

Decision No. R12-1132

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12A-687R

IN THE MATTER OF THE APPLICATION OF THE SANTA FE TRAIL RANCH
METROPOLITAN DISTRICT FOR AUTHORITY TO CONSTRUCT AN AT-GRADE
CROSSING IN LAS ANIMAS COUNTY AT BNSF RR MILEPOST 0648.58,
APPROXIMATELY ½ MILE NORTH OF INTERSTATE 25 EXIT TWO IN COLORADO

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
GRANTING MOTION TO DISMISS APPLICATION
AND CLOSING DOCKET**

Mailed Date: September 28, 2012

I. STATEMENT

1. On June 13, 2012, the Santa Fe Trail Ranch Metropolitan District (District) filed an Application for the Construction of an At-Grade Crossing located at existing track owned by BNSF Railway Company (BNSF) at Milepost 0648.58, approximately one-half mile north of Interstate Highway 25, Exit Two in Las Animas County, Colorado (Application).

2. According to the District, the purpose of the Application is to restore an at-grade crossing at Milepost 0648.58, which authority was originally granted by the Colorado Public Utilities Commission (Commission) on August 28, 1951 by Decision No. 37312. Because the crossing was removed in 2009, the District contends that only one ingress/egress location remains for the approximately 180 homeowners living in the District's development. The District represents that the Las Animas County Board of Commissioners, the Colorado State Forest Service and the Fisher's Peak Fire Protection District support the re-establishment of the crossing to allow for the District's use in emergency situations.

3. On June 18, 2012, Commission Railroad Staff (Staff) issued a deficiency letter to the District indicating several areas in which the Application was deficient. On June 28, 2012, the District filed a Motion to Amend Application and Response to Deficiency Notice. The motion and response address and cure the deficiencies cited by Staff.

4. On June 28, 2012, the Commission provided notice of the District's Application and provided a 30-day intervention period or until July 30, 2012 for any interested party to intervene in the matter.

5. On July 27, 2012, BNSF filed its Entry of Appearance and Notice of Intervention as of right. On that same day, BNSF also filed a Motion to Dismiss/Motion for Summary Judgment (Motion).

6. BNSF takes the position that dismissal of the Application is based on a question of jurisdiction. According to BNSF, while the road in question was a county road for a period of time in the 1950s and prior to then, the unpaved, gravel surface road referred to in the Application has been a private road and not a county road since 1961.

7. In support of its claim, BNSF offers a 1961 application filed by the Atchison, Topeka and Santa Fe Railway Company (AT&SF) requesting that the Commission approve the retirement of crossing signals and closing of the crossing at approximately Milepost 648 + 2991' near Morley, Colorado. In that application, AT&SF indicated that the public road crossing serving the mining town of Morley at Milepost 648 + 2991' had been abandoned, the crossing removed and the road barricaded and no longer in use. Consequently, AT&SF sought closure of the former public crossing at Morley, removal of the signal lights and installation of signal lights at another location.

8. On July 26, 1961, the Commission issued Decision No. 56886 in which it found that the road at the crossing in question at Milepost 648 +2991' had been abandoned since coal production at nearby Morley mine had been discontinued. In addition, the road had been barricaded and a bridge removed, so the crossing was no longer in use. Consequently, the Commission granted AT&SF's Application to remove the crossing at Milepost 648 + 2991' since the road was abandoned. As the crossing was no longer in use, the Commission additionally found that there was no need or requirement for the automatic flashing signals and therefore approved their removal. In addition, BNSF points out that the United States Department of Transportation (U.S. DOT) recognizes the crossing (National Inventory Crossing No. 003355L) as a private crossing.

9. As a result, BNSF takes the position that the Commission does not have subject matter jurisdiction over the crossing since the Commission's jurisdiction is limited to crossings of public highways across the tracks of any railroad. *See*, § 40-4-106(2)(a), C.R.S. and Commission Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7-7201(f) and 7204. Based on its arguments, BNSF seeks to have the Application dismissed for lack of subject matter jurisdiction, or grant BNSF summary judgment against the District on its Application for lack of subject matter jurisdiction.

