97410-1

No. 79090-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

RANDOLPH PETERSON, a taxpayer resident; JASON MOUNT, an individual; JAMES SUMMEY, an individual; PEGGI DOGGETT, an individual; JENNIFER HARTSFIELD, an individual; and MANDI OUKROP, an individual,

Petitioners,

v.

PORT OF BENTON, a Washington port district,

Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant,

and

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

Intervenor Plaintiff,

and

BNSF RAILWAY COMPANY, a Delaware corporation,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Petitioners Peterson, Mount, Summey, Doggett, Hartsfield, and Oukrop seek review of the decision terminating review set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division I, issued its published opinion on June 17, 2019. It is set forth in the Appendix at pages 1 through 14.

C. ISSUE PRESENTED FOR REVIEW

> Where the Port of Benton ("Port") allowed railroads to use its railroad track rent free and without paying for the impact to the track from the wear and tear occasioned by their trains' track usage, was there at least a fact question as to whether the Port had the requisite donative intent or the consideration it derived from the railroads for their usage of its track was so grossly inadequate as to be tantamount to a gift so that the Port made an unconstitutional gift of public funds to the railroads under article VIII, § 7 of the Washington Constitution?

D. STATEMENT OF THE CASE

Division I's opinion correctly set forth the basic outline of the facts and procedure in this case. Op. at 2-5. However, certain points of fact bear emphasis, the most prominent of which relate to Division I's apparent confusion of the consideration received by the Port for the transfer of property from the federal government with the puny "consideration" received by the Port from the Burlington Northern Santa Fe ("BNSF") and Union Pacific ("UP") for the rent-free use of tracks in perpetuity.

The critical facts here are:[1]

- The railroads' predecessors each paid the federal government $50,000 in 1947 to construct the tracks at issue here. Op. at 1-2;

- In 1998, the federal government transferred land in Tri-Cities and 16 miles of track to the Port for no consideration. Op. at 2;

- Apart from a promised $50,000 payment, BNSF has not paid for use of the public railroad tracks at issue here since 2009 and UP has not done so since 2017.[2] Reply br. at 2;

- The Port was subject to Washington constitutional obligations when it received the tracks from the United States government. *BNSF Ry. Co. v. Tri-City & Olympia Ry. Co.*, 835 F. Supp. 2d 1056, 1062 (E.D. Wash. 2011);

- Under their constitutional analysis, the railroads will *never* have to pay the Port for track usage in perpetuity;

- The Port, in fact, knew that the railroads had an obligation to pay for track usage, going so far as to force UP to pay fees under threat of contract termination in 2000. Op. at 8; Appellants br. at 24;

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[1] Peterson provided a comprehensive description of those facts below. CP 1282-1304. *See* Appendix.

[2] Division I confused the consideration for the railroads' initial track usage, and the consideration for the 1998 transfer of property by the federal government to the Port with the constitutionally-mandated consideration the Port must receive *from the railroads* for the tracks' use. The federal government could give the railroads rent-free track usage as it is unencumbered by constitutional restrictions like article VIII, § 7. For 21 years, that arrangement remained in place – 21 years of rent-free track usage. But when the United States Department of Energy ("DOE") declared the tracks and other property to be surplus in 1998 and transferred that property to the Port, the Port received land, buildings, and the tracks, subject to prior federal agreements with the railroads. DOE received the benefit of relinquishing any obligation to maintain the buildings and the tracks, many of which were in need of significant public expenditures, as the Port/BNSF readily conceded when they noted the extensive costs that faced DOE, including clean up of contaminated properties. Resp'ts br. at 7. But this "consideration" received by the Port from DOE for receipt of surplus federal properties is *irrelevant* to the grossly inadequate consideration the Port received from *the railroads* for track usage.

- While the Port was obligated under the deal with the federal government to devote all lease payments and other revenues derived from the railroads to cover maintenance, it has *never* complied with that obligation. Appellants br. at 6 n.8;

- In 2000, the Port leased the tracks to the Tri-Cities Railroad Co. LLC ("TCRY"). Op. at 2-3. TCRY is essentially the Port's agent for the routine maintenance of the tracks, as the Port did not pay TCRY for such services. Rather, their agreement understood that TCRY would be paid by the railroads that actually used the tracks. Appellants br. at 5-6. Without fees collected from the railroads at the Port's direction, the TCRY/Port agreement was economically unsustainable;

- BNSF and UP ended their respective relationships with TCRY in 2009 and 2017;

- TCRY does not pay for *all* track maintenance because the Port intends to seek *millions of dollars* in major capital expenditures to upgrade the tracks as part of a Master Plan. Appellants br. at 26-27;

- Railroad cars cause wear and tear to the tracks and the public will be forced to pay for the railroads' harm to the tracks. Appellants br. at 4-5, 26-27;

- In its 250 other leases of public property, the Port requires the payment of fair market value for the property it leases; no other for profit tenant gets use of public property rent-free. The Port does not have a process by which a private entity can request to use the Port's property without paying monetary consideration. CP 438. If a private entity requested exemption from paying cash consideration for use of Port's property, the Port would not enter into such a lease. CP 435-36;

- The Port has negotiated with BNSF concerning payments for track usage since 2009, as well as internal discussions

> indicating that it is the Port's future intent to obtain fees or other compensation from BNSF for its track use.[3]

Division I's opinion reflects a fundamental misunderstanding of the relationship between the railroads and TCRY when it discusses access to competing Class I railroads. Op. at 8. If the Port chose to cancel the 1947 agreement as it had the authority to do on 6 months' notice to the railroads, rail customers located off of the Port-owned rail line would still have competing Class 1 railroad access. TCRY would only be providing the end service. Also, Division I acknowledged that BNSF terminated its relationship with TCRY in order to save roughly $100-150 per car. Op. at 3-4. That is roughly the amount that TCRY would have applied to the maintenance and upkeep of the track. *Someone* will have to pay that track maintenance expense, and it will be the Port's taxpayers, or other public sources, rather than the railroads who make the necessary expense.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case presents the opportunity for this Court to properly apply article VIII, § 7. Division I's interpretation of that constitutional provision contravenes this Court's many decisions on it. RAP 13.4(b)(1). If this

[3] For example, in 2013, a Port consultant wrote that the "Port would like to talk to BNSF about an operating agreement and funding plan that addresses the use, maintenance and repair issues for the rail line." CP 1314. In 2016, the Port held meetings with its consultants regarding updating the 1947-48 contracts and charging UP and BNSF for direct access to the Port's track. CP 1320, 1322. On March 29, 2016, an email was sent by the Port's counsel, Tom Cowan, to staff setting forth a proposed letter to UP asking it for a contribution toward the "additional maintenance and improvements to the Port's railroad … required to accommodate this traffic." CP 1318.

case does not involve a gift of public funds, then literally no case can *ever* meet that requisite constitutional gift standard; this Court should not condone the evisceration of article VIII, § 7. RAP 13.4(b)(4).

(1) Analysis of an Article VIII, § 7 Violation

The plain language of article VIII, §§ 5[4] and 7 evidences the Framers' unambiguous intent to broadly restrain the ability of public officials, state and local, to use public moneys to assist private individuals or business entities. By its terms (*see* Appendix), article VIII, § 7 bars either the gifting or loaning of public funds or property.[5]

The historical context of article VIII, § 7 is particularly significant in understanding its meaning. That constitutional provision was promulgated as the result of the undue political influence of railroads in late Nineteenth Century. The trial court agreed. RP 101. *See also*, Robert F. Utter, Hugh D. Spitzer, *The Washington Constitution: A Reference*

[4] The Port argued below that article VIII, § 5 authority was inapposite in analyzing § 7. RP 89-90. That is wrong because the analytical protocol is identical. In *Adams v. University of Washington*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986), albeit in the article VIII, § 5 setting, this Court stated: "Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration." *See also, CLEAN v. City of Spokane*, 133 Wn.2d 455, 469, 947 P.2d 1169 (1997), *cert. denied*, 525 U.S. 812 (1998); *In re Limited Tax General Obligation Bonds of City of Edmonds*, 162 Wn. App. 513, 530, 256 P.3d 1242 (2011).

[5] § 7 is broad in scope, as explained by Justice Frank Hale in clear terms in his concurring opinion in *Graham v. City of Olympia*, 80 Wn.2d 672, 687, 497 P.2d 924 (1972).

Guide (Greenwood Press 2002) at 145-46. *Accord*, *Graham,* 80 Wn.2d at 675.[6]

In general terms, an unconstitutional gift is present if a public entity intends to make a gift of public funds or permits a private company to use public property without paying consideration for such use. *King Cty. v. Taxpayers of King Cty.,* 133 Wn.2d 584, 597, 949 P.2d 1260 (1997), *cert. denied*, 523 U.S. 1076 (1998) (*citing CLEAN v. State,* 130 Wn.2d 782, 800, 928 P.2d 1054 (1997)). This Court has developed a rich body of law on gifts or loans of public money within the meaning of article VIII, § 7. *E.g., Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 527 P.2d 263, 533 P.2d 128 (1975); *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978); *City of Seattle v. State*, 100 Wn.2d 232, 668 P.2d 1266 (1983); *City of Marysville v. State*, 101 Wn.2d 50, 676 P.2d 989 (1984); *City of Tacoma v. Taxpayers of the City*

[6] This anti-railroad slant to article VIII, § 7 is confirmed by the fact that the Framers aggressively regulated railroad conduct elsewhere in our Constitution as well. They provided for regulation of common carriers (article XII, § 13); prohibited combinations of railroads (article XII, § 14 – later repealed); prohibited discriminatory charging practices by railroads (article XII, § 15); prohibited consolidation of competing lines (article XII, § 16); provided for taxation of railroad rolling stock (article XII, § 17); allowed for railroad rate regulation (article XII, § 18). They even banned free passes to legislators from railroads (article XII, § 20). The Utter/Spitzer treatise describes the promulgation of § 18 in particular. Its initial version called for the creation of a railroad commission by the Constitution itself. They describe railroad lobbyists descending on the delegates, exerting pressure that resulted in many delegates changing their votes, leading to the present version of § 19 with the Legislature having discretion to create a commission.

of Tacoma, 108 Wn.2d 679, 743 P.2d 793 (1987); *CLEAN*, *supra*; *King County, supra*.

