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No. 97410-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RANDOLPH PETERSON, et al.

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.

Respondents.

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**RESPONDENTS THE PORT OF BENTON AND BNSF RAILWAY  
COMPANY'S ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Petitioner Randolph Peterson (“Peterson”) does not identify a single art. VIII, §7 decision of this Court or the Court of Appeals with which the Court of Appeals’ decision purportedly conflicts.<sup>1</sup> Rather, Peterson claims the Court of Appeals erred in applying well-settled law to the specific facts of this case. In short, Peterson’s Petition for Review is nothing more than an effort to re-litigate this case on the merits. Such error correction, however, is not a ground for this Court to review a case under RAP 13.4(b). Far from resolving a conflict among decisions, Peterson is seeking to alter this Court’s art. VIII, §7 jurisprudence, arguing that “donative intent” should always be treated as an issue of fact determined by a jury. But this Court has never so held and has often decided art. VIII, §7 cases on a summary judgment record, as the Court of Appeals did here. Peterson also suggests that this case presents a legitimate issue of substantial public interest to warrant review under RAP 13.4(b)(4), but his “sky is falling” cries ring hollow. Although he expresses unsubstantiated fears that the Court of Appeals’ decision will somehow “empower” corporations to bully local governments, Peterson does not assert that BNSF engaged in such conduct and the Court of Appeals’ opinion does not speak to, much less

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<sup>1</sup> Other taxpayers intervened as Plaintiffs in the proceedings below and join in Peterson’s Petition for Review, but their complaints essentially mirror Peterson’s claims and all are represented by Peterson’s counsel. CP 932-33, 942-43.

condone, it. Nor does the Court of Appeals' opinion create a new bar that will make proving an art. VIII, §7 violation impossible. In summary, this case does not warrant this Court's review under any of the grounds in RAP 13.4(b). The Petition should be denied.

## **II. IDENTITY OF RESPONDENTS**

Respondents are the Port of Benton and BNSF Railway Company ("BNSF"), Defendants and Respondents in the proceedings below.

## **III. STATEMENT OF THE CASE**

Respondents incorporate by reference the statement of facts in the Court of Appeals' opinion, Respondents' Answer to Peterson's unsuccessful Statement of Grounds for Direct Review, and Respondents' Joint Opening Brief. *See* Appendices A, C, and E. The material facts in this case are undisputed. *See* Pet. at 1 (stating that the Court of Appeals "correctly set forth the basic outline of the facts and procedure in this case," and citing to the Court of Appeals' opinion in emphasizing the "critical facts" in support of his claims). Respondents provide this brief summary for additional context and to explain misrepresentations in Peterson's Petition.

### **A. The federal government negotiates an agreement with the Railroads to provide improved rail service to Hanford.**

In 1947, the federal government, acting through the U.S. Atomic Energy Commission (the "AEC"), and the predecessors-in-interests to BNSF and Union Pacific (together, the "Railroads") negotiated an

agreement in which the Railroads agreed to pay for the construction of rail tracks (the “Tracks”) to establish rail service to the Hanford Nuclear Reservation (“Hanford”), in exchange for the right to operate on the Tracks in the future (the “Historical Agreement”).<sup>2</sup> Op. at 1-2; CP 40-41, 57. Hanford received “[t]remendous inbound tonnages of coal, chemicals and other commodities” by rail to support its operations, and the rail service to be provided by the Railroads was essential both for security reasons and to significantly reduce operating costs. CP 39, 43, 44. The Historical Agreement provided that the Railroads “would each pay one half of \$100,000 to AEC,” which is equivalent to more than \$1 million today. *See* Op. at 2. In return, the Railroads “would be entitled to use those tracks free of rental or any other charge.” Op. at 2; CP 28, 57. As is typical in government contracts, the AEC reserved the right to terminate the Historical Agreement on six months’ notice.<sup>3</sup> Op. at 2; CP 58, 71.

The Interstate Commerce Commission (“ICC”) approved the Historical Agreement, concluding the rail connection would be in the “public interest.” CP 49, 51; *see* Op. at 2. The ICC also concluded that “when full payment has been made, [the Railroads] should thereafter be

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<sup>2</sup> The 1947 agreement was reaffirmed in subsequent agreements between the parties. Op. at 2 n.2.

<sup>3</sup> Neither the federal government nor its assignee, the Port, has ever exercised that right. *See* CP 1996.

permitted to operate over the tracks without further payments.” Op. at 2.

**B. The federal government declares land surplus, including the Tracks, and transfers it to the Port at no cost in exchange for the Port’s adherence to the Historical Agreement.**

In 1998, as the Department of Energy (“DOE”), the successor to the AEC, downsized its Hanford operations at the close of the Cold War, it transferred a number of properties to the Port of Benton through the DOE’s beneficial reuse program. CP 137. DOE declared approximately 768 acres of Hanford, with 26 facilities and 16 miles of railroad, including the Tracks, to be surplus and conveyed ownership to the Port in a quitclaim deed. CP 85, 122. At the time, the property transferred was valued at more than \$5.1 million. *Id.* Today, the property is valued at over \$50 million. Op. at 2 n.3. The quitclaim deed was subject to the terms of an Indenture. CP 1022. The Surface Transportation Board, the successor to the ICC, approved the transfer. Op. at 2; CP 1022, 1026.

The Port did not pay any money for these valuable lands and facilities. Instead, as consideration for the property transfer, the Port agreed to assume all of DOE’s contractual and legal obligations associated with the Tracks, including an express condition that the Port continue to honor the Historical Agreement “governing access to the Railroad.” Op. at 2; CP 87, 90. In the Indenture, the DOE stated that the “purpose” of the transaction was to “assist in [the Port’s] economic development activities” and “foster[]

economic development.” CP 85. The Port agreed to use the property “to create economic and employment opportunities in the community[.]” CP 86. The Port further agreed to provide DOE “continued rail access to the Hanford Site for as long as [the Port] continues to maintain and/or operate the Railroad.” *Id.* The Port agreed it “shall maintain the Railroad . . . during the useful life thereof.” CP 89. The Port could obtain a release from its obligations if it “determines that the continued ownership of the Railroad is no longer viable.” CP 90. Under the terms of the Indenture, the Port agreed that the “Railroad shall be used and maintained for [economic development] purposes . . . and if said Railroad ceases to be used or maintained for such purposes” all or part of the Railroad shall revert back to DOE, at DOE’s option. CP 92-93.

**C. Peterson’s company enters into a lease governing its use of the Tracks.**

The Port has entered into various agreements with Peterson’s business, Tri-City Railway Company (“TCRY”), regarding the Tracks. *See Op.* at 3. In 1998, the Port contracted with TCRY to provide track maintenance. CP 1390. In 2002, TCRY and the Port negotiated a lease agreement which authorized TCRY to operate on the Tracks and to use certain real and personal property including a building, maintenance equipment, and two locomotives. *Id.*; CP 143. In addition to cash rent,

TCRY agreed to continue to maintain the Tracks as part of the consideration for the lease. Op. at 3; CP 1044, 1786. Both agreements expressly provide that TCRY's rights are subject to the Historical Agreement and Indenture. Op. at 3; CP 1040, 1043. Because TCRY's use of the Tracks is governed by a lease agreement, TCRY pays rent and leasehold taxes to the Port. CP 1043, 1042.

**D. BNSF's use of the Tracks.**

In contrast, BNSF's operation on the Tracks is governed by the Historical Agreement (assigned to the Port through the Indenture), not a lease.<sup>4</sup> BNSF paid for its use of the Tracks decades ago and, under the express terms of the Historical Agreement, BNSF may now use the Tracks without further payment. CP 57. BNSF's operation on the Tracks has facilitated significant economic development in the region, as the Indenture intended. *See* CP 85-86, 92-93. The availability of rail service from two Class I carriers, which have the resources and capacity to provide interstate service, attracts businesses to the Port. CP 1023, 1148-49, 1151-52.

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<sup>4</sup> Although Peterson places much emphasis on the fact that the Port did not disclose to the State Auditor that BNSF was using the Tracks without paying a leasehold tax, it is unclear why the Port would do so because BNSF does not have a lease and thus does not have an obligation to pay leasehold taxes. The Court of Appeals thus properly rejected that argument. Op. at 8.

Although TCRY is legally obligated to maintain the Tracks, BNSF has also contributed to maintenance costs.<sup>5</sup> CP 1311-12, 1314, 1830-31.

**E. Peterson’s ongoing opposition to BNSF’s use of the Tracks.**

In 2000, BNSF contracted with TCRY to interchange railcars using the Tracks for a per-car fee. CP 1390. This contract “specifically reserved BNSF’s rights under” the Historical Agreement. CP 1390. When BNSF later realized it could operate its own cars on the Tracks “at a savings of around \$100-150 per car,” it terminated its agreement with TCRY. CP 1390-91; Op. at 3-4.

TCRY’s owner, Peterson, was angered by BNSF’s decision and “attempted to physically block BNSF’s use of the tracks” in retaliation. CP 1391; Op. at 4. BNSF then filed a lawsuit seeking declaratory and injunctive relief prohibiting TCRY from blocking BNSF’s access to the Tracks. Op. at 4. In that litigation, “TCRY concede[d] that BNSF has the right to operate directly on a portion of the Richland Trackage,” and challenged only the geographic area to which those rights extended. *BNSF Ry. Co. v. Tri-City*

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<sup>5</sup> In 2014, the Port determined that certain areas of the Tracks needed to be repaired and upgraded to accommodate increased traffic. CP 1830-31. While Union Pacific and TCRY refused to help fund Track improvements, BNSF paid the Port \$50,000, which included half the cost of realigning the Tracks and adding ballast to permit heavier unit trains to operate on the Tracks. *Id.*; CP 1787. Peterson’s assertion that “the **only** financial contribution made by [BNSF] for the tracks for seventy years of track use is a single 1947 payment of \$50,000 by their predecessors” is thus false. Pet. at 16 (emphasis in original).

*& Olympia R.R. Co. LLC*, No. CV-09-5062-EFS, 2012 WL 12951546, at \*5 (E.D. Wash. Feb. 14, 2012). The federal district court determined that the Railroads have the right to operate directly on the Tracks pursuant to the Historical Agreement, and entered a permanent injunction requiring TCRY to allow the Railroads to directly serve customers on the Tracks. *Id.*; CP 1398.

**F. Peterson files this lawsuit.**

After TCRY's lawsuit was unsuccessful (and a permanent injunction prohibited it from interfering with BNSF's operating rights to the Tracks), Peterson filed this lawsuit in the guise of a concerned taxpayer. Op. at 4; CP 7-24. He alleged (among other claims) that BNSF's operation on the Tracks violates the public gift and privileges and immunities clauses of the Washington Constitution. *Id.* BNSF intervened as a defendant.<sup>6</sup> CP 352, 402. The parties cross-moved for summary judgment. Op. at 5. The trial court granted Respondents' motions for summary judgment, denied Peterson's motion for summary judgment, and dismissed Peterson's claims

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<sup>6</sup> Peterson suggests that the fact that the Port and BNSF have a common interest agreement somehow "evidenc[es] the Port's intent to benefit BNSF." Pet. 12 n.11. But the existence of a common interest agreement in no way suggests that the Port has improper motives. And Peterson offers no additional facts or argument suggesting that it does. The Port and BNSF share a common interest in opposing Peterson's unfounded attempts to invalidate the Historical Agreement and Indenture, and have thus properly asserted common interest privilege with regard to certain materials in discovery.

with prejudice. Op. at 5; CP 2029-2033.

The Court of Appeals affirmed the trial court's decision.<sup>7</sup> Op. at 13-14. Peterson now seeks review of the Court of Appeals' dismissal of his unconstitutional public gift claim.<sup>8</sup> Pet. at 4-5.

#### IV. ARGUMENT

**A. The Court of Appeals' decision is consistent with, and involves a straightforward application of, this Court's precedent regarding public gift claims.**

The Court of Appeals properly applied this Court's precedent in *CLEAN*, *City of Tacoma*, and *King County* to find that DOE's transfer of property through the Indenture provided the Port sufficient consideration under art. VIII, §7 for taking an assignment of BNSF's operating rights granted in the Historical Agreement. The facts presented did not demonstrate any donative intent. *See* Op. at 5-11. Peterson recognizes that the Court of Appeals applied the proper analysis in evaluating his public gift claim, *see* Pet. at 8, but essentially argues that review under RAP 13.4(b)(1) is warranted based on his disagreement with the application of the proper analysis to the specific facts of the case. Aside from the fact that

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<sup>7</sup> On June 22, 2017, Peterson submitted a statement of grounds for direct review to this Court, asserting that this case presents an issue of public importance warranting review, among other grounds. Appendix B. This Court denied review and transferred the case to Division II of the Court of Appeals. Appendix G.

<sup>8</sup> Peterson does not seek review of the Court of Appeals' decision regarding his privileges and immunities claim.

he fails to identify a **single** case with which the Court of Appeals' decision purportedly conflicts, Peterson's arguments are insufficient to establish that review is warranted under RAP 13.4(b)(1).

Peterson's primary argument is that the Court of Appeals should not have resolved the issue of donative intent because it is inherently a fact question reserved for the jury. *See* Pet. 10, 11. The argument has no merit. First, none of the cases cited for the proposition that donative intent is inherently a fact issue for the jury are gift of public fund cases. *See In re Estate of Little*, 106 Wn.2d 269, 286, 721 P.2d 950 (1986) (action to determine whether deed conveying real estate to intestate was a gift, and thus subject to ancestral estate statute); *Buckerfield's Ltd. V. B.C. Goose Farm, Ltd.*, 9 Wn. App. 220, 223-24, 226, 511 P.2d 1360 (1973) (tort claim for conversion of vessel); *Miebach v. Colasurdo*, 102 Wn.2d 170, 179, 685 P.2d 1074 (1984) (action to set aside sheriff's sale on equitable grounds); *Casa del Rey v. Hart*, 110 Wn.2d 65, 69-70, 750 P.2d 261 (1988) (same). Second, numerous gift of public fund cases have been decided based on a summary judgment record. *See, e.g., King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 596, 601, 949 P.2d 1260 (1997); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 468-70, 947 P.2d 1169 (1997); *Washington Pub. Util. Districts' Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam Cty.*, 112 Wn.2d 1, 3, 9, 771 P.2d 701 (1989). Third, Peterson does not dispute

the facts material to the question of donative intent. *See* Pet. at 1-4. Instead, he disagrees only with the conclusions that the Court draws from those undisputed facts. *See* Pet. at 11-12. Peterson’s “[c]onclusions and opinions as to the significance of the facts” on which the Court of Appeals relied in ruling on his public gift claim are irrelevant, and certainly not sufficient to create a “fact question as to whether the Port had donative intent,” as Peterson suggests. *See* Pet. at 17, 18; *see Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 404 P.3d 464 (2017). The Court properly resolved that question on summary judgment on the undisputed record. *See* CR 56(c).

Peterson also argues that the Court of Appeals erred in its analysis of whether the Port’s consideration was “grossly inadequate” but, again, fails to identify a single decision of this Court with which the Court of Appeals’ analysis conflicts. *See* Pet. at 13-17. Instead, he argues that the Court erroneously determined that “fraudulent intent” or “ill motive” is a required element of gross inadequacy. Pet. at 10, 13. Peterson misrepresents the Court of Appeals’ decision on this point. The Court **did not** hold that “fraudulent intent” or “ill motive” is a required element; instead, the Court of Appeals properly applied this Court’s decisions in *King County, Miebach*, and *Binder* to conclude that gross inadequacy exists “where the

consideration is ‘so gross as to shock the conscience[.]’” *Id.* at 8-9 (internal marks omitted). The Court of Appeals stated that a finding of gross inadequacy “**may** suggest fraud or other wrongdoing,” but it in no way held that it was required. *See id.* at 9 (emphasis added). Although Peterson argues that the Court’s analysis “dramatically elevated the bar” to establish an unconstitutional public gift claim, he provides no explanation or support for this hyperbolic statement. *See Pet.* at 13. The Court of Appeals’ analysis of gross inadequacy was a logical and straightforward application of this Court’s precedent, and does not warrant this Court’s review.

It is notable that while Peterson disagrees with the Court’s analysis of gross inadequacy, he does not identify what he believes the proper analysis to be. The Court of Appeals properly noted that Peterson’s prior argument on this point—that gross inadequacy allows the Court to engage in “careful consideration of the ‘consideration’ received by the Port for the use of its tracks by BNSF”—had “no legal support” and directly contradicted this Court’s decision in *King County. Op.* at 8-9 (discussing *King Cty.*, 133 Wn.2d at 597). Peterson thus wisely abandoned that argument in his Petition. If the Court of Appeals’ analysis was truly “in conflict” with a decision of this Court, as Peterson alleges and as RAP 13.4(b)(1) requires, Peterson presumably would state in his Petition what he asserts should be the appropriate analysis. It is telling that he does not.

Grasping at straws, Peterson also argues that, even if the Court of Appeals' analysis of gross inadequacy is correct, the question of gross inadequacy is a fact question that should be reserved for the jury. Pet. at 12-13, 17. Peterson's argument on this point is nonsensical. In essence, he argues that the consideration received for the Historical Agreement and Indenture is grossly inadequate because, in their business dispute **decades** later, the Port's "thinly disguised intent was always to displace TCRY as its agent for track maintenance." *Id.* at 17. Aside from the dubious nature of this claim,<sup>9</sup> Peterson offers no authority (and Respondents are aware of none) for the incredible proposition that the Port's alleged motives in its current business dealings with TCRY are at all relevant to whether it received adequate consideration for past agreements with unrelated parties.

In short, the Court of Appeals' decision is wholly consistent with and a straightforward application of this Court's decisions regarding public gift claims. Indeed, Peterson has not identified a single decision of this Court with which the Court of Appeals' decision purportedly conflicts.

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<sup>9</sup> Although Peterson states in passing that the Port's alleged "malevolent efforts to terminate TCRY's contract with the Port is the subject of a pending federal False Claims Act case," Pet. at 17 n.15, he omits that the trial court in that case recently denied his motion for partial summary judgment, holding that "Plaintiffs have failed to establish the Port had a retaliatory intent[.]" *United States ex rel. Peterson v. Port of Benton Cty.*, No. 2:17-CV-0191-TOR, 2019 WL 1299373, at \*8 (E.D. Wash. Mar. 21, 2019).

Peterson has failed to establish that review is warranted under RAP 13.4(b)(1).

**B. The Court of Appeals’ decision does not raise an issue of substantial public interest.**

Peterson also cursorily argues that review is warranted under RAP 13.4(b)(4) because this case “involves an issue of substantial public interest.” *See* Pet. at 9. It is unclear what issue of public interest Peterson asserts is raised by this case. *See id.* To the contrary, the Court of Appeals’ decision involved a straightforward application of this Court’s precedent to the specific and complex facts of this case, and has little if any impact beyond the parties. Peterson previously filed a Statement of Grounds for Direct Review on this same basis, and this Court appropriately denied his request. Appendices B, G.

Peterson appears to fear that the Court of Appeals’ decision will “embolden private entities to demand concessions from governments for doing business with those governments,” but is unclear on what that fear is based. *See* Pet. 9. Peterson has not alleged that BNSF engaged in such conduct in this case, and the Court of Appeals’ opinion does not speak to, much less condone, such behavior. Instead, BNSF’s operating rights originate from BNSF’s historical agreements with the federal government, subject to which the Port assumed ownership of the Tracks in exchange for

millions of dollars in property, not any negotiation (demanding or otherwise) with the Port. In short, Peterson ignores that the transaction at issue is the one between DOE and the Port, not some phantom separate transaction between the Port and BNSF.

Peterson also laments that the Court of Appeals' decision "eviscerate[ed]" the public gift standard such that "literally no case can **ever** meet" it. *See* Pet. at 5 (emphasis in original). As argued above, Peterson both overstates and misstates the Court of Appeals' ruling in this case. *See* Section IV.A *supra*. Regardless, a case does not "involve an issue of substantial public interest" merely because it includes a constitutional claim and involves a railroad. Because Peterson fails to identify (much less raise a legitimate) issue of substantial public interest involved in this case, review is also not warranted under RAP 13.4(b)(4).

## V. CONCLUSION

Peterson has failed to establish that the Court of Appeals' decision conflicts with a decision of this Court or involves an issue of substantial public interest, which are the only grounds upon which he seeks review. Instead, Peterson merely disagrees with the outcome in this case and seeks to re-litigate the merits before this Court. Because this Court's review is not warranted under any of the grounds in RAP 13.4(b), the Petition should be denied.

RESPECTFULLY SUBMITTED this 9th day of August, 2019.

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## APPENDIX

App.	Description	Date Filed
A	Court of Appeals' Opinion	June 17, 2019
B	Appellants' Statement of Grounds for Direct Review	June 22, 2017
C	Respondents Port of Benton and BNSF Railway Company's Answer to the Statement of Grounds for Direct Review	July 6, 2017
D	Brief of Appellants	September 20, 2017
E	Respondents Port of Benton and BNSF Railway Company's Joint Opening Brief <sup>10</sup>	October 17, 2017 (corrected October 20, 2017)
F	Reply Brief of Appellants	December 14, 2017
G	Order Transferring Case to Division II of the Court of Appeals	April 4, 2018

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<sup>10</sup> Appendix E is the corrected version of Respondents Port of Benton and BNSF Railway Company's Joint Opening Brief, filed on October 20, 2017. This version corrected page number errors in the Table of Authorities. The substance of the brief remained unchanged.

# **APPENDIX A**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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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).<sup>1</sup> 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."<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> The property today is valued in excess of \$50 million dollars.

<sup>4</sup> 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.<sup>5</sup>

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.

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<sup>5</sup> 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.

No. 79090-1-I/14

We affirm.

  
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WE CONCUR:

  
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# **APPENDIX B**

No. 94588-8

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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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,

Appellants,

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.

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APPELLANTS' STATEMENT  
OF GROUNDS FOR DIRECT REVIEW

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A. INTRODUCTION

There is a certain irony that article VIII, § 7 of the Washington Constitution was enacted to forestall the gift or loan of public funds to the railroads, a profound political problem in the late Nineteenth Century. *City of Marysville v. State*, 101 Wn.2d 50, 53-55, 676 P.2d 989 (1984). The Framers “were deeply concerned about the effects on the public purse of granting public subsidies to commercial enterprises, primarily railroads.” *Id.* at 55. Cases arising under article VIII, § 7 rarely involve railroads. This one does. This case involves the decision of the Port of Benton County (“Port”) to allow the Burlington Northern Santa Fe Railway Company (“BNSF”) the use of public track for free, without the payment of any rental or maintenance for that track.

Pursuant to RAP 4.2(a), Randolph Peterson and other taxpayers (“Peterson”) seek direct review of the trial court’s summary dismissal of their claim that the Port violated article I, § 12 and article VIII, § 7 of the Washington Constitution by permitting BNSF to use publicly owned property without paying rent or maintenance expenses for the damages its use causes to the Port’s track.

Direct review is appropriate in this case under RAP 4.2(a) because the case involves a matter of significant public importance, addressing the authority of governmental entities to permit use of, and damage to,

publicly owned property by private entities, without payment of consideration or compensation for damages caused. RAP 4.2(a)(4).<sup>1</sup> This action is also in the nature of an action against a state officer as Peterson seeks to enjoin Port officials from their continuing constitutional violations. RAP 4.2(a)(5).

This Court's review is necessary to establish the primacy of the Washington Constitution as to decisions by local governments that elect to permit free use of public property. If the trial court's decision is permitted to stand, it will have widespread and adverse effects on the public purse, on publicly owned property, and on local governmental entities across Washington. Moreover, if the argument of the Port and BNSF that "economic development" constitutes "consideration" in analyzing a government's donative intent is accepted, article VIII, § 7 will be severely undercut.

## B. NATURE OF CASE AND DECISION

In 1998, the United States Department of Energy ("DOE") transferred 767.13 acres of industrial property in Tri-Cities, including 16 miles of railroad track, to the Port for no monetary consideration. The Port assumed responsibility for the maintenance of that land, its structures, and the track. The contracts connected with the 1998 DOE property

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<sup>1</sup> BNSF also pays no taxes, such as the leasehold tax, for this use.

transfer to the Port provided that the modern successors to the historic railroads that served the federal government's Hanford Railroad for the benefit of the Atomic Energy Commission could use the government track rent free until such time that the government terminated their free use, for any reason or none, upon six months' notice. The predecessors of BNSF and the Union Pacific ("UP") each contributed \$50,000 in 1947 to construct the line.

When the Port obtained the right to the DOE property, it did so with the knowledge that such use of the property then became fully subject to Washington constitutional imperatives. *BNSF Ry. Co. v. Tri-City & Olympia Ry. Co.*, 835 F. Supp. 2d 1056, 1062 (E.D. Wash. 2011).

Presently, BNSF uses Port property without paying rent or maintenance expenses for the damage its trains cause to the tracks. The Port has prepared a Master Plan requiring expenditure of considerable public funds to more fully maintain and upgrade the tracks.

Peterson is the principal of the Tri-City Railroad Company, LLC ("TCRY"). In 2000, the Port leased the tracks to TCRY, with the understanding that BNSF and UP would pay TCRY a fee so that it could maintain the tracks. Both BNSF and UP had such agreements with TCRY paying it fees. In effect, TCRY acted as the Port's agent for track maintenance. In 2009, BNSF ended its relationship with TCRY. BNSF

now pays no rental to the Port for the use of the track and no fee for the wear and tear its trains cause to the track, except for a promised payment of \$50,000.<sup>2</sup> UP continues to pay the fee to TCRY.

According to international railroad expert Norman Hooper, P.Eng., since 2009, BNSF has received a “gift” of free track use of as much as \$10,000,000. In 2017 alone, BNSF is anticipated to receive a “gift” in excess of \$3,000,000. Furthermore, BNSF running 21<sup>st</sup> Century trains on 70-year-old railroad track designed for World War II era trains has caused damage to the track and will require as much as \$8.5 million of repair costs in the next five years, according to the Port’s own 2017 Master Plan.

Dr. Clarence Barnes, professor of economics at Gonzaga University and Dean Emeritus of its School of Business Administration, testified that providing BNSF free use of public property under such circumstances bears no relationship to the promotion of economic development and in fact simply represents a windfall to BNSF.<sup>3</sup>

In addition to the property received from the DOE, the Port is also an owner of other significant property within its district and is the lessor in

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<sup>2</sup> The Port has not disclosed this rent-free arrangement with BNSF to the State Auditor, nor has BNSF paid leasehold taxes to the Department of Revenue.

<sup>3</sup> By way of analogy, western Washington has an increasing number of toll roads. Were the government to allow FedEx to avoid the tolls, while charging UPS and DHL normal tolls, such favoritism toward FedEx could not be said to meaningfully promote economic development. Instead, it would simply provide a windfall to one private company while disadvantaging the others.

approximately 250 leases to private parties. For lessors other than BNSF, the Port mandates a collection of fair market value for its rentals. The Port's executive director testified that under no circumstances would any private party be able to use Port property for free or at a reduced rate if that private party promised to promote economic development. The Port does not have a policy or protocol by which other tenants can seek rent-free leaseholds. Yet, the Port's executive director testified that the sole consideration it receives from BNSF for use of the track is the alleged promotion of economic development.

Peterson challenged the Port's provision of free use of public property to the BNSF. Other taxpayers intervened to object to the Port's gift of funds and property to BNSF.

In response to Peterson's constitutional challenge, the Port contended that free use of its property by BNSF promotes economic development which constitutes sufficient consideration to avoid any constitutional gift restriction. Alternatively, the Port argued that it need not receive any consideration because it is inherently entitled to determine which private entities it may allow to use its property for free. The Port further contended that it was required as a condition for accepting the property from DOE that it "honor" the contracts, presumably by not invoking the 6-month termination clause of those contracts. Finally, the

Port contended that because it obtained \$50,000 from BNSF in 2014 pursuant to a contract which expressly states that the payment is not consideration for the use of the Port's property, the 2014 contract language should be disregarded and the payment from be considered consideration, nonetheless.

The trial court denied summary judgment to Peterson, and granted summary judgment to the Port and BNSF holding, *inter alia*, that the only standard under article VIII, § 7 was legal sufficiency, and that receipt by the federal government of payment from BNSF's predecessor for a revocable permit constituted consideration to the Port for use of its property in perpetuity.

C. ISSUES PRESENTED

1. Where the Port allows BNSF to use its railroad track rent free and without paying for the impact to the track from the wear and tear occasioned by its trains' use of that track, does such use constitute a gift of public funds under article VIII, § 7 of the Washington Constitution where the BNSF made one small payment to the federal government in the 1940's for the line's construction and has since made one small payment toward the track's maintenance?

2. Does the Port's granting of a "special advantage" to BNSF available to no other Port tenant in the form of rent-free use of a rail line violate article I, § 12 of the Washington Constitution as a special privilege?

D. REASONS WHY DIRECT REVIEW SHOULD BE GRANTED

This case involves issues which affect public property owned by local governmental entities across the state of Washington. As this matter is capable of repetition in future cases, this is precisely the type of issue on which this Court grants direct review under RAP 4.2(a). Direct review by this Court is appropriate to establish the authority of local governments to permit use of publicly owned property by private entities for no or nominal consideration in violation of constitutional restrictions.

(1) Article VIII, § 7

As noted *supra*, since 1889, our Constitution has prohibited governmental entities from granting public subsidies to private commercial enterprises, primarily railroads.<sup>4</sup> An unconstitutional gift is

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<sup>4</sup> “[T]he inclusion of article 8, section 7, was a response to loans and gifts made by other states and local governments to private companies to stimulate railroad development which, in many instances, because an improvident investment leaving the governments without recourse.” *Graham v. City of Olympia, et al.*, 80 Wn.2d 672, 675, 497 P.2d 924 (1972) (internal citations omitted).