10. On August 10, 2012, the District filed its Response to BNSF's Motion (Response). In its Response, the District remarks that one of its priorities to the public (as stated in its Service Plan) is the acquisition, construction, relocation, completion, installation

and/or operation and maintenance of street improvements, and/or services for a system of traffic and safety controls and devices on streets and highways and at railroad crossings.¹

11. The District also states that it obtained a perpetual easement from the Santa Fe Trail Ranch Property Owners Association (POA) in order to establish a public highway which the POA and the public in general may utilize for ingress and egress and other reasonable uses.² Notably, the easement was entered into on August 6, 2012, approximately 10 days after BNSF filed its Motion to Dismiss.³

12. The District then maintains that because a “public highway” now exists, and neither the District nor the Colorado Department of Transportation (CDOT) has placed signs along the roadway restricting public access on the roadway, and because the District and CDOT are both public authorities that have the power to operate and maintain the roadway connected to the crossing site; therefore, the public nature of the roadway is such that the Commission has jurisdiction pursuant to § 40-4-106(2)(a) and Rule 7204 to approve the Application.

13. Because the District presented new evidence in the form of the perpetual easement from the POA in its response pleading, by Interim Decision No. R12-0976-I, BNSF was permitted to file a reply brief by September 5, 2012.

14. On September 5, 2012, BNSF filed its reply brief in support of its Motion to Dismiss. BNSF takes the position that the road on the west side of the crossing is not and has

¹ See, Exhibit D to Response, *Service Plan for Santa Fe Trail Ranch Metropolitan District*.

² See, Exhibit E to Response, *Public Highway Easement Deed and Agreement*.

³ It is also noted that while the instrument indicates that it was entered into on August 6, 2012, and filed in the Las Animas County records on August 7, 2012, the Notary Public verification indicates that the instrument was acknowledged before the Notary Public on July 6, 2012.

never been a public road since the Morely mine was closed and the road leading to the mine was abandoned prior to 1961. As for the road on the east side of the crossing, BNSF notes that it is designated as a dead end that terminates at the BNSF property line with a locked gate. The road on the east side had a barbed wire gate at its origin near Exit 2 at Interstate 25 as late as 2002. Together with the fact that the crossing has been gated and locked since the 1960's, it is BNSF's contention that the crossing at issue is a private crossing over which the Commission has no jurisdiction.

15. In describing the roads on either side of the crossing, BNSF states that the locked gate on the road west of the crossing is located where the road crosses onto the BNSF property line. That gate contains a "No Trespassing" sign and is depicted in a series of photos attached to the Application as Exhibit No. 6.

16. BNSF argues that the District does not dispute the evidence in BNSF's Motion to Dismiss that the road into Morely and the public crossing were declared abandoned and the crossing closed in 1961 by the Commission, and that no public road authority has maintained any road into Morely from 1961 up to the time the Application was filed. BNSF maintains that the District has offered no evidence of the public use of the road on the west side of the crossing since 1961. Instead, the District maintains that the road is now a public road by virtue of the Public Highway Easement Deed and Agreement it executed on August 6, 2012 (attached to the District's Response as Exhibit E); its status as a quasi-municipal organization; and, the powers set forth in the District's Service Plan. However, BNSF takes the position that the District's exhibits and argument fail to create a genuine issue of material fact that the road is public for several reasons.

17. According to BNSF, because the Public Highway Easement Deed wasn't negotiated, drafted, executed or recorded until after BNSF filed its Motion to Dismiss, it is evident that the deed was executed solely for purposes of this litigation and is therefore a sham. BNSF argues that this action is evidence that the District did not consider this road public until August 6, 2012. If the road was public and maintained by a public authority, no conveyance of easement would have been necessary.

