4-25-1979

Colorado Land Use Commission v. Board of County Com'rs of Larimer County

No. 79SA47

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

COLORADO LAND USE COMMISSION, Appellant, vs. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, and in their official capacity, WILLIAM LOPEZ, Chairman, DAVID WEITZEL, and NONA THAYER, the individual members of said Board, and THE CITY OF FORT COLLINS, THE CITY OF LOVELAND, THE CITY OF LONGMONT, THE TOWN OF ESTES PARK, and THE PLATTE RIVER POWER AUTHORITY, a political corporation and a political subdivision of the State of Colorado Appellees.	APPEAL FROM THE DISTRICT COURT OF LARIMER COUNTY Honorable CONRAD J. BALL Judge

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ANSWER BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER AND IN THEIR OFFICIAL CAPACITY, WILLIAM LOPEZ, CHAIRMAN, DAVID WEITZEL, AND NONA THAYER, THE INDIVIDUAL MEMBERS OF SAID BOARD

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I. INTRODUCTION

This brief is submitted on behalf of the Board of County Commissioners of the County of Larimer, and in their official capacity, William Lopez, Chairman, David Weitzel and Nona Thayer. Throughout this brief, said Defendants will be referred to as "County." The Appellant will be referred to as the "Land Use Commission." The City of Fort Collins, the City of Loveland, the City of Longmont and the Town of Estes Park will be referred to as "Cities." The Platte River Power Authority will be referred to as "PRPA." In this brief the County will respond only to arguments I and IV made by the Land Use Commission in its brief.

II. STATEMENT OF CASE AND FACTS

The parties have stipulated in the trial court to certain facts. Said stipulation is included in the record at pages 163 - 174. For purposes of the County's arguments in this matter, the salient facts can be summarized as follows. (Some facts important to this case and to the County's arguments have taken place subsequent to the trial court's ruling. Appropriate supplements to the record of such facts will be made.)

On August 25, 1977, the County and PRPA entered into an "intergovernmental agreement" defining the terms and conditions under which the County would review PRPA's proposed coal-fired electrical generating facility. (Hereafter referred to as "Rawhide Project.") (A copy of the contract is attached to this brief as Exhibit "A") On September 15, 1978, PRPA filed a petition for rezoning and for special review for the Rawhide Project pursuant to the terms and conditions of the agreement and the Larimer County Comprehensive Zoning Resolution. PRPA completed the applications on December 15, 1978.

Pursuant to the terms and conditions of Section 30-28-116 C.R.S. 1973 (pertaining to amendment of zoning maps and zoning regulations) and all the requirements of the Larimer County Comprehensive Zoning Resolution pertaining to amendments of the zoning map and review of uses by special review, the Board of County Commissioners and the Larimer County Planning Commission conducted a public hearing on March 6, 1979 on PRPA's application. On March 12, 1979, the Larimer County Planning Commission recommended conditional approval of PRPA's

rezoning request and request for use by special review. On March 26, 1979, the Board of County Commissioners conditionally approved PRPA's rezoning request and request for use by special review. Subject to certain performance conditions, the property in question for the Rawhide site is now properly zoned and the special review permission is properly given for the construction and operation of the Rawhide Project.

As set forth in the Land Use Commission's opening brief and in the Stipulation of Facts, the Land Use Commission requested the County to designate the site selection and construction of major facilities of a public utility; site selection and development of solid waste disposal sites; and efficient utilization of municipal and industrial water projects in Larimer County as activities of state interest as defined by Section 24-65.1-203 C.R.S. 1973. (The designation process is controlled by Article 65.1 of Title 24, Colorado Revised Statutes 1973, also referred to herein as House Bill 1041) Pursuant to statutory requirements as set forth in Section 24-65.1-407 C.R.S. 1973 the County conducted public hearings on these matters and declined to so designate.

The Land Use Commission thereafter instituted this litigation pursuant to Section 24-65.1-407(1)(c) seeking a trial de novo of the County's refusal to designate the matters requested by the Land Use Commission. The County responded to the litigation by asking dismissal of the suit on grounds that Section 24-65.1-407(1)(c) C.R.S 1973 violates the separation of powers clause set forth in Article III of the Constitution of the State of Colorado. The Trial Court ruled in favor of the County's position on this issue.

The Land Use Commission further sought to have the contract of August 25, 1977 between the County and PRPA declared invalid, ultra vires and void. The Trial Court ruled against the Land Use Commission's position and declared the contract valid.

The Cities and PRPA argued that the Land Use Commission's activities with respect to PRPA violates Article V Section 35 of the Constitution of the State of Colorado by allowing a special commission of the state to interfere with municipally owned property. The Trial Court ruled in favor of PRPA and against the position of the Land Use Commission on this issue.

III. SUMMARY OF ARGUMENT

A. The statutory requirement for a trial de novo of the County Commissioner's decision not to designate a matter of state interest violates Article III of the Constitution of the State of Colorado. Article III distributes the powers of the state among the legislative, executive and judicial departments. The designation function set forth in House Bill 1041 is a legislative matter thereby prohibiting judicial activity with respect thereto.

B. The intergovernmental agreement is a proper exercise of joint governmental power. PRPA has some land use authority over its own activities. Under the applicable constitutional and statutory provisions, units of government can contract with each other for the joint exercise of governmental power over subjects lawfully authorized to each contracting unit. The intergovernmental agreement does not contract away

any legislative power of the County. Instead, the intergovernmental agreement affirms the County's zoning authority over PRPA which, without such agreement, is questionable. All zoning decisions with respect to PRPA were handled in strict compliance with state and local requirements.

C. The intergovernmental agreement is now fully performed. County review of the Rawhide Project is complete. The property is finally zoned and special review permission has been given. The contract has fulfilled its purpose. Neither party has any further rights or obligations thereunder and there is no controversy with respect thereto. Even if the contract is to be declared invalid, the County zoning actions would stand. Accordingly judicial review of the contract is now meaningless and a court decision on this point would not affect the rights of any parties before this Court.

IV. ARGUMENT

A. Section 24-65.1-407(1)(c) of the Act violates Article III of the Constitution of the State of Colorado and therefor deprives the Court of subject matter jurisdiction.

Article III of the Constitution of the State of Colorado is as follows:

> Distribution of Powers
>
> The powers of the government of this state are divided into three distinct departments, - the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The County submits that the designation function as defined and set forth in House Bill 1041 is a legislative matter. The provision authorizing de novo judicial review

requires a Court to assume duties of the local government to designate and adopt guidelines and in fact, asks the Court to make legislation.

Generally, House Bill 1041 provides a statutory scheme whereby units of local government may designate certain matters as matters of state interest. Among the matters specified by statute which may be so designated are the three items requested for designation by the Land Use Commission. Section 24-65.1-203 C.R.S. 1973. The designation procedure is governed by Section 24-65.1-404 C.R.S. 1973. That Section provides for notice and public hearing upon the designation issue. In this case, the Land Use Commission initiated the designation request under Section 24-65.1-407. The procedure as specified in Section 404 is also used for the designation hearing on matters requested by the Land Use Commission under Section 407. Section 24-65.1-401 of the Act provides the "standards" to be considered by the local government in deciding a designation, whether the matter is one brought at the initiative of the local government or at the request of the Land Use Commission. Those standards are:

a. The intensity of current and foreseeable development pressures and

b. The applicable guidelines for designation issued by the Land Use Commission.

