

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

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent

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

Intervenors.

DOCKET NO. TR-070696

**WSDOT'S CLOSING BRIEF IN
SUPPORT OF BNSF'S PETITION TO
CLOSE THE AT-GRADE CROSSING
ON HICKOX ROAD**

WSDOT'S CLOSING BRIEF
IN SUPPORT OF BNSF'S PETITION TO CLOSE
THE AT-GRADE CROSS ON HICKOX ROAD

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STATUTES

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I. INTRODUCTION

The Washington State Department of Transportation (WSDOT) provides this closing brief to assist the administrative law judge (ALJ) with the main legal and factual issues in this matter.

II. ISSUES PRESENTED

BNSF initiated this case under RCW 81.53.060, which authorizes a railroad company whose track is crossed by a street or highway, to petition the Washington State Utilities and Transportation Commission (Commission) that public safety requires closure of the crossing. The issues presented are whether the crossing at Hickox Road is dangerous. And, if so, is the need for the crossing so great that it must be kept open notwithstanding its danger?¹ As explained below, the evidence in this case supports the following conclusions:

- (1) The at grade rail crossing at Hickox Road is dangerous and will be more so when the siding extension project is completed.
- (2) The dangers posed by the main line and siding configuration that will be present at Hickox Road can only be eliminated by closure.
- (3) The need for a crossing at Hickox Road is not so great that it must be kept open notwithstanding the especially dangerous condition posed.

III. ANALYSIS

A. The Crossing at Hickox Road will be Especially Dangerous

Our state's legislature appropriated \$2.5 million to construct the Mount Vernon Siding Extension project.² The siding extension project is an essential component of our state's long term plan to add faster, more frequent Amtrak *Cascades* passenger trains between Portland

¹ Dep't of Transp. v. Snohomish Cy., 35 Wn.2d 247, 212 P.2d 829 (1949).

² Schultz, Exh. 8:14:8-13.

Oregon, and Vancouver B.C.³ The project is strategically located along this single line track between the Stanwood siding to the south, and the siding at Bow to the north.⁴ The project will extend the existing siding track approximately 3,700 feet south to allow long freight trains to meet and pass to improve overall rail line efficiency and capacity.⁵ The project will add a second set of tracks at the Hickox Road Crossing.⁶ There are presently 11-12 freight trains and 4 Amtrak trains travelling through Mount Vernon daily with steady growth projected.⁷ The railroad anticipates the Mount Vernon Siding will be used extensively.⁸ Long freight trains will frequently block Hickox Road from minutes to several hours if it remains open.⁹ In the event of a washout or mudslide, the crossing could be blocked up to two days.¹⁰

All at grade rail crossings are dangerous, and the policy of the law is strongly against the allowance of such crossings.¹¹ The expert testimony presented in this case explains why the proposed configuration and intended use of the siding is necessary to achieve the state's transportation goals.¹² Expert testimony also explains the unfortunate reality that the siding extension project presents a track configuration at Hickox Road that will make an at grade crossing there especially hazardous.

Mr. Zeinz, Mr. Gordon, Mr. MacDonald, and Ms. McIntyre each describe similar safety concerns. Every open, at grade crossing carries an inherent risk of a train-vehicle collision that

³ Schultz, Exh. 8:3-16.

⁴ Schultz, Exh. 8:111:13-23.

⁵ See, e.g., Schultz, Exh. 8:9-14.

⁶ Schultz, Exh. 8:16:19-20.

⁷ McIntyre, Exh. 2:3:11-12.

⁸ Schultz, Exh. 8:12:2-5.

⁹ Gordon, Exh. 1:2:24; Schultz, Exh 8:16:19-23; McIntyre, Exh. 2:3-4:25-6.

¹⁰ Gordon, TR. 696:6-18.

¹¹ See, e.g., RCW 81.53.020; Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R., 195 Wash. 146, 80 P.2d 406 (1938); State ex rel. Oregon-Washington R. & Nav. Co. v. Walla Walla Cy., 5 Wn.2d 95, 104 P.2d 764 (1940).

