



229467
229468
229469
600 University Street, Suite 3600
Seattle, Washington 98101
main 206.624.0900
fax 206.386.7500
www.stoel.com

May 6, 2011

MATTHEW COHEN
Direct (206) 386-7569
mcohen@stoel.com

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**ENTERED
Office of Proceedings**

MAY 06 2011

**Part of
Public Record**

Re: GNP Rly, Inc. Petition for Exemption, STB Finance Docket No. 35407;

**GNP Rly, Inc. Petition to Vacate NITU or Abandonment, STB Docket Nos. AB-6
(Sub. No. 463X) and AB-6 (Sub. No. 465X)**

Dear Ms. Brown:

Please find enclosed:

1. Motion of the City of Redmond, Washington for Leave to File a Reply to GNP Rly's Motion to Strike or Reject or in the Alternative for Leave to Reply;
2. The City of Redmond's Reply to GNP Railway Motion to Strike or Reject or in the Alternative for Leave to Reply;
3. Verified Statement of Carolyn J. Hope in Opposition to GNP's Motion to Strike or Reject or in the Alternative for Leave to Reply with exhibits thereto.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Matthew Cohen".

Matthew Cohen
Counsel for City of Redmond, Washington

cc: Parties of Record
70684036.1 0058059-00001

**Case Title: GNP RLY, INC.--ACQUISITION AND OPERATION
EXEMPTION--REDMOND SPUR AND WOODINVILLE SUBDIVISION
Docket No. 35407 and
STB Docket Nos. AB-6 (Sub No. 463X and Sub No. 465X)
CERTIFICATE OF SERVICE**

<u>Filed By</u>	<u>Address</u>	<u>Email</u>	<u>Filed For</u>
1. Matthew Cohen	Stoel Rives Llp 600 University Street, Suite 3600 Seattle, WA 98101 Tel: 206-386-7569 Fax: 206-386-7500	Mcohen@Stoel.Com	City Of Redmond WA
2. Hunter Ferguson	Stoel Rives Llp 600 University Street, Suite 3600 Seattle, WA 98101 Tel: 206-386-7514	Hoferguson@Stoel.Com	
3. Charles A. Spitulnik W. Eric Pilsk Allison I. Fultz	Kaplan Kirsch & Rockwell Llp 1001 Connecticut Avenue, Nw. Suite 800 Washington, DC 20036 Tel: (202) 955-5600	csputulnik@kaplankirsch.com epilsk@kaplankirsch.com afultz@kaplankirsch.com	King County, WA
4. Pete Ramels, Andrew Marcuse	Office of the Prosecuting Attorney Civil Division W400 King County Courthouse 516 Third Avenue Seattle, WA 98104 Tel:	pete.ramels@kingcounty.gov andrew.marcuse@kingcounty.gov	King County
5. John D. Heffner James H. M. Savage	Law Offices 1750 K Street, N.W., Suite 350 Washington, DC 20006 Tel: 202-296-3333 Fax: 202-296-3939	j.heffner@verizon.net jsavagelaw@aim.com	Gnp Rly Inc.
6. Denis Law	City Of Renton 1055 S Grady Way Renton, WA 98057 Tel: 425-430-6500	by U. S. Mail	City Of Renton
7. Lawrence J. Warren	City of Renton PO Box 626 Renton, WA 98057 Tel: 425-430-6480	lwarren@rentonwa.gov	City of Renton
8. Isabel Safora Anne DeKoster	Port Of Seattle P. O. Box 1209 Seattle, WA 98111	safora.i@portseattle.org dekoster.a@portseattle.org	Port Of Seattle
9. Kevin Sheys	K&L Gates LLP 1601 K Street NW Washington, DC 20006 Tel: 202-778-9855 Fax: 202-778-9100	kevin.sheys@klgates.com	Port Of Seattle
10. Steve Sarkozy	City Of Bellevue P.O. Box 90012 Bellevue, WA 98009 Tel:	by U. S. Mail	City Of Bellevue
11. Kurt Triplett	City Of Kirkland 125 5Th Ave Kirkland, WA 98033 Tel:	by U. S. Mail	City Of Kirkland

12 David T. Ralston, Jr.	Foley & Lardner Llp 3000 K Street, N.W., Suite 500 Washington, DC 20007-5143 Tel: (202) 672-5300 Fax: (202) 672-5399	Dralston@Foley.Com	Central Puget Sound Regional Transit Authority
13 Davit T. Rankin Kristy D. Clark	BNSF Railway PO Box 961039 Forth Worth, TX 76131-2828	david.rankin@bnsf.com kristy.clark@bnsf.com	BNSF
14 Karl Morell	Ball Janik LLP 655 Fifteenth Street NW, Suite 225 Washington, DC 2005 Tel: 202-638-3307 Fax: 202-783-6947	kmorell@balljanik.com	BNSF Railway Co
15 Jordan Wagner	401 S. Jackson St. Seattle, WA 98104	jordan.wagner@soundtransit.org	Sound Transit
16 Andrea C. Ferster	Rails-To-Rails Trails Conservancy 2121 Ward Court, N.W., 5th Floor Washington, DC 20037	afferster@railstotrails.org	Rails-To-Rails Trails Conservancy
17 Jean M. Cerar	Issaquah Valley Trolley PO Box 695 Issaquah, WA 98027	info@issaquahhistory.org	Issaquah Valley Trolley
18 Mike Bates	Woodinville Lumber, Inc. 15900 Woodinville-Redmond Road NE Woodinville, WA 98072 Tel: 425-488-1818 Fax: 425-488-7409	by U. S. Mail	Woodinville Lumber, Inc.
19 Kathy Cox	Marketing Philharmonic 218 Main Street #668 Kirkland, WA 98033 Tel: 425-822-3925	by U. S. Mail	Marketing Philharmonic
20 Don Davis	Master Builders Association of King & Snohomish Counties 335 - 116th Avenue SE Bellevue, WA 98004 Tel: 425-451-7920 Fax: 425-646-5985	by U. S. Mail	Master Builders Association of King & Snohomish Counties
21 Dean Kattler	Waste Management of Washington, Inc. 13225 NE 126th Place Kirkland, WA 98034 Tel: 425-823-6164 Fax: 425-814-7866	by U. S. Mail	Waste Management, Inc.
22 Ernest F. Wilson	17509 NE 38th Court Redmond, WA 98052 Tel: 425-869-8899	ewilson@spiretech.com	Ernest F. Wilson
23 Paul Zimmer	Eastside Rail Now PO Box 3524 Bellevue, WA 98009 Tel: 425-646-8517	pzimmer@eastsiderailnow.org	Eastside Rail Now

