



KAPLAN KIRSCH ROCKWELL

FILED

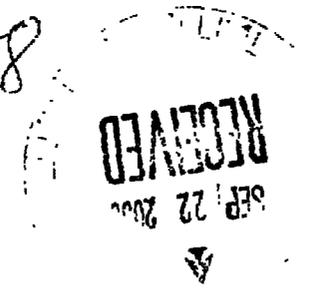
SEP 22 2008

**SURFACE
TRANSPORTATION BOARD**

September 22, 2008

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

22 3658



Re: *King County, Washington - Verified Petition for an Exemption from 49 U.S.C. §10901, Finance Docket No. 35148*

Dear Ms. Quinlan:

I am enclosing an original and ten (10) copies of the Verified Petition for Exemption from 49 U.S.C. §10901 of King County, Washington, in the above referenced proceeding. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

I am enclosing the \$12,600.00 filing fee required for the Petition for Exemption. However, King County requests a waiver of the filing fee based on the fact that it is a local government entity filing the Petition for Exemption on behalf of the general public. *See 49 CFR §1002.2(e); STB Ex Parte No. 542 (Sub-No. 6) – Regulations Governing Fees For Services Performed In Connection With Licensing and Related Services – Policy Statement (Served December 6, 2000).* King County is a "state or local government entity" and is a non-carrier, as explained in the attached Petition for Exemption.

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Sincerely,

Charles A. Spitulnik

Enclosure

cc: All Parties of Record

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THIS SUBMISSION CONTAINS AN OVERSIZE COLOR IMAGE AT EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

FINANCE DOCKET NO. 35148

223658

**KING COUNTY, WASHINGTON
- ACQUISITION EXEMPTION -
BNSF RAILWAY COMPANY**

VERIFIED PETITION FOR AN EXEMPTION FROM 49 U.S.C. §10901

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Dated: September 22, 2008

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

FINANCE DOCKET NO. 35148

**KING COUNTY, WASHINGTON
– ACQUISITION EXEMPTION – BNSF RAILWAY COMPANY**

VERIFIED PETITION FOR AN EXEMPTION FROM 49 U.S.C. §10901

INTRODUCTION

Pursuant to 49 U.S.C. §§10901 and 10502 and 49 C.F.R. Part 1121, King County, Washington (“**King County**”), a political subdivision of the State of Washington and a non-carrier, hereby files this Verified Petition for Exemption to acquire from BNSF Railway Company (“**BNSF**”) the residual common carrier rights and obligations, including the right to reinstitute rail service in the future, over the following rail lines located in King County, Washington:

1. Woodinville Subdivision from Milepost 5.00 in Kenndale north to Milepost 10.60 at Wilburton (the “**South Railbanking Segment**”). BNSF recently submitted a Notice of Exemption with respect to the South Railbanking Segment abandonment in *BNSF Railway Company – Abandonment Exemption – in King County, WA*, AB-6 (Sub-No. 464X) (filed September 8, 2008) (“*South Abandonment*”).
2. Woodinville Subdivision from Milepost 11.25 near Wilburton north to 23.80 in Woodinville¹ (the “**North Railbanking Segment**”). BNSF filed a Petition for Exemption with respect to the abandonment of the North Railbanking Segment on

¹ The segment of the Woodinville Subdivision from Milepost 10.6 to Milepost 11.25 (the “**Wilburton Segment**”) has been fully abandoned and is therefore no longer under the Board’s jurisdiction. *BNSF Railway Company – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 453X) Notice of Consummation (Filed March 10, 2008).

August 11, 2008. *BNSF Railway Company – Abandonment Exemption – in King County, WA, AB-6 (Sub-No. 465X)* (filed August 11, 2008) (“*North Abandonment*”).

This Board published a notice of the Petition in the Federal Register on August 29, 2008. 73 Fed. Reg. 51047 (August 29, 2008).

3. The Redmond Spur from Milepost 0.0 in Woodinville to approximately Milepost 7.30 in Redmond (the “**Redmond Spur**”). The Redmond Spur connects with and crosses the North Railbanking Segment at Milepost 23.80 of the Woodinville Subdivision. The BNSF recently submitted a Notice of Exemption with respect to the abandonment in *BNSF Railway Company – Abandonment Exemption – in King County, WA, AB-6 (Sub-No. 463X)* (filed September 8, 2008) (“*Redmond Spur Abandonment*”).

Collectively, these three lines comprise the “**Railbanking Segments**”. The Railbanking Segments contain a total of approximately 25.45 route miles. A map depicting the Railbanking Segments is attached as **Exhibit A**.

King County intends to use the Railbanking Segments for a public trail and potentially other public purposes. On September 18, 2008, the County submitted trail use requests to obtain Notices of Interim Trail Use (each a “**NITU**”) for the South Railbanking Segment, Redmond Spur and for the North Railbanking Segment pursuant to Section 8(d) of the National Trails System Act, codified at 16 U.S.C. §1247(d), and 49 C.F.R. §1152.29 (collectively, as such statutes and regulations may be amended, the “**Railbanking Legislation**”).² BNSF and King County have negotiated a Trail Use Agreement with respect to all three Railbanking Segments. King County will be the trail manager of the Railbanking Segments, and acknowledges that its use of the Railbanking Segments for public

² Along with its trail use requests, King County filed in each of the three relevant proceedings Replies in support of BNSF’s requests to exempt those abandonments from offers of financial assistance and public use conditions.

trails will be subject to the potential future restoration of rail service over the lines pursuant to the requirements of the Railbanking Legislation.

The real property and physical assets of the Railbanking Segments are being acquired by the Port of Seattle (the “Port”) from BNSF. The Port will grant to King County a public multipurpose easement to allow King County to use the Railbanking Segments for an interim trail pursuant to the Railbanking Legislation.³ In view of the railbanked status of the three segments, the Port will not acquire any right or obligation to conduct rail freight operations on the Railbanking Segments. BNSF will also transfer to the Port BNSF’s real property interests in the already-abandoned Wilburton Segment. Accordingly, through the proposed transactions, BNSF intends to convey its interest in the real property and physical assets associated with the Railbanking Segments and the real property interests associated with the Wilburton Segment to the Port and to separately and simultaneously convey its right to reactivate service in the future on the Railbanking Segments to King County, the trail manager.⁴

BNSF wishes to divest itself of its entire interest in the Railbanking Segments. King County’s proposed acquisition of BNSF’s reactivation right and the Port’s acquisition of the physical assets associated with the Railbanking Segments will together effect a bifurcated transfer of all of BNSF’s interest in the Railbanking Segments. King County is a non-carrier. Accordingly, BNSF’s

³ The multipurpose easement will also apply to the Wilburton Segment, such that King County will be able to establish a trail and maintain connections to the national rail system through the entirety of the Wilburton Subdivision between milepost 5.0 and milepost 23.8.

⁴ In a related transaction, the Port will also acquire the physical assets on the portion of the Woodinville Subdivision to the north of the North Railbanking Segment, from Milepost 23.80 in Woodinville to Milepost 38.25 in Snohomish, in King and Snohomish Counties (the “Freight Portion”). The Notice of Exemption with respect to the Port’s acquisition of the physical assets associated with the Freight Portion became effective on July 4, 2008. *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35128. Notice of Exemption (Service Date June 20, 2008). BNSF conducts freight operations over the Freight Portion and will retain the exclusive, permanent easement to continue to conduct operations on that segment. Accordingly, and simultaneously with its Notice of Exemption, the Port filed a motion to dismiss the exemption on jurisdictional grounds. *Id.* at 2. Along with the closing of the transactions described in this Petition, BNSF will convey the freight easement to a third party operator which will secure separate Board approval or an exemption to conduct freight common carrier service. King County does not seek to acquire any rights with respect to the Freight Portion and that line is therefore not included in this Petition.

transfer of its reactivation rights in the Railbanking Segments constitutes a non-carrier acquisition pursuant to 49 U.S.C. §10901(a)(4). Because (a) the disposition of this railbanked property by BNSF is not necessary to carry out the transportation policy of section 10101 of 49 U.S.C., (b) the transaction is limited in scope and (c) the transaction will not result in an abuse of market power, King County is seeking an exemption from the requirements of Section 10901 pursuant to 49 U.S.C. §10502 for its acquisition of this limited interest in the Railbanking Segments from BNSF.

SUMMARY OF THE TRANSACTION

King County's acquisition of BNSF's restart right on the Railbanking Segments is one component of a multi-party series of transactions. The first step in this series of transactions is the abandonment by BNSF of its obligation to provide freight service: STB Dockets AB-6 (Sub-No. 463X), AB-6 (Sub-No. 464X) and AB-6 (Sub-No. 465X). The second step is the submission by King County of trail use requests in the foregoing abandonment proceedings. The third step is the Port's simultaneous acquisition of BNSF's interest in the physical assets associated with the Railbanking Segments and of the Wilburton Segment. The final step is King County's acquisition of the restart right in the Railbanked Segments.⁵

BNSF, the Port and King County expect to consummate the transactions relating to the Railbanking Segments, Wilburton Segment and Freight Portion as soon as feasible after September 30, 2008, once all of the required approvals from this Board have been obtained. On the closing date, the following simultaneous events will occur with respect to the Railbanking Segments:

⁵ As noted previously in fn. 4, *supra*, this series of transactions is related as well to the transaction in which the Port will acquire from BNSF the physical assets on the Freight Portion. BNSF will retain the exclusive rail freight easement on that segment. A copy of the Response of BNSF, the Port of Seattle and King County to Request for Information in Docket No. AB-6 (Sub-No. 465X) (Filed September 18, 2008), which summarizes the transactions between and among these parties, the proceedings before this Board necessary to effect those transactions, and the relationship of the transactions and proceedings to each other, is attached hereto as **Exhibit B**.

1. BNSF will transfer its interest in the right-of-way, track, fixtures and other physical assets of the Railbanking Segments and Wilburton Segment to the Port.
2. The Port will grant to King County a Public Multipurpose Easement to allow King County to use the Railbanking Segments for an interim trail pursuant to the Railbanking Legislation. A copy of the Public Multipurpose Easement is attached hereto as **Exhibit C**.
3. King County and BNSF will execute a Trail Use Agreement (relating to all 3 Railbanking Segments) allocating the responsibilities of King County and BNSF under the Railbanking Legislation to effect the development and use of a trail and other public facilities. A copy of the form of Trail Use Agreement to be executed by King County and BNSF is attached hereto as **Exhibit D**.
4. BNSF will transfer its right and obligation to reactivate rail service on the Railbanking Segments to King County.

These documents are collectively the “**Transfer Documents**.” In this proceeding, King County seeks authority to acquire BNSF’s reactivation right.

ARGUMENT

The circumstances of this multi-faceted transaction justify approving the transfer of BNSF’s reactivation right and obligation to King County. King County will be the trail manager and therefore the party with primary responsibility for the physical and legal maintenance of the Railbanking Segments for a trail and potentially other public use. BNSF wishes to divest itself of its entire interest in the Railbanking Segments, including the limited residual common carrier obligation that comprises the reactivation right, which it would otherwise retain as the abandoning railroad pursuant to the Railbanking Legislation. BNSF, King County and the Port have mutually agreed to the transactions described in this Petition in furtherance of King County’s public purpose. Because

King County, as trail manager, will be the entity whose interests would be most immediately impacted by a request for freight rail service on any of the Railbanking Segments, King County has agreed to acquire the right to reinstitute service from BNSF, the party who would have retained that right by operation of the Railbanking Legislation.

A. Board Precedent Supports the Authorization of the County's Acquisition of BNSF's Restart Right

In the first case in which it authorized the acquisition of the right to restart service from an abandoning railroad, the ICC stated that “the right to reinstitute rail service is a common carrier interest that did not exist prior to the Trails Act.” *Norfolk & Western Ry. Co. – Aban. St. Marys & Minister in Auglaize County, OH*, 9 I.C.C.2d 1015, 1018 (1993). When a trail user obtains a Notice of Interim Trail Use from the Board and enters into a trail agreement, the trail user takes on the obligation, among others, to make the corridor available for the reinstatement of rail service because the abandoning carrier retains a residual common carrier obligation over the railbanked line. *Id.* at 1017-18. A party other than the abandoning carrier may obtain that right only with the Board's approval, “because the right embraces the unextinguished, residual common carrier obligation, and only [the Board] may authorize its transfer or exempt it from regulation.” *Id.* at 1018-19. Accordingly, “the right to reactivate rail service on all or part of a rail banked line does not transfer to the trail user without the Board's approval.” *BG & CM R., Inc. – Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 34399 (Service Date October 17, 2003), *slip op.* at 5.

