

LAW OFFICES
JOHN D. HEFFNER, PLLC
1750 K STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

BY E-FILING

April 28, 2011

ENTERED
Office of Proceedings

APR 28 2011

Part of
Public Record

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**RE: Finance Docket 35407, GNP RLY INC. – ACQUISITION AND
OPERATION EXEMPTION - REDMOND SPUR AND
WOODINVILLE SUBDIVISION**

229408

**Docket No. AB-6 (Sub No. 463X), BNSF RAILWAY COMPANY –
ABANDONMENT EXEMPTION – IN KING COUNTY, WA**

229410

**Docket No. AB-6 (Sub No. 465X), BNSF RAILWAY COMPANY –
ABANDONMENT EXEMPTION – IN KING COUNTY, WA**

229411

Dear Ms. Brown:

I am submitting on behalf of GNP Rly (“GNP”) its “Motion to Strike Or
Reject Or In The Alternative For Leave To Reply” to the Letter filed by the City of
Redmond with the Board on April 13, 2011.

Sincerely yours,



John D. Heffner

Attachment

cc: All parties

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35407

**GNP RLY INC.
-- ACQUISITION AND OPERATION 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**

**MOTION TO STRIKE OR REJECT
OR IN THE ALTERNATIVE FOR
LEAVE TO REPLY**

Submitted:
John D. Heffner
John D. Heffner, PLLC
James H.M. Savage
1750 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-3335

Counsel for Petitioner
GNP Rly Inc.

Dated: April 28, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35407

**GNP RLY INC.
-- ACQUISITION AND OPERATION 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**

**MOTION TO STRIKE OR REJECT
OR IN THE ALTERNATIVE FOR
LEAVE TO REPLY**

INTRODUCTION

Pursuant to 49 C.F.R. 1104.8, 10, and 13, GNP Rly, Inc. (“GNP”), moves to strike or reject the April 13, 2011, letter filed by the City of Redmond, WA (“Redmond”) in these related proceedings as untimely and unauthorized. Should the Board accept this letter, GNP seeks leave to respond and requests that Board order Redmond to refrain from undertaking the actions described in this pleading.

In the interest of time and in the event the Board grants GNP leave to reply, this pleading contains GNP's response.

On April 6, 2011, the Board issued a decision (hereafter "the April 6th Decision") scheduling these proceedings for oral argument May 12, 2011. It states, in part, "[a]bsent a request from the Board, no additional written comments or other submissions may be filed."¹ Directly contrary to the Board's order, Redmond filed a letter ("the LOI") with the Board stating its intent to remove approximately 1.1 miles of track from milepost 6.2 to milepost 7.3 on that line of railroad known as the Redmond Spur, all of which lies inside the City of Redmond. Redmond does not indicate which, if any, related rail infrastructure will also be removed. Significantly, Redmond's April 13th letter does not seek Board permission to supplement its comments or the record, as required by the Board's April 6th Decision.

BACKGROUND

Briefly, this proceeding involves the efforts of GNP, a class III rail carrier, to restore rail service over two rail-banked segments of railroad right-of-way ("ROW"),² that have been have been the subject of a trail use designation under the National Trails Act and the attempts by two political subdivisions, King County,

¹ See, April 6th Decision at 2.

² The segments include the Redmond Branch extending between milepost 0.0 at Woodinville and MP 7.3 at Redmond and a two-mile long segment of the Woodinville Subdivision extending between milepost 23.8 and 22.0 near Woodinville.

WA, and Redmond, to thwart those efforts. The subject trackage had formerly been owned and operated by BNSF Railway Company (“BNSF”) which had sought and obtained Board authority to abandon them.³ Thereafter, the Port of Seattle (“the Port”) acquired the trackage and conveyed to King County an easement for trail use. King County filed an NITU with the Board designating itself as the trail user and submitted a petition for exemption to the Board for authority to acquire BNSF’s common carrier rights and obligations.⁴ Redmond’s LOI and GNP’s responsive Motion just concern the 7.3 miles between milepost 0.0 at Woodinville and milepost 7.3 in Redmond.