Perhaps the most recent comprehensive analysis of the gifting of public funds under article VIII, § 7 is this Court's opinion in *CLEAN*, a case involving Seattle's professional baseball stadium. That opinion noted that the focus of article VIII, § 7 is that "public funds cannot be used to benefit private interests when the public interest is not primarily being served." 130 Wn.2d at 792. Thus, in analyzing whether a gift of public funds is being made, that overarching purpose of § 7 must be kept firmly in mind. *Id*. at 797. The Court applied a two-part test for determining if a gift is present:

> First, the court asks if the funds are being expended to carry out a fundamental purpose of the government? If the answer to that question is yes, then no gift of public funds has been made. The second prong comes into play only when the expenditures are held to not serve fundamental purposes of government. The court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body in order to determine whether or not a gift has occurred.

Id. at 797-98. If and only if the Court determines that donative intent on the government's part, either express or proven by the presence of such grossly inadequate consideration for the valuable public property that is tantamount to express donative intent, is absent, does the Court then look

to the adequacy of consideration. *King County*, 133 Wn.2d at 601 ("In the absence of donative intent or grossly inadequate return, the Court's review is limited to the legal sufficiency of consideration for the lease.").[7] The adequacy of consideration is determined on the basis of legal sufficiency, whether there is value to support a promise, and is analyzed as a question of law. *Id*. at 597-98.[8] S*ee also, Adams*, 106 Wn.2d 312 at 327; *City of Tacoma*, 106 Wn.2d at 703. The trial court's oral ruling documents that it misapplied this necessary test. RP 102. Division I seemingly agreed, applying the analysis set forth above. Op. at 8-9.[9]

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[7] This Court need not reach whether the issue of legal consideration because the Port had donative intent. If it does choose to reach it, the consideration here was legally insufficient. The Port has received *nothing* in the way of tangible consideration from BNSF for its perpetual rent-free use of the tracks. A payment made 70 years ago by BNSF's predecessor to a now defunct federal agency does not inure to the Port's benefit, particularly where the Port received the tracks for free from the federal government. Vague promises to perhaps contribute to the upkeep of the tracks at BNSF's complete discretion, made for the first time in 2014, similarly do not rise to the level of legally sufficient consideration.

[8] *CLEAN* involved more of a "facial challenge" to Seattle's baseball stadium, while *Taxpayers* was the "as-applied challenge." In the latter case, the plaintiffs aggressively argued donative intent was present because the public received grossly inadequate consideration from the Mariners for the stadium's use. 133 Wn.2d at 598. The Court's majority rejected that argument noting that the Mariners paid substantial annual rent, agreed to contribute $45 million in construction costs, paid construction cost overruns, maintained the facility, made major repairs and capital improvements, and agreed to share profits with the new public stadium district. *Id*. at 598-601. The Port's disinclination to require *any* consideration from the railroads for use of its tracks stands in stark contrast.

[9] On the question of whether a fundamental government purpose was at stake, the parties agree no such interest is present. Op. at 7. Like a baseball stadium in *CLEAN*, 130 Wn.2d at 798, and unlike the public financing of local elections, *City of Seattle*, 100 Wn.2d at 240-41, no fundamental government purpose was at issue. The Port never argued below that a governmental purpose was involved here. CP 1761-70; RP 40-55, 85-90. The Port's counsel characterized this case as merely a "private business dispute

This case is one of public importance within the meaning of RAP 13.4(b)(4). When property is owned by the State or any of its political subdivisions, the Constitution does, and should, apply to those publicly-owned properties. Upon statehood in 1889, Washington received lands from the federal government. In the century since, the State and its subdivisions have received additional property from the federal government. Under settled Washington law, once the State or political subdivision receives property, the administration and disposition of that property are subject to our Constitution. The trial court's conclusion, condoned by Division I, that *de minimis* consideration paid by commercial entities like the railroads' predecessors long ago to the federal government somehow binds the Port *never* to charge it rent or for track wear and tear renders the "consideration" for track use here grossly inequitable, violating article VIII, § 7.

Ultimately, if this is not an article VIII, § 7 case, no case under that constitutional provision can succeed under the high bar established in Division I's opinion. That court's decision will embolden private entities to demand concessions from governments for doing business with those governments. The effect will be particularly pernicious for small

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between BN and TCRY." RP 87. The relationship between the Port and the railroads was a routine commercial relationship. Thus, the trial court's ruling on this point, RP 102, was amply supported.

governments lacking the political clout to withstand the efforts of big corporations like BNSF or UP. This Court should not allow the evisceration of article VIII, § 7. Review is merited. RAP 13(b)(4).

(2) Donative Intent under Article VIII, § 7 Is a Fact Question for the Trier of Fact

Under the *CLEAN* protocol, this Court looks to whether the local government had express donative intent, *i.e.* the local government intended to make a gift of public funds to the recipient of them, or alternatively, if it received such grossly inadequate consideration as to be tantamount to a gift. The trial court erroneously *conflated* these distinct treatments of consideration in the case law. RP 102-03. Division I correctly treated both aspects of donative intent as distinct analytical matters but it erroneously determined that a fraudulent intent factor into the latter analysis never before found in Washington law.

Critically, donative intent, whether manifested as actual intent or grossly inadequate consideration, has long been held to be a *question of fact*. *E.g.*, *Buckerfield's Ltd. v. B.C. Goose Farm, Ltd.*, 9 Wn. App. 220, 511 P.2d 1360 (1973) (donative intent is a fact issue for the finder of fact); *Miebach v. Colasurdo*, 102 Wn.2d 170, 685 P.2d 1074 (1984) (sale of home at sheriff's sale for $1,340.02 when house's fair market value was $106,000 constituted grossly inadequate consideration); *In re Estate of*

Little, 106 Wn.2d 269, 288, 721 P.2d 950 (1986) ("The existence or absence of donative intent is a factual issue to be resolved by the trier of fact."). *Casa del Rey v. Hart*, 110 Wn.2d 65, 750 P.2d 261 (1988) (sheriff's sale of property worth at least $290,000 for $14,125.85 constituted grossly inadequate consideration). Division I here erred in affirming the trial court's determination of donative intent as a matter of law. Review is merited. RAP 13.4(b)(1).

(a) The Port Intended to Give the Railroads the Use of the Tracks Without Any Charge Forever

Division I affirmed the trial court's determination as a matter of law that the Port had no donative intent. Op. at 7-8. But that court erred in making this factual determination as a matter of law[10] where there was substantial contrary evidence.

The Port had express donative intent by virtue of its decision to allow BNSF since 2009, and UP since 2017, to use the tracks at issue rent-free. The Port has never terminated the railroads' revocable permit to use the Port's tracks for free. The Port *admitted* that BNSF used its tracks for private purposes, CP 441, and that the revenue that it generated using the Port's tracks is not shared with the Port. CP 438. The Port's donative intent is further reinforced by the fact that no other governmental entity in

[10] The court asserted it could do so, citing *King County*, 133 Wn.2d at 597-601. But it ignored the case law cited *supra* that this issue is a factual one for the jury.

Washington allows railroads to use publicly-owned tracks without payment of monetary consideration, CP 438, and the Port allows no other tenant to use its public property rent-free. CP 435-36, 438.

With regard to the other principal railroad using these tracks, the UP, the Port was insistent that UP pay for use of the tracks, evidencing the fact that the Port knew it must not gift public facilities to private concerns. In 2000, the Port even directed that UP's permit to use the Port's tracks be terminated because UP was not paying monetary consideration. CP 1838-49; 835 F. Supp. 2d at 1060. By contrast, the Port never directed that BNSF's rights be terminated because it was not paying monetary consideration.[11]

Moreover, the Port's express donative intent is demonstrated by in its deliberate hiding of its sweetheart arrangement with BNSF from the State Auditor. The Port was audited by the Auditor in 2012 and in 2015. CP 440-41. It never disclosed that BNSF was using Port property without paying either monetary consideration or the leasehold tax. CP 441. A fact issue was present on the Port's actual donative intent.

[11] The Port and BNSF closely coordinated their legal activities relating to their relationship, further evidencing the Port's intent to benefit BNSF. When the federal court action was filed by TCRY against BNSF, the Port intervened in support of BNSF's position. *BNSF,* 835 F. Supp. 2d at 1060. BNSF intervened in this action and joined in the Port's arguments. The Port has claimed that correspondence by its executive director, Scott Keller, to BNSF is privileged. CP 1283-84; 1400-07. BNSF claims a "common interest agreement" with the Port. CP 1409-10. That "common interest agreement" with the Port was not disclosed by BNSF when it filed its motion to intervene in this case. CP 327-48.

