

ORIGINAL



0000175004

RECEIVED  
AZ CORP COMMISSION  
DOCKET CONTROL

2016 NOV 23 P 4: 05

JACKSON & ODEN, P.C.  
3573 East Sunrise Drive, Suite 125  
Tucson, Arizona 85718  
Telephone: (520) 884-0024  
Fax: (520) 884-0025  
TODD JACKSON ASB NO. 012202  
TJACKSON@JACKSONODENLAW.COM  
LANE D. ODEN ASB NO. 012833  
LODEN@JACKSONODENLAW.COM

Attorneys for Mountain View Ranch  
Development Joint Venture, LLC

**BEFORE THE ARIZONA POWER PLANT AND  
TRANSMISSION LINE SITING COMMITTEE**

IN THE MATTER OF THE  
APPLICATION OF SOUTHLINE  
TRANSMISSION LLC, IN  
CONFORMANCE WITH THE  
REQUIREMENTS OF ARIZONA  
REVISED STATUTES 40-360, ET SEQ.,  
FOR A CERTIFICATE OF  
ENVIRONMENTAL COMPATIBILITY  
AUTHORIZING CONSTRUCTION OF  
NON-WAPA-OWNED ARIZONA  
PORTIONS OF THE SOUTHLINE  
TRANSMISSION PROJECT,  
INCLUDING A NEW  
APPROXIMATELY 66-MILE 345KV  
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 AEPKO APACHE  
SUBSTATION, AND  
APPROXIMATELY 5 MILES OF NEW  
138-KV AND 230-KV TRANSMISSION  
LINES AND ASSOCIATED  
FACILITIES TO CONNECT THE

Docket No. L-00000AAA-16-0370-00173

Case No. 173

**NOTICE OF LIMITED APPEARANCE,  
STATEMENT OF INTEREST, and  
STATEMENT OF POSITION OF  
MOUNTAIN STATES RANCH  
DEVELOPMENT JOINT VENTURE, LLC**

Arizona Corporation Commission

**DOCKETED**

NOV 23 2016

DOCKETED BY	
<i>JM</i>	

1 EXISTING PANTANO, VAIL, DEMOSS  
2 PETRIE, AND TORTOLITA  
3 SUBSTATIONS TO THE UPGRADED  
4 WAPA-OWNED 230-KV APACHE-  
5 TUCSON AND TUCSON-SAGUARO  
6 TRANSMISSION LINES IN PIMA AND  
7 PINAL COUNTIES.

8 Mountain View Ranch Development Joint Venture, LLC (“Mountain View  
9 Ranch”), by and through its counsel undersigned and pursuant to A.R.S. § 40-360.05(B),  
10 hereby enters and gives notice of its limited appearance in these proceedings, and submits  
11 the following Statement of Interest and Statement of Position regarding the Application of  
12 Southline Transmission, L.L.C. for a Certificate of Compatibility (the “Application”) dated  
13 October 14, 2016 for the Southline Transmission Project (the “Project”).

14  
15 **I. STATEMENT OF INTEREST**

16 Mountain View Ranch is the owner of a 470-acre parcel of land, platted as a  
17 residential subdivision and located at the junction of I-10 and Scenic Highway 83, in Pima  
18 County near Vail, Arizona (the “Mountain View Ranch Subdivision” or “Subdivision”).  
19 The Plat for the Mountain View Ranch Subdivision, Lots 1-362, was approved by the Pima  
20 County Board of Supervisors on October 17, 2000 (the “Plat”) (attached as Exhibit 1). The  
21 Plat provides for 362 one-acre and larger residential home sites, some of which have been  
22 sold and have homes on them, and all of which are currently being marketed for custom  
23 and semi-custom home construction.  
24  
25

26 According to the map exhibits of the Application, the Project Route will transect the  
Subdivision, approximately midway through the portion of the Subdivision south of I-10,

1 and between the Vail and Pantano substations. The Application is imprecise with respect  
2 to the exact siting and infrastructure planned for this section of the route, in part because  
3 the Application seeks a disclaimer of jurisdiction for this section, and limits its discussion  
4 to the “CEC Upgrade Route”—a defined term that excludes the portion of the Project  
5 transecting the Subdivision.  
6

7 The Application and Southline’s Project website do, however, indicate that the  
8 Project contemplates: (i) upgrade of the entirety of the existing Apache-Tucson  
9 transmission line from a single 115-kV line to a double-circuit 230kV line, pursuant to a  
10 yet to-be-finalized “public-private endeavor” with WAPA (*Application at 2-3*), (ii) 150  
11 foot or greater right-of-ways and construction of support structures that nearly double the  
12 height of existing structures (*Application at 20*), and (iii) the use of existing right of ways  
13 for the upgrades “to the extent feasible” (*Southline FAQ link at*  
14 [www.southlinetransmissionproject.com](http://www.southlinetransmissionproject.com) at p.5.).  
15  
16

17 The Subdivision is bisected by a 100-foot electric easement granted to the United  
18 States Department of the Interior in 1949, (the “Easement”) (attached as Exhibit 2), which  
19 appears to be the intended routing of the Project through the Subdivision. Though the full  
20 impact of the Project on the Subdivision is not adequately evaluated or stated in the  
21 Application as required by law, it appears that the Project will, at a minimum, transect the  
22 Subdivision, exceed the physical and use scope of the Easement and materially impact the  
23 surrounding property, particularly the southern portion of the Subdivision, which has a  
24 scenic viewshed of the Rincon mountains to the north.  
25  
26

1           Accordingly, Mountain View Ranch is an interested party with respect to the  
2 Application, with a right to appear and submit its positions and objections pursuant to  
3 A.R.S. § 40-360.05(B).  
4

5 **II.     STATEMENT OF POSITION**

6           For the reasons set forth below, Mountain View Ranch respectfully requests that the  
7 Committee reject Southline’s requested disclaimer of jurisdiction for the portions of the  
8 Project affecting the Subdivision, and deny or defer the Application.  
9

10           Alternatively, Mountain View Ranch requests that the Committee reject the  
11 disclaimer and condition any approval of the Certificate on inclusion of the requirements  
12 set forth in Section II.D below.

13           Mountain View Ranch reserves all rights and remedies, including without limitation  
14 defenses and/or rights arising under law for property encroachment or trespass, easement  
15 expansion or overburden, and/or takings or interference with its property rights. Nothing  
16 stated or omitted from this filing should be construed as a waiver of any such rights and  
17 remedies.  
18

19  
20           **A.     The Mountain View Ranch Subdivision**

21           As stated, the Subdivision is platted for 362 one acre and larger residential lots,  
22 which have been and are currently being marketed and sold to homeowners. It is located  
23 within the Vail school district with close proximity to and easy access and commuting  
24 distance to Tucson and Sierra Vista, as well as several major employers and military  
25 installations in Southern Arizona. Mountain View Ranch purchased and platted the  
26 property prior to Southline’s expansion plans that are the subject of the Application. After

1 years of distress in the Arizona homebuilding and real estate industry, sales and buyer  
2 interest in the area have begun to rebound; several homes in the Subdivision have been  
3 completed by Southern Arizona builders; and sales and buyer interest for the home sites  
4 have increased significantly in recent months.

5  
6 In addition to its proximity to urban centers and employers, the natural beauty of  
7 and dramatic site lines to the Rincon Mountains are unique and important attributes of the  
8 Subdivision, as shown in the photos attached as Exhibit 3. Preservation of the natural  
9 aesthetics of the area are thus important not only to the current property owner and its  
10 return on investment, but also to the existing and future residents, and the economic health  
11 of Southern Arizona homebuilding industry in general, which will benefit from sustaining  
12 the improved market activity and scenic beauty of available home sites in the Rincon  
13 Valley area.  
14  
15

16 In short, it is important for the Committee to recognize that this section of the  
17 Project, which is not adequately addressed in the Application, will transect a large new  
18 residential community, platted and planned prior to the Project, where expansive  
19 infrastructure will exceed existing rights of way, and will require significant mitigation and  
20 remediation to reduce its impact, if approved.  
21

22 **B. Committee Jurisdiction**

23 A.R.S. § 40-360.03 states that “every utility planning to construct a ... transmission  
24 line ... in this state” shall first file an application to this committee for review and approval.  
25 Southline nonetheless requests that the CEC *disclaim* jurisdiction over the majority of the  
26 Upgrade Section of the Project, including the portions of the Project Route impacting the

1 Subdivision, on the grounds that these sections of the transmission line will be constructed,  
2 owned, and operated by WAPA. Mountain View Ranch objects to and opposes such  
3 disclaimer, and requests that the CEC exercise its regulatory role and oversight with respect  
4 to the entirety of the Project.  
5

6 WAPA's role in the Project thus far is the preparation of the EIS – work which was  
7 funded by Southline. *Southline FAQ link at [www.southlinetransmissionproject.com](http://www.southlinetransmissionproject.com) at p.*

8  
9 3. WAPA's future role in the construction, ownership, operation, and financing of the new  
10 facilities is currently undetermined and unknown. As stated in the April 2016 WAPA  
11 Record of Decision ("ROD") attached to the Application:

12 This ROD does not make decisions about Western's participation in the  
13 project or financing. Those decisions are contingent on the successful  
14 development of participation agreements and financial underwriting, and  
15 would be recorded in a second ROD.

16 *Application at Ex.B-15-3 (WAPA R.O.D.).* Other sections of the ROD confirm both that  
17 Southline is involved in the design and development plans, and that such plans, as they  
18 impact private and state lands in Arizona, have yet to be developed. *Id. at B-15.11.* While  
19 WAPA participated with BLM in preparing the EIS and approved the route selection, these  
20 decisions simply initiate the Project cost evaluations "necessary for future participation and  
21 financing decisions". *Id. at B-15.13.* As the ROD clearly states, such decisions:

22  
23 are contingent on the successful development of participation agreements  
24 and financial underwriting, and would be recorded in a second ROD.  
25 Participation and financing agreements will address Project details such as  
26 interconnections, ownership, operations, maintenance, marketing, financing,  
and land acquisition.

*Id.*

1 Southline's Project website likewise states that construction funding has yet to be  
2 evaluated or determined, and that:

3 **Southline** is proposing to upgrade approximately 120 miles of Western's  
4 existing transmission line between Saguaro and Apache substations as part  
5 of its proposed Project. **Western is evaluating to what extent it will**  
6 **participate in the Proposed Project.**

7 *Southline FAQ at [www.southlinetransmissionproject.com](http://www.southlinetransmissionproject.com) at p.3 (emphasis added).*

8 Similarly, the Application states that the Project "contemplates" a public-private joint  
9 venture with WAPA retaining ownership of the line, but acknowledges that such  
10 "contemplated" arrangement is still "subject to negotiations and WAPA stakeholder  
11 approval." *Application at 2.*

12  
13 In short, WAPA's role in construction, ownership, and operations is at present  
14 conceptual and undetermined. What is known is that Southline initiated the Project,  
15 including the expansions and construction throughout the Upgrade Section, and will  
16 participate in the development, ownership, construction, and benefits from at least some  
17 aspects of the interconnected upgrades and new bi-directional circuit on which the entire  
18 Project is premised.

19  
20 In this circumstance, the disclaimer of jurisdiction requested by Southline is  
21 unwarranted or, at a minimum, premature. The Colorado Public Utilities Commission  
22 recently rejected a similar premature request by an applicant seeking to construct  
23 transmission lines in WAPA ROWs in Colorado in its Decision Nos. C07-0417 and C07-  
24 0588 (attached as Exhibit 4). Like here, WAPA's participation in the project was  
25 conceptualized but not contractually finalized. The Commission rejected the assertion that  
26

1 WAPA's anticipated participation in the project defeated its jurisdiction, noting that  
2 "WAPA's participation in the project is speculative," and that "while WAPA may have  
3 responsibilities under the potential contract, this does not diminish [applicant's] role, or its  
4 own responsibilities under the contract." As the above statements of WAPA and Southline  
5 confirm, that is the circumstance existing here.  
6

7 **C. Mountain View Ranch Objections to Approval**

8 *1. Right of Way ("ROW") Width*

9  
10 Due to the requested jurisdiction disclaimer, and associated limit of discussion to  
11 only the more limited "CEC Upgrade Route," the Application does not specify the ROW  
12 footprint contemplated within the Subdivision. It does, however, indicate that the 230-kV  
13 Upgrade sections of the transmission line will require 150 foot ROWs, with new centerlines  
14 that will expand the existing 100 foot ROW by another 125 feet, for a total ROW corridor  
15 of 225 feet. *See Application Ex. G-12B.*  
16

17 The Easement within the Subdivision is limited to 100 feet, and is thus insufficient  
18 to support the planned expansion. Mountain View Ranch opposes and objects to any  
19 expansion of the Easement or encroachment, permanent or temporary, into its fee-owned  
20 property.  
21

22 *2. Increased Impact and Overburden of Easement*

23  
24 The Application also fails to specify the type, height, number, and siting of supports  
25 contemplated for the section of the Project Route that transects the Subdivision. Even as  
26 to the "CEC Upgrade Route" that is addressed, the Application is vague as to these  
specifications, providing only ranges of height and estimated spans, and diagrams of

1 “typical” supports and “concepts” of proposed facilities. *Application at 18-20 & Exhibit*  
2 G. Southline’s public disclosures are similarly vague, stating only that the line upgrade  
3 between the Apache and Saguaro Substations (i.e., the section transecting the Subdivision)  
4 will involve replacing existing supports with “new structures **such as**” steel monopoles.  
5 *Southline FAQ at [www.southlinetransmissionproject.com](http://www.southlinetransmissionproject.com) at p.5 (emphasis added).*  
6 Likewise, Southline’s website states that it plans to use existing ROWs and access roads,  
7 but only to the greatest extent “possible”, and subject to “further studies and analysis” to  
8 determine where the Project “will require widening or deviations from” such existing  
9 ROWs and access. *Id.*

12 The absence of such location, scope, and specification detail and firm commitments  
13 should alone result in denial of the Application, or deferral of decision until such  
14 specifications are determined.

