

OPEN MEETING ITEM



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COMMISSIONERS
KRISTIN K. MAYES - Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



ORIGINAL

Executive Director

ARIZONA CORPORATION COMMISSION

RECEIVED

DATE: AUGUST 31, 2010
DOCKET NO.: RR-20736A-10-0140

2010 AUG 31 P 1:15

AZ CORP COMMISSION
DOCKET CONTROL

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

DRAKE CEMENT, LLC
(NEW CROSSING)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

SEPTEMBER 9, 2010

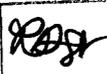
The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

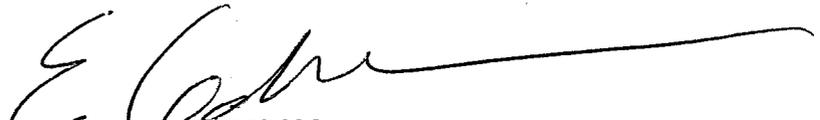
SEPTEMBER 16, 2010

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission
DOCKETED

AUG 31 2010

DOCKETED BY 


ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 KRISTIN K. MAYES - Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

8 IN THE MATTER OF THE APPLICATION OF
9 DRAKE CEMENT, LLC TO ESTABLISH A NEW
10 RAILROAD CROSSING ON YAVAPAI COUNTY
11 ROAD 71 NEAR DRAKE, YAVAPAI COUNTY,
12 ARIZONA, USDOT NO. 933-885-T.

DOCKET NO. RR-20736A-10-0140

DECISION NO. _____

OPINION AND ORDER

9 DATE OF HEARING: July 19, 2010
10 PLACE OF HEARING: Phoenix, Arizona
11 ADMINISTRATIVE LAW JUDGE: Marc E. Stern
12 APPEARANCES: Mr. Patrick J. Black, FENNEMORE CRAIG, on
13 behalf of the Drake Cement, LLC;
14 Mr. Martin Brennan, Deputy Yavapai County
15 Attorney, on behalf of Yavapai County; and
16 Mr. Charles Hains, Staff Attorney, Legal Division,
17 on behalf of the Safety Division of the Arizona
18 Corporation Commission.

17 **BY THE COMMISSION:**

18 On April 9, 2010, Drake Cement, LLC (“Drake Cement,” “Company” or “Applicant”)¹ filed
19 with the Arizona Corporation Commission (“Commission”) an application for the establishment of a
20 new public at-grade railroad crossing on Yavapai County Road (“CR”) 71 in the vicinity of an
21 unincorporated area known as Drake, Yavapai County (“County”), Arizona, USDOT NO. 933-885-T
22 (“Application”).

23 On May 12, 2010, by Procedural Order, the proceeding was scheduled for hearing on July 19,
24 2010.

25 On June 17, 2010, Applicant filed certification that it had provided public notice of the
26 Application pursuant to the Commission’s Procedural Order.

27 _____
28 ¹ The ownership of the Company is vested in the Yavapai Apache Indian Nation and another business entity known as Skanon Investments, Inc., an Arizona corporation, which is controlled by a South American family from Lima, Peru. The family is engaged in the cement business in South America.

1 On July 19, 2010, a full public hearing was convened before a duly authorized Administrative
2 Law Judge of the Commission at its offices in Phoenix, Arizona. Applicant and the Railroad Safety
3 Section of the Commission's Safety Division ("Staff") were present with counsel. A Deputy Yavapai
4 County Attorney also entered an appearance.² At the conclusion of the hearing, the matter was taken
5 under advisement pending submission of a Recommended Opinion and Order to the Commission.

6 * * * * *

7 Having considered the entire record herein and being fully advised in the premises, the
8 Commission finds, concludes, and orders that:

9 **FINDINGS OF FACT**

10 1. On April 9, 2010, the Company filed an Application in which it requested an Opinion
11 and Order from the Commission approving the establishment of a new public at-grade railroad
12 crossing on CR 71 in the vicinity of Drake, Yavapai County, Arizona at USDOT NO. 933-885-T.