(b) The Actual Consideration Received by the Port from the Railroads for Their Perpetual Use of the Tracks Was Grossly Inadequate

While Division I correctly determined that donative intent could be demonstrated by grossly inadequate consideration, op. at 8, it erred in ruling as a matter of law that it could determine if the consideration received from the railroads was not so grossly inadequate as to constitute a gift. Op. at 8-10. Rejecting what is a straightforward factual analysis, the court instead added a requirement to the constitutional analysis *nowhere* supported in this Court's article VIII, § 5 or § 7 jurisprudence. The grossly inadequate consideration must "shock the conscience" of the court, that is, it must "suggest fraud or other wrongdoing," or be "unconscionable." Op. at 9. In adopting this test, which is also factual in nature, Division I dramatically elevated the bar to establish an article VIII, § 5 or § 7 constitutional violation without this Court's imprimatur for doing so. Only this Court should establish such a constitutional interpretation. RAP 13.4(b)(1).

But then, having raised the bar for a constitutional violation, Division I intruded upon *the jury's function* to determine if such a standard was met. And there was *ample* evidence adduced below upon which a jury could conclude not only that the "consideration" received by the Port for the use of its tracks from the railroads evidenced such a grossly

disparate benefit that for all practical purposes the Port made a gift of public property to the railroads, a jury could conclude that the Port's conduct had the requisite level of wrongdoing or unconscionability where the Port's manifest intention was to oust TCRY as its agent for track operation/maintenance.

As noted *supra*, the railroads have not paid any rent for track usage at least since 2009 (BNSF) and 2017 (UP), and will not pay for future track usage despite the fact that their trains cause substantial wear and tear on the tracks in question. While TCRY pays for some of the track maintenance cost, given the wear and tear caused by BNSF/UP trains, Port taxpayers will have to bear the expense of major improvements to the track to handle the railroads' modern railroad use.[12]

Critically, Peterson offered unrebutted expert testimony of experienced experts on the valuation of the benefit the Port conferred on BNSF. Dr. Clarence Barnes, Ph.D., a professor of economics and Dean Emeritus of the Gonzaga University School of Business Administration, CP 1567, 1571-77, testified on the speculative nature of any alleged

[12] The Port is involved in major track rehabilitation efforts. CP 1451-1539. The Port's own Master Plan, placed on its website in January 2017, proposes an expenditure of nearly $8.5 million to upgrade the tracks to address the wear and tear to which the railroads' trains have substantially contributed. CP 1883-1974. The railroads' rent-free use of the tracks obviously results in a *substantial* expense to the taxpayers. The 2019 Legislature appropriated $2.5 million for Port track improvements, according to the Port's May 8, 2019 Commission meeting minutes. https://portofbenton.com/tricities/wp-content/uploads/2019/06/Minutes_5-8-19.pdf.

economic development benefit of the railroads' free use of the tracks. CP 1568. BNSF's use of the Port's publicly-owned property, without paying consideration and without paying for wear and tear it causes, did not fit with any economic model of which Professor Barnes was aware. *Id*.

Norman E. Hooper, a professional engineer and an expert in railroad construction, maintenance, and operations, CP 1541, 1653-64, concluded that BNSF received millions of dollars of benefit from its use of Port tracks without paying rent or a fee. Public rail owners usually recover costs in taxes and fees for funding on-going capital and maintenance of the tracks. CP 1561. Since 2009, the Port acted in a manner atypical of other public rail owners. *Id*. This is particularly true where the railroads' track usage added to the cost of track maintenance – the greater the traffic, the higher variable costs. CP 1561. For the lines in question here, Hooper indicated the impact on the Port's tracks was very substantial.[13]

Hooper calculated the overall gift by the Port to BNSF alone from 2009-2016 to be between $6,830,000 to $10,254,000. CP 1562. If the

[13] If the present circumstances continued, as to BNSF alone, the increase in rail traffic would increase maintenance cost – $300,000 per mile for 5 miles of yard track; $400,000 per mile on 4.5 miles of main track with modern rail and, $800,000 per mile if the 6.5 miles of the 90lb rail must be changed, totaling in the range of $8.5 million. CP 1561-62. Prior to 2009, BNSF paid a fee for interchange and switching of $500 to $750 per car load. CP 1562. That fee, whether collected by a track owner or that owner's agent, would normally be used for the maintenance and capital investment necessary to keep a rail line in service. *Id*. BNSF independently handled 13,660 carloads from 2009 to 2016. *Id*.

BNSF volume of the traffic on the Port's track in 2017 was the same as it was in 2016 (4,212 railcars), the gift to BNSF in 2017 would be between $2,106,000 to $3,159,000. *Id*. That does not include the comparable benefit to UP.

In sum, the railroads have what amounts to perpetual rent-free use of valuable public property; the *only* financial contribution made by them for the tracks for seventy years of track use is a single 1947 payment of $50,000 by their predecessors. They have no obligation to pay any rent or fee for track usage indefinitely into the future. Moreover, its continued use of the tracks will result in added expense to Port taxpayers for the tracks' maintenance and upgrade. The railroads will not pay for the expense their trains cause to publicly-owned tracks. In the meanwhile, the railroads profit from their private use of the tracks and do not share a dime of that profit with Port taxpayers.[14]

[14] The Port and the railroads attempted to overcome the vast benefit they received from the Port by arguing that the alleged economic benefit the Port's free use of Port tracks provides to the Tri-Cities community is consideration for purposes of the article VIII, § 7 analysis. CP 469, 470, 1023. But the Port/BNSF largely abandoned that contention on appeal in the face of overwhelmingly contrary authority. Washington law does not permit utilization of so amorphous a concept as "economic development" to substitute for actual, tangible consideration. Nor should it. The Port/BNSF did not point to a single Washington case that introduced such a concept into the article VIII, § 7 donative intent calculus. This Court has made it clear that such intangible benefits to the public are *not* to be utilized. For example, in *Port of Longview*, *supra*, this Court rejected a port's contention that a provision of pollution control facilities, financed by a governmental loan, for nonpublic entities were beneficial, tartly stating: "The loan of money or credit by a municipality to a private corporation is a violation of our state constitution regardless of whether or not it serves a laudable public purpose." 85 Wn.2d at 231. *Accord*, *Lassila*, 89 Wn.2d at 810 (rejecting a loan of public funds to facilitate the

And if Division I is correct that an element of ill motive must accompany grossly disproportionate consideration to constitute donative intent, there was at least a fact question on that topic as well.[15] The Port's thinly disguised intent was always to displace TCRY as its agent for track maintenance. By depriving TCRY of revenue from the railroads, its contract with the Port was not viable economically. The Port wanted to take over track maintenance and charge the railroads fees directly for track usage. Appellants br. at 45 n.43. In doing so, it asserted "we can eliminate the old contracts and charge for rail service." CP 1316. The Port even attempted to coerce Peterson into dropping this action by threatening heavy taxation against TCRY. Appellants br. at 8 n.13.

In sum, there is at least a fact question here as to whether the Port had donative intent. Division I's opinion on that question merits review by this Court. RAP 13.4(b).

F. CONCLUSION

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redevelopment of a part of Wenatchee's downtown, despite its laudable purpose of urban redevelopment or the city's expectation "to reap future public benefits from the sale."). It is no different for a gift of public facilities based on the putative receipt of "economic development." Whether it is Washington tax credits for Boeing or Wisconsin's corporate benefits for Foxconn, there are serious questions about whether such inducements to corporations benefit taxpayers.

[15] Such malevolent efforts to terminate TCRY's contract with the Port is the subject of a pending federal False Claims Act case in *United States ex rel. Peterson v. Port of Benton County, et al.*, No. 2:17-cv-191-TOR (E.D. Wash.).

This case presents a critical state constitutional issue for this Court. The Port has allowed the railroads to use its public facilities rent-free for years and intends to continue this gift of public facilities indefinitely into the future. The Port's arrangement with those railroads is exactly the kind of gifting of public funds that our Progressive Era Framers intended to stop by promulgating article VIII, § 7. Review is merited. RAP 13.4(b)(1), (4).

The trial court erred in granting summary judgment to the Port/BNSF. As noted *supra*, at a minimum, there was a question of fact regarding the Port's donative intent and the grossly inadequate consideration received by the Port for the railroads rent-free track usage. This Court should reverse the trial court's order. Costs on appeal should be awarded to Peterson.

DATED this 10th day of July, 2019.

Respectfully submitted,

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APPENDIX

FILED
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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RANDOLPH PETERSON, a taxpayer resident, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, a state agency; PORT OF BENTON, a Washington port district, Respondents.	No. 79090-1-I DIVISION ONE PUBLISHED OPINION FILED: June 17, 2019

MANN, A.C.J. — Randolph Peterson sued the Port of Benton (Port) alleging that the Port violated article VIII, section 7 and article I, section 12 of the Washington Constitution by allowing Burlington Northern Santa Fe Railway Co. (BNSF) the free use of public railroad tracks despite the wear and tear caused by BNSF's use of those tracks. Peterson appeals the trial court's order granting summary judgment and dismissing his case. We affirm.

I.

