

ORIGINAL

NEW APPLICATION



0000049079

RECEIVED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FENNEMORE CRAIG, P.C. 2006 APR 13 P 3:55
Jay L. Shapiro (No. 014650)
Patrick J. Black (No. 017141)
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012
Telephone: (602) 916-5000

AZ CORP COMMISSION
DOCUMENT CONTROL

Attorneys for Northern Sunrise Water Company and Southern Sunrise Water Company

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION
OF NORTHERN SUNRISE WATER COMPANY
AND SOUTHERN SUNRISE WATER COMPANY
FOR THE APPROVAL OF SALE AND
TRANSFER OF WATER UTILITY ASSETS, AND
CANCELLATION OF CERTIFICATES OF
CONVENIENCE AND NECESSITY, FOR
MIRACLE VALLEY WATER COMPANY,
COCHISE WATER COMPANY, HORSESHOE
RANCH WATER COMPANY, CRYSTAL
WATER COMPANY, MUSTANG WATER
COMPANY, CORONADO ESTATES WATER
COMPANY AND SIERRA SUNSET WATER
COMPANY, LOCATED IN COCHISE COUNTY,
ARIZONA.

W-20453A-06-0251 W-20454A-06-0251
W-01646A-06-0251 W-01868A-06-0251
W-02235A-06-0251 W-02316A-06-0251
W-02230A-06-0251 W-01629A-06-0251
W-02240A-06-0251

**APPLICATION FOR APPROVAL
OF SALE AND TRANSFER OF
ASSETS, AND CANCELLATION OF
CERTIFICATES OF
CONVENIENCE AND NECESSITY,
OF McLAIN WATER SYSTEMS.**

Pursuant to A.R.S. § 40-285.A and A.A.C. R14-3-101 *et seq.*, Northern Sunrise Water Company (“NSWC”) and Southern Sunrise Water Company (“SSWC”) (collectively, “Applicants”), Arizona corporations, hereby jointly apply to the Arizona Corporation Commission (“Commission”) for an Order approving the transfer of assets, and cancellation of Certificates of Convenience and Necessity (“CC&N”), of the Miracle Valley Water Company, Cochise Water Company, Horseshoe Ranch Water Company, Crystal Water Company, Mustang Water Company, Coronado Estates Water Company and Sierra Sunset Water Company (hereinafter “McLain Water Systems”).

I. INTRODUCTION

1. The troubled history surrounding the McLain Water Systems is well-chronicled in Commission Decision No. 68412 (January 23, 2006). Previous ownership allowed these systems

1 to fall into a state of serious disrepair, and numerous violations cited by the Arizona Department
2 of Environmental Resources (“ADEQ”) brought into question the potential for risk to the health
3 and safety of customers being served by them. Property taxes and Sales taxes in respect of the
4 assets and operations of these systems were not paid for almost 15 years were collected but never
5 paid, and water utility service was being extended to customers outside of the CC&N boundaries
6 of these systems in violation of Commission rules and regulations. Ultimately, the previous
7 owners of the assets filed for Chapter 13 bankruptcy relief under Title 11 of the United States
8 Bankruptcy Code. *See In re Johnny A. McLain, et al.*, Case No. 4-03-bk-04125 TUC-EWH.

9 2. On October 22, 2004, the Bankruptcy Court for the District of Arizona Authorized
10 and Approved an Asset Purchase Agreement (“Agreement”) executed by Algonquin Water
11 Resources, Inc. (“Algonquin”), which provided for the purchase of water utility assets included in
12 the McLain Bankruptcy Estate. A copy of the Agreement is attached hereto as **Exhibit 1**. On
13 March 20, 2006, the Bankruptcy Court for the District issued an Order confirming the sale at a
14 total purchase price of \$696,752.14, based specifically on the Commission’s determination of
15 ratebase for the McLain Water System in Decision No. 68412. A copy of the Bankruptcy Court
16 Order is attached hereto as **Exhibit 2**. Before the transfer of assets can be finalized by the
17 Bankruptcy Court, Algonquin is required to, among other things, obtain Commission approval for
18 the sale and transfer of the assets of the McLain Water Systems, as required by A.R.S. § 40-285.

19 **11. SUMMARY OF TRANSACTION**

20 3. On or around July 7, 2004, Algonquin entered into the Agreement, under the
21 authority of the Bankruptcy Court, to purchase the assets of the McLain Water Systems. The
22 Agreement included a placeholder, initially set at \$1,000,000 being an amount deemed sufficient
23 to discharge all the Creditor claims and administrative charges in the McLain Bankruptcy
24 proceeding, but this price was subject to adjustment to be made equal to the rate base value of
25 these systems as may be established by the Commission at some later date, but prior to the
26 Closing. On January 23, 2006, in Decision No. 68412, the Commission established the following

1 ratebase for each McLain Water System as follows:

2	Mustang Water Company	\$24,008.81
3	Crystal Water Company	\$19,003.18
4	Sierra Sunset Water Company	\$18,583.75
5	Coronado Estates Water Company	\$29,988.84
6	Miracle Valley Water Company	\$22,798.78
7	Horseshoe Ranch Water Company	\$124,920.98
8	Cochise Water Company	\$457,447.80

9 4. On March 13, 2006, the Bankruptcy Court conducted a hearing in response to
10 Cochise County's *Motion of Secured Creditor Cochise County for the Court to Confirm Prior*
11 *Approved Sale of the Water Companies Owed by the Debtors*. See Exhibit 2 at page 2. Cochise
12 County had provided a notice of hearing suggesting that bids higher than the adjusted purchase
13 price that resulted as a consequence of the rate base established by the Commission would be
14 entertained but no other bidders appeared nor expressed interest and hence no bids were e
15 received. As a result, the Bankruptcy Court entered its March 20,2006 Order confirming the sale
16 to Algonquin on the basis of the previously executed Agreement. The Bankruptcy Court also set
17 a Status Hearing for April 25, 2006, to evaluate the progress towards the closing of the
18 Agreement.