On October 3, 2008, the Board’s Section of Environmental Analysis (SEA) served an environmental assessment (EA) in the Abandonment Exemption proceeding. SEA recommended that, prior to conducting any salvage activities along the line, BNSF be required to consult with the Washington Department of Ecology (WDE), regarding possible impacts of abandonment activities on wetlands located along the line and to ensure compliance with NPDES permitting requirements. SEA also recommended, per the U.S. Army Corps of Engineers (Corps), that BNSF should establish the extent of floodplains and wetlands in the

³ BNSF Railway Company-Abandonment Exemption-in King County, WA, Docket No. AB-6 (Sub-No. 463X), STB served October 27, 2008 authorizing abandonment of the Redmond Spur (hereafter cited as the Abandonment Exemption) and BNSF Railway Company-Abandonment Exemption-in King County, WA, Docket No. AB-6 (Sub-No. 465X), STB served November 28, 2008, authorizing the abandonment of two miles of the Woodinville Subdivision.

⁴ Docketed as King County, Wash.-Acquisition Exemption-BNSF Railway Company, FD 35148.

project area and determine if any such resources would be impacted by the proposed abandonment. According to the Corps, the project area contains wetlands and floodplains along the entire corridor and includes a crossing over the Sammamish River at Milepost 6.2, a navigable waterway subject to Corps permitting requirements. Therefore, SEA recommended a condition requiring BNSF to 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. The environmental conditions recommended by SEA in the EA were imposed by the Board in its Decision served October 27, 2008.⁵

On September 18, 2008, King County filed a request for issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29, to enable it to negotiate with BNSF for use of both the Redmond Spur and the Woodinville Subdivision for interim trail use. King County submitted a statement of willingness to assume full financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and acknowledged that

⁵ A third condition recommended by the SEA and imposed by the Board, involving historic preservation, was removed by Decision served April 6, 2009.

the use of the right-of-way for trail purposes is subject to future reactivation for rail service.

In a decision served September 18, 2009, the Board granted King County's exemption petition authorizing it to acquire BNSF's "residual common carrier rights and obligations," including BNSF's right to reinstate rail service in the future, over approximately 25.45 miles of rail line including the 7.3 mile Redmond Spur.⁶ King County filed a notice of consummation of its trail use agreement with BNSF on March 8, 2010. On June 30, 2010, Redmond acquired from the Port the southerly 3.9 miles of the Redmond Spur, between MP 3.4 and 7.3, subject to the NITU easement held by King County.⁷ Redmond subsequently removed a public grade crossing at 161st Ave. NE (approx. MP 6.6), damaging a railway signal device and altering the ROW, activities forbidden by the salvage conditions imposed in the Abandonment Exemption.

In its April 13th LOI, Redmond expressed the intent to remove all remaining trackage and rail infrastructure between milepost 6.2 and milepost 7.3. For the reasons expressed herein, GNP objects to the removal of the trackage and rail infrastructure, and moves for the relief requested herein.

⁶ King County, Wash. – Acquisition Exemption – BNSF Railway Company, FD 35148, slip op. at 3-4 (STB served Sept. 18, 2009) (hereafter King County).

⁷ See, City of Redmond's comments in opposition to GNP's petition to vacate, filed November 9, 2010 at p. 2.

ARGUMENT

Redmond's LOI presents the Board with two issues requiring its attention. First, Redmond's LOI is an unauthorized pleading and must be stricken or rejected as contrary to the April 6th Decision. Second, Redmond's LOI indicates that it has undertaken and will continue to undertake railroad salvage activities that are expressly forbidden by environmental conditions imposed by the Board in the Abandonment Exemption. GNP will address each of these in turn.

Pursuant to 49 C.F.R. 1104.8, the Board may strike any objectionable material from any document. Pursuant to 1104.10, the Board may reject a document that does not comply with the rules. Pursuant to 1104.13, a party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board. Both the Board and its predecessor, the Interstate Commerce Commission ("I.C.C."), have ruled that the substance of the pleading or motion takes precedence over the form in which it is styled; and where appropriate, has rejected "motions" which were in reality replies to a reply. See, Consolidated Rail Corporation -- Exemption -- Abandonment of the Weirton Secondary Track in Harrison And Tuscarawas Counties, OH, I.C.C. Docket No. AB-167 (Sub-No. 1088X), served October 17, 1990. Though Redmond characterizes its April 13th filing as a "letter", it is in substance an untimely and unauthorized additional

comment on the merits of the proceedings, and therefore prohibited absent Board pre-approval, which Redmond sought not.

Redmond's untimely and unauthorized filing either raises or implicates several substantive legal issues requiring Board attention and relief.

