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ATTORNEYS

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ENTERED
Office of Proceedings
June 25, 2015
Part of
Public Record

William C. Schroeder
(509) 455-6016
will.schroeder@painehamblen.com
Licensed in Washington and Montana

June 25, 2015

VIA ELECTRONIC FILING

Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

RE: **FD 35915**
Tri-City Railroad Company, LLC vs. The City Of Kennewick; and The City Of Richland
Supplemental Certificate of Service

Dear Madam:

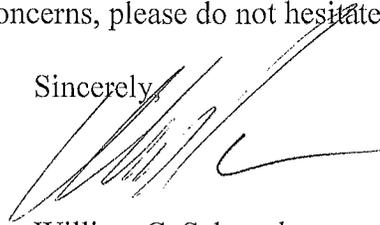
On June 24, 2015, in addition to service upon those listed in the Certificates of Service, I caused to be served upon Ms. Stephanie Weir, of Foster Pepper LLP, electronically and by delivery of hard copy, the following documents which were filed on behalf of Petitioner, Tri-City Railroad Company, LLC:

1. Rebuttal Verified Statement of Counsel re: Petition for Declaratory Order;
2. Rebuttal Verified Statement of John Miller re: Petition for Declaratory Order;
3. Rebuttal Verified Statement of Foster Peterson re: Petition for Declaratory Order;
4. Rebuttal Verified Statement of Rhett Peterson re: Petition for Declaratory Order;
5. Rebuttal Verified Statement of Randolph Peterson re: Petition for Declaratory Order; and

6. Rebuttal Verified Statement of Lisa Anderson.
7. Tri-City Railroad Company's Rebuttal Brief re: Petition for Declaratory Order.

Should there be any questions or concerns, please do not hesitate to contact me.

Sincerely,



William C. Schroeder

cc: Ms. Heather Kintzley
Ms. Lisa Beaton
Mr. P. Stephen DiJulio
Ms. Stephanie Weir

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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	REBUTTAL VERIFIED
	)	STATEMENT OF COUNSEL RE
Petitioner,	)	PETITION FOR DECLARATORY
	)	ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

William C. Schroeder, being first duly sworn on oath, does hereby depose and state:

1. Attached as **Exhibit 1** is a true and correct copy of the April 13, 2015 letter sent by Tri-City Railroad to each counsel member of the City Council of Kennewick.

2. **Exhibit 2** is a true and correct copy of the April 15, 2015 letter sent by Tri-City Railroad to the Mayor and Council members for the City of Richland.

3. Attached hereto as **Exhibit 3** is a true and correct copy of the April 21, 2015 council agenda item confirming that both Cities had passed their respective condemnation ordinances.

4. Attached hereto as **Exhibit 4** is a true and correct copy of the May 7, 2015 Summons and Petition for Condemnation filed by the City of Kennewick and City of Richland against the Tri-City Railroad. The Petition for Condemnation, dated May 7, 2015, makes no mention of TCRY's pending Petition for Declaratory Order.

5. Attached hereto as **Exhibit 5** is a true and correct copy of a May 29, 2015 email exchange.

6. Attached hereto as **Exhibit 6** is a true and correct copy of a June 1, 2015 email exchange.

7. Attached hereto as **Exhibit 7** is a true and correct copy of a June 3, 2015 email exchange.

8. Attached hereto as **Exhibit 8** is a true and correct copy of a June 5, 2015 email exchange.

9. Attached hereto as **Exhibit 9** is a true and correct copy of a June 6, 2015 email exchange.

10. Attached hereto as **Exhibit 10** is a true and correct copy of 835 F.Supp.2d 1056 (E.D. Wash. 2011).

11. Attached hereto as **Exhibit 11** is a true and correct copy of the cover and signature page of a June 9, 2014 Petition for Reconsideration of Final Order, Petition for Rehearing and Petition for Stay of Order.

12. The undersigned counsel was retained by the Tri-City Railroad in the summer of 2014, after the conclusion of the Washington State Utilities & Transportation Commission matter. Although present counsel for the Tri-City Railroad represents the railroad in its state court appeal of the UTC matter, present counsel did not represent the Tri-City Railroad before the UTC.

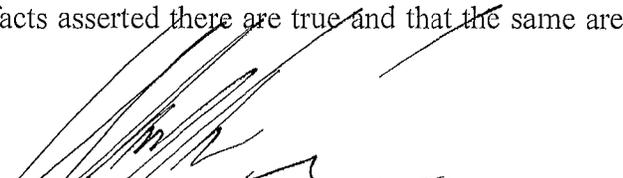
13. Present counsel for TCRY did not represent the Tri-City Railroad in its 2010 and 2011 federal suit with BNSF, 835 F.Supp.2d 1056.

STATE OF WASHINGTON)

: ss.

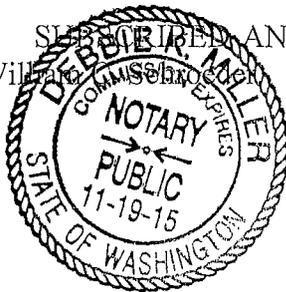
County of SPOKANE)

William C. Schroeder being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.



William C. Schroeder

SUBSCRIBED AND SWORN to before me this 23rd day of June, 2015,
by William C. Schroeder



Deborah K Miller

Notary Public in and for the State of
WA, residing at Spokane
My Commission Expires: 11-19-15

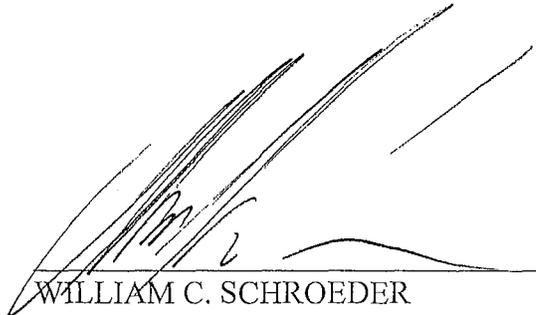
CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of June, 2015, I caused to be served a true and correct copy of the foregoing **REBUTTAL VERIFIED STATEMENT OF COUNSEL RE PETITION FOR DECLARATORY ORDER**, by the method indicated below and addressed to the following:

Heather Kintzley	_____	U.S. MAIL
Richland City Attorney	_____	HAND DELIVERED
975 George Washington Way	<u> x </u>	OVERNIGHT MAIL
PO Box 190 MS-07	_____	TELECOPY
Richland, WA 99352		

Lisa Beaton	_____	U.S. MAIL
Kennewick City Attorney	_____	HAND DELIVERED
210 West 6 th Avenue	<u> x </u>	OVERNIGHT MAIL
P.O. Box 6108	_____	TELECOPY
Kennewick, WA 99336		

P. Stephen DiJulio	_____	U.S. MAIL
Jeremy Eckert	_____	HAND DELIVERED
Foster Pepper PLLC	<u> x </u>	OVERNIGHT MAIL
1111 Third Avenue, Suite 3400	_____	TELECOPY
Seattle, WA 98101		



WILLIAM C. SCHROEDER

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PAINE  HAMBLEN™

A T T O R N E Y S

William C. Schroeder
(509) 455-6016
will.schroeder@painehamblen.com
Licensed in Washington and Montana

April 13, 2015

VIA FEDERAL EXPRESS

Councilmember Don Britain
Councilmember Gregory Jones
Councilmember John Trumbo
Councilmember Bob Olson
Councilmember Paul Parish
Councilmember Bob Parks
Councilmember Steve Young
210 West 6th Avenue
P.O. Box 6108
Kennewick, WA 99336

Re: Surface Transportation Board #FD-35915-0;
Notice of Eminent Domain Proceedings;
Prepared Comment for Record at April 14, 2015 Council Hearing

Dear Councilmembers:

The Tri-City Railroad Company received notice at its corporate headquarters on April 2, 2015, by certified mail that the City of Kennewick is proceeding with enacting an ordinance authorizing eminent domain proceedings concerning a crossing at-grade bisecting the main and passing tracks located near Center Parkway and Tapteal Drive.

As you may be aware, the issues of jurisdiction and federal preemption of state condemnation powers pursuant to 49 U.S.C. § 10501 and 49 U.S.C. § 10906 are currently pending in *Tri-City Railroad Co. v. City of Richland and City of Kennewick*, Surface Transportation Board No. FD-35915-0. For reference, enclosed with this letter is a copy of the disc containing the pleadings pending before the Board.

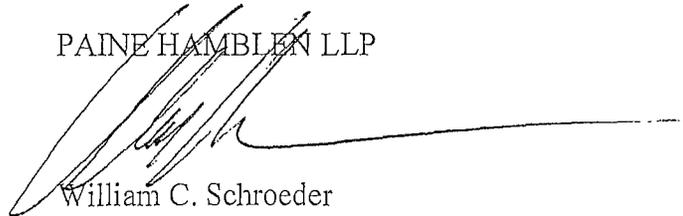
Kennewick City Council
April 13, 2015
Page 2

Given the pending questions of jurisdiction and preemption, Tri-City Railroad Company requests that the Council hold the present eminent domain resolution as to the railroad in abeyance, until the federal Board makes its determination.

Thank you very much for your time, and your consideration of these matters.

Very truly yours,

PAINE HAMBLEN LLP

A handwritten signature in black ink, appearing to read 'William C. Schroeder', is written over the typed name. The signature is fluid and extends to the right.

William C. Schroeder

Enclosure

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PAINE  HAMBLENTM

A T T O R N E Y S

William C. Schroeder
(509) 455-6016
will.schroeder@painehamblen.com
Licensed in Washington and Montana

April 15, 2015

VIA FEDERAL EXPRESS

Mayor David W. Rose
Mayor Pro Tem Phillip Lemley
Councilmember Brad Anderson
Councilmember Terry Christensen
Councilmember Gregory L. Jones
Councilmember Sandra Kent
Councilmember Robert Thompson
505 Swift Blvd.
P.O. Box 190
Richland, WA 99352

Re: Surface Transportation Board #FD-35915-0;
Notice of Eminent Domain Proceedings;
Prepared Comment for Record at April 21, 2015 Council Hearing

Dear Mayor and Members of the Council:

The Tri-City Railroad Company received notice at its corporate headquarters on April 2, 2015, by certified mail that the City of Richland is proceeding with enacting an ordinance authorizing eminent domain proceedings concerning a crossing at-grade bisecting the main and passing tracks located near Center Parkway and Tapteal Drive.

As you may be aware, the issues of jurisdiction and federal preemption of state condemnation powers pursuant to 49 U.S.C. § 10501 and 49 U.S.C. § 10906 are currently pending in *Tri-City Railroad Co. v. City of Richland and City of Kennewick*, Surface Transportation Board No. FD-35915-0. For reference, enclosed with this letter is a copy of the disc containing the pleadings pending before the Board.

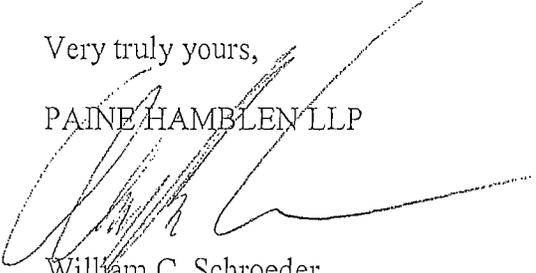
Richland City Council
April 13, 2015
Page 2

Given the pending questions of jurisdiction and preemption, Tri-City Railroad Company requests that the Council hold the present eminent domain resolution as to the railroad in abeyance, until the federal Board makes its determination.

Thank you very much for your time, and your consideration of these matters.

Very truly yours,

PAINE HAMBLEN LLP



William C. Schroeder

Enclosure

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COUNCIL AGENDA ITEM COVERSHEET

Council Date: 04/21/2015

Agenda Category: Ordinances - Second Reading/Passage

Key Element: Key 2 - Infrastructure & Facilities

Subject:

Ordinance No. 17-15, Authorizing Eminent Domain for the Center Parkway Project Right-of-Way

Department:
Public Works

Ordinance/Resolution Number:
17-15

Document Type:
Ordinance

Recommended Motion:

Give second reading and pass Ordinance No. 17-15, authorizing eminent domain proceedings for the Center Parkway project.

Summary:

In September 2001, the Cities of Richland and Kennewick entered into an interlocal agreement to complete the Center Parkway extension between Gage Boulevard in Kennewick and Tapteal Drive in Richland. The project is included in each Cities' Comprehensive Plan and the Regional Transportation Plan. It is needed to support vehicular circulation in the busy Columbia Center retail / commercial area. Supplement No. 2 to the interlocal agreement assigns the lead role for completing Center Parkway to the City of Richland.

Acquisition of private property for the new street segment will be required. State and federal law require fair treatment and just compensation for property owners whose property is needed for a new street segment. Washington State law empowers City governments with the power of eminent domain as a tool to accomplish property acquisitions in pursuit of projects meeting a public need. Eminent domain provides a method of acquiring private property and establishing just compensation when voluntary negotiations and administrative procedures fail to achieve the needed acquisition.

City staff has initiated negotiations with affected property owners, following the established procedures that ensure conformance with state and federal law. Staff has also provided required notice of the Council's consideration of the proposed ordinance.

The proposed ordinance includes a finding by the City Council that the Center Parkway Extension is a necessary public use. The ordinance provides authority for the City Manager to implement various activities to complete the property acquisitions after further consultation with the City Council. A similar ordinance was approved by the Kennewick City Council at its April 14 meeting. The Kennewick ordinance delegates implementation of any eminent domain proceeding to Richland, as contemplated in the interlocal agreement. Staff recommends approval of the ordinance.

On April 7, 2015, Council gave first reading of the ordinance.

Fiscal Impact:
Yes

Exercising the eminent domain procedures will require legal representation that carry significant costs. An estimate of these costs is included in the Center Parkway project budget as approved in the 2015 - 2030 Capital Improvement Plan. No additional budget authority is needed at this time to proceed with property acquisitions and eminent domain procedures.

Attachments:

1. Ordinance No. 17-15 - Center Parkway Eminent Domain
2. Right of Way Acquisition Map

ORDINANCE NO. 17-15

AN ORDINANCE of the City of Richland, Washington, authorizing the City Manager to acquire certain real property interests by negotiated voluntary purchase under threat of condemnation, by condemnation, or by settling condemnation litigation or entering administrative settlements for the purpose of extending Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; providing for severability; and establishing an effective date.

WHEREAS, in order to improve mobility, meet the current and planned travel demands of the Cities of Richland and Kennewick, and satisfy the current and future requirements and goals of the City of Richland Comprehensive Plan, it will be necessary for the City to construct a new street segment called Center Parkway; and

WHEREAS, the planned Center Parkway crosses the municipal boundary joining the City of Richland with the City of Kennewick; and

WHEREAS, the Cities of Richland and Kennewick have entered in an interlocal agreement, dated September 18, 2001, documenting the Cities' partnership to complete Center Parkway; and

WHEREAS, the interlocal agreement, specifically Supplement No. 2 to the interlocal agreement, assigns the lead role for completing the Center Parkway project to the City of Richland; and

WHEREAS, in its lead role, the City of Richland has planned and budgeted to complete Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; and

WHEREAS, in order to complete the Center Parkway Project, it has been determined that the City of Richland and the City of Kennewick must acquire the property and property rights described in Exhibit 1, falling within their respective jurisdictions, for the public uses of public travel and public parking; and

WHEREAS, Chapter 8.12 RCW authorizes the Cities to exercise the power of eminent domain for the purpose of condemning property for certain public needs; and

WHEREAS, the City of Richland has commissioned appraisals to determine the fair market value of the properties identified herein and will continue to negotiate in good faith with the owners of the properties authorized to be acquired with the intent of reaching agreements for the voluntary acquisition of the property for fair market value; and

WHEREAS, in the event voluntary negotiated agreements are not reached, eminent domain proceedings will be required to complete the required acquisitions; and

WHEREAS, the funds necessary to acquire the property by voluntary purchase or to pay just compensation adjudged due after condemnation shall be paid from City of Richland funds.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Richland as follows:

Section 1. Public Use and Necessity Declared: The City of Richland City Council finds construction of the Center Parkway Project to be a public use, specifically the construction of public streets and public parking. Further, the City Council finds construction of the Center Parkway Project to be necessary and in the best interests of the citizens and motorists within the City of Richland.

Section 2. Agency Acknowledged: Pursuant to interlocal agreement and ordinance, the City of Kennewick has delegated to the City of Richland the authority to initiate and prosecute any action necessary, including condemnation, to acquire the property and property rights described in attached Exhibit 1 that are located within the City of Kennewick. The City of Richland accepts this delegation of authority.

Section 3. City Manager Authorized: The City Manager is hereby authorized to negotiate and prepare such agreements as are customary and necessary for the acquisition of the real property interests described in Exhibit 1, said property to be used for the public use of construction of the Center Parkway Project. Execution of such final agreements by the City Manager shall occur only after approval by the Richland City Council at an open public meeting.

Section 4. Settlement: The City Manager is further authorized to settle condemnation litigation or enter administrative settlements (a settlement in lieu of initiating condemnation litigation) for the acquisition of the real property interests described in Exhibit 1. Such settlements shall be made only upon the recommendation of legal counsel, for amounts deemed to be a reasonable estimation of fair market value, and shall be subject to final approval by the Richland City Council at an open public meeting.

Section 5. Condemnation Proceedings Authorized: In addition to the authority granted to the City Manager in Sections 3 and 4 above, the City Manager may further authorize the City Attorney to commence any such condemnation proceedings as may be useful or necessary to acquire the properties and property rights described in the attached Exhibit 1, to include prosecuting condemnation actions as the Agent of the City of Kennewick as directed in City of Kennewick Ordinance No. 5592.

Section 6. Property Descriptions: The City Manager is additionally authorized to make minor amendments to the legal descriptions of properties described in the

attached Exhibit 1 as may be necessary to correct scrivener's errors or to conform any legal description to the precise boundaries of the property actually acquired for construction of the Center Parkway Project.

Section 7. Funds: The funds necessary to acquire the property by purchase or to pay just compensation adjudged due after condemnation shall be paid from the City of Richland's Capital Improvement Plan funds.

Section 8. Severability: Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 9. Effective Date: This ordinance shall take effect the day following its publication in the official newspaper of the City of Richland.

PASSED by the City Council of the City of Richland, at a regular meeting on the 21st day of April, 2015.

DAVID W. ROSE
Mayor

ATTEST:

APPROVED AS TO FORM:

MARCIA HOPKINS
City Clerk

HEATHER KINTZLEY
City Attorney

Date Published: April 26, 2015

EXHIBIT 1

Property Descriptions

Portion of PID# 1-3099-300-0001-007

That portion of the West ½ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East of the Willamette Meridian, City of Richland, Benton County, Washington, described as follows:

Beginning at the Northeast corner of Parcel 1 of Record of Survey No. 2966, as recorded in Volume 1 of Surveys on Page No. 2966, records of said County and State; Said corner is lying on the Southerly right-of-way of Tappedal Drive as shown on said Survey; Thence North 69°56'55" West a distance of 230.22 feet along the Northerly line of said Parcel and said Southerly right-of-way, to the Northwest corner of said Parcel 1, and the **TRUE POINT of BEGINNING**, and the beginning of a 30.00 foot radius tangent curve to the left; Thence Southwesterly a distance of 48.19 feet along the arc of said curve through a central angle of 92°01'52" along the Westerly line of said Parcel 1, to the beginning of a 700.00 foot radius tangent compound curve to the left; Thence Southwesterly a distance of 227.91 feet along the arc of said curve through a central angle of 18°39'16", along the Westerly line of said Parcel 1, to its point of tangency. (Said point of tangency is lying North 00°38'03" West from the Northwest corner of Parcel 2 of said Record of Survey No. 2966); Thence South 00°38'03" East a distance of 325.26 feet along the Westerly line of said Parcel 2, to a point on the Northerly right-of-way of the Port of Benton / Tri-City Railroad, (formerly A.E.C. Hanford Works Railroad), and the beginning of a 2242.34 foot radius non-tangent curve having a radial bearing of North 23°02'06" East; Thence Northwesterly along said right-of-way a distance of 91.76 feet along the arc of said curve through a central angle of 02°12'15" to the Southeast corner of Record of Survey No. 3241 as recorded in Volume 1 of Surveys on Page No. 3241, records of said County and State; Thence North 01°50'14" East a distance of 294.65 feet, leaving said Northerly right-of-way, to the Northeast corner of said Record of Survey No. 3241, said corner is also the East/ Southeasterly corner of Record of Survey No. 3245, records of said County and State; Thence continuing North 01°50'14" East a distance of 29.53 feet along the Easterly line of said Record of Survey No. 3245, leaving the Northeast corner of said Record of Survey No. 3241, to the beginning of a 770.00 foot radius tangent curve to the right: Thence Northeasterly a distance of 221.92 feet along the arc of said curve and said Easterly line of said Record of Survey No. 3245, through a central angle of 16°30'48" to the beginning of a 30.00 foot radius tangent reverse curve to the left; Thence Northwesterly a distance of 46.23 feet along the arc of said curve and said Easterly line of said Record of Survey No. 3245 to its Northeast corner, through a central angle of 88°17'57", to a point on said Southerly right-of-way of Tappedal Drive: Thence South 69°56'55" East a distance of 130.07 feet leaving said Record of Survey No. 3245, back to the true point of beginning.

Containing 43,421.0 square feet, more or less, according to the bearings and distance s listed above.

All of PID # 1-3099-400-0010-000

That Portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29, lying south of the Union Pacific Railroad right of way,

defined as follows: Beginning at the Southwest corner of said subdivision; Thence South 89°23'43" East along the South line thereof 686.76 Feet to a point in the West line of the East 615.9 Feet of the said subdivision; Thence North 00°15'13" West along said West line 350 feet to the TRUE POINT OF BEGINNING; Thence continuing North 00°15'13" West, 170.18 feet to a point which is 200 feet South of the South right of way line of the Union Pacific Railroad; Thence South 89°22'17" West: Parallel with said right of way line, 80 feet; Thence South 00°15'13" East, 168.46 Feet to a point which is 350 feet from the South line of said subdivision: Thence South 89°23'43" East parallel with said South line 80 feet to the True Point of Beginning. Containing 13,543.7 square feet, more or less, according to the bearings and distances listed above.

Portion of PID # 1-3099-401-0192-001

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

A portion of Lot 1 of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, and the TRUE POINT of BEGINNING; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Southeasterly a distance of 48.23 feet, along the arc of said curve through a central angle of 03°38'09", leaving said Northerly line to a point of reverse curve, to the beginning of a 490.00 foot radius tangent curve to the right; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of 01°22'28", back to the true point of beginning. Containing 497.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Lot 1 of Short Plat No. 192 as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 90.21 feet along the Southerly line of said Lot, to the beginning of a 460.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $85^{\circ}56'01''$ West; and the TRUE POINT of BEGINNING; Thence Northwesterly a distance of 114.93 feet along the arc of said curve, through a central angle of $14^{\circ}18'53''$, leaving said Southerly line of said Lot 1, to the beginning of a 790.00 foot radius tangent reverse curve, concave to the Northeast, having a radial bearing of North $71^{\circ}37'09''$ East; Thence Northwesterly a distance of 57.44 feet along the arc of said curve, through a central angle of $04^{\circ}09'58''$, to a point on a Northerly line of said Lot 1; Thence North $88^{\circ}58'02''$ East leaving said curve to the beginning of a 760.00 foot radius non-tangent curve, concave to the Northeast, having a common with the aforementioned 790.00 foot radius curve; Thence Southeasterly a distance of 48.23 feet along the arc of said curve, through a central angle of $03^{\circ}38'09''$, leaving said Northerly line of said Lot 1, to the beginning of a 490.00 foot radius tangent reverse curve, concave to the Southwest, having a radial bearing of South $71^{\circ}37'09''$ West; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of $01^{\circ}22'28''$, to a point on the Westerly line of a Parcel described by Parcel Identifications number (P.I.D.) 1-3099-400-0010-000, records of said County and State; Thence South $00^{\circ}41'35''$ East leaving said curve, along said Westerly line, to a point on said Southerly line of said Lot 1; Thence North $89^{\circ}48'03''$ West a distance of 11.07 feet along said Southerly line, back to the true point of beginning. Containing 3,882.37 square feet, more or less, according to the bearings and distances listed above.

Portion PID# 1-3099-400-0009-000

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1, and the TRUE POINT of BEGINNING; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence North 88°58'44" East a distance of 60.02 feet along said Southerly line to the beginning of a 700.00 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of South 89°24'34" East; Thence Southeasterly a distance of 202.04 feet along the arc of said curve, through a central angle of 16°32'14", to a point on the Southerly line of said P.U.D. Substation Parcel; Thence South 88°58'02" West a distance of 45.30 feet, leaving said curve, back to the true point of beginning. Containing 12,112.8 square feet, more or less, according to the bearings and distances listed above.

Portion of PID# 1-3099-304-0009-000

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03"

West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Southeasterly a distance of 64.51 feet along the arc of said curve, through a central angle of 01°34'41", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 112.53 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence South 88°56'20" West a distance of 60.08 feet along said right-of-way, back to the true point of beginning. Containing 7,544.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of $15^{\circ}12'31''$ to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South $88^{\circ}58'44''$ West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South $89^{\circ}33'21''$ East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of $01^{\circ}23'35''$, leaving said Southerly line, to its point of tangency; Thence North $01^{\circ}50'14''$ East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North $88^{\circ}56'20''$ East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North $01^{\circ}50'14''$ East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North $24^{\circ}10'23''$ East; Thence Northwesterly a distance of 6.49 feet along the arc of said curve, through a central angle of $00^{\circ}09'32''$, along said Northerly and Southerly lines; Thence South $01^{\circ}50'14''$ West a distance of 142.04 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North $88^{\circ}56'20''$ East a distance of 6.01 feet along said right-of-way, back to the true point of

beginning.

Together With: Beginning at the aforementioned true point of beginning; Thence North 88°56'20" East a distance of 60.08 feet along said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B", to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 112.53 feet to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°35'42" East; Thence Southeasterly a distance of 29.87 feet along the arc of said curve, through a central angle of 00°43'34", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 100.71 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 28.04 feet along said right-of-way, back to the true point of beginning. Containing 3,828.3 square feet, more or less, according to the bearings and distances listed above.

**A portion of Port of Benton and Tri-City Railroad right-of-way – No PID# assigned
Street Crossing & Utility Easement**

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying within, Port of Benton and Tri-City Railroad right-of-way, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on

the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), to the **TRUE POINT of BEGINNING**; said point being at (Station 16+39.17 at 30.00' Left as shown on Center Parkway Right-of-way Plans) and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of 00°31'48"; Thence North 01°50'14" East a distance of 108.98 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.34 foot radius non-tangent curve, concave to the Northeast, and having a radial bearing of North 25°47'06" East; Thence Southeasterly a distance of 107.63 feet, along the arc of said curve, through a central angle of 02°45'00", along said Northerly right-of-way; to a point on the proposed Easterly proposed right-of-way of Center Parkway; Thence continuing along said curve and Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way Southeasterly a distance of 0.67 feet, along the arc of said curve, through a central angle of 00°01'02", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 106.921 feet leaving said Northerly right-of-way to a point on said Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, said point is also lying on a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°04'22" East; Thence Northwesterly a distance of 85.86 feet along the arc of said curve through a central angle of 02°06'01" back to the true point of beginning.

Containing 10,792.0 square feet, more or less, according to the bearings and distances listed above.

City of Richland

CENTER PARKWAY EXTENSION



END
STA. 23+44.09

TAPTEAL DR.

CENTER PARKWAY

PARCEL 1 ROSA 3245
(1-3099-400-0031-000)

PARCEL 1 ROSA 2986
(1-3099-400-0030-000)

PARCEL 1 ROSA 3243
(1-3099-400-0032-000)

PARCEL 2 ROSA 2986
(1-3099-400-0031-000)

CITY OF RICHLAND
(BENTON COUNTY)

HOLIDAY
INN EXPRESS

PORT OF BENTON RR

CROSSING BASEMENT
BASEMENT FOR PUBLIC
STREET (SIDE OF RICHLAND
TO CITY OF KENNEWICK)

TRACT "B"
(1-3099-304-0009-000)

MEMORANDUM OF LEASE
AP#004-23028

250.24' R. PER PLAN
COLUMBIA CENTER ESTATE NO. 2

UNION PACIFIC RR

CITY OF KENNEWICK
(BENTON COUNTY)

BEGINNING
STA. 10+00.00

COLUMBIA
CENTER MALL

GAGE BLVD



CAD DWG: CNTR_ST_RW FOR COUNCIL.DWG
DATE: 04.14.2015
DRAWN BY: SC NYDY
SCALE: NONE

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 07 2015

FILED

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

THE CITY OF KENNEWICK, a Washington
municipal corporation; THE CITY OF
RICHLAND, a Washington municipal
corporation,

Petitioners,

v.

PORT OF BENTON, a Washington Port
District; TRI-CITY RAILROAD COMPANY,
LLC, a Washington limited liability company;
BENTON COUNTY, a Washington political
subdivision,

Respondents.

[In re Center Parkway]

No. 15-2-01039-2

SUMMONS

TO: ALL RESPONDENTS, as set forth in Exhibit B to the Petition for Condemnation
(Exhibit B is also attached to this Summons).

Petitioners, the City of Kennewick and the City of Richland, have started a lawsuit
against you in the above-entitled court. Petitioner's claim is stated in the Petition for
Condemnation ("Petition"), a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Petition by noting your
appearance in writing and by serving a copy of the notice of appearance upon the undersigned
attorney for Petitioner within twenty (20) days after service of this summons (or within sixty (60)
days after said service, if served outside the State of Washington), excluding the day of service,
or a default judgment may be entered against you without notice. A default judgment is one

SUMMONS - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

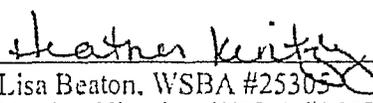
1 where the petitioner is entitled to what it asks for because you have not responded. If you serve a
2 notice of appearance on the undersigned person, you are entitled to notice before a default
3 judgment may be entered.

4 If you wish to seek the advice of an attorney in this matter, you should do so promptly so
5 that your written response, if any, may be served on time.

6 This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State
7 of Washington.

8
9 DATED this 7th day of May, 2015.

10 FOSTER PEPPER PLLC; and
11 HEATHER KINTZLEY, WSBA #35520
12 City Attorney, City of Richland; and
13 LISA BEATON, WSBA #25305
14 City Attorney, City of Kennewick

15 
16 Lisa Beaton, WSBA #25305
17 Heather Kintzley, WSBA #35520
18 P. Stephen DiJulio, WSBA #7139
19 Attorneys for Petitioners

1 EXHIBIT B

2
3 Port of Benton, a Washington Port District: Fee Interest [Note, Port has previously granted to
4 Cities easement interests for the Center Parkway Extension].

5 Tri-City Railroad Company LLC, a Washington limited liability company: Lessee (of Port of
6 Benton)

7 Benton County, a political subdivision of the State of Washington: Tax claims, if any.

8 THE IDENTIFICATION OF INTERESTS IN PROPERTY SET FORTH ABOVE ARE FOR
9 INFORMATIONAL PURPOSES ONLY; AND, ARE NOT A REPRESENTATION OR
10 ACKNOWLEDGMENT OF A RESPONDENT'S SPECIFIC RIGHTS.
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EXHIBIT B

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 07 2015

FILED

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

THE CITY OF KENNEWICK, a Washington
municipal corporation; THE CITY OF
RICHLAND, a Washington municipal
corporation,

Petitioners,

v.

PORT OF BENTON, a Washington Port
District; TRI-CITY RAILROAD COMPANY,
LLC, a Washington limited liability company;
BENTON COUNTY, a Washington political
subdivision,

Respondents.

[In re Center Parkway]

No. 15-2-01039-2
PETITION FOR CONDEMNATION

1. INTRODUCTION. By this action, the City of Kennewick and the City of Richland ("Cities") are acquiring certain, limited property rights (easement) necessary for the extension of Center Parkway between Kennewick and Richland. After years of local and regional planning, and extensive hearings and review, the State of Washington Utility and Transportation Commission ("WUTC") approved the extension of Center Parkway between Kennewick and Richland. Docket TR-130499. This Court affirmed the WUTC orders on December 9, 2014. *Tri-City R.R. Co. v. State of Washington*, Benton County Cause No. 14-2-07894-8. The WUTC found the Port of Benton, Burlington Northern Santa Fe Railroad, Union Pacific Railroad do not oppose the Center Parkway extension. State, regional and local planning and transportation

PETITION FOR CONDEMNATION - 1

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SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 agencies, and public comment on record before the WUTC, all support the project. The Port of
2 Benton owns the property; Tri-City Railroad Company, LLC ("TCRY") is a tenant under a lease.

3 **2. PARTIES.**

4 2.1 Petitioners. The Cities are municipal corporations of the State of Washington and are
5 authorized by the laws of the State of Washington, including, without limitation, RCW 8.12.030
6 and Chapter 8.12 RCW to appropriate, condemn and damage real estate for public use.

7 2.2 Respondents.

8 2.2.1 Respondents are those individuals and entities set out in Exhibit B, attached
9 hereto. The Respondents identified herein may or may not have any interest in any award or
10 judgment resulting from these proceedings.

11 2.2.2 All other persons or parties unknown claiming any right, title, estate, lien, or
12 interest in the real estate described in the Petition herein, pursuant to RCW 4.28.150.

13 **3. PUBLIC USE.** The object and use for which the property and property rights
14 described in Exhibit A, attached hereto, are sought to be taken or damaged is a public object and
15 a public use, *i.e.*, acquisition of real property to enable the Cities to finish Center Parkway
16 between Kennewick and Richland for road and utility purposes. Accordingly, the Cities have
17 determined that certain properties and property rights are condemned, appropriated, taken and
18 damaged for the construction and improvement of city streets, as provided in their Ordinances.

19 **4. NECESSITY.** It is necessary that the Cities acquire rights to the real property
20 identified in the Ordinances in order to extend Center Parkway between Kennewick and
21 Richland. This proceeding is brought to obtain an adjudication of public use and necessity for
22 the taking or damaging of the property or property rights listed herein and to ascertain the just
23 compensation to be paid for such taking or damaging. The City and certain Respondents have
24 been unable to agree upon the compensation to be paid by the City for the property rights or
25 interest in the necessary portions of the respective parcels.

1 5. THE ORDINANCES.

2 5.1 Notice of Final Action. Pursuant to Chapter 8.12 RCW and RCW 8.25.290, the
3 Cities timely caused notice of the planned condemnation to be: (a) mailed to the property
4 owners of record at least 15 days prior to taking final action on the Ordinances; and (b) published
5 for two consecutive weeks in the *Tri-City Herald*, the legal newspaper with the largest
6 circulation in the City and routinely used by the Cities for the publication of legal notices.

7 5.2 Kennewick Ordinance. The Kennewick City Council of City
8 Commissioners adopted Ordinance No. 5592 on April 14, 2015. The title of the Ordinance is:

9 AN ORDINANCE RELATING TO TRANSPORTATION FACILITIES;
10 AUTHORIZING THE CITY OF RICHLAND TO ACQUIRE CERTAIN REAL
11 PROPERTY INTERESTS BY NEGOTIATED VOLUNTARY PURCHASE
12 UNDER THREAT OF CONDEMNATION, BY CONDEMNATION, OR BY
13 SETTLING CONDEMNATION LITIGATION OR ENTERING
ADMINISTRATIVE SETTLEMENTS FOR THE PURPOSE OF EXTENDING
CENTER PARKWAY FROM TAPTEAL DRIVE IN RICHLAND TO GAGE
BOULEVARD IN KENNEWICK; PROVIDING FOR SEVERABILITY; AND
ESTABLISHING AN EFFECTIVE DATE.

14 5.3 Richland Ordinance. The Richland City of Council of City Commissioners
15 adopted Ordinance No. 17-15 on April 21, 2015. The title of the Ordinance is:

16 AN ORDINANCE OF THE CITY OF RICHLAND, WASHINGTON,
17 AUTHORIZING THE CITY MANAGER TO ACQUIRE CERTAIN REAL
18 PROPERTY INTERESTS BY NEGOTIATED VOLUNTARY PURCHASE
19 UNDER THREAT OF CONDEMNATION, BY CONDEMNATION, OR BY
20 SETTLING CONDEMNATION LITIGATION OR ENTERING
ADMINISTRATIVE SETTLEMENTS FOR THE PURPOSE OF EXTENDING
CENTER PARKWAY FROM TAPTEAL DRIVE IN RICHLAND TO GAGE
BOULEVARD IN KENNEWICK; PROVIDING FOR SEVERABILITY; AND
ESTABLISHING AN EFFECTIVE DATE.

21 5.4 Ordinance Exhibits. A true and correct copy of each Ordinance is attached to
22 this Petition as Exhibit C and is incorporated herein by this reference. The Ordinances authorize
23 and direct the City Attorneys to begin and prosecute the necessary proceedings provided by law
24 to condemn, take and appropriate the land and other property rights necessary to carry out the
25 provisions of the Ordinances.

1 6. RELIEF REQUESTED

2 Wherefore, the Cities pray that the Court enter an order:

3 6.1 Adjudicating that the use for which the property sought is a public use, that the
4 public interest requires the prosecution of this action; and that the acquisition of the property
5 described in this petition is for a public use;

6 6.2 Directing that a jury be summoned and called in the manner provided by law to
7 ascertain the just compensation to be paid for the property and property rights described herein,
8 unless a jury be waived, in which case the same determination shall be made by the Court, sitting
9 without a jury;

10 6.3 Assigning the first reasonably available trial date for the ascertaining of such
11 compensation as required by RCW 8.12.090; and

12 6.4 For such other and further relief as the Court deems just and equitable.

13
14 RESPECTFULLY SUBMITTED this 7th day of May, 2015.

15 FOSTER PEPPER PLLC; and
16 HEATHER KINTZLEY, WSBA #35520
17 City Attorney, City of Richland; and
18 LISA BEATON, WSBA #25305
19 City Attorney, City of Kennewick

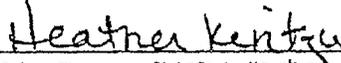
20 
21 Lisa Beaton, WSBA #25305
22 Heather Kintzley, WSBA #35520
23 P. Stephen DiJulio, WSBA #7139
24 Attorneys for Petitioners
25
26

EXHIBIT B

Port of Benton, a Washington Port District: Fee Interest [Note, Port has previously granted to Cities easement interests for the Center Parkway Extension].

Tri-City Railroad Company LLC, a Washington limited liability company: Lessee (of Port of Benton)

Benton County, a political subdivision of the State of Washington: Tax claims, if any.

THE IDENTIFICATION OF INTERESTS IN PROPERTY SET FORTH ABOVE ARE FOR INFORMATIONAL PURPOSES ONLY; AND, ARE NOT A REPRESENTATION OR ACKNOWLEDGMENT OF A RESPONDENT'S SPECIFIC RIGHTS.

EXHIBIT B

FOSTER PEPPER PLLC
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SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

EXHIBIT A

Port of Benton / Tri-City Railroad
Proposed Right-of-way & Utility Easement

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, more particularly described as follows:

A portion of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State).

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of $15^{\circ}12'31''$ to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South $88^{\circ}58'44''$ West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South $89^{\circ}33'21''$ East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of $01^{\circ}23'35''$, leaving said Southerly line, to its point of tangency; Thence North $01^{\circ}50'14''$ East a distance of 81.28 feet, leaving said curve, to a point on the of the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North $88^{\circ}56'20''$ East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, Thence North $01^{\circ}50'14''$ East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and

Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State), and the **TRUE POINT of BEGINNING**, said point being the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of 00°31'48"; Thence North 01°50'14" East a distance of 104.28 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.01 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 26°17'06" East; Thence Southeasterly a distance of 108.69 feet, along the arc of said curve, through a central angle of 02°46'40, along said Northerly right-of-way;

Thence South 01°50'14" West a distance of 101.21 feet, leaving said Northerly line to a point on said Southerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2342.34 foot radius non-tangent curve concave to the Northeast and having a common radius with the aforementioned curve having a 2342.34 foot radius curve; Thence Northwesterly a distance of 85.86 feet along the arc of said curve, through a central angle of 02°06'01, along said Southerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and Northerly line of said Tract "B", back to the true point of beginning.

Containing 10,270.8 square feet, more or less, according to the bearings and distances listed above and as depicted on the attached **Exhibit "A"**.

14-099d
Drpjrls

EXHIBIT C

CITY OF KENNEWICK
ORDINANCE NO. 5592

AN ORDINANCE RELATING TO TRANSPORTATION FACILITIES;
AUTHORIZING THE CITY OF RICHLAND TO ACQUIRE CERTAIN REAL
PROPERTY INTERESTS BY NEGOTIATED VOLUNTARY PURCHASE UNDER
THREAT OF CONDEMNATION, BY CONDEMNATION, OR BY SETTLING
CONDEMNATION LITIGATION OR ENTERING ADMINISTRATIVE
SETTLEMENTS FOR THE PURPOSE OF EXTENDING CENTER PARKWAY
FROM TAPTEAL DRIVE IN RICHLAND TO GAGE BOULEVARD IN
KENNEWICK; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN
EFFECTIVE DATE

WHEREAS, in order to improve mobility, meet the current and planned travel demands of the Cities of Kennewick and Richland, and satisfy the current and future requirements and goals of the City of Kennewick Comprehensive Plan, it will be necessary for the City to construct a new street segment called Center Parkway; and

WHEREAS, the planned Center Parkway crosses the municipal boundary joining the City of Richland with the City of Kennewick; and

WHEREAS, the Cities of Richland and Kennewick have entered into an interlocal agreement, dated September 18, 2001, documenting the Cities' partnership to complete Center Parkway; and

WHEREAS, the interlocal agreement, specifically Supplement No. 2 to the interlocal agreement, assigns the lead role for completing the Center Parkway project to the City of Richland, including specifically acquisition of right of way; and

WHEREAS, in its lead role the City of Richland has planned and budgeted to complete Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; and

WHEREAS, in its lead role, the City of Richland will assign staff and hire contractors as required to complete the Center Parkway project; and

WHEREAS, in order to complete the Center Parkway Project, it has been determined that several parcels of right of way must be acquired within the City of Kennewick. The required property rights are described in Exhibit I for the public uses of public travel and public parking; and

WHEREAS, Chapter 8.12 RCW delegates to cities the authority to use eminent domain for the purpose of condemning property for certain public needs; and

WHEREAS, the City of Richland, in its lead role, has commissioned appraisals to determine the fair market value of the properties and will negotiate in good faith with the owners of the properties authorized to be acquired with the intent of reaching agreements for the voluntary acquisition of the property for fair market value; and

WHEREAS, in the event voluntary negotiated agreements are not reached, eminent domain proceedings will be required to complete the required acquisitions; and

WHEREAS, the intent of the Cities' interlocal agreement and Supplement No. 2 is that the City of Richland will administer processes, including eminent domain proceedings, on behalf of the Cities of Richland and Kennewick for completion of the required property acquisitions; and

WHEREAS, the intent of the Cities' interlocal agreement is that the Cities will own and operate the portions of the completed Center Parkway within their municipal boundaries; and

WHEREAS, the funds necessary to acquire the property by voluntary purchase or to pay just compensation adjudged due after condemnation, shall be paid from City of Richland funds;
NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF KENNEWICK, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Public Use and Necessity Declared. The City of Kennewick City Council finds construction of the Center Parkway Project to be a public use, specifically the construction of public streets and public parking. Further, the City Council finds construction of the Center Parkway Project to be necessary and in the best interests of the citizens and motorists within the City of Kennewick.

Section 2. Richland Authorized. The City of Richland, as Agent on behalf of the City of Kennewick, is hereby authorized to negotiate, prepare and execute such agreements as are customary and necessary for the acquisition of the real property interests described in Exhibit 1, said property to be used for the public use of construction of the Center Parkway Project. Execution of such final agreements by the City of Richland shall occur only after approval by the Richland City Council at an open public meeting.

Section 3. Settlement. The City of Richland is further authorized, as Agent on behalf of the City of Kennewick, to settle condemnation litigation or enter administrative settlements (a settlement in lieu of initiating condemnation litigation) for the acquisition of the real property interests described in Exhibit 1. Such settlements shall be made only upon the recommendation of legal counsel, for amounts deemed to be a reasonable estimation of fair market value, and shall be subject to final approval by the Richland City Council at an open public meeting.

Section 4. Condemnation Proceedings Authorized. In addition to the authority granted to the City of Richland in Sections 2 and 3 above, the City of Richland is hereby authorized to initiate condemnation proceedings as Agent on behalf of the City of Kennewick, and directed to prosecute the actions and proceedings necessary to acquire the properties and property rights described in the attached Exhibit 1. The City of Richland shall promptly provide copies of all pleadings to the Kennewick City Attorney.

Section 5. Property Descriptions. The City of Richland is additionally authorized to make minor amendments to the legal descriptions of properties described in the attached Exhibit 1 as may be necessary to correct scrivener's errors or to conform any legal description to the precise boundaries of the property actually acquired for construction of the Center Parkway Project.

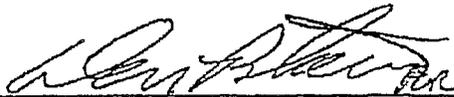
Section 6. Funds. The funds necessary to acquire the property by purchase or to pay just compensation adjudged due after condemnation shall be paid from the City of Richland's Capital Improvement Plan funds.

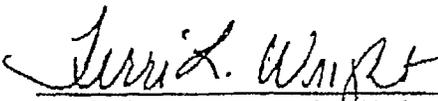
Section 7. Severability. Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 8. Effective Date. This ordinance shall take effect five days from and after its approval, passage and publication as required by law.

PASSED BY THE CITY COUNCIL OF THE CITY OF KENNEWICK, WASHINGTON, this 14th day of April, 2015, and signed in authentication of its passage this 14th day of April, 2015.

Attest:

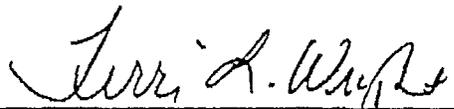

STEVE C. YOUNG, Mayor


TERRI L. WRIGHT, City Clerk

ORDINANCE NO. 5592 filed and recorded in the office of the City Clerk of the City of Kennewick, Washington this 15th day of April, 2015.

Approved as to form:


LISA BEATON, City Attorney


TERRI L. WRIGHT, City Clerk

DATE OF PUBLICATION 4-18-15

EXHIBIT 1

Property Descriptions

All of PID # 1-3099-400-0010-000:

That Portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29, lying south of the Union Pacific Railroad right of way, defined as follows: Beginning at the Southwest corner of said subdivision; Thence South $89^{\circ}23'43''$ East along the South line thereof 686.76 Feet to a point in the West line of the East 615.9 Feet of the said subdivision; Thence North $00^{\circ}15'13''$ West along said West line 350 feet to the TRUE POINT OF BEGINNING; Thence continuing North $00^{\circ}15'13''$ West, 170.18 feet to a point which is 200 feet South of the South right of way line of the Union Pacific Railroad; Thence South $89^{\circ}22'17''$ West: Parallel with said right of way line, 80 feet; Thence South $00^{\circ}15'13''$ East, 168.46 Feet to a point which is 350 feet from the South line of said subdivision; Thence South $89^{\circ}23'43''$ East parallel with said South line 80 feet to the True Point of Beginning. Containing 13,543.7 square feet, more or less, according to the bearings and distances listed above.

Portion of PID # 1-3099-401-0192-001:

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

A portion of Lot 1 of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, and the TRUE POINT OF BEGINNING; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Southeasterly a distance of 48.23 feet, along the arc of said curve through a central angle of $03^{\circ}38'09''$, leaving said Northerly line to a point of reverse curve, to the beginning of a 490.00 foot radius tangent curve to the right; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of $01^{\circ}22'28''$, back to the true point of beginning. Containing 497.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Lot 1 of Short Plat No.192 as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 90.21 feet along the Southerly line of said Lot, to the beginning of a 460.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 85°56'01" West; and the TRUE POINT of BEGINNING; Thence Northwesterly a distance of 114.93 feet along the arc of said curve, through a central angle of 14°18'53", leaving said Southerly line of said Lot 1, to the beginning of a 790.00 foot radius tangent reverse curve, concave to the Northeast, having a radial bearing of North 71°37'09" East; Thence Northwesterly a distance of 57.44 feet along the arc of said curve, through a central angle of 04°09'58", to a point on a Northerly line of said Lot 1; Thence North 88°58'02" East leaving said curve to the beginning of a 760.00 foot radius non-tangent curve, concave to the Northeast, having a common with the aforementioned 790.00 foot radius curve; Thence Southeasterly a distance of 48.23 feet along the arc of said curve, through a central angle of 03°38'09", leaving said Northerly line of said Lot 1, to the beginning of a 490.00 foot radius tangent reverse curve, concave to the Southwest, having a radial bearing of South 71°37'09" West; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of 01°22'28", to a point on the Westerly line of a Parcel described by Parcel Identifications number (P.I.D.) I-3099-400-0010-000, records of said County and State; Thence South 00°41'35" East leaving said curve, along said Westerly line, to a point on said Southerly line of said Lot 1; Thence North 89°48'03" West a distance of 11.07 feet along said Southerly line, back to the true point of beginning. Containing 3,882.37 square feet, more or less, according to the bearings and distances listed above.

Portion PID# 1-3099-400-0009-000:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot

radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1, and the TRUE POINT of BEGINNING; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence North 88°58'44" East a distance of 60.02 feet along said Southerly line to the beginning of a 700.00 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of South 89°24'34" East; Thence Southeasterly a distance of 202.04 feet along the arc of said curve, through a central angle of 16°32'14", to a point on the Southerly line of said P.U.D. Substation Parcel; Thence South 88°58'02" West a distance of 45.30 feet, leaving said curve, back to the true point of beginning. Containing 12,112.8 square feet, more or less, according to the bearings and distances listed above.

Portion of PID# 1-3099-304-0009-000:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South

89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Southeasterly a distance of 64.51 feet along the arc of said curve, through a central angle of 01°34'41", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 112.53 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence South 88°56'20" West a distance of 60.08 feet along said right-of-way, back to the true point of beginning. Containing 7,544.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South

89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 6.49 feet along the arc of said curve, through a central angle of 00°09'32", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 142.04 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 6.01 feet along said right-of-way, back to the true point of beginning.

Together With: Beginning at the aforementioned true point of beginning; Thence North 88°56'20" East a distance of 60.08 feet along said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B", to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 112.53 feet to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°35'42" East; Thence Southeasterly a distance of 29.87 feet along the arc of said curve, through a central angle of 00°43'34", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 100.71 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 28.04 feet along said right-of-way, back to the true point of beginning. Containing 3,828.3 square feet, more or less, according to the bearings and distances listed above.

**A portion of Port of Benton and Tri-City Railroad right-of-way -- No PID# assigned
Street Crossing & Utility Easement:**

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying within, Port of Benton and Tri-City Railroad right-of-way, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a

central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of $15^{\circ}12'31''$ to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South $88^{\circ}58'44''$ West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South $89^{\circ}33'21''$ East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of $01^{\circ}23'35''$, leaving said Southerly line, to its point of tangency; Thence North $01^{\circ}50'14''$ East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State; Thence North $88^{\circ}56'20''$ East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line; Thence North $01^{\circ}50'14''$ East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), to the TRUE POINT of BEGINNING; said point being at (Station 16+39.17 at 30.00' Left as shown on Center Parkway Right-of-way Plans) and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North $24^{\circ}10'23''$ East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of $00^{\circ}31'48''$; Thence North $01^{\circ}50'14''$ East a distance of 108.98 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.34 foot radius non-tangent curve, concave to the Northeast, and having a radial bearing of North $25^{\circ}47'06''$ East; Thence Southeasterly a distance of 107.63 feet, along the arc of said curve, through a central angle of $02^{\circ}45'00''$, along said Northerly right-of-way; to a point on the proposed Easterly proposed right-of-way of Center Parkway; Thence continuing along said curve and Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way Southeasterly a distance of 0.67 feet, along the arc of said curve, through a central angle of $00^{\circ}01'02''$, along said Northerly right-of-way; Thence South $01^{\circ}50'14''$ West a distance of 106.921 feet leaving said Northerly right-of-way to a point on said Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, said point is also lying on a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North $22^{\circ}04'22''$ East; Thence Northwesterly a distance of 85.86 feet along the arc of said curve through a central angle of $02^{\circ}06'01''$ back to the true point of beginning. Containing 10,792.0 square feet, more or less, according to the bearings and distances listed above.

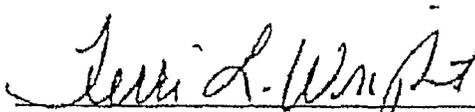
CERTIFICATION

I, Terri L. Wright, City Clerk of the City of Kennewick, Washington (the "City"), hereby certify as follows:

1. The attached copy of Ordinance No. 5592 (the "Ordinance") is a full, true and correct copy of the Ordinance duly passed at a regular meeting of the City Council of the City held at the regular meeting place thereof on the 14th day of April, 2015, as that Ordinance appears on the Minute Book of the City; and

2. A quorum of the members of the City Council was present throughout the meeting and a majority of those members present voted in the proper manner for the adoption of the Ordinance.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of April, 2015.



Terri L. Wright, City Clerk

ORDINANCE NO. 17-15

AN ORDINANCE of the City of Richland, Washington, authorizing the City Manager to acquire certain real property interests by negotiated voluntary purchase under threat of condemnation, by condemnation, or by settling condemnation litigation or entering administrative settlements for the purpose of extending Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; providing for severability; and establishing an effective date.

WHEREAS, in order to improve mobility, meet the current and planned travel demands of the Cities of Richland and Kennewick, and satisfy the current and future requirements and goals of the City of Richland Comprehensive Plan, it will be necessary for the City to construct a new street segment called Center Parkway; and

WHEREAS, the planned Center Parkway crosses the municipal boundary joining the City of Richland with the City of Kennewick; and

WHEREAS, the Cities of Richland and Kennewick have entered in an Interlocal agreement, dated September 18, 2001, documenting the Cities' partnership to complete Center Parkway; and

WHEREAS, the interlocal agreement, specifically Supplement No. 2 to the Interlocal agreement, assigns the lead role for completing the Center Parkway project to the City of Richland; and

WHEREAS, in its lead role, the City of Richland has planned and budgeted to complete Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; and

WHEREAS, in order to complete the Center Parkway Project, it has been determined that the City of Richland and the City of Kennewick must acquire the property and property rights described in Exhibit 1, falling within their respective jurisdictions, for the public uses of public travel and public parking; and

WHEREAS, Chapter 8.12 RCW authorizes the Cities to exercise the power of eminent domain for the purpose of condemning property for certain public needs; and

WHEREAS, the City of Richland has commissioned appraisals to determine the fair market value of the properties identified herein and will continue to negotiate in good faith with the owners of the properties authorized to be acquired with the intent of reaching agreements for the voluntary acquisition of the property for fair market value; and

WHEREAS, in the event voluntary negotiated agreements are not reached, eminent domain proceedings will be required to complete the required acquisitions; and

WHEREAS, the funds necessary to acquire the property by voluntary purchase or to pay just compensation adjudged due after condemnation shall be paid from City of Richland funds.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Richland as follows:

Section 1. Public Use and Necessity Declared: The City of Richland City Council finds construction of the Center Parkway Project to be a public use, specifically the construction of public streets and public parking. Further, the City Council finds construction of the Center Parkway Project to be necessary and in the best interests of the citizens and motorists within the City of Richland.

Section 2. Agency Acknowledged: Pursuant to interlocal agreement and ordinance, the City of Kennewick has delegated to the City of Richland the authority to initiate and prosecute any action necessary, including condemnation, to acquire the property and property rights described in attached Exhibit 1 that are located within the City of Kennewick. The City of Richland accepts this delegation of authority.

Section 3. City Manager Authorized: The City Manager is hereby authorized to negotiate and prepare such agreements as are customary and necessary for the acquisition of the real property interests described in Exhibit 1, said property to be used for the public use of construction of the Center Parkway Project. Execution of such final agreements by the City Manager shall occur only after approval by the Richland City Council at an open public meeting.

Section 4. Settlement: The City Manager is further authorized to settle condemnation litigation or enter administrative settlements (a settlement in lieu of initiating condemnation litigation) for the acquisition of the real property interests described in Exhibit 1. Such settlements shall be made only upon the recommendation of legal counsel, for amounts deemed to be a reasonable estimation of fair market value, and shall be subject to final approval by the Richland City Council at an open public meeting.

Section 5. Condemnation Proceedings Authorized: In addition to the authority granted to the City Manager in Sections 3 and 4 above, the City Manager may further authorize the City Attorney to commence any such condemnation proceedings as may be useful or necessary to acquire the properties and property rights described in the attached Exhibit 1, to include prosecuting condemnation actions as the Agent of the City of Kennewick as directed in City of Kennewick Ordinance No. 5592.

Section 6. Property Descriptions: The City Manager is additionally authorized to make minor amendments to the legal descriptions of properties described in the

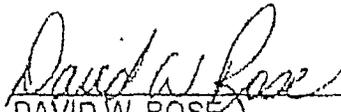
attached Exhibit 1 as may be necessary to correct scrivener's errors or to conform any legal description to the precise boundaries of the property actually acquired for construction of the Center Parkway Project.

Section 7. Funds: The funds necessary to acquire the property by purchase or to pay just compensation adjudged due after condemnation shall be paid from the City of Richland's Capital Improvement Plan funds.

Section 8. Severability: Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

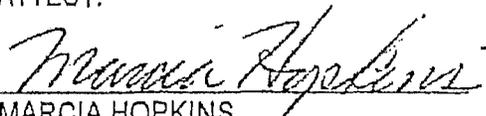
Section 9. Effective Date: This ordinance shall take effect the day following its publication in the official newspaper of the City of Richland.

PASSED by the City Council of the City of Richland, at a regular meeting on the 21st day of April, 2015.



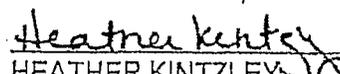
DAVID W. ROSE
Mayor

ATTEST:



MARCIA HOPKINS
City Clerk

APPROVED AS TO FORM:



HEATHER KINTZLEY
City Attorney

Date Published: April 26, 2015

EXHIBIT 1

Property Descriptions

Portion of PID# 1-3099-300-0001-007

That portion of the West ½ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East of the Willamette Meridian, City of Richland, Benton County, Washington, described as follows:

Beginning at the Northeast corner of Parcel 1 of Record of Survey No. 2966, as recorded in Volume 1 of Surveys on Page No. 2966, records of said County and State; Said corner is lying on the Southerly right-of-way of Taptel Drive as shown on said Survey; Thence North 69°56'55" West a distance of 230.22 feet along the Northerly line of said Parcel and said Southerly right-of-way, to the Northwest corner of said Parcel 1, and the TRUE POINT of BEGINNING, and the beginning of a 30.00 foot radius tangent curve to the left; Thence Southwesterly a distance of 48.19 feet along the arc of said curve through a central angle of 92°01'52" along the Westerly line of said Parcel 1, to the beginning of a 700.00 foot radius tangent compound curve to the left; Thence Southwesterly a distance of 227.91 feet along the arc of said curve through a central angle of 18°39'16", along the Westerly line of said Parcel 1, to its point of tangency. (Said point of tangency is lying North 00°38'03" West from the Northwest corner of Parcel 2 of said Record of Survey No. 2966); Thence South 00°38'03" East a distance of 325.26 feet along the Westerly line of said Parcel 2, to a point on the Northerly right-of-way of the Port of Benton / Tri-City Railroad, (formerly A.E.C. Hanford Works Railroad), and the beginning of a 2242.34 foot radius non-tangent curve having a radial bearing of North 23°02'06" East; Thence Northwesterly along said right-of-way a distance of 91.76 feet along the arc of said curve through a central angle of 02°12'15" to the Southeast corner of Record of Survey No. 3241 as recorded in Volume 1 of Surveys on Page No. 3241, records of said County and State; Thence North 01°50'14" East a distance of 294.65 feet, leaving said Northerly right-of-way, to the Northeast corner of said Record of Survey No. 3241, said corner is also the East/ Southeasterly corner of Record of Survey No. 3245, records of said County and State; Thence continuing North 01°50'14" East a distance of 29.53 feet along the Easterly line of said Record of Survey No. 3245, leaving the Northeast corner of said Record of Survey No. 3241, to the beginning of a 770.00 foot radius tangent curve to the right; Thence Northeasterly a distance of 221.92 feet along the arc of said curve and said Easterly line of said Record of Survey No. 3245, through a central angle of 16°30'48" to the beginning of a 30.00 foot radius tangent reverse curve to the left; Thence Northwesterly a distance of 46.23 feet along the arc of said curve and said Easterly line of said Record of Survey No. 3245 to its Northeast corner, through a central angle of 88°17'57", to a point on said Southerly right-of-way of Taptel Drive; Thence South 69°56'55" East a distance of 130.07 feet leaving said Record of Survey No. 3245, back to the true point of beginning.

Containing 43,421.0 square feet, more or less, according to the bearings and distances listed above.

