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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability
company,

Petitioner,

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.

PETITION FOR DECLARATORY ORDER

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I. SUMMARY OF RELIEF SOUGHT

Tri-City Railroad Company, LLC (“TCRY”) petitions the Surface Transportation Board (“Board”) for a Declaratory Order. TCRY seeks a determination that the efforts of the City of Kennewick, Washington, (“Kennewick”) and the City of Richland, Washington, (“Richland”) to use Washington State law to condemn and acquire a right-of-way for a public street which will bisect two active tracks at-grade (a main track and a 1900-foot passing track, between two switches), and which will interfere with and prevent continued operations on the passing track, is preempted by operation of federal law. The legal basis for this Petition for a Declaratory Order is that the proposed at-grade crossing is not “routine”. Rather, the evidence demonstrates that the proposed at-grade crossing would unreasonably interfere with current and planned railroad operations, both by rendering portions of track unusable for existing and proposed switching and railcar storage operations, and by creating new hazards for rail crews and members of the public by establishing a new at-grade crossing where a nearby grade-separated crossing already exists, and then diverting motor vehicles to the new, less safe crossing. *See, e.g. Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, STB Finance No. 35196, 2010 WL 691256 (March 1, 2010); *Harris County, Texas v. Union Pacific*

Railroad Company, 807 F.Supp.2d 624 (2011); *Wisconsin Central v. City of Marshfield*, 160 F.Supp.2d 1009 (W.D.Wis. 2000); *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005).

Moreover, 49 U.S.C. § 10906 separately deprives the Cities of state law condemnation power over the 1900-foot siding upon which TCRY operates and stores railcars, and further places the crossing in question outside of the ‘routine crossing’ exception to the Board’s jurisdiction, since the ‘routine crossing’ exception was developed out of a different jurisdictional statute, 49 U.S.C. § 10501, and concerns non-exclusive easements over main tracks. The Cities lack state law jurisdiction to condemn an easement which will bisect an existing siding between switches, eliminating TCRY’s existing railcar storage operations within the vicinity of the proposed crossing. *Cf. Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008).

Supporting this filing are the Affidavit of John Miller re: Petition for Declaratory Order, with 42 Exhibits, the Affidavit of Rhett Peterson, and the Affidavit of Counsel re: Petition for Declaratory Order, with 14 Exhibits.

II. PARTIES AND STATUTORY JURISDICTION

TCRY is a limited liability company organized under the laws of the State of Washington. Its headquarters are located in Kennewick,

Washington, and its principal place of business is within the State of Washington.

Kennewick is a municipal corporation and code city organized under the laws of the State of Washington. It is located within Benton County, Washington.

Richland is a municipal corporation and first class city organized under the laws of the State of Washington. It is located within Benton County, Washington.

The Board has authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty. The Board may institute declaratory proceedings where, as here, the question is whether the Board has exclusive jurisdiction over a City's plans to extend a street and create an at-grade crossing bisecting active tracks. *See, e.g., Louisville & Indiana Railroad – Petition for Declaratory Order*, STB No. FD 35536, 2012 WL 569750 (S.T.B.) (February 22, 2012).

“The Board has jurisdiction over rail transportation, regardless of whether the property upon which that transportation is being conducted is owned, leased, or held in easement by the operating railroad.” *Norfolk Southern Railway Company and the Alabama Great Southern Railroad*

Company – Petition for Declaratory Order, STB Finance No. 35196, 2010 WL 691256 at *5 (March 1, 2010).

III. STATEMENT OF THE CASE

A. Tri City Railroad

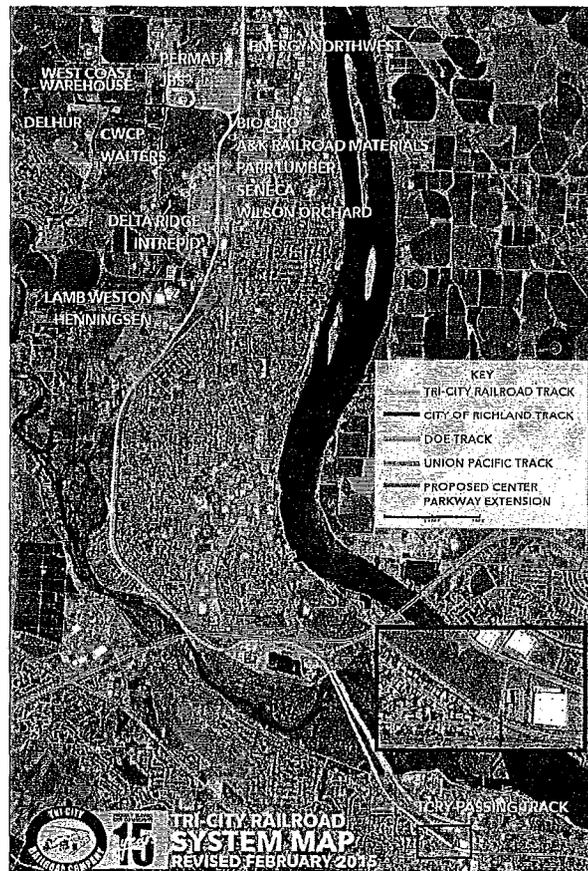
TCRY was founded in 1999 as a Washington limited liability company. (Affidavit of John Miller re: Petition for Declaratory Order (“Miller Aff’t”) ¶ 3). It is a closely-held business, with its headquarters and principal place of business in Benton County, Washington. (Id.).

TCRY is a Class III railroad. (Miller Aff’t, ¶ 4). It has 16 current employees, and owns or leases a number of locomotives, including 11 SD40-2s, one 100 ton switcher, two 70 ton switchers, and 2 SW1200s. (Id.). TCRY’s primary yard is in Richland, as are its shop facilities. (Id.).

TCRY primarily operates on approximately 16 miles of track which run through Kennewick and Richland. (Miller Aff’t, ¶ 5). This trackage was originally constructed by the United States Department of Energy, and is currently owned by the Port of Benton. (Id.). TCRY operates on this trackage as the Port of Benton’s lessee, pursuant to a written lease agreement. (Id.). TCRY moves carloads for its own customers on this trackage; it also operates as the handling carrier for the

Union Pacific Railroad (“UP”).¹ (Id.). Along the 16 miles of leased track, TCRY serves 16 of its own customers. (Miller Aff’t, ¶ 7).

The Burlington Northern and Santa Fe Railway (“BNSF”) also operates on this trackage pursuant to an independent contractual right.² (Miller Aff’t, ¶ 6).



¹ 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. (Miller Aff’t, ¶ 5).

² See *BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC.*, 835 F.Supp.2d 1056, 1058-59 (2011). That case also provides a summary of the history of portions of this trackage, from its construction related to the development of the Hanford area in the late 1940s up through the early 2000s.

In 2013, TCRY handled 2,247 carloads on this trackage, averaging two 9-car trains per day. (Miller Aff't, ¶ 8). In 2014, TCRY handled 2,626 carloads on this trackage, averaging two 10-car trains per day. (Id.). TCRY is expected to handle approximately 4,175 carloads on this trackage in 2015, an average of two 16-car trains per day. (Id.).

BNSF handled 285 carloads on this trackage in 2013, and 367 carloads in 2014. (Miller Aff't, ¶ 9). Due to recent changes and upgrades to the BNSF network, BNSF is expected to bring 100+ car unit trains across this trackage. (Id.).

TCRY additionally has operating rights on approximately 37 miles of Department of Energy trackage, and operates on 8 miles of UP track to facilitate car interchange at Kennewick. (Miller Aff't, ¶ 10).

B. The 1900-Foot Siding / Passing Track

Significant here are 1900 feet of parallel tracks; a main track, and a parallel 1900-foot passing track with switches at each end. (Miller Aff't, ¶ 11-12). Although UP and BNSF use the main track, TCRY has exclusive rights to use the 1900-foot passing track. (Id.).

In conjunction with the main track, the passing track allows trains to meet and pass when entering or exiting the area, and provides for use as a siding to store idle freight cars when not otherwise in use. (Id.)

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. (Id.). TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track. (Id.). As three railroads use the main line, from an operational standpoint, it is critical to TCRY to have the unfettered right to use the passing track as a location to set out or hold a train, while allowing another train to utilize the main line. (Id.). 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. (Id.). As noted, the passing track has switches at both ends; those switches are used by TCRY on an almost daily basis. (Id.).

Moreover, the stretch of track between Steptoe Street in the northwest, and Edison Street in the southeast, is approximately 2.6 miles of track uninterrupted by any at-grade crossings. (Affidavit of Rhett Peterson re Petition for Declaratory Order ("Peterson Aff't") at ¶¶ 2-3). It is one of the only locations where a unit train can be stopped to wait for operations to clear along the track, or for other safety or security reasons. (Id.). At nearly the middle of this 2.6 mile stretch are the parallel main and 1900-foot passing track in question. Because of the expected future train traffic, including the increase in unit trains, TCRY is exploring expanding

the length of the passing track to as much as 10,000 feet, so that the main and parallel passing tracks can accommodate unit trains. (Peterson Aff't, ¶ 4).

An important increase to TCRY's rail business is currently in the process of implementation. (Miller Aff't, ¶ 13). It is known as the "Preferred Freezer Plant" and is coming online in 2015. It is the largest frozen foods plant in the world and will provide rail traffic both to TCRY directly, as well as to TCRY as the handling agent for UP. (Id.). This is expected to increase TCRY / UP rail traffic by approximately 1,575 carloads in 2015, 2,325 carloads in 2016 and 1,300 carloads in 2017. (Id.).

Independent of TCRY / UP operations, BNSF is expected to significantly increase its rail traffic on the main track parallel to the passing track area, due to changes in its operations, and the construction of a new rail loop by Richland. (Miller Aff't, ¶ 14). Richland has projected as many as 12,500 inbound and 12,500 outbound rail cars per year at the passing track area in the coming years. (Id.).

C. The Proposed At-Grade Crossing.

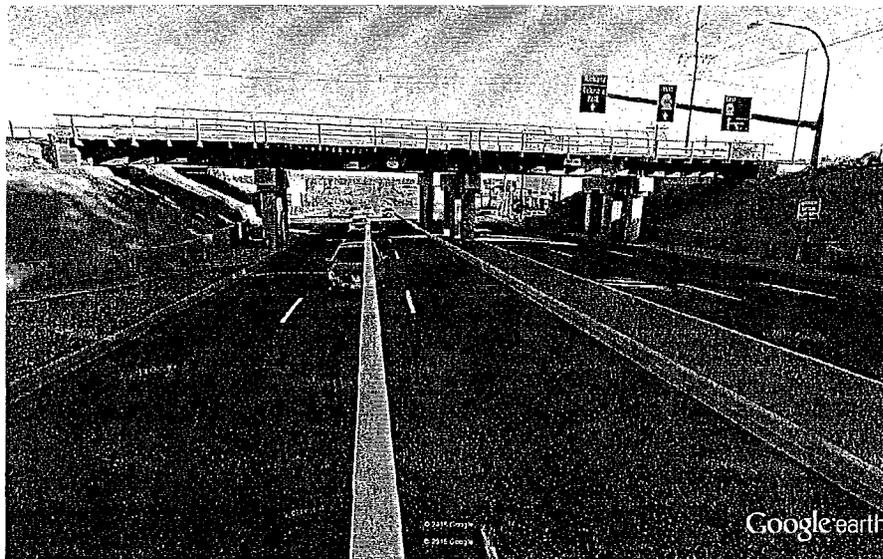
1. The Cities' 2006 Petition Is Denied.

As depicted below, there are two sets of parallel tracks at the location of the at-grade crossing sought by the Cities. The tracks running east-west are part of spur owned by the Union Pacific Railroad. (See

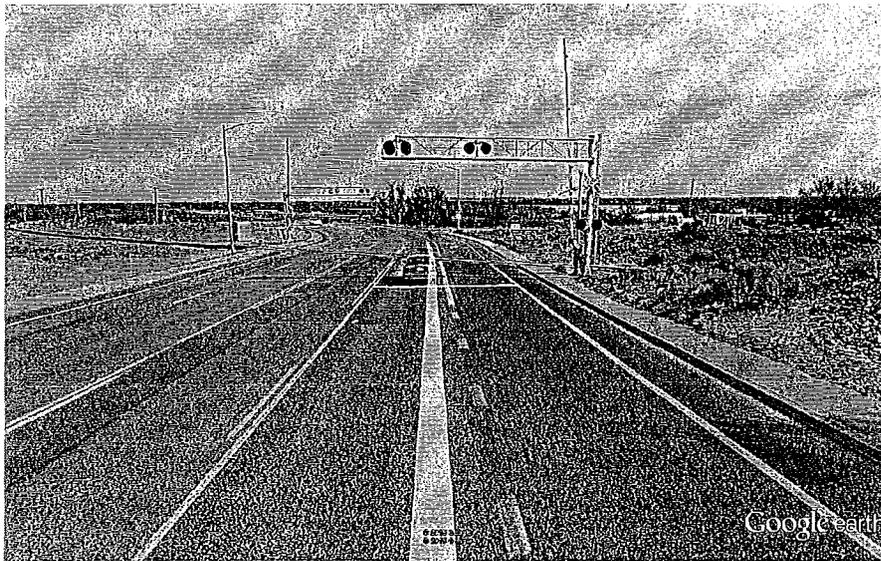
Miller Aff't, ¶ 18, Exhibit 10) The Tracks which angle to the northwest are the main track and passing track operated upon by TCRY. (Id.).



Near this location are two existing crossings. About 1/3rd of a mile to the east is an existing grade-separated crossing, with an underpass for six (6) lanes of traffic. (See Miller Aff't, ¶¶ 33-35, Exhibits 29-31).



About 3500 feet to the west is an existing at-grade crossing, which has active warning lights and gates. (Id.).



In 2006, the Cities filed a petition with the Washington State Utilities and Transportation Commission (“UTC”) to approve an at-grade crossing extending a city street across all four tracks. (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”). This petition was opposed by TCRY, Union Pacific, and Burlington Northern & Santa Fe Railroad (“BNSF”). (Id.).

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.

(Id.).

At the time of the 2006 petition by the Cities, TCRY and Union Pacific's operations were described as follows, for the pertinent crossing location:

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.) (notes omitted)

Given that the location of the proposed crossing has multiple tracks and is actively used for switching, the UTC 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.).

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.)

2. The Cities' 2013 Petition is Initially Denied.

On April 8, 2013, Kennewick filed a second petition with the UTC to construct a highway-rail grade crossing at Center Parkway and to remove the passing track. (April 8, 2013 Petition To Construct A Highway-Rail Grade Crossing, Washington State Utilities and Transportation Commission Docket TR-130499-P, attached as Exhibit 2 to the Counsel Aff't, at, e.g., pp. 8, 12, 37, 48, 49) On May 31, 2013, Richland joined Kennewick's petition. (See February 24, 2014 Initial Order Denying Petition to Open At-Grade Railroad Crossing, Washington State Utilities and Transportation Commission Docket TR-130499-P, attached as Exhibit 3 to the Counsel Aff't, at p. 1).

Prior to filing a second petition seeking permission for an at-grade crossing with Washington's UTC, the Cities negotiated with Union Pacific and BNSF to relocate their switching operations. (Id. at pp. 2-3). Consequently, the two Union Pacific spur tracks could be removed, and so now the proposed crossing will cross two active tracks – TCRY's main track, and the parallel 1900-foot passing track.

TCRY again opposed the crossing, because of the anticipated interference with its operations.³ The Washington UTC's administrative law judge summarized:

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.

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

³ The UTC has limited jurisdiction, and took testimony concerning TCRY's operations only for purposes 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 outside of the purview of the UTC, and instead are within the exclusive jurisdiction of the Board.

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.

(Id. at pp. 4-5).

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[.]” (Id. at p. 7). The Cities sought to justify the public need for the proposed crossing through three arguments, which were 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.

(Id. at pp. 18-22).

3. Despite Agreeing That Public Safety Does Not Justify Constructing The Crossing, the UTC Approved Its Construction For Local Political Reasons.

The Cities sought review of the initial denial of their 2013 petition by the UTC, which again was opposed by TCRY. (*See* March 18, 2014 Cities of Kennewick and Richland Petition for Administrative Review, and March 28, 2014 Answer of Respondent Tri-City & Olympia Railroad Co. To Petition For Administrative Review, attached as Exhibits 4 and 5 to the Counsel Aff't).

Meanwhile, five (5) Washington state legislative members sent correspondence to the UTC, seeking intervention of the UTC's executive

director to reverse the earlier denial and approve the crossing. (*See* March 14, 2014 letter from State senators Brown and Hewitt, and State representatives Klippert, Haler, and Walsh to the Executive Director of the Washington Utilities and Transportation Commission, attached as Exhibit 6 to the Counsel Aff't).

Again on review, the UTC 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.

(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).

Nonetheless, in reversing the Initial Order, and approving the crossing, the UTC 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[.]” (Id. at pp. 10-11).

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.

(Id. at pp. 14-15).

4. The Cities Have Served a Pre-Condemnation Notice on TCRY, Demanding TCRY Acquiesce to the Proposed Crossing Under Threat of Condemnation.

Since the UTC’s approval of the crossing appeared to approve the removal of TCRY’s passing track (*see id.* at p. 6, Figure 2; *see also* Exhibit 2 to the Counsel Aff’t, at pp. 8, 12, 37, 48, 49), TCRY, for this and other reasons, sought appeal of the crossing approval, and filed a declaratory action in Washington state court. (*See* January 2, 2015 Notice of Appeal to Division III of the Court of Appeals, Benton County Sup. Ct. No. 14-2-01894-8, attached as Exhibit 8 to the Counsel Aff’t; July 25, 2014 Complaint for Declaratory and Injunctive Relief Superior Court, Benton County Case No. 14-2-01910-3, attached as Exhibit 9 to the

Counsel Aff't). The declaratory pleading was subsequently amended to describe federal preemption principles, as well. (See December 10, 2014 Tri-City Company's First Amended Complaint for Declaratory and Injunctive Relief, Superior Court, Benton County Case No. 14-2-01910-3, attached as Exhibit 10 to the Counsel Aff't).

On November 12, 2014, TCRY received written notification from an appraiser that the Cities would be conducting an appraisal of the tracks at issue, apparently in preparation for a condemnation action under state law. (See November 12, 2014 correspondence from Bruce Jolicoeur, MAI to William J. Schroeder, attached as Exhibit 11 to the Counsel Aff't).

However, the Cities subsequently stated that they are no longer seeking removal of the passing track; rather, they now intend to install an at-grade crossing which bisects both the main track and the passing track. The Cities have since served pleadings in the above-mentioned state court declaratory action, seeking its dismissal on the basis that, *inter alia*, they do not intend to take or remove the passing track, and that installation of an at-grade crossing is therefore within their authority. (See February 12, 2015 Answer to First Amended Complaint for Declaratory and Injunctive Relief, Superior Court, Benton County, Case No. 14-2-01910-3, attached to the Counsel Aff't as Exhibit 12; February 12, 2015 Cities' Motion for

Summary Judgment of Dismissal, Superior Court, Benton County Case No. 14-2-01910-3, attached to the Counsel Aff't as Exhibit 13).

On February 12, 2015, while the instant petition was being drafted, the Cities filed a motion for summary judgment in the state court declaratory action. (Id.). That motion argues, *inter alia*, that the proposed crossing falls within the Board's "routine crossing" exception to the Board's exclusive jurisdiction. (Id.). The state court declaratory action has been voluntarily dismissed, without prejudice, by TCRY, which has instead sought the Board's determination as to its own jurisdiction.

Finally, the Cities recently served TCRY pre-condemnation paperwork, describing the process for the Cities to acquire the proposed right of way through condemnation, and offering \$38,500 in compensation. (See February 10, 2015 condemnation paperwork served upon TCRY by the Cities, including the Acquisition Acquiring Real Property and Federal-Aid Programs and Project, attached as Exhibit 14 to the Counsel Aff't).

D. Kennewick's Regulation of At-Grade Crossings.

Kennewick has enacted an ordinance, Kennewick Municipal Code ("KMC") 11.80.090, 'Blocking Use of Street When Switching', which provides:

Cars or engines must be left clear of road crossing signal circuits. When it can be avoided, cars or engines must not be left standing nearer than two hundred fifty feet (250') to a road crossing. Automatic crossing signals must not be actuated unnecessarily by an open switch or by permitting equipment to stand within a controlling circuit. When this cannot be avoided, if the signals are equipped for manual operation, a crew member must manually operate the signals for the movement of traffic. A crew member must restore the signals to automatic operation before a crossing is occupied by a train or engine, or before leaving the crossing. A public crossing must not be blocked for more than five (5) minutes when it can be avoided.

The net effect of KMC 11.80.090 is that although the Cities contend that they are not seeking the removal of the passing track, the ordinance, by its terms, would significantly limit the operational use of the passing track because of public safety, should the proposed at-grade crossing be allowed.

E. The Proposed At-Grade Crossing Would Interfere with Current and Planned Railroad Operations.

As set forth more fully *infra*, Should the at-grade crossing be constructed bisecting TCRY's main track and passing track, the immediate effect would be to: eliminate railcar storage at and in the vicinity of the crossing; limit switching operations given the proximity of crossing to switch, so as to avoid fouling crossing; increase the danger for rail crews being near motorists while performing operations; and limit the ability to

use the passing track as temporary over-capacity storage when the TCRY rail yard reaches its maximum, given the projected car counts in the coming 5 years. (Miller Aff't, ¶¶ 16-43, Exhibits 8 ~ 42.).

IV. POINTS AND AUTHORITIES

A. The Board Generally Has Exclusive Jurisdiction Over Railroad Operations.

49 U.S.C. § 10501 (b) provides:

The jurisdiction of the [Board] over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law

“[C]ongressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause.” *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998). “If a railroad line falls within [the ICCTA’s] jurisdiction, the [Board]’s authority over abandonment is both exclusive and plenary.” *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 530 (6th Cir. 2002).

In other words, “Congress has delegated to the [Board] exclusive jurisdiction to regulate ‘transportation by rail carriers’ and ‘the construction, acquisition, operation, abandonment, or discontinuance’ of rail facilities . . . with the instruction that the agency ‘ensure the development and continuation of a sound rail transportation system’ [citation omitted].” *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

In *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007), the court noted:

[T]he courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. Second, there can be no state or local regulation of matters directly regulated by the Board — such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-11328); and railroad rates and service (see 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124).

Id. at 1130 (quoting *CSX Transp., Inc. — Petition for Declaratory Order*, 2005 WL 1024490, at *2-*4 (Surface Transp. Bd. May 3, 2005)).

B. The STB's Jurisdiction Is Exclusive When A Proposed At-Grade Crossing Would Burden or Unreasonably Interfere With Railroad Operations.

In what is known as the 'routine crossing' exception, when a proposed at-grade crossing would not unreasonably interfere with current or planned railroad operations, the acquisition of the right of way and construction of that crossing is excepted from federal preemption under 49 U.S.C. 10501(b). *See Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835 (S.T.B.) (March 3, 2004).

However, if the construction and operation of the proposed at-grade crossing will unreasonably interfere with current or planned railroad operations, the Board's jurisdiction is exclusive, and condemnation actions are preempted.

In *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005), a city sought to acquire a portion of a railroad right of way to construct a pedestrian and bike trail, and to improve its storm drain system. *Id.* at 859. When the city informed the railroad of its plans, the railroad informed the city it would invoke federal preemption. *Id.* at 859. Consequently, the city petitioned the Surface Transportation Board for a declaration that its planned state law condemnation action would not be preempted. *Id.*

The railroad “originally did not oppose the storm sewer project or construction of the trail between 19th Street and 22nd Street, but it changed its position about the trail after the Board commenced proceedings.” *Id.* at 859.

[The Railroad] stated that it would not be able to get equipment to the tracks for maintenance or to handle derailments if its right of way were narrowed. [The Railroad] expressed concerns about the safety of trail users in the case of a derailment or while I joists or large pieces of lumber were being unloaded from center beam cars. These concerns were heightened by the fact that its calculations showed that at one point the trail would be only 7.5 feet from the rail. [The Railroad] also projected significant increases in rail traffic and described its plans to develop a railroad terminal area and rebuild a sidetrack. It proposed several alternative routes for the trail.

Id. at 859.

Holding that preemption applied, the Board found...

...that Lincoln had not adequately refuted [the Railroad’s] contention that it needed all of the right of way to satisfy its present and future rail needs. [The Railroad] had argued to the Board that it currently used the space to move freight, store lumber, unload railroad cars, and stage unloaded freight for further movement into shipper facilities, and it asserted that it might rebuild a sidetrack and construct a terminal facility. According to the Board all of these activities are part of transportation by rail as defined in 49 U.S.C. § 10102(9), and the proposed trail could interfere with these transportation activities. Additionally, the Board determined that Lincoln

had not adequately refuted [the Railroad's] contentions that the trail would create safety hazards.

Id. at 860.

The Eighth Circuit noted that “the Board can consider the railway’s future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition. Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” *Id.* at 862 (internal citation omitted).

The Eighth Circuit affirmed the Board’s determination, explaining that:

The Board has broad authority over the operation of railways and associated property. The ICCTA gives the Board exclusive jurisdiction over rail transportation...The statute also defines rail transportation expansively to encompass any property, facility, or equipment related to the movement of passengers and property by rail and any related services, including “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10102(9). Courts have recognized that Congress intended to give the Board extensive authority in this area. *See City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (reviewing the history of railway preemption, text of the ICCTA, and court decisions to reject the argument that preemption is limited to economic regulation).

Id. at 861.

On the topic of future plans of the railroad, the Board's decision in *Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, is instructive. STB Finance No. 35196, 2010 WL 691256 (March 1, 2010). In that petition, the City of Birmingham, Alabama sought to condemn under state law several acres of railroad property to convert into a public park. *Id.* at *1. Objecting, and seeking a declaratory order that the City's condemnation was preempted, the Railroad explained:

...the major portion of the Property was acquired by the railroad in the mid-1880s and has track on it that formerly served an NS produce depot. NS explains that, though not currently in use for actual rail service, the Property is adjacent to, parallel to, and at a lower grade than seven elevated rail lines, including two NS mainlines over which NS moves between 25 and 30 trains per day, consisting of both freight and Amtrak passenger trains. According to NS, the rail lines are held in place by a retaining wall. NS asserts that it uses the Property to maintain the tracks and structure and retaining wall and that its long-term plans include use of virtually all of the Property to construct an embankment to replace the retaining wall. NS further states that it is in the process of replacing signal towers that serve the elevated lines, and that the new rail signal structures will occupy a portion of the Property. NS also asserts that the Property could eventually be needed to support NS's Crescent Corridor project (involving expanded rail capacity between Birmingham and New Orleans). Finally, because the City's plans

show that an amphitheater and walking path would abut the retaining wall, NS asserts that the City's plans raise potential safety concerns and would leave NS insufficient room for equipment needed for track maintenance and clearing derailments.

Id.

The City, for its part,

...contend[ed] that its proposed condemnation action would not interfere with rail use because NS does not now use the Property as part of its active rail operations. Birmingham also relies on case law finding that federal preemption under section 10501(b) is not "complete," but displaces only state laws that have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. Birmingham further asserts that, because there are six other public parks adjacent to active rail lines in the City, the construction of a park on the Property would not pose a safety hazard.

Id. at *2 (internal citation omitted).

The Board, granting the petition, found "that the City's proposed taking of the disputed property under state eminent domain law would unreasonably interfere with rail transportation and therefore would be federally preempted." *Id.* at *4.

"Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may

become necessary for railroad uses.” *Id.* (quoting *City of Lincoln*, 414 F.3d at 862).

The Board noted that “the right to proceed under state law is conditioned upon the action taken under state law not unreasonably interfering with railroad operations or interstate commerce, and not constituting regulation of the railroad’s operations.” *Id.* (citation omitted). The Board explained: “Here, the record shows that this Property abuts an existing rail corridor; that NS has plans for significant improvement and increased rail traffic volume; and that the park the City proposes to build would interfere with or prevent these transportation activities, as well as prevent the railroad from properly conducting railroad maintenance activities and clearing derailments.” *Id.* at *5.

In *Wisconsin Central v. City of Marshfield*, 160 F.Supp.2d 1009 (W.D.Wis. 2000), the Wisconsin Central Ltd. sought declaratory and injunctive relief against the city, concerning the city’s efforts to condemn under state law a passing track, as part of a highway re-alignment project. *Id.* at 1011.

The highway re-alignment plan involved constructing an overpass over top of the existing railroad mainline, but also required eliminating a large portion of the parallel passing track. *Id.* The railroad sought

injunctive and declaratory relief, that federal law preempted the state law condemnation action. *Id.*

Surveying the law, the court explained that it “agrees with these courts in their reading of the broad preemptive language of the ICCTA. The preemption provision makes all ICCTA remedies exclusive and explicitly preempts all other Federal and State remedies. It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.” *Id.* at 1013 (citations omitted).

In granting the railroad’s motion for summary judgment, the court explained:

In using state law to condemn the track defendant is exercising control — the most extreme type of control — over rail transportation as it is defined in section 10102(9). Characterizing condemnation as relocation does not change this conclusion. Were the condemnation properly considered a relocation, the act of forcing WCL to relocate its passing track is no less an exercise of control over transportation by the City through its laws than is outright condemnation. Defendant’s reliance on Board of Hudson River is wholly misplaced. The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach. Congress’ preemptive language and intent is paramount, and the nature of the preempted state regulation is irrelevant. *See City of Auburn*, 154 F.3d at 1031 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)).

The ICCTA expressly preempts more than just state laws specifically designed to regulate rail transportation. Environmental laws — statutes of general application — have been found to be expressly preempted under the ICCTA when applied to facilities and property constituting rail transportation. *See City of Auburn*, 154 F.3d at 1031. Limiting preemption to state laws aimed specifically at railroad regulation would arbitrarily limit the purposefully broad language chosen by Congress in the ICCTA.

Id. at 1013-14.

The court additionally found that the use of state law to condemn the railroad passing track was subject to both field and conflict preemption. *Id.* at 1014-15. The court concluded: “Giving effect to the condemnation authority of municipalities over railroad property conflicts with Congress’ purpose in enacting the ICCTA.” *Id.* at 1015.

In *Fort Bend Co. v. Burlington Northern and Santa Fe Railway Co.*, 237 S.W.3d 355 (Tex.App. 2007), a county sought to build an at-grade crossing across a main track with a parallel passing track. *Id.* at 356-57. In finding preemption, the court explained:

There is ample evidence in the record that placing the public crossing over the regular and passing tracks would interfere with railroad operations and cause safety hazards. Burlington presented affidavits and testimony detailing how the placement of the Royal Lakes crossing interferes with its railroad operations. Burlington showed, among other problems, the following: the Booth passing track is the only uncut passing track

within 30 miles; because of the placement of the crossing, Burlington has lost capacity due to loss of time; it is necessary to railroad operations to have this piece of track unencumbered and, therefore, it needs to move a portion of the track or take out the crossing; and the placement of the crossing has affected the entire line. Burlington also showed it parked coal trains destined for the Houston Lighting and Power facility at Smithers Lake on the passing track, approximately four out of seven days a week; these trains would block the crossing for extended periods of time; and Burlington is paid a fee based on the number of trains it is able to park on the passing track.

Moreover, Burlington presented evidence that, by law, it must break any train that blocks a public crossing for longer than 10 minutes; the County sent the sheriff out to force it to break the trains on several occasions at the Royal Lakes crossing; and when trains are broken, there is a delay of approximately 45 minutes for the reconnection. Other evidence showed that if the train sits broken for longer than four hours, a federal law is triggered specifying that a brake test must be done before moving the train. This federal brake test delays the train approximately 90 minutes, blocking the crossing during re-connection and the mandatory brake test. Burlington presented evidence that showed citizens worry about how emergency vehicles would get past the blocked crossing. Burlington stated, when using the Booth track to pass trains, other trains may have to be broken and the same time added to their connection, causing scheduling problems and time delays throughout the line, not just at the Booth passing track. Additionally, Burlington produced evidence of citizens' complaints that when broken trains sat approximately 140 feet from the crossing, it caused a visual hazard and, therefore, the trains needed to be parked at least 250 feet

from each side so drivers could see past both tracks. To park the trains farther from the crossing would take away the use of an additional 220 aggregate feet of the passing track.

Id. at 359-60.

According to the evidence presented, the condemnation has the effect of regulating Burlington now and in the future by affecting the speed and length of its trains. Additionally, Burlington presented evidence that showed the need of an uninterrupted passing track at Booth for future operations, that the crossing interferes with current railroad operations, and that the crossing causes more federally-mandated air brake tests and has a negative economic effect on the railroad. Condemnation is a permanent action, and “it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005) (quoting *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928)).

The enlarged crossing, bisecting Burlington’s passing track with a four-lane boulevard street and esplanade, would impermissibly interfere with railroad operations and, thus, is preempted.

Id. at 360 (footnote omitted).

In *Union Pacific R. Co v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011), the court affirmed the granting of an injunction prohibiting a local transit authority from obtaining an easement across a railroad right of way by operation of state law. *Id.* at 676-78. The court noted that “there is no dispute that Union Pacific and its 2.8-mile Right of Way fall under”

ICCTA, and held that a the proposed state condemnation establishing a perpetual easement over the Right of Way is a regulation of railroad transportation preempted by ICCTA. *Id.* at 683.

In *City of North Little Rock v. Union Pacific R.R. Co.*, 808 F.Supp.2d 1102 (E.D.Ark. 2011), the city commenced a condemnation action to acquire an easement for a pedestrian and bicycle lane across land owned by one railroad, and operated upon by another. *Id.* at 1103.

The railroad at the location was a short line carrier operating on small, branch lines. *Id.* at 1103. “It retrieves loaded railroad cars from shippers and delivers them to interstate carriers, such as Union Pacific, for transportation to destinations in other states.” *Id.* at 1104.

Midland has a two mile track, the Ashgrove lead, running through the property with the center of the track located 50 feet from the boundary of the property. The proposed easement cuts across the Ashgrove lead adjacent to Baucum Pike. It then runs alongside the track between the boundary of the railroads' property and the Ashgrove lead.

An additional track, the team track, separates from the Ashgrove lead and runs parallel with it. The team track is primarily used to park overflow railcars and for transloading, that is, moving product from railcars to trucks and vice versa. The center of the team track is 17 feet 7 inches from the center of the Ashgrove lead. A freight car on the team track normally extends another 5.5 feet from the center of the team track. With a train upon it, the team track extends about 23 feet from the Ashgrove lead. Thus, there are only about 27

feet between the team track and the boundary of the railroads' property. The proposed 30 foot wide easement overlaps with the team track. Charles Laggan, vice president and general manager of Midland, testified that granting the easement would render the team track unusable.

Id. at 1104.

Should a derailment occur on the team track or the Ashgrove lead, the railroad would likely need to bring large equipment onto the proposed easement. In response to evidence that the City might build a fence to separate the bicycle trail from the railroad track, Laggan testified any fence would interfere with Midland's ability to bring in the large equipment needed in the rerailling process. Even the trail itself could constitute an obstacle because the necessary equipment would likely damage the trail. Laggan testified that the railroad switch itself is a high-risk area for derailments. Laggan also testified that the construction of a trail on the proposed easement would severely impact Midland's ability to conduct transloading and switching operations and to deal with derailments.

Id.

Noting the exclusive preemption language of 49 U.S.C. § 10501(b), the court noted that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations’ than the language contained in Section 10501(b).” *Id.* at 1105 (quoting *Union Pac. R.R. Co. v. Chi. Transit Auth.*, No. 07CV229,

2009 WL 448897, *5 (N.D. Ill. Feb. 23, 2009) (citing *CSX Transp. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

The court concluded:

The evidence demonstrates that the proposed easement could interfere with Midland's ability to operate its team track as well as its transloading and switching facilities and could interfere with efforts to address derailments. Whether to allow the taking is a decision that, on these facts, involves the regulation of rail transportation. Congress has vested exclusive jurisdiction over the regulation of rail transportation in the Surface Transportation Board.

Id.

In *Harris County, Texas v. Union Pacific Railroad Company*, 807 F.Supp.2d 624 (2011), the county sought to condemn an at-grade right of way across the middle of a 13,800 foot section of Union Pacific track. *Id.* at 625. The *Harris* court noted:

The Fifth Circuit has adopted the STB's test for determining the preemptive scope of § 10501(b). *Franks Inv. Co., LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410, 414 (5th Cir. 2010) (*en banc*). The test distinguishes two types of preempted actions: categorically preempted actions and actions that are preempted "as applied." *Id.* at 410. The former includes state or local regulations that prevent or govern activities directly regulated by the STB. Such regulations are preempted on the basis of "the act of regulation itself" and not "the reasonableness of the particular state or local action." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008)

(quoting *CSX Transp., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, at *2-3 (S.T.B. May 3, 2005)).

“As applied” preemption covers state or local actions according to “a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* While “routine crossing disputes . . . do not fall into the category of ‘categorically preempted,’” railroad crossing disputes may be preempted “as applied,” if the crossings “impede rail operations or pose undue safety risks.” *Id.* at 332-33 (quoting *Maumee & W. R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835, at *2 (S.T.B. March 2, 2004)).

Id. at 632.

Explaining that the “Court may consider Union Pacific’s future plans in evaluating unreasonable interference with its operations”, including plans to construct a side track to accommodate additional trains where are “expected in this area due to customer demand for greater carrying capacity”, the Fifth Circuit found that state condemnation law was preempted, and could not be employed by the county to obtain the right of way easement for the road extension and at-grade crossing, as “the proposed crossing...is not a ‘routine’ at-grade crossing...and [it] unreasonably burdens or interferes with Union Pacific’s current and projected use of its railroad tracks. *Id.* (citations omitted).

C. The Cities' Proposed Crossing Does Not Fall Within The 'Routine Crossing' Exception to the Board's Jurisdiction; Any Condemnation Proceeding Initiated By the Cities to Obtain The Proposed Right Of Way is Preempted.

Here, the proposed at-grade crossing is not "routine", as it would significantly interfere with current and planned future switching, passing, and storage operations, as described *supra* and in the Miller Aff't. 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. (Miller Aff't, ¶ 12). 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. (Id.). The effect of the proposed crossing will be eliminating 545 feet of usefulness, at minimum, of the 1900-foot passing track. (Id. at ¶27). The proposed crossing affecting nearly 1/3rd of the tracks, it will significantly affect TCRY's current operations to perform switching, storage, and passing operations without frequently fouling or closing the proposed crossing. (Id.).

Among other expected effects of the proposed at-grade crossing, should the at-grade crossing be constructed bisecting TCRY's main track and passing track, the immediate effect would be to eliminate railcar storage at the location of the crossing. (Id. at ¶ 43). It will also limit

switching operations given the proximity of crossing to switch, so as to avoid fouling crossing; it will increase the danger for rail crews being near motorists while performing operations; and it will limit the ability to use the passing track as temporary over-capacity storage when the TCRY rail yard reaches its maximum, given the projected car counts in coming 5 years. (Id.).

Further, the stretch of track between Steptoe Street in the northwest, and Edison Street in the southeast, is approximately 2.6 miles of track uninterrupted by any at-grade crossings. (Peterson Aff't at ¶¶ 2-3). It is one of the only locations where a unit train can be stopped to wait for operations to clear along the track, or for other safety or security reasons. (Id.). At nearly the middle of this 2.6 mile stretch are the parallel main and 1900-foot passing track in question. Because of the expected future train traffic, including the increase in unit trains, TCRY is exploring expanding the length of the passing track to as much as 10,000 feet, so that the main and parallel passing tracks can accommodate unit trains. (Peterson Aff't, ¶ 4). 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. (Peterson Aff't, ¶ 3). 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. (Id.).

Therefore, TCRY requests a Declaratory Order that the effort of the Cities to use Washington State law to condemn the proposed at-grade right of way is preempted. *See, e.g. Fort Bend Co. v. Burlington Northern and Santa Fe Railway Co.*, 237 S.W.3d 355 (Tex.App. 2007).

D. 49 U.S.C. § 10906 Separately Deprives the Cities of Jurisdiction to Condemn An At-Grade Right-Of-Way Across Sidings And Passing Tracks.

As noted above, section 10501(b) of the ICCTA broadly grants jurisdiction to the Board over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state...” 49 U.S.C. § 10501(b)(2). This broad jurisdictional grant is coupled with an express preemption clause mandating that “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.” 49 U.S.C. § 10501(b). As a consequence, jurisdiction over “spur, industrial, team, switching or side tracks, or facilities” rests solely with the Board. 49 U.S.C. § 10501(b)(2); *see also United Transp. Union Ill.-Legis. Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999).

The present case concerns both a main track, and a parallel siding, or passing track. A separate jurisdictional statute governs spurs, switching tracks, and side tracks. *See* 49 U.S.C. § 10906. The first question, then, is whether a given track at issue is a main track or a siding.

Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a “spur” or “industrial” track, include whether the railroad maintains a train schedule or regular service over the track; furnishes express, passenger, or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading. *See Chicago, M., St. P. & P.R. Co. v. Chicago & E.I.R. Co.*, 198 F.2d 8, 12 (7th Cir. 1952). It is also relevant whether the track has been or is to be used for anything other than industrial delivery, *see La. & Ark. Ry. Co. v. Mo. Pac. R.R. Co.*, 288 F.Supp. 320, 323 (D.C.La. 1968), the length of the track, whether the track serves only a single customer, and whether the customer requested the carrier to provide service. *See Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991).

Port City Properties v. Union Pacific R. Co., 518 F.3d 1186, 1189 (10th Cir. 2008).

Sidings, switching tracks, and passing tracks, like the 1900-foot passing track here, fall under 49 U.S.C. § 10906. That statute separately deprives the Cities of jurisdiction to condemn an at-grade right-of-way across the passing track.

§ 10906 has been interpreted to preclude all regulation of industrial or spur tracks: “When

sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management.” *Cities of Auburn and Kent*, 2 S.T.B. 330, 1997 WL 362017 at *7 (1997); *see also* Report on ICCTA, H.R. Rep. No. 104-422, 104th Cong., 1st. Sess. 167 (1995), U.S. Code Cong. & Admin. News 1995, pp. 850, 1995 U.S.C.C.A.N. 850 (explaining that § 10501(b)(2) was added “[i]n light of the exclusive Federal authority over auxiliary tracks and facilities. . . .”). In short, read together, § 10501 and § 10906 completely preempt Hodges’ state law tort claims with respect to spur or industrial tracks. *See, e.g., PCI Transp. v. Fort Worth & Western R.R.*, 418 F.3d 535, 545 (5th Cir. 2005) (ICCTA completely preempts non-contractual claims); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (ICCTA preempts claims of negligence and negligence per se with respect to railroad’s alleged road blockages); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F.Supp.2d 326, 334 (D.Me. 2003) (state law claims preempted by ICCTA); *South Dakota ex rel. South Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F.Supp.2d 919, 934-35 (D.S.D. 2003) (state law claims for punitive damages and tortious interference preempted by ICCTA); *Guckenberger v. Wis. Cent. Ltd.*, 178 F.Supp.2d 954, 958 (E.D.Wis. 2001) (state law nuisance claim preempted with respect to railway traffic issue); *Rushing v. Kan. City S. Ry. Co.*, 194 F.Supp.2d 493, 500-01 (S.D.Miss. 2001) (ICCTA preempts state law nuisance and negligence claims intended to interfere with railroad’s operation of switchyard).

Port City Properties, 518 F.3d at 1188.

The fact that this matter concerns a proposed at-grade crossing which will bisect not only a main track, but also a siding, necessarily implicates 49 U.S.C. § 10906. That statute both governs jurisdiction over the siding in question, and separately deprives the Cities of jurisdiction to condemn a right-of-way over the siding. Furthermore, the ‘routine crossing’ exception to the Board’s jurisdiction was developed under 49 U.S.C. § 10501, and generally concerns ‘non-exclusive’ easements over main tracks. As 49 U.S.C. § 10906 separately deprives both the Cities and the Board of jurisdiction over sidings, the ‘routine crossing’ analysis is inapplicable to the question of whether the Cities have jurisdiction to condemn a right-of-way across a siding, and 49 U.S.C. § 10906 provides an independent basis for the Board to enter a Declaratory Order that the Cities’ proposed condemnation is preempted.

V. RELIEF REQUESTED

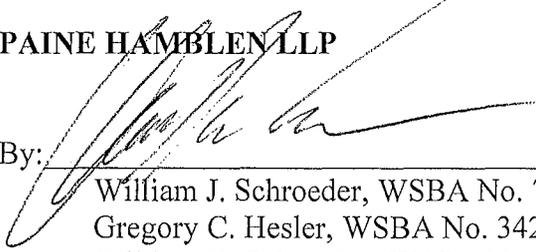
Pursuant to the Board’s authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 and the decisional law cited above, TCRY requests that the Board enter a Declaratory Order as to the following:

1. Finding that the Board’s jurisdiction over the proposed crossing is exclusive; and

2. Finding that any condemnation action brought by the Cities to acquire the right of way for the proposed at-grade crossing which will bisect TCRY's main track and passing track is preempted.

RESPECTFULLY SUBMITTED this 18 day of March, 2015.

PAINE HAMBLEN LLP

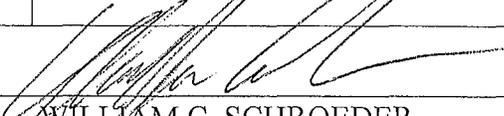
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CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of March, 2015, I caused to be served a true and correct copy of the foregoing document, 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
The City of Richland 505 Swift Boulevard Richland, WA 99352	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
The City of Kennewick 210 West 6 th Avenue Kennewick, WA 99336	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY



WILLIAM C. SCHROEDER

No.

**Before the
SURFACE TRANSPORTATION BOARD**

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	AFFIDAVIT OF JOHN MILLER
	)	RE: PETITION FOR
Petitioner,	)	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.)	
_____)	

STATE OF WASHINGTON)
: ss.
County of BENTON)

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

1. I am the Chief Operations Officer 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. I graduated from the University of Wisconsin at Oshkosh in 1974 with a BBA in Accounting and received a MBA in Finance from DePaul University in 1985. I have 40 years of experience in the railroad industry. I started my career with the Milwaukee Road Railroad in June 1974 in the internal auditing department and transferred into the Accounting Department in 1978. I became Manager – Budget and Responsibility Accounting in March 1979 and in addition assumed the Disbursement Accounting function in 1983. I was responsible for the consolidation, preparation, and monitoring of the company's \$400 million operating expense budget, preparation of the company's book cash forecasts, and all accounts payable functions of the company, including invoice processing, general ledger account reconciliation and accounting for material and supplies inventory. I was a key member of the team involved in the five-year business planning process that culminated in the development of the successful plan of reorganization from bankruptcy. The Milwaukee Road was then acquired by the Soo Line Railroad in 1985 and I was the primary accounting person responsible for coordinating the transfer of accounting functions from one railroad to the other. At Soo Line I was responsible for Disbursements and Billing and later Property Accounting. In 1986 I took a position as Director – Finance and Accounting for Lake States Division where I was responsible for the accounting function for a separate 1800 mile \$85 million profit center. Lake States was put out to bid and was eventually acquired as Wisconsin Central Railroad. I took a

position with WC in 1987 as its Director –General and Property Accounting and developed and implemented its general ledger and associated peripheral systems. I was responsible for the preparation and consolidation of financial statements and the preparation of the company’s operating and capital budgets. I moved to California in 1990 and worked for Southern Pacific Railroad until it was acquired by Union Pacific in 1996. I held several positions at SP and at the time of the merger I was the Director of Budgets for Distribution Services. While at UP I moved into the Short Line Marketing Group in 1999 as Manager – Short Line Development and held that position until accepting my current position with TCRY. While working in the short line group I managed the relationships with approx. 60 short line railroads, including commercial rate negotiations, equipment agreements, branch line sales and leases, and developing business jointly with UP’s short line partners.

3. TCRY was founded in 1999 as a Washington limited liability company. It is a family-owned business, with its headquarters and principal place of business in Benton County, Washington.

4. TCRY is a Class III railroad. TCRY has 16 current employees, and owns or leases a number of locomotives, including 11 SD40-2s, one 100 ton switcher, two 70 ton switchers, and 2 SW1200s. TCRY’s primary yard is in Richland, Washington, as are its shop facilities.

5. 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.

6. The BNSF Railway also operates on this trackage pursuant to an independent contractual right.

7. Along these 16 miles of leased track, TCRY serves 16 of its own customers. Attached as **Exhibit 1** is a map showing both the trackage, as well as the names and locations of TCRY's customers.

8. 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.

9. BNSF handled 285 carloads on this trackage in 2013, and 367 carloads in 2014. Due to recent changes and upgrades to the BNSF network, BNSF is expected to bring 100+ car unit trains across this trackage.

10. TCRY additionally has operating rights on approximately 37 miles of Department of Energy trackage, and operates on 8 miles of Union Pacific track to facilitate car interchange at Kennewick, Washington.

11. The attached **Exhibit 2** depicts TCRY's main track, along with a 1900-foot parallel passing track with switches at each end. Although UP and BNSF use the main track, TCRY has exclusive rights to use the 1900 foot passing track. In conjunction with the main track, the passing track allows trains to meet and pass when entering or exiting the area, and provides for use as a siding to store idle freight cars when not otherwise in use.

12. 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.

13. An important increase to TCRY's rail business is currently in the process of implementation. The new Preferred Freezer plant is coming online in 2015 and is the largest frozen foods plant in the world. This new facility will produce rail traffic both to TCRY directly, as well as to TCRY as the handling agent for UP. This is expected to increase TCRY / UP rail traffic by approximately 1575 carloads in 2015, 2325 carloads in 2016 and 1300 carloads in 2017. **Exhibits 3 and 4** are recent articles concerning the Plant.

14. Independent of TCRY / UP operations, BNSF is expected to significantly increase its rail traffic at the passing track area, due to changes in its operations, and the construction of a new rail loop by the City of Richland. The City of Richland has projected as many as 12,500 inbound and 12,500 outbound rail cars per year at the passing track area in the coming years. **Exhibits 5, 6 and 7** are documents concerning the anticipated increased rail traffic due to these developments.

15. To illustrate the effect of the proposed crossing on TCRY's operations on its passing track, I participated in taking some measurements and depictions of the proposed crossing site, which are presented below.

16. **Exhibit 8** is a satellite image of the TCRY track, proposed crossing, and environs. For orientation purposes, I have marked the TCRY tracks in blue, and the proposed crossing in orange.

17. **Exhibit 9** is a closer representation of the environs of the proposed crossing. Note, there is a now-abandoned spur line, which I have marked in green.

18. **Exhibit 10** shows the location of the proposed crossing bisecting the main and passing tracks. They are marked, blue (TCRY track), orange (proposed crossing), and green (disused track), as the previous figures.

19. **Exhibit 11** shows the length of the main track and parallel 1900-foot passing track. I have circled the north and south switches for ease of reference.

20. **Exhibit 12** shows the view north from the perspective of the tracks, facing the uphill road from which the proposed crossing will be built. Measurements taken at the time of the photograph indicate the width of the existing road is 45 feet from curb to curb.

21. **Exhibit 13** shows the section of the proposed crossing as occupied by railcars on the 1900-foot passing track. The orange paint markings on the rails nearest the camera demark the location of the prolongation of the existing road's curb lines. For ease of reference, those markings have been circled in orange, as well.

22. **Exhibit 14** is a view south from the end of the existing road, across the tracks. The two railcars depicted demonstrate the width of the proposed road crossing.

23. **Exhibit 15** depicts both the passing track and the main track occupied.

24. **Exhibit 16** depicts the passing track occupied by two railcars. The orange paint markings on the rails note the location of the prolongation of the curb lines from the existing road across the rails, where the proposed at-grade crossing will be located.

25. **Exhibit 17** depicts the location of the proposed crossing, as occupied by a string of railcars being stored by TCRY on the passing track, as well as a train passing on the main track, southbound.

26. **Exhibit 18, Exhibit 19, and Exhibit 20** depict the view from the end of the existing road, looking along the tracks to the northwest. Railcars are being stored on the passing track, with a TCRY train approaching from the TCRY Richland yard, located 9 miles to the north. This location, with the 1900-foot passing track with switches on both ends, is the only such location between TCRY's Richland yard in the north, and the Union Pacific and BNSF operations in the south. The passing track supports the simultaneous operations of all three railroads.

27. I was asked to examine the effect of not being able to store railcars within 250 feet of the curb lines of the proposed crossing on each side, which has the practical effect of eliminating 545 feet of usefulness, at minimum, of the 1900-foot passing track. The proposed crossing affecting nearly 1/3rd of the tracks, it will significantly affect TCRY's current operations to perform switching, storage, and passing operations without frequently fouling or closing the proposed crossing. In the following figures, the prolongation of the curb lines from the existing road are marked on the rails in orange, and then 250 feet from each curb line is marked. The photographs illustrate having 545 feet of passing track be unusable for the purposes they are currently put by TCRY.

28. **Exhibit 21** depicts the prolongation of the curb line for the western curb, with measurement to 250 feet to the north.

29. **Exhibit 22** depicts the same stretch of track, from the west curb line to 250 feet therefrom. The crewmembers depicted are standing at the 250 feet marker.

30. **Exhibit 23** is taken from the orange paint mark for the west curb line, and likewise depicts a crewmember standing at 250 feet therefrom.

31. **Exhibit 24** and **Exhibit 25** depict the view from 250 feet to the north of the proposed crossing (marked in blue), to the crossing, where crewmembers are standing on the paint lines marking the prolongation of the curb line.

32. **Exhibit 26** depicts the view of the proposed crossing from the north to the south. The crewmembers depicted in the reflective gear demark the location of the crossing curb line, and 250 feet to the north.

33. **Exhibit 27** and **Exhibit 28** similar depictions, are notable because they show the rise in grade in the city street. Approximately 1/3rd of a mile to the east of the proposed at-grade crossing is an existing grade separated crossing, with motor vehicle traffic passing underneath.

34. **Exhibit 29** depicts a satellite map, showing the existing grade separated crossing about 1/3rd of a mile to the east of the proposed at-grade crossing.

35. **Exhibit 30** depicts the view of a southbound motorist of the existing grade-separated crossing, and **Exhibit 31** depicts the view of a northbound motorist of the existing at-grade crossing.

36. **Exhibit 32** and **Exhibit 33** are views of the south switch.

37. **Exhibit 34** depicts a view of the south switch with a locomotive on the passing track.

38. **Exhibit 35** and **Exhibit 36** are views from the south switch to the north. The railcar and crew are at the location of the proposed crossing.

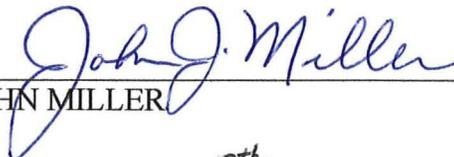
39. **Exhibit 37** and **Exhibit 38** are views north from the south switch. The crew is standing at the 250 foot mark, with the railcar at the proposed crossing.

40. **Exhibit 39** and **Exhibit 40** are views from the old Union Pacific spur, depicting the crew at the 250 foot mark, and at the crossing curb line.

41. **Exhibit 41** depicts the view from the south 250 foot mark, with the crew standing at the location of the proposed east curb line.

42. **Exhibit 42** depicts the view from near the south switch, with crewmembers standing at the 250 foot mark (foreground) and the east curb line (background).

43. Among other expected effects of the proposed at-grade crossing, should the at-grade crossing be constructed bisecting TCRY's main track and passing track, the immediate effect would be to eliminate railcar storage at the location of the crossing. It will also limit switching operations given the proximity of crossing to switch, so as to avoid fouling crossing; it will increase the danger for rail crews being near motorists while performing operations; and it will limit the ability to use the passing track as temporary over-capacity storage when the TCRY rail yard reaches its maximum, given the projected car counts in coming 5 years.



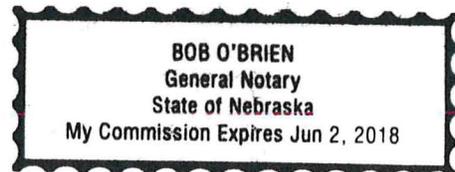
JOHN MILLER

SUBSCRIBED AND SWORN to before me this 13th day of March, 2015,
by JOHN MILLER.



Notary Public in and for the State of
Nebraska Washington, residing at *3910 N. 132nd St. Omaha, NE 68134*
and My Commission Expires: 6/2/2018

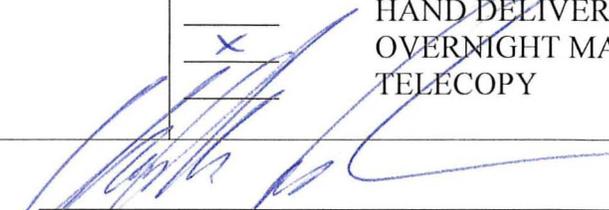
AFFIDAVIT OF JOHN MILLER
RE: PETITION FOR DECLARATORY ORDER - 11



CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of March, 2015, I caused to be served a true and correct copy of the foregoing **AFFIDAVIT OF JOHN MILLER 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
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WILLIAM C. SCHROEDER

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EXHIBIT 1

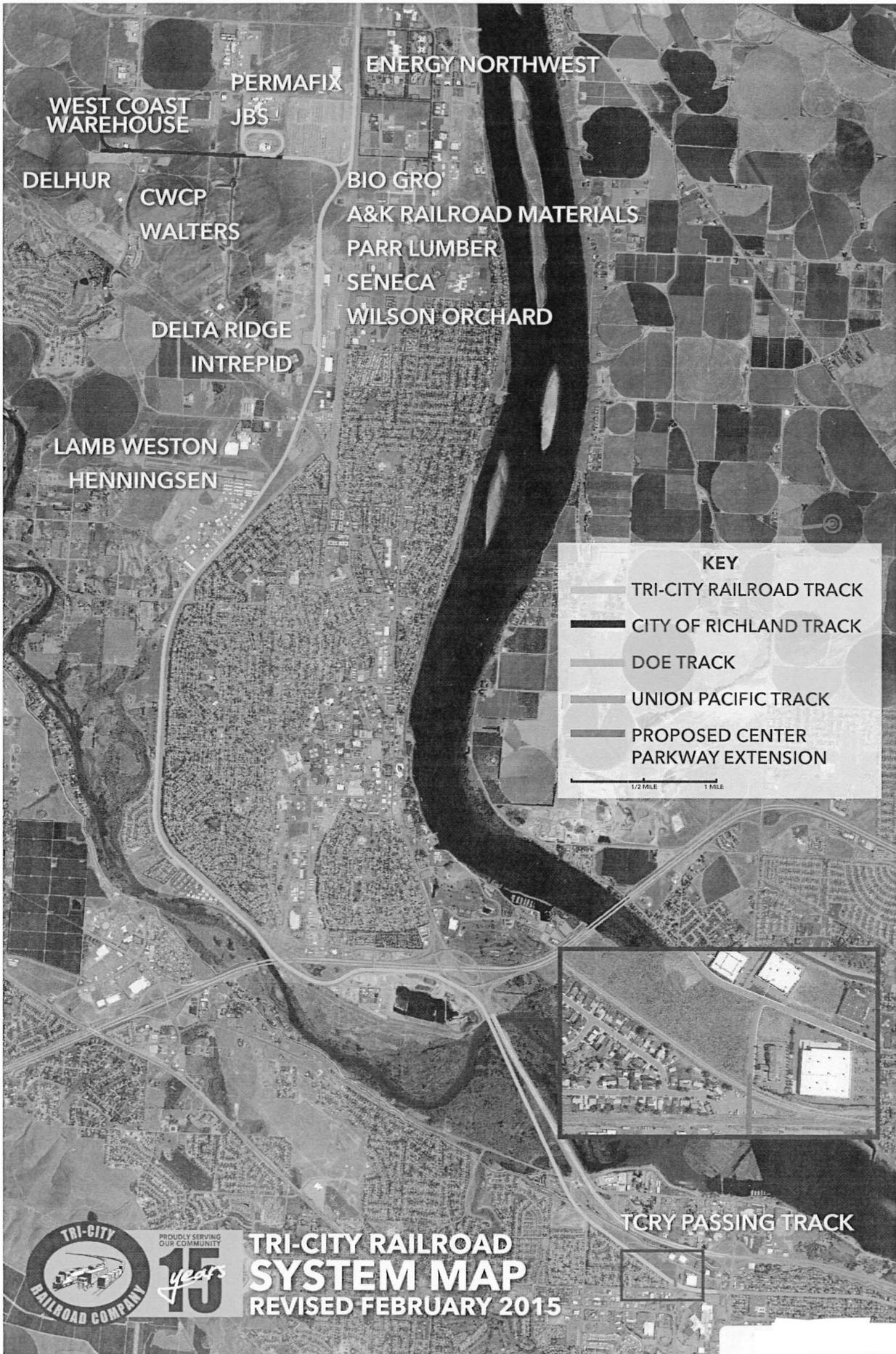


EXHIBIT 2



EXHIBIT 3

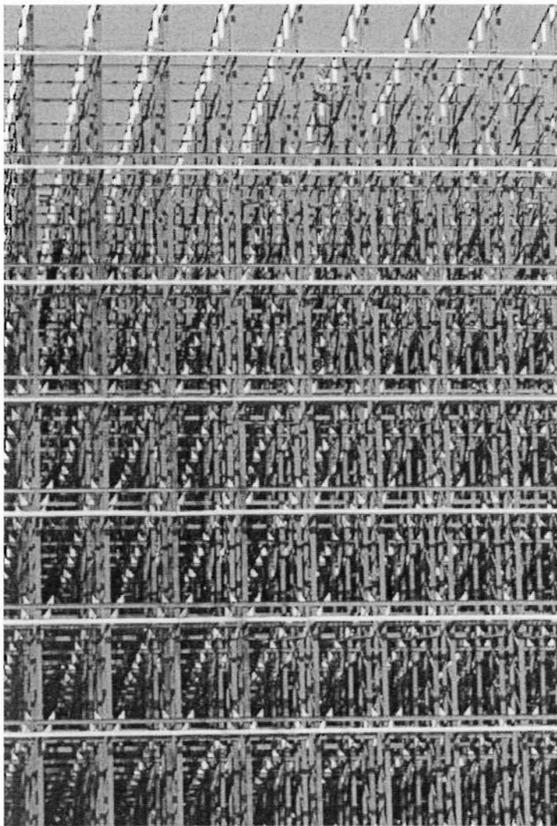
Tri-CityHerald.com

North America's largest freezer nearing completion in north Richland

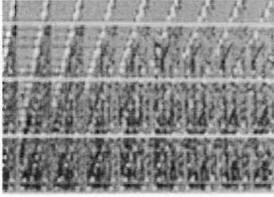
By Geoff Folsom

Tri-City Herald February 23, 2015

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Construction workers sit on top of a large bank of steel racks Monday while working on the largest refrigerated warehouse in North America being built on 40 acres off Kingsgate Way in the Horn Rapids Industrial Park in north Richland. **See story on page B4.** ANDREW JANSEN — Tri-City Herald |Buy Photo



Richland city officials have received a number of questions about the monolith rising out of the ground in the northern part of the city. From a distance, the mostly white building with some uncovered blue steel frames looks like it could be a giant office building or even another vitrification plant for Hanford waste.

"A lot of folks seem to be driving by and not know what it is," said Gail Everett, communications and marketing specialist with the city.

The 455,000 square-foot, 116-foot tall building will be the largest refrigerated warehouse in North America and largest automated freezer in the world when it opens in July, said Burnie Taylor, general manager of the new building for New Jersey-based Preferred Freezer Services. It also has gone up much faster than a Hanford building, with ground broken last April.

The last metal support frame of the \$115 million building will be installed on the south side of the building by Tuesday, and the structure soon will be fully covered with thousands of 40-foot tall by 4-foot wide white insulated metal panels.

"It's not like your conventional building where you'll see columns and steel girders," said R.J. Burton, vice president of Indianapolis-based Victory Unlimited Construction, the construction contractor. "The walls are supported by the rack. The roof is supported by the rack."

Three 104,000 square-foot freezers will be located inside the building, built on 40 acres off Kingsgate Way in the Horn Rapids Industrial Park. Plans call for them each to be set at negative 10 degrees, but that can be adjusted.

"It has room for expansion for another 104,000 square-foot box in case this isn't big enough," Burton said.

About 2 billion pounds of food will pass through the building in a year, Taylor said. It can store 110,000 pallets or more than 200 million pounds of food at a time, he said. Each freezer will be run automatically.

"The only reason anyone walks into the freezer is for maintenance," he said.

The facility will store frozen fruits, vegetables, meat and pre-made meals to be shipped both to stores and restaurants, Taylor said. It will run 24 hours a day, with workers on 12-hour shifts.

A number of companies will be using the facility, contrary to rumors that it would be operated by ConAgra Foods, he said. Though the company could be a customer.

"ConAgra is in no way part of our management structure," he said. "Preferred Freezer Services will operate the building as a public warehouse facility with multiple customers."

The building has used 250 construction workers and another 134 employees will be hired, with all but 10 of them coming from the area, Taylor said. A recent job fair attracted 300 people.

The project has not been without controversy. Concerns were raised about the labor practices of two out-of-town contractors. Iron Workers Local 14 in Kennewick filed labor practice grievances last year with the National Labor Relations Board against Victory Unlimited Construction and Nehemiah Rebar Services. Others involved include the Pacific Northwest District Council of Iron Workers in Edmonds and the Iron Workers Local 847 of Phoenix, which assisted Local 14.

NLRB officials did not return a call Monday for comment. In September, officials said they were investigating the complaints.

Preferred Freezer Services has 32 freezer warehouses in the United States plus three in Asia. But Taylor said the Richland site will be its first in the Northwest.

"There is a solid customer base. There is a growing agriculture base here," he said. "We decided it's a good fit."

The west side of the building will have a two-story administration area, including a control room and lounge for workers, Taylor said. It will also have a semitruck bay featuring 35 doors, 18 for inbound trucks and 17 for outgoing trucks. Loading docks will be cooled to between 34 and 36 degrees.

Six more doors on the north side will be served by four rail spurs. Taylor said the facility will be able to load 30 to 40 rail cars per day.

Company officials have heard some other ideas for uses of the use tall building.

"I like the one about using the east side of the building as a movie screen," Taylor said.

Geoff Folsom: 509-582-1543; gfolsom@tricityherald.com; Twitter: @GeoffFolsom

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EXHIBIT 4



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Richland Soon to be Home of the World's Largest Refrigerated Warehouse

Posted: Feb 23, 2015 6:38 PM PST

Updated: Feb 23, 2015 7:23 PM PST

Posted by Raven Richard, Reporter [CONNECT](#)

RICHLAND, WA- The largest refrigerated warehouse in North America will soon be finished in Richland bringing more than 100 to the area.

Preferred Freezer Services is building a 116-foot tall structure that will hold up to 2 billion pounds of frozen food a year.

The facility costs \$115 million to build. That equals nearly \$250,000 a day. Nearly 250 construction workers are out there working on the project. This refrigerated warehouse is also the first in the U.S. to have an oxygen reduction system inside, as it's main fire prevention system.

The company said with all the growth in the area, it was the perfect place for this structure.

"We looked at this market, the strong growth and agriculture and other things around here. It was very attractive. We've grown and expanded our niche and our market over the last 20 years. We started to branch out and we decided this was the next step for us," said Burnie Taylor, Preferred Freezer Services General Manager.

The warehouse is 455,000 square feet in total, which is equal to about eight football fields. The structure is on track to be finished in July. Once it opens, Preferred Freezer Services expects more than 100 jobs to be available at the warehouse.

[Click here for more information or to find job listings for this facility.](#)

EXHIBIT 5

RECEIVED

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ATTY GEN DIV
WUTC

1 Brandon L. Johnson
2 Minnick-Hayner, P.S.
3 P.O. Box 1757
4 Walla Walla, WA 99362
5 (509) 527-3500

6 Paul J. Petit
7 MT Bar No. 3051
8 General Counsel
9 Tri-City Railroad Company, LLC
10 d/b/a Tri-City & Olympia Railroad
11 P.O. Box 1700
12 Richland, WA 99352
13 (509) 727-6982

WUTC DOCKET TR-130499
EXHIBIT RVP-3-X
ADMIT W/D REJECT

14 WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION.

15 CITY OF KENNEWICK and CITY OF
16 RICHLAND

17 Petitioners

18 vs.

19 PORT OF BENTON, TRI-CITY &
20 OLYMPIA RAILROAD CO., BNSF
21 RAILWAY and UNION PACIFIC
22 RAILROAD

23 Respondents.

DOCKET NO. TR-130499-P

RESPONDENT'S RESPONSE TO
UTC STAFF DATA REQUESTS
NOS. 2-5 TO TRI-CITY &
OLYMPIA RAILROAD

RESPONDENT TRI-CITY AND OLYMPIA RAILROAD CO. ("TCRY")

pursuant to WAC 480-07-400, responds to UTC STAFF DATA REQUESTS NOS.

2-5 as follows:

UTC STAFF DATA REQUEST NO. 2: How many trains per day does Tri-City &
Olympia Railroad operate at the location of the proposed crossing? Do you anticipate

RESPONDENT'S RESPONSE
TO UTC DATA REQUESTS 2-5

Page 1

001339

1 any change in the number of Tri-City & Olympia Railroad trains traveling over the
2 track at this location within the next ten years? If yes, please describe the change.

3 **RESPONSE:** On average at present TCRY operates between two (2) to four
4 (4) trains per each weekday through the location, exclusive of "unit trains." In
5 addition BNSF Railway Co. ("BNSF") operates on average two (2) trains per each
6 weekday through the location. However, in addition to these trains, Union Pacific
7 Railroad ("UPRR") moves "unit trains" consisting of on average 100 cars through this
8 location on a periodic basis as customer needs demand and interchanges these railcars
9 with TCRY at the TCRY rail yard north of the location. More detail regarding recent
10 and anticipated railcar activity through the location by both TCRY and BNSF was
11 provided in Respondent's Response to Petitioners' Data Request, a copy of which is
12 attached hereto, Responses to Data Requests Nos. 21 and 22. Please note that the
13 summary of number of railcars provided in Responses to Data Requests Nos. 21 and
14 22 reflect car count, which must be doubled to reflect number of trips over the rail at
15 the proposed crossing. Therefore, for 2013, TCRY projects a total of 4,620 railcar
16 trips over the proposed crossing by its own trains and an additional 498 railcar trips
17 over the proposed crossing by BNSF trains for a total of 5,118 railcars passing over
18 the proposed crossing per year.

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

24 a. Anticipated growth in UPRR and TCRY business reflecting increases
25 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.

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

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

7 All of these factors demonstrate a likely increase in rail traffic across the
8 location of the proposed crossing which could, in the near future, reach or exceed
9 20,000 railcar trips per year, many of which will be "unit trains" of approximately 100
10 railcars each.

11 **UTC STAFF DATA REQUEST NO. 3:**

12 At the location of the proposed crossing:

- 13 a. What is the maximum legal operating train speed?
14 b. What is the maximum timetable speed of Tri-City & Olympia Railroad trains?
15 c. At what speed do Tri-City & Olympia Railroad trains usually travel?

16 **RESPONSE:**

- 17 a. 25 mph.
18 b. 20 mph.
19 c. 20 mph.

20 Notwithstanding the foregoing, it is anticipated that train speeds at the location of the
21 proposed crossing will increase in the near future. UPRR has recently invested
22 approximately \$10 million to upgrade its track over which TCRY now also operates
23 from Kennewick to locations on the Port of Benton track and the Horn Rapids Spur.
24 The Port of Benton has received a grant to rebuild a rail bridge on its line, leased to
25 TCRY. In addition, the Port of Benton has commissioned a study on the current status
of its rail and the possibility of upgrading that rail to handle traffic at higher speeds.
The anticipated increase in rail traffic referred to in Response to UTC Data Request

RESPONDENT'S RESPONSE
TO UTC DATA REQUESTS 2-5

001341

1 No. 3, combined with improvements of both the UPRR and Port of Benton tracks, will
2 undoubtedly lead to higher operating speeds in the future.

3 **UTC STAFF DATA REQUEST NO. 4:**

4 What is the average number of cars or length of the trains that Tri-City & Olympia
5 Railroad operates at the location of the proposed crossing? Do you anticipate any
6 changes in the length of trains that travel over the track at this location within the next
7 ten years? If yes, describe the change.

8 **RESPONSE:** At present, TCRY trains average roughly 15 cars per train, not
9 including "unit train" operations. As noted in Response to Request No. 2 and
10 described in detail in the attached Responses to Requests Nos. 21 and 22 TCRY
11 anticipates a substantial increase in both the number of trains and the number of cars
12 per train which will operate through the location of the proposed crossing.

13 **UTC STAFF DATA REQUEST NO. 5:**

14 Please clarify the number and type of tracks proposed at the crossing. If a siding is
15 present, will switching occur over the crossing? If yes, please describe the frequency
16 of switching operations, the length of time the crossing will likely be blocked due to
17 switching operations, and any other impact on the crossing attributable to switching
18 operations.

19 **RESPONSE:** A switch and siding as well as the TCRY main line are present
20 at this location within what is shown as the "Port of Benton" railroad right of way on
21 the attached Exhibit A (Center Parkway Right-of-Way Survey). Switching will occur
22 over the crossing. TCRY has used, and intends to use, this siding for both car storage
23 and switching. As rail traffic increases as anticipated, TCRY will likely need to utilize
24 this siding more frequently for switching operations. Although the length of time that
25 the crossing will be blocked due to car spotting and car switching operations on this
siding will certainly increase the total time that the crossing will be blocked, TCRY
can not estimate what that length of time will be.

RESPONDENT'S RESPONSE
TO UTC DATA REQUESTS 2-5

001342

1 Brandon L. Johnson
2 Minnick-Hayner, P.S.
3 P.O. Box 1757
4 Walla Walla, WA 99362
5 (509) 527-3500

6 Paul J. Petit
7 MT Bar No. 3651
8 General Counsel
9 Tri-City Railroad Company, LLC
10 d/b/a Tri-City & Olympia Railroad
11 P.O. Box 1700
12 Richland, WA 99352
13 (509) 727-6982

14 WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

15 CITY OF KENNEWICK and CITY OF
16 RICHLAND

17 Petitioners

18 vs.

19 PORT OF BENTON, TRI-CITY &
20 OLYMPIA RAILROAD CO., BNSF
21 RAILWAY and UNION PACIFIC
22 RAILROAD

23 Respondents.

DOCKET NO. TR-130499-P

RESPONDENT'S RESPONSE TO
PETITIONERS' DATA REQUEST

RESPONDENT TRI-CITY AND OLYMPIA RAILROAD CO.

("Respondent") pursuant to WAC 480-07-400, responds to the data request of

Petitioners, City of Kennewick and City of Richland, dated August 20, 2013.

Respondent's response is timely pursuant to WAC 480-07-150.

RESPONDENT'S RESPONSE
TO PETITIONERS' DATA REQUEST

- Page 1

001343

1 Response to Data Requests Nos. 1-9. TCRY further asserts that whether it
2 participated in any of the various planning identified in these Requests is wholly
3 irrelevant to the issues raised, and the Petitioners' burden, in this proceeding. TCRY
4 produces in Response to these Data Requests copies of its communications with the
5 Benton Franklin Council of Governments and notes relating to communications
6 with that entity relating to rail service. TCRY has no other documents within the
7 scope of these Requests.

8 Response to Data Request No. 10: See documents produced herewith and
9 labeled as in response to this Data Request.

10 Response to Data Request No. 11: This Data Request makes reference to
11 crossings "labeled and identified in data request #9" although Response to Data
12 Request No. 10 was clearly intended. See documents produced Response to Data
13 Request No. 10.

14 Response to Data Request No. 12: This Data Request makes reference to
15 crossings "labeled and identified in data request #9" although Response to Data
16 Request No. 10 was clearly intended. TCRY objects to this Data Request on the
17 grounds that the occurrence of specific incidents endangering public health at other
18 rail crossings on the TCRY rail line is not relevant to whether Petitioners can
19 overcome their burden of demonstrating a need for an inherently dangerous at-grade
20 crossing at Center Parkway. Notwithstanding that objection, TCRY asserts that no
21 train-vehicle collision has occurred at any of the identified crossings during its
22 operation of the TCRY/Port of Benton Rail, incidents involving vehicles striking
23 crossing signal apparatus and driving through closed crossing gate arms have been
24 numerous. Although TCRY does not maintain complete records in this regard, a
25 representative sample of the incidents in question is identified in the spreadsheet
produced in Response to Data Request No. 12.

Response to Data Request No. 13: This Data Request makes reference to
crossings "labeled and identified in Data Request #9" although Response to Data

1 Request No. 10 was clearly intended; TCRY does not maintain its records in a
2 manner which would allow it to allocate delay to specific incidents.

3 Response to Data Request No. 14: TCRY does not maintain its records in a
4 manner which would allow it to allocate delay to specific incidents.

5 Response to Data Request No. 15: TCRY does not maintain its records in a
6 manner which would allow it to allocate revenue loss to all incidents. TCRY has
7 documented its costs in connection with specific crossing damage claims. See
8 documents produced herewith and labeled as in response to this Data Request.

9 Response to Data Request No. 16: TCRY objects to this Data Request on the
10 grounds that it asserts and is based on the claim that TCRY has made a "statement
11 regarding the site-specific dangers" of the proposed Center Parkway at-grade
12 crossing. As factual support for its opposition, TCRY will provide expert testimony
13 that there is no need for any crossing at Center Parkway. That work is ongoing and
14 will be made available to Petitioners pursuant to the case schedule. Therefore, not
15 constructing a crossing, or constructing a separated-grade crossing, at this location
16 would fully mitigate the site-specific dangers of an at-grade crossing.

17 Response to Data Request No. 17: TCRY objects to this Data Request on the
18 grounds that it asserts and is based on the "claimed impacts on the spur" which are
19 irrelevant to the Petitioners' statutory burden. TCRY also objects to classifying the
20 rail at the proposed crossing site as a "spur" because the rail line is part of the
21 interstate rail system on which TCRY operates as a common carrier and interchange
22 carrier for the Union Pacific Railroad. As factual support for its opposition, TCRY
23 will provide expert testimony that there is no need for any crossing at Center
24 Parkway. That work is ongoing and will be made available to Petitioners pursuant to
25 the case schedule. Therefore, not constructing a crossing, or constructing a
separated-grade crossing, at this location would eliminate all "impacts on the spur."

Response to Data Request No. 18: TCRY does not believe that Petitioner has
demonstrated that access for public emergency services is unreasonable, or that
there is a need for any crossing at Center Parkway.

RESPONDENT'S RESPONSE
TO PETITIONERS' DATA REQUEST
- Page 3

001345

1 Response to Data Request No. 19: As factual support for its opposition,
2 TCRY will provide expert testimony that there is no need for any crossing at Center
3 Parkway. That work is ongoing and will be made available to Petitioners pursuant to
4 the case schedule. Therefore, not constructing a crossing, or constructing a
5 separated-grade crossing, at this location would eliminate all "impacts on the spur."

6 Response to Data Request No. 20: As factual support for its opposition,
7 TCRY will provide expert testimony as part of its pre-filed testimony that there is
8 no need for any crossing at Center Parkway. That work is ongoing and will be made
9 available to Petitioners pursuant to the case schedule. Therefore, not constructing a
10 crossing, or constructing a separated-grade crossing, at this location would eliminate
11 all considerations of practicality of alternatives to an at-grade crossing.

12 Response to Data Request No. 21: TCRY currently uses the railway which is
13 the subject of the Petition for at-grade crossing as an interchange carrier for the
14 Union Pacific Railroad to provide service to customers on the TCRY/Port of Benton
15 rail and on the Horn Rapids Spur of the City of Richland. (See Response to Data
16 Request No. 10) TCRY operates each week day on this line, with trains traversing
17 the proposed crossing location at least twice and on occasion four times per day.
18 The number of railcars moved by TCRY over the proposed crossing location in
19 2011, 2012 and 2013 (through August) by commodity, inbound and outbound, are
20 as shown on the document produced in Response to Request No. 21. TCRY also
21 supplies the following summary and projection for the total for 2013 (based on 8
22 months actual):

	2011	2012	2013 (8 MONTHS)	2013 (PROJECTED)
TOTAL RAILCARS	2060	1999	1540	2310

23 Without significant change in customer needs, TCRY anticipates annual increases in
24 railcar traffic of approximately 20% each year. However, TCRY is aware that
25 ConAgra Lamb Weston has entered into an agreement to purchase property in the
Horn Rapids Industrial Park area to construct a cold storage warehouse facility

RESPONDENT'S RESPONSE
TO PETITIONERS' DATA REQUEST
- Page 4

001346

1 which could be served by TCRY as well as by Union Pacific Railroad and BNSF
2 Railway Company directly. In addition, TCRY understands that development plans
3 are proceeding to construct one or more "loop tracks" in the same area as shown by
4 the documents produced in Response to Request No. 24. In addition, TCRY's
5 affiliated company, 10 North Washington Ave., LLC, has constructed, is utilizing,
6 and plans to expand its business on its "loop track" located on the Horn Rapids
7 Spur, the location of which is shown on documents produced in Response to
8 Request No. 24. All of these development factors demonstrate a likely substantial
9 increase in rail traffic at the proposed crossing the near future which could easily
10 approach 20,000 railcars per year, many of which will be single commodity unit
11 trains of in excess of 100 railcars. All reasonable inquiry demonstrates the
12 substantial likelihood that train traffic at the proposed crossing location will increase
13 substantially in the future and that the number of unit trains as a percentage of total
14 traffic will increase as well. In addition, TCRY is aware that the Port of Benton has
15 commissioned an evaluation of the potential to upgrade its track to accommodate
16 this increased rail traffic and higher speeds on the existing rail, all of which will
17 substantially increase the danger of an at-grade crossing at Center Parkway.

18 **Response to Data Request No. 22:** BNSF Railway Company currently uses
19 the railway which is the subject of the Petition for at-grade crossing to provide
20 direct service without interchange to specific customers on the TCRY/Port of
21 Benton rail and on the Horn Rapids Spur of the City of Richland. As the operating
22 railroad on the TCRY/Port of Benton rail, TCRY identifies the movements of BNSF
23 trains and railcars. The number of railcars moved by BNSF over the proposed
24 crossing location in 2011, 2012 and 2013 (through August) with a projection for the
25 total for 2013 (based on 8 months of 2013) are as follows:

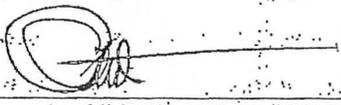
	2011	2012	2013 (8 MONTHS)	2013 (PROJECTED)
TOTAL RAILCARS	273	230	166	249

TCRY is not privy to BNSF plans and projections regarding future train traffic across the proposed Center Parkway crossing site. However, the elements identified in Response to Data Request No. 21 strongly suggest the likelihood of substantial BNSF rail traffic increase in the near future, either to service a proposed "loop track" or to service the ConAgra Lamb Weston cold storage warehouse facility to be constructed in the Horn Rapids Industrial Park area.

Response to Data Request No. 23: TCRY objects to this Data Request on the grounds that increased costs which TCRY will inevitably incur are not relevant to the statutory burden that Petitioners must meet to justify an inherently dangerous at-grade crossing.

Response to Data Requests Nos. 24 and 25: See documents produced herewith and labeled as in response to these Data Requests.

DATED THIS 4th day of September, 2013.



Paul J. Petit, MSBA # 3051
One of the Attorneys for
Respondent Tri-City & Olympia
Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served this day by email on all parties of record in this proceeding by email to the parties identified below:

P. Stephen DiJulio Jeremy Eckert Foster Pepper PLLC 11113rd Avenue, Ste. 3400 Seattle, WA 98101 dijulio@foster.com eckertj@foster.com	Peter Beaudry Public Works Director City of Kennewick 210 West 6 th Avenue P.O. Box 6108 Kennewick, WA 99336-0108 Peter.beaudry@ci.kennewick.wa.us
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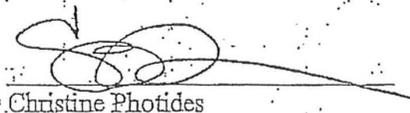
RESPONDENT'S RESPONSE
TO PETITIONERS' DATA REQUEST

1 2 3	Terrell A. Anderson Manager, Industry & Public Projects Union Pacific Railroad Co. 9451 Atkinson St. Roseville, CA 95747 taanders@up.com	Steven W. Smith Assistant Attorney General 1400 S. Evergreen Park Drive S.W. P.O. Box 40128 Olympia, WA 98504-0128 ssmith@utc.wa.gov
4 5	Tom A. Cowan Cowan Moore Stam and Luke P.O. Box 927 Richland, WA 99352 tcowan@cowanmoore.com	Scott D. Keller Port of Benton 3100 George Washington Way Richland, WA 99354 keller@portofbenton.com
6 7 8 9	Tom Montgomery Kelsey Endres Montgomery Scarp, PLLC 1218 Third Ave., Ste. 2700 Seattle, WA 98101 tom@montgomeryscarp.com kelsey@montgomeryscarp.com	Richard Wagner Manager Public Projects BNSF Railway 2454 Occidental Ave. S. Ste. 2D Seattle, WA 98134 richardwagner@bnsf.com
10 11 12	Carolyn Larson Dunn Carney Allen Higgins and Tongue LLP 851 SW Sixth Ave. Ste. 1500 Portland, OR 97204 cll@dunn-carney.com	

13
14 A courtesy copy email was also sent to:

15 Adam E. Torem
16 Administrative Law Judge
17 1300 S. Evergreen Park Dr. S.W.
18 P.O. Box 47250
19 Olympia, WA 98504-7250
atorem@utc.wa.gov

20 DATED this 7th day of September, 2013, at Kennewick, Washington.

21
22 
23 Christine Photides

24 RESPONDENT'S RESPONSE
25 TO PETITIONERS' DATA REQUEST
- Page 7

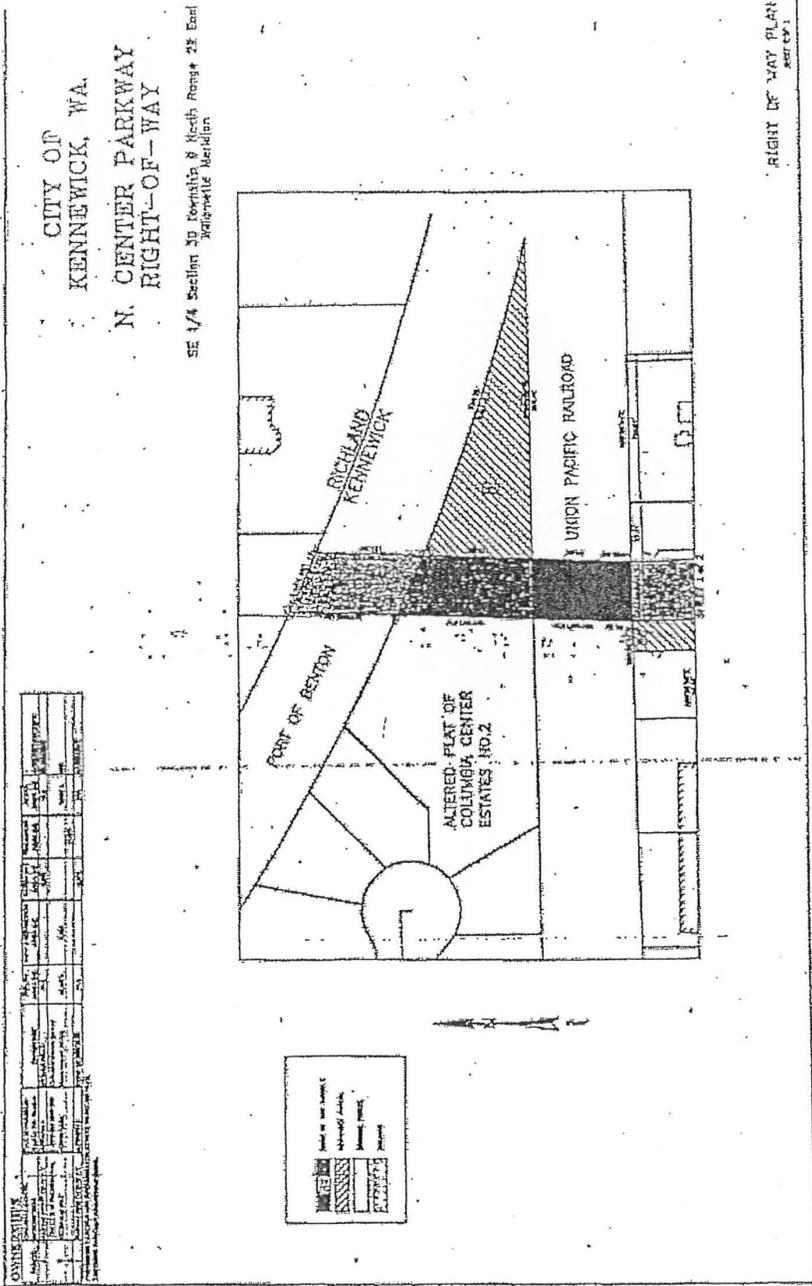


Exhibit 3 (Cont.)

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EXHIBIT 6



MEMORANDUM
Economic Development Office

Note: Dollar amounts were generated in August 2013 and have been modified as contract specifications have been resolved. – SCM, 11/14/2013

TO: Economic Development Committee
FROM: Economic Development Office
DATE: August 19, 2013
SUBJECT: Commodities Plus - Land Lease, Land Purchase, & Infrastructure Financing,
Horn Rapids Industrial Park

As part of the Economic Development Committee's responsibility to review proposals of potential land sales and leases, the Economic Development staff is asking for the EDC to review the proposed land lease, land purchase, and financing request that Commodities Plus is pursuing at the Horn Rapid Industrial Park (HRIP) and to make a recommendation to Council.

Summary:

- Dennis Kylo with Commodities Plus and his partners at Central Washington Corn Processors (CWCP) have been working with city staff regarding a loop track in the Horn Rapids Industrial Park. At this time, Mr. Kylo and his partners would like to proceed with a land lease of approximately 19 acres to build a loop track, a purchase of approximately 19 acres in the Horn Rapids Industrial Park above the proposed loop track location for their facility, as well as some financing assistance for the project (see map). Their investment for the loop and property improvements will be approximately \$5,000,000.
- The proposed lease will be approximately \$38,000 per year. The initial lease term will be for 15 years with an option to extend every five years. There will be rate escalations throughout the term of the initial lease. Commodities Plus is planning on building and paying for an 8400 lineal foot loop track on the proposed city-leased land.
- The proposed price for the land purchase will be approximately \$675,000.00 (\$22,500 per acre for 30 acres). Commodities Plus is planning to build two office buildings, storage area, and a silo on this property for their bulk trans-loading business.
- Commodities Plus has requested that the city help with road improvements to the property. Staff is researching and analyzing the costs of these improvements to see if the property and lease improvements will quantify these road improvements for LRF.

Real Estate Analysis:

Land Lease

- The price for the proposed property is approximately \$38,000 per year for approximately 8400 lineal feet.

WUTC DOCKET TR-130499
EXHIBIT RJ-14X
ADMIT W/D REJECT

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- Premises will be approximately nineteen (19) acres of land for a rail loop track and service road, the approximate location for which is shown on Exhibit 1 "Proposed Rail Loop Exhibit." 19 acres assumes an 8,400 foot rail loop track and 50 feet from the track centerline on both sides of the track.
- The term of the initial lease will be for 15 years from effective date and will terminate on the fifteen year anniversary.
- There will be an option to negotiate a five year lease after the initial lease term is complete.
- In lieu of the first year's lease payment, upon execution, Lessee shall pay a security deposit equal to one year's rent. Lessee shall then have up to 18 months to complete construction of the rail loop track. If completion occurs before the 18th month, yearly rent payments shall commence on the first full month after completion of the loop track. If the loop track is not completed within 18 months, yearly rent shall commence at the beginning of the 19th month. The security deposit shall be applied to the first year's rent and thereafter be payable on a yearly basis and due by the 5th day of the month in which it is due.
- On December 31, 2019 and on December 31, 2024 the annual lease rate will be increased based on inflation, calculated by using the November 2014 CPI-w and the November 2019 CPI-w and the November 2024 CPI-w as published by the U.S. Bureau of Labor and Statistics.
- CWCP will be responsible for paying the leasehold excise tax assessed by the state during the lease term.
- All parties will agree to permitted and prohibited uses to present to Council for approval.
- The purchasers will have a five year option to purchase the land within or adjacent to the loop for \$25,000 per acre.
- There will be a limited non-compete clause in place during the term of the lease where the city cannot or will not offer for sale or lease of property within or adjacent to the loop to third parties engaged in business in direct competition of CWCP or their partners.
- CWCP and its partners will maintain and manage the rail loop during the term of the lease.
- CWCP and its partners will submit to the city a maintenance plan and a rail operations plan prior to closing. Both parties need to agree to the maintenance and operations plan terms in order to close.
- There will be a "without cause" and "with cause" termination section in the agreement in order to protect the city from breaches of contracts as well as other reasons that may come up in the long term.
- CWCP and its third parties will be held to city and state regulatory compliance rules related to environmental, code, and other nuisance concerns.
- There will be a buyback provision in the contract that will give the city an option to purchase the rail improvements if the city determines that they would like to terminate the contract without cause. If there is a breach of contract and the breach is not remedied, the city will not compensate the purchasers for the rail loop.

Land Purchase

- The proposed price for the land purchase will be approximately \$675,000.00 (\$22,500 per acre for 30 acres). Commodities Plus is planning to build two office buildings, storage area, and a silo on this property for their bulk trans-loading business.
- There will be a limited "non-compete" clause for sales and lease for the area within the "Rail Loop Interior".
- The city will stub utilities ten (10) feet into the property. This is part of our standard development practices.

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- There is a reversionary clause within the purchase and sale agreement which will allow the city to repurchase the property if the purchasers fail to submit a building plan application for approval within six months, or do not initiate construction of the facility or fail to build the loop track within 18 months.

Financing Assistance

- CWCP and Commodities Plus are requesting the city's assistance for approximately 2,400 lineal ft. of roadway improvements from Battelle Blvd. to the loop. Staff is researching and preparing cost estimates to see if these proposed LRF improvements are feasible.

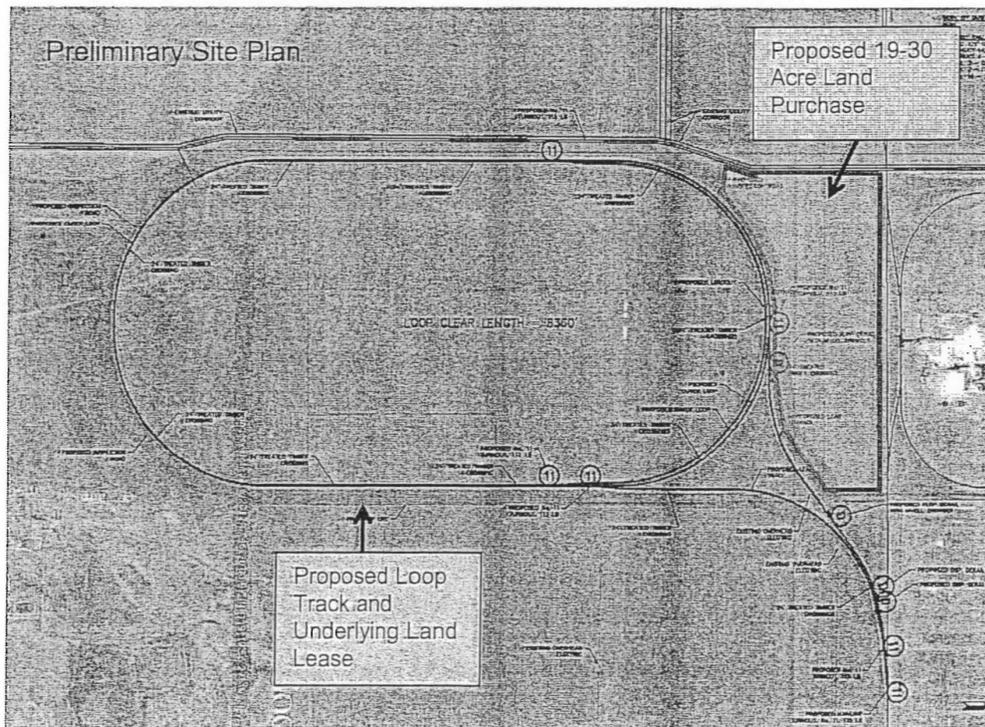
Recommendation:

Staff supports Commodities Plus and Central Washington Corn Processors proposed lease, purchase and financing request at the Horn Rapids Industrial Park for a proposed loop track, office buildings, storage and silo with a positive recommendation.

Proposed Motion:

I move that the Economic Development Committee make a positive recommendation to the Richland City Council to authorize the proposed lease, purchase and financing request (dependent on staff cost estimates) at the Horn Rapids Industrial Park for a proposed loop track, office buildings, storage and silo.

PREPARED BY: Sally Mohr, RE Marketing Specialist



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001066



MEMORANDUM
Economic Development Office

Note: Dollar amounts were generated in August 2013 and have been modified as contract specifications have been resolved. – SCM, 11/14/2013

TO: Economic Development Committee
FROM: Economic Development Office
DATE: August 26, 2013
SUBJECT: American Rock Products, Repurchase of 20 Acre Property and Cancellation of Option and Mineral Extraction License Agreement - Horn Rapids Industrial Park

As part of the Economic Development Committee's responsibility to review proposals of potential land sales and leases, the Economic Development staff is asking for the EDC to review and provide a positive recommendation to Council for the proposed repurchase of land, cancellation of option and a mineral extraction license agreement with American Rock Products at the Horn Rapid Industrial Park (HRIP).

Summary:

In April 2004, the City and American Rock Products (ARP) entered into a Purchase and Sale Agreement and closed on the purchase for approximately 20 acres in the Horn Rapids Industrial Park (shown on map as Parcel A). Simultaneous with the execution of the Purchase and Sale Agreement, the City and ARP also entered into an Option Agreement allowing ARP to purchase 5 acre increments of land south of Parcel A (shown in the map as Parcel B).

At this time, the City would like to buy back that same 20-acre property from ARP and cancel ARP's option on the adjacent property. ARP is willing to sell the purchased property back to the City and agrees to the cancellation of its option in return for a mineral extraction agreement to mine, produce, store and remove aggregate materials from the Horn Rapids Industrial Park for a set period of time.

This purchase and sale agreement with the option cancellation and the mineral extraction license agreement are tied to the Central Washington Com Processors' proposed loop project. If the proposed loop project does not move forward for any reason, neither will the buy-back agreement with the option cancellation nor the mineral extraction license agreement.

Purchase and Sale Agreement and Option Cancellation:

- The City will pay American Rock Products \$270,875.27 for the repurchase of the 20 acre property that American Rock Product (same price ARP paid in 2004) and \$20,000.00 for the cancellation of the Option Agreement.
- This will allow the City to move forward with the development of a proposed loop project encompassing parcel A, which in turn will allow for more development of the Horn Rapids Industrial Park.

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Mineral Extraction License Agreement:

- In addition, the City agrees to enter into a Mineral Extraction License Agreement to allow American Rock Products to conduct, at no further charge from the City, the removal and processing of sand and gravel and related activities on the property described as Parcels A & B and portions of the land within the interior of and adjacent to the Rail Loop.
- ARP will be allowed to extract, produce, store and remove aggregate materials for a two-year period.

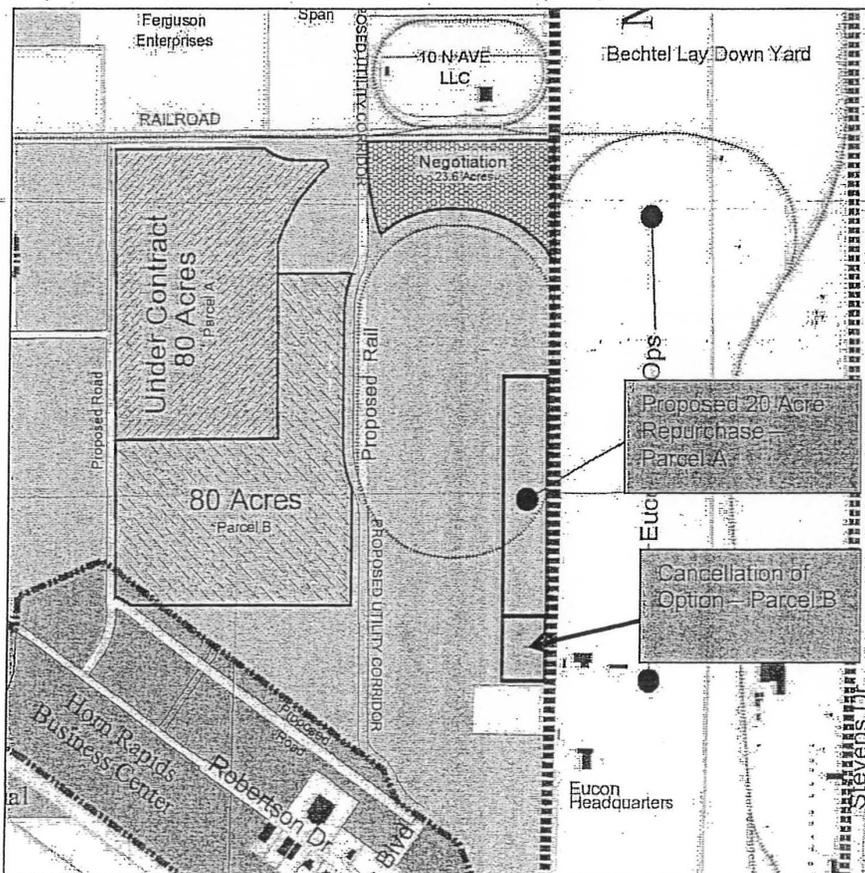
Recommendation:

Staff supports the City's proposal to the repurchase of land, cancellation of the option agreement and a mineral extraction license agreement with American Rock Products at the Horn Rapid Industrial Park.

Proposed Motion:

I move that the Economic Development Committee make a positive recommendation to the Richland City Council to authorize the repurchase of the 20-acre parcel of land, the cancellation of the existing option agreement and entering into a mineral extraction license agreement with American Rock Products at the Horn Rapid Industrial Park.

PREPARED BY: Sally Mohr, RE Marketing Specialist



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001068

**GROUND LEASE AGREEMENT
BETWEEN
THE
CITY OF RICHLAND
AND
WASHINGTON TRANSFER TERMINAL, LLC.**

This Agreement is made and entered into by and between the **CITY OF RICHLAND**, a municipal corporation of the State of Washington, hereinafter referred to as "City," and **CENTRAL WASHINGTON TRANSFER TERMINAL LLC.**, a Delaware limited liability company, hereinafter referred to as "Lessee."

WITNESSETH:

WHEREAS, the City of Richland has identified in its long-term strategic plan the desire to develop industries served by rail; and

WHEREAS, the Lessee desires to enter into an Agreement leasing a portion of industrial park to construct, maintain and operate a rail "loop track" and uses ancillary to and dependent upon the rail industry;

NOW, THEREFORE, in consideration of the covenants and agreements herein contained and the terms and conditions hereof, the parties agree as follows:

**SECTION 1
PREMISES, TERMS, AND RENEWAL**

- 1.1 Premises.** The Premises shall be approximately twenty-five (25) acres of land for a rail loop track and service road. The approximate location is set forth herein as Exhibit A and shall be supplemented by as-built drawings upon completion of the track. The twenty-five (25) acres assumes eighty-four hundred (8,400) feet of rail loop track and fifty (50) feet from the centerline of the track on both sides, labeled as Area 1 as well as Area 2 depicted in Exhibit A. The final lease legal description will be based on the actual length of track.
- 1.2 Inspection of Property.** Lessee has inspected the Property and agrees to take the Property in its present condition. Lessee is relying on its own inspections of the Property to determine whether to enter this Lease, and Lessee is not relying on any representation made by City, its employees or agents. The taking of possession by Lessee under this Lease shall be deemed conclusively to establish that the Property is in good and satisfactory condition, and Lessee accepts the Property "as is," having had a full and complete opportunity to inspect the same.
- 1.3 Effective Date.** This Lease Agreement, although executed on the date of signature of the second party, shall become effective fifteen (15) calendar days

after closing on the Purchase and Sale Agreement between the City of Richland and Washington Transfer Terminal, LLC for purchase of the 25 acres upon which the rail loop shall be constructed. In the event the City of Richland and Central Washington Transfer Terminal fail to close on the Purchase and Sale Agreement referenced herein, this Lease Agreement shall terminate, and the parties shall have no obligations hereunder.

- 1.4 **Term.** The permission herein granted to the Lessee shall be for a period of fifteen (15) years from the effective date as determined under Section 1.3 above, and shall cease and terminate at 11:59 p.m. on the fifteen-year anniversary of the effective date.
- 1.5 **Renewal.** Upon application of the Lessee, and provided that the Lessee is not in uncured breach of this Agreement, the City and Lessee shall negotiate a renewal of this lease in increments of additional five (5) year terms. Negotiations for extension of this Lease Agreement shall commence upon written request of Lessee given to City no later than six (6) months prior to the end of each lease term.
- 1.6 **Expiration.** If, upon the end of the initial fifteen (15) year term, a renewal is not successfully negotiated, this Lease shall terminate and be subject to Section 5.2(b) of this Agreement.
- 1.7 **Lease Rate.** The lease rate for the Premises described in Section 1.1 during the initial term of this Agreement shall be \$2,000 (two thousand) per acre (calculated at \$25,000 land value x 0.08 rent rate = \$2,000 per acre) paid in twelve (12) equal monthly installments as follows:
 1. Upon execution of this Lease Agreement, Lessee commits to pay a security deposit equal to one year's rent plus applicable leasehold excise tax. This deposit shall be paid in lieu of the first year's monthly lease payments, and shall be delivered to the City no later than ten (10) business days after the effective date of this Agreement as defined in Section 1.3 above. Thereafter, monthly rent payments on the annual amount due shall commence on either: 1) the beginning of the 19th month after the effective date of this Agreement (the month of signing counts as month one); or 2) the first full month post-completion of the loop track, whichever occurs earlier. The security deposit shall be applied to the first year's rent, and all rent payments thereafter shall be paid on a monthly basis and due by 1600 hours (4:00 p.m.) on the 5th day of the month in which it is due. If the 5th day of the month falls on a weekend or holiday, Lessee's rent payment is due the first business day after the 5th when the City of Richland is open to the public for business transactions.
 2. On December 31, 2019 and December 31, 2024, respectively, the annual lease rate will increase based on inflation, calculated by using the November 2014 CPI-W, the November 2019 CPI-W, and the November 2024 CPI-W as

published by the U.S. Bureau of Labor and Statistics. This is calculated by taking the current rent and multiplying as follows: $[1 + (\text{CPI-W } 2019 - \text{CPI-W } 2014)/\text{CPI-W } 2014]$ for the rent increase effective January 1, 2020, and $[1 + (\text{CPI-W } 2024 - \text{CPI-W } 2019)/\text{CPI-W } 2019]$ for the rent increase effective January 1, 2025.

3. **Leasehold Excise Tax.** In addition to the rent amount as identified and calculated above, Lessee is also required to pay to the City of Richland leasehold excise tax as assessed by the Washington State Department of Revenue pursuant to RCW 82.29A, or as hereafter amended. The City shall calculate and notify Lessee of its monthly excise tax obligation, which shall be paid simultaneously with Lessee's monthly rent obligation. City shall remit Lessee's monthly leasehold excise tax to the Washington State Department of Revenue on Lessee's behalf. The 2013 leasehold tax rate is 12.84% of taxable rent; Lessee shall pay each year per the current adjusted rate for the year in which payment is made.
 4. **Late Payments.** Any rent or leasehold excise tax payment not paid within ten (10) days of the due date shall accrue interest on the unpaid amount 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.
- 1.8 **Permitted Uses.** The Lessee shall use the Premises for the purpose of receiving, shipping, and trans-loading of rail cars holding products listed in Exhibit B. All storage and handling of materials shall meet code requirements as established in the Richland Municipal Code.
 - 1.9 **Prohibited Uses.** The Lessee shall not use the Premises for the purpose of receiving, shipping, storing, or trans-loading of rail cars holding products listed in Exhibit C.
 - 1.10 **Uses Requiring City Approval.** For uses not identified in Exhibits B and C as incorporated by reference in Sections 1.6 and 1.7 herein, Lessee shall submit a written request to the City's Economic Development Manager requesting authorization for the use. Upon receipt, City staff shall review the proposed use, and may authorize a temporary, one-time thirty (30) day approval for the transport and/or storage of said use, or the City may deny Lessee's request. Either decision rests within the City's sole discretion. Any request by Lessee to permanently expand the uses allowed under Exhibit B of this Agreement must be submitted in writing to the City's Economic Development Manager and presented to Council for approval.

SECTION 2

TRACK CONSTRUCTION, MAINTENANCE, RIGHTS, FEES & OPTION

- 2.1 **Purchase Option.** For a period of five (5) years after completion of rail loop track infrastructure, Lessee shall have an option to purchase real property located within the rail loop track at a price of \$25,000 per acre. Thereafter, the purchase price shall be negotiated in good faith based upon City listings for similarly-situated property. Approval of any purchase during the Option period shall be subject to the City's approval of the intended use of the property, and shall also be subject to a reversionary clause in the event the property is not developed consistent with the intended use or City-prescribed construction schedules.
- 2.2 **Limited Non-Compete.** During the term of this initial Lease, the City shall not offer for sale or lease property within the loop track to third parties engaged in the business of shipping or trans-loading commodities used for animal feed. Exhibit D identifies the properties to which this limited non-compete applies. This limited non-compete shall expire after the initial 15-year term.
- 2.3 **Option to Purchase Remaining Interior Property.** Once development has occurred on no fewer than sixty (60) acres of the interior rail loop property, Lessee shall have the option to buy the remaining interior property within the rail loop, as well as the land underlying the loop that is the subject of this Lease. This option shall be separately negotiated between the parties upon written notice by Lessee of Lessee's intent to execute the option to purchase. For purposes of this section, development is defined as physical improvements built on the property (e.g., development storage space or buildings).
- 2.4 **Loop Parcel Marketing.** The City may market for lease or sale the property within or adjacent to the loop track subject to the limitations set forth in Section 2.2.
- 2.5 **Track Rights and Charges.** During the term of this Lease, unless otherwise agreed in writing by the Parties, Lessee shall be responsible for scheduling and use of the track by Lessee and any third parties subject to a Rail Operations Plan that includes the following:
1. Lessee shall provide tariffs for use of the loop track which shall be approved by the City. The tariffs may have yearly escalators based upon the Consumer Price Index ("CPI") for King County, Washington.
 2. Lessee shall establish hours of operation and operational details for third party users. The final Rail Operations Plan shall be submitted no later than sixty (60) business days prior to commencement of the use of the rail loop track. Lessee is required to obtain City approval of the final Rail Operations Plan no later than fifteen (15) days prior to use of the loop track. Upon approval, the final Rail Operations Plan shall become Exhibit E of this Agreement. If a draft and final Rail Operations Plan is not agreed upon by

both Parties by said dates, this Agreement shall terminate unless an extension is mutually agreed upon in writing.

3. Lessee, or its agents or assigns, shall perform maintenance on the loop track, at all times maintaining the Premises and Lessee's improvements in a clean and safe condition and in good repair and operating condition in accordance with industry standards. The rail loop track and rail leads shall be maintained to the standards described in Exhibit F herein, referred to as the Rail Track Maintenance Standards.
4. Neither Lessee, nor any third party, shall utilize the loop track for storage of rail cars. All entities must trans-load in accordance with the applicable demurrage time schedules detailed in the final Rail Operations Plan.
5. The Lessee shall allow BNSF Railway and the Union Pacific Railroad, or their agents, to deliver trains directly to the Lessee and/or third parties using the rail loop track so long as tariffs are paid in accordance with the final Rail Operations Plan.
6. Lessee and City are each authorized to grant access to third parties for use of the rail loop track.
7. Lessee agrees to keep the rail loop track clear when not in use by a unit train in order to allow other third parties to exercise access rights.
8. Under no circumstance shall Lessee use the Rail Wye Tracks for the storage of rail cars.
9. Lessee shall comply with all city, state, and federal codes, and shall be in compliance with relation to noise, dust, and odor, and other regulations not specified herein.

2.6 Lessee Improvements

1. Lessee Construction. No construction activities shall occur until an authorized City representative has issued a Notice to Proceed (NTP).
2. Rail Loop Track. The Lessee shall, within eighteen (18) months of the effective date of this Lease, construct and build an operational rail loop track on the Premises, at Lessee's sole cost and expense, as generally shown on Exhibit A ("Rail Loop Track"). At a minimum, the Rail Loop Track must meet FRA Class II railroad guidelines and be approved for unit train operation by BNSF Railway and Union Pacific Railroad.
3. Additional Track and Minimum Standards. Lessee shall, within twelve (12) months of the effective date of this Lease, construct and build rail tracks connecting the City's rail line to the rail loop track, at Lessee's sole cost and expense, as also generally shown on Exhibit A ("Rail Wye Tracks"). The Rail Wye Tracks will be located on City and Port property. At a minimum, the Rail Wye Tracks must meet FRA Class II railroad guidelines and be approved for unit train operation by BNSF Railway and Union Pacific Railroad.

4. Service Road. Lessee shall, within twelve (12) months of the effective date of this Lease, construct and build an operational road along the perimeter of the Rail Loop Track and along the Rail Wye Tracks, at Lessee's sole cost and expense ("Service Road"). The Service Road must be capable of accommodating service inspections of rail cars and unit trains, as well as provide emergency vehicle access to the interior of the rail loop. The Service Road must be in compliance with City codes and permitting. Rail operations shall not occur until service roads are constructed and in place.
5. Site Plans. Construction of the rail loop is subject to approval of the City's planning process. Failure to receive the proper approvals through the building application process will result in City's termination of this Lease without penalty. Lessee shall be responsible to pay for and obtain all necessary permits for Lessee-initiated improvements.
6. Insurance Requirements of Contractors/Subcontracts. Lessee is solely responsible for determining the insurance coverage and limits required for all contractors or subcontractors involved in construction of the improvements contemplated under this Lease Agreement, which determination shall be made in accordance with reasonable and prudent business practices.
7. Protection of Property from Construction Liens. Lessee shall not permit any mechanics', materialmen's, contractors' or subcontractors' liens arising from any work or improvement performed by or for Lessee to be enforced against the Premises, however it may arise. Lessee may withhold payment of any claim in connection with a good faith dispute over an obligation to pay, so long as City's property interests are not jeopardized. Lessee shall defend and indemnify City against all liability and loss of any type arising out of the construction of improvements on the Property by Lessee. Unless caused by City, its agents or contractors, Lessee shall reimburse the City for all sums paid according to this paragraph, together with the City's reasonable attorney's fees and costs plus interest on those sums at the legal rate.

2.7 Right to Mine, Mineral License, American Rock Products. During the term of the Lease, Lessee shall allow American Rock Products (ARP) the exclusive right to mine, process, remove and store aggregate materials. ARP shall not use the License Location for any other purpose without the written consent of the City. The City shall not use the License Location, nor grant any other party the right to use the License Location, for any other purpose without the express written consent of ARP. Upon Lessee's commencement of construction of the railroad spur and loop, the City shall send ARP written notice that ARP's exclusive right to mine, process, store and remove aggregate materials from the License Location shall now be limited to two (2) years from date of the City's written notice, or until such time as ARP gives notice to the City of its intent to cease mining operations and thereafter completes its reclamation obligations, whichever occurs first. Neither Lessee, nor Lessee's agents or assigns, shall interfere with ARP's ability to mine, process, remove or store aggregate materials from the License Location, and shall, to the extent practicable, prevent, minimize

and/or remove physical obstacles to ARP's mining operation caused by the rail loop construction.

2.8 Performance and Maintenance Bond. Lessee shall provide the City with a performance bond, or other agreed form of security in an amount not less than the annual rent under the lease times fifteen (15) years, which is equal to the total value of this Lease Agreement. Lessee or its primary contractor shall also provide a construction bond in an amount of not less than four million five hundred thousand dollars (4.5 million), which is equal to the value of all improvements contemplated under this Lease Agreement. Each bond shall be executed on forms provided by the City, and must be issued by a company registered to do business in the State of Washington.

2.9 Approval Process. In connection with Lessee's improvements, the City may impose reasonable requirements on Lessee and on operators, contractors and agents performing work for the Lessee, including, but not limited to, the requirement to submit: names of proposed contractor(s), proposed plans and specifications in such detail as is determined necessary by the City, a site-use plan, an erosion/sediment control plan, and environmental controls. The City shall have thirty (30) days from the submission of required information to approve or disapprove the proposed work, or to approve the proposed work subject to certain conditions. Lessee shall provide "as-built" drawings to the City within thirty (30) days after completion of any work. This approval process is in addition to any permitting or regulatory process to which the city may be a party.

