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6 BEFORE THE WASHINGTON  
7 UTILITIES AND TRANSPORTATION COMMISSION

8 CHELAN COUNTY, )

9 Petitioner, )

10 vs. )

11 BNSF RAILWAY COMPANY, )

12 Respondent. )

DOCKET NO. TR-061442

RESPONDENT BNSF'S BRIEF ON  
JURISDICTIONAL ISSUES

13 WUTC CROSSING NO: 2A1673.50U )  
14 USDOT CROSSING NO. 084493W )  
15 )  
16 )

17 **I. INTRODUCTION AND RELIEF REQUESTED**

18 Respondent BNSF Railway Company ("BNSF"), formerly the Burlington Northern and  
19 Santa Fe Railway Company, submits the following Brief on Jurisdictional Issues in response to  
20 the Petition filed by Chelan County. Chelan County seeks an order from the Commission  
21 authorizing the alteration, relocation, construction and financing of an under-crossing located on  
22 the BNSF main rail line on the Chumstick Highway at MP 1.83.

23 BNSF respectfully requests that the Commission dismiss the petition because it lacks  
24 subject matter jurisdiction. Exclusive jurisdiction over rail carriers as to construction, acquisition,  
25 operation, and facilities rests with the Surface Transportation Board ("STB").  
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## II. STATEMENT OF FACTS

On September 11, 2006, Chelan County filed a petition with the WUTC seeking authorization of a construction project to alter and relocate an under-crossing of the BNSF main rail line at MP 1.83 of the Chumstick Highway. See Petition for Alteration and Relocation of a Highway-Rail Under-Crossing (“Petition”), ¶1. The project is described by Chelan County as follows:

Chelan County proposes altering and relocating the BNSF under-crossing<sup>1</sup> along with straightening the existing Chumstick Highway roadway to achieve greater sight distances and roadway continuity. The roadway will be widened and the trestle clearance will be increased to comply with the current grade separated crossing design standards.

*Id.* at ¶7, a. Chelan County’s stated justification for alteration and relocation of the under-crossing is to improve public safety. *Id.* at ¶7, b.

In addition to seeking authorization for the project, Chelan County also seeks an order allocating the unspecified costs pursuant to RCW 81.53.110. *Id.* at ¶11.

On November 22, 2006, BNSF answered Chelan County’s Petition and included among its affirmative defenses, lack of subject matter jurisdiction. Because the proposed project involves the design, construction, alteration and relocation of the railroad trestle (under-crossing) and therefore affects railroad transportation, operations, and facilities within the meaning of 49 U.S.C. §10501(b)(2), enforcement of state authority is preempted and jurisdiction rests exclusively with the Surface Transportation Board.

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## III. ISSUE PRESENTED

1. Whether jurisdiction over the subject matter of Chelan County’s Petition rests exclusively with the Surface Transportation Board? **Answer: Yes.**

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<sup>1</sup>Chelan County labelled the highway as “the BNSF under-crossing,” however, that term is misleading insofar as BNSF did not design and does not control this segment or any portion of the Chumstick Highway.

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#### IV. EVIDENCE RELIED UPON

This motion is based upon the pleadings and materials on file in this action.

#### V. AUTHORITY AND ARGUMENT

##### A. State regulatory authority over railroad operations is expressly preempted.

The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824). The Interstate Commerce Act (ICA), in which Congress regulates railroads, is “among the most pervasive and comprehensive of federal regulatory schemes.” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *accord Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989) (holding the ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims).

Although the ICA has long included a preemption clause, Congress further broadened the Act’s express preemption with the enactment of the Interstate Commerce Commission Termination Act (“ICCTA”) in 1995. The provisions set forth in the ICCTA, 49 U.S.C.S. § 10101 *et seq.*, vest exclusive jurisdiction of railroad transportation in the Surface Transportation Board (STB).<sup>2</sup>

The House report on ICCTA states that “[t]he bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce Federal standards. . . .” H.R. Rep. No. 104-311, at 95-96 (1995) *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08. The House report explains that:

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<sup>2</sup>Section 10501(b)(2) states:

(b) The **jurisdiction of the Board over –**

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

49 U.S.C. § 10501(b)(2) (emphasis added).

1 [a]lthough States retain the police powers reserved by the Constitution, the  
2 Federal scheme of economic regulation and deregulation is intended to address  
3 and encompass *all* such regulation and to be completely exclusive. Any other  
4 construction would undermine the uniformity of the Federal . . . scheme of  
5 minimal regulation for this intrinsically interstate form of transportation.