13 2. On May 12, 2010, by Procedural Order, a hearing was scheduled on the Company's
14 Application on July 19, 2010.

15 3. On June 17, 2010, pursuant to the Commission's Procedural Order, the Company filed
16 certification that it provided public notice of the Application and hearing thereon in the *Courier*, a
17 newspaper of general circulation in the area of the site where the crossing will be constructed.

18 4. The hearing was held as scheduled on July 19, 2010.

19 5. On June 22, 2010, the Staff Memorandum was filed recommending approval of the
20 Application subject to certain conditions.

21 6. The Application provides for the Company to construct and maintain a new public at-
22 grade railroad crossing at CR 71 approximately two miles northeast of State Route ("SR") 89 and
23 approximately .4 of a mile east of an existing Burlington Northern and Santa Fe Railway Company
24 ("BNSF") at-grade crossing.

25 7. The Company is in the process of constructing a plant to manufacture cement and has
26 contracted with the BNSF to transport coal to a private spur which is being built in conjunction with
27

28 ² The County had not previously requested intervention and did not actively participate in the proceeding.

1 the plant and which is to cross CR 71. The coal is needed to fuel the new cement plant's kiln which
2 will convert raw materials into cement. The Company anticipates selling its cement primarily in the
3 Phoenix and Las Vegas markets.

4 8. Mr. Clifford Ayres, the Company's Chief Operating Officer, testified in support of the
5 Application. He testified that Drake Cement's manufacturing facility is being constructed on a
6 quarter section of land which had been purchased from the owner of a ranch in the middle of the
7 Prescott National Forest. Construction of the facility started in May 2008 and is approximately 90
8 percent complete. (Tr. 9: 2-22)

9 9. Mr. Ayers testified that the new public at-grade crossing will serve only the
10 Company's cement plant and is part of a larger project which involves the realignment of CR 71. (Tr.
11 11: 9-14)

12 10. In order to proceed with the construction of the private spur line, Drake Cement
13 entered into an agreement with Yavapai County dated April 19, 2010. (Ex. A-2)

14 11. In order to facilitate the design of the public at-grade crossing of CR 71, the Company
15 hired Civiltec Engineering ("Civiltec"), a private engineering firm from Prescott, to design the
16 crossing in order to meet safety standards. (Tr. 12: 6-16)

17 12. According to Mr. Ayers, CR 71 is being realigned where it will be crossed by the
18 proposed new public at-grade crossing. For safety reasons, the roadway will be constructed so that it
19 is straighter where it is crossed by the tracks. (Tr. 13: 12-16)

20 13. While testifying, Mr. Ayers identified a diagram of the crossing site and a number of
21 photographs of the site where the proposed crossing will be constructed after the Commission
22 approves the Application herein. (Ex. A-4, A-5 and A-6)

23 14. Mr. Ayers acknowledged that Drake Cement had constructed an at-grade crossing
24 across CR 71 at the site of the new cement plant without prior Commission approval. The Company
25 was advised by the County Engineer in the fall of 2009 that Drake Cement should have secured
26 Commission approval before the new public at-grade crossing was constructed. (Tr. 15: 3-6)

27 15. After the Company was advised by the County Engineer that Commission approval
28 for the public at-grade crossing was required for the crossing, all work was stopped on the initial

1 crossing site until Commission Staff was contacted and was able to visit the crossing site. (Tr. 15: 7-
2 12)

3 16. Subsequent to the Commission's Staff visiting the crossing site and reviewing the
4 Applicant's plans, the Company modified its plans and the proposed location of the crossing and filed
5 its Application herein pursuant to the direction of Staff. (Tr. 15: 14-23)

6 17. Mr. Ayers further described how, on an annual basis, the Company will use its private
7 rail spur in order to transport approximately 80,000 tons of coal which will be delivered by two
8 BNSF trains per week. (Tr. 18: 12-18)

9 18. According to Mr. Ayers, there will be a total of four movements of train cars per week
10 through the public crossing, two inbound and two outbound, each with an average of seven cars. (Tr.
11 46: 18-24)

12 19. The Company's initial operating plans are to ship the finished cement product from
13 the plant by truck, but if the economy improves as expected there is a possibility that cement may be
14 shipped from the plant by rail twice a week in the future.

