

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

BNSF RAILWAY COMPANY,

DOCKET TR-070696

Petitioner,

CITY’S PRE-HEARING MOTION
IN LIMINE AND MOTION FOR
SUMMARY JUDGMENT
REQUIRING NEW SEPA
DETERMINATION BY THE
WUTC

v.

CITY OF MOUNT VERNON,

Respondent

And

SKAGIT COUNTY , WASHINGTON
STATE DEPARTMENT OF
TRANSPORTATION, WEST VALLEY
FARMS LLC, and SKAGIT COUNTY,

Intervenors

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.....

1 **NAME AND ADDRESS OF PLEADING PARTY.** The City of Mount Vernon,
Respondent, located at 910 Cleveland Avenue, Mount Vernon, Washington 98273

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I. TABLE OF AUTHORITIES

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4 **II. INTRODUCTION AND RELIEF REQUESTED.**

5 This matter comes before the Washington State Utilities and Transportation Commission
(WUTC) to consider Petitioner’s request to abandon and close to public use a railroad-
highway grade crossing located at Hickox Road, Mount Vernon (“the Crossing”) in
accordance with RCW 81.53.060 and all applicable law. The WUTC convened a Second
Prehearing Conference on Friday, July 20, 2007 for the purpose of creating a procedural
schedule for the case and addressing any objections to the first Prehearing Conference
Order (Order 01). Order 02 was then entered establishing a date for the filing of motions
by August 28, 2007.

6 The City respectfully submits the following motions based on the authority and argument
herein and respectfully requests that the WUTC deny the petition for closure until the
State Environmental Policy Act is complied with including WUTC removing WSDOT’s
previous threshold determination based on inadequate review and new information and
grant the City’s motion in limine allowing the City to present certain evidence during the
hearing that closure of the crossing will detrimentally impact and run against public
policy found elsewhere within state law.

7 **III. STATEMENT OF FACTS**

8 **A. Description of the Area Served by the Hickox Road Crossing**

9 The Hickox Road crossing, (“the Crossing”) is located at the southern jurisdiction
boundary line of the City of Mount Vernon.¹ Hickox Road is a two lane road running
East-West extending Westerly to and intersecting with Dike Road.² Dike Road abuts a
system of dikes protecting against flood events that may occur by overflowing of the
Skagit River.³ Landward of the dikes and between the Crossing, or the west side of the
Crossing, lie property that is part of the City’s 100 year flood plain based on current

¹ See Exhibit -1 Declaration of Mikael Love; See Exhibit 2- Declaration of Jodi Brautaset and attached map

² Id.

³ Id.

FEMA mapping.⁴ Land uses of the property include farming, use and storage of large farm equipment, maintaining livestock, and use as a primary residence.⁵ To the East of the Crossing is the Interstate Five corridor.⁶

10 The City of Mount Vernon partly responsible provides emergency services to the area including medical and fire services; however, the City relies heavily on Skagit County Fire Protection District No. 3 (“Fire District No. 3”) for the provision of these services within the area that lies between the Crossing and Dike Road to the West.⁷ Fire District No. 3 is an all-volunteer fire district whose volunteers respond out of two stations, Cedardale and Conway.⁸ The Cedardale station is located East of the Crossing.⁹ The Conway Station is located in the flood plain.¹⁰ The District’s five-year plan is to relocate the Conway Station out of the flood plain.¹¹ This will necessarily move the Conway Station a further distance from the affected area and will significantly increase the response time from Conway.¹² Once the relocation is completed, Cedardale will remain the station with the initial response responsibilities for the affected area.¹³

11 **B. Flood Hazards on the Skagit River.**

12 Overall, the City of Mount Vernon is protected by a dike system maintained by Dike Districts 3, 17, 20 and 1.¹⁴ The system of dikes that reside in the area due East of the Crossing are located within the jurisdiction of special purpose district Dike District No. 3.¹⁵ Dike District No. 3 is required by statute to provide flood protection, which includes the maintenance and repair of levees, compliance with Army Corps of Engineers and FEMA standards for levee inspection and improvements for the overall protection of life and property within the District. Recent flood studies prepared by the Army Corps and

⁴ Id.

⁵ See Exhibit 3- August 23, 2006 letter of Gary Jones on behalf of Richard Smith to the WUTC and May 30, 2007 letter of Gary Jones on behalf of David Boon to the WUTC; See also Exhibit 11 Declaration of John Devlieger.

⁶ See Exhibit 3- Declaration of Jodi Brautaset and attached map

⁷ See Exhibit 4- Declaration of Assistant Fire Chief Glenn Brautaset.

