

SUPREME COURT OF THE STATE OF WASHINGTON

RANDOLPH PETERSON,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE, et
al.,

Respondents.

PRAECIPE RE:
RESPONDENTS THE PORT
OF BENTON AND BNSF
RAILWAY COMPANY'S
JOINT OPENING BRIEF

Respondents the Port of Benton and BNSF Railway Company (together, "Respondents") submit this Praecipe in connection with Respondents' Joint Opening Brief. Respondents respectfully request that the Court accept and consider the attached version of Respondents' Joint Opening Brief, which corrects page number errors in the Table of Authorities. The substance of the brief is unchanged.

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RESPECTFULLY SUBMITTED this 20th day of November,
2017.

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I. INTRODUCTION

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

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

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

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

II. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Port Contracts with TCRY for Track Maintenance.

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

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

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

E. BNSF’s Use of the Tracks.

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

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

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

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

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

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

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

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

⁵The “Richland Trackage” is a different name for the Tracks.

extended. *Id.* at 1062. In analyzing the parties’ respective rights, the federal district court declared that, “for all of the historical complexity surrounding the Richland Trackage, the relative rights of the parties are actually quite simple: The United States granted BNSF and UP’s predecessors in interest full rights to operate on the Richland Trackage, and TCRY took possession of the Richland Trackage subject to these rights.” *Id.* at 1066-67.

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

G. Peterson Responds by Filing This Lawsuit.

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

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

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

This appeal followed.

III. ISSUES PRESENTED FOR REVIEW

A. Unconstitutional Public Gift Claim.

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

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

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

B. Privileges and Immunities Claim.

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

IV. ARGUMENT

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

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

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

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

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

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

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

Flouting this controlling authority, Peterson wrongly argues that the principle of “grossly inadequate return” provides this Court an avenue to engage in “careful consideration of the ‘consideration’ received by the Port for the use of its tracks by BNSF.” App. Br. 26. Although Peterson is correct that grossly inadequate return is relevant to the public gift inquiry, *see* 133 Wn.2d at 601, “gross inadequacy” is a general contract law principle under which courts may set aside a contract on equitable grounds where the consideration is “so gross as to shock the conscience,” and thus may suggest fraud or other wrongdoing. *See Miebach v. Colasurdo*, 102 Wn.2d 170, 178, 685 P.2d 1074 (1984); *Binder v. Binder*, 50 Wn.2d 142, 150, 309 P.2d 1050 (1957). Peterson, however, does not argue, nor is there any evidence to support, that the consideration for the Historical Agreement and the Indenture is unconscionable. *Cf. King Cnty.*, 133 Wn.2d at 599 (addressing, although ultimately rejecting, Taxpayers’ argument that the Mariners’ lease is “unconscionable” because the “consideration for the lease . . . is so grossly inadequate”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lastly, Peterson intimates that donative intent exists because the Port did not report its arrangement with BNSF to the State Auditor. But Peterson provides no legal basis for why the Port was required to do so, where BNSF does not have a lease with the Port and thus does not pay leasehold taxes. BNSF does not pay rent for its use of the Tracks because, unlike Peterson, it does not operate on the Tracks pursuant to a leasing arrangement. *See App. Br. 26.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The only authority Peterson does cite—*Grant Cnty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) and *Ockletree*—is irrelevant to the privilege he asserts. He relies on *Grant County* for the proposition that “the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from” is a fundamental right, but Peterson does not assert that BNSF’s different treatment is a result of

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

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

V. CONCLUSION

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

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

RESPECTFULLY SUBMITTED this 17th day of November,
2017.

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November 20, 2017 - 3:22 PM

Transmittal Information

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

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