I certify that I have sent to the parties of record as set forth above & obtained from the STB website, via email/pdf and/or via U. S. Mail the following: (1) Cover letter of May 6, 2011, from Matthew Cohen to Cynthia T. Brown; (2) Motion of the City of Redmond, Washington for Leave to File a Reply to GNP Rly's Motion to Strike or Reject or in the Alternative for Leave to Reply; (3) The City of Redmond's Reply to GNP Railway Motion to Strike or Reject or in the Alternative for Leave to Reply; (4) Verified Statement of Carolyn J. Hope in Opposition to GNP's Motion to Strike or Reject or in the Alternative for Leave to Reply with exhibits thereto.

Dated: Friday, May 06, 2011


Teresa Bitseff, Legal Secretary
STOEL RIVES LLP
600 University St., Ste 3600
Seattle, WA 98101

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 463X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**MOTION OF THE CITY OF REDMOND, WASHINGTON FOR LEAVE TO FILE A
REPLY TO GNP RLY'S MOTION TO STRIKE OR REJECT OR IN THE
ALTERNATIVE FOR LEAVE TO REPLY**

Communications with respect to this pleading should be addressed to:

Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 386-7569 (tel)
(206) 386-7500 (fax)
mcohen@stoel.com
hoferguson@stoel.com

*Attorneys for the City of Redmond,
Washington*

Dated: May 6, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 463X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**MOTION OF THE CITY OF REDMOND, WASHINGTON FOR LEAVE TO FILE A
REPLY TO GNP RLY’S MOTION TO STRIKE OR REJECT OR IN THE
ALTERNATIVE FOR LEAVE TO REPLY**

The City of Redmond, Washington (“Redmond”), hereby moves the Board for leave to file a reply to GNP Railway’s Motion To Strike Or Reject Or In The Alternative For Leave To Reply, filed in this proceeding on April 28, 2011 (“GNP Motion”). Redmond’s proposed Reply is attached to this motion. Although captioned as a “Reply,” GNP’s filing seeks affirmative relief against Redmond and is more correctly considered a motion for a preliminary injunction, to which Redmond, as a party, is entitled to reply under Board procedures. Because the Board

has ordered that no further papers be filed in this proceeding without leave Redmond files this motion.

As a general matter, the Board permits parties to a proceeding to make an otherwise impermissible filing when it “provides a more complete record, clarifies the arguments, will not prejudice any party, and does not unduly prolong the proceeding. It is within the Board’s discretion to permit otherwise impermissible filings . . .” *BNSF Rly. Co. – Abandonment Exemption – In Kootenai County, ID*, STB Docket No. AB-6 (Sub-No. 468X), slip op. at 1 (served Nov. 27, 2009).

If the Board considers GNP’s request for injunctive relief, the Board should accept and consider Redmond’s proposed reply, so that Redmond has an opportunity to address GNP’s contentions and the Board has a record upon which to consider GNP’s claimed grounds for relief.

Respectfully submitted,



Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 386-7569 (tel)
(206) 386-7500 (fax)
mcohen@stoel.com
hoferguson@stoel.com

Attorneys for the City of Redmond, Washington

Dated: May 6, 2011

70683263.2 0058059-00001

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 35407
GNP RLY INC.
—ACQUISITION AND EXEMPTION—
REDMOND SPUR AND WOODINVILLE SUBDIVISION**

**STB DOCKET NO. AB-6 (SUB. NO. 463X)
BNSF RAILWAY COMPANY
—ABANDONMENT EXEMPTION—
IN KING COUNTY, WA**

**STB DOCKET NO. AB-6 (SUB. NO. 465X)
BNSF RAILWAY COMPANY
—ABANDONMENT EXEMPTION—
IN KING COUNTY, WA**

**THE CITY OF REDMOND'S
REPLY TO GNP RAILWAY MOTION TO STRIKE OR REJECT OR IN THE
ALTERNATIVE FOR LEAVE TO REPLY**

On April 13 the City of Redmond notified the Board and the parties that in July 2011 the City intends to salvage 1.1 miles of trackage on the railbanked Redmond Spur to accommodate construction of a stormwater trunk line.¹ On April 28 GNP Railway filed a pleading styled, “Motion To Strike Or Reject Or In the Alternative For Leave To Reply.” While this pleading

¹ Letter of Apr. 13, 2011 from Hunter Ferguson to Cynthia T. Brown (filed Apr. 13, 2011) (“Redmond’s Apr. 13 Letter”). Since filing the April 13 letter the City has reduced to 0.7 miles the length of track to be salvaged this summer. *See* note 11 *infra*.

asserts a litany of grievances, the ultimate relief requested by GNP is a preliminary injunction barring Redmond from salvaging the trackage on a railbanked right of way that Redmond owns.²

In this reply Redmond treats GNP's pleading as a motion for a preliminary injunction. The City applies to GNP's motion the "generally accepted criteria"³ that the Board considers when reviewing requests for preliminary injunctive relief under 49 U.S.C. 721(b)(4):

- 1) Substantial likelihood of success on the merits;
- 2) Irreparable harm in the absence of the requested relief;
- 3) Harm to other parties from issuance of the order; and
- 4) The public interest in grant or denial of the relief requested.⁴

A preliminary injunction constitutes "extraordinary relief," and GNP, as the moving party, bears the burden of persuasion on all elements.⁵ As explained below, GNP has not met its burden. The key facts (all set forth previously in comments on GNP's petitions) are that GNP has no prospect of reinstating rail service on the Redmond Spur, that Redmond's project will not preclude service to any of the phantom freight customers cited by GNP in its pleadings, and that enjoining Redmond from completing its stormwater line would damage Redmond's ability to protect water quality in two salmon spawning streams that adjoin downtown Redmond.