All of PID # 1-3099-400-0010-000

That Portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29, lying south of the Union Pacific Railroad right of way,

defined as follows: Beginning at the Southwest corner of said subdivision; Thence South 89°23'43" East along the South line thereof 686.76 Feet to a point in the West line of the East 615.9 Feet of the said subdivision; Thence North 00°15'13" West along said West line 350 feet to the TRUE POINT OF BEGINNING; Thence continuing North 00°15'13" West, 170.18 feet to a point which is 200 feet South of the South right of way line of the Union Pacific Railroad; Thence South 89°22'17" West: Parallel with said right of way line, 80 feet; Thence South 00°15'13" East, 168.46 Feet to a point which is 350 feet from the South line of said subdivision; Thence South 89°23'43" East parallel with said South line 80 feet to the True Point of Beginning. Containing 13,543.7 square feet, more or less, according to the bearings and distances listed above.

Portion of PID # 1-3099-401-0192-001

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

A portion of Lot 1 of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, and the TRUE POINT OF BEGINNING; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Southeasterly a distance of 48.23 feet, along the arc of said curve through a central angle of 03°38'09", leaving said Northerly line to a point of reverse curve, to the beginning of a 490.00 foot radius tangent curve to the right; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of 01°22'28", back to the true point of beginning. Containing 497.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Lot 1 of Short Plat No.192 as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 90.21 feet along the Southerly line of said Lot, to the beginning of a 460.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 85°56'01" West; and the TRUE POINT of BEGINNING; Thence Northwesterly a distance of 114.93 feet along the arc of said curve, through a central angle of 14°18'53", leaving said Southerly line of said Lot 1, to the beginning of a 790.00 foot radius tangent reverse curve, concave to the Northeast, having a radial bearing of North 71°37'09" East; Thence Northwesterly a distance of 57.44 feet along the arc of said curve, through a central angle of 04°09'58", to a point on a Northerly line of said Lot 1; Thence North 88°58'02" East leaving said curve to the beginning of a 760.00 foot radius non-tangent curve, concave to the Northeast, having a common with the aforementioned 790.00 foot radius curve; Thence Southeasterly a distance of 48.23 feet along the arc of said curve, through a central angle of 03°38'09", leaving said Northerly line of said Lot 1, to the beginning of a 490.00 foot radius tangent reverse curve, concave to the Southwest, having a radial bearing of South 71°37'09" West; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of 01°22'28", to a point on the Westerly line of a Parcel described by Parcel Identifications number (P.I.D.) 1-3099-400-0010-000, records of said County and State; Thence South 00°41'35" East leaving said curve, along said Westerly line, to a point on said Southerly line of said Lot 1; Thence North 89°48'03" West a distance of 11.07 feet along said Southerly line, back to the true point of beginning. Containing 3,882.37 square feet, more or less, according to the bearings and distances listed above.

Portion PID# 1-3099-400-0009-000

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1, and the TRUE POINT of BEGINNING; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence North 88°58'44" East a distance of 60.02 feet along said Southerly line to the beginning of a 700.00 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of South 89°24'34" East; Thence Southeasterly a distance of 202.04 feet along the arc of said curve, through a central angle of 16°32'14", to a point on the Southerly line of said P.U.D. Substation Parcel; Thence South 88°58'02" West a distance of 45.30 feet, leaving said curve, back to the true point of beginning. Containing 12,112.8 square feet, more or less, according to the bearings and distances listed above.

Portion of PID# 1-3099-304-0009-000

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03"

West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Southeasterly a distance of 64.51 feet along the arc of said curve, through a central angle of 01°34'41", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 112.53 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence South 88°56'20" West a distance of 60.08 feet along said right-of-way, back to the true point of beginning. Containing 7,544.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of $15^{\circ}12'31''$ to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South $88^{\circ}58'44''$ West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South $89^{\circ}33'21''$ East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of $01^{\circ}23'35''$, leaving said Southerly line, to its point of tangency; Thence North $01^{\circ}50'14''$ East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North $88^{\circ}56'20''$ East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North $01^{\circ}50'14''$ East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North $24^{\circ}10'23''$ East; Thence Northwesterly a distance of 6.49 feet along the arc of said curve, through a central angle of $00^{\circ}09'32''$, along said Northerly and Southerly lines; Thence South $01^{\circ}50'14''$ West a distance of 142.04 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North $88^{\circ}56'20''$ East a distance of 6.01 feet along said right-of-way, back to the true point of

beginning.

Together With: Beginning at the aforementioned true point of beginning; Thence North 88°56'20" East a distance of 60.08 feet along said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B", to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 112.53 feet to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°35'42" East; Thence Southeasterly a distance of 29.87 feet along the arc of said curve, through a central angle of 00°43'34", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 100.71 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 28.04 feet along said right-of-way, back to the true point of beginning. Containing 3,828.3 square feet, more or less, according to the bearings and distances listed above.

**A portion of Port of Benton and Tri-City Railroad right-of-way – No PID# assigned
Street Crossing & Utility Easement**

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying within, Port of Benton and Tri-City Railroad right-of-way, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on

the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), to the **TRUE POINT OF BEGINNING**; said point being at (Station 16+39.17 at 30.00' Left as shown on Center Parkway Right-of-way Plans) and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of 00°31'48"; Thence North 01°50'14" East a distance of 108.98 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.34 foot radius non-tangent curve, concave to the Northeast, and having a radial bearing of North 25°47'06" East; Thence Southeasterly a distance of 107.63 feet, along the arc of said curve, through a central angle of 02°45'00", along said Northerly right-of-way; to a point on the proposed Easterly proposed right-of-way of Center Parkway; Thence continuing along said curve and Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way Southeasterly a distance of 0.67 feet, along the arc of said curve, through a central angle of 00°01'02", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 106.921 feet leaving said Northerly right-of-way to a point on said Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, said point is also lying on a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°04'22" East; Thence Northwesterly a distance of 85.86 feet along the arc of said curve through a central angle of 02°06'01" back to the true point of beginning.

Containing 10,792.0 square feet, more or less, according to the bearings and distances listed above.

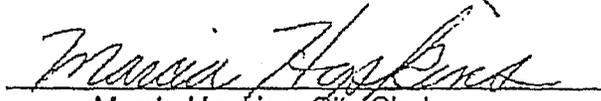
CERTIFICATION

I, Marcia Hopkins, City Clerk of the City of Richland, Washington (the "City"), hereby certify as follows:

1. The attached copy of Ordinance No. 17-15 (the "Ordinance") is a full, true and correct copy of the Ordinance duly passed at a regular meeting of the City Council of the City held at the regular meeting place thereof on the 21 day of April, 2015, as that Ordinance appears on the Minute Book of the City; and

2. A quorum of the members of the City Council was present throughout the meeting and a majority of those members present voted in the proper manner for the adoption of the Ordinance.

IN WITNESS WHEREOF, I have hereunto set my hand this 21 day of April, 2015.



Marcia Hopkins, City Clerk

William J. Schroeder

To: Stephen DiJulio
Cc: William C. Schroeder
Subject: RE: TCRY v WUTC

Steve --

Sorry for the delay in responding. I was travelling to attend a wedding. We have no objection to an extension and will advise the STB of that fact tomorrow.

Electronic service is fine.

I hope all is well.

Regards,
Bill

From: Stephen DiJulio [mailto:DiJup@foster.com]
Sent: Friday, May 29, 2015 12:18 PM
To: William J. Schroeder
Cc: William C. Schroeder; Debbie Miller
Subject: TCRY v WUTC

Bill and Will,

Do you have any objection to extending the date for City response to the STB proceeding one week, until Monday, June 15, 2015? Other dates would extend accordingly.

And, will you except electronic service? We will reciprocate and accept electronic service. Thanks,
Steve

P. Stephen (Steve) DiJulio

Attorney

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3400

Seattle, WA 98101-3299

Phone: 206-447-8971

Fax: 206-749-1927

dijup@foster.com

www.foster.com

From: William J. Schroeder
Sent: Monday, June 01, 2015 3:34 PM
To: Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us';
'tcowan@cowanmoore.com'; 'Reid.Hay@co.benton.wa.us'
Subject: Cities of Richland & Kennewick vs. Port of Benton et al.
Attachments: STB DECISION (01446218x7AC1D).pdf; Joint Motion Stay of Proceedings - Cities vs.
TCRY (01453065x7AC1D).docx

Counsel –

As you are aware, the Surface Transportation Board (“STB”) issued a Decision on May 21, 2015 in which it found that a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under 49 U.S.C § 10501(b). As a result, the STB instituted a proceeding to consider the matter under the modified procedure rules at 49 C.F.R. pt. 1112. A copy of the Decision is attached.

Given the STB’s May 21, 2015 Decision, please advise by June 4, 2015 whether your respective clients will agree to stay the condemnation action in Benton County Superior Court Cause No. 15-2-01039-2 until after the STB rules whether the condemnation action is preempted.

I have attached a proposed Joint Motion for Stay of Proceedings and Order Staying Proceedings for your consideration.

Regards,
Bill Schroeder

William J. Schroeder

Partner

PAINE  HAMBLEN™

509-455-6043

william.schroeder@painehamblen.com

SERVICE DATE – MAY 21, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35915

TRI-CITY RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER

Decided: May 18, 2015

By petition filed on March 19, 2015, Tri-City Railroad Company, LLC (TCRY) seeks a declaratory order concerning efforts by two Washington State communities to bisect TCRY's tracks with a proposed at-grade street crossing. TCRY, a Class III rail carrier, operates on approximately 16 miles of track, which is owned by the Port of Benton.¹ The track runs through the City of Kennewick and the City of Richland (collectively the Cities).² TCRY asks for a finding that 49 U.S.C. § 10501(b) preempts actions by the Cities to condemn and acquire a right-of-way for a proposed at-grade crossing, which would bisect TCRY's main and passing tracks.³ TCRY claims that the proposed at-grade crossing would unreasonably interfere with current and planned railroad operations by rendering portions of the tracks unusable for switching and railcar storage operations.⁴ Moreover, TCRY asserts that the proposed at-grade crossing would create new hazards for both rail crews and members of the public.⁵

TCRY states that the Cities filed two petitions with the Washington State Utilities and Transportation Commission (UTC) to approve the at-grade crossing at issue here. TCRY claims that the first petition, filed in 2006, was denied because the UTC found that the Cities had failed to meet their burden to demonstrate that the inherent and site-specific dangers of the crossing could be mitigated with the installation of safety devices.⁶ The Cities filed a second petition in 2013. TCRY notes that the UTC initially denied the 2013 petition, but that it ultimately reversed itself and approved the crossing.⁷

¹ TCRY Pet. 4, Mar. 19, 2015.

² Id.

³ Id. at 1-2 and 46-7.

⁴ Id. at 1.

⁵ Id.

⁶ Id. at 13-4.

⁷ TCRY Pet. 18-20, Mar. 19, 2015.

The Cities subsequently served a pre-condemnation notice outlining the Cities' plan for condemning the right-of-way and offered \$38,500 in compensation.⁸ On April 7, 2015, TCRY filed a supplemental affidavit of counsel with the Board and attached the Cities' Notice of Planned Final Action and the proposed condemnation ordinances. According to the Cities, approval of these ordinances would authorize the commencement of eminent domain (condemnation) proceedings against TCRY.⁹ Although the Cities were scheduled to consider the condemnation ordinances in April, the record is silent concerning the outcome.

The Cities did not file a reply to the petition for declaratory order as provided for in 49 C.F.R. § 1104.13(a), but they did file a notice of appearance on March 20, 2015.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. Here, a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under § 10501(b), and the record is incomplete. The Board will therefore institute a declaratory order proceeding and consider the matter under the modified procedure rules at 49 C.F.R. pt. 1112.

The Board will treat TCRY's March 19 petition as its opening statement. Replies and comments from interested parties are due June 8, 2015. TCRY's rebuttal to all replies and comments shall be due June 17, 2015.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice, including 49 C.F.R. parts 1112 and 1114.

2. Replies are due June 8, 2015.

3. TCRY's rebuttal is due June 17, 2015.

4. Notice of the Board's action will be published in the Federal Register.

5. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁸ Id. at 23.

⁹ TCRY's Supplemental Aff. Ex. 1, Apr. 7, 2015.

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

THE CITY OF KENNEWICK, a Washington)
municipal corporation; THE CITY OF) No. 15-2-01039-2
RICHLAND, a Washington municipal)
corporation,)

Petitioners,)

vs.)

PORT OF BENTON, a Washington Port)
district; TRI-CITY RAILROAD COMPANY,)
LLC, a Washington limited liability company;)
BENTON COUNTY, a Washington political)
subdivision,)

Respondents.)

[In re Center Parkway])

**JOINT MOTION FOR STAY OF
PROCEEDINGS AND ORDER
STAYING PROCEEDINGS**

I. MOTION

On May 21, 2015, the Surface Transportation Board (“STB”) issued a Decision finding that “a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under § 10501(b).” As a result, the STB instituted “a declaratory order proceeding and [is considering] the matter under the modified procedure

**JOINT MOTION FOR STAY OF PROCEEDINGS AND
ORDER STAYING PROCEEDINGS - 1**

PAINÉ HAMBLEN LLP
717 WEST SPRAGUE AVENUE, SUITE 1200,
SPOKANE, WA 99201 PHONE (509) 455-6000
FAX (509) 838-0007

1 rules at 49 C.F.R. Part 1112.” A copy of the Surface Transportation Board’s Decision, Docket
2 No. FD-35915, is attached to this Joint Motion as **Exhibit A**.

3 Therefore, the parties jointly request that this Court stay proceedings in this matter
4 until such time as the STB determines whether this action is preempted.

5 DATED the _____ day of June, 2015.

6
7 COWAN MOORE LAW FIRM

PAINE HAMBLÉN LLP

8
9 By: _____
10 Thomas A. Cowan, Jr., WSBA #5079
11 Attorneys for Port of Benton

By: _____
William J. Schroeder WSBA #7942
William C. Schroeder WSBA #41986
Attorneys for Respondent Tri-City
Railroad Company, LLC

12 FOSTER PEPPER PLLC

KENNEWICK CITY ATTORNEY

13 By: _____
14 P. Stephen DiJulio, WSBA #7139
15 Attorneys for Plaintiffs City of
Kennewick and City of Richland

By: _____
Lisa Beaton, WSBA #25305
Attorney for City of Kennewick

16 RICHLAND CITY ATTORNEY

BENTON COUNTY ATTORNEY

17 By: _____
18 Heather Kintzley, WSBA #35520
19 Attorney for City of Richland

By: _____
Reid W. Hay, WSBA #34584

20 **II. ORDER**

21 THIS MATTER came before the Court on the Joint Motion of the parties. The Court
22 has considered the joint motion of the parties, the Court file, and is otherwise fully advised.

23
24
25 **JOINT MOTION FOR STAY OF PROCEEDINGS AND**
26 **ORDER STAYING PROCEEDINGS - 2**

PAINE HAMBLÉN LLP
717 WEST SPRAGUE AVENUE, SUITE 1200,
SPOKANE, WA 99201 PHONE (509) 455-6000
FAX (509) 838-0007

1 NOW, THEREFORE, the Court orders, that the Joint Motion for Stay of Proceedings
2 is granted. The parties shall jointly file a report with the Court sixty (60) days from the date of
3 this Order advising the Court as to the pendency of the STB matter.
4

5 DONE this _____ day of _____, 2015.

6 HONORABLE JUDGE _____
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on this _____ day of June, 2015, I caused to be served a true
3 and correct copy of the foregoing **JOINT MOTION FOR STAY OF PROCEEDINGS,**
4 **AND ORDER STAYING PROCEEDINGS** by the method indicated below and addressed
5 as follows:

6 P. Stephen DiJulio _____ U.S. MAIL
7 FOSTER PEPPER PLLC _____ OVERNIGHT MAIL
8 1111 Third Avenue, Suite 3400 _____ DELIVERED
9 Seattle, Washington 98101-3299 _____ TELECOPY (FACSIMILE)
10 (206) 447-9700 _____ E-MAIL

11 Heather Kintzley _____ U.S. MAIL
12 Richland City Attorney _____ OVERNIGHT MAIL
13 975 George Washington Way _____ DELIVERED
14 PO Box 190 MS-07 _____ TELECOPY (FACSIMILE)
15 Richland, WA 99352 _____ E-MAIL
16 (509) 942-7689

17 Lisa Beaton _____ U.S. MAIL
18 Kennewick City Attorney _____ OVERNIGHT MAIL
19 P.O. Box 6108 _____ DELIVERED
20 Kennewick, WA 99336 _____ TELECOPY (FACSIMILE)
21 (509) 585-4424 _____ E-MAIL

22 Thomas A. Cowan _____ U.S. MAIL
23 Cowan Moore Law Firm _____ OVERNIGHT MAIL
24 503 Knight Street, Suite A _____ DELIVERED
25 Richland, WA 99352 _____ TELECOPY (FACSIMILE)
26 (509) 943-2676 _____ E-MAIL

27 _____
28 Debbie Miller

I:\Spodocs\32447\00006\PLEAD\01453065.DOCX

29 **JOINT MOTION FOR STAY OF PROCEEDINGS AND**
30 **ORDER STAYING PROCEEDINGS - 4**

PAINÉ HAMBLEN LLP
717 WEST SPRAGUE AVENUE, SUITE 1200,
SPOKANE, WA 99201 PHONE (509) 455-6000
FAX (509) 838-0007

Debbie Miller

From: William J. Schroeder
Sent: Wednesday, June 03, 2015 8:31 AM
To: Debbie Miller
Subject: FW: Cities of Richland & Kennewick vs. Port of Benton et al.

From: Tom Cowan [mailto:tcowan@cowanmoore.com]
Sent: Tuesday, June 02, 2015 10:49 AM
To: William J. Schroeder; Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'; 'Reid.Hay@co.benton.wa.us'
Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Bill

The proposed stay is acceptable to the Port of Benton. If the other parties agree, please let me know how you wish to handle signatures.

From: William J. Schroeder [mailto:william.schroeder@painehamblen.com]
Sent: Monday, June 01, 2015 3:34 PM
To: Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'; Tom Cowan; 'Reid.Hay@co.benton.wa.us'
Subject: Cities of Richland & Kennewick vs. Port of Benton et al.

Counsel –

As you are aware, the Surface Transportation Board (“STB”) issued a Decision on May 21, 2015 in which it found that a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under 49 U.S.C § 10501(b). As a result, the STB instituted a proceeding to consider the matter under the modified procedure rules at 49 C.F.R. pt. 1112. A copy of the Decision is attached.

Given the STB’s May 21, 2015 Decision, please advise by June 4, 2015 whether your respective clients will agree to stay the condemnation action in Benton County Superior Court Cause No. 15-2-01039-2 until after the STB rules whether the condemnation action is preempted.

I have attached a proposed Joint Motion for Stay of Proceedings and Order Staying Proceedings for your consideration.

Regards,
Bill Schroeder

William J. Schroeder
Partner
PAINE  HAMBLEN™
509-455-6043
william.schroeder@painehamblen.com

Debbie Miller

From: William J. Schroeder
Sent: Friday, June 05, 2015 9:44 AM
To: Stephen DiJulio
Cc: 'Reid.Hay@co.benton.wa.us'; 'tcowan@cowanmoore.com'; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'; William C. Schroeder
Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Steve –

Tom and Reid have agreed to the stay. Please let me know the Cities' position today.

Regards,
Bill

From: Reid Hay [mailto:Reid.Hay@co.benton.wa.us]
Sent: Thursday, June 04, 2015 12:05 PM
To: Tom Cowan; William J. Schroeder; Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'
Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Mr. Schroeder,

Benton County is willing to agree to the stay if the other parties also agree.

-- Reid

Reid Hay
Deputy Prosecuting Attorney
Benton County Prosecuting Attorney's Office
Phone: (509) 735-3591
Fax: (509) 222-3705

This email, any and all attachments hereto, and all information contained and conveyed herein may contain and be deemed confidential attorney client privileged and/or work product information. If you have received this email in error, please delete and destroy all electronic, hard copy and any other form immediately. It is illegal to intentionally intercept, endeavor to intercept or procure any other person to intercept or endeavor to intercept, any wire, oral or electronic communication.

From: Tom Cowan [mailto:tcowan@cowanmoore.com]
Sent: Tuesday, June 02, 2015 10:49 AM
To: William J. Schroeder; Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'; Reid Hay
Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Bill

The proposed stay is acceptable to the Port of Benton. If the other parties agree, please let me know how you wish to handle signatures.

Debbie Miller

From: William J. Schroeder
Sent: Saturday, June 06, 2015 12:06 PM
To: 'Randolph Peterson'; 'Rhett Peterson'; Rydel Peterson; 'Lisa Anderson'
Cc: William C. Schroeder; 'Anne Schroeder'; Debbie Miller
Subject: FW: Cities of Richland & Kennewick vs. Port of Benton et al.

FYI--Bill

From: Stephen DiJulio [mailto:DiJup@foster.com]
Sent: Friday, June 05, 2015 10:49 AM
To: William J. Schroeder; William C. Schroeder
Cc: 'Reid.Hay@co.benton.wa.us'; 'tcowan@cowanmoore.com'; 'hkintzley@ci.richland.wa.us';
'lisa.beaton@ci.kennewick.wa.us'
Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

All,

Thank your for your interest in this matter. Soon we will be sending forms of disclaimer of interest to the Port and County for consideration. As there is no court schedule, there is nothing to stay. The Cities have not noted the hearing for public use and necessity, and will not do so until after the STB acts. As a result, you may rely on this representation from the Cities and avoid unnecessary court filings.

Steve

P. Stephen (Steve) DiJulio

Attorney

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3400

Seattle, WA 98101-3299

Phone: 206-447-8971

Fax: 206-749-1927

dijup@foster.com

www.foster.com

From: William J. Schroeder [mailto:william.schroeder@painehamblen.com]
Sent: Friday, June 05, 2015 9:44 AM
To: Stephen DiJulio
Cc: 'Reid.Hay@co.benton.wa.us'; 'tcowan@cowanmoore.com'; 'hkintzley@ci.richland.wa.us';
'lisa.beaton@ci.kennewick.wa.us'; William C. Schroeder
Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Steve --

Tom and Reid have agreed to the stay. Please let me know the Cities' position today.

Regards,
Bill

From: Reid Hay [mailto:Reid.Hay@co.benton.wa.us]

Sent: Thursday, June 04, 2015 12:05 PM

To: Tom Cowan; William J. Schroeder; Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'

Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Mr. Schroeder,

Benton County is willing to agree to the stay if the other parties also agree.

-- Reid

Reid Hay

Deputy Prosecuting Attorney

Benton County Prosecuting Attorney's Office

Phone: (509) 735-3591

Fax: (509) 222-3705

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From: Tom Cowan [mailto:tcowan@cowanmoore.com]

Sent: Tuesday, June 02, 2015 10:49 AM

To: William J. Schroeder; Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'; Reid Hay

Subject: RE: Cities of Richland & Kennewick vs. Port of Benton et al.

Bill

The proposed stay is acceptable to the Port of Benton. If the other parties agree, please let me know how you wish to handle signatures.

From: William J. Schroeder [mailto:william.schroeder@painehamblen.com]

Sent: Monday, June 01, 2015 3:34 PM

To: Stephen DiJulio; 'hkintzley@ci.richland.wa.us'; 'lisa.beaton@ci.kennewick.wa.us'; Tom Cowan;

'Reid.Hay@co.benton.wa.us'

Subject: Cities of Richland & Kennewick vs. Port of Benton et al.

Counsel –

As you are aware, the Surface Transportation Board (“STB”) issued a Decision on May 21, 2015 in which it found that a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under 49 U.S.C § 10501(b). As a result, the STB instituted a proceeding to consider the matter under the modified procedure rules at 49 C.F.R. pt. 1112. A copy of the Decision is attached.

Given the STB’s May 21, 2015 Decision, please advise by June 4, 2015 whether your respective clients will agree to stay the condemnation action in Benton County Superior Court Cause No. 15-2-01039-2 until after the STB rules whether the condemnation action is preempted.

I have attached a proposed Joint Motion for Stay of Proceedings and Order Staying Proceedings for your consideration.

Regards,
Bill Schroeder

William J. Schroeder

Partner

PAINE  HAMBLEN

509-455-6043

william.schroeder@paineambly.com

835 F.Supp.2d 1056
United States District Court,
E.D. Washington.

BNSF RAILWAY COMPANY, Plaintiff,
Union Pacific Railroad Company, and
Port of Benton, Plaintiff-Intervenors,
v.
TRI-CITY & OLYMPIA RAILROAD
COMPANY LLC, Defendant.

No. CV-09-5062-EFS. | Dec. 14, 2011.

Synopsis

Background: Railroad brought action alleging that rail and track maintenance service provider breached railroad lease agreement when it blocked railroad's access to trackage and seeking declaratory judgment recognizing its operating rights over trackage and permanent injunction compelling lessee to afford it equal access to trackage. Another railroad and rail owner intervened, and provider filed counterclaims against owner for inverse condemnation, breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, quantum meruit, and tortious interference with contract. Plaintiff and provider filed cross-motions for summary judgment.

Holdings: The District Court, Edward F. Shea, J., held that:

[1] railroads had right to access entirety of trackage in question, and

[2] permanent injunction barring rail and track maintenance service provider from interfering with railroads' rights to operate on trackage was warranted.

Plaintiff's motion granted.

West Headnotes (7)

[1] **Contracts**

↳ Extrinsic circumstances

Under Washington law, in interpreting contract, extrinsic evidence is only admissible as to entire

circumstances under which contract was made, as aid in ascertaining parties' intent.

Cases that cite this headnote

[2] **Federal Civil Procedure**

↳ Contract cases in general

Under Washington law, when contract is unambiguous and its formation is undisputed, contract's interpretation is question of law that is appropriate for resolution on summary judgment.

Cases that cite this headnote

[3] **Railroads**

↳ Construction and operation

Under Washington law, railroads' agreements with United States granting railroads operating rights over "the tracks covered by this agreement" "as it may be necessary to use for the purpose of moving freight shipments to or from the tracks" granted railroads right to access entirety of trackage, even though one section of agreement listed only sections of track south of interchange facility, where agreement included detailed map depicting entirety of trackage, minus subsequently-built trackage and spurs, and another section granted railroads and industries served by them right to construct additional "industrial spur, set-out, and such other tracks connecting with the Government's main tracks or classification yards."

Cases that cite this headnote

[4] **Declaratory Judgment**

↳ Nature and elements in general

Declaratory Judgment

↳ Adverse interests or contentions

Declaratory judgment is proper when one party has established that there is substantial controversy, between parties having adverse interest, of sufficient immediacy and reality to warrant issuance of declaratory judgment. 28 U.S.C.A. § 2201.

Cases that cite this headnote

[5] **Injunction**

☛ Grounds in general; multiple factors

Permanent injunctive relief is proper when party can show that: (1) it has suffered irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering balance of hardships between plaintiff and defendant, remedy in equity is warranted; and (4) public interest would not be disserved by permanent injunction.

Cases that cite this headnote

[6] **Injunction**

☛ Clear, likely, threatened, anticipated, or intended injury

Injunction

☛ Irreparable injury

Irreparable injury requirement for permanent injunction is also satisfied by continuing and imminent threat of harm.

Cases that cite this headnote

[7] **Injunction**

☛ Railroads

Permanent injunction barring rail and track maintenance service provider from interfering with railroads' rights to operate on trackage was warranted, even though provider had right under maintenance and operation agreement and lease with owner to charge per-car fee for its services, where railroads were granted right to operate in prior agreements with United States, provider took possession of trackage subject to railroads' pre-existing rights, and it was in public interest to encourage competition among railroads and to ensure that railroad service remained efficient.

Cases that cite this headnote

Attorneys and Law Firms

*1057 Leland Barrett Kerr, Patrick J. Galloway, Kerr Law Group, Kennewick, WA, Matthew R. Brodin, Timothy R. Thornton, Briggs and Morgan, PA, Minneapolis, MN, for Plaintiff.

Tim D. Wackerbarth, Lane Powell, P.C., Rob J. Crichton, Keller Rohrback, LLP, Seattle, WA, Lucinda Jean Luke, Thomas A. Cowan, Jr., Cowan, Moore, Stam, Luke & Petersen, Richland, WA, for Intervenor Plaintiffs.

David Lawrence Meyer, Morrison & Foerster, LLP, Washington, DC, Derek F. Foran, Morrison & Foerster, LLP, San Francisco, CA, Nicholas D. Kovarik, Dunn & Black, PS, Spokane, WA, Paul J. Petit, Kennewick, WA, Robert A. Dunn, Dunn & *1058 Black, PS, Spokane, WA, Brandon L. Johnson, Minnick Hayner, P.S., Walla Walla, WA, for Defendant.

ORDER GRANTING BNSF'S MOTION FOR SUMMARY JUDGMENT, DENYING TCRY'S MOTION FOR SUMMARY JUDGMENT, AND DENYING ALL OTHER PENDING MOTIONS AS MOOT

EDWARD F. SHEA, District Judge.

Before the Court, without oral argument, are Plaintiff BNSF Railway Company's (hereinafter "BNSF") Motion for Summary Judgment, ECF No. 267, and Defendant Tri-City & Olympia Railroad Company LLC's (hereinafter "TCRY") Motion for Summary Judgment, ECF No. 273. Also before the Court are BNSF's Motion to Compel Discovery Propounded to Defendant Tri-City & Olympia Railroad Company, L.L.C., ECF No. 305, and TCRY's Motion for Protective Order, ECF No. 316. After reviewing the submissions of the parties and applicable authority, the Court is fully informed. For the reasons discussed below, the Court grants BNSF's Motion for Summary Judgment, denies TCRY's Motion for Summary Judgment, and denies all other pending motions as moot.

I. BACKGROUND¹

A. 1947 Agreement

On November 6, 1947, the United States, acting through the U.S. Atomic Energy Commission ("Commission"), entered

into an agreement ("1947 Agreement") with several railroads to establish service to the Hanford Nuclear Reservation ("Hanford site"). BNSF and Union Pacific Railroad Company ("UP"), the undisputed successors-in-interest to the 1947 Agreement, were granted "equal joint" operating rights over trackage beginning near Kennewick and extending north of Richland to the Hanford site ("Richland Trackage").

The 1947 Agreement identifies the rights of the parties to railway lines as shown on an August 25, 1947 map attached to the Agreement as "Exhibit A." The 1947 Agreement acknowledges that "the Government has constructed on its property a line of railway ... extending from Hanford, Washington, southerly to a point near the north bank of the Yakima River," and states as its purpose that "the Government desires to have a direct rail connection to the south so as to interchange business with [BNSF and UP's predecessors in interest]." To this end, Article V of the 1947 Agreement grants BNSF and UP's predecessors in interest the "equal joint right" to operate on the rail line and "to use said interchange facilities and wye for the purpose of interchanging business with the Government." Article VII of the Agreement states that BNSF and UP's predecessors in interest "each of itself agrees to deliver and receive at said interchange facilities all business which either is obligated to transport as a common carrier railroad." Article IX of the Agreement imposes an obligation on BNSF and UP's predecessors to "agree from time to *1059 time upon rules and regulations covering the movement of engines, cars and trains over the line B-E and on said interchange facilities."

The map attached to the 1947 Agreement identifies several points, labeled A through E. Point A is in Kennewick, and points B, C, and D extend along the rail line in a northwesterly direction toward the Hanford site. The map identifies point E as a location to the north of Richland upon which interchange tracks were to be built. The government later constructed an interchange facility at Point E, and today, Point E is TCRY's rail yard and is still operated as an interchange facility. Though the 1947 map identified a location to the south of the interchange tracks for the wye, the wye was in fact later built to the north of the interchange tracks.²

In 1948, the 1947 Agreement was the subject of a ruling by the Interstate Commerce Commission (ICC). Because the government was the only "customer" served by BNSF and UP's predecessors, the railroads sought exemption from the required public convenience and necessity certifications for common rail carriers. The ICC's Order held that a

certificate *was* required because the railroads would also provide common carrier services to businesses in and around Richland. The ICC's Order modified terms in the 1947 Agreement regarding payment and rights to termination, but left the remainder of the Agreement undisturbed.

B. 1961 Agreement

In 1961, the Commission entered into a second agreement ("1961 Agreement") with the Railroads. Section 1 of the 1961 Agreement leased three specified areas of track to the railroads. Section 2 of the Agreement granted "the Railroads, and the industries served by them, the right to construct additional industrial spur, set-out, and such other tracks connecting with the Government's main tracks or classification yards as may be required to provide rail service for industries." Section 3 of the 1961 Agreement states as follows:

The Commission hereby grants the Railroads the right to operate with their employees and equipment over such segments of the Government's tracks shown on Exhibit "A" as it may be necessary to use for the purpose of moving freight shipments to or from the tracks covered by this agreement.

Section 3's grant of authority was consistent with the agreement's stated purpose of allowing the railroads to operate on the United States' tracks "for the sole purpose of receiving and delivering shipments routed via the Railroads and consigned by or to shippers and receivers located on said spur or side tracks."

The rail line depicted in a 1960 map attached as Exhibit A to the 1961 Agreement begins south of Richland at the Yakima River Bridge, and extends to a Department of Energy (DOE) "barricade" roughly one thousand feet north of the wye tracks. The three segments of track leased in the 1961 Agreement are all south of the interchange facility and wye.

In 1979, the United States entered into an agreement with the railroads converting the 1961 lease agreement into a permit so that the tracks could be classified as surplus under the Federal Property and Administrative Services Act of 1949. This agreement deleted Sections 1 and 4 of the 1961 Agreement, which detailed the terms of the lease and the railroads' maintenance obligation, but left the 1961 Agreement's other provisions "in full force and effect."

***1060 C. 1998 Indenture**

In 1998, the United States, acting through the DOE, conveyed ownership of a six-mile section of track to the Port of Benton ("Port") through an Indenture, thereby assigning the DOE and Commission's rights under the 1947 and 1961 Agreements to the Port. The indenture stated that the 1947 and 1961 Agreements and the 1979 permit agreement governed access to the Railroad. The Indenture also stated that the Port, as assignee, agreed to be bound by the obligations and considerations in the United States' permit. As a result of these agreements, the Port has the right to terminate BNSF and UP's rights to use the Richland Trackage upon six months notice.

D. Interchange Agreement

On October 1, 1998, the Port entered into a Maintenance and Operation Agreement with TCRY's predecessor, Livingston Rebuild Center, Inc. ("Livingston"), under which it agreed to pay Livingston \$325,000 per year for the maintenance of the Richland Trackage. These contractual rights and obligations were subsequently assigned to TCRY.

In May 2000, BNSF and TCRY contracted to interchange cars going into the Richland Trackage ("Interchange Agreement"). They exchanged cars at the Richland Junction, and TCRY served BNSF's customers along the Richland Trackage. TCRY maintained the trackage at its own expense and began charging a per-car fee for its services. This contract specifically reserved BNSF's rights under the 1947 and 1961 Agreements.

In a September 12, 2000 letter to then-TCRY President John Haakenson, the Port's Assistant Executive Director Scott Keller acknowledged that the Port was paying TCRY to maintain the railroad under a contract that allowed TCRY to charge a fee for its railroad operations, the revenue from which would offset the cost of maintenance. Recognizing that UP was using the Richland Trackage without paying a fee, the Port directed TCRY "to give written notice to [UP] terminating its rights to use the Port of Benton track." Beginning November 14, 2000, UP could no longer continue its unauthorized use of the Richland Trackage: it would need to establish an interchange agreement with TCRY.

From approximately April 2001 through November 2001, TCRY and BNSF continuously disagreed about BNSF's right to operate on the Richland Trackage. BNSF claimed the 1947 and 1961 Agreements allowed it to directly operate

on the Richland Trackage without interchanging; TCRY maintained that BNSF could only operate on the Richland Trackage if it operated under the Interchange Agreement. This disagreement about BNSF's rights to operate on the Richland Trackage forms the essential controversy before the Court today.

E. Railroad Lease

In 2002, TCRY and the Port negotiated a lease agreement ("Railroad Lease") that authorized TCRY to provide rail and track maintenance services on the Richland Trackage. Paragraph 7.4 of the lease agreement states that TCRY "shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port's prior written consent."

F. Legal Action

In 2009, BNSF informed TCRY that it intended to exercise its rights to directly operate on the Richland Trackage. TCRY objected, and on July 20 and 21, 2009, TCRY erected a barrier which physically prevented a BNSF locomotive from reaching *1061 BNSF customers along the Richland Trackage. A few days later, TCRY requested that the Port terminate the Richland Trackage agreements with BNSF. The Port refused.

BNSF filed this suit on July 20, 2009. ECF No. 1. UP moved to intervene on August 4, 2009, ECF No. 26, and the Court granted UP's motion. ECF No. 46. On August 12, 2009, 2009 WL 2486170, the Court granted BNSF's motion for a preliminary injunction, prohibiting TCRY from blocking BNSF's access to the Richland Trackage and requiring TCRY to charge its customary fee. ECF No. 46 & 93. TCRY filed an interlocutory appeal on September 9, 2009, which was voluntarily dismissed. ECF Nos. 67, 101, 108 & 109. Since August 15, 2009, BNSF and TCRY have been operating under the Proposed Operating Plan created to comply with the Court's preliminary injunction. ECF No. 52.

On March 8, 2010, the Court granted the Port of Benton's request to intervene. ECF No. 121. On June 2, 2010, TCRY filed a separate but related action in Benton County Superior Court against the Port, asserting claims for inverse condemnation, breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, and quantum meruit. ECF No. 209-1. By order dated August 20,

2010, the Superior Court stayed the state court action pending resolution of the federal claims in this Court. ECF No. 209–2.

On September 29, 2010, the Port amended its complaint, asserting that TCRY breached Railroad Lease Paragraph 7.4, which prohibits TCRY from “amend[ing], modify[ing], terminat[ing], or invalidat[ing]” other railroads’ existing contractual relationships with the Port, when it temporarily blocked BNSF Railroad Company (BNSF)’s access to the Richland Trackage in July 2009. ECF No. 136. TCRY asserted several counterclaims against the Port, including inverse condemnation, breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, quantum meruit, and tortious interference with contract. ECF No. 165, ¶¶ 18–24.

TCRY filed a motion for summary judgment on October 20, 2010, seeking dismissal of the Port’s Amended Complaint. ECF No. 142. On November 24, 2010, the Port moved for summary dismissal of TCRY’s counterclaims. ECF No. 171. TCRY then moved on December 17, 2010, to remand the inverse condemnation claims to state court for determination where they were originally asserted. ECF No. 200. On July 1, 2011, 2011 WL 2607162, the Court denied TCRY’s Motion for Summary Judgment and Motion for Remand. ECF No. 264. The Court’s Order granted the Port’s Motion for Partial Summary Judgment, dismissing TCRY’s counterclaims against the Port. *Id.* In denying TCRY’s Motion for Summary Judgment, the Court found that under the 1947 and 1961 Agreements, BNSF and UP have “equal joint” rights to operate directly upon the Richland Trackage, and that TCRY took its lease of the Richland Trackage subject to BNSF and UP’s rights. *Id.*

TCRY and BNSF now both move for summary judgment regarding the nature and extent of BNSF and UP’s rights to operate on the Richland Trackage. ECF Nos. 267 & 273. TCRY asserts that BNSF and UP’s rights under the Agreements are limited to use of the trackage only up to the interchange, or alternatively, the wye, and that BNSF may use those portions of track for interchange purposes only. BNSF argues that their right to operate directly extends to all Richland Trackage south of the old Department of Energy barricade, and is subject only to *1062 the limitation that it be used “for the purpose of moving freight shipments.” After reviewing the record in this matter, the arguments of the parties, and applicable authority, the Court is fully informed. Because the 1947 and 1961 Agreements give BNSF and UP the right to operate directly on the entirety of the Richland

Trackage, the Court denies TCRY’s motion and grant BNSF’s motion.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if the “pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Id.* at 322, 106 S.Ct. 2548. When considering a motion for summary judgment, the Court does not weigh the evidence or assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. When ruling on cross-motions for summary judgment, the Court has a duty to review the record supporting the parties’ motions and to determine whether there are issues of material fact precluding summary judgment. *Fair Housing Council of Riverside Cnty., Inc.*, 249 F.3d at 1136.

Here, both TCRY and BNSF have moved for summary judgment. Both parties agree that there are no genuine issues of material fact, and after reviewing the record in this matter, the Court finds that there are none. Summary judgment is thus appropriate if either party is entitled to judgment as a matter of law.

B. Applicable Law

[1] [2] When interpreting a contract under Washington law, the Court attempts to “ascertain the parties’ intentions and give effect to their intentions.” *Taylor–Edwards Warehouse & Transfer Co. of Spokane, Inc. v. Burlington N., Inc.*, 715 F.2d 1330, 1334 (9th Cir.1983) (citing *Jones v. Hollingsworth*, 88 Wash.2d 322, 326, 560 P.2d 348 (1977)). Under Washington law, extrinsic evidence is only admissible “as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties’ intent.” *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990). When a contract is unambiguous and its formation is

undisputed, the interpretation of the contract is a question of law that is appropriate for resolution on summary judgment. *See, e.g., Mfg'd Hous. Cmty. of Wash. v. St. Paul Mercury Ins. Co.*, 660 F.Supp.2d 1208, 1212 (W.D.Wash.2009) (citing *Mayer v. Pierce Cnty. Med. Bureau*, 80 Wash.App. 416, 420, 909 P.2d 1323 (1995)).

C. The Parties' Positions

TCRY concedes that BNSF has the right to directly on a portion of the Richland Trackage, but argues that language in the 1947 Agreement geographically restricts the United States' grant to BNSF and UP's predecessors to direct service between points "C" and "E" on the map attached as Exhibit A to the 1947 Agreement. Because point "E" on Exhibit A to the 1947 Agreement is the present-day site of TCYR's interchange facility, TCYR argues that BNSF and UP should be enjoined *1063 from directly serving points north of the interchange facility, and should be required to interchange with TCYR in order to serve customers north of the interchange facility. Alternatively, TCYR argues that BNSF and UP's operating rights should terminate at the wye built a short distance north of the interchange facility.

TCRY also asserts, in an argument developed primarily in its reply memorandum, that the 1947 Agreement only grants the railroads rights to use trackage between points "C" and "E" on Exhibit A for the purpose of interchanging rail traffic with the government, and not to provide direct rail service to customers along that track. Finally, TCYR argues that it would be unfair to allow BNSF and UP to directly service customers north of the interchange facility because pursuant to the 1998 Maintenance and Operation Agreement, it is charged with the sole responsibility for maintaining the Richland Trackage. TCYR requests a permanent injunction prohibiting BNSF and UP from traveling north of its interchange facility.

BNSF argues that because the wye pictured in Exhibit A to the 1947 Agreement was later built to the north of the interchange facility (instead of to the south as represented in Exhibit A), the 1947 Agreement does in fact grant the railroads operating rights north of the interchange facility. BNSF further argues that Sections 2 and 3 of the 1961 agreement extended the Railroads' operating rights to the entirety of the Richland Trackage, limited only by the broad requirement that their operations be for the purpose of "moving freight shipments."³ BNSF requests a declaratory judgment recognizing its operating rights over the Richland

Trackage and a permanent injunction compelling TCYR to afford it equal access to the Richland Trackage.

Intervenor-Plaintiff UP does not oppose BNSF's motion, but asks that any ruling on the motion protect the "equal, just, and fair" operating rights to the Richland Trackage that it was granted by the 1947 Agreement. UP also asserts that BNSF does not have the right to provide direct rail service to the Hanford site, but that BNSF's direct rail service rights instead terminate somewhere between TCYR's interchange facility and Hanford.

D. Analysis

i. BNSF's Operating Rights on the Richland Trackage

[3] On close review of the underlying agreements, it is apparent that BNSF's reading of the 1947 and 1961 Agreements is the correct one. While the 1947 Agreement's grant to BNSF and UP's predecessors in interest is explicitly limited to the "right to operate ... between points B and E, and to use said interchange facilities and wye for the purpose of interchanging business with the government," ECF No. 32-2 at 13, this agreement was speculative and referenced trackage that had yet to be *1064 built. *See id.* at 12 (the Commission shall lay track in "approximately the location shown in yellow on said exhibit," and shall build an interchange and wye "in the vicinity of point E." (emphasis added)). At the time the 1947 Agreement was drafted, the United States was the only shipper on this section of track, and security concerns prevented private access to the Hanford site; thus, the Agreement's reference to point "E" appears to be intended to demarcate a convenient place for interchange, rather than to provide an affirmative limitation on the railroads' later ability to service rail customers. But regardless of the exact intent behind the 1947 Agreement, the 1961 Agreement greatly expands the United States' grant to BNSF and UP.

The 1961 Agreement has the stated purpose of allowing the railroads to "receiv[e] and deliver[] shipments routed via the Railroads and consigned by or to shippers and receivers" located on spur or side tracks connecting to the United States' tracks. ECF No. 32-3 at 62. As noted above, Section 3 of the 1961 Agreement states as follows:

The Commission hereby grants the Railroads the right to operate with their employees and equipment over such segments of the Government's tracks

shown on Exhibit "A" as it may be necessary to use for the purpose of moving freight shipments to or from the tracks covered by this agreement.

Id. at 63. Exhibit A to the 1961 Agreement is a detailed map depicting the entirety of the Richland Trackage, minus the subsequently-built Port trackage and spurs extending west from the wye. The above-quoted language grants BNSF and UP broad operating rights over the Richland Trackage, and bulwark's BNSF's position.

TCRY makes much of Section 3's limitation that the railroads may only use such segments of the tracks as may be necessary to access "the tracks covered by this agreement." TCRY argues that because Section 1 of the agreement, which contains the operative language of the lease, lists only sections of track *south* of the interchange facility, the "tracks covered by this agreement" are all south of the interchange, and thus Section 3's grant does not extend north of the interchange or wye. Section 2 of the agreement, however, also grants "the Railroads, and industries served by them," the right to construct additional "industrial spur, set-out, and such other tracks connecting with the Government's main tracks or classification yards as may be required to provide rail service for industries." *Id.* It seems readily apparent that the Port's spur tracks are "industrial spur, set-out, and such other tracks" that were constructed by "the industries served by [the railroads]" as the phrase is used in the 1961 Agreement. These subsequently-built tracks are thus "tracks covered by" the 1961 Agreement, and it follows logically that Section 3 also grants BNSF and UP the right to serve customers on these later-built sections of Port trackage and spurs extending west of the wye.

TCRY also argues that Section 3's reference to "tracks shown on Exhibit 'A'" precludes a reading of the 1961 Agreement that grants BNSF and UP rights relating to tracks built after the Agreement, because they by definition could not be shown on Exhibit A. But Section 3's reference to "tracks shown on Exhibit 'A'" relates to the section of track over which BNSF and UP are afforded rights, not the Section's later use of the phrase "tracks covered by this agreement;" these tracks are precisely the tracks over which BNSF and UP seek access. This interpretation of the 1961 Agreement is supported by its stated purpose of opening up the Richland Trackage to common carrier rail service in order to promote industrial development in *1065 the Richland area. Of course, BNSF and UP's right to use the Richland Trackage may only be "for the purpose of moving freight shipments."

Accordingly, the Court finds that the 1961 Agreement grants BNSF and UP the right to operate directly on the Richland Trackage. This right extends north of the TCRY interchange facility, and includes both the spur tracks to the west of the wye and the main-line tracks north to Horn Rapids Road. Neither BNSF nor UP has a right to serve the Hanford site directly.

ii. UP's Operating Rights on the Richland Trackage

UP's position is clearly supported by the 1947 Agreement. The 1947 Agreement grants both BNSF and UP's predecessors in interest "the equal joint right" to operate on the relevant section of track. ECF No. 32-2 at 13. This grant includes the future-looking assurance that "any right or privilege at any time granted by the Commission to one of said companies in respect to its operations shall be a right or privilege which the other company may at its option exercise in respect to its operations." *Id.* Furthermore, the Agreement requires BNSF and UP's predecessors to "agree from time to time upon rules and regulations" for the use of the Richland Trackage, and requires that such rules and regulations "shall be equal, just, and fair," and "shall not unjustly discriminate against either." *Id.* at 14. These portions of the 1947 Agreement have not been modified by later agreement, and remain in force today. As such, the Court includes UP in any declaratory or injunctive relief it affords BNSF.

E. Relief Granted

i. Declaratory Judgment

[4] Under the Declaratory Judgment Act, 28 U.S.C. § 2201, declaratory judgment is proper when one party has established that "there is a substantial controversy, between parties having adverse interest, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th Cir.2002) (quoting *Western Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981)). Here, the factual background of this case unquestionably demonstrates that such a controversy exists and that declaratory judgment is proper.

BNSF requests a declaratory judgment recognizing its rights to provide direct rail service over the Richland Trackage.⁴

For the reasons discussed above, the Court grants BNSF's request in this regard, and issues a declaratory judgment recognizing both BNSF and UP's rights to provide direct rail service over the Richland Trackage.

ii. Permanent Injunction

BNSF also requests a permanent injunction compelling TCRY to allow it access over the Richland Trackage and requiring TCRY to coordinate train scheduling and dispatching with BNSF and UP.

[5] [6] Permanent injunctive relief is proper when a party can show “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The first factor, the existence of irreparable injury, is also satisfied by a continuing and imminent threat of harm. *See, e.g., Bowler v. Home Depot USA Inc.*, No. C09-5523 JCS, 2011 WL 166140, at *3 (N.D.Cal. January 19, 2011) (citing *Monsanto Co. v. Geertson Seed Farms*, — U.S. —, 130 S.Ct. 2743, 2760, 177 L.Ed.2d 461 (2010)). The decision to grant or deny permanent injunctive relief is within the Court's discretion. *See eBay Inc.*, 547 U.S. at 391, 126 S.Ct. 1837 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)).

[7] Here, BNSF fulfills the first two factors because the perceptible loss of customer goodwill that will occur if TCRY again blocks it from accessing the Richland Trackage is imminent; the loss of consumer goodwill is an irreparable injury, and legal remedies are inadequate to compensate for that injury. *See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir.1991); *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 519-20 (9th Cir.1984). The balance of hardships between BNSF and TCRY also runs in BNSF's favor: While TCRY is currently tasked with maintaining the Richland Trackage under the 1998 Maintenance and Operation Agreement and the 2002 Lease, as the Court has already found, TCRY took possession of the Richland Trackage subject to BNSF and UP's pre-existing rights; the temporary hardship TCRY will suffer under its contract with the Port is outweighed by the

long-term hardship BNSF and UP would suffer if their rights under the 1947 and 1961 Agreements were permanently abrogated. Finally, as the Court found in its Order granting BNSF's motion for a preliminary injunction, ECF No. 93 at 10-11, it is in the public interest to encourage competition among the railroads and to ensure that railroad service remains efficient. Accordingly, a permanent injunction is proper.

TCRY argues that if such relief is granted, the injunction should not be “asymmetrical.” TCRY cites *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir.2010), in support of this position, but this case mentions no such consideration, and simply affirms a district court's preliminary injunction issued under the *Winter* framework. TCRY asserts that an order enjoining only it would be unfair because it would “give [] only one party the asymmetric right to seek an order of contempt over any claim of contract breach.” ECF No. 283 at 15. However, only TCRY is in breach of the 1947 and 1961 Agreements, and BNSF has committed no harm that need be redressed with equitable relief. Furthermore, the Court's contempt power will only be available for breach of the *injunction*, and both parties will retain the ability to seek legal relief for breach of the underlying contract. As such, the Court denies TCRY's request for a “symmetrical” injunction.

For the reasons discussed above, the Court grants BNSF's request and issues a permanent injunction requiring TCRY 1) to allow both BNSF and UP to directly serve customers along the Richland Trackage, and 2) to coordinate train scheduling and dispatching with both BNSF and UP. The parties shall meet and confer to develop a comprehensive operational plan as detailed below.

F. Conclusion

For all of the historical complexity surrounding the Richland Trackage, the relative rights of the parties are actually quite simple: The United States granted BNSF and UP's predecessors in interest full rights to operate on the Richland Trackage, and TCRY took possession of the *1067 Richland Trackage subject to these rights. Accordingly, the Court issues a declaratory judgment recognizing BNSF and UP's operating rights, and issues a permanent injunction protecting these rights.

Accordingly, **IT IS HEREBY ORDERED:**

1. BNSF's Motion for Summary Judgment, ECF No. 273, is **GRANTED**. Both BNSF and UP shall have the right to

operate directly on the Richland Trackage. Representatives from BNSF, TCRY, and UP shall meet and confer at a mutually-convenient time and place—either by phone or in person—and draft a comprehensive operational plan (COP), consistent with the Court's ruling, that is signed and agreed upon by all three parties. A representative of the Port shall be permitted to attend and offer comments. The COP shall cover trackage from the Richland junction to Horn Rapids Road (and all spurs that spring therefrom). The proposed COP shall be filed for Court approval no later than 5:00 p.m. on December 23, 2011 unless on or before that date, BNSF, TCRY, and UP file with the Court a joint stipulation to a later date. The Port shall have seven (7) days after the filing of

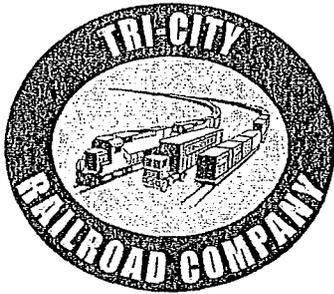
the proposed COP in which to file a statement with the Court stating its comments or objections to the proposed COP. The parties shall have seven (7) days after the filing of the Port's statement in which to file individual or joint reply to the Port's statement. No other responsive or reply memoranda will be considered.

2. All pending motions are **DENIED as moot**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to counsel.

Footnotes

- 1 In connection with their motions, the parties submitted Joint Statements of Uncontroverted Facts. ECF Nos. 281 & 294. The Court treats these facts as established consistent with Federal Rule of Civil Procedure 56(d), and sets these forth in this "Factual Background" section without reference to an ECF number. Any disputed facts are supported by a citation to the record. The Court has reviewed the record supporting the parties' cross-motions for summary judgment, and finds that there are no issues of material fact precluding summary judgment. See *Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.2001) (discussing district court's duty to review the record when ruling on cross-motions for summary judgment).
- 2 A wye is a triangular arrangement of rail tracks designed to allow railway equipment to change direction by performing a "three-point turn."
- 3 BNSF also argues that TCRY's argument is foreclosed by the law of the case. However, the Court's September 28, 2009, 2009 WL 3149569, Order Granting BNSF's Motion for Preliminary Injunction expressly stated that the Court's preliminary injunction ruling was "not binding on the Court in future proceedings in this case." ECF No. 93 at 2; see also *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir.1984) (recognizing that trial court's findings regarding a party's probability of success on the merits are not binding on future stages of the case). Furthermore, while the Court's July 1, 2011 Order held that TCRY leasehold rights were "subject to UP and BNSF's continued use of the Richland Trackage, as secured by the 1947 and 1961 Agreements," ECF No. 264 at 23, the question of the exact nature and extent of the parties' rights over the Richland Trackage was not then before the Court.
- 4 TCRY argues that BNSF's requested relief must be denied because BNSF failed to name the Port and UP, who are necessary parties under Federal Rule of Civil Procedure 19. However, any argument that BNSF has improperly failed to join the Port and UP was rendered moot when they intervened in this lawsuit.



Tri-City Railroad Company, LLC
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Paul J. Petit
General Counsel
509-727-6982

June 9, 2014

STEVEN V. KING
Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 40128
1300 S. Evergreen Park Drive SW
Olympia, Washington 98504-0128

Re City of Kennewick v. Port of Benton, et al
Docket # TR-130499

Respondent Tri-City Railroad Company's
PETITION FOR RECONSIDERATION OF FINAL ORDER, PETITION FOR
REHEARING AND PETITION FOR STAY OF ORDER

Dear Mr. King:

I am enclosing for filing the original and twelve copies (three hole punched) of Respondent's PETITION FOR RECONSIDERATION OF FINAL ORDER, PETITION FOR REHEARING AND PETITION FOR STAY OF ORDER which was also filed electronically with the Commission on June 9, 2014.

If you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

Paul J. Petit
General Counsel

enc.

Hard Copy

2014 JUN 10 AM 10:40

1 At the same time, Order 03 imposes upon TCRY and the other railroads using
2 this track, without legitimate reason, the burden of increased liability and the stigma of
3 blame for the inevitable accidents which will occur at this crossing.

4 In light of the foregoing, TCRY requests that the Commission abandon Order
5 03 which re-writes the sound, competent and thorough determination in the Initial
6 Order that the Cities failed to demonstrate public need for the proposed crossing at all,
7 let alone need which would outweigh the inherent hazards of a disfavored at-grade
8 crossing. TCRY requests that the Commission do so by:

- 9 a) Granting the Petition for Reconsideration, vacating Order 03 and entering a
10 Final Order approving the Initial Order herein; or
11 b) Granting the Petition for Rehearing and ordering further adjudicatory
12 proceedings, either before the Commission or before an ALJ, in which the
13 Cities are required to provide actual evidence of economic benefit to meet their
14 burden of proof.
15

16 TCRY also requests that the Commission grant its Petition for Stay of the Final
17 Order pending the decision of the Commission on the Petition for Reconsideration and
18 the outcome of the proceedings ordered in granting the Petition for Reconsideration
19 and the Petition for Rehearing.

20 Dated this 9th day of June, 2014.

21 TRI-CITY & OLYMPIA RAILROAD

22
23
24 By: 

Paul J. Petit, Its Attorney

Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	REBUTTAL VERIFIED
	)	STATEMENT OF JOHN MILLER
Petitioner,	)	RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

JOHN MILLER, being first duly sworn on oath, does hereby depose and state:

1. For the purposes of my rebuttal verified statement under 49 CFR 1112.6, I have reviewed the following material:

TCRY's Petition for Declaratory Order; Affidavit of John Miller re: Petition for Declaratory Order; Affidavit of Counsel re: Petition for Declaratory Order; Affidavit of Rhett Peterson re: Petition for Declaratory Order; Reply Brief of City of Kennewick and City of Richland; Verified Statement of Pete Rogalsky; Verified Statement of Susan Grabler; Verified Statement of Kevin Jeffers; and Verified Statement of Stephen DiJulio. In addition, I am familiar with the contents

of the Rebuttal Verified Statements of Foster Peterson, Lisa Anderson, Rhett Peterson, and Randolph Peterson.

2. I reviewed the Surface Transportation Board's ("Board") May 21, 2015 Decision, and it is my understanding that the principal issue now before the Board is whether the proposed Center Parkway at-grade crossing over TCRY's main track and parallel 1900 foot siding ("passing track") will unreasonably interfere with current or planned railroad operations.

3. It is my understanding that my rebuttal verified statement "shall be confined to issues raised in the reply statements to which they are directed" under 49 CFR 1112.6. Accordingly, for purposes of my rebuttal testimony, I will quote each paragraph of the verified statements to which I am rebutting.

VERIFIED STATEMENT OF ROGALSKY

4. **Paragraph 5** of the Rogalsky verified statement provides:

Statement: "In 2013, the Cities petitioned the Washington Utilities and Transportation Commission ("UTC") to construct the Crossing over the main track and the siding track owned by the Port of Benton. Those tracks extend from a UPRR line, and begin at the Richland Junction, immediately east of the Crossing and extend several miles to the north and west within the City of Richland and onto the Hanford Site. The siding track that is west of and parallel to the main line track is approximately 2,000 feet long, 400 feet of which is east of the Crossing and the remainder is west of the Crossing."

Rebuttal: As described in TCRY's petition, this picks up the story 7 years after the fact. The Cities petitioned for an at-grade crossing in 2006, which was opposed by TCRY, BNSF, and UP. The Washington UTC denied the petition for the reasons it described in the document TCRY provided to the Board in its initial filing on March 19, 2015. (See January 26, 2007 Initial Order Denying Petition, in Washington State Utilities and Transportation Commission Docket TR-040664, attached as Exhibit 1 to the Affidavit of Counsel re: Petition for Declaratory Order ("Counsel Aff't")).

5. **Paragraph 6** of the Rogalsky verified statement provides:

Statement: "UPRR (and BNSF) have no objection to the Crossing."

Rebuttal: Union Pacific was told by the City of Richland that they were forbidden from serving customers on the new Horn Rapids rail loop unless they did not oppose construction of the Center Parkway crossing, and were further paid \$2.1 million dollars to relocate their operations from the proposed crossing location to an alternative location. This information is a matter of public record, per the City Council for the City of Richland. **See Exhibit 1.** BNSF, who did not perform switching operations at the location of the proposed crossing, was also forbidden from serving customers on the new Horn Rapids rail loop did they not agree to not oppose the new proposed Center Parkway crossing. The City of Richland's record provides:

The city's economic development goals have long sought expanded industrial development in the Horn Rapids Industrial Park and expanded retail / commercial development in the Tapteal Business Center. City-provided infrastructure in the Horn Rapids Industrial Park includes two miles of city-owned industrial railroad track.

Since the late 1990's, Richland and Kennewick's transportation plans have included an extension of Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick. Center Parkway is necessary to improve vehicle circulation opportunities and support highest and best use development of the Tapteal Business Center and west Gage Boulevard area.

Since approximately 2000, the Tri-City Railroad (TCRR), Union Pacific Railroad (UPRR), and Burlington Northern Santa Fe Railroad (BNSF) have interchanged rail cars at Richland Junction, located on the alignment of the proposed Center Parkway. The railroads have refused city requests to relocate interchange operations and permit completion of Center Parkway using an at-grade railroad crossing.