2.10 Joint Rail Access. No action shall be taken by Lessee to restrict the fair, equal, and competitive joint use or access opportunity of the BNSF Railway or the Union Pacific Railroad, or their agents, to operate on the Premises with their equipment and employees.

2.11 City Inspections. A joint inspection by the City and Lessee of the Premises and Lessee's improvements shall be performed annually each September during the Lease Term, at an agreed-upon reasonable time, to assess the condition of the entire Premises and Lessee's improvements, including the environmental condition, and to document any necessary maintenance and repairs. The joint inspection shall be documented in writing by the City, and shall include a list of all necessary maintenance and repairs to the Premises and improvements as agreed by the parties during the joint inspection. A copy of the joint inspection report produced by the City shall be provided to Lessee within thirty (30) days after completion of the joint inspection. Lessee shall expeditiously correct all condition deficiencies identified in the joint inspection report to the satisfaction of the City.

2.12 Monthly Reporting. Beginning the second full month that the rail loop is operational, Lessee shall provide a monthly report to the City summarizing all rail activity and rail car counts (volumes) on the Premises during the preceding

month. This report shall, at a minimum, show the number of rail cars broken down by railroad, as well as rail content handled on the Premises. Lessee shall immediately notify the City of all emergencies, accidents, and incidents occurring on the Premises, and shall contact emergency responders when warranted by the circumstances of any such emergency, accident or incident.

2.13 City Obligations. The City shall be obligated to perform the following:

1. Acquire an access/easement to City property for the purpose of Lessee's construction of the Rail Wye Tracks.
2. The City reserves the right to add rail switches and associated rail trackage to the Rail Loop Track to tie third-party rail spurs into the Rail Loop Track, the Rail Wye, or any other trackage. The City may construct new rail infrastructure, including new rail tracks, on the Premises, provided the construction or existence of such infrastructure does not materially interfere with Lessee's operations.

**SECTION 3
STANDARD CONDITIONS**

- 3.1 **Anti-Discrimination.** Lessee shall not discriminate against any person or persons because of race, religion, color, sex, national origin, or sexual orientation in the conduct of its operation hereunder.
- 3.2 **Assignment.** The permission herein granted shall not be assignable or transferable by operation of law, nor shall the Lessee assign, transfer, mortgage, pledge or encumber the same or any structure or thing erected, constructed or maintained by the Lessee pursuant to the permission herein granted, except with the prior written consent of the City. Notwithstanding the above, any easements granted shall run with the property.
- 3.3 **Contracting Officer.** The Economic Development Manager for the City of Richland or his/her designated representative shall be the contracting officer who shall act as the agent of the City under this Agreement. Lessee shall be responsible for notifying the City of a current contact person for the Lessee in the event of an emergency.
- 3.4 **Emergency Services.** The Lessee shall coordinate with the City of Richland Fire Department in all matters concerning fire safety and emergency vehicle access. City reserves the right at all times and without notice to access the Premises for emergency services.
- 3.5 **Indemnification/Hold Harmless.** Lessee shall defend, indemnify and hold harmless the City, its officers, officials, employees and volunteers from and against any and all claims, suits, actions, or liabilities for injury or death of any person, or for loss or damage to property, which arises out of Lessee's, or its

contractor's or subcontractor's use of premises, or from any activity, work or thing done, permitted, or suffered by the Lessee in or about the Premises, except only such injury or damage as shall have been occasioned by the sole negligence of the City.

(a) In enforcing this obligation, Lessee shall also bear sole responsibility for all losses or damages arising from the operation of the rail loop track, including:

1. The condition, use, occupancy, repair, or maintenance of the Premises.
2. Lessee's non-observance or non-performance of any law, ordinance, or regulation applicable to the rail loop track or the Premises.
3. Willful or negligent acts or omissions of the Lessee.
4. Costs incurred by the Lessor in obtaining possession of the Premises after default by the Lessee.
5. Costs incurred by the Lessor upon surrendering possession or early termination of the term of this Lease by Lessee.
6. Enforcement of any covenants in this Agreement. This includes, without limitation, any liability for injury to the person or property of Lessee, its agents, officers, employees, or invitees.

(b) Lessee waives all claims against City for damages for loss of business, damage to equipment used in or upon or about the Premises, or for injury to Lessee, its agents, officers, employees, invitees in or about the Premises, or from any cause arising at any time for any reason, other than for City's sole negligence or willful misconduct.

(c) Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Lessee and the City, its officers, officials, employees, and volunteers, Lessee's liability hereunder shall be only to the extent of the Lessee's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Lessee's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

3.6 Insurance. Lessee shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damage to property which may arise from or in connection with Lessee's operation and the use of the leased Premises. Additionally, the City shall require any third party lessees or lot owners

to acquire property and casualty insurance naming Lessee as an additional insured and requiring a certificate of insurance naming Lessee as an additional insured.

(a) No Limitation. Lessee's maintenance of insurance as required by the Agreement shall not be construed to limit the liability of the Lessee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

(b) Minimum Scope of Insurance. Lessee shall obtain insurance of the types described below:

1. Commercial General Liability insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover Premises and contractual liability. The City shall be named as an insured on Lessee's Commercial General Liability insurance policy using ISO Additional Insured-Managers or Lessors of Premises Form CG 20 11 or a substitute endorsement providing equivalent coverage.

2. Property insurance shall be written on an "all risk" basis.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

(c) Minimum Amounts of Insurance. Lessee shall maintain the following insurance limits:

1. Commercial General Liability insurance shall be written with limits no less than \$2,000,000 each occurrence; \$6,000,000 general aggregate.

2. Property insurance shall be written covering full value of Lessee's property and improvements with no co-insurance provisions.

(d) Other Insurance Provisions. The Lessee's Commercial General Liability insurance policy or policies are to contain, or be endorsed to contain:

1. That they shall be primary insurance with respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Lessee's insurance and shall not contribute with it.

2. Lessee's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

- (e) Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.
- (f) Verification of Coverage. Lessee shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Lessee.
- (g) Waiver of Subrogation. Lessee and City hereby release and discharge each other from all claims, losses and liabilities arising from or caused by any hazard covered by property insurance on or in connection with the Premises. This release shall apply only to the extent that such claim, loss or liability is covered by insurance.
- (h) Failure to Maintain Insurance. Failure on the part of the Lessee to maintain the insurance as required shall constitute a material breach of this Lease Agreement, upon which the City may, after giving five (5) business days' notice to the Lessee to correct the breach, terminate the Lease for cause.
- 3.7. Laws, Licenses and Permits.** The Lessee, at Lessee's own expense, shall comply with all federal, state and city laws and regulations with regard to construction, licenses or permits to do business, and all other matters. Further, Lessee shall comply with all laws and regulations governing rail operations.
- 3.8. Taxes.** All sales taxes, leasehold excise taxes, and other applicable taxes shall be coded to the City of Richland.
- 3.9. Sanitation.** In addition and without limitation, the Lessee shall at all times during the term of this Lease, at its own expense, keep and maintain the area identified in Exhibit A hereof free from litter or debris.
- 3.10. Utilities.** The Lessee shall, at its own expense, furnish and pay for all utilities as may be required under building and operating permits.
- 3.11. Construction.** Construction of facilities and all accessory amenities such as parking, access streets, utilities, etc. completed by the Lessee shall be the responsibility of the Lessee. All improvements shall be to City of Richland standards. All plans shall be submitted, reviewed, and approved by the City prior to construction.

SECTION 4 HAZARDOUS MATERIALS AND ENVIRONMENTAL COMPLIANCE

- 4.1 Definition.** "Hazardous Materials" as used herein shall mean:

- (a) Any toxic substances or waste, sewage, petroleum products, radioactive substances, medical, heavy metals, corrosive, noxious, acidic, bacteriological or disease-producing substances or any dangerous waste or hazardous waste as defined in the Washington Hazardous Waste Management Act as now existing or hereafter amended (RCW Ch. 70.105) or as defined in the Resource Conservation and Recovery Act as now existing or hereafter amended (42 U.S.C. Sec. 6901 et seq.); or
- (b) "Hazardous Substance" means any substance which now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination or cleanup, including, but not limited to, the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") as now existing or hereafter amended (42 U.S.C. Sec. 9601 et seq.) and Washington's Model Toxics Control Act ("MTCA") as now existing or hereafter amended (RCW Ch. 70.105); or
- (c) Any pollutants, contaminants, or substances posing a danger or threat to public health, safety or welfare, or the environment, which are regulated or controlled as such by any applicable federal, state or local laws, ordinances or regulations as now existing or hereafter amended.

4.2 Use of Hazardous Substances. Lessee covenants and agrees that Hazardous Substances will not be used, stored, generated, processed, transported, handled, released, or disposed of in, on, or above the property, except in accordance with all applicable laws.

4.3 Environmental Compliance.

- (a) Lessee shall, at Lessee's own expense, comply with all federal, state and local laws, ordinances and regulations now or hereafter affecting the Premises, City's business, or any activity or condition on or about the Premises, including, without limitation, all laws, ordinances and regulations related to Hazardous Materials, all laws relating to creation of noise, light and glare, the creation of dust, smoke or other emissions into the air and all other environmental laws relating to the improvements on the Premises, soil and groundwater, storm water discharges, or the air in and around the Premises, as well as such rules as may be formulated by the City ("the Laws"). Lessee warrants that its business and all activities to be conducted or performed in, on, or about the Premises shall comply with all the Laws. Lessee agrees to change, reduce, or stop any non-complying activity, or install necessary equipment, safety devices, pollution control systems, or other installations that may be necessary at any time during the term of this Agreement to comply with the Laws.

- (b) Lessee shall not cause or permit to occur any violation of the Laws on, under, or about the Premises, or arising from Lessee's use or occupancy of the Premises; including, but not limited to, soil and ground water conditions.
- (c) Lessee shall promptly provide all information regarding any activity of Lessee related to hazardous Materials on or about the Premises that is requested by the City. If Lessee fails to fulfill any duty imposed under this paragraph within a reasonable time, City may do so; and in such case, Lessee shall cooperate with City in order to prepare all documents City deems necessary or appropriate to determine the applicability of the Laws to the Premises and Lessee's use thereof, and for all compliance therewith, and Lessee shall execute all documents promptly upon City's request. No such action by City and no attempt made by City to mitigate damages shall constitute a waiver of any Lessee's obligations under this paragraph.
- (d) Lessee shall, at Lessee's own expense, make all submissions to, provide all information required by, and comply with all requirements of all governmental authorities ("the Authorities") under the Laws.
- (e) Should any Authority demand that a cleanup plan be prepared and that a cleanup be undertaken because of any deposit, spill, discharge or other release of Hazardous Materials that occurs during the term of this Agreement at or from the Premises and that is not the result of the acts or omissions of the City, or which arises at any time from Lessee's use of occupancy of the Premises, then Lessee shall, at Lessee's own expense, prepare and submit the required plans and all related bonds and other financial assurances; and Lessee shall carry out all such cleanup plans. Any such plans and cleanup are subject to City's prior written approval.
- (f) If a release of Hazardous Substances occurs in, on, under, or above the Property, or other property, arising out of any action, inaction, or event described or referred to in this document, Lessee shall at its sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substance. Cleanup actions shall include, without limitation, removal, containment and remedial actions and shall be performed with all applicable laws, rules, ordinances, and permits. Lessee shall be solely responsible for all cleanup, administrative, and enforcement costs of governmental agencies, including natural resource damage claims, arising out of any action, inaction, or event described or referred to in this document.

4.4 Indemnification.

- (a) Lessee shall be fully and completely liable to the City for any and all cleanup costs, and any and all other charges, fees, penalties (civil and criminal) imposed by any Authority with respect to Lessee's use, disposal, transportation, generation, release, handling, spillage, storage, treatment, deposit and/or sale of Hazardous Materials in or about the Premises, common area, or buildings. Lessee shall indemnify, defend, and save the City harmless from any and all of the costs, fees, penalties, and charges assessed against or imposed upon City (as well as City's attorney's fees and costs) by any Authority as a result of Lessee's use, disposal, transportation, generation, release, handling, spillage, storage, treatment, deposit and/or sale of Hazardous Materials, or from Lessee's failure to provide all information, make all submissions, and take all steps required by all Authorities under the Laws.
- (b) Lessee shall indemnify and hold City harmless from any and all claims, liabilities, lawsuits, damages, and expenses including reasonable attorney's fees for bodily injury or death, property damage, loss, or costs caused by or arising from the use, disposal, transportation, generation, release, handling, spillage, storage, treatment, deposit and/or sale of Hazardous Materials by Lessee or any of its agents, representatives or employees in, on, or about the Premises occurring during the term of this Agreement.
- (c) City shall indemnify and hold the Lessee harmless from any and all claims, liabilities, lawsuits, damages, and expenses, including reasonable attorney's fees arising from third party actions brought against Lessee that are caused by or arise from the use, disposal, transportation, generation, release, handling, spillage, storage, treatment, deposit and/or sale of Hazardous Materials by City or any of its agents, representatives or employees in, on, or about the Premises.

4.5 Reporting Requirements. Lessee shall comply with the Laws requiring the submission, reporting, or filing of information concerning Hazardous Materials with the Authorities, and shall provide to City a full copy of such filing or report as submitted within fifteen (15) days of such submission.

4.6 Right to Check on Lessee's Environmental Compliance. City expressly reserves the right, and Lessee shall fully cooperate in allowing, from time to time, such examinations, tests, inspections, and reviews of the Premises as City, in its sole and absolute discretion, shall determine to be advisable in order to evaluate any potential environmental problems.

4.7 Remedies. Upon Lessee's default under this Section, Hazardous Materials and

Environmental Compliance, City shall be entitled to the following rights and remedies in addition to any other rights and remedies that may be available to the City:

- (a) At City's option, to terminate this Agreement immediately, notwithstanding the notice of Section 6.8 and the buyback provisions of Section 5; and/or
- (b) At City's option, to perform such response, remediation and/or cleanup as is required to bring the Premises and any other areas of City property affected by Lessee's default into compliance with the Laws and to recover from Lessee all of the City's costs on connection therewith; and/or
- (c) To recover from Lessee any and all damages associated with the default, including, but not limited to, response, remediation and cleanup costs and charges, civil and criminal penalties and fees, adverse impacts on marketing the Premises or any other adjacent area of City property, loss of business and sales by City and other City lessees, diminution of value of the Premises and/or other adjacent areas owned by City, the loss or restriction of useful space on the Premises and/or other adjacent areas owned by City, any and all damages and claims asserted by third parties, and City's attorney's fees and costs.

4.8 Remediation on Termination of Agreement. Upon the expiration or earlier termination of this Agreement, Lessee shall remove, remediate or cleanup any Hazardous Materials on or emanating from the Premises, provided that the presence of Hazardous Materials arises from Lessee's use or occupancy of the Premises or Lessee's acts or omissions exacerbate the cost of remediation and Lessee shall undertake whatever other action may be necessary to bring the Premises into full compliance with the Laws ("Termination Cleanup"). The process for such Termination Cleanup is subject to City's prior written approval. If Lessee fails or refuses to commence the Termination Cleanup process, or fails to reasonably proceed toward completion of such process, City may elect to perform such Termination Cleanup after providing Lessee with written notice of the City's intent to commence Termination Cleanup, and after providing Lessee a reasonable opportunity, which shall be not less than ninety (90) days after such notice (unless City is given notice by a government agency with jurisdiction over such matter that Termination Cleanup must commence within a shorter time, in which case City shall give Lessee notice of such shorter time), to commence or resume the Termination Cleanup process. If City performs such Termination Cleanup after said notice and Lessee's failure to perform same, Lessee shall pay all City costs.

4.9 Survival. Lessee's obligations and liabilities under this Section, Hazardous Materials and Environmental Compliance, shall survive the expiration of this Agreement.

4.10 Third Parties. Lessee shall require of third party lessee or owner, within the interior or adjacent to the loop, to comply with Section 4 of this Agreement.

**SECTION 5
TERMINATION & LOOP TRACK BUYBACK**

5.1 Termination. This Agreement may be terminated as set forth below subject to the Buyback provisions contained herein.

- (a) For Cause. Any failure on the part of the Lessee to comply with any or all parts of this Agreement may result in termination of this Agreement for "just cause." "Just cause" shall include, but is not limited to, repeated violations of minor aspects of this Agreement, or a single violation of this Agreement which causes or may cause significant property damage or threatens the health, safety or welfare of citizens of Richland or customers of the Lessee. Prior to termination, the parties will schedule a meeting within forty-eight (48) hours of receipt of written notice to resolve the problem or concern. Termination may be initiated for failure to cure any violation within sixty (60) days. Lessee may seek a hearing before the City Council if good cause exists for the failure to cure within the prescribed period. The Council may thereafter extend the cure period. Any waiver of an infraction by the City shall not be deemed to become a waiver of any other infraction which may occur.

Breach of Contract: Other defined events or thresholds that, if remain uncured with reasonable notice, provide the City the authority to terminate include:

1. Failure to maintain roads.
 2. Failure to comply with a City-approved tariff structure.
 3. Failure to allow use of the track to paying third parties.
 4. Failure to address nuisance activity.
 5. Failure to safely operate the track.
 6. Failure to comply with City code requirements.
 7. Failure to generate rail traffic (less than 1,200 cars annually).
 8. Failure to maintain insurance as provided herein.
 9. Other items that may be defined by mutual agreement and incorporated herein as an exhibit to this Lease Agreement.
- (b) Without Cause. Either party may terminate this Agreement without cause by giving the other party a minimum of ninety (90) business days' written notification. However, termination shall not preclude Lessee from access rights to the Rail Loop Track under the same terms as any third party user.
- (c) If the Lessee terminates the Agreement per Section 5.1(b), Lessee shall not be compensated. Lessee will remove the improvements at Lessee's

expense, or the City will have the option to take possession and ownership of the improvements (at no charge).

- (d) If the rail loop has been abandoned, vacated, and/or partially or fully removed, this Agreement shall be terminated and will be considered a "for cause" termination subject to Section 5.2(b). In the event of termination for the reason provided herein, and the Lessee does not remove within thirty (30) days' written notice the stockpiled material, supporting structures, buildings and other improvements placed upon the Premises by the Lessee, the City may, at its option: 1) on the payment of one dollar (\$1.00) take title to said property and/or material; or 2) dismantle, remove and dispose of such property at the City's discretion, and charge to the Lessee a fee for dismantling, removing, transporting and disposing of said property and/or material.

5.2 Buyback Provisions. Upon termination of this Lease Agreement, the City and Lessee have the following options:

- (a) If the City terminates this Agreement per Section 5.1(b) "without cause" and the loop track continues to be in use, the City shall have the option to purchase the rail loop track improvements at the value agreed upon in the buyback schedule shown in Exhibit G. In the event the City terminates "without cause," the Lessee shall have a right as a third party to utilize the rail loop according to the Rail Operations Plan.
- (b) If the City terminates "for cause" under Section 5.1(a), the City has the option to either take possession and ownership of the improvements (at no charge) or require Lessee to remove the improvements at Lessee's expense.

SECTION 6 MISCELLANEOUS PROVISIONS

- 6.1 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.
- 6.2 Dispute Resolution.** City and Lessee agree to negotiate in good faith for a period of thirty (30) business days from the date of notice of any dispute between them prior to exercising their rights under this Agreement, or under law. All disputes between the City and the Lessee not resolved by negotiation between the parties may be arbitrated only by mutual agreement of the City and the Lessee. If not mutually agreed to resolve the claim by arbitration, the claim will be resolved by legal action. Venue shall be Benton County Superior Court. Arbitration of all claims will be in accordance with the Mandatory Arbitration Rules of Benton & Franklin Counties. In any dispute, the substantially prevailing party shall be entitled to reasonable attorney fees and costs.

- 6.3 Severability.** If any provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable as written, the remainder of the Agreement or the applications of the remainder of the Agreement shall not be affected.
- 6.4 Integration.** This Lease Agreement contains the entire agreement of the parties hereto and supersedes all previous understandings and agreements, written and oral, with respect to this transaction. Neither party shall be liable to the other for any representations made by any person concerning the premises or regarding the terms of this Agreement, except to the extent that the same are expressed in this Agreement. This Agreement may be amended only by written instrument executed by Lessor and Lessee or their lawful successors and assigns subsequent to the date hereof.
- 6.5 Survival of Obligations.** In the event of termination of this Agreement for any reason, the obligations of Lessee to restore the Property, and to indemnify the City as set forth above, shall survive termination.
- 6.6 Exhibits and Addenda.** All exhibits and addenda to which reference is made in this Lease are incorporated in the Lease by the respective references herein. References made to "this Lease" include matters incorporated by reference.
- 6.7 Captions.** 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 any part or parts of this Lease.
- 6.8 Notice:** Whenever any party hereto shall desire to give or serve upon the other any notice, demand, request or other communication, each such notice, demand, request or other communication shall be in writing and shall be given or served upon the other party by personal delivery (including delivery by written electronic transmission) or by certified, registered or express United States mail, or Federal Express or other commercial courier, postage prepaid, addressed as follows:

TO LESSEE:

Central Washington Transfer
Terminal
Attn: Dennis Kylo
Central Washington Transfer
Terminal
Attn: Dennis Kylo
427 W 1st Avenue
Spokane, WA 99201
(509) 623-1144
dkyllo@commoditiesplus.com

TO CITY:

City of Richland
Attn: Economic Development Manager
975 George Washington Way
PO Box 190, MS 18
Richland, WA 99352
Phone: (509)942-7583
FAX: (509)942-5666

Any such notice, demand, request or other communication shall be deemed to have been received upon the earlier of personal delivery thereof or two (2) business days after having been mailed as provided above, as the case may be.

6.9 Legal Relationship. No partnership, joint venture or joint undertaking shall be construed from the existence of this Agreement, and except as herein specifically provided, neither party shall have the right to make any representations for, act on behalf of, or be liable for the debts of the other. All terms, covenants and conditions to be observed and performed by either of the parties hereto shall be joint and several if entered into by more than one person.

6.10 Warranty of Authority. The persons executing and delivering this Lease on behalf of City and Lessee each represent and warrant that each of them is duly authorized to do so, and that execution of this Lease is the lawful and voluntary act of the person or entity on whose behalf they purport to act.

IN WITNESS WHEREOF, the City has executed this Agreement on the date shown next to its signature and Lessee has accepted on the date shown next to its signature.

Signed this _____ day of _____, 2013

CITY OF RICHLAND - Lessor

WASHINGTON TRANSFER TERMINAL
Lessee

By: Cynthia D. Johnson Date
Its: City Manager

By: Dennis Kylo Date
Its:

ATTESTED:

Marcia Hopkins, City Clerk

APPROVED AS TO FORM:

Heather Kintzley, City Attorney

STATE OF WASHINGTON)
) ss.
County of _____)

On this day personally appeared before me DENNIS KYLLO, to me known to be the individual described in and who executed the within and foregoing Ground Lease Agreement, and acknowledged that he or she signed the same as his or her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this ___ day of _____, 2013.

Print Name: _____

NOTARY PUBLIC in and for the State of
Washington; residing at: _____
My commission expires: _____

STATE OF WASHINGTON)
) ss.
County of Benton)

On this ___ day of _____, 2013, before me personally appeared CYNTHIA D. JOHNSON, known to be the CITY MANAGER and/or representative for CITY OF RICHLAND and the person who executed the within and foregoing Ground Lease Agreement and acknowledged that the said instrument is to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, the day and year first above written.

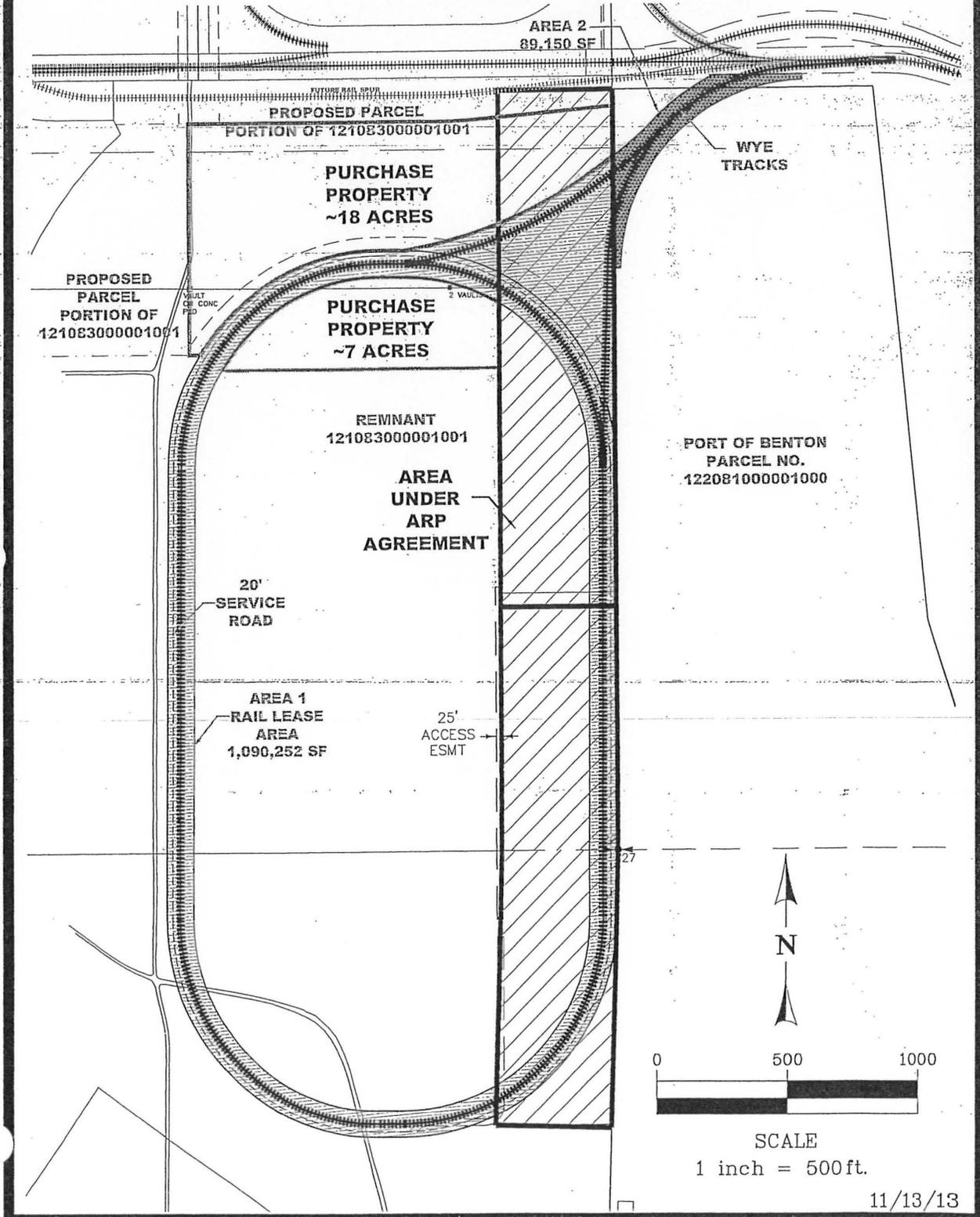
NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My Commission Expires: _____

EXHIBITS

- Exhibit A - Map of Rail Loop Track on Leased Property
- Exhibit B – Permitted Uses
- Exhibit C- Non-Permitted Uses
- Exhibit D – Map of Purchase Option and Non-Compete Areas of Property
- Exhibit E – Final Operations Plan
- Exhibit F - Rail Track Maintenance Standards
- Exhibit G – Buyback Schedule

DRAFT

HORN RAPIDS RAIL LOOP LEASE-EXHIBIT A



11/13/13

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Exhibit B – Permitted Uses

The following list is items that might be shipped to or from the proposed loop track to be built in Richland. This list is general in nature and is not meant to be exclusive of products outside of the "not allowed" list.

Ag-Products:

- Wheat & its by-products such as screenings, Millfeed, midds, flour, etc.
- Corn & its by-products such as screenings, DDG, corn gluten, germ, hominy, meals, etc.
- Beans & its by-products such as oil, meal, soy hull pellets, etc.
- Sugar beets
- Molasses
- Hay (grasses or alfalfa)
- Barley (Malt, sprouts, brewery products, etc.)
- Blood meal
- Citrus products
- Cotton seed, meal & oils
- Animal Fat
- Feather meal
- Fish products
- Linseed (meal & oils)
- Canola (meal & oils)
- Oats & by-products
- Meat & bone meal
- Peanuts & by-products
- Poultry by-products
- Rice & by-products
- Sunflowers & by-products
- Milk & By-Products
- Yeast
- Crop Seeds
- Fruits
- Vegetables

General Categories: (Agricultural-related)

- Fertilizers
- Phosphates
- Potash
- Amino Acids
- Minerals for feed
- Vegetable oils & meals
- Animal Fats

Non-Agricultural related:

- Metal goods (i.e. windmills, steel, pipe, etc.)
- Lumber products (i.e. wood, sawdust, wood chips, finished goods, etc.)
- Machinery (i.e. tractors, farm equipment, etc.)

Containerized items:

- For companies such as Wal-Mart, Target, Costco, etc.

Fuels:

- Ethanol
- Diesel

***Fuels: All fuel storage needs to be above ground and meets all city building and zoning codes.**

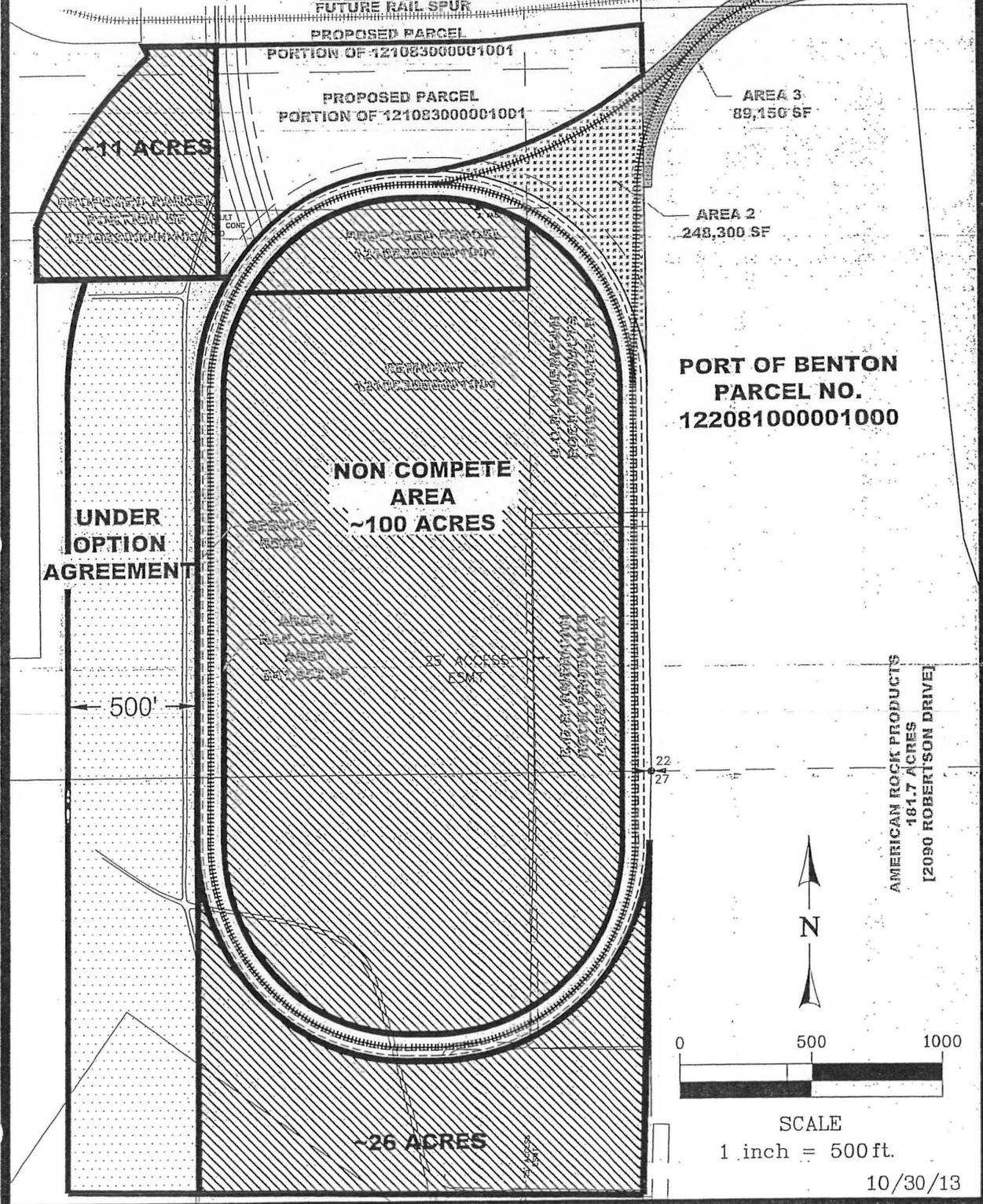
***All uses (such as woodchips, fuels, fertilizers, etc.) will have to be handled, stored and transported according to all safety, ecology, federal, state and local municipal standards.**

Exhibit C- Non-Permitted Uses

- Coal
- Radioactive waste,
- Hazardous waste
- Any other product that the City determines is a dust or odor nuisance per city of Richland code.

DRAFT

HORN RAPIDS RAIL LOOP NON COMPETE AREAS LEASE-EXHIBIT D



10/30/13
000030

001093

Exhibit E – Final Rail Operations Plan

[To be inserted after approved by City]

DRAFT

Exhibit F - Rail Track Maintenance Standards

The Rail Track shall be maintained, at a minimum, to the following standards:

1. The track improvements on the Terminal are maintained to FRA Class 2 standards or better regarding roadbed, geometry, track structure, and track appliances and other track related devices;
2. Roadbed is maintained so as to avoid the roadbed becoming compromised;
3. Ballast shall not show evidence of holding water, shall be full section with full fractured ballast, including full cribs, and have functional walkways consistent with the original plans;
4. Vegetation is not growing in the track structure and vegetation of the balance of the Terminal will be in a manageable condition;
5. 90% of the ties (cross and switch) shall be non-defective (as defined by the FRA) and no locations will exist where there are two adjacent defective ties;
6. Rail surface shall be free of visible defects and the rail profile shall be ground consistent with the original rail profile;
7. Maximum allowable head wear and gage face wear will not exceed 5/16 inch;
8. Joints shall be tight with all bolts, washers, and nuts present and tight;
9. Loaded track gage will be within 1/2 inch of unloaded standard gage;
10. Horizontal alignment will be within 1 inch of original As-built alignment and vertical alignment shall be within 1/2 inch deviation from uniform within a 62' cord;
11. All other track materials (small items such as tie-plates, spikes, bolts and anchors) and special track work components shall be present and in serviceable condition, consistent with the original As-built configuration; and
12. All switches, lights, crossings, and other related-rail improvements shall be present and in safe and serviceable condition, consistent with the original as-built configuration.

Exhibit G - Buyback Schedule

Commodities Plus Rail Loop - Buy Back Schedule	Proposed	
Original Asset (beginning of operation)	\$ 4,500,000	Spurs, switches, embankment, and track improvements Estimate, Exact amount to be determined and agreed to.
Year	Value	Buyback Amount 120% of remaining value
1	\$ 4,500,000	N/A
2	\$ 4,200,000	\$ 5,040,000
3	\$ 3,900,000	\$ 4,680,000
4	\$ 3,600,000	\$ 4,320,000
5	\$ 3,300,000	\$ 3,960,000
6	\$ 3,000,000	\$ 3,600,000
7	\$ 2,700,000	\$ 3,240,000
8	\$ 2,400,000	\$ 2,880,000
9	\$ 2,100,000	\$ 2,520,000
10	\$ 1,800,000	\$ 2,160,000
11	\$ 1,500,000	\$ 1,800,000
12	\$ 1,200,000	\$ 1,440,000
13	\$ 900,000	\$ 1,080,000
14	\$ 600,000	\$ 720,000
15	\$ 300,000	\$ 360,000
16	\$ 0	\$ 0

Value is estimate beginning of year. 1st year value is agreed value of approved asset.
 Straight line depreciation of value based on 15 years.
 Year of operation begins when rail loop is completely operational.
 Can't buyback first year of operation. Buyback option starts at beginning of 2 year of operation.

*Estimated buyback schedule proposed by City.

[An adjusted buyback schedule based on exact amount of actual rail loop investment to be inserted after approved by City]

AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY

This Agreement for Purchase and Sale of Real Property ("Agreement") is made and entered into this ___ day of November, 2013 between the **CITY OF RICHLAND**, a Washington municipal corporation (hereinafter referred to as "Seller"), and **CENTRAL WASHINGTON TRANSFER TERMINAL**, a Delaware limited liability company (hereinafter referred to as "Purchaser").

1. Purchase and Sale of Property. Seller agrees to sell and Purchaser agrees to purchase, on the terms hereafter stated, all of the following described property (collectively, the "Property"):

1.1. The Property. The land involved in this transaction is located in the City of Richland, Benton County, Washington, and is legally described as follows:

(See Exhibit A)

1.2. Scrivener's Errors. In the event of an error in the legal description, the parties agree that either party or a scrivener may correct the error.

1.3. Laws and Rights. It is understood that the sale and conveyance to be made pursuant to this Agreement shall be subject to any and all applicable federal, state and local laws, orders, rules and regulations, and any and all outstanding rights of record or which are open and obvious on the ground.

1.4. Timing of Conveyance. The Property described in Section 1.1 shall be conveyed to Purchaser by a statutory warranty deed ("deed") subject to the permitted exceptions and at the time of payment. The deed shall be delivered to Purchaser at closing.

2. Purchase Price. The estimated purchase price for the Property is the sum of five hundred and sixty two thousand and five hundred dollars and no cents (\$562,500) computed on a price of twenty-two thousand and five hundred dollars and no cents (\$22,500) per acre for 25 (twenty-five) acres of property. The actual purchase price shall be calculated per actual acreage described in the legal description (Exhibit A). The actual purchase price shall be paid by Purchaser to Seller, and shall be deposited in an escrow account with Tri-City Title and Escrow ("Title Company"). The funds shall be deposited in the following manner: ten thousand dollars (\$10,000) earnest money shall be deposited within ten (10) business days after the date of execution of this Agreement by both parties, and the balance of the purchase price upon closing. For purposes of calculating time, the date of signing shall not count as the first business day. In the event the earnest money is not deposited in escrow by the close of business on the tenth (10th) business day after the date of execution of this

contract, this agreement shall automatically terminate. If, for any reason, the Purchaser terminates this Purchase and Sale Agreement after the due diligence period and prior to closing, the costs incurred by Seller for any services rendered for this specific project shall be deducted from the earnest money deposit. The Purchaser shall be entitled to any interest accrued on the earnest money deposit.

3. Conditions Precedent to Sale. This Agreement is made and executed by the parties hereto subject to the following conditions precedent:

3.1. Title Review. Within ten (10) business days after the final parcel description is approved by the Seller and Purchaser, Seller shall request from Tri-City Title and Escrow a preliminary title report on the Property, and copies of all documents referred to therein. Said title report and related documents shall be provided to Purchaser as soon as possible, but in any event, no later than thirty (30) days before closing. Seller shall procure said title report and related documents at its sole cost and expense.

3.2. Due Diligence. Upon execution of this Agreement by both parties, Purchaser is granted a due diligence period until and including thirty (30) business days after receipt of the title report described in Section 3.1 above. Said due diligence period may be extended an additional thirty (30) business days upon written agreement by the Purchaser and Seller. Purchaser may conduct, at its own expense, a full review of legal, title, environmental, and any other related issues. Seller will promptly provide to Purchaser copies of all documentation and reports relating to the Property, including, but not limited to, soil tests, environmental reports and similar reports. If, in Purchaser's opinion, the results of said review are unsatisfactory, Purchaser may, at its option, terminate this Agreement by giving Seller written notice of termination prior to the end of the due diligence period. In the event of termination by Purchaser under this section, this Agreement shall immediately terminate and be without further force and effect, and without further obligation of either party to the other. Upon notice of termination during the due diligence period, receipts costs incurred by the Seller for any services rendered specific to this project shall be deducted from the earnest money deposit. The earnest money deposited under Section 2 of this Agreement shall be forfeited in its entirety to Seller as liquidated damages should Purchaser notify Seller of its intent to terminate this Agreement at any time after expiration of the due diligence period.

3.3. Council Approval. The closing of this transaction is contingent upon approval of this Agreement by the City Council of the City of Richland. In the event the Richland City Council determines not to approve this Agreement, this Agreement shall immediately terminate and be without further force and effect, and without further obligation of either party to the other.

4. Closing. On or before the date of closing, Purchaser shall deliver to Tri-City Title and Escrow the actual purchase price and closing costs for the Property in the

form approved by the escrow company less the earnest money previously paid and interest on the earnest money deposit. Seller shall deliver the deed, as approved by Purchaser, to Tri-City Title and Escrow for placing in escrow. Title Company shall be instructed that when it is in a position to issue a standard owner's policy of title insurance in the full amount of the purchase price, insuring fee simple title to the Property in Purchaser, than Title Company shall record and deliver to Purchaser the deed and issue and deliver to Purchaser the standard owner's policy of title insurance.

4.1. Closing Costs. Each party shall pay its own attorney's fees. Seller shall pay one-half of all transfer taxes, recording costs, escrow closing costs, if applicable, and the full premium for a standard owner's policy of title insurance. Purchaser shall pay one-half of all transfer taxes, recording costs and escrow closing costs. Any other closing costs not specifically addressed in this Agreement shall be apportioned according to the customary practices for commercial real estate transactions.

4.2. Closing Date. The closing of the transaction and delivery of all items shall occur at Tri-City Title and Escrow, and shall occur on a date specified by Seller and communicated in writing to Purchaser. Closing shall occur no later than thirty (30) business days after the execution of the Ground Lease Agreement between the City of Richland and Washington Transfer Terminal related to the construction, maintenance, and operation of a rail loop.

5. Title. Upon closing of escrow as set forth in Section 4, title to the Property shall be conveyed by Seller to Purchaser by a duly executed statutory warranty deed.

6. Covenants, Representations and Warranties.

6.1. Seller's Covenants. Seller hereby covenants and agrees as follows:

6.1.1. From the date of this Agreement through the closing date, the Seller shall not make any material alterations to the Property or to any of the licenses, permits, legal classifications or other governmental regulations relating to the Property, nor enter into any leases or agreements pertaining to the Property without the Purchaser's prior written consent.

6.1.2. During the contract period, Seller shall not voluntarily cause to be recorded any encumbrance, lien, deed of trust, easement or the like against the title to the Property without Purchaser's prior consent.

6.1.3. Seller shall use its best efforts to remove all disapproved exceptions described in the preliminary title report.

6.1.4. During the contract period, Seller will operate and maintain the Property in a manner consistent with Seller's past practices relative to the Property and so as not to

cause waste to the Property.

6.1.5. Seller shall reasonably cooperate with Purchaser to obtain approvals and permits for the development of the Property.

6.1.6. Seller has or is able to comply with Washington law regarding the surplus and sale of the Property.

6.1.7. Utilities (water, sewer, and power) are available in the Logston Utility Corridor along the west border of the parcel. Purchaser will be required to extend utilities into the parcel to their new structures. Purchaser will be responsible for designing and constructing needed service laterals, and for obtaining all permits and paying all fees associated with utility connection and use.

6.1.8. The Seller will record necessary easements to provide ingress/egress to the Property. The Seller will consult with the Purchaser to locate a suitable ingress/egress location and agreed-upon dimensions for these easements to the property.

6.1.9. Seller and Purchaser further agree that other agreed-upon infrastructure improvements will be memorialized in a separate Infrastructure Agreement executed by both parties and herein incorporated by reference. In the event this Purchase and Sale Agreement is terminated by either party prior to the transfer of land ownership contemplated herein, the Infrastructure Agreement shall become null and void with no enforceability or continuing obligation by either party.

6.2. Seller's Representations and Warranties. Seller hereby makes the following representations and warranties to Purchaser, each of which shall be true on the date hereof, throughout the contract period, and on the date of closing. Seller shall immediately provide Purchaser with written notice of any event which would make any representation or warranty set forth below incorrect or untrue.

6.2.1. With one exception, Seller has full power and authority to enter into and carry out the terms and provisions of this Purchase Agreement and to execute and deliver all documents which are contemplated by this Agreement. All actions of Seller necessary to confer such authority upon the persons executing this Purchase Agreement and such other documents have been, or will be, taken. The one exception relates to an option agreement between the City of Richland and EUCON/American Rock Products (contract C126-04) dated April 19, 2004. To effectuate this transaction with Purchaser, Seller has renegotiated the option agreement with EUCON/American Rock Products and will repurchase the property from EUCON/American Rock Products at the closing of this purchase and sale with Purchaser. The City will close on the EUCON/American Rock Products property simultaneously with the CWTT agreements.

However, the City's repurchase of the EUCON/American Rock Products property must to be recorded first.

6.2.2. Seller is a Washington municipal corporation, duly formed and organized, validly existing and in good standing under the laws of the State of Washington.

6.2.3. Seller has not received any written notice from any governmental authorities or regulatory agencies that eminent domain proceedings for the condemnation of the Property are pending or threatened.

6.2.4. Seller has not received any written notice of pending or threatened investigation, litigation or other proceeding before a local governmental body or regulatory agency which would materially and adversely affect the Property.

6.2.5. Seller has not received any written notice from any governmental authority or regulatory agency that Seller's use of the Property is presently in violation of any applicable zoning, land use or other law, order, ordinance or regulation affecting the Property.

6.2.6. No special or general assessments have been levied against the Property except those disclosed in the preliminary title report, and Seller has not received written notice that any such assessments are threatened.

6.2.7. Seller is not a "foreign person" for purposes of Section 1445 of the Internal Revenue Code.

6.3. Purchaser's Representations. Purchaser hereby makes the following representations to Seller, each of which shall be true on the date hereof and on the date of closing.

6.3.1. Purchaser has full power and authority to enter into and carry out the terms and provisions of this Purchase Agreement and to execute and deliver all documents which are contemplated by this Agreement. All actions of Purchaser necessary to confer such authority upon the persons executing this Purchase Agreement and such other documents have been, or will be, taken.

6.3.2. Purchaser represents that it has sufficient funds to close this transaction.

6.3.3. Purchaser is a limited liability company in good standing under the laws of its formation. In the event this statement is false, the person or person signing on behalf of the company shall be personally liable under this contract.

6.3.4. Purchaser represents that the property will be developed as a bulk trans-

loading facility utilizing an adjacent rail loop also proposed and anticipated to be developed by the Purchaser. Prior to closing, the Purchaser agrees to provide a site plan indicating how the twenty-five (25) acres will be developed. Deviation from the Purchaser's intended use must be authorized by the Seller in writing. Failure to obtain the Seller's permission for any deviation from the intended use stated herein shall subject the Property to the Reversionary Clause in Section 10.13. Nothing in this section alleviates the Purchaser from obtaining the necessary approvals, authorizations or permits required for the development of the Property for the intended use.

6.4. Survival of Covenants. The covenants, representations, and warranties contained in Section 6 of this Agreement shall survive the delivery and recording of the deed from the Seller to the Purchaser.

7. Casualty and Condemnation

7.1. Material Casualty or Condemnation. If, prior to the closing date: (i) the Property shall sustain damage caused by casualty which would cost ten thousand dollars (\$10,000) or more to repair or replace; or (ii) if a taking or condemnation of any portion of the Property has occurred, or is threatened, which would materially affect the value of the Property; either the Purchaser or Seller may, at its option, terminate this Agreement by providing written notice to the other party within two (2) days' notice of such event. If, prior to the closing date, neither party provides said termination notice within such two (2) day period, the closing shall take place as provided herein with a credit against the purchase price in an amount equal to any insurance proceeds or condemnation awards actually collected by Seller. At closing, Seller shall assign to Purchaser Seller's full interest in any insurance proceeds or condemnation awards which may be due but unpaid to Seller on account of such occurrence.

7.2. Immaterial Casualty or Condemnation. If prior to closing date, the Property shall sustain damage caused by casualty which is not described in Section 7.1., or a taking or condemnation has occurred, or is imminently threatened, which is not described in Section 7.1., neither Purchaser nor Seller have the right to terminate this Agreement. Closing shall take place as provided herein with a credit against the Purchase Price equal to the cost to repair that portion of the Property so damaged by insured casualty, or an amount equal to the anticipated condemnation award, as applicable. At closing, Purchaser shall assign to Seller all rights or interest in and to any insurance proceeds or condemnation awards which may be due on account of any such occurrence.

8. Purchasers' Remedies. In the event of material breach of this Agreement by Seller, Purchaser shall have, as their sole remedies: (a) the right to pursue specific performance of this Agreement, (b) the right to terminate this Agreement and (c) all remedies presently or hereafter available at law or in equity. Purchaser hereby waives

all other remedies on account of a breach hereof by Seller.

9. Liquidated Damages. In the event of material pre-closing default by Purchaser in the performance of their obligations hereunder, Seller shall have the right to terminate this Agreement without further obligations to Purchaser and keep the earnest money deposit as liquidated damages. Purchaser agrees that it is difficult to assess the amount of damages incurred by the Seller in the event of a default by the Purchaser. The parties therefore agree that, as of the date of this contract, the amount of the earnest money deposit is a reasonable estimate of the damages incurred by Seller.

10. Miscellaneous.

10.1. Finder's Fee. Purchaser and Seller each agree that a real estate finder's fee ("Real Estate Compensation") is not due to each other or to any third party. Each party hereby agrees to indemnify and defend the other against and hold the other harmless from and against any and all loss, damage, liability or expense, including costs and reasonable attorney's fees, resulting from any claims for Real Estate Compensation by any person or entity other than provided herein. The provisions of this section shall survive the closing.

10.2. Time of the Essence. Time is of the essence of every provision of this Agreement.

10.3. Notices. Whenever any party hereto shall desire to give or serve upon the other any notice, demand, request or other communication, each such notice, demand, request or other communication shall be in writing and shall be given or served upon the other party by personal delivery (including delivery by written electronic transmission) or by certified, registered or express United States mail, or Federal Express or other commercial courier, postage prepaid, addressed as follows:

TO PURCHASER:

Central Washington Transfer Terminal
Attn: Dennis Kylo
427 W 1st Avenue
Spokane, WA 99201
(509) 623-1144
dkyllo@commoditiesplus.com

TO SELLER:

City of Richland
Attn: Economic Development Manager
975 George Washington Way
PO Box 190, MS 18
Richland, WA 99352
Phone: (509) 942-7763

Any such notice, demand, request or other communication shall be deemed to have been received upon the earlier of personal delivery thereof or two (2) business days after having been mailed as provided above, as the case may be.

10.4. Assignments and Successors. Purchaser may not assign this Agreement

without Seller's consent. Any assignment made without Seller's consent is null and void, and does not relieve the Purchaser of any liability or obligation hereunder.

10.5. Captions. Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement.

10.6. Exhibits. All exhibits attached hereto shall be incorporated by reference as if set out in full herein.

10.7. Binding Effect. Regardless of which party prepared or communicated this Purchase Agreement, this Purchase Agreement shall be of binding effect between Purchaser and Seller only upon its execution by an authorized representative of each such party.

10.8. Construction. The parties acknowledge that each party and its counsel have reviewed and revised this Purchase Agreement and that the normal rule of construction providing that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Purchase Agreement or any amendment or exhibits hereto. This is a fully integrated Agreement. There are no additional terms, conditions, or obligations binding upon the parties unless specifically referenced herein.

10.9. Counterparts. This Purchase Agreement may be executed in several counterparts, each of which shall be an original, but all of such counterparts shall constitute one such Agreement.

~~**10.10. Cooperation and Further Assurances.** Each party shall cooperate with the other in good faith to achieve the objectives of this Agreement. The parties shall not unreasonably withhold responses to requests for information, approvals, or consent provided for in this Agreement. The parties agree to take further action and execute further documents, both jointly or within their respective powers and authority, as may be reasonably necessary to implement the intent of this Agreement.~~

10.11. Full Performance and Survival. The delivery of the deed and any other documents and instruments by Seller and the acceptance and recordation thereof by Purchaser shall effect a merger and be deemed the full performance and discharge of the obligations on the part of Purchaser and Seller to be performed hereunder. Certain clauses, covenants, warranties and indemnifications specifically provided herein or that can only be performed after closing shall survive the closing.

10.12. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Washington. The parties agree that Benton County is the appropriate venue for filing of any civil action arising out of this

Agreement, and both parties expressly agree to submit to personal jurisdiction in Benton County Superior Court.

10.13. Reversionary Clause and Option to Repurchase/Reclaim. This Property is being sold to Purchaser in anticipation of the development of a bulk trans-load facility. The Seller reserves a reversionary interest to reclaim title to the Property under the following circumstances:

10.13.1. If Purchaser fails to submit an application to Seller for approval of building plans within six (6) months of closing; or

10.13.2. If Purchaser does not initiate construction of its trans-load facility within eighteen (18) months of closing.

10.14. Reconveyance. Seller shall reclaim this Property by refunding the actual purchase price without interest. Seller will not assume any liability for expenses incurred by Purchaser in conducting this transaction. Purchaser agrees to reconvey title in fee to Seller within sixty (60) days of receipt of notice from Seller seeking reconveyance of Property pursuant to Section 10.13.2 of this Agreement. Purchaser may, in its sole discretion, remove any improvements or fixtures made or provided by Purchaser prior to reconveyance. This reversionary right is exclusive to the Seller and shall be exercised at Seller's sole discretion. Seller shall be under no obligation to exercise this reversionary right. This reversionary right survives forty-eight (48) months after closing or until such time as building commences, whichever is earlier. In the event Purchaser desires to sell to a third party during the forty-eight (48) month reversionary period, Purchaser must obtain Seller's approval for any resale of the Property within the forty-eight (48) month reversionary period. Seller shall grant or deny such approval for resale within its sole discretion.

10.15. Scrivener. The party drafting this Agreement is the City of Richland. The City of Richland makes no representations regarding the rights or responsibilities of Purchaser under this Agreement. Purchaser is encouraged to review the completed contract with counsel before signing this Agreement.

IN WITNESS WHEREOF, the Parties have entered into this Agreement on the day and year first above written.

CITY OF RICHLAND - Seller

CENTRAL WASHINGTON TRANSFER
TERMINAL - Purchaser

By: Cynthia D. Johnson

By: Dennis Kylo

Its: City Manager _____ Its: _____

ATTESTED:

Marcia Hopkins, City Clerk

APPROVED AS TO FORM:

Heather Kintzley, City Attorney

STATE OF WASHINGTON)
) ss.
County of _____)

On this day personally appeared before me DENNIS KYLLO, to me known to be the individual described in and who executed the within and foregoing Agreement for Purchase of Real Property, and acknowledged that he or she signed the same as his or her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this ___ day of _____, 2013.

Print Name:

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My commission expires: _____

STATE OF WASHINGTON)
) ss.
County of Benton)

On this ___ day of _____, 2013, before me personally appeared CYNTHIA D. JOHNSON, known to be the CITY MANAGER and/or representative for CITY OF RICHLAND and this person that executed the within and foregoing Agreement

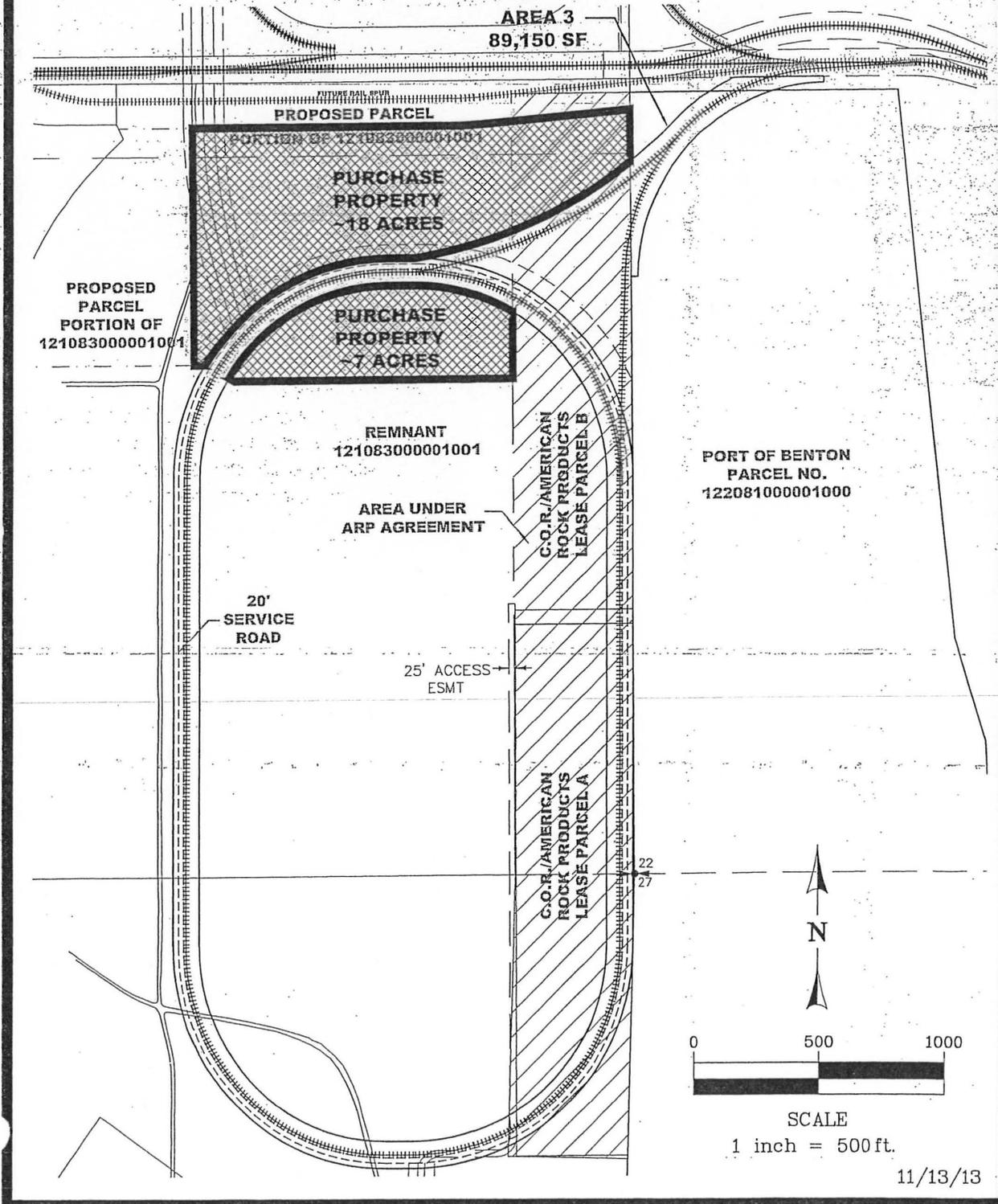
for Purchase of Real Property and acknowledged that the said instrument is to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My Commission Expires: _____

DRAFT

HORN RAPIDS RAIL LOOP PURCHASE AND SALE AGREEMENT EXHIBIT A



000045

001108

City of Richland
Infrastructure Agreement

This Infrastructure Agreement ("Agreement") is made and entered into by and between the **CITY OF RICHLAND**, a municipal corporation of the State of Washington, hereinafter referred to as "City," and **CENTRAL WASHINGTON TRANSFER TERMINAL LLC**, a Delaware limited liability company, hereinafter referred to as "CWTT." CWTT and City are sometimes herein individually referred to as a "Party" or collectively as the "Parties."

I. RECITALS

WHEREAS, CWTT has entered into an Agreement to purchase certain real property ("Purchase Agreement") consisting of approximately twenty-five (25) acres located along Battelle Boulevard, Richland, Washington, as more particularly described on attached Exhibit A and depicted on Exhibit B ("Owner Property"), which CWTT desires to develop, including the construction of several buildings; and

WHEREAS, City desires to facilitate CWTT's development by developing public infrastructure that will serve CWTT's property and City property, described as the construction of a public street, Logston Boulevard, starting from Battelle Boulevard and extending approximately two thousand (2,000) lineal feet of road south; and

WHEREAS, the development of public infrastructure under this Agreement will benefit property of both City and CWTT in the form of improved accessibility and increased property values;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties hereby agree as follows:

II. AGREEMENT

1. DEVELOPMENT OBLIGATIONS

- 1.1 *City Contribution.* City shall expend funds ("Development Funds") for the building of two thousand lineal feet of road (shown in Exhibit C) in an amount equal to the difference between the Benton County 2019 assessed value of Owner Property (shown in Exhibit B) less the 2013 Benton County assessed value of Owner Property, which is \$401,468.12 (\$16,058.72 per acre x 25 acres), multiplied by ten percent (10%). For clarity: (2019 assessed value – 2013 assessed value) x .10 = development fund amount].
- 1.2 *Development Funding True-Up.* On August 1, 2019, the Parties shall mutually cooperate to determine whether the actual amount City has then expended in Development Funds exceeds the development fund amount, and, if such an

excess exists, Owner shall pay the excess amount to City no later than August 31, 2019.

2. CONDITIONS AND TERM

- 2.1 *Effective Date and Term.* This Agreement, although executed on the date of signature of the second party, shall become effective fifteen (15) calendar days after closing on the Purchase and Sale Agreement between the City of Richland and Washington Transfer Terminal, LLC for purchase of the Owner Property. In the event the City of Richland and Washington Transfer Terminal fail to close on the Purchase and Sale Agreement referenced herein, this Infrastructure Agreement shall terminate, and the parties shall have no obligations hereunder. This Agreement shall terminate on August 31, 2019, or upon full payment of any obligation due under Section 1.2 above, whichever date occurs last in time.
- 2.2 *CWTT Bid Notice.* Prior to commencement of construction of the infrastructure contemplated under this Agreement, the City shall provide CWTT with all bid award information. "Bid award information" includes the City's call for proposals, and the scope of work/specifications related to the project contemplated under this Agreement. Commencement of construction shall be conditioned upon CWTT approving, in writing, all bid award information. If CWTT does not approve all bid award information within a reasonable time, this Agreement shall automatically terminate and be of no further force and effect.
- 2.3 *Commencement of Construction.* Construction on the infrastructure contemplated under this Agreement shall commence once the rail loop is "under construction" as determined by the issuance of all necessary permits and the commencement of grading activities on site.

3. GENERAL

- 3.1 *Amendment.* No Amendment to this Agreement shall be made unless mutually agreed to by the Parties in writing.
- 3.2 *Assignment/Successors.* This Agreement shall be binding upon the heirs, successors, assigns of any or all of the Parties hereto.
- 3.3 *Entire Agreement.* This Agreement contains the entire agreement of the parties hereto and supersedes all previous understandings and agreements, written and oral, with respect to this transaction. Neither party shall be liable to the other for any representations made by any person concerning the premises or regarding the terms of this Agreement, except to the extent that the same are expressed in this Agreement.

- 3.4 *Governing Law/Forum Selection.* Unless otherwise controlled by federal law, the interpretation and enforcement of this Agreement shall be governed by the laws of the State of Washington. The parties agree that Benton County is the appropriate venue for filing of any civil action arising out of this Agreement. User expressly agrees to submit to personal jurisdiction in Benton County Superior Court.
- 3.5 *Notice.* Any notice or demand required or permitted to be given under this Agreement shall be sufficient if in writing and sent by registered or certified mail, return receipt requested, or by overnight courier, or hand delivered, to the address of the Parties set forth below. Any Party may give notice in the manner provided in this Section to the other Parties of a change of address. Any notice shall be deemed to have given on the date it is deposited in the U.S. Postal Service mail, delivered to the overnight courier, with postage prepaid, or upon hand delivery, as the case may be.

TO THE CITY:

City of Richland
Attn: Economic Development
Manager
P.O. Box 190, MS 18
Richland, WA 99352
Phone: (509) 942-7763

TO CWTT:

Central Washington Transfer Terminal
Attn: Dennis Kylo
427 W 1st Avenue
Spokane, WA 99201
(509) 623-1144
dkyllo@commoditiesplus.com

- 3.6 *Severability.* If any provision of this Agreement conflicts with applicable law or its application is found to be invalid, the remainder of this Agreement shall not be affected and to this end, the terms of this Agreement are declared to be severable.
- 3.7 *Legal Action.* In the event legal action is necessary to enforce any of the provisions of this Agreement, the parties agree that the prevailing party will be awarded its reasonable attorney's fees and costs in action.
- 3.8 *Notice of Agreement.* Either Party may record with Benton County a document providing notice of the existence of this Agreement.

[Signature Page to Follow]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day shown next to their signatures below.

CITY OF RICHLAND

CENTRAL WASHINGTON TRANSFER
TERMINAL

By: Cynthia D. Johnson Date
Its: City Manager

By: Dennis Kylo Date
Its:

ATTESTED:

Marcia Hopkins, City Clerk

APPROVED AS TO FORM:

Heather Kintzley, City Attorney

DRAFT

EXHIBIT A- LEGAL DESCRIPTION OF PURCHASED PROPERTY

(To be inserted when purchase is executed)

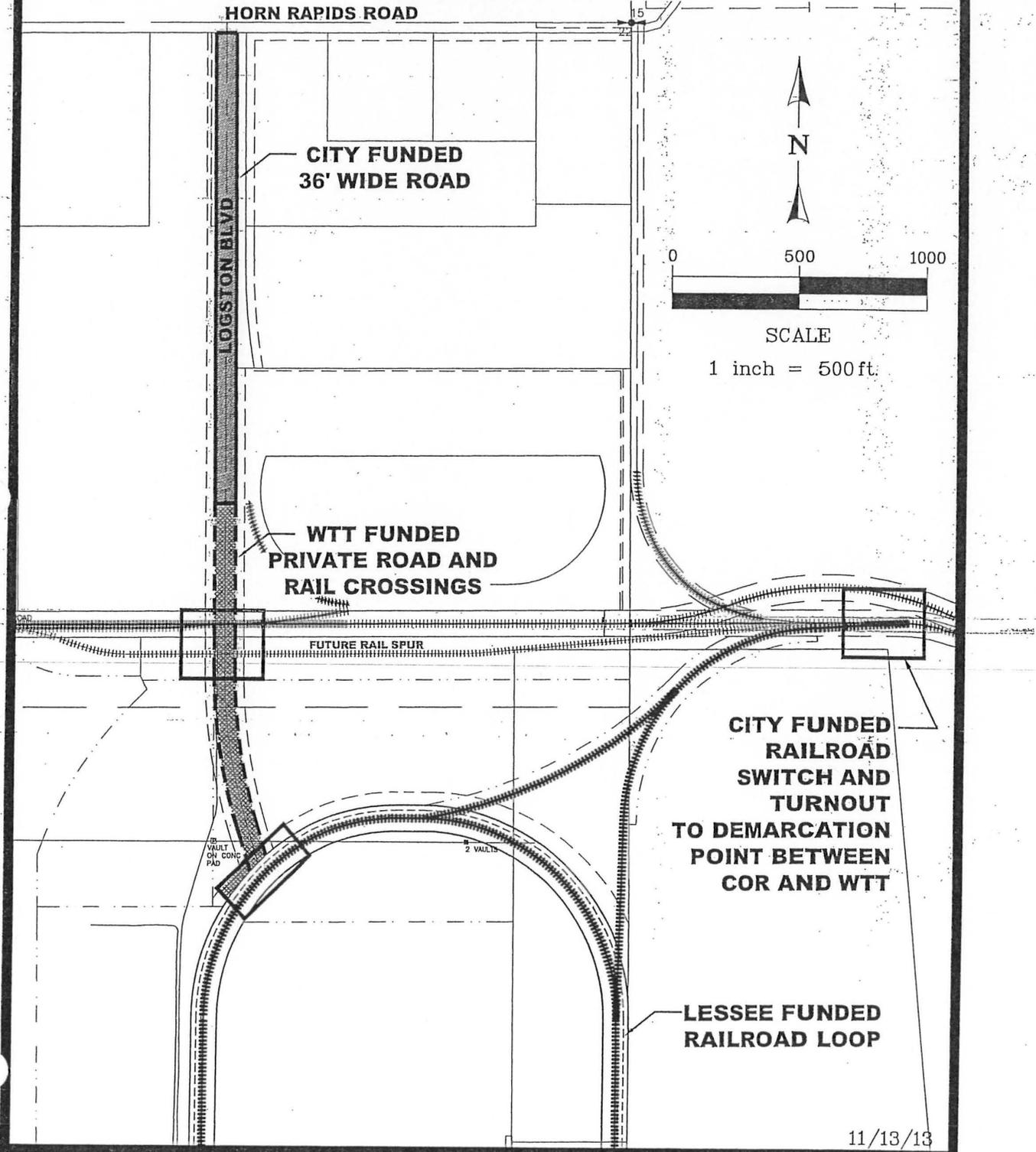
DRAFT

EXHIBIT B- MAP OF PURCHASED PROPERTY

(To be inserted when purchase is executed)

DRAFT

HORN RAPIDS RAIL LOOP INFRASTRUCTURE AGREEMENT EXHIBIT C



11/13/13

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**AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY
AND
CANCELLATION OF OPTION
AMERICAL ROCK PRODUCTS**

This Agreement for Purchase and Sale of Real Property and Cancellation of Option ("Agreement") is made and entered into this ___ day of November, 2013, between **AMERICAN ROCK PRODUCTS**, a Washington Corporation (hereinafter referred to as "Seller" or "ARP"), and the **CITY OF RICHLAND**, a Washington municipal corporation (hereinafter referred to as "Purchaser" or "City").

RECITALS:

On or about April 26, 2004, the City as Seller and ARP as Purchaser entered into a Purchase and Sale Agreement relating to the real property legally described in Exhibit A hereto ("Purchased Property"). ARP became the owner of record of the Purchased Property on or about April 30, 2004. Simultaneous with the execution of the Purchase and Sale Agreement, the City as Seller and ARP as Purchaser entered into an Option Agreement governing a second parcel of real property legally described in Exhibit "B" hereto ("Option Property").

To facilitate the development of the Horn Rapids Rail Loop, the City desires to reacquire the Purchased Property from ARP and cancel ARP's Option on the Option Property. ARP is willing to sell the Purchased Property to the City, and further agrees to the cancellation of its option on the Option Property, pursuant to the terms and conditions set forth herein.

1. Property and Sale of Property. ARP agrees to sell and City agrees to purchase, on the terms hereafter stated, the Purchased Property legally described in Exhibit A hereto, situated in the City of Richland, Benton County, Washington, together with all improvements thereon (if any) and all mineral and resource rights, including ground-water rights, held by ARP.

1.1. Scrivener's Errors. In the event of an error in the legal description, the parties agree that either party or a scrivener may correct the error.

1.2. Laws and Rights. It is understood that the sale and conveyance to be made pursuant to this Agreement shall be subject to any and all applicable federal, state and local laws, orders, rules and regulations, and any and all outstanding rights of record or which are open and obvious on the ground.

1.3. Timing of Conveyance. The Purchased Property described in Section 1 shall be conveyed to City by a Statutory Warranty Deed ("Deed") subject to the permitted

exceptions and at the time of payment, which shall be rendered to ARP at the time of closing. The Deed shall be delivered to City at closing.

2. Cancellation of Option. At the time of closing of the purchase of the Purchased Property, ARP agrees to the cancellation of its option governing the Option Property described in Exhibit B hereto, situated in the City of Richland, Benton County, Washington, on the terms hereafter stated. Cancellation shall be evidenced and effectuated by the execution and recording of the Termination of Purchase Option attached hereto as Exhibit C.

3. Consideration. The consideration for both the sale of the Purchased Property and the release of the Option governing the Option Property is as follows:

a. Cash Consideration. City shall pay ARP the Purchase Price of two hundred seventy thousand eight hundred seventy-five dollars and 27/100 cents (\$270,875.27) for the Purchased Property, and the sum of twenty thousand dollars and 00/100 cents (\$20,000.00) for the cancellation of the Option Agreement, said consideration collectively referred to hereafter as the cash consideration. The total cash consideration shall be deposited by City into an escrow account with Cascade Title Company, and shall be paid to ARP at closing subject to all adjustments and proration as may be provided for elsewhere herein.

b. Non-Cash Consideration. In addition to the cash consideration to be paid to ARP, City hereby agrees to enter into a Mineral Extraction License Agreement in the form attached hereto as Exhibit D. The purpose of the License Agreement is to allow ARP, as part of the consideration for the property purchase and release of option provided herein by ARP, to conduct at ARP's sole expense (but at no further charge from the City), removal and processing of sand and gravel and related activities on the property described in Exhibits A and B hereto, and on such other real property as described in the License Agreement.

4. Conditions Precedent to Sale and Option Cancellation. This Agreement is made and executed by the parties hereto subject to the following conditions precedent:

4.1. Title Review. Within ten (10) business days of executing this Agreement, City shall obtain a title report for the Purchased Property and the Option Property. For purposes of calculating time, the date of signing shall not count as the first business day. City expressly agrees that all exceptions, defects and encumbrances that were of record when City originally sold the Purchased Property to ARP and granted an option in the Option Property to ARP are hereby accepted by City in connection with this transaction.

4.1.1. New Exceptions. To the extent there are exceptions, defects and encumbrances of record that have arisen since the original closing, City will notify ARP in writing within ten (10) business days from the execution of this Agreement of any such

new exceptions, defects and encumbrances to which City objects ("title objections"). ARP shall then have ten (10) business days from receipt of City's notice of title objections to give City written notice either that: 1) ARP shall, before closing, remove all identified title objections at no cost to City, and in each such case ARP shall promptly provide City with evidence satisfactory to City of ARP's ability to so remove such title objections; or 2) ARP elects in its sole discretion not to cause one or more of such title objections to be removed. ARP's determination not to cause one or more title objections to be removed shall not constitute default, but shall entitle City to terminate this Agreement with no penalty by giving ARP notice thereof within ten (10) business days of receiving ARP's notice of non-removal. If City fails to deliver timely written notice of termination, then City shall be deemed to have waived its title objections.

4.1.2. Monetary Encumbrances. Notwithstanding anything in this Agreement to the contrary, ARP shall remove all monetary encumbrances and monetary defects that have not been prorated at or before closing. The terms "monetary encumbrances" or "monetary defects" as used herein mean encumbrances or defects to title that by their terms require the payment of money, whether in installments or at a fixed time or otherwise, including, but not limited to, mortgages, deeds of trust, mechanics' or materialmen's liens, but shall not include liens associated with public improvement districts and special assessments. If monetary encumbrances or monetary defects exist as to either the Purchased Property or the Option Property that are not cured or waived in a timely manner, this Agreement shall terminate with no penalty.

4.1.3. Other Due Diligence. City has conducted a full review of legal, title, environmental, archaeological and any other related issues and subject to the terms, conditions and representations herein, has completed its due diligence on both the Purchased Property and the Option Property with the current available information. ARP shall provide to City copies of all documentation and reports that it has in its possession (other than those documents and reports previously provided to ARP by City) relating to both the Purchased Property and the Option Property, including, for example, soil tests, environmental reports and similar reports. City reserves the right to terminate this Agreement with no penalty if, within fifteen (15) business days of receipt of additional reports and documentation from ARP, the City determines that the review of the reports is, in its sole opinion, unsatisfactory. In the event of termination by City under this section, this Agreement shall immediately terminate and be without further force and effect, and without further obligation of either party to the other.

4.2. Council Approval. The closing of this transaction is contingent upon approval by the City Council of the City of Richland. In the event the Richland City Council determines not to approve this Agreement, this Agreement shall immediately terminate with no penalty and be without further force and effect, and without further obligation of either party to the other.

4.3. Third Party Option Rights. Pursuant to this Agreement, ARP is releasing its Option interest on the Option Property, legally described herein in Exhibit A, as previously acquired pursuant to a 2004 Real Estate Option Agreement between the City of Richland

and American Rock Products. ARP makes no warranties or representations of any nature as to the existence (or lack thereof) of any other interests or encumbrances effecting the Option Property.

4.4. Proposed Loop Project. The City of Richland has the option to terminate this Agreement with no penalty in the event the Purchase and Sale Agreement with Central Washington Transfer Terminal for purchase of 25 acres terminates or does not reach closing for any reason.

4.5. Execution of Lease Agreement. Concurrent with closing on this Purchase and Sale Agreement and Cancellation of Option, the parties shall execute a License Agreement authorizing ARP's ongoing gravel and sand removal on the subject properties as described in said License Agreement attached as Exhibit D. In the event this Purchase and Sale Agreement and Cancellation of Option with ARP terminates or does not reach closing, neither party has any further obligation to enter said License Agreement.

5. Closing. On or before the date of closing, as described below, City shall deliver to the escrow company, Cascade Title Company, the total cash consideration in the form of a certified or cashier's check. ARP shall deliver the statutory warranty deed, as approved by City, to Cascade Title Company for placing in escrow. ARP shall also deliver the executed Termination of Purchase Option to Cascade Title Company, and the parties shall have executed the License Agreement and delivered a copy thereof to Cascade Title Company. Cascade Title Company shall be instructed that when it is in a position to issue a standard owner's policy of title insurance in the full amount of the Purchase Price, insuring fee simple title to the Purchased Property in City, Cascade Title Company shall record and deliver to City the deed; and issue and deliver to City the standard owner's policy of title insurance. Cascade Title Company shall also record the Termination of Purchase Option and Memorandum of License Agreement in the form attached hereto as Exhibit G.

5.1. Closing Costs. Each party shall pay its own attorney's fees. ARP shall pay all transfer taxes, recording costs, and escrow closing costs, if applicable. City will pay the full premium for a standard owner's policy of title insurance. Real property taxes (excluding assessments) for the then-current tax year relating to the Purchased Property shall be prorated. All unpaid assessments, if any, existing as of the closing date shall be prorated between City and Seller as of the closing date. Any other closing costs not specifically addressed in this Agreement shall be apportioned according to the customary practices for commercial real estate transactions.

5.2. Closing Date. Closing on this Purchase and Sale Agreement is contingent upon the City's successful closing of the Purchase and Sale Agreement with Central Washington Transfer Terminal. Therefore, the closing of this transaction with ARP shall occur simultaneously with the City's closing on the Purchase and Sale Agreement with Central Washington Transfer Terminal, or within two business days thereafter. The closing of this transaction, and delivery of all items, shall occur at Cascade Title Company.

6. Covenants, Representations and Warranties.

6.1. Seller's Covenants. Seller hereby covenants and agrees as follows:

6.1.1. From the date of this Agreement through the closing date, Seller shall not make any material alterations to the Purchased Property, or to any of the licenses, permits, legal classifications or other governmental regulations relating to the Purchased Property or the Option Property, nor enter into any leases or agreements pertaining to the Purchased Property or the Option Property without City's prior written consent.

6.1.2. From the date of this Agreement through the closing date, ARP shall not voluntarily cause to be recorded any encumbrance, lien, deed of trust, easement or the like against the title to the Purchased Property or against the Option Property without City's prior consent.

6.1.3. From the date of this Agreement through the closing date, ARP will operate and maintain the Purchased Property in a manner consistent with ARP's past practices relative to the Property and so as not to cause waste to the Purchased Property.

6.2. Seller's Representations and Warranties. ARP hereby makes the following representations and warranties to City, each of which shall be true on the date hereof, throughout the contract period, and on the date of closing. ARP shall immediately provide Purchaser with written notice of any event which would make any representation or warranty set forth below incorrect or untrue. In addition to any other remedies available at law or in equity, City may elect to terminate this Agreement without penalty upon notice from Seller prior to closing that one or more of the representations or warranties contained herein are incorrect or untrue.

6.2.1. ARP has full power and authority to enter into and carry out the terms and provisions of this Agreement, and to execute and deliver all documents which are contemplated by this Agreement. All actions of ARP necessary to confer such authority upon the persons executing this Agreement and such other documents have been, or will be, taken.

6.2.2. ARP is a Washington corporation, duly formed and organized, validly existing and in good standing under the laws of the State of Washington. ARP holds title to the Purchased Property in fee subject to any encumbrances of record, and is legally authorized to transfer ownership of said property.

6.2.3. ARP has not received any written notice from any governmental authorities or regulatory agencies that eminent domain proceedings for the condemnation of the Purchased Property or the Option Property are pending or threatened.

6.2.4. ARP has not received any written notice of pending or threatened investigation, litigation or other proceeding before a local governmental body or regulatory agency which would materially and adversely affect the Purchased Property or the Option Property.

6.2.5. ARP has not received any written notice from any governmental authority or regulatory agency that ARP's use of the Purchased Property is presently in violation of any applicable zoning, land use or other law, order, ordinance or regulation affecting the Property.

6.2.6. No special or general assessments have been levied against the Purchased Property except those disclosed in the Preliminary Title Report, and ARP has not received written notice that any such assessments are threatened.

6.2.7. ARP is not a "foreign person" for purposes of Section 1445 of the Internal Revenue Code.

6.2.8. ARP represents and warrants that, to the best of its knowledge and belief, there are no hazardous substances in, on, or under the Purchased Property that are in quantities or in concentrations that violate any applicable state, federal or local laws. For purposes of this representation, "Hazardous Substances" means any substance, material or waste that is designated or regulated as "toxic," "hazardous," "pollutant," or "contaminant" or a similar designation or regulation under any federal, state or local law (whether under common law, statute, regulation or otherwise) or judicial or administrative interpretation of such, including, without limitation petroleum or natural gas.

6.2.9. Seller represents and warrants that, to the best of its knowledge and belief, the Purchased Property is not an archeologically significant site.

6.3. Purchaser's Representations and Warranties. City hereby represents and warrants to ARP as follows:

6.3.1. Purchaser has full power and authority to enter into and carry out the terms and provisions of this Purchase Agreement and to execute and deliver all documents which are contemplated by this Agreement. All actions of Purchaser necessary to confer such authority upon the persons executing this Purchase Agreement and such other documents have been, or will be, taken.

6.3.2. City is a municipal corporation, duly formed and organized, validly existing and in good standing under the laws of the State of Washington.

6.3.3. Purchaser represents that it has sufficient funds to close this transaction.

6.4. Survival of Covenants. The covenants, representations, and warranties of the ARP and the City contained in Section 6 of this Agreement shall survive both the

delivery and recording of the deed from the ARP to the City, and the cancellation of the Option.

7. Casualty and Condemnation.

7.1. Material Casualty or Condemnation. If, prior to the closing date: (i) the Purchased Property shall individually sustain damage caused by casualty which would cost ten thousand dollars (\$10,000.00) or more to repair or replace; or (ii) if a taking or condemnation of any portion of either the Purchased Property has occurred, or is threatened, which would materially affect the value of the property, either City or ARP may, at its option; terminate this Agreement by providing written notice to the other party within two (2) days' notice of such event. If, prior to the closing date, neither party provides said termination notice within such two (2) day period, the closing shall take place as provided herein with a credit against the purchase price in an amount equal to any insurance proceeds or condemnation awards actually collected by ARP. At closing, ARP shall assign to City all of ARP's interest in any insurance proceeds or condemnation awards which may be due but unpaid to ARP on account of such occurrence.

7.2. Immaterial Casualty or Condemnation. If, prior to the closing date, the Purchased Property shall sustain damage caused by casualty which is not described in Section 7.1., or a taking or condemnation has occurred, or is threatened, which is not described in Section 7.1.; neither City nor ARP shall have the right to terminate this Agreement. Closing shall take place as provided herein with a credit against the purchase price equal to the cost to repair that portion of the Purchased Property so damaged by insured casualty, or an amount equal to the anticipated condemnation award, as applicable. At closing, City shall assign to ARP all rights or interest in and to any insurance proceeds or condemnation awards which may be due on account of any such occurrence.

8. City's Remedies. In the event of material breach of this Agreement by ARP, City shall have, as its sole remedies: (a) the right to pursue specific performance of this Agreement; (b) the right to terminate this Agreement; and (c) all remedies presently or hereafter available at law or in equity.

9. ARP's Remedies. In the event of material breach of this Agreement by City, ARP shall have, as its sole remedies: (a) the right to pursue specific performance of this Agreement; (b) the right to terminate this Agreement; and (c) all remedies presently or hereafter available at law or in equity.

10. Miscellaneous.

10.1. Finder's Fee. City and ARP each agree that a real estate finder's fee is not due to each other or any other. Each party hereby agrees to indemnify and defend the other against and hold the other harmless from and against any and all loss, damage, liability or expense, including costs and reasonable attorneys' fees, resulting from any claims for a Finder's Fee made as a result of the indemnifying party's conduct. The provisions of this section shall survive the closing.

10.2. Time of the Essence. Time is of the essence of every provision of this Agreement.

10.3. Notices. Whenever any party hereto shall desire to give or serve upon the other any notice, demand, request or other communication, each such notice, demand, request or other communication shall be in writing and shall be given or served upon the other party by personal delivery (including delivery by written electronic transmission) or by certified, registered or express United States mail, or Federal Express or other commercial courier, postage prepaid, addressed as follows:

TO SELLER:

American Rock Products
Attn: Michael D. McKinney
4418 E. 8th Avenue
Spokane Valley, WA 99212
Phone: (509) 533-1683
Fax: (509) 533-1644

TO PURCHASER:

City of Richland
Attn: Economic Development Manager
975 George Washington Way
PO Box 190, MS 18
Richland, WA 99352
Phone: (509) 942-7763
FAX: (509) 942-5666

Any such notice, demand, request or other communication shall be deemed to have been received upon the earlier of personal delivery thereof or two (2) business days after having been mailed as provided above, as the case may be.

10.4. Captions. Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement.

10.5. Exhibits. All exhibits attached hereto shall be incorporated by reference as if set out herein in full herein.

10.6. Binding Effect. Regardless of which party prepared or communicated this Agreement, this Agreement shall be of binding effect between City and ARP only upon its execution by an authorized representative of each such party.

10.7. Construction. The parties acknowledge that each party and its counsel have reviewed and revised this Agreement and all related documents, and that the normal rule of construction providing that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendment or exhibits hereto. This is a fully integrated Agreement. There are no additional terms, conditions, or obligations binding upon the parties unless specifically referenced herein.

10.8. Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original, but all of such counterparts shall constitute one such Agreement.

10.9. Cooperation and Further Assurances. Each party shall cooperate with the other in good faith to achieve the objectives of this Agreement. The parties shall not unreasonably withhold responses to requests for information provided for in this Agreement. The parties agree to take further action and execute further documents, both jointly or within their respective power and authority, as may be reasonably necessary to implement the intent of this Agreement. Provided, however, that nothing in this section affects a party's right to make any decision that is determined to be within that party's sole discretion.

10.10. Waiver of Disclosure Statement. City expressly waives the right to receive a Seller's Commercial Real Estate Disclosure Statement provided for by RCW 64.06.

10.11. Full Performance and Survival. The delivery of the deed and any other documents and instruments by Seller and the acceptance and recordation thereof by Purchaser shall effect a merger and be deemed the full performance and discharge of the obligations on the part of Purchaser and Seller to be performed hereunder. Certain clauses, covenants, warranties and indemnifications specifically provided herein or that can only be performed after closing shall survive the closing.

10.12. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Washington. The parties agree that Benton County is the appropriate venue for filing of any civil action arising out of this Agreement, and both parties expressly agree to submit to personal jurisdiction in Benton County Superior Court.

10.13. Scrivener. The party drafting this Agreement is the City of Richland. The City of Richland makes no representations regarding the rights or responsibilities of ARP under this Agreement. ARP is encouraged to review the completed contract and all relevant documents with counsel before signing this Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have entered into this Agreement on the day and year first above written.

CITY OF RICHLAND - PURCHASER

AMERICAN ROCK PRODUCTS-
SELLER/OPTION RELEASOR

By: Cynthia D. Johnson
Its: City Manager

By: _____
Its: _____

ATTESTED:

Marcia Hopkins, City Clerk

APPROVED AS TO FORM:

Heather Kintzley, City Attorney

STATE OF WASHINGTON)
) ss.
County of Benton)

On this _____ day of _____, 2013, before me personally appeared CYNTHIA D. JOHNSON, known to be the CITY MANAGER and/or representative for CITY OF RICHLAND, and the person who executed the within and foregoing Agreement for Purchase of Real Property and acknowledged that the said instrument is to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My Commission Expires: _____

STATE OF WASHINGTON)
) ss.
County of _____)

On this day personally appeared before me _____, to me known to be the individual described in and who executed the within and foregoing Agreement for Purchase of Real Property and Cancellation of Option, and acknowledged that he or she signed the same as his or her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this ____ day of _____, 2013.

Print Name:

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My commission expires: _____

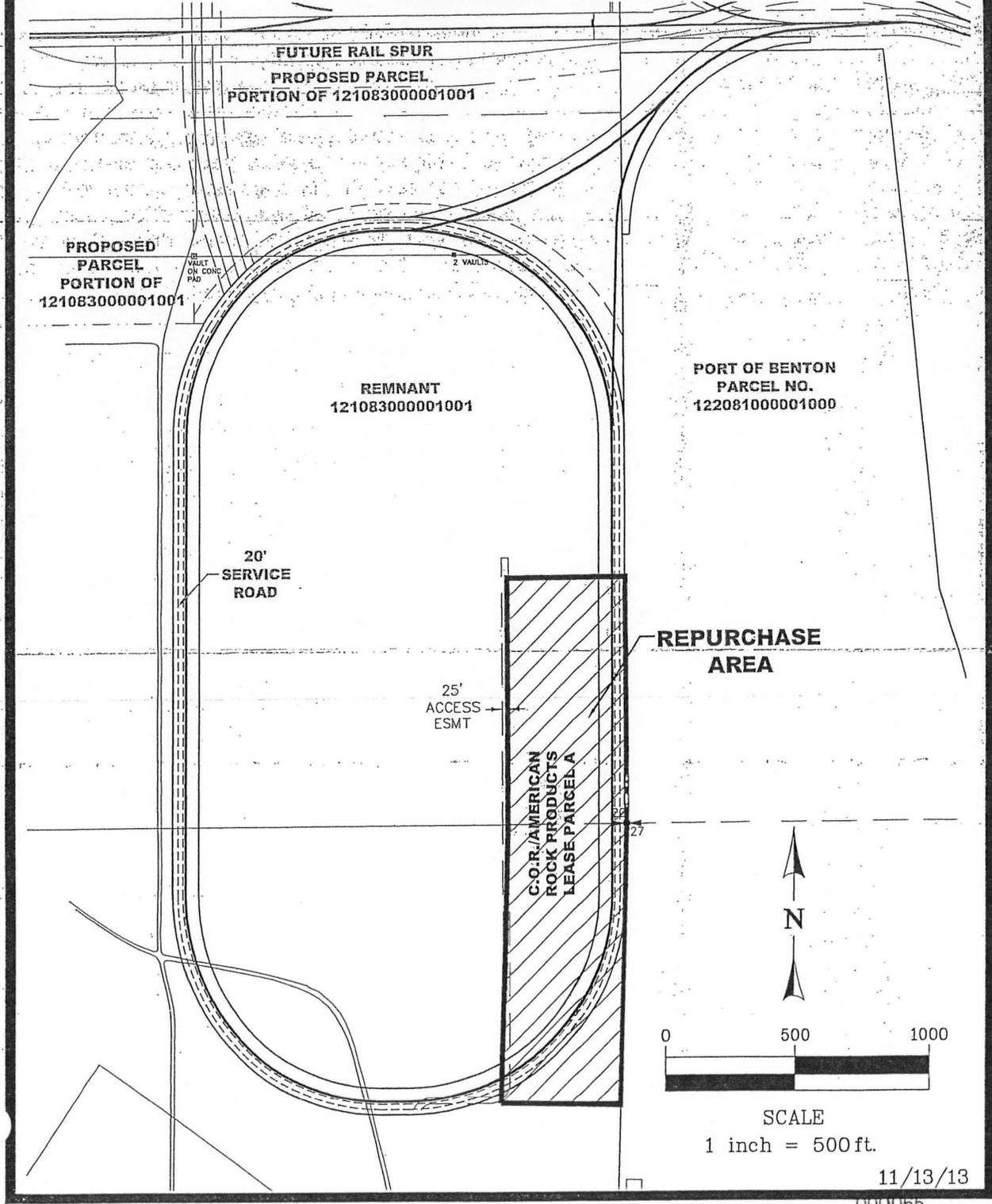
Exhibit A – Legal Description of Repurchase Property

Portion of West half of Section 22, Township 10 North, Range 28 East, and of Northwest quarter of Section 27, Township 10 North, Range 28 East, W.M., records of Benton County, Washington, described as follows:

Beginning at the South one-quarter corner of said Section 22, thence North $0^{\circ}5'15''$ East, along the North-South centerline of said Section 22, a distance of 917.34 feet; thence North $89^{\circ}35'5''$ West, 448.00 feet; thence South $0^{\circ}5'15''$ West, parallel to said centerline, 910.99 feet; thence South $2^{\circ}02'03''$ West, parallel to the North-South centerline of Section 27, Township 10 North, Range 28 East, W.M., 1,033.67 feet; thence South, $89^{\circ}35'05''$ East 448.17 feet to a point on the said North-South centerline of said Section 27; thence North $2^{\circ}02'03''$ East along said centerline, 1,027.31 feet to the Point of Beginning.

DRAFT

HORN RAPIDS RAIL LOOP PSA AND CANCELLATION OPTION EXHIBIT A



11/13/13

000065

001128

Exhibit B – Legal Description of Option Property

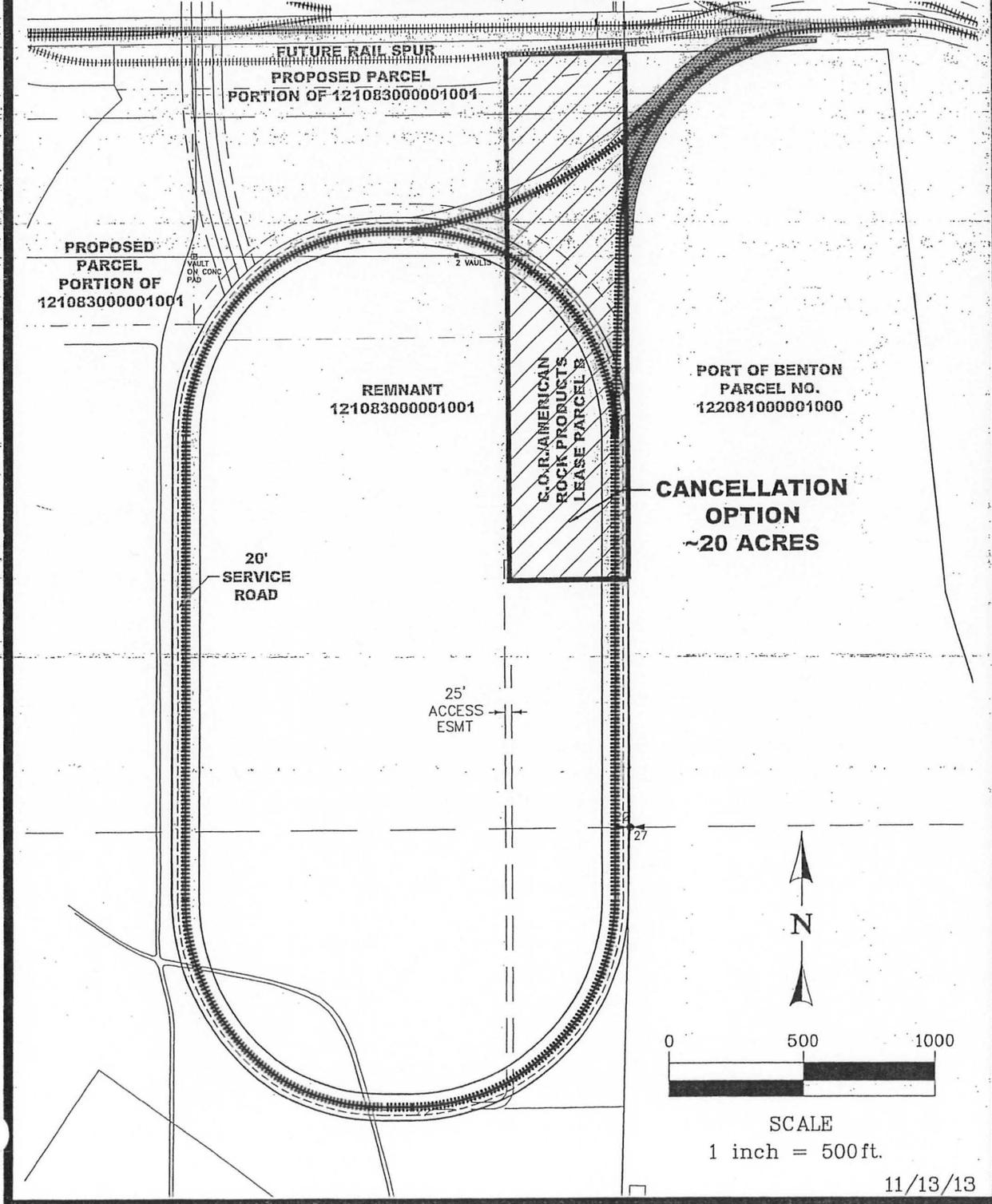
Portion of West half of Section 22, Township 1.0 North, Range 28 East, W.M., records of Benton County, Washington, described as follows:

Beginning at the South one-quarter corner of said Section 22, thence North $0^{\circ}5'15''$ East, along the North-South centerline of said Section 22, a distance of 917.34 feet to the True Point of Beginning,

Thence, continuing along said North-South centerline, North $0^{\circ}5'15''$ East, 1,944.65 feet; thence North $89^{\circ}35'5''$ West, 448.00 feet; thence South $0^{\circ}25'15''$ West, parallel to said centerline, 1,944.65 feet; thence South $89^{\circ}35'05''$ East, 448.00 feet to the True Point of Beginning.

DRAFT

HORN RAPIDS RAIL LOOP PSA AND OPTION CANCELLATION EXHIBIT B



001130

After recording please return to:
Heather Kintzley, City Attorney
City of Richland
P.O. Box 190 MS 07
Richland, WA 99352

TERMINATION OF PURCHASE OPTION

This Termination of Purchase Option ("Termination") is dated as of November ____, 2013 by and between the **City of Richland**, a Washington municipal corporation (hereinafter referred to as "City"), and **American Rock Products**, a Washington corporation (hereinafter referred to as "ARP").

I. Recitals

WHEREAS, City and ARP entered into a Real Estate Option Agreement on April 19, 2004 relating to certain real property located in the City of Richland, County of Benton, State of Washington (the "Property") legally described as:

Portion of West half of Section 22, Township 10 North, Range 28 East of the Willamette Meridian, records of Benton County, Washington, described as follows:

Beginning at the South one-quarter corner of said Section 22, thence North 0°5'15" East, along the North-South centerline of said Section 22, a distance of 917.34 feet to the True Point of Beginning,

Thence, continuing along said North-South centerline, North 0°5'15" East, 1,944.65 feet; thence North 89°35'5" West, 448.00 feet; thence South 0°25'15" West, parallel to said centerline, 1,944.65 feet; thence South 89°35'05" East, 448.00 feet to the True Point of Beginning.

CONTAINS 20.0 ACRES MORE OR LESS; and

WHEREAS, City and ARP caused to be recorded under Auditor File No. 2004-014978 in the Official Records of Benton County, Washington a Memorandum of Real Estate Option Agreement in order to put interested parties on notice of the Purchase Option; and

WHEREAS, the Purchase Option has been terminated and is no longer of any force or effect; and

WHEREAS, City and ARP now desire to cause this Termination to be recorded in the Official Records of Benton County, Washington in order to put interested parties on notice that the Purchase Option has been terminated.

II. Agreement

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City and ARP hereby (a) terminate the Purchase Option, (b) agree that the Purchase Option has terminated, and (c) agree that the Purchase Option is void and of no force or effect.

IN WITNESS WHEREOF, City and ARP have executed this Termination as of the date first written above.

CITY OF RICHLAND

AMERICAN ROCK PRODUCTS

By: Cynthia D. Johnson
Its: City Manager

By: _____
Its: _____

ATTESTED:

Marcia Hopkins, City Clerk

APPROVED AS TO FORM: _____

Heather Kintzley, City Attorney

STATE OF WASHINGTON)
) ss.
County of Benton)

On this _____ day of _____, 2013, before me personally appeared CYNTHIA D. JOHNSON, known to be the CITY MANAGER and/or representative for CITY OF RICHLAND, and the person who executed the within and foregoing Termination of Purchase Option and acknowledged that the said instrument is to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My Commission Expires: _____

STATE OF WASHINGTON)
) ss.
County of _____)

On this day personally appeared before me _____, to me known to be the individual described in and who executed the within and foregoing Termination of Purchase Option, and acknowledged that he or she signed the same as his or her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this ____ day of _____, 2013.

Print Name:

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My commission expires: _____

LICENSE AGREEMENT FOR MINING AND REMOVAL OF AGGREGATE

This License Agreement for mining and removal of aggregate ("License Agreement") is entered into this ___ day of _____, 2013, by and between the **CITY OF RICHLAND**, a municipal corporation of the State of Washington (hereinafter referred to as "City"), and **AMERICAN ROCK PRODUCTS, INC.**, a Washington corporation, (hereinafter referred to as "ARP").

I. RECITALS

WHEREAS, simultaneous to the execution of this License Agreement, the Parties have entered into a "Agreement for Purchase and Sale of Real Property and Cancellation of Option" ("Purchase and Option Cancellation Agreement") whereby City has agreed to reacquire from ARP the parcel of real property it sold to ARP in 2004, described in Exhibit A, herein; and

WHEREAS, in addition to the sale to City of the real property identified in Exhibit A, ARP has also agreed to cancellation of an option that was previously granted to it by City to purchase real property described in Exhibit B herein; and

WHEREAS, the non-cash consideration for the transaction described in the Purchase and Option Cancellation Agreement included the granting by City to ARP of the right to mine and remove aggregate from parcels A and B as identified on Exhibits A and B, and from that portion of an adjacent parcel identified as the Railroad Loop site and depicted on the map attached hereto as Exhibit C. Collectively, the two parcels identified in Exhibits A and B, and the Railroad Loop portion of Exhibit C herein shall be referred to as the License Location; and

WHEREAS, this Agreement is necessary to grant permission to ARP to mine, process, remove and store aggregate materials from the License Location to fulfill City's non-cash consideration obligation supporting the Agreement for Purchase and Option Cancellation Agreement executed in connection herewith.

NOW THEREFORE, in consideration of the agreements and covenants contained herein, and for such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and ARP agree as follows:

II. AGREEMENT

1. Terms of License. While this License Agreement is in effect:

- a) ARP shall have the exclusive right to mine, produce, store and remove aggregate materials from the License Location. ARP shall mine no closer than 5 (five) feet above groundwater level as shown on Exhibit B.
- b) ARP shall not use the License Location for any other purpose without the written

consent of the City.

- c) City shall have the right to construct a railroad spur and loop across the License Location in the approximate area depicted on Exhibit C.
 - d) The City shall not use the License Location, nor grant any other party the right to use the License Location, for any other purpose without the express written consent of ARP.
 - e) ARP and the City shall coordinate the timing of construction of the railroad spur and loop, and the timing and location of ARP's mining, storage and production activities so as to maximize the mining resource located on the License Location, the economic recovery of the resource by ARP, and to facilitate the most efficient and cost effective construction possible of the railroad spur and loop.
 - f) In the event City does not construct the railroad spur and loop at the License Location, ARP shall still have the exclusive right to mine, produce, store and remove aggregate materials from the License Location in accordance with the terms of this Agreement, and City will not develop or engage in the construction of any building or improvement on the License Location (other than the railroad spur and loop) without the express written consent of ARP.
2. Duration of License. This License Agreement shall be in effect from the date of closing of the purchase and sale and cancellation of option transactions contemplated by the Purchase and Option Cancellation Agreement, and shall continue in effect for a period of five (5) years, or until ARP gives notice to the City of its intent to cease mining operations and thereafter completes its reclamation obligations, whichever occurs first.

- a) City shall give ARP written notice when construction on the proposed rail loop is imminent. Once construction of the rail loop commences, ARP has an option for up to two (2) years to extract the aggregate from within the rail loop. Further, once construction of the rail loop commences, ARP cannot store material within the rail loop area, and shall be required to reclaim the ground after gravel removal in order to level the ground for use.
- b) Once the rail loop is constructed and is operational, ARP shall schedule any resource recovery operations that need to take place inside the loop area during the months of December through April. If, after loop operations have begun, ARP has a need to conduct resource recovery operations outside of this anticipated resource removal season (December - April), ARP shall coordinate and schedule such use and access with the City and the rail loop operator(s) in such a manner so as to minimize any potential disruption of the rail loop and ARP's operations.

3. Reclamation Plan. ARP has previously permitted and filed a Reclamation Plan covering the real property described in Exhibits A and B. The Reclamation Plan delineates the condition in which the parcels described in Exhibits A and B shall be left by ARP after removal of the aggregate. The City, at its election, may excavate the Railroad Loop property depicted on Exhibit C. If the City chooses to do so, ARP shall be entitled to remove the aggregate produced by the City's excavation from the Railroad Loop area, and any reclamation of the Railroad Loop area shall be the responsibility of the City. In the event ARP excavates the Railroad Loop area, the City shall identify the precise boundaries for excavation and notify ARP by written notice. ARP shall be responsible for actual excavation and for returning the property to the condition required by any reclamation plan agreed to between the City and ARP, and/or required by any local or state agencies. The City shall be responsible for any permitting obligations related to its use of the License Location. ARP will provide the City a copy of the Reclamation Plan already provided to Washington Department of Natural Resources.
- a) Based upon the City's development plans for the License Location, the City may direct ARP to deposit topsoil in certain areas, and to deposit other types of fill materials in other areas. ARP shall cooperate with the City in the manner of the restoration of the overburden and fill to the extent the City's directions are consistent with the Reclamation Plan previously developed for Parcels A and B, and any future reclamation plan developed for the Railroad Loop area, and provided that such directions do not materially increase the cost to ARP to restore and reclaim the License Location.
- b) To the extent reasonably practicable, any topsoil or overburden which is removed shall be stored on-site or in the most operationally-practical location as determined by ARP.
-
4. Aggregate Storage. ARP may also use the License Location for storage of aggregate removed from the License Location so long as such use does not interfere with the City's use of the Property. The term "aggregate" shall include all rock, sand or other materials mined from the License Location for use, storage, removal or resale by ARP. This term shall not include any top soil or overburden which is removed, but remains on the Property for eventual reuse for reclamation of the Property.
5. Access to License Location. At all times during the term of this Agreement, ARP shall have adequate access to the License Location to allow ARP to conduct the activities contemplated by this Agreement in an economical and efficient manner. This shall include access over any railroad spur that may ultimately be constructed on the License Location.
6. Inspections. The City shall have the right enter the License Location at any time to inspect the License Location to ensure that ARP is performing in accordance with the provisions of this Agreement. The City shall notify ARP of its intent to inspect,

and shall conduct any such inspections at reasonable times so as not to disrupt ARP's operations.

7. Maintenance of the License Location: ARP shall at all times maintain the areas it is actively using within the License Location, including storage areas, free from waste and debris related to its operations and use of the property. ARP shall have no duty to maintain areas used by the City or other invitees of the City.

8. Indemnification/Hold Harmless.

a) Indemnification/Hold Harmless of City by ARP: ARP shall defend, indemnify and hold harmless the City, its officers, officials, employees and volunteers from and against any and all claims, suits, actions, or liabilities for injury or death of any person, or for loss or damage to property, which arises out of Licensee's, or its contractor's or subcontractor's, use of the Premises, or from any activity, work or thing done, permitted, or suffered by the Licensee in or about the Premises, to the extent such injury or damage shall have been caused by the negligence or intentional conduct of Licensee or any of its employees or agents.

It is further specifically and expressly understood that the indemnification provided herein constitutes ARP's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification and does not include or extend to any claim by ARP's employees directly against ARP. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

b) Indemnification/Hold Harmless of ARP by City: The City shall defend, indemnify and hold harmless ARP, its officers, directors, employees and agents from and against any and all claims, suits, actions, or liabilities for injury or death of any person, or for loss or damage to property, which arises out of the City's, or its contractor's or subcontractor's, use of the Premises, or from any activity, work or thing done, permitted, or suffered by the City in or about the Premises, to the extent such injury or damage shall have been caused by the negligence or intentional conduct of the City or any of its employees or agents.

It is further specifically and expressly understood that the indemnification provided herein constitutes the City's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification and does not include or extend to any claim by the City's employees directly against the City. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

9. Insurance: ARP shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damage to property which may

arise from or in connection with the performance of the work hereunder by ARP, their agents, representatives, employees or subcontractors.

a) No Limitation. ARP's maintenance of insurance, its scope of coverage and limits as required herein shall not be construed to limit the liability of ARP to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

b) Minimum Scope of Insurance. ARP shall obtain insurance of the types described below:

1. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.

2. Commercial General Liability insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover premises and contractual liability. The City shall be named as an insured on Lessee's Commercial General Liability insurance policy using ISO Additional Insured- Managers or Lessors of Premises Form CG 20 11 or a substitute endorsement providing equivalent coverage. There shall be no endorsement or modification of the Commercial General Liability Insurance for liability arising from explosion, collapse or underground property damage.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

c) Minimum Amounts of Insurance. ARP shall maintain the following insurance limits:

1. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

2. Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate and \$2,000,000 products-completed operations aggregate limit.

d) Other Insurance Provision. ARP's Automobile Liability and Commercial General Liability insurance policies are to contain, or be endorsed to contain that they shall be primary insurance with respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of ARP's insurance, and shall not contribute with it.

- e) Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: VII.
- f) Verification of Coverage. ARP shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of ARP before commencement of the work.
- g) Subcontractors. ARP shall have sole responsibility for determining the insurance coverage and limits required, if any, to be obtained by subcontractors, which determination shall be made in accordance with reasonable and prudent business practices.
- h) Notice of Cancellation. Within two (2) business days of receipt of such notice, ARP shall provide the City and all additional insureds for this work with written notice of any policy cancellation.
- i) Failure to Maintain Insurance. Failure on the part of ARP to maintain the insurance as required shall constitute a material breach of contract, upon which the City may, after giving five (5) business days' notice to ARP to correct the breach, immediately terminate the contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith; with any sums so expended to be repaid to the City on demand.
10. Taxes, License and Permits. ARP agrees to pay for all labor, employee benefits, materials, equipment, and tools necessary for the performance of its work at the License Location, and to obtain all applicable state and local licenses and permits necessary for the performance of said activities. ARP shall pay all state and local taxes which may become due and payable as a result of ARP's use or occupation of the License Location, which may be due and payable as a result of ARP's mining, processing, removal, storage or sale of materials removed from the License Location. ARP accepts the full and exclusive liability for payment of all such costs and expenses, and shall hold the City harmless from any liens, claims, judgments, expenses or costs, including attorney's fees, arising from a claim for the payment of such costs and expenses. The City shall be liable for all real estate property taxes and assessments for the License Location, if any.
11. Protection of Property from Construction Liens. ARP shall not permit any mechanics', materialmen's, contractors' or subcontractors' liens arising from any work performed by or for ARP to be enforced against the Property, however it may arise. ARP may withhold payment of any claim in connection with a good faith dispute over an obligation to pay, so long as City's Property interests are not jeopardized.
12. Default. In the event of any default by ARP or City under this Agreement, the non-defaulting party shall give the defaulting party written notice of default.

- a) If the default creates an imminent danger of injury to persons or property, the defaulting party shall promptly undertake to cure the default, and shall have cured the default within three (3) days of the receipt of the notice of default.
- b) Other defaults shall be cured within thirty (30) days of the receipt of the notice of default. In the event the nature of the default is such that it cannot be cured within thirty (30) days, the defaulting party shall submit a plan to the non-defaulting party for curing the deficiencies within the same thirty (30) day period, and if accepted by the non-defaulting party, the defaulting party will thereafter have a reasonable amount of time consistent with the plan to cure the default.
- c) If the non-defaulting party fails to cure a default (or otherwise submit an acceptable plan for doing so) within the time provided, then the non-defaulting party shall have all remedies available to it at law and equity, including but not limited to, termination of this Agreement and the right to seek damages therefrom. Notwithstanding the foregoing, the termination of this Agreement shall not terminate ARP's obligation to restore any of the property in accordance with any filed Reclamation Plan.

13. Notices. Whenever any party hereto shall desire to give or serve upon the other any notice, demand, request or other communication, each such notice, demand, request or other communication shall be in writing and shall be given or served upon the other party by personal delivery (including delivery by written electronic transmission) or by certified, registered or express United States mail, or Federal Express or other commercial courier, postage prepaid, addressed as follows:

TO ARP:
 American Rock Products
 Attn: Michael D. McKinney
 4418 E. 8th Avenue
 Spokane Valley, WA 99212
 Phone: (509) 533-1683
 Fax: (509) 533-1644

TO THE CITY:
 City of Richland
 Attn: Economic Development Manager
 975 George Washington Way
 PO Box 190, MS 18
 Richland, WA 99352
 Phone: (509)942-7583
 FAX: (509)942-5666

Any such notice, demand, request or other communication shall be deemed to have been received upon the earlier of personal delivery thereof or two (2) business days after having been mailed as provided above, as the case may be.

14. Assignment: ARP may assign this Agreement to a wholly-owned subsidiary of Eucon Corporation without the prior written consent of the City. No other assignments of this Agreement shall be made without the written consent of City, which shall be made or denied in its sole discretion. No assignment shall relieve ARP of its obligations under this Agreement.

15. Entire Agreement: This Agreement contains the entire agreement of the parties hereto and supersedes all previous understandings and agreements, written and oral. Neither party shall be liable to the other for any representations made by any person concerning the Premises or regarding the terms of this Agreement, except to the extent that the same are expressed in this Agreement. This Agreement may be amended only by written instrument executed by the parties or their lawful successors and assigns subsequent to the date hereof.

16. Governing Law/Forum Selection: Unless otherwise controlled by federal law, the interpretation and enforcement of this Agreement shall be governed by the laws of the State of Washington. The parties agree that Benton County is the appropriate venue for filing of any civil action arising out of this Agreement. User expressly agrees to submit to personal jurisdiction in Benton County Superior Court.

17. Attorney's Fees: In any action arising under this Agreement, the prevailing party shall be entitled to recover all costs incurred in such action including reasonable attorney fees. For the purposes of this paragraph, an arbitration or administrative hearing shall be considered an action.

18. Severability: If any provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable as written, the remainder of the Agreement or the applications of the remainder of the Agreement shall not be affected.

IN WITNESS WHEREOF, the parties have entered into this Agreement the day and year first above written.

CITY OF RICHLAND

AMERICAN ROCK PRODUCTS

By: Cynthia D. Johnson
Its: City Manager

By: _____
Its: _____

ATTESTED:

Marcia Hopkins, City Clerk

APPROVED AS TO FORM:

Heather Kintzley, City Attorney

STATE OF WASHINGTON)
) ss.
County of Benton)

On this _____ day of _____, 2013, before me personally appeared CYNTHIA D. JOHNSON, known to be the CITY MANAGER and/or representative for CITY OF RICHLAND, and the person who executed the within and foregoing License Agreement for Mining and Removal of Aggregate and acknowledged that the said instrument is to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My Commission Expires: _____

STATE OF WASHINGTON)
) ss.
County of _____)

On this day personally appeared before me _____, to me known to be the individual described in and who executed the within and foregoing License Agreement for Mining and Removal of Aggregate, and acknowledged that he or she signed the same as his or her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this ____ day of _____, 2013.

Print Name:

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My commission expires: _____

EXHIBIT 7

JD-__-X
KJ-__-X
KH-__-X

CONTRACT NO. 142-11

AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY

This Agreement for Purchase and Sale of Real Property (the "Agreement") is made and entered into this 20th day of *December, 2011* between the **CITY OF RICHLAND**, a Washington municipal corporation ("Seller"), and **CONAGRA FOODS LAMB WESTON, INC.**, a Delaware corporation, and/or assigns ("Purchaser").

1. Purchase and Sale of Property. Seller agrees to sell and Purchaser agrees to purchase, on the terms hereafter stated, all of the following described property (collectively, the "Property"):

1.1. The Property. The land involved in this transaction is approximately 80 acres located in the Horn Rapids Industrial Park, City of Richland, Benton County, Washington, and is legally described as follows:

The Property is generally depicted as the "Property" on Exhibit B and consists of approximately 80 acres (the "Property"). Seller and Purchaser shall work together to complete an ALTA survey ("Survey") of the Property as soon as practical during the Contingency Period and the completed legal description from the Survey shall be inserted into Exhibit A to this Agreement by mutual agreement of the parties prior to the expiration of the Contingency Period. Seller shall pay the expense for the Survey.

