STATE OF CALIFORNIA
PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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July 23, 2002

TO: PARTIES OF RECORD IN CASE 01-01-016
DECISION 02-07-050, MAILED JULY 23, 2002

On June 19, 2002, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 8.2 of the Commission's Rules of Practice and Procedure provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

Carl K. Oshiro, Interim Chief
Administrative Law Judge

CKO:hkr

Attachment

Decision 02-07-050 July 23, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Lynn R. and Roma Buehler, et al., Complainants, vs. Burlington Northern & Santa Fe Railway Company, Defendant.	Case 01-01-016 (Filed January 8, 2001)

Marguerite P. Battersby, Attorney at Law, and Elizabeth Grady Merkin, for Lynn R. and Roma Buehler, et al., complainants.

Benjamin B. Salvaty, Attorney at Law, and R. Curtis Ballantyne, for Burlington Northern & Santa Fe Railway Company, defendant.

OPINION RESOLVING COMPLAINT

Summary

In today's decision, we resolve this complaint, in which, through earlier ruling, we temporarily enjoined the defendant railroad from closing a crossing. The temporary restraining order (TRO) responded to access concerns raised by complainants, including the lack of ready alternatives to the crossing for use by emergency response vehicles. Today, we decline to make the injunction permanent, but we will continue the injunctive relief for 120 days to give the

parties time to consider a permanent solution consistent with guidance provided in the decision.

Procedural Background

Complainants request (1) a declaration of complainants' and the public's continued right to use the Summit Truck Trail, which complainants allege is a nonexclusive easement and public right of way; (2) a preliminary and permanent injunction enjoining Burlington Northern & Santa Fe Railway Company (BNSF) from obstructing or interfering with complainants' or the public's use of the Summit Truck Trail; and (3) damages under the theory of inverse condemnation. BNSF denies there is a nonexclusive easement and public right of way in the Summit Truck Trail where it crosses over BNSF's tracks. BNSF raises 17 affirmative defenses, including whether the Commission lacks subject matter jurisdiction to determine property rights and whether complainants have suffered a compensable invasion of their rights. BNSF further alleges the crossing is private and is immune from acquisition by prescription and by adverse possession.

Four days before tendering this Complaint, complainants, by letter to the Chief Administrative Law Judge, requested a TRO requiring BNSF to remove the barricade that it placed across the Summit Truck Trail. BNSF opposed the TRO. On February 27, 2001, the assigned Commissioner and Administrative Law Judge (ALJ) granted the TRO, which required BNSF to remove all barricades, gates, fences and padlocks it erected across the Summit Truck Trail crossing, and to refrain from erecting any other obstruction until further order of the Commission.

BNSF filed a motion to dismiss parts of the complaint. By ruling on May 23, 2001, the assigned ALJ denied the motion insofar as the complaint asks us to determine (1) whether the Summit Truck Trail crossing is private, public, or

publicly used, and (2) what access rights follow from such a determination. The ruling granted the motion insofar as the complaint asks us to resolve issues of inverse condemnation; the Commission lacks jurisdiction to resolve such issues.

The Commission held evidentiary hearings on March 21 and April 25, 2001. Complainants presented nine witnesses, Supervisor Bill Postmus, Chard Walker, Tim Sakaguchi, Complainant Roy Jones, Complainant Lynn Buehler, Dennis Felgar, Complainant John Terry, Complainant Garnett Van Natta, and Charles Laird. Defendant presented one witness, Rudy D. San Miguel Jr., and subpoenaed Commission staff engineer, Steven J. Handelman. Opening and reply briefs were filed on July 9 and July 30, 2001. Pursuant to ruling, complainants, BNSF, and Intervenor County of San Bernardino (County) filed supplemental briefs on whether the Commission can or should find the Summit Truck Trail crossing a private crossing publicly used. With the filing of supplemental briefs (September 13, 2001), the case was submitted.

