

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Docket No. 10A-409R

IN THE MATTER OF THE CITY OF FOUNTAIN FOR AUTHORITY TO CREATE
ALTERNATIVE AT-GRADE ROADWAY RAILROAD CROSSINGS FOR DUCKWOOD
ROAD AND TO CLOSE THE EXISTING MESA ROAD RAILROAD CROSSINGS

**STIPULATION AND SETTLEMENT AGREEMENT
BETWEEN APPLICANT AND ALL INTERVENORS**

Applicant City of Fountain ("Applicant"), Intervenor BNSF Railway Company ("BNSF"), Intervenor Union Pacific Railroad Company ("Union Pacific"), and Intervenor Colorado Department of Transportation, by and through their respective counsel, hereby enter into this Stipulation and Settlement Agreement ("Stipulation") and in consideration of all of the terms and conditions set forth herein, hereby agree and stipulate as follows:

1. The application commencing this action (the "Application") was filed by Applicant on June 4, 2010. In the Application, Applicant seeks, inter alia, to open a new public road crossing at Duckwood Road to be located in Fountain, Colorado ("Fountain") across the two Union Pacific tracks at that location and to close the Union Pacific and BNSF railroad crossings at Mesa Road further north in Fountain¹. The proposed closing of both the Union Pacific and BNSF crossings at Mesa Road is contingent upon the PUC's approval of the new public road crossing at Duckwood Road.

2. On July 13, 2010, Union Pacific filed its *Entry of Appearance* and *Notice of Intervention*. Union Pacific did not object to the Application but raised several issues of concern. On

¹ The Application also sought to keep the BNSF crossing open as a single lane, gated, private and emergency access but the parties agree that the PUC does not have jurisdiction over private crossings and therefore this portion of the Application is withdrawn. The existence and configuration of the BNSF crossing at Mesa after its closure is the subject of a separate

July 13, 2010, BNSF filed its *Entity of Appearance* and *Notice of Intervention* objecting to that portion of the Application that proposes that the Mesa Road crossing of the BNSF tracks remain open for any type of use and noting that the PUC did not have jurisdiction to approve a private crossing.

3. The Commission Order Deeming Application Complete and Referring Application to an ALJ was served on August 3, 2010.

4. Union Pacific filed an *Amended Intervention* on August 13, 2010 opposing the Application because of the existence of a large berm on the south side of the crossing and another berm on the north and east side of the proposed crossing that created a site distance issue at the proposed Duckwood Road crossing location.

5. Applicant filed its *Amended and Restated Application* on September 2, 2010. On October 8, 2010, Applicant filed a *Supplement to Application*.

6. On October 8, 2010, Applicant filed the *Affidavit of Duane Greenwood* stating that notices of proposed closing of crossings were placed at the BNSF and Union Pacific Mesa Road crossings as of October 8, 2010.

7. On August 31, 2011, BNSF sought leave to amend its Entry of Appearance and Notice of Intervention to include an objection to the proposed Duckwood crossing because of the effect the opening of the Duckwood crossing would have on BNSF train operations. The ALJ approved the motion to amend on September 21, 2011 and BNSF filed its *Amended Entry of Appearance and Notice of Intervention* on September 29, 2011.

8. On November 29, 2011, BNSF filed its *Motion to Vacate and Reset Hearing* on the basis of what appeared to be a change in position of Applicant from keeping the Mesa Road crossing of the BNSF tracks private to leaving it open to the public. Additionally, BNSF stated

agreement between Applicant and BNSF.

that there was insufficient time to resolve certain proposals concerning moving signals on the Union Pacific track to accommodate BNSF's operational concerns with the proposed Duckwood crossing.

9. On December 5, 2011, the ALJ granted BNSF's motion to vacate hearing.

10. On January 6, 2012, BNSF filed its *Motion to Dismiss Application as Preempted by Federal Law or in the Alternative to Refer Matter to Surface Transportation Board for Declaratory Order*. The essence of the motion was that the PUC was without jurisdiction to approve the Application since it would affect BNSF's train operations, i.e., "transportation," which was within the sole province of the STB.

