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SERVICE DATE – AUGUST 27, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34936

PORT OF MOSES LAKE—CONSTRUCTION EXEMPTION—MOSES LAKE,  
WASHINGTON

STB Finance Docket No. 34936 (Sub-No. 1)

PORT OF MOSES LAKE—ACQUISITION EXEMPTION—MOSES LAKE, WASHINGTON

Decided: August 21, 2009

By petition filed on August 28, 2008, the Port of Moses Lake (Port) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 in STB Finance Docket No. 34936 to construct rail lines in Moses Lake, WA, between the community of Wheeler and Parker Horn (Segment 1) and between Columbia Basin Railroad Company, Inc. (CBRW) trackage and the east side of the Grant County International Airport (Segment 2). In the same petition, the Port seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 in STB Finance Docket No. 34936 (Sub-No. 1) to acquire a segment of rail line from CBRW that runs approximately from Parker Horn near Stratford Road to near the Grant County International Airport (Segment 3), which would connect Segments 1 and 2. The Port plans to rehabilitate and upgrade Segment 3, including the upgrade of two signalized grade crossings. The Port estimates the total mileage of its construction and acquisition proposals to be approximately 11.5 miles in length.

In a decision served on October 3, 2008, the Board instituted a proceeding under 49 U.S.C. 10502(b). No comments opposing the transportation merits of the Port's petition were filed.

The Port has not sought authority to operate the rail lines at issue here. As noted in the October 3 decision, CBRW has indicated that it intends to file separately a verified notice of exemption to operate the rail lines. When filed, the operation exemption notice will be docketed as STB Finance Docket No. 34936 (Sub-No. 2).

The Board's Section of Environmental Analysis (SEA) and the Washington State Department of Transportation (WSDOT) jointly conducted an environmental review of the proposal and alternatives to the proposal. A detailed Preliminary Environmental Assessment (EA) was issued on November 7, 2008, for public review and comment. A Final EA, served on May 8, 2009, responded to comments on the Preliminary EA, developed and analyzed new alternatives and one modified route, corrected or added to information in the Preliminary EA,

modified 10 mitigation measures in the Preliminary EA, and recommended one new mitigation measure.

Following issuance of the Final EA, the parties successfully negotiated a Programmatic Agreement to address the identification and mitigation of historic sites and structures in accordance with section 106 of the National Historic Preservation Act, 16 U.S.C. 470(f). SEA issued a Post EA on June 16, 2009, recommending that the Board impose a mitigation measure to require the Port to comply with the terms of the executed Programmatic Agreement and recommending deletion of another historic preservation condition in the Final EA as now unnecessary.

After considering the entire record, including both the transportation aspects of the petition and the potential environmental issues, we will grant the requested construction and acquisition exemptions as discussed below, subject to the environmental mitigation measures recommended in the Final EA, as modified in this decision and in the Post EA. We are granting the Port exemptions from 49 U.S.C. 10901 for the construction of Segments 1 and 2 and acquisition of Segment 3. The EA here considered all of these activities, as well as the operation of these segments. Because Segment 3 is an existing line of railroad, when the Port acquires Segment 3, it will assume the common carrier obligation as to that segment. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), *aff'd sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982). Moreover, should the Port construct Segments 1 and 2 pursuant to the authority granted in this decision, the Port will acquire a residual common carrier obligation to provide service over those segments as well, even though CBRW plans to seek authority to become the actual operator of the line.<sup>1</sup> Thus, we are imposing in this decision the EA's final recommended mitigation measures, with appropriate modifications, that pertain to operation of all three segments. Specifically, although the Port might not become the actual operator of the line, we have modified the final recommended conditions in the EA that pertain to rail operations to impose the ultimate responsibility for carrying them out on the Port. Our final mitigation measures are set forth in Appendix A.

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<sup>1</sup> See, e.g., Big Stone-Grant Industrial Development and Transportation, L.L.C.--Construction Exemption--Ortonville, MN and Big Stone City, SD, Finance Docket No. 32645, slip op. at 2 (ICC served Sept. 26, 1995) (“[T]he constructing entity holds itself out to fulfill the common carrier obligation that attaches to the line. That obligation remains with the constructing entity even though its fulfillment may be undertaken by operating railroads under trackage rights, leases, or similar agreements.”), vacated on other grounds, Big Stone-Grant Industrial Development and Transportation, L.L.C.--Construction Exemption--Ortonville, MN and Big Stone City, SD, Finance Docket Nos. 32645, et al. (STB served June 9, 1998); Southern Electric Railroad Company--Construction Exemption--Jefferson County, AL, Finance Docket No. 31972 (ICC served Mar. 17, 1992) (“[Southern Electric Railroad Company] will be a rail carrier and have a common carrier obligation to provide service.”); Jackson County Port Authority--Construction Exemption--Pascagoula, MS, Finance Docket No. 31536 (ICC served Aug. 21, 1990) (“[Jackson County Port Authority] will become a rail carrier and will have a residual common carrier obligation to provide service.”).

## BACKGROUND

The Port is a noncarrier municipality of the State of Washington that is chartered for economic development. It operates the Grant County International Airport (GCIA) and the GCIA Industrial Park, which has over 1 million square feet of building space and over 1,000 acres of industrial and commercial land. In 2005, the Washington State Legislature appropriated \$2 million for the design and construction of the Northern Columbia Basin Railroad Project (Project), which is the subject of these proceedings. According to the Port, the Project will allow trains to bypass downtown Moses Lake, leaving that area available for possible future development as a waterfront park, boardwalk, and bicycle/pedestrian trail. The Project will also provide rail service to land designated for industrial development, which will enhance opportunities for economic development and attract new rail-dependent business to the area.<sup>2</sup>

As noted, the Project consists of three rail segments, two of which involve new construction. Segment 1 consists of approximately 4.5 miles of newly constructed track to connect, in the east, an existing industrial track that is connected to CBRW's main line in Wheeler to the east end of Segment 3 (described below) after crossing over Parker Horn, a body of water and arm of Moses Lake. An alternative water crossing, Alternative 1A, would cross Parker Horn further north at the mouth of Crab Creek and would then connect with the east end of Segment 3. By constructing a line between the existing CBRW line in Wheeler and Segment 3 just beyond Parker Horn, the Port hopes to provide not only a more direct route to GCIA, but also to encourage industrial development along Wheeler Road. The construction of Segment 1 will also relocate rail traffic from downtown Moses Lake, with the goal of improving safety in that area. The Port anticipates that the relocation of rail traffic will make that region more attractive to businesses and allow for possible acquisition of the existing right-of-way in downtown Moses Lake for development as a waterfront park, boardwalk, and trail.