King County's use of the Railbanking Segments for a public trail keeps alive the inchoate obligation to provide service if requested over the line. Were it not for King County's interest in railbanking, the Railbanking Segments would be fully abandoned and BNSF would be transferring an abandoned, rather than railbanked, line to the Port. 16 U.S.C. §1247(d). Accordingly, allowing King County to acquire BNSF's residual common carrier obligation will satisfy twin public aims of

the Railbanking Legislation, providing public recreational trails and preserving the Railbanking Segments for future freight rail use, by vesting responsibility for the trail and the right to restart service in the same entity. The Board should therefore grant this Petition and allow King County to acquire the right to reactivate service in the future over the Railbanking Segments.

B. An Exemption from the Requirements of Section 10901 is Appropriate.

As discussed below, the absence of a discernable impact of King County's acquisition of BNSF's restart right on existing freight rail operations illustrates that an exemption under Section 10502 from the requirements of Section 10901 is appropriate.

1. The Application of Section 10901 is Not Necessary to Carry out the Transportation Policy of Section 10101.

Board oversight of this transaction is not necessary to carry out rail transportation policy. In fact, granting the exemption will serve the goals of that policy: "to minimize the need for Federal regulatory control over the rail transportation system..." and "to reduce regulatory barriers to entry into and exit from the industry." 49 U.S.C. §10101 (2) and (7). BNSF has sought authority to abandon these segments, which will have the effect of removing them from the national freight rail system, subject to the requirements of the Railbanking Legislation. This authority, once granted, will be exercised through the ratification of the Transfer Documents. Once the BNSF abandonments become effective, the Board will have removed the regulatory barriers to taking the Railbanking Segments out of the national freight rail system. *Consummation of Rail Line Abandonments that are Subject to Historic Preservation and Other Environmental Conditions*, STB Docket Ex Parte No. 678 (Service Date April 23, 2008), *slip op.* at 2. Permitting the transfer to King County of the residual rights that link this line to that system without requiring additional oversight makes sense as well. That transfer vests in one entity the responsibility for overseeing the maintenance of the

corridor and its preservation for future rail service. The Board should exempt King County's acquisition of the residual common carrier obligation from the requirements of Section 10901.

2. The Transaction is of Limited Scope

This Petition addresses the proposed acquisition of certain specifically delineated, inchoate rights in connection with several lines for which BNSF has sought abandonment authority. The Railbanking Segments, in total, extend approximately 25.45 miles. No existing rail operations will be affected. Because the proposed acquisition of BNSF's restart right affects a limited geographic area and will not have any impact on the existing national freight rail network, the transaction is limited in scope and the Board should exempt it from the requirements of Section 10901.

3. The Application of Section 10901 is Not Needed to Protect Shippers from the Abuse of Market Power.

BNSF has sought authority to abandon the Railbanking Segments. As a result, the question whether this transfer will affect the interests of shippers is moot. Those interests were addressed already by the opportunity to participate in the abandonment proceeding. Moreover, the transfer is designed to enhance the interest of the shippers by ensuring that one party is responsible for the maintenance of the corridor and for its preservation for future reactivation of rail service. The Board should therefore exempt the acquisition of the restart right from the requirements of Section 10901.

ADDITIONAL INFORMATION

The name and address of the party transferring the right to reactivate service over the Railbanking Segments is as follows:

BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76131

King County will not conduct any freight operations. Therefore the projected freight revenues of the rail line involved in this transaction will not exceed those that would qualify King County as a Class III rail carrier.

Under 49 C.F.R. § 1105.6(c)(2), the proposed acquisition of the reactivation right by King County is exempt from environmental reporting requirements. King County's acquisition of the right to reactivate service over the Railbanking Segments will not result in significant changes in carrier operations (i.e., changes which exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5)) because there are no carrier operations existing on the Railbanking Segments, and none are projected to follow at this time.

Under 49 C.F.R. § 1105.8(b)(1), the proposed acquisition of the reactivation right by King County also is exempt from historic preservation reporting requirements. BNSF has already acquired and exercised abandonment authority with respect to the Railbanking Segments, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

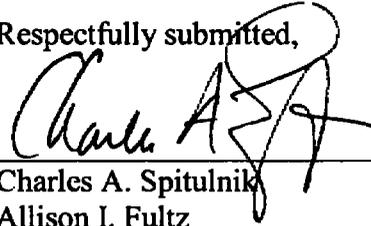
CONCLUSION

King County's proposed acquisition of the right to restore service to the Railbanking Segments in the future is consistent with prior Board decisions allowing an abandoning carrier to transfer its restart right over a railbanked line to another party. Furthermore, because regulation of the transaction is not necessary to carry out rail transportation policy, the transaction is of limited scope and will not subject shippers to an abuse of market power, the Board should grant this Petition.

WHEREFORE, for the reasons set forth above, King County respectfully requests that the Board grant this Petition, permit King County to acquire BNSF's residual common carrier obligation

over the Railbanking Segments, and exempt the acquisition from the requirements of 49 U.S.C. §10901.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

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Phone: (202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com

Dated: September 22, 2008

VERIFICATION AND CERTIFICATION

I, the Director, Encos # ^{Subsidiary}, [title] of King County, Washington, verify under penalty of perjury that the facts recited in the foregoing Petition for Exemption are true and correct. Further, I certify that I have personal knowledge of the facts stated therein and that I am authorized to verify these facts stated in this Verified Petition for Exemption.

[Handwritten Signature]
[sign name]

Roderick C. Beardslee
[print or type name]

Subscribed and sworn to before me this 17th day of September, 2008.

[Handwritten Signature]
Notary Public

My commission expires: 8/1/12

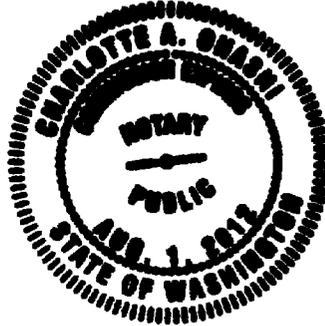


EXHIBIT A

MAP OF THE LINE

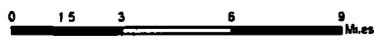
[attached hereto]

BNSF Woodinville Subdivision

(N Renton to Snohomish)

Existing Rail Lines and Regional Trails

-  Subject Corridor
-  Other Regional Rail Lines
-  Regional Bike Routes/Trails
-  Metropolitan Transportation System
-  Abandoned MP 38.25-39.00 (eff 07/21/2008)
-  Abandoned MP 10.60-11.25 (eff 03/07/2008)
-  Abandoned and Sold



May 31, 2008

Abandoned and Sold
 * Milepost 39.00 to Milepost 47.11
 Abandoned 5/6/1986
 * Milepost 47.11 to Milepost 57.36
 Abandoned 3/23/1972
 * Milepost 39.10 to 57.36 Sold to Snohomish County

Milepost 39.10 to Milepost 39.26
 GNP-Snohomish County lease -- 0.85 mile from end of national rail system at Milepost 38.25

Snohomish

End of Freight Portion
 MP 38.25

* Milepost 38.25 to Milepost 39.00
 Abandoned 07/21/08
 * Sale of real estate to City of Snohomish (MP 38.25 to MP 39.10) soon to close

Beginning of AB-6 (Sub-No 463X)
 Milepost 0.00

End of AB-6 (Sub-No 463X)
 Milepost 7.30

Beginning of Freight Portion
 Milepost 23.80

End of AB-6 (Sub-No 463X)
 Milepost 11.25

Beginning of AB-6 (Sub-No 463X)
 Milepost 11.25

End of AB-6 (Sub-No 464X)
 Milepost 10.60

Beginning of AB-6 (Sub-No 464X)
 Milepost 5.00

Kitsap

King

EXHIBIT B

**RESPONSE OF BNSF RAILWAY COMPANY, PORT OF SEATTLE AND KING
COUNTY, WASHINGTON
TO REQUEST FOR INFORMATION IN DOCKET NO. AB-6 (SUB-NO. 465X)
(FILED SEPTEMBER 18, 2008)**

[attached hereto]

THIS SUBMISSION CONTAINS COLOR IMAGES AT EXHIBITS B AND C

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

223642



**FINANCE DOCKET NO. 35128
THE PORT OF SEATTLE
ACQUISITION EXEMPTION - CERTAIN ASSETS OF BNSF RAILWAY COMPANY**

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

**DOCKET NO. AB-6 (SUB-NO. 464X)
BNSF RAILWAY COMPANY
ABANDONMENT EXEMPTION IN KING COUNTY, WASHINGTON**

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

ENTERED
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SEP 19 2008
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Public Record

**RESPONSE OF BNSF RAILWAY COMPANY, PORT OF SEATTLE AND KING
COUNTY, WASHINGTON
TO REQUEST FOR INFORMATION IN DOCKET NO. AB-6 (SUB-NO. 465X)**

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**Attorneys for The Port of
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**Attorneys for King County,
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**Attorneys for BNSF Railway
Company**

Dated: September 18, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

**FINANCE DOCKET NO. 35128
THE PORT OF SEATTLE
ACQUISITION EXEMPTION – CERTAIN ASSETS OF BNSF RAILWAY COMPANY**

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

**DOCKET NO. AB-6 (SUB-NO. 464X)
BNSF RAILWAY COMPANY –
ABANDONMENT EXEMPTION IN KING COUNTY, WASHINGTON**

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

**RESPONSE OF BNSF RAILWAY COMPANY, PORT OF SEATTLE AND KING COUNTY,
WASHINGTON
TO REQUEST FOR INFORMATION IN DOCKET NO. AB-6 (SUB-NO. 465X)**

The BNSF Railway Company (“BNSF”), Port of Seattle (“Port”) and King County, Washington (“King County”) hereby submit this joint Response (the “Joint Response”) to the request for information included in the Notice issued by the Board in Docket No AB-6 (Sub-No. 465X), 73 Fed.Reg. 51047 (August 29, 2008) (the “August 29 Notice”).

BACKGROUND

The *August 29 Notice* related to a Petition for Exemption in which BNSF sought authority to abandon a 12.55-mile segment of the Woodinville Subdivision from milepost 11.25 near Wilburton to milepost 23.80 in Woodinville, King County, Washington. The Board noted that two other proceedings involving BNSF had been filed concerning the Woodinville Subdivision: (1) *The Port*

of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company, STB Finance Docket No. 35128 (Service Date June 20, 2008) (“*Port of Seattle*”), in which the Port filed a notice of exemption to acquire from BNSF the right-of-way, track, and other property and physical assets on the Woodinville Subdivision between milepost 23.80 and milepost 38.25; and (2) *The Burlington Northern and Santa Fe Railway Company – Abandonment Exemption – In Snohomish County, WA*, STB Docket No. AB-6 (Sub-No. 422X) (Service Date July 2, 2004), in which BNSF initially sought authority to abandon a 0.99 mile segment from milepost 38.01 to 39.00 (the “*BNSF Snohomish Abandonment*”), and pursuant to which BNSF ultimately consummated abandonment of the segment from milepost 38.25 to milepost 39.00, retaining the segment from milepost 38.01 to milepost 38.25 as an active rail line.¹

Additionally, the Board has asked about the relationship between these transactions and a Modified Certificate of Public Convenience and Necessity it issued with respect to a segment that is not contiguous to the segments just described. *GNP Rly Inc. – Modified Rail Certificate – In Snohomish County, WA*, STB Finance Docket No. 35151 (Service Date August 13, 2008). That is a separate and wholly independent proceeding, and neither BNSF nor the Port nor King County is a party to that transaction or the proceeding. GNP Rly, Inc. (“GNP”) sought a Modified Certificate of Public Convenience and Necessity to lease and operate service over an abandoned segment of the Woodinville Subdivision owned by Snohomish County, Washington, from milepost 39.10 to approximately milepost 39.30, a distance of approximately 0.20 mile.²

In the *August 29 Notice*, the Board requested that BNSF, the Port, King County and other interested persons, if any, provide information to supplement filings in the record involving the

¹ BNSF Notice of Consummation, AB-6 (Sub-No. 422X) (Filed Date July 21, 2008).

² GNP Railway’s Modified Certificate applies to part of a longer line authorized for abandonment by the Interstate Commerce Commission over 22 years ago *Burlington Northern Railroad Company-Exemption-Abandonment in Snohomish County, WA*, Docket No. AB-6 (Sub-No. 280X) (Service Date March 12, 1986)

Woodinville Subdivision segments to clarify the interrelationship (or independence, as the case may be) of the various proceedings. The following explains the multi-faceted transactions, and the relationship among the proceedings that have been and will be commenced with respect to them.