In 1947, the Atomic Energy Commission (AEC), and the predecessors to BNSF and the Union Pacific Railroad (UP) entered into a contract to establish rail service to

the Hanford Nuclear Reservation (Hanford).[1] The 1947 contract provided that the predecessors of BNSF and UP would each pay one half of $100,000 to AEC, which equaled the cost to construct 5.4 miles of rail tracks between Hanford and the north bank of the Yakima River. In return, BNSF and UP would be entitled to use those tracks free of rental or any other charge. The 1947 contract was terminable upon six months' notice. The Interstate Commerce Commission (ICC) approved the 1947 contract and included in its report that "when full payment has been made, [BNSF and UP] should thereafter be permitted to operate over the tracks without further payments."[2]

In 1998, the Department of Energy (DOE) declared certain parts of its Hanford property to be surplus, and transferred 767.13 acres of industrial property to the Port by indenture. The conveyance was valued at $5.1 million.[3] The conveyance included the 5.4 miles of railroad tracks built under the 1947 contract. The indenture assigned DOE's rights under the 1947 contract to the Port. As assignee, the Port agreed to be bound by the obligations and considerations in the 1947 contract.[4] The successor to the ICC, the Surface Transportation Board (STB), approved the transfer.

The same day that the indenture became effective, the Port entered into a maintenance and operation agreement with Livingston Rebuild Center, Inc. (LRC), where the Port paid LRC to maintain the track. Peterson controlled LRC.

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[1] The parties to the original 1947 contract were the AEC, Northern Pacific Railway Company, the Oregon-Washington Railroad & Navigation Company, and its lessee the Union Pacific Railroad Company.

[2] A second agreement was entered between the railroads and AEC in 1961 addressing use of certain spur tracks. The 1961 agreement was converted to a permit in 1979. The 1961 agreement and 1979 permit did not change the relevant terms of the 1947 contract.

[3] The property today is valued in excess of $50 million dollars.

[4] The Port also agreed to be bound by the terms of the 1961 agreement and 1979 permit.

Subsequently, Peterson formed the Tri-City Railroad Co. (TCRY) as a local, short-haul railroad company, and LRC assigned its rights and obligations under the maintenance agreement to TCRY.

In 2000, the Port entered an agreement with TCRY to interchange railroad cars. Under the interchange agreement, TCRY charged BNSF a per-car fee for exchanging cars for the benefit of BNSF's customers. The interchange agreement "specifically reserved BNSF's rights under the 1947 and 1961 Agreements."

In 2002, TCRY negotiated a lease agreement with the Port for the right to operate the track and use certain real and personal property. The lease obligated TCRY to "use the Property for the operation and maintenance of railroad transportation facilities." The lease was "subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto, and the Quit Claim Deed from the United States of America." The lease also obligated TCRY's "use, operations, and maintenance of the tracks [to] comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property." Additionally, the lease indicated that TCRY was provided with copies of the indenture.

The lease indicated that TCRY, "at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear." Until 2009, BNSF paid TCRY to interchange cars, on a per-car basis. The interchange fees were used to maintain the tracks. BNSF provided TCRY with a written termination notice because BNSF realized

it "could operate its own cars on the Richland Trackage at a savings of around $100-150 per car" under the 1947 contract.

When BNSF ended its agreement with TCRY in 2009, TCRY did not believe that BNSF had a right to operate directly on the tracks and attempted to physically block BNSF's use of the tracks. BNSF responded by filing a lawsuit in the United States District Court seeking declaratory and injunctive relief prohibiting TCRY from blocking BNSF's access to the rail tracks. BNSF Ry. Co. v. Tri-City & Olympia Ry. Co. LLC, 835 F. Supp. 2d 1056, 1066 (E.D. Wash. 2011). The District Court declared that "for all of the historical complexity surrounding the Richland Trackage, the relative rights of the parties are actually quite simple: The United States granted BNSF and UP's predecessors in interest full rights to operate on the Richland Trackage, and TCRY took possession of the Richland Trackage subject to these rights." BNSF Ry. Co., 835 F. Supp. 2d at 1066-67. The District Court entered a permanent injunction requiring TCRY to allow BNSF and UP to directly serve customers on the tracks. BNSF Ry. Co., 835 F. Supp. 2d at 1066.[5]

Peterson filed this action on August 15, 2016, alleging the Port and the Washington Department of Revenue (DOR) violated their statutory taxing duties, article VIII, section 7, and article I, section 12 of the Washington Constitution. BNSF and UP successfully moved to intervene. Port taxpayers, Peggi Doggett, Jennifer Hartsfield, Jason Mount, Mandi Oukrop, and James Summey then successfully moved to intervene, objecting to the Port's gift of public funds and property to BNSF.

[5] Currently BNSF and UP operate as Class I carriers, providing competitive interstate service to businesses in the Port.

All parties moved for summary judgment. The trial court granted the Port's and BNSF's motions for summary judgment and denied Peterson's motion for summary judgment. Peterson appeals.

II.

Peterson argues first that by allowing BNSF to use its tracks rent free, and without paying for the impact to the tracks from wear and tear, the Port has made an unconstitutional gift of public funds in violation of article VIII, section 7 of the Washington Constitution. Peterson contends that the trial court erred when it found that there was no issue of material fact as to whether the Port was receiving a grossly inadequate return. We disagree.

We review summary judgment de novo and consider the facts in a light most favorable to the nonmoving party. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "[S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012). "In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact." Young, 112 Wn.2d at 225. If the moving party is the defendant and meets this initial showing, "then the inquiry shifts to the party with the burden of proof at trial." Young, 112 Wn.2d at 225. Constitutional issues are reviewed de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

A.

Article VIII, section 7 of the Washington Constitution provides:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

The purpose of this constitutional provision is "to prevent state funds from being used to benefit private interests where the public interest is not primarily served." Japan Line, Ltd. v. McCaffree, 88 Wn.2d 93, 98, 558 P.2d 211 (1977).

To determine whether there has been a gift of state funds, courts apply a two-pronged analysis:

> First, the court asks if the funds are being expended to carry out a fundamental purpose of the government? If the answer to that question is yes, then no gift of public funds has been made. The second prong comes into play only when the expenditures are held not to serve fundamental purposes of government. The court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of appropriating body in order to determine whether or not a gift has occurred.

CLEAN v. State, 130 Wn.2d 782, 797-98, 928 P.2d 1054 (1996). The court's analysis focuses on consideration and donative intent. City of Tacoma v. Taxpayers of City of Tacoma, 108 Wn.2d 679, 702, 743 P.2d 793 (1987). To overcome the presumption that the indenture is constitutionally valid, Peterson must show that BNSF's use of the railway amounts to a "transfer of property without consideration and with donative intent." General Tel. Co. v. City of Bothell, 105 Wn.2d 579, 588, 716, P.2d 879 (1986); City of Tacoma, 108 Wn.2d at 702.

B.

The parties do not dispute that the answer to the first prong of the CLEAN analysis—whether BNSF's use of the tracks rent free carries out a fundamental governmental purpose—is no. The focus thus turns to whether there was a donative intent and consideration. CLEAN, 130 Wn.2d at 797-98. "We use the donative intent element to determine how closely we scrutinize the sufficiency of the consideration, 'the key factor.'" City of Tacoma, 108 Wn.2d at 703 (quoting Adams v. Univ. of Washington, 106 Wn.2d 312, 327, 722 P.2d 74 (1986). "Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency, under which a bargained-for act or forbearance is considered sufficient consideration." City of Tacoma, 108 Wn.2d at 703; King County v. Taxpayers of King County, 133 Wn.2d 584, 601, 949 P.2d 1260 (1997).

1.

Peterson argues that the Port had express donative intent when it allowed BNSF to use the railroad tracks rent free. Donative intent can be determined as a matter of law. King County, 133 Wn.2d at 597-601. Peterson makes several arguments in support of his contention that the Port had express donative intent.

Peterson first argues that the Port's donative intent is evident because it has never terminated BNSF's revocable permit, the Port allows no other tenant to use its public property rent free, and no other government entity in Washington allows BNSF to use publicly-owned tracks without monetary compensation. This evidence is not sufficient to show that the Port had donative intent when it began allowing BNSF to use the rail tracks rent free. To the contrary, under the indenture, the Port received property

valued in 1998 at $5.1 million in exchange for agreeing to honor BNSF's operating rights under the 1947 contract.

Peterson next argues that the Port's donative intent is evident because UP continued to pay for its use of the railroad until 2017 while BNSF did not. Peterson contends that the Port required UP to begin paying monetary consideration in 2000, threatening to terminate UP's permit to use the tracks, while treating BNSF differently. It is unclear why UP continued to pay for its use of the track until 2017. However, UP's continued payment until 2017 does not demonstrate that the Port had donative intent when it allowed BNSF to continue to use the tracks rent free. Terminating BNSF's and UP's rights would leave the businesses the Port serves without Class I rail service.

Finally, Peterson argues donative intent is demonstrated because the Port hid BNSF's rent free use of the tracks from the State Auditor. Peterson argues that the Port was audited in 2012 and 2015 and never disclosed that BNSF was using Port property without paying monetary consideration or leasehold tax. Peterson fails, however, to offer a legal basis for why the Port was required to do so, where BNSF does not have a lease with the Port and thus does not pay leasehold taxes.

Peterson has failed to demonstrate express donative intent.

2.