...Const. art. 8, s. 7...was and is expressly aimed at the use of public money by any private entity for private purposes. It is directed against the use of public money for political favoritism, preferment and manipulation; it is aimed at preventing or curtailing the private economic enhancements of persons and corporations by the employment of public funds for private purposes. It is designed to protect the public purse from private spending. The prohibition in the constitution of the use of public funds for private purposes... is directly aimed at particular forms of graft, corruption, favoritism and special privilege in politics and government, for it lays down an inexorable principle that anyone standing for public office who openly or tacitly promises to make any part of the public treasury available for private profit, use, manipulation or investment will be unable to keep such promises lawfully.

*Id.* at 687 (Hale, J., concurring).

present if a public entity permits a private company to use public property while paying either no cash consideration or only nominal consideration. *King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 597, 949 P.2d 1260 (1997) (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, supra*; *City of Tacoma v. Taxpayers of the City of Tacoma*, 108 Wn.2d 679, 742 P.2d 793 (1987); *CLEAN, supra*; *King County, supra*.<sup>5</sup>

These cases make clear that courts must first discern if the funds are being spent for a fundamental governmental, as opposed to proprietary, purpose. The courts must then look to whether the government had donative intent, a question of fact. Donative intent may be discerned from grossly inadequate consideration.<sup>6</sup> If there is no

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<sup>5</sup> In *each* of the cases cited above, as might be expected given the *public* importance of issues pertaining to the gifting or loaning of *public* property or funds, this Court has granted direct review.

<sup>6</sup> There was a question of fact as to donative intent here. Under the Port/BNSF analysis, for one payment in 1947, BNSF received the right to use the line rent-free and without payment of maintenance costs *forever*. Quite a deal.

donative intent, then courts examine the sufficiency of consideration for the public funds or benefit received. *CLEAN*, 130 Wn.2d at 797-98.

The Port's determination to allow BNSF to use public property for free implicates the fundamental purpose of article VIII, § 7: as feared by the Framers, without the prohibition on giving gifts of public property, funds, or credit to private companies, those private companies will be able to demand free or reduced rate use of public property in exchange for merely doing business in that locality. This significant change to Washington law will have a particularly pernicious effect in sparsely populated and rural counties, which have insufficient political clout to resist the whims of major corporations with disproportionate economic clout in such smaller communities. A policy which permits local governments to determine which private entities it believes sufficiently promote "economic development" and therefore are entitled to reduced rate or free use of public property empowers local favoritism and cronyism.

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 decision here is troubling for two significant reasons with profound ramifications for the public. First, the trial court's conclusion that *de minimis* consideration paid by a commercial entity like BNSF 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. Further, the trial court also appeared to accept the argument of the Port and BNSF that the alleged economic development benefit of free use of a public facility can be considered part of the consideration analysis under article VIII, § 7. This is an issue of first impression in Washington<sup>7</sup> with profound repercussions.<sup>8</sup> This will

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<sup>7</sup> This Court has frequently concluded that issues of first impression qualify for direct review under RAP 4.2(a). *See, e.g., In re Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011) (use of guardianship fees for advocacy activities); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city's response to a public records request was a proper claim of exemption sufficient to trigger the applicable statute of limitations); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (constitutionality of random drug testing of student athletes); *King Cty. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 14 P.3d 133 (2000) (recreational use of land in areas designated under GMA for agricultural purposes); *e.g., Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 411-12, 899 P.2d 787 (1995) (interpretation of insurance policy excluding government-owned vehicles from the definition of underinsured motor vehicles); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 846, 758 P.2d 968 (1988) (legality of exculpatory clause required of student athletes as a prerequisite to student participation in certain school-related activities); *State v. Gunwall*, 106 Wn.2d 54, 56, 720 P.2d 808 (1986) (admissibility of evidence obtained from a pen register). *See also, Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014) (court granted review under RAP

undercut the entire purpose of article VIII, § 7. This Court should address this issue.

(2) Article I, § 12

In addition to article VIII, § 7, this case implicates article I, § 12 insofar as the Port conferred a clear-cut benefit upon BNSF available to no other Port tenant, as it admitted. As this Court discussed in *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), if a government confers a special privilege or immunity as to a fundamental right on an entity without reasonable explanation, that offends article I, § 12. Exempting an entity from taxes or burdens as to property qualifies as a fundamental right. *Id.* at 813;<sup>9</sup> *see also, Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014).

There is no reasonable ground for the Port to give BNSF a leasehold tax-free in perpetuity, favoritism shown no other Port tenant. No Port policy or protocol even hints at making such a favored right

---

13.5 on whether decision on duty to defend should await insurer's discovery on policy defenses).

<sup>8</sup> As but one example of the potential ramifications of this argument, what would prevent, for example, Alaska Air Group or Delta Airlines, from demanding use of Sea-Tac Airport facilities for free from the Port of Seattle because of the ostensible economic development benefit they bring?

<sup>9</sup> This Court granted direct review in this case.

available to any other tenant. That is exactly the kind of favoritism article I, § 12 was designed to bar.

(3) Direct Review Is Appropriate under RAP 4.2(a)(4) or (5)

Direct review is merited under RAP 4.2(a)(4) as this case presents a significant issue of public importance for the reasons enumerated above. This case has a significant and permanent effect on the disposition of public property owned by every governmental entity in our state.<sup>10</sup> The case profoundly impacts the public purse.<sup>11</sup> This Court should grant direct review to determine whether the Constitution permits a government like the Port to favor a private commercial enterprise by giving it the free use of public property.

Direct review is also appropriate under RAP 4.2(a)(5). *See, e.g., Dioxin/Organochlorine Ctr. v. Dep't of Ecology (D/O Center)*, 119 Wn.2d 761, 763, 837 P.2d 1007 (1992) (suit against the director of the Department of Ecology). The Port is a subdivision of the State. *Port of*

---

<sup>10</sup> The Court has granted direct review when a public agency's authority is involved. *See, e.g., Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 913 P.2d 375 (1996) (contract dispute between county and professional football team over construction of a new football stadium); *Marino Prop. Co. v. Port Comm'rs of Port of Seattle*, 97 Wn.2d 207, 644 P.2d 1181 (1982) (Port authority to convey surplus property); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) (State authority regarding dangerous roadway).

<sup>11</sup> This Court routinely grants direct review in cases involving issues of public finance. *E.g., McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (funding of common school education in Washington); *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005) (MVET levied by Sound Transit and Seattle monorail).

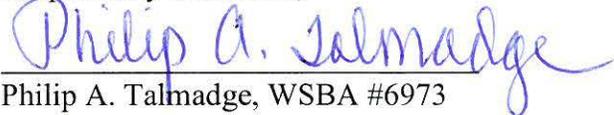
*Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 318, 324 P.2d 1099 (1958). The gravamen of this action is to enjoin the Port and its officers from continuing to violate the Constitution in their favoritism toward BNSF.

E. CONCLUSION

This is a Supreme Court case. This Court should grant direct review. RAP 4.2(a).

DATED this 22<sup>nd</sup> day of June, 2017.

Respectfully submitted,



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221 N. Wall, Suite 210  
Spokane, WA 99201  
(509) 624-8988  
Attorneys for Appellants

# APPENDIX

Wash. Const. art. I, § 12:

No 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.

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.

5  
FILED  
SUPERIOR COURT  
THURSTON COUNTY, WASH.

17 MAY 17 PM 3: 01

Linda Myhre Enlow  
Thurston County Clerk

1  **EXPEDITE**  
2  No hearing is set  
3  Hearing is set  
4 Date: May 5, 2017  
5 Time: 1:30 p.m.  
6 Judge/Calendar: James Dixon/Civil

16-2-03211-34  
ORGSJ  
Order Granting Summary Judgment  
1342902



7 SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

8 RANDOLPH PETERSON, a taxpayer resident,

9 Plaintiff,

10 v.

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

14 Defendants.

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

19 Intervenor Plaintiffs,

20 and

21 BNSF RAILWAY COMPANY, a Delaware  
22 corporation,

23 Intervenor Defendant.

**EX PARTE**

No. 16-2-03211-34

~~PROPOSED~~ ORDER REGARDING  
MOTIONS FOR SUMMARY  
JUDGMENT

24  
25 This matter came before the Court on the Plaintiffs' and Defendant Port of Benton's  
26 Motions for Summary Judgment. The Court has considered the papers and pleadings filed in the

27 ~~PROPOSED~~ ORDER REGARDING MOTIONS FOR SUMMARY  
JUDGMENT- 1

**KELLER ROHRBACK L.L.P.**

1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
TELEPHONE: (206) 623-1900  
FACSIMILE: (206) 623-3384

1 above-captioned matter, including the following:

- 2 1. Defendant Port of Benton's Motion for Summary Judgment;
- 3 2. Defendant Port of Benton's Memorandum in Support of Motion for Summary
- 4 Judgment; -
- 5 3. Declaration of Nicholas Zachary A. Ratkai filed in support of Defendant Port of
- 6 Benton's Motion for Summary Judgment;
- 7 4. Declaration of Dennis B. Kylo filed in support of Defendant Port of Benton's Motion
- 8 for Summary Judgment;
- 9 5. Declaration of Brian Winningham filed in support of Defendant Port of Benton's
- 10 Motion for Summary Judgment;
- 11 6. Declaration of Scott D. Keller filed in support of Defendant Port of Benton's Motion
- 12 for Summary Judgment;
- 13 7. Defendant-Intervenor BNSF Railway Company's Memorandum Joining the Port of
- 14 Benton's Motion for Summary Judgment;
- 15 8. Plaintiff Randolph Peterson and Intervenor Plaintiffs Jason Mount and James
- 16 Summey's Motion for Summary Judgment;
- 17 9. Plaintiffs Doggett, Hartsfield, Mount, Oukrop, Peterson, and Summey's Memorandum
- 18 in Support of Motion for Summary Judgment;
- 19 10. Plaintiffs Doggett, Hartsfield, Mount, Oukrop, Peterson, and Summey's Response to
- 20 Defendant Port of Benton's Motion for Summary Judgment;
- 21 11. Plaintiffs Doggett, Hartsfield, Mount, Oukrop, Peterson, and Summey's Response to
- 22 Defendant-Intervenor BNSF Railway Company's Joinder for Summary Judgment;
- 23
- 24
- 25
- 26

JD  
~~PROPOSED~~ ORDER REGARDING MOTIONS FOR SUMMARY  
JUDGMENT- 2

**KELLER ROHRBACK L.L.P.**

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- 1 12. Plaintiffs Doggett, Hartsfield, Mount, Oukrop, Peterson, and Summey's Combined  
2 Statement of Facts as to All Pending Summary Judgment Motions;  
3  
4 13. Declaration of Counsel regarding Motions for Summary Judgment;  
5  
6 14. Declaration of Lisa Anderson regarding Motions for Summary Judgment;  
7  
8 15. Declaration of Norman E. Hooper regarding Motions for Summary Judgment;  
9  
10 16. Declaration of Dr. Clarence Barnes regarding Motions for Summary Judgment;  
11  
12 17. Supplemental Declaration of Dr. Clarence Barnes, Ph.D. in Response to Port of Benton  
13 and BNSF Railway Company's Motion for Summary Judgment;  
14  
15 18. Defendant Port of Benton's Opposition to Plaintiffs' Motion for Summary Judgment;  
16  
17 19. Declaration of Stuart B. Dezember Re: In Opposition to Plaintiffs' Motion for  
18 Summary Judgment;  
19  
20 20. Declaration of Scott D. Keller in Support of Port of Benton's Opposition to Plaintiffs'  
21 Motion for Summary Judgment and Exhibit 4 to Declaration of Brian Winningham,  
22 incorporated by reference thereto;  
23  
24 21. Declaration of Thomas A. Cowan in Opposition to Plaintiffs' Motion for Summary  
25 Judgment;  
26  
27 22. Defendant-Intervenor BNSF Railway Company's Opposition to Plaintiffs' Motion for  
28 Summary Judgment;  
29  
30 23. Declaration of Matt Brodin in Support of Defendant-Intervenor BNSF Railway  
31 Company's Opposition to Plaintiffs' Motion for Summary Judgment;  
32  
33 24. Plaintiffs' Combined Reply Memorandum Re: Plaintiff Taxpayers' Motion for  
34 Summary Judgment;  
35  
36 25. Plaintiffs' Supplemental Declaration of Counsel Re: Motion for Summary Judgment;

JD  
~~PROPOSED~~ ORDER REGARDING MOTIONS FOR SUMMARY  
JUDGMENT- 3

**KELLER ROHRBACK L.L.P.**

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TELEPHONE: (206) 623-1900  
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1 26. Defendant Port of Benton's Reply Memorandum in Support of Motion for Summary  
2 Judgment;

3 27. Reply Declaration of Stuart B. Dezember In Support of Port of Benton's Motion for  
4 Summary Judgment;

5 28. The documents and pleadings on file with the Court;

6 29. The argument of counsel at hearing in open court on May 5, 2017;

7 30. \_\_\_\_\_;

8 31. \_\_\_\_\_;

9 32. \_\_\_\_\_;

10 33. \_\_\_\_\_.

11  
12  
13 Based on the above, the Court hereby ORDERS:

- 14
- 15 1. Plaintiffs' Motion for Summary Judgment is DENIED.
  - 16 2. Defendant Port of Benton's Motion for Summary Judgment based on preemption,  
17 and Intervenor-Defendant BNSF's joinder in the same, is DENIED;
  - 18 3. Defendant Port of Benton's Motion for Summary Judgment on Plaintiffs'  
19 Washington Constitution Article VIII, Sec. 7 (unconstitutional gift) and Article I,  
20 Sec. 12 (unconstitutional privileges and immunities) claims, and Intervenor-  
21 Defendant-BNSF's joinder in the same, is GRANTED;
  - 22 4. Defendant Port of Benton's Motion for Summary Judgment on Plaintiffs' Uniform  
23 Declaratory Judgment Act claim is GRANTED;
  - 24 5. Plaintiffs' claims are dismissed in their entirety with prejudice.
- 25  
26

1 So ORDERED this 16 day of May, 2017.



HONORABLE JAMES DIXON

2  
3 Presented by:

4  
5 PACIFICA LAW GROUP LLP

6 By

 per email authorization  
Paul J. Lawrence, WSBA No. 13557  
Gregory J. Wong, WSBA No. 39329  
Alanna E. Peterson, WSBA No. 46502

8 and

9  
10 Matthew R. Brodin (appearing *pro hac vice*)  
BRIGGS AND MORGAN, P.A.

11 Attorneys for Intervenor Defendant, BNSF  
12 Railway Company

13 KELLER ROHRBACK LLP

14 By:

  
Rob J. Crichton, WSBA #20471  
Eric R. Laliberte, WSBA #44840

16 Attorneys for Port of Benton

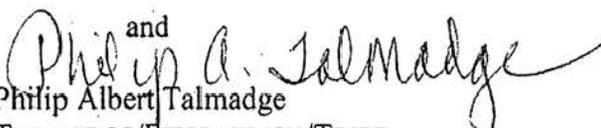
17  
18 ~~AGREED AS TO FORM:~~

Notice of Presentation Waived; Approved for Entry

19 KSB LITIGATION

20 By:

William J. Schroeder, WSBA #7942  
William C. Schroeder, WSBA #41986  
Anne K. Schroeder, WSBA #47952

23 and  
  
24 Philip Albert Talmadge  
25 TALMADGE/FITZPATRICK/TRIBE

26 Attorneys for Plaintiff

[PROPOSED] ORDER REGARDING MOTIONS FOR SUMMARY  
JUDGMENT - 5

**KELLER ROHRBACK L.L.P.**

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1 not go back in and change anything in the legal  
2 standard that was set forth that talks about  
3 consideration is legal sufficiency, nor did they  
4 identify that the dissent's interpretation of that  
5 was incorrect. That's something that the majority  
6 could have done.

7 The only case that BNSF is aware of that's  
8 interpreted, the *King County*, case is the *Friends of*  
9 *Spokane County* case. And in that case, the court --  
10 the court applied the *King County* legal standard for  
11 consideration and said that its legal sufficiency,  
12 and even a peppercorn constitutes legal sufficiency.

13 So the Court of Appeals of Washington spoke on  
14 that and has interpreted it in that fashion, and  
15 there are no cases that have interpreted it in a  
16 fashion that has been presented by the Plaintiffs  
17 today. That's all I have, Your Honor.

18 THE COURT: Thank you. The court is ready to  
19 rule.

20 The court will preface its ruling by making a  
21 comment or two that have no bearing whatsoever on the  
22 court's legal analysis or its decision this  
23 afternoon, but in the court's opinion, it bears  
24 mentioning. As people in this courtroom who are in  
25 this courtroom on a daily basis know, that includes

1 this person and the two people closest to me, this  
2 court spends the majority of virtually every day  
3 considering arguments from lawyers who are not always  
4 prepared, not always supporting their arguments by  
5 briefs, and not always recognizing nor appreciating  
6 rules of decorum that this particular court believes  
7 are extremely important, hence the plaque on the  
8 door.

9 Just as an aside, when this court, years ago, was  
10 not a judge but just a practicing lawyer in this  
11 community, this person as a lawyer felt so strongly  
12 that rules of decorum were not being recognized in  
13 this court that when this particular person became  
14 president of the local bar association, I got those  
15 plaques for every courtroom in this county, including  
16 District Courts and Municipal Courts, because it was  
17 important, at least for me, to send a message to  
18 litigants that it is important to be respectful to  
19 the court. And I apologize for getting tangential.  
20 But the point I'm trying to make is, the court  
21 understands the decision the court is going to make  
22 today is not going to make some people happy. That's  
23 the way the system works.

24 That being said, it is important to this court to  
25 tell the people in this courtroom and in this

1 community, however the term "community" is defined,  
2 not just limited to the people who are in the  
3 courtroom, that the parties to this case have been  
4 more than well represented. And the court earlier  
5 this afternoon made some sort of either verbal  
6 comment and/or nonverbal comment with respect to the  
7 amount of pleadings that the court had to review.  
8 And I did that, and as soon as I did that, it  
9 occurred to me that that might be taken the wrong  
10 way; that the court had some sort of complaint that  
11 it had to work too hard because it has so many briefs  
12 to review. Just the opposite.

13 The court appreciates good lawyering, and the  
14 parties in this case have been more than well  
15 represented. I don't say that to pander to the  
16 lawyers, because I don't know these guys. I don't  
17 think they have ever appeared in front of me. So I  
18 don't gain anything by saying that. But again, it is  
19 just so impressive to me to have good quality lawyers  
20 in this courtroom. I appreciate it.

21 The matter comes before the court on partial  
22 summary judgment motion by the Plaintiff and on  
23 summary judgment motion by the Port joined in part,  
24 at least, by Burlington Northern Railway. The  
25 Plaintiff's motion is based on two issues: First,

1           whether BNSF's use of railroad tracks violates state  
2           constitutional prohibition of gifts on public  
3           property under Article VIII, Section 7; and secondly,  
4           whether a grant of special advantage by the Port to  
5           BNSF violates the state constitutional privileges and  
6           immunities clause in Article I, Section 12.

7           The Port moves for summary judgment alleging,  
8           first, that the claim under the Uniform Declaratory  
9           Judgment Act fails because there's a standing issue,  
10          but that issue has been abandoned. The Port claims  
11          that the public gift claim alleged by the Plaintiff  
12          fails as a matter of law, that the privileges and  
13          immunities claim fails as a matter of law, and in the  
14          alternative, that all of Mr. Peterson's claims are  
15          preempted by federal law. BNSF joins the motion,  
16          presents its own argument, except with respect to the  
17          issue regarding whether the Uniform Declaratory  
18          Judgment Act claim fails as a matter of law.

19          First with respect to federal preemption, the Port  
20          and BNSF, more particularly BNSF, assert that  
21          Congress provided the Surface Transportation Board  
22          exclusive jurisdiction over construction,  
23          acquisition, operation, abandonment, or  
24          discontinuance of spur, industrial team switching for  
25          side tracks or facilities, even if the tracks are

1 located or intended to be located entirely in one  
2 state. That is 49 United States Code 1051(b).

3 There are several federal decisions, a handful of  
4 them cited verbally today by Mr. Schroeder, including  
5 *Reading* and *Yolo*, that stand for the proposition and  
6 the holding that contract processes are within state  
7 jurisdiction. In the instant case, this court finds  
8 that the issue, at least in part, is the  
9 interpretation of contract rights and  
10 responsibilities. Accordingly, this court rules that  
11 federal preemption does not preclude this court from  
12 exercising its jurisdiction.

13 With regard to the gift of public funds argument,  
14 State Constitution Article VIII, Section 7, that  
15 article provides in part, "No county, city, town ...  
16 shall give any money, or property ... to any ...  
17 company or corporation ..."

18 One of the recognized principles behind the  
19 enactment of that article was that the framers of the  
20 Constitution intended to prevent the harmful effects  
21 on the public purse of granting public subsidies to  
22 private commercial enterprises, primarily railroads.  
23 The court is citing *City of Tacoma vs. Taxpayers of*  
24 *City of Tacoma*, 108 Wn. 2d 679, a 1987 case.

25 As it relates to this constitutional provision,

1 the court grants summary judgment to the Port and to  
2 BNSF. In considering whether there has been a gift  
3 of state funds, the court must conduct a two-prong  
4 analysis:

5 First, are the funds being expended to carry out a  
6 fundamental governmental purpose. If yes, then there  
7 is no gift. If no, number two, the court must  
8 determine whether any consideration was received by  
9 the public for that expenditure and whether there  
10 was donative intent, citing *CLEAN vs. State*,  
11 130 Wn. 2d 782, 1996.

12 Here, in this case, the court finds that funds  
13 were expended, that the railway services of BNSF are  
14 not a fundamental government service, and so the  
15 court considers donative intent and consideration.  
16 Mr. Peterson argues donative intent. The Port  
17 replies that the Port agreed to the indenture, and it  
18 received, in return, approximately 25, \$26 million in  
19 today's dollars in consideration, including the  
20 obligation to allow BNSF its historic rights to  
21 operate on the tracks it built.

22 The court finds that consideration did and does  
23 exist. In assessing consideration, courts do not  
24 inquire into the adequacy of the consideration;  
25 rather, the court must employ a legal sufficiency

1 test. The court is citing *King County vs. Taxpayers*  
2 *of King County*, 133 Wn. 2d 584, a 1997 case. Here  
3 BNSF paid the Atomic Energy Commission to build the  
4 tracks in exchange for operating rights at no further  
5 expense. This court finds that this constitutes  
6 legally sufficient consideration. So the court  
7 grants summary judgment to the Port and BNSF on the  
8 cause of action as it relates to the gift of public  
9 funds.

10 The parties argue cross-motions for summary  
11 judgment on the privileges and immunities clause.  
12 Article I, Section 12, of the State Constitution  
13 provides that,

14 "No law shall be passed granting to any ...  
15 corporation ... privileges or immunities which upon  
16 the same terms shall not belong to all."

17 In this case the court grants summary judgment to  
18 the Port and to BNSF. The court finds that  
19 Article I, Section 12, involves the passage of a law.  
20 The clause does not address equal treatment when a  
21 law is passed. In this case the challenge is to  
22 contracts, not the passing or enactment of a law. So  
23 the court finds that Article I, Section 12, does not  
24 apply, grants summary judgment to the Port and BNSF  
25 on that issue.

1           With respect to the Uniform Declaratory Judgment  
2 Act claim wherein Mr. Peterson asks this court to  
3 declare that the railway at issue is a public  
4 right-of-way because the Port has violated the State  
5 Constitution, as I have just ruled, the Plaintiff's  
6 claims regarding the Port's constitutional violations  
7 fail as a matter of law; therefore, Plaintiff's UDJA  
8 claim fails, as well.

9           In summary, Plaintiff's motions for summary  
10 judgment are denied; the Port's motion for summary  
11 judgment is granted. As to the motions to dismiss  
12 the causes of action for gift of public funds and  
13 privileges and immunities, the declaratory judgment  
14 action asking for a declaration or a holding that the  
15 railroad is a public right-of-way is dismissed. It  
16 is based on faulty constitutional premises. And  
17 finally, the court denies the motion for summary  
18 judgment based on federal preemption.

19           That is the ruling of the court. The court will  
20 require the parties to prepare an order reflecting  
21 the court's ruling. The parties can do that today if  
22 they wish; the parties can do that at a later time if  
23 they wish. If the parties do not agree with respect  
24 to the language to be included in a proposed order,  
25 the parties may note this matter for presentation.

1 In the alternative, if the parties agree with respect  
2 to language in a proposed order, they may draft an  
3 order, sign it, after which the court will sign an  
4 order ex parte.

5 Thank you. The court is in recess.

6  
7 (Conclusion of the May 5, 2017, Proceedings.)  
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24  
25

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Statement of Grounds for Direct Review* in Supreme Court Cause No. 94588-8 to the following parties:

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William J. Schroeder  
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Thomas A. Cowan  
David Billetdeaux  
Cowan Moore Billetdeaux  
3250 Port of Benton Blvd., Suite F  
Richland, WA 99354-2160

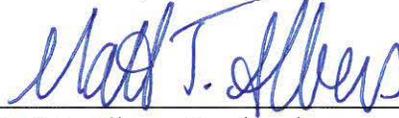
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Seattle, WA 98101-3404

Original e-filed with:  
Supreme Court  
Clerk's Office  
415 12<sup>th</sup> Avenue SW  
Olympia, WA 98504

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: June 22, 2017 at Seattle, Washington.



---

Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

# TALMADGE/FITZPATRICK/TRIBE

June 22, 2017 - 10:48 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94588-8  
**Appellate Court Case Title:** Randolph Peterson v. State of Washington, Department of Revenue, et al.  
**Superior Court Case Number:** 16-2-03211-4

### The following documents have been uploaded:

- 945888\_State\_of\_Grounds\_for\_Direct\_Rvw\_20170622104519SC179368\_9696.pdf  
This File Contains:  
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### Comments:

Statement of Grounds for Direct Review

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# **APPENDIX C**

No. 94588-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RANDOLPH PETERSON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.

Respondents.

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**THE PORT OF BENTON AND BNSF RAILWAY COMPANY'S  
ANSWER TO THE STATEMENT OF GROUNDS FOR DIRECT  
REVIEW**

---

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## **I. INTRODUCTION AND RELIEF REQUESTED**

Plaintiff Randolph Peterson's ("Peterson") request for direct review should be denied. Peterson's appeal does not raise issues of broad public importance nor involve an action against a state officer, the only two grounds asserted for direct review. Instead, Peterson's constitutional claims turn on the application of well-settled law to a unique factual record. Moreover, the trial court's holding has little impact beyond the parties themselves because fundamentally this is a competitive dispute between two railroads based on one-off historical circumstances and agreements. Simply because Peterson's claim involves an allegation of an unlawful gift of public funds involving a railroad does not make the case one of broad public import.

Peterson's assertion that this case involves an action against a state officer is puzzling, as no state officers are involved, much less named as parties, in this dispute. Accordingly, the Port of Benton (the "Port") and BNSF Railway Company ("BNSF") respectfully request that this Court decline to accept direct review.

## **II. NATURE OF THE CASE AND DECISION BELOW**

This appeal arises from Peterson's dissatisfaction with the circumstances under which BNSF operates on certain railroad tracks (the "Tracks") owned by the Port. BNSF's right to operate on the Tracks is

governed by historical agreements with the federal government. The Port assumed ownership of the Tracks under the express condition that it honor those agreements. Peterson's company, Tri City Railroad Company, LLC ("TCRY"), competes with BNSF and operates on the Tracks pursuant to a lease with the Port, for which it pays rent and leasehold taxes. Dissatisfied that BNSF and TCRY have different rights and obligations with regard to the Tracks, Peterson brought this lawsuit alleging (among other claims) that BNSF's operation on the Tracks violated the public gift and privileges and immunities clauses of the Washington Constitution.

In 1947, the U.S. Atomic Energy Commission (the "AEC") entered into an agreement with the predecessors to BNSF and Union Pacific Railroad ("Union Pacific") (together, the "Railroads") to build tracks and establish service to the Hanford Nuclear Reservation (the "Hanford site"). The sole purpose of constructing the Tracks and entering into the operating agreement was to ensure that the Hanford site had direct access to multiple Class I railroads. Class I service was necessary to move the hazardous and oversized shipments originating from and terminating at the Hanford site, which is a (now mostly decommissioned) nuclear production complex.

At the time the 1947 Agreement was signed, the AEC was the only customer on the Tracks. Accordingly, the Railroads sought an exemption

from the public convenience and necessity certification required for common carriers by the Interstate Commerce Commission (the “ICC”), the entity which regulated interstate commerce and was the predecessor to the Surface Transportation Board (“STB”). The ICC denied the exemption on the basis that common carrier services would serve businesses located in Richland now or in the future.

The ICC required the Railroads to pay the AEC half the cost of constructing the Tracks. The ICC determined that “when full payment has been made, [the Railroads] should thereafter be permitted to operate over the line without further payments.” The parties then modified the 1947 agreement to reflect that ruling. The revised agreement is attached as Appendix A.

In 1961, the AEC entered into another agreement with the Railroads. The 1961 agreement reaffirmed the 1947 agreement and granted the Railroads the right to operate over and to construct additional spurs and tracks. In 1979, the federal government entered into an additional agreement with the Railroads to convert the 1961 agreement into a permit. The 1979 agreement left the prior historical agreements in full force and effect.

In 1998, the federal government, through the AEC’s successor, the Department of Energy (“DOE”), conveyed ownership of approximately

768 acres, including the Tracks, to the Port through an Indenture. In exchange, the Port agreed to assume all of DOE's contractual and legal obligations associated with the Tracks, including an express condition that the Port continue to honor the historical agreements with the Railroads. The Indenture is attached as Appendix B.

