

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, a
Delaware Corporation,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent

DOCKET NO. TR-070696

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION'S ANSWER
TO THE PETITIONS FOR
ADMINISTRATIVE REVIEW FILED
BY BNSF RAILWAY COMPANY AND
BY WESTERN VALLEY FARMS, LLC

I. INTRODUCTION

1 The Mount Vernon extension project is an essential component of the Washington State Department of Transportation's (WSDOT or State) plans to improve and expand Amtrak passenger service from Bellingham to Portland.¹ It is to be constructed by the BNSF Railway Company (BNSF) with funds appropriated by the Legislature and administered by WSDOT.²

2 The Mount Vernon siding is strategically located on a single track line.³ Adding additional passenger trains to this route will result in schedule changes requiring Amtrak

¹ Jeff Schultz Prefiled Written Testimony (Schultz Test.), Ex. 8:10:22.

² Schultz Test., Ex. 8: 14: 2-13.

³ Schultz Test., Ex. 8:11:14-15.

trains to meet and pass at Mount Vernon.⁴ Extending the siding will also allow longer freight trains to meet and pass improving freight mobility and overall rail line capacity.⁵

3 Failure to permit closure of the Hickox Road rail crossing, or to allow the public to use the crossing in a manner that would interfere with the safe and efficient operation of the siding as requested by Western Valley Farms, LLC (WVF) would place this critically important transportation project in jeopardy.

I. WSDOT's Answer to BNSF's Petition for Administrative Review

4 Although the WSDOT did not formally join in BSNF's Petition for Administrative Review (BNSF's Petition), WSDOT is in agreement with the analysis presented by BNSF and supports the relief requested in BNSF's Petition.

5 Perhaps most significantly, WSDOT agrees with BNSF that the part of the Initial Order which would require BNSF to enter into negotiations with WVF to provide for seasonal agricultural use of a private crossing at Hickox Road should be eliminated from the order. This requirement was not posed as a potential remedy before or during the hearing, and the parties were not provided an opportunity to brief or present testimony regarding the significant safety risks and operational challenges posed by this requirement.

6 Moreover, the use of Hickox Road proposed by WVF during its seasonal harvest is inconsistent with the proposed use of the extended siding by Amtrak and BNSF for passenger and freight rail. There does not appear to be likelihood that such negotiations between BNSF and WVF would actually result in an agreement, but would simply protract this matter.

⁴ Schultz Test., Ex. 8:12:7-14.

⁵ Schultz Test., Ex. 8:13:10-13.

II. WSDOT's Answer to WVF's Petition for Administrative Review

7 Again, WSDOT concurs with the legal analysis presented by BNSF's Petition, and in
BNSF's answer to WVF's Petition for Administrative Review (WVF Petition). The
following is intended to supplement, rather than duplicate the analysis presented by BNSF.

8 For the reasons set forth in BNSF's briefing, WVF is incorrect in its assumption that
the Surface Transportation Board must take some affirmative action in order to give rise to
federal preemption of state environmental regulation for construction of a rail siding project
on rail right-of-way.

9 Moreover, WVF is also incorrect in asserting that "the National Environmental Policy
Act (NEPA) has not been applied to the Hickox Road siding location or design."⁶ The
National Environmental Policy Act (NEPA) was applied in conjunction with WSDOT's
application for a 401 Water Quality Certification from the U.S. Army Corps of Engineers.⁷
WSDOT's Environmental Specialist, Elizabeth Phinney, explained that: "Prior to
preparation of the SEPA documents, studies were conducted and reports were prepared that
looked at the potential environmental impacts of the Mount Vernon Siding extension. All of
those documents were made available to the City of Mount Vernon, Skagit County, the DOE,
the U.S. Army Corps of Engineers, and the Federal Highway Administration. SEPA and the
National Environmental Policy Act (NEPA) environmental documents were prepared based
on those studies."⁸ A State Environmental Policy Act (SEPA) Determination of Non-

⁶ WVF Petition for Administrative Review, ¶ 12.

⁷ Declaration of Elizabeth Phinney in Support of Joint Response in Opposition for Summary Judgment.

⁸ *Id.* at ¶ 18.

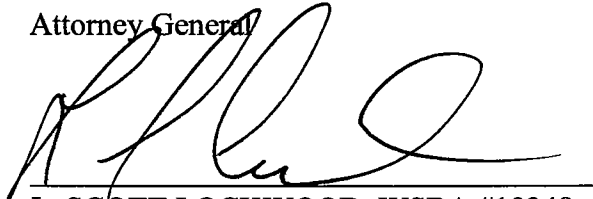
Significance (DNS) (and Environmental Checklist) and a NEPA Documented Categorical Exclusion (DCE) were prepared for this project.⁹

II. CONCLUSION

10 WSDOT respectfully requests that the WUTC grant the relief requested in BNSF's Petition; deny the relief requested by WVF; and, otherwise adopt the findings, conclusions and order in the Initial Order as its final order.

DATED this 25th day of July, 2008.

ROBERT M. McKENNA
Attorney General



L. SCOTT LOCKWOOD, WSBA #19248
Attorneys for State of Washington

⁹ *Id.* at ¶ 19.

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 July 25, 2008, I caused to be served by first class mail, postage prepaid, a true and correct copy of the foregoing document on the following:

BRADLEY P. SCARP, ESQ.
1218 THIRD AVENUE, 27TH FLOOR
SEATTLE WA 98101

STEPHEN FALLQUIST, ESQ.
605 S. 3RD STREET
MOUNT VERNON WA 98273

JONATHAN THOMPSON, AAG
P. O. BOX 40128
OLYMPIA WA 98504-0128

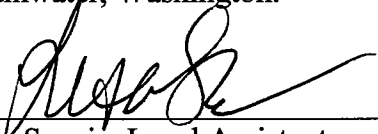
GARY T. JONES, ESQ.
P. O. BOX 1245
MOUNT VERNON WA 98273

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

KEVIN ROGERSON, CITY ATTORNEY
P. O. BOX 809
MOUNT VERNON, WA 98273

THOMAS BURKE, ESQ.
612 SOUTH 227TH STREET
DES MOINES WA 98198

DATED this 25th day of July, 2008 at Tumwater, Washington.



Lisa Savoia, Legal Assistant