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SUPREME COURT OF THE STATE OF WASHINGTON

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ARTHUR LANE, JOHN ALLERTON and KENNETH GOROHOFF,

Appellants,

v.

PORT OF SEATTLE; KING COUNTY; BNSF RAILWAY COMPANY;  
GNP RLY, INC.; and CITY OF REDMOND,

Respondents.

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**BRIEF OF RESPONDENT BNSF RAILWAY COMPANY**

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ORIGINAL

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## INTRODUCTION

The institutional stakeholders, the parties to the transaction, and now the trial court, in a careful and well-reasoned opinion, have reached the same conclusion: The Port of Seattle (the “Port”) validly exercised its statutorily delegated, discretionary authority to acquire a rail corridor, referred to as the “Corridor” or the “Eastside Rail Corridor.” The Plaintiffs, a handful of disgruntled taxpayers who paid no attention to the proposed rail transaction until after it happened, seek the impossible and would impose the inequitable—a wholesale re-write of the parties’ \$81 million transaction with dramatic and unfair consequences to the parties and third-parties alike. BNSF Railway Company (“BNSF”) joins in the other Respondents’ request that the Court affirm the trial court’s judgment and separately addresses the question of remedy, applicable only if the Court disagrees on the authority question.

The parties here entered into a single, complex, and interdependent transaction under which the Port acquired the entire Corridor from BNSF. Here are the key pieces of the transaction:

- BNSF donated the Southern Portion of the Corridor to the Port;
- BNSF sold the Northern Portion of the Corridor to the Port for \$81 million;

- BNSF granted GNP Railway, Inc. (“GNP”) an easement (approved by the Surface Transportation Board, the federal agency charged with exclusive jurisdiction over such rail transactions), allowing GNP to carry freight over a portion of the Corridor. This easement was contingent on GNP entering into an operations and maintenance agreement with the Port; and
- King County assumed responsibility as the “Interim Trail User” and obtained common-carrier reactivation rights for the Southern Portion and the Redmond Spur (a seven-mile stretch that is part of the Northern Portion), which have been “railbanked” as part of the overall acquisition under the authority of the Surface Transportation Board. (“Railbanking” authorizes the conversion of “rails to trails” as long as the railroad right-of-way is preserved for future rail service.)

Parties and third-parties entered into numerous other agreements dependent on the Port’s acquisition of the Corridor:

- BNSF used the sale proceeds to enter into 13 like-kind exchanges authorized by the Internal Revenue Code.
- The City of Redmond purchased from the Port a four-mile segment of the Redmond Spur for \$10 million.
- Sound Transit spent \$13.8 million to acquire an easement and a fee-simple interest in a segment of the Corridor.
- Puget Sound Energy invested \$13.8 million to acquire a utility easement over portions of the Corridor.

*If* the Court finds that the Port lacked authority to acquire the Corridor, Plaintiffs ask this Court to direct the trial court on remand to determine “appropriate remedies,” specifically “rescission of the purchase and return of the purchase money to the Port.”



Rescission is a purely equitable, all-or-nothing remedy designed to restore the parties to the pre-transaction status quo. Rescission is not available to re-write the parties' agreements. Nor is it appropriate to rescind part of a transaction in a way that allows a party to retain the benefits while shedding its burdens.

Plaintiffs seek to rescind only one part of this complex, multi-party transaction (the purchase of the Northern Portion) and insist that any rescission would not disturb other interdependent parts of the transaction. In other words, Plaintiffs want the benefits of this transaction—the donated property—but not its burdens. Reversing the sale while leaving other parts of the acquisition intact (even if that were possible) will completely re-write the parties' interdependent transaction, force the parties into agreements they never intended, and leave BNSF and other parties in a far worse position than the pre-transaction status quo.

Plaintiffs' partial rescission remedy also would have a domino effect on the numerous complex transactions linked to the Port's acquisition with consequences for parties, third-parties, courts, and a regulatory body. Rescission would cast doubt on the effect of BNSF's 13 like-kind exchanges; potentially ensnarl the parties (and the Washington courts) in GNP's bankruptcy case; interfere with the Surface Transportation Board's exclusive jurisdiction over rail transactions; force

the parties to walk away from substantial investments and acquisitions designed to enhance regional economic development; re-write the parties' agreements; and compel the parties to enter into entirely new agreements to address GNP's easement and the effect of returning the Corridor to BNSF. Simply put, it is impossible to restore the parties to the position they were in before the transaction.

“There are times when an attempt by the court to rescind a contract is like trying to unring a bell. What’s done is done and cannot be undone.” *Yount v. Indianola Beach Estates, Inc.*, 63 Wn.2d 519, 519, 387 P.2d 975 (1964). That is the case here. No rescission remedy—much less the version of rescission promoted by Plaintiffs—is viable, appropriate, equitable, or proper.

BNSF requests that the Court consider the circumstances surrounding the transaction, the parties involved, the equities, and the governing law, in crafting any directives related to the remedy question.

#### STATEMENT OF ISSUES

1. Did the Port of Seattle properly exercise its authority under RCW 53.08.010, 53.08.020, or 53.08.290 in acquiring the Corridor?