11. On January 17, 2011, the parties filed a *Stipulated Procedural Schedule* stipulating, in part, that any further hearing in this matter should occur on June 21, 2012.

12. On January 31, 2012, Applicant filed its *Motion for Leave to Amend Application Related to Mesa Road Crossing*. In its Motion, Applicant sought to amend its Application to designate the BNSF Mesa Road crossing as public, not private, but with limited controlled access.

13. On February 16, 2012, the ALJ denied Applicant's motion. On May 7, 2012, the ALJ denied BNSF's Motion to Dismiss Application as Preempted by Federal Law.

14. On May 16, 2012, Applicant, Union Pacific and CDOT filed their *Stipulation and Settlement Agreement* (the "Duckwood Stipulation") resolving all issues between them. Union Pacific withdrew its opposition to the Application but noted that the Duckwood Stipulation was contingent on BNSF's objection being fully resolved in a manner that is not in any way objectionable to Union Pacific.

15. Applicant, BNSF and Union Pacific have now resolved the issues giving rise to BNSF's objections to the Application by separate agreements.

16. Applicant, Union Pacific, BNSF and CDOT now therefore agree as follows:

- a. Subject to the conditions set forth herein and the separate Stipulations reached between the parties concerning issues outside the PUC's jurisdiction, BNSF will withdraw any and all objection that it had pertaining to Applicant's Application..
- b. Within thirty (30) days after the opening of the Duckwood Crossing, the Union Pacific crossing at Mesa Road (the "Union Pacific/Mesa Road Crossing") and the BNSF crossing at Mesa Road (the "BNSF/Mesa Road Crossing") shall be closed by the following actions: Applicant, at Applicant's sole expense, shall (i) remove one lane of pavement over and across the BNSF/Mesa Road Crossing; (ii) erect a Type Three barrier and a drainage swale on the east side of the Union Pacific/Mesa Road Crossing; (iii) remove the existing pavement and installing a drainage swale on the west side of the Union Pacific/Mesa Road Crossing; and construct the improvements all as set forth in Exhibit A to the Duckwood Stipulation (the "Mesa Road Exhibit"). In addition, BNSF shall be responsible for removing (at Applicant's expense) all railroad crossing materials, signals and appurtenances located at the BNSF/Mesa Road Crossing as noted on the Mesa Road Exhibit, and Union Pacific shall be responsible for removing (at Applicant's expense) all railroad crossing materials, signals and appurtenances located at the crossing over the Union Pacific tracks at Mesa Road. All materials removed by BNSF shall be retained by or disposed of by BNSF in its sole discretion, and all materials removed by Union Pacific shall be retained by or disposed of by Union Pacific in its sole discretion. The reference to "salvage" on the Mesa Road Exhibit shall have no meaning inconsistent with this paragraph.
- c. The new Duckwood Road railroad crossing shall not be used for any construction activities or other private use prior to the opening of the Duckwood Road crossing to

the public. Such opening shall include having all surface work on the crossing completed, all signal work on the crossing completed, the adjoining intersection (US 85 and Duckwood Road) shall be fully completed with all surface and signal improvements installed, including interconnecting the signals at that intersection to the signals at the new Duckwood Road railroad crossing and having all wayside signals moved and operational as required by the Duckwood Stipulation and separate agreement(s) between the parties, and Duckwood Road shall be open to the public as a through roadway. If the Duckwood Road crossing is completed with all signal and surface improvements prior to the time of interconnection to the adjoining intersection signals (US 85 and Duckwood Road) and/or prior to the time that Duckwood Road is fully open to the public as a through highway from US 85 to a point east of the new Duckwood Road crossing, then the Duckwood Road railroad crossing shall be barricaded, at Applicant's sole expense, with a Type III barricade on both sides of the Union Pacific tracks until such time as all improvements are complete, Duckwood Road can be opened as a through roadway, the US 85/Duckwood Road intersection is signalized and interconnected to the signals at the Duckwood Road Railroad crossing, such interconnection is fully operational, and all wayside signals have been moved and are operational.