Consistent with the Indenture, the Port has since permitted BNSF to use the Tracks without further payment. BNSF's operation on the Tracks is governed by the historical agreements, assigned to the Port through the Indenture, not a lease. Thus, BNSF does not pay rent or leasehold taxes to the Port.

BNSF has also compensated the Port for maintenance of the Tracks. In 2014, the Port determined that certain areas of the Tracks needed to be repaired and upgraded to accommodate increased traffic. BNSF paid the Port \$50,000, which included half the cost of realigning the Tracks and adding ballast to permit heavier unit trains to operate on the Tracks. Both Union Pacific and TCRY refused to help fund those improvements.

Peterson's company, TCRY, also operates on the Tracks pursuant to a lease with the Port.<sup>1</sup> The lease agreement prohibits TCRY from

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<sup>1</sup> TCRY's lease includes not only the right to operate on the Tracks, but also the right to use certain real and personal property including a building, maintenance equipment, and two locomotives.

taking any action that would “amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier[.]” Because TCRY’s use is governed by a lease agreement, TCRY pays rent and leasehold taxes to the Port.

Peterson has for some time opposed BNSF’s operation on the Tracks. In 2009, TCRY physically blocked BNSF from entering the Tracks and serving its customers. BNSF filed a lawsuit seeking declaratory and injunctive relief prohibiting TCRY from blocking BNSF’s access to the Tracks. The court determined that BNSF and Union Pacific have the right to operate directly on the Tracks pursuant to the historical agreements, and entered a permanent injunction requiring TCRY to allow BNSF and Union Pacific to directly serve customers on the Tracks. *BNSF Ry. Co. v. Tri-City & Olympia R. Co. LLC*, 835 F. Supp. 2d 1056, 1066 (E.D. Wash. 2011).

To avoid breaching TCRY’s lease and the permanent injunction, Peterson—posing as a concerned taxpayer—initiated this lawsuit in superior court. Peterson asserted various claims against the Department of Revenue and the Port, including public gift and privileges and immunities claims under the Washington Constitution. BNSF and Union Pacific intervened as defendants. Other taxpayers intervened as plaintiffs, but

their complaints essentially mirror Peterson's claims and all are represented by Peterson's counsel.

The parties filed cross-motions for summary judgment. In addition to moving for summary judgment on Plaintiffs' claims, the Port (joined by BNSF) also argued that Peterson's claims are preempted by the Interstate Commerce Commission Termination Act, which vested the STB with exclusive authority over a railroad's operation, discontinuance, and abandonment of tracks.

The superior court denied Plaintiffs' motion for summary judgment, granted summary judgment to the Port and BNSF on Plaintiffs' constitutional and Uniform Declaratory Judgment Act claims, and dismissed Plaintiffs' claims with prejudice. The superior court denied the Port and BNSF's motion for summary judgment based on preemption. Peterson now seeks direct review of the trial court's order.<sup>2</sup>

### **III. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW**

**A. Unconstitutional Gift Claim.** Article VIII, Section 7 of the Washington Constitution prohibits a public entity from transferring property to a private entity with donative intent and without consideration. BNSF paid half the cost of constructing the Tracks and the Port received

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<sup>2</sup> BNSF filed a Notice of Cross Appeal on its preemption claim to preserve the issue should this Court accept direct review.

land valued at over \$5 million in exchange for its promise to honor BNSF's historical operating rights. Did the trial court err in granting summary judgment to the Port and BNSF on Peterson's unconstitutional gift claim?

**B. Privileges and Immunities Claim.** Article I, Section 12 of the Washington Constitution prohibits the passage of "laws" which unequally grant privileges and immunities, which are defined as fundamental rights of state citizenship, to citizens. Peterson does not identify a "law" upon which his privileges and immunities claim is based and alleges only that the Port treats BNSF differently than other private companies. Did the trial court err in granting summary judgment to the Port and BNSF on Peterson's privileges and immunities claim?

#### **IV. ANSWER TO GROUNDS FOR DIRECT REVIEW**

A party may obtain direct review of a superior court decision "only" if it establishes one of the six grounds listed in RAP 4.2(a). Peterson argues that direct review is warranted for two reasons: (1) this case involves an issue of broad public import, and (2) it involves an action against a state officer. But Peterson fails to demonstrate why this fact-specific dispute involving settled issues of constitutional law is of broad public import such that it requires prompt and ultimate determination by this Court. And no state officers are involved, much less named as parties,

in this dispute. Because Peterson has failed to establish any ground for direct review, his request should be denied.

**A. Peterson’s Claims Do Not Raise Legal Issues of Broad Public Import.**

Peterson argues that this Court should accept direct review of this case because it presents issues of broad public import. But Peterson’s constitutional claims turn on the straightforward application of existing authority to a unique factual record, and have little impact beyond the parties themselves. This dispute does not warrant this Court’s review.

The parties largely agree on the legal standards applicable to an unconstitutional public gift claim: donative intent and lack of consideration. Statement of Grounds at 10; *see King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 597, 949 P.2d 1260 (1997). Peterson, however, claims error in the application of the legal standards to the facts at issue. But Peterson’s argument relies on a significant misreading of the case’s application of the legal standards.

Specifically, Peterson alleges that BNSF has paid inadequate consideration for the right to operate on the Tracks. This Court has stated, however: “In assessing consideration, courts do not inquire into the adequacy of consideration, but employ a legal sufficiency test.” *King Cty.*, 133 Wn.2d at 597. And Peterson conveniently ignores both the

consideration paid by BNSF for those operating rights (half the cost of constructing the Tracks) and the consideration received by the Port in exchange for continuing to honor BNSF's operating authority (ownership of the Tracks and property worth over \$5 million). These benefits are more than enough to withstand scrutiny as "[e]ven a peppercorn" is legally sufficient consideration under the constitution. *Friends of N. Spokane Cty. Parks v. Spokane Cty.*, 184 Wn. App. 105, 134, 336 P.3d 632 (2014) (discussing *King Cty.*). The superior court applying this well-established legal test properly held that there was legally sufficient consideration.

Peterson alternatively argues that BNSF's operating rights, as provided by the historical agreements, are "inequitable." But "[l]egal sufficiency is concerned not with comparative value but with that which will support a promise." *King Cty.* 133 Wn.2d at 597 (quoting *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P.2d 314 (1967)). Peterson thus seeks to have this Court overturn well-settled law and invites the Court "to engage in an in-depth analysis of the adequacy of consideration" even though "such an analysis interferes unduly with governmental power to contract and would establish a 'burdensome precedent' of judicial interference with government decisionmaking." *Id.*

Peterson also suggests that the appeal raises an issue of first impression: whether economic development is appropriate consideration.

Statement of Grounds at 10-11. Putting aside that there is no basis for thinking that economic development is not an appropriate governmental consideration, the evidence from the Port demonstrated that the Port received over \$5 million worth of property from the federal government in exchange for, *inter alia*, honoring BNSF's historic rights. Indeed, the superior court did not reach the issue of whether to consider economic development when determining consideration, and did not mention economic development in its oral opinion at all. *Id.*, App'x., Oral Opinion of the Court, pp. 102-03. The trial court found more than adequate consideration otherwise.

Finally, Peterson argues that the superior court's decision will empower private companies to "demand free or reduced rate use of public property in exchange for merely doing business in the locality." *Id.* at 9. But there is no such arrangement between the Port and BNSF, and Peterson does not even allege that BNSF made such demands. Instead, BNSF's operating rights originate from BNSF's historical agreements with the federal government, which the Port assumed when it was given ownership of the Tracks and surrounding property by the federal government. The superior court's decision has no impact beyond the specific (and unique) factual scenario before the court.

Peterson's privileges and immunities claim can likewise be

resolved by existing authority. The superior court properly rejected Peterson's privileges and immunities claim because he did not allege that this dispute implicated the passage of a "law," as the plain language of the privileges and immunities clause requires. *Id.*, App'x, Oral Opinion of the Court at 103; *see* Const. art. I, § 12 (prohibiting "law[s] . . . granting to any citizen, class of citizens, or corporation . . . privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.").

The superior court's ruling is also supported by the fact that Peterson failed to allege that this dispute implicates a privilege or immunity within the meaning of the Washington Constitution. A privilege or immunity is not merely favoritism, as Peterson suggests, but is instead a term of art which "pertain[s] alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 103, 178 P.3d 960 (2008) (internal citation omitted). Although Peterson now argues that "[e]xempting an entity from taxes or burdens as to property qualifies as a fundamental right," the authority he cites does not support that proposition. *See Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004) (stating that "privileges and immunities" includes "the right to be exempt . . . from taxes or burdens

which the property or persons of citizens of some other state are exempt from.”); *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 779, 317 P.3d 1009 (2014) (rejecting an interpretation of the privileges and immunities clause which would require courts to “second guess the distinctions drawn by the legislature,” including for property tax exemptions).

Accordingly, the issues in the case are limited to the straightforward application of settled authority, and hardly raise “fundamental and urgent issue[s] of broad public import” requiring “prompt and ultimate determination” by this Court. *See* RAP 4.2(a)(4).

**B. This Case Does Not Involve an Action Against a State Officer.**

Peterson also curiously argues that direct review is warranted under RAP 4.2(a)(5), which provides for direct review of cases involving “[a]n action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus[.]” RAP 4.2(a)(5) . Specifically, Peterson argues that RAP 4.2(a)(5) applies because through this action he seeks to “enjoin the Port and its officers.” Statement of Grounds at 13. But there are no state officers involved, much less named as defendants, in this action. Moreover, under Peterson’s logic any action seeking injunctive relief against a local government entity would be eligible for

direct review before this Court, a proposition not supported by any case law and which is not what the Rules of Appellate Procedure intended. Accordingly, there is no basis for direct review under RAP 4.2(a)(5) . *Cf. Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn.2d 761, 763–64, 837 P.2d 1007 (1992) (granting direct review under RAP 4.2(a)(5) where the central issue is “whether the Superior Court for Thurston County has jurisdiction to adjudicate claims against . . . and the Director of that department”); *Luther v. Ray*, 91 Wn.2d 566, 567, 588 P.2d 1188 (1979) (accepting review under RAP 4.2(a)(5) where the governor appealed an injunction).

## V. CONCLUSION

Peterson has failed to establish any of the six grounds required to obtain direct review of the superior court’s sound decision. This case turns on detailed facts and well-settled law, and it impacts the parties alone. It does not involve an action against a state officer. This case therefore lacks any of the grounds that might warrant this Court’s review.

For all these reasons, Peterson's request for direct review should be denied.

RESPECTFULLY SUBMITTED this 6th day of July, 2017.

PACIFICA LAW GROUP LLP

KELLER ROHRBACK LLP

By: s/ Paul J. Lawrence

Paul J. Lawrence, WSBA No. 13557  
Gregory J. Wong, WSBA No. 39329  
Alanna E. Peterson, WSBA No. 46502

By: s/ Rob J. Crichton

Rob J. Crichton, WSBA No. 20471  
Eric R. Laliberte, WSBA No. 44840

Counsel for the Port of Benton and  
BNSF Railway Company

Counsel for the Port of Benton

# APPENDIX A

OPTIONAL FORM NO. 33

U.S. GOVERNMENT PRINTING OFFICE: 1964 O - 350-001

(NPRyGo. COPY)

Supplemental Agreement No. 1

Contract No. AT-45-1-Gen-21

Modified to read as follows:

ARTICLE X  
ATOMIC ENERGY COMMISSION

This article shall be the same as will be between certain...

The Commission of the Atomic Energy Commission...

Statement attesting the approval of the Commission, said that this  
THIS CONTRACT, entered into this 7<sup>th</sup> day of December 1948,  
by and between the UNITED STATES OF AMERICA (hereinafter called the "Government"),  
acting by and through the UNITED STATES ATOMIC ENERGY COMMISSION, created by  
Public Law 585, 79th Congress, approved August 1, 1946, (hereinafter called the  
"Commission"), NORTHERN PACIFIC RAILWAY COMPANY, a Wisconsin Corporation, (here-  
inafter called "Pacific Company"), and OREGON-WASHINGTON RAILROAD & NAVIGATION  
COMPANY, an Oregon Corporation, and its Lessee, UNION PACIFIC RAILROAD COMPANY,  
a Utah Corporation (hereinafter collectively called the "Union Company"). Said  
railroad companies are also hereinafter collectively referred to as "Railroads".

WITNESSETH THAT:

WHEREAS, a certain contract was entered into between the parties  
hereto on November 6, 1947, designated as contract No. AT-45-1-Gen-21; and

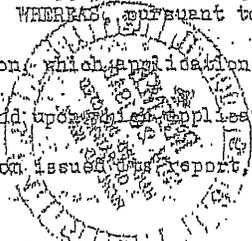
WHEREAS, by Article IX of said contract No. AT-45-1-Gen-21, the same  
was conditioned upon approval, if required, by the Interstate Commerce Commission;  
and

WHEREAS, pursuant to application duly made to the Interstate Commerce  
Commission, which application was officially designated as Finance Docket No.  
15925, and upon which application, and after hearing, the Interstate Commerce  
Commission issued its report, order, and certificate dated September 28, 1949;  
and

WHEREAS, pursuant to said report and order it is necessary to modify  
said contract No. AT-45-1-Gen-21 in order to comply with the decision and order  
of the Interstate Commerce Commission;

NOW, THEREFORE, it is mutually agreed;

Section 1. Article X of contract No. AT-45-1-Gen-21 is amended and



modified to read as follows:

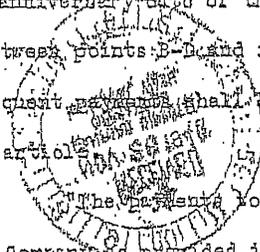
"ARTICLE I"

"Upon completion of the line of railway between points B-C the Commission shall furnish to each of the Railroads a detailed statement showing the cost of construction of said line of railway B-C, including the right of way and bridge.

"As rental for the right to use the line of railway between points B-C, the Pacific Company and the Union Company, each for itself, agrees to pay annually for twenty-five (25) years, one-twenty-fifth (1/25) of one-half (1/2) of the initial actual cost of construction of said line of railway between points B-C, without interest.

"Unless otherwise directed by the Commission, the payments to be made by the Pacific Company and the Union Company as provided in this article shall be paid to the Electric Company as prime contractor of the Commission or to such other contractor as the Commission may designate, for application in reduction of cost of work under the terms of said prime contract or other contract. The Pacific Company and Union Company shall make their first annual payments on the first anniversary date of the final completion of the line of railway between points B-C and interchange tracks and wye tracks, and subsequent payments shall be made annually thereafter as provided in this article.

"The payments to be made by the Pacific Company and Union Company as provided in this article shall be in lieu of all other charges for use by them or either of them during the term of this agreement of said line B-C. After all said annual payments to be made by the Pacific Company and Union Company have been made, the Pacific Company and Union Company shall continue to have the right to operate over the trackage without further payments."



Section 2. Article XV of contract No. AT-45-1-Gen-21 is amended and modified to read, as follows:

"ARTICLE XV"  
"Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Railroads will immediately give notice thereof to the Commission. Such notice shall include all relevant information with respect to such dispute."

"The Commission may terminate this agreement at any time on six months' notice in writing being given by the Commission to the Railroads. If the Commission exercises said right of termination the Railroads, and each of them, thereupon shall be relieved from any and all liability for annual payments provided for in Article X from and after the effective date of termination. In the event the effective date of termination is not the anniversary date on which an annual payment is payable, rental shall be pro rated on a per diem basis, and shall be paid for the portion of the year during which this agreement has been in effect."

"If either the Pacific Company or Union Company shall fail to perform any of its obligations under this agreement, the Commission may terminate this agreement as to the railroad so defaulting by giving to such railroad six months' written notice of intention so to do; provided, that if during such six-month period the defaulting railroad corrects said default, then this agreement shall not terminate because of such default. A default by either railroad shall not be cause for termination of this agreement by the Commission as to the other railroad. The termination of this agreement because of default by one of the railroads shall not relieve the defaulting company from its obligation to make all annual payments as required by Article X hereof."

"If the Commission terminates the Hanford Project, or suspends operation thereof for an indefinite period which continues for one

REGISTRATION OF DOCUMENTS

year, the Railroads may terminate this agreement by giving the Commission six (6) months notice in writing, and upon giving of such notice to the Commission, the Railroads shall be relieved from any and all annual payments provided for in Article X from and after the date of receipt by the Commission of such notice. If the Commission suspends operation of the Project for a fixed or determinable period of time, this agreement shall remain in effect, but the obligation of the Railroads to pay rental under Article X shall be suspended for the period during which the operations are suspended.

"The financial liabilities assumed hereunder by the Commission shall be conditional upon the availability of funds for payment of any claims which may arise."

Section 3. Except as herein specifically modified and amended, said contract No. AT-45-1-Gen-21 remains and continues in full force and effect.

IN WITNESS WHEREOF, the parties have executed this contract as of the day and year first above written.

WITNESSES:

UNITED STATES ATOMIC ENERGY COMMISSION

\_\_\_\_\_  
\_\_\_\_\_  
*H. J. Fickett*  
\_\_\_\_\_  
*Thomas J. ...*  
\_\_\_\_\_  
*C. W. Wentz*

By *David F. Shaw*  
Deputy Manager, ~~REGIONS OPERATIONS~~ Operations  
Hanford Operations Office  
NORTHERN PACIFIC RAILWAY COMPANY

By *[Signature]*  
President

OREGON-WASHINGTON RAILROAD & NAVIGATION  
COMPANY  
UNION PACIFIC RAILROAD COMPANY

By *[Signature]*  
President

# APPENDIX B

INDENTURE

STATE OF WASHINGTON §
COUNTY OF BENTON §

THIS INDENTURE is effective the 1st day of October 1998, between the UNITED STATES OF AMERICA, acting by and through the U.S. DEPARTMENT OF ENERGY, (the "Grantor") and the PORT OF BENTON, acting through its Board of Commissioners, (the "Grantee") (collectively, the "Parties").

WITNESSETH:

WHEREAS, Grantor has owned and maintained certain real property and improvements thereto in or proximate to Richland, Washington known as the Hanford 1100 Area (the "Real Property") and the Hanford Rail Line, Southern Connection (the "Railroad") and certain personal property appurtenant to said real property ("Personal Property"); and

WHEREAS, Grantor has determined that it is in the best interest of the UNITED STATES OF AMERICA to convey said Real Property and Railroad to Grantee for the purpose of fostering economic development; and

WHEREAS, Grantor has the authority to sell, lease, grant, and dispose of said Real Property, Railroad, and Personal Property pursuant to the Atomic Energy Act of 1954, as amended, specifically Section 161(g) (42 U.S. Code § 2201(g)); and

WHEREAS, Grantor may need continued rail access to the Hanford Nuclear Reservation (the "Hanford Site") for so long as Grantor conducts operations at said site; and

WHEREAS, Grantee agrees to use said Real Property and Railroad to create economic and employment opportunities in the community served by the PORT OF BENTON; and

WHEREAS, Grantee agrees to provide Grantor continued rail access to the Hanford Site for as long as Grantee continues to maintain and/or operate the Railroad.

NOW THEREFORE, for the following consideration, the Parties agree as follows:

I DESCRIPTION OF PROPERTY AND CONVEYANCE

- A. Grantor owns and maintains Real Property and improvements thereto having an area of approximately 768 acres and containing 26 buildings, improved parking and other support areas, and grassy swales, which is described in Attachment A. Grantor also owns and maintains the Railroad and improvements thereto having an area of approximately 92 acres and linear track length of approximately 16 miles, which is described, in part, in Attachment B. Finally, Grantor owns Personal Property that is described in Attachment C. Grantor hereby grants, conveys, and forever quitclaims to Grantee, without warranty, either express or implied, said Real Property, Railroad, and Personal Property on an "as is" and "where is" basis and subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument. The quitclaim deed (the "Deed") conveying said Real Property, Railroad, and Personal Property is attached (see Attachment D).
B. The descriptions of the Real Property, Railroad, and Personal Property set forth, respectively, in Attachments to this Indenture and any other information provided herein are based on the best information available to Grantor and believed to be correct, but an error or omission, including, but not limited to, the omission of any information available to Grantor or any other Federal

agency, shall not constitute grounds or reason for noncompliance with the terms of this Indenture or for any claim by Grantee against the UNITED STATES OF AMERICA including, without limitation, any claim for allowance, refund, deduction, or payment of any kind.

- C. Grantor shall make reforms, corrections, and amendments to the Deed if necessary to correct such Deed or to conform such Deed to the requirements of applicable law.

## II. CONSIDERATION

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.

## III. TITLE EVIDENCE

Grantee reserves the right to procure a title report and/or obtain a title insurance commitment issued by a licensed Washington Title insurer agreeing to issue to Grantee, upon recordation of the Deed, a standard owner's policy of title insurance insuring Grantee's good and marketable title to said Real Property and Railroad.

## IV. COSTS OF RECORDATION

Grantee shall pay all taxes and fees imposed on this transfer and shall obtain at Grantee's expense and affix to the Deed such revenue and documentary stamps as may be required by Federal, State of Washington, and local laws and ordinances. The Deed and any security documents shall be recorded by Grantee in the manner prescribed by State of Washington and Benton County recording statutes.

## V. EASEMENTS, RESTRICTIONS, AND LIMITATIONS

- A. Grantor retains an easement, described in the Deed found at Attachment D, on the road known as Stevens Drive that extends north from the junction of Spengler Street to Horn Rapids Road (the "Road"). Grantee shall have a right of first refusal governing any conveyance in the Road by Grantor.
- B. Grantee shall take title subject to all public utility and other easements on record, described in Attachment E, and any other zoning regulations and restrictions appearing on plats, in the Deed, or in any title report prepared to support this transfer of Real Property and the Railroad.
- C. Grantor retains an easement, described in Attachment F, for Grantor's existing infrastructure, including telecommunications infrastructure, on the Real Property and Railroad. Grantee shall reasonably negotiate and convey no-cost new easements to support access to existing or new infrastructure of any type or to improve on said infrastructure.
- D. Grantor shall have until March 31, 1999, to remove personal property not conveyed to Grantee and cultural artifacts described in Section XXIII, below from buildings on the Real Property and the Railroad and vacate any of the buildings in which it currently operates.
- E. Grantee shall take title subject to the use permit, described in Attachment F, executed between the Home Depot and Grantor.

## VI. LICENSES

- A. Grantor reserves unto itself a no-cost license for whole or partial use of the buildings described in Attachment G and a parking lot for use by Grantor's Safeguards and Security Division to conduct

its "Emergency Vehicle Operations course". The term for these licenses also is listed in Attachment G, said licenses terminating upon: (i) early abandonment of licenses upon notification to Grantee; or (ii) expiration of licenses unless renewed. Renewal shall be in at Grantor's option for one-(1) year periods not to exceed a total of ten (10) periods, and Grantee shall presume that said options are exercised unless notice declining renewal is received within thirty (30) days or more of each license expiration. Grantor shall cooperate with Grantee in the event that Grantee has a commercial tenant for space licensed by Grantor, and to the extent practicable, abandon such license(s) if (i) such abandonment is in the best interest of the UNITED STATES OF AMERICA, and (ii) substitute space is made available by Grantee, if Grantor requires such space and it is not available within the Hanford Site.

- B. Grantor's operations in those buildings and the parking lot in which it retains licenses shall be: (i) conducted in a neat and orderly manner so as not to endanger personnel or property of Grantee or Grantee's other licensees, lessees, and invitees; and (ii) in compliance with all applicable laws, regulations, rules, and ordinances. In the event that the buildings licensed to Grantor become unsuitable for occupancy for any reason, including damage, destruction, or collective wear and tear, Grantor reserves the right to restore the buildings during the term of the licenses.
- C. Before expiration or prior termination of building licenses, Grantor shall restore the buildings or building interiors to the condition in which they were conveyed or to such improved condition as may have resulted from any improvement made therein by Grantee during license terms, subject to ordinary wear and tear for which Grantor is not liable hereunder.
- D. Grantor shall be responsible for all utilities and maintenance associated with operations conducted in the building under license. In the event that partial building space is used, Grantor and Grantee shall agree on a suitable prorated amount for building utilities and maintenance that Grantor shall be responsible to pay to Grantee periodically.
- E. Grantor reserves to the General Services Administration ("GSA") a license to site a double-wide trailer and use parking spaces and a portion of the parking lot for enclosed storage on the Real Property located south of building 1175 (address: 2565 Stevens Drive, Richland, Washington) to have and use until abandoned. GSA shall be responsible for all utilities and maintenance associated with operations conducted from its trailer.
- F. Grantor reserves unto itself a no-cost license providing access to the Railroad for as long as Grantee maintains and/or operates said Railroad. Grantor shall pay published tariffs as applicable.

#### VII. CONDITION OF REAL PROPERTY AND MAINTENANCE OF RAILROAD

- A. Grantor shall clean the Real Property to an "industrial use" standard prior to transfer under this Indenture and subsequent abandonment of licenses. All buildings, utilities, and other property conveyed will be transferred in "as is" and "where is" condition as at the signing hereof, without any warranty or guarantee, expressed or implied, of any kind or nature, except as otherwise expressly stated in this Indenture. Grantor shall not be obligated to repair, replace, or rebuild any structures if and when licenses are abandoned except when Grantor's use resulted in damages exceeding ordinary wear and tear. Except as provided for in Section VIII, below, Grantor shall not be responsible for any liability to Grantee or third persons arising from such condition of the Real Property. The failure of Grantee to inspect fully the Real Property or to be fully informed as to the condition thereof will not constitute grounds for any noncompliance with the terms of this Indenture.

- B. For so long as Grantee continues to maintain and/or operate the Railroad (or Grantee's similarly situated successor(s)), 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 and equipment only during the useful life thereof, as determined jointly by Grantor and Grantee.

#### VIII. WARRANTIES AND REPRESENTATIONS

- A. Grantor represents and warrants under its enabling legislation (the Atomic Energy Act of 1954, as amended) that: (i) it has the full capacity, power and authority to enter into this Indenture and the transactions contemplated herein; and (ii) the execution, delivery and performance by Grantor of this Indenture has been duly authorized and approved by all necessary governmental action on the part of Grantor.
- B. Grantee represents and warrants that: (i) it is a political instrumentality of the State of Washington and duly organized under laws of the State of Washington; (ii) it has full capacity, power and authority to enter into and perform this Indenture and the continuing obligations contemplated herein; and (iii) the execution, delivery and performance by Grantee of this Indenture have been duly and validly authorized and approved by all necessary action on the part of Grantee.
- C. Grantor represents that, to the best of Grantor's knowledge, there are no facts known to Grantor that materially affect the value and condition of the Real Property and Railroad that are not readily observable by Grantee or that have not been disclosed to Grantee. The Parties acknowledge that in the course of abandoning any licenses, Grantor may learn additional facts regarding the value and condition of the Real Property. Grantor shall identify such facts and disclose them to Grantee in a timely manner.
- D. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA") Section 120(h)(1) (42 U.S. Code § 9620(h)(1)), and 40 U.S. Code of Federal Regulations Part 373, Grantor has made a complete search of its records concerning the Real Property and Railroad. These records indicate that hazardous substances, as defined by CERCLA Section 101(14), have been stored, disposed, or generated on the Real Property during the time Grantor owned said Real Property. Quantities of hazardous substances were released or disposed of on the Real Property during the course of ownership by Grantor, and the Real Property was listed on the National Priorities List by the Environmental Protection Agency ("EPA"). Said Real Property was remediated and removed from the National Priorities List in September 1996. Grantor agrees to meet all CERCLA obligations associated with the transfer of the Real Property now or in the future upon notice by Grantee.
- E. All remedial actions necessary to protect human health and the environment with respect to any such hazardous substances remaining on the Real Property have been or will be taken before the date of transfer, and any additional remedial actions found to be necessary by regulatory authorities with jurisdiction over the Real Property or Railroad attributable to contamination of hazardous substances shall be conducted by Grantor at Grantor's expense.

#### IX. ASSIGNMENT OF LEASES AND CONTRACTS

- A. Grantor hereby assigns Parts 1, 2, and 3 of the lease dated May 1, 1996, (see Attachment H) executed between Grantor and R.H. Smith Distributing Co., Inc. ("Smith") for fuel oil distribution from building 1172A. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by Smith for building 1172A operations, which are assigned herewith to Grantee. Grantor shall notify Smith of assignment.

- B. Grantor hereby assigns the lease dated March 5, 1998, (see Attachment H) executed between Grantor and Livingston Rebuild Center, Inc. ("LRC") for equipment repair services in building 1171. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by LRC for building 1171, which are assigned herewith to Grantee. Grantor shall notify LRC of assignment.
- C. Grantor hereby assigns two agreements, a supplemental agreement, and permit made among and by the Atomic Energy Agency (and its successors); Burlington Northern, Inc.; Oregon-Washington Railroad & Navigation Company; and Union Pacific Railroad Company governing access to the Railroad (see Attachment H). Grantee hereby accepts the obligations and considerations under this agreement and permit. Grantor shall notify successors Burlington Northern and Union Pacific of these assignments.

X. OTHER AGREEMENTS

- A. No prior, present, or contemporaneous agreements shall be binding upon Grantor or Grantee unless specifically referenced in this Indenture. No modification, amendment, or change to this Indenture shall be valid or binding upon the Parties unless in writing and executed by representatives authorized to contract for the Parties.
- B. Grantor on written request from Grantee may grant a release from any of the terms, reservations, restrictions and conditions contained in the Deed. Grantor may release Grantee from any terms, restrictions, reservations, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions if Grantor determines that the Real Property and Railroad no longer serve the purposes for which they were conveyed or the Grantee determines that continued ownership of the Railroad is no longer economically viable. All or any portion of the Real Property or Railroad may be reconveyed to Grantor subject to the conditions detailed in Section XVII. below.