⁸ See Exhibit 5 – Declaration of David Skrinde Fire Chief for Fire Protection District No. 3

⁹ See Exhibit 3-- Declaration of Jodi Brautaset and attached map

¹⁰ See Exhibit 5 – Declaration of David Skrinde Fire Chief for Fire Protection District No. 3

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ See Exhibit 1 Declaration of Mikael Love

¹⁵ See Exhibit 6 Declaration of David Olson Dike District No. 3 Chairman

Skagit County anticipate the potential for flood damage with the City to be greater than which is shown in the current FEMA maps.¹⁶ The system of dikes which protects the City cannot withstand a 100 year flood event.¹⁷ Recent flood events of 1990, 1995, and 2003 have come close to over topping the dike system.¹⁸ No recent flood event has reached the predicted 100 year flood level.¹⁹ Each flood event in recent history has required the City to assist Dike District 3 in flood fighting efforts.²⁰

13

Flooding has the potential to cripple key infrastructure, transportation, water, sewer, residential areas, farmland, and endanger the welfare of persons and property that reside within the floodplain. There have been several occasions where the Hickox Road crossing was designated as an “alternate contingency route” for flood control.²¹ The purpose for the route was two-fold; 1) secondary evacuation route for residents and businesses south of Section Street, 2) secondary logistical route for flood control supplies for dike reinforcement south of the Waste Water Treatment Plant.²² Dike District 3 and landowners both rely on this route as a potential evacuation route in the event of Dike failure and the necessity to flee the area.²³ Skagit County’s hazard mitigation plan and vulnerability assessment identifies the threat of flooding as the greatest hazard to the general public and welfare within the County and specifically identifies low lying areas as particularly vulnerable.²⁴ The plan depends on warnings systems which are effective only if evacuation routes are maintained.²⁵ A key resource for flood fighting and emergency repairs to the dikes is the Meridan Quarry located East of Hickox Road in the City of Mount Vernon.²⁶ Maintaining the Hickox road crossing would allow an efficient route for delivery of necessary materials (i.e. sand, rock, equipment) needed for flood fighting purposes.²⁷

14

C. The Mount Vernon Siding Project

¹⁶ See Exhibit 1 Declaration of Mikael Love

¹⁷ Id.; See Exhibit 6 Declaration of David Olson Dike District No. 3 Chairman

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ See Exhibit 4 Declaration of Assistant Fire Chief Glenn Brautaset

²² Id.

²³ See Exhibit 6 Declaration of David Olson Dike District No. 3 Chairman; See also Exhibit 11 Declaration of John Devlieger

²⁴ See Exhibit 7- Excerpt from Skagit County’s Hazard Mitigation Plan

²⁵ Id.

²⁶ See Exhibit 6 Declaration of David Olson Dike District No. 3

15 Petitioners filed with the WUTC a request to order the Hickox rail crossing located within the City of Mount Vernon, Skagit County abandoned and closed.²⁸ A reason for the closure was to allow for the proposed expansion of WSDOT's Mount Vernon Siding Extension Project.²⁹ According to the Petitioners, removal of the crossing will allow construction of the siding project to take place.³⁰

16 The Mount Vernon Siding Project ("the Project") is a project sponsored by WSDOT to extend the existing 6,000 foot BNSF Railway siding in Mount Vernon an additional 3700 feet to the south.³¹ The purpose for the total siding length of 9700 feet is to allow long freight trains to pull off the main line track and permit faster trains and other faster freight to pass.³² As part of the proposal, WSDOT has anticipated that two at-grade railroad crossings located at Hickox Road (public crossing) and Pederson Lane (private crossing) will be closed.³³

17 **D. Previous Environmental Review Conducted**

18 Prior to the Petition, WSDOT Officials met with City Officials regarding the proposed closure of the Hickox rail crossing and provided a draft report involving an analysis of the traffic impacts as a result of the closure. After the meeting City Officials submitted written comment to WSDOT Officials objecting to the closure and its impacts on the City's built environment.³⁴ Specifically, the City objected to the impacts the closure would have to the City's land use planning and future growth needs, impacts to the City's existing transportation system and grid in the City's UGA, and the reduction of access across the railroad line for traffic and emergency vehicles in South Mount Vernon.³⁵ Similar concerns were raised as comment by the City with the WUTC.³⁶ Fire District No. 3 provided comment prior to the completion of the traffic study in which WSDOT would provide basis for its environmental review that the study underestimated the

²⁷ Id.

²⁸ See Exhibit 8- Petition to WUTC

²⁹ Id.

³⁰ Id.

³¹ See Exhibit 9- WSDOT's Determination of Non-Significance and Environmental Checklist

³² Id.

³³ Id.

³⁴ See Exhibit 10- City's June 30, 2006 letter to WSDOT and City's May 10, 2007 letter to WUTC.

³⁵ Id.

³⁶ Id.

impact of the closure on fire protection and provided a response time summary to WSDOT's consultant documenting that the closure would cause a 2 to 4.5 minute increase in response times to those areas of the of the District currently accessed by Hickox Road.³⁷ Subsequent to providing that information, Fire District 3 has obtained more information about response times in the area due to a typical fire response occurring on May 14, 2007.³⁸

19 On February 16, 2007, WSDOT's designated responsible official prepared and submitted both an environmental checklist involving the Project and a Determination that the additional 3600 feet of side tracking and closure of two rail crossing would not have a probable significant adverse impact on the environment also known as a Determination of Nonsignificance ("DNS").³⁹ Neither City nor Fire District comments were included within either document nor identified. Impacts to flooding, flood fighting operations or evacuations for a flood flight were not identified as a result of the closure or the project as a whole.