18. Even if the easement deed is valid, BNSF points out that it only creates a public road within a single privately owned Lot J5 between the private property of BNSF and the private road system within the Santa Fe Trail development. Because the public cannot get to the road without crossing private property, by definition, the road is not open to the public.

19. BNSF presents evidence which it claims further shows that the west road is private. BNSF provides the recorded subdivision plat for Unit Twelve, Santa Fe Trail Ranch, Stagecoach Meadows, recorded with the Las Animas Clerk and Recorder's Office⁴ which platted Lots J1 through J10. BNSF notes that under the "General Notes" section of the title page, note 4 states that "[a]ll roads are private and maintenance will be done by the [POA]." Additionally, note 10 reserves ingress/egress rights over the roadways in Units 1-11 to owners of Lots J1-J10, and an ingress/egress easement over Lot J2 for the owner of Lot J1. However, no reservation for ingress/egress is made over Lot J5 (the lot adjacent to the west road) for anyone.

20. BNSF also provides Sheet 4 of 5 of the plat (identified as Exhibit 13 attached to BNSF's filing and Exhibit A attached to Applicant's Response pleading) which BNSF states

⁴ Recorded on October 4, 1996, Book 935, page 437.

shows that the road through Lot J5 is and has been a private road for the exclusive use of lot owners within the Santa Fe Trail Ranch subdivision. BNSF asserts that all roads within the subdivision are maintained by the POA and have been since at least 1996 when the area was platted. BNSF argues that private parties may not change a recorded plat by agreement and the recorded plat controls.⁵ BNSF argues that the POA is not a public entity as provided in its Articles of Incorporation. Consequently, since the road is private and has not, and is not maintained by a public entity, the crossing cannot be public.

21. BNSF provides minutes from the Emergency Services Committee and the Board of the POA to show that the POA has generally regarded the road in question as being blocked by locked gates; that the crossing under strict control of BNSF, which can also permanently close Exit 2 within no recourse; as well as an understanding that the road is to only be used in case of an evacuation. Additionally, BNSF claims that excerpts from POA Board meeting minutes show that the POA knew the crossing was private as late as 2009.

22. Finally, BNSF includes two affidavits with its pleading. The first affidavit of James Wark (Exhibit 19) regards two aerial photos of the area surrounding the crossing from 1977 and 1984. The second affidavit of Ralph Ponce (Exhibit 20), a former track supervisor for the Atchison Topeka & Santa Fe Railway Company, states that he regularly visited the area in question from 1976 until his retirement sometime around 2009. Mr. Ponce confirms the lack of any west road until the subdivision was built and that the westerly right of way line was fenced and no one had access to the crossing from the west until the subdivision was built and the locked gate was installed.

⁵ *Citing, Simco Ventures West v. North Pointe Gardens*, Unpublished Opinion of the Colorado Court of Appeals, No. 10AC2335, March 1, 2012, pp. 6,7.

23. Regarding the road west of the crossing, BNSF concludes that the road serving Morley from the Interstate 25 side of the crossing, as well as the crossing, was abandoned in 1961. No road west of the railroad tracks existed at any time after 1961 until the subdivision was developed sometime in the early 1990's. Further, all roads within the subdivision have been platted as private roads maintained by the POA rather than any public entity, including the west road which runs through Unit 12 of the subdivision. Additionally, the POA considers the west road private and removable at BNSF's discretion. Access to the crossing has been gated and locked and is not open to the public.

24. Regarding the road east of the crossing, BNSF concludes that by Mr. Ponce's affidavit, it is evident that no vehicles other than BNSF trucks utilized the road during his tenure as a BNSF employee. BNSF finds it inconsequential that the road connects to an exit off of Interstate 25 and is maintained by CDOT, or that there are no restrictions to its use by the public. What is relevant, according to BNSF, is that the road dead-ends at the end of the bridge over Raton Creek with a locked gate at BNSF's property line. A sign within 100 yards of its origin indicates that there is no outlet. The east side of the road has terminated at the gate to BNSF property for decades and there is no crossing on this road. Rather, the grade crossing is on a roadway which is not open to use by the public.