Complainants contend they and the public generally have a present and continuing right to use the public right of way of the Summit Truck Trail. BNSF disputes the claimed right and requests that the TRO be dissolved.

Factual Background

The parties do not dispute most facts concerning the Summit Truck Trail and crossing and their use by emergency response vehicles and the public generally.

1. Summit Truck Trail

The Summit Truck Trail, also referred to as Post Office Road, is a dirt road that has existed for approximately 100 years. It runs between Jenny Street at Highway 15 and State Route 138, and traverses the Oak Hills development where complainants reside. Most of the Summit Truck Trail is part of the Zone B Oak Hills Transportation Facilities Plan (Plan), adopted by the County of San

Bernardino in 1989. Improvements to the Summit Truck Trail within the Plan boundaries were scheduled for early in the Plan, and fees are being collected for that purpose. Decker Road is the southern boundary of the Plan. One complainant's home (Jones) is one-half mile south of Decker Road and is the most southerly residence in Oak Hills. His home is approximately one-half mile north of the crossing. The portion of the Summit Truck Trail below Decker Road that crosses BNSF's tracks is not part of the Plan and the County does not maintain that portion.

The public has used the Summit Truck Trail regularly since at least 1934. Property north of the tracks includes private property, Bureau of Land Management lands, and utilities' property. Complainants' properties are not adjacent to or bisected by BNSF's right of way. Oak Hills has approximately 6,800 residents.

2. Crossing

The crossing at issue is where the Summit Truck Trail crosses the BNSF right of way and tracks at Mile Post 55.82. BNSF relocated its tracks to that site 30 years ago after obtaining the parcel across the trail. The crossing which resulted from the relocation of the tracks was intended to be used by railroad maintenance crews, as well as Forest Service and Edison Power Company maintenance crews, and was considered by BNSF to be a private crossing. BNSF brought in fill dirt to bring the Summit Truck Trail up to the grade of the rail line being placed so that vehicles could pass over the tracks.

There has been one fatality at the crossing. In the latter part of 1994, BNSF decided to close the crossing to prevent public access. BNSF contacted the County, which confirmed that the Summit Truck Trail was not in the County Maintained Road System but declined to consent to the closure because the road might provide access to property above or north of the tracks.

Commission staff recommended that the crossing be closed in a May 8, 1995 letter. Factors noted in that letter include train speeds of 55 and 50 MPH, the presence of two operating main line tracks, the roadway geometrics and view obstructions, and the daily maximum of 56 freight and 2 Amtrak trains. (In 2001, these numbers had increased to 75 freight and 4 Amtrak trains per day.)

The crossing was closed on or about November 1, 2000. After the crossing was closed, BNSF met with Commission staff to address allegations that property owners affected by the closure had no alternate access routes available to them. Alternate routes available are two roadway main entrances to the Oak Hill properties provided from the north side of the subdivision from Mariposa Road.

At the time of the closure, passive warning devices consisting of stop signs protected the crossing. Private crossing signs in accordance with General Order 75-C are placed near the crossing. Commission records do not list the Summit Truck Trail as a public crossing.

3. Emergency Use of the Summit Truck Trail and Crossing

The Summit Truck Trail and crossing is used by Station 48 of the County Consolidated Fire Department to provide emergency response to the Oak Hills community. There is no other easily traversed crossing that emergency response can use. The community also uses the road for personal and business purposes. Some residents have mailboxes near the intersection of the Summit Truck Trail and Highway 138. In storms the northern portion of the Summit Truck Trail is impassable for an hour or two. The southern portion of the Summit Truck Trail is not impassable.

