Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket No. 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/ Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service	)	ET Docket No. 95-18

To: The Commission

REPLY TO OPPOSITIONS TO
MOTION FOR PARTIAL STAY OF DECISION
PENDING APPELLATE REVIEW

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December 7, 2004

SUMMARY

Mobile Relay Associates ("MRA") and Skitronics (collectively, the "Movants") have a very high likelihood of prevailing on appellate review. Nextel's references to Skitronics' earlier filing are irrelevant to MRA, which has consistently opposed the Nextel proposals throughout this proceeding. In any event, Skitronics was misled into making that filing, and Nextel should not now be allowed to use it against Skitronics. Also, Nextel has mischaracterized the facts, and has failed to distinguish itself or Southern Linc from MRA and Skitronics. By asking to have the same spectrum value post-rebanding as they had pre-rebanding, Movants are not asking for any "enhancement." It is Nextel, not Movants, that is attempting to "game" the system, to convert its encumbered 800 MHz spectrum into virgin, clean 800 MHz spectrum after having acquired its spectrum on the cheap based upon a different regulatory playing field.

Movants, and particularly, MRA, will suffer irreparable harm from the immediate implementation of the *Rebanding Decision*, harm which could never be repaired even if they prevailed on appellate review. Conversely, there has been no credible showing of irreparable harm to any other person if a stay is implemented. Even assuming, *arguendo*, Nextel might have to cease using some of its channels temporarily in the absence of a stay, there is no public policy reason to put MRA out of business just so that Nextel can avoid a slight diminution in the quality of its service to customers pending review. Notwithstanding the resort by APCO to hyperbole, there has never yet been a documented case where a communications failure resulted in death or serious injury, nor is one likely to occur in the near future, whether or not rebanding is immediately implemented.

Accordingly, this Commission should grant the Motion for Partial Stay.

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MOTION FOR PARTIAL STAY OF DECISION
PENDING APPELLATE REVIEW

Mobile Relay Associates ("MRA") and Skitronics, LLC ("Skitronics", or, collectively with MRA, "Movants") hereby reply to the opposition pleadings filed by Nextel Communications, Inc. ("Nextel") and by the Association of Public-Safety Communications Officials-International, Inc., *et al.* ("APCO"), respecting Movants' November 19, 2004 Motion for Partial Stay of Decision Pending

Appellate Review ("Motion for Stay") herein. As discussed below, neither the Nextel Opposition nor the APCO Opposition rebuts Movants' showing that a stay is warranted.

I. Movants Have a High Likelihood of Success

A. The References to Skitronics Are a Red Herring

Nextel's prime argument against a stay is that one Movant, Skitronics, at a time before it retained Washington, DC communications regulatory counsel in this proceeding, filed a statement indicating support for the modified "Consensus Plan." This argument is, of course, beside the point, because even if it had some relevance to Skitronics (which, as discussed below, it does not), it is completely irrelevant to MRA. Had MRA filed the Motion for Stay on its own, the earlier, separate filings of Skitronics would have been irrelevant to consideration of the Motion; Skitronics' earlier filings cannot be mutated into any sort of "admission" by MRA simply because Skitronics seconds that Motion for Stay. The Commission still would have to substitute the word "MRA" for the word "Movants" and resolve the Motion for Stay accordingly.

And even as to Skitronics, that earlier filing is irrelevant. Skitronics, represented at the time by its North Carolina corporate counsel, had strongly opposed the original Nextel "consensus" plan, in Comments filed May 6, 2002. Subsequently, Nextel revised the "consensus" plan. As discussed in the attached declaration of John Komorowski, Skitronics' founder and president, he was contacted in the fall of 2002 by a Nextel representative with whom he was previously acquainted, who attempted to explain the revised Nextel plan to Mr. Komorowski. Following this contact, during the next pleading cycle, Mr. Komorowski instructed North Carolina counsel to withdraw Skitronics' opposition to the revised Nextel plan. (This February, 2003 filing is the one over which Nextel makes such a ballyhoo.)

However, that February, 2003 filing was the direct result of Mr. Komorowski's misunderstanding of the revised Nextel plan based upon his conversations with his Nextel acquaintance and the absence of obtaining any advice at the time from any attorney specializing in this field.[1] Once the Commission's August 6, 2004 decision herein ("*Rebanding Decision*") was released, Skitronics retained communications regulatory counsel and became satisfied that the decision, if implemented, will materially harm Skitronics, by wiping out the value of its major asset, by wiping out all flexibility it previously had with respect to business strategies, and by freezing Skitronics in a regulatory backwater while enhancing the ability of its major competitor (Nextel) to dynamically adjust its business strategies in response to any future developments in the industry.[2]

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[1]Skitronics does not claim there was any wrongdoing on the part of Nextel. It has the right to attempt to persuade other persons of its case. In any event, Mr. Komorowski's Nextel acquaintance is not, to the knowledge of Movants, actively involved in either the development or the defense of the "consensus" plan, or even employed in Nextel's department of regulatory affairs, and thus may himself have had a less than perfect understanding of what the revised "consensus" plan proposed.

[2]Nextel disingenuously pretends that Movants cannot viably exist in the same band with cellular architecture systems unless and until they implement their own cellular architecture operations (something which, conveniently for Nextel, they are now prohibited forever from doing in the absence of a grant of a rule waiver!). *See* Nextel Opposition at p.8. However, MRA has been co-existing with Nextel all along without implementing cellular architecture yet, and without receiving any harmful interference.

The same is true with respect to Skitronics, which has been co-existing quite well with Nextel without receiving harmful interference – notwithstanding Nextel's mischaracterization (Nextel Opposition, p.8) of Skitronics' May 6, 2002 Comments herein. Skitronics' statement that "we have had to resolve issues where Nextel sites were causing interference on our systems" was and is an indication that interference issues were and are resolved using best practices before they rise to the level of harmful interference. As noted in the Motion for Stay, p.2, "Neither [Movant] has ever filed a complaint at the FCC alleging receipt of harmful interference from the operations of [Nextel], Southern Linc or any Part 22 cellular system operator."