II. FINDINGS AND CONCLUSIONS

25. The matter at issue here is whether the Commission has jurisdiction over the crossing in question.

26. The Commission derives its jurisdiction over the point of crossing at which railroad tracks may be constructed across public highways under §40-4-106(2)(a), C.R.S. which provides in relevant part:

the commission has the power to determine, order, and prescribe, in accordance with the plans and specifications to be approved by it, the just and reasonable manner including the particular point of crossing at which the tracks or other facilities of any public utility may be constructed across the facilities of any other public utility at grade, or above or below grade, or at the same or different levels, or *at which the tracks or other facilities of any railroad corporation may be constructed across any public highway* at grade, or above or below grade, or at which any public highway may be constructed across the tracks or other facilities of any railroad corporation at grade, or above or below grade and to determine, order, and prescribe the terms and conditions of installation and operation, maintenance, and warning at all such crossings that may be constructed, including the posting of personnel or the installation and regulation of lights, block, interlocking, or other system of signaling, safety appliance devices, or such other means or instrumentalities as may to the commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted. (Emphasis supplied)

27. Commission Rule 4 CCR 723-7-7201(f) defines a “highway-rail crossing” as:

- (I) the point at which any *public highway* may be constructed across the tracks or other facilities of any railroad corporation, railroad, or rail fixed guideway, at, above, or below grade; or
- (II) the point at which the tracks or other facilities of any railroad corporation, railroad, or rail fixed guideway may be constructed across any *public highway* at, above, or below grade; or
- (III) the point at which any *public highway* may be constructed across private tracks, over which any railroad corporation, railroad, or transit agency may operate, at, above, or below grade; or
- (IV) the point at which private tracks, over which any railroad corporation, railroad or transit agency may operate, may be constructed across any *public highway* at, above, or below grade.

(Emphasis supplied)

28. The Commission defined the term “public crossing” and distinguished that term from “private crossing” in Decision No. C07-0673⁶ at Section (I)(A), ¶8 where it states that

⁶ Docket No. 06A-176R, issued August 8, 2007.

“[a] public crossing is a highway-rail grade crossing that is on a roadway open to use by the public and maintained by a public authority. A private crossing is a highway-rail grade crossing that is on a roadway not open to use by the public nor maintained by a public authority.”

29. In Decision No. C10-1256⁷ at Section (I)(A), ¶10, the Commission again concluded that where a crossing is determined to be private (there, it was verified that the crossing was listed in the U.S. DOT database as a private crossing and that the crossing was private in nature) the Commission does not regulate such crossings.

30. In *Regional Transportation District v. Public Utilities Commission of the State of Colorado*, 92CV1918, Order issued September 22, 1993, the court found that under the terms of § 40-6-106(2)(a) and (3)(b), C.R.S. the Commission has “regulatory authority ... with respect to safety in the point of crossing, design, installations and maintenance of public crossings ...” *Id.* at p.7. Additionally, in Decision No. R01-0258-I, the Administrative Law Judge there found that based on that Denver District Court order, the Commission only has jurisdiction over rail crossings that intersect public highways. *Id.* at p 2.

31. Here, it is undisputed that the road into Moreley and the public crossing were declared abandoned and the crossing closed in 1961 by the Commission.⁸ In Decision No. 56886 the Commission noted that since the time it granted installation of a public grade crossing (by Decision No. 37312 on August 28, 1951), coal production at the Morley Mine had been discontinued; the county road serving Morley had been abandoned; the road barricaded and a bridge removed, which made it apparent to the Commission that the crossing was no longer in use.

⁷ Docket No. 05A-500R, issued November 22, 2010.

⁸ *See*, Commission Decision No. 56886, in Application No. 18585, issued July 26, 1961.