16 Moreover, the concept plans that are disclosed by the Application, while lacking in  
17 detail, nonetheless suggest a significant expansion of the existing scope and use of the  
18 Easement, with corresponding increases in visual, aesthetic, and landscape impacts from  
19 the construction and addition of new facilities and increased line capacity.

21 The WAPA ROD indicates Southline has proposed that the entire upgrade section  
22 will be expanded from a single 115 kV line to a 230-kV double circuit line. *Application*  
23 *at Ex. B-15.4.* It thus will, presumably, utilize the “typical” tubular steel monopoles that  
24 are compared to existing structures at Exhibit G-10 to the Application. That exhibit shows  
25 such proposed infrastructure, if used in the Subdivision Easement, will nearly double the  
26 height and visual impact of the existing facilities. As the Application acknowledges, the

1 visual “impacts are anticipated to be highest where new structures are introduced into  
2 existing landscape for viewers (e.g. residential viewers) with unobstructed views of the  
3 [proposed route] within the immediate foreground distance zone.” *Application Ex. E at*  
4 *E-10.*

6 The Application exhibits also disclose that the Project will affect radio signals in the  
7 proximity of the transmission line, and negatively affect ambient soundscapes in “noise  
8 sensitive receptors” such as residential areas. *Application Ex. I.* In addition, construction  
9 activities will alter the landscape with “ground disturbance, removal of vegetation, storage  
10 of equipment and materials, construction equipment and activities, and “it could take a  
11 numbers of years before temporary disturbances are no longer visible.” *Application Ex. E*  
12 *at E-9-10.* As the Application acknowledges,

15 [T]he transmission line structures will cause major, long-term change to  
16 scenery, while construction of the structures and facilities will be short-term  
17 and temporary. During the construction, the motion associated with  
18 construction equipment, structure movement, conductor stringing,  
19 alternation of topography, earthwork, vegetation clearing, short term impacts  
from dust generation, and landform modification will be noticeable and  
create visual contrast within the viewshed.

20 *Application Ex. E at E-12.* Absent remediation, visual impacts from scars, barren areas,  
21 or natural lines and contrast from clearing “will remain for the life of the proposed Project.”  
22 *Id. at E-13.*

23 In short, the Project will material impact the Subdivision’s scenic viewshed,  
24 sensitive landscape and vegetation, and the aesthetic character of the affected open space  
25 and lots in or near the Easement. This is not permitted by law, as the owner of an easement  
26 cannot materially increase the burden of the easement on the servient estate or impose a

1 new burden. *E.g., Red Mountain, LLC. v. Fallbrook Pub. Util. Dist.*, 48 Cal. Rptr. 3d  
2 875, 889 (2006). The contemplated expansion violates this precept, and Mountain View  
3 Ranch objects to the approval of Application on this basis.  
4

5 In the event the Application is approved, such approval should attempt to mitigate  
6 these impacts to the extent possible by including conditions, effective at any location in the  
7 Project within the Subdivision or its viewshed, which preclude any lattice structures; limit  
8 new pole height to that of existing supports; require noise and EMF reduction, barriers to  
9 unauthorized use egress routes, full remediation of all disturbed landscapes and vegetation,  
10 and contemporaneous removal and remediation of pre-existing infrastructure as new  
11 facilities are constructed; provide for Mountain View Ranch's participation and agreement  
12 to the siting, type, and finish materials for all new poles and infrastructure; and require dust  
13 control and protection of surrounding properties during all construction and maintenance  
14 activities.  
15  
16

### 17 3. *Failure to Evaluate Impact on the Subdivision*

18 Rule 14-3-219 states the Applicant must, to the extent it is able to determine, "state  
19 the existing plans of ... private entities for other developments at or in the vicinity of the  
20 proposed site or route." The Subdivision has been platted and a matter of public record  
21 since 2000. The existence of this residential subdivision, and the specific plans for and  
22 impacts of the proposed expansion on it, should have been evaluated and stated in the  
23 Application. Yet the Existing Plan Analysis at Exhibit H of the Application fails to even  
24 reference this subdivision, and suggests no such impacts exist. *See Application Exhibit H*  
25 *at H-11* ("No new planned residential subdivisions are identified in the study area.") The  
26

1 Application contains no evaluation or disclosure of the anticipated construction in or near  
2 the Subdivision. This should be required as a condition to the issuance of any final  
3 approval.  
4

5 The Application does state in Exhibit H that “a good faith effort” will be made to  
6 purchase title to or easements on affected private lands “through reasonable negotiations  
7 with the landowners,” and that landowners will be compensated based on market value.  
8 *Id. at H-16; see also H-17* (“Where private lands will be intersected, easements will be  
9 negotiated with the landowner”). Such a purchase will be required for the contemplated  
10 use and expansion of the Easement, at a minimum. Southline’s commitments to proceed  
11 in good faith should be made binding conditions to any approval of the Application.  
12

13 **D. Requested Conditions**  
14

15 Mountain View Ranch requests that the Committee deny or defer the Application,  
16 for the reasons stated above. At a minimum, however, any approval should include the  
17 following conditions:  
18

19 1. All pole structures within the Subdivision or its viewshed shall be tubular  
20 steel monopoles, with finish and color and siting determined through a Pole Finish Plan  
21 prepared in consultation and agreement with Mountain View Ranch. Applicant shall utilize  
22 no lattice supports within view of the Subdivision.

23 2. No pole or other structure within the Subdivision or its viewshed shall exceed  
24 the height of existing support structures.

25 3. All improvements, access, and construction shall be confined to the existing  
26 100 foot Easement within the Subdivision, unless expanded by written agreement with  
Mountain View Ranch.

4. Applicant shall employ as reasonably practical methods to mitigate EMF,  
radio interference, and noise, including corona noise, within the Subdivision resulting from  
the construction, operation, or maintenance of the transmission line.

1  
2 5. Applicant shall install site appropriate barriers to OTV use of its ROW or  
access roads.

3  
4 6. Applicant shall fully remediate all disturbed landscapes and vegetation, and  
contemporaneously remove and remediate any pre-existing infrastructure as new facilities  
5 are constructed. Such remediation shall, without limitation, eliminate all contrasts  
6 resulting from grading, access, or other landform or vegetation modification caused by  
construction or maintenance activities in the Subdivision or its viewshed.

7  
8 7. Applicant shall employ industry standard techniques for dust control and  
protection of surrounding properties during all construction and maintenance activities.

9  
10 8. Applicant shall undertake good faith efforts to purchase title to or easements  
on private lands through reasonable negotiations with the landowners, and compensate  
landowners for such rights at market value.

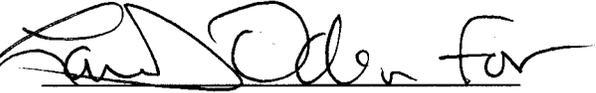
11  
12 9. Applicant shall comply with the notice and salvage requirements of the  
Arizona Native Plant Law (A.R.S. §§ 3-901, *et seq.*) and shall, to the extent feasible,  
13 minimize the destruction of native plants during Project construction.

14  
15 10. Applicant shall make every reasonable effort to identify and correct, on a  
case specific basis, all complaints of interference with radio or television signals from  
16 operation of the transmission lines and related facilities. Applicant shall maintain written  
17 records for a period of five years of all complaints of radio or television interference  
18 attributable to operation, together with the corrective action taken in response to each  
complaint. All complaints shall be recorded to include notations on the corrective action  
19 taken. Complaints not leading to a specific action or for which there was no resolution shall  
be noted and explained.

20  
21 11. Before commencing construction, Applicant shall file a construction  
mitigation and restoration plan ("Plan") with the Arizona Corporation Commission. The  
22 Plan shall specify that Applicant use existing roads for construction and access, minimize  
impacts to wildlife, minimize vegetation disturbance outside of the Project right-of-way,  
23 particularly in drainage channels and along stream banks, and shall revegetate, unless  
waived by the landowner, native areas of construction disturbance to its preconstruction  
24 state.

1 RESPECTFULLY SUBMITTED this 23rd day of November, 2016.

2  
3 JACKSON & ODEN, P.C.

4  
5 By: 

6 Todd Jackson  
7 Attorneys for Mountain View Ranch  
8 Development Joint Venture, LLC

9 ORIGINAL and 25 copies hand delivered for filing with Docket Control  
10 on this 23rd day of November, 2016.

11 Director of Utilities  
12 Arizona Corporation Commission  
13 1200 West Washington Street  
14 Phoenix, Arizona 85007

---

1 COPY of the foregoing mailed  
2 this 23rd day of November, 2016 to:

3 Janet Wagner  
4 Arizona Corporation Commission  
5 1200 W Washington Street  
6 Phoenix, Arizona 85007

7 Jeffrey M. Hatch-Miller  
8 Interim Director of Utilities  
9 1200 W Washington Street  
10 Phoenix, AZ 85007

11 Cedric Hay  
12 Deputy County Attorney  
13 Pinal County  
14 P.O. Box 887  
15 Florence, AZ 85132

16 James Guy  
17 Sutherland Asbill & Brennan LLP  
18 600 Congress Avenue, Suite 2000  
19 Austin, Texas 78701-3238  
20 [James.guy@sutherland.com](mailto:James.guy@sutherland.com)

21 Robert Lynch  
22 340 E Palm Lane, Suite 140  
23 Phoenix, Arizona 85004-4603  
24 [rslynch@rslynchaty.com](mailto:rslynch@rslynchaty.com)

25 Meghan Grabel  
26 Osborn Maladon, PA  
2929 N Central Avenue, Suite 2100  
Phoenix, AZ 85012  
[mgrabel@omlaw.com](mailto:mgrabel@omlaw.com)