B. Nextel Has Materially Mischaracterized the Facts

The Nextel Opposition contains multiple material misstatements of fact. Since these false factual assertions form the primary foundation for Nextel's legal arguments, those legal arguments must fall. A prime example is Nextel's mischaracterization of MRA's current channel position. First, Nextel assesses how many of MRA's existing channels are required to be taken away from MRA by assuming that only channels between 1-120 are required to be vacated. Nextel Opposition, p.11. However, all channels between 1-***150*** are required to be vacated. *See Rebanding Decision*, 19 FCC Rcd. at 15052. Under that standard, MRA has 23 channels that are required to be vacated.

More importantly, without regard to the number of channels to be vacated, in any event, MRA must retune or replace every single 800 MHz customer unit in its Denver-area system, because the customer units are each programmed to work on any of MRA's channels. That constitutes some 3,000 customer units.

Nextel also claims that MRA's channel position consists of "39 site-specific channels in Colorado *that are located outside the core population center of Denver. . .*" (Emphasis added.) Nextel Opposition, p.10,n.26. This claim is incorrect.

MRA's main facilities are licensed at Lee Hill, Eldorado Mountain, Lookout Mountain and Bear Mountain (with an additional channel each at Horsetooth Mountain and Dillon). Although these four main transmit sites are physically located in Jefferson County (Eldorado, Lookout and Bear) or Boulder County (Lee Hill), they do serve Denver, including the downtown business area, as demonstrated by the coverage maps which are exhibits to the attached declaration of Mark J. Abrams.

Jefferson County abuts Denver City/County. MRA covers 90% to100% of the City of Denver

from Eldorado Mountain (depending upon power output), 98% (all but the area around the Denver airport) from Lookout Mountain, and between 80% and 90% (depending upon power output) from Bear Mountain. Nextel's claim is akin to claiming that transmitters in Montgomery County, Maryland do not put a reliable service area coverage contour over the District of Columbia. Such a claim would be false in the case of a hypothetical Montgomery County transmitter, and is false in the case of MRA's transmitters. And even in the case of Lee Hill, it lies high enough in the Rocky Mountains that its reliable service area covers 70% of the City of Denver.

C. Nextel Has Failed to Distinguish Itself (or Southern Linc) for Favored Treatment

Nextel claims that Movants are not similarly situated to Nextel or Southern Linc because Movants have not already implemented cellular architecture, and, in the case of MRA, because it no longer holds any 800 MHz auction spectrum. These are both irrelevant distinctions.

Whether two licensees are similarly situated is a function of their licenses. Nextel and Southern Linc both hold a composite of auction licenses and site-based licenses. Nextel and Southern Linc have each implemented cellular architecture on some but by no means all of their licenses. The vast bulk of Southern Linc's operations, although digital, are high-site, high-power operations that do not interfere with Public Safety or anyone else, because Southern Linc does not currently have the customer loading or capacity issues that would require low-site, high-density "cellular" operations. Southern Linc's opposition to the Nextel "consensus" plan, prior to its side agreement with Nextel, related primarily to its being "frozen" and unable to move to low-site architecture in the future as its system grew.

Thus, Southern Linc is no different than Movants, who also need to have the same ability to grow (whether internally, or through acquisition or merger) post-*Rebanding Decision* as they had pre-

Rebanding Decision. Even Nextel continues to hold numerous analog or high-site operations in areas where its operations do not yet require low-site cellular architecture.[3] Yet, under the *Rebanding Decision*, Nextel's otherwise non-qualifying licenses will be moved to the new cellular-permissible block, solely because Nextel is Nextel, and Nextel, unlike its competitors, is entitled to move its analog or other non-cellular licenses to enable future growth and development.

Persons are similarly or dissimilarly situated based upon whether they hold identical types of spectrum licenses, not based upon whether, in reasonable reliance upon past Commission pronouncements, they have utilized a license in one of the multiple permissible ways it could be used. Thus, notwithstanding Nextel's contrary claim (Opposition, p.10, n.26), it is not significant at all that MRA holds no 800 MHz auction licenses, or that when it held such licenses, they were in different geographic areas from MRA's site-based licenses.

This Commission told the public (including MRA and Skitronics) that there would be no distinction made between co-channel General Category or "Lower 80" auction and site-based licenses in terms of permissible uses and flexibility of use, and no forced migration of incumbent site-based licensees out of this highly flexible and valuable portion of the 800 MHz band.[4] Thus, that MRA chose auction licenses for Denver in the 900 MHz band rather than the 800 MHz band to supplement its 800

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[3]For example, Nextel is one of the three largest holders of 800 MHz spectrum (including substantial site-based spectrum) in the Puerto Rico EA, but had no low-site cellular operations there at all, unless it built it in the last few weeks post-release of the *Rebanding Decision*.

[4]*See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, Second Report and Order*, 12 FCC Rcd. 19079 (1997); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd. 17556 (1999).

MHz site-based spectrum is not merely insignificant, but necessarily irrelevant, because MRA did so in reliance upon this Commission's pronouncements (*see* n.4, *supra*). For the Commission to rule otherwise in the *Rebanding Decision* (as it did) was patently arbitrary and capricious.

D. It Is Nextel, Not Movants, Attempting to "Game" the System

Nextel also engages in an act of audacity equivalent to the man who murders his parents and then seeks mercy on the ground he is an orphan. Specifically, Nextel accuses Movants of attempting to "game" the system to "enhance" their spectrum positions! Movants have asked only that this Commission avoid eviscerating Movants' pre-existing spectrum positions. Rather, it is Nextel that has consistently asked this Commission to overrule the *status quo* and enhance Nextel's position within the 800 MHz band by converting Nextel's 800 MHz spectrum into virgin spectrum, unencumbered by incumbent licensees, while ensuring that no Nextel competitors (with the exception of Southern Linc) will ever have the capability to grow (or merge) into a high-capacity cellular operator.

If Nextel is entitled to value-for-value, and if Southern Linc is entitled to value-for-value (and the *Rebanding Decision* says that they are), then Movants are also entitled to value-for-value. And asking to have the same value, post-rebanding, as one had pre-rebanding, is not asking for an enhancement, nor is it an attempt to "game" anything. Nextel's contrary claim is frivolous.

E. There Are No Inconsistencies in Movants' Position

Nextel next claims, Opposition at p. 12, that Movants are being inconsistent when they argue that they deserve to be moved into the cellular-permissible band along with other SMRs such as Nextel and Southern Linc, while simultaneously arguing that the relocation process will cause them damage not currently subject to cure through the reimbursement process. There is nothing inconsistent in Movants'

position.