*Only if the Court answers “no” to Issue No. 1, should it reach the following question.*

2. Is rescission of the sale of the Northern Portion a proper remedy?

## STATEMENT OF THE CASE

### **A. The Corridor.**

At issue in this case is the Port's acquisition of a 42-mile rail corridor from BNSF. CP 1264. This corridor is referred to as the "Corridor" or "Eastside Corridor" and consists of a Northern Portion and a Southern Portion. CP 1207. The bulk of the Northern Portion is used for freight operations, while the Southern Portion and the 7.3-mile segment of the Northern Portion between Woodinville and Redmond (the "Redmond Spur") have been "rail-banked" under the Federal Rails-to-Trails Act, 16 U.S.C. § 1247(d).<sup>1</sup> CP 1206, 1209. The Corridor provided the rail infrastructure to move freight in the region for over 100 years. CP 1209-10. BNSF and its predecessors owned the Corridor until 2009. CP 1209, 1211.

### **B. BNSF decided to dispose of the Corridor.**

In 2003, BNSF indicated to regional institutions that it was considering divesting the Corridor and asked whether there was interest in a public acquisition. CP 1263. A public process unfolded, and several entities expressed an interest in the Corridor. CP 1263. In 2005, BNSF entered into exclusive negotiations with King County to acquire the entire Corridor because it wanted to preserve the unified rail line as a

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<sup>1</sup> This statute allows a railroad right-of-way to be converted to trails as long as the right-of-way is preserved for future rail service. 16 U.S.C. § 1247(d).

transportation corridor and trail, but King County was unwilling to pay full value for the entire Corridor. CP 1263, 1279. The City of Redmond also expressed interest in purchasing the Redmond Spur. CP 4921. The Port emerged as the most likely buyer in 2006 and entered into a memorandum of understanding with BNSF in 2007. *See* CP 1288. And in May 2008 – after a robust public process – the Port agreed to acquire the entire Corridor. CP 1446; CP 1517.

**C. As part of a single, interdependent transaction, the Port of Seattle acquired the Corridor.**

In December 2009, as part of a single transaction, the Port acquired the Corridor. This single transaction is made up of several inextricably linked agreements: (1) a Purchase and Sale Agreement (“PSA”) under which the Port paid BNSF \$81 million for the Northern Portion and the Redmond Spur (CP 1446-66);<sup>2</sup> (2) a Donation Agreement under which BNSF agreed to donate the Southern Portion of the Corridor to the Port (CP 1279); (3) an agreement between BNSF and GNP granting GNP an easement to transport freight from BNSF’s inter-state line to businesses along the Northern Portion (CP 2642-61);<sup>3</sup> and (4) an Interlocal

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<sup>2</sup> The Port and BNSF initially agreed on a price of \$106 million for the northern portion of the Corridor, but that price was reduced to \$81 million when the Port told BNSF that it lacked sufficient funding for the original sale price. CP 1278-79.

<sup>3</sup> This transaction was approved by the Surface Transportation Board—the federal agency with exclusive jurisdiction to review and approve such rail transactions. CP 4921. Subsequently, GNP and the Port entered into a separate Operations and Maintenance

Agreement between the Port and King County and a Trail Use Agreement between BNSF and King County (CP1580-89, 3630-36).

The parties executed the PSA and the Donation Agreement on the same day, and their obligation to close under each agreement was contingent on the simultaneous (1) closing under the other agreement and (2) conveyance of the freight easement to GNP. CP 1459-60; CP 1530. So, for example, if the Donation Agreement or easement grant did not occur, then the PSA never would have closed. Similarly, the easement conveyance to GNP was conditioned on yet another agreement—an operations and maintenance agreement between GNP and the Port, establishing the parties' rights and obligations as owner and easement holder, without which the Port would not have agreed to the easement conveyance to GNP. CP 1447.

The default remedies under the various contracts also show that the parties expressly linked the agreements together. CP 1460-61; CP 1531. If, for example, there is a material default under either the Donation Agreement or the PSA, the remedy is the termination of both agreements—not just one. *See id.*

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Agreement allowing GNP to operate the freight line and requiring GNP to satisfy specific maintenance obligations. GNP currently moves freight on the Northern Portion under an arrangement with Ballard Terminal Railroad. CP 1192 (referencing STB Finance Docket No. 35213, *GNP Rly Inc.—Acquisition and Operation Exemption—BNSF Railway Company* (not printed), served Feb. 13, 2009).

Further examples of the intertwined nature of the agreements are King County's Interlocal Agreement and Trail Use Agreement. Under these agreements, the County assumed responsibility as the "Interim Trail User" and obtained common-carrier reactivation rights for the Southern Portion and the Redmond Spur, which had been rail-banked under the authority of the Surface Transportation Board. CP 1580-81, 3630-38. Like the PSA, the Donation Agreement, and the GNP easement, the Interlocal Agreement was expressly conditioned on the closing of the Port's acquisition. CP 1581.

