

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

BNSF RAILWAY COMPANY,	)	DOCKET TR-070696
	)	
Petitioner,	)	ORDER 06
	)	
v.	)	FINAL ORDER ON REVIEW,
	)	GRANTING ADMINISTRATIVE
CITY OF MOUNT VERNON,	)	REVIEW; MODIFYING INITIAL
	)	ORDER GRANTING PETITION
Respondent.	)	TO CLOSE HICKOX ROAD
	)	GRADE CROSSING SUBJECT
	)	TO CONDITIONS
.....	)	

*Synopsis: This Commission Final Order modifies an initial order granting a petition by Burlington Northern Santa Fe Railway Company to close the Hickox Road at-grade railroad crossing in the City of Mount Vernon, Skagit County, subject to conditions. The Final Order affirms a requirement to maintain a private crossing for flood and emergency service access, removes the requirement of farm harvest access and modifies requirements for the private crossing's signals.*

**I. INTRODUCTION**

1 **NATURE OF PROCEEDING.** Docket TR-070696 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF or Burlington Northern) to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon, Skagit County, Washington (US DOT #084737D) in accordance with RCW 81.53.060. The purpose of the closure is to address safety hazards associated with extension of a siding alongside main line tracks at the location of a crossing.

2 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent Burlington Northern (BNSF). Kevin Rogerson, City Attorney, Mount Vernon, Washington, represents the City of Mount Vernon (Mount Vernon or the City). Stephen Fallquist, Civil Deputy Prosecuting Attorney, Mount Vernon, Washington, represents Skagit County (County). Scott Lockwood,

Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the Washington State Department of Transportation (WSDOT), Tumwater, Washington. Thomas Burke, Burke Law Offices Inc., P.S., and Brian Snure, Snure Law Office, PSC, both of Des Moines, Washington, represent Skagit County Fire Protection District No. 3 (Fire District No. 3), Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley Farms, LLC (Western Valley Farms or Western Valley). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).

- 3     **Procedural History.** BNSF initially filed its petition to close the Hickox Road at-grade railroad crossing in Skagit County on April 11, 2007, and the Commission set the matter for hearing.
- 4     Administrative Law Judge Adam Torem conducted an evidentiary hearing upon due and proper notice to all interested parties, with hearing sessions on January 8, 9, and 10, 2008, in Mount Vernon, Washington and on January 31, 2008, in Seattle, Washington. The Commission also held two hearing sessions to receive public comment in Mount Vernon, Washington, on January 8 and 9, 2008. The Commission received written comments and petitions from over 200 persons, all but one opposing closure of the Hickox Road crossing. The record for decision consists of 140 exhibits and over 1000 pages of transcript.
- 5     The parties submitted post-hearing briefs on February 15, 2008. The Commission declined a request to allow supplemental briefing.
- 6     **Initial Order:** Judge Torem found that construction and operation of the siding would result in extraordinary hazards, and proposed that the Commission grant BNSF's petition to close the Hickox Road at-grade railroad crossing to public use, but only subject to the following conditions:
- 7     (1) BNSF must upgrade the Stackpole Road at-grade crossing (to the south of Hickox Road) with safety measures equivalent to those now in place at the Hickox Road crossing;

8 (2) BNSF must provide funding for necessary road improvements associated with the closure of the Hickox Road crossing;

9 (3) BNSF must negotiate and enter into a private crossing agreement for limited continued use of the Hickox Road crossing with the local governmental entities party to this case (City of Mount Vernon, Skagit County, and Skagit County Fire District No. 3) in order to accommodate response to emergencies affecting the health, safety, and welfare of the surrounding communities;

10 (4) BNSF must separately negotiate and enter into a private crossing agreement for limited continued use of the Hickox Road crossing with Western Valley Farms in order to accommodate the seasonal harvesting and related cross-highway transportation of its corn or other feed crops; and

11 (5) BNSF must continue to maintain and operate the safety features now in place at the Hickox Road crossing.

