

FILED
SUPREME COURT
STATE OF WASHINGTON
12/13/2019 4:25 PM
BY SUSAN L. CARLSON
CLERK

No. 97410-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RANDOLPH PETERSON, et al.

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.

Respondents.

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

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 3

A. The federal government negotiates an agreement with the Railroads to secure rail service to Hanford. 3

B. The federal government transfers surplus land, including the Tracks, to the Port for no cost in exchange for the Port’s adherence to the Historical Agreement..... 5

C. TCRY is enjoined from interfering with BNSF’s operations on the Tracks after a business dispute between the parties. 7

D. Peterson files this taxpayer lawsuit seeking to invalidate BNSF’s operating rights on the Tracks. 9

III. ARGUMENT 11

A. The Port’s adherence to the Historical Agreement, which was assigned to it through the Indenture, does not constitute an unconstitutional gift of public funds. 11

1. The Port recognizes BNSF’s operating rights as part of its bargain with the federal government, not because it intends to make a gift. 12

2. Both the Indenture and the underlying Historical Agreement were supported by legally sufficient consideration. 17

B. The trial court properly decided and dismissed Peterson’s gift of public funds claim on summary judgment. 19

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

	Page(s)
Washington Cases	
<i>Binder v. Binder</i> , 50 Wn.2d 142, 309 P.2d 1050 (1957).....	16
<i>Buckerfield's Ltd. V. B.C. Goose Farm, Ltd.</i> , 9 Wn. App. 220, 511 P.2d 1360 (1973).....	19
<i>Casa del Rey v. Hart</i> , 110 Wn.2d 65,750 P.2d 261 (1988).....	19
<i>Citizens Protecting Res. v. Yakima Cty.</i> , 152 Wn. App. 914, 219 P.3d 730 (2009).....	14
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	14
<i>Estate of Little</i> , 106 Wn.2d 269, 721 P.2d 950 (1986).....	19
<i>General Tel. Co. v. City of Bothell</i> , 105 Wn.2d 579, 716 P.2d 879 (1986).....	11
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	20
<i>Japan Line, Ltd. v. McCaffree</i> , 88 Wn.2d 93, 558 P.2d 211 (1977).....	14
<i>Jordan v. Hartford Acc. & Indem. Co.</i> , 120 Wn.2d 490, 844 P.2d 403 (1993).....	18
<i>King Cnty. v. Taxpayers of King Cnty.</i> , 133 Wn.2d 584, 949 P.2d 1260 (1997).....	passim
<i>Miebach v. Colasurdo</i> , 102 Wn.2d 170, 685 P.2d 1074 (1984).....	16, 19

Peterson v. Dept. of Revenue,
9 Wn. App. 2d 220, 443 P.3d 818 (2019)..... passim

Puget Sound Nat. Bank v. State Dep't of Revenue,
123 Wn.2d 284, 868 P.2d 127 (1994)..... 18

SAK & Assocs., Inc. v. Ferguson Const., Inc.,
189 Wn. App. 405, 357 P.3d 671 (2015)..... 19

Federal Cases

BNSF Ry. Co. v. Tri-City & Olympia R.R. Co. LLC,
835 F. Supp. 2d 1056 (E.D. Wash. 2011)..... 9

United States ex rel. Peterson v. Port of Benton Cty.,
No. 2:17-CV-0191-TOR, 2019 WL 1299373 (E.D. Wash. Mar. 21,
2019)..... 17

United States ex rel. Peterson v. Port of Benton Cty.,
No. 2:17-CV-0191-TOR, 2019 WL 4979822 (E.D. Wash. Oct. 8, 2019)
..... 9, 17

Washington Statutes

RCW 53.08.245(1)..... 13

I. INTRODUCTION

The Court of Appeals correctly rejected Petitioner Randolph Peterson's ("Peterson") gift of public funds claim. Respondent Port of Benton (the "Port") did not provide BNSF Railway Company ("BNSF") with a gift of public funds when it accepted valuable land from the federal government at no cost in exchange for the Port's commitment to use the land for economic development and assume the federal government's existing contractual obligations, including a decades-old agreement between the federal government and BNSF governing BNSF's access to the railroad tracks that are the subject of this dispute (the "Tracks").