It is understood that the sale and conveyance to be made pursuant to this Agreement shall be subject to any and all applicable federal, state and local laws, orders, rules and regulations, and any and all outstanding rights of record or which are shown on the Survey.

1.2. Option Property. For a period of five (5) years from the date of Closing, Purchaser shall have an option ("Option") to purchase up to an additional eighty (80) acres located to the south of the Property, as generally depicted as the "Option Property" on Exhibit B (the "Option Property") at a price of Eighteen Thousand Five Hundred Dollars and zero cents (\$18,500.00) per acre. The Purchaser may exercise its option in minimum twenty (20) acre contiguous increments over the five (5) year option term. Purchaser may exercise the option by delivering written notice and a legal description of the Option Property, or portion thereof to be purchased, to Seller and the closing on the Option Property shall occur on the earlier of: (i) the sixtieth day following Seller's receipt of written notice from Purchaser exercising the Option, or (ii) the thirtieth day following Benton County approval of any required subdivision of the Option Property. Title to the Option Property shall be conveyed by Seller and the Closing costs shall be paid pursuant to same requirements as applicable to the Property. Seller shall grant Purchaser reasonable access to the Option Property to complete Purchaser's investigations of the Option Property. Seller and Purchaser shall work together to

WUTC DOCKET TR-130499
EXHIBIT JD-9-X
ADMIT W/D REJECT

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complete a legal description(s) of the Option Property soon as possible following completion of the Survey and the completed description(s) shall be inserted into Exhibit C by mutual agreement of the parties prior to the expiration of the Contingency Period. Seller shall pay the expense for preparing the legal description of the Option Property. Purchaser and Seller shall execute and deliver an Option Agreement in recordable form at Closing and the Option Agreement shall be recorded against the Option Property immediately following Closing.

1.3 Contingency Period. The "Contingency Period" shall be one hundred and eighty (180) days from the date of this Agreement. If the Rail Contingency (as defined in Section 3.3) and or the Bid Contingency (as defined in Section 3.4) is not satisfied by the expiration of the Contingency Period, then Purchaser shall have the right, but not the obligation, to extend the Contingency Period to the earlier of: (i) forty days following satisfaction of the Rail or Bid Contingency; or (ii) two (2) years following the Seller's execution of this Agreement, provided that Purchaser delivers written notice to Seller on or before the expiration of the original Contingency Period.

1.4 Project. The buildings and improvements constructed the Seller shall have a minimum value of \$35,000,000 (the "Project") as evidenced by construction contracts and invoices totaling the minimum value.

1.5 Contract Period. Contract period shall be defined as the period from Seller's execution of this Agreement through Closing.

2. Purchase Price.

2.1 Purchaser shall pay to Seller as the purchase price (the "Purchase Price") for the Property the title to Lot 2, SHORT PLAT No. 3234, according to the survey thereof recorded under Auditor's File No. 2010-003244, record of Benton County, Washington (the "Columbia Point Property"). Upon transfer of title by Purchaser of title to the Columbia Point Property to Seller as provided herein, Purchaser shall be relieved of any and all liability under the agreement dated June 30, 2009 between ConAgra Foods Lamb Weston, Inc. and the City of Richland, WA for the purchase price of the Columbia Point Property ("Columbia Point Agreement").

2.2 In the event that Closing on the Property has not occurred on or before October 31, 2012, whether due to termination of this Agreement or extension of the Contingency Period, Seller shall purchase from Purchaser the Columbia Point Property for the repurchase price stated in Section 6.1.4(i) of the Columbia Point Agreement. In the event of a repurchase the City of Richland will close the repurchase on January 31, 2013 and Purchaser will be relieved of all liability under the Columbia Point Agreement. The obligation contained in Section 2.2 shall survive termination of the Agreement.

2.3 In the event that the Contingency Period is extended as provided herein and the Seller repurchases the Columbia Point Property as provided in Section 2.2

above, the Purchase Price for the Property shall be Eighteen Thousand Five Hundred Dollars (\$18,500.00) per acre.

2.4 Seller agrees to pay building permit fees for construction of the Project.

3. Conditions Precedent to Sale. This Agreement is subject to the following conditions precedent to the Purchaser's obligation to close on the purchase of the Property ("Closing Conditions"):

3.1. Title Review. Within ten (10) business days after the later of: (i) the date of execution of this Agreement by both parties ("Execution Date"); or (ii) upon completion of any survey and inserting the legal description in Exhibit A as provided in Section 1.1, Seller, at its sole cost and expense, shall obtain from Cascade Title Insurance Company (the "Title Company") a title commitment for the Property, and copies of all documents referred to therein, and furnish same to Purchaser. Title to the Property shall be marketable at Closing and shall be free and clear of all liens, judgments or other financial encumbrances, as well as all other encumbrances, except Permitted Encumbrances. Rights, reservations, covenants, conditions, restrictions, easements presently of record or shown on the Survey that do not materially affect the value of the Property or interfere with Purchaser's intended development or use of the Property shall be Permitted Encumbrances. Purchaser shall provide written notice of Purchaser's objections within fifteen (15) days after the later of Purchaser's receipt of i) commitment for title insurance; or ii) the ALTA survey. Encumbrances to be discharged by Seller shall be paid by Seller on or before Closing.

3.2. Due Diligence:

a.) Due Diligence: This transaction is contingent upon Purchaser completing its due diligence inspections, review and testing at Purchaser's sole expense and receiving findings satisfactory to Purchaser in its sole discretion. Seller agrees to act in good faith to provide records reasonably requested by the Purchaser and to allow Purchaser reasonable access to the Property to complete its due diligence. Purchaser shall be responsible to repair any damage to the Property caused by Purchaser's due diligence activities should this transaction fail to Close for any reason. Purchaser reserves the right to terminate this Agreement during the Contingency Period should Purchaser determine that the Property is not acceptable to Purchaser for any reason, in its sole and complete discretion. Upon termination as provided in the prior sentence, the parties shall be released from any further liability to each other, except for repair to the Property as required in this Section 3.2.

3.3 Tri City Railroad Litigation- Rail Spur/Loop: Seller acknowledges that Purchaser requires reliable rail service to the Property. Seller has begun a proposal to construct a rail loop/spur connecting the Property to the Seller owned Horn Rapids Rail Spur, which connects to rail lines owned by the Port of Benton. Currently, Tri City Railroad Company, LLC and its subsidiaries has brought legal action on multiple

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parties, including, but not necessarily limited to Burlington Northern Railroad, Port of Benton and City of Richland. This transaction is contingent upon completion of the (i) any pending litigation (or any litigation initiated during the Contract Period) affecting the ability of the Seller to install the rail loop/rail spur or Purchaser to use the rail loop/spur; and (ii) approval by Purchaser of the rail loop/spur design, both of which shall be determined in Purchaser's sole discretion prior to the expiration of the Contingency Period (collectively "Rail Contingency"). This Rail Contingency shall not be considered satisfied until all appeals have been finally resolved and all appeal periods have expired. Seller shall submit to Purchaser fully engineered drawings of the rail loop/spur ("Rail Drawings") to Purchaser within ninety (90) days of the date of this Agreement. Purchaser shall review the drawings within thirty (30) days of receipt and provide Seller with comments or requested changes. Seller shall submit this rail design to Burlington Northern Railroad and Union Pacific Railroad for approval upon written approval by Purchaser of the rail design.

3.4 Facility Operator. The Purchaser has identified a preferred 3rd Party operator for the Project. In the event that the preferred operator cannot meet the requirements of the Purchaser for the Project, which determination shall be in the Purchaser's sole discretion, the Purchaser shall be provided sufficient time to bid for a new facility operator ("Bid Contingency") provided Purchaser provides notice to Seller prior to expiration of the Contingency Period.

3.5 Environmental Reports. Seller, at Seller's cost, shall provide to Purchaser a current Phase I Environmental Site Assessment report certified to Purchaser. The environmental consultant conducting the Phase I shall be selected by Purchaser and reasonably approved by Seller. If reasonably deemed necessary by Purchaser to evaluate the condition of the Property, Seller shall may obtain a Phase II Site Assessment or other environmental investigation of the Property. Seller shall provide the Phase I report within 45 days of the date of this Agreement. The party Seller engages to perform the Phase I and Phase II (if necessary) shall be subject to Purchaser's reasonable approval and Seller shall require the environmental consultant to cooperate with Purchaser in Purchaser's review of the Property.

3.6 Building Height Requirement. Within sixty (60) days of this Agreement, the Seller shall provide to Purchaser a determination that a building or structure for commercial/industrial use up to 130 ft in height is not prohibited due to any regulatory agency including the Federal Aviation Administration or other governmental restrictions. Seller shall further provide written evidence from the FAA stating that such a building is not prohibited under FAA regulatory requirements.

3.7 Site Development Agreement. Prior to the expiration of the Contingency Period, Seller and Purchaser shall agree upon and obtain all necessary approvals for a Site Development Agreement (the "SDA"). Each party shall execute and deliver the SDA at Closing. The SDA shall detail the improvements necessary for the development of the Property including but not limited to the items described above in this Section 6 of

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the Agreement and detail each parties' obligations and remedies. The necessary construction documents and specifications shall be attached to the SDA.

3.8 Document Delivery. All documents required of Seller in Section 4 must be executed and delivered to the Title Company on or before Closing.

3.9 Litigation. The Property must not be subject to any litigation, including the expiration of any appeal periods, as of the Closing.

3.10. Effect of No Notice In the event any of these Closing Conditions are not satisfied within the Contingency Period, this transaction shall be null and void, unless such contingencies are either waived by the Purchaser in writing or the contingency is modified and approved by written agreement of both Purchaser and Seller. If the Purchaser fails to give written notice to the Seller of Purchaser's approval of any of the contingencies and/or waiver of the contingencies by the end of the Contingency Period, then the Closing Conditions shall be deemed unsatisfied and this Agreement shall terminate with.

4. Closing. On or before the date of a Closing, as described herein, Purchaser shall deliver into escrow with Title Company, the Purchase Price for the Property, a signed closing statement, all documents required of Purchaser by the Title Company to issue the Title Insurance, the SDA executed by Purchaser, the Memorandum of Option executed by Purchaser and all other documents required herein or reasonably required by the Title Company to close the transaction. On or before the date of a Closing, Seller shall deliver into escrow with Title Company the Deed, a signed closing statement, all documents required of Seller by the Title Company to issue the Title Insurance, the SDA executed by Seller, the Memorandum of Option executed by Seller and all other documents required herein or reasonably required by the Title Company to close the transaction. Title Company shall be instructed that when it is in a position to issue a standard owner's policy of title insurance in the full amount of the Purchase Price with all standard exceptions deleted, insuring fee simple title to the Property in Purchaser, Title Company shall record and deliver to Purchaser the Deed; and issue and deliver to Purchaser the standard owner's policy of title insurance.

4.1. Closing Costs. Each party shall pay its own attorney's fees. Seller shall pay one-half of all transfer taxes, recording costs, escrow Closing costs, if applicable, and *the full* premium for a standard owner's policy of title insurance. Purchaser shall pay one-half of all transfer taxes, recording costs, and escrow Closing costs. Additionally, Purchaser shall pay any additional costs associated with extended title insurance coverage or endorsements to the policy, if Purchaser elects such. Seller and Purchaser shall each pay one-half of the escrow closing fees and Purchaser shall pay all recording fees for the Deed and the Memorandum of Option. Seller shall provide an estimate of Closing Costs within fifteen (30) business days of the date of this Agreement.

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4.2. Closing Date. The closing of the transaction and delivery of all items required herein ("Closing") shall occur at Cascade Title Company on the thirtieth (30th) day following written satisfaction or waiver by Purchaser of all Contingencies, unless such day falls on a non-business day, in which case the Closing shall occur on the next business day.

5. Title. Upon Closing of escrow as set forth in Section 4, title to the Property shall be conveyed by Seller to Purchaser by a duly executed Statutory Warranty Deed in recordable form conveying title as provided in Section 3.1 ("Deed").

6. Covenants, Representations and Warranties.

6.1. Seller's Covenants. Seller hereby covenants and agrees as follows:

6.1.1. From the date of this Agreement through the Closing Date(s), the Seller shall not make any material alterations to the Property or to any of the licenses, permits, legal classifications or other governmental regulations relating to the Property, nor enter into any leases or agreements pertaining to the Property without the Purchaser's prior written consent.

6.1.2. During the Contract Period, Seller shall not voluntarily cause or allow to be recorded any encumbrance, lien, deed of trust, easement or other title encumbrance against the title to the Property without Purchaser's prior written consent.

6.1.3. Prior to the expiration of the Contingency Period, Seller shall use its best efforts to remove all title exceptions, except Permitted Exceptions, as described in Section 3.1.

6.1.4. During the Contract Period, Seller will operate and maintain the Property in a manner consistent with Seller's past practices relative to the Property and so as not to cause waste to the Property.

6.1.5. Seller shall reasonably cooperate with Purchaser to obtain approvals and permits for the development of the Property. This obligation shall be also included in the SDA.

6.1.6. Utility Improvements. Seller, at Seller's expense, shall extend water, sewer, high speed internet lines and power stubs a maximum distance of ten (10) feet into the Property as shown on Exhibit "D" and as further specified in this Section 6.1.6 ("Utility Improvements") and in the SDA. The Utilities Improvements shall be located at a location to be mutually approved by Purchaser and Seller. The sewer line will be a minimum of 8" and the water line will be a minimum of 16" with a flow of 4000 gpm at a pressure of 20 psi and/or a flow of 1600 gpm at a pressure of 60 psi. Seller to provide necessary infrastructure, cabling, and equipment to support the estimated 9 Mega Watt, 4.16 KV, 3 Phase power as agreed upon in the SDA. The Utility Improvements include,

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but are not limited to, mainline cuts, extension of service lines, including electrical cabling, and ancillary costs associated with pavement patching and trenching. Seller will commence installation of the Utility Improvements upon receipt of written notice by Purchaser requesting commencement of the Utility Improvements installation, which shall not be prior to closing, and Seller shall complete construction of all Utility Improvements within nine (9) months after commencement of installation. Purchaser and Seller agree that these Utility Improvements will be at no cost to the Purchaser if and only if the Purchaser completes the construction of the Project within 24 months of completion of the Utility Improvements. To the extent that Seller completes the agreed upon Utility Improvements required in this section and the Purchaser fails to complete construction of the Project within the time period provided herein, Purchaser shall pay half of the actual cost of the Utility Improvements, not to exceed \$2,400,000.

6.1.7. Roadway Improvements. Seller, at Seller's expense, shall provide roadway access to the Property consisting of a new (East/West) extended 1st Street connecting to the existing Kingsgate Way and a new to be named north/south street from north property line and connected to Robertson Street to the south and Logston Blvd., as shown on Exhibit "E", or otherwise provide two (2) separate access points to allow ingress and egress, acceptable to Purchaser in Purchaser's sole discretion, from the western and southern boundary of the Property ("Roadway Improvements") as will be agreed upon in the SDA. Seller will provide site design drawings of Roadway Improvements no later than 90 days following the Effective Date. All roadways and connecting road structure providing access to the Property must have sufficient capability for a weight of at least 101,000 lbs. per truck and a capacity to handle peak truck access to the Property for up to 500 semi-truck trips per day without modification by Purchaser. Seller will commence the installation of Road Improvements upon receipt of written notice by Purchaser requesting commencement of the Roadway Improvements installation, which shall not be prior to closing, and Seller will complete construction of the Roadway Improvements within nine (9) months of commencement of installation. Purchaser and Seller agree that these associated Road Improvements will be at no cost to Purchaser if and only if Purchaser completes the construction of the Project, within 24 months of completion of the Roadway Improvements. To the extent Seller completes the agreed upon Road Improvements and Purchaser fails to complete construction of the Project within the time period provided herein, Purchaser shall pay half of the actual cost of Road Improvements serving the Property, not to exceed \$1,500,000.

6.1.8. Rail Spur Improvements. Seller, at Seller's expense, shall provide rail spur and rail improvements to provide rail access to the Property at a mutually agreed upon point as shown on Exhibit "F" and as will be further agreed upon in the SDA, ("Rail Spur Improvements"). Rail Spur Improvements must not cross any roadway or street which provides access to the Property. Purchaser agrees to pay all rail spur access costs charged by a railroad servicing the Property. Seller will commence the construction and installation of the Rail Spur Improvements upon receipt of written notice by Purchaser requesting commencement of the Rail Spur Improvements installation, which shall not

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be prior to closing, and Seller shall complete the Rail Spur Improvements within nine (9) months of commencement of installation. Purchaser and Seller agree that these associated Rail Spur Improvements will be at no cost to Purchaser if and only if Purchaser completes the construction of the Project, within 24 months of completion of the Rail Spur Improvements. To the extent the Seller completes the Rail Spur Improvements and Purchaser fails to complete construction of the Project within the time period provided herein, Purchaser shall pay half of the actual costs of the Rail Spur Improvements serving the Property, not to exceed \$400,000.

6.1.9 Utilities, Road and Rail Design Criteria. Purchaser shall provide the necessary design criteria to allow complete design of the Utility Improvements, Roadway Improvements and Railway Improvements within sixty (60) days of the date of this Agreement. Seller requires the information to be sufficient to ensure that utilities, road and rail infrastructure can be developed to meet Purchaser's criteria.

6.2. Seller's Representations and Warranties. Seller hereby makes the following representations and warranties to Purchaser, each of which shall be true on the date hereof and on the date of any Closing.

6.2.1. Seller has full power and authority to enter into and carry out the terms and provisions of this Agreement and to execute and deliver all documents which are contemplated by this Agreement, and all actions of Seller necessary to confer such authority upon the persons executing this Agreement and such other documents will have been taken.

6.2.2. Seller is a Washington municipal corporation, duly formed and organized, validly existing and in good standing under the laws of the State of Washington.

6.2.3. As of the date hereof, to the best of Seller's knowledge, during the Contract Period:

6.2.3.1. Seller has not received any written notice from any governmental authorities or regulatory agencies that eminent domain proceedings for the condemnation of the Property are pending or threatened.

6.2.3.2. Seller has not received any written notice of pending or threatened investigation, litigation or other proceeding before a local governmental body or regulatory agency which would materially and adversely affect the Property.

6.2.3.3. Seller has not received any written notice from any governmental authority or regulatory agency that Seller's use of the Property is presently in violation of any applicable zoning, land use or other law, order, ordinance or regulation affecting the Property. Seller warrants that the Property is properly zoned for Purchaser's contemplated usage.

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6.2.4 Approval. The Seller has obtained any and all approvals necessary to execute the Agreement and undertake Seller's obligations contained herein, including the approval of the City Council of the City of Richland.

6.2.5. No special or general assessments have been levied against the Property except those disclosed in the Preliminary Title Report and Seller has not received written notice that any such assessments are threatened.

6.2.6. Seller is not a "foreign person" for purposes of Section 1445 of the Internal Revenue Code.

6.2.7. The Property is not within a flood plain, flood way or flood control district.

6.2.8. To the best of Seller's knowledge, following all appropriate and due diligent inquiry into the condition of the Property, Seller represents, warrants, and covenants to Purchaser that no Hazardous Substances (i) are or have been used, treated, stored, disposed of, released, spilled, generated, manufactured, or otherwise handled on the Property, or transported to or from the Property, (ii) have been spilled, released, intruded, leached, or disposed of from the Property onto adjacent property; or (iii) have otherwise come to be located on or beneath the Property. Application of herbicides, pesticides, fungicides and other form chemicals consistent with the labeling therefore are deemed to be consistent with the warranty stated herein. No liens have been placed on the Property under any environmental laws, and Seller has no knowledge of any threatened or pending liens. Seller has received no notice and is not aware of any administrative or judicial investigations, proceedings, or actions with respect to violations, alleged or proven, of environmental laws by Sellers or any of their tenants, or otherwise involving the Property or the operations conducted thereon.

6.2.9. Seller shall immediately give Purchaser written notice of any event which would make any representation or warranty set forth in Section 6.2 incorrect or untrue.

6.3. Purchaser's Representations: Purchaser hereby makes the following representations to Seller, each of which shall be true on the date hereof and on the date of both Closings.

6.3.1. Purchaser represents that it has sufficient funds to close this transaction. If the Purchaser is a corporation, the Purchaser represents that it is a corporation in good standing, under the laws of its incorporation. If the Purchaser is a limited liability company, the Purchaser represents that it is a limited liability company in good standing, under the laws of its formation.

6.3.2. Purchaser further represents that following Closing the Property will be developed as a storage/warehouse facility for agricultural products or food products and/or agricultural and/or food processing and storage facility. Deviation from this intended use must be authorized by the Seller in writing or be subject to the

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Reversionary Clause in Section 10.13. This agreement does not alleviate the Purchaser from obtaining the necessary approvals, authorizations or permits required for the development of Property for said use.

6.4. Survival of Covenants. The covenants, representations, and warranties contained in Section 6 of this Agreement shall survive the delivery and recording of the Deed from the Seller to the Purchaser.

7. Casualty and Condemnation.

7.1. Material Casualty or Condemnation. If prior to the Closing Date (i) the Property shall sustain damage caused by casualty which would cost fifty thousand dollars (\$50,000.00) or more to repair or replace, or (ii) if a taking or condemnation of any portion of the Property has occurred, or is threatened, which would materially affect the value or utility of the Property, Purchaser may, at its option, terminate this Agreement by written notice to Seller given within ten (10) business days after notice of such event. If prior to the Closing Date Purchaser does not provide said termination notice within such ten (10) business day period, the Closing shall take place as provided herein with a credit against the Purchase Price in an amount equal to any insurance proceeds or condemnation awards actually collected by Seller and an assignment to Purchaser at Closing of all Seller's interest in and to any insurance proceeds or condemnation awards which may be due but unpaid to Seller on account of such occurrence.

7.2. Immaterial Casualty or Condemnation. If prior to Closing Date, the Property shall sustain damage caused by casualty which is not described in Section 7.1., or a taking or condemnation has occurred, or is threatened, which is not described in Section 7.1., Purchaser shall not have the right to terminate this Agreement. Closing shall take place as provided herein with a credit against the Purchase Price equal to (i) the cost to repair that portion of the Property so damaged by insured casualty, or (ii) an amount equal to the anticipated condemnation award, as applicable. At Closing, Purchaser shall assign to Seller all rights or interest in and to any insurance proceeds or condemnation awards which may be due on account of any such occurrence.

8. Purchaser's Remedies. In the event of material breach of this Agreement by Seller, Purchaser shall have, as its remedies (a) the right to pursue specific performance of this Agreement, (b) the right to terminate this Agreement and (c) all remedies presently or hereafter available at law or in equity.

9. Liquidated Damages. IN THE EVENT THAT PURCHASER FAILS TO PURCHASE THE PROPERTY AS PROVIDED HEREIN, SELLER'S EXCLUSIVE REMEDY SHALL BE TO TERMINATE THIS AGREEMENT BY WRITTEN NOTICE AND WITHOUT FURTHER OBLIGATIONS TO PURCHASER AND IN SUCH CASE FIFTY THOUSAND DOLLARS (\$50,000) SHALL BE PAID BY PURCHASER TO SELLER AS LIQUIDATED DAMAGES. PURCHASER AND SELLER AGREE THAT IT

IS DIFFICULT TO ASSESS THE AMOUNT OF DAMAGES INCURRED BY THE SELLER, IN THE EVENT OF A DEFAULT BY THE PURCHASER, AND ACCORDINGLY THE PARTIES AGREE THAT THE AMOUNT OF \$50,000 IS A REASONABLE ESTIMATE OF THE DAMAGES. THE RIGHT GRANTED TO SELLER IN THE PRIOR SENTENCE SHALL NOT APPLY IN THE CASE OF (I) A MATERIAL DEFAULT BY SELLER IN THE PERFORMANCE OF ITS OBLIGATIONS HEREUNDER, (II) PURCHASER'S EXERCISE OF A TERMINATION RIGHT PROVIDED HEREIN, AND/OR (III) THE NON-SATISFACTION OF A CLOSING CONDITION AS PROVIDED IN SECTION 3.

10. Miscellaneous.

10.1. Finders Fee. Purchasers and Seller each agree that if Purchaser closes on the purchase of the Option Property, Seller shall pay a three percent (3%) finder's fee to a licensed real-estate agent representing Purchaser as provide in Exhibit G. Except as provided herein, each party hereby agrees to indemnify and defend the other against and hold the other harmless from and against any and all loss, damage, liability or expense, including costs and reasonable attorneys' fees, resulting from any claims for a commission or finder's fee resulting from Purchase of the Property or Option Property. The provisions of this Section 10.1 shall survive the Closing.

10.2. Time of the Essence. Time is of the essence of every provision of this Agreement.

10.3. Notices. Whenever any party hereto shall desire to give or serve upon the other any notice, demand, request or other communication, each such notice, demand, request or other communication shall be in writing and shall be given or served upon the other party by personal delivery or by certified, registered or Express United States Mail, or Federal Express or other commercial courier, postage prepaid, addressed as follows:

TO PURCHASER:
ConAgra Foods, Inc.
c/o Jim Doyle
Vice President - Corporate Real Estate & Facilities
Mail Stop 1-190
One ConAgra Drive
Omaha, NE 68102

With a copy to:
ConAgra Foods, Inc.
One ConAgra Drive
Omaha, NE 68102
Attn: Legal Department

TO SELLER:
City of Richland
505 Swift Boulevard
PO Box 190, MS #18
Richland, WA 99352
ATTENTION: Community Development

With a copy to:
City of Richland
505 Swift Boulevard
PO Box 190, MS #18
Richland, WA 99352
ATTENTION: City Attorney

Any such notice, demand, request or other communication shall be deemed to have been received upon the earlier of personal delivery thereof or three (3) business days after having been mailed as provided above, as the case may be. Either party may change its notice address by serving written notice as provided herein.

10.4. Assignments and Successors. Purchaser may only assign this Agreement with Seller's written consent, which consent may not be unreasonably withheld, conditioned or delayed. Notwithstanding the prior sentence, Purchaser may, without the Seller's written consent, assign this Agreement or rights under this Agreement to a third party ("Warehouse Provider") who intends to build a warehouse facility on the Property and with whom Purchaser intends to enter into a warehouse services agreement. Nothing herein shall prevent Purchaser from assigning the rights to purchase the Property while retaining the right to purchase the Option Property as provided herein.

10.5. Captions. Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement.

10.6. Definition of Days. All references to days, months, or years shall mean days unless specified as "business" days.

10.7. Exhibits. All exhibits attached hereto shall be incorporated herein by reference as if set out herein in full.

10.8. Binding Effect. Regardless of which party prepared or communicated this Agreement, this Agreement shall be of binding effect between Purchaser and Seller only upon its execution by an authorized representative of each such party.

10.9. Construction. The parties acknowledge that each party and its counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be

employed in the interpretation of this Agreement or any amendment or exhibits hereto.

10.10. Counterparts. This Agreement may be executed in several counterparts each of which shall be an original, but all of such counterparts shall constitute one such Agreement.

10.11. Further Assurances. Purchaser and Seller shall make, execute and deliver such documents and undertake such other and further acts as may be reasonably necessary to carry out the intent of the parties hereto.

10.12. Merger. The delivery of the Deed and any other documents and instruments by Seller and the acceptance and recordation thereof by Purchaser shall effect a merger, and be deemed the full performance and discharge of every obligation on the part of Purchaser and Seller to be performed hereunder, except those clauses, representations, covenants, warranties and indemnifications specifically provided herein to survive the delivery and recording of the Deed.

10.13. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Washington.

10.14. Reversionary Clause and Option to Repurchase/Reclaim. The Property is being sold to Purchaser in anticipation of building a storage/warehouse facility for agricultural products and/or food products and/or agricultural and/or food processing and storage facility. If Purchaser does not initiate construction of the Project within twenty-four (24) months of Closing ("Construction Period"), Seller shall have the right to repurchase title to the Property ("Repurchase Right") for the original Purchase Price paid by Purchaser. In the case of a repurchase as provided in this Section 10.14, Purchaser shall pay cost, if any, of all recording fees, escrow fees, and the premium for a standard owner's title policy purchase by Seller, and each party shall pay its own attorney fees. To exercise its Repurchase Right, Seller must deliver an irrevocable written notice that Seller is exercising its Repurchase Right ("Repurchase Notice") within ninety (90) days following the expiration of the Construction Period. Seller's failure to deliver the Repurchase Notice within the time period provided in the prior sentence shall constitute a waiver of Seller's Repurchase Right. Upon valid exercise of the Repurchase Right, Purchaser agrees to convey title to Property to Seller within sixty (60) days of receipt of Seller's Repurchase Notice. This reversionary right is exclusive to the Seller and shall be exercised at the sole discretion of the Seller. This Repurchase Right shall survive the delivery of the Deed and shall terminate upon the earlier of (i) commencement of construction of the Project or (ii) Seller's waiver of the Repurchase Right. The Seller shall be under no obligation to exercise this reversionary right. Purchaser agrees that Seller must grant approval of any resale of the Property by Purchaser to any unrelated third party prior to expiration of the Construction Period. Seller acknowledges that the sale or transfer of the Property to a joint venture or entity with which Purchaser has a lease or operating agreement shall not constitute a sale subject to this Repurchase Right. Upon termination of the Repurchase Right, Seller

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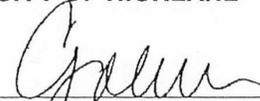
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agrees to execute any documents necessary or desirable to release the Repurchase Right as are reasonably requested by Purchaser, or its assigns and successors in interest.

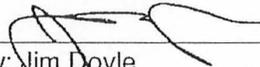
10.15. Right to Rescind Until Seller Acceptance. Purchaser reserves the right to rescind this Agreement in writing until it is accepted by Seller.

IN WITNESS WHEREOF, the Purchaser have executed this Agreement on the date shown next to its signature and Seller has accepted on the date shown next to its signature.

CITY OF RICHLAND - SELLER


By: Cynthia D. Johnson
Its: City Manager
Date: 12-14-11

**CONAGRA FOODS LAMB WESTON, INC.-
PURCHASER**


By: Jim Doyle
Its: Vice President - Real Estate
Date: 12/20/11

APPROVED AS TO FORM:

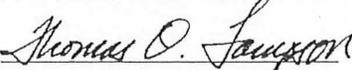
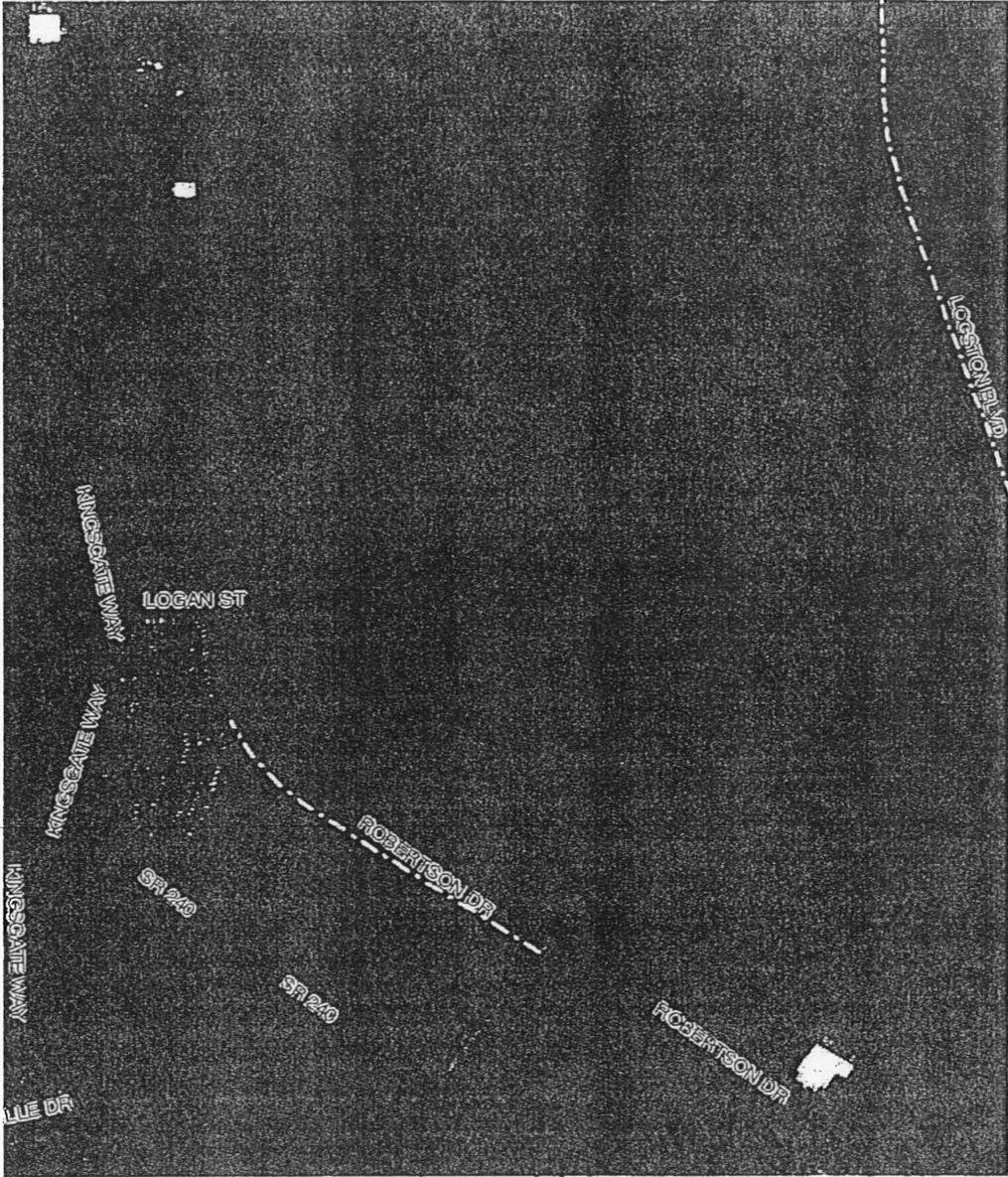

Thomas O. Lampson
City Attorney

Exhibit A
Legal Description of the Property
(To be inserted pursuant to Section 1.1)

Exhibits: PSA ConAgra

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Exhibit B
Depiction of the Property and Option Property



Exhibits: PSA ConAgra

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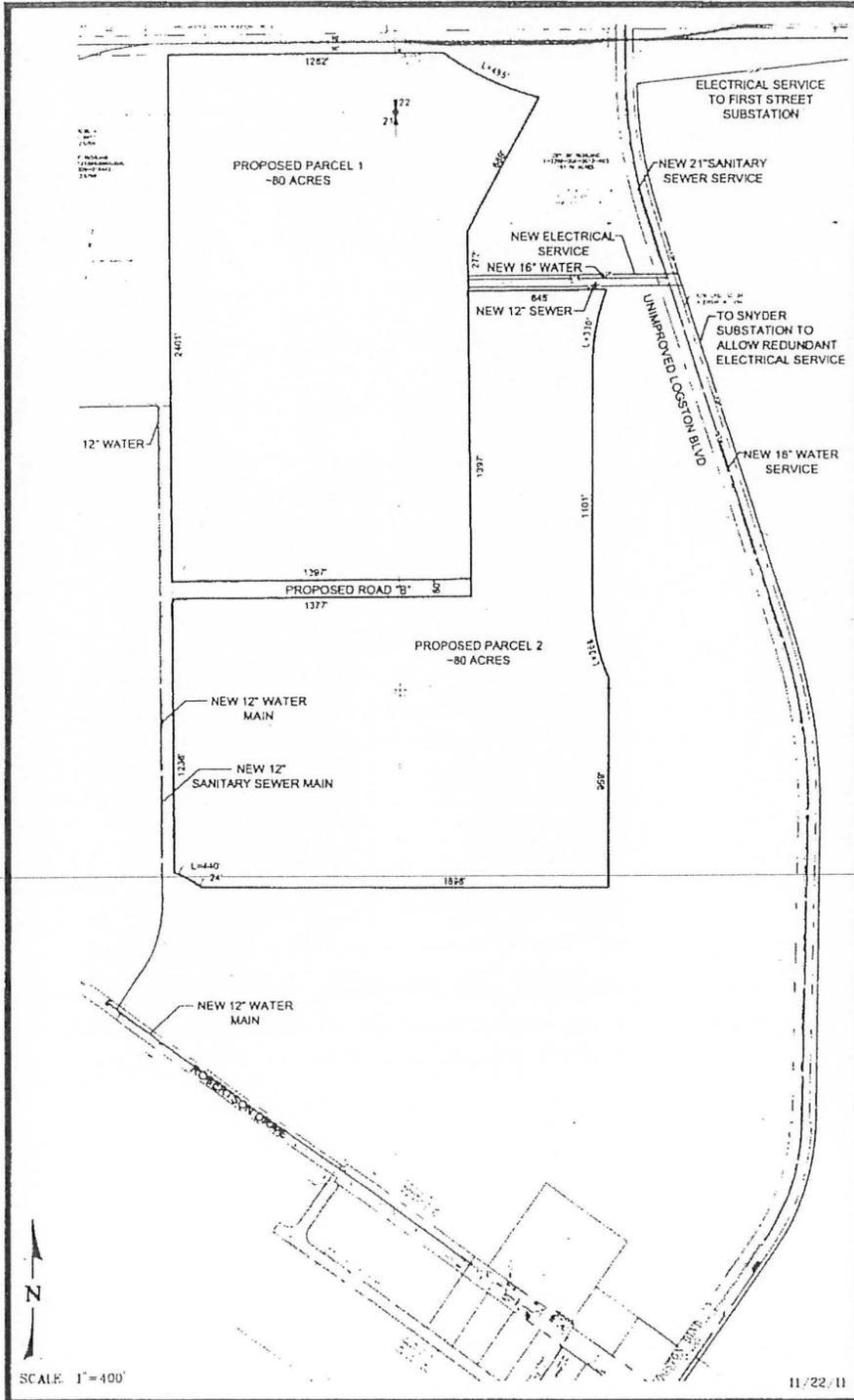
Exhibit C
Legal Description of the Option Property

(To be inserted pursuant to Section 1.2)

Exhibits: PSA ConAgra

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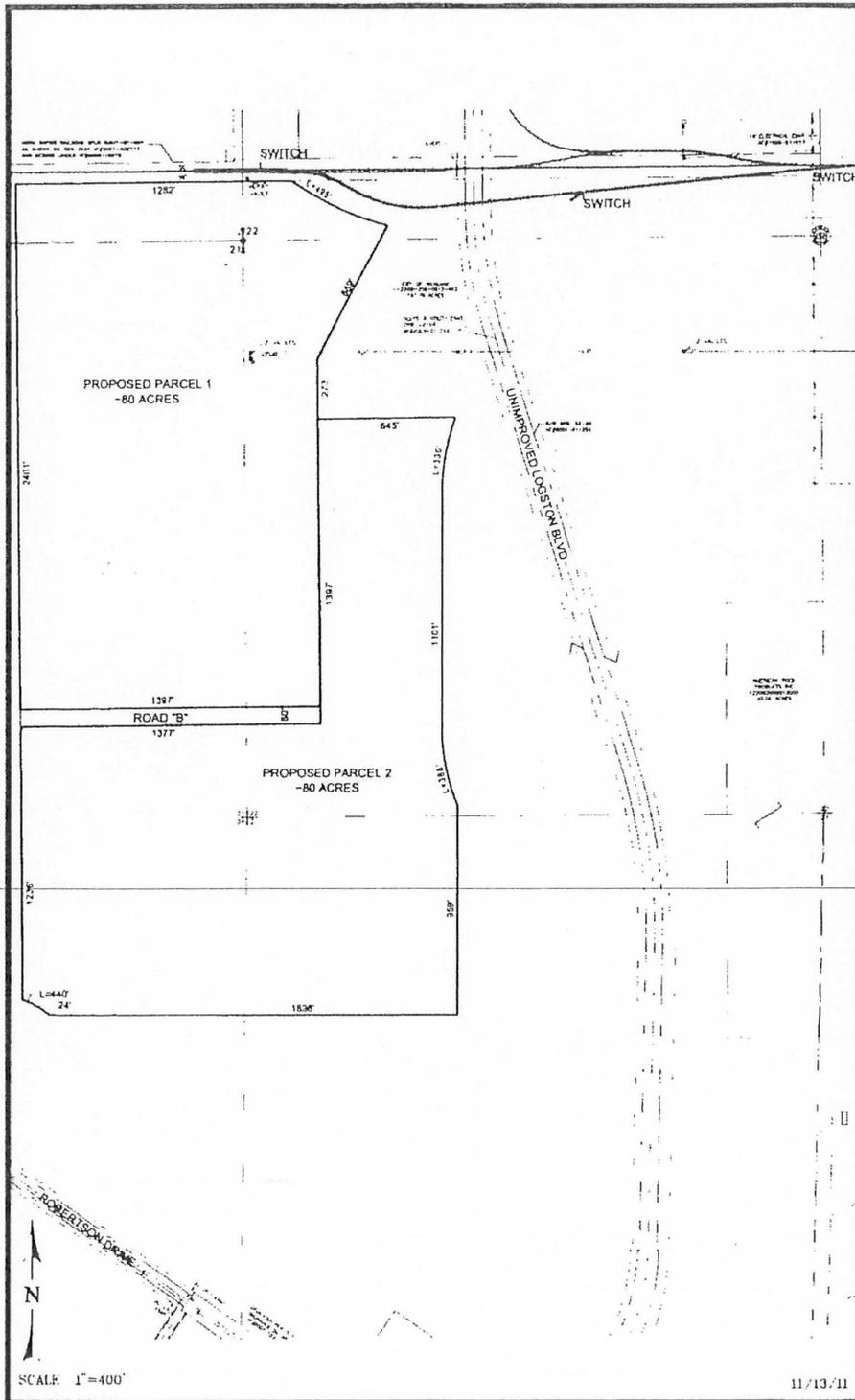
Exhibit D
Utility Improvements



Exhibits: PSA ConAgra

000912
UTC028233

Exhibit F - Rail Spur Improvements



Exhibits: PSA ConAgra

000914

UTC028235

**Exhibit G
CITY OF RICHLAND
FINDERS FEE AGREEMENT (FORM OF)**

Name of Broker/Agent making Introduction: _____,

Agent for: _____

Name of Prospective Purchaser: _____

Description of Land: 80 Acres in the Horn Rapids Industrial Park – (Option Property only – see Exhibit B of PSA)

The City agrees to pay the above named Broker/Agent a Finders fee upon the execution and successful closure of a purchase and sale agreement with the above named Purchaser, for the purchase and sale of the above-described tract of land. This Agreement is not an exclusive listing agreement. The Broker/Agent will only be entitled to payment of the Finders fee upon closing of the sale. The Title Company shall pay said fee out of escrow at time of closing.

Term of Agreement: 60 days, plus the time period until closing provided for in the Purchase and Sale Agreement that references this Finders Fee Agreement.

Agent/Broker's Fee: 3% of Total Purchase Price. Purchase Price is estimated at \$1,480,000.00 (\$18,500/acre)

The Economic Development Manager for the City of Richland may at his/her sole discretion, grant an extension of the term of this Agreement if he/she determines that the transaction is making satisfactory progress towards closing. This Agreement expires 60 days after the Inception Date. Execution of any purchase and sale agreement is subject to approval by City Council. During the term of this Agreement the City may pursue other purchasers for the subject property until the time of execution of a purchase and sale agreement with the above Prospective Purchaser.

Inception Date: 10/19/2011

Economic Development Manager

Signature of Broker/Agent

Name of above Broker/Agent - Printed

Exhibits: PSA ConAgra

000915

UTC028236

EXHIBIT 8

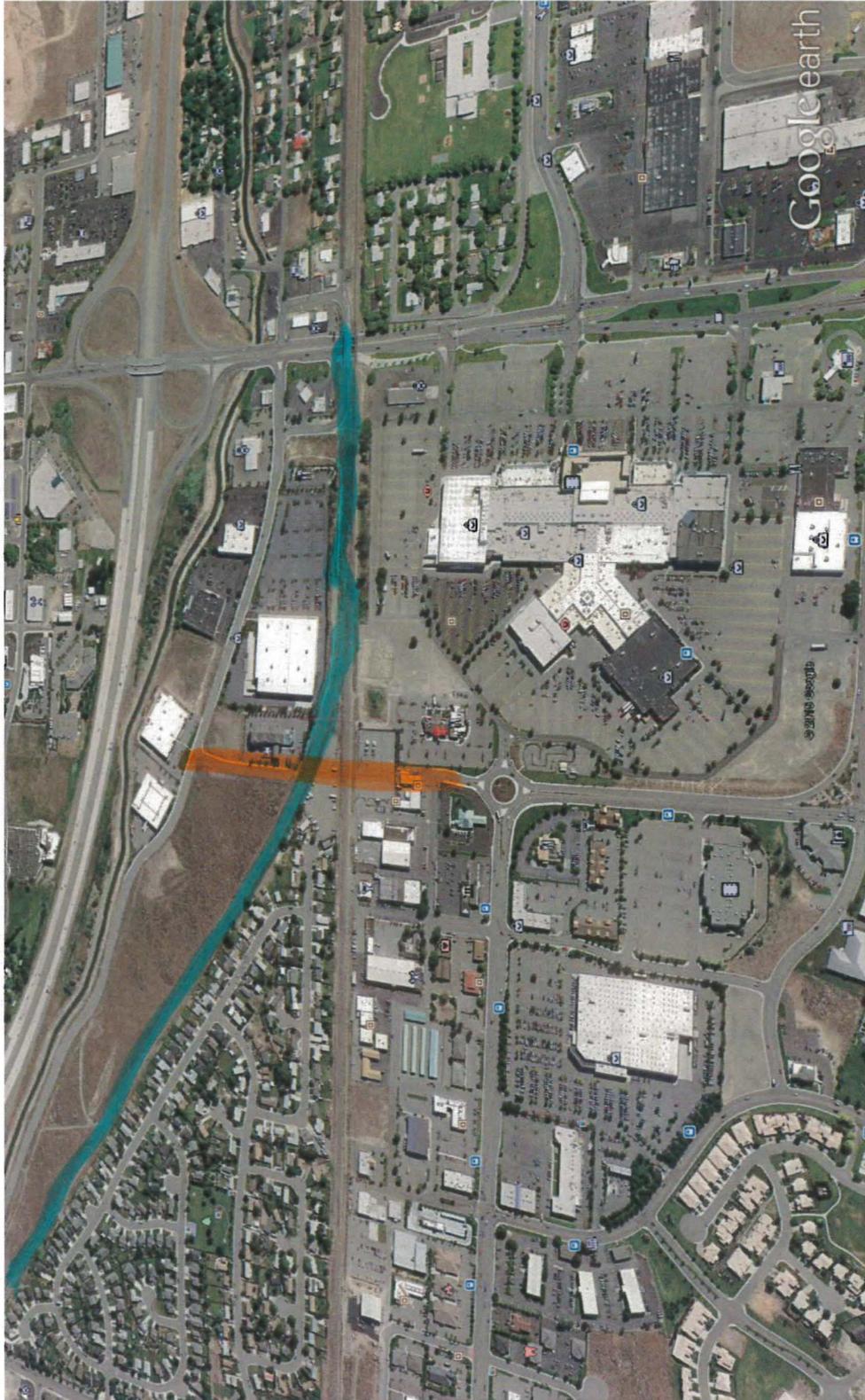


EXHIBIT 9



EXHIBIT 10

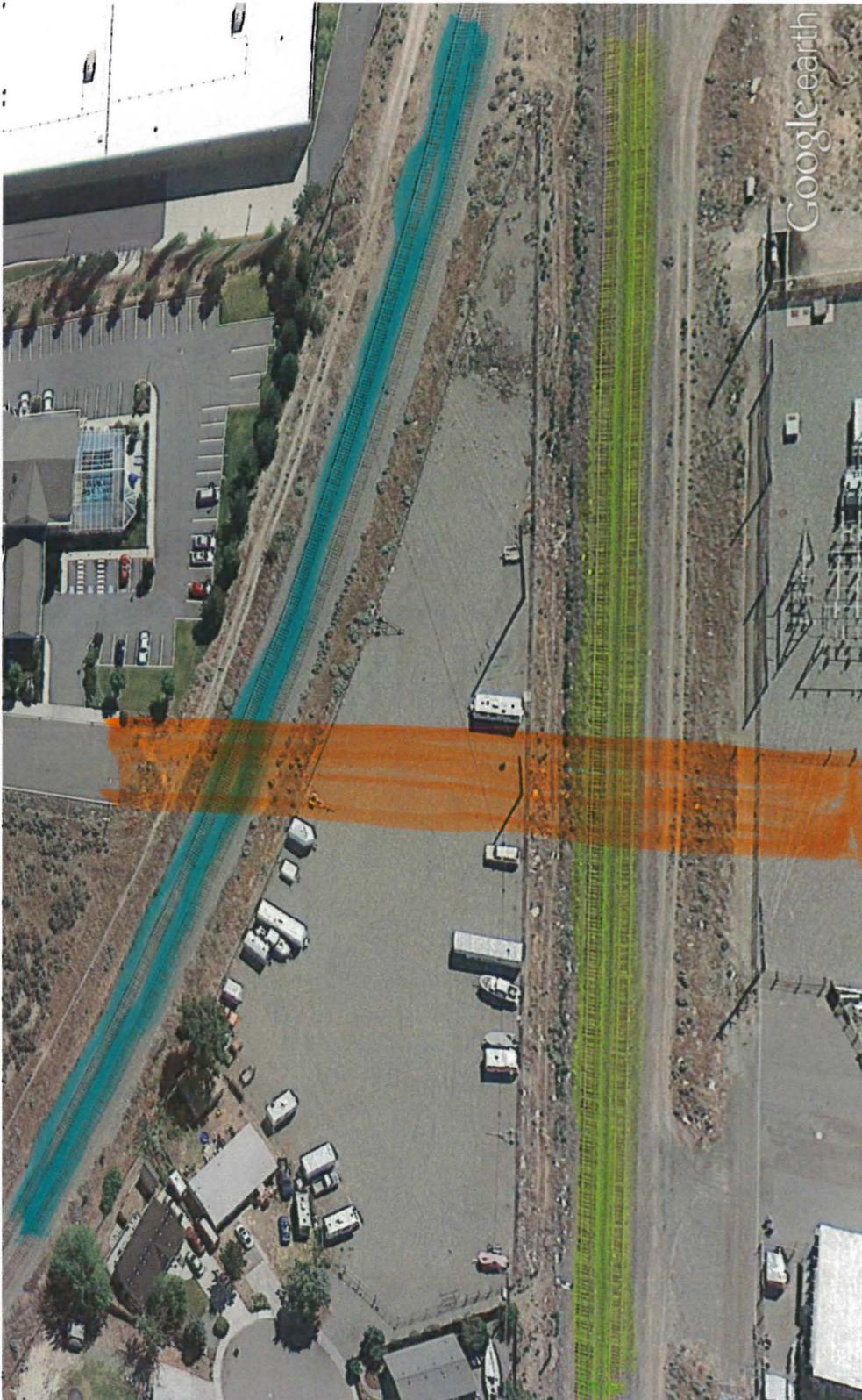


EXHIBIT 11



EXHIBIT 12



EXHIBIT 13



EXHIBIT 14



EXHIBIT 15



EXHIBIT 16

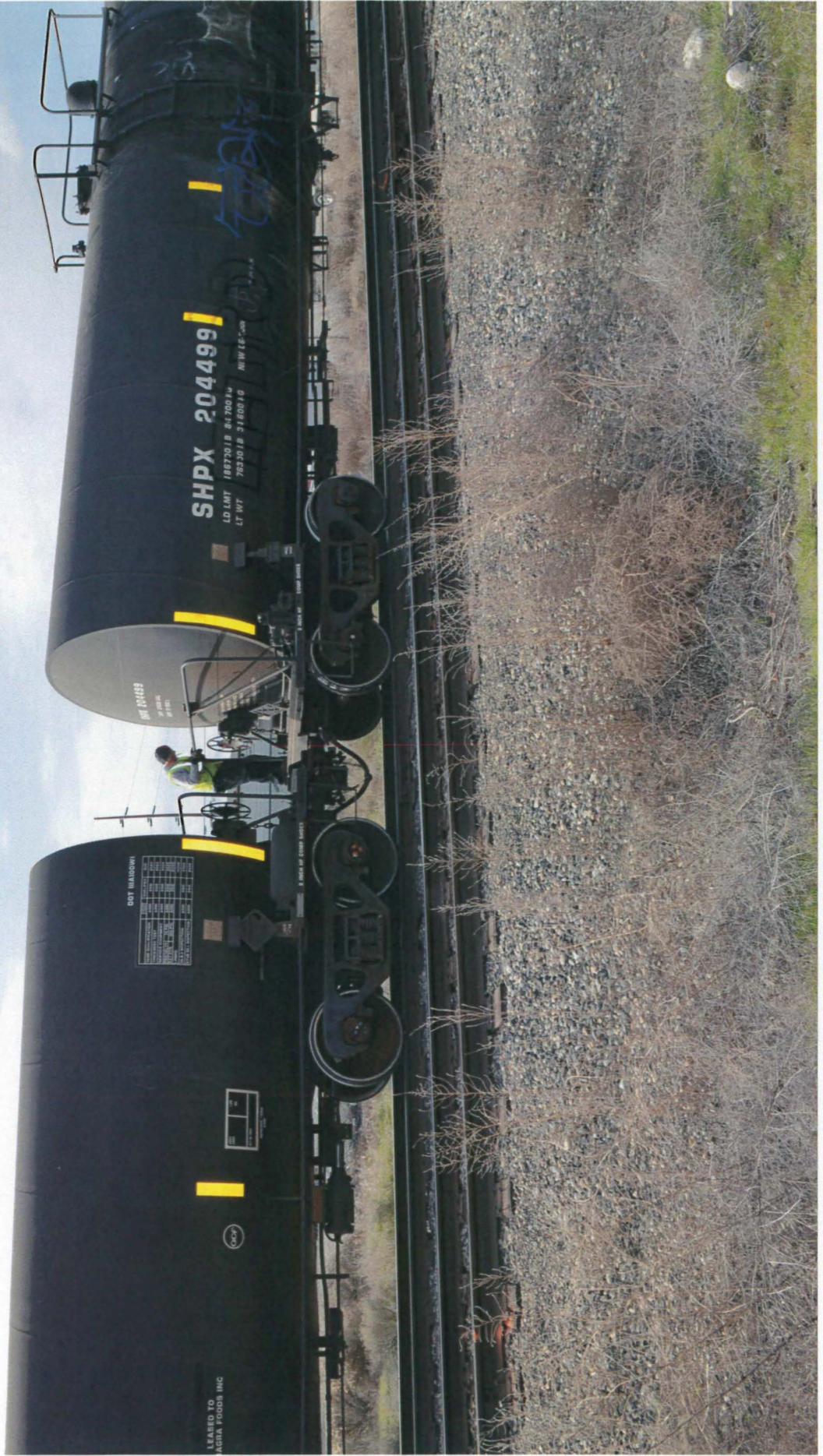


EXHIBIT 17



EXHIBIT 18



EXHIBIT 19

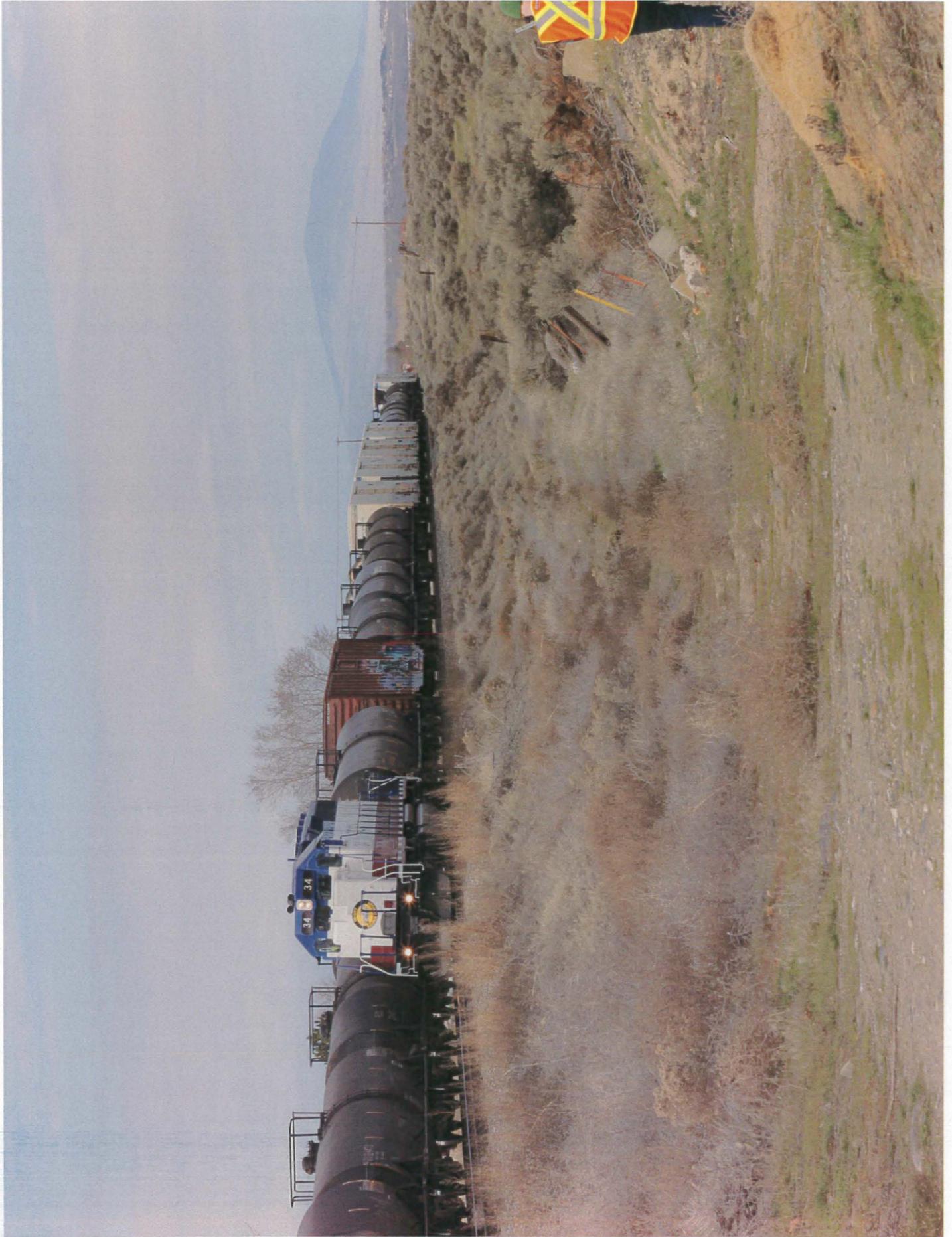


EXHIBIT 20



EXHIBIT 21

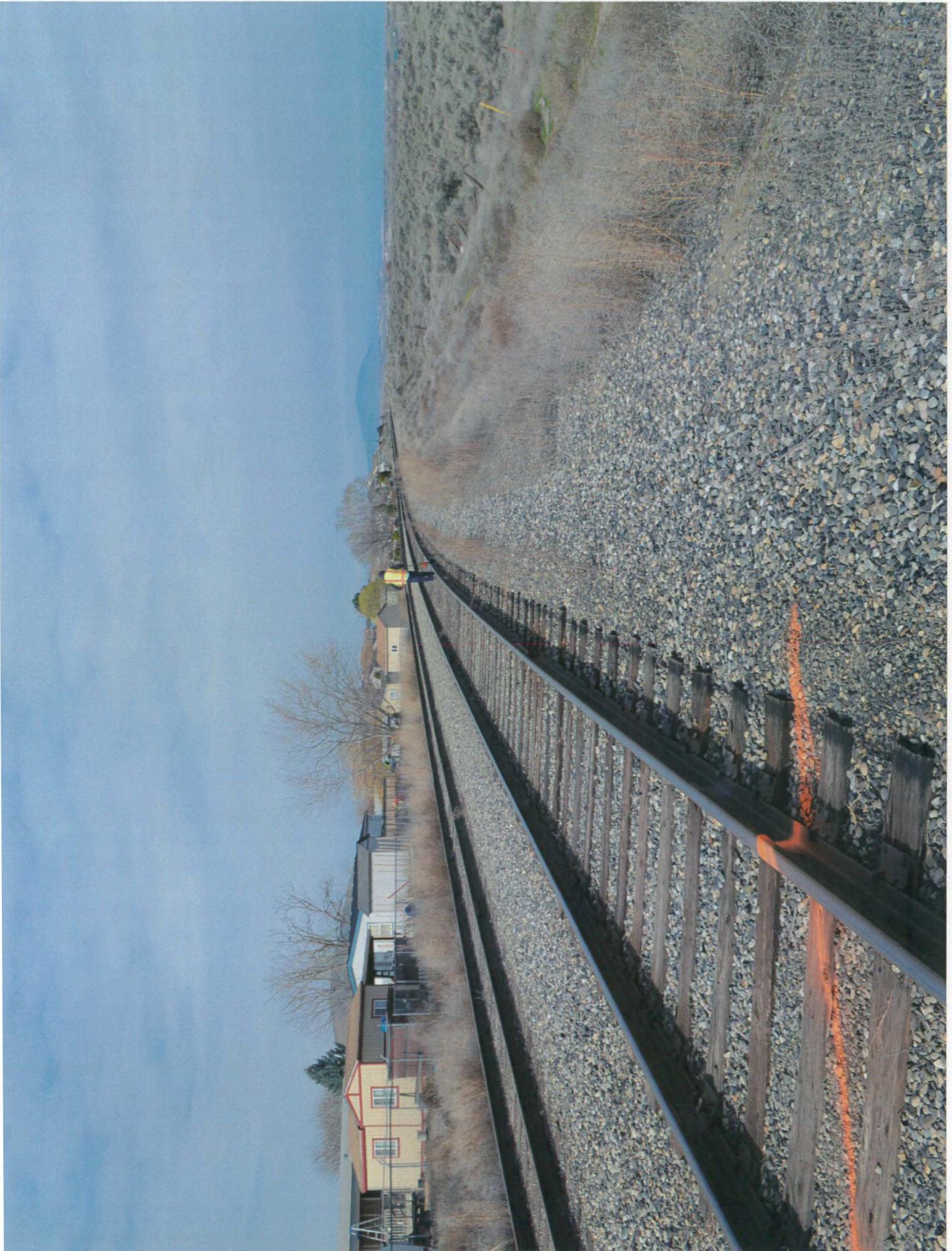


EXHIBIT 22

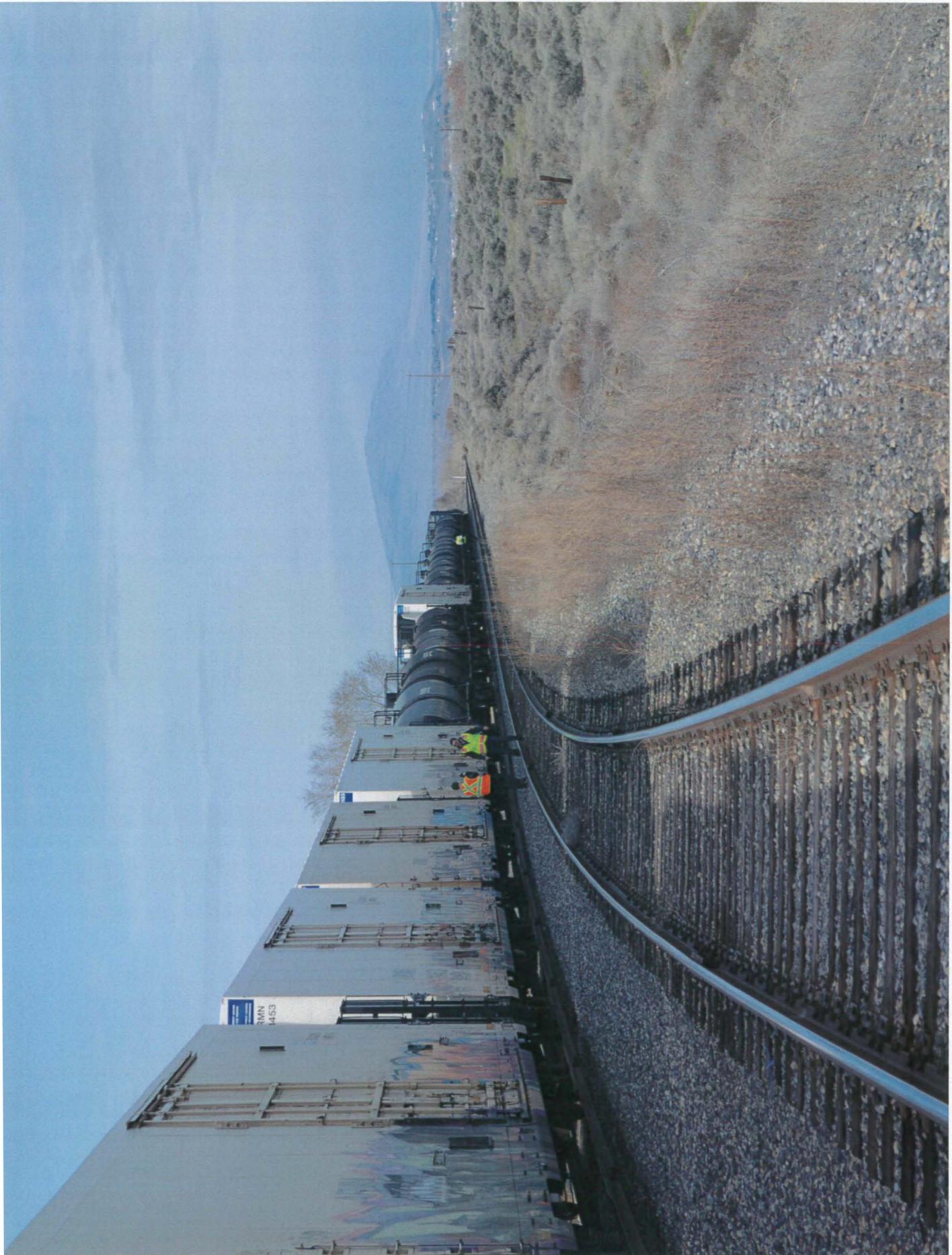


EXHIBIT 23



EXHIBIT 24



EXHIBIT 25



EXHIBIT 26



EXHIBIT 27



EXHIBIT 28



EXHIBIT 29



EXHIBIT 30



EXHIBIT 31



EXHIBIT 32



EXHIBIT 33



EXHIBIT 34



EXHIBIT 35



EXHIBIT 36



EXHIBIT 37

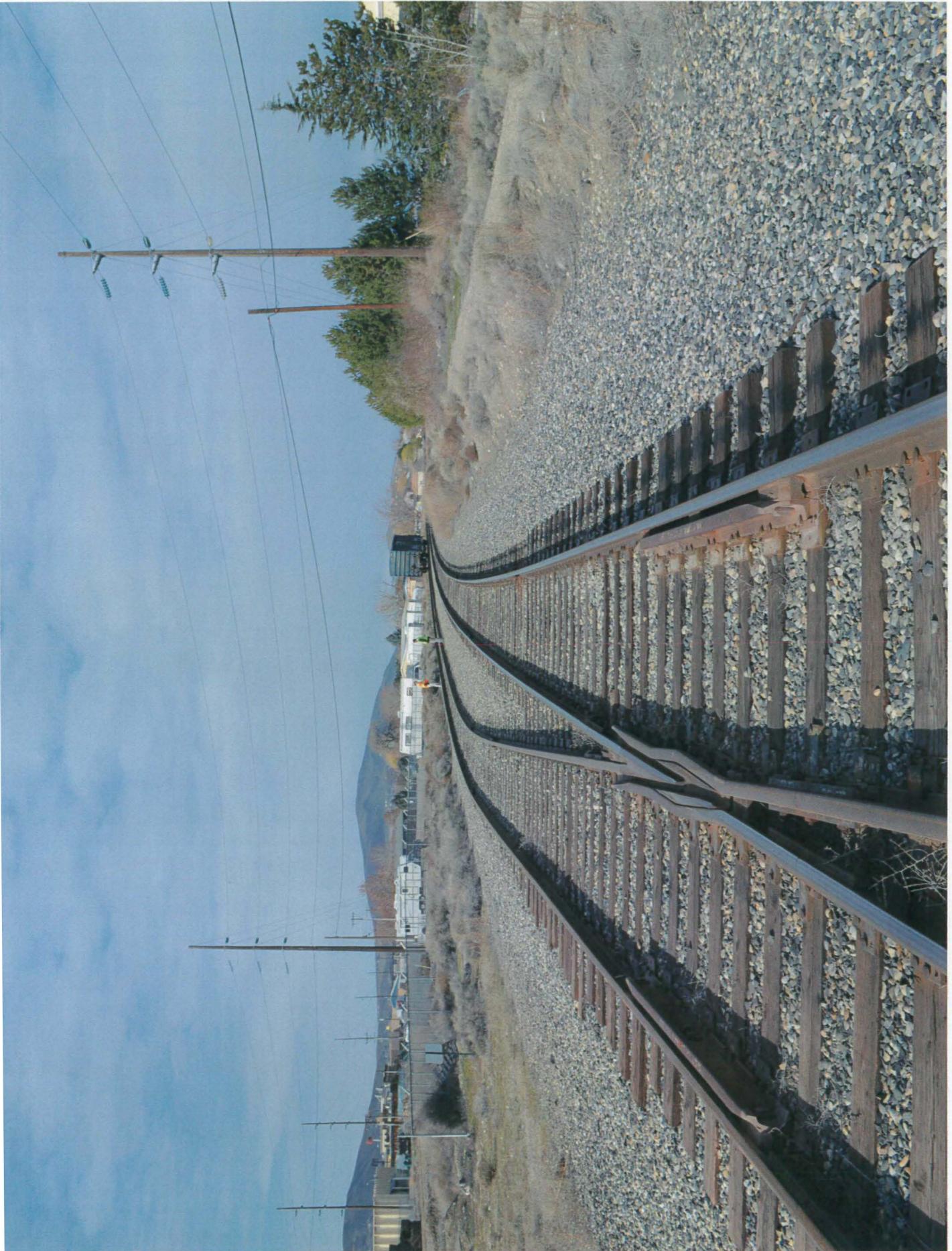


EXHIBIT 38



EXHIBIT 39



EXHIBIT 40



EXHIBIT 41

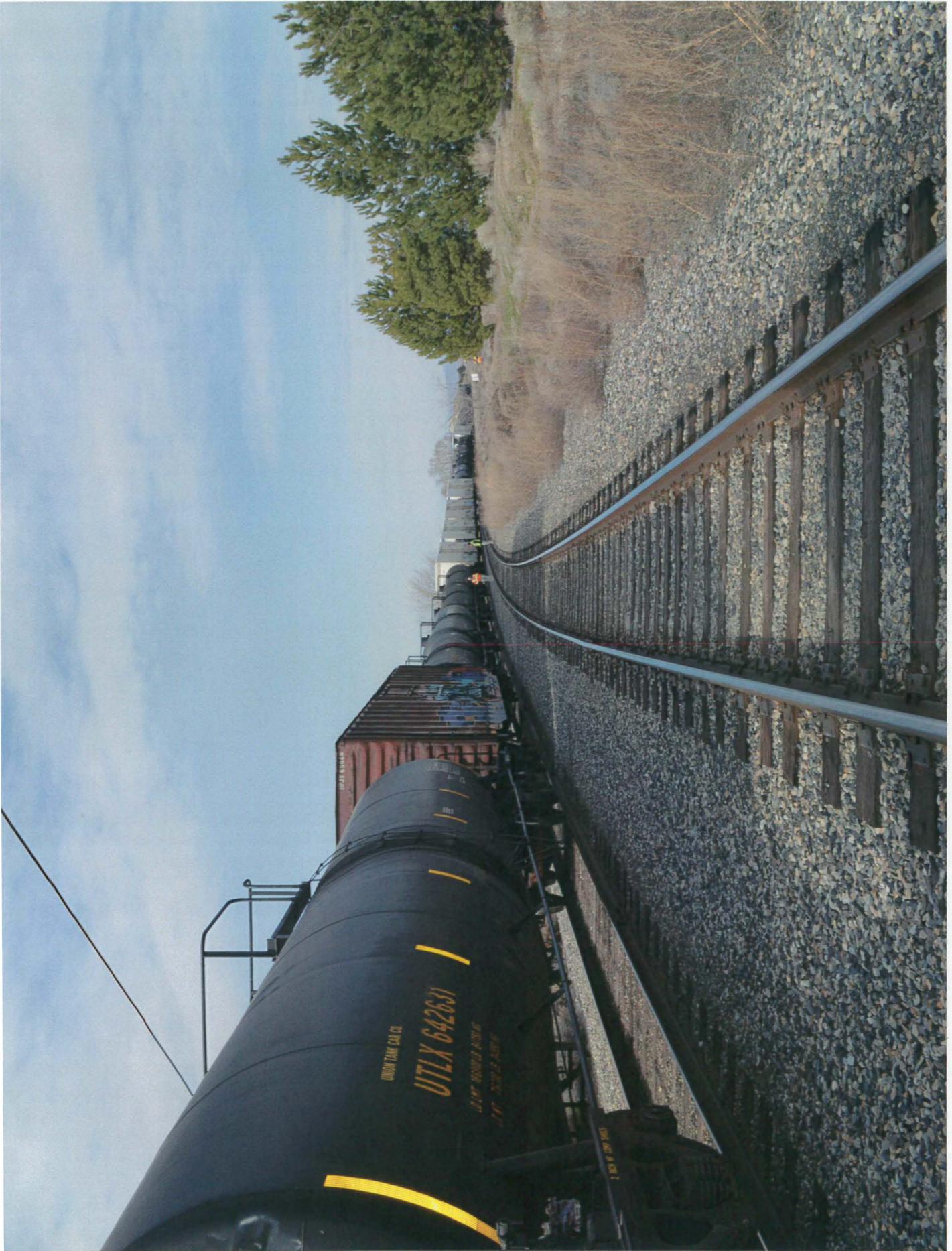


EXHIBIT 42



No.

Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)
COMPANY, LLC, a Washington)
limited liability company,)

Petitioner,)

**AFFIDAVIT OF RHETT
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)
of Washington, located in Benton)
County, Washington,)

Respondents.)

CONTAINS COLOR

STATE OF WASHINGTON)

: ss.

County of BENTON)

RHETT PETERSON, being first duly sworn on oath, does hereby depose
and state:

1. 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. In addition to the impediments on TCRY's operations described by John Miller, another consideration is that the stretch of main track in question runs uninterrupted, and is one of the only locations where a unit train can be stopped to wait for operations further up track, or for other safety or security reasons.

3. 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.

4. 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.

5. By way of illustration, the below image from Google Earth depicts the stretch of tracks which currently exist between Steptoe St. and Edison St.:



I have marked the TCRY tracks in blue, and the proposed crossing in orange, for ease of reference.

RHETT PETERSON

SUBSCRIBED AND SWORN to before me this ____ day of March, 2015,
by RHETT PETERSON.

Notary Public in and for the State of
Washington, residing at _____
My Commission Expires: _____

5. By way of illustration, the below image from Google Earth depicts the stretch of tracks which currently exist between Steptoe St. and Edison St.:



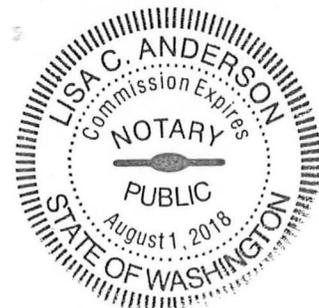
I have marked the TCRY tracks in blue, and the proposed crossing in orange, for ease of reference.

RHETT PETERSON

SUBSCRIBED AND SWORN to before me this 17th day of March, 2015,
by RHETT PETERSON.

Notary Public in and for the State of
Washington, residing at Kennelworth
My Commission Expires: 8/01/18

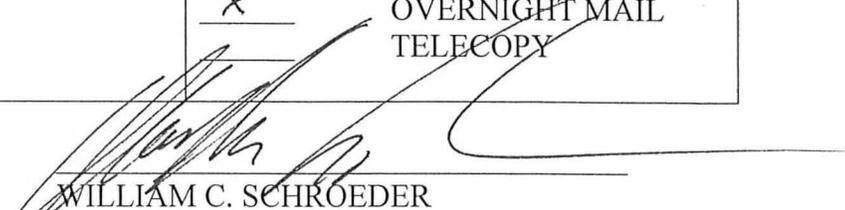
AFFIDAVIT OF RHETT PETERSON
RE: PETITION FOR DECLARATORY ORDER - 3



CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of March, 2015, I caused to be served a true and correct copy of the foregoing **AFFIDAVIT 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 checked="" type="checkbox"/> <input type="checkbox"/> <input 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 checked="" type="checkbox"/> <input type="checkbox"/> <input 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 checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
The City of Richland 505 Swift Boulevard Richland, WA 99352	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
The City of Kennewick 210 West 6 th Avenue Kennewick, WA 99336	<input checked="" type="checkbox"/> <input type="checkbox"/> <input 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,)

Petitioner,)

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.)

**AFFIDAVIT OF COUNSEL RE:
PETITION FOR DECLARATORY
ORDER**

CONTAINS COLOR

STATE OF WASHINGTON)

: ss.

County of Spokane)

WILLIAM C. SCHROEDER, being first duly sworn on oath, does hereby
depose and state:

1. I am one of the attorneys for Petitioner TCRY in the above-
captioned matter. I am over the age of eighteen (18), am competent to testify to
the matters contained herein, and all matters contained herein are based upon
personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the January 26, 2007 Initial Order Denying Petition, in Washington State Utilities and Transportation Commission Docket TR-040664.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Petition to Construct A Highway-Rail Grade Crossing Center Parkway, WUTC Docket No. TR-130499-P, filed April 8, 2013.

4. Attached hereto as **Exhibit 3** is a true and correct copy of Order 02, Initial Order Denying Petition to Open At-Grade Railroad Crossing, WUTC Docket TR-130499, filed February 25, 2014.

5. Attached hereto as **Exhibit 4** is a true and correct copy of the March 18, 2014 Cities of Kennewick and Richland Petition for Administrative Review, WUTC Docket TR-130499.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the March 28, 2014 Answer of Respondent Tri-City & Olympia Railroad Co. To Petition For Administrative Review, WUTC Docket TR-130499.

7. Attached hereto as **Exhibit 6** is a true and correct copy of the March 14, 2014 letter from State senators Brown and Hewitt, and State representatives Klippert, Haler, and Walsh to the Executive Director of the Washington Utilities and Transportation Commission.

8. Attached hereto as **Exhibit 7** is a true and correct copy of the May 29, 2014 Final Order Granting Petition for Administrative Review, WUTC Docket TR-130499.

9. Attached hereto as **Exhibit 8** is a true and correct copy of the January 2, 2015 Notice of Appeal to Division III of the Court of Appeals, Benton County Sup. Ct. No. 14-2-01894-8.

10. Attached hereto as **Exhibit 9** is a true and correct copy of Complaint for Declaratory and Injunctive Relief Superior Court, Benton County Case No. 14-2-01910-3, filed July 25, 2014.

11. Attached hereto as **Exhibit 10** is a true and correct copy of Plaintiff Tri-City Company's First Amended Complaint for Declaratory and Injunctive Relief, Superior Court, Benton County Case No. 14-2-01910-3, filed December 10, 2014.

12. Attached hereto as **Exhibit 11** is a true and correct copy of correspondence from Bruce Jolicoeur, MAI to William J. Schroeder, dated November 12, 2014.

13. Attached hereto as **Exhibit 12** is a true and correct copy of Cities' Answer to First Amended Complaint for Declaratory and Injunctive Relief, Superior Court, Benton County, Case No. 14-2-01910-3, filed February 12, 2015.

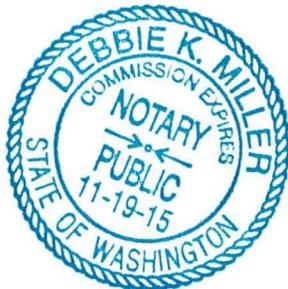
14. Attached hereto as **Exhibit 13** is a true and correct copy of Cities' Motion for Summary Judgment of Dismissal, Superior Court, Benton County Case No. 14-2-01910-3, filed February 12, 2015.

15. Attached hereto as **Exhibit 14** is a true and correct copy of the February 10, 2015 condemnation paperwork served upon TCRY by the Cities, including the Acquisition Acquiring Real Property and Federal-Aid Programs and Projects.



WILLIAM C. SCHROEDER

SUBSCRIBED AND SWORN to before me this 18th day of March, 2015, by WILLIAM C. SCHROEDER.

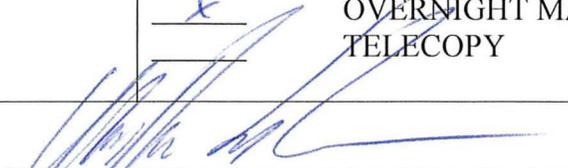


Debbie K Miller
Notary Public in and for the State of
Washington, residing at Spokane, WA
My Commission Expires: 11-19-15

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of March, 2015, I caused to be served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL 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
The City of Richland 505 Swift Boulevard Richland, WA 99352	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY
The City of Kennewick 210 West 6 th Avenue Kennewick, WA 99336	<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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EXHIBIT 1

[Service Date January 26, 2007]

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

CITY OF KENNEWICK,	)	DOCKET TR-040664
)	
Petitioner,	)	ORDER 06
)	
v.)	
	)	INITIAL ORDER DENYING
UNION PACIFIC RAILROAD,	)	PETITION
)	
Respondent.)	
)	
.....)	
CITY OF KENNEWICK,	)	DOCKET TR-050967
)	
Petitioner,	)	ORDER 02
)	
v.)	
	)	INITIAL ORDER DENYING
PORT OF BENTON AND TRI-CITY	)	PETITION
& OLYMPIA RAILROAD,)	
)	
Respondent.)	
)	
.....)	

1 **Synopsis:** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the petitions for an at-grade crossing of Center Parkway with the Union Pacific Railroad’s dead end spur west of Richland Junction and the Port of Benton and Tri-City & Olympia Railroad’s Hanford Industrial Branch west of Richland Junction will be denied.*

2 **Nature of the Proceedings:** The City of Kennewick (Kennewick)¹ filed two petitions for at-grade crossings. The first petition is for approval of an at-grade crossing of Center Parkway with the Union Pacific Railroad’s (UPRR) dead end spur west of Richland Junction. The second petition is for approval of an at-grade crossing

¹ Kennewick filed the petitions on behalf of the City of Kennewick and the City of Richland. References to the acronym “Kennewick” refer to both cities.

of Center Parkway over the Port of Benton (Benton)² and Tri-City & Olympia Railroad's (TCRY) Hanford Industrial Branch west of Richland Junction. The petitions were consolidated for hearing.³

- 3 **Procedural history:** A comprehensive procedural history of the initial stages of these petitions was set forth in previous orders of the Washington Utilities and Transportation Commission (Commission) and will not be repeated herein.⁴ The petitions were heard upon due and proper notice to all interested parties before Administrative Law Judge Patricia Clark October 19, and 20, 2006, in Olympia, Washington.
- 4 During the hearing, on October 19, 2006, Kennewick and the Port of Benton reached an agreement whereby the Port of Benton granted Kennewick an easement allowing Kennewick to construct a railroad crossing over its tracks subject to the rights of its lessee, TCRY.⁵ The Agreement recognized that the lessee, TCRY, and UPRR, opposed the at-grade crossing. Given the agreement, the Port of Benton did not appear at hearing.
- 5 At the conclusion of the hearing on October 20, 2006, the Administrative Law Judge established two post-hearing briefing schedules after input from the parties. During testimony adduced at hearing it became apparent that there was a potential conflict between Washington state law and Federal Railroad Administration (FRA) requirements for silent, at-grade crossings. The first briefing schedule was mandatory and required parties to address the apparent conflict in law and, if there was a conflict, an analysis of which requirement would prevail. On November 20, 2006, the parties timely filed a joint brief on this issue. The joint brief demonstrated that there is no conflict of law. The second briefing schedule was discretionary and permitted post-hearing briefs on the issues in these proceedings. If Kennewick elected to file post-hearing briefs, the remaining parties were permitted to file responsive briefing. Kennewick elected to file post-hearing briefing and timely filed its brief on December 20, 2006. The TCRY, UPRR, BNSF, and Commission Staff timely filed briefs on or before the deadline of January 22, 2007.

² The Port of Benton leases its track to Tri-City & Olympia Railroad.

³ Order 05 entered in Docket TR-040664 on January 19, 2006, and Order 01 entered in Docket TR-050967 on the same date.

⁴ *Id.*

6 **Initial Order:** The presiding administrative law judge proposes to deny the petitions.

7 **Appearances:** The parties were represented as follows.

Petitioner, City of Kennewick by John Ziobro
City Attorney's Office
P.O. Box 6108
Kennewick, WA 99336-0108
Attorney City

Commission Staff by Jonathan Thompson
Assistant Attorney General
1400 S. Evergreen Park Dr. SW
Olympia, WA 98504-0128

Respondent, UPRR by Carolyn L. Larson
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland OR 97204-1357

Respondent, Port of Benton by Daryl Jonson⁶
Cowan Moore Stam & Luke, P.S.
P.O. Box 927
Richland, WA 99352

Respondent, TCRY by Brandon L. Johnson
Minnick-Hayner
P.O. Box 1757
Walla Walla, WA 99362-0348

⁵ The Agreement renders moot the outstanding motion to dismiss for lack of jurisdiction filed by the Port of Benton on February 7, 2006.

⁶ The Port of Benton reached an agreement with the Cities of Kennewick and Richland and did not enter an appearance at hearing.

Respondent, BNSF Railway by Kevin MacDougall
Montgomery Scarp MacDougall, PLLC
Seattle Tower, 27th Floor
1218 Third Avenue
Seattle, WA 98101

DISCUSSION

- 8 **Issue:** The principal issue in these proceedings is whether Kennewick should be authorized to extend Center Parkway between Tapteal Drive and Gage Boulevard with an at-grade crossing over four sets of railroad tracks owned by the UPRR and the Port of Benton. The tracks owned by the Port of Benton are leased to the TCRY. The other parties to these proceedings, UPRR, TCRY, BNSF, and the Commission Staff oppose granting the request for an at-grade crossing.
- 9 **Applicable Law:** The Commission's authority to regulate the safety of grade crossings is set forth in Chapter 81.53, RCW. The law, RCW 81.53.020, disfavors at-grade railroad crossings and requires railroad crossings to be constructed with a grade separation, where practicable. The same statute provides that Kennewick must obtain authority from the Commission for the at-grade crossing. According to RCW 81.53.030, the Commission has discretion to grant or deny petitions for opening at-grade crossings.
- 10 The Commission's consideration of whether to grant an at-grade crossing is premised on the theory that all at-grade crossings are dangerous.⁷ The Commission then considers the following analysis:

[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

⁷RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146,150, 80 P.2d 406 (1938).

sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.⁸

- 11 If the petitioner demonstrates that the inherent and site-specific dangers are moderated to the extent possible and there is an acute public need for the crossing that outweighs the danger, then the analysis turns to application to the factors in RCW 81.53.020, to determine whether a separation of grades is practicable. That statute provides in pertinent part, that:

[I]n determining whether a separation of grades 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.

- 12 **Burden of Proof:** Kennewick has the burden of proving that the inherent and site-specific dangers at the proposed crossing have been moderated to the extent possible and that there is an acute public need to construct an at-grade crossing at Center Parkway between Tapteal Drive and Gage Boulevard that outweighs the danger. If Kennewick meets that burden, then Kennewick bears the burden of demonstrating that a separation of grades is impracticable.
- 13 **Petitions for At-Grade Crossings:** The Cities of Kennewick and Richland are interested in extending Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick.⁹ At the present time, four sets of railroad tracks obstruct the southern extension of Center Parkway from Tapteal Drive and the northern extension of Center Parkway from Gage Boulevard.¹⁰ There is a regional shopping mall on the southern side of the railroad tracks and other commercial and retail development north of the railroad tracks.¹¹ The closest ingress and egress between the two commercial and retail areas is at either Columbia Center Boulevard or Steptoe

⁸ *Town of Tonasket*, Docket No. TR-921371 (1993).

⁹ Darrington, Exh. No. 1 at 1:24-25

¹⁰ Darrington, Exh. No. 2.

¹¹ Darrington, Exh. 2.

Street. Columbia Center Boulevard is approximately 0.38 miles to the east of the proposed crossing.¹² There is a separated grade crossing, an overpass, at Columbia Center Boulevard.¹³ Steptoe Street is approximately 0.6 miles to the west of the proposed crossings.¹⁴ There is at at-grade crossing at Steptoe Street.¹⁵

- 14 *Inherent Danger in At-Grade Crossings:* There are two petitions at issue in this proceeding because four sets of railroad tracks, used and operated by three different railroads, would be affected by this crossing.¹⁶ The first petition involves UPRR. The proposed extension of Center Parkway would cross two UPRR tracks that are used for interchanging cars with the TCRY.¹⁷ The southerly track is the end portion of the Kalan Industrial lead and is referred to as the old Union Pacific (UP) Main.¹⁸
- 15 UPRR uses these tracks to interchange cars with TCRY.¹⁹ 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.²⁰ The procedure for picking up and setting out cars varies depending on the number of cars to be picked up from TCRY.²¹ If UPRR had 9-10 or fewer cars to pick up, it would cross Center Parkway twice.²² If UPRR had more than 10 cars to pick up, it would cross Center Parkway up to eight times to complete the switching operation.²³
- 16 The second petition at issue involves TCRY and BNSF’s use of the Port of Benton track. BNSF uses the track to interchange cars with TCRY.²⁴ TCRY sets out cars for BNSF in the morning and BNSF picks them up between noon and 6:00 p.m., and sets out cars for TCRY to pick up the following morning.²⁵ BNSF performs these switching operations in the location of the proposed crossing approximately one time

¹² Darrington, Exh. No. 2 and Plummer Exh. No. 6 at 8:22-24.

¹³ Plummer, Exh. No. 6 at 8:22-24

¹⁴ Darrington, Exh. No. 2 and Plummer, Exh. No. 6 at 8:21-22.

¹⁵ Plummer, Exh. No. 6 at 8:21-22.

¹⁶ Plummer, Exh. No. 6 at 3:6-8.

¹⁷ Leathers, Exh. No. 15 at 2:8-9.

¹⁸ Leathers, Exh. No. 15 at 2:9-11.

¹⁹ Leathers, Exh. No. 15 at 2:22.

²⁰ Leathers, Exh. No. 15 at 2:22-24.

²¹ Leathers, Exh. No. 15 at 2:25-26.

²² Leathers, Exh. No. 15 at 3:24.

²³ Leathers, Exh. No. 15 at 3:25-26.

²⁴ Labberton, Exh. No. 50 at 2:25-26.

²⁵ Labberton, Exh. No. 50 at 2:26-27.

per day, five days per week.²⁶ BNSF would cross Center Parkway approximately four times for each switching operation.²⁷

17 TCRY has a long-term lease with the Port of Benton for track that meets the UPRR track at Richland Junction.²⁸ TCRY interchanges cars with both UPRR and the BNSF at that junction.²⁹ TCRY has both a main line and a siding at Richland Junction.³⁰ TCRY's main line connects to the UPRR branch line and the siding is the track primarily used for interchanging rail traffic with BNSF.³¹ TCRY uses the UPRR Old Pass for interchanging traffic with UPRR.³² TCRY picks up and drops off UPRR cars at least once a day.³³ Depending on the time of year, TCRY picks up BNSF cars multiple times a week.³⁴ It is not unusual for TCRY to conduct switching operations two to three times a day during the busy season.³⁵ 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."³⁶

18 Kennewick stated that there are other at-grade crossings in Washington that have extensive rail movement.³⁷ There is an at-grade crossing at East D Street, in Tacoma, where over 45 freight and 10 passenger trains pass daily.³⁸ Numerous switching operations occur at the same location 24 hours a day.³⁹ This street is currently being grade separated.⁴⁰ At the Stacy Street Yard in Seattle, there is an at-grade crossing at Royal Brougham, a major roadway, where switching occurs 24 hours a day, seven days a week.⁴¹

²⁶ Labberton, Exh. No. 50 at 3:15-16.

²⁷ Labberton, Exh. No. 50 at 3:24.

²⁸ Peterson, Exh. No. 41 at 2:20-23.

²⁹ Peterson, Exh. No. 41 at 2:23-24.

³⁰ Peterson, Exh. No. 41 at 2:28-29.

³¹ Peterson, Exh. No. 41 at 2:9 and 3:1.

³² Peterson, Exh. No. 41 at 3:1-2.

³³ Peterson, Exh. No. 41 at 9:6-9.

³⁴ Peterson, Exh. No. 41 at 9:10-13.

³⁵ Peterson, Exh. No. 41 at 9:27-29.

³⁶ Peterson, TR. 357:9-12.

³⁷ Short, Exh. No. 48 at 7:19-25 and 8:1-2.

³⁸ Short, Exh. No. 48 at 7:21-22.

³⁹ Short, Exh. No. 48 at 7:22-23.

⁴⁰ Short, Exh. No. 48 at 7:23-24.

⁴¹ Short, Exh. No. 48 at 7:24-25 and 8:1-2.

- 19 It is apparent from the foregoing facts that extensive switching operations for three railroads are conducted at the proposed Center Parkway crossing. Naturally, the nature and extent of the railroad traffic will impact the site-specific crossing dangers that are presented by the proposed crossing and that Kennewick must address in its demonstration of the types of signals and warning devices that Kennewick would need to install to moderate those dangers to the extent possible. The danger present at the proposed crossing also influences Kennewick's demonstration of acute public need.
- 20 The law disfavors at-grade crossings because certain risks are inherent.⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵ At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians.⁴⁶ 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.⁴⁷ Grade crossing accidents also have adverse psychological effects on train crews.⁴⁸
- 21 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

⁴² RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d 406 (1938).

⁴³ Plummer, Exh. No. 6 at 5:20-21.

⁴⁴ Deskins, Exh. No. 13:15; Hammond, Exh. No. 37 at 4:14-17 and 5:4-6; Peterson, Exh. No. 41 at 6:17-18.

⁴⁵ Deskins, Exh. No. 13 at 3:15-17.

⁴⁶ Trumbull, Exh. No. 32 at 3:3-5.

⁴⁷ Trumbull, Exh. No. 32 at 3:7-8.

⁴⁸ Trumbull, Exh. No. 32 at 3:8-9.

approaching on another track that was hidden from view by the stationary cars.⁴⁹ 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.⁵⁰ More than 50 percent of accidents occur at signalized crossings.⁵¹

- 22 *Moderation of Danger to the Extent Possible:* The first prong of the legal test is for Kennewick to demonstrate that the inherent and site-specific dangers of the crossing are moderated to the extent possible by the installation of safety devices. The evidence on this topic was sparse. Kennewick stated that it intended to seek approval from the FRA to install a silent at-grade crossing.⁵² For this type of crossing, Kennewick asserted that the FRA would require the installation of median barriers and crossing gates that fully block all four quadrants of the roadway.⁵³ However, in response to inquiry by Commission Staff, Kennewick was unable to articulate exactly the type of safety devices it would install to moderate the danger at the Center Parkway crossing site.⁵⁴ Specifically, Kennewick was asked if it proposed to put in four quadrant gates and median barriers if the FRA did not approve a silent crossing and Kennewick indicated that “we’re not really that far into the design. . .”⁵⁵ Kennewick was also unable to respond to inquiry regarding whether wayside horns constitute supplemental safety devices.⁵⁶ Kennewick indicated that information regarding crossing safety devices would be the type of work to be addressed by a consultant.⁵⁷ However, the study performed by the consultants hired by Kennewick contains a paucity of information on this topic. The study does address installing a railroad crossing with arms at a cost of \$220,000, but Kennewick did not present any specific design to protect the crossing.⁵⁸ One proposal was to install a median separator and four quadrant gates, but that was presented as only “one possible design.”⁵⁹ It is clear from the absence of a sufficient record on this topic that

⁴⁹ Trumbull, Exh. No. 32 at 3:24-26 and 4:1-2.

⁵⁰ Peterson, Exh. No. 41 at 7:5-11.

⁵¹ Trumbull, TR. 231:3-10,

⁵² Kennewick has not yet sought approval from the FRA.

⁵³ Plummer, Exh. No. 6 at 8:3-6.

⁵⁴ Plummer, TR. 147:7-12.

⁵⁵ Plummer, TR. 147:10-12.

⁵⁶ Plummer, TR 148-5-25 and 149:1-4.

⁵⁷ Plummer, TR. 149:1-4.

⁵⁸ Plummer, Exh. No. 7 at 37:21.

⁵⁹ Deskins, TR. 198:10-14.

Kennewick did not meet its burden of proof that the site-specific and inherent risks of the Center Parkway crossing have been moderated to the extent possible.

- 23 Having failed to meet its burden of proof on the first prong of the applicable legal standard, the petitions could be denied without further discussion. However, it may provide some guidance to Kennewick for future filings to consider the second prong of the legal standard.
- 24 *Acute Public Need:* The second prong of the legal test applicable in these proceedings is for Kennewick to demonstrate that there is an acute public need for the crossing that outweighs the danger. For the City of Richland, the road extension would serve two purposes: (1) it would facilitate new commercial and retail development along Tapteal Drive,⁶⁰ and (2) it would improve traffic circulation.⁶¹ The City of Kennewick cites the primary benefit of the crossing as relief of present and future traffic congestion from Columbia Center Boulevard which is currently approximately 40,000 vehicles per day.⁶² The City of Kennewick also asserted that there would be greater accessibility to Kennewick retail business which would improve the economic strength and vitality of this area.⁶³
- 25 With respect to commercial and retail development along Tapteal Drive, it appears that there is new commercial and retail development even absent the at-grade crossing at Center Parkway.⁶⁴ A newly-constructed Holiday Inn Express is located immediately north of the railroad tracks off Tapteal Drive.⁶⁵ There is also a Home Depot, a Costco, Circuit City, and Staples in the same area.⁶⁶ In addition, within the past two years, a Macy's furniture store was constructed and a second furniture store is under construction.⁶⁷ Thus, it appears that economic development in this area is occurring even without the proposed crossing. In any event, while economic

⁶⁰ Darrington, Exh. No. 1 at 3:1-3 and Plummer, Exh. No. 6 at 3:13-15..

⁶¹ Darrington Exh. No. 1 at 3:3-5

⁶² Hammond, Exh. No. 5 at 2:17-18 and Hammond, TR. 120:10-20. The testimony of the City of Kennewick is in conflict on this issue. While one witness, Hammond cites relief of traffic congestion at the "primary benefit", another witness, Deskins, cites stimulation of economic growth as the "primary need." Deskins, Exh. No. 13 at 4:16.

⁶³ Hammond, Exh. No. 5 at 2:18-20 and Plummer, Exh. No. 6 at 3:13-15.

⁶⁴ Darrington, TR. 285:6-9.

⁶⁵ Darrington, Exh. No. 2 and Leathers, Exh. Nos. 23-26.

⁶⁶ Darrington, Exh. No. 2; Deskins, TR. 19:19-25 and 20:1-4; Deskins TR 204:5-11; Darrington, TR. 285:16-17; Darrington, TR. 294:13-14..

⁶⁷ Deskins, TR. 19:19-25 and 20:1-14 and Deskins, TR. 204:5-11.

development is definitely a positive goal for these cities, it does not rise to the level of an acute public need.

- 26 The second goal cited by Kennewick, traffic mitigation, may constitute acute public need if alternate crossings are insufficient to accommodate traffic.⁶⁸ Based on the record, it does not appear that the Center Parkway crossing would be particularly effective in achieving the goal of traffic mitigation. According to Kennewick, if the Center Parkway crossing is approved, the projected average daily volume of traffic on this roadway would be 2,200 vehicles.⁶⁹ The average daily volume of traffic is projected to increase to 4,250 by the year 2023.⁷⁰ Therefore, assuming that Kennewick is accurate in its estimates, only approximately 5-6 percent of the traffic would be diverted from Columbia Center Boulevard.⁷¹ In 2023, approximately 700 vehicles could be diverted off Steptoe Street onto the new Center Parkway extension.⁷² The traffic diversion from Steptoe Street was characterized as slight and probably within the daily variation of traffic on Steptoe Street.⁷³ Alleviating traffic congestion is a positive goal. However, the *de minimis* level of traffic diversion anticipated by Kennewick does not appear to be an effective means to accomplish that goal. Moreover, the two alternate crossings at Columbia Center Boulevard and Steptoe Street appear adequate to accommodate this level of traffic and both alternate crossings are within 0.6 miles or less of the proposed Center Parkway crossing. Therefore, Kennewick did not meet its burden of proof on the second prong of the legal standard.
- 27 Having concluded that Kennewick failed to meet its burden of proof for the first two prongs of the legal standard; that is, to demonstrate that it has moderated the risks associated with the crossing to the extent possible and that there is an acute public need for the crossing that outweighs the danger, the petitions should be denied.

⁶⁸ See n. 8.

⁶⁹ Plummer, Exh. No. 6 at 6:18.

⁷⁰ Plummer, Exh. No. 6 at 6:18-19.

⁷¹ Plummer, TR. 152:12-25 and 153:1-7 and Hammond, TR. 243:18-19..

⁷² Hammond, TR. 243:8-12.

⁷³ Hammond, TR. 242:14-17.

FINDINGS OF FACT

- 28 Having discussed above in detail all matters material to the Commission's decision,
and having stated general findings, the Commission now makes the following
summary findings of fact. Those portions of the preceding discussion that include
findings pertaining to the Commission's ultimate decisions are incorporated by this
reference.
- 29 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to determine whether a
highway may be extended across a railroad at grade.
- 30 (2) The City of Kennewick filed two petitions on behalf of the Cities of
Kennewick and Richland to construct an at-grade crossing of four railroad
tracks at Center Parkway.
- 31 (3) The first petition involves extending Center Parkway across two Union Pacific
Railroad tracks.
- 32 (4) The second petition involves extending Center Parkway across two Port of
Benton railroad tracks that are leased to Tri City and Olympia Railway.
- 33 (5) There is a regional shopping mall on the southern side of the railroad tracks
and commercial and retail development north of the railroad tracks.
- 34 (6) Access between the regional shopping mall and the commercial and retail
development is via either Columbia Center Boulevard or Steptoe Street.
- 35 (7) Columbia Center Boulevard is approximately 0.38 miles east of the proposed
crossing and has an over-grade crossing of the railroad tracks.
- 36 (8) Steptoe Street is approximately 0.6 miles west of the proposed crossing and
has an at-grade crossing of the railroad tracks. .

- 37 (9) Union Pacific Railroad, Tri City and Olympia Railway, and BNSF conduct
extensive switching operations on the four tracks that are at issue in these
petitions.
- 38 (10) Railway crossings at-grade are inherently dangerous because they present the
potential for train and vehicular, pedestrian, or bicycle conflict.
- 39 (11) The potential for train and vehicular, pedestrian, or bicycle conflict is
exacerbated by the existence of four railroad tracks and the presence of three
railroads conducting switching operations at the proposed crossing site.
- 40 (12) Kennewick does not have a definitive plan for the types of safety equipment,
including gates, signals, lights, and signage that would be installed at the
proposed crossing.
- 41 (13) Kennewick proposed the railroad crossing to facilitate new commercial and
retail development both north and south of the railroad tracks and to reduce
traffic congestion.
- 42 (14) The other parties to these proceeding, Union Pacific Railroad, Tri City and
Olympia Railroad, BNSF Railway, and the Commission Staff oppose granting
the petitions.

CONCLUSIONS OF LAW

- 43 Having discussed above in detail all matters material to the Commission's decision,
and having stated general findings and conclusions, the Commission now makes the
following summary conclusions of law. Those portions of the preceding detailed
discussion that state conclusions pertaining to the Commission's ultimate decisions
are incorporated by this reference.
- 44 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of, and parties to, these proceedings, according to RCW
81.53.
- 45 (2) Pursuant to RCW 81.53, at-grade crossings are disfavored because of the
inherent public risk.

- 46 (3) Pursuant to RCW 81.53.030 and case law,⁷⁴ the Commission may either grant
or deny petitions for at-grade crossings.
- 47 (4) At-grade crossings may be permitted if the inherent and site-specific dangers
of the crossing are moderated to the extent possible and there is an acute
public need for the crossing that outweighs the danger.
- 48 (5) Kennewick has the burden of proof in these proceedings.
- 49 (6) Kennewick failed to meet its burden of proof that the inherent and site-specific
dangers of the crossing are moderated to the extent possible and there is an
acute public need for the crossing that outweighs the danger.
- 50 (7) The petition filed by the City of Kennewick for approval of an at-grade
crossing of Center Parkway with the Union Pacific Railroad's dead end spur
west of Richland Junction should be denied.
- 51 (8) The petition filed by the City of Kennewick for approval of an at-grade
crossing of Center Parkway over the Port of Benton and Tri-City and Olympia
Railroad's Hanford Industrial Branch we of Richland Junction should be
denied.

ORDER

THE COMMISSION ORDERS THAT

- 52 (1) The petition filed by the City of Kennewick for approval of an at-grade
crossing at Center Parkway with the Union Pacific Railroad's dead end spur
west of Richland Junction is denied.

⁷⁴ *Town of Tonasket*, WUTC Docket No. TR-921371 (1993) and *Department of Transportation v. Snohomish County*, 35 Wn 2d 247, 254, 212 P.2d 829 (1949).

- 53 (2) The petition filed by the City of Kennewick for approval of an at-grade crossing of Center Parkway over the Port of Benton and Tri-City & Olympia Railroad's Hanford Industrial Branch west of Richland Junction is denied.

Dated at Olympia, Washington, and effective January 26, 2007.

PATRICIA CLARK
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

**DOCKET TR-040664
ORDER 06
DOCKET TR-050967
ORDER 02**

PAGE 16

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

EXHIBIT 2

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

	)	DOCKET NO. TR-130499-7
)	
City of Kennewick	)	PETITION TO CONSTRUCT A
_____	)	HIGHWAY-RAIL GRADE
Petitioner,	)	CROSSING
	)	Center Parkway
vs.)	
Port of Benton;)	
Tri City & Olympia Railroad Company;)	
BNSF Railway; Union Pacific Railroad)	
_____)	
Respondent)	

.....

Prior to submitting a Petition to Construct a Highway-Rail Grade Crossing to the Washington Utilities and Transportation Commission (UTC), State Environmental Protection Act (SEPA) requirements must be met. Washington Administrative Code (WAC) 197-11-865 (2) requires:

All actions of the utilities and transportation commission under statutes administered as of December 12, 1975, are exempted, except the following:

(2) Authorization of the openings or closing of any highway/railroad grade crossing, or the direction of physical connection of the line of one railroad with that of another;

Please attach sufficient documentation to demonstrate that the SEPA requirement has been fulfilled. For additional information on SEPA requirements contact the Department of Ecology.

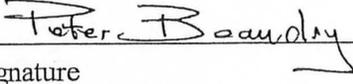
The Petitioner asks the Washington Utilities and Transportation Commission to approve construction of a highway-rail grade crossing.

STATE OF WASHINGTON
 UTILITIES AND TRANSPORTATION COMMISSION
 RECEIVED
 PROJECT MANAGEMENT
 2013 APR -8 PM 3:42

Posted

000004

Section 1 – Petitioner's Information

City of Kennewick
Petitioner

Signature
210 W. 6th Avenue
Street Address
Kennewick, WA 99336
City, State and Zip Code
P.O. Box 6108, Kennewick, WA 99336-0108
Mailing Address, if different than the street address
Peter Beaudry
Contact Person Name
(509) 585-4292, Peter.Beaudry@ci.kennewick.wa.us
Contact Phone Number and E-mail Address

Section 2 – Respondent's Information

Port of Benton
Respondent
3100 George Washington Way
Street Address
Richland, WA 99354
City, State and Zip Code

Mailing Address, if different than the street address
Scott D. Keller
Contact Person Name
(509) 375-3060, keller@portofbenton.com
Contact Phone Number and E-mail Address

000005

Tri-city and Olympia Railroad Company

Respondent

10 North Washington Street

Street Address

Kennewick, Washington 99336

City, State and Zip Code

PO Box 1700, Richland, WA 99352

Mailing Address, if different than the street address

Rhett Peterson

Contact Person Name

(509) 727-8824, rhettwater@mac.com

Contact Phone Number and E-mail Address

000006

BNSF Railway

Respondent

2454 Occidental Ave. S., Suite 2D

Street Address

Seattle, WA 98134

City, State and Zip Code

Mailing Address, if different than the street address

Richard Wagner

Contact Person Name

(206) 625-6152; richard.wagner@bnsf.com

Contact Phone Number and E-mail Address

Union Pacific Railroad Company

Respondent

9451 Atkinson Street

Street Address

Roseville, CA 95747

City, State and Zip Code

Mailing Address, if different than the street address

Terrel Anderson

Contact Person Name

(916) 390-3693, taanders@up.com

Contact Phone Number and E-mail Address

000007

Section 3 – Proposed Crossing Location

1. Existing highway/roadway Center Parkway

2. Existing railroad Port of Benton Rail Spur (aka Richland Spur), operated by Tri-City and Olympia Railroad

3. Location of proposed crossing:
Located in the NW 1/4 of the SE 1/4 of Sec. 30, Twp. 9, Range 29 W.M.

4. GPS location, if known: Latitude 46.22983, Longitude -119.23120

5. Railroad mile post (nearest tenth) 0.2

6. City Kennewick County: Benton

Section 4 – Proposed Crossing Information

1. Railroad company: Tri-City and Olympia Railroad Company

2. Type of railroad at crossing Common Carrier Logging Industrial
 Passenger Excursion

3. Type of tracks at crossing Main Line Siding or Spur

4. Number of tracks at crossing: 2 existing, including siding; 1 proposed

5. Average daily train traffic, freight 2 to 4 per day
Authorized freight train speed: 15 mph Operated freight train speed: 15 mph

6. Average daily train traffic, passenger 0
Authorized passenger train speed N/A Operated passenger train speed: N/A

7. Will the proposed crossing eliminate the need for one or more existing crossings?
Yes No

8. If so, state the distance and direction from the proposed crossing.

9. Does the petitioner propose to close any existing crossings?
Yes No

Section 5 – Temporary Crossing

1. Is the crossing proposed to be temporary? Yes ____ No X

2. If so, describe the purpose of the crossing and the estimated time it will be needed

3. Will the petitioner remove the crossing at completion of the activity requiring the temporary crossing? Yes ____ No ____

Approximate date of removal _____

Section 6 – Current Highway Traffic Information

1. Name of roadway/highway: Center Parkway

2. Roadway classification Minor Arterial

3. Road authority: City of Kennewick

4. Estimated average annual daily traffic (AADT): 5,200(Projected, Opening Year2014)

5. Estimated average pedestrian use per day: Unknown, See #12

6. Number of lanes: 2 (Proposed)

7. Roadway speed: 30mph (Proposed)

8. Is the crossing part of an established truck route? Yes ____ No: X

9. If so, trucks are what percent of total daily traffic? _____

10. Is the crossing part of an established school bus route? Yes ____ No: X

11. If so, how many school buses travel over the crossing each day? _____

12. Describe any changes to the information in 1 through 7, above, expected within ten years:
 The AADT is projected to increase to 7,000 in 2033; traffic is projected to be between 5,200 and 7,000 during the initial 10 years of operation. Train speeds could increase to 20 MPH in the future with the removal of a turnout (aka switch) east of the project site.

The pedestrian use per day is expected to be low due to the lack of pedestrian-oriented businesses and recreational facilities in the vicinity. However sidewalks will be provided on both sides of the proposed roadway that meet the city's design standards.

000009

Section 7 – Alternatives to the Proposal

1. Does a safer location for a crossing exist within a reasonable distance of the proposed location?

Yes ___ No X

2. If a safer location exists, explain why the crossing should not be located at that site.

3. Are there any hillsides, embankments, buildings, trees, railroad loading platforms or other barriers in the vicinity which may obstruct a motorist's view of the crossing?

Yes X No ___

4. If a barrier exists, describe:

- ◆ Whether petitioner can relocate the crossing to avoid the obstruction and if not, why not.
- ◆ How the barrier can be removed.
- ◆ How the petitioner or another party can mitigate the hazard caused by the barrier.

The trees in the NE quadrant of the proposed crossing are on private property. Security fences in the SE and SW quadrants are anticipated just outside the roadway and railroad property lines. The lack of sight distance in that quadrant will be mitigated through the use of active warning devices (flashing lights and gates) and a non-mountable median.

5. Is it feasible to construct an over-crossing or under-crossing at the proposed location as an alternative to an at-grade crossing?

Yes ___ No X

6. If an over-crossing or under-crossing is not feasible, explain why.

A roadway bridge over the rail line is not feasible. The northern roadway approach would exceed the established design standards for the City of Richland of 8%. This is true even if the rail line was lowered beginning at the end of the bridge over Columbia Center Boulevard (CCB) at a 1% grade. Lowering the CCB rail bridge would create a substandard vertical clearance for that roadway. Regardless, the required elevated Center Parkway roadway would eliminate access to the existing hotel in the Northeast quadrant of the proposed crossing and limit access to other commercial parcels. A rail bridge over the roadway is also not feasible. The required lowered roadway would eliminate access to the existing Holiday Inn hotel at the Northeast quadrant of the proposed crossing and limit access to other commercial parcels.

Please refer to the supporting document prepared by the City of Richland, titled *Center Parkway Extension, Grade Separation Evaluation*, for more detailed information.

000010

7. Does the railway line, at any point in the vicinity of the proposed crossing, pass over a fill area or trestle or through a cut where it is feasible to construct an over-crossing or an under-crossing, even though it may be necessary to relocate a portion of the roadway to reach that point?

Yes No

8. If such a location exists, state:

- ◆ The distance and direction from the proposed crossing.
- ◆ The approximate cost of construction.
- ◆ Any reasons that exist to prevent locating the crossing at this site.

9. Is there an existing public or private crossing in the vicinity of the proposed crossing?

Yes No

10. If a crossing exists, state:

- ◆ The distance and direction from the proposed crossing.
- ◆ Whether it is feasible to divert traffic from the proposed to the existing crossing.

There is public underpass (road under rail) about 1950 feet (0.37 miles) east of the proposed location for Columbia Center Boulevard. Columbia Center Boulevard is a heavily traveled 6-lane roadway that intersects with Tapteal Rd. as Columbia Center Boulevard enters the interchange with State Route 240. The heavy vehicle traffic that serves large retail developments from SR240 has resulted in an unusual access arrangement to and from Tapteal Dr. SB vehicles on Columbia Center Blvd. originating from WB SR 240 or Columbia Park Trail that wish to access Tapteal Drive and the Richland side of the rail line are required to make an uncontrolled left turn across 3 lanes of NB Columbia Center Blvd. traffic and loop in a clockwise direction back over Columbia Center Blvd. and down to Tapteal Drive, then make a left turn at a stop sign. NB traffic on Columbia Center Blvd. has to make a right turn onto Tapteal Drive and follow the same route up and back over Columbia Center Blvd. to access this area.

000011

Section 8 – Sight Distance

1. Complete the following table, describing the sight distance for motorists when approaching the tracks from either direction.

“Number of feet from proposed crossing” is measured from the crossing gate along the centerline of the travel lane. Sight distance is measured from the edge of traveled way (edge of fog line or curb line) along the centerline of track at the crossing. NOTE - for “Left” sight distances, the edge of traveled way is on the *opposite* side of the roadway.

a. Approaching the crossing from South, the current approach provides an unobstructed view as follows: (North, South, East, West)

Direction of sight (left or right)	Number of feet from proposed crossing	Provides an unobstructed view for how many feet
Right	250	17
Right	150	20
Right	100	27
Right	50	73
Left	250	26
Left	150	37
Left	100	53
Left	50	192

b. Approaching the crossing from North, the current approach provides an unobstructed view as follows: (Opposite direction-North, South, East, West)

Direction of sight (left or right)	Number of feet from proposed crossing	Provides an unobstructed view for how many feet
Right	250	>500 (unobstructed)
Right	150	>500 (unobstructed)
Right	100	>500 (unobstructed)
Right	50	>500 (unobstructed)
Left	250	60
Left	150	72
Left	100	94
Left	50	154

2. Will the new crossing provide a level approach measuring 25 feet from the center of the railway on both approaches to the crossing?