¹² Schultz, Exh. 8:3-17:14-8.

can result in injury or death to vehicle drivers and their passengers, to train crews and passengers, and to local residents where trains might be hauling hazardous or explosive materials. These dangers are exacerbated where higher-speed passenger trains, like Amtrak, are present.¹³

Crossing two sets of tracks is inherently more dangerous than crossing a single set.¹⁴ A crossing that may be blocked for an extended period of time increases the danger that a motorist will ignore crossing warning devices and try to “beat the train.”¹⁵ Another, perhaps more serious risk, occurs when a stopped train is short enough to fit into the siding track between the Hickox Road and Blackburn Road at-grade crossings, and a second train approaches. A motorist’s sight may be obstructed by the parked train and may falsely presume the crossing signals and gates are activated by the train that is not moving on the siding track and ignore the signals and drive around the gate and collide with the train hidden from view on the main line.¹⁶

Warning devices can reduce some of the risk presented, but cannot eliminate it because crossing accidents are primarily caused by a motorist’s or pedestrian’s failure to heed such devices.¹⁷ Unfortunately, despite best efforts to design effective warning devices, people still ignore them quite often.¹⁸ That is a particular concern at Hickox Road, because there is a considerably greater likelihood that people will ignore warning devices and try to beat a train when they know that a crossing may be blocked for an extended period of time.¹⁹ The additional danger posed by two sets of tracks where a motorist can be confused by a train stopped on one set of tracks blocking the view of a second fast moving train on the other set of tracks, will also

¹³ Zeinz, Exh. 50:2:12-13.

¹⁴ Gordon, Exh. 1:3:8-9.

¹⁵ MacDonald, Exh 7:3:7-11; Zeinz, Exh. 50:32-3:22-16.

¹⁶ Zeinz, Exh. 50:5:4-20; Gordon, Exh. 1:3:9-13; MacDonald, Exh. 7:3:8-11.

¹⁷ McIntyre, TR. 662-664:22-14.

¹⁸ McIntyre, TR. 676:22-25.

¹⁹ Zienc, Exh. 50:3:6-16; MacDonald, Exh. 7:3:6-8.

be present at this location.²⁰ People can and do drive around two-quadrant gates, and if prevented from doing so by a median barrier, may simply lift it out of the way or drive through it.²¹ The use of four quadrant gates does not eliminate these behaviors, and presents some additional risks.²² One might be tempted to conclude that any person in such a hurry that they ignore or defeat such warning devices assumes the risk and get what they deserve if there is a collision. Unfortunately, the consequence of a train/vehicle collision can be catastrophic not only to the motorist and his passengers, but also to the blameless train crew, passengers and others.²³

The evidence presented in this case clearly establishes that the double track, main line and siding configuration at Hickox Road, coupled with the fact that the siding will be frequently blocked for extended periods, presents an especially dangerous condition. The only way to eliminate those hazards is to close the crossing.²⁴

B. The Need for the Crossing is not so Great That it Must Remain Open

1. Closing the Hickox Road crossing will not create a significant adverse impact on traffic.

Once it is established that a crossing is dangerous, the decision maker must next consider “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 its dangerous condition.”²⁵

Evidence regarding the convenience and the necessity of those using the Hickox Road crossing was offered by a number of local business owners, officials and residents opposed to closure. Regardless whether the crossing is closed, or simply blocked more frequently for longer

²⁰ MacDonald, Exh. 7:3:8-11; Gordon, Exh.1:3:8-11; Zienz, Exh.50:5:4-20.

²¹ Zeinz TR. 1178-1180:7-18.

²² McIntyre, Exh. 3:2:3-8; Peterson, Exh. 92:5:11-19.

²³ Zienz TR. 1217-1218:12:21; Exh. 143.

²⁴ Peterson, Exh. 92:6:3-6.