Station 40, which is located north of the BNSF crossing, provides primary emergency response to complainants' properties. Station 48 is closer to the southern portion of the Oak Hills property. Station 40 responds to Oak Hills

20-25 times a year by itself. Station 48 responds to Oak Hills 30-40 times each year and historically has been able to beat Station 40 into the southern area of Oak Hills. There are no alternate routes for Station 48's emergency response to Oak Hills that add less than 30 minutes to the response time. When the barricades were in place and the chain lock needed to be unlocked, a delay of 3 to 7 minutes occurred. On one occasion the lock froze. After BNSF permitted the Fire Department to page a security guard who unlocked the barricade before the emergency vehicle's arrival, there was no delay in response time. The Fire Department paged the security guard, and the guard opened the lock and swung open the barricade so the units could go through without delay.

Parties' Contentions

Complainants assert that the crossing is a public crossing and that the public acquired an easement and right of way in the Summit Truck Trail by implied-in-law dedication. Complainants further assert that exclusive jurisdiction to close the crossing resides with the Commission, and that BNSF did not obtain or seek the Commission's authority to close the crossing. Finally, complainants state the Commission can find that the Summit Truck Trail crossing is a publicly used private crossing reasonably necessary or convenient for ingress and egress to other lands.

BNSF asserts that there is no evidence to support a Commission finding that the Summit Truck Trail crossing is a statutorily required private crossing, and that there is no judicial determination of any public easement or right of way where it crosses BNSF's right of way. BNSF states it has not dedicated the crossing, and the County has not agreed to accept such dedication. BNSF asserts that the public convenience and necessity do not require keeping the crossing open. Finally, BNSF states that the Summit Truck Trail crossing is not a private crossing publicly used because no private lands immediately adjoin the crossing.

The County joins in complainants' position that the Commission can find the Summit Truck Trail a private crossing publicly used.

Discussion

1. Overview

To resolve this complaint, we must determine the legal status of the crossing. We must also determine whether circumstances require that the crossing remain open. Finally, if the crossing is to remain open, we must determine whether safety issues necessitate improvements and who should bear the costs to improve and maintain the crossing.

Existing circumstances warrant extending injunctive relief for 120 days to permit the parties sufficient time to consider a permanent solution consistent with this decision. We decline to order BNSF to leave the crossing open and unrestricted permanently. Although (as we will explain later) the crossing has been treated as private and is publicly used, we decline to order that this crossing remain open to permit access for complainants and the general public, because there are alternate routes available to them. In addition, complainants are not adjoining landowners who can establish a private crossing for their benefit.

We affirm the assigned Commissioner's and ALJ's issuance of the TRO, which required BNSF to remove all barricades, gates, fences and padlocks it erected across the Summit Truck Trail crossing and to refrain from erecting any other obstruction until further order of the Commission. We further affirm the assigned ALJ's ruling on BNSF's motion to dismiss.

2. Legal Status of the Crossing

We must first determine the legal status of the Summit Truck Trail crossing. Whether a crossing is private, public, or publicly used is primarily a factual issue. Pub. Util. Code §§ 1201, 1202, 1202.3, and 7537 address public and

private crossings and the Commission's authority to grant or close such crossings. Private crossings generally permit property owners whose land adjoins the railroad right of way to have access to that land. Public crossings generally traverse public roads, highways, and streets. However, both private and public crossings can traverse publicly used roads. Legal standards governing private landowners' access to private crossings, such as they exist, pertain to adjoining landowners. Access problems also can arise under circumstances, such as those presented here, where landowners are not adjacent to the railroad tracks and crossing, but access problems do not, by themselves, create a legal entitlement to a crossing.

If a crossing is private, the Commission can determine whether keeping it open is necessary and whether safety measures are sufficient. If a crossing is public, the Commission similarly can determine whether it should be altered, relocated or closed.

a. Private Crossing

Pub.Util. Code § 7537 provides in relevant part:

> The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner . . .

BNSF asserts that the Commission cannot find the Summit Truck Trail a private crossing under § 7537, because § 7537 only applies to adjoining landowners and complainants' property is not adjacent to BNSF's right-of-way. There is a distinction between whether a crossing is private and whether a property owner has a right to assert the need for a private crossing. The record points to the Summit Truck Trail as having been treated as a private crossing but

further demonstrates that complainants are not entitled to establish a private crossing under § 7537. Signage near the crossing states the crossing is private. BNSF relocated its tracks and the crossing when it purchased the property across the Summit Truck Trail and did not seek Commission approval to move the crossing. BNSF thereby treated the Summit Truck Trail as a private crossing, but complainants are not owners of lands adjacent to that crossing. Private property does adjoin the BNSF right-of-way, but complainants do not own that property. Thus, complainants lack standing under § 7537 to request that the Commission formally adjudicate the crossing as private for purposes of their "ingress to or egress from" lands through which the "railroad is constructed or maintained."

Complainants assert they have an easement, but BNSF states it has never granted one. There is no order that grants complainants the easement they assert. There is a judgment in civil court that the Summit Truck Trail is a public road but that judgment applied to a different section of the Summit Truck Trail, and the proceeding did not include BNSF. (Oak Hills Property Owners Association, Inc. v. Gary T. Sanderson, California Court of Appeal, Fourth District, Division Two, E015845 (filed January 24, 1997: unpublished opinion).)[1] We have found that easements by prescription to a public railroad right of way cannot occur. (*See* In the Matter of the Application of David O. Daily, et al., (1981) D.93087, 6 CPUC 2d 184, 189.) The prior judgment is insufficient to permit complainants continued use of the Summit Truck Trail crossing.

b. Public Crossing

The Commission has exclusive power to:

[1] Katherine and Garnett Van Natta and John T. and Clyveen R. Terry were individual plaintiffs/respondents to the court action and are complainants here. Roy Jones was a defendant to the court action and is a complainant here.

> Determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or of a railroad by a street. (Pub. Util. Code § 1202(a).)

Although the BNSF tracks cross the Summit Truck Trail, a publicly used road, Commission records do not treat the crossing as public. The fact that the Summit Truck Trail is not in the County-maintained road system prevents a finding that the crossing is public. Because there is no dedication and no judicial determination of implied dedication, we cannot find the crossing public on the record before us. (*See* Southern Pacific Transportation Co. v. Public Utilities Commission, (1976) 18 Cal. 3d 308, 314, 134 Cal. Rptr. 189.) Pub. Util. Code § 1202.3 requires:

> Notwithstanding any other provision of this chapter, in any proceeding under Section 1202, in the case of a crossing involving a publicly used road or highway not on a publicly maintained road system, the commission may apportion expense for improvements to the county in the case of unincorporated territory, city or other political subdivision if the commission finds (a) that the owner or owners of private property served by such publicly used crossing agree to expressly dedicate and improve, and the affected public agency agrees to accept, a right-of-way or roadway over such property for a reasonable distance from such crossing as determined by the commission, or (b) that a judicial determination of implied dedication of such road or highway over the railroad right-of-way to public use, based on public user in the manner and for the time required by law, has taken place.
>
> If neither of these conditions is found to exist, the commission shall order the crossing abolished by physical closing.

Although there is no pending application at the Commission for a public crossing at the Summit Truck Trail, there is no legal barrier to filing such an application, as long as the constraints presented by § 1202.3 are resolved. In 1974, the California Department of Transportation applied to the Commission for a public crossing at the Summit Truck Trail as part of a road improvement project but withdrew that application when the project did not proceed.