In mid-2010, city staff, working with a consultant team, drafted a Horn Rapids Standard Form Track Use Agreement linking access to the city's industrial park railroad track to railroad cooperation on Center Parkway. The Agreement provided standard terms for all interested railroads to access the Horn Rapids track. In January 2011, the BNSF entered into the agreement. The proposed agreement represents completed negotiations with the UPRR, largely to the same terms agreed to by BNSF. The UPRR and BNSF agree to pay an annual access fee, indemnify the city for damages caused by railroad operations, operate under the city's authority to ensure fair access to both railroads and allow completion of Center Parkway, including an at-grade railroad crossing. In addition to the standard terms, the UPRR agreement includes compensation paid by the city, for UPRR assets at Richland Junction, a roadway easement across UPRR property and impacts to UPRR operating costs due to the interchange relocation. The city acquires railroad materials present on UPRR property at Richland Junction. These materials may be salvaged or reused by the city in its industrial park development.

The Kennewick's City Council is considering a budget adjustment at their April 5th meeting to support this agreement.

UPRR will provide approximately \$15,000 annually to support track maintenance. The Agreement requires compensation to UPRR totalling \$2,100,000. Staff proposes that Kennewick provide \$1,000,000 and Richland provide \$1,100,000 because Richland will own the salvaged railroad materials. In addition, Richland's share of consultant and legal fees adds \$65,000. Staff proposes to fund Richland's share with \$416,000 from the LTGO 98 fund, \$250,000 from the Industrial Development Fund and \$500,000 from the Center Parkway project.

See Exhibit 1.

In my position at Union Pacific during that timeframe, I was involved in discussions with a the City of Richland and/or its consultant about this issue, and I was struck by how heavy-handed the City was in denying access to customers along the new rail loop that the City was constructing unless Union Pacific agreed to not oppose the proposed Center Parkway at-grade crossing.

6. Paragraph 7 of the Rogalsky verified statement provides:

Statement: "The UTC unanimously approved the Crossing, rejecting the Tri-City Railroad Company LLC ("TCRY") opposition to the Cities' Crossing petition."

Rebuttal: The orders of the Washington UTC were provided to the Board as part of TCRY's Petition for Declaratory Order, and speak for themselves. Pertinent here, I quote:

The Initial Order determines that the Cities failed to carry their burden to show a "public need" for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.

Petitioners challenge this conclusion, focusing almost exclusively on asserted public safety benefits, largely in the form of improved response times from two local fire stations to the point where the planned Center Parkway extension would intersect Tapteal Drive. In other words, the Cities' principal claim of improved public safety is that emergency responders could get to a single point on a one-mile long, two-lane collector roadway with a "T" intersection at both ends more quickly than they can today. In addition, there is some evidence that completion of this project would reduce traffic on other roadways in the vicinity, relieving congestion and potentially reducing accidents. The Initial Order analyzes the evidence on this issue in detail that does not bear repeating here. It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

...

The Initial Order fairly weighs the evidence and argument presented in the post-hearing briefs, and reaches a legally sustainable result. The Cities' almost

exclusive focus on improved response times for first responders on a point-to-point basis as the principal benefit demonstrating “public need” does not weigh persuasively against even the demonstrated low level of “inherent risk” at the proposed crossing. Nor are the Cities’ legal arguments that their comprehensive planning processes under the Growth Management Act mandate Commission approval persuasive. However, considering evidence the parties largely ignored that shows additional public benefits in the form of enhanced economic development opportunities, and considering the broader public policy context that gives a degree of deference to local jurisdictions in the areas of transportation and land use planning, we determine that the Cities’ petition for administrative review should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

(May 29, 2014 Final Order Granting Petition for Administrative Review, WUTC Docket TR-130499, attached to the Counsel Aff’t as Exhibit 7, at pp. 7, 14-15).

The Cities’ Reply to the Board relies almost entirely upon testimony taken two years ago concerning the issues of public safety and “public need”. The quotations above describe the outcome on these issues, which are separately on appeal in the appellate courts in Washington State, and are distinct from the question presented to the Board of whether the proposed at-grade crossing will unreasonably interfere with current or planned railroad operations.

Whether or not the Washington UTC has jurisdiction to consider “enhanced economic development opportunities” and “deference to local

jurisdictions” are the issues presently before the appellate court in Washington State. **See Exhibit 2.**

7. **Paragraph 8** of the Rogalsky verified statement provides:

Statement: “TCRY is a lessee on the Port of Benton track.”

Rebuttal: As I stated in my initial Affidavit to the Board, I was formerly the Manager of Short Line Development for Union Pacific, managing the relationship between Union Pacific and about 60 short line railroads. In my experience, it is common for railroads, including short lines, to operate on leased track. It is my understanding that any common carrier by railroad is subject to the jurisdiction of the Board, whether that common carrier is operating on track it owns, leases, or is subject to a joint facilities agreement.

8. **Paragraph 9** of the Rogalsky verified statement provides:

Statement: “Before the UTC, TCRY reported that it moved two to four trains per weekday, with roughly “fifteen cars per train.” (Facts located in the Court of Appeals Clerk’s Paper (“CP”) at 1915:2-3 and CP 1917:7-8 (TCRY’s response to the UTC data request for track usage).”

Rebuttal: This data, provided two years ago, concerned the issue of public safety as it pertained to the Washington UTC’s consideration of approval of an at-grade crossing. TCRY’s forecasts of its planned operations are now demonstrably reaching fruition. The documents the Cities quote, at pages 0001915 and 0001916, provide:

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RE: PETITION FOR DECLARATORY ORDER - 7

TCRY moves railcars interchanged to it by the UPRR. However, TCRY, UPRR, and BNSF each has the right to operate directly through this location. TCRY anticipates a dramatic increase in the number of trains that it operates and expects a similar increase in the number of trains which BNSF and UPRR operate through this location in the next ten years due to a number of factors, including:

a. Anticipated growth in UPRR and TCRY business reflecting increases in daily train operations and unit train operations as a result of additional customers locating on the transload facility serviced by TCRY on the City of Richland's Horn Rapids Spur.

b. Anticipated growth in BNSF, UPRR and TCRY railcar volume as a result of likely construction of the ConAgra Lamb Weston cold storage warehouse facility as described in the attached Response to Data Requests Nos. 21 and 22.

c. Anticipated growth in BNSF, UPRR and TCRY railcar volume as a result of likely construction of one or more "loop track" facilities off the Horn Rapids Spur.

All of these factors demonstrate a likely increase in rail traffic across the location of the proposed crossing which could, in the near future, reach or exceed 20,000 railcar trips per year, many of which will be "unit trains" of approximately 100 railcars each.

Now, as demonstrated in the verified statements of myself, Lisa Anderson, and Rhett Peterson, the projections of increased rail traffic vis-à-vis the Preferred Freezer Services plant are happening faster than the 10 year timeframe projected two years ago to the UTC. As illustrated by the pictures from June, 2015, of the refrigerated railcars over-loading TCRY's railyard, in anticipation of the July

opening of the Preferred Freezer Services plant, a significant increase in TCRY's railroad business and number of carloads handled is already occurring.

9. **Paragraph 11** of the Rogalsky verified statement provides:

Statement: "Now, before the Surface Transportation Board ("STB"), TCRY assert that it handled 2,247 railcars in 2013, and that it projects to handle approximately 4,175 carloads on the Port of Benton tracks in 2015."

Rebuttal: This paragraph is actually a misquotation. TCRY did not assert that it handled "2,247 railcars in 2013". TCRY testified it handled 2,247 **carloads**. A carload represents two railcar trips – one in, one out.

As demonstrated by the massive recent increase in empty refrigerated cars being stored by TCRY in anticipation of the July, 2015 opening of the Preferred Freezer Services plant, TCRY's railcar projections for 2015, as described in more detail by Lisa Anderson and Rhett Peterson, anticipated a massive increase in carloads handled beginning in July of 2015, which is now being realized.

10. **Paragraph 12** of the Rogalsky verified statement provides:

Statement: "TCRY has not submitted any data or records to the UTC or the STB to support its 2013 track usage or its projected track usage."

Rebuttal: First, the information was provided to both the UTC, as quoted specifically above, as well as to the Board, as described below.

Mr. Rogalsky apparently did not read the affidavit I submitted to the Board, in which I provided the specific numbers for 2013 and 2014. As I provided

in that Affidavit, I was acting as speaking agent for the corporation. Specifically, I stated:

In 2013, TCRY handled 2,247 carloads on this trackage, averaging two 9-car trains per day. In 2014, TCRY handled 2,626 carloads on this trackage, averaging two 10-car trains per day. TCRY projects that traffic will grow to 4,175 carloads on this trackage in 2015 due to several business development opportunities, an average of two 16-car trains per day.

In addition, please see Lisa Anderson's verified statement, providing further detail as to TCRY's 2013, 2014, and 2015 car counts.

11. **Paragraph 13** of the Rogalsky verified statement provides:

Statement: "TCRY has not submitted any data or records to the UTC or the STB to identify its usage of the siding track."

Rebuttal: Again, it does not appear that Mr Rogalsky has read the pleadings submitted to the Board by TCRY. First, at page 15 of TCRY's Petition, that information is specifically described. Second, in my Affidavit to the Board, I also specifically describe TCRY's use of its own track. Moreover, Rhett Peterson, in an Affidavit not addressed, discussed, or refuted by any of the Cities' witnesses, describes additional impediments on TCRY's operations created by the construction of this new at-grade crossing.

12. **Paragraph 14** of the Rogalsky verified statement provides:

Statement: "A cold storage company is proceeding to develop a new storage facility in the City's Horn Rapids Industrial Park that will be served by rail. When

the facility is completed and begins shipping by rail, the increased rail shipping will have no impact on rail operations at the Crossing. The crossing safety devices provide security and safety, and avoid conflicts between vehicular traffic and train traffic.”

Rebuttal: As of June 1, 2015, TCRY is the rail operations manager for the Preferred Freezer Services plant, and will be directing all rail traffic at the new plant. Shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY’s rail yard, and nearby industrial lead being over capacity with awaiting empty refrigerated railcars. The pending opening of the plant has already had a significant impact on operations, and given that further increases in rail traffic are expected, TCRY’s ability to use its sole passing track unencumbered by an at-grade crossing, and the restrictions upon operations that accompany a crossing, is increasingly important. Constructing the planned crossing will exclude TCRY’s current and planned uses of nearly 1/3rd of its only siding outside of its yard, and thus would significantly interfere with its operations. The Rebuttal Verified Statements of Foster Peterson and Rhett Peterson more fully describe the interference the crossing would have on TCRY’s railroad operations.

13. **Paragraph 16** of the Rogalsky verified statement provides:

Statement: “The City of Richland never made this rail traffic projection. The City of Richland has permitted development of a unit train servicing facility in its Horn Rapids Industrial Park. The facility is scheduled to begin operation in 2015. The facility’s developers have speculated that additional business attracted to the facility may eventually result in up to two inbound and two outbound unit trains using facility per week. These trains would each include approximately one hundred cars. This activity, if it materialized in the future, would contribute no more than one additional train trip per day over the Crossing. Also, Miller Exhibit 5, 6, and 7 do not support Mr. Miller’s assertion. Miller Exhibit 5 is TCRY’s response to the UTC data request and TCRY’s response to the Citie’s data request, not a City of Richland document. Miller Exhibit 6 is a memo with supporting documentation from the City of Richland’s Economic Development Committee. Miller Exhibit 7 is a real property purchase and sale agreement. These materials do not support John Miller’s unfounded assertion that the City of Richland projected 12,500 inbound and 12,500 outbound cards per year.”

Rebuttal: Since it was the City of Richland that provided this information during the 2013 Washington UTC proceedings (the record from which the Cities have drawn almost the entirety of their reply to TCRY’s Petition for Declaratory Order), I did not anticipate that the possible number of railcars projected by the

City of Richland was a disputed issue. As a result, I submitted Exhibits 5, 6, and 7 simply to show that the facility was being built, and for what purposes.

I now note that in Mr Rogalsky's Verified Statement, he indicates that I made unfounded assertions, and that the City of Richland never projected 'as many as 12,500 inbound and 12,500 outbound railcars per year'. He goes on to state "the City of Richland never made this rail traffic projection."

By way of background, a unit train is a train consisting almost entirely of the same type of railcar, and typically has between 100 and 120 cars. Page 16 of TCRY's Petition for Declaratory Order quotes the Washington State administrative law judge who summarizes the evidence presented by the City of Richland concerning the Horn Rapids rail loop and the projected number of unit trains. The relevant passage provides:

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day).

I also reviewed the transcript of the testimony referenced in the above paragraph, which consisted of testimony elicited from Mr. Ballew by the attorney for the City of Richland at an administrative hearing before the Washington Utilities and Transportation Commission. On November 20, 2013, Mr. DiJulio,

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counsel for the City of Richland, elicited the following testimony from Mr. Ballew:

Mr. DiJulio Q: Okay. Now, with the new proposed Central Washington Transfer Terminal facility, has the City of Richland determined what if the maximum, most optimistic development scenario arising out of these agreements comes through, the number of unit trains that would be anticipated?

Mr. Ballew A: We believe operationally the track will be limited to an average of two and a half trains per week.

Mr. DiJulio Q: And when you say two and a half trains per week, you're talking about a total of five trips, two and a half in, two and a half out, one per day?

Mr. Ballew A: Approximately, yes.

See Exhibit 3, at pp. 369-370.

Based upon the above testimony, the City of Richland has projected that the loop may ultimately handle as many as 240 carloads a week, or as many as 12,500 carloads per year (*i.e.*, 12,500 inbound railcars, and 12,500 outbound railcars, all of which must travel over the parallel tracks and proposed at-grade crossing at issue).

If the projected increase is accurate, it makes the uninterrupted 1900 foot passing track and parallel main track even more critical for TCRY's current and planned railroad operations. Lacking the unencumbered use of TCRY's sole uninterrupted passing track and parallel main will interfere with TCRY's ability to stage, pause, or hold a manifest or any unit train approaching the loop without violating best railroad practices by fouling an at-grade crossing for unknown

lengths of time, and would likewise not be consistent with GCOR 6.32.4, 6.32.5, and 6.32.6, which are described more fully by Foster Peterson in his Rebuttal Verified Statement.

VERIFIED STATEMENT OF GRABLER

14. **Paragraph 2** of the Grabler verified statement provides:

Statement: “I reaffirm my pre-filed testimony that I submitted in the Washington Utilities and Transportation Commission proceeding for the Center Parkway Crossing.”

Rebuttal: The testimony referred to by Ms. Grabler was provided to the Washington UTC in 2013. After submission of this, and other testimony, and as described in TCRY’s Petition for Declaratory Order, the UTC’s administrative law judge issued an Order concerning that issue. The Cities sought appeal of the administrative law judge’s decision, and the UTC’s Order was also placed before the Board and described in TCRY’s Petition for Declaratory Order. Ms Grabler references no testimony here which she presented to the UTC on the issue of whether the establishment of the new at-grade crossing over the parallel main and siding would unreasonably interfere with TCRY’s current or planned railroad operations, as that issue was not before the UTC.

15. **Paragraph 9** of the Grabler verified statement provides:

Statement: “The City of Richland and the City of Kennewick have received unanimous approval from the UTC to extend Center Parkway through construct an at-grade crossing[sic][.]”

Rebuttal: As can be seen from the UTC’s 2014 Order provided along with TCRY’s Petition for Declaratory Order, the UTC did not address whether the construction of the crossing would unreasonably interfere with current or planned railroad operations. That issue was not before the UTC. It is my understanding that that issue is solely within the jurisdiction of the Board.

16. **Paragraph 10** of the Grabler verified statement provides:

Statement: “The Crossing will cross a main track and a siding owned by the Port of Benton. Those tracks extend from a UPRR line, and begin at the Richland Junction, immediately east of the Crossing. UPRR (and BNSF) have no objection to the Crossing.”

Rebuttal: In my position at Union Pacific during that timeframe, I was involved in discussions with the City of Richland and/or its consultant about this issue, and I was struck by how heavy-handed the City was in denying access to customers along the new rail loop that the City was constructing unless Union Pacific (and BNSF) agreed to not oppose the proposed Center Parkway at-grade crossing.

Here is the background: Union Pacific was told by the City of Richland that they were forbidden from serving customers on the new Horn Rapids rail loop unless

the did not oppose construction of the Center Parkway crossing, and were further paid \$2.1 million dollars to relocate their operations from the proposed Center Parkway crossing location to an alternative location. This information is a matter of public record, per the City Council for the City of Richland. See Exhibit 1. BNSF, who did not perform switching operations at the location of the proposed crossing, was also forbidden from serving customers on the new Horn Rapids rail loop had they not agreed to not oppose the new proposed Center Parkway crossing. The City of Richland's record provides:

The city's economic development goals have long sought expanded industrial development in the Horn Rapids Industrial Park and expanded retail / commercial development in the Tapteal Business Center. City-provided infrastructure in the Horn Rapids Industrial Park includes two miles of city-owned industrial railroad track.

Since the late 1990's, Richland and Kennewick's transportation plans have included an extension of Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick. Center Parkway is necessary to improve vehicle circulation opportunities and support highest and best use development of the Tapteal Business Center and west Gage Boulevard area.

Since approximately 2000, the Tri-City Railroad (TCRR), Union Pacific Railroad (UPRR), and Burlington Northern Santa Fe Railroad (BNSF) have interchanged rail cars at Richland Junction, located on the alignment of the proposed Center Parkway. The railroads have refused city requests to relocate interchange operations and permit completion of Center Parkway using an at-grade railroad crossing.

In mid-2010, city staff, working with a consultant team, drafted a Horn Rapids Standard Form Track Use Agreement linking access to the city's industrial park railroad track to railroad cooperation on Center Parkway. The Agreement provided standard terms for all interested railroads to access the Horn Rapids track. In January 2011, the BNSF entered into the agreement. The proposed agreement represents completed negotiations with the UPRR, largely to the same terms agreed to by BNSF. The UPRR and BNSF agree to pay an annual access fee, indemnify the city for damages caused by railroad operations, operate under the city's authority to ensure fair access to both railroads and allow completion of Center Parkway, including an at-grade railroad crossing. In addition to the standard terms, the UPRR agreement includes compensation paid by the city, for UPRR assets at Richland Junction, a roadway easement across UPRR property and impacts to UPRR operating costs due to the interchange relocation. The city acquires railroad materials present on UPRR property at Richland Junction. These materials may be salvaged or reused by the city in its industrial park development.

The Kennewick's City Council is considering a budget adjustment at their April 5th meeting to support this agreement.

UPRR will provide approximately \$15,000 annually to support track maintenance. The Agreement requires compensation to UPRR totalling \$2,100,000. Staff proposes that Kennewick provide \$1,000,000 and Richland provide \$1,100,000 because Richland will own the salvaged railroad materials. In addition, Richland's share of consultant and legal fees adds \$65,000. Staff proposes to fund Richland's share with \$415,000 from the LTGO 98 fund, \$250,000 from the Industrial Development Fund and \$500,000 from the Center Parkway project.

See Exhibit 1.

Further, with respect to the Cities working with the Port of Benton, in October, 2006, the Cities entered into a contract with the Port of Benton, which provides that the Port consents to an easement for the proposed crossing, but that:

3. The Cities acknowledge and agree that the easement is subject to the rights of TC&ORR set forth in the Lease Agreement attached as Exhibit 2. The Cities must obtain additional authority from TC&ORR, either by contract or by exercise of authority granted by law, for the extension of The Center Parkway, construction of the crossing, installation of equipment and maintenance and operation of the crossing and safety equipment.

See Exhibit 4 at p. 2.

17. **Paragraph 11** of the Grabler verified statement provides:

Statement: "TCRY is a lessee of the tracks."

Rebuttal: As I stated in my initial Affidavit to the Board, I was formerly the Manager of Short Line development for Union Pacific, managing the relationship between Union Pacific and about 60 short line railroads. In my experience, it is common for railroads, including short lines, to operate on leased track. It is my understanding that any common carrier by railroad is subject to the jurisdiction of the Board, whether that common carrier is operating on track it owns, leases, or is subject to a joint facilities agreement.

18. **Paragraph 15** of the Grabler verified statement provides:

Statement: "The field study also shows that BNSF Railway makes trips to the Port of Benton on the track every few days, and my review of the train operations included the BNSF engine movements in my average train operation counts."

Rebuttal: With respect to the “field study”, it is my understanding that the Cities had a camera in what appears to be a supply closet in a Holiday Inn Express. The railroad and its operations are there for anybody to see, and had the Cities wished, photographs could be taken from the street.

With respect to BNSF’s operations, Ms Grabler’s comment that BNSF makes trips to the “Port of Benton” is confusing, as the Port of Benton is not a location, it is an entity.

19. **Paragraph 16** of the Grabler verified statement provides:

Statement: “The field study does not include any UPRR trips on the tracks.”

Rebuttal: As described in my initial Affidavit to the Board:

TCRY primarily operates on approximately 16 miles of track which run through the cities of Kennewick and Richland, Washington. This trackage was originally constructed by the United States Department of Energy, and is currently owned by the Port of Benton. TCRY operates on this trackage as the Port of Benton’s lessee, pursuant to a written lease agreement. TCRY moves cars for its own customers on this trackage; it also operates as the handling carrier for the Union Pacific railroad. A handling carrier identifies a short line that has a contractual commercial arrangement with Union Pacific, whereby Union Pacific adopts the short line’s stations, and markets that short line’s business, as if that short line was physically served by Union Pacific.

Since TCRY is the handling carrier for Union Pacific, it is TCRY which takes railcars from the Union Pacific across TCRY track to serve customers, and then returns the railcars from the customers to the Union Pacific for shipment.

The interchange happens in Kennewick, and the railcars brought to TCRY's tracks for delivery to and from customers.

20. **Paragraph 17** of the Grabler verified statement provides:

Statement: "The siding track that is west of and parallel to the main line track and adjacent to the hotel is being used as a storage track."

Rebuttal: As described in my initial Affidavit to the Board:

This 1900-foot passing track is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south. TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track. As three railroads use these tracks, it is important to have the passing track as a location to set out or hold a train, while allowing another train to utilize the main line. The passing track also serves as a purge valve for the main TCRY yard when it reaches capacity, and it provides a place for TCRY to store railcars when they are not needed at industries. As noted, the passing track has switches at both ends; those switches tend to be used by TCRY on a daily basis.

March 19, 2015 Affidavit of John Miller, ¶12.

21. **Paragraph 19** of the Grabler verified statement provides:

Statement: "The siding track is not being used as a typical railroad passing track, because of the parked rail cars that the TCRY is parking on the siding track. There appears no reason for such conduct other than an attempt to mislead the STB. And, TCRY is parking rail cars on the siding tracks for several days at a time,

which would preclude the TCRY Railroad from using the siding as a passing track (as TCRY apparently asserts).”

Rebuttal: I am not clear what is meant by “a typical railroad passing track.” A siding is an axillary track which is connected to a main track by a switch. Sidings can be of different lengths and, depending upon their configuration, have different uses. Uses of sidings include switching operations, storage of railcars and maneuvers to permit one train to pass another. Sidings are mentioned numerous times in the Code of Federal Regulations promulgated by the Federal Railroad Administration governing safe railroad operations. For example, 49 CFR 236.802A “siding” provides that a siding is “an axillary track for meeting or passing trains.” 49 CFR 218.93 provides that “siding means an axillary track, adjacent and connected to a main track used for meeting or passing trains.” Here, the tracks in question are a parallel main track and siding, referred to as a passing track, because it is one continuous parallel siding for 1,900 feet (long enough for a train) which has switches at both ends, allowing one train to pass another.

As I stated in my Affidavit to the Board,

“This 1900-foot passing track is the only siding on this stretch of tracks between TCRY’s yard in the north, and the UP and BNSF yards in the south. TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track. As three railroads use these tracks, it is important to have the passing track as a location to set out or hold a train, while allowing another train to utilize the main line. The passing track also serves as a purge valve for the main TCRY

yard when it reaches capacity, and it provides a place for TCRY to store railcars when they are not needed at industries. As noted, the passing track has switches at both ends; those switches tend to be used by TCRY on a daily basis.”

March 19, 2015 Affidavit of John Miller, ¶12.

It appears Ms. Grabler did not review the submissions of TCRY to the Board before she made her comments. It also appears Ms. Grabler has no experience with respect to short line railroad operations. As described more fully by Foster Peterson, and with which I concur, railcars tend to be spotted near the switch they will likely be retrieved from, and with a passing track of this length with switches at both ends, railcars are spotted near one end or the other, to leave the alternate end free for other uses.

22. **Paragraph 23** of the Grabler verified statement provides:

Statement: “The Crossing will not adversely impact TCRY’s train operations because of the Crossing’s safety features and geometry.”

Rebuttal: As Foster Peterson stated, and with which I concur, installation of gates and lights at an at-grade crossing does not reduce the inherent interference with railroad operations presented by the presence of the crossing itself. Regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching. If the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to

simultaneously store cars and hold and pass trains at that location, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations.

23. **Paragraph 24** of the Grabler verified statement provides:

Statement: "Based on my 42 years of railroad engineering experience, and my knowledge of the operations of the Port of Benton tracks that begin at the Richland Junction, there is no impact on the movement of freight or other rail as a result of the Crossing."

Rebuttal: As Foster Peterson testified in his Rebuttal Verified Statement, and with which I concur, Ms. Grabler, in her verified statement, does not refer to any of the rules contained within the GCOR, or promulgated by the Federal Railroad Administration, that TCRY must follow. The establishment of this new at-grade crossing will have a significant impact on TCRY's current and future movement of freight. Regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations. I concur with Foster Peterson's conclusion in his Rebuttal Verified Statement that paragraph 24 of Ms. Grabler's verified statement does not address the issue of whether excluding TCRY's

current use of that 1900 foot siding through construction of a bisecting at grade crossing is an unreasonable interference with railroad operations.

VERIFIED STATEMENT OF JEFFERS

24. **Paragraph 2** of the Jeffers verified statement provides:

Statement: “I reaffirm my pre-filed testimony that I submitted in the UTC proceeding for the Center Parkway Crossing.”

Rebuttal: The testimony referred to by Mr. Jeffers was provided to the Washington UTC in 2013. After submission of this, and other testimony, and as described in TCRY’s Petition for Declaratory Order, the UTC’s administrative law judge issued an Order concerning that issue. The Cities sought appeal of the administrative law judge’s decision, and the UTC’s Order was also placed before the Board and described in TCRY’s Petition for Declaratory Order. Mr. Jeffers references no testimony here which he presented to the UTC on the issue of whether the establishment of the new at-grade crossing over the parallel main and siding would unreasonably interfere with TCRY’s current or planned railroad operations, as that issue was not before the UTC.

25. **Paragraph 5** of the Jeffers verified statement provides:

Statement: “My knowledge of the rail lines in this area is based on information I have gathered organically in my 15-plus years working in the rail industry, together with observations of the Port of Benton line; the area served by the Port rail line; through discussions with the City of Richland and the City of Kennewick

engineering and operations staff; through research of TCRY; and, through review of UPRR and BNSF timetables and track charts.”

Rebuttal: I am confused by the reference to time tables. TCRY began operations on the trackage at issue in 2002, and since that time TCRY has the only timetable for this section of track. If Mr. Jeffers was looking at UPRR and BNSF timetables for TCRY’s trackage, those timetables must pre-date TCRY’s formation 15 years ago. He does not provide copies of or citation to the timetables he references.

26. **Paragraph 6** of the Jeffers verified statement provides:

Statement: “As I stated in my pre-filed testimony before the UTC, the City of Richland has worked closely with both the BNSF and the UPRR to eliminate BNSF and UPRR’s use of the railroad siding in the vicinity of Center Parkway. The City has worked with the Port of Benton, which owns the remaining railroad line, to address issues with respect to the new railroad crossing that would be created by the Center Parkway Extension. The City has also secured federal and state funding for the construction of the roadway, including the railroad crossing.”

Rebuttal: In my position at Union Pacific during that timeframe, I was involved in discussions with the City of Richland and/or its consultant about this issue, and I was struck by how heavy-handed the City was in denying access to customers along the new rail loop that the City was constructing unless Union Pacific (and BNSF) agreed to not oppose the proposed Center Parkway at-grade crossing.

Here is the background: Union Pacific was told by the City of Richland that they were forbidden from serving customers on the new Horn Rapids rail loop unless they did not oppose construction of the Center Parkway crossing, and were further paid \$2.1 million dollars to relocate their operations from the proposed Center Parkway crossing location to an alternative location. This information is a matter of public record, per the City Council for the City of Richland. See **Exhibit 1**. BNSF, who did not perform switching operations at the location of the proposed crossing, was also forbidden from serving customers on the new Horn Rapids rail loop had they not agreed to not oppose the new proposed Center Parkway crossing. The City of Richland's record provides:

The city's economic development goals have long sought expanded industrial development in the Horn Rapids Industrial Park and expanded retail / commercial development in the Tapteal Business Center. City-provided infrastructure in the Horn Rapids Industrial Park includes two miles of city-owned industrial railroad track.

Since the late 1990's, Richland and Kennewick's transportation plans have included an extension of Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick. Center Parkway is necessary to improve vehicle circulation opportunities and support highest and best use development of the Tapteal Business Center and west Gage Boulevard area.

Since approximately 2000, the Tri-City Railroad (TCRR), Union Pacific Railroad (UPRR), and Burlington Northern Santa Fe Railroad (BNSF) have interchanged rail cars at Richland Junction, located on the alignment of the proposed Center Parkway. The railroads have refused city requests to relocate interchange operations and permit completion of Center Parkway using an at-grade railroad crossing.

In mid-2010, city staff, working with a consultant team, drafted a Horn Rapids Standard Form Track Use Agreement linking access to the city's industrial park railroad track to railroad cooperation on Center Parkway. The Agreement provided standard terms for all interested railroads to access the Horn Rapids track. In January 2011, the BNSF entered into the agreement. The proposed agreement represents completed negotiations with the UPRR, largely to the same terms agreed to by BNSF. The UPRR and BNSF agree to pay an annual access fee, indemnify the city for damages caused by railroad operations, operate under the city's authority to ensure fair access to both railroads and allow completion of Center Parkway, including an at-grade railroad crossing. In addition to the standard terms, the UPRR agreement includes compensation paid by the city, for UPRR assets at Richland Junction, a roadway easement across UPRR property and impacts to UPRR operating costs due to the interchange relocation. The city acquires railroad materials present on UPRR property at Richland Junction. These materials may be salvaged or reused by the city in its industrial park development.

The Kennewick's City Council is considering a budget adjustment at their April 5th meeting to support this agreement.

UPRR will provide approximately \$15,000 annually to support track maintenance. The Agreement requires compensation to UPRR totalling \$2,100,000. Staff proposes that Kennewick provide \$1,000,000 and Richland provide \$1,100,000 because Richland will own the salvaged railroad materials. In addition, Richland's share of consultant and legal fees adds \$65,000. Staff proposes to fund Richland's share with \$415,000 from the LTGO 98 fund, \$250,000 from the Industrial Development Fund and \$500,000 from the Center Parkway project.

See Exhibit 1.

REBUTTAL VERIFIED STATEMENT OF JOHN MILLER
RE: PETITION FOR DECLARATORY ORDER - 26

Further, with respect to the Cities working with the Port of Benton, in October, 2006, the Cities entered into a contract with the Port of Benton, which provides that the Port consents to an easement for the proposed crossing, but that:

3. The Cities acknowledge and agree that the easement is subject to the rights of TC&ORR set forth in the Lease Agreement attached as Exhibit 2. The Cities must obtain additional authority from TC&ORR, either by contract or by exercise of authority granted by law, for the extension of The Center Parkway, construction of the crossing, installation of equipment and maintenance and operation of the crossing and safety equipment.

See Exhibit 4.

With respect to paragraph 5 of Mr. Jeffers' Verified Statement, he correctly does not state that the Cities have worked with TCRY to address TCRY's railroad operations concerns with respect to the new proposed crossing. Unlike the conduct of the Cities with respect to the disruption of Union Pacific's operations which would be caused by the establishment of the new at-grade crossing, the Cities do not seem to care about the disruption of TCRY's operations and have not offered it accommodations like those offered to Union Pacific.

27. **Paragraph 10** of the Jeffers verified statement provides:

Statement: "The UTC approved the Crossing over both tracks. Thus, the project will not remove any tracks. The Crossing will cross a main line and a siding."

Rebuttal: The issue of whether or not the crossing would unreasonably interfere with current or planned railroad operations was not before the Washington UTC. Any suggestion by Mr. Jeffers to the contrary is incorrect.

28. **Paragraph 12** of the Jeffers verified statement provides:

Statement: “In the past, UPRR and TCRY interchanged on the siding that Center Parkway will cross. However, UPRR contracted to stop switching at this location. The interchange of cars now takes place near Walulla, Washington, east of Kennewick. In addition, BNSF is now using operating rights over the Port owned rail line to access the UPRR-owned tracks. And, BNSF has contracted to not engage in switching in the Center Parkway crossing-area. But, BNSF does not interchange cars with either TCRY or UPRR. Thus, UPRR and BNSF do not switch any trains at this location. UPRR and BNSF do not use the siding.”

Rebuttal: This paragraph is simply factually incorrect. TCRY and Union Pacific do not interchange in Walulla; they interchange in Kennewick. BNSF does not use TCRY’s track to access Union Pacific track; rather, Union Pacific’s track meets TCRY’s and BNSF operates across Union Pacific’s track to reach TCRY’s track.

It is correct that Union Pacific and BNSF do not use TCRY’s 1900 foot passing track, as TCRY has the exclusive contractual right to use that siding. TCRY is the handling carrier for Union Pacific, and so is responsible for serving Union Pacific’s customers situated on TCRY’s track.

Finally, Union Pacific was paid \$2.1 million to relocate its operations away from the proposed crossing.

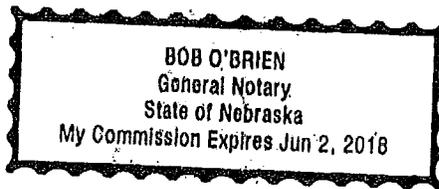
STATE OF NEBRASKA)
 : ss.
County of DOUGLAS)

JOHN MILLER being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

John J. Miller
JOHN MILLER

SUBSCRIBED AND SWORN to before me this 23rd day of June, 2015,
by JOHN MILLER.

Bob O'Brien
Notary Public in and for the State of
Nebraska, residing at 3910 N. 132nd St. Omaha, NE
My Commission Expires: 6/2/2018



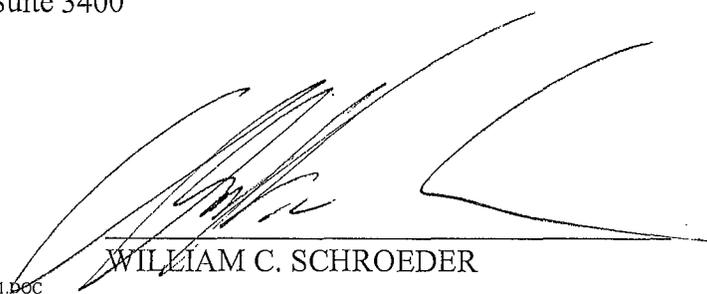
CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 2015, I caused to be served a true and correct copy of the foregoing **REBUTTAL VERIFIED STATEMENT OF JOHN MILLER RE: PETITION FOR DECLARATORY ORDER**, by the method indicated below and addressed to the following:

Heather Kintzley	_____	U.S. MAIL
Richland City Attorney	_____	HAND DELIVERED
975 George Washington Way	<u> X </u>	OVERNIGHT MAIL
PO Box 190 MS-07	_____	TELECOPY
Richland, WA 99352		

Lisa Beaton	_____	U.S. MAIL
Kennewick City Attorney	_____	HAND DELIVERED
210 West 6 th Avenue	<u> X </u>	OVERNIGHT MAIL
P.O. Box 6108	_____	TELECOPY
Kennewick, WA 99336		

P. Stephen DiJulio	_____	U.S. MAIL
Jeremy Eckert	_____	HAND DELIVERED
Foster Pepper PLLC	<u> X </u>	OVERNIGHT MAIL
1111 Third Avenue, Suite 3400	_____	TELECOPY
Seattle, WA 98101		



WILLIAM C. SCHROEDER

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Council Agenda Coversheet

Council Date: 04/05/2011

Category: Items of Business

Agenda Item: B1

Key Element: Key 2 - Infrastructure & Facilities

Subject: HORN RAPIDS TRACK USE AGREEMENT WITH UNION PACIFIC RAILROAD

Department: Public Works

Ordinance/Resolution:

Reference: 42-11

Document Type: Contract/Agreement/Lease

Recommended Motion:

Authorize the City Manager to sign and execute the attached Standard Form Track Use Agreement with Union Pacific Railroad subject to the City of Kennewick's action to provide funding support, amend the Capital Improvement Plan to supplement Center Parkway project funding to fulfill the City's obligations under the Agreement, and authorize the necessary budget adjustments.

Summary:

The city's economic development goals have long sought expanded industrial development in the Horn Rapids Industrial Park and expanded retail / commercial development in the Tapteal Business Center. City-provided infrastructure in the Horn Rapids Industrial Park includes two miles of city-owned industrial railroad track.

Since the late 1990's, Richland and Kennewick's transportation plans have included an extension of Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick. Center Parkway is necessary to improve vehicle circulation opportunities and support highest and best use development of the Tapteal Business Center and west Gage Boulevard area.

Since approximately 2000, the Tri-City Railroad (TCRR), Union Pacific Railroad (UPRR), and Burlington Northern Sante Fe Railroad (BNSF) have interchanged rail cars at Richland Junction, located on the alignment of the proposed Center Parkway. The railroads have refused city requests to relocate interchange operations and permit completion of Center Parkway using an at-grade railroad crossing.

In mid-2010, city staff, working with a consultant team, drafted a Horn Rapids Standard Form Track Use Agreement linking access to the city's industrial park railroad track to railroad cooperation on Center Parkway. The Agreement provided standard terms for all interested railroads to access the Horn Rapids track. In January 2011, the BNSF entered into the agreement. The proposed agreement represents completed negotiations with the UPRR, largely to the same terms agreed to by BNSF. The UPRR and BNSF agree to pay an annual access fee, indemnify the city for damages caused by railroad operations, operate under the city's authority to ensure fair access to both railroads and allow completion of Center Parkway, including an at-grade railroad crossing. In addition to the standard terms, the UPRR agreement includes compensation paid by the city, for UPRR assets at Richland Junction, a roadway easement across UPRR property and impacts to UPRR operating costs due to the interchange relocation. The city acquires railroad materials present on UPRR property at Richland Junction. These materials may be salvaged or reused by the city in its industrial park development.

The Kennewick's City Council is considering a budget adjustment at their April 5th meeting to support this agreement.

Fiscal Impact?

Yes No

UPRR will provide approximately \$15,000 annually to support track maintenance. The Agreement requires compensation to UPRR totalling \$2,100,000. Staff proposes that Kennewick provide \$1,000,000 and Richland provide \$1,100,000 because Richland will own the salvaged railroad materials. In addition, Richland's share of consultant and legal fees adds \$65,000. Staff proposes to fund Richland's share with \$415,000 from the LTGO 98 fund, \$250,000 from the Industrial Development Fund and \$500,000 from the Center Parkway project.

Attachments:

- 1) UP - City of Richland Horn Rapids Spur Agmnt
- 2) CFP - Center Parkway- revised 04-05-2011

City Manager Approved:

Johnson, Cindy
Mar 31, 16:39:42 GMT-0700 2011

CITY OF RICHLAND
STANDARD FORM RAILROAD TRACK USE AGREEMENT

THIS RAILROAD TRACK USE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into as of this ____ day of April, 2011 (hereinafter referred to as the "Effective Date") by and between the **CITY OF RICHLAND**, a municipal corporation in the State of Washington (hereinafter referred to as "City") and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation and a duly licensed corporation in the State of Washington (hereinafter referred to as "Railroad").

WITNESSETH

WHEREAS, City is the owner of a railroad industrial spur track, commonly known as the Horn Rapids Rail Spur, located at the Horn Rapids Industrial Park in the City of Richland and connected to the Southern Connection of the Hanford Railroad (owned by the Port of Benton, Washington (hereinafter referred to as the "Port"), successor in interest to the United States Department of Energy), as shown on Exhibit A attached hereto (hereinafter referred to as the "Track"); and

WHEREAS, Railroad operates pursuant to separate agreement(s) over tracks owned by the Port which tracks connect with the Track near Milepost B 37 on the Port's trackage and a portion of which tracks have been used for the interchange of traffic between rail carriers at or near Richland Junction, Washington (hereinafter referred to as "Richland Junction"); and

WHEREAS, Railroad desires to use the Track for the purpose of providing railroad freight service thereon and thereover to industries located on or adjacent to the Track (hereinafter referred to individually as "Industry" and collectively as "Industries"); and

WHEREAS, City desires that all railroad interchange operations at Richland Junction be permanently eliminated to facilitate commercial development and improve vehicular traffic movement in the area; and

WHEREAS, City is willing to allow Railroad to use the Track on a non-exclusive basis but only on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties, intending to be bound, do hereby agree as follows:

SECTION 1
GRANT OF USE

Section 1.1. City hereby grants to Railroad non-exclusive permission to operate its trains, locomotives, cars and equipment with its own crews over the Track for the purposes set forth herein. Railroad's use of the Track shall be in common with such other user or users of the Track as City has heretofore admitted, or may at any time in the future admit, to use of all or any

portion of the Track, provided that City shall require such user or users to comply with all Legal Requirements (as defined in Section 9.1) applicable to such user's or users' use of the Track. Subject to the foregoing, City shall retain the exclusive right to grant to other persons the right to use all or any portion of the Track, provided that such use does not unreasonably interfere with the rights granted to Railroad herein.

Section 1.2. The Track shall include, without limitation, the right-of-way, tracks, rails, ties, ballast, other track materials, switches, bridges, grade crossings and any and all other improvements or fixtures affixed to the right-of-way.

Section 1.3. Railroad shall take the Track in an "AS IS, WHERE IS" condition subject to all rights, interests and estates of third parties in and to the Track.

Section 1.4. City represents that it owns or controls the land underlying the Track and that there are no existing easements or encumbrances affecting such land that would interfere with Railroad's rights under this Agreement.

SECTION 2 **PERMITTED USE**

Section 2.1. Railroad's use of the Track shall be limited to the movement of goods by rail to and from an Industry via tracks of such Industry that connect to the Track.

Section 2.2. Railroad shall not knowingly and intentionally permit the loading or unloading of railcars on the Track by any party within its control, and shall not enter into agreements or arrangements with any person for the storage of empty or loaded railcars on the Track or any portion thereof, without the prior written consent of City.

Section 2.3. Neither party shall use the Track or any portion thereof, for the storage, transload or disposal of any hazardous substances, as defined by the Comprehensive Environmental Response, Compensation and Liability Act, as amended (hereinafter referred to as "CERCLA"), or petroleum or oil as defined by CERCLA, the Resource Conservation and Recovery Act, as amended (hereinafter referred to as "RCRA"), the Clean Water Act, the Oil Pollution Act, and the Hazardous Materials Transportation Act (hereinafter collectively referred to herein as the "Environmental Laws"), provided however, that nothing herein shall preclude Railroad or any other admittee of City from using the Track for the movement of hazardous substances in railcars in the normal course of providing rail transportation service to or from an Industry.

Section 2.4. Neither party shall use nor allow the use of the Track for the transportation of passengers thereon or thereover, provided however, that nothing herein shall preclude Railroad or any other admittee of City from operating a hi-rail vehicle over the Track for the purpose of inspecting the Track.

Section 2.5. Railroad shall not cause to be filed or knowingly and intentionally permit persons within its control to file any liens against the Track. In the event any such liens

are filed, Railroad shall cause such liens to be released within thirty (30) days of Railroad's receipt of notice of any such lien.

Section 2.6. Railroad shall not create or store any waste or nuisance on the Track. Railroad shall neither use nor occupy the Track or any part thereof in violation of Legal Requirements (as defined in Section 9.1). City shall not cause or allow the Track to be blocked, obstructed or used in any manner that would impair or diminish Railroad's ability to use the Track for the purposes set forth in this Agreement, provided however, that use of the Track by any user in the ordinary course of providing rail service to any industry on the Track, shall not be deemed a violation of the requirements of this sentence.

SECTION 3 **MAINTENANCE**

Section 3.1. City, at its cost and expense, shall be solely responsible for, and shall have exclusive direction and control over, the maintenance of the Track which shall include, but not be limited to, maintenance of tracks, subgrade, track drainage, grade crossings, grade crossing warning signs and devices, signal boxes, bridges and abutments, culverts, drainage ditches, retaining walls and any fences or barriers that City may erect. City shall also be solely responsible for litter and vegetation control and for keeping the Track sufficiently free and clear of snow and ice to permit railroad operations thereover.

Section 3.2. City shall maintain the Track to not less than Federal Railroad Administration (hereinafter referred to as "FRA") Class 2 track safety standards with a maximum gross weight limitation of not less than 286,000 lbs. per car and City shall maintain the Track in such condition and in compliance with all Legal Requirements (as hereinafter defined below). City shall also maintain all grade crossing signal equipment on the Track in accordance with all applicable Legal Requirements (as defined in Section 9.1).

Section 3.3. City, in its sole discretion, may contract with a third party to perform City's maintenance obligations hereunder, provided, however, City shall remain responsible for any obligations of City under this Agreement that may be performed by any such contractor.

Section 3.4. Railroad shall notify City in writing of any deficiencies in City's maintenance of the Track when such deficiencies are reasonably discovered by Railroad, and City shall, as soon as practicable, but in any event not more than thirty (30) days after its receipt of such notice, or in the case of an imminent safety hazard and/or condition which renders the Track impassable, within forty-eight (48) hours, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence.

Section 3.5. If the use of the Track is at any time interrupted or traffic thereover is delayed for any cause whatsoever, City shall, with reasonable diligence, restore the Track for the passage of trains. Railroad shall not have nor make any claim against City for loss, damage, loss of business or expenses of any kind resulting from such interruption or delay.

Section 3.6. City shall be bound to use only reasonable and customary care, skill and diligence in the maintenance, repair and renewal of the Track and, Railroad shall not, by reason of City's performing or failing, or neglecting to perform any maintenance, repair or renewal of the Track, have or make against City, its officers, agents or employees, any claim or demand for loss, damage, destruction, injury or death whatsoever resulting from any defect in the Track or City's performance, failure or neglect, except as provided otherwise in Section 11 herein.

Section 3.7. Subject to the provisions of Section 8.1 herein, Railroad shall have the right to enter upon the Track and make inspections to determine compliance with the terms of this Agreement. In no event shall Railroad be obligated to make any such inspections, and Railroad shall not be liable for any failure to make any such inspections or failure to identify any matters that are not in compliance with this Agreement. In no event shall Railroad's conducting of inspections be deemed to result in a waiver of City's compliance with any terms of this Agreement.

Section 3.8. City shall be responsible for reporting of grade crossings and structures inventory and any other similar information as may be required by the FRA or any other governmental body having jurisdiction over such matters.

SECTION 4 **COMPENSATION**

Section 4.1. For so long as City permits Railroad reasonable use of the Track, as compensation for Railroad's use of the Track, Railroad shall pay to City annually at the beginning of each calendar year a fee of Fifteen Thousand Dollars (\$15,000) (hereinafter referred to as the "Annual Fee") which shall be payable regardless of Railroad's use of the Track during that year.

Section 4.2.

A. The Annual Fee shall be subject to adjustment on January 1 of each year beginning January 1, 2011 in accordance with changes in the Consumer Price Index for Wage Earners and Clerical Workers, series CWUR0000SA0 (hereinafter referred to as "CPI-W"). The Annual Fee set forth in Section 4.1 shall be revised by calculating the percentage of increase or decrease for the year to be revised based on the final index of the most recent July as related to the final index of the previous July and applying this percentage of increase or decrease to the current Annual Fee to be revised. The resulting adjusted Annual Fee shall hereinafter be referred to as "the Revised Annual Fee."

By way of example, assuming "A" to be the CPI-W final index figure for July 1, 2009; "B" to be the CPI-W final index figure for July, 2010; and "C" to be the current Annual Fee to be escalated; the Revised Annual Fee effective January 1, 2011 would be determined by the following formula:

$$B/A \times C = \text{Revised Annual Fee, Rounded to Nearest Whole Cent}$$

B. In the event that publication of the CPI-W is discontinued, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the matter shall be submitted to arbitration in accordance with Section 16 herein.

C. Under no circumstances shall the Revised Annual Fee paid by Railroad to City be less than the Annual Fee in effect on the date of this Agreement.

Section 4.3.

A. Railroad agrees that as part of the consideration for obtaining City's permission to use the Track herein, Railroad shall, subject to Legal Requirements, as of the Effective Date and during the term of this Agreement, permanently relocate any interchange receipt operations between Railroad and another rail carrier at Richland Junction to an alternate interchange location except that Railroad may, in emergency situations only, interchange cars at Richland Junction. For purposes of this provision, an emergency situation includes, but is not limited to, the following: Force Majeure events or other Acts of God; movement of High or Wide loads; movement or handling of rail security-sensitive materials (as such term is defined in 49 CFR Part 1580, as amended, supplemented or replaced) in compliance with Legal Requirements or other safety requirements; track or other mechanical conditions necessitating a change in interchange location. Except as required by law or as provided in this Section 4.3.A, Railroad shall not, during the term of this Agreement, enter any agreement to deliver cars in interchange to any other railroad at Richland Jct.

B. City intends to construct a public street, called Center Parkway, at the location of Richland Junction. Railroad further agrees to provide easements and rights of way necessary to complete Center Parkway in exchange for compensation as defined in Section 18.

C. Railroad further agrees that if the design of Center Parkway requires an at-grade crossing of a track owned or used by Railroad, Railroad shall not oppose installation of a crossing designed in compliance with the current version of the Manual on Uniform Traffic Control Devices or any other applicable Legal Requirements, with the appropriate traffic control system to be used at the crossing to be determined by an engineering study involving both the City and Railroad representatives. In the event that both City and Railroad representatives jointly agree as to the appropriate traffic control system to be used at the crossing, Railroad shall execute a waiver of hearing document to the Washington State Utilities and Transportation Commission regarding the proposed crossing.

Section 4.4. City acknowledges that the compensation provided for in this Section 4 shall be the sole consideration for the right to use the Track, and in no event shall City impose any additional charges, tariffs, or surcharges on Railroad or any customer or receiver of Railroad as a condition of use of the Track for the provision of rail transportation service except to the extent expressly set forth below. Notwithstanding the foregoing, City may assess additional charges, tariffs, or surcharges for maintenance, operating and dispatching costs associated with the Track if all of the following conditions are satisfied: (i) City provides Railroad with ninety (90) days advance written notice of the proposed charges, tariffs or

surcharges and detailed information concerning City's costs, including the deficit not covered by the then current Annual Fee; and (ii) City, Railroad and any other users of the Track are not able to negotiate, within sixty (60) days of City providing notice in (i) above, an updated Annual Fee in lieu of the proposed charges to the mutual satisfaction of the parties. The increase in the updated Annual Fee as provided in this Section 4.4, shall not exceed Railroad's proportionate share of the deficit not covered by the Annual Fee prior to update. Railroad's proportionate share shall be calculated by comparing the total number of cars handled by Railroad over the Track to the total number of cars handled by all users over the Track for the twelve (12) full months prior to City's notification to Railroad of its intent to increase the Annual Fee.

SECTION 5

BILLING AND PAYMENT

Section 5.1. City shall render to Railroad a bill for the Annual Fee.

Section 5.2. Upon reasonable request by City, Railroad shall furnish to City, within sixty (60) days of receiving such request, a statement of the number of loaded and empty cars handled by Railroad over all or any portion of the Track during the previous twelve (12) months. Notwithstanding the foregoing, City shall only be entitled to make one request for such car information each calendar year during the term of this Agreement.

Section 5.3. All payments called for under this Agreement shall be made by Railroad within thirty (30) days after receipt of a bill therefor except for any claims or demands for payment pursuant to Section 11 of this Agreement. No payment shall be withheld because of any dispute as to the correctness of items in any bill rendered and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. In the event that Railroad shall fail to pay any monies due to City within thirty (30) days after the invoice date, Railroad shall pay interest on such unpaid sum of twelve percent (12%), or the maximum rate permitted by law, whichever is less.

Section 5.4. The records of each party, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of billing.

Section 5.5. For purposes of this Agreement, the terms "cost," "costs," "expense" and "expenses" shall include actual labor and material costs together with the surcharges, overhead percentages and equipment rentals as specified by City at the time any work is performed for Railroad, which surcharges, overhead percentages and equipment rentals shall be reasonable and consistent with City's then-current standard billing practice, procedures, rates and schedules. City's overhead percentages shall not exceed sixty percent (60%) during the term of this Agreement without Railroad's review and approval.

SECTION 6

ADDITIONS, RETIREMENTS AND ALTERATIONS

Section 6.1. City, from time to time, and at its sole cost and expense, may make such changes in, additions and improvements to, and retirements from the Track as shall, in its

judgment, be necessary or desirable for the economical or safe operation thereof, or as shall be required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction. Such additions and improvements shall become part of the Track and such retirements shall be excluded from the Track.

Section 6.2. If Railroad requests City to make changes in or additions or improvements to the Track required to accommodate Railroad's operations thereover, and Railroad agrees to reimburse City therefor, and City determines that the requested improvements will not adversely impact City's economic development goals, then City shall make such changes, additions or improvements to the Track and Railroad shall pay to City the cost thereof, including the annual expense, if any, of maintaining, repairing and renewing such additional or altered facilities. Any facilities other than the Track, which are exclusively funded by Railroad as provided for herein, shall be for the exclusive use of Railroad and City shall not allow any other party access to the facility without Railroad's prior written agreement.

SECTION 7

TERM

Section 7.1. This Agreement shall take effect on the date hereof and shall continue in full force and effect for three (3) years from the date hereof (hereinafter referred to as the "Initial Term") and shall automatically renew for successive one (1) year periods thereafter, absent termination as provided in Section 14.

SECTION 8

OPERATIONS

Section 8.1. Railroad agrees that entry to and exit from the Track shall be controlled by City or any contractor or admittee designated by City. City shall require that any entity allowed by City to control operations thereover shall be required to ensure that the trains, locomotives and cars of all users of the Track shall be operated thereon and thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track. Except to the extent prohibited by law, City reserves the right at any time by sixty (60) days prior written notice to Railroad and any other user or users of the Track to assume coordination of operations over the Track consistent with the terms of this Section 8.1.

Section 8.2. Railroad shall provide, at its sole cost and expense, all locomotives, railcars, other rolling stock and transportation equipment, personnel, fuel and train supplies necessary for Railroad to provide safe and adequate rail transportation to the Industries. Railroad shall also provide, at its sole cost and expense, all radios and other communication facilities as necessary to comply with the regulations of the FRA. Railroad shall be solely responsible for all car hire charges and mileage allowances on cars in Railroad's account handled over the Track.

Section 8.3. City, at its sole cost and expense, shall provide all necessary switch locks for use in the operation of the Track. City shall provide at no charge a reasonable number of keys for such switch locks to Railroad and any other user or users of the Track.

Section 8.4. Railroad, at its sole cost and expense, shall perform or cause to be performed any repairs required to make locomotives, cars or other equipment in the custody or control of Railroad on the Track comply with Legal Requirements (as defined in Section 9.1).

Section 8.5. City shall not place, permit to be placed or allow to remain, any permanent or temporary material, structure, pole, or other obstruction within eight and one-half (8-1/2) feet laterally from the centerline of straight track (nine and one-half (9-1/2) feet on either side of the centerline of curved track) or within twenty-three (23) feet vertically from the top of the rail of any track (hereinafter referred to as "Minimal Clearances"), provided that if any Legal Requirements (as defined in Section 9.1) require greater clearances than those provided for in this Section 8.5, City shall comply with such Legal Requirements. However, vertical or lateral clearances which are less than the Minimal Clearances but are in compliance with Legal Requirements shall not be a violation of this Section, so long as City complies with the terms of any such Legal Requirements.

Section 8.6. Railroad shall not place or allow to be placed any rail car within two hundred fifty (250) feet of either side of any at-grade crossing on the Track. Railroad shall not place or permit to be placed on the City's right-of-way any permanent or temporary structure of any kind whatsoever without the prior written consent of City, which consent may be withheld at City's sole discretion. City shall require any other user or users of the Track to comply with the requirements of this Section 8.6.

Section 8.7. Railroad and City agree that with respect to the at-grade road crossings on the Port of Benton's track between the proposed Center Parkway crossing at Richland Junction and SR 240 (Vantage Highway) inclusive, Railroad shall use reasonable efforts to minimize its operations over such crossings during peak highway traffic times Monday through Friday. City acknowledges and understands that Railroad's compliance with its common carrier obligations may, from time to time, require operations over such crossings during peak highway traffic times. Railroad agrees to use reasonable efforts to meet its obligations under this Section 8.7.

Section 8.8. In the event that any user of the Track, including Railroad, provides notice to the City of any violation of Legal Requirements by any user of the Track, including Railroad, or any violation of the terms of this Agreement or the applicable agreement between such user and City (including without limitation, any applicable obligation to control entry to and exit from the Track or operations thereon or thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track), City shall conduct an investigation into such alleged violation, and if, in the reasonable judgment of City, Railroad or such user shall be in violation of applicable Legal Requirements or the terms of this Agreement or such user's agreement with the City, City shall require Railroad or such user as the case may be to cure such conduct in accordance with this Agreement or the applicable agreement, and unless and until same shall be cured in compliance with this Agreement or the applicable agreement, City shall bar Railroad or such user as the case may be from use of the Track.

SECTION 9
COMPLIANCE WITH LAWS

Section 9.1. The parties agree to comply with all applicable provisions of law, statutes, regulations, ordinances, orders, covenants, restrictions and decisions of any governmental body or court having jurisdiction (hereinafter collectively referred to as "Legal Requirements") relating to this Agreement and/or use of the Track. Each party hereto shall indemnify, protect, defend and hold harmless the other party and its officers, agents and employees from and against all fines, penalties, and liabilities imposed on the other party under such laws, rules and regulations by any such public authority or court having jurisdiction when attributable to the failure of the first party to comply with its obligations in this regard.

Section 9.2. It is the understanding of the City and the Railroad that the Track is industry track. Unless otherwise required by law, Railroad does not intend to and will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

SECTION 10
CLEARING OF WRECKS

Section 10.1. If trains, locomotives, cars or equipment of Railroad are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, Railroad shall be responsible for the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if Railroad fails to restore the Track to service within a reasonable period of time, not to exceed forty-eight (48) hours, after such wreck or derailment, City, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and Railroad shall reimburse City for the cost and expense thereof in accordance with Section 5 herein. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be determined in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by Railroad at the time of such wreck shall be promptly delivered to Railroad.

Section 10.2. If trains, locomotives, cars or equipment of any admittee of City, other than Railroad, are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, City shall ensure the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if City fails to have the Track restored to service within a reasonable period of time, not to exceed seventy-two (72) hours, after such wreck or derailment, Railroad, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and City shall reimburse Railroad for the cost and expense thereof in accordance with Section 5 herein. In order for Railroad's costs to be eligible for reimbursement, Railroad shall provide at least twenty-four (24) hours written notice to City and all other users of the Track of Railroad's intent

to mobilize resources to complete the work. City will be responsible for coordinating resources of various entities to complete the repair and avoid duplication of effort. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be determined in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by City or its admittee at the time of such wreck shall be promptly delivered to City or its admittee, as the case may be.

SECTION 11 **LIABILITY**

Section 11.1

A. TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CITY AND CITY'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "**CITY INDEMNITEES**"), FROM AND AGAINST ANY AND ALL CLAIMS AND LIABILITIES OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, INCLUDING, WITHOUT LIMITATION, PERSONAL INJURIES, DEATHS, DAMAGE OR DESTRUCTION OF PROPERTY AND DAMAGE TO OR DESTRUCTION OF THE ENVIRONMENT WHATSOEVER, INCLUDING WITHOUT LIMITATION LAND, AIR, WATER, WILDLIFE, AND VEGETATION (HEREINAFTER COLLECTIVELY REFERRED TO AS "**CLAIMS**"), TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY RAILROAD AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF RAILROAD OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

B. TO THE FULLEST EXTENT PERMITTED BY LAW, CITY SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD AND RAILROAD'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "**RAILROAD INDEMNITEES**"), FROM AND AGAINST ANY AND ALL CLAIMS OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY CITY AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF CITY OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

C. UPON WRITTEN NOTICE FROM RAILROAD OR CITY, THE OTHER PARTY AGREES TO ASSUME THE DEFENSE OF CLAIMS OR ANY LAWSUIT OR OTHER PROCEEDING BROUGHT AGAINST ANY INDEMNITEE OF THE OTHER PARTY BY ANY ENTITY, RELATING TO ANY MATTER COVERED IN THIS AGREEMENT FOR WHICH THE OTHER PARTY HAS AN OBLIGATION TO ASSUME

LIABILITY FOR AND/OR SAVE AND HOLD HARMLESS SUCH INDEMNITEE. THE OTHER PARTY SHALL PAY ALL COSTS INCIDENT TO SUCH DEFENSE, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES, INVESTIGATOR'S FEES, LITIGATION AND APPEAL EXPENSES, SETTLEMENT PAYMENTS, AND AMOUNTS PAID IN SATISFACTION OF JUDGMENTS.