²⁵ Dep't. of Transp. v. Snohomish Cy., 35 Wn.2d 247, 254, 212 P.2d 829 (1949).

times, motorists accustomed to using the Hickox Road crossing are going to experience some delay compared to what they currently enjoy. Frequent, extended blockage of the crossing by trains will require motorists to decide whether to try to use the Hickox Road and risk the possibility of being delayed or having to turn around and use an alternative route. Closure of the crossing will eliminate that risk by simply requiring all non-emergency motorists to use an alternative route that will be safer, but somewhat longer and, therefore, less convenient than using the crossing at Hickox Road.²⁶ There is always going to be a trade off between the conveniences of a shorter route for some motorists on the one hand, and the enhanced public safety achieved by the closure of a crossing on the other. In this case the weight of the evidence favors closure.

The best tools available to predict actual impacts on Hickox Road users show that the likely inconvenience from closing this dangerous crossing will be much less than many local residents fear. Total traffic volume in the area of Hickox Road, and how that traffic will be impacted by the closure of the crossing, was determined by Gary Norris of Gary Struthers and Associates, Inc.²⁷ As a registered professional engineer in the state of Washington, Mr. Norris understood his mandate was to look at these issues in relationship to the overall community impact and the overall community benefit, and determine the impacts of closure in light of the total community, not just the limited impact of people who might have to take a little longer route to get where they want to go.²⁸ Mr. Norris is eminently qualified to conduct such a study.²⁹

Mr. Norris collected actual traffic counts on the roads within the study area network and used data from Skagit County Public Works to adjust those counts for annual average peak hour

²⁶ As discussed below, BNSF has offered to install locked gates that would enable emergency vehicle use.

²⁷ Norris, Exh. 13

²⁸ Norris, TR. 767-768:20-4.

²⁹ Norris, Exh. 12; Norris TR. 801-802.

volumes.³⁰ Traffic volumes at key intersections in the study area are low.³¹ To predict the routes that users of Hickox Road would be diverted to, and what impact that would have, Mr. Norris applied the standard modeling tools used by traffic engineers for this purpose, including the City of Mount Vernon comprehensive plan traffic assignment model.³²

Drivers entering or leaving the area impacted by the closure of the Hickox Road crossing do so through one of four “portal” interchanges: Anderson Road, Old Highway 99, Pioneer Highway, or Blackburn Road.³³ Adjusted traffic counts show that the closure of Hickox crossing would, on average at the busiest hour of the day, divert approximately 32 vehicles split between east and west bound directions.³⁴ Adding this diverted traffic to the remaining alternate routes to and from the access portals will, again on average, result in an increase in traffic at 10 intersections, a decrease at 5, and no change at 1 intersection.³⁵ There is more than adequate capacity to handle this additional traffic without any adverse impact to roadway service levels.³⁶ Notably, not all of the traffic diverted as a result of the closure of Hickox Road Crossing will simply go north and cross the tracks at Blackburn Road, or south to cross at Stackpole Road. Driver behavior is not that simplistic.³⁷ In fact, the model shows that closure of Hickox Road will not increase the number of vehicles turning right onto Blackburn Road from Dike Road, or left from Old Highway 99 onto Blackburn Road, as compared to those making those turns with the crossing open.³⁸

³⁰ Norris, Exh 13:8.

³¹ Norris, Exh. 13.

³² Norris TR. 800-802.

³³ Norris, Exh. 13:15.

³⁴ Norris, Exh. 13:47 (representing traffic in 2006).

³⁵ Norris, Exh, 13:26.

³⁶ Norris, Exh. 13:47; Norris TR. 800:16-25.

³⁷ Norris TR. 786:10-20.

³⁸ Norris, Exh, 13: Fig. 3.1; Norris TR. 786:2-4.