12 **Petitions for Review:** Western Valley Farms petitioned for review of the decision to close the crossing, arguing that it should remain open or that conditions should be modified; BNSF petitioned for removal of authorization for farm use and of conditions (4) and (5), above; Commission Staff, West Valley Farms, WSDOT and BNSF answered these petitions.<sup>1</sup>

13 **Commission Decision:** The initial order is affirmed with modification, rejecting conditions (4) and (5) identified above, and with minor clarification.

## II. BACKGROUND

14 This proceeding involves a petition by Burlington Northern Santa Fe Railroad to close a railway-highway crossing at-grade at Hickox Road, at the southern border of Mount Vernon, Washington. The request is occasioned by the extension by BNSF and

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<sup>1</sup> Mount Vernon and Skagit County answered the BNSF petition for administrative review, understanding it to oppose use of the private crossing by city and county emergency vehicles and to state the view that the local governments would be expected to share in costs of crossing

WSDOT of a siding at that location to allow upgrading of passenger train service between Seattle and Bellingham to operate at speeds over 100 miles per hour in a high-speed rail corridor using BNSF's single main-line track. The siding would lengthen to nearly two miles and extend past the Hickox Road crossing. It would create frequent, sometimes-extended crossing blockages, and trains stopped on the siding although not blocking the crossing could dangerously restrict lines of sight for motorists using the crossing. The Hickox Road crossing is relatively little-used (less than 400 vehicles per average day), and alternative crossings are relatively near (Blackburn Road is within 1.5 miles to the north and Stackpole Road within a mile to the south).

- 15 The Hickox Road crossing is in a rural area near the city limits of Mount Vernon, surrounded by open farm fields, barns, and some rural homes. To the east, both Interstate 5 (I-5) and Old Highway 99 run approximately parallel to the BNSF main line; to the west are the Skagit River and Dike Road. Active safety features at the Hickox Road crossing include flashing light signals, automatic gates and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign and a white "crossbuck" highway-rail grade crossing sign on each side of the tracks.<sup>2</sup>
- 16 Stackpole Road, approximately one mile to the south, lies in a rural area outside of Mount Vernon's city limits. It is surrounded by open farm fields. BNSF's request to close the Hickox Road crossing pledges to upgrade the Stackpole Road crossing to include active safety features at the same level currently in use at Hickox Road.
- 17 The Blackburn Road crossing, approximately 1.5 miles to the north of Hickox Road, is entirely within Mount Vernon. It consists of two sets of tracks and is situated at the intersection of several roads. Active safety features there include cantilevered flashing light signals, automatic gates, warning bells, and traffic signals interconnected for preemption by the automatic railway gates. Numerous passive

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reconfiguration. BNSF replied, clarifying that neither understanding was correct, although it did propose to review and discuss the need for warning devices at the private Hickox Road crossing.<sup>2</sup> The initial order contained exhaustive footnotes to exhibits and transcripts for the source of factual statements. For economy in presentation and as a matter of style we include such citations only where necessary to explain or complete the text of this Order. Persons seeking the exact record source of factual statements may refer to the initial order.

safety features also protect this crossing: yellow advance warning signs and white “crossbuck” signs on each side of the tracks, supplemental traffic control signage indicating where drivers should stop when presented with a red traffic light and warning drivers not to stop on the tracks, as well as painted pavement markers in advance of the intersection.

- 18 The area west of the Hickox Road crossing, outside Mount Vernon, is generally within a designated floodplain subject to seasonal flooding, and is protected from the Skagit River by a raised dike system. The County’s primary source of rock and gravel for flood fighting actions is located approximately 1.2 miles east of the Hickox Road crossing.
- 19 The area of Mount Vernon closest to the Hickox Road crossing is designated for commercial and limited industrial uses. It contains sparse residential and some commercial development.