In short, the parties considered the Corridor acquisition a single, overarching transaction. *See* CP 1366. In August 2010, the Port passed Resolution No. 3639 ratifying the transaction and determined that the Port's acquisition was "reasonably necessary to link the rail services, equipment and facilities within the port district to an interstate railroad system." CP 1341-42.

**D. In reliance on the Port's acquisition, parties and third-parties entered into agreements and made substantial investments.**

The parties and numerous third-parties relied on this transaction to enter into agreements and make substantial investments. BNSF re-invested its \$81 million sale proceeds in 13 like-kind exchanges across the country; these transactions were authorized under the Internal Revenue

Code. CP 1195-97. GNP and the Port entered into a separate Operations and Maintenance Agreement requiring GNP to satisfy specific maintenance obligations, which agreement was a condition of the conveyance of the easement to GNP. CP 1890-1915.

The City of Redmond invested \$10 million in June 2010 to purchase four miles of the Redmond Spur. CP 2348. Sound Transit spent \$13.8 million to acquire an easement for the Southern Portion and a fee interest for a one-mile segment of that line; Sound Transit is also poised to purchase rights to use the Redmond Spur for its light-rail and other mass-transit options. CP 1401. Puget Sound Energy bought a previously unavailable utility easement running over portions of the Corridor from the Port for \$13.8 million. *Id.*<sup>4</sup>

**E. GNP's bankruptcy proceeding.**

In 2011, while this case was pending, a group of GNP's creditors filed an involuntary bankruptcy proceeding to force GNP into bankruptcy protection. CP 1345-47. GNP's only significant asset for the purposes of the bankruptcy proceeding is the freight easement it holds on the Northern Portion. CP 1345. Early in the bankruptcy case, the bankruptcy court lifted the automatic stay to allow the Plaintiffs to pursue their claims based

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<sup>4</sup> Other transactions predicated on the Port's acquisition of the Corridor have recently been approved as well, including a \$5 million purchase by the City of Kirkland from the Port of a 5 ¾ mile stretch of the Corridor. *See, e.g., Pl. Br. App. C.*

on Plaintiffs' representation to the bankruptcy court that their suit "does not ask for any monetary relief, injunctive relief or any other kind of relief from" GNP and that this suit "will have virtually no impact on the Debtor." CP 1356, 1357; *see In re GNP Rly, Inc.*, No. 11-40829-BDL (Bankr. W.D. Wash.). The bankruptcy case remains pending.

**F. Plaintiffs sued to *partially* unwind the Port's acquisition of the Corridor.**

Taxpayers Lane, Allerton and Gorohoff (the Plaintiffs) knew about the Port's proposed acquisition of the Corridor in 2007. CP 1002-03. But they took no actions to lodge their complaint with Port officials: they attended no Port meetings; they sent no written communications to Port officials questioning the proposal; they made no phone calls to Port commissioners about the acquisition; and they took no efforts to rally the public or otherwise voice a public opposition to the proposal. CP 1304-06, 1309-10, 1316-17, 1318-19, 1325-31.<sup>5</sup> Nevertheless, in July 2010, more than seven months after the transaction closed and after the parties and third-parties had relied on the transaction, Plaintiffs filed suit against the Port, naming BNSF, King County, the City of Redmond, and GNP as additional defendants. CP 1-33. Plaintiffs challenge only the Port's legal

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<sup>5</sup> There was a letter sent to the Attorney General's office in 2008 asking the Attorney General to bring a taxpayer suit to challenge the Port's proposed acquisition. CP 1841. The Attorney General declined to bring suit because the Port's acquisition was not clearly contrary to law, and a suit would not serve the interest of the State's taxpayers. CP 1841-42; CP 4844.



authority under RCW 53.08.290 to purchase the Northern Portion and seek to partially rescind that portion of the transaction; they do not complain about BNSF's donation of the Corridor's Southern Portion and claim rescission would not affect other aspects of the overall transaction. Pl. Br. 2 n.3; CP 89, 190.

The trial court denied Plaintiffs' class-certification request. CP 4920. The parties then filed cross-motions for summary judgment on the authority and remedy questions. *See* CP 173-200, 1164-1190, 4290-4325, 4326-4356. After comprehensive summary judgment briefing and a lengthy hearing, the trial court issued a detailed 21-page order ruling that the Port acted well within its statutory authority in purchasing the Northern Portion. CP 4937. The trial court entered a final judgment based on its summary judgment dismissing Plaintiffs' claims with prejudice. CP 4913.

#### ARGUMENT

BNSF joins in the other Respondents' request that the Court affirm the trial court's judgment. In the final sentence of their Opening Brief, however, Plaintiffs also ask that the Court "direct the trial court on remand to ... determine appropriate remedies for the taxpayers, including rescission of the purchase and return of the purchase money to the Port." BNSF here makes a separate argument regarding the remedy.

Specifically, this brief argues that if the Court determines that the Port lacked authority, Plaintiffs' request for rescission is improper because it would not restore the parties to the status quo, upset numerous complex post-transaction agreements and investments, and implicate the jurisdiction of the bankruptcy court and the Surface Transportation Board. These concerns should inform any decision by this Court addressing the question of remedy.