SUMMARY OF BNSF, PORT AND KING COUNTY PROCEEDINGS BEFORE THE BOARD

Following are descriptions of the proposed transactions (the "BNSF Transactions"), including their relationship to one another, and the corresponding proceedings which have commenced or will be commenced before this Board. As the following descriptions indicate, the Port will acquire from BNSF (1) a continuous 33.25 mile-long corridor along the Woodinville Subdivision extending from milepost 5.00 in Kenndale to milepost 38.25 in Snohomish and (2) the 7.30 mile-long Redmond Spur, which intersects the Woodinville Subdivision at milepost 23.80. With respect to the northernmost segment, between milepost 23.80 and milepost 38.25 (the "Freight Portion"), BNSF will retain an exclusive freight easement.³ BNSF has sought authority to abandon and will enter into a trail use agreement with King County for the remaining segments (the "Railbanking Segments").⁴ The Port will grant King County an easement to permit King County to fulfill its trail use responsibilities. King County will also acquire BNSF's reactivation right with respect to the Railbanking Segments. BNSF, the Port and King County expect to consummate the BNSF Transactions as soon as feasible after September 30, 2008, once all of the required approvals from this Board have been obtained. An index of relevant proceedings and pleadings is attached hereto as **Exhibit A**. On the closing date, the following simultaneous events will occur.

³ BNSF will transfer that freight easement to a third party operator. At the appropriate time, that operator will comply fully with all regulatory requirements.

⁴ The segment of the Woodinville Subdivision from Milepost 10.6 to Milepost 11.25 (the "Wilburton Segment") has been fully abandoned and is therefore no longer under the Board's jurisdiction. *BNSF Railway Company – Abandonment Exemption – In King County, WA – STB Docket No. AB-6 (Sub-No. 453X) Notice of Consummation (Filed March 10, 2008)* BNSF will transfer the Wilburton Segment to the Port along with the Railbanking Segments

Freight Portion Transactions:

1. BNSF will transfer its interest in the right-of-way, track, fixtures and other physical assets of the Freight Portion to the Port. The proceeding relating to this transaction is Finance Docket No. 35128, *Port of Seattle*, involving the Port's request for an exemption to acquire BNSF's real property interests and physical assets along the Freight Portion, from milepost 23.80 north to milepost 38.25 in King County and Snohomish County, Washington. The exemption became effective as of July 4, 2008. The Port has filed a Motion to Dismiss the Exemption in Finance Docket No. 35128, which is pending before the Board.

2. BNSF will transfer its operating easement over the Freight Portion to a third party operator, who will have been selected prior to closing. The third party operator will file for authority to acquire the right to operate over the Freight Portion.

Railbanking Transactions:

3. BNSF will secure authorization for abandonment of, and will transfer its interest in the right-of-way, track, fixtures and other physical assets of, the Railbanking Segments to the Port. Since BNSF will have obtained abandonment and railbanking authority for the Railbanking Segments before transferring its interest to the Port and simultaneously transferring its residual common carrier rights and obligations to King County, the transfer of the real property interests in the Railbanking Segments will not be subject to Board jurisdiction. The proceedings relating to this transaction are:

- Docket No. AB-6 (Sub-No. 463X), *BNSF Railway Company – Abandonment Exemption – In King County, Washington*, addressing BNSF's request to abandon the Woodinville Subdivision from milepost 0.00 in Woodinville to approximately milepost 7.30 in Redmond (the "Redmond Spur"), which connects with and crosses

the North Railbanking Segment (defined below) at milepost 23.80 of the Woodinville Subdivision. Concurrently with this Joint Response, King County is filing its statement of willingness to assume financial responsibility as the trail sponsor for this segment pursuant to Section 8(d) of the National Trails System Act, codified at 16 U.S.C. §1247(d), and 49 C.F.R. §1152.29 (collectively, the “Railbanking Legislation”).

- Docket No. AB-6 (Sub-No. 464X), *BNSF Railway Company – Abandonment Exemption – In King County, Washington*, addressing BNSF’s request to abandon the Woodinville Subdivision from milepost 5.00 in Kenndale north to milepost 10.60 in Wilburton (the “South Railbanking Segment”). Concurrently with this Joint Response, King County is filing its statement of willingness to assume financial responsibility as the trail sponsor for this segment pursuant to the Railbanking Legislation.
- Docket No. AB-6 (Sub-No. 465X), *BNSF Railway Company – Abandonment Exemption – In King County, Washington*, addressing BNSF’s request to abandon the Woodinville Subdivision from milepost 11.25 near Wilburton north to milepost 23.80 in Woodinville (the “North Railbanking Segment”). Concurrently with this Joint Response, King County is filing its statement of willingness to assume financial responsibility as the trail sponsor for this segment pursuant to the Railbanking Legislation.

4. The Port will grant to King County a public multipurpose easement to allow King County to use the Railbanking Segments for an interim trail pursuant to the Railbanking Legislation, providing King County with the property rights necessary to exercise its rights under the respective

Notices of Interim Trail Use to be issued in the three abandonment proceedings listed in Item 3.⁵ No STB authorization will be required for the grant of this easement.

5. King County and BNSF will enter into a Trail Use Agreement (relating to all 3 Railbanking Segments) allocating the responsibilities of King County and BNSF under the Railbanking Legislation to effect the development and use of a trail and other public facilities.

6. BNSF will transfer its right and obligation to reactivate rail service on the Railbanking Segments to King County. The proceeding relating to this transaction will be Finance Docket No. 35148, *King County, Washington, Acquisition Exemption – BNSF Railway Company*, and will consist of King County's request for an exemption from the requirements of 49 U.S.C. §10901 to acquire from BNSF the residual common carrier rights and obligations, including the right to reinstitute rail service in the future, over the North Railbanking Segment, the South Railbanking Segment and the Redmond Spur. King County will shortly be filing its Petition for Exemption to acquire BNSF's restart right.

A map of the Railbanking Segments, Wilburton Segment and Freight Portion is attached as **Exhibit B**.

**THE GNP RAILWAY, INC., MODIFIED CERTIFICATE IS NOT RELATED IN ANY WAY
TO THE BNSF TRANSACTIONS.**

The Board has issued a modified certificate of public convenience and necessity for a 0.20 mile segment of the former Woodinville Subdivision that is not contiguous to the Railbanking Segments, the Wilburton Segment or the Freight Portion. *GNP Rly Inc. – Modified Rail Certificate – In Snohomish County, WA, STB Finance Docket No. 35151 (Service Date August 13, 2008)*. The

⁵ The multipurpose easement will also apply to the Wilburton Segment, such that King County will be able to establish a trail and maintain connections to the national rail system through the entirety of the Wilburton Subdivision between milepost 50 and milepost 23.8

putative GNP operation is not part of the transactions described above, and has not been either sought or sanctioned by BNSF, the Port or King County. In its entirely separate and wholly independent proceeding, GNP sought a Modified Certificate of Public Convenience and Necessity to lease and operate service over an already-abandoned segment of the Woodinville Subdivision owned by Snohomish County, Washington, from milepost 39.10 to milepost 39.30. A map of the segments addressed in GNP's proceeding and in the *BNSF Snohomish Abandonment* is attached hereto as **Exhibit C.**

GNP's statements in the record of Finance Docket No. 35151 that its 0.20 mile segment connects to BNSF's active rail line are incorrect. GNP did not clarify what interest it has or intends to obtain in the segment between milepost 39.00 and 39.10, and BNSF has consummated abandonment of the segment from milepost 38.25 to milepost 39.00.⁶ Accordingly, there is no national rail system connection at the south end of GNP's 0.20 mile segment.

GNP was not and is not a party to any of the existing transactions involved in the three-way BNSF-Port-King County deal. Those transactions give GNP no right or interest in the Freight Portion, the Railbanking Segments or the Wilburton Segment. GNP cannot connect to the national rail system, the segments included in the *BNSF Snohomish Abandonment* or any of the segments comprehended in the BNSF Transactions from the south end of the 0.20 mile segment for which GNP sought a modified certificate of public convenience and necessity. Therefore, GNP's assertions that it is able to connect to lines south of its leased segment in the City of Snohomish are incorrect.

⁶ *The Burlington Northern and Santa Fe Railway Company – Abandonment Exemption – In Snohomish County, WA, Notice of Consummation (Filed Date July 21, 2008)*

CONCLUSION

BNSF, the Port and King County have endeavored through this Joint Response to present a full picture of the BNSF Transactions and related Board actions and trust that the information provided has been responsive to the Board's request in the *August 29 Notice*.

Once the BNSF Transactions are consummated, BNSF will have divested itself of all of its interest in the Railbanking Segments, the Wilburton Segment, and the Freight Portion. The Port will own the fee interest and physical assets associated with each segment. Rail service over the Freight Portion will be provided by a third party operator pursuant to an exclusive freight easement. King County will be the trail sponsor for the Railbanking Segments pursuant to the Trail Use Agreement it has negotiated with BNSF, and subject to the terms of the multipurpose public easement the Port will grant to it. King County will also have acquired the right to reinstitute service over the Railbanking Segments.

As described above, the filings previously submitted, submitted concurrently with this Joint Response or to be submitted provide to the Board all of the notices, petitions and requests necessary to prosecute the regulatory actions to support the BNSF Transactions. King County will shortly be filing its Petition for Exemption to acquire BNSF's restart right over the Railbanking Segments. Once a third-party operator for the Freight Portion has been selected, that operator will obtain such Board authorization as necessary to provide service over the Freight Portion, and we will supplement this Joint Response as necessary as further developments may require.



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Dated: September 18, 2008



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Respectfully submitted,



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**Attorneys for King County,
Washington**

EXHIBIT A

PROCEEDINGS AND PLEADINGS

Proceeding and Pleadings	Comment
1. Finance Docket No. 35128, <i>The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company</i> (Service Date June 20, 2008).	
(a) Port’s Notice of Exemption Pursuant to 49 C.F.R. §1150.31 (filed June 4, 2008)	This exemption became effective on July 4, 2008.
(b) Port’s Motion to Dismiss Notice of Exemption (filed June 4, 2008)	This Motion is pending before the Board.
2. Docket No. AB-6 (Sub-No. 463X), <i>BNSF Railway Company – Abandonment Exemption – In King County, Washington</i> (Redmond Spur, mileposts 0.00 to 7.30)	
(a) BNSF’s Historic and Environmental Reports (filed August 13, 2008)	
(b) BNSF’s Notice of Exemption (filed September 8, 2008)	
(c) BNSF’s Petition for Exemption from 49 U.S.C. §10904 (filed September 8, 2008)	
(d) Request of King County, Washington, for Interim Trail Use Pursuant to 49 CFR 1152.29	Filed concurrently with this Joint Response
(e) Reply of King County, Washington, to BNSF’s Petition for Exemption from 49 U.S.C. §10904	Filed concurrently with this Joint Response
3. Docket No. AB-6 (Sub-No. 464X), <i>BNSF Railway Company – Abandonment Exemption – In King County, Washington</i> (South Railbanking Segment, mileposts 5.00 to 10.60)	
(a) BNSF’s Historic and Environmental Reports (filed August 13, 2008)	

Proceeding and Pleadings**Comment**

- (b) BNSF's Notice of Exemption (filed September 8, 2008)
 - (c) BNSF's Petition for Exemption from 49 U.S.C. §10904 (filed September 8, 2008)
 - (d) Request of King County, Washington, for Interim Trail Use Pursuant to 49 CFR 1152.29
 - (e) Reply of King County, Washington, to BNSF's Petition for Exemption from 49 U.S.C. §10904
4. Docket No. AB-6 (Sub-No. 465X), *BNSF Railway Company – Abandonment Exemption – In King County, Washington* (North Railbanking Segment, mileposts 11.25 to 23.80)
- (a) BNSF's Historic and Environmental Reports (filed June 30, 2008)
 - (b) BNSF's Petition for Exemption (including petition for exemption from 49 U.S.C. §10904) (filed August 11, 2008)
 - (c) Request of King County, Washington, for Interim Trail Use Pursuant to 49 CFR 1152.29
 - (d) Reply of King County, Washington, to BNSF's Petition for Exemption from 49 U.S.C. §10904
5. Finance Docket No. 35148, *King County, Washington – Acquisition Exemption – BNSF Railway Company*, Petition for Exemption from 49 U.S.C. §10901

Filed concurrently with this Joint Response

Filed concurrently with this Joint Response

Notice of Petition published in 73 Fed.Reg. 51047 (August 29, 2008)

Filed concurrently with this Joint Response

Filed concurrently with this Joint Response

Will be filed shortly following this Joint Response

EXHIBIT B

MAP OF THE SEGMENTS INCLUDED IN THE BNSF TRANSACTIONS

[attached hercto]

BNSF Woodinville Subdivision
(N. Renton to Snohomish)

Existing Rail Lines and Regional Trails

- +— Subject Corridor
- +—+— Other Regional Rail Lines
- Regional Bike Routes/Trails
- Metropolitan Transportation System
- Abandoned MP 38.25-39.00 (on 07/21/2008)
- Abandoned MP 10.80-11.25 (on 03/07/2008)
- Abandoned and Sold

