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BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF SOUTHLINE TRANSMISSION, L.L.C., IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES 40-360, ET SEQ., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING CONSTRUCTION OF THE NON-WAPA-OWNED ARIZONA PORTIONS OF THE SOUTHLINE TRANSMISSION PROJECT, INCLUDING A NEW APPROXIMATELY 66-MILE 345-KV TRANSMISSION LINE IN COCHISE COUNTY FROM THE ARIZONA-NEW MEXICO BORDER TO THE PROPOSED SOUTHLINE APACHE SUBSTATION, THE ASSOCIATED FACILITIES TO CONNECT THE SOUTHLINE APACHE SUBSTATION TO THE ADJACENT AEPCO APACHE SUBSTATION, AND APPROXIMATELY 5 MILES OF NEW 138-KV AND 230-KV TRANSMISSION LINES AND ASSOCIATED FACILITIES TO CONNECT THE EXISTING PANTANO, VAIL, DEMOSS PETRIE, AND TORTOLITA SUBSTATIONS TO THE UPGRADED WAPA-OWNED 230- KV APACHE-TUCSON AND TUCSON-SAGUARO TRANSMISSION LINES IN PIMA AND PINAL COUNTIES.	CASE NO. 173 DOCKET NO. L-00000AAA-16-0370-00173 **LEGAL MEMORANDUM**

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Pursuant to Paragraph 29 of the Procedural Order issued in this docket on October 24, 2016, the Irrigation & Electrical Districts' Association of Arizona ("IEDA"), on behalf of itself and its Members[1] and Associate Members[2], by and through it undersigned counsel, herewith submits the Legal Memorandum invited by that provision.

[1] Ak-Chin Energy Services, Buckeye Water Conservation & Drainage District, Electrical District No. 3, Electrical District No. 4, Electrical District No. 6, Electrical District No. 7, Harquahala Valley Power District, Hohokam Irrigation & Drainage District, Maricopa County Municipal Water Conservation District No., Roosevelt Irrigation District, Tonopah Irrigation District, Wellton-Mohawk Irrigation and Drainage District

Paragraph 29 asks the following:

"Does section 505(a)(iv) of the Federal Land Policy and Management Act apply to any portion of what is described in the Application as the Upgrade Section and owned by Western Area Power Administration ("WAPA"), and if so what portion? Assuming section 505(a)(iv) applies, what are Arizona's substantive line siting standards or are such standards established through the Certificate of Environmental Compatibility ("CEC") process? What information would be necessary to enable the Committee to determine compliance with Arizona's substantive line siting standards? Should the Applicant present such information to the Line Siting Committee at the hearing to allow it, and by extension the Commission, to determine whether the Applicant has met Arizona's substantive standards? *State of Montana v. Johnson*, 738 F.2d 1074, 1079 (9th Cir. 1984), *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 605-06 (9th Cir. 1981). (The foregoing questions assume the Applicant does not need to obtain a CEC for the WAPA-owned lines and facilities included in the Upgrade Section.)"

We believe that the answers to the questions posed in Paragraph 29 can be resolved by application of the Ninth Circuit decisions in *State of Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984) (hereinafter "*Montana*") and *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981) (hereinafter "*Columbia Basin*").

First, we agree with the assumption that a Certificate of Environmental Compatibility (CEC) under Arizona law is not required by the Applicant for its proposal on federal land.[3] While this Applicant is a private corporation, not a federal agency, the issue is not the nature of the Applicant but the fact that the proposed transmission line is to be constructed on/upgraded on

[2] Aguila Irrigation District, Central Arizona Water Conservation District, Electrical District No. 8, McMullen Valley Water Conservation and Drainage District, Page Electric Utility, The City of Safford, Salt River Project, San Carlos Irrigation Project, The Town of Thatcher, Yuma County Water Users Association, Yuma Irrigation District, Yuma-Mesa Irrigation and Drainage District

[3] *Montana*, 738 F.2d at 1077; *Columbia Basin*, 643 F.2d at 605.

federal land.[4] What the *Montana* and *Columbia Basin* courts decided was that the Federal Land Policy and Management Act (FLPMA) did not cede state jurisdiction over federal land for procedural requirements but did make substantive requirements of state law applicable to a siting that occurred on federal land.[5] Here, the lack of a federal agency applicant removes the sovereignty issue raised in *Montana* but does not alter the court's analysis.