The closure of the Hickox Road Crossing will impact some users' travel times where a trip to or from a property to the nearest access portal was Hickox Road, but is now diverted to the next shortest alternative route.³⁹ The average PM peak hour increase in travel distance for these users is two to three miles,⁴⁰ and the average increase in time for those few affected travelers is five minutes.⁴¹

Of course, the inconvenience associated with adding even a few additional minutes to a trip will vary depending on the circumstances of the individuals affected. During the few weeks a year devoted to harvest, those additional minutes can increase a farmer's costs of doing business.⁴² However, many of these additional costs will likely be incurred regardless whether the crossing is open or closed because of the increased rail traffic and operational use of the siding.⁴³ Drivers' concerns about the safety of the Stackpole Road at-grade crossing as an alternative to Hickox Road would be addressed by installing appropriate, active warning devices.⁴⁴ Increasing the turning radii at the Stackpole Road/Dike Road and at the Hickox Road/Dike Road intersections could further enhance safety for large truck and farm equipment diverted using this alternate route.⁴⁵

2. Closure of Hickox Road Crossing will not have a significant adverse impact on emergency services.

The response time for police and emergency medical service will vary depending on the origin of the vehicle dispatched.⁴⁶ Neither the Skagit County Sheriff nor the Mount Vernon Police Department anticipate that the closure of the Hickox Road Crossing would have an

³⁹ Norris, Exh. 13:29.

⁴⁰ Norris, Exh. 13:48.

⁴¹ Norris, Exh. 13:29.

⁴² See, e.g., D. Boon, Exh. 67; J. Boon, Exh. 71; Smith, Exh. 77.

⁴³ J. Boon TR. 115:1-15.

⁴⁴ J. Boon TR. 1106:14-18.

⁴⁵ Norris, Exh. 13:60.

⁴⁶ Norris, Exh. 13:32-32.

appreciable impact on response time.⁴⁷ Skagit County Medic One can dispatch from a variety of locations including from near the hospital in Mount Vernon, from Mclean Rd. Fire Department, or even Sedro Woolley, Anacortes or Stanwood.⁴⁸ The impact of closure on police and Medic One response times will be minimal.⁴⁹

Closure will increase Skagit County Fire District No. 3's response time to the Hickox Road area.⁵⁰ Vehicles dispatched from the Cedardale Station to Hickox Road west of the tracks would likely use Stackpole Road, adding as much as three miles.⁵¹ Chief Harman, and Mr. Rabel believe this could add two to four minutes to the response time, and Mr. Norris suggests it might add as much as seven.⁵² Emergency response times along the two north-south roads, Conway Frontage and Dike Road, will not be impacted by the closure.⁵³

There are several factors that tend to lessen the significance of a potential increase in response time from the Cedardale Station to properties west of the BNSF tracks. It is clear that the volume of emergency calls to this area is expected to be very light given there are only a handful of properties affected that are not closer to the Skagit County Fire District No. 3's Conway station.⁵⁴ During 2005, 2006 and 2007, the fire district responded to a total of twelve service calls to the entire area north of Stackpole Road, south of Mount Vernon, and west of the railroad tracks.⁵⁵ Closure of the Hickox Road Crossing will eliminate delays for emergency vehicles stuck waiting at Hickox Road during the frequent times the crossing is blocked by trains for extended times. Improved signalization at the Stackpole crossing will eliminate delay

⁴⁷ Norris, Exh. 13:32.

⁴⁸ Harman TR. 922:8-14.

⁴⁹ Norris, Exh. 13:32.

⁵⁰ Norris, Exh. 13:32

⁵¹ Norris, Exh. 13:32.

⁵² Harmon, TR. 944 9-12; Norris, Exh. 13:32.

⁵³ Norris, Exh. 13:32.

⁵⁴ Rabel TR. 372:1-5.1

⁵⁵ Harman TR. 926:17-22.

associated with having to stop at a stop sign at that crossing. If Hickox Road Crossing is closed, Skagit County Fire District No. 3 would figure out an alternative to the use of Hickox Road to off set the delay.⁵⁶ Possibilities include potentially to rewrite its mutual aid agreements,⁵⁷ or perhaps to develop a volunteer firefighter sleeper program.⁵⁸

Closing the crossing at Hickox Road will eliminate a potential alternative flood evacuation route that could possibly be used during a catastrophic blockage of alternative routes.⁵⁹ The Hickox Road Crossing also provides access to the Meridian Quarry, a direct route to Dike Road that could be used to transport flood fighting materials to some portions of the dike.⁶⁰