Peterson next argues that, even if the Port did not have express donative intent, donative intent can also be demonstrated by the presence of grossly inadequate consideration. In general, we agree. See King County, 133 Wn.2d at 601 ("In the absence of donative intent or grossly inadequate return, the Court's review is limited to the legal sufficiency of the consideration for the lease."); City of Tacoma, 108 Wn.2d at

703. We disagree, however, with Peterson's position that this inquiry provides the court with an avenue to engage in "careful consideration of the 'consideration' received by the Port for the use of its tracks by BNSF." Peterson offers no legal support for such a detailed inquiry. To the contrary, in King County, our Supreme Court, over a vigorous dissent, made clear that reviewing courts "do not inquire into the adequacy of consideration, but employ a legal sufficiency test." 133 Wn.2d at 597. As the Court explained,

> [w]e have been reluctant to engage in an in-depth analysis of the adequacy of consideration because such an analysis interferes unduly with governmental power to contract and would establish a "burdensome precedent" of judicial interference with government decision making.

King County, 133 Wn.2d at 597. Adopting Peterson's call for a careful inquiry into the consideration as part of our analysis of the donative intent element would result in the same judicial interference that King County cautioned against.

Instead, while a grossly inadequate return may be relevant to the donative intent inquiry, we conclude that our review for gross inadequacy is similar to the general equitable contract law principal under which courts may set aside a contract where the consideration is "so gross as to shock the conscience," and thus may suggest fraud or other wrongdoing. See Miebach v. Colasurdo, 102 Wn.2d 170, 178, 685 P.2d 1074 (1984); Binder v. Binder, 50 Wn.2d 142, 150, 309 P.2d 1050 (1957). Peterson, does not argue, nor is there any evidence to support, that the consideration for the 1947 contract and the indenture was unconscionable. Cf. King County, 133 Wn.2d at 599-601 (rejecting the Taxpayers' argument that the Mariners' lease was "unconscionable" because the "consideration for the lease . . . is so grossly inadequate").

Instead, the Port bargained for nearly 768 acres of land, worth $5.1 million dollars in 1998, in exchange for assuming the obligations of the federal government in the 1947 contract. The Port has over 250 leases generating income. While it is clear from the indenture that the Port may terminate BNSF's and UP's rights to use the track on a six-month notice, doing so would leave the Port without any Class I railroads. "An incidental benefit to a private individual or organization will not invalidate an otherwise valid public transaction." King County, 133 Wn.2d at 596. The benefits to BNSF are incidental to acquiring $5.1 million in property and having two Class I railroads competing. The consideration for the contract and indenture was not grossly inadequate.

C.

Peterson also fails to demonstrate that the 1947 contract and indenture were not supported by legally sufficient consideration. King County, 133 Wn.2d at 597. Legal sufficiency "is concerned not with comparative value but with that which will support a promise." King County, 133 Wn.2d at 597 (quoting Browning v. Johnson, 70 Wn.2d 145, 147, 422 P.2d 591 (1967). The adequacy of consideration is a question of law and may be determined by a court on summary judgment. King County, 133 Wn.2d at 597.

The 1947 contract was supported by legally sufficient consideration. The 1947 contract provided that the predecessors of BNSF and UP would each pay one half of $100,000 to the AEC, which equaled the cost to construct 5.4 miles of rail tracks between Hanford and the north bank of the Yakima River. In return, BNSF and UP would be entitled to use those tracks free of rental or any other charge. Similarly, the

indenture was supported by legally sufficient consideration. The Port received nearly 768 acres of land, worth $5.1 million dollars in 1998, in exchange for assuming the obligations of the federal government in the 1947 contract.

Summary judgment and dismissal of Peterson's claims under article VIII, section 7, was appropriate.

III.

Peterson next contends that the indenture violates the anti-favoritism provision of the privileges and immunities clause of the Washington Constitution. Because Peterson fails to identify any law that grants an unconstitutional privilege or immunity, and does not allege that this dispute implicates a fundamental right of state citizenship, we disagree.

Article I, section 12 of the Washington Constitution provides, "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." We analyze claims brought under article I, section 12 using a two-step analysis. Ockletree v. Franciscan Health Sys., 179 Wn.2d 769, 776, 317 P.3d 1009 (2014). First, we determine if the law in question involves a privilege or immunity, and second, if so, whether the legislature had a "reasonable ground" for granting the privilege or immunity. Ockletree, 179 Wn.2d at 776.

A.

As a threshold matter, the plain language of article I, section 12 applies to the passing of a "law." Peterson's claim is based on the 1947 contract and the indenture. Both are contracts, not laws and thus, on its face article I, section 12 is not applicable.

Peterson argues, however, that the Port's resolution allowing it to enter the indenture has the force of law.

RCW 53.12.245 indicates that "[a]ll proceedings of the port commission shall be by motion or resolution recorded in a book or books kept for such purpose, which shall be public records." However, RCW 53.08.070 provides that "a port district may enter into any contract for warfage, dockage, warehousing, or port or terminal charges, with the United States or any government agency thereof . . . under such terms as the commission may, in its discretion, negotiate." While the Port adopted a resolution to enter the indenture with the DOE, RCW 53.08.070 authorizes the Port to negotiate the contract, in its discretion. Thus—while resolutions may have the force of law when operating as a general law—here, the resolution allowed the Port to enter a private contract with DOE, which cannot be challenged as a "law" under article I, section 12. Peterson does not cite any authority where an appellant successfully challenged a government contract as violating the privileges and immunities clause.

B.

Moreover, even if the resolution approving the indenture can be characterized as a law, and therefore subject to article I, section 12 analysis, Peterson's argument fails because he has failed to identify a fundamental right at issue.

"The privileges and immunities clause is concerned both with avoiding favoritism and preventing discrimination." Am. Legion Post #149 v. Wash. State Dep't. of Health, 164 Wn.2d 570, 606, 192 P.3d 306 (2008). But, "[a] privilege is not necessarily created every time a statute allows a particular group to do or obtain something." Am. Legion Post #149, 164 Wn.2d at 606-07 (citation omitted). "Privileges and immunities 'pertain

alone to those fundamental rights which belong to the citizens of this state by reason of such citizenship.'" Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004) (quoting State v. Vance, 29 Wn. 435, 458, 70 P. 34 (1902) (emphasis added).

Peterson argues that the "government's obligation to be properly compensated for use of public property" is the fundamental right at issue. He cites Grant County and Ockletree in support. Peterson asserts that Grant County stands for the proposition that "the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from" is a fundamental right. Grant County, 150 Wn.2d at 813. But Peterson does not argue that BNSF's treatment is a result of its citizenship in another state. Similarly, Peterson cites Ockletree for the proposition that an exemption in Washington's Law Against Discrimination for religious groups implicated a fundamental right. But Peterson fails to explain how Ockletree is analogous or relevant to this dispute.

Peterson failed to identify a law and a fundamental right belonging to the citizens of this state to which the privilege and immunities and clause applies. Summary judgment and dismissal of his claim under article I, section 12 of the Washington Constitution was appropriate.

We affirm.

Mann, A.C.J.

WE CONCUR:

Dwyer, J.

Appelwick, C.J.

[ ] EXPEDITE
[ ] No hearing set
[X] Hearing is set
Date: 03/31/2017 and 04/28/2017
Time: 9:00 am
Judge James Dixon/Civil

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF THURSTON

RANDOLPH PETERSON, a taxpayer resident,

Plaintiff,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, a Washington state agency; and PORT OF BENTON, a Washington port district;

Defendants.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation; JASON MOUNT, an individual; JAMES SUMMEY, an individual; PEGGI DOGGETT, an individual; JENNIFER HARTSFIELD, an individual; and MANDI OUKROP, an individual,

Intervenor Plaintiffs,

and

BNSF RAILWAY COMPANY, a Delaware corporation,

Intervenor Defendant.

No. 16-2-03211-34

PLAINTIFFS DOGGETT, HARTSFIELD, MOUNT, OUKROP, PETERSON, AND SUMMEY'S COMBINED STATEMENT OF FACTS AS TO ALL PENDING SUMMARY JUDGMENT MOTIONS

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Plaintiffs Doggett, Hartsfield, Mount, Oukrop, Peterson, and Summey ("Taxpayers") submit the following combined statement of facts with respect to their motion for summary judgment, the Port of Benton's ("Port") motion for summary judgment, and BNSF Railway Company's ("BNSF") joinder for summary judgment.

A. Overview.

1. Through the following e-mails, it is shown that the Port and BNSF's positions asserted in this case are different from what they are doing in private:

a. Chris Randall, 3/25/2009 e-mail: Chris Randall, a BNSF employee, states to the Port in part:

> The second item is track maintenance. As we have indicated, BNSF is willing to pay fair compensation for using a track we do not own. Recognizing that there may be multiple owners of track north of Richland Junction, we suggest BNSF would make a monthly payment to the Port of Benton which could distribute the funds as appropriate. The payment would be based on the number of loaded cars moved at a rate per carload that represents maintenance. Please let me know if this concept is acceptable and we will make the arrangements necessary to make payments.

(Attached to the contemporaneously-filed Declaration of Counsel ("Counsel Decl.") **Exh. 1**)

b. Craig Levie 11/6/2013 e-mail: Craig Levie, a consultant for the Port through Tangent Services, states in part, to Chris Randall and others:

> The Port of Benton has reviewed its 10 miles of railroad track and has come up with a list of maintenance and repair issues. This list is divided into two parts: short and long term needs. The maintenance and repair issues on the short term list will, for the most part, upgrade and the service reliability of the track to Class 3 standards with some exceptions and at certain grade crossings.