Yes No

3. If not, state in feet the length of level grade from the center of the railway on both approaches to the crossing.

The track that is proposed to remain has a cross slope (superelevation) that places the northern rail lower than the south rail. The roadway will be constructed such that the roadway profiles will be within 3 inches of the plane of the two rails for 30 feet from the closest rail.

000012

4. Will the new crossing provide an approach grade of not more than five percent prior to the level grade?

Yes No

5. If not, state the percentage of grade prior to the level grade and explain why the grade exceeds five percent.

The existing Center Parkway roadway approaching the proposed crossing from the north is 6%. The grade is proposed to decrease to meet the track's superelevation as it approaches the crossing and to continue to decrease as it continues southward. If the roadway grade is decreased to 5%, the intersection with Tapteal Drive would have to be raised more than 15 feet.

Section 9 – Illustration of Proposed Crossing Configuration

Attach a detailed diagram, drawing, map or other illustration showing the following:

- ◆ The vicinity of the proposed crossing.
- ◆ Layout of the railway and highway 500 feet adjacent to the crossing in all directions.
- ◆ Percent of grade.
- ◆ Obstructions of view as described in Section 7 or identified in Section 8.
- ◆ Traffic control layout showing the location of the existing and proposed signage.

Section 10 – Proposed Warning Signals or Devices

1. Explain in detail the number and type of automatic signals or other warning devices planned at the proposed crossing, including a cost estimate for each.

The proposed warning devices include flashing lights, audible bells, and crossing gates.

The control equipment for the railroad warning devices will be modern constant warning time units.

The approximate cost for railroad crossing signal improvements is \$250,000.

2. Provide an estimate for maintaining the signals for 12 months. \$5,000

3. Is the petitioner prepared to pay to the respondent railroad company its share of installing the warning devices as provided by law?

Yes No

000013

Section 11 – Additional Information

Provide any additional information supporting the proposal, including information such as the public benefits that would be derived from constructing a new crossing as proposed.

Concrete crossing panel surfaces will be installed, and the roadway paved to match the elevation of the panels.

Non-mountable median islands will be installed on either side of the track. The south island will be 100 ft. from the NB crossing gate; the north island will be at least 60 feet from the SB crossing gate.

000014

Section 12 – Waiver of Hearing by Respondent

Waiver of Hearing

The undersigned represents the Respondent in the petition to construct a highway-railroad grade crossing.

USDOT Crossing No.: _____

We have investigated the conditions at the proposed or existing crossing site. We are satisfied the conditions are the same as described by the Petitioner in this docket. We agree that a crossing be installed or reconstructed and consent to a decision by the commission without a hearing.

Dated at _____, Washington, on the _____ day of _____, 20. _____

Printed name of Respondent

Signature of Respondent's Representative

Title

Name of Company

Phone number and e-mail address

Mailing address

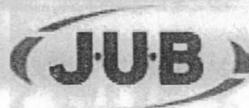
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Center Parkway Extension And Railroad Crossing

Traffic Study

March 2013

Prepared by:



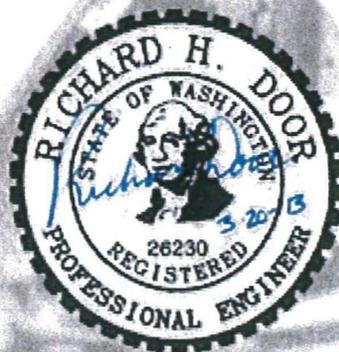
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000016

Center Parkway Extension And Railroad Crossing

Traffic Study

March 2013



Prepared by:

Spencer Montgomery
Rick Door, PE



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Kennewick, Washington 99336

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Traffic Forecasts
Level of Service Worksheets

Introduction

For several years the City of Richland has pursued the extension of Center Parkway to connect between Gage Boulevard on the south to Tapteal Drive on the north. This effort has been challenging because of existing railroad lines that operate parallel to and in between Gage Boulevard and Tapteal Drive. There are multiple purposes for connecting Center Parkway which include:

- Complete a grid network of functionally classified roadways
- Provide relief to congested arterial facilities
- Provide improved access to commercial areas and developable land
- Improve emergency response times

The City has worked closely with both the Burlington Northern Santa Fe Railroad and the Union Pacific Railroad to relocate railroad siding in the vicinity of Center Parkway. The City has also worked with the Port of Benton, who owns the remaining railroad line, to address issues with respect to a new railroad crossing that would be created by the Center Parkway Extension. This effort has produced substantial progress such that the Center Parkway is within reasonable reach. The City has also secured federal and state funding for the construction of the roadway including the railroad crossing.

The City has commissioned this traffic study to document conditions with the future roadway connection to contribute to design considerations and ensure safety with the new railroad crossing. This traffic study will summarize existing conditions, transportation need and benefit for the project, forecast 20-year traffic volumes with and without the roadway connection, evaluate traffic operational conditions with the Center Parkway Extension and make recommendations to safely accommodate the project including safe railroad crossing treatment.

Existing Conditions

This section will discuss existing land use and the roadway network in the area around Center Parkway. A vicinity map showing the study area is included in Figure 1.

Land Use

The study area around Center Parkway is dominated by commercial development, with the Columbia Center Regional Mall located immediately adjacent to Center Parkway. Gage Boulevard terminates at Center Parkway at the west entrance to the Columbia Center Mall. Many other commercial developments have also located in the vicinity of the Mall so as to take advantage of the activity generated in the area. To the west is a residential development which takes access from Steptoe Street approximately one-half mile to the west. To the northwest is undeveloped land within the City of Richland that is zoned for commercial development.

Roadway Characteristics

Center Parkway south of Gage Boulevard is designated as a principal arterial south to Quinault Avenue. North of Gage Boulevard Center Parkway is discontinuous in the vicinity of the railroad tracks and thus is identified as a future minor arterial roadway from north of Gage Boulevard to Tapteal Drive. Center Parkway also extends south of Quinault Avenue as a local roadway serving residential neighborhoods. In recent years Center Parkway was extended by the City of Kennewick and curves to the west to connect with Steptoe Street. The Richland Transportation Plan identifies Center Parkway to be extended one more mile to the west to connect with Leslie Road. It provides 3 lanes including a two-way-left-turn-lane with shoulders, curb, gutter, sidewalks and street lights and a speed limit of 30 MPH. A two lane roundabout is at the intersection with Gage Boulevard that also provides access to the Mall to the east. The traffic volume during the PM peak hour is nearly 800 vehicles south of Gage Boulevard.

Gage Boulevard is an east-west principal arterial roadway that extends from Center Parkway to the west and currently terminates at the foothills of Badger Mountain approximately 2.75 miles to the west. To the east of Center Parkway is one entrance to the Columbia Center Mall. The City Transportation Plan identifies Gage Boulevard to be extended westward through the saddle of Badger Mountain to connect with Dallas Road and the interchange with I-82 approximately three miles to the west. Gage Boulevard in the vicinity of Center Parkway is a 5 lane roadway, including a two-way left-turn lane with curb, gutter, sidewalks and streetlights with a speed limit of 40 MPH. The traffic volume during the PM peak hour is 1200 vehicles west of Center Parkway and 2500 vehicles east of Steptoe Street.

Steptoe Street is a north south principal arterial situated approximately 0.6 miles west of Center Parkway. This street was recently extended south of Gage Boulevard to connect with Center Parkway and additional extension is underway that will connect to Clearwater Avenue in Kennewick as well as 10th Avenue further to the south. Steptoe Street general includes 5 lanes including a two-way-left-turn-lane with shoulders, curb, gutter, sidewalks and street lights with a speed limit of 40 MPH. To the north Steptoe Street has an at-grade railroad crossing, connects with Tapteal Drive and provides access to SR 240. The traffic volume during the PM peak hour is 1400 vehicles north of Gage Boulevard.

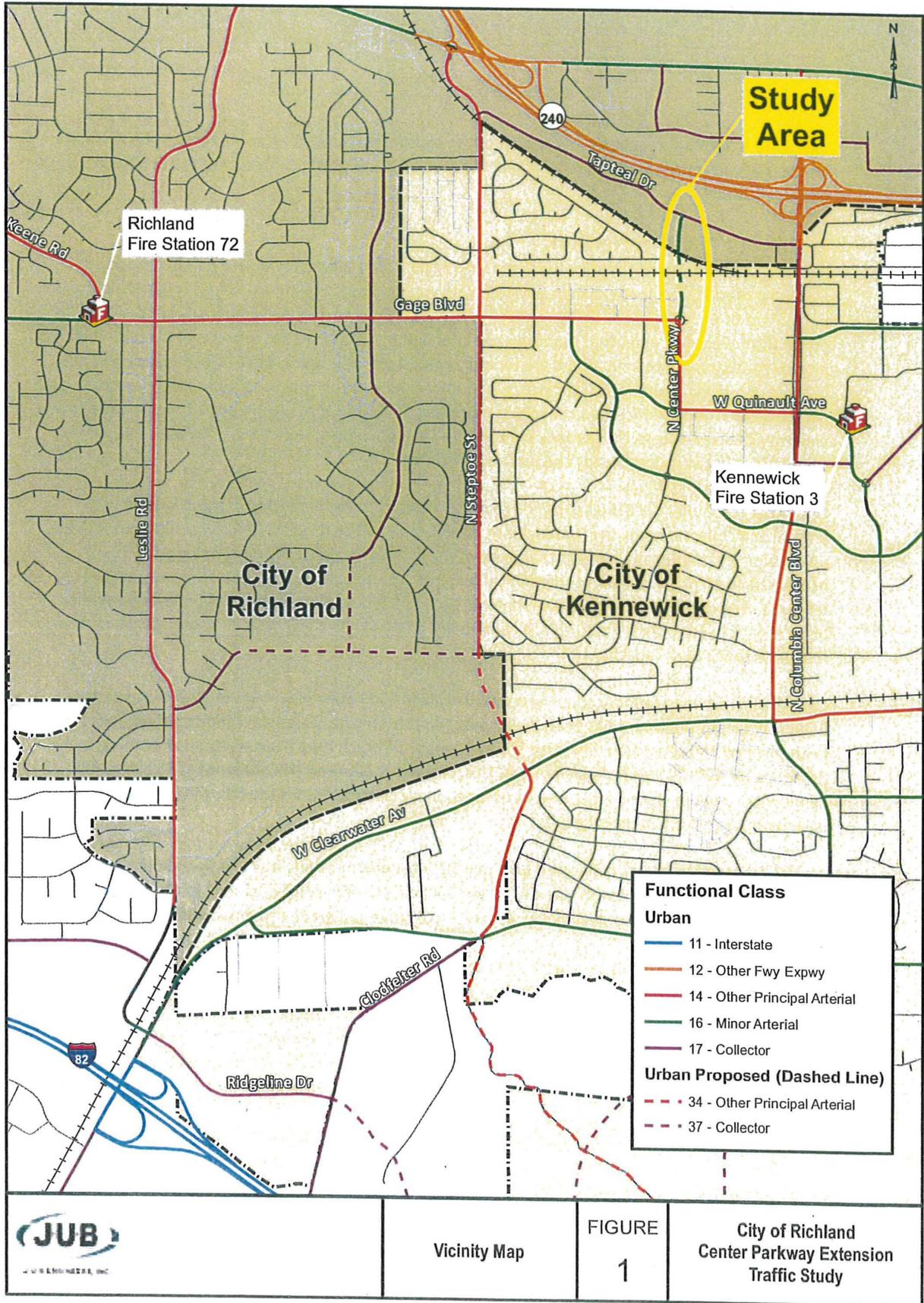
Columbia Center Boulevard is a north south principal arterial situated approximately 0.4 miles east of Center Parkway that gives major access to the most significant retail area in southeastern Washington. It provides connections to SR 240 at an interchange to the north and south to 10th Avenue. In the

vicinity of the Columbia Center Mall it is a 6 lane facility with curb, gutter, sidewalks and streetlights with a speed limit of 35 MPH. Columbia Center Boulevard provides a grade separated crossing of the railroad. Several years ago, in an effort to alleviate congestion on Columbia Center Boulevard, a grade separated connection to Tapteal Drive for northbound traffic was provided via Tapteal Loop. The traffic volume during the PM peak hour is 2400 vehicles north of Quinault Avenue and 2600 vehicles south of SR 240.

Tapteal Drive is an east west collector roadway with a single through lane in each direction and a two-way left turn lane with shoulders. Although there is curb and gutter on both sides of the road, sidewalks are only provided where development has been implemented. It currently extends from Steptoe Street on the west to Columbia Center Boulevard (CCB) on the east, with a "T" intersection at either end. At the east end a grade separated overpass was built to limit movements at CCB to right-in/right-out only; eastbound Tapteal Drive traffic wishing to turn north on CCB must use the overpass to cross CCB and then make a right turn to go north. At the west end studies have been performed to extend Tapteal Drive westward to provide access to commercial area, cross the canal to the north and connect with Columbia Park Trail. The speed limit is 30 MPH. The traffic volume during the PM peak hour is 225 vehicles west of Columbia Center Boulevard.

Quinault Avenue between Center Parkway and Columbia Center Boulevard is a 5 lane east-west principal arterial roadway with a speed limit of 30 MPH. West of Center Parkway and east of Columbia Center Boulevard it is a 3-lane minor arterial roadway.

Grandridge Boulevard is generally an east-west minor arterial roadway that provides a by-pass of sorts to the Columbia Center Mall. It is 3 lanes, with extra turn lanes at some intersections. It connects on the west to Gage Boulevard west of Center Parkway and heads south, then east, crossing Center Parkway and Columbia Center Boulevard, then continues east and then north to connect with Canal Drive.



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Transportation Need and Benefit

There are multiple purposes for the pursuit of the completion of Center Parkway across the railroad tracks to connect the two separate segments to the north and south. Some of the major objectives are discussed below.

Complete a Roadway Network

In planning for a transportation network within a region, city, subarea or even a neighborhood, a hierarchy of roadways that make up a system with varying functional classifications is beneficial for the movement of people and goods. A roadway system functions best when some roads are designed to primarily move traffic and other roadways are intended to provide access to adjacent parcels. Principal arterial roadways which limit access are typically spaced one mile apart, have higher speeds and are capable of moving more traffic. Local access roadways have lower speeds to more safely accommodate entering and exiting traffic; their capacity is much lower. Collector roadways serve to both move traffic and provide some access, these roads typically are situated in between arterial roadways and provide connections between local roads and arterials roadways.

One other component of a well-designed roadway network is the formation of a grid system with arterial and collector roadways running both north/south and east/west. In many communities there are natural and man-made barriers that prevent the completion of a fully functioning grid. These barriers include: rivers, canals, topographical features such as hills and canyons, freeways, airports, railroads, freeways or even large developments such as military installations. Often times bridges or other means to cross these features are constructed to complete a grid system, especially when nearby roadways reach their capacity.

Over the last three to four decades the area of Richland and Kennewick south of SR 240 and west of Columbia Center Boulevard has been developing. As this area has developed additional roadways have been planned and constructed to serve the area, many of which have been widened after being in existence for over 20 years. As evidence of this joint effort between the two cities of Richland and Kennewick to put in place a grid network of functionally classified roads the following improvements have been carried out in recent years:

- Steptoe Street was connected between SR 240/Columbia Park Trail and Gage Boulevard
- Tapteal Drive was constructed between Columbia Center Boulevard and Steptoe Street
- Columbia Center Boulevard was widened to 6 lanes and grade separated with the BNSF railroad being lowered
- Gage Boulevard was widened to 5 lanes
- Leslie Road was constructed to urban standards
- Center Parkway was extended south and west to future Steptoe Street
- Steptoe Street was extended south to connect to Center Parkway
- Construction is underway of Steptoe Street south to Clearwater Avenue, including a grade separation with the BNSF railroad, with opening anticipated in 2013

The completion of Center Parkway north of Gage Boulevard is merely one step of many to complete both a functionally classified network and a north-south component of a grid system to provide safe efficient movement of traffic into this area of the region.

Congestion Relief

As described above, Center Parkway is one piece of a planned network of roadways. Columbia Center Boulevard is one of the busiest roadways in the region. The extension and connection of Steptoe Street to Clearwater Avenue has long been planned to provide significant relief to that congested facility. However, as growth continues to fill in the undeveloped portions of the area, regional models indicate that Steptoe Street will also become congested. The significant commercial activity attracted to the area immediately around the Columbia Center Mall requires a well thought out plan for accommodating traffic demand. Having alternate routes and multiple roadways will allow traffic to move into and out of this congested area, enhancing the ability to provide services and let the region continue to develop without extending other urban infrastructure into areas not yet served.

Center Parkway has been planned to provide relief to both Columbia Center Boulevard as well as Steptoe Street, consistent with the philosophy of providing collector roadways parallel and in between arterial roadways.

Improved Access

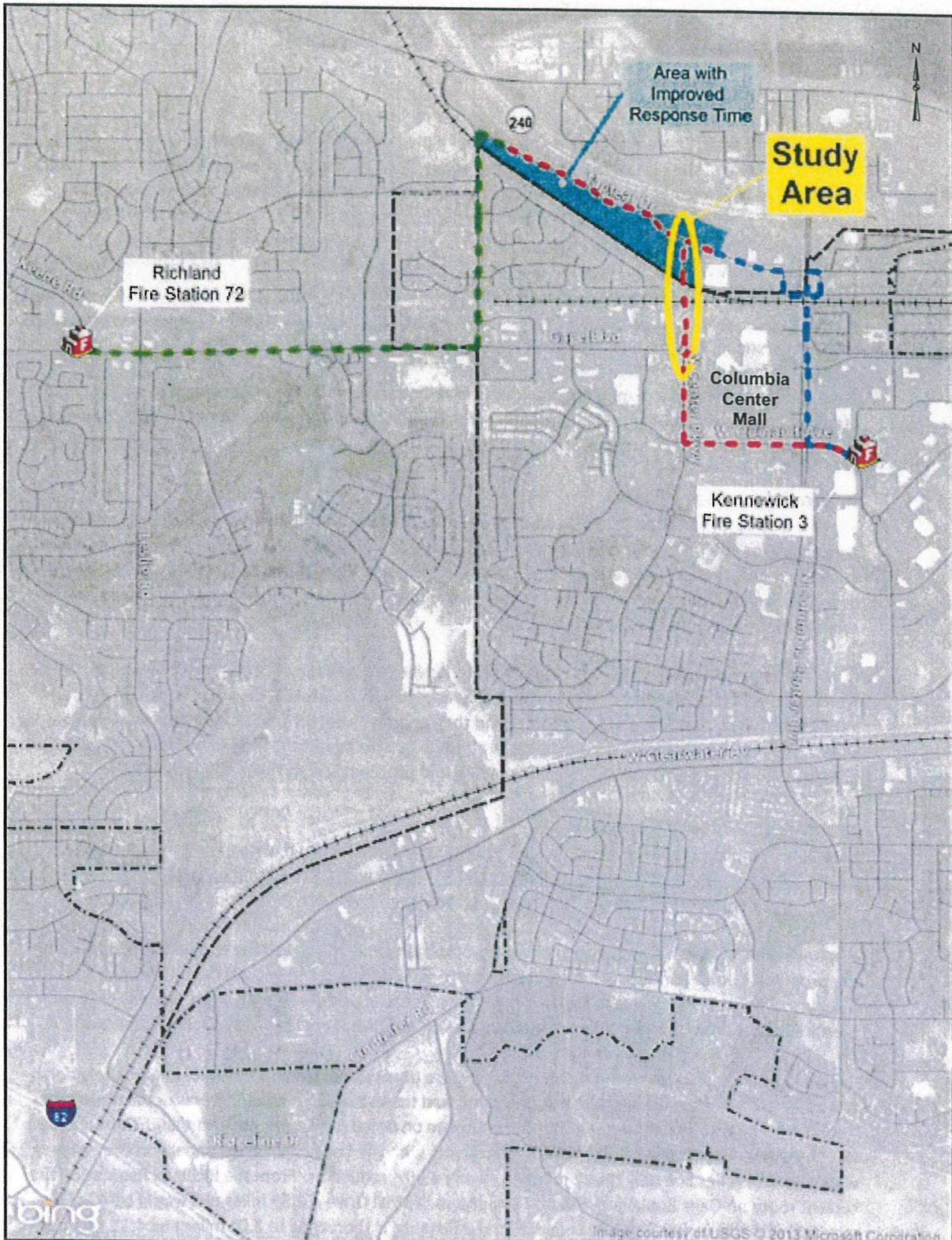
There is also significant land yet to be developed in this general area of the region, including nearly 60 acres between the railroad and SR 240 which has desirable visibility. Today this land has all utilities and collector roadway access on Tapteal Drive, however it is not as close to the rest of the commercial areas as it could be without Center Parkway, because of the barrier created by the railroad, so it lacks the synergy that commercial areas often seek.

Currently to get from the Columbia Center Mall to businesses on Tapteal Drive, traffic must make a left turn to go north on Columbia Center Boulevard, which is often congested, then proceed to go east on Yellowstone Avenue, south on Belfair Street and then proceed west on Tapteal Loop to access Tapteal Drive. With the Center Parkway connection, traffic will be able to exit the Mall area on the west side and go north at the roundabout at Gage Boulevard and proceed directly north to Tapteal Drive.

Improve Emergency Response

Emergency response to the area is provided by both the City of Richland, with a fire station on Gage Boulevard West of Leslie Road, and by the City of Kennewick with a fire station on Quinault Avenue east of Columbia Center Boulevard. An interagency agreement allows both jurisdictions to respond to incidents in the other jurisdiction, so coverage areas overlap. An evaluation of distances and emergency response times was performed by examining 4 potential routes: from each fire station with and without the proposed Center Parkway connection between Gage Boulevard and Tapteal Drive. Three of these routes are shown in Figure 2 (the fourth is not shown because using the new Center Parkway Extension is only a benefit from the City of Kennewick fire station because response from that site is quicker).

For comparative purposes an examination of response times to the Holiday Inn hotel immediately north and east of the Center Parkway crossing of the railroad tracks was undertaken. It was determined that from the Kennewick fire station that the current route on Columbia Center Boulevard and Tapteal Loop is 1.31 miles away and takes 2:48 minutes to respond, with the Center Parkway connection the distance would be 0.98 miles and only take 2 minutes, nearly a 30% reduction. From the Richland fire station the current route on Gage Boulevard, Steptoe Street and Tapteal Drive is 2.59 miles and would take 5:42 minutes, with the Center Parkway connection the distance is shortened to 2.02 miles and 4:18 seconds.



Emergency Routes

FIGURE
2

City of Richland
Center Parkway Extension
Traffic Study

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Traffic Forecast and Operational Analysis

Traffic Volumes

For this traffic study a 20 year forecast of traffic volumes with Center Parkway was needed in order to perform operational analysis at the intersection of Center Parkway and Tapteal Drive. This forecast was needed to determine appropriate intersection and traffic control and ensure that traffic would not back up across the railroad tracks during peak times. A comparison of the benefits to other facilities was also desired. Thus a forecast of year 2033 traffic volumes with the existing roadway network (without the Center Parkway Extension) and with the Center Parkway Extension was prepared. The methodology to prepare those forecasts is presented below.

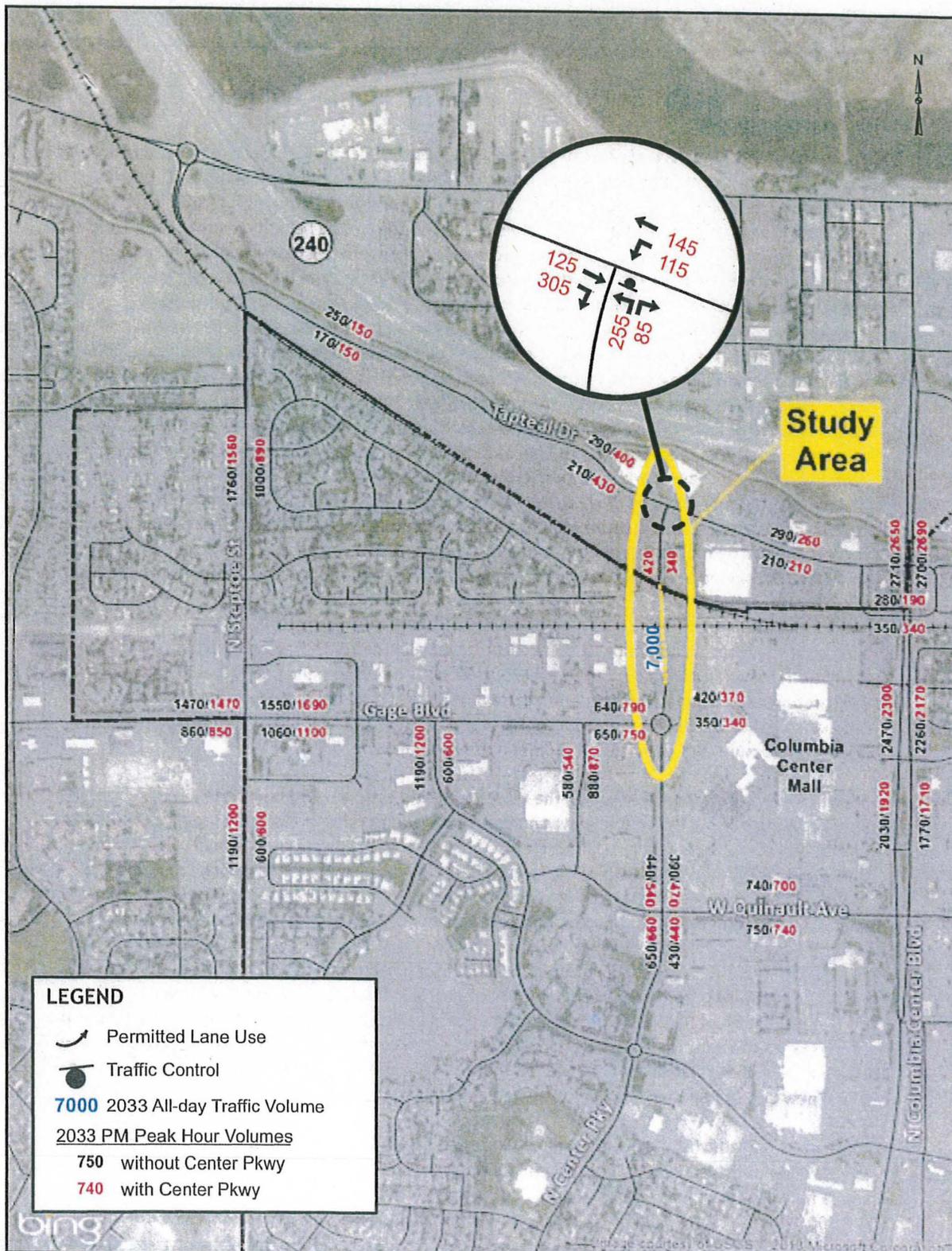
As a tool in preparing the Regional Transportation Plan, the Benton Franklin Council of Governments maintains a set of regional computerized transportation models. The model is developed using current traffic data and land uses in the region (representing year 2010) using Transportation Analysis Zones (TAZs) that are defined with various attributes describing the number and type of households and employees as well as other land uses within each zone. The model is calibrated using Federal Highway Administration procedures and methods. Once calibrated, changes in assumptions for future land uses and roadway networks can be made to determine the potential impacts of developments and/or roadway scenarios. Land use assumptions representing future conditions are developed to determine various impacts on the roadway network at a regional level. The future year model representing the year 2030 developed by BFCOG represents the best land use and roadway assumptions available at the time it was created.

It must be recognized that although traffic models are calibrated within acceptable ranges, the model is a tool in transportation planning and traffic forecasting. Professional judgment should be used in interpreting model outputs. To arrive at reasonable estimates of traffic volumes for the year 2033, a comparison of model results representing the year 2030 and 2010 was made; a comparison between 2010 model results and actual 2010 traffic counts was also made.

Specifically, an evaluation of how well the model currently performs and how closely existing traffic volumes are predicted by the model was made. An assumption was made that if the model currently predicts higher or lower traffic volumes than actually observed that this trend would continue into the future. The 2030 model was also compared to determine the growth in traffic between it and the 2010 model. Growth rates for the various roadway links being evaluated for this study were determined and continued from the year 2030 to 2033, but were applied to the year 2010 ground counts.

A few additional steps were undertaken to arrive at final projections for traffic volumes on applicable roadways. First, a cordon line was examined to ensure that the future volumes crossing a line immediately north of Gage Boulevard was within 1% in both scenarios. Since there is no existing traffic to compare against for the Center Parkway Extension some minor adjustments were needed. A second step was performed which balanced the volumes entering and exiting the two intersections at the end of the new Center Parkway Extension at Gage Boulevard and Tapteal Drive.

Average Daily Traffic (ADT) volumes were also prepared by examining the peak hour proportion of the all day volumes for the 2010 calibration counts along the cordon line used and applying that percentage to the final peak hour forecasts prepared. The forecast ADT for Center Parkway at the railroad crossing is 7,000 vehicles. A table in the Appendix shows all of the various volumes used for this forecast, with the volumes for both scenarios being shown in Figure 3.



2033 Traffic Forecast

FIGURE
3

City of Richland
Center Parkway Extension
Traffic Study

000027

Some observations with respect to anticipated adjustments to traffic patterns during the PM peak hour with Center Parkway Extension in place include:

- Traffic volumes on Columbia Center Blvd and Steptoe St will go down 210 and 310 respectively
- Traffic volumes on Gage Blvd west of Center Parkway and East of Steptoe Street will go up 250 and 180 respectively
- Volumes on Center Parkway south of Gage Boulevard will go up 220
- Volumes on Tapteal Drive will go up 330
- Volumes on Grandridge Boulevard south of Gage Boulevard will go down 50
- Quinault Avenue west of Columbia Center Boulevard will go down 50
- Columbia Center Blvd south of Canal Drive will go down 170
- On several roadways outside of those mentioned above, such as Gage Blvd west of Steptoe Street, Steptoe Street south of Gage Blvd

An opening day forecast of the ADT was also prepared. The BFCOG model had no such projection, so the growth rate along the cordon line of 1.6% per year was used and backed up from the 2033 forecast. The resulting 2014 ADT is 5200 vehicles.

Operational Analysis

An operational analysis was performed for the intersection of Center Parkway/Tapteal Drive, it being 660' from the railroad crossing. The intersection of Center Parkway/Gage Boulevard was not expected to cause any problems because it is approximately 1,000' from the railroad crossing and the intersection control is a roundabout which would provide better service than the stop sign north of the railroad crossing.

The analysis of Level-of-Service (LOS) is a means of quantitatively describing the quality of operational conditions of a roadway segment or intersection and the perception by motorists and passengers. Service levels are identified by letter designation, A – F, with LOS "A" representing the best operating conditions and LOS "F" the worst. Each LOS represents a range of operating conditions and one or more measures of effectiveness (MOE's) are used to quantify the LOS of a roadway element. For intersections the MOE used is average control delay (seconds) per vehicle. While there are several methodologies for estimating the LOS of intersections, the most commonly used is presented in the Highway Capacity Manual and is the methodology used in this study (HCM 2000). The Highway Capacity Manual LOS criteria for unsignalized intersections are summarized in Table 1.

Table 1. Level of Service Criteria for Unsignalized Intersections

Level of Service (LOS)	Average Control Delay (seconds/vehicle)
A	<=10
B	>10 - < 15
C	>15 - < 25
D	>25 - < 35
E	>35 - <50
F	>50
Source: <i>Highway Capacity Manual 2000</i> , Transportation Research Board, National Research Council, Washington, D.C., 2000.	

For unsignalized intersections delay is based on the availability of gaps in the major street to allow minor street movements to occur. As traffic volumes increase the availability of gaps will decrease and greater delay tends to result in driver frustration and anxiety, loss of time, unnecessary fuel consumption, and contributes to unnecessary air pollution. The City of Richland standard for Level of Service is LOS "D" for minor street approaches at unsignalized intersections, meaning the overall intersection LOS must be "D" or better.

Peak hour traffic volumes shown in Figure 3 at the intersection of Center Parkway and Tapteal Drive were input into the Highway Capacity Software (HCS) along with the assumption that the intersection would have exclusive left turn lanes for each approach and a stop sign for northbound Center Parkway. This analysis was performed to determine the delay and Level of Service at the intersection as well as queue lengths for the northbound approach. The results of the capacity analysis and intersection delay for existing conditions are shown in Table 2 with LOS worksheet calculations included in the Appendix.

As shown in Table 2, the intersection of Center Parkway is forecast to operate with acceptable delay and LOS, with under 25 seconds of average vehicle delay and LOS C. It was determined that the average queue length during the PM peak hour would be approximately 4.09 vehicles for the left turn lane and less than 1 vehicle for the right turn lane. Thus, with an average vehicle length of 25 feet the queue length would not extend more than 125' of the total 660' feet back from Tapteal Drive to the railroad crossing and there is no concern that vehicles would be put in an unsafe situation of being stopped on the railroad tracks during a train event.

Table 2. Summary of 2017 Build Scenario Delay (sec) and Level of Service

Intersection	Northbound Left Turn	Northbound Right Turn
Center Parkway/ Tapteal Drive	24.7/C	10.6/B

LEGEND

22.5/C Delay and Level of Service using existing lane configurations

An analysis was also performed to determine the potential impact of a train event on the intersection of Center Parkway/Tapteal Drive. Trains operating on the Tri-City and Olympia Railway are typically relatively short trains of 10 – 12 cars. To be conservative, and allowing for increased rail demand, an evaluation of a train with 30 cars of average length of 50 feet was performed. Because it is not uncommon for trains to travel in the 10 MPH range, this speed was used for this analysis, however clearly a faster train would result in a shorter duration of the railroad crossing closure. It would take 1.7 minutes for a 30 car train to travel its 1500 foot length at 10 MPH. Adding 15 seconds to account for the railroad crossing gate arms amounts to just under 2 minutes of total closure during a train event or 3.33% of the peak hour. With 420 southbound vehicles during the peak hour it would be expected that approximately 14 vehicles might be stopped at the crossing during a train event. The average length of vehicle being 25' would amount to a queue length extending back from the railroad crossing of approximately 350', which would still leave 300' between the queue and Tapteal Drive. The driveway for the Holiday Inn and the property on the west side opposite the Holiday Inn could be blocked for a portion of the train event, however southbound vehicles destined for the Holiday Inn could use the center turn lane to proceed to their destination. Cross access between the two parcels on the west side could be a possible feature to better accommodate a train event.

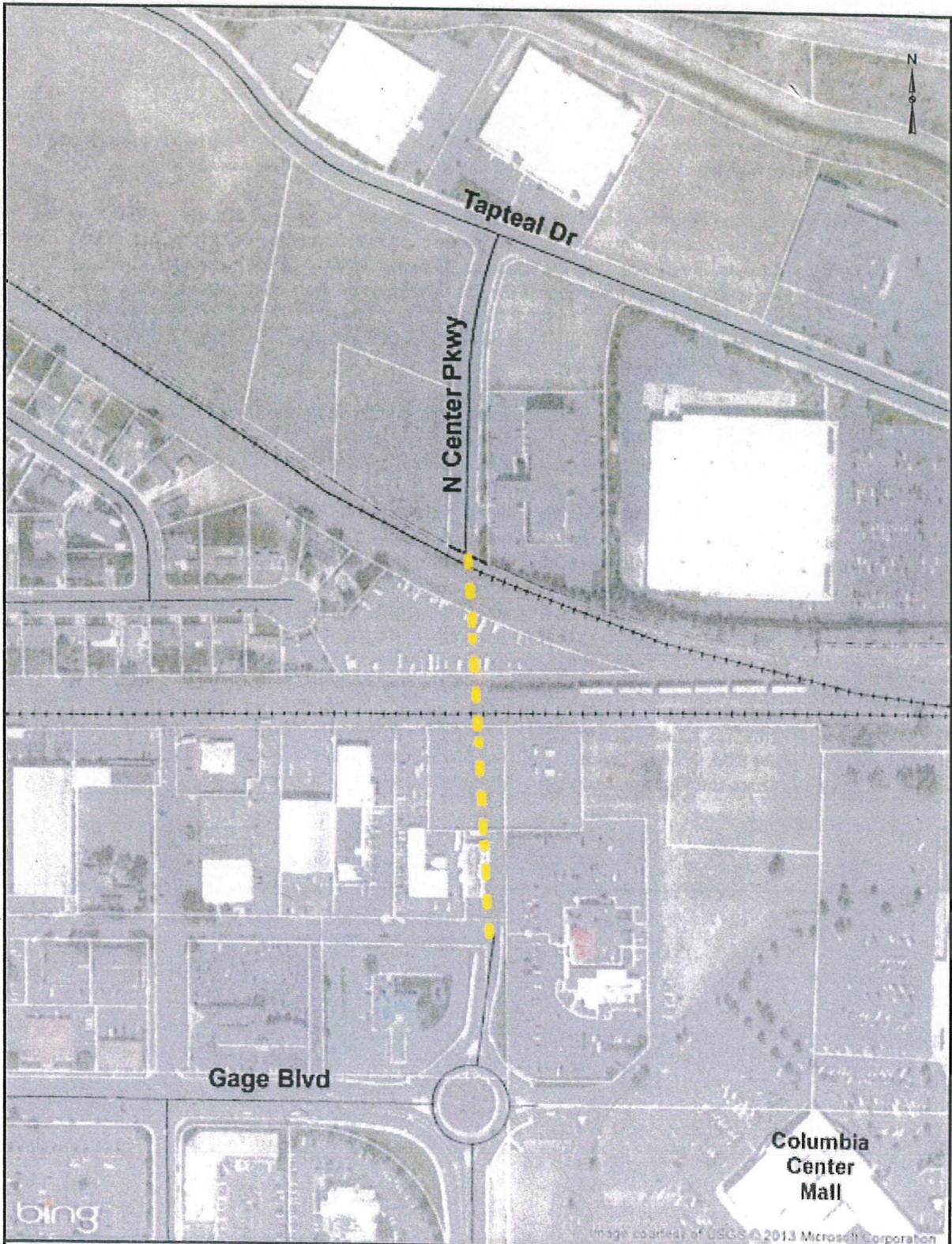
Center Parkway Project Area Considerations

The project area for the Center Parkway Extension is shown in Figure 4. There are two considerations worth discussion here for future development and consideration in the design of the roadway.

First, development on the east side of the road immediately north of the railroad crossing is the Holiday Inn which has two access points. The southern access is within 100' of the railroad crossing and the northern driveway is over 200' from the crossing. On the west side of Center Parkway there are two undeveloped lots. It is recommended that the southern lot on the west take its access opposite the northern access to the Holiday Inn, and that the northern lot take either share that access or take access from Tapteal Drive. In this fashion there will be enough spacing between the railroad crossing and the driveway accesses to Center Parkway.

Second, as a safety benefit to the railroad crossing, and to improve the environment for businesses and homes in the vicinity, the cities are interested in creating a Quiet Zone at the railroad crossing. To be most effective, a Quiet Zone at the Steptoe Street railroad crossing would be desirable as well.

The Federal Railroad Administration, since the early 1990's has undertaken a substantial technical and public process to put rules in place to require the sounding of train horns at all railroad crossings. The rule was finalized in 2005. Along with this requirement, provisions were included to allow the creation of Quiet Zones that have Supplementary Safety Measures (SSM's) at railroad crossings that "fully compensate for the absence of the train horn." These SSM's are physical constraints that prevent travelers from circumventing the gate arms at a railroad crossing, thus providing for a safer condition. Without the need for train horns the crossings are also more neighborhood and business friendly. In any event, when the train conductor sees the need, the train horn can be blown for improved safety. The purpose of the Quiet Zone is to eliminate the "routine" blowing of the train horn. For these particular crossings, a raised center median extending back 100' in length from the gate arms is the most cost-effective SSM. A formal procedure will need to be followed by the City of Richland to establish the Quiet Zone once the Supplementary Safety Measures are in place.



 JUB ENGINEERS, INC.	<p>0 125 250 Feet 1 inch = 250 feet</p>	<p>Center Parkway Extension Project Area</p>	<p>FIGURE 4</p>	<p>City of Richland Center Parkway Extension Traffic Study</p>
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Summary and Recommendations

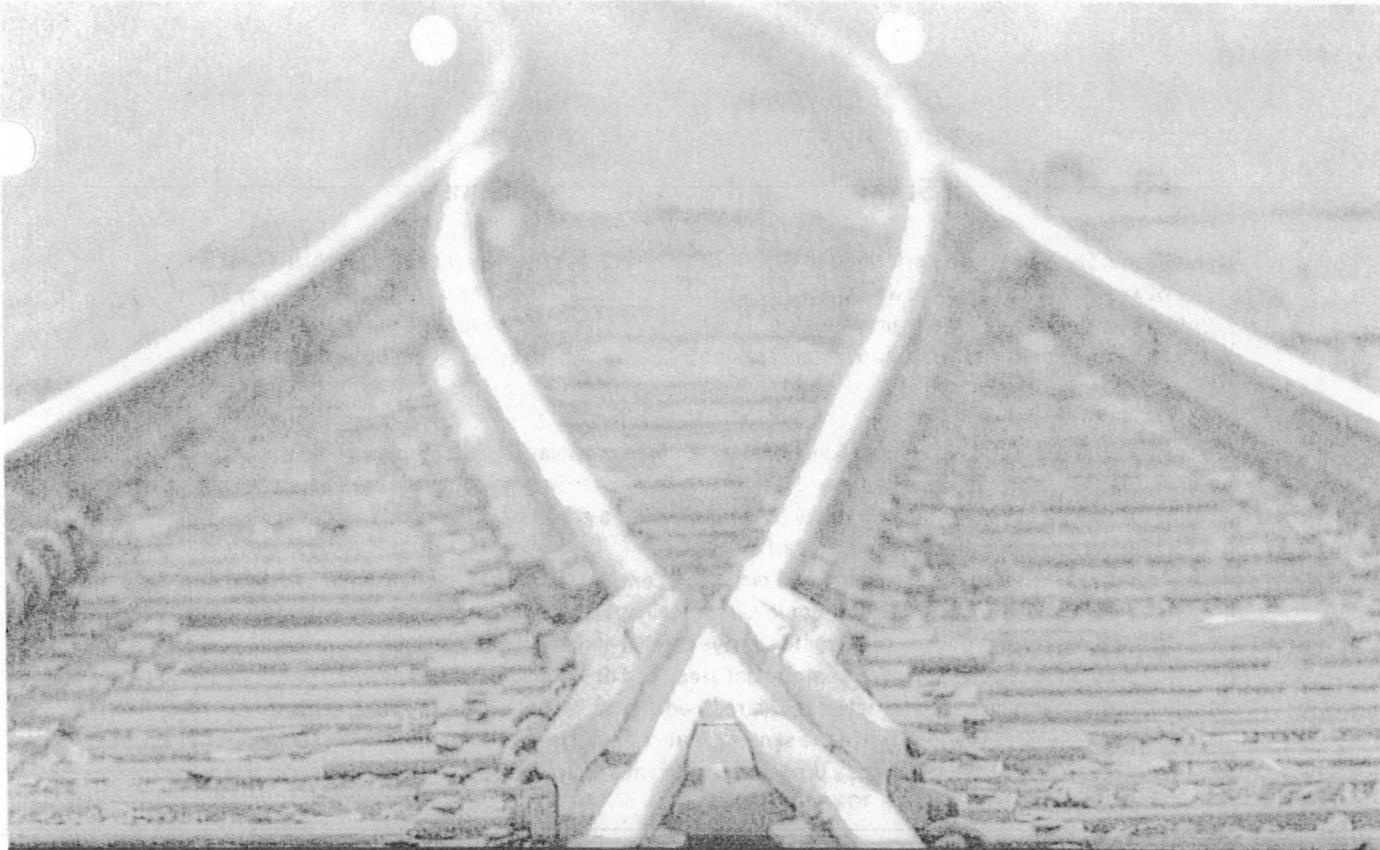
This Traffic Study has been performed to describe the efforts put forth by the City of Richland and the City of Kennewick to complete a roadway network that includes the extension of Center Parkway in order to accommodate growth in the region. Four primary objectives have been discussed that document the needs and benefits of extending Center Parkway between Gage Boulevard and Tapteal Drive that include:

- **Complete a grid network of functionally classified roadways** – The completion of Center Parkway north of Gage Boulevard is merely one step of many to complete both a functionally classified network and a north-south component of a grid system to provide safe efficient movement of traffic into this area of the region.
- **Provide relief to congested arterial facilities** - Center Parkway has been planned to provide relief to both Columbia Center Boulevard as well as Steptoe Street, consistent with the philosophy of providing collector roadways parallel and in between arterial roadways.
- **Provide improved access to commercial areas and developable land** – nearly 60 developable acres of commercial land between the railroad and SR 240 which has desirable visibility will have improved access and will gain the synergy that commercial areas often seek.
- **Improve emergency response times** – a significant area will have improved emergency response times, some with nearly a 30% reduction.

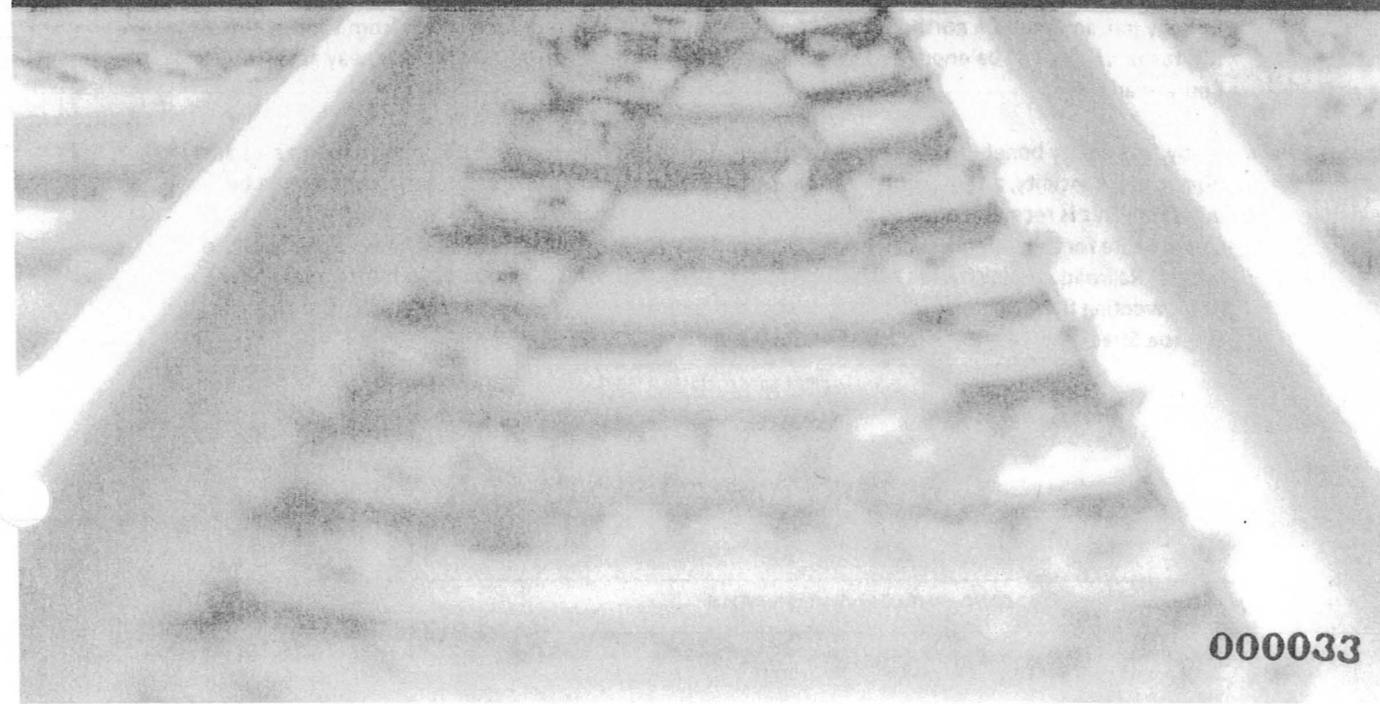
Traffic forecasts were prepared with and without the Center Parkway Extension for the year 2033. It is expected that the most significant change in traffic patterns will be a decrease in traffic volumes on Columbia Center Boulevard and Steptoe Street of 210 and 310 respectively during the PM peak hour. An examination of traffic queues in the vicinity of the railroad crossing was performed and it was estimated that the northbound queue would be less than 125 feet back from Tapteal Drive with over 650 feet of distance between Tapteal Drive and the railroad crossing.

For the undeveloped land west of Center Parkway between the railroad and Tapteal Drive, it is recommended that the southern lot on the west take its access opposite the northern access to the Holiday Inn, and that the northern lot take either share that access or take access from Tapteal Drive. In this fashion there will be enough spacing between the railroad crossing and the driveway accesses to Center Parkway.

Lastly, as a safety benefit to the railroad crossing, and to improve the environment for businesses and homes in the vicinity, a 100' median extending back from the railroad crossing gate arms should be installed. This is recommended as a Supplementary Safety Measures (SSM's) that will "fully compensate for the absence of the train horn" and allow the establishment of a "Quiet Zone" per the Federal Railroad Administration rules. This SSM is a physical constraint that prevents travelers from circumventing the gate arms at a railroad crossing, thus providing for a safer condition. The crossing at Steptoe Street should also be included in the Quiet Zone



APPENDIX



000033

**CENTER PARKWAY TRAFFIC STUDY
TRAFFIC FORECAST**

Location	2010				2030 Model				2033 *				2033 ADT	
	Calibration Ground Counts		Regional Model		Without Center Pkwy		With Center Pkwy		Without Center Pkwy		With Center Pkwy		w/o	with
	NB/WB	SB/EB	NB/WB	SB/EB	NB/WB	SB/EB	NB/WB	SB/EB	NB/WB	SB/EB	NB/WB	SB/EB	Center Pkwy	
Tapteal W/CCB	120	101	132	163	299	326	265	266	290	210	260	210	4600	4400
Tapteal W/Center Pkwy	120	101	132	163	299	326	445	602	290	210	400	430	4600	7700
Tapteal E/ Steptoe	82	73	136	153	399	344	232	307	250	170	150	150	3900	2800
CCB s/SR 240	1906	1981	1618	1724	2182	2250	2180	2202	2700	2710	2690	2650	50100	49400
Mall E/Ctr Pkwy	314	296	200	265	255	303	217	296	420	350	370	340	7100	6600
Gage W/Steptoe	1144	765	1117	1014	1370	1081	1368	1070	1470	860	1470	850	21600	21500
Gage E/Steptoe	1424	1117	1534	1305	1593	1177	1740	1228	1550	1060	1690	1100	24200	25800
Gage W/Ctr Pkwy	596	595	735	826	756	856	945	978	640	650	790	750	11900	14300
Tapteal Overpass	156	95	138	55	234	129	157	133	280	230	190	240	4700	4000
Leslie N/Gage	471	662	408	645	476	757	470	754	580	810	570	810	12900	12800
Steptoe N/Gage	670	825	833	784	1183	1597	1051	1414	1000	1760	890	1560	25600	22700
Center Pkwy N/Gage	--	--	--	--	--	--	271	427	--	--	340	420	--	7000
CCB N/Canal Dr	1603	1815	1676	1825	2252	2361	2171	2205	2260	2470	2170	2300	43800	41400
Leslie S/Gage	625	984	672	907	782	917	779	915	760	1040	760	1040	16700	16700
Steptoe S/Gage	--	--	--	--	574	1132	573	1140	600	1190	600	1200	16600	16700
Grandridge S/Gage	967	755	620	675	540	498	530	459	880	580	870	540	13500	13100
Center Pkwy S/Gage	384	414	575	601	550	603	651	761	390	440	470	540	7700	9400
CCB S/Canal Dr	1275	1478	1514	1629	2003	2133	1935	2022	1770	2030	1710	1920	35200	33600
Center Pkwy s/G'Ridge	256	498	270	410	429	512	445	522	430	650	440	660	10000	10200
Quinault W/CCB	627	567	865	841	976	1054	925	1042	740	750	700	740	13800	13300
Cordon Line N/Gage	2744	3302	2917	3254	3911	4715	3963	4800	4120	5270	4160	5330	87000	87900

*Model Growth Rate Perpetuated from 2020 to 2033

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TWO-WAY STOP CONTROL SUMMARY							
General Information				Site Information			
Analyst	Montgomery			Intersection	Tapleal Dr/Center Parkway		
Agency/Co.	JUB ENGINEERS			Jurisdiction	City of Richland		
Date Performed	3/13/2013			Analysis Year	2033		
Analysis Time Period	PM Peak Hour						
Project Description: Center Parkway Extension							
East/West Street: Tapleal Drive				North/South Street: Center Parkway			
Intersection Orientation: East-West				Study Period (hrs): 0.25			
Vehicle Volumes and Adjustments							
Major Street	Eastbound			Westbound			
Movement	1	2	3	4	5	6	
	L	T	R	L	T	R	
Volume (veh/h)		125	305	115	145		
Peak-Hour Factor, PHF	0.90	0.90	0.90	0.90	0.90	0.90	
Hourly Flow Rate, HFR (veh/h)	0	138	338	127	161	0	
Percent Heavy Vehicles	0	--	--	0	--	--	
Median Type	Raised curb						
RT Channelized			0				0
Lanes	0	1	0	1	1	0	
Configuration			TR	L	T		
Upstream Signal		0			0		
Minor Street	Northbound			Southbound			
Movement	7	8	9	10	11	12	
	L	T	R	L	T	R	
Volume (veh/h)	255		85				
Peak-Hour Factor, PHF	0.90	0.90	0.90	0.90	0.90	0.90	
Hourly Flow Rate, HFR (veh/h)	283	0	94	0	0	0	
Percent Heavy Vehicles	0	0	0	0	0	0	
Percent Grade (%)		0			0		
Flared Approach		N			N		
Storage		0			0		
RT Channelized			0				0
Lanes	1	0	1	0	0	0	
Configuration	L		R				
Delay, Queue Length, and Level of Service							
Approach	Eastbound	Westbound	Northbound			Southbound	
Movement	1	4	7	8	9	10	11
Lane Configuration		L	L		R		
v (veh/h)		127	283		94		
C (m) (veh/h)		1097	458		738		
v/c		0.12	0.62		0.13		
95% queue length		0.39	4.09		0.44		
Control Delay (s/veh)		8.7	24.7		10.6		
LOS		A	C		B		
Approach Delay (s/veh)	--	--	21.2				
Approach LOS	--	--	C				



DAVID EVANS
ASSOCIATES

Meeting Record

Project:	City of Richland – Center Parkway At-Grade Crossing
DEA Project #:	CRCH0000-0001
Date:	December 11 th , 2012
Time:	9:30 A.M. until 12:00 P.M.
Subject:	Center Parkway proposed at-grade highway-railroad Crossing Diagnostic Meeting
Attendees:	Pete Rogalsky, City of Richland; Jeff Peters; City of Richland; Julie Nelson, City of Richland; Kathy Hunter, Washington Utilities and Transportation Commission (UTC); John Deskins, City of Kennewick; Steve Plummer, City of Kennewick; Bruce Beauchene, City of Kennewick; Spencer Montgomery, JUB Engineers; Susan Grabler, David Evans and Associates; Kevin Jeffers, David Evans and Associates
Invited but not in attendance	Rhett Peterson, Tri-City and Olympia Railroad; Scott D. Keller, Port of Benton
Location:	Current end of street near 1970 Center Parkway, Richland, WA 99352
Copies to:	Invitees, project file

Introductions

City of Richland

Pete Rogalsky, Public Works Director
 Jeff Peters, Transportation & Development
 Manager
 Julie Nelson, Project Engineer

Washington Utilities and Transportation Commission (UTC)

Kathy Hunter, Rail Manager

JUB Engineers

Spencer Montgomery, Transportation Planner

City of Kennewick

John Deskins, Traffic Engineer
 Steve Plummer, Engineering Services
 Manager
 Bruce Beauchene, City Engineer

David Evans and Associates (DEA)

Susan Grabler, Grade Crossing/Quiet Zone
 Specialist
 Kevin Jeffers, Project Manager

Items Discussed:

City of Richland (City) intends to petition the UTC to allow the opening of a new at-grade crossing at Center Parkway over the Port of Benton (Port) tracks operated by Tri-Cities and Olympia Railroad (TCRY). They are leading the project under an inter-local agreement with the City of Kennewick. The two cities will have joint ownership and maintenance responsibilities for the roadway infrastructure.

The proposed roadway would run north-south and connect the existing dead-end Center Parkway in Richland to the existing round-a-bout at North Center Parkway and West Gage Avenue in Kennewick.

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The proposed roadway will cross the Port tracks just south of the current dead-ended Center Parkway. The north property line of the Port railroad is the boundary of the two cities, making the proposed at-grade crossing in the City of Kennewick.

While invited, the TCRY and Port did not have representatives in attendance. Thus, no one at the meeting entered the Port right-of-way.

There are currently two sets of tracks at the proposed highway-railroad crossing. The TCRY holds train operating rights on the northern-most set of tracks that extend to the Port of Benton, north of Richland. The Port of Benton owns the rail infrastructure and the underlying right-of-way. There are two tracks on the Ports right-of-way at the proposed Center Parkway highway-railroad crossing; based on aerial photos, the northerly track is the "main" line track; the south track is a siding track. The turnouts (aka switches) to the siding are about 500 feet to the east and about 1,600 feet to the west of the proposed crossing.

It is believed that the train speed on the main track is about 35 mph; the siding speed is believed to be no higher than 10 mph. The Federal Railroad Administration (FRA) crossing database for the Steptoe Road at-grade crossing (USDOT Number 310397T) about 1/3rd of a mile to the west suggests that six trains per day traverse the proposed crossing, but this data has not been updated since 2004. Further, the Port and the City both anticipate increases in industrial development on the rail line which could increase the number or length of trains using the branch line.

In the past, TCRY is believed to have used the siding to interchange cars with Union Pacific Railroad (UPRR). It is now understood that TCRY moves cars bound for UPRR further into Kennewick.

Both UPRR and BNSF Railway have trackage rights into the Port of Benton, based on a recent court case. The City has agreements with both the BNSF and UPRR to not oppose a petition for the proposed Center Parkway at-grade highway-railroad crossing. The UPRR agreement includes a clause that UPRR will no longer interchange cars at the proposed at-grade crossing location. The City also has an agreement with the Port of Benton that would grant an easement for the roadway once a Crossing Order is received through the UTC process.

About 200 feet south of Port tracks are two UPRR tracks. These tracks are no longer being used. The City of Kennewick has purchased the ROW for the roadway from Union Pacific. The City intends to remove the tracks from the roadway ROW as part of the project, so no at-grade crossing of these two tracks will be required.

DEA presented a three-page conceptual design of what the proposed at grade crossing might look like. This depicts only the "main line" Port track will be crossed and assumes the "siding track" will be relocated or removed from the crossing. It was discussed that elimination of the "siding" track would likely be a condition of approval of the petition. The crossing is conceptually designed to include active warning devices including bells, flashing lights, and gates. While the conceptual design depicts four lanes, the City advised that it will only have two travel lanes, a center turn lane and two bike lanes. Sidewalks on both sides of the proposed roadway are also included to be located behind the automatic warning devices per the MUTCD.

During the meeting, it was discussed that non-mountable medians would be included at the proposed Port crossing; the southern median would be at least 100 feet from the crossing arm protecting the

nearest track. The northern median would be 60 feet long to accommodate the existing hotel driveway in the northeast quadrant of the proposed crossing.

It was also discussed that a quiet zone for the crossing would likely be pursued if the crossing is approved by the UTC. This may result in the use of four-quadrant gates rather than the two-quadrant gates shown in the conceptual design; however, this will not be a part of the initial petition. The Quiet Zone process for the crossing was briefly discussed. The UTC's only role in such actions is to provide comments on the safety of the proposal; it is the FRA that makes the final decision on Quiet Zone applications.

Emergency services were discussed. The City has a fire station and EMT service at 710 Gage Boulevard, while the City of Kennewick has a fire station and EMT service at 7400 W Quinault Avenue. It appears that the Kennewick station is closer to the existing hotel just north of the proposed crossing. A map showing the emergency services covering this area should be provided to the UTC during the petition process.

The UTC petition process was discussed. The UTC will require the City to provide justification for why a grade separation is not feasible at this location. Technical infeasibility is a major consideration at this location due to grades approaching it from the north and the Holiday Inn Express main entrance that would be eliminated. Once the petition is submitted, the UTC will notify all stakeholders who have not waived the UTC hearing process. The stakeholders will have 20 calendar days to respond to the petition. If all stakeholders are not in support of the petition, UTC staff will recommend that the matter be set for hearing. The City should also provide the projected AADT for the Center Parkway crossing, which will be required in the UTC petition.

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Center Parkway Extension

Grade Separation Evaluation

Center Parkway and Tri-City and Olympia Railroad

The Cities of Richland and Kennewick are seeking to extend Center Parkway from Gage Blvd north to Tapteal Blvd. The extension is part of the City of Richland's and City of Kennewick's long term transportation plans. The project would construct a 3-lane roadway for 750 feet starting on the north side of the Gage Blvd Roundabout crossing the railroad tracks and connecting into the existing improvements just south of Tapteal Blvd.

This report evaluates the feasibility of constructing a grade separated crossing in lieu of an at-grade crossing at this location. It is intended to be used to support a petition to the Washington Utilities and Transportation Commission.

EXISTING CONDITIONS:

Railroad

- To the East of the proposed Center Parkway crossing, approx. 1,900 feet, there is a railroad bridge crossing over Columbia Center Blvd.
- To the West of the proposed Center Parkway crossing, approx. 3,800 feet, there is an at-grade signalized crossing of Steptoe St.
- For evaluation purposes, the track is assumed to be on an approx. 0.11% grade from Steptoe St. to Columbia Center Blvd.

Center Parkway

- The existing width of Center Parkway is 46 feet.
- Improvements stop just north of Gage Blvd at the Private Dr and start just north of the railroad tracks.
- The roadway grade approaching the railroad from the south is descending at 0.5%, but approaching the railroad from the north, the roadway is climbing at up to 6.0%.

DESIGN CRITERIA:

Railroad

- Max track grade of 1%.
- Minimum vertical clearance of 23.33 feet.
- Minimum horizontal clearance of 25 feet either side of track.

Center Parkway

- The width of Center Parkway in the area of the railroad will be 46 feet.
- Minimum vertical clearance of 16.5 feet.
- Minimum horizontal clearance is the width of the roadway section.

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EVALUATED OPTIONS:

Option #1-Maintain Center Parkway elevation and lower track either side of crossing.

- This option is not feasible due to the impacts at the Columbia Center Blvd crossing. In order to lower the track and maintain the elevation at Center Parkway, the grade past the existing railroad bridge and Columbia Center Blvd would need to be lowered over 18 feet. Columbia Center Blvd is a highly travelled arterial and the surrounding area around the crossing is developed. Therefore, the impacts to the traveling public and properties rule out this option. *(Due to its obvious infeasibility; no exhibit has been created for this option.)*

Option #2-Lower railroad and elevate Center Parkway

- This option is not feasible because the Center Parkway profile design will not meet City design criteria. The roadway grade would be over 8%. Further the fill depth would be over 19 feet restricting access to existing businesses as well as adjacent properties. It would also require extensive retaining wall systems along the railroad as well as Center Parkway. *(See Grade Separation Evaluation #2 Exhibit)*

Option #3-Maintain railroad elevation and lower Center Parkway under track.

- This option is not feasible because the excavation depth along Center Parkway would be over 23 feet. This would restrict access to existing businesses as well as adjacent properties. It would require an extensive retaining wall system along Center Parkway. It should also be noted that a rail over roadway crossing is generally not desirable to railroads as this tends to increase maintenance costs. *(See Grade Separation Evaluation #3 Exhibit)*

Option #4-Raise railroad and lower Center Parkway.

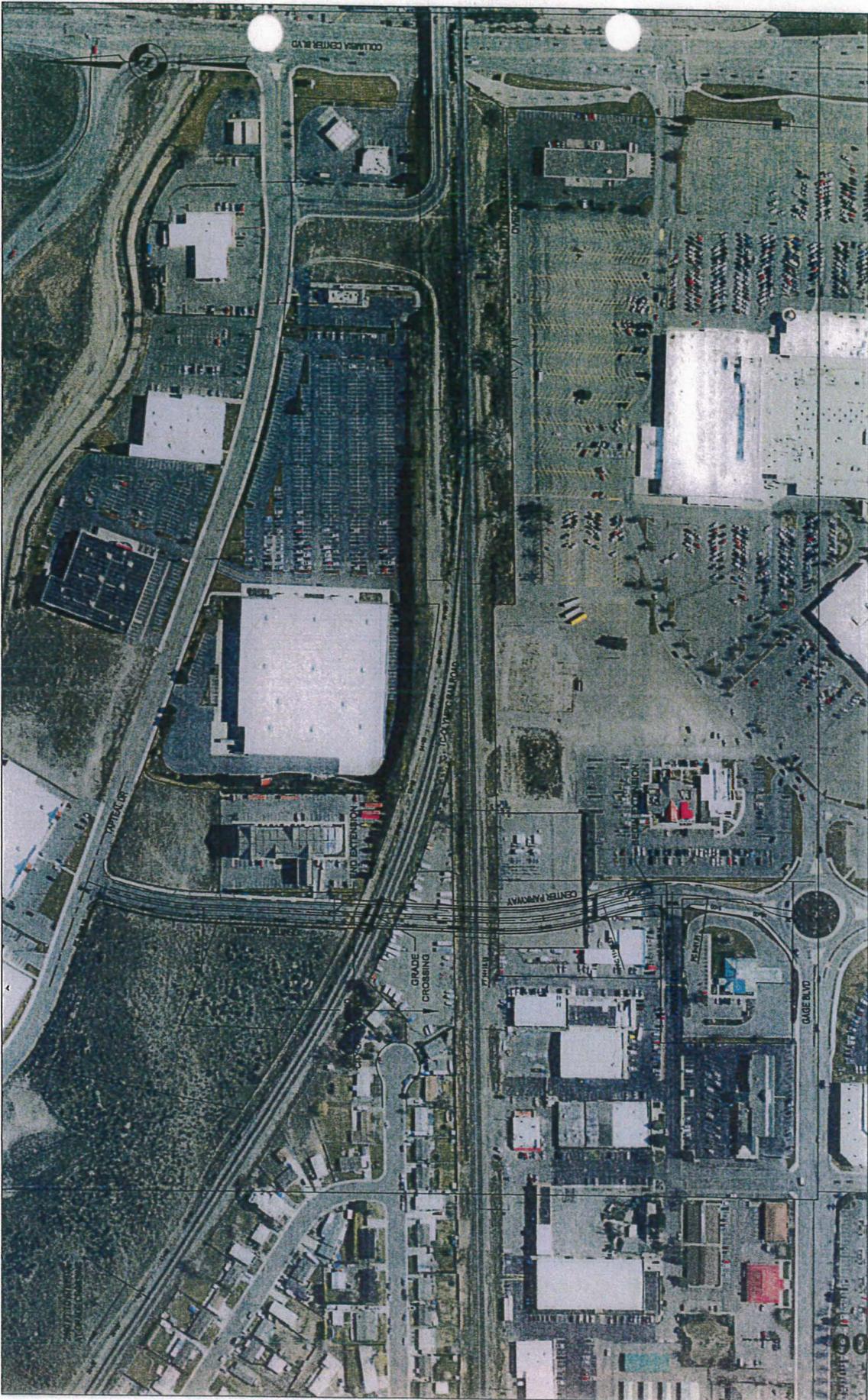
- This option is not feasible because the fill depth along the track would be over 18 feet requiring an extensive retaining wall system to keep the fill within the right of way. Raising the grade of the railroad would likely require fill slopes that could impact the loop road parallel to the tracks that goes over Columbia Center. Similarly, fill slopes would likely impact private properties on either side of Center Parkway. Although this has the least grade impact along Center Parkway it would still require an excavation depth over 6 feet and would restrict access to existing businesses as well as adjacent properties. *(See Grade Separation Evaluation #4 Exhibit)*

Summary

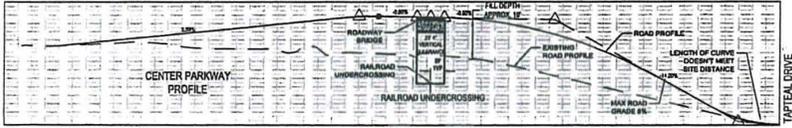
In looking at a grade separation, the most desirable configuration is for the roadway to go over the railroad. Options #1 and #2 evaluate what would be required to provide a roadway overcrossing of the railroad. Neither of these options are feasible geometrically. The next configuration is for the railroad to go over the roadway. Options #3 and #4 evaluate what would be required to provide a roadway undercrossing of the railroad. Option #3 is not feasible due to the excavation depths and access issues. Option #4 is not feasible because, like Option #3, the depths of the fills restrict access to the businesses and adjacent properties. In addition, Option #3 and #4 would be difficult to construct while maintaining rail operations.

Based on this analysis, a grade separated crossing is not feasible at this location.

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**GRADE SEPARATION EVALUATION #2
RAILROAD UNDER ROADWAY**

- HOLD RR ELEVATION AT COLUMBIA CENTER RR BRIDGE
 - GRADE RR TOWARDS CENTER PARKWAY USING A MAX -1% SLOPE
 - CONSTRUCT ROADWAY BRIDGE OVER RAILROAD FOR CENTER PARKWAY CROSSING
- OPTION DOES NOT WORK GEOMETRICALLY:**
- GRADE ON CENTER PARKWAY EXCEEDS MAX ROADWAY GRADES ALLOWED
 - FILL DEPTH IS IN EXCESS OF 19' WOULD RESTRICT ACCESS TO PROPERTIES ALONG CORRIDOR.
 - RETAINING WALL HEIGHTS GREATER THAN 19' WOULD BE REQUIRED.



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**GRADE SEPARATION EVALUATION #3
ROADWAY UNDER RAILROAD**

- HOLD RR ELEVATION AT CENTER PARKWAY
- GRADE ROADWAY UNDER RAILROAD
- CONSTRUCT RR BRIDGE OVER ROADWAY FOR CENTER PARKWAY CROSSING

OPTION DOES NOT WORK GEOMETRICALLY:
 - EXCAVATION DEPTH IS IN EXCESS OF 23' WOULD RESTRICT ACCESS TO PROPERTIES ALONG CORRIDOR.
 - RETAINING WALL HEIGHTS GREATER THAN 23' WOULD BE REQUIRED.



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**GRADE SEPARATION EVALUATION #4
ROADWAY UNDER RAILROAD**

- HOLD RR ELEVATION AT COLUMBIA CENTER RR BRIDGE
 - GRADE ROADWAY TOWARDS CENTER PARKWAY USING A MAX +1% SLOPE
 - CONSTRUCT RR BRIDGE OVER ROADWAY FOR CENTER PARKWAY CROSSING
- OPTION DOES NOT WORK GEOMETRICALLY:
- EXCAVATION DEPTH IS IN EXCESS OF 8' WOULD RESTRICT ACCESS TO PROPERTIES ALONG CORRIDOR.
 - RETAINING WALL HEIGHTS GREATER THAN 18' WOULD BE REQUIRED ALONG THE RAILROAD.



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CENTER PARKWAY AT-GRADE CROSSING DESIGN



VICINITY MAP



LOCATION MAP

DRAWING LIST

SHEET NO.	PLANS
1	COVER SHEET / PROJECT AREA
2	AERIAL MAP
3	AT-GRADE CROSSING PLAN
4	AT-GRADE CROSSING WITH AERIAL
5	AT-GRADE CROSSING DETAILS
6	CENTER PARKWAY PROFILES

COVER SHEET / PROJECT AREA
**CENTER PARKWAY
AT-GRADE CROSSING**
City of Richland
Richland, Washington

DAVID EVANS
AND ASSOCIATES INC.
3700 Pacific Hwy, East Beach, WA 98541
Phone: 509.623.9760



PRELIMINARY
CONTENT
SUBJECT TO
CHANGE

REVISIONS: APPD.

DATE: 01-14-2013
DESIGN: KJAE
DRAWN: CDG
CHECKED:
REVISION NUMBER:

SCALE: NOT TO SCALE

PROJECT NUMBER:
CRCH00000001

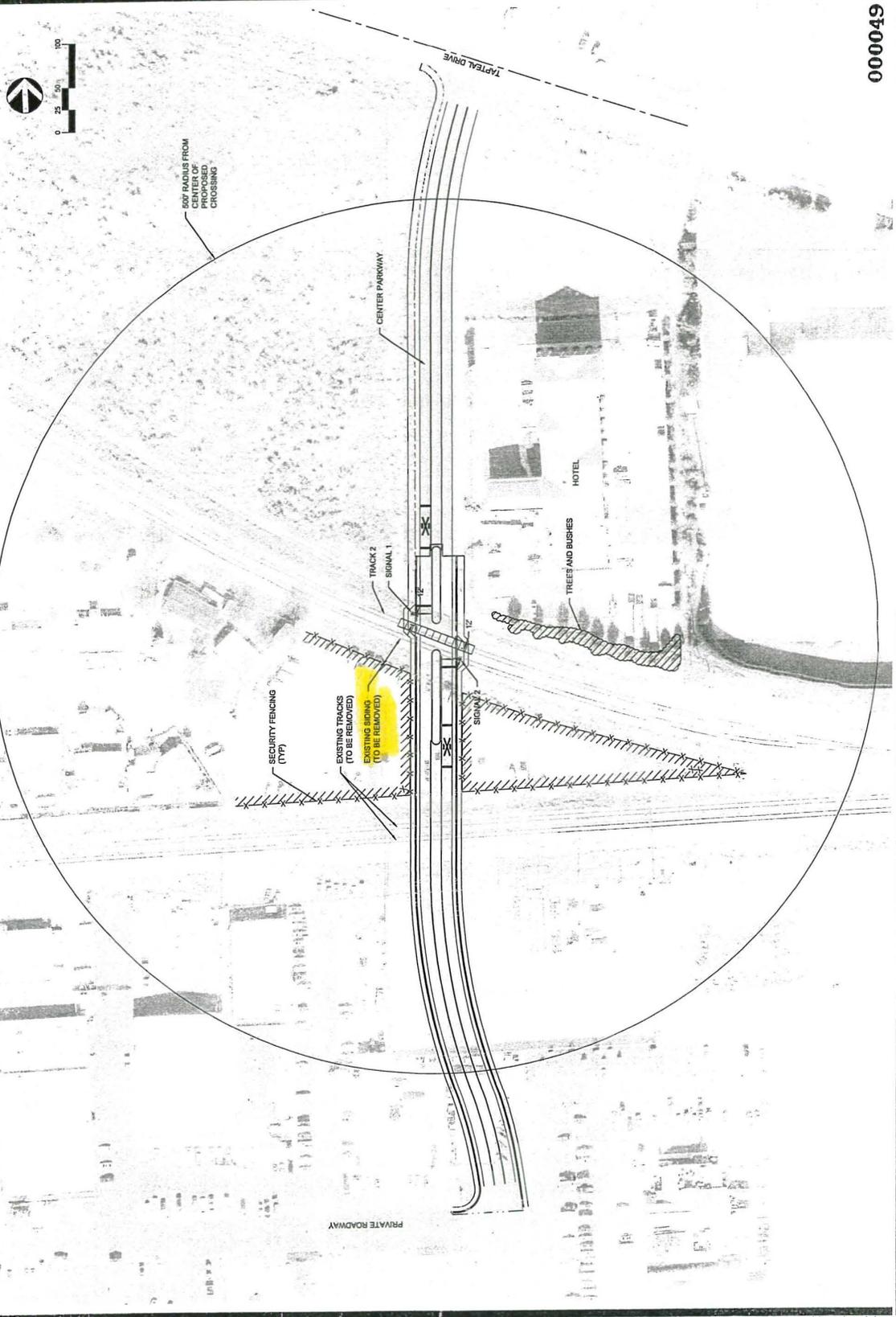
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SHEET NO.

000046

1
SHEET 1 OF 6

c:\p1\1131 2.dwg - P:\1131\1131.dwg



000049

4
SHEET 4 OF 6

AT-GRADE CROSSING SIGHT DISTANCE
CENTER PARKWAY
 City of Richland
 Richland, Washington

DAVID EVANS
 AND ASSOCIATES INC.
 2700 PACIFIC HWY. SUITE 300
 TACOMA, WASHINGTON 98424
 PHONE: 253.222.7870

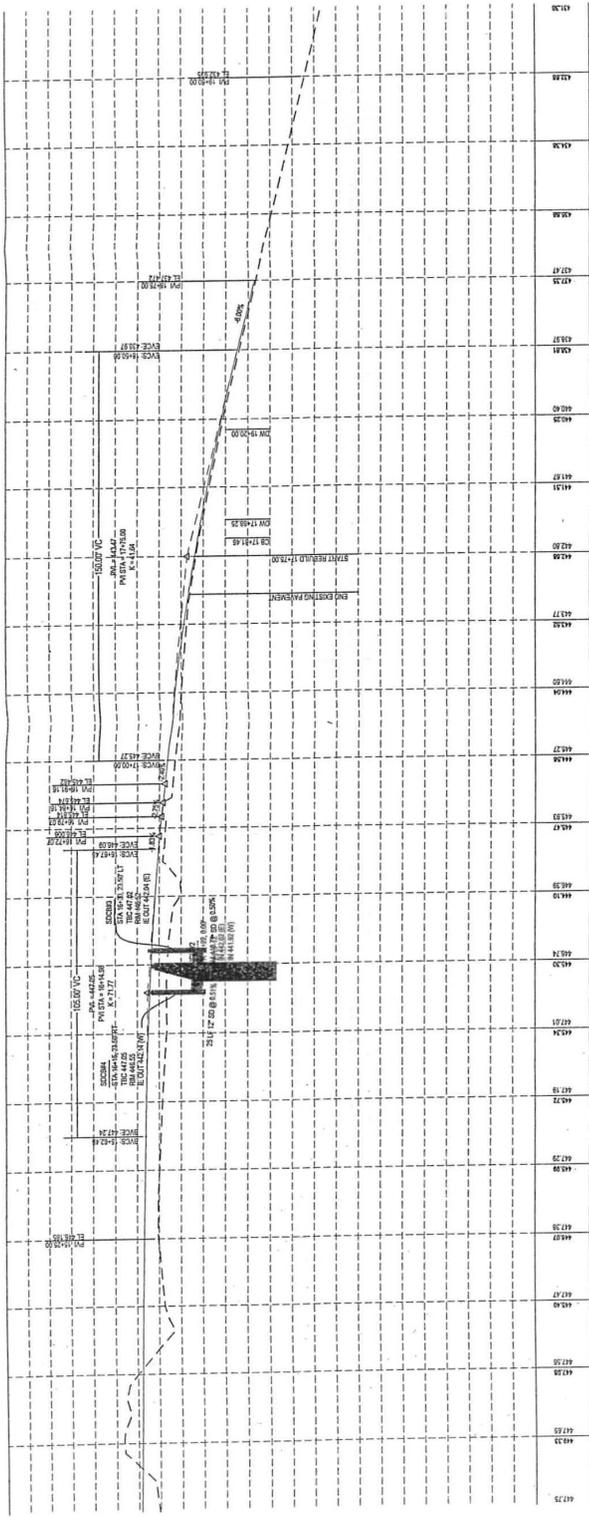


PRELIMINARY
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 CHANGE

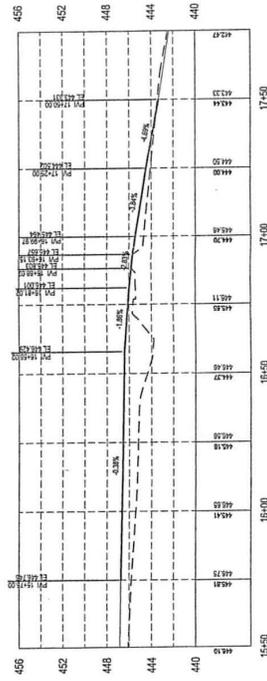
EXTENSIONS: APPR.

 DATE: 01-14-2013
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 CHECKED BY: CDE
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 SCALE: 1"=50'
 PROJECT NUMBER: CRCH00000001
 DRAWING FILE: 0000049.dwg
 SHEET NO. 4

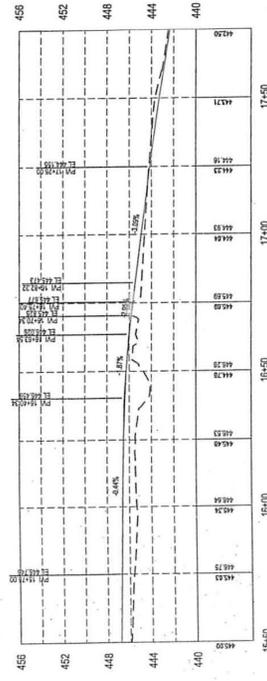
PV-(9)-CENTER PARKWAY



PV-(15)-FOG-RR-LEFT



PV-(17)-FOG-RR-RIGHT



CENTER PARKWAY PROFILES
 CENTER PARKWAY
 AT-GRADE CROSSING
 City of Richland
 Richland, Washington

DAVID EVANS
 ASSOCIATES INC.
 3700 Pacific Hwy, East, Suite 301
 Tacoma, Washington 98424
 Phone: 253.922.9780



PRELIMINARY
 CONTENT
 SUBJECT TO
 CHANGE

REVISIONS: AFDL
 PROJECT NUMBER: CRCH00000001
 DRAWING FILE: rpl\crch000001.dwg
 SHEET NO. 6
 SCALE: NOT TO SCALE
 DATE: 01-14-2013
 DESIGNER: KALE
 CHECKER: JES
 REVISION NUMBER

000051
 6
 SHEET 6 OF 6

Appendix to Center Parkway Extension Grade Separation Evaluation

In Support of a Petition to Construct a New Highway-Rail Grade Crossing

Prepared by Kevin M. Jeffers, PE of David Evans and Associates

March 25, 2013

Background

The cities of Richland and Kennewick propose to extend Center Parkway over the rail line owned by the Port of Benton. It is proposed to be a two lane urban arterial roadway with a center turn lane, two bike lanes and two sidewalks, running north/south and connecting the two cities. Land use in the urban area is primarily commercial, with residences southwest of the proposed crossing. The proposed speed of the roadway is 30 mph. The projected Annual Average Daily Traffic (AADT) is 7,000 in 2033.

The existing rail line is running east/west but is curving slightly at the proposed crossing location, resulting in a slight skew (22 degrees from normal). There are two tracks at the proposed crossing location; however the project proposes to remove the short siding track on the south side of the "main" track. The rail line is expected to host a maximum of up to six (6) freight trains per day at speeds up to 15 mph, based on the current level of service and the industry move to consolidate car-load service into blocks or unit trains for economy of scale. No passenger trains are operating or anticipated.

Why is a grade separation not warranted?

The Federal Highway Administration (FHWA) Grade Separation Guidelines state that a highway-rail grade crossing should be considered for grade separation whenever one or more of the following conditions in the table below exist.

The roadway is part of the designated Interstate System	No
The roadway is otherwise designed to have full controlled access	No
The posted roadway speed equals or exceeds 70 mph	No
AADT exceeds 100,000 in urban area or 50,000 in rural areas	No
Maximum authorized train speed exceeds 110 mph	No
An average of 75 or more passenger trains per day in urban area or 30 or more passenger trains per day in rural areas	No
Crossing exposure (the product of the number of trains per day and AADT) exceeds 1,000,000 in urban areas or 250,000 in rural areas	No
Passenger train crossing exposure (the product of the number of passenger trains per day and AADT) exceeds 800,000 in urban areas or 200,000 in rural areas	No
The expected accident frequency (EAF) for active devices with gates, as calculated by the USDOT Accident Prediction Formula including 5-year accident history, exceeds 0.5	No
Vehicle Delay exceeds 40 vehicle hours per day	No

As such, a grade separation is not warranted based on:

- Roadway characteristics
- Average Daily Vehicle Delay
- Crossing Exposure Value, or
- Accident Prediction

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To support this finding, the following data was gathered and calculations prepared.

Traffic Volumes

Traffic volumes for 2033 were based on the Center Parkway Extension and Railroad Crossing Traffic Study, dated March 2013 and prepared by Spencer Montgomery and Rick Door, PE, of J-U-B Engineers, Inc. These were predicted to be 7,000 average daily vehicles.

Vehicle Delay

In the previously cited traffic study, along with the number of vehicles per day using the crossing, the duration of a train event is derived to be just under 2 minutes. Based on the 7000 vehicles per day, the average vehicles per minute would be just under 5. At 5 vehicles per minute, a train event lasting 2 minutes, and up to 6 train-events per day, the number of hours of vehicle delay would be:

$$5 \text{ vehicles/minute} \times 2 \text{ minutes/train} \times 6 \text{ trains/day} \times 2 \text{ minutes of delay/train} / 60 \text{ minutes/hour} \\ = \underline{2 \text{ vehicle hours per day}}$$

This is less than the 40 vehicle hours per day threshold.

Crossing Exposure

The Crossing Exposure in 2033 is calculated as:

$$6 \text{ trains per day} \times 7,000 \text{ AADT} = 42,000, \text{ which is less than the } 1,000,000 \text{ threshold for urban areas}$$

Accident Prediction:

The methodology used to prepare an accident prediction model for the proposed crossing was developed using principles consistent with USDOT Accident Prediction Model (http://safety.fhwa.dot.gov/xings/com_roaduser/07010/sec03.htm). It should also be noted that no accident history for this proposed crossing is available.

The basic formula provides an initial hazard ranking based on a crossing's characteristics. The proposed crossing's characteristic will be as follows:

Warning Device	Crossing Gate
AADT (2033)	7,000
Trains per day	6
Main Tracks	1
Daytime through Trains	6
Roadway Surface	Paved
Maximum Train Speed	15
Highway Type	Urban Minor Arterial
Highway Lanes	2

Appendix to Center Parkway Extension Grade Separation Evaluation
March 25, 2013

The Basic formula is:

$$a = K \times EI \times MT \times DT \times HP \times MS \times HT \times HL,$$

where:

a = initial collision prediction, collisions per year at the crossing

K = formula constant

EI = factor for exposure index based on product of highway and train traffic

MT = factor for number of main tracks

DT = factor for number of through trains per day during daylight

HP = factor for highway paved

MS = factor for maximum timetable speed

HT = factor for highway type

HL = factor for number of highway lanes

Based on the proposed crossing characteristics and using Table 19 from *Railroad-Highway Grade Crossing Handbook - Revised Second Edition 2007*, the following factors to be used in the basic formula are:

$$K = 0.001088$$

$$HP = 1.0$$

$$EI = 46.53$$

$$MS = 1.0$$

$$MT = 3.21$$

$$HT = 1.0$$

$$DT = 1.0$$

$$HL = 1.11$$

The resulting factor "a" from the basic formula is 0.180.

Based on the Table 20 of *Railroad-Highway Grade Crossing Handbook - Revised Second Edition 2007*, and assuming no accidents have occurred, the resulting Final Accident Prediction is 0.145 accidents per year. This is derived by interpolating between the two "a" values in Table 20 of 0.10 and 0.20.

This result shows that the proposed crossing will be well below the FHWA expected accident frequency threshold of 0.5, where grade separation should be considered. Further, the result is also below the FHWA expected accident frequency threshold of 0.2, where a grade separation should be considered based on fully allocated life-cycle costs.

Based on the level of accidents predicted, it does not appear a grade separation is warranted from a public benefit perspective.

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CE-SP-03-002

January 24, 2003

Pete Rogalsky
City of Richland
PO Box 190
Richland, WA 99352

RE: Center Parkway/Gage Boulevard
SEPA – Mitigated Determination of Non-Significance #02-95

Dear Pete:

Enclosed is the MDNS for the referenced project for your review and approval. If you have any questions, please call me at (509) 585-4287.

Yours truly,

Steve Plummer
Project Engineer

Encl.

PUBLIC WORKS DEPARTMENT

000056

210 W. 6th Avenue • P.O. Box 6108 • Kennewick, WA 99336-0108
(509) 585-4249 • Fax (509) 585-4451



January 7, 2003

Jack Clark
Dept. of Public Works
PO Box 6108
Kennewick, WA 99336

Dear Mr. Clark,

Enclosed is a Mitigated Determination of Non-Significance #02-95 for the Center Parkway extension and Gage Boulevard widening. This Determination means no Environmental Impact Statement is required in order for the City to continue the processing of your application.

Please notice that several changes have been made to your Environmental Checklist. No additional conditions have been added. The City of Kennewick has determined that as mitigated, this proposal will not have a probable significant adverse impact on the environment. An Environmental Impact Statement (EIS) is not required under RCW 43.21C.030(2)(c). This decision was made after review of a completed Environmental Checklist, and will be available to the public on request.

If you should have any questions, please feel free to contact me.

Sincerely,

Rick D. White, Director
Community and Economic Development

RDW:drk

Enclosure

- c: Dept. of Ecology
- WA Dept. Fish & Wildlife - Paul LaRiviere
- WA Dept. Fish & Wildlife - Mark Teske, 201 N. Pearl, Ellensburg, WA 98926
- Yakama Nation, 815 Sanford Avenue, Richland WA 99352
- CTUIR - Carey Miller, PO Box 638, Pendleton, OR 97801
- Associate Planner
- File

000057

RECEIVED JAN 13 2003

CITY OF KENNEWICK
MITIGATED DETERMINATION OF NON-SIGNIFICANCE

Description of Proposal: Center Parkway Extension - Gage Boulevard Widening.

Proponent: City of Kennewick, Jack Clark, Public Works Department.

Location of proposal, including street address, if any: See attached map.

Lead Agency: CITY OF KENNEWICK

Mitigation Required for Potentially Significant Adverse Impacts: According to KMC 18.80.040(1), the City may impose any condition necessary to protect the health, safety, and welfare or otherwise bring a proposed development into compliance with the purpose and intent of this Title.

For this proposal, conditions include the mitigation from the required acquisition of three (3) existing businesses in a building at 8220 W. Gage Boulevard owned by Mail by the Mall. This building will be demolished for the Center Parkway extension pursuant to the options discussed and adopted by the Kennewick City Council on October 1, 2002. The existing business will be relocated at city expense in accordance with state and federal guidelines.

x This Mitigated DNS is issued under 197-11-340(2). The City will not act on this proposal for fifteen (15) days from the date below. Comments must be submitted by 1/23/03. After the review period has elapsed, all comments received will be evaluated and the DNS will be retained, modified, or withdrawn as required by SEPA regulations.

x Changes, modifications and/or additions to the checklist have been made on the attached Environmental Checklist Review.

x This MDNS is subject to the attached conditions.

Responsible Official: Rick D. White
Position/Title: Director, Community and Economic Development
Address: 210 West 6th Avenue, P.O. Box 6108, Kennewick, WA 99336
Phone: (509) 585-4278

Date 1/8/03 Signature R White

According to KMC 4.08.430, this determination may be appealed to:

Board of Zoning Adjustment
City of Kennewick
210 West 6th Avenue, P.O. Box 6108
Kennewick, WA 99336

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The time for appealing SEPA issues is thirty (30) days after notice (WAC 197-11-680(5)(a)). You should be prepared to make specific, written factual objections. Contact Rick White to read or request the procedures for SEPA appeals.

CITY OF KENNEWICK
ENVIRONMENTAL CHECKLIST REVIEW

E.D. File #: 02-95

Action: Center Parkway Extension - Gage Boulevard Widening.

Reviewed by: L. Patterson

Date: January 7, 2003

The City of Kennewick has reviewed the checklist and has made changes on it.

The City of Kennewick is adopting the Biological Assessment and Essential Fish Habitat Document prepared by Jack Clark, Environmental Engineer, in conjunction with MDNS #02-95.

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Center Parkway Extension – Gage Boulevard Widening

4. BACKGROUND

1. Name of proposed project, if applicable: Center Parkway Extension – Gage Boulevard Widening
2. Name of applicant: City of Kennewick
3. Address and phone number of applicant and contact person: Jack Clark, DPW Environmental Engineer, POBox 6108, Kennewick, WA 99336 (509) 585-4317.
4. Date checklist prepared: August 28, 2002
5. Agency requesting checklist: City Of Kennewick - Community and Economic Development Department (Planning Division) and a courtesy review sent to the City of Richland Community Development Dept.
6. Proposed timing or schedule (including phasing, if applicable): Design through 2002, acquire right of way, bid in September 2003, start construction in November 2003, and finish in summer of 2004.
7. Do you have any plans for future additions, expansion, or further activity related to or connected with this proposal? No If yes, explain
8. List any environmental information you know about that has been prepared, or will be prepared, directly related to this proposal. Biological Assessment for ESA listed species in area that will be submitted to Corps of Engineers, National Marine Fisheries Service (NMFS), US Fish and Wildlife Service (USFW), and Cultural Resources Survey of project area.
9. Do you know whether applications are pending for governmental approvals of other proposals directly affecting the property covered by your proposal? Yes If yes, explain. Following the SEPA determination governmental approval from Corps, WDFW, NMFS, USFW and Confederated Tribes of the Umatilla Reservation will have to occur for work to proceed.
10. List any government approvals or permits that will be needed for your proposal, if known. Corps of Engineers Nation Wide permit, Washington State Department of Fish and Wildlife (WDFW) Hydraulic Project Approval (HPA) and informal consultation with NMFS and USFWS.
11. Give a brief, complete description of your proposal, including the proposed uses and the size of the project and site. There are several questions later in this checklist that ask you to describe certain aspects of your proposal. You do not need to repeat those answers on this page. This is a joint project with the City of Richland. It proposes to widen Gage Blvd. from Leslie Road in Richland to Center Parkway in Kennewick with the addition of curb, gutter and sidewalk where none exists. Add a storm drain pipe from Steptoe east to Center Parkway and north to Tapteal Drive. And extend Center Parkway in Kennewick to Tapteal in Richland by creating a new road with sidewalk, curb and gutter.
12. Location of the proposal. Give sufficient information for a person to understand the precise location of your proposed project, including a street address, if any, and section, township, and range, if known. If a proposal would occur over a range of area, provide the range or boundaries of the site(s). Provide a legal description, site plan, vicinity map, and topographic map, if reasonably available. While you should submit any plans required by the agency, you are not required to duplicate maps or detailed plans submitted with any permit applications related to this checklist. The project area is from Leslie Road in

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Richland on Gage Boulevard to Center Parkway and Center Parkway extension to Tapteal Drive in Richland. A vicinity and site maps are attached to this document.

B. ENVIRONMENTAL ELEMENTS

1. Earth

a. General description of the site (circle one): Flat, **rolling**, hilly, steep slopes, mountainous, other,

b. What is the steepest slope on the site (approximate percent slope?) 5.4% on Center Parkway and 8% - 10% on Gage Blvd.

c. What general types of soils are found on the site (for example, clay, sand, gravel, peat, muck)? If you know the classification of agricultural soils, specify them and note any prime farmland. The soil classifications are varied, from Finley stony fine sandy loam (0-30% slopes), Kennewick silt loam (2-5% slopes), Scootenev silt loam with gravely subsoil (0-2% slopes) and Warden silt loam (0-8% slopes).

d. Are there surface indications or history of unstable soils in the immediate vicinity? No If so describe.

e. Describe the purpose, type and approximate quantities of any filling or grading proposed. The Center Parkway extension will be cleared, grubbed and graded. The surface area exposed to allow for material to be placed, which will be an urban arterial street. Material brought to the site will be from a local sand and gravel company. Material removed will be taken to permitted facility. Indicate source or fill. Immediate source of material unknown, contractor will provide material according to contract specifications.

f. Could erosion occur as a result of clearing, construction or use? Yes If so, generally describe? Soil erosion due to water and air is likely during construction.

g. About what percent of the site will be covered with impervious surfaces after project construction (for example, asphalt or buildings)? On Center Parkway there will be approximately 57,000 sq. ft. of new impervious surface. On Gage Boulevard there will be approximately 90,000 sq. ft. of new impervious surface.

h. Proposed measures to reduce or control erosion, or other impacts to the earth, if any: Water (domestic) to be applied for soil stabilization and dust control. Revegetation of disturbed soils with native varieties will be specified in the contract.

2. Air

a. What types of emissions to the air would result from the proposal (i.e., dust, automobile odors, industrial wood smoke) during construction and when the project is completed? The project area is in attainment for all EPA criteria pollutants. It is not expected to substantially change transportation demand in the region. Rather, it is intended solely to improve safety for the traveling public and is not expected to affect air quality. During project construction PM₁₀ emissions would be associated with demolition, land clearing, ground excavation, cut-and-fill operation and construction of the roadways. Construction emissions would be greatest during the earthwork phase because most emission would be associated with the movement of dirt on the site. Benton Clean Air Authority (BCAA) regulates particulate emission (typically in the form of fugitive dust) during construction activities. Incorporating mitigation measures into the

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construction specifications for the project will reduce construction impacts. If any, generally describe and give approximate quantities if known. The approximate quantities are not known.

- b. Are there any off-site sources of emissions or odor that may effect your proposal? None identified in the vicinity of this project. If so, generally describe.
- c. Proposed measures to reduce or control emissions or other impacts to air, if any: Dust control through water application to limit the amount of air borne particulants as described in the Benton County Clean Air Authority guidelines. Rev-vegetation of disturbed soils to control erosion.

3. Water

a. Surface.

1. Is there any surface water body on or in the immediate vicinity of the site (including year-round and seasonal streams, saltwater, lakes, ponds, and wetlands)? Yes If yes, describe type and provide names. Amon Creek If appropriate, state what stream or river it flows into. Amon Creek enters the Yakima River delta area approximately 6,000 from Gage Blvd
2. Will the project require any work over, in, or adjacent to (within 200 feet) the described waters? Yes If yes, please describe and attach available plans. The roadway will cross over Amon Creek. The WDFW considers the existing culvert to be compatible with existing fish passage criteria.
3. Estimate the amount of fill and dredge material that would be placed in or removed from surface water or wetlands and indicate the area of the site that would be affected. Presently there is no fill coming into the Gage Blvd portion of the project. Material removed will remain on site and out of the stream channel or removed during roadway construction to a permitted facility for reuse. Indicate the source of fill material. Fill and roadway material on the Center Parkway portion will be imported from a local sand and gravel facility.
4. Will the proposal require surface water withdrawals or diversions? None being proposed in this project. Give general description, purpose, and approximate quantities if known.
5. Does the proposal lie within a 100-year floodplain? No If so, note location on the site plan.
6. Does the proposal involve any discharges of waste materials to surface waters? No If so, describe the type of waste and anticipated volume of discharge?

b. Ground.

1. Will ground water be withdrawn, or will water be discharged to ground water? No Give general description, purpose, and approximate quantities if known.
2. Describe waste material that will be discharged into the ground from septic tanks or other sources, if any (for example: Domestic sewage; industrial, containing the following chemicals . . . ; agricultural; etc.) Describe the general size of the system, the number of such systems, the number of houses to be served (if applicable), or the number of animals or humans the system(s) are expected to serve. None

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c. Water Runoff (including storm water).

1. Describe the source of runoff (including storm water) and method of collection and disposal, if any (include quantities, if known). Stormwater runoff will be from impervious surfaces such as roofs and driving paths. Where will this water flow? To ground. Will this water flow into other waters? Only if weather event is in excess of 25-year event. If so, describe.
2. Could waste materials enter ground or surface waters? During construction, accidental spills of construction materials and fuels are always a possibility. However, using BMP's, prevention, and containment of accidental spills of waste material will reduce the risk of ground water contamination and transportation of materials from the project site. If so, generally describe.

d. Proposed measures to reduce or control surface, ground and runoff water impacts, if any: Contract administration and scheduling of work. The contractor to provide a spill containment and counter measure plan for construction activities that would affect ground water impacts. Disturbed areas and roadside slopes will receive erosion control measures to minimize erosion and replace vegetation cover. Vegetation will be reestablished in disturbed areas

4. Plants

- a. Check or circle the types of vegetation found on the site:
- deciduous tree:** alder, maple, aspen, other
 - evergreen tree: fir, cedar, pine, other
 - shrubs
 - grass**
 - pasture
 - crop or grain
 - wet soil plants;** cattail, buttercup, bulrush, skunk, cabbage, other
 - water plants: water lily, eelgrass, milfoil, other
 - other types of vegetation

b. What kind and amount of vegetation will be removed or altered?
The dominant plant associations to be removed are mainly grasses, sagebrush, and weedy species. Post construction erosion control techniques such as revegetation will take place in areas that have been disturbed.

c. List threatened or endangered species known to be on or near the site. Status listings received for Benton County. No reported instances or sightings of T&E plant species have been found in or near the project site. After numerous site visits and some vegetation surveys, the determination is that the area has been significantly altered from pre-European settlement conditions and any habitat that may have been suitable for rare plants has been eliminated.

Status:	Species listed and Agency listing:
Endangered	Upper Columbia River Chinook Spring Run – NMFS
Threatened	Middle Columbia River Steelhead – NMFS
Endangered	Upper Columbia River Steelhead – NMFS

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Threatened	Bald Eagle – USFWS
Threatened	Ute Ladies' tresses – USFWS
Threatened	Bull Trout – USFWS
Candidate	Umtanum wild buckwheat – USFWS

d. Proposed landscaping, use of native plants, or other measures to preserve or enhance vegetation on the site, if any: Native plants, grasses and trees in areas disturbed that are not covered with impervious surface.

5. Animals

a. Circle any birds and animals, which have been observed on or near the site or are known to be on or near the site:

birds: **hawk**, heron, eagle, **songbirds**, other

mammals: deer, **rodents**, bear, elk, **beaver**, other

fish: bass, **salmon**, trout, herring, shellfish, other

b. List any threatened or endangered species known to be on or near the site. Various animals, birds, fish etc. are located on or near the vicinity of the project site. Threatened and Endangered Species list obtained from federal and state resources indicate the following species may be affected by the proposed project:

Threatened: Mid-Columbia River Steelhead, Bald Eagle, and Bull Trout.

Endangered: Upper Columbia River Spring-run Chinook Salmon and Upper Columbia River Steelhead.

Species of Concern: Coho Salmon (State)

c. Is the site part of a migration route? Yes Is so, explain. The Pacific Coast Flyway (Columbia Basin) for waterfowl. The Amon Creek has been reported by the WDFW to contain Coho Salmon. They believe the fish actually spawn in the upper reach associated with the colder springs coming from the hillsides to the south of Meadow Springs Golf Course.

d. Proposed measures to preserve or enhance wildlife, if any: Vegetation enhancements to Amon Creek in the vicinity of the crossing will help existing species survive. It is anticipated that further work may be necessary in the down stream area of the lower stretch of the Amon to serve as mitigation.

6. Energy and Natural Resources

a. What kinds of energy (electric, natural gas, oil, wood stove, solar) will be used to meet the completed project's energy needs? Electric, gas, and diesel. Describe whether it will be used for heating, manufacturing, etc. Construction only

b. Would your project affect the potential use of solar energy by adjacent properties? No If so, generally describe.

c. What kinds of energy conservation features are included in the plans of this proposal? The proposal by its very nature reduces the average trip distance to and from the Tapteal / Center Parkway area. The extension of Center Parkway would eliminate over 610,00 miles of travel per

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year. The savings are in time, cleaner air, less noise and fuel. List other proposed measures to reduce or control energy impacts, if any: Light conservation

7. Environmental Health

a. Are there any environmental health hazards, including exposure to toxic chemicals, risk of fire and explosion, spill or hazardous waste that could occur as a result of this proposal? Yes Is so, describe. There are environmental health hazards associated with construction projects of this size include fires, explosion from fuels and spills of fuels or chemicals.

1. Describe special emergency services that might be required. Emergency Medical Services for employees injured on the job site.

2. Proposed measures to reduce or control environmental health hazards, if any: Normal safety practices required by federal, state, and local regulations will apply to all construction work. The contractor must submit to the City Public Works Department a Spill Containment and counter Measure Plan that is acceptable before work will be allowed to start. This plan will address procedures, equipment, and materials used in the event of a spill.

b. Noise.

1. What types of noise exist in the area, which may affect your project (for example: traffic, equipment, operation, other)? None identified

2. What types and levels of noise would be created by or associated with the project on short-term or a long-term basis (for example: traffic, construction, operation, other)? Indicate what hour's noise would come from the site. Traffic from trucks delivering construction equipment and material. Noise from construction equipment. The hours are 7:00am to 5:00pm .

3. Proposed measures to reduce or control noise impacts, if any: The hours of work will be between 7:00am to 5:00pm, Monday to Friday, and the project engineer will follow the City of Kennewick Standard Specifications and Details for construction work.

8. Land and Shoreline Use

a. What is the current use of the site and adjacent properties? Commercial business and apartments on the Gage Blvd. portion. Commercial businesses and modular home park on the Center Parkway portion.

b. Has the site been used for agriculture? No If so, describe.

c. Describe any structures on the site. Fences, commercial business buildings, railroad tracks, poles for lighting, power transmission or traffic control.

d. Will any structures be demolished? Yes If so, what? On the Center Parkway extension, Mail By The Mall will be demolished and the PUD fence relocated. On Gage Blvd. some above ground poles for lighting or power will be removed or replaced or relocated.

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e. What is the current zoning classification of the site? On Gage Blvd. through the City of Richland the zoning is Central Business (CB), Planned Unit Development (PUD), Commercial Limited Business (C-LB), Medium Density Single Family Residential (R-1M), Multiple Family Residential (R-3), and Agricultural (AG). On the City of Kennewick portion of the project on Gage Blvd. the zoning is Commercial General (CG) and Residential High (RH), Commercial Retail (CR), and Commercial Office (CO). On Center Parkway through the City of Richland the zoning is General Business (C-3). On Center Parkway through the City of Kennewick the zoning is Commercial Retail (CR), Commercial General (CG) and Public Facility.

f. What is the current Comprehensive Plan designation of the site? In the City of Richland on Gage Blvd. the Comp Plan designation is Commercial, High Density Residential and Low Density Residential, while Kennewick's Plan designates commercial and residential. In the City of Kennewick on Gage Blvd. the current designation is Commercial and High Density Residential. In the City of Richland along Center Parkway the designation is Commercial, which is the same as the City of Kennewick's Comp Plan.

g. If applicable, what is the current Shoreline Master Program designation of the site? Compliance

h. Has any part of the site been classified as an "environmentally sensitive" area? Yes If so, specify. The Amon Creek has a critical area designation on Richland's Geological Hazard Map. The creek area between Gage Blvd. and the railroad causeway is a Class II wetland with only the eastern boundary delineated to date.

i. Approximately how many people would reside or work in the completed project? Not applicable

j. Approximately how many people would reside or work in the completed area? Not applicable

k. Proposed measures to avoid or reduce displacement impacts, if any: None

l. Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any: Already compatible with existing land uses.

9. Housing

a. Approximately how many units would be provided, if any? Does not apply Indicate whether high, middle or low-income housing.

b. Approximately how many units, if any, would be eliminated? Mail By The Mall Indicate whether high, middle, or low-income housing. Structure houses three businesses

c. Proposed measures to reduce or control housing impacts, if any: Relocation of businesses

10. Aesthetics

a. What is the tallest height of any proposed structure(s), not including antennas; Street light poles what is the principal exterior building material(s) proposed? None proposed

b. What views in the immediate vicinity would be altered or obstructed? None

c. Proposed measures to reduce or control aesthetic impacts, if any: None

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1. Light and Glare

- a. What type of light or glare will the proposal produce? Street lighting What time of day would it mainly occur? Night
- b. Could light or glare from the finished project be a safety hazard or interfere with views? Not very likely
- c. What existing off-site sources of light or glare may affect your proposal? None
- d. Proposed measures to reduce or control light and glare impacts, if any? Low glare downward illuminating street lights

12. Recreation

- a. What designated and informal recreational opportunities are in the immediate vicinity? There are walking, jogging, bike riding and bird watching activities to pursue in and around the roadway. To the South of Gage Blvd. lies the Meadow Springs Golf Course.
- b. Would the proposed project displace any existing recreational use? No If so, describe.
- c. Proposed measures to reduce or control impacts on recreation, including recreation opportunities to be provided by the project or applicant, if any: None identified

13. Historic and Cultural Preservation

- a. Are there any places or objects listed on, or proposed for, national, state or local preservation registers known to be on or next to the site? No If so, generally describe.
- b. Generally describe any landmarks or evidence of historic, archaeological, scientific, or cultural importance known to be on or next to the site. No
- c. Proposed measures to reduce or control impacts, if any: A preliminary cultural survey will be completed by the Confederated Tribes of the Umatilla Nation by visiting the site and inspecting the land being disturbed. If any cultural resources are discovered during construction, work will stop and appropriate parties notified. A cultural resource inspector may be required during land disturbance activities.

14. Transportation

- a. Identify public streets and highways serving the site, and describe proposed access to the existing street system. See site and area maps for major arterial streets Show on site plans, if any.
- b. Is site currently served by public transit? Yes If not, what is the approximate distance to the nearest transit stop?
- c. How many parking spaces would the completed project have? None How many would the project eliminate?

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ESA LISTED SALMONIDS CHECKLIST

The Listed Salmonids Checklist is provided in order that the City can identify a project's potential impacts (if any) on salmonids that have been listed as "threatened" or "endangered" under the Federal Endangered Species Act (ESA). A salmonid is any fish species that spends part of its life cycle in the ocean and returns to fresh water. Potential project impacts that may result in a "taking" of listed salmonids must be avoided, or mitigated to insignificant levels. Generally, under ESA, a "taking" is broadly defined as any action that causes the death of, or harm to, the listed species. Such actions include those that affect the environmental in ways that interfere with or reduce the level of reproduction of the species.

If ESA listed species are present or ever were present in the watershed where your project will be located, your project has the potential for affecting them, and you need to comply with the ESA. The questions in this section will help determine if the ESA listing will impact your project. The Fish Program Manager at the appropriate Department of Fish and Wildlife (DFW) regional office can provide additional information. Please contact the Dept. of Fish and Wildlife at 1701 S. 24th, Yakima WA 98902-5720, Phone No. 509-575-2740.

1. Are ESA listed salmonids currently present in the watershed in which your project will be? YES xx NO

Please Describe.

Upper Columbia River Spring – Run Chinook (Endangered)

Upper Columbia River Steelhead (Endangered)

Middle Columbia River Steelhead (Threatened)

2. Has there ever been an ESA listed salmonid stock present in this watershed?

YES xx NO

Please Describe.

All migrate through this section of the Columbia River at various times during the year. WDFW has records of salmonid fish in Amon Creek.

NOTE: Kennewick is located in the upper Mid-Columbia watershed. Salmonids are present in the watershed - questions no. 1 and no. 2 already answered "yes". Questions A-1 and A-2 are also answered.

PROJECT SPECIFIC: The questions in this section are specific to the project and vicinity.

A1. Name of watershed Upper Mid-Columbia (Lower Yakima River)

A2. Name of nearest waterbody Amon Creek

A3. What is the distance from this project to the nearest body of water? Gage Blvd. crosses over Amon Creek

Often a buffer between the project and a stream can reduce the chance of a negative impact to fish.

A4. What is the current land use between the project and the potentially affected water body (parking lots, farmland, etc.) Open space and public arterial street.

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✓ A5. What percentage of the project will be impervious surface (including pavement & roof area)? 90%

FISH MIGRATION: The following questions will help determine if this project could interfere with migration of adult and juvenile fish. Both increases and decreases in water flows can affect fish migration.

✓ B1. Does the project require the withdrawal of

a. Surface water? Yes _____ No X
Amount _____
Name of surface water body _____

b. Ground water? Yes _____ No X
Amount _____
From Where _____
Depth of well _____

✓ B2. Will any water be rerouted? YES _____ NO X
If yes, will this require a channel change?

✓ B3. Will there be retention ponds? YES X NO _____
If yes, will this be an infiltration pond or a surface discharge to either a municipal storm water system or a surface water body? Discharge to surface from retention pond (25 year weather event) through a constructed wetland (2).

If to a surface water discharge, please give the name of the waterbody. Amon Creek and then to the Yakima River Delta.

✓ B4. Will this project require the building of new roads? Yes Increased road mileage may affect the timing of water reaching a stream and may, thus, impact fish habitat.

✓ B5. Are culverts proposed as part of this project? No

✓ B6. Are stormwater drywells proposed as part of this project?
Yes X No _____

✓ B7. Will topography changes affect the duration/direction of runoff flows?
Yes _____ No X

If yes describe the changes.

✓ B8. Will the project involve any reduction of a floodway or floodplain by filling or other partial blockage of flows? Yes _____ No X

If yes, how will the loss of flood storage be mitigated by your project?

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WATER QUALITY: The following questions will help determine if this project could adversely impact water quality. Degraded water quality can affect listed species. Water quality can be made worse by runoff from impervious surfaces, altering water temperature, discharging contaminants, etc.

C1. Will your project either reduce or increase shade along or over a waterbody?
YES ___ NO X Removal of shading vegetation or the building of structures such as docks or floats often result in a change in shade.

C2. Will the project increase nutrient loading or have the potential to increase nutrient loading or contaminants (fertilizers, other waste discharges, or runoff) to the waterbody?
YES ___ NO X

C3. Will turbidity (dissolved or partially dissolved sediment load) be increased because of construction of the project or during operation of the project? In-water or near water work will often increase turbidity.
YES ___ NO X

C4. Will your project require long term maintenance, i.e., bridge cleaning, highway salting, chemical sprays for vegetation management, clearing of parking lots?
YES ___ NO X

Please Describe.

Vegetation: The following questions are designed to determine if the project will affect riparian vegetation, which can impact listed species.

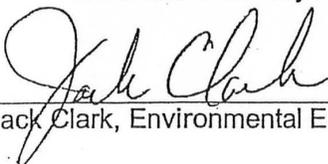
D1. Will the project involve the removal of any vegetation from the stream banks?
YES ___ NO X

If yes, please describe the existing conditions and the amount and type of vegetation to be removed.

D2. If any vegetation is removed, do you plan to re-plant? YES X NO ___
If yes, what types of plants will you use? Native grasses and trees

E. SIGNATURE

The above answers are true and complete to the best of my knowledge. I understand the City is relying on them to make its decision.



Jack Clark, Environmental Engineer – DPW

August 28, 2002

Date

*This proposal
includes
new roads
& improvements
to existing roadways.*

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Will the proposal require any new roads or streets, or improvements to existing roads or streets, not including driveways? No If so, generally describe (indicate whether public or private).

Will the project use (or occur in the immediate vicinity of) water, rail, or air transportation? Yes
If so, generally describe. Center Parkway is extended to Tapteal and crosses two rail lines. One is used as a siding and the other goes to the Hanford area.

f. How many vehicular trips per day would be generated by the completed project? On the new extension of Center Parkway traffic engineering estimates are for 2,200 vehicular trips a day. If known, indicate when peak volumes would occur. Peak times of usage would be morning traffic between the hours of 7-9 a.m. and evening traffic between the hours of 4-6 p.m.

g. Proposed measures to reduce or control transportation impacts, if any: Work hours for construction will be between the hours of 7:00am and 5:00pm during the weekdays of Monday to Friday.

15. Public Services

a. Would the project result in an increased need for public services (for example: fire protection, police protection, health care, schools, other)? No If so, generally describe.

b. Proposed measures to reduce or control direct impacts on public services, if any. None identified.

16. Utilities

a. Circle utilities currently available at the site: **electricity**, natural gas, **water**, **refuse service**, **telephone**, **sanitary sewer**, septic system, other _____.

b. Describe the utilities that are proposed for the project, the utility providing the service, and the general construction activities on the site or in the immediate vicinity, which might be needed. Existing services are all that are needed.

C. SIGNATURE

The above answers are true and complete to the best of my knowledge. I understand that the City is relying on them to make its decisions.

Signature 

Date Submitted: August 28, 2002

Center Parkway Extension – Gage Boulevard Widening

D. SUPPLEMENTAL SHEET FOR NONPROJECT ACTIONS

Because these questions are very general, it may be helpful to read them in conjunction with the list of the elements of the environment. When answering these questions, be aware of the extent the proposal, or the types of activities likely to result from the proposal, would affect the item at a greater intensity or at a faster rate than if the proposal were not implemented. Respond briefly and in general terms.

1. How would the proposal be likely to increase discharge to water; emissions to air; production, storage, or release of toxic or hazardous substances; or production of noise? Not very likely to increase any of the above.

Proposed measures to avoid or reduce such increases are: By its very nature the project proposes to decrease an estimated 610,000 miles of travel per year in twenty years.

2. How would the proposal be likely to affect plants, animals, fish, or marine life? The proposal would not likely affect plants, animal, fish, or marine life. Some degraded step-shrub vegetation will be removed and replaced by impervious surface. Affects are considered inconsequential.

Proposed measures to protect or conserve plants, animals, fish, or marine life are: Disturbed land will be revegetated with native species, erosion control plans will be in place before contractor can start work. Any in water work in Amon creek will be timed to minimally impact fish species and habitat.