19 5. Section 9.2 of the Agreement provides:

20 9.2 Transfer Approval: A condition for the sale and purchase
21 is approval by the Arizona Corporation Commission of the sale
22 and purchase and the approval by the Arizona Corporation
23 Commission of the transfer to Purchaser or the issuance to
24 Purchaser of all the Certificates of Convenience and Necessity for
25 the Water Companies. Approval of the Purchaser's acquisition
26 must also be obtained, to the satisfaction of the Purchaser, from all
other governmental bodies and agencies having jurisdiction over
the Water Companies and/or the transfer to Purchaser of all other
permits, certificates, licenses or other authorizations necessary for
the operation of all plants, facilities, and equipment comprising the
Water Companies. All such transfers shall be approved without
the imposition of any restrictions, conditions, or obligations that

1 are unacceptable to Purchaser in its sole discretion.

2 This Joint Application has been filed to obtain the approval necessary to satisfy one of the
3 approvals required under Section 9.2 of the Agreement, which requires Algonquin to obtain
4 Commission approval for the transfer of assets before Closing can be finalized, and to meet the
5 requirements of A.R.S. § 40-285.

6 6. Based on many factors and geographic location, the condition of existing water
7 utility infrastructure, development layout, customer type and other factors, Algonquin asserts that
8 the public interest will be served by consolidating the water companies in the McLain Water
9 Systems into two separate legal entities, NSWC and SSWC. being one for the systems at the
10 intersection of Highways 92 and 80 north of Huachuca City and the other for those systems
11 located well south of Belle Vista southwest of Nicksville. Applicants have thus filed separate
12 requests for new CC&Ns concurrent with this filing.

13 7. Under the restructured format, NSWC would accept transfer of the assets of
14 Crystal Water Company, Mustang Water Company, Coronado Estates Water Company and Sierra
15 Sunset Water Company. SSWC would receive the assets of Horseshoe Water Company, Cochise
16 Water Company and Miracle Valley Water Company. *See Exhibit 3*, attached hereto, reflecting
17 the current fair value of the assets being transferred.

18 8. In addition to their infrastructure and real property assets, the McLain Water
19 Systems collectively hold CC&Ns authorizing each water company to provide water utility
20 service in their respective service areas. In order to effectively transfer the McLain Water
21 Systems and allow NSWC and SSWC to initiate service, Applicants request that the Commission
22 cancel the existing CC&Ns.

23 **11. THE PARTIES**

24 9. Cochise County is a political subdivision of the state, and creditor-in-interest
25 regarding the sale of McLain Water Systems under the auspices of the United States Bankruptcy
26 Court, District of Arizona.

1 10. Algonquin is a water utility holding company that owns and operates several water
2 and wastewater utility companies in Arizona, including Bella Vista Water Company, Litchfield
3 Park Service Company, Gold Canyon Sewer Company, Black Mountain Sewer Corporation and
4 Rio Rico Utilities.

5 11. NSWC and SSWC are newly formed legal entities incorporated for the express
6 purpose of restructuring the McLain Water Systems assets into two water companies based on
7 geographic location, opportunity for consolidation and potential growth in each respective service
8 area to be served. Applicants are wholly owned by Algonquin, which can provide access to
9 extensive capital resources, and managerial, administrative and technical expertise in the water
10 utility service industry.

11 **IV. THE PUBLIC INTEREST**

12 12. Applicants have filed this Application pursuant to A.R.S. § 40-285.A, which
13 requires, among other things, that a public service corporation shall not sell, lease, assign,
14 mortgage or otherwise dispose of any part of its plant or system necessary or useful in the
15 performance of its duties to the public. Typically, these types of applications are jointly filed by
16 the transferor public service corporation and the transferee. However, because the transfer is set
17 to close pursuant to bankruptcy proceedings involving the previous owners of the McLain Water
18 Systems as debtors, the transferor is not a public service corporation, but a trustee. Nonetheless,
19 Applicants assert that A.R.S. § 40-285.A is the proper statute by which to effectuate the transfer.

20 13. Applicants assert that approval of this Joint Application will serve the public
21 interest. In Decision No. 68412, the Commission established a ratebase for the McLain Water
22 Systems to allow the Bankruptcy Court to confirm a sale price under the Agreement, and order
23 the parties to obtain the regulatory approvals necessary to effectuate the transfer of assets before
24 closing. The Commission also noted in Decision No. 68412 that the public interest is served by
25 finding an entity willing to not only own and operate the McLain Water Systems, but invest the
26 capital necessary to repair and improve a collective infrastructure that has been neglected for

1 years. *See* Decision at 8, 10.

2 14. Applicants have developed an aggressive capital improvement program to address
3 the current state of "unprecedented disrepair" of the McLain Water Systems, including adding
4 water storage facilities and booster pumps, rebuilding new wells to current standards, repairing
5 water main leaks, and replacing damaged and non-standard piping throughout the various
6 distribution systems. This new infrastructure, and the effect of the capital improvement program
7 on rates, will be addressed in separate CC&N proceedings filed by NSWC and SSWC.

8 15. Transferring the McLain Water Systems assets into two separate water companies
9 (NSWC and SSWC) will also serve the public interest. Each of these systems presently operate
10 under individual CC&Ns and under individual rate structures (most of which remained
11 unchanged for many years), making them unnecessarily cumbersome especially given that some
12 of the systems serve under 70 connections. The Applicants propose the consolidation of these
13 water utility system assets into two legal entities, each with its own CC&N. The systems are
14 clustered into two distinct geographic areas. The northern systems are about 6 miles north of
15 Sierra Vista at the intersection of Highways 90 and 82, and the southern systems are all clustered
16 to the west and southwest of Nicksville about 8 miles south of Sierra Vista. This separation will
17 allow NSWC and SSWC to more closely match and track the capital investment, revenues,
18 operating costs and other parameters more closely within a like group of customers. Furthermore,
19 each of the systems within a cluster share certain important characteristics that are different from
20 the other cluster; ratepayers who have like issues respecting water quality, inter-connectability,
21 co-reliance on the same asset base, development layout and patterns, and growth prospects.