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> The Port would like to talk with BNSF about an operating agreement and funding plan that addresses the use, maintenance and repair issues for its rail line. We have some ideas on how to proceed but would like to work with the railroads on a approach that meets all of our needs.
> We would like to set up a time to talk with BNSF folds about how to best move forward before the new rail volume increases begin.

(Counsel Decl. **Exh. 2**)

c. Tom Cowan 11/17/2013 e-mail: Tom Cowan, to Scott Keller and others, states in part: "I asked Gary if the railroads were going to sign on the dual access agreement and he said he did not know. If the railroads sign off, then we can eliminate the old contracts and charge for rail access." (Counsel Decl. **Exh. 3**)

d. Tom Cowan 3/29/2016 e-mail: Tom Cowan, to Port employees, states in part concerning a proposed letter to Union Pacific:

> Here is my suggested language for a response;
> Due to the size of the unit trains. [T]he Port is concerned that additional maintenance and improvements to the Port's railroad may be required to accommodate this traffic. The Port is working with its consultants to determine the appropriate charges to the users to support the railroad maintenance and improvements. When the Port has received a recommendation, the Port will discuss the appropriate charges with UP, BNSF, and TCRY.
> In the interim, BNSF has agreed to make a lump sum payment to the Port of $50,000 to help with ballast replacement and improvement necessary to handle the unit trains. The previously requested UP to participate in this project, but UP refused on the basis it was already paying TCRY. The Port thinks it would be appropriate for UP to match the payment made by BNSF. The initial work will be to remove the inappropriate ballast in the Berry's Bridge area of the Port track and to replace it with appropriate ballast. Please let me know if you want to review this work in more detail. Please provide the Port with any input you would like to provide as to the appropriate charges for UP's operation of unit trains across the Port tracks.

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(Counsel Decl. **Exh. 4**)

e. Craig Levie 9/6/2016 e-mail: Craig Levie, to the Port, states in part: "Today, we discussed the desire to keep momentum going on the Port's Rail Program. Here are the current items and issues going forward…Pursue updating the 1947-1948 agreement with BNSF and UP." (Counsel Decl. **Exh. 5**)

f. Port 9/16/2016 Conference Call Discussion Agenda: Rail Program; 1947-1948 agreement with BNSF and UP; Scott discuss with railroads; have Sippel notify legal departments. (Counsel Decl. **Exh. 6**)

g. Port 9/30/2016 Conference Call Discussion Agenda: Rail Program; Class I direct delivery rail car fee. (Counsel Decl. **Exh. 7**)

B. Taxpayer Plaintiffs.

2. Taxpayers Doggett, Hartsfield, Mount, Oukrop, and Summey own real property within the Port's district. (*See* Declaration of Taxpayers filed with the Motions for Intervention) Taxpayers are not employed by the Tri-City Railroad ("TCRY"); they have no business interest in TCRY; they have no ownership interest in TCRY; they are not family members of owners or employees of TCRY. (Declaration of Lisa Anderson ("Anderson Decl.") ¶7) As discussed in their declarations, the Taxpayers believe it is wrong for the Port to be taxing its constituents, but then allow free use of public property to a private company for it to generate revenue at the Taxpayers' expense. (*See e.g.* 1/17/2017 Declaration of Jason Mount)

C. Port.

The Port is a Municipal Corporation.

3. The Port is a municipal corporation established pursuant to Title 53 R.C.W.

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4. The Port's current executive director is Scott Keller. (*See* December 16, 2016 transcript of Deposition of CR 30(b)(6) designee of the Port ("Port Depo.") attached as **Exh. 8** to Counsel Decl. p. 5 *ll* 13-14) The executive director, who runs the day-to-day operations of the Port, reports to the three Port Commissioners at a public meeting held usually once a month. (*See* December 16, 2016 transcript of Deposition of Scott Keller ("Keller Depo."), att'd to Counsel Decl. as **Exh. 9**, p. 8)

The Port Taxpayers.

5. The Port is a taxing authority, which currently taxes at a rate of $0.39 per $1,000.00 of real property assessed value located within the Port district. (Keller Depo. p. 13)

6. The Port's taxing authority extends over all owners of real property located within the Port district. (Keller Depo. p. 13) The Port district encompasses approximately two-thirds of Benton County. (Keller Depo. p. 14)

The Payment of Fair Market Value is Required to Use Port Property.

7. The Port owns a significant amount of property in the Benton County, and is the lessor of property in approximately 250 leases to private individuals and entities. (Keller Depo p. 31 *ll* 14-16)

8. From those lessees, the Port requires the payment of fair market value ("FMV") for the property it leases. (Keller Depo. p. 31 *ll* 17-19)

9. The Port is aware that as a public entity it cannot allow public property to be occupied without receiving consideration. (Keller Depo. p. 20; *see also* September 19, 2014 Letter from Port's Counsel, att'd as **Exh. 8** to the First Amended Complaint ("FAC")) (The "Port, as a public entity, cannot allow its property to be occupied without compensation.")

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Department of Energy Transfers Property to the Port.

10. When property is given to the Port, the Port's Board of Commissioners passes a resolution formally accepting the property. (*See* December 16, 2016 transcript of the Deposition of Roy Keck ("Keck Depo."), att'd to the Counsel Decl. as **Exh. 10**, p. 10)

11. In 1998, the United States Department of Energy ("DOE") transferred to the Port, for no monetary consideration, 767.13 acres of industrial property including 16 miles of railroad track. (*See* FAC, ¶¶ 33-37, and **Exh. 7** thereto) On September 30, 1998, DOE and the Port entered into an Amendment to Indenture concerning the transfer of the property. (Anderson Decl. **Exh. A**)

12. The Port and BNSF's assertion that BNSF paid for the construction of ½ of the approximately 16 miles of tracks referenced above is incorrect. The 1948 Interstate Commerce Commission ("ICC") Decision that is incorporated in the transferring Indenture provides that the Government will construct approximately 5.4 miles of track to connect to the existing government track and the Yakima branch; upon completion of the construction of the 5.4 miles, the railroads, (one of which was BNSF's predecessor), will each pay ½ of $100,000. (*See* FAC **Exh. 2,** p. "Sheet 5")) BNSF did not itself exist in 1948.

13. The ICC decision states that "the Government may terminate the agreement at any time upon 6 months' advance notice in writing to the applicants." (*See* FAC **Exh. 2,** p. "Sheet 6")

14. The Port understood when it accepted the property from DOE in 1998 that the Washington Constitution applied once the Port received it. (Keller Depo. p. 22 *ll* 11-19)

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15. The Port understood when it accepted the 16 miles of track from DOE in 1998 that it had the right to terminate BNSF and UP's free use of the Port's tracks upon six months' notice. (Keller Depo. p. 19 *ll* 4-9; p. 23 *ll* 11-17)

D. Port's Railroad Tracks.

16. In 1998, the Port entered into a Maintenance and Operation Agreement with Tri-City Railroad's ("TCRY")[1] predecessor in interest. *See BNSF Ry. Co. v. Tri-City & Olympia R. Co. LLC*, 835 F.Supp.2d 1056, 1060 (2011).

17. In May 2000, BNSF contracted to interchange cars on the Port's tracks: BNSF paid a per-car fee, which was then applied to maintenance of the Port's tracks. *Id.*

18. In September 2000, the Port, recognizing that UP was using the Port's tracks without paying consideration, directed "written notice to [UP] terminating its rights to use the Port of Benton track." *Id.* Keller testified that he thought it was a 'ploy'. The Port did not seek approval from the Surface Transportation Board to revoke UP's permit. (Keller Depo. p. 30-31)

19. Subsequent to the written termination notice, UP entered into an interchange agreement under which TCRY operates as a handling carrier for the UP on Port tracks, paying a per car fee. (*See* August 29, 2016 FAC, ¶ 40; *see also* 835 F.Supp.2d at 1060)

[1] "TCRY" is the reporting mark of the Tri-City Railroad Company, LLC. Reporting marks, officially known as 'Standard Carrier Alpha Code', are assigned by the Association of American Railroads, under the authority of the Surface Transportation Board.

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E. The Federal Lawsuit.

20. Since the Port had not terminated BNSF's permit, in 2009 BNSF determined to directly operate on the Port's tracks. *BNSF Ry. Co.,* 835 F.Supp2d at 1060.

21. A lawsuit commenced, and the Port intervened in support of BNSF's position. *Id.*

22. In the lawsuit, BNSF asserted that the dispute should not be referred to the Surface Transportation Board ("STB") and the court agreed with that position. (Counsel Decl. **Exh. 11** and **12**)

23. The *BNSF Ry. Co.* court held that the contracts connected with the 1998 DOE transfer of property to the Port, and whatever rights and obligations the Port obtained under them, are subject to Washington law, and that the contracts themselves are to be interpreted under Washington contract law. *Id.* at 1062.

24. The court confirmed that since the 1998 transfer "the Port has the right to terminate BNSF and UP's rights to use the Richland Trackage upon six months' notice." *Id.* at 1060. TCRY continues to operate as a handling carrier for UP on Port tracks. As UP pays a railcar charge for its traffic on the Port's tracks, only BNSF's free use of Port property is implicated in the constitutional matter before the court.