However, the fact that much of Hickox Road's driving surface is at a lower elevation than the alternative evacuation routes from the area would seem to detract from its utility for this purpose during a flood emergency.⁶¹ Testimony offered by opponents suggesting that an open, but often blocked crossing at Hickox Road, would somehow benefit the public in the event of an unforeseen catastrophic failure of the dike which would inundate the area with water in minutes, was unpersuasive. It would seem prudent for planners to avoid relying on roads that are at a lower elevation and that are frequently blocked. This may explain why Hickox Road is not formally designated as an evacuation route.⁶²

Moreover, in the event regional emergency planners want to use Hickox Road in an emergency, BNSF has indicated a willingness to discuss the installation of a locked gate. This arrangement would satisfy the concerns of the Skagit County Department of Emergency

⁵⁶ Harman TR. 944 11-13.

⁵⁷ Harman TR. 944:1-12.

⁵⁸ Harman TR. 945:518.

⁵⁹ Norris, Exh. 13:48.

⁶⁰ Watkinson, Exh. 35:5:79-99.

⁶¹ Watkinson TR. 1050-1060:20-10.

⁶² Watkinson, Exh. 35:5:81-82.

Management in the event of a planned and deliberate evacuation.⁶³ A locked gate at Hickox Road for emergency use would also address the concerns of Skagit County Fire District No. 3 regarding access to the additional fire hydrant on the east side of the tracks in the event of a major structure fire.⁶⁴ Chief Harman reports that “the railroad has been very good to us in Fire District 3, [and] worked with us for a long time on different issues.” Chief Harman points out that they already have a protocol for stopping trains to accommodate the community’s needs in an emergency.⁶⁵ There is every reason to expect that an appropriate arrangement could be reached with the BNSF to allow emergency use of the crossing when needed to fight floods or fires.

IV. CONCLUSION

Freight and passenger rail is an important part of our state’s transportation system. Moving people and goods by rail is safer and friendlier to the environment than adding traffic to our already congested highways.⁶⁶ Construction of the Mount Vernon Siding Extension Project is a necessary step toward achieving our state’s long-range plan for Amtrak *Cascades*, and will incidentally enhance the efficiency of freight rail along the I-5 Corridor. However, these benefits cannot be achieved without exacerbating what is already a hazardous at-grade crossing at Hickox Road. A thorough professional analysis shows that closing this dangerous crossing will have no significant adverse impacts to traffic in the area. Any potential need that the public may have to use Hickox Road to adequately respond to a major structural fire or flood event can be met through an agreement with BNSF to install a locked gate to ensure it could be safely opened and available for that limited purpose.

⁶³ Watkinson TR. 1065:11-19.

⁶⁴ Harman TR. 942:14-24.

⁶⁵ Harman TR. 948:15-25.

⁶⁶ Washington State Long-Range Plan for Amtrak Cascades, Exh. 10:2-1.

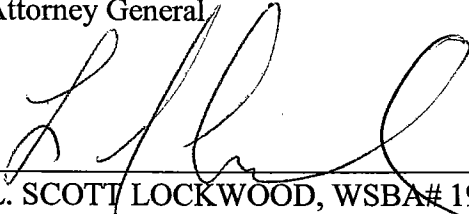
Although, closure will cause some residents some inconvenience, when one balances the inconvenience to some of taking a slightly longer trip against the risk of a fatal, or even catastrophic crossing collision, public policy supports closure. There is no need for this crossing so great that it must be kept open notwithstanding its danger.

Therefore, WSDOT respectfully asks that BNSF's Petition to close the Hickox Road Crossing be granted.

DATED this 15th day of February, 2008.

Respectfully submitted,

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DECLARATION OF SERVICE

Lisa M. Savoia 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 February 15, 2008, I caused to be served by first class mail, postage prepaid, a true and correct copy of the foregoing document entitled WSDOT's Closing Brief on the following:

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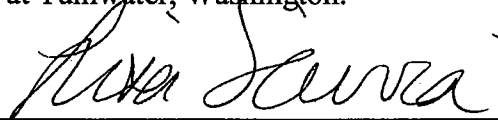
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