6 *Id.* (emphasis in original).

7 **1. Rulings on ICCTA preemption are clear.**

8 The Washington Supreme Court and Ninth Circuit Court of Appeals addressing regulation  
9 of rail transportation<sup>3</sup> interpret ICCTA preemption very broadly and affirm that the STB has  
10 exclusive jurisdiction to regulate rail transportation. *See, e.g., Seattle v. Burlington N. R.R.*, 105  
11 Wn. App. 832, 836, 22 P.3d 260 (2001), *aff'd*, 145 Wn.2d 661(2002) (“This language is clear,  
12 broad, and unqualified. It grants the STB jurisdiction over the listed activities. These provisions  
13 have been ruled an ‘express preemption clause’ evidencing Congress’s intent to preempt state  
14 regulatory authority over railroad operations.”) (citing *City of Auburn v. United States Gov’t*, 154  
15 F.3d 1025, 1030 (9th Cir. 1998). In *City of Seattle v. Burlington Northern Railroad Company*,  
16 Washington’s Supreme Court found that a city ordinance prohibiting switching movements across  
17 arterial street during peak traffic hours was preempted by the ICCTA because it regulated railroad  
18 activities. *City of Seattle v. Burlington Northern Railroad Company*, 145 Wash.2d 661, 41 P.3d  
19 1169 (2002).

20 In *City of Auburn*, the Ninth Circuit upheld an STB decision finding preemption of local  
21 environmental permitting standards for the reopening of an existing railroad line through the city  
22 of Auburn, Washington. *City of Auburn v. United States*, 154 F.3d 1025,1029 (9<sup>th</sup> Cir. 1998). The  
23 court specifically reiterated that “[a]ll the [ICCTA preemption] cases . . . find a broad reading of  
24 Congress’ preemption intent, not a narrow one,” and

25 there is nothing in the case law that supports Auburn’s argument that . . . Congress  
26 only intended preemption of economic regulation of railroads. . . . If local  
27 authorities have the ability to impose “environmental” permitting regulations on  
the railroad, such power will in fact amount to “economic regulation” if the carrier  
is prevented from constructing, acquiring, operating, abandoning, or discontinuing

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<sup>3</sup> Rail transportation includes locomotives, yards, property, facilities, instrumentalities, or equipment “of any kind related to the movement of passengers or property, or both, by rail,” and “services related to that movement.” 49 U.S.C. §10102(9).

1 a line. We believe the congressional intent to preempt this kind of state and local  
2 regulation of rail lines is explicit in the plain language of the ICCTA and the  
statutory framework surrounding it.

3 *Id.* at 1031.

4 Other jurisdictions interpreting the ICCTA agree that its language and legislative history  
5 dictate a broad preemptive reach. *See, e.g., CSX Transportation, Inc.*, 944 F. Supp. 1573, 1581-  
6 82 (N.D. Ga. 1996) (“it is difficult to imagine a broader statement of Congress’ intent to preempt  
7 state regulatory authority over railroad operations. . . .it is clear that Congress intended the  
8 preemptive net of the [ICCTA] to be broad by extending jurisdiction to the STB for anything  
9 included within the general and all inclusive term ‘transportation by rail carriers.’”). The fact that  
10 the ICCTA expressly withdrew the states’ jurisdiction over wholly *intrastate* railroad tracks  
11 “evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states,  
12 over the regulation of railroad operations.” *CSX*, 944 F.Supp. at 1582.<sup>4</sup>

13 In accord with the multitude of court rulings regarding the broad scope of federal  
14 preemption, the Surface Transportation Board’s own written decisions also recognize that

15 the preemptive effect of section 10501(b) is broad and sweeping. And, as  
16 particularly pertinent here, the courts have made it clear that state or local  
17 permitting or preclearance requirements of any kind that would affect rail  
operations (including building permits, zoning ordinances, and environmental and  
land use permitting requirements) are categorically preempted.

18 *City of Creede*, Co-Petition for declaratory order, STB Finance Docket No. 34376, May 3, 2005  
19 (emphasis added); *see also North San Diego County Transit Development Board*, STB Finance  
20 Docket No. 34111.

