

pattern for the Boon Farm is matched by the crop rotation pattern described in the Affidavits of Darrin Morrison Exhibit 84 and Richard H. Smith Exhibit 77. Growing and processing potatoes, hauling forage for dairy cattle to the west side of the tracks over Interstate 5, all are adversely impacted. The relief proposed in the Initial Order is seasonal and recognizes a distinction between the impact on other intersections of vehicle traffic and farm use, including equipment movement and harvest trucks.

3 The BNSF Petition fails to account for the safety arguments that it makes on its own behalf. If it is desirable to protect the public and the railway from a collision during emergency use (or seasonal farm use) then having lights and gates with safety warnings at Hickox Road is a safety benefit. Leaving safety devices in place protects both the railroad and the public when emergency use is made. Safety devices also accommodate agricultural use. UTC should give additional weight to the public convenience and necessity of crossing users. Crossing users have no alternative within one mile. In addition to the time and inconvenience of driving around, they are prevented from making efficient use of Interstate 5, a major WSDOT transportation facility which also has a federal nexus in laws and regulations governing its construction and use.

4 Nowhere in the BNSF Petition for Administrative Review is there any indication that federal regulators have considered alternatives which meet federal objectives and benefit the local community. Exhibit 8 prefiled testimony of Jeffrey Schultz page 13 line 16 and page 14 shows that the siding location was between BNSF and WSDOT. This is essential to due process

under federal law. Where is the National Environmental Policy Act review?
As Mr. Schultz says on page 14 Washington State funds pay for the siding
where BNSF wants it.

5 The BNSF Petition relies heavily upon the *Department of Transp. of State v. Snohomish County* 35 Wn.2d 247 and quotes the case at page 255. The Park Street crossing which was closed lay within 500 feet of an overpass built by the State Highway Department as a federal aid project. The facts in the present case are nearly the opposite of the Snohomish County case. In this case there is no alternative crossing closer than one mile away. Further, the federal aid has been expended on creating a crossing for Interstate 5 which is immediately adjacent to Hickox Road. The Initial Order preserves the investment made by the federal government in both the Interstate 5 interchange and the improvements to rail transportation. If the State Department of Transportation was providing an overpass for the siding at Hickox Road or at Anderson Road, a second Interstate 5 interchange one mile distant, then the Snohomish County case would have some application. In this factual setting the Snohomish County case does not provide an adequate basis for the UTC rejecting the Initial Order. Based on public use and necessity the Initial Order should be adopted.

6 The Green Road crossing closure in TR 940282 Skagit County is factually like the Snohomish County case. Cook Road and Highway 99 have overpass lanes for the traffic near Green Road closure. The facts make it different from

the Hickox Road and the result at the crossing should be different. Hickox Road should be kept open.

II. PROPOSED LANGUAGE OF FINAL ORDER

7 If UTC does not keep the crossing open at Hickox Road based on the WVF Petition for Administrative Review, then the proposed language of final order as amended in the form attached hereto should be adopted. See pages 23 – 28 inclusive proposed by BNSF with track changes showing WVF position.

III. CONCLUSION

8 Western Valley Farms, LLC asks the UTC to reaffirm the private crossing language of the Initial Order if the crossing is not left open to the public based on Western Valley Farms LLC Petition for Review.

Respectfully Submitted this _____ day of July 2008

JONES & SMITH

GARY T. 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 WESTERN VALLEY FARMS, LLC'S RESPONSE TO BNSF RAILWAY COMPANY'S PETITION FOR ADMINISTRATIVE REVIEW on the following:

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