

COMMISSIONERS
DOUG LITTLE - Chairman
BOB STUMP
BOB BURNS
TOM FORESE
ANDY TOBIN

OPEN MEETING ITEM



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ARIZONA CORPORATION COMMISSION
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DATE: FEBRUARY 9, 2016
DOCKET NO.: RR-02635B-15-0300

Arizona Corporation Commission
DOCKETED
FEB 09 2016

TO ALL PARTIES:

DOCKETED BY *[Signature]*

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:

BURLINGTON NORTHERN & SANTA FE RAILWAY
(INSTALL GRADE SEPARATED CROSSING AND
REMOVE AT-GRADE 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:

FEBRUARY 18, 2016

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:

MARCH 2, 2016 AND MARCH 3, 2016

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.

[Signature]
JODI A. JERICH
EXECUTIVE DIRECTOR

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This document is available in alternative formats by contacting Shaylin Bernal, ADA Coordinator, voice phone number 602-542-3931, E-mail SABernal@azcc.gov.

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 DOUG LITTLE – Chairman
4 BOB STUMP
5 BOB BURNS
6 TOM FORESE
7 ANDY TOBIN

8 IN THE MATTER OF THE APPLICATION OF THE
9 UNITED STATES DEPARTMENT OF THE
10 INTERIOR/BUREAU OF INDIAN AFFAIRS TO
11 REPLACE AN EXISTING AT-GRADE CROSSING
OF THE BURLINGTON NORTHERN & SANTA FE
RAILWAY AND TO CONSTRUCT A FOUR SPAN
BRIDGE OVER THE BURLINGTON NORTHERN
& SANTA FE RAILWAY TRACKS AND THE RIO
PUERCO RIVER IN NAVAJO, APACHE COUNTY,
ARIZONA, USDOT NO. 025-011-J.

DOCKET NO. RR-02635B-15-0300

DECISION NO. _____

OPINION AND ORDER

12 DATE OF HEARING: December 10, 2015
13 PLACE OF HEARING: Phoenix, Arizona
14 ADMINISTRATIVE LAW JUDGE: Marc E. Stern
15 APPEARANCES: Mr. Evan Blackstone, U.S. Department of the Interior on
16 behalf of the Bureau of Indian Affairs;
17 Mr. Patrick J. Black, Fennemore Craig, on behalf of
18 Burlington Northern & Santa Fe Railway Company; and
19 Mr. Charles Hains, Staff Attorney, Legal Division, on
20 behalf of the Safety Division of the Arizona Corporation
Commission.

BY THE COMMISSION:

21 On August 19, 2015, the United States Department of the Interior/Bureau of Indian Affairs
22 (“USBIA”) filed with the Arizona Corporation Commission (“Commission”) a request for approval for
23 the USBIA to replace an existing at-grade crossing of the Burlington Northern and Santa Fe Railway
24 (“Railway”) with the construction of a four span bridge overpass that will span both the tracks of the
25 Railway and the Rio Puerco River in Navajo, Apache County, Arizona at USDOT No. 025-011-J
26 (“Application”).

27 On September 22, 2015, by Procedural Order, a hearing on the Application was scheduled to
28

1 commence on December 10, 2015.

2 On October 14, 2015, the USBIA filed four affidavits of publication of public notice concerning
3 the hearing on the Application in this proceeding.

4 On October 26, 2015, counsel for the Railway filed notice of his appearance in the proceeding
5 and exercised the option of the Railway and its counsel to receive service of all filings in this docket
6 via his designated email address.

7 On October 28, 2015, by Procedural Order, counsel's request on behalf of the Railway for
8 Consent to Email Service was approved.

9 On November 17, 2015, the Commission's Safety Division, Railroad Safety Section ("Staff")
10 filed the Staff Memorandum which recommends approval of the Application.

11 On December 4, 2015, Ms. Sonia Overholser with the U.S. Department of the Interior, Office
12 of the Phoenix Solicitor, filed an Entry of Appearance and also a Motion to Associate Counsel *Pro Hac*
13 *Vice* for Mr. Evan Blackstone, an attorney from New Mexico with the U.S. Department of the Interior,
14 Office of the Solicitor, Southwest Region, in this proceeding.

15 On December 10, 2015, a full public hearing was convened before a duly authorized
16 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The USBIA, the
17 Railway, and Staff were present with counsel. At the outset of the proceeding, leave was granted to
18 Mr. Blackstone to appear as counsel pro hac vice. At the conclusion of the hearing, Mr. Blackstone
19 called upon several area Navajo tribal representatives and a local rancher who made public comment
20 in support of the Application, after which the matter was taken under advisement pending submission
21 of a Recommended Opinion and Order to the Commission.

22 * * * * *

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

25 **FINDINGS OF FACT**

26 1. On August 19, 2015, the USBIA filed an Application requesting an Opinion and Order
27 from the Commission to approve the replacement of an existing at-grade crossing of the Railway's
28 tracks with the construction by the USBIA of a four span bridge overpass that will span both the right

1 of way of the Railway and the Rio Puerco River that lies to the south of the Railway's tracks in Navajo,
2 Apache County, Arizona USDOT No. 025-011-J.

3 2. The Railway's right of way where the present at-grade crossing exists runs in a generally
4 east-west direction and parallels Interstate 40 ("I-40").

5 3. The Railway's tracks are intersected by Kerr McGee Road/N2007 ("Kerr McGee")
6 which is a north south arterial roadway that has an interchange at I-40.

7 4. The USBIA is seeking Commission approval to upgrade Kerr McGee, which is a two
8 lane roadway that, at the Railway's tracks, is protected with flashing lights, automatic gates and bells.
9 When the upgrade is completed, these automatic warning devices will be removed and the at-grade
10 crossing where the Railway's tracks cross the roadway will be closed. They will be replaced by the
11 planned four span bridge overpass that will span both the Railway's tracks and the Rio Puerco River.

12 5. The new bridge will be constructed in phases approximately 100 feet to the west of the
13 existing at-grade crossing of Kerr McGee. During the first phase of construction, a small detour of the
14 roadway will be constructed approximately 15 feet to the east and it will use the existing bridge over
15 the Rio Puerco River as part of the detour until the new bridge is completed spanning the river and the
16 tracks.

17 6. When construction begins, as part of the first phase of construction, the piers and south
18 abutment of the new bridge overpass will be constructed and once the overpass is completed, traffic
19 will be rerouted over the new bridge and the Railway's existing at-grade crossing closed.

20 7. According to the Staff Memorandum, it is estimated that construction will take
21 approximately 20 months. (Ex. S-1)

22 8. The improvements planned for Kerr McGee will be funded by the Highway Trust Fund
23 through the Federal Lands Highway Tribal Transportation Program at a total cost estimated at \$15.5
24 million according to the Staff Memorandum (Ex. S-1)

25 9. The Railway will contribute five percent, or approximately \$322,460, of the total cost
26 of the bridge structure in compliance with Federal Law. After the bridge is constructed, it will be
27 maintained by the USBIA in accordance with the construction agreement. (Ex. S-1)

28 10. The Staff Memorandum further states that the nearest alternate crossings to this remote

1 area where Kerr McGee is located are 14 miles to the east and 18 miles to the west where two other
2 overpasses are located.

3 11. Although the nearest school to the Kerr McGee crossing is in Sanders, 30 miles from
4 the crossing, twice a day school buses utilize the existing at-grade crossing of the Railway's tracks.

5 12. According to the Staff Memorandum, although there is a small truck stop and
6 convenience store located at the intersection of I-40 and Kerr McGee, the area of the crossing is
7 generally rural with additional commercial development planned in the future on both sides of the I-40
8 when the new bridge is built.

9 13. The Staff Memorandum states that a primary reason for the overpass to be constructed
10 is that the existing one lane bridge has a low structural rating and a replacement bridge would be too
11 close to the existing at-grade crossing. It was determined that in order to meet the current American
12 Association of State Highway and Transportation Officials ("AASHTO") design criteria, a new
13 overpass would be required to span both the Rio Puerco River and the Railway's right of way.
14 Additionally, because of the number and frequency of trains passing through the area and plans for
15 development, local tribal officials decided that there is a need for construction of the bridge overpass.

16 14. Mr. Harold J. Riley, the planning and design branch chief for the USBIA, Navajo
17 Region, Division of Transportation, testified that he is responsible for the planning and design of all
18 transportation projects in the Navajo Region. (Tr. 7:1-8)

19 15. According to Mr. Riley, who negotiated the agreement with the Railway, his division
20 assisted the Navajo-Hopi Indian Relocation Commission in the development of the transportation
21 infrastructure which includes the bridge project for which the USBIA is seeking approval by the
22 Commission. (Tr. 7:18-25)

23 16. Mr. Riley stated that the project is approximately one-half mile southeast of the junction
24 of I-40 and Kerr McGee, and involves replacing the existing bridge and the existing at-grade crossing
25 of the Railway with the construction of the bridge overpass. (Tr. 9:5-23)

26 17. Mr. Riley further stated that the development of the project dated back to 1999 when
27 his division became involved in the project. After examining the existing bridge structure in 2002, it
28 was determined that it was structurally insufficient, with a maximum load capacity of 10 tons, which

1 “pretty much shut down the use of the bridge by any commercial traffic” (Tr. 9-10: 12-6)

2 18. Mr. Riley testified further that due to the poor condition of the existing bridge and its
3 proximity to the Railway’s tracks, it was determined that it was easier to build the overpass.
4 Additionally, consideration was given to the safety of school children because school busses are
5 required to utilize the bridge, and because alternatives were at least 45 minutes away to cross the river
6 and the train tracks. (Tr. 10:7-24)

7 19. Mr. Riley stated that during the construction of the overpass, the project calls for
8 realigning the existing road approximately 15 feet to the east and for the Railway to relocate its existing
9 warning devices for the temporary detour while the bridge overpass is constructed. (Tr. 11:8-27)

10 20. In furtherance of these plans, the USBIA and the Railway have executed their agreement
11 in writing in order for the project to proceed. (Tr. 11:18-21)

12 21. Mr. Riley testified that the project will be done in four phases over 20 months, starting
13 with the construction of the detour to the east. Subsequent to construction of the detour, heavy
14 construction equipment will be brought from Sanders, Arizona, which is 30 miles away. (Tr. 12:3-14)

15 22. Mr. Riley stated that public notice of the project and the hearing at the Commission
16 were provided in four separate newspapers including the *Gallup Independent*, the *Navajo Times*, the
17 *Tribune-News* from Holbrook and the *Arizona Daily Sun* from Flagstaff. (Tr. 12:19-23)

18 23. Mr. Riley further stated that, in response to the public notice provided by the USBIA,
19 there have been no comments, protests, or objections to the project. (Tr. 13:1-4)

20 24. Mr. Riley testified that he has reviewed the Staff Memorandum, he is in agreement with
21 the recommendations made by Staff, and believes that the improvements proposed for the crossing are
22 in the public interest and will improve safety. (Tr. 13:5-14)

23 25. Mr. Riley stated that he believes that the construction of the bridge overpass will require
24 the 20 months estimated for construction because of the type of construction that will be required and
25 because the heavy construction equipment will have to be brought from a distance. (Tr. 14-15:14-8)

26 26. Mr. Riley further stated that with the improvements being planned for the crossing,
27 individuals living in remote communities south of the Rio Puerco River will have better access to
28 healthcare facilities in places such as Flagstaff, which is 120 miles from Navajo, Arizona. (Tr. 17)

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IT IS FURTHER ORDERED that upon the completion of the removal of the at-grade crossing at Kerr McGee Road and the construction of the grade separated structure at Kerr McGee Road, the Burlington Northern & Santa Fe Railway shall maintain its right-of-way in compliance with A.A.C. R14-5-104.

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, JODI JERICH, 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 _____ 2016.

JODI JERICH
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
MS:ru

1 SERVICE LIST FOR: BURLINGTON NORTHERN & SANTA FE
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