20 Within the environmental checklist, WSDOT failed to include approval by the WUTC for closure of the crossings within the list of government approval needed for the proposal.⁴⁰ Under proposed measures to ensure that the proposal is compatible with existing and project land uses, WSDOT's response failed to acknowledge significant impacts to the current agricultural land uses located in the area, significant impacts to the existing local transportation grid in the area, or significant impacts to planned transportation improvements and land uses identified in the City's and County's planning documents.⁴¹ When questioned about access to the existing street system and public streets serving the site, WSDOT response referred to a traffic study it has conducted to ensure that access is still available due to intersecting roads; however, WSDOT further explained that WUTC will hold a public hearing prior to closure decision.⁴² WSDOT explained that the project would not result in an increased need for public services and that any measures to reduce or control direct impacts on public service are not proposed as a part of the proposal.⁴³ At this time, it is unknown to the Respondent whether or not notice of WSDOT's

³⁷ See Exhibit 5 – Declaration of David Skrinde Fire Chief for Fire Protection District No. 3

³⁸ Id.

³⁹ See Exhibit 9- WSDOT's Determination of Non-Significance and Environmental Checklist.

⁴⁰ Id. at page 2.

⁴¹ Id. at page 10.

⁴² Id. at page 13.

⁴³ Id. at page 13-14

Determination of Nonsignificance (“DNS”) was provided in accordance with the regulations set under the regulations set forth by the Department of Ecology.⁴⁴

IV. LEGAL ARGUMENT

21 **The Closure of the rail crossing is an action which the WUTC is a responsible agency to determine and obtain compliance the State Environmental Policy Act.**

22 The State Environmental Policy Act’s (“SEPA”) primary requirement is that state and local agencies “include in every recommendation or report on proposals for legislation and other major action significantly affecting the quality of the environment,” a statement describing the environmental impacts and alternatives to the proposal.⁴⁵

23 The first step is determine whether the proposed government decision of activity constitutes a covered action or whether they are categorically exempt. Under the Department of Ecology rules, grade crossing closures *are not* categorically exempt from the State Environmental Policy Act.⁴⁶ Therefore, SEPA requires WUTC as the responsible Agency with authority to determine whether or not the closure of the Hickox Road Crossing constitutes a major action significantly affecting the quality of the environment.

24 **SEPA rules require the WUTC to prepare a new threshold determination if new information indicates probable significant adverse environmental impacts including lack of material disclosure.**

25 WAC 197-11-600 sets forth the criteria for determining whether a preexisting environmental document may be used unchanged and describes when existing documents may be used to meet all or part of an agency’s responsibilities under SEPA.

26 For a DNS, preparation of a new threshold determination is required by the Agency if there are either substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant impacts if a DS is being withdrawn), or new information indicating a proposals probable significant adverse

⁴⁴ See Exhibit 12 Declaration of Kevin Rogerson

⁴⁵ RCW 43.21C.030(c).

⁴⁶ WAC 197-11-865(2)

environmental impacts including discovery of misrepresentation or lack of material disclosure.⁴⁷

27 In the present matter, the City and Respondents have submitted new information to the WUTC not before received in WSDOT's previous environmental review. Such information relates to likely adverse impacts to both the built environment and natural environment. SEPA specifically identifies that elements of the natural environment to which an agency must determine probable significant environmental impacts include floods and surface water movement/quantity/quality.⁴⁸ The City has provided information the Crossing has been identified as a route to be utilized in the event evacuation is necessary to those residents during a flood flight.⁴⁹ Diking District 3 has identified the importance of the crossing in order to provide its services of maintaining and repairing the dikes in which it is responsible in staging successful emergency operations during a flood event.⁵⁰ Flooding of the Skagit River is a frequent and consistent threat to those properties that lie within the flood plain. Diking District 3 and the landowners both the area rely on the Crossing as a potential evacuation route.

28 SEPA identifies that elements of the build environment includes the proposal's impact to existing land use plans and to estimated population, agricultural crops, transportation systems, vehicular traffic, movement/circulation of people or goods, and the impacts to public services and utilities including fire, maintenance, water/storm water, sewer/solid waste, and other governmental services or utilities.⁵¹ Previous comments not included in WSDOT's DNS were submitted by the City that the proposed closure is inconsistent with land use plans of the City and would adversely impact its transportation system and grid.⁵² Moreover, both Fire District 3 and the City has submitted information, including new data, to the WUTC that this closure would adversely impact it ability to provide fire and medical services to the area West of the closure.⁵³ Previous comments and newly

⁴⁷ WAC 197-11-600 (3)(b)(i)(ii)

⁴⁸ WAC 197-11-444 (1)(c)(i)(iii)

⁴⁹ Exhibit 4 Declaration of Assistant Chief Glenn Brauteset

⁵⁰ Exhibit 6 Declaration of David Olsen Dike 3 Chairmen

⁵¹ WAC 197-11-444 (2)(b)(i),(vii); WAC 197-11-444(2)(c)(i),(ii),(v); WAC 197-11-444(2)(d)(i),(v),(vii),(viii),(xi).

⁵² Exhibit 1 Declaration of Mikael Love

⁵³ Exhibit 5 Declaration of David Skrinde; Exhibit 10 City's June 30, 2006 letter to WSDOT and City's May 10, 2007 letter to WUTC.

submitted information provided by declaration from land owners to the surrounding area indicate an adverse impact to agricultural crops and agricultural activity.⁵⁴

29 In sum, WSDOT's environmental review of the above built and natural environmental elements are either inadequate or not addressed. City respectfully requests, based on the new information presented by the Respondent and Intervenors, that WUTC remove WSDOT's DNS and conduct its own supplemental environmental analysis involving how the closure will impact the natural and built environment. Only through this process, may potentially affected parties be assured that all probable significant adverse environmental impacts are identified and appropriate mitigation is conditioned.