Once a designation is made, the local government must issue guidelines for reviewing development of matters of state interest. Section 24-65.1-404(3). House Bill 1041 specifies standards for guidelines depending upon the item designated. The statutory standards for the items at issue are:

a. Major facilities of a public utility shall be located so as to avoid direct conflict with adopted local government, regional and state master plans. Section 24-65.1-204(6) C.R.S. 1973.

b. Major solid waste disposal sites shall be developed in accordance with sound conservation practices and shall emphasize, where feasible, the recycling of waste materials. Consideration shall be given to longevity and subsequent use of waste disposal sites, soil and wind conditions, the potential problems of pollution inherent in the proposed site, and the impact on adjacent property owners, compared with alternate locations. Section 24-65.1-204(2) C.R.S. 1973.

c. Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissable under existing law, the recycling and reuse of water. Urban development, population densities, site lay-out and design of storm water and sanitation systems shall be accomplished in the manner that will prevent pollution of aquifer recharge areas. Section 24-65.1-204(8) C.R.S. 1973.

Once a matter of state interest has been designated, and guidelines adopted for the administration of such designated matters, no development with respect to that matter of state interest can proceed without the issuance of a permit by the local government under Section 24-65.1-501 C.R.S. 1973. The permit process includes a 30 day published notice and public hearing. Section 24-65.1-501(2)(a) C.R.S. 1973. At the hearing, the local government would evaluate the proposal against the

guidelines adopted for administering the matter of state interest and subsequent to such public noticed hearing would approve the application if the proposal complys with the guidelines, and if not, deny the proposal. Section 24-65.1-501(4). Section 24-65.1-502 provides a judicial review of the local government's decision on the permit application. The judicial review as specified in this section is different from the judicial review instituted in this case under Section 407. Section 502 review contemplates a court review of the record of the quasi-judicial permit hearing. This is consistent with traditional concepts of judicial review of County action. Section 407 review requires a de novo trial of a designation hearing which involves judicial determination of the designation issue and the adoption of guidelines for a matter designated as one of state interest. Such a de novo trial is totally different from any established methods of judicial review of County action.

According to Black's Law Dictionary, 4th Edition, de novo means anew; afresh, a second time.

> The term "hearing de novo" means literally a new hearing or a hearing the second time; and means that a case shall be heard the same as though it had not been heard before. 25A C.J.S. DE. P.483.

It is clear that by requiring a de novo hearing, the legislature is asking a Court to hear the designation issue again as though the first hearing before the Board of County Commissioners never took place. Whether or not this requirement is consistent with Article III of the Constitution of the State of Colorado depends upon whether or not the designation and guideline function as set forth in Sections 404 and 407 of

House Bill 1041 are in fact legislative functions or quasi-judicial functions. The Land Use Commissions' argument on this issue totally ignores this important question. The County agrees with some of the statements made by the Land Use Commission in its brief that under proper circumstances, a de novo review is entirely proper. However, the question before this Court is not the propriety or inpropriety of de novo reviews in an abstract sense. Rather the question is whether the subject matter of this de novo review is a legislative function. If it is legislative, Article III of the Constitution of the State of Colorado is violated and the Court has no subject matter jurisdicition.

This Court in Parsons vs. Parsons 70 Colo. 154, 198 P. 156 (1921), quoting from Corpus Juris, made the distinction between legislative functions and judicial functions as follows:

> The distinction between the functions between the legislative and judicial departments is that it is the province of the legislature to establish rules that shall regulate and govern in matters or transactions occurring subsequent to the legislative action, while the judiciary determines rights and obligations with reference to transactions that are past or conditions that exist at the time of exercise of judicial power. 198 P. 158.

Furthermore, at 50 C.J.S. Judicial, page 560, the distinction between a judicial act and a legislative act is explained as:

> [A judicial act] deals with or determines what the law is and what the rights of the parties are with reference to transactions already had. [A legislative act] relates to, or prescribes what the law shall be in future cases arising under it.

The Court in State vs. Huber 129 W. Va. 198, 40 S.E. 2d 11 (1946) in wrestling with the distinctions among legislative, judicial and executive power commented that the legislative power is a power of lawmaking bodies to frame and enact laws. That the lawmaking power is a wide scope and, except where limited by federal and state constitutions, is essentially unlimited. The executive power is more limited and extends to the detail of carrying into effect the laws enacted by the legislature. When attempting to define judicial power, the Court became rather frustrated in that there appeared to be no meaningful definitions. The Huber Court however, did comment upon judicial power as follows:

> It is the power of which a regularly constituted Court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of Courts in which matters do not come within the power granted to the executive or vested in the legislative department of government. 40 S.E. 2d 18.

Chief Justice John Marshall, in Marbury vs. Madison 1 CR. (5 U.S.) 137 (1803) first clearly established the principal of judicial review of actions of other branches of government. Even in that case, Justice Marshall recognized that there were and should be limits to the judicial power of review and stated as follows:

> The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws submitted to the executive can never be made by this Court.

The issue of Marberry vs. Madison was administrative power rather than legislative. However, the principles are the same. This Court should heed Chief Justice Marshall's remarks and not involve itself with legislative power as Chief Justice Marshall did not involve himself with executive decisions. Justice Cardozo in his essay "The Nature of the Judicial Process" (New Haven: 1921) P.141 explained the limits of judicial power as follows:

> [A] jurist is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of duty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life.

An important opinion in distinguishing between legislative and judicial action is Smith vs. Waymer 29 Colo. App. 544, 487 P.2d 599 (1971). This case involved the establishment of a County housing authority pursuant to Section 24-4-501 C.R.S. 1973 et seq. The statute provides that the Board of County Commissioners after a hearing upon a petition is to make certain findings of fact concerning the availability of decent, safe and sanitary dwelling accomodations within a County. Upon making such findings, a housing authority would be established. In this particular case, the County Commissioners refused the petition for creation of a housing authority. The Court, upon judicial review, found that the fact finding function of the County and the establishment of a housing authority was a legislative matter and did not take jurisdiction. This case is

not only important as a reaffirmation of the principle that a Court will not involve itself with legislation but the case also provides some guidance as to what constitutes legislative action vs. judicial action. Even in this case, where the judicial review was not de novo and the statute required specific findings measured against definite criteria, the Court found the matter to be legislative. The reason is obviously that the decision regarding the housing authority triggers further governmental action and does not affect existing rights based upon past transactions.

In examining the designation process under House Bill 1041, the following characteristics of that process are apparent whether the decision is being made by the Board of County Commissioners or by a District Court: there are no operative facts resulting from an existing or past transaction; there are no established guidelines or pinciples against which the action to be taken is measured; upon designation no rights or responsibilities among parties are settled; nothing happens until future development is proposed pertaining to the matter designated. Designation and accompanying guidelines speak only to future transactions and proclaims what the law will be in the event future action is taken. A judicial action would be totally prospective and would not settle an existing controversy. The designation decision meets every definition conceived for "legislative action" and does not meet any definition of proper "judicial action".