Peterson does not assert that the agreement between the Port and federal government (the "Indenture") was unconstitutional when it was executed. Nor could he, as the Port received land and facilities worth millions of dollars in consideration. Instead, he asks this Court to disregard the Indenture and focus its analysis on the subsequent course of dealing between the parties. Peterson provides no support for this novel and unwarranted departure from this Court's gift of public funds precedent.

Peterson's challenge to the Port's ongoing adherence to the federal government's underlying contract with BNSF (the "Historical Agreement") also lacks merit. In the Historical Agreement, BNSF agreed to pay for the construction of the Tracks and provide improved rail service to Hanford

Nuclear Reservation in exchange for the ongoing right to use the Tracks without further payment. Through the Indenture, the Port stepped into the federal government's shoes as to this contractual promise to BNSF. That is the reason why BNSF may use the Tracks today without further charge. Moreover, the Port retains the right to terminate the Historical Agreement if it ceases to be economically viable (with ownership of the Tracks reverting to the federal government). The Port's adherence to its contractual obligations does not constitute a public gift to BNSF.

Recognizing the futility of his merits arguments, Peterson shifts focus to argue that his public gift claim involves issues of fact that must be decided by a jury. But courts regularly decide public gift cases as a matter of law, and the trial court and the Court of Appeals properly did so in this case. This dispute is nothing more than the latest iteration in the parties' ongoing business dispute, in which a district court has already enjoined Peterson's company from interfering with BNSF's operating rights on the Tracks. This Court should affirm.

II. STATEMENT OF THE CASE¹

A. The federal government negotiates an agreement with the Railroads to secure rail service to Hanford.

During World War II, the federal government constructed the Hanford Nuclear Reservation (“Hanford”), the only large-scale plutonium processing plant in the United States, which at its height covered 540 square miles and spanned three counties.² The plutonium produced there was “vital” to the development of the United States’ weapons arsenal.³ By the onset of the Cold War, Hanford became a primary “national defense target,” the “military importance” of which was “common knowledge throughout the world.”⁴ The federal government determined that improved rail service was essential both for national security and to reduce operating costs.⁵

In 1947, the U.S. Atomic Energy Commission (the “AEC”), and the predecessors-in-interest to BNSF and Union Pacific (together, the “Railroads”) negotiated the Historical Agreement in which the Railroads agreed to pay the cost of constructing the Tracks to secure improved rail service to Hanford, in exchange for the right to operate on the Tracks in the

¹ The facts material to Peterson’s unconstitutional public gift claim are undisputed. *See Peterson v. Dept. of Revenue*, 9 Wn. App. 2d 220, 223-26, 443 P.3d 818 (2019); Pet. at 1 (stating that the Court of Appeals “correctly set forth the basic outline of the facts and procedure in this case”).

² CP 38.

³ *Id.*

⁴ CP 43.

⁵ CP 39, 43, 44.

future without additional payment.⁶ Specifically, the Railroads agreed to “each pay one half of \$100,000 to AEC,” which is equivalent to more than \$1 million today.⁷ In return, the Railroads “would be entitled to use those tracks free of rental or any other charge” throughout the term of the Historical Agreement.⁸ As is typical in government contracts, the AEC reserved the right to terminate the Historical Agreement on six months’ notice.⁹ The parties went through multiple rounds of negotiations before they agreed to the final deal.¹⁰

The Historical Agreement was conditioned on the approval of the Interstate Commerce Commission (“ICC”), the federal agency tasked with regulating railroads.¹¹ The ICC approved the Historical Agreement, concluding the rail connection would “materially enhance[]” the “public interest.”¹² The ICC relied in part on testimony from the government that the Tracks “would provide, at modest expense, the most effective and practical means of obtaining additional rail transportation service” to Hanford, which had risen to “the top of any list of national defense

⁶ 9 Wn. App. 2d at 223; CP 40-41, 57. The 1947 agreement was reaffirmed in subsequent agreements between the parties. 9 Wn. App. 2d at 223 n.2.

⁷ *Id.* at 223.

