

**BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

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BNSF RAILWAY COMPANY,	)	<b>DOCKET NO. TR-070696</b>
	)	
Petitioner	)	<b>ORDER NO. 05</b>
	)	
v.	)	<b>PETITION FOR</b>
	)	<b>ADMINISTRATIVE REVIEW BY</b>
CITY OF MOUNT VERNON,	)	<b>WESTERN VALLEY FARMS LLC,</b>
	)	<b>INTERVENOR</b>
Respondent	)	
	)	
and	)	
	)	
SKAGIT COUNTY, WASHINGTON	)	
STATE DEPARTMENT OF	)	
TRANSPORTATION, WESTERN VALLEY	)	
FARMS LLC, and FIRE DISTRICT NO. 3,	)	
	)	
Intervenors		

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*1*           **COMES NOW** Western Valley Farms, LLC, a Washington Limited Liability Company composed of members of the Boon family including David Boon and Yvonne Boon, Intervenors and by their attorney, Gary T. Jones of Jones & Smith petition the Utilities and Transportation Commission as authorized by RCW 80.01.060 and WAC 480-07 825(1) for administrative review of the Initial Order Granting Petition to Close Hickox Road Grade Crossing Subject to Conditions served June 25, 2008.

**I. BACKGROUND**

*2*           Western Valley Farms, LLC (“WVF” hereafter) operates a 700 cow dairy at Hickox Road on the west side of the BNSF railroad tracks. WVF has two other farms in Skagit County, one on Fir Island and the home dairy East of

Interstate 5 on Bulson Road. WVF raises dairy replacement stock at George Washington. The company participated in the pre-hearing and hearing phases of the proceedings on BNSF's petition to close Hickox Road. WVF advocated leaving the crossing open to public use.

## **II. RELIEF REQUESTED**

3           WVF petitions the Utilities and Transportation Commission ("UTC" hereafter) to modify the Initial Order by denying BNSF Railway Company's ("BNSF" hereafter) petition for closing Hickox Road Grade Crossing. The relevant portion of the order appears under the heading IV. DISCUSSION AND DECISION B. Closure. paragraphs 63 to 77 pp 23-27 Initial Order. WVF answers the detailed references to the evidence and the findings by noting that the administrative law judge does not address the unique role of the Hickox Road as an agricultural transport corridor. The Initial Order adopts the position of BNSF that grade crossing at Blackburn Road and the mainline track is irrelevant to the decision. See BNSF Post-Hearing Brief pp 72 and 73. Testimony of Mr. Norris traffic engineering witness and testimony of Mr. Schultz for Washington Department of Transportation ("WSDOT" hereafter) are to this effect also. However BNSF has maintained two tracks for many years at that location.

4           In fact the current project is an extension of the two tracks which originate north of Blackburn Road and extend south of Blackburn Road today. Amtrak Cascade trains pull on to this siding now in order to allow passage of other Amtrak Cascade trains and freight trains. It is because this side track is too

short to accommodate long freight trains that the current siding is being built. Transcript and prefiled testimony of Jeffery Schultz. Under the Initial Order Blackburn crossing remains open and should remain open without the added pressure of mixing agricultural use with urban traffic.

5           The administrative law judge and the Commission must balance public use and necessity against the safety hazard posed by the crossing. Department of Transportation vs. Snohomish County (1949) 35 Wash 2d 247, at 254. WVF asks the Commission to strike a balance in favor of leaving the Hickox Road crossing open, recognizing that the safety of the public will be served by segregating the agricultural equipment and truck traffic which currently uses the Hickox Road crossing from the passenger cars and urban traffic which uses Blackburn Road. This balance is supported by the evidence of special considerations recited by the administrative law judge at paragraphs 85, 86 and 87, pages 29 and 30 of the Initial Order. It also preserves access to both sides of Interstate 5 for WVF farm equipment and trucks and others. See Prefiled Testimony of David and Jeff Boon, DeVlieger, Morrison. Exhibits 67-70, 71-74, 83, 84.

6           WVF acknowledges that the City of Mount Vernon and Skagit County did not join this petition for review. The argument made by UTC staff attorneys at pp. 20-22 paragraph 35-40 Post-Hearing Brief may affect Commission thinking. WVF asks UTC to reconsider this consequence of “road authority” inaction. Should it be cause for closure as argued by staff at Paragraph 41 pp 22, 23 Commission Staff Post-Hearing Brief.

### III.PRIVATE CROSSING

7           If the Commission does not find in favor of a public crossing, then WVF requests the Commission to clarify that part of the administrative law judge's Initial Order which calls for "negotiation". At page 31, paragraph 89 a private crossing agreement that allows seasonal access across the tracks at Hickox Road for WVF harvest operations is made a condition of crossing closure. This would be welcome relief if the control of the gate for agricultural harvest were in the hands of WVF with discretion to use the crossing for farm purposes.