### III. THE PROPOSED SIDING AND ITS CONSEQUENCES

- 20 Completion of the proposed siding would result in a two-track crossing, with the road intersecting both a main line and a siding track. Such crossings create unique safety hazards, including the experience that some people, assuming that a train stopped on a siding is activating the signals, will attempt to drive around the lowered gates only to be hit by an oncoming train on the main line. It is possible to clear the crossing for auto traffic<sup>3</sup>, but “splitting” trains that are only waiting to continue their journey, not stopping or parking, involves difficulties. Switching may be needed that could affect main line track use; the split train could continue to activate signals, confusing motorists; and the process of splitting the train could add time to the train’s use of the siding and interfere with traffic as well as delay the train.
- 21 A siding situated at a main line crossing poses dangers. If trains using the siding are within the range of activation sensors, active warning devices (flashing lights, bells, and gates) would effectively close the crossing for the full length of time needed for the trains to meet and pass. This includes the time for a train to enter the siding, slow

to a stop, wait, and leave the siding. Freight trains are expected typically to pause on the siding for five to ten minutes to allow a passenger train to pass, but in some circumstances could remain parked, blocking the crossing up to several hours to allow another freight train to pass.

22 Freight trains parked on the Hickox Road siding would create a visibility hazard for cars and pedestrians east of the crossing, preventing a clear view of trains on the main line. Activation of the crossing's warning lights, bells and gates by a train that remained parked on the crossing but did not enter or block the crossing would cause confusion for drivers and pedestrians, tempting some to go around the lowered gates and across both sets of tracks. In addition, some drivers will ignore railway crossing safety signals and drive around lowered gates, even when "four-quadrant" gates (gates which also block lanes of opposing traffic) are installed.<sup>4</sup>

23 The average weekday traffic volume was 340 vehicles on Hickox Road based on 2006 data. If the crossing is closed, a study predicts that the majority of this traffic would be diverted to Stackpole Road,<sup>5</sup> to the south, with only a single peak-hour trip diverting north to cross the tracks at Blackburn Road.<sup>6</sup> WSDOT witness Mr. Norris stated that if all Hickox Road traffic were diverted to Blackburn Road, the additional traffic would not be detectable within the accuracy of traffic count equipment and safety at the Blackburn Road crossing would not be adversely affected.

24 Mr. Zeinz, the expert witness for Commission Staff, stated that installation of a four-quadrant gate system could mitigate the newly created hazards from the siding track, albeit at considerable expense.<sup>7</sup> He acknowledged that four-quadrant gates are typically found only in high-speed rail corridors to temporarily "seal" crossings as passenger trains rush through, not at multiple track crossings with blocking issues

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<sup>3</sup> WAC 480-62-220(1) states that "railroad companies must not block a grade crossing for more than ten consecutive minutes, if reasonably possible."

<sup>4</sup> Peterson, Exh. No. 92, 5:10 - 7:13; Peterson, TR. 614:14 - 619:24 (discussing ability of drivers to defeat protections offered by four quadrant gates by breaking gate arms or taking advantage of vehicle presence detection systems on "exit" gates).

<sup>5</sup> G. Norris, Exh. No. 11, 16:15 - 17:3; *see also* G. Norris (rebuttal), Exh. No. 15, 2:13-14.

<sup>6</sup> G. Norris (rebuttal), Exh. No. 15, 2:1-14. *See also* G. Norris, TR. 784:10 - 787:16.

<sup>7</sup> "In part, it becomes a value judgment as to whether the potential advantages of retaining the crossing can justify such expense [upwards of \$400,000 to \$500,000], especially the fact that it will still be blocked and rendered unusable from time to time." Zeinz, Exh. No. 50, 8:14-18.

from trains waiting on sidings. He recognized that drivers who are intent on defeating the added protections of four-quadrant gates could do so and that a “gate violator” could cause an extremely serious collision with an oncoming train. Mr. Zeinz stated:

[I]t’s commonly accepted by all the people in my profession from railroads, from state highway departments, from regulatory agencies where I have had experience, if you have a situation where a crossing is going to be routinely blocked by a train, generally the best practice is not to have a crossing there at all, either try and close it or grade separate it or something.<sup>8</sup>

25 Nearly two dozen members of the public spoke against closure of the Hickox Road at-grade crossing at two public comment hearings in Mount Vernon. Their concerns ranged from impacts on agricultural transportation routes to impacts on emergency response services to matters of personal convenience for access to I-5. In addition, the Commission received numerous written comment letters as well as several petitions opposed to the closure.