Segment 2 consists of approximately 3.1 miles of new track to connect the west end of Segment 3 to the east side of the GCIA. This construction will allow access to the GCIA Industrial Park's 1,000 acres of low-cost industrial land and another industrial-zoned area being promoted for development to the east of Moses Lake. An alternative alignment to the north end of Segment 2, Alternative 2A, could also provide access to the east side of the GCIA industrial area. Alternative 2A would consist of approximately 3.6 miles of new track and would be slightly longer than Segment 2.

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<sup>2</sup> On October 8, 2008, the Board received correspondence from the Grant County Board of County Commissioners expressing support for the Project. Similarly, on October 30, 2008, the Board received correspondence from Joseph K. Gavinski, City Manager for the City of Moses Lake, expressing the City's support of the Project, noting that it will provide economic growth and reduce rail traffic through downtown Moses Lake. On April 1, 2009, the Board received correspondence from Craig L. Baldwin, Executive Manager of the Port, requesting that we expedite our final decision process, which, as discussed in more detail below, we have done to the extent practicable.

Segment 3 is the subject of the acquisition exemption. Segment 3 is an approximately 3-mile line currently owned by CBRW that runs from Parker Horn, near Stratford Road, to near the GCIA. Upon its acquisition, the property will be rehabilitated by the Port. The rehabilitation will consist primarily of upgrading two signalized grade crossings and replacing rails, ties, and other track materials to allow for the use of newer, larger rail cars.<sup>3</sup>

## DISCUSSION

### Rail Transportation Analysis

The construction and acquisition of railroad lines by noncarriers require prior Board approval under 49 U.S.C. 10901. However, under 49 U.S.C. 10502, we must exempt a transaction or service from regulation when we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is limited in scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Based on the information before us, we conclude that detailed scrutiny of the proposed construction and acquisition under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy. The requested exemptions will promote that policy. Exempting the proposed construction and acquisition will reduce the need for Federal regulation [49 U.S.C. 10101(2)], ensure the development of a sound rail transportation system with effective competition to meet the needs of the shipping public [49 U.S.C. 10101(4)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and reduce regulatory barriers to entry [49 U.S.C. 10101(7)]. Other aspects of the rail transportation policy will not be affected.

Regulation of the transactions is not necessary to protect shippers from an abuse of market power. According to the Port and CBRW, no shipper will lose service as a result of the proposed transactions. Rather, the proposed transactions will improve service to existing shippers and provide an opportunity for prospective shippers who could benefit from rail service to move onto the line in areas already designated for industrial development. No shippers or other parties have filed comments opposing the transportation merits of the proposal. Given our finding regarding market power, we need not determine whether the transactions are limited in scope.

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<sup>3</sup> We note that the Preliminary EA states that the Port plans to acquire approximately 0.5 miles of existing track located north of where Segments 2 and 3 meet for which no construction or rehabilitation is planned. However, this portion of existing track was not included in the Port's acquisition exemption. Therefore, the Port or other appropriate party will need to obtain appropriate authority to acquire this portion of existing track prior to operation over it.

## Environmental Analysis

In reaching our decision, we have also analyzed the environmental impacts associated with these proposals by fully considering the Preliminary EA, Final EA, Post EA, and the entire environmental record. Based on the environmental record, we have also assessed the alternative routes that have been studied and imposition of appropriate environmental mitigation conditions.

### 1. The Requirements of the National Environmental Policy Act

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43, requires Federal agencies to examine the environmental effects of proposed Federal actions and to inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, we must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize railroad construction as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential adverse environmental impacts. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Mid States Coalition for Progress v. STB, 345 F.3d 520, 533-34 (8th Cir. 2003) (Mid States). Thus, once the adverse environmental effects have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

### 2. The Environmental Review Process

As noted above, in this case the Preliminary EA was issued for public review and comment on November 7, 2008. The Preliminary EA concluded, based on available information from all sources, that the proposed construction, acquisition, and operation of approximately 11.5 miles of rail line in Grant County (the Build Alternative)<sup>4</sup> would not significantly affect the quality of the natural or human environment provided that all the recommended mitigation measures in the Preliminary EA were implemented.

SEA and WSDOT received 29 comments on the Preliminary EA. After considering the comments, a Final EA, dated May 8, 2009, was issued that developed and analyzed new alternatives and one modified route -- the Ecology Modification, which would modify a 0.94-mile portion of Segment 1 by shifting the rail line to the east in order to minimize impacts on wetlands and decrease impacts to wildlife habitat.

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<sup>4</sup> The Build Alternative includes within Segment 1 two different water crossings (one at Parker Horn and one at the mouth of Crab Creek, the latter designated as Alternative 1A) and within Segment 2 two different routes on the eastern side of the GCIA (the longer of which is designated as Alternative 2A).

The Final EA also modified several mitigation measures. These measures include: mitigation measure 7, which involves historic preservation; mitigation measure 13, which concerns impacts to over-water structures; mitigation measure 14(a), which addresses impacts to burrowing owls; mitigation measure 16, which concerns the northern leopard frog; mitigation measure 25, which addresses potential impacts to irrigation systems; mitigation measure 31, which addresses coordination with the Moses Lake School District regarding safety measures; mitigation measure 40, which concerns compliance with Federal Railroad Administration (FRA) track maintenance and inspections; mitigation measure 47, which concerns erosion and sediment control; mitigation measure 49(a), which addresses the handling and disposing of pollutants during construction; and mitigation measures 50(a) and (b), which concern construction-related mitigation measures. Further, the Final EA recommended new mitigation measure 58, which requires the Port to include conditions of all permits in any construction documents provided to contractors.