First, the Board should enforce the Abandonment Exemption and King County decisions to prohibit Redmond's unauthorized removal of rail assets from a rail banked line. Should the Board conclude it lacks jurisdiction over Redmond, it should require King County to restore the salvaged and/or damaged assets or vacate the NITU previously issued to King County to restore the *status quo ante*. GNP avers that inherent therein was the obligation by King County and/or Redmond to comply with the two above described environmental conditions imposed by the Board. In short, neither the Port or King County nor any entity such as Redmond acquiring the ROW from the Port could initiate salvage activities until those environmental conditions had been satisfied. Tulare Valley Railroad Company-Abandonment Exemption-In Tulare County, CA, Docket No. AB-397 (Sub-No. 7x), STB served August 19, 2009(holding that the railroad could not commence salvage activities without satisfying the historic conditions imposed upon the abandonment) and Consummation of Rail Line Abandonments That Are Subject To Historic Preservation and Other Environmental Conditions, Ex Parte No. 678, STB served April 23, 2008, slip op. at 5 (holding that a successor interest

cannot commence salvage activities until it complies with the environmental conditions imposed on the former owner). It may well be that King County and/or Redmond are forbidden from conducting any salvage activities absent some modification or vacation of the NITU. Missouri-Kansas-Texas Railroad Company-Abandonment, Et Al-Petition for Declaratory Order, Docket No. AB-102 (Sub-No. 13), STB slip op. served July 13, 2010 (hereafter MKT).

Prior to entering its appearance in September 2010, Redmond was a non-party to these or any Board proceedings involving the Woodinville Subdivision, and thus Redmond was not subject to Board jurisdiction. Redmond disclosed in its comments in opposition to GNP's petitions that on June 25, 2010, it had acquired from the Port title to the rail infrastructure and underlying ROW of the portion of the Redmond spur from milepost 3.4 to milepost 7.3. The Board had previously been advised of the conveyance of the physical assets of the Redmond Spur from BNSF to the Port as well as the conveyance of BNSF's common carrier rights and obligations to King County as the Trail User. The proposed abandonment by BNSF was authorized but never consummated due to the intervention of King County to become the Trail User under the Board-approved NITU. The proposed removal of track infrastructure by Redmond absent compliance with the above-cited environmental conditions constitutes an unauthorized activity justifying Board intervention.

Even prior to filing its April 13th LOI, Redmond had already performed unauthorized salvage activities on the Spur segment east of the Sammamish River Bridge in Downtown Redmond. A grade crossing had been removed from 161st Ave. NE at approximately milepost 6.6 and track had been salvaged.⁸ This rail infrastructure is of vital importance to GNP because it affords sole rail access to Downtown Redmond.

Second, GNP avers the full 50-foot-wide rail ROW is necessary for it to restore rail operations. Redmond's action of taking a 34-foot-wide strip of railbanked between mile post 6.2 and mile post 7.3 would substantially frustrate GNP's proposed restoration of interstate rail freight transportation activities and services over that portion of the rail line. In the event Redmond were to proceed with removing the 1.1 miles of track in Downtown Redmond, such action would irreparably harm GNP's ability to offer freight service east of Woodinville, or even to use the Spur for car storage or engine turn around purposes, all of which are essential elements of rail freight transportation under the ICCTA.

As the presentation made by Redmond Senior Planner Carolyn Hope and attached here as Exhibit A makes clear, Redmond's proposed construction of the

⁸ The City cut through and removed the track, removed all the signal arms at all crossings inside the City, broke into and damaged one signal box, and disabled all the signals at the crossings on the segment they bought.

storm water trunk line would severely harm GNP's proposed operations by substantially encroaching upon, and thus interfering with the rail ROW.⁹ Ms. Hope's opined that "**not all the pieces fit**,"¹⁰ meaning that the ROW is not sufficiently wide to accommodate both the storm water trunk line and restored rail service. Notwithstanding this disturbing disclosure, the Infrastructure Alignment Plan was approved by Redmond City Council, and project planning moved ahead to its next phase. Without attempting to reconcile infrastructure alignment issues and constructing the storm water trunk line in the face of these pending proceedings, Redmond is attempting to present the Board and the other parties with a *fait accompli*. GNP seeks Board relief to preserve the *status quo* prior to the disposition of these proceedings.

