



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission  
DOCKETED

MAR 10 2016

DOUG LITTLE – Chairman  
BOB STUMP  
BOB BURNS  
TOM FORESE  
ANDY TOBIN

DOCKETED BY *KL*

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES DEPARTMENT OF THE INTERIOR/BUREAU OF INDIAN AFFAIRS TO 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. 75483

OPINION AND ORDER

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

**BY THE COMMISSION:**

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

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

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)

1           27.     Mr. Riley, who is an engineer, stated that the bridge overpass will be 1,000 feet in length  
2 and rest on three piers because it will cross over both the Rio Puerco River and the Railway's tracks.  
3 The bridge will have two lanes with sidewalks on both sides of the bridge. (Tr. 18)

4           28.     Further testifying, Mr. Riley stated that the bridge is being constructed on land owned  
5 by the Railway, which has a 1,200 foot easement in that area, which is surrounded by federal trust land  
6 that was purchased for the Navajo Nation. (Tr. 19:1-8)

7           29.     Mr. Riley testified that although it was estimated that the project would originally cost  
8 \$16.8 million, the contract that was negotiated by the USBIA with the contractor was for \$15.5 million  
9 (Tr. 19:18-23)

10          30.     Mr. Riley stated that during summer months approximately 57 or 58 trains a day pass  
11 through the area and that they are both passenger and freight trains. (Tr. 21:1-16)

12          31.     Testifying further, Mr. Riley stated that because the roadway is being constructed on  
13 federal land, it has to comply with the AASHTO standards. (Tr. 23:6-23)

14          32.     Mr. Chris Watson, the Assistant Supervisor of the Railroad Safety Section and the Grade  
15 Crossing Inspector for the State of Arizona, testified that he was responsible for the preparation of the  
16 Staff Memorandum which recommends approval of the Application in this proceeding. (Tr. 27-28:5-  
17 9)

18          33.     Mr. Watson further testified that Staff believes the upgrade proposed for the crossing  
19 will make it safer for the public and that it is in the public interest to approve the Application. (Tr. 28-  
20 29:20-3)

21          34.     Mr. Watson further testified that the improvements planned for the bridge overpass  
22 described in the Application are similar to other crossings of this nature in Arizona. (Tr. 31:3-7)

23          35.     Staff is recommending that the Application be approved.

#### CONCLUSIONS OF LAW

24  
25          1.     The Commission has jurisdiction over the parties and over the subject matter of the  
26 Application pursuant to Article XV of the Constitution and Arizona Revised Statutes ("A.R.S.") §§  
27 40-336, 40-337, and 40-337.01.

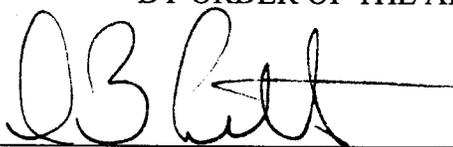
28          2.     Notice of the Application was provided in accordance with the law.



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

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

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

7 

8  
9 CHAIRMAN



COMMISSIONER

10 

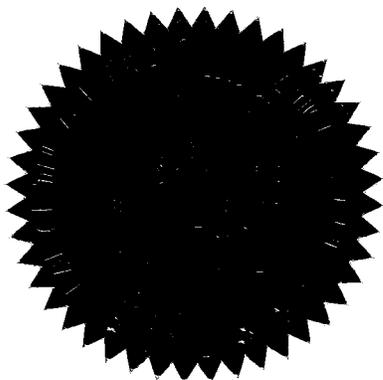
11 COMMISSIONER



COMMISSIONER



COMMISSIONER



12  
13 IN WITNESS WHEREOF, I, JODI JERICH, Executive Director  
14 of the Arizona Corporation Commission, have hereunto set my  
15 hand and caused the official seal of the Commission to be affixed  
16 at the Capitol, in the City of Phoenix, this 10th day  
17 of March 2016.



JODI JERICH  
EXECUTIVE DIRECTOR

19 DISSENT \_\_\_\_\_

21 DISSENT \_\_\_\_\_  
22 MS:ru

1 SERVICE LIST FOR:

BURLINGTON NORTHERN & SANTA FE  
RAILWAY

2 DOCKET NO.:

RR-02635B-15-0300

3 United States Department of the Interior  
4 Bureau of Indian Affairs  
5 P.O. Box 1060  
6 Gallup, New Mexico 87306

7 Sonia Overholser  
8 U.S. Department of the Interior,  
9 Office of the Solicitor  
10 Sandra Day O'Conner Federal Courthouse  
11 Suite 404  
12 401 West Washington, SPC #44  
13 Phoenix, AZ 85003

14 Evan C. Blackstone  
15 U.S. Department of the Interior  
16 Office of the Solicitor, Southwest Region  
17 505 Marquette Ave., NW  
18 Suite 1800  
19 Albuquerque, NM 87102

20 Patrick J. Black  
21 FENNEMORE CRAIG, P.C.  
22 2394 E. Camelback Road, Suite 600  
23 Phoenix, AZ 85016  
24 Attorneys for BNSF  
25 [pblack@fclaw.com](mailto:pblack@fclaw.com)  
26 **Consented to Service by Email**

27 Matthew Keim  
28 Manager Public Projects  
BNSF RAILWAY  
740 East Carnegie Drive  
San Bernardino, CA 92408-3571

Janice Alward, Chief Counsel  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

Brian Lehman, Chief  
Railroad Safety Section of the Safety Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007