The Final EA determined that for the Build Alternative the environmentally preferred route would follow Segment 1 (utilizing the proposed Alternative 1A water crossing at Crab Creek and the subsequently developed Ecology Modification), to Segment 3, and then to Segment 2 (without Alternative 2A). But given the similarity between most of the environmental impacts associated with the Ecology Modification and the impacts associated with the corresponding 0.94-mile portion of Segment 1 (as originally proposed), and also given the moderate to negligible nature of those environmental impacts, the Final EA concluded that neither Segment 1 with the Ecology Modification nor Segment 1 without the Ecology Modification emerged as markedly preferable.

The Post EA contained an executed Programmatic Agreement setting forth the process to address any adverse effects to historic properties. After the Programmatic Agreement was executed, it was submitted to the Advisory Council on Historic Preservation on June 15, 2009. Therefore, the Post EA recommended that one of the historic preservation mitigation measures in the Final EA (mitigation measure 6) be modified to provide that the Port shall comply with the terms of the executed Programmatic Agreement, attached hereto as Appendix B, and that mitigation measure 7 be deleted.

### 3. Environmental Conclusions

After carefully reviewing the entire environmental record, we adopt all of the analysis and conclusions in the Preliminary EA, Final EA, and Post EA, including those not specifically discussed here. We are satisfied that this environmental documentation has allowed the Board to take the requisite “hard look” at potential environmental impacts, and accurately identified and independently evaluated the potential environmental effects associated with these proposals.

With respect to Segment 1, we identify Segment 1 with the Alternative 1A water crossing and the Ecology Modification as the environmentally preferred alignment, because the Ecology Modification would reduce wetland impacts and decrease impacts to wildlife habitat. We also authorize the Port to construct Segment 1 with only the Alternative 1A water crossing (and without the Ecology Modification), because, as the analysis in the Final EA demonstrates, the alternatives have similarly minor/negligible environmental impacts. With respect to Segment 2,

we find that Segment 2, without Alternative 2A, is the environmentally preferred alignment and, accordingly, we authorize construction of Segment 2. We agree that, subject to the 57 recommended mitigation measures set forth in Appendix A to this decision, all of which we will impose, the construction, acquisition, and operation of the line would not significantly affect the quality of the human environment, and that preparation of an Environmental Impact Statement is not required.

#### 4. Expedited Decision

As noted, the Port asked that we expedite our final decision process. The Port explains that two prospective shippers are in need of immediate rail service and that expedited action will facilitate the Port's efforts to obtain funding for the Project. While the Port's request is reasonable, the Programmatic Agreement here was not executed until June 2009, thus necessitating some delay in the completion of our proceedings. See Mid States, 345 F.3d at 554-55 (stating that the Board should not have issued a final decision in that case until the programmatic agreement was executed). Under the circumstances presented here, however, it is reasonable to make the exemptions at issue effective on September 9, 2009, rather than the typical 30 days after service of our final decision and publication in the Federal Register.

### CONCLUSION

We find, after weighing the various transportation and environmental concerns and considering the entire record, that the petitions for exemption should be granted. We further find that the Port may, subject to compliance with the mitigation measures listed in Appendix A to this decision, do the following: build Segment 1, with Alternative 1A and either with or without the Ecology Modification; build Segment 2 (without Alternative 2A); and acquire Segment 3.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

#### It is ordered:

1. Under 49 U.S.C. 10502, we exempt the proposed construction and acquisition of the above-described lines from the prior approval requirements of 49 U.S.C. 10901, subject to the mitigation measures imposed in this decision.
2. We adopt the environmental mitigation measures set forth in Appendix A to this decision, and we impose them as conditions on the construction and acquisition exemptions granted in this proceeding.
3. Notice will be published in the Federal Register on August 27, 2009.
4. Petitions to reopen must be filed by September 16, 2009.

5. This decision is effective on September 11, 2009.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Anne K. Quinlan  
Acting Secretary

## APPENDIX A

### FINAL ENVIRONMENTAL MITIGATION MEASURES<sup>5</sup>

#### **Air Quality**

1. The Port<sup>6</sup> shall implement best management practices and appropriate fugitive dust suppression controls, such as spraying water on haul roads adjacent to construction sites and exposed soils, street sweeping, covering loaded trucks, and washing haul trucks before they leave the construction site.
2. The Port shall comply with the requirements of all applicable Federal, state, and local regulations regarding open burning and the control of fugitive dust related to rail line construction activities.
3. The Port shall revegetate areas disturbed during construction with native grasses or other appropriate native habitat as soon as possible after construction activities are completed, to minimize windblown dust.
4. The Port shall shut off construction equipment when it is not in direct use, to reduce idling emissions.
5. The Port shall verify that construction equipment is properly maintained and regularly inspected and that required pollution control devices are in good working condition.

#### **Cultural, Historic, and Archaeological Resources**

6. The Port shall comply with the terms of the June 2009 Programmatic Agreement, which sets forth the steps for the identification and evaluation of historic sites and structures, as well as the mitigation of any adverse effects.
7. In the event that any unanticipated historic or cultural properties, archaeological sites, human remains, funerary items, or assorted artifacts are discovered during the proposed construction, the Port shall immediately cease all work and notify the SHPO, SEA, WSDOT, interested federally recognized Tribes, and consulting parties, if any, to

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<sup>5</sup> If there are conflicts between the measures in this Appendix and any Federal, state, or local requirements for the Project that are not preempted under the Interstate Commerce Act, such Federal, state, or local requirements shall prevail and supersede these measures.