0 1 2 4 8 Miles

May 31, 2008

Puget Sound Regional Council

Abandoned and Sold
 • Milepost 39 00 to Milepost 47 11
 Abandoned 5/6/1986
 • Milepost 47 11 to Milepost 57 36
 Abandoned 3/23/1972
 • Milepost 39 10 to @57 36 Sold to
 Snohomish County

Milepost 39 10 to Milepost 39 26
 GNP/Snohomish County lease - 0.85 mile from
 end of national rail system at Milepost 38 25

End of Freight Portion
 MP 38 25

• Milepost 38.25 to Milepost 39 00
 Abandoned 07/21/08
 • Sale of real estate to City of Snohomish
 (MP 38.25 to MP 39 10) soon to close

Beginning of AB-6 (Sub-No. 463X)
 Milepost 0 00

End of AB-6 (Sub-No. 463X)
 Milepost 7 30

Beginning of Freight Portion
 Milepost 23 80

Beginning of Sub-No. 463Z
 Milepost 10 00

End of Sub-No. 463Z
 Milepost 12 00

Beginning of Sub-No. 463Y
 Milepost 15 00

End of Sub-No. 463Y
 Milepost 18 00

Kitsap

King

Pierce

Tacoma
 Everett
 University Place

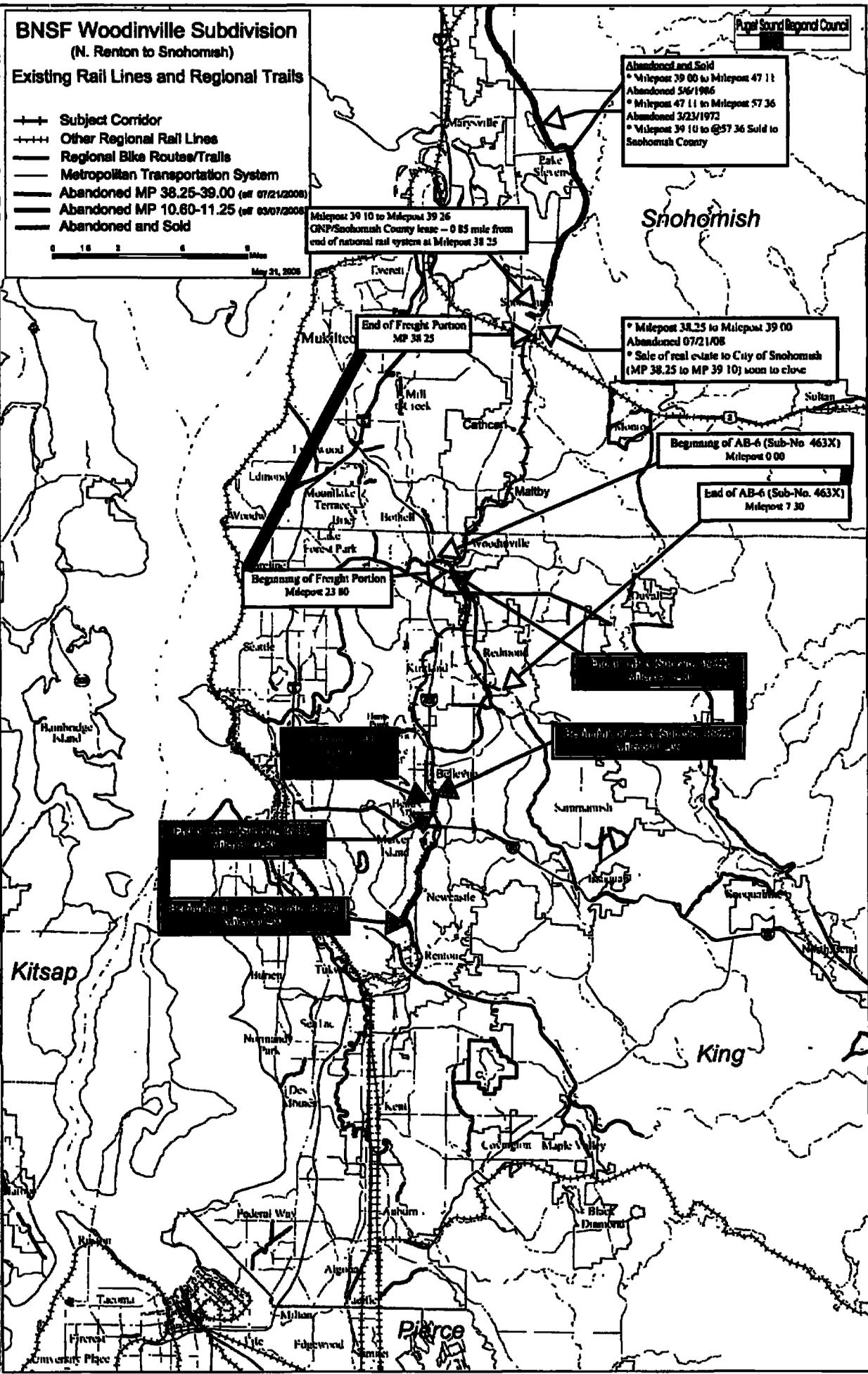
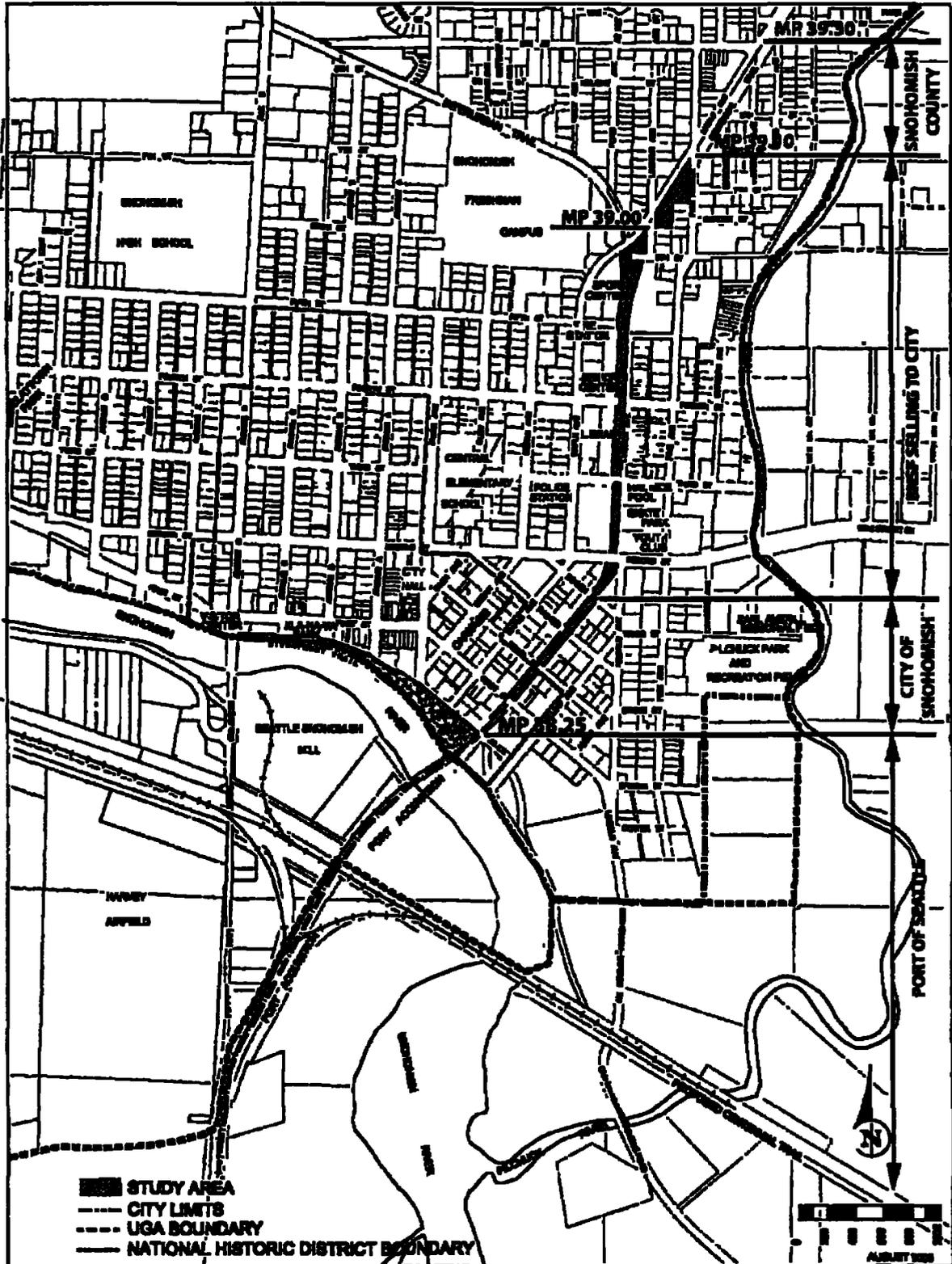


EXHIBIT C

MAP OF SEGMENTS NOT INCLUDED IN THE BNSF TRANSACTIONS

[attached hereto]



- STUDY AREA
- - - CITY LIMITS
- - - UGA BOUNDARY
- - - NATIONAL HISTORIC DISTRICT BOUNDARY



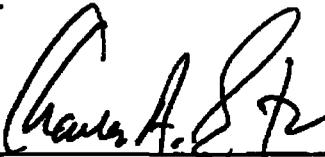
CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing
RESPONSE OF BNSF RAILWAY COMPANY, PORT OF SEATTLE AND KING COUNTY,
WASHINGTON TO REQUEST FOR INFORMATION IN DOCKET NO. AB-6 (SUB-NO.
465X) to be served by first class mail, postage prepaid upon the following:

Jerry L Tidwell
Safeway Inc.
5918 Stoneridge Mall Road
Pleasanton, CA 94588-3229

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

Dated this 18th day of September, 2008.



Charles A. Spitulnik

EXHIBIT C

Public Multipurpose Easement

[attached hereto]

FORM OF PUBLIC MULTIPURPOSE EASEMENT AGREEMENT

Recording Requested By And
When Recorded Return to:

King County

Seattle, WA

PUBLIC MULTIPURPOSE EASEMENT

Grantor: Port of Seattle

Grantee: King County

Legal Description (abbreviated): _____, Additional legal(s) on Page ____.

Assessor's Tax Parcel ID# _____

Reference Nos. Of Documents Released or Assigned: _____

Project [Area]: _____

Parcel [#]: _____

This easement is granted this _____ day of _____, 2008, by the PORT OF SEATTLE a Washington State municipal corporation ("Grantor"), to KING COUNTY, a home rule charter county and political subdivision of the State of Washington ("Grantee").

WITNESSETH

RECITALS

1. Grantor and Grantee executed a Purchase and Sale Agreement and Donation Agreement ("Acquisition Agreements") with BNSF Railway Company ("BNSF"), by and through which BNSF agreed to convey a rail corridor with rails in place, known as the Woodinville Subdivision ("Subdivision"), to Grantor. In the Acquisition Agreements, Grantee received a right of first opportunity to purchase portions of the Subdivision from Grantor.
2. Grantee has been approved as an Interim Trail User by the Surface Transportation Board ("STB") for the purpose of "railbanking" the Property, and Grantee is accordingly subject to certain legal obligations related to the Property, which are referred to herein as the "Railbanking Obligations." The Railbanking Obligations consist of those obligations imposed through Section 8(d) of the National Trails System Act, also known as the Rails-to-Trails Act, 16 U.S.C. 1247(d), and 49 C.F.R. 1152.29 (collectively, and as any of the foregoing may hereafter be amended or interpreted by binding judicial or administrative authority, the "Railbanking Legislation"), the Notice of Interim Trail Use ("NITU") for the Property issued by the STB; the Trail Use Agreement ("TUA") entered into between BNSF and Grantee for the Property under which Grantee agrees to accept, exercise, and fulfill all

of the legal rights, duties, and obligations of an Interim Trail User, and the Statement of Willingness to Accept Financial Responsibility ("SWAFR"). Under the TUA, Grantee has also received BNSF's rail service reactivation rights and/or obligations for the Property as approved by the STB.