Movants argued, without success, that relocation within the 800 MHz band was not the appropriate solution, that moving Public Safety to 700 MHz would be more appropriate if it were deemed that Public Safety needed to be moved at all. Movants identified several distinct injuries they would suffer if the "consensus" plan were adopted, including, *inter alia*, that: 1) Nextel would be receiving new 800 MHz spectrum with greater flexibility and value than Nextel had pre-rebanding, while Movants would be placed in 800 MHz spectrum having lesser flexibility and lesser value than they had pre-rebanding; and 2) the proposed rebanding process did not contain any provision for reimbursement for losses due to "churn." Thus, Movants requested that they be placed, post-rebanding, into 800 MHz spectrum containing the same flexibility of use that they had pre-rebanding, and also that their relocation costs of moving to this new spectrum, including costs of churn, be reimbursed. There is nothing inconsistent in being asked to be made whole, or in asking to be treated the same as others that hold the exact same type of licenses.

Nextel claims it makes no sense to move Movants into the new cellular-permissible band because Movants' *current* operations do not interfere with Public Safety. Nextel Opposition, p.12, n.31. Again, this is beside the point. That Movants are not creating harmful interference is not, standing alone, justification for putting them out of business, any more than Nextel's status as the largest creator of harmful interference can justify giving Nextel a special windfall.

While it may be convenient to hamstring Movants from evolving in their operations, because Movants *current* operations do not interfere while those of Nextel do interfere, there are routinely public policy situations where the most convenient solution would be to strip rights and property from

one affected group but not another similarly-situated group. The US Constitution says that in those situations, the government must find a solution that is fair, even if that solution is not the most administratively convenient.

II. Movants (Particularly MRA) Will Suffer Irreparable Harm without a Stay

As noted, in the absence of a stay, MRA will have to retune or replace every single Denver-area customer unit, because all of the customer units are programmed to work on all of MRA's 800 MHz channels. If Movants later prevail on appeal, MRA will have to retune or replace every single Denver-area customer unit a second time. Because no third person (other than the Commission, which is immune) would be responsible for this harm, MRA would have no recourse at law to collect money damages. Moreover, although the TA requested an extension of time within which to issue the schedule of rebanding, MRA understands that the Denver Public Safety region is likely to be one of the first, if not the very first region scheduled for implementation of rebanding. Thus, in the absence of an immediate stay, MRA definitely will suffer the involuntary rebanding, and associated churn losses.

Notwithstanding Nextel's argument that MRA's past experience is irrelevant simply because it involved a voluntary agreement with Nextel (as opposed to forced relocation), MRA's past experience is right on point. In any mass relocation, the vast majority of relocations necessarily have to be negotiated and voluntary, because otherwise the relocation system would break down. (That is why the Commission imposes penalties for negotiating in bad faith.) The mere fact that, in the Los Angeles area, MRA vacated 800 MHz channels not in the upper 200 band on a voluntary basis does not change the mechanics of relocation, especially where, as in MRA's case, the relocation was also negotiated with Nextel.

Relocation of customer units, as opposed to internal company units, results in material customer dissatisfaction and therefore in churn. Based upon actual real-world experience, MRA has documented that the percentage of customers churning off the system is in the range of 50%. So in the absence of a stay, MRA is going to lose 50% of its customers each time it is forced to reband. This is irreparable harm.

III. There Is No Irreparable Harm from a Stay

APCO claims that every day of additional delay in rebanding causes it irreparable harm, because, ostensibly, at some point there will arise "a life-threatening communications failure . . ." APCO Opposition, p.2. However, there has never, in the history of this proceeding, been a single such communications failure that has ever resulted in death or injury. This Commission itself delayed the publication of the *Rebanding Decision* in the *Federal Register*, something it would not have done if there were some critical need to implement rebanding immediately for safety purposes.

There is a reason why there have been no such deaths or injuries – virtually all Public Safety licensees, especially in the major metropolitan areas where interference from Nextel is possible, operate trunked systems with multiple channels, and if one channel suffers interference, another channel in the trunk group will be available. Also, if interference is perceived, in the vast majority of instances, Public Safety personnel have been able to eliminate it by simply walking a short distance. The interference to date has simply been so rare and so limited that there have been no life-threatening situations.

The justification for involuntary rebanding is and has been not the current level of interference, but the fear that future growth of the wireless industry will create unacceptable levels of interference, so a short delay will not cause irreparable harm to Public Safety. If, hypothetically, some private person

were required to suffer harm in the interim, there is no public policy reason to rule that MRA should suffer as opposed to Nextel. Nextel could shut down interfering channels pending appellate review, and thereby eliminate all the interference it causes. While this would reduce Nextel's channel capacity, and therefore its quality of service to customers, the relative harm to Nextel would still be less than the definite harm to MRA if the Commission refuses to stay its decision pending review.

CONCLUSION

The Movants have a very high likelihood of prevailing on appellate review. Nextel's references to Skitronics' earlier filing are irrelevant to MRA, which has consistently opposed the Nextel proposals throughout this proceeding. In any event, Skitronics was misled into making that filing, and Nextel should not now be allowed to use it against Skitronics. Also, Nextel has mischaracterized the facts, and has failed to distinguish itself or Southern Linc from MRA and Skitronics. By asking to have the same spectrum value post-rebanding as they had pre-rebanding, Movants are not asking for any "enhancement." It is Nextel, not Movants, that is attempting to "game" the system, to convert its encumbered 800 MHz spectrum into virgin, clean 800 MHz spectrum after having acquired its spectrum on the cheap based upon a different regulatory playing field.

Movants, and particularly, MRA, will suffer irreparable harm from the immediate implementation of the *Rebanding Decision*, harm which could never be repaired even if they prevailed on appellate review. Conversely, there has been no credible showing of irreparable harm to any other person if a stay is implemented. Even assuming, *arguendo*, Nextel might have to cease using some of its channels temporarily in the absence of a stay, there is no public policy reason to put MRA out of business just so that Nextel can avoid a slight diminution in the quality of its service to customers

pending review. Notwithstanding the resort by APCO to hyperbole, there has never yet been a documented case where a communications failure resulted in death or serious injury, nor is one likely to occur in the near future, whether or not rebanding is immediately implemented.