⁸ *Id.*; CP 28, 57.

⁹ 9 Wn. App. 2d at 223; CP 32, 58, 71. Neither the federal government nor its assignee, the Port, has ever exercised that right. *See* CP 1996.

¹⁰ CP 40.

¹¹ CP 41.

¹² CP 49, 51; *see* 9 Wn. App. 2d at 223.

targets.”¹³ The ICC also concluded that “when full payment has been made, [the Railroads] should thereafter be permitted to operate over the tracks without further payments.”¹⁴

B. The federal government transfers surplus land, including the Tracks, to the Port for 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.¹⁵ 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 surplus properties to the Port through the DOE’s beneficial reuse program.¹⁶ Through that program, Congress authorized the DOE to work with negatively impacted communities to ensure that former nuclear defense facilities were reused beneficially for industrial, economic, commercial, or civic redevelopment.¹⁷

In 1998, the federal government declared approximately 767 acres of Hanford, with 26 facilities and 16 miles of railroad, including the Tracks,

¹³ CP 43.

¹⁴ 9 Wn. App. 2d at 223.

¹⁵ Port of Benton, *The Port of Benton History: 1958- 2012*, at *2-5 (2012), *available at* <https://portofbenton.com/tricities/wp-content/uploads/2015/07/History2012.pdf>.

¹⁶ CP 137.

¹⁷ 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.

to be surplus and conveyed ownership to the Port in a quitclaim deed.¹⁸ At the time, the property transferred was valued at more than \$5.1 million.¹⁹ Today, the property is valued at over \$50 million.²⁰ DOE characterized the transfer as “the most significant real property conversion in recent times.”²¹

The terms of the transfer were memorialized in an Indenture.²² 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 existing 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.”²³ These contractual rights and obligations were assigned to the Port.²⁴

The stated “purpose” of the Indenture was to “assist in [the Port’s] economic development activities” and “foster[] economic development.”²⁵ The Port agreed to use the property “to create economic and employment opportunities in the community[.]”²⁶ Under the terms of the Indenture, if the Railroad (which includes the Tracks) “ceases to be used or maintained for”

¹⁸ CP 85, 122; 9 Wn. App. 2d at 223.

¹⁹ 9 Wn. App. 2d at 223-24.

²⁰ *Id.* at 224 n.3.

²¹ CP 85.

²² CP 1022.

²³ CP 87, 90; 9 Wn. App. 2d at 224.

²⁴ *See id.*

²⁵ CP 86.

²⁶ CP 86, 92.

economic development purposes, all or part of the Railroad shall revert back to DOE, at DOE's option.²⁷ Alternatively, the Indenture provides that the Port can obtain a release from its obligations if it "determines that the continued ownership of the Railroad is no longer viable."²⁸ The Surface Transportation Board, the successor to the ICC, reviewed and approved the Indenture.²⁹

BNSF's rights and obligations with regard to the Tracks are governed by the Historical Agreement (assigned to the Port through the Indenture), not a lease or any other legal agreement with the Port (in contrast to TCRY's operations). BNSF's operation on the Tracks has facilitated significant economic development in the region, as the Indenture intended.³⁰ The availability of rail service from two Class I carriers, which have the resources, capacity, and regulatory approval to provide interstate service, attracts businesses to the Port.³¹

C. TCRY is enjoined from interfering with BNSF's operations on the Tracks after a business dispute between the parties.

The Port has entered into various agreements with Peterson's business, TCRY, regarding use and maintenance of the Tracks.³² In 2002,

²⁷ CP 92.

²⁸ CP 90.

²⁹ 9 Wn. App. 2d at 224.

³⁰ See CP 85-86, 92-93.

³¹ CP 1023, 1148-49, 1151-52.

³² See 9 Wn. App. 2d at 224-25; CP 1390.