30 **SEPA Required WSDOT's to Send its DNS and Environmental Checklist to Mount Vernon and to Give Public Notice in Accordance with the Dept. Of Ecology Regulations.**

31 When a responsible official makes a determination that there will be no probable significant adverse environmental impacts from a proposal, the responsible official is required to send the DNS and environmental checklist to agencies with jurisdiction, the Department of Ecology, affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal.⁵⁵ Moreover, the responsible official must give notice to the public and other agencies that the environmental document is being prepared or is available using reasonable methods set forth within the Agencies own procedures or use similar methods provided by the Dept. of Ecology.⁵⁶ If the proposal involves another agency with jurisdiction, WSDOT cannot act upon the proposal for fourteen days after date of issuance of a DNS.⁵⁷ Within the fourteen day period, an agency with jurisdiction may assume lead agency status or submit comments to the lead agency.⁵⁸ The responsible official must reconsider its DNS when timely comments are made.⁵⁹

⁵⁴ Exhibit 3 August 23, 2006 letter of Gary Jones on behalf of Richard Smith to the WUTC and May 30, 2007 letter of Gary Jones on behalf of David Boon to the WUTC; Exhibit 11 Declaration of John Devlieger.

⁵⁵ WAC 197-11-340 (b).

⁵⁶ WAC 197-11-340 (b); WAC 197-11-510

⁵⁷ WAC 197-11-340(2)(a)(i)

⁵⁸ WAC 197-11-340(2)(c)(e)

⁵⁹ WAC 197-11-340(2)(f)

32 This regulatory scheme sets forth a clear purpose that it is necessary to provide both public notice and specific notice to agencies with jurisdiction, political subdivisions which may be affected as a result of implementation, and the public at large of the proposal when a DNS is determined in order to afford them an opportunity to provide comment or assume lead agency status if applicable. It is unclear at this point that WSDOT satisfied those notice requirements due to the fact that WSDOT has to date failed to provide such documents evidencing compliance with this requirement upon request by the City.⁶⁰ As such, the City cannot confirm or deny that WSDOT's previous SEPA review has complied with the procedural notice requirements set forth by the Dept. of Ecology. City would request that WUTC condition any adoption in whole or in part of WSDOT's previous environmental review upon a showing of compliance with procedural requirements set forth by the Department of Ecology's regulations.

33 **Evidence Presented that the Closure of the Crossing will Detrimentally Impact and Run against Public Policy found within State Law is Relevant to the Determination that Public Convenience and Necessity Requires the Crossing to Remain Open.**

34 Should it be established that the Crossing is dangerous and unsafe, the Washington Supreme Court, citing language within the findings of a Department of Transportation administrative ruling subject to review, held that the WUTC must further determine whether "...the convenience and the necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding the dangerous condition."⁶¹ The WUTC has construed this holding broadly requiring a balancing of the public convenience and need for the crossing against the danger of the crossing.⁶²

35 Neither terms public convenience nor public need are defined within state statute or Washington case law. As such, the WUTC has allowed wide latitude involving issues to be raised and presented in order to determine public convenience and necessity.

36 Factual issues previously looked to by the WUTC include: 1) Are there available alternate crossings in an urban area in close proximity and sufficient numbers?; 2) What is the ability of those crossings to handle additional traffic?; 3) What are the number of

⁶⁰ See Exhibit 13 Declaration of Kevin Rogerson

⁶¹ Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949).

⁶² Burlington Northern Santa Fe v. City of Ferndale TR 940330 (1995); Burlington Northern Railroad Company v. Skagit County Docket No. TR-940282 (Dec. 1996) .

people affected by the closure?;⁶³ 4) What is the amount and character of travel on the railroad and on the highway?; 5) Do the alternative crossings have the ability to handle any additional traffic that would result from the closure?;⁶⁴ and 6) Are the alternative crossings safer and readily available?⁶⁵

37

In construing the term public convenience and public need broadly, WUTC has examined not only individual impacts of users of the crossing, but has also examined broader public policy issue regarding such a closure. Consistent with the WUTC's broad construction, the WUTC has included in its deliberations policy considerations regarding the effect such a closure has on larger public policy issues identified by Washington State Legislature elsewhere within state law. For example, affirming an initial order of closure of an at grade crossing in the City of Ferndale, the WUTC cited the state policy supporting the operation of passenger service embodied within Chapter 47.79 RCW establishing a high-speed ground transportation system which the closure purportedly promoted as additional grounds to support public need for such a closure.⁶⁶

The City has previously raised concerns that closure of the crossing will detrimentally impact and run against public policy found elsewhere within state law. Specifically, the policies identified in our state legislature within Washington State's Growth Management Act (GMA) declare that the State's public policy include: 1) efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans⁶⁷; 2) maintaining and enhancing natural resource-based industries, including agricultural and encouraging the conservation of productive agricultural lands⁶⁸, 3) the protection of critical areas.⁶⁹

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Just as the WUTC identified public policy found elsewhere by the state as relevant to whether there existed public need and convenience that the closure will promote interconnectivity and passenger service, the City respectfully asks the WUTC to grant the

⁶³ Burlington Northern Santa Fe v. City of Ferndale TR 940330 (1995).

⁶⁴ Burlington Northern Railroad Company v. Skagit County Docket No. TR-940282 (Dec. 1996).