Accordingly, this Commission should grant the Motion for Partial Stay.

Respectfully submitted,
MOBILE RELAY ASSOCIATES and SKITRONICS, LLC

December 7, 2004

By: _____
David J. Kaufman, Their Attorney

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Reply to Opps to Stay Motion-FCC.wpd

DECLARATION OF JOHN KOMOROWSKI

John Komorowski, under penalty of perjury, hereby states as follows:

1. I am the founder and chief executive officer of Skitronics, LLC ("Skitronics"). I have read the "Opposition of Nextel Communications, Inc. to Motion for Partial Stay" ("Nextel Opposition") and the "Opposition to Motion for Partial Stay" filed by APCO, *et al.* ("APCO Opposition"), as well as the joint "Reply to Oppositions to Motion for Partial Stay of Decision Pending Appellate Review" to which this declaration is being appended ("Reply"). All facts pertaining to Skitronics set forth in the Reply are true and correct.

2. Without limiting the foregoing, Skitronics disavows the February, 2003 Comment filed by its North Carolina corporate counsel in WT Docket No. 02-55. That document was filed by corporate counsel on my instructions based upon the explanation given to me of the changes to the original "consensus" plan (which Skitronics had opposed) by an acquaintance of mine at Nextel Communications, Inc. ("Nextel"). I was told that the portions of the original consensus plan to which Skitronics had objected had been corrected in the "supplemental" plan, and, moreover, that if the "supplemental" consensus plan were adopted, there would be a great need for Skitronics' services as a contractor to retune or replace the radios of a very large number of 800 MHz licensees up and down the East Coast. Had I then understood the supplemental consensus plan or had advice from counsel that specialize in communications regulatory matters, Skitronics never would have filed that February, 2003 document.

Executed on December 17th, 2004.

John Komorowski

DECLARATION OF MARK J. ABRAMS

Mark J. Abrams, under penalty of perjury, hereby states as follows:

1. I am a general partner in Mobile Relay Associates ("MRA"), and am in charge of its communications regulatory affairs. I have read the "Opposition of Nextel Communications, Inc. to Motion for Partial Stay" ("Nextel Opposition") and the "Opposition to Motion for Partial Stay" filed by APCO, *et al.* ("APCO Opposition"), as well as the joint "Reply to Oppositions to Motion for Partial Stay of Decision Pending Appellate Review" to which this declaration is being appended ("Reply"). All facts pertaining to MRA set forth in the Reply are true and correct.

2. Without limiting the foregoing, Nextel's implication that MRA's 800 MHz system does not cover the core population of Denver, Colorado is absolutely false. Attached hereto as Exhibits 1-7 are reliable service area coverage contour maps for MRA's various 800 MHz transmitters, showing that MRA does indeed cover the City of Denver, which is precisely where MRA markets its services.

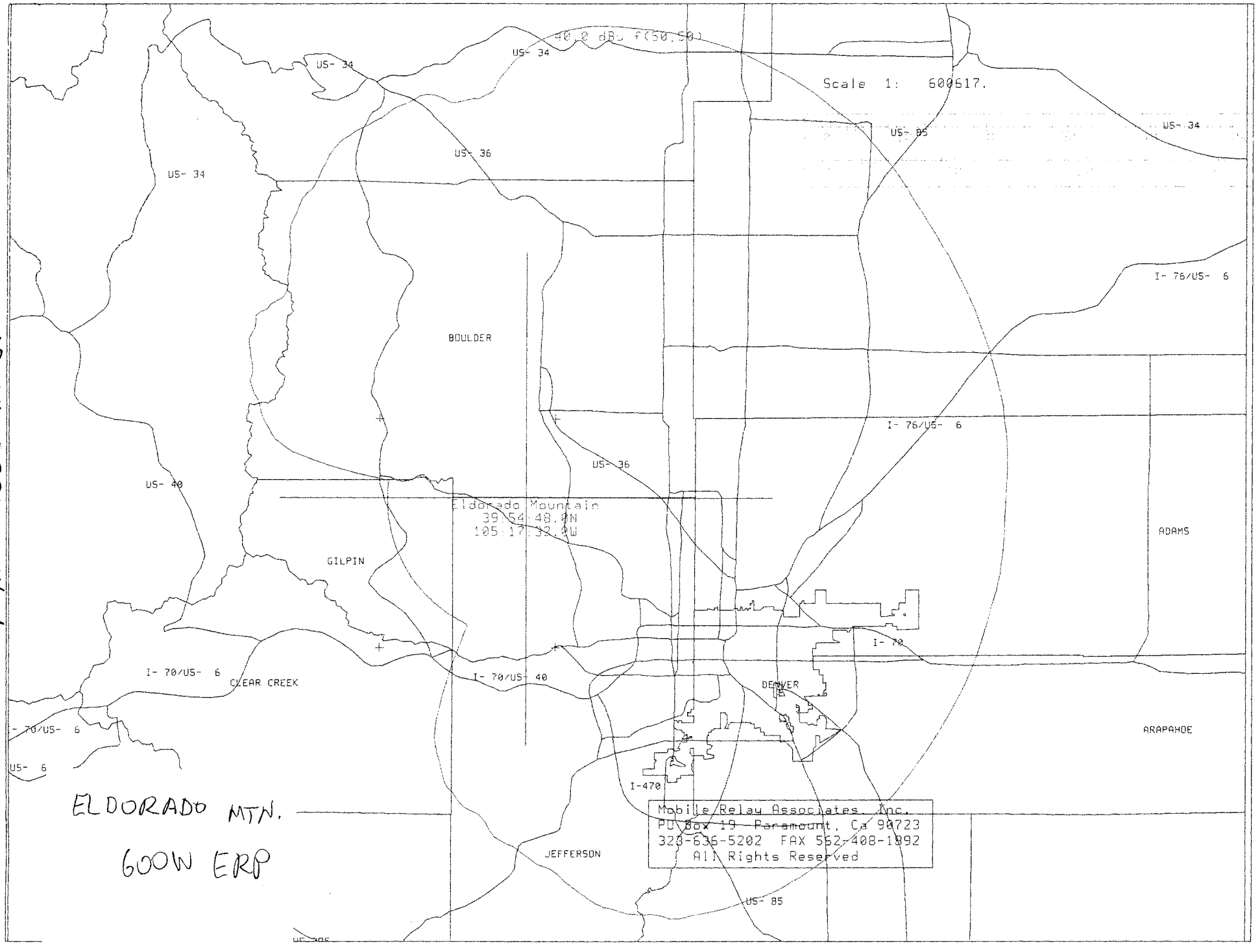
3. In addition, I hereby affirm that MRA relied upon this Commission's rules and *Federal Register* publications in making its decisions concerning what auction spectrum to bid upon, and which licenses to acquire in the secondary markets. MRA specifically did not acquire 800 MHz auction licenses for the Denver EA, because MRA already had a significant site-based spectrum position there, and the Commission told MRA that its site-based spectrum would not be secondary to co-channel auction spectrum, or subject to more limitations in potential usage or flexibility of use. Instead, MRA concentrated on acquiring 800 MHz spectrum outside the Denver EA, and acquired 900 MHz auction spectrum in Denver.