# Exhibit A

# MOUNTAIN VIEW RANCH

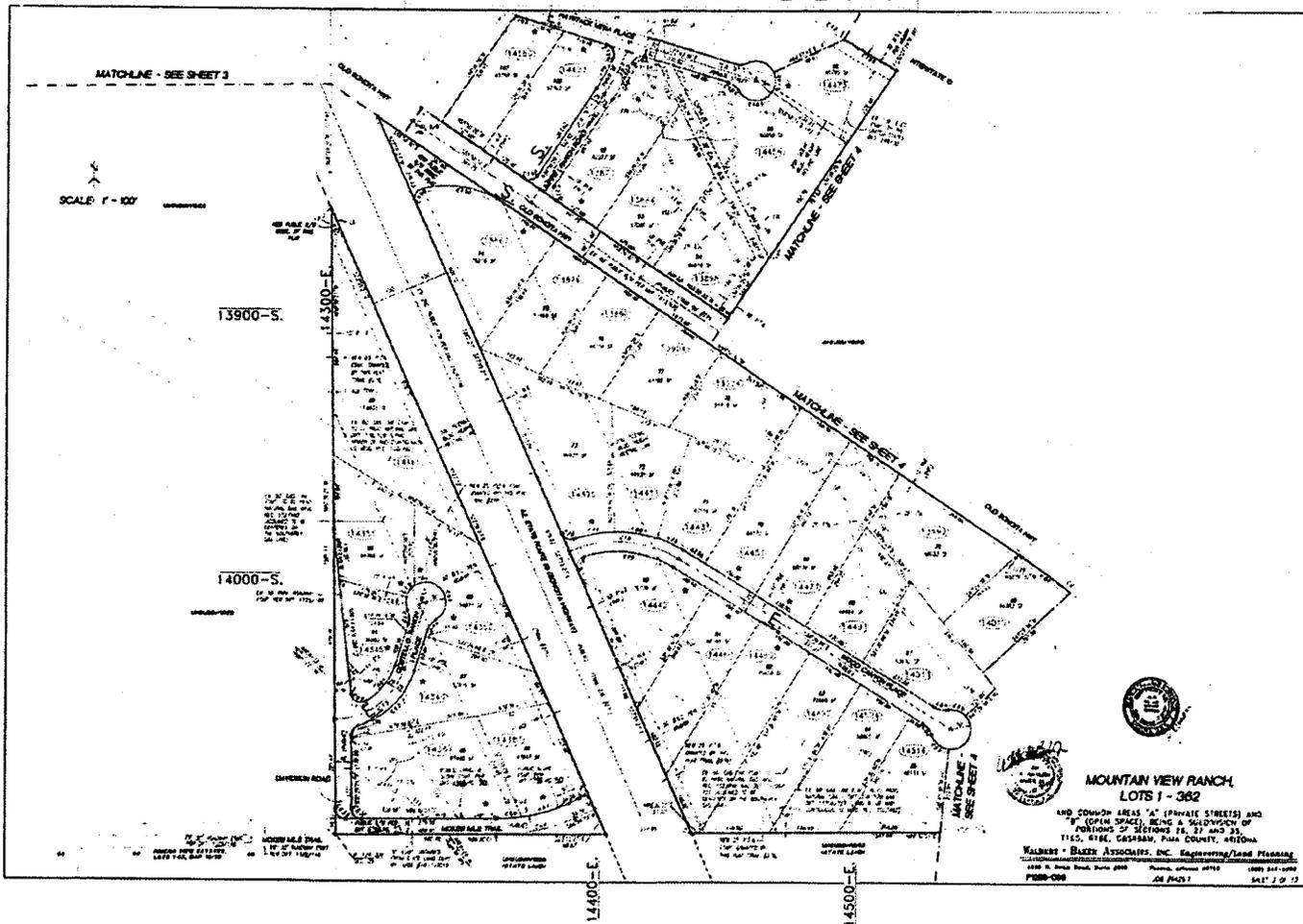
MP 54005

RECORDED: OCTOBER 26, 2000

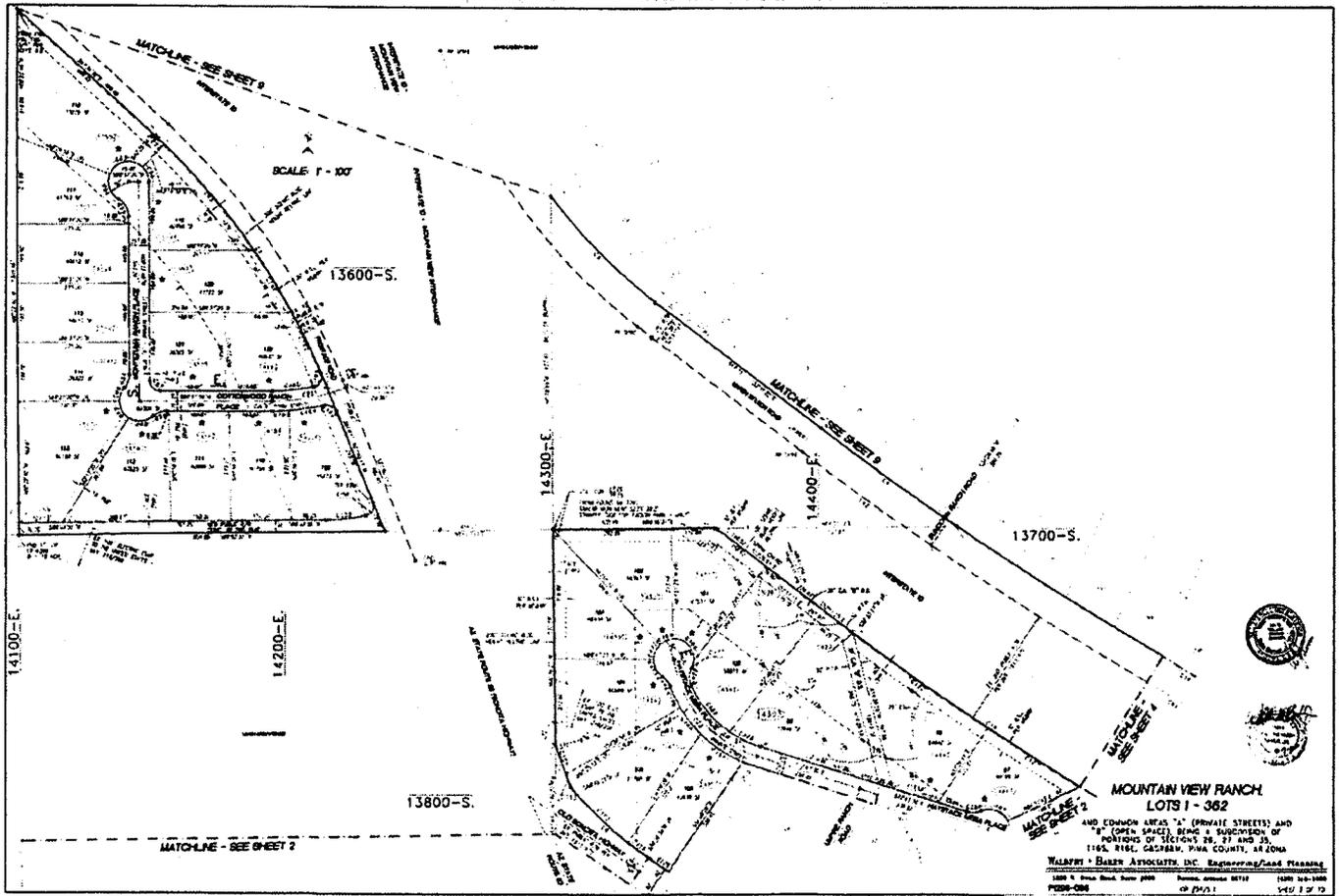
\*\*\*THE FOLLOWING PLAT IS AN ANNOTATED  
VERSION OF THE ORIGINAL DOCUMENT. IT HAS  
BEEN ALTERED BY PIMA COUNTY  
DEVELOPMENT SERVICES TO SHOW  
ADDITIONAL INFORMATION. ORIGINAL COPIES  
MAY BE OBTAINED FROM THE PIMA COUNTY  
RECORDER\*\*\*



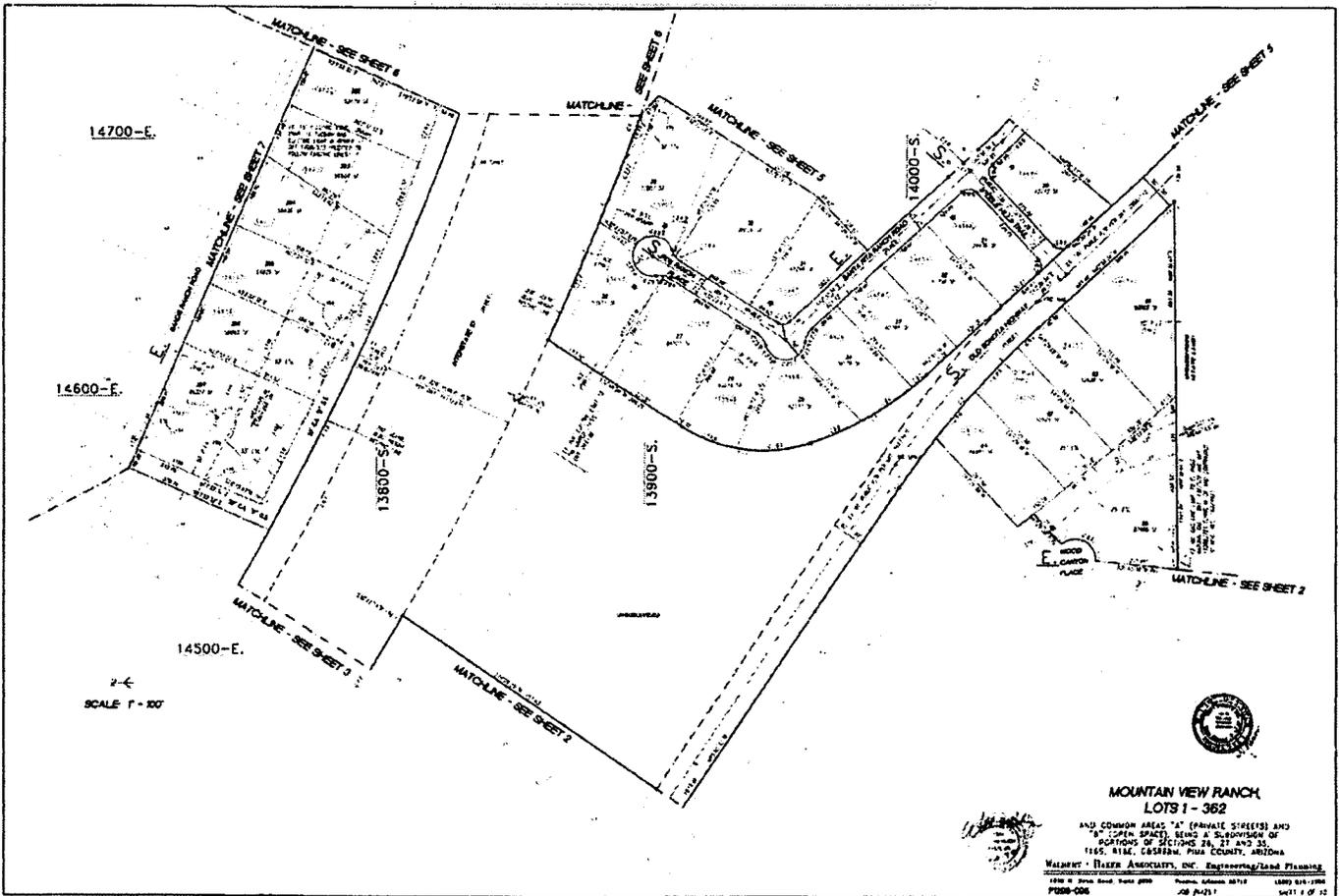
# ANNOTATED COPY



ANNOTATED COPY



# ANNOTATED COPY

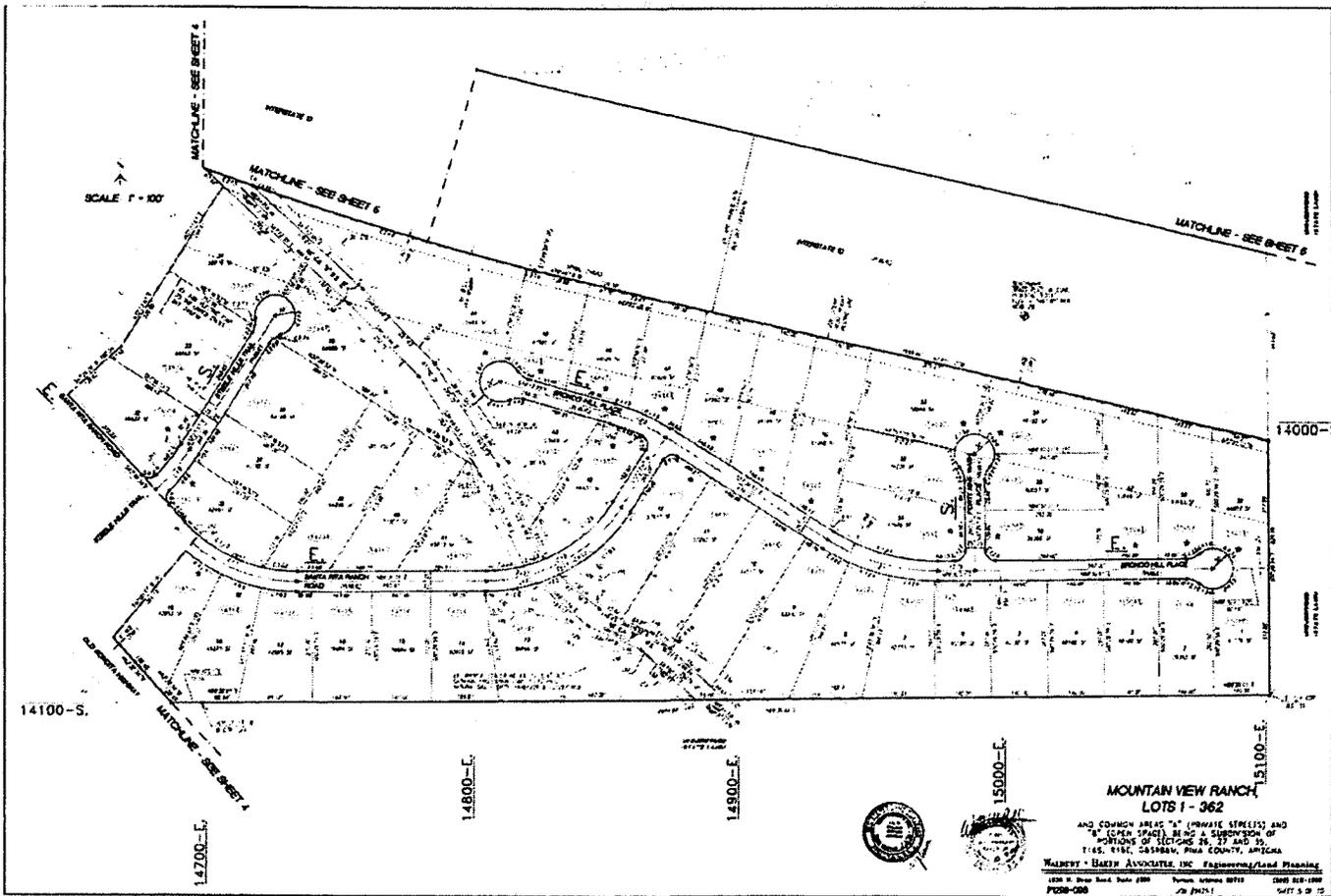


**MOUNTAIN VIEW RANCH**  
**LOTS 1 - 362**

AND COMMON AREAS "A" (PRIVATE STREETS) AND  
 "B" (OPEN SPACE) BEING A SUBDIVISION OF  
 PORTIONS OF SECTIONS 26, 27 AND 32,  
 1155, 811E, C&G&M, PIMA COUNTY, ARIZONA.