21 **B. The STB has exclusive jurisdiction over the proposed construction project described  
22 in Chelan County’s Petition.**

23 State and local regulation cannot be used to interfere with interstate railroad operations.  
24 Yet, this is precisely what Chelan County proposes. Enforcement of the Petition would  
25 substantially interfere with BNSF’s ability to operate its rail lines, unreasonably interfere with

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27 <sup>4</sup>In accordance with Congress’ intent to assume complete jurisdiction over regulation of railroad operations,  
the Washington legislature has recently amended Chapter 81.48 on railroad operating requirements and regulations  
to expressly acknowledge preemption of federal law in the context of regulating train speeds. *See* RCW 81.48.040.

1 interstate commerce, and ultimately control the manner in which BNSF operates its trains and  
2 manages its facilities in that area. The County has only recently provided BNSF with initial  
3 design drawings, but has not attempted to determine the project's undeniably expense price tag.  
4 So not only would the project significantly disrupt BNSF's mainline operations, but the temporary  
5 rerouting of the current track and operations during construction alone is expected to cost several  
6 million dollars and will present engineering and operational challenges. Relocating and  
7 constructing the permanent railroad structure will cost an additional several million dollars  
8 regardless of which of the new design proposals is selected by the County for its highway project.  
9 *See Amended Answer and Affirmative Defenses to Petition for Alteration and Relocation of a*  
10 *Highway-Rail Under-Crossing.* Imposition of the construction project would not only interfere  
11 with rail transportation and railroad operations, but would also amount to "economic regulation"  
12 because Chelan County seeks an order directing BNSF to pay for all or part of the County's  
13 proposed construction project. Further, the County has not estimated the project's time frame.

14 Although BNSF has previously indicated a willingness to work with Chelan County in  
15 addressing its local concerns including design, construction and safety issues relating to the  
16 railroad facility, that does not include financing the County's project. Therefore, enforcement of  
17 state and local authority to compel BNSF's compliance with the County's proposed construction  
18 project would significantly impact and unreasonably interfere with BNSF's operations and  
19 facilities, economically regulate the railroad operation, and is therefore preempted by ICCTA.  
20 Jurisdiction over the subject matter of the underlying petition rests exclusively with the STB.

## 21 22 VI. CONCLUSION

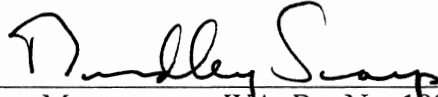
23 Chelan County's Petition for Alteration and Relocation of a Highway-Rail Under-  
24 Crossing falls squarely within the exclusive jurisdiction of the ICCTA and the Surface  
25 Transportation Board, thereby preempting any action by the Commission. To recognize state  
26 authority and force BNSF to comply with an order granting Chelan County's Petition would  
27 unduly interfere with interstate commerce by giving a local body the ability to control railroad

1 operations and facilities and constitutes an invalid attempt to regulate transportation by a rail  
2 carrier contrary to the ICCTA.

3 Accordingly, Chelan County's Petition should be dismissed.  
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5 DATED this 3rd day of May, 2007.

6 Montgomery Scarp MacDougall, PLLC

7 

8 Tom Montgomery, WA. Bar No. 19998

9 Bradley Scarp, WA. Bar No. 21453

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1 **CERTIFICATE OF SERVICE**

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3 I am over the age of 18; and not a party to this action. I am the assistant to an attorney  
4 with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite  
5 2700, Seattle, Washington, 98101.

6 I hereby certify that true and complete copies of *Respondent BNSF's Brief on  
7 Jurisdictional Issues and Amended Answer And Affirmative Defenses to Petition For  
8 Alteration and Relocation of Highway-Rail Under-Crossing* have been sent via U.S. Mail and  
9 Electronic Mail to the following interested parties:

10 Carole J. Washburn, Executive Secretary (Original and 5 copies)  
11 Washington Utilities and Transportation Commission  
12 1300 S. Evergreen Park Drive S.W.  
13 P.O. Box 47250  
14 Olympia, WA 98504-7250  
15 Fax: (360) 586-1150

16 Gary A. Riesen (one copy)  
17 Chelan County Prosecuting Attorney  
18 Louis N. Chernak  
19 Chelan County Prosecuting Attorney's Office  
20 401 Washington Street, 5<sup>th</sup> Floor  
21 P.O. Box 2596  
22 Wenatchee, WA 98807  
23 Fax: (509) 667-6490

24 I declare under penalty under the laws of the State of Washington that the foregoing  
25 information is true and correct.

26 DATED this 3<sup>rd</sup> day of May, 2007 at Seattle, Washington.

27  
  
\_\_\_\_\_  
Lisa Miller, Legal Assistant