<sup>6</sup> It is understood that the Port may utilize contractors, in which case the Port shall ensure that its contractors implement the mitigation measures imposed in this proceeding. The Port must also ensure that its operator of the line complies with all mitigation measures, including the Programmatic Agreement, applicable to line operators.

determine if additional consultation and mitigation is necessary. In the event that human remains are discovered, the Port shall also notify appropriate law enforcement agencies.

**Fish, Wildlife, and Vegetation**

8. The Port shall abide by construction timing and guidelines stipulated by the Washington Department of Fish and Wildlife (WDFW) through the Hydraulic Project Approval (HPA). If there are differences between the measures in this Environmental Assessment and the conditions of the HPA, the HPA criteria shall apply.
9. The Port shall consult with the WDFW and comply with its applicable laws and regulations so that Project-related construction activities are conducted in a manner that avoids or minimizes impacts to birds and bats (roosting bald eagles, over-wintering waterfowl, migrating shorebirds, foraging bats, and nesting birds).
10. To minimize disturbance to wildlife and vegetation to the maximum extent possible, the Port shall limit construction activities, including staging areas and vehicle turnaround areas, to the right of way or within previously disturbed areas. Existing vegetation shall be preserved to the maximum extent possible.
11. To preserve water quality in aquatic or wetland habitat, the Port shall implement measures to prevent uncured concrete from coming into contact with surface waters, and all refueling shall occur more than 200 feet from a water body or wetlands.
12. The Port shall minimize the impacts that could result from over-water structures, such as the structure crossing Crab Creek. To minimize or avoid impacts to walleye spawning, the Port shall comply with measures specified by the WDFW. Such measures may include, but are not limited to, avoidance of work within the waters of Crab Creek/Parker Horn between April 1 and early July.
13. To minimize or avoid impacts to nesting burrowing owls, the Port shall:
  - a. Conduct a directed survey for burrowing owl nests within 0.5 miles of the areas to be disturbed by construction. Surveys should be done during the breeding season (April to June) and should abide by WDFW protocol. Survey results should be submitted to WDFW prior to the start of construction. If active nests or nests that could become active are located along the route, WDFW may require additional mitigation such as artificial burrow installations.
  - b. Avoid new construction work in areas within 0.5 miles of identified nesting areas close to Segment 1, Alternative 1A, and Segment 2, between February 15 and September 25. If construction activities take place during this period, then the Port shall consult with WDFW to ensure that construction activities are conducted in a manner that avoids or minimizes impacts to burrowing owls.

14. To minimize or avoid impacts to bald eagle roost trees, the Port shall locate the Project alignment and support areas, such as staging areas, away from roost trees. If clearing of any roost trees is required, the Port shall create artificial roosts in an appropriate site near the existing roost.
15. To preserve existing aquatic and moist site vegetation habitats for the northern leopard frog to the maximum extent possible, the Port shall minimize clearing activities and locate equipment staging areas in previously disturbed areas, to the extent possible. The Port shall mitigate impacts to northern leopard frog habitat that will be disturbed or removed as a result of this Project. Acceptable mitigation will be determined by the WDFW and may include funds and/or equipment and man-hours dedicated to efforts by the WDFW to create and enhance habitat on the designated northern leopard frog recovery area of the Potholes Reservoir Unit south of Interstate 90.
16. To minimize or avoid impacts to Yuma myotis and Townsend's big-eared bats, the Port shall install bat boxes (alternative bat roosting structures) to allow bat roosting near the Crab Creek crossing.

### **Hazardous Materials**

17. Prior to initiating any construction activities, the Port shall consult and coordinate with the U.S. Environmental Protection Agency's (EPA) Region 10 Office and the Washington State Department of Ecology concerning appropriate investigation, if more is needed, and mitigation, as may be required, for the sites listed below. If more investigation is needed, such investigation shall be conducted by a qualified environmental professional, as defined by ASTM International and the EPA.
  - a. On Segment 1 and Alternative 1A, the Bernard Cattle Company site at the southwest corner of Broadway and Road 4 NE (Cherokee Road).
  - b. On Segment 1, the Grant County Road District No. 2 facility on the south side of Wheeler Road (Road 3 NE) between RP 1 and RP 2.
  - c. On Segment 2, the Randolph Road Base Dump (14A – EPA Site No. 8), and the Paint Hangar Leach Pit (14B – EPA Site No. 22).
  - d. On Segment 2, the Boeing polychlorinated biphenyl cleanup area located on Tyndall Road.
18. The Port shall coordinate with the operator of the rail line to develop a Spill Prevention Control and Countermeasures (SPCC) plan and an emergency response plan. In a manner consistent with applicable legal requirements, the SPCC plan and emergency response plan shall address the following:
  - a. Definition of what constitutes a reportable spill.

- b. Requirements and procedures for reporting spills to appropriate government agencies.
  - c. Equipment available to respond to spills and where the equipment will be located.
  - d. Training of personnel and training records.
  - e. List of government agencies and response personnel to be contacted in the event of a spill.
  - f. Measures to address the transport of hazardous materials by rail.
19. The Port shall observe the requirements of the FRA and other Federal, state, and local applicable requirements concerning the handling and disposal of any hazardous waste or hazardous materials and clean-up in the event of a spill during construction.
20. The Port shall ensure that the operator of the rail line observes the requirements of the FRA and other Federal, state, and local applicable requirements concerning the handling and disposal of any hazardous waste or hazardous materials and clean-up in the event of a spill during rail operation.
21. The Port shall ensure that locomotives associated with Project operations are checked regularly for leaks.

### **Land Use**

22. To the maximum extent practicable, the Port shall advise businesses and the public of construction schedules in advance to minimize disruptions.
23. The Port shall abide by all requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 et seq.). Relocation assistance shall be provided for any commercial properties acquired for the Project.
24. To the extent practicable, the Port shall negotiate with affected property owners to minimize any Project-related severance impacts, including impacts to irrigation systems.
25. The Port shall submit form 7460 (Notice of Proposed Construction or Alteration) to the Federal Aviation Administration prior to construction.

