ARIZONA)
) SS
COUNTY OF PIMA)



The foregoing instrument was ACKNOWLEDGED before me this 17TH day of January, 2012, by Pamela J. Schultz.

Ramon R. Rojas
Notary Public

My commission expires:
11-29-2014

Appendix “B”

**January 18, 2012 Motion
Rincon Creek Water Company
Docket No. W-03783A-10-0172**

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 **GARY PIERCE, Chairman**
4 **BOB STUMP**
5 **SANDRA D. KENNEDY**
6 **PAUL NEWMAN**
6 **BRENDA BURNS**

7 IN THE MATTER OF THE APPLICATION)
8 OF MICHAEL W. SCHULTZ AND) DOCKET NO. W-03783A-12-____
9 PAMELA J. SCHULTZ DBA RINCON)
10 CREEK WATER COMPANY, FOR AN) **APPLICATION FOR ORDER**
11 ORDER OF THE COMMISSION) **CANCELLING CERTIFICATE OF**
12 CANCELLING CERTIFICATE OF) **CONVENIENCE AND NECESSITY**
13 CONVENIENCE AND NECESSITY.)

12 Michael W. Schultz and Pamela J. Schultz d/b/a Rincon Creek Water Company,
13 (collectively "Schultz") hereby apply for an appropriate order of the Commission declaring that
14 Rincon Creek Water Company is no longer acting as a public service corporation as defined in
15 Article 15, Section 2 of the Arizona Constitution and cancelling the certificate of convenience
16 and necessity ("CC&N") granted by the Commission in Decision Nos. 31532 and 31637.

17 **I.**

18 **PROCEDURAL BACKGROUND**

19 On May 3, 2010 Schultz filed an application with the Commission requesting an order (i)
20 authorizing a sale of the water system assets of Rincon Creek Water Company ("Company") to
21 William Shirley and Gretchen Shirley (collectively "Shirley"), and (ii) transferring the associated
22 CC&N to Shirley. This filing became the subject of Docket No. W-03783A-10-0172. On
23 December 10, 2010 an evidentiary hearing on the aforesaid application was held in Tucson
24 before Administrative Law Judge Belinda A. Martin. On August 15, 2011, Judge Martin issued
25 a Procedural Order within which she directed the parties file Opening Briefs and Reply Briefs on
26 three (3) issues identified at page 2, lines 14-23 of the aforesaid Procedural Order. Thereafter,
27 Shirley and the Commission's Staff filed Opening Briefs and Reply Briefs on the three (3) issues
28

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1 specified by Judge Martin. In their Reply Brief, and in connection with the third issue specified
2 by Judge Martin,¹ Shirley suggested that perhaps a cancellation of the Company's CC&N
3 represented the most appropriate course of action, in light of changes in the surrounding
4 circumstances which had occurred since Schultz's application was filed on May 3, 2010 and the
5 evidentiary hearing was conducted on December 10, 2010. That suggestion was further
6 discussed during a December 15, 2011 Procedural Conference in Docket No. W-03783A-10-
7 0172, and the Instant Application is a result of that discussion.

8 II.

9 CHANGE IN CIRCUMSTANCES

10 As noted in the Motion to (i) Withdraw Application, (ii) Administratively Close Docket
11 and (iii) Transfer Pleadings and Hearing Record to New Docket ("Motion"), which is
12 contemporaneously being filed by Schultz and Shirley in Docket No. E-03783A-10-0172,² there
13 have been certain significant changes in the surrounding circumstances since Docket No. E-
14 03783A-10-0172 was established in response to Schultz's filing of the aforesaid May 3, 2010
15 application and the December 10, 2010 evidentiary hearing was conducted thereon.

16 More specifically, since the May 3, 2010 Application was filed and the December 10,
17 2010 evidentiary hearing was conducted in Docket No. E-03783A-10-0172, changed
18 circumstances have given rise to the question of whether or not there is any reason for Rincon
19 Creek Water Company ("Company") to continue to possess a certificate of convenience and
20 necessity ("CC&N") authorizing it to provide water service to the general public. First, two (2)
21 of the previous five (5) customers of the Company have since disconnected from the Company's
22 water system, and they now are connected to private wells unrelated to the Company. Second,
23 Shirley and the remaining two (2) customers have since entered into a well-sharing agreement by
24 means of which their respective requirements for water service will be satisfied. In that regard,
25 the well-sharing agreement does not contemplate nor provide for the provision of present or
26 future water service to additional parties. Third, Shirley does not need a CC&N in order to own

27
28 ¹ Issue No. 3 asked the parties to "address whether it is possible that the matter might be addressed as an
adjudication not a public utility pursuant to Commission Decision No. 55568 (May 7, 1987)."

² A copy of the Motion is attached hereto as Appendix "A" and is incorporated herein by this reference.