3. Necessity for Keeping the Crossing Open

We next must consider whether it is necessary to keep open the Summit Truck Trail crossing by evaluating the need for such crossing under Pub. Util. Code §§ 7537 and 1202(b).

a. Necessity for a Private Crossing

The Commission has exclusive authority to alter, relocate, or abolish a public crossing. (Pub. Util. Code § 1202(b).) Where, as here, there is a dispute among the parties, we can adjudicate the need for a private crossing. (Pub. Util. Code § 7537; *see* 6 CPUC 2d at 190.) A licensing agreement generally is required. (*Id.* at 188-189.) However, adjacent property owners are not parties to this proceeding, and there is no evidence to indicate they would be amenable to negotiating a licensing agreement. Ordering the parties to negotiate a licensing agreement would not resolve the parties' dispute over the need for the crossing, because the Oak Hills properties are not adjacent to the crossing and there are other property owners and an additional crossing (belonging to Union Pacific Railroad) before the Summit Truck Trail reaches complainants' properties. Thus, formally determining that the crossing should remain open as a private crossing is neither reasonable nor in the public interest.

Residents and the general public used the Summit Truck Trail for decades without restriction. Emergency response vehicles also regularly use the crossing. However, existing circumstances, as reflected in the record, do not

sustain a finding of necessity for the Summit Truck Trail crossing to remain open as a private crossing publicly used. We distinguish an earlier decision in which we kept open a "publicly" used private crossing, and required the railroad to pay for improvements, in order to permit access to a parking lot for a number of businesses. (Re Southern Pacific Transportation Co., (1970) D.77892, 71 CPUC 490.) In the Southern Pacific proceeding, the crossing was directly between a paved parking lot and businesses and a paved road. Here, however, complainants are not adjacent landowners, and the Summit Truck Trail is an unimproved road that is approximately a mile away from the Oak Hills residences.

b. Necessity for a Public Crossing

Use of the Summit Truck Trail and crossing for emergency response, a public use, is the most compelling reason for the crossing to remain open. Although Station 48 is designated the backup unit for emergency response to the Oak Hills community, it annually responds almost twice as frequently as the primary response unit. Station 48 has no alternate access route that permits such timely response. On balance, the one fatality at the crossing in the 30 years at its present location and other safety concerns do not preclude use of the crossing for emergency response access to the community, so long as the safety concerns are appropriately addressed.

Sections 1201 and 1202 give the Commission exclusive authority to grant a public crossing and to determine the manner by which it operates. Due to the need for emergency response access, the Commission could grant an application under Pub. Util. Code §§ 1201 and 1202 and Rules 38 and 39 of the Commission's Rules of Practice and Procedure to convert the Summit Truck Trail private crossing to a public crossing, provided that the application meets requirements for safety improvements and maintaining the road.

Although there is no current application for a public crossing at the Summit Truck Trail, County Supervisor Postmus has stated:

> We will do everything in our power to keep the crossing open so that we can have the fastest possible response to all our emergency personnel; and if that means filing for [a public crossing], then we'll do it.

The County's stated desire to continue emergency response access through the Summit Truck Trail crossing permits us to find that the County could potentially be authorized to convert the existing private crossing to a public crossing. We next address the requisite safety improvements and road maintenance arrangements.

4. Need for Safety Improvements

Our staff has noted safety concerns at the Summit Truck Trail crossing and has recommended closure. In addition, there has been a fatality at the crossing. In recommending closure, staff notes it favors eliminating railroad grade crossings where possible and upgrading present grade crossing warning devices. According to staff, the Association of American Railroads, the California Department of Transportation, and the United States Department of Transportation—Federal Highway Administration also favor crossing elimination or upgrades.

We would require safety improvements at the crossing, if approved as a public crossing, and apportion the cost of those improvements and maintenance expenses between the County and BNSF. The Commission supports the elimination of unsafe grade crossings. (*See* Application of the City Oceanside for an Order Authorizing Construction of a Private Crossing, D.01-11-016, 2001 Cal. PUC LEXIS 1052 *7.) Where circumstances warrant keeping open a crossing, we can order safety upgrades consistent with our general orders. To address staff's safety concerns, should the crossing remain

open as a public crossing, we would require two standard number 9 automatic gate-type warning devices under General Order 75-C.