TCRY and the Port negotiated a lease that authorized TCRY to operate on the Tracks and to use certain property.³³ In addition to rent, TCRY agreed to continue to maintain the Tracks as part of the consideration for the lease.³⁴ TCRY's agreements with the Port expressly provide that TCRY's rights are subject to the Historical Agreement and Indenture.³⁵ The lease prohibits TCRY from taking any action that would forfeit the Indenture or to "amend, modify, terminate or invalidate any existing contract which the Port has with any other railroad carrier," such as BNSF.³⁶

In 2000, BNSF contracted with TCRY to interchange railcars using the Tracks for a per-car fee.³⁷ This contract "specifically reserved BNSF's rights under" the Historical Agreement.³⁸ 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.³⁹

TCRY's owner, Peterson, was angered by BNSF's decision and "attempted to physically block BNSF's use of the tracks" in retaliation.⁴⁰ BNSF then filed a lawsuit seeking declaratory and injunctive relief

³³ CP 143, 1390.

³⁴ 9 Wn. App. 2d at 224; CP 1044, 1786. Although TCRY is legally obligated to maintain the Tracks, BNSF also has contributed to maintenance costs. *See* CP 1311-12, 1314, 1787, 1830-31.

³⁵ 9 Wn. App. 2d at 224-25; CP 1040, 1043.

³⁶ CP 1043.

³⁷ CP 1390.

³⁸ *Id.*

³⁹ CP 1390-91; 9 Wn. App. 2d at 225.

⁴⁰ CP 1391; 9 Wn. App. 2d at 225.

prohibiting TCRY from blocking BNSF's access to the Tracks.⁴¹ 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.⁴² 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 BNSF to directly serve customers on the Tracks.⁴³

Peterson then continued to escalate the dispute by lodging a federal fraud complaint against the Port (which was investigated and dismissed) and filing a related lawsuit asserting a *qui tam* action against the Port under the False Claims Act, among a grab bag of other claims.⁴⁴ The federal district court recently dismissed the *qui tam* action as "clearly frivolous," "vexatious[,] and brought primarily for the purpose of harassment" and awarded fees and costs to the Port.⁴⁵

D. Peterson files this taxpayer lawsuit seeking to invalidate BNSF's operating rights on the Tracks.

After TCRY was enjoined, Peterson filed this lawsuit in the guise of

⁴¹ *Id.* at 225.

⁴² *BNSF Ry. Co. v. Tri-City & Olympia R.R. Co. LLC*, 835 F. Supp. 2d 1056, 1066 (E.D. Wash. 2011).

⁴³ *Id.* at 1066-67; CP 1398.

⁴⁴ See *United States ex rel. Peterson v. Port of Benton Cty.*, No. 2:17-CV-0191-TOR, 2019 WL 4979822, at *3 (E.D. Wash. Oct. 8, 2019).

⁴⁵ *Id.* at *10.

a concerned taxpayer.⁴⁶ He alleged that BNSF's operation on the Tracks violates the gift of public funds and privileges and immunities clauses of the Washington Constitution.⁴⁷ The parties cross-moved for summary judgment.⁴⁸ The trial court granted Respondents' motions for summary judgment and dismissed Peterson's claims with prejudice.⁴⁹

The Court of Appeals affirmed the trial court's decision.⁵⁰ The Court of Appeals held that Peterson failed to demonstrate donative intent because the Port allows BNSF to operate on the Tracks pursuant to the Indenture, for which it received valuable land and facilities, not with the intent to make a gift.⁵¹ The Court of Appeals further held that both the Historical Agreement and the Indenture, pursuant to which BNSF operates on the Tracks, are supported by legally sufficient consideration.⁵² The Court of Appeals also upheld the trial court's summary judgment and dismissal of Peterson's privileges and immunities claim, but Peterson did not seek review of that aspect of the Court of Appeals' decision.⁵³

This Court granted review.

⁴⁶ 9 Wn. App. 2d at 225; CP 7-24.

⁴⁷ 9 Wn. App. 2d at 225. BNSF intervened as a defendant. *Id.* At 226.

⁴⁸ 9 Wn. App. 2d at 226.

⁴⁹ *Id.*; CP 2029-2033.

⁵⁰ 9 Wn. App. 2d at 223, 234.

⁵¹ *Id.* at 228-31.

⁵² *Id.*

⁵³ *See Id.* at 232-234; *generally* Pet.

III. ARGUMENT

A. The Port’s adherence to the Historical Agreement, which was assigned to it through the Indenture, does not constitute an unconstitutional gift of public funds.