3. How would the proposal be likely to deplete energy or natural resources? Not very likely to deplete either.

Proposed measures to protect or conserve energy and natural resources are: By building the project, a savings of 30,500 gallons of fuel would be saved each year. Building the project, means reduced traffic volumes on Columbia Center Boulevard.

4. How would the proposal be likely to use or affect environmentally sensitive areas or areas designated (or eligible or under study) for governmental protection; such as parks, wilderness, wild and scenic rivers, threatened or endangered species habitat, historic or cultural sites, wetlands, floodplains or prime farmlands? The proposal does not use or affect environmentally sensitive areas.

Proposed measures to protect such resources or to avoid or reduce impacts are: Project timing, insuring adequate resources are present during construction and attention to obtaining adequate permits.

5. How would the proposal be likely to affect land and shoreline use, including whether it would allow or encourage land or shoreline uses incompatible with existing plans? The proposal is compatible with existing land uses and plans.

Proposed measures to avoid or reduce shoreline and land use impacts are: None

6. How would the proposal be likely to increase demands on transportation or public services and utilities? The proposal would not likely increase demands on transportation or public services and utilities.

Proposed measures to reduce or respond to such demand(s) are: Compatible with existing services and transportation plans.

7. Identify, if possible, whether the proposal may conflict with local, state, or federal laws or requirements for the protection of the environment. None, identified at this time.

000072



October 11, 2002

To Interested Parties

Subject: Center Parkway Extension and Gage Boulevard Widening Project

This is a joint project with the City of Richland. As lead agency, the City of Kennewick Department of Public Works is proposing to extend Center Parkway from Gage Boulevard to Tapteal Drive in the City of Richland. The project will also widen Gage Boulevard from Center Parkway to Leslie Boulevard in Richland. Additional information on property acquisition required for this traffic enhancement project as part of a SEPA checklist is available.

The purpose of this notification is to provide an opportunity for comments on any additional information that may affect the environmental determination for this project. The checklist containing the additional information is best summarized as follows:

- Extending Center Parkway from Gage Boulevard to Tapteal Drive in the City of Richland
- Widening Gage Boulevard from Center Parkway to Leslie Boulevard in the City of Richland
- This is a joint project with the Cities' of Richland and Kennewick.
- The City of Kennewick is the lead agency on this project
- Right of way is being purchased for this project

The SEPA Checklist and related documents are available at City Hall for review. To review these materials please contact the City of Kennewick Project Engineer, Steve Plummer at 585-4287. To provide written comments for consideration during this environmental review of the checklist, please provide those to:

SEPA Responsible Official
Rick White
PO Box 6108
Kennewick WA 99336
rwhite@ci.kennewick.wa.us

This notification is being published in the Tri City Herald on October 12, 2002. It is expected that a Threshold Determination will be issued after 30 days of this publication date. Therefore any comments must be submitted by November 12, 2002.

PUBLIC WORKS DEPARTMENT

210 W. 6th Avenue • P.O. Box 6108 • Kennewick, WA 99336-0108
(509) 585-4249 • Fax (509) 585-4451

000073

City of Kennewick

SEPA NOTIFICATION

The Community Economic and Development Department has received a SEPA Checklist for the Center Parkway Extension and Gage Boulevard Widening on August 28, 2002. The checklist is complete and the lead official is seeking comments on this project. Thirty (30) days from the publication of this notice in the Tri City Herald the lead official will issue an environmental threshold determination for this project.

The purpose of this notification is to provide an opportunity for comments on any additional information that may affect the environmental determination of this project. The checklist containing the additional information is best summarized as follows:

- Extending Center Parkway from Gage Boulevard to Tapteal Drive into the City of Richland
- Widening Gage Boulevard from Center Parkway to Leslie Boulevard into the City of Richland
- This is a joint project with the Cities' of Richland and Kennewick
- The City of Kennewick is the lead agency on this project
- Right of way is being purchased for this project

The revised SEPA Checklist and related documents are available at City Hall for review. To review these materials please contact the City of Kennewick Project Engineer, Steve Plummer at 585-4287. To provide written comments for consideration during this environmental review of the checklist, please provide those to:

SEPA Responsible Official
Rick White
PO Box 6108
Kennewick WA 99336
rwhite@ci.kennewick.wa.us

This notification is being published in the Tri City Herald on **October 12, 2002**. It is expected that a Threshold Determination will be issued after 30 days of this publication date. Therefore any comments must be submitted by **November 12, 2002**.

000074

KADLEC MEDICAL CENTER,
888 SWIFT BLVD
RICHLAND, WA 99352

KADLEC MEDICAL CENTER,
888 SWIFT BLVD
RICHLAND, WA 99352

COLUMBIA COMMUNITY
CHURCH,
150 GAGE BLVD
RICHLAND, WA 99352

CITY OF RICHLAND,
P O BOX 190
RICHLAND, WA 99352

JOHN WILLIAM MEYER
TRUSTEE
1976 GREENVIEW
RICHLAND, WA 99352

Department of Ecology
15 W. Yakima Ave. Suite 200
Yakima, WA 98902

JOHN MEYER,
1976 GREENVIEW DR
RICHLAND, WA 99352

CRAIG D & MARILEE
NEERKES
P O BOX 6980
KENNEWICK, WA 99336

PATRICK H & VIVIAN
LEDVALSON
812 GAGE BLVD
RICHLAND, WA 99352

GENERAL TELEPHONE CO OF
THE NW,
BOX 1003
EVERETT, WA 98206

CITY OF RICHLAND,
P O BOX 190
RICHLAND, WA 99352

RICHLAND ASSISTED L L C,
3131 ELLIOTT AVENUE
SEATTLE, WA 981210000

ALBERTSON'S INC,
250 PARKCENTER BLVD #20
BOISE, ID 83726

GORDON C HETTERSCHIEDT
303 GAGE BLVD APT #311
RICHLAND, WA 99352

DION L DIETRICH
1602 MORGAN RD
SUNNYSIDE, WA 98944

KIV LLC
2625 THOROUGHbred WAY
RICHLAND, WA 99352

BJL PROPERTIES L L C,
9116 E SPRAGUE UNIT 270
SPOKANE, WA 99206

ORCHARD HILL COMM DEV
PARTNSHP,
601 WILLIAMS BLVD
RICHLAND, WA 993523258

CAR WASH INVESTMENTS,
169 LAURELWOOD CT
RICHLAND, WA 993520000

D MARK & EILEEN FREEMAN
98504 E CLOVER RD
KENNEWICK, WA 99337

GAGE PROPERTY
DEVELOPMENT LLCA,
8551 GAGE BLVD SUITE A
KENNEWICK, WA 99336

ORCHARD HILLS MEDICAL
BUILDING LLC
8551 W GAGE BLVD #A
KENNEWICK, WA 99336

FRANK H & JANET NFALLERT
305 PEACH AVENUE
SUNNYSIDE, WA 989440000

JOHN F TORTORELLI
3521 S FOX
SPOKANE, WA 99206

PAUL TOMA
16425 WOOD VALLEY TRAIL
JAMUL, CA 91935

DAVID C. MOBLEY
1930 MINT LP
RICHLAND, WA 99352

OSCAR RODRIGUEZ
1955 MINT LP
RICHLAND, WA 99352

P TY COURSON
1955 MINT LP
RICHLAND, WA 99352

STEVEN HUTCHISON
1940 MINT LP
RICHLAND, WA 99352

MEADOWS NORTH
ASSOCIATION,
P O BOX 694
RICHLAND, WA 993520000

000075

MEADOWS NORTH
ASSOCIATION,
P O BOX 6994
RICHLAND, WA 99352

ROBERT HOHASHI, ET AL
P O BOX 96
RICHLAND, WA 99352

ROBERT HOHASHI, ET AL
1177 JADWIN
RICHLAND, WA 99352

ROBERT E-PATRICIA
RFUHRMAN
1954 SHERIDAN PL
RICHLAND, WA 99352

JAMES TILLMAN &
PATTIELILLY
1948 SHERIDAN PL
RICHLAND, WA 99352

JOHN RAMMERMAN
1942 SHERIDAN PL
RICHLAND, WA 99352

MICHAEL F & CHERYL MEYER
1936 SHERIDAN PLACE
RICHLAND, WA 99352

BERNIE J & JANET O NEILL
1930 SHERIDAN PLACE
RICHLAND, WA 99352

JOHN F & BETTY AMARRON
TRUSTEES
1924 SHERIDAN PLACE
RICHLAND, WA 99352

HARENDRA P &
USHASHRIVASTAVA
183 EDGEWOOD
RICHLAND, WA 99352

KENNEWICK IRRIGATION
DISTRICT,
214 W 1ST AVENUE
KENNEWICK, WA 99352

Washington State Department of Fish and
Wildlife
C/O Paul LaRiviere
2620 North Commercial Ave.
Pasco, WA 99301

GREGORY & MADELINE
BENNETT
297 GAGE BLVD
RICHLAND, WA 99352

ANGELINA THORPE
321-B GAGE BLVD
RICHLAND, WA 99352

DALE V & ELIZABETH WHITE
323-A GAGE BLVD
RICHLAND, WA 99352

LOYD PETTY
323 B GAGE BLVD
RICHLAND, WA 99352

GARY W & BETSY CSMITH
289 GAGE BLVD
RICHLAND, WA 99352-968

WILLIAM R-WALDEANA KING
291 GAGE BLVD
RICHLAND, WA 99352

GLORIA SHERFEY
285 GAGE BLVD
RICHLAND, WA 99352

GREGORY P & BECKY
TARMATROUT
345 BLALOCK CT
RICHLAND, WA 99352

MARK R STRANKMAN
281 GAGE BLVD
RICHLAND, WA 99352

MARTHA A NIPPER
329-B GAGE BLVD
RICHLAND, WA 99352

FRED A & DIANA L RUCK
227 GAGE BLVD
RICHLAND, WA 99352

MICHAEL BRUCE & DOROTHY
HALLERKOVANEN TRUSTEES
7306 STEILACOOM BLVD SW
LAKEWOOD, WA 98499

WILLIAM R & MARION
AWOMBACHER
273 GAGE BLVD
RICHLAND, WA 99352

JAMES V & SYDAWNA RHOKE
275 GAGE BLVD
RICHLAND, WA 99352

TIMOTHY MCKAY
269 GAGE BLVD
RICHLAND, WA 99352

VIRGINIA MORCUENDE
333 GAGE BLVD UNIT B
RICHLAND, WA 99352

ALLISON H DEGOES
337-A GAGE BLVD
RICHLAND, WA 99352

VIRGINIA G PITTS
337-B GAGE BOULEVARD
RICHLAND, WA 99352

000076

LARRYTRICKEY
303 GAGE BLVD #217
RICHLAND, WA 99352

MANOLO E & LILIA JUGUILON
2021 HOXIE AVENUE
RICHLAND, WA 99352

ANTHONY RAY VIOLA
33525 7TH PL SW
FEDERAL WAY, WA 98032

ROBERT R & WINSOME KING
11 S JURUPA ST
KENNEWICK, WA 99337

FRANK & ANADEAN BLONDIN
1134 N TANGLEWOOD LN
LIBERTY LAKE, WA 99019

TIM M & PATRICIA LROLOFF
11403 S 952 PRSE
KENNEWICK, WA 99337

MICHAEL R CONLEY
303 GAGE BLVD UNIT 317
RICHLAND, WA 99352

TODD SCHUMACHER
303 GAGE BLVD
RICHLAND, WA 99352

Resident
PO Box 3167
Portland, OR

TRACIE MILLER
303 GAGE BLVD APT 320
RICHLAND, WA 99352

LISA KOSKI
2257 GRANITE DR
WALLA WALLA, WA 99362

Stephen Henager
16202 S. Griffin Rd.
Prosser, WA 99350

Resident
16301 NE 8th St.
St. 102
Bellevue, WA

NATALIE SHAFFER
303 GAGE BLVD UNIT 124
RICHLAND, WA 99352

Gage Park Mini Storage
8500 gage Blvd.
Suite A
Kennewick, WA 99337

Bruce & Joyce Fleming
359 Quailwood Place
Richland, WA 99352

Resident
7655 Market Street
Youngstown, OH

PATRICK E & JULIE
PLAMBERT
303 GAGE BLVD UNIT 224
RICHLAND, WA 99352

ON THE GREEN
CONDOMINIUM ASSOC,
303 GAGE BLVD APT#225
RICHLAND, WA 99352

DAVID L & ENA MKNUTSON
303 GAGE BLVD APT 216
RICHLAND, WA 99352

JOHN & MARY ANN NIELSEN
303 GAGE BLVD #323
RICHLAND, WA 99352

Patrick & Dolores McCoy
402 Anthony Dr.
Richland, WA 99352

Jack White
8911 W. Grandridge Blvd.
St. C
Kennewick, WA 99336

MASON L GARRISON
303 GAGE BLVD #326
RICHLAND, WA 99352

DALE F & JUDY M DANIELS,
ET AL
3911 W 36TH AVE
KENNEWICK, WA 99337

MARLENE HARRIS TRUSTEE
303 GAGE BLVD UNIT 128
RICHLAND, WA 99352

DELORES ANDRIE
303 GAGE BLVD UNIT 129
RICHLAND, WA 99352

Resident
PO Box 190
Richland, WA 99352

SHELLY R CALLAWAY
303 GAGE BLVD #227
RICHLAND, WA 99352

ARNOLD R & CAROL CLOBES
2454 PYRAMID
LIVERMORE, CA 94550

000077

ARTHUR & SHARON MEYERS
261 GAGE BLVD
RICHLAND, WA 99352

DAVID HNYMAN
339 B GAGE BLVD
RICHLAND, WA 99352

ANN JACKSON
303 GAGE BLVD APT 101
RICHLAND, WA 99352

LADD CALLISON
303 GAGE BLVD APT 102
RICHLAND, WA 99352

PEGGY HAGGARD, ET AL
94805 E GRANADA COURT
KENNEWICK, WA 99336

BONNIE LARMATIS
1310 HAINS
RICHLAND, WA 99352

MAURICE & KATHY BALCOM
1331 PHEND ROAD
PASCO, WA 99301

TERRI FRAZIER
303 GAGE BLVD UNIT 202
RICHLAND, WA 99352

MARY D FLEISCHMANN
303 GAGE BOULEVARD #203
RICHLAND, WA 99352

VERNA GAYLE KRAN
303 GAGE BLVD APT #204
RICHLAND, WA 99352

CHRISTINE KOEPP
12384 SAINT HEDWIG RD
SAINT HEDWIG, TX 781529706

CAROL M WELCH
303 GAGE BLVD UNIT 302
RICHLAND, WA 99352

KARI JUDY
303 W GAGE BLVD
RICHLAND, WA 99352

LAWRENCE J HIPPLER
303 GAGE BLVD APT #304
RICHLAND, WA 99352

ROGER LEHMAN
303 GAGE BLVD UNIT 105
RICHLAND, WA 99352

BARBARA I PEARSON
303 GAGE BLVD #106
RICHLAND, WA 99352

BILLIE A MASTERTSON
303 GAGE BLVD APT 107
RICHLAND, WA 99352

CARL & SHIRLEY MARUSHIA
303 GAGE BLVD #108
RICHLAND, WA 99352

DAVID L & ENA M KNUTSON
303 GAGE BLVD APT 216
RICHLAND, WA 99352

JERALD & SANDRA LUKINS
303 GAGE BLVD UNIT 110
RICHLAND, WA 99352

RICHARD L & JUDY HAMES
303 GAGE BLVD #309
RICHLAND, WA 99352

KEVIN & ELIZABETH HIRSCH
1027 COUNTRY CT
RICHLAND, WA 99352

BETTY CERRILLO
303 GAGE BLVD #206
RICHLAND, WA 99352

ARNOLD R & CAROL CLOBES
2454 PYRAMID
LIVERMORE, CA 94550

BRUCE A & JEAN M TURLEY
34 W 23RD PLACE
KENNEWICK, WA 993370000

DAVID E & SUSAN MEAKIN
4807 W 12TH
KENNEWICK, WA 99337

DAVID E & SUSAN MEAKIN
4807 W 12TH
KENNEWICK, WA 99337

Barbara Nation
PO Box 151
Oppenish, WA 98948

JOANN LLOYD
303 GAGE BLVD #306
RICHLAND, WA 99352

JOYCE BYRD, TRUSTEE
303 GAGE BLVD UNIT 307
RICHLAND, WA 99352

000078

Confederated Tribes of the Umatilla
Indian Reservation (CTUIR)
c/o Carey Miller
P.O. Box 638
W. Umatilla, OR 97801

Resident
8911 Grandridge Blvd.
Suite C
Kennewick, WA 99336

Terry & Cynthia Preszler
8797 W. Gage Blvd.
Kennewick, WA 99336

MARY ANN BRISSE
303 GAGE BLDG #111
RICHLAND, WA 99352

SUE BELL
303 GAGE BLVD UNIT 112
RICHLAND, WA 99352

SCOTT BARTHOLOMEW
303 GAGE BLVD APT 113
RICHLAND, WA 99352

JAMES R JOHNSON
4990 HACIENDA AVE
SAN LUIS OBISPO, CA 93401-

MYRTLE OFSTHUN
303 GAGE BLVD #115
RICHLAND, WA 99352

LINDA K BISHOP
201 S SHERMAN PLACE
KENNEWICK, WA 99336

ROGER R TRUE
1615 LAMB AVE
RICHLAND, WA 99352

CLAUDE D & VERGIE
KRAWLINS
303 GAGE BLVD APT 212
RICHLAND, WA 99352

DAVID & PATRICIA
VANLEUVEN
303 GAGE BOULEVARD #213
RICHLAND, WA 99352

JOAN I BATES
303 GAGE BLVD APT #214
RICHLAND, WA 99352

NEIL WARREN PALMER
2721 S GARFIELD
KENNEWICK, WA 99337

DAVID L & ENA M KNUTSON
303 GAGE BLVD APT 216
RICHLAND, WA 99352

GORDON HETTERSCHIEDT
303 GAGE BLVD #311
RICHLAND, WA 99352

LANCE EGGERS
PO BOX 1262
RICHLAND, WA 99352

STEVENS EVERN
303 GAGE BLVD APT 313
RICHLAND, WA 99352

NANCY NADOLSKI
303 GAGE BLVD #313
RICHLAND, WA 99352

SHAWN STODDARD
303 GAGE BLVD #313
RICHLAND, WA 99352

PHILLIP TRACY
303 GAGE BLVD #313
RICHLAND, WA 99352

WILLIAM CORSIGLIA
303 GAGE BLVD APT 313
RICHLAND, WA 99352

MICHAEL K HAMILTON
303 GAGE BLVD 315
RICHLAND, WA 99352

SEAN STOCKARD
303 GAGE BOULEVARD #117
RICHLAND, WA 99352

MARIONE SKILDSEN
303 GAGE BLVD UNIT 118
RICHLAND, WA 99352

Resident
8836 Gage Blvd.
Suite 201B
Kennewick, WA 99336

ADELINE RYATES
95204 E REATA RD
KENNEWICK, WA 99338

WILLIAM & LORALEE
C. LAWAY
1520 NACHES CRT
RICHLAND, WA 99352

MARY SAMUELSON
303 GAGE BLVD UNIT 121
RICHLAND, WA 99352

DARWIN D & LOIS MLAMBIER
PO BOX 964
CAMAS, WA 98607

000079



Resident
3104 W. Kennewick Ave.
St. C
Kennewick, WA 99337

Resident
PO Box 1900
Pasco, WA 99301

Resident
1335 Grandridge Blvd.
Kennewick, WA 99337

Resident
3500 Gage Blvd.
St. A
Kennewick, WA 99337

John Meyer
1976 Greenview Dr.
Richland, WA 99352

CCW East property Owners
Assoc.
3104 W. Kennewick Ave. St. 3
Kennewick, WA 99337

Resident
16301 N 8th St.
St. 102
Bellevue, WA

Jeff & Amy Bertelsen
33881 Riverview Dr.
Hermiston, OR 97838

Emanuel Edibiokpo
807 N. Pittsburgh St.
Kennewick, WA 99337

Resident
3202 W. Gage Blvd.
Kennewick, WA 99337

Dirk & Derae Stricker
3104 S. Morain Place
Kennewick, WA 99336

Robert & Margaret Stratton
1101 S. Taft St.
Kennewick, WA 99337

Terry Lynn & Suzanne Bee
McCardle Trustees
PO Box 518
Friday Harbor, WA 98250

Jack Clark

*Gage & Center Parkway
Meeting Labels*

From: Steve Plummer
Sent: Monday, October 07, 2002 3:37 PM
To: Jack Clark
Subject: FW:

-----Original Message-----

From: Richard Evans [mailto:RichardE@scm-ae.com]
Sent: Friday, September 20, 2002 11:49 AM
To: Steve Plummer
Subject: RE:

Here is what I have:

Columbia Center Mall
Barb Johnson
Columbia Center Blvd
Kennewick, WA 99336

Peter Rogalsky (E-mail)
City of Richland
840 Northgate Dr.
Richland, WA 99352

The Home Depot Inc
1451 Taptal Drive
Richland, WA 99352

Greg Markel
8551 Gage Blvd
Kennewick, WA 99336-7113

Banner Bank
Dave Bixby
1221 Jadwin Ave
Richland, WA 99352

Columbia Center West Business Owners Assoc.
Nick Castorina
27008 Clover Rd
Kennewick, WA 99336

McCoys
Mail By The Mall, McCoy Recording, McCoy Distributing
Laurie McCoy
8220 West Gage Boulevard
Kennewick, WA 99336

Victor Gomez
8236 Gage Boulevard
Kennewick, WA 99336

Benton PUD
Brad Langdell
P.O. Box 6270
Kennewick, WA 99336

Port of Benton

Scott Keller

*(I typed these envelopes)
not on list)*

3100 George Washington Way
Richland, Washington 99352

John Haakenson
100 George Washington Way
Richland, WA 99352

UPRR
John Trumbull
5424 S.E. Mc Loughlin Blvd.
Portland, OR 97202

Tapteal Properties (Holiday Inn):
Allpro Inc
Jack Nelson
1232 Columbia Drive Southeast, Richland, WA 99352

Tapteal II LLC (Bob Young):
Bob Young
5 Presidio Terrace
San Francisco, CA 94118

Columbia Center West Homeowners Assoc.
Floyd & Dixie Johnston
8306 W Yellowstone
Kennewick, WA 99336

-----Original Message-----

From: Steve Plummer [mailto:stephen-plummer@ci.kennewick.wa.us]
Sent: Friday, September 20, 2002 11:24 AM
To: Richard Evans
Subject: RE:

Thanks Rich. Will you be able to get me a mailing list today? Steve

-----Original Message-----

From: Richard Evans [mailto:RichardE@scm-ae.com]
Sent: Friday, September 20, 2002 11:22 AM
To: Steve Plummer (E-mail)
Cc: Roger Wright
Subject:

Steve,

Here is the status of our calls.
Everyone I spoke with was happy to receive a call.

Richard

Columbia Center Mall (Barb Johnson)
Out until Monday. Staff took message.

Pete Rogalski
Left voice message

Home Depot
Manager out until Monday. Spoke with Jeff, the Assistant Manager.

Greg Markel
Unavailable. Staff took message.

Banner Bank, Dave Bixby

Left Dave a voice message

Columbia Center West Business Owners Assoc.
Left Nick Castorina a voice message.

McCoys

Spoke with Laurie McCoy. She will inform her father and brother.

Victor Gomez (owner next to Mail by the Mall)

Spoke with Victor. Asked him to see if he could catch Nick
Castorina

Benton PUD

Brad Langdell out until Monday. Left Brad a voice message.

Port of Benton

Scott Keller out of town until Monday.

I left John Haakenson a voice message, he called and asked to have
the information regarding the meeting e-mailed to him, which I did.

UPRR

Spoke with John Trumbull

Tapteal Properties (Holiday Inn)

Jack Nelson out of town until Oct 1. Staff took message and will
contact Jack.

Tapteal II LLC (Bob Young)

Roger Wright to contact Bob.

Columbia Center West Homeowners Assoc.

Spoke with Dixie Johnston, Her husband is the homeowner President.

911 GRANDRIDGE BLVD, STE C,,KENNEWIC'
ERRY J & CYNTHIA L,PRESZLER,8797 W G BL' 'NNEWICK,WA,99336
836 GAGE BLVD STE 201B,,KENNEWICK,WA,99336,
O BOX 3167,,PORTLAND,OR
TEPHEN,HENAGER,16202 S GRIFFIN RD,,PROSSER,WA,99350
6300 NE 8TH ST STE 102,,BELLEVUE,WA
G ARK MINI STG),8500 GAGE BLVD STE A,,KENNEWICK,WA
RL. J & JOYCE A,FLEMING,359 QUAILWOOD PLACE,,RICHLAND,WA,99352
655 MARKET STREET,,YOUNGSTOWN,OH
ATRICK & DOLORES E,MC COY,402 ANTHONY DR,,RICHLAND,WA,99352
ACK J,WHITE,8911 W GRANDRIDGE BLVD STE C,,KENNEWICK,WA,99336
O BOX 190,,RICHLAND,WA,99352
104 W KENNEWICK AVE STE C,,KENNEWICK,WA,99336
O BOX 1900,,PASCO,WA,99301
TEPHEN D & CAROLYN K,HENAGER,8400 W GAGE BLVD,,KENNEWICK,WA,99336
335 GRANDRIDGE BLVD,,KENNEWICK,WA
500 GAGE BLVD STE A,,KENNEWICK,WA
OHN,MEYER,1976 GREENVIEW DR,,RICHLAND,WA,99352
CW EAST PROPERTY OWNERS ASSOC,3104 W KENNEWICK AV STE C,,KENNEWICK,WA,99336
UDLEY AVENUE,,PROSSER,WA
6301 NE 8TH ST STE 102,,BELLEVUE,WA
EFF & AMY,BERTELSEN,33881 RIVERVIEW DR,,HERMISTON,OR,97838
MANUEL,EDIBIOKPO,807 N PITTSBURGH ST,,KENNEWICK,WA,99336
202 W GAGE BLVD,,KENNEWICK,WA,99336
IRK A & DERAЕ,STRICKER,3104 S MORAIN PL,,KENNEWICK,WA,99337
OBERT H & MARGARET R,STRATTON,1101 S TAFT ST,,KENNEWICK,WA,99337
ERRY LYNN & SUZANNE BEE,MCCARDLE TRUSTEES,PO BOX 518,,FRIDAY HARBOR,WA,98250

*Edge Center Parkway
Mailing Labels*

(These addresses are included in the mailing label list.

000084

000085



April 2, 2013

Washington Utilities and Transportation Commission
Chandler Plaza
1300 S. Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504

RECEIVED
PROGRAM MANAGEMENT
2013 APR -8 PM 3:42
STATE OF WASH
UTIL. AND TRANSP
COMMISSION

ATTN: Kathy Hunter, Rail Manager

RE: At-Grade crossing of Port of Benton Hanford Industrial Branch
Kennewick Washington Contract P0219 (Phase 3)

Dear Kathy:

Enclosed are an original and three copies of the completed petition for a proposed at-grade crossing of Center Parkway over the Port of Benton Hanford Industrial Branch west of Richland Junction (MP 18.8 of the former UPRR Yakima Mainline). Included with each petition is a copy of:

- Preliminary Crossing Design
- Grade Separation Evaluation
- Appendix to Grade Separation Evaluation
- Traffic Study
- Diagnostic Meeting Record

Due to the complexity of this project, we are requesting that the Commission serve the respondents.

Your support of this important project is appreciated. If you have questions or require additional information, please contact me at (509) 585-4287 or by e-mail at: steve.plummer@ci.kennewick.wa.us.

Yours truly,



Stephen R. Plummer
Engineering Services Manager

ENGINEERING DIVISION

1010 E. Chemical Drive • PO Box 6108 • Kennewick, WA 99336-0108
(509) 585-4287 • Fax (509) 585-4451 • steve.plummer@ci.kennewick.wa.us

000086

000087

EXHIBIT 3

[Service date February 25, 2014]

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

CITY OF KENNEWICK,	)	DOCKET TR-130499
)	
Petitioner,)	
	)	ORDER 02
v.)	
)	
PORT OF BENTON, TRI-CITY &	)	INITIAL ORDER DENYING
OLYMPIA RAILROAD COMPANY,	)	PETITION TO OPEN AT-GRADE
BNSF RAILWAY COMPANY, AND	)	RAILROAD CROSSING
UNION PACIFIC RAILROAD,)	
)	
Respondents.)	
.....)	

BACKGROUND

- 1 On April 8, 2013, the City of Kennewick filed with the Washington Utilities and Transportation Commission (Commission) a petition to construct a highway-rail grade crossing at Center Parkway, Kennewick, Washington and remove an existing railroad siding. On May 31, 2013, the City of Richland petitioned to intervene in support of this petition.

- 2 On June 4, 2013, the Commission held a prehearing conference in Olympia, Washington, before Administrative Law Judge Adam E. Torem. At that time, the Commission granted intervenor status to the City of Richland and adopted a procedural schedule for this docket.

- 3 At the prehearing conference, the City of Kennewick indicated compliance with the State Environmental Policy Act (SEPA) by its 2003 completion of a SEPA checklist for the Center Parkway Extension project and subsequent issuance of a Mitigated Determination of NonSignificance (MDNS). On July 26, 2013, the City of Kennewick updated its previous environmental assessment and prepared an Addendum to its SEPA checklist. On August 20, 2013, the City of Kennewick confirmed to the Commission that all SEPA compliance work was complete.

- 4 The Commission conducted evidentiary hearings on November 19-20, 2013, and a public comment hearing on November 20, 2013, in Richland, Washington. Judge Torem performed a site visit and toured the area on November 21, 2013. The parties simultaneously filed written post-hearing briefs on December 20, 2013.

5 *Representatives.*¹ P. Stephen DiJulio and Jeremy Eckert, Foster Pepper PLLC, Seattle, represent petitioner City of Kennewick and intervenor City of Richland (Cities). Paul J. Petit, Richland, represents respondent Tri-City & Olympia Railroad (TCRY). Steven W. Smith, Assistant Attorney General, Olympia, represents the Commission's regulatory staff (Commission Staff or Staff).²

EVIDENCE

A. Center Parkway and Surroundings

6 Center Parkway is a minor arterial roadway in Kennewick. As currently constructed, its northbound traffic moves into a roundabout intersection with Gage Boulevard and cannot proceed further north to Tapteal Drive.³ As part of their comprehensive plans, the Cities intend to connect Tapteal Drive in Richland with Gage Boulevard in Kennewick by extending Center Parkway northward.⁴ In order to accomplish this, Center Parkway would cross two sets of railroad tracks owned by the Port of Benton.⁵

7 Seven years ago, the Commission denied the City of Kennewick's original petition to construct this at-grade crossing.⁶ At that time, extending Center Parkway northward would have required crossing four sets of tracks. However, in 2011, the City of Richland completed negotiations with the Union Pacific Railroad Company (UPRR) and Burlington Northern Santa Fe Railway Company (BNSF) to relocate their switching operations from the area, allowing removal of the two UPRR spur tracks.⁷

¹ The following parties appeared at the prehearing conference but did not participate in any other portion of the proceedings: Thomas A. Cowan, Richland, represents respondent Port of Benton. Tom Montgomery and Kelsey Endres, Seattle, represent respondent Burlington Northern Santa Fe Railway Company (BNSF). Carolyn Larson, Portland, OR, represents respondent Union Pacific Railroad Company (UPRR).

² In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

³ Exh. JP-5-X, at 2-3 (overview maps of area).

⁴ Exh. JP-1T, 2:11-24; *see also* Exh. JP-2, Exh. JP-3, and Exh. JP-4.

⁵ *See* Exh. KH-2 (aerial view of surrounding area) and Exh. KH-3 (crossing configuration).

⁶ *See* Docket TR-040664, *City of Kennewick v. Union Pacific Railroad*, Order 06, Initial Order Denying Petition; Docket TR-050967, *City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad*, Order 02, Initial Order Denying Petition (January 26, 2007) (2007 Order).

⁷ Exh. JP-6-X (UPRR) and Exh. JP-7-X (BNSF).

- 8 Commercial and retail properties dominate the area surrounding the proposed crossing. As shown in Figure 1,⁸ the Columbia Center Mall, a major regional shopping center, is located immediately southeast of the proposed crossing, bordered by Center Parkway (west side), Quinault Street (south side), and Columbia Center Boulevard (east side). The Mall's northern boundary abuts Port of Benton and UPRR railroad tracks that connect at Richland Junction, just east of the proposed crossing.



Figure 1. Overview Map of Area (including old UPRR spur track, now removed)

- 9 North of the proposed crossing, Tapteal Drive provides access to a hotel and various retail, commercial and undeveloped properties located in a mile-long pocket of land below Highway 240. The proposed Center Parkway crossing would provide a more direct connection from this area to the Columbia Center Mall.⁹
- 10 Road access between these two areas now exists where Tapteal Drive intersects Columbia Center Boulevard, approximately 0.4 miles east of the proposed crossing.

⁸ Aerial imagery of the area is provided by Exhs. JD-27-X, JD-28-X, JD-29-X, and JD-30-X.

⁹ See Petition at 8; see also Exh. RS-1T, 8:20 – 9:2 and Exh. JD-1T, 3:6 – 4:20.

Columbia Center Boulevard has a grade-separated overpass to cross the UPRR mainline track; however, as this section of the roadway is divided, northbound traffic accessing Tapteal Drive must make a series of right turns to loop up and over the major arterial roadway (Tapteal Loop). Alternatively, Tapteal Drive meets Steptoe Street approximately 0.7 miles west of the proposed crossing. From there, southbound motorists currently pass through a regular at-grade crossing to connect with Gage Boulevard, another major arterial roadway that provides eastbound access to the mall area via the current roundabout intersection with Center Parkway.¹⁰

B. Rail Operations at Richland Junction

- 11 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.¹¹ When no passing operations are scheduled, TCRY also uses the second track as a siding to store idle freight cars.¹²
- 12 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 2013.¹³ Mr. Peterson expects further

¹⁰ See Exh. JP-5-X, at 2-3. In 2009, the Commission granted the City of Richland’s petition to realign the Tapteal-Steptoe intersection atop the at-grade crossing to create Washington’s first-ever roundabout intersection with a rail line running through the middle. See Exh. GAN-10-X, Docket TR-090912, *City of Kennewick v. Tri-City & Olympia Railroad*, Order 01, Order Granting Petition to Reconstruct the Steptoe Street Highway-Rail Grade Crossing and Modify Active Warning Devices (July 2, 2009). Although the Benton-Franklin Council of Governments 2011-2032 Regional Transportation Plan projected this construction to begin in 2012, the City has not yet initiated any construction work. See Exh. RS-4, at 16 (Steptoe Street Phase 3).

¹¹ Peterson, TR. 381:5 – 383:15.

¹² The Cities contend TCRY makes only sparing use of the passing track. See Exh. KJ-13-X, at 2. The Cities argued that several tank cars present on the siding during the evidentiary hearing had not been moved for days or even weeks. Peterson, TR. 405:14 – 410:19; see also Exh. RVP-9-X.

¹³ Exh. RVP-1T at 3-4; see also Exh. RVP-3-X at 1-3. The Cities estimate current train traffic to be appreciably lower, between 3.2 to 5.02 trains per weekday, or 2,310 total railcars moved by TCRY annually. See Exhs. KJ-10T-R, KJ-11, and KJ-12; see also Jeffers, TR. 143:1 – 146:25.

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.¹⁴

- 13 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.¹⁵ 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).¹⁶ 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.¹⁷ Mr. Ballew expects an average of 30 rail cars each week will come and go from ConAgra's facility.¹⁸
- 14 All trains traveling to the Horn Rapids area must pass through the Richland Junction and cross the proposed Center Parkway extension.¹⁹ 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.²⁰ 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.²¹

C. Grade Separation

- 15 Grade separation refers to the method of aligning the junction of two or more surface transportation rights-of-way at different heights (grades) to avoid conflicts or disruption of traffic flows as they cross each other. In the case of highway-rail junctions, underpasses, overpasses, or bridges are the most common forms of grade

¹⁴ Exh. RVP-1T at 5-6; *see also* Exh. GAN-16-X.

¹⁵ Richland's rail loop will be approximately 8400 feet in total length. Ballew, TR. 354:25 – 357:22; *see also* Exhs. JD-37-X, JD-38-X, JD-39-X, KJ-14-X, and King, TR. 334:1 – 336:15 and 337:21 – 340:16.

¹⁶ Ballew, TR. 358:2-12, 364:15 – 365:3, 369:21 – 370:6, 375:4 – 376:24; *see also* Exh. JD-38-X.

¹⁷ Ballew, TR. 342:23 – 345:15; *see also* Exhs. JD-9-X, JD-10-X, and JD-11-X.

¹⁸ Ballew, TR. 345:16 – 346:17 and 373:6-14.

¹⁹ Ballew, TR. 346:22 – 347:8; *see also* Jeffers, TR. 173:10-19.

²⁰ Post-Hearing Brief of Respondent Tri-City & Olympia Railroad Co. at 9; *see also* Jeffers, TR. 154:24 – 159:12.

²¹ Peterson, TR. 414:23 – 418:5.

separated crossings. 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.

- 16 Rick Simon, Development Services Manager for the City of Richland, testified that constructing a grade-separated crossing at Center Parkway is not feasible due to differences in topography on the north and south sides of the rail line.²² Susan Grabler, a railroad engineer from David Evans and Associates, Inc. (DEA), explained that roadway geometry at Center Parkway and the close proximity of Columbia Center Boulevard make grade separation impracticable.²³ Ms. Grabler pointed out that a grade-separation project would require increasing the steepness of the track approaching the crossing from the existing one percent grade to something greater than two percent, exceeding the operational capabilities of most trains now using that track.²⁴ Kevin Jeffers, a DEA associate working with Ms. Grabler, determined that grade separation would require either replacement of the existing rail bridge over Columbia Center Boulevard (to the east) or elimination of existing access to the hotel immediately north of the crossing due to the depth of the undercrossing.²⁵
- 17 Ms. Grabler also testified that the expected average daily traffic (ADT) on the Center Parkway extension would not justify grade separation. The Federal Highway Administration (FHWA) Railroad-Highway Grade Crossing Handbook establishes a threshold of 100,000 ADT to require grade separation at an urban crossing.²⁶ The Cities estimate that Center Parkway's traffic will reach only 7,000 ADT by 2033, much lower than the FHWA threshold.²⁷ This low traffic volume contributes to a low predicted accident frequency rate, further reducing justification for grade separation. Using an FHWA model, Mr. Jeffers predicted that the crossing's accident frequency would be 0.145 accidents per year, or 1 accident every 6.9 years.²⁸ Kathy Hunter, testifying for Commission Staff, analyzed a similar crossing in Prosser and forecast an even lower likelihood of accidents at the proposed Center Parkway crossing.²⁹

²² Exh. RS-1T, 6:17-23.

²³ Exh. SKG-1T, 3:13-20; *see also* Grabler, TR. 205:21 – 206:13.

²⁴ Exh. SKG-1T, 6:11-23; *see also* Exh. KJ-1T, 9:7-19.

²⁵ Exh. KJ-1T, 4:12-17.

²⁶ Exh. KJ-2, at 11 (*see* paragraph 6.a.iv).

²⁷ Exh. SKG-1T, 3:21-25; *see also* Exh. KJ-1T, 6:14-20.

²⁸ Exh. KJ-1T, 7:11-20; *see also* Exh. KJ-2 (at 4-8) and Exh. KJ-7 (at 2-3).

²⁹ Exh. KH-1T, 24:21 – 26:22; *see also* Exh. KH-12. Ms. Hunter's calculation predicts 0.018701 collisions per year, or one accident every 53.5 years.

- 18 Jeff Peters, Transportation and Development Manager for the City of Richland, testified that constructing the proposed at-grade crossing would cost approximately \$250,000. Mr. Peters estimated that a grade-separated crossing for Center Parkway would cost between \$15 million and \$200 million.³⁰ Mr. Jeffers identified four different design options for a grade-separated crossing within that price range, each requiring extensive retaining walls due to excavation depths of 20 feet or more for the roadway or, alternatively, fill depths under the tracks in equivalent amounts.³¹
- 19 Commission Staff concurred with the Cities that grade separation is not warranted at this location.³² Noting the low traffic volumes and determining that train crossings would be infrequent, Ms. Hunter endorsed the Cities' proposal to mitigate the dangers of an at-grade crossing through installation of active warning devices, to include advanced signage, flashing lights, audible bell, automatic gates, and a raised median to prevent drivers from going around the gates.³³ Staff believes these measures adequately moderate the dangers presented by the proposed at-grade crossing.³⁴

D. Public Need for Proposed Crossing

- 20 The Cities seek to complete a planned network of roadways and address traffic issues in the area by extending Center Parkway from Tapteal Drive to Gage Boulevard. The Center Parkway extension project has been included in the Cities' comprehensive planning process since 2006.³⁵ The project is also noted for funding in the Benton-Franklin Council of Governments Regional Transportation Plan.³⁶ According to the Cities, extending Center Parkway to Tapteal Drive and constructing the necessary at-grade crossing will decrease emergency vehicle response times, reduce the amount of accidents near the Columbia Center Mall, and improve traffic circulation in an important commercial area.³⁷

³⁰ Exh. JP-1T, 3:1-8.

³¹ Exh. KJ-1T, 10:3-13; *see also* Exhs. KJ-6 and KJ-7 and Jeffers, TR. 195:8 – 201:2.

³² Exh. KH-1T, 8:1 – 12:9.

³³ Exh. KH-1T, 21:15 – 24:19; *see also* Exhs. KH-3 and KH-9.

³⁴ Exh. KH-1T, 27:1-3.

³⁵ Deskins, TR. 58:7-15; *see also* Exhs. RS-2, RS-3, GAN-2-X, GAN-3-X, GAN-4-X, GAN-6-X, GAN-7-X at 2, GAN-13-X, GAN-14-X, and GAN-15-X.

³⁶ *See* Exhs. RS-4, GAN-8-X, and GAN-9-X. The Executive Summary of the Regional Transportation Plan only discusses current congestion on Gage Boulevard in Kennewick being relieved in future years by extension of the Steptoe Street Corridor. The Plan has no specific discussion of anticipated benefits from extending Center Parkway. Exh. RS-4 at 6.

³⁷ Exh. JD-1T, 5:1-21; *see also* Exh. KJ-5.

1. Emergency Response Times

- 21 The Cities' police and fire departments have each established response time objectives for arriving at emergency incidents or high priority calls. In Richland, the police department has a one-to-five minute average response goal for high priority calls.³⁸ Similarly, Richland's Fire & Emergency Services first responders seek to arrive at incidents within five minutes or less from time of dispatch, 90 percent of the time.³⁹ Kennewick's fire response goal is five minutes and the emergency medical response goal is four minutes, each for 90 percent of events.⁴⁰
- 22 The Cities' emergency response providers support each other and respond to each other's calls for help.⁴¹ The Cities and three local fire districts signed a Master Interlocal Partnership and Collaboration Agreement in 2010 that includes an "automatic aid agreement" for prioritizing and sequencing certain aid calls.⁴² The Cities' emergency service providers all agree that extending Center Parkway from Gage Boulevard to Tapteal Drive will improve emergency response times in the area. However, none of these witnesses testified that any of the Cities' emergency services providers were not routinely meeting their response time objectives.
- 23 Richland Chief of Police Chris Skinner explained that police response times are sometimes difficult to evaluate because officers are often already deployed in the community and can be responding from varied distances.⁴³ Chief Skinner testified that extending Center Parkway would provide better access for his officers, providing them a potentially faster alternative route to choose from when responding to emergency calls.⁴⁴ Kennewick Chief of Police Kenneth Hohenberg testified similarly.⁴⁵ Neither police chief conducted or consulted specific studies to support their claims of faster response times if the proposed crossing was opened.⁴⁶

³⁸ Exh. RS-1T, 5:11-12; *see also* Exh. GAN-4-X.

³⁹ Exh. RS-1T, 5:5-11; *see also* Exh. GAN-3-X.

⁴⁰ Exh. GAN-6-X at 2.

⁴¹ Exh. CS-1T, 3:12-14 and KMH-1T, 2:10-15; *see also* Skinner, TR. 93:19 – 94:5.

⁴² Exh. NH-1T, 2:13-25, and Exh. RGB-1T, 2:18—3:15. *See also* Baynes, TR. 109:4 – 110:15.

⁴³ Skinner, TR. 87:20 – 88:17.

⁴⁴ Exh. CS-1T, 4:1-6.; *see also* TR. Skinner, 95:4-8.

⁴⁵ Exh. KMH-1T, 3:1-21.

⁴⁶ Skinner, TR. 95:4-14; Hohenberg, TR. 138:11-25.

- 24 Kennewick Fire Chief Neil Hines testified that the best emergency response routes for fire and medical units are on “straight arterial-type roadways providing the most direct route with the least amount of traffic, traffic control systems, intersections, and turns to negotiate.”⁴⁷ Without a direct connection between Gage Boulevard and Tapteal Drive, Kennewick emergency responders must travel north of the Mall via Columbia Center Boulevard or Steptoe Street, routes that are less direct, occasionally burdened with heavy traffic, and with multiple intersections and numerous turns to negotiate. According to Chief Hines, improving response times by even a few seconds could significantly impact the outcome for a patient in a critical event.⁴⁸ Richland Fire & Emergency Services Director Richard Baynes testified that the Center Parkway extension would provide a viable north-south route for fire and medical units if the primary routes on Steptoe Street or Columbia Center Boulevard were obstructed, growing in value as the Tapteal area continues its development.⁴⁹
- 25 In support of their petition, the Cities submitted a traffic study completed by JUB Engineers, Inc. (JUB Study).⁵⁰ Using the hotel on Tapteal Drive and Center Parkway as an example, the JUB Study claimed that extending Center Parkway northward would reduce the response distance from the City of Kennewick’s fire station to this point by one-third of a mile and reduce the response time from 2 minutes, 48 seconds, down to only 2 minutes. Coming from the Richland Fire Station, the JUB Study found that the response distance would be reduced by almost two-thirds of a mile and reduce response time from 5 minutes, 42 seconds, down to 4 minutes, 18 seconds.⁵¹ Chief Baynes reviewed the response times in the JUB Study against his Department’s records and calculated that “there’s about a minute difference between accessing Tapteal via the proposed crossing versus the traditional routes.”⁵²
- 26 Gary Norris, a traffic engineer hired by TCRY, questioned whether the JUB Study should be relied upon to demonstrate a public need for extending Center Parkway and opening an at-grade crossing. Mr. Norris pointed out that the above-noted 2 minute,

⁴⁷ Exh. NH-1T, 3:15-18.

⁴⁸ *Id.* at 3:18-24.

⁴⁹ Exh. RGB-1T, 4:12-22.

⁵⁰ Exh. KJ-5; *see also* Petition.

⁵¹ Exh. KJ-5, at 9; Exh. JP-5-X, at 1. Exh. KJ-5 provides a vicinity map showing the locations of both fire stations on page 7. Chief Hines stated his agreement with the JUB Study’s response times. *See* Exh. NH-1T, 3:15.

⁵² Baynes, TR. 105:16-18; *see also* Baynes, TR. 107:13-15 and Exh. GAN-18-X. However, Chief Baynes noted that the 2:48 response time could not include the firefighters’ turnout time, as it would only be possible under optimum driving conditions (averaging 28 miles per hour) and probably could not be replicated during heavier daytime traffic. Baynes, TR. 123:4 – 124:13.

48 second response time to the hotel already meets the Cities' goal for response times by a wide margin. Further, Mr. Norris contends that the JUB Study fails to consider that existing or increased future train traffic may make the new roadway unavailable for reliable emergency response.⁵³

- 27 Acknowledging the possibility of a train blocking the Center Parkway crossing, Chief Baynes explained "the more routes into areas we have, the better" number of alternatives there are for working around such problems.⁵⁴ Even so, Chief Baynes conceded that a unit train could block traffic at both the existing Steptoe Street crossing and the proposed Center Parkway crossing for lengthy periods of time, delaying emergency response times even longer if a fire or medical unit committed to a particular crossing before knowing the train's direction of travel.⁵⁵
- 28 Mr. Norris presented an alternate response route from the Richland Fire Station to the hotel that avoided the potentially congested intersection of Steptoe Street and Gage Boulevard and would not require crossing a rail line at-grade. Mr. Norris contended that his alternate route over existing streets would take less than four minutes and perhaps be advantageous because it avoided potential delays from traffic and trains.⁵⁶
- 29 Mr. Norris asserted that the JUB Study does not document an existing lack of reasonable alternate access for public emergency services.⁵⁷ Mr. Simon, Richland's Development Services Manager, conceded that he did not know if there were any areas in the City of Richland where meeting emergency response objectives would be improved by construction of the proposed Center Parkway crossing.⁵⁸

2. *Accident Reduction*

- 30 The Cities also contend that opening the Center Parkway crossing would reduce traffic on Columbia Center Boulevard and therefore the number of accidents on that route and also remove the temptation for drivers to use the Mall's ring road as a through-route, endangering pedestrians.⁵⁹ Mr. Deskins likened the new Center

⁵³ Exh. GAN-1T, 5:1 – 6:17.

⁵⁴ Baynes, TR. 108:9 – 109:3 and 119:9-11.

⁵⁵ Baynes, TR. 114:1 – 120:12; *see also* TR. 130:3 – 132:1.

⁵⁶ Norris, TR. 308:7 – 309:19; *see also* Exh. GAN-19-X. Mr. Norris calculated response speed to be approximately 28 miles per hour, the same as that relied upon in the Cities' JUB Study. Norris, TR. 310:8 – 312:16.

⁵⁷ Exh. GAN-1T, 5:1-16.

⁵⁸ Simon, TR. 60:13 – 61:5.

⁵⁹ Exh. JD-1T, 4:1-20 and Exh. JD-2TR, 2:23 – 3:4; *see also* Exh. SM-1TR, 6:9-12.

Parkway crossing to “connecting the parking lots between two popular businesses so that drivers don’t have to enter the busier city street to travel between the two.”⁶⁰

- 31 Mr. Deskins provided an exhibit listing 12 years of crash data for two Columbia Center Boulevard intersections: Quinault Avenue and Canal Drive.⁶¹ Going back to 2001, the intersection reports show 154 total crashes at Quinault Avenue and 165 total crashes at Canal Drive.⁶² According to Mr. Deskins, opening the Center Parkway crossing on the other side of the Mall would reduce traffic at these intersections and “should ultimately reduce crashes” at these locations.⁶³ Spencer Montgomery, a transportation specialist with JUB Engineers, explained that JUB did not perform a study to support this conclusion because “if you reduce the traffic volume on a road, and it has a certain accident rate, then you will reduce the number of accidents.”⁶⁴

3. Mitigation of Traffic Congestion

- 32 In compliance with the Growth Management Act (GMA), the Transportation Element of Richland’s Comprehensive Plan adopts standards and threshold levels of service (LOS) for the City’s intersections. The LOS scale goes from A to F, measuring the length of delay a vehicle will experience at a signalized intersection. Richland’s threshold LOS for acceptable delay is LOS D, a delay of 35-55 seconds; any intersection rated worse (E or F) is considered deficient.⁶⁵
- 33 The Cities presented evidence that Columbia Center Boulevard is one of the busiest roadways in the region and that Steptoe Street could occasionally be congested at peak hours.⁶⁶ Further, the roadways around Columbia Center Mall can become extremely congested during the holiday shopping season in late November and early December.⁶⁷ According to the JUB Study, extending Center Parkway to Tapteal Drive will relieve some of this traffic congestion, but the study provides no further explanation of how the proposed crossing will achieve this result.⁶⁸

⁶⁰ Exh. JD-1T, 4:5-7.

⁶¹ Exh. JD-3.

⁶² *Id.* at 7 and 14.

⁶³ Exh. JD-2TR, 3:8-14.

⁶⁴ Montgomery, TR. 222:14-23.

⁶⁵ Exh. RS-2 at 17-19; *see also* Exh. RS-1T, at 4-5 (generalized explanation of LOS).

⁶⁶ Exh. KJ-5, at 9.

⁶⁷ Exh. JD-1T, 3:6-26.

⁶⁸ Montgomery, TR. 219:2-12 (acknowledging that the JUB Study provides no data or explanation of the methodology used to arrive at its conclusions).

- 34 JUB's Mr. Montgomery estimated that 7,000 vehicles per day would make use of the new Center Parkway crossing, some coming from Columbia Center Boulevard and some coming from Steptoe Street.⁶⁹ The JUB Study predicts that in 20 years, opening the Center Parkway crossing will decrease the afternoon peak hour volumes on those streets by 210 and 310 vehicles, respectively.⁷⁰ The JUB Study makes no further predictions on how opening Center Parkway would improve LOS ratings at surrounding intersections currently suffering congestion issues.⁷¹
- 35 Mr. Simon testified that "one way to reduce congestion is to increase the number of access routes between any two points" and contended "the extension of Center Parkway would provide an important link, not only for emergency vehicle response, but also to reduce overall traffic congestion."⁷² As to LOS levels, Mr. Simon testified that Tapteal Drive was not currently operating at a deficient level,⁷³ but two other intersections south of the railroad tracks were identified as deficient: Columbia Center Boulevard at Quinault⁷⁴ and Steptoe Street at Gage Boulevard.⁷⁵ When asked to explain the effect of extending Center Parkway on the LOS E for eastbound left turns at the intersection of Columbia Center Boulevard and Quinault, Mr. Simon stated "I'm not sure that I can."⁷⁶ Even though he had not seen any data or traffic studies to inform his opinion, Mr. Simon also asserted that a Center Parkway crossing

⁶⁹ Montgomery, TR. 222:24 – 225:6; see also Exh. KJ-5, at 11.

⁷⁰ Exh. KJ-5, at 13, 17, and 19; *see also* Exh. GAN-1T, 7:13-19.

⁷¹ The JUB Study claims that after construction of the proposed crossing, the Center Parkway / Tapteal Drive intersection would operate a LOS C for northbound left turns and LOS B for northbound right turns. Exh. KJ-5, at 14.

⁷² Exh. RS-1T, 5:22-25.

⁷³ Simon, TR. 61:18-22.

⁷⁴ According to information provided to Kevin Jeffers by John Deskins and Spencer Montgomery, the intersection of Columbia Center Boulevard and Quinault Street is deficient because the eastbound left-turn movement is currently LOS E, degrading to LOS F by 2028. The overall intersection is currently LOS C, but expected to degrade to LOS F by 2028. *See* Exh. GAN-17-X.

⁷⁵ According to that same information, the intersection of Steptoe Street and Gage Boulevard is deficient because the southbound left-turn movement is currently LOS F, with three out of four left-turn movements degrading to LOS F by 2028. The overall intersection is currently LOS E and expected to remain at that level in 2028. *See* Exh. GAN-17-X.

⁷⁶ Simon, TR. 67:1-13. Mr. Simon conceded that other than the JUB Study, he had no other evidence to support his opinion. Simon, TR. 62:16 – 63:6 (referring to the intersection of Columbia Center Boulevard and Quinault Street).

could improve the deficient LOS at the Steptoe Street and Gage Boulevard intersection by allowing some traffic to divert to the proposed crossing.⁷⁷

- 36 Mr. Deskins, the City employee most familiar with the City’s traffic modeling simulation, conceded that he did not perform an LOS analysis specifically focused on the result of installing the proposed crossing at Center Parkway.⁷⁸ Mr. Deskins also acknowledged that he did not attempt to consider or model potential delays from trains at the proposed crossing or at the existing Steptoe Street crossing.⁷⁹

DISCUSSION AND DETERMINATIONS

A. Res Judicata Does Not Bar the Cities’ Petition

- 37 TCRY argues that the Commission’s 2007 Order denying the City of Kennewick’s request to construct an at-grade crossing at Center Parkway precludes the Cities from pursuing a subsequent petition seeking the same relief.⁸⁰ According to TCRY, the prior and current petitions are “fundamentally identical” in seeking an at-grade crossing at the same location.⁸¹
- 38 The Cities differentiate their current petition from the one put forward in 2005: they followed comprehensive planning update procedures adopted in 2006, completed extensive engineering and design studies, and worked with stakeholders to eliminate two track crossings from the project.⁸² Commission Staff agrees that removal of two track crossings and the related reduction in rail switching operations at the site present a substantial change in circumstances.⁸³
- 39 In administrative proceedings, the doctrine of res judicata limits repeated submissions of applications involving the same subject matter.⁸⁴ In order to apply res judicata, repeat applications must have the same (a) subject matter, (b) cause of action, (c) persons and parties, and (d) quality of the persons for or against whom the claims

⁷⁷ Simon, TR. 67:14 – 69:22.

⁷⁸ Deskins, TR. 78:4-7; *see also* Deskins, TR. 73:4-12.

⁷⁹ Deskins, TR. 79:2 – 81:8. Mr. Deskins stated that because he was focused on specific intersection LOS ratings, the impact of delays from trains at the crossings “didn’t concern me.”

⁸⁰ Post-Hearing Brief of Respondent Tri-City & Olympia Railroad Co. at 3:5 – 6:3.

⁸¹ *Id.* at 5:16-17.

⁸² Petitioners’ Post-Hearing Brief at 3-4.

⁸³ Post-Hearing Brief of Commission Staff at 13-14.

⁸⁴ *Hilltop Terrace Homeowner’s Ass’n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995).

are made.⁸⁵ Second applications that present a substantial change in circumstances or conditions are permitted.⁸⁶

40 There is no dispute that the Center Parkway crossing is proposed for the same site and the same use previously rejected in the 2007 Order. However, the Cities have negotiated with BNSF and UPRR to remove their switching tracks from the area, reducing the number of tracks involved from four down to two. This alone is a significant change from the prior circumstances. Further, the record supporting the current petition is substantially different than that created seven years ago: the Cities presented updated traffic studies, additional detail regarding emergency response needs in the area, and much more detailed information about safety mitigation measures and warning devices to be installed at the proposed crossing. In addition to these substantial factual differences, the 2007 Order suggested that the Commission would consider a second application.⁸⁷

41 The Commission finds that the Cities' current petition presents a substantially different situation from that considered by the Commission seven years ago. The Commission determines that *res judicata* does not bar the Cities' current petition.

B. The Growth Management Act is Not Dispositive

42 The Cities contend that state agencies are mandated to comply with local land use plans adopted under the Growth Management Act.⁸⁸ Therefore, the Cities argue that their regional comprehensive planning process "mandates" the Center Parkway crossing in order for the Cities to achieve their stated LOS for emergency response times and traffic flow at signalized intersections.⁸⁹ According to the Cities, the GMA prohibits the Commission from evaluating public need, alternatives for opening a proposed railroad crossing, or even whether the proposed crossing will function in the matter claimed by the Cities. Taken to its logical end point, the Cities' argument

⁸⁵ *Id.* at 32, citing *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

⁸⁶ *Id.* at 32-33.

⁸⁷ 2007 Order at 10, ¶ 23 ("...the petitions could be denied without further discussion. However, it may provide some guidance to Kennewick for future filings to consider the second prong of the legal standard.").

⁸⁸ Petitioners' Post-Hearing Brief at 7-12. The Cities cite specifically to RCW 36.70A.103's mandate that "[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter." *Id.* at 8, n. 29.

⁸⁹ Petitioners' Post-Hearing Brief, at 9-11.

would require the Commission to approve any at-grade crossing planned for in a local jurisdiction's comprehensive planning process.⁹⁰

43 We disagree that a land use planning statute deprives the Commission of its statutory authority to regulate public safety at rail crossings. We do not dispute that the GMA requires cities such as Richland and Kennewick to plan for future growth and make efforts at intergovernmental coordination.⁹¹ However, a jurisdiction's comprehensive planning obligations under the GMA do not substitute for meeting the standards set out in RCW 81.53. The GMA and RCW 81.53 both address transportation safety issues, but from wholly different perspectives on public policy. In order to maintain the integrity of both statutes within the overall statutory scheme, the GMA must be read together and in harmony with RCW 81.53.⁹² We find that the Cities must comply with the requirements of both statutes.

44 The Commission's statutory responsibility to protect the public from the dangers inherent to all at-grade crossings is independent of the Cities' obligation to plan under the GMA. The Commission retains and will exercise its authority to determine whether the proposed crossing satisfies the requirements of RCW 81.53.

C. Standards for Commission Approval of Rail Crossings

45 RCW 81.53.020 prohibits construction of at-grade crossings without prior authorization from the Commission. The statute requires that crossings be grade-separated "when practicable" and provides that:

In determining whether a separation of grades 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.

⁹⁰ *Id.* at 8. In essence, the Cities argue that the GMA invalidated the Commission's ruling in *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) (*Tonasket*), at least for GMA planning jurisdictions.

⁹¹ RCW 36.70A.070(6)(a)(v) requires the transportation element of a growth management plan to include intergovernmental coordination efforts.

⁹² *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) ("In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.").

If a grade crossing is authorized, RCW 81.53.030 allows the Commission to require installation and maintenance of proper signals or other devices to ensure public safety.

46 The Commission answers three key questions when evaluating a petition to authorize construction of a new at-grade crossing:

- 1) Considering engineering requirements and cost constraints, is grade-separation practicable?
- 2) Have inherent and site-specific hazards been moderated to the extent possible?
- 3) Is there a demonstrated public need for the crossing that outweighs the risks of opening the at-grade crossing?⁹³

The Cities carry the burden of proof for each of these issues. Absent the required showing of impracticability of grade separation, moderation of risks, and a sufficient demonstration of public need, the Commission will not authorize the Cities to open a new at-grade crossing at Center Parkway.

1. Practicability of Grade Separation

47 By its nature, an at-grade crossing poses hazards for motorists, pedestrians, and railroad operators that are not present at grade-separated crossings. Washington courts have deemed at-grade crossings to be inherently dangerous.⁹⁴ In determining whether the Commission will require grade separation, RCW 81.53.020 requires an evaluation of

- 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.

⁹³ See *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) (*Tonasket*); see also *Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330 (March 1995).

⁹⁴ See *Reines v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 195 Wn. 146, 150, 80 P.2d 406, 407 (1938); *State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104, 104 P.2d 764 (1940); *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 250-51 and 257, 212 P.2d 829, 831-32 and 835 (1949).

In addition to these statutory factors, Commission Staff relies on the U.S. Department of Transportation's Federal Railroad Administration Railroad-Highway Grade Crossing Handbook (FRA Handbook) when considering "other circumstances and conditions" for grade separating a roadway from a railroad right-of-way, such as predicted accident frequency and vehicle delay times.⁹⁵

48 Mr. Deskins and Mr. Montgomery testified that Center Parkway is expected to carry up to 7,000 vehicles per day by the year 2033. Mr. Peterson and Mr. Jeffers estimated that rail traffic may grow from the current high of five trains per weekday to perhaps double that amount in the foreseeable future. According to the FRA Handbook, traffic levels this low do not mandate grade separation, even in an urban setting.⁹⁶

49 Mr. Simon, Ms. Grabler, and Mr. Jeffers all testified to the infeasibility of constructing a grade-separated crossing due to roadway alignment, topography, and cost considerations. Further, Mr. Jeffers and Ms. Hunter determined that accidents at the proposed crossing would be uncommon and infrequent. Finally, the JUB Study provided assurances that lowered crossing gates associated with normal rail operations would not result in vehicle queues extending into nearby intersections.

50 The Commission finds that the amount and character of travel on the railroad and on Center Parkway do not justify grade separation. Further, there is no evidence in the record disputing the engineering infeasibility of constructing a grade-separated crossing at Center Parkway. Finally, there is no serious dispute in the record that a grade-separated crossing would be tremendously more expensive than the proposed at-grade crossing. Therefore, considering engineering requirements and cost constraints, the Commission determines that a grade-separated crossing is not practicable at Center Parkway.

2. Moderation of Risk

51 If grade separation is impracticable, the Commission evaluates whether inherent and site-specific hazards at a proposed at-grade crossing have been moderated to the extent possible. As noted above, the risks of an accident at the proposed crossing are relatively low considering current and projected train traffic and predicted levels of

⁹⁵ Exh. KH-7 and Exh. KJ-2 at 11. The FRA Handbook echoes the statute's requirement to consider the levels of train traffic, train speeds, and levels of auto traffic, and posted speed limits. The FRA Handbook also states that "[i]f a new access is proposed to cross a railroad where railroad operation requires temporarily holding trains, only grade separation should be considered." See Exh. KH-10.

⁹⁶ See Norris, TR. 321:10 – 325:5.

vehicle traffic. However, the existence of a second set of tracks and limited sight distances from some approaches to the crossing present a risk for motorists.

52 The Cities’ petition includes crossing design specifications intended to mitigate the dangers of the at-grade crossing with active warning devices. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip designed to prevent drivers from going around lowered gates.

53 Commission Staff performed a diagnostic review of the proposed crossing design configuration and determined that the Cities’ planned safety devices specifically address the hazards presented by the proposed Center Parkway at-grade crossing.⁹⁷ There is no evidence in the record disputing Staff on this determination.

54 We concur with Commission Staff that the petition’s proposed advance and active warning devices would moderate the risks presented by this crossing to the extent possible at this site, even with motorists crossing two sets of tracks.

3. Demonstration of Public Need

55 The Commission will not approve construction of a new at-grade crossing without a demonstration of public need that outweighs the hazards inherent in the at-grade configuration. Petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.⁹⁸

56 In the City of Kennewick’s prior petition to construct an at-grade crossing at this same location, the Commission determined that Kennewick failed to demonstrate “acute public need” and denied the petition.⁹⁹ The 2007 Order concluded that a city’s goal to encourage economic development did not rise to the level of an acute public need, noting that economic development was already occurring along Tapteal Drive even without the proposed crossing.¹⁰⁰ The 2007 Order also concluded that traffic mitigation might constitute an acute public need, but only if alternate crossings were insufficient to accommodate traffic. The traffic study presented seven years ago

⁹⁷ Exh. KH-5.

⁹⁸ See *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).

⁹⁹ 2007 Order, ¶¶ 24-26.

¹⁰⁰ *Id.* ¶ 25.

showed only a *de minimis* level of traffic diversion to Center Parkway and did not prove the nearby alternate crossings insufficient to handle the entire traffic flow.¹⁰¹

- 57 The Cities and Staff argue that the 2007 Order relied upon an outdated and overly stringent “acute public need” standard. They contend that in recent years the Commission has approved opening other at-grade crossings using a balancing test, weighing the need for the crossing against any dangers remaining after installation of safety devices.¹⁰² The Cities and Staff cite several orders approved through the Commission’s open meeting process, none of which presented the complexities involved in this matter.¹⁰³
- 58 We agree with the Cities and Staff that the statute does not require a showing of “acute public need” to justify opening a new at-grade crossing. Nevertheless, no party petitioned for review of the 2007 Order and, until now, we have not had an opportunity to revisit the Center Parkway crossing. RCW 81.53 does not prohibit the Commission from approving approve new at-grade crossings, but mere convenience or a *de minimis* showing of need will not suffice. As Staff points out, we are obligated to balance public need against the hazards presented by a new crossing.¹⁰⁴ The Cities similarly concede that the Commission must determine “whether there is a

¹⁰¹ *Id.* ¶ 26.

¹⁰² Petitioners’ Post-Hearing Brief at 5-7, n. 20, and Post-Hearing Brief of Commission Staff at 9-12; *see also* Hunter, TR. 273:16 – 277:22. Staff also points out that while the FRA Handbook discourages opening new crossings, it recognizes that consideration of public necessity, convenience, safety, and economics will factor into individual decisions. According to the Handbook, “new grade crossings, particularly on mainline tracks, should not be permitted unless no other alternatives exist and, even in those instances, consideration should be given to closing one or more existing crossings.” *See* Exh. KH-10.

¹⁰³ 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)).

¹⁰⁴ Post-Hearing Brief of Commission Staff at 12, ¶ 33.

demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.”¹⁰⁵

59 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.

a) Emergency Response Times

60 The Cities contend that the proposed crossing will improve emergency response times. However, the evidence in the record demonstrates that the Cities’ police and fire departments are generally meeting the response time objectives established in their respective comprehensive plans. Although the Cities point out individual statistics where response times have occasionally exceeded these goals,¹⁰⁶ the Cities’ emergency responders are not regularly failing to achieve their established LOS. We recognize that improving emergency medical response times by even a few seconds could significantly impact the outcome for some patients, but the Cities introduced no evidence of a public need for faster response times and did not adequately explain how the Center Parkway extension would contribute to improved public safety.

61 Even if the Cities’ emergency response time LOS levels were deficient, there is insufficient evidence in the record to demonstrate that opening a crossing at Center Parkway would solve this problem. Richland’s comprehensive planning documents do not focus on building more roadways to solve response time deficiencies. Instead, the capital facilities element of Richland’s GMA documents discuss building additional fire stations closer to areas needing better response times.¹⁰⁷

62 Chief Baynes, Chief Skinner, and Chief Hohenberg all testified that more choices and more alternatives are always better for emergency responders. However, this new access route between Gage Boulevard and Tapteal Drive may prove to be an illusory option if rail traffic increases according to even the most conservative estimates made

¹⁰⁵ Petitioners’ Post-Hearing Brief at 6, 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 (February 15, 2011) at ¶ 29.

¹⁰⁶ Petitioners’ Post-Hearing Brief at 10, citing to Exhs. GAN-3-X and GAN-18-X. Chief Baynes provided little, if any, context for additional response time data he provided in Exh. GAN-18-X. See Baynes, TR. 103:5 – 105:21, 121:13 – 125:6 and Norris, TR. 295:6 – 297:16.

¹⁰⁷ See Exhs. GAN-3-X and GAN-4-X.

part of the record in this case. The potentially shorter response times that might be possible to a very limited area of south Richland with this new at-grade crossing are not sufficient to demonstrate public need.

b) Reduced Accident Rates

- 63 The Cities also argued that a public need exists to open the Center Parkway crossing because doing so would reduce traffic accident rates at two Columbia Center Boulevard intersections. However, neither the JUB Study nor the Cities' traffic engineering witnesses provided any data or studies to support this assertion.
- 64 Mr. Deskins provided raw data on the number of vehicle collisions over a decade's time but analysis on how or why these accidents occurred. Mr. Montgomery offered only unconfirmed notions that reducing traffic levels would reduce accident rates. The record has no persuasive evidence connecting improved traffic safety on Columbia Center Boulevard to opening a new roadway that will regularly be blocked by rail traffic.

c) Relief of Traffic Congestion

- 65 Similarly, the Cities presented evidence showing that busy intersections in the vicinity of the Mall were approaching deficient LOS levels during peak travel times. Traffic waits for left turn signals at two intersections feeding into the Mall are already one level below the acceptable LOS D. We do not dispute that the Cities must find a way to resolve traffic congestion patterns in this area, but the Cities offered no persuasive evidence that opening a crossing at Center Parkway would materially contribute to this desired result:
- The JUB Study made no specific findings about how a crossing at Center Parkway would impact deficient LOS ratings at congested intersections.
 - Mr. Simon was unable to explain the effect of extending Center Parkway on the LOS E for eastbound left turns at the intersection of Columbia Center Boulevard and Quinault.
 - Mr. Deskins failed to conduct any LOS analysis focused on the installation of a crossing at Center Parkway and never factored train delays into any of the models he did consider.
- 66 The record does not conclusively link extending Center Parkway to any improvement in traffic flow at congested intersections in the immediate area. At best, the record demonstrates that opening the proposed at-grade crossing will make public travel

more convenient between the Tapteal Drive area and the Columbia Center Mall. It is certainly possible that opening a new roadway will divert traffic away from existing overcrowded intersections, but supposition alone is not sufficient to demonstrate public need. The Cities failed to demonstrate that opening the proposed Center Parkway crossing would reduce traffic congestion around the Mall or at the intersection of Gage Boulevard and Steptoe Street.

4. Balancing of Public Need Against Hazards of At-Grade Crossings

- 67 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.
- 68 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.
- 69 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 70 Having discussed above in detail the evidence received in this proceeding regarding all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts and conclusions, incorporating by reference pertinent portions of the preceding detailed discussion:
- 71 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate railroad

crossings, and has jurisdiction over the parties and subject matter of this proceeding.

- 72 (2) The City of Richland and the City of Kennewick are governmental entities authorized by law to petition the Commission pursuant to RCW 81.53.020 for authority to construct an at-grade railroad crossing where it is not practicable to construct a grade-separated crossing and there is a public need for such a crossing that outweigh its inherent risks.
- 73 (3) Res judicata does not bar the Commission from ruling on the Cities' petition because it is sufficiently different from the City of Kennewick's prior petition.
- 74 (4) Comprehensive planning under the Growth Management Act does not relieve the Cities from complying with RCW 81.53.
- 75 (5) A grade-separated crossing at the proposed project site is not practicable because of engineering requirements and cost constraints.
- 76 (6) The risks of an accident at the proposed crossing are relatively low considering current and projected train traffic, predicted levels of vehicle traffic, and plans to install active warning devices and other safety measures.
- 77 (7) The Cities' emergency responders are meeting or exceeding the response time objectives established in the Cities' comprehensive plans.
- 78 (8) The Center Parkway extension may assist the Cities' emergency responders by providing an alternative route for responding to incidents in the vicinity of Columbia Center Mall, but only when trains are not blocking the intersection.
- 79 (9) The Cities did not produce sufficient evidence to demonstrate that the Center Parkway extension would reduce accident rates in the area or improve traffic flow at congested intersections surrounding the Columbia Center Mall.
- 80 (10) The Cities failed to demonstrate sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing.
- 81 (11) The Commission should deny the City of Richland's and City of Kennewick's petition for authority to construct an at-grade crossing at the proposed extension of Center Parkway.

ORDER

THE COMMISSION ORDERS:

- 82 (1) The petition filed by the City of Kennewick and joined in by the City of
Richland is denied.
- 83 (2) The Commission retains jurisdiction to enforce the terms of this order.

Dated at Olympia, Washington, and effective February 25, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **five (5)** copies of any Petition or Answer must be filed by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

EXHIBIT 4

1
2 **BEFORE THE WASHINGTON**
3 **UTILITIES AND TRANSPORTATION COMMISSION**

4 CITY OF KENNEWICK AND CITY OF
5 RICHLAND

6 Petitioners,

7 vs.

8 PORT OF BENTON, TRI-CITY & OLYMPIA
9 RAILROAD COMPANY, BNSF RAILWAY
10 COMPANY, AND UNION PACIFIC
11 RAILROAD

12 Respondents.

DOCKET TR-130499

CITIES OF KENNEWICK AND
RICHLAND PETITION FOR
ADMINISTRATIVE REVIEW

ORAL ARGUMENT REQUESTED

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STATE OF WASH
UTIL. AND TRANSP
COMMISSION

PETITIONERS' PETITION FOR REVIEW

ORIGINAL

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1 **1. INTRODUCTION**

2 The Initial Order applies a legal standard for at-grade crossing petitions that does not
3 conform to controlling law or the UTC's¹ interpretation of controlling law. Without action by
4 the Commission, the Initial Order will create an unlawful and dangerous precedent that, as
5 documented in this petition, will put lives at risk.

6 The Initial Order correctly concluded that the City of Kennewick and the City of
7 Richland ("Cities"), satisfied the first two questions that the Administrative Law Judge ("ALJ")
8 applied to evaluate an at-grade crossing petition for the Center Parkway crossing:

9 1) "A grade-separated crossing at the proposed project site is not practicable
10 because of engineering requirements and cost constraints;"² and

11 2) "The risks of an accident at the proposed crossing are relatively low considering
12 the current and projected train traffic, predicted levels of vehicular traffic, and plans to install
13 active warning devices and other safety measures."³

14 However, the ALJ denied the petition because he concluded, "the Cities failed to
15 demonstrate public need to outweigh the inherent risks presented by the proposed at-grade
16 crossing."⁴ Despite uncontested evidence in the record, the ALJ incorrectly determined that
17 "The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to
18 balance against the inherent hazards of an at-grade crossing."⁵ Neither the evidence nor the law
19 supports the ALJ's conclusions.

20 Uncontested evidence demonstrates that the public need for the crossing outweighs the
21 speculative risk of opening the at-grade crossing. The UTC calculated the risks of opening the
22 proposed at-grade crossing, concluding that it would result in 0.018701 collisions per year, or
23

24 ¹ Washington Utilities and Transportation Commission, or "UTC," or "Commission."

25 ² Initial Order at ¶ 75 (emphasis added). *Also see*, Initial Order ¶¶ 47-50.

26 ³ Initial Order at ¶ 76. *Also see* ¶¶ 51-54.

⁴ Initial Order at ¶ 80.

⁵ Initial Order at ¶ 67.

1 **one accident every 53.5 years.**⁶ Therefore, under the legal standard cited by the ALJ, the ALJ
2 must approve the petition if the Cities demonstrate that the public need for the crossing
3 outweighs the potential for one accident every 53.5 years.

4 Uncontested evidence shows that the Center Parkway crossing demonstrates the public
5 need to improve failing emergency response times. All of the emergency responders agree that
6 the Cities' failure to achieve emergency response times places lives at risk. Uncontested
7 evidence also shows that the Center Parkway crossing demonstrates many other public needs,
8 including: relieving traffic congestion, reducing traffic accidents, promoting economic
9 development, and completing a long-planned regional transportation network.

10 The public needs are cumulative, but the uncontested evidence regarding only emergency
11 response times demands the UTC's approval of the crossing. For example, to protect the public
12 health and safety, the City of Richland (as many communities providing emergency medical
13 response) has established its level of service ("LOS") at a **maximum 5-minute response time**
14 for its emergency responders to arrive at incidents.⁷ The City of Kennewick has established its
15 LOS at a **maximum 4-minute response time** for emergency responders.⁸ The record contains
16 undisputed facts that the Cities are failing to achieve this emergency response time in this area.⁹
17 The Director of Fire and Emergency Services for the City of Richland testified that the Richland
18 Fire Department's median response time for the Tapteal Drive area is **5 minutes 50 seconds**, and
19 that the Kennewick Fire Department's median response time to Tapteal Drive is **7 minutes 50**
20 **seconds.**¹⁰ The record shows conclusively that existing disconnected transportation network and
21 traffic congestion result in the Cities' failure to achieve its emergency response times.¹¹ The

22
23 ⁶ Exh. KH-1T 25:7-23:7.

⁷ Exh. RS-1T, 5:11-12, see also Exh. GAN-4-X.

⁸ Exh. GAN-6-X at 2.

⁹ Exhs. GAN-3-X, GAN-18-X.

¹⁰ Exh. GAN-18-X, TR 103:1:17-105-21 (describing the facts and conclusions in GAN-18-X).

Consistent with GAN-18-X, the City of Richland's comprehensive plan shows emergency response times
at 7 minutes 44 seconds for EMS. GAN-3-X.

¹¹ TR. 105:222-107:14

1 Center Parkway crossing provides a direct connection to Tapteal Drive, which will improve
2 emergency response times to the Tapteal Drive area by 30% and 24% from Kennewick Fire
3 Station 3 and Richland Fire Station 72, respectively.¹² The proposed crossing will reduce
4 response times by “approximately a minute.”¹³

5 The failure to achieve the emergency response times presents a critical safety issue for
6 the residents and businesses of the City of Kennewick and the City of Richland. An
7 “improvement [in response times] of mere seconds may significantly impact the outcome for
8 critical events related to a medical emergency or fire.”¹⁴ And, the “fire service is acutely aware
9 of the criticality of response times and their impact on outcomes, particularly for trauma, cardiac,
10 and stroke patients, and wildland fires. Our service delivery is tuned to count seconds saved
11 from dispatch through to arrival at the patient/fire/rescue.”¹⁵

12 Despite this conclusive evidence, the Initial Order denied the proposed crossing.
13 Creating a troubling precedent, the Initial Order stated: “Although the Cities point out individual
14 statistics where response times have occasionally exceeded these goals [*i.e.*, less than five-
15 minute response time], the Cities’ emergency responders are not **regularly failing** to achieve
16 their established LOS.”¹⁶ This is not the legal standard.¹⁷

17 The Cities demonstrated that they are not meeting their adopted level of service standards
18 and that emergency response issues will continue to worsen with time. The Cities also
19 demonstrated other public needs, including: relieving traffic congestion, reducing traffic
20 accidents, promoting economic development, and completing a regional transportation network.

21 ¹² Exh. JP-5-X.

22 ¹³ TR 107:15 (testimony of Richland’s Director of Fire and Emergency Services).

23 ¹⁴ Exh. NH-1T, 3:15-18 (testimony of City of Kennewick Fire Chief).

24 ¹⁵ Exh. RGB-1T, 4:4-7 (testimony of Richland’s Director of Fire and Emergency Services).

25 ¹⁶ Initial Order ¶ 60. A primary purpose for this petition is to begin the permitting, bidding, and
26 construction process for the crossing so that the Cities will never regularly fail to achieve emergency
response times, which, as the record conclusively demonstrates, would place lives at risk.

¹⁷ Hypothetically, if this decision becomes UTC’s new standard, how does a petitioner demonstrate
“**regularly failing**” emergency response times? For example, must a petitioner present data showing a
30-percent failure rate? A 60-percent failure rate? Is a death that is attributed to a failed emergency
response time necessary?

1 No law requires the Cities to demonstrate “regularly failing” emergency response times in order
2 to receive UTC approval for a crossing that will reduce emergency response times, especially
3 when the proposed crossing poses a risk of one incident every 53.5 years. The petition should
4 be approved. The uncontested evidence demonstrates that public need for the crossing
5 outweighs the speculative risk of opening the at-grade crossing.

6 **2. PETITION AND RELIEF REQUESTED**

7 The Cities petition the Washington Utilities and Transportation Commission
8 (“Commission”) for review of the INITIAL ORDER DENYING PETITION TO OPEN AT-
9 GRADE RAILROAD CROSSING dated February 25, 2014 (the “Initial Order”).¹⁸ A copy of
10 the Initial Order is included with this appeal as Exhibit A. The Cities file this petition pursuant
11 to WAC 480-07-825 within 20 days of service of the Initial Order, and it is timely pursuant to
12 WAC 480-07-825(2).

13 The Cities request that the Commission APPROVE the at-grade Center Parkway
14 crossing. The Cities also request that the Commission revise the Initial Opinion so that it does
15 not create a dangerous precedent that places public safety at risk. Because of the critical safety
16 issues at stake, the Cities request oral argument, pursuant to WAC 480-07-825(6).¹⁹

17 **3. BACKGROUND**

18 By 2030, the City of Richland’s population is projected to increase by 68% and the City
19 of Kennewick’s population is projected to increase by 56%.²⁰ This projected growth will place
20 increased demands upon the Cities’ existing transportation network. To accommodate the
21 projected growth, the Cities have engaged in local and regional transportation planning efforts.
22 The Center Parkway crossing is a key element of the planned transportation network.

23
24
25 ¹⁸ Docket TR-130499 Order 02 (2014).

26 ¹⁹ Written testimony is inadequate, as the Commission will likely have additional questions regarding the
Initial Opinion’s attempt to create an unprecedented and dangerous legal standard for at-grade crossings.

²⁰ Exh. GAN-2-X.

1 The Center Parkway crossing north to Tapteal Drive has been part of city, county and
2 regional planning, consistent with the Growth Management Act, for nearly two decades. The
3 Center Parkway crossing is included in both Cities' comprehensive plans, and the regional
4 transportation plan, and it is included *as if the Crossing already exists* in the regional
5 transportation model.²¹ The Center Parkway crossing demonstrates public need, including:
6 (1) addressing documented failing emergency response times; (2) reducing accident rates;
7 (3) relieving traffic congestion, thereby addressing the existing transportation issues for motorists
8 and public transit and for the multi-modal shipment of freight through the Tri-Cities (*e.g.*,
9 allowing trucks to access rail yards); (4) promoting economic development; and (5) satisfying
10 the concurrency requirements of the Growth Management Act. All of these issues will become
11 more pressing as the usage of the transportation network increases with Tri-Cities' growing
12 population.

13 The evidentiary support for the Center Parkway crossing of Port of Benton tracks set out
14 in the Petition and heard by the Commission is effectively uncontested. The Cities, with the
15 independent analysis of UTC staff, agree that a separated grade crossing is not practicable, based
16 upon the factors set forth in chapter 81.53 RCW and controlling agency interpretation of the law.
17 The Cities' crossing design includes safety features **exceeding** typical engineering standards for
18 such an intersection. The safety measures include a raised center median to provide a higher
19 degree of protection from vehicles navigating around the warning gates. The at-grade crossing
20 also includes more safety measures not typically found at crossings throughout Washington state
21 and North America (*e.g.*, active warning devices).²² The Cities' attention to safety devices
22 further reduces any risk at the proposed crossing, and, therefore, the Cities and the UTC agree

23 _____
24 ²¹ TR 84:4-9.

25 ²² The proposed safety features are reviewed in the following elements of the record: Petition; KJ-1T;
26 KH-1T at 8; SKG-1T at 4; KH-1T at 23-24; KJ-8. The Cities' previous petition did not include adequate
safety design. To address this issue, Petitioners hired Ms. Grabler and Mr. Jeffers, railroad professionals
with over 59 years' experience to design the safety features that will be implemented at the crossing.
Exh. JP-1T at 4:4-8.

1 that the petition demonstrates a public need for the crossing that outweighs the speculative risks
2 of opening the at-grade crossing.

3 Elected officials, public safety officials, businesses, and substantial numbers of regional
4 and community groups and individuals support the Petition.²³ The only party in this petition that
5 does not fully support this petition is the Tri-City & Olympia Railroad (“TCRY”), which refused
6 to engage in any aspect of the Cities’ transportation planning²⁴ or the UTC’s Diagnostic Meeting
7 for this proposed crossing.²⁵ And even TCRY admits “the City’s [Richland’s] interest in
8 facilitating well designed urban transportation improvements, including rail, vehicle, and
9 pedestrian facilities.”²⁶ And, at the hearing, TCRY admitted that **it does not oppose** a crossing
10 of the track and the siding.²⁷

11 The Initial Order states incorrectly that TCRY “opposes the new Center Parkway
12 crossing because rail operations could regularly require freight trains to block the crossing,
13 occasionally for lengthy periods of time.”²⁸ The uncontested record shows that the crossing will
14 be closed approximately one percent (1%) of the day,²⁹ further undermining the ALJ’s findings.
15 For this reason, and the remaining record before the UTC, the Petition should be granted.

16 **4. SUMMARY OF ISSUES FOR ADMINISTRATIVE REVIEW**

17 This Initial Order creates immediate health and safety issues for the Cities, and it also
18 creates a dangerous precedent for future petitions to the UTC. The Initial Order is deficient in
19 many regards:

20 (1) The Initial Order fails to defer to UTC’s consistent interpretation of RCW 81.53.020
21 and .030;

22 _____
23 ²³ Public Comment Exhibit.

24 ²⁴ Exh. RS-1T 3.

25 ²⁵ Exhs. KH-1T 7:9-11; KH-5 at 2 (“While invited, TCRY and Port did not have representatives in
26 attendance.”)

27 ²⁶ Exh. RVP-7-X.

28 ²⁷ TR. 414-418.

29 ²⁸ Initial Order ¶14, citing TR 414:23-418:5.

²⁹ Exh. SM-1T 5:7.

1 (2) The Initial Order violates RCW 36.70A.103;

2 (3) The Initial Order applies an incorrect legal standard to review the petition;

3 (4) The Initial Order incorrectly interprets evidence; and, for these reasons

4 (5) The Initial Order concludes with Findings of Fact and Conclusions that are not
5 supported by fact, not supported by law, and create a dangerous precedent that places the public
6 at risk, while limiting local government's ability to address identified health and safety issues.

7 This petition addresses each of these issues in the order outlined above.

8 **5. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

9 *The Cities assign error to §§ 76, 77, 78, 79, 80, and 81 (respectively numbered: 6, 7, 8,*
10 *9, 10, and 11) because they are inconsistent with evidence and controlling law, as demonstrated*
11 *throughout this petition and the evidentiary record. The Cities propose the following Findings of*
12 *Fact and Conclusions of Law:*

13 STRIKE ¶76; PROPOSED ¶: The inherent risk of the proposed at-grade crossing is low
14 considering current and projected train traffic, predicted levels of vehicle service, and plans to
15 install active warning devices and other safety measures. After the construction of the crossing,
16 the UTC calculates the risk at one incident every 53.5 years.

17 STRIKE ¶77; PROPOSED ¶: The Cities have demonstrated that they are failing to achieve
18 established emergency response times, placing the public at risk.

19 STRIKE ¶78; PROPOSED ¶: The Center Parkway crossing will assist emergency responders by
20 providing an alternative route for responding to incidents on Tapteal Drive and in the vicinity of
21 Columbia Center Mall. The Cities have also demonstrated that the proposed Center Parkway
22 extension will reduce emergency response times.

23 STRIKE ¶ 79. Delete – unnecessary.

24 STRIKE ¶ 80; PROPOSED ¶: The Cities presented sufficient evidence to demonstrate that the
25 public need outweighs any risks presented by the at-grade crossing at this location.

26 STRIKE ¶ 81; PROPOSED ¶: The Commission approves the City of Richland's and the City of
Kennewick's petition for authority to construct an at-grade crossing at the proposed extension of
Center Parkway.

STRIKE ¶ 82; PROPOSED ¶ The petition filed by the City of Kennewick and joined in by the
City of Richland is approved.

1 **6. LEGAL STANDARD**

2 The Cities’ proposed Findings of Fact and Conclusions of Law are consistent with UTC’s
3 application of RCW 81.53.020 and .030 and the ALJ’s admission that the UTC applies a
4 balancing test to evaluate at-grade crossing petitions. To ensure that the UTC does not
5 inadvertently establish a new and dangerous precedent, the Cities assign error to the Initial
6 Opinion’s statement of legal standard of review for at-grade crossing petitions. The Initial Order
7 fails to apply the correct legal standard, because it does not defer to the UTC’s consistent
8 position on “public need” used to evaluate petitions for an at-grade crossing.

9 **6.1 The ALJ Failed to Defer to UTC’s Consistent Interpretation of the Law.**

10 *The Cities assign error to ¶¶ 45-46, 58-59.* As background, RCW 81.53.020 and .030
11 provide the UTC with certain authority over certain petitions for opening at-grade crossings
12 when a grade-separated crossing is not practicable.³⁰ To determine whether a separated grade
13 crossing is practicable, the UTC must consider a non-exclusive list of statutory factors, including
14 (1) amount and character of travel on the railroad and on the highway; (2) the grade and
15 alignment of the railroad and the highway; (3) the cost of separating grades; (4) the topography
16 of the county; and (5) all other circumstances naturally involved in such an inquiry. RCW
17 81.53.020.³¹ The statute does not define the term, “other circumstances,” thereby allowing the

18 _____
19 ³⁰ The Petitioners do not waive any jurisdictional argument regarding the Cities’ exemption from this
20 petition process. RCW 81.53.240 exempts first-class cities from the at-grade crossing petition process.
21 The City of Richland is a first-class city, and the City of Kennewick is a code city. State law provides
22 that code cities have the same authority as first-class cities. RCW 35A.11.020: “The legislative body of
23 each code city shall have all powers possible for a city or town to have under the Constitution of the state,
24 and not specifically denied to code cities by law.” Nevertheless, the Petitioners believe UTC review and
25 approval worthwhile.

26 ³¹ RCW 81.53.020 states: All railroads and extensions of railroads hereafter constructed shall cross
existing railroads and highways by passing either over or under the same, when practicable, and shall in
no instance cross any railroad or highway at grade without authority first being obtained from the
commission to do so. All highways and extensions of highways hereafter laid out and constructed shall
cross existing railroads by passing either over or under the same, **when practicable**, and shall in no
instance cross any railroad at grade without authority first being obtained from the commission to do so:
PROVIDED, That this section shall not be construed to prohibit a railroad company from constructing
tracks at grade across other tracks owned or operated by it within established yard limits. **In determining
whether a separation of grades is practicable, the commission shall take into consideration the**

1 UTC to determine the “other circumstances,” so long as such a determination is consistent with
2 the governing statute.

3 Within this statutory framework, the UTC applies a balancing test, summarized by
4 Administrative Law Judge Dennis Moss as follows:

5 The Commission, in practice, addresses two principal questions when considering
6 whether to authorize construction of an at-grade crossing, which, by its nature,
7 poses risks for motorists and pedestrians not present at grade-separated crossings:

- 8 A. Whether a grade-separated crossing is practicable considering cost and
9 engineering requirements and constraints.
- 10 B. Whether there is a demonstrated **public need** for the crossing that
11 outweighs the hazards inherent in an at-grade configuration.³²

12 At the evidentiary hearing, UTC’s Deputy Assistant Director³³ testified that the UTC
13 interprets “public need” to be synonymous with the following terms: “good cause shown,
14 reasonable, consistent with public interest, public convenience and necessity.”³⁴ Undisputed
15 testimony shows that the UTC has consistently applied this standard to recent at-grade crossing
16 petitions.³⁵ UTC also testified that “public need” does *not* mean “acute public need.”³⁶ To be
17 clear, the “acute public need” standard is not required under RCW 81.53.020 or .030, which
18 authorizes the UTC to examine “all other circumstances,” and a showing of “acute public need”
19 is not required by the UTC.

20 The ALJ must defer to an agency’s consistent interpretation of an ambiguous statute.
21 *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000) (“Where a

22 **amount and character of travel on the railroad and on the highway; the grade and alignment of the
23 railroad and the highway; the cost of separating grades; the topography of the country, and all
24 other circumstances and conditions naturally involved in such an inquiry.** (Emphasis supplied.)

25 ³² *Benton County*, Docket No. TR-100572, Order 06 at 13 (2011) (emphasis added).

26 ³³ Ms. Hunter has worked for the Commission for 24 years. Since 2008, she has been responsible for all
of the UTC’s rail safety staff and for either directly working, or directing the work of, all rail safety
dockets. Exh. KH-1T at 1:12-23.

³⁴ TR. at 277:21-22.

³⁵ TR. at 279:20-23; 273:23-25 to 274:1-2.

³⁶ TR. at 273:23-25 to 274:1-2. “Acute public need” was first used in the 1985 Order for *Whatcom
County v. Burlington Northern Railroad Company*, and cited in other orders, including the 1993 Order for
Town of Tonasket v. Burlington Northern Railroad Company, Docket No. TR-921371, Order Denying
Review at 4 (1993).

1 statute is within the agency's special expertise, the agency's interpretation is accorded great
2 weight; provided the statute is ambiguous."). And, the ALJ conceded that "the statute does not
3 require a showing of acute public need."³⁷ But, the ALJ, contrary to controlling law, analyzed
4 the "public need" of the petition by relying upon an unarticulated standard that can only have
5 exceeded the UTC's consistent position that "public need" is synonymous with "good cause
6 shown, reasonable, consistent with public interest, public convenience and necessity."³⁸

7 **6.2 The Initial Order's New and Unprecedented Legal Standard is Ambiguous**
8 **and Dangerous.**

9 Without Commission action, the Initial Order will create a precedent that the UTC cannot
10 approve an at-grade crossing for public safety (and other) reasons unless the petitioner
11 demonstrates "regularly failing" emergency response times when the UTC identifies the
12 proposed risk of the crossing at less than two incidents per century. The record clearly
13 demonstrates that "mere seconds" may significantly influence the outcomes of emergency
14 response events,³⁹ and this petition demonstrates that the proposed crossing will improve
15 emergency response times by 30% and 24% from Kennewick Fire Station 3 and Richland Fire
16 Station 72, respectively.⁴⁰

17 The application of the "regularly failing" standard is absurd. Under the Initial Order,
18 apparently the first step in the petition process is for the Cities to compile a record that

19
20 ³⁷ Initial Order at ¶ 58.

21 ³⁸ TR at 277:21-22. For example, in ¶ 57, footnote 102 of the Initial Order, the ALJ appears to improperly
22 rely upon the USDOT Railroad-Highway Grade Crossing Handbook ("Handbook") to create a new and
23 elevated standard of review for at-grade crossings. Significantly, the USDOT and UTC have not
24 promulgated any rule to adopt the Handbook as a dispositive regulation in this petition for an at-grade
25 crossing (*see e.g.*, WAC 480-62-999). In addition, the Initial Order fails to acknowledge that the
26 Handbook qualifies its statement with the term: "**Generally**, new grade crossings" The Handbook
also sets forth circumstances when the Handbook would consider an at-grade crossing to be warranted
(*e.g.*, "when no other viable alternative exists"). The Handbook contemplates new at-grade crossings
solely to "provide access to any land development." Ex. KH-10. Undisputed testimony also demonstrates
that the Handbook also lists "public necessity, convenience, and safety as factors to be considered." Ex.
KH-1T 15:7-10.

³⁹ Exh. NH-1T 3:15-18.

⁴⁰ Exh. JP-5-X.

1 demonstrates “regularly failing” emergency services.⁴¹ Then, the Initial Order will apparently
2 allow the Cities to file a petition with the UTC, wait approximately one year for the completion
3 of the process, bid the project, permit the project, and construct the project.⁴² And, during this
4 multi-year process, the Cities’ residents will remain at risk because the Cities are “regularly
5 failing” to provide basic health and safety services to its citizens. This is not the law. RCW
6 81.53.020 does not create a legal standard that places lives at risk when the risk of intersection
7 conflicts at the proposed at-grade crossing is speculative.

8 **6.3 The Initial Order Violates RCW 36.70A.103.**

9 *The Cities assign error to §§ 42-46.* The Growth Management Act provides for more
10 than planning at a local level.⁴³ It is a comprehensive program for the integration of local
11 regional and state planning for the benefit of an entire community, and all of its systems,
12 including rail and roads. See RCW 36.70A.070 (including identification of state and local
13 needs.). And, “state agencies shall comply with the local comprehensive plans and development
14 regulations and amendments thereto adopted pursuant to this chapter ...” RCW 36.70A.103.
15 The Initial Order fails to conform to this mandate. That Order properly concludes that Center
16 Parkway crossing is included in the City of Kennewick’s comprehensive plan, the City of
17 Richland’s comprehensive plan, and the Benton-Franklin Council of Government’s Regional
18 Transportation Plan.⁴⁴ But the Order then ignores such planning.

19
20
21 ⁴¹ Initial Order ¶ 60. Under the ALJ’s “regularly failing” standard, would the petition need to include
evidence demonstrating deaths or near deaths attributable to failed response times?

22 ⁴² The application of the Initial Order’s new and unprecedented legal standard is equally absurd. For
23 example, how would the UTC define “regularly failing”?

24 ⁴³ RCW 36.70A.010: “The legislature finds that uncoordinated and unplanned growth, together with a
25 lack of common goals expressing the public’s interest in the conservation and the wise use of our lands,
pose a threat to the environment, sustainable economic development, and the health, safety, and high
26 quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local
governments, and the private sector cooperate and coordinate with one another in comprehensive land use
planning. Further, the legislature finds that it is in the public interest that economic development
programs be shared with communities experiencing insufficient economic growth.”

⁴⁴ Initial Order ¶ 20.

1 The Commission need not address this issue in order to reach its decision. The Petition
2 and evidence showing public need is clear. However, to preserve this issue, the Cities assign
3 error and propose correct findings to the following provisions of the Initial Order.

4 **6.4 Petitioners' Proposed Decision and Determinations.**

5 The Cities provide the following proposed amendments to subsection B. and C. of the
6 Initial Order's section titled "Evidence:"

7 Delete ¶¶ 42-46 and ¶¶ 58-59. Insert the following:

8 B. LEGAL STANDARD FOR AT-GRADE CROSSING PETITIONS THAT
9 IMPROVE EMERGENCY RESPONSE TIMES

10 ¶ RCW 81.53.020 requires the UTC to approve a petition for an at-grade crossing
11 prior to its construction. The statute requires that crossings be grade-separated "when
12 practicable."

13 ¶ To determine whether a separated grade crossing is practicable, the UTC must
14 consider a non-exclusive list of statutory factors, including (1) amount and character of travel on
15 the railroad and on the highway; (2) the grade and alignment of the railroad and the highway;
16 (3) the cost of separating grades; (4) the topography of the county; and (5) all other
17 circumstances naturally involved in such an inquiry. RCW 81.53.020. The statute does not
18 define the term, "other circumstances."

19 ¶ The Administrative Law Judge must defer to the UTC's interpretation of RCW
20 81.53.020, which includes the term, "other circumstances."⁴⁵

21 ¶ Previously, the UTC has relied upon the following analysis for at-grade crossing
22 petitions:

23 The Commission, in practice, addresses two principal questions when considering
24 whether to authorize construction of an at-grade crossing, which, by its nature,
25 poses risks for motorists and pedestrians not present at grade-separated crossings:

- 26 A. Whether a grade-separated crossing is practicable, considering cost and
engineering requirements and constraints.
- 27 B. Whether there is a demonstrated **public need** for the crossing that
outweighs the hazards inherent in an at-grade configuration.⁴⁶

28 ¶ Consistent with RCW 81.52.020, the UTC may not approve a petition for an at-
29 grade crossing if it does not satisfy factor (A): "Whether a grade-separated crossing is
30 practicable, considering cost and engineering requirements and constraints." The statute
31 explicitly contemplates these factors.

32 ⁴⁵ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

33 ⁴⁶ *Benton County*, Docket No. TR-100572, Order 06 at 13 (2011) (emphasis added).

1 ¶ The UTC may not approve a petition for an at-grade crossing unless it also
2 satisfies factor (B). However, unlike factor (A), the term “public need” as used in (B) is not
3 explicitly listed as a factor in RCW 81.52.020.

4 ¶ The UTC has previously determined that the term “public need” is consistent with
5 the terms “good cause shown, reasonable, consistent with public interest, public convenience and
6 necessity.”⁴⁷

7 ¶ To demonstrate public need, a petitioner may demonstrate how the proposed
8 crossing will reduce emergency response times or address future identified emergency response
9 time level of service issues. As required under the UTC’s analysis, the UTC will weigh this
10 demonstration of public need against the identified dangers of the proposed crossing.

11 ¶ A petitioner may also submit other evidence to demonstrate “public need.” The
12 UTC will weigh this evidence on a case-by-case basis.

13 ¶ To demonstrate public need, the petitioner is not required to demonstrate that it is
14 “regularly failing” emergency response times. Such a requirement would be dangerous, and this
15 standard is not required by RCW 81.53.020 or .030, and the UTC has not applied this standard in
16 any previous petition.

17 ¶ The Cities carry the burden of proof for each on these issues.

18 7. THE EVIDENCE DEMONSTRATES THE PUBLIC NEED FOR THE CROSSING

19 The evidence demonstrates the public need for the project. The evidence section in the
20 Initial Order is deficient because it incorrectly cites evidence, fails to make a finding of fact that
21 reconciles conflicting evidence,⁴⁸ or disregards uncontested evidence. The Cities assign error to
22 the following paragraphs:

23 7.1 Rail Operations at Richland Junction.

24 *The Cities assign error to ¶ 11.* At the hearing, TCRY (apparently for the first time in
25 these proceedings) attempted to label the siding track as a “passing track.” The previous 2005
26 petition described the second track as a passing track used for the express purpose of
interchanging cars with BNSF and Union Pacific Railroad.⁴⁹ All Class I railroads, including
BNSF and UPRR, have ceased to use Richland Junction for interchange.⁵⁰

27 ⁴⁷ TR 277:21-22.

28 ⁴⁸ WAC 480-07-820(1)(a) requires the ALJ to “dispose of the merits in a proceeding ...”

29 ⁴⁹ Docket No. TR-040664, Order 6 / TR-050967 Order 2, ¶ 17 at Exhibit JP-9-X. AT TR 152:10-18,
Kevin Jeffers conclusively demonstrative that the siding track is not long enough to be used as a passing

1 At the hearing, the Cities impeached Mr. Peterson, the President of TCRY, who testified
2 that the TCRY makes “very frequent” use of the so-called “passing track.”⁵¹ On cross-
3 examination, the Cities presented Mr. Peterson with a series of photographs that depicted the
4 same car sitting on the siding track from October 3, 2013 to November 15, 2013.⁵² Mr. Peterson
5 then stated that the cars in the photos were not owned by TCRY. Impeaching his own testimony
6 regarding the “very frequent” use of the siding track, Mr. Peterson stated “They [the cars on the
7 siding track] can sit there for months.”⁵³

8 Curiously, the ALJ summarized Mr. Peterson’s testimony as if this evidence did not exist.
9 Paragraph 11 of the Initial Order states TCRY makes “frequent, if not daily, use of the facility.”
10 Contrary evidence notwithstanding, this ALJ summary is directly in conflict with Mr. Peterson’s
11 uncontested testimony:

12 Q: Mr. Peterson, I want to go to your direct testimony regarding the use of the
13 Richland junction facility as a passing track. You recognize that it’s not
used every day, isn’t that correct?

14 A: Correct.⁵⁴

15 The UTC should not permit its proceedings to ignore uncontested evidence. The City proposes a
16 correct finding, as follows.

17 STRIKE ¶ 11; PROPOSED ¶: TCRY is a rail carrier conducting interstate rail operations
18 through Kennewick and Richland. TCRY leases the track west and north of Richland Junction
19 from the Port of Benton; BNSF and UPRR also operate on this track, although these Class I
20 railroads have ceased to interchange at the Richland Junction.⁵⁵ The second track is a siding
21 track, which is primarily used for the storage of idle freight cars.⁵⁶ TCRY concedes that idle
freight cars may sit on the siding track “for months.”⁵⁷

22 track for one unit train while another unit train passes. Ex. JD-27-X (showing a 1,916.13 foot line that
23 extends well beyond the extent of the existing siding track).

24 ⁵⁰ Exhibits JP-7-X; JP-8-X.

25 ⁵¹ TR. 381:16-17.

26 ⁵² Exh. RVP-9-X; TR. 405:7-410:19.

⁵³ TR. 410:12-17.

⁵⁴ TR. 405:14-18.

⁵⁵ Exhd. JP-7-X; JP-8-X.

⁵⁶ Exh. RVP-9-X; TR. 405:7-410:19.

⁵⁷ TR. 410:12-17.

1 *The Cities assign error to ¶12.* Throughout the at-grade crossing petition process, TCRY
2 presented UTC with inconsistent and inflated track usage data. The Cities identified these
3 inconsistencies and presented credible evidence by railroad industry experts demonstrating fault
4 with TCRY's figures.⁵⁸

5 For example, TCRY reported to **UTC** (in response to UTC's data request) that it moves 2
6 to 4 trains per weekday, with an average length of "roughly 15 cars per train."⁵⁹ TCRY reported
7 to **Cities** (in response to the Cities' data request) that it is projected to move a total of 2,310
8 railcars over the crossing in 2013.⁶⁰ These figures are inconsistent, and TCRY provided
9 inaccurate data either to the UTC or the Cities. 2,310 cars divided by 15 cars per train = 154
10 trains for 2013.⁶¹ 154 divided by 52 weeks = 2.96 trains per week divided by 5 weekdays per
11 week = TRCY runs 0.59 trains per weekday in one direction, or 1.18 cars per weekday, if loaded
12 cars go in one direction over the crossing and cross again in the other direction empty. This
13 calculation is inconsistent with TCRY's other assertion that it runs an average of "two (2) to four
14 (4) trains per weekday."⁶²

15 BNSF and UPRR are the only other track users. BNSF reported to UTC that it runs one
16 train per day, with an average length of six cars per train.⁶³ UPRR reported to UTC that it ran no
17 trains in 2013, although it has moved 12 unit trains between 80-100 cars per train over the past
18 4.5 years.⁶⁴

19 Based upon the railroads' submitted data, Kevin Jeffers' pre-filed testimony concluded
20 that track usage is estimated at 3.2 to 5.02 trains per weekday (at most optimistic levels), or
21

22 ⁵⁸ Exh. KJ-10TR 4:9-9:13.

23 ⁵⁹ Exh. RVP-3-X 4:7-10 (TCRY's response to **UTC's** data request).

24 ⁶⁰ Exh. RVP-3-X 4:10-20 (TCRY's response to **Cities'** data request).

25 ⁶¹ Exh. KJ-10TR 4:9-26.

26 ⁶² These inconsistencies are further identified in Kevin Jeffers' pre-filed testimony at Exh. KMJ-10T
4:10-25.

⁶³ Exh. RVP-2-X (BNSF's response to UTC's data request).

⁶⁴ Exh. RVP-4-X (UPRR's response to UTC's data request). The track usage data is summarized in Exh.
KJ-10TR.

1 approximately 1,159 to 1,833 trains per year.⁶⁵ Yet, the Initial Order cites Mr. Peterson's
2 unsupported assertion "that the combined annual train traffic through the Richland Junction
3 increased from nearly 4,500 railcars in 2012 to over 5,100 railcars in 2013." The ALJ clearly
4 erred in his consideration of the evidence.

5 Consistent with TCRY's tendency to inflate track usage, Mr. Peterson also provided the
6 wildly ambitious growth targets of TCRY's use of the railway, claiming that he anticipates an
7 unprecedented growth rate of "approximately 20% each year."⁶⁶ Mr. Peterson's assertion is not
8 supported by any data and it is completely inconsistent with industry-accepted growth
9 standards.⁶⁷

10 To assist the UTC in evaluating the actual usage of the railway, the Cities also prepared
11 exhibits KJ-11 and KJ-12, which depict (1) the current track usage, (2) projected track usage
12 using an industry-accepted 5% growth rate, and (3) projected track usage relying upon TCRY's
13 unrealistic 20% annual growth rate.⁶⁸ These exhibits are further described in KJ-10TR at 4:9-
14 9:13. As a result, the evidence here requires a finding, as follows:

15 STRIKE ¶ 12; PROPOSED ¶: TCRY, BNSF, and UPRR are the only railroads that operate on
16 this track. No passenger trains operate on this track. In response to UTC and the Cities' data
17 requests, the railways submitted their actual track usage summarized in Exhibit KJ-10TR at 4:1-
18 8. BNSF reported to UTC that it runs one train per day, with an average length of six cars per
19 train. UPRR reported to UTC that it ran zero trains in 2013, although it has moved 12 unit trains
20 between 80-100 cars per train over the past 4.5 years.⁶⁹ TCRY reported inconsistent track usage
21 figures. TCRY reported to UTC that it moves 2 to 4 trains per weekday, with an average length
of "roughly 15 cars per train." TCRY reported to Cities (via the Cities' data request) that it is
projected to move a total of 2,310 railcars over the crossing in 2013.⁷⁰ Based upon these figures,
the UTC estimates track usage at 3.2 to 5.02 trains per weekday, or approximately 1,159 to 1,833
trains per year.⁷¹ The UTC agrees with the Cities that an annualized 5% rate of growth is the
railway industry standard, which should apply here. The UTC disagrees with TCRY's assertion

22 ⁶⁵ Exhs. KJ-10TR 4-7; KJ-11; KJ-12.

23 ⁶⁶ Exh. RVP-1T 5:5.

24 ⁶⁷ Exh. KJ-10TR 7:2-18.

25 ⁶⁸ Exh. KJ-11 depicts average trains per weekday based upon car counts provided by TCRY's data
request. Exhibit KJ-12 depicts average trains per week based upon train counts provided by TCRY. This
analysis is needed because TCRY provided the UTC with inconsistent car and train counts.

26 ⁶⁹ Exh. KJ-10TR 5:23-6:7.

⁷⁰ Exh. RVP-3-X 4:10-20.

⁷¹ Exhs. KJ-10TR 4-7; KJ-11; KJ-12.

1 that annual train traffic through Richland Junction was 4,500 railcars in 2012 and 5,100 railcars
2 in 2013. The UTC further disagrees with TCRY's projected 20% annual growth rate.

3 *The Cities assign error to ¶ 13.* In addition to the Center Parkway crossing, the Horn
4 Rapids project is also a component of the City of Richland's Comprehensive Plan.⁷² Both the
5 Center Parkway crossing and the Horn Rapids projects are set forth as key strategies to promote
6 economic development within an integrated transportation system. The City's vision is to
7 encourage rail yard activities at Horn Rapids, while using the proposed Center Parkway Crossing
8 to reduce vehicular congestion, thereby improving the region's multi-modal transportation
9 network. As the Cities' transportation consultant demonstrated, "The transportation system
10 works as a whole. If the region cannot move cars, then it also cannot move trucks. If the system
11 cannot move trucks, then there are delays in loading and unloading rail freight."⁷³

12 Track usage is currently estimated at 3.2 to 5.02 trains per weekday.⁷⁴ By 2030,
13 assuming an annual five-percent (5%) growth rate, approximately 5.48 trains will use the track
14 per weekday.⁷⁵ 5.48 trains per day accounts for, and is consistent with, any additional rail traffic
15 that will result from the proposed Horn Rapids Industrial Development. The City of Richland's
16 Economic Development manager explained that, under the "maximum, most optimistic
17 development scenario," the Horn Rapids Industrial Development will result in a total of five new
18 unit trains per week (two and a half in and two and a half out), or one per day.⁷⁶ All rail usage
19 data used to evaluate the Center Parkway crossing petition accounts for any increased rail traffic
20

21
22 ⁷² Exh. GAN-16-X 4 ("the [Horn Rapids Master Plan Update] supplements the Richland Comprehensive
23 Plan and supersedes the previous Master Plan adopted in 1995). *Also see*, GAN-15-X, establishing the
24 City of Richland's economic development policies, which are consistent with the Horn Rapids Master
25 Plan.

26 ⁷³ Exh. SM-1TR 3.

⁷⁴ Exhs. KJ-10TR; KJ-11; KJ-12. As stated by Mr. Montgomery, "we studied a different crossing of this
line 12 years ago, and the number of trains at that time was four. And today we have three to four. So it
hasn't changed much." TR at 232.

⁷⁵ Exhs. KJ-10TR; KJ-11; KJ-12.

⁷⁶ TR. 370.

1 attributed to the Horn Rapids Industrial Development.⁷⁷ The evidence should reflect this
2 undisputed record:

3 STRIKE ¶ 13; PROPOSED ¶: Gary Ballew, the City of Richland's Economic Development
4 Manager, testified that the Richland City Council recently approved a series of development
5 agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids
6 area.⁷⁸ Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to
7 process the equivalent of two and a half unit trains per week (approximately one unit train
8 entering or leaving the facility each day).⁷⁹ Mr. Ballew also testified that Richland has entered
9 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.⁸⁰ Mr. Ballew
expects an average of 30 rail cars each week will come and go from ConAgra's facility.⁸¹ All rail
usage data used to evaluate the Center Parkway crossing petition accounts for any increased rail
traffic attributed to the Horn Rapids Industrial Development.⁸²

10 *The Cities assign error to ¶ 14.* For the reasons set forth in the assignment of error for
11 ¶ 11, the Cities assign error to the use of the term "passing track" in ¶ 14. Further, the Initial
12 Order cites only Mr. Peterson's opposition to the blockage of the crossing, without citing the
13 uncontested evidence that the crossing will be blocked less than one percent (1%) of the day.⁸³
14 Such facts are necessary for the Commission to make an informed decision in this petition. The
15 following correctly reflects the record:

16 STRIKE ¶ 14; PROPOSED: All trains traveling to the Horn Rapids area must pass through the
17 Richland Junction and cross the proposed Center Parkway extension.⁸⁴ All Class I railroads,
18 including BNSF and UPRR, have ceased to use Richland Junction for interchange.⁸⁵ The record
19 is unclear whether TCRY uses the siding for anything more than the storage of cars.
Mr. Peterson testified that he opposes Center Parkway crossing because rail operations could
regularly require freight trains to block the crossing.⁸⁶ The evidence demonstrates that the
crossing will be blocked approximately one percent (1%) of the day.⁸⁷

20 _____
21 ⁷⁷ Exh. KJ-11.

22 ⁷⁸ Richland's rail loop will be approximately 8400 feet in total length. Ballew, TR. 354:25 – 357:22; *see*
also Exhs. JD-37-X, JD-38-X, JD-39-X, KJ-14-X, and King, TR. 334:1 – 336:15 and 337:21 – 340:16.

23 ⁷⁹ Ballew, TR. 358:2-12, 364:15 – 365:3, 369:21 – 370:6, 375:4 – 376:24; *see also* Exhibit JD-38-X.

24 ⁸⁰ Ballew, TR. 342:23 – 345:15; *see also* Exhs. JD-9-X, JD-10-X, and JD-11-X.

25 ⁸¹ Ballew, TR. 345:16 – 346:17 and 373:6-14.

26 ⁸² Exh. KJ-11.

⁸³ Exh. SM-1TR 5:7.

⁸⁴ Ballew, TR. 346:22 – 347:8; *see also* Jeffers, TR. 173:10-19.

⁸⁵ Exh. JP-7-X; JP-8-X.