XI. NOTICES

Any notices required under this Indenture shall be forwarded to Grantor or Grantee, respectively, by Registered or Certified mail, return receipt requested, or by overnight delivery, at the following addresses:

Realty Officer  
U.S. Department of Energy  
Richland Operations Office  
P.O. Box 550, G3-18  
Richland, Washington 99352

Executive Director  
Port of Benton  
3100 George Washington Way  
Richland, Washington 99352

XII. LIMITATION OF GRANTOR'S AND GRANTEE'S OBLIGATIONS

- A. The responsibilities of Grantor, as described in this Indenture, are subject to: (i) the availability of appropriated program funds for remediation and operation of the Hanford Site; and (ii) the federal Anti-Deficiency Act (31 U.S. Code §§ 1341 and 1517).
- B. Grantee shall, to the extent permitted under applicable law, indemnify and defend the United States against, and hold the UNITED STATES OF AMERICA harmless from, damages, costs, expenses, liabilities, fines, or penalties incurred by Grantor and/or third parties and resulting

from Grantee's activities on the Real Property and Railroad, or any part thereof, including releases or threatened releases of, or any other acts or omissions related to, any hazardous wastes, substances, or materials by Grantee and any subsequent lessee or owner of the Real Property or Railroad or any subdivision thereof, their officers, agents, employees, contractors, sublessees, licensees, or the invitees of any of them.

- C. Grantee hereby releases the UNITED STATES OF AMERICA, and shall take whatever action may be required by Grantor to assure the complete release of the UNITED STATES OF AMERICA from any and all liability for restoration or other damage under the Deed or other agreement covering the use by Grantee or its licensees, invitees, and lessees of any Real Property transferred by this instrument.
- D. Grantee's responsibilities for maintenance and operation of the Railroad under the terms of this Indenture are subject to the economic viability of the Railroad. Section XVII. below shall apply if Grantee determines that economic viability is impossible after ten (10) years.

#### XIII. RIGHT OF ACTION

The provisions of this Indenture are not intended to benefit third persons, and breach thereof shall not be the basis for a cause of action by such third person against either Grantor or Grantee.

#### XIV. DISPUTES

- A. Except as otherwise provided in this Indenture, any dispute concerning a question of fact that is not disposed of by agreement between the Parties shall be submitted for decision by the Manager, U.S. Department of Energy, Richland Operations Office, or his successor in function ("Manager-RL). The Manager-RL shall, within twenty (20) days, mail or otherwise furnish a written decision to Grantee. The decision of the Manager-RL, shall be final and conclusive unless, within twenty (20) calendar days from the date of receipt of such copy, Grantee mails or otherwise furnishes to the Manager-RL, a written appeal addressed to the Associate Deputy Secretary for Field Management (FM-2). The decision of the Associate Deputy Secretary for Field Management (FM-2), this officer's successor, or the duly authorized representative for the determination of such appeals shall be presented in writing within twenty (20) calendar days from receipt of notice of appeal and shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this Section, Grantee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute under this Section, Grantee shall proceed diligently with the performance of this Indenture in accordance with the decision of the Manager-RL.
- B. This Section shall not preclude consideration of questions of law in correction with decisions provided for herein. Nothing in this Section, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

#### XV. PLANNING AND DEVELOPMENT

- A. Grantor is aware that Grantee is acquiring the Real Property and Railroad for development for industrial use. Accordingly, Grantor agrees that it shall cooperate reasonably with Grantee and sign such documents and undertake such other acts, without incurring costs or liability, that are necessary for Grantee to complete the planning, zoning, and development of the Real Property and Railroad, the resale and marketing of any portion of the Real Property, and the formation and operation of special districts, metropolitan districts, and other quasi-governmental entities organized for the purpose of providing infrastructure facilities and services to or for the benefit of

the Real Property and Railroad.

- B. Without incurring costs or liability, Grantor will cooperate reasonably with Grantee by signing such documents necessary for Grantee to apply to the Auditor and to the Treasurer of Benton County, Washington and to the Washington State Department of Revenue for tax valuation or abatement with regard to the Real Property that Grantee intends to sell. Upon request by Grantee, Grantor will execute and deliver to and in the name of Grantee one or more easements, accompanied by a legal description, for subsequent re-grant to local utility providers, for the purpose of installing new utility systems and relocating any existing systems, on any portion of the Real Property in which Grantor retains an interest. Other easements include, without limitation easements for ingress and egress and private utility lines required in connection with any portion of the Real Property and Railroad being conveyed. Such easement documents shall be in form and content satisfactory to Grantor and Grantee.

#### XVI SUCCESSORS AND ASSIGNS

- A. The covenants, provisions, and agreements contained herein shall in every case be binding on and inure to the benefit of the Parties hereto and their respective successors. The rights and responsibilities under this Indenture may not be assigned by Grantee within ten (10) years of the date of this Indenture without the written consent of Grantor, said consent not being unreasonably withheld.
- B. Grantee shall not enter into any transaction that would deprive it of any of the rights and powers necessary to perform or comply with any or all of the terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions set forth herein, and if an arrangement is made for management or operation of the Real Property and Railroad by any agency or person other than Grantee, it shall reserve sufficient rights and authority to ensure that said Real Property and Railroad shall be operated and maintained in accordance with the terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions.

#### XVII REVERSIONARY INTEREST

- A. For the ten (10) years next following the effective date of this Indenture, in the event that any of the aforesaid terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions are not met, observed, or complied with by Grantee, whether caused by the legal inability of said Grantee to perform any of the obligations herein set out, or otherwise, the title, right of possession, and all other rights conveyed by the Deed to Grantee, or any portion thereof, shall at the option of Grantor revert to the UNITED STATES OF AMERICA in its then existing condition sixty (60) days following the date upon which demand to this effect is made in writing by Grantor or its successor, unless within said sixty (60) days such default or violation shall have been cured and all such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions shall have been met, observed, or complied with, in which event said reversion shall not occur, and title, right of possession, and all other rights conveyed, except those that have reverted, shall remain vested in Grantee.
- B. The Railroad shall be used and maintained for the purposes for which it was conveyed, and if said Railroad ceases to be used or maintained for such purposes, all or any portion of the Railroad shall, in its then existing condition, at the option of Grantor, revert to the UNITED STATES OF AMERICA. If Grantor notifies Grantee or its similarly situated successor(s) that rail service no longer is required, such reversionary interest shall terminate and Grantee shall be free to abandon or convert the use of any portion or all of the Railroad.

- C. Grantee agrees that in the event Grantor exercises its option to revert all right, title, and interest in and to any portion of the Real Property or Railroad to the UNITED STATES OF AMERICA or Grantee voluntarily returns title to said Real Property and Railroad in lieu of a reverter, then Grantee shall provide protection to, and maintenance of said Real Property and Railroad at all times until such time as the title actually reverts or is returned to and accepted by the UNITED STATES OF AMERICA. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in 41 U.S. Code of Federal Regulations § 101-47.4913 in effect as of the date of the conveyance.

#### XVIII. USE OF REAL PROPERTY AND RAILROAD

Grantee shall use and maintain the Real Property and Railroad on fair and reasonable terms without unlawful discrimination. In furtherance of this condition (but without limiting its general applicability and effect) Grantee specifically agrees that: (i) it will establish such fair, equal, and nondiscriminatory conditions to be met by all users of the Real Property and Railroad; provided that Grantee may prohibit or limit any given type and kind of use if such action is necessary to promote safe operations; (ii) in its operation and the operation of the Real Property and Railroad, neither it nor any person or organization occupying space or facilities thereupon shall discriminate against any person or class of persons by reason of race, color, creed, sex, age, marital status, political affiliation or non-affiliation, national origin, religion, handicap or sexual orientation in the use of any of the facilities provided for the public; and (iii) that in any agreement, contract, lease, or other arrangement under which a right or privilege granted to any person, firm or corporation to conduct or engage in any lawful activity, Grantee shall insert and enforce provisions requiring the party to: (i) furnish said service on a fair, equal and nondiscriminatory basis to all users thereof; and (ii) charge fair, reasonable, and nondiscriminatory prices for each unit for service, provided, that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

#### XIX. ACCESS

- A. Subject to the provisions of Section V.A. above, Grantee shall, insofar as it is within its powers and to the extent reasonable, adequately protect the land access routes to the Real Property and Railroad. Grantee shall, either by the acquisition and retention of easements or other interests in or rights for the use of land or by adoption and enforcement of zoning regulations, prevent the construction, erection or alteration of any structure in the access routes to and from the Real Property and Railroad.
- B. Grantor reserves the right of access to those portions of the Real Property and Railroad for the purpose of construction, installing, maintaining, repairing, operating, and/or removing utility, telecommunications, or well monitoring equipment over, under, across, and upon the Real Property and Railroad.

#### XX. SEVERABILITY

If the construction of any of the foregoing terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions recited herein as provisions or Attachments, or the application of the same as provisions in any particular instance is held invalid, the particular term, reservation, restriction, license, easement, covenant, equitable servitude, contract, lease, or condition in question shall be construed instead merely as conditions upon the breach of which Grantor may exercise its option to cause the title, interest, right of possession, and all other rights conveyed to Grantee, or any portion thereof, to revert to it. The application of such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions as provisions elsewhere in the Indenture and the construction of the remainder of such terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and conditions as provisions shall not be affected thereby.

XXI GRANTEE'S STATUS

Grantee shall remain at all times a political instrumentality of Benton County, State of Washington.

XXII ENVIRONMENTAL DISCLOSURES

A. Lead-Based Paint Conditions.

1. Prior to use of any Real Property by children under seven (7) years of age, Grantee shall remove all lead-based paint hazards and all potential lead-based paint hazards from the said Real Property in accordance with all federal, State of Washington, and local lead-based paint laws, rules, regulations, and ordinances.
2. Grantee agrees to indemnify Grantor and the UNITED STATES OF AMERICA to the extent allowable under applicable law from any liability arising by reason of Grantee's failure to perform Grantee's obligations hereunder with respect to the elimination of immediate lead-based paint health hazards, the prohibition against the use of lead-based paint, and Grantee's responsibility for complying with applicable federal, State of Washington, and local lead-based paint laws, rules, regulations, and ordinances.

B. Presence of Asbestos.

1. Grantee is informed that the Real Property may be improved with materials and equipment containing asbestos-containing materials. The Due Diligence Assessment Report (see Attachment I) prepared by R.E. Morgan for Fluor Daniel Hanford, Inc. on August 28, 1998, discloses the condition and probable locations of asbestos-containing materials. Grantee is cautioned that unprotected or unregulated exposure to asbestos in product manufacturing and building construction workplaces have been associated with asbestos-related diseases. Both the Occupational Safety and Health Administration ("OSHA") and the EPA regulate asbestos because the potential hazards associated with exposure to airborne asbestos fibers. Both OSHA and EPA have determined that such exposure increases the risk of asbestos-related diseases, which include certain cancers and which can result in disability or death.
2. Grantee is invited, urged, and cautioned to inspect the Real Property to ascertain the any asbestos content and condition and corresponding hazardous or environmental conditions relating thereto. Grantor shall assist Grantee in obtaining any authorization that may be required to carry out any such inspection. Grantee shall be deemed to have relied solely on its own judgement in assessing the overall condition of all or any portion of the Real Property, including without limitation, any asbestos hazards or concerns.

C. Presence of Polychlorinated Biphenyls. Except for the 1162 and 1163 facilities, buildings on the Real Property were constructed prior to the enactment of the Toxic Substances Control Act of 1976, as amended, (15 U.S. Code §§ 2601 - 2692) that banned the manufacture of polychlorinated biphenyls ("PCBs"). Fluorescent light fixtures may contain ballasts with trace amounts of PCBs. Spills from overheated ballasts and ballast management (e.g., removal from service) are subject to requirements found in 40 U.S. Code of Federal Regulations Part 761.

D. Grantor's Disclaimer.

1. No warranties, either express or implied, are given with regard to the condition of the Real Property including, without limitation, whether the Real Property does or does not

contain lead-based paint, asbestos, PCBs or petroleum residues attributable to past operations (see "Environmental Assessment for the Transfer of 1100 Area, Southern Rail Connection and Rolling Stock, Hanford Site, Richland, Washington," also contained in Attachment I) or is not safe for a particular purpose. The failure of Grantee to inspect or to be fully informed as to the condition of all or any portion of the Real Property shall not constitute grounds for any claim or demand for adjustment or noncompliance with the terms of this Indenture.

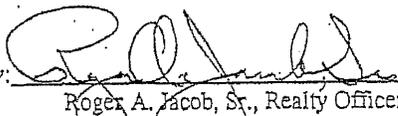
- 2. Grantor assumes no liability for damages for personal injury, illness, disability, or death to Grantee or to Grantee's successors, assigns, employees, invitees, or any other person subject to Grantee's control or direction or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity causing or leading to contact of any kind whatsoever with asbestos on the Real Property, whether Grantee has properly warned or failed to properly warn the individuals(s) injured.

XXIII. CULTURAL ARTIFACTS AND HISTORIC STRUCTURES

- A. Grantor conducted an inspection of the Real Property on February 3, 1998, in compliance with Part V, Paragraph C of the "Programmatic Agreement for the Built Environment," which states that the Grantor's Cultural Resources Program shall undertake a cultural assessment of the contents of historic buildings and structures to locate and identify artifacts that may have interpretive or educational value as exhibits for local, State of Washington, or national museums. Said assessment has been completed, and artifacts identified are listed in Attachment J.
- B. Grantor and Grantee shall jointly execute a Memorandum of Understanding ("MOU") with the Washington State Department of Community, Trade, and Economic Development, Office of Archeology and Historic Preservation that will address cultural resource issues associated with the Real Property and Railroad. After joint negotiation of an acceptable MOU, Grantee shall be bound by the terms of said MOU for the purposes of cultural artifacts disposition and care under the terms of this Indenture.

IN WITNESS WHEREOF, the Parties, by and through their authorized representatives, have executed the foregoing Indenture on the date first written above.

United States of America by and through the U.S. Department of Energy  
GRANTOR:

By:   
Roger A. Jacob, Sr., Realty Officer, Richland Operations Office

Date: August 28, 1998

Witnessed by Notary Public: Wesley K. Knutson State of Washington, County of Ben

My Commission Expires: July 04, 2001

Port of Benton, Washington

GRANTEE:

By: \_\_\_\_\_  
Ben Bennett, Executive Director, Port of Benton, Washington

Date: \_\_\_\_\_

Witnessed by Notary Public: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

# PACIFICA LAW GROUP

July 06, 2017 - 2:56 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94588-8  
**Appellate Court Case Title:** Randolph Peterson v. State of Washington, Department of Revenue, et al.  
**Superior Court Case Number:** 16-2-03211-4

### The following documents have been uploaded:

- 945888\_Answer\_SOG\_for\_Direct\_Review\_20170706145442SC077776\_5357.pdf  
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*The Original File Name was Port and BNSF Answer to Grnds for Direct Review..pdf*

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- Dawn.taylor@pacificallawgroup.com
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Phone: (206) 245-1707

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# APPENDIX D

No. 94588-8

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SUPREME COURT  
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,

Appellants,

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.

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BRIEF OF APPELLANTS

---

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(206) 574-6661

Attorneys for Appellants

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A. INTRODUCTION

Article VIII, § 7 of the Washington Constitution was enacted to forestall the gift or loan of public funds to the railroads, a profound political problem in the late Nineteenth Century. The Framers were deeply concerned about the effects on the public purse of granting subsidies to commercial enterprises, primarily railroads. Modern cases arising under article VIII, § 7 rarely involve railroads. This one does. This case involves the decision of the Port of Benton (“Port”) to allow the Burlington Northern Santa Fe Railway Company (“BNSF”) the use of public railroad tracks for free, without the payment of any rent or fee for that usage or track maintenance, despite the wear and tear caused by BNSF trains on that track.

The trial court erred in dismissing the action by Randolph Petersen and other taxpayers (“Peterson”) in which they alleged that the Port violated article VIII, § 7 and article I, § 12 of the Washington Constitution by favoring BNSF like no other lessee with whom the Port contracted, allowing it free use of publicly owned property.

This Court must vindicate the restrictions set forth in the Washington Constitution on the ability of local governments to permit free use of public property in the guise of “economic development” and to

favor selected private commercial entities at the expense of taxpayers and the public purse.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its order on summary judgment on May 17, 2017.

(2) Issues Pertaining to Assignment of Error

1. Where the Port allows BNSF to use its railroad track rent free and without paying for the impact to the track from the wear and tear occasioned by its trains' track usage, has the Port made an unconstitutional gift of public funds to BNSF under article VIII, § 7 of the Washington Constitution? (Assignment of Error Number 1)

2. Does the Port's granting of a special advantage to BNSF in the form of rent-free use of a rail tracks in a fashion unavailable to any other railroad using the tracks or any other Port tenant using public property constitute the unconstitutional favoritism prohibited by article I, § 12 of the Washington Constitution? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE<sup>1</sup>

(1) Construction of the Track

In 1947, the Atomic Energy Commission ("AEC") and the predecessors to BNSF and the Union Pacific Railroad ("UP") entered into an agreement for the construction of certain railroad tracks to service the

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<sup>1</sup> Peterson provided a Statement of Facts to the trial court. CP 1282-1304. A copy is in the Appendix.

Hanford Nuclear Reservation. CP 26-35. That agreement provided that upon completion of the 5.4 miles of rail line, and the payment of one half of \$100,000 by the railroads, “The [AEC] shall own said [railroad tracks] but [the railroad companies] shall be entitled during the term of this agreement to use [the tracks] ... free of rental or any other charge.” CP 28. The agreement, terminable upon six months’ notice, gave the railroads what amounts to a revocable permit to use the tracks. CP 32.<sup>2</sup> The railroads apparently made the required payments of \$50,000 each, and the track at issue here was constructed.<sup>3</sup>

The 1947 agreement was further refined in a 1961 agreement between the AEC and the railroads. CP 67-83. The key provisions of the 1947 agreement referenced above were not disturbed. *Id.*

(2) The Port Receives the Track as Surplus Property from DOE

In 1998, the United States Department of Energy (“DOE”), the AEC’s successor, declared certain property to be surplus, transferring 767.13 acres of industrial property in Tri-Cities, including 16 miles of railroad track, to the Port for no monetary consideration by an indenture.

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<sup>2</sup> A 1948 Interstate Commerce Commission (“ICC”) decision confirmed that the United States Government would construct approximately 5.4 miles of track to connect to existing government track; upon completion of the construction of the 5.4 miles, the railroads, (one of which was BNSF’s predecessor), would each pay ½ of \$100,000. CP 41-42. The ICC decision stated that “the Government may terminate the agreement at any time upon 6 months’ advance notice in writing[.]” CP 42.

<sup>3</sup> To be precise, BNSF did not pay the \$50,000; the BNSF did not exist in 1948. CP 1287. A predecessor paid the fee.

CP 85-135.<sup>4</sup> By this transfer, the Port assumed responsibility for the maintenance of the land transferred to it by the DOE, including structures and the tracks at issue here, and the railroads had a revocable permit to use the tracks rent-free until such time that the Port terminated their free use upon six months' notice. CP 28.<sup>5</sup> The Port was fully aware that upon the transfer of the tracks, use of the tracks was subject to Washington law and that it could not allow such public property to be used without compensation. CP 276 ("The Port, as a public entity, cannot allow its property to be occupied without compensation.").

Presently, BNSF uses the tracks, public property, without paying rent or fees for the appropriate upkeep of the tracks or for the damage its trains cause to them. CP 469, 470, 471 ("We don't get any cash

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<sup>4</sup> In *BNSF Ry. Co. v. Tri-City & Olympia Ry. Co.*, 835 F. Supp. 2d 1056, 1060 (E.D. Wash. 2011) ("*BNSF*"), the district court succinctly described the relationship of the Port to prior federal role as to the tracks at issue:

In 1998, the United States, acting through the DOE, conveyed ownership of a six-mile section of track to the Port of Benton ("Port") through an Indenture, thereby assigning the DOE and Commission's rights under the 1947 and 1961 Agreements to the Port. The indenture stated that the 1947 and 1961 Agreements and the 1979 permit agreement governed access to the Railroad. The Indenture also stated that the Port, as assignee, agreed to be bound by the obligations and considerations in the United States' permit. As a result of these agreements, the Port has the right to terminate BNSF and UP's rights to use the Richland Trackage upon six months' notice.

In arriving at its decision on the import of these contracts, the district court applied Washington law. *Id.* at 1062.

<sup>5</sup> Presently, the Port leases public property to approximately 250 lessees, many of which are located in the 767 acres of property the Port received from DOE. CP 437.

consideration for use of the rail.”). Running 21<sup>st</sup> Century trains on 70-year-old railroad track designed for World War II era trains has caused damage to the track. CP 1546-59.<sup>6</sup>

(3) TCRY and BNSF

In 1998, the Port entered into a maintenance and operation agreement with the Tri-City Railroad Company, LLC’s (“TCRY”) predecessor. CP 1789-1800; *BNSF Ry. Co. v. Tri-City & Olympia R.R. Co. LLC*, 835 F. Supp. 2d 1056, 1060 (E.D. Wash. 2011).<sup>7</sup> It was renewed in 2002. CP 825-39. The basis for the agreement was that TCRY would maintain the tracks and then secure reimbursement for such activities from the railroads using the tracks. CP 1838-39.

TCRY’s lease provided that it would abide by the terms of the Port/DOE indenture, CP 1040, which provided that the Port would

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<sup>6</sup> BNSF was fully aware that its track usage caused wear and tear and that it had an obligation to pay for that use; Chris Randall, a BNSF employee noted in a March 25, 2009 email to the Port:

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.

CP 1312.

<sup>7</sup> Peterson is TCRY’s principal. CP 142-43, 1022, 1838.

maintain the tracks in a “serviceable condition.” CP 1044. In accordance with its lease from the Port, TCRY maintained the tracks. CP 1440. It provided day-by-day maintenance of the track subject to reasonable wear and tear, while the Port paid for more substantial capital improvements. CP 1440. In effect, TCRY acted as the Port’s agent for track maintenance, satisfying the Port’s maintenance obligations on the tracks. CP 1785-86 (“As a result of these lease arrangements with TCRY, the Port has provided for the maintenance of the Richland Trackage which the Port agreed to do in the Indenture with the United States.”).<sup>8</sup>

In May 2000, BNSF contracted to interchange cars<sup>9</sup> on the Port’s tracks, paying a per-car fee, that was then to be applied by the Port to track maintenance. 835 F. Supp. 2d at 1060. That September, recognizing that UP was using its tracks without paying consideration, the Port gave “written notice to [UP] terminating its rights to use the Port of Benton track.” *Id.* The Port did not seek approval from the Surface Transportation Board, the applicable federal regulatory body, to revoke UP’s permit. CP 437. Subsequent to the written termination notice, UP entered into an interchange agreement under which TCRY operates as a

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<sup>8</sup> Paragraph 3 of the amendment to the indenture required the Port to devote lease payments first to line maintenance. CP 1444. It has not done so.

<sup>9</sup> To interchange a car in railroad parlance means to transfer control of a railcar from one rail carrier to another.

handling carrier for the UP on Port tracks, for which UP paid a per-car fee to TCRY. CP 412, 1838-49. *See also*, 835 F. Supp. 2d at 1060.

In 2009, BNSF ended its relationship with TCRY. 835 F. Supp. 2d at 1060. As a result, since 2009, BNSF has not paid rent to the Port for the use of the track, nor has it paid a fee for the wear and tear its trains caused to the track, except for a promised payment of \$50,000.<sup>10</sup> At present, UP continues to pay fees to TCRY.<sup>11</sup>

In addition to the property received from DOE, the Port is also an owner of other significant property within its district and is the lessor to private parties in approximately 250 leases. CP 437. For lessors other than BNSF, the Port mandates the collection of fair market value for the rental of its public properties. CP 435. The Port's executive director,

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<sup>10</sup> In December 2014, the Port and BNSF, but not UP, entered into a "funding agreement" pursuant to which the Port and BNSF reaffirmed the 1947 agreement and BNSF offered to make a one-time payment of up to \$50,000 toward the wear and tear on the tracks created by its trains. CP 1824, 1830-31. By its terms, the agreement does not alter BNSF's revocable permit to use Port tracks for free, nor was it intended to do so. At its face value, the \$50,000 BNSF paid in December 2014 was neither a lease payment, nor an access fee, nor any other exchange of consideration for continued use of Port property, and consequently does not negate the unconstitutionality of the Port and BNSF's present agreement. Moreover, the Port and BNSF have never explained why this one-time payment, if consideration for permanent use of the tracks by BNSF without further charge, was not made in 1998 when the Port obtained the property, in 2010 when BNSF began operating under the Port's tenure without paying cash consideration for use or damages, or in 2011, after the completion of the federal suit. If the \$50,000 represents a use fee or lease payment, the Port and BNSF have not explained why this was not reported to the Office of the Auditor as part of the Port's audits in 2012 and 2015, nor why BNSF is not paying the leasehold tax on that amount to DOR.

<sup>11</sup> However, if BNSF is allowed to avoid paying any rent or fee for Port track usage, it is not difficult to imagine that UP would demand similar treatment.

Scott Keller, testified that under no circumstances would any private party, other than BNSF, be able to use Port property for free or at a reduced rate, even if that private party promised to promote economic development. CP 435-36. The Port does not have a policy or protocol by which tenants can seek rent-free leaseholds. CP 437-38. Yet, Keller testified that the sole consideration the Port receives from BNSF for use of the track is the alleged promotion of economic development. CP 469, 470.

(4) Proceedings Below

Peterson challenged the Port's provision of free use of public property to the BNSF, filing the present action in the Thurston County Superior Court on August 15, 2016. CP 7-141.<sup>12</sup> The Port answered. CP 311-26.<sup>13</sup> Believing that the Department of Revenue ("DOR") was not

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<sup>12</sup> Peterson filed an amended complaint shortly thereafter that is the basis for the present action. CP 142-294. Peterson argued there that the Port violated the Washington Constitution, article I, § 12, and article VIII, § 7, among other claims. *Id.*

<sup>13</sup> After the filing of Peterson's first amended complaint, the Port's counsel sent an email to Peterson's counsel on September 28, 2016 in which he threatened Peterson with a claim that TCRY had underpaid the leasehold tax "by more than a million dollars," unless Peterson dropped this case. CP 446. Ironically, the central thrust of the Port's theory was that the TCRY lease was not based on fair market value, CP 875, 882, *something the Port ignored as to BNSF*. The Port even attached a proposed third-party complaint against Peterson to the email. CP 447-66. The Port's claim was spurious. Keller asserted that it was a "strategy." CP 442. The Port decided not to pursue this baseless claim, CP 445, but reserved the right at some unspecified future point to again assert this spurious claim. CP 820.

Peterson filed a CR 15 motion for leave to file a second amended complaint stating a claim under 42 U.S.C. § 1983 against the Port for its use of its taxing authority as a coercive threat. CP 425-668. The trial court denied the motion, holding that Peterson could show neither damages nor that he had standing. CP 929-31. Peterson sought reconsideration of this ruling, CP 938-41, but the trial court did not rule on the

collecting the leasehold taxes due from BNSF deliberately, Peterson also sued DOR in that action. CP 144, 157-59.<sup>14</sup>

BNSF moved to intervene, CP 327-48, and the trial court granted BNSF's motion. CP 352-55. BNSF then answered Peterson's complaint. CP 387-98. UP also moved to intervene, CP 355-86, and the trial court granted the motion. CP 402-08. UP filed a complaint. CP 409-17.

Other taxpayers – Peggi Doggett, Jennifer Hartsfield, Jason Mount, Mandi Oukrop, and James Summey – moved to intervene to object to the Port's gift of public funds and property to BNSF, CP 678-739, which the trial court granted. CP 932-37, 942-49. Those intervenors filed their own complaints, CP 986-96. The Port and BNSF answered those complaints separately. CP 954-61, 1219-28, 1706-16.

All of the parties moved for summary judgment.<sup>15</sup> In response to Peterson's constitutional challenge, the Port contended that neither article

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reconsideration motion when it dismissed the case on summary judgment three months later.

<sup>14</sup> While a public entity like the Port here does not pay the business and occupation tax to the State, its private commercial tenants must pay a leasehold excise tax in lieu of that B&O tax. See RCW 82.29A. The Port has not disclosed this rent-free arrangement with BNSF to the State Auditor, nor has BNSF paid leasehold taxes to DOR. CP 440-41.

<sup>15</sup> Peterson moved to strike certain expert testimony the Port sought to present on summary judgment when *it* had asserted in discovery that the expert was nontestifying, CP 2019-23. The trial court granted the motion. CP 2024-28; RP 8-18. Peterson also moved to dismiss DOR insofar as DOR was unaware of the Port's failure to collect the leasehold tax as to BNSF. CP 962-65. The trial court granted that motion. CP 2024-28; RP 5-8.

VIII, § 7 nor article I, § 12 was violated; it asserted that it had no donative intent because it was merely fulfilling the terms of the indenture, and any consideration was sufficient. CP 997-1020, 1749-72.<sup>16</sup> BNSF joined in the Port's arguments, and also contended that Peterson's claims here are federally preempted. CP 1196-1218.

The trial court denied summary judgment to Peterson, and granted summary judgment to the Port and BNSF holding, *inter alia*, that the only standard under article VIII, § 7 was legal sufficiency, and that receipt by the federal government of payment from BNSF's predecessor for a revocable permit constituted consideration to the Port for use of its property in perpetuity. CP 2029-33; RP 99-104.<sup>17</sup> This timely appeal followed. CP 2034-43.