As this Court held in *King County Taxpayers v. King County* (“*King County*”), Peterson must establish that the Port’s agreement with the federal government, embodied in the Indenture, “amounts to a transfer of property without consideration and with donative intent” to prevail on his gift of public funds claim.⁵⁴ Although Peterson initially ignored this Court’s decision in *King County* and instead relied upon earlier cases to argue that he need only demonstrate donative intent **or** lack of consideration, not both, he has since abandoned that argument and now agrees that *King County* sets forth the proper analysis.⁵⁵ Through the lens of the Indenture, Peterson’s gift of public funds claim is revealed to be nothing more than a futile effort to fit a square peg into a round hole. The Court of Appeals properly applied *King County* and this Court’s other gift of public funds precedent to hold that Peterson has failed to establish either factor, and thus cannot overcome the presumption that the Indenture is constitutional.⁵⁶

⁵⁴ 133 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)) (internal marks omitted and emphasis added).

⁵⁵ *Compare* App. Br. at 22-23 with Pet. at 7-8.

⁵⁶ 9 Wn. App. 2d at 227, 229-31.

1. The Port recognizes BNSF’s operating rights as part of its bargain with the federal government, not because it intends to make a gift.

First, the Court of Appeals properly held that Peterson failed to demonstrate that the Port had “express donative intent” in entering into the Indenture.⁵⁷ The stated purpose of the Indenture was for the Port to receive property now worth \$50 million to catalyze economic development in a region negatively impacted by the loss of jobs associated with the closure of Hanford, while honoring BNSF’s operating rights under the Historical Agreement.⁵⁸

As an initial matter, the Court of Appeals appropriately focused its gift of public funds analysis on the Indenture and the Historical Agreement, from which BNSF’s operating rights arise. Peterson does not meaningfully contest that the Indenture and the Historical Agreement are constitutional exercises of the government power to contract. Instead, Peterson’s disagreement with the Court of Appeals’ opinion boils down to his position that the Court of Appeals should have focused its analysis on the subsequent course of dealing between the parties, without regard for and independent from the legal agreements that govern the parties’ rights and obligations. Peterson provides no authority for his position that the subsequent course

⁵⁷ *Id.* at 229.

⁵⁸ *See* CP 86, 87, 90.

of dealing between parties is at all relevant to the gift of public funds analysis, much less that it can retroactively transform an otherwise constitutional agreement into an unconstitutional public gift.

Next, Peterson argues that economic development is not appropriate consideration for the transfer by the federal government. That argument mischaracterizes the terms of the Indenture. The Port's intent in entering into the Indenture was to acquire \$5 million worth of property at no cost and to realize an unparalleled opportunity to participate in the federal government's beneficial reuse program.⁵⁹ The federal government's requirement in return was for the Port to adhere to and respect BNSF's preexisting contractual right to use the Tracks without further payment. Economic development is just one of many benefits the Port and its constituents has received as a result of the Indenture. Moreover, the legislature has recognized that economic development by a port district serves a public purpose.⁶⁰

That the Indenture incidentally benefits BNSF does not make it unconstitutional. As this Court held in *King County*, “[a]n incidental benefit to a private individual or organization will not invalidate an otherwise

⁵⁹ CP 85.

⁶⁰ *See, e.g.*, RCW 53.08.245(1) (“It shall be in the public purpose for all port districts to engage in economic development programs.”).

valid public transaction.”⁶¹ Public entities regularly enter into complex contractual relationships with, involving, or impacting private entities. To prohibit even “incidental benefit” would impede, rather than further, the “manifest purpose” of the gift of public prohibition “to prevent state funds from being used to benefit private interests where the public interest is not primarily served.”⁶² Here, there can be no genuine dispute that the Indenture “primarily serves” the public interest.⁶³

Peterson provides **no** evidence or argument that the Port had donative intent when it entered into the Indenture. Instead, all of Peterson’s arguments on the donative intent issue relate to his impressions of the subsequent course of dealing between the Port and BNSF **after** the Indenture was executed.⁶⁴ Those arguments are irrelevant to whether the Port had donative intent in entering into the Indenture, and were properly rejected by the Court of Appeals.

