

March 2, 2006 Proposed Joint Use Agreement with BNSF Railway Company

Secretary Rhonda G. Faught, P.E.
Secretary, New Mexico Department of Transportation
P.O. Box 1149
Santa Fe, New Mexico 87504-1149

Re: **Proposed Joint Use Agreement with BNSF Railway Company.**

Dear Secretary Faught:

By letter dated December 6, 2005, you called upon me to opine on the legal sufficiency of the Joint Use Agreement (Agreement) that the New Mexico Department of Transportation (NMDOT) and Burlington Northern Santa Fe Railway Company (BNSF) executed on or about December 5, 2005. Under NMSA 1978, Section 8-5-2 (D), as the State of New Mexico's Attorney General, I may give an opinion in writing upon a question of law submitted to me by an appointed state official. Moreover, under the terms of the Agreement, BNSF has required my opinion as to the Agreement's legal sufficiency under the laws of the State of New Mexico as a condition to closing.

In performing my legal review, I express no opinion as to the economics or the merits of the Agreement. Nor do I express any view as to whether the Agreement is beneficial or detrimental to the interests of the State Of New Mexico. My legal opinion addresses only the legal sufficiency of the Agreement and is an expression of professional judgment and not a guarantee of a particular outcome.

In the course of reviewing the Agreement, my senior staff and I have had extensive discussions with your outside counsel. As part of those discussions my staff and I reviewed the Agreement noted above and the correspondence and other materials referenced below. In the course of those discussions and reviews, I pointed out a number of changes that needed to be made to the Agreement including:

1. Deletion from the Agreement of the purchase of that portion of the rail line and equipment outside the State of New Mexico to be replaced by an option to purchase the property at a later date.
2. Recognition and acknowledgement in the Agreement that any release of liability in favor of BNSF Railway may apply only to unliquidated claims as provided by Article IV, Section 32 of the New Mexico Constitution and the laws of New Mexico.
3. Clarification in the Agreement that all arbitrations of disputes will be based upon New Mexico substantive law and will be subject to judicial scrutiny by a New Mexico court of competent jurisdiction.
4. Clarification in the Agreement that the source of funds to be placed in the Escrow Account will be special funds, not general tax revenues, and that general tax revenues

are not to be used to pay any future or contingent obligations of NMDOT under the Agreement.

5. Your written commitment that the results of the environmental audit performed on the subject property have been independently reviewed to ensure that any claim of conflict of interest has not affected the audit results. I appreciate the additional documentation that you provided to my Office concerning the environmental audit results in response to my request.

With respect to these needed amendments, I appreciate the full cooperation your office and your counsel provided in communicating with BNSF Railway and obtaining these changes to the Agreement. I therefore rely upon the representations of you and your counsel that no closing will occur until the Agreement is amended accordingly.

The Joint Use Agreement is part of a larger plan to develop a passenger light rail system in New Mexico. Such a project has not been previously undertaken in New Mexico and therefore the project is a matter of first impression here. New Mexico's courts have not had occasion or reason to rule upon a proposed transaction and project of this type. Because of the unprecedented nature of this project for New Mexico, I have concluded that I should state the factual assumptions and legal conclusions upon which I base my Opinion.

I assume, based upon the limited review noted herein, as follows:

1. BNSF Railway has sufficient title to all property and rights of use to be conveyed to New Mexico pursuant to the Agreement and the individuals signing on behalf of BNSF Railway have full corporate authority to enter into the Agreement.
2. BNSF Railway has properly performed or will perform all duties, inspections, audits, consultations, and provided or will provide all notices as required by it under the Agreement, the law of New Mexico, and any applicable federal law.

My legal conclusions are based upon the limited review noted herein and are as follows:

1. The NMDOT has statutory authority to enter into the Agreement. (See 2003 New Mexico Laws (Special Session) Chapter 3, Section 27; NMSA 1978 Section 67-3-70,71; NMSA 1978 Section 42-2-4; Secretary Faught letter of February 22, 2006, NMDOT outside counsel letters of January 20, 2006 and February 23, 2006, and NMDOT bond counsel letter of February 22, 2006 upon which I rely.)
2. The NMDOT has duly delegated its authority to those individuals signing the Agreement on behalf of New Mexico and NMDOT is capable of fully and lawfully performing its duties under the Agreement. (See Secretary Faught letter of February 22, 2006 upon which I rely.)

3. The GRIP bonds, the proceeds of which are to be used to pay for New Mexico's payments under the Agreement and the required liability insurance premium payments, have been lawfully issued and the funds lawfully collected and retained. I conclude that the GRIP bond proceeds may lawfully be used for the purposes contemplated by the Agreement. (See NMDOT bond counsel letter of February 22, 2006 upon which I rely.)

4. The contractual Escrow Fund identified in the Joint Use Agreement is a matter of first impression in New Mexico. I conclude, as limited herein, that our New Mexico courts would review supporting precedent and thereby likely conclude that the Escrow Fund is lawful and effective to implement the "Special Fund" doctrine so that any future or contingent liabilities arising from the Agreement may only be satisfied from the Escrow Fund. (See 2003 New Mexico Laws (Special Session) Chapter 3, Section 27; NMDOT outside counsel letter of January 20, 2006 and February 23, 2006 upon which I rely; NMDOT bond counsel opinion of February 22, 2006 upon which I rely; State ex rel. Linn v. Romero, 53 N.M. 402 (1949); Wiggs v. City of Albuquerque, 56 N.M. 214 (1952); Bolton v. Board of County Commissioners of Valencia, 119 N.M. 355 (Ct. App. 1994); and Treloar v. County of Chaves, 130 N.M. 794, (Ct. App. 2001).

5. The Joint Use Agreement is not a construction contract within the meaning of NMSA 1978 Section 56-7-1 et seq and therefore, NMDOT may lawfully indemnify BNSF as provided in the Agreement. (See NMDOT outside counsel letters of January 20, 2006 and February 22, 2006 upon which I rely; Brown v. Baltimore & Ohio Railroad Co., 805 F.3d 1133, (4th Cir. 1986); Lovellette v. Southern Railway Co. 898 F.2d 1286 (7th Cir. 1990); Fort Wayne Cablevision v. Indiana & Michigan Electric Co., 443 NE 2d 863 (Ind. App. 1983); and Illinois Central Gulf Railroad Co. v. International Paper Co., 824 F.2d 403 (5th Cir. 1987.)

6. The liability insurance coverages obtained by the General Services Department through its Risk Management Division to fulfill New Mexico's obligations under the Agreement were lawfully selected, the selected underwriters are authorized and licensed to underwrite these risks in New Mexico, and the insurance coverages selected are adequate to cover the liability risks for New Mexico. (See Secretary Jaramillo's letter of February 28, 2006, upon which I rely.)

7. The receipt of federal funds to implement the Agreement is not a precondition to the legality of the Agreement under the law of New Mexico. (See NMDOT bond counsel letter of February 22, 2006 upon which I rely.)

This Opinion is limited to the Joint Use Agreement and I express no opinion as to the four (4) prior transactions and agreements identified as exhibits and incorporated by reference into the Agreement.

Based upon and as limited by the foregoing, it is my opinion, to a reasonable legal certainty, that the Joint Use Agreement is lawful under the laws of the State of New Mexico.

Yours very truly,

PATRICIA A. MADRID
Attorney General