F. The Port's Special Relationship with BNSF.

BNSF Pays No Monetary Consideration For Its Use Of Public Property.

25. The Port has never terminated BNSF's revocable permit to use the Port's tracks for free. From 2009 to present, BNSF has been using the Port's tracks without paying monetary consideration. (Port Depo. p. 7 *ll* 17-18; p. 10 *ll* 14-18; p. 14 *ll* 13-17)

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26. The Port admits that BNSF is using the Port's tracks for private purposes. (Keller Depo. p. 45 *ll* 8-13)

27. The revenue that BNSF generates using the Port's tracks is not shared with Port. (Keller Depo. p. 36 *ll* 9-11)

28. The Port has not had any discussions with BNSF as to the revenue BNSF generates using the Port's tracks. (Keller Depo. p. 36 *ll* 18-21)

29. The Port is unaware of any other governmental entity in Washington which allows BNSF to use publicly-owned tracks without payment of monetary consideration. (Keller Depo p. 34 *ll* 14-18)

30. The Port has never asked BNSF whether it would refuse to serve shippers if the Port required BNSF to pay fair market value for use of Port property. (Keller Depo. p. 25 *ll* 20-25)

The Port's Shifting justifications for BNSF's free use of Port Property

31. On August 10, 2016, the Port sent a letter ("the Letter") to the Washington Attorney General, in which the Port takes several inconsistent positions as to why it is not violating the Washington Constitution by providing free use of public property to BNSF, a private railroad company. (*See* August 10, 2016 Letter, att'd as **Exh. 9** to the FAC)

32. In the Letter, the Port asserts the "compensation" it receives is because of the "competition" between BNSF and UP. The Port did not inform the Attorney General that the Port had in fact terminated UP's permit to operate in 2000.

33. The Port asserts in the Letter that "[t]he complainant suggests that the Port can cancel the 1947 Contract through a simple notice of termination to UP and BNSF. That is not the case." The Port did not inform the Attorney General that the Port established in its federal

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lawsuit over this same issue that "the Port has the right to terminate BNSF and UP's rights to use the Richland Trackage upon six months' notice." *See* 835 F.Supp.2d at 1060. The Port further did not inform the Attorney General that it previously terminated UP's revocable permit through a "simple notice of termination" in 2000.

34. The Port asserts in the Letter that "[t]he agreements and UP and BNSF operations now fall under the jurisdiction of the Surface Transportation Board[.]" The Port failed to advise the Attorney General that the Port had already established in federal court that the contracts granting the revocable permit terminable upon six months' notice are interpreted under Washington State contract law. 835 F.Supp.2d at 1062. Indeed, the federal court specifically rejected the contention that interpretation and enforcement of the contracts fell under STB jurisdiction. (Counsel Decl. **Exh. 12**)

35. The Port in the Letter suggests its rail line should be considered a public right of way: The Port does not explain in the Letter why, if the rail line is analogous to a public right of way, certain users selected by the Port may use the property for free and without tax, yet others must pay both rent to access the property and the leasehold tax on the use of the property.

The Port Now Contends that it receives 'promotion of economic development' from BNSF.

36. The Port contends that the sole consideration it receives for BNSF's use of its tracks is the 'promotion of economic development.' (Port Depo. p. 7 *ll* 15-16; p. 10 *ll* 8)

37. The Port admits it has no methodology or other means of measurement to determine whether it in fact receives 'promotion of economic development' from BNSF, or to quantify

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the non-monetary consideration it contends it receives from BNSF. (Port Depo. p. 11 // 7-8; Keller Depo. p. 32 // 6-15)

38. The Port admits that it has neither policy nor methodology to determine how much 'promotion of economic development' is sufficient consideration in exchange for free use of Port property. (Keller Depo. p. 32 // 6-18)

39. The Port admits it has no accounting procedure to record the 'promotion of economic development' consideration it contends it receives from BNSF. (Port Depo. p. 11 // 15-18)

40. The Port admits it does not know what the difference in 'promotion of economic development' would be if the Port required BNSF to pay to use Port property, rather than allowing BNSF to use the Port's tracks for free. (Keller Depo. p. 32 // 12-21)

41. Although for other private lessees of Port property the Port determines sufficiency of consideration with reference to FMV, the Port admits that it does not consider FMV with respect to BNSF's free use of the Port's tracks. (Keller Depo. p. 21 // 2-5; 9-10)

42. Although since 2009 the Port has allowed BNSF to use its property without payment of monetary consideration, the Port's Board of Commissioners has not discussed whether there should be a policy that addresses whether or not 'promotion of economic development' by a user of Port property is sufficient consideration without payment of monetary consideration. (Keller Depo. p. 32 // 16-25) Thus, the Port has no policy on that issue. (Keller Depo. p. 33 // 1-5)

G. <u>The Port's Favoritism Towards BNSF.</u>

43. The Port was audited by the Washington Auditor's office in 2012 and in 2015. (Keller Depo p. 44-45) Yet, the Port never disclosed to the Washington Auditor's office that BNSF is

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using Port property without paying either monetary consideration or the Leasehold tax. (Keller Depo p. 45 *ll* 14-2)

44. In 2000, the Port directed that UP's permit to use the Port's tracks be terminated because UP was not paying monetary consideration. (835 F.Supp.2d at 1060) On the other hand, the Port has never directed that BNSF's rights be terminated because it was not paying monetary consideration.

45. If another private party or entity requested exemption from paying cash consideration for the use of the Port's property, and represented that it would promote economic development in exchange for free use of Port property, the Port would not allow that party or entity to use Port property without paying cash consideration. (Keller Depo. pp. 23-25)

46. The Port does not have an application process under which a private entity can request to use Port property without paying monetary consideration if it can show that its use of the property will promote economic development. (Keller Depo p. 33 *ll* 6-11)

47. The Port threatened Plaintiff Peterson that unless he dismissed this lawsuit contending that the Port's special relationship with BNSF was unconstitutional, the Port would seek over a million dollars in alleged unpaid taxes from Peterson's company, TCRY. (*See* Keller Depo., pp. 48-52) The Port later admitted that there were no unpaid taxes owing, and the threat was merely a "strategy". (Keller Depo. p. 50 *ll* 1-5)

48. The relationship the Port has with BNSF, in seeking to maintain the status quo is such that on September 1, 2016, two weeks after the lawsuit was filed, the Port's executive director, Scott Keller, sent correspondence to BNSF's representative, Chris Randall and copied the Port's attorney on the correspondence. In its privilege log, the Port contends that

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the correspondence is protected by the attorney/client privilege. (Counsel Decl. **Exh. 13**) Similarly, on September 2, 2016, Scott Keller again wrote to Chris Randall. The Port refused to produce the correspondence contending that it is protected by the work product privilege. (*Id.*) Although not stated on its privilege log, in March 2017, the Port asserted that it has a joint defense agreement with BNSF.

49. On March 16, 2017, two months after it produced documents, in response to the Taxpayers discovery requests, BNSF asserted that it has a "common interest agreement" with the Port and demanded that various documents it had produced be destroyed or returned. (Counsel Decl. **Exh. 14**) Many of the document that it requested be destroyed pre-dated the litigation by four and five months. BNSF did not disclose its "common interest agreement" with the Port when it filed its motion to intervene in this case. (*Id.*)

H. Opinions of Professor Clarence Barnes

50. Dr. Clarence Barnes, Ph.D., is a professor of economics and Dean Emeritus of the Gonzaga University School of Business Administration. (Declaration of Dr. Clarence Barnes, Ph.D. ("Barnes Decl."), ¶ 3)

51. As described by Professor Barnes, from models and analysis, it can be ascertained and quantified in a monetary fashion the effect that certain activities bring to the promotion of economic development. (Barnes Decl., ¶ 7)

52. The Port has not utilized any models or performed any analysis to ascertain and quantify whether BNSF's use of the Port's tracks, without paying compensation, promotes economic development. (Barnes Decl., ¶ 8)

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53. As a result, without an economic impact study it is speculative as to whether BNSF's use of the Port's tracks, without paying compensation, promotes economic development, as compared with BNSF using the Port's tracks while paying cash consideration for so doing. (Barnes Decl., ¶ 8)

54. BNSF, as a private company, uses the Port's tracks to generate revenue for itself. By using the Port's tracks, without paying consideration, BNSF realizes added revenues. (Barnes Decl., ¶ 9)

55. BNSF and the Port does not have an arrangement whereby they share revenues from the increased revenue BNSF generates from using the Port's tracks without paying compensation. (Barnes Decl., ¶ 10) BNSF does not compensate the Port for the wear and tear BNSF's use of the Port's tracks causes to the tracks. (Barnes Decl., ¶ 10) BNSF's use of the Port's publicly-owned property, without paying consideration and without paying for wear and tear it causes, does not fit with any economic model in which Professor Barnes is aware. (Barnes Decl., ¶ 10) Professor Barnes is unaware of any economic model in which a public entity, such as the Port, selects which private companies it will allow to use publicly-owned property without paying consideration. (Barnes Decl., ¶ 11)

56. The Port has not asked BNSF whether it would stop serving industries in the Port's district if it was required to pay consideration for the use of the Port's tracks; as described by Professor Barnes, that question must be answered before one can begin assessing whether BNSF's use of the Port's tracks without paying consideration promotes economic development, as opposed to BNSF using the Port's tracks while paying consideration for so

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doing. (Barnes Decl., ¶ 12) As noted by Professor Barnes, the following deposition testimony of the Port's executive director is instructive in that regard:

> Q: Do you know whether or not there's any governmental entity in the State of Washington that allows BNSF to use its tracks without monetary compensation?
>
> A. Not that I know of.
> Q. Is it your belief, Mr. Keller, that any place BNSF serves in the State of Washington, that it is promoting economic development?
> A. You know. I believe that.