3. Grantor desires Grantee to be the Interim Trail User for the Property because Grantee has substantial expertise and experience in acquiring, developing, maintaining and operating public trails, and Grantee is willing to assume this responsibility so long as it has sufficient rights to the Property to serve as the Interim Trail User for purposes of the Railbanking Legislation.
4. Prior to the closing on the Acquisition Agreements ("Closing"), Grantor and Grantee separately entered into an Interlocal Agreement ("Interlocal") regarding their mutual rights and obligations concerning the Property. The Interlocal is premised on the Parties' intent that the Property be used for regional recreational trail and other transportation purposes, including but not limited to rail or other transportation purposes other than interstate freight service ("Transportation Use").
5. It is anticipated that such Transportation Use will be carried out by a Third Party Operator ("TPO") with rights granted by separate agreement affecting or relating to the Property ("TPO Agreements").
6. The Parties intend that if interstate freight service should be reactivated in the future, such service should be able to be integrated with and not necessarily displace the Parties' intended regional trail and Transportation Uses.
7. The Parties agree that acquisition of the Property is of substantial benefit to the region because of its potential for use for regional recreational trail use and Transportation Use, and therefore the Interlocal includes a binding commitment to undertake a formal, multi-agency process to plan and recommend appropriate uses of the Property ("Regional Process").
8. Grantor and Grantee intend that the development of a public trail authorized by this Easement will not prevent Transportation Uses on the Property, but rather will be designed and developed to accommodate Transportation Uses.

NOW, THEREFORE, the PORT OF SEATTLE and KING COUNTY, in consideration of each other's duties and obligations under this Easement, the Acquisition Agreements, the TUA, and the Interlocal, and all of them, and in exchange for the other good and valuable consideration described therein, the sufficiency of which is hereby acknowledged, do hereby agree as follows:

TERMS AND CONDITIONS

1. Overview of Grantee's Easement Rights

Grantor grants to Grantee, its successors and assigns, a non-exclusive, perpetual easement ("Easement") over, under, through, along and across certain parcels of land situated in King County, Washington, as legally described in Exhibit "A" attached hereto and incorporated herein (the "Property") solely for the following purposes:

1.1 To develop, operate, maintain, repair and improve a public hard- and/or soft-surface regional trail for public pedestrian, bicycle, or other non-motorized uses ("Trail") over a portion of the Property to be designated by Grantor and Grantee in a future amendment to this Easement ("Trail Area"), in accordance with Section 2.1.1 below; and

1.2 To carry out Grantee's Railbanking Obligations over the full width and length of the Property.

1.3 Grantee's Easement rights shall be subject to all preexisting fully executed recorded or unrecorded easements, leases, permits, franchises, occupancy agreements, licenses or other agreements demising space in, providing for the use or occupancy of, or otherwise similarly affecting or relating to the Property in favor of Puget Sound Energy for facilities/utilities that are physically located on or in the Property at the time this Easement is granted ("PSE Instruments"). If any such PSE Instruments are renewed or extended, such renewal or extension shall be subject to this Easement.

1.4 Any TPO Agreement shall be subject to this Easement.

2. Grantee's Trail Use Rights

This Easement gives Grantee the right to, at Grantee's sole cost and expense, develop, operate, maintain, repair and improve a Trail upon commencement of "Trail Development". For purposes of this Easement, "Trail Development" means the initial construction or any substantial re-construction of a Trail. Trail Development shall commence on the date that Grantee specifies to Grantor, in writing, as the date for breaking ground in a particular, identified segment of the Trail Area. In the event Grantee fails to break ground within five (5) days of the specified date, Trail Development shall not be deemed to have commenced until Grantee provides a new date in writing to Grantor, **provided**, if Grantee has broken ground in a segment in accordance with the requirements of Section 2.1.7 but without having provided Grantor written notice of the date, Grantee may cure the lack of notice at any time for such segment such that Trail Development shall be deemed to have commenced for such segment on the date Grantee broke ground as determined by Grantee's construction contracts.

2.1 Scope of Trail Use Upon Commencement of Trail Development

2.1.1 Grantor and Grantee will jointly determine, after the completion of and in consideration of the recommendations of the Regional Process, the appropriate location and size of the Trail Area. Grantee may initiate negotiation of the joint determination through written notice to Grantor no sooner than the earlier of the completion of the Regional Process or one (1) year after Closing. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within eighteen (18) months after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3. After the joint determination as to the location and size of the Trail Area is made, Grantor and Grantee shall amend this Easement to incorporate a legal description of the Trail Area, and if thereafter the Trail Area is moved consistent with the terms of this Easement, Grantor and Grantee will further amend this Easement to incorporate a revised legal description of the Trail Area. Grantor and Grantee agree that under generally applicable trail development standards for regional trails, the Trail Area will generally range from 10 feet in width to 30 feet in width depending on the Parties' joint determination as to the uses to be undertaken on the Property, and the physical constraints of the Property. The Parties acknowledge that the Trail Area could be wider than 10 to 30 feet in width where additional width is needed to accommodate all necessary slopes for cuts and fills for the Trail; to install abutments, pilings, or other structural elements of trail bridges or tunnels; to allow grade or other physical separation of the Trail and any active rail lines on the Property; or to install storm water drainage or detention facilities or other facilities required by a permitting agency in support of or as mitigation for the Trail. Grantor and Grantee further agree that the location and size of the Trail Area will accommodate, and not prevent, future Transportation Use of the Property.

2.1.2 At the conclusion of the earlier of the joint determination process or the eighteen (18) month period for negotiating the joint determination as set forth in Section 2.1.1 herein, and prior to commencement of Trail Development but no later than five (5) years after Closing, Grantee may at its sole discretion elect not to proceed with Trail Development and may take action to terminate this agreement and request STB approval to transfer or terminate Grantee's Interim Trail User status and Railbanking Obligations on one-hundred and twenty (120) days written notice to Grantor. In the event of such notice, Grantor may engage a substitute Interim Trail User consistent with all current and future STB requirements, and Grantee shall cooperate fully and as necessary to support such effort. If Grantee fails to exercise this option to terminate within the earlier of five (5) years after Closing or prior to Trail Development, the Grantee's option to terminate under this Section 2.1.2 is forever waived without further action by either party. Upon approval by the STB of the transfer of Grantee's Interim Trail User status and Railbanking Obligations or the termination of Grantee's Interim Trail User status and Railbanking Obligations, the Easement shall, at Grantor's written option, be assigned to a replacement Interim Trail User or terminated. Upon such assignment or termination, Grantor shall pay Grantee for its Easement rights in the amount of \$1,903,000.

2.1.3 Grantor and Grantee will jointly determine, after completion of and in consideration of the Regional Process, the appropriate timeline for the development of the Trail. Grantee may develop the Trail in phases. At the time jointly determined by Grantor and Grantee, but no later than five (5) years after Closing, Grantee shall have the right to commence Trail Development in the Trail Area as to any segment of the Trail Area for which Grantee notifies Grantor in accordance with Section 2 above.

2.1.4 Grantee shall have the right to use the Trail Area for all purposes necessary or incidental to Grantee's installation, construction, ownership, use, operation, maintenance, inspection, repair, replacement, renovation, improvement, removal and enhancement of a Trail, including, but not limited to, the rights of ingress and egress across the surface of the Property, provided, such ingress and egress shall not interfere with any Transportation Use on the Property, if any; the right to use motorized vehicles for the improvement, construction, alteration, repair, maintenance and operation of a Trail and for emergency purposes; the right to install, construct, operate, maintain, modify, repair, replace, improve, remove and use the Trail Area for any Trail-related purposes as Grantee may now or hereafter deem appropriate, including the addition, removal or replacement of Trail improvements at Grantee's election, either in whole or in part with either like or different improvements. All Trail-related improvements of any kind that are now or hereafter acquired, constructed or installed by Grantee, at Grantee's sole cost and expense within the Trail Area shall be and shall at all times remain the property of Grantee.

2.1.5 Grantee's rights under this Easement include the further right to temporarily stage equipment and material on the Property in and around the Trail Area as reasonably necessary to construct, operate, maintain, improve, or remove the Trail, provided, such temporary staging shall not interfere with any Transportation Use on the Property, if any; and further provided, that Grantee shall not commence such temporary staging on the Property until Grantee has prepared a restoration plan for the affected portions of the Property, the surface of which shall be restored, at Grantee's sole cost and expense, as nearly as possible to the condition in which it existed prior to construction, or to such other condition as the Grantor and Grantee may agree.

2.1.6 Grantee may construct, operate, and maintain Trail crossings over, under, or across any railroad tracks or other transportation facilities on the Property, provided that such crossings shall be consistent with applicable law, trail or crossing design standards and shall not interfere with any Transportation Uses on the Property, and provided further that Grantee shall be responsible for performing and paying for Custodial Activities as defined in this Easement as to any of the crossing improvements, but not to the railroad tracks or other transportation facilities in the area of the crossing.

2.1.7 At least ninety (90) days prior to the commencement of any Trail Development or any other activity related to Trail Development, Grantee shall provide Grantor with (i) a copy of all plans and specifications for such proposed Trail Development and (ii) a plan for coordinating the proposed Trail Development with any then current or reasonably foreseeable Transportation Uses or other uses by Grantor on the Property. Grantee shall not commence any such Trail Development construction, work or activity

unless and until Grantor agrees in writing to the proposal, which shall not be unreasonably withheld, conditioned or delayed.

2.1.8 Grantee shall, at its sole cost and expense, comply with all stormwater requirements for Trail Development to the extent any such requirements are applicable to Grantee's Trail Development, including, but not limited to: (i) Grantee shall be the sole applicant for any Washington State construction stormwater general permit for Trail Development, and shall be liable for any fines or other liability that derives from non-compliance with any such permit; (ii) Grantee shall be the applicant for any construction stormwater permits for Trail Development required by any local jurisdiction that the Property is located in, and shall be responsible for any costs associated with drainage review by any such local jurisdiction; (iii) Grantee shall perform its own drainage reviews and pay all drainage review fees required under King County Code for Trail Development for sections of the Property located within Grantee's jurisdiction; (iv) Grantee shall have all maintenance obligations for any drainage facilities it constructs for Trail Development pursuant to this Easement; and (v) Grantee shall provide Grantor with copies of all correspondence between Grantee and Washington State or any local jurisdiction related to construction stormwater permits associated with Grantee's activities under this Easement.

2.1.8.1 Grantee acknowledges and agrees that Grantor is bound under its Municipal Stormwater Permit ("Permit") and that the Property is subject to the Permit terms. Grantee agrees to cooperate with Grantor in Grantor's compliance of its obligations under the Permit including, but not limited to, Grantor's right to inspect the Property, map pipes on the Property, provide stormwater education and enforce Permit provisions.

2.2 Trail Use and Transportation Use of Property

2.2.1 Grantee understands, acknowledges, and agrees that Grantor or a TPO may undertake Transportation Use of the Property outside of the Trail Area. Outside of the Trail Area, and except as set forth in this Easement, Grantee shall not take any action on or in the Property to limit such Transportation Uses or to limit ingress and egress to any part of the Property for such Transportation Use, unless such action is specifically approved in writing by Grantor.

2.2.2 If Grantor or any TPO is required, or may desire at any time, or from time to time to engage in any Transportation Use or to add to or to improve railroad infrastructure or other Transportation Use facilities in the Trail Area, or to change the grade or location of any railroad infrastructure or other Transportation Use facilities in the Trail Area (collectively "Transportation Infrastructure Change"), and such change would unreasonably interfere with Grantee's then existing or future development of the Trail Area, including but not limited to trail crossings of Transportation Use facilities in the Property in accordance with the rights granted under this Easement, or Grantee's then existing or future development of the Trail Area would interfere with the Transportation Use related to the Transportation Infrastructure Change, then Grantor or such TPO may make such change in its facilities in the Trail Area, and Grantor and Grantee will jointly determine a new Trail Area location to replace the affected portion of the Trail Area and any Trail or Trail-related

improvements. If Grantee elects to replace any Trail or Trail-related improvements in the relocated Trail Area, such replacement shall be at Grantee's sole cost. Any such relocation shall occur within the Property and any affected Trail Area shall be relocated in a location that is consistent with the standards in Section 2.1.1 and that is consistent with Grantee's Railbanking Obligations; *provided*, that if there is no reasonably practicable alternative for such relocation within the Property consistent with Section 2.1.1, then such relocation on the Property may be to standards less than required by Section 2.1.1 so long as the Parties make a good faith effort to allow for a Trail Area no less than ten feet in width and the relocation meets the minimum standards necessary to satisfy Grantee's Railbanking Obligations. Grantee may, at its sole cost, relocate any affected Trail or Trail-related improvements off the Property. At least one hundred twenty (120) days before Grantor may take any action that would require a joint determination under this Section 2.2.2, it shall initiate negotiation of such joint determination through written notice to Grantee accompanied by a detailed description of its proposed action. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within one hundred twenty (120) days after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3 to make the joint determination of the new Trail Area location and to seek all available remedies, and Grantor or TPO may make such Transportation Infrastructure Change even if the joint determination has not been made. "Reasonably practicable" as used in this Easement shall mean capable of being implemented in a reliable and effective manner including consideration of cost. When considering cost, an alternative shall not be considered reasonably practicable if the incremental costs of the alternative are substantially disproportionate to the incremental degree of benefits provided by the alternative.