WALDREY & BAKER ASSOCIATES, INC. ENGINEERS/LAND PLANNERS  
 1800 N. 29TH AVENUE, SUITE 2000 PHOENIX, ARIZONA 85016  
 PDSB-006 08 P-217 0401 1 OF 12

ANNOTATED COPY



**MOUNTAIN VIEW RANCH  
LOTS 1 - 362**

AND COMMON AREAS "A" (PRIVATE STREETS) AND  
"B" (OPEN SPACE) BEING A SUBDIVISION OF  
PORTIONS OF SECTIONS 24, 25 AND 26,  
T14S, R14E, S45M4N, PIMA COUNTY, ARIZONA

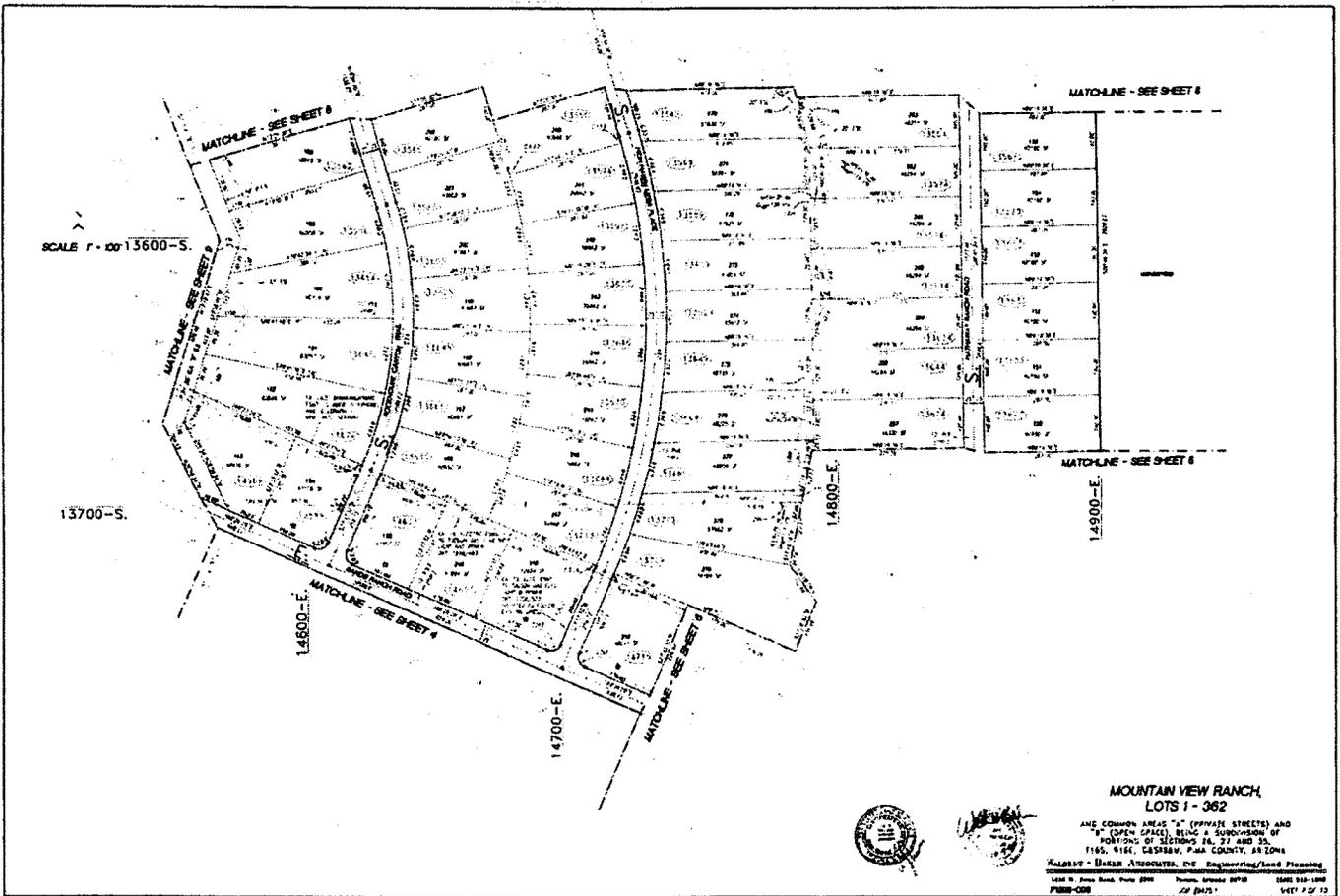
WAINSBURY & BAKER ASSOCIATES, INC. ENGINEERS/PLANNERS