⁸⁶ Peterson, TR. 414:23 – 418:5.

⁸⁷ Exh. SM-1TR 5:7.

1 7.2 Public Need Demonstrated.

2 *The Cities assign error to ¶ 20.* The uncontested record demonstrates that all relevant
3 transportation plans and comprehensive plans support the Center Parkway crossing. Since 2006,
4 the at-grade Center Parkway Crossing has been an essential public facility in (1) the City of
5 Richland Comprehensive Plan,⁸⁸ (2) the City of Kennewick Comprehensive Plan,⁸⁹ and (3) the
6 Regional Transportation Plan.⁹⁰ Recognizing the regional significance of this project, the Center
7 Parkway Crossing has received funding from the State through the Washington State Community
8 Economic Revitalization Board, the Surface Transportation Program Regional Competitive
9 Fund, and the Transportation Improvement Board.⁹¹ But, the findings of public need by these
10 state agencies apparently are of little interest to the ALJ's consideration of public need.

11 The Cities measure their transportation-related Level of Service through a traffic model
12 prepared by Benton-Franklin Council of Governments ("COG"). The Center Parkway crossing
13 is a funded project in the COG's Regional Transportation Plan,⁹² and the COG's transportation
14 model includes Center Parkway crossing **as if the Crossing exists** in the regional transportation
15 model.⁹³ The record demonstrates further that the Council of Governments, therefore,
16 recognizes the public benefits of the proposed Crossing through its traffic modeling.

17 The ALJ has no factual basis to include footnote 36 that questions the planning
18 foundation for the Center Parkway crossing. The record contains only two elements of the
19 COG's Regional Transportation Plan: the Preface/Executive Summary and Exhibit H, which lists
20 contemplated traffic improvement projects. These sections would not include any discussion of
21 the merits of specific projects. By dismissing all state, regional, county and other planning, the
22 Initial Order is clearly in error. The following properly summarizes the evidence:

23
24 ⁸⁸ Exh. RS-2 at T 5-4 ("Center Parkway from Tapteal to Gage: Construct 3-lane road").

25 ⁸⁹ Exh. GAN-7-X at 58 to 59.

26 ⁹⁰ Exh. RS-4 at H-3 ("Center Parkway Extension – Gage to Tapteal").

⁹¹ Exh. JP-2; JP-3.

⁹² Exhs. RS-4, GAN-8-X, GAN-9-X.

⁹³ TR. 84:4-12.

1 STRIKE ¶ 20; PROPOSED ¶: The Cities seek to complete a planned network of roadways and
2 address traffic issues in the area by extending Center Parkway from Tapteal Drive to Gage
3 Boulevard. Since 2006, the at-grade Center Parkway Crossing has been identified as an essential
4 capital improvement in (1) the City of Richland Comprehensive Plan,⁹⁴ (2) the City of
5 Kennewick Comprehensive Plan,⁹⁵ and (3) the Regional Transportation Plan.⁹⁶ Recognizing the
6 regional significance of this project, the Center Parkway Crossing has received funding from the
7 State through the Washington State Community Economic Revitalization Board, the Surface
8 Transportation Program Regional Competitive Fund, and the Transportation Improvement
9 Board.⁹⁷ Extending Center Parkway to Tapteal Drive and constructing the at-grade crossing will
10 decrease emergency vehicle response times,⁹⁸ reduce the amount of accidents near the Columbia
11 Center Mall, and improve traffic circulation in an important commercial area.⁹⁹

12 STRIKE FOOTNOTE 36; PROPOSED FOOTNOTES: Insert the footnotes included in proposed
13 ¶ 20.

14 *The Cities assign error to ¶ 22.* The record contains undisputed facts that the Cities are
15 failing to achieve established emergency response times.¹⁰⁰ The Richland Fire Department's
16 median response time for Tapteal addresses is **5 minutes 50 seconds**, and the Kennewick Fire
17 Department's median response time for Tapteal addresses is **7 minutes 50 seconds**.¹⁰¹
18 Consistent with this testimony, the City of Richland's comprehensive plan shows emergency
19 response times at 7 minutes 44 seconds for EMS.¹⁰² The last sentence of ¶ 22 is not relevant to
20 the UTC's legal standard, and it fails to properly present undisputed evidence.

21 STRIKE ¶ 22; PROPOSED ¶: The Cities' emergency response providers support each other and
22 respond to each other's calls for help.¹⁰³ The Cities and three local fire districts signed a Master
23 Interlocal Partnership and Collaboration Agreement in 2010 that includes an "automatic aid
24 agreement" for prioritizing and sequencing certain aid calls.¹⁰⁴ The Director of Fire and
25 Emergency Services for the City of Richland's uncontested evidence shows that the Richland
26 Fire Department's median response time for Tapteal addresses is 5 minutes 50 seconds, and that
the Kennewick Fire Department's median response time for Tapteal addresses is 7 minutes 50

94 Exh. RS-2 at T 5-4 ("Center Parkway from Tapteal to Gage: Construct 3-lane road").

95 Exh. GAN-7-X at 58 to 59.

96 Exh. RS-4 at H-3 ("Center Parkway Extension – Gage to Tapteal").

97 Exh. JP-2; JP-3.

98 Exh. JP-5-X; tr 107:15.

99 Exh. JD-1T 3:2-4, 5:11-21.

100 Exhs. GAN-3-X, GAN-18-X.

101 Exh. GAN-18-X, TRs 103:1:17-105-21 (Chief Baynes described the facts and findings in GAN-18-X).
Consistent with Exh. GAN-18-X, the City of Richland's comprehensive plan shows emergency response
times at 7 minutes 44 seconds for EMS.

102 Exh. GAN-3-X.

103 Exhs. CS-1T, 3:12-14 and KMH-1T, 2:10-15; *see also* Skinner, TR. 93:19 – 94:5.

104 Exh. NH-1T, 2:13-25, and Exh. RGB-1T, 2:18—3:15. *See also* Baynes, TR. 109:4 – 110:15.

1 seconds.¹⁰⁵ This testimony is based upon data prepared by the City of Richland Fire
2 Department.¹⁰⁶ The City of Richland's comprehensive plan shows emergency response times at
3 7 minutes 44 seconds for EMS.¹⁰⁷

4 *The Cities assign error to ¶ 23.* The uncontested evidence shows conclusively that the
5 crossing advances the public interest. The "Center Parkway connection provides a clear
6 improvement to access and police response capability."¹⁰⁸ The two alternative routes (on
7 Columbia Center Boulevard and Steptoe) are inadequate:

8 In an emergency requiring response to the Columbia Center Mall area or a
9 location on Tapteal Drive, a police officer responding via Columbia Center
10 Boulevard without the connectivity provided by Center Parkway would have
11 approximately three quarters of a mile trip navigating at least two complex
12 intersections and the frequently congested railroad undercrossing.¹⁰⁹ In the same
13 incident the officer responding via Steptoe Street would have an approximately
14 two mile trip requiring navigation of approximately five complex intersections
15 and a potentially blocked at-grade crossing. In contrast, the Center Parkway route
16 would provide access within less than half a mile and only one roundabout
17 intersection and the proposed at-grade crossing that will never function as a busy
18 commuting route.¹¹⁰

19 And, the Center Parkway connection "would improve emergency response between the two
20 cities as well as provide other alternatives for quicker response to each entity."¹¹¹

21 The evidence of public safety response times is from on-the-ground experience in the
22 City of Richland and the City of Kennewick. For example, Chief Hohenberg has served as a
23 City of Kennewick Police Officer since 1978. He has served in a variety of assignments,
24 including being a first responder and being assigned to the patrol division.¹¹² Failing to
25 recognize this history and expertise, paragraph 23 in the Initial Order fails to properly
26 characterize the Police Chiefs' testimony. The Cities propose the following:

21 ¹⁰⁵ Exh. GAN-18-X, TRs 103:1:17-105-21 (describing the facts and findings in GAN-18-X). Consistent
22 with GAN-18-X, the City of Richland's comprehensive plan shows emergency response times at 7
23 minutes 44 seconds for EMS.

23 ¹⁰⁶ Exh. GAN-18-X.

24 ¹⁰⁷ Exh. GAN-3-X.

25 ¹⁰⁸ Exh. CS-1T 4:20-23 (testimony of Police Chief Skinner).

26 ¹⁰⁹ The railroad crossing on Columbia Center Boulevard is a grade-separated crossing. Chief Skinner's
testimony is demonstrating that the intersection is car-congested, *not* train-congested.

¹¹⁰ Exh. CS-1T4:13-19 (testimony of Chief Hohenberg).

¹¹¹ Exh. KMH-1TR 3:2-7.

¹¹² Exh. KMH-1TR 2:5-8.

1 PROPOSED ¶ 23 The uncontested evidence from Richland Chief of Police Skinner showed that
2 “the Center Parkway connection provides a clear improvement to access and police response
3 capability.”¹¹³ The uncontested evidence from Kennewick Chief of Police Hohenberg showed
4 that “The proposed project would improve emergency response between the two cities as well as
5 provide other alternatives for quicker response to each entity.”¹¹⁴ Police response times are
6 sometimes difficult to evaluate because officers are often already deployed in the community and
7 can be responding from varied distances.¹¹⁵

8 *The Cities assign error to ¶ 24.* The Cities’ First Responders repeatedly stressed the
9 challenges presented by the existing unconnected road network. The record shows conclusively
10 that existing disconnected transportation network and traffic congestion result in the Cities’
11 failure to achieve its emergency response times.¹¹⁶ For example, Chief Baynes described the
12 challenges in responding to an emergency at Tapteal Drive from Kennewick Fire Station #3,
13 located to the east of Columbia Center Mall:

14 From the station, the fire truck must go through a controlled
15 intersection and turn right onto Colombia Center Boulevard, “which is essentially
16 a one way street because it’s center divided. And one of the challenges in a center
17 divided road is you get jammed up. It’s a lot easier to move vehicles out of your
18 way when you’re coming at them head on versus behind them.”¹¹⁷

19 Then the fire truck must make a series of complicated right-hand
20 turns “on a fairly steep slope.”

21 Finally, the fire trucks make a left hand turn onto Tapteal.¹¹⁸
22 Chief Baynes then described the emergency route over the proposed crossing, which involves
23 crossing Columbia Center Boulevard to reach Quinault, turning right at a roundabout onto Center
24

25 ¹¹³ Exh. CS-1T 4:20-23.

26 ¹¹⁴ Exh. KMH-1TR 3:2-7.

¹¹⁵ TR. 87:20 – 88:17 (testimony of Chief Skinner).

¹¹⁶ TR 105:222-107:14.

¹¹⁷ On cross-examination, Chief Baynes further described how the center-divided road causes congestion and reduces emergency response times. TR. 129:19-25. The Cities’ traffic consultant also discusses the challenges presented by the divided roadway. Exh. SM-1TR 5:8-12.

¹¹⁸ TR. 105:22-107:2.

1 Parkway, and proceeding on Center Parkway to Tapteal.¹¹⁹ This route is more direct, involves
2 only one controlled intersection, and does not include any one-way or center-divided roads.

3 The Center Parkway crossing will reduce emergency response times to Tapteal by
4 “approximately a minute.”¹²⁰ A minute is substantial for emergency response, when seconds
5 count.¹²¹ The reduction of response time is further supported by the JUB Report, concluding that
6 the Center Parkway Crossing reduces the response times by Kennewick Fire Station 3 and
7 Richland Fire Station 72 to property near the north of the Center Parkway crossing by 30% and
8 24%, respectively.¹²²

9 The uncontested evidence clearly shows that “an improvement [in response times] of
10 mere seconds may significantly impact the outcome for critical events related to a medical
11 emergency or fire.”¹²³ And, the “fire service is acutely aware of the criticality of response times
12 and their impact on outcomes, particularly for trauma, cardiac, and stroke patients, and wildland
13 fires. Our service delivery is tuned to count seconds saved from dispatch through to arrival at the
14 patient/fire/rescue.”¹²⁴

15 The Initial Order mischaracterizes the evidence by failing to identify the challenges
16 presented by the divided Columbia Center Boulevard. The Initial Order also fails to highlight
17 the significant risk that delayed emergency response times pose to the public. Here is an accurate
18 statement of the uncontested evidence:

19 STRIKE ¶24; PROPOSED ¶: The best emergency response routes for fire and medical units are
20 similar to the characteristics of Center Parkway, *i.e.*, a two-way, straight arterial-type roadways
21 providing the most direct route with the least amount of traffic, traffic control systems,
intersections, and turns to negotiate.¹²⁵ Without a direct connection between Gage Boulevard
and Tapteal Drive, Kennewick emergency responders must travel north of the Mall via Columbia

22 ¹¹⁹ TR. 107:7:12.

23 ¹²⁰ TR. 107:15 (testimony of Chief Baynes).

24 ¹²¹ Exhs. RGB-1T, 4:4-7; NH-1T, 3:15-18.

25 ¹²² Exh. JP-5-X. Mr. Montgomery testified that the response times in the JUB Report did not include
time spent at traffic signals or behind traffic to provide a similar evaluation technique for existing route
and the proposed route. TR. at 218-219.

26 ¹²³ Exh. NH-1T, 3:15-18 (testimony of Chief Hines)

¹²⁴ Exh. RGB-1T, 4:4-7 (testimony of Chief Baynes)

¹²⁵ Exh. NH-1T, 3:15-18.

1 Center Boulevard or Steptoe Street, routes that are less direct, occasionally burdened with heavy
2 traffic, and with multiple intersections and numerous turns to negotiate. According to Chief
3 Hines, improving response times by even a few seconds could significantly impact the outcome
4 for a patient in a critical event.¹²⁶ Richland Fire & Emergency Services Director Richard Baynes
5 shows “The fire service is acutely aware of the criticality of response times and their impact on
6 outcomes, particularly for trauma, cardiac, and stroke patients, and wildland fires. Our service
7 delivery is tuned to count seconds saved from dispatch through to arrival at the
8 patient/fire/rescue.”¹²⁷ The Center Parkway extension would provide a viable north-south route
9 for fire and medical units if the primary routes on Steptoe Street or Columbia Center Boulevard
10 were obstructed, growing in value as the Tapteal area continues its development.¹²⁸

11 *The Cities assign error to ¶ 25.* In addition to the uncontested evidence from emergency
12 response, the transportation study (“JUB Study”) concluded that the Center Parkway Crossing
13 would reduce the response times by Kennewick Fire Station 3 and Richland Fire Station 72 to
14 property near the north of the Center Parkway crossing by 30% and 24%, respectively.¹²⁹
15 Spencer Montgomery, a transportation planner, prepared the JUB Study. In addition to his 23
16 years of transportation planning experience, Mr. Montgomery was born and raised in the Tri-
17 Cities, and he has worked professionally on transportation issues in the Tri-Cities for the past 13
18 years.¹³⁰

19 The uncontested evidence from Mr. Montgomery showed that the response times in the
20 JUB Report did *not* include emergency responder turnout time, time spent at traffic signals, or
21 behind traffic, to provide a similar evaluation technique for the existing route and the proposed
22 route.¹³¹ The Initial Order improperly relied upon the response time listed in the JUB, while
23 failing to recognize that the relevant fact is the *percentage decrease* in time. A correct finding is
24 proposed as follows:

25 STRIKE ¶25: PROPOSED ¶: In support of their petition, the Cities also submitted a traffic
26 study completed by JUB Engineers, Inc. (JUB Study).¹³² The JUB Study concluded that the
Center Parkway Crossing would reduce emergency response times by Kennewick Fire Station 3
and Richland Fire Station 72 to property near the north of the Center Parkway crossing by 30%

126 *Id.* at 3:18-24.

127 Exh. RGB-1T, 4:4-7.

128 Exh. RGB-1T, 4:12-22.

129 Exh. JP-5-X.

130 TR. 211:24-25.

131 TR. at 218:13-219:1.

132 Exh. KJ-5; *see also* Petition.

1 and 24%, respectively.¹³³ Spencer Montgomery, a transportation planner with J-U-B
2 ENGINEERS, Inc., prepared the JUB Study. In addition to his 23 years of transportation
3 planning experience, Mr. Montgomery was born and raised in the Tri-Cities, and he has worked
4 professionally on transportation issues in the Tri-Cities for the past 13 years.¹³⁴ The JUB Report
5 did *not* include emergency responder turnout time, time spent at traffic signals, or behind traffic,
6 to provide a similar evaluation technique for the existing route and the proposed route.¹³⁵

7 *The Cities assign error to ¶ 26.* At the hearing, Spencer Montgomery demonstrated why
8 the Center Parkway crossing provides a “more reliable and quicker route for emergency
9 responders” when compared to the existing routes.¹³⁶

10 First, any first responder traveling on Gage or north on Center Parkway would have the
11 ability to view whether or not the crossing was blocked, and take an alternative route.¹³⁷ An
12 emergency responder may travel to a closed crossing at the existing at-grade crossing at Steptoe
13 Street. However, at Steptoe Street, the first responder cannot see the closed crossing “until you
14 come over the hill and see the crossing, and at that point, a fire truck isn’t going to be able to turn
15 around. Whereas with this direction [*i.e.*, the Center Parkway crossing] a fire truck could turn
16 around.”¹³⁸

17 Second, the alignment of the road to the tracks allows emergency responders to view the
18 crossing upon approach: “they would know which direction the train was going and which way
19 to go from there. Whereas today, they have no option.”¹³⁹ The Center Parkway crossing
20 provides necessary improvements for public safety response.

21 Finally, the record contains undisputed evidence that the crossing will be closed less than
22 one percent (1%) of the day to accommodate train traffic.¹⁴⁰ Mr. Montgomery testified that this
23 closure rate “is not significant enough closing to merit particular attention from emergency

24 ¹³³ Exh. JP-5-X.

25 ¹³⁴ TR. 211:24-25.

26 ¹³⁵ TR. at 218:13-219:1.

¹³⁶ TR. 229:4.

¹³⁷ TR. 229:21-25.

¹³⁸ TR. 230:8-11.

¹³⁹ TR. 230:23-25.

¹⁴⁰ TR. 231:5-6; Exh. SM-1TR 5:7.

1 response vehicles to alert their route of travel.¹⁴¹ Mr. Montgomery reached this conclusion based
2 upon the track usage data submitted by BNSF, UPRR, and TCRY.¹⁴² At the hearing,
3 Mr. Montgomery clearly articulated that, even under TCRY's wildly inflated growth projections,
4 the crossing would be closed less than three percent (3%) of the day.¹⁴³ Mr. Montgomery
5 concluded that this closure will not have any measurable impact upon the Cities' ability to
6 provide emergency services because "if it was a regular intersection with a traffic signal, it could
7 be closed, you know, for regular traffic operations.... The intersection of Steptoe and Gage has a
8 red light for one approach all day long. I'm saying that it's insignificant to say that the train, the
9 train event closing the crossing to emergency is insignificant."¹⁴⁴ This uncontested evidence
10 cannot be ignored in the determination of sufficient need.

11 Mr. Montgomery could make these conclusions, in part, because of his personal
12 experience in the Tri-Cities. It should be further noted that TCRY's expert witness, Mr. Norris,
13 has no relevant experience in at-grade railway crossings,¹⁴⁵ did not attend the UTC Diagnostic
14 Meeting,¹⁴⁶ and does not have first-hand experience with the Cities' transportation network.¹⁴⁷
15 Paragraph 26 is also misleading because it cites the JUB Report's response times, which, for
16 reasons described above, are irrelevant to this analysis. The evidence here demonstrates the
17 following as a proper finding:

18 STRIKE ¶ 26; PROPOSED ¶: Gary Norris, a traffic engineer hired by TCRY, questioned the
19 JUB Study. The Cities addressed Mr. Norris's concerns with uncontested evidence. The
20 purpose of the JUB Study is to demonstrate that the proposed crossing will reduce existing
21 emergency response times, not to demonstrate actual response times, Mr. Montgomery testified
22 that the JUB Report did *not* include emergency responder turnout time, time spent at traffic
23 signals, or behind traffic to provide a similar evaluation technique for existing route and the
24 proposed route.¹⁴⁸ The record clearly demonstrates that the Cities are failing to achieve

22 ¹⁴¹ Exh. SM-1TR 5:6-8.

23 ¹⁴² TR. 231:17-232:20.

24 ¹⁴³ TR 233:18-20. This figure was further supported by track usage data submitted by BNSF, UPRR, and
25 TCRY. TR. 234:8-18.

26 ¹⁴⁴ TR. 233:22-234:3.

¹⁴⁵ Exh. GAN-1T2:22-3:3.

¹⁴⁶ Exh. KH-5 at page 1.

¹⁴⁷ TR. 313:3.

¹⁴⁸ TR. 218:13-219:1.

1 emergency LOS.¹⁴⁹ The Center Parkway crossing will provide a viable route for emergency
2 responders.¹⁵⁰ Uncontested evidence also shows that the existing crossing will be closed one
3 percent (1%) of the day under current conditions, and it is highly unlikely that it will be closed
4 more than three percent (3%) of day time under track usage figures submitted by the railroads.¹⁵¹

5 Of course this proposed finding is also consistent with the undisputed UTC analysis regarding
6 the minimum number of anticipated accidents (one for every 53.5 years for an at-grade Center
7 Parkway crossing).

8 *The Cities assign error to ¶ 27.* For the reasons set forth in the assignment of error to
9 ¶ 26, this evidentiary finding overstates the significance of a railway closure that is documented
10 to be approximately one percent (1%) of the day. More accurately:

11 STRIKE ¶ 27; PROPOSED ¶: Acknowledging the possibility of a train blocking the Center
12 Parkway crossing, Chief Baynes explained “the more routes into the areas we have, the
13 better.”¹⁵² Although it is possible for a train to block the crossing, Mr. Montgomery testified to
14 the difference between this at-grade crossing and the existing at-grade crossing on Steptoe.
15 Unlike Steptoe where the emergency responders must commit to the crossing, the presence of the
16 roundabout south of the proposed Center Parkway crossing allows emergency responders to view
17 the crossing, and to use the roundabout to take another approach to the incident site if the
18 crossing is closed.¹⁵³ This is not an insurmountable issue, as the record demonstrates that the
19 crossing is projected to be closed less than one percent (1%) of the day.¹⁵⁴

20 *The Cities assign error to ¶ 28.* The record does not include any viable alternative to the
21 Center Parkway crossing for emergency vehicles. At the hearing, Mr. Norris, TCRY’s witness,
22 presented a proposed crossing that begins at Richland Fire Station 72, turns left onto Leslie
23 Road, continues to Columbia Park Trail, crosses an existing grade-separated crossing, turns right
24 at N. Steptoe, and then requires a left turn onto Tapteal.¹⁵⁵ For many reasons, Mr. Norris’s
25 proposed route fails to present a viable alternative, casting doubt on Mr. Norris’s basic
26 understanding of the project area:

149 Exhs. GAN-18-X; GAN-3-X.

150 TR. 218:13-219:1.

151 TR. 233:18-20. This figure was further supported by track usage data submitted by BNSF, UPRR, and
TCRY. TR 234:8-18.

152 TR. 108:9-109:3 and 119:9-11.

153 TR. 229:21-25; 230:8-11.

154 TR. 231:5-6, SM-1TR.

155 Exh. GAN-19-X.

1 TCRY's proposed route does not include the Kennewick Fire Station 3.
2 The proposed route provides no solution to the access issues described by Chief
3 Baynes (discussed at ¶ 24 in this petition), which results in the documented 7 minute
4 20 second median response time from Kennewick Fire Station 3 to Tapteal
5 addresses.¹⁵⁶ Accordingly, TCRY's proposed alternative route will do nothing to
6 improve emergency response times from this station.

7 TCRY's proposed route will not improve emergency response times from
8 the Richland Fire Station 72. Mirroring the JUB Study's methods, Mr. Norris
9 calculated response times to be "under four minutes," but, when pressed, Mr. Norris
10 conceded that his study did not account for turnout time, time spent at traffic signals,
11 or behind traffic.¹⁵⁷ Mr. Norris did not provide any data that depicted the calculated
12 actual emergency response time with this information.

13 Mr. Norris could not identify the number of controlled intersections along
14 the proposed route, which would have an impact on actual emergency response
15 times.¹⁵⁸

16 As a result, the proper finding is as follows:

17 STRIKE ¶28; PROPOSED ¶: No party presented a viable alternative to the Center Parkway
18 crossing during the petition process. TCRY's proposed route fails to provide a viable alternative,
19 because, among other reasons, it fails to address any of the identified issues associated with
20 responses from Kennewick Fire Station 3.¹⁵⁹

21 *The Cities assign error to ¶ 29.* For the reasons stated in response to ¶ 28, TCRY failed
22 to identify any viable alternative to the Cities' proposed crossing. Nothing in RCW 81.53.020 or
23 .030 or UTC precedent requires the Cities to prove a negative, *i.e.*, that no other alternative to the
24 proposed crossing exists. At the hearing, TCRY's attorney attempted to trap Mr. Simon by

25 ¹⁵⁶ Exh. GAN-18-X.

26 ¹⁵⁷ TR. 312:10-16.

¹⁵⁸ TR. 312:2-9.

¹⁵⁹ *See e.g.*, the route proposed in Exh. GAN-19-X solely including Richland Fire Station 73.

1 asking specific emergency-response-related issues.¹⁶⁰ Mr. Simon appropriately stated that he
2 could not answer those questions, deferring to those with specific expertise in that area, such as
3 Chief Baynes, Chief Hines, Chief Hohenburg, Chief Skinner, and Mr. Montgomery. Answering
4 those questions, the uncontested testimony of Chief Baynes and Mr. Montgomery demonstrates
5 that the Tapteal Drive area is not serviced within the Cities' established emergency response time
6 LOS, and that the Center Parkway crossing will improve response times to this area.¹⁶¹ The
7 Initial Order misconstrues the evidence. An appropriate synthesis of the uncontested record is
8 provided below:

9 STRIKE ¶ 29; PROPOSED ¶: TCRY questioned whether any area in the City of Richland is not
10 serviced within the City of Richland's emergency response time performance objective.¹⁶² The
11 uncontested testimony of Chief Baynes and Mr. Montgomery demonstrates that Tapteal Drive is
12 not serviced within the Cities' established emergency LOS, and that the Center Parkway crossing
13 will improve response times to this area.¹⁶³ Evidence also demonstrates that the Cities are failing
14 to achieve established emergency response times in areas near the Columbia Center Mall, and
15 that the Center Parkway crossing will also improve emergency response times to this area.¹⁶⁴

13 **8. THE SAFETY MEASURES AND THE SPECULATIVE RISK OF THE
14 PROPOSED CROSSING**

15 No party to this petition contests the UTC's calculation of risk for the proposed crossing
16 at one incident every 53.5 years.¹⁶⁵ The Center Parkway crossing presents only a speculative
17 risk, in part because the Cities' crossing design includes safety features **exceeding** typical
18 engineering standards for such an intersection.

19 **8.1 The Safety Features of the Proposed Crossing.**

20 A visual depiction of the safety measures is set forth in Exhibit KH-3.¹⁶⁶ The measures
21 on each side of the roadway include four flashing lights, two facing north and two facing south,
22 mounted on a single vertical mast that will also include an audible bell and two "crossbuck"

23 ¹⁶⁰ TR. 61:1-4.

24 ¹⁶¹ Exhs. GAN-18-X; JP-5-X; TR 107:15.

25 ¹⁶² TR. 61:1-4.

26 ¹⁶³ Exhs. GAN-18-X; JP-5-X; TR 107:15.

¹⁶⁴ Exh. GAN-18-X.

¹⁶⁵ Exh. KH-1T- 25:7-27:3.

¹⁶⁶ This exhibit depicts Center Parkway crossing two tracks.

1 signs (MUTCD Sign Type R15-1); “Number of Tracks” sign (R15-2), again one set facing north
2 and the other facing south; and a traffic gate on each side of the roadway prior to the crossing.
3 The flashing lights, bells and gates are activated automatically by an approaching train, with
4 lights and bells starting first, followed by the gates descending in front of approaching vehicles.

5 The beginning of the activation sequence will be electronically controlled such that the
6 control device will measure the speed of the approaching train and will start the warning devices
7 at a per-set time before the train arrives. This is commonly referred to as “constant warning.”

8 The gates will stay down and the lights will continue to flash as long as a train is within
9 the roadway. If the train stops before reaching the roadway, the flashing lights will continue and
10 the gate will stay down for a prescribed period of time before “timing out” and ending the
11 warning cycle. If a second train approaches on a second track as the first train is clearing the
12 crossing, and the system recognizes the second train will arrive within the pre-set time, the lights
13 will continue to flash and the gates will stay down.

4 In addition to the active warning devices, the roadway will have a raised curb and center
15 median to keep vehicles from driving around the lowered gates. The roadway profile for the
16 crossing is contoured to prevent a low-slung vehicle from becoming high-centered. Typical
17 advance warning signs and roadway striping for a grade crossing are included.

18 The active warning system, as well as the signage and striping, complies with the Manual
19 on Uniform Traffic Control Devices.¹⁶⁷ The roadway profile complies with the
20 recommendations of the AASHTO *A Policy on Design of Highways and Streets*, and the
21 American Railway Engineering and Maintenance-of-way Association’s *Manual for Railway*
22 *Engineering*, 2013, to avoid creating a “humped” crossing.¹⁶⁸ There was no evidence in the
23 record that any safety issue was overlooked.

24
25
26

¹⁶⁷ Exh. KJ-3.

¹⁶⁸ Exh. KJ-4.

1 The record contains **no** evidence that raises **any** objection to the safety measures that will
2 be implemented at the crossing. *See, e.g.*, Gary Norris’s testimony, TR at 285-334; GAN-1T;
3 GAN-1TR (Mr. Norris did not question any of the safety features designed for the crossing). At
4 the hearing, Kathy Hunter, UTC’s Deputy Assistant Director, Transportation and Safety,
5 conclusively demonstrated how the proposed active warning devices measures separate the
6 traveling public from the crossing.¹⁶⁹

7 **8.2 The Speculative Risk of the Proposed Crossing.**

8 *The Cities assign error ¶ 17.* The UTC concluded the potential risk for the crossing is
9 one incident every 53.5 years, based upon (1) the proposed crossing’s safety measures, (2) actual
10 data for similar at-grade crossings, and (3) the Federal Railroad Administration’s Accident
11 Predictor Model, the accepted measure for calculating risk as set forth in the existing data for
12 comparable crossings.¹⁷⁰

13 The UTC’s review of other at-grade crossings data demonstrates that there have been no
4 incidents involving trains and pedestrians and trains and vehicles at any TCRY-operated
15 intersection, including the existing at-grade crossings in the vicinity of the Center Parkway
16 crossing.¹⁷¹ In her pre-filed testimony, Ms. Hunter describes, in detail, how she calculated the
17 speculative risk of the crossing by strictly adhering to the Federal Railroad Administration’s
18 Accident Predictor Model.¹⁷² Ms. Hunter’s testimony conclusively demonstrates why the UTC’s
19 calculation is more accurate than Mr. Jeffers’s conservative calculation. The UTC’s calculations
20 are based upon *actual* data, while the only other submitted risk calculation is based upon
21 *theoretical, projected* data.¹⁷³ TCRY submitted no crash projection data, and the Cities concur
22 with the UTC’s analysis. The Initial Order fails to properly represent the uncontested evidence.
23 The only calculation that relies upon actual data demonstrates that the speculative risk for the

24 ¹⁶⁹ TR. 263:18-23, 264:10-13, 265:6-9.

25 ¹⁷⁰ Exh. KH-12.

26 ¹⁷¹ TR. 269:24-270:10.

¹⁷² Exh. KH-1T 25:7-27:3.

¹⁷³ Exh. KH-1T 25:10-21.

1 Center Parkway crossing is one incident every 53.5 years. A determination of speculative risk
2 that is consistent with uncontested evidence is as follows:

3 STRIKE ¶ 17; PROPOSED ¶: Ms. Grabler also testified that the expected average daily
4 traffic (ADT) on the Center Parkway extension would not justify grade separation. The
5 Federal Highway Administration (FHWA) Railroad-Highway Grade Crossing Handbook,¹⁷⁴
6 establishes a threshold of 100,000 ADT to require grade separation at an urban crossing.
7 The Cities estimate that Center Parkway's traffic will reach only 7,000 ADT by 2033, much
8 lower than the FHWA threshold.¹⁷⁵ This low traffic volume contributes to a low predicted
9 accident frequency rate, further reducing justification for grade separation. Kathy Hunter,
10 testifying for Commission Staff, analyzed historical TCRY crash data¹⁷⁶ and similar
11 crossings. Based upon a forecast using the Federal Railroad Administration Accident
12 Predictor Model,¹⁷⁷ Ms. Hunter determined that the proposed crossing presented a
13 speculative risk of one accident every 53.5 years.¹⁷⁸

9 **9. THE PUBLIC NEED FOR THE CENTER PARKWAY CROSSING OUTWEIGHS**
10 **ANY RISK (I.E., LESS THAN TWO INCIDENTS PER CENTURY) OF THE**
11 **PROPOSED CROSSING**

12 The Cities have conclusively demonstrated that the public need for the crossing
13 outweighs the risks of opening the at-grade crossing. The record shows that the Cities are failing
14 to achieve their emergency response times.¹⁷⁹ The record also shows that the Cities are failing to
15 achieve emergency response times by **minutes**, *not* just seconds.¹⁸⁰ A life is at risk every time
16 the Cities fail to respond promptly to an emergency call.¹⁸¹ The Center Parkway crossing's
17 ability to improve the Cities' emergency response times¹⁸² demonstrates a "public need,"
18 especially when the UTC defines "public need" as "good cause shown, reasonable, consistent
19 with public interest, public convenience and necessity."¹⁸³
20

21 ¹⁷⁴ Exh. KJ-2, at 11 (*see* paragraph 6.a.iv).

22 ¹⁷⁵ Exh. SKG-1T, 3:21-25; *see also* Exh. KJ-1T, 6:14-20.

23 ¹⁷⁶ TR. 269:24-270:10; Exh. KH-1T 25:7-22.

24 ¹⁷⁷ Exh. KH-12.

25 ¹⁷⁸ Exh. KH-1T 26:20-22.

26 ¹⁷⁹ Exhs. GAN-18-X, GAN-3-X.

¹⁸⁰ GAN-3-X; GAN-18-X. *See e.g.*, the emergency response times from Kennewick Fire Station 3 to
Tapteal addresses in GAN-18-X.

¹⁸¹ Exhs. NH-1T, 3:15-18; GRB-1T, 4:4-7.

¹⁸² TR. 107:15, JP-5-X.

¹⁸³ TR. 277:21-22.

1 The Cities have a combined population of over 100,000 residents, and that population
2 will increase by thousands over the next five years.¹⁸⁴ Exhibit GAN-18-X shows 42 responses to
3 emergency responses to the Tapteal Drive area and 37 emergency responses near Columbia
4 Center Mall, demonstrating that residents and businesses routinely call and rely upon the Cities
5 for emergency assistance near the proposed crossing.¹⁸⁵

6 Under the controlling standard of review, the UTC must approve the Cities' petition
7 when the Cities demonstrate that the public need for the crossing outweighs one incident every
8 53.5 years.¹⁸⁶ The record provides the Commission with ample evidence that the Cities have
9 achieved this standard solely by relying upon the Cities' emergency response time evidence.

10 **9.1 Improved Emergency Response Times Demonstrates a Public Need.**

11 *The Cities assign error to ¶59.* As demonstrated throughout this petition, uncontested
12 evidence demonstrates that the Center Parkway crossing will reduce emergency response
13 times.¹⁸⁷ No law requires the Cities to demonstrate that they are “regularly failing” to achieve
14 their established LOS. The ALJ applied an improper legal standard and improperly weighed the
15 uncontested evidence to reach his conclusion set forth in ¶ 59. The evidence demands a different
16 finding, as proposed here:

17 STRIKE ¶59; PROPOSED ¶ In this case, the Cities demonstrate public need by providing
18 uncontested evidence that the Center Parkway crossing will address immediate public safety
19 issues through improved emergency response times. The Cities also demonstrate reduced
20 accident rates around the Columbia Center Mall, relief of traffic congestion at nearby
21 intersections with deficient levels of service, increased opportunities for economic development,
and the need to complete a connected transportation system. As explained in greater detail
below, the evidence in the record shows that the Center Parkway crossing demonstrates a public
need.

22 *The Cities assign error to ¶ 60.* As demonstrated through this petition, no law requires
23 the Cities to demonstrate that they are “regularly failing” to achieve their established LOS.

24 _____
25 ¹⁸⁴ Exh. GAN-2-X.

¹⁸⁵ Exh. GAN-18-X; TR 103:1:17-105-21 (describing the facts and conclusions in GAN-18-X).

¹⁸⁶ Exh. KH-1T 24:21 – 26:22; *see also* Exh. KH-12.

¹⁸⁷ Exh. JP-5-X; TR. 107:15.

1 STRIKE: 60; PROPOSED ¶: The record shows that the Cities are failing to achieve their
2 emergency response times.¹⁸⁸ The record also shows that the Cities are failing to achieve
3 emergency response times by **minutes, not seconds.**¹⁸⁹ A life is at risk every time the Cities fail
4 to respond promptly to an emergency call.¹⁹⁰ The Center Parkway crossing's ability to improve
the Cities' emergency response times¹⁹¹ demonstrates a "public need," especially when the UTC
defines "public need" as "good cause shown, reasonable, consistent with public interest, public
convenience and necessity."¹⁹²

5 *The Cities assign error to ¶ 61.* There is ample evidence that opening a crossing at Center
6 Parkway would provide a public need. For example, the JUB Report demonstrates the crossing
7 will reduce emergency response times by 30% and 24% from Kennewick Station 3 and Richland
8 Fire Station 72, respectively.¹⁹³ The new crossing would reduce emergency response times by
9 "approximately one minute." These findings are supported by studies and by logic.¹⁹⁴ The new
10 route represents a better alignment for emergency responders to access Tapteal addresses and
11 addresses near the Columbia Center Mall, both of which have documented failing LOS for
12 emergency services.¹⁹⁵ Further, the ALJ's suggestion that the Cities must build new fire stations
13 to address failing emergency response times is absurd and not supported by any evidence. The
14 document cited by the ALJ as support for this conclusion explicitly states that emergency
15 response times are based upon an efficient transportation system:

16
17 The transportation system also has an effect on the LOS of fire and emergency services.
18 **In order to keep response times low, the Fire Department depends upon an efficient**
19 **transportation system in good repair.** The layout of streets, their width and condition,
and secondary access routes directly affect response times. Since these considerations
are building into future City LOS standards, **it is assumed that future transportation**
20 **improvements will promote more efficient fire and emergency service activities.**¹⁹⁶

21
22 ¹⁸⁸ Exha. GAN-18-X, GAN-3-X.

23 ¹⁸⁹ Exha. GAN-3-X; GAN-18-X. *See e.g.,* the emergency response times from Kennewick Fire Station 3
to Tapteal addresses in Exh. GAN-18-X.

24 ¹⁹⁰ Exhs. NH-1T, 3:15-18; GRB-1T, 4:4-7.

25 ¹⁹¹ TR. 107:15, Exh. JP-5-X.

26 ¹⁹² TR. 277:21-22.

¹⁹³ Exh. JP-5-X.

¹⁹⁴ TR. 105-107, TR. 229:4.

¹⁹⁵ Exh. GAN-18-X.

¹⁹⁶ Exh. GAN-3-X at CF 5-3 (second paragraph on the page)

1 In other words, the Cities' planning documents recognize that a new fire station can be effective
2 only if the existing transportation system is effective. To create an effective transportation
3 system, the Cities' planning documents also explicitly include the Center Parkway crossing as a
4 necessary transportation improvement.¹⁹⁷

5 STRIKE ¶61; PROPOSED ¶: There is ample evidence that opening a crossing at Center
6 Parkway would provide a public need. An effective emergency response network requires an
7 effective transportation system.¹⁹⁸ The Center Parkway crossing is a planned transportation
8 project that will improve the regional transportation network.¹⁹⁹ For example, the JUB Report
9 demonstrates the crossing will reduce emergency response times by 30% and 24% from
10 Kennewick Station 3 and Richland Fire Station 72, respectively.²⁰⁰ Chief Baynes testified that
11 the new crossing would reduce emergency response times by "approximately one minute."
12 These findings are supported by studies and by logic.²⁰¹ The new route represents a better
13 alignment for emergency responders to access Tapteal addresses and addresses near the
14 Columbia Center Mall, both of which have documented failing LOS for emergency services.²⁰²

15 *The Cities assign error to ¶ 62.* Evidence depicts that the crossing will be closed one
16 percent (1%) of the day and up to three percent (3%) of the day under the most optimistic rail
17 traffic scenarios.²⁰³ Mr. Norris's unsupported assertion provides no support for the final two
18 sentences of ¶ 62. As a result, that paragraph must be revised:

19 STRIKE ¶ 62; PROPOSED ¶: The Center Parkway crossing will provide a more reliable and
20 quicker route for emergency responders, as crossing closures are not anticipated to exceed three
21 percent (3%) of the day.²⁰⁴ Chief Baynes, Chief Skinner, and Chief Hohenberg all testified that
22 more choices and more alternatives are always better for emergency responders, and the
23 evidence demonstrates that the crossing will improve the Cities' emergency response times.

24 *The Cities assign error to ¶¶ 67-69.* As described throughout this petition, the evidence
25 demonstrates that the Cities have a significant public need for the Center Parkway crossing.
26 Paragraphs 67 to 69 are inconsistent with both substantial and uncontested evidence.

STRIKE ¶ 67; PROPOSED ¶: The Cities demonstrated public need for the proposed crossing.
Evidence shows that improved emergency response times improve the chances of survival for

197 Exhs. GAN-7-X at 59; GAN-9-X.

198 Exh. GAN-3-X.

199 Exhs. GAN-7-X at 59; GAN-9-X.

200 Exh. JP-5-X.

201 TR. 105-107, TR. 229:4.

202 Exh. GAN-18-X.

203 Exh. SM-1TR 5:7; TR. 233:18-20.

204 TR. 233:18-20.

1 trauma, cardiac, and stroke patients.²⁰⁵ As the Cities continue to grow, additional and more
2 frequent demands will be placed upon the Cities' first responders.

3 STRIKE ¶ 68; PROPOSED ¶: The Center Parkway crossing includes improved safety measures
4 to protect the public, including advance pavement markings, warning signs, gates and lights,
5 which will be designed with constant warning time devices for motorists, and a traffic island that
6 will act as a median separator.²⁰⁶ The UTC calculates that the crossing poses a risk of one
7 incident per 53.5 years.²⁰⁷

8 STRIKE ¶ 69; PROPOSED ¶: The Commission finds that the Cities' demonstrated public need
9 outweighs the inherent hazards of an at-grade crossing.

10 **9.2 Other Public Needs.**

11 It is unnecessary for the Commission to review the merits regarding accident rates and
12 relief of traffic congestion. However, to preserve the issue for appeal, the Cities assign error to
13 ¶¶ 33, 36, and 63-66, below, as described in greater detail in section 9 of this petition, and
14 include the following finding that is consistent with the legal standard for at-grade crossing
15 petitions:

16 PROPOSED ¶: Because the Commission finds that the emergency response times satisfy the
17 public need requirement, and that the public need outweighs the risks of the proposed crossing, it
18 is unnecessary for the Commission to review the evidence submitted regarding traffic
19 congestion, accident reduction, economic development, and a completed transportation network.

20 **10. THE PETITION INCLUDES ADDITIONAL PUBLIC NEED**

21 In addition to improving failing emergency response times, the record and the Initial
22 Order include additional evidence documenting the additional "public need" for the crossing.
23 This evidence is cumulative, further supporting the Cities' petition. Although unnecessary for
24 the purpose of demonstrating adequate public need, the Cities assign error to evidence and
25 findings regarding accident reduction, mitigation of traffic congestion (¶¶ 33, 36, and 63-66).

26 The Cities also propose the following finding of fact and conclusion:

PROPOSED (FINDINGS OF FACT AND CONCLUSIONS OF LAW) ¶: The Cities have
demonstrated that the Center Parkway crossing will provide additional public needs, including:

²⁰⁵ Exhs. RGB-1T 4:4-7; NH-1T 3:15-18.

²⁰⁶ Exhs. KH-1T 21:15-23:23; KJ-1T 8:1-9:4; SKG-1T 5:15-6:9

²⁰⁷ Exh. KH-1T 26:15-23; Initial Order ¶ 17, footnote 29.

1 relieving traffic congestion, reducing traffic accidents, promoting economic development, and
2 completing a regional transportation network.

3 However, the Commission should not need to reach the merits of these issues, as the
4 petition should be granted based upon the merits of the emergency response time evidence.

5 **10.1 The Center Parkway Crossing Will Reduce Traffic Congestion.**

6 The Initial Order cites evidence demonstrating that the Center Parkway crossing will
7 address a public need by reducing traffic congestion, providing a benefit to emergency
8 responders and to the public who use the Cities' roadways. The Initial Opinion misconstrues the
9 uncontested evidence.

10 *The Cities assign error to ¶ 33.* The uncontested record demonstrates that the
11 intersections near the proposed crossing are congested and either failing or near failing the
12 Cities' level of service for transportation.²⁰⁸ The JUB Report demonstrates that the Center
13 Parkway crossing will alleviate traffic congestion: "Center Parkway has been planned to provide
14 relief to both Columbia Center Boulevard as well as Steptoe Street, consistent with the
15 philosophy of providing collector roadways parallel and in between arterial roadways."²⁰⁹ This
16 finding is supported by documentation and analysis.²¹⁰ Mr. Montgomery provided this
17 documentation and analysis to TCRY in response to a TCRY data request to "Produce copies of
18 all documents pertaining to, supporting, analyzing, reviewing or reporting on the assertions made
19 in the document entitled "Center Parkway Extension and Railroad Crossing Traffic Study, March
20 2013 [i.e., the JUB Report] ..." Upon receipt of JUB's analysis (now Exhibit GAN-20-X), UTC
21 rules afforded TCRY the opportunity to submit subsequent data requests to Petitioners,
22 requesting further explanation of the Petitioners' analysis. The record shows that TCRY did not
23 present contrary data, despite the opportunity.

24
25 _____
26 ²⁰⁸ Exh. GAN-17-X. TCRY did not contest this level of service transportation data.

²⁰⁹ Exh. KJ-5 at 6.

²¹⁰ Exh. GAN-20-X.

1 Mr. Deskins, the City of Kennewick's transportation engineer, agreed with the JUB
2 Report's conclusions: "I would expect [the Center Parkway crossing] would reduce the
3 congestion and improve level of service. Because it does give alternatives for people to use
4 through-traffic movements, which again are usually less congested than the left-turn
5 movements."²¹¹ The uncontested evidence demonstrates that the Center Parkway crossing
6 advances a public need by reducing congestion at failing intersections.

7 STRIKE ¶ 33; PROPOSED ¶: The Cities presented evidence that many of the intersections near
8 the proposed crossing are congested and failing to achieve the Cities' stated level of service.²¹²
9 The roadways around Columbia Center Mall can become even more congested during the
10 holiday shopping season in late November and early December.²¹³ "Center Parkway has been
11 planned to provide relief to both Columbia Center Boulevard as well as Steptoe Street, consistent
12 with the philosophy of providing collector roadways parallel and in between arterial
13 roadways."²¹⁴

14 *The Cities assign error to ¶¶ 36 and 65-66.* The JUB Study and Mr. Montgomery's
15 testimony demonstrated that vehicular queuing raises no valid issue for this crossing.²¹⁵ Mr.
16 Montgomery's uncontested testimony demonstrates that traffic stopped at a railway crossing will
17 not back into any controlled crossing. Footnote 79 mischaracterizes the evidence. Mr. Deskins
18 was testifying that *queues* "didn't concern him,"²¹⁶ and that assertion is supported by uncontested
19 evidence in the record. Further, the regional transportation model is programmed to determine
20 times as if the Center Parkway crossing already exists. In other words, the model already
21 recognizes the transportation benefits of the proposed crossing. As a result, a proper evidentiary
22 finding is as follows:

23 STRIKE ¶ 36; PROPOSED ¶: The JUB Study and uncontested evidence shows that the crossing
24 does not present any queuing issues for the proposed crossing.²¹⁷ Although Mr. Deskins, the
25 City employee most familiar with the City's traffic modeling simulation, conceded that he
26 did not perform an LOS analysis specifically focused on the result of installing the proposed

23 ²¹¹ TR. 76:2-7.

24 ²¹² Exhs. KJ-5, at 6, 9; GAN-20-X; GAN-17-X; TR 76:2-7.

25 ²¹³ Exhs. JD-1T, 3:6-26.

26 ²¹⁴ Exh. KJ-5 at 6.

²¹⁵ Exh. SM-1TR at 6:15-26.

²¹⁶ Mr. Deskins was answering the question set forth at TR. 79:2-3.

²¹⁷ Exh. SM-1TR at 6:15-26.

1 crossing at Center Parkway,²¹⁸ the modeling program includes the Center Parkway crossing
2 in the region transportation model, as it the Crossing already exists.

3 STRIKE ¶¶ 65 and 66; PROPOSED ¶ The Center Parkway demonstrates a public need by
4 reducing congestion. To demonstrate a public need, it is not necessary for the Cities to
5 conclusively show a failing transportation LOS. Satisfying the UTC's "public need" criteria, the
6 Cities demonstrated that several intersections are congested and that the crossing will provide
7 congestion relief.²¹⁹

8 **10.2 The Center Parkway Crossing Will Reduce Traffic Accidents Near Columbia**
9 **Center Mall.**

10 Mr. Deskins' testimony shows that the proposed crossing will relieve failing or near
11 failing intersections, thereby reducing crashes near the Columbia Center Mall.²²⁰ These
12 intersections are regularly within the top five crash locations in the City of Kennewick.²²¹ In
13 response to the submitted crash data,²²² TCRY's expert witness replied: "The majority of these
14 crashes are not injury crashes, only like an average of three injury (sic) per year and four at the
15 other, at the Canal Street intersection."²²³ The Initial Order seems to be taking the indefensible
16 position that an average seven documented injuries per year at these intersections does not
17 present a critical public need.

18 *The Cities assign error to ¶¶ 63 and 64 because they do not conform to the undisputed*
19 *evidence:*

20 STRIKE ¶¶ 63 and 64; PROPOSED ¶: The Center Parkway crossing demonstrates public need
21 by reducing traffic accidents near Columbia Center Mall. Since 2001, intersection report data
22 demonstrates over 300 accidents.²²⁴ The record contains no evidence that refutes Mr.
23 Montgomery's explanation that "if you reduce the traffic volume on a road and it has a certain
24 accident rate, then you will reduce the number of accidents."²²⁵ The Commission concludes that
25 the Center Parkway crossing will reduce accidents near the Columbia Center Mall.
26

218 Deskins, TR. 78:4-7; *see also* Deskins, TR. 73:4-12.

219 Exh. GAN-17-X, Simon TR. 67:14-69:22.

220 Exh. JD-1T at 4. The JUB Report further supports Mr. Deskins' testimony. Exh. KJ-5T at 6.

221 Exh. JD-1T at 4.

222 Exh. JD-3T.

223 TR. at 90:6-11.

224 Exh. JD-3.

225 TR. 222:14-23.

1 **10.3 The Center Parkway Crossing Will Provide Infrastructure to Support**
2 **Community and Economic Development.**

3 The Center Parkway Crossing provides infrastructure to encourage community and
4 economic development. Mr. Montgomery testified to the importance of addressing congestion to
5 ensure an integrated multi-modal transportation system: “The transportation system works as a
6 whole. If the region cannot move cars, then it also cannot move trucks. If the system cannot
7 move trucks, then there are delays in loading and unloading rail freight.”²²⁶ The JUB Report also
8 identified the crossing as providing access to nearly 60 acres of land that has utilities and
9 collector roadway access, but lacks direct access to the commercial area south of the railway.²²⁷
10 The Initial Order fails to include this undisputed evidence that further demonstrates the public
11 need for the crossing.

12 PROPOSED NEW ¶. The Cities demonstrated that the Center Parkway crossing demonstrates
13 public need by promoting economic development through encouraging multi-modal
14 transportation in the region and by creating direct access to developable land.²²⁸

15 **10.4 The Center Parkway Crossing Will Complete the Roadway Network.**

16 Finally, the Center Parkway Crossing also completes the regional roadway network. This
17 crossing is the final step in a series of transportation projects to improve the functionality of the
18 network by providing a north-south connection in the existing grid system.²²⁹

19 PROPOSED NEW ¶. The Cities demonstrated that the Center Parkway crossing demonstrates
20 public need by completing the roadway network.²³⁰

21 **11. SUMMARY**

22 Despite lack of real opposition from any party or any non-party to the Center Parkway
23 crossing; despite the provision of the fullest extent of traffic safety devices; despite the
24 uncontested evidence that a grade-separated crossing is not practicable; despite the uncontested

25 _____
26 ²²⁶ Exh. SM-1TR 3.

²²⁷ Exh. KJ-5 at 6. The USDOT Railroad-Highway Grade Crossing Handbook explicitly considers
 authorizing at-grade crossings solely to “provide access to any land development. Exh. KH-10.

²²⁸ Exhs. SM-1TR at 3; KJ-5 at 6.

²²⁹ Exh. KJ-5 at 5.

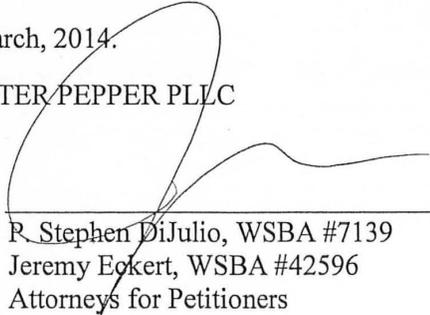
²³⁰ Exh. KJ-5 at 5.

1 evidence of little risk of an accident at the crossing; despite decades of comprehensive planning
2 at local, regional and state levels (including state funding); despite the uncontested evidence
3 regarding reduction in accident rates in surrounding areas; and, despite the uncontested evidence
4 that the Center Parkway crossing is necessary to provide critical emergency response times in the
5 community, the Initial Order finds no public benefit to satisfy RCW 81.53.020. This was clear
6 error.

7 The Cities have conclusively demonstrated the significant public need for the Center
8 Parkway crossing. The Center Parkway crossing will improve emergency response times,
9 improving the likelihood that lives will be saved in emergency circumstances that routinely arise
10 in an area with 100,000 residents. The Center Parkway crossing will also reduce traffic
11 congestion, reduce traffic accidents, promote economic development, and complete the Cities'
12 roadway network. Each identified benefit of the crossing satisfies the UTC's interpretation of
13 the term "public need." Together, those elements are overwhelming in application of the
14 balancing test applied by the UTC. The demonstrated public need for the Center Parkway
15 crossing outweighs its calculated risk of one accident every 53.5 years. The Cities have met their
16 burden, and this Petition should be approved. A proposed form of order is submitted with this
17 Petition for Administrative Review.

18 Respectfully submitted this 17th day of March, 2014.

19 FOSTER PEPPER PLLC

20
21 By: 

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25
26

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14 WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

15 CITY OF KENNEWICK and CITY OF
16 RICHLAND

17 Petitioners

18 vs.

19 PORT OF BENTON, TRI-CITY &
20 OLYMPIA RAILROAD CO., BNSF
21 RAILWAY and UNION PACIFIC
22 RAILROAD

23 Respondents.

24 DOCKET NO. TR-130499-P

25 ANSWER OF RESPONDENT TRI-
CITY & OLYMPIA RAILROAD
CO. TO PETITION FOR
ADMINISTRATIVE REVIEW

ANSWER OF RESPONDENT TRI-CITY & OLYMPIA RAILROAD CO. TO
PETITION FOR ADMINISTRATIVE REVIEW

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I. INTRODUCTION

Respondent Tri-City & Olympia Railroad Co. (“TCRY”) submits this Answer in opposition to the Petition for Administrative Review (“Petition”) filed by the Cities of Richland and Kennewick (“Cities”). That Petition requests that this Commission review and overturn the Initial Order (“Order 02”) entered by the Administrative Law Judge denying the Cities’ “Petition to Construct a Highway-Rail Grade Crossing, Center Parkway” crossing of the Port of Benton rail line operated by TCRY.¹

TCRY respectfully submits that the well-reasoned and fully supported ALJ decision in Order 02 be adopted as the Final Order herein and that the relief sought by the Cities’ Petition for Administrative Review be denied. Following the statutory mandate, the ALJ concluded that the Cities had failed to show a public need for the proposed Center Parkway crossing.² Based on that conclusion, the ALJ ruled that “[t]he Cities failed to demonstrate public need for the proposed crossing, **leaving nothing to balance against the inherent hazards of an at-grade crossing**” and that even if public convenience alone were sufficient to show public need, it does not outweigh the hazards of an at-grade crossing.³

¹ That “Petition to Construct” was filed by the City of Kennewick which identified itself as the “Road Authority” because the track sought to be crossed is within its municipal boundaries. (Petition, p. 6, Section 6, No. 3) The City of Richland (which borders but does not include the proposed crossing) filed a Motion to Intervene, claiming an interest in the pending Application. Respondent TCRY did not object to that Motion and leave was granted to Richland to intervene. (Order 01)

² Order 02, p. 20, ¶ 59 through p. 22 ¶ 66.

³ Order 02, p. 22, ¶ 67 (Emphasis supplied).

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1 The Cities ask that the Commission re-write Order 02. However, as shown
2 here, their arguments have no merit, and that request should be rejected.

3
4 **II. THE COMMISSION'S AUTHORITY IS NOT PRE-EMPTED BY CITIES'
5 PLANS UNDER THE GROWTH MANAGEMENT ACT**

6 The Administrative Law Judge ("ALJ") correctly summarized the Cities'
7 argument in this regard as follows:

8 The Cities contend that state agencies are mandated to comply with local land
9 use plans adopted under the Growth Management Act. Therefore, the Cities
10 argue that their regional comprehensive planning process "mandates" the
11 Center Parkway crossing in order for the Cities to achieve their stated LOS for
12 emergency response times and traffic flow at signalized intersections.
13 According to the Cities, the GMA prohibits the Commission from evaluating
14 public need, alternatives for opening a proposed railroad crossing, or even
15 whether the proposed crossing will function in the manner claimed by the
16 Cities.⁴

17 In Order 02, the ALJ properly rejected that argument which is based on the
18 Cities' reading of RCW 36.70A.103 that "[s]tate agencies shall comply with the local
19 comprehensive plans and development regulations and amendments" adopted pursuant
20 to the GMA. The ALJ held:

21 We disagree that a land use planning statute deprives the Commission of its
22 statutory authority to regulate public safety at rail crossings. We do not dispute
23 that the GMA requires cities such as Richland and Kennewick to plan for
24 future growth and make efforts at intergovernmental coordination. However, a
25 jurisdiction's comprehensive planning obligations under the GMA do not
substitute for meeting the standards set out in RCW 81.53. The GMA and
RCW 81.53 both address transportation safety issues, but from wholly
different perspectives on public policy. **In order to maintain the integrity of
both statutes within the overall statutory scheme, the GMA must be read**

24 ⁴ Order 02, p. 14, ¶ 42; footnotes omitted.

1 together and in harmony with RCW 81.53. We find that the Cities must
2 comply with the requirements of both statutes.⁵

3 The ALJ's conclusion is unquestionably correct. RCW 81.53 is a specific
4 statute regarding regulation of railroad crossings. As related to rail crossings, the
5 GMA is, at best, a "general statute." In addition, RCW 36.70A.103, relied on by the
6 Cities, does not specifically state that municipal planning under the GMA usurps the
7 authority of the commission with respect to rail crossings referred to in such plans.

8 Assuming that both statutes address the same subject, a conflict exists only if
9 the two cannot be harmonized.⁶ The ALJ's ruling harmonizes these statutes. In the
10 absence of harmony, RCW 81.53 as a specific statute supersedes the general statute
11 RCW 36.70A.103 under Washington law.⁷ Either way, the ALJ's conclusion that the
12 GMA does not preempt the Commission's authority is correct and the Cities'
13 argument is wrong.

14
15 **III. ORDER 02 DOES NOT "FAIL TO DEFER TO THE UTC'S CONSISTENT**
16 **INTERPRETATION OF RCW 81.53"**

17 The ALJ did not apply an erroneous legal standard in evaluating the public
18 need versus inherent risk calculus mandated by prior Commission rulings. Order 02
19 states this standard as follows:

20 _____
21 ⁵ Order 02, p. 15, ¶ 43; emphasis supplied; footnotes omitted.

22 ⁶ Statutes relating to the same subject "are to be read together as constituting a unified whole, to the end
23 that a harmonious total statutory scheme evolves which maintains the integrity of the respective
24 statutes." *State v. Wright*, 84 Wash.2d 645, 650, 529 P.2d 453 (1974) quoted with approval in
In re Estate of Kerr, 134 Wn.2d 328, 337, 949 P.2d 810, 815 (1998).

25 ⁷ A specific statute will supersede a general one when both apply. *General Tel. Co. of Northwest, Inc. v.*
Utilities & Transp. Comm'n, 104 Wash.2d 460, 464, 706 P.2d 625 (1985); *Waste Mgmt. of Seattle, Inc.*
v. Utilities & Transp. Comm'n, 123 Wn.2d 621, 630, 869 P.2d 1034, 1039 (1994)

1 The Commission will not approve construction of a new at-grade crossing
2 without a demonstration of public need that outweighs the hazards inherent in
3 the at-grade configuration. Petitioners must provide evidence of public
benefits, such as improvements to public safety or improved economic
development opportunities.⁸

4 Order 02 also states “We agree with the Cities and Staff that the statute does
5 not require a showing of ‘acute public need’ to justify opening a new at-grade
6 crossing.”⁹ The standard actually applied by the ALJ is identical to, and cites as
7 support, the very decision that the Cities claim asserts the correct standard -- *Benton*
8 *County v. BNSF Railway Company*, Docket TR-100572, Order 06, Initial Order
9 Granting Benton County’s Petition for an At-Grade Railroad Crossing, Subject to
10 Conditions ¶¶ 33-37 (Feb. 15, 2011). The *Benton County* decision (at p. 14, ¶ 33) found
11 such need in “[a]n overall improvement in public safety” and “improved economic
12 development opportunities.”

13 Here, the ALJ also noted that both the Cities and the Staff assert that the public
14 need must outweigh the hazards presented by the crossing:
15

16 RCW 81.53 does not prohibit the Commission from approving approve [sic]
17 new at-grade crossings, but mere convenience or a *de minimis* showing of need
18 will not suffice. As Staff points out, we are obligated to balance public need
19 against the hazards presented by a new crossing. The Cities similarly concede
that the Commission must determine “whether there is a demonstrated public
need for the crossing that outweighs the hazards inherent in an at-grade
configuration.”¹⁰

20 Order 02 does exactly that – weighs the demonstrated public need against the
21 inherent hazards. Thus the ALJ applied the exact legal standard argued for by both the
22

23 ⁸ Order 02, p. 18, ¶ 55.

24 ⁹ Order 02, p. 19, ¶ 58.

25 ¹⁰ Order 02, p. 19-20, ¶ 58.

1 Staff and the Cities. Indeed, Cities concede that the ALJ articulated the correct
2 standard but relied on an “unarticulated standard” which could only have exceeded the
3 correct standard.¹¹ The ALJ’s conclusion that the evidence taken as a whole does not
4 demonstrate a public need that supports the proposed crossing, Order 02 applies the
5 correct standard. Cities attempt to prove otherwise is an exercise in mind-reading and
6 should be rejected.

7 In this regard, the Cities argue that the ALJ applied a *standard* which *requires*
8 applicants to show that they are “regularly failing” to meet emergency response times.
9 However, the public need analysis applied by the ALJ considers the totality of the
10 evidence submitted by Cities and does not mandate a “regularly failing” standard at
11 all. In addition, the Cities themselves elected to attempt to prove that they were
12 “regularly failing” to meet emergency response times as one element of the public
13 need for the crossing. Thus, Cities’ attack on the ALJ as imposing an “absurd”
14 standard is itself ludicrous.
15

16
17 **IV. CITIES FAILED TO PROVE THE REQUISITE PUBLIC NEED FOR THE
18 PROPOSED CROSSING**

19 RCW 81.53.020 requires that “All highways and extensions of highways
20 hereafter laid out and constructed shall cross existing railroads by passing either over
21 or under the same, when practicable, and shall in no instance cross any railroad at
22 grade without authority first being obtained from the commission to do so.”
23

24

¹¹ Petition, 10:3-6.

1 As Order 02 articulates, “[b]y its nature, an at-grade crossing poses hazards for
2 motorists, pedestrians, and railroad operators that are not present at grade-separated
3 crossings.”¹² In this regard, the ALJ properly noted that: “Washington courts have
4 deemed at-grade crossings to be inherently dangerous.”¹³ The pending Petition takes
5 no issues with these principles. Cities do, however, argue that the calculated accident
6 rate in essence eliminates the requirement to show public need and displaces the
7 presumption that at-grade crossings are inherently dangerous. However, Cities cite no
8 authority to support this conclusion.

9 Cities attempted to prove that “public need that outweighs the hazards inherent
10 in the at-grade configuration” by relying on three factors which they claimed would
11 result from the proposed crossing:

- 12 a) Improved emergency response times;
- 13 b) Reduced vehicle accident rates; and
- 14 c) Relief of traffic congestion.

15
16 In Order 02, the ALJ concluded that the Cities had failed to carry their burden
17 of establishing the “public need” factors selected by the Cities as grounds for the
18 Petition.

19 In ruling that the Cities had failed to demonstrate a “public need” based on
20 these factors, the ALJ, in summary, grounded his conclusions on the following:

21
22 ¹² Order 02, p. 16, ¶ 47.

23 ¹³ Order 02, p. 16, ¶ 47 and fn. 94 in which the ALJ cites: *Reines v. Chicago, Milwaukee, St. Paul &*
24 *Pacific R. Co.*, 195 Wn. 146, 150, 80 P.2d 406, 407 (1938); *State ex rel. Oregon-Washington Railroad*
& Navigation Co. v. Walla Walla County, 5 Wn.2d 95, 104, 104 P.2d 764 (1940); *Department of*
Transportation v. Snohomish County, 35 Wn.2d 247, 250-51 and 257, 212 P.2d 829, 831-32 and 835
(1949)

- 1 a. The Cities failed to show either a public need for faster response times or that
2 opening a crossing at Center Parkway would solve any response times
3 deficiencies.
- 4 b. The Cities failed to show that a Center Parkway crossing would reduce
5 accident rates.
- 6 c. The Cities failed to show that a Center Parkway crossing would materially
7 contribute to a reduction in congestion.

8 **A. Cities Failed to Prove that the Center Parkway Crossing Would Produce
9 Improved Emergency Response Times**

10 The Cities relied on claimed enhanced emergency response times to establish a
11 public need for the crossing. The ALJ correctly concluded that “the Cities introduced
12 no evidence of a public need for faster response times and did not adequately explain
13 how the Center Parkway extension would contribute to improved public safety”¹⁴ and
14 even if emergency response times were deficient “there is insufficient evidence in the
15 record to demonstrate that opening a crossing at Center Parkway would solve this
16 problem.”¹⁵

17 Cities now argue that the record contains “undisputed facts that the Cities are
18 failing to achieve this emergency response time in this area.”¹⁶ In support of that
19 conclusion, Cities rely on two Exhibits -- GAN-3-X and GAN-18-X -- and a portion of
20 the testimony of Chief Baynes.

21 Exh. GAN-3-X is a two-page excerpt from the City of Richland
22 Comprehensive Plan which reports EMS response times of 7:44 “for only those

23 ¹⁴ Order 02, p. 20, ¶ 60.

24 ¹⁵ Order 02, p. 20, ¶ 61.

25 ¹⁶ Petition for Review, 2:15-16.

1 incidents in the city for the 2002-2003 study period.”¹⁷ Not only is this data stale by
2 more than 10 years, there is no indication that these response times focus on the area
3 which would be served by EMS vehicles negotiating a Center Parkway crossing –
4 these are city-wide statistics. They do not prove that the Cities “are failing to achieve”
5 the anticipated response times in the area which would be accessed by the proposed
6 crossing. Further, as the ALJ noted, Richland proposed to enhance these response
7 times by additional facilities and staffing, not construction of “alternate routes” for
8 EMS response.¹⁸

9 Exh. GAN-18-X, consists of a compilation of response times for “several
10 addresses” in the Tapteal area, around Mail by the Mall and PF Changs. As the ALJ
11 noted, “Chief Baynes provided little, if any, context for additional response time data
12 he provided” in this Exhibit.¹⁹ In fact, rather than being “undisputed” as the City
13 contends, the testimony of TCRY’s traffic expert, Mr. Norris, asserts that the data
14 contained in this GAN-18-X does not support Chief Baynes’ conclusions regarding
15 response time and is “more confusing than helpful.”²⁰

17 In addition, the testimony provided by emergency response witnesses is based
18 on assumptions regarding traffic congestion on the proposed crossing as opposed to
19 traffic congestion on the existing parallel roadways and alternative emergency
20
21

22 _____
¹⁷ Ex GAN-3-X at CF 5-3.

23 ¹⁸ Order 02, p. 20. ¶ 61: “ Instead, the capital facilities element of Richland’s GMA documents discuss
building additional fire stations closer to areas needing better response times.”

24 ¹⁹ Order 02, p. 20, fn. 107.

²⁰ TR. 295:5-297:16.

1 response routes.²¹ It also fails to address the fact that without the proposed crossing,
2 both the Kennewick and Richland Fire Department response times fall within the “4
3 minutes 90 percent of the time” standard of the NFPA²² and is based on unsupportable
4 assumptions regarding lack of school bus routes over the proposed crossing.²³

5 Thus, the Cities claim that they have proved that they are “failing to achieve”
6 their EMS response time goals by undisputed evidence despite the fact that the
7 evidence is both disputed and non-conclusive. In turn, they then attack the ALJ for
8 adopting a “failing to achieve” standard when they chose and failed to demonstrate
9 exactly that as a basis for the public need for the proposed crossing.

10 Cities argue that an alleged improvement in response times is demonstrated by
11 the “JUB Study.”²⁴ According to the City, this study “concluded that the Center
12 Parkway Crossing would reduce the response times by Kennewick Fire Station 3 and
13 Richland Fire Station 72 to property near the north of the Center Parkway crossing by
14 30% and 24%, respectively.”²⁵ The un rebutted testimony of Mr. Norris debunks this
15 conclusion by noting, “there is no documentation in the JUB report of the factors used
16 in estimating emergency response times and no substantiation of its conclusions in this
17 regard.”²⁶ In addition, as Mr. Norris testified:

19 The J-U-B study notes that the North Center Parkway Extension would
20 improve emergency response times by about 30% to the Holiday Inn.
21 However, this is a narrow focus. When comparing response times with and

22 ²¹ Exh. GAN-1TR. 3:2-24.
23 ²² Exh. GAN-1TR. 4:2-20.
24 ²³ Exh. GAN-1TR. 5:8-14.
25 ²⁴ Exh. JP-5-X.
26 ²⁵ Petition, 10:14-16.
²⁶ Exh. GAN-1TR. 3:19-24.

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1 without connection, a more general focal point for the affected area should be
2 used. The study should have considered, but did not consider, the entire service
area and not one specific site.²⁷

3 The evidence adduced by the Cities fails to establish the lack of reasonable
4 alternate access for public emergency services,²⁸ fails to show that the traffic volume
5 changes identified as resulting from the proposed crossing will have a significant
6 beneficial impact on the level of service²⁹ and fails to identify the effect of traffic
7 queues resulting from trains (especially unit trains) moving through the crossing.³⁰

8 Finally, the evidence adduced by the Cities fails to analyze capacity issues on
9 parallel roadways comparing delays on Center Parkway to those on parallel routes,³¹
10 gives no consideration to the likely substantial increase in rail traffic as affecting
11 whether the route over the proposed crossing would provide reliable emergency
12 access³² and fails to document that the proposed crossing will reduce emergency
13 response time for 90 percent of incidents.³³
14

15 **B. Cities Failed to Prove That a Center Parkway Crossing Would Reduce**
16 **Accident Rates**

17 Cities argued a public need for the crossing based on the claim that it would
18 reduce accident rates at two Columbia Center Boulevard intersections. Order 02
19 concluded that the Cities' evidence failed to substantiate any such anticipated
20

21 _____
²⁷ Exh. GAN-1T. 5:17-21.

22 ²⁸ Exh. GAN-1T. 5:8-6:17.

23 ²⁹ Exh. GAN-1T. 7:1-8:3.

24 ³⁰ Exh. GAN-1T. 9:4-11.

25 ³¹ Exh. GAN-1TR. 6:4-6.

³² Exh. GAN-1TR. 6:7-10.

³³ Exh. GAN-1TR. 6:10-11.

1 reduction: “However, neither the JUB Study nor the Cities’ traffic engineering
2 witnesses provided any data or studies to support this assertion.”³⁴

3 Accurately summarizing the Cities’ expert witness testimony on this point, the
4 ALJ concluded:

5 Mr. Deskins provided raw data on the number of vehicle collisions over a
6 decade’s time but [no] analysis on how or why these accidents occurred. Mr.
7 Montgomery offered only unconfirmed notions that reducing traffic levels
8 would reduce accident rates. The record has no persuasive evidence connecting
9 improved traffic safety on Columbia Center Boulevard to opening a new
10 roadway that will regularly be blocked by rail traffic.³⁵

11 Misconstruing this conclusion, the Cities argue that Order 02 “seems to be
12 taking the indefensible position that an average seven documented injuries per year at
13 these intersections does not present a critical public need.” Of course, that is not at all
14 what the ALJ concluded.

15 Instead, Order 02 focuses on the inadequacy of the Cities’ expert testimony to
16 document the conclusion that a Center Parkway crossing would reduce the number of
17 accidents at any intersection. The ALJ noted that, in essence, these experts assumed
18 that a Center Parkway crossing would reduce traffic at these intersections and further
19 assumed that a reduction in traffic results in a reduction in accidents.

20 Mr. Deskins provided an exhibit listing 12 years of crash data for two
21 Columbia Center Boulevard intersections: Quinault Avenue and Canal Drive.
22 Going back to 2001, the intersection reports show 154 total crashes at Quinault
23 Avenue and 165 total crashes at Canal Drive. According to Mr. Deskins,
24 opening the Center Parkway crossing on the other side of the Mall would
25 reduce traffic at these intersections and —should ultimately reduce crashes at
these locations. Spencer Montgomery, a transportation specialist with J-U-B

34 Order 02, p. 21, ¶ 63.

35 Order 02, p. 21, ¶ 64

1 Engineers, explained that J-U-B did not perform a study to support this
2 conclusion because —if you reduce the traffic volume on a road, and it has a
certain accident rate, then you will reduce the number of accidents.³⁶

3 Further, the ALJ noted that:

4 Motorists who might deviate from Columbia Center Boulevard’s grade-
5 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
6 comes with a risk of collision.³⁷

7 In other words, even if the proposed crossing would reduce the risk of vehicle-
8 to-vehicle collisions, it increases the risk of train to vehicle collisions. It does this by
9 diverting traffic from the inherently safe grade-separated Columbia Center Boulevard
10 to an inherently unsafe at-grade Center Parkway crossing.³⁸

11 **C. Cities Failed to Prove that the Proposed Crossing Would Result in**
12 **Traffic Congestion Relief**

13 Order 02 correctly concludes that “. . . the Cities offered no persuasive
14 evidence that opening a crossing at Center Parkway would materially contribute . . .”
15 to vehicle traffic congestion relief.³⁹ The ALJ based this conclusion on three facts:

- 16
17 a. The failure of the J-U-B Study to make specific findings to show that a Center
18 Parkway crossing would have an impact on deficient LOS ratings at congested
intersections.

19
20
21 ³⁶ Order 02, p. 11 ¶ 31 (footnotes omitted). The conclusions of the ALJ are fully supported by his
citations to the record: Exh. JD-3, at 7 and 14; Exh. JD-2TR. 3:8-14; TR. 222:14-23.

22 ³⁷ Order 02, p. 22, ¶ 68.

23 ³⁸ Exh. GAN 1T. 7: 6-11. Mr. Norris there testified: “The crossing at Columbia Center Boulevard is a
separated grade crossing. Steptoe has an at-grade crossing. Diversion of traffic from Columbia Center
24 Boulevard to the proposed Center Parkway would have the effect of diverting traffic from a safer
separated grade crossing to an inherently dangerous at-grade crossing. Diversion from Steptoe replaces
one at-grade crossing with another with no net train/vehicle safety enhancement.”

25 ³⁹ Order 02, p. 21, ¶ 65.

1 b. The inability of the Cities' expert, Mr. Simon, to explain the effect of a Center
2 Parkway crossing on the LOS E for eastbound left turns at the intersection of
Columbia Center Boulevard and Quinault.

3 c. The failure of the Cities' expert, Mr. Deskins, to conduct any LOS analysis
4 focused on the effect of a Center Parkway crossing or consider train delays in
any of the models he did consider.

5 There is ample evidence in the record to support each of these conclusions.

6 First, the ALJ is absolutely correct that the "JUB Study"⁴⁰ which purports to be
7 a traffic study, in fact makes no findings to support a conclusion of reduced congestion
8 at existing intersections. Instead, the JUB Study focuses on the LOS at the
9 intersections which would be created by the Center Parkway crossing, identified in the
10 Study as Center Parkway and Tapteal Drive and Center Parkway and Gage Boulevard.
11 Demonstrating that the LOS at these intersections would be acceptable in no way
12 demonstrates a reduction of congestion at *existing* intersections.⁴¹
13

14 Rather, as the testimony of TCRY's traffic expert, Mr. Norris, demonstrates:

15 In order to present a better representation of congestion relief benefits (or lack
16 thereof) of the North Center Parkway Extension, the intersection LOS and
17 delay should be reported for several of the surrounding arterial intersections,
with and without the North Center Parkway Extension. That data has not been
provided.

18 At a minimum, the report should document the LOS changes at intersections
19 along the Columbia Center and Steptoe Street corridors with and without the
proposed extension. This data has not been provided.⁴²
20

21 ⁴⁰ The entire report entitled "Center Parkway Extension and Railroad Crossing, Traffic Study, March,
22 2013" prepared by J-U-B Engineers, Inc. attached to the Petition to Construct A Highway-Rail Grade
Crossing, Center Parkway" file by the City of Kennewick.

23 ⁴¹ J-U-B Study at p. 11.

24 ⁴² Exh. GAN-1T. 8:19-9-3. Mr. Norris also testified that the JUB Study addresses LOS at only one
25 intersection, Tapteal and Center Parkway – an intersection which would be open to through traffic from
Center Parkway only if the proposed crossing were constructed. TR. 301:4-13. JUB therefore does not
address LOS improvement at any existing intersection resulting from a Center Parkway crossing.

1 The ALJ was also correct in finding that Mr. Simon was unable to explain the
2 effect of a Center Parkway crossing on the LOS E for eastbound left turns at the
3 intersection of Columbia Center Boulevard and Quinault, an existing intersection. As
4 Order 02 states:

5
6 As to LOS levels, Mr. Simon testified that Tapteal Drive was not currently
7 operating at a deficient level, but two other intersections south of the railroad
8 tracks were identified as deficient: Columbia Center Boulevard at Quinault and
9 Steptoe Street at Gage Boulevard. When asked to explain the effect of
10 extending Center Parkway on the LOS E for eastbound left turns at the
11 intersection of Columbia Center Boulevard and Quinault, Mr. Simon stated
12 "I'm not sure that I can." Even though he had not seen any data or traffic
13 studies to inform his opinion, Mr. Simon also asserted that a Center Parkway
14 crossing could improve the deficient LOS at the Steptoe Street and Gage
15 Boulevard intersection by allowing some traffic to divert to the proposed
16 crossing.⁴³

17 As the ALJ correctly noted, "Mr. Deskins, the City employee most familiar
18 with the traffic modeling simulation, conceded that he did not perform and LOS
19 analysis specifically focused on the result of installing the proposed crossing at Center
20 Parkway.⁴⁴ When asked, "Did you run an analysis that specifically focused on the
21 result of installation of a crossing at Center Parkway?" Mr. Deskins' answer was "No,
22 I did not."⁴⁵

23 Likewise, Mr. Deskins did not attempt to consider or model potential delays
24 from trains either at the proposed Center Parkway crossing or the existing Steptoe
25

⁴³ Order 02, p. 12-13, ¶ 35 (footnotes omitted). TR. 61:18-22, 62:16-63:6, 67: 1-13 and 67:14-69:22.
The cited testimony supports the conclusions drawn by the ALJ.

⁴⁴ Order 02, p. 13, ¶ 36, citing the testimony at TR. 78:4-7 and 73:4-12.

⁴⁵ TR. 78:4-7.

1 Street crossing.⁴⁶ Indeed, the Cities have no evidence in the record on this point. The
2 ALJ's conclusion in this regard is beyond dispute.

3 The testimony of Mr. Norris also highlights additional deficiencies in the
4 Cities' evidence regarding claimed traffic congestion relief. As Mr. Norris testified, a
5 Center Parkway crossing would have a minor effect on traffic on the most heavily
6 traveled street in the area – Columbia Center Boulevard – a decrease of 210 vehicles
7 per hour, which he describes as inconsequential considering the traffic volume at
8 issue.⁴⁷ As Mr. Norris put it:

9 According to our calculations, the volume change is less than 5%. A change of
10 plus or minus five (5) percent is considered within the "margin of error" for
11 traffic counts such that the impact of these volume changes would be
undetectable in a typical traffic volume study.⁴⁸

12 Further, there is no evidence that the traffic volume changes resulting from the
13 proposed crossing will have a significant impact on arterial or intersection LOS
14 because neither the J-U-B Study nor any other evidence identifies capacity
15 deficiencies resulting from anticipated volume increases or presents an evaluation of
16 traffic conditions without the proposed crossing.⁴⁹

17 In addition, the Cities' evidence fails to demonstrate that construction of the
18 proposed crossing would have any significant beneficial effect in completing the road
19

20
21
22 ⁴⁶ TR. 79:2-80:13. Mr. Deskins testified that he did not submit any simulation that takes into
23 consideration the effect of a Center Parkway train crossing on the traffic on Gage Boulevard, Center
Parkway or the surrounding area.

24 ⁴⁷ Exh. GAN-1T. 8:4-11.

⁴⁸ Exh. GAN-1T. 8:8-12.

⁴⁹ Exh. GAN-1T. 7:20-8:2.

1 grid network as it can only provide access to Tapteal Drive⁵⁰ and fails to demonstrate
2 that the proposed crossing would improve current and future road capacities by
3 significant diversion of traffic volumes from the neighboring arterials – Columbia
4 Center Boulevard and Steptoe Street.⁵¹

5 For all the foregoing reasons, Cities have failed to demonstrate any reasonable
6 need for the subject crossing, let alone a need which would outweigh the potential
7 risks inherent in an at-grade crossing.
8

9 **V. WHILE REPRESENTING TO THE COMMISSION THAT RAIL TRAFFIC**
10 **INCREASE WILL BE MINIMAL, THE CITY OF RICHLAND WAS**
11 **FINALIZING PLANNED DEVELOPMENTS WHICH WILL**
12 **SUBSTANTIALLY INCREASE RAIL TRAFFIC OVER THE PROPOSED**
13 **CROSSING**

14 Because the ALJ's conclusions of failure to demonstrate public need are more
15 than adequately supported by the record, the Commission need look no further to
16 affirm Order 02 in its entirety and reject the arguments raised in the Cities' Petition.
17 However, TCRY demonstrated in detail the anticipated increase in rail traffic which
18 would make a Center Parkway crossing even more dangerous.

19 Cities criticize the ALJ's conclusions regarding likely substantial increase in
20 rail traffic over the proposed crossing. In reality, Cities evidence of minimal traffic
21 increases is contradicted by the evidence of additional rail traffic which will result
22 from developments *promoted by the City of Richland itself*. Thus, while seeking
23 authority to construct this crossing, the City of Richland was taking dramatic steps

24 ⁵⁰ Exh. GAN-1T. 9:22-10-10.

25 ⁵¹ Exh. GAN-1T. 10:17-11:10.

1 which would result in increased rail traffic and thus increased risk of vehicle-train
2 interaction, at the proposed Center Parkway crossing.

3 This anticipated traffic increase is born out by evidence of three factors. First,
4 the City of Richland has sold to ConAgra Foods Lamb Weston a parcel of land for the
5 purpose of constructing a substantial automated cold storage food warehouse which
6 will be served by rail on the subject track resulting in a substantial increase in rail
7 traffic not properly considered by the Cities.⁵² Second, the City of Richland has leased
8 a land parcel to a developer for the purpose of constructing a 1.5-mile rail loop to be
9 serviced by 100+ railcar "unit trains." Once operative, this facility will substantially
10 increase the number of unit trains utilizing the Port of Benton track.⁵³ The presence of
11 unit trains in addition to other train traffic on this rail will result in increased rail
12 traffic not taken into consideration by the Cities' evidence.

13
14 Third, TCRY has documented the substantial anticipated increase in its own
15 traffic⁵⁴ including traffic to the existing rail loop on the Horn Rapids Spur. All rail
16 traffic accessing ConAgra, the Richland Loop and the existing rail loop must travel
17 over a Center Parkway crossing, if constructed.⁵⁵ The location and proposed
18
19

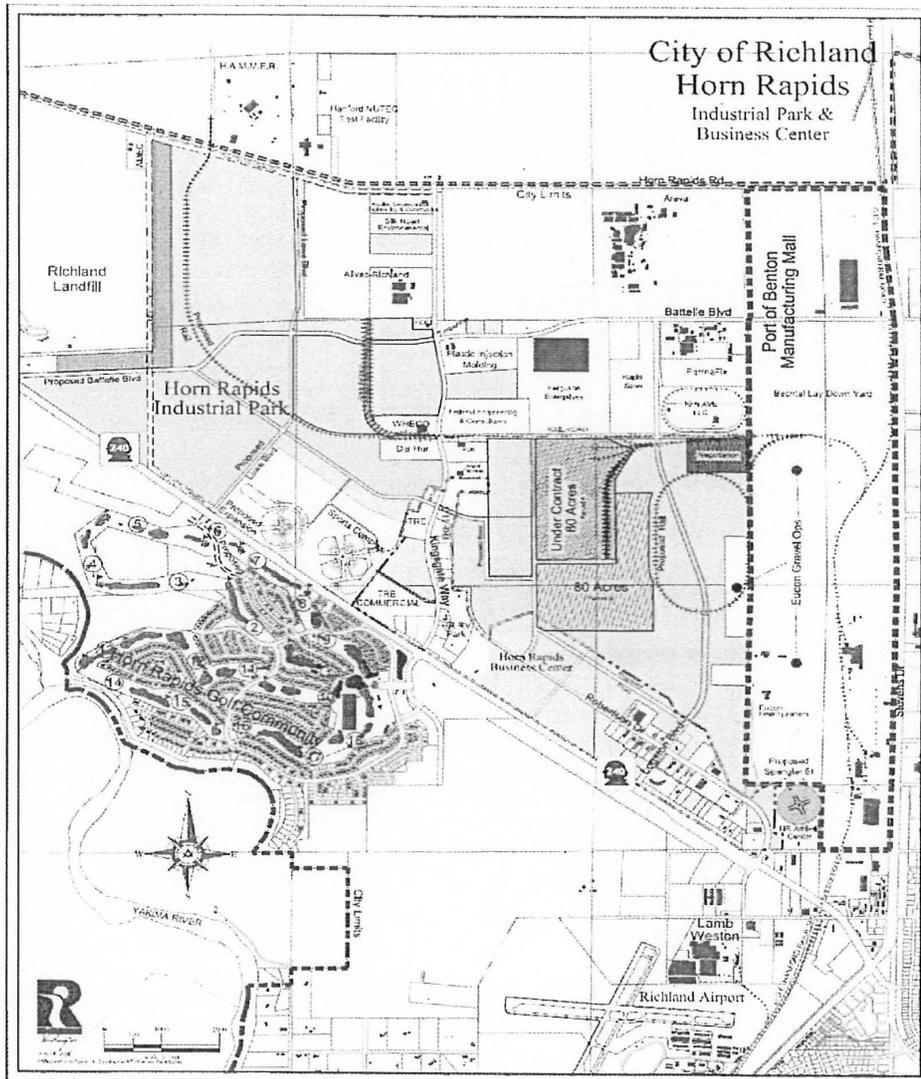
20 _____
21 ⁵² Exh. JD-9-X and JD-10-X.

22 ⁵³ Exh. KJ-14-X

23 ⁵⁴ Exh. RVP-3-X

24 ⁵⁵ These developments are located on the City of Richland's Horn Rapids Spur which, as is shown on
25 the Exh. JD-10-X is accessed from what is labeled there as the "DOE Hanford Railroad" which is now
the Port of Benton rail leased to TCRY. RVP-1T, 2:16-3:5. As Mr. Ballew admitted, the projected
ConAgra facility can only be reached by trains travelling over the proposed Center Parkway crossing.
TR. 346:22-347:8. As shown on Exh. JD-10-X, the same is true of trains travelling to the City of
Richland loop and the existing 10 NWA, LLC loop.

1 configuration of these two facilities is shown here.⁵⁶



20 The ConAgra facility is identified above as “Under Contract 80 Acres Parcel
21 A” with an additional 80 acres under option.⁵⁷ The City of Richland Loop is depicted
22

23 ⁵⁶ This Graphic generated by the City of Richland is a part of Exh. JD-10-X.

24 ⁵⁷ TR. 343:2-10; 344:19-345:3. The contract is Exh. JD-9-X. TR. 344:8-15. ConAgra also has an option
to purchase an additional 80 acres from the City of Richland at this site. TR. 345:4-7.

1 as “Proposed Rail” and is shown in greater detail as part of Exh. KJ-14-X. The
2 existing rail loop is identified as “10 NWA, LLC.”

3 The Cities’ expert witness (Jeffers) providing evidence of anticipated rail
4 traffic was not informed by the City of Richland regarding either the ConAgra project
5 or the 1.5 mile rail loop and was provided no information regarding these planned
6 facilities and thus, in effect, did not take these developments into consideration in
7 projecting minimal increase in rail traffic over the proposed crossing.⁵⁸ Instead, this
8 witness utilized a growth rate the he “felt was reasonable.”⁵⁹

9 Mr. Jeffers also was not provided any information regarding anticipated
10 increase in rail traffic to the rail loop already in place on the Horn Rapids Spur and as
11 a result, as to this traffic, admitted, “it would be hard to project anything.”⁶⁰ He was
12 not even asked to and did not perform a modeling analysis on the capacity of the rail
13 line.⁶¹

15 **A. City of Richland Rail Loop**

16
17 While the hearing before the ALJ was in progress, the Richland City Council
18 voted to approve a new 1.5 mile rail loop in the Horn Rapids Industrial Park
19 connecting the Horn Rapids Spur to the Port of Benton railroad operated by TCRY.⁶²
20

21 ⁵⁸ TR. 175:14-176:20. The City of Richland did not inform Mr. Jeffers of either development and he
22 did not take the increased rail traffic generated by these developments into consideration in his
23 computation of rail traffic. TR. 178:16-179:10. Indeed, Mr. Jeffers didn’t understand that the ConAgra
24 and rail loop developments were two separate projects. TR. 193:12-18.

⁵⁹ TR. 179:3-10.

⁶⁰ TR. 179:18-25.

⁶¹ TR. 192:20-193:5.

⁶² TR. 354:25-355:7; TR. 334:16-24, 335:19-24. TR. 2336:11-15

1 This loop is to be constructed on property leased by the City to a private business
2 entity under a 15-year lease.⁶³ This 8400-foot rail loop will accommodate “unit
3 trains” (trains over 100 railcars).⁶⁴ The purpose for this facility is to allow the delivery
4 of unit trains and the transloading of their contents for transport elsewhere.⁶⁵ In
5 addition, the City approved the sale of 25 acres of land at this location for the
6 construction of facilities for transloading and other operations.⁶⁶ Under the terms of
7 the Lease, the loop track is to be built and operational within 18 months (i.e., by no later
8 than the end of May, 2015) and the City expects that the facility will be online,
9 operational and receiving unit trains within that time.⁶⁷

10 The Lease requires that the operator allow access to the rail loop by both
11 BNSF Railway Company and Union Pacific Railroad.⁶⁸ The Lease allows the delivery
12 of a variety of products, including containerized goods for companies such as Wal-
13 Mart, Target and Costco as well as fuels including ethanol and diesel, fertilizers,
14 phosphates, metal goods, lumber and machinery.⁶⁹

15 The City anticipates a substantial investment by the loop operator as well as
16 the companies who will locate on the loop to handle these commodities.⁷⁰ This is part
17
18

19 ⁶³ TR. 355:21-356:10; TR. 336:1-10. A copy of the Lease is Exh. KJ-14-X. A copy of the City’s
20 presentation regarding the loop development is Exh. JD-38-X which shows the planned facility in
21 detail.

22 ⁶⁴ TR. 356:21-357:2.

23 ⁶⁵ TR. 357:3-6.

24 ⁶⁶ TR. 357:7-27; TR. 335:19-24.

25 ⁶⁷ TR. 358:2-12; 364:15-20.

⁶⁸ TR. 362:18-23.

⁶⁹ Exh. KJ-14-X at 27-28. TR. 339:9-23; TR. 358:13-359:2; 360:8-15. See also Exh. JD-39-X, a
videotape of television interview with Bill King, Deputy City Manager describing potential uses of new
rail loop including handling containerized products.

⁷⁰ TR. 360:18-361:9

1 of the City's plan to maximize use of the land within its industrial park for the
2 economic benefit of the City.⁷¹ Approximately one-half of the total of 2,000 acres
3 comprising that industrial park remains available for development (not including the
4 rail loop and ConAgra warehouse).⁷²

5 There is no doubt that this development will generate additional rail traffic.⁷³
6 There are no limitations on the number of trains that this rail loop facility is allowed to
7 accept.⁷⁴ The City's economic director, Mr. Ballew, testified, "we believe
8 operationally the track will be limited to an average of two and a half trains per
9 week."⁷⁵ However, neither Mr. Ballew nor any other City witness provided any data
10 as the basis for that "belief."

11 In fact, with a substantial amount of land available for construction and no
12 limit on the number of trains allowed to access the rail loop, it is apparent that the
13 increase in rail traffic will be substantial. All of that rail traffic will travel over the
14 proposed Center Parkway crossing.⁷⁶

15
16 **B. ConAgra Cold Storage Facility**

17 The ConAgra facility is to be constructed on an 80-acre tract of property under
18 contract for purchase from the City of Richland⁷⁷ and subject to a proposed site
19

20
21 ⁷¹ TR. 361:10-20.

22 ⁷² TR. 374: 4-18.

23 ⁷³ TR. 361:21-23.

24 ⁷⁴ TR. 364:21-365:3.

25 ⁷⁵ TR. 269:21-370:6

⁷⁶ See citations at fn. 27 above.

⁷⁷ TR. 343:2-10; 344:19-345:3. The contract is Exh. JD-9-X. TR. 344:8-15. ConAgra also has an option to purchase an additional 80 acres from the City of Richland at this site. TR. 345:4-7.

1 development agreement with the City of Richland.⁷⁸ This facility is to be serviced by
2 rail.⁷⁹

3 The City of Richland has conducted no study to determine the anticipated
4 volume of rail traffic to this facility,⁸⁰ but concedes that there is no question that this
5 facility would generate additional rail traffic, all of which would travel over the
6 proposed crossing.⁸¹

7 It may be impossible to calculate the precise extent of this increase in rail
8 traffic and change in the nature of rail traffic, including increasing the number of mile-
9 long unit trains which will run through the proposed crossing. However, the evidence
10 clearly supports the conclusion that this increase and change will occur.⁸² And the
11 Cities presented no evidence demonstrating that it has analyzed or projected the railcar
12 traffic increase, but has instead relied on vague and unsubstantiated representations by
13 others in its attempt to minimize the projected traffic increase. This evidence does not
14 support granting the relief sought, as removal of the Center Parkway crossing once
15

16
17
18 ⁷⁸ TR. 343:16-344:7. The draft site development agreement is Exh. JD-10-X.

19 ⁷⁹ TR. 345:13-15. Preliminary drawings show an extensive rail system to service this facility. See Exh.
20 JD-11-X.

21 ⁸⁰ TR. 345:23-346:2. The City has received an "initial estimate" of 30 railcars per week from a Dutch
22 firm no longer associated with the project. TR. 346:13-21. There was no evidence that the City of
23 Richland has itself studied the impact on train volume resulting from the ConAgra development and no
24 further data was provided.

25 ⁸¹ TR. 346:22-347:8

⁸² See, Exh. JD-37-X. Video of Tangent Rail presentation to Richland City Council re planned speed
increase on the Port of Benton rail dated Nov. 5, 2013; Exh. JD-38-X, City of Richland presentation to
Port of Benton re planned rail developments dated November 13, 2013; Exh. JD-39-X. Video –
television news interview by Mr. Bill King, City of Richland, re new rail loop and live testimony of Mr.
King regarding that interview to the effect that uses of the new rail loop will include container unit
trains as well as grain trains.

1 constructed would be a virtual impossibility despite a dramatic increase in rail traffic
2 and the likelihood of rail-vehicle interaction.

3 The evidence is also clear that the Cities failed to disclose these planned
4 developments as part of the Petition for Construction and ignored or attempted to
5 minimize their impact in projecting rail traffic in the proceedings before the ALJ.

6
7
8 **C. Train Traffic Evidence Is Consistent With The ALJ's Findings and
Provides No Support For Modification of Order 02**

9
10 Cities attack TCRY's disclosure of rail traffic over the track at the proposed
11 crossing site. However, Cities' argument is a false "gotcha" with no substance.

12 TCRY reported to the UTC that it operates 2-4 trains per weekday on this
13 track.⁸³ In other words, TCRY stated that it operates a minimum of 2 trains per day
14 and a maximum of 4. In fact, ignored by the Cities, TCRY clarified this estimate as
15 follows:⁸⁴

16 TCRY operates each week day on this line, with trains traversing the proposed
17 crossing location at least twice and on occasion four times per day.

18 TCRY also stated its average length of "roughly 15 cars per train."⁸⁵

19 Cities now argue that these figures are inconsistent with what the Cities claim
20 to be TCRY's disclosure that it *projected* a total railcar volume of 2,300 railcars in
21 total in the year 2013.⁸⁶ The Cities argument in this regard is fallacious.

22
23 ⁸³ Exh. RVP 3-X, p.2 (of 12):2-3.

24 ⁸⁴ Exh. RVP 3-X, p. 8 (of 12):13-14.

25 ⁸⁵ Exh. RVP 3-X, p. 4:7(of 12):7-10.

⁸⁶ Petition, p. 15:6-8.

1 Cities use the rough averages for train length and the total for railcars handled
2 to compute that TCRY runs only 2.96 trains per week.⁸⁷ That computation is directly
3 refuted by TCRY's disclosure that it runs a minimum of 2 trains per day, not 3 trains
4 per week, over the proposed Center Parkway crossing site. Further, the Cities
5 argument is inconsistent with, and ignores the more specific data provided by TCRY.

6 Trains on the track at the Center Parkway site run two directions – inbound and
7 outbound. Cities are wrong in relying on the 2,310 railcar number, as this was clearly
8 identified by TCRY to represent count of cars handled, not car trips (which include
9 both inbound and outbound movement of a car). As TCRY fully disclosed in its
10 Response to UTC Staff Data Requests Nos. 2-5:⁸⁸

11 Please note that the summary numbers of railcars provided in Responses to
12 [Petitioners'] Data Requests Nos. 21 and 22 reflect car count, which must be
13 doubled to reflect number of trips over the rail at the proposed crossing.
14 Therefore, for 2013, TCRY projects⁸⁹ a total of 4,620 railcar trips over the
15 proposed crossing by its own trains and an additional 498 railcar trips over the
16 proposed crossing by BNSF trains for a total of 5,118 railcars passing over the
17 proposed crossing per year.

18 Using the Cities' computation formula, TCRY clearly disclosed data
19 demonstrating that it operated at least 308 trains over the proposed crossing in 2013,
20 not the 154 calculated by Cities.⁹⁰

21 In yet a further attempt to compare apples to oranges, Cities states that the ALJ
22 "erred in his consideration of the evidence" by including what it calls an "unsupported

23 ⁸⁷ Petition, p. 15:10-11.

24 ⁸⁸ Part of Exh. RVP 3-X, p. 2 of 12: 10-14.

25 ⁸⁹ TCRY's Response was made on September 23, 2013, projecting the total for the entire 2013 year.

Exh. RFP 3-X.

⁹⁰ Even using that junk math, TCRY's average computes to 5.9 trains per week.

1 assertion 'that the combined annual train traffic through the Richland Junction [site of
2 the proposed crossing] increased from nearly 4,500 railcars in 2012 to over 5,100
3 railcars in 2013.'" ⁹¹ It bases this argument on its calculated total track usage of by all
4 railroads of 1,159 to 1,833 **trains, not railcars** per year at the proposed crossing site.

5 In addition, Cities conveniently ignore the fact that the ALJ did not base his
6 findings on the specific number of trains which would use the crossing, and noted that
7 the parties had presented conflicting evidence on this point.⁹² Therefore, the ALJ did
8 not err in any determination based on present train traffic.

9 Cities also take issue with TCRY's projection of anticipated growth of rail
10 traffic (which was not quantified in any finding by the ALJ). Cities mischaracterize
11 the evidence by stating that "[c]onsistent with TCRY's tendency to inflate track usage,
12 Mr. Peterson also provided wildly ambitious growth targest of **TCRY's use of the**
13 **railway**, claiming that he anticipates an unprecedented growth rate of 'approximately
14 20% each year.'⁹³

15
16 Cities is wrong. The growth rate identified by Mr. Peterson⁹⁴ is not for
17 "TCRY's use of the railway" but for total rail traffic over the proposed crossing. That
18 growth rate is not unsupported, as the Cities claim but is based on a detailed analysis
19
20

21 _____
⁹¹ Petition, p. 16:1-4; Order 02, p. 4, ¶ 12.

22 ⁹² Order 02, p. 4, ¶ 12 and fn. 13 noting the argument made by Cities.

23 ⁹³ Petition, p. 16:5-7.

24 ⁹⁴ RVP-1T. Mr. Peterson testified: "Based on current business TCRY anticipated annual rail traffic
increases of approximately 20% each year which would result in **total railcar traffic** over the proposed
crossing in 2014 of more than 6,200 railcar trips per year. TCRY anticipates a dramatic increase in
total train traffic, through this location in the next ten years due to a number of factors."

1 of factors specific to this rail line, not an average national industry growth statistic.

2 The factors supporting that projection are clearly set forth in the record.⁹⁵

3 Those factors tie directly to the rail facility developments described above as
4 noted in the record.⁹⁶

5 TCRY anticipates a dramatic increase in the number of trains it operates and
6 expects as similar increase in the number of trains which BNSF and UPRR
7 operate through this location in the next ten years due to a number of factors,
8 including:

- 9 a. Anticipated growth in UPRR and TCRY business reflecting increases
10 in daily train operations and unit train operations as a result of
11 additional customers locating on the transload facility serviced by
12 TCRY on the City of Richland's Horn Rapids Spur;
- 13 b. Anticipated growth in BNSF, UPRR and TCRY railcar volume as a
14 result of likely construction of the ConAgra Lamb Weston cold storage
15 warehouse facility described in the attached Response to Data Requests
16 Nos. 21 and 22.
- 17 c. Anticipated growth in BNSF, UPRR and TCRY railcar volume as a
18 result of the likely construction of one or more "loop track" facilities
19 off the Horn Rapids Spur.

20 **D. Cities' Attack On TCRY's Characterization Of The Second Track At
21 The Proposed Crossing Location As A "Passing Track" Is Erroneous**

22 The proposed crossing would traverse two tracks at the Center Parkway
23 location – TCRY's main line and an adjacent passing track. As demonstrated by Exh.
24 JD-27-X, the track which the Cities call a "siding" is in actuality a passing track, with
25 switches to the east and west of the proposed crossing. Thus the track is clearly not
simply a "siding" but rather a track which was installed and is used for the specific
purpose of allowing trains to pass each other.

⁹⁵ Exh. RVP 1-T, 5:9-6-2 and Exh. RVP 3-X

⁹⁶ Exh. RVP 3-X, p. 2 (of 12): 16-3:5. These same factors are cited in TCRY's Response to Cities' Data Request, RVP 3-X, p. 8(of 12):21-9:14.

1 The Cities assault the findings in Order 02 at ¶ 11 as erroneous. This attack
2 demonstrates the extent to which the Cities are reaching in an attempt to assign error.

3 In pertinent part, ¶ 11 states:

4 Randolph V. Peterson, Managing Member of TCRY, explained that the second
5 set of tracks immediately west of Richland Junction allows trains to meet and
6 pass when entering or exiting the area. According to Mr. Peterson, this passing
7 track is “absolutely essential” because TCRY **makes frequent, if not daily,**
8 **use of that facility.** When no passing operations are scheduled, TCRY also
9 uses the second track as a siding to store idle freight cars.⁹⁷

10 Cities assert that this finding is erroneous because, in other testimony Mr.
11 Peterson (TCRY’s Managing Member) agreed that TCRY did not use the **junction**
12 **facility as a passing track** every day.⁹⁸ However, Order 02, ¶ 11 did not conclude
13 that TCRY used the second track as a passing track every day. Rather, the ALJ
14 concluded, correctly, that TCRY made frequent if not daily use of the facility – the
15 track which would be crossed by the proposed Center Parkway. That finding is
16 grounded on the unrebutted testimony of Mr. Peterson that the track is frequently used
17 by TCRY in order to allow trains to pass and is “absolutely essential” to TCRY’s
18 operations.⁹⁹ The ALJ’s finding in this regard is not erroneous and the Cities’ attack
19 on it is a waste of both time and paper.

20 In their Petition, the Cities state that the testimony of Kevin Jeffers was
21 “conclusively demonstrative that the siding track is not long enough to be used as a
22 passing track **for one unit train while another unit train passes.**”¹⁰⁰ This contention

23 ⁹⁷ Order 02, p. 4, ¶ 11. Footnotes omitted, emphasis supplied.

24 ⁹⁸ TR. 405:14-18.

25 ⁹⁹ TR. 381:8-383:15.

¹⁰⁰ TR. 152:10-18. Emphasis added.

1 is a red herring. At no time did TCRY claim that the existing passing track at Center
2 Parkway would allow two 100+ car “unit trains” to pass each other. Significantly,
3 there was no testimony to the effect that the typical 15-railcar train could not use the
4 passing track to get out of the way of an oncoming train of similar length, or an
5 oncoming unit train for that matter. Cities’ evidence in this regard proves nothing.

6 Likewise, Cities’ evidence regarding railcars parked on this passing track does
7 not prove anything. There was no testimony addressing (and no admission by TCRY)
8 that the presence of those parked cars prevented use of the passing track for its
9 intended purpose. For example, there was no testimony that the positioning of these
10 cars left no room for a train to pull onto this track or that TCRY was prevented from
11 moving the parked cars out of the way as needed to accommodate use of the passing
12 track. Further, and more to the point, TCRY’s witness on this issue, its Managing
13 Member, Mr. Peterson, was not asked whether the passing track had been used as such
14 during the period that railcars were parked on it.
15

16 However, the bottom line on this attack by the City is simple – how and to
17 what extent the second track at the Center Parkway location is used has no impact on
18 the merits of the ALJ’s decision in Order 02 – that the Cities failed to demonstrate a
19 public need for the crossing.
20

21 VI. CONCLUSION

22 In light of the foregoing, TCRY respectfully requests that the Commission
23 reject the request in the Petition that it re-write the sound, competent and thorough
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determination by the ALJ in Order 02 that the Cities failed to demonstrate public need for the proposed crossing at all, let alone need which would outweigh the inherent hazards of a disfavored at-grade crossing.

Dated this 27th day of March 2014.

TRI-CITY & OLYMPIA RAILROAD
By: 
Paul J. Petit
One of Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served this day by email and by U.S. Postal Service on all parties of record in this proceeding to the parties identified below:

P. Stephen DiJulio Jeremy Eckert Foster Pepper PLLC 1111 3rd Avenue, Ste. 3400 Seattle, WA 98101 dijup@foster.com eckej@foster.com	Peter Beaudry Public Works Director City of Kennewick 210 West 6 th Avenue P.O. Box 6108 Kennewick, WA 99336-0108 Peter.beaudry@ci.kennewick.wa.us
Terrell A. Anderson Manager, Industry & Public Projects Union Pacific Railroad Co. 9451 Atkinson St. Roseville, CA 95747 taanders@up.com	Steven W. Smith Assistant Attorney General 1400 S. Evergreen Park Drive S.W. P.O. Box 40128 Olympia, WA 98504-0128 ssmith@utc.wa.gov
Tom A. Cowan Cowan Moore Stam and Luke P.O. Box 927 Richland, WA 99352 tcowan@cowanmoore.com	Scott D. Keller Port of Benton 3100 George Washington Way Richland, WA 99354 keller@portofbenton.com
Tom Montgomery Kelsey Endres Montgomery Scarp, PLLC 1218 Third Ave., Ste. 2700 Seattle, WA 98101 tom@montgomeryscarp.com Kelsey@montgomeryscarp.com	Richard Wagner Manager Public Projects BNSF Railway 2454 Occidental Ave. S. Ste. 2D Seattle, WA 98134 richard.wagner@bnsf.com
Carolyn Larson Dunn Carney Allen Higgins and Tongue LLP 851 SW Sixth Ave. Ste. 1500 Portland, OR 97204 cll@dunn-carnev.com	Cindy Johnson, City Manager City of Richland P.O. Box 190 Richland, WA 99352
Betsy DeMarco bdemarco@utc.wa.gov	Krista Gross kgross@utc.wa.gov

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1 A courtesy copy email was also sent to:

2 Adam E. Torem
3 Administrative Law Judge
4 1300 S. Evergreen Park Dr. S.W.
5 P.O. Box 47250
6 Olympia, WA 98504-7250
7 atorem@utc.wa.gov

8 DATED this 27th day of March, 2014, at Kennewick, Washington.

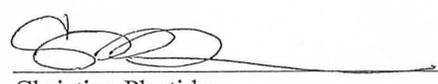
9 
10 Christine Photides

EXHIBIT 6

March 14, 2014

Mr. Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, Washington 98504-7250

STATE OF WASH
UTIL. AND TRANSP
COMMISSION

2014 MAR 14 PM 3:48

RECEIVED
PROGRAM MANAGEMENT

SUBJECT: CITY OF KENNEWICK DOCKET TR-130499

Dear Mr. King:

We are writing to request active participation by you and your rail safety division staff in the upcoming review of Docket TR-130499. The initial order in this case is very disappointing to us. We have personal knowledge of the extensive community support and planning that calls for completion of the Center Parkway project and approval of the Cities' petition for a new at-grade railroad crossing required for its completion.

Richland and Kennewick's population growth has led the state over the past decade and is forecast to continue to do so for the foreseeable future. This growth has and will strain the capacity of the regional transportation network and of other municipal services, such as emergency responders. The Cities have collaborated both locally and regionally to adopt plans for transportation and emergency response. For most of the past two decades, adopted plans have included the Center Parkway link between Tapteal Drive and Gage Boulevard as the final segment of the street network in one of the highest volume travel areas in the Tri-Cities.

In addition to the necessary improvements to transportation services and emergency response capabilities the Cities planning for economic vitality is at stake. The Cities' land use plans identify undeveloped commercial and retail properties near the proposed Center Parkway that are not adequately served. Development of these properties to their highest and best use is in the region's economic and fiscal best interest. Completion of the street network, including Center Parkway, is vital to fulfillment of those plans and the communities' vitality.

The Cities have expended enormous energy and resources aligning support and resolving concerns for this last incomplete street segment with the result that several state and regional agencies have provided grant funds to support its completion. These agencies include the Washington State Department of Transportation, the Washington State Transportation Improvement Board, and the Benton-Franklin Council of Governments, our area's Regional

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Steven King
March 14, 2014
Page two

Transportation Planning Organization. Significant costs in local funds from the Cities have achieved agreements with Union Pacific Railroad and Burlington Northern Santa Fe Railroad to allow the street to be completed, including the at-grade crossing.

Support for this project is nearly unanimous in our communities and includes the general public, public safety officials, business interests, and elected officials. The only known opposition to the petition and project comes from the Tri-City and Olympia Railroad, a lease operator of a regional industrial spur track owned by the Port of Benton. The Port, as the track owner, does not oppose the crossing and has provided the easement needed to complete the crossing.

We believe the WUTC railroad safety division staff correctly analyzed the petition. We support their testimony indicating that the Cities' petition should be approved. We are asking that you thoughtfully consider initiating an appeal of the initial order in support of your staff's analysis of this case.

If you elect to not initiate an appeal by staff, we strongly encourage the WUTC staff to actively support the Cities' position before the Commission. Failure to do so would effectively abandon your staff's diligent and thoughtful analysis of this case with potentially devastating results for local and regional planning as well as railroad safety.

Thank you for your consideration.

Sincerely,



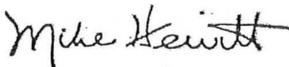
Sharon Brown
State Senator
8th Legislative District



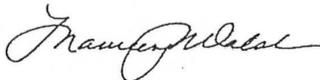
Bradley Klippert
State Representative
8th Legislative District



Larry Haler
State Representative
8th Legislative District



Mike Hewitt
State Senator
16th Legislative District



Maureen Walsh
State Representative
16th Legislative District

cc: Kennewick City Council
Richland City Council

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EXHIBIT 7

3, 2013. Staff filed responsive testimony supporting the petition on October 1, 2013. TCRY filed opposing testimony on October 2, 2013. Finally, the Cities and TCRY filed rebuttal testimony and exhibits on October 23, 2013.

4 The Commission conducted evidentiary hearings on November 19-20, 2013, and a public comment hearing on November 20, 2013, in Richland, Washington before Administrative Law Judge Adam Torem. Judge Torem performed a site visit and toured the area on November 21, 2013. The parties simultaneously filed written post-hearing briefs on December 20, 2013.

5 The Commission entered its Initial Order on February 25, 2014, denying Kennewick's petition. Kennewick and Richland filed a joint Petition for Administrative Review on March 18, 2014. The Cities ask for oral argument, which we find unnecessary to resolve their Petition for Administrative Review. Denying the Cities' request for oral argument causes them no prejudice.

6 TCRY filed an answer on March 27, 2014, opposing the joint petition. Staff also filed an answer on March 27, 2014, reiterating its support for the Cities' petition for authority to construct the subject rail crossing, but addressing the Cities' alternative arguments about the impact of the Growth Management Act (GMA) and the application of chapter 81.53 RCW to code Cities. Staff disagrees with the city on the application of both the GMA and RCW 35A.11.020 to its petition.

7 On April 1, 2014, Kennewick and Richland filed a "Reply in Support of Commission Review." TCRY filed a motion to strike the reply on April 3, 2014, arguing it failed to satisfy the requirements for such a pleading under WAC 480-07-825(a) and is procedurally deficient because the Cities did not seek leave to file a reply as required under WAC 480-07-825(5)(b). On April 4, 2014, the Cities filed a response to TCRY's motion to strike. The Commission grants TCRY's motion and will not consider the Cities' reply.¹

¹ Contrary to what the Cities argue in their response to TCRY's motion, the Commission's procedural rules are not mere technicalities. Those who elect to practice before the Commission are expected to be familiar with and adhere to its procedural rules. Not only did the Cities fail to seek leave to file a reply, the reply itself does not meet the substantive requirements for such a pleading. It does not cite new matters raised by TCRY's answer and state why those matters were not reasonably anticipated or explain satisfactorily why a reply is necessary, all as required by the Commission's rule governing replies.

8 **APPEARANCES.** P. Stephen DiJulio and Jeremy Eckert, Foster Pepper PLLC, Seattle, represent the Cities. Paul J. Petit, Richland, represents respondent TCRY. Steven W. Smith, Assistant Attorney General, Olympia, represents the Commission’s regulatory staff (Commission Staff or Staff).²

DISCUSSION

I. Description of Proposed At-Grade Railroad Crossing

9 The proposed crossing would be built at the intersection of an extension of Center Parkway in the City of Kennewick, and two tracks owned by the Port of Benton. The location and configuration of the proposed site are illustrated in Figure 1.

**FIGURE 1
PROJECT LOCATION MAP**



² In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

The Center Parkway extension would be from an existing roundabout in Kennewick, where the parkway intersects Gage Boulevard, continuing north to Tapteal Drive, a one-mile stretch of road connecting North Steptoe Street to the west, with Columbia Center Boulevard to the east, in Richland. There is a “T” intersection at both ends of this short roadway. There is an at-grade crossing on North Steptoe Street and a grade-separated crossing at Columbia Center Boulevard.