#### D. SUMMARY OF ARGUMENT

By the 1998 DOE indenture, the Port received extensive federal surplus property, including the tracks at issue here. The Port received that property subject to the 1947 and 1961 agreements between the AEC and

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<sup>16</sup> In making this argument of donative intent as to BNSF, the Port collapsed the question of consideration for the transfer of DOE properties to the Port with BNSF's continuing free use of the tracks. CP 1011-13, 1761-67. The two are *distinct* matters where the indenture gave the Port the power to terminate BNSF's license to use the tracks for *any* reason on six months' notice.

<sup>17</sup> In granting summary judgment to the Port/BNSF, however, the trial court rejected their argument that Peterson lacked standing, and noting that the Port had abandoned it, RP 19, 100. The court also rejected the Port/BNSF contention that the issues here were federally preempted. CP 2032; RP 100-01.

the railroads regarding those tracks. Those agreements were not perpetual, but rather were in the nature of revocable permits, conferring upon DOE, and now the Port, the right to terminate the agreements with the railroads for use of the tracks upon six months' notice. Those agreements were subject to Washington law upon DOE's 1998 transfer of the tracks to the Port.

Under the Washington Constitution, as a political subdivision of the State, the Port could not allow BNSF to use the tracks without payment. Article VIII, § 7 bans the Port from making gifts of public funds or giving public property to a private entity like BNSF; this Court has established a clear protocol for analyzing article VIII, § 7 issues. In determining whether a gift of public property has been made, the first question is whether a fundamental government purpose is at issue. Here, the lease of the tracks did not involve a fundamental government purpose; this was merely a straightforward property lease. The next issue is donative intent: the trial court erred in ruling on donative intent as a matter of law where there was direct evidence that the Port intended to give the tracks to BNSF without charge forever. Moreover, donative intent can also be documented by grossly inadequate consideration. The perpetual use of rail tracks for a one-time \$50,000 payment in 1947 that does not require BNSF to pay for the wear and tear its trains cause now,

thereby compelling Port taxpayers to bear that expense, is just such inadequate consideration. The alleged economic development benefit of such perpetual use by BNSF is not a substitute for tangible financial compensation to the Port and does not alter the fact that there was, at a minimum, a question of fact on donative intent.

With regard to the anti-favoritism provision of the Washington Constitution, article I, § 12, there was, at a minimum, a question of fact as to whether the Port conferred a special benefit on BNSF by allowing it what amounted to perpetual immunity from paying rent for use of public property. The Port had no protocol for allowing the rent-free use of its other properties and, in fact, did not allow any other tenant rent-free use of its public property. There was no reasonable ground for the Port's favoritism toward BNSF.

E. ARGUMENT<sup>18</sup>

(1) Interpretive Principles for Constitutional Analysis

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<sup>18</sup> This Court reviews summary judgment orders *de novo*, looking at the issues from the same position as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). CR 56 governs summary judgment motions; summary judgment is proper if the court, viewing all the facts and reasonable inferences in the light most favorable to the non-moving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate if reasonable persons could reach only one conclusion. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

This Court's principles for construction of the Washington Constitution are well-developed. As the Court noted in *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004), *cert. denied*, 543 U.S. 1120 (2005), this Court first looks to the plain language of the constitutional text and will accord it a reasonable interpretation, giving words in the constitution text their common and ordinary meaning at the time they were drafted. *Id.* The Court also examines the historical context of the constitutional provision for guidance. *Id. Accord, League of Education Voters v. State*, 176 Wn.2d 808, 821, 295 P.3d 743 (2013).

The overarching nature of the Washington Constitution also guides this Court's interpretation. Our Constitution is not a grant of authority, but rather a restriction on government's power. *Clark v. Dwyer*, 56 Wn.2d 425, 431, 353 P.2d 941, 945 (1960).

This Court reviews issues of constitutional interpretation *de novo*. *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 167, 385 P.3d 769 (2016); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642, 15 P.3d 990 (2007).

(2) The Port/BNSF Violated Article VIII, § 7

The plain language of article VIII, §§ 5<sup>19</sup> 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. As to local governments, they provided in § 7, the provision at issue here, as follows:

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.

By its terms, article VIII, § 7 bars either the gifting or loaning of public funds or property.<sup>20</sup> The historical context of article VIII, § 7 is particularly significant in understanding its meaning.

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<sup>19</sup> Article VIII, § 5 provides that the State's credit may not be loaned or given to any individual, association, company, or corporation.

<sup>20</sup> The breadth of § 7 was fully 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):

...Const. art. 8, s. 7...was and is expressly aimed at the use of public money by any private entity for private purposes. It is directed against the use of public money for political favoritism, preferment and manipulation; it is aimed at preventing or curtailing the private economic enhancements of persons and corporations by the employment of public funds for private purposes. It is designed to protect the public purse from private spending. The prohibition in the constitution of the use of public funds for private purposes... is directly aimed at particular forms of graft, corruption, favoritism and special privilege in politics and government, for it lays down an inexorable principle that anyone standing for public office who openly or tacitly promises to make any part of the public treasury available for private

Article VIII, § 7 was promulgated as the result of the undue political influence of railroads in late Nineteenth Century. The trial court agreed. RP 101. In their treatise on the Washington Constitution, Justice Robert Utter and Professor Hugh Spitzer discussed the history of article VIII, § 7 at the 1889 constitutional convention:

During the convention, Section 7, addressing local governments, received much more attention than the state-oriented Section 5, mainly because local concerns with the railroads dominated the discussion. However, a textual difference between Sections 5 and 7 is that Section 7 allows for the “necessary support of the poor and infirm.” Nevertheless, because of increasing state responsibility for the poor and infirm, Sections 5 and 7 are interpreted identically (*Citizens for Clean Air v. Spokane*, 1990; *Washington Health Care Facilities Auth. v. Ray*, 1980).

One of the most highly debated issues of the convention, the gift and loan prohibitions of Sections 5 and 7 were as stubbornly contested as any other provision. Many personal and local issues were involved in what was seen as a railroad subsidy question (*Airey*, 1945, 484). In order to attract a railway spur line, the citizens of Walla Walla had urged adoption of a clause allowing counties to subsidize railroads or other corporations when it was deemed to be for the public good (*Seattle Post-Intelligencer*, July 13, 1889). The convention’s Committee on State, County, and Municipal Indebtedness was hopelessly divided on the issue (*Seattle Post-Intelligencer*, July 22, 1889).

The president of the Oregon and Washington Territory Railroad Company had promised Walla Walla a

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profit, use, manipulation or investment will be unable to keep such promises lawfully.

line connecting that city with the Northern Pacific Railroad system, in return for a subsidy.

The lack of railroad competition had caused problems for eastern Washington farmers, and agriculturalists saw a competing railroad line as necessary to stop unfair practices (*Walla Walla Weekly Union*, June 22, 1889). But the Union Pacific Railroad, already building lines in Walla Walla County, did not want competition from the Northern Pacific Railroad, so Union Pacific worked to defeat the subsidy scheme at the convention (Fitts, 1951, 65). Sections 5 and 7 are seen as anti-railroad provisions so it is ironic that one of the two major railways sided with anti-corporate populists to gain their enactment.

Many lobbyists appeared before the convention on the issue, including some of the delegates themselves. One delegate who moved to accept the subsidies was himself the president of a railroad company, looking to establish subsidies for his own interests (Fitts, 151, 70-71). Further, a scandal arose when the *Seattle Post-Intelligencer* accused the chair of the legislative committee, a Northern Pacific Railroad lobbyist, of taking a bribe from the railroad (*Seattle Post-Intelligencer*, July 13, 1889). A reporter witnessed “enough cases of liquor to stock a small saloon for two years” being delivered to the residence of delegate J.Z. Moore on the night the committee was due to meet there. The *Seattle Post-Intelligencer* reported that it was common for the railroads to use money or whiskey to get delegates to vote their way. Several days after the story on J.Z. Moore was released, Moore addressed the convention, denied the charges, and produced a bill for the whiskey (*Seattle Post-Intelligencer*, July 17, 1889).

However, the discussions always focused on the railroads. The supporters of subsidies noted that railroads were a quasi-public concern and that it was a good principle for the government to aid them. Another delegate argued that the difference between the railroads and, for example, water works owned by a city was that the profits of the railroad would go into private pockets. Some

delegates looked beyond the railroad issue and feared to what other purposes subsidies would go. The vote for a provision prohibiting subsidies passed by a 2-to-1 margin. Motions for exceptions for irrigation canals, grain terminals, and shipping facilities were also defeated (Rosenow, 1962, 681-84).

Five of the counties associated with the railroad subsidy scheme—Asotin, Walla Walla, Franklin, Columbia, and Garfield—rejected the constitutional ratification when it went before the voters (Fitts, 1951, 194).

Robert F. Utter, Hugh D. Spitzer, *The Washington Constitution: A Reference Guide* (Greenwood Press 2002) at 145-46. This Court has concurred in the view that the conduct of railroads prompted § 7's inclusion in our Constitution. "[T]he inclusion of article 8, section 7, was a response to loans and gifts made by other states and local governments to private companies to stimulate railroad development which, in many instances, because an improvident investment leaving the governments without recourse." *Graham*, 80 Wn.2d at 675 (internal citations omitted).<sup>21</sup>

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<sup>21</sup> 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.

In general terms, an unconstitutional gift is present if a public entity permits a private company to use public property without paying cash consideration or paying only nominal consideration. *King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 597, 949 P.2d 1260 (1997) (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 of Tacoma*, 108 Wn.2d 679, 742 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 Justice Gerry Alexander's opinion in *CLEAN*, a case involving Seattle's Safeco Field. 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.").<sup>22</sup> 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

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<sup>22</sup> 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); *In re Limited Tax General Obligation Bonds of City of Edmonds*, 162 Wn. App. 513, 530, 256 P.3d 1242 (2011).

of law. *Id.* at 597-98.<sup>23</sup> The trial court’s oral ruling documents that it misapplied this necessary test. RP 102.

(a) Fundamental Governmental Purpose

As noted above, this Court must first discern if the funds are being spent for a fundamental governmental, as opposed to proprietary, purpose. Of necessity, certain public programs on which public funds are expended may result in benefit to individuals or businesses for which those individuals or businesses give “no consideration” in the traditional contractual sense. Thus, if there is a “public purpose,” there is no gift.

In *CLEAN*, the Court held that while the construction of a stadium was a legitimate public purpose, “it cannot be seriously contended that the development of a baseball stadium for a major league team is a “fundamental purpose” of state government. *Id.* at 798. By contrast, in *City of Seattle*, this Court rejected an article VIII, § 7 challenge to an ordinance providing for partial public financing of City election campaigns did involve a fundamental purpose of government:

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<sup>23</sup> *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 BNSF for its track use stands in stark contrast.

The difference between aid to private railroads in the business of making money for their stockholders and expenditure of public funds for limited purposes as part of an effort to prevent dominance of the electoral process by special interests dramatizes the inapplicability of Const. art. 8, § 7 to Seattle's ordinance.

The electoral process belongs to the public and has no counterpart in the private sector. In such a context, the words "gift" and "subsidy" as conceived by the drafters of Const. art. 8, § 7 have no application. Section 13 of ordinance 107772, codified as Seattle Municipal Code 2.04.400-.480, provides that public campaign funds may be used only for direct campaign purposes. Such funds never leave the public arena; they never go into the private pockets of the candidate for his own personal purposes. The candidate holds the funds in a fiduciary capacity and can spend only to further the objectives of the ordinance. When the campaign is over, all public funds not spent for those limited purposes must be returned to the City.

100 Wn.2d at 240-41.<sup>24</sup>

Here, the operation of railroad tracks by a public port district does not constitute a "fundamental purpose" of government, nor has the Port ever argued below that it did. CP 1761-70; RP 40-55, 85-90. The Port's counsel characterized this case as merely a "private business dispute between BN and TCRY." RP 87. The trial court agreed that a fundamental purpose of government was not at stake. RP 102.<sup>25</sup> Rather,

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<sup>24</sup> This Court specifically noted a series of "entitlement" programs in *City of Seattle* involving services without charge that do implicate more fundamental government purposes. 100 Wn.2d at 241-43.

<sup>25</sup> The trial court stated:

the Port's relationship with BNSF as to the tracks is in the nature of a routine commercial relationship. Thus, the Court must turn to the second step in the article VIII, § 7 protocol, donative intent.

(b) Donative Intent

Under the *CLEAN* protocol, applying numerous prior court decisions, 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. Alternatively, donative intent can be proven by grossly inadequate consideration received by the government for the property. In the absence of either donative intent or grossly inadequate tangible consideration, the Court's review is confined to the "legal sufficiency" of the consideration. *King County*, 133 Wn.2d at 601;

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In considering whether there has been a gift of state funds, the court must conduct a two-prong analysis:

First, are the funds being expended to carry out a fundamental governmental purpose. If yes, then there is no gift. If no, number two, the court must determine whether any consideration was received by the public for that expenditure and whether there was donative intent, citing *CLEAN v. State*, 130 Wn. 2d 782, 1996.

Here, in this case, the court finds that funds were expended, that the railway services of BNSF are not a fundamental government service, and so the court considers donative intent and consideration.

RP 102.

*City of Tacoma*, 108 Wn.2d at 703. The trial court erroneously *conflated* these distinct treatments of consideration in the case law. RP 102-03.<sup>26</sup>

Critically, donative intent, whether manifested as actual intent or grossly inadequate consideration, has long been held to be a *question of fact*. *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.”). The trial court here erred in addressing donative intent as a matter of law.

(i) The Port Intended to Give BNSF the Use of the Tracks Without Any Charge Forever

The Port had express donative intent by virtue of its decision to allow BNSF since 2009 to use the tracks at issue rent-free. The Port has never terminated BNSF’s revocable permit to use the Port’s tracks for

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<sup>26</sup> The trial court stated:

Mr. Peterson argues donative intent. The Port replies that the Port agreed to the indenture, and it received, in return, approximately 25, \$26 million in today’s dollars in consideration, including the obligation to allow BNSF its historic rights to operate on the tracks it built.

The court finds that consideration did and does exist. In assessing consideration, courts do not inquire into the adequacy of the consideration; rather, the court must employ a legal sufficiency test. The court is citing *King County v. Taxpayers of King County*, 133 Wn. 2d, a 1997 case. Here BNSF paid the Atomic Energy Commission to build the tracks in exchange for operating rights at no further expense. This court finds that this constitutes legally sufficient consideration. So the court grants summary judgment to the Port and BNSF on the cause of action as it relates to the gift of public funds.

RP 102-03.

free.<sup>27</sup> The Port *admits* that BNSF is using the Port's tracks for private purposes, CP 441, and that the revenue that it generates 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 Washington allows BNSF 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 has been 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 has never directed that BNSF's rights be terminated because it was not paying monetary consideration.<sup>28</sup>

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<sup>27</sup> The Port 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. CP 436.

<sup>28</sup> The Port and BNSF have also 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. On September 1, 2016, two weeks after this action was filed, Keller sent correspondence to BNSF's representative, Chris Randall, copying the Port's attorney. CP 1283-84. In its privilege log, the Port contends that the correspondence is protected by the attorney/client privilege. CP 1400-07. Similarly, on September 2, 2016, Keller again wrote to Randall. The Port refused to produce the

Moreover, further evidence of the Port's express donative intent can be discerned 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.

In sum, the Port has expressly intended to gift use of the tracks in question to BNSF.

(ii) The Actual Consideration Received by the Port from BNSF for Its Perpetual Use of the Tracks Was Grossly Inadequate

Even if this Court were to conclude that there is a fact question as to the Port's express donative intent, as noted *supra*, donative intent can be proved by the presence of grossly inadequate consideration for the Port's provision of property to a private entity like BNSF, and that, too, is a question of fact.

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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; two months after it produced documents, in response to the 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. CP 1409-10. Many of the documents 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. CP 327-48.

Here, careful consideration of the “consideration” received by the Port for the use of its tracks by BNSF evidences a grossly disparate benefit to BNSF that for all practical purposes constitutes a gift of public property to it by the Port.

First, it is *undisputed* that since 1998 BNSF, unlike UP, has not paid any rent or other fee for the use of the Port’s tracks. Historically, it is true that BNSF’s predecessor (and not BNSF itself) paid \$50,000 in 1947 to assist in the track’s construction. In effect, for a payment of \$50,000 seventy years ago, BNSF has had the free use of the tracks for that period of time.

Second, under the argument of the Port/BNSF, BNSF is entitled to continue that rent-free use indefinitely *into the future* because its predecessor made that \$50,000 payment to the federal government. Neither the Port nor BNSF indicated below that there was *any* limitation in the future on such use.

Third, it is *undisputed* that BNSF’s trains cause substantial wear and tear on the tracks in question. TCRY addresses some of the cost of maintaining the tracks, given that wear and tear, but Port taxpayers will have to bear the expense of major improvements to the track to handle BNSF’s modern railroad use. 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 BNSF's trains have substantially contributed. CP 1883-1974. That Master Plan is a critical admission by the Port that BNSF's rent-free use of the tracks at issue here result in a *substantial* expense to the taxpayers, and expense BNSF simply gets to ignore as it exploits the Port's public property.

Fourth, Peterson offered unrebutted expert testimony on the valuation of the benefit the Port received. Dr. Clarence Barnes, Ph.D., professor of economics and Dean Emeritus of the Gonzaga University School of Business Administration, CP 1567, 1571-77, testified that the Port has not utilized any models or performed any analysis to ascertain and quantify whether BNSF's use of Port tracks without paying rent or fees promotes economic development. CP 1568.<sup>29</sup> Without such an economic impact study, any asserted economic development benefit is speculation. *Id.* He noted that BNSF, as a private company, uses the Port's tracks to generate revenue, *id.*, but BNSF does not share such

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<sup>29</sup> Barnes noted that railroads, trucking companies and delivery services, such as UPS and FedEx, all could be said to promote economic development. CP 1569, 1746. However, they do that without free use of publicly-owned property. *Id.*

revenues with the Port, *id.*, nor does it compensate the Port for the wear and tear its use of the Port's tracks causes. *Id.*<sup>30</sup>

According to Barnes, if BNSF was required to pay compensation for the use of the Port's tracks, it would merely readjust the rates that it charges its customers. CP 1569.

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. Hooper testified that a public entity that owns railroad tracks usually receives financial consideration for track use in one or a combination of the following forms: right of access granted to any connecting carrier for a fee, usually a car load rate set by the owner or a regulator; annual costs of capital and maintenance are apportioned to permitted users, generally on a car load basis; inter-switching rates are set by a regulator or the government entity; the track is leased to a switching railroad who maintains the track and charges on a carload basis with fees remitted to the government; running rights and joint track usage are negotiated among the railroads and negotiated fees are paid to the government, generally on a carload basis, sometimes with

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<sup>30</sup> 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 of which Professor Barnes is aware. CP 1568.

an additional annual fee, and maintenance is the railroads' responsibility. CP 1560.<sup>31</sup> 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 has acted in a manner atypical of other public rail owners. *Id.*

Hooper noted that 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 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.<sup>32</sup>

Hooper calculated the overall gift by the Port to BNSF from 2009-2016 to be between \$6,830,000 to \$10,254,000. CP 1562. If the BNSF volume of the traffic on the Port's track in 2017 is the same as it was in

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<sup>31</sup> Under these methods, except the last two methods, either the government or a third party contractor maintains the track.

<sup>32</sup> 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 \$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 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 handled 13,660 carloads from 2009 to 2016. *Id.*

2016 (4,212 railcars), the gift to BNSF in 2017 will be between \$2,106,000 to \$3,159,000. *Id.*

In sum, BNSF has what amounts to perpetual rent-free use of valuable public property; the *only* financial contribution made by BNSF for the tracks for seventy years of track use is a single 1947 payment of \$50,000 it did not make. BNSF has 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. BNSF will not pay for the expense its trains cause to publicly-owned tracks, except that it has promised to make a payment of up to \$50,000. In the meanwhile, BNSF profits from its private use of the tracks and does not share a dime of that profit with Port taxpayers. Quite a deal.

The only way that the Port and BNSF have attempted to overcome the vast benefit BNSF receives from the Port for grossly inadequate consideration is to argue 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.<sup>33</sup> Economic benefit was the

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<sup>33</sup> Despite this argument, the Port's ostensible justification for BNSF's rent/fee-free use of the tracks in question has actually shifted in the course of this case. Before it fixed upon the economic development benefit of BNSF's relationship with the Port, it claimed in an August 10, 2016 letter to the Attorney General that the public benefits from UP/BNSF competition, without revealing that it had terminated UP's revocable permit to

central focus of the declaration of Scott Keller on summary judgment. CP 1023. Indeed, the Port has admitted that the only consideration it receives for BNSF's use of its tracks is the promotion of economic development. CP 469, 470 ("The consideration is economic development."). But 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 the non-monetary consideration it contends it receives from BNSF. CP 437, 470. It also 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. CP 437. It has no accounting procedure to record the economic development "consideration" it contends it receives from BNSF. CP 470. Simply put, the Port cannot, and did not, document 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 tracks rent-free.<sup>34</sup>

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operate on the tracks in 2000 or that UP, unlike BNSF, was paying a fee for track use. CP 279-83.

<sup>34</sup> BNSF did not submit any evidence on summary judgment supporting its view that free use of the Port's tracks promotes "economic development." The Port offered the Winningham declaration that was excluded by the trial court. It also offered declarations from a BNSF customer extolling the benefits of access to UP and BNSF lines, CP 1148-49, and the City of Richland's Economic Development Manager, CP 1151-52. But those declarations hardly constitute a rigorous analysis of the elusive concept of "economic

The Port simply treats BNSF differently from all other tenants. Although for other private lessees of Port property, it determines sufficiency of consideration with reference to fair market value, the Port does not consider fair market value with respect to BNSF's free use of the Port's tracks. CP 435. The Port's Commissioners have 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, CP 437, and has no policy on that issue. CP 437-38. 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. CP 435-36. The Port does not have an application process by 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. CP 438.

Washington law does not permit utilization of so amorphous a concept as "economic development" to substitute for actual, tangible

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development benefit," nor do they explain how requiring BNSF to pay for use of the tracks would affect access by rail customers to UP or BNSF services.

consideration.<sup>35</sup> Even assuming that “economic benefit” is at all quantifiable in this context,<sup>36</sup> and the Port has never developed an analytical protocol to evaluate this amorphous concept as noted *supra*, the Port/BNSF cannot point to a single Washington case that introduced such a concept into the article VIII, § 7 donative intent calculus. There are

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<sup>35</sup> By way of analogy, western Washington has an increasing number of toll roads. Were the government to allow FedEx to avoid the tolls, while charging UPS and DHL normal tolls, such favoritism toward FedEx could not be said to meaningfully promote economic development. Instead, it would simply provide a windfall to one private company while disadvantaging the others. Moreover, it is fully to be expected that every tenant of local and state government will argue that they confer an “economic benefit” upon public entities sufficient to permit them to escape any obligation to pay rent. For example, it is not hard to imagine that airlines like Alaska or Delta will argue that they should not pay rents for their facilities at Sea-Tac Airport because of the economic benefits they bring to western Washington. Shipping lines will make a similar argument about their use of waterfront port facilities. There is no principled limitation on this type of argument. It was *precisely* for this reason the Framers promulgated article VIII, § 7.

<sup>36</sup> The notion that gifts of public properties/funds, or even tax credits, to corporations result in tangible “benefit” to the public is legitimately subject to question. The recent example of Foxconn in Wisconsin is instructive. There, Wisconsin’s governor proposed a package of \$3 billion in tax breaks to that Taiwanese electronics firm to build a factory in a rural part of that state. The state’s nonpartisan Legislative Fiscal Bureau estimated Wisconsin would not recoup its investment until at least 2043, subsidizing the possible Foxconn jobs at an annual rate of between \$15,000 to \$19,000 each. *Questions Emerge Over What Wisconsin Must Give for Foxconn Plant*, *New York Times*, Aug. 10, 2017. <https://www.nytimes.com/2017/08/10/us/foxconn-jobs-wisconsin-walker-tax-incentives.html>.

Similarly, in our state, in 2013, the Legislature enacted aerospace tax breaks of nearly \$9 billion through 2040 that largely benefit Boeing. <http://www.nytimes.com/2013/11/11/business/washington-state-clears-boeing-tax-breaks.html>. These tax breaks, and Boeing’s consequent decisions affecting Washington jobs, prompted the 2017 introduction of HB 2145 that purports to connect tax breaks to actual employer conduct on job maintenance and creation. § 1 of that bill expressly noted:

Certain tax incentives provided to the aerospace industry, however, have not fully lived up to the legislature’s intent, as evidenced by the loss of twelve thousand two hundred fifty-nine jobs at Washington’s largest aerospace employer since the tax incentives were last extended while other states have experienced net gains in their employment.

decisions from this Court that do make 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, stating:

Our function is not to weigh the economic impact of the transactions. 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. "If the framers of the Constitution had intended only to prohibit counties from giving money or loaning credit for other than ... public purposes, they would doubtless have said so in direct words." *Johns v. Wadsworth*, 80 Wash. 352, 354, 141 P. 892, 893 (1914).

85 Wn.2d at 231.

This Court was even more forceful in *Lassila, supra*, in rejecting a loan of public funds to facilitate the redevelopment of a part of Wenatchee's downtown. There, the city used public funds to buy property for the purpose of selling it to private concerns. This Court rejected the city's contention that it "expected to reap future public benefits from the sale." 89 Wn.2d at 810. The Court stated at 811:

An expected future public benefit also does not negative an otherwise unconstitutional loan. We have repeatedly held that a loan of money or credit by a municipality to a private party violates Const. art. 8 s 7 regardless of whether it may serve a laudable public purpose.

It is no different for a gift of public facilities based on the putative receipt of “economic benefit.”

The Port’s determination to allow BNSF to use free public property implicates the fundamental purpose of article VIII, § 7; as feared by the Framers, without the prohibition on giving gifts of public property, funds, or credit to private companies, those private companies will be able to demand free or reduced rate use of public property in exchange for merely doing business in that locality. This significant change to Washington law will have a particularly pernicious effect in sparsely populated and rural counties, which have insufficient political clout to resist the whims of major corporations with disproportionate economic clout in such smaller communities. A policy which permits local governments to determine which private entities it believes sufficiently promote “economic development” and therefore are entitled to reduced rate or free use of public property empowers local favoritism and cronyism.

In sum, there is at least a fact question here as to whether the Port had donative intent. The existence of such a fact question requires reversal of the trial court’s summary judgment decision.

(c) Consideration

This Court need not reach this factor in the analysis 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.

(3) The Port/BNSF Violated Article I, § 12

In addition to article VIII, § 7, this case implicates article I, § 12, which provides:

No 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.

This Court has concluded that article I, § 12 was designed to foreclose special favoritism by government toward particular individuals or companies; the clause was adopted during a period of distrust towards laws that served special interests and was "to limit the sort of favoritism that ran rampant during the territorial period." *Ockletree v. Franciscan*

*Health Sys.*, 179 Wn.2d 769, 775, 317 P.3d 1009 (2014) (internal citation omitted). “[A]rticle 1, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others.” *Id.* (internal citation omitted).<sup>37</sup>

The trial court here found no article I, § 12 violation in the Port’s unique treatment of BNSF, allowing it to use public property rent-free in perpetuity, unlike any other Port tenant. The court erroneously assumed that the adoption by a port district’s elected commissioners of a resolution does not constitute the enactment of law and focused instead on the need for “a law” to be enacted conferring the benefit on the favored recipient of the government’s goodwill, rather than practices that constituted favoritism:

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<sup>37</sup> Article I, § 12 is distinct in perspective from the Equal Protection Clause of the Fourteenth Amendment. “Our framers’ concern with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.” *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004) (internal citation omitted). Put another way, “the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Id.* at 806-07. As one commentator noted:

... one might expect that the state provision would have a harder “bite” where a small class is given a special benefit, with the burden spread among the majority. On the other hand, the Equal Protection Clause would bite harder where majority interests are advanced at the expense of minority interests.

Johnathan Thompson, *The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1251 (1996).

The court finds that Article I, Section 12, involves the passage of a law. The clause does not address equal treatment when a law is passed. In this case the challenge is to contracts, not the passing or enactment of a law. So the court finds that Article I, Section 12, does not apply, grants summary judgment to the Port and BNSF on that issue.

RP 103. The trial court erred in this interpretation of article I, § 12, not even reaching this Court's test for applying the provision.

This Court has applied a straightforward two-part test for determining if a constitutional violation is present. First, a court must determine if the government has conferred a distinct benefit with respect to a fundamental right upon a favored individual or group. Next, the court must determine if there is a reasonable explanation for such favored treatment. *Ockletree*, 179 Wn.2d at 775-76.