In examining the practicalities of a designation hearing, it further becomes apparent how ill equiped the judicial system and Courts are to deal with this sort of an issue on a de novo basis. At the County's designation hearing, statements were presented from many diverse groups including the Chamber of Commerce, representatives of PRPA, representatives of lobbying groups favoring designation and lobbying groups opposing designation and comments from individuals either generally in favor or generally objecting to the building of the Rawhide Project. Most all of the comments presented were opinions. Little evidence in the "judicial sense" was presented. The hearing was a classic example of a legislative type hearing. The hearing was completely foreign to any concept of a judicial hearing. Although some testimony was presented as to the potential statewide impact of a power plant, or at least an impact that goes beyond the boundaries of Larimer County, the Court should be aware that evidence of such impacts are not material to the issue and the term "state interest" does not provide any standard for review. The term "designation of a matter of state interest" as seen throughout House Bill 1041 is in actuality a misstatement. The "standards" for designation do not refer to statewide interests. Whether or not a matter is to be designated an item of state interest does not depend upon whether or not it in fact affects the State of Colorado or at least those areas beyond the boundaries of Larimer County. Designating a matter of state interest simply triggers a review mechanism for future development applications that would not otherwise be available.

The Court in Chemical Bank & Trust Company vs. Faulkner 369 S.W.2d 427 (1963) commented upon the practical difficulties involved in a Court conducting a de novo hearing of a legislative matter. The statute in the Chemical Bank case required a statutory de novo hearing of the decision of the banking board with respect to the issuance of a bank's charter. The statute set forth five very specific findings that must be made before a charter is issued. Even in that case, when the Court was aided by specific statutory standards to aid a discretionary decision, it found the questions to be legislative and declined to take de novo jurisdiction. The Court commented as follows:

> The appeal provision places a duty on the Court to make these determinations. The placing of this duty upon the Courts makes the proceedings adversary with each party - applicant and contestent - advocating its own special interests. Each party would introduce evidence sustaining its own point of view. That would leave no protection for the general public since the Courts are not equipped to make an independent investigation into the facts and circumstances. Banking has always been a field of great public interest. There is more involved than the rights of individuals who wish to engage in the business of banking. The general populace has an economic interest in the financial welfare of banking institutions.

While the Chemical Bank Court was specifically concerned with the banking issue, the Court nevertheless succinctly points out the difficulty of any Court becoming involved in legislation. A Court is bound by what is presented to it. A Court has no independent staff or investigative agencies to ferret out and research the facts and opinions

which may be material to an issue. The state legislature delegated to the Board of County Commissioners in House Bill 1041 the legislative power to consider and make designation determinations. The legislature as well as the County employs the staff to assist in gathering facts, data, policies, opinions and a host of other material involved in deciding a designation issue. Courts are not similarly equipped. This Court in Public Utilities Commission vs. Northwest Water Corp. 168 Colo. 154, 451 P.2d 266 (1969) declined to construe the statute authorizing judicial review of Public Utility Commission decisions as authorizing a de novo hearing. In that case, the Court commented that without the aid of a staff and the expertise of a commission, a Court should not undertake to duplicate the evaluation and judgment made by the Public Utilities Commission in arriving at a decision.

While the legislature may properly delegate to the County a legislative duty, it may not also delegate that legislative duty to the Court. To impose such a matter upon the Court would require the Court to conduct a legislative hearing which the Court is not equipped to carry out.

Once Courts have determined that the matters before them on a de novo basis are legislative rather than judicial, the Courts have not hesitated to decline jurisdiction. The reason often given, and repeated by this Court in Public Utilities Commission vs. Northwest Water Corp. (supra page 15) is that if the function performed by an agency is administrative or legislative, or if a Court is required to do all over again what the agency has done, the system of review

violates Article III of the Constitution of the State of Colorado and the Separation of Powers Doctrine.

In holding that a Kentucky statute authorizing judicial de novo review of zoning actions was unconstitutional and void, the Court of Appeals of Kentucky in American Beauty Homes vs. Louisville & Jefferson County Planning & Zoning Commission 379 SW2d 450 (Ky. 1964) stated:

> The legislature has undertaken to confer upon the judiciary the identical duties and powers of the [zoning] commission. This is accomplished by requiring a "de novo" trial on appeal to the Circuit Court. . . . The futility of the initial proceeding is obvious when we recognize that all the steps taken before the commission are nulified by taking an appeal. The detailed administrative process is a mockery. This procedural absurdity may be traced directly to the unconstitutional character of the "de novo" provision . . . .
>
> If a Court is required to try out independently the propriety of an adjustment in a zoning plan, then the Court is simply substituted for the commission in determining and applying legislative policy to local conditions which require the expertise of an administrative agency. The legislature cannot by directing a method of appeal procedure, impose upon the Courts administrative duties to carry out its policies by discretionary decisions.

Courts have also refused to rule on legislative matters when such were before them on other than de novo review procedure. In People vs. Summit 183 Colo. 421, 517 P.2d 850 (1974) this Court refused to involve itself in a legislative matter even when the Court had severe doubts about the validity of the legislation. See also, People vs. Harris 187 Colo. 362, 531 P.2d 385 (both these cases involve the legislative classification of marijuana as a narcotic drug)

In Tihonovich vs. Williams ____ Colo. ____, 582 P.2d 1051 (1978) this Court declined jurisdiction under Rule 106 of the Rules of Civil Procedure to review a budget decision by the Board of County Commissioners of Pueblo County. This Court stated that the adoption of a budget is not a judicial or quasi-judicial function and therefore judicial review could not be conducted. Based upon the Tihonovich holding, this Court should not only reject a review under the broad unlimited trial de novo review requirements of Section 24-65.1-407(1)(c) C.R.S. 1973 but also reject review under the narrow confines of a certiorari proceeding under Rule 106.

The Supreme Court of the United States spoke to this issue in Keller vs. Potomic Electric Power Company 261 U.S. 428 (1923). In declining de novo jurisdiction over the Public Utilities Commission for the District of Columbia, the Supreme Court pointed out that the jurisdiction of Courts is limited to cases and controversies in such form that the judicial power is capable of acting on them, which involve real cases and real parties and does not involve legislative issues or controversies not involving real cases and real parties.

The Court in State vs. Huber supra page 10 gave the most detailed explanation as to why a Court should not exercise jurisdiction over legislative matters. The Court dwelled upon the theory of separation of powers and thought it worthy of extensive discussion. The Court quoted James Madison as saying: "The accumulation of all power, legislative, executive and judicial in the same hands whether of one, a few, or many, whether hereditary, self-appointed, or elected, may just be pronounced the very definition of tyranny." The Court further

quoted John Adams as saying: "it is by balancing one of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved." Finally, the Court quoted Alexander Hamilton as saying: "I agree that there is no liberty if the power of judging be not separated from the legislative and executive powers."

Even the Land Use Commission in its brief argues that if the Court is required to substitute its judgment for the agency's there may be a violation of the constitutional requirement of separation of powers. The Land Use Commission further argues that as long as the evidence upon which the Court bases its decision was before the agency, the Court will not be substituting its judgment for the agency. The LUC further comments that if the Court relies on evidence which was not presented to the agency, the Court should remand the issue to the agency for its consideration of the new evidence. (Land Use Commission Opening Brief page 8.) This argument points out the utter folly of a Court getting involved with a legislative matter on any basis, let alone through the medium of a de novo hearing. If the Court hears the same evidence that was before the County, and reaches a different conclusion, how can it be said that the Court would not be substituting its judgment for that of the County? When a de novo hearing is conducted as if the first hearing did not even occur, how can it be said that the evidence before the Court would be the same as the evidence before the County? If there is different evidence before the Court should the matter be remanded to the County for reconsideration? Is the County decision upon reconsideration again

to be submitted to the Court for de novo review? What is "evidence" to support a legislative discretionary decision? It becomes obvious that a Court, in conducting such a de novo hearing of legislative discretionary matters will soon become immersed in a sea of legislative policies and issues completely foreign to traditional jurisprudance.

