

No. 97410-1

No. 94588-8

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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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 CASE¹

(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

¹ 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 32.² The railroads apparently made the required payments of \$50,000 each, and the track at issue here was constructed.³

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.

² 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.

³ 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 85-135.⁴ 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 28.⁵ 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

⁴ 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.

⁵ 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 21st Century trains on 70-year-old railroad track designed for World War II era trains has caused damage to the track. CP 1546-59.⁶

(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).⁷ 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

⁶ 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.

⁷ 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.”).⁸

In May 2000, BNSF contracted to interchange cars⁹ 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

⁸ 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.

⁹ 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 \$50,000.¹⁰ At present, UP continues to pay fees to TCRY.¹¹

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,

¹⁰ 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.

¹¹ 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 7-141.¹² The Port answered. CP 311-26.¹³ Believing that the Department of Revenue ("DOR") was not

¹² 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.*

¹³ 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, 157-59.¹⁴

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.¹⁵ In response to Peterson's constitutional challenge, the Port contended that neither article

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

¹⁴ 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.

¹⁵ 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, 1749-72.¹⁶ 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 99-104.¹⁷ 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

¹⁶ 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.

¹⁷ 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. ARGUMENT¹⁸

(1) Interpretive Principles for Constitutional Analysis

¹⁸ 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, §§ 5¹⁹ 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.²⁰ The historical context of article VIII, § 7 is particularly significant in understanding its meaning.

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

²⁰ 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

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).²¹

²¹ 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.").²² 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

²² 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 597-98.²³ 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:

²³ *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 240-41.²⁴

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 102.²⁵ Rather,

²⁴ 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.

²⁵ 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;

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 102-03.²⁶

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

²⁶ 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.²⁷ 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.²⁸

²⁷ 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.

²⁸ 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.

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 un rebutted 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 1568.²⁹ 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

²⁹ 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.*³⁰

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

³⁰ 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 1560.³¹ 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.³²

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

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

³² 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.³³ Economic benefit was the

³³ 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.³⁴

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

³⁴ 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

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.³⁵ Even assuming that “economic benefit” is at all quantifiable in this context,³⁶ 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

³⁵ 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.

³⁶ 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).³⁷

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:

³⁷ 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.³⁸

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

³⁸ *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).³⁹ 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

³⁹ 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.⁴⁰ 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

⁴⁰ 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.⁴¹

(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

⁴¹ 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.⁴² These

⁴² 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.⁴³

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

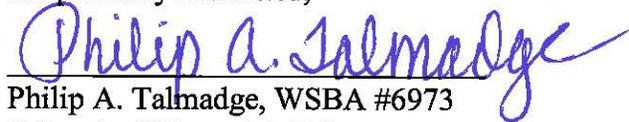
contribution toward the "additional maintenance and improvements to the Port's railroad ... required to accommodate this traffic." CP 1318.

⁴³ 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 **A. Overview.**

6
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.
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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")¹ 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 ¹ "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)

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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

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

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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
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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
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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
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11 **TALMADGE/FITZPATRICK/TRIBE**

12 By: Phillip Talmadge
13 Phillip Talmadge, WSBA #6973
14 Attorney for Plaintiffs Doggett,
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CERTIFICATE OF SERVICE

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

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<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 th Street, Suite 2200 Minneapolis, MN 55402 <i>Pro Hac Vice Counsel for BNSF Railroad</i>
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DECLARATION OF SERVICE

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

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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: September 20, 2017 at Seattle, Washington.



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September 20, 2017 - 11:58 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

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