(Barnes Decl., ¶ 12)

57. Railroads, trucking companies and delivery services, such as UPS and Fedex, all could be said to promote economic development. (Barnes Decl., ¶ 12) However, they do that without free use of publicly-owned property. (Barnes Decl., ¶ 12) If BNSF was required to pay compensation for the use of the Port's tracks, it would continue to serve the Port district and readjust the rates that it charges its customers. (Barnes Decl., ¶ 12)

I. Opinions of Norman E. Hooper, P.Eng.

58. Mr. Norman E. Hooper, P.Eng., is a professional engineer, and an expert in railroad construction, maintenance, and operations. (Declaration of Norman E. Hooper, P.Eng. ("Hooper Decl."), ¶ 3)

59. As a summary of his opinions, Mr. Hooper states:

> BNSF traffic on Port-owned railroad tracks is increasing and BNSF is using the Port's tracks without paying either a fee for use or to repair the damage its use causes since 2009, the value of the free use to BNSF, and therefore the value of the 'gift' it received from the Port, is in the range of $6,830,000.00 to $10,245,000.00. Assuming BNSF's traffic volume in 2017 is similar to that of 2016, in 2017 the value of the 'gift' will be in the range of $2,106,000.00 to $3,159,000.00. (Hooper Decl. ¶4)

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60. As described by Mr. Hooper, a public entity which owns railroad tracks generally obtains consideration for use of the tracks in one or a combination of the following forms:

- Right of access is granted to any connecting carrier for a fee; usually a car load rate set by the owner or a regulator; track is maintained by the Port or a third party
- Annual costs of Capital and Maintenance are apportioned to permitted users; generally on a car load basis; track is maintained by the Port or a third party
- Inter-switching rates are set by a Regulator or Port; and, maintenance is performed by the Port or a third party
- The track is leased to a switching railroad who maintains the track and charges on a carload basis with fees remitted to the Port
- Running rights and joint track usage are negotiated among carriers and negotiated fees are paid to the agency, generally on a carload basis, sometimes with an additional annual fee, and maintenance is the responsibility of the carriers.

(Hooper Decl., ¶ 49)

61. Significantly, public entity rail owners usually recover costs in taxes and fees for funding on-going Capital and Maintenance of the Railroad. (Hooper Decl., ¶ 50) Here, however, since 2009, the Port of Benton is acting in a manner atypical of other Port Railway owners and risks the long term condition of the Railway and unanticipated costs. (Hooper Decl., ¶ 51)

62. A significant component of the track maintenance (tie deterioration and mechanical wear, joint deterioration, rail wear and defect formation, ballast degradation, crossing maintenance, bridge maintenance) is related to total carload throughput. The more carload traffic: the higher total in the variable costs. (Hooper Decl., ¶ 52)

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63. If the present circumstances continue, with BNSF's increasing rail traffic using the Port's tracks for free, an order of magnitude value of rehabilitation would be $300k per mile for 5 miles of yard track; $400k mile on 4.5 miles of main track with modern rail and, $800k per mile if the 6.5 miles of the 90lb rail must be changed, totaling in the range of $8.5 million. (Hooper Decl., ¶ 53)

64. Prior to 2009, BNSF paid a fee for interchange and switching of $500 to $750 per car load. (Hooper Decl., ¶ 54) That fee, whether collected by the owner of a track or that owner's agent, would normally be used for the maintenance and capital investment necessary to keep a rail line in service. (*Id.*) BNSF has independently switched 13,660 carloads from 2009 to 2016. (*Id.*) This is a value or 'gift' of between $6,830,000 to $10,254,000 (*Id.*) If the BNSF volume of the traffic on the Port's track in 2017 is the same as it was in 2016 (4,212), the gift provided BNSF in 2017 will be between $2,106,000 to $3,159,000. (Hooper Decl., ¶ 55)

J. Maintenance of the Tracks

65. TCRY's lease provides that it "…agrees to take the Property in its present condition, and subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto…" (*See* Declaration of Scott Keller ("Keller Decl.") in Support of the Port's Motion for Summary Judgment **Exh. 4** ¶1.2)

66. The Indenture provides: "Grantee shall maintain the Railroad, including all structures improvements, facilities and equipment in which this instrument conveys any interest, at all times in safe and serviceable condition, to assure its efficient operation and use, provided, however, that such maintenance shall be required as to structures, improvements, facilities

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and equipment only during the useful life thereof, as determined jointly by Grantor and Grantee." (**Exh. 7** to FAC p. 4 ¶ B)

67. TCRY's Lease provides in part: "Tenant, at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear…" (Keller Decl. **Exh. 4** ¶ 8)

68. TCRY provides day to day maintenance of the track subject to reasonable wear and tear. (Anderson Decl. ¶ 6) The Port pays for capital improvements. (Anderson Decl. ¶ 7) In that regard, the Port has sent out for bid for work titled "Rail Rehab Project". (Anderson Decl. **Exh. B**) The engineer's estimate that the cost of the work will be approximately $400,000 - $450,000. (*Id.*) With respect to funding, the Port has stated "The funding is being provided by the Port of Benton along with financial assistance from the State of Washington." (Anderson Decl. **Exh. C**) Mr. Hooper has opined that this project, and other capital improvements, will be increasingly necessary to account for the increased tonnage BNSF traffic represents. (Hooper Decl. ¶45)

69. Paragraph 3 of the Amendment to the Indenture states "Grantee agrees to devote all lease payments or other sources of revenue from the Real Property and Railroad to first cover maintenance of the Railroad; provided, however, that any surplus lease payments or other sources of revenue shall be used at the discretion of Grantee." (Anderson Decl. **Exh. A**)

K. Defendants' Summary Judgment Pleadings

70. In its summary judgment pleadings, BNSF did not submit a declaration from a BNSF official stating that if BNSF was required to pay for the use of the Port's tracks, it would no longer serve the Port's area.

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71. BNSF speculates that if the Port exercises its six months' revocable permit, that UP may be able to terminate BNSF's rights to use the portion of UP's rail line that connects to the BNSF's tracks. (BNSF Brief p. 7) However, it provided no declarations to support its speculation.

72. BNSF did not submit any declarations to support its assertion that its free use of the Port's tracks promotes economic development, as opposed to BNSF paying market value to use the Port's tracks.

73. In its brief, BNSF states: "In exchange for recognizing BNSF's operating rights, the Port obtained hundreds of acres of land, many facilities, and the Tracks from the federal government." (BNSF Brief p. 2) BNSF does not cite to any authority to support its statement. BNSF's statement is incorrect. The Indenture states: "Grantor's conveyance is in consideration of the assumption by Grantee of all Grantor's maintenance obligations and its taking subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument." (**Exh. 7** to FAC p. 2)

74. In summary judgment pleadings, the Port did not submit a declaration stating that if BNSF was required to pay for the use of the Port's tracks, it would no longer serve the Port's area. Nor did it disclose the e-mails and documents in SOF 1(a)-1(g).

75. The Port contends that if TCRY abides by the Lease, then the County's taxpayers should not be burdened with any costs associated with BNSF's use of the Port's tracks. (Port's Brief p. 8) The Port's contention is incorrect. (See SOF #68)

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76. The Declaration of Nicholas Zachary, the Port submitted, does not address the issues before the Court. It appears he incorrectly assumes that if the Port requires compensation, BNSF will not provide service. Mr. Zachary's declaration does not address the facts set fort in SOF 1(a) – 1(g). Nor does he address the issues discussed by Professor Barnes. (SOF #51-57).

77. The Declaration of Dennis Kyllo, the Port submitted, does not address the issues before the Court. It appears that he incorrectly assumes that if the Port requires compensation, BNSF will not provide service. Mr. Kyllo's declaration does not address the facts set fort in SOF 1(a) – 1(g). Nor does he address the issues discussed by Professor Barnes. (SOF #51-57). Mr. Kyllo's declaration does not explain why Taxpayers should pay for the damage to the tracks caused by BNSF unit trains.

78. The Declaration of Scott Keller does not address the facts set forth in SOF 1(a) – 1(g), It appears that he incorrectly assumes that if the Port requires the payment of compensation by BNSF, it will not provide service. The declaration does not address the other Taxpayers who are parties to this action.

79. The report prepared by several authors that is attached to the Declaration of Brian Winningham is subject to a motion to strike. The report does not address the issues before the Court. Specifically, the report does not explain any difference between the 'promotion of economic development' if BNSF had to pay market value to use publicly owned property, rather than using it for free. Moreover, it does not address the issues set forth in Professor Barnes's Declaration (SOF #51-57)

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DATED this 20 day of March, 2017.

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CERTIFICATE OF SERVICE

I certify that on March 20, 2017, I served a copy of this document, via electronic service, per agreement, on the following:

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Anne K. Schroeder

Wash. Const. art. VIII, § 7:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 79090-1-I to the following counsel of record:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 10, 2019 at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK

July 10, 2019 - 11:21 AM

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