22 **V. RELIEF REQUESTED**

23 WHEREFORE, Applicant respectfully requests the following:

24 A. That the Commission proceeds to consider and act upon this Joint Application as
25 timely as possible and to schedule a hearing, if necessary, on this matter;

26 B. That upon completion of said hearing that the Commission enter an Order

1 approving the transfer of the McLain Water Systems assets to NSWC and SSWC respectively, as
2 more accurately described in **Exhibit 3**;

3 C. That the Commission enter an Order canceling the McLain Water Systems'
4 applicable CC&Ns; and

5 D. That the Commission grant such other and further relief as may be appropriate
6 under the circumstances herein.

7 DATED this 13th day of April, 2006.

8 FENNEMORE CRAIG, P.C.

9
10 By 
11 Jay L. Shapiro
12 Patrick J. Black
13 Northern Sunrise Water Company and
14 Southern Sunrise Water Company

14 ORIGINAL and 13 copies delivered this
15 13th day of April, 2006, to:

16 Docket Control
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Arizona 85007

18 Copies hand delivered this 13th day
19 of April, 2006, to:

20 Chairman Jeff Hatch-Miller
21 Arizona Corporation Commission
22 1200 West Washington Street
23 Phoenix, Arizona 85007

22 Commissioner Marc Spitzer
23 Arizona Corporation Commission
24 1200 West Washington Street
25 Phoenix, Arizona 85007

25 Commissioner William A. Mundell
26 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

1 Commissioner Mike Gleason
2 Arizona Corporation Commission
3 1200 West Washington Street
4 Phoenix, Arizona 85007

5 Commissioner Kristin Mayes
6 Arizona Corporation Commission
7 1200 West Washington Street
8 Phoenix, Arizona 85007

9 Hearing Division
10 Arizona Corporation Commission
11 1200 West Washington Street
12 Phoenix, Arizona 85007

13 Jason Gellman, Esq.
14 Legal Division
15 Arizona Corporation Commission
16 1200 West Washington Street
17 Phoenix, Arizona 85007

18 By: Whitney Biko

19 1784285.1

20
21
22
23
24
25
26

EXHIBIT

1

PURCHASE AND SALE AGREEMENT

This Purchase and Sale Agreement (the "Agreement") dated, for reference purposes only, this ___th day of July, 2004, is made and entered into by and between The Bankruptcy Estate of Johnny A. McLain and Linda M. McLain, husband and wife, District of Arizona bankruptcy case number 4-03-bk-04125-EWH, hereinafter referred to as Seller and Algonquin Water Resources of America, Inc., a Delaware corporation, having a mailing address of 2845 Bristol Circle, Oakville, Ontario Canada L6H 7H7, or its assigns, hereinafter referred to as Purchaser.

SECTION 1: PURCHASE AND SALE

1.1 Purchase and Sale: Subject to the terms and conditions of this Agreement, Seller hereby agrees to sell and Purchaser hereby agrees to purchase all right, title, claim and interest the Seller has in and to the following water Companies doing business in Cochise County, Arizona, hereinafter referred to collectively as the "Water Companies" and individually as a "Water Company" whether held by the Debtors individually or as the sole shareholder of Miracle Valley Water Company, Inc. that operates the Miracle Valley Water Company:

- a. Sierra Sunset Water Company
- b. Coronado Water Company
- c. Cochise Water Company
- d. Crystal Water Company
- e. Horseshoe Ranch Water Company
- f. Mustang Water Company
- g. Miracle Valley Water Company

1.2 Real Property Description: The assets of the Water Companies to be sold and purchased hereunder includes all real property, including any and all water and mineral rights, located in Cochise County, Arizona wherein the Bankruptcy Estate has a legal or equitable interest that is used by the Water Companies in the storage and/or distribution of water to customers (the "Real Property"). A legal description for this Real Property will be provided for the Closing by the Escrow Agent hereafter named. The sale and purchase shall include as part of this Real Property all right, title, claim and interest the Seller has in any easements or licenses utilized for any purpose related to the Water Companies including ingress, egress, water line or meter placement or usage. Excluded from the Real Property being sold and purchased is the Debtors' single family residence at 7110 S. Jaxel Road Hereford, Arizona and the property known as 5161 E, Hereford, Hereford, Arizona presently used by the Water Companies as an office and/or storage facility for equipment and materials.

1.3 Personal Property Description: The sale and purchase is to include right, title, claim and interest in and to all personal property and fixtures used in or related to the Water Companies including, but not limited to, copies of business records, if such records are available, showing customers names, addresses, and rates, all water rights, wells, well casings, storage tanks, pumps, meters, underground and above ground piping and other fixtures or improvements

owned or used by the Water Companies in the distribution or storage of water plus the right to serve present and future customers, all business and trade names, all issued certificates and licenses related to the Water Companies and the right to have issued or transferred to Purchaser by the Arizona Corporation Commission any and all certificates necessary to run and operate the Water Companies (the "Personal Property"). Excluded from the Personal Property are monies held by the Water Companies as cash or in a checking, savings, credit union, money market account, or other financial entity prior to Closing and any customer deposits as the Debtors have stated under penalty of perjury that they hold no deposits,

1.4 Accounts Receivable: Accounts of the Debtors related to and arising out of the Water Companies would be pro-rated as of the day of Closing. Purchaser would endeavor, after Closing, to collect the accounts held by the Debtors in the normal and regular course of business operations. Monies collected by the Purchaser on accounts of the Debtors would be remitted with an accounting report, sixty (60) days after Closing less ten percent (10%) of the amount collected as compensation for collecting the monies. Monies collected on the Debtors' accounts after sixty (60) days of the Closing, would be included in the sale to Purchaser,

1.5 Miracle Valley System; The Water Company known as the Miracle Valley Water System may be held by an Arizona corporation, and if so held, the transaction contemplated herein shall include, at the sole discretion of the Purchaser, either: (a) the conveyance from such corporation to the Purchaser of all of the assets related to or utilized in respect of such Water Company, or (b) the conveyance to the Purchaser of all of the stock of such corporation, free and clear of any and all liabilities. Control of this corporation is included in the Bankruptcy Estate because Johnny A. McLain and Linda M. McLain, husband and wife, own all of the stock in such corporation.

1.6 Property Definition: All Real Property and Personal Property being sold and conveyed is referred to collectively as the "Property".