Before turning to the merits of GNP's motion it is necessary to address two distractions. First, GNP contends that the Board should strike Redmond's April 13 letter as an unauthorized

² GNP Motion To Strike Or Reject Or In the Alternative For Leave To Reply ("GNP Motion") at 13 (filed Apr. 28, 2011).

³ *DeBruce Grain v. Union Pacific*, 2 S.T.B. 773, 775 (1997).

⁴ *Id.*; see also *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Finance Docket No. 35305, slip op. at 2 (served Nov. 5, 2010); *Edwin Kessler – Petition for Injunctive Relief*, STB Finance Docket No. 35206, slip op. at 4 (served June 12, 2009).

⁵ *Ark. Elec. Coop.*, note 4, slip op. at 2.

attempt to submit supplemental briefing on the merits of GNP's petitions.⁶ Redmond filed the letter as a courtesy, to advise the Board and the parties of an upcoming project of relevance to these proceedings. Unlike GNP's current motion, the City's letter plainly does not address the merits of GNP's arguments. If the Board elects to resolve GNP's motion by striking both Redmond's April 13 letter and GNP's motion, Redmond would welcome that result.

Second, GNP beseeches the Board to enjoin Redmond from violating the environmental consultation obligations imposed by the Board's NITU Order as a pre-condition to salvage of the rails.⁷ GNP apparently assumed that Redmond plans to build its stormwater line in violation of the Board's order and the underlying requirements of the Clean Water Act. Unlike GNP, however, Redmond claims no immunity from state or federal environmental law. Redmond's stormwater line is part of a \$26 million project that Redmond began permitting in 2009.⁸ The project includes a new stormwater treatment facility adjacent to the Sammamish River and a 48 inch diameter stormwater trunk line to collect runoff from downtown Redmond and convey it to the new treatment plant.⁹ With respect to the specific consultation obligations in the Board's NITU order:

- The Board directed BNSF to "(a) consult with WDE [the Washington Department of Ecology] regarding possible impacts of abandonment activities on wetlands located along the line and to ensure compliance with NPDES permitting requirements, and (b) consult with the [Army] Corps regarding possible impacts

⁶ GNP Motion at 2–3.

⁷ *BNSF Ry. Co. – Abandonment Exemption – in King County, WA*, STB Docket No. AB-6 (Sub. No. 463X), slip op. at 3 (served October 27, 2008) ("NITU Order").

⁸ Verified Statement of Carolyn Hope In Opposition To GNP Motion For Preliminary Injunction ¶ 2 ("Hope Statement").

⁹ Hope Statement ¶ 2.

of abandonment activities to water bodies and wetlands, and to ensure compliance with Corps permitting requirements.”¹⁰

- There are no wetlands on the 0.7 mile segment of the Redmond Spur that the City will salvage this summer.¹¹ The affected segment traverses downtown Redmond, and does not extend as far west as the Sammamish River.¹² In recognition of this fact, the Department of Ecology and the Army Corps of Engineers both have advised Redmond that construction of the stormwater trunk line and the rail salvage needed to construct the trunk line requires no consultation or permitting under the wetland protection and floodplain management programs that these agencies administer.¹³
- The stormwater upgrades (including salvage of 0.7 miles of track) will require coverage under the Department of Ecology’s Construction Stormwater General Permit. The General Permit is an NPDES permit.¹⁴ The applicant must file a Notice of Intent (NOI) Application to claim coverage under the General Permit. The permit provides automatic coverage upon filing an NOI application, unless Ecology notifies the applicant that coverage has been denied.¹⁵ Redmond will file an NOI application about 60 days prior to commencement of construction, as recommended in Ecology’s guidance.¹⁶

¹⁰ NITU Order at 3.

¹¹ Hope Statement ¶ 4. Redmond’s April 13 letter erroneously stated that the City intends to salvage 1.1 mile of trackage this summer. In fact the stormwater trunk line requires salvage of only 0.7 miles of track. Redmond plans to complete only this segment in 2011. The following summer Redmond will salvage another 0.4 miles of track to construct a trail on the right of way, after completing consultation and permitting with the agencies referenced in the NITU Order. *Id.* ¶ 5.

¹² *Id.* ¶ 4.

¹³ E-mail of May 4, 2011 from Kristine Dillon, Army Corps of Engineers, to Carolyn Hope, Hope Statement Ex. A; E-mail of May 4, 2011 from Erik Stockdale, Wash. Dep’t of Ecology, to Carolyn Hope, Hope Statement Ex. B.

¹⁴ Wash. Dept. of Ecology, Construction General Stormwater Permit (Dec. 1, 2010). The permit runs 54 pages and can be viewed at <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permitdocs/cswgpppermit120110.pdf>.

¹⁵ See Wash. Dep’t of Ecology, *How To Meet Ecology’s Construction Stormwater General Permit Requirements: A Guide For Construction Sites* at 6 (March 2010). This guidance can be viewed at <http://www.ecy.wa.gov/pubs/9937.pdf>.

¹⁶ *Id.* at 6.

In short, Redmond has completed the wetlands consultation requirements imposed by the Board in its NITU order, and will, in a timely manner, apply for NPDES general permit coverage for construction of the stormwater trunk line, including the rail salvage component.

Turning then to the real animus behind GNP's pleading, GNP asks the Board to enjoin Redmond from developing a stormwater line on a railbanked right of way that Redmond owns. King County, the trail manager, fully supports the projects that Redmond plans to construct this summer,¹⁷ and Redmond has engineered the stormwater line to be consistent with future rail use of the corridor.¹⁸ The Board does not regulate the use of railbanked rights of way, other than to enforce the requirement that the legal integrity of the right of way be preserved for future railroad use.¹⁹ On what grounds, then, does GNP urge the Board to enjoin Redmond from salvaging 0.7 miles of track to construct a stormwater line?