(a) Exemption from Rent for Public Property Involves a Fundamental Right

As noted above, and as discussed at length in *Ockletree*, merely treating two similarly situated businesses differently does not necessarily affect a fundamental right. Rather, this Court noted long ago that privileges and immunities within the meaning of article I, § 12:

pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and

to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and 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. Cooley, *Constitutional Limitations* (6th ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

*State v. Vance*, 29 Wash. 435, 458, 70 Pac. 34 (1902). A “special privilege” has been found in numerous settings historically.<sup>38</sup>

More recently, this Court concluded in *Grant County* that the petition method of annexation did not involve a fundamental attribute of citizenship because the Legislature had plenary authority over local government annexation methods, and the method at issue was advisory only. 150 Wn.2d at 813-16. *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 176 P.3d 960 (2008) (hauler did not have a fundamental right to haul garbage, a particular public service, and such a right was delegated to municipalities. *See also, Am. Legion Post No. 149 v. Dep’t of Health*, 164

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<sup>38</sup> *E.g., In re Application of Camp*, 38 Wash. 393, 397, 80 Pac. 547 (1905) (holding that city ordinance prohibiting any one from peddling fruits and vegetables within city, but exempting farmers who grew produce themselves violated article I, § 12 as granting privilege to class of citizens); *City of Spokane v. Macho*, 51 Wash. 322, 323-26, 98 Pac. 755 (1909) (holding ordinance regulating employment agencies unconstitutional because it imposed criminal penalties upon one party, but imposed no penalties for others in like circumstances); *City of Seattle v. Dencker*, 58 Wash. 501, 504, 108 Pac. 1086 (1910) (invalidating ordinance as unconstitutional under article I, § 12 because it imposed tax upon sale of goods by automatic devices that was not imposed upon merchants selling same class of goods); *State v. Robinson Co.*, 84 Wash. 246, 249-50, 146 Pac. 628 (1915) (invalidating statutes that exempted cereal and flouring mills from act imposing onerous conditions on other similarly situated persons and corporations).

Wn.2d 570, 192 P.3d 306 (2008) (prohibition on smoking within a place of employment was not a fundamental right of carrying on a business).

By contrast, in *Ockletree*, this Court concluded that a fundamental right was implicated by a religious employer exemption from the Washington Law Against Discrimination. The Court's majority (expressed in the opinion of Justice Stephens) concluded that the right to be free from discriminatory practices was a fundamental right. 179 Wn.2d at 794-97.

While many of the cases cited above involve the enactment of a statute or ordinance, no decision of this Court states, as the trial court ruled, that a statute must be enacted for article I, § 12 to apply. Such an interpretation leaves a gaping hole in article VIII, § 7 never intended by the Framers. Literally, so long as no statute or ordinance is enacted, under the trial court's analysis, the government would be free to give away or loan public funds without consequence. This is a particularly baseless interpretation where so many units of government such as school, port, water, public utility, and many other districts do not pass "laws" as such, but rather adopt policies or resolutions.

RCW 53.12.295 provides:

The port commission shall organize by the election of its own members of a president and secretary, shall by resolution adopt rules governing the transaction of its

business and shall adopt an official seal. All 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.

Thus, the Port's resolution has the force of law. *See Freedom Foundation v. Wash. State Dep't of Transportation*, 168 Wn. App. 278, 276 P.3d 341 (2012) (concluding that an agency regulation may constitute an "other statute" exemption to the Public Records Act so long as the regulation has the force of law; it has the force of law if it is legislative in nature, affecting substantive rights of individuals and is promulgated under statutory authority in accordance with the statutorily imposed procedural requirements).

Ultimately, there is simply no difference whatsoever in legal effect between a resolution, ordinance, or statute. Each carries the force of law. Article I, § 12 precludes favoritism whether the cases involve cities and counties (which enact ordinances, rather than statutes) or ports (which adopt resolutions).<sup>39</sup> The trial court erred.

Further, although the trial court did not reach the issue of a fundamental right in the article I, § 12 context, BNSF argued that a benefit it, and only it, received from the Port – rent-free use of public property on

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<sup>39</sup> In *Ventenbergs, supra*, no one contended that article I, § 12 was not violated because a city cannot pass a statute.

perpetuity – did not implicate a fundamental government right. BNSF is wrong.

A fundamental right is at issue here – the government’s obligation to be properly compensated for use of public property.<sup>40</sup> In *Grant Cty.*, this Court cited the broad *Vance* definition with approval in which the Court noted that a fundamental right included “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.” 150 Wn.2d at 813. In other words, the exemption of BNSF from rental obligations implicated a fundamental right. Similarly, in *Ockletree*, the Court noted that an exemption from Washington’s Law Against Discrimination for religious groups implicated a fundamental right.

Peterson met the first element of the article I, § 12 analysis because this case goes to the core of article I, § 12’s anti-favoritism policy. Article VIII, § 7 forbids the giving of public property or funds as a gift or loan to private entities, particularly railroads. It is a fundamental right of

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<sup>40</sup> This fundamental right is evaluated from the context of the anti-favoritism thrust of article I, § 12, looking to the impact *on others similarly situated* – the interest of all citizens, referenced *supra* in *Grant Cty.* By contrast, the fundamental government purpose analysis in article VIII, § 7 is viewed differently as an objective overall assessment of the program at issue.

Washington businesses to have the same taxes or burdens which the property of other similarly situated Washington businesses experience.<sup>41</sup>

(b) There Is No Valid Justification for the Port's Special Treatment of BNSF

In *Ockletree*, this Court discussed the second facet of the article I, § 12 test at length, concluding that there were no rational economic or regulatory grounds for distinguishing between religious and secular entities in the application of the anti-discrimination policies of RCW 49.60. 179 Wn.2d at 794-804. Similarly, there is no justification for allowing BNSF, unlike any other Port tenant, or for that matter any other corporate lessee of public property in Washington, to enjoy such use of public property without paying legitimate rentals.

The Port continues to grant BNSF the “special advantage” of free use of Port property, which is not available to other private persons and entities. Indeed, UP, the other railroad using the tracks at issue here, does not receive such a benefit.

As noted *supra*, in its 250 other leases of public property, the Port requires the payment of fair market value for the property it leases. No

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<sup>41</sup> Perhaps the most pointed example of the Port's favoritism toward BNSF is its refusal to tolerate any criticism of that favored relationship. As noted *supra*, the Port threatened 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 TCRY. The Port later admitted that there were no unpaid taxes owing, and the threat was merely a “strategy.” CP 442.

other tenant gets use of public property rent-free due to its alleged promotion of economic development. Instead, the Port determines sufficiency of consideration for these leases with reference to fair market value alone, something it does not do with respect to BNSF's free use of the Port's tracks. CP 435. The Port does not have a process by which a private entity can request to use the Port's property without paying monetary consideration if they can show that the use would promote economic development. CP 438. If a private entity requested exemption from paying cash consideration for use of Port's property, and represented that it would promote economic development, the Port would not enter into such a lease. CP 435-36.

Moreover, the Port's "official" position that it was constitutionally acceptable for BNSF to use the tracks rent-free is undercut by the Port's negotiations 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.<sup>42</sup> These

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<sup>42</sup> Internal Port emails evidenced the Port's intent to secure payment from BNSF for track usage. 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. Perhaps the most telling example of the Port's awareness of how train usage affected the tracks and the need for securing compensation from the railroads was the March 29, 2016 email of the Port's counsel, Tom Cowan, to staff setting forth a proposed letter to UP asking it for a

facts crystalize the Port's real intent – to displace TCRY and Peterson from their contract with the Port.<sup>43</sup>

There is no reasonable ground for the Port to give BNSF a leasehold tax-free in perpetuity, favoritism shown no other Port tenant. No Port policy even hints at making such a favored right available to any other tenant. That is exactly the kind of favoritism article I, § 12 was designed to bar. This Court should so conclude.

#### F. CONCLUSION

This case presents classic state constitutional issues for this Court's attention. The Port has allowed BNSF 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 that railroad is exactly the kind of gifting of public funds that our Progressive Era Framers intended to stop by promulgating article VIII, § 7. Similarly, it is the type of governmental favoritism they wanted to preclude in article I, § 12.

The trial court erred in granting summary judgment to the Port/BNSF. This Court should reverse the trial court's order. As noted *supra*, at a minimum, there was a question of fact regarding the Port's

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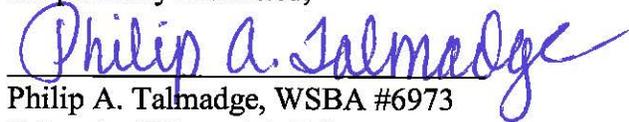
contribution toward the "additional maintenance and improvements to the Port's railroad ... required to accommodate this traffic." CP 1318.

<sup>43</sup> The reason for the Port's interest in getting BNSF/UP to pay for track usage was clear – to get the railroads to step up on this expense so that "we can eliminate the old contracts and charge for rail service." CP 1316.

donative intent and the grossly inadequate consideration received by the Port for BNSF's rent-free track usage. This Court could also rule as a matter of law on these facts that the Port violated article VIII, § 7 and article I, § 12. Costs on appeal should be awarded to Peterson.

DATED this 20th day of September, 2017.

Respectfully submitted,



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# APPENDIX

Wash. Const. art. I, § 12:

No 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.

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.

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

7 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF THURSTON

8 RANDOLPH PETERSON, a taxpayer  
9 resident,

10 Plaintiff,

11 v.

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

16 Defendants.

17 UNION PACIFIC RAILROAD  
18 COMPANY, a Delaware corporation;  
19 JASON MOUNT, an individual; JAMES  
20 SUMMEY, an individual; PEGGI  
21 DOGGETT, an individual; JENNIFER  
22 HARTSFIELD, an individual; and  
23 MANDI OUKROP, an individual,

24 Intervenor Plaintiffs,

25 and

26 BNSF RAILWAY COMPANY, a  
27 Delaware corporation,

28 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

PLAINTIFFS DOGGETT, HARTSFIELD, MOUNT,  
OUKROP, PETERSON, AND SUMMEY'S COMBINED  
STATEMENT OF FACTS AS TO ALL PENDING  
SUMMARY JUDGMENT MOTIONS- 1

KSB LITIGATION P.S.  
221 N. WALL STREET, STE 210  
SPOKANE, WA 99201  
(509) 624-8988

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

5  
6 **A. Overview.**

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

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

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

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

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

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

PLAINTIFFS DOGGETT, HARTSFIELD, MOUNT,  
OUKROP, PETERSON, AND SUMMEY'S COMBINED  
STATEMENT OF FACTS AS TO ALL PENDING  
SUMMARY JUDGMENT MOTIONS- 2

*KSB LITIGATION P.S.*  
221 N. WALL STREET, STE 210  
SPOKANE, WA 99201  
(509) 624-8988

1 The Port would like to talk with BNSF about an operating  
2 agreement and funding plan that addresses the use, maintenance  
3 and repair issues for its rail line. We have some ideas on how to  
4 proceed but would like to work with the railroads on a approach  
5 that meets all of our needs.

6 We would like to set up a time to talk with BNSF folds about  
7 how to best move forward before the new rail volume increases  
8 begin.

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

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

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

16 Here is my suggested language for a response;

17 Due to the size of the unit trains. [T]he Port is concerned that  
18 additional maintenance and improvements to the Port's railroad may  
19 be required to accommodate this traffic. The Port is working with its  
20 consultants to determine the appropriate charges to the users to  
21 support the railroad maintenance and improvements. When the Port  
22 has received a recommendation, the Port will discuss the appropriate  
23 charges with UP, BNSF, and TCRY.

24 In the interim, BNSF has agreed to make a lump sum payment to the  
25 Port of \$50,000 to help with ballast replacement and improvement  
26 necessary to handle the unit trains. The previously requested UP to  
27 participate in this project, but UP refused on the basis it was already  
28 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.

1 (Counsel Decl. Exh. 4)

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

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

9 g. Port 9/30/2016 Conference Call Discussion Agenda: Rail Program; Class 1  
10 direct delivery rail car fee. (Counsel Decl. Exh. 7)

11  
12 **B. Taxpayer Plaintiffs.**

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

21  
22  
23 **C. Port.**

24 *The Port is a Municipal Corporation.*

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

26 PLAINTIFFS DOGGETT, HARTSFIELD, MOUNT,  
27 OUKROP, PETERSON, AND SUMMEY'S COMBINED  
STATEMENT OF FACTS AS TO ALL PENDING  
28 SUMMARY JUDGMENT MOTIONS- 4

KSB LITIGATION P.S.  
221 N. WALL STREET, STE 210  
SPOKANE, WA 99201  
(509) 624-8988

1 4. The Port's current executive director is Scott Keller. (See December 16, 2016  
2 transcript of Deposition of CR 30(b)(6) designee of the Port ("Port Depo.") attached as **Exh. 8**  
3 to Counsel Decl. p. 5 // 13-14) The executive director, who runs the day-to-day operations of  
4 the Port, reports to the three Port Commissioners at a public meeting held usually once a  
5 month. (See December 16, 2016 transcript of Deposition of Scott Keller ("Keller Depo."),  
6 att'd to Counsel Decl. as **Exh. 9**, p. 8)  
7

8 *The Port Taxpayers.*

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

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

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

16 7. The Port owns a significant amount of property in the Benton County, and is the lessor  
17 of property in approximately 250 leases to private individuals and entities. (Keller Depo p. 31  
18 // 14-16)

19 8. From those lessees, the Port requires the payment of fair market value ("FMV") for  
20 the property it leases. (Keller Depo. p. 31 // 17-19)  
21

22 9. The Port is aware that as a public entity it cannot allow public property to be occupied  
23 without receiving consideration. (Keller Depo. p. 20; see also September 19, 2014 Letter from  
24 Port's Counsel, att'd as **Exh. 8** to the First Amended Complaint ("FAC")) (The "Port, as a  
25 public entity, cannot allow its property to be occupied without compensation.")  
26

1            *Department of Energy Transfers Property to the Port.*

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

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

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

17           13. The ICC decision states that "the Government may terminate the agreement at any  
18 time upon 6 months' advance notice in writing to the applicants." (See FAC **Exh. 2**, p. "Sheet  
19 6")

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

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

4 **D. Port's Railroad Tracks.**

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

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

10 18. In September 2000, the Port, recognizing that UP was using the Port's tracks without  
11 paying consideration, directed "written notice to [UP] terminating its rights to use the Port of  
12 Benton track." *Id.* Keller testified that he thought it was a 'ploy'. The Port did not seek  
13 approval from the Surface Transportation Board to revoke UP's permit. (Keller Depo. p. 30-  
14 31)

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

18  
19  
20  
21  
22  
23  
24 <sup>1</sup> "TCRY" is the reporting mark of the Tri-City Railroad Company, LLC. Reporting marks, officially known as  
25 'Standard Carrier Alpha Code', are assigned by the Association of American Railroads, under the authority of  
the Surface Transportation Board.

1        **E. The Federal Lawsuit.**

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

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

5        22. In the lawsuit, BNSF asserted that the dispute should not be referred to the Surface  
6 Transportation Board ("STB") and the court agreed with that position. (Counsel Decl. **Exh.**  
7 **11 and 12**)

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

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

17        **F. The Port's Special Relationship with BNSF.**

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

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

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

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

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

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

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

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

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

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

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

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

5  
6 34. The Port asserts in the Letter that “[t]he agreements and UP and BNSF operations now  
7 fall under the jurisdiction of the Surface Transportation Board[.]” The Port failed to advise the  
8 Attorney General that the Port had already established in federal court that the contracts  
9 granting the revocable permit terminable upon six months’ notice are interpreted under  
10 Washington State contract law. 835 F.Supp.2d at 1062. Indeed, the federal court specifically  
11 rejected the contention that interpretation and enforcement of the contracts fell under STB  
12 jurisdiction. (Counsel Decl. Exh. 12)

13  
14 35. The Port in the Letter suggests its rail line should be considered a public right of way:  
15 The Port does not explain in the Letter why, if the rail line is analogous to a public right of  
16 way, certain users selected by the Port may use the property for free and without tax, yet  
17 others must pay both rent to access the property and the leasehold tax on the use of the  
18 property.

19 *The Port Now Contends that it receives ‘promotion of economic development’ from*  
20 *BNSF.*

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

23 37. The Port admits it has no methodology or other means of measurement to determine  
24 whether it in fact receives ‘promotion of economic development’ from BNSF, or to quantify  
25

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

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

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

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

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

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

20  
21  
22  
23 **G. The Port's Favoritism Towards BNSF.**

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

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

3 44. In 2000, the Port directed that UP's permit to use the Port's tracks be terminated  
4 because UP was not paying monetary consideration. (835 F.Supp.2d at 1060) On the other  
5 hand, the Port has never directed that BNSF's rights be terminated because it was not paying  
6 monetary consideration.  
7

8 45. If another private party or entity requested exemption from paying cash consideration  
9 for the use of the Port's property, and represented that it would promote economic  
10 development in exchange for free use of Port property, the Port would not allow that party or  
11 entity to use Port property without paying cash consideration. (Keller Depo. pp. 23-25)  
12

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

16 47. The Port threatened Plaintiff Peterson that unless he dismissed this lawsuit contending  
17 that the Port's special relationship with BNSF was unconstitutional, the Port would seek over  
18 a million dollars in alleged unpaid taxes from Peterson's company, TCRY. (*See* Keller Depo.,  
19 pp. 48-52) The Port later admitted that there were no unpaid taxes owing, and the threat was  
20 merely a "strategy". (Keller Depo. p. 50 // 1-5)  
21

22 48. The relationship the Port has with BNSF, in seeking to maintain the status quo is such  
23 that on September 1, 2016, two weeks after the lawsuit was filed, the Port's executive  
24 director, Scott Keller, sent correspondence to BNSF's representative, Chris Randall and  
25 copied the Port's attorney on the correspondence. In its privilege log, the Port contends that  
26

1 the correspondence is protected by the attorney/client privilege. (Counsel Decl. **Exh. 13**)  
2 Similarly, on September 2, 2016, Scott Keller again wrote to Chris Randall. The Port refused  
3 to produce the correspondence contending that it is protected by the work product privilege.  
4 (*Id.*) Although not stated on its privilege log, in March 2017, the Port asserted that it has a  
5 joint defense agreement with BNSF.  
6

7 49. On March 16, 2017, two months after it produced documents, in response to the  
8 Taxpayers discovery requests, BNSF asserted that it has a “common interest agreement” with  
9 the Port and demanded that various documents it had produced be destroyed or returned.  
10 (Counsel Decl. **Exh. 14**) Many of the document that it requested be destroyed pre-dated the  
11 litigation by four and five months. BNSF did not disclose its “common interest agreement”  
12 with the Port when it filed its motion to intervene in this case. (*Id.*)  
13

#### 14 **H. Opinions of Professor Clarence Barnes**

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

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

21  
22 52. The Port has not utilized any models or performed any analysis to ascertain and  
23 quantify whether BNSF’s use of the Port’s tracks, without paying compensation, promotes  
24 economic development. (Barnes Decl., ¶ 8)

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

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

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

17       **56.** The Port has not asked BNSF whether it would stop serving industries in the Port's  
18 district if it was required to pay consideration for the use of the Port's tracks; as described by  
19 Professor Barnes, that question must be answered before one can begin assessing whether  
20 BNSF's use of the Port's tracks without paying consideration promotes economic  
21 development, as opposed to BNSF using the Port's tracks while paying consideration for so  
22  
23  
24  
25

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

3 Q: Do you know whether or not there's any governmental entity in the  
4 State of Washington that allows BNSF to use its tracks without monetary  
5 compensation?

6 A. Not that I know of.

7 Q. Is it your belief, Mr. Keller, that any place BNSF serves in the State  
8 of Washington, that it is promoting economic development?

9 A. You know. I believe that.

10 (Barnes Decl., ¶ 12)

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

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

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

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

21 BNSF traffic on Port-owned railroad tracks is increasing and BNSF is  
22 using the Port's tracks without paying either a fee for use or to repair the  
23 damage its use causes since 2009, the value of the free use to BNSF, and  
24 therefore the value of the 'gift' it received from the Port, is in the range  
25 of \$6,830,000.00 to \$10,245,000.00. Assuming BNSF's traffic volume in  
26 2017 is similar to that of 2016, in 2017 the value of the 'gift' will be in  
27 the range of \$2,106,000.00 to \$3,159,000.00. (Hooper Decl. ¶4)

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

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

13 (Hooper Decl., ¶ 49)

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

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

1 63. If the present circumstances continue, with BNSF's increasing rail traffic using the  
2 Port's tracks for free, an order of magnitude value of rehabilitation would be \$300k per mile  
3 for 5 miles of yard track; \$400k mile on 4.5 miles of main track with modern rail and, \$800k  
4 per mile if the 6.5 miles of the 90lb rail must be changed, totaling in the range of \$8.5 million.  
5 (Hooper Decl., ¶ 53)  
6

7 64. Prior to 2009, BNSF paid a fee for interchange and switching of \$500 to \$750 per car  
8 load. (Hooper Decl., ¶ 54) That fee, whether collected by the owner of a track or that owner's  
9 agent, would normally be used for the maintenance and capital investment necessary to keep a  
10 rail line in service. (*Id.*) BNSF has independently switched 13,660 carloads from 2009 to  
11 2016. (*Id.*) This is a value or 'gift' of between \$6,830,000 to \$10,254,000 (*Id.*) If the BNSF  
12 volume of the traffic on the Port's track in 2017 is the same as it was in 2016 (4,212), the gift  
13 provided BNSF in 2017 will be between \$2,106,000 to \$3,159,000. (Hooper Decl., ¶ 55)  
14

15 **J. Maintenance of the Tracks**

16 65. TCRY's lease provides that it "...agrees to take the Property in its present condition,  
17 and subject to the restrictions contained in the Indenture between the United States of  
18 America and the Port, the amendments thereto..." (*See* Declaration of Scott Keller ("Keller  
19 Decl.") in Support of the Port's Motion for Summary Judgment **Exh. 4** ¶1.2)  
20

21 66. The Indenture provides: "Grantee shall maintain the Railroad, including all structures  
22 improvements, facilities and equipment in which this instrument conveys any interest, at all  
23 times in safe and serviceable condition, to assure its efficient operation and use, provided,  
24 however, that such maintenance shall be required as to structures, improvements, facilities  
25

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

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

6 68. TCRY provides day to day maintenance of the track subject to reasonable wear and  
7 tear. (Anderson Decl. ¶ 6) The Port pays for capital improvements. (Anderson Decl. ¶ 7) In  
8 that regard, the Port has sent out for bid for work titled “Rail Rehab Project”. (Anderson Decl.  
9 Exh. B) The engineer’s estimate that the cost of the work will be approximately \$400,000 -  
10 \$450,000. (*Id.*) With respect to funding, the Port has stated “The funding is being provided by  
11 the Port of Benton along with financial assistance from the State of Washington.” (Anderson  
12 Decl. Exh. C) Mr. Hooper has opined that this project, and other capital improvements, will  
13 be increasingly necessary to account for the increased tonnage BNSF traffic represents.  
14 (Hooper Decl. ¶45)

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

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22 **K. Defendants’ Summary Judgment Pleadings**

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

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

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

8 73. In its brief, BNSF states: "In exchange for recognizing BNSF's operating rights, the  
9 Port obtained hundreds of acres of land, many facilities, and the Tracks from the federal  
10 government." (BNSF Brief p. 2) BNSF does not cite to any authority to support its statement.  
11 BNSF's statement is incorrect. The Indenture states: "Grantor's conveyance is in  
12 consideration of the assumption by Grantee of all Grantor's maintenance obligations and its  
13 taking subject to certain terms, reservations, restrictions, licenses, easements, covenants,  
14 equitable servitudes, contracts, leases, and other conditions set forth in this instrument." (Exh.  
15 7 to FAC p. 2)

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

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

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1       76. The Declaration of Nicholas Zachary, the Port submitted, does not address the issues  
2 before the Court. It appears he incorrectly assumes that if the Port requires compensation,  
3 BNSF will not provide service. Mr. Zachary's declaration does not address the facts set fort in  
4 SOF 1(a) – 1(g). Nor does he address the issues discussed by Professor Barnes. (SOF #51-57).  
5

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

12       78. The Declaration of Scott Keller does not address the facts set forth in SOF 1(a) – 1(g),  
13 It appears that he incorrectly assumes that if the Port requires the payment of compensation by  
14 BNSF, it will not provide service. The declaration does not address the other Taxpayers who  
15 are parties to this action.  
16

17       79. The report prepared by several authors that is attached to the Declaration of Brian  
18 Winningham is subject to a motion to strike. The report does not address the issues before the  
19 Court. Specifically, the report does not explain any difference between the 'promotion of  
20 economic development' if BNSF had to pay market value to use publicly owned property,  
21 rather than using it for free. Moreover, it does not address the issues set forth in Professor  
22 Barnes's Declaration (SOF #51-57)  
23

1 DATED this 20 day of March, 2017.

2 **KSB LITIGATION, P.S.**

3  
4 By: Anne Schroeder  
5 William J. Schroeder, WSBA #7942  
6 William C. Schroeder, WSBA # 41986  
7 Anne K. Schroeder, WSBA # 47952  
8 Attorneys for Plaintiffs Doggett,  
9 Hartsfield, Mount, Oukrop, Peterson, and  
10 Summey

11 **TALMADGE/FITZPATRICK/TRIBE**

12 By: Phillip Talmadge  
13 Phillip Talmadge, WSBA #6973  
14 Attorney for Plaintiffs Doggett,  
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16 Summey

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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:

<p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p><u>X</u></p> <p>Email: <a href="mailto:AndrewK1@atg.wa.gov">AndrewK1@atg.wa.gov</a></p> <p>Email: <a href="mailto:rosannf@atg.wa.gov">rosannf@atg.wa.gov</a></p> <p>Email: <a href="mailto:REVolyEF@atg.wa.gov">REVolyEF@atg.wa.gov</a></p>	<p>HAND DELIVERY</p> <p>U.S. MAIL</p> <p>OVERNIGHT MAIL</p> <p>FAX TRANSMISSION</p> <p>ELECTRONIC MAIL</p>	<p>Andrew Krawczyk Rosann Fitzpatrick Assistant Attorney Generals OFFICE OF THE ATTORNEY GENERAL Revenue and Finance Division P.O. Box 40123 Olympia, WA 98504-0123</p> <p style="text-align: center;">Attorneys for Washington State, Dept. of Revenue</p>
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<p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p><u>X</u></p> <p>Email: <a href="mailto:Paul.Lawrence@pacificallawgroup.com">Paul.Lawrence@pacificallawgroup.com</a></p> <p>Email: <a href="mailto:Greg.Wong@pacificallawgroup.com">Greg.Wong@pacificallawgroup.com</a></p> <p>Email: <a href="mailto:Alanna.Peterson@pacificallawgroup.com">Alanna.Peterson@pacificallawgroup.com</a></p>	<p>HAND DELIVERY</p> <p>U.S. MAIL</p> <p>OVERNIGHT MAIL</p> <p>FAX TRANSMISSION</p> <p>ELECTRONIC MAIL</p>	<p>Paul J. Lawrence Gregory J. Wong Alanna E. Peterson Pacifica Law Group LLP 1191 Second Avenue, Suite 2000 Seattle, WA 98101-3404</p> <p style="text-align: center;">Attorneys for BNSF</p>
<p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p><u>X</u></p> <p>Email: <a href="mailto:wackerbarth@lanepowell.com">wackerbarth@lanepowell.com</a></p> <p>Email: <a href="mailto:yatesa@lanepowell.com">yatesa@lanepowell.com</a></p>	<p>HAND DELIVERY</p> <p>U.S. MAIL</p> <p>OVERNIGHT MAIL</p> <p>FAX TRANSMISSION</p> <p>ELECTRONIC MAIL</p>	<p>Tim Wackerbarth Andrew Yates LANE POWELL PC 1420 Fifth Ave., Ste. 4200 Seattle, WA, 98111</p> <p style="text-align: center;">Attorneys for Union Pacific</p>

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<input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> FAX TRANSMISSION <input checked="" type="checkbox"/> ELECTRONIC MAIL	Matthew R. Brodin Briggs and Morgan 80 South 8 <sup>th</sup> Street, Suite 2200 Minneapolis, MN 55402  <i>Pro Hac Vice Counsel for BNSF Railroad</i>
Email: <a href="mailto:mbrodin@briggs.com">mbrodin@briggs.com</a>	
<input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> FAX TRANSMISSION <input checked="" type="checkbox"/> ELECTRONIC MAIL	Talmadge/Fitzpatrick/Tribe 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126  Associated with KSB Litigation
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\_\_\_\_\_  
Anne K. Schroeder

PLAINTIFFS DOGGETT, HARTSFIELD, MOUNT,  
OUKROP, PETERSON, AND SUMMEY'S COMBINED  
STATEMENT OF FACTS AS TO ALL PENDING  
SUMMARY JUDGMENT MOTIONS- 23

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# **APPENDIX E**

No. 94588-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RANDOLPH PETERSON, et al.

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.

Respondents.

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**RESPONDENTS THE PORT OF BENTON AND BNSF RAILWAY  
COMPANY'S JOINT OPENING BRIEF**

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## I. INTRODUCTION

This appeal represents the latest effort by Appellant Randolph Peterson—the principal of the Tri-City Railroad Company, LLC (“TCRY”)—to obstruct Respondent BNSF Railway Company’s (“BNSF”) operations on certain railroad tracks (“Tracks”) owned by the Port of Benton (“Port”). Unlike TCRY, which uses and maintains the Tracks pursuant to a straightforward lease agreement, BNSF’s operating rights on the Tracks arise from two distinct contractual relationships: (1) a Cold War-era agreement between the federal government, BNSF, and the Union Pacific Railroad Company (“UP”), in which BNSF and UP paid the cost of constructing the Tracks and provided service via the Tracks to the Hanford Nuclear Reservation (“Hanford”) in exchange for the right to operate on the Tracks in the future without further payment (the “Historical Agreement”), and (2) an Indenture fifty years later in which the Port received millions of dollars in federal property, including the Tracks, at no cost in exchange for assuming the federal government’s obligations under the Historical Agreement.

TCRY previously attempted to block BNSF’s use of the Tracks, but in a separate lawsuit a federal district court enjoined Peterson from that and any future interference with BNSF’s operating rights. To sidestep that injunction, Peterson filed the instant lawsuit in an attempt to elevate

his commercial dispute to one of constitutional significance. Peterson's constitutional claims, however, are without merit.