Because the Summit Truck Trail is not a publicly maintained road system, we cannot find the crossing a public crossing and order safety improvements without addressing whether there is dedication. Instead, we can consider an application to convert the private crossing to a public crossing at the Summit Truck Trail if the County incorporates the portion of the Summit Truck Trail below Decker into the County-maintained road system, thereby eliminating the need for dedication. Because the County must maintain that portion of the Summit Truck Trail for the benefit of emergency response to Oak Hills residents, those residents should bear the cost of necessary improvements.

The County should have the opportunity to determine whether it is feasible to incorporate the Summit Truck Trail into the County-maintained road system and, if so, to file an application to convert the private crossing at the Summit Truck Trail to a public crossing. The application must be filed within 90 days of the effective date of this order. The application must show the County is prepared to meet appropriate conditions regarding safety improvements and maintaining the road. If the County does not file such an application, we order BNSF to close the crossing 120 days after the effective date of this order, after giving the County Fire Department 30-day's notice and posting notice of the date of closure on the private crossing signs 30 days in advance of closure. If the crossing is closed, we further order BNSF to place a security guard at the crossing who will open the barricade when paged to permit emergency response to proceed as quickly as if there were no barricade. This requirement will continue until further order of the Commission.

5. BNSF's November 2000 Closure of the Crossing

BNSF failed to provide notice to the public and to the Fire Department in advance of closing the crossing. Consistent with the need for notice discussed in Selby v. Union Pacific Railroad, D.00-02-035, 2000 CPUC LEXIS 49, BNSF should have posted a notice of the pending closure on the private crossing sign near the crossing at the Summit Truck Trail and should have listed a number where residents could have called to obtain information about the pending closure. BNSF also should have notified the Fire Department in advance of closing the crossing to ensure that emergency response access was not interrupted. Although BNSF did consult Commission staff and the County, the County did not know how frequently residents north of the tracks used the crossing. BNSF knew that the crossing was used by the public and could have determined how frequently residents and emergency response vehicles used it. As discussed above, we will require BNSF to provide notice in advance of closing this crossing.

Attorney's fees

Complainants seek attorney's fees. We have the power to award attorney's fees under the common fund theory in adjudicatory proceedings, as described in Consumers Lobby Against Monopolies v. Public Utilities Commission, (1979) 25 Cal. 3d 891 (CLAM).[2] Our Advocates Trust Fund (created following the CLAM decision) provides for compensation of attorney's fees directly related to litigation or representation of consumer interests in quasi-judicial complaint cases. There are three situations in which parties may

[2] Besides CLAM, the Commission has authority under Pub. Util. Code §§ 1801-1812 to award attorney's and other fees and costs. However, the statutory fee award program applies only to our proceedings involving electric, gas, water, or telephone utilities; the program does not apply to a proceeding, such as this case, involving a railroad.

establish eligibility for such compensation: (1) if they generate a common fund but that fund is inadequate to meet reasonable attorney or expert witness fees; (2) if a substantial benefit has been conferred upon a party or members of an ascertainable class of persons but no convenient means are available for charging those benefited with the cost of obtaining the benefit; or (3) if they have acted as private attorneys general in vindicating an important principle of statutory or constitutional law, but no other means of fund is available for an award of fees. (*See* Karrison v. A&P Moving, Inc., D.01-07-034, 2001 Cal. PUC LEXIS 539.) Complainants have not established eligibility for award of attorney's fees under any of the three theories. Therefore, we deny their request.[3]

Findings of Fact

1. BNSF closed the Summit Truck Trail crossing on November 1, 2000.

2. BNSF failed to provide notice to the public and to the County Fire Department in advance of closing the Summit Truck Trail crossing.

3. On February 27, 2001, the assigned Commissioner and Administrative Law Judge granted complainants' request for a temporary restraining order and required BNSF to remove all barricades, gates, fences and padlocks it erected across the Summit Truck Trail crossing and to refrain from erecting any other obstruction until further order of the Commission.