**I. Rescission is an equitable remedy focused on returning parties to their pre-transaction position.**

Plaintiffs have the burden to establish entitlement to rescission. *See Vermette v. Andersen*, 16 Wn. App. 466, 469, 558 P.2d 258 (1976). They cannot satisfy that burden. Rescission is an equitable remedy designed to restore parties to the position they were in before the transaction. *Busch v. Nervik*, 38 Wn. App. 541, 547-48, 687 P.2d 872 (1984); *Yount v. Indianola Beach Estates, Inc.*, 63 Wn.2d 519, 525, 387 P.2d 975 (1964).

The Washington Supreme Court has recognized key limiting principles on a court's equitable authority to rescind an agreement. One of these limitations is that "[c]ourts are not at liberty ... to rewrite the parties' agreement and 'foist upon the parties a contract they never made.'" *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d

824, 833, 991 P.2d 1126 (2000). Further, when it is “not practicable” to “restore the parties to their position before” the agreement was made, a court should refrain from ordering rescission. *Id.*; *Newport Yacht Club v. City of Bellevue*, Case No. C09-0589-MJP, 2012 WL 1022427, \*7 (W.D. Wash. Mar. 23, 2012) (rejecting rescission of a settlement agreement when several years had passed since the agreement had been signed).

In some circumstances, rescission is simply impossible: the bell cannot be unrung; “what’s done is done;” and the parties cannot be returned to the pre-transaction status quo. *Yount*, 63 Wn.2d at 519. This is just such a case.<sup>6</sup>

## **II. Rescission is improper in this case.**

### **A. Rescission is an all-or-nothing remedy: Plaintiffs’ partial rescission remedy is unworkable, unfair, and would *rewrite* the parties’ agreements.**

Rescission generally involves undoing an entire transaction; a court “cannot disaffirm it in part, and enforce it in part.” *Creel v. Nettleton*, 151 Wash. 440, 444, 276 P. 91 (1929). But that is what Plaintiffs seek to do here: shed the burden of the \$81 million purchase, retain the benefits of the donated Southern Portion, and rewrite parties’ rights and obligations with respect to the Northern Portion. Pl. Br. 2 n. 3

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<sup>6</sup> The arguments set forth in this brief related to rescission are without waiver of other arguments that preclude rescission, including but not limited to BNSF’s affirmative defense of laches.

(“The appellant taxpayers do not challenge the Port’s acceptance of the donation; they challenge only the Port’s purchase of the ‘northern portion’ of the Corridor”).

Plaintiffs’ representations to the bankruptcy court in GNP’s bankruptcy case are revealing. On the one hand, they told the bankruptcy court there was nothing to worry about because whatever relief they might obtain in state court would “have virtually no impact on the Debtor.” CP 1356, 1357. But on the other, they plan to ask the trial court to undo the purchase, which, along with the donation, is the basis for the easement, the railbanking for trail use of the Redmond Spur, and a host of other agreements and investments. Plaintiffs cannot have it both ways because the transaction is a single, intertwined transaction.

The overall transaction is made up of several interdependent agreements. The Purchase and Sale Agreement under which the Port agreed to pay \$81 million for the Northern Portion was entered into on the same day as the Donation Agreement and was expressly conditioned on the simultaneous closing of the Donation Agreement and the conveyance of the freight easement to GNP. The same is true for the Donation Agreement. The default remedies set forth in the agreements further underscore the interdependent nature of the transaction. If the Port materially breached either the PSA or Donation Agreement, BNSF’s

remedy was termination of *both* agreements, not merely one of them. There are other interconnected agreements as well: GNP and the Port's Operations and Maintenance Agreement; the Interlocal Agreement; and the Trail Use Agreement. These agreements are explicitly conditioned on the closing of the Port's overall acquisition.

While this transaction was complex and the agreements many, the existence of multiple written contracts does not transform one overall transaction into separate deals. See *In re Estate of Brown*, 29 Wn.2d 20, 29, 185 P.2d 125 (1947) (holding that it was impossible to rescind community property agreement in which each spouse signed his and her own separate agreement because those agreements constituted "a single transaction" that can only be "rescinded in toto"). The transfer of the entire corridor from BNSF to the Port was a single transaction.

Courts have cautioned that, in the context of partial rescission, they "are not at liberty ... to rewrite the parties' agreement and 'foist upon the parties a contract they never made.'" *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126 (2000). That is the precise problem with Plaintiffs' partial rescission remedy. Plaintiffs would have the Court unwind *only* the Port's purchase of the Northern Portion from BNSF. But they would leave in place BNSF's donation. They assert that their remedy would not touch GNP's easement, although

it would leave GNP without an operating and maintenance agreement. CP 4340-41. And they insist that the other parts of the transaction related to the Northern Portion would remain in effect (*e.g.*, the transfer to King County of common-carrier reactivation rights and interim trail use of the Redmond Spur). CP 3630-34, 4342.