Second, under *Montana* and *Columbia Basin*, state substantive standards are applicable to rights-of-way across federal lands under Section 505(a)(iv) of FLPMA, 43 U.S.C. Section 1765.[6] The *Montana* court makes the distinction, based on the language in the statute, between environmental and public health issues and siting and construction, operation and maintenance issues. The latter, under the specific terms of the statute, only apply where a right-of-way is sought.[7] However, both decisions require that the state substantive standards be more stringent than applicable federal standards.[8] Thus, we are presented with the issue of which of the state requirements are substantive standards related to public health or environment or related to siting, construction, operation and maintenance of right-of-way?

Third, this in turn requires an examination of Arizona law to determine the nature of the Arizona standards and whether the language in the relevant statute is sufficiently precise and not vague so as not to comprise a standard?[9] To us, the applicable state substantive standards are found in A.R.S. Section 40-360.06. At the very least, the nine factors listed in subsection A and, separately, subsection B could be considered substantive standards. It is possible to argue that the requirements of subsection C only pertain to the actual issuance of a CEC but neither the

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[4] "[S]ection 505(a)(iv) applies to any entity, public or private, that obtains a right-of-way over federal lands." *Montana*, 738 F.2d at 1079.

[5] *Montana*, 738 F.2d at 1078; *Columbia Basin*, 643 F.2d at 604-5.

[6] *Montana,* 738 F.2d at 1079*; Columbia Basin,* 643 F.2d at 604.

[7] *Montana*, 738 F.2d at 1078.

[8] *Montana*, 738 F.2d at 1079; *Columbia Basin*, 643 F.2d at 598.

[9] *Montana*, 738 F.2d at 1077.

Montana nor *Columbia Basin* courts made such a narrow distinction, both decisions separating the existence of standards from the process of applying them in issuing a permit.[10]

Finally, then, the ultimate question is whether or not Arizona law provides sufficient specificity to have the relevant statutory requirements be deemed substantive standards? Those that do then must be separated from those that don't. Further examination is then required to determine whether the former grouping provides substantive standards more stringent than federal law and, therefore, is applicable here. Once this legal analysis is complete, then the final two questions can be addressed.

Depending on the outcome of that exercise, it would seem prudent to review the Environmental Impact Statement and Record of Decision already compiled in this case to see what federal requirements are already included and whether they satisfy any Arizona substantive standards deemed more stringent. Other Arizona standards appear to be peculiarly non-federal and would have no reason to be in the EIS or ROD in any event. Since they are outside the scope of federal inquiry, they could clearly be said to be more stringent than federal requirements.

In our view, doing this analysis as quickly as possible may narrow the need for further inquiry on this matter and, at least, should focus whatever further inquiry needs to be made. The Applicant will need to present some additional evidence to supplement the current record[11] but, in our view, it would be in the best interests of the state as well as the parties to spend some time focusing on just exactly what needs to be done and how soon. Clearly this is a matter for the prehearing conference scheduled for November 16, 2016.

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[10] *Montana*, 738 F.2d at 1077-8; *Columbia Basin*, 643 F.2d at 604-5.

[11] *Columbia Basin*, 643 F.2d at 605.

RESPECTFULLY SUBMITTED this 9th day of November, 2016.

By /s/ Robert S. Lynch

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ORIGINAL & 25 copies of the foregoing were filed with Docket Control on the 9th day of November, 2016.

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