⁶⁵ Union Pacific Railroad v. Spokane County, Docket No. TR 950177 (1996).

⁶⁶ See BNSF v. Ferndale TR 94033 (1995) (citing state policy embodied within RCW 47.79 supporting the operation of passenger service).

⁶⁷ RCW 36.70A.020 (3)

⁶⁸ RCW 36.70A.020(9)

⁶⁹ RCW 36.70A.060

City's motion to allow parties to raise public policy found codified elsewhere by Washington State's legislature..

39

V. CONCLUSION

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The Petitioner must show that the previous environmental review complies with the applicable SEPA procedural regulations which provide for specific notice to affected jurisdictions and public notice of WSDOT's DNS before the WUTC can entertain adoption in whole or in part of WSDOT's previous review. Regardless, the City and Intervenors have provided new information to WUTC that the proposed closure will significantly and adversely impact the built and natural environment. Based on the information and Declarations herein, the WUTC should not adopt WSDOT's DNS. Rather, the WUTC should seek supplemental review in order to make a new threshold determination so that adequate review of the potential environmental impacts to Petitioners proposal occurs. Under the facts of this case, the petition concerning the closure of the crossing will likely run counter to public policy found with the State's Growth Management Act. Because the WUTC has construed the term public convenience and necessity broadly and previously examined policy issues, parties at the hearing should be able to present evidence relevant to policies issues.

41

DATED this 28th day of August, 2007



Kevin Rogerson
WSBA #31664
City Attorney
City of Mount Vernon, Respondent

TABLE OF EXHIBITS

Pre-filing Record Number	Description of Exhibit
Exhibit 1	Declaration of Mikael Love
Exhibit 2	Declaration of Jodi Brautaset and attached map
Exhibit 3	August 23, 2006 letter of Gary Jones on behalf of Richard Smith to the WUTC and May 30, 2007 letter of Gary Jones on behalf of David Boon to the WUTC.
Exhibit 4	Declaration of Assistant Fire Chief Glenn Brautaset.
Exhibit 5	Declaration of David Skrinde Fire Chief for Fire Protection District No. 3
Exhibit 6	Declaration of David Olson Dike District No. 3 Chairman
Exhibit 7	Excerpt from Skagit County's Hazard Mitigation Plan
Exhibit 8	Petition of BNSF to WUTC
Exhibit 9	WSDOT Determination of Non-Significance and Environmental Checklist
Exhibit 10	City's June 30, 2006 letter to WSDOT and City's May 10, 2007 letter to WUTC.
Exhibit 11	Declaration of John Devlieger
Exhibit 12	Declaration of Kevin Rogerson

EXHIBIT 1

BEFORE THE WASHINGTON UTILITIES TRANSPORTATION COMMISSION

BSNF RAILWAY COMPANY,)	
Petitioner)	DOCKET NO. TR-070696
)	
v.)	
)	
CITY OF MOUNT VERNON)	DECLARATION OF
Respondent)	MIKAEL LOVE
)	
And)	
SKAGIT COUNTY, WASHINGTON)	
STATE DEPARTMENT OF)	
TRANSPORTATION, and WEST)	
VALLEY FARMS)	
Intervenors)	

I, Mikael Love , do hereby declare the following:


1. That I am a Professional Civil Engineer licensed in the State of Washington and employed by the City of Mount Vernon’s Public Works Department as the Assistant Public Works Director. I have been employed by the City approximately 9 years and do hereby make this declaration in that capacity.
2. That my duties as a manager for the City of Mount Vernon include acting as the operations manager during flood fight activities. I assist the Incident Commander during a flood fight operation in implementation of the flood fight plan.
3. That Current 1985 FEMA mapping indicates that most of Mount Vernon’s commercial industrial zone will effected by a 100-year flood event. The area of potential effect includes all area with Mount Vernon west of the river including the City’s Riverfront Park, South Mount Vernon commercial district, Downtown business district, College Way business district, and the River bend area.

4. That recent flood studies prepared by the Army Corps and Skagit County anticipate the potential for flood damage with the City to be greater than that which is shown in the current FEMA maps.
5. That the City is protected by a dike system maintained by Dike Districts 3, 17, 20, and 1. These dike districts maintain a system of protective dikes that in their current configuration can not withstand a 100-year flood without significant improvements.
6. That the recent flood events of 1990, 1995, and 2003 have come close to over topping the dike system. No recent flood event has reached the predicted 100 year flood level.
7. That Mount Vernon's historic downtown business district has one of the lowest dike systems in the entire Skagit River basin. Each flood event in recent history has required the City to assist Dike District 3 in the construction of the temporary sandbag wall. Construction of the temporary sandbag wall requires the aid of approximately 2,000 volunteers and 120,000 sand bags to be constructed within a 12 hours period.
8. That the public assets within Mount Vernon susceptible to flooding include our Waste Water Treatment Plant, US Post Office, MV School District bus facility, 3 schools, City shop complex, all Public buildings downtown including City Hall, County Courthouse, County Jail, County Public Health Building, Library, and Public Works offices, other City infrastructure within the flood plain include, Interstate 5, surface streets, 4 Bridges crossing the River, traffic signals, and pump stations. The Privately owned assets susceptible to flood damage include approximately 90% of all the City's zoned commercial and industrial districts.
9. That the Hickox Road crossing is located at the southern jurisdiction boundary line of the City of Mount Vernon and involves Hickox Road which is a two lane road running East-West extending Westerly to and intersecting with Dike Road.