15 20. Mr. Ayers testified that the Company plans to begin operations on October 1, 2010,
16 and estimates that it will require approximately three to four weeks to complete the proposed
17 construction of the public at-grade crossing. This will enable the Company to have an ample supply
18 of coal to operate the kiln. (Tr. 21: 11-21)

19 21. Although the Company plans, in the future, to operate its cement plant on a round-the-
20 clock basis, according to Mr. Ayers, due to the sluggish economy, the Company will initially conduct
21 active cement-making operations for three months and shut down manufacturing operations for four
22 months while the Company continues selling cement manufactured previously.³ (Tr. 26: 21-24)

23 22. The Company will employ approximately 40 individuals when it begins
24 manufacturing operations, but it is anticipated that at full production, twice that many employees will
25 be working at the plant. (Tr. 45: 5-7)

26 23. According to the Staff Report, in order to facilitate the movement of railcars between

27 ³ The Company projects that by 2013 it will be producing cement on an ongoing basis 24 hours a day instead of the
28 limited operations expected initially. (Tr.39: 11-16)

1 the BNSF line and Drake Cement, the Company purchased line and rail infrastructure from the
2 Arizona Central Railroad ("AZCR") which lie adjacent to the cement plant, for a switching operation
3 where the coal-filled or empty railcars can be left and/or stored until they are returned to the BNSF.

4 24. A related, but separate entity, Drake Switching Company, LLC ("Drake Switching"),
5 was formed and it has five employees trained in the federal Railroad Worker Protection ("RWP")
6 regulations and certified to operate the switching operation. Two employees will be involved on a
7 full-time basis, one as a traffic manager and one as the operator of what is known as a Track Mobile
8 or Shuttle Wagon. The three other employees will work in rail operations as secondary operators of
9 the Track Mobile, as flagmen and as track maintenance personnel. Drake Switching's employees
10 will conduct the movement of the coal-filled or empty railcars into and out of Drake Cement through
11 the public crossing

12 25. Mr. Ayers explained that the Track Mobile or Shuttle Wagon is capable of operating
13 on either paved surfaces with its rubber tires or on the rails with its steel train wheels. The Track
14 Mobile will be utilized to move the railcars because it is much more economical to operate than a
15 regular locomotive. (Tr. 42: 21-23)

16 26. The Company and Drake Switching have secured the appropriate exemptions from the
17 United States Department of Transportation Surface Transportation Board ("STB") in order to
18 conduct switching operations for the coal-bearing railcars as a non-carrier subject to the safety
19 regulations of the Federal Railroad Administration ("FRA") and the Commission. Copies of these
20 exemptions from the STP were late-filed in the docket.

21 27. The Company has obtained the necessary County approvals which permit it to conduct
22 construction activities on CR 71. (Tr. 24: 1-3)

23 28. According to Mr. Ayers, the Company spent \$250,000 for the construction of the
24 initial crossing which was begun without Commission approval. Mr. Ayers estimates that it will cost
25 approximately another \$250,000 to construct the proposed crossing which will conform to the
26 realignment of CR 71 once Commission approval is given. The Company is also paying for the
27 realignment of CR 71 under the terms of its agreement with the County. (Tr. 31-32: 25,1-12)

28 29. Mr. Ayers further stated that under the terms of the Company's agreement with the

1 County it will cost the Company approximately \$2.5 million to finish the roadwork on CR 71
2 because a significant portion of it will be paved. (Tr. 32: 18-25)