8           The history of this case includes negotiations which went nowhere. Thus, WVF is unwilling to relinquish its right to appeal the administrative Final Order without knowing what the emergency provisions will be ordered after negotiations between the public parties and BNSF. WVF is also unwilling to waive its rights prior to knowing what seasonal agricultural use it will be able to make of the private crossing described in the Initial Order.

9           Ideally, WVF would like have "veto" power over crossing closure. No doubt BNSF would like to be able to close the crossing even if WVF is not happy. The private crossing agreement will be more effective if the parties are required to put their proposals on the record and submit them to Commission Staff and a mediator prior to any return to the Commission.

10          WVF believes that Initial Order paragraph 116 at the end of the order on page 36 requires clarification. What does it mean that the "UTC retains jurisdiction"? If the Commission appoints a master to conduct the

negotiations concurrently among the public parties and the WVF intervenors so that a comprehensive understanding of the private crossing can be reached and approved as a condition of and prior to closing the crossing with gates, then WVF would be more accepting of the Initial Order. However, there is insufficient specification of the rights of the intervenors, to induce WVF to accept the Initial Order. The fact that the harvest use is separated from the public safety issues and flood evacuation (60 vs 75 days) adds to WVF's concerns. Initial Order pages 35 and 36 paragraph 115(2)(c)&(d)

11           The access to both sides of Interstate 5, for farm machinery, adequate flood evacuation routes and access for medical and fire response are so urgent to the value and continuity of the WVF farm at Hickox Road that any outcome which does not preserve access threatens the economic viability of the farm and its successors.

### **III.           FEDERAL PREEMPTION**

12           WVF Intervenors are cognizant of the limitations on the Commission's authority regarding construction and use of the planned siding track. See Commission staff's post-hearing brief at pages 10, 11 and 12. The question which should be asked and which has not been answered in the Initial Order is whether the Surface Transportation Board acting under the authority of the Interstate Commerce Commission Termination Act has exercised its jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state."

849 USC Section 10501(b)(2). WVF does not find in the record any indication that the federal jurisdiction has been exercised. As a consequence the National Environment Policy Act (“NEPA” hereafter) has not been applied to the Hickox Road siding location or design. WVF therefore asks the Commission to impose a condition that BNSF file a Surface Transportation Board order approving the location of the siding and reached after consideration of the alternatives under NEPA, before any Final Order is filed.

13           The existence of alternatives has been presented in the evidence of this case. Both Interstate 5 and the BNSF track are substantial federally regulated facilities. The failure on the part of Washington State Department of Transportation (“WSDOT” hereafter) to consider siding alternatives in the federal context should be a reason for conditioning the crossing closure on federal environmental review. Such a Final Order would recognize federal supremacy but protect the due process rights of all parties.

14           This argument is supported by the evidence that traffic will be diverted from the Hickox Road crossing to the Blackburn Road crossing. Although arguments are put forward by BNSF at pp 72 and 73 and by staff at page 14 paragraph 21 of their Post-Hearing Brief, the fact is that farmers are in need of a crossing not only for the railroad tracks but also for Interstate 5. Staff Post Hearing Brief page 14, paragraph 22 The logical and most available place for equipment crossing is at Hickox Road Exit 224 of Interstate 5 and the Hickox Road crossing of the railroad tracks. The present situation allows for separation of most of the agricultural traffic including farm machinery, large

trucks and frequent trips during harvest season. The best solution for public safety and for meeting the public use and necessity requirements, including the emergency needs of Skagit County Fire District, Skagit County Diking District No. 3, City of Mount Vernon and Skagit County would be to leave Hickox Road open as a single track crossing with gates and lights already in place.

15           This petition for review asks whether the federal jurisdiction cited as a reason for non-interference by the State of Washington shields WSDOT and BNSF from any process for mitigating the environmental impacts on local traffic circulation and public safety. If the Surface Transportation Board after affording local and state interests an opportunity to present the evidence assembled at the hearing comes to the conclusion that the Hickox Road location is the best location, and then UTC and the parties will be bound by that outcome. As it is Surface Transportation Board default has become a shield against scrutiny of a very bad decision based on budget problems and convenience of the proponents. It is not a sound public policy decision made in the open after considering all the factors which should apply to major transportation facilities, such as access to Interstate 5 and the BNSF mainline track.

Respectfully Submitted this \_\_\_\_\_ day of July 2008

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Gary Jones, WSBA # 5217  
Attorney for Intervenor  
Western Valley Farms, LLC, Intervenor

CERTIFICATE OF SERVICE

Llewella Faye Davis 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 July \_\_\_\_\_, 2008, I hereby certify that I have this day served by first class mail, postage prepaid, and an electronic submission a true and correct copy of the foregoing document(s) upon all parties of record in this proceeding entitled PETITION FOR ADMINISTRATIVE REVIEW BY WESTERN VALLEY FARMS LLC, INTERVENOR on the following:

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DATED this \_\_\_\_\_ day of July, 2008 at Mount Vernon, Washington.

/s/ Llewella Faye Davis  
Llewella Faye Davis, Legal Assistant