First GNP cites two irrelevant decisions in which the Board intervened to prevent interference with rail transportation activity on active rail lines.²⁰ Finally, GNP reaches its real grievance, that Redmond's stormwater line should be enjoined because it would interfere with

¹⁷ Reply of King County, Washington to GNP Rly's Motion To Strike Or Reject Or In The Alternative For Leave To Reply at 1-2, filed in these dockets on May 5, 2011.

¹⁸ See Redmond's Apr. 13 Letter, note 1.

¹⁹ The Board recently reiterated that its "role under the Trails Act [16 USC 1247(d)] is limited and largely ministerial" and that it does not regulate activities over railbanked rights-of-way other than to ensure the integrity of such of rights-of-way remains to allow for future rail use. *National Trails System Act and Railroad Rights-of-Way*, STB Docket No. EP 702 at 5 (served Feb. 10, 2011) (citing *Ga. Great S. Div. – Aban. & Discontinuance Exemption – Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga.*, 6 STB 902, 907 (2003)).

²⁰ See GNP Motion at 11–13 (citing *City of Lincoln – Petition for Declaratory Order*, STB Finance Docket No. 34425 (served Aug 12, 2004) (ruling that city may not condemn portion of an active rail line for trail use where trail use would interfere with rail operations); *Cent. Ore. & Pac. R.R. Inc. – Coos Bay Rail Line*, STB Finance Docket No. 35130 (served Apr. 10, 2008) (ruling that carrier may not indefinitely embargo service on an active line without inviting adverse abandonment)).

GNP's aspirations to provide interstate rail freight service on the Redmond Spur.²¹ GNP correctly invokes the four criteria the Board applies in reviewing requests for injunctive relief.²²

Turning to those criteria, GNP contends that it has "a strong likelihood of success on the merits."²³ Redmond submits that GNP has no prospect of establishing rail freight service on the 0.7 mile segment that the City plans to salvage this summer. Redmond bases this contention, not on the fact that GNP has stiffed all of its trade creditors and faces an imminent determination of insolvency in United States Bankruptcy Court,²⁴ or that GNP's purported freight customers on the Redmond Spur are illusory. While these facts are amply documented in comments filed on GNP's petitions²⁵ the Board need not resolve disputed factual issues to conclude that GNP will not run any freight in downtown Redmond. The Board need only recognize that GNP contracted with the Port of Seattle to transport no freight on the Redmond Spur.²⁶ King County is a third

²¹ GNP Motion at 14.

²² *Id.* at 13.

²³ *Id.*

²⁴ See the Declaration of Byron D. Cole, Founder and General Manager of Ballard Terminal Railway Company and the Declaration of GNP's 50 percent shareholder and former Chief Financial Officer Douglas Engle ("GNP is insolvent . . ."), filed as Exs. 2 and 3, respectively, to the Reply of the City of Redmond, King County and the Central Puget Sound Regional Transit Authority to GNP's Motion To Hold Proceedings in Abeyance (filed Feb. 15, 2011).

²⁵ See Redmond's Comments in Opposition to GNP Railway Petitions for Exemption and to Vacate Notices of Interim Trail Use at 12–14, 25–32 (filed Nov. 9, 2010) ("Redmond Comments"); Comments of King County, Washington Regarding Petitions of GNP Rly Inc. (filed Nov. 9, 2010) at 32–34 ("King County Comments").

²⁶ See Redmond Comments at 24. Redmond's comments quote the terms of the License Agreement between GNP and the Port of Seattle. That agreement, Ex. E to Redmond's Comments, prohibits GNP from operating common carrier or contract freight service between mileposts 0.0 and 2.5 of the Redmond Spur. Ex. C to the Hope Statement, a map of the Redmond Spur, shows that GNP cannot serve any freight customers on the Spur without traversing this segment.

party beneficiary of that contract, and Redmond is the assignee of the Port's rights under the contract.²⁷

The Board frequently acknowledges that authorization to a carrier to provide rail service is permissive, and that it does not displace other legal and practical requirements that the carrier must satisfy to provide service.²⁸ GNP will not satisfy those requirements here because it holds no property interest in the corridor and because GNP contracted *not* to provide freight service on the Redmond Spur.²⁹ Redmond intends to enforce this prohibition. For this reason, GNP is not likely to prevail in its attempt to establish freight service in downtown Redmond.

Will GNP be “irreparably harmed” by the denial of a preliminary injunction? GNP cites no evidence to support that contention.³⁰ Even assuming that GNP could avoid its contractual commitment not to transport freight on the Redmond Spur and that customers were waiting to ship with GNP, Redmond's project would not prevent GNP from providing service to any of GNP's putative customers. The Redmond Spur is a seven mile spur line that connects to the interstate rail network only at its north end, in Woodinville.³¹ The segment of track that Redmond intends to salvage this summer is near the south end of the line, on the east side of the

²⁷ *Id.* at 25.

²⁸ *See, e.g., FPN-USA, Inc. – Operation Exemption – Tijuana-Tecate Shortline*, STB Finance Docket No. 35155, slip op at 3 n.6 (served July 25, 2008) (noting that even if a shortline were to obtain an exemption, “the authority obtained is permissive and does not bestow on [the shortline] any legal rights it would need to obtain by contract from the” rail property owner and carriers with trackage rights); *James Riffin, d/b/a the Raritan Valley Connecting R.R. – Acquisition and Operation Exemption – on Raritan Valley Connecting Track*, STB Finance Docket No. 34963, slip op at 2 (served Dec. 11, 2006) (explaining that an exemption to acquire and/or operate a rail line under 49 USC 10902 “would simply give permissive authority to consummate a transaction described in the notice of exemption”).

²⁹ *See* Redmond Comments at 23-25.

³⁰ GNP Motion at 14.

³¹ Hope Statement Ex. C.