10 Tri-City and Olympia Railroad, BNSF Railway, and Union Pacific Railroad all operate trains over the so-called Hanford Reservation tracks at this location. Tri-City and Olympia Railroad uses a short, parallel spur at Richland Junction for switching and storage of rail cars, and opposes the Cities’ petition, arguing the crossing would interfere with its operations. Both tracks are owned by the Benton County Port Authority. BNSF and UPRR have moved their switching operations since the Commission denied an earlier petition to open a crossing in this location and do not oppose the Cities’ current petition.³

II. Review of Initial Order

11 The Initial Order analyzes Kennewick’s petition using the framework in a 2011 Commission initial order approving another petition for an at-grade crossing in Benton County:

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.

³ When the Cities petitioned to open a crossing at this same location in 2007, Tri-City and Olympia Railroad, BNSF and UPRR opposed the two petitions, which were consolidated for hearing. Staff also opposed the earlier petitions. At that time, there were four tracks and all three railroad companies conducted switching operations in the vicinity of the Richland Junction. The Commission denied the petitions in a single order. *See City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06 and Docket TR-050967, Order 02, Initial Order Denying Petition[s] (January 26, 2007). The Initial Order in these dockets became final by operation of law on February 15, 2007.

- b) Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.⁴

We agree that we should evaluate the petition to determine whether a grade-separated crossing is practicable and whether a demonstrated public need for the crossing outweighs the hazards of an at-grade crossing. We agree with most of the Initial Order's findings and conclusions on these questions, but we conclude that a broader public need than the public safety concerns the parties advocate supports the petition.

A. Grade Separation and Inherent Risk

- 12 No one contests on review the Initial Order's finding that it is physically and financially impractical to build a grade-separated crossing in this instance:

The amount and character of travel on the railroad and on Center Parkway do not justify grade separation. Further, there is no evidence in the record disputing the engineering infeasibility of constructing a grade-separated crossing at Center Parkway. Finally, there is no serious dispute in the record that a grade-separated crossing would be tremendously more expensive than the proposed at-grade crossing. Therefore, considering engineering requirements and cost constraints, the Commission determines that a grade-separated crossing is not practicable at Center Parkway.⁵

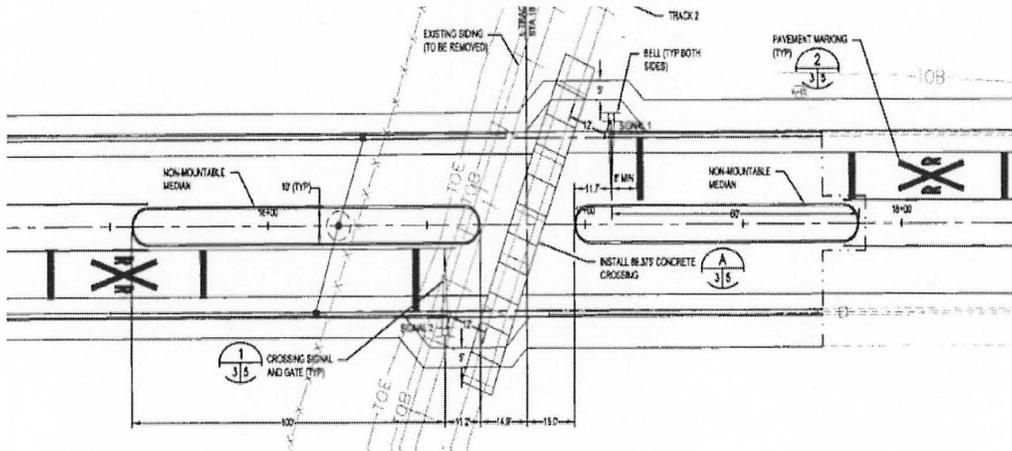
- 13 The Cities, however, propose to build an at-grade crossing designed to mitigate the inherent dangers to vehicles and pedestrians by using active warning devices and taking other measures. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip

⁴ *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, ¶ 29 (Feb. 15, 2011) (citing: *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) and *Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330 (March 1995). This Initial Order became final by operation of law on March 8, 2011.

⁵ Initial Order ¶ 50.

designed to prevent drivers from going around lowered gates, as illustrated below in Figure 2.⁶

FIGURE 2
AT-GRADE CROSSING CONFIGURATION



14 Taken together, these measures significantly reduce the risks to motorists who might, in the absence of these measures, make inopportune efforts to cross the tracks when trains are present.⁷ Even imprudent drivers will be effectively barred from crossing the tracks when the gates are closed next to concrete barrier medians. These same measures reduce the risk to pedestrian and bicyclist traffic

⁶ This illustration shows the removal of the 1900 foot siding track. However, in the face of Tri-City and Olympia Railroad's opposition, Staff's analysis of the site and consideration of its proposed safety features assumes that the second track remains in operation. Ms. Hunter testifies:

The active warning devices consisting of advanced pavement markings and warning signs, gates and lights, and a traffic island that will act as a median separator, provide an adequate level of safety at the proposed crossing. In addition, the train and vehicle speeds and the volume of train and vehicle traffic at the site of the proposed crossing are fairly low, making the possibility of an accident less likely than crossings with higher speeds or increased traffic.

Exh. No. KH-1T at 23:15-20.

⁷ Mr. Jeffers, a professional engineer, calculated the predicted accident rate to be 0.145 per year or 1 accident per 6.9 years. Exh. No. KMJ-1T at 7:11-20. The USDOT Accident Prediction Formula standard for requiring a grade-separated crossing is 0.5 accident per year. Exh. No. KH-1T at 11:18-20.

by alerting prudent travelers when it is unsafe for them to cross the tracks and making it more difficult for them to pass.⁸

B. Public Safety Need

15 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.⁹

16 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.

17 If the feasibility of grade separation and public safety as a component of public need were our only concerns, we would end our discussion here and sustain the Initial Order. However, having studied the full record, we find reason to analyze this matter outside the narrow constraints of these two questions. We address in the next section of this Order an additional point of decision that we find determinative.

⁸ The planned road extension includes sidewalks and bike paths on both sides so it is clear some such traffic is expected. However, there is some evidence that pedestrian and bicycle traffic is expected to be light, and no evidence to the contrary. *See* Exh. No. KH-1T at 24:1-7.

⁹ *See 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).

C. Broader Public Need

18 The Cities argue that state agencies are mandated to comply with local land use plans adopted under the Growth Management Act (GMA).¹⁰ They contend that their regional comprehensive planning process “mandates” the Center Parkway crossing in order for them to achieve their stated levels of service for emergency response times and traffic flow at signalized intersections.¹¹ According to the Cities, the GMA prohibits the Commission from evaluating public need, alternatives for opening a proposed railroad crossing, or even whether the proposed crossing will function in the matter claimed by the Cities. As the Initial Order observes:

Taken to its logical end point, the Cities’ argument would require the Commission to approve any at-grade crossing planned for in a local jurisdiction’s comprehensive planning process.¹²

The Initial Order rejects the Cities’ legal argument that the GMA somehow controls our determination of their petition under RCW 81.53 for authority to construct the subject railroad crossing.

19 We agree with the Initial Order’s determination that the GMA does not relieve the Commission from its statutory obligation to regulate public safety at rail crossings, including the one proposed here. The two statutes do not conflict with each other and the integrity of both statutes within the overall statutory scheme is preserved by reading the GMA together and in harmony with RCW 81.53.¹³ The Initial Order ends its discussion of this issue without considering how this

¹⁰ Petitioners’ Post-Hearing Brief at 7-12. The Cities cite specifically to RCW 36.70A.103’s mandate that “[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter.” *Id.* at 8, n. 29.

¹¹ Petitioners’ Post-Hearing Brief, at 9-11.

¹² Initial Order ¶ 42.

¹³ *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) (“In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.”).

harmony should be achieved in the context of the facts presented in this case. We find it necessary to undertake this analysis on review.¹⁴

20 The proposed extension of Center Parkway has been part of Richland's and Kennewick's transportation planning for some time.¹⁵ As summarized in the introduction to the Center Parkway Extension and Railroad Crossing Traffic Study completed for the city in March 2013 by JUB Engineers, Inc.:

For several years the City of Richland has pursued the extension of Center Parkway to connect Gage Boulevard on the south to Tapteal Drive on the north. This effort has been challenging because of existing railroad lines that operate parallel to and in between Gage Boulevard and Tapteal Drive. There are multiple purposes for connecting Center Parkway which include:

- Complete a grid network of functionally classified roadways.
- Provide relief to congested arterial facilities.
- Provide improved access to commercial areas and developable land.
- Improve emergency response times.¹⁶

21 Following a detailed narrative, supported by appendices, the JUB Engineers, Inc. report summarizes the study's key findings, elaborating on the points above:

This Traffic Study has been performed to describe the efforts put forth by the City of Richland and the City of Kennewick to complete a

¹⁴ In considering petitions for administrative review, the Commission conducts de novo review of the issues decided in an initial order. *See* RCW 34.05.464(4) ("The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing").

¹⁵ The Center Parkway extension project has been included in the Cities' comprehensive planning process since 2006. The proposed at-grade Center Parkway Crossing has been identified as an essential public facility in (1) the City of Richland Comprehensive Plan, (2) the City of Kennewick Comprehensive Plan, and (3) the Regional Transportation Plan. The proposed project has received funding from the State through the Washington State Community Economic Revitalization Board, the Surface Transportation Program Regional Competitive Fund, and the Transportation Improvement Board. Petition for Admin. Rev. at 19:2-9.

¹⁶ Exh. KJ-5 at page 1 of JUB Traffic Study.

roadway network that includes the extension of Center Parkway in order to accommodate growth in the region. Four primary objectives have been discussed that document the needs and benefits of extending Center Parkway between Gage Boulevard and Tapteal Drive that include:

- Complete a grid network of functionally classified roadways -The completion of Center Parkway north of Gage Boulevard is merely one step of many to complete both a functionally classified network and a north-south component of a grid system to provide safe efficient movement of traffic into this area of the region.
- Provide relief to congested arterial facilities -Center Parkway has been planned to provide relief to both Columbia Center Boulevard as well as Steptoe Street, consistent with the philosophy of providing collector roadways parallel and in between arterial roadways.
- Provide improved access to commercial areas and developable land - nearly 60 developable acres of commercial land between the railroad and SR 240 which has desirable visibility will have improved access and will gain the synergy that commercial areas often seek.
- Improve emergency response times - a significant area will have improved emergency response times, some with nearly a 30% reduction.¹⁷

Economic Development

22 We determine that the Commission should consider public need for the proposed at-grade railroad crossing in the broader context of the several purposes discussed in the JUB transportation study, rather than with the narrower focus that the parties, and consequently the Initial Order, place on public safety. 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,

¹⁷ *Id.* at page 14 of JUB Traffic Study.

and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland, as shown below in Figure 3.

**FIGURE 3
DEVELOPMENT AND DEVELOPMENT POTENTIAL**



23 The potential for additional development in this area is underscored by a public comment filed in this proceeding by a landowner, Preston K. Ramsey III, writing on behalf of FBA Land Holdings. FBA Land Holdings owns two undeveloped parcels bordered on the north by Tapteal Drive and on the west by the proposed Center Parkway Extension. These are labeled “Tap I” and “Tap II” in Figure 3. Mr. Ramsey comments that:

The proposed street extension of Center Parkway across railroad tracks currently leased by TCRY literally would create a new bridge between two highly interdependent communities in terms of transportation, economics, land use as well as the traffic patterns and habits of the

approximate 25,000 people who live, work and otherwise travel through this area daily.¹⁸

- 24 Similarly, another public comment filed by Brian Malley, Executive Director of the Benton-Franklin Council of Governments, the Metropolitan Planning Organization for the Tri-City metropolitan area, emphasizes community expectations with respect to the proposed Center Parkway extension:

In addition to easing congestion, this proposed link provides connectivity to two adjacent retail areas that are separated only by the tracks that divide them. The Tri-City area has, and continues to, grow at impressive rates. Planning and encouraging alternate modes, such as bike/ [pedestrian]/ transit will be a crucial step toward alleviating future congestion. At this time, there simply is no option between these two retail areas that does not require the use of a car to negotiate the roadways to travel between. Additionally, a connection in this location may well contribute to the tax base, as Tapteal area businesses have suffered through marginal access for years, with no reasonable link to the adjacent retail areas to the south.¹⁹

Deference to Local Government

- 25 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. Indeed, it is worth considering that if the City of Richland was the petitioner for this project, instead of Kennewick, it would be exempt from the Commission's jurisdiction.²⁰ RCW 81.53.240 exempts first-class cities from the

¹⁸ Public Comment Exhibit (Written comment submitted December 9, 2013).

¹⁹ Public Comment Exhibit (Written comment submitted November 20, 2013).

²⁰ The Cities note in their petition for administrative review that:

The Petitioners do not waive any jurisdictional argument regarding the Cities' exemption from this petition process. RCW 81.53.240 exempts first-class cities from the at-grade crossing petition process. The City of Richland is a first-class city, and the City of Kennewick is a code city. State law provides that code cities have the same authority as first-class cities. RCW 35A.11.020: "The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of the state, and not specifically denied to code cities by law." Nevertheless, the Petitioners believe UTC review and approval worthwhile.

at-grade crossing petition process. The City of Richland is a first-class city.²¹ This exemption has been present in the law in one form or another since 1909. It is reasonable to infer its passage into law was largely a reflection of the state Constitution giving deference to local jurisdictions on matters that are deemed best left to local control.²² Planning and designing intra-urban transportation networks that will best serve the public's needs in the jurisdictional boundaries of the state's larger Cities fall squarely into this category.²³ Although Kennewick is not legally exempt from our jurisdiction, it is consistent with legislative policies implementing Constitutional home rule that the Commission give significant weight to the evidence concerning the Cities' perspective that the Center Parkway extension is important to transportation planning and economic development in both jurisdictions.

26 There is additional public comment in the record of this proceeding from various community leaders that focuses on these points and illustrates the local

Petition for Administrative Review at 8, footnote 30.

Staff argues that because RCW 81.53.240 is a limitation on Commission jurisdiction, not a grant of authority to first-class cities, RCW 35A.11.020 does not apply. We see no need to resolve this legal argument in this case. We consider the underlying purpose of the exemption as part of the policy context in which the Commission should evaluate the evidence.

²¹ The Washington Constitution, adopted in 1889, directed the legislature to provide for the incorporation of cities and established that cities with population of 20,000 or more could frame a charter for their own government. Wash. Const., Art. XI, Sec. 10. The 1890 legislature established a classification scheme and provided that charter cities are "first class cities" with the broad powers generally associated with "home rule" concepts. Efforts toward greater local self-government powers as the state has become more urban led to amendment of the state Constitution in 1964, lowering the population threshold for charter cities to 10,000 and to legislation in 1994 that similarly lowered the population threshold for first class city designation to 10,000. See Amendment 40, Wash. Const., Art. XI, Sec. 10 and; RCW 35.01.010. In 1967, the legislature enacted a new municipal code (Ch. 119, Laws of 9167, Ex. Sess.), effective July 1, 1969, that gave cities the option of becoming a "code city" with generally the same powers as first class cities. See RCW 35A.11.020. Kennewick is such a code city.

²² Wash. Const., Art. XI, Sec. 10 (cities and towns with population greater than 20,000 could frame a charter for their own government). Amendment 40, in 1964, allowed any city with 10,000 or more inhabitants to frame a charter, subject to the state's general laws. In this sense, RCW 81.53.240, is consistent with the general scheme of government in Washington that gives broad "home rule" powers to first class cities.

²³ Richland's population is greater than 50,000 and that of Kennewick greater than 75,000. The Tri-cities metropolitan area, including Pasco and surrounding urban and suburban areas is more than 250,000.

importance of recognizing the broader public policy environment. Carl F. Adrian, president of the Tri-City Development Council, for example, comments that:

This at-grade railroad crossing on Center Parkway is a well-planned necessary component of our region's transportation system. The project will dramatically improve traffic movement between two important and growing commercial areas in Richland and Kennewick.

. . . Completion of Center Parkway between Tapteal Drive and Gage Boulevard is a long-standing element of a carefully developed transportation system plan. That planning has included careful consideration of the safety implications in the planned road and at-grade railroad crossing.²⁴

27 Comments from the Tri-City Regional Chamber of Commerce and the Port of Kennewick also support the proposed project on the bases that it is an important feature in a long-planned transportation network that will contribute to commercial development while reducing traffic congestion and promoting public safety in the project vicinity.²⁵

III. Conclusion

28 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

²⁴ Public Comment Exhibit (Written comment submitted November 20, 2013).

²⁵ *Id.* (Tri-City Regional Chamber of Commerce written comment submitted November 25, 2013; Port of Kennewick written comment submitted December 6, 2013).

should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

FINDINGS AND CONCLUSIONS

- 29 We endorse certain of the findings and conclusions in the Initial Order, and restate
them below. In addition, we modify certain of the Initial Order's findings and
conclusions to make them consistent with the discussion in this Order. Finally,
we add new findings and conclusions based on our de novo review of the record.
- 30 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to regulate railroad
crossings, and has jurisdiction over the parties and subject matter of this
proceeding.
- 31 (2) The City of Kennewick is a governmental entity authorized by law to petition
the Commission pursuant to RCW 81.53.020 for authority to construct an at-
grade railroad crossing where it is not practicable to construct a grade-
separated crossing and there is a public need for such a crossing that
outweighs its inherent risks.
- 32 (3) Res judicata does not bar the Commission from ruling on the Cities' petition
because it is sufficiently different from the City of Kennewick's prior petition.
- 33 (4) Comprehensive planning under the Growth Management Act does not relieve
the Cities from complying with RCW 81.53. The Commission, however,
considers the Cities' planning as part of the policy context in which it
evaluates a proposed at-grade rail crossing in the commercial center of the
urban area.
- 34 (5) A grade-separated crossing at the proposed project site is not practicable
because of engineering requirements and cost constraints.
- 35 (6) The risks of an accident at the proposed crossing are relatively low considering
current and projected train traffic, predicted levels of vehicle traffic, and
engineering plans that include active warning devices and other safety
measures.

- 36 (7) The Center Parkway extension may assist the Cities' emergency responders by
providing an alternative route for responding to incidents in the vicinity of
Columbia Center Mall, when trains are not blocking the intersection.
- 37 (8) The Center Parkway extension, including the proposed at-grade railroad
crossing, is a long-planned and important component of the Cities'
transportation system. The project will improve traffic movement between two
important and growing commercial areas in Richland and Kennewick, thus
promoting economic development.
- 38 (9) The record includes substantial competent evidence showing sufficient public
need to outweigh the inherent risks presented by the proposed at-grade
crossing.
- 39 (10) The Commission should grant the City of Richland's and City of
Kennewick's petition for authority to construct an at-grade crossing at the
proposed extension of Center Parkway.

ORDER

THE COMMISSION ORDERS:

- 40 (1) The Petition for Administrative Review filed by the City of Kennewick and
joined in by the City of Richland is granted.
- 41 (2) The Initial Order entered in this proceeding on February 25, 2014, is reversed
to the extent it would deny the City of Kennewick's petition to construct a
highway-rail grade crossing at Center Parkway, Kennewick, Washington. The
Commission authorizes construction of the proposed crossing.

42 (3) The Commission retains jurisdiction to enforce the terms of this order.

Dated at Olympia, Washington, and effective May 29, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

EXHIBIT 8

RECEIVED

JAN -7 2015

PAINE HAMBLEN LLP

JOSIE DELVIN
BENTON COUNTY CLERK

JAN 02 2015

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IN THE SUPERIOR COURT, STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

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

No. 14-2-01894-8

Petitioner,)

NOTICE OF APPEAL TO DIVISION
III OF THE COURT OF APPEALS

vs.)

STATE OF WASHINGTON, UTILITIES AND)
TRANSPORTATION COMMISSION)

Respondent.)

Tri-City Railroad Company, LLC, Petitioner, seeks review by Division III of the Court of Appeals for the State of Washington of the *Order Affirming the Washington Utilities And Transportation Commission's Orders in Docket TR-130499*, entered on December 9, 2014 by the Superior Court for the County of Benton.

A copy of said Order is attached to this notice.

///

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NOTICE OF APPEAL TO DIVISION III
OF THE COURT OF APPEALS- 1

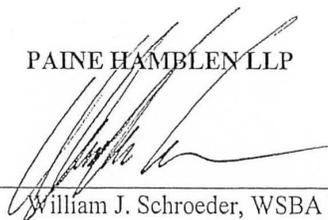
PAINE HAMBLEN LLP
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SPOKANE, WA 99201 PHONE (509) 455-6000
FAX (509) 838-0007

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SIGNED this 31st day of December, 2014.

PAINÉ HAMBLÉN LLP

By: _____



William J. Schroeder, WSBA No. 07942
Gregory C. Hesler, WSBA No. 34217
William C. Schroeder, WSBA No. 41986
Paine Hamblen, LLP
717 West Sprague Avenue, ste 1200
Spokane, Washington, 99201
(509) 455 6000
Attorneys for Appellant/Petitioner Tri-City Railroad
Company, LLC

NOTICE OF APPEAL TO DIVISION III
OF THE COURT OF APPEALS- 2

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2014, I caused to be served a true and correct copy of both the foregoing **NOTICE OF APPEAL TO DIVISION III OF THE COURT OF APPEALS**, by the method indicated below and addressed to the following:

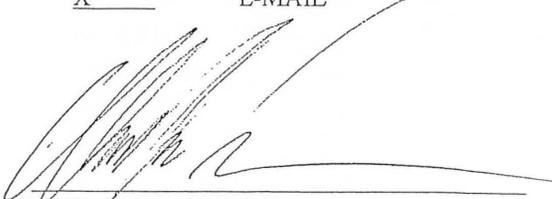
Division III of the Court of Appeals for the State of Washington 500 North Cedar Street Spokane, Washington 99201-1905	<input checked="" type="checkbox"/> _____ _____ _____ _____ _____	DELIVERED U.S. MAIL OVERNIGHT MAIL TELECOPY (FACSIMILE) E-MAIL
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P. Stephen DiJulio Jeremy Eckert Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, Washington 98101 dijup@foster.com eckej@foster.com	_____ <input checked="" type="checkbox"/> _____ _____ _____ <input checked="" type="checkbox"/> _____	DELIVERED U.S. MAIL OVERNIGHT MAIL TELECOPY (FACSIMILE) E-MAIL
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Heather Kintzley City of Richland 975 George Washington Way Richland, Washington 99352 hkintzley@ci.richland.wa.us	_____ <input checked="" type="checkbox"/> _____ _____ _____ <input checked="" type="checkbox"/> _____	DELIVERED U.S. MAIL OVERNIGHT MAIL TELECOPY (FACSIMILE) E-MAIL
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Lisa Beaton City of Kennewick 210 West Sixth Avenue Kennewick, Washington 99336 lisa.beaton@ci.kennewick.wa.us	_____ <input checked="" type="checkbox"/> _____ _____ _____ <input checked="" type="checkbox"/> _____	DELIVERED U.S. MAIL OVERNIGHT MAIL TELECOPY (FACSIMILE) E-MAIL
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Michael A. Fassio Julian Hua Beattie Attorney General of Washington Utilities and Transportation Division 1400 South Evergreen Park Drive SW P.O. Box 40128 Olympia, Washington 98504-0128 michaelfl@atg.wa.gov jbeattie@utc.wa.gov	_____ <input checked="" type="checkbox"/> _____ _____ _____ _____ <input checked="" type="checkbox"/> _____	DELIVERED U.S. MAIL OVERNIGHT MAIL TELECOPY (FACSIMILE) E-MAIL
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William C. Schroeder

NOTICE OF APPEAL TO DIVISION III
OF THE COURT OF APPEALS- 3

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I:\Spodocs\32447\00007\PLEA

1 1. The WUTC Orders 03 and 04 are supported by substantial evidence. ~~Tri-City and~~
2 ~~Olympia Railroad was afforded full opportunity to contest and rebut the evidence, and to present~~
3 ~~its own evidence, before and during the WUTC, and brief all issues before the WUTC.~~ *BAS*

4 2. As found by the WUTC, the public need for the Center Parkway Crossing
5 outweighs any speculative risk. And, the WUTC committed no error of law in its approval of the
6 Center Parkway Crossing.

7 3. This Court rejects Tri-City and Olympia's argument regarding RCW 81.53.261.
8 New issues cannot be raised on appeal. However, that statute has no application in any event to
9 a proposal for a new crossing.

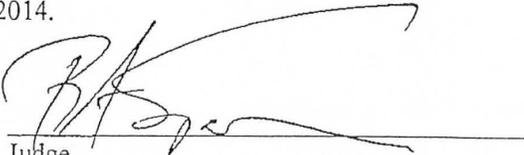
10 4. The WUTC decision does not implicate property rights and this APA appeal is
11 not the forum for consideration of such issues. See in this regard the pending action in Benton
12 County Cause No. 14-2-01910-3.

13 IT IS HEREBY ORDERED, as follows:

14 1. The Washington State Utilities and Transportation Commission's Orders (03 and
15 04) in Docket TR-130499 are **AFFIRMED**.

16 2. Costs are awarded to Respondents consistent with Chapter 34.05 RCW and Court
17 Rule.

18 DATED this ^{9th} ~~8th~~ day of December, 2014.

19
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21 Judge

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ORDER AFFIRMING THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION'S ORDERS
IN DOCKET TR-130499 - 2

FOSTER PEPPER PLLC
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SEATTLE, WASHINGTON 98101-3299
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1 PRESENTED BY:

2 Lisa Beaton
3 Kennewick City Attorney, WSBA #25305
4 Heather Kintzley
5 Richland City Attorney, WSBA #35520

6 

7 P. Stephen DiJulio, WSBA #7139
8 Jeremy Eckert, WSBA #42596
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14 Email: dijup@foster.com
15 Email: eckej@foster.com
16 Attorneys for the City of Richland and the City of Kennewick

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ORDER AFFIRMING THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION'S ORDERS
IN DOCKET TR-130499 - 3

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EXHIBIT 9

JOSIE DELVIN
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JUL 25 2014

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability company,)	No. 14-2-01910-3
Plaintiff,	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
vs.)	
THE CITY OF KENNEWICK, a municipal corporation of the State of Washington, located in Benton County, Washington; THE CITY OF RICHLAND, a municipal corporation of the State of Washington, located in Benton County, Washington,)	
Defendants.)	

COMES NOW PLAINTIFF, Tri-City Railroad Company, LLC, and. for claims
against DEFENDANTS, the City of Kennewick and the City of Richland, states and alleges
the following:

COMPLAINT - 1

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I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Tri-City Railroad Company, LLC, (“TCRY”) is a Washington limited liability company headquartered in Benton County, Washington, and has paid all necessary and required taxes, licensed, and fees that may form a precondition to filing suit.

2. The City of Kennewick (“Kennewick”) is a municipal corporation and First Class City located in Benton County, Washington.

3. The City of Richland (“Richland”) is a municipal corporation and Code City located in Benton County, Washington.

4. This case concerns property rights possessed by TCRY in railroad tracks located within the City of Kennewick, County of Benton. Venue is proper pursuant to RCW §4.12.010, RCW §4.12.025, and RCW §7.24.010.

5. The Superior Court has jurisdiction and authority to hear declaratory judgment actions to determine the rights of parties under RCW §7.24.010, RCW §7.24.020, and RCW §7.24.030. The Court has authority to grant injunctive relief under RCW §7.24.190.

II. FACTS

6. TCRY operates on railroad trackage leased from the Port of Benton. The railroad trackage includes, among other things, a main railroad track, together with a 1900 foot railroad passing track located within Kennewick (collectively, the “Tracks”).

7. Pursuant to an October 19, 2006 contract with the Port of Benton, Kennewick, and Richland agreed that easement rights in the Tracks, granted to them in by the Port of Benton, would be subject to the leasehold rights of TCRY:

1 The Cities acknowledge and agree that the easement is subject to the rights of
2 [TCRY] set forth in the Lease Agreement attached as Exhibit 2. The Cities
3 must obtain additional authority from [TCRY], either by contract or by
4 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.

5 8. On April 8, 2013, Kennewick filed a petition with the Washington State
6 Utilities and Transportation Commission ("UTC") to construct a highway-rail grade crossing
7 at Center Parkway and to remove the passing track. On May 31, 2013, Richland joined
8 Kennewick's petition.

9 9. Center Parkway is a minor arterial roadway in Kennewick. As currently
10 constructed, its northbound traffic moves into a roundabout intersection with Gage Boulevard
11 and cannot proceed further north to Tapteal Drive. Kennewick and Richland intend to
12 connect Tapteal Drive in Richland with Gage Boulevard in Kennewick by extending Center
13 Parkway northward. In order to accomplish this, Center Parkway would cross the Tracks.
14

15 10. As shown in Figure 1, the Columbia Center Mall is located immediately
16 southeast of the proposed crossing. The Mall's northern boundary abuts Port of Benton and
17 UPRR railroad tracks that connect at Richland Junction, just east of the proposed crossing.
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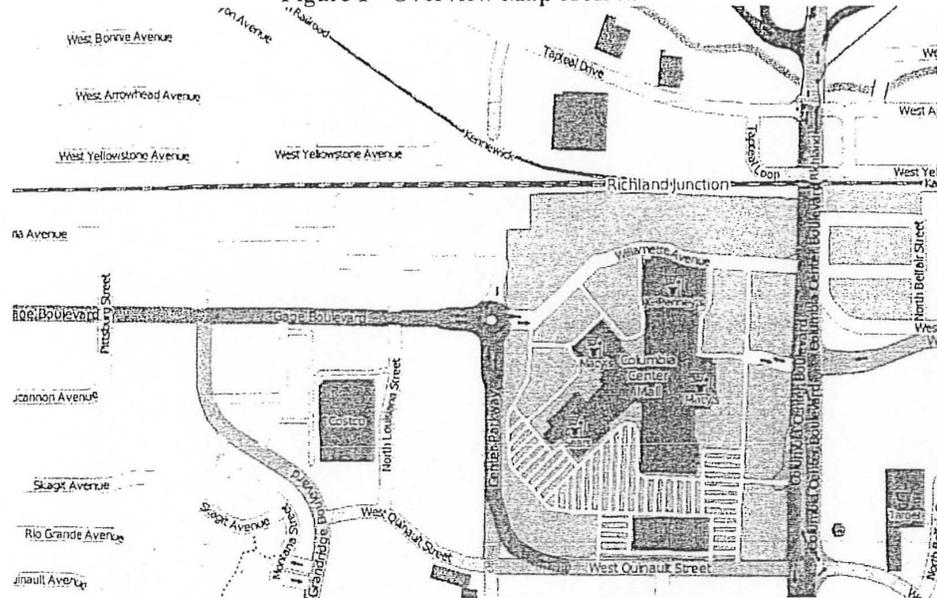
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25 COMPLAINT - 3

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Figure 1 - Overview Map of Area



11. In conjunction with the main track, the passing track allows trains to meet and pass when entering or exiting the area, and provides for use as a siding to store idle freight cars when not otherwise in use. TCRY makes frequent, if not daily, use of the Tracks.

12. The UTC approved the petition on May 29, 2014, permitting Kennewick and Richland to construct the crossing and to remove the 1900-foot passing track.

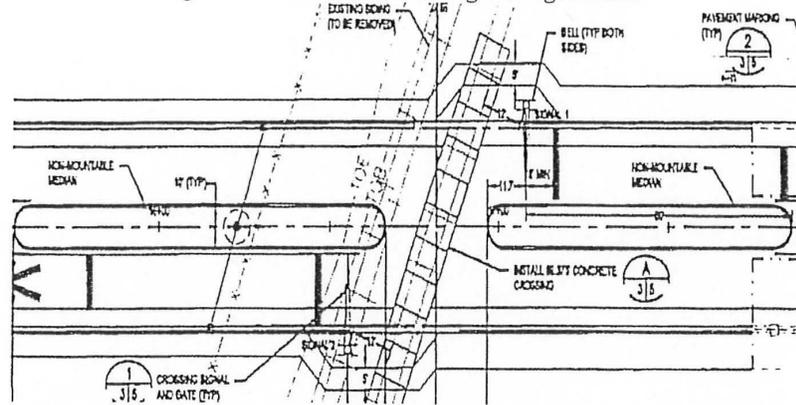
13. The design for the crossing by Kennewick and Richland is as follows:

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COMPLAINT - 4

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FAX (509) 838-0007

Figure 2 - At-Grade Crossing Configuration



III. CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF

16. The Washington State Constitution, Article I, Section 16, provides that “No private property shall be taken or damaged for public or private use without just compensation having been first made”.

17. TCRY has a specific property right in the Tracks.

18. Neither Kennewick nor Richland has initiated an eminent domain proceeding pursuant to RCW 8.12 *et seq.* in order to obtain TCRY’s property rights in the Tracks.

THEREFORE, TCRY prays for the following relief:

1. That the Court declare TCRY has a property right in the Tracks, which may only be involuntarily obtained through an eminent domain proceeding;

2. That the Court enjoin Kennewick and Richland from constructing the crossing across the Tracks until such time as they properly acquire TCRY’s interests in the same.

3. For costs and attorney’s fees, as allowed by law; and

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

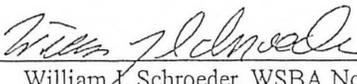
COMPLAINT - 5

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DATED this 25 day of July, 2014.

PAINÉ HAMBLÉN LLP

By: 
William J. Schroeder, WSBA No. 7942
Gregory C. Hesler, WSBA No. 34217
Attorneys for Plaintiff

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COMPLAINT -

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EXHIBIT 10

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PAINE HAMBLEN LLP

JOSIE DELVIN
BENTON COUNTY CLERK

DEC 10 2014

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability company,)	No. 14-2-01910-3
Plaintiff,	)	PLAINTIFF TRI-CITY RAILROAD COMPANY'S FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
vs.)	
THE CITY OF KENNEWICK, a municipal corporation of the State of Washington, located in Benton County, Washington; THE CITY OF RICHLAND, a municipal corporation of the State of Washington, located in Benton County, Washington,)	
Defendants.)	

COMES NOW PLAINTIFF, Tri-City Railroad Company, LLC, and for its Amended Complaint against DEFENDANTS, the City of Kennewick and the City of Richland, states and alleges the following in support of its request that the Cities be permanently enjoined from constructing an at-grade crossing until they acquire TCRY's interest in the same as provided for under federal law:

AMENDED COMPLAINT - 1

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I. PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Tri-City Railroad Company, LLC, (“TCRY”) is a Washington limited liability company headquartered in Benton County, Washington, and has paid all necessary and required taxes, licensed, and fees that may form a precondition to filing suit.

2. The City of Kennewick is a municipal corporation located in Benton County, Washington.

3. The City of Richland is a municipal corporation located in Benton County, Washington. (Collectively, Kennewick and Richland are referred to *infra* as “Cities”)

4. This case concerns TCRY’s exclusive rights in a 1900-foot railroad siding track located within the City of Kennewick, County of Benton, and its railroad operations on that siding as well as on a parallel main line. Venue is proper pursuant to RCW §4.12.010, RCW §4.12.025, and RCW §7.24.010.

5. The Superior Court has jurisdiction and authority to hear declaratory judgment actions to determine the rights of parties under RCW §7.24.010, RCW §7.24.020, and RCW §7.24.030. The Court has authority to grant injunctive relief under RCW §7.24.190 and RCW §7.40 *et seq.*

II. FACTS

6. TCRY operates on approximately 17 miles railroad tracks located in the Tri-Cities area. Included among the tracks upon which TCRY operates is the Richland Trackage, which was built by the U.S. Atomic Energy Commission in the late 1940s and 1950s. *See*

1 BNSF Railway Company v. Tri-City & Olympia Railroad Company, LLC, 835 F. Supp.2d
2 1056, 1058-59 (2011).

3 7. In 1998, the U.S. Atomic Energy Commission's successor, the United States
4 Department of Energy, conveyed the government's rights in the Richland Trackage to the
5 Port of Benton through an Indenture. Id. at 1060.

6 8. On October 1, 1998, the Port of Benton entered into an agreement for the
7 maintenance and operation of the Richland Trackage with TCRY's predecessor in interest. Id.
8 That contract was later assigned to TCRY. Id.

9 9. In 2002, TCRY and the Port of Benton entered into a lease agreement for,
10 among other things, a main railroad track, together with a 1900-foot siding, or passing track,
11 located within the Cities.

12 10. TCRY has filed the required notifications with the federal Surface
13 Transportation Board ("STB"), and continues to operate as a Class III railroad.

14 11. Pursuant to an October 19, 2006 contract with the Port of Benton, the Cities
15 agreed that easement rights in the Tracks, granted to them in by the Port of Benton, would be
16 subject to the leasehold rights of TCRY:

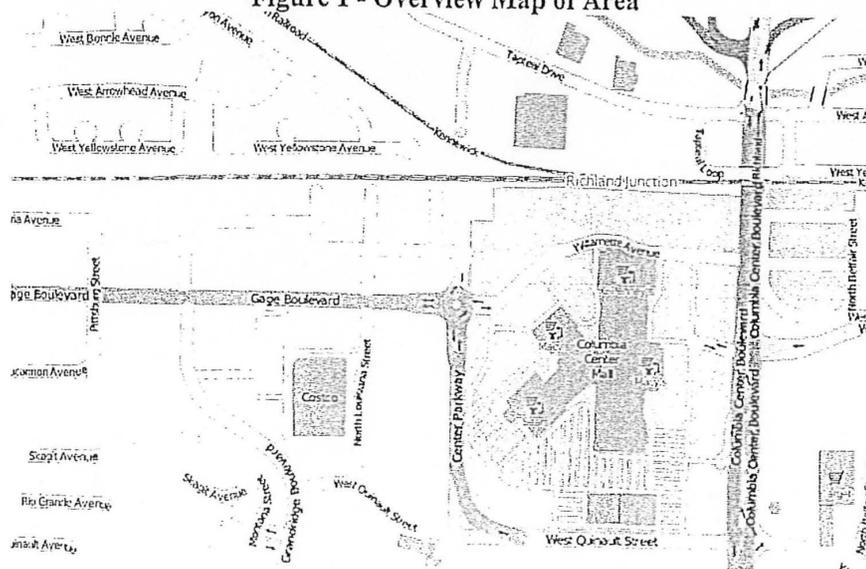
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19 The Cities acknowledge and agree that the easement is subject to the rights of
20 [TCRY] set forth in the Lease Agreement attached as Exhibit 2. The Cities
21 must obtain additional authority from [TCRY], either by contract or by
22 exercise of authority granted by law, for the extension of The Center Parkway,
23 construction of the crossing, installation of equipment and maintenance and
24 operation of the crossing and safety equipment.

1 12. On April 8, 2013, Kennewick filed a petition with the Washington State
2 Utilities and Transportation Commission (“UTC”) to construct a highway-rail grade crossing
3 at Center Parkway and to remove the passing track. On May 31, 2013, Richland joined
4 Kennewick’s petition.

5
6 13. Center Parkway is a minor arterial roadway in Kennewick. As currently
7 constructed, its northbound traffic moves into a roundabout intersection with Gage Boulevard
8 and cannot proceed further north to Tapteal Drive. The Cities intend to connect Tapteal Drive
9 in Richland with Gage Boulevard in Kennewick by extending Center Parkway northward. In
10 order to accomplish this, Center Parkway would cross the Tracks.

11 14. As shown in Figure 1, the Columbia Center Mall is located immediately
12 southeast of the proposed crossing. The Mall’s northern boundary abuts Port of Benton and
13 UPRR railroad tracks that connect at Richland Junction, just east of the proposed crossing.
14

15 **Figure 1 - Overview Map of Area**



16 AMENDED COMPLAINT - 4

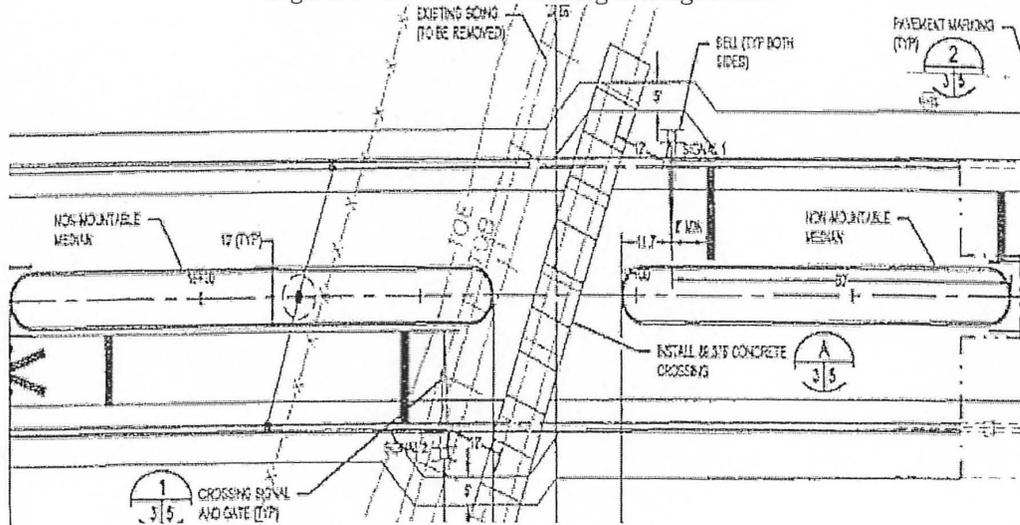
17 PAINÉ HAMBLEN LLP
18 717 WEST SPRAGUE AVENUE, SUITE 1200,
19 SPOKANE, WA 99201 PHONE (509) 455-6000
20 FAX (509) 838-0007

1 15. In conjunction with the main track, the passing track allows trains to meet and
2 pass when entering or exiting the area, and provides for use as a siding to store idle freight
3 cars when not otherwise in use.

4 16. The UTC approved the petition on May 29, 2014, for the Cities to construct
5 the crossing and to remove the 1900-foot passing track. Under federal law, the UTC has no
6 such authority.

7 17. The design for the proposed at-grade crossing is as follows:

8 Figure 2 - At-Grade Crossing Configuration



9 Note, "Existing Siding (To Be Removed)".

10 18. On November 12, 2014, TCRY received written notification from a certified
11 appraiser that the Cities would be conducting an appraisal of the 1900-foot siding, apparently
12 in preparation for a condemnation action under state law.

1 III. EXPRESS FEDERAL PREEMPTION

2 19. As a matter of federal law, state courts and administrative agencies lack the
3 jurisdiction to compel the abandonment of railroad tracks and sidings. 49 U.S.C. § 10501(b);
4 49 U.S.C. § 10903; 49 U.S.C. § 10906.

5 20. State courts and administrative agencies likewise lack the authority to order a
6 railroad to modify or alter its operations on tracks under the authority of the STB. 49 U.S.C. §
7 10501(b).

8 21. The Supremacy Clause of Article VI of the United States Constitution
9 establishes the doctrine of federal preemption:
10

11 This Constitution and the Laws of the United States which shall be
12 made in Pursuance thereof, . . . shall be the supreme law of the
13 Land; and the Judges in every State shall be bound thereby, any
14 Thing in the Constitution or Laws of any State to the Contrary
notwithstanding.

15 U.S. Const. art. VI, cl. 2.

16 22. “Under the preemption doctrine, states are deemed powerless to apply their
17 own law due to restraints deliberately imposed by federal legislation.” *See, Alverado v.*
18 *Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 430-31, 759 P.2d 427 (1988)

19 23. As the Washington Supreme Court has explained, preemption may occur in
20 several ways:

21 Congress may preempt local law by explicitly defining the extent to
22 which its enactments preempt laws (express preemption). Preemption
23 may also occur where the federal government intends to exclusively
24 occupy a field (field preemption) and where it is impossible to
comply with both state and federal law (conflict preemption).

1
2 See, Veit v. BNSF Corp., 171 Wn.2d 88, 99-100, 249 P.3d 607 (2011), (citing Campbell v.
3 Dep't of Soc. & Health Servs., 150 Wn.2d 881, 897, 83 P.3d 999 (2004)).

4 24. 49 U.S.C. § 10501 (b) provides:

5 The jurisdiction of the [STB] over –

6 (1) transportation by rail carriers, and the remedies provided in this
7 part with respect to rates, classifications, rules (including car service,
8 interchange, and other operating rules), practices, routes, services,
9 and facilities of such carriers; and

10 (2) the construction, acquisition, operation, abandonment, or
11 discontinuance of spur, industrial, team, switching, or side tracks, or
12 facilities, even if the tracks are located, or intended to be located,
13 entirely in one State,

14 is exclusive. Except as otherwise provided in this part, the remedies
15 provided under this part with respect to regulation of rail
16 transportation are exclusive and preempt the remedies provided under
17 Federal or State law.

18 25. In order to compel a railroad to modify, alter, or discontinue its operations on
19 railroad lines under STB's jurisdiction, the party seeking the discontinuance must petition the
20 STB for an involuntary abandonment. See 49 U.S.C. § 10903.

21 26. Accordingly, "congressional intent is clear, and the preemption of rail activity
22 is a valid exercise of congressional power under the Commerce Clause." City of Auburn v.
23 U.S. Government, 154 F.3d 1025, 1031 (9th Cir. 1998). "If a railroad line falls within [the
24 ICCTA's] jurisdiction, the STB's authority over abandonment is both exclusive and plenary."
25 Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 530 (6th Cir. 2002). In other
26 words, "Congress has delegated to the [STB] exclusive jurisdiction to regulate 'transportation

27 AMENDED COMPLAINT - 7

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1 by rail carriers' and 'the construction, acquisition, operation, abandonment, or
2 discontinuance' of rail facilities . . . with the instruction that the agency 'ensure the
3 development and continuation of a sound rail transportation system' [citation omitted]." City
4 of South Bend, IN v. Surface Transp. Bd., 566 F.3d 1166, 1168 (D.C. Cir. 2009).

5
6 27. In Emerson v. Kansas City Southern Ry. Co., 503 F.3d 1126, 1130 (10th Cir.
7 2007), the United States Court of Appeals for the Tenth Circuit noted:

8 [T]he courts have found two broad categories of state and local
9 actions to be preempted regardless of the context or rationale for
10 the action. The first is any form of state or local permitting or
11 preclearance that, by its nature, could be used to deny a railroad the
12 ability to conduct some part of its operations or to proceed with
13 activities that the Board has authorized. Second, there can be no state
14 or local regulation of matters directly regulated by the Board — such
15 as the construction, operation, and abandonment of rail lines (*see* 49
16 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and
17 other forms of consolidation (*see* 49 U.S.C. §§ 11321-11328); and
18 railroad rates and service (*see* 49 U.S.C. §§ 10501(b), 10701-10747,
19 11101-11124).

20 Id. at 1130 (*quoting CSX Transp., Inc. — Petition for Declaratory Order*, 2005 WL 1024490,
21 at *2-*4 (Surface Transp. Bd. May 3, 2005) (citations and footnote omitted) (denying
22 petitions for reconsideration and reopening)).

23 28. A "state or local law that permits a non-federal entity to restrict or prohibit the
24 operations of a rail carrier is preempted under the ICCTA." Norfolk Southern Ry Co. v. City
25 of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010).

26 29. For sidings, switching tracks, and passing tracks, state and local authorities
27 likewise lack jurisdiction to compel a railroad to construct, acquire, operate upon, abandon,
28

1 or discontinue their use. Under this 49 U.S.C. § 10906, and the case law construing it, neither
2 state or local authorities, nor the STB itself may use an operation of law to compel the
3 abandonment or discontinuance of a siding or passing track. In Port City Properties v. Union
4 Pacific R. Co., 518 F.3d 1186, 1188 (10th Cir. 2008), the Tenth Circuit noted that 49 U.S.C.
5 § 10906 provides that “the STB has no authority over the regulation of spur and industrial
6 tracks as opposed to main railroad lines.” But “[t]hat authority is left entirely to railroad
7 management who may contract services as they see fit.” 518 F.3d at 1189.

9 § 10906 has been interpreted to preclude *all* regulation of industrial
10 or spur tracks: When sections 10906 and 10501(b)(2) are read
11 together, it is clear that Congress intended to remove STB authority
12 over the entry and exit of these auxiliary tracks, while still
preempting state jurisdiction over them, leaving the construction and
disposition of them entirely to railroad management.

13 518 F.3d at 1188 (internal citations and markings omitted).

14 30. Under Washington law, a party seeking a permanent injunction must satisfy the
15 following:

17 It is an established rule in this jurisdiction that one who seeks relief
18 by temporary or permanent injunction must show (1) that he has a
19 clear legal or equitable right, (2) that he has a well-grounded fear of
20 immediate invasion of that right, and (3) that the acts complained of
are either resulting in or will result in actual and substantial injury to
him.

21 Washington Fed’n of State Employees, Coun. 28 v. State, 99 Wn.2d 878, 888, 665 P.2d 1337
22 (1983).

26 AMENDED COMPLAINT - 9

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28

1 31. TCRY has a legal right in the tracks at issue, established by lease with the Port
2 of Benton, and has been authorized to operate as a Class III railroad upon those tracks by the
3 STB.

4 32. TCRY has a well-grounded fear of an immediate invasion of its property
5 rights to its tracks and operations, as the Cities have formally communicated that they are
6 initiating the appraisal process under Washington's condemnation laws, so as to use a state
7 condemnation proceeding to take TCRY's exclusive track rights and operations thereon.
8

9 33. Permitting the Cities to take TCRY's exclusive track rights, as well as its
10 operations thereon, despite its objections, will result in actual and substantial injury to TCRY.

11 **THEREFORE, TCRY prays for the following relief:**

12 **Declaratory Relief:**

13 1. That the Court declare that federal law exclusively controls the question of
14 whether TCRY's exclusive track rights, and operations thereon, may be acquired over its
15 objections; and
16

17 2. That the Court declare that state law, including the Cities' attempt to initiate a
18 state law condemnation action to acquire TCRY's exclusive track rights, and operations
19 thereon, is preempted.
20

21 **Injunctive Relief:**

22 3. That the Court permanently enjoin the Cities from constructing the at-grade
23 crossing until they acquire TCRY's interests in its exclusive track rights, and operations
24 thereon, as provided under federal law.
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Additional Relief:

- 4. For costs and attorney's fees, as allowed by law; and
- 5. For such other and further relief as the Court deems just and equitable.

SIGNED this 8th day of December, 2014.

PAINÉ HAMBLÉN LLP

By: 
William J. Schroeder, WSBA No. 7942
Gregory C. Hesler, WSBA No. 34217
William C. Schroeder, WSBA No. 41986
Attorneys for Plaintiff TCRY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of December, 2014, I caused to be served a true and correct copy of the foregoing PLAINTIFF TRI-CITY RAILROAD COMPANY'S FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, by the method indicated below and addressed to the following:

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Jeremy Eckert	<u>X</u> _____	U.S. MAIL
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Seattle, Washington 98101-3299	_____	E-MAIL
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<u>eckej@foster.com</u>		

Heather Kintzley	_____	DELIVERED
City Attorney	<u>X</u> _____	U.S. MAIL
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P. O. Box 190, MS-07	<u>X</u> _____	E-MAIL
Richland, Washington 99352		
<u>hkintzley@ci.richland.wa.us</u>		

Lisa Beaton	_____	DELIVERED
City Attorney	<u>X</u> _____	U.S. MAIL
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210 West Sixth Avenue	_____	FACSIMILE
P. O. Box 6108	<u>X</u> _____	E-MAIL
Kennewick, Washington 99336		
<u>lisa.beaton@ci.kennewick.wa.us</u>		



Marsha Ungricht

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AMENDED COMPLAINT - 12

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SPOKANE, WA 99201 PHONE (509) 455-6000
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EXHIBIT 11



Valbridge

PROPERTY ADVISORS

Auble, Jolicoeur & Gentry, Inc.

Received
11-14-14

324 N. Mullan Road
Spokane Valley, WA 99206
509-747-0999 phone
509-747-3559 fax
valbridge.com

November 12, 2014

William J. Schroeder
Paine Hamblen
717 W. Sprague Avenue, Suite 1200
Spokane, Washington 99201

RE: Railroad Right-of-Way at Center Parkway

Dear Mr. Schroeder:

The City of Richland is acquiring right-of-way for use in a public project to realign and widen Center Parkway. An easement to allow crossing a portion of railroad right-of-way that Tri-Cities Railroad leases from the Port Benton has been identified as a requirement for this project. I understand that you represent Tri-Cities Railroad in this matter. Valbridge Property Advisors has been hired by the City of Richland to appraise the property to help determine the Just Compensation for the property and rights to be acquired.

As part of the appraisal process, I ask that you or your representative meet with me and allow me to inspect your property. During the inspection, I will share maps of the proposed project and the portion of your property that the City of Richland seeks to acquire.

My assignment is to provide a fair and impartial appraisal without bias of any nature. To that end, during the inspection or at any time during the appraisal process, you are welcome and encouraged to share your observations and concerns about the impact the project may have on the value of your property.

I will contact you by phone to schedule an inspection at your convenience, or feel free to give me a call at 509-747-0999.

Kindest regards,

Bruce C. Jolicoeur, MAI
Washington State Certified General Appraiser
Cert. No.: 1100633

VALBRIDGE PROPERTY ADVISORS: AKRON • ATLANTA • BATON ROUGE • BOISE • BOSTON • BOULDER • CENTRAL VALLEY CA/CENTRAL COUNTIES • CHARLESTON • CHARLOTTE • CINCINNATI • COEUR D'ALENE
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• ORANGE COUNTY • LOUISVILLE • LUBBOCK • MEMPHIS • MILWAUKEE • MINNEAPOLIS • MONTEREY/CARMEL • MONTGOMERY • NAPLES • NASHVILLE • NEW ORLEANS • NORFOLK/VIRGINIA BEACH
• NORWALK/STAMFORD • OLYMPIA • ORLANDO • PHILADELPHIA • PITTSBURGH • RALEIGH • RICHMOND • ROANOKE • SACRAMENTO • SALT LAKE CITY • SAN ANTONIO • SAN DIEGO
• SAN FRANCISCO BAY AREA/EAST BAY • SAN FRANCISCO BAY AREA/SILICON VALLEY • SEATTLE • SHREVEPORT • SPOKANE • SOUTHERN UTAH
• TAMPA/ST. PETERSBURG • TRI CITIES/COLUMBIA BASIN • TUCSON • TULSA • WASHINGTON DC/BALTIMORE

EXHIBIT 12

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PAINE HAMBLEN LLP

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY, LLC, a
Washington limited liability company,

Plaintiff,

v.

THE CITY OF KENNEWICK, a municipal
corporation of the State of Washington, located
in Benton County, Washington; THE CITY OF
RICHLAND, a municipal corporation of the
State of Washington, located in Benton County,
Washington,

Defendants.

No. 14-2-01910-3

CITIES' ANSWER TO FIRST
AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

I. INTRODUCTION

After years of local and regional planning, and extensive hearings and review, the Washington Utilities and Transportation Commission ("WUTC") approved the extension of Center Parkway by the City of Kennewick and the City of Richland (collectively, "Cities"). This Court affirmed the WUTC in Benton County Cause No. 14-2-01894-8 (Order Affirming [WUTC], December 9, 2014). Plaintiff Tri-City Railroad Company, LLC ("TCRY") is a tenant on property owned by the Port of Benton that will be crossed by Center Parkway. TCRY's First Amended Complaint for Declaratory and Injunctive Relief ("Complaint") has no foundation in fact or law. The Cities answer the Complaint, and assert its defenses as follows.

CITIES' ANSWER TO FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF - 1

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51420944.2

1 **2. ANSWER TO COMPLAINT**

2 **2.1 Answer to Complaint's Statement of Parties, Jurisdiction and Venue.**

3 **2.1.1** Cities lack information or knowledge sufficient to form a belief as to the truth of
4 the allegations set forth in Complaint Section 1 and therefor deny the same.

5 **2.1.2** Cities admit Complaint Section 2.

6 **2.1.3** Cities admit Complaint Section 3.

7 **2.1.4** Answering Complaint Section 4, the Complaint speaks for itself. To the extent
8 that Section 4 asserts one or more legal conclusions, no response thereto is required.

9 **2.1.5** Answering Complaint Section 5, the Section asserts one or more legal
10 conclusions, and no response thereto is required.

11 **2.2 Answer to Complaint's Statement of Facts.**

12 **2.2.1** Cities admit Complaint Section 6.

13 **2.2.2** Cities admit Complaint Section 7.

14 **2.2.3** Cities admit Complaint Section 8.

15 **2.2.4** Cities admit Complaint Section 9.

16 **2.2.5** Answering Complaint Section 10, the Cities admit TCRY is a Class III Railroad.
17 Cities lack information or knowledge sufficient to form a belief as to the truth of the remaining
18 allegations set forth in Complaint Section 10 and therefor deny the same.

19 **2.2.6** Answering Complaint Section 11, the 2006 contract between the Cities and the
20 Port of Benton speaks for itself.

21 **2.2.7** Cities admit Complaint Section 12, and further reference WUTC Docket No.
22 TR-130499.

23 **2.2.8** Cities admit Complaint Section 13.

24 **2.2.9** Answering Complaint Section 14, Figure 1 speaks for itself; the Cities admit the
25 Columbia Center Mall is immediately south of the now-abandoned Union Pacific Railroad rail
26

1 corridor; and, admit the area known as the “Richland Junction.” Any remaining allegations in
2 Complaint Section 14 are denied.

3 **2.2.10** Answering Complaint Section 15, the Cities admit the existence of a siding track
4 and that the track is sometimes referred to as a passing track. Cities lack information or
5 knowledge sufficient to form a belief as to the truth of the remaining allegations set forth in
6 Complaint Section 15 and therefor deny the same.

7 **2.2.11** Answering Complaint Section 16, the Cities state the WUTC orders No. 03 and
8 04 in Docket No. TR-130499 speak for themselves. The remaining allegations or
9 characterizations in Complaint Section 16 are denied.

10 **2.2.12** Answering Complaint Section 17, the Cities admit the record before the WUTC in
11 Docket No. TR-130499 included an exhibit with a design depicted in Figure 2. The WUTC
12 orders No. 03 and 04 in Docket No. TR-130499 approving the Center Parkway Project speak for
13 themselves. The Cities further answer the Complaint by restating its admission to this Court in
14 Benton County Cause No. 14-2-01894-8 that the Cities are not seeking to remove the siding
15 track. The Center Parkway Project, as designed by the Cities and approved by the WUTC,
16 retains the siding. See Docket No. TR-130499, Order 03 at 6. The remaining allegations or
17 characterizations in Complaint Section 17 are denied.

18 **2.2.13** Answering Complaint Section 18, the Cities admit an appraiser engaged by the
19 Cities contacted TCRY (on or about November 12, 2014) as part of the Cities’ process to
20 appraise properties necessary for the Center Parkway Project. The Cities further admit that
21 RCW 8.26.180 provides for an appraisal prior to the initiation of a city’s acquisition of property.
22 The Cities deny any remaining allegations in Complaint Section 18.

23 **2.3 Answer to Complaint Allegations of Federal Preemption.**

24 **2.3.1** Answering Complaint Sections 19 through 30, the Sections assert one or more
25 legal conclusions, and no response thereto is required. To the extent an answer is required, the
26 Cities deny any factual allegations and application of law to the facts of this case.

CITIES’ ANSWER TO FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF - 3

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51420944 2

1 **2.3.2** Answering Complaint Section 31, see Answer at Section 2.2.4: the lease between
2 the Port and TCRY is admitted; that lease speaks for itself. Any further allegations in Complaint
3 Section 31 are denied.

4 **2.3.3** The Cities deny Complaint Section 32.

5 **2.3.4** The Cities deny Complaint Section 33.

6 **2.4** Answer to Complaint Prayer for Relief.

7 **2.4.1** Cities deny that TCRY is entitled to the declaratory relief it seeks in Sections 1
8 and 2 of the Complaint's prayer for relief.

9 **2.4.2** Cities deny that TCRY is entitled to injunctive relief it seeks in Section 3 of the
10 Complaint's prayer for relief.

11 **2.4.3** Cities deny that TCRY is entitled to any further relief it seeks in Sections 4 and 5
12 of the Complaint's prayer for relief.

13 **2.5** General. Any allegation of fact in the Complaint not specifically admitted
14 above is denied.

15 **3. DEFENSES**

16 **3.1** Cities reassert Sections 1 and 2 of this Answer, above.

17 **3.2** The Cities expressly reserve the right to assert any and all affirmative defenses as
18 may be appropriate under CR 8 (b) and (c), and any other defense, at law or in equity, that may
19 now exist or in the future be available based upon discovery and further investigation in this
20 matter. Without prejudice to the forgoing, the Cities hereby assert the following affirmative
21 defenses.

22 **3.2.1** Plaintiff has failed to state a claim upon which relief can be granted.

23 **3.2.2** The Complaint is barred by the doctrine of primary jurisdiction.

24 **3.2.3** Plaintiff's claims are not ripe.

25 **3.2.4** Plaintiff has a plain, speedy and adequate remedy at law, and therefore is not
26 entitled to injunctive relief.

CITIES' ANSWER TO FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF - 4

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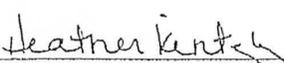
- 3.2.5 Plaintiff's claims are barred by *stare decisis*.
- 3.2.6 Plaintiff's claims are barred by *res judicata* and/or issue preclusion.
- 3.2.7 Plaintiff's claims are barred by *estoppel*.
- 3.2.8 Plaintiff's claims are barred by the law of the case doctrine.
- 3.2.9 Plaintiff's claims are barred by the doctrine of comity.
- 3.2.10 Plaintiff has failed to name a necessary party.

4. CITIES REQUEST FOR RELIEF

The Cities pray that the Complaint be dismissed with prejudice and without an award of fees and costs, and that the Court award such other relief to the Defendants as it deems just and proper, including attorney fees allowed by law.

DATED this 11th day of February 2015.

FOSTER PEPPER PLLC; and
 HEATHER KINTZLEY, WSBA #35520
 City Attorney, City of Richland; and
 LISA BEATON, WSBA #25305
 City Attorney, City of Kennewick



 Lisa Beaton, WSBA #25305
 Heather Kintzley, WSBA #35520
 P. Stephen DiJulio, WSBA #7139
 Jeremy Eckert, WSBA #42596
 Attorneys for Defendants

EXHIBIT 13

JOSIE DELVIN
BENTON COUNTY CLERK

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY, LLC,
a Washington limited liability company,

Petitioners,

v.

THE CITY OF KENNEWICK, a municipal
corporation of the State of Washington, located
in Benton County, Washington; THE CITY OF
RICHLAND, a municipal corporation of the
State of Washington, located in Benton County,
Washington,

Respondents.

No. 14-2-01910-3

CITIES' MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL

CITIES' MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL

51-422002 3

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— **INDEX OF EXHIBITS**

A. WUTC Order 03 in Docket TR-130499 (May 29, 2014)

B. WUTC Order 04 in Docket TR-130499 (June 24, 2014)

C. Order Affirming [WUTC], Benton County Cause No. 14-2-01894-8
(December 9, 2014)

D. Declaration of Pete Rogalsky in Support of Motion for Summary Judgment of Dismissal

E. *Maumee & Western Railroad*, STB Docket No. 34354 (March 2, 2004)

F. Order Granting Cities’ Motion for Summary Judgment of Dismissal [Proposed]

1 **1. INTRODUCTION**

2 After years of local and regional planning, and extensive hearings and review, the State
3 of Washington Utility and Transportation Commission (“WUTC”) approved the extension of
4 Center Parkway between Kennewick and Richland.¹ This Court affirmed the WUTC orders on
5 December 9, 2014.²

6 Tri-City Railroad Company, LLC (“TCRY”) is a tenant on property owned by the Port of
7 Benton. As found by the WUTC, the Port of Benton, Burlington Northern Santa Fe Railroad,
8 Union Pacific Railroad, and other entities with any interest in the Center Parkway crossing, do
9 not oppose the Center Parkway extension. State, regional and local planning and transportation
10 agencies, and public comment on record, all support the project. Plaintiff TCRY’s opposition is
11 without foundation.

12 Kennewick and Richland (“Cities”) have regulatory approval of the crossing. But, the
13 Cities have not commenced an action to acquire property rights (if necessary) from the Port and
14 TCRY. The law is clear that the federal Surface Transportation Board (“STB”) does not preempt
15 the Cities. The governing law and STB hold that rail crossings, such as the Center Parkway
16 project, do not implicate federal preemption. There are no issues of fact, and under law the
17 TCRY Complaint must be dismissed.

18 **2. MOTION AND REQUESTED RELIEF.**

19 The Cities respectfully request the Court to grant this motion for summary judgment
20 under CR 56(c), dismissing the Plaintiff Tri-City Railroad Company’s First Amended Complaint
21 for Declaratory and Injunctive Relief (“Complaint”).

22
23 ¹ Final Order Granting Petition for Administrative Review, Order 03, Docket TR-130499, attached as
24 **Exhibit A**; and Denying Petition for Reconsideration, Petition for Stay, and Petition for Rehearing, Order
25 04, Docket TR-130499, attached as **Exhibit B**. The Cities request the Court take judicial notice of this
26 and related WUTC and Benton County Superior Court records. The WUTC Orders are referenced herein
as WUTC Order 03 and 04.

² *Tri-City R.R. Co. v. State of Washington*, Benton County Cause No. 14-2-07894-8 (Order Affirming the
Washington Utilities and Transportation Commission’s Orders in Docket TR-130499), attached as
Exhibit C.

1 **3. EVIDENCE RELIED UPON.**

2 The law of the case is already set forth in the WUTC proceedings, as previously reviewed
3 and approved by this Court.³ The WUTC Order approving the Crossing explicitly states the
4 “analysis of the site and consideration of the proposed safety features **assumes that the second**
5 **track will remain in operation.”**⁴ Consistent with the WUTC Order, the Cities have previously
6 stipulated that the siding track will remain. The affidavit of Pete Rogalsky, City of Richland
7 Public Works Director, confirms foundation for the project from the WUTC record, and the
8 design for the proposed Center Parkway crossing, including maintenance of the siding.
9 Mr. Rogalsky’s affidavit is attached as **Exhibit D**.

10 **4. BRIEF RESTATEMENT OF UNCONTESTED MATERIAL FACTS**

11 **4.1 The Center Parkway Crossing Project Exceeds Safety Standards.**

12 The Center Parkway Crossing (“Crossing”) is an essential capital improvement identified
13 in the City of Richland’s Comprehensive Plan, the City of Kennewick’s Comprehensive Plan,
14 and the Regional Transportation Plan.⁵ Center Parkway currently ends at a roundabout west of
15 the Columbia Center Mall in Kennewick, as identified in the following image.⁶ And see
16 Complaint at Figure 1.

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25 ³ See fn. 1 and fn. 2.

26 ⁴ WUTC Order 03 at p. 6, f.n. 6.

⁵ WUTC Order 03 at §§ 20, 21.

⁶ WUTC Order 03 at § 9.



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13 The Crossing will extend Center Parkway northward, across both Port of Benton tracks, into the
14 City of Richland and intersecting Tapteal Drive. The Crossing project completes a grid network
15 of regional significance.⁷ TCRY is a class III rail operation on the Port's rail line. Complaint at
16 Section 9.

17 In 2013, the City of Kennewick and the City of Richland (the "Cities") jointly petitioned
18 the WUTC to approve construction the Crossing. The WUTC granted the Cities' petition.⁸
19 Following the TCRY appeal, Judge Spanner concurred with the WUTC in finding that the
20 Crossing poses only speculative risk to public safety because the Crossing's safety features
21 **exceed** typical engineering and safety standards for such an intersection.⁹ It is also undisputed
22

23 ⁷ WUTC Order 03 at §§ 20, 21, citing the City of Richland Comprehensive Plan, the City of Kennewick
24 Comprehensive Plan, and the Regional Transportation Plan.

25 ⁸ See fn. 1 and fn. 2.

26 ⁹ *Tri-City R.R. Co. v. State of Washington*, No. 14-2-07894-8 (Order Affirming the Washington Utilities
and Transportation Commission's Orders in Docket TR-130499) at 2:5. TCRY does not contest WUTC's
calculation of risk for the proposed crossing at one incident per every 53.5 years ("The probability of
accident is .018701 percent for any one-year period"). See WUTC Order 03, at § 16 and Funding § 6;

1 that the safety features will prohibit vehicular traffic across the tracks when railroad operations
2 occur at or near the Crossing.¹⁰

3 The record before the WUTC and Benton County Superior Court establish that the
4 Crossing is needed to (1) complete a grid network to provide safe and efficient movement of
5 traffic; (2) provide relief to congested arterials; (3) encourage economic development; and
6 (4) improve emergency response times.¹¹ The Crossing will provide numerous public needs,
7 while not impeding rail operations or imposing any undue safety risk. WUTC Orders No. 03 and
8 04.

9 **4.2 The Siding Track Will Not Be Removed.**

10 Order 03, unanimously issued by the WUTC's Commissioners, approved the Crossing.
11 TCRY's siding argument rests on Figure 2 in Order 03. The WUTC included Figure 2 *to show a*
12 *crossing configuration*. See Complaint at Figure 2. But significantly, the WUTC included
13 footnote 6 to further explain Figure 2: "This illustration shows the removal of the 1900 foot
14 siding track. **However, in the face of Tri-City and Olympia Railroad's opposition, Staff's**
15 **analysis of the site and consideration of its proposed safety features assumes that the**
16 **second track remains in operation.**"¹² Consistent with Order 03, the Cities have repeatedly
17 stated that the siding track will remain. The Cities stipulated to this fact before Judge Spanner
18 during TCRY's appeal of the WUTC Order. The Cities repeat the stipulation in this proceeding.
19 In short, TCRY's Complaint regarding the siding track is irrelevant because the WUTC and the
20 Cities agreed to accommodate TCRY's concerns during WUTC's adjudicative proceeding. The
21 siding track will remain.¹³

22
23 WUTC Order 04 at § 7 at p. 3 (and fn. 3 and 4 therein); § 8, at p. 5 and fn. 12, citing the Testimony of
24 UTC Staff, Kathy Hunter.

25 ¹⁰ *Id.*

26 ¹¹ See WUTC Orders 03 and 04.

¹² Order 03, p. 6, fn. 6 (emphasis added). The Cities submitted this figure at the beginning of the WUTC
process, when the Cities were contemplating removing the siding. The Cities proceeded with the
Crossing that included crossing of both tracks.

¹³ Declaration of Pete Rogalsky at §6.

CITIES' MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL – 4

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1 The jurisdictional fact-finding agency, the WUTC, has determined facts following
2 contested proceedings. This court has affirmed the WUTC. There are no material issues of fact.

3 **5. STANDARD OF REVIEW**

4 Summary judgment is appropriate where “pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
6 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
7 of law.” CR 56(c). The court must consider the facts submitted and all reasonable inferences
8 from those facts in the light most favorable to the nonmoving party. *Clements v. Travelers*
9 *Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). The purpose of summary judgment,
10 after all, is to avoid a “useless trial.” *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349,
11 588 P.2d 1346 (1979) (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)).
12 Here, the WUTC already has adjudicated all facts in dispute. This Court affirmed the WUTC.
13 The Court should dismiss the Complaint as a matter of law.

14 **6. AUTHORITY AND ARGUMENT**

15 **6.1 Summary of Argument.**

16 There are no genuine issues of material fact. The facts and law have already been
17 adjudicated pursuant to law by the WUTC. The WUTC orders were appealed and affirmed by
18 this Court. It does not matter whether the Court applies the law of the case doctrine (see, e.g.,
19 RAP 2.5(c)(2)), collateral estoppel, res judicata, stare decisis or comity, any contested issues
20 have been adjudicated and subject to appeal among the present parties.¹⁴

21
22 ¹⁴ As summarized by the Supreme Court in *Robertson v. Perez*, 156 Wn.2d 33, 41 (and fns. 6 – 8), 123
23 P.3d 244 (2005): “In its most common form, the law of the case doctrine stands for the proposition that
24 once there is an appellate holding enunciating a principle of law, that holding will be followed in
25 subsequent stages of the same litigation. . . . Collateral estoppel, or issue preclusion, prevents a party from
26 relitigating an issue determined against that party in an earlier action, even if the second action differs
significantly from the first one. BLACK’S LAW DICTIONARY 279 (8th ed. 2004). See also *Clark v.*
Baines, 150 Wn.2d 905, 912-13, 84 P.3d 245 (2004). . . . Res judicata, or claim preclusion, prevents the
same parties from litigating a second lawsuit on the same claim or any other claim arising from the same
transaction or series of transactions that could have been, but was not, raised in the first suit. BLACK’S
LAW DICTIONARY 1336-37 (8th ed. 2004). See also *In re Estate of Black*, 153 Wn.2d 152, 170,

1 The STB hold that crossing of railroad track with construction of a new public street
2 (here, the extension of Center Parkway) does not implicate the Federal preemption under 49
3 U.S.C. 10501(b). There has already been an adjudication that the new road crossing between the
4 Cities would not prevent or unreasonably interfere with railroad operations. The Port of Benton
5 and its tenant TCRY retain the right to use the spur line track between Richland Junction and the
6 Hanford Site, and the adjacent siding. Both tracks will be preserved and protected with safety
7 improvements exceeding established standards.¹⁵ TCRY has not, and cannot, plead differently.
8 The TCRY Complaint should be dismissed.

9 **6.2 The Surface Transportation Board Rejects Jurisdiction Over Crossings.**

10 In 1995 Congress enacted the Interstate Commerce Commission Termination Act
11 (“ICCTA”)¹⁶ to create the STB. The ICCTA confers STB jurisdiction over “the construction,
12 acquisition, operation, abandonment, or discontinuance of ... tracks.” 49 U.S.C. 10501(b). Yet,
13 the STB’s jurisdiction does *not* extend to new at-grade crossing so long as the at-grade crossing
14 “would not impede rail operations or pose undue safety risks.” *Maumee & Western Railroad*
15 *Corp. and RMW Ventures, LLC*, Petition for Declaratory Order, STB Finance Docket No. 34354
16 (March 3, 2004).¹⁷

17 In *Maumee*, a local government sought to condemn an easement for an at-grade crossing
18 over (and subsurface utilities under) an 8,000 s.f. parcel on a **main line** rail right-of-way. The
19 STB rejected the railroad company’s argument that 49 U.S.C. 10501(b) preempts the exercise of
20 eminent domain authority with respect to railroad property. In a brief decision, the STB easily
21 concluded that the railroad’s preemption argument was overbroad:
22

23 102 P.3d 796 (2004). . . . Stare decisis, the doctrine of precedent, generally dictates that a court follow
24 earlier judicial decisions when the same points of law arise again in litigation. BLACK’S LAW
25 DICTIONARY 1443 (8th ed. 2004). *See also In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 5,
100 P.3d 805 (2004).”

25 ¹⁵ Declaration of Pete Rogalsky at §6.

26 ¹⁶ 49 U.S.C. 10101, *et. seq.*

¹⁷ A copy of the decision is attached to Motion at **Exhibit E**.

1 ...state and local regulation is permissible where it does not interfere with
2 interstate rail operations, and localities retain certain police powers to protect
3 health and public safety. Thus, acquisition of an easement by eminent domain to
4 permit a crossing of railroad track in connection with construction of a new public
5 street would not implicate the Federal preemption of 49 U.S.C. 10501(b) unless it
6 would prevent or unreasonably interfere with railroad operations..... **[R]outine,
7 non-conflicting uses, such as non-exclusive easements for at-grade railroad
8 crossings..., are not preempted so long as they would not impede rail
9 operations or pose undue safety risks.**¹⁸

6 The STB does not assert jurisdiction over at-grade crossings that do not prevent or unreasonably
7 interfere with railroad operations or pose undue safety risks.¹⁹ As the STB stated, “these
8 crossing cases are typically resolved in state courts.” *Id.*

9 The federal courts uphold the STB’s jurisdictional avoidance of such crossing cases. *See*
10 *e.g., New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332-34 (Fifth Circuit 2008);
11 *City of Sachse, Texas v. Kansas City Southern*, 564 F.Supp.2d 649 (E.D. Texas 2008). The
12 TCRY analysis of STB preemption is wrong in citing to *City of Auburn v. U.S. Government*, 154
13 F.3d 1025 (C.A. 9, 1998) (city challenging expansion of Stampede Pass rail crossing and related
14 impacts on city). That case has no application to this simple rail crossing. In *City of Auburn*, the
15 Ninth Circuit held that state and local environmental review laws regarding railroad operations
16 were preempted. But the law, as the STB and the courts hold, is different when applied to local
17 road crossings.

18 Citing the U.S. Supreme Court, the Fifth Circuit Court of Appeals holds that the STB’s
19 refusal of jurisdiction over rail crossings is consistent with the historical, pre-ICCTA rule
20 governing crossing disputes:

21 The care of grade crossings is peculiarly within the police power of the states,
22 and, if it is seriously contended that the cost of this grade crossing is such as to
23 interfere with or impair economical management of the railroad, this should be
24 made clear. **It was certainly not intended by the Transportation Act to take
25 from the states or to thrust upon the Interstate Commerce Commission**

25 ¹⁸ *Maumee & Western Railroad Corp. and RMW Ventures, LLC*. (internal citations omitted, emphasis
supplied).

26 ¹⁹ In *Green Mountain R.R. Corp v. Vermont*, 404 F.3d 638, 642 (2005), the Second Circuit Court of
Appeals found that the STB is “uniquely qualified” on the application of 49 U.S.C. 10501(b).

1 investigation into parochial matters like this, unless by reason of their effect on
2 economical management and service, their general bearing is clear.

3 *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332-34, citing *Lehigh Valley R.R.*
4 *Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35, 49 S.Ct. 69, 73 L.Ed. 161 (1928) (citations
5 omitted, emphasis supplied); see also *Erie R.R. Co. v. Bd. of Pub. Util. Comm'rs*, 254 U.S. 394,
6 409, 41 S.Ct. 169, 65 L.Ed. 322 (1921) (Holmes, J.) ("It is well settled that railroad corporations
7 may be required, at their own expense, not only to abolish existing grade crossings but also to
8 build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their
9 tracks or to carry their tracks over such highways." (internal quotation marks omitted)). Thus,
10 the STB's jurisdictional test for at-grade rail crossings is supported by the ICCTA, the STB's
11 interpretation of the ICCTA, case law, and longstanding U.S. Supreme Court precedent. There is
12 no federal preemption of the Cities' Center Parkway crossing project.

13 **6.3 TCRY Fails to Allege Any Genuine Issue of Material Fact That Surface**
Transportation Board Preempts This Matter.

14 TCRY's STB jurisdictional argument, even were there one, fails because TCRY did not
15 allege facts (nor do facts exist) for the STB to invoke jurisdiction. The Complaint does not
16 allege that the crossing will impede rail operations or pose undue safety risks.²⁰ This is because
17 the facts already adjudicated conclusively demonstrate that the railroad will continue to have the
18 right-of-way over the crossing and that the safety measures exceed typical engineering and safety
19 standards for such an intersection.²¹ Thus, no genuine issue of material fact exists as to whether
20 the STB has jurisdiction over this at-grade crossing.²²

21
22
23 ²⁰ Complaint at p. 2-5.

²¹ See fn. 8.

24 ²² In fact, TCRY cannot argue that the crossing will impede rail operations or pose undue safety risks.
25 The Washington Utilities and Transportation Commission properly reviewed the merits of the proposed
26 crossing. WUTC Docket TR-130499. On appeal filed by TCRY, Judge Spanner's Order stated: "As
found by the WUTC, the public need for the Center Parkway Crossing outweighs any speculative risk.
And, the WUTC committed no error of law in its approval of the Center Parkway Crossing." *Tri-City*
R.R. Co. v. State of Washington, No. 14-2-07894-8 at Exhibit C.

1 TCRY's argument regarding the siding is without merit. TCRY's Complaint sets out the
2 authority that the STB does not have jurisdiction over the siding.²³ Regardless, TCRY's citations
3 to case law regarding the removal of siding tracks are irrelevant because the siding track will
4 remain, consistent with WUTC Order 03 and the Cities' repeated stipulations to this fact.²⁴

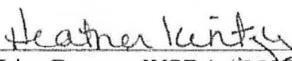
5 **7. CONCLUSION**

6 The WUTC Orders approving the Center Parkway Crossing conformed to applicable
7 law.²⁵ Similarly, the Cities may exercise their police and eminent domain power (if deemed
8 necessary) to extend the WUTC-approved Crossing over the Port's spur line and the siding
9 track.²⁶ There is no Federal preemption in this matter.

10 The Cities respectfully request that this court dismiss TCRY's Complaint. A proposed
11 order dismissing TCRY's Complaint is attached as **Exhibit F**.

12 RESPECTFULLY SUBMITTED this 11th day of February, 2015.

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

18 
19 Lisa Beaton, WSBA #25305
20 Heather Kintzley, WSBA #35520
21 P. Stephen DiJulio, WSBA #7139
22 Jeremy Eckert, WSBA #42596
23 Attorneys for Defendant Cities

23 ²³ Complaint at p. 9:6-7. TCRY's citation to 49 U.S.C. 10906 is irrelevant here. This section exempts
24 rail carriers from the Board's authority of "this chapter;" *i.e.* Chapter 109. Chapter 109 addresses STB
25 licensing requirements for certain issues that are not before this Court, such as the construction of railroad
26 lines. *See e.g.*, 49 U.S.C. 10901(a).

²⁴ Order 03, Docket TR-130499; and attached Declaration of Pete Rogalsky.

²⁵ No. 14-2-07894-8 (Order Affirming the WUTC Orders in Docket TR-130499).

²⁶ *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332-34, *citing Lehigh Valley R.R. Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35, 49 S.Ct. 69, 73 L.Ed. 161 (1928).

CITIES' MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL - 9

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EXHIBIT A

SERVICE DATE
MAY 29 2014

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,) DOCKET TR-130499
)
Petitioner,)
) ORDER 03
v.)
)
PORT OF BENTON, TRI-CITY &) FINAL ORDER GRANTING
OLYMPIA RAILROAD COMPANY,) PETITION FOR ADMINISTRATIVE
BNSF RAILWAY COMPANY, AND) REVIEW
UNION PACIFIC RAILROAD,)
)
Respondents.)
.....)

BACKGROUND

- 1 On April 8, 2013, the City of Kennewick filed with the Washington Utilities and Transportation Commission (Commission) a petition to construct a highway-rail grade crossing at Center Parkway, Kennewick, Washington and remove an existing railroad siding. On May 31, 2013, the City of Richland petitioned to intervene in support of the petition.
- 2 Three railroad companies move trains on the subject track, which is owned by the Port of Benton. Burlington Northern Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UPRR) filed waivers of hearing stating their agreement to the proposed crossing. The third railroad company that operates on these tracks, Tri-City & Olympia Railroad (TCRY), answered Kennewick's petition and requested a hearing. TCRY opposes the petition.
- 3 Commission Staff filed a memo on May 5, 2013, recommending that the Commission set this matter for hearing. The Commission conducted a prehearing conference on June 4, 2013, and on June 7, 2013, entered Order 01-Prehearing Conference Order; Notice of Hearing. Order 01 set a procedural schedule allowing three rounds of pre-filed testimony. The cities of Kennewick and Richland (collectively "Cities") filed direct testimony and exhibits on September

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3, 2013. Staff filed responsive testimony supporting the petition on October 1, 2013. TCRY filed opposing testimony on October 2, 2013. Finally, the Cities and TCRY filed rebuttal testimony and exhibits on October 23, 2013.

4 The Commission conducted evidentiary hearings on November 19-20, 2013, and a public comment hearing on November 20, 2013, in Richland, Washington before Administrative Law Judge Adam Torem. Judge Torem performed a site visit and toured the area on November 21, 2013. The parties simultaneously filed written post-hearing briefs on December 20, 2013.

5 The Commission entered its Initial Order on February 25, 2014, denying Kennewick's petition. Kennewick and Richland filed a joint Petition for Administrative Review on March 18, 2014. The Cities ask for oral argument, which we find unnecessary to resolve their Petition for Administrative Review. Denying the Cities' request for oral argument causes them no prejudice.

6 TCRY filed an answer on March 27, 2014, opposing the joint petition. Staff also filed an answer on March 27, 2014, reiterating its support for the Cities' petition for authority to construct the subject rail crossing, but addressing the Cities' alternative arguments about the impact of the Growth Management Act (GMA) and the application of chapter 81.53 RCW to code Cities. Staff disagrees with the city on the application of both the GMA and RCW 35A.11.020 to its petition.

7 On April 1, 2014, Kennewick and Richland filed a "Reply in Support of Commission Review." TCRY filed a motion to strike the reply on April 3, 2014, arguing it failed to satisfy the requirements for such a pleading under WAC 480-07-825(a) and is procedurally deficient because the Cities did not seek leave to file a reply as required under WAC 480-07-825(5)(b). On April 4, 2014, the Cities filed a response to TCRY's motion to strike. The Commission grants TCRY's motion and will not consider the Cities' reply.¹

¹ Contrary to what the Cities argue in their response to TCRY's motion, the Commission's procedural rules are not mere technicalities. Those who elect to practice before the Commission are expected to be familiar with and adhere to its procedural rules. Not only did the Cities fail to seek leave to file a reply, the reply itself does not meet the substantive requirements for such a pleading. It does not cite new matters raised by TCRY's answer and state why those matters were not reasonably anticipated or explain satisfactorily why a reply is necessary, all as required by the Commission's rule governing replies.

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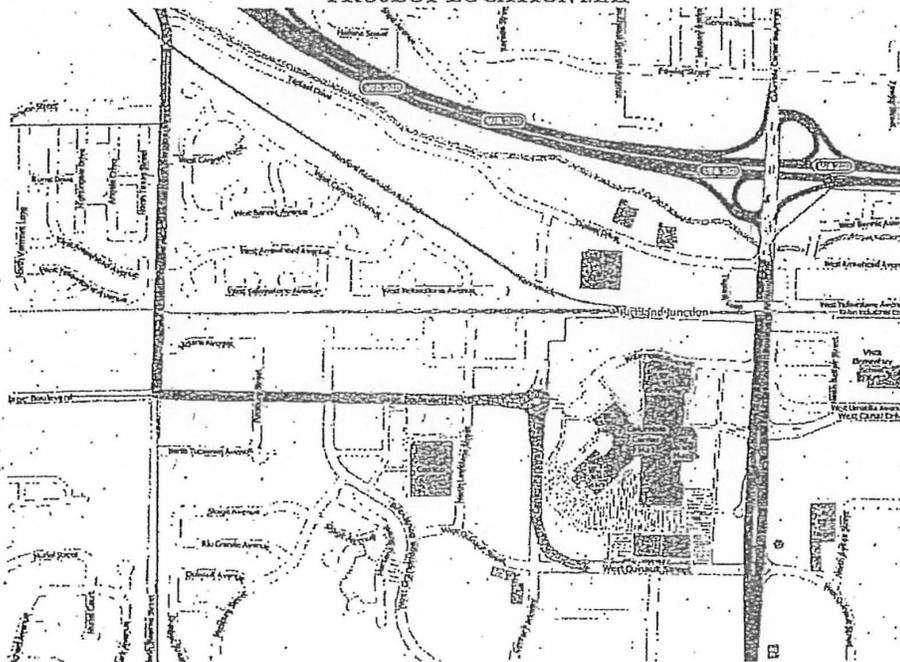
8 APPEARANCES. P. Stephen DiJulio and Jeremy Eckert, Foster Pepper PLLC, Seattle, represent the Cities. Paul J. Petit, Richland, represents respondent TCRY. Steven W. Smith, Assistant Attorney General, Olympia, represents the Commission's regulatory staff (Commission Staff or Staff).²

DISCUSSION

I. Description of Proposed At-Grade Railroad Crossing

9 The proposed crossing would be built at the intersection of an extension of Center Parkway in the City of Kennewick, and two tracks owned by the Port of Benton. The location and configuration of the proposed site are illustrated in Figure 1.

FIGURE 1
PROJECT LOCATION MAP



² In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

The Center Parkway extension would be from an existing roundabout in Kennewick, where the parkway intersects Gage Boulevard, continuing north to Tapteal Drive, a one-mile stretch of road connecting North Steptoe Street to the west, with Columbia Center Boulevard to the east, in Richland. There is a "T" intersection at both ends of this short roadway. There is an at-grade crossing on North Steptoe Street and a grade-separated crossing at Columbia Center Boulevard.

- 10 Tri-City and Olympia Railroad, BNSF Railway, and Union Pacific Railroad all operate trains over the so-called Hanford Reservation tracks at this location. Tri-City and Olympia Railroad uses a short, parallel spur at Richland Junction for switching and storage of rail cars, and opposes the Cities' petition, arguing the crossing would interfere with its operations. Both tracks are owned by the Benton County Port Authority. BNSF and UPRR have moved their switching operations since the Commission denied an earlier petition to open a crossing in this location and do not oppose the Cities' current petition.³

II. Review of Initial Order

- 11 The Initial Order analyzes Kennewick's petition using the framework in a 2011 Commission initial order approving another petition for an at-grade crossing in Benton County:

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.

³ When the Cities petitioned to open a crossing at this same location in 2007, Tri-City and Olympia Railroad, BNSF and UPRR opposed the two petitions, which were consolidated for hearing. Staff also opposed the earlier petitions. At that time, there were four tracks and all three railroad companies conducted switching operations in the vicinity of the Richland Junction. The Commission denied the petitions in a single order. *See City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06 and Docket TR-050967, Order 02, Initial Order Denying Petition[s] (January 26, 2007). The Initial Order in these dockets became final by operation of law on February 15, 2007.

- b) Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.⁴

We agree that we should evaluate the petition to determine whether a grade-separated crossing is practicable and whether a demonstrated public need for the crossing outweighs the hazards of an at-grade crossing. We agree with most of the Initial Order's findings and conclusions on these questions, but we conclude that a broader public need than the public safety concerns the parties advocate supports the petition.

A. Grade Separation and Inherent Risk

- 12 No one contests on review the Initial Order's finding that it is physically and financially impractical to build a grade-separated crossing in this instance:

The amount and character of travel on the railroad and on Center Parkway do not justify grade separation. Further, there is no evidence in the record disputing the engineering infeasibility of constructing a grade-separated crossing at Center Parkway. Finally, there is no serious dispute in the record that a grade-separated crossing would be tremendously more expensive than the proposed at-grade crossing. Therefore, considering engineering requirements and cost constraints, the Commission determines that a grade-separated crossing is not practicable at Center Parkway.⁵

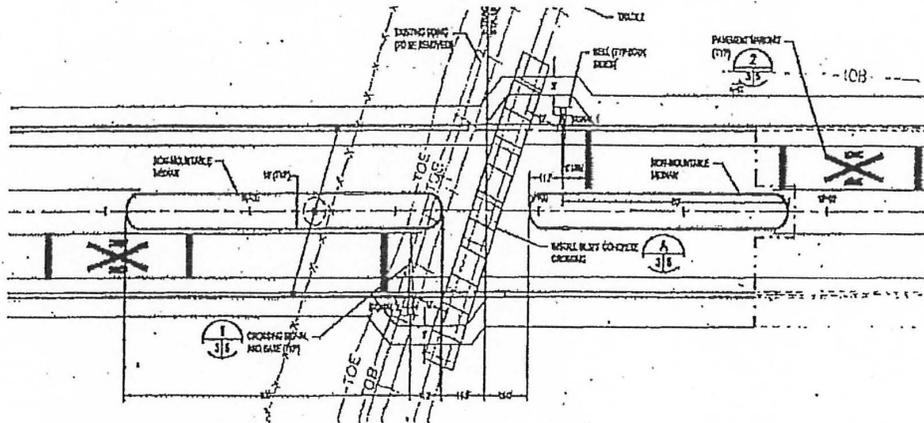
- 13 The Cities, however, propose to build an at-grade crossing designed to mitigate the inherent dangers to vehicles and pedestrians by using active warning devices and taking other measures. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip

⁴ *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, ¶ 29 (Feb. 15, 2011) (citing: *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) and *Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330 (March 1995)). This Initial Order became final by operation of law on March 8, 2011.

⁵ Initial Order ¶ 50.

designed to prevent drivers from going around lowered gates, as illustrated below in Figure 2.⁶

FIGURE 2
AT-GRADE CROSSING CONFIGURATION



14 Taken together, these measures significantly reduce the risks to motorists who might, in the absence of these measures, make inopportune efforts to cross the tracks when trains are present.⁷ Even imprudent drivers will be effectively barred from crossing the tracks when the gates are closed next to concrete barrier medians. These same measures reduce the risk to pedestrian and bicyclist traffic

⁶ This illustration shows the removal of the 1900 foot siding track. However, in the face of Tri-City and Olympia Railroad's opposition, Staff's analysis of the site and consideration of its proposed safety features assumes that the second track remains in operation. Ms. Hunter testifies:

The active warning devices consisting of advanced pavement markings and warning signs, gates and lights, and a traffic island that will act as a median separator, provide an adequate level of safety at the proposed crossing. In addition, the train and vehicle speeds and the volume of train and vehicle traffic at the site of the proposed crossing are fairly low, making the possibility of an accident less likely than crossings with higher speeds or increased traffic.

Exh. No. KH-1T at 23:15-20.

⁷ Mr. Jeffers, a professional engineer, calculated the predicted accident rate to be 0.145 per year or 1 accident per 6.9 years. Exh. No. KMF-1T at 7:11-20. The USDOT Accident Prediction Formula standard for requiring a grade-separated crossing is 0.5 accident per year. Exh. No. KH-1T at 11:18-20.

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by alerting prudent travelers when it is unsafe for them to cross the tracks and making it more difficult for them to pass.⁸

B. Public Safety Need

15 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.⁹

16 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.

17 If the feasibility of grade separation and public safety as a component of public need were our only concerns, we would end our discussion here and sustain the Initial Order. However, having studied the full record, we find reason to analyze this matter outside the narrow constraints of these two questions. We address in the next section of this Order an additional point of decision that we find determinative.

⁸ The planned road extension includes sidewalks and bike paths on both sides so it is clear some such traffic is expected. However, there is some evidence that pedestrian and bicycle traffic is expected to be light, and no evidence to the contrary. See Exh. No. KH-1T at 24:1-7.

⁹ See *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).

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C. Broader Public Need

18 The Cities argue that state agencies are mandated to comply with local land use plans adopted under the Growth Management Act (GMA).¹⁰ They contend that their regional comprehensive planning process “mandates” the Center Parkway crossing in order for them to achieve their stated levels of service for emergency response times and traffic flow at signalized intersections.¹¹ According to the Cities, the GMA prohibits the Commission from evaluating public need, alternatives for opening a proposed railroad crossing, or even whether the proposed crossing will function in the matter claimed by the Cities. As the Initial Order observes:

Taken to its logical end point, the Cities’ argument would require the Commission to approve any at-grade crossing planned for in a local jurisdiction’s comprehensive planning process.¹²

The Initial Order rejects the Cities’ legal argument that the GMA somehow controls our determination of their petition under RCW 81.53 for authority to construct the subject railroad crossing.

19 We agree with the Initial Order’s determination that the GMA does not relieve the Commission from its statutory obligation to regulate public safety at rail crossings, including the one proposed here. The two statutes do not conflict with each other and the integrity of both statutes within the overall statutory scheme is preserved by reading the GMA together and in harmony with RCW 81.53.¹³ The Initial Order ends its discussion of this issue without considering how this

¹⁰ Petitioners’ Post-Hearing Brief at 7-12. The Cities cite specifically to RCW 36.70A.103’s mandate that “[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter.” *Id.* at 8, n. 29.

¹¹ Petitioners’ Post-Hearing Brief, at 9-11.

¹² Initial Order ¶ 42.

¹³ *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) (“In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.”).

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harmony should be achieved in the context of the facts presented in this case: We find it necessary to undertake this analysis on review.¹⁴

20 The proposed extension of Center Parkway has been part of Richland's and Kennewick's transportation planning for some time.¹⁵ As summarized in the introduction to the Center Parkway Extension and Railroad Crossing Traffic Study completed for the city in March 2013 by JUB Engineers, Inc.:

For several years the City of Richland has pursued the extension of Center Parkway to connect Gage Boulevard on the south to Tapteal Drive on the north. This effort has been challenging because of existing railroad lines that operate parallel to and in between Gage Boulevard and Tapteal Drive. There are multiple purposes for connecting Center Parkway which include:

- Complete a grid network of functionally classified roadways.
- Provide relief to congested arterial facilities.
- Provide improved access to commercial areas and developable land.
- Improve emergency response times.¹⁶

21 Following a detailed narrative, supported by appendices, the JUB Engineers, Inc. report summarizes the study's key findings, elaborating on the points above:

This Traffic Study has been performed to describe the efforts put forth by the City of Richland and the City of Kennewick to complete a

¹⁴ In considering petitions for administrative review, the Commission conducts de novo review of the issues decided in an initial order. See RCW 34.05.464(4) ("The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing").

¹⁵ The Center Parkway extension project has been included in the Cities' comprehensive planning process since 2006. The proposed at-grade Center Parkway Crossing has been identified as an essential public facility in (1) the City of Richland Comprehensive Plan, (2) the City of Kennewick Comprehensive Plan, and (3) the Regional Transportation Plan. The proposed project has received funding from the State through the Washington State Community Economic Revitalization Board, the Surface Transportation Program Regional Competitive Fund, and the Transportation Improvement Board. Petition for Admin. Rev. at 19:2-9.

¹⁶ Exh. KJ-5 at page 1 of JUB Traffic Study.

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roadway network that includes the extension of Center Parkway in order to accommodate growth in the region. Four primary objectives have been discussed that document the needs and benefits of extending Center Parkway between Gage Boulevard and Tapteal Drive that include:

- Complete a grid network of functionally classified roadways - The completion of Center Parkway north of Gage Boulevard is merely one step of many to complete both a functionally classified network and a north-south component of a grid system to provide safe efficient movement of traffic into this area of the region.
- Provide relief to congested arterial facilities - Center Parkway has been planned to provide relief to both Columbia Center Boulevard as well as Steptoe Street, consistent with the philosophy of providing collector roadways parallel and in between arterial roadways.
- Provide improved access to commercial areas and developable land - nearly 60 developable acres of commercial land between the railroad and SR 240 which has desirable visibility will have improved access and will gain the synergy that commercial areas often seek.
- Improve emergency response times - a significant area will have improved emergency response times, some with nearly a 30% reduction.¹⁷

Economic Development

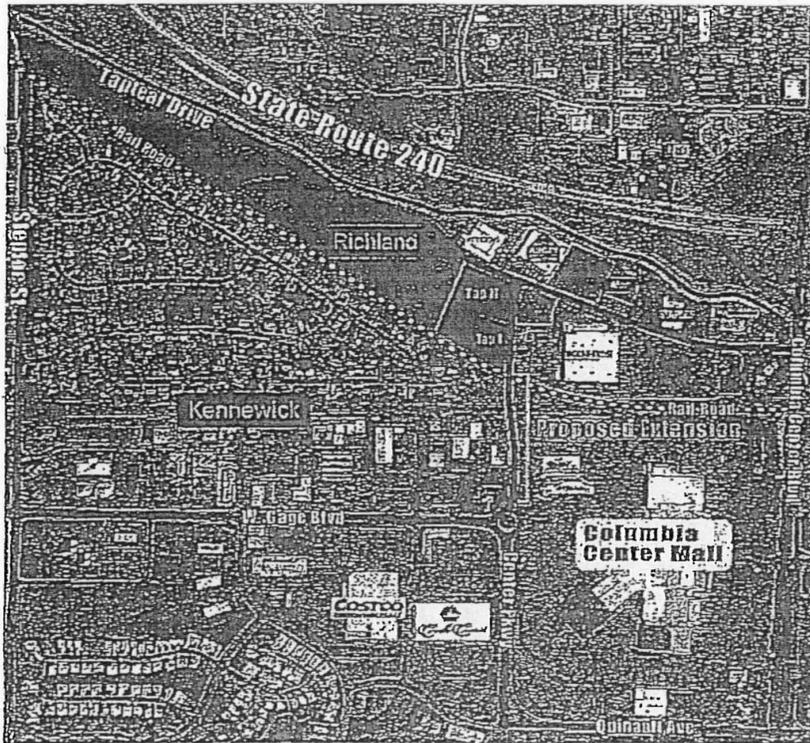
22 We determine that the Commission should consider public need for the proposed at-grade railroad crossing in the broader context of the several purposes discussed in the JUB transportation study, rather than with the narrower focus that the parties, and consequently the Initial Order, place on public safety. 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,

¹⁷ *Id.* at page 14 of JUB Traffic Study.

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and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland, as shown below in Figure 3.

FIGURE 3
DEVELOPMENT AND DEVELOPMENT POTENTIAL



23. The potential for additional development in this area is underscored by a public comment filed in this proceeding by a landowner, Preston K. Ramsey III, writing on behalf of FBA Land Holdings. FBA Land Holdings owns two undeveloped parcels bordered on the north by Tapteal Drive and on the west by the proposed Center Parkway Extension. These are labeled "Tap I" and "Tap II" in Figure 3. Mr. Ramsey comments that:

The proposed street extension of Center Parkway across railroad tracks currently leased by TCRY literally would create a new bridge between two highly interdependent communities in terms of transportation, economics, land use as well as the traffic patterns and habits of the

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approximate 25,000 people who live, work and otherwise travel through this area daily.¹⁸

- 24 Similarly, another public comment filed by Brian Malley, Executive Director of the Benton-Franklin Council of Governments, the Metropolitan Planning Organization for the Tri-City metropolitan area, emphasizes community expectations with respect to the proposed Center Parkway extension:

In addition to easing congestion, this proposed link provides connectivity to two adjacent retail areas that are separated only by the tracks that divide them. The Tri-City area has, and continues to, grow at impressive rates. Planning and encouraging alternate modes, such as bike/ [pedestrian]/ transit will be a crucial step toward alleviating future congestion. At this time, there simply is no option between these two retail areas that does not require the use of a car to negotiate the roadways to travel between. Additionally, a connection in this location may well contribute to the tax base, as Tapteal area businesses have suffered through marginal access for years, with no reasonable link to the adjacent retail areas to the south.¹⁹

Deference to Local Government

- 25 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. Indeed, it is worth considering that if the City of Richland was the petitioner for this project, instead of Kennewick, it would be exempt from the Commission's jurisdiction.²⁰ RCW 81.53.240 exempts first-class cities from the

¹⁸ Public Comment Exhibit (Written comment submitted December 9, 2013).

¹⁹ Public Comment Exhibit (Written comment submitted November 20, 2013).

²⁰ The Cities note in their petition for administrative review that:

The Petitioners do not waive any jurisdictional argument regarding the Cities' exemption from this petition process. RCW 81.53.240 exempts first-class cities from the at-grade crossing petition process. The City of Richland is a first-class city, and the City of Kennewick is a code city. State law provides that code cities have the same authority as first-class cities. RCW 35A.11.020: "The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of the state, and not specifically denied to code cities by law." Nevertheless, the Petitioners believe UTC review and approval worthwhile.

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at-grade crossing petition process. The City of Richland is a first-class city.²¹ This exemption has been present in the law in one form or another since 1909. It is reasonable to infer its passage into law was largely a reflection of the state Constitution giving deference to local jurisdictions on matters that are deemed best left to local control.²² Planning and designing intra-urban transportation networks that will best serve the public's needs in the jurisdictional boundaries of the state's larger Cities fall squarely into this category.²³ Although Kennewick is not legally exempt from our jurisdiction, it is consistent with legislative policies implementing Constitutional home rule that the Commission give significant weight to the evidence concerning the Cities' perspective that the Center Parkway extension is important to transportation planning and economic development in both jurisdictions.

26 There is additional public comment in the record of this proceeding from various community leaders that focuses on these points and illustrates the local

Petition for Administrative Review at 8, footnote 30.

Staff argues that because RCW 81.53.240 is a limitation on Commission jurisdiction, not a grant of authority to first-class cities, RCW 35A.11.020 does not apply. We see no need to resolve this legal argument in this case. We consider the underlying purpose of the exemption as part of the policy context in which the Commission should evaluate the evidence.

²¹ The Washington Constitution, adopted in 1889, directed the legislature to provide for the incorporation of cities and established that cities with population of 20,000 or more could frame a charter for their own government. Wash. Const., Art. XI, Sec. 10. The 1890 legislature established a classification scheme and provided that charter cities are "first class cities" with the broad powers generally associated with "home rule" concepts. Efforts toward greater local self-government powers as the state has become more urban led to amendment of the state Constitution in 1964, lowering the population threshold for charter cities to 10,000 and to legislation in 1994 that similarly lowered the population threshold for first class city designation to 10,000. See Amendment 40, Wash. Const., Art. XI, Sec. 10 and; RCW 35.01.010. In 1967, the legislature enacted a new municipal code (Ch. 119, Laws of 1967, Ex. Sess.), effective July 1, 1969, that gave cities the option of becoming a "code city" with generally the same powers as first class cities. See RCW 35A.11.020. Kennewick is such a code city.

²² Wash. Const., Art. XI, Sec. 10 (cities and towns with population greater than 20,000 could frame a charter for their own government). Amendment 40, in 1964, allowed any city with 10,000 or more inhabitants to frame a charter, subject to the state's general laws. In this sense, RCW 81.53.240, is consistent with the general scheme of government in Washington that gives broad "home rule" powers to first class cities.

²³ Richland's population is greater than 50,000 and that of Kennewick greater than 75,000. The Tri-cities metropolitan area, including Pasco and surrounding urban and suburban areas is more than 250,000.

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importance of recognizing the broader public policy environment. Carl F. Adrian, president of the Tri-City Development Council, for example, comments that:

This at-grade railroad crossing on Center Parkway is a well-planned necessary component of our region's transportation system. The project will dramatically improve traffic movement between two important and growing commercial areas in Richland and Kennewick.

... Completion of Center Parkway between Tapteal Drive and Gage Boulevard is a long-standing element of a carefully developed transportation system plan. That planning has included careful consideration of the safety implications in the planned road and at-grade railroad crossing.²⁴

27 Comments from the Tri-City Regional Chamber of Commerce and the Port of Kennewick also support the proposed project on the bases that it is an important feature in a long-planned transportation network that will contribute to commercial development while reducing traffic congestion and promoting public safety in the project vicinity.²⁵

III. Conclusion

28 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

²⁴ Public Comment Exhibit (Written comment submitted November 20, 2013).

²⁵ *Id.* (Tri-City Regional Chamber of Commerce written comment submitted November 25, 2013; Port of Kennewick written comment submitted December 6, 2013).

should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

FINDINGS AND CONCLUSIONS

29 We endorse certain of the findings and conclusions in the Initial Order, and restate them below. In addition, we modify certain of the Initial Order's findings and conclusions to make them consistent with the discussion in this Order. Finally, we add new findings and conclusions based on our de novo review of the record.

30 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate railroad crossings, and has jurisdiction over the parties and subject matter of this proceeding.

31 (2) The City of Kennewick is a governmental entity authorized by law to petition the Commission pursuant to RCW 81.53.020 for authority to construct an at-grade railroad crossing where it is not practicable to construct a grade-separated crossing and there is a public need for such a crossing that outweighs its inherent risks.

32 (3) Res judicata does not bar the Commission from ruling on the Cities' petition because it is sufficiently different from the City of Kennewick's prior petition.

33 (4) Comprehensive planning under the Growth Management Act does not relieve the Cities from complying with RCW 81.53. The Commission, however, considers the Cities' planning as part of the policy context in which it evaluates a proposed at-grade rail crossing in the commercial center of the urban area.

34 (5) A grade-separated crossing at the proposed project site is not practicable because of engineering requirements and cost constraints.

35 (6) The risks of an accident at the proposed crossing are relatively low considering current and projected train traffic, predicted levels of vehicle traffic, and engineering plans that include active warning devices and other safety measures.

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- 36 (7) The Center Parkway extension may assist the Cities' emergency responders by providing an alternative route for responding to incidents in the vicinity of Columbia Center Mall, when trains are not blocking the intersection.
- 37 (8) The Center Parkway extension, including the proposed at-grade railroad crossing, is a long-planned and important component of the Cities' transportation system. The project will improve traffic movement between two important and growing commercial areas in Richland and Kennewick, thus promoting economic development.
- 38 (9) The record includes substantial competent evidence showing sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing.
- 39 (10) The Commission should grant the City of Richland's and City of Kennewick's petition for authority to construct an at-grade crossing at the proposed extension of Center Parkway.

ORDER

THE COMMISSION ORDERS:

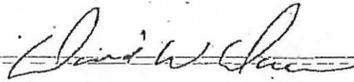
- 40 (1) The Petition for Administrative Review filed by the City of Kennewick and joined in by the City of Richland is granted.
- 41 (2) The Initial Order entered in this proceeding on February 25, 2014, is reversed to the extent it would deny the City of Kennewick's petition to construct a highway-rail grade crossing at Center Parkway, Kennewick, Washington. The Commission authorizes construction of the proposed crossing.

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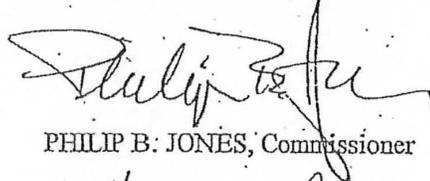
42 (3) The Commission retains jurisdiction to enforce the terms of this order.

Dated at Olympia, Washington, and effective May 29, 2014.

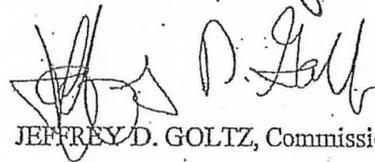
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chairman



PHILIP B. JONES, Commissioner



JEFFREY D. GOLTZ, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

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EXHIBIT B

SERVICE DATE

JUN 24 2014

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,	)	DOCKET TR-130499
)	
Petitioner,)	
	)	ORDER 04
v.)	
)	
PORT OF BENTON, TRI-CITY &	)	DENYING PETITION FOR
OLYMPIA RAILROAD COMPANY,	)	RECONSIDERATION, PETITION
BNSF RAILWAY COMPANY, AND	)	FOR STAY, AND PETITION FOR
UNION PACIFIC RAILROAD,	)	REHEARING
)	
.....)	
Respondents.)	
.....)	

MEMORANDUM

I. Background and Procedural History

- 1 The City of Kennewick (Kennewick) filed a petition with the Washington Utilities and Transportation Commission (Commission) on April 8, 2013, seeking approval to construct a highway-rail at-grade crossing as part of a project to extend Center Parkway from an existing roundabout in Kennewick, where the parkway intersects Gage Boulevard, continuing north to intersect Tapteal Drive in the City of Richland (Richland). On May 31, 2013, Richland petitioned to intervene in support of Kennewick's petition.
- 2 Three railroad companies move trains on the subject track, which is owned by the Port of Benton. Burlington Northern Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UPRR) filed waivers of hearing stating their agreement to the proposed crossing. The third railroad company, Tri-City & Olympia Railroad (TCRY), answered Kennewick's petition and requested a hearing. TCRY opposes the proposed crossing.

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- 3 The Commission's regulatory staff (Staff) supports Kennewick's petition.¹
- 4 Following evidentiary hearings on November 19-20, 2013, a public comment hearing on November 20, 2013, in Richland, Washington, and briefing by the parties, the Commission entered Order 02, its Initial Order, on February 25, 2014, denying Kennewick's petition. Kennewick and Richland (Cities) filed a joint Petition for Administrative Review on March 18, 2014.
- 5 TCRY filed an answer on March 27, 2014, opposing the joint petition for review. Staff also filed an answer on March 27, 2014, reiterating its support for the Cities' petition for authority to construct the subject rail crossing, but addressing the Cities' alternative arguments about the impact of the Growth Management Act (GMA) and the application of chapter 81.53 RCW to code Cities. Staff disagrees with the city on the application of both the GMA and RCW 35A.11.020 to its petition.
- 6 The Commission entered Order 03-Final Order Granting Petition for Administrative Review, reversing Order 02, on May 29, 2014. TCRY filed its joint Petition for Reconsideration of Final Order, Petition for Rehearing, and Petition for Stay of Order on June 9, 2014. Staff and the Cities responded on June 1, 2014, opposing TCRY's Petition for Rehearing and Petition for Stay of Order.

II. Petitions for Reconsideration, Rehearing, and Stay

- 7 TCRY argues that "Order 03 reverses the Initial Order without rationale, analysis or reason."² TCRY focuses initially on the fact that Order 03, our Final Order Granting Petition for Administrative Review, states 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

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

² TCRY Petition at 8:7-8.

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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.³

TCRY ignores, however, that the key operative phrase in the quoted sentence, italicized here, explains that the “benefits to public safety alleged by the Cities *are too slight on their own* to support the petition.”⁴ Order 03 follows immediately with the point that:

If the feasibility of grade separation and public safety as a component of public need were our only concerns, we would end our discussion here and sustain the Initial Order. However, having studied the full record, *we find reason to analyze this matter outside the narrow constraints of these two questions.* We address in the next section of this Order an additional point of decision that we find determinative.⁵

The emphasized language in the quote above succinctly describes the Commission’s responsibility when reviewing an Initial Order, whether on its own motion⁶ or, as in this case, in response to a petition for administrative review filed by a party.⁷ The Administrative Procedure Act describes this responsibility as follows:

³ Order 03 ¶ 16. The project is designed to mitigate the inherent dangers to vehicles and pedestrians by using active warning devices and taking other measures. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip designed to prevent drivers from going around lowered gates, as illustrated in Order 03. *Id.* ¶ 13 Figure 2 At-Grade Crossing Configuration. Ms. Hunter testifies for Staff that she believes these safety features “are sufficient to moderate, to the extent possible, any danger that may exist at the crossing.” Indeed, Ms. Hunter, comparing the proposed Center Parkway crossing to an existing crossing with similar characteristics and using the Federal Railroad Administration accident predictor model to determine the probability of an accident at the proposed crossing is .018701 percent for any one-year period.

⁴ *Id.* at 9:14-15 (quoting from Order 03 ¶ 15 (emphasis added)). The Cities and the Initial Order focus attention on the question whether the crossing would result in incremental improvements to public safety by, for example, improving first responder times in the area. We agree with the Initial Order’s determination that the incremental increases in public safety the Cities allege are too slight on their own to support their petition, but we also are mindful of the Initial Order’s finding and agreement “with Commission Staff that the petition’s proposed advance and active warning devices would moderate the risks presented by this crossing to the extent possible at this site.”

⁵ Order 03 ¶ 16 (italics added for emphasis).

⁶ See RCW 34.0.464(1)(a).

⁷ See RCW 34.05.464(1)(b).

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The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.⁸

In other words, administrative review under the APA is *de novo*, as noted in Order 03.⁹ The independent nature of this *de novo* review is emphasized further in the next section of RCW 34.05.464, which states that: "The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties."¹⁰

8 Despite these clear statements of the law governing review, TCRY grounds its Petition with an argument that the Commission is limited in its consideration on review to points expressly argued by a party seeking review:

Order 03, while accepting all parts of the Initial Order, injects for the first time in this proceeding the concept of "Broader Public Need" with two components – economic development and deference to local government. The Commission uses these concepts, never argued by the Cities, to sweep aside the determination of the ALJ who heard the evidence and was able to observe the demeanor and credibility of the witnesses, allowing the Cities to prevail without ever putting TCRY on notice of the arguments that the Commission now uses to impose a significant burden on TCRY and the public by reversing the Initial Order.¹¹

⁸ RCW 34.05.464(4).

⁹ Order 03 ¶19, footnote 14.

¹⁰ RCW 34.05.464(5).

¹¹ Petition at 10:1-10. This is in apparent reference to ¶ 11 in Order 03, where we say:

We agree that we should evaluate the petition to determine whether a grade-separated crossing is practicable and whether a demonstrated public need for the

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TCRY, misses several fundamental points. Contrary to what TCRY argues, we did not accept in Order 03 "all parts of the Initial Order" and, indeed, found it focused too narrowly on the evidence and argument concerning public safety. The concept of broader public need reflects both the Commission's overarching obligation to exercise its jurisdictional duties in the public interest and, in the case at hand, to look beyond public safety¹² to other aspects of public need as demonstrated in the record of this proceeding. The Commission did not "sweep aside" the ALJ's determination in Order 02; it found the parties' arguments and the ALJ's analysis too focused on a single issue and, following a review of the full record, found reasons to "enter a final order disposing of the proceeding" differently than did the ALJ in his Initial Order.¹³ Finally, the Commission does not make "arguments"; it makes decisions and these are announced through its orders. At every stage, parties have the right to challenge the Commission's determinations in its orders, as TCRY has done here in its Petition for Reconsideration. There simply is no issue of "notice" here. TCRY has not been deprived of any process to which it is due.