### **Noise and Vibration**

26. During construction, the Port shall ensure that manufacturer-recommended mufflers have been installed on all diesel-powered equipment used on the Project and that all equipment is kept in good operating condition.

27. The Port shall ensure that construction within the boundaries of the City of Moses Lake will not occur between 10:00 PM and 7:00 AM without prior approval by the City Council.

**Social Elements and Environmental Justice**

28. During Project construction, the Port shall comply with applicable state, county, and city regulations or requirements regarding detour signs and the routing of construction truck traffic. The Port shall also provide proper notification of the construction schedule to the public and the nearest fire department and emergency response units.
29. The Port shall work with the operator of the rail line, the City of Moses Lake, community organizations, and Longview Elementary School to arrange for a rail safety program, such as Operation Lifesaver,<sup>7</sup> to be offered at least once per year.
30. The Port shall coordinate with the operator of the rail line and the Moses Lake School District to help identify and implement practicable safe crossings and other potential rail safety measures.
31. On Segment 3, the Port shall upgrade the existing crossing gate structures and signs to help provide better advance warnings of approaching trains for pedestrians and drivers.

**Soils and Geology**

32. The Port shall construct the proposed Project in accordance with the American Railway Engineering and Maintenance of Way Association guidelines.
33. The Port shall mitigate the potential liquefaction of loose or soft alluvium or other soils during an earthquake by designing foundation elements for reduced soil strength, accounting for potential ground displacements, and/or implementing ground improvements.
34. The Port shall minimize sedimentation and erosion in the Project area by employing best management practices during construction.
35. The Port shall revegetate disturbed areas with native grasses as soon as practicable after Project construction ends.

**Traffic and Transportation**

36. The Port shall ensure, to the extent possible, that all truck activity associated with the construction of the proposed Project occurs during daytime hours.

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<sup>7</sup> Operation Lifesaver seeks to educate drivers and pedestrians about making safer decisions at crossings and around railroad tracks.

37. The Port shall consider school bus schedules in planning and executing the necessary road work.
38. The Port shall consult with appropriate Federal, state, and local transportation agencies to determine the final design of the grade crossings and associated warning devices.
39. The Port shall comply with applicable FRA track maintenance and inspection standards and ensure that the operator of the rail line does so.

### **Visual Quality**

40. To the extent practicable, the Port shall be responsible for the following:
  - a. Ensuring that only the vegetation that needs to be cleared for construction purposes is removed.
  - b. Using native flora and vegetation when replanting disturbed areas.
  - c. Adding compost to the soil before seeding or planting in order to increase plant establishment.
  - d. Ensuring that cut-and-fill slopes are blended with the form and line of the existing landscape through grading practices to enhance visual quality.
  - e. Ensuring that vegetative buffers, such as trees or bushy shrubs, are located near residential areas to help screen the railroad corridor from viewers. These buffers should be located where additional vegetation would not impair visibility at road crossings.

### **Water Resources**

41. The Port shall ensure that any bridge constructed over Crab Creek is designed such that stormwater runoff does not enter the water body.
42. For Project-related construction, the Port shall comply with the stormwater management requirements of all Federal, state, and local regulations regarding stormwater management, including the *Stormwater Manual for Eastern Washington* and National Pollutant Discharge Elimination System requirements.
43. The Port shall prepare an approved Stormwater Site Plan and a Temporary Erosion and Sediment Control Plan prior to construction. The temporary erosion control measures shall be inspected regularly by the Port and maintained as necessary to ensure that these measures are functioning properly.

44. Consistent with applicable legal requirements, the Port shall coordinate with the operator of the rail line to prepare a SPCC plan to minimize any impacts associated with accidental spills of hazardous materials. The SPCC plan will require the development of a spill contingency plan and will provide for the implementation of containment and other countermeasures that could prevent spills from reaching navigable waters or wetlands.
45. The Port shall implement the following erosion and sedimentation controls:
- a. Installing silt fencing with geotextile material along the proposed Project area perimeter to filter sediment from unconcentrated surface water runoff.
  - b. Placing catch basin inserts in all new and existing catch basins receiving runoff from the disturbed areas of the Project.
  - c. Placing straw bales in paths of concentrated runoff to filter sediment.
  - d. Preserving existing vegetation to the maximum extent possible.
  - e. Revegetating areas disturbed during construction with native grasses, where practicable. These areas shall be reseeded as soon as practicable to prevent erosion.
  - f. Covering exposed soils with plastic or straw in the event of a major storm.
  - g. Constructing temporary ditches, berms, and sedimentation ponds to collect runoff and prevent discharge of sediment into drainages, streams, or wetlands.
  - h. Installing stabilized construction entrances and exits<sup>8</sup> for truck access to the construction site to protect existing roadways and railroad tracks.
  - i. Cleaning any storm sewer facilities affected by Project construction to prevent sediment from leaving the site after construction is completed and erosion control measures are removed.
46. If the erosion and sediment control measures described above are not adequate to control erosion and sedimentation, all work shall cease and the Port shall consult with the Washington State Department of Ecology regarding additional erosion control or restoration measures to protect adjacent properties.
47. To avoid or minimize impacts to water resources during construction, the Port shall implement the following measures:

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<sup>8</sup> A stabilized construction entrance involves placing blacktop or gravel along the edge of the roadway to avoid erosion or displacement of soil where trucks access and leave the roadway.