Sammamish River. All of GNP's phantom customers are north and west of the Sammamish River.³² The only service that will be precluded by Redmond's stormwater project is passenger excursion service from downtown Redmond, a class of service not regulated by the Board.³³

The third criterion the Board considers in weighing a request for a preliminary injunction is harm to others from the relief requested by the applicant. The injunction requested by GNP would delay or frustrate Redmond's plans to improve water quality in the Sammamish River and in the City's drinking water supply. Downtown Redmond currently has no regional stormwater treatment capability. Stormwater is currently managed by individual property owners or discharged into drywells, Bear Creek, or the Sammamish River. Bear Creek and the Sammamish River are both salmon spawning streams, but development in the City since the 1960s has degraded the water quality of both streams. Data from 2008 show that Bear Creek and the River violate state water quality standards for temperature, dissolved oxygen and fecal coliform. In addition, Redmond obtains 40 percent of its drinking water from a shallow aquifer lying about twelve feet below grade in downtown Redmond. Contaminated stormwater runoff has the potential to pollute part of the City's drinking water supply.³⁴

The new stormwater trunk line and treatment facility will collect runoff from 250 acres of commercial/residential land in and around downtown Redmond. It will collect stormwater that currently discharges into Bear Creek and route it to a new treatment facility near the Sammamish

³² Hope Statement ¶ 6. The most southerly of GNP's shippers is Building Specialties, at MP 5.4. See Ex. C to Hope Statement .

³³ See Redmond Comments at 35.

³⁴ Hope Statement ¶ 7-8.

River. Pollutant loadings to Bear Creek of copper (4 kg/year) and zinc (16 kg/year) will be eliminated. The new treatment facility will also decrease pollutant loadings to the River.³⁵

The bulk of the stormwater trunk line construction must occur during the summer months, because the groundwater level in Redmond is shallow, and the state Department of Fish and Wildlife limits construction near water bodies to a summer “work window.”³⁶

The stormwater project is a year behind schedule. Redmond is currently advertising for bids to construct the project in the summer of 2011. If the City cannot execute a contract to construct the trunk line by June Redmond will miss the summer 2011 “work window,” and will need to postpone the project until 2012. With each passing year the density of development in downtown Redmond increases, the acreage covered by impervious surface increases, and the pollutant loadings to salmon bearing streams from untreated stormwater increase. GNP’s proposed injunction would harm the residents of Redmond and the aquatic species that inhabit Bear Creek and the Sammamish River.³⁷

Finally, there is a broad public interest in denial of the injunctive relief requested by GNP. Contrary to GNP’s contentions, this motion (and GNP’s petitions) are not about whether freight service will be reactivated on the Redmond Spur. There will be no freight service into downtown Redmond because GNP contracted not to provide it,³⁸ because GNP has no ownership interest in or right to access the property, and because there are no customers west of the Sammamish River. The real choice posed by GNP’s motion is whether the Board will delay the

³⁵ Hope Statement ¶ 7.

³⁶ Hope Statement ¶ 9.

³⁷ Hope Statement ¶ 10.

³⁸ See *supra* note 26 and accompanying text.

construction of costly and environmentally critical public infrastructure projects in downtown Redmond that the City is poised to complete in 2011. The need to capture and treat contaminated stormwater runoff is more than enough reason to deny GNP's motion, where GNP contracted not to provide freight service and where salvage of the south end of the Redmond Spur would not prevent GNP from serving the shippers who submitted statements in support of GNP's petition.

An applicant for injunctive relief under 49 U.S.C. 721(b)(4) must present evidence, not just assertions, that the balance of interests favors an injunction.³⁹ GNP does not present a shred of evidence to support its claims of "irreparable harm." All four of the criteria that the Board considers in balancing a request for preliminary injunctive relief favor denial of GNP's motion.

DATED: May 6, 2011

STOEL RIVES LLP

By: 

Matthew Cohen

Hunter Ferguson

STOEL RIVES LLP

600 University Street, Suite 3600

Seattle, WA 98101

(206) 386-7569 (tel)

(206) 386-7500 (fax)

mcohen@stoel.com

hoferguson@stoel.com

Attorneys for the City of Redmond, Washington

³⁹ See *Ariz. Pub. Serv. Co. & PacifiCorp v. The Burlington Northern and Santa Fe Rly. Co.*, STB Docket No. 42077, slip op. at 5–6 (served Oct. 14, 2003) (denying request for injunction because claim of irreparable harm was unsupported by evidence and was therefore speculative); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274 (D.D.C. 2005) (explaining that motion for preliminary injunction must be supported by "credible evidence") *Health Ins. Ass'n of Am. V. Goddard Clausen Porter Novelli*, 211 F. Supp. 2d 23, 32 (D.D.C. 2002) (denying motion for preliminary injunction for lack of evidence because movant merely asserted irreparable harm but provided no "affidavits or declarations supporting its claims").

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 463X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**VERIFIED STATEMENT OF CAROLYN J. HOPE
IN OPPOSITION TO GNP RLY'S MOTION TO STRIKE OR REJECT OR IN THE
ALTERNATIVE FOR LEAVE TO REPLY**

I, Carolyn J. Hope, being competent to make this statement and having personal knowledge of the matters set forth herein, do swear and affirm the following:

1. I am a Senior Park Planner in the Parks Planning Division of the Parks and Recreation Department for the City of Redmond, Washington. Redmond is a municipal corporation located within King County, Washington. I have served in this capacity since January 20, 2009. I am responsible for park and trail acquisition, easements, planning, permitting and development, as well as policy making and strategic planning.

2. Since 2009 the City has been engaged in planning and permitting a \$26 million project to capture and treat stormwater from over 250 acres of commercial/residential land in and around downtown Redmond. The project includes construction of a new stormwater treatment facility adjacent to the Sammamish River and a 48 inch diameter stormwater trunk line to collect runoff from downtown Redmond and convey it to the new treatment plant.

3. The new stormwater trunk line will be constructed within the downtown segment of the railroad right of way that the City purchased from the Port of Seattle in 2010. To construct the stormwater line the City will need to salvage the trackage over a 0.7 mile segment of the railbanked right of way, roughly between 170th Avenue NE and 166th Avenue NE. On May 4, 2011 the City advertised for bids to construct the stormwater trunk line, including salvage of the trackage overlying the route of the trunk line. The City plans to begin construction in July, following submittal of a notice of intent application to secure coverage for the project under the Washington Department of Ecology General Stormwater Construction Permit.