10. That Dike Road abuts a system of dikes that is included within the City's system of flood protection which serves to protect against flood events that may occur due to overflowing of the Skagit River.
11. That behind the Dikes and between the Hickox Crossing, or the west side of the Crossing, lie property that is part of the City's 100 year flood plain based on current FEMA mapping.

The below-signed does certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct at the time it was written.

DATED this day of August 28, 2007.


Mikael Love
Assistant Public Works Director
for the City of Mount Vernon

City of Mount Vernon
Location Where Declaration Made

EXHIBIT 2

BEFORE THE WASHINGTON UTILITIES TRANSPORTATION COMMISSION

BSNF RAILWAY COMPANY,)	
Petitioner)	DOCKET NO. TR-070696
)	
v.)	
)	
CITY OF MOUNT VERNON)	DECLARATION OF
Respondent)	JODI BRAUTASET
)	
And)	
SKAGIT COUNTY, WASHINGTON)	
STATE DEPARTMENT OF)	
TRANSPORTATION, and WEST)	
VALLEY FARMS)	
Intervenors)	

I, Jodi Brautaset, do hereby declare the following:

1. That I am a employed by the City of Mount Vernon’s Planning and Engineering Department as the City’s Engineering Technician. I have been employed by the City for a period of 8 years and do hereby make this declaration in that capacity.
2. That my duties include producing technically accurate maps and reviewing proposed plats for planning and development activities.
3. That the attached map is a fair and accurate aerial representation according to scale of the Southern Mount Vernon area based on available and accurate information and data maintained by the City of Mount Vernon and Skagit County.
4. That the overlay markings on the map are fair and accurate identifications of existing roadways, city limits, urban growth areas and the Cedardale Fire Station.

The below-signed does certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct at the time it was written.

DATED this day of August 28, 2007.

Jodi Brautaset
Mikael Love
Capital Program Manager
for the City of Mount Vernon

Jodi Brautaset
Senior Engineering Technician

City of Mount Vernon
Location Where Declaration Made

Jones & Smith*Attorneys at Law*

Gary T. Jones

Gail R. Smith

May 30, 2007

Carole Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

COPY

**Re: Reference No. TR-070696 BNSF
Highway-Railroad Grade Crossing Closure-Hickox Road**

Dear Ms. Washburn:

I am writing on behalf of David Boon owner and manager of the dairy located at the Southwest corner of the intersection between Hickox Road and BNSF Mainline track. The Boons are milk producers who farm land in the area and ship milk and receive large trucks to supply their farming needs. The primary access to the farm is Hickox Road and the proximity of the farm to Interstate 5 and South Mount Vernon is an economic advantage. This railroad closure seriously threatens the viability of the dairy and imposes significant costs on its continued operation.

Among the costs are higher insurance rates because of slower response times for fire and emergency personnel to come to the farm. All routes leading from the farm which do not cross Hickox Road involve multiple mile travel on narrow County roads. This is not only slow but dangerous to the extent that farm equipment, trucks, and other support vehicles currently use the Hickox Road crossing for shorter, safer access.

The Hickox Road crossing is particularly significant because it is a crossing for the Interstate 5 corridor, to Frontage Roads in addition to being the crossing of the Burlington Northern Sante Fe track. The ability to maintain a commercially viable dairy is partly a function of being able to get farm equipment to and from the center of the farm out to sources of forage and back to the farm. Closing the Burlington Northern crossing would narrow the available options for the dairy.

The interests of the dairy and those landowners whose property lies West of BNSF mainline track would be served by having a separation of the grade crossing. This would improve safety, maintain the vehicle access to the property and allow for farm use without the risk of train collision. However, this investment in infrastructure may not be immediately justifiable and the option of leaving the grade crossing open for agricultural use or other interruptible use would be preferable to a total closure. If the Utilities and Transportation Commission decides to allow a closure it would be in the interest of the Boon family to have a relocated crossing. Because we

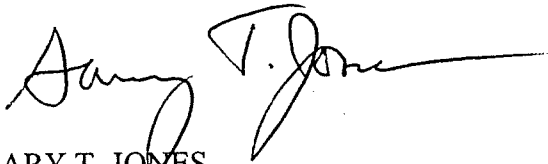
May 31, 2007

perceive that the control of a limited access crossing would be a constant problem, the relocation option is the preferred alternative.

My clients are concerned about the Hickox Road crossing because of its regional impacts and would like to see that the farm use of the South Mount Vernon area between BNSF tracks and Skagit River are viable for continuing commercial and agricultural use. The grade crossing threatens that use and requires mitigation measures now and in the long-term future. The decisions about how to solve the problem should be made in conjunction with Skagit County, the City of Mount Vernon, other landowners, and the Regional Transportation Planning Organization which coordinates transportation decisions.

Respectfully yours,

JONES & SMITH

A handwritten signature in black ink, appearing to read "Gary T. Jones", with a long horizontal flourish extending to the right.