#### IV. THE INITIAL ORDER

##### A. Closure.

26 The initial order ruled that the crossing should be closed. It found that adding the siding track will magnify the inherent potential dangers by obstructing motorists’ vision as they approach the crossing and also cause confusion on the regular occasions when a train blocks the crossing for appreciable lengths of time. It also found that the addition of another set of tracks will pose another problem: A train waiting on the siding track nearest a driver may obstruct the view of oncoming train traffic on the main line, such that persons waiting at a gated crossing may only observe the train stopped on the siding, become impatient with the apparently unnecessary delay, drive around the gates, and be struck by an oncoming train. The initial order found that the dangerous situation presented by this case could not be fully mitigated by keeping the crossing open through use of four quadrant gates, and that after completion of the siding project, the Hickox Road crossing will become so unsafe and dangerous that it must be closed to further public travel.

27 The initial order further found that after the safety upgrades pledged by BNSF for the Stackpole Road crossing are in place, Stackpole Road will be as safe as the Hickox Road grade crossing is in its present configuration. Blackburn Road, despite its complex intersection, will remain safe and will be safer than the reconfigured Hickox Road.

### **B. Private Crossing**

28 The initial order found that emergency response needs require mitigation of the effect of closing the crossing and ordered conversion of Hickox Road from a public crossing into a private crossing for emergency response and for flood control and mitigation. It ordered upgrades to the safety features at Stackpole Road and turnaround provisions at the closed Hickox Road crossing.

29 The order also found that special considerations are necessary when closing a road that provides the most direct access to a long-established business that could be “financially landlocked” if existing access is eliminated.<sup>9</sup> It noted that the Federal Railroad Administration specifically includes farm crossings within its listing of appropriate uses for private crossings and that another owner of nearby farmlands enjoys the benefit of a private crossing.

30 The order determined that Western Valley Farms’ need for the Hickox Road crossing is greater than and distinct from all other local agricultural businesses operating in the area west of the crossing because Western Valley has become financially dependent on the existence of the Hickox Road crossing during the late summer harvest season. The order determined that closing the Hickox Road crossing would threaten the financial health of a long-established family farm business.<sup>10</sup> The initial order would require BNSF to convert the public crossing into a gated private crossing, while maintaining the existing active signals, for seasonal use by Western Valley despite possible extended blockages requiring trucks to detour around the blocked crossing.

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<sup>8</sup> Zeinz, TR. 1195:3-10.

<sup>9</sup> We note that a private crossing already exists north of Hickox Road for the benefit of David Christianson’s business, which would otherwise be geographically landlocked. This order does not address the modifications, if any, that might become necessary to the existing private crossing agreement between BNSF and Mr. Christianson once the siding project is complete.

<sup>10</sup> See D. Boon, Exh. No. 67, and J. Boon, Exh. No. 71.



Finally, the order would require the farm and the railroad to provide each other with sufficient advance notice of their schedules to minimize disruptions to Western Valley and to allow BNSF (and Amtrak) to advise its engineers of farm equipment temporarily making use of the private crossing at Hickox Road.

## V. PETITIONS FOR ADMINISTRATIVE REVIEW

31 The Commission received petitions for administrative review from Western Valley Farms and BNSF. In response, BNSF, Western Valley Farms, WSDOT, Commission Staff and the local jurisdictions answered one or both of the petitions.

### I. Western Valley Farms

#### 1. Closure of the Crossing

32 Western Valley challenges the initial order's decision to close the crossing. It argues first that the initial order fails to consider the unique role of Hickox Road as an agricultural transport corridor. It contends that the siding to be extended now crosses Blackburn Road and thus poses the same hazards cited for Hickox Road once the siding is extended. It also argues that closing the Hickox Road crossing would divert agricultural traffic to Blackburn Road – thus rendering it less safe than a reconfigured Hickox Road crossing that continued to carry agricultural traffic.

33 Western Valley's argument contains insufficient citation of facts to support its conclusions. While it argues that the existence of the siding at Blackburn Road will result in obstructed views of the main line track, Western Valley Farms does not cite to the record to support its contention. Rather, the expert testimony of record is that the Blackburn Road crossing has adequate capacity to absorb all of the Hickox Road traffic without creating difficulties. Even if the traffic study failed to consider the effects of harvest traffic (other farm traffic appears to be incidental), we find credible the expert testimony that Blackburn Road could absorb an average volume of 340 vehicles per day without affecting safety, that such volume would be insignificant within the accuracy of traffic counting devices and that very few drivers would choose the Blackburn Road crossing over the Stackpole Road crossing. Our conclusion from the credible evidence of record is that the Blackburn Road crossing can safely absorb the agricultural traffic in question.