Redmond's actions are tantamount to condemnation of property necessary for restoration of rail service. As the Board has previously ruled, condemnation of rail assets constitute a form of state or local regulation of rail transportation, which is federally preempted by 49 U.S.C. 10501(b). *See, City of Lincoln—Petition for Declaratory Order*, FD No. 34425, STB served August 12, 2004, where the City

⁹ On September 14, 2010 Redmond Senior Planner, Carolyn Hope, briefed Redmond City Council regarding the City's Infrastructure Alignment Plan, indicating the railroad ROW constricts to 50 feet at its narrowest point, the Leary Way grade crossing in downtown Redmond.⁹ On October 12, 2010 Ms. Hope returned to City Council to report that the existing ROW must accommodate a 25-29 foot wide trail, a 34 foot wide storm water trunk line (20 feet from the pipe to the ROW boundary, four (4) feet for the diameter of the pipe itself,⁹ and 10 feet from the pipe to the rail), and a 28 foot wide light rail envelope.⁹ A 17 foot lateral envelope was established for heavy rail.

¹⁰ *See*, Exhibit A at 17.

sought to obtain by condemnation a 20-foot-wide strip of land within a rail corridor that was part of the national rail system for the purpose of installing a sewer line.

The Board has several tools at its disposal to remedy Redmond's wrongs. The Board could issue a "show cause order" as it did in Central Oregon & Pacific Railroad, Inc.—Coos Bay Rail Line, FD No. 35130, STB served April 10, 2008, where the Board took action against incumbent carrier which had imposed an embargo amounting to a *de facto* unauthorized abandonment without first seeking abandonment authority. It required the railroad to restore service.

Alternatively, the Board could enter a "cease and desist" order as it did in Suffolk & Southern Rail Road LLC—Lease and Operation Exemption—Sills Road Realty, LLC, FD No. 35036, STB served October 12, 2007), directing any party or related entity¹¹ to cease and desist from undertaking any construction activities at the subject rail facility, and to either obtain Board authorization for the construction, or a Board decision (through a declaratory order proceeding or other appropriate formal means) finding that such activity does not require Board approval. The MKT decision cited above suggests that the Board could issue a cease and desist order against any further salvage activities until either Redmond or King County satisfy the environmental conditions imposed in the Abandonment

¹¹ GNP requests that in addition to Redmond, the Board likewise direct the trail user, King County, and any other party or interested persons from salvaging any part of the ROW during these proceedings.

Exemption. MKT, *supra*, slip op. at 7 (none issued there because the Board found that the Union Pacific Railroad as the successor to the original applicant would not attempt to avoid compliance with the Board's historic conditions).

Finally, under 49 U.S.C. 721(b) (4), the Board also has inherent authority to issue an appropriate order "when necessary to prevent irreparable harm." To obtain an injunction under this provision, the requesting party must show: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. See, DeBruce Grain, Inc. v. Union Pacific RR, 2 S.T.B. 773, 775 n.3 (1997) (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

In evaluating these factors, the agency must "balance the strengths of the requesting party's arguments in each of the four required areas," so that "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (citation and internal quotation marks omitted). In particular, "[p]robability of success is inversely proportional to the degree of irreparable injury evidenced."

GNP has a strong likelihood of success on the merits. In a related proceeding concerning this very rail line this Board found, "While the parties' agreement

would transfer to King County BNSF's opportunity to provide rail service, it would not preclude *any other service provider* from seeking Board authorization to restore active rail service on all or parts of the rail banked segments in the future if King County does not exercise its right to reinstate rail service. See 16 U.S.C. 1247(d); Georgia Great Southern," cited in FD No. 35148 King County, *supra*, slip op. at 3-4. [Emphasis supplied.]

Further heightening GNP's probability of success is the fact that King County, not Redmond, is the trail sponsor. The trail sponsor is obligated by statute to make the corridor available to reinstitute service when the necessary criteria are satisfied under the Trails Act. Norfolk & Western Ry. Co—Abandonment Between St. Marys And Minister In Auglaize County, OH. 9 I.C.C.2d 1015,1018-19 (1993). King County, and not Redmond, is the party obliged to comply with the conditions imposed by the Board in the Abandonment Exemption decision. Accordingly, GNP has is a substantial likelihood of restoring this line to active rail service.

GNP would be irreparably harmed by the Board's failure to grant its requested relief as Redmond's construction and salvage activities on the Redmond Spur would substantially interfere with its proposed restoration of interstate rail freight transportation activities and services over that portion of the rail line as discussed above. Conversely, neither Redmond nor King County has not shown

how delaying salvage activities during the pendency of this proceeding would substantially harm them.

An injunction would further be in the public interest as GNP seeks to provide essential freight transportation services for local customers seeking to become re-connected with the national rail system. Several Redmond-based potential customers, including Unisea and Steeler, Inc. have submitted letters of support for GNP in these proceedings. The restoration of freight rail service on the Redmond Spur will promote the reduction of highway congestion, result in fuel conservation and encourage the laudable goal of increased use of the national rail system. It is also in the public interest to be able to utilize a rail system as an energy efficient, environmentally friendly form of transportation, amidst the well documented global warming problem and shortage of fossil fuel.