First, Peterson raises various arguments related to the fact that BNSF does not have the same obligations as private entities with lease agreements.⁶⁵ But that is because BNSF’s rights and obligations arise from

⁶¹ *King Cnty.*, 133 Wn.2d at 596 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 705, 743 P.2d 793 (1987)).

⁶² *Citizens Protecting Res. v. Yakima Cty.*, 152 Wn. App. 914, 920, 219 P.3d 730, 733 (2009) (quoting *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211 (1977)).

⁶³ *See id.*

⁶⁴ *See* 9 Wn. App. 2d at 228-29 (describing Peterson’s key donative intent arguments).

⁶⁵ *Id.*

the Indenture and the Historical Agreement, **not** a lease agreement.⁶⁶

Second, Peterson argues that donative intent is present because the Port has not terminated the Historical Agreement. No case holds that the presence of a termination provision in a contract—which is a regular feature in government contracts—means that a government entity’s subsequent failure to terminate is subject to a gift of public funds analysis. Such an interpretation is unmoored from the prohibition against gifts of public funds, which focuses on the underlying transaction not the parties’ subsequent performance of contractual obligations. It would open the door to perpetual second-guessing of government contracts, an exercise this Court squarely rejected in *King County*.⁶⁷ Although it is undisputed that the Port **can** terminate BNSF’s operating rights under the Historical Agreement on six months’ notice, Peterson provides no authority for the proposition that the Washington Constitution **requires** the Port to do so.

The Court of Appeals also rejected Peterson’s conclusory statements regarding gross inadequacy, which is an alternate basis for establishing donative intent. The Court of Appeals properly applied this Court’s

⁶⁶ *Id.* at 228-29. In the same vein, 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 properly rejected that argument. *See id.*

⁶⁷ *See* 133 Wn.2d at 601.

precedent in *King County, Miebach*, and *Binder* to conclude that gross inadequacy exists “where the consideration is ‘so gross as to shock the conscience[.]’”⁶⁸ That Peterson disagrees with the Court of Appeals’ analysis regarding gross inadequacy⁶⁹ is beside the point because he does not argue that the consideration for either the Indenture or the Historical Agreement is grossly inadequate.⁷⁰ Instead, he suggests 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.”⁷¹ Peterson offers no authority for the proposition that the Port’s alleged motives in its current business dealings with TCRY—even if true (which they are not)—are at all relevant to whether it received adequate consideration for past agreements with unrelated parties.⁷² The

⁶⁸ See 9 Wn. App. 2d at 230 (citing *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); *King County*, 133 Wn.2d at 599-601). Peterson initially argued 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,” but the Court of Appeals properly noted that argument had “no legal support” and directly contradicted this Court’s decision in *King County*. See *id.*

⁶⁹ Peterson asserts that that the Court of Appeals erroneously determined that “fraudulent intent” or “ill motive” is a required element of gross inadequacy, see Pet. at 10, 13, but that is not what the Court of Appeals held. 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 *Peterson* 9 Wn. App. 2d at 230 (emphasis added).

⁷⁰ See *Peterson*, 9 Wn. App. 2d at 230 (“Peterson, does not argue, nor is there any evidence to support, that the consideration for the 1947 contract and the indenture was unconscionable.”).

⁷¹ Pet. at 17.

⁷² 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

Court of Appeals properly concluded that Peterson has failed to establish that either the Indenture or the Historical Agreement were intended to make a gift to BNSF.

2. Both the Indenture and the underlying Historical Agreement were supported by legally sufficient consideration.

Peterson also cannot establish the second factor in the gift of public funds analysis—lack of consideration. Although Peterson initially advocated for a more rigorous analysis of this factor, he now concedes that “adequacy of consideration is determined on the basis of legal sufficiency, whether there is value to support a promise”⁷³ The Court of Appeals properly applied that analysis in holding that Peterson has failed to establish that the Indenture and the Historical Agreement lack legally sufficient consideration.⁷⁴

As with donative intent, Peterson does not meaningfully dispute that the Indenture and Historical Agreement are supported by legally sufficient consideration. Instead, he argues that BNSF was required to provide **additional** consideration to the Port after the Historical Agreement was

Act case,” Pet. at 17 n.15, he omits that the trial court in that case denied his motion for partial summary judgment, holding that “Plaintiffs have failed to establish the Port had a retaliatory intent,” and has dismissed his fraud claims. *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); *United States ex rel. Peterson v. Port of Benton Cty.*, No. 2:17-CV-0191-TOR, 2019 WL 4979822, at *3 (E.D. Wash. Oct. 8, 2019).