34 Here, the *transportation* needs can reasonably be met by existing alternative crossings, and enhancing safety protection at Stackpole Road. The travel will be farther than using the existing crossing, and consequently somewhat more expensive per trip. The additional travel is of a relatively slight distance, and somewhat less convenient, but is a route that is much safer and meets the public need for cross-track access.<sup>11</sup>

35 The entire purpose of closing the crossing is to protect the public, including the farm operators, their drivers and employees, and railroad employees, passengers and shippers, from unnecessary risk of death, injury, and destruction of property at the crossing. The uncontradicted testimony of the safety experts is that the existing safety devices at the Hickox Road crossing are inadequate to provide that protection, and that even upgrades costing several hundred thousand dollars would not afford complete protection. We are unwilling to expose farmers, and their employees, the railroad and its employees, passengers, and shippers to an increased risk of death, injury, and destruction of property when reasonable transportation alternatives exist.

## 2. Federal Preemption

36 Western Valley argues that the initial order fails to resolve whether the federal Surface Transportation Board has exercised its jurisdiction under law with regard to the Hickox Road crossing, and challenges an apparent lack of an environmental impact statement under the National Environmental Protection Act, or NEPA.<sup>12</sup>

37 We reject these arguments. The appropriate place to challenge an alleged failure to assert federal jurisdiction is before the appropriate federal agency, not before a state agency lacking jurisdiction to address the issue. Further, the record indicates that the project has been reviewed under the Washington State Environmental Policy Act (“SEPA”).

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<sup>11</sup> While we have no reason to doubt the sincerity of the testimony regarding dire financial effects of crossing closure on the farm, it is a matter of opinion rather than a matter of fact. No evidence exists on this record of underlying facts or assumptions, nor of a complete financial picture of the farm. Therefore, we are in no position to evaluate it.

<sup>12</sup> WSDOT asserts in its Answer that the proponents of the project complied with NEPA as well as its Washington State counterpart, as disclosed in a Declaration filed in an earlier phase of the proceeding.

3. Concern Regarding Negotiations

38 Western Valley also contests the initial order's proposal to allow harvest-period use of the Hickox Road crossing. Citing the initial order's proposal that the railroad and Western Valley negotiate terms for use of the crossing, Western Valley argues that it will be unable to determine whether to appeal the Commission order until the negotiations have been held and it determines whether the results of negotiation are favorable or unfavorable to its interests. Western Valley prefers the Commission make a final decision whether the crossing should be closed.

39 While our decision below to reject the proposal for harvest use may render this issue moot, we note that the Commission's retention of jurisdiction to effectuate the terms of a Commission order appears to provide an adequate remedy to review disagreements over implementation of an order. Western Valley acknowledges that the Commission, subject to judicial review, has statutory jurisdiction to decide whether crossings remain open or are closed.

**B. BNSF Railway Company**

1. Private crossing for harvest use

40 BNSF also petitions for administrative review. Its basic challenge is to the initial order's proposed requirement that a private crossing be established for farmers' harvest-period use. BNSF recognizes that the proposed order attempts to accommodate the parties' needs of record, but it challenges several aspects of the initial order's requirements and its supporting reasoning.

2. Financial Need

41 BNSF first argues that the initial order improperly assesses the need for a private harvest crossing. BNSF argues that the issue of financial damage, which the initial order cites as the controlling factor in requiring a private crossing, is beyond the scope of the Commission's inquiry.<sup>13</sup> Commission Staff supports this view.

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<sup>13</sup> The initial order found that the costs of using alternative crossings would result in economic failure of Western Valley Farms. Initial Order, ¶ 87.