D. NOTWITHSTANDING ANY PROVISION TO THE CONTRARY HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF THE CONDUCT OF AN INDEMNIFIED PARTY OR THE EMPLOYEES, AGENTS, OFFICERS, OR CONTRACTORS OF AN INDEMNIFIED PARTY.

SECTION 12
INSURANCE

Section 12.1.

A. Railroad shall, at its sole cost and expense, procure and maintain during the term of this Agreement the following insurance coverage:

1. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post-1998 ISO occurrence form or equivalent and include coverage for, but not limited to:

- Bodily Injury and Property Damage
- Personal Injury and Advertising Injury
- Fire legal liability
- Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- The employee and workers compensation-related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within fifty (50) feet of the Track.
- Any exclusion related to explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy with regard to Railroad's use of the Track under this Agreement.

2. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to:
 - Bodily injury and property damage
 - Any and all vehicles owned, used or hired
 3. Workers' Compensation and Employers Liability insurance including coverage for, but not limited to:
 - Railroad's statutory liability under the worker's compensation laws of the State of Washington. If optional under State law, the insurance must cover all employees anyway.
 - Employers' liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.
 4. Excess Liability insurance in an amount not less than \$10,000,000 each occurrence and \$10,000,000 aggregate limit.
- B. Railroad shall also comply with the following requirements:
1. Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.
 2. Railroad agrees to waive its right of recovery against City and Indemnites under its Commercial General Liability, Automobile Liability, and Workers' Compensation/Employers Liability insurance coverages.
 3. Railroad's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by City. The certificate of insurance must reflect that the above wording is included in evidenced policies.
 4. All policy(ies) required above (excluding Workers' Compensation) shall include a severability of interest endorsement and shall name City as an additional insured by endorsement using additional insured form CG 26 07 04 with respect to Railroad's use of the Track under this Agreement. Severability of interest and naming City as an additional insured shall be indicated on the certificate of insurance.

5. Except if Railroad is a Class I rail carrier as defined under the regulations of the STB, Railroad is not allowed to self-insure without the prior written consent of City. If granted by City, any deductible, self insured retention or other financial responsibility for claims shall be paid directly by Railroad. Any and all City liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by Railroad's insurance shall be paid by Railroad as if Railroad elected not to include a deductible, self-insured retention or other financial responsibility for claims.
6. Prior to entering upon the Track, Railroad shall furnish to City an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify City in writing at least thirty (30) days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving City arising out of this Agreement, Railroad will make available any required policy covering such claim or lawsuit.
7. Any insurance policy shall be written by a reputable insurance company acceptable to City or with a current Best's Guide Rating of A and Class VII or better, and authorized to do business in the State of Washington.
8. Railroad represents that this Agreement has been thoroughly reviewed by Railroad's insurance agent(s)/broker(s), who have been instructed by Railroad to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.
9. Not more frequently than once every five (5) years, City may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.
10. Failure to provide evidence as required by this section shall entitle, but not require, City to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Railroad's obligations hereunder.
11. The fact that insurance (including, without limitation, self-insurance) is obtained by Railroad shall not be deemed to release or diminish the liability of Railroad including, without limitation,

liability under the indemnity provisions of this Agreement. Damages recoverable by City shall not be limited by the amount of the required insurance coverage.

C. City shall waive in writing the above insurance requirements if Railroad is a Class I rail carrier as defined in the regulations of the STB.

SECTION 13 **ENVIRONMENTAL**

Section 13.1

A. Railroad shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Track, including, but not limited to Environmental Laws. Railroad shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws, anywhere on the Track. Railroad shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws, anywhere on the Track. Any such release shall not be considered a default of this Agreement but shall be remedied as described below.

B. In the event of any such release described in Section 13.1.A., then Railroad shall provide immediate notice to City's Contract Officer at (509) 942-7327 of any release of hazardous substances on or from the Track, violation of Environmental Laws, or inspection or inquiry by government authorities charged with enforcing Environmental Laws with respect to Railroad's use of the Track. Railroad shall use reasonable efforts to promptly respond to any release on or about the Track. Railroad also shall give City immediate notice of all measures undertaken on behalf of Railroad to investigate, remediate, respond to or otherwise cure such release or violation.

C. In the event that City receives notice from Railroad or otherwise learns of a release or violation of Environmental Laws on the Track which occurred or may occur during the term of this Agreement for which Railroad is responsible pursuant to this Agreement, City may require Railroad, at Railroad's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure or prevent such release or violation affecting the Track.

D. Railroad shall promptly report to City in writing any known conditions or activities on the Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Railroad's reporting to City shall not relieve Railroad of any obligation whatsoever imposed on it by this Agreement. Railroad shall promptly respond to City's request for information regarding said conditions or activities.

SECTION 14 **TERMINATION**

Section 14.1. Railroad may terminate this Agreement at any time after one year from the Effective Date, by giving City not less than six (6) months' written notice of

termination. Upon expiration or termination of this Agreement consistent with the terms herein, all rights of Railroad to use the Track shall cease.

Section 14.2. Notwithstanding any other provision of this Agreement except Section 14.3, at any time after the Effective Date, City may terminate this Agreement if Railroad shall default on or breach any of its material obligations hereunder, including but not limited to timely payment of compensation to City pursuant to Section 4.1, and Railroad fails to cure such default or breach within thirty (30) days of receipt of written notice from City specifying such default or breach.

Section 14.3. Notwithstanding any other provision of this Agreement, at any time after the Effective Date, City may terminate this Agreement if Railroad fails to comply with its material obligations under Section 4.3 herein and Railroad does not cure such failure within thirty (30) days of receipt of written notice from City specifying such failure.

Section 14.4. Termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to the termination hereof. The Annual Fee paid by Railroad to City pursuant to Section 4.1 shall be non-refundable if termination of this Agreement becomes effective after June 1 of the year to which the Annual Fee applies.

SECTION 15 **NOTICES**

Section 15. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice for such change in address:

If to City: Community Development Services
 Attn: Horn Rapids Rail Spur
 City of Richland
 975 George Washington Way
 P.O. Box 190, MS #18
 Richland, WA 99352
 (509) 942-7593

If to Railroad:

General Manager Joint Facilities
1400 Douglas Street
MS 1180
Omaha, Nebraska 68179
(402) 544-2292

SECTION 16
ARBITRATION

Section 16.1. Any dispute arising between the parties hereto with respect to any of the provisions of this Agreement which cannot be settled by the parties themselves shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as such rules may be amended from time to time, and as shall be applied with reference to the customs and practices of the railroad industry. Any such arbitration shall be held in Richland, Washington or at such other location as may be mutually acceptable to the parties hereto. The decision of the arbitrator or arbitration panel shall be final and conclusive upon the parties hereto. A final decision and award of the arbitration panel shall be enforceable in any court of competent jurisdiction in the United States of America. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own arbitrator, witnesses, exhibits and counsel. The compensation, costs and expenses of any neutral arbitrator, if any, shall be borne equally by the parties hereto. The arbitrator or arbitration panel shall not have the power to (a) award punitive or consequential damages, (b) determine violations of antitrust or criminal laws, or (c) reform the terms of this Agreement, in whole or in part.

SECTION 17
MISCELLANEOUS

Section 17.1. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, provided however, no modification of this Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

Section 17.2. This Agreement shall be binding upon and inure to the benefit of City and Railroad, and shall be binding upon the successors and assigns of Railroad, subject to the limitations hereinafter set forth. Railroad may not assign its rights under this Agreement or any interest therein, or attempt to have any other person assume its obligations in whole or in part under this Agreement, without the prior written consent of City which consent may be withheld; in City's sole discretion; provided, however, no such consent shall be required where assignment occurs as a result of a sale or transfer of all or substantially all of the assets of Railroad pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority.

Section 17.2.1. Notwithstanding Section 17.2 of this Agreement, UP shall have the right, at its sole discretion and upon ten (10) days advance written notice to the City, to name an agent to handle UP rail traffic to and from Industries located along the Track. While handling

such UP traffic, for the purposes of this Agreement, any agent so named by UP shall be considered to be UP, and City may enforce the provisions of this Agreement against UP for the acts of such agent. Regardless of whether or not UP names an agent as provided for in this Section 17.2.1, UP shall continue to have the right to handle part or all of its own traffic to Industries.

Section 17.3. If fulfillment of any provision hereof shall be declared invalid or unenforceable under applicable law, such provision shall be ineffective only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable the remainder of such provision or the remaining provisions of this Agreement, which shall remain in full force and effect.

Section 17.4. Section headings used in this Agreement are inserted for convenience of reference only and shall not be deemed to be a part of this Agreement for any purpose.

Section 17.5. This Agreement shall be governed and construed in accordance with the laws of the State of Washington. It is expressly agreed that no party may sue or commence any litigation against the other party unless such legal proceeding is brought in state court in Washington.

Section 17.6. No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is in writing and signed by the parties hereto. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 17.7. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

Section 17.8. The parties each represent and warrant to each other that neither has employed a broker in connection with this transaction. In the event there is a claim against either party hereto with respect to any broker whatsoever other than as set forth in this Section 17.8, the party whose action gives rise to the claim for commission shall indemnify the other party against any liability, damage, cost or fee in connection with such claim, including, without limitation, attorneys' fees and costs.

Section 17.9. The failure of either of the parties hereto in one or more instances to insist upon strict performance or observation of one or more of the covenants or conditions hereof, or to exercise any remedy, privilege, or option herein conferred upon or reserved to such party, shall not operate and shall not be construed as a relinquishment or waiver for the future of such covenant or condition or of the right to enforce the same or to exercise such privilege, option, or remedy, but the same shall continue in full force and effect.

Section 17.10. Railroad shall, on the last day of the term, or upon any earlier termination of this Agreement, peaceably and in an orderly manner vacate the Track free of any property of Railroad or third parties placed by Railroad thereon. Railroad shall, if not in default

hereunder, remove its equipment, goods, trade fixtures and effects and those of all persons claiming by, through or under it, provided that such removal does not cause irreparable damage to the Track. Any personal property not used in connection with the operation of the Track and belonging to Railroad, if not removed at the termination hereof, and if City shall so elect, shall be deemed abandoned and become the property of City without any payment or offset therefor. City may remove such property from the Track and store it at the risk and expense of Railroad if City shall not so elect. Railroad shall repair and restore all damage to the Track caused by the removal of any of Railroad's equipment and personal property. Railroad, if requested by City, shall remove all signs placed on the Track by Railroad and restore the portion of the Track on which they were placed substantially to the same condition as immediately prior to installation thereof.

Section 17.11. The failure of Railroad to vacate the Track on the expiration or termination of this Agreement as required pursuant to the terms of this Agreement and the subsequent holding over by Railroad, with or without the consent of City, shall result in the creation of a tenancy at will at a monthly fee equal to one hundred fifty percent (150%) of the then-applicable Annual Fee divided by twelve (12), for each month or portion thereof in which the Railroad holds over, payable on the tenth (10th) day of the following month. This provision does not give Railroad any right to hold over at termination of this Agreement, and all other terms and conditions of this Agreement shall remain in force during any tenancy at will created by any holding over by Railroad.

SECTION 18

RELOCATION AND COMPENSATION

Section 18.1. Railroad has secured all agreements necessary with Tri-City Railroad Company, LLC ("Tri-City Railroad") to permanently relocate the UP/Tri City Railroad interchange ("Interchange") from Richland Junction and the path of the Center Parkway. Pursuant to the Tri-City Railroad agreements, Railroad shall relocate its Interchange with Tri-City Railroad within thirty (30) days of the effective date of this Agreement.

Section 18.2. Within sixty (60) days after relocation of the Interchange, City shall pay to Railroad \$2,100,000 (which constitutes \$2,000,000 for the relocation of the Interchange and offset for Railroad's increased operating expense and \$100,000 for the easement, as described below).

Section 18.3. The payment described in Section 18.2 provides compensation to the Railroad for the following:

- a. The Railroad's estimated cost of increased operating expense and to replace rail assets lost due to the relocation of the Interchange.
- b. A roadway and utility easement conveyed by the Railroad to the City of Kennewick for the completion of Center Parkway across Railroad's property at Richland Junction as described below.

- c. Salvage by the City of all Railroad Track Materials (defined below) located on Railroad's property at Richland Junction west of the Richland Junction switch between MP 18.8 and the end of track at MP 19.5.

Section 18.4 Railroad shall convey an easement in width not to exceed eighty (80) feet to City for the Center Parkway across Railroad's right of way. The easement shall allow for curb cuts on each side of the road to serve Railroad's adjacent property. The easement shall be delivered to City no later than the date upon which the Interchange operations are relocated away from the Center Parkway.

Section 18.5 As of the date Interchange operations are relocated away from Richland Junction and the Center Parkway, the City will assume ownership and control of the Railroad Track Materials. Railroad Track Materials is defined to include rail, ties, switches and other track materials which make up the current interchange track between MP 18.8 and the end of track at MP 19.5 of Railroad's Kalan Industrial Lead west of the Richland Junction switch. At its sole risk, cost and discretion the City may remove, salvage or reuse all Railroad Track Materials; provided, however, that the City first obtains a right of entry to Railroad's property from Railroad.

Section 18.6 Subsequent to relocation of the Interchange, Railroad shall not reestablish an interchange operation at Richland Junction or the Center Parkway location, or any portion thereof, or sell or lease property at Richland Junction or the Center Parkway location to another railroad for the purposes of establishing a switching or interchange operation.

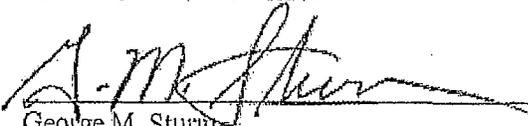
Section 18.7 Notwithstanding any termination of this Agreement, Section 18.6 above shall remain in full force and effect until City, at its sole election, shall agree to any proposed change.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first herein above written.

CITY OF RICHLAND,
WASHINGTON

UNION PACIFIC
RAILROAD COMPANY

CYNTHIA D. JOHNSON
City Manager



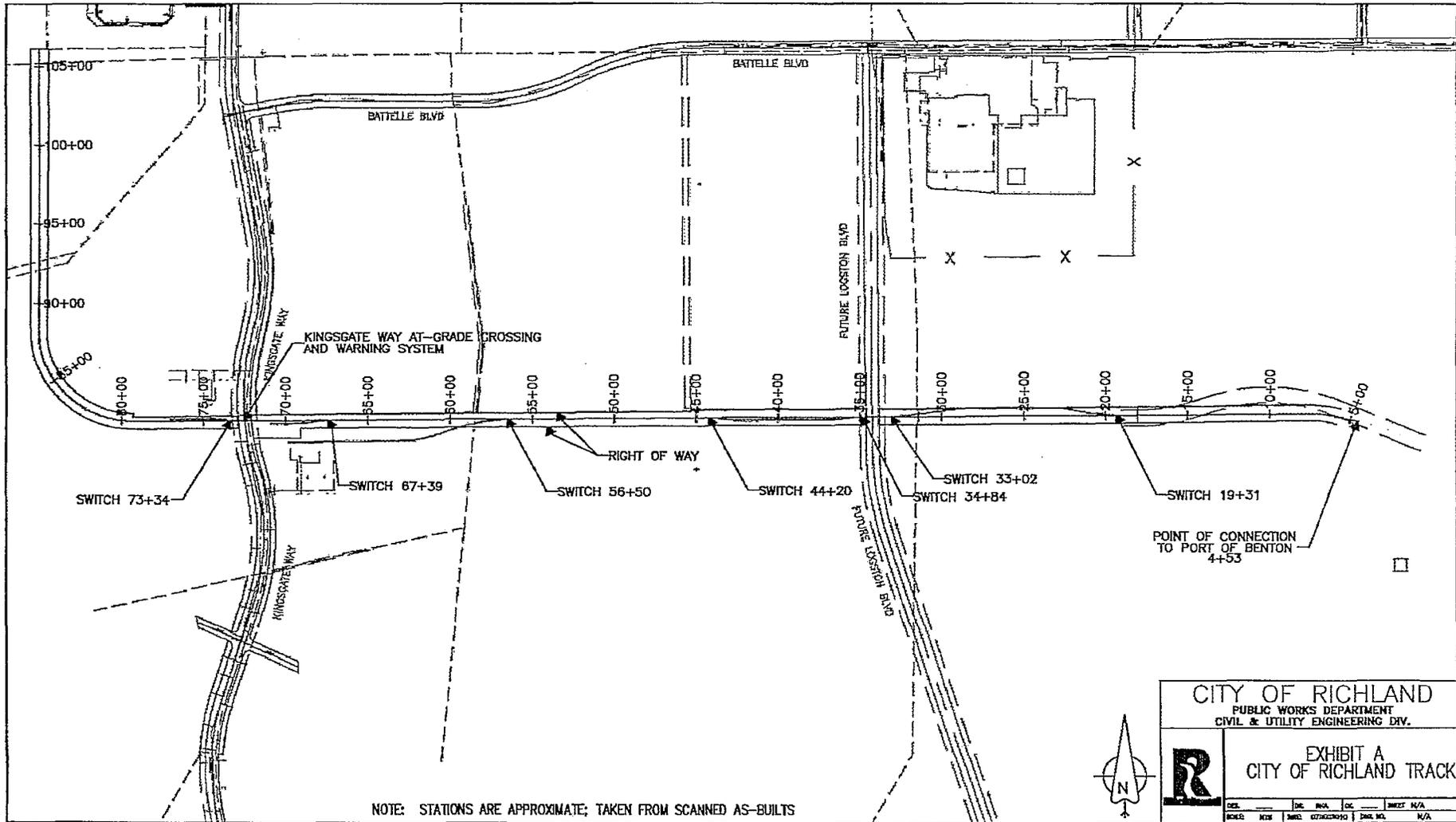
George M. Sturim
General Manager Joint Facilities

ATTEST:

APPROVED AS TO FORM:

MARCIA HOPKINS
City Clerk

THOMAS O. LAMPSON
City Attorney



CITY OF RICHLAND
 PUBLIC WORKS DEPARTMENT
 CIVIL & UTILITY ENGINEERING DIV.

R

EXHIBIT A
 CITY OF RICHLAND TRACK

DES.	DRG. INVA.	CHK.	SHEET N/A
SCALE	NOT	DATE 07/26/2010	DWG. NO. N/A

PROJECT DESCRIPTION

PROJECT NAME: Center Parkway Construction

KEY ELEMENT					
Key #	2	Goal #	1	Objective #	7

PROJECT ADMINISTRATION: Public Works Administration and Engineering

PROJECT LOCATION: Center Parkway from South City Limits to Tapteal Drive

PROJECT DESCRIPTION: Construction of a final pavement lift and striping connecting Tapteal Drive to south City limits. Project completion is being held up by railroad operations. The City of Kennewick is the project lead for engineering and construction.

PROJECT STATUS: Engineering design is 30% complete. Agreements with BNSF and UPRR have been secured to permit the needed at-grade crossing.

RESPONSE TO GMA LEVEL OF SERVICE: Yes.

revision to Council 4-05-2011

PROJECT BUDGET	Total Estimated Project Cost	Project Costs To Date 12/31/09	Prior Years Remaining Budget	PROJECT EXPENDITURES BY YEAR				
				2011	2012	2013	2014	2015
PREDESIGN / DESIGN	-	-	-	-	-	-	-	-
CONSTRUCTION MGMT	-	-	-	-	-	-	-	-
CONSTRUCTION	120,980	34,480	86,500	-	-	-	-	-
10% CONTINGENCY	-	-	-	-	-	-	-	-
OTHER: RAILROAD NEGOTIATIONS	2,212,520	47,205	500,315	1,665,000	-	-	-	-
TOTAL	\$2,333,500	\$ 81,685	\$ 586,815	\$ 1,665,000	\$ -	\$ -	\$ -	\$ -

PARTICIPATING FUNDS	Total Estimated Project Revenue	Project Revenue To Date 12/31/09	Prior Years Remaining Budget	PROJECT REVENUES BY YEAR				
				2011	2012	2013	2014	2015
REVITALIZATION GRANT	86,500	-	86,500	-	-	-	-	-
STREET FUND - FUEL TAX	13,500	13,500	-	-	-	-	-	-
INDUSTRIAL DEVELOPMENT FUND	500,000	27,378	222,622	250,000	-	-	-	-
CITY OF KENNEWICK	1,068,500	40,807	27,693	1,000,000	-	-	-	-
LTGO 98 FUND	415,000	-	-	415,000	-	-	-	-
RE EXCISE TAX 2ND 1/4%	250,000	-	250,000	-	-	-	-	-
TOTAL	\$2,333,500	\$ 81,685	\$ 586,815	\$ 1,665,000	\$ -	\$ -	\$ -	\$ -

IMPACT ON OPERATING FUNDS	2011	2012	2013	2014	2015
REVENUE INCREASE (DECREASE)	-	-	-	-	-
EXPENDITURE INCREASE (DECREASE)	-	-	-	-	-
TOTAL	\$ -	\$ -	\$ -	\$ -	\$ -

CASE NO. 330311

IN THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

TRI-CITY RAILROAD COMPANY, LLC, a Washington corporation,

Appellant,

v.

STATE OF WASHINGTON, UTILITIES AND TRANSPORTATION
COMMISSION,

Respondent.

BRIEF OF APPELLANT

PAINE HAMBLÉN LLP
William C. Schroeder, WSBA #41986
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Appellant

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City of Kennewick v. Port of Benton, et al., Docket TR-130499, Order 03, Final Order Granting Petition for Administrative Review (May 29, 2014)

Benton County v. BNSF Railway Company, Docket TR-100572, Order 06, Initial Order Granting Benton County's Petition for an At-Grade Railroad Crossing, Subject to Conditions (February 15, 2011)

RCW 81.53 *et seq.* (LexisNexis annotated)

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I. INTRODUCTION

“The statute law of this state relating to grade crossings has for many years been based upon the theory that all grade crossings are dangerous[.]” *Dept. of Trans. v. Snohomish Co.*, 35 Wn.2d 247, 251, 212 P.2d 829 (1949) (quoting *Reines v. Chicago, M., St. P. & Pac. R. Co.*, 195 Wn. 146, 150, 80 P.2d 406 (1938)).

This case concerns a petition by the cities of Richland and Kennewick (“Cities”) to construct a new at-grade railroad crossing, across two active tracks of the Tri-City Railroad Company, LLC (“TCRY”). The location for the proposed new at-grade crossing is near a shopping mall in Kennewick. Two crossings, one at-grade and one grade-separated, are within a few thousand feet to the east and west of the proposed crossing.

An administrative law judge for the Washington Utilities and Transportation Commission (“Commission”) denied the petition, finding:

The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to balance against the inherent hazards of an at-grade crossing. Even if public convenience were sufficient to demonstrate public need, we find that it does not outweigh the hazards of an at-grade crossing.

(CP 445, February 25, 2014 Initial Order Denying Petition to Open At-Grade Railroad Crossing (“Initial Order”))

The Commission agreed with the Initial Order, explaining:

It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

(CP 636, May 29, 2014 Final Order Granting Petition for Administrative Review ("Final Order")).

Yet, the Commission reversed the Initial Order, on the following basis:

It is particularly important to give weight to the economic development interests considering that the Center Parkway extension would conveniently connect existing, complementary commercial developments in Richland and Kennewick, and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland[.]

(CP 638-639)

In reversing, the Commission reached its decision by considering "economic development interests," "deference to local government," and "the broader public policy environment", and by considering certain written public comments as substantive evidence.

The Commission's approval of the crossing on the basis of an alleged economic benefit to some partially developed commercial lots,

without a net benefit to public safety, is contrary to the Commission's own precedent.

Moreover, the three additional factors considered by the Commission, "economic development interests," "deference to local government," and "the broader public policy environment", have no statutory basis, and the Commission exceeded its statutory authority in considering those factors.

Finally, the Commission failed to follow its own procedures and evidentiary rules when it determined to treat public comment as substantive evidence, without providing notice to the parties or opportunity to examine the makers of the written public comments.

Having failed to follow its own precedent, the Commission's authorizing statutes, and the Commission's own procedural and evidentiary rules, the Commission erred in entering the Final Order approving this at-grade crossing, and the Commission's Final Order should be reversed.

II. ISSUES PRESENTED AND ASSIGNMENTS OF ERROR

- A. Whether the Commission failed to follow its established precedent when it held that ‘improved economic development opportunities’ alone, without any improvement to public safety, constituted a public need which outweighed the hazards inherent in an at-grade crossing?

The Commission did not reverse any of the findings or conclusions in the Initial Order, and explained that it “agree[d] with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition[.]” (CP 635) Yet, the Commission reversed the Initial Order and permitted the crossing on the following legal basis: “To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.” (CP 635)¹

The statement that “improvements to public safety or improved economic development opportunities” can establish public need sufficient to outweigh the hazards inherent in at-grade crossings is not supported by the precedent cited, or other of the Commission’s precedent. Without improving public safety by, e.g., closing other at-grade crossings, or diverting trucks carrying hazardous chemicals away from residential zones

¹ *Citing Benton County v. BNSF Railway Company*, Docket TR-100572, Order 06, Initial Order Granting Benton County’s Petition for an At-Grade Railroad Crossing, Subject to Conditions ¶¶ 33-37 (Feb. 15, 2011).

and schools, "improved economic development opportunities" by itself is insufficient to establish a public need which outweighs the hazards inherent in a new at-grade crossing.

Pursuant to RAP 10.3(h) and RCW 34.05.570(3)(c) and (d), TCRY assigns error to the Final Order Granting Petition for Administrative Review, paragraphs 17, 22, 25, 28, 33, 39, and 41.

B. Whether the Commission's statutory authority in determining whether to permit construction of a new at-grade crossing allows consideration of "economic development interests," "deference to local government," and "the broader public policy environment"?

The statutes concerning petitions for new at-grade crossings ask the Commission to consider: whether grade separation is practicable; whether the highway can be re-routed to either avoid a grade crossing or allow for a safer grade crossing; and the safety of the public and railroad employees. *See* RCW 81.53.020, RCW 81.53.030, and RCW 81.53.040.

The Commission then determines whether to grant or deny the right to construct the at-grade crossing. RCW 81.53.030.

The statutes do not specifically authorize consideration of "economic development interests," "deference to local government," and "the broader public policy environment", nor do they authorize the consideration of similar subject matter as a basis to outweigh considerations of public safety.

Pursuant to RAP 10.3(h) and RCW 34.05.570(3)(c) and (d), error is assigned to the Final Order Granting Petition for Administrative Review, paragraphs 17, 22, 25, 28, 33, 39, and 41.

- C. Whether the Commission's reliance upon written public comments as substantive evidence in reversing the Initial Order, without prior notice that public comments were being considered as evidence, was consistent with the Commission's procedural and evidentiary rules?

Written comments submitted by members of the public were relied upon by the Commission to support its decision reversing the Initial Order. The Commission's use of public comments under these procedural circumstances is not consistent with the Commission's procedural and evidentiary rules. *See* WAC 480-07-490(5); WAC 480-07-498. Further, having relied upon inadmissible documents in arriving at its decision to reverse the Initial Order, the Commission's findings based upon those documents are not supported by substantial evidence.

Pursuant to RAP 10.3(h) and RCW 34.05.570(3)(c) and (e), error is assigned to the Final Order Granting Petition for Administrative Review, paragraphs 23, 24, 26, 27, 28, 37, 38, 39, and 40.

III. STATEMENT OF THE CASE

- A. The Richland Trackage, Including The Tracks At Issue, Were Constructed By The United States In The 1940s And 1950s.

In 1947, the United States, acting through the Atomic Energy Commission, entered into an agreement with several railroads to establish

railroad service to the Hanford Nuclear Reservation.² In the following years, various sections of the Richland Trackage were constructed and then leased to the railroads for their use.

B. The United States Transferred Ownership Of The Tracks To The Port Of Benton; The Port Leases The Tracks To TCRY.

In 1998, the United States Department of Energy transferred ownership of the tracks to the Port of Benton. In 2002, TCRY and the Port negotiated a lease agreement which authorized TCRY to perform rail and track maintenance services on the tracks.

C. The Cities' 2006 Petition To Establish An At-Grade Crossing Over Tracks Was Denied.

In 2006, the Cities filed a petition to approve the construction of an at-grade crossing extending a city street across the four tracks then in operation in the area: TCRY's main and parallel passing track; and Union Pacific's parallel spur tracks. (*See* CP 429, 632)³ The petition was opposed by TCRY, Union Pacific, and Burlington Northern & Santa Fe Railroad ("BNSF").

² Some of the historical facts surrounding the railroad tracks at issue have already been before a federal court. *See BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC*, 835 F.Supp.2d 1056 (E.D.Wash. 2011). For context, that history is briefly summarized in sections A and B.

³ *City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06, Initial Order Denying Petition; and *City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad*, Docket TR-050967, Order 02, Initial Order Denying Petition (January 26, 2007).



In denying the petition, the UTC explained that under Washington

law:

The Commission's consideration of whether to grant an at-grade crossing is premised on the theory that all at-grade crossings are dangerous. ... [T]he Commission will direct the opening of a grade crossing within its jurisdiction when the inherent and the site-specific dangers of the crossing are moderated to the extent possible with modern design and signals and when there is an acute public need which outweighs the resulting danger of the crossing. Such needs which have been found appropriate include the lack of a reasonable alternate access for public emergency services; and the sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.

City of Kennewick v. Union Pacific Railroad, Docket TR-040664, Order

06, at pp. 4-5.

⁴ This satellite image, for illustrative purposes, shows the location of the proposed crossing.

At the time of the 2006 petition by the Cities, TCRY and Union

Pacific's operations at the crossing were:

UPRR uses these tracks to interchange cars with TCRY. TCRY sets out cars (primarily refrigerator cars or "reefers") in the morning and UPRR picks up the TCRY cars in the evening as well as setting out cars for TCRY to pick up the following morning. The procedure for picking up and setting out cars varies depending on the number of cars to be picked up from TCRY. If UPRR had 9-10 or fewer cars to pick up, it would cross Center Parkway twice. If UPRR had more than 10 cars to pick up, it would cross Center Parkway up to eight times to complete the switching operation.

...

TCRY has a long-term lease with the Port of Benton for track that meets the UPRR track at Richland Junction. TCRY interchanges cars with both UPRR and the BNSF at that junction. TCRY has both a main line and a siding at Richland Junction. TCRY's main line connects to the UPRR branch line and the siding is the track primarily used for interchanging rail traffic with BNSF. TCRY uses the UPRR Old Pass for interchanging traffic with UPRR. TCRY picks up and drops off UPRR cars at least once a day. Depending on the time of year, TCRY picks up BNSF cars multiple times a week. It is not unusual for TCRY to conduct switching operations two to three times a day during the busy season. TCRY was unable to state with specificity the number of times it would cross Center Parkway during its switching operations, but with the combined UPRR and BNSF interchange traffic, it would be "a lot."

Id. at 6-7 (notes omitted).

Given that the location of the proposed crossing has multiple tracks and is actively used for switching, the Commission described the inherent dangers as follows:

The law disfavors at-grade crossings because certain risks are inherent. In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays. The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of train activity. In addition, with this site involving four railroad tracks, the drivers of vehicles who ignore warning signs and drive too fast for the conditions may launch over the second track or "bottom out" depending the speed and direction of the vehicle. At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians. Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle's driver and any passengers involved as well injury to train crews. Grade crossing accidents also have adverse psychological effects on train crews.

The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train approaching on another track that was hidden from view by the stationary cars. Motorists may

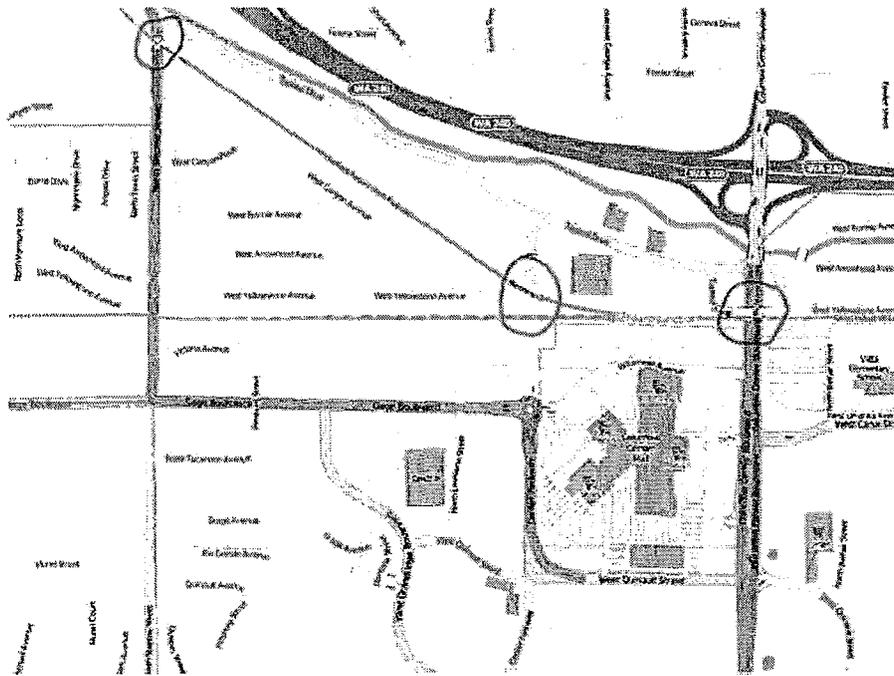
also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay. More than 50 percent of accidents occur at signalized crossings.

Id. at 8-9.

Finding that the Cities failed to meet their burden to demonstrate that the inherent and site-specific dangers of the crossing could be moderated to the extent possible by the installation of safety devices, the petition for the crossing was denied. *Id.* at 9-14.

D. The Cities Petitioned Again In 2013 To Construct The Center Parkway At-Grade Crossing, And Were Initially Denied.

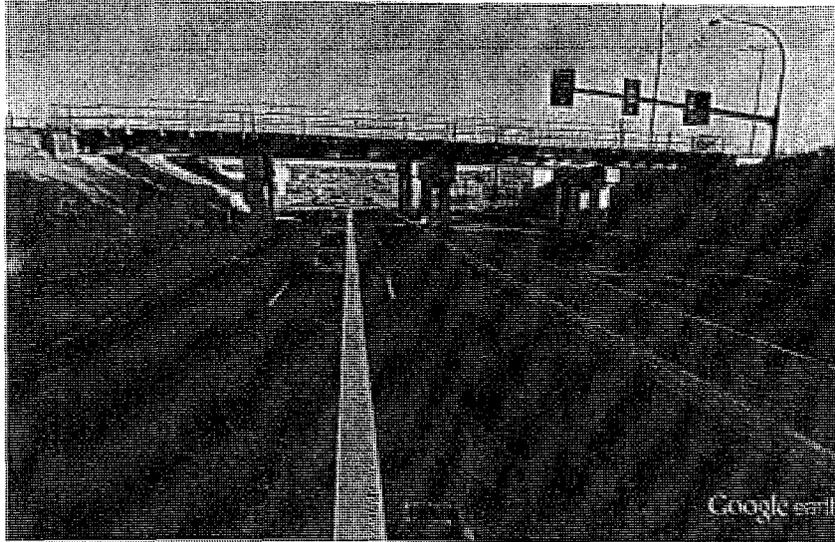
On April 8, 2013, Kennewick filed a new petition to construct an at-grade crossing at Center Parkway. (CP 77-128) On May 31, 2013, Richland joined Kennewick's petition. (*See* CP 428)



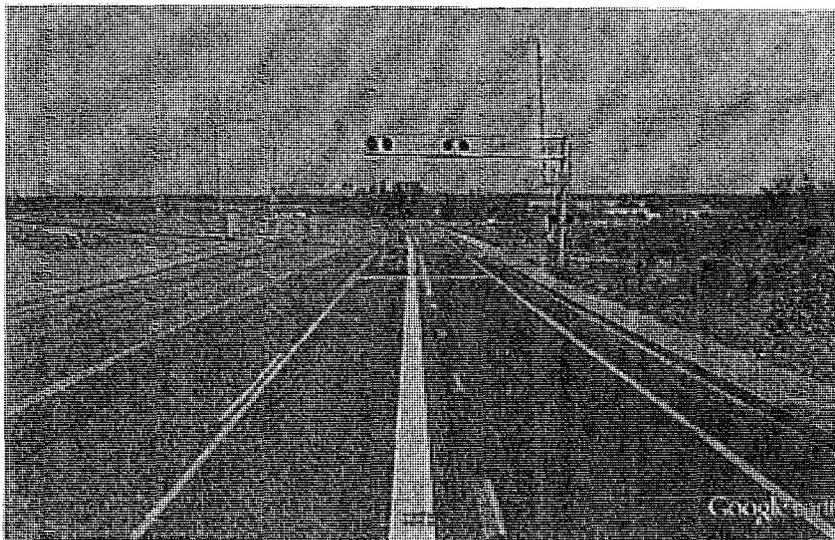
(CP 430, 631) (from left to right, the circles mark the Steptoe street at-grade crossing, the proposed Center Parkway at-grade crossing, and the Columbia grade-separated crossing).

The proposed Center Parkway at-grade crossing is located about 1900 feet to the west of an existing grade-separated crossing at Columbia Center Boulevard. (CP 430-431)⁵

⁵ See also, *City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06, at p. 12.



Similarly, the proposed at-grade crossing is about 3500 feet to the east of an existing at-grade crossing, over a single set of tracks, and is equipped with active warning devices, gates, and lights. (CP 430-431)⁶



⁶ See also CP 1788-1792, *City of Richland v. Tri-City Railroad and Port of Benton*, Docket TR-090912, Order Granting Petition to Reconstruct the Steptoe Street Highway-Rail Grade Crossing and Modify Active Warning Devices, Order 01 (July 2, 2009).

Prior to filing the 2013 petition for an at-grade crossing, the Cities negotiated with Union Pacific and BNSF to relocate their switching operations. (CP 429-430) Consequently, the two Union Pacific spur tracks were removed, and so now the proposed crossing will cross two active tracks – TCRY’s main track, and the parallel 1900-foot passing track. The Cities presented evidence contending that grade separation is not warranted at the proposed crossing site because of roadway characteristics, accident prediction models, and cost. (CP 432-434)

TCRY again opposed the crossing, because of the anticipated interference with its operations.⁷ As described in the Initial Order:

TCRY is a rail carrier conducting interstate rail operations through Kennewick and Richland. TCRY leases the track west and north of Richland Junction from the Port of Benton; BNSF and UPRR also operate on this track. Randolph V. Peterson, Managing Member of TCRY, explained that the second set of tracks immediately west of Richland Junction allows trains to meet and pass when entering or exiting the area. According to Mr. Peterson, this passing track is “absolutely essential” because TCRY makes frequent, if not daily, use of that facility. When no passing operations are scheduled, TCRY also uses the second track as a siding to store idle freight cars.

⁷ The Commission has limited jurisdiction, and took testimony concerning TCRY’s operations for purpose of evaluating public safety. The question of whether the existence of the crossing would “unreasonably interfere” with existing and projected railroad operations was not adjudicated, as such determinations are within the exclusive jurisdiction of the federal Surface Transportation Board. See 49 U.S.C. § 10501(b); *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005); *Harris County, Texas v. Union Pacific Railroad Company*, 807 F.Supp.2d 624 (S.D.Tex. 2011).

Mr. Peterson estimates that TCRY presently operates 10 to 20 freight trains each week on the mainline track that passes through the Richland Junction. BNSF operates another 10 freight trains each week and, on occasion, UPRR operates a "unit train," a mile-long freight train consisting of approximately 100 to 120 cars all carrying the same cargo. No passenger trains operate on this track. Mr. Peterson testified that the combined annual train traffic through the Richland Junction increased from nearly 4,500 railcars in 2012 to over 5,100 railcars in 2013. Mr. Peterson expects further increases in train traffic because of TCRY's continued growth and new commercial developments in the Horn Rapids Industrial Park that will be served by rail.

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day). Mr. Ballew also testified that Richland has entered real estate and development agreements with ConAgra Foods to build an automated cold storage warehouse in the Horn Rapids area served by a separate smaller loop track. Mr. Ballew expects an average of 30 rail cars each week will come and go from ConAgra's facility.

All trains traveling to the Horn Rapids area must pass through the Richland Junction and cross the proposed Center Parkway extension. Considering the expected increase train traffic across Richland Junction, TCRY contends that the passing track will become even more essential and perhaps need to be extended to accommodate longer trains. Mr. Peterson testified that he

opposes the new Center Parkway crossing because rail operations could regularly require freight trains to block the crossing, occasionally for lengthy periods of time.

(CP 431-432)

The Cities propose to install at the proposed crossing “active warning devices, to include advanced signage, flashing lights, audible bell, automatic gates, and a raised median[.]” (CP 434). The Cities sought to justify the public need for the proposed crossing through three arguments, which the Initial Order rejected:

In this case, the Cities attempt to demonstrate public need by arguing improvements to public safety through faster emergency response times, reduced accident rates around the Columbia Center Mall, and relief of traffic congestion at nearby intersections with deficient levels of service. As explained below, the evidence in the record does not support the Cities’ arguments that opening the Center Parkway crossing will create such improvements or alleviate existing traffic problems.

...

The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to balance against the inherent hazards of an at-grade crossing. Even if public convenience were sufficient to demonstrate public need, we find that it does not outweigh the hazards of an at-grade crossing.

By its nature, opening a new at-grade crossing at Center Parkway would increase risk to motorists by creating another opportunity to interact with freight trains. Motorists who might deviate from Columbia Center Boulevard’s grade-

separated crossing in order to access the Tapteal Road area would trade safe and undelayed passage over the UPRR tracks for a potentially faster route that comes with a risk of collision. The active safety measures proposed to be installed at the crossing would mitigate, but would not eliminate, such risk.

The Cities' justifications for the crossing do not outweigh the risk. At most, the evidence demonstrates that, on occasion, a police, fire, or ambulance response *might* be faster if the Center Parkway crossing was available and no trains were blocking traffic. Some drivers also would find the option to use Center Parkway more appealing to enter or depart the north side of the Columbia Center Mall than Gage Boulevard, particularly during the busy holiday shopping season. Such slight benefits do not overcome the law's strong disfavor for at-grade crossings. Accordingly, the Commission should deny the Cities' petition for failure to demonstrate a public need for the proposed crossing.

(CP 445-449)

E. Despite Agreeing That Public Safety Does Not Justify Constructing The Crossing, The Commission Reversed The Initial Order And Permitted The At-Grade Crossing Based Upon Consideration Of Three Factors: "Economic Development Interests," "Deference To Local Government," And "The Broader Public Policy Environment"

The Cities sought review of the initial denial of the 2013 petition, which again was opposed by TCRY. (See CP 457-547; 548-581). On review, the Commission rejected the Cities' contentions concerning public safety:

The Initial Order determines that the Cities failed to carry their burden to show a "public

need” for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.

Petitioners challenge this conclusion, focusing almost exclusively on asserted public safety benefits, largely in the form of improved response times from two local fire stations to the point where the planned Center Parkway extension would intersect Tapteal Drive. In other words, the Cities’ principal claim of improved public safety is that emergency responders could get to a single point on a one-mile long, two-lane collector roadway with a “T” intersection at both ends more quickly than they can today. In addition, there is some evidence that completion of this project would reduce traffic on other roadways in the vicinity, relieving congestion and potentially reducing accidents. The Initial Order analyzes the evidence on this issue in detail that does not bear repeating here. It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

(CP 635-636)

Nonetheless, in reversing the Initial Order, the Commission explained “[it] is particularly important to give weight to the economic development interests considering that the Center Parkway extension would conveniently connect existing, complementary commercial

developments in Richland and Kennewick, and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland[.]” (CP 638-639)

The Commission explained that in order “[t]o establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.” (CP 635)⁸ “In addition to economic benefits, the Commission as a matter of policy should give some deference to the Cities’ transportation and land use planning goals, as these are matters of local concern and within the jurisdictional authority of the Cities[.]” (CP 640)

The factual basis for the Commission’s reversal of the Initial Order was five written public comments, submitted after the evidentiary hearing on this matter. (*See* CP 639-642)

The Commission concluded:

The Initial Order fairly weighs the evidence and argument presented in the post-hearing briefs, and reaches a legally sustainable result. The Cities’ almost exclusive focus on improved response times for first responders on a point-to-point basis as the principal benefit demonstrating “public need” does not weigh persuasively against even the demonstrated low level of “inherent risk” at the proposed crossing. Nor are the

⁸ *Citing Benton County v. BNSF Railway Company*, Docket TR-100572, Order 06, Initial Order Granting Benton County’s Petition for an At-Grade Railroad Crossing, Subject to Conditions ¶¶ 33-37 (Feb. 15, 2011).

Cities' legal arguments that their comprehensive planning processes under the Growth Management Act mandate Commission approval persuasive. However, considering evidence the parties largely ignored that shows additional public benefits in the form of enhanced economic development opportunities, and considering the broader public policy context that gives a degree of deference to local jurisdictions in the areas of transportation and land use planning, we determine that the Cities' petition for administrative review should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

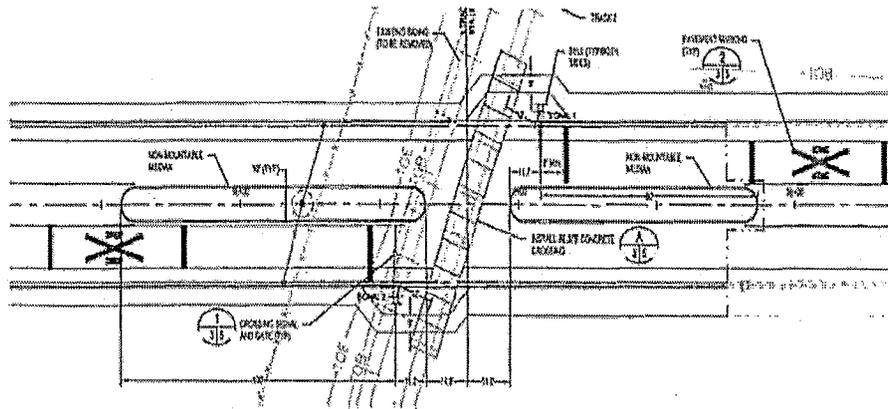
(CP 642-644)

F. The Cities Have Confirmed That They Do Not Seek Elimination Of Any Of TCRY's Tracks, But Rather Intend To Construct The At-Grade Crossing Over Both Sets.

The Cities' petition requested the elimination of TCRY's 1900-foot siding as part of the construction of the at-grade crossing. (See CP 81, 85, 110).

The Commission's Final Order incorporated a proposed design for the crossing which would necessitate the elimination of TCRY's parallel siding, though the language of the Final Order was ambivalent, or ambiguous, as to whether track removal was at issue. (See CP 634)

Figure 2
At-Grade Crossing Configuration



(CP 634)

The Cities have subsequently confirmed that they are not seeking removal of the passing track. The Cities intend to install an at-grade crossing over both the main track and the passing track. (VRP 29)

IV. ARGUMENT

A. Standard of Review.

RCW 34.05.570(3) governs judicial review of an order issued by the Commission. The statute provides, in pertinent part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review[.]

The standard of review is *de novo* for petitions brought pursuant to subsections (a) ~ (d). See *Chicago Title Insurance Company v. The Office of the Insurance Commissioner*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). “Legal determinations are reviewed using the ‘error of law’ standard, which allows the court to substitute its view of the law for that of the [agency].” *Chicago Title*, at 133 (citing *Verizon Nw., Inc. v. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008)).

To apply this standard, “the court determines the meaning and purpose of a statute *de novo*, although in the case of an ambiguous statute which falls within the agency’s expertise, the agency’s interpretation of the statute is accorded great weight, provided it does not conflict with the statute.” *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

Petitions brought pursuant to RCW 34.05.570(3)(e) are reviewed for substantial evidence. See *Edelman v. Washington*, 160 Wn. App. 294, 303, 248 P.3d 581 (2011). “Substantial evidence is evidence in sufficient

quantum to persuade a fair-minded person of the truth of the declared premises.” *Id.* at 304 (quoting *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995)).

B. Statutory Interpretation, And The Scope Of An Administrative Agency’s Authority, Are Questions Of Law For The Court.

The meaning of a statute is a question of law reviewed *de novo*. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)).

In interpreting a statute, the court’s objective is to ascertain and carry out the Legislature’s intent. *Jongeward*, 174 Wn.2d at 592 (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)).

If a statute’s meaning is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. The plain meaning is discerned from all that the Legislature has said in the statute. Plain meaning may also be discerned from related statutes which disclose legislative intent about the provision in question. An examination of related statutes aids our plain meaning analysis because legislators enact legislation in light of existing statutes.

Jongeward, 174 Wn.2d at 595 (internal citations and quotations omitted).

Statutes relating to the same subject matter should be construed together. See *Jongeward*, 174 Wn.2d at 593 (citing *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001)).

“[U]nlike courts, which are granted the ‘judicial power of the state’ by the Washington Constitution, CONST. art. IV, § 1, agencies are limited to the powers the legislature has granted them.” *Snohomish County Public Transportation Benefit Area v. Public Employment Relations Commission, et al.*, 173 Wn. App. 504, 518, 294 P.3d 803 (2013) (citing *Local 2916, IAFF v. PERC*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995)). “[A]n administrative agency ... has no more authority than is granted to it by the Legislature. Determining the extent of that authority is a question of law[.]” *Local 2916* at 379 (internal citations omitted).

Administrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute. *Kaiser Aluminum & Chem. Corp. v. Dept. of Labor & Indus.*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993); *Human Rights Comm'n v. Cheney Sch. Dist.* 30, 97 Wn.2d 118, 125, 641 P.2d 163 (1982).

Whether it would be beneficial, useful, or reasonable for an agency to have certain powers is not the issue; it is the statutory authorization of that power which must be determined as a matter of law. *See Washington Independent Telephone Ass'n v. Telecommunications Ratepayers Ass'n for Cost-Based & Equitable Rates*, 75 Wn. App. 356, 364, 880 P.2d 50 (1994).

C. Washington Law Presumes At-Grade Crossings Are Dangerous, And The Primary Consideration Of The Commission Is Public Safety.

The statutes concerning petitions to the Commission for new at-grade crossings ask the Commission to consider whether grade separation is practicable, whether the highway can be re-routed to either avoid a grade crossing or allow for a safer grade crossing, and the safety of the public and railroad employees. *See* RCW 81.53.020, .030, and .040. The Commission then determines whether to grant or deny the right to construct the at-grade crossing. RCW 81.53.030.

To determine whether a grade separate is practicable, the Commission shall take into consideration the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry.

RCW 81.53.020.

RCW 81.53.030, concerning petitions to permit crossings, provides:

Whenever a railroad company desires to cross a highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade. Whenever the legislative authority of a county, or the municipal authorities of a city, or the state officers authorized to lay out and construct state roads, or the state parks and

recreation commission, desire to extend a highway across a railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving the petition, the commission shall immediately investigate it, giving at least ten days' notice to the railroad company and the county or city affected thereby, of the time and place of the investigation, to the end that all parties interested may be present and heard. If the highway involved is a state road or parkway, the secretary of transportation or the state parks and recreation commission shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If it finds that it is not practicable to cross the railroad or highway either above or below grade, the commission shall enter a written order in the cause, either granting or denying the right to construct a grade crossing at the point in question. The commission may provide in the order authorizing a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flaggers, interlocking devices, or other devices or means to secure the safety of the public and its employees. In respect to existing railroad grade crossings over highways the construction of which grade crossings was accomplished other than under a commission order authorizing it, the commission may in any event require the railroad company to install and maintain, at or near each crossing, on both sides of it, a sign known as the sawbuck crossing sign with the lettering "Railroad Crossing" inscribed thereon with a suitable inscription indicating the number of tracks. The sign shall be of standard design conforming to specifications furnished by the Washington state department of transportation.

When a new road and new at-grade crossing is at issue, the Commission also should consider whether an over-crossing, and under-crossing, or a safer grade crossing can be made at a different location. RCW 81.53.040.

“The statute law of this state relating to grade crossings has for many years been based upon the theory that all grade crossings are dangerous[.]” *Dept. of Trans. v. Snohomish Co.*, 35 Wn.2d 247, 251, 212 P.2d 829 (1949) (quoting *Reines v. Chicago, M., St. P. & Pac. R. Co.*, 195 Wn. 146, 150, 80 P.2d 406 (1938)).

TCRY did not locate a case of record construing the statutes applicable to crossing petitions on the specific issue of a petition to open a new at-grade crossing where the railroad opposes the crossing and the governmental entity proposing the crossing asserts economic development as a basis to proceed. In *Snohomish Co.*, the court noted, in the context of a petition to close an at-grade crossing:

It is contended by residents of Mukilteo that the closing of this crossing would damage business property due to the fact that the closing of the crossing would result in making the north portion of Park Avenue a dead end street. The department has no jurisdiction to consider damage to property as such.

Id. at 255.

The three factors described by the Commission in reversing the Initial Order, “economic development interests,” “deference to local government,” and “the broader public policy environment” do not appear in the crossing statutes. The Court should hold that those three factors do not have statutory basis, and that the Commission erred in reversing the Initial Order on the basis of its analysis of those factors.

D. Consistent With Washington Law, The Commission’s Precedent Reflects That Public Safety Is The Primary Concern In The Evaluation Of A Petition To Cross Existing Railroad Tracks With A New Public Highway.

When evaluating the Cities’ 2006 petition, the Commission described the inherent dangers of this particular at grade crossing as follows:

The law disfavors at-grade crossings because certain risks are inherent. In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays. The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of train activity... At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians. Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle’s driver and any passengers involved as well injury to train crews. Grade crossing accidents also have adverse psychological effects on train crews.

The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train approaching on another track that was hidden from view by the stationary cars. Motorists may also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay. More than 50 percent of accidents occur at signalized crossings.

City of Kennewick v. Union Pacific Railroad, Docket TR-040664, Order 06, Initial Order Denying Petition; and *City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad*, Docket TR-050967, Order 02, Initial Order Denying Petition (January 26, 2007), at pp. 8-9.

E. In The Present Case, The Initial Order Properly Applied The Commission's Precedent, And Found That The Cities Failed To Demonstrate Sufficient Public Need To Outweigh The Inherent Risks Presented By The Proposed At-Grade Crossing

As acknowledged by the Commission in the Final Order, "the benefits to public safety alleged by the Cities are too slight on their own to support the petition[.]" (CP 635) The Initial Order concluded that the Cities "failed to demonstrate sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing." (CP 450) The

Cities argued that the Commission's precedent supported the petition for a new at-grade crossing, but the Initial Order distinguished each case:

The Cities cited open meeting dockets that were all uncontested and did not benefit from a thoroughly developed evidentiary record. The only case with any persuasive value resulted in a net closure of crossings, trading two existing passively protected private at-grade crossings in the City of Marysville for one new public crossing with active warning devices (Docket TR-111147). None of the other approved new crossings were in urban areas where over 7,000 vehicles per day were expected to cross tracks currently traveled by five or more trains per day (in one case, the Commission approved a new crossing to divert approximately 400 commercial vehicles per day away from residential roadways and across a single set of tracks traveled by up to two trains per day (Docket TR-112127); in two other cases, the commission approved installing new industrial rail lines across very lightly traveled roadways in order to promote industrial growth (the road in Docket TR-100072 had only 150 vehicles per day and the road in Docket TR-121467 had less than 1600 vehicles per day); and in two other cases, the Commission approved new pedestrian-only crossings across lightly used tracks (Docket TR-100041 had one weekly freight train and Docket TR-110492 had no active railroading operations)).

(CP 446).

F. The Precedent Relied Upon By The Commission In Reversing The Initial Order Does Not Support Its Decision, Because The Proposed Crossing In The Present Case Will Not Result In The Closure Of Other At-Grade Crossings Or A Net Improvement To Public Safety.

In the Final Order, the Commission described the applicable legal standard as follows:

The Commission, in practice, addresses two principal questions when considering whether to authorize construction of an at-grade crossing, which, by its nature, poses risks for motorists and pedestrians not present at grade-separated crossings: a) Whether a grade-separated crossing is practicable considering cost and engineering requirements and constraints; b) Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at grade configuration.

...
The Initial Order determines that the Cities failed to carry their burden to show a “public need” for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.

(CP 634-635) (citation omitted)

The case relied upon by the Commission, *Benton County v. BNSF Railway Company*, Docket TR-100572, Order 06, Initial Order Granting Benton County’s Petition for an At-Grade Railroad Crossing, Subject to Conditions ¶¶ 33-37 (Feb. 15, 2011) (“*Benton*”) concerned a series of petitions to close four private and one public at-grade crossing, and to establish four new public at grade crossings. *Benton* at pp. 1-4. The configuration of the roads in the area required commercial truck traffic passing from the Finley industrial area travelling to I-82 to navigate through a residential area, including past a middle school and a high

school. *Id.* at 4-5. The truck traffic included trucks carrying hazardous materials past the schools. *Id.* The purpose of the construction of the new at-grade crossings, in conjunction with the closings of other nearby crossing, was to “mitigate the problems and dangers of trucks passing through residential areas and school zones.” *Id.* at 5.

The particular at-grade crossing to be opened discussed in *Benton* was a public street crossing a single private industrial spur. *Id.* at 6. The train traffic across that private industrial spur averaged three trains per week, and there was no indication that rail traffic was expected to increase in the coming years. *Id.* at 7.

Due to the proposed roadway alignment, no switching operations would occur on the crossing, or were expected to block the crossing. *Id.* at 8.

There was no dispute that it was not practical, from an engineering or financial perspective, to build a grade separated crossing. *Id.* at 13.

Finding acute public need in the form of both an “overall improvement in public safety” and “improved economic development opportunities”, the *Benton* Commission:

The proposed extension of Piert Road will provide a more direct route for trucks entering and exiting the Finley industrial area on the way to I-82 via SR-397. As Mr. Thorp testifies, trucks currently travelling from the Finley industrial area

to I-82 via SR-397 must pass through a residential area and past a middle school and high school. This includes chemical trucks leaving the Agrium fertilizer facility. Completion of the Piert Road extension project, including the petitioned crossing, will provide a more direct route for this truck traffic thus mitigating the risks of trucks passing through residential areas and school zones. When the potential elimination of these existing risks to public safety are measured against the risks of an accident at the proposed crossing, which the record shows to be quite low, it appears there would be at least some improvement in public safety for the residents of Benton County and those traveling in the Finley area if the project is completed. While the record does not include quantitative measures of the relative risks, it is a matter of common sense to recognize that it is a good idea to divert truck traffic away from residential areas and school zones to a route through a lightly traveled industrial area with favorable topography and geography, and good sight distances for a relatively low risk at-grade rail crossing. In addition to producing an overall improvement in public safety for the community, the second advantage of the Piert Road Extension is that it would open up approximately 300 acres of land in the Finley industrial area that is currently difficult to access. This would promote development and job creation in the area. Considering both the improvement in public safety in the community and the greater economic development prospects in Benton County that will result from the proposed project, the Commission determines that there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.

Id. at 14-15.

Benton was the only precedent cited by the Commission to justify the proposition that “improvements to public safety or improved economic development opportunities” can establish public need sufficient to outweigh the hazards inherent in at-grade crossings. As described in *Benton*, the primary basis for permitting the crossing was the improvement to public safety, with economic development a secondary benefit. Here, the proposed new at-grade crossing is merely for additional access to already partially-developed commercial lots. The proposed crossing is within 3500 feet to the east of an existing at-grade crossing, and is within 2000 feet to the west of an existing grade-separated crossing. As noted in the Initial Order, this proposed crossing will interface 7000 vehicles per day with multiple trains per day, and the danger is increased by the presence of multiple tracks, rail car storage, and switching operations.

Unlike in *Benton*, the proposed at-grade crossing here will not eliminate hazardous material trucks travelling through residential areas, near middle and high schools. Unlike in *Benton*, the proposed crossing here will not result in the elimination of multiple other private and public crossings, to divert commercial traffic out of residential areas. Unlike in *Benton*, which concerned a road crossing an industrial spur, here the proposed crossing runs over multiple tracks where railcars are often stored and where switching operations are frequently performed. Unlike in

Benton, where there was no projected change to the railroad operations, here use of the tracks by three railroads is expected to increase in the coming years.

The proposed crossing here does not improve public safety, coupled with a potential economic benefit. *Benton* does not support supplanting public safety, disregarding it, or outweighing its consideration by invoking economics.

G. The Commission Treated Written Public Comments As Substantive Evidence, And Relied Upon Them In Reversing The Initial Order. Doing So Was Not Consistent With The Commission's Procedural And Evidentiary Rules.

Hearings on petitions for at-grade crossings are governed by the Administrative Procedures Act, RCW 34.05.410 ~ .494, RCW 81.53 *et seq.*, and the WAC provisions promulgated by the Commission. *See* WAC 480-07-300 ~ -498.

Concerning public comment:

The commission will receive as a bench exhibit any public comment filed, or otherwise submitted by nonparties, in connection with an adjudicative proceeding. The exhibit will be treated as an illustrative exhibit that expresses public sentiment received concerning the pending matter. The commission may convene one or more public comment hearing sessions to receive oral and written comments from members of the public who are not parties in the proceeding[.]