GARY T. JONES
GTJ/sh

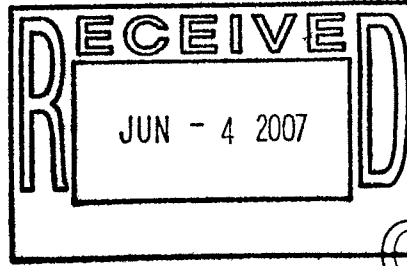
Jones & Smith

Attorneys at Law

Gary T. Jones

Gail R. Smith

May 30, 2007



COPY

Carole Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

**Re: Reference No. TR-070696
BNSF Railway Petition to Close Hickox Road Highway – Rail Grade Crossing**

Dear Ms. Washburn:

This comment letter is offered based on the Notice originally made to expire May 17, 2007 and later extended to May 31, 2007. It effects the crossing which abuts Skagit County Parcel No. P29327 owned by Richard H. Smith and Patricia A. Smith, husband and wife, and Robert E. Burkland and Pamela K. Burkland, husband and wife. My clients have pending plans for development of the property which lies within the Urban Growth Area for the City of Mount Vernon and abuts Old Highway 99 south of Mount Vernon in close proximity to a freeway overpass.

The Burklands and the Smiths live West of the BNSF track on Britt Road and Dike Road respectively and also farm land on the Westside of the BNSF tracks. Closing the Hickox Road Grade Crossing would impose a personal hardship on their homes, in addition to adverse effects on the business property.

Our office has previously commented at Public Meetings held about this proposal and attended the Board of County Commissioners Hearing prior to the decision by the Commissioners to oppose the grade crossing by Resolution adopted July 31, 2006. At that time Gary Struthers and Associates, Inc., consulting engineers put forward a compromise plan for revising the grade crossing to preserve access to the freeway from Hickox Road and from Hickox Road to South Mount Vernon west of the BNSF Railroad. The other alternative which would preserve the crossing would be a separation of the grade crossing so that the current and projected needs for surface transportation to South Mount Vernon and the agricultural land between Conway and Mount Vernon would continue to receive adequate service. Neither of the alternatives appear in the BNSF Petition and my clients are concerned that this closure is a prelude to more interference with surface transportation essential to South Mount Vernon and the agricultural land nearby.

There are already limits imposed on the westerly extension of Anderson Road which practically prohibits use of that crossing. One consequence of that closure is the limitation of access to

May 30, 2007

South Mount Vernon from the Westside of BNSF tracks. Please see the attached letter dated August 23, 2006 which itemizes the rail crossing closure issues. We believe that regional transportation planning at the federal level should take the opportunity to coordinate with the Growth Management Act based transportation planning required by RCW 36.70A.

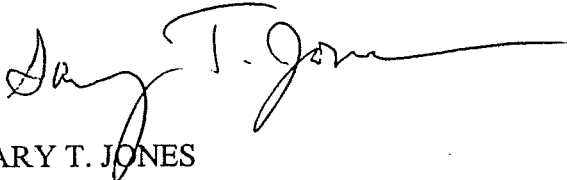
My clients anticipate the future development of South Mount Vernon and the interchange at Hickox Road. It would be shortsighted not to account for the future transportation needs of South Mount Vernon by retaining the Hickox Road crossing, either as a road highway – rail grade crossing or as a separation crossing. If the decision is made to close the highway – rail grade crossing now, the obligation of the BNSF to participate in sharing the costs of a separation of the highway – rail grade would be lost. This is an unfair shifting of economic burdens associated with the surface transportation requirements of the BNSF and the local community.

My clients are looking to the Washington Utilities and Transportation Commission for a resolution of this petition which pays more respect to the needs of local landowners and planning, while accomplishing the long term transportation goal of expanding the capacity of the rail line for passenger and freight transport.

Thank you for your consideration in this matter.

Respectfully yours,

JONES & SMITH

A handwritten signature in black ink, appearing to read "Gary T. Jones", with a long horizontal flourish extending to the right.

GARY T. JONES
GTJ/lf

Jones & Smith

Attorneys at Law

Gary T. Jones

Gail R. Smith

August 23, 2006

Jeffrey T. Schultz
Rail Operations & Technical Expert
WSDOT Rail Office
PO Box 47387
Olympia, WA 98504-7387

via First Class Mail and
email to: SchultJ@wsdot.wa.gov

Re: Rail Crossing Closure Issues – Mount Vernon

Dear Mr. Schultz:

Richard Smith has asked me to respond to the traffic study of the Hickox Road closure proposed by BNSF and WSDOT near Mount Vernon between Old Highway 99 and the Dike Road.

The first and most obvious problem with the study is that it collected data on traffic during January / February 2006. The timing is not compatible with finding the peak flows of traffic in the study area. If you are studying birds it would be like looking for Trumpeter Swans in the summer when they are fledging their young on Wrangell Island. There is significantly more traffic associated with the agricultural use of this study area between March 15 and October 15. So, the impact on property owners including dairy, crop farmers, nursery, stock producers and others in the agricultural community are significantly underestimated by the study. These users are potentially in need of emergency medical services and fire response which your study shows suffer a decline in level of service if the closure option is chosen. The study also fails to differentiate among uses.