1020 N. New River Road, Suite 200 Phoenix, Arizona 85018 (602) 942-1988  
PDS-000 2/8/2011 SHEET 5 OF 15

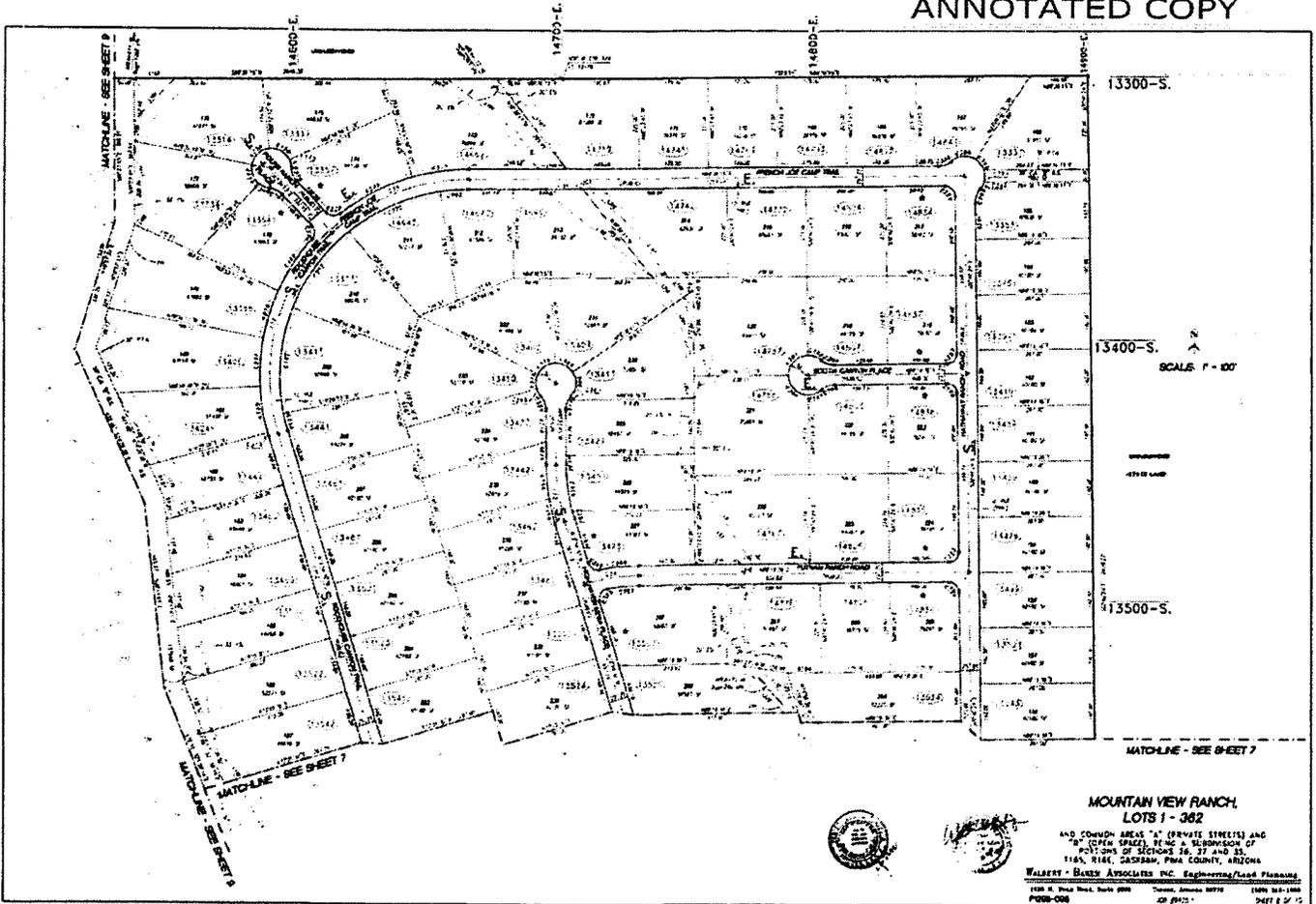




ANNOTATED COPY



ANNOTATED COPY

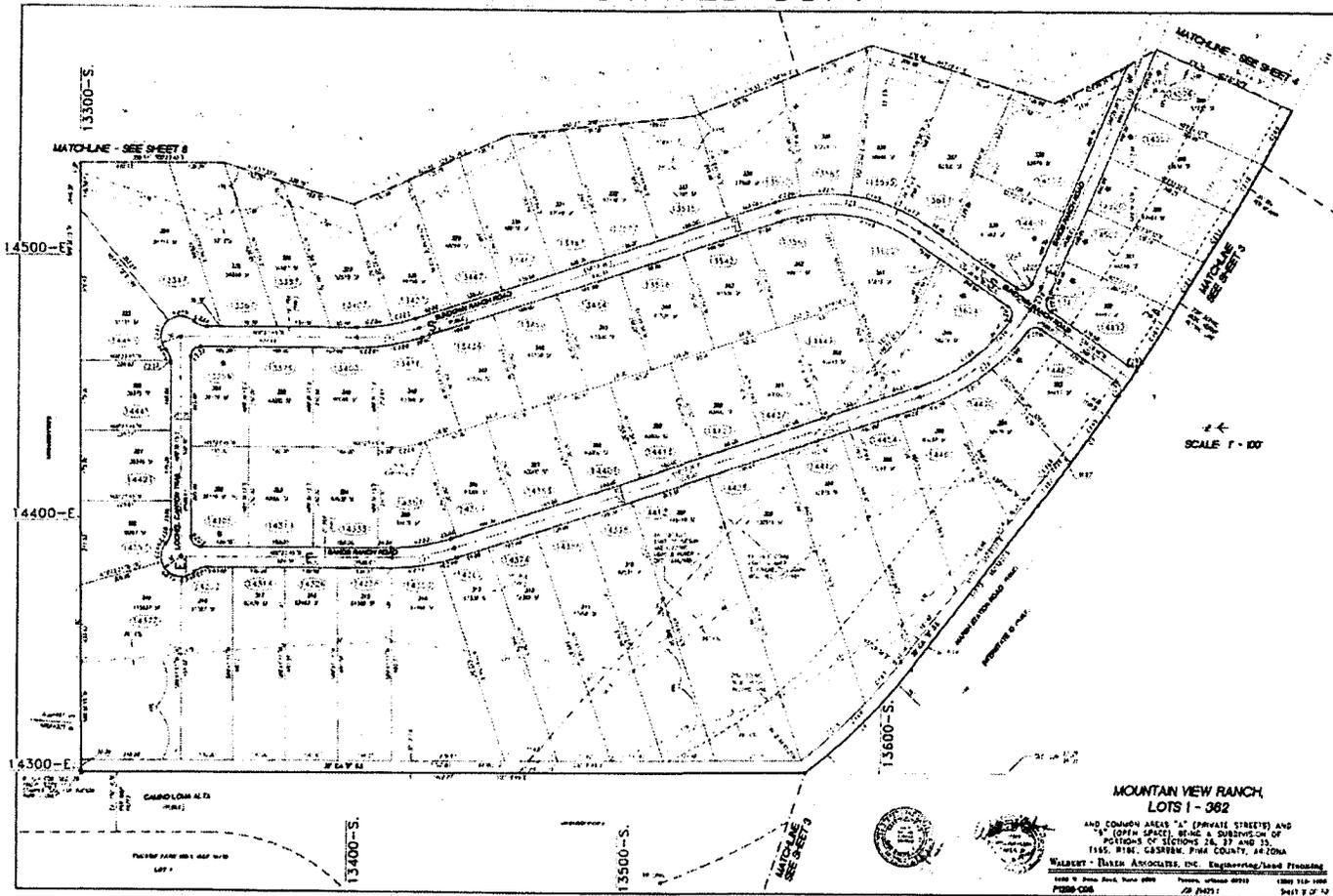


MOUNTAIN VIEW RANCH,  
LOTS 1 - 362

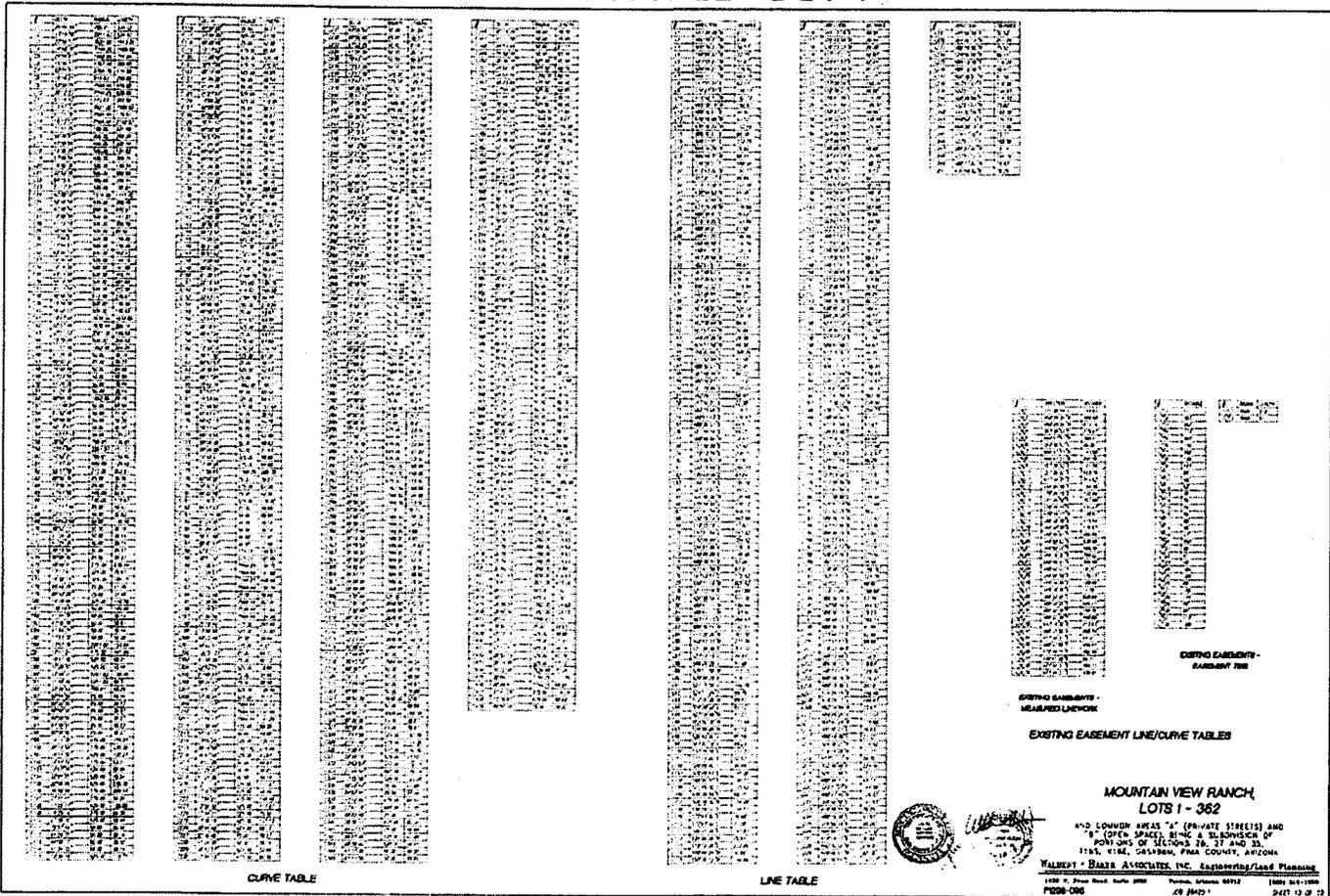
AND CORRIDOR AREAS "A" (PRIVATE STREETS) AND  
"B" (OPEN SPACE), BEING A SUBDIVISION OF  
PORTIONS OF SECTIONS 16, 17 AND 22,  
116S, 114E, GADSDEN, PIMA COUNTY, ARIZONA

WILBERT - BAKER ASSOCIATES INC. Engineering/Leads Planning  
1000 N. First Street, Suite 2000 Tucson, Arizona 85710 1979 100-1000  
P000-000 42 000-1 0401 8-27-79

ANNOTATED COPY



ANNOTATED COPY



# Exhibit B

Executed Original

7/6/32 38958

BOOK 218 PAGE 208

(9)

Treasurer

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF RECLAMATION

CONTRACT SYMBOL & NO. 1  
2619

Contract and Grant of Easement

THIS CONTRACT, made this 30th day of September  
1932 pursuant to the Act of Congress approved June 17, 1902 (32 Stat., 388)  
and acts amendatory thereof or supplementary thereto, and particularly pur-  
suant to the Act of Congress approved August 30, 1935 (49 Stat., 1029, 1039),  
between THE UNITED STATES OF AMERICA, hereinafter referred to as United States,  
and Lee Wilton and Grace E. Wilton, husband and wife

hereinafter collectively referred to as Vendor:

WITNESSETH:

The following grant and the following mutual covenants by and between  
the parties:

1. For the consideration hereinafter expressed Vendor does hereby grant  
unto the United States, its successors and assigns, the right, privilege and  
easement to construct, operate and maintain an electric transmission line,  
with all poles, crossarms, cables, wires, guys, supports, fixtures and devices,  
used or useful in the operation of said line, through, over and across the  
following described land situated in the County of Pima  
State of Arizona to wits

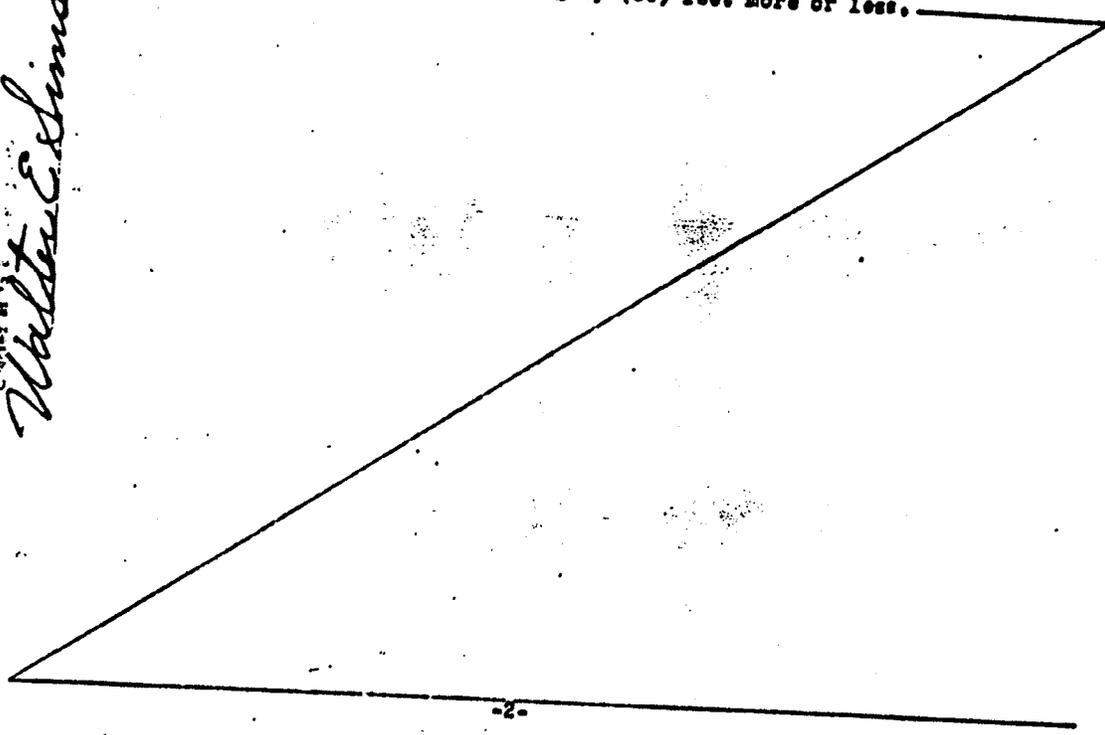
The Southeast quarter of the Southeast quarter (SE<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>) of Section Twenty-  
seven (27), Township Sixteen (16) South, Range Sixteen (16) East, G. & S. R. 2.  
& M.

Checked as by Engineering Dept  
Walter E. Lima

The center line of the route of said line of poles and wires to be erected across said lands shall be as follows:

Beginning at a point in the Westerly boundary line of said parcel of land in Section Twenty-seven (27), Township Sixteen (16) South, Range Sixteen (16) East of the C. & S. R. B. & N. from which the Southwest corner of the Southeast Quarter of the Southeast Quarter (SW cor.  $\frac{SW}{4} \frac{SE}{4}$ ) of said Section Twenty-seven (27) bears in a Southerly direction a distance of Twenty-eight (28) feet more or less; and running thence South  $71^{\circ}05'$  East eighty-five (85) feet more or less, to a point in the Southerly boundary line of said parcel of land from which the Southwest corner of the Southeast quarter of the Southeast quarter (SW cor.  $\frac{SW}{4} \frac{SE}{4}$ ) of said Section Twenty-seven (27) bears in a westerly direction a distance of eighty (80) feet more or less.

*Walter E. Line*



2. Said transmission line and every part thereof shall, where it crosses vendor's land, be confined to lands within 50 feet of either side of the hereinabove described center line, except that the United States shall have the right and privilege of placing and maintaining guys and anchorages at greater distances from said center line where reasonably necessary to support said transmission line.

3. The grant of easement herein contained shall include the right to enter upon said premises, survey, construct, maintain, operate, control and use said transmission line and to remove objects interfering therewith, and the right to permit the attachment of wires of others. Vendor reserves the right to cultivate, use and occupy said premises for any purpose consistent with the rights and privileges above granted and which will not interfere with or endanger any of the equipment of the United States or the use thereof. In case of permanent abandonment of said right of way, the title and interest herein granted shall end, cease and determine. The United States shall use due care in the construction and maintenance of said transmission line.

4. The grant of easement herein contained is subject to existing rights of way for highways, roads, railroads, oil and gas pipelines, canals, laterals, ditches, other electrical transmission lines and telegraph and telephono lines covering any part of the above described land.

5. As complete consideration for the above grant of easement, the United States agrees to pay Vendor the sum of Ten and 00/100 - - - - Dollars (\$ 10.00 ); provided, however, that it is understood and agreed that damages to trees, seedlings, vines and crops of whatsoever nature, caused by construction of said transmission line, shall be compensated for separately on the basis of an appraisal to be made by the Bureau of Reclamation at the time said damages occur.

6. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom; but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In WITNESS WHEREOF, the parties hereto have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA  
By L. A. McWilliams OCT 24 1949  
Project Engineer

Lee Wilton  
Lee Wilton  
Grace B. Wilton  
Grace B. Wilton

State of Arizona } 53  
County of Maricopa }

This instrument was acknowledged before me this 30th  
day of September, Nineteen Hundred Forty-nine  
(1949) by Lee Wilton and Grace B. Wilton



[Signature]  
Notary Public

My Commission Expires:  
May 20, 1950

STATE OF ARIZONA }  
COUNTY OF PIMA } ss.  
Witness my hand and Official Seal.

I hereby certify that the within instrument was filed for record in Pima County, State of Arizona