SECTION 2: PURCHASE PRICE AND PAYMENTS

2.1 Purchase Price: The purchase price to be paid by the Purchaser to the Seller on Closing for the Property described herein shall be One Million Dollars (\$1,000,000.00), subject to a positive or negative adjustment of the Purchase Price at the Closing of the sale to reflect that Purchase Price to be paid shall be equal to the rate base amount for the Water Companies to be determined conclusively prior to Closing by the Arizona Corporation Commission (the "ACC") as the value of the Property being purchased by Purchaser for future rate making purposes (the "Rate Base"). The purchase price adjusted in accordance herewith shall be hereinafter referred to as the "Purchase Price".

2.2 Initial Earnest Money Deposit: Not less than 10 days following the date of execution of this Agreement by Seller (the date of execution being referred to as the "Agreement Date"), Purchaser shall deposit an amount equal to Two Thousand Dollars (\$2,000.00) (the "Earnest Money Deposit") with the Escrow Agent named below. The Escrow Agent shall hold all Earnest Money Deposit for the benefit of the parties as described herein. At the option and

cost of the Purchaser, the Earnest Money Deposit shall be maintained either: (a) in an interest bearing account; or (b) a non-interest bearing account. All interest which is earned on the Earnest Money Deposit shall be for the benefit of the Purchaser, unless the Earnest Money Deposit is forfeited to Seller, in which case any interest earned shall be for the benefit of the Seller. The Escrow Agent shall provide notice to Seller and Purchaser of the receipt of the Earnest Money Deposit. If an Earnest Money Deposit referred to in this Section 2.2 is not deposited in accordance herewith, this Agreement shall be promptly terminated without recourse between the Parties and Purchaser shall have no interest whatsoever in the Property pursuant to or arising out of this Agreement or otherwise.

2.3 Additional Deposit Upon Bankruptcy Court Approval: After the Bankruptcy Court, in District of Arizona case number 4-03-bk-04125-EWH, In Re the Bankruptcy of Johnny A. McLain and Linda M. McLain, husband and wife, (the "Bankruptcy Case") issues an Order approving, after notice and hearing, the sale and purchase described herein, (the "Approval"), the Purchaser shall, within ten (10) days of the Approval Order being entered and final, deposit with the Escrow Agent an additional One Hundred Ninety Eight Thousand Dollars (\$198,000.00) as an for an additional Earnest Money Deposit making the total Earnest Money Deposit Two Hundred Thousand Dollars (\$200,000.00).

2.4 Payment of Purchase Price: Upon Closing the Purchaser shall pay the Purchase Price (as adjusted in accordance with Section 2.1 hereof) to Sellers in cash. Purchaser can use the Earnest Money Deposit and any interest earned toward the Purchase Price.

2.5 Forfeiture of Earnest Money Deposit: The Earnest Money Deposit shall be forfeited to Seller as liquidated damages, as described hereafter in the event the Purchaser defaults in material breach of this Agreement.

SECTION 3: TITLE TO THE PROPERTY

3.1 Title Examination of the Property: Upon the issuance of the Approval Order, the Purchaser and Seller shall instruct the Escrow Agent to:

- (i) cause the title to the Real and Personal Property to be examined by a title insurance company selected by the Escrow Agent and to deliver, as soon as practical, to Purchaser and Seller a commitment, subject to the stated exceptions, for a standard owner's policy of title insurance insuring ownership of the Real Property in the name of the Purchaser for the amount of the Purchase Price and a copy of every instrument of record referred to in the commitment for title insurance; and
- (ii) cause a Uniform Commercial Code title examination to be undertaken and deliver to Purchaser and Seller copies of all lien instruments of record that are outstanding against the Personal Property.

The cost for the examinations and standard owner's policy set out above shall be on the

account of Seller and shall be paid by Seller at Closing. The cost of any extended title insurance requested by Purchaser shall be for the account of Purchaser.

3.2 Objections to Title: Within ten (10) business days of the receipt of a title examination and/or commitment, the Purchaser shall give written notice to Seller of any matter that is not acceptable to Purchaser (which items shall be referred to as the "Disapproved Title Exceptions"). Within ten (10) business days of Seller's receipt of Purchaser's notice of Disapproved Title Exceptions, Seller shall provide Purchaser with notice advising as to any Disapproved Title Exceptions which will not be corrected by Seller prior to Closing. If Seller does not agree to correct all Disapproved Title Exceptions prior to Closing, Purchaser shall be entitled to terminate this Agreement without recourse between the Parties and upon such termination by Purchaser, the Earnest Money Deposit shall be returned to Purchaser.

SECTION 4: CLOSING

4.1 Escrow Agent: The Escrow Agent for the sale and purchase shall be Pioneer Title Agency, 580 E. Wilcox Drive, Sierra Vista, Arizona 85635, telephone number (520) 458-3500 and facsimile number (520) 458-6121. This Agreement shall serve as escrow instructions although the parties agree to sign any additional escrow instructions requested by the Escrow Agent so long as such instructions do not conflict with this Agreement.

4.2 Closing Date: The Closing of this transaction (the "Closing") shall be held at the offices of the Escrow Agent on the tenth (10th) day following satisfaction of all conditions precedent set out herein, Closing via the mail, in counterparts, and with the Escrow Agent being able, but not required, to rely on facsimile signatures shall all be permitted.

4.3 Closing Costs: Seller shall pay all costs related to the making of record all deeds, the Affidavit of Value, a certified copy of the Order approving the sale and/or conveying title, and to release any lien or claim. Each party shall be responsible for the fees and charges of their respective legal counsel. At a Closing, Purchaser and Seller shall each pay one half (1/2) of the fees and costs of the Escrow Agent.

4.4 Property Tax Prorations: Real and any Personal Property taxes and assessments shall be prorated as of the date of the Closing and the apportionment of such taxes shall be made on the basis of the tax rate and assessment in effect during the previous year if the tax rate and assessment for the current year is not yet set. Purchaser shall only be responsible for paying all Real and any Personal Property Taxes arising after the date of Closing.

4.5 Payment of Property Taxes at Closing: The Escrow Agent for the Sale and Purchase shall pay at Closing those delinquent Real and Personal Property Taxes authorized by the Bankruptcy Court in the Order approving the Sale. The payment of or the provision for the payment of all Real and Personal Property Taxes will be as is needed to provide insurable and marketable title by Seller. If there are, at Closing, Real and Personal Property Taxes that have been assessed but are not yet due then the amount to be paid by the Seller for such taxes shall be withheld by the Escrow Agent from the Purchase Price and used by the Escrow Agent to pay the

taxes owed by the Seller when payment can be made or, at the option of the Purchaser, the amount owed by the Seller for such taxes shall be a credit against the Purchase Price with the Purchaser to then be responsible for paying the taxes not yet due at the time of Closing when payment of such taxes can be made with the payment by the Purchaser to include what the Seller would otherwise be responsible for paying.

