

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

BNSF RAILWAY COMPANY,	)	DOCKET NO. TR-070696
	)	
Petitioner,	)	MOTION FOR RECONSIDERATION
	)	BY WESTERN VALLEY FARMS,
v.	)	L.L.C.
	)	
CITY OF MOUNT VERNON,	)	
	)	
Respondent.	)	

---

Western Valley Farms, L.L.C., a Washington Limited Liability Company, by its attorney, Gary T. Jones of Jones & Smith, submits the following motion for reconsideration of the Final Order on Review, Granting Administrative Review; Modifying Initial Order Granting Petition to Close Hickox Road Grade Crossing Subject to Conditions.

**I. RELIEF REQUESTED**

1 A. That the Utilities and Transportation Commission (“UTC” hereafter ) find that its authority exercised pursuant to RCW 81.53.060 is subject to the State Environmental Policy Act (“SEPA” hereafter) and that the Washington State Department of Transportation (“WSDOT” hereafter )determination of non-significance initially made February 16, 2007 and repeated on the 17<sup>th</sup> day of July 2007 violated RCW

43.21C.030(2)(a) by failing to use systematic and multi-disciplinary approaches to reconcile conflicting uses of transportation resources and in particular failing to discharge its duty under subsection (e) to study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning the alternative use of available resources.

- 2 B. That the UTC include in the Private Crossing Agreement for limited continued use of Hickox Road, Western Valley Farms, L.L.C. as a representative of private property owners on Hickox Road west of the closed grade crossing along with the 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 700 dairy cows currently being milked at the Western Valley Farms L.L.C. dairy on Hickox Road and other owners of equipment and agricultural enterprises dependent upon Hickox Road.
- 3 C. That the UTC correct its erroneous "Background" fact recital at page 4, paragraph 15 to state that the Hickox Road crossing is within the city limits of Mount Vernon. City of Mount Vernon is the lead respondent to BNSF's Petition because this grade crossing is within the city limits and not "near" the city limits as stated in the Background paragraph 15 of the Order of the UTC.
- 4 D. That the UTC find as a fact that there is a 2.5 mile distance between the Blackburn Road grade crossing and the proposed Stackpole signalized grade crossing thus denying direct access from the west side of Burlington Northern Santa Fe railroad ("BNSF" hereafter) to two Interstate 5 interchanges, one at Anderson Road and one at Hickox Road, thereby reducing the utility and function of the interstate highway system

and resource investments of WSDOT for the benefit of agricultural natural resource land use and other members of the public.

5 E. That the UTC reject the argument set forth at page 13, paragraph 48 with respect to the utility of the private crossing for harvest use or emergency use. Respondents anticipate that when the private crossing is open that the frequency of use would warrant an individual monitor at the train tracks to guide drivers crossing the railroad grade and not the multi-stop BNSF scenario which is unsupported by the evidence.

6 F. That the UTC in the exercise of its continuing jurisdiction over the resolution of concerns of the local jurisdictions for public safety by including Western Valley Farms, L.L.C.

7 G. That the Findings of Fact (1) at page 15, paragraph 57 and Conclusion of Law (1) at page 17, paragraph 70 be conditioned on compliance with the SEPA and that the UTC find that the WSDOT has not complied by declaring non-significant the environmental impact of the closing of Hickox Road Grade Crossing in light of the administrative record and the failure to consider alternatives to the action presented by BNSF's petition to the UTC.

8 H. That the UTC Findings of Fact (3), (4), (5), and (6) at page 16, paragraphs 59, 60, 61, and 62, be modified by including references to the Interstate 5 overpasses at Anderson Road and Hickox Road, giving particular attention to the importance of Hickox Road as a corridor for agricultural traffic to support the agricultural natural resource zoning by Skagit County outside the urban growth area of the City of Mount Vernon.