2.2.3 If a portion of the Property is subject to Transportation Use when Grantee commences Trail Development within the Trail Area, then Grantee shall be responsible for installing barriers to separate such portion of the Property from the Trail Area. If Grantor or a TPO commences Transportation Use of a portion of the Property that is adjacent to a portion of Trail Area where Trail Development has commenced, then Grantor or TPO shall be responsible for installing barriers separating such portion of the Property from the Trail Area. Grantee and Grantor (or TPO if designated by Grantor) shall jointly determine the type and scope of barriers (e.g. jersey barriers, fencing, or grade separation) or other measures reasonably needed to separate the Trail Area from the Transportation Use, which barriers shall at a minimum meet any applicable regulatory standards; *provided*, that after initial barrier installation is completed, Grantee shall be responsible, at Grantee's sole cost and expense, to inspect, maintain and replace any barriers or other measures that will separate the Trail Area from the Transportation Use. Before either Party may take any action that would require a joint determination under this Section 2.2.3, it shall initiate negotiation of such joint determination through written notice to the other Party accompanied by a detailed description of the proposed barriers. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within ninety (90) days after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3.

2.3. Grantor's Retained Rights to the Trail Area

2.3.1 Grantor retains the right to use and allow others to use the Trail Area in any manner that does not unreasonably interfere with Grantee's easement rights and is consistent with the terms of this Easement.

2.3.2 Grantor may make improvements in the Trail Area, including surface or subsurface improvements that are not part of, and do not relate to, Grantee's Trail (collectively, "Other Improvements"), *provided*, that Grantor shall coordinate with Grantee to (i) prevent unreasonable interference with Grantee's Easement rights, (ii) ensure reasonable integration of the Trail and Transportation Uses on the Property, (iii) prevent any health or safety risk; (iv) avoid or minimize to the greatest practicable extent any disruption to Trail uses; and (v) restore the Trail Area to a condition substantially similar to that existing prior to the alteration. Such Other Improvements may not cause the Trail Area to be relocated.

2.3.3 Grantee shall reasonably cooperate with PSE to site future PSE facilities authorized under PSE Instruments, or future fully executed instruments in which Grantor grants an interest in the Property to PSE, within the Trail Area if such facilities can reasonably collocate within the Trail Area with Grantee's Trail use.

2.3.4 At least ninety (90) days prior to the commencement of any construction or substantial reconstruction of Other Improvements by Grantor in the Trail Area, Grantor shall provide Grantee with (i) a copy of all plans and specifications for such proposed Other Improvements and (ii) a plan for coordinating the proposed Other Improvements with Grantee's use of the Trail Area. Grantor shall not commence any such construction unless and until Grantee agrees in writing to the proposal, which shall not be unreasonably withheld, conditioned or delayed.

3. Railbanking Obligations On the Property

This Easement gives Grantee the right to carry out all Railbanking Obligations, including Custodial Activities, over the full width and length of the Property.

3.1 Custodial Activities and Transportation Use

3.1.1 "Custodial Activities" are those activities that a Property owner would reasonably take to manage the Property in order to keep the Property in a physical condition suitable for its use, to maintain the physical integrity of the Property, to prevent health and safety hazards, and to manage public access in a manner appropriate for the Property's use, which may range from allowing public access to prohibiting such access, depending on circumstances. Custodial Activities include both "Routine Maintenance" and "Capital Improvements." "Routine Maintenance" includes, but is not limited to, inspecting the property, litter and garbage pick up, brush and hazardous tree trimming or removal, drainage maintenance or repair, and fencing or signage maintenance. "Capital Improvements" includes capital investments in the Property that go beyond Routine Maintenance, including, but not

limited to, the installation of fences, barriers, or signs, or the repair of a wash-out on the Property. Custodial Activities do not include any activities related to granting or managing easements, leases, permits, franchises, occupancy agreements, licenses or other agreements demising space in, providing for the use or occupancy of, or otherwise similarly affecting or relating to the Property, which activities shall be the sole responsibility of Grantor.

3.1.2 A Transportation Use is undertaken when Grantor or a TPO begins to use the Property for the operation of a Transportation Use; and a Transportation Use is terminated when such use ceases and (a) the Grantor or a TPO notifies Grantee in writing that such use will not resume for a period of at least ninety (90) days, or (b) when Grantee notifies Grantor in writing that it has determined, in good faith and upon reasonable investigation, that such use will not resume for a period of at least ninety (90) days. Both Grantor and Grantee have a duty to notify each other as in subsections 3.1.2(a) and (b) if they become aware that Transportation Use has terminated.

3.1.3 "Trail-Side Area" means an area between the Trail Area and the Property boundary that is not being used for Transportation Use.

3.2 Custodial Activities Performance and Cost Allocation

Custodial Activities will be performed and paid for in the following manner depending on the uses present on the Property:

3.2.1 In any portion of the Property where there Trail Development has not commenced and there is no Transportation Use, Grantee shall be responsible for performing all Custodial Activities. Grantor shall compensate Grantee for the actual cost and expense of performing Routine Maintenance. Should more than Routine Maintenance be needed to carry out Custodial Activities, Grantor and Grantee will jointly decide what Capital Improvements are needed to address any such conditions identified by Grantor or Grantee. Grantor will pay Grantee the actual cost and expense of carrying out such Capital Improvements. Grantee shall make such Capital Improvements. Either Party may initiate negotiation of a joint determination under this Section 3.2.1 through written notice to the other Party accompanied by a detailed description of the identified condition and proposed Capital Improvements. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within ninety (90) days after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3. Either party may start Dispute Resolution earlier if circumstances require a shorter time to make a joint determination in order to prevent or mitigate significant damage to or loss of the Property.

3.2.2 In any portion of the Property where Trail Development has commenced but there is no Transportation Use, Grantee shall be responsible for performing and paying for all Custodial Activities.

3.2.3 In any portion of the Property where Trail Development has commenced and there is Transportation Use, Grantee shall be responsible for performing

and paying for all Custodial Activities inside the Trail Area, inside any Trail-Side Area, and inside any portion of the Property used by Grantee under Sections 2.1.5 of this Easement. Grantor or the TPO undertaking Transportation Use shall be responsible for performing and paying for all Custodial Activities on the remainder of such Property.

3.2.4 In any portion of the Property where there is Transportation Use but Trail Development has not commenced, Grantor or the TPO undertaking Transportation Use shall be responsible for performing and paying for all Custodial Activities.

3.3 Cost Allocation Framework to be Implemented by Contract

Grantor and Grantee shall separately contract to implement the cost allocation framework set forth in Section 3.2, and such contract may be revised from time to time as the Parties may agree.

3.4 Custodial Activities Following Termination of Transportation Use

If and when Transportation Use is terminated on a segment of the Property consistent with Section 3.1.2 of this Easement, then Grantee shall resume performing Custodial Activities for such segment if requested to do so by Grantor in writing or if Grantee elects to do so in written notice to Grantor.

3.5 The Property shall be subject to the Railbanking Obligations. In the event Grantee determines that it is no longer reasonably practicable to carry out Railbanking Obligation because of actions taken by Grantor or any other entity using or claiming ownership of the Property, then Grantee, after unsuccessfully engaging in the dispute resolution process pursuant to Sections 4.3.1 and 4.3.2, may notify the STB that Grantee will no longer serve as the Interim Trail User for all or a portion of the Property, and request that Grantee's Railbanking Obligations be extinguished as to the identified land pursuant to the Railbanking Legislation. If Grantee seeks extinguishment of its Railbanking Obligations as to all or a portion of the Property, Grantee shall, if requested by Grantor, cooperate to transfer, as to the identified land, its Interim Trail User status and its interest in this Easement to a replacement Interim Trail User. As to any portion of the Property for which Railbanking Obligations are terminated, Grantor or a replacement Interim Trail User may acquire from Grantee its Easement rights in exchange for an amount equal to a pro rata share of the County's payment \$1,903,000 to the Port for the Easement, plus compounded annual interest on that amount from the date of the grant of this Easement at a rate equal to three percent per annum.

3.6 The Parties recognize and agree that a portion of the Property between milepost 10.6 and 11.25 ("Wilburton Segment") has not been subject to Interim Trail Use and the Railbanking Obligations, but rather was abandoned with the approval of the STB prior to Grantor's acquisition of the Property. The Wilburton Segment is a critical link in the maintenance of the remainder of the Property in compliance with the Railbanking Obligations. Therefore, the Wilburton Segment is subject to the terms of this Easement and shall be deemed to be and treated under this Easement as if it was subject to Interim Trail

Use and the Railbanking Obligations, including specifically, but without limitation, the requirement to keep ownership of the Wilburton Segment intact and available with the remainder of the Property for reactivated interstate freight rail service.

4. Other Terms and Conditions.

4.1. Reactivation of Interstate Rail Service Under the Railbanking Legislation

4.1.1 Grantor and Grantee understand, acknowledge and agree that if the STB receives a request to use all or any portion of the Property for federally regulated interstate freight rail service, then Grantor and Grantee may each be required to, and will if so required, make available some or all of their respective interests in the Property to accommodate reactivated freight rail service.

4.1.2 Grantor and Grantee agree that if the STB receives a request for approval to use the Property for reactivated freight rail service, then Grantor and Grantee will cooperate in order to cause the party making such request, including Grantor or Grantee if either makes the request, (a) to bear all costs to restore or improve the Property for reactivated freight rail service; (b) to bear responsibility to take all steps necessary before the STB and any other regulatory agency, governmental or quasi-governmental body having jurisdiction over such work, to cause the relevant NITU to be vacated; and (c) to compensate Grantor and Grantee for the fair market value of any and all of their respective rights or interests in the Property, or in improvements thereon that may be destroyed, lost, compromised, or otherwise reduced in value or function when the Property or any portion of it is put to use for reactivated freight rail service.

4.1.3 Grantor will indemnify, hold harmless, and defend Grantee, its officers, employees, agents and contractors from all costs or liability arising out of or relating to Grantor's failure to make available its interests in the Property to accommodate reactivated freight rail service in compliance with the Railbanking Obligations.

4.1.4 Grantee will indemnify, hold harmless, and defend Grantor, its officers, employees, agents and contractors from all costs or liability arising out of or relating to Grantee's failure to make available its interests in the Property to accommodate reactivated freight rail service in compliance with the Railbanking Obligations.

4.2 Insurance, Indemnification, and Hazardous Substances

4.2.1 Grantee As Additional Insured for Transportation Use

Grantor shall require any entity utilizing the Property for Transportation Uses to name Grantee as an additional insured on any insurance policy maintained by the entity or required under the applicable TPO Agreement.

4.2.2 Indemnification by Grantor

Without in any way limiting the provisions of Section 4.2.5, and subject to the provisions of Subsection of 4.2.3.1, Grantor will indemnify, hold harmless, and defend Grantee, its officers, employees, agents and contractors from all liability arising out of or relating to the transfer, condition, use, possession, management, operation, or control of the Property, including without limitation public access, the Custodial Activities, Transportation Uses, and challenges to Grantor's authority to acquire or own the Property.

4.2.3 Indemnification by Grantee

4.2.3.1 Without in any way limiting the provisions of Section 4.2.5, Grantee will indemnify, hold harmless and defend Grantor, its officers, employees, agents and contractors from all liability arising out of or relating to Grantee's, its officers, employees, agents or contractors' negligence in the exercise of Grantee's rights and obligations under this Easement.

4.2.3.2 Grantee agrees to defend, indemnify and hold Grantor harmless from any and all claims, causes of action, regulatory demands, changes in permits and/or regulatory requirements for the Property, liabilities, fines, penalties, losses, costs and expenses (including attorneys' fees, costs and all other reasonable litigation expenses when incurred and whether incurred in defense of actual litigation or in reasonable anticipation of litigation), arising from stormwater discharges caused by Grantee's exercise of its Trail rights and obligations on the Property under Section 2.1 of this Easement.

4.2.4 Indemnification for Transportation Use

Grantor shall require any entity utilizing the Property for rail-based or fixed guideway Transportation Uses to indemnify, hold harmless and defend Grantee from any and all obligations imposed by Railroad Unemployment Insurance Act (45 U.S.C.A. §§ 351 et seq.), Railroad Retirement Act (45 U.S.C. § 231 et seq.), Railway Labor Act (45 U.S.C. Sec. 151 et. seq.), Federal Employers Liability Act (45 U.S.C. Sec 51 et. seq.), common carrier obligations pursuant to (49 U.S.C. Sec. 10101 et. seq.), and any Federal rail safety legislation, that arise from such Transportation Use of the Property.