Closing a crossing has one level of impact for emergency vehicles and another for agricultural use. Tractors, cultivators, planters, spray rigs, irrigation and harvest equipment can each have their own special needs. In general the vehicles and equipment necessary for farming are a hazard to higher speed traffic and themselves on the frontage roads. Thus, cutting off a crossing road has a very heavy impact on the agricultural use of the land between the railroad tracks and the Skagit River. Under the Growth Management Act the area west of the railroad tracks has been designated for agricultural use as land with long-term commercial value for agricultural production. The option you are proposing negates that planning to a significant degree. It subordinates agriculture to rail transport

This problem with land use must be looked at in the context of Mount Vernon's Urban Growth Area encroaching upon traditional agricultural land. Hickox Road on both sides of the railroad tracks forms the southern boundary of the Mount Vernon Urban Growth Area. Within the area

east of the railroad tracks a substantial level of development has been achieved and the infrastructure investment made by Mount Vernon will transform this area.

This study does not recognize the need to coordinate crossing of I-5 and the rail road tracks. The relationship between Hickox crossing I-5 and the tracks is an important one.

The study fails to include contacts with the County and City of Mount Vernon transportation planners. For example, Dennis Carlson at Mount Vernon Development Services is usually contacted with regard to all Mount Vernon related transportation development issues. No where is his name or input recorded in the final report in draft form. Esco Bell, the Public Works Director for the City of Mount Vernon is also not mentioned and Jana Hansen, the Director of Development Services is not quoted or apparently contacted about this study.

Skagit County Public Works has a roads section headed by David Sheridan. Mr. Sheridan's input on the traffic impacts of the project are also not seen in the report. This may partially explain the opposition of the Skagit County Board of Commissioners. The Commissioners are very aware of the obligation under the Growth Management Act to protect long-term commercially significant farmland and to serve rural residences through fire protection and emergency services. The failure of the study to recognize the significance of Hickox Road as a border between City of Mount Vernon urban development and Skagit County agriculture is a fault, regardless of the levels of service.

Two alternatives are presented in the study. No mention is made of the alternative of rerouting Hickox Road around the proposed closure. There is also no mention of the alternative for providing a second track south of Stackpole Road and north of the Conway crossing. The area served and the loss of the level of service would be minimized by closing the Peter Johnson Road and leaving the Stackpole and Hickox Roads open for crossing. The desired length of siding for freight trains or other passing traffic could be achieved in the southern area. This would no doubt involve filling and grading some farm land. However, the remainder would be adequately served for transportation services, law enforcement and emergency response time. The heavy impacts on the Britt Road and Dike Road which flow from closing the Hickox crossing are avoided. The City of Mount Vernon plans for developing the urban growth area North of Hickox Road are preserved under this alternative.

The report fails to explain why the particular length of siding is demanded. Is there an alternative which allows the track to be improved up to but not across the Hickox Road? Trains in the range of 100 cars can be held by lengthening the second track from Pedersen Road to Hickox Road, without closing the crossing at Hickox Road. A rough estimate would be 1-½ miles of available siding without impacting the intersection at Blackburn and the intersection of Hickox and the railroad tracks.

In summary, the rail transportation planning would fit better with the surface transportation needs if the Hickox Road were left open as a connection between the east and west sides of Interstate 5. Any alternative which closes the Hickox Road will have substantial impacts on

agriculture, future development of Mount Vernon, and on the present residents of rural Skagit County, especially those on the west side of the Burlington Northern Santa Fe rail line which would be closed by this proposed action.

Respectfully yours,

JONES & SMITH

A handwritten signature in black ink, appearing to read "Gary T. Jones". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

GARY T. JONES
GTJ/lfd

cc: Garry Struthers Associates Inc.
Attn: Gary A. Norris, P.E.
3150 Richards Road, Suite 100
Bellevue, WA 98005-4446
email: garyn@gsassoc-inc.com

Richard Smith

CERTIFICATE OF SERVICE

Chrissy Sprouse states and declares as follows:

I am a citizen of the United States of America, over 18 years of age and competent to testify to the matters set forth herein. On August 28, 2007, I hereby certify that I have this day served by first class mail, postage prepaid, a true and correct copy of the foregoing document(s) upon all parties of record in this proceeding entitled CITY'S PRE-HEARING MOTION IN LIMINE AND MOTION FOR SUMMARY JUDGMENT REQUIRING NEW SEPA DETERMINATION BY THE WUTC (with exhibits) on the following:

PETITIONER

JOHN LI, MANAGER
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BNSF RAILWAY COMPANY
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REPRESENTATIVE: BRADLEY P. SCARP
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SEATTLE TOWER, 27TH FLOOR
1218 THIRD AVENUE
SEATTLE, WA 98101
(206) 625-1801
BRAD@MONTGOMERYSCARP.COM

RESPONDENT

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MOUNT VERNON, WA 98273

REPRESENTATIVE: STEPHEN FALLQUIST
DEPUTY PROSECUTING ATTORNEY, CIVIL DIVISION
SKAGIT COUNTY
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(360) 336-9460
STEPHENF@CO.SKAGIT.WA.US

COMMISSION STAFF

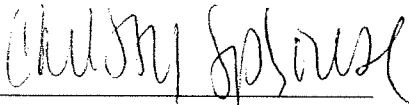
JONATHAN THOMPSON
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GARY T. JONES
JONES & SMITH
P. O. BOX 1245
MOUNT VERNON WA 98273

BRIAN K. SNURE
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612 SOUTH 227TH STREET
DES MOINES WA 98198

Commission Staff: Jonathan Thompson
Assistant Attorney General
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(360) 664-1225
jthomps@utc.wa.gov

DATED this 28th day of August, 2007 at Mount Vernon, Washington.



Chrissy Sprouse, Paralegal