Executed December 6, 2004.

Mark J. Abrams

Mark J. Abrams

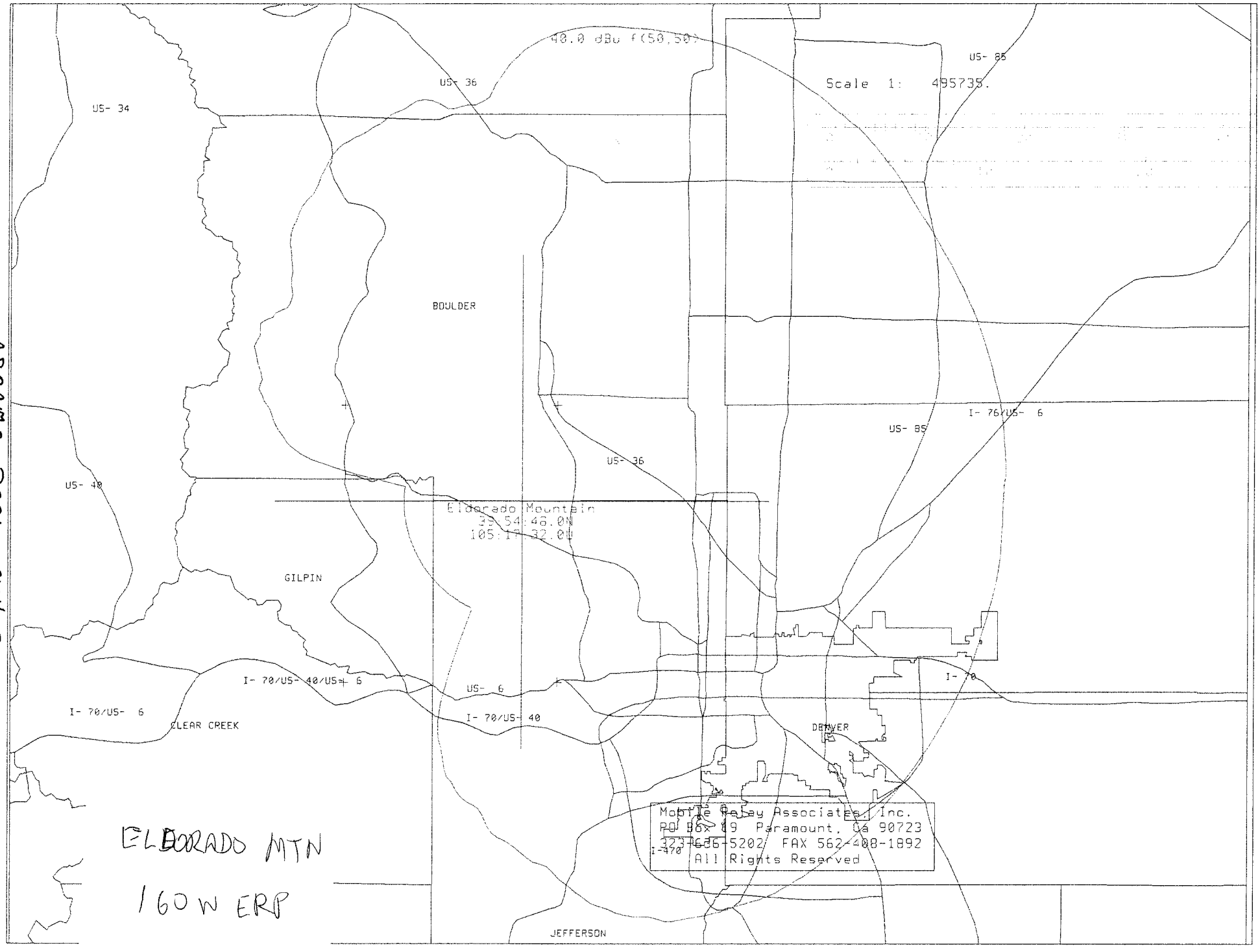
ABRAMS DECL., EXH. 1



ELDORADO MTN.