It would be against the public interest for Redmond to initiate rail salvage activity and storm water sewer construction activity only to have its activity subsequently invalidated by a contrary order of this Board. Sound public policy dictates that it is far better to preserve the *status quo* for a brief time than to hastily embark on a costly and erroneous course of action.

Accordingly, GNP requests the Board enjoin King County and/or Redmond from undertaking or initiating any construction or salvage activities interfering with rail service or the restoration of rail service on the Redmond Spur, including

those activities described in Redmond's April 13th LOI. The injunction should become effective immediately and remain effective until the disposition of these proceedings, or unless or until the Board otherwise orders, and upon such terms as the Board directs.

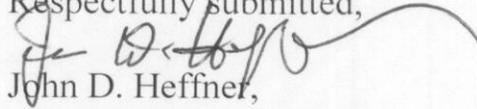
CONCLUSION

For the foregoing reasons and based upon the above cited authority, GNP respectfully requests the Board strike or reject Redmond's April 13, 2011 filing as untimely and unauthorized.

In the alternative, GNP respectfully requests the Board to grant GNP leave to reply to Redmond's April 13th filing, and to grant GNP such other and further relief as the interests of justice require, including but not necessarily limited to the following:

1. Vacating the NITU previously issued to King County;
2. Enjoining King County and/or Redmond from removing any rail trackage or infrastructure from the Redmond Spur ROW pending further order of this Board; and
3. Such other and further relief as the interests of justice require.

Respectfully submitted,



John D. Heffner,

John D. Heffner, PLLC

James H.M. Savage

1750 K Street, N.W., Suite 200

Washington, D.C. 20006

(202) 296-3335

Counsel for Petitioner

GNP Rly Inc.

Dated: April 28, 2010

EXHIBIT A

Redmond Central Connector Master Plan

**Briefing to the Redmond City Council
On the Infrastructure Alignment Plan
September 14, 2010**

**By Carolyn Hope, Senior Planner
425.556.2313
cjhope@redmond.gov**

&

**Dave Knight & Guy Michaelsen
The Berger Partnership**

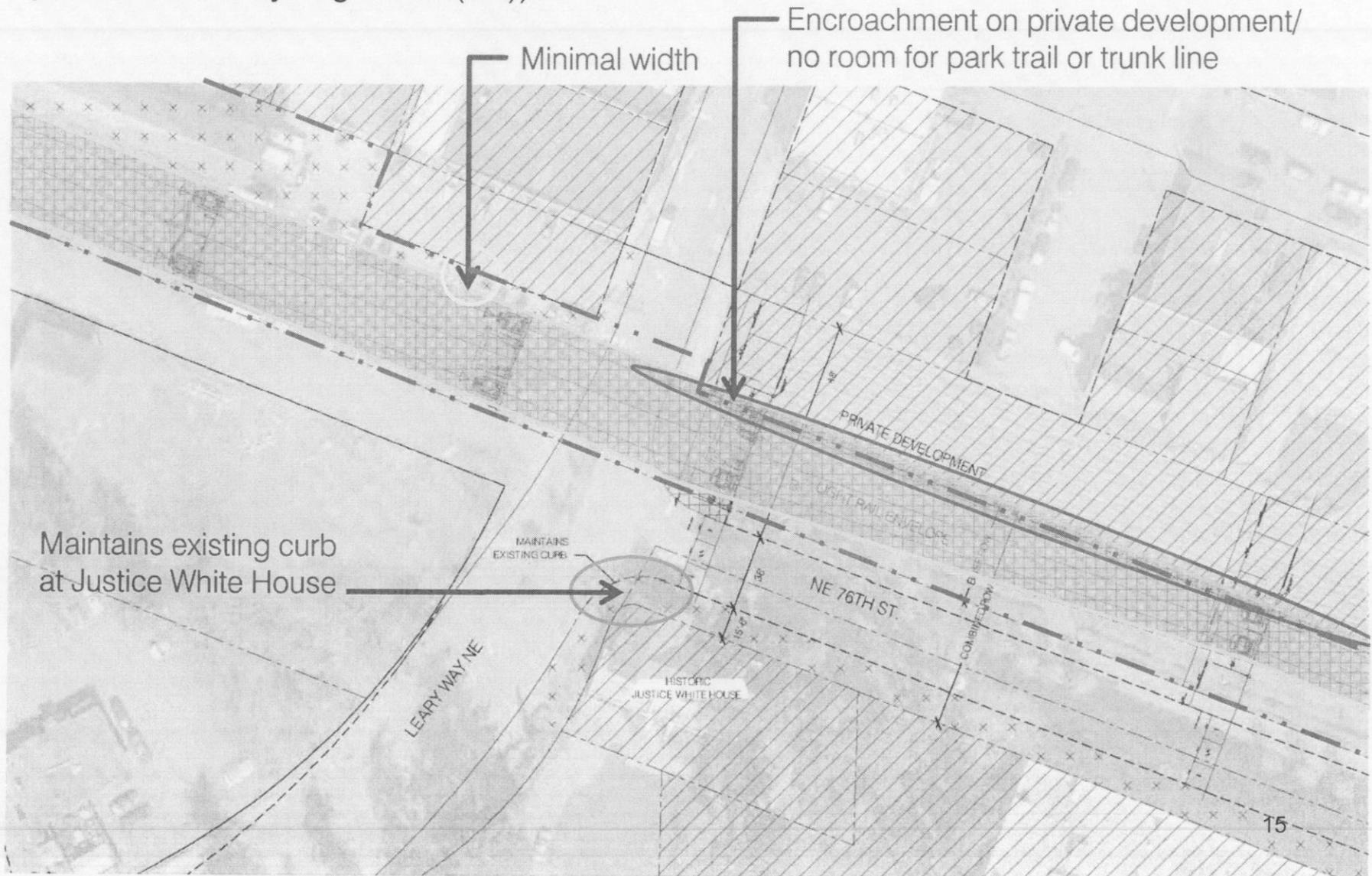
Park Trail + Light Rail + Streets + Infrastructure