- 9 I. That the UTC Finding of Fact (12) at page 17, paragraph 68, be modified to show that any adoption of a grade crossing closure which requires a cul de sac must include east and west approaches, not a single approach to the grade crossing. See attached Milky Way division of LTI letter to the UTC with attached map by Brad Williamson, president of Milky Way.
- 10 J. That the UTC modify its Conclusions of Law (5), (6) and (7) at page 18, paragraphs, 74, 75 and 76 to recognize the necessity of Western Valley Farms, L.L.C. having rights to evacuate its animals and machinery over Hickox Road grade crossing as a farm emergency use which is concurrent with the emergency use for flood prevention and control and for emergency services as provided in the UTC Order.
- 11 K. That the UTC Order (1)(b) at page 19, paragraph 79 be modified to show two turn around cul de sacs one on each approach to the railroad tracks, east and west of Hickox Road.
- 12 L. That the UTC Order (1)(c) at page 19, paragraph 80 be altered to include Western Valley Farms, L.L.C. as a party to the diagnostic team which will negotiate with the City of Mount Vernon, Skagit County, Skagit County Fire District No. 3, Skagit County Diking District No. 3 and BNSF to determine local emergency response pursuant to UTC Order at page 19, paragraph 81.

**II. ARGUMENT IN SUPPORT OF RELIEF REQUESTED  
WITH CITATION TO THE RECORD**

- 13 A. In support of its Request for Relief I. A. Western Valley Farms, L.L.C. points out that UTC does not have a categorical exemption from SEPA where it authorizes the opening or closing of highways / railroad grade crossings. WAC 197-11-865(2).

Western Valley Farms challenges the letter determination July 20, 2007 by Chris Rose of UTC as to SEPA compliance. In particular the reliance upon WSDOT as lead agency when the lead agency disregarded and did not study alternatives put forward by the public violates both the letter and the spirit of RCW 43.21C.030(2).

14 B. In the testimony of Mark Watkinson, in particular Exhibit 35, his prefiled direct testimony and the two-page map attachment of Skagit County evacuation routes the risk of flooding in the subject area was established. Rick Bogge, Surface Water Manager for Skagit County Public Works in his testimony as Exhibit 41 prefiled testimony and the photo Exhibit 44 showing 1951 flooding in the vicinity of Hickox Road establish the risk to cattle, equipment and people at the Western Valley Farm location. Furthermore, major levee failures in the lower Skagit River basin shown in Exhibit 46 reinforced the risk from failure to provide evacuation routes to people on Hickox Road. The concerns of a private property owner such as Western Valley Farms which has more than 700 dairy animals at its site between the Skagit River and the BNSF railroad mainline track should receive an opportunity for participation in any diagnostic team and response negotiation for protection of life and property in the floodable area west of the grade crossing closed by action of the UTC. Western Valley Farms is not included in the Findings or Order as presented contrary to the information provided by Western Valley Farms principals, Jeffrey Boon in his prefiled testimony Exhibit 71 and the prefiled direct testimony of David Boon in Exhibit 67.

15 C. The caption of the case and the prehearing determination by administrative law judge Adam Torem that Mount Vernon is the lead respondent to the petition was based on the fact that the railroad crossing is within the city limits of Mount Vernon. ORDER

O1 – Prehearing Conference Order, page 2, paragraph 4, July 2, 2007. UTC in its Background fact recital at page 4, paragraph 15 does not acknowledge this fact and thereby prejudices the parties and the decision by reference to a significant factual error.

16 D. One of the unaccountable ironies of the proceeding to close the Hickox Road grade crossing is the determination by WSDOT that it would not consider alternatives to the siding location now adopted by the UTC. The WSDOT, more than any other agency has a duty to use the transportation resources available to the public as a wise steward. To cut off the access from the west side of BNSF tracks to both Anderson Road interchange and Hickox Road interchange by denying the railroad crossing to agricultural traffic and to the general public significantly diminishes the present and future use of the two interstate crossing interchanges at Hickox Road and Anderson Road. This is an example of the error which would be avoided by RCW 43.21C.060 (a) and (e) and WAC 197-11-865 studying and considering alternatives to the siding location chosen by WSDOT and affirmed by BNSF and UTC.