- a. Consulting with the U.S. Army Corps of Engineers and complying with the requirements of the Section 404 permitting process (Segment 1/Alternative 1A only).
  - b. Consulting with the Washington State Department of Ecology and complying with the requirements of the Section 401 Water Quality Certification process (Segment 1/Alternative 1A only).
  - c. Locating equipment staging areas further than 200 feet from water bodies (Parker Horn, Crab Creek, or wetlands).
  - d. Leaving in place erosion control measures at culvert construction sites until the permanent culvert construction process is completed.
  - e. Coordinating with farmers and/or agricultural businesses regarding drainage issues that might arise.
  - f. Applying noxious weed control measures by an appropriately licensed contractor, using herbicides approved by the EPA's Region 10 Office. Herbicides shall not be applied during periods of high wind.
48. To prevent non-sedimentation pollutants (such as hazardous materials) from entering water bodies, the Port shall implement the following measures:
- a. Handling and disposing of all pollutants used on-site during construction in a manner that does not contaminate stormwater, wetlands, irrigation canals, Parker Horn, or Crab Creek.
  - b. Establishing staging areas for equipment repair and maintenance at least 200 feet from all wetlands or water bodies.
  - c. Inspecting all construction equipment regularly for any fuel, lube oil, hydraulic fluids, or antifreeze leaks. If leaks are found, the Port shall immediately remove the equipment from service and repair or replace it and remediate the spill.
  - d. Disposing any washout from concrete trucks in a manner that avoids dumping it into storm drains or onto soil or pavement.
  - e. Ensuring that thinners and solvents are used at least 200 feet from wetlands or water bodies. Capturing, containing, and properly disposing of thinners and solvents.
  - f. Requiring that fuel trucks maintain a minimum distance of 200 feet from water bodies and fueling construction vehicles away from sensitive areas, such as areas of permeable soils where a spill could more easily migrate to surface water.

- g. Designing staging areas to capture all runoff and/or spills.
  - h. Testing all fill before it is placed into surface water to ensure it is free of polluting materials.
49. The Port shall implement the following construction-related mitigation measures at the Crab Creek crossing:
- a. Isolating concrete piers or abutments from water in Crab Creek for seven days to allow the concrete to cure and to avoid toxicity to aquatic life. Uncured or wet concrete shall not be allowed to come into contact with flowing waters. Any isolated water that comes into contact with wet concrete and that has a pH greater than nine shall be pumped out and disposed of appropriately.
  - b. Consultation with the U.S. Army Corps of Engineers, the Washington State Department of Ecology, and the WDFW, and compliance with the requirements of the Clean Water Act Section 404 permit, the Section 401 water quality certification, and the HPA.
50. To minimize the operational effects of the proposed Project on water resources, the Port shall implement the following railroad practices, or ensure that the operator of the rail line does so:
- a. Developing a bridge maintenance plan in compliance with FRA regulations.
  - b. Regularly checking locomotives associated with the proposed operations to identify and repair fluid leaks or discharges.

### **Wetlands**

51. Prior to submittal of wetland permit applications to appropriate Federal, state, and local agencies, the Port shall perform additional field work and conduct analysis for the properties that were previously unavailable for wetland assessment.
52. The Port shall avoid or minimize disturbance to wetland areas whenever possible during construction.
53. The Port shall not allow construction staging areas in wetlands, even within the Project right of way.
54. The Port shall prepare a Wetland Mitigation Plan to describe measures to avoid and minimize impacts to wetlands. The following measures shall be included:
- a. Compensating for unavoidable impacts by creating, restoring, or enhancing existing wetlands.

- b. Adhering to current agency guidance on wetland mitigation, Wetland Mitigation in Washington State,<sup>9</sup> as well as guidance in the City of Moses Lake's Shoreline Management Master Plan and the Critical Areas Ordinance (for wetlands within the city), and complying with replacement ratios, buffer width, site selection criteria, and other criteria presented in this guidance.
  - c. Identifying a suitable off-site mitigation site.
  - d. Designing bridge span widths, fill slope angles, and the alignment to minimize impacts to wetlands and other aquatic resources.
  - e. Restoring disturbed areas in native plant communities near Wetland A and in the Crab Creek and Parker Horn areas to improve habitats and buffer wetlands.
  - f. Including habitat restoration to the extent practicable in the design of the proposed Crab Creek bridge to offset loss of wildlife habitats.
55. The Port shall implement the following mitigation measures specific to each Wetland Resource. The Port shall comply with additional mitigation measures, if any, required by the U.S. Army Corps of Engineers and/or the Washington State Department of Ecology:
- a. Wetland A (Segment 1 and Alternative 1A): Enhancement<sup>10</sup> of remaining wetland, off-site mitigation.<sup>11</sup>
  - b. Wetland B (Segment 1 and Alternative 1A): Off-site mitigation.
  - c. Wetland C (Alternative 1A only): Wetland creation/enhancement of Crab Creek floodplain, off-site mitigation.
  - d. Wetland D (Alternative 1A only): Wetland creation/enhancement of Crab Creek floodplain, off-site mitigation.

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<sup>9</sup> Ecology (Washington State Department of Ecology), U.S. Army Corps of Engineers Seattle District, and EPA Region 10. 2006. *Wetland Mitigation in Washington State*. Washington State Department of Ecology Publication #06-06-0 1 1b. Olympia, WA. March 2006.

<sup>10</sup> Enhancements usually involve habitat-related improvements, such as planting additional vegetation to increase plant density, or adding habitat structures like downed wood. It does not include increasing the wetland area.

<sup>11</sup> Off-site mitigation would allow the use of properties for wetland mitigation that are located outside the boundaries of the area disturbed by the Project. Such properties are typically located within the same drainage basin or watershed as the impact area.

- e. Wetland E (Segment 1 only): Wetland creation/enhancement of Crab Creek floodplain, off-site mitigation.
  - f. Wetland F (Segment 1 only): Wetland creation/habitat enhancement of Crab Creek / Parker Horn floodplain, off-site mitigation.
  - g. Crab Creek (Alternative 1A only): Incorporate habitat structures.
  - h. Ditches/Canals: Maintain or improve water quality.
56. The Port shall ensure that irrigation ditches and canals are either avoided by spanning both banks with the crossing structure, or that a culvert is installed to allow water to flow beneath the rail fill.