⁷³ Compare App. Br. at 26 with Pet. at 8.

⁷⁴ 9 Wn. App. 2d at 231.

assigned to it.⁷⁵ But the mere fact that the Historical Agreement was assigned does not require BNSF to offer additional consideration to support the assignment especially as the assignment was part of a transaction solely between the Port and the federal government. 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.⁷⁶ 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 to a Washington governmental entity, and Respondents are aware of none. Such an interpretation would run contrary to Washington authority broadly encouraging the assignment of contracts.⁷⁷

Peterson also appears to suggest that additional consideration is required because the Historical Agreement is “perpetual.”⁷⁸ That characterization is belied by the plain language of both the Indenture and the Historical Agreement, which together permit the Port to terminate

⁷⁵ See, e.g., Pet. at 1.

⁷⁶ *Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993) (internal citation omitted).

⁷⁷ See, e.g., *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”).

⁷⁸ See Pet. at 1, 2 n.2.

BNSF’s operating rights on six months’ notice. Such termination for convenience clauses are customary in government contracts to permit the government to avoid incurring costs that are no longer necessary.⁷⁹ More broadly, the Indenture provides both parties with an option to terminate the agreement—for the federal government, if the property transferred is no longer used for economic development purposes, and for the Port, if the use and maintenance of the property transferred is no longer feasible. Neither the Historical Agreement nor the Indenture are “perpetual.”

B. The trial court properly decided and dismissed Peterson’s gift of public funds claim on summary judgment.

Finally, Peterson’s argument that the issue of donative intent is a fact question that must be reserved for the jury is without merit.⁸⁰ Numerous gift of public fund cases have been decided based on a summary judgment record, including *King County*.⁸¹ And none of the cases Peterson cited for the proposition that donative intent is inherently a fact issue for the jury are gift of public fund cases.⁸² Moreover, Peterson does not dispute the facts

⁷⁹ See, e.g., *SAK & Assocs., Inc. v. Ferguson Const., Inc.*, 189 Wn. App. 405, 410, 357 P.3d 671 (2015) (“[T]ermination for convenience clauses are required by regulations for most government procurement contracts.”).

⁸⁰ See Pet. at 10, 11.

⁸¹ See, e.g., *King County*, 133 Wn.2d at 592, 597-601.

⁸² 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).

material to the question of donative intent; instead, he disagrees only with the conclusions that the Court of Appeals drew from those undisputed facts.⁸³ 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.⁸⁴The Court of Appeals properly resolved that question on summary judgment.

IV. CONCLUSION

The only transaction here properly subject to a gift of public funds analysis is the Indenture, the transfer between the Port and the federal government. The Port received more than adequate consideration—\$5.1 million of land and associated facilities—to support its taking assignment of the Historical Agreement between the federal government and BNSF. There is no evidence of donative intent on behalf of the Port. And the idea that the Port is subject to a gift of public funds claim on an ongoing basis because it has not exercised a termination provision in the Indenture is without precedent. Accordingly, Respondents respectfully request that this Court affirm the Court of Appeals’s decision.

⁸³ See Pet. at 1-4, 11-12.

⁸⁴ See *id.* 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).

RESPECTFULLY SUBMITTED this 13th day of December, 2019.

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 13th day of December, 2019, I caused to be served, via the Washington State Supreme Court's Portal System, a true copy of the foregoing document upon all parties of record via electronic mail.

Dated this 13th day of December, 2019.

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December 13, 2019 - 4:25 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97410-1
Appellate Court Case Title: Randolph Peterson et al. v. Port of Benton, et al.
Superior Court Case Number: 16-2-03211-4

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