First, Peterson's unconstitutional public gift claim ignores the Historical Agreement and the Indenture. The Port recognizes BNSF's operating rights in adherence to the Historical Agreement, not with donative intent, and both the Historical Agreement and the Indenture were supported by ample consideration. Indeed, the Port received millions of dollars of valuable land at no cost that has led to significant benefit to the Port in return for stepping into the shoes of the federal government vis-à-vis BNSF's operating rights. This Court should decline Peterson's invitation to assess the adequacy of consideration in the decades-old Historical Agreement. Second, Peterson's privileges and immunities claim fares no better. This dispute involves rights under contracts, not laws. Regardless, Peterson fails to identify a fundamental right of state citizenship that is necessary to support his claim. For these reasons, the trial court's ruling should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. The Development of Hanford and the Need for Improved Rail Service.**

During World War II, the federal government constructed the only large-scale plutonium processing plant in the United States at Hanford.

CP 38. The plutonium produced at Hanford was “vital” to the development of the United States’ military weapons arsenal. *Id.* Hanford covered 540 square miles, spanning Benton, Grant, and Franklin counties. *Id.* Hanford’s rapid expansion at the onset of the Cold War resulted in the exponential growth of surrounding communities.<sup>1</sup> *Id.*

To support its operations, Hanford received “[t]remendous inbound tonnages of coal, chemicals and other commodities” by rail. *Id.* Initially, the only rail service to Hanford was from the north. CP 39. Although the northern connection was adequate during World War II, when the “significance” of the Hanford Site was “virtually unknown,” it was not deemed sufficient afterward when the “military importance” of Hanford was “common knowledge throughout the world” and Hanford became a primary “national defense target.” CP 43. The federal government determined that a southern rail connection was essential for security reasons, in addition to “operating convenience” and “large savings in transportation costs[.]” CP 43, 44.

#### **B. The Federal Government Negotiates an Agreement with the Railroads to Provide Rail Service.**

In 1947, the federal government, acting through the U.S. Atomic Energy Commission (the “AEC”), and the predecessors-in-interests to

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<sup>1</sup>The town of Richland quickly grew from 250 to 18,000 during the 1940’s, and continued to grow at a rapid rate as Hanford expanded. *Id.*

BNSF and UP (together, the “Railroads”)<sup>2</sup> negotiated an agreement in which the Railroads agreed to pay for the construction of southern-connection rail tracks (the “Tracks”) and establish service to Hanford, in exchange for the right to operate on the Tracks in the future. CP 40-41, 57. Specifically, the agreement provided that, after the Railroads reimbursed the federal government for the cost of construction, the Railroads would have “equal joint right to operate” over the Tracks and would thereafter be permitted to operate over the line “free of rental or any other charge.” CP 28, 57.

When the 1947 Agreement was signed, the AEC was the only customer on the Tracks. *BNSF Ry. Co. v. Tri-City & Olympia R.R. Co. LLC*, 835 F. Supp. 2d 1056, 1059 (2011), *amended by* No. CV-09-5062-EFS, 2012 WL 12951546 (E.D. Wash. Feb. 14, 2012). Accordingly, the Railroads sought an exemption from the public convenience and necessity certification required for common carriers by the Interstate Commerce Commission (the “ICC”), the federal agency which regulated interstate commerce. *Id.* The ICC denied the exemption on the basis that common carrier services would serve businesses located in Richland then or in the future. *Id.* In its decision, the ICC evaluated and ultimately decided that

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<sup>2</sup> BNSF and UP are “the undisputed successors-in-interest to the 1947 Agreement . . . .” *BNSF Ry. Co.*, 835 F. Supp. 2d at 1058.

the southern rail connection would be in the “public interest.” CP 49, 51. The ICC also recognized that the agreement would “result in benefits to the Government in providing more direct routes and lower transportation costs on shipments moving to and from Richland.” CP 49. In analyzing and approving the agreement, the ICC also concluded that “when full payment has been made, [the Railroads] should thereafter be permitted to operate over the line without further payments.” CP 50; 57.

In 1961, the AEC entered into another agreement with the Railroads. CP 67-72. The 1961 agreement reaffirmed the 1947 agreement and granted the Railroads the right to operate over and to construct additional spurs and tracks. CP 67.

In 1979, the federal government entered into an additional agreement with the Railroads to convert the 1961 agreement into a permit. *BNSF Ry. Co.*, 835 F. Supp. 2d at 1059. The federal government desired to convert the agreement into a permit “so that the tracks could be classified as surplus under the Federal Property and Administrative Services Act of 1949.” *Id.* Aside from minor changes irrelevant to this lawsuit, the 1979 agreement left the prior Historical Agreement “in full force and effect.” *Id.*

As is typical in government contracts, in each agreement AEC reserved the right to terminate the agreement on six months' notice.<sup>3</sup> CP 58, 71. Neither the federal government nor its assignee, the Port, has ever exercised that right.<sup>4</sup> *See* CP 1996.

**C. The Federal Government Declares Land Surplus, Including the Tracks, and Transfers it to the Port at No Cost in Exchange for the Port's Adherence to the Historical Agreement.**

The Port is a special purpose district created in 1958 to foster economic development, trade, and tourism in the communities surrounding Hanford. Port of Benton, *The Port of Benton History: 1958-2012*, at \*2-5 (2012), *available at* <http://portofbenton.com/tricities/wp-content/uploads/2015/07/History2012.pdf>. As the Department of Energy ("DOE"), the successor to the AEC, downsized its operations at the close of the Cold War, it transferred a number of properties to the Port through the DOE's beneficial reuse program. CP 137. Through that program, Congress authorized the DOE to work with negatively impacted communities to ensure that former nuclear defense facilities were beneficially reused for industrial, economic, commercial, or civic

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<sup>3</sup>"[T]ermination for convenience clauses are required by regulations for most government procurement contracts." *SAK & Assocs., Inc. v. Ferguson Const., Inc.*, 189 Wn. App. 405, 410, 357 P.3d 671 (2015). The purpose of such clauses is to permit the government to avoid incurring costs that are no longer necessary. *Id.*

<sup>4</sup> Although Peterson claims that the Port terminated UP's rights, that is untrue. CP 1996. Although the Port at one time considered it, it never did so.

redevelopment. U.S. Dept. of Energy, Land and Asset Transfer for Beneficial Reuse, DOE/LM-1475, at \*3 (June 2015), *available at* [https://energy.gov/sites/prod/files/2015/07/f24/DOE\\_LM-1475.pdf](https://energy.gov/sites/prod/files/2015/07/f24/DOE_LM-1475.pdf). The purpose of the program was to “address and minimize the negative social and economic impacts of workforce restructuring on communities surrounding DOE facilities.” *Id.* at \*3. It saved DOE significant storage, maintenance, and security costs associated with decommissioned properties. *Id.* at \*5. It also eliminated the need to conduct costly demolition and site restoration after environmental cleanup of contaminated properties. *Id.* at \*5.

In 1998, DOE declared approximately 768 acres of Hanford, with 26 facilities and 16 miles of railroad, including the Tracks, to be surplus and conveyed ownership to the Port in a quitclaim deed. CP 122, 85. At the time, the property transferred was valued at more than \$5.1 million. *Id.* The quitclaim deed was subject to the terms of an Indenture. CP 1022. The Surface Transportation Board (“STB”), the successor to the ICC, approved the transfer. CP 1022, 1026.

The Port did not pay any money for these valuable lands and facilities. As consideration for the property transfer, the Port agreed to assume all of DOE’s contractual and legal obligations associated with the Tracks, including an express condition that the Port continue to honor the

Historical Agreement “governing access to the Railroad.” *See* CP 87, 90 (providing that the Port “accepts the obligations and considerations under” the Historical Agreement); *BNSF Ry. Co.*, 835 F. Supp. 2d at 1060. The Port also agreed to provide DOE with continued rail access to Hanford as long as the Port maintains the Tracks. CP 1774. The Port also agreed to “devote all lease payments or other sources of revenue from the Real Property and Railroad [conveyed through the Indenture] to cover maintenance of the Railroad[.]” CP 1444.

In the Indenture, the DOE stated that the “purpose” of the transaction was to “assist in [the Port’s] economic development activities” and “foster[] economic development.” CP 85. The Port agreed to use the property “to create economic and employment opportunities in the community[.]” CP 86. Under the terms of the Indenture, if the Port ceases to use the property for economic development, all or part of the property transferred shall revert back to DOE. CP 92-93.

#### **D. The Port Contracts with TCRY for Track Maintenance.**

Shortly after the Port acquired ownership of the Tracks, the Port contracted with a previous company controlled by Peterson for maintenance of the Tracks. CP 286, 294, 1789; *BNSF Ry. Co.*, 835 F. Supp. 2d at 1060. That contract eventually was assigned to TCRY. 835 F. Supp. 2d at 1060.

Later, TCRY and the Port negotiated a lease agreement which authorized TCRY to “provide rail and track maintenance services” on the Tracks. *Id.*; CP 1039-55. The lease agreement includes not only the right to operate on the Tracks, but also the right to use certain real and personal property including a building, maintenance equipment, and two locomotives. CP 143. In the lease, TCRY agrees that its right to the Tracks is “subject to” the Historical Agreement and Indenture. CP 1040, 1043. The lease agreement also provided that TCRY “shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port’s prior written consent.” *BNSF Ry. Co.*, 835 F. Supp. 2d at 1060.

In addition to cash rent, TCRY agreed to continue to maintain the Tracks as part of the consideration for the lease. CP 1044, 1786. TCRY subleases space to generate revenue to cover track maintenance expenses. CP 1786-87. Because TCRY’s use is governed by a lease agreement, TCRY pays rent and leasehold taxes to the Port. CP 143, 1042.

**E. BNSF’s Use of the Tracks.**

BNSF’s operation on the Tracks is governed by the Historical Agreement, assigned to the Port through the Indenture, not a lease. Consistent with the Historical Agreement, BNSF paid for its use of the

Tracks decades ago and, under the express terms of the contract, may now use the Tracks without further payment. CP 57.

Further, BNSF's operation on the Tracks has facilitated significant economic development in the region, as the Indenture intended. *See* CP 85-86, 92-93. The availability of rail service from two Class I carriers, which have the resources and capacity to provide interstate service, attracts businesses to the Port. CP 1023, 1148-49, 1151-52. It also facilitates the construction of new facilities to utilize access to the Railroads, which generates significant tax revenue. *Id.* As the federal district court recognized specifically in regard to the Tracks, "it is in the public interest to encourage competition among the railroads and to ensure that railroad service remains efficient." *BNSF Ry. Co.*, 835 F. Supp. 2d at 1066.

Although TCRY is legally obligated to maintain the Tracks, BNSF has also contributed to maintenance costs. CP 1311-12, 1314, 1830-31. In 2014, the Port determined that certain areas of the Tracks needed to be repaired and upgraded to accommodate increased traffic. CP 1830-31. While UP and TCRY refused to help fund Track improvements, BNSF paid the Port \$50,000, which included half the cost of realigning the Tracks and adding ballast to permit heavier unit trains to operate on the Tracks. *Id.*; CP 1787.

## **F. Peterson’s Ongoing Opposition to BNSF’s Use of the Tracks.**

In 2000, BNSF contracted with TCRY to interchange railcars using the Tracks. CP 1390; *BNSF Ry. Co.*, 835 F. Supp. 2d at 1060. “TCRY maintained the trackage at its own expense and began charging a per-car fee for its services.” 835 F. Supp. 2d at 1060. “This contract specifically reserved BNSF’s rights under the 1947 and 1961 Agreements.” *Id.*

BNSF later realized it “could operate its own cars on the Richland Trackage at a savings of around \$100-150 per car.”<sup>5</sup> CP 1390. When “BNSF informed TCRY that it intended to exercise its rights to directly operate” on the Tracks, their disagreement began. CP 1390-91. In response, TCRY’s owner, Peterson, threatened that ““track maintenance” would prevent BNSF from using the Richland Trackage at all.” CP 1391.

The dispute escalated in 2009, when TCRY “erected a barrier which physically prevented a BNSF locomotive from reaching BNSF customers” along the Tracks. *BNSF Ry. Co.*, 835 F. Supp. 2d at 1060-61; CP 1391. BNSF filed a lawsuit seeking declaratory and injunctive relief prohibiting TCRY from blocking BNSF’s access to the Tracks. *BNSF Ry. Co.*, 835 F. Supp. 2d at 1066. In that litigation, “TCRY concede[d] that BNSF has the right to operate directly on a portion of the Richland Trackage,” and challenged only the geographic area to which those rights

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<sup>5</sup>The “Richland Trackage” is a different name for the Tracks.

extended. *Id.* at 1062. In analyzing the parties’ respective rights, the federal 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.” *Id.* at 1066-67.

The federal district court determined that BNSF and UP have the right to operate directly on the Tracks pursuant to the Historical Agreement, and entered a permanent injunction requiring TCRY to allow BNSF and UP to directly serve customers on the Tracks. *Id.*; CP 1398.

**G. Peterson Responds by Filing This Lawsuit.**

To avoid breaching TCRY’s lease and the permanent injunction, Peterson—posing as a concerned taxpayer—initiated this lawsuit in the trial court. CP 7-24. Peterson asserted various claims against the Department of Revenue and the Port, including public gift and privileges and immunities claims under the Washington Constitution. *Id.* BNSF and UP intervened as defendants. CP 352, 402. Other taxpayers intervened as plaintiffs, but their complaints essentially mirror Peterson’s claims and all are represented by Peterson’s counsel. CP 932-33, 942-43.

The parties filed cross-motions for summary judgment. The trial

court denied Plaintiffs' motion for summary judgment, granted summary judgment to the Port and BNSF on Plaintiffs' constitutional and Uniform Declaratory Judgment Act claims, and dismissed Plaintiffs' claims with prejudice.<sup>6</sup> CP 2029-2033. The trial court denied Peterson's public gift claim on the basis that "BNSF paid the Atomic Energy Commission to build the tracks in exchange for operating rights at no further expense. This court finds that this constitutes legally sufficient consideration." VRP 103. The trial court denied Peterson's privileges and immunities claim because "[i]n this case the challenge is to contracts, not the passing or enactment of a law. So the court finds that Article I, Section 12, does not apply." *Id.*

This appeal followed.

### **III. ISSUES PRESENTED FOR REVIEW**

#### **A. Unconstitutional Public Gift Claim.**

Article VIII, Section 7 of the Washington Constitution prohibits a public entity from transferring property to a private entity with donative intent and without consideration. BNSF paid half the cost of constructing

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<sup>6</sup>In addition to moving for summary judgment on Plaintiffs' claims, the Port and BNSF also argued that Peterson's claims are preempted by the Interstate Commerce Commission Termination Act, which vests the STB with exclusive authority over a railroad's operation, discontinuance, and abandonment of tracks. CP 1014-19, 1203-08. The trial court denied the Port and BNSF's motion for summary judgment based on preemption, without explaining the basis for denial. CP 2032. Respondents filed a Notice of Cross-Appeal on this issue, but have decided not to pursue it further.

the Tracks and has provided rail service in the national interest for decades. The Port received land valued at over \$5 million that has resulted in significant benefit to the Port in exchange for its promise to honor BNSF's historical operating rights. Did the trial court properly grant summary judgment to the Port and BNSF based on this evidence of sufficient consideration and the lack of any evidence of donative intent?

**B. Privileges and Immunities Claim.**

Article I, Section 12 of the Washington Constitution prohibits the passage of laws which unequally grant privileges and immunities, which are defined as fundamental rights of state citizenship, to citizens. Peterson does not identify a law or a fundamental right of state citizenship upon which his privileges and immunities claim is based, instead alleging only that the Port treats BNSF differently than other private companies. Did the trial court properly grant summary judgment to the Port and BNSF on Peterson's privileges and immunities claim where no law or fundamental right of state citizenship is at issue?

**IV. ARGUMENT**

**A. The Port's Adherence to the Historical Agreement, From Which BNSF's Operating Rights Arise, Does Not Constitute an Unconstitutional Public Gift.**

To prevail on his unconstitutional public gift claim, Peterson must establish that the Port's agreement to recognize BNSF's operating rights

“amounts to ‘a transfer of property without consideration and with donative intent.’” *King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 597, 949 P.2d 1260 (1997) (citing *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 588, 716 P.2d 879 (1986)) (emphasis added). Peterson cannot establish either element. Here, legally sufficient consideration supports both the Historical Agreement, in which BNSF obtained rights to use the Tracks in exchange for paying for its construction, and the Indenture, in which the Port recognized BNSF’s operating rights in exchange for over \$5 million worth of property and facilities. Moreover, the Port’s agreement to adhere to BNSF’s right to use of the Tracks was not made with the intent to provide a gift. Peterson’s counterarguments are high on rhetoric and low on substance, and were properly rejected by the trial court. At its core, Peterson’s argument seeks to have this Court second-guess the federal government’s decision to enter into the Historical Agreement to further the nation’s interests and the Port’s decision to take millions of dollars of property from the federal government at no cost, but subject to the Historical Agreement. This Court wisely has declined to engage in such second-guessing in other cases and should decline to do so here.

**1. An Unconstitutional Public Gift Claim Requires Proof of Both Lack of Legally Sufficient Consideration and Donative Intent.**

To begin with, Peterson largely ignores this Court’s decision in *King County* and instead relies upon cases preceding it to argue that he need only demonstrate donative intent or lack of consideration, not both.<sup>7</sup> *See* App. Br. 22. Although this Court’s public gift jurisprudence has changed over time, in *King County* this Court held that “[i]n assessing consideration, courts do not inquire into the adequacy of consideration, but employ a legal sufficiency test.” *King Cnty.*, 133 Wn.2d at 597 (internal quotations omitted and emphasis added).<sup>8</sup> That holding was based on the rationale that an ad hoc judicial analysis of the adequacy of consideration would “interfere[] unduly with governmental power to contract and would establish a ‘burdensome precedent’ of judicial interference with government decisionmaking.” *King Cnty.*, 133 Wn.2d at 597 (citing *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 703 P.2d 793 (1987)).

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<sup>7</sup> Peterson cites to *King County* for the proposition that “an unconstitutional gift is present if a public entity permits a private company to use public property without paying cash consideration or paying only nominal consideration.” App. Br. 18. But the *King County* Court did not so hold, and did not distinguish cash from other forms of consideration at all.

<sup>8</sup> As the Court of Appeals noted in *Friends of North Spokane County*: “[b]efore *King County*, one might have argued—as the dissenting justices in that case did—that a plaintiff could establish an unconstitutional gift of public funds by demonstrating the government’s donative intent or that it received a grossly inadequate return . . . [b]ut *King County* established that such a view would be mistaken.” 184 Wn. App. at 133.

Flouting this controlling authority, Peterson wrongly argues that the principle of “grossly inadequate return” provides this Court an avenue to engage in “careful consideration of the ‘consideration’ received by the Port for the use of its tracks by BNSF.” App. Br. 26. Although Peterson is correct that grossly inadequate return is relevant to the public gift inquiry, *see* 133 Wn.2d at 601, “gross inadequacy” is a general contract law principle under which courts may set aside a contract on equitable grounds 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, however, does not argue, nor is there any evidence to support, that the consideration for the Historical Agreement and the Indenture is unconscionable. *Cf. King Cnty.*, 133 Wn.2d at 599 (addressing, although ultimately rejecting, Taxpayers’ argument that the Mariners’ lease is “unconscionable” because the “consideration for the lease . . . is so grossly inadequate”).

Peterson’s insistence that this Court look to the adequacy, rather than the legal sufficiency, of the consideration at issue mirrors the dissent in *King County*, with which only one other Justice concurred (neither of whom are currently on the Court). *See id.* at 618 (disagreeing with the majority’s conclusion that “the constitution is satisfied if there is *legally*

*sufficient* consideration (a peppercorn will do) to support the enforceability of a promise”) (emphasis in original). The majority opinion, authored by Justice Talmadge (opposing counsel here) and joined by six other Justices, sets forth the applicable standard: legally sufficient consideration is all that the constitution requires to defeat an unconstitutional public gift claim. *Id.* at 597, 601.

**2. The Historical Agreement and the Indenture, Through Which the Historical Agreement Was Assigned to the Port, Were Supported by Legally Sufficient Consideration.**

Legal sufficiency “is concerned not with comparative value but with that which will support a promise.” *King Cnty.*, 133 Wn.2d at 597-98 (quoting *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P.2d 314 (1967)). “[A]nything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised.” *Id.* (internal quotations and citations omitted). “[A] bargained-for act or forbearance is considered sufficient consideration.” *Taxpayers of Tacoma*, 108 Wn.2d at 703. “Even a peppercorn” is legally sufficient consideration to support a promise. *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 134, 336 P.3d 632 (2014) (applying peppercorn standard to unconstitutional gift claim’s consideration factor) (citing *King Cnty.*, 133 Wn.2d at 597).

As an initial matter, Peterson does not directly challenge the legal sufficiency of the consideration offered for the Historical Agreement and the Indenture, nor is there a basis for him to do so.<sup>9</sup> He conveniently ignores both the consideration paid by BNSF for its operating rights (half the cost of constructing the Tracks) and the consideration received by the Port in exchange for its assumption of the federal government's obligations under the Historical Agreement (ownership of the Tracks and property worth over \$5 million). That consideration is more than enough to withstand scrutiny as “[e]ven a peppercorn” is legally sufficient consideration. *Friends of N. Spokane Cnty.*, 184 Wn. App. at 134.

Instead, Peterson conflates the terms of the Historical Agreement and the Indenture and questions generally the validity of the relationship between the Port and BNSF, without mention of the agreement on which that relationship is based. But as the federal district court held, BNSF's operating rights arise from the Historical Agreement and the Indenture, not through an independent agreement with the Port. *BNSF Ry. Co.*, 835

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<sup>9</sup>Although Peterson vaguely argues that consideration paid by a “predecessor” to a “defunct federal agency” is somehow legally insufficient to support the continued validity of the Historical Agreement, he provides no evidence or legal authority to support that position. Peterson does not challenge the validity of the mergers through which Northern Pacific, the original party to the Historical Agreement, became BNSF. *See BNSF Ry. Co.*, 835 F. Supp. 2d at 1058 (acknowledging that BNSF and UP are the “undisputed successors-in-interest to the 1947 Agreement”). And although Peterson emphasizes that the AEC is “defunct,” he does not contest the validity of the DOE's succession to the AEC's interests in the Historical Agreement.

F. Supp. 2d at 1066. Since the Historical Agreement was supported by legally sufficient consideration, there is no legal basis upon which BNSF, the obligor to the Historical Agreement, would be required to provide additional consideration merely because the federal government assigned its contractual interest. An assignment does not modify or invalidate the underlying agreement, but instead provides a mechanism through which the assignee—here, the Port—“steps into the shoes” of the assignor—here, DOE—and assumes their rights and obligations with respect to the underlying agreement. See *Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993) (citing *Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978)) (“[a]n assignee steps into the shoes of the assignor, and has all of the rights of the assignor.”). Peterson provides no authority for the position that an obligor must pay additional consideration when a contract to which they are a party is assigned, and Respondents are aware of none.<sup>10</sup>

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<sup>10</sup> Peterson’s position is also contrary to Washington authority broadly encouraging the assignment of contracts. See *Puget Sound Nat. Bank v. State Dep’t of Revenue*, 123 Wn.2d 284, 288, 868 P.2d 127 (1994) (“A fundamental understanding of commercial law is that all contracts are assignable unless such assignment is expressly prohibited by statute or is in contravention of public policy”).

Regardless, the Port received significantly more than a peppercorn for allowing BNSF's continued operations on the Tracks.<sup>11</sup> The Port received property now worth tens of millions of dollars, increased business development in the area, and enlarged its tax and rent revenues. *See* CP 85-87, 90, 1023, 1148-49, 1151-52, 1774. Additionally, BNSF willingly paid for its share of recent capital improvements to the Tracks.<sup>12</sup> CP 1311-12, 1314, 1787, 1830-31. Accordingly, BNSF has provided legally sufficient consideration for its operating rights.

Peterson also complains that BNSF does not pay fair market value, specifically in the form of ongoing lease payments, for its use of the Tracks. App. Br. 32. Peterson submitted extensive expert opinions regarding whether BNSF has paid fair market value for its operating rights, and cites them at length in his brief. But that is not the appropriate standard. “[L]egal sufficiency is concerned not with comparative value but with that which will support a promise.” *King Cnty.*, 133 Wn.2d at 597

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<sup>11</sup> Peterson's reliance on *Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 533 P.2d 128 (1975) and *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978) is misplaced. *See* App. Br. 34. Although this Court initially interpreted Article 8, Section 7 to apply to all government action benefitting private parties, regardless of whether the action served a laudable public purpose, its approach has since shifted. After *Longview* and *Lassila*, this Court held that “[w]here the public receives sufficient consideration, and benefit to an individual is only incidental to and in aid of the public benefit, no unconstitutional gift has occurred.” *City of Tacoma*, 108 Wn.2d at 705.

<sup>12</sup> Peterson also decries that track maintenance is “a *substantial* expense to taxpayers,” but that argument is disingenuous because Peterson knows that *his* company, not the public, pays for it. *See* App. Br. 27 (emphasis in original).

(quoting *Browning*, 70 Wn.2d at 147). Peterson thus seeks to have this Court overturn well-settled law and invites the Court “to engage in an in-depth analysis of the adequacy of consideration” even though “such an analysis interferes unduly with governmental power to contract and would establish a ‘burdensome precedent’ of judicial interference with government decisionmaking.” *Id.* The effort here is particularly wrong-headed as it relies on a current economic evaluation to assert the insufficiency of decades-old transactions. This Court should decline the invitation.

**3. The Port Recognizes BNSF’s Operating Rights As Part of Its Bargain with the Federal Government, Not Because It Intends to Make a Gift.**

Peterson also fails to demonstrate the other requisite element of his unconstitutional public gift claim: donative intent. *King Cnty.*, 133 Wn.2d at 597. Donative intent can be determined as a matter of law. *See id.* at 592, 597-601 (affirming trial court’s summary judgment ruling regarding donative intent). Peterson produced no evidence that the Port acted with donative intent by accepting the obligations of the Historical Agreement and continuing to honor BNSF’s associated operating rights. Instead, Peterson relies solely on innuendo and regurgitates his consideration arguments. *See App. Br. 23* (“[t]he Port had express

donative intent by virtue of its decision to allow BNSF since 2009 to use the tracks at issue rent-free.”). That is not enough.

First, Peterson would have the Court believe that merely because the Port does not accept a monthly lease payment from, or a profit-sharing arrangement with, BNSF, there is an unconstitutional public gift. But these are only a few of the countless types of consideration that would be legally sufficient to support a promise, and they are not relevant to donative intent.

Second, Peterson also argues that donative intent exists because the Port terminated UP’s rights, but not BNSF’s rights, to operate on the Tracks. That is untrue, and Peterson knows it. As discussed above, the Port never actually terminated UP’s rights, and both UP and BNSF continue to enjoy identical operating authority on the Tracks, so there is no evidence of favoritism or donative intent solely towards BNSF. *See* CP 1996. Moreover, the Port has no desire to terminate BNSF’s operating rights because doing so would undermine the economic development purposes for which the federal government conveyed the Tracks to the Port. *See* CP 85-86. Termination of BNSF’s rights would necessarily require the Port to terminate UP’s rights as well, which would leave the businesses the Port serves without Class I rail service.

Third, Peterson’s suggestion that BNSF’s use of the Tracks under the terms of the Historical Agreement is “perpetual” is without merit. As all parties recognize, the Historical Agreement is a terminable contract. But it does not follow that the Washington Constitution requires the Port to terminate BNSF’s operating rights under the Historical Agreement. There simply is no case law supporting that proposition. Indeed, if that were the case then the Port would have been constitutionally obligated to do so the minute it signed the Indenture. In other words, from day one it would not have been able to honor the obligations of the Historical Agreement as it promised the federal government it would do in accepting the quitclaim deed and entering into the Indenture. Thus, under Peterson’s view, the Port could not have agreed to accept \$5 million worth of property and facilities in exchange for honoring BNSF’s existing rights simply because such rights were not time-limited in the assigned contract. This would be an absurd result. The Constitution’s concern is with public gifts—not the assumption of a contract that recognizes and respects bargained-for, long-term operating rights in return for obtaining valuable property and facilities.

Fourth, Peterson claims that the Port must have donative intent towards BNSF because it does not allow new parties to use Port property without paying some form of consideration beyond contributing to

economic development. But the entire premise of this hypothetical ignores the salient facts of this case.<sup>13</sup> Economic development was important in the Indenture and has certainly occurred. CP 85 (“purpose” of Indenture is to “assist in [the Port’s] economic development activities” and “foster[] economic development”), 1023, 1148-49, 1151-52. And, as argued above, economic development is far from the only consideration the Port received for assuming the federal government’s obligations under the Historical Agreement.

Lastly, Peterson intimates that donative intent exists because the Port did not report its arrangement with BNSF to the State Auditor. But Peterson provides no 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. BNSF does not pay rent for its use of the Tracks because, unlike Peterson, it does not operate on the Tracks pursuant to a leasing arrangement. *See App. Br. 26.*

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<sup>13</sup> Peterson’s example of a toll road is useful when put into the proper context. *See App. Br. 33 n. 35.* The most apt analogy to the facts here is if the government wishes to put a road in an area of the state without any roads but of strategic importance, and FedEx pays to construct and provide service along the road in exchange for not having to pay any future tolls on that same road. There is no donative intent or insufficient consideration in this scenario. And that is precisely why Peterson’s claims fail here.