4.6 Condition of Title: Good and marketable fee simple, insurable title in the Real Property shall be conveyed by Seller to Purchaser at the Closing by a duly executed Deed or Court Order, suitable for recording, subject only to the Permitted Exceptions. Possession of the Real Property shall be delivered at the Closing or pursuant to Order of the Bankruptcy Court that gives possession to the Purchaser prior to Closing. As used herein, "marketable title" shall mean marketable fee simple title to the Real Property as determined in accordance with the laws of the State of Arizona. As used herein, "insurable title" shall mean fee simple title that is currently insurable at regular rates by the Title Insurance Company selected by the Escrow Agent and Purchaser, under its standard owner's title insurance policy currently in use in Arizona, without any exception or exclusion from coverage other than the agreed upon Permitted Exceptions. Seller can use the Purchase Price to be paid to discharge or pay at Closing any obligation Seller is required to pay as part of the Closing to provide insurable title. Purchaser shall advise the Escrow Agent prior to Closing how Purchaser wants to take title or if its interest has been assigned in whole or in part,

4.7 Closing Documents: In addition to the Deed or Court Order, Seller shall deliver to the Escrow Agent and/or Purchaser at Closing the following together with any other documents as may be reasonably required by the Title Company to Close the transaction in accordance with the terms and conditions of this Agreement:

- (i) a Certificate of Non-foreign Status in accordance with Section 1445 of the Internal Revenue Code of 1986, as amended and the regulations thereunder;
- (ii) such Form 1099's or other forms required by the Internal Revenue Code, as amended; and
- (iii) evidence, satisfactory to the Escrow Agent of Seller's authority to execute and deliver a Deed and other Closing documents.

The Escrow Agent shall advise Seller as to Escrow Agent's requirements such that Seller can obtain the necessary documentation for a timely Closing. Purchaser shall deliver to the Escrow Agent at Closing evidence satisfactory to the Escrow Agent of the Purchaser's authority to complete the transaction contemplated hereunder and any other documents as may be reasonably required to Close this transaction in accordance with the terms and conditions as set forth in this Agreement.

4.8 Bill of Sale: All Personal Property being sold and purchased shall be conveyed

- free and clear of Liens by a Bill of Sale and/or Court Order.

4.9 **Court Order Conveying Title**; If *the* bankrupts, Johnny A. McLain and Linda M. McLain, husband and wife, will *not* sign any documents required to complete the transaction contemplated hereunder, Purchaser agrees that title to the Property may be conveyed to Purchaser by Order of the Bankruptcy Court provided such Order is acceptable to the Title Insurance Company and the Arizona Corporation Commission.

4.10 **Utilities**: Purchaser shall place in its name all utilities as of the date of Closing. The pro-ration of utility charges will be handled by Seller and Purchaser upon Closing,

SECTION 5: FORFEITURE OF EARNEST MONEY DEPOSIT

5.1 If the Purchaser fails to Close timely as set forth herein, then all Earnest Money Deposit and any interest thereon shall not be refunded to Purchaser but shall be forfeited to Seller, not as a penalty, but as and for liquidated damages for Seller having removed the subject Property from the market and for other damages Purchaser acknowledges have been incurred by Seller as a direct result of the Purchaser's default. The Seller and Purchaser recognize and acknowledge that given the fluctuation of land values and availability of financing it would not be practical to attempt to ascertain with any degree of certainty the actual damages suffered by Seller if Purchaser fails to Close timely but both parties agree that the Earnest Money Deposit to be forfeited is a reasonable estimate of the Seller's damages.

SECTION 6: AGENCY DISCLOSURE AND COMMISSIONS

6.1 Seller and Purchaser hereby represent and warrant, each to the other, that no party is entitled, as a result of the actions of Seller or Purchaser, as the case may be, to a real estate commission or other fee resulting from the execution of this Agreement or the sale and conveyance herein contemplated, Seller and Purchaser hereby indemnify and hold each other harmless from and against any and all losses, costs, damages and expenses (including attorney's fees) incurred or paid as a result of any claim for a real estate commission or other such fee arising out of the actions of Seller or Purchaser, as the case may be, with regard to this Agreement.

SECTION 7: WARRANTIES AND REPRESENTATIONS OF SELLER

7.1 **Condition of Property**: No agreement or representations pertaining to this transaction, have been made by Seller or any third person to the Purchaser or its agents, except as stated herein. Neither the Seller nor any one acting for the Seller is allowed or authorized to make any verbal representation and, therefore, if it is asserted by the Purchaser or its agent that a verbal representation was nevertheless made, the Purchaser and its agents cannot rely on any such verbal representation.

7.2 **As-Is, Where-Is Basis**: This is a sale of the Property is being completed on an "AS IS", "WHERE IS" and "WITH ALL FAULTS" basis. Seller makes no warranties or

representations of any kind or nature whatever in connection with the Property including, without limitation, its zoning, set back requirements, boundary lines, compaction, the availability of water, or any utility service, flooding characteristics, wetland questions or other site characteristics including, but not limited to, access, ingress or egress restrictions. No representation of any kind is made with regard to my improvements or personal property on or about the Property including, but not limited to, the number of customers and the rates charged and/or the sufficiency of any system as to distribution, pressure, and/or storage capacity. Purchaser is aware that while certain records and inventory are to be included in the sale they may not be delivered to the Purchaser and, if not delivered, there will be no adjustment to the Purchase Price for this failure to deliver,

7.3 Hazardous Waste: The generation, handling, transporting, storage, treatment, usage, disposal, release, and/or burial of hazardous or toxic substances, petroleum products, batteries may have occurred on the Property, If it is found prior to Closing that an environmental or contamination problem exists with the Property then, despite anything to the contrary in this Agreement, at the option of the Purchaser, the Purchaser shall: (a) terminate this Agreement and, upon such termination, Escrow Agent shall return the Earnest Money Deposit together with interest earned thereon; or (b) accept the Property in its existing condition and to hold Seller completely and absolutely harmless for any cleanup, removal, or protection safeguards or requirements. If any such problem is discovered after Closing the risk and obligation to remedy is solely on the Purchaser and the Seller shall be held completely and absolutely harmless.