**Permit Conditions**

57. Conditions of all permits shall be included in any construction documents that the Port provides to contractors.

**APPENDIX B**  
**NORTHERN COLUMBIA BASIN RAILROAD PROJECT**  
**PROGRAMMATIC AGREEMENT**  
**AMONG**  
**THE SURFACE TRANSPORTATION BOARD,**  
**THE PORT OF MOSES LAKE,**  
**AND**  
**THE WASHINGTON DEPARTMENT OF ARCHAEOLOGY AND**  
**HISTORIC PRESERVATION**

REGARDING STB FINANCE DOCKET NO. 34936, PORT OF MOSES LAKE –  
CONSTRUCTION EXEMPTION – MOSES LAKE, WASHINGTON

AND

STB FINANCE DOCKET NO. 34936 (SUB-NO. 1), PORT OF MOSES LAKE –  
ACQUISITION EXEMPTION – MOSES LAKE, WASHINGTON

AND

STB FINANCE DOCKET NO. 34936 (SUB-NO. 2), NORTHERN COLUMBIA BASIN  
RAILROAD – OPERATION EXEMPTION – MOSES LAKE, WASHINGTON

**WHEREAS**, the Port of Moses Lake (Port) is proposing the construction and acquisition of approximately 11.5 miles of rail line in Grant County, Washington. The proposed rail project, known as the Northern Columbia Basin Rail Project (hereinafter, “the Project”), is an undertaking with the potential to adversely affect historic properties as defined in 36 CFR 800.16(y); and

**WHEREAS**, the Surface Transportation Board (STB), as the lead federal agency for the environmental review of the Project, has consulted with the Washington State Historic Preservation Officer (SHPO) pursuant to 36 CFR 800; and,

**WHEREAS**, on December 8, 2008, the STB invited the Advisory Council on Historic Preservation (Advisory Council) to participate in the development of this Programmatic Agreement (hereinafter, “the Agreement”), and the Advisory Council has not elected to participate; and

**WHEREAS**, the following federally-recognized Native American Tribes have been consulted and invited to participate in the preparation of this Agreement: the Confederated Tribes and Bands of the Yakama Nation; the Colville Confederated Tribes; and the Confederated Tribes of the Warm Springs Reservation of Oregon. However, those tribes have not elected to participate; and

**WHEREAS**, the non-federally recognized Wanapum Tribe has been consulted and invited to participate in the preparation of this Agreement, and it has not elected to participate; and

**WHEREAS**, the STB has consulted with the Washington State Department of Transportation, Rail and Marine Office (WSDOT) and invited WSDOT to be a concurring party to this Agreement, and it has agreed to participate; and

**WHEREAS**, Columbia Basin Railroad Company, Inc. has been consulted and invited to be a concurring party to this Agreement, and it has agreed to participate; and

**WHEREAS**, the STB has conducted a cultural resource survey report for the Project to identify historic properties in the Area of Potential Effects (APE) and evaluate whether the historic properties are eligible for listing in the National Register of Historic Places (NRHP); and,

**WHEREAS**, the STB has determined that some areas within the APE are not currently accessible and cannot be adequately investigated prior to the completion of the planning process, and may contain NRHP-eligible historic properties; and,

**NOW, THEREFORE**, the STB, the Port, and the SHPO agree that the Project is subject to the following stipulations in order to take into account the effects of the Undertaking on historic properties and further agree that these stipulations shall govern the Undertaking and all of its parts until this Agreement expires or is terminated.

### **STIPULATIONS**

In coordination with the other signatory parties, the STB shall ensure that the following measures are carried out:

#### **I. GENERAL REQUIREMENTS AND STANDARDS**

- A. The Port shall ensure that all work carried out under this Agreement is conducted by or under the direct supervision of a person or persons meeting, at a minimum, the *Secretary of the Interior's Professional Qualification Standards* (36 CFR 61).
- B. Activities carried out pursuant to this Agreement shall meet the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 CFR 44716, as revised) as well as standards and guidelines for historic preservation activities as established by the SHPO.
- C. The Port shall ensure that survey work will be conducted on parcels contained within Segment 1, Alternative 1A, and/or the Ecology Modification that were not part of previous investigations.

## **II. NHPA EVALUATION**

- A. Once access to a previously inaccessible area within the APE has been secured, or in the event that the Project's APE is expanded, the Port shall:
  1. Contact the SHPO, interested and affected Indian Tribes, and other consulting parties with the survey methodology and project schedule at least fourteen (14) calendar days prior to initiating the cultural resources survey.
  2. Conduct a professional cultural resources survey to identify archaeological resources and/or historic structures that are 45 years old or older. Any identified resources will be inventoried and evaluated for their eligibility for inclusion in the National Register of Historic Places (NRHP). The inventory and evaluation will be documented in a Draft Survey Report that addresses such properties' potential eligibility for listing on the NRHP, potential adverse affects to the resource as a result of the project, and recommended actions for further investigation of identified resources.
- B. The Port shall provide the Draft Survey Report and any applicable Historic Property Inventory (HPI) forms to the STB. The STB shall review and comment on the Draft Survey Report and HPI forms within fourteen (14) calendar days. The Port shall revise the Draft Survey Report consistent with the STB's comments and submit three (3) copies of the revised Draft Survey Report within fourteen (14) calendar days of the receipt of comments.
- C. The STB shall provide the revised Draft Survey Report to the SHPO, any interested or affected Native American Tribes, and other consulting parties for review and comment. The SHPO, any interested and affected Native American Tribes, and other consulting parties shall review the documentation and respond with any comments within thirty (30) calendar days.
- D. The STB, in consultation with the SHPO, any interested or affected Native American Tribes, and other consulting parties, may determine that further study is necessary. The STB may require the Port to conduct additional fieldwork, including a pedestrian survey and/or subsurface testing, as necessary.

