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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION OF THE ARIZONA DEPARTMENT OF TRANSPORTATION TO UPGRADE AN EXISTING CROSSING OF THE ARIZONA EASTERN RAILWAY COMPANY AT BIA 2 ROAD EAST OF THE BIA SR170 HIGHWAY, GILA COUNTY, ARIZONA, AT USADOT NO. 742-332-T.

Cons. Docket No. RR-02634A-10-0235, -0236, -0237, -0238, -0239

RR-02634A-10-0236
RR-02634A-10-0237
RR-02634A-10-0238
RR-02634A-10-0239

SAN CARLOS APACHE TRIBE'S MEMORANDUM

IN THE MATTER OF THE APPLICATION OF THE ARIZONA DEPARTMENT OF TRANSPORTATION TO UPGRADE AN EXISTING CROSSING OF THE ARIZONA EASTERN RAILWAY COMPANY AT BIA 101 ROAD NORTH OF THE BIA SR170 HIGHWAY, GILA COUNTY, ARIZONA, AT USADOT NO. 742-336-V.

Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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The San Carlos Apache Tribe (the "Tribe"), by and through its attorneys undersigned, provide this memorandum to the Arizona Corporation Commission ("Commission"), regarding its position on two of the proposed upgrades to the Arizona Eastern Railroad ("AER") crossings located within the exterior boundaries of the San Carlos Apache Reservation and addressed in the applications for upgrades in Docket No. RR-02634A-10-0238 and Docket No. RR-02634A-10-0239. While the Tribe has supported these two public crossings, the Tribe respectfully requests that the Commission provide qualified approval.

Background

The Tribe is a federally recognized Tribe, organized pursuant to organized pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act

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1 of June 15, 1935 (49 Stat. 378). Located south of Globe and north of Safford, Arizona,
2 the San Carlos Apache Reservation consists of approximately 1.8 million square acres, an
3 area the size of Rhode Island. The Reservation is home to some 14,500 enrolled
4 members of the Tribe.

5 The Tribe appears before the Commission, recognizing that Arizona has exercised
6 authority over the railroads since statehood; however, that authority tends to fall short for
7 the AER rights-of-way crossing through the San Carlos Apache Reservation.¹ Article
8 XV of the Arizona Constitution grants regulatory authority to the Commission over
9 railroads and common carriers. Pursuant to this constitutional grant of authority, the
10 ACC has long regulated railroad safety in Arizona until preempted by later federal
11 legislation.² Arizona exercises regulatory authority over railroad crossings pursuant to
12 A.R.S. § 40-377 *et seq.*

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15 The Tribe further recognizes that this longstanding exercise of authority
16 establishes a systemic practice that runs together with the federal conveyance of authority
17 through the Federal Highway Safety Act ("FHSA"), 23 U.S.C. § 101 *et seq.*, which
18 provides jurisdiction over railroads to states. The FHSA makes federal funds available to
19 the states to improve railroad grade crossings. As a prerequisite to receiving federal
20 funds, a state must "conduct and systematically maintain a survey of all highways to
21 identify those railroad crossings which may require separation, relocation, or protective
22

23
24 ¹ See Act of Congress of February 18, 1895, 28 Stat. 655; *Van Dyke v. Arizona Eastern*
25 *R. Co.*, 18 Ariz. 220, 222, 157 P. 1019, 1020 (1916)(interpreting the legislation by which
the railroad was granted the right of way), *aff'd*. 248 U.S. 49, 29 S.Ct. 29, 63 L.Ed. 199
(1918).

26 ² *Arizona Eastern R. Co. v. State*, 19 Ariz. 409, 171 P. 906 (1918)(upholding state
27 statute regulating length of trains).

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1 devices, and establish and implement a schedule of projects for this purpose.” 23 U.S.C.
2 § 130(d).

3 The two of the five public crossings presented to the Commission for approval are
4 entirely within the exterior boundaries of the San Carlos Apache Reservation. These two
5 crossings occur at Bureau of Indian Affairs (“BIA”) 2 Road east of the BIA State Route 170
6 Highway in Gila County, Arizona (USDOT No. 742-332-T), and BIA 101 Road north of the
7 BIA State Route 170 Highway, Gila County, Arizona (USDOT No. 742-336-V). BIA 2
8 Road is located at Again Bridge in Peridot, Arizona, and BIA 101 Road is at Sam’s
9 Crossing at Gilson Wash, Arizona. The effected highways are principal road corridors that
10 traverse the Reservation, which connect Safford and Globe, Arizona. BIA 2 Road has
11 3,845 vehicles per day, while BIA 101 has 2,992 vehicles per day, according to ADOT 2009
12 data provided to the Commission. Both BIA roads fall under the jurisdiction of the Tribes
13 Department of Planning, Office of Tribal Transportation. The Tribe anticipates major future
14 development that will lead to increased traffic at both crossings, and construction of a mix of
15 residential and commercial buildings.
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18 By Resolution No. FB-09-029, the Tribal Council authorized an Intergovernmental
19 Agreement between the Arizona Department of Transportation (“ADOT”) and the Tribe for
20 railroad improvements at the two crossings. See Exhibit 1, as attached and incorporated by
21 this reference.
22