7.4 Satisfactory Condition: The Purchaser has investigated whether the Property is suitable for the purposes purchased and in Closing Purchaser acknowledges that the Property is suitable and satisfactory for the needs of the Purchaser. By Closing Purchaser accepts the condition of the Property, including any actual or potential environmental problems, and waives and releases any and all claims against the Seller except for defects or problems with title which claim shall be limited to Purchaser proceeding against the title insurance policy. Purchaser acknowledges that it should consult with government agencies, financial institutions, insurance agents, architects, engineers, and other appropriate persons to determine whether or not to Close on the purchase.

7.5 Survey Not Provided: Seller will not provide a survey for the Real Property. If a survey is desired by purchaser then the Purchaser shall obtain a survey at its cost. Should the Purchaser pay for a survey and the sale to Purchaser is not approved by the Bankruptcy Court but a sale to a third person is instead approved then, in such event, if the sale that is approved Closes the Purchaser will, at that Closing, be reimbursed the cost of the survey provided the Purchaser makes the survey and any costs for a title examination available to the buyer approved by the Bankruptcy Court.

7.6 Outstanding Notices of Violations: Purchaser is aware that violations of City, County, State or Federal laws, codes, ordinances or statutes has been asserted, issued, or assessed against the Property by the Arizona Corporation Commission and the Arizona Department of Environmental Quality, If such allegations are not resolved to the satisfaction of the Purchaser, Purchase may, at its option, terminate this Agreement without recourse between the Parties and,

upon such termination, the Escrow Agent shall promptly return the Earnest Money Deposit to the Purchaser together with accrued interest thereon.

SECTION 8: CONDITIONAL OFFER TO SELL BY SELLER

8.1 Bankruptcy. The Seller is the Chapter 11 Bankruptcy Estate for Johnny A. McLain and Linda M. McLain, husband and wife, in District of Arizona bankruptcy case number 4-03-bk-04125-BWH. As a result, Bankruptcy Court approval of the sale is required before there is any legal obligation on the part of the Seller arising out of or related to this Agreement. A Motion and Application shall be filed with the Bankruptcy Court to have the sale approved as presented or as may be mutually modified by Seller and Purchaser prior to or during my hearing to approve the sale. A hearing on the Motion and Application can usually be expected within thirty (30) days of the filing of the Motion. Objections may be made to the sale. As a result, when Bankruptcy Court approval will be obtained or if it can be obtained is not a certainty. Seller will ask the Court to allow the Purchaser to appear telephonically at hearings on or related to the sale, if this is desired by Purchaser. Confirmation of the Liquidating Plan of Reorganization submitted by Cochise County may be a condition for a sale to be approved.

8.2 Bidding. In presenting this Agreement to the Bankruptcy Court for approval, the Seller, Cochise County, and/or the Bankruptcy Court will seek higher and better bids for the Property. Higher and better bids, if made, will be considered. If the Court approves of a sale to a Third Party Purchaser then, subject to the payment of the break fee set out in Section 8.3, as approved by the Bankruptcy Court, this Agreement will be terminated and the Purchaser herein shall have no further interest in the Property and the Earnest Money Deposit together with any interest earned thereon shall be returned to the Purchaser. At the hearing for approval of the sale, the Purchaser shall be entitled to make a higher offer to buy the Property should a Third Party Purchase submit a bid that is of more benefit to Seller than the terms set out herein. Seller and/or Cochise County will advertise the sale in an attempt to attract higher and better offers for the Property,

8.3 Compensation to Purchaser: If the Bankruptcy Court accepts a higher and better bid and approves of a sale to a Third Party Purchaser, Seller shall pay to the Purchaser at the Closing of the sale to the Third Party Purchaser approved by the Bankruptcy Court, Twenty Five Thousand Dollars (\$25,000.00) to compensate and reimburse Purchaser for the time, effort, and costs incurred by Purchaser in presenting this Agreement to the Bankruptcy Court for consideration.

SECTION 9: PURCHASER'S CONDITIONS FOR CLOSING:

9.1 Rate Base Approval: The Rate Base value of the Water Companies shall be determined by the Arizona Corporation Commission (the "Rate Base") according to the rules, regulations and guidelines which the Arizona Corporation Commission has for determining the net invested capital value or Rate Base of an investor-owned public utility system for rate making purposes. Upon the determination of the Rate Base, the Purchase Price shall be adjusted upward or downward as described herein, Purchaser shall use commercially reasonable efforts to

provide, on a timely basis, all information requested by the Arizona Corporation Commission provided such information is available to the Purchaser.

9.2 Transfer Approval: A condition for the sale and purchase is approval by the Arizona Corporation Commission of the sale and purchase and the approval by the Arizona Corporation Commission of the transfer to Purchaser or the issuance to Purchaser of all Certificates of Convenience and Necessity for the Water Companies. Approval of the Purchaser's acquisition must also be obtained, to the satisfaction of the Purchaser, from all other governmental bodies and agencies having jurisdiction over the Water Companies and/or the transfer to Purchaser of all other permits, certificates, licenses or other authorizations necessary for the operation of all plants, facilities, and equipment comprising the Water Companies. All such transfers shall be approved without the imposition of any restrictions conditions, or obligations that are unacceptable to Purchaser in its sole discretion.

SECTION 10: PURCHASER'S OPERATION OF THE WATER COMPANIES:

10.1 Purchaser's Willingness to Take Control Pre-Closing: Subject to notice and hearing and approval by the Bankruptcy Court and the Arizona Corporation Commission and after the issuance of an Order of the Bankruptcy Court that is final, the Purchaser is willing to take control of and operate the Water Companies. All management and operation services provided by Purchaser would have to follow and be in accordance with Order of the Bankruptcy Court and requirements of the Arizona Corporation Commission as to the filing of reports and restrictions on operations. Purchaser would, during its period of operation, from monies collected, pay bills and expenses incurred in the operation. Compensation to be paid to Purchaser for operating would be as is set by the Court and/or the Arizona Corporation Commission. In the event capital improvements were needed that could not be paid from operations the Purchaser would present the matter to the Bankruptcy Court with a proposal for paying for the needed improvement.