600W ERP

ABRAMS DECL., EXH. 2



ELDORADO MTN

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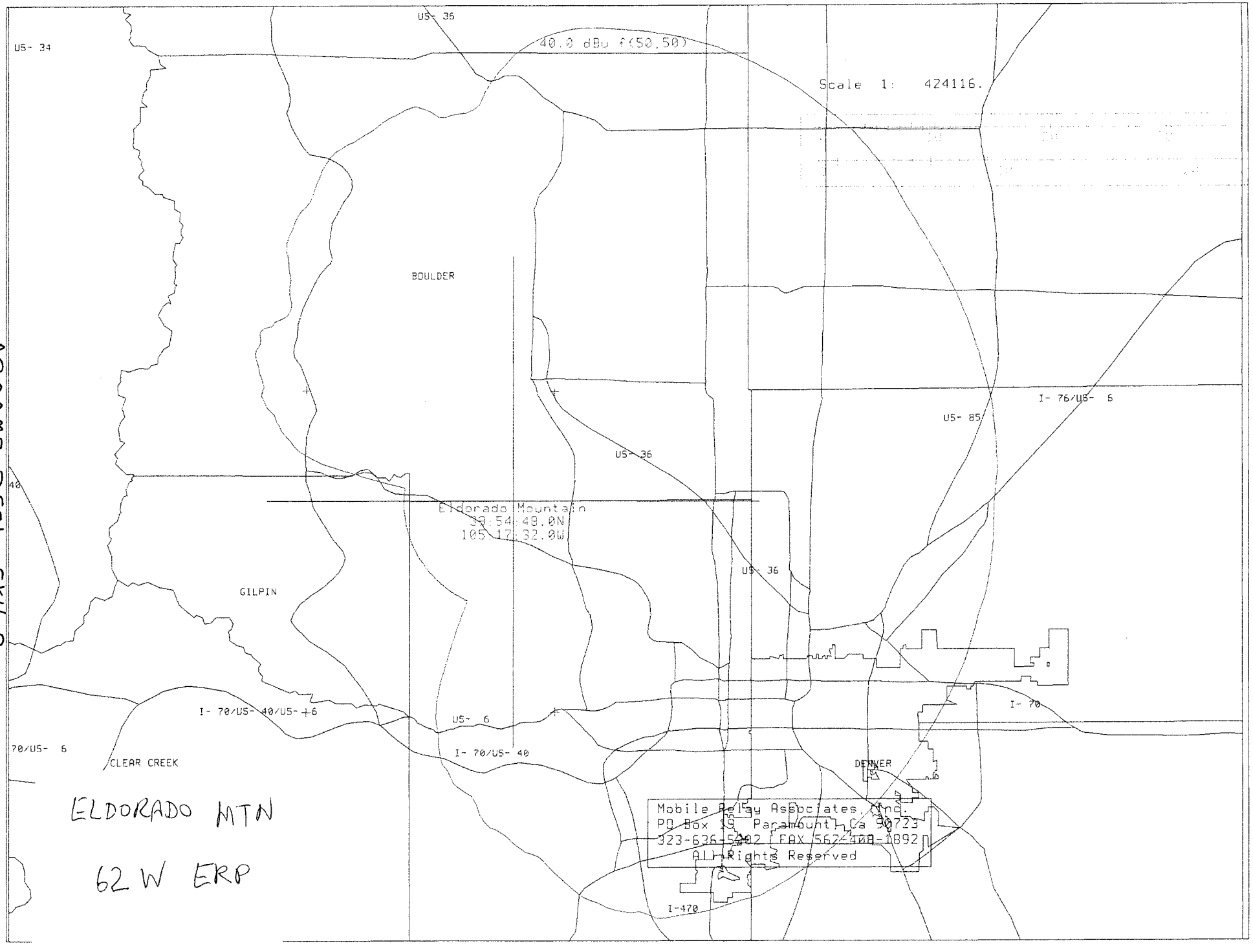

ELDORADO MTN

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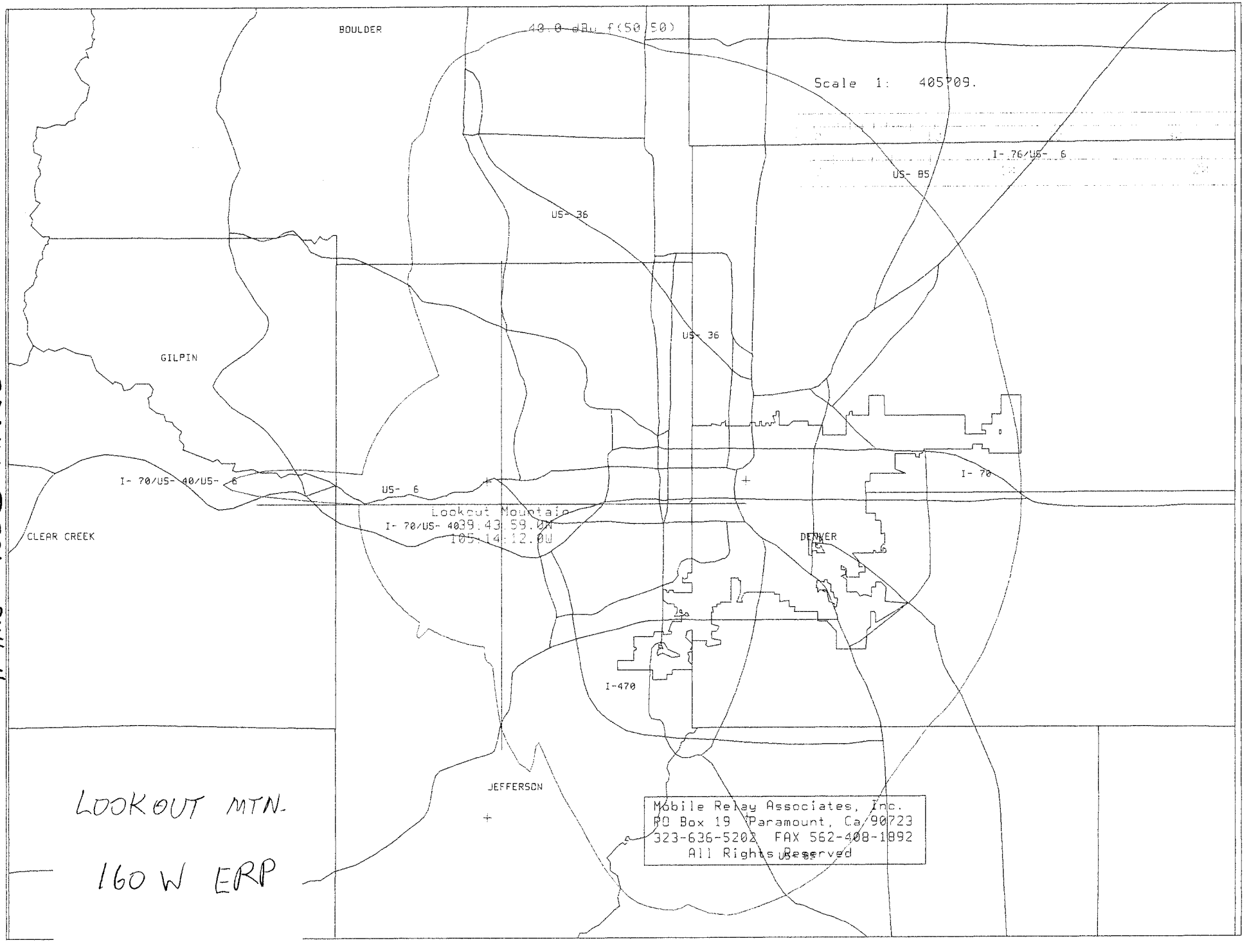

LOOKOUT MTN.