Plaintiff's remedy thus completely rewrites the parties' agreements and forces them into a transaction they never intended – BNSF's donation of the Southern Portion that relinquishes its significant rights on the Northern Portion. Under Plaintiffs' proposed remedy, the new agreement would look like this:

- a *donation* of only a *part* of the Corridor (the Port wanted the entire Corridor, and BNSF was looking to completely divest itself).
- a *relinquishment* of BNSF's *right to move freight* over the Northern Portion (GNP would retain that right according to Plaintiffs), even though BNSF would *own the Northern Portion*.
- an *elimination* of GNP's *maintenance obligations* associated with its right to move freight over the Northern Portion because there would be no operations and maintenance agreement in place.
- a *transfer* of BNSF's common-carrier reactivation rights to King County, with King County also holding interim trail use rights related to the Redmond Spur, even though BNSF would *own the Northern Portion*.

In other words, BNSF would be forced to buy back the Northern Portion, leave the donation with the Port, and, despite owning the Northern Portion, would lack rights to use and operate on the Northern Portion. Those rights would remain with GNP and King County. Rescission is not available to refashion the parties' agreement in this way. *See Seattle Prof'l Eng'g Employees Ass'n*, 139 Wn.2d at 833.

**B. The parties cannot be restored to their pre-transaction position.**

**1. Multiple transactions related to GNP cannot be undone, and any such relief would implicate the jurisdiction of the Surface Transportation Board and the Bankruptcy Court.**

A critical component of the Corridor transaction was BNSF's transfer of a freight easement to GNP. Unwinding the sale of the Northern Portion would necessarily implicate the GNP piece of the transaction in three significant ways. *First*, if mere ownership of the Northern Portion were returned to BNSF, the status quo would not be restored because BNSF will have been deprived of its pre-transaction rights to run freight over the line. *Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986) (rescission is designed to restore the parties to the "positions they would have occupied if no contract had ever been made"). GNP would retain those rights, and BNSF would own the line without any authority to perform freight operations. That is not the pre-contract status quo.

*Second*, rescission would rewrite the parties' agreements related to GNP's easement. As part of the Port's acquisition and as a condition to the easement, GNP entered into an Operations and Maintenance Agreement with the Port. This agreement governs the owner-easement holder relationship. Rescission would wipe out the Port-GNP Operations and Maintenance Agreement and leave GNP without such an agreement with the new owner (BNSF), creating tremendous uncertainty about GNP's maintenance obligations and the parties' rights.

*Third*, even if a rescissory remedy could put BNSF in the same position it was in before the Port's acquisition—restoration of BNSF's rights to run freight—that would prejudice GNP's easement rights and implicate the bankruptcy court's and the Surface Transportation Board's jurisdiction. *See* 11 U.S.C. § 362 (preventing various acts that effect the property of a debtor in bankruptcy); 49 U.S.C. § 11323(a) (identifying the transactions by rail carriers that may only be carried out with the approval and authorization of the Surface Transportation Board). A forced relinquishment of GNP's easement goes to the very heart of the Surface Transportation Board's exclusive and plenary authority over rail abandonments. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-21, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981). "Absent ... valid ... abandonment [authority] ... a state may not require a



railroad to cease operations over a right-of-way.” *Nat’l Wildlife Fed. v. ICC*, 850 F.2d 694, 704 (D.C. Cir. 1988) (citing *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966)).<sup>7</sup> And the Surface Transportation Board can force the sale of a rail line only if the line has been approved for abandonment or in other very limited circumstances not present here. 49 U.S.C. § 10904; 49 U.S.C. § 10907. Just as the Court cannot force GNP to abandon the easement without Surface Transportation Board authority, BNSF cannot renew operations on any portion of the Corridor without Surface Transportation Board authority. *See* 49 U.S.C. § 11323(a).<sup>8</sup>

The jurisdictional morass associated with rescission is magnified here because GNP is currently a debtor-in-possession under Chapter 11 of the Bankruptcy Code and thus subject to the bankruptcy court’s jurisdiction. 28 U.S.C. § 1334(a) (establishing that federal courts have original and exclusive jurisdiction over bankruptcy cases). While the bankruptcy court (in conjunction with the Surface Transportation Board) may authorize an abandonment of the easement if that were “in the best

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<sup>7</sup> Reinforcing the Surface Transportation Board’s exclusive jurisdiction over the railbanked portions of the Corridor (e.g., the Redmond Spur), the Board recently ruled that adjoining landowners’ state-law adverse possession claims asserting ownership rights to railbanked property were preempted under the Interstate Commerce Act. STB Finance Docket No. 35539, *Jie Ao & Xin Zhou--Petition for Declaratory Order*, served June 6, 2012.

<sup>8</sup> Even a voluntary abandonment requires Surface Transportation Board approval. 49 U.S.C. § 11323(a)(2).

interest of the estate; or essential to the formulation of a plan; and ... consistent with the public interest,” it is unlikely that the bankruptcy court would do so when the easement is GNP’s only significant asset. *See* 49 U.S.C. § 11323(a)(2) (voluntary transfer of easement requires Surface Transportation Board approval); 11 U.S.C. § 1170(a)-(c) (requiring bankruptcy court approval of an abandonment after an application process with the Surface Transportation Board). Regardless of whether abandonment would be approved in these circumstances, rescission would unquestionably affect GNP’s rights and implicate both the bankruptcy court’s and the Surface Transportation Board’s jurisdiction.