17 E. UTC adopts an argument by BNSF which is not supported by the record. If a private crossing were to be open for harvest use or to be open for emergency use, the intensity of the use would warrant having a flagger on the track during the use to avoid the need for closing the crossing between uses. The prefiled testimony of David Boon and Jeffrey Boon, Exhibits 71 and 67 respectively demonstrate that the use of the harvester on both sides of Interstate 5 requires intervals of four or five minutes between trucks to make use of the machinery. At this rate of intensity of use the scenario described by BNSF would be ridiculous and the presence of a flagger at the grade crossing during the harvest and emergency use would be the preferred avenue. These

issues are further examples of study which should have been given to the proposed alternatives before action by WSDOT and by UTC with respect to the Hickox Road grade crossing.

- 18 F. Western Valley Farms asks the UTC in the exercise of its continuing jurisdiction over resolution of concerns and local jurisdictions for public safety that it names Western Valley Farms to participate, representing private property owners, whose interests will be directly affected by the negotiated terms of the private crossing. It is apparent that UTC did not adequately examine the record including the submission May 11, 2007 by Milky Way to understand the daily milk truck visits to the Western Valley Farm site on Hickox Road. This requires a further involvement in the process of determining the location and character of the cul de sacs described in items I and K below.
- 19 G. Finding of Fact (1) at page 15, paragraph 57 and Conclusion of Law (1) at page 17, paragraph 70 erroneously conclude that declaring the impact of Hickox Road grade crossing to be non-significant is in error. See other authorities Burlington Northern Railroad Company vs. Skagit County No. TR940282 (Dec 1996)
- 20 H. The testimony of Richard Smith prefiled under Exhibit 77 and supplemented by a railroad siding extension map Exhibit 78 further illustrates why failure to comply with SEPA has produced an erroneous ruling by UTC. Prefiled direct testimony of John DeVlieger and Darrin Morrison Exhibit 84 also support the relief requested in paragraphs G and H.
- 21 I. Finding of Fact (12) at page 17, paragraph 68 does not account for important testimony about the presence of daily milk truck which provides at the bottom of a letter dated May 11, 2007 that the alternative route will change the direction of traffic of the

milk truck, the standard 83 foot long trailer and double tank trailer configuration make it essential that there be an adequate cul de sac at the west side of the Hickox Road closure. This improvement is subject to the continuing jurisdiction of the UTC but should have been studied and alternatives developed as part of the SEPA process before WSDOT determined the siding extension project to be non-significant. The consequences of imposing the siding project on the Hickox Road location should be mitigated by the proponent, WSDOT and BNSF. Failure to require mitigation under SEPA is a violation of the Act and an impermissible shifting of the burden of closing the grade crossing.

22 J. The UTC Conclusions of Law (5), (6), and (7) at page 18, paragraphs 74, 75 and 76 should recognize the necessity of evacuating animals from the Western Valley Farm in a flood. Failure to account for the animals in an orderly evacuation create a strong probability that animals would go to the railroad tracks for high ground in a flood situation thereby endangering the cattle, trains and others in the transportation corridor. The Western Valley Farms Intervenors urged the UTC to broaden its description of the private crossing use for emergency flood prevention and control in emergency services to specifically recognize the need to evacuate animals, including dairy cattle and farm machinery adversely affected by flooding. Driving toward the Skagit River during a flood on the Hickox Road is not an option and this was identified in the testimony of Jim Youngsman at the public hearing on January 5, 2008 and in the testimony of David Boon Exhibit 67 prefiled testimony page t second half and top of page 7.

23 K. As mentioned in previous requests for relief B, E, F, H, and I, the UTC order recognizing only the east side of Hickox Road as requiring a cul de sac is a gross misreading of the impact of the grade crossing on traffic. As in the case of BNSF vs.