SECTION 11: REMEDIES

11.1 Remedies of Purchaser: In the event that Seller shall fail to perform fully and timely any of its material obligations hereunder or to consummate the transaction contemplated herein for any reason, except for Purchaser's material default hereunder, Purchaser's sole and exclusive remedy shall be the right to apply to the Bankruptcy Court to enforce specific performance of the conveyance of the interest the Seller holds in the Property without the expenditure of money by the Seller other than the Purchase Price. If, after Closing, a problem or claim arises with title to the Property Purchaser's sole remedy shall be limited to recovery against the title insurance policy to be issued. If the transaction contemplated hereunder is not approved by the Bankruptcy Court on or before September 30, 2004 (other than as a result of a breach by Purchaser of its obligations hereunder), Purchase shall have the right to terminate this Agreement and, upon such termination, Escrow Agent shall promptly return the Earnest Money Deposit together with interest earned thereon to Purchaser,

112 **Remedies of Seller:** ~~If~~ the purchaser shall fail to timely Close **for any** reason, **except Seller's default or the termination of the Agreement pursuant to a right to terminate** given herein, **the Seller's sole and exclusive remedy shall be to retain as liquidated damages the Earnest Money Deposit and any interest thereon as described herein.** If the adjusted Purchase Price to be paid is less than One Million Dollars (\$1,000,000.00) then, at the option of Seller, Seller may: (a) terminate the Agreement upon the return of the Earnest Money Deposit together with interest earned thereon to Purchase; or (b) complete the transaction in accordance with the adjusted Purchase Price to be paid.

SECTION 12: MISCELLANEOUS

12.1 **Notices:** Any demand, request or notice which either party hereto **desires or** may be required to make or deliver to the other pursuant to this Agreement shall be in writing and shall be deemed delivered when personally delivered, received by facsimile, or when delivered by private courier, Federal Express or similar service, or four (4) calendar days after being deposited in the United States Mail, registered or certified, postage prepaid, return receipt requested, addressed as follows or to such other single address and person as either party may communicate to the other by like written notice:

To Purchaser:

Mr. Ian Robertson
Algonquin Water Resources of America, Inc.
2845 Bristol Circle
Oakville, Ontario
CANADA L6H 7H7
Telephone: (1-905) 465-4551
Facsimile: (1-905) 465-4514

To Seller:

Michael M. Neal, P.C.
110 S. Church Avenue, Suite 4298
Tucson, Arizona 85701
Telephone: (520) 623-5686
Facsimile: (520) 623-5255

with a copy to:

Mr. John A. MacKinnon
Deputy County Attorney
Office of the County Attorney
P.O. Box CA
Bisbee, AZ 85603
Telephone: (520) 432-8700
Facsimile: (520) 432-8778

12.2 Entire Agreement: **TIME IS OF THE ESSENCE AS TO EACH AND EVERY TERM AND CONDITION OF THIS AGREEMENT.** This Agreement contains the entire understanding between the parties and **supersedes any prior understandings and agreements between them respecting the subject matter hereof.** There are no other representations, agreements, **arrangements or understandings, oral or written, between and among the parties hereto or any of them, relating to the subject matter of this Agreement.** No amendment of, supplement, or superceding of, this **Agreement shall be valid or effective unless made in writing and executed by the parties hereto.**

12.3 Assignments: **Purchaser shall have the right to transfer or assign its interest in this Agreement without the prior written consent of Seller but the Purchaser shall, despite; any assignment, remain liable to the Seller under this Agreement.** This Agreement **shall inure to the benefit of and be binding upon the heirs, successors, and assignees of the parties hereto.**

12.4 Other costs: **In the event a party is required to enforce the provisions of this Agreement, such party, if it prevails, shall be entitled to receive from the other party all costs and expenses, including, Without limitation, reasonable attorney's fees and costs incurred, including the cost for any expert witnesses and investigations and those for a trial and appeal, in connection with such enforcement.**

12.5 Construction: **If the time period by which any right, option, election, or extension provided under this Agreement must be exercised, or by which any act required hereunder must be performed, or by which the Closing must be held, expires on a Saturday, Sunday or legal holiday, then such time period shall be automatically extended through the close of business on the next business day.**

12.6 Agreement as Offered: **The execution of this Agreement by the Purchaser shall constitute an offer to purchase the Property upon Bankruptcy Court approval and satisfaction of all terms and conditions. However, Purchaser shall have only thirty (30) days from its receipt of this Agreement to make an offer to purchase by signing the Agreement presented.**

12.7 No Recording: **Recording of this Agreement or any memorandum thereof by Purchaser is prohibited and any recording shall be null, void, and of no force or effect.**

12.8 Governing Law: **This Agreement shall be governed and construed in accordance with the laws of the State of Arizona.**

12.9 Survival: **Except as otherwise expressly provided in this Agreement to the contrary, Purchaser's and Seller's obligations shall survive the Closing.**

12.10 Authority: **The person executing this Agreement on behalf of the Purchaser represents and warrants that they are fully authorized to do so and that this Agreement as executed and delivered constitutes a valid, binding and enforceable offer of the Purchaser to purchase upon Bankruptcy Court approval.**

12.11 **Eminent Domain:** If an eminent domain proceeding is commenced against the Property prior to the Closing, the Purchaser shall have the right to elect either to: (a) complete the sale of the Property in accordance with the terms of this Agreement, in which event Purchaser shall be entitled to receive all compensation, including any severance damages, payable on account of said taking by eminent domain; or (b) to terminate this Agreement by giving written notice to the Seller within fifteen (15) days after receiving Written notice or written information concerning the commencement of any such proceeding in which event all Earnest Money Deposits together with interest thereon shall be returned to Purchaser and the Parties shall be released from all further obligations hereunder, except as is otherwise provided in this Agreement.