Though Plaintiffs insist GNP’s easement will not be affected by their partial rescission remedy, why did Plaintiffs name them as a defendant in this suit? Either they are seeking to oust GNP (which would implicate its rights, the bankruptcy court’s jurisdiction, and the Surface Transportation Board’s authority) or they are not seeking a complete rescission remedy. *See Creel v. Nettleton*, 151 Wash. 440, 444, 276 P. 91 (1929). No matter the answer, rescission is improper here.

**2. Rescission would affect a host of other transactions, leaving parties and third-parties in a worse position than they were pre-transaction.**

Any rescissionary relief would require careful consideration of the effects of undoing the sale of the Corridor on transactions entered into

based on the Port's acquisition. If the sale of the Corridor is unwound, these other transactions will be in jeopardy as well.

*First*, BNSF entered into 13 like-kind exchanges by reinvesting the proceeds of the \$81 million sale of the Corridor across the country. CP 1195-97; 26 U.S.C. §1031 (providing that an exchange of business or investment property solely for business or investment property of like-kind results in no tax gain or loss). Rescission would force BNSF to return the \$81 million it received from the sale of the Corridor, requiring BNSF to (i) evaluate whether it could unwind the 13 separate real-estate transactions it entered into after the sale, which would adversely affect additional third-parties or (ii) invest \$81 million in new money to bring the Corridor back to BNSF. There may be tax consequences as well, making it impossible for BNSF to be put in its pre-transaction position. *See* Rev. Rul. 80-58, 1980-1 C.B. 181.

*Second*, the City of Redmond will be affected. The Port and the City of Redmond would be forced to undo their \$10 million agreement under which the City purchased a segment of the Redmond Spur. And the City of Redmond could lose money it invested in development and improvement expenditures undertaken in reliance on the Corridor transaction.

*Third*, agreements with King County, which depend on Surface Transportation Board authority, would be implicated. The County had agreements with the Port and BNSF to develop a public trail system, as authorized by the Surface Transportation Board. CP 3630-38. The viability of this arrangement and the resulting benefits of trail development would be uncertain if the Port's acquisition of the Redmond Spur were unwound. A new arrangement fashioned by the courts would require further approval by the Surface Transportation Board. *See* CP 1581. Another example relates to BNSF's transfer of residual "common carrier" rights, approved by the Surface Transportation Board, to the County. STB Finance Docket No. 35148, *King County, WA—BNSF Railway Company* (not printed), served September 18, 2009. Though Plaintiffs assert otherwise, if the purchase were reversed, BNSF could only be returned to the pre-transaction status quo if those rights to reinstate rail service were returned to BNSF. But that would affect the County's rights and also require further proceedings before the Surface Transportation Board to approve a re-transfer. *See id.*

*Finally*, rescission would unravel various agreements conveying utility and transportation easements, including easements agreements with Sound Transit and Puget Sound Energy.

It is simply impossible to restore the parties to their pre-transaction position. BNSF and its counterparties would be affected; parties with agreements expressly linked to the Port's acquisition would be harmed; and third-parties who acted in reliance on the acquisition would be prejudiced. Therefore, rescission of the sale is an improper remedy.

**III. The Court should affirm the trial court's ruling that the Port had authority to acquire the Corridor.**

BNSF joins in the other Respondents' request that the Court affirm the trial court's judgment on the authority question and provides the following overview explaining why the Court should reject Plaintiffs' arguments for reversal.

**A. The Port properly exercised its statutory authority to purchase the Northern Portion.**

The trial court properly determined that the Port acted within its authority in purchasing the Northern Portion. The authority question turns largely on the interpretation of RCW 53.08.290 and RCW 53.08.010. These provisions provide authority for the Port to purchase both sections of the Corridor within its and outside its taxing district.

RCW 53.08.290 provides:

In addition to the other powers under this chapter, a port district, in connection with the operation of facilities and improvements of the district, may perform all necessary activities related to the intermodal movement of interstate and foreign cargo.... A port district may, by itself or in conjunction with public or private entities, acquire,

construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities inside or outside the port district: PROVIDED, That such authority may only be exercised outside the boundaries of the port district if such extraterritorial rail services, equipment, or facilities are found, by resolution of the commission of the port district exercising such authority, to be reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system....

Under the plain language of this provision, the Port has broad authority to acquire rail services, equipment and facilities within its district. Thus, the Port's purchase of that part of the Northern Portion of the Corridor within King County, including the Redmond Spur, was well within its authority. The Port also had statutory authority to purchase the remainder of the Northern Portion outside King County if the purchase is "reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system." RCW 53.08.290. The Port Commission so found and thus the remainder of the transaction was within the Port's authority.

