

23



0000040394

W-03512A-01-0464

RECEIVED

2001 JUN -8 P 3:12

ORIGINAL

AZ CORP COMMISSION
DOCUMENT CONTROL

1 FENNEMORE CRAIG
 Jay L. Shapiro (No. 014650)
 2 Thomas R. Wilmoth (No. 017557)
 3 3003 North Central Avenue
 Suite 2600
 Phoenix, Arizona 85012-2913
 4 Telephone: (602) 916-5000
 Attorneys for Complainant
 5 Pine Water Company

6
7

BEFORE THE ARIZONA CORPORATION COMMISSION

9 PINE WATER COMPANY, an Arizona
corporation,

Complainant,

v.

12 STRAWBERRY HOLLOW
 13 DEVELOPMENT, INC., an Arizona
 corporation, STRAWBERRY HOLLOW
 14 PROPERTIES, L.L.C., an Arizona limited
 liability company, STRAWBERRY
 15 HOLLOW PROPERTY OWNER'S
 ASSOCIATION, INC., an Arizona not-for-
 16 profit corporation,

Respondents.

Docket No.

APPLICATION FOR ORDER TO SHOW
CAUSE

Arizona Corporation Commission
DOCKETED

JUN 08 2001

DOCKETED BY	
-------------	--

18

19 Pine Water Company ("Pine Water") applies to the Arizona Corporation Commission
 20 ("Commission") for an Order to Show Cause why Respondents should not be adjudicated a
 21 public service corporation and regulated as such by this Commission.

22 **I. INTRODUCTION.**

23 Pine Water is a public service corporation providing domestic water utility service within
 24 that geographic area designated in its certificate of convenience and necessity ("CC&N").
 25 Commission Decision No. 60972 (1998). The territory now served by Pine Water has historically
 26 experienced water shortages. Commission Decision No. 59753, Finding of Fact 10. In the late

1 1980s, the Commission ordered various moratoria on new connections and/or main extensions in
2 the area previously served by E&R Water Company, Pine Water's predecessor. Commission
3 Decision Nos. 56539, 56654. In July, 1996, the Commission allowed E&R Water Company to
4 connect "one single family residential connection per month on a first come first served basis"
5 and continued the complete moratorium on new main extensions. Commission Decision No.
6 59753 at 12. In sum, the Commission has acted repeatedly to protect the public interest in
7 securing and maintaining reliable domestic water supplies in the Pine/Strawberry area.

8 Strawberry Hollow Development, Inc. ("Strawberry Hollow Development"), is an
9 Arizona corporation owning and intending to develop real property located in Gila County,
10 Arizona, known as Strawberry Hollow (the "Property"). See Maps attached at Tab A. The
11 Property is located within Pine Water's certificated service area and, therefore, Pine Water has an
12 exclusive right to provide domestic water utility service to the Property. See, e.g., Trico Electric
13 Co-op v. Arizona Corporation Commission, 86 Ariz. 27 (1959). Strawberry Hollow
14 Development now intends to develop and sell lots in "Phase I" of the Property.¹

15 Over Pine Water's objections and in derogation of Pine Water's rights under its CC&N,
16 Strawberry Hollow Development is constructing a centralized water distribution system and
17 intends to deliver groundwater through that system to all lot owners within the Property. See Pine
18 Water's Complaint ("Compl.") at Tab A. In short, Respondents are acting as a public service
19 corporation and infringing on Pine Water's rights.² Moreover, if Respondents are allowed to
20 construct a water supply system, withdraw groundwater, and serve customers without regulation,
21 they will exacerbate the already dire water shortage in the area and impair Pine Water's ability to

22 _____
23 ¹ "Phase I" is apparently the first half of a larger development scheme, including the development and sale of
approximately 80 residential lots.

24 ² Strawberry Hollow Development is currently the owner of all lands within the Property and the entity operating as a
25 public service corporation. Strawberry Hollow Development intends to transfer ownership and operational
26 responsibility for the water distribution system to a homeowners' association, Strawberry Hollow Owners'
Association ("Strawberry Hollow Association"), once it is formed. Pine Water is proceeding against all Respondents
because it believes that the Respondents are acting in concert to evade regulation by this Commission or deprive Pine
Water of its rights.

1 serve its existing customers.

2 As a public service corporation, Respondents must obtain a CC&N allowing it to provide
3 domestic water utility service to the Property. A.R.S. § 40-281(A). It cannot do so, however,
4 because as explained above, Pine Water has an exclusive right to provide such service to the
5 Property. Therefore, once Respondents are adjudicated a public service corporation, they must be
6 prohibited from constructing water utility facilities and providing water utility service to the
7 Property. A.R.S. § § 40-422 and 424.