12.12 **Risk of Loss:** The risk of material loss or damage to the Property by casualty, prior to Closing, is retained by the Seller. Upon the happening of any material loss or damage, Seller shall provide Purchaser with notice thereof. At the option of the Purchaser to be exercised within ten (10) days thereafter, Purchaser may: (a) terminate this Agreement; or (b) Close with the Purchase Price reduced to reflect the damage. If the Purchaser elects to close the transaction with a reduced Purchase Price, Seller may either: (a) Close the transaction at such reduced Purchase Price; or (b) terminate this Agreement. In the event of either Party's termination of this Agreement pursuant to this section, the Earnest Money Deposit together with interest thereon shall be immediately refunded to the Purchaser and the Parties hereunder shall have no further obligation or liability to each other, except as otherwise provided in this Agreement,

IN WITNESS WHEREOF, this Agreement has been executed on the dates set forth next to the signatures below.

PURCHASER:

ALGONQUIN WATER RESOURCES OF AMERICA, INC., a Delaware corporation,

By: _____

Its Authorized Agent *EMILY A. PATRICK*

Dated: July 7th 2004

SELLER:

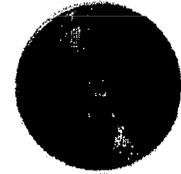
The Bankruptcy Estate of **Johnny A. McLain** and **Linda M. McLain**, husband and wife, District of Arizona case number 4-03-bk-04125-EWH

By: _____

Dated: _____

EXHIBIT

2



Dated: March 20, 2006

1 One South Church Avenue, Suite 700
2 Tucson, Arizona 85701-1611
3 Facsimile (520) 879-4705
4 Telephone (520) 622-4427

Rob Charles, State Bar No. 007359
Email: rcharles@lrllaw.com

Attorneys for Algonquin Water Resources of America, Inc.

EILEEN W. HOLLOWELL
U.S. Bankruptcy Judge

5
6 UNITED STATES BANKRUPTCY COURT
7 DISTRICT OF ARIZONA

8 In re:

9 Johnny A. McLain and Linda M. McLain,
10 husband and wife,

11 Debtors.

(Chapter 11 Case)

No. 4:03-bk-04125-EWH

**ORDER CONFIRMING SALE TO
ALGONQUIN WATER RESOURCES
OF AMERICA, INC.**

12 Algonquin Water Resources of America, Inc. ("Algonquin") agreed to purchase
13 the estate's interests in various water company assets (the "Property") and as described in
14 a Purchase and Sale Agreement dated July 7, 2004 (the "Agreement") filed with this
15 Court by creditor Cochise County on August 3, 2004 (DE 133). Cochise County sought
16 this Court's approval of the sale of the Property by its *Motion and Application by Cochise
17 County to Authorize and Approve: 1) Sale of Water Companies Free and Clear of Liens;
18 (2) Authorize the Payment of Closing Costs and a Payment to Creditors at Closing in
19 Accordance with Confirmed Plan; and (3) Operation of the Water Companies by
20 Purchaser, Pending Closing, if Acceptable to the Arizona Corporation Commission and
21 the Purchaser (the "Sale Motion")* (DE 130). The Sale Motion was filed by Cochise
22 County pursuant to its *First Amended Liquidating Plan of Reorganization (the "Plan")*
23 *(DE 126)*, confirmed by this Court's August 4, 2004 *Order Confirming as Modified*
24 *Herein First Amended Liquidating Plan of Reorganization Filed June 2, 2004 by*
25 *Creditor Cochise County (the "Confirmation Order")* (DE 135).
26

1 At the hearing, Algonquin committed to promptly file its application for issuance
2 of Certificates of Convenience and Necessity ("CC&Ns") and transfer to Algonquin of
3 the Property.

4 Section 9.2 of the Agreement provides:

5 9.2 **Transfer Approval:** A condition for the sale and purchase is
6 approval by the Arizona Corporation Commission of the sale and purchase
7 and the approval by the Arizona Corporation Commission of the transfer to
8 Purchaser or the issuance to Purchaser of all Certificates of Convenience
9 and Necessity for the Water Companies. Approval of the Purchaser's
10 acquisition must also be obtained, to the satisfaction of the Purchaser, from
11 all other governmental bodies and agencies having jurisdiction over the
12 Water Companies and/or the transfer to Purchaser of all other permits,
13 certificates, licenses or other authorizations necessary for the operation of
14 all plants, facilities, and equipment comprising the Water Companies. All
15 such transfers shall be approved without the imposition of any restrictions
16 conditions, or obligations that are unacceptable to Purchaser in its sole
17 discretion.

18 The Court set a **Status** Hearing to monitor the process of compliance with the
19 conditions precedent to the Closing. No one objected to the setting of the status hearing.

20 Good cause appearing from the entire record before this Court.

21 **IT IS ORDERED:**

- 22 1. The prior sale to Algonquin under the Agreement is confirmed at a
23 Purchase Price of \$696,752.14.
- 24 2. The Court will conduct a status hearing in this case concerning the progress
25 toward the Closing on April 25, 2006 at 11:30 a.m. Interested **parties** may appear by
26 telephone in accordance with this Court's procedures.

27 DATED _____, 2006.

United States Bankruptcy Judge
District of **Arizona**

**LEWIS
AND
ROCA
LLP**

LAWYERS

APPROVED AS TO FORM:

LEWIS AND ROCA LLP

By /s/ RC 007359

Rob Charles
One South Church Avenue, Suite 700
Tucson, **Arizona** 85701-1611
Tel: 520-629-4427 Fax: 520-879-4705
Email: rcharles@lrlaw.com
Attorneys for Algonquin Water Resources of America, Inc.

LAW OFFICE OF MICHAEL M. NEAL, P.C.

By: /s/ MMN 04331

Michael M. Neal
mmnealpc@qwest.net
110 S. Church Ave., Suite 4298
Tucson, AZ 85701
Co-Counsel for Cochise County

and

Charles A. Irwin, Esq.
cirwin@co.cochise.az.us
Office of the County Attorney
P.O. Box CA
Bisbee, AZ 85603
Co-Counsel for Cochise County

GRANTED

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT

3

Exhibit 3

Northern Sunrise Water Company

Coronado Estates Water Company
Crystal Water Company
Mustang Water Company
Sierra Sunset Water Company

Southern Sunrise Water Company

Cochise Water Company
Horseshoe Ranch Water Company
Miracle Valley Water Company