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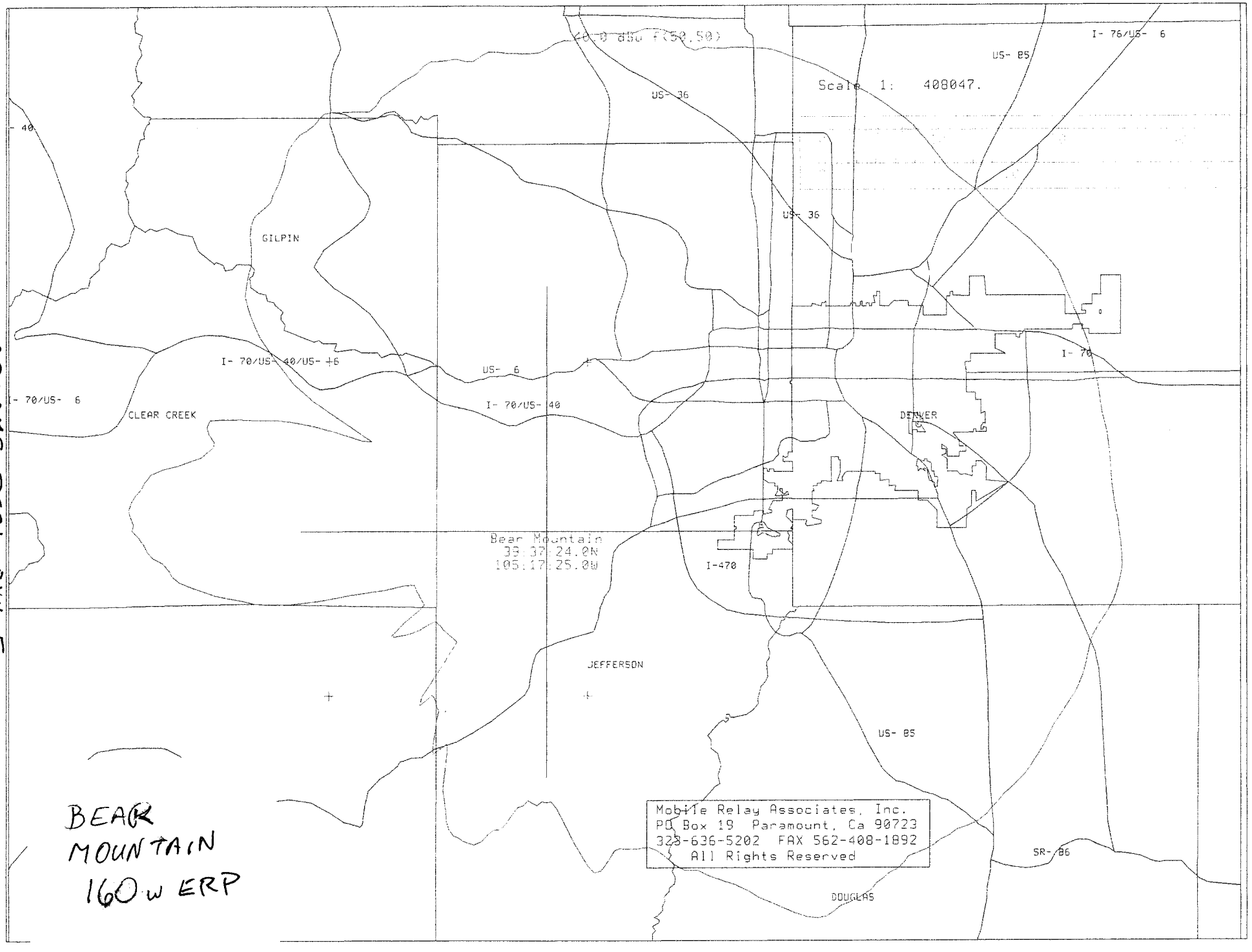
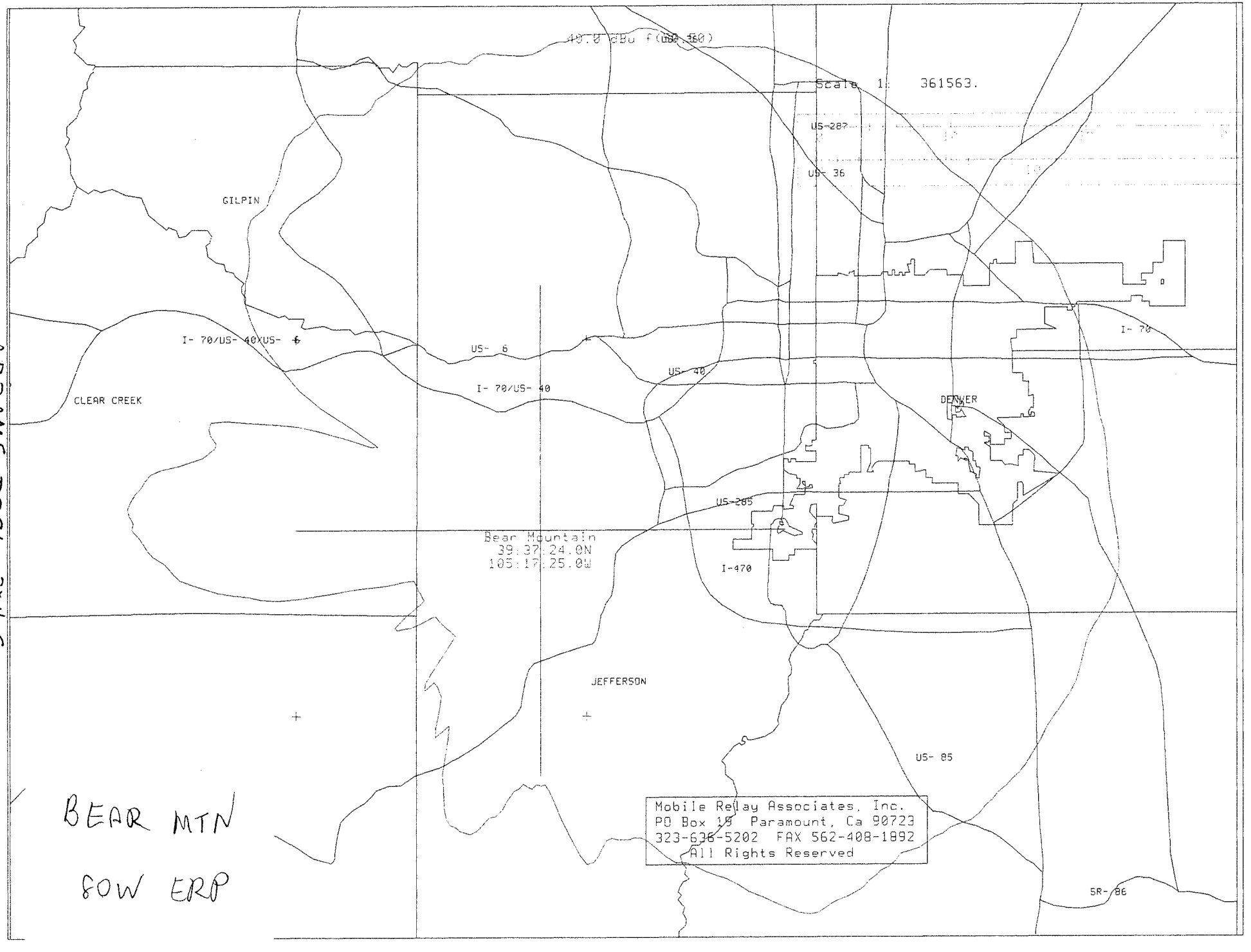
ABRAMS DECL., EXH. 4