23 **Position**

24 The Tribe has two main concerns regarding construction of the improvements and
25 cargo that AER may transport. The methodologies which AER and ADOT may utilize to
26 implement the crossing upgrades should consider and reflect the interests of the Tribe and its
27

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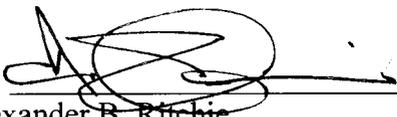
1 members. During construction of the improvements, AER or its subcontractors must take
2 all necessary steps to minimize the disruption of local traffic and abate construction noise
3 and construction disruptions to minimize the impact upon nearby residents. The Tribe
4 requests that the Commission direct that AER and its subcontractors coordinate with Tribal
5 authorities to minimize the impact of the construction crossing improvements on local traffic
6 at the affected locations, particularly the disruption which will be caused to school busses
7 and commuter traffic on scheduled routes. The Tribe also requests that the Commission
8 direct AER and its subcontractors coordinate with Tribal authorities regarding daily
9 construction start and stop times and engage in all reasonable efforts to minimize disruption
10 and inconvenience to local residents.
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12 The Tribe understands and believes that AER carries hazardous cargo on occasion.
13 AER has experienced train accidents and derailments in the past. No disaster plan exists at
14 this time for the spill of any hazardous cargo or any train accident occurring within the AER
15 right-of-way that falls within the exterior boundaries of the Reservation. While the Tribe
16 supports the two railroad improvements, it seeks assurance from the State and the
17 Commission that AER be required to (1) enter into a disaster management plan with the
18 Tribe; (2) provide the Tribe reasonable notice before the transportation of hazardous cargo
19 across the Reservation that may require advance readiness by either the Tribe's San Carlos
20 Police or Fire or EMS Departments. In addition, in the event that AER increases its current
21 traffic through its right-of-way crossing Reservation lands, the Tribe seeks assurance from
22 the State and the Commission that AER will be required to comply with all of the Arizona
23 Department of Environmental Quality regulations as to noise and environmental pollution
24 impacts for residential areas surrounding AER's right-of-way.
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RESPECTFULLY SUBMITTED this 14th day of OCTOBER, 2010.

TITLA & PARSI, PLLC

By: 

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this day caused to be served the original and thirteen
3 copies of the foregoing document by hand delivery on:

4 Docket Control
5 Arizona Corporation Commission
6 200 West Washington Street
7 Phoenix, Arizona 85008

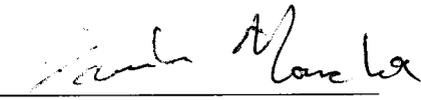
8 I further certify that I have this day caused to be served a copy of the foregoing
9 document by delivering by hand and mailing a copy thereof, properly addressed with first
10 class postage prepaid to the following:

11 Charles H. Hains, Staff Counsel
12 Bridget A. Humphrey, Staff Counsel
13 Legal Division
14 Arizona Corporation Commission
15 1200 West Washington Street
16 Phoenix, Arizona 85007

17 Robert A. Travis
18 State Railroad Liaison
19 Arizona Department of Transportation
20 205 South 17th Avenue, Room 357
21 MD 618E
22 Phoenix, Arizona 85007

23 Terry R. Vanderplas
24 Vice President Railroad Services
25 Arizona Eastern Railway Company
26 P.O. Box 2200
27 Claypool, Arizona 85532

28 Dated at Globe, Arizona, this 14th day of October, 2010

By: 
Sandra Mancha

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Exhibit 1
San Carlos Apache Tribe
Tribal Council Resolution No. FB-09-029

SAN CARLOS APACHE TRIBE
SAN CARLOS APACHE INDIAN RESERVATION
SAN CARLOS, ARIZONA

RESOLUTION

No. FB-09-029

Approving Intergovernmental Agreements with the State of Arizona Department of Transportation for Projects JPA-07-171 and JPA-07-034 and to provide a limited waiver of the Tribe's sovereign immunity from suit for such purposes.

WHEREAS, the San Carlos Apache Tribe is a federally recognized Indian Tribe organized pursuant to the provisions of section 16 of the Indian Reorganization Act of June 18, 1934 (38 stat. 984); and,

WHEREAS, the Tribe has the authority, among other things, to "appoint, employees and to prescribe their tenure and duties", pursuant to Article V, section 1(o) of the Amended Constitution and By-Laws of the San Carlos Apache Tribe; and,

WHEREAS, the State of Arizona does provide services and funds necessary to the Tribe through contractual agreements; and,

WHEREAS, the Tribe's Transportation Planner proposes that the Tribe enter into two intergovernmental agreements with the State of Arizona; and,

1. ADOT Project No. JPA-07-171, upgrade the railroad crossing at BIA 101 and Arizona Eastern Railway tracts (#742-336-V), by the erection for automatic warning signals, automatic gate arms, plank crossings, pavement marking, and other railroad crossing related appurtenances; and,

2. ADOT project No. JPA-07-034, upgrade the railroad crossing at the intersection of highway 170 and BIA 2 (SCIR) on Arizona Eastern Railway tracks (#742-332-T) north of Peridot, by furnishing and installing flashers, gates and a concrete crossing surface; and,

WHEREAS, the State of Arizona requires that any and all claims, disputes and controversies relating to its agreements be submitted to binding arbitration pursuant to A.R.S. ' 12-1501 *et seq.*; and,

WHEREAS, a provision for arbitration expressed in a written contract has been found by the U.S. Supreme Court to be a waiver of a Tribe's sovereign immunity from suit, *C.L. ENTERPRISE v CITIZEN BEN POTAWATOMI INDIAN TRIBE*, 532 U.S.411 (2001); and,

WHEREAS, the Tribe's General Counsel, through its negotiations with attorneys for the State of Arizona, has found that the State of Arizona will not submit to the jurisdiction or laws of the San Carlos Apache Tribe, or accept the Tribe's sovereign immunity from suit; and,

WHEREAS, the Tribe may provide a limited waiver of sovereign immunity from suit for the purposes of binding arbitration if and only if the following conditions exist in conformance with A.R.S. '12-1501 *et seq.*

A dispute between the State of Arizona and the San Carlos Apache Tribe arises directly from the Agreement between them for the purposes expressed therein.

The claim alleges a breach by the Tribe or one or more specific obligations or duties which the Tribe expressly assumes under the terms of the Agreement.

The claim seeks either (1) specific performance by the Tribe (2) payment of all amounts due under the Agreement and reasonable costs the State incurs in collection of such amounts, or (3) the foreclosure of collateral secured under the Agreement, if any.

The scope of arbitration is solely limited to breach of contract actions brought pursuant to the Agreement referenced herein for the benefit of the State of Arizona only, or an Assignee of a valid assignment of the State of Arizona's interest in the Agreement, if any;

The Tribe does not agree to any arbitration by persons or parties or their assignees which are not a party to the Agreement nor to any arbitration proceeding or other proceeding based on alleged tortious conduct, or for the imposition of incidental, consequential, exemplary or punitive damages or lost profits.

Any claim against which arbitration may be demanded must be made in writing to the Tribe by the State of Arizona and the Tribe shall have thirty (30) days to act on such claim before arbitration proceedings may be instituted; and

WHEREAS, the Tribal Council after careful consideration, finds that agreements with the State of Arizona remain in the best interest of the San Carlos Apache Tribe for the funds and services provided thereunder, and that a limited waiver of sovereign immunity for the purposes of enforcement of arbitration provisions therein are acceptable according to the terms described above.

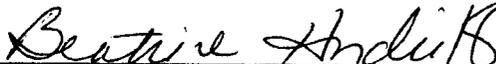
NOW THEREFORE BE IT RESOLVED THAT by the San Carlos Apache Tribal Council that:

1. The proposed intergovernmental agreements with the State of Arizona as identified herein are hereby approved.
2. As part of the approval of the said Agreements, the Tribal Council hereby grants a limited waiver of sovereign immunity for the purpose of effecting dispute resolution thereunder in the form of binding arbitration pursuant to A.R.S '12-1501 *et seq.*

BE IT FURTHER RESOLVED THAT Chairman, Vice-Chairman or designated representative are authorized to take all actions necessary to carry out the intent of this Resolution.

CERTIFICATION

I, the undersigned Secretary of the San Carlos Apache Tribal Council hereby certify that the Tribal Council is presently composed of eleven (11) members of whom ten (10), constituting a quorum were present at a Regular Council Meeting hereto held on the 3rd day of February 2009, and that the foregoing Resolution No. FB-09-029 was duly adopted by a vote of 8 for; 0 opposed, 0 Abstained of the Tribal Council, pursuant to Article V, section 1(a) of the Amended Constitution and Bylaws of the San Carlos Apache Tribe, effective February 24, 1954.


Beatrice Hendricks, Acting Tribal Secretary
San Carlos Apache Tribal Council