WAC 480-07-498.

The evidentiary status of public comments is defined as follows:

Documents from the public. When a member of the public presents a document in conjunction with his or her testimony, the commission may receive the document as an illustrative exhibit. The commission may receive as illustrative exhibits any letters that have been received by the secretary of the commission and by public counsel from members of the public regarding a proceeding. Documents a public witness presents that are exceptional in their detail or probative value may be separately received into evidence as proof of the matters asserted after an opportunity for cross-examination.

WAC 480-07-490(5).

Within administrative law, parties have the right to cross-examine the preparers of documents which are considered as evidence by the adjudicative agency. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 32-35, 873 P.2d 498 (1994).

Here, the procedural order permitted the parties three rounds of pre-filed testimony, with the final rebuttal testimony being filed by all parties on October 23, 2013. (CP 629). Evidentiary hearings were conducted on November 19 and 20, 2013. (CP 630). Public comment was accepted on November 20, 2013, with additional written public comments being filed in the weeks following. (*Id.*).

The Initial Order Denying Petition to Open At-Grade Railroad Crossing was issued on February 25, 2014. (See CP 428) The Initial Order neither mentions, nor treats as evidence any public comments.

The Cities petitioned for administrative review of the Initial Order on March 18, 2014. (CP 630) The Cities' petition does not reference the public comments as a basis to reverse the Initial Order. (See CP 457-547).

The Final Order, issued on May 29, 2014, provides, in pertinent part:

It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

(CP 635)

Despite the Commission's agreement with the Initial Order, the Final Order reversed and authorized the at-grade crossing. The factual basis for the reversal was five written public comments, all submitted after the evidentiary hearing on this matter, without notice or opportunity to examine the submitters. (See CP 639-642)

By elevating public comment to the status of admissible, substantive evidence, and basing its reversal of the Initial Order on public comments, the Commission was not consistent with WAC 480-07-490(5)

and WAC 480-07-498. The parties were not given notice that the Commission would consider public comment as “proof of the matters asserted,” nor were they afforded the opportunity to cross-examine the submitters of the public comments relied upon by the Commission.

Pursuant to RCW 34.05.570(3)(c), the Commission failed to follow its own evidentiary regulations and procedures.

H. Since The Evidence Relied Upon By The Commission In Reversing The Initial Order Was Inadmissible, The Final Order Lacked Substantial Evidence.

An agency’s order must be supported by substantial evidence in the record. *See* RCW 34.05.570(3)(e); *Edelman v. Washington*, 160 Wn. App. 294, 303, 248 P.3d 581 (2011). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Edelman* 160 Wn. App. at 304 (internal quotation omitted). *Cf. In re X.T.*, 174 Wn. App. 733, 739, 300 P.3d 824 (2013) (“In the absence of the testimony based on inadmissible hearsay, substantial evidence did not support the juvenile court’s findings of fact.”).

Per the Commission’s evidentiary rules, public comment is to be treated as illustrative exhibit, rather than evidence. WAC 480-07-498. Public comment cannot be “received into evidence as proof of the matters asserted” unless there is an opportunity for cross-examination. WAC 480-07-490(5). Nonetheless, the Commission based its reversal of the Initial

Order upon five written public comments, which, as argued above, are not admissible evidence. (See CP 639-642)

Since 1) the Commission accepted all of the facts found in the Initial Order; 2) the basis for the reversal of the Initial Order was public comment; and 3) public comment is not itself “proof of the matters asserted”; the Commission lacked substantial evidence for paragraphs 23, 24, 26, 27, 28, 37, and 38 of the Final Order.

I. Costs and Attorney’s Fees.

Under RCW 4.84.350, a party that prevails in a judicial review of an agency action is entitled to attorney fees and other expenses up to \$25,000 unless “the court finds that the agency action was substantially justified or that circumstances make an award unjust.” Pursuant to that statute, and to RAP 18.1, TCRY requests an award of its costs and attorney’s fees, should it obtain relief on a significant issue. *See Gerow v. Gambling Commission*, 181 Wn. App. 229, 245-46, 324 P.3d 800 (2014).

V. CONCLUSION

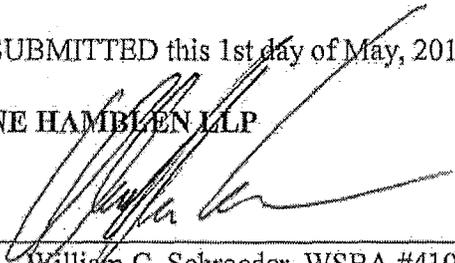
The factors considered by the Commission in reversing the Initial Order, “economic development interests,” “deference to local government,” and “the broader public policy environment”, are not supported by the Commission’s precedent or by the statutes from which the Commission’s authority is drawn. The Commission’s own rules do not

allow it to consider public comments as substantive evidence in the manner it did, TCRY could not have predicted that the Commission would disregard its precedent, exceed its statutory authority by creating new factors to consider, or consider public comment in violation of the Commission's own rules, and so was deprived of the opportunity to present argument and evidence to the Commission on those issues.

For the reasons described above, TCRY requests that the Court reverse the Commission's Final Order.

RESPECTFULLY SUBMITTED this 1st day of May, 2015.

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By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2105, I caused to be served a true and correct copy of the foregoing BRIEF OF APPELLANT, by the method indicated below and addressed to the following:

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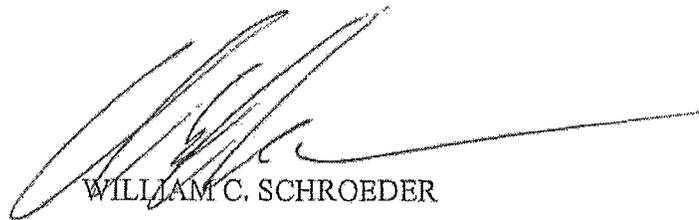
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WILLIAM C. SCHROEDER

1 witness, Your Honor.

2 ADMINISTRATIVE LAW JUDGE TOREM: Anything from
3 the city?

4 MR. DIJULIO: Thank you, Your Honor. Very
5 briefly.

6
7

8 CROSS-EXAMINATION

9

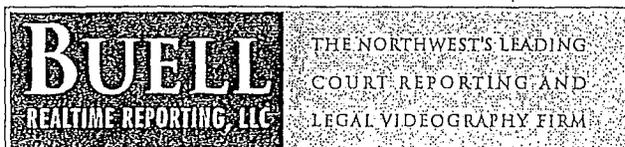
10 BY MR. DIJULIO:

11 Q. Mr. Ballew, talking about the Central Washington
12 Transfer Terminal facility, the Washington Transfer Terminal
13 facility, there is already a Washington Transfer Terminal
14 facility in the Horn -- general Horn Rapids area, is that
15 correct?

16 A. The principals of Central Washington Transfer
17 Terminal, LLC also own property in the Horn Rapids Industrial
18 Park where they conduct this activity.

19 Q. Okay. And so is this a new facility to replace
20 the existing facility, or is it an additional facility so
21 there will be two operating facilities?

22 A. That would be up to Central Washington Transfer
23 Terminal on how they do that. We believe that much of the
24 business that's currently conducted on their existing property
25 will be switched to this property, but that, again, is their



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1 business case to make.

2 Q. Okay. And is that existing facility rail served?

3 A. Yes.

4 Q. And has that facility received unit trains
5 currently?

6 A. Currently I'm not aware of unit trains serving it.

7 Q. Has it received unit trains in the past?

8 A. It has received -- the facility is served by a
9 small rail loop that requires the unit train to be broken
10 apart and then -- and then off-loaded and then, you know, next
11 set of cars brought in and off-loaded. And so in the past, it
12 was considered -- it did -- unit trains were brought in
13 through town, came up north into north Richland, were broken
14 apart somewhere in north Richland, and then they'd go into
15 that facility.

16 Q. Okay. And that has been the subject -- that other
17 loop has been the subject of prior testimony. You understand
18 that other smaller loop to be the existing TCRY loop within
19 the Horn Rapids industrial area?

20 A. Yes.

21 Q. Okay. Now, with the new proposed Central
22 Washington Transfer Terminal facility, has the City of
23 Richland determined what if the maximum, most optimistic
24 development scenario arising out of these agreements comes
25 through, the number of unit trains that would be anticipated?

1 A. We believe operationally the track will be limited
2 to an average of two and a half trains per week.

3 Q. And when you say two and a half trains per week,
4 you're talking about a total of five trips, two and a half in,
5 two and a half out, or one per day?

6 A. Approximately, yes.

7 Q. Okay. And sitting here today, you don't know
8 whether there will continue to be trains serviced to the other
9 facility operated by Central Washington Transfer Terminal?

10 A. I do not know, no.

11 Q. In your testimony, you also talked about ConAgra
12 facilities.

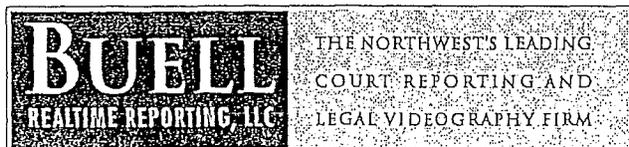
13 A. (Nodded head affirmatively).

14 Q. Let's -- I want to ask you to be precise about
15 this now. Is there an operating ConAgra facility in the Horn
16 Rapids area?

17 A. Not within Horn Rapids, but there is a Lamb Weston
18 French fry plant south of Highway 240. And adjacent to that
19 plant is a Henningsen Cold Storage facility, it actually kind
20 of blends right into the plant, and so that -- we currently
21 have a cold storage which is within the Horn Rapids general
22 area.

23 Q. Within the general area. And are those facilities
24 rail served?

25 A. Yes, they are.



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1 Q. And do you know if there is current rail service
2 in or out of those facilities?

3 A. Yes, there is.

4 Q. And what do you understand that rail service to
5 be?

6 A. Likely oil containers for canola oil, for fry oil,
7 as well as I would guess refrigerated cars for French fries.

8 Q. And are those unit trains?

9 A. No, they're not.

10 Q. Okay. And do you know how frequently those trains
11 service that particular Lamb Weston and cold storage facility?

12 A. No, I don't.

13 Q. Now, you talked about a different ConAgra
14 facility, the -- is ConAgra under contract with -- has ConAgra
15 actually purchased property from the city yet?

16 A. They -- not in Horn Rapids, they have not
17 purchased. We're under a purchase and sale agreement.

18 Q. Okay. And have they -- the city has not closed on
19 that agreement yet?

20 A. No. The agreement needs to close by January 20th
21 of 2014 or it's no longer.

22 Q. And is that property that may be developed in the
23 future by ConAgra?

24 A. Yes.

25 Q. And what would -- what's the intended use for that



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1 facility were it to be closed?

2 A. So it --

3 Q. Were the deal to be closed.

4 A. So we have a purchase and sale agreement with
5 ConAgra for 80 acres. On that 80 acres, they would contract
6 with a third party and may actually assign the agreement to a
7 third party who would own, operate, and construct what's
8 called an automated cold -- or what we refer to as an
9 automated cold storage warehouse.

10 Q. Okay.

11 A. This automated warehouse is actually a change in
12 business practice for Lamb Weston. There would be some
13 consolidation of other cold storage facilities in the
14 immediate area, and then that facility uses -- it's all
15 robotic. It's actually quite a large facility. It's about a
16 hundred feet tall and uses automated cranes and -- to control
17 the inventory better.

18 So -- so it basically allows ConAgra better
19 inventory -- or Lamb Weston better inventory control and
20 better logistics by utilizing this facility. They use a
21 similar type of facility over in Europe, and so they're trying
22 to bring that model here to the United States.

23 Q. And when you use the phrase -- you're referring to
24 Lamb Weston and ConAgra. Are they the same company?

25 A. Lamb Weston is a wholly owned subsidiary of



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1 ConAgra. The formal title is ConAgra Lamb Weston Foods, Inc.

2 Q. Okay.

3 A. And that is their division. So we will say,
4 around here we'll say ConAgra, we'll say Lamb Weston, and we
5 usually interchange those.

6 Q. If, in the future, that facility on the 80 acres
7 is constructed, has there been any projection by the city,
8 again, you know, assuming the best scenario development,
9 employment, full occupancy, and the rest, of train traffic to
10 that particular facility?

11 A. We have a car estimate that I had provided.

12 Q. The 30 cars?

13 A. 30 cars, but I don't know how that would relate to
14 number of trains. It depends on how many --

15 Q. That's the only information you have with respect
16 to demand that might occur as a result of this proposed but
17 yet to be completed facility?

18 A. That's correct.

19 Q. Thank you. The current Central Washington
20 Transfer facility operates, when it does receive product by
21 rail, as rail in and truck out, is that correct?

22 A. When it receives product by rail, yes, it is rail
23 in and truck out.

24 Q. How long has the City of Richland been working to
25 attract tenants, purchasers, developers, to this area?

1 A. Well, it would be -- I think the first Horn Rapids
2 master plan for the industrial park area was developed in the
3 1990s. It may have gone back further than that.

4 Q. Lots of land still out there available?

5 A. Yeah, I think the park is, industrial park's
6 roughly 2,000 acres, with I believe our estimate's around 1200
7 acres is still available for development. That's not taking
8 into account the deals that may be on the table and ready to
9 go.

10 Q. So counting as already contracted, there still
11 remains 1200 acres?

12 A. If you counted in the contracts that have been
13 discussed here, the ConAgra, which is 80 acres, the lease of
14 21, 25, the purchase of an additional 25, so that puts you at
15 130 acres, so roughly 1070 acres still remain.

16 Q. Okay. Thank you. So about half is still
17 available?

18 A. Yes, roughly half.

19 MR. DIJILIO: Okay. That's all I have.

20 ADMINISTRATIVE LAW JUDGE TOREM: Commission
21 staff, any questions for this witness?

22 MR. SMITH: No questions.

23

24

25



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EXAMINATION

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BY ADMINISTRATIVE LAW JUDGE TOREM:

Q. Mr. Ballew, there was reference to an 18-month time frame in which the facilities would have to be constructed. Has the start date to measure that 18 months been triggered by last night's city council vote?

A. No, it would be triggered by execution of the lease. If you look at the deal flow that was provided, the purchase and sale agreement gets signed first, due diligence, then the lease agreement gets signed.

Q. And is that lease agreement, is there a deadline for that signature?

A. Yes. And we -- I would have to review the agreement, but we tried to tie -- so you execute the purchase and sale agreement, a time clock starts ticking on the lease, and you execute the lease, and then a time clock starts ticking on closing on the purchase and sale agreement.

Q. So you mentioned that the lease with ConAgra would have to be closed by the 20th of January next year?

A. That's the purchase and sale agreement --

Q. Sorry, purchase and sale.

A. -- for 80 acres, and that would have to occur by January 20th, 2014.

Q. Is that connected with the lease execution date as



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1 well?

2 A. No.

3 Q. Separate?

4 A. Those are totally separate.

5 Q. What's your ballpark figure of when the 18-month
6 clock might start ticking?

7 A. Should execute soon. We're expecting closing of
8 all agreements, as you step down on that deal flow, we've put
9 a date in of February 14th, 2014. One of our agreements with
10 American Rock, that needs to be closed by then. So we would
11 expect the lease agreement to be signed in, at the latest, in
12 January of 2014.

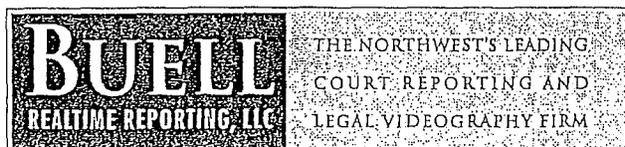
13 Q. So we're thinking July or August of 2015, from
14 there would be 18 months?

15 A. That would be the 18 months, yes, roughly.

16 Q. Is that about when the city anticipates any new
17 rail traffic, whether it's replacement or new rail traffic,
18 would begin?

19 A. That would be the outside envelope of the lease
20 agreement. I would say our expectations are that it would
21 occur sooner than that, that the construction of the rail
22 could occur sooner, but I would still expect January of 2015,
23 maybe the beginning of 2015, is when we could see a fully
24 operational railroad.

25 ADMINISTRATIVE LAW JUDGE TOREM: Okay. Thank



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1 you. Mr. Petit, does that raise any additional questions?

2 MR. PETIT: No, Your Honor. I think you
3 covered that thoroughly. I have nothing else.

4 ADMINISTRATIVE LAW JUDGE TOREM: Any other
5 questions for this witness, then?

6 MR. DIJULIO: No. Thank you, Judge.

7 MR. SMITH: No.

8 ADMINISTRATIVE LAW JUDGE TOREM: All right.
9 Thank you, Mr. Ballew, for your time.

10 A little admitting of exhibit housework to take
11 care of. The prior witness, we had a video that was shown, it
12 was JD-39-X. Were there any objections to that coming into
13 the record? I believe a DVD was supplied to all parties.

14 MR. DIJULIO: Excuse me?

15 ADMINISTRATIVE LAW JUDGE TOREM: The video
16 that we saw before the lunch break, we hadn't admitted that
17 yet. Were there any objections to the DVD?

18 MR. DIJULIO: We produced it at their request.
19 We did not propose it. If he wants to make copies of it and
20 mark it --

21 ADMINISTRATIVE LAW JUDGE TOREM: I'm not
22 suggesting it was. I'm just asking, any objections to
23 admitting it to the --

24 MR. DIJULIO: Oh, absolutely none.

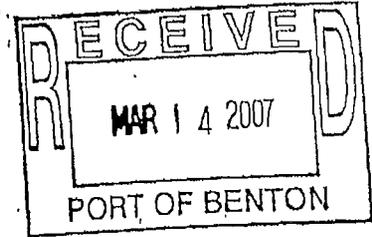
25 ADMINISTRATIVE LAW JUDGE TOREM: All right. I



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RAILROAD CROSSING AGREEMENT

THIS AGREEMENT is entered into this 19 day of October, 2006 by and among the CITY OF KENNEWICK, a municipal corporation of the State of Washington, hereafter referred to as "Kennewick", the CITY OF RICHLAND, a municipal corporation of the State of Washington, hereafter referred to as "Richland", Kennewick and Richland shall hereafter be jointly referred to as "Cities" and the PORT OF BENTON, a municipal corporation of the State of Washington, hereafter referred to as "Port".

WHEREAS, the Port is the owner of the Southern Connection of the Hanford Railroad extending from Union Pacific Railroad track in Kennewick, Washington to Horn Rapids Road in the City of Richland, Washington, hereafter referred to as the "Port Railroad".

WHEREAS, the Port acquired the Port Railroad from the United States and a copy of the Indenture conveying the railroad to the Port is attached hereto as Exhibit 1.

WHEREAS, the Port has leased the Port Railroad to Tri-Cities & Olympia Railroad, L.L.C. (hereafter "TC&ORR"). A copy of this Agreement is attached hereto as Exhibit 2.

WHEREAS, the Kennewick owns The Center Parkway which is a public street within the City of Kennewick and the City wishes to extend this street and utilities across the Port Railroad in the location described on the attached Exhibit 3.

WHEREAS, the City of Kennewick has filed a petition with the Washington Utilities and Transportation Commission to acquire an at-grade crossing over the railroad lines owned by the Port and Union Pacific Railroad

WHEREAS, TC&ORR and Union Pacific are opposing the at-grade crossing for the extension of The Center Parkway.

WHEREAS, the parties wish to provide in this Agreement for the acquisition of easement across the Port Railroad and for the extension of roads and utilities across the Port Railroad, subject to the rights of TC&ORR.

NOW THEREFORE, it is hereby agreed among the parties as follows:

1. The Port hereby agrees to grant Kennewick an easement, in the form attached hereto as Exhibit 4, allowing the City to construct a railroad crossing for The Center Parkway and to extend associated utilities across the Port Railroad within the legal

description attached hereto as Exhibit 3 subject to the terms and conditions set forth in this Agreement.

2. The Cities acknowledge and agree that the easement is subordinate and subject to the rights of United States set forth in the Indenture attached as Exhibit 1. In the event the Port reconveys the Port Railroad to the United States or the United States takes possession or ownership of the Port Railroad, this Agreement will not be enforceable against the United States. If the Port Railroad is reconveyed to the United States for any reason, the reconveyance shall not be a breach of this Agreement and the Port shall not be liable to the Cities for any loss the Cities may incur as a result of such reconveyance.

3. The Cities acknowledge and agree that the easement is subject to the rights of TC&ORR set forth in the Lease Agreement attached as Exhibit 2. The Cities must obtain additional authority from TC&ORR, either by contract or by exercise of authority granted by law, for the extension of The Center Parkway, construction of the crossing, installation of equipment and maintenance and operation of the crossing and safety equipment.

4. All improvements constructed within the Port Railroad right of way and all equipment installed within the Port Railroad right of way shall be constructed or installed in accordance with the plans and specifications in compliance with all applicable federal codes and regulations, all State statutes and regulations and all local codes. At least thirty days prior to the commencement of construction, the Cities shall provide copies of the design documents to the Port and to TC&ORR for review. The Port and TC&ORR may review the documents to determine whether the design complies with the provisions of this Section. The Cities shall indemnify and hold the Port harmless from any liability, cost or expense related to the design, construction of improvements or installation of equipment and the Cities shall not allow liens or encumbrances attach to the Port property by reason of the Cities' activities within the Port Railroad right of way. The review of the design documents by the Port and TC&ORR shall not relieve the Cities of this obligation to indemnify the Port and it hold harmless.

5. The Cities shall maintain or provide for the maintenance of any improvements constructed within the Port Railroad right of way and equipment installed within the Port Railroad right of way, in compliance with all applicable federal codes and regulations, all State statutes and regulations and all local codes, as the same may now exist or as hereafter adopted. The Cities may contract with TC&ORR or its successor to provide for maintenance of the equipment or improvements.

6. In the event the railroad operations permanently cease or the switching operations are relocated and the Port agrees to allow the track or portions of the track to be removed, the Cities shall bear the cost of any approved alterations to Center Parkway or the railroad crossing equipment consistent with the standards set forth in Section 4 of this Agreement. The Cities shall indemnify and hold the Port harmless from any liability, cost or expense related to the design, construction of improvements or installation of

equipment and the Cities shall not allow liens or encumbrances attach to the Port property by reason of the Cities' activities within the Port Railroad right of way.

7. The Cities shall fund the maintenance of the safety equipment or warning devices which it constructs or installs within the Port Railroad right of way. The Cities shall provide all utilities and electrical power necessary to the safely operate the improvements and equipment in the Port Railroad right of way, in accordance with all applicable laws and regulations. The Cities shall indemnify and hold the Port harmless from any liability, cost or expense related to the maintenance and operation of the safety equipment and warning devices. The Cities may contract with TC&ORR or its successor for maintenance of the safety equipment.

8. In consideration of the grant of the easement by the Port to Kennewick, the Cities agree to indemnify and hold the Port, its employees and agents, harmless from and against all claims, damages, losses and expenses including attorney's fees, court costs and any costs of appeal, arising from any injury, death, or damage which may be sustained, or incurred by any person or property and which may directly or indirectly result from the Cities' use of the easement; the negligent act or omission of the Cities, their employees or agents; resulting from any act, omission, neglect or misconduct irrespective of whether claims, damages, losses or expenses were actually or allegedly caused wholly or in part through the negligence of any other person or party; or arising from any failure, neglect, act or omission by either City, its employees or agents with regard to any law, requirement, ordinance or regulation of any governmental authority. The scope of indemnity does not include claims referenced above that result solely from acts, omissions, neglect, or misconduct of the Port, its employees, or agents. In any and all claims against the Port, its employees or agents which are subject to this indemnity, this indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the City under the ~~Washington Industrial Insurance Act, disability acts or other employee benefit acts.~~

9. This Agreement may be amended only by written agreement signed by all of the parties.

10. All notices and other communications provided for herein shall be validly given, made or served, in writing and delivered personally or sent by certified mail postage prepaid, to the addresses listed below:

CITY OF KENNEWICK
Kennewick City Manager
P.O. Box 6108
Kennewick, WA 99336

CITY OF RICHLAND:
Richland City Manager
P.O. Box 190
Richland, WA 99352

PORT
Executive Director
Port of Benton
3100 George Washington Way
Richland, WA 99352

Or to such other parties as designated in writing and delivered to the party receiving notice as provided herein.

11. This agreement will inure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided, however, that the parties hereto may not assign this Agreement without the prior written consent of the non-assigning party, which may not be unreasonably withheld or delayed.

12. The foregoing terms and conditions and the attached exhibits and addenda represent the entire agreement between the Port and the City with respect to the subject matter and supersede all prior and contemporaneous agreements or understanding that parties may have. All pre-existing easements, crossing permits, or licenses with and among other parties shall remain unaffected by this agreement.

13. All questions concerning the interpretation or application of provisions of this agreement shall be decided according to the laws of the State of Washington. Venue of any action based on this agreement shall be Benton County Superior Court.

14. Should it become necessary to enforce any provision of this agreement by use of any court action or proceeding, the prevailing party shall be entitled to a ~~reasonable attorney's fee, costs and expenses.~~

15. The waiver of the breach of any provision herein by either party shall in no way impair the right of either party to enforce that provision in any subsequent breach thereof.

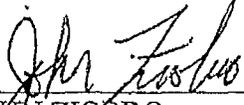
DATED this 19 day of October, 2006.

CITY OF KENNEWICK

By: 

Title: James R. Beaver, Mayor

Approved as to form:

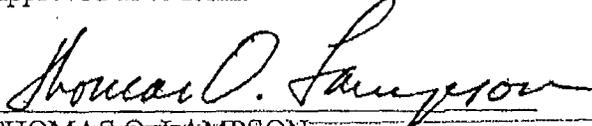

JOHN ZIOBRO,
Kennewick City Attorney

CITY OF RICHLAND

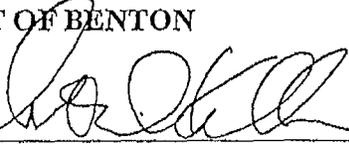
By: 

Title: city manager

Approved as to form:


THOMAS O. LAMPSON
Richland City Attorney

PORT OF BENTON

By: 

SCOTT D. KELLER
Executive Director

INDENTURE

STATE OF WASHINGTON §
 §
COUNTY OF BENTON §

THIS INDENTURE is effective the 1st day of October 1998, between the UNITED STATES OF AMERICA, acting by and through the U.S. DEPARTMENT OF ENERGY, (the "Grantor") and the PORT OF BENTON, acting through its Board of Commissioners, (the "Grantee") (collectively, the "Parties").

WITNESSETH:

WHEREAS, Grantor has owned and maintained certain real property and improvements thereto in or proximate to Richland, Washington known as the Hanford 1100 Area (the "Real Property") and the Hanford Rail Line, Southern Connection (the "Railroad") and certain personal property appurtenant to said real property ("Personal Property"); and

WHEREAS, Grantor has determined that it is in the best interest of the UNITED STATES OF AMERICA to convey said Real Property and Railroad to Grantee for the purpose of fostering economic development; and

WHEREAS, Grantor has the authority to sell, lease, grant, and dispose of said Real Property, Railroad, and Personal Property pursuant to the Atomic Energy Act of 1954, as amended, specifically Section 161(g) (42 U.S. Code § 2201(g)); and

WHEREAS, Grantor may need continued rail access to the Hanford Nuclear Reservation (the "Hanford Site") for so long as Grantor conducts operations at said site; and

WHEREAS, Grantee agrees to use said Real Property and Railroad to create economic and employment opportunities in the community served by the PORT OF BENTON; and

WHEREAS, Grantee agrees to provide Grantor continued rail access to the Hanford Site for as long as Grantee continues to maintain and/or operate the Railroad.

NOW THEREFORE, for the following consideration, the Parties agree as follows:

I. DESCRIPTION OF PROPERTY AND CONVEYANCE

- A. Grantor owns and maintains Real Property and improvements thereto having an area of approximately 768 acres and containing 26 buildings, improved parking and other support areas, and grassy swales, which is described in Attachment A. Grantor also owns and maintains the Railroad and improvements thereto having an area of approximately 92 acres and linear track length of approximately 16 miles, which is described, in part, in Attachment B. Finally, Grantor owns Personal Property that is described in Attachment C. Grantor hereby grants, conveys, and forever quitclaims to Grantee, without warranty, either express or implied, said Real Property, Railroad, and Personal Property on an "as is" and "where is" basis and subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument. The quitclaim deed (the "Deed") conveying said Real Property, Railroad, and Personal Property is attached (see Attachment D).
- B. The descriptions of the Real Property, Railroad, and Personal Property set forth, respectively, in Attachments to this Indenture and any other information provided herein are based on the best information available to Grantor and believed to be correct, but an error or omission, including, but not limited to, the omission of any information available to Grantor or any other Federal

agency, shall not constitute grounds or reason for noncompliance with the terms of this Indenture or for any claim by Grantee against the UNITED STATES OF AMERICA including, without limitation, any claim for allowance, refund, deduction, or payment of any kind.

- C. Grantor shall make reforms, corrections, and amendments to the Deed if necessary to correct such Deed or to conform such Deed to the requirements of applicable law.

II. CONSIDERATION

Grantor's conveyance is in consideration of the assumption by Grantee of all Grantor's maintenance obligations and its taking subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument.

III. TITLE EVIDENCE

Grantee reserves the right to procure a title report and/or obtain a title insurance commitment issued by a licensed Washington Title insurer agreeing to issue to Grantee, upon recordation of the Deed, a standard owner's policy of title insurance insuring Grantee's good and marketable title to said Real Property and Railroad.

IV. COSTS OF RECORDATION

Grantee shall pay all taxes and fees imposed on this transfer and shall obtain at Grantee's expense and affix to the Deed such revenue and documentary stamps as may be required by Federal, State of Washington, and local laws and ordinances. The Deed and any security documents shall be recorded by Grantee in the manner prescribed by State of Washington and Benton County recording statutes.

V. EASEMENTS, RESTRICTIONS, AND LIMITATIONS

- A. Grantor retains an easement, described in the Deed found at Attachment D, on the road known as Stevens Drive that extends north from the junction of Spengler Street to Horn Rapids Road (the "Road"). Grantee shall have a right of first refusal governing any conveyance in the Road by Grantor.
- B. Grantee shall take title subject to all public utility and other easements on record, described in Attachment E, and any other zoning regulations and restrictions appearing on plats, in the Deed, or in any title report prepared to support this transfer of Real Property and the Railroad.
- C. Grantor retains an easement, described in Attachment F, for Grantor's existing infrastructure, including telecommunications infrastructure, on the Real Property and Railroad. Grantee shall reasonably negotiate and convey no-cost new easements to support access to existing or new infrastructure of any type or to improve on said infrastructure.
- D. Grantor shall have until March 31, 1999, to remove personal property not conveyed to Grantee and cultural artifacts described in Section XXIII, below from buildings on the Real Property and the Railroad and vacate any of the buildings in which it currently operates.
- E. Grantee shall take title subject to the use permit, described in Attachment F, executed between the Home Depot and Grantor.

VI. LICENSES

- A. Grantor reserves unto itself a no-cost license for whole or partial use of the buildings described in Attachment G and a parking lot for use by Grantor's Safeguards and Security Division to conduct

its "Emergency Vehicle Operations course". The term for these licenses also is listed in Attachment G, said licenses terminating upon: (i) early abandonment of licenses upon notification to Grantee; or (ii) expiration of licenses unless renewed. Renewal shall be in at Grantor's option for one-(1) year periods not to exceed a total of ten (10) periods, and Grantee shall presume that said options are exercised unless notice declining renewal is received within thirty (30) days or more of each license expiration. Grantor shall cooperate with Grantee in the event that Grantee has a commercial tenant for space licensed by Grantor, and to the extent practicable, abandon such license(s) if (i) such abandonment is in the best interest of the UNITED STATES OF AMERICA, and (ii) substitute space is made available by Grantee, if Grantor requires such space and it is not available within the Hanford Site.

- B. Grantor's operations in those buildings and the parking lot in which it retains licenses shall be: (i) conducted in a neat and orderly manner so as not to endanger personnel or property of Grantee or Grantee's other licensees, lessees, and invitees; and (ii) in compliance with all applicable laws, regulations, rules, and ordinances. In the event that the buildings licensed to Grantor become unsuitable for occupancy for any reason, including damage, destruction, or collective wear and tear, Grantor reserves the right to restore the buildings during the term of the licenses.
- C. Before expiration or prior termination of building licenses, Grantor shall restore the buildings or building interiors to the condition in which they were conveyed or to such improved condition as may have resulted from any improvement made therein by Grantee during license terms, subject to ordinary wear and tear for which Grantor is not liable hereunder.
- D. Grantor shall be responsible for all utilities and maintenance associated with operations conducted in the building under license. In the event that partial building space is used, Grantor and Grantee shall agree on a suitable prorated amount for building utilities and maintenance that Grantor shall be responsible to pay to Grantee periodically.
- E. Grantor reserves to the General Services Administration ("GSA") a license to site a double-wide trailer and use parking spaces and a portion of the parking lot for enclosed storage on the Real Property located south of building 1175 (address: 2565 Stevens Drive, Richland, Washington) to have and use until abandoned. GSA shall be responsible for all utilities and maintenance associated with operations conducted from its trailer.
- F. Grantor reserves unto itself a no-cost license providing access to the Railroad for as long as Grantee maintains and/or operates said Railroad. Grantor shall pay published tariffs as applicable.

VII. CONDITION OF REAL PROPERTY AND MAINTENANCE OF RAILROAD

- A. Grantor shall clean the Real Property to an "industrial use" standard prior to transfer under this Indenture and subsequent abandonment of licenses. All buildings, utilities, and other property conveyed will be transferred in "as is" and "where is" condition as at the signing hereof, without any warranty or guarantee, expressed or implied, of any kind or nature, except as otherwise expressly stated in this Indenture. Grantor shall not be obligated to repair, replace, or rebuild any structures if and when licenses are abandoned except when Grantor's use resulted in damages exceeding ordinary wear and tear. Except as provided for in Section VIII, below, Grantor shall not be responsible for any liability to Grantee or third persons arising from such condition of the Real Property. The failure of Grantee to inspect fully the Real Property or to be fully informed as to the condition thereof will not constitute grounds for any noncompliance with the terms of this Indenture.

- B. For so long as Grantee continues to maintain and/or operate the Railroad (or Grantee's similarly situated successor(s)), Grantee shall maintain the Railroad, including all structures, improvements, facilities and equipment in which this instrument conveys any interest, at all times in safe and serviceable condition, to assure its efficient operation and use, provided, however, that such maintenance shall be required as to structures, improvements, facilities and equipment only during the useful life thereof, as determined jointly by Grantor and Grantee.

VIII. WARRANTIES AND REPRESENTATIONS

- A. Grantor represents and warrants under its enabling legislation (the Atomic Energy Act of 1954, as amended) that: (i) it has the full capacity, power and authority to enter into this Indenture and the transactions contemplated herein; and (ii) the execution, delivery and performance by Grantor of this Indenture has been duly authorized and approved by all necessary governmental action on the part of Grantor.
- B. Grantee represents and warrants that: (i) it is a political instrumentality of the State of Washington and duly organized under laws of the State of Washington; (ii) it has full capacity, power and authority to enter into and perform this Indenture and the continuing obligations contemplated herein; and (iii) the execution, delivery and performance by Grantee of this Indenture have been duly and validly authorized and approved by all necessary action on the part of Grantee.
- C. Grantor represents that, to the best of Grantor's knowledge, there are no facts known to Grantor that materially affect the value and condition of the Real Property and Railroad that are not readily observable by Grantee or that have not been disclosed to Grantee. The Parties acknowledge that in the course of abandoning any licenses, Grantor may learn additional facts regarding the value and condition of the Real Property. Grantor shall identify such facts and disclose them to Grantee in a timely manner.
- D. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA") Section 120(h)(1) (42 U.S. Code § 9620(h)(1)), and 40 U.S. Code of Federal Regulations Part 373, Grantor has made a complete search of its records concerning the Real Property and Railroad. These records indicate that hazardous substances, as defined by CERCLA Section 101(14), have been stored, disposed, or generated on the Real Property during the time Grantor owned said Real Property. Quantities of hazardous substances were released or disposed of on the Real Property during the course of ownership by Grantor, and the Real Property was listed on the National Priorities List by the Environmental Protection Agency ("EPA"). Said Real Property was remediated and removed from the National Priorities List in September 1996. Grantor agrees to meet all CERCLA obligations associated with the transfer of the Real Property now or in the future upon notice by Grantee.
- E. All remedial actions necessary to protect human health and the environment with respect to any such hazardous substances remaining on the Real Property have been or will be taken before the date of transfer, and any additional remedial actions found to be necessary by regulatory authorities with jurisdiction over the Real Property or Railroad attributable to contamination of hazardous substances shall be conducted by Grantor at Grantor's expense.

IX. ASSIGNMENT OF LEASES AND CONTRACTS

- A. Grantor hereby assigns Parts 1, 2, and 3 of the lease dated May 1, 1996, (see Attachment H) executed between Grantor and R.H. Smith Distributing Co., Inc. ("Smith") for fuel oil distribution from building 1172A. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by Smith for building 1172A operations, which are assigned herewith to Grantee. Grantor shall notify Smith of assignment.

- B. Grantor hereby assigns the lease dated March 5, 1998, (see Attachment H) executed between Grantor and Livingston Rebuild Center, Inc. ("LRC") for equipment repair services in building 1171. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by LRC for building 1171, which are assigned herewith to Grantee. Grantor shall notify LRC of assignment.
- C. Grantor hereby assigns two agreements, a supplemental agreement, and permit made among and by the Atomic Energy Agency (and its successors); Burlington Northern, Inc.; Oregon-Washington Railroad & Navigation Company; and Union Pacific Railroad Company governing access to the Railroad (see Attachment H). Grantee hereby accepts the obligations and considerations under this agreement and permit. Grantor shall notify successors Burlington Northern and Union Pacific of these assignments.

X. OTHER AGREEMENTS

- A. No prior, present, or contemporaneous agreements shall be binding upon Grantor or Grantee unless specifically referenced in this Indenture. No modification, amendment, or change to this Indenture shall be valid or binding upon the Parties unless in writing and executed by representatives authorized to contract for the Parties.
- B. Grantor on written request from Grantee may grant a release from any of the terms, reservations, restrictions and conditions contained in the Deed. Grantor may release Grantee from any terms, restrictions, reservations, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions if Grantor determines that the Real Property and Railroad no longer serve the purposes for which they were conveyed or the Grantee determines that continued ownership of the Railroad is no longer economically viable. All or any portion of the Real Property or Railroad may be reconveyed to Grantor subject to the conditions detailed in Section XVII. below.

XI. NOTICES

Any notices required under this Indenture shall be forwarded to Grantor or Grantee, respectively, by Registered or Certified mail, return receipt requested, or by overnight delivery, at the following addresses:

Realty Officer
U.S. Department of Energy
Richland Operations Office
P.O. Box 550, G3-18
Richland, Washington 99352

Executive Director
Port of Benton
3100 George Washington Way
Richland, Washington 99352

XII. LIMITATION OF GRANTOR'S AND GRANTEE'S OBLIGATIONS

- A. The responsibilities of Grantor, as described in this Indenture, are subject to: (i) the availability of appropriated program funds for remediation and operation of the Hanford Site; and (ii) the federal Anti-Deficiency Act (31 U.S. Code §§ 1341 and 1517).
- B. Grantee shall, to the extent permitted under applicable law, indemnify and defend the United States against, and hold the UNITED STATES OF AMERICA harmless from, damages, costs, expenses, liabilities, fines, or penalties incurred by Grantor and/or third parties and resulting

from Grantee's activities on the Real Property and Railroad, or any part thereof, including releases or threatened releases of, or any other acts or omissions related to, any hazardous wastes, substances, or materials by Grantee and any subsequent lessee or owner of the Real Property or Railroad or any subdivision thereof, their officers, agents, employees, contractors, sublessees, licensees, or the invitees of any of them.

- C. Grantee hereby releases the UNITED STATES OF AMERICA, and shall take whatever action may be required by Grantor to assure the complete release of the UNITED STATES OF AMERICA from any and all liability for restoration or other damage under the Deed or other agreement covering the use by Grantee or its licensees, invitees, and lessees of any Real Property transferred by this instrument.
- D. Grantee's responsibilities for maintenance and operation of the Railroad under the terms of this Indenture are subject to the economic viability of the Railroad. Section XVII. below shall apply if Grantee determines that economic viability is impossible after ten (10) years.

XIII. RIGHT OF ACTION

The provisions of this Indenture are not intended to benefit third persons, and breach thereof shall not be the basis for a cause of action by such third person against either Grantor or Grantee.

XIV. DISPUTES

- A. Except as otherwise provided in this Indenture, any dispute concerning a question of fact that is not disposed of by agreement between the Parties shall be submitted for decision by the Manager, U.S. Department of Energy, Richland Operations Office, or his successor in function ("Manager-RL). The Manager-RL shall, within twenty (20) days, mail or otherwise furnish a written decision to Grantee. The decision of the Manager-RL, shall be final and conclusive unless, within twenty (20) calendar days from the date of receipt of such copy, Grantee mails or otherwise furnishes to the Manager-RL, a written appeal addressed to the Associate Deputy Secretary for Field Management (FM-2). The decision of the Associate Deputy Secretary for Field Management (FM-2), this officer's successor, or the duly authorized representative for the determination of such appeals shall be presented in writing within twenty (20) calendar days from receipt of notice of appeal and shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this Section, Grantee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute under this Section, Grantee shall proceed diligently with the performance of this Indenture in accordance with the decision of the Manager-RL.
- B. This Section shall not preclude consideration of questions of law in correction with decisions provided for herein. Nothing in this Section, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

XV. PLANNING AND DEVELOPMENT

- A. Grantor is aware that Grantee is acquiring the Real Property and Railroad for development for industrial use. Accordingly, Grantor agrees that it shall cooperate reasonably with Grantee and sign such documents and undertake such other acts, without incurring costs or liability, that are necessary for Grantee to complete the planning, zoning, and development of the Real Property and Railroad, the resale and marketing of any portion of the Real Property, and the formation and operation of special districts, metropolitan districts, and other quasi-governmental entities organized for the purpose of providing infrastructure facilities and services to or for the benefit of

the Real Property and Railroad.

- B. Without incurring costs or liability, Grantor will cooperate reasonably with Grantee by signing such documents necessary for Grantee to apply to the Auditor and to the Treasurer of Benton County, Washington and to the Washington State Department of Revenue for tax valuation or abatement with regard to the Real Property that Grantee intends to sell. Upon request by Grantee, Grantor will execute and deliver to and in the name of Grantee one or more easements, accompanied by a legal description, for subsequent re-grant to local utility providers, for the purpose of installing new utility systems and relocating any existing systems, on any portion of the Real Property in which Grantor retains an interest. Other easements include, without limitation easements for ingress and egress and private utility lines required in connection with any portion of the Real Property and Railroad being conveyed. Such easement documents shall be in form and content satisfactory to Grantor and Grantee.

XVI. SUCCESSORS AND ASSIGNS

- A. The covenants, provisions, and agreements contained herein shall in every case be binding on and inure to the benefit of the Parties hereto and their respective successors. The rights and responsibilities under this Indenture may not be assigned by Grantee within ten (10) years of the date of this Indenture without the written consent of Grantor, said consent not being unreasonably withheld.
- B. Grantee shall not enter into any transaction that would deprive it of any of the rights and powers necessary to perform or comply with any or all of the terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions set forth herein, and if an arrangement is made for management or operation of the Real Property and Railroad by any agency or person other than Grantee, it shall reserve sufficient rights and authority to ensure that said Real Property and Railroad shall be operated and maintained in accordance with the terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions.

XVII. REVERSIONARY INTEREST

- A. For the ten (10) years next following the effective date of this Indenture, in the event that any of the aforesaid terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions are not met, observed, or complied with by Grantee, whether caused by the legal inability of said Grantee to perform any of the obligations herein set out, or otherwise, the title, right of possession, and all other rights conveyed by the Deed to Grantee, or any portion thereof, shall at the option of Grantor revert to the UNITED STATES OF AMERICA in its then existing condition sixty (60) days following the date upon which demand to this effect is made in writing by Grantor or its successor, unless within said sixty (60) days such default or violation shall have been cured and all such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions shall have been met, observed, or complied with, in which event said reversion shall not occur, and title; right of possession, and all other rights conveyed, except those that have reverted, shall remain vested in Grantee.
- B. The Railroad shall be used and maintained for the purposes for which it was conveyed, and if said Railroad ceases to be used or maintained for such purposes, all or any portion of the Railroad shall, in its then existing condition, at the option of Grantor, revert to the UNITED STATES OF AMERICA. If Grantor notifies Grantee or its similarly situated successor(s) that rail service no longer is required, such reversionary interest shall terminate and Grantee shall be free to abandon or convert the use of any portion or all of the Railroad.

- C. Grantee agrees that in the event Grantor exercises its option to revert all right, title, and interest in and to any portion of the Real Property or Railroad to the UNITED STATES OF AMERICA or Grantee voluntarily returns title to said Real Property and Railroad in lieu of a reverter, then Grantee shall provide protection to, and maintenance of said Real Property and Railroad at all times until such time as the title actually reverts or is returned to and accepted by the UNITED STATES OF AMERICA. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in 41 U.S. Code of Federal Regulations § 101-47.4913 in effect as of the date of the conveyance.

XVIII. USE OF REAL PROPERTY AND RAILROAD

Grantee shall use and maintain the Real Property and Railroad on fair and reasonable terms without unlawful discrimination. In furtherance of this condition (but without limiting its general applicability and effect) Grantee specifically agrees that: (i) it will establish such fair, equal, and nondiscriminatory conditions to be met by all users of the Real Property and Railroad, provided that Grantee may prohibit or limit any given type and kind of use if such action is necessary to promote safe operations; (ii) in its operation and the operation of the Real Property and Railroad, neither it nor any person or organization occupying space or facilities thereupon shall discriminate against any person or class of persons by reason of race, color, creed, sex, age, marital status, political affiliation or non-affiliation, national origin, religion, handicap or sexual orientation in the use of any of the facilities provided for the public; and (iii) that in any agreement, contract, lease, or other arrangement under which a right or privilege granted to any person, firm or corporation to conduct or engage in any lawful activity, Grantee shall insert and enforce provisions requiring the party to: (i) furnish said service on a fair, equal and nondiscriminatory basis to all users thereof; and (ii) charge fair, reasonable, and nondiscriminatory prices for each unit for service, provided, that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

XIX. ACCESS

- A. Subject to the provisions of Section V.A. above, Grantee shall, insofar as it is within its powers and to the extent reasonable, adequately protect the land access routes to the Real Property and Railroad. Grantee shall, either by the acquisition and retention of easements or other interests in or rights for the use of land or by adoption and enforcement of zoning regulations, prevent the construction, erection or alteration of any structure in the access routes to and from the Real Property and Railroad.
- B. Grantor reserves the right of access to those portions of the Real Property and Railroad for the purpose of construction, installing, maintaining, repairing, operating, and/or removing utility, telecommunications, or well monitoring equipment over, under, across, and upon the Real Property and Railroad.

XX. SEVERABILITY

If the construction of any of the foregoing terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions recited herein as provisions or Attachments, or the application of the same as provisions in any particular instance is held invalid, the particular term, reservation, restriction, license, easement, covenant, equitable servitude, contract, lease, or condition in question shall be construed instead merely as conditions upon the breach of which Grantor may exercise its option to cause the title, interest, right of possession, and all other rights conveyed to Grantee, or any portion thereof, to revert to it. The application of such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions as provisions elsewhere in the Indenture and the construction of the remainder of such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions as provisions shall not be affected thereby.

XXI. GRANTEE'S STATUS

Grantee shall remain at all times a political instrumentality of Benton County, State of Washington.

XXII. ENVIRONMENTAL DISCLOSURES

A. Lead-Based Paint Conditions.

1. Prior to use of any Real Property by children under seven (7) years of age, Grantee shall remove all lead-based paint hazards and all potential lead-based paint hazards from the said Real Property in accordance with all federal, State of Washington, and local lead-based paint laws, rules, regulations, and ordinances.
2. Grantee agrees to indemnify Grantor and the UNITED STATES OF AMERICA to the extent allowable under applicable law from any liability arising by reason of Grantee's failure to perform Grantee's obligations hereunder with respect to the elimination of immediate lead-based paint health hazards, the prohibition against the use of lead-based paint, and Grantee's responsibility for complying with applicable federal, State of Washington, and local lead-based paint laws, rules, regulations, and ordinances.

B. Presence of Asbestos.

1. Grantee is informed that the Real Property may be improved with materials and equipment containing asbestos-containing materials. The Due Diligence Assessment Report (see Attachment I) prepared by R.E. Morgan for Fluor Daniel Hanford, Inc. on August 28, 1998, discloses the condition and probable locations of asbestos-containing materials. Grantee is cautioned that unprotected or unregulated exposure to asbestos in product manufacturing and building construction workplaces have been associated with asbestos-related diseases. Both the Occupational Safety and Health Administration ("OSHA") and the EPA regulate asbestos because the potential hazards associated with exposure to airborne asbestos fibers. Both OSHA and EPA have determined that such exposure increases the risk of asbestos-related diseases, which include certain cancers and which can result in disability or death.
2. Grantee is invited, urged, and cautioned to inspect the Real Property to ascertain the any asbestos content and condition and corresponding hazardous or environmental conditions relating thereto. Grantor shall assist Grantee in obtaining any authorization that may be required to carry out any such inspection. Grantee shall be deemed to have relied solely on its own judgement in assessing the overall condition of all or any portion of the Real Property, including without limitation, any asbestos hazards or concerns.

C. Presence of Polychlorinated Biphenyls. Except for the 1162 and 1163 facilities, buildings on the Real Property were constructed prior to the enactment of the Toxic Substances Control Act of 1976, as amended, (15 U.S. Code §§ 2601 - 2692) that banned the manufacture of polychlorinated biphenyls ("PCBs"). Fluorescent light fixtures may contain ballasts with trace amounts of PCBs. Spills from overheated ballasts and ballast management (e.g., removal from service) are subject to requirements found in 40 U.S. Code of Federal Regulations Part 761.

D. Grantor's Disclaimer.

1. No warranties, either express or implied, are given with regard to the condition of the Real Property including, without limitation, whether the Real Property does or does not

contain lead-based paint, asbestos, PCBs or petroleum residues attributable to past operations (see "Environmental Assessment for the Transfer of 1100 Area, Southern Rail Connection and Rolling Stock, Hanford Site, Richland, Washington," also contained in Attachment I) or is not safe for a particular purpose. The failure of Grantee to inspect or to be fully informed as to the condition of all or any portion of the Real Property shall not constitute grounds for any claim or demand for adjustment or noncompliance with the terms of this Indenture.

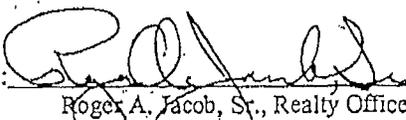
2. Grantor assumes no liability for damages for personal injury, illness, disability, or death to Grantee or to Grantee's successors, assigns, employees, invitees, or any other person subject to Grantee's control or direction or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity causing or leading to contact of any kind whatsoever with asbestos on the Real Property, whether Grantee has properly warned or failed to properly warn the individuals(s) injured.

XXIII. CULTURAL ARTIFACTS AND HISTORIC STRUCTURES

- A. Grantor conducted an inspection of the Real Property on February 3, 1998, in compliance with Part V, Paragraph C of the "Programmatic Agreement for the Built Environment," which states that the Grantor's Cultural Resources Program shall undertake a cultural assessment of the contents of historic buildings and structures to locate and identify artifacts that may have interpretive or educational value as exhibits for local, State of Washington, or national museums. Said assessment has been completed, and artifacts identified are listed in Attachment J.
- B. Grantor and Grantee shall jointly execute a Memorandum of Understanding ("MOU") with the Washington State Department of Community, Trade, and Economic Development, Office of Archeology and Historic Preservation that will address cultural resource issues associated with the Real Property and Railroad. After joint negotiation of an acceptable MOU, Grantee shall be bound by the terms of said MOU for the purposes of cultural artifacts disposition and care under the terms of this Indenture.

IN WITNESS WHEREOF, the Parties, by and through their authorized representatives, have executed the foregoing Indenture on the date first written above.

United States of America by and through the U.S. Department of Energy
GRANTOR:

By: 
Roger A. Jacob, Sr., Realty Officer, Richland Operations Office

Date: August 28, 1998

Witnessed by Notary Public: Wesley K. Knuter State of Washington, County of Pierce

My Commission Expires: July 04, 2001

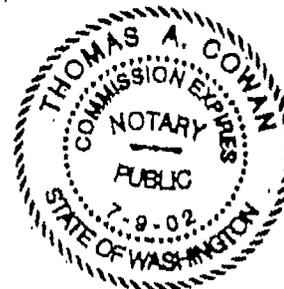
Port of Benton, Washington
GRANTEE:

By: *Ben Bennett*
Ben Bennett, Executive Director, Port of Benton, Washington

Date: September 25, 1998

Witnessed by Notary Public: Thomas A. Cowan

My Commission Expires: July 9, 2002



RAILROAD LEASE
Port of Benton-Tri-City Railroad Company

PARTIES:

LESSOR: PORT OF BENTON, a municipal corporation of the State of Washington, hereafter "Port".

TENANT: TRI-CITY RAILROAD COMPANY, L.L.C., a Washington limited liability company hereafter "Tenant".

RECITALS:

WHEREAS, the Port acquired the Southern Connection of the Hanford Railroad from the United States Department of Energy (hereafter "DOE") to prevent the closure of the railroad and to maintain railroad operations for economic development purposes.

WHEREAS, DOE conveyed the former 1100 Area to the Port to enable the Port to generate revenues to pay the costs of operation and maintenance of the railroad.

WHEREAS, the Port entered into an Operations and Maintenance Agreement with Livingston Rebuild Company dated October 1, 1998 which has been assigned to the Tenant and this agreement requires the Port to pay certain expenses related to the railroad, including insurance premiums, in excess of \$100,000.00 per year and the Port has the responsibility for the inspection, maintenance and replacement of the bridges and overpasses.

WHEREAS, the Port has been required to pay for the replacement of a section of the railroad bridge which was destroyed by fire.

WHEREAS, the Port entered into a Building Lease with Livingston Rebuild Company for the railroad maintenance building in the Port's Manufacturing Mall (formerly DOE's 1100 Area), which Lease has been assigned to the Tenant.

WHEREAS, the parties wish to transfer the costs associated with the operation of the railroad, including the insurance and the responsibility for the inspection and maintenance of the bridges and overpasses to the Tenant.

WHEREAS, the Port has been required to respond to an inquiry by the Railroad Retirement Board concerning the Port's liability for pension payments as an railroad operator and the Port wants to avoid classification as a railroad operator.

WHEREAS, the Port wishes to transfer the responsibility for rail operations and for negotiating with major carriers to the Tenant and to relieve the Port of the responsibility for such activities; now therefore it is hereby agreed among the parties as follows:

AGREEMENTS:

1. LEASE. Port hereby leases to Tenant upon the terms, covenants and conditions contained herein, the real and personal property known as the Port of Benton Railroad Southern Connection and the 1171 Building (hereafter the "Property"). The real property is described on Attachment 1.

1.1 The Property consists of approximately 16 miles of railroad trackage and right of way extending from the Richland Connection in Kennewick, Washington to the Port of Benton's Manufacturing Mall in Richland, Washington, and generally bordered by Horn Rapids Road on the north, formerly known as the 1100 Area, including the tracks, bridges, trestles, crossings and maintenance equipment. The equipment and fixtures are more particularly described on Attachment 2 to this Agreement.

1.2 The Tenant has been operating the Port of Benton railroad and has occupied the 1171 Building since October, 1998 and is fully familiar with the Property and agrees to take the Property in its present condition, and subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto, and the Quit Claim Deed from the United States of America, copies of which has been provided to the Tenant. The Tenant agrees to take the Property in its present condition without warranties. The Tenant is relying upon its own inspections of the Property to determine whether to enter into this Lease, and the Tenant is not relying upon any representation made by the Port, its employees or agents, except as specifically set forth in this Lease.

1.3 The Port may acquire trackage rights to use additional railroad tracks owned by DOE serving the Hanford Project. To the extent that the Port acquires additional trackage rights from the DOE, the Port will attempt to negotiate an agreement with the Tenant to add the track rights to this agreement, if permitted by the terms of any agreements with the United States and to the extent the terms of the agreement for trackage rights are acceptable to the Tenant. An agreement to add additional track to this agreement, may require the Tenant to pay additional fees to the Port based upon volume of traffic over the tracks. Provided, that the Port may cancel any agreement with the United States for trackage rights without any further obligation to Tenant. Provided, further, in the event the Port terminates its agreement with the United States for trackage rights, the Tenant shall be free to negotiate with the United States for the trackage rights.

1.4 The Port of Benton currently has a Memorandum of Agreement with DOE to use the track north of Horn Rapids Road to the Energy Northwest Generating Station site, which the Port agrees to allow the Tenant to utilize under the terms of this Lease, provided that the Tenant maintains the track as herein required. DOE has proposed a Memorandum of Agreement with the Port of Benton for use of the Hanford Railroad north of the Energy Northwest Generating Station. After the execution of the MOA by the Port and DOE, the Port will permit the Tenant to utilize additional track which is covered by the MOA, provided that the Tenant complies with the terms and conditions of the MOA and subject to the provisions of this Lease.

2. TERM. This lease shall run for a period of ten years commencing on the 1st day of August, 2002 and terminating on the 31st day of March, 2012.

2.1 The Tenant shall have the option to extend this Lease for two additional terms of ten years each after the expiration of the initial term and after the expiration of the first renewal term.

2.2 The option to extend this Lease shall be deemed to have been exercised unless the Tenant shall give the Port written notice of its intent not to exercise an option at least one hundred eighty (180) days prior to termination of the initial term or the expiration of the first renewal term.

2.3 The Tenant may only exercise the right to extend the term of this Lease if the Tenant is not in material default in the performance of the terms of this Lease at the time the Tenant exercises the option or at the time an option is deemed to be exercised under Section 2.2.

2.4 In the event the Tenant elects not to exercise the Lease extension as provided in this Section, then this Lease shall terminate and the Tenant shall have no further rights under the terms of the Lease.

3. RENT. Tenant shall pay rent, in advance on the first day of each month during the term of this lease, in the following amounts:

3.1 During the initial term of the lease, the parties have agreed that the monthly rental for the real property, railroad trackage, right of way and building more particularly described in Attachment 1, shall be \$2,000.00, plus the applicable leasehold tax as hereafter provided.

3.2 In addition to the rent for the real property, the Tenant shall pay \$2,000.00 per month as rent for the railroad maintenance and operation equipment owned by the Port and more particularly described on Attachment 2. The Tenant shall be responsible for the payment of any sales tax which may be payable as a result of the lease of equipment.

3.3 Rent payments shall be made payable to the Port of Benton and shall be paid at the Port offices at 3100 George Washington Way, Richland, Washington, or at such other address as the Port shall direct in writing.

3.4 In addition to the rent provided for herein, the Tenant shall pay the Leasehold Tax as required by the Revised Code of Washington Chapter 82.29A, as the statute may be hereafter amended. The Leasehold Tax shall be paid with each monthly installment of rent. The current leasehold tax rate is 12.84%.

3.5 Commencing five (5) years from the commencement date of this lease, and on every anniversary thereafter, the minimum rent set forth in sections 3.1 and 3.2 shall be increased in order to reflect the proportionate increase, if any, occurring between the commencement date and such adjustment date in the cost of living as indicated by the Consumer Price Index for Urban Consumers - Western US Average - All Items, as published by the U.S. Department of Labor's Bureau of Labor Statistics (the "Index"). Such adjustment shall be accomplished by multiplying the numerator of which shall be the Index level as of the January preceding the date of adjustment, and the denominator of which shall be the Index level as of the January preceding the Lease commencement date. Any adjustment of rent shall become effective immediately. In no event shall the rent be less than that specified in sections 3.1 and 3.2. If the index is discontinued, Landlord shall substitute a similar index of consumer prices.

3.6 Any rent payment not paid within ten days of the date upon which the Tenant receives notice that a payment is past due shall accrue interest on the unpaid rent at the rate of one and one-half percent of the late payment for each month or portion of month by which the payment is delayed.

4. **CONDITION OF PROPERTY.** The Tenant shall take the Property in its present condition, without warranties or representations by the Port except as set forth in this Lease. The Tenant shall be responsible for the maintenance and repair of the railroad maintenance and operation equipment owned by the Port and used by the Tenant pursuant to this Lease. In the event any of the Port equipment becomes inoperable or unusable for any reason the Port shall not be required to provide replacement equipment. If the equipment becomes obsolete or inoperable through no fault of the Tenant, the unusable equipment shall be returned to the Port and the rent shall be adjusted to account for the equipment which is no longer being used by the Tenant. This provision shall not apply to the equipment that becomes inoperable due to the Tenant's failure to properly maintain the equipment.

5. **SECURITY.** The Tenant shall provide a rent security in accordance with RCW 53.08.085 in an amount equal to the rent and Leasehold Tax to be paid during the initial year of this Lease.