1 and operate the guest ranch facilities they now own and operate,³ which ownership and operation
2 business plan was what motivated Shirley to contractually agree to acquire Shultz's acreage and
3 the water system facilities located on that acreage. Finally, if the Commission received an
4 application today requesting a CC&N for the purpose of providing water service to five (5) or
5 less customers, in all likelihood it would deny the request.

6 In connection with the foregoing, during the briefing stage in the Docket No. E-03783A-
7 10-0172, consideration was given as to whether or not the Company could qualify for an
8 adjudication not a public service corporation.⁴ However, a review of the pleadings and the
9 hearing record makes quite clear that the Company and Schultz cannot satisfy the criteria
10 prescribed by the Commission for that purpose in its Decision No. 55568. Moreover, it makes
11 no financial sense to require that the Company and Schultz incur the time and expense of
12 endeavoring to demonstrate that the Company is not a public service corporation under Arizona
13 law, applying the criteria articulated by the Arizona Supreme Court in the Serv-Yu decision,
14 given that as a practical matter the Company now has no customers.

15 In that regard, and briefly summarized, Schultz (and Shirley) believe that application of
16 the Serv-Yu factors in the factual circumstances now surrounding Company would disclose the
17 following:

18 Factor No. 1 (What the Entity Actually Does): Company has no customers and no longer
19 provides water service to the public.

20 Factor No. 2 (Dedication of Property to A Public Use): In light of the response to Factor
21 No. 1, Company's property is no longer dedicated to a public use.

22 Factor No. 3 (Articles of Incorporation): Company is not a corporation, a limited liability
23 company, a partnership, a joint venture or any other legal or formal entity; and, as
24 a consequence, does not have any articles of incorporation, articles of
25

26 ³ As Judge Martin observed during the December 10, 2010 evidentiary hearing in Docket No. E-03783A-10-0172,
27 the water system assets and operations in question have already been transferred to Shirley for all practical purposes.
[Tr. 8, l. 21-24.]

28 ⁴ As previously noted, in an August 15, 2011 Procedural Order, the parties were directed to "address whether it is
possible that the matter might be addressed as an adjudication not a public utility pursuant to Commission Decision
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1 organization, partnership agreement or joint venture agreement. Company is
2 simply a name adopted by Schultz (and Schultz's predecessor-in-interest) for
3 business purposes when water service was being provided to members of the
4 public.

5 Factor No. 4 (Service of a Commodity in Which Public is Generally Held to Have an
6 Interest): As noted in response to Factor No. 1, Company no longer provides a
7 commodity or service in which the public might have an interest.

8 Factor No. 5 (Monopolizing or Intending to Monopolize): Company has no intent to
9 monopolize, nor does Schultz (or Shirley). To the contrary, by means of this
10 Application, Schultz seeks to have Company's current exclusive right to provide
11 water service cancelled.

12 Factor No. 6 (Acceptance of Substantially All Requests for Service): Company has not
13 received any new requests for service in recent years. To the contrary, former
14 customers have either fully disconnected from Company's water system or now
15 receive water under a well-sharing agreement which does not allow for additional
16 connections. Thus, Company is not accepting substantially all (or any) requests
17 for water service.

18 Factor No. 7 (Service Under Contracts): Company has no contracts for water service.

19 Factor No. 8 (Competition with Other Public Service Corporations): Company
20 heretofore has not been in competition with other public service corporations;
21 and, if this Application is granted, Company will not be in competition with any
22 public service corporations in the future.

23 Accordingly, absent possession of the CC&N which this Application seeks to cancel, Company
24 is not and will not be a public service corporation under a Serv-Yu analysis.

25 As previously noted, during a December 15, 2011 Procedural Conference with Judge
26 Martin, the foregoing circumstances and considerations were discussed. Based on that
27 discussion, Schultz has elected to file this Application and the aforesaid contemporaneously filed
28 Motion with the Commission for its consideration and decision.

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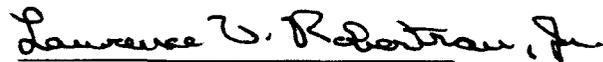
III.

CONCLUSION

Based upon the procedural history and circumstances discussed in Sections I and II above, Schultz hereby requests that the Commission enter an appropriate form of order (i) declaring that Rincon Creek Water Company is no longer acting as a public service corporation as defined in Article 15, Section 2 of the Arizona Constitution and (ii) cancelling the CC&N granted by the Commission in Decision Nos. 31532 and 31637.⁵

Dated this 18th day of January 2012.

Respectfully submitted,



Lawrence V. Robertson, Jr., Of Counsel
Munger Chadwick, PLC
Attorney for William Shirley and Gretchen
Shirley, Transferees/Co-Applicants

The original and thirteen (13) copies of the foregoing will be mailed the 19th day of January 2012 to:

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Steven M. Olea, Director
Utilities Division
Arizona Corporation Commission
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Phoenix, AZ 85007

⁵ Attached hereto as Appendix "B" is a Limited Power of Attorney, executed by Schultz, which authorizes Shirley to act upon behalf of Schultz with respect to both this Application and the Motion.

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