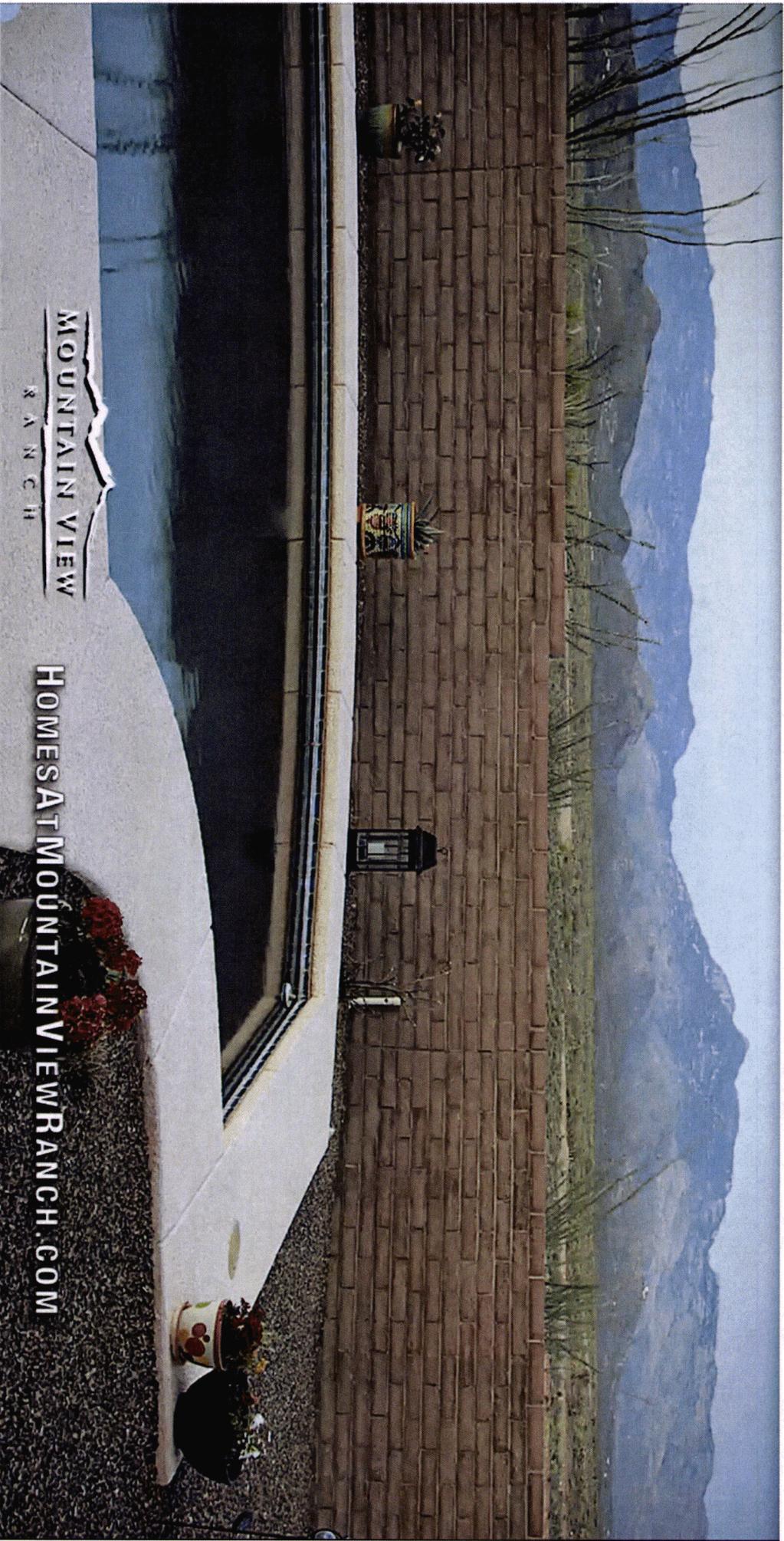
ANNA SULLINGER,  
County Recorder

Indexed	Paged	Blotted
<u>[initials]</u>	✓	<u>[initials]</u>

By A. S. Sochan  
Deputy

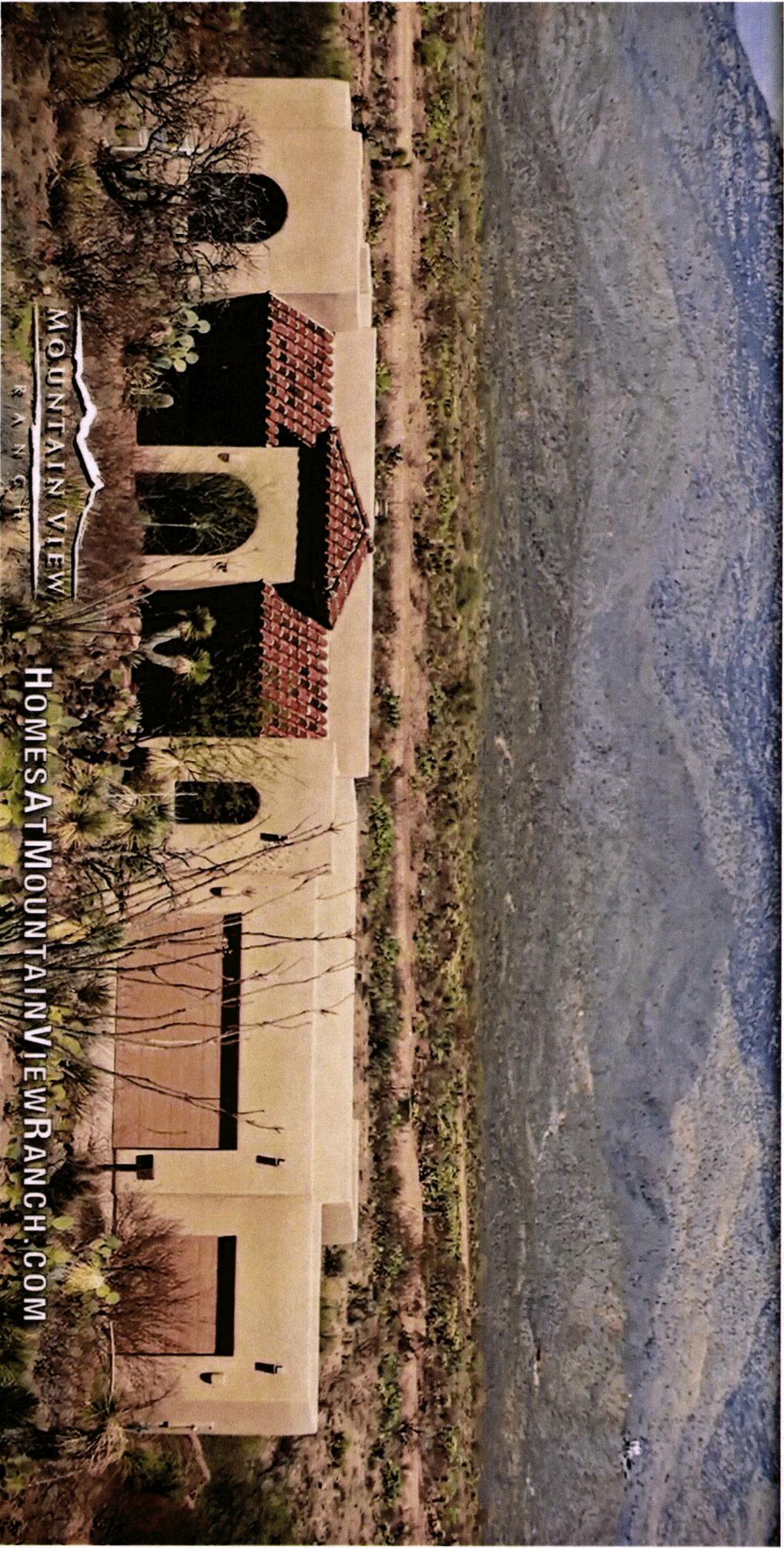
No. 38958  
Book 218 Page 208 to 209  
Date: 1949 DEC 27 AM 10:50  
Request of: [initials]  
FEE: \$ 2.55

# Exhibit C



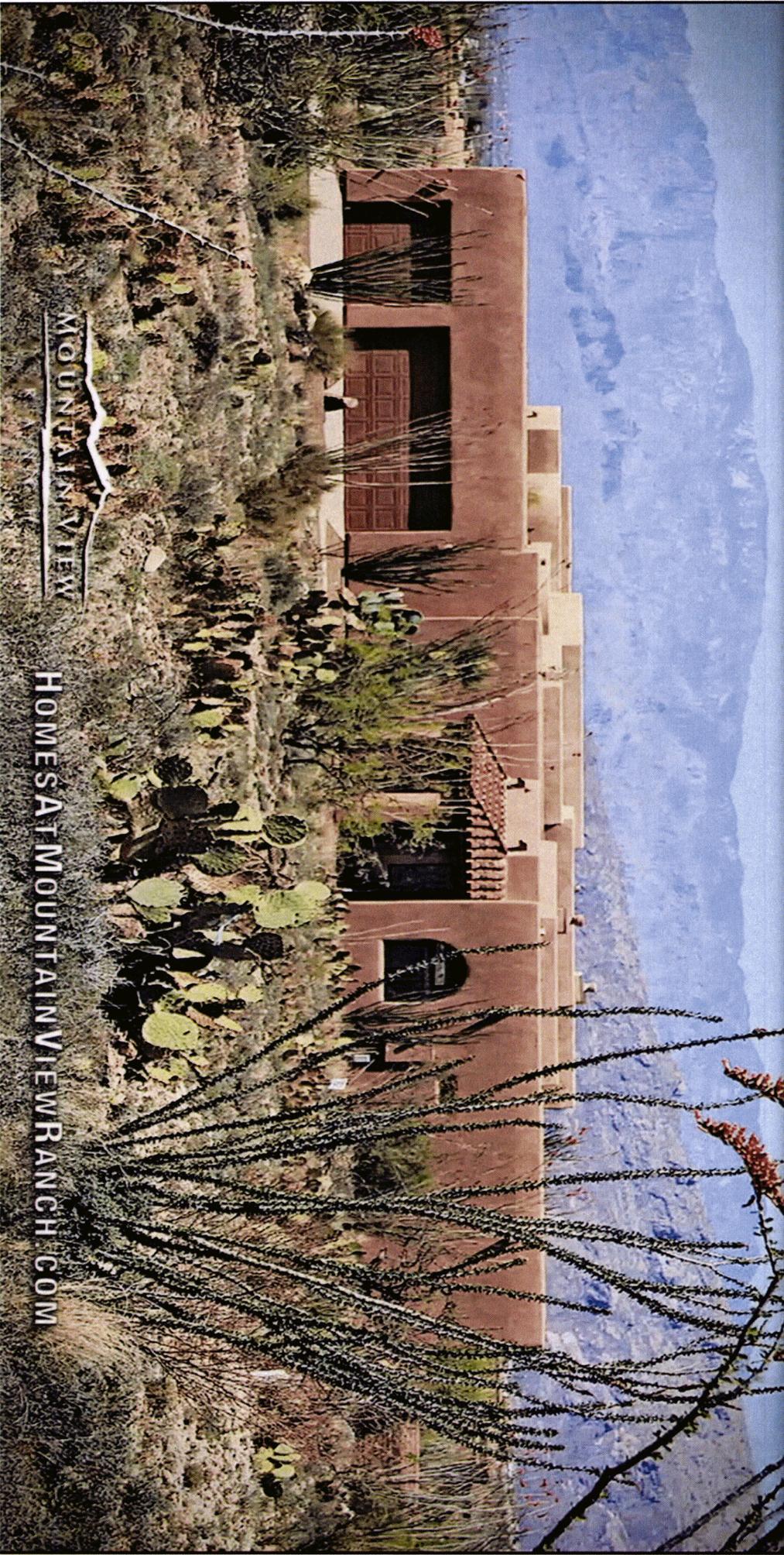
**MOUNTAIN VIEW**  
R A N C H

**HOMESATMOUNTAINVIEWRANCH.COM**



MOUNTAIN VIEW  
RANCH

HOMESATMOUNTAINVIEWRANCH.COM



MOUNTAIN VIEW

HOMES AT MOUNTAIN VIEW RANCH.COM

# Exhibit D

Decision No. C07-0417

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 07D-014E

---

IN THE MATTER OF THE PETITION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., FOR A DECLARATORY RULING THAT NO CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY IS REQUIRED FOR TRI-STATE'S PARTICIPATION IN THE EASTERN PLAINS TRANSMISSION PROJECT.

---

**ORDER DENYING PETITION  
FOR DECLARATORY ORDER**

---

Mailed Date: May 22, 2007  
Adopted Date: April 25, 2007

**I. BY THE COMMISSION**

**A. Statement and Background**

1. This matter comes before the Commission for consideration of a petition for declaratory ruling, filed by Tri-State Transmission and Generation Association (Tri-State) on January 16, 2007.

2. Tri-State seeks a declaration from the Commission that no certificate of public convenience and necessity (CPCN) is required for Tri-State's participation with the Western Area Power Administration (Western), an agency within the Federal Department of Energy, in the Eastern Plains Transmission Project.

3. The proposed project would build roughly one thousand miles of transmission lines in eastern Colorado at a cost of about \$750 million. The project will be built in three phases, and is designed to connect generation plants in Holcomb, Kansas, to various substations and other facilities in eastern Colorado; the majority all of the transmission lines will be in Colorado. The project will include construction of three new substations. When complete, the

project would be operated according to the applicable criteria and policies of the Western Electricity Coordinating Council (WECC). Tri-State also pledges to cooperate with the Colorado Long Range Transmission Planning Group when integrating the Eastern Plains Transmission Project (EPTP) into the bulk electric system in Colorado and the surrounding region.

4. Tri-State will be the owner of the transmission lines and towers, and Western will own the rights-of-way. Western will lease to Tri-State all property easements and rights-of-way for construction, operation and maintenance. Western will act as the general contractor, and will be responsible for the siting and routing of the line while Tri-State will have final approval over every aspect of the line. Western's total financial investment will be capped at \$15 million, but could be less. Western will own 50 MW of bi-directional system transmission capacity, as well as a yet-to-be determined amount of north-to-south and south-to-north transmission capacity, and the use of six optical fibers of the Tri-State communications system installed in the project.

5. The petition was noticed by the Commission pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1206(a) on January 17, 2007, and interventions were due by February 16, 2007, pursuant to Commission Rule 4 CCR 723-1-1206(d). We allowed Tri-State a broad opportunity to address in its reply brief the issues and questions set forth in Decision No. C07-0159, since that order was issued after Tri-State filed its opening brief. We have received and granted interventions from Western Resources Advocates (WRA), Staff of the Commission (Staff) and the Office of Consumer Counsel (OCC), and granted Aquila, Inc. amicus status. Aquila has not participated, and the other three parties filed briefs in response to Tri-State's Application. Tri-State filed a reply brief to the response briefs.

6. Under the terms of 4 CCR 723-1-1304(i)(III), the Commission may "grant, deny, or dismiss any petition seeking a declaratory order." In Decision No. C07-0115 we determined

that we should hear the petition because of the potential for increased construction of transmission facilities in Colorado and the need to address jurisdictional questions. Now, having been advised on this matter, we deny Tri-State's petition.

**B. Discussion**

7. Tri-State argues in its opening brief that the Commission has not regulated Tri-State's rates, which has little relevance except to demonstrate that the Commission does not regulate Tri-State on some issues. It then argues that this Commission lacks jurisdiction over the project because of Western's involvement and the project's interstate nature. Tri-State asserts that the Commission has no jurisdiction over Western and that Western's involvement makes this a federal project.<sup>1</sup> Tri-State points to the Path 15 transmission line project in California in which the California Commission challenged the right of Western to participate in the Path 15 project without obtaining appropriate state permits. In addition, Tri-State points to Western's federal status, and *United States of America v. 14.02 Acres of Land*, 2005 WL 2230459 (E.D.Cal. 2005), and *State of North Carolina, et. al. v. Carolina Power & Light Company, et. al.*, 588 S.E. 2d 77 (N.C.App. 2003), in support of its argument that we have no jurisdiction over the project.

8. Tri-State also argues that Commission jurisdiction over the project would impinge on the Commerce Clause of the U.S. Constitution, distinguishing the facts of *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), from

---

<sup>1</sup> Tri-State anticipates that Western will issue a Record of Decision with respect to the project in 2008, at which point the project will officially be designated a 'federal project.' It is of note that the project is not yet a federal project. At any rate, Tri-State has not defined 'federal project,' and how, legally that is significant with respect to the Commission's jurisdiction over Tri-State, which is not a federal agency.

this case. Tri-State also argues that 16 U.S.C. § 824(a), a section of the Federal Power Act, preempts this Commission's jurisdiction.

9. Staff, the OCC, and WRA filed responses to Tri-State's petition. According to Staff, § 40-5-101, C.R.S. grants the Commission jurisdiction over Tri-State when it undertakes new construction in Colorado because the section is as applicable to Tri-State as any other utility under the Commission's jurisdiction. Tri-State expressly acknowledged this during the Colorado-Ute bankruptcy. Staff does not believe that Tri-State has presented persuasive federal constitutional or preemption issues to negate statutory jurisdiction. Further, according to Staff, Tri-State explicitly acknowledged the Commission's jurisdiction over an interstate transmission line in Docket No. 00A-580E which involved Tri-State's Colorado-New Mexico 230kV interconnection project. This also expressly negates Tri-State's interstate commerce argument, according to Staff.

10. Staff states that there are significant state interests supporting the Commission's jurisdiction including the reliability of not only Tri-State's system, but the systems of other Colorado utilities.

11. With respect to Tri-State's federal project exemption argument, Staff states that Tri-State has failed to meet its burden because it has failed to demonstrate that Western's participation in the project has any effect on the Commission's jurisdiction over Tri-State as a public utility in Colorado. Tri-State fails to present any legal citations with respect to what 'federal project' means. Staff tried in vain to ascertain the legal meaning of federal project but received no satisfaction, even through discovery. Thus Tri-State failed to meet its burden of proof, and this argument fails.

12. Staff argues that Tri-State's argument on the Path 15 project is inapplicable because Western was acting under the specific direction of the Secretary of Energy to relieve transmission constraints, and there is no evidence of direction from the Secretary of Energy in this matter. Second, the U.S. would own the Path 15 transmission line. Lastly, the Path 15 case involved a California Commission challenge to the right of Western to participate in the project prior to Western receiving approval from the California Commission. Here the Commission is not challenging the right of a federal agency.

13. According to Staff, the Federal Power Act provides States the power over siting. The Energy Policy Act of 2005 (EPAAct of 2005) provides limited authority to the Federal Energy Regulatory Commission (FERC) over siting matters, specifically only to designated national interest electric transmission corridors, and then only if a state fails to act or does not have the authority to act.

14. Staff also argues that Tri-State has failed to demonstrate that Commission regulation of the lines will constitute impermissible interference with interstate commerce. According to Staff, the cases cited by Tri-State either support Staff's position or are inapplicable.

15. The OCC is concerned that, if the Commission does not exercise jurisdiction, no agency will oversee the one thousand mile EPTP project. Without Commission coordination, there could be overlap in some areas, and insufficient transmission in other areas of Colorado. WECC is not a body that has oversight authority: it promotes reliability. Commission oversight could force all utilities to act together in a fashion that would have the least cost impact on customers.

16. According to the OCC, based on the Decision in 00A-580E, Tri-State's commitment in the Colorado Ute bankruptcy proceeding is still valid, and the Commission has

jurisdiction over the portion of the line constructed in Colorado. That docket also was concerned with reliability, notably the effects of the project on the Public Service Company of Colorado system. That reasoning holds true in this docket as well, given that 1000 miles of extra-high and high voltage transmission lines are being constructed. Without Commission oversight, there is no regulatory body with the authority to mitigate any adverse effects as a result of the construction. Given that there will be additional generation and transmission built as a result of the LCP process and Amendment 37, the Commission must coordinate transmission line construction in order to ensure that its responsibility under the least cost rules is fulfilled.

17. The OCC argues that the EAct of 2005 does not affect Commission jurisdiction. As argued by Staff, the Path 15 line is an inapt comparison because it was a federally owned project, with specific direction from Congress, the President and the Secretary of Energy for Western to participate.

18. Lastly, the OCC argues that, if the Commission determines that it has no jurisdiction, it should nevertheless dismiss the petition as being premature. Basically, the Commission does not have enough relevant facts to make a decision. Western will not be a partner in the project until the Environmental Impact Statement (EIS) is complete and results are known. The EIS has not yet been issued in draft let alone final form, the route is not yet final, and alternatives and additional projects are also to be evaluated. The assertion by Tri-State that Western is a participant in the EPTP, thereby excluding it from Commission jurisdiction is premature, according to the OCC.

19. WRA argues that Tri-State is required under § 40-1-103(2)(a), C.R.S. to obtain a CPCN for new facilities. WRA points out that, if one follows Tri-State's position, all a utility would have to do to evade Commission jurisdiction is partner in any way with some appropriate

federal agency. The Commission rejected this approach in a prior matter: *Re Tri-State Generation and Transmission Association, Inc.* 104 P.U.R. 4<sup>th</sup> 221 (Colo. P.U.C. 1989).

20. WRA also points to Tri-State's commitment in the Colorado-Ute Bankruptcy matter, specifically a pleading entitled Statement of Tri-State jurisdiction Re. the Commission's jurisdiction over Tri-State.

21. WRA argues that *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983) should be used to evaluate Tri-State's interstate commerce arguments, and that the case supports upholding jurisdiction. Under that case, whether the EPTP is a federal project does not matter - - what matters is the balancing of the State's interest versus the impact that jurisdiction might have on interstate commerce: "Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Arkansas* at 393-4. Tri-State, according to WRA, has not presented any evidence that Commission regulation will be excessive in relation to the putative local benefits.

22. WRA argues that Tri-State's application of the Path 15 case to this matter is in error, and that its interpretation of that case is mistaken, because with respect to PG&E, the jurisdictional utility, the California Commission ruled that the scope of the project was not such that it required a CPCN, but originally the scope warranted an application for a CPCN.

23. Next, WRA argues that Tri-State's Federal Power Act (FPA) preemption discussion misses the mark because it does not preempt Commission jurisdiction over the EPTP. Rather, the FPA restricts federal regulation of transmission only to those matters which are not subject to regulation by the States, which the EPTP is. WRA believes that the Commission and

the State have fundamental interests at stake which only the Commission can protect, and thus the Commission should exercise the jurisdiction given it by statute.

24. In reply, Tri-State argues that no CPCN is required for three reasons: the Project is a federal project over which the Commission has no jurisdiction; the exercise of Commission jurisdiction would conflict with the Commerce Clause of the Constitution; and, Commission jurisdiction is preempted by the FPA and/or the EAct of 2005.

25. Tri-State argues emphatically that the FPA and caselaw support the proposition that there is a clear divide in jurisdiction between retail sales and instate facilities, which are subject to state jurisdiction and interstate transmission and wholesale purchases which are exclusively under the purview of the federal government. Tri-State grants that the State has jurisdiction over the *siting* of facilities, which can be found in the local government law under land use and zoning, but disputes the Staff contention that *siting* also includes need. Tri-State asserts that "there is no support in the Colorado public utility law for the assertion that the Commission's certificate of need authority includes siting jurisdiction, as the term is used in the FPA." (Need for interstate transmission is within federal jurisdiction exclusively.) The basic purpose of § 40-5-101, C.R.S. is to prevent duplication of facilities.

26. Tri-State then argues that the ability of States (local governments in Colorado) to site lines in particular spots does not include the authority to make a determination as to initial need: FERC has jurisdiction over development of interstate networks. According to Tri-State, all of the provisions of the EAct of 2005 which relate to transmission are intended to promote the development of transmission.

27. Tri-State argues that the project is a federal project by virtue of Western's participation and that *Sierra Club v. Morton*, 400 F.Supp. 610 (N.D. Cal. 1975) stands for that

proposition. The Court ruled that the federal government was not required to comply with federal environmental reporting requirements because the facility was a federal facility.

28. Tri-State believes that Commission jurisdiction impinges on the Commerce Clause of the US Constitution. Tri-State points out that there is a two tiered approach to commerce clause issues, and states that the exercise of Commission jurisdiction would amount to a direct impact on interstate commerce simply because the lines run from Kansas to Colorado and will involve the transfer of power generated in Kansas to Colorado.

29. We are not convinced by Tri-State's arguments. First, Western's participation will not be certain until the results of the EIS are known. Concluding that Western is a participant in this project is premature. If, as Tri-State argues, a transmission project can evade state commission jurisdiction through the participation of a federal agency by what amounts to a token contribution and token ownership, then it would be easy for projects to avoid state jurisdiction. Here, Western will perhaps contribute up to \$15 million out of perhaps more than \$750 million, and will own slightly more than 50 MW of transmission capacity, the rights of way, and some fiber optic capacity. Tri-State will finance nearly all, and perhaps the entire project, and own all the lines and towers, and the rest of the capacity. Tri-State will have final say over every aspect of the construction of the project. This does not seem to us to amount to a federal project. The *Sierra Club* case is distinguishable. Tri-State argues that the case stands for the proposition that the extent of federal involvement is irrelevant to preemption of state jurisdiction. We find the case's relevance tenuous. In *Sierra Club*, it was the federal government which was not required to submit to the state environmental review process. We also believe the analogy to the PATH 15 project to be wanting. In that case the transmission lines were owned by the federal government,

and the question was whether the State had jurisdiction over the federal government. Here, the issue is not state jurisdiction over Western, but Tri-State.

30. Similarly, *U.S. v. 14.02 Acres of Land* is not persuasive authority. That decision discussed Western's authority to construct power lines, but says nothing about a state commission's jurisdiction over a utility. We also disagree with Tri-State's citation to *State of North Carolina, et. al. v. Carolina Power & Light Company, et. al.*, 588 S.E. 2d 77 (North Carolina (N.C. App. 2003)). Tri-State cites to that case because the Court of Appeals found that the FPA gave FERC the exclusive jurisdiction to determine the reasonableness of wholesale electric energy contracts in interstate commerce.

31. However, this intermediate court decision was overturned by the North Carolina Supreme Court. *See 614 S.E. 2d. 281* (N.C. 2005). The Court held that federal law does not preempt the North Carolina commission's authority to conduct a pre-sale review of a wholesale contract that would affect its obligations under the North Carolina Public Utilities Act "by ensuring that the utility had sufficient resources to provide reliable and adequate service to its captive retail ratepayers." *Id.* at 290. If anything, this case should be read to support our jurisdiction, because the exercise of jurisdiction by the North Carolina commission was over a wholesale contract that affected intrastate concerns. In addition, the issue here is not contracts for wholesale power, which involves the sale of power, but rather facilities jurisdiction.<sup>2</sup>

32. As Staff notes, Tri-State does not define 'federal project.' Western, in its comments suggests that what constitutes a federal project should not be defined by ownership interests, or level of participation. Western argues that, a project is federal if Western's reasons

---

<sup>2</sup> We note that the reversal of the intermediate court was not referenced by Tri-State.

for participating serve its congressionally determined mission. If the project helps fulfill Western's mission, it is protected by the 'public use' requirement of the 5<sup>th</sup> and 14<sup>th</sup> amendments of the U.S. Constitution. This might be true, but does not remove Tri-State from state jurisdiction. In any event, we do not believe that token participation by Western is enough to make a project a 'federal project.'

33. We are not convinced by Tri-State's statutory arguments. We do not believe that the EAct of 2005 preempts our jurisdiction. Rather, we believe its language implies that this Commission does have jurisdiction over this project. Tri-State argues that the EAct of 2005 enhances FERC's plenary and exclusive authority over interstate transmission lines.<sup>3</sup> The other parties believe there will be no regulatory oversight of this project, and we agree. Section 1222 of the EAct of 2005 provides authority to the FERC to issue a construction permit only if state commissions are not empowered to consider the interstate benefits of a project, authorize projects, or if a state commission fails to act within a year's time. But in any case, this section applies only if the transmission line is in a national interest electricity transmission corridor -- not the case here. We believe that the federal statutory language implies that state commissions have jurisdiction over transmission projects. We certainly will act in a year's time, and we have the authority to consider the interstate benefits of the EPTP.

34. We similarly disagree with Tri-State's FPA argument. There is simply no language in the federal statute that reserves exclusive authority over lines such as the EPTP to FERC. Nor is there any indication that Congress occupied the field.<sup>4</sup> To the contrary, as

---

<sup>3</sup> Tri-State elsewhere argues that FERC regulates Western's rates, and that Western is subject to regulatory governance by the Secretary of Energy. Its confusion belies its argument that FERC has exclusive control of interstate transmission lines.

<sup>4</sup> We believe the preemption analysis set forth in *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 106 S.Ct. 1890 (1986) controls.

discussed above, Congress indicates in the EPAct of 2005 that states maintain a critical role in approving these sorts of projects.

35. Section 40-5-105, C.R.S. is a valid statute as we apply it, and requires all public utilities to apply for a CPCN to extend facilities. We do not believe Tri-State to be exempt for this project. Also, recently enacted Commission Rule 4 CCR 723-3-3206 requires all utilities (and cooperatives) to obtain a CPCN.

36. We also agree with Staff's and WRA's analysis of Commission jurisdiction on interstate commerce. Several parties cite to the *Arkansas Electric Cooperative Corporation* case *supra*. While the facts of the case relate to rates, the Supreme Court did not indicate a different approach should be used for rates when performing an interstate commerce analysis. It is the approach used by the court in its analysis, in *Arkansas Electric Cooperative Corporation* that is important. Thus we consider the impact of our exercise of jurisdiction on interstate commerce, and balance that with our local concerns. Tri-State has misread the *Arkansas Electric Cooperative Corporation* case, and failed to demonstrate that the exercise of jurisdiction will impact interstate commerce so significantly as to outweigh the concerns of the Commission. Rather, it merely asserts that there will be an impermissible impact.

37. Tri-State's reading of *American Booksellers Found. v. Dean*, 342 F3d 96, 102 (2<sup>nd</sup> Cir. 2003) that the proper question is the overall effect of the statute on both local and interstate activity is accurate. Tri-State simply fails to demonstrate that the Commission's exercise of jurisdiction will have a negative impact (or any impact) on interstate commerce. We also believe that the actual construction of the project, which is what the Commission would exercise jurisdiction over, as opposed to the transmission of power, is in fact *intrastate* commerce.

38. We agree with Tri-State's reading of the Colorado-Ute bankruptcy settlement. Tri-State submitted to Commission jurisdiction over its facilities subject to any statutory and constitutional exceptions. While we don't believe that Tri-State has met its burden in demonstrating that those exceptions are applicable in this matter, we believe that the settlement agreement should not be construed as some endless submission to Commission jurisdiction. If Tri-State has concerns about the Commission's interpretation of that agreement, those concerns could be brought before the Commission in an appropriate pleading.

**C. Conclusion**

39. Tri-State simply has not convinced us that we have no jurisdiction over this project. It has not met its burden of demonstrating that the exercise of Commission jurisdiction will have an undue burden on interstate commerce, and its preemption analyses are lacking. In general this Commission is concerned with duplication of facilities, the potential impact of those extra facilities on the general public, and the financial impact of this project on jurisdictional utilities and their ratepayers. It is also concerned with the reliability of the transmission grid within Colorado, and the ability of jurisdictional load serving entities to deliver electricity to their customers reliably, at just and reasonable rates. We do not dispute that there is a need for transmission infrastructure in the State. We believe, however, that without Commission jurisdiction, there will be no regulatory body to ensure that the project is built in a manner that most efficiently meets the needs of Colorado.

40. We conclude that Tri-State must file an application for a CPCN to construct the Eastern Plains Transmission Project.

**II. ORDER**

**A. The Commission Orders That:**

1. Tri-State Generation and Transmission Association's petition for declaratory ruling is denied.

2. Tri-State shall file an application for a certificate of public convenience and necessity before beginning construction of the Eastern Plains Transmission Project.

3. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
April 25, 2007.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_

Commissioners

Decision No. C07-0588

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 07D-014E

---

IN THE MATTER OF THE PETITION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., FOR A DECLARATORY RULING THAT NO CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY IS REQUIRED FOR TRI-STATE'S PARTICIPATION IN THE EASTERN PLAINS TRANSMISSION PROJECT.

---

**COMMISSION ORDER DENYING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION**

---

Mailed Date: July 11, 2007

Adopted Date: July 5, 2007

**I. BY THE COMMISSION**

**A. Statement and Background**

1. This matter comes before the Commission for consideration of an application for rehearing, reargument, or reconsideration (RRR) filed by Tri-State Generation and Transmission Association, Inc. (Tri-State) to Commission Decision No. C07-0417, which was effective May 22, 2007. Tri-State seeks RRR to the Commission's decision denying its request for a declaratory ruling that no certificate of public convenience and necessity (CPCN) was necessary for Tri-State's participation with the Western Area Power Administration (WAPA), an agency within the Federal Department of Energy, in the Eastern Plains Transmission Project (EPTP).

2. Now, being fully advised in the matter, we deny Tri-State's RRR.

3. On January 16, 2007, Tri-State filed its Petition for Declaratory Order (Petition) that no CPCN was necessary for its participation in a proposed project to build approximately one thousand miles of transmission lines in eastern Colorado at a cost of about \$750 million.

According to the Petition, the project is to be built in three phases, and is designed to connect generation plants in Holcomb, Kansas to various substations and other facilities in eastern Colorado. The majority of the transmission lines are to be in Colorado.

4. Tri-State also represented that it would be the owner of the transmission lines and towers, while WAPA would own the rights-of way. Additionally, WAPA is to lease all property easements and rights-of-way for construction, operation, and maintenance to Tri-State. WAPA's financial participation is to be capped at \$15 million. Notably, WAPA's participation in the project is speculative. WAPA will not be a partner with Tri-State until the Environmental Impact Statement (EIS) is complete and results are known.

5. In Decision No. C07-0417, we found that Tri-State's characterization of the project as a "federal project" was without merit. We found WAPA's participation in the project speculative. Further, we were not persuaded by Tri-State's citations to several cases, which we found had a tenuous relationship to this matter at best. While Tri-State defined the project as a "federal project," we found it failed to define what legally comprises such a characterization.

6. Additionally, we were not convinced by Tri-State's argument that the Energy Policy Act (EPA) of 2005 preempts Commission CPCN jurisdiction in this matter. Rather, we found that its language tended to indicate that we do indeed have jurisdiction over the EPTP project. We could find nothing in federal statutory language that reserves exclusive authority to the Federal Energy Regulatory Commission (FERC) over construction of transmission lines such as those proposed here. Additionally, Tri-State provided nothing to indicate that Congress had intended to occupy the entire field, resulting in no role for states. To the contrary, we found that Congress indicated in the EPA of 2005, that states are to maintain a critical role regarding projects of this nature.

7. We also found Tri-State's argument that Commission authority here would impede interstate commerce unavailing. We determined that Tri-State failed to demonstrate that Commission exercise of CPCN jurisdiction would have a negative impact, or any impact for that matter, on interstate commerce.

**B. Analysis and Findings**

8. In its RRR, Tri-State reiterates many of the same arguments it made in its Petition. Tri-State argues that the EPTP is not a discrete transmission segment intended to enhance or provide load-serving capability solely for Tri-State's Colorado members. Tri-State believes that the Commission's jurisdiction over a project which will provide benefits not only for Tri-State, but also for a multi-state region is limited, particularly where a federal agency has a significant role in the design, construction management, and construction of the EPTP project. However, Tri-State concedes that it measures multi-state benefits through "efficiencies gained in any part of Tri-State's system [that] benefits all of its members."

9. Tri-State again argues that the federal status of the EPTP due to WAPA's potential participation limits the Commission's jurisdiction over the project. Because each party to the contract has substantive and independent responsibilities which enable the joint development of the EPTP, Tri-State implies that the project is therefore a federal project. Tri-State goes on to make the case that, given the partnership between WAPA and Tri-State, it is impossible to separate the objectives of WAPA and the objectives of Tri-State in the completion of the EPTP. Tri-State posits that Commission jurisdiction over Tri-State amounts to an assertion of jurisdiction over WAPA, since any limitations or conditions placed on the EPTP by the Commission may diminish the overall value of the EPTP from WAPA's perspective.

10. We are still not persuaded by Tri-State's argument. We first note that, while WAPA may have responsibilities under the potential contract, this does not diminish Tri-State's role, or its own responsibilities under the contract. As we indicated in Decision No. C07-0417, those substantial responsibilities warrant Commission CPCN authority over Tri-State. Neither are we persuaded by Tri-State's argument regarding the inability to separate the objectives of WAPA and Tri-State. Recently, the U.S. 10th Circuit Court of Appeals, in a telecommunications matter, found that the Telecommunications Act does not prevent a state public utility commission from exercising its express statutory authority under the Act in a way that affects the interstate components of services offered by carriers who are otherwise subject to the jurisdiction of the PUC.<sup>1</sup> We find the 10th Circuit holding instructive here. We find nothing that prevents us from exercising the express authority we are provided under the EAct. We find nothing new in Tri-State's argument here to persuade us to change our position. Therefore, we deny Tri-State's contention regarding the federal status of the project.

11. Tri-State also argues that Commission assertion of CPCN authority here inappropriately impedes interstate commerce. According to Tri-State, the issue is whether state regulation will be an excessive burden on interstate commerce in relation to the local benefits of the state regulation. In support of its position, Tri-State again references *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983). In Tri-State's view, the Court determined there that state rate regulation *could* interfere with interstate commerce, even where the members of the generation and transmission cooperative were all located in the same state.

---

<sup>1</sup> See, *WWC Holding Co. v. Sopkin et al.*, 2007 WL 1600389 (10th Cir.2007).

12. Tri-State also cites two cases from the 2nd Circuit for the proposition that the appropriate analysis of whether state regulation impinges on the Commerce Clause is whether the regulation has “extraterritorial effects” that impact the economic activity in other states.<sup>2</sup> Tri-State concedes it is impossible to quantify the extent interstate commerce would be impacted should the Commission assert CPCN authority here. Nonetheless, Tri-State concludes that an exact quantification of any economic impact is unnecessary for Commerce Clause purposes.

13. We are not persuaded by Tri-State’s Commerce Clause position. While its citation to 2nd Circuit cases is instructive, we note that the decisions of the 2nd Circuit are not binding on this Commission. Additionally, we find our initial reading of *Arkansas Electric* sound. It is clear that the Supreme Court made a concerted move away from attempting to ascertain a mechanical, precise division between direct and indirect effects on interstate commerce as advocated by Tri-State toward a “general trend in our modern Commerce Clause jurisprudence to look in every case to ‘the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.’” *Arkansas Electric* at 390. The Court went on to hold that “in recent years, this Court has explicitly abandoned a series of formalistic distinctions ... which once both defined and controlled various corners of the Commerce Clause doctrine.” *Id.* at 391.

14. Citing *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844 (1970) the Court provided as follows:

Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be

---

<sup>2</sup> Citing, *Grand River Enters. Six Nations. Ltd. v. Pryor*, 425 F.3d 158, 168 (2d. Cir.2005) (citations omitted).

tolerated will of course depend on the nature of the local interest involved, and in whether it could be promoted as well with a lesser impact on interstate activities.

*Id.* at 393-94.

15. Tri-State argues that any putative local benefits can be protected by means other than Commission CPCN jurisdiction over the EPTP. However, Tri-State provides no indication as to how that could be achieved.

16. We find that Commission CPCN authority here has at most an incidental effect on interstate commerce, and any burden imposed on interstate commerce is minute at best, and clearly not excessive in relation to any putative local benefits. Those benefits were best articulated by the Office of Consumer Counsel (OCC) in the case below, where it expressed concern that, should this Commission fail to exercise jurisdiction, no agency would oversee the EPTP. OCC went on to state that, without Commission coordination, there could be overlap in some areas, and insufficient transmission in other areas of Colorado. According to OCC, Commission oversight would encourage all utilities to act together in a fashion that would have the least cost impact on customers. We agree. Therefore, we deny Tri-State's interstate commerce argument.

17. Tri-State also maintains that the Federal Power Act (FPA) preempts Commission jurisdiction over the EPTP. Tri-State cites to § 201(b) of the FPA, 16 U.S.C. § 824(b) which according to Tri-State, while the federal government does not have exclusive authority over all aspects of the EPTP, only limited siting jurisdiction is left to the states. Tri-State goes on to argue that given the recent adoption by the FERC of mandatory transmission reliability standards, additional state regulation of the interstate transmission grid to ensure reliability is unnecessary.

18. We deny Tri-State's preemption argument. In a seminal case regarding preemption, the Supreme Court, in *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 106 S.Ct. 1890 (1986), set out the guiding principles to be used to determine when preemption occurs. According to the Court, preemption of state law occurs when Congress, in enacting federal statute, expresses clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for states to supplement federal law, or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* Additionally, the Court found that preemption of state law may result not only from action taken by Congress itself, but also, a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. *Id.* The critical question in any preemption analysis is always whether Congress intended that federal regulation supersedes state law.

19. We find nothing in the FPA, or the actions of the FERC to indicate that state law, especially the CPCN authority of this Commission, has been preempted by Congress, or by the FERC, acting within the scope of its congressionally delegated authority. We disagree with Tri-State that § 201(b) of the FPA preempts Commission CPCN authority over the EPTP. None of the scenarios enumerated above in *Louisiana Public Service Commission* exists here. Therefore, we find that our CPCN authority over the EPTP is not preempted by Congress, federal law, or through the actions or rules of the FERC. Therefore, we deny Tri-State's preemption argument.

**II. ORDER**

**A. The Commission Orders That:**

1. Tri-State Generation and Transmission Association, Inc.'s application for rehearing, reargument, or reconsideration is denied consistent with the discussion above.

2. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
July 5, 2007.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Commissioners