4. The Summit Truck Trail is a dirt road that has existed for approximately 100 years. It is not in the County Maintained Road System.

5. Property north of the tracks includes private property, Bureau of Land Management lands, and utilities' property. Complainants' properties are not

[3] We note, in any event, that currently the Advocates Trust Fund is depleted.

adjacent to or bisected by BNSF's right of way. The nearest landowner is approximately one half to one mile away.

6. BNSF relocated its tracks to that site 30 years ago after obtaining the parcel across the trail. The crossing which resulted from the relocation of the tracks was intended to be used by railroad maintenance crews, as well as Forest Service and Edison Power Company maintenance crews, and was considered by BNSF to be a private crossing.

7. Staff recommends closing the Summit Truck Trail crossing, citing policy that calls for a safety program for the elimination of railroad grade crossings and upgrading present grade crossing warning devices.

8. At the time of the closure, passive warning devices consisting of stop signs protected the crossing. Private crossing signs in accordance with General Order 75-C are placed near the crossing. At the Commission, the Summit Truck Trail is not listed as a public crossing.

9. Alternate routes to the Summit Truck Trail and the Summit Truck Trail crossing are two roadway main entrances to the Oak Hill properties provided from the north side of the subdivision from Mariposa Road.

10. The Summit Truck Trail and crossing are used by the County Fire Department to provide emergency response to the Oak Hills community. There is no other easily traversed crossing that emergency response can use.

11. Station 40, located north of the BNSF crossing, provides primary emergency response to complainants' properties. Station 48 is closer to the southern portion of Oak Hills. Station 40 responds to Oak Hills 20-25 times a year by itself. Station 48 responds to Oak Hills 30-40 times each year and historically has been able to beat Station 40 into the southern area of Oak Hills.

Conclusions of Law

1. The TRO requiring BNSF to remove all barricades, gates, fences, and padlocks erected across the Summit Truck Trail is dissolved.

2. It is reasonable to require BNSF to keep open The Summit Truck Trail crossing for 120 days from the effective date of this order for the parties to consider a permanent solution consistent with guidance provided in the decision.

3. To determine that the Summit Truck Trail crossing is a private crossing under Pub. Util. Code § 7537 that should remain open is neither reasonable nor in the public interest under existing circumstances.

4. Existing circumstances do not make it reasonably necessary for the Summit Truck Trail crossing to remain open as a private crossing publicly used.

5. It is reasonable to give the County of San Bernardino 90 days from the effective date of this decision to file an application to convert the private crossing at the Summit Truck Trail to a public crossing, subject to the conditions discussed in this decision.

6. It is reasonable to require BNSF to close the Summit Truck Trail crossing 120 days after the effective date of this order if the County of San Bernardino does not file an application for a public crossing at the Summit Truck Trail. Such closure should be subject to stationing a security guard, as discussed in this decision.

7. Lynn R. and Roma Buehler's request for attorney's fees should be denied because they have not established eligibility for compensation.

8. Today's order should be made effective immediately so that the permanent status of the crossing at issue may be resolved as soon as possible.

ORDER

IT IS ORDERED that:

1. The Burlington Northern & Santa Fe Railway Company (BNSF) shall not obstruct the Summit Truck Trail crossing for 120 days from the effective date of this order subject to the terms and conditions contained in this opinion and order.

2. The County of San Bernardino has 90 days from the effective date of this order to file an application for a public crossing at the Summit Truck Trail subject to the terms and conditions contained in this opinion and order.

3. If the County of San Bernardino does not file an application as set forth in Ordering Paragraph 2, BNSF shall close the Summit Truck Trail crossing permanently, subject to the terms and conditions contained in this opinion and order.

4. The complaint is granted to the extent set out in these ordering paragraphs and is otherwise denied.

5. This proceeding is closed.

This order is effective today.

Dated July 23, 2002, at San Francisco, California.

JUL 2 5 2002