4.2.5 Hazardous Substances

4.2.5.1 The Parties are acquiring their respective interests in the Property through the Acquisition Agreements. Section 6 and 7 of the Acquisition Agreements spells out the obligations of BNSF, Grantor and Grantee with regard to Hazardous Substances and Environmental Laws. These Sections are also included within the Deed for the Property. Section 7(e) says that the Section 7 obligations running from BNSF to Grantor and Grantee, and the Section 7 rights running to BNSF from Grantor and Grantee, will be allocated as between Grantor and Grantee in the manner separately agreed to by Grantor and Grantee. The liability for Hazardous Substances generally and the allocation as between the Grantor and Grantee referenced in Section 7 shall be as follows:

4.2.5.2 Grantor shall be responsible for the Remediation of, and shall indemnify, defend and hold harmless Grantee, its officers, employees, agents and contractors from all liability arising out of the discovery of Hazardous Substances released on the Property before or after Closing, and the Grantor shall be entitled to all rights running from BNSF under Section 7 and shall be subject to all obligations running to BNSF under Section 7, except that:

(a) Grantee shall be responsible for the Remediation of, and shall indemnify, defend and hold harmless Grantor, its officers, employees, agents or contractors from all liability arising out of Hazardous Substances released on the Property by the Grantee, its officers, employees, agents or contractors after Closing, and

(b) Grantee shall be responsible for the Remediation of, and shall indemnify, defend and hold harmless Grantor, its officers, employees, agents and contractors, from all liability arising out of Hazardous Substances released after Closing by third parties within the Trail Area related to the development, operation, maintenance or use of the Trail; and

(c) Grantee shall be entitled to the rights running from BNSF under Section 7 and shall be subject to the obligations running to BNSF under Section 7 to the extent that the Hazardous Substances at issue are discovered within the Trail Area as a result of Grantee's Trail Development on the Property, in which case the Grantee shall be entitled to the pro rata share of any costs paid by BNSF to Remediate such Hazardous Substances within the Trail Area, and shall be responsible for carrying out and bearing the costs of Remediation of such Hazardous Substances within the Trail Area.

4.2.5.3 In the event Hazardous Substances are discovered on the Property, Grantor and Grantee shall promptly give notice to the other Party of such discovery and shall in good faith cooperate with one another to carry out the terms of this Agreement. Each Party shall have the right to enforce directly against BNSF the terms of the Acquisition Agreements relating to Hazardous Substances. To the extent that both Parties seek to enforce those terms, the Grantor and Grantee shall also in good faith cooperate with one another to do so

4.2.5.4 In the event a dispute arises between the Grantor and Grantee as to the allocation of rights and obligations between each other relating to Section 7 of the Acquisition Agreements and Grantor and Grantee are also in a dispute with BNSF under Section 7, or in the event a dispute arises between Grantee and the Grantor only as to Hazardous Substances under this Easement, but does not involve Section 7 of the Acquisition Agreements, then in either case Grantor and Grantee as between each other shall be bound to resolve the dispute through the Arbitration provisions of Section 10.4 of the Acquisition Agreements.

4.2.6 Each party agrees that its obligations under this Section 4.2 extend to any claim, demand, and/or cause of action brought by or on behalf of any employees, or agents. For this purpose, each party, by mutual negotiation, hereby waives, with respect to the other party only, any immunity that would otherwise be available against such claims

under the Industrial Insurance provisions of Title 51 RCW, but only to the extent necessary to indemnify the other party.

4.3 Dispute Resolution

Any claim, dispute or other matter in question arising out of or related to this Easement, including any inability of Grantor and Grantee to make joint determinations called for by this Agreement ("Disputes") shall be exclusively subject to the following alternative dispute resolution procedure as a condition precedent to the institution of legal or equitable proceedings by either party. This requirement cannot be waived except by an explicit written waiver signed by the Parties.

4.3.1 Informal Process

The Parties shall negotiate in good faith and use their best efforts to resolve any Disputes that may develop under this Agreement. The Port's Chief Executive Officer (or his/her designee) and the King County Executive (or his/her designee) along with any staff or technical persons any of the Parties desire, shall meet within seven (7) days after written request from either party and attempt to resolve a Dispute. The Parties may agree to extend the time provided for in this Section for an additional seven (7) days.

4.3.2 Mediation

If a Dispute is not resolved under the procedure set forth in Section 4.3.1, or within such additional time as the Parties mutually agree, then the Parties shall endeavor to resolve a Dispute by mediation with a mediator agreed to by the Parties. A Party shall submit a request for mediation in writing to the other Party. Mediation shall proceed in advance of legal or equitable proceedings. Any contractual or statutory deadlines, including without limitation statutes of limitation, shall be tolled pending mediation for a period of 60 (sixty) days from the date of the mediation request, unless tolled for a longer period by agreement of the parties. Final authority for settlement may be subject to the approval of the Parties' respective legislative bodies.

4.3.3 Right to Litigate Contingent on Prior Effort to Mediate

The Parties shall not commence litigation on a Dispute unless the Dispute has been properly raised and considered in the above mediation procedure. The Parties shall share equally in the costs of the mediation. Any mediation under this Agreement shall be held in King County, Washington. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.3.4 Immediate Action

If Grantee or Grantor reasonably determine that circumstances require immediate action to prevent or mitigate significant damage to or loss of the Property, then such Party may pursue any immediate remedy available at law or in equity without having to follow

these alternative dispute resolution procedures in this Section, and then pursue such alternative dispute resolution procedures.

4.3.5 Matters Not Subject to Alternative Dispute Resolution

This Section on alternative dispute resolution procedures shall not apply to any dispute between the Parties that also relates to a dispute with BNSF or any dispute between the Parties concerning Hazardous Substances. This Section on alternative dispute resolution shall also only apply to Disputes between the original Grantor and Grantee, and not to their respective heirs, legal representatives, successors and assigns, or TPOs, unless such parties to a Dispute agree to alternative dispute resolution, except that this Section will apply to any Disputes between Grantor and Grantee and their respective heirs, legal representatives, successors and assigns or TPOs (if applicable) related to Sections 2.1.1, 2.2.2, 2.2.3 and 3.2.1.

4.3.6 In addition to the specific remedies set forth in this Easement, and except for the limitations on remedies for Hazardous Substances set forth in Section 4.2.5 of this Easement, Grantor and Grantee, following the alternative dispute resolution procedure called for herein, shall be entitled to all remedies in law or equity. Further, should the Grantor and Grantee be unable to make any joint determination called for by this Agreement and be unable to resolve the Dispute through the alternative dispute resolution procedure called for herein, then Grantor and Grantee agree that a Court shall have the authority to decide the terms of the joint determination in question.

4.4 Litigation Regarding Title; Encroachments

4.4.1 Grantor makes no warranty of title as to the Property or the Easement. If Grantor or Grantee receives any written document or lawsuit challenging or questioning Grantor's title to any portion of the Property, then within ten (10) business days of receipt the receiving Party shall transmit to the other Party a copy of such document. Grantor and Grantee shall in good faith cooperate and confer with one another as to the appropriate response to any such challenge in order to carry out the Parties' intended uses of the Property as expressed in the Easement.

4.4.2 Should either Party identify an unauthorized encroachment on the Property, such party shall reasonably promptly notify the other in writing, and the Parties shall in good faith cooperate and confer with one another as to the appropriate action to take with regard to the encroachment in order to carry out the Parties' intended uses of the Property as expressed in the Easement.

4.5 Taxes

4.5.1 Grantee shall be solely responsible to pay on a current basis any taxes and assessments related to the Property, if any, including without limitation real property ad valorem taxes, special benefit assessments and other governmental impositions (collective "Taxes") that may apply to its interests in the Property, its activities upon the Property, or its

improvements to the Property, including all stormwater management fees assessed by any jurisdiction in which the Trail Area is located that are triggered by or arising from Grantee's exercise of its Trail rights and obligations on the Property under Section 2.1 of this Easement. Grantor shall be solely responsible to pay on a current basis any Taxes that may apply to its activities upon the Property, or its improvements to the Property, and to require any third party with an interest in the Property or any TPO to pay on a current basis any Taxes that may apply to their respective interests in the Property, activities upon the Property, or improvements to the Property. Nothing contained herein shall modify the Parties' respective rights to contest any such Tax, and neither party shall be deemed to be in default as long as it shall, in good faith, be contesting the validity or amount of any such Taxes.

4.6 Effect of Easement; Assignment

This Easement creates a servitude running with the land that comprises the Property. It conveys an easement that is appurtenant to, for the benefit of, and shall run with Grantee's regional system of trails and parks and all real property and real property interests now owned or hereafter acquired for park or trail purposes by Grantee and its heirs, legal representatives, successors and assigns. The terms and conditions contained in this Easement shall also be deemed covenants running with the land that comprises the Property, and shall bind the Grantor, and its heirs, legal representatives, successors and assigns. The terms "Grantor" and "Grantee" are expressly defined to mean the Port of Seattle and King County, respectively, and their respective heirs, legal representatives, successors and assigns. Grantee may assign its rights in this Easement to another entity so long as such entity is approved by the STB as a replacement Interim Trail User and assumes all Railbanking Obligations associated therewith, and so long as such entity is approved by Grantor, which approval shall not be unreasonably withheld, conditioned or delayed.

4.7 Headings

The headings in this Easement are for convenience only and shall not be deemed to expand, limit, or otherwise affect the substantive terms of the Easement rights and the covenant obligations that it embodies.

4.8 Neutral Authorship

Each party has been represented by counsel in connection with the negotiation, execution and delivery of this Easement. Each of the provisions of this Easement has been reviewed and negotiated, and represents the combined work product of both parties hereto. No presumption or other rules of construction which would interpret the provisions of this Easement in favor of or against the party preparing the same will apply in connection with the construction or interpretation of any of the provisions of this Easement.

4.9 Governing Law; Jurisdiction and Venue; Attorneys' Fees

The laws of the State of Washington shall govern the interpretation and enforcement of this Easement. The parties agree that the Superior Court in King County, Washington, shall be the sole and exclusive venue for any action or legal proceeding for an alleged breach of any of the terms and conditions set forth herein, or to enforce, protect, determine or establish any term, covenant or provision of this Easement or the rights hereunder of either party; and the parties hereby agree to submit to the personal jurisdiction of said court. If either party brings such an action or legal proceeding, the prevailing party shall be entitled to recover from the non-prevailing party, as part of such action or proceedings, or in a separate action brought for that purpose, reasonable attorneys' fees and costs, expert witness fees and court costs, including those incurred upon appeal, as may be fixed by the court.

4.10 Severability

If any provision of this Easement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable unless striking such provision materially alters the intention of the parties. If a court finds that any provision of this Easement is invalid or unenforceable, but that by limiting such provisions it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

4.11 Non-Waiver

The failure of either party to enforce any provision of this Easement shall not be construed as a waiver or limitation of that party's right subsequently to enforce and compel strict compliance with every provision of this Easement.

4.12 Entire Agreement; Relation to Master Agreement and Acquisition Agreements

This Easement, the Acquisition Agreements and the Interlocal set forth the entire agreement between the Parties with respect to the subject matter hereof, and are intended by the Parties to be read in harmony with one another. There are no understandings or agreements between the parties respecting the subject matter hereof, written or oral, other than as set forth in those documents. If, however, there is any conflict between this Easement and the Interlocal, or between this Easement and the Acquisition Agreements, then the terms of this Easement shall control. This Easement may be amended by the mutual written agreement of the Parties.

IN WITNESS WHEREOF, the said Grantor and Grantee have signed this _____
day of _____, 2008.

GRANTOR

PORT OF SEATTLE
Approved as to Form:

By _____
General Counsel

By _____
Tay Yoshitani
Chief Executive Officer

KING COUNTY
Approved as to Form:

By _____
Senior Deputy Prosecuting Attorney

By _____
Ron Sims
King County Executive

EXHIBIT 1

LEGAL DESCRIPTION FOR THE PROPERTY

EXHIBIT D

Trail Use Agreement

[attached hereto]

FORM OF TRAIL USE AGREEMENT

THIS TRAIL USE AGREEMENT (this "Agreement") is made as of _____, 2008, by and between BNSF Railway Company, a Delaware corporation ("BNSF"), and King County, Washington, a political subdivision and body corporate and politic of the State of Washington ("County") (each, individually, a "Party" and, collectively, the "Parties").