32. The Commission also noted in Decision No. 56886 that official abandonment of the county road facility and approval for the removal of the crossing and signals was given by the Las Animas Board of County Commissioners in correspondence to the Commission dated July 6, 1961. Since the Las Animas Board of County Commissioners approved the closure of the county road at Morely, the Commission found it appropriate to approve the abandonment and removal of the public grade crossing there located at Milepost 648 + 2991'.⁹

33. The District's line of reasoning is that by virtue of the perpetual easement conveyed to it by the POA over all of Lot J5 which lies on the west side of the crossing, and because CDOT maintains the road on the east side of the crossing, a public highway is therefore established. The District further maintains that since it and CDOT are both public authorities, they have the power to operate and maintain the roadway connected to the crossing and as a result, the public nature of the roadway is such that the Commission has jurisdiction pursuant to § 40-4-106(2)(a) and Commission Rule 7204.

34. The District's reasoning is without merit. As found *supra*, it is undisputed that the west road has been closed for decades. BNSF has provided significant evidence that no road has been opened or re-opened as a public road in the area. The roads that have been constructed are private roads within the District's subdivision. Further, it is apparent that the roads within the District's subdivision are platted as, and operated as, private roads as well as maintained by the District. The west road is included in those platted roads as part of on one of the subdivision's lots (Unit 12); it is maintained by the POA and is not currently open to the public.

⁹ *Id.* at Ordering Paragraph No. 1, p. 4.

The District has also conceded in its POA and Board minutes that the west road is removable at the discretion of BNSF. Therefore, it is evident that the west road is a private road and has been fenced or gated since 1961.

35. As for the east road, BNSF also established that it dead-ends at the end of the bridge over Raton Creek with a locked gate at BNSF's property line. In addition, a sign is posted that indicates that there is no outlet from the east road. Most importantly, there is no grade crossing on the east road. Also of note is the affidavit of Mr. Stephen Neubauer attached as Exhibit No. 5 to BNSF's Motion to Dismiss, and copies of U.S. DOT Crossing Inventory Information for the crossing at issue, which attests to the fact that the crossing (National Inventory Crossing No. 003355L) has been a private crossing since at least January 1, 1970.

36. The purported conveyance of a perpetual easement by the POA to the District to establish a public highway does not eliminate the private status of the crossing. Whether the after-the-fact conveyance is lawful or not is of little consequence for the purposes of this Decision. Even if valid, the conveyance would only create a public road within the confines of the District's subdivision, which in this case would be Unit 12. The remainder of the road leading to the closed crossing would still be private - particularly that portion of the road which lies on the other side of the locked gate on the west road which is BNSF property. Nor does the conveyance create a public road on the east road, which is outside the District's boundaries and remains a dead-end road which ends at a locked gate at BNSF's property line. It is inconsequential that CDOT grades the road from time to time, which the District argues is evidence of the public nature of that road. Such action alone does not create a public road.

37. The remainder of the evidence provided by BNSF clearly establishes that no public road exists in the area of the proposed crossing. In addition, it is equally evident that the crossing is a private crossing and has been categorized as such since 1970. That status has not changed.

38. Upon a review of the pleadings of both parties, it is apparent that the facts are not in dispute. The issue of whether the conveyance of the perpetual easement creates a public highway over the crossing in question is a legal question rather than a factual dispute. As stated above, it is found that whether or not the conveyance creates a public highway is inconsequential since such a conveyance fails to create a public highway over the crossing. Because the crossing at issue is a private crossing and no public highway exists over the crossing, the ALJ is satisfied that after weighing the evidence, the Commission is without jurisdiction pursuant to § 40-4-106, C.R.S. to determine the relief sought in the Application of the District. Consequently, BNSF's Motion to Dismiss will be granted.

39. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. It is Ordered That:

1. The Motion of BNSF Railway Company to Dismiss the Application of the Santa Fe Trail Ranch Metropolitan District is granted.

2. The Application of the Santa Fe Trail Ranch Metropolitan District for Authority to Construct an At-Grade Crossing in Las Animas County at BNSF RR Milepost 0648.58, Approximately ½ Mile North of Interstate 25 Exit Two in Colorado is dismissed without prejudice.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director