Plaintiffs raise two issues about the interpretation and application of RCW 53.08.290. *First*, they argue that the statute's "in connection with" language requires that any acquired rail line must have a physical connection with the Port's harbor or airport facility. Pl. Br. 29-31. The trial court wisely rejected this argument because the ordinary and common understanding of "in connection with" is that the "two actions have some

relation or association.” CP 4927. In other words, the statute is not as narrowly written as urged by the Plaintiffs. The Port is permitted to acquire a rail line such as the Corridor here that provides intermodal interstate rail capacity to businesses and taxpayers within its taxing district.

*Second*, Plaintiffs claim that the Port’s acquisition of the Northern Portion was not supported by a pre-purchase finding that the acquisition was “reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system.” Pl. Br. 32-38. But the Port’s ratification of its acquisition of the Northern Portion was effective. Public entities such as the Port are entitled to ratify past acts that are procedurally flawed unless the original act was *ultra vires*.

An *ultra vires* act is one “performed with no legal authority and [is] characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed.” *South Tacoma Way LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). A governmental act is *ultra vires* and void only where done “wholly without legal authorization or in direct violation of existing statutes” and does not include acts within “the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means.” *Finch v. Matthews*, 74 Wn.2d

161, 172, 443 P.2d 833 (1968). When a governmental entity has been “generally authorized” by law to undertake governmental action, it does not act *ultra vires* in taking such action. See *South Tacoma Way*, 169 Wn.2d at 123 (stating that “[i]f... the State was generally authorized to sell the surplus property, its act of doing so was not *ultra vires*”). “Consequently, a contract formed between a government entity and a private entity will be void only where the government entity had no authority to enter the contract in the first place.” *Id.* Here, the Port had authority to enter into the transaction with BNSF to purchase the corridor. Therefore, the contract was not *ultra vires* and subject to ratification.

“That an unauthorized contract may be ratified...will not be denied...” *Ettor v. City of Tacoma*, 77 Wash. 267, 274, 137 P. 820 (1914). In *Ettor*, the City of Tacoma claimed that certain contracts for work done on annexed land, entered into by the County before the City’s annexation, were *ultra vires* and void. This Court rejected that argument, reasoning that the city could legally have entered into the contracts in the first place. *Id.* at 272-75. The Court held that the city ratified the contracts, and they were therefore enforceable. *Id.* at 275. This conclusion has been repeatedly reached by Washington courts and applies



here.<sup>9</sup> The trial court properly ruled that Resolution No. 3639 “remedied whatever procedural default may have existed at the time the ERC transaction closed.” CP 4936.

Further, Resolution No. 3639 made the appropriate findings and was supported by sufficient evidence. The following facts support the Commission’s action: (1) the Northern Portion currently carries freight rail traffic, and has done so for over 100 years, (2) the Northern Portion starts in Woodinville, includes the Redmond spur (both within the Port’s district) and extends into Snohomish County, (3) the Northern Portion intersects with the East-West rail line in Snohomish, and (4) the East-West rail line crosses Stevens Pass and is part of an interstate railroad system.<sup>10</sup> Accordingly, freight from the Port’s district has in the past, and can in the future, move along the Northern Portion and connect to an interstate rail line. And, as the trial court explained, the Port’s quasi-legislative

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<sup>9</sup> See, e.g., *Pierce County v. State*, 159 Wn.2d 16, 40-41, 148 P.3d 1002 (2006) (holding that a properly enacted statute remedied defects in an earlier enacted statute); *Jones v. City of Centralia*, 157 Wash. 194, 212, 289 P. 3 (1930) (recognizing a municipal authority’s ability to ratify contracts where the municipal authority had the power to enter into the contract in the first place); *Eugster v. City of Spokane*, 110 Wn. App. 212, 228-29, 39 P.3d 380 (2002) (holding that a challenge to the validity of a city ordinance was moot where the city had subsequently retraced its steps and properly enacted the ordinance); *Henry v. Town of Oakville*, 30 Wn. App. 240, 246-47, 633 P.2d 892 (1981) (“[W]here a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defect by re-enactment with the proper formalities.”).

<sup>10</sup> CP 1129, 1130-31, 1134-35, 1141-42, 1144, 1149-51, 1155-1156, 1160, 1400, 1408-09, 1411-12, 2142-45, 2160-62.

determinations were entitled to deference and should only be disturbed if arbitrary or capricious. CP 4930.

Although the Respondents believe that there was ample authority under RCW 53.08.290, the trial court ruled that RCW 53.08.290 did not authorize the purchase of the Redmond Spur. The court properly found that the Port had authority under RCW 53.08.010 to purchase the Redmond Spur. RCW 53.08.010 allows the Port to purchase “all lands, property, property rights, leases, or easements necessary for its purposes.” RCW 53.08.010. The Port’s acquisition of the Redmond Spur was “necessary for its purposes” based on the Port’s broad mission and findings that acquiring the Redmond Spur “would advance trade and commerce, promote industrial growth and sti[m]ulate economic development.” CP 4929.