Even with all the legal and practical problems associated with the de novo review, the County's position is not that de novo review is inherently unconstitutional. The key to this issue is not that Courts should never conduct de novo review of County decisions. Rather, it is that the Courts should never conduct de novo review, or any kind of review, of legislative decisions.

B. The intergovernmental agreement of August 25, 1977 is valid.

The Land Use Commission seems to urge the invalidity of the contract on two separate grounds: (1) the contract constitutes an illegal surrender of the County's zoning authority; (2) the contract is not consistent with the constitutional and statutory authority permitting intergovernmental agreements. These contentions will be addressed in order.

The County agrees wholeheartedly with the proposition that a government may not, by contract or otherwise, surrender its governmental, legislative or police powers. Governmental entities cannot confer public powers upon others nor delegate legislative powers. A government cannot make a contract which interferes with its legislative or governmental functions. A

detailed examination of the contract between PRPA and the County unequivocably demonstrates that the County has not contracted away any governmental power. Rather than diminishing governmental power, the contract in question enhances the legislative governmental power of the County.

The Platte River Power Authority is a governmental entity. Because of this, the application of County zoning to PRPA is uncertain. In 1961, this Court held in Reber vs. South Lakewood Sanitation District 147 Colo. 70, 362 P.2d 877 (1961) that authorities and other state authorized governmental subdivisions have the power to overrule or disregard the restrictions of County or municipal zoning regulations. In Blue River Defense Committee vs. The Town of Silverthorne 33 Colo. App. 10, 516 P.2d 452 (1973) the Court of Appeals held that a town may overrule a County's decision regarding the proposed construction of a sewage plant. In City & County of Denver vs. The Board of County Commissioners 113 Colo. 150, 156 P.2d 101 (1945) this Court specifically held that the public body charged with carrying out a specific public project, not a Board of County Commissioners, has the ultimate voice on whether and how the project shall be carried out. These three cases construe Section 30-28-110 C.R.S. 1973. Basically that Section provides that when a County has adopted a master plan, as Larimer County has done, a County Planning Commission must review all public projects to be carried out within such County. In the event of County Planning Commission disapproval of the project based on a master plan, the public body intending to carry out the public project may overrule the Planning Commission and proceed. This body of law casts a

considerable cloud over Larimer County's zoning authority with respect to the Rawhide Project of the Platte River Power Authority. Rather than contracting away this doubtful zoning authority, the County obtained Platte River's consent to be bound by the County zoning. Platte River by the agreement agreed to the following:

1. To apply for rezoning of the subject property from O-Open zoning district to I-1 Heavy Industrial zoning district.

2. To apply for approval of the Rawhide Project as a use by special review within the I-1 Heavy Industrial District (power plants being a use specified by special review in the I-1 zoning district as set forth in the Larimer County Comprehensive Zoning Resolution).

3. To obtain the County's approval of the location of the Rawhide Project as conforming to and complying with the previously adopted elements of the Larimer County Master Plan.

4. To apply for such variances as required by the Larimer County zoning resolution.

5. To apply for zoning approval of transmission lines from the Rawhide Project.

6. To pay $100,000.00 to Larimer County as an application fee for the review of the Rawhide Project. (In fact, PRPA paid $150,000.00 as an application fee.)

7. To comply with and abide by reasonable land use conditions and actions of Larimer County in reviewing the Rawhide Project. (Contract page 3 and 4 record page 60 and 61)

Finally, the parties agreed that the decisions made by the Board of County Commissioners with respect to PRPA's application for rezoning, special review and master plan approval were discretionary with the Board of County Commissioners and that such decisions were final in all respects except to the extent such decisions may be found to be arbitrary or capricious. (Contract page 5 record page 62) Rather than varying any of the state or local zoning resolutions with respect to PRPA, the agreement simply applies in total all state and local zoning resolutions to PRPA. Pursuant to the agreement, the County held zoning hearings as required by statute and by local resolution and ultimately granted conditional approval of the Rawhide Project. Also pursuant to the contract PRPA appeared before the Larimer County Board of Adjustment and obtained necessary variances from the zoning resolution for the construction of the Rawhide Project.

The Land Use Commission further argues that the agreement provides special review criteria only applicable to the Rawhide Project and not applicable to all applications under the County zoning resolution. This is true. The agreement provides for detailed submittal requirements by Platte River Power Authority before its application for rezoning and special review would be deemed complete. (See attachment A to the agreement page 65 through 69 of the record.) The submittal requirements are not required of all applicants seeking a change in zoning or use by special review. However, due to the magnitude of the Rawhide Project, the County determined that existing submittal requirements were not comprehensive enough.

These submittal requirements are not less than what is otherwise required but is in addition to what is otherwise required. In addition, the standards of review for PRPA's application (set forth in attachment B to the agreement, page 70 through 73 of the record) are more comprehensive than what is otherwise required. Again not all applications for rezoning and special review are subject to this detailed scrutiny. The review criteria are not less than what is otherwise required, but is in addition thereto.

The Land Use Commission further points to the County's agreement to "grant approval or conditional approval of Platte River's supplemented application if the County determines whether the standards set forth herein and the evaluation criteria set forth in attachment B hereto have been met" (contract page 5 record page 62) as an example of contracting away governmental power. However, this is exactly what the County does in any land use matter. If established procedures are followed and established criteria, in the judgment of the County, are met, an applicant is entitled to approval. It is this judging of an application against established criteria which prevents arbitrary and capricious use of the County's land use power.

PRPA has no power under the agreement to overrule the County decisions. The County decisions were final. PRPA agreed that the standard of review of the County decisions was that the decisions were valid unless found to be arbitrary or capricious. This is the standard of review of any County land use decision. With all these factors in mind, it is extremely

difficult to see how the Land Use Commission can, in good conscience, urge that this Court find the County in fact contracted away its zoning power. The contract does not diminish the zoning power in any way whatsoever. The contract clearly enhances the zoning power as it applies to the Platte River Power Authority.

The Land Use Commission next argues that the intergovernmental agreement is void because of a claimed non-compliance with Article XIV, Section 18(2)(a) of the Constitution of the State of Colorado and Section 29-1-203(1) C.R.S. 1973. We agree with the Land Use Commission's analysis of the issue in that the critical statutory provision is that the contract may extend only to matters which are "lawfully authorized to each of the cooperating or contracting units." The subject matter of the contract is land use review of the Rawhide Project of PRPA. Both parties to the contract must be lawfully authorized to conduct the matter specified in the contract i.e., land use review of the Rawhide Power Project in order for the contract to be valid. There is no doubt that each of the contracting parties have such power. In Section 30-28-110 C.R.S. 1973 PRPA, as a governmental body having jurisdiction over its own affairs, has the power to review and overrule decisions of the Larimer County Planning Commission as to the Rawhide Project's compliance with the Larimer County master plan. This principle was interpreted and clarified in the cases of Blue River Defense Commission vs. The Town of Silverthorne supra page 20; Reber vs. South Lakewood Sanitation District supra page 20; and City and County of Denver vs. The

Board of County Commissioners supra page 20. There can be little argument after reading this statutory provision and the opinions in these cases that PRPA has land use powers over the Rawhide Project.

There also can be little argument that the County has general land use powers over the Rawhide Project through Section 30-28-110 C.R.S. 1973 and 29-20-101 C.R.S. 1973 et seq. With each governmental contracting party having some measure of land use authority over the Rawhide Project site and its enviorns, the intergovernmental agreement should not only be declared to be a valid joint exercise of governmental power but should be applauded as a significant step in a direction of intergovernmental cooperation.

C. The intergovernmental agreement which the Land Use Commission seeks to have declared ultra vires and void has been fully performed by the parties and is terminated. There exists no controversy over the agreement and no relief can be given by this Court with respect thereto.

As explained above, the essence of the intergovernmental agreement was that PRPA agreed to submit to the zoning authority of the County and to abide by all reasonable land use conditions of the County. Pursuant to that agreement and pursuant to the applicable state and local laws and regulations with respect to zoning changes and approval of a use by special review, the property in question for the Rawhide Project has been conditionally rezoned and a use by special review conditionally granted. The contract has been fully performed. A

ruling by this Court that the contract is void would have no effect on the rights and obligations of the parties whatsoever. The rights and obligations are now set forth in the County's Zoning Resolutions. The subject matter of this issue, the intergovernmental contract of August 25, 1977, has ceased to exist in the sense that performance thereunder by both parties is complete.

In the case of City and County of Denver vs. Brown 47 Colo. 513, 108 P. 971 (1910) this Court was faced with a similar circumstance. In that case, Plaintiffs brought suit to compel the Defendants to supply Plaintiffs with water from a City and County ditch during the irrigation season of 1905. The Trial Court ruled in favor of the Plaintiffs. The Defendant appealed. The appeal was heard and argued long after the irrigation season of 1905 had ended. The Supreme Court dismissed the proceedings and held as follows:

> The judgment of the Trial Court was to the effect that the Defendants should carry and deliver water to the Plaintiffs in whose favor judgment was rendered during the irrigation season of 1905. . . . If the Court erred in rendering the judgment it did, nothing would be gained by granting the Defendants a new trial in a case which involves nothing more than the right to water for a season that has passed. A judgment of this Court on that question could not affect the rights of either of the parties at this time. Whatever they may have been when the original suit was instituted, and a judgment below rendered, cannot, in the circumstances of this case avail either party now, for the obvious reason that the subject matter of the controversy has ceased to exist. The existence of an actual controversy is an essential requisite to appellate jurisdiction and it is not within the province of an Appellate Court to decide abstract or hypothetical questions disconnected from the granting of actual relief or from the determination to which no practical result can follow.

See also Northern Colorado Irrigation Company vs. Pouppirt 47 Colo. 490, 108 P. 23 (1910); Iron Silver Mining Company vs. Waldrum 47 Colo. 8, 105 P. 860 (1909).

Furthermore, at 5 C.J.S. Appeal and Error Section 455 P. 593 the following appears as a statement of the general law:

> Appellate Courts determine only matters actually before them on appeal, and will generally not decide questions not necessary or material to the determination of the cause or abstract, moot or academic questions, or questions the decision of which will not affect the result.

In the case at bar, it is important to remember that neither party to the contract challenged its validity. The Land Use Commission as a non-party and having no rights or obligations thereunder is the party questioning the contract. A decision by this Court in favor of the Land Use Commission's position on the contract would not affect the rights of either the County or PRPA, since the property is now properly zoned for the use in question. The real question the Land Use Commission seems to be arguing is the validity of the zoning. If the Land Use Commission argues that the contract has so tainted the zoning that the zoning is now invalid, the proper and exclusive method to challenge the zoning as stated by this Court is pursuant to Rule 106(a)(4) of the Rules of Civil Procedure. Snyder vs. The City of Lakewood ____ Colo. _____, 542 P.2d 371 (1975). This Court cannot invalidate the zoning in this action.

V. CONCLUSION

For the reasons set forth herein, the County urges this Court to find that the de novo review provisions of Section 24-65.1-407(1)(c) violate the separation of powers

principle established by Article III of the Constitution of the State of Colorado and thereby affirm the Trial Court's dismissal of the Land Use Commission's Complaint. The County further urges the Court to dismiss the claim with respect to the intergovernmental agreement on the basis that the intergovermental agreement is fully performed and no rights can be adjucated thereunder. If not, the County urges the Court to find that the intergovernmental agreement is a proper exercise of joint governmental powers and by executing the same, the County has not contracted away any of its zoning power.

DATED this 25th day of April, 1979.

HARDEN, NAPHEYS, SCHMIDT & HASS
A Professional Corporation

By _____
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Telephone: 482-7777

Copy sent ~~delivered~~ to attorneys of record on April 25, 1979

By _____

INTERGOVERNMENTAL AGREEMENT

THIS AGREEMENT, made this 25th day of August, 1977, between the BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO, (hereinafter called "Larimer County" or "Board of Commissioners") and PLATTE RIVER POWER AUTHORITY (hereinafter called "Platte River"), a separate governmental entity and a political subdivision of the State of Colorado, which is a municipal utility wholly-owned by the Colorado municipalities of Estes Park, Fort Collins, Longmont, and Loveland (hereinafter called the "Municipalities"),

W I T N E S S E T H:

WHEREAS, Larimer County, through its Board of Commissioners, and pursuant to Colorado Revised Statutes Sections 30-28-101 et seq. and Sections 29-20-101 et seq. (1973), is the local governmental body with jurisdiction over planning, zoning, and regulation of the use of land, and is responsible for guiding and accomplishing a coordinated, adjusted and harmonious development of the unincorporated territory within Larimer County;

WHEREAS, Platte River, as a municipally-owned utility is the local governmental body with responsibility for determining what electric generation and transmission facilities are necessary to supply the wholesale electric energy needs of the Municipalities and in so doing take into consideration and, when feasible, foster compliance with adopted land use master plans of local governments;

WHEREAS, Platte River has determined that, in order to supply its constituent Municipalities and their citizens with the electric energy they will require in the future, it is necessary and desirable to construct a 230 megawatt coal-fired electric generating facility and place it in service by 1985. That facility, which Platte River proposes to locate in northern Larimer County together with related transmission facilities, is the Rawhide Energy Project (the "Rawhide Project");

WHEREAS, as a preliminary step to seeking Larimer County's approval of the Rawhide Project, Platte River submitted that project to the Larimer-Weld Regional Council of Governments ("Larimer-Weld COG") for its analysis and evaluation of the environmental, engineering, and socio-economic aspects, and after holding a series of public hearings, the Larimer-Weld COG has published its report together with its recommendations which have been forwarded to the Larimer County Board of Commissioners, which Board has carefully reviewed and considered said report and recommendations;

WHEREAS, the Rawhide Project is estimated to cost approximately $215,000,000 and unreasonable delays in obtaining a decision will, at current prevailing rates of wage and price escalation, add to the costs of the Rawhide Project which will be paid for by the electric consumers of the Municipalities;

WHEREAS, Platte River has made application to Larimer County for Use by Special Review of the Rawhide Project site and has requested conditional approval as to the conceptual acceptability of the Rawhide Project in order to avoid the expenditure of substantial sums of money on specific site investigations without receiving reasonable assurances that such site is conceptually acceptable to Larimer County;

WHEREAS, the Larimer County Board of Commissioners has submitted Platte River's application to various state and local government agencies for their review and comment;

WHEREAS, the Parties desire to provide for good environmental conditions around the Rawhide site, in order to minimize or avoid (i) potential adverse effects on the surrounding community, (ii) dangers to public health, (iii) traffic congestion and incompatible uses, and (iv) the extension of government services beyond the capacity of Larimer County;

WHEREAS, the Parties further desire to use the most up-to-date electric generating technology that is available and practicable, to minimize the

disruption of public utility services, provide for solid waste disposal which will emphasize, where feasible, the recycling of waste materials, and make the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of such water, and to make the most efficient use of energy, including cogeneration where economically feasible and practicable;

WHEREAS, the Larimer County Board of Commissioners has carefully considered a request that the site selection and construction of the Rawhide Project be designated a matter of state interest pursuant to Colorado Revised Statutes Sections 24-65.1-101 et seq. (1973), and has declined to so designate that project;

WHEREAS, the Larimer County Board of Commissioners, on the basis of its review of the report of the Larimer-Weld COG together with the information supplied to it to date by Platte River, the Municipalities, state and local agencies, the Larimer County Planning Staff, and the public, has concluded, and does by the execution of this agreement, affirm that a coal-fired electric generating facility in Larimer County is conceptually acceptable at the proposed Rawhide Project site and that Platte River may proceed with detailed studies necessary for final action on the Rawhide Project; and

WHEREAS, the Larimer County Board of Commissioners and Platte River are committed to establishing a procedure that will provide a thorough, comprehensive, and responsible public review of the Rawhide Project as a matter of regional and local concern;

NOW THEREFORE, pursuant to the provisions of Colorado Revised Statutes Sections 29-1-201 et seq. and Sections 29-20-101 et seq. (1973) and Section 18, Article XIV of the Colorado Constitution, it is hereby agreed by the Larimer County Board of Commissioners and Platte River Power Authority as follows:

(1) Platte River shall:

(a) Supplement its application for Use by Special Review filed

June 2, 1977, with Larimer County so that as supplemented it shall constitute an application for:

(i) Rezoning of the Rawhide Project site from the present "O, Open District" zoning classification to an "I-1, Heavy Industrial District" zoning classification.

(ii) Approval of the Rawhide Project as a Use by Special Review within such "I-1, Heavy Industrial District."

(iii) Approval of the location and extent of the Rawhide Project as conforming to and complying with the elements of the Larimer County Comprehensive Master Plan adopted prior to the filing of Platte River's Notice of Completion referred to in (1)(d) below.

(iv) Such variances and other permits, if any, as may be necessary for construction of the Rawhide Project as a Use by Special Review in such "I-1, Heavy Industrial District."

(b) Reimburse Larimer County for its actual out-of-pocket expenses incurred in conducting its review of the Rawhide Project, up to a maximum total of $100,000. Reimbursement payments shall be made monthly by Platte River within ten (10) days following receipt of invoice.

(c) Present to Larimer County, as soon as it is available, an "Environmental Impact Analysis" of the Rawhide Project in accordance with guidelines contained in Attachment "A" hereto.

(d) Notify Larimer County at such time as the Environmental Impact Analysis contemplated by Attachment "A" is complete and the supplemented application is ready for review ("Notice of Completion").

(e) Obtain all necessary permits for or relating to the Rawhide Project which are required by other government agencies.

(f) Follow the procedure contemplated by this Intergovernmental Agreement and comply with and abide by reasonable land use conditions and actions of Larimer County in reviewing the Rawhide Project.

(2) Upon receipt of such Notice of Completion from Platte River referred to in (1)(d) above, Larimer County shall:

(a) Diligently proceed with a review of the Supplemented Application. The Larimer County Board of Commissioners shall use its best efforts to give its final decision within one hundred twenty (120) days following receipt of such Notice of Completion.

(b) As part of its Final Review, determine whether the standards set forth herein and the evaluation criteria set forth in Attachment "B" hereto have been met and, if so, grant Approval or Conditional Approval of Platte River's Supplemented Application described in Section (1)(a) above. The parties agree that the decisions made by the Board of Commissioners in this regard are discretionary with such Board. Such decisions are final in all respects except to the extent such decision are found to be arbitrary or capricious.

The grant of that portion of Platte River's application which is a petition for rezoning and Use by Special Review may be conditioned upon Platte River's acquisition of the property identified in its application for same and upon the initiation of construction of the Rawhide Project. Larimer County's final decision may further be conditioned upon the receipt, prior to the issuance of a building permit, of evidence of approval, or conditional approval, from the government agencies that have jurisdiction in specialized areas, together with evidence that Platte River can and will meet the conditions, if any, imposed by such government agencies.

(3) Platte River further agrees to:

(a) Reimburse Larimer County and affected local governments in Larimer County to the extent legally permissible, for all direct or indirect, and identifiable cost impacts which they experience as a result of Platte River's construction and operation of the Rawhide Project, including, but not limited to, loss of taxes on land removed from the tax rolls, roads, water and sewer, police and fire protection, health, recreation, schools and other public facilities and services. The amount and category of such reimbursement payments shall be mutually agreed upon by the Parties and other affected local governments through the establishment of an impact monitoring and alleviation system and negotiations to be commenced and to be conducted in a timely and diligent manner as soon as adequate data relative to each such cost impact becomes available. The terms of said reimbursement agreement shall be set forth in a separate document and may extend beyond the term of this Intergovernmental Agreement.

(b) Promptly advise Larimer County of any changes or discoveries, including, but not limited to, soil reports and geologic investigations, meteorological, and air quality investigations, archeological, paleontological or ecological discoveries, which significantly affect the siting of the Rawhide Project.

(c) Review, in such detail as may be requested by Larimer County, the need for the Rawhide Project and continue to monitor electric energy requirements in the four Municipalities keeping Larimer County informed concerning changes in future capacity and energy projections, using a computerized econometric model and other methods for this purpose.

(d) Review and bring up to date the analysis of the potential socio-economic impacts from the Rawhide Project immediately prior to, and during, its construction.

(e) Provide Larimer County with a status report of any new electric energy generation technologies that are reliable and practicable for incorporation into the Rawhide Project.

(f) If the Windy Gap Project is not available as a source of cooling water in time for operation of the Rawhide Project, investigate and obtain other feasible alternative sources of sources of water supply or technological alternatives and advise Larimer County concerning the findings of such investigation, together with an evaluation of the impact of the use of such alternative water source.

(g) Obtain from the Municipalities, at least annually, a projection of their wholesale electric capacity and energy requirements for at least the ensuing five (5) years, and encourage the Municipalities to promote the conservation of electric energy within their respective service areas.

Except where otherwise specifically provided this Intergovernmental Agreement shall terminate two (2) years after initial commercial operation of the Rawhide Project or upon final denial of approval of the Rawhide Project by the Larimer County Board of Commissioners.

IN WITNESS WHEREOF, the Parties have caused this Intergovernmental Agreement to be executed on the day and year first above written.

THE BOARD OF COUNTY COMMISSIONERS
OF LARIMER COUNTY

By _____
Chairman

Attest:

_____

PLATTE RIVER POWER AUTHORITY

By _____
Chairman, Board of Directors

Attest:

_____
Secretary

ATTACHMENT A

GUIDELINES FOR RAWHIDE ENERGY PROJECT
ENVIRONMENTAL IMPACT ANALYSIS AND REIMBURSEMENT

The following guidelines outline the information that Platte River is to provide in an Environmental Impact Analysis to Larimer County officials in accordance with the terms of the evaluation criteria listed in Attachment "B" and of the foregoing intergovernmental agreement.

A. Description of the proposed project
   1. Description of the proposed power plant and support facilities
      a. Site plan indicating the layout for power block, coal storage, water storage, waste disposal, parking and landscaping
         (1) Size of the site
         (2) Generating capacity
      b. Specify the routing or location and the design of:
         (1) Water delivery system
         (2) Rail access
         (3) Highway access
      c. Description of future plans for increased capacity, expansion of support facilities, etc.
      d. Timetable for construction of projects described in a, b, and c above
      e. Estimated cost of construction for initial project
   2. Description of the proposed transmission lines and/or substations
      a. Map showing the preferred transmission line route and/or the preferred substation location
      b. Map showing all existing rights-of-way and transmission lines in the area
      c. Acreage and right-of-way requirements for the necessary facilities
      d. Power source, line capacity, load destination
      e. Site plan for a substation including:
         (1) Transmission line location
         (2) Road access
         (3) Landscaping and screening plan
         (4) Design drawings and pictures of the proposed substation
      f. Design drawings and pictures of the structures proposed to support the transmission lines
      g. Construction techniques
      h. Land reclamation procedures
      i. Future plans for increasing line capacity, installing additional lines, substation modification, etc.
      j. Timetable for construction
      k. Costs of construction for the preferred project

B. Discussion of alternatives to the Rawhide Energy Project
   1. Power generation alternatives to Rawhide
   2. Cost analysis for each of such alternatives
   3. Other methods of generation
   4. Other sources of electricity and cost

C. Discussion of site alternatives considered in Larimer County and the surrounding counties.

D. List all the required State and Federal permits and a statement regarding the progress that has been made on each.

E. Site survey including the following:
   1. Aerial photo (available from the Planning Department) showing the proposed site and its immediate surroundings
   2. Topography of the site
   3. Hydrology
      a. Groundwater investigations
         (1) Identify aquifers at the site and surrounding area
         (2) Flow direction of the ground water
         (3) Productivity potential of the aquifers
         (4) Identify existing wells in the area
      b. Surface hydrology (indicate 100-year floodplain if applicable)
         (1) Generalized map of surface flow direction

   4. Aerial photos of the alternate routes and/or locations of the transmission lines and substations

F. Geology of the Rawhide Power Plant Site and Transmission Line Routes
   1. Map bedrock and surficial geology
   2. Map and evaluate geologic hazards and constraints
      a. Erosion and sedimentation
      b. Mud flows and debris fans
      c. Unstable or potentially unstable slopes
      d. Special seismic considerations
      e. Areas of significant radioactivity
      f. Ground subsidence
      g. Expansive soil and rock
   3. Map and evaluate any mineral and/or energy resources on the site
   4. Map and evaluate soil types and conditions
   5. Identify geological environments suitable for safe water storage and waste disposal based upon at least:
      a. Soils
      b. Foundation suitability
      c. Impoundment design
      d. Seepage potential
   6. Complete final grading plan including all proposed cuts and fills

G. Waste Disposal
   1. Itemize and describe the types and quantities of solid and liquid waste created by the power plant operation during construction and operation
   2. Describe how and where these waste substances will be treated and/or disposed of
   3. Provide land reclamation plan for solid waste disposal areas
   4. Anticipated effects of proposed method of ultimate disposal of waste water on water quality in the area

H. Water supply and quality
   1. Description of proposed water system
      a. Source of supply, volume and rate of flow at full development
      b. Water rights owned or utilized
      c. Proposed points of diversion
      d. Proposed routes for water conduit
      e. Alternate sources of supply

2. Water quality control
   a. Pollution loads (point and non-point sources)
   b. Methods for maintaining surface and groundwater quality
   c. Control of thermal pollution
3. Description of the impact on current water quality conditions
   a. From the proposed project
   b. From the ultimate size of the facility
   c. Data from similar facilities
   d. Effects of the actual construction of the power plant and transmission lines on water quality

I. Biological surveys and impact assessment of the Rawhide Power Plant Site and Preferred Transmission Line Routes
   1. Vegetation
   2. Wildlife
   3. Ecosystem sensitivities

J. Archaeological, paleontological and historical resources survey and impact assessment of the Rawhide Plant Site

K. Land use survey and impact assessment
   1. Describe existing land use in the area of the power plant and preferred transmission line routes
   2. Describe possible impacts of the power plant, transmission lines and substations on existing land use in the area (e.g. gliderport, existing agricultural productivity)

L. Noise investigation and impact assessment of the Rawhide Plant and substations
   1. Ambient conditions
   2. Data from similar facilities
   3. Proposed performance criteria

M. Analysis of the visual impact of the power plant, its support facilities, preferred transmission lines and substations

N. Meteorological conditions and air quality at Rawhide Site and for power plant under operating conditions
   1. Existing meteorological data
      a. Wind speed and direction
      b. Inversion height
      c. Atmospheric stability
      d. Presence of any high wind hazard
   2. Background ambient air quality (TSP, SO_2, NO_x)
   3. Description of air pollution control measures, including fugitive dust
   4. Description of the impact on current air quality conditions
      a. From the proposed project
      b. From the ultimate size of the facility
      c. Interaction with nearby sources of air pollution

O. Construction and operating materials
   1. Environmental control measures during the construction phase
      a. Construction materials
         (1) Describe how construction materials shall be transported to the site

(2) Specific plan for controlling traffic routes to the site
(3) Timetable for transporting construction materials to the site

b. Environmental considerations
(1) Fugitive dust
(2) Limitations on on-site traffic

2. Operation of the plant
a. Operating materials
(1) Describe how the materials necessary for the operation of the plant shall be transported to the site
(2) Specific plan for controlling traffic routes to the site
(3) Frequency of delivery of the materials described in (1)

P. Road Improvements
1. Specify all the improvements needed to county and state roads to meet weight/traffic demand necessitated by the construction and operation of the power plant
2. Schedule for making these improvements

Q. Source of Fuel
1. Name and location of possible coal supply areas
2. Proposed transportation route to the power plant
3. Describe the composition of the fuel available from the areas listed in 1 above
a. Btu/lb.
b. Moisture content
c. Ash content
d. Sulfur content
4. Provide information for 1 and 3 above from contract between Platte River and coal supplier when available

R. Socio-economic impacts during construction and operation
1. Origination of work force
2. Impact on public services and facilities
a. Water and sanitation
b. Health and hospital facilities
c. Education facilities
d. Highways and roads
e. Police and fire protection
f. Recreation
3. Housing
a. Existing cost, supply, condition and location
b. Effect of incoming work force on the above
4. Impact in terms of costs and benefits to the public sector of the local economy
5. Proposed methods for compensating local governments for any adverse impacts that occur

S. Employment
1. Characteristics of local work force
a. Crafts and skills available
b. Rate of unemployment and underemployment

2. Describe employment opportunities created by the Rawhide Energy Project
   a. Construction phase
      (1) Types of jobs and number of positions anticipated.
      (2) Number of work shifts and the number of employees needed for each shift
      (3) Salary schedules
      (4) Opportunities for employment for local citizens in terms of the unskilled and skilled positions described in 1
   b. Operation of the facility
      (1) Types of jobs and number of positions anticipated
      (2) Number of work shifts and the number of employees needed for each shift
      (3) Salary schedules
      (4) Opportunities for employment of local citizens
      (5) Employment opportunities for local citizens in terms of the unskilled and skilled positions described in 1

T. Describe the monitoring system(s) that will enable local government to assess various short and long term socio-economic impacts brought about by the construction and operation of the Rawhide Project
   1. Pre-construction period monitoring program
   2. Construction period monitoring program
   3. Post-construction monitoring program

U. Plan for fiscal and other assistance to local government regarding:
   1. Road improvement and maintenance
   2. Utility service (water, sanitation, electricity, etc.)
   3. Police and fire protection
   4. Education facilities
   5. Health facilities
   6. Recreation
   7. Loss of taxes on land removed from tax roles

V. Describe the monitoring system(s) that will enable local government to assess various short and long term environmental impacts of the Rawhide Project. Impacts to the following shall be considered before, during and after construction:
   1. Air quality
   2. Water quality and water use
   3. Vegetation
   4. Wildlife

W. Present any additional data or information regarding items that were determined to need further clarification or were found to be potential problems.

ATTACHMENT B

EVALUATION CRITERIA FOR THE RAWHIDE PROJECT

1. The facility does not materially conflict with this jurisdiction's adopted Comprehensive Plan, or a Comprehensive Plan in the required statutory process of adoption, and all reasonable and prudent actions have been taken to avoid conflict with other adopted plans of this jurisdiction, region, state, and nation.

2. Other feasible alternatives to the proposed facility have been adequately assessed, and the proposed facility represents the best interest of the people of this jurisdiction and the wisest utilization of the resources of this jurisdiction.

3. The relationship between the construction and operation of the facility and the natural environment (hydrology, geology, biological components, air, water) has been adequately addressed and analyzed.

4. The effect of the facility on the cultural resources, existing, and future land use, and the socio-economic environment has been adequately addressed and analyzed.

5. When an adverse impact is expected to occur, reasonable modifications, and programs and other reasonable mitigating actions will be implemented and maintained to minimize the degree of adversity of the impact.

6. Adequate resources (e.g. schools, water and air, roads, labor) exist, or will exist, for the construction and efficient operation of the facility.

7. The nature and location or expansion of the facility does not unduly or unreasonably impact existing community services.

8. The nature and location of the facility will not create an expansion of the demand for government services beyond the reasonable capacity of the community or region to provide such services, as determined by the County of Larimer.

9. The nature and location of the facility will not unduly interfere with any existing easements for or rights-of-way, for other utilities, canals, mineral claims, or roads.

10. The applicant is able to obtain needed easements for drainage, disposal, utilities, access, etc.

11. Adequate electric, gas, telephone, water, sewage, and other utilities exist or shall be developed to service the site.

12. The nature and location of the facility will not adversely affect the water rights of any upstream, downstream, or adjacent communities or other water users.

13. Adequate water supplies are or will be available for facility needs.

14. The benefits of the proposed development outweigh the losses of any natural resources or reduction or productivity or agricultural lands as a result of the proposed development.

15. Site selection and construction of transmission lines

a. Construction on productive agricultural land shall be avoided whenever possible. When this land must be utilized, construction shall be planned so as to have a minimum impact on the efficiency of the agricultural operation.

b. Locations within densely populated areas should be avoided when practical.

c. Existing rights-of-way should be given priority as the locations for additions to existing transmission facilities provided that the integrity of the system would not be decreased.

d. Where possible, retirement or upgrading of existing lower voltage transmission circuits which allows construction of higher voltage, higher capacity circuits on the existing right-of-way should be strongly considered.

e. Subject to requirements of system reliability, the joint use of rights-of-way with other types of utilities should be coordinated in a common corridor wherever uses are compatible.

f. Planning of rights-of-way should take into account local and regional plans for growth and development in order to minimize conflict with present and future planned land uses.

g. Where practical, rights-of-way should avoid:

(i) the national historic places listed in the National Register of Historic Places;
(ii) the local historic places listed in the Larimer County Identification List of Significant Historical sites;
(iii) the natural landmarks listed in the National Register of Natural Landmarks;
(iv) floodplains, geologic hazards;
(v) valuable mineral resources;
(vi) road intersections or interchanges;
(vii) reservoirs and lakes;
(viii) wildlife protection areas; and
(ix) scenic areas

h. Rights-of-way should avoid locating near existing facilities which would experience considerable interference of efficiency of operation or jeopardy of safety due to the proximity of the right-of-way (i.e. agriculture, airports).

i. Where rights-of-way cross streams or other bodies of water, the banks should be stabilized to prevent erosion. Construction on rights-of-way should not damage shorelines, recreational areas or fish and wildlife habitats.

j. Trees and brush should be cleared only when necessary to provide electrical clearance, line reliability or suitable access and construction roads for operation, maintenance and construction.

k. Where rights-of-way enter dense timber from a meadow or where they cross major roadways, streams or rivers in forested areas, a screen of natural vegetation should be retained along the right-of-way.

l. Wherever possible, transmission lines should be located with a background of topography and natural cover in preference to a sky background. Vegetation and terrain should be used to screen these facilities from highways and other areas of public view.

m. When crossing a canyon in a forest, high, long-span towers should be used to keep the conductors above the trees and to minimize the need to clear all vegetation from below the lines.

n. Where it is impossible to avoid public view in forested areas, rights-of-way should be cleared with curved boundaries and trimmed to blend with the original topography.

o. Transmission line rights-of-way should not cross hills and other high points at the crests and, when possible, should avoid placement of transmission towers at the crest of a ridge or hill. Towers should be spaced below the crest to carry the line over the ridge or hill, and the profile of the facilities should present a minimum silhouette against the sky.

p. Transmission lines should not cross highways at the crest of a road.

q. Long tunnel views of transmission lines crossing highways in forested areas, down canyons and valleys or up ridges and hills should be avoided.

r. The time and method of clearing rights-of-way should take into account matters of soil stability, the protection of natural vegetation and the protection of adjacent resources.

s. Access and construction roads should be located in a manner that will preserve natural beauty and minimize erosion. Road grades and alignments should follow the contour of the land with smooth, gradual curves when possible. Commensurate with the topography, construction should be located for later use as maintenance access roads or to provide access to recreational areas. Existing roads should be used to the maximum extent possible.

t. The design of transmission towers and the colors of the components of the towers should blend with the natural surroundings when feasible.

u. In situations where individual or short sequences of transmission towers are viewed from close range, are visually dominant, and are located in a public area (such as a park, historical area, reservoir, etc.) such towers should be aesthetically designed.

16. Site slection and construction of substations

    a. The design of the exteriors of substations and like facilities should be compatible with the surroundings and other buildings in the area.

    b. Such facilities should be located in areas where sound will not be resonated.

    c. Trees and other landscaping appropriate to the site should be placed around substations.