- 9 In addition to making its threshold argument that the Commission erred in Order 03 by taking a broad view of the record on review, considering facts and policy issues not addressed in the Initial Order, TCRY argues concerning two substantive matters salient to the Commission's decision on review: 1) the benefits to economic development that Order 03 weighs as a component of the public need analysis; 2) our policy determination that, while not controlling,¹⁴ some deference should be given to the Cities' transportation and land use planning goals when the Commission evaluates public need.

crossing outweighs the hazards of an at-grade crossing. We agree with most of the Initial Order's findings and conclusions on these questions, but we conclude that a broader public need than the public safety concerns the parties advocate supports the petition.

¹² This is not to say that we ignore public safety as a factor. We consider specifically, for example, that Staff's support for the proposed crossing is predicated largely on Ms. Hunter's safety analysis, as discussed above. *See supra* ¶ 7 footnote 3.

¹³ *See* RCW 34.05.464(7) and WAC 480-07-825(9).

¹⁴ The Cities argue the GMA may override our authority under RCW 81.53. The Initial Order rules to the contrary and we find no reason to address the question further. *See* Order 02 ¶¶ 42-44.

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- 10 Much of TCRY's argument related to these matters simply rehashes points made in the Initial Order related to public safety. TCRY misleadingly and incorrectly argues that Order 03 "overturns the Initial Order without finding any issue with its propriety [, amounting] to a wholesale subversion of the adjudicative process."¹⁵
- 11 What TCRY ignores is that our Order on review examines the question of public need in terms of economic development as an important factor in addition to public safety.¹⁶ We also consider the evidence in the context of policy considerations not addressed in the Initial Order. While we agree with the Initial Order that the public safety benefits demonstrated by the evidence are too slight on their own to support a determination of public need that outweighs inherent risk, when coupled with evidence of economic development benefits the balance shifts. In addition, while the ALJ's role does not necessarily require consideration of the broader policy implications of the Commission's adjudicative orders, the Commissioners' role requires this inquiry. Thus, in Order 03 we determined that:

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. . . . Although Kennewick is not legally exempt from our jurisdiction, it is consistent with legislative policies implementing Constitutional home rule that the Commission give significant weight to the evidence concerning the Cities' perspective that the Center Parkway extension is important to transportation planning and economic development in both jurisdictions.¹⁷

¹⁵ Petition for Reconsideration at 21:11-14.

¹⁶ See *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) ("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.").

¹⁷ Order 03 ¶ 25.

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We thus harmonize the state's Growth Management Act (GMA) with our statute requiring Commission approval of at-grade railroad crossings, except in first-class cities such as Richland,¹⁸ which are expressly exempt from our jurisdiction.¹⁹

- 12 TCRY's objection that in thus harmonizing the two statutes "the Commission has effectively granted the Cities the unilateral power to construct at-grade crossings, while rejecting the argument that approval of this crossing is required by statutory mandate" is misplaced and, indeed, flatly erroneous. Order 03 simply recognizes that the Commission should consider and give some weight to the Cities' transportation and urban development planning when evaluating the issue of public need.
- 13 In addition to these arguments, TCRY devotes considerable portions of its Petition to arguments that are at best tangential to the bases for our decision in Order 03. In argument filling over seven pages of its twenty-nine page Petition for Reconsideration, TCRY argues "the Cities are entitled to no 'deference'" because conflicting evidence in the record concerning the potential for increases in train traffic over time is the product of "sleight of hand and failure of candor" by Richland in working with its witnesses and presenting its case before the ALJ. We find no support in the record for this unfortunate assertion. In any event, we do not question in Order 03 the Initial Order's finding that:

¹⁸ We note in Order 03 that Richland's population is greater than 50,000 and that of Kennewick greater than 75,000. Both are qualified to be first-class cities but Kennewick has opted to be a code city instead. The Tri-cities metropolitan area, including Pasco and surrounding urban and suburban areas is more than 250,000. *Id.* footnote 23. *See also Id.* footnotes 20-22.

¹⁹ In our order on review we say that:

We agree with the Initial Order's determination that the GMA does not relieve the Commission from its statutory obligation to regulate public safety at rail crossings, including the one proposed here. The two statutes do not conflict with each other and the integrity of both statutes within the overall statutory scheme is preserved by reading the GMA together and in harmony with RCW 81.53. The Initial Order ends its discussion of this issue without considering how this harmony should be achieved in the context of the facts presented in this case. We find it necessary to undertake this analysis on review.

Id. ¶ 19 (citing *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) ("In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.")).

The risks of an accident at the proposed crossing are relatively low considering current and projected train traffic, predicted levels of vehicle traffic, and plans to install active warning devices and other safety measures.²⁰

Moreover, the only discussion of deference in Order 03 bears no relation whatsoever to our weighing of the evidence concerning the balance between claimed improvements in public safety and the inherent or demonstrated risk of an accident at the proposed crossing. Instead, as discussed above, we determined as a matter of policy that it is appropriate for the Commission to give some deference to the Cities' transportation and land use planning goals when evaluating the question of public need.

In simple terms, TCRY's argument in this regard misses the mark by a wide margin.

14 TCRY also discusses at length proceedings addressing Kennewick's 2004 and 2005 petitions for authority to construct and at-grade crossing at Center Parkway. These petitions were consolidated and in 2007 the Commission entered an Initial Order denying them.²¹ TCRY's discussion of the 2007 order in its Petition for Reconsideration essentially is a collateral attack on the Initial Order's determinations that these earlier proceedings do not bar Kennewick's petition here under the doctrine of *res judicata*²² and do not properly articulate the standard the Commission applies in cases such as this one.²³ We have no need to address these points raised by TCRY.

15 In sum, we find nothing in TCRY's lengthy Petition that persuades us to reconsider the Commission's determinations in Order 03, to reopen the record and rehear the matter, or to stay the effectiveness of the order. We conclude here that we should deny TCRY's joint Petition for Reconsideration of Final Order, Petition for Rehearing, and Petition for Stay of Order.

²⁰ Order 02 ¶ 76; Order 03 ¶ 35.

²¹ *City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06 and Docket TR-050967, Order 02, Initial Order Denying Petition[s] (January 26, 2007). The Initial Order in these dockets became final by operation of law on February 15, 2007. We note that the Commission does not consider Initial Orders precedential.

²² See Order 02 ¶¶ 37-41.

²³ *Id.* ¶ 58.

ORDER

THE COMMISSION ORDERS:

- 16 (1) TCRY's Petitions for Reconsideration, Rehearing and Stay are denied.
- 17 (2) The Commission retains jurisdiction to enforce the terms of this Order.

Dated at Olympia, Washington, and effective June 24, 2014.

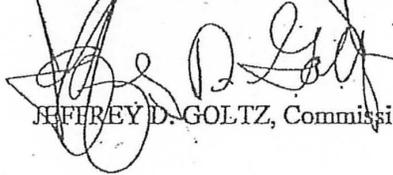
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chairman



PHILIP B. JONES, Commissioner



JEFFREY D. GOLTZ, Commissioner

000647

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PROOF OF SERVICE

DOCKET 130499

I HEREBY CERTIFY That I, as an employee of the Washington Utilities and Transportation Commission at Olympia, Washington, have served on 6/24/2014 the parties of record in this proceeding a true copy of the following document(s):

Order 04 - Denying petition for reconsideration, petition for stay, and petition for rehearing.

The document(s) was/were mailed to each of the parties of record in this docket. Each envelope was addressed to the address shown in the official file, with the required first class postage, and deposited on this date in the United States mail in the City of Olympia, County of Thurston, State of Washington.


Lorri Targus, Customer Service Specialist 3

PARTIES OF RECORD AND OTHERS RECEIVING NOTICE

Mailed to Parties of Record via First Class mail.

SERVED BY MAIL:

Wagner, Richard, BNSF Railway Co., 2454 Occidental Ave S, STE, 2D, Seattle, WA, 98134
Beaudry, Peter M, City of Kennewick, 210 W. 6th Avenue, Kennewick, WA, 99336
Johnson, Cindy, City of Richland, PO BOX 190, Richland, WA, 99352-0190
Cowan, Tom A, Cowan Moore Stam & Luke, PO BOX 927, Richland, WA, 99352
Larson, Carolyn, Dunn Carney Allen Higgins and Tongue LLP, 851 SW Sixth Avenue, STE, 1500, Portland, OR, 97204
DiJulio, P. Stephen, Foster Pepper & Shefelman PLLC, 1111 3rd Avenue, STE, 3400, Seattle, WA, 98101-3299
Ecket, Jeremy, Foster Pepper PLLC, 1111 3rd Avenue, STE, 3400, Seattle, WA, 98101
Johnson, Brandon L, Minnick-Hayner, P.S., 249 West Alder; P.O. Box 1757, Walla Walla, WA, 99362-0348
Montgomery, Tom, Montgomery Scarp MacDougall, PLLC, 1218 Third Avenue, STE, 2700, Seattle, WA, 98101
Endres, Kelsey, Montgomery Scarp MacDougall, PLLC, 1218 Third Avenue, STE, 2700, Seattle, WA, 98101
Keller, Scott D, Port of Benton, 3100 George Washington Way, Richland, WA, 99352
Petit, Paul J., Tri-City & Olympia Railroad, P.O. Box 1700, Richland, WA, 99354
Peterson, Rhetf, Tri-City & Olympia Railroad, P.O. Box 1700, Richland, WA, 99352
Anderson, Terrel, Union Pacific Railroad Company, 9451 Atkinson St., Roseville, CA, 95747
Fassio, Michael, WUTC, PO Box 40128, Olympia, WA, 98504-0128
Brown, Sally, WUTC, PO Box 40128, Olympia, WA, 98504-0128

NOTIFIED BY E-MAIL:

Wagner, Richard, BNSF Railway Co., Richard.wagner@bnsf.com

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Cowan, Tom A, Cowan Moore Stam & Luke, tcowan@cowanmoore.com
Larson, Carolyn, Dunn Carney Allen Higgins and Tongue LLP, cli@dunn-carney.com
DiJulio, P. Stephen, Foster Pepper & Shefelman PLLC, dijup@foster.com
Johnson, Brandon L, Minnick-Hayner, P.S., bljohnson@my180.net
Montgomery, Tom, Montgomery Scarp MacDougall, PLLC, tom@montgomeryscarp.com
Endres, Kelsey, Montgomery Scarp MacDougall, PLLC, kelsey@montgomeryscarp.com
Petit, Paul J., Tri-City & Olympia Railroad, paulpetit@tcry.com
Peterson, Rhett, Tri-City & Olympia Railroad, rnettwater@mac.com
Anderson, Terrel, Union Pacific Railroad Company, taanders@up.com
Kopta, Gregory, Utilities and Transportation Commission, gkopta@utc.wa.gov
Fassio, Michael, WUTC, MFassio@utc.wa.gov
Brown, Sally, WUTC, sbrown@utc.wa.gov
Torem, Adam, atorem@utc.wa.gov
Dickson, Alan, ADickson@utc.wa.gov
Maxwell, Amanda, amaxwell@utc.wa.gov
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Moen, Nancy, nmoen@utc.wa.gov
Curl, Paul, pcurl@utc.wa.gov

000649

EXHIBIT C

Hearing Date: December 9, 2014
Hearing Time: 1:30 p.m.

JOSIE DELVIN
BENTON COUNTY CLERK

DEC 09 2014

FILED

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pm

SUPERIOR COURT OF WASHINGTON IN AND FOR BENTON COUNTY

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

Petitioner,

v.

STATE OF WASHINGTON, UTILITIES
AND TRANSPORTATION COMMISSION,

Respondent.

No. 14-2-01894-8

ORDER AFFIRMING THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION'S
ORDERS IN DOCKET TR-130499

THIS MATTER came for hearing before this Court on Tri-City and Olympia Railroad's petition for review of the Washington Utility and Transportation (WUTC) in Docket TR-130499, under the Administrative Procedures Act (Chapter 34.05 RCW). The Court has considered the administrative record and files contained therein, including:

1. The WUTC's Order 03 and 04 in Docket TR-130499, granting the City of Kennewick and the City of Richland authority to construct an at-grade crossing at the proposed extension of the Center Parkway;
2. The record of the WUTC's administrative proceedings, including hearing transcript, exhibits and testimony, briefing and orders; and
3. The briefing before this Court.

In addition to these documents, this Court heard argument of counsel for the parties. The Court is fully advised. Based upon the foregoing, the Court concludes:

ORDER AFFIRMING THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION'S ORDERS
IN DOCKET TR-130499 - 1

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

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1 1. The WUTC Orders 03 and 04 are supported by substantial evidence. ~~Tri-City and~~
2 ~~Olympia Railroad was afforded full opportunity to contest and rebut the evidence, and to present~~
3 ~~its own evidence, before and during the WUTC, and brief all issues before the WUTC.~~ *BA*

4 2. As found by the WUTC, the public need for the Center Parkway Crossing
5 outweighs any speculative risk. And, the WUTC committed no error of law in its approval of the
6 Center Parkway Crossing.

7 3. This Court rejects Tri-City and Olympia's argument regarding RCW 81.53.261.
8 New issues cannot be raised on appeal. However, that statute has no application in any event to
9 a proposal for a new crossing.

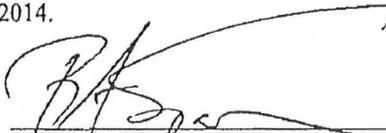
10 4. The WUTC decision does not implicate property rights and this APA appeal is
11 not the forum for consideration of such issues. See in this regard the pending action in Benton
12 County Cause No. 14-2-01910-3.

13 IT IS HEREBY ORDERED, as follows:

14 1. The Washington State Utilities and Transportation Commission's Orders (03 and
15 04) in Docket TR-130499 are **AFFIRMED**.

16 2. Costs are awarded to Respondents consistent with Chapter 34.05 RCW and Court
17 Rule.

18 DATED this ^{9th} ~~8th~~ day of December, 2014.

19 
20 _____
21 Judge

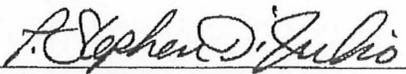
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ORDER AFFIRMING THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION'S ORDERS
IN DOCKET TR-130499 - 2

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51408913 2

1 PRESENTED BY:

2 Lisa Beaton
3 Kennewick City Attorney, WSBA #25305
4 Heather Kintzley
5 Richland City Attorney, WSBA #35520

6 

7 P. Stephen DiJulio, WSBA #7139
8 Jeremy Eckert, WSBA #42596
9 FOSTER PEPPER PLLC
10 1111 Third Avenue, Suite 3400
11 Seattle, Washington 98101-3299
12 Telephone: (206) 447-4400
13 Facsimile: (206) 447-9700
14 Email: dijup@foster.com
15 Email: eckej@foster.com
16 Attorneys for the City of Richland and the City of Kennewick

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ORDER AFFIRMING THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION'S ORDERS
IN DOCKET TR-130499 - 3

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EXHIBIT D

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SUPERIOR COURT OF WASHINGTON IN AND FOR BENTON COUNTY

TRI-CITY RAILROAD COMPANY, LLC,
a Washington limited liability company,

Plaintiff,

v.

THE CITY OF KENNEWICK, a municipal
corporation of the State of Washington, located
in Benton County, Washington; and THE CITY
OF RICHLAND, a municipal corporation of
the State of Washington, located in Benton
County, Washington,

Defendants.

No. 14-2-01910-3

DECLARATION OF PETE ROGALSKY
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OF
DISMISSAL

COMES NOW Pete Rogalsky, and declares as follows:

1. I am of legal age, have personal knowledge of the facts stated herein, and am competent to be a witness in this action.
2. I am the City of Richland's Public Works Director. I have held this position in the City for 10 years. As the Public Works Director, I am responsible for overseeing infrastructure and services for (1) transportation and streets, (2) water, (3) wastewater; (4) stormwater, and (5) solid waste.
3. I am responsible for the planning and execution of the Center Parkway Crossing ("Crossing") for the Cities of Richland and of Kennewick (by interlocal agreement).

DECLARATION OF PETE ROGALSKY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT OF DISMISSAL- 1

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4. As the record in this case and before the WUTC shows, Center Parkway currently ends at a roundabout to the west of the Columbia Center Mall in Kennewick, as identified in the following image:



The Crossing will extend Center Parkway northward, across both Port of Benton tracks, and into the City of Richland, intersecting Tapteal Drive.

5. During the UTC approval process in Docket TR-130499, the Cities showed that the Crossing may be designed to remove the siding, and it can be designed to accommodate the siding. The Cities' stipulated that "The Petitioners will accommodate the UTC's preferred approach."¹ The Cities also provided the UTC with a diagram labeled "Plan and Profile of Crossing that Includes Siding."² I oversaw this response to the UTC.

6. UTC Order 03 approved the Crossing. Order 03 included Figure 2 to show the crossing configuration. Order 03 includes a footnote to further explain Figure 2:

¹ WUTC TR-130499 at Exhibit 6: Petitioners' Response to UTC Staff and Data Requests Nos. 2-4 at p. 1:21-22, attached as Ex. 1 to this Declaration.

² *Id.* at Exhibit C (labeled pages 001062-63), attached as Ex. 1 to this Declaration.

DECLARATION OF PETE ROGALSKY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DISMISSAL- 2

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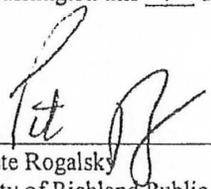
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“This illustration shows the removal of the 1900 foot siding track. However, in the face of Tri-City and Olympia Railroad’s opposition, Staff’s analysis of the site and consideration of its proposed safety features assumes that the second track remains in operation.”³ The Cities acknowledge that the Order approves a Crossing over both the main track and the siding track. The Cities stipulated to this fact before Judge Spanner during Tri-City and Olympia Railroad Company’s appeal of the UTC Order. The Cities repeat this stipulation here. The siding track will remain.

7. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at the City of Richland, Washington this 9 day of February, 2015.



Pete Rogalsky
City of Richland Public Works Director

³ Final Order Granting Petition for Administrative Review, Order 03, Docket TR-130499, p. 6, fn. 6 (emphasis added).

DECLARATION OF PETE ROGALSKY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DISMISSAL- 3

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EXHIBIT D-1

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ATTY GEN DIV
WUTC

WUTC DOCKET TR-130499
EXHIBIT KJ-13-X
ADMIT W/D REJECT

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK AND CITY OF
RICHLAND

Petitioners,

vs.

PORT OF BENTON, TRI-CITY & OLYMPIA
RAILROAD COMPANY, BNSF RAILWAY
COMPANY, AND UNION PACIFIC
RAILROAD

Respondents.

DOCKET TR-130499

PETITIONERS' RESPONSE TO UTC
STAFF DATA REQUESTS NOS. 2 - 4.

PETITIONERS, City of Kennewick and City of Richland, respond to UTC Staff Data
Requests Nos. 2 - 4.

Data Request No. 2. Thank you for providing us with an opportunity to clarify the
Petitioners' position. The petition before the UTC is for an at-grade crossing at Center Parkway.
The crossing may be designed to remove the siding, and it can be designed to accommodate the
siding. The Petitioners will accommodate the UTC's preferred approach.

The Petitioners' preferred approach is to remove the siding track as part of the project,
making the crossing over only one track. The Petitioners know that rail car interchange with
BNSF Railway and Union Pacific Railroad ("UPRR") will not occur at this location, because the
City of Richland has agreements with both railroads wherein BNSF and UPRR agree to

PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 1

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permanently cease interchange at this location. The agreements are available in Petitioners' response to TCRY's first data request.

TCRY has refused to engage in any design consultation with Petitioners on the Center Parkway Crossing. As a result, the Petitioners and TCRY have been unable to develop an agreed-upon solution to the siding track. Based upon TCRY's data, the removal of the siding will likely not impact TCRY's use of the line at the crossing. TCRY has yet to submit any quantifiable information to UTC or Petitioners regarding its use of the siding. In addition, TCRY's car numbers crossing the intersection are 2,060 cars in 2011 and 1,999 cars in 2012. Although a new cold-storage facility is scheduled to begin operation, which may inform TCRY's projected growth, TCRY has not provided any data to demonstrate how it can sustain a 20% annual rate of growth. We note that TCRY's own data demonstrate that TCRY's track usage *decreased* over three percent (3%) from 2011 to 2012, the only two years of complete data provided by TCRY.

As background, the siding track was formerly used for the interchange of rail cars between BNSF and TCRY. But this siding use is no longer the case, as stated in Kevin Jeffers' pre-filed testimony. The use of the siding today is infrequent. 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 (aka bad-ordered) while en route. Kevin Jeffers did not observe any rail cars in the siding when visiting the area in August 2012, December 2012, and April 2013.

The best outcome for this project is to eliminate the siding at the crossing location and mitigate the loss of this siding feature in one of several ways:

1. Remove the existing switch east of the crossing and the length of the track between the switch and the crossing, and reinstall this equipment elsewhere on the Port of Benton track as directed by UTC;

PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 2

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2. Relocate the switch existing east of the crossing and the track between the crossing and the switch to a location west of the proposed crossing; or

3. Remove the switch and track east of the crossing and distribute the materials as directed by UTC.

Alternatively, the crossing could be constructed over both existing tracks, relying on the proposed safety measures to protect the crossing, ongoing railroad operations, and the public.

Data Request No. 3. The requested data is attached in Exhibit A and Exhibit B. In addition to the danger of pedestrian-to-vehicle crashes, it is important to note the unnecessary vehicle-to-pedestrian interactions that occur as a result of some drivers using the Columbia Mall roads to connect between Gage Boulevard and Columbia Center Boulevard. There are drivers who would otherwise use the Center Parkway connection if it were available.

Data Request No. 4. The City of Richland proposed to eliminate the southernmost track (aka the siding track). This proposal is set forth in the petition and is depicted in the design plans submitted with the petition. However, as identified in Data Request No. 2, above, the Petitioners alternatively propose to include the siding if the UTC determines that the siding should not be removed. Petitioners attach a plan and profile of the proposed crossing with the track and the siding, in Exhibit C.

Between September 12 and 24, 2013, the following individuals assisted in preparing Petitioners' response to UTC's data requests:

For Data Request No. 2: Pete Rogalsky, City of Richland, Public Works Director,
(509) 942-7558;

Kevin Jeffers, P.E., David Evans and Associates, Senior
Project Manager, (253) 250-0674.

For Data Request No. 3: John Deskins, P.E.; PTOE, City of Kennewick, Traffic
Engineer, (509) 585-4400

PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 3

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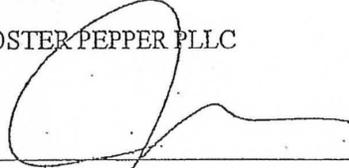
Alisha Piper, City of Kennewick, Traffic Technician, (509)
585-4342.

For Data Request No 4: Pete Rogalsky, City of Richland, Public Works Director,
(509) 942-7558;

Kevin Jeffers, P.E., David Evans and Associates, Senior
Project Manager, (253) 250-0674.

DATED THIS 25th day of September, 2013

FOSTER PEPPER PLLC



P. Stephen DiJulio, WSBA #12921
Jeremy Eckert, WSBA # 42596
Attorneys for City of Richland and City of Kennewick

PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 4

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding in the manner indicated, to the parties identified below:

Tom A. Cowan Cowan Moore Stam & Luke P.O. Box 927 Richland WA 99352 <u>tcowan@cowanmoore.com</u>	Scott D. Keller Port of Benton 3100 George Washington Way Richland WA 99354 <u>keller@portofbenton.com</u>
Paul J. Petit General Counsel P.O. Box 1700 Richland WA 99352 By U.S. Mail <u>paulpetit@tcry.com</u>	Rhett Peterson Tri-City & Olympia Railroad Co. P.O. Box 1700 Richland, WA 99352 By U.S. Mail <u>Rhettwater@mac.com</u>
Brandon L. Johnson Minnick-Hayner, P.S. 249 West Alder P.O. Box 1757 Walla Walla WA 99362 <u>bljohnson@my180.net</u>	Tom Montgomery Kelsey Endres Montgomery Scarp, PLLC 1218 Third Ave., Ste. 2700 Seattle WA 98101 <u>tom@montgomeryscarp.com</u> <u>Kelsey@montgomeryscarp.com</u>
Richard Wagner Manager Public Projects BNSF Railway 2454 Occidental Ave. S., Ste. 2D Seattle WA 98134 <u>richardwagner@bnsf.com</u>	Carolyn Larson Dunn Carney Allen Higgins and Tongue LLP 851 SW Sixth Ave., Ste. 1500 Portland OR 97204 <u>cll@dunn-carney.com</u>
Terrell A. Anderson Manager, Industry & Public Projects Union Pacific Railroad Co. 9451 Atkinson St. Roseville CA 95747 <u>taanders@up.com</u>	Steven W. Smith Assistant Attorney General 1400 S. Evergreen Park Dr. S.W. P.O. Box 40128 Olympia WA 98504-0128 By U.S. Mail <u>ssmith@utc.wa.gov</u>

PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 5

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2 A courtesy copy was also delivered to:

3 Adam E. Torem
4 Administrative Law Judge
5 c/o Steven W. Smith
6 Assistant Attorney General
7 1400 S: Evergreen Park Dr. S.W.
8 P.O. Box 40128
9 Olympia WA 98504-0128
10 By U.S. Mail
11 atorem@utc.wa.gov

12 DATED this 25th day of September 2013, at Seattle, Washington.

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Helen M. Stubbert

PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 6

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EXHIBIT C

PLAN AND PROFILE OF CROSSING THAT INCLUDES SIDING

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PETITIONERS' RESPONSE TO UTC STAFF DATA
REQUESTS NOS. 2-4 - 9

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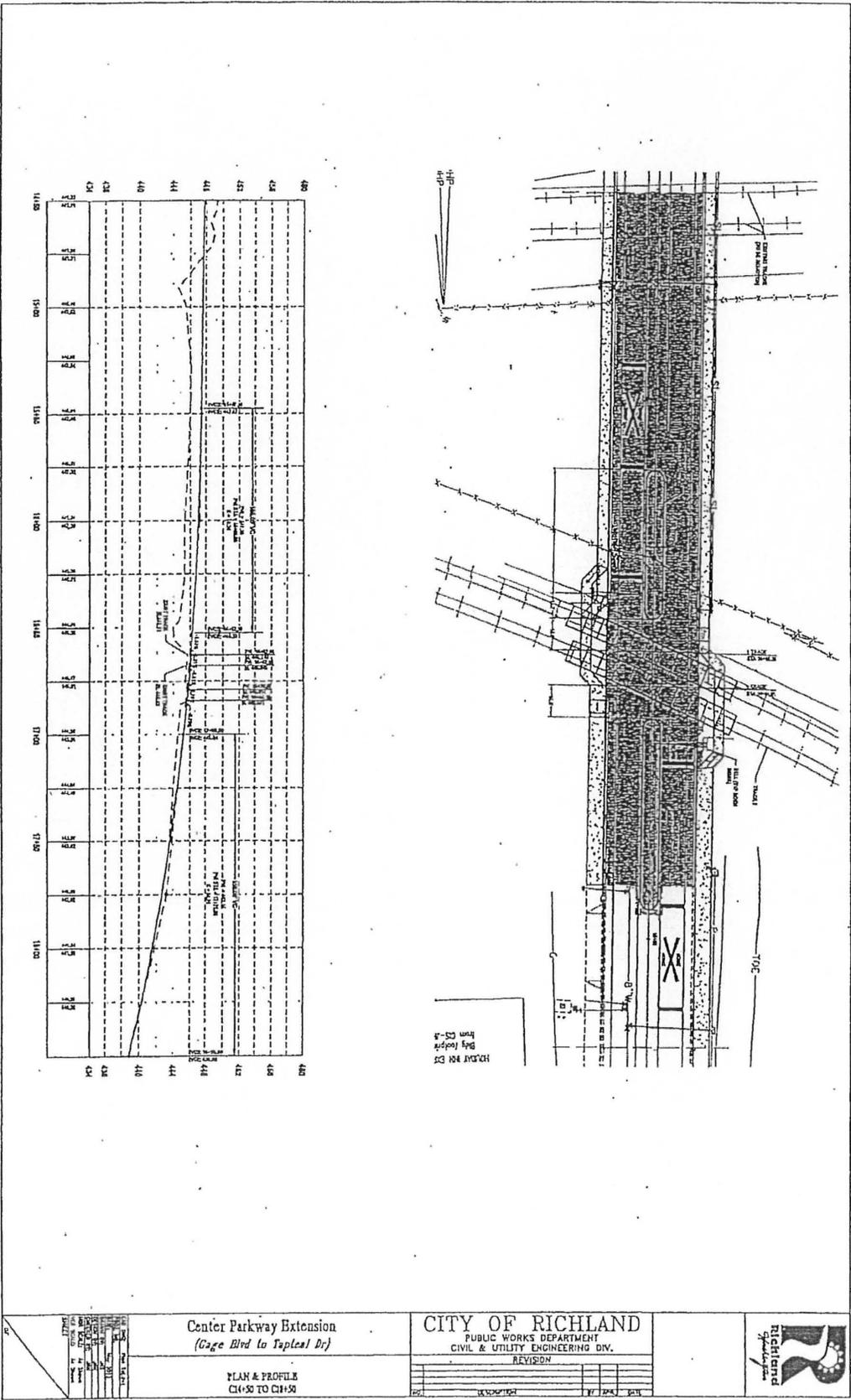


EXHIBIT E

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Fort Bend County v. Burlington Northern and Santa Fe Ry. Co., Tex.App.-Hous. (14 Dist.), June 21, 2007

2004 WL 395835 (S.T.B.)

SURFACE TRANSPORTATION BOARD (S.T.B.)

MAUMEE & WESTERN RAILROAD CORPORATION AND RMW
VENTURES, LLC--PETITION FOR DECLARATORY ORDER

Decided: March 2, 2004

Service Date: March 3, 2004

SURFACE TRANSPORTATION BOARD DECISION

STB Finance Docket No. 34354

*1 By the Board, David M. Konschnik, Director, Office of Proceedings.

By a petition filed on May 6, 2003, Maumee & Western Railroad Corporation (Maumee) and RMW Ventures, LLC (RMW) (collectively, petitioners) jointly seek the institution of a declaratory order proceeding to determine whether local condemnation proceedings by the City of Napoleon, OH (City), to acquire an easement for a road crossing over and subsurface utilities under an 8,000 sq. ft. parcel of main line right-of-way, which is owned by RMW and operated by Maumee, are preempted by 49 U.S.C. 10501(b).¹ On May 23, 2003, the City filed a reply. On June 9, 2003, petitioners filed a motion for a procedural order, and, on June 23, 2003, the City replied. For the reasons discussed below, petitioners' request for institution of a declaratory order proceeding will be denied.

BACKGROUND

Petitioners own and operate approximately 51 miles of rail line from Liberty Center, OH, to Woodburn, IN, running through the City (the line). The City desires to construct a two-lane public street to connect a planned industrial park with the City. By resolution, the City authorized the acquisition of an easement over RMW's property so that it may construct a public at-grade crossing over the line. After the parties failed to reach an agreement concerning the at-grade crossing, the City, on May 16, 2003, petitioned the Common Pleas Court of Henry County, OH (the Ohio court), to acquire an easement over the line by eminent domain pursuant to Ohio statute. Petitioners sought to have the court proceeding removed to the United States District Court for the Northern District of Ohio (Western Division). Neither the Ohio court nor the Federal court has, to date, sought the Board's opinion regarding this matter.

DISCUSSION AND CONCLUSIONS

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, however, there is no need for the Board to institute a proceeding.

The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), protects railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. See *City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. See *Joint Petition for Declaratory Order — Boston and Maine Corporation and Town of Ayer, MA*,

STB Finance Docket No. 33971, slip op. at 9 (STB served May 1, 2001). Thus, acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption of 49 U.S.C. 10501(b) unless it would prevent or unreasonably interfere with railroad operations.

*2 Maumee's primary argument here is that section 10501(b) would preempt any exercise of state eminent domain power with respect to railroad property, but this interpretation is overbroad. Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations. See, e.g., Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000) (state eminent domain action preempted where passing track necessary to railroad's operations would have been eliminated); Dakota, Minnesota & Eastern R.R. v. South Dakota, 236 F. Supp.2d 989 (D. S.D. 2002) (recently added sections of state's eminent domain law that would have unreasonably interfered with future railroad operations preempted). But neither the court cases, nor the Board's precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible. Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.

These crossing cases are typically resolved in state courts. When federal preemption issues are raised they may be removed to federal court. In either case, courts can, and regularly do (sometimes with input from the Board through referral), make determinations as to whether proposed eminent domain actions would impermissibly interfere with railroad operations. The concerns that Maumee has raised here are generalized and of the type that the courts are well-suited to address. Should the court request Board assistance in assessing those issues, the Board remains available. In the meantime, however, Board involvement does not appear to be necessary or appropriate.

Accordingly, petitioners' request for institution of a declaratory order proceeding will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioners' request for a proceeding is denied.
2. This decision is effective on the date of service.

Vernon A. Williams

Secretary

Footnotes

- 1 Petitioners filed a similar petition with the Board on October 21, 2002, but, upon the request of petitioners, the proceeding was discontinued in a decision served on December 5, 2002.

2004 WL 395835 (S.T.B.)

EXHIBIT F

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY, LLC,
a Washington limited liability company,

Petitioners,

v.

THE CITY OF KENNEWICK, a municipal
corporation of the State of Washington, located
in Benton County, Washington; THE CITY OF
RICHLAND, a municipal corporation of the
State of Washington, located in Benton County,
Washington,

Respondents.

No. 14-2-01910-3

ORDER GRANTING CITIES' MOTION
FOR SUMMARY JUDGMENT OF
DISMISSAL [PROPOSED]

THIS MATTER came for hearing before this Court on Tri-City Railroad Company's
("TCRY's") First Amended Complaint for Declaratory and Injunctive Relief. The Court has
considered the record and files contained therein, including:

	<u>Sub. No.</u>
1. TCRY's Amended Complaint;	11
2. The Cities' Answer;	---
3. The Cities' Motion for Summary Judgment of Dismissal (and Exhibits);	---
4. TCRY Response;	---
5. City Reply; and	---

ORDER GRANTING CITIES' MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL [PROPOSED] - 1

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

51424566.1

1 6. The Court takes notice of Benton County File No. 14-2-07894-8.

2 The Court is fully advised. Based upon the foregoing, the Court concludes:

3 1. There are no genuine issues of material fact. See WUTC Docket No. TR-130499;

4 2. The Surface Transportation Board does not have jurisdiction over the Cities
5 Crossing as approved by the WUTC;

6 3. The Cities are entitled to judgment as a matter of law.

7 IT IS HEREBY ORDERED, as follows:

8 1. The Cities' motion for summary judgment of dismissal in this matter is granted,
9 and this case is dismissed.

10 2. Costs are awarded to Respondents consistent with Court Rule.

11 DATED this ____ day of February, 2015.

12
13
14

Judge

15 PRESENTED BY:

16 Lisa Beaton
17 Kennewick City Attorney, WSBA #25305
18 Heather Kintzley
19 Richland City Attorney, WSBA #35520
20

21 _____
22 P. Stephen DiJulio, WSBA #7139
23 Jeremy Eckert, WSBA #42596
24 FOSTER PEPPER PLLC
25 1111 Third Avenue, Suite 3400
26 Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: dijup@foster.com
Email: eckej@foster.com
Attorneys for the City of Richland and the City of Kennewick

ORDER GRANTING CITIES' MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL [PROPOSED] - 2

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51424566 1

EXHIBIT 14



**CITY OF RICHLAND
PUBLIC WORKS DEPARTMENT**

840 Northgate Drive
P.O. Box 190 MS-26
Telephone (509) 942-7500
Fax (509) 942-7468

PO BOX 190 • RICHLAND, WA 99352 • CI.RICHLAND.WA.US

February 10, 2015

Mr. Scott Keller, Executive Director
Port of Benton
3250 Port of Benton Boulevard
Richland, WA 99354

**RE: CENTER PARKWAY EXTENSION RIGHT-OF-WAY
RIGHT-OF-WAY PLAN SHEET 2 OF 2
PARCEL NO. 6**

Dear Mr. Keller:

The City of Richland and City of Kennewick, acting by and through the Richland Public Works Department, plan to proceed with the above-titled public project. As a part of the project, the Cities need to purchase an easement over your property identified on the "Right-of-Way Plan" by the "parcel number" listed above. The bearer of this letter is the City's acquisition specialist assigned to complete this transaction. A copy of the Right-of-Way Plan is attached.

Your property has been examined by qualified appraisers and appraisal reviewers who have carefully considered all the elements which contribute to the market value of your property. By law, they must disregard any general increase or decrease in value caused by the project itself. The appraisal prepared for this transaction used the accepted "across the fence" methodology in determining the value of the easement necessary for the project. Based upon the market value estimated for your property, the Cities' offer is \$38,500.

RIGHT OF WAY EASEMENT
\$38,500

Closing of our transaction and payment for your property will be made pursuant to the terms of a Purchase and Sale Agreement approved by the Richland City Council. The specific terms of the Purchase and Sale agreement will be negotiated between you and Mr. Pete Rogalsky, the undersigned. Attached you will find a draft copy of a Purchase and Sale Agreement and Right of Way Easement Deed. Mr. Rogalsky will be available to discuss your questions and concerns regarding its terms.

You may wish to employ professional services to evaluate the City's offer. If you do so, we suggest you employ well-qualified evaluators so the resulting evaluation report will be useful to you in deciding whether to accept the Cities' offer. The City of Richland will reimburse up to \$750 of your evaluation costs upon submission of the bill or paid receipt.

If you decide to reject the offer, the Cities, acting in the public interest, will use the right of eminent domain to acquire your property for public use. In conformity with the Washington State Constitution and laws, the Cities will take such action, including the filing of a condemnation suit to obtain a "Court Order of Public Use and Necessity" and a trial will be arranged to determine the just compensation to be paid for the property.

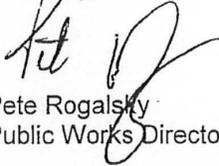
The Internal Revenue Service (IRS) requires the City obtain your correct taxpayer identification number (TIN) or social security number (SSN) to report income paid to you as a result of this real estate transaction. You will be required to complete the attached IRS Form W-9 and provide said form at closing.

If you have personal property presently located on the property being acquired by the Cities that needs to be moved, the City of Richland will reimburse you for the cost of moving it through the Relocation Assistance program.

The Cities have attempted by this letter to provide a concise statement of our offer and summary of your rights. We hope the information will assist you in reaching a decision. Please feel free to direct any questions you may have to me. Once you have reviewed the documents, I will contact you to set up a time to sign and notarize the purchase and sale agreement. I can be reached at (509) 942-7500 and at the progalsky@ci.richland.wa.us.

Thank you.

Sincerely,



Pete Rogalsky
Public Works Director

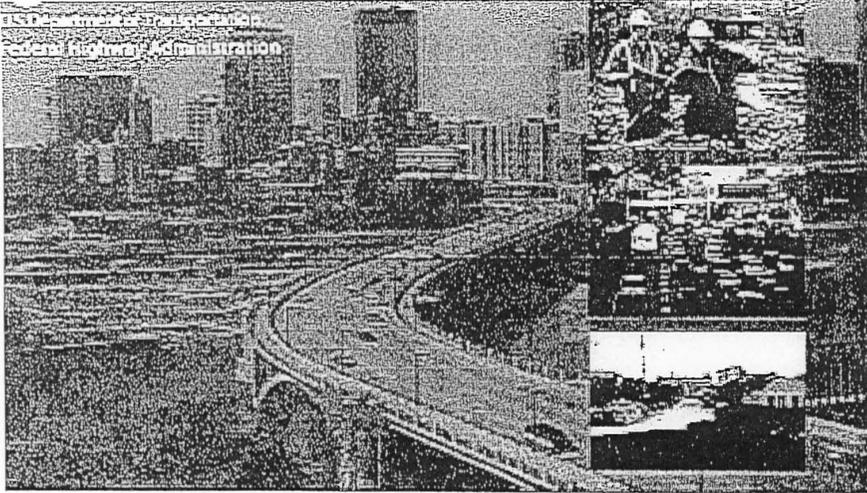
Enclosures: Right of Way Plan
Right of Way Acquisition Agreement
Right of Way Easement Deed
Release of Lease
W-9 Form
Real Estate Acquisition Brochure

c: Mr. Randolph Peterson, Tri-City Railroad
Cary Roe, City of Kennewick
File

Receipt of this letter is hereby acknowledged. I understand that this acknowledgement does not signify my acceptance or rejection of this offer. Please return the attached copy of this letter signed in the attached envelope.

Signature

Date



ACQUISITION

ACQUIRING REAL PROPERTY
FOR FEDERAL AND FEDERAL-AID
PROGRAMS AND PROJECTS



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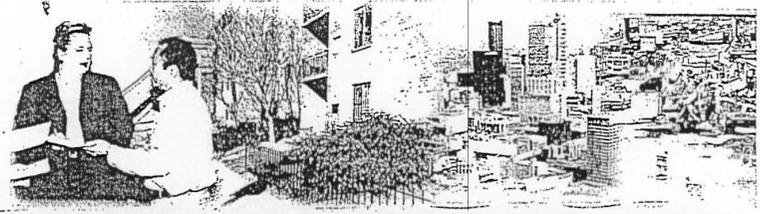
INTRODUCTION

Government programs designed to benefit the public as a whole often result in acquisition of private property and, sometimes, in the displacement of people from their residences, businesses or farms. Acquisition of this kind has long been recognized as a right of government and is known as the power of eminent domain. The Fifth Amendment of the Constitution states that private property shall not be taken for public use without just compensation.

To provide uniform and equitable treatment for persons whose property is acquired for public use, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and amended it in 1987. This law, called the Uniform Act, is the foundation for the information discussed in this brochure.

Revised rules for the Uniform Act were published in the Federal Register on January 4, 2005. The rules are reprinted each year in the Code of Federal Regulations (CFR), Title 49, Part 24. All Federal, State and local government agencies, as well as others receiving Federal financial assistance for public programs and projects, that require the acquisition of real property, must comply with the policies and provisions set forth in the Uniform Act and the regulation.

2



The acquisition itself does not need to be federally-funded for the rules to apply. If Federal funds are used in any phase of the program or project, the rules of the Uniform Act apply. The rules encourage acquiring agencies to negotiate with property owners in a prompt and amicable manner so that litigation can be avoided.

This brochure explains your rights as an owner of real property to be acquired for a federally-funded program or project. The requirements for relocation assistance are explained in a brochure entitled Relocation, Your Rights and Benefits as a Displaced Person under the Federal Relocation Assistance Program.

Acquisition and relocation information can be found on the Federal Highway Administration Office of Real Estate Services website: www.fhwa.dot.gov/realstate

The agency responsible for the federally-funded program or project in your area will have specific information regarding your acquisition. Please contact the sponsoring agency to receive answers to your specific questions.

3

IMPORTANT TERMS USED IN THIS BROCHURE

Acquisition

Acquisition is the process of acquiring real property (real estate) or some interest therein.

Agency

An agency can be a government organization (Federal, State, or local), a non-government organization (such as a utility company), or a private person using Federal financial assistance for a program or project that acquires real property or displaces a person.

Appraisal

An appraisal is a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

Condemnation

Condemnation is the legal process of acquiring private property for public use or purpose through the agency's power of eminent domain. Condemnation is usually not used until all attempts to reach a mutually satisfactory agreement through negotiations have failed. An agency then goes to court to acquire the needed property.

Easement

In general, an easement is the right of one person to use all or part of the property of another person for some specific purpose. Easements can be permanent or temporary (i.e.,

limited to a stated period of time). The term may be used to describe either the right itself or the document conferring the right. Examples are: permanent easement for utilities, permanent easement for perpetual maintenance of drainage structures, and temporary easement to allow reconstruction of a driveway during construction.

Eminent Domain

Eminent domain is the right of government to take private property for public use. In the U.S., just compensation must be paid for private property acquired for federally-funded programs or projects.

Fair Market Value

Fair market value is market value that has been adjusted to reflect constitutional and other legal requirements for public acquisition.

Interest

An interest is a right, title, or legal share in something. People who share in the ownership of real property have an interest in the property.

Just Compensation

Just compensation is the price an agency must pay to acquire real property. An agency official must make the estimate of just compensation to be offered to you for the property needed. That amount may not be less than the amount established in the approved appraisal report as the fair market value for your property. If you and the agency cannot agree on the amount of just compensation to be

paid for the property needed, and it becomes necessary for the agency to use the condemnation process, the amount determined by the court will be the just compensation for your property.

Lien

A lien is a charge against a property in which the property is the security for payment of a debt. A mortgage is a lien. So are taxes. Customarily, liens must be paid in full when the property is sold.

Market Value

Market value is the sale price that a willing and informed seller and a willing and informed buyer agree to for a particular property.

Negotiation

Negotiation is the process used by an agency to reach an amicable agreement with a property owner for the acquisition of needed property. An offer is made for the purchase of property in person, or by mail, and the offer is discussed with the owner.

Person

A person is an individual, partnership, corporation, or association.

Personal Property

In general, personal property is property that can be moved. It is not permanently attached to, or a part of, the real property. Personal property is not to be included and valued in the appraisal of real property.

Program or Project

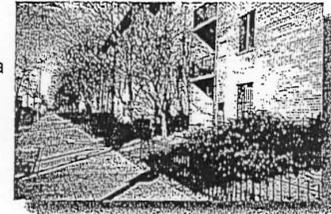
A program or project is any activity or series of activities undertaken by an agency where Federal financial assistance is used in any phase of the activity.

Waiver Valuation

The term waiver valuation means an administrative process for estimating fair market value for relatively low-value, non-complex acquisitions. A waiver valuation is prepared in lieu of an appraisal.

PROPERTY APPRAISAL

An agency determines what specific property needs to be acquired for a public program or project after the project has been planned and government requirements have been met.



If your property, or a portion of it, needs to be acquired, you, the property owner, will be notified as soon as possible of (1) the agency's interest in acquiring your property, (2) the agency's obligation to secure any necessary appraisals, and (3) any other useful information.

When an agency begins the acquisition process, the first personal contact with you, the property owner, should be no later than during the appraisal of the property.



An appraiser will contact you to make an appointment to inspect your property. The appraiser is responsible for determining the initial fair market value of the property. The agency will have a review appraiser study and recommend

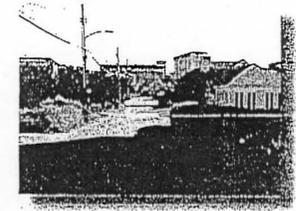
approval of the appraisal report used to establish the just compensation to be offered to you for the property needed.

You, or a representative that you designate, will be invited to accompany the appraiser when the appraiser inspects your property. You can point out any unusual or hidden features of the property that the appraiser could overlook. At this time, you should advise the appraiser if any of these conditions exist:

- There are other persons who have ownership or interest in the property.
- There are tenants on the property.
- Items of real or personal property that belong to someone else are located on your property.
- The presence of hazardous material, underground storage or utilities.

This is your opportunity to tell the appraiser about anything relevant to your property, including other properties in your area that have recently sold.

The appraiser will inspect your property and note its physical characteristics. He or she will review sales of properties similar to yours in order to compare the facts of those sales with the facts about your property. The appraiser will analyze all elements that affect value.



The appraiser must consider normal depreciation and physical deterioration that has taken place. By law, the appraiser must disregard the influence of the future public project on the value of the property. This requirement may be partially responsible for any difference in the fair market value and market value of your property.

The appraisal report will describe your property and the agency will determine a value based on the condition of the property on the day that the appraiser last inspected it, as compared with other similar properties that have sold.

JUST COMPENSATION

Once the appraisal of fair market value is complete, a review appraiser from the agency will review the report to ensure that all applicable appraisal standards and requirements are met. When they are, the review appraiser will give the agency the approved appraisal to use in determining the amount of just compensation to be offered for your real property. This amount will never be less than the fair market value established by the approved appraisal.



If the agency is only acquiring a part of your property, there may be damages or benefits to your remaining property. Any allowable damages or benefits will be reflected in the just compensation amount. The agency will prepare a written offer of just compensation for you when negotiations begin.

Buildings, Structures and Improvements

Sometimes buildings, structures, or other improvements are located on the property to be acquired. If they are real property, the agency must offer to acquire at least an equal interest in them if they must be removed or if the agency determines that the improvements will be adversely affected by the public program or project.

An improvement will be valued as real property regardless of who owns it.

Tenant-Owned Buildings, Structures and Improvements

Sometimes tenants lease real property and build or add improvements for their use. Frequently, they have the right or obligation to remove the improvements at the expiration of the lease term. If, under State law, the improvements are considered to be real property, the agency must make an offer to the tenants to acquire these improvements as real property.

In order to be paid for these improvements, the tenant-owner must assign, transfer, and release to the agency all right, title, and interest in the improvements. Also, the owner of the real property on which the improvements are located must disclaim all interest in the improvements.

For an improvement, just compensation is the amount that the improvement contributes to the fair market value of the whole property, or its value for removal from the property (salvage value), whichever amount is greater.

A tenant-owner can reject payment for the tenant-owned improvements and obtain payment for his or her property interests in accordance with other applicable laws. The agency cannot pay for tenant-owned improvements if such payment would result in the duplication of any other compensation otherwise authorized by law.

If improvements are considered personal property under State law, the tenant-owner may be reimbursed for moving them under the relocation assistance provision.

The agency will personally contact the tenant-owners of improvements to explain the procedures to be followed. Any payments must be in accordance with Federal rules and applicable State laws.

EXCEPTIONS TO THE APPRAISAL REQUIREMENT

The Uniform Act requires that all real property to be acquired must be appraised, but it also authorizes waiving that requirement for low value acquisitions.

Regulations provide that the appraisal may be waived:

- If you elect to donate the property and release the agency from the obligation of performing an appraisal, or
- If the agency believes the acquisition of your property is uncomplicated and a review of available data supports a fair market value likely to be \$10,000 or less, the agency may prepare a waiver valuation, rather than an appraisal, to estimate your fair market value.

If the agency believes the acquisition of your property is uncomplicated and a review of available data supports a fair market value likely to be over \$10,000 but less than \$25,000, the agency may prepare a waiver valuation rather than an appraisal to estimate your fair market value, however, if you elect to have the agency appraise your property, an appraisal will be obtained.

THE WRITTEN OFFER

After the agency approves the just compensation offer they will begin negotiations with you or your designated representative by delivering the written



offer of just compensation for the purchase of the real property. If practical, this offer will be delivered in person by a representative of the agency. Otherwise, the offer will be made by mail and followed up with a contact in person or by telephone. All owners of the property with known addresses will be contacted unless they collectively have designated one person to represent their interests.

An agency representative will explain agency acquisition policies and procedures in writing, either by use of an informational brochure, or in person.

The agency's written offer will consist of a written summary statement that includes all of the following information:

- The amount offered as just compensation.
- The description and location of the property and the interest to be acquired.
- The identification of the buildings and other improvements that are considered to be part of the real property.

The offer may list items of real property that you may retain and remove from the property and their retention values. If you decide to retain any or all of these items, the offer will be reduced by the value of the items retained. You will be responsible for removing the items from the property in a timely manner. The agency may elect to withhold a portion of the remaining offer until the retained items are removed from the property.

Any separately held ownership interests in the property, such as tenant-owned improvements, will be identified by the agency.

The agency may negotiate with each person who holds a separate ownership interest, or, may negotiate with the primary owner and prepare a check payable jointly to all owners.

The agency will give you a reasonable amount of time to consider the written offer and ask questions or seek clarification of anything that is not understood.

If you believe that all relevant material was not considered during the appraisal, you may present such information at this time. Modifications in the proposed terms and conditions of the purchase may be requested. The agency will consider any reasonable requests that are made during negotiations.

Partial Acquisition

Often an agency does not need all the property you own. The agency will usually purchase only what it needs.

If the agency intends to acquire only a portion of the property, the agency must state the amount to be paid for the part to be acquired.

In addition, an amount will be stated separately for damages, if any, to the portion of the property you will keep.

If the agency determines that the remainder property will have little or no value or use to you, the agency will consider this remainder to be an uneconomic remnant and will offer to purchase it. You have the option of accepting the offer for purchase of the uneconomic remnant or keeping the property.

Agreement Between You and the Agency

When you reach agreement with the agency on the offer, you will be asked to sign an option to buy, a purchase agreement, an easement, or some form of deed prepared by the agency. Your signature will affirm that you and the agency are in agreement concerning the acquisition of the property, including terms and conditions.



If you do not reach an agreement with the agency because of some important point connected with the acquisition offer, the agency may suggest mediation as a means of coming to agreement. If the agency thinks that a settlement cannot be reached, it will initiate condemnation proceedings.

The agency may not take any action to force you into accepting its offer. Prohibited actions include:

- Advancing the condemnation process.
- Deferring negotiations.
- Deferring condemnation.
- Delaying the deposit of funds with the court for your use when condemnation is initiated.
- Any other coercive action designed to force an agreement regarding the price to be paid for your property.

ACQUISITIONS WHERE CONDEMNATION WILL NOT BE USED

An agency may not possess the power of eminent domain. Or an agency has the power of eminent domain but elects not to use it for a program or project. If this is the case, you will be informed in writing, before negotiations begin, that the agency will not condemn your property if you and the agency fail to reach agreement. Before making you an offer, the agency will inform you, in writing, of what it believes to be

the fair market value for the property it would like to acquire. An owner, in this situation, is not eligible for relocation assistance benefits.

Tenants on the property may be eligible for relocation benefits.

PAYMENT

The next step in the acquisition process is payment for your property. As soon as all the necessary paperwork is completed for transferring title of the property, the agency will pay any liens that exist against the property and pay your equity to you. Your incidental expenses will also be paid or reimbursed.

Incidental expenses are reasonable expenses incurred as a result of transferring title to the agency, such as:

- Recording fees and transfer taxes.
- Documentary stamps.
- Evidence of title, however, the agency is not required to pay costs required solely to perfect your title or to assure that the title to the real property is entirely without defect.
- Surveys and legal descriptions of the real property.
- Other similar expenses necessary to convey the property to the agency.

Penalty costs and other charges for prepaying any preexisting recorded mortgage entered into in good faith encumbering the real property will be reimbursed.

The pro rata share of any prepaid real property taxes that can be allocated to the period after the agency obtains title to the property or takes possession of it, will be reimbursed.

If possible, the agency will pay these costs directly so that you will not need to pay the costs and then claim reimbursement.

POSSESSION

The agency may not take possession of your property unless:

- You have been paid the agreed purchase price, or
- In the case of condemnation, the agency has deposited with the court an amount for your benefit and use that is at least the amount of the agency's approved appraisal of the fair market value of your property, or
- The agency has paid the amount of the court award of compensation in the condemnation proceeding.



If the agency takes possession while persons still occupy the property:

- All persons occupying the property must receive a written notice to move at least 90 days in advance of the required date to move. In this context, the term person includes residential occupants, homeowners, tenants, businesses, non-profit organizations, and farms.
- An occupant of a residence cannot be required to move until at least 90 days after a comparable replacement dwelling has been made available for occupancy. Only in unusual circumstances, such as when continued occupancy would constitute a substantial danger to the health or safety of the occupants, can vacation of the property be required in less than 90 days.

SETTLEMENT

The agency will make every effort to reach an agreement with you during negotiations. You may provide additional information, and make reasonable counter offers and proposals for the agency to consider.

When it is in the public interest, most agencies use the information provided as a basis for administrative or legal settlements, as appropriate.

CONDEMNATION

If an agreement cannot be reached, the agency can acquire the property by exercising its power of eminent domain. It will do this by instituting formal condemnation proceedings with the appropriate State or Federal court.

If the property is being acquired directly by a Federal agency, the condemnation action will take place in a Federal court and Federal procedures will be followed.

If the property is being acquired by anyone else that has condemnation authority, the condemnation action will take place in State court and the procedures will follow State law.

In many States, a board of viewers or commissioners, or a similar body, will initially determine the amount of compensation you are due for the property. You and the agency will be allowed to present information to the court during these proceedings.

If you or the agency are dissatisfied with the board's determination of compensation, a trial by a judge or a jury may be scheduled. The court will set the final amount of just compensation after it has heard all arguments.

Litigation Expenses

Normally, the agency does not reimburse you for costs you incur as a result of condemnation proceedings. The agency will reimburse you, however, under any of the following conditions:

- The court determines that the agency cannot acquire your property by condemnation.
- The condemnation proceedings are abandoned by the agency without an agreed-upon settlement.
- You initiate an inverse condemnation action and the court agrees with you that the agency has taken your real property rights without the payment of just compensation, or the agency elects to settle the case without further legal action.
- The agency is subject to State laws that require reimbursement for these or other condemnation costs.

The information is provided to assist you in understanding the requirements that must be met by agencies, and your rights and obligations. If you have any questions, contact your agency representative.

Additional information on Federal acquisition requirements, the law and the regulation can be found at www.fhwa.dot.gov/realestate



NOTES



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NOTES



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Uniform Relocation Assistance and Real Property Acquisition
Policies Act of 1970 As Amended, Including 49 Code of Federal
Regulations (CFR) Part 24 dated January 4, 2005.

Office of Real Estate Services 202-566-0142 www.fmvra.dot.gov/real estate



DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

IR

Collection



**CITY OF RICHLAND
PUBLIC WORKS DEPARTMENT**

840 Northgate Drive
P.O. Box 190 MS-26
Telephone (509) 942-7500
Fax (509) 942-7468

PO BOX 190 • RICHLAND, WA 99352 • CI.RICHLAND.WA.US

February 10, 2015

Mr. Scott Keller, Executive Director
Port of Benton
3250 Port of Benton Boulevard
Richland, WA 99354

**RE: CENTER PARKWAY EXTENSION RIGHT-OF-WAY
RIGHT-OF-WAY PLAN SHEET 2 OF 2
PARCEL NO. 6**

Dear Mr. Keller:

The City of Richland and City of Kennewick, acting by and through the Richland Public Works Department, plan to proceed with the above-titled public project. As a part of the project, the Cities need to purchase an easement over your property identified on the "Right-of-Way Plan" by the "parcel number" listed above. The bearer of this letter is the City's acquisition specialist assigned to complete this transaction. A copy of the Right-of-Way Plan is attached.

Your property has been examined by qualified appraisers and appraisal reviewers who have carefully considered all the elements which contribute to the market value of your property. By law, they must disregard any general increase or decrease in value caused by the project itself. The appraisal prepared for this transaction used the accepted "across the fence" methodology in determining the value of the easement necessary for the project. Based upon the market value estimated for your property, the Cities' offer is \$38,500.

RIGHT OF WAY EASEMENT
\$38,500

Closing of our transaction and payment for your property will be made pursuant to the terms of a Purchase and Sale Agreement approved by the Richland City Council. The specific terms of the Purchase and Sale agreement will be negotiated between you and Mr. Pete Rogalsky, the undersigned. Attached you will find a draft copy of a Purchase and Sale Agreement and Right of Way Easement Deed. Mr. Rogalsky will be available to discuss your questions and concerns regarding its terms.

You may wish to employ professional services to evaluate the City's offer. If you do so, we suggest you employ well-qualified evaluators so the resulting evaluation report will be useful to you in deciding whether to accept the Cities' offer. The City of Richland will reimburse up to \$750 of your evaluation costs upon submission of the bill or paid receipt.

If you decide to reject the offer, the Cities, acting in the public interest, will use the right of eminent domain to acquire your property for public use. In conformity with the Washington State Constitution and laws, the Cities will take such action, including the filing of a condemnation suit to obtain a "Court Order of Public Use and Necessity" and a trial will be arranged to determine the just compensation to be paid for the property.

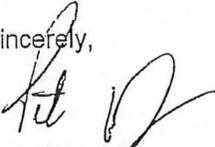
The Internal Revenue Service (IRS) requires the City obtain your correct taxpayer identification number (TIN) or social security number (SSN) to report income paid to you as a result of this real estate transaction. You will be required to complete the attached IRS Form W-9 and provide said form at closing.

If you have personal property presently located on the property being acquired by the Cities that needs to be moved, the City of Richland will reimburse you for the cost of moving it through the Relocation Assistance program.

The Cities have attempted by this letter to provide a concise statement of our offer and summary of your rights. We hope the information will assist you in reaching a decision. Please feel free to direct any questions you may have to me. Once you have reviewed the documents, I will contact you to set up a time to sign and notarize the purchase and sale agreement. I can be reached at (509) 942-7500 and at the progalsky@ci.richland.wa.us.

Thank you.

Sincerely,



Pete Rogalsky
Public Works Director

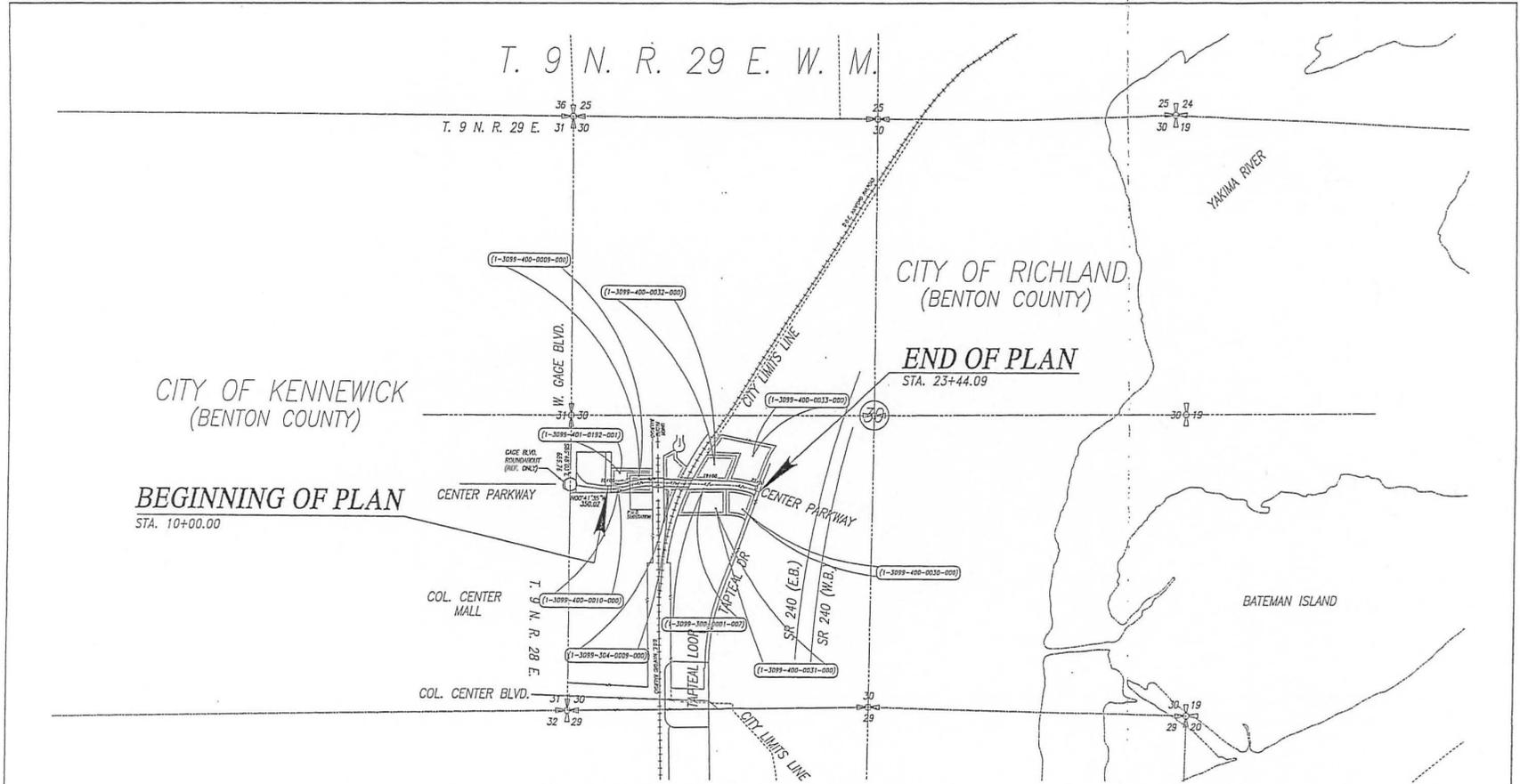
Enclosures: Right of Way Plan
Right of Way Acquisition Agreement
Right of Way Easement Deed
Release of Lease
W-9 Form
Real Estate Acquisition Brochure

c: Mr. Randolph Peterson, Tri-City Railroad
Cary Roe, City of Kennewick
File

Receipt of this letter is hereby acknowledged. I understand that this acknowledgement does not signify my acceptance or rejection of this offer. Please return the attached copy of this letter signed in the attached envelope.

Signature

Date



VICINITY MAP AND TOTAL PARCEL DETAILS



1"=400' (FULL SIZE 22X24)
 1"=800' (FULL SIZE 11X17)

LEGEND	
PROPERTY OWNERSHIP NUMBERS =	(1-3099-400-0000-0000)
PROPERTY LINES =	-----

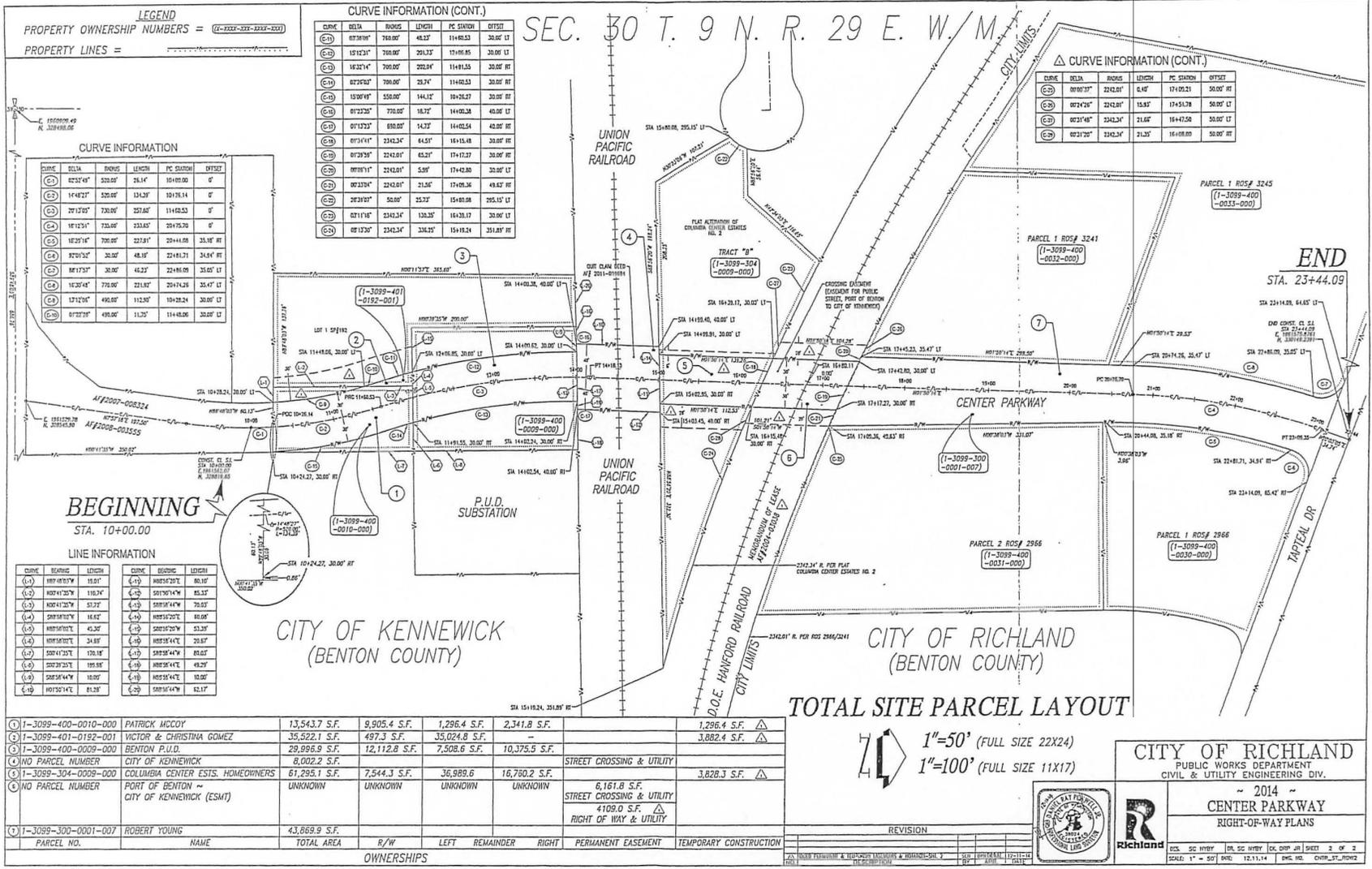
REVISION	
NO.	DESCRIPTION



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

~ 2014 ~
CENTER PARKWAY
 RIGHT-OF-WAY PLANS

DES.	SC. INTY.	DR. SC. INTY.	EX. DRP. DR.	SHEET 1 OF 2
SCALE: 1"=400'	DATE: 12.11.2014	ENG. NO.	ENTR. ST. HWY1	



LEGEND
 PROPERTY OWNERSHIP NUMBERS = (1-3099-400-0010-000)
 PROPERTY LINES =

CURVE INFORMATION (CONT.)

CURVE	BELTA	BACKS	LENGTH	PC STATION	PTST
(C11)	87.389°	760.00'	48.37'	11449.53	30.00' LT
(C12)	151.231°	760.00'	201.33'	13466.85	30.00' LT
(C13)	182.314°	760.00'	202.84'	11491.53	30.00' RT
(C14)	82.750°	760.00'	25.74'	11449.53	30.00' RT
(C15)	150.918°	550.00'	144.12'	10426.27	30.00' RT
(C16)	87.232°	770.00'	18.72'	14402.38	40.00' LT
(C17)	87.172°	850.00'	14.22'	14402.54	40.00' RT
(C18)	87.141°	2342.34'	64.51'	18415.48	30.00' RT
(C19)	87.232°	2342.61'	65.21'	17472.27	30.00' RT
(C20)	88.071°	2342.61'	5.90'	17442.80	30.00' RT
(C21)	88.233°	2342.61'	21.56'	17409.36	40.00' RT
(C22)	28.292°	50.00'	25.57'	15401.08	295.15' LT
(C23)	87.118°	2342.34'	130.25'	18420.17	30.00' LT
(C24)	88.133°	2342.34'	336.25'	15419.24	351.89' RT

CURVE INFORMATION

CURVE	BELTA	BACKS	LENGTH	PC STATION	PTST
(C1)	82.354°	530.00'	26.14'	10409.00	0'
(C2)	144.821°	530.00'	134.33'	10176.14	0'
(C3)	27.127°	730.00'	257.80'	11402.53	0'
(C4)	181.251°	730.00'	253.65'	22479.70	0'
(C5)	182.914°	700.00'	227.81'	22444.88	35.18' RT
(C6)	87.012°	30.00'	48.18'	22481.71	34.54' RT
(C7)	88.173°	30.00'	46.25'	22486.08	35.05' LT
(C8)	182.314°	770.00'	221.81'	20474.28	35.47' LT
(C9)	171.718°	490.00'	112.50'	19428.24	30.00' LT
(C10)	87.232°	490.00'	11.25'	11448.00	30.00' LT

△ CURVE INFORMATION (CONT.)

CURVE	BELTA	BACKS	LENGTH	PC STATION	PTST
(C25)	88.070°	2242.01'	6.45'	17402.21	50.00' RT
(C26)	88.234°	2242.01'	15.87'	17415.78	50.00' LT
(C27)	88.234°	2242.24'	31.67'	16471.50	50.00' LT
(C28)	88.232°	2242.24'	21.25'	16468.00	50.00' RT

BEGINNING
 STA. 10+00.00

LINE INFORMATION

CURVE	BEARING	LENGTH	CURVE	BEARING	LENGTH
(L1)	N89°48'27"W	15.01'	(L11)	N89°16'20"E	80.10'
(L2)	N00°41'30"W	118.24'	(L12)	S81°50'14"W	85.33'
(L3)	N00°41'30"W	51.72'	(L13)	S88°18'44"W	70.03'
(L4)	S89°18'22"E	16.82'	(L14)	N89°16'20"E	80.08'
(L5)	N89°18'22"E	45.20'	(L15)	S89°16'20"W	53.20'
(L6)	N89°18'22"E	34.88'	(L16)	N89°18'47"E	20.67'
(L7)	S00°41'30"E	170.18'	(L17)	S89°38'44"W	81.05'
(L8)	S00°39'25"E	199.58'	(L18)	N89°38'47"E	49.29'
(L9)	S89°58'44"W	180.00'	(L19)	N89°58'47"E	103.00'
(L10)	N01°50'47"E	81.28'	(L20)	S89°58'47"W	82.17'

NO	PARCEL NUMBER	OWNER	TOTAL AREA	R/W	LEFT	REMAINDER	RIGHT	PERMANENT EASEMENT	TEMPORARY CONSTRUCTION
1	1-3099-400-0010-000	PATRICK MCCOY	13,543.7 S.F.						
2	1-3099-401-0192-001	VICTOR & CHRISTINA GOMEZ	35,522.1 S.F.						
3	1-3099-400-0009-000	BENTON P.U.D.	29,898.9 S.F.						
4	NO PARCEL NUMBER	CITY OF KENNEWICK	8,002.2 S.F.						
5	1-3099-304-0009-000	COLUMBIA CENTER ESTS. HOMEOWNERS	61,295.1 S.F.						
6	NO PARCEL NUMBER	PORT OF BENTON ~ CITY OF KENNEWICK (ESMT)	UNKNOWN						
7	1-3099-300-0001-007	ROBERT YOUNG	43,869.9 S.F.						

TOTAL SITE PARCEL LAYOUT

1"=50' (FULL SIZE 22X24)
 1"=100' (FULL SIZE 11X17)

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

2014
 CENTER PARKWAY
 RIGHT-OF-WAY PLANS

REVISION

DATE: 11-11-14
 SCALE: 1" = 50'



Richland
Washington

**CITY OF RICHLAND
PUBLIC WORKS DEPARTMENT**

840 Northgate Drive
P.O. Box 190 MS-26
Telephone (509) 942-7500
Fax (509) 942-7468

PO BOX 190 • RICHLAND, WA 99352 • CI.RICHLAND.WA.US

February 10, 2015

Mr. Randolph Peterson, Manager
Tri-City Railroad Company
10 N. Washington Street
Kennewick, WA 99336

**RE: CENTER PARKWAY EXTENSION RIGHT-OF-WAY
RIGHT-OF-WAY PLAN SHEET 2 OF 2
PARCEL NO. 6**

Dear Mr. Peterson:

The City of Richland and City of Kennewick, acting by and through the Richland Public Works Department, plan to proceed with the above-titled public project. As a part of the project, the Cities need to purchase an easement over the Port of Benton property over which you hold a lease interest. As part of the transaction the City intends to obtain the release of your leasehold interest in the property effected by the easement. The effected property is identified on the "Right-of-Way Plan" by the "parcel number" listed above. The bearer of this letter is the City's acquisition specialist assigned to complete this transaction. A copy of the Right-of-Way Plan is attached.

The property has been examined by qualified appraisers and appraisal reviewers who have carefully considered all the elements which contribute to the market value of the property. By law, they must disregard any general increase or decrease in value caused by the project itself. The appraisal prepared for this transaction used the accepted "across the fence" methodology in determining the value of the easement necessary for the project. Based upon the market value estimated for the property, the Cities' offer is \$38,500 for the easement.

RIGHT OF WAY EASEMENT
\$38,500

Closing of the transaction with the Port of Benton and payment for the property will be made pursuant to the terms of an agreement approved by the Richland City Council. The specific terms of the agreement will be negotiated between the Port and Mr. Pete Rogalsky. A proposed agreement has been provided to the Port and is enclosed for your information. Completion of a transaction to obtain the release of your lease interest will also be made pursuant to the terms of an agreement approved by the Richland City Council and negotiated with Mr. Rogalsky. Attached you will find a standard form release of lease document that can be used to execute the release of lease. The form and content of an agreement enabling execution of the release has not been prepared by the City, but the proposed agreement with the Port may provide many useful provisions for this necessary agreement. Mr. Rogalsky will be available to discuss your questions and concerns regarding its terms.

You may wish to employ professional services to evaluate the City's compensation offer in relation to your lease interest. The City's appraisal evaluated the total value of the effected property without consideration of the different interests of the Port, as owner, and you, as leaseholder. If you employ professional services, we suggest you employ well-qualified evaluators so the resulting evaluation report will be useful to you in deciding whether to accept the Cities' offer. The City of Richland will reimburse up to \$750 of your evaluation costs upon submission of the bill or paid receipt.

If you decide to reject the offer, the Cities, acting in the public interest, will use the right of eminent domain to acquire your property interest for public use. In conformity with the Washington State Constitution and laws, the Cities will take such action, including the filing of a condemnation suit to obtain a "Court Order of Public Use and Necessity" and a trial will be arranged to determine the just compensation to be paid for the property.

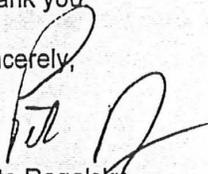
The Internal Revenue Service (IRS) requires the City obtain your correct taxpayer identification number (TIN) or social security number (SSN) to report income paid to you as a result of this real estate transaction. You will be required to complete the attached IRS Form W-9 and provide said form at closing.

If you have personal property presently located on the property being acquired by the Cities that needs to be moved, the City of Richland will reimburse you for the cost of moving it through the Relocation Assistance program.

The Cities have attempted by this letter to provide a concise statement of our offer and summary of your rights. We hope the information will assist you in reaching a decision. Please feel free to direct any questions you may have to me. Once you have reviewed the documents, I will contact you to set up a time to initiate negotiations. In the meantime you may contact me at (509) 942-7500 and at the progalsky@ci.richland.wa.us.

Thank you

Sincerely,



Pete Rogalsky
Public Works Director

Enclosures: Right of Way Plan
Right of Way Acquisition Agreement
Right of Way Easement Deed
Release of Lease
W-9 Form
Real Estate Acquisition Brochure

c: Mr. Scott Keller, Port of Benton
Cary Roe, City of Kennewick

Receipt of this letter is hereby acknowledged. I understand that this acknowledgement does not signify my acceptance or rejection of this offer. Please return the attached copy of this letter signed in the attached envelope.

Signature

Date

RIGHT OF WAY EASEMENT ACQUISITION AGREEMENT

THIS AGREEMENT is entered into this ____ day of _____ 2015 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", with Kennewick and Richland jointly referred to hereafter 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 Richland, Washington, hereafter referred to as the "Port Railroad"; and

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; and

WHEREAS, the Port has leased the Port Railroad to Tri-City Railroad, L.L.C. (hereafter "TCRR"). A copy of this Agreement is attached hereto as Exhibit 2; and

WHEREAS, the Cities intend to complete an extension of Center Parkway, which will be a public street connecting Gage Boulevard within the City of Kennewick with Tapteal Drive in the City of Richland. The Cities wish to extend this street and utilities across the Port Railroad in the location described on the attached Exhibit 3; and

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

WHEREAS, the Washington Utilities and Transportation Commission approved Kennewick's petition in May, 2014; and

WHEREAS, the Cities have entered into an interlocal agreement authorizing Richland to act on behalf of the Cities to complete the Center Parkway project; and

WHEREAS, the Cities have assembled funding from federal, state and local sources to support completion of the Center Parkway project; and

WHEREAS, the Cities must acquire property rights from several property owners to assemble the right-of-way necessary to construct the Center Parkway extension. The Port's railroad right-of-way is one of the properties from which the right-of-way must be assembled; and

WHEREAS, Richland, acting on behalf of the Cities, has completed valuation of the Port's property to determine fair market value and just compensation for the necessary easement, in accordance with federal and state law; and

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.

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 3, allowing the City to construct a public street, including an at-grade railroad crossing for Center Parkway and to extend associated utilities across the Port Railroad within the legal description included in the easement subject to the terms and conditions set forth in this Agreement.

2. Richland shall provide \$38,500 as full and complete compensation for conveyance of the easement. The Port acknowledges and supports the professional valuation completed by the Cities in support of this transaction as an accurate and fair valuation of the conveyed easement.

3. 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.

4. The Cities acknowledge that the Port railroad right-of-way is currently encumbered by the rights of TCRR set forth in the Lease Agreement attached as Exhibit 2. The terms of this Agreement may only be satisfied, and the conveyance of the required easement completed, after the TCRR Lease Agreement encumbrance is cleared from the Property.

5. 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 TCRR for review. The Port and TCRR may, but are not obligated to, review the documents to determine whether the design complies with the provisions of this Section. The Cities shall retain full responsibility for the adequacy of the design and constructed improvements. 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 to 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 TCRR shall not relieve the Cities of this obligation to indemnify the Port and it hold harmless.

6. 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 TCRR or any other qualified contractor to provide for maintenance of the equipment or improvements.

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 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 TCRR or any other qualified contractor 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 when 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 OF BENTON
Executive Director
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 Cities with respect to the subject matter and supersede all prior and contemporaneous agreements or understanding that parties may have, including the 2006 Railroad Crossing Agreement. 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 ____ day of _____, 2015.

CITY OF KENNEWICK

By: _____

Title: _____

Approved as to form:

LISA BEATON,
Kennewick City Attorney

CITY OF RICHLAND

By: _____

Title: _____

Approved as to form:

HEATHER KINTZLEY,
Richland City Attorney

PORT OF BENTON

By: _____

Title: _____

Approved as to form:

SCOTT D. KELLER
Executive Director

Exhibit 1

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

EXHIBIT 1

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: Deann K. Knuter State of Washington, County of

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

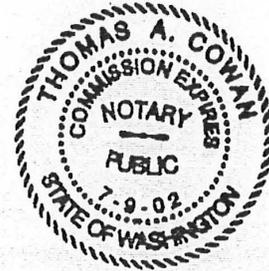


Exhibit 2

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.

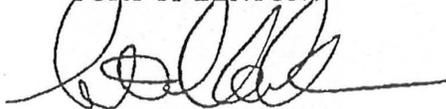
23.10 PARTIAL INVALIDITY. If any provision of this Lease is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

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.

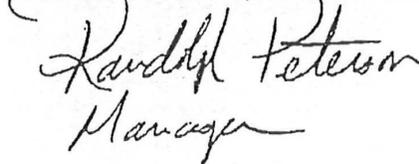
23.12 CONSENT. Whenever the consent or approval of a party to this Lease is required to be given by the terms of this Lease to the other party, such consent or approval shall not be unreasonably withheld or delayed.

DATED this 15th day of April, 2002.

PORT OF BENTON



TRI-CITY RAILROAD COMPANY, L.L.C.



Manager

[Signature]
NOTARY PUBLIC in and for the State of
Washington, residing at *Lasco WA*
My commission expires: *Jan 25, 2003*

Exhibit 3

WHEN RECORDED RETURN TO:

City Surveyor
City of Richland
840 Northgate Dr.
Richland, WA 99352
MS#26

Portion of Parcel: No number assigned by County. (Right-of-way)

Right-of-Way Easement

The Grantor, **PORT of BENTON**, a municipal corporation of the State of Washington, the, for and in consideration of the transfer of interest in a portion of property and other valuable considerations, grants to the **CITY OF RICHLAND**, Washington, a municipal corporation, and the **CITY OF KENNEWICK**, Washington, a municipal corporation, a **right-of-way easement** in, over and under the following described property situated in the County of Benton, State of Washington, 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 within, Port of Benton and Tri-City Railroad right-of-way, 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

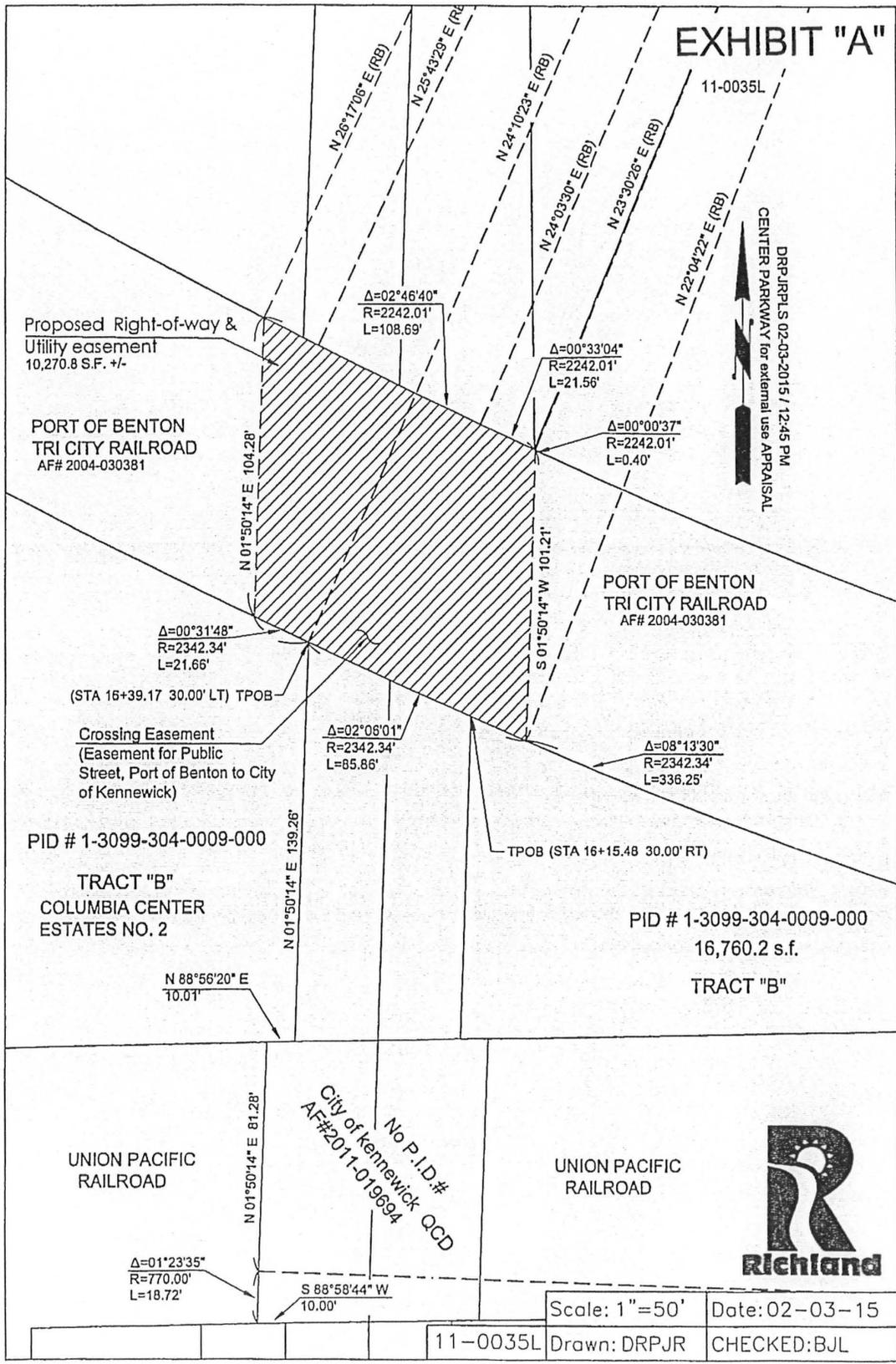
Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly 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 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, and 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; 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 0.40 feet, along the arc of said curve, through a central angle of 00°00'37", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 101.21 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 10,270.8 square feet, more or less, according to the bearings and distances listed above and as depicted on the attached **Exhibit "A"**.

For the purpose of constructing, installing, maintaining, repairing, and operating a **right-of-way, street crossing, above- and below-ground utilities, including an at-grade railroad crossing street surface and warning system**, with full right to go upon said premises at any time, subject to established industry standard railroad safety procedures and coordination protocols, for such purposes, together with the right to trim brush and trees that may interfere with the construction, maintenance and operation of same. This easement does grant the right to permit franchise holder and utility licensees of the City of Richland and the City of Kennewick to place underground utility facilities in this easement.

EXHIBIT "A"



WHEN RECORDED RETURN TO:

City of Richland
City Surveyor
P.O. Box 190 MS-26
Richland, WA 99352

Portion of Parcel: No number assigned by County.

PARTIAL RELEASE OF LEASE

Tri-City Railroad, LLC, being the Lessee, under that certain lease dated **August 1, 2002**, executed by the **Port of Benton**, in **Benton County**, Washington for and in sufficient consideration releases from said lease all right, title and interest in the following described property situated in Benton County, State of Washington:

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

and the beginning of a 2242.01 foot radius non-tangent curve, concave to the Northeast, and 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; 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 0.40 feet, along the arc of said curve, through a central angle of 00°00'37", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 101.21 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 10,270.8 square feet, more or less, according to the bearings and distances listed above and as depicted on the attached **Exhibit "A"**.

This release shall not be construed to in any manner discharge, release or impair the effect of said lease upon any property other than the property specifically described herein.

PARTIAL RELEASE OF LEASE

LESSEE:

_____ Date

Accepted & Acknowledged
LESSOR:

_____ Date

STATE OF WASHINGTON)
 : SS
COUNTY OF BENTON)

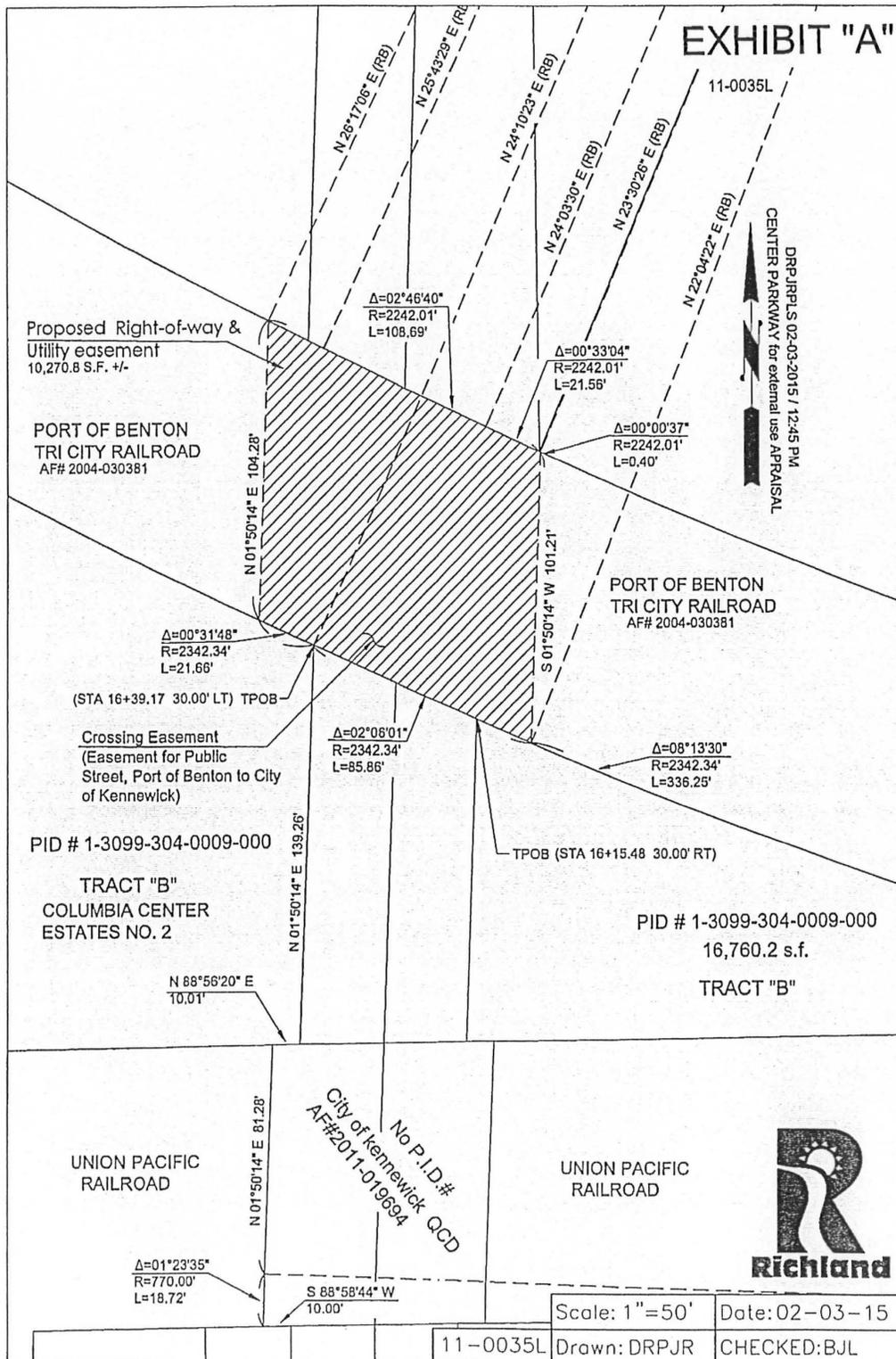
On this ___ day of _____ 2014, before me, the undersigned, a Notary Public in and for the State of Washington, personally appeared, _____ an authorized representative for **Tri-City Railroad**, and that he/she executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed for the uses and purposes therein mentioned, and on oath state that he/she are authorized to execute the said instrument.

Witness my hand and official seal hereto affixed the day and year first above written.

Sign Name:

Notary Public in and for the State of
Washington; residing at _____
My appointment expires _____

Print Name:



WHEN RECORDED RETURN TO:

City Surveyor
City of Richland
840 Northgate Dr.
Richland, WA 99352
MS#26

Portion of Parcel: No number assigned by County. (Right-of-way)

Right-of-Way Easement

The Grantor, **PORT of BENTON**, a municipal corporation of the State of Washington, the, for and in consideration of the transfer of interest in a portion of property and other valuable considerations, grants to the **CITY OF RICHLAND**, Washington, a municipal corporation, and the **CITY OF KENNEWICK**, Washington, a municipal corporation, a **right-of-way easement** in, over and under the following described property situated in the County of Benton, State of Washington, described as follows:

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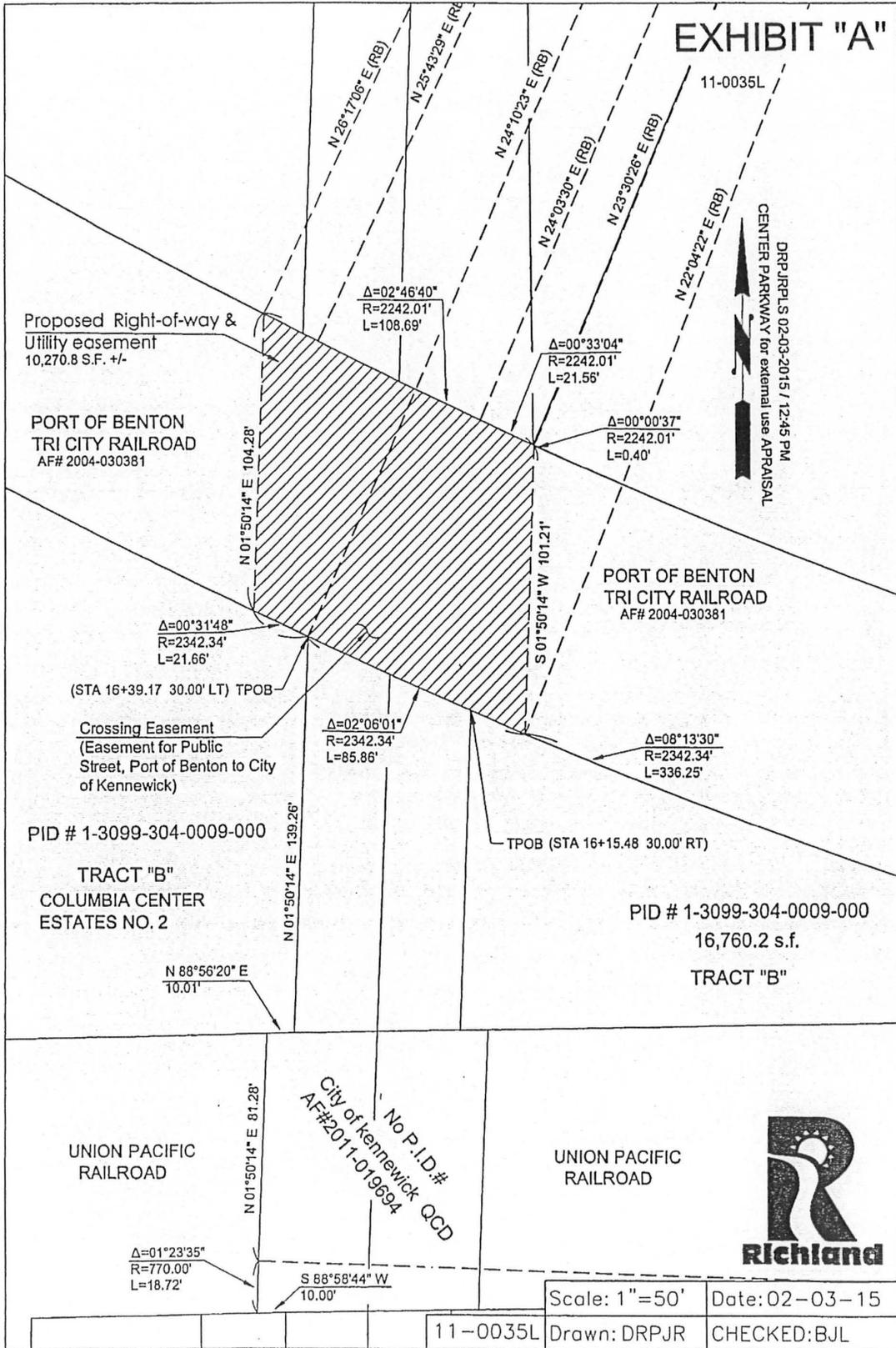
Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly 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 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, and 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; 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 0.40 feet, along the arc of said curve, through a central angle of 00°00'37", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 101.21 feet leaving said

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EXHIBIT "A"



In the cases below, the following person must give Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States:

- In the case of a disregarded entity with a U.S. owner, the U.S. owner of the disregarded entity and not the entity,
- In the case of a grantor trust with a U.S. grantor or other U.S. owner, generally, the U.S. grantor or other U.S. owner of the grantor trust and not the trust, and
- In the case of a U.S. trust (other than a grantor trust), the U.S. trust (other than a grantor trust) and not the beneficiaries of the trust.

Foreign person. If you are a foreign person or the U.S. branch of a foreign bank that has elected to be treated as a U.S. person, do not use Form W-9. Instead, use the appropriate Form W-8 or Form 8233 (see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities).

Nonresident alien who becomes a resident alien. Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the payee has otherwise become a U.S. resident alien for tax purposes.

If you are a U.S. resident alien who is relying on an exception contained in the saving clause of a tax treaty to claim an exemption from U.S. tax on certain types of income, you must attach a statement to Form W-9 that specifies the following five items:

1. The treaty country. Generally, this must be the same treaty under which you claimed exemption from tax as a nonresident alien.
2. The treaty article addressing the income.
3. The article number (or location) in the tax treaty that contains the saving clause and its exceptions.
4. The type and amount of income that qualifies for the exemption from tax.
5. Sufficient facts to justify the exemption from tax under the terms of the treaty article.

Example. Article 20 of the U.S.-China income tax treaty allows an exemption from tax for scholarship income received by a Chinese student temporarily present in the United States. Under U.S. law, this student will become a resident alien for tax purposes if his or her stay in the United States exceeds 5 calendar years. However, paragraph 2 of the first Protocol to the U.S.-China treaty (dated April 30, 1984) allows the provisions of Article 20 to continue to apply even after the Chinese student becomes a resident alien of the United States. A Chinese student who qualifies for this exception (under paragraph 2 of the first protocol) and is relying on this exception to claim an exemption from tax on his or her scholarship or fellowship income would attach to Form W-9 a statement that includes the information described above to support that exemption.

If you are a nonresident alien or a foreign entity, give the requester the appropriate completed Form W-8 or Form 8233.

What is backup withholding? Persons making certain payments to you must under certain conditions withhold and pay to the IRS a percentage of such payments. This is called "backup withholding." Payments that may be subject to backup withholding include interest, tax-exempt interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee pay, payments made in settlement of payment card and third party network transactions, and certain payments from fishing boat operators. Real estate transactions are not subject to backup withholding.

You will not be subject to backup withholding on payments you receive if you give the requester your correct TIN, make the proper certifications, and report all your taxable interest and dividends on your tax return.

Payments you receive will be subject to backup withholding if:

1. You do not furnish your TIN to the requester,
2. You do not certify your TIN when required (see the Part II Instructions on page 3 for details),
3. The IRS tells the requester that you furnished an incorrect TIN,
4. The IRS tells you that you are subject to backup withholding because you did not report all your interest and dividends on your tax return (for reportable interest and dividends only), or
5. You do not certify to the requester that you are not subject to backup withholding under 4 above (for reportable interest and dividend accounts opened after 1983 only).

Certain payees and payments are exempt from backup withholding. See *Exempt payee code* on page 3 and the separate Instructions for the Requester of Form W-9 for more information.

Also see *Special rules for partnerships* on page 1.

What is FATCA reporting? The Foreign Account Tax Compliance Act (FATCA) requires a participating foreign financial institution to report all United States account holders that are specified United States persons. Certain payees are exempt from FATCA reporting. See *Exemption from FATCA reporting code* on page 3 and the Instructions for the Requester of Form W-9 for more information.

Updating Your Information

You must provide updated information to any person to whom you claimed to be an exempt payee if you are no longer an exempt payee and anticipate receiving reportable payments in the future from this person. For example, you may need to provide updated information if you are a C corporation that elects to be an S corporation, or if you no longer are tax exempt. In addition, you must furnish a new Form W-9 if the name or TIN changes for the account, for example, if the grantor of a grantor trust dies.

Penalties

Failure to furnish TIN. If you fail to furnish your correct TIN to a requester, you are subject to a penalty of \$50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

Civil penalty for false information with respect to withholding. If you make a false statement with no reasonable basis that results in no backup withholding, you are subject to a \$500 penalty.

Criminal penalty for falsifying information. Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment.

Misuse of TINs. If the requester discloses or uses TINs in violation of federal law, the requester may be subject to civil and criminal penalties.

Specific Instructions

Name

If you are an individual, you must generally enter the name shown on your income tax return. However, if you have changed your last name, for instance, due to marriage without informing the Social Security Administration of the name change, enter your first name, the last name shown on your social security card, and your new last name.

If the account is in joint names, list first, and then circle, the name of the person or entity whose number you entered in Part I of the form.

Sole proprietor. Enter your individual name as shown on your income tax return on the "Name" line. You may enter your business, trade, or "doing business as (DBA)" name on the "Business name/disregarded entity name" line.

Partnership, C Corporation, or S Corporation. Enter the entity's name on the "Name" line and any business, trade, or "doing business as (DBA) name" on the "Business name/disregarded entity name" line.

Disregarded entity. For U.S. federal tax purposes, an entity that is disregarded as an entity separate from its owner is treated as a "disregarded entity." See Regulation section 301.7701-2(c)(2)(iii). Enter the owner's name on the "Name" line. The name of the entity entered on the "Name" line should never be a disregarded entity. The name on the "Name" line must be the name shown on the income tax return on which the income should be reported. For example, if a foreign LLC that is treated as a disregarded entity for U.S. federal tax purposes has a single owner that is a U.S. person, the U.S. owner's name is required to be provided on the "Name" line. If the direct owner of the entity is also a disregarded entity, enter the first owner that is not disregarded for federal tax purposes. Enter the disregarded entity's name on the "Business name/disregarded entity name" line. If the owner of the disregarded entity is a foreign person, the owner must complete an appropriate Form W-8 instead of a Form W-9. This is the case even if the foreign person has a U.S. TIN.

Note. Check the appropriate box for the U.S. federal tax classification of the person whose name is entered on the "Name" line (individual/sole proprietor, Partnership, C Corporation, S Corporation, Trust/estate).

Limited Liability Company (LLC). If the person identified on the "Name" line is an LLC, check the "Limited liability company" box only and enter the appropriate code for the U.S. federal tax classification in the space provided. If you are an LLC that is treated as a partnership for U.S. federal tax purposes, enter "P" for partnership. If you are an LLC that has filed a Form 8832 or a Form 2553 to be taxed as a corporation, enter "C" for C corporation or "S" for S corporation, as appropriate. If you are an LLC that is disregarded as an entity separate from its owner under Regulation section 301.7701-3 (except for employment and excise tax), do not check the LLC box unless the owner of the LLC (required to be identified on the "Name" line) is another LLC that is not disregarded for U.S. federal tax purposes. If the LLC is disregarded as an entity separate from its owner, enter the appropriate tax classification of the owner identified on the "Name" line.

Other entities. Enter your business name as shown on required U.S. federal tax documents on the "Name" line. This name should match the name shown on the charter or other legal document creating the entity. You may enter any business, trade, or DBA name on the "Business name/disregarded entity name" line.

Exemptions

If you are exempt from backup withholding and/or FATCA reporting, enter in the *Exemptions* box, any code(s) that may apply to you. See *Exempt payee code* and *Exemption from FATCA reporting code* on page 3.

Exempt payee code. Generally, individuals (including sole proprietors) are not exempt from backup withholding. Corporations are exempt from backup withholding for certain payments, such as interest and dividends. Corporations are not exempt from backup withholding for payments made in settlement of payment card or third party network transactions.

Note. If you are exempt from backup withholding, you should still complete this form to avoid possible erroneous backup withholding.

The following codes identify payees that are exempt from backup withholding:

- 1—An organization exempt from tax under section 501(a), any IRA, or a custodial account under section 403(b)(7) if the account satisfies the requirements of section 401(f)(2)
- 2—The United States or any of its agencies or instrumentalities
- 3—A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities
- 4—A foreign government or any of its political subdivisions, agencies, or instrumentalities
- 5—A corporation
- 6—A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States
- 7—A futures commission merchant registered with the Commodity Futures Trading Commission
- 8—A real estate investment trust
- 9—An entity registered at all times during the tax year under the Investment Company Act of 1940
- 10—A common trust fund operated by a bank under section 584(a)
- 11—A financial institution
- 12—A middleman known in the investment community as a nominee or custodian
- 13—A trust exempt from tax under section 664 or described in section 4947

The following chart shows types of payments that may be exempt from backup withholding. The chart applies to the exempt payees listed above, 1 through 13.

IF the payment is for . . .	THEN the payment is exempt for . . .
Interest and dividend payments	All exempt payees except for 7
Broker transactions	Exempt payees 1 through 4 and 6 through 11 and all C corporations. S corporations must not enter an exempt payee code because they are exempt only for sales of noncovered securities acquired prior to 2012.
Barter exchange transactions and patronage dividends	Exempt payees 1 through 4
Payments over \$600 required to be reported and direct sales over \$5,000 ¹	Generally, exempt payees 1 through 5 ²
Payments made in settlement of payment card or third party network transactions	Exempt payees 1 through 4

¹ See Form 1099-MISC, Miscellaneous Income, and its instructions.

² However, the following payments made to a corporation and reportable on Form 1099-MISC are not exempt from backup withholding: medical and health care payments, attorneys' fees, gross proceeds paid to an attorney, and payments for services paid by a federal executive agency.

Exemption from FATCA reporting code. The following codes identify payees that are exempt from reporting under FATCA. These codes apply to persons submitting this form for accounts maintained outside of the United States by certain foreign financial institutions. Therefore, if you are only submitting this form for an account you hold in the United States, you may leave this field blank. Consult with the person requesting this form if you are uncertain if the financial institution is subject to these requirements.

- A—An organization exempt from tax under section 501(a) or any individual retirement plan as defined in section 7701(a)(37)
- B—The United States or any of its agencies or instrumentalities
- C—A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities
- D—A corporation the stock of which is regularly traded on one or more established securities markets, as described in Reg. section 1.1472-1(c)(1)(i)
- E—A corporation that is a member of the same expanded affiliated group as a corporation described in Reg. section 1.1472-1(c)(1)(i)
- F—A dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any state

- G—A real estate investment trust
- H—A regulated investment company as defined in section 851 or an entity registered at all times during the tax year under the Investment Company Act of 1940
- I—A common trust fund as defined in section 584(a)
- J—A bank as defined in section 581
- K—A broker
- L—A trust exempt from tax under section 664 or described in section 4947(a)(1)
- M—A tax exempt trust under a section 403(b) plan or section 457(g) plan

Part I. Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. If you are a resident alien and you do not have and are not eligible to get an SSN, your TIN is your IRS individual taxpayer identification number (ITIN). Enter it in the social security number box. If you do not have an ITIN, see *How to get a TIN* below.

If you are a sole proprietor and you have an EIN, you may enter either your SSN or EIN. However, the IRS prefers that you use your SSN.

If you are a single-member LLC that is disregarded as an entity separate from its owner (see *Limited Liability Company (LLC)* on page 2), enter the owner's SSN (or EIN, if the owner has one). Do not enter the disregarded entity's EIN. If the LLC is classified as a corporation or partnership, enter the entity's EIN.

Note. See the chart on page 4 for further clarification of name and TIN combinations.

How to get a TIN. If you do not have a TIN, apply for one immediately. To apply for an SSN, get Form SS-5, Application for a Social Security Card, from your local Social Security Administration office or get this form online at www.ssa.gov. You may also get this form by calling 1-800-772-1213. Use Form W-7, Application for IRS Individual Taxpayer Identification Number, to apply for an ITIN, or Form SS-4, Application for Employer Identification Number, to apply for an EIN. You can apply for an EIN online by accessing the IRS website at www.irs.gov/businesses and clicking on Employer Identification Number (EIN) under Starting a Business. You can get Forms W-7 and SS-4 from the IRS by visiting IRS.gov or by calling 1-800-TAX-FORM (1-800-829-3676).

If you are asked to complete Form W-9 but do not have a TIN, apply for a TIN and write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester. For interest and dividend payments, and certain payments made with respect to readily tradable instruments, generally you will have 60 days to get a TIN and give it to the requester before you are subject to backup withholding on payments. The 60-day rule does not apply to other types of payments. You will be subject to backup withholding on all such payments until you provide your TIN to the requester.

Note. Entering "Applied For" means that you have already applied for a TIN or that you intend to apply for one soon.

Caution: A disregarded U.S. entity that has a foreign owner must use the appropriate Form W-8.

Part II. Certification

To establish to the withholding agent that you are a U.S. person, or resident alien, sign Form W-9. You may be requested to sign by the withholding agent even if items 1, 4, or 5 below indicate otherwise.

For a joint account, only the person whose TIN is shown in Part I should sign (when required). In the case of a disregarded entity, the person identified on the "Name" line must sign. Exempt payees, see *Exempt payee code* earlier.

Signature requirements. Complete the certification as indicated in items 1 through 5 below.

1. **Interest, dividend, and barter exchange accounts opened before 1984 and broker accounts considered active during 1983.** You must give your correct TIN, but you do not have to sign the certification.
2. **Interest, dividend, broker, and barter exchange accounts opened after 1983 and broker accounts considered inactive during 1983.** You must sign the certification or backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item 2 in the certification before signing the form.
3. **Real estate transactions.** You must sign the certification. You may cross out item 2 of the certification.
4. **Other payments.** You must give your correct TIN, but you do not have to sign the certification unless you have been notified that you have previously given an incorrect TIN. "Other payments" include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services (including payments to corporations), payments to a nonemployee for services, payments made in settlement of payment card and third party network transactions, payments to certain fishing boat crew members and fishermen, and gross proceeds paid to attorneys (including payments to corporations).
5. **Mortgage interest paid by you, acquisition or abandonment of secured property, cancellation of debt, qualified tuition program payments (under section 529), IRA, Coverdell ESA, Archer MSA or HSA contributions or distributions, and pension distributions.** You must give your correct TIN, but you do not have to sign the certification.

What Name and Number To Give the Requester

For this type of account:	Give name and SSN of:
1. Individual	The individual
2. Two or more individuals (joint account)	The actual owner of the account or, if combined funds, the first individual on the account ¹
3. Custodian account of a minor (Uniform Gift to Minors Act)	The minor ²
4. a. The usual revocable savings trust (grantor is also trustee) b. So-called trust account that is not a legal or valid trust under state law	The grantor-trustee ¹ The actual owner ¹
5. Sole proprietorship or disregarded entity owned by an individual	The owner ³
6. Grantor trust filing under Optional Form 1099 Filing Method 1 (see Regulation section 1.671-4(b)(2)(i)(A))	The grantor ⁴
For this type of account:	Give name and EIN of:
7. Disregarded entity not owned by an individual	The owner
8. A valid trust, estate, or pension trust	Legal entity ⁴
9. Corporation or LLC electing corporate status on Form 8832 or Form 2553	The corporation
10. Association, club, religious, charitable, educational, or other tax-exempt organization	The organization
11. Partnership or multi-member LLC	The partnership
12. A broker or registered nominee	The broker or nominee
13. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program payments	The public entity
14. Grantor trust filing under the Form 1041 Filing Method or the Optional Form 1099 Filing Method 2 (see Regulation section 1.671-4(b)(2)(i)(B))	The trust

¹ List first and circle the name of the person whose number you furnish. If only one person on a joint account has an SSN, that person's number must be furnished.

² Circle the minor's name and furnish the minor's SSN.

³ You must show your individual name and you may also enter your business or "DBA" name on the "Business name/disregarded entity" name line. You may use either your SSN or EIN (if you have one), but the IRS encourages you to use your SSN.

⁴ List first and circle the name of the trust, estate, or pension trust. (Do not furnish the TIN of the personal representative or trustee unless the legal entity itself is not designated in the account title.) Also see *Special rules for partnerships* on page 1.

*Note. Grantor also must provide a Form W-9 to trustee of trust.

Note. If no name is circled when more than one name is listed, the number will be considered to be that of the first name listed.

Secure Your Tax Records from Identity Theft

Identity theft occurs when someone uses your personal information such as your name, social security number (SSN), or other identifying information, without your permission, to commit fraud or other crimes. An identity thief may use your SSN to get a job or may file a tax return using your SSN to receive a refund.

To reduce your risk:

- Protect your SSN,
- Ensure your employer is protecting your SSN, and
- Be careful when choosing a tax preparer.

If your tax records are affected by identity theft and you receive a notice from the IRS, respond right away to the name and phone number printed on the IRS notice or letter.

If your tax records are not currently affected by identity theft but you think you are at risk due to a lost or stolen purse or wallet, questionable credit card activity or credit report, contact the IRS Identity Theft Hotline at 1-800-908-4490 or submit Form 14039.

For more information, see Publication 4535, Identity Theft Prevention and Victim Assistance.

Victims of identity theft who are experiencing economic harm or a system problem, or are seeking help in resolving tax problems that have not been resolved through normal channels, may be eligible for Taxpayer Advocate Service (TAS) assistance. You can reach TAS by calling the TAS toll-free case intake line at 1-877-777-4778 or TTY/TDD 1-800-829-4059.

Protect yourself from suspicious emails or phishing schemes. Phishing is the creation and use of email and websites designed to mimic legitimate business emails and websites. The most common act is sending an email to a user falsely claiming to be an established legitimate enterprise in an attempt to scam the user into surrendering private information that will be used for identity theft.

The IRS does not initiate contacts with taxpayers via emails. Also, the IRS does not request personal detailed information through email or ask taxpayers for the PIN numbers, passwords, or similar secret access information for their credit card, bank, or other financial accounts.

If you receive an unsolicited email claiming to be from the IRS, forward this message to phishing@irs.gov. You may also report misuse of the IRS name, logo, or other IRS property to the Treasury Inspector General for Tax Administration at 1-800-366-4484. You can forward suspicious emails to the Federal Trade Commission at: spam@uce.gov or contact them at www.ftc.gov/idtheft or 1-877-IDTHEFT (1-877-438-4338).

Visit IRS.gov to learn more about identity theft and how to reduce your risk.

Privacy Act Notice

Section 6109 of the Internal Revenue Code requires you to provide your correct TIN to persons (including federal agencies) who are required to file information returns with the IRS to report interest, dividends, or certain other income paid to you; mortgage interest you paid; the acquisition or abandonment of secured property; the cancellation of debt; or contributions you made to an IRA, Archer MSA, or HSA. The person collecting this form uses the information on the form to file information returns with the IRS, reporting the above information. Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for use in administering their laws. The information also may be disclosed to other countries under a treaty, to federal and state agencies to enforce civil and criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. You must provide your TIN whether or not you are required to file a tax return. Under section 3406, payers must generally withhold a percentage of taxable interest, dividend, and certain other payments to a payee who does not give a TIN to the payer. Certain penalties may also apply for providing false or fraudulent information.