**B. The Port’s passage of Resolution No. 3639 was neither arbitrary nor capricious.**

Plaintiffs renew their complaint that passage of Resolution No. 3639 was arbitrary and capricious. It was neither. Judicial review of the Port’s determination that acquiring the Northern Portion was reasonably necessary to link to an interstate railroad system is limited. The Port’s determination should be upheld unless it is arbitrary, capricious or

contrary to law.<sup>11</sup> An action is arbitrary and capricious only if it is a “willful and unreasonable action, without consideration and a disregard of facts or circumstances.” *Buell v. City of Bremerton*, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972). “When applying the ‘arbitrary and capricious’ standard of review, a reviewing court does not substitute its judgment for that of the agency. Where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration even if the reviewing court believes an erroneous conclusion was reached.” *Equitable Shipyards, Inc. v. State By & Through Dep’t of Transp.*, 93 Wn.2d 465, 474-75, 611 P.2d 396, 402 (1980) (citations omitted). *See also In re Port of Grays Harbor*, 30 Wn. App. 855, 863, 638 P.2d 633 (1982) (A port’s choice “is not arbitrary and capricious simply because a reviewing court would select a different option.”).

Here, the evidence establishes that the Port’s passage of the resolution was an appropriate exercise of its discretionary judgment. The Port made an independent policy decision to acquire the Corridor. Accordingly, the trial court properly found that the Port’s resolution was not arbitrary or capricious. CP 4917.

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<sup>11</sup> *Marino Prop. Co. v. Port Comm’rs of Port of Seattle*, 97 Wn.2d 307, 316, 644 P.2d 1181 (1982) (holding that a port’s declaration that a parcel of land was surplus for purposes of transferring property rights was not arbitrary or capricious or contrary to law).

**C. The Court should decline Plaintiffs' invitation to rule that, as a matter of law, the Northern Portion is not a "belt line railway."**

The Port has the express statutory authority to purchase "belt line railways," such as the Corridor: "A port district may also construct, purchase and operate belt line railways, but shall not acquire the same by condemnation." RCW 53.08.020 (emphasis added). While the statute does not define "belt line railways," the Washington Attorney General offered a definition before the statute was revised to allow for port ownership of such lines that defined a "belt line railway" as "a rail system to be used for the transfer of commodities between industries and line haul railroads." Attorney Gen. Opinion 55-57 No. 99.

The Corridor is a "belt line railway" under the plain language of RCW 53.08.020. In reality, GNP and Ballard Terminal use the Northern Portion to transfer commodities between various industries on the line and BNSF. Moreover, BNSF is "a line haul railroad," and, as Plaintiffs admit, there are and have been numerous freight customers located along the Corridor. Accordingly, the Corridor is now and has historically been a belt line railway as it was "used for the transfer of commodities between industries and line haul railroads." *See* Attorney Gen. Opinion 55-57 No. 99.

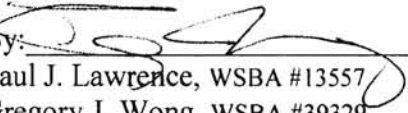
Plaintiffs are thus in error when they argue that the Northern Portion is not a "belt line railway" as a matter of law. Pl. Br. 48-50.

**CONCLUSION**

BNSF respectfully requests that the Court affirm the trial court's judgment. Even if the Court concludes that the Port lacked authority to acquire the Corridor, Plaintiffs' asserted rescission remedy is not an appropriate remedy in this case. BNSF further requests any other relief to which it is justly entitled.

Respectfully submitted this 7th day of June, 2012.

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No. 86894-8

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR LANE, JOHN ALLERTON  
and KENNETH GOROHOFF,

Appellants,

v.

PORT OF SEATTLE; KING  
COUNTY; BNSF RAILWAY  
COMPANY; GNP RLY, INC. and  
CITY OF REDMOND,

Respondents.

**CERTIFICATE OF  
SERVICE**

I, Katie Dillon, hereby certify under penalty of perjury under the law of  
the State of Washington:

1. I am a citizen of the United States, and I am now and have been at  
all times over the age of 18 years. I am employed at Pacifica Law  
Group, attorneys for Respondent BNSF Railway in this action, and  
make this declaration based upon my personal knowledge of the  
facts stated below. I am not a party to this above-entitled action  
and am competent to be a witness herein.

ORIGINAL

2. On this 7th day of June, 2012, I caused a true and correct copy of *Brief of Respondent BNSF Railway Company* to be to be filed and served on counsel of record via email and U.S. Mail to the following:

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Dated this 7th day of June, 2012.

  
Katie Dillon



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**Subject:** RE: Lane v. BNSF - 86894-8: Brief of Respondent BNSF Railway Company

Rec. 6-7-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**Subject:** Lane v. BNSF - 86894-8: Brief of Respondent BNSF Railway Company

Attached for filing, please find the Brief of Respondent BNSF Railway Company, and accompanying Certificate of Service. These documents are being filed by Gregory J. Wong on behalf of Defendant BNSF. Greg Wong's email address is: [greg.wong@pacificallawgroup.com](mailto:greg.wong@pacificallawgroup.com) and his WSBA Number is 39329.

Hard copies are in the U.S. mail to opposing counsel.

**Katie Dillon**

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Secretary to Gregory J. Wong



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