42 We agree. The *Snohomish County* decision<sup>14</sup> on which the initial order relies approves the principle that crossings may remain open only if the need for the crossing, *i.e.*, the public convenience and necessity for the crossing, outweighs any dangerous condition at the crossing. However, we do not have jurisdiction to consider the financial consequences of crossing closure when balancing need with risk. We only have jurisdiction to consider the effects of closing a crossing on transportation at the crossing. To the extent Western Valley believes itself financially damaged by a decision to close the crossing, it may pursue a judicial remedy.

### 3. Nature of Use

43 BNSF challenges expansion of the allowable use of a private crossing from occasional, as-needed use by emergency vehicles and rarely-necessary but critically-important flood-related activities, to include hundreds of crossings per day by commercial vehicles for a significant period every year. It argues that use several times per year for emergency access and use at intervals of several years for flood response are fundamentally different from the needs of farms during an annual harvest season.

44 We agree. The first difference is the volume of use. Emergency use is a relatively rare occurrence, likely numbering fewer than a dozen times per year. The proposed farm use of as many as several hundred crossings per day would amount to a *de facto* public crossing during a part of the year, even when access is through a gate with a lock.

45 BNSF argues that the purpose of the harvest traffic use is different from use for emergency vehicles, pointing out that the initial order finds the reconfigured crossing to be exceptionally dangerous. Emergencies requiring safety agency or flood response by their nature have a high degree of necessity that justifies the occasional risk in use of the crossing. The same cannot be said of use by routine harvest traffic in search of a slightly shorter, slightly less expensive route.

46 Finally, BNSF argues that the character of use, by heavy commercial vehicles, is by itself a more dangerous use than by individual passenger vehicles. It cites evidence of

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<sup>14</sup> *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 255, 212 P.2d 829 (1949).

record that trucks and tractor-trailers are involved in more than three-quarters of private crossing injuries, nearly 70 percent of all collisions, and more than half of fatalities.<sup>15</sup>

47 We find each of these arguments persuasive. On the facts here, the proposed “private” use by farm vehicles at the crossing is traffic of a sort that is inconsistent with use of a limited-use private crossing.

#### 4. Public need versus danger

48 BNSF argues that, when measured against use of the *reconfigured* crossing, the alternative crossings are manifestly more safe and arguably more convenient. The private crossing would be protected by a locked gate. Use of the crossing, BNSF points out, would require each driver, on each harvest-season trip, to stop the 3-axle or semi-trailer truck, leave the cab, unlock and open the gate, return to the truck, verify that the crossing is clear, proceed across the tracks, stop, return to the other side on foot to close and lock the gate, then recross the tracks on foot, and drive the truck away. In addition to the time involved, the process requires crossing the tracks three times, once in a vehicle, twice on foot. If the crossing is blocked by a train, the driver would have to wait until the crossing clears to cross the tracks, or drive to an alternate crossing. It is possible that a train could arrive while the driver is out of the vehicle on the other side of the tracks, leaving driver and vehicle separated for the duration of the blockage or tempting the driver to outrun the train to return to the vehicle. Farm witnesses testified that because of the uncertainty about crossing availability due to use of the siding, the farm might well choose not to use the Hickox Road crossing even if it remained open – uncertainties about access via Hickox Road would thus require farm traffic to use an alternative crossing anyway.<sup>16</sup>

49 We conclude that harvest-season value of the private crossing after construction of the siding would be greatly diminished, while the danger of the crossing is greatly increased. Given this equation, the degree of public need, including the affected farm’s transportation need, does not justify the risk in leaving the crossing open either as a public crossing or as a private crossing for harvest use.

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<sup>15</sup> Exh. No. 101, at 192.

<sup>16</sup> See, J. Boon, TR. at 1111-1115.

5. Retention of signals

50 The railroad also argues that retention of automatic signals and gates at a closed Hickox road crossing is inconsistent with a private crossing, is prohibitively expensive, and is unnecessary for limited private use.<sup>17</sup>

51 BNSF urges that the Commission allow a diagnostic team, including representatives of the railroad and local jurisdictions to determine required safety measures at the crossing. Commission Staff supports creation of a diagnostic team and asks to be designated as a member.