4. There are no wetlands on the 0.7 mile segment of the Redmond Spur that the City plans to salvage this summer. The affected segment traverses downtown Redmond, and does not extend as far west as the Sammamish River. In recognition of this fact, the Washington Department of Ecology and the U.S. Army Corps of Engineers both advised me that construction of the stormwater trunk line and the rail salvage needed to construct the trunk line requires no consultation or permitting under the wetland protection and floodplain management programs that these agencies administer. Attached as Exhibits A and B to this statement are true and correct copies of e-mail messages between me and Army Corps Project Manager Kristine Dillon and Ecology Wetlands/401 Unit Supervisor Erik Stockdale.

5. Hunter Ferguson's April 13, 2011 letter to Cynthia T. Brown of the Surface Transportation Board erroneously stated that the City intends to salvage 1.1 miles of trackage on the Redmond Spur to accommodate the stormwater trunk line. In fact the stormwater line requires salvage of only 0.7 miles of track. The City plans to complete only this segment in 2011. The following summer the City will salvage another 0.4 miles of track to construct a trail

on the right of way, after completing consultation and permitting with the Department of Ecology and the Army Corps.

6. Exhibit C to this statement is a map of the Redmond Spur prepared by staff in the GIS Division, Finance & Information Services Department of the City of Redmond. It shows the route of the railbanked spur from Milepost 0.0 in Woodinville to the south terminus at Milepost 7.3 in Redmond. The 0.7 mile segment that the City intends to salvage this summer is near the south end of the line, on the east side of the Sammamish River. All of the companies that GNP has identified to the Surface Transportation Board as prospective shippers are located north and west of the Sammamish River. Salvage of the trackage on the east side of the Sammamish River would not affect access from Woodinville Junction to shippers on the west side of the river.

7. Downtown Redmond currently has no regional stormwater treatment capability. Stormwater is currently either managed by individual property owners or discharged into drywells, Bear Creek, or the Sammamish River. Bear Creek and the Sammamish River are both salmon spawning streams, but development in the City since the 1960s has degraded the water quality of both streams. Data from 2008 show that Bear Creek and the River violate state water quality standards for temperature, dissolved oxygen and fecal coliform. In addition, Redmond obtains 40 percent of its drinking water from a shallow aquifer lying about twelve feet below grade in downtown Redmond. Contaminated stormwater has the potential to pollute part of the City's drinking water supply.

8. The City's new stormwater trunk line will collect runoff from 250 acres of commercial/residential land in and around downtown Redmond. It will collect stormwater that currently discharges into Bear Creek and route it to a new treatment facility near the Sammamish River. Pollutant loadings to Bear Creek of copper (4 kg/year) and zinc (16 kg/year) will be eliminated. The new treatment facility will also decrease pollutant loadings to the River.

9. The bulk of the stormwater trunk line construction must occur during the summer months, because the groundwater level in Redmond is shallow, and the state Department of Fish and Wildlife limits construction near water bodies to a summer "work window."

10. The stormwater project is a year behind schedule. If the City cannot execute a contract to construct the trunk line by June the City will miss the summer 2011 "work window," and will need to postpone the project until 2012. With each passing year the density of development in downtown Redmond increases, the acreage covered by impervious surface increases, and the pollutant loadings to salmon bearing streams from untreated stormwater increase. A one year delay in construction of the stormwater collection and treatment system would harm the residents of Redmond and the aquatic species that inhabit Bear Creek and the Sammamish River.

I declare under penalty of perjury that the foregoing is true and correct.



CAROLYN J. HOPE

Dated: 5/6/2011

Place: Redmond, WA

70683261.1 0058059-00001

EXHIBIT A

Carolyn J. Hope

From: Dillon, Kristine R NWS [Kristine.R.Dillon@usace.army.mil]
Sent: Wednesday, May 04, 2011 9:21 AM
To: Carolyn J. Hope
Subject: RE: City of Redmond Stormwater Trunk Line Project - NWS-2009-336

Carolyn,

Thank you for the information.

I have reviewed the file and consulted with our staff archaeologist have we have determined the Corps will not federalize the additional work you have described. We would not require a Section 404 permit or additional monitoring of cultural resources for this area.

Kris Dillon, Project Manager
Regulatory Program
USAED, Seattle
206-764-6914

-----Original Message-----

From: Carolyn J. Hope [<mailto:CJHOPE@redmond.gov>]
Sent: Tuesday, May 03, 2011 5:09 PM
To: Dillon, Kristine R NWS
Subject: City of Redmond Stormwater Trunk Line Project - NWS-2009-336

Kris,

The City of Redmond submitted a JARPA application for the Downtown/Redmond Way Stormwater Trunk and Water Quality Treatment Facility in February 2009 (ACOE Project No. NWS-2009-336). This application did not specifically call out the linear portion of the project extending from 170th Ave NE to Redmond Way (approximately 0.7 miles) that includes demolition of the tracks and associated equipment and installation of a linear trunk line, because there are no wetlands or floodplains in this area. Attached are the critical area maps with the location on the linear project shown with a line and the location of the previously permitted project shown with a triangle. The City has conducted a critical areas review of the area for another project and confirmed that City critical area maps are correct.

I am writing you because as part of the abandonment process, the US DOT Surface Transportation Board prepared a decision of Notice of Interim Trail Use or Abandonment on this property, which states that BNSF (or the trail sponsor) shall "Consult with the Corps prior to conducting any salvage activities along the line regarding possible impacts of abandonment activities to water bodies and wetlands and to ensure compliance with Corps permitting requirements." Can you please confirm that such a consultation is not necessary, since the linear portion of the project area where the rail salvage activities will occur does not include wetlands or floodplains?