Skagit County UTC Case TR940282 decided December 13, 1996, significant environmental impacts can arise from closing a grade crossing and designing the cul de sacs for local traffic re-routed by the grade crossing. This is not a situation like the case cited by UTC in Department of Transportation vs. Snohomish County 35 Wash. 2d 247, 255 212 P.2d 829 (1949) where the alternative transportation corridor was within a few hundred feet of the closed crossing. In this case it is 2.5 miles between Blackburn Road and Stackpole Road. The lack of alternative sites for diverting traffic make it essential that cul de sacs be available at both sides of the closed grade crossing to accommodate the milk trucks, large equipment and evacuation traffic which is expected to use the crossing on a private crossing emergency basis only.

24 L. The initial order of the administrative law judge recognized the importance of the grade crossing to Western Valley Farms, L.L.C. The UTC order goes too far when it excludes Western Valley Farms from the process by which modifications will be made to accommodate a grade crossing. While the Western Valley Farms still believes that the public interest would be served by an open crossing, the duty of WSDOT and UTC is to harmonize the competing interests of the rail line with the surface transportation requirements of the local community. Safety, while a paramount concern, is not an excuse for imposing economic harms which could be avoided by adopting reasonably prudent alternatives to the action requested by WSDOT and BNSF. See UTC Decision in BNSF vs. Skagit County TR940282.

### III. CONCLUSION

- 25 The SEPA has not been complied with and consequently the decision of the UTC is void.
- 26 In order to accommodate the emergency needs of private property owners as well as the public entities potentially affected by flooding and fire and medical emergencies, Western Valley Farms should be included as part of the post crossing closure team which will negotiate conditions for private crossing use of the closed crossing.

RESPECTFULLY SUBMITTED this 14 day of November 2008.

JONES & SMITH

By:   
GARY T. JONES, WSBA #5217  
Attorney for Western Valley Farms, LLC

DECLARATION 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 November 14, 2008, I hereby declare that I have, this day, served by first class mail, postage prepaid, and made an electronic submission of a true and correct copy of the MOTION FOR RECONSIDERATION BY WESTERN VALLEY FARMS, L.L.C. upon all parties of record in this proceeding as follows:

Stephen Fallquist  
Deputy Prosecuting Attorney  
Skagit County  
605 South 3<sup>rd</sup> Street  
Mount Vernon, WA 98273  
[stephenf@co.skagit.wa.us](mailto:stephenf@co.skagit.wa.us)

L. Scott Lockwood  
Assistant Attorney General  
1400 S. Evergreen Park Dr., S.W.  
PO Box 40128  
Olympia, WA 98504  
[scottl@atg.wa.gov](mailto:scottl@atg.wa.gov)

Tom Montgomery  
Bradley Scarp  
Montgomery, Scarp MacDougall, PLLC  
1218 Third Avenue, Suite 2700  
Seattle, WA 98101  
[brad@montgomeryscarp.com](mailto:brad@montgomeryscarp.com)

Jonathan Thompson  
Assistant Attorney General  
1400 S. Evergreen Park Dr., S.W.  
PO Box 40128  
Olympia, WA 98504  
[jthomпсо@utc.wa.gov](mailto:jthomпсо@utc.wa.gov)

Brian K. Snure  
Snure Law Office  
612 South 227<sup>th</sup> Street  
Des Moines, WA 98198  
[brian@snurelaw.com](mailto:brian@snurelaw.com)

Kevin Rogerson, City Attorney  
City of Mount Vernon  
PO Box 809  
Mount Vernon, WA 98273  
[kevinr@ci.mount-vernon.wa.us](mailto:kevinr@ci.mount-vernon.wa.us)

David W. Danner  
Washington Utilities & Transportation Commission  
PO Box 47250  
Olympia, WA 98504-7250  
[records@utc.wa.gov](mailto:records@utc.wa.gov)

Adam Torem  
Administrative Law Judge  
1300 S. Evergreen Park Drive, SW  
PO Box 47250  
Olympia, WA 98504-7250  
[atorem@utc.wa.gov](mailto:atorem@utc.wa.gov)

I declare under penalty under the law of the State of Washington that the foregoing is true and correct.

DATED this <sup>th</sup>14 day of November 2008 at Mount Vernon, Washington.

  
Llewella Faye Davis, Legal Assistant