**4. The Legal Relationship Between the Port and BNSF Does Not Implicate the History or Purpose of the Constitutional Prohibition on Public Gifts.**

Peterson asks this Court to overlook the dearth of evidentiary or legal support for his claim by arguing that this dispute implicates the “fundamental purpose” of the public gift prohibition. App. Br. 35. But, as Peterson admits, the public gift prohibition was motivated by the Framers’ concerns with railroads’ efforts to bribe or lobby the government for subsidies. *See* App. Br. 14-18 (evaluation of the propriety of a public gift prohibition considered to be a “railroad subsidy question”); *City of Marysville v. State*, 101 Wn.2d 50, 54, 676 P.2d 989 (1984) (citing the minutes of the Constitutional Convention, which provided that “[d]elegate after delegate rose to declare, often in heated terms, that they supported the version which would prohibit the practice of local governments granting direct and often speculative subsidies to private railroad companies.”). “In short, the framers of our Constitution were deeply concerned about the effects on the public purse of granting public subsidies to private commercial enterprises, primarily railroads.” *Marysville*, 101 Wn.2d at 55. But in this case there is no evidence or allegation that BNSF bribed or lobbied for subsidies from the federal government or the Port. And contrary to Peterson’s suggestion (without citation to authority), the constitutional prohibition against gifts of public

funds does not create a heightened standard of judicial review of government leases with railroads. In stark contrast to the sordid history that preceded the public gift clause, here BNSF obtained operating rights in exchange for consideration, including the cost of construction and ancillary benefits such as national security, cost savings, and economic development.

Peterson's fears that this case will empower local favoritism and cronyism are likewise misplaced. *See* App. Br. 35. It was the federal government, not the Port, which initially granted the Railroads the long-term right to operate on the Tracks. The Historical Agreement and the Indenture were evaluated and approved by the independent agency tasked with regulating railroads. CP 50. And the federal government did so for the express purpose of ensuring the security of national defense interests. CP 43-44. The Port accepted the federal government's assignment of its rights and obligations under the Historical Agreement for a purpose that undeniably served the public interest: the conveyance of millions of dollars in surplus federal property to catalyze the development of its industrial sector at no cost to the Port or its taxpayers.

And unlike the historical examples that motivated the creation of the prohibition on public gifts, the Port's recognition of BNSF's operating rights does not unduly burden the public purse. The DOE conveyed to the

Port both the Tracks and additional land and facilities for the express purpose of raising revenue to pay for the cost of maintaining the Tracks. CP 1444. Consistent with that purpose, the Port entered into an agreement with TCRY wherein TCRY leased a building for approximately the same price for which the Port compensated TCRY for track maintenance, and then TCRY subleased the building to cover costs. CP 1786-87.

Peterson's history lesson aside, "[a]t its core" Peterson's position is simply that the Port, in entering into the Indenture, "made a bad deal." *See* 133 Wn.2d at 601. But it is not for this Court to second guess the wisdom of a government contract. And even so, it is difficult to imagine a set of facts on which the receipt of millions of dollars in federal property at no cost could constitute a bad deal. Because Peterson's disagreement alone is not enough to substantiate his public gift claim, this Court should affirm.

**B. A Commercial Dispute Between Two Businesses Operating in Washington Does Not Invoke the Privileges and Immunities Clause.**

Peterson's privileges and immunities claim fares no better. Peterson's privileges and immunities claim is entirely divorced from the applicable legal standard, and instead relies largely upon cherry-picking phrases from this Court's privileges and immunities jurisprudence. Peterson fails to identify any law that improperly grants an unconstitutional privilege or

immunity, and does not allege that this dispute implicates a fundamental right of state citizenship.

**1. This Dispute Arises Out of Contracts, Not Laws.**

Article I, Section 12 of the Washington Constitution is not invoked any time the government treats entities differently, as Peterson suggests. Instead, the plain language of the Constitution states it applies only to “law[s] . . . 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.” Const. art. I, § 12. Peterson cites no authority to the contrary. App. Br. 40. And Respondents are aware of none. Accordingly, the trial court properly denied Peterson’s privileges and immunities claim because it was premised on contracts, not the “passing or enactment of a law.” CP 103.

Although Peterson argues vaguely that “[t]he court erroneously assumed that the adoption by a port district’s elected commissioners of a resolution does not constitute enactment of a law,” Peterson fails to identify exactly what resolution is at issue, much less one that implicates a right of state citizenship. *See* App. Br. 37. If Peterson is referring to the resolution the Port adopted to enter into the Indenture, that resolution does not grant a special privilege to BNSF. Instead, it was only one component of a favorable deal to the Port, in which it received millions of dollars’

worth of federal property for free. Peterson's mere disagreement with the terms under which BNSF uses the Tracks does not give rise to a constitutional violation. Without identifying a law that violates Article I, Section 12, Peterson's claim fails even to cross the threshold of a constitutional claim.

**2. The Different Treatment of Private Companies Does Not Implicate a Fundamental Right Of State Citizenship.**

Peterson's privileges and immunities claim also fails because he cannot identify a fundamental right of state citizenship which is implicated by this dispute. The parties generally agree on the legal standard for evaluating privileges and immunities claims. Courts first determine "whether the law in question involves a privilege or immunity." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014). "If there is no privilege or immunity involved, then article I, section 12 is not implicated," and the Court's inquiry ends there. *Id.* A privilege or immunity is not merely "favoritism" or "unequal treatment," as Peterson appears to suggest, but is instead a term of art which "pertain[s] *alone* to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 103, 178 P.3d 960 (2008) (internal citation omitted and emphasis in original). Fundamental rights protected by Article I, Section 12 that have

been recognized include the right to vote, to acquire and hold property, and to bring claims in state court. *See State ex rel. Cruikshank v. Baker*, 2 Wn.2d 145, 150–51, 97 P.2d 638 (1940); *Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007). None of those fundamental rights are at issue in this case.

Here, the only privilege or immunity that Peterson alleges is “the government’s obligation to be properly compensated for use of public property,” but Peterson provides no authority recognizing that as a fundamental right. *See App. Br. 42*. Instead, he states that “[t]his fundamental right is evaluated from the context of the anti-favoritism thrust of Article I, Section 12, looking to the impact on *others similarly situated . . .*” *See App. Br. 42 n. 40* (emphasis in original). But this Court has soundly rejected such a broad reading of the privileges and immunities clause. *See Ventenbergs*, 163 Wn. 2d at 103.

The only authority Peterson does cite—*Grant Cnty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) and *Ockletree*—is irrelevant to the privilege he asserts. He relies on *Grant County* 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, but Peterson does not assert that BNSF’s different treatment is a result of

its citizenship in another state. *See* App. Br. 42 (emphasis added). Peterson also cites *Ockletree*, noting that in that case this Court held that there are “no rational economic or regulatory grounds for distinguishing between religious and secular entities in the application of” Washington’s anti-discrimination laws. App. Br. 43. Peterson does not even attempt to explain how that case is analogous or even relevant to this dispute, and simply citing a case does not make it so.

To the contrary, Peterson admits that “merely treating two similarly situated businesses differently does not affect a fundamental right,” but at most that is what Peterson alleges here. App. Br. 38, 43 (“The Port continues to grant BNSF the ‘special advantage’ of free use of Port property, which is not available to other private persons and entities”), 43 (noting that “in its 250 other leases of public property, the Port requires payment of fair market value for the property it leases.”). Because Peterson has failed to identify any law which forms the basis of his claim, much less any fundamental right of state citizenship which is implicated by such a law, his privileges and immunities claim is without basis and must be denied.

## V. CONCLUSION

Peterson misconstrues the salient facts and glosses over well-settled legal standards in an effort to elevate this commercial dispute to

one of constitutional significance. These arguments should be rejected. Despite Peterson's efforts to downplay them, the two distinct agreements at issue here—the Historical Agreement and the Indenture—are supported by legally sufficient consideration, and the mere fact that the Historical Agreement was assigned does not require BNSF to offer additional consideration to support it. Further, this commercial dispute between two Washington businesses involves the application of contracts, not laws, and does not implicate a fundamental right of state citizenship. For all of these reasons, Peterson's claims are without merit. The Port and BNSF respectfully request that this Court affirm.

RESPECTFULLY SUBMITTED this 17th day of November,  
2017.

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# **APPENDIX F**

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SUPREME COURT  
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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,

Appellants,

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.

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A. INTRODUCTION

The brief submitted by the Port of Benton (“Port”) and the BNSF Railway Company (“BNSF”) is remarkable on a number of grounds. First, by submitting a joint brief, the Port/BNSF document the fact that they are in bed together, and are combining to maintain BNSF’s rent-free use of public railroad tracks in perpetuity.

Second, the Port/BNSF brief largely concedes the factual recitation in the opening brief of Randolph Peterson and other taxpayers (“Peterson”). Apart from a promised \$50,000 payment by BNSF, BNSF has made no payments for use of the Port’s public railroad tracks since 2009 and will *never* have to make any payment for their use in perpetuity. This is so, despite the wear and tear caused to the tracks by BNSF railroad cars.

Third, the Port/BNSF have abandoned any other alleged justifications for their actions<sup>1</sup> and focus only on Peterson’s state constitutional arguments. They simply misstate the test for violations of article VIII, § 7 and article I, § 12 of the Washington Constitution. They import an entirely novel interpretation of article VIII, § 7, in which an entity using public facilities can substitute “economic development” for

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<sup>1</sup> The Port/BNSF contended below that the issues here were federally preempted. The trial court ruled against them. CP 2032; RP 100-01. They have abandoned that argument on review. Br. of Resp’ts at 13 n.6.

tangible consideration to the public entity, and article I, § 12 claiming its anti-favoritism policy applies only when a law is enacted providing for governmental favoritism.

This Court must reject the Port/BNSF's effort to gut constitutional restrictions on government largesse to private enterprise and vindicate the restrictions set forth in the Washington Constitution on the ability of local governments to permit free use of public property in the guise of "economic development" and to favor selected private commercial entities at the expense of taxpayers and the public purse.

#### B. STATEMENT OF THE CASE

In large measure, the Port/BNSF concede the history of the case set forth in Peterson's opening brief. Br. of Appellants at 2-10. They do not deny that apart from a promised \$50,000 payment, BNSF has not paid for use of the public railroad tracks at issue here since 2009. Further, they do not deny that under their constitutional analysis, BNSF will seemingly *never* have to pay the Port for track usage in perpetuity.<sup>2</sup> Peterson noted that 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

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<sup>2</sup> Just as predicted in Peterson's opening brief at 7 n.11, the rent-free approach to track usage is too tempting for other users not to claim its benefit. Up until recently, the Union Pacific ("UP") has paid for its track use. It gave notice to the Tri-Cities Railway Co. ("TCRY") that effective December 8, 2017, it will no longer pay for track use.

termination. Br. of Appellants at 24. The Port/BNSF misrepresent what Peterson argued when they assert that Peterson argued that the Port terminated UP's rights. Br. of Resp'ts at 6 n.4. The point is that the Port's conduct as to UP evidenced its understanding that it was constitutionally obligated to satisfy article VIII, § 4 as to BNSF. *See also*, Br. of Appellants at 5 n.6, 44 n.42.

Additionally, the Port/BNSF have the audacity to note that under the Indenture the Port was obligated to devote all lease payments and other revenues derived from the railroads to cover maintenance. Br. of Resp'ts at 8. The Port does not deny that it has *never* complied with that obligation. Br. of Appellants at 6 n.8.

The Port/BNSF do not dispute TCRY's role with regard to the tracks.<sup>3</sup> TCRY is essentially the Port's agent for the routine maintenance of the tracks. Br. of Appellants at 5-6. 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. *Id.* Simply put, without fees collected from the BNSF or UP at the Port's direction, the TCRY/Port

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<sup>3</sup> Nor do the Port/BNSF dispute the fact that the Port attempted to coerce Peterson into dropping this action by threatening heavy taxation against TCRY. Br. of Appellants at 8 n.13.

agreement was economically unsustainable.<sup>4</sup> Moreover, the Port/BNSF misstate the Port's role in paying for track maintenance when they claim in a footnote that TCRY pays for *all* track maintenance. Br. of Resp'ts at 21 n.12. The Port's *own documents* disclose its intent to seek *millions of dollars* in major capital expenditures to upgrade the tracks as part of a Master Plan. Br. of Appellants at 26-27. The Port (and its taxpayers), not TCRY, paid, and will pay, for major improvements. CP 1440.

The Port/BNSF do not dispute the fact that BNSF cars cause wear and tear to the tracks, or that the public will be forced to pay for BNSF's harm to the tracks. Br. of Appellants at 4-5, 26-27. Specifically, not only will the BNSF not pay a dime of rent for track usage into the indefinite future, its tracks will cause damage to the tracks by wear and tear, and the Port's taxpayers will be expected to pick up the tab for such damage.

Perhaps the most egregious of their factual misstatements to attempt to defeat the constitutional issues Peterson presents is the Port/BNSF conflation of the consideration for the Port's receipt of the tracks from the federal government as surplus property, with the consideration owed to the Port as a Washington governmental entity under the Washington Constitution for BNSF's use of public property.

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<sup>4</sup> This may be the Port's intention in order to take over track maintenance and charge the railroads fees for track usage on its own. Br. of Appellants at 45 n.43.

The predecessors to UP and BNSF entered into an agreement with the federal government in 1947 for the tracks' construction. Those railroads each paid \$50,000 for rent-free use of the tracks, subject to termination of the usage agreement upon 6 months' notice. Br. of Appellants at 3. The federal government could make an agreement, that gifts BNSF with rent-free track usage as it is unencumbered by constitutional restrictions like article VIII, § 7 of the Washington Constitution. For 21 years, that arrangement remained in place – 21 years of rent-free track usage by BNSF.

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, DOE was again not subject to any constitutional restrictions like article VIII, § 7, as was the Port. There was “consideration” for the transfer, however. The Port received land, buildings, and the tracks, subject to prior federal agreements with the railroads, but 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 concede when they note the extensive costs that faced DOE, including clean up of contaminated properties. Br. of Resp'ts 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 BNSF for track usage.

What is critical to the Court’s analysis is the fact that although the Port “inherited” DOE’s contractual arrangements with BNSF, it is *undisputed* that the Port was subject to Washington constitutional obligations when it did so. The Port had to satisfy article VIII, § 7 in its contractual relationship with BNSF. The Port/BNSF are obtuse to that constitutional obligation, as will be noted *infra*.

C. ARGUMENT<sup>5</sup>

(1) The Port/BNSF Rent-Free Deal Is a Gift of Public Facilities in Violation of Article VIII, § 7

The Port/BNSF have no answer to Peterson’s description of the historical basis for article VIII, § 7, br. of appellants at 14-17, and instead merely decry its applicability here. Br. of Resp’ts at 26-28. But that historical basis for the constitutional provision animates the plain language of article VIII, §§ 5, 7 – the Framers *banned* gifts of public facilities, particularly to railroads.

Rather than apply the explicit test for a gift of public facilities this Court has developed over the years, the Port/BNSF torture the case law, insisting that the test is: anything goes, so long as legal consideration is

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<sup>5</sup> The Port/BNSF do not dispute the interpretive principles for constitutional issues set forth in Peterson’s opening brief at 13.

present. Their argument is flatly wrong, and pernicious.<sup>6</sup> In *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1997), this 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.<sup>7</sup>

Instead of applying this Court's requisite test, the Port/BNSF simply ignore the possibility that in real world terms the consideration for a private entity's use of public facilities is so grossly inadequate as to

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<sup>6</sup> That grossly disproportionate consideration is evidence of donative intent is hardly surprising and, in fact, makes complete sense if the Framers' purpose in article VIII, §§ 5, 7 is to be met. For example, if the Port of Seattle gave Alaska Airlines the open-ended use of the Port's facilities at Seattle-Tacoma International Airport for a peppercorn, or \$1, "legally sufficient consideration" in the eyes of the Port/BNSF, wouldn't such an obviously sweetheart deal certainly imply that the Port's commissioners made a gift of public facilities to Alaska?

<sup>7</sup> That this test controls has been confirmed in a number of decisions since *CLEAN/Taxpayers*. See, e.g., *CLEAN v. City of Spokane*, 133 Wn.2d 455, 459, 947 P.2d 1169 (1997), cert. denied, 525 U.S. 812 (1998) (applying *City of Tacoma*); *Columbia River Carbonates v. Port of Woodland*, 182 Wn. App. 1008, 2014 WL 2963955, review denied, 181 Wn.2d 1023 (2014). Division III misstated the rule of *King County* in its opinion in *Friends of North Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 133-34, 336 P.3d 632 (2014), appeal after remand, 197 Wn. App. 1052 (2017), but came to the correct conclusion there that donative intent was not present due to grossly inadequate consideration. The County agreed there to amend an acceptance of dedicated parkland to allow a road easement and private construction of the road. The road would serve an adjoining residential development, and would be public.

effectively be a gift, asserting that “gross inadequacy” is a contract law question irrelevant to the constitutional analysis under article VIII, § 7. Br. of Resp’ts at 17. This Court’s precedents clearly contemplate that grossly inadequate consideration for the use of public facilities establishes donative intent.

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, the Court then looks to the adequacy of consideration. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 601, 949 P.2d 1260 (1997), *cert. denied*, 522 U.S. 1076 (1998) (“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.”). The Port/BNSF misstate the holding in *King County*. They assert that grossly inadequate consideration is irrelevant. Br. of Resp’ts at 15-18. They also claim the majority opinion in that case eschewed an analysis of consideration in conjunction with donative intent and that grossly inadequate consideration as evidence of donative intent was only of interest to the dissent. *Id.* at 17-18. They are wrong.

In *King County*, if legal sufficiency were the *only* basis upon which to analyze consideration, this Court’s analysis of consideration – 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 – would make little sense. Rather, the Court’s analysis focused squarely on *donative intent*, as evidenced by allegedly grossly inadequate consideration. *Id.* at 598-601.<sup>8</sup> The Court specifically noted at 601: “In the absence of donative intent or grossly inadequate consideration, the Court’s review is limited to the legal sufficiency of the consideration for the lease.” The Court cited *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987) for this point. There, this Court made the rule even plainer, stating at 703:

We use the donative intent element to determine how closely we scrutinize the sufficiency of the consideration, “the key factor.” *Adams v. University of Washington*, 106 Wash.2d 312, 327, 722 P.2d 74 (1986). “Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration.” (Italics ours.) *Adams*, at 327, 722 P.2d 74; *see Scott Paper Co. v. Anacortes*, 90 Wash.2d 19, 32-33, 578 P.2d 1292 (1978). Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration. *Adams*, 106 Wash.2d at 327, 722 P.2d 74.

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<sup>8</sup> If consideration is an issue, its adequacy 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. Like the Port/BNSF, the trial court misapplied this necessary test. RP 102.

Applying the correct test, the Port/BNSF deal violated article VIII, § 7.

(a) Fundamental Governmental Purpose

The Port/BNSF do not contest the argument set forth in Peterson's opening brief that the operation of the Port's tracks does not constitute a fundamental governmental purpose within the meaning of the article VIII, § 7 analysis. Br. of Appellants at 20-21. It does not bear the earmarks of more clearly fundamental government activities.<sup>9</sup>

(b) Donative Intent Was Present Here<sup>10</sup>

Having improperly articulated this Court's article VIII, § 7 protocol in which donative intent can be documented by grossly inadequate consideration, it is hardly surprising that the Port/BNSF give scant attention to the Port's donative intent in giving BNSF rent-free use

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<sup>9</sup> Br. of Appellants at 21 n.24. *See also, Hudson v. City of Wenatchee*, 94 Wn. App. 990, 974 P.2d 342 (1999) (police offering free assistance to citizens locked out of cars was aspect of police community caretaker function, a fundamental government purpose); *Citizens Protecting Resources v. Yakima County*, 152 Wn. App. 914, 219 P.3d 730 (2009), *review denied*, 168 Wn.2d 1024 (2010) (land swap with wrecking yard moving it out of flood plain was an aspect of flood control, a fundamental government purpose).

<sup>10</sup> Donative intent is a question of fact. *In re Estate of Little*, 106 Wn.2d 269, 288, 721 P.2d 950 (1986). The Port/BNSF claim in their brief at 22 that it is a question of law, citing *King County*, 133 Wn.2d at 592, 597-601. *Nowhere* in the cited pages of the opinion did this Court say what the Port/BNSF claim. Rather, on undisputed facts, the Court concluded that the consideration received by the district there from the Seattle Mariners was grossly inadequate. Factual issues abound here as to the Port's actual donative intent or its donative intent as discerned from the grossly inadequate consideration it received from BNSF for track usage.

of the tracks at issue here in perpetuity. Br. of Resp'ts at 22-25. The Port *intended* to make this gift to BNSF. Br. of Appellants at 23-25.

Moreover, even if that donative intent is measured by assessing whether the consideration the Port receives from BNSF is “grossly inadequate,” the Port/BNSF are not exactly forthcoming in their treatment of the inadequacy of the consideration the Port receives from BNSF for track usage. As noted *supra*, they intentionally blur the lines between the consideration given between the federal government and the railroads in 1947 for perpetual rent-free track usage with the “consideration” the Port received *from DOE* for the receipt of federal surplus property. In their brief at 21, they do not dispute the expert testimony adduced by Peterson that articulates the dollar value of the BNSF’s rent-free utilization of the Port’s tracks. Br. of Appellants at 27-30. Simply put, BNSF (and now UP) will have the rent-free use of the Port’s tracks at issue here into the indefinite future. They will cause substantial wear and tear to those tracks that the Port’s taxpayers will be forced to address. The “consideration” for the Port/BNSF deal was grossly inadequate. *See generally*, Br. of Appellants at 25-35.

The only means of compensating for such grossly inadequate consideration is for the Port/BNSF to assert that the Port receives the intangible benefit of “economic development,” but the Port/BNSF are also

less than clear, or candid, as to the importance of “economic development” in the consideration, or lack thereof, that the Port receives from BNSF for article VIII, § 7 purposes. The Port/BNSF do not specifically state that economic development must be included in any article VIII, § 7 calculation of grossly inadequate consideration, but they frequently reference economic development in their brief. *E.g.*, Br. of Resp’ts at 8, 10, 23, 25, 27. In fact, they do not, and cannot, cite a single case arising under article VIII §§ 5 or 7 that holds that a government may substitute the intangible benefit of “economic development,” however that is defined or measured, for tangible consideration like rental payments.<sup>11</sup> This Court has seemingly rejected intangible benefits as consideration in *Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 527 P.2d 263, 533 P.2d 128 (1975) and *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978). This Court should again squarely reject the Port/BNSF implied argument, peppered throughout their brief, that “economic development” may substitute for tangible consideration in measuring donative intent under article VIII, § 7.

In sum, the trial court erred in determining as a matter of law that the Port did not intent a gift of its tracks to BNSF under these facts.

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<sup>11</sup> The Port/BNSF have *no answer* to Peterson’s discussion of how “economic development” has been abused in private-public dealings. Br. of Appellants at 33 n.36.

(c) There Was Inadequate Legal Consideration for the Port/BNSF Deal

The Port/BNSF contend in their brief at 18-22 that Peterson never challenged the legal sufficiency of the consideration the Port received from BNSF and that the consideration received was, in fact, legally sufficient. It is wrong on both contentions. Br. of Appellants at 35.

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The trial court erred in granting summary judgment to the Port/BNSF on article VIII, § 7.

(2) The Port/BNSF Deal Is Governmental Favoritism Violating Article I, § 12

The Port/BNSF are dismissive of Peterson’s article I, § 12 argument on two grounds. They contend the constitutional restriction on favoritism toward a private entity by government cannot be present if the favoritism is manifested in a contract, rather than a law. They also contend that a “fundamental right” is not at issue here. Br. of Resp’ts at 28-32. Their first argument would create a *gaping* hole in the mandate of article I, § 12. Their second argument is not supported in law or on these facts. Both should be rejected by this Court.<sup>12</sup>

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<sup>12</sup> It is important to note that the Port/BNSF do not dispute the facts that the Port allowed such a rent-free deal for Port property to no other Port tenant or that it had no policy or protocol establishing a procedure by which a tenant could seek such a deal. Br. of Appellants at 7-8. Their putative “explanation,” br. of resp’ts at 25, for the Port’s failure to report this troubling rent-free gift to BNSF to the State Auditor in 2012 or 2015

First, the contention that the constitutional restrictions on favoritism require such favoritism to be expressed in a “law” makes no sense, given the powerful public policy expressed by the Framers in article I, § 12. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775, 317 P.3d 1009 (2014). The Port/BNSF have *no answer* to the fact that this interpretation would effectively immunize all special purpose units of government, like the Port, from article I, § 12, as their decisionmakers do not enact “laws.” Br. of Appellants at 40-42. Also, more general purpose units of government like the State itself, or cities and counties, would be free to engage in blatant favoritism toward private entities so long as that favoritism did not result from the enactment of a statute or ordinance.

Constitutional interpretation should avoid an unreasonable result.<sup>13</sup> The interpretation of article I, § 12 advocated by the Port/BNSF as to article I, § 12 enshrines an unreasonable restriction on the constitutional anti-favoritism policy of that provision; this Court should reject it.

Specifically, the Port/BNSF have no real answer to the point in Peterson’s opening brief at 40-41 that article I, § 12 applies to a Port

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audits, CP 440-41, is remarkable for the Port’s contention that it has no lease with BNSF. If this rent-free deal was legally acceptable, why did the Port hide it from the State Auditor?

<sup>13</sup> As stated in *Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004), this Court gives the language of the Constitution a reasonable interpretation, employing its common and ordinary meaning at the time it was drafted. The Court also looks to the historical context of the provision.

decision approved by resolution as such a resolution of the Port's commissioners has the force of law. RCW 53.12.295. When the Framers employed the word "law" in article I, § 12 they were aware that municipal corporations other than cities and counties would be created by the Legislature. Wash. Const., art. XI, § 10.<sup>14</sup> They knew that the acts of district decisionmakers would carry the force of law.

Here, the Port did adopt the Indenture by resolution, as it *essentially* admits. Br. of Resp'ts at 29. Article I, § 12 applied.

Further, the Port/BNSF's contention that a fundamental right is not at stake here, br. of resp'ts at 30-32,<sup>15</sup> is equally unavailing to them. Citing *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960 (2008),<sup>16</sup> the Port/BNSF claim that only *certain* fundamental rights are protected by article I, § 12. But they have *no answer* to this Court's broad description of fundamental rights in *State v. Vance*, 29 Wash. 435, 438, 70 Pac. 34 (1902) that specifically references "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 exempted from." Similarly, they fail to

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<sup>14</sup> Indeed, the Legislature created irrigation districts in the first legislative session in 1889. RCW 87.03.010. Diking, drainage, and flood control district soon followed in 1895. RCW 85.05.010; RCW 87.03.005.

<sup>15</sup> The trial court did not reach this question.

<sup>16</sup> Contrary to the claim by the Port/BNSF in their brief at 30-31, citing page 10 of this Court's opinion in *Ventenbergs*, the Court there did not confine the reach of article I, § 12 merely to the right to vote, to acquire and hold property, or to litigate in court.

address other cases on article I, § 12 evidencing a broad understanding of fundamental rights. Br. of Appellants at 39 n.38.

Simply put, Port taxpayers have a fundamental right to expect that businesses like the BNSF will pay for their use of public facilities. The Port/BNSF violated article I, § 12 in their perpetual, rent-free sweetheart deal for BNSF usage of valuable publicly-owned facilities.

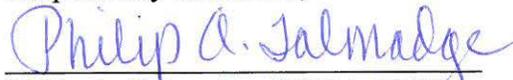
#### D. CONCLUSION

The Port/BNSF cannot support the obvious gift of public facilities and illicit government favoritism toward BNSF that its use of the Port tracks rent-free in perpetuity represents. This is precisely what the Framers intended to prevent in adopting article VIII, § 7 and article I, § 12 of our Constitution.

This Court should reverse the trial court's order on summary judgment. 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 BNSF's rent-free track usage. This Court could also rule as a matter of law on these facts that the Port violated article VIII, § 7 and article I, § 12. Costs on appeal should be awarded to Peterson.

DATED this 14<sup>th</sup> day of December, 2017.

Respectfully submitted,



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# APPENDIX

Wash. Const. art. I, § 12:

No 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.

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 *Reply Brief of Appellants* in Supreme Court Cause No. 94588-8 to the following parties:

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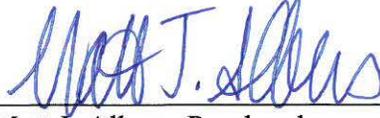
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 14, 2017 at Seattle, Washington.



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**TALMADGE/FITZPATRICK/TRIBE**

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**Comments:**

Reply Brief of Appellants

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# **APPENDIX G**

# THE SUPREME COURT OF WASHINGTON

RANDOLPH PETERSON,	)	No. 94588-8
	)	
Appellant,	)	<b>ORDER</b>
	)	
v.	)	Thurston County Superior Court
	)	No. 16-2-03211-4
STATE OF WASHINGTON, DEPARTMENT	)	
OF REVENUE, et al.,	)	
	)	
Respondents.	)	
_____	)	

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins, and Gordon McCloud, considered this matter at its April 3, 2018, Motion Calendar and unanimously agreed that the following order be entered.

**IT IS ORDERED:**

That this case, including the pending motion to change the case title, is transferred to Division II of the Court of Appeals.

DATED at Olympia, Washington, this 4th day of April, 2018.

For the Court

  
\_\_\_\_\_  
CHIEF JUSTICE

## CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 9<sup>th</sup> day of August, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon all parties of record via electronic mail.

Dated this 9<sup>th</sup> day of August, 2019.



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# PACIFICA LAW GROUP

August 09, 2019 - 3:07 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97410-1  
**Appellate Court Case Title:** Randolph Peterson v. Port of Benton, et al.  
**Superior Court Case Number:** 16-2-03211-4

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### Comments:

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