Thank you for your time,

Carolyn Hope

Senior Park Planner

City of Redmond - MS 4NPK

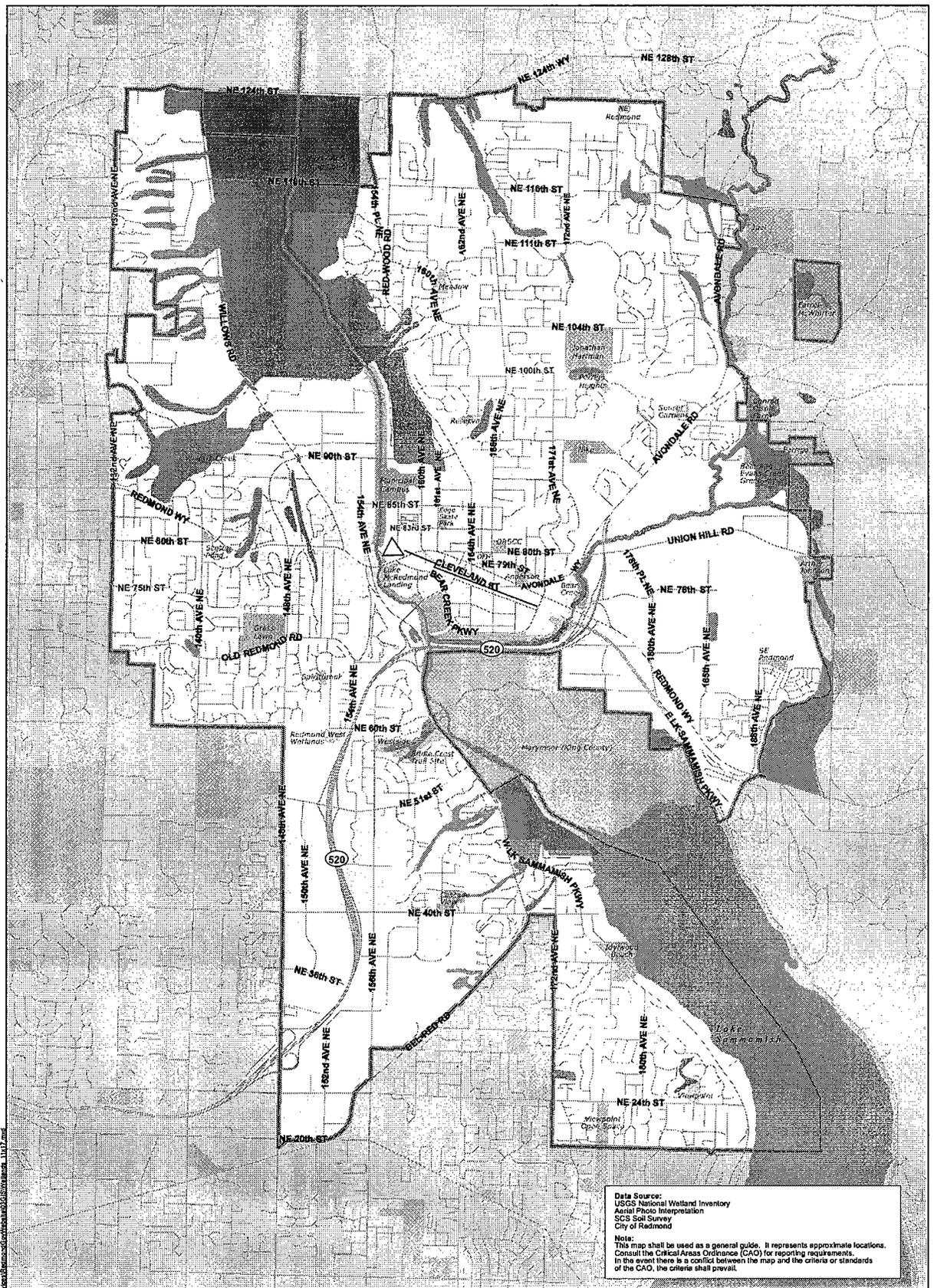
PO Box 97010

Redmond, Washington 98073-9710

425.556.2313 - direct

425.556.2700 - fax

This message has been scanned for malware by Websense. www.websense.com
<<http://www.websense.com/>>



Wetlands
Critical Areas Map
 City of Redmond, Washington
 Effective: 05/28/2005



-  Mixed Wetland/Upland
-  Wetland
-  City Limit
-  Park and Open Space
-  Water

Disclaimer: This map is created and maintained by GIS Services Group/Finance and Information Services, City of Redmond, Washington, for reference purposes only.
 The City makes no guarantee as to the accuracy of the features shown on this map.

File Name: C:\redmond\gis\mxd\CAO\CAO.mxd; Date: 05/28/2005 11:17 AM

EXHIBIT B

Carolyn J. Hope

From: Stockdale, Erik (ECY) [ESTO461@ecy.wa.gov]
Sent: Wednesday, May 04, 2011 10:21 AM
To: Carolyn J. Hope
Subject: RE: City of Redmond Stormwater Trunk Line Project - NWS-2009-336

Hi Carolyn: Thanks for your inquiry. The project you referred to received a Nationwide Permit 7 from the Corps of Engineers. That permit was "certified" by Ecology which means you do not need further review from Ecology for the outfall, provided the project complies with the conditions attached to the permit.

Please let me know if you have any other questions. Good luck with the project.

Regards,

Erik

Erik Stockdale | Wetlands/401 Unit Supervisor | Department of Ecology | 425-649-7061 | erik.stockdale@ecy.wa.gov

-----Original Message-----

From: Carolyn J. Hope [<mailto:CJHOPE@redmond.gov>]
Sent: Wednesday, May 04, 2011 9:30 AM
To: Stockdale, Erik (ECY)
Subject: FW: City of Redmond Stormwater Trunk Line Project - NWS-2009-336

Erik,

Per our telephone conversation this morning, please let me know if Ecology requires analysis, permitting or other work relating to the railroad track removal portion of the Downtown Stormwater Trunkline Project.

Feel free to contact me if you have any further questions.

Thank you for your time.

Carolyn Hope

Senior Park Planner

City of Redmond - MS 4NPK

PO Box 97010

Redmond, Washington 98073-9710

425.556.2313 - direct

425.556.2700 - fax

-----Original Message-----

From: Dillon, Kristine R NWS [<mailto:Kristine.R.Dillon@usace.army.mil>]
Sent: Wednesday, May 04, 2011 9:21 AM
To: Carolyn J. Hope

Subject: RE: City of Redmond Stormwater Trunk Line Project - NWS-2009-336

Carolyn,

Thank you for the information.