City of Redmond Stormwater Trunk Line

- 4 foot wide pipe in BNSF ROW
- From Redmond Way trestle to 170th Ave NE area
- At 60 Percent Design and asked to postpone a year
- Must complete design by March to Construct in June



BNSF Corridor Center Running
(ST SDEIS Study Alignment (E2))



Park Trail + Light Rail + Streets + Infrastructure

Not all the pieces fit

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of GNP's Motion to Strike was served by first-class United States mail or electronic mail upon the following:

Matthew Cohen *
Hunter Ferguson*
Stoel Rives LLP
600 University Street, Site 3600
Seattle, WA 98101

Jared Cook*
Foley & Lardner LLP
Washington Harbour
3000 K Street, NW, Suite 500
Washington, DC 20007-5143

Kurt Triplett
City of Kirkland
125 5th Avenue
Kirkland, WA 98033

Jean M. Cerar
Issaquah Valley Trolley
P.O. Box 695
Issaquah, WA 98052

Isabel Safora*
Ann DeKoster*
Port of Seattle
P.O. Box 1209
Seattle, WA 98111
safora.i@portseattle.org
dekoster.a@portseattle.org

Steve Sarkozy
City of Bellevue Manager
P.O. Box 90012
Bellevue, WA 98009

Kathy Cox
Marketing Philharmonic
218 Main St. #668
Kirkland, WA 98033

Karl Morell *
Ball Janik LLP
1455 F Street, NW, Suite 225
Washington, DC 20005

Robin Pollard
Washington Wine Commission
1000 Second Ave., Suite 1700
Seattle, WA 98104-3621

Tom Carpenter
International Paper
International Place I
6400 Poplar Avenue
Memphis, TN 38197

Don Davis
Master Builders Association of
King and Snohomish Counties
335 116th Ave. S.E.
Bellevue, WA 98004

Charles A. Spitulnik *
Allison I. Fultz*
W. Eric Pilsk*
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, DC 20036

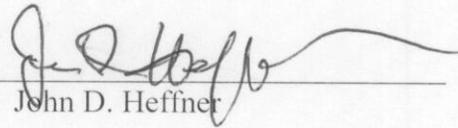
*Electronic service.

Ernest F. Wilson, PLS
17509 NE 38th Court
Redmond, WA 98052

Dean Kattler
Waste Management of WA, Inc.
13225 N.E. 126th Place
Kirkland, WA 98034

Andrea C. Ferster
Rails-To-Rails Trails Conservancy
2121 Ward Court, NW, 5th Floor
Washington, DC 20037

Paul Zimmer
Eastside Rail Now
P.O. Box 3524
Bellevue, WA 98009



John D. Heffner

Dated: April 28, 2011