ABRAMS DECL, EXH. 5



BEAR MOUNTAIN 160 w ERP

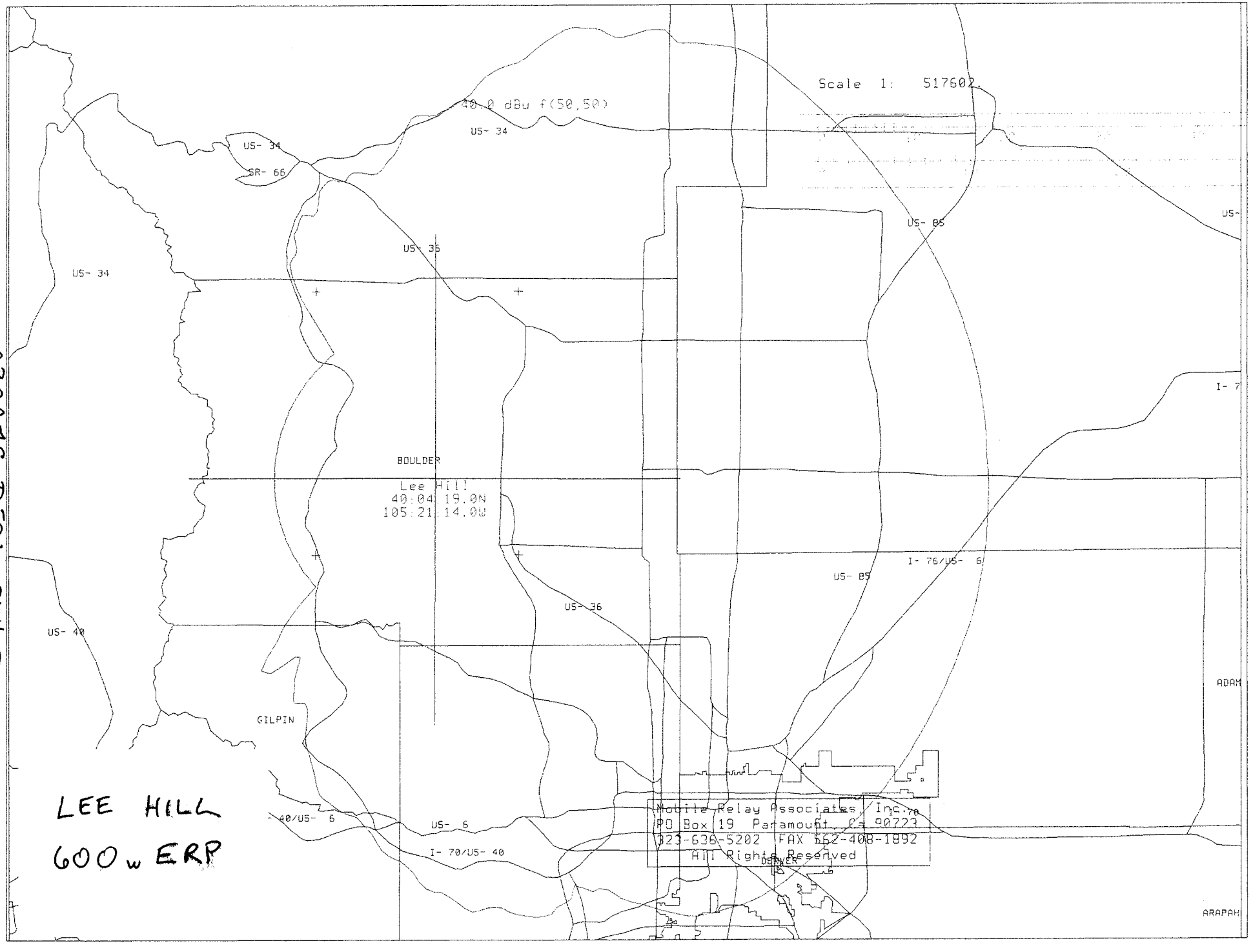


ABRAMS DECL., EXH. G

BEAR MTN

80W ERP

ABRAMS DECL, EXH. 7



LEE HILL
600w ERP

CERTIFICATE OF SERVICE

I, Stephen Denison, a paralegal in the office of Brown Nietert and Kaufman, Chartered, hereby certify that I caused a copy of the foregoing "Reply to Oppositions to Motion for Partial Stay of Decision Pending Appellate Review" to be served via hand delivery, this 7th day of December, 2004, upon each of the following:

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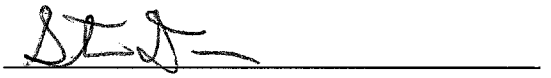

Stephen Denison