52 We accept BNSF's arguments and agree that it would be appropriate to engage a diagnostic team before authorizing a level of signalization at the crossing. A diagnostic team should be convened with representatives from BNSF, WSDOT, the local emergency service and flood control agencies, and Staff, to determine the need for and configuration of any required safety protections at the crossing. The parties must submit the team's report for Commission review and approval prior to opening the private crossing, as a condition of closing the crossing to public traffic.

6. Lack of schedule; interference with railroad operations

53 BNSF raises two other matters. First, it notes that unlike passenger trains, freight trains do not run on schedules<sup>18</sup> It argues (and we accept) that it is inappropriate to require the railroad to provide train-operation schedule information to assist farmers in planning harvest movements. Even were that not the case, we also agree with BNSF and Staff that such a requirement would risk inappropriately entering into the sphere of federal jurisdiction over train operations.,

54 Second, BNSF objects to references in the initial order to the availability of private crossings for farm use and to the existence of a nearby private crossing for farm use. The objection is valid, and we disregard the references because there is no indication

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<sup>17</sup> Western Valley argues that its needs are of a different character from those of the general public, and that both the private crossing and retention of signals are needed for its convenience. We reject the private harvest crossing proposal because retaining signals at the crossing, even with additional devices, would be inadequate to protect public safety.

<sup>18</sup> McIntyre, TR 679.

in this record about the nature of use of the existing private crossing, the reasons for its existence, the nature of the agreement for its operation, or aspects of the law authorizing such crossings or any regulations there under, nor any information at all, that would render its mere existence relevant to a decision in this proceeding.<sup>19</sup>

**C. Local Jurisdiction**

55 The local jurisdictions (the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3) all respond to proposed changes to the initial order that are contained in the BNSF petition. In reply, BNSF withdraws the relevant changes or explains them as not intending to alter prior understandings about proposed rights and responsibilities. On that basis we perceive that the interests of the local jurisdictions are satisfied and no further inquiry need be made.

**FINDINGS OF FACT**

56 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

57 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of at-grade crossings of railroad tracks with public roadways within Washington.

58 (2) The Hickox Road at-grade crossing is located at the southern edge of the city limits of Mount Vernon in Skagit County, Washington. On an average day, four Amtrak passenger trains, a dozen freight trains, and fewer than 400 vehicles make use of the crossing.

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<sup>19</sup> The initial order does not find that any Western Valley land is landlocked, *i.e.*, without lawful road access to public streets.

- 59 (3) The Hickox Road crossing is within one mile of a crossing to the south (Stackpole Road) and one and one-half miles of a crossing to the north (Blackburn Road).
- 60 (4) At-grade crossings with more than one set of tracks are significantly more dangerous than at-grade crossings with only a single set of tracks. When a siding track creates the potential to obstruct a motorist's view of the main line track, the crossing becomes exceptionally hazardous.
- 61 (5) WSDOT is planning to extend a siding track south of Mount Vernon that would extend past the Hickox Road crossing to allow upgrading of passenger train service between Seattle and Bellingham to operate at speeds over 100 miles per hour in a high-speed rail corridor using BNSF's single main-line track. Extending the siding track will result in a multiple track crossing at Hickox Road.
- 62 (6) Closing the Hickox Road grade crossing will divert a majority of its current traffic to Stackpole Road, with the remainder diverted to Blackburn Road. Closure of the Hickox Road crossing will increase the travel time and distance required of some users of the existing crossing. The alternate crossings are both less than 1.5 miles from the Hickox Road crossing and both have the capacity to absorb the resulting traffic increase without adverse effect on crossing safety.
- 63 (7) The Skagit River poses regular threats of flooding to the areas surrounding the Hickox Road crossing, requiring continued access to the crossing by local governmental agencies in order to maintain their abilities to fight the rising river and permit the public to use an alternate emergency evacuation route when necessary. The Hickox Road crossing is critically located and its continued use is crucial for responding to flood emergencies.
- 64 (8) Closing the Hickox Road crossing will detrimentally impact response times for critical emergencies by Skagit County Fire District No. 3 to areas located west of the Hickox Road crossing.