6. **TAXES AND ASSESSMENTS.** Tenant shall pay all taxes assessed against the buildings and improvements owned by the Tenant and the other property of Tenant located upon the Property, promptly as the same become due. Tenant shall pay all assessments hereafter levied against the Property, or a portion thereof, during the term of this Lease, including assessments coming due to any special purpose governmental district; provided, however, if the assessment is payable in installments, whether or not interest shall accrue on the unpaid installments, the Tenant may pay the assessments in installments as they become due, provided

that the Tenant's obligation to pay the assessments levied during the term of the Lease, even though paid in installments, shall survive the termination or expiration of this Lease.

6.1 Tenant may contest the legal validity or amount of any taxes, assessments or charges which Tenant is responsible for under this Lease, and may institute such proceedings as Tenant considers necessary. If Tenant contests any such tax, assessment or charge, Tenant may withhold or defer payment or pay under protest but shall protect Port and the Property from any lien. Port appoints Tenant as Port's attorney-in-fact for the purpose of making all payments to any taxing authorities and for the purpose of contesting any taxes, assessments or charges.

7. USE. The Tenant shall use the Property for the operation and maintenance of railroad transportation facilities, for uses in conjunction with or reasonably connected to the permitted uses and for no other purposes except those approved in writing by the Port.

7.1 The Tenant's use, operations, and maintenance of the tracks shall comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property. In addition, the Tenant shall comply with all laws, rules and regulations applicable to the Tenant's use, operation and maintenance of the property. Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States.

7.2 In the event the Department of Energy, or any user of the railroad files a complaint with the Port concerning the Tenant's rates, tariffs or operations, the Port will notify the Tenant of the complaint and will attempt to resolve the complaint through negotiations with the Tenant and the complainant.

7.2.1 If the complaint involves matters which are within the purview of National Surface Transportation Board (NSTB), the Port will, to the extent applicable, utilize the rules of the NSTB to resolve the dispute.

7.2.2 If the Port is unable to resolve the complaint which is within the jurisdiction of the NSTB and which the NSTB will accept for resolution, the complaint shall be referred to the NSTB, if permitted by the terms and conditions of the Indenture and the Quit Claim Deed.

7.2.3 Complaints which can not be referred to the NSTB, shall be resolved pursuant to the terms and conditions of this Lease.

7.3 The Port acquired title to the Property by conveyances from the United States of America. The Tenant covenants that it will not use the Property in any manner which would subject the Property to forfeiture under the provisions of the above-described Indenture or quit claim deed.

7.4 The Tenant shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the

Port's prior written consent. The Tenant shall continue to provide railroad access to areas currently served by the railroad unless the Port and Tenant mutually agree that such access is no longer practicable.

8. MAINTENANCE OF PROPERTY. Throughout the term of this Lease, Tenant, at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear, and in accordance with all applicable covenants, laws, rules, ordinances, and regulations of governmental agencies applicable to the maintenance and operation of the railroad, provided, however, that the Port shall be responsible for the maintenance of the roof and the exterior walls of the 1171 Building. The Tenant will maintain the equipment described on Attachment 2 in good working condition and repair, ordinary and usual wear and tear excepted.

8.1 Tenant will provide for regular inspections of the railroad bridges, spans and overpasses by certified personnel. The inspections will comply with the requirements of CFR 49 and any other applicable laws and regulations to maintain the railroad as a Class 3 railroad. Tenant will promptly repair any conditions which require repair or replacement in order to comply with applicable rules and regulations. The obligation to maintain the railroad shall include the maintenance, repairs or replacements of the bridges, spans and overpasses and the maintenance, repair and replacement of the tracks which cross the bridges, spans and overpasses. In the event the Port assigns trackage rights to the Tenant pursuant to agreements with DOE, and the Tenant accepts the trackage rights, the Tenant agrees to assume the obligation to maintain the additional track in accordance with the terms and conditions of the agreement which the Port has entered into with DOE.

8.2 Any repairs or maintenance which is necessary for safety or the protection of life and property shall be done as soon as possible. Tenant shall promptly report any such conditions to the Port.

8.3 Tenant will provide for regular inspections and maintenance of the railroad crossings and the crossing signals by certified personnel. The inspections will comply with CFR 49 and any applicable law and regulations. The crossings and crossing signals shall be maintained in at least their present condition.

8.4 Tenant will provide all of the labor and materials necessary to maintain, repair or replace any of the railroad as required to meet the conditions of this contract.

8.5 Tenant shall be responsible for the maintenance of the equipment during the term of this agreement and shall insure the equipment against loss or damage. Upon the termination of this agreement or if Tenant determines that the equipment is no longer needed for maintenance of the railroad, Tenant shall return the equipment to the Port in its present condition, reasonable wear and tear excepted.

8.6 In the event the equipment becomes unavailable for use due to obsolescence or for any other reason, Tenant shall provide sufficient equipment to fulfill its obligations under the terms of this agreement.

8.7 The equipment shall be used only for the maintenance and operation of the railroad and for no other purpose without the prior written consent of the Port and an use agreement which provides for payment for the use of the equipment.

8.8 The Port shall retain title to the equipment and the Port may dispose of any of the equipment which is not needed for the maintenance of the railroad.

9. **CONDITIONS OF CONSTRUCTION.** Before any construction, reconstruction or alteration of the improvements on the Property, except for interior improvements or non-structural modifications is commenced and before any building materials have been delivered to the Property in connection with such construction, reconstruction or alteration by Tenant or under Tenant's authority, Tenant shall comply with all the following conditions or procure Port's written waiver of the following condition or conditions:

9.1 Tenant shall deliver to Port, for its approval, one set of preliminary construction plans and specifications prepared by an architect or engineer licensed to practice as such in the State of Washington including, but not limited to, preliminary grading utility connections, locations of ingress and egress to and from public thoroughfares, curbs, gutters, parkways, street lighting, designs and locations for outdoor signs, storage areas, and landscaping, all sufficient to enable Port to make an informed judgment about the design and quality of construction. All improvements shall be constructed within the exterior property lines of the Property provided that required work beyond the Property on utilities, access, and conditional use requirements will not violate this provision. Tenant shall permit Port to use the plans without payment for purposes relevant to and consistent with this Lease.

9.2 The Port shall examine the plans and specifications for the purpose of determining reasonable compliance with the terms and conditions of this Lease, the Protective Covenants and compatibility with the overall design and use. Approval will not be unreasonably withheld. Approval or disapproval shall be communicated to the Tenant, and disapproval shall be accompanied by specification in reasonable detail of the grounds for disapproval; provided that Port's failure to disapprove the initial construction plans within fourteen (14) days or subsequent construction plans within thirty (30) days after delivery to Port shall be considered to be approval.

9.3 Tenant shall prepare final working plans and specifications substantially conforming to preliminary plans previously approved by the Port, submit them to the appropriate governmental agencies for approval, and deliver to Port one complete set as approved by the governmental agencies.

9.4 Tenant shall notify Port of its intention to commence the initial construction at least fourteen days before commencement of any such work or delivery of any

materials. The notice shall specify the approximate location and nature of the intended improvements. During the course of construction, Port shall have the right to post and maintain on the Property any notices of non-responsibility provided for under the applicable law, and to inspect the Property at all reasonable times.

9.5 Except as specifically provided in this Lease, Port makes no covenant or warranties respecting the condition of the soil or subsoil or any other condition of the Property.

9.6 Once work is begun, Tenant shall, with reasonable diligence, complete all construction of improvements. Construction required at the inception of the Lease shall be completed and ready for use within eighteen (18) months after commencement of construction, provided that the time for completion shall be extended for so long as the Tenant is prevented from completing the construction due to delays beyond the Tenant's control; but failure, regardless of cause, to commence construction within eighteen (18) months from the commencement date of the Lease shall, at Port's election exercised by thirty days written notice, terminate this Lease. All work shall be performed in a workmanlike manner, substantially comply with the plans and specifications required by this Lease, and comply with all applicable governmental permits, laws, ordinances, and regulations.

9.7 Tenant shall pay the cost and expense of all Tenant's improvements constructed on the Property. Tenant shall not permit any mechanic's, or construction liens to attach to the Property. Tenant shall not permit any mechanics', materialmen's, contractors' or subcontractors' lien arising from any work of improvement performed by or for the Tenant to be enforced against the Property, however it may arise. Tenant may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, so long as Port's Property interests are not jeopardized. Tenant shall defend and indemnify Port against all liability and loss of any type arising out of the construction of improvements on the Property by Tenant. Unless caused by the Port, its agents, contractors, and invitees, Tenant shall reimburse Port for all sums paid according to this paragraph, together with the Port's reasonable attorneys' fees and costs plus interest on those sums at the legal rate.

9.8 On completion of the construction of any improvements, additions or alterations, covered by this Section 9, Tenant shall give Port notice of all structural or material changes in plans or specifications made during the course of the work and shall at that time supply Port with drawings accurately reflecting all such changes. Changes which are non-structural or which do not substantially alter the plans and specifications as previously approved by the Port do not constitute a material change.

10. OWNERSHIP OF IMPROVEMENTS. All improvements constructed on the Property by Tenant as permitted by this Lease shall be owned by Tenant until termination of this Lease. Upon the termination of this Lease for any reason, any buildings, improvements or trade fixtures installed on the Property shall become the property of the Port. Provided, however, in the event, the Tenant has failed to maintain the Property as required by this Lease, or the Property is contaminated by toxic or hazardous materials as the result of the actions of the Tenant or its successors, such that in any event the value of the improvements is less than the cost of removal,

remediation or renovation to bring the Property into compliance, then the Port may require the Tenant to remove any improvements or trade fixtures installed by the Tenant. The Tenant shall repair, at Tenant's expense, any damage to the Property resulting from such removal.

10.1 The equipment and fixtures on the property which belong to the Port shall remain the property of the Port and the Tenant shall be required to maintain the Port-owned equipment and fixtures during the term of this Agreement. The equipment and fixtures owned by the Port shall be returned to the Port upon the termination of this Agreement, reasonable wear and tear excepted.

11. ASSIGNMENT AND SUBLETTING. Tenant shall neither assign, sublet nor transfer its interest in this Lease, in whole or in part, to any person or entity, without Port's prior written consent. Each sublease for any portion of the premises in addition to the reference to Section 7 of this lease, shall specifically advise the subtenant that the sublease is subject to the reverter contained in the deed and indenture from the United States to the Port of Benton. No assignment or sublease of the Lease shall relieve the Tenant of its obligations under this Lease.

12. INSURANCE. Throughout the term, at Tenant's sole cost and expense, Tenant shall keep or cause to be kept in force, for the mutual benefit of Port and Tenant, comprehensive broad form railroad liability insurance (including a contractual liability endorsement) against claims and liability for personal injury, death or property damage arising from the use, operation, maintenance, occupancy, misuse, or condition of the Property and improvements, with limits of liability of at least \$5,000,000 and with deductibles in such amounts as may be reasonably acceptable to the Port. The Port shall be an additional insured on such policies.

12.1 RAILROAD PROPERTY INSURANCE. Throughout the term of the Lease, at Tenant's sole cost and expense, the Tenant shall keep or cause to be kept in force, for the mutual benefit of the Port and the Tenant, property insurance insuring all of the tracks, bridges, trestles, crossing and other improvements, fixtures, equipment and all of the railroad property subject to this lease against loss or damage from any cause, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port.

12.2 BUILDING PROPERTY INSURANCE. The Port shall maintain property insurance insuring the improvement known as the 1171 Building described in Attachment 1 against loss or damage from fire, flood, wind, or other natural disasters, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port. The Tenant shall maintain insurance coverage on the Tenant's property, fixtures and equipment located on the premises.

12.3 PROOF OF COMPLIANCE. The Tenant shall provide the Port with Certificates of Insurance showing the coverages and deductibles. All property insurance which the Tenant is required to maintain on the Port's property shall name the Port as the owner of the property and shall insure the Port's interest in the property. The Tenant shall deliver to Port, in the manner required for notices, a copy or certificate of all insurance policies required by this

Lease. Tenant shall include a provision in each of its insurance policies requiring the insurance carrier to give Port at least ninety (90) days prior written notice before such policy terminates. Tenant shall not substantially modify any of the insurance policies required by this Lease without giving at least ninety (90) days prior written notice to Port.

13. INDEMNIFICATION. The Tenant shall indemnify and hold the Port harmless from all liability, claims, damages, losses, or costs, including attorney fees, arising out of any claim, suit, action, or legal proceedings brought against the Port by any party alleged to have resulted from the Tenant's use, operation, maintenance or occupation of the railroad or any portion of the premises or any of Tenant's activities incidental thereto, or any breach or default in the performance of any of the terms or conditions of the Tenant's obligations under this lease agreement.

14. DEFAULT.

14.1 EVENTS OF DEFAULT. Each of the following events shall be a default by Tenant and a breach of this Lease.

14.1.1 The breach of any of the terms or conditions of the Lease Agreement

14.1.2 The failure or refusal to pay when due any installment of rent or other sum required by this Lease to be paid by Tenant, or the failure to perform as required or conditioned by any other covenant or condition of this Lease.

14.1.3 The appointment of a receiver to take possession of the Property or improvements, or of Tenant's interest in the leasehold estate or of Tenant's operations on the Property for any reason, unless such appointment is dismissed, vacated or otherwise permanently stayed or terminated within sixty days after the appointment.

14.1.4 An assignment by Tenant for the benefit of creditors or the filing of a voluntary or involuntary petition by or against Tenant under any law for the purpose of adjudicating Tenant a bankrupt; or for extending time for payment, adjustment or satisfaction of Tenant's liability; or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; unless the assignment or proceeding, and all consequent orders, adjudications, custodies, and supervision are dismissed, vacated, or otherwise permanently stayed or terminated within sixty days after the assignment, filing, or other initial event.

14.2 NOTICE. As a precondition to pursuing any remedy for an alleged default by Tenant, Port shall give written notice of default to Tenant, in the manner herein specified for the giving of notices. Each notice of default shall specify the alleged event of default and the intended remedy.

14.3 TENANT'S RIGHT TO CURE. If the alleged default is nonpayment of rent, taxes, or other sums to be paid by Tenant as provided in this Lease, Tenant shall have ten

(10) days after receipt of written notice to cure the default. For the cure of any other default, Tenant shall have thirty days after receipt of written notice to cure the default, provided, however, that if it takes more than thirty (30) days to cure a default, the Tenant shall not be in default if it promptly undertakes a cure and diligently pursues it.

14.4 TIME OF THE ESSENCE. Time is of the essence of this Lease, and for each and every covenant or condition which must be performed hereunder.

15. PORT'S REMEDIES. If any default by Tenant continues uncured after receipt of written notice of default and the period to cure as required by this Lease, for the period applicable to the default, subject to the provisions of Section 13, the Port has the following remedies in addition to all other rights and remedies provided by law or equity to which Port may resort cumulatively or in the alternative:

15.1 Without terminating this Lease, Port shall be entitled to recover from Tenant any amounts due hereunder, or any damages arising out of the violation or failure of Tenant to perform any covenant, condition or provision of this Lease.

15.2 Port may elect to terminate this Lease and any and all interest and claim of Tenant by virtue of such lease, whether such interest or claim is existing or prospective, and to terminate all interest of Tenant in the Property and any improvements or fixtures thereon (except trade fixtures). In the event this Lease is terminated, all obligations and indebtedness of Tenant to Port arising out of this Lease prior to the date of termination shall survive such termination. In the event of termination by Port, Port shall be entitled to recover immediately as damages the total of the following amounts:

15.2.1 The reasonable costs of re-entry and reletting, including, but not limited to, any expenses of cleaning, repairing, altering, remodeling, refurbishing, removing, Tenant's property or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, reasonable attorney's fees, court costs, broker's commissions and advertising expense.

15.2.2 The loss of rental on the Property accruing until the date when a new tenant has been or with the exercise of reasonable diligence could have been, obtained.

15.3 Port may re-enter the Property and take possession thereof and remove any persons and property by legal action or by self-help and without liability for damages, and Tenant shall indemnify and hold the Port harmless from any claim or demand arising out of such re-entry and removal of persons and property. Such re-entry by the Port shall not terminate the Lease or release the Tenant from any obligations under the Lease. In the event Port re-enters the Property for the purpose of reletting, Port may relet all or some portion of the Property, alone or in conjunction with other properties, for a term longer or shorter than the term of this Lease, upon any reasonable terms and conditions, including the granting of a period of rent-free occupancy or other rental concession, and Port may not be required to relet to any tenant which Port may reasonably consider objectionable.

15.4 In the event Port relets the Property as agent for Tenant, Port shall be entitled to recover immediately as damages the total of the following amounts.

15.4.1 An amount equal to the total rental coming due for the remainder of the term of this Lease, computed based upon the periodic rent provided for herein and without discount or reduction for the purpose of adjusting such amount to present value of anticipated future payments, less any payments thereafter applied against such total rent by virtue of the new lease.

15.4.2 The reasonable costs of re-entry and reletting, including but not limited to, any expense of cleaning, repairing, altering, remodeling, refurbishing, removing Tenant's property, or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, attorneys' fees, court costs, broker's commissions and advertising expense.

15.5 All payments received by Port from reletting shall be applied upon indebtedness and damages owing to Port from Tenant, if any, and the balance shall be remitted to Tenant.

16. WAIVER. No waiver of any default shall constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No waiver, benefit, privilege or service voluntarily given or performed by either party shall give the other any contractual right by custom, estoppel, or otherwise. The subsequent acceptance of rent pursuant to this Lease shall not constitute a waiver of any preceding default by Tenant other than default on the payment of that particular rental payment, regardless of Port's knowledge of the preceding breach at the time of accepting rent. Acceptance of rent or other payment after termination shall not constitute a reinstatement, extension or renewal of this Lease, or revocation of any notice or other act by Port.

17. ATTORNEYS' FEES. If either party brings any action or proceeding to enforce, protect or establish any right or remedy under this Lease, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs from the non-prevailing party. Arbitration is an action or proceeding for the purpose of this provision. The "prevailing party" means the party determined by the court or the arbitrator to most nearly have prevailed.

18. ACCESS BY PORT. Port, or Port's representatives and agents, shall have access to the Property at reasonable times and upon reasonable notice, for the purpose of inspecting the Property; provided that Port shall exercise all reasonable efforts not to unreasonably disturb the use and occupancy of the Property by Tenant.

19. RECORDING OF LEASE. Either party to this Lease may record the Lease with the Auditor of Benton County. In lieu of recording the entire Lease either party may record a memorandum of lease setting forth the legal description of the property, the parties and the term of the Lease, together with any additional information which the party deems to be relevant, and

as long as the information in the memorandum is accurate the other party agrees to sign the memorandum of lease.

20. HOLDING OVER. In the event Tenant shall hold over after the expiration or termination of this Lease, or at the expiration of any option term, such holding over shall be deemed to create a tenancy from month-to-month on the same terms and conditions of the lease except that the rental rate shall be adjusted as provided in Section 3 and the rent shall be prorated over a 365 day year and paid by Tenant each month in advance. The tenancy may be terminated by either party giving the other party thirty days written notice of the intent to terminate.

21. SECURITY FOR TENANT'S OBLIGATIONS. In addition to the security provided for in Section 5, in order to secure the prompt, full and complete performance of all of Tenant's obligations under this Lease, including but not limited to, Tenant's obligations to protect and indemnify Port from any liability subject to the lien, if any, of the holder of the first mortgage against the property, Tenant hereby grants to Port a security interest in and assigns to Port all of Tenant's right, title and interest in and to all rents and profits from the Property, all of the materials stored on the premises, and all permanent improvements constructed thereon, to secure the Tenant's obligations under this Lease. In the event Tenant defaults in any of its obligations hereunder, Port shall have the right at any time after the period for cure provided in paragraph 15.3, without notice or demand, to collect all rents and profits directly and apply all sums so collected to satisfy Tenant's obligations hereunder, including payment to Port of any sums due from Tenant. The assignment of rents to the Port shall be subordinate to any assignment of rents to a leasehold mortgagee for security purposes. Such remedy shall be in addition to all other remedies under this Lease. This security interest will not extend to the Tenant's business receivables other than rents and profits from the property, provided that this exception will not affect the enforcement or collection of any judgment obtained against the Tenant by the Port.

22. HAZARDOUS MATERIALS. Tenant shall not take or store upon the Property any hazardous or toxic materials; as defined by the law of the State of Washington or by federal law, except in strict compliance with all applicable rules, regulations, ordinances and statutes. Tenant shall comply with the Port's Hazardous Materials Communications Policy, but shall not be subject to the notice requirements thereof in connection with the installation, use, operation, or removal of usual office equipment including, without limitation, computers and photocopiers.

22.1 Tenant shall not permit any contamination of the Property. The Tenant shall immediately remove any contaminants or pollutants and shall promptly restore the Property, subject to any condition existing prior to the commencement of this Lease, which shall be the responsibility of the Port.

22.2 Tenant shall defend Port and hold it harmless from any cost, expense, claim or litigation arising from hazardous or toxic materials on the Property or resulting from the contamination of the Property, caused by the acts or omissions of the Tenant, its subtenants, employees, agents, invitees, or licensees, during the term of this Lease.

22.3 In the event of the termination of this Lease for any reason, the obligation of the Tenant to restore the Property and the obligation to indemnify the Port set forth above, shall survive the termination.

23. GENERAL CONDITIONS.

23.1 NOTICES. Any notices required or permitted to be given under the terms of this Lease, or by law, shall be in writing and may be given by personal delivery, or by registered or certified mail, return receipt requested, or by overnight courier, directed to the parties at the following addresses, or such other address as any party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law:

Port: Port of Benton
3100 George Washington Way
Richland, Washington 99352

Tenant: Tri-City Railroad Company, L.L.C.
2355 Stevens Drive
P.O. Box 1700
Richland, WA 99352

Any notice given shall be effective when actually received, or if given by certified or registered mail, upon the recipient's receipt of a notice from the U. S. Postal Service that the mailed notice is available for pick up.

23.2 NONMERGER. If both Port's and Tenant's estates in the Property or the improvements or both become vested in the same owner, this Lease shall nevertheless not be destroyed by application of the doctrine of merger except by the express election of the owner and the consent of the mortgagee or mortgagees under all mortgages existing upon the Property.

23.3 CAPTIONS AND TABLE OF CONTENTS. The Table of Contents of this Lease and the captions of the various paragraphs are for convenience and ease of reference only, and do not define, limit, augment or describe the scope, content or intent of this Lease or of any part or parts of this Lease.

23.4 EXHIBITS AND ADDENDA. All exhibits and addenda to which reference is made in this Lease are incorporated in the Lease by the respective references to them. References to "this Lease" includes matters incorporated by reference.

23.5 SUCCESSORS. Subject to the provisions of this Lease on assignment and subletting, each and all of the covenants and conditions of this Lease shall be binding upon and inure to the benefit of the heirs, successors, executors, administrators, assigns, and personal representatives of the respective parties. The Port agrees that if the Property is sold, assigned, or

conveyed, except for any conveyance to the United States, the Port will place a provision in any conveyance making the conveyance subject to the terms and conditions of this Lease. The Port represents, that if this Lease is recorded, any subsequent conveyance of the Property by the Port will be subject to the terms of this Lease, with the exception of any conveyance to the United States.

23.6 NO BROKERS. Each party warrants and represents that it has not dealt with any real estate brokers or agents in connection with this Lease. Each party will indemnify and hold the other harmless from any cost, expense or liability (including costs of suit and reasonable attorney fees) for any compensation, commission, or fees claimed by any broker or agent in connection with this Lease.

23.7 WARRANTY OF AUTHORITY. The persons executing and delivering this Lease on behalf of Port and Tenant each represent and warrant that each of them is duly authorized to do so and that the execution of this Lease is the lawful and voluntary act of the person on whose behalf they purport to act.

23.8 QUIET POSSESSION. The Port agrees that upon compliance with the terms and conditions of this Lease, the Tenant shall at all times have the right to the quiet use and enjoyment of the Property for the term of the Lease and any extensions.

23.9 LEASE CERTIFICATION. Upon the request of the Tenant the Port agrees to provide a written certification of the status of the Lease; to the best knowledge of the Port at the time of the certification, setting forth the following: i) whether the Lease is in full force and effect; ii) whether there have been any amendments or modifications to the Lease; iii) whether the Tenant is current in the payment of the rent and other charges under the terms of the Lease; iv) whether the Port is aware of any default or breach on the part of the Tenant.

23.10 PARTIAL INVALIDITY. If any provision of this Lease is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

23.11 CONSTRUCTION. The parties lease have reviewed this lease and have the opportunity to consult with their respective counsel. The lease shall not be deemed to be drafted by either party and the lease shall not be construed against either party as the drafter.

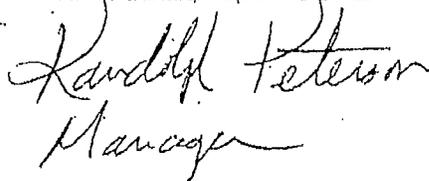
23.12 CONSENT. Whenever the consent or approval of a party to this Lease is required to be given by the terms of this Lease to the other party, such consent or approval shall not be unreasonably withheld or delayed.

DATED this 1st day of August, 2002.

PORT OF BENTON



TRI-CITY RAILROAD COMPANY, L.L.C.



Manager

Scott M. Hill

NOTARY PUBLIC in and for the State of
Washington, residing at *Pasco, WA*

My commission expires: *Jan 25, 2003*

PARCEL 8

A PORTION OF THE DEPARTMENT OF ENERGY HANFORD WORKS RAILROAD SPUR RIGHT OF WAY AS RECORDED UNDER AUDITORS FILE NUMBER 307015, RECORDS OF BENTON COUNTY, WASHINGTON, LOCATED IN THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 30, TOWNSHIP 9 NORTH, RANGE 29 EAST, W.M., BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF TRACT B OF COLUMBIA CENTER ESTATES NUMBER 2 AS RECORDED IN LINE 14 OF PLATS, BEING A POINT ON THE SOUTHERLY RIGHT OF WAY OF SAID RAILROAD SPUR AND A POINT OF CURVE; THENCE ALONG A NON-RADIAL CURVE TO THE LEFT ALONG SAID SOUTHERLY RIGHT OF WAY, HAVING A CENTRAL ANGLE OF $03^{\circ}02'28''$, A RADIUS OF 2342.34 FEET, A CHORD BEARING OF $S64^{\circ}18'23''E$, AN ARC DISTANCE OF 124.31 FEET TO THE TRUE POINT OF BEGINNING; THENCE $N01^{\circ}50'14''E$ A DISTANCE OF 108.52 FEET TO A POINT ON THE NORTHERLY MARGIN OF SAID RAILROAD SPUR RIGHT OF WAY AND POINT OF CURVE; THENCE ALONG A NON-RADIAL CURVE TO THE LEFT ALONG SAID NORTHERLY RIGHT OF WAY HAVING A CENTRAL ANGLE OF $01^{\circ}39'37''$, A RADIUS OF 2242.34 FEET, A CHORD BEARING OF $S65^{\circ}36'11''E$, AN ARC DISTANCE OF 64.97 FEET; THENCE $S01^{\circ}50'14''W$ A DISTANCE OF 107.29 FEET TO A POINT ON THE SOUTHERLY RIGHT OF WAY OF SAID RAILROAD SPUR AND POINT OF CURVE; THENCE ALONG A NON-RADIAL CURVE TO THE RIGHT ALONG SAID SOUTHERLY RIGHT OF WAY HAVING A CENTRAL ANGLE OF $01^{\circ}34'41''$, A RADIUS OF 2342.34 FEET, A CHORD BEARING OF $N66^{\circ}36'57''W$, AN ARC DISTANCE OF 64.51 FEET TO THE TRUE POINT OF BEGINNING.

SUBJECT TO RESERVATIONS, RESTRICTIONS, RIGHTS OF WAY AND EASEMENTS OF RECORD.

OWNERSHIP'S

PARCEL	ORIGINAL PARCEL DESCRIPTION	TAX ID NUMBER (Assessor File Number)	OWNERSHIP	BEFORE AREA (SQ FT)	ROW ACQUISITION AREA (SQ FT)	EASEMENT AREA (SQ FT)	REMAINDER AREA (SQ FT)	AFTER AREA (SQ FT)	ACQUISITION TYPE
1	TRAILHEAD RIGHT-OF-WAY	43800101	UP RAILROAD	N/A		4,000		N/A	EASEMENT
7	TRACT 8 of the Alameda Center Area	1209000-0009-0001	Alameda Center Assoc	10,441.4	7,500			2,941.4	RESE
8	RAILROAD RIGHT-OF-WAY	1209000-0009-0001	UP RAILROAD	N/A		6,000		N/A	EASEMENT

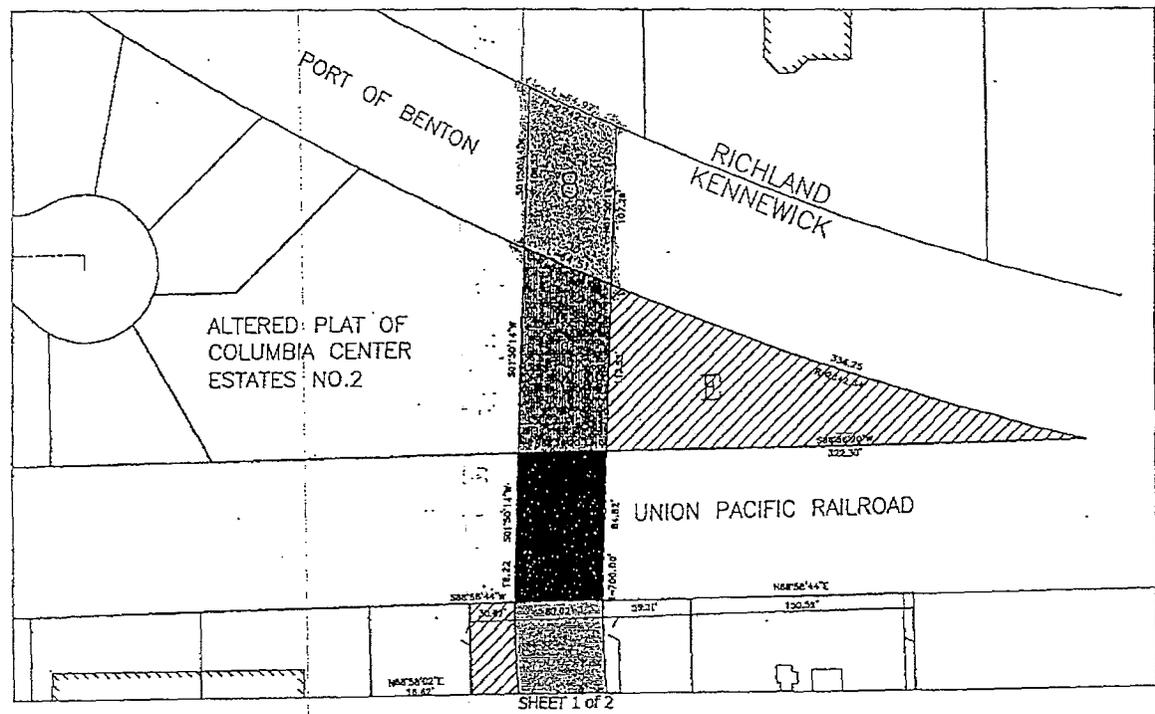
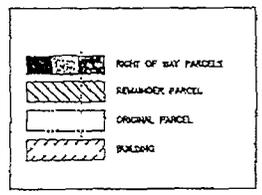
NUMERED PARCELS ARE REQUIRED FOR STREET RIGHT-OF-WAY.
LETTERED PARCELS ARE REMAINDERS.

CITY OF
KENNEWICK, WA.

N. CENTER PARKWAY
RIGHT-OF-WAY

SE 1/4 Section 30 Township 9 North Range 29 East
Willamette Meridian

Exhibit 3 (Cont.)



SHEET 1 of 2

RIGHT OF WAY PLAN
SHEET 2 OF 2

After recording return to:
Thomas A. Cowan
Cowan Walker, P.S.
P. O. Box 927
Richland, WA 99352

EASEMENT DEED

THE GRANTOR, PORT OF BENTON, a municipal corporation of the State of Washington, hereby quit claims, conveys and transfers to the Grantee, the CITY OF KENNEWICK, a municipal corporation of the State of Washington, an easement over, under and across the real estate situated in Benton County, Washington, more particularly described

Exhibit 1.

This easement is granted for the purpose of constructing and installing a public street within the easement, including the right to construct, install, maintain, repair and replace roadways, curbs, gutters, sidewalks, landscaping within the easement.

The easement may be used for the installation of utilities, including water, sewer, phone, communications, electrical and gas transmission lines. All utilities shall be underground.

This easement is granted pursuant to a Railroad Crossing Agreement entered into between the Grantor and the Grantee. The use of this easement is subject to all the terms and conditions of the Railroad Crossing Agreement.

Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	REBUTTAL VERIFIED
	)	STATEMENT OF FOSTER
Petitioner,	)	PETERSON RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE	)	CONTAINS COLOR
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

FOSTER PETERSON, being first duly sworn on oath, does hereby depose and state:

1. I am over the age of 18, an am competent to testify to the matters contained herein. I offer my testimony as a railroad operations expert. My professional qualifications and experience are set forth below:

PROFESSIONAL QUALIFICATIONS

2002 – Present Full Service Railroad Consulting, Inc. Marietta, GA
Partner

Provide clients with timely and accurate analysis of railroad operational issues. Provide training in railroad safety, rules, and operating practices. Conduct operational and safety audits. Provide services as a consulting and/or testifying expert in railroad mechanical, operating, and engineering disciplines. Provide

railroad technical and engineering consulting support from accident/incident response through case analysis and report preparation including consulting and/or testifying expert witness services if requested. Utilize vehicle and train dynamics simulation models in derailments and accident investigation and analysis. Design and perform field testing of rail vehicles.

1995 –2001 Rail Sciences Inc. Atlanta, GA

Senior Director Testing and Engineering Applications 2000-2001

Director Testing and Engineering Applications 1999-2000

Engineer 1995-1999

Responsible for the use and application of advanced analytical techniques for the solution of railway operational problems. Perform accident and derailment investigations, railroad operational and safety studies, vehicle dynamic studies, mechanical inspections, physical testing, and railroad training. Perform field investigation of derailments including gathering track measurements, digital wheel and rail profiles, mechanical data, and event recorder data. Experience with simulation tools such as the AAR's Train Operations Simulator, (TOS), Train Operations and Energy Simulator (TOES), and New and Untried Car Analytic Regime Simulation (NUCARS). As Director and Senior Director, responsible for Rail Sciences' testing and instrumentation work, including field testing of lateral/vertical wheelset forces, over-the-road testing, mechanical testing, and design and fabrication of test fixtures

WHITE PASS & YUKON ROUTE RAILROAD

2009 – Present White Pass & Yukon Route Railroad Skagway, AK

Consists of Pacific and Arctic Railway and Navigation Company (US), British Columbia-Yukon Railway Company (British Columbia) and The British Yukon Railway Company (Yukon)

Manager of Operating Practices

Responsible for training and management of operating employees in United States and Canada. Set up and administer locomotive engineer certification program. Create and deliver operating, safety, air brake and train handling and locomotive engineer training programs. Assist management with compliance with FRA and Transport Canada regulations. Qualified on and train WPYR personnel on Canadian Rail Operating Rules (CROR) and WPYR US Subdivision, Safety and Air Brake and Train Handling Rules. Help introduce newly rebuilt, technologically advanced diesel locomotives into service.

REBUTTAL VERIFIED STATEMENT OF FOSTER PETERSON
RE: PETITION FOR DECLARATORY ORDER - 2

TENNESSEE VALLEY RAILROAD MUSEUM, INC. and its Operating Subsidiaries:

1986 - Present

Tennessee Valley Railroad Museum (TVRM) Chattanooga, TN

East Chattanooga Belt Railroad (ECTB) Chattanooga, TN

Hiwassee River Railroad (HWRV) Copperhill, TN (2005-Present)

Tyner Terminal Railway Company (TNTX) Chattanooga, TN (2011-Present)

Director, Safety and Operating Practices (2011-Present)

Manager, Training, Rules & Safety (1995-2010)

Designated Supervisor of Locomotive Engineers (1995-2000, 2002-Present)

Currently Director, Safety & Operating Practices for the Operating Subsidiaries of Tennessee Valley Railroad Museum, Inc. including Tennessee Valley Railroad (operates historic passenger trains), East Chattanooga Belt Railroad (operates freight trains on former NS Belt Line in Chattanooga, TN), Hiwassee River Railroad (freight railroad in eastern Tennessee) and Tyner Terminal Railway (rail switching operations at Enterprise South Industrial Park in Chattanooga, TN), continuing work performed between 1995 and 2011 as Manager, Training Rules & Safety. Responsible in this capacity and as a Designated Supervisor of Locomotive Engineers (Road Foreman of Engines) for operating management of these railroads. Create and deliver rules and safety training for all TVRM operating, mechanical and engineering employees and help administer locomotive engineer certification program. Personally qualified on and train TVRM personnel on TVRM Rules, Norfolk Southern Rules and General Code of Operating Rules (starting in 2010). Act as liaison to Federal Railroad Administration and railroad partners Norfolk Southern, CSX Transportation and Genesee & Wyoming.

Set up rail operations in 2011 at Tyner Terminal Railway which provides the rail switching services at Enterprise South Industrial Park in Chattanooga, Tennessee. TNT's primary customer is a Volkswagen automobile assembly plant and interchanges with both Norfolk Southern and CSX Transportation.

Set up rail operations in 2005 as Chief Operating Officer of the Hiwassee River Railroad, a 43.5-mile shortline railroad in eastern Tennessee. Initial freight operations consisted of yard switching and road train operation of unit trains of iron ore. Passenger operations subsequently began on this line in 2006. Responsible for training of all operating personnel on this new property including certification of locomotive engineers and mechanical training (power brake law and freight car inspection). Designated Supervisor of Locomotive Engineers and certified locomotive engineer including on CSX trackage rights.

Locomotive Engineer (Qualified in 1990, Certified in 1993 Continuously to Present)

Qualified locomotive engineer on TVRM as well as Norfolk Southern and CSX trackage rights in Tennessee. Also operated on mainline NS trackage. Engineer qualification and later certification continuous to present day. Responsible for maintenance and servicing of locomotives and cars. Apprentice machinist study.

Railroad Operations 1986-1990

Brakeman/Fireman in train service. Also learned maintenance practices for cars and locomotives.

NEW GEORGIA RAILROAD

1993 – 1995 Atlanta, GA

Locomotive Engineer, Machinist

Qualified locomotive engineer. Operated on CSX trackage rights in Georgia as well as mainline operation on CSX and Norfolk Southern. Installed machine shop at Pullman Yard in Atlanta, and responsible for machining and welding repairs to cars and locomotives. Designed and built machines and fixtures for car and locomotive repair. Also responsible for mechanical support for cars in leasing program.

PUBLICATIONS AND PRESENTATIONS

- Basics of Train Handling: Braking” - International Association of Railway Operating Officers, Chicago, Illinois, September 2011
- The Train Is Unstoppable and Denzel Is Nowhere to Be Found (Are You Ready?), American Short Line and Regional Railroad Association Annual Convention, San Antonio, Texas, May, 2011
- “Basics of Train Handling: Getting Off to a Good Start” - International Association of Railway Operating Officers, Chicago, Illinois, September 2009
- “Locomotive Camera Update” - International Association of Railway Operating Officers, Chicago, Illinois, September 2009
- “Locomotive Event Recorder Update” - International Association of Railway Operating Officers, Chicago, Illinois, September 2008
- “The Effect of Slack Action and Hard Couplings on Locomotive Occupants” – National Association of Railroad Trial Counsel Fall Meeting, Colorado Springs, Colorado, September 2008
- “The Current State of Locomotive Event Recorders” – 13th Annual Railroad Liability Seminar, Denver, Colorado, July, 2006
- “The Current State of Locomotive Event Recorders” – Midwest Claims Conference, Naperville, IL, May 2006
- “(Almost) Everything You Need to Know About Locomotive Event Recorders: These Are Not Your Father’s 8 Tracks...” – National Association of Railroad Trial Counsel Winter Meeting, Naples, Florida, February, 2006

- “(Almost) Everything You Need to Know About Locomotive Event Recorders: These Are Not Your Father’s 8 Tracks...” – National Association of Railroad Trial Counsel Special Litigation Conference XVI, Park City, Utah, February, 2006
- “Advances in the Locomotive Event Recorder Download Process: Class 1 vs. Shortline/Regional Perspective” - International Association of Railway Operating Officers, Chicago, Illinois, September 2005
- “Risk Management: A Team Approach,” Twelfth Annual ASLRRRA Liability/Claims Seminar, July, 2005
- “Car and Locomotive Brakes 101: Involvement of Brakes in Railroad Accidents/Incidents and Subsequent Litigation,” Eleventh Annual ASLRRRA Liability/Claims Seminar, July, 2004
- “Modern Railroad Locomotive Technology,” Guest Lecturer at University of Minnesota Class AFEE & BIE3121, Communication, Power, Energy, Transportation and Machinery Technologies, March 2004
- “Defending Against Claims of Careless Train Operation”, 49th Annual Meeting, National Association of Railroad Trial Counsel , July, 2003 (Co-authored with B.P. Heikkila)
- “On-Train Railroad Employee Injuries: Causation, Investigation, Analysis and Technical Defense”, Tenth Annual Regional Railroad Liability Seminar, July, 2003
- “The Manifest” Bulletin of the International Association of Railway Operating Officers, Editor, June 2003, September 2004, April 2006
- “Investigating Derailments: Maintenance of Way and Track Integrity Considerations”, 9th Annual Railroad Liability Seminar, Indianapolis, Indiana, June, 2002
- “Causes, Analysis, and Prevention of Empty Tank Car Derailments”, International Association of Railway Operating Officers, Chicago, Illinois, September 2000 (Co-authored with G.P. Wolf)
- “The Use of Event Recorder Data in Reconstructing Railway Accidents”, Regional Railroad Liability Seminar, Nashville, Tennessee, July 2000 (Co-authored with G.P. Wolf)
- “An Integrated Approach to a Comprehensive Wheel/Rail Management System”, Advanced Rail Management Rail/Wheel Interface Infozone Sessions, Chicago, Illinois, May 2000 (Co-authored with G.P. Wolf)
- “Dynamic Response of High Speed Rail Vehicles over Perturbed Track”, Advanced Rail Management Rail/Wheel Interface Seminar, Chicago, Illinois, May 2000 (Co-authored with G.P. Wolf, RSI, and Jon Jeambey, TTX)

- “Deployment of AC Power: Effect on Train Operations and Track Structure”, International Association of Railway Operating Officers, Chicago, Illinois, September 1999 (Co-authored with G.P. Wolf)
- “The Relationship Among Operating Procedures, Track Geometry, Rail Profile, and Rail Wear Rates”, Advanced Rail Management Rail/Wheel Interface Seminar, Chicago, Illinois, May 1998 (Co-authored with G.S. Bachinsky and G.P. Wolf)
- “Optimizing Curve Superelevation to Reduce Rail Wear, Maintenance, and Derailment Potential”, Advanced Rail Management Rail/Wheel Interface Seminar, Chicago, Illinois, May 1998
- “Application and Validation of the Automated Truck Performance Measurement System”, American Society of Mechanical Engineers/Institute of Electrical and Electronic Engineers Joint Railroad Conference, Philadelphia, Pennsylvania, April 1998 (Co-authored with G.P. Wolf)
- “Automated Truck Performance Measurement System”, International Association of Railway Operating Officers, Chicago, Illinois, September 1997 (Co-authored with G.P. Wolf)
- “Optimizing LOCOTROL Train Performance”, GE-Harris LOCOTROL Distributed Power Seminar, Melbourne, Florida, February 1997 (Co-authored with G.P. Wolf)

MATERIALS REVIEWED

2. For the purposes of my rebuttal verified statement under 49 CFR 1112.6, I have reviewed the following material:

TCRY’s Petition for Declaratory Order; Affidavit of John Miller re: Petition for Declaratory Order; Affidavit of Counsel re: Petition for Declaratory Order; Affidavit of Rhett Peterson¹ re: Petition for Declaratory Order; Reply Brief of City of Kennewick and City of Richland; Verified Statement of Pete Rogalsky; Verified Statement of Susan Grabler; Verified Statement of Kevin Jeffers; and Verified Statement of Stephen DiJulio.

¹ I am not related to the Peterson family, which owns the Tri City Railroad.
 REBUTTAL VERIFIED STATEMENT OF FOSTER PETERSON
 RE: PETITION FOR DECLARATORY ORDER - 6

I have also interviewed the operations manager for TCRY, Rhett Peterson, as well as Randolph Peterson, the railroad's president, and have been provided with additional documents which I have attached to my verified statement as Exhibits, and are described more particularly below.

3. I have also reviewed the Surface Transportation Board's ("Board") May 21, 2015 Decision, and it is my understanding that the principal issue before the Board is whether the proposed Center Parkway at-grade crossing over TCRY's main track and parallel siding ("passing track") will unreasonably interfere with current or planned railroad operations.

4. It is also my understanding from Mr. John Miller and Mr. Rhett Peterson that the passing track is used by TCRY as follows:

This 1900-foot passing track is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south. TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track. As three railroads use these tracks, it is important to have the passing track as a location to set out or hold a train, while allowing another train to utilize the main line. The passing track also serves as a purge valve for the main TCRY yard when it reaches capacity, and it provides a place for TCRY to store railcars when they are not needed at industries. As noted, the passing track has switches at both ends; those switches tend to be used by TCRY on a daily basis.

March 18, 2015 Affidavit of John Miller, ¶12.

REBUTTAL TESTIMONY

5. It is my understanding that my rebuttal verified statement “shall be confined to issues raised in the reply statements to which they are directed” under 49 CFR 1112.6. Accordingly, for purposes of my rebuttal testimony, I will quote each paragraph of the verified statements to which I am rebutting.

VERIFIED STATEMENT OF ROGALSKY

6. **Paragraph 8** of the Rogalsky verified statement provides:

Statement: “TCRY is a lessee on the Port of Benton track.”

Response: This statement does not appear to be related to the question of whether the establishment of the proposed crossing will unreasonably interfere with current or planned railroad operations. However, it is common in the railroad industry to lease tracks for railroad operations. Of the four short line railroads I manage in Tennessee, three of them either lease or operate upon track they do not own. Class I railroads also often operate on leased track; one of Norfolk Southern’s main lines through the state of North Carolina is owned by the state, and is leased and operated upon by that railroad.

7. **Paragraph 14** of the Rogalsky verified statement says:

Statement: “A cold storage company is proceeding to develop a new storage facility in the City’s Horn Rapids Industrial Park that will be served by rail. When the facility is completed and begins shipping by rail, the increased rail shipping will have no impact on rail operations at the Crossing. The crossing safety devices

provide security and safety, and avoid conflicts between vehicular traffic and train traffic.”

Rebuttal: As stated above, I understand that the issue is not “conflicts between vehicular traffic and train traffic”, but rather whether the construction of this new at-grade crossing will unreasonably interfere with current or planned railroad operations. I have been advised by TCRY’s operations manager, Rhett Peterson, that shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY’s rail yard, and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars. The amount of activity seen is indicative of the increasing capacity of TCRY operations. In my opinion, this, in turn, makes it even more critical for TCRY to have use of its sole uninterrupted passing track for its current and planned operations. TCRY’s practices and planned uses of the 1900 foot siding are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate the current uses of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction

of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations.

8. **Paragraph 16** of the Rogalsky verified statement says:

Statement: "The City of Richland never made this rail traffic projection. The City of Richland has permitted development of a unit train servicing facility in its Horn Rapids Industrial Park. The facility is scheduled to begin operation in 2015. The facility's developers have speculated that additional business attracted to the facility may eventually result in up to two inbound and two outbound unit trains using facility per week. These trains would each include approximately one hundred cars. This activity, if it materialized in the future, would contribute no more than one additional train trip per day over the Crossing. Also, Miller Exhibit 5, 6, and 7 do not support Mr. Miller's assertion. Miller Exhibit 5 is TCRY's response to the UTC data request and TCRY's response to the Cities' data request, not a City of Richland document. Miller Exhibit 6 is a memo with supporting documentation from the City of Richland's Economic Development Committee. Miller Exhibit 7 is a real property purchase and sale agreement. These materials do not support John Miller's unfounded assertion that the City of Richland projected 12,500 inbound and 12,500 outbound cards per year."

Rebuttal: A unit train is a train consisting almost entirely of the same type of railcar, and typically has between 100 and 120 cars. TCRY's Petition, at page 16, quotes pages 4 and 5 of the February 24, 2014 Initial Order Denying Petition to

Open At-Grade Railroad Crossing, attached at Exhibit 3 to the March 18, 2015 Counsel Aff't, in which the Washington State administrative law judge describes the evidence presented by the City of Richland concerning the Horn Rapids rail loop and the projected number of unit trains:

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day).

I also reviewed the transcript of the testimony referenced in the above paragraph, which consisted of testimony elicited from Mr. Ballew by the attorney for the City of Richland at an administrative hearing before the Washington Utilities and Transportation Commission. The relevant pages were provided to me for my review, and are attached as **Exhibit 1**.

If Mr. Ballew's testimony is predictive of what will occur, then any customers on the loop may ultimately be served by 2 ½ unit trains per week, which, assuming a per-train consist of 100 to 120 railcars, equates to 200 to 240 carloads per week, times 52 weeks, yielding between 10,400 and 12,480 carloads per year.

Since TCRY is at the end of a line, connected to a main line, each "carload" represents two railcar trips across TCRY tracks. That is, an empty car

will be delivered to a customer, who will fill the car, and then it will be delivered to Union Pacific on its main line for transport (or vice-versa). So, as referenced above, 10,400 carloads represent 20,800 railcar trips across TCRY's tracks.

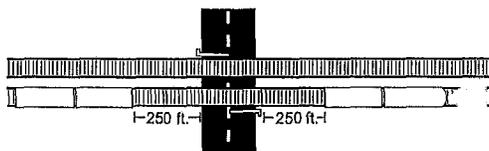
Mr. Rogalsky indicates that if this number of unit trains materializes in the future, then it would be the equivalent to one additional unit train per day going across the proposed crossing – that is, measuring in railcar trips, rather than carloads. With respect to the actual number of railcars involved, whether calculated on a carload per year or railcar trip per day basis, the projected maximum numbers by Mr. Ballew, City of Richland's Economic Development Manager, result in between 10,400 and 12,480 carloads per year, or between 20,800 and 24,960 rail car trips per year.

This projected increase in railcars makes the uninterrupted parallel tracks even more critical for TCRY's current and planned railroad operations. Lacking the unencumbered use of this small railroad operation's sole uninterrupted passing track and parallel main track will interfere with TCRY's ability to stage, pause, or hold a manifest or any unit train approaching the loop without violating best railroad practices by fouling an at-grade crossing for unknown lengths of time, and would likewise not be consistent with GCOR 6.32.4, 6.32.5, and 6.32.6. As I have confirmed with TCRY's operations manager, TCRY has adopted the GCOR. Copies of the relevant sections of the 7th Edition are below, and are also attached to my verified statement as **Exhibit 2**.

6.32.4 Clear of Crossings and Signal Circuits

Leave cars, engines, or equipment clear of road crossings and crossing signal circuits.

When practical, avoid leaving cars, engines, or equipment standing closer than 250 feet from the road crossing when there is an adjacent track.



[Diagram A.]

6.32.5 Actuating Automatic Warning Devices Unnecessarily

Avoid actuating automatic warning devices unnecessarily by leaving switches open or permitting equipment to stand within the controlling circuit. If this cannot be avoided and if the signals are equipped for manual operation, a crew member must manually operate the signal for movement of traffic. A crew member must restore signals to automatic operation before a train or engine occupies the crossing or before it leaves the crossing.

6.32.6 Blocking Public Crossings

When practical, a standing train or switching movement must avoid blocking a public crossing longer than 10 minutes.

I understand that in addition to these GCOR provisions, the City of Kennewick also has a local ordinance prohibiting the blocking of public crossings. If a train being held at the proposed crossing location is there for more than 10 minutes, the train would have to be broken in order to clear the crossing. Once a train is cut, there will be a delay for the reconnection proportional with the length of the train. If the train sits broken for longer than four hours, a brake test must be done before moving the train. This federal brake test delays the train for an amount of time proportional with the train's length.

Further, because of the local ordinance, and the GCOR rule, broken trains sitting too close to an at grade crossing can create a visual hazard (restricting motorist ability to see past railcars parked), meaning the railcars must be spotted

at least 250 feet from each side of the new crossing, meaning that use of 550-600 feet of the parallel main and passing track are being eliminated (*i.e.* the width of the vehicular right of way, plus 250 feet to either side).

9. **Paragraph 18** of the Rogalsky verified statement provides:

Statement: “The field study documents actual track usage through (1) time lapse footage of the track and (2) still camera shots of track usage. Exhibit A, attached to this Verified Statement, shows the time lapse camera in the Holiday Inn Express, located immediately to the north of the tracks. Exhibit A also shows that my staff took photos of the track and siding just to the north of the tracks.”

Rebuttal: These photographs appear to document the normal operations of a Class III railroad of this size, in this part of the country during this season (*i.e.* primarily agricultural customers), operating on a limited stretch of railroad track with only one non-railyard location to switch and store railcars. Moreover, the time-lapse camera located in what appears to be a supply room at a nearby chain hotel is pointed in a westerly direction, and does not observe either the southern switch or the approximately 600 southern feet of the parallel tracks at issue.

Generally, best railroad operations practice is that when one is using a siding to switch and then spot and store rail cars, one spots the cars near, though not on top of or in foul of the switch being used. Selection of where, when, and how to switch and spot are determined by the ultimate destination of the railcars.

Here, TCRY interchanges with the Union Pacific in the City of Kennewick, to the

south and east of the parallel siding in question. Consequently, TCRY uses the southern switch and spots cars bound for the Union Pacific interchange at the southern end of the 1900-foot siding. As a result, the still photographs taken of the railcars shown in Exhibit A to Rogalsky's verified statement depict those railcars in the place they should be located in preparation for interchange with the Class I mainline, consistent with best railroad operations practices. Not using the southern switch for southbound cars, or spotting cars in the north that are southbound would not be preferred, as it would not be an efficient use of fuel, time, or labor.

10. **Paragraph 19** of the Rogalsky verified statement provides:

Statement: "The Field Study began on February 10, 2015 and it continues to this day. For the purposes of this proceeding for the STB, the attached exhibits include information from February 10, 2015 through May 26, 2015."

Rebuttal: I have been advised by TCRY's operations manager, Rhett Peterson, that shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY's rail yard, and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars. The amount of activity seen is indicative of the increasing capacity of TCRY operations. In my opinion, this, in turn, makes it even more critical for TCRY to

have use of its sole uninterrupted 1900 foot parallel main and passing tracks for its current and planned operations.

11. **Paragraph 25** of the Rogalsky verified statement provides:

Statement: “The field study and my past observations show that railcars were present (staged) on the siding most days during the referenced period. Based on the Field Study and observations, once the cars were placed on the siding, they typically stayed at the same locations on the siding for three (3) days or more, on many occasions they stayed for more than a week.”

Rebuttal: It is my understanding that Mr Rogalsky has no experience, training, or education in railroad operations and management. He uses the term “staged”, whereas the correct railroad term is “spotted” in this context, as it describes railcars that are spotted and set for storage, unconnected to a locomotive. As previously stated, the railcars were spotted in the appropriate location, consistent with best railroad operations practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick. Moreover, a short line railroad like TCRY which serves primarily agriculture-industry customers has high and low seasons related to those of its customers. However, as can be seen by the photographs I was advised have been taken in early June, 2015, the TCRY is and will remain extremely busy during its normal busy seasons, and it will be critical for it to have use of its 1900 foot siding in the

future, without the interposition of a new at grade crossing bisecting that track and limiting or eliminating its usefulness. Copies of the photographs I was provided are attached as **Exhibit 3**.

12. **Paragraph 26** of the Rogalsky verified statement provides:

Statement: “During the field study TCRY frequently staged cars immediately in front of the proposed Center Parkway Crossing, instead of elsewhere on the siding track.”

Rebuttal: As previously stated, the correct railroading term is “spotted”, rather than “staged” in this particular context, as the spotted cars are being stored. As previously stated, the railcars were spotted in the appropriate location, consistent with best railroad operations practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick.

VERIFIED STATEMENT OF GRABLER

13. **Paragraph 11** of the Grabler verified statement provides:

Statement: “TCRY is a lessee of the tracks.”

Rebuttal: As I noted above, statements like this do not appear to be related to the question of whether the establishment of the proposed crossing will unreasonably interfere with current or planned railroad operations. Again, that being said, I reiterate that it is common in the railroad industry to lease tracks for railroad operations. Of the four short line railroads I manage in Tennessee, three of them

either lease or operate upon track they do not own. Class I railroads also often operate on leased track; one of Norfolk Southern's main lines through the state of North Carolina is owned by the state, and is leased and operated upon by that railroad.

14. **Paragraph 13** of the Grabler verified statement provides:

Statement: "I have personally observed the tracks (including train movement) and the proposed Crossing. I have considered the record of train movement from railway-filed reports with the UTC. I have reviewed a field study prepared by the City of Richland that document the use of the existing rail siding that crosses the proposed roadway crossing location. Those observations are dated from February 10, 2015 to May 26, 2015. As discussed in greater detail in Pete Rogalsky's verified statement, both still and time-lapse photos were used to compile the field study data."

Rebuttal: I have been advised by Rhett Peterson, TCRY's operations manager, that shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY's rail yard and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars. The amount of activity seen is indicative of the increasing capacity of TCRY operations. In my opinion, this, in turn, makes it even more critical for TCRY to

have use of its sole uninterrupted passing track for its current and planned operations.

15. **Paragraph 17** of the Grabler verified statement provides:

Statement: “The siding track that is west of and parallel to the main line track and adjacent to the hotel is being used as a storage track.”

Rebuttal: Ms. Grabler does not appear to have experience or training in railroad operations, and it is unclear to me what definition of ‘storage track’ she has in mind. As described to me by TCRY’s operations manager Rhett Peterson, the 1900 foot passing track is the only parallel siding TCRY has outside of its railyard. It is used for switching, a purge valve when the railyard is overcapacity, and a holdout when trains need to pass, as TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track.

The photographs to which Ms. Grabler refers document normal operations of a Class III railroad of this size, in this part of the country during this season (*i.e.* primarily agricultural customers), operating on a limited stretch of railroad track with only one non-railyard location to switch and store railcars. Moreover, the time-lapse camera located in what appears to be a supply room at a nearby chain hotel is pointed in a westerly direction, and does not observe either the southern switch or the approximately 600 southern feet of the parallel tracks at issue.

Generally, best railroad operations practice is that when one is using a siding to switch and then spot and store rail cars, one spots the cars near, though not on top of or in foul of the switch being used. Selection of where, when, and how to switch and spot are determined by the ultimate destination of the railcars. Here, TCRY interchanges with the Union Pacific in the City of Kennewick, to the south an east of the parallel siding in question. Consequently, TCRY uses the southern switch and spots cars bound for the Union Pacific interchange at the southern end of the 1900-foot siding. As a result, the still photographs taken of the railcars shown in Exhibit A to Rogalsky's verified statement depict those railcars in the place they should be located in preparation for interchange with the Class I mainline, consistent with best railroad operations practices. Not using the southern switch for southbound cars, or spotting cars in the north that are southbound would not be preferred, as it would not be an efficient use of fuel, time, or labor.

16. **Paragraph 18** of the Grabler verified statement provides:

Statement: "TCRY is staging cars immediately in front of the proposed Center Parkway Crossing, instead of elsewhere on the siding track."

Rebuttal: It is my understanding that Ms Grabler has no experience, training, or education in railroad operations. She uses the term "staged", whereas the correct railroad term is "spotted" in this context. As previously stated, the railcars were spotted in an appropriate location, consistent with best railroad operations

practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick. Moreover, a short line railroad like TCRY which serves primarily agriculture-industry customers has high and low seasons related to those of its customers. However, as can be seen by the photographs I was advised have been taken in early June, 2015, the TCRY is and will remain extremely busy during its normal busy seasons, and it will be critical for it to have use of its 1900 foot siding in the future, without the interposition of a new at grade crossing bisecting that track and limiting or eliminating its usefulness.

17. **Paragraph 19** of the Grabler verified statement provides:

Statement: “The siding track is not being used as a typical railroad passing track, because of the parked rail cars that the TCRY is parking on the siding track. There appears no reason for such conduct other than an attempt to mislead the STB. And, TCRY is parking rail cars on the siding tracks for several days at a time, which would preclude the TCRY Railroad from using the siding as a passing track (as TCRY apparently asserts).”

Rebuttal: It appears that when Ms. Grabler accuses TCRY of misleading the Board, she has not reviewed the Affidavits of John Miller or Rhett Peterson, nor the TCRY’s Petition to this Board, all of which describe TCRY’s normal operations in switching and storing rail cars on the 1900 foot siding, which TCRY

accurately refers to as a 'passing track' given its length, location, and presence of switches at both ends. Moreover, from a railroad operations standpoint, her statement that parking railcars would 'preclude...[use] as a passing track' is incorrect. First, it is not unusual for a small, Class III railroad with only one parallel siding outside of its railyard to spot and store cars for varying lengths of time on that siding, and as I've described above, normal operations would be to spot the cars near the switch. Second, the significance of this parallel track to TCRY is that it has switches at both ends. Given that configuration, railcars can be switched, spotted, and stored at one end, while the other is kept clear for moving and holding trains, to allow passing. So, rather than 'precluding' use as a passing track, TCRY's practices are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location if it chooses or needs to, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations.