I have reviewed the file and consulted with our staff archaeologist and we have determined the Corps will not federalize the additional work you have described. We would not require a Section 404 permit or additional monitoring of cultural resources for this area.

Kris Dillon, Project Manager
Regulatory Program
USAED, Seattle
206-764-6914

-----Original Message-----

From: Carolyn J. Hope [<mailto:CJHOPE@redmond.gov>]

Sent: Tuesday, May 03, 2011 5:09 PM

To: Dillon, Kristine R NWS

Subject: City of Redmond Stormwater Trunk Line Project - NWS-2009-336

Kris,

The City of Redmond submitted a JARPA application for the Downtown/Redmond Way Stormwater Trunk and Water Quality Treatment Facility in February 2009 (ACOE Project No. NWS-2009-336). This application did not specifically call out the linear portion of the project extending from 170th Ave NE to Redmond Way (approximately 0.7 miles) that includes demolition of the tracks and associated equipment and installation of a linear trunk line, because there are no wetlands or floodplains in this area. Attached are the critical area maps with the location on the linear project shown with a line and the location of the previously permitted project shown with a triangle. The City has conducted a critical areas review of the area for another project and confirmed that City critical area maps are correct.

I am writing you because as part of the abandonment process, the US DOT Surface Transportation Board prepared a decision of Notice of Interim Trail Use or Abandonment on this property, which states that BNSF (or the trail sponsor) shall "Consult with the Corps prior to conducting any salvage activities along the line regarding possible impacts of abandonment activities to water bodies and wetlands and to ensure compliance with Corps permitting requirements." Can you please confirm that such a consultation is not necessary, since the linear portion of the project area where the rail salvage activities will occur does not include wetlands or floodplains?

Thank you for your time,

Carolyn Hope

Senior Park Planner

City of Redmond - MS 4NPK

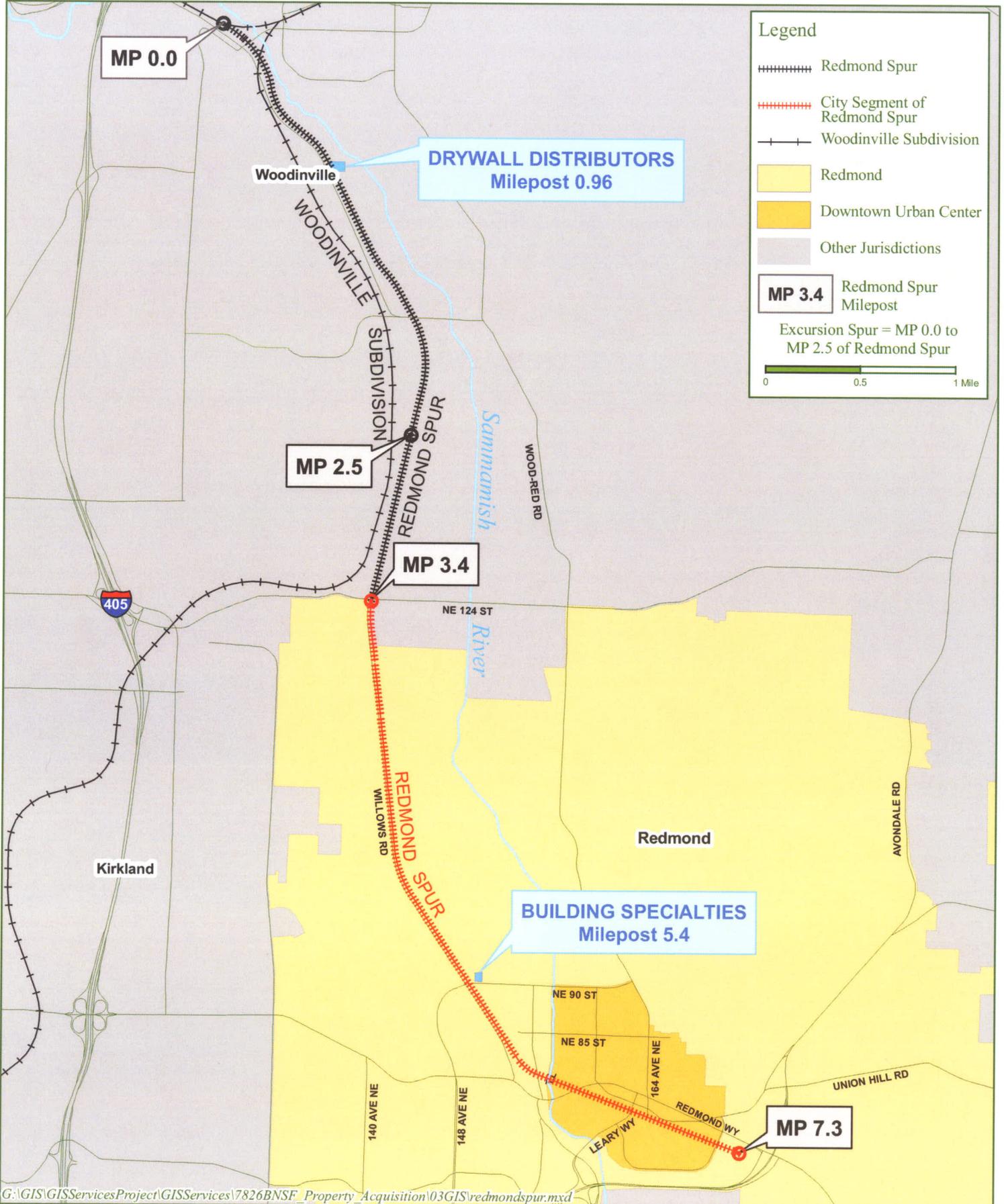
PO Box 97010

EXHIBIT C



Redmond Spur

Date: 10/18/10



G:\GIS\GIServicesProject\GIServices\7826BNSF_Property_Acquisition\03GIS\redmondspur.mxd

Disclaimer: This map is created and maintained by the GIS Division, Finance & Information Services Department, of the City of Redmond, Washington, for reference purposes only. The City makes no guarantee as to the accuracy or completeness of the features shown on this map.