3 30. According to Mr. Ayers, there are no schools or hospitals in the area of the cement
4 plant and he has not seen a school bus or an ambulance on CR 71. (Tr. 10: 11-17)

5 31. Mr. Ayers does not anticipate any substantial growth in residential traffic in the area as
6 the nearest community is Paulden, Arizona and it is located eight miles to the south. (Tr. 30: 5-15)

7 32. Due to the limited number of vehicle crossings projected by the County at the
8 proposed public at-grade crossing, neither automatic warning devices nor grade separation are being
9 considered in the Company's construction plans. (Tr. 31: 7-21)

10 33. Upon the completion of the crossing, the County will maintain the roadway and the
11 Company will maintain the actual crossing utilizing a private contractor, Mountain States
12 Contracting. (Tr. 51: 3-12)

13 34. According to Mr. Ayers, the BNSF has met with representatives of the Chino Valley
14 Chamber of Commerce and the County Board of Supervisors to discuss plans for future economic
15 development in the vicinity of the Company's spur line. (Tr. 19: 5-15)

16 35. Mr. Ayers testified further that Drake Cement has received letters in support of the
17 Company's Application in the proceeding from both a leader of the local Sierra Club that describes
18 the Company's efforts as "environmentally responsible" and a letter from Carol Springer, a County
19 Supervisor, who refers to the construction of Drake Cement as a "benefit to the economy in Yavapai
20 County" by providing jobs for more than 400 local employees. (Ex. A-7 and A-8)

21 36. Mr. Brian Lehman, the Commission's Supervisor for Railroad Safety Section, testified
22 that he had reviewed the Company's proposed warning signage and the configuration of the proposed
23 public at-grade crossing and finds them appropriate. (Tr. 58: 1-4)

24 37. According to Mr. Lehman, the Company's proposed public at-grade crossing of CR 71
25 does not satisfy any of the nine criteria set forth in the Federal Highway Administration ("FHWA")
26 Railroad-Highway Grade Crossing Handbook (Revised 2d, August 2007) ("Crossing Handbook")
27 which would establish a need for automatic warning devices. (Tr. 58: 20-23)

28 38. Mr. Lehman further testified that none of the nine criteria of the FHWA Crossing

1 Handbook are satisfied which would require a grade separated crossing to be constructed on the
2 Company's private spur line which is to cross CR 71. (Tr. 59: 12-15)

3 39. Mr. Lehman stated that the Company's proposed construction of the at-grade crossing
4 of its private spur line is in the public interest and will improve safety at the crossing. (Tr. 60: 1-4)

5 40. According to the Staff Memorandum, the Company's proposal to use passive warning
6 devices at the proposed new at-grade crossing is consistent with safety measures employed at similar
7 rural at-grade crossings in Arizona and will provide for the public safety as follows:

- 8 • railroad cross bucks along with yield signs pursuant to the Manual on
9 Uniform Traffic Control Devices ("MUTCD");
- 10 • advanced railroad crossing warning signs pursuant to the MUTCD posted
11 on the roadway in both directions;
- 12 • skewed angle warning signs pursuant to the MUTCD posted on the
13 roadway in both directions indicating the skewed angle in which the tracks
14 will cross the roadway;
- 15 • asphalt paving on the east and west approaches to the proposed new
16 crossing that will include pavement markings indicating a railroad
17 crossing pursuant to the MUTCD;
- 18 • two flagmen, one for each direction of travel stationed at the crossing
19 during travel through the crossing by railcars; and,
- 20 • posting of the USDOT inventory number at the crossing.

21 41. Staff is recommending approval of the Company's proposed public at-grade crossing
22 along with the adoption of the Company's proposed signage and passive warning devices including
23 the posting of a flagman stationed on the roadway for each direction of travel to protect the motoring
24 public.

25 42. Additionally, a gate will be constructed just off the right-of-way of CR 71 on the
26 Company's site, situated perpendicular to the rail spur as it enters the cement plant site. The gate will
27 be 24 feet wide and 6 feet high and when closed and locked will block rail access into and out of the
28 plant.