18. **Paragraph 20** of the Grabler verified statement provides:

Statement: "The Automatic Constant Warning Devices included in the Crossing's safety features give a constant warning time to all motorists using an

at-grade highway-railroad crossing equipped with gates and lights. The CWT is defined by the Federal Highway Administration as a warning time of not less than 20 seconds. The railroads will typically use approximately 30-35 seconds of CWT, which will give a CWT whether the train is traveling at 5 mph or 35 mph”

Rebuttal: I have been asked to offer my professional opinions, from the perspective of a railroad operations expert, as to whether the proposed at grade crossing will unreasonably interfere with current or planned railroad operations. Paragraph 20 of the Grabler verified statement does not appear to address a railroad operations issue.

Currently, no at-grade crossing exists at this location. Not having an at-grade crossing is, from a railroad operations standpoint, safer than installing a new at-grade crossing given that the separation of track and roadway removes the possibility of train / motor vehicle interaction. Describing establishing a new at-grade crossing, and then describing the warning systems protecting the crossing, only describes mitigating the safety risk you create by installing the new crossing in the first place. I agree with the quotation from the UTC in TCRY’s Petition at page 20, that “the benefits to public safety alleged by the Cities are too slight on their own to support the [proposed crossing], even though the inherent risks are mitigated to a large extent by the project design.”

As I've stated above, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching

I further note that in my railroad operations experience, it is unusual to have an at-grade crossing across a main track with a parallel siding of this size, simply because of the significant impact the proximity of an at grade crossing to a switch and siding has on operations. Installation of gates and lights at an at-grade crossing does not reduce the inherent interference on railroad operations presented by the presence of the crossing itself. In my years of railroading experience, I know of many instances of error and equipment failure which have resulted in injuries and fatalities to railroad crew and motorists at at-grade crossings equipped with gates and lights. From an operations perspective, it is preferred to close at-grade crossings or separate the grade, rather than to open new at-grade crossings.

19. **Paragraph 21** of the Grabler verified statement provides:

Statement: "The Crossing also is in conformance with the MUTCD. 'The gates should cover the approaching highway to block all highway vehicles from being driven around the gate without crossing the center line.' This will typically keep even the smallest of vehicles from trying to circumvent the automatic gates."

Rebuttal: I re-iterate that from the perspective of railroad operations, regardless of the warning systems which accompany this proposed crossing, the

establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations.

20. **Paragraph 22** of the Grabler verified statement provides:

Statement: "In addition to these safety measures, the Crossing's safety features includes center medians, which are known in the railroad crossing safety arena, deters drivers from trying to circumvent the automatic warning devices."

Rebuttal: I re-iterate that from the perspective of railroad operations, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations.

21. **Paragraph 23** of the Grabler verified statement provides:

Statement: "The Crossing will not adversely impact TCRY train operations because of the Crossing's safety features and geometry."

Rebuttal: Again, I re-iterate that from the perspective of railroad operations, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade

crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations.

22. **Paragraph 24** of the Grabler verified statement provides:

Statement: "Based on my 42 years of railroad engineering experience, and my knowledge of the operations of the Port of Benton tracks that begin at the Richland Junction, there is no impact on the movement of freight or other rail as a result of the Crossing."

Rebuttal: Ms Grabler, in her verified statement, does not refer to any of the rules contained within the GCOR, or promulgated by the Federal Railroad Administration, that TCRY must follow. The establishment of this new at grade crossing will have a significant impact on TCRY's current and future movement of freight, as I have discussed above. I re-iterate that from the perspective of a railroad operations expert, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations. In summary, paragraph 24 of Ms Grabler's verified statement does not address the issue of whether excluding TCRY's current use of that 1900 foot siding through construction of a bisecting at grade crossing is an unreasonable interference with railroad operations.

VERIFIED STATEMENT OF JEFFERS

23. **Paragraph 13** of the Jeffers verified statement provides:

Statement: “Based upon information submitted by TCRY to the UTC, I calculated that an average of three to five TCRY trains pass the crossing location on a daily basis. Based upon a field study conducted by the City of Richland using time-lapse photos, I calculate two to four TCRY trains pass the proposed crossing location on a daily basis, carrying on average of 9 cars per train.”

Rebuttal: It appears Mr. Jeffers, who discloses no expertise, experience, or training in railroad operations, was not provided with any information concerning either the seasonal nature of a Class III railroad with largely agricultural-related customers, nor was he provided information concerning the unit trains the City of Richland expects at its new Horn Rapids rail loop, nor was he provided with information concerning the new Preferred Freezer Services plant, at which TCRY is now the rail manager. Instead, it appears he relies upon information which is several years old, coupled with surveillance from winter and spring only showing one small portion of track, and was not provided with information from early June of 2015, showing that TCRY’s railyard is nearing over capacity with refrigerator cars, waiting for the July opening of the Preferred Freezer Services plant.

24. **Paragraph 14** of the Jeffers verified statement provides:

Statement: “TCRY’s petition states that ‘TCRY is expected to handle approximately 4,175 carloads on this trackage in 2015.’ Actual track usage does not support TCRY’s estimate.”

Rebuttal: As described in rebuttal to paragraph 13 of Jeffers’ verified statement, TCRY’s rail business is seasonally affected, and is increasing substantially in the summer of 2015, given the July opening of the Preferred Freezer Services plant. I understand from this paragraph that Mr. Jeffers believes rail traffic is both static and uniform throughout the year. Neither assumption is valid. Again, as I understand the issue before the Board is whether the proposed crossing will unreasonably interfere with current or planned railroad operations. As I previously stated, the establishment of the crossing itself will unreasonably interfere with current operations, and will have an even more significant negative effect on future operations, given projections of increased traffic from the substantial industrial development along that rail line.

25. **Paragraph 15** of the Jeffers verified statement provides:

Statement: “Even if track use increased, the crossing safety devices provide security and safety, and avoid conflicts with train traffic.”

Rebuttal: Again, as I understand the issue before the Board is whether the proposed crossing will unreasonably interfere with current or planned railroad operations. Mr Jeffers, in his verified statement, does not refer to any of the rules

contained within the GCOR, or promulgated by the Federal Railroad Administration, that TCRY must follow. I re-iterate that from the perspective of railroad operations, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations. Paragraph 15 of Mr Jeffers' verified statement does not address the issue of whether excluding TCRY's current use of that 1900 foot siding through construction of a bisecting at grade crossing is an unreasonable interference with current or planned railroad operations.

26. **Paragraph 18** of the Jeffers verified statement provides:

Statement: "I have reviewed a field study prepared by the City of Richland that documents observations of the use of the existing rail siding that cross the proposed roadway crossing location. Those observations are dated from February 10, 2015 to May 26, 2015. As discussed in greater detail in Pete Rogalsky's verified statement, both still and time-lapse photos were used to compile the field study data."

Rebuttal: I have been advised by TCRY's operations manager, Rhett Peterson, that shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union

Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY's rail yard, and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars. The amount of activity seen is indicative of the increasing capacity of TCRY operations. In my opinion, this, in turn, makes it even more critical for TCRY to have use of its sole uninterrupted passing track for its current and planned operations.

27. **Paragraph 19** of the Jeffers verified statement provides:

Statement: "The documentation showed that railcars were present on the siding on most days during the referenced period. Based on the observations, once the cars were placed on the siding, they typically stayed at the same locations on the siding for three days or more, and on many occasions they stayed for more than a week."

Rebuttal: As previously stated, the railcars were spotted in an appropriate location, consistent with best railroad operations practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick. Moreover, a short line railroad like TCRY which serves primarily agriculture-industry customers has high and low seasons related to those of its customers. However, as can be seen by the photographs I was advised have been taken in early June, 2015, the TCRY is and will remain extremely busy during its

normal busy seasons, and it will be critical for it to have use of its 1900 foot siding in the future, without the interposition of a new at grade crossing bisecting that track and limiting or eliminating its usefulness.

28. **Paragraph 20** of the Jeffers verified statement provides:

Statement: “The field study data demonstrates that TCRY is using the siding for car storage, not for regular switching, as might be seen in a typical yard. Also, since the cars were observed being moved into place and then removed only by TCRY locomotives, there is no interchange with UPRR or BNSF occurring here.”

Rebuttal: It appears that Mr. Jeffers is expressing opinions concerning railroad operations, though he discloses no training or experience in railroad operations. Nor does he disclose the basis for these opinions. I do not know why he refers to a “typical yard”, as the parallel main and siding in question are not located in a yard. I do not know what he means in this context by the term “regular switching”, though it appears he believes “regular switching” must occur in a yard. This is incorrect. Switching can occur frequently, wherever there are switches. His statement “there is no interchange with UPRR or BNSF occurring here” shows a lack of knowledge of the underlying facts, or TCRY’s operations, and the contents of TCRY’s Petition to this Board. TCRY has exclusive use of the 1900 foot passing track, and is the only railroad to make use of it. TCRY does not interchange with BNSF, though BNSF trains run across TCRY’s track. TCRY interchanges with Union Pacific in within Kennewick, though not at the location

of the parallel main track and 1900 foot parallel passing track in question. That only TCRY locomotives were observed moving railcars on the 1900 foot siding is consistent with TCRY's exclusive right to use that track.

29. **Paragraph 21** of the Jeffers verified statement provides

Statement: "The field study also demonstrates that TCRY is placing cars on the siding immediately in front of the Crossing. It appears that TCRY's car staging is solely for the purposes of misleading the STB in this proceeding because the car placement in front of the Crossing does not serve any railroad purpose."

Rebuttal: Mr Jeffers has disclosed no railroad operations experience, nor any basis to opine as to the "railroad purpose" of operations decisions and practices. It appears that when Mr Jeffers accuses TCRY of misleading the Board, he has not reviewed the verified statements of John Miller or Rhett Peterson, nor the TCRY's Petition to this Board, all of which describe TCRY's normal operations in switching and storing rail cars on the 1900 foot siding, which TCRY accurately refers to as a 'passing track' given its length, location, and presence of switches at both ends. Moreover, from a railroad operations standpoint, his statement that "placement in front of the Crossing does not serve any railroad purpose" is incorrect. First, there is no 'Crossing', and so no railcars were placed in front of one. To have done so would have violated GCOR 6.32.6, concerning Blocking Public Crossings, which illustrates the unreasonable interference upon railroad operations construction of this crossing will have. Second, it is not unusual for a

small, Class III railroad with only one parallel siding outside of its railyard to spot and store cars for varying lengths of time on that siding, and as I've described above, normal operations would be to spot the cars near the switch. Third, the significance of this parallel track to TCRY is that it has switches at both ends. Given that configuration, railcars can be switched, spotted, and stored at one end, while the other is kept clear for moving and holding trains, to allow passing. So, TCRY's practices are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location, and TCRY has no other equivalent siding to move its operations to. The construction of the proposed crossing will have a substantial impact upon TCRY's present and planned railroad operations.

30. **Paragraph 22** of the Jeffers verified statement provides

Statement: "The only practical use of the siding track is for long-term storage of rail cars not required by a shipper, or to store on-track equipment and rail cars used for track maintenance or to hold railcars that are found to be defective by a train crew while en route. These actions do not require blocking the Crossing."

Rebuttal: My rebuttal to this paragraph is similar as to paragraph 22 of Mr Jeffers' verified statement. There are many other uses of sidings in railroad

operations, of which Mr. Jeffers is unaware, not having education, training, or expertise in railroad operations. First, there is no 'Crossing', and so no railcars were placed in front of one. To have done so would have violated GCOR 6.32.6, concerning Blocking Public Crossings, which illustrates the unreasonable interference upon railroad operations construction of this crossing will have. Second, it is not unusual for a small, Class III railroad with only one parallel siding outside of its railyard to spot and store cars for varying lengths of time on that siding, and as I've described above, normal operations would be to spot the cars near the switch. Third, the significance of this parallel track to TCRY is that it has switches at both ends. Given that configuration, railcars can be switched, spotted, and stored at one end, while the other is kept clear for moving and holding trains, to allow passing. So, TCRY's practices are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location, and TCRY has no other equivalent siding to move its operations to. The construction of the proposed crossing will have a substantial impact upon TCRY's present, and future railroad operations.

31. **Paragraph 23** of the Jeffers verified statement provides

Statement: “Based on my experience, and my knowledge of the operations of the Port of Benton tracks that begin at the Richland Junction, there is no impact on the movement of freight or other rail as a result of the Crossing.”

Rebuttal: At the outset, I note that the Port of Benton is not a common carrier by rail, nor does it operate the tracks in question nor a railroad operation upon them. The tracks at issue are operated upon by TCRY.

The final clause of this paragraph appears similar to the final clause in the final paragraph of the Grabler verified statement, and it is unclear what an “impact on the movement of...other rail” means. Nonetheless, Mr Jeffers, in his verified statement, does not refer to any of the rules contained within the GCOR, or promulgated by the Federal Railroad Administration, that TCRY must follow. The establishment of this new at grade crossing will have a significant impact on TCRY’s current and future movement of freight, as I have discussed above. I reiterate that from the perspective of railroad operations, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY’s current and planned railroad operations.

VERIFIED STATEMENT OF DIJULIO

32. Paragraph 3 of the DiJulio verified statement provides:

Statement:

Attached hereto as Exhibit A is a true and correct copy of the Amended Order Granting BNSF's Motion For Summary Judgment, Denying TCRY's Motion For Summary Judgment, And Denying All Other Pending Motions As Moot, *BNSF Railway Co v. Tri-City and Olympa R.R.*, United States District Court, Eastern District of Washington, No. CV-09-5062-EFS (filed February 14, 2012).

Rebuttal: I have reviewed this document, and do not understand why it has been included. It does not address the 1900 foot parallel tracks at issue, nor the proposed Center Parkway crossing, nor whether establishment of the new crossing would unreasonably interfere with current or planned railroad operations.

STATE OF GEORGIA)

County of Cobb) : ss.

Foster Peterson being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Foster Peterson
FOSTER PETERSON

SUBSCRIBED AND SWORN to before me this 22nd day of June, 2015, by FOSTER PETERSON.

Bliss A Peterson
Notary Public in and for the State of Georgia , residing at Cobb County
My Commission Expires: 11/16/2015

REBUTTAL VERIFIED STATEMENT OF FOSTER PETERSON
RE: PETITION FOR DECLARATORY ORDER - 36



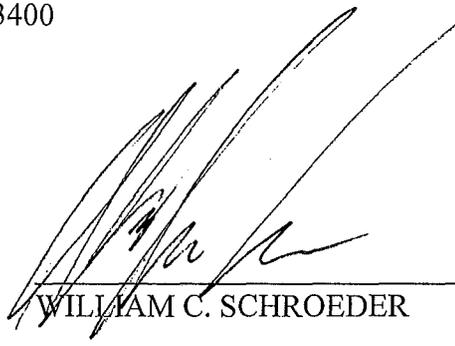
CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, I caused to be served a true and correct copy of the foregoing **REBUTTAL VERIFIED STATEMENT OF FOSTER PETERSON RE: PETITION FOR DECLARATORY ORDER**, by the method indicated below and addressed to the following:

Heather Kintzley	_____	U.S. MAIL
Richland City Attorney	_____	HAND DELIVERED
975 George Washington Way	<u> X </u>	OVERNIGHT MAIL
PO Box 190 MS-07	_____	TELECOPY
Richland, WA 99352		

Lisa Beaton	_____	U.S. MAIL
Kennewick City Attorney	_____	HAND DELIVERED
210 West 6 th Avenue	<u> X </u>	OVERNIGHT MAIL
P.O. Box 6108	_____	TELECOPY
Kennewick, WA 99336		

P. Stephen DiJulio	_____	U.S. MAIL
Jeremy Eckert	_____	HAND DELIVERED
Foster Pepper PLLC	<u> X </u>	OVERNIGHT MAIL
1111 Third Avenue, Suite 3400	_____	TELECOPY
Seattle, WA 98101		



WILLIAM C. SCHROEDER

1 witness, Your Honor.

2 ADMINISTRATIVE LAW JUDGE TOREM: Anything from
3 the city?

4 MR. DIJULIO: Thank you, Your Honor. Very
5 briefly.

6
7

8 CROSS-EXAMINATION

9
10

BY MR. DIJULIO:

11 Q. Mr. Ballew, talking about the Central Washington
12 Transfer Terminal facility, the Washington Transfer Terminal
13 facility, there is already a Washington Transfer Terminal
14 facility in the Horn -- general Horn Rapids area, is that
15 correct?

16 A. The principals of Central Washington Transfer
17 Terminal, LLC also own property in the Horn Rapids Industrial
18 Park where they conduct this activity.

19 Q. Okay. And so is this a new facility to replace
20 the existing facility, or is it an additional facility so
21 there will be two operating facilities?

22 A. That would be up to Central Washington Transfer
23 Terminal on how they do that. We believe that much of the
24 business that's currently conducted on their existing property
25 will be switched to this property, but that, again, is their



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EXHIBIT I

1 business case to make.

2 Q. Okay. And is that existing facility rail served?

3 A. Yes.

4 Q. And has that facility received unit trains
5 currently?

6 A. Currently I'm not aware of unit trains serving it.

7 Q. Has it received unit trains in the past?

8 A. It has received -- the facility is served by a
9 small rail loop that requires the unit train to be broken
10 apart and then -- and then off-loaded and then, you know, next
11 set of cars brought in and off-loaded. And so in the past, it
12 was considered -- it did -- unit trains were brought in
13 through town, came up north into north Richland, were broken
14 apart somewhere in north Richland, and then they'd go into
15 that facility.

16 Q. Okay. And that has been the subject -- that other
17 loop has been the subject of prior testimony. You understand
18 that other smaller loop to be the existing TCRY loop within
19 the Horn Rapids industrial area?

20 A. Yes.

21 Q. Okay. Now, with the new proposed Central
22 Washington Transfer Terminal facility, has the City of
23 Richland determined what if the maximum, most optimistic
24 development scenario arising out of these agreements comes
25 through, the number of unit trains that would be anticipated?



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1 A. We believe operationally the track will be limited
2 to an average of two and a half trains per week.

3 Q. And when you say two and a half trains per week,
4 you're talking about a total of five trips, two and a half in,
5 two and a half out, or one per day?

6 A. Approximately, yes.

7 Q. Okay. And sitting here today, you don't know
8 whether there will continue to be trains serviced to the other
9 facility operated by Central Washington Transfer Terminal?

10 A. I do not know, no.

11 Q. In your testimony, you also talked about ConAgra
12 facilities.

13 A. (Nodded head affirmatively).

14 Q. Let's -- I want to ask you to be precise about
15 this now. Is there an operating ConAgra facility in the Horn
16 Rapids area?

17 A. Not within Horn Rapids, but there is a Lamb Weston
18 French fry plant south of Highway 240. And adjacent to that
19 plant is a Henningsen Cold Storage facility, it actually kind
20 of blends right into the plant, and so that -- we currently
21 have a cold storage which is within the Horn Rapids general
22 area.

23 Q. Within the general area. And are those facilities
24 rail served?

25 A. Yes, they are.



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1 Q. And do you know if there is current rail service
2 in or out of those facilities?

3 A. Yes, there is.

4 Q. And what do you understand that rail service to
5 be?

6 A. Likely oil containers for canola oil, for fry oil,
7 as well as I would guess refrigerated cars for French fries.

8 Q. And are those unit trains?

9 A. No, they're not.

10 Q. Okay. And do you know how frequently those trains
11 service that particular Lamb Weston and cold storage facility?

12 A. No, I don't.

13 Q. Now, you talked about a different ConAgra
14 facility, the -- is ConAgra under contract with -- has ConAgra
15 actually purchased property from the city yet?

16 A. They -- not in Horn Rapids, they have not
17 purchased. We're under a purchase and sale agreement.

18 Q. Okay. And have they -- the city has not closed on
19 that agreement yet?

20 A. No. The agreement needs to close by January 20th
21 of 2014 or it's no longer.

22 Q. And is that property that may be developed in the
23 future by ConAgra?

24 A. Yes.

25 Q. And what would -- what's the intended use for that



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1 facility were it to be closed?

2 A. So it --

3 Q. Were the deal to be closed.

4 A. So we have a purchase and sale agreement with
5 ConAgra for 80 acres. On that 80 acres, they would contract
6 with a third party and may actually assign the agreement to a
7 third party who would own, operate, and construct what's
8 called an automated cold -- or what we refer to as an
9 automated cold storage warehouse.

10 Q. Okay.

11 A. This automated warehouse is actually a change in
12 business practice for Lamb Weston. There would be some
13 consolidation of other cold storage facilities in the
14 immediate area, and then that facility uses -- it's all
15 robotic. It's actually quite a large facility. It's about a
16 hundred feet tall and uses automated cranes and -- to control
17 the inventory better.

18 So -- so it basically allows ConAgra better
19 inventory -- or Lamb Weston better inventory control and
20 better logistics by utilizing this facility. They use a
21 similar type of facility over in Europe, and so they're trying
22 to bring that model here to the United States.

23 Q. And when you use the phrase -- you're referring to
24 Lamb Weston and ConAgra. Are they the same company?

25 A. Lamb Weston is a wholly owned subsidiary of



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1 ConAgra. The formal title is ConAgra Lamb Weston Foods, Inc.

2 Q. Okay.

3 A. And that is their division. So we will say,
4 around here we'll say ConAgra, we'll say Lamb Weston, and we
5 usually interchange those.

6 Q. If, in the future, that facility on the 80 acres
7 is constructed, has there been any projection by the city,
8 again, you know, assuming the best scenario development,
9 employment, full occupancy, and the rest, of train traffic to
10 that particular facility?

11 A. We have a car estimate that I had provided.

12 Q. The 30 cars?

13 A. 30 cars, but I don't know how that would relate to
14 number of trains. It depends on how many --

15 Q. That's the only information you have with respect
16 to demand that might occur as a result of this proposed but
17 yet to be completed facility?

18 A. That's correct.

19 Q. Thank you. The current Central Washington
20 Transfer facility operates, when it does receive product by
21 rail, as rail in and truck out, is that correct?

22 A. When it receives product by rail, yes, it is rail
23 in and truck out.

24 Q. How long has the City of Richland been working to
25 attract tenants, purchasers, developers, to this area?



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1 A. Well, it would be -- I think the first Horn Rapids
2 master plan for the industrial park area was developed in the
3 1990s. It may have gone back further than that.

4 Q. Lots of land still out there available?

5 A. Yeah, I think the park is, industrial park's
6 roughly 2,000 acres, with I believe our estimate's around 1200
7 acres is still available for development. That's not taking
8 into account the deals that may be on the table and ready to
9 go.

10 Q. So counting as already contracted, there still
11 remains 1200 acres?

12 A. If you counted in the contracts that have been
13 discussed here, the ConAgra, which is 80 acres, the lease of
14 21, 25, the purchase of an additional 25, so that puts you at
15 130 acres, so roughly 1070 acres still remain.

16 Q. Okay. Thank you. So about half is still
17 available?

18 A. Yes, roughly half.

19 MR. DIJILIO: Okay. That's all I have.

20 ADMINISTRATIVE LAW JUDGE TOREM: Commission
21 staff, any questions for this witness?

22 MR. SMITH: No questions.

23

24

25



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EXAMINATION

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BY ADMINISTRATIVE LAW JUDGE TOREM:

Q. Mr. Ballew, there was reference to an 18-month time frame in which the facilities would have to be constructed. Has the start date to measure that 18 months been triggered by last night's city council vote?

A. No, it would be triggered by execution of the lease. If you look at the deal flow that was provided, the purchase and sale agreement gets signed first, due diligence, then the lease agreement gets signed.

Q. And is that lease agreement, is there a deadline for that signature?

A. Yes. And we -- I would have to review the agreement, but we tried to tie -- so you execute the purchase and sale agreement, a time clock starts ticking on the lease, and you execute the lease, and then a time clock starts ticking on closing on the purchase and sale agreement.

Q. So you mentioned that the lease with ConAgra would have to be closed by the 20th of January next year?

A. That's the purchase and sale agreement --

Q. Sorry, purchase and sale.

A. -- for 80 acres, and that would have to occur by January 20th, 2014.

Q. Is that connected with the lease execution date as



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1 well?

2 A. No.

3 Q. Separate?

4 A. Those are totally separate.

5 Q. What's your ballpark figure of when the 18-month
6 clock might start ticking?

7 A. Should execute soon. We're expecting closing of
8 all agreements, as you step down on that deal flow, we've put
9 a date in of February 14th, 2014. One of our agreements with
10 American Rock, that needs to be closed by then. So we would
11 expect the lease agreement to be signed in, at the latest, in
12 January of 2014.

13 Q. So we're thinking July or August of 2015, from
14 there would be 18 months?

15 A. That would be the 18 months, yes, roughly.

16 Q. Is that about when the city anticipates any new
17 rail traffic, whether it's replacement or new rail traffic,
18 would begin?

19 A. That would be the outside envelope of the lease
20 agreement. I would say our expectations are that it would
21 occur sooner than that, that the construction of the rail
22 could occur sooner, but I would still expect January of 2015,
23 maybe the beginning of 2015, is when we could see a fully
24 operational railroad.

25 ADMINISTRATIVE LAW JUDGE TOREM: Okay. Thank



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1 you. Mr. Petit, does that raise any additional questions?

2 MR. PETIT: No, Your Honor. I think you
3 covered that thoroughly. I have nothing else.

4 ADMINISTRATIVE LAW JUDGE TOREM: Any other
5 questions for this witness, then?

6 MR. DIJULIO: No. Thank you, Judge.

7 MR. SMITH: No.

8 ADMINISTRATIVE LAW JUDGE TOREM: All right.
9 Thank you, Mr. Ballew, for your time.

10 A little admitting of exhibit housework to take
11 care of. The prior witness, we had a video that was shown, it
12 was JD-39-X. Were there any objections to that coming into
13 the record? I believe a DVD was supplied to all parties.

14 MR. DIJULIO: Excuse me?

15 ADMINISTRATIVE LAW JUDGE TOREM: The video
16 that we saw before the lunch break, we hadn't admitted that
17 yet. Were there any objections to the DVD?

18 MR. DIJULIO: We produced it at their request.
19 We did not propose it. If he wants to make copies of it and
20 mark it --

21 ADMINISTRATIVE LAW JUDGE TOREM: I'm not
22 suggesting it was. I'm just asking, any objections to
23 admitting it to the --

24 MR. DIJULIO: Oh, absolutely none.

25 ADMINISTRATIVE LAW JUDGE TOREM: All right. I



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GCOR

General Code of Operating Rules

Seventh Edition

Effective April 1, 2015

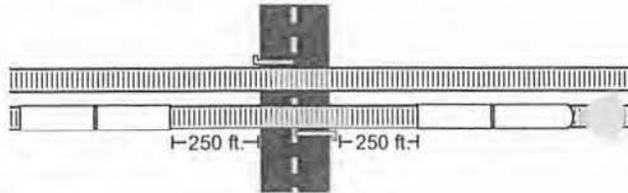
These rules herein govern the operations of the railroads listed and must be complied with by all employees regardless of gender whose duties are in any way affected thereby. They supersede all previous rules and instructions inconsistent therewith.

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6.32.4 Clear of Crossings and Signal Circuits

Leave cars, engines, or equipment clear of road crossings and crossing signal circuits.

When practical, avoid leaving cars, engines, or equipment standing closer than 250 feet from the road crossing when there is an adjacent track.



[Diagram A.]

6.32.5 Actuating Automatic Warning Devices Unnecessarily

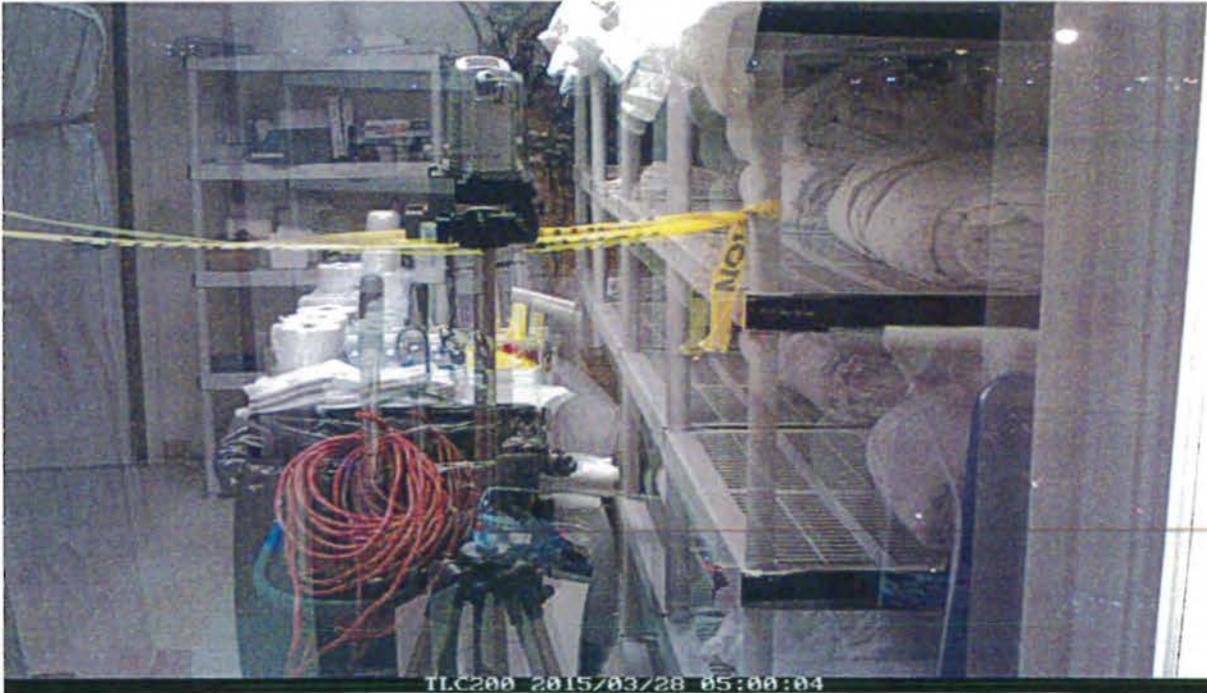
Avoid actuating automatic warning devices unnecessarily by leaving switches open or permitting equipment to stand within the controlling circuit. If this cannot be avoided and if the signals are equipped for manual operation, a crew member must manually operate the signal for movement of traffic. A crew member must restore signals to automatic operation before a train or engine occupies the crossing or before it leaves the crossing.

6.32.6 Blocking Public Crossings

When practical, a standing train or switching movement must avoid blocking a public crossing longer than 10 minutes.



EXHIBIT 3



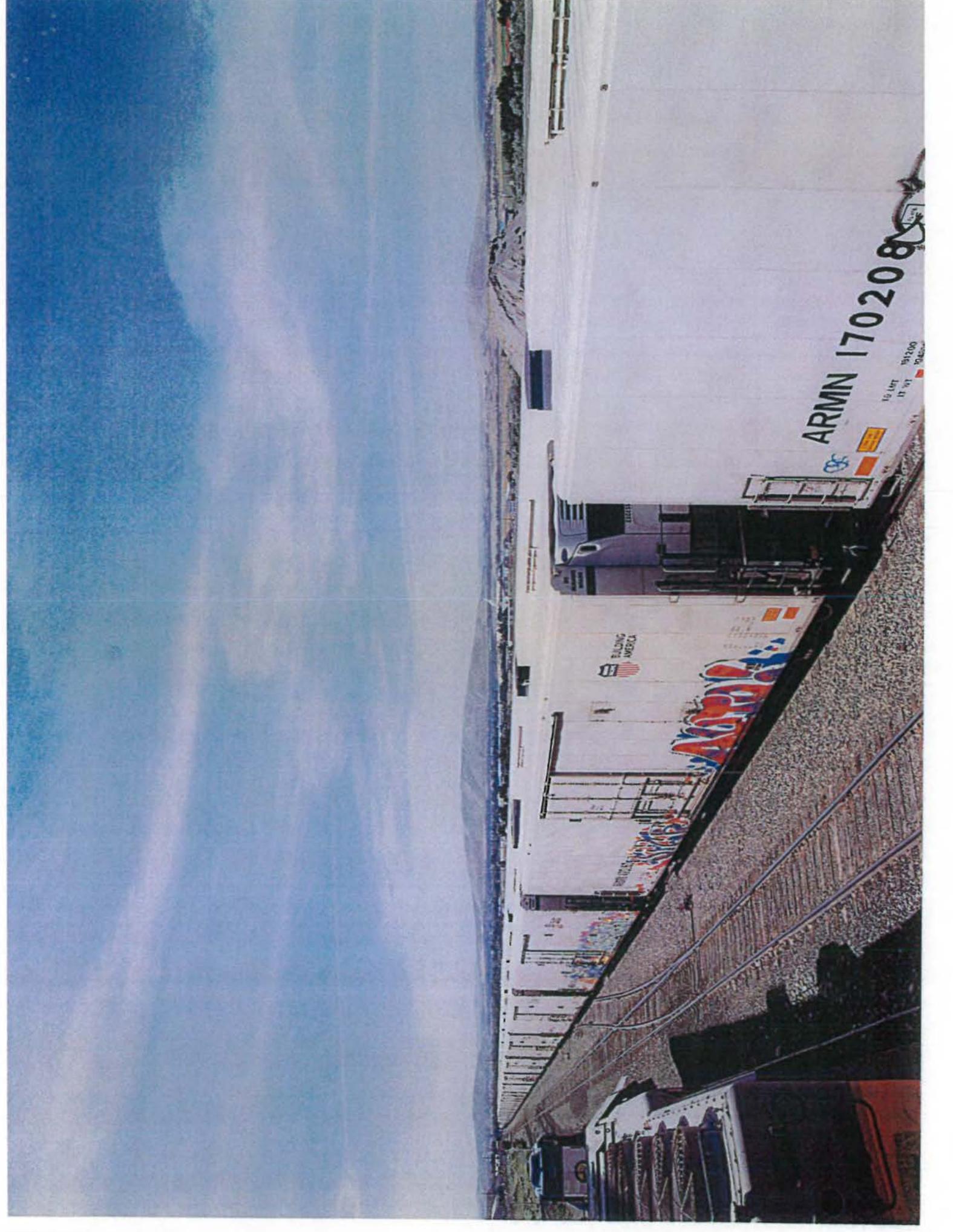
CENTER PKWY
1900

DEAD END











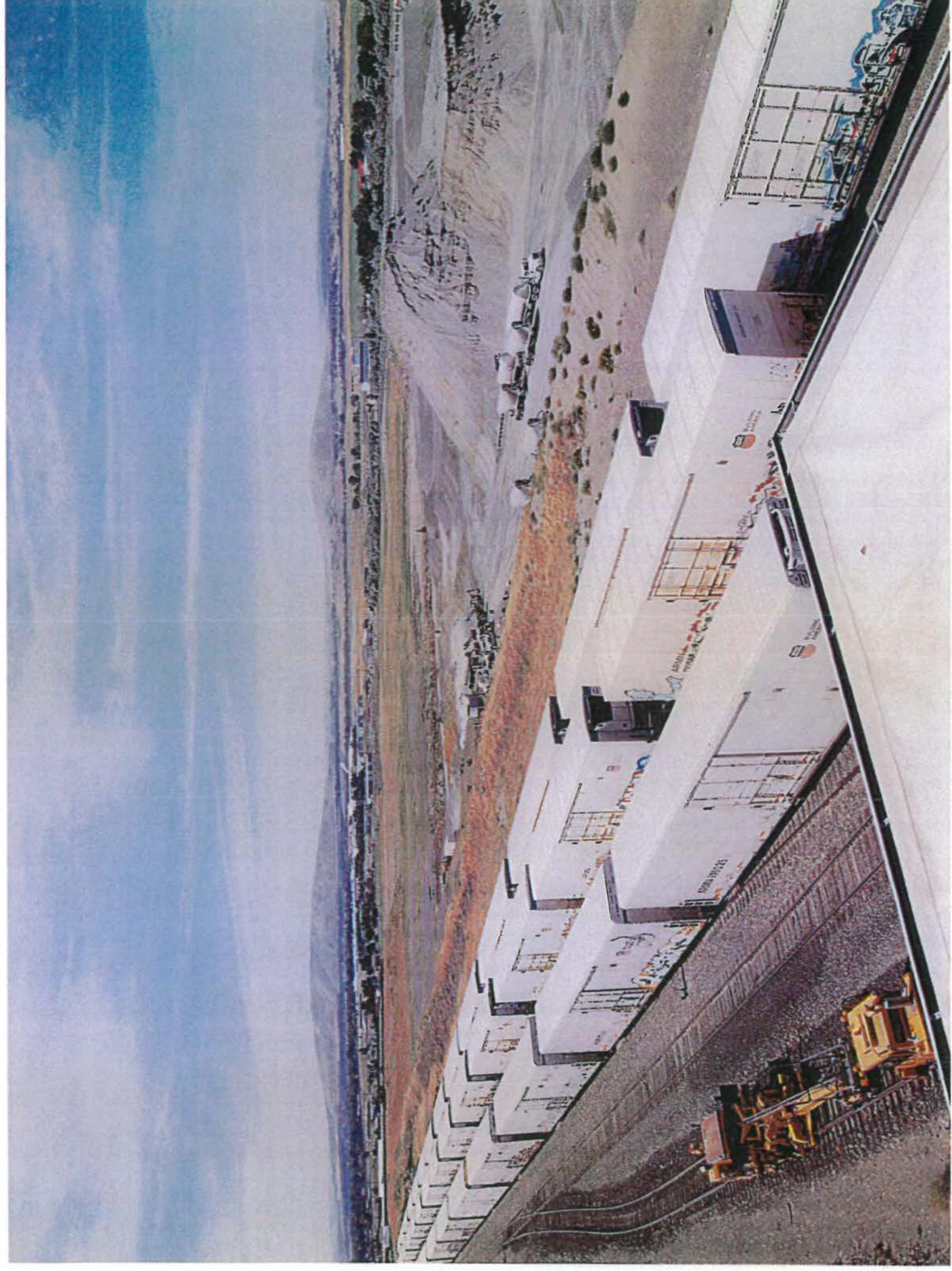
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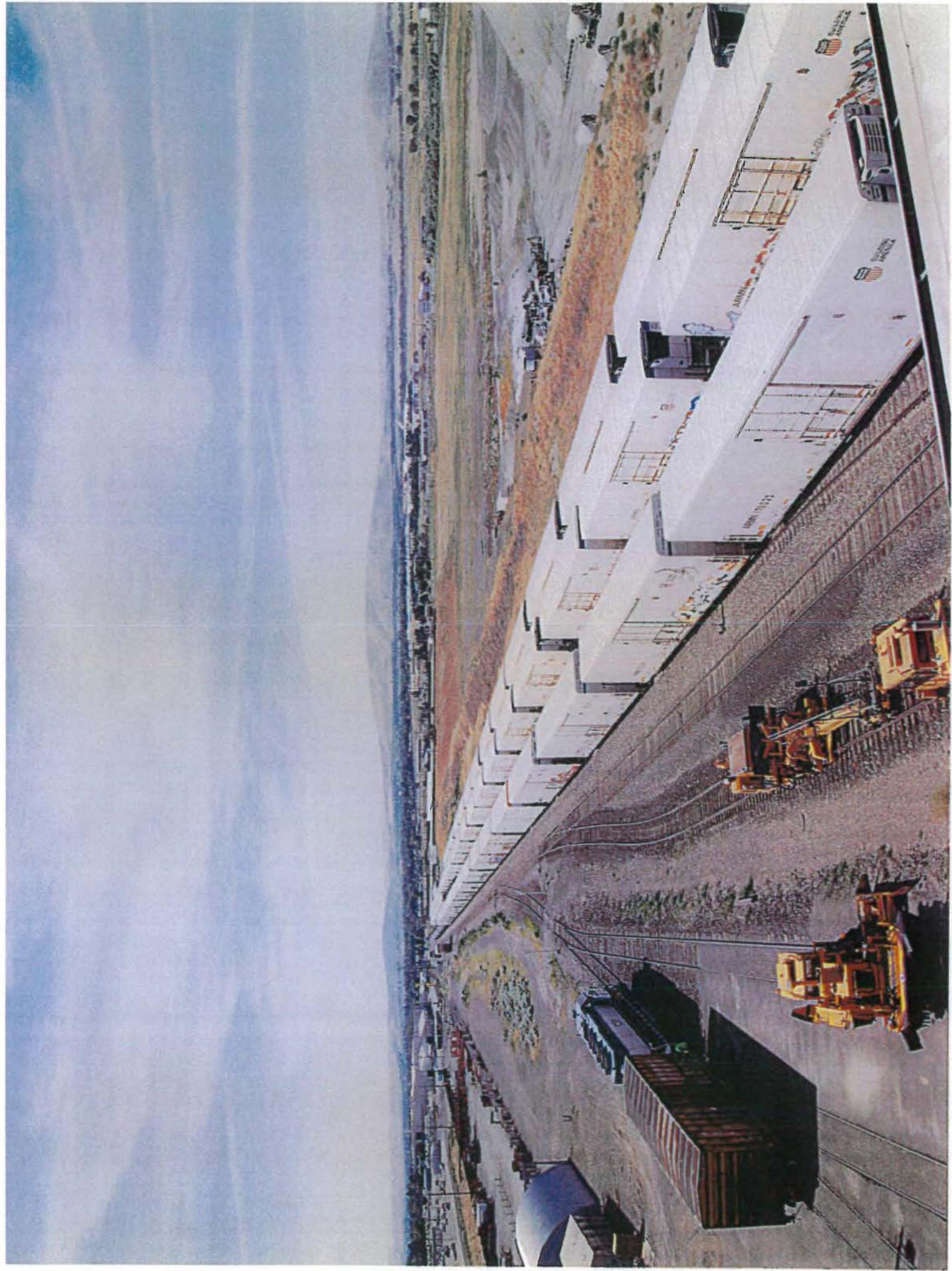


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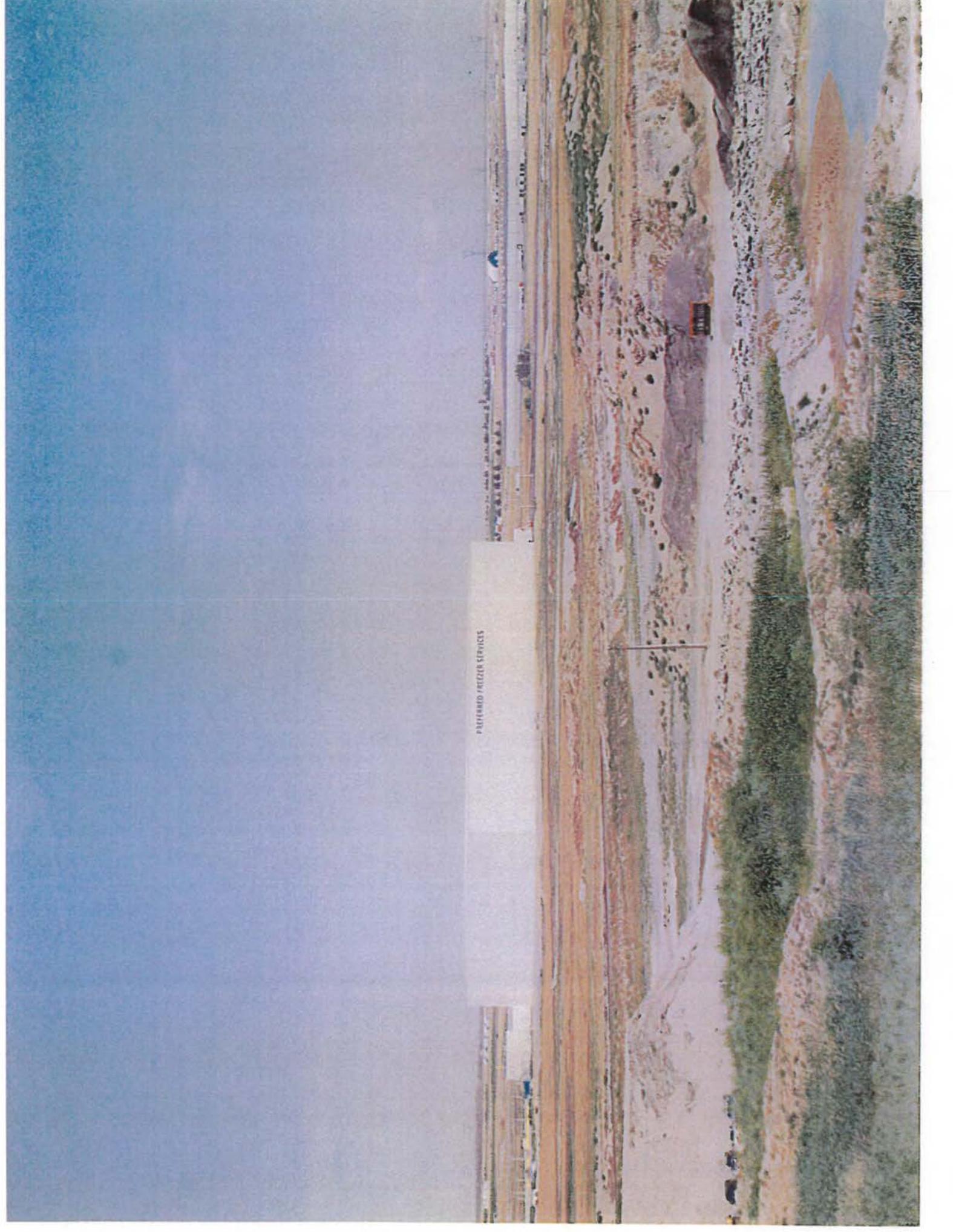




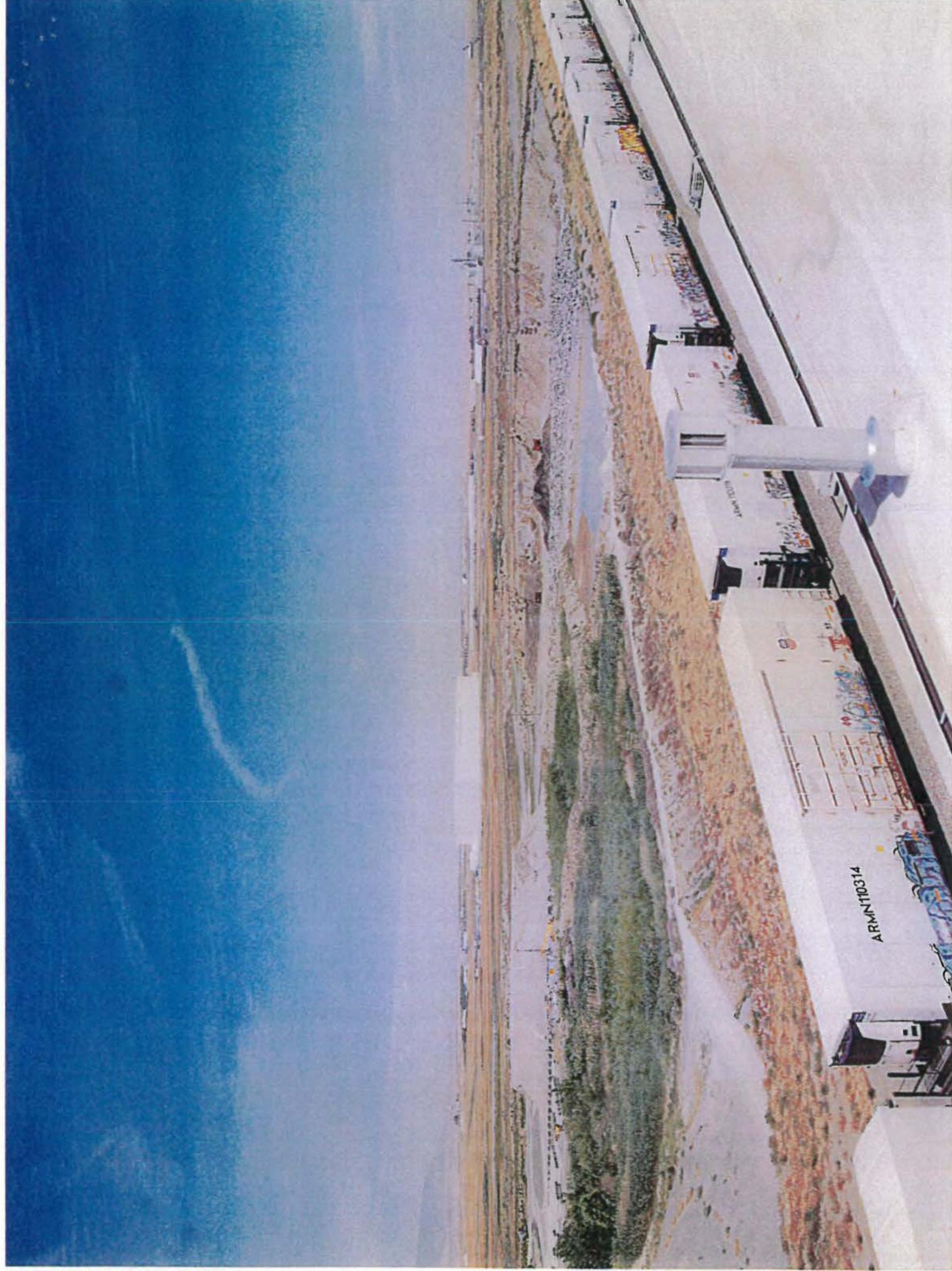








PATERNAL FEEZER SERVICES





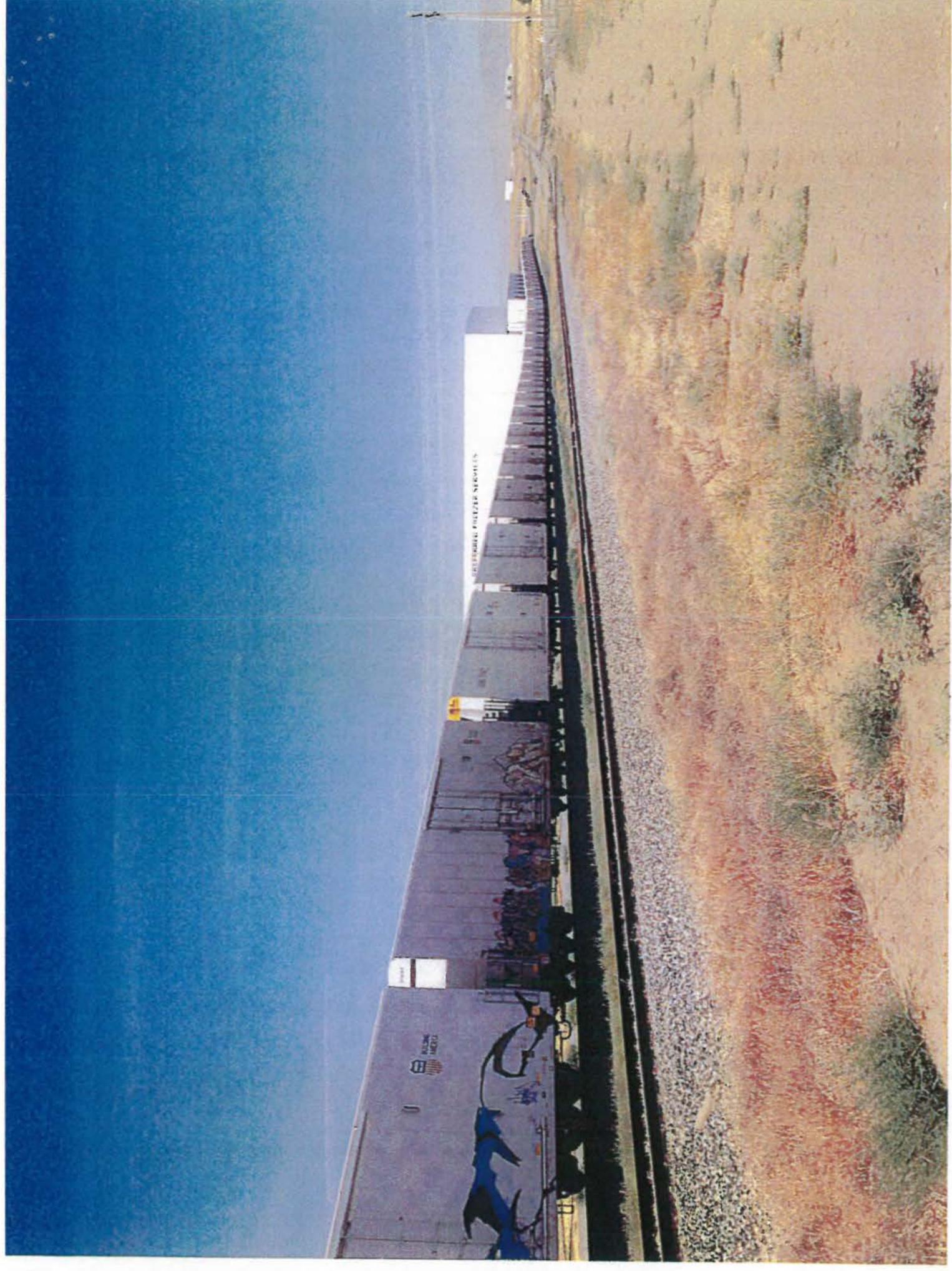


RAILROAD
CROSSING



ARMN 170158







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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	REBUTTAL VERIFIED
	)	STATEMENT OF RHETT
Petitioner,	)	PETERSON RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State	)	CONTAINS COLOR
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
)	

RHETT PETERSON, being first duly sworn on oath, does hereby depose and state:

1. As I stated in my March 18, 2015 Affidavit, I am the Manager of Operations for Petitioner Tri City Railroad Company, LLC ("TCRY"). I am over the age of eighteen (18), and am competent to testify to the matters contained herein. The matters contained herein are either based upon personal knowledge, or are within the scope of my speaking authority for TCRY.

2. It is my understanding that my rebuttal verified statement "shall be confined to issues raised in the reply statements to which they are directed" under

49 CFR 1112.6. Accordingly, for purposes of my rebuttal testimony, I will quote each paragraph of the verified statements to which I am rebutting.

VERIFIED STATEMENT OF ROGALSKY

3. **Paragraph 14** of the Rogalsky verified statement provides:

Statement: “A cold storage company is proceeding to develop a new storage facility in the City’s Horn Rapids Industrial Park that will be served by rail. When the facility is completed and begins shipping by rail, the increased rail shipping will have no impact on rail operations at the Crossing. The crossing safety devices provide security and safety, and avoid conflicts between vehicular traffic and train traffic.”

Rebuttal: There are two separate sources of the projected increase in railcar traffic across TCRY’s tracks. The first is the Horn Rapids rail loop, built by the City of Richland, which will primarily serve the grain industry. **Exhibit 1** is a graph showing the number of railcars sent by BNSF to the Horn Rapids rail loop since the loop became active in April, 2015.

Shortly after May 26, 2015, (a few days after the cut off date of the material supplied by the Cities from the hotel supply room “field study”) the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. **Exhibit 2** is a graph showing the empty railcars being stored on TCRY’s line, and the spike in empty railcars being stored on line

by TCRY in early June, representing the increase in refrigerated cars in anticipation of the Preferred Freezer Services plant opening in July.

Additional refrigerated railcars have since arrived, resulting in TCRY's rail yard, and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars. The tremendous amount of activity seen is indicative of the increasing capacity of TCRY operations. In this 15 year history of TCRY, we have never been inundated with railcars in this fashion. **Exhibit 3** is a series of photographs depicting the refrigerated railcars at TCRY's railyard, and lined up on the industrial lead going to the Preferred Freezer Services plant.

As of June 1, 2015, TCRY is the contractual rail services manager for Preferred Freezer Services, meaning TCRY will be responsible for the management and dispatch of all railroads which provide service to the Preferred Freezer Services plant.

This tremendous increase in business, in turn, makes it even more critical, from a railroad operations standpoint, for TCRY to have use of its sole uninterrupted passing track for its current and planned operations. With a full railyard, access to the uninterrupted 1900 foot passing track for unexpected holding and spotting railcars is a necessity from an operations standpoint.

In my March 18 Affidavit to the Board, I stated:

Between the at-grade crossing at Steptoe Street in the northwest, and the at-grade crossing at Edison Street in the southeast, are approximately 2.6 miles of track which

are uninterrupted by any at-grade crossings. TCRY, as lessee of the track west of Richland Junction, is responsible for dispatch and management of use of the track by TCRY, Union Pacific, and BNSF. Should the proposed at-grade crossing be constructed, it will bisect this uninterrupted stretch of track at near the halfway point, impacting the ability of TCRY, as dispatcher, to stop or stage a unit train at this location. Moreover, to accommodate expected future unit train traffic by both UP and BNSF, TCRY is exploring expanding the length of the existing 1900-foot passing track by as much as 10,000 feet, so that the parallel main and passing tracks can accommodate unit trains.

It does not appear that the Cities offered any testimony replying to the testimony I offered in my March 18, 2015 Affidavit.

From a railroad operations standpoint, if the proposed Center Parkway crossing is built, it will impede the ability to hold trains at that location, and eliminate the current uses of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations. As a result, Mr Rogalsky's statement that "When the facility is completed and begins shipping by rail, the increased rail shipping will have no impact on rail operations at the Crossing" is simply incorrect. Moreover, his statement that "The crossing safety devices provide security and safety, and avoid conflicts between vehicular traffic and train traffic" is unrelated to the question of whether the establishment of the

proposed at-grade crossing would unreasonably interfere with current or planned railroad operations.

4. **Paragraph 16** of the Rogalsky verified statement provides:

Statement: “The City of Richland never made this rail traffic projection. The City of Richland has permitted development of a unit train servicing facility in its Horn Rapids Industrial Park. The facility is scheduled to begin operation in 2015. The facility’s developers have speculated that additional business attracted to the facility may eventually result in up to two inbound and two outbound unit trains using facility per week. These trains would each include approximately one hundred cars. This activity, if it materialized in the future, would contribute no more than one additional train trip per day over the Crossing. Also, Miller Exhibit 5, 6, and 7 do not support Mr. Miller’s assertion. Miller Exhibit 5 is TCRY’s response to the UTC data request and TCRY’s response to the Citie’s data request, not a City of Richland document. Miller Exhibit 6 is a memo with supporting documentation from the City of Richland’s Economic Development Committee. Miller Exhibit 7 is a real property purchase and sale agreement. These materials do not support John Miller’s unfounded assertion that the City of Richland projected 12,500 inbound and 12,500 outbound cards per year.”

Rebuttal: As Foster Peterson testified in his Rebuttal Verified Statement, with which I concur, a unit train is a train consisting almost entirely of the same type of railcar, and typically has between 100 and 120 cars. At pages 4 and 5 of the

February 24, 2014 Initial Order Denying Petition to Open At-Grade Railroad Crossing, attached at Exhibit 3 to the March 18, 2015 Counsel Aff't, the Washington State administrative law judge describes the evidence presented by the City of Richland concerning the Horn Rapids rail loop and the projected number of unit trains. The relevant passage, which was in TCRY's Petition at page 16, provides:

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day).

If Mr. Ballew's testimony is predictive of what will occur, then any customers on the loop will ultimately be served by 2 ½ unit trains per week, which, assuming a per-train consist of 100 to 120 railcars, equates to 200 to 240 carloads per week, times 52 weeks, yielding between 10,400 and 12,480 carloads per year.

Since TCRY is at the end of a line, connected to a main line, each "carload" represents two railcar trips across TCRY tracks. That is, an empty car will be delivered to a customer, who will fill the car, and then it will be delivered to Union Pacific on its main line for transport (or vice-versa). So, as referenced above, 10,400 carloads represents 20,800 railcar trips across TCRY's tracks.

Mr. Rogalsky indicates that if this number of unit trains materializes in the future, then it would be the equivalent to one additional unit train per day going across the proposed crossing – that is, measuring in railcar trips, rather than carloads. With respect to the actual number of railcars involved, whether calculated on a carload per year or railcar trip per day basis, the projected maximum numbers by Mr. Ballew, City of Richland’s Economic Development Manager, result in between 10,400 and 12,480 carloads per year, or between 20,800 and 24,960 rail car trips per year.

As operations manager for TCRY, this projected increase in railcars makes the uninterrupted 1900 foot passing track even more critical for TCRY’s current and planned railroad operations. Lacking the unencumbered use of our sole passing track will severely handicap with TCRY’s ability to pause or hold any unit train approaching the loop without violating best railroad practices by fouling an at-grade crossing for unknown lengths of time and would likewise not be consistent with the General Code of Operating Rules, 7th Edition (“GCOR”) 6.32.4, 6.32.5, and 6.32.6, that TCRY follows.

5. **Paragraph 18** of the Rogalsky verified statement provides:

Statement: “The field study documents actual track usage through (1) time lapse footage of the track and (2) still camera shots of track usage. Exhibit A, attached to this Verified Statement, shows the time lapse camera in the Holiday Inn

Express, located immediately to the north of the tracks. Exhibit A also shows that my staff took photos of the track and siding just to the north of the tracks.”