## **III. TREATMENT OF HISTORIC PROPERTIES**

- A. For archaeological or cultural resources or historic properties deemed eligible for inclusion on the NRHP, the STB will apply the criterion of adverse effect and consult with the SHPO, any interested or affected Native American Tribes, and other consulting parties.
- B. The STB shall develop a treatment plan to avoid, minimize, or mitigate adverse effects to the historic properties identified during the Survey, and this treatment plan will include a curation plan for any artifacts that are recovered. The treatment plan will be developed by cultural resource professionals that meet the

Secretary of the Interior's Standards and must be concurred upon by the SHPO prior to implementation.

- C. The STB will ensure that the treatment plan is implemented.

#### **IV. APPROVAL TO PROCEED**

- A. The Port may not proceed with construction of Segment 1, Alternative 1A, and/or the Ecology Modification until notified in writing by the STB's Section of Environmental Analysis that there are no unresolved concerns pertaining to the STB's assessment of effects on any identified historic properties or measures required to avoid, reduce, or mitigate adverse effects on those properties. The STB may require the Port to conduct additional evaluation or assessment of effects to resolve any concerns as necessary.
- B. If the SHPO, interested and affected Indian Tribes, or other consulting parties fail to provide comments within the designated review period, the STB and WSDOT will assume their concurrence and proceed with the proposed action or activity.

#### **V. DISPUTE RESOLUTION**

- A. If any party to this agreement or any tribe or other interested party objects to plans, documents, reports, activities, or determinations proposed pursuant to the terms of this Agreement, the STB shall notify SHPO of the objection, then consult with the objecting party and the SHPO to resolve the issue. If, after initiating consultation, the STB determines that the objection cannot be resolved through consultation, the STB shall forward all documentation relevant to the dispute to the Advisory Council for a review of the findings. Such documentation shall include the STB's proposed response to the objection.
  1. Any comment provided by the Advisory Council will be taken into account by the STB in accordance with 36 CFR Part 800.6.
  2. Any recommendation or comment provided by the Advisory Council will be understood to pertain only to the subject of the dispute, and the STB's responsibility regarding actions outside the dispute will remain unchanged.
  3. The parties may continue all actions under this Agreement that are not the subject of the dispute.
  4. Each party reserves any and all rights it may otherwise have to enforce its rights or seek resolution of the dispute under applicable law.

#### **VI. FAILURE TO COMPLY**

- A. Should the STB find that the terms of this Agreement have not been carried out:

1. The STB will request the Advisory Council to comment in accordance with 36 CFR Part 800;
2. The Port will not take any action to make an irreversible commitment that would result in an adverse effect with respect to an inadvertently discovered property or other properties covered by this Agreement; and
3. The STB will not foreclose the Advisory Council's opportunity to suggest modifications or alternatives to the proposed APE that could avoid or mitigate any adverse effect on historic, cultural or archaeological resources until the commenting process has been completed.

## **VII. MODIFICATIONS AND AMENDMENTS**

Any signatory to this Agreement may propose that it be amended or modified, whereupon the parties will confer and consider the amendment. Any resulting amendment requires the agreement of all signatory parties and shall be executed in writing.

## **VIII. UNANTICIPATED DISCOVERIES**

In the event that any unanticipated historic or cultural properties, archaeological sites, human remains, funerary items, or assorted artifacts are discovered during the proposed construction, the Port shall immediately cease all work and notify the SHPO, STB, WSDOT, interested federally-recognized tribes, and consulting parties, if any, to determine if additional consultation and mitigation is necessary. In the event that human remains are discovered, the Port shall also notify appropriate law enforcement agencies. (See the Plan and Procedures for the Unanticipated Discovery of Cultural Resources and Human Skeletal Remains in Appendix B).

## **IX. TERMINATION**

- A. This Agreement shall remain in effect until terminated by mutual agreement of the signatory parties or replaced with a revised Agreement.
- B. Any signatory party may withdraw from this Agreement upon thirty (30) days written notice to the other parties.
- C. Any discovery of historic or cultural properties, archaeological sites, human remains, funerary items, or assorted artifacts in process under the terms of this Agreement at the time of the termination shall be processed to its completion.
- D. In the event of termination or a signatory party withdraws from the Agreement, the STB will comply with 36 CFR Part 800, Protection of Historic Properties.

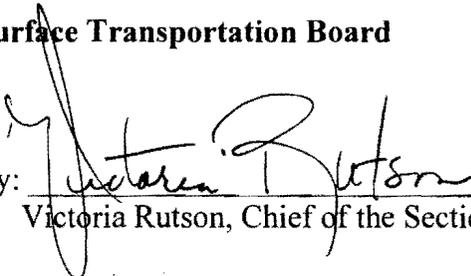
## **X. SUNSET CLAUSE**

This Agreement shall terminate if the Project is cancelled; if the terms of this Agreement have been met; or ten (10) years after the date of any STB decision approving the construction and operation of the proposed new rail line in Grant County, Washington.

**ACCEPTED AND AGREED**

**SIGNATORY PARTIES**

**Surface Transportation Board**

By:  Date: 5-29-2009  
Victoria Rutson, Chief of the Section of Environmental Analysis

**Washington Department of Archaeology and Historic Preservation**

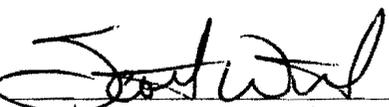
By:  Date: 6/10/09  
Dr. Allyson Brooks, Washington State Historic Preservation Officer

**The Port of Moses Lake**

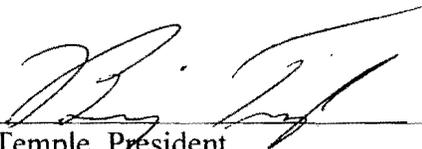
By:  Date: 6/11/09  
Craig Baldwin, Executive Manager

**CONSULTING PARTIES**

**Washington State Department of Transportation**

By:  Date: 6/5/09  
Scott Witt, Director of the State Rail and Marine Office

**Columbia Basin Railroad Company, Inc.**

By:   
\_\_\_\_\_  
Brig Temple, President

Date: 6/3/09