RECITALS

WHEREAS, BNSF is the owner of that certain real estate known as the "Woodinville Subdivision", located in King County, Washington, and Snohomish County, Washington (the "Woodinville Subdivision" or "Subdivision") and conducts rail operations over the Subdivision from the City of Renton, Washington to the City of Snohomish, Washington; and

WHEREAS, the Port of Seattle ("Port") has negotiated with BNSF a purchase and sale agreement pursuant to which the Port intends to acquire the Subdivision, and the County is a party to those agreements and has contributed to the purchase price for the purpose of railbanking a portion of the Subdivision; and

WHEREAS, the Port does not desire to take on any rail operating responsibility with respect to the Subdivision, and, accordingly, BNSF will seek abandonment of its rail common carrier obligation on three segments of the Subdivision, and will transfer its rail operating responsibility on the remainder to a short line operator; and

WHEREAS, the County desires to convert three segments of the Subdivision to public trail use and potentially other public purposes, and, accordingly, the County and BNSF desire to enter into this Agreement for railbanking and for public space pursuant to and in accordance with 49 C.F.R. 1152.29 and Section 8(d) of the National Trails System Act (also known as the "Rails-to-Trails Act"), 16 U.S.C. 1247(d) (collectively, and as any of the foregoing may hereafter be amended or interpreted by binding judicial or administrative authority, the "Railbanking Legislation"); and

WHEREAS, the purpose of this Agreement is to delineate the responsibilities of each of the Parties pursuant to the Railbanking Legislation, as such responsibilities may be appropriately allocated during each phase of the development and use of a trail or other facilities by the County; and

WHEREAS, the Parties acknowledge that any railbanking, trail use or other public purpose proposed by the County, including this Agreement, will be subject to the authorization and jurisdiction of the Surface Transportation Board ("STB" or the "Board"); and

WHEREAS, the Parties acknowledge that STB authorization has been obtained upon the issuance of a Notice of Interim Trail Use ("NITU") for each segment of the Subdivision being abandoned by BNSF in accordance with the Board's rules and procedures; and

WHEREAS, the Parties acknowledge that the County has applied for, obtained and is the holder

of the NITUs, and, further, the County acknowledges that, pursuant to the requirements of the Railbanking Legislation, freight service may be reactivated on the three segments of the Subdivision and the County must make the three segments of the Subdivision available for such reactivation of freight service; and

WHEREAS, subject to the request of the Port or other requests for service reactivation, the Parties intend that the County is also obtaining the right and obligation to permit or effect reactivation, which has been approved by the STB, and pursuant thereto to permit the person requesting reactivation to take such steps as may be required to permit or effect that reactivation; and

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and the County's contribution to the purchase price of the Subdivision and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, BNSF and the County agree as follows:

AGREEMENT

1. RAIL LINES BEING RAILBANKED

The segments of the Subdivision being railbanked are located: (a) between milepost 5 and milepost 10.6; (b) between milepost 11.25 and milepost 23. 90; and (c) between milepost 0.0 and milepost 7.3 of the Redmond Spur (collectively the "Railbanked Segments") A map of the Subdivision with an indication of the three Railbanked Segments is attached hereto as **Exhibit A**.

2. RAILBANKING OBLIGATIONS

(a) Unless otherwise defined in this Agreement, terms used herein will have the meanings defined in the Railbanking Legislation.

(b) For the purposes of this Agreement, authorization by the STB of the County's trail use will be referred to herein as the "NITUs".

(c) Pursuant to 49 C.F.R. 1152.29, the County assumes the following obligations in respect to the Railbanked Segments in accordance with the Statement of Willingness to Assume Financial Responsibility required as a condition precedent to the issuance of a NITU (the "SWAFR"), the form of which is attached to this Agreement as **Exhibit B**, and otherwise in accordance with the Railbanking Legislation: (i) all responsibility for the management of the Railbanked Segments; (ii) all responsibility for all legal liabilities arising out of or relating to the transfer, use, possession, management, operation or control of the Railbanked Segments; and (iii) all other obligations arising under the NITUs, the SWAFR, and/or the Railbanking Legislation as it applies to the Railbanked Segments.

(d) BNSF hereby transfers to the County the right and/or obligation to permit reactivation of the Railbanked Segments for rail service.

(e) The Parties agree that this Agreement will constitute prima facie evidence of a valid and continuing purpose on the part of the County to initiate interim trail use along the Railbanked Segments.

3. TERMINATION OF NITU

It is the understanding and intent of the parties that all right and/or obligation to permit reactivation of the Railbanked Segments for rail service has been transferred by BNSF to County and that BNSF no longer retains any such right or obligation. If notwithstanding this the STB receives a request from BNSF that rail service be restored on all or portion(s) of the Railbanked Segments, the County agrees that it will make its interest in the corresponding portion(s) of the Railbanked Segments available for such restoration and BNSF will compensate the County for such interests and any improvements that have been made by the County on the Railbanked Segments at their then fair market value. If (a) the County, after the date of this Agreement, has removed any railroad tracks or any railroad equipment or supporting apparatus within the portion(s) of the Railbanked Segments being reactivated pursuant to such a request by BNSF, or (b) any equipment or improvements ("Post-Railbanking Installations") installed on the portion(s) of the Railbanked Segments being reactivated pursuant to such a request by BNSF after the date of this Agreement would prevent or otherwise impede the restoration of rail service, then BNSF will either restore any required railroad infrastructure or remove any Post-Railbanking Installations at its sole expense, and will undertake at its sole expense any work necessary to restore rail service on the portion(s) of the Railbanked Segments. In the event of a request to reactivate service on any Railbanked Segment(s) pursuant to such a request by BNSF and of the receipt of any required approvals by the STB, the County will cause the NITUs to be vacated on the subject Railbanked Segment(s), in whole or in part, and will file at the STB any required notice and/or other information as may be necessary at that time.

4. NOTICES

Except as otherwise expressly provided in this Agreement, all requests, notices, demands, authorizations, directions, consents, waivers or other communications required or permitted under this Agreement shall be in writing and shall either be: (i) delivered in person, (ii) deposited postage prepaid in the certified mails of the United States, return receipt requested, (iii) delivered by a nationally recognized overnight or same-day courier service that obtains receipts, or (iv) delivered via facsimile, with confirmation of receipt with an original deposited postage prepaid in the first class mails of the United States. Such notices shall be addressed to County at:

County
 King County Office of the Executive
 701 Fifth Avenue
 Suite 3210
 Seattle, WA 98104
 ATTN: Chief of Staff

With an additional copy to:

Office of the King County Prosecuting Attorney
 Civil Division
 400 King County Courthouse
 516 Third Avenue
 Seattle, WA 98102
 ATTN: Chief Civil Deputy

or to BNSF at:

BNSF Railway Company
 2500 Lou Menk Drive

Fort Worth, Texas 76131
ATTN: Rick Weicher
Fax No.: 312-850-5677

With an additional copy to:

BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76131
Attn: David Rankin
Fax No.: 817-352-2398

or to such person and at such other addresses as either Party may at any time or from time to time designate for itself by notice in accordance herewith. Each such request, notice, demand, authorization, direction, consent, waiver or other document shall be deemed to be delivered to a Party when received at its address set forth or designated as above provided.

5. GENERAL TERMS

(a) Entire Agreement. This Agreement, together with any amendments or exhibits, constitutes the entire agreement between the Parties with respect to the subject matter hereof, and may be modified only by a writing executed by the Parties.

(b) No Third Party Beneficiaries. Except as otherwise provided in this Agreement, nothing contained in this Agreement, in any provision or exhibit to this Agreement, or in any agreement or provision included in this Agreement by reference, will operate or be construed as being for the benefit of any third person.

(c) Parties. Wherever used in this Agreement, the terms "BNSF" and "County" shall be construed in the singular or plural as the context may require or admit, and shall include the permitted successors and assigns of such parties.

(d) Severability. This Agreement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules and regulations. If any term or provision of this Agreement or the application thereof to any person or circumstance shall for any reason and to any extent be held to be invalid or unenforceable, then such term or provision shall be ignored, and to the maximum extent possible, this Agreement shall continue in full force and effect, but without giving effect to such term or provision.

(e) Governing Law; Headings; Rules of Construction. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington, without reference to the conflicts of laws or choice of law provisions thereof. The titles of sections and subsections herein have been inserted as a matter of convenience of reference only and shall not control or affect the meaning or construction of any of the terms or provisions herein. All references herein to the singular shall include the plural, and vice versa. The Parties agree that this Agreement is the result of negotiation by the Parties, each of whom was represented by counsel, and thus, this Agreement shall not be construed against the maker thereof.

(f) No Waiver. Neither the failure of either Party to exercise any power given such Party hereunder or to insist upon strict compliance by the other Party with its obligations hereunder, nor any custom or practice of the Parties at variance with the terms hereof shall constitute a waiver of either Party's

right to demand exact compliance with the terms hereof.

(g) Assianability. The County may assign this Agreement at its discretion, subject to regulatory requirements for transfer of the NITUs.

(h) Time is of the Essence. Time is of the essence in the performance of each Party's obligations under this Agreement.

(i) Incorporation of Exhibits. All exhibits attached to this Agreement will be incorporated by this reference and made a part of this Agreement for all purposes.

(j) Multiple Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and such counterparts shall constitute one and the same instrument.

(k) Waiver of Trial by Jury, Venue and Personal Jurisdiction. BNSF AND THE COUNTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR COUNTERCLAIM ARISING IN CONNECTION WITH, OUT OF OR OTHERWISE RELATING TO, THIS AGREEMENT. King County Superior Court or the Federal District Court for the Western District of Washington, both in King County, Washington, shall be the sole and exclusive venues for any action or legal proceeding for an alleged breach of any provision of this Agreement or any representation, warranty, covenant or agreement herein set forth, or to enforce, protect, determine or establish any term, covenant or provision of this Agreement or the rights hereunder of either Party; and the Parties hereby agree to submit to the personal jurisdiction of said courts.

(l) Relationship. Nothing in this Agreement shall be deemed or construed by the Parties, nor by any other person, as creating the relationship of principal and agent or of partnership or of joint venture between the Parties.

(m) Authorization. BNSF represents and warrants that it has obtained all necessary corporate approvals authorizing the execution and delivery of this Agreement, and that the execution and delivery of this Agreement will not violate the articles of incorporation or bylaws of such corporation, and will not constitute a material breach of any contract by which such corporation is bound. The County represents and warrants that it has obtained all necessary legislative approvals authorizing the execution and delivery of this Agreement, and that the execution and delivery of this Agreement will not violate the County's Charter or code, and will not constitute a material breach of any contract by which the County is bound.

(n) Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective heirs, executors, administrators, legal representatives, successors and assigns.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed by its duly authorized signatory, effective as of the day and year first above written.

BNSF RAILWAY COMPANY

By: _____
Name:
Title:

KING COUNTY

By: _____
Name:
Title:

EXHIBIT A

To Trail Use Agreement

Form of Statement of Willingness to Assume Financial Responsibility

Statement of Willingness to Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, King County, a political subdivision and body corporate and politic of the State of Washington (Interim Trail User) is willing to assume full responsibility for 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 for the payment of any and all taxes that may be levied or assessed against the right-of-way. The property extends from: (1) railroad milepost 5.0 on the Woodinville Subdivision near _____ (Station Name), to railroad milepost 10.60, near _____ (Station name), a distance of 5.6 miles in King County, Washington; (2) railroad milepost 11.25 on the Woodinville Subdivision near _____ (Station Name), to railroad milepost 23.8 , near _____ (Station name), a distance of _____ miles in King County, Washington; and (3) railroad milepost 0.0 on the Redmond Spur near _____ (Station Name), to railroad milepost 7.3, near _____ (Station name), a distance of 7.3 miles in King County, Washington. The right-of-way described in item (1) is part of a line of railroad proposed for abandonment in STB Docket No. AB-6 (Sub-No. 464X). The right-of-way described in item (2) is part of a line of railroad proposed for abandonment in STB Docket No. AB-6 (Sub-No. 465X). The right-of-way described in item (3) is part of a line of railroad proposed for abandonment in STB Docket No. AB-6 (Sub-No. 463X).

King County acknowledges that use of the right-of-way is subject to the user continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

EXHIBIT B
To Trail Use Agreement

Map of Three Railbanked Segments

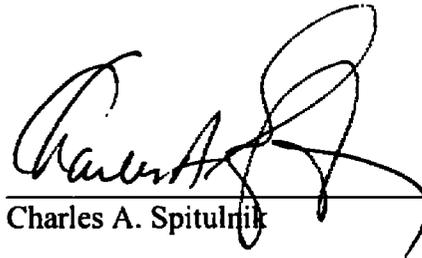
Certificate of Service

I hereby certify that on this 22nd day of September, 2008, I caused to be served a copy of the foregoing Verified Petition for an Exemption from 49 U.S.C. §10901 of King County to be served by first class mail, postage prepaid, upon:

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menck Drive – AOB3
Ft. Worth, TX 76131

Kevin M. Sheys
Janie Sheng
K&L Gates
1601 K Street, NW
Washington, D.C. 20006

Karl Morell
Ball Janik LLP
1455 F Street N.W.
Suite 225
Washington, D.C. 20005



Charles A. Spitulnik