- 65 (9) Constructing the siding at Hickox Road will adversely affect harvest traffic for Western Valley Farms. Because the siding would block the crossing at times not easily predictable, resulting in waiting time or rerouting of traffic, the farm would find a reconfigured but open Hickox road crossing much less convenient than the current crossing.
- 66 (10) Closing the Hickox Road crossing will result in additional time and distance for harvest traffic of Western Valley Farms. Post-closure travel routes will increase necessary distances by up to approximately three miles. The increase in distance for seasonal traffic and the resulting increase in travel time do not constitute an undue barrier to the orderly flow of automotive traffic across the tracks.
- 67 (11) The Stackpole Road and Blackburn Road crossings individually, or together, provide the public with suitable alternative access across the tracks with a minimum of inconvenience. Under normal conditions, traffic diverted from Hickox Road can conveniently use the Stackpole Road crossing to the south or the Blackburn Road crossing to the north.
- 68 (12) Closing the Hickox Road crossing will result in inconvenience to some persons who now use the crossing. Mitigating measures, such as upgrading the safety features at the Stackpole Road at-grade crossing, creating a turnaround cul-de-sac on the approach to the railroad tracks on Hickox Road, and improving the intersection radii at Stackpole Road and Dike Road, can ameliorate concerns about closing of the Hickox Road crossing.

### CONCLUSIONS OF LAW

- 69 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 70 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.

- 71 (2) The Hickox Road at-grade crossing in Mount Vernon, Skagit County, Washington, is inherently dangerous. WSDOT's addition of a second set of tracks to this crossing magnifies the danger presented to vehicle traffic, creating an exceptionally hazardous crossing upon completion of the siding extension project.
- 72 (3) The public convenience and necessity do not require that the Hickox Road crossing remain open. The Commission should grant BNSF's petition and order that the Hickox Road at-grade crossing in Mount Vernon be closed to the public, upon conditions that will mitigate the inconvenience of closure.
- 73 (4) The risk of flooding from the Skagit River and maintaining access for emergency fire and medical vehicles is necessary to protect public health, safety and welfare and warrants creating a private crossing at Hickox Road to benefit local governmental agencies.
- 74 (5) The relatively modest inconvenience to Western Valley Farms' seasonal harvest traffic does not demonstrate public convenience and necessity sufficient to require maintaining a public crossing or creating a private crossing at Hickox Road for the farm's harvest use and is unnecessary in light of available alternatives.
- 75 (6) The financial impact on Western Valley Farms of closing of the Hickox Road crossing is not a matter that the Commission may consider in determining public convenience and necessity for the crossing.
- 76 (7) The Hickox Road at-grade crossing should be closed to the public, subject only to emergency use for flood prevention and control and for emergency services, as provided in this Order.

**ORDER**

THE COMMISSION ORDERS:

- 77 (1) The Commission grants the petition of Burlington Northern Santa Fe Railway to close the Hickox Road at-grade crossing to public use, subject to the following conditions, which must be met prior to closure:
- 78 (a) BNSF must upgrade the safety features at the Stackpole Road at-grade crossing to include active warning devices equivalent to those now in place at Hickox Road (flashing light signals, automatic gates, and warning bells);
- 79 (b) BNSF must work with the City of Mount Vernon and Skagit County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Hickox Road and to alter intersection turning radii at Stackpole Road and Dike Road; and
- 80 (c) BNSF must enter into negotiations with the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3 to draft a private crossing agreement that ensures continued access across the tracks for local emergency response to flood-related events, as well as incidents where the health, safety, and welfare of local residents would be affected. BNSF shall submit this agreement to the Commission no later than 75 days after entry of this Final Order or such further time as authorized by letter from the Secretary of the Commission.
- 81 (2) To ensure adequate safety at the private crossing, BNSF shall convene a diagnostic team to review the safety features of the private Hickox Road at-grade crossing. Team members shall include representatives of the railroad, the public safety and flood control jurisdictions, and Commission Staff. The diagnostic team shall propose necessary safety measures to the Commission for approval no later than 75 days after entry of this Final Order or such further time as authorized by letter from the Secretary of the Commission.

- 82 (3) The Commission retains jurisdiction over the subject matter of and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective November \_\_\_\_, 2008

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES:**

**This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.**