Rebuttal: These photographs and video document some of TCRY’s practices for this time of year at that location, though I note that there are a number of time gaps in the footage provided, and that the recordings cease on May 26, 2015, which is just prior to TCRY receiving the refrigerated railcars in anticipation of the opening of the Preferred Freezer Services plant, described in a previous paragraph of this Verified Statement.

The time-lapse camera located in what appears to be a supply room at a nearby chain hotel is pointed in a westerly direction, and does not observe either the southern switch or the approximately 600 southern feet of the parallel tracks at issue.

Generally, best railroad operations practice is that when one is using a siding to switch and then spot and store rail cars, one spots the cars near, though not on top of, the switch being used. Selection of where, when, and how to switch and spot are determined by the ultimate destination of the railcars. Here, TCRY interchanges with the Union Pacific in the City of Kennewick, to the south and east of the parallel siding in question. Consequently, TCRY uses the southern switch and spots cars bound for the Union Pacific interchange at the southern end of the 1900-foot siding. As a result, the still photographs taken of the railcars shown in Exhibit A to Rogalsky’s verified statement depict those railcars in the place they

should be located in preparation for interchange with the Class I mainline, consistent with best railroad operations practices. Not using the southern switch for southbound cars, or spotting cars in the north that are southbound would not be preferred, as it would not be an efficient use of fuel, time, or labor.

6. **Paragraph 19** of the Rogalsky verified statement provides:

Statement: “The Field Study began on February 10, 2015 and it continues to this day. For the purposes of this proceeding for the STB, the attached exhibits include information from February 10, 2015 through May 26, 2015.”

Rebuttal: Shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY’s rail yard, and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars. The amount of activity seen is indicative of the increasing capacity of TCRY operations.

7. **Paragraph 25** of the Rogalsky verified statement provides:

Statement: “The field study and my past observations show that railcars were present (staged) on the siding most days during the referenced period. Based on the Field Study and observations, once the cars were placed on the siding, they typically stayed at the same locations on the siding for three (3) days or more, on many occasions they stayed for more than a week.”

Rebuttal: As Foster Peterson indicated, and with which I concur, Mr Rogalsky uses the term “staged” whereas from a railroad operations standpoint the correct railroad term is “spotted” in this context. The railcars were spotted in the appropriate location, consistent with best railroad operations practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick. Moreover, TCRY, which serves primarily agriculture-industry customers, has high and low seasons related to those of its customers. However, as can be seen by the photographs taken in early June, 2015, depicting TCRY’s over-capacity yard and industrial lead, TCRY is and will remain extremely busy during its normal busy seasons, and it will be critical for it to have use of its 1900 foot siding in the future, without the interposition of a new at grade crossing bisecting that track and limiting or eliminating its usefulness.

8. **Paragraph 26** of the Rogalsky verified statement provides:

Statement: “During the field study TCRY frequently staged cars immediately in front of the proposed Center Parkway Crossing, instead of elsewhere on the siding track.”

Rebuttal: As previously stated, the correct railroading term is “spotted”, rather than “staged” in this context. I note again that the “field study” was being conducted from a hotel supply closet.

As Foster Peterson has stated, and with which I concur, the railcars were spotted in an appropriate location, consistent with best railroad operations practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick.

VERIFIED STATEMENT OF GRABLER

9. **Paragraph 13** of the Grabler verified statement provides:

Statement: “I have personally observed the tracks (including train movement) and the proposed Crossing. I have considered the record of train movement from railway-filed reports with the UTC. I have reviewed a field study prepared by the City of Richland that document the use of the existing rail siding that crosses the proposed roadway crossing location. Those observations are dated from February 10, 2015 to May 26, 2015. As discussed in greater detail in Pete Rogalsky’s verified statement, both still and time-lapse photos were used to compile the field study data.”

Rebuttal: Shortly after May 26, 2015, the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July. Additional refrigerated railcars have since arrived, resulting in TCRY’s rail yard and nearby industrial lead being over capacity with awaiting empty refrigerated railcars. The

amount of activity seen is indicative of the increasing capacity of TCRY operations.

10. **Paragraph 17** of the Grabler verified statement provides:

Statement: “The siding track that is west of and parallel to the main line track and adjacent to the hotel is being used as a storage track.”

Rebuttal: The 1900 foot passing track is the only parallel siding TCRY has outside of its railyard. It is used for switching, a purge valve when the railyard is overcapacity, and a holdout when trains need to pass, as TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track. TCRY frequently stores railcars on the south-eastern portion of the passing track closest to the beginning to UP territory.

11. **Paragraph 18** of the Grabler verified statement provides:

Statement: “TCRY is staging cars immediately in front of the proposed Center Parkway Crossing, instead of elsewhere on the siding track.”

Rebuttal: It is my understanding that Ms Grabler has no experience, training, or education in railroad operations. The correct railroad term is “spotted” in this context. As previously stated, the railcars were spotted in an appropriate location, consistent with best railroad operations practices, on the south end of the 1900 foot siding, though not too close to the south switch, to facilitate the transfer of those cars to the interchange location with Union Pacific inside the City of Kennewick. Moreover, TCRY has high and low seasons related to those of its

customers. As can be seen by the photographs taken in early June, 2015, TCRY is extremely busy, and it will be critical for it to have use of its 1900 foot siding in the future, without a new at-grade crossing bisecting that track and limiting or eliminating its usefulness.

12. **Paragraph 19** of the Grabler verified statement provides:

Statement: “The siding track is not being used as a typical railroad passing track, because of the parked rail cars that the TCRY is parking on the siding track. There appears no reason for such conduct other than an attempt to mislead the STB. And, TCRY is parking rail cars on the siding tracks for several days at a time, which would preclude the TCRY Railroad from using the siding as a passing track (as TCRY apparently asserts).”

Rebuttal: It appears that when Ms. Grabler accuses TCRY of misleading the Board, she has not reviewed the Affidavits of John Miller or Rhett Peterson, nor the TCRY’s Petition to this Board, all of which describe TCRY’s normal operations in switching and storing rail cars on the 1900 foot passing track.

Ms. Grabler contends that the siding was not used as a “passing” track during their hotel supply closet “field study” – I think by ‘passing’, Ms. Grabler means a time in which both tracks were clear, one train was directed onto the siding, and another train either overtook or passed from the opposite direction. Since TCRY routinely uses either one end or the other of the passing track for railcar storage, it is likely accurate during the time period of the hotel supply

closet “field study” that no direct overtaking occurred. The misunderstanding, though, seems to be one of operations terminology. This siding is parallel to a main track, outside of a railyard, has switches at both ends, and is of sufficient length (1900 feet) that it is a ‘passing’ track, as opposed to a different type of siding or auxiliary track (*e.g.* spur, industrial lead). As I have described, and as John Miller and Foster Peterson described, a siding like this passing track has a number of uses in railroad operations. The focus on the term ‘passing’ in the phrase ‘passing track’ simply misunderstands the terminology (much as one does not necessarily drive on a driveway or park on a parkway).

Moreover, from a railroad operations standpoint, Ms. Grabler’s statement that parking railcars would ‘preclude...[use] as a passing track’ is incorrect. First, it is not unusual for TCRY spot and store cars for varying lengths of time on that siding, and normal operations are to spot the cars near the switch. Second, the parallel siding has switches at both ends. Given that configuration, railcars can be switched, spotted, and stored at one end, while the other is kept clear for moving and holding trains, to allow passing. So, rather than ‘precluding’ use as a passing track, TCRY’s practices are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location,

and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations.

13. **Paragraph 23** of the Grabler verified statement provides:

Statement: "The Crossing will not adversely impact TCRY train operations because of the Crossing's safety features and geometry."

Rebuttal: From the perspective of railroad operations, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching. The new at-grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations.

14. **Paragraph 24** of the Grabler verified statement provides:

Statement: "Based on my 42 years of railroad engineering experience, and my knowledge of the operations of the Port of Benton tracks that begin at the Richland Junction, there is no impact on the movement of freight or other rail as a result of the Crossing."

Rebuttal: Ms. Grabler, in her verified statement, does not refer to any of the rules contained within the GCOR, or promulgated by the Federal Railroad Administration, that TCRY must follow. The establishment of this new at-grade crossing will have a significant impact on TCRY's current and future movement of freight, as I have discussed above. From the perspective of railroad operations,

regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching, and the establishment of the new at grade crossing itself at this location will unreasonably interfere with TCRY's current and planned railroad operations.

VERIFIED STATEMENT OF JEFFERS

15. **Paragraph 11** of the Jeffers verified statement provides:

Statement: "As detailed in the UTC record, the Crossing has safety features that include active warning devices, bells, gates, and a raised median. The gates will go down as a train approaches and will stay down when a train occupies the tracks within the limits of the crossing. The gates will not rise until all trains have cleared the crossing limits."

Rebuttal: From a railroad operations standpoint, if the proposed Center Parkway crossing is built, it will impede the ability to hold trains at that location, and eliminate the current storage and switching of 1/3rd of the 1900 foot siding, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations. Lacking the unencumbered use of our sole passing track will severely handicap with TCRY's ability to pause or hold any unit train approaching the Horn Rapids rail loop without violating best railroad practices by fouling an at-grade crossing for unknown lengths of time and

would likewise not be consistent with the General Code of Operating Rules, 7th Edition (“GCOR”) 6.32.4, 6.32.5, and 6.32.6.

16. **Paragraph 16** of the Jeffers verified statement provides:

Statement: “UPRR or BNSF trains may use the rail line twice a day, but likely not on the same day. This information is documented in information the railroads provided to the UTC.”

Rebuttal: This appears to be speculative (*i.e.* “may”), and does not understand the relationship between Union Pacific and TCRY. As Union Pacific’s handling carrier, TCRY interchanges with Union Pacific in Kennewick, so by the time the railcars enter TCRY’s tracks, the Union Pacific railcars are generally already being handled by TCRY.

17. **Paragraph 17** of the Jeffers verified statement provides:

Statement: “The City of Richland field study showed only TCRY and BNSF trains and not UPRR trains during the study period (February 10, 2015 to May 26, 2015).”

Rebuttal: This does not understand the relationship between Union Pacific and TCRY. As Union Pacific’s handling carrier, TCRY interchanges with Union Pacific in Kennewick, so by the time the railcars enter TCRY’s tracks, the Union Pacific railcars are being handled by TCRY.

STATE OF WASHINGTON)

: ss.

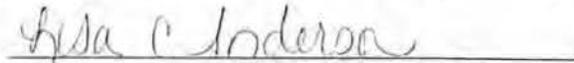
County of BENTON)

RHETT PETERSON being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

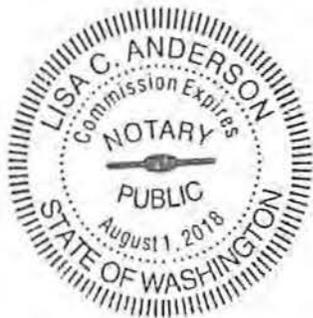


RHETT PETERSON

SUBSCRIBED AND SWORN to before me this 23 day of June, 2015,
by RHETT PETERSON.



Notary Public in and for the State of
Washington residing at Kennelwick
My Commission Expires: August 1, 2018



CERTIFICATE OF SERVICE

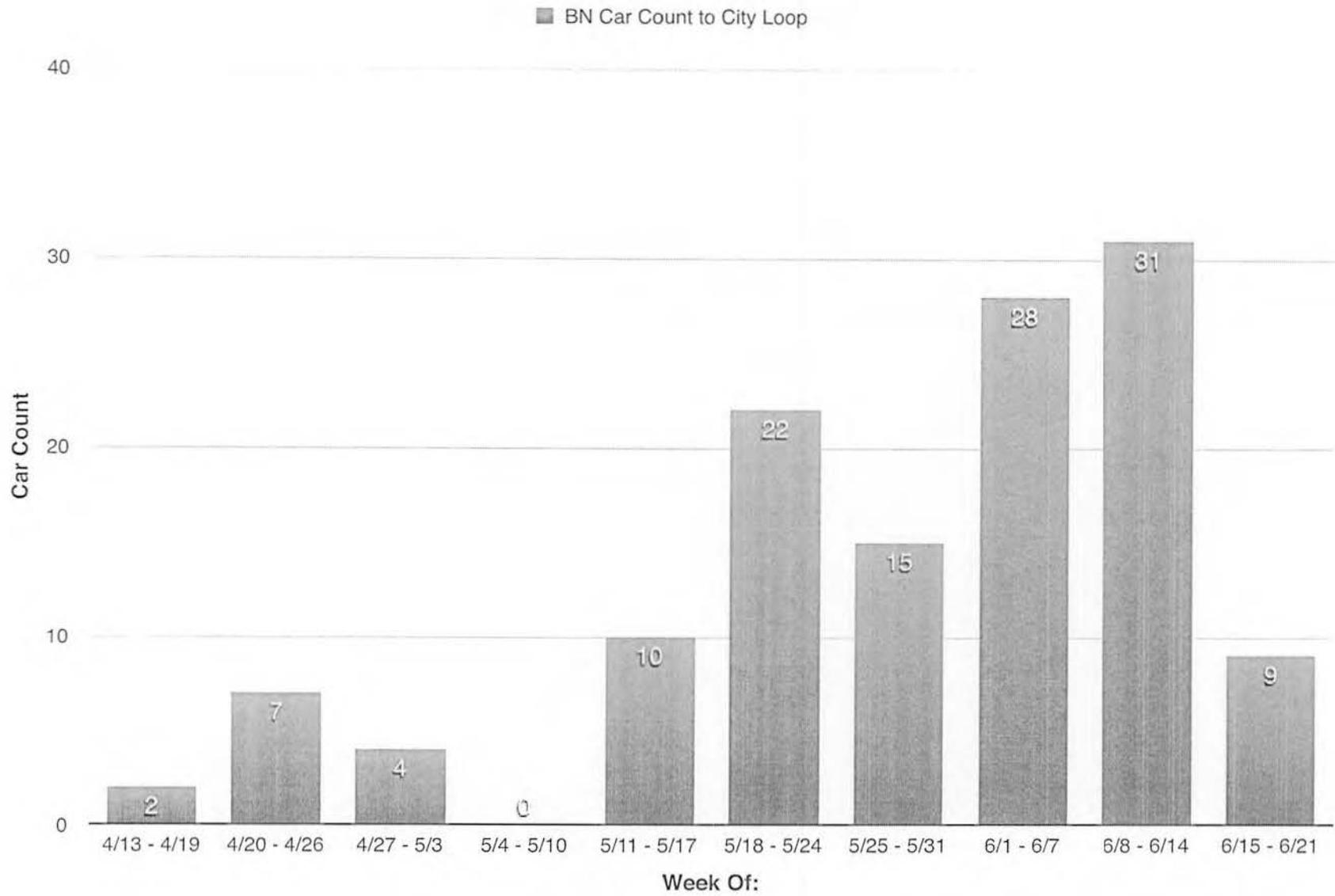
I hereby certify that on this 23 day of June, 2015, I caused to be served a true and correct copy of the foregoing **REBUTTAL VERIFIED STATEMENT OF RHETT PETERSON RE: PETITION FOR DECLARATORY ORDER**, by the method indicated below and addressed to the following:

Heather Kintzley Richland City Attorney 975 George Washington Way PO Box 190 MS-07 Richland, WA 99352	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
Lisa Beaton Kennewick City Attorney 210 West 6 th Avenue P.O. Box 6108 Kennewick, WA 99336	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
P. Stephen DiJulio Jeremy Eckert Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY



WILLIAM C. SCHROEDER

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■ CARS ON LINE

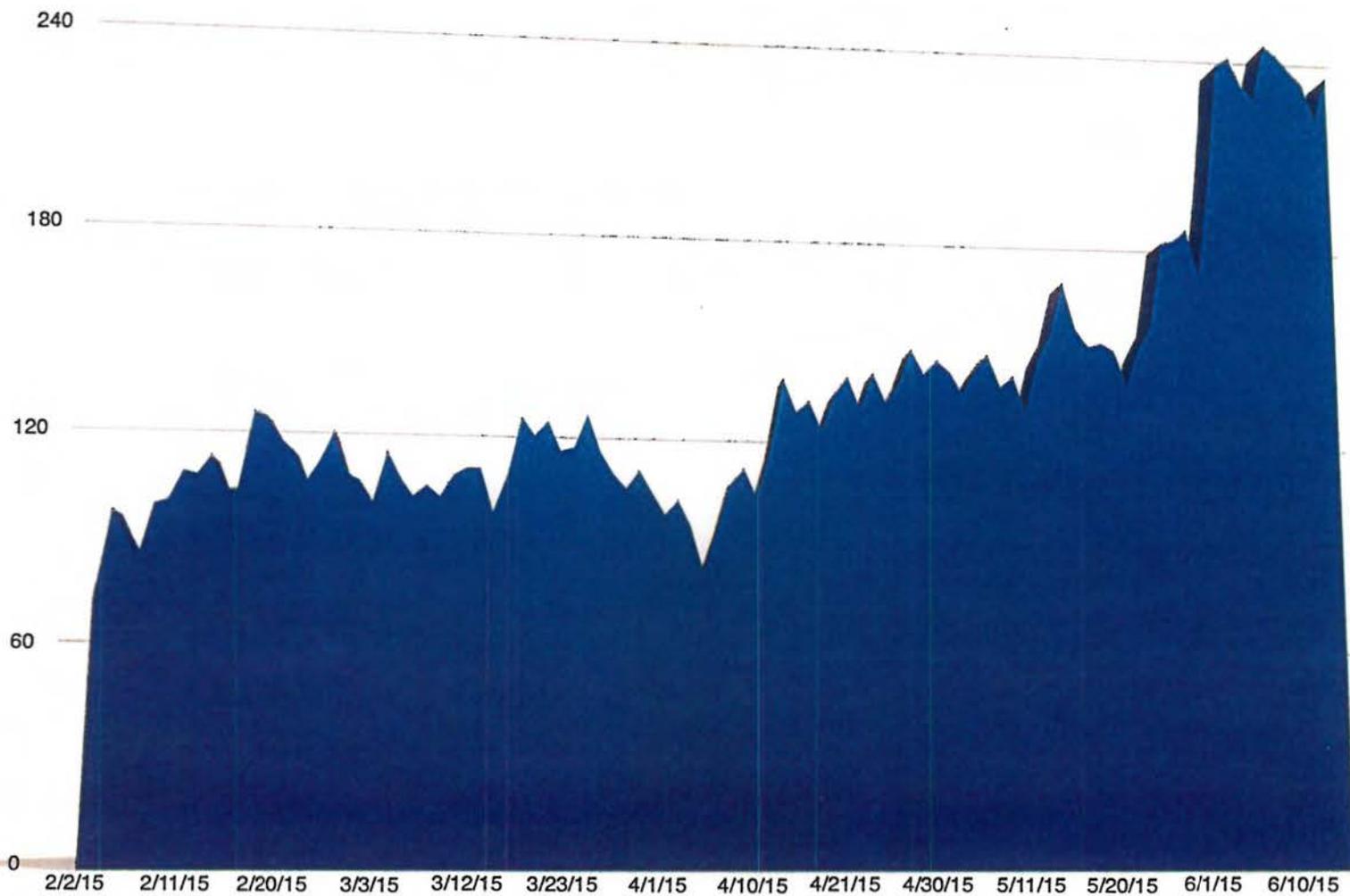
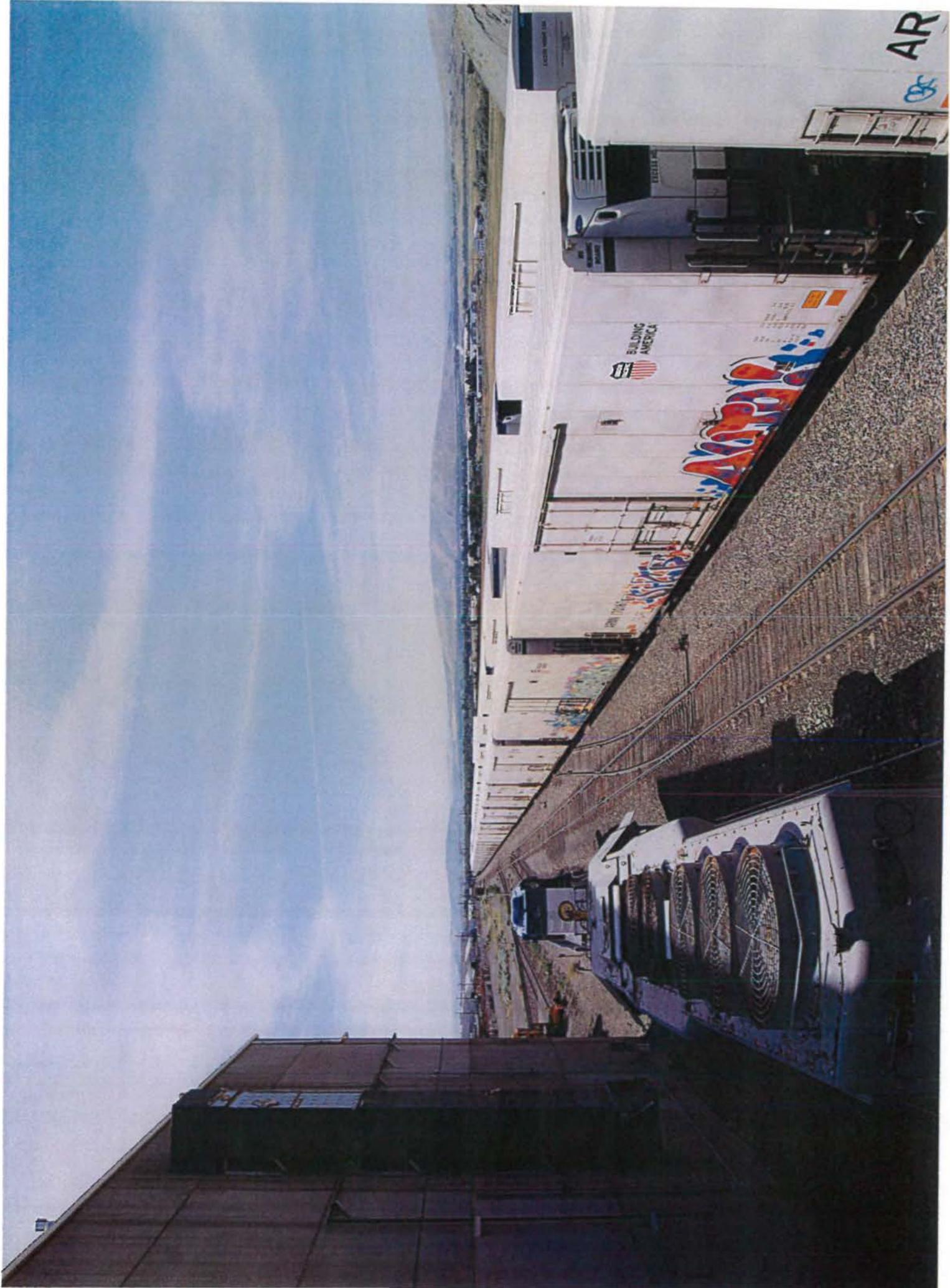


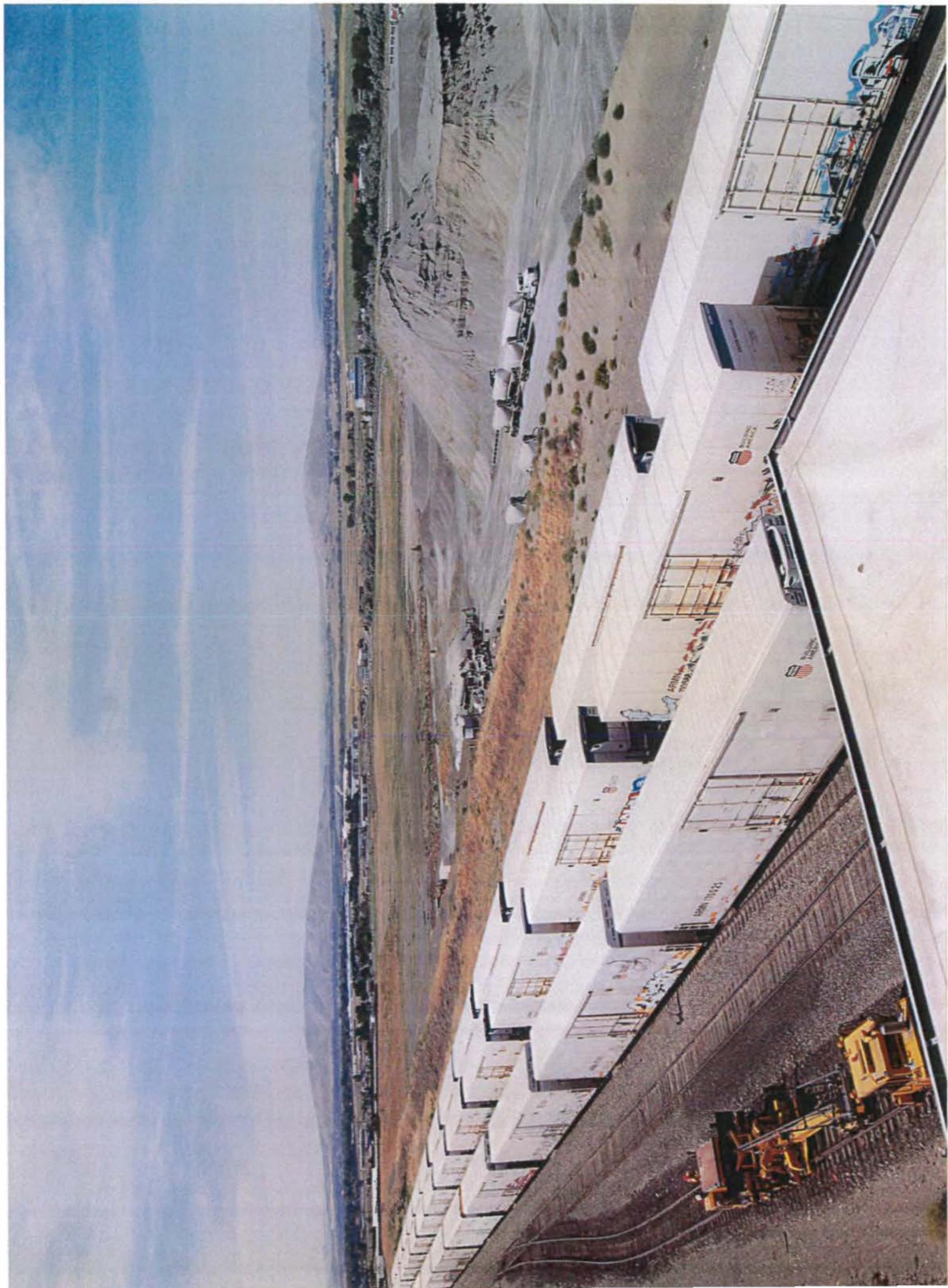


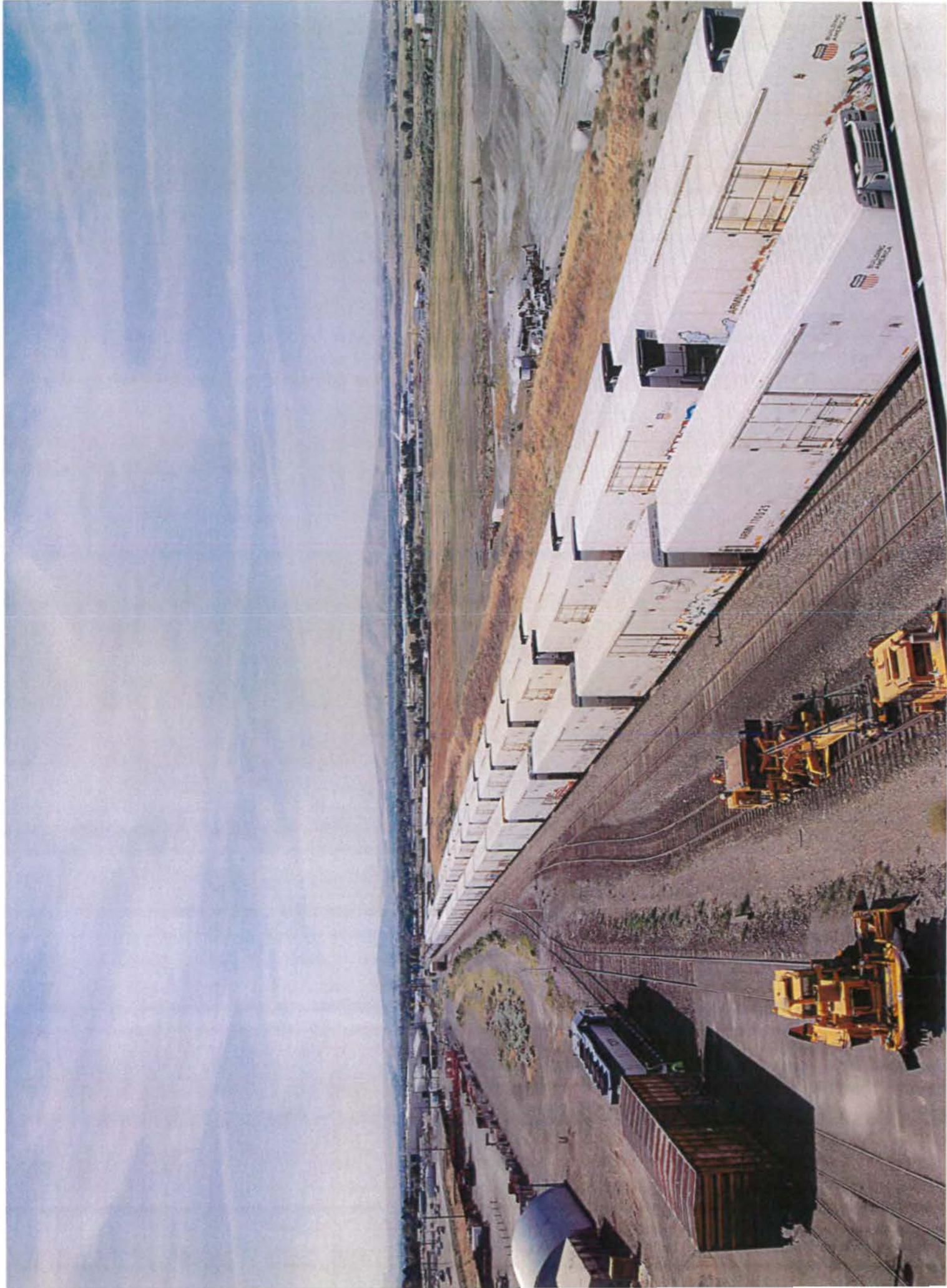
EXHIBIT 3

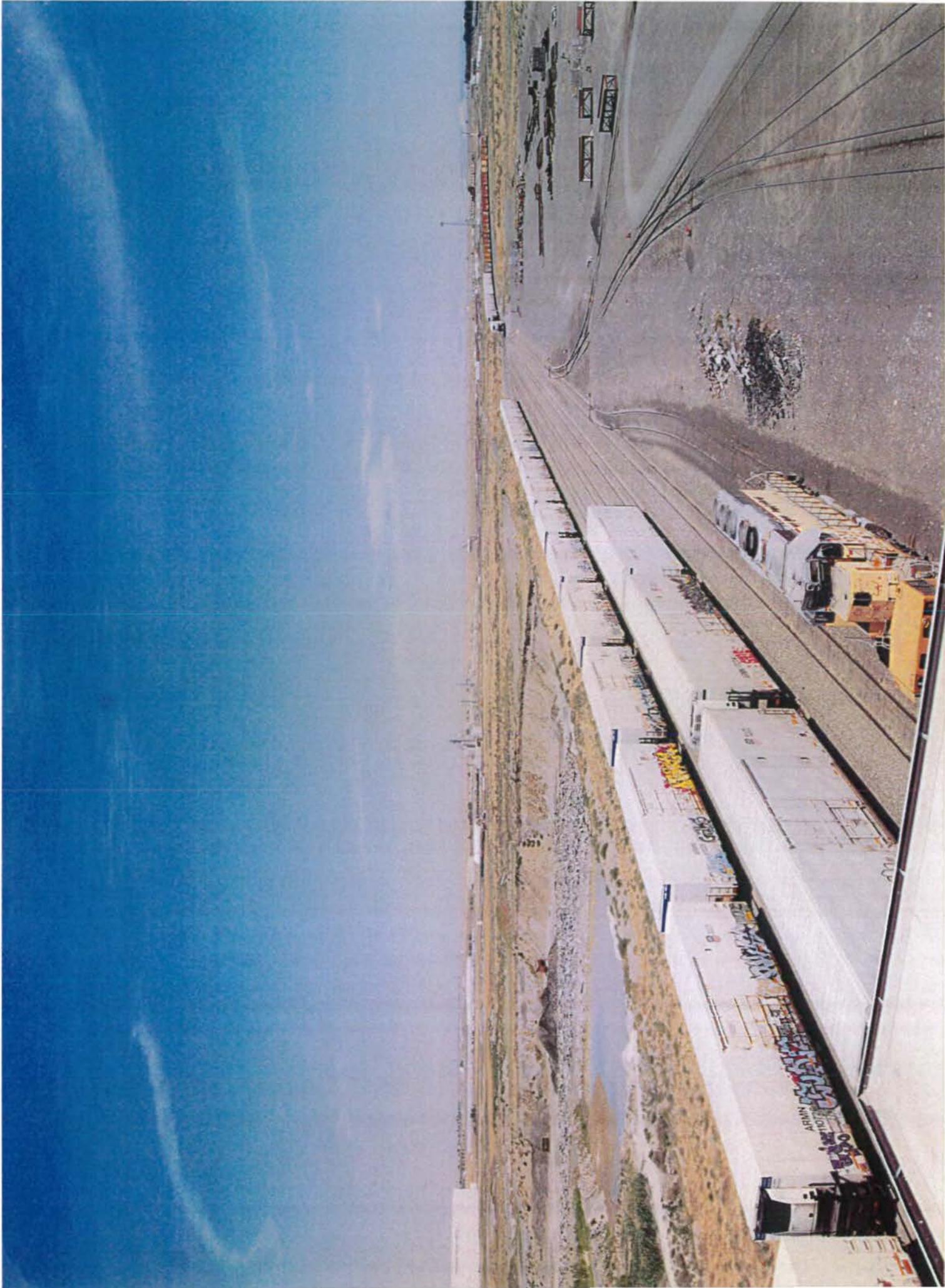




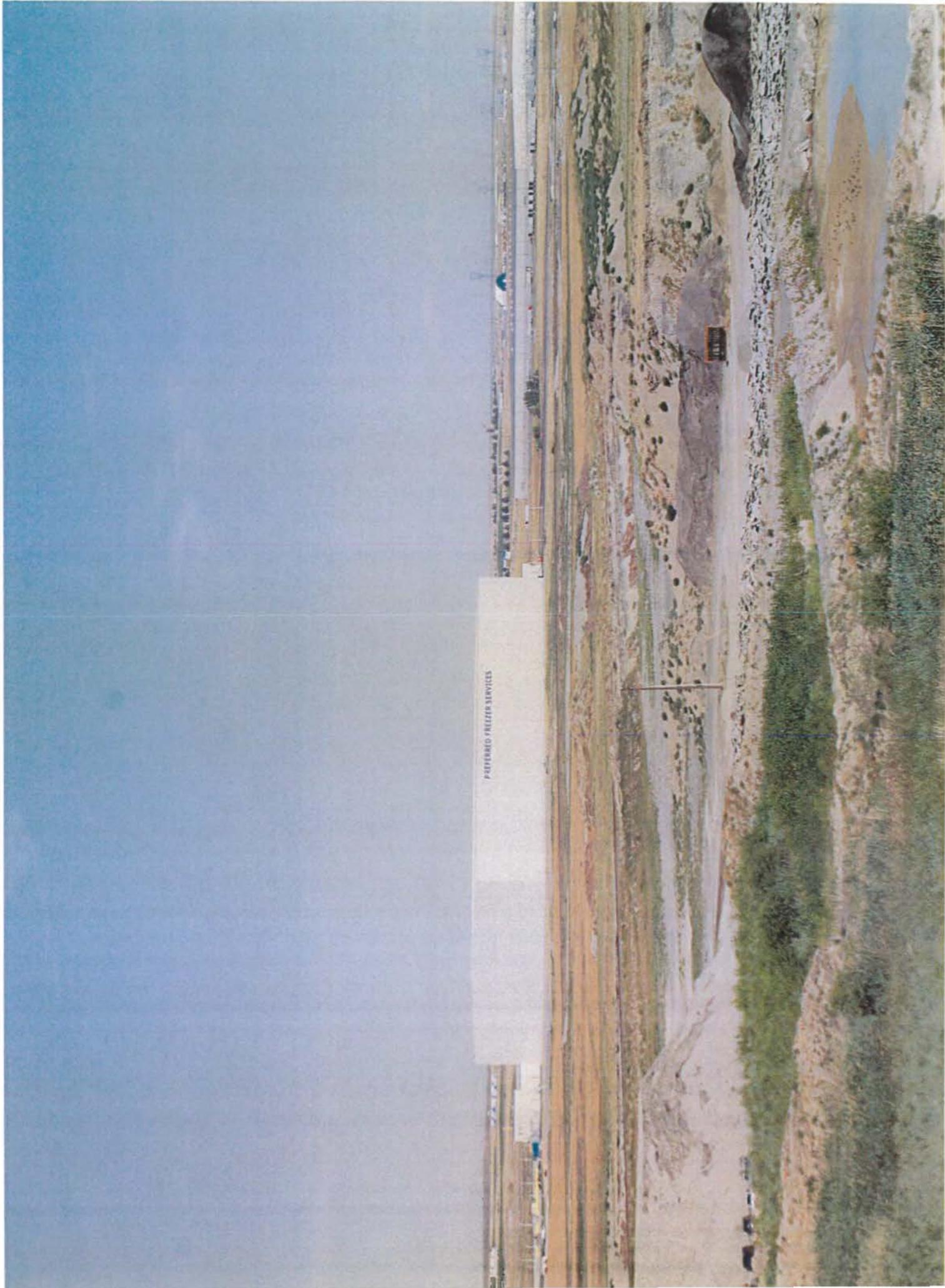




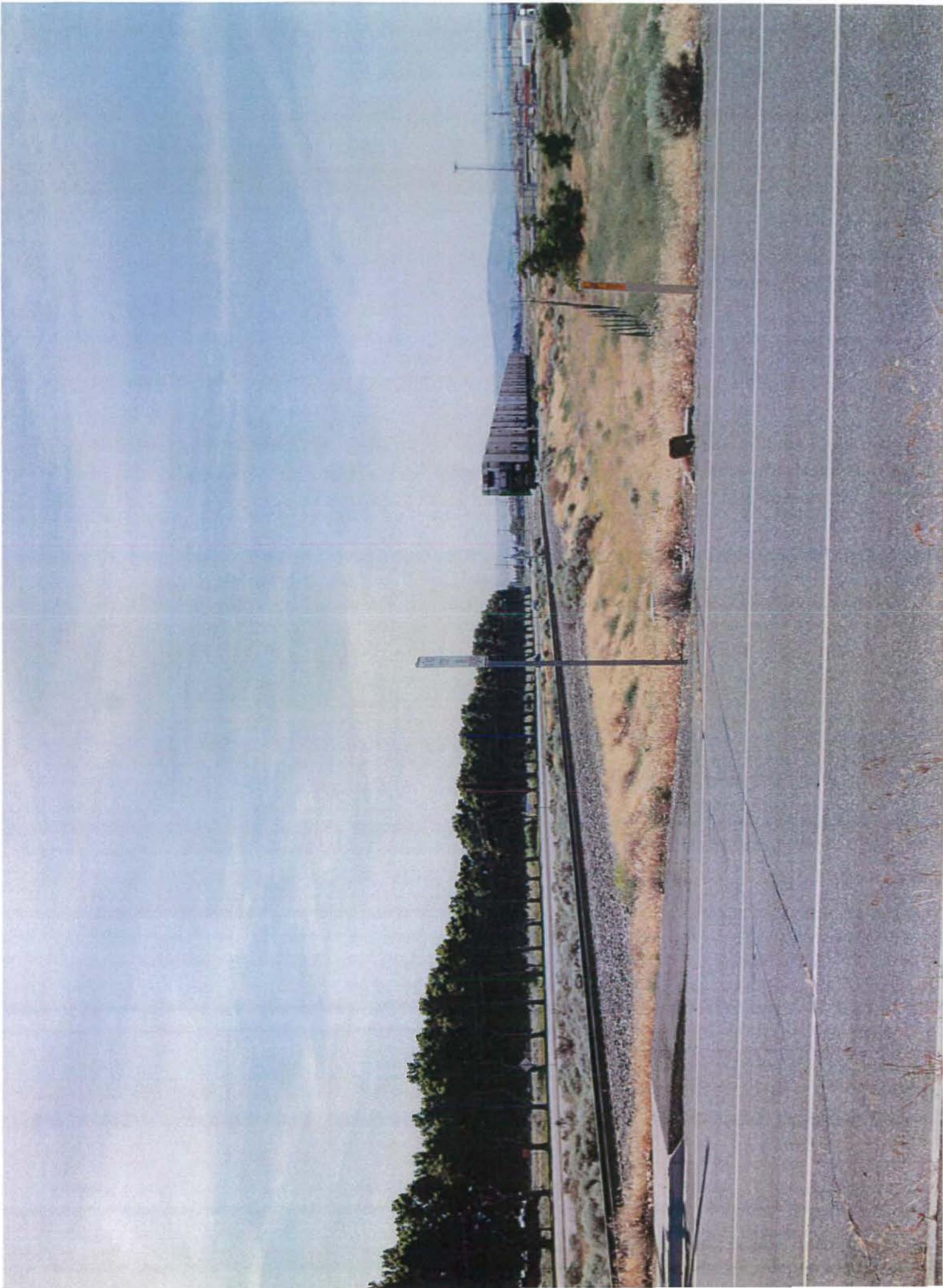




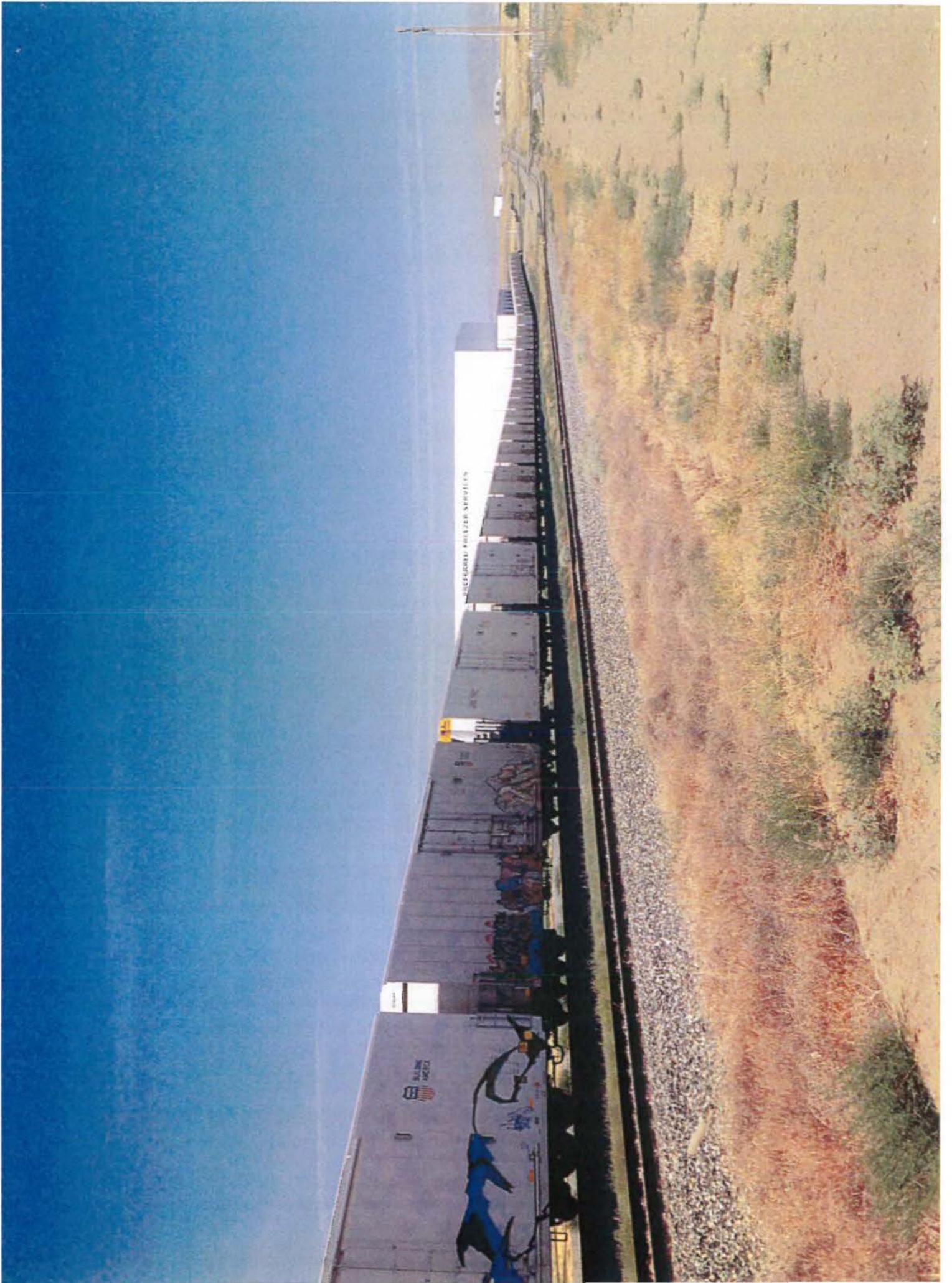














Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	REBUTTAL VERIFIED
	)	STATEMENT OF RANDOLPH
Petitioner,	)	PETERSON
)	
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

RANDOLPH PETERSON, being first duly sworn on oath, does hereby
depose and state:

1. I am over the age of 18, am competent to testify to the matters
contained herein, and all matters contained herein are based upon personal
knowledge. I am President and CEO of the Tri-City Railroad Company, LLC
("TCRY").

2. It is my understanding that my rebuttal verified statement "shall be
confined to issues raised in the reply statements to which they are directed" under
49 CFR 1112.6. Accordingly, for purposes of my rebuttal testimony, I will quote
each paragraph of the verified statements to which I am rebutting.

VERIFIED STATEMENT OF ROGALSKY

3. **Paragraph 10** of the Rogalsky verified statement provides:

Statement: “Before the UTC, TCRY also reported that it projected 20% annual growth in its rail traffic.”

Rebuttal: This projection was made two years ago. As it presently stands, with the pending opening of the Preferred Freezer Services plant, we may exceed that projection. I note also that the Horn Rapids rail loop is projected to substantially increase rail traffic across TCRY’s track, though that will not necessarily be TCRY’s rail traffic.

VERIFIED STATEMENT OF JEFFERS

4. **Paragraph 8** of the Jeffers verified statement provides:

Statement: “As part of the City of Richland’s work, I facilitated a grade crossing diagnostic meeting prior to the Cities’ petition to the UTC, the Port of Benton, City of Richland, City of Kennewick, UPRR, BNSF, and TCRY. I also followed-up with e-mails and phone calls or messages to the three railroads. TCRY did not attend the site visit or diagnostic meeting and did not respond to the invitation or messages”

Rebuttal: TCRY had made it clear that the proposed at-grade crossing would drastically interfere with its railroad operations. As a result, we declined to attend the meeting.

5. Paragraph 9 of the Jeffers verified statement provides:

Statement: "At the diagnostic meeting, the Cities and UTC discussed Crossing options and safety measures. Because TCRY was not present, the Cities designed two Crossing options: one with the siding and one without."

Rebuttal: I reiterate the testimony in response to paragraph 8 of the Jeffers verified statement above. However, it should be noted that Mr Jeffers states: "Because TCRY was not present, the Cities designed two Crossing options: one with the siding and one without." Any crossing design which is not grade-separated would drastically interfere with our railroad operations.

STATE OF WASHINGTON)

: ss.

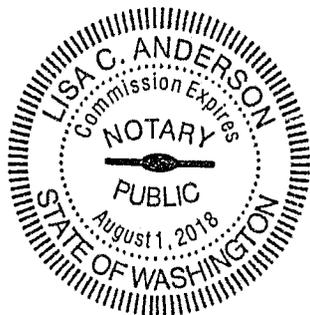
County of BENTON)

RANDOLPH PETERSON being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Randolph Peterson
RANDOLPH PETERSON

SUBSCRIBED AND SWORN to before me this 23rd day of June, 2015,
by RANDOLPH PETERSON.

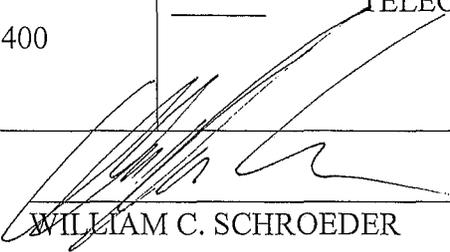
Lisa C. Anderson
Notary Public in and for the State of,
Washington, residing at Kennedick
My Commission Expires: August 1, 2018



CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 2015, I caused to be served a true and correct copy of the foregoing **REBUTTAL VERIFIED STATEMENT OF RANDOLPH PETERSON**, by the method indicated below and addressed to the following:

Heather Kintzley Richland City Attorney 975 George Washington Way PO Box 190 MS-07 Richland, WA 99352	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
Lisa Beaton Kennewick City Attorney 210 West 6 th Avenue P.O. Box 6108 Kennewick, WA 99336	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
P. Stephen DiJulio Jeremy Eckert Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY



WILLIAM C. SCHROEDER

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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	REBUTTAL VERIFIED
	)	STATEMENT OF LISA
Petitioner,	)	ANDERSON
)	
vs.)	
)	
THE CITY OF KENNEWICK, of	)	CONTAINS COLOR
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
)	

LISA ANDERSON, being first duly sworn on oath, does hereby depose and state:

1. I am over the age of 18, am competent to testify to the matters contained herein, and all matters contained herein are based upon personal knowledge. I am Corporate Secretary and Vice President of Administrative Services for Tri-City Railroad Company, LLC ("TCRY").

2. It is my understanding that my rebuttal verified statement "shall be confined to issues raised in the reply statements to which they are directed" under 49 CFR 1112.6. Accordingly, for purposes of my rebuttal testimony, I will quote each paragraph of the verified statements to which I am rebutting.

VERIFIED STATEMENT OF ROGALSKY

3. **Paragraph 11** of the Rogalsky verified statement provides:

Statement: “Now, before the Surface Transportation Board (“STB”), TCRY assert that it handled 2,247 railcars in 2013, and that it projects to handle approximately 4,175 carloads on the Port of Benton tracks in 2015.”

Rebuttal: TCRY did not assert that it handled “2,247 railcars in 2013”. TCRY testified it handled 2,247 **carloads**. A carload represents two railcar trips – one in, one out. See the March 18, 2015 Affidavit of John Miller, at paragraph 8. See also TCRY’s Petition, at page 6.

4. **Paragraph 12** of the Rogalsky verified statement provides:

Statement: “TCRY has not submitted any data or records to the UTC or the STB to support its 2013 track usage or its projected track usage.”

Rebuttal: Mr. Rogalsky is incorrect. The March 18, 2015 Affidavit of Mr. Miller, at paragraph 8, states:

In 2013, TCRY handled 2,247 carloads on this trackage, averaging two 9-car trains per day. In 2014, TCRY handled 2,626 carloads on this trackage, averaging two 10-car trains per day. TCRY projects that traffic will grow to 4,175 carloads on this trackage in 2015 due to several business development opportunities, an average of two 16-car trains per day.

TCRY needs to keep careful records of carloads handled for a number of business reasons. All cars which enter TCRY’s tracks must be tracked, and the information sent to the Union Pacific for payment purposes, to the railcar owners

and leasing companies, who use the information to track where their railcars are and how much time they spent in the TCRY system. To track and send out this information, we use software and services provided by ShipXpress.

Attached as **Exhibit 1** are Carload by Interchange Road Reports for 2013, 2014, and 2015 through June 17. As will be noted, in 2013 TCRY handled 2,247 carloads. In 2014, TCRY handled 2,626 carloads. In 2015 through June 17, TCRY has handled 1,067 carloads.

With respect to 2015, TCRY's carloads are not consistent through the year, being affected by the economy and the season. However, when TCRY prepares its forecasts each year for revenue purposes, it tries to anticipate how many carloads it will have at various times of the year. Attached as **Exhibit 2** is TCRY's 2015 Cash Flow Forecast, which projects 1550 carloads through July 30, 2015, and an additional 2,625 from July 31 through December 31 (proprietary financial information has been redacted from the Exhibit). The reason for this projection is the anticipated opening of the Preferred Freezer Services plant in July, 2015. At this juncture, it appears TCRY will meet these projected numbers. Attached as **Exhibit 3** is a graph demonstrating the number of empty refrigerated railcars, which have been sent to TCRY for pre-staging. The cars have been pre-tripped (cleaned and fueled) and are ready to be spotted at the Preferred Freezer Services plant, beginning in July, 2015.

VERIFIED STATEMENT OF GRABLER

5. Paragraph 14 of the Grabler verified statement provides:

Statement: “Based upon data submitted by TCRY, the Cities calculated that TCRY had an average of 4 – 6 train movements per day over the Crossing. This figure exaggerates TCRY’s actual track usage. The field study’s video recordings demonstrate that the average daily train traffic at the Crossing is approximately 2-4 train movements per day (this train count does not include any late night or after midnight train operations that were not video recorded, if any).”

Rebuttal: In 2015 through June 17, TCRY has handled 1,067 carloads (during the hotel supply closet “field study”). With respect to 2015, TCRY’s carloads are not consistent through the year, being affected by the economy and the season. However, when TCRY prepares its forecasts each year for revenue purposes, it tries to anticipate how many carloads it will have at various times of the year. Attached as **Exhibit 2** is TCRY’s 2015 Cash Flow Forecast, which projects 1,550 carloads through July 30, 2015, and an additional 2,625 from July 31 through December 31 (proprietary financial information has been redacted from the Exhibit). The reason for this projection is the anticipated opening of the Preferred Freezer Services plant in July, 2015. At this juncture, it appears TCRY will meet these projected numbers. Attached as **Exhibit 3** is a graph demonstrating the number of empty refrigerated railcars, which have been sent to TCRY for pre-staging. The cars have been pre-tripped (cleaned and fueled) and

are ready to be spotted at the Preferred Freezer Services plant, beginning in July, 2015.

VERIFIED STATEMENT OF JEFFERS

6. **Paragraph 13** of the Jeffers verified statement provides:

Statement: “Based upon information submitted by TCRY to the UTC, I calculated that an average of three to five TCRY trains pass the crossing location on a daily basis. Based upon a field study conducted by the City of Richland using time-lapse photos, I calculate two to four TCRY trains pass the proposed crossing location on a daily basis, carrying on average of 9 cars per train.”

Rebuttal: In 2015 through June 17, TCRY has handled 1,067 carloads (during the hotel supply closet “field study”). With respect to 2015, TCRY’s carloads are not consistent through the year, being affected by the economy and the season. However, when TCRY prepares its forecasts each year for revenue purposes, it tries to anticipate how many carloads it will have at various times of the year. Attached as **Exhibit 2** is TCRY’s 2015 Cash Flow Forecast, which projects 1,550 carloads through July 30, 2015, and an additional 2,625 from July 31 through December 31 (proprietary financial information has been redacted from the Exhibit). The reason for this projection is the anticipated opening of the Preferred Freezer Services plant in July, 2015. At this juncture, it appears TCRY will meet these projected numbers. Attached as **Exhibit 3** is a graph demonstrating the number of empty refrigerated railcars, which have been sent to TCRY for pre-

staging. The cars have been pre-tripped (cleaned and fueled) and are ready to be spotted at the Preferred Freezer Services plant, beginning in July, 2015.

7. **Paragraph 14** of the Jeffers verified statement provides:

Statement: "TCRY's petition states that "TCRY is expected to handle approximately 4,175 carloads on this trackage in 2015." Actual track usage does not support TCRY's estimate."

Rebuttal: In 2015 through June 17, TCRY has handled 1,067 carloads (during the hotel supply closet "field study"). With respect to 2015, TCRY's carloads are not consistent through the year, being affected by the economy and the season. However, when TCRY prepares its forecasts each year for revenue purposes, it tries to anticipate how many carloads it will have at various times of the year. Attached as **Exhibit 2** is TCRY's 2015 Cash Flow Forecast, which projects 1,550 carloads through July 30, 2015, and an additional 2,625 from July 31 through December 31 (proprietary financial information has been redacted from the Exhibit). The reason for this projection is the anticipated opening of the Preferred Freezer Services plant in July, 2015. At this juncture, it appears TCRY will meet these projected numbers. Attached as **Exhibit 3** is a graph demonstrating the number of empty refrigerated railcars, which have been sent to TCRY for pre-staging. The cars have been pre-tripped (cleaned and fueled) and are ready to be spotted at the Preferred Freezer Services plant, beginning in July, 2015.

STATE OF WASHINGTON)

: ss.

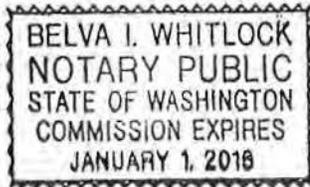
County of BENTON)

LISA ANDERSON being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Lisa Anderson
LISA ANDERSON

SUBSCRIBED AND SWORN to before me this 23 day of June, 2015,
by LISA ANDERSON.

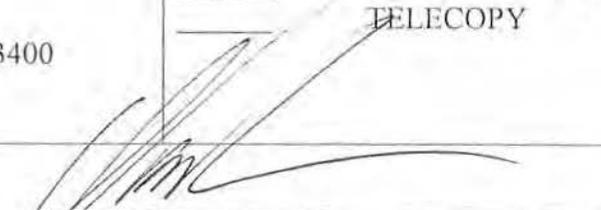
Belva Whitlock
Notary Public in and for the State of
Wash., residing at Kennecook
My Commission Expires: 01-01-2016



CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 2015, I caused to be served a true and correct copy of the foregoing **REBUTTAL VERIFIED STATEMENT OF LISA ANDERSON**, by the method indicated below and addressed to the following:

Heather Kintzley Richland City Attorney 975 George Washington Way PO Box 190 MS-07 Richland, WA 99352	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
Lisa Beaton Kennewick City Attorney 210 West 6 th Avenue P.O. Box 6108 Kennewick, WA 99336	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
P. Stephen DiJulio Jeremy Eckert Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY



WILLIAM C. SCHROEDER

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Tri-City Railroad
 Carload by Interchange Road Report

INTERCHANGE_ROAD	STATION_NAME	EQUIP_MOVE_TYPE_DESC	SUM(NUM_OF_CARS)
CARLOAD BY INTERCHANGE ROAD			
Road Mark:	TCRY		
Run Date:	6/17/15 13:00	Report ID:	CarloadIntercha
Begin Date:	1/1/13	End Date:	12/31/13
UP	RICHLAND JUNCTION		2,247
	RICHLAND JUNCTION		2,247
UP			2,247
			2,247

Tri-City Railroad
 Carload by Interchange Road Report

INTERCHANGE_ROAD	STATION_NAME	EQUIP_MOVE_TYPE_DESC	SUM(NUM_OF_CARS)
CARLOAD BY INTERCHANGE ROAD			
Road Mark:	TCRY		
Run Date:	6/17/15 13:03	Report ID:	CarloadIntercha
Begin Date:	1/1/14	End Date:	12/31/14
UP	RICHLAND JUNCTION		2,626
	RICHLAND JUNCTION		2,626
UP			2,626
			2,626

Tri-City Railroad
Carload by Interchange Road Report

INTERCHANGE_ROAD	STATION_NAME	EQUIP_MOVE_TYPE_DESC	SUM(NUM_OF_CARS)
CARLOAD BY INTERCHANGE ROAD			
Road Mark:	TCRY		
Run Date:	6/17/15 13:19	Report ID:	CarloadIntercha
Begin Date:	1/1/15	End Date:	6/16/15
UP	RICHLAND JUNCTION		1,067
	RICHLAND JUNCTION		1,067
UP			1,067
			1,067

2015 Cash Flow Forecast - Handling Carrier Revenue Calculation with FSC Est and Rev Supp.

Rev. Total		Rev. Total	
Current Avg		Adjusted Avg	
25 ConAgra		100	
25 other		25	
Weekly		Weekly	

NFW BUSINESS FORECAST

	JUL	AUG	SEP	OCT	NOV	DEC
Propane	2	6	6	6	6	6
Henningsen	8	8	8	8	8	8
Grimm	1	12	12	12	12	12
Agro		16	16	16	16	16
Subtotal	11	42	42	42	42	30

Handling Carrier Revenue Projection 2015 - 2017

Per Week:	2015		Per Week:	2016		Per Week:	2017	
	ConAgra	Other		ConAgra	Other		ConAgra	Other
Pre-July 30 (31 Wks)		775	775	Entire Year	5200	1300	Entire Year	6500
Post-July 30 (21 Wks)		2100	525					
Total:		2875	1300					



■ CARS ON LINE