8 Pine Water now moves the Commission to order Respondents to come before the
9 Commission and show cause why Respondents should not be adjudicated a public service
10 corporation and regulated by the Commission as such.

11 **II. LEGAL FRAMEWORK.**

12 In Arizona, entities, other than municipal, engaged in furnishing water for irrigation, fire
13 protection or other public purposes are considered “public service corporations.” Arizona
14 Constitution, Article 15, § 2. Public service corporations are subject to the Commission’s
15 jurisdiction. General Alarm Inc. v. Underdown, 76 Ariz. 235, 238 (1953); Arizona Corporation
16 Commission v. Nicholson 108 Ariz 317, 318 (1972). Arizona law imposes various obligations on
17 such corporations. For instance, public service corporations must obtain a CC&N before
18 constructing utility plant. A.R.S. § 40-281(A).

19 The Commission exercises certain quasi-judicial powers inherent in its responsibility to
20 properly regulate public service corporations pursuant to Article 15, § 3 of the Arizona
21 Constitution and to protect the public interest. Southwest Gas Corporation v. Arizona
22 Corporation Commission, 169 Ariz. 279, 284 (1991). These powers include determination of
23 whether a particular business is a public service corporation as defined therein. Id. To be a
24 public service corporation, a corporation’s business must be “such as to make its rates, charges,
25 and methods of operation a matter of **public** concern. It must be clothed with a **public** interest
26 which subjects it to governmental control.” Nicholson, 108 Ariz. at 321 (1972). (Emphasis

1 added.) Governmental control is authorized under the Constitution for “that class of business
2 that might be characterized as a public service enterprise. The theory is that the right to public
3 regulation and protection outweighs the customary right of competition.” Id. at 321. The
4 Commission must also balance the public interest in regulation against private economic interests.
5 Protection of the public interest is the paramount consideration when making these
6 determinations. See, e.g., Trico, 86 Ariz. at 35.

7 Eight factors serve as guideposts to determine whether an entity is a public service
8 corporation. See, e.g., Natural Gas Service Company v. Serv-Yu Cooperative, 70 Ariz. 235, 237-
9 38 (1956). These factors are:

- 10 1. What the corporation actually does;
- 11 2. A dedication to public use;
- 12 3. Articles of incorporation, authorization, and purposes;
- 13 4. Dealing with the service of a commodity in which the public has been generally
14 been held to have an interest;
- 15 5. Monopolizing or intending to monopolize the territory with a public service
16 commodity;
- 17 6. Acceptance of substantially all requests for service;
- 18 7. Service under contract and reserving the right to discriminate is not always
19 controlling; and
- 20 8. Actual or potential competition with other corporations whose business is clothed
21 with public interest.

22 Id. The Commission examines these factors concurrently to identify corporations clothed with
23 the public interest and subject to regulation because they are “indispensable to large segments of
24 [Arizona’s] population.” Southwest Gas, 169 Ariz. at 286. No one factor is dispositive, but all
25 factors are important indicators. Again, protecting the public interest is the Commission’s
26 primary obligation.

1 **III. ARGUMENT.**

2 Respondent’s activities, when evaluated in light of the relevant factors, particularly factors
3 4-8 described above, demonstrates that they are a public service corporation subject to the
4 Commission’s jurisdiction. The public interest, moreover, demands that Respondents be
5 regulated as such.

6
7 **A. Application of the Relevant Factors Demonstrates that Respondents are a
8 Public Service Corporation.**

9 Respondents are dealing with the service of a commodity, water, in which the public has
10 an indisputable interest. Arizona courts have repeatedly recognized this fact. See, e.g., Arizona
11 Water Company v. Arizona Corporation Commission, 161 Ariz. 389 (1989); Nicholson 108 Ariz.
12 at 320 (“There can be no question” that water is a commodity of “special public interest”).

13 Respondents intend to monopolize domestic water utility service within the Property.
14 Strawberry Hollow Development has indicated that it will be the “water provider” to the Property.
15 See Compl. at Tab B. Strawberry Hollow Development, and ultimately, the Strawberry Hollow
16 Association will have full control over operational decisions regarding the delivery of water to
17 Strawberry Hollow landowners. See Compl. at Tabs D and E. Respondents intend to accept all
18 requests for service by any lot owner within the Property. Id.

19 Pine Water already has an existing CC&N both obligating and entitling it to serve the
20 Property. James P. Paul Water Co. v. Arizona Corporation Commission, 137 Ariz. 426 (1983).
21 Respondents will thus engage in actual competition with Pine Water’s business of water delivery.
22 A corporation calculated to compete with public utilities and take their business should be under
23 like regulatory restriction. Actual (or even potential) competition with other corporations whose
24 business is clothed with a public interest must be avoided, lest corporations be organized to
25 compete but evade regulation. Serv-Yu, 70 Ariz. at 241.³

26 ³ The court in Serv-Yu cites with approval Van Dyke v. Geary, 244 U.S. 39 (1917), wherein the plaintiffs organized
a corporation to acquire land and establish a town, which it did. Plaintiffs sold lots to purchasers with the

1 Respondents will likely argue that they are not a public service corporation because they
2 will only serve Strawberry Hollow landowners and then, only pursuant to contract. But, a
3 corporation cannot avoid public regulation by simply incorporating as a non-profit corporation if
4 it is dealing with a commodity which is in the public interest, serves a substantial portion of the
5 public, and competes with a certificated public service corporation already in the field. Id.
6 Dedication to public use is a question of intent. Serv-Yu, 70 Ariz. at 239. An entity may not, by
7 entering into contracts, or limiting service to “members,” escape the burdens attending a public
8 utility. Id.

9 Moreover, where a corporation, association or other entity otherwise meets the definition
10 of a public service corporation, the fact that the general public has no right to demand service is
11 immaterial. If a sizable portion of the public is served, even though that group is restricted in
12 some sense, the necessary impact of service on the public is still met. Nicholson, 108 Ariz. at 319
13 citing Serv-Yu, 70 Ariz. 235 (not all members of the public must have access to service). Here,
14 in just the first phase of this development, 41 lots and perhaps as many as 200 people will receive
15 service from Respondents. This number will likely double when the second phase of
16 development is brought on line.

17 **B. The Public Interest Demands Regulation of Respondents.**

18 Notwithstanding application of the eight factors, “if the business is still affected with the
19 public interest, it remains a public utility.” Serv-Yu, 70 Ariz. at 242. If an entity has dedicated
20 itself to public utility service on behalf of a substantial part of the public and within a substantial
21 area so as to make its business a matter of public concern, welfare and interest, it is a public
22 service corporation. Id. See also General Alarm v. Underdown, 76 Ariz. 235, 239 (1953) (public
23 interest depends on nature of business, means by which it touches the public, and abuses that may

24 understanding that the purchasers could obtain water from the plaintiffs. The Commission declared the company a
25 public utility and the U.S. Supreme Court agreed “that lot purchasers bought with the understanding that they might
26 purchase water from [plaintiffs] water system at rates fixed by her, are all facts of no significance; for the character
and extent of the use make it public; and since the service is a public one, the rates are subject to regulation.” Serv-
Yu 70 Ariz. at 240-241.

1 be reasonably anticipated if not controlled).

2 Now, the Commission must exercise jurisdiction over Respondents or else the public
3 interest will suffer. The Commission has imposed various moratoria after significant
4 consideration of the relevant hydrology of the area in question. The public is currently protected
5 against inadequate domestic water service by virtue of the moratoria. Should Strawberry Hollow
6 Development be allowed to circumvent the moratoria by evading regulation, it will undoubtedly
7 proceed to sell lots for which inadequate supplies are available. See Compl. at Tab C.
8 (“[b]ecause a 100-year adequate water supply has not been demonstrated, the Department of
9 Water Resources must find the water supply to be *inadequate*.”) (Emphasis in original.)

10 Pine Water’s ability to serve its existing customers will also be compromised by the
11 increased pumping Respondents intend to conduct. In short, a demonstrated local water shortage
12 will be exponentially exacerbated to the detriment of existing water users.

13 **IV. CONCLUSION AND RELIEF SOUGHT.**

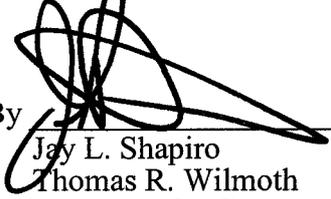
14 Respondents are operating as a public service corporation without compliance with
15 applicable law, and to the detriment of Pine Water and its customers. The public interest requires
16 that the Commission exercise jurisdiction over Strawberry Hollow Development. Accordingly,
17 Pine Water requests that the Commission order Respondents to show cause why they should not
18 be adjudicated a public service corporation. Pine Water further seeks a declaration pursuant to
19 A.R.S. 40-422 that the Respondents are operating as a public service corporation without having
20 first obtained a CC&N as required by A.R.S. 40-281(A). Finally, Pine Water respectfully
21 requests that the Commission immediately initiate proceedings pursuant to A.R.S. § 40-422(A) to
22 enjoin Respondents from proceeding with construction of water distribution facilities and/or
23 water service to entities within the certificated area covered by Pine Water’s CC&N.

24
25
26

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

DATED this 6th day of June, 2001.

FENNEMORE CRAIG



By
Jay L. Shapiro
Thomas R. Wilmoth
Attorneys for Complainant
Pine Water Company

Original and 10 copies
hand-delivered this 6th
day of June, 2001 to:

Docket Control
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Copy of the foregoing
hand-delivered this 6th
day of June, 2001 to:

James Benham, Esq.
Moore & Benham PLC
1144 E. Jefferson
Phoenix, AZ 85034-2285
Attorney and Statutory Agent for Respondents
Strawberry Hollow Development and
Strawberry Hollow Properties, L.L.C.

Lyn Farmer
Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Deb Scott, Director
Steve Olea, Assistant Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

1 Chris Kempley, Chief Counsel
2 Legal Division
3 Arizona Corporation Commission
4 1200 W. Washington St.
5 Phoenix, AZ 85007

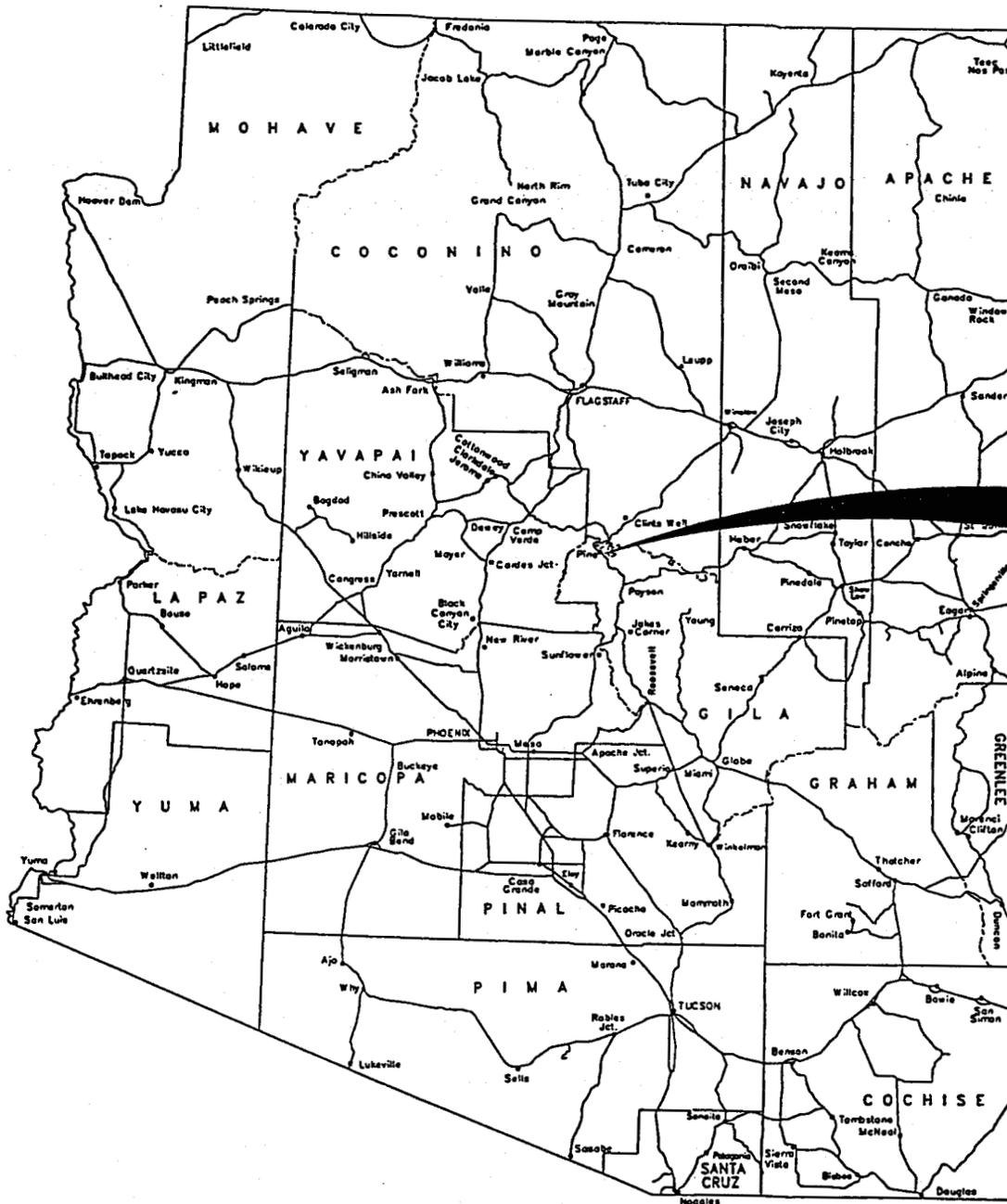
6 And a copy mailed to:

7 Mr. Loren Peterson
8 201 N. Trailwood Rd.
9 Payson, AZ 85541
10 Statutory Agent for Strawberry
11 Hollow Property Owner's Association, Inc.

12 By Mary House

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

A



**Project
Location**

——— STATE HIGHWAYS
 ——— SURVEY ONLY (APPROXIMATE ALIGNMENT)

Figure 1-1. Location Map

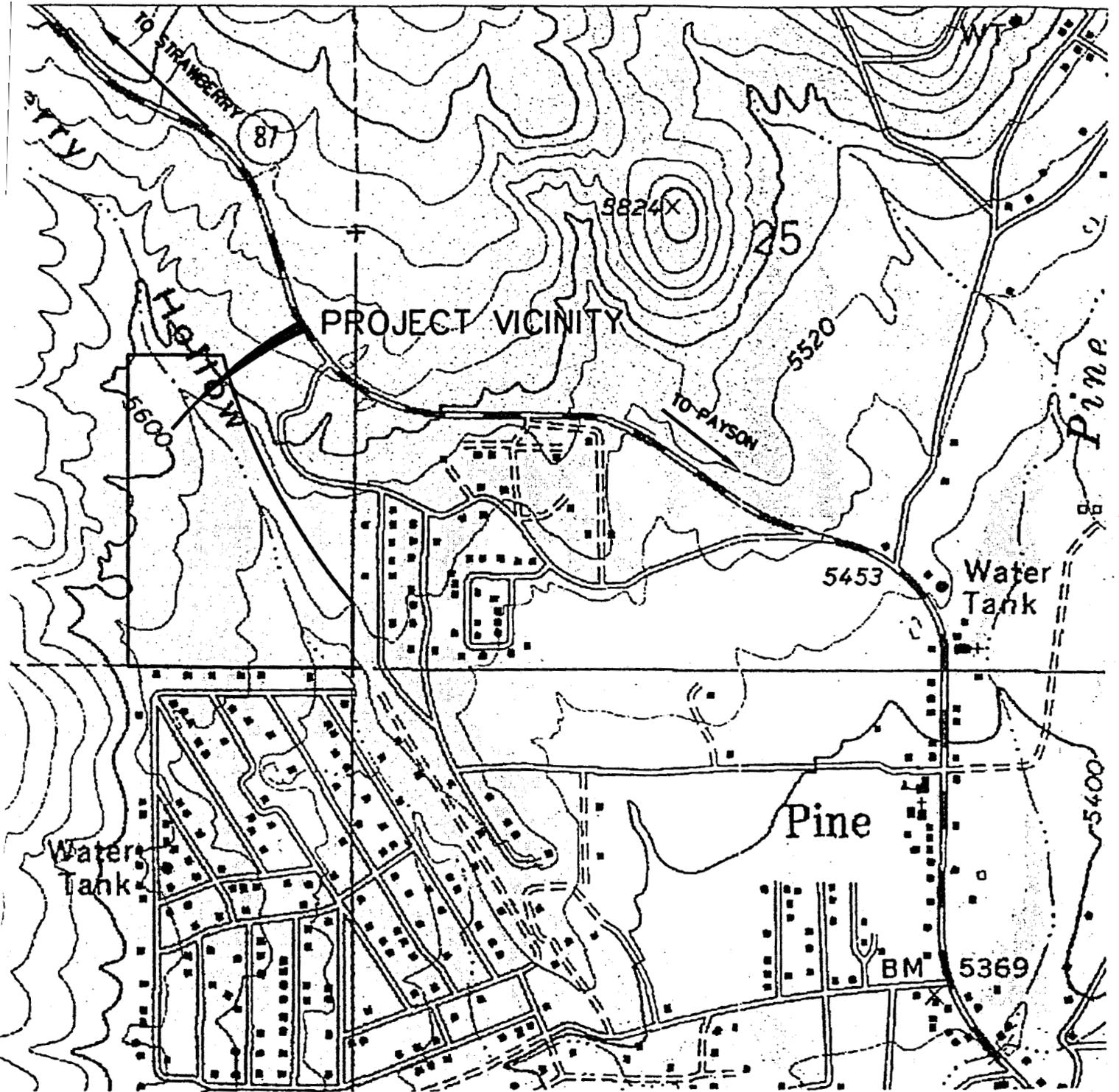


Figure 1-2. Vicinity Map