- d. Nothing herein is intended to alter the terms of the Duckwood Stipulation except with respect to paragraph 12 of that Stipulation, which is modified consistent herewith: *i.e.*, the meaning and intent of the second, third, and fourth sentence of paragraph 12 of the Duckwood Stipulation are rendered moot by this Stipulation. Union Pacific, Applicant and BNSF agree that BNSF's train operation objections have been resolved in a manner

satisfactory to these parties by separate agreement, which is contingent upon the opening of the Duckwood Crossing consistent with the terms set forth herein.

17. Consistent with paragraph 13 of the Duckwood Stipulation, Applicant, Union Pacific and BNSF and CDOT hereby request that the Commission enter an Order as follows:

- a. Approving the terms of this Stipulation to be part of the final orders approving the Application;
- b. Approving the construction and opening of the Duckwood crossing consistent with this Stipulation and the Duckwood Stipulation;
- c. Approving the closure and removal of the Union Pacific/Mesa Road Crossing, the closure of the BNSF/Mesa Road Crossing to public traffic, and the opening of the Duckwood crossing as set forth in the *Amended and Restated Application* and in this Stipulation, with closure of the Union Pacific/Mesa Road crossing and the BNSF/Mesa Road crossing delayed until and contingent upon the opening of the Duckwood crossing.

18. This Stipulation may be enforced only by the parties hereto or their successors. The parties agree to cooperate and otherwise perform this Stipulation in good faith, and shall execute such additional documents or instruments as may be reasonably necessary or required in order to properly carry out and effectuate the terms, provisions and intent of this Stipulation.

19. This Stipulation constitutes a settlement of disputed and compromised claims regarding the proposed closure and opening of the Duckwood Crossing. Each party also agrees that except as expressly provided in this Stipulation, it will take no action in any administrative or judicial proceeding which would have the effect, directly or indirectly of contravening the provisions of this Stipulation. Furthermore, except as otherwise provided herein, nothing in this Stipulation shall constitute a waiver by any party with respect to any matter not specifically addressed in this

Stipulation.

20. This Stipulation shall not become effective until the Commission issues an Order approving the Stipulation, which Order does not contain any modification of the terms and conditions of this Stipulation that is unacceptable to any of the parties to the Stipulation. In the event the Commission modifies this Stipulation in a manner unacceptable to any party hereto, that party may withdraw from the Stipulation and shall so notify the Commission and the other parties to the Stipulation in writing within 10 days of the date of the final Commission Order. In the event a party exercises its right to withdraw from the Stipulation, the Stipulation shall be null and void and have no effect.

21. In the event this Stipulation becomes null and void, or in the event the Commission does not approve this Stipulation, this Stipulation as well as the negotiations undertaken in conjunction with this Stipulation shall not be admissible into evidence in any subsequent proceeding.

22. The parties state that they have reached this Stipulation by means of a negotiated process that is in the public interest, and that the results reflected in this Stipulation are just, reasonable and in the public interest.

23. This Stipulation may be exercised in separate counterparts, including facsimile. The counterparts taken together shall constitute the Stipulation. The parties represent that the signatories to the Stipulation shall have full authority to bind their respective parties to the terms of the Stipulation.

24. The Stipulation shall be governed by and construed in accordance with the Laws of the State of Colorado.

Dated 6th day of December, 2012.

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By: 

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BNSF:

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By: _____



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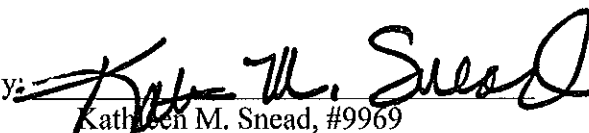
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