43. Mr. Lehman testified that Staff recommends a \$5,000 civil fine for not securing
Commission approval before beginning construction of the at-grade crossing of CR 71.⁴ (Tr. 60: 21-

⁴ He also testified that instead of a fine, the Commission could order the Company to make a donation of \$5,000 by the Company to Arizona Operation Lifesaver. Operation Lifesaver is an international non-profit education awareness

1 24)

2 44. After reviewing Staff's recommendations in its Memorandum, Mr. Ayers testified that
3 both he and the Company are in complete agreement with Staff's recommendations. (Tr. 16: 5-6)

4 45. Under the circumstances, the Application should be approved as recommended by
5 Staff and the Company should pay a penalty of \$5,000.

6 **CONCLUSIONS OF LAW**

7 1. The Commission has jurisdiction over the Company and over the subject matter of the
8 Application pursuant to Article XV of the Arizona Constitution and A.R.S. § 40-336 and 40-337.

9 2. Notice of the Application was provided in accordance with the law.

10 3. The construction of the public at-grade crossing of the Company's private spur line is
11 necessary for the public's convenience and safety.

12 4. Pursuant to A.R.S. §§ 40-336 and 40-337, the Application should be approved as
13 recommended by Staff.

14 5. The Company should notify the Commission, in writing, within 10 days of both the
15 commencement and completion of the project for the at-grade crossing of CR 71 in accordance with
16 A.A.C. R14-5-104.

17 6. The Company failed to obtain Commission approval prior to constructing a public at-
18 grade crossing in violation of A.R.S. §§ 40-336 and 40-337 and therefore, pursuant to A.R.S. §§ 40-
19 424 and 40-425, should pay a penalty of \$5,000.

20 7. After the completion of the public at-grade crossing at CR 71, pursuant to the
21 Company's agreement with a private contractor, the public at-grade crossing should be maintained in
22 accordance with A.A.C. R14-5-104.

23 **ORDER**

24 IT IS THEREFORE ORDERED that the Application of Drake Cement, LLC for the
25 construction of a public at-grade crossing of CR 71 in Yavapai County, Arizona is hereby approved.

26 IT IS FURTHER ORDERED that Drake Cement, LLC shall notify the Commission in writing
27

28 program to inform the public about at-grade crossings and railroad rights-of-way to end collisions, injuries and fatalities
at highway railroad crossings. A member of Staff is presently on the board of Arizona Operation Lifesaver.

1 within 10 days of both the commencement and the completion of the grade-separated crossing of its
2 private spur line at CR 71 in Yavapai County, Arizona, pursuant to A.A.C. R14-5-104.

3 IT IS FURTHER ORDERED that upon completion of the grade-separated crossing, Drake
4 Cement, LLC shall maintain the crossing located in the roadway of CR 71 in Yavapai County,
5 Arizona in compliance with A.A.C. R14-5-104.

6 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under
7 A.R.S. §§ 40-424 and 40-425, that Drake Cement, LLC shall pay a penalty in the amount of \$5,000,
8 payable by either cashier's check or money order payable to the "State of Arizona," within 30 days of
9 the effective date of this Decision with payment tendered to the Commission for deposit in the
10 general fund for the State of Arizona, with certification to be filed with the Commission's Docket
11 Control, as a compliance item in this docket.

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IT IS FURTHER ORDERED that Drake Cement, LLC shall remove, within 30 days of the effective date of this Decision, the at-grade crossing located at CR 71 constructed prior to the filing of the Application approved herein and file with the Commission's Docket Control certification of said removal, as a compliance item in this docket.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN _____ COMMISSIONER

COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _____, 2010.

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
MES:db

1 SERVICE LIST FOR: DRAKE CEMENT, LLC

2 DOCKET NO.: RR-20736A-10-0140

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