

BEFORE THE
SURFACE TRANSPORTATION BOARD

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TRI-CITY RAILROAD COMPANY, LLC,)
Complainant,)
v.) STB DOCKET NO.
CITY OF RICHLAND, WASHINGTON,) NOR 42163
and)
CITY OF KENNEWICK, WASHINGTON,)
Defendants.)

**COMPLAINT AND PETITION FOR PRELIMINARY INJUNCTION
UNDER 49 U.S.C. § 1321(b)(4)**

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**COMPLAINT AND PETITION FOR PRELIMINARY INJUNCTION
UNDER 49 U.S.C. § 1321(b)(4)**

Pursuant to 49 U.S.C. § 10501(b), 49 U.S.C. § 1321(b)(4), and 49 C.F.R. § 1111.1, *et seq.*, TRI-CITY RAILROAD COMPANY, LLC (TCRY) hereby complains against the CITY OF RICHLAND, WASHINGTON and the CITY OF KENNEWICK, WASHINGTON (the Cities), and respectfully petitions for issuance of a preliminary injunction, on the following grounds:

I.

NATURE OF THE CASE

The Board is asked to issue an injunction under 49 U.S.C. § 1321(b)(4) in aid of its own jurisdiction under 49 U.S.C. § 10501(b) to determine whether State action that would affect a rail carrier is federally preempted. The injunction would prohibit the Cities from going forward with condemnation of land for a road crossing over TCRY's tracks on the purported authority of a decision of a Washington State Court that unlawfully failed to give effect to an earlier Board declaration that condemnation of the same land for the same crossing would be federally preempted. Relocation of a parallel track away from the crossing, alleged by the Cities to result

in a new crossing not previously addressed by the Board, is instead merely a changed circumstance that bears on whether the crossing previously addressed by the Board would have a material adverse effect on TCRY's rail operations so as to be federally preempted under 49 U.S.C. § 10501(b). Jurisdiction to make that determination is in the Board under 49 U.S.C. § 1322(c), that provides an opportunity for the Cities to petition the Board to reopen its prior determination on the ground that relocation of the parallel track is a substantially changed circumstance that warrants reconsideration.

II.

IDENTITY OF COMPLAINANT

TCRY is a family-owned Class III rail carrier subject to the jurisdiction of the Board under the Interstate Commerce Act, as amended, 49 U.S.C. § 10101, *et seq.* TCRY is authorized by the Board to lease from the Port of Benton County, Washington (the Port), and to operate, a rail line commonly known as the Southern Connection that extends between Milepost 46.6 at a point of connection to Union Pacific Railroad Company (UP) at Richland, WA and Milepost 28.3 at the border of the U.S. Department of Energy's Hanford Site. *See Tri-City Railroad Company -- Lease and Operation Exemption -- Rail Line of the Port of Benton in Richland, WA*, 2000 WL 804992 (STB Docket No. FD 33888, decision served on June 23, 2000). TCRY was the Petitioner in the Board decision in which it was determined that condemnation of land for a road crossing of TCRY's tracks at Richland was federally preempted. *Tri-City Railroad Company -- Petition for Declaratory Order*, 2016 WL 5904750 (STB Docket No. FD 35915, decision served on September 14, 2016). For nearly 20 years, TCRY has provided the highest

quality of rail freight service to shippers and receivers located on the Southern Connection.

III.

IDENTITY OF DEFENDANTS

The City of Richland is a rail carrier subject to the jurisdiction of the Board by virtue of ownership of switching tracks commonly known as the Horn Rapids Spur which are subject to the Board's jurisdiction. *See Tri-City Railroad Company, LLC -- Petition for Declaratory Order*, 2017 WL 2392532 (STB Docket No. FD 36037, decision served June 1, 2017).

The Board has jurisdiction over the City of Richland and the City of Kennewick because they were active parties in the Board decision in which it was determined that condemnation of land for a road crossing over TCRY's tracks is federally preempted.

IV.

JURISDICTION

The Board has jurisdiction over the subject matter of the Complaint by virtue of its statutory authority to issue an injunction under 49 C.F.R. § 1321(b)(4) in aid of its jurisdiction to determine whether particular activity affecting rail carriers is federally preempted by virtue of 49 U.S.C. § 10501(b).

The Board has personal jurisdiction over the City of Richland as a rail carrier by virtue of the City's ownership of switching track that is commonly known as the Horn Rapids Spur, which is subject to the jurisdiction of the Board.

The Board has jurisdiction over both the City of Richland and the City of Kennewick by virtue of their active participation in the Board decision in which it was determined that condemnation of land for a road crossing over TCRY's tracks is federally preempted.

V.

TCRY'S PETITION FOR DECLARATORY ORDER

On March 19, 2015, TCRY filed a Petition for Declaratory Order at the Board. The Petition sought a determination that a condemnation of land proposed by the Cities for a road crossing over TCRY's tracks at Richland, WA would be federally preempted under 49 U.S.C. § 10501(b) because the crossing would have a material adverse effect on TCRY's rail operations. A copy of TCRY's Petition is attached as Appendix 1.

VI.

THE CITIES' STATE COURT CONDEMNATION ACTION

On May 7, 2015, seven weeks after the filing of TCRY's Petition for Declaratory Order, the Cities filed a Petition for Condemnation in a Washington State Court. The condemnation sought by the Cities involved the same land for the same crossing as was involved in TCRY's Petition for Declaratory Order. A copy of the Cities' Petition for Condemnation is attached as Appendix 2.

VII.

THE BOARD'S DECISION ON TCRY'S PETITION

Attached to this Complaint as Appendix 3 is a copy of the Board's decision finding that the condemnation proposed by the Cities would be federally preempted. *Tri-City Railroad Company -- Petition for Declaratory Order*, 2016 WL 5904750 (STB Docket No. FD 35915, decision served September 14, 2016).

VIII.

THE CITIES' PURPORTED AMENDMENT OF ITS CONDEMNATION ACTION

Subsequent to the Board's decision on TCRY's Petition, and their withdrawal of their Ninth Circuit appeal of that decision (Appendix 9), the Cities purportedly amended their Condemnation Petition in State Court (Appendix 7 at 3 and 6) in an attempt to propose a track relocation plan whereby a TCRY parallel track would be relocated several hundred feet away so that it would be out of the path of the proposed road crossing. A copy of the Cities' Purported Amendment is included in their Response to TCRY's Motion to Dismiss attached as Appendix 4. The Purported Amendment failed to meet the standards set forth in Washington Revised Code 8.12.060.

IX.

TCRY'S MOTION TO DISMISS THE PETITION FOR CONDEMNATION

TCRY filed a Motion in the State Court to dismiss the Cities' Condemnation Action on the ground that TCRY's first-filed Petition for Declaratory Order deprived the State Court of jurisdiction to rule on the Cities' Petition for Condemnation. A copy of TCRY's Motion to Dismiss is attached as Appendix 5.

X.

THE STATE COURT DECISIONS DENYING TCRY'S MOTION TO DISMISS

Attached to this Complaint as Appendix 6 is a copy of the Order Denying TCRY's Motion to Dismiss issued on January 11, 2019 by the Superior Court of Benton County, Washington in its Case No. 15-2-01039-2, *City of Kennewick, et al v. Port of Benton, et al.* The State Court held that it has subject matter of the Cities' Purported Amended Condemnation

Action because the crossing involved in TCRY's Petition "is no longer the at-grade crossing associated with these continuing eminent domain proceedings". The Superior Court did not provide any findings or rationale in support of that holding.

Attached to this Complaint as Appendix 7 is a copy of TCRY's Motion for Discretionary Review (Interlocutory Appeal). Attached as Appendix 8 is a copy of the Ruling of a Commissioner of the Washington Court of Appeals, issued on April 18, 2019, in its Case No. 36588-3-III, *City of Kennewick, et al v. Tri-City Railroad Company*, denying TCRY's Motion for Discretionary Review. The Commissioner identified the Cities' position as follows (Ruling at 4):

The Cities contend (that) their new proposed crossing cures the ground on which the Board found preemption (because) the parallel track will be relocated from the area impacted by the crossing.

The Commissioner ultimately concluded that she could not say that the Superior Court committed obvious error sufficient to support discretionary review. . .when it interpreted the Board's decision as not to preclude the newly proposed plan (at 7).

XI.

THE CRITERIA FOR ISSUANCE OF A PRELIMINARY INJUNCTION HAVE BEEN SATISFIED

The Board's injunctive power is found in 49 U.S.C. § 1321(b)(4), viz:

The Board may . . . when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of Chapter 5 of title 5.

Although the statute makes reference only to irreparable harm as a criterion for issuance of an injunction, the case law adds three additional criteria. Thus, in *Union Pacific Railroad -- Petition for Declaratory Order and Preliminary Injunction*, 2018 WL 3209461 (STB Docket No. FD 36197, decision served June 29, 2018), the Board said (at 2):

A party seeking a preliminary injunction must establish that (1) it is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest . . .

Those criteria are satisfied in the present case.

1. TCRY Is Likely To Prevail On The Merits

The Board is likely to find that the Board, not the State Court, has subject matter jurisdiction to determine whether the proposed condemnation is federally preempted for the simple reason that TCRY's Petition for Declaratory Order was filed at the Board before the Cities' Petition for Condemnation was filed at the State Court. The first-filed legal action triggered subject matter jurisdiction in the Board.

The Cities' Purported Amendment of the Petition for Condemnation to propose a plan whereby the parallel track would be relocated away from the crossing does not change the foregoing principle. The relocation would not result in a condemnation for a new crossing. The condemnation would still involve the same land at the same location for the same crossing, notwithstanding relocation of the parallel track. Relocation of the parallel track is no more than a changed circumstance that bears on whether the crossing ruled on initially by the Board would materially interfere with TCRY's rail operations, the same as would any other change of circumstance, such as an increase in the number of trains per day over the crossing or a decrease in the volume of motorized traffic over the crossing. Those factors bear on whether the condemnation would have a material adverse effect on TCRY's rail operations, not on whether the Board or the State Court has subject matter jurisdiction over that issue.

The foregoing does not leave the Cities without a legal remedy. They can file a petition to reopen and reconsider the prior Board action under 49 U.S.C. § 1322(c) which provides:

The Board may, at any time . . . because of . . . substantially changed circumstances (1) reopen a proceeding; (2) grant rehearing, reargument, or reconsideration of an action of the Board; or (3) change an action of the Board. Any interested party may petition to reopen and reconsider an action of the Board under this subsection under regulations of the Board.

What the Cities cannot do is to circumvent the subject matter jurisdiction of the Board without a legal basis, which they have done in the case at hand. That unlawful action should be enjoined.

2. TCRY Would Be Irreparably Harmed In The Absence Of The Requested Injunction

In the absence of an injunction, the Cities will move forward to construct and operate the proposed crossing. That would be done without Board oversight as a result of the State Court's erroneous displacement of the Board's subject matter jurisdiction. There would not be an adequate opportunity for TCRY to show that its rail operations would be materially impeded as a result of the proposed crossing, notwithstanding to relocation of the passing track. Once the crossing is constructed and operational, it would be extremely difficult or impossible for TCRY to convince a ruling body that the crossing should be dismantled and removed. As a result, TCRY would be irreparably harmed in the absence of a Board injunction.

3. Other Parties Would Not Be Substantially Harmed

The Cities would not be substantially harmed by issuance of the requested injunction because they have a right to be heard by means of a Petition to Reopen and Reconsider the Board's prior decision on the ground of substantially changed circumstances under 49 U.S.C. § 1322(c), i.e., the proposal to relocate the parallel track away from the proposed crossing.

4. Issuance Of An Injunction Would Be In The Public Interest

Issuance of the requested injunction would be very much in the public interest because it would show that when the Board's subject matter jurisdiction has been lawfully invoked, such jurisdiction is not to be usurped by a State Court that may have a different view on federal preemption.

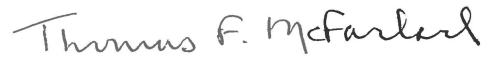
CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should grant the Petition for preliminary injunction.

Respectfully submitted,

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Petitioner



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Appendix 1

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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability
company,

Petitioner,

vs.

THE CITY OF KENNEWICK, of the State of Washington, located in
Benton County, Washington; THE CITY OF RICHLAND, of the State of
Washington, located in Benton County, Washington,

Respondents.

PETITION FOR DECLARATORY ORDER

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I. SUMMARY OF RELIEF SOUGHT

Tri-City Railroad Company, LLC (“TCRY”) petitions the Surface Transportation Board (“Board”) for a Declaratory Order. TCRY seeks a determination that the efforts of the City of Kennewick, Washington, (“Kennewick”) and the City of Richland, Washington, (“Richland”) to use Washington State law to condemn and acquire a right-of-way for a public street which will bisect two active tracks at-grade (a main track and a 1900-foot passing track, between two switches), and which will interfere with and prevent continued operations on the passing track, is preempted by operation of federal law. The legal basis for this Petition for a Declaratory Order is that the proposed at-grade crossing is not “routine”. Rather, the evidence demonstrates that the proposed at-grade crossing would unreasonably interfere with current and planned railroad operations, both by rendering portions of track unusable for existing and proposed switching and railcar storage operations, and by creating new hazards for rail crews and members of the public by establishing a new at-grade crossing where a nearby grade-separated crossing already exists, and then diverting motor vehicles to the new, less safe crossing. *See, e.g. Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, STB Finance No. 35196, 2010 WL 691256 (March 1, 2010); *Harris County, Texas v. Union Pacific*

Railroad Company, 807 F.Supp.2d 624 (2011); *Wisconsin Central v. City of Marshfield*, 160 F.Supp.2d 1009 (W.D.Wis. 2000); *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005).

Moreover, 49 U.S.C. § 10906 separately deprives the Cities of state law condemnation power over the 1900-foot siding upon which TCRY operates and stores railcars, and further places the crossing in question outside of the 'routine crossing' exception to the Board's jurisdiction, since the 'routine crossing' exception was developed out of a different jurisdictional statute, 49 U.S.C. § 10501, and concerns non-exclusive easements over main tracks. The Cities lack state law jurisdiction to condemn an easement which will bisect an existing siding between switches, eliminating TCRY's existing railcar storage operations within the vicinity of the proposed crossing. *Cf. Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008).

Supporting this filing are the Affidavit of John Miller re: Petition for Declaratory Order, with 42 Exhibits, the Affidavit of Rhett Peterson, and the Affidavit of Counsel re: Petition for Declaratory Order, with 14 Exhibits.

II. PARTIES AND STATUTORY JURISDICTION

TCRY is a limited liability company organized under the laws of the State of Washington. Its headquarters are located in Kennewick,

Washington, and its principal place of business is within the State of Washington.

Kennewick is a municipal corporation and code city organized under the laws of the State of Washington. It is located within Benton County, Washington.

Richland is a municipal corporation and first class city organized under the laws of the State of Washington. It is located within Benton County, Washington.

The Board has authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty. The Board may institute declaratory proceedings where, as here, the question is whether the Board has exclusive jurisdiction over a City's plans to extend a street and create an at-grade crossing bisecting active tracks. *See, e.g., Louisville & Indiana Railroad – Petition for Declaratory Order*, STB No. FD 35536, 2012 WL 569750 (S.T.B.) (February 22, 2012).

“The Board has jurisdiction over rail transportation, regardless of whether the property upon which that transportation is being conducted is owned, leased, or held in easement by the operating railroad.” *Norfolk Southern Railway Company and the Alabama Great Southern Railroad*

Company – Petition for Declaratory Order, STB Finance No. 35196, 2010 WL 691256 at *5 (March 1, 2010).

III. STATEMENT OF THE CASE

A. Tri City Railroad

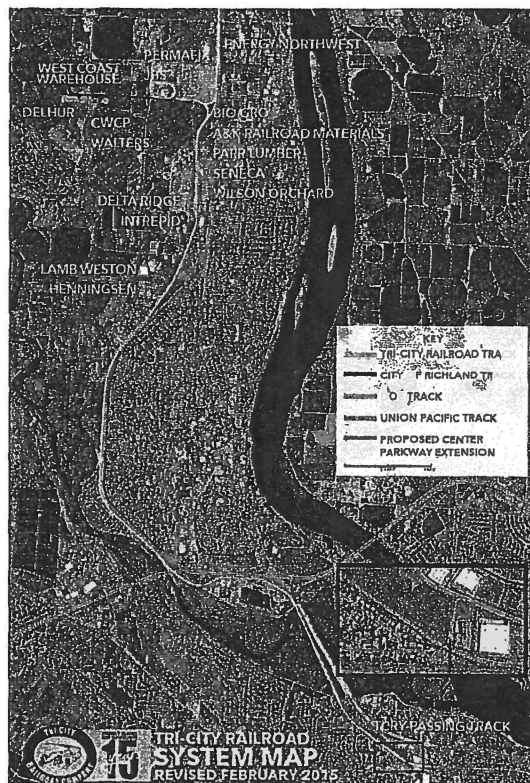
TCRY was founded in 1999 as a Washington limited liability company. (Affidavit of John Miller re: Petition for Declaratory Order (“Miller Aff’t”) ¶ 3). It is a closely-held business, with its headquarters and principal place of business in Benton County, Washington. (Id.).

TCRY is a Class III railroad. (Miller Aff’t, ¶ 4). It has 16 current employees, and owns or leases a number of locomotives, including 11 SD40-2s, one 100 ton switcher, two 70 ton switchers, and 2 SW1200s. (Id.). TCRY’s primary yard is in Richland, as are its shop facilities. (Id.).

TCRY primarily operates on approximately 16 miles of track which run through Kennewick and Richland. (Miller Aff’t, ¶ 5). This trackage was originally constructed by the United States Department of Energy, and is currently owned by the Port of Benton. (Id.). TCRY operates on this trackage as the Port of Benton’s lessee, pursuant to a written lease agreement. (Id.). TCRY moves carloads for its own customers on this trackage; it also operates as the handling carrier for the

Union Pacific Railroad (“UP”).¹ (Id.). Along the 16 miles of leased track, TCRY serves 16 of its own customers. (Miller Aff’t, ¶ 7).

The Burlington Northern and Santa Fe Railway (“BNSF”) also operates on this trackage pursuant to an independent contractual right.² (Miller Aff’t, ¶ 6).



¹ A handling carrier identifies a short line that has a contractual commercial arrangement with Union Pacific, whereby Union Pacific adopts the short line’s stations, and markets that short line’s business, as if that short line was physically served by Union Pacific. (Miller Aff’t, ¶ 5).

² See *BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC.*, 835 F.Supp.2d 1056, 1058-59 (2011). That case also provides a summary of the history of portions of this trackage, from its construction related to the development of the Hanford area in the late 1940s up through the early 2000s.

In 2013, TCRY handled 2,247 carloads on this trackage, averaging two 9-car trains per day. (Miller Aff't, ¶ 8). In 2014, TCRY handled 2,626 carloads on this trackage, averaging two 10-car trains per day. (Id.). TCRY is expected to handle approximately 4,175 carloads on this trackage in 2015, an average of two 16-car trains per day. (Id.).

BNSF handled 285 carloads on this trackage in 2013, and 367 carloads in 2014. (Miller Aff't, ¶ 9). Due to recent changes and upgrades to the BNSF network, BNSF is expected to bring 100+ car unit trains across this trackage. (Id.).

TCRY additionally has operating rights on approximately 37 miles of Department of Energy trackage, and operates on 8 miles of UP track to facilitate car interchange at Kennewick. (Miller Aff't, ¶ 10).

B. The 1900-Foot Siding / Passing Track

Significant here are 1900 feet of parallel tracks; a main track, and a parallel 1900-foot passing track with switches at each end. (Miller Aff't, ¶ 11-12). Although UP and BNSF use the main track, TCRY has exclusive rights to use the 1900-foot passing track. (Id.).

In conjunction with the main track, the passing track allows trains to meet and pass when entering or exiting the area, and provides for use as a siding to store idle freight cars when not otherwise in use. (Id.)

This 1900-foot passing track is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south. (Id.). TCRY is responsible for dispatch and control of train traffic along this corridor, including at the passing track. (Id.). As three railroads use the main line, from an operational standpoint, it is critical to TCRY to have the unfettered right to use the passing track as a location to set out or hold a train, while allowing another train to utilize the main line. (Id.). The passing track also serves as a purge valve for the main TCRY yard when it reaches capacity, and it provides a place for TCRY to store railcars when they are not needed at industries. (Id.). As noted, the passing track has switches at both ends; those switches are used by TCRY on an almost daily basis. (Id.).

Moreover, the stretch of track between Steptoe Street in the northwest, and Edison Street in the southeast, is approximately 2.6 miles of track uninterrupted by any at-grade crossings. (Affidavit of Rhett Peterson re Petition for Declaratory Order ("Peterson Aff't") at ¶¶ 2-3). It is one of the only locations where a unit train can be stopped to wait for operations to clear along the track, or for other safety or security reasons. (Id.). At nearly the middle of this 2.6 mile stretch are the parallel main and 1900-foot passing track in question. Because of the expected future train traffic, including the increase in unit trains, TCRY is exploring expanding

the length of the passing track to as much as 10,000 feet, so that the main and parallel passing tracks can accommodate unit trains. (Peterson Aff't, ¶ 4).

An important increase to TCRY's rail business is currently in the process of implementation. (Miller Aff't, ¶ 13). It is known as the "Preferred Freezer Plant" and is coming online in 2015. It is the largest frozen foods plant in the world and will provide rail traffic both to TCRY directly, as well as to TCRY as the handling agent for UP. (Id.). This is expected to increase TCRY / UP rail traffic by approximately 1,575 carloads in 2015, 2,325 carloads in 2016 and 1,300 carloads in 2017. (Id.).

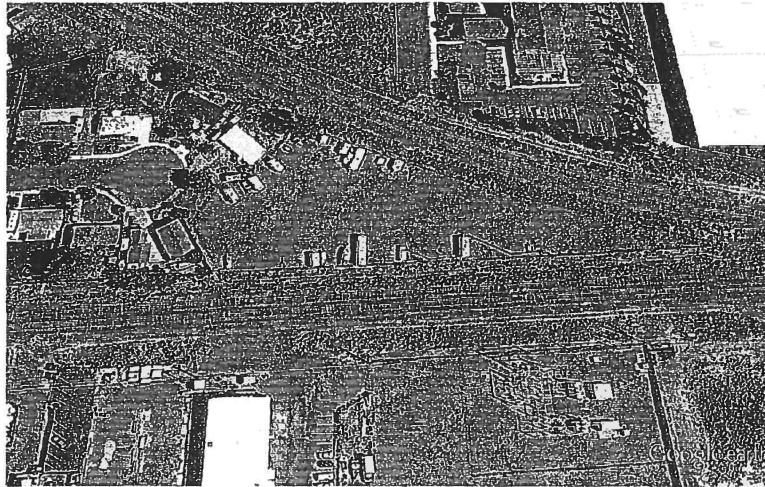
Independent of TCRY / UP operations, BNSF is expected to significantly increase its rail traffic on the main track parallel to the passing track area, due to changes in its operations, and the construction of a new rail loop by Richland. (Miller Aff't, ¶ 14). Richland has projected as many as 12,500 inbound and 12,500 outbound rail cars per year at the passing track area in the coming years. (Id.).

C. The Proposed At-Grade Crossing.

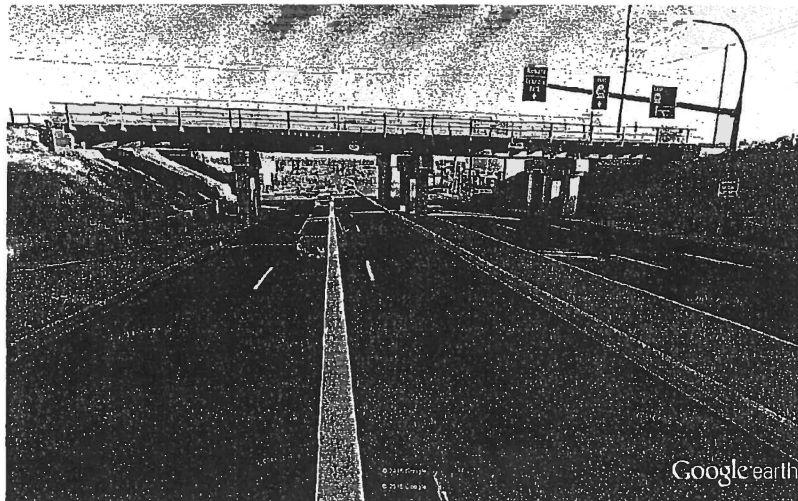
1. The Cities' 2006 Petition Is Denied.

As depicted below, there are two sets of parallel tracks at the location of the at-grade crossing sought by the Cities. The tracks running east-west are part of spur owned by the Union Pacific Railroad. (See

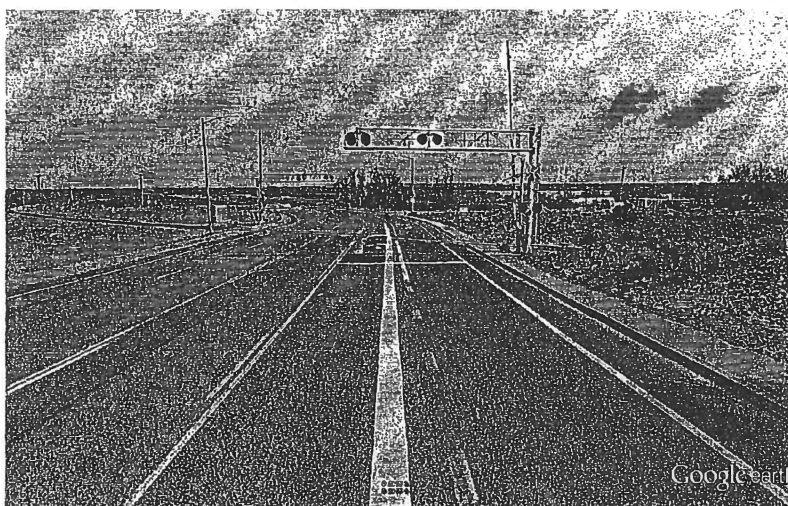
Miller Aff't, ¶ 18, Exhibit 10) The Tracks which angle to the northwest are the main track and passing track operated upon by TCRY. (Id.).



Near this location are two existing crossings. About 1/3rd of a mile to the east is an existing grade-separated crossing, with an underpass for six (6) lanes of traffic. (See Miller Aff't, ¶¶ 33-35, Exhibits 29-31).



About 3500 feet to the west is an existing at-grade crossing, which has active warning lights and gates. (Id.).



In 2006, the Cities filed a petition with the Washington State Utilities and Transportation Commission (“UTC”) to approve an at-grade crossing extending a city street across all four tracks. (See January 26, 2007 Initial Order Denying Petition, in Washington State Utilities and Transportation Commission Docket TR-040664, attached as Exhibit 1 to the Affidavit of Counsel re: Petition for Declaratory Order (“Counsel Aff’t”). This petition was opposed by TCRY, Union Pacific, and Burlington Northern & Santa Fe Railroad (“BNSF”). (Id.).

In denying the petition, the UTC explained that under Washington law:

The Commission's consideration of whether to grant an at-grade crossing is premised on the theory that all at-grade crossings are dangerous.

...

[T]he Commission will direct the opening of a grade crossing within its jurisdiction when the inherent and the site-specific dangers of the crossing are moderated to the extent possible with modern design and signals and when there is an acute public need which outweighs the resulting danger of the crossing. Such needs which have been found appropriate include the lack of a reasonable alternate access for public emergency services; and the sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.

(Id.).

At the time of the 2006 petition by the Cities, TCRY and Union Pacific's operations were described as follows, for the pertinent crossing location:

UPRR uses these tracks to interchange cars with TCRY. TCRY sets out cars (primarily refrigerator cars or "reefers") in the morning and UPRR picks up the TCRY cars in the evening as well as setting out cars for TCRY to pick up the following morning. The procedure for picking up and setting out cars varies depending on the number of cars to be picked up from TCRY. If UPRR had 9-10 or fewer cars to pick up, it would cross Center Parkway twice. If UPRR had more than 10 cars to pick up, it would cross Center Parkway up to eight times to complete the switching operation.

...

TCRY has a long-term lease with the Port of Benton for track that meets the UPRR track at Richland Junction. TCRY interchanges cars with both UPRR and the BNSF at that junction. TCRY has both a main line and a siding at Richland Junction. TCRY's main line connects to the UPRR branch line and the siding is the track primarily used for interchanging rail traffic with BNSF. TCRY uses the UPRR Old Pass for interchanging traffic with UPRR. TCRY picks up and drops off UPRR cars at least once a day. Depending on the time of year, TCRY picks up BNSF cars multiple times a week. It is not unusual for TCRY to conduct switching operations two to three times a day during the busy season. TCRY was unable to state with specificity the number of times it would cross Center Parkway during its switching operations, but with the combined UPRR and BNSF interchange traffic, it would be "a lot."

(Id.) (notes omitted)

Given that the location of the proposed crossing has multiple tracks and is actively used for switching, the UTC described the inherent dangers as follows:

The law disfavors at-grade crossings because certain risks are inherent. In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays. The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of

train activity. In addition, with this site involving four railroad tracks, the drivers of vehicles who ignore warning signs and drive too fast for the conditions may launch over the second track or "bottom out" depending the speed and direction of the vehicle. At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians. Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle's driver and any passengers involved as well injury to train crews. Grade crossing accidents also have adverse psychological effects on train crews.

The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train approaching on another track that was hidden from view by the stationary cars. Motorists may also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay. More than 50 percent of accidents occur at signalized crossings.

(Id.).

Finding that the Cities failed to meet their burden to demonstrate that the inherent and site-specific dangers of the crossing could be

moderated to the extent possible by the installation of safety devices, the petition for the crossing was denied. (Id.)

2. The Cities' 2013 Petition is Initially Denied.

On April 8, 2013, Kennewick filed a second petition with the UTC to construct a highway-rail grade crossing at Center Parkway and to remove the passing track. (April 8, 2013 Petition To Construct A Highway-Rail Grade Crossing, Washington State Utilities and Transportation Commission Docket TR-130499-P, attached as Exhibit 2 to the Counsel Aff't, at, *e.g.*, pp. 8, 12, 37, 48, 49) On May 31, 2013, Richland joined Kennewick's petition. (*See* February 24, 2014 Initial Order Denying Petition to Open At-Grade Railroad Crossing, Washington State Utilities and Transportation Commission Docket TR-130499-P, attached as Exhibit 3 to the Counsel Aff't, at p. 1).

Prior to filing a second petition seeking permission for an at-grade crossing with Washington's UTC, the Cities negotiated with Union Pacific and BNSF to relocate their switching operations. (Id. at pp. 2-3). Consequently, the two Union Pacific spur tracks could be removed, and so now the proposed crossing will cross two active tracks – TCRY's main track, and the parallel 1900-foot passing track.

TCRY again opposed the crossing, because of the anticipated interference with its operations.³ The Washington UTC's administrative law judge summarized:

TCRY is a rail carrier conducting interstate rail operations through Kennewick and Richland. TCRY leases the track west and north of Richland Junction from the Port of Benton; BNSF and UPRR also operate on this track. Randolph V. Peterson, Managing Member of TCRY, explained that the second set of tracks immediately west of Richland Junction allows trains to meet and pass when entering or exiting the area. According to Mr. Peterson, this passing track is "absolutely essential" because TCRY makes frequent, if not daily, use of that facility. When no passing operations are scheduled, TCRY also uses the second track as a siding to store idle freight cars.

Mr. Peterson estimates that TCRY presently operates 10 to 20 freight trains each week on the mainline track that passes through the Richland Junction. BNSF operates another 10 freight trains each week and, on occasion, UPRR operates a "unit train," a mile-long freight train consisting of approximately 100 to 120 cars all carrying the same cargo. No passenger trains operate on this track. Mr. Peterson testified that the combined annual train traffic through the Richland Junction increased from nearly 4,500 railcars in 2012 to over 5,100 railcars in 2013. Mr. Peterson expects further increases in train

³ The UTC has limited jurisdiction, and took testimony concerning TCRY's operations only for purposes of evaluating public safety. The question of whether the existence of the crossing would "unreasonably interfere" with existing and projected railroad operations was not adjudicated, as such determinations are outside of the purview of the UTC, and instead are within the exclusive jurisdiction of the Board.

traffic because of TCRY's continued growth and new commercial developments in the Horn Rapids Industrial Park that will be served by rail.

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day). Mr. Ballew also testified that Richland has entered real estate and development agreements with ConAgra Foods to build an automated cold storage warehouse in the Horn Rapids area served by a separate smaller loop track. Mr. Ballew expects an average of 30 rail cars each week will come and go from ConAgra's facility.

All trains traveling to the Horn Rapids area must pass through the Richland Junction and cross the proposed Center Parkway extension. Considering the expected increase train traffic across Richland Junction, TCRY contends that the passing track will become even more essential and perhaps need to be extended to accommodate longer trains. Mr. Peterson testified that he opposes the new Center Parkway crossing because rail operations could regularly require freight trains to block the crossing, occasionally for lengthy periods of time.

(Id. at pp. 4-5).

The Cities propose to install at the proposed crossing “active warning devices, to include advanced signage, flashing lights, audible bell, automatic gates, and a raised median[.]” (Id. at p. 7). The Cities sought to justify the public need for the proposed crossing through three arguments, which were rejected:

In this case, the Cities attempt to demonstrate public need by arguing improvements to public safety through faster emergency response times, reduced accident rates around the Columbia Center Mall, and relief of traffic congestion at nearby intersections with deficient levels of service. As explained below, the evidence in the record does not support the Cities’ arguments that opening the Center Parkway crossing will create such improvements or alleviate existing traffic problems.

...

The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to balance against the inherent hazards of an at-grade crossing. Even if public convenience were sufficient to demonstrate public need, we find that it does not outweigh the hazards of an at-grade crossing.

By its nature, opening a new at-grade crossing at Center Parkway would increase risk to motorists by creating another opportunity to interact with freight trains. Motorists who might deviate from Columbia Center Boulevard’s grade-separated crossing in order to access the Tapteal Road area would trade safe and undelayed passage over the UPRR tracks for a potentially faster route that comes with a risk of collision.

The active safety measures proposed to be installed at the crossing would mitigate, but would not eliminate, such risk.

The Cities' justifications for the crossing do not outweigh the risk. At most, the evidence demonstrates that, on occasion, a police, fire, or ambulance response *might* be faster if the Center Parkway crossing was available and no trains were blocking traffic. Some drivers also would find the option to use Center Parkway more appealing to enter or depart the north side of the Columbia Center Mall than Gage Boulevard, particularly during the busy holiday shopping season. Such slight benefits do not overcome the law's strong disfavor for at-grade crossings. Accordingly, the Commission should deny the Cities' petition for failure to demonstrate a public need for the proposed crossing.

(Id. at pp. 18-22).

3. Despite Agreeing That Public Safety Does Not Justify Constructing The Crossing, the UTC Approved Its Construction For Local Political Reasons.

The Cities sought review of the initial denial of their 2013 petition by the UTC, which again was opposed by TCRY. (*See* March 18, 2014 Cities of Kennewick and Richland Petition for Administrative Review, and March 28, 2014 Answer of Respondent Tri-City & Olympia Railroad Co. To Petition For Administrative Review, attached as Exhibits 4 and 5 to the Counsel Aff't).

Meanwhile, five (5) Washington state legislative members sent correspondence to the UTC, seeking intervention of the UTC's executive

director to reverse the earlier denial and approve the crossing. (*See* March 14, 2014 letter from State senators Brown and Hewitt, and State representatives Klippert, Haler, and Walsh to the Executive Director of the Washington Utilities and Transportation Commission, attached as Exhibit 6 to the Counsel Aff't).

Again on review, the UTC rejected the Cities' contentions concerning public safety:

The Initial Order determines that the Cities failed to carry their burden to show a "public need" for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.

Petitioners challenge this conclusion, focusing almost exclusively on asserted public safety benefits, largely in the form of improved response times from two local fire stations to the point where the planned Center Parkway extension would intersect Tapteal Drive. In other words, the Cities' principal claim of improved public safety is that emergency responders could get to a single point on a one-mile long, two-lane collector roadway with a "T" intersection at both ends more quickly than they can today. In addition, there is some evidence that completion of this project would reduce traffic on other roadways in the vicinity, relieving congestion and potentially reducing

accidents. The Initial Order analyzes the evidence on this issue in detail that does not bear repeating here. It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

(May 29, 2014 Final Order Granting Petition for Administrative Review, WUTC Docket TR-130499, attached to the Counsel Aff't as Exhibit 7, at pp. 7).

Nonetheless, in reversing the Initial Order, and approving the crossing, the UTC explained “[it] is particularly important to give weight to the economic development interests considering that the Center Parkway extension would conveniently connect existing, complementary commercial developments in Richland and Kennewick, and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland[.]” (Id. at pp. 10-11).

The Initial Order fairly weighs the evidence and argument presented in the post-hearing briefs, and reaches a legally sustainable result. The Cities’ almost exclusive focus on improved response times for first responders on a point-to-point basis as the principal benefit demonstrating “public need” does not weigh persuasively against even the demonstrated low

level of “inherent risk” at the proposed crossing. Nor are the Cities’ legal arguments that their comprehensive planning processes under the Growth Management Act mandate Commission approval persuasive. However, considering evidence the parties largely ignored that shows additional public benefits in the form of enhanced economic development opportunities, and considering the broader public policy context that gives a degree of deference to local jurisdictions in the areas of transportation and land use planning, we determine that the Cities’ petition for administrative review should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

(Id. at pp. 14-15).

4. The Cities Have Served a Pre-Condemnation Notice on TCRY, Demanding TCRY Acquiesce to the Proposed Crossing Under Threat of Condemnation.

Since the UTC’s approval of the crossing appeared to approve the removal of TCRY’s passing track (*see id.* at p. 6, Figure 2; *see also* Exhibit 2 to the Counsel Aff’t, at pp. 8, 12, 37, 48, 49), TCRY, for this and other reasons, sought appeal of the crossing approval, and filed a declaratory action in Washington state court. (*See* January 2, 2015 Notice of Appeal to Division III of the Court of Appeals, Benton County Sup. Ct. No. 14-2-01894-8, attached as Exhibit 8 to the Counsel Aff’t; July 25, 2014 Complaint for Declaratory and Injunctive Relief Superior Court, Benton County Case No. 14-2-01910-3, attached as Exhibit 9 to the

Counsel Aff't). The declaratory pleading was subsequently amended to describe federal preemption principles, as well. (See December 10, 2014 Tri-City Company's First Amended Complaint for Declaratory and Injunctive Relief, Superior Court, Benton County Case No. 14-2-01910-3, attached as Exhibit 10 to the Counsel Aff't).

On November 12, 2014, TCRY received written notification from an appraiser that the Cities would be conducting an appraisal of the tracks at issue, apparently in preparation for a condemnation action under state law. (See November 12, 2014 correspondence from Bruce Jolicoeur, MAI to William J. Schroeder, attached as Exhibit 11 to the Counsel Aff't).

However, the Cities subsequently stated that they are no longer seeking removal of the passing track; rather, they now intend to install an at-grade crossing which bisects both the main track and the passing track. The Cities have since served pleadings in the above-mentioned state court declaratory action, seeking its dismissal on the basis that, *inter alia*, they do not intend to take or remove the passing track, and that installation of an at-grade crossing is therefore within their authority. (See February 12, 2015 Answer to First Amended Complaint for Declaratory and Injunctive Relief, Superior Court, Benton County, Case No. 14-2-01910-3, attached to the Counsel Aff't as Exhibit 12; February 12, 2015 Cities' Motion for

Summary Judgment of Dismissal, Superior Court, Benton County Case No. 14-2-01910-3, attached to the Counsel Aff't as Exhibit 13).

On February 12, 2015, while the instant petition was being drafted, the Cities filed a motion for summary judgment in the state court declaratory action. (Id.). That motion argues, *inter alia*, that the proposed crossing falls within the Board's "routine crossing" exception to the Board's exclusive jurisdiction. (Id.). The state court declaratory action has been voluntarily dismissed, without prejudice, by TCRY, which has instead sought the Board's determination as to its own jurisdiction.

Finally, the Cities recently served TCRY pre-condemnation paperwork, describing the process for the Cities to acquire the proposed right of way through condemnation, and offering \$38,500 in compensation. (See February 10, 2015 condemnation paperwork served upon TCRY by the Cities, including the Acquisition Acquiring Real Property and Federal-Aid Programs and Project, attached as Exhibit 14 to the Counsel Aff't).

D. Kennewick's Regulation of At-Grade Crossings.

Kennewick has enacted an ordinance, Kennewick Municipal Code ("KMC") 11.80.090, 'Blocking Use of Street When Switching', which provides:

Cars or engines must be left clear of road crossing signal circuits. When it can be avoided, cars or engines must not be left standing nearer than two hundred fifty feet (250') to a road crossing. Automatic crossing signals must not be actuated unnecessarily by an open switch or by permitting equipment to stand within a controlling circuit. When this cannot be avoided, if the signals are equipped for manual operation, a crew member must manually operate the signals for the movement of traffic. A crew member must restore the signals to automatic operation before a crossing is occupied by a train or engine, or before leaving the crossing. A public crossing must not be blocked for more than five (5) minutes when it can be avoided.

The net effect of KMC 11.80.090 is that although the Cities contend that they are not seeking the removal of the passing track, the ordinance, by its terms, would significantly limit the operational use of the passing track because of public safety, should the proposed at-grade crossing be allowed.

E. The Proposed At-Grade Crossing Would Interfere with Current and Planned Railroad Operations.

As set forth more fully *infra*, Should the at-grade crossing be constructed bisecting TCRY's main track and passing track, the immediate effect would be to: eliminate railcar storage at and in the vicinity of the crossing; limit switching operations given the proximity of crossing to switch, so as to avoid fouling crossing; increase the danger for rail crews being near motorists while performing operations; and limit the ability to

use the passing track as temporary over-capacity storage when the TCRY rail yard reaches its maximum, given the projected car counts in the coming 5 years. (Miller Aff't, ¶¶ 16-43, Exhibits 8 ~ 42.).

IV. POINTS AND AUTHORITIES

A. The Board Generally Has Exclusive Jurisdiction Over Railroad Operations.

49 U.S.C. § 10501 (b) provides:

The jurisdiction of the [Board] over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law

“[C]ongressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause.” *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998). “If a railroad line falls within [the ICCTA’s] jurisdiction, the [Board]’s authority over abandonment is both exclusive and plenary.” *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 530 (6th Cir. 2002).

In other words, “Congress has delegated to the [Board] exclusive jurisdiction to regulate ‘transportation by rail carriers’ and ‘the construction, acquisition, operation, abandonment, or discontinuance’ of rail facilities . . . with the instruction that the agency ‘ensure the development and continuation of a sound rail transportation system’ [citation omitted].” *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

In *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007), the court noted:

[T]he courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. Second, there can be no state or local regulation of matters directly regulated by the Board — such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-11328); and railroad rates and service (see 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124).

Id. at 1130 (quoting *CSX Transp., Inc. — Petition for Declaratory Order*, 2005 WL 1024490, at *2-*4 (Surface Transp. Bd. May 3, 2005).

B. The STB's Jurisdiction Is Exclusive When A Proposed At-Grade Crossing Would Burden or Unreasonably Interfere With Railroad Operations.

In what is known as the 'routine crossing' exception, when a proposed at-grade crossing would not unreasonably interfere with current or planned railroad operations, the acquisition of the right of way and construction of that crossing is excepted from federal preemption under 49 U.S.C. 10501(b). *See Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835 (S.T.B.) (March 3, 2004).

However, if the construction and operation of the proposed at-grade crossing will unreasonably interfere with current or planned railroad operations, the Board's jurisdiction is exclusive, and condemnation actions are preempted.

In *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005), a city sought to acquire a portion of a railroad right of way to construct a pedestrian and bike trail, and to improve its storm drain system. *Id.* at 859. When the city informed the railroad of its plans, the railroad informed the city it would invoke federal preemption. *Id.* at 859. Consequently, the city petitioned the Surface Transportation Board for a declaration that its planned state law condemnation action would not be preempted. *Id.*

The railroad “originally did not oppose the storm sewer project or construction of the trail between 19th Street and 22nd Street, but it changed its position about the trail after the Board commenced proceedings.” *Id.* at 859.

[The Railroad] stated that it would not be able to get equipment to the tracks for maintenance or to handle derailments if its right of way were narrowed. [The Railroad] expressed concerns about the safety of trail users in the case of a derailment or while joists or large pieces of lumber were being unloaded from center beam cars. These concerns were heightened by the fact that its calculations showed that at one point the trail would be only 7.5 feet from the rail. [The Railroad] also projected significant increases in rail traffic and described its plans to develop a railroad terminal area and rebuild a sidetrack. It proposed several alternative routes for the trail.

Id. at 859.

Holding that preemption applied, the Board found...

...that Lincoln had not adequately refuted [the Railroad’s] contention that it needed all of the right of way to satisfy its present and future rail needs. [The Railroad] had argued to the Board that it currently used the space to move freight, store lumber, unload railroad cars, and stage unloaded freight for further movement into shipper facilities, and it asserted that it might rebuild a sidetrack and construct a terminal facility. According to the Board all of these activities are part of transportation by rail as defined in 49 U.S.C. § 10102(9), and the proposed trail could interfere with these transportation activities. Additionally, the Board determined that Lincoln

had not adequately refuted [the Railroad's] contentions that the trail would create safety hazards.

Id. at 860.

The Eighth Circuit noted that “the Board can consider the railway’s future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition. Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” *Id.* at 862 (internal citation omitted).

The Eighth Circuit affirmed the Board’s determination, explaining that:

The Board has broad authority over the operation of railways and associated property. The ICCTA gives the Board exclusive jurisdiction over rail transportation...The statute also defines rail transportation expansively to encompass any property, facility, or equipment related to the movement of passengers and property by rail and any related services, including “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10102(9). Courts have recognized that Congress intended to give the Board extensive authority in this area. *See City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (reviewing the history of railway preemption, text of the ICCTA, and court decisions to reject the argument that preemption is limited to economic regulation).

Id. at 861.

On the topic of future plans of the railroad, the Board's decision in *Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, is instructive. STB Finance No. 35196, 2010 WL 691256 (March 1, 2010). In that petition, the City of Birmingham, Alabama sought to condemn under state law several acres of railroad property to convert into a public park. *Id.* at *1. Objecting, and seeking a declaratory order that the City's condemnation was preempted, the Railroad explained:

...the major portion of the Property was acquired by the railroad in the mid-1880s and has track on it that formerly served an NS produce depot. NS explains that, though not currently in use for actual rail service, the Property is adjacent to, parallel to, and at a lower grade than seven elevated rail lines, including two NS mainlines over which NS moves between 25 and 30 trains per day, consisting of both freight and Amtrak passenger trains. According to NS, the rail lines are held in place by a retaining wall. NS asserts that it uses the Property to maintain the tracks and structure and retaining wall and that its long-term plans include use of virtually all of the Property to construct an embankment to replace the retaining wall. NS further states that it is in the process of replacing signal towers that serve the elevated lines, and that the new rail signal structures will occupy a portion of the Property. NS also asserts that the Property could eventually be needed to support NS's Crescent Corridor project (involving expanded rail capacity between Birmingham and New Orleans). Finally, because the City's plans

show that an amphitheater and walking path would abut the retaining wall, NS asserts that the City's plans raise potential safety concerns and would leave NS insufficient room for equipment needed for track maintenance and clearing derailments.

Id.

The City, for its part,

...contend[ed] that its proposed condemnation action would not interfere with rail use because NS does not now use the Property as part of its active rail operations. Birmingham also relies on case law finding that federal preemption under section 10501(b) is not "complete," but displaces only state laws that have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. Birmingham further asserts that, because there are six other public parks adjacent to active rail lines in the City, the construction of a park on the Property would not pose a safety hazard.

Id. at *2 (internal citation omitted).

The Board, granting the petition, found "that the City's proposed taking of the disputed property under state eminent domain law would unreasonably interfere with rail transportation and therefore would be federally preempted." *Id.* at *4.

"Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may

become necessary for railroad uses.” *Id.* (quoting *City of Lincoln*, 414 F.3d at 862).

The Board noted that “the right to proceed under state law is conditioned upon the action taken under state law not unreasonably interfering with railroad operations or interstate commerce, and not constituting regulation of the railroad’s operations.” *Id.* (citation omitted). The Board explained: “Here, the record shows that this Property abuts an existing rail corridor; that NS has plans for significant improvement and increased rail traffic volume; and that the park the City proposes to build would interfere with or prevent these transportation activities, as well as prevent the railroad from properly conducting railroad maintenance activities and clearing derailments.” *Id.* at *5.

In *Wisconsin Central v. City of Marshfield*, 160 F.Supp.2d 1009 (W.D.Wis. 2000), the Wisconsin Central Ltd. sought declaratory and injunctive relief against the city, concerning the city’s efforts to condemn under state law a passing track, as part of a highway re-alignment project. *Id.* at 1011.

The highway re-alignment plan involved constructing an overpass over top of the existing railroad mainline, but also required eliminating a large portion of the parallel passing track. *Id.* The railroad sought

injunctive and declaratory relief, that federal law preempted the state law condemnation action. *Id.*

Surveying the law, the court explained that it “agrees with these courts in their reading of the broad preemptive language of the ICCTA. The preemption provision makes all ICCTA remedies exclusive and explicitly preempts all other Federal and State remedies. It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.” *Id.* at 1013 (citations omitted).

In granting the railroad’s motion for summary judgment, the court explained:

In using state law to condemn the track defendant is exercising control — the most extreme type of control — over rail transportation as it is defined in section 10102(9). Characterizing condemnation as relocation does not change this conclusion. Were the condemnation properly considered a relocation, the act of forcing WCL to relocate its passing track is no less an exercise of control over transportation by the City through its laws than is outright condemnation. Defendant’s reliance on Board of Hudson River is wholly misplaced. The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach. Congress’ preemptive language and intent is paramount, and the nature of the preempted state regulation is irrelevant. *See City of Auburn*, 154 F.3d at 1031 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)).

The ICCTA expressly preempts more than just state laws specifically designed to regulate rail transportation. Environmental laws — statutes of general application — have been found to be expressly preempted under the ICCTA when applied to facilities and property constituting rail transportation. *See City of Auburn*, 154 F.3d at 1031. Limiting preemption to state laws aimed specifically at railroad regulation would arbitrarily limit the purposefully broad language chosen by Congress in the ICCTA.

Id. at 1013-14.

The court additionally found that the use of state law to condemn the railroad passing track was subject to both field and conflict preemption. *Id.* at 1014-15. The court concluded: “Giving effect to the condemnation authority of municipalities over railroad property conflicts with Congress’ purpose in enacting the ICCTA.” *Id.* at 1015.

In *Fort Bend Co. v. Burlington Northern and Santa Fe Railway Co.*, 237 S.W.3d 355 (Tex.App. 2007), a county sought to build an at-grade crossing across a main track with a parallel passing track. *Id.* at 356-57. In finding preemption, the court explained:

There is ample evidence in the record that placing the public crossing over the regular and passing tracks would interfere with railroad operations and cause safety hazards. Burlington presented affidavits and testimony detailing how the placement of the Royal Lakes crossing interferes with its railroad operations. Burlington showed, among other problems, the following: the Booth passing track is the only uncut passing track

within 30 miles; because of the placement of the crossing, Burlington has lost capacity due to loss of time; it is necessary to railroad operations to have this piece of track unencumbered and, therefore, it needs to move a portion of the track or take out the crossing; and the placement of the crossing has affected the entire line. Burlington also showed it parked coal trains destined for the Houston Lighting and Power facility at Smithers Lake on the passing track, approximately four out of seven days a week; these trains would block the crossing for extended periods of time; and Burlington is paid a fee based on the number of trains it is able to park on the passing track.

Moreover, Burlington presented evidence that, by law, it must break any train that blocks a public crossing for longer than 10 minutes; the County sent the sheriff out to force it to break the trains on several occasions at the Royal Lakes crossing; and when trains are broken, there is a delay of approximately 45 minutes for the reconnection. Other evidence showed that if the train sits broken for longer than four hours, a federal law is triggered specifying that a brake test must be done before moving the train. This federal brake test delays the train approximately 90 minutes, blocking the crossing during re-connection and the mandatory brake test. Burlington presented evidence that showed citizens worry about how emergency vehicles would get past the blocked crossing. Burlington stated, when using the Booth track to pass trains, other trains may have to be broken and the same time added to their connection, causing scheduling problems and time delays throughout the line, not just at the Booth passing track. Additionally, Burlington produced evidence of citizens' complaints that when broken trains sat approximately 140 feet from the crossing, it caused a visual hazard and, therefore, the trains needed to be parked at least 250 feet

from each side so drivers could see past both tracks. To park the trains farther from the crossing would take away the use of an additional 220 aggregate feet of the passing track.

Id. at 359-60.

According to the evidence presented, the condemnation has the effect of regulating Burlington now and in the future by affecting the speed and length of its trains. Additionally, Burlington presented evidence that showed the need of an uninterrupted passing track at Booth for future operations, that the crossing interferes with current railroad operations, and that the crossing causes more federally-mandated air brake tests and has a negative economic effect on the railroad. Condemnation is a permanent action, and “it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005) (quoting *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928)).

The enlarged crossing, bisecting Burlington’s passing track with a four-lane boulevard street and esplanade, would impermissibly interfere with railroad operations and, thus, is preempted.

Id. at 360 (footnote omitted).

In *Union Pacific R. Co v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011), the court affirmed the granting of an injunction prohibiting a local transit authority from obtaining an easement across a railroad right of way by operation of state law. *Id.* at 676-78. The court noted that “there is no dispute that Union Pacific and its 2.8-mile Right of Way fall under”

ICCTA, and held that a the proposed state condemnation establishing a perpetual easement over the Right of Way is a regulation of railroad transportation preempted by ICCTA. *Id.* at 683.

In *City of North Little Rock v. Union Pacific R.R. Co.*, 808 F.Supp.2d 1102 (E.D.Ark. 2011), the city commenced a condemnation action to acquire an easement for a pedestrian and bicycle lane across land owned by one railroad, and operated upon by another. *Id.* at 1103.

The railroad at the location was a short line carrier operating on small, branch lines. *Id.* at 1103. “It retrieves loaded railroad cars from shippers and delivers them to interstate carriers, such as Union Pacific, for transportation to destinations in other states.” *Id.* at 1104.

Midland has a two mile track, the Ashgrove lead, running through the property with the center of the track located 50 feet from the boundary of the property. The proposed easement cuts across the Ashgrove lead adjacent to Baucum Pike. It then runs alongside the track between the boundary of the railroads' property and the Ashgrove lead.

An additional track, the team track, separates from the Ashgrove lead and runs parallel with it. The team track is primarily used to park overflow railcars and for transloading, that is, moving product from railcars to trucks and vice versa. The center of the team track is 17 feet 7 inches from the center of the Ashgrove lead. A freight car on the team track normally extends another 5.5 feet from the center of the team track. With a train upon it, the team track extends about 23 feet from the Ashgrove lead. Thus, there are only about 27

feet between the team track and the boundary of the railroads' property. The proposed 30 foot wide easement overlaps with the team track. Charles Laggan, vice president and general manager of Midland, testified that granting the easement would render the team track unusable.

Id. at 1104.

Should a derailment occur on the team track or the Ashgrove lead, the railroad would likely need to bring large equipment onto the proposed easement. In response to evidence that the City might build a fence to separate the bicycle trail from the railroad track, Laggan testified any fence would interfere with Midland's ability to bring in the large equipment needed in the rerailing process. Even the trail itself could constitute an obstacle because the necessary equipment would likely damage the trail. Laggan testified that the railroad switch itself is a high-risk area for derailments. Laggan also testified that the construction of a trail on the proposed easement would severely impact Midland's ability to conduct transloading and switching operations and to deal with derailments.

Id.

Noting the exclusive preemption language of 49 U.S.C. § 10501(b), the court noted that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations’ than the language contained in Section 10501(b).” *Id.* at 1105 (quoting *Union Pac. R.R. Co. v. Chi. Transit Auth.*, No. 07CV229,

2009 WL 448897, *5 (N.D. Ill. Feb. 23, 2009) (citing *CSX Transp. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

The court concluded:

The evidence demonstrates that the proposed easement could interfere with Midland's ability to operate its team track as well as its transloading and switching facilities and could interfere with efforts to address derailments. Whether to allow the taking is a decision that, on these facts, involves the regulation of rail transportation. Congress has vested exclusive jurisdiction over the regulation of rail transportation in the Surface Transportation Board.

Id.

In *Harris County, Texas v. Union Pacific Railroad Company*, 807 F.Supp.2d 624 (2011), the county sought to condemn an at-grade right of way across the middle of a 13,800 foot section of Union Pacific track. *Id.* at 625. The *Harris* court noted:

The Fifth Circuit has adopted the STB's test for determining the preemptive scope of § 10501(b). *Franks Inv. Co., LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410, 414 (5th Cir. 2010) (*en banc*). The test distinguishes two types of preempted actions: categorically preempted actions and actions that are preempted "as applied." *Id.* at 410. The former includes state or local regulations that prevent or govern activities directly regulated by the STB. Such regulations are preempted on the basis of "the act of regulation itself" and not "the reasonableness of the particular state or local action." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008)

(quoting *CSX Transp., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, at *2-3 (S.T.B. May 3, 2005)).

“As applied” preemption covers state or local actions according to “a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* While “routine crossing disputes . . . do not fall into the category of ‘categorically preempted,’” railroad crossing disputes may be preempted “as applied,” if the crossings “impede rail operations or pose undue safety risks.” *Id.* at 332-33 (quoting *Maumee & W. R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835, at *2 (S.T.B. March 2, 2004)).

Id. at 632.

Explaining that the “Court may consider Union Pacific’s future plans in evaluating unreasonable interference with its operations”, including plans to construct a side track to accommodate additional trains where are “expected in this area due to customer demand for greater carrying capacity”, the Fifth Circuit found that state condemnation law was preempted, and could not be employed by the county to obtain the right of way easement for the road extension and at-grade crossing, as “the proposed crossing...is not a ‘routine’ at-grade crossing...and [it] unreasonably burdens or interferes with Union Pacific’s current and projected use of its railroad tracks. *Id.* (citations omitted).

C. The Cities' Proposed Crossing Does Not Fall Within The 'Routine Crossing' Exception to the Board's Jurisdiction; Any Condemnation Proceeding Initiated By the Cities to Obtain The Proposed Right Of Way is Preempted.

Here, the proposed at-grade crossing is not "routine", as it would significantly interfere with current and planned future switching, passing, and storage operations, as described *supra* and in the Miller Aff't. As three railroads use these tracks, it is important to have the passing track as a location to set out or hold a train, while allowing another train to utilize the main line. (Miller Aff't, ¶ 12). The passing track also serves as a purge valve for the main TCRY yard when it reaches capacity, and it provides a place for TCRY to store railcars when they are not needed at industries. (Id.). The effect of the proposed crossing will be eliminating 545 feet of usefulness, at minimum, of the 1900-foot passing track. (Id. at ¶27). The proposed crossing affecting nearly 1/3rd of the tracks, it will significantly affect TCRY's current operations to perform switching, storage, and passing operations without frequently fouling or closing the proposed crossing. (Id.).

Among other expected effects of the proposed at-grade crossing, should the at-grade crossing be constructed bisecting TCRY's main track and passing track, the immediate effect would be to eliminate railcar storage at the location of the crossing. (Id. at ¶ 43). It will also limit

switching operations given the proximity of crossing to switch, so as to avoid fouling crossing; it will increase the danger for rail crews being near motorists while performing operations; and it will limit the ability to use the passing track as temporary over-capacity storage when the TCRY rail yard reaches its maximum, given the projected car counts in coming 5 years. (Id.).

Further, the stretch of track between Steptoe Street in the northwest, and Edison Street in the southeast, is approximately 2.6 miles of track uninterrupted by any at-grade crossings. (Peterson Aff't at ¶¶ 2-3). It is one of the only locations where a unit train can be stopped to wait for operations to clear along the track, or for other safety or security reasons. (Id.). At nearly the middle of this 2.6 mile stretch are the parallel main and 1900-foot passing track in question. Because of the expected future train traffic, including the increase in unit trains, TCRY is exploring expanding the length of the passing track to as much as 10,000 feet, so that the main and parallel passing tracks can accommodate unit trains. (Peterson Aff't, ¶ 4). TCRY, as lessee of the track west of Richland Junction, is responsible for dispatch and management of use of the track by TCRY, Union Pacific, and BNSF. (Peterson Aff't, ¶ 3). Should the proposed at-grade crossing be constructed, it will bisect this uninterrupted stretch of track at near the

halfway point, impacting the ability of TCRY, as dispatcher, to stop or stage a unit train at this location. (Id.).

Therefore, TCRY requests a Declaratory Order that the effort of the Cities to use Washington State law to condemn the proposed at-grade right of way is preempted. *See, e.g. Fort Bend Co. v. Burlington Northern and Santa Fe Railway Co.*, 237 S.W.3d 355 (Tex.App. 2007).

D. 49 U.S.C. § 10906 Separately Deprives the Cities of Jurisdiction to Condemn An At-Grade Right-Of-Way Across Sidings And Passing Tracks.

As noted above, section 10501(b) of the ICCTA broadly grants jurisdiction to the Board over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state...” 49 U.S.C. § 10501(b)(2). This broad jurisdictional grant is coupled with an express preemption clause mandating that “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.” 49 U.S.C. § 10501(b). As a consequence, jurisdiction over “spur, industrial, team, switching or side tracks, or facilities” rests solely with the Board. 49 U.S.C. § 10501(b)(2); *see also United Transp. Union Ill.-Legis. Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999).

The present case concerns both a main track, and a parallel siding, or passing track. A separate jurisdictional statute governs spurs, switching tracks, and side tracks. *See* 49 U.S.C. § 10906. The first question, then, is whether a given track at issue is a main track or a siding.

Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a “spur” or “industrial” track, include whether the railroad maintains a train schedule or regular service over the track; furnishes express, passenger, or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading. *See Chicago, M., St. P. & P.R. Co. v. Chicago & E.I.R. Co.*, 198 F.2d 8, 12 (7th Cir. 1952). It is also relevant whether the track has been or is to be used for anything other than industrial delivery, *see La. & Ark. Ry. Co. v. Mo. Pac. R.R. Co.*, 288 F.Supp. 320, 323 (D.C.La. 1968), the length of the track, whether the track serves only a single customer, and whether the customer requested the carrier to provide service. *See Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991).

Port City Properties v. Union Pacific R. Co., 518 F.3d 1186, 1189 (10th Cir. 2008).

Sidings, switching tracks, and passing tracks, like the 1900-foot passing track here, fall under 49 U.S.C. § 10906. That statute separately deprives the Cities of jurisdiction to condemn an at-grade right-of-way across the passing track.

§ 10906 has been interpreted to preclude all regulation of industrial or spur tracks: “When

sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management.” *Cities of Auburn and Kent*, 2 S.T.B. 330, 1997 WL 362017 at *7 (1997); *see also* Report on ICCTA, H.R. Rep. No. 104-422, 104th Cong., 1st. Sess. 167 (1995), U.S. Code Cong. & Admin. News 1995, pp. 850, 1995 U.S.C.C.A.N. 850 (explaining that § 10501(b)(2) was added “[i]n light of the exclusive Federal authority over auxiliary tracks and facilities. . . .”). In short, read together, § 10501 and § 10906 completely preempt Hodges’ state law tort claims with respect to spur or industrial tracks. *See, e.g., PCI Transp. v. Fort Worth & Western R.R.*, 418 F.3d 535, 545 (5th Cir. 2005) (ICCTA completely preempts non-contractual claims); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (ICCTA preempts claims of negligence and negligence per se with respect to railroad’s alleged road blockages); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F.Supp.2d 326, 334 (D.Me. 2003) (state law claims preempted by ICCTA); *South Dakota ex rel. South Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F.Supp.2d 919, 934-35 (D.S.D. 2003) (state law claims for punitive damages and tortious interference preempted by ICCTA); *Guckenberg v. Wis. Cent. Ltd.*, 178 F.Supp.2d 954, 958 (E.D.Wis. 2001) (state law nuisance claim preempted with respect to railway traffic issue); *Rushing v. Kan. City S. Ry. Co.*, 194 F.Supp.2d 493, 500-01 (S.D.Miss. 2001) (ICCTA preempts state law nuisance and negligence claims intended to interfere with railroad’s operation of switchyard).

Port City Properties, 518 F.3d at 1188.

The fact that this matter concerns a proposed at-grade crossing which will bisect not only a main track, but also a siding, necessarily implicates 49 U.S.C. § 10906. That statute both governs jurisdiction over the siding in question, and separately deprives the Cities of jurisdiction to condemn a right-of-way over the siding. Furthermore, the 'routine crossing' exception to the Board's jurisdiction was developed under 49 U.S.C. § 10501, and generally concerns 'non-exclusive' easements over main tracks. As 49 U.S.C. § 10906 separately deprives both the Cities and the Board of jurisdiction over sidings, the 'routine crossing' analysis is inapplicable to the question of whether the Cities have jurisdiction to condemn a right-of-way across a siding, and 49 U.S.C. § 10906 provides an independent basis for the Board to enter a Declaratory Order that the Cities' proposed condemnation is preempted.

V. RELIEF REQUESTED

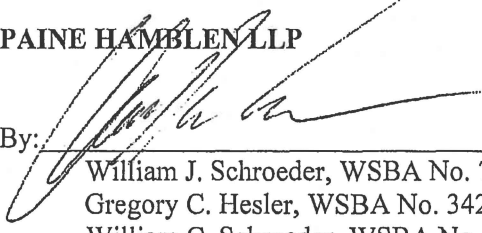
Pursuant to the Board's authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 and the decisional law cited above, TCRY requests that the Board enter a Declaratory Order as to the following:

1. Finding that the Board's jurisdiction over the proposed crossing is exclusive; and

2. Finding that any condemnation action brought by the Cities to acquire the right of way for the proposed at-grade crossing which will bisect TCRY's main track and passing track is preempted.

RESPECTFULLY SUBMITTED this 18 day of March, 2015.

PAINE HAMBLER LLP

By: 

William J. Schroeder, WSBA No. 7942
Gregory C. Hesler, WSBA No. 34217
William C. Schroeder, WSBA No. 41986
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Spokane, WA 99201-3505
(509) 455-6000

STB Docket No. NOR 42163

Appendix 2

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 07 2015

FILED

33
R

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

THE CITY OF KENNEWICK, a Washington
municipal corporation; THE CITY OF
RICHLAND, a Washington municipal
corporation,

Petitioners,

v.

PORT OF BENTON, a Washington Port
District; TRI-CITY RAILROAD COMPANY,
LLC, a Washington limited liability company;
BENTON COUNTY, a Washington political
subdivision,

Respondents.

[In re Center Parkway]

No. 15-2-01039-2

PETITION FOR CONDEMNATION

1. INTRODUCTION. By this action, the City of Kennewick and the City of Richland ("Cities") are acquiring certain, limited property rights (easement) necessary for the extension of Center Parkway between Kennewick and Richland. After years of local and regional planning, and extensive hearings and review, the State of Washington Utility and Transportation Commission ("WUTC") approved the extension of Center Parkway between Kennewick and Richland. Docket TR-130499. This Court affirmed the WUTC orders on December 9, 2014. *Tri-City R.R. Co. v. State of Washington*, Benton County Cause No. 14-2-07894-8. The WUTC found the Port of Benton, Burlington Northern Santa Fe Railroad, Union Pacific Railroad do not oppose the Center Parkway extension. State, regional and local planning and transportation

PETITION FOR CONDEMNATION – 1

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1 agencies, and public comment on record before the WUTC, all support the project. The Port of
2 Benton owns the property; Tri-City Railroad Company, LLC ("TCRY") is a tenant under a lease.

3 **2. PARTIES.**

4 2.1 Petitioners. The Cities are municipal corporations of the State of Washington and are
5 authorized by the laws of the State of Washington, including, without limitation, RCW 8.12.030
6 and Chapter 8.12 RCW to appropriate, condemn and damage real estate for public use.

7 2.2 Respondents.

8 2.2.1 Respondents are those individuals and entities set out in Exhibit B, attached
9 hereto. The Respondents identified herein may or may not have any interest in any award or
10 judgment resulting from these proceedings.

11 2.2.2 All other persons or parties unknown claiming any right, title, estate, lien, or
12 interest in the real estate described in the Petition herein, pursuant to RCW 4.28.150.

13 **3. PUBLIC USE.** The object and use for which the property and property rights
14 described in Exhibit A, attached hereto, are sought to be taken or damaged is a public object and
15 a public use, *i.e.*, acquisition of real property to enable the Cities to finish Center Parkway
16 between Kennewick and Richland for road and utility purposes. Accordingly, the Cities have
17 determined that certain properties and property rights are condemned, appropriated, taken and
18 damaged for the construction and improvement of city streets, as provided in their Ordinances.

19 **4. NECESSITY.** It is necessary that the Cities acquire rights to the real property
20 identified in the Ordinances in order to extend Center Parkway between Kennewick and
21 Richland. This proceeding is brought to obtain an adjudication of public use and necessity for
22 the taking or damaging of the property or property rights listed herein and to ascertain the just
23 compensation to be paid for such taking or damaging. The City and certain Respondents have
24 been unable to agree upon the compensation to be paid by the City for the property rights or
25 interest in the necessary portions of the respective parcels.

1 **5. THE ORDINANCES.**

2 5.1 Notice of Final Action. Pursuant to Chapter 8.12 RCW and RCW 8.25.290, the
3 Cities timely caused notice of the planned condemnation to be: (a) mailed to the property
4 owners of record at least 15 days prior to taking final action on the Ordinances; and (b) published
5 for two consecutive weeks in the *Tri-City Herald*, the legal newspaper with the largest
6 circulation in the City and routinely used by the Cities for the publication of legal notices.

7 5.2 Kennewick Ordinance. The Kennewick City Council of City
8 Commissioners adopted Ordinance No. 5592 on April 14, 2015. The title of the Ordinance is:

9 AN ORDINANCE RELATING TO TRANSPORTATION FACILITIES;
10 AUTHORIZING THE CITY OF RICHLAND TO ACQUIRE CERTAIN REAL
11 PROPERTY INTERESTS BY NEGOTIATED VOLUNTARY PURCHASE
12 UNDER THREAT OF CONDEMNATION, BY CONDEMNATION, OR BY
13 SETTLING CONDEMNATION LITIGATION OR ENTERING
14 ADMINISTRATIVE SETTLEMENTS FOR THE PURPOSE OF EXTENDING
15 CENTER PARKWAY FROM TAPTEAL DRIVE IN RICHLAND TO GAGE
16 BOULEVARD IN KENNEWICK; PROVIDING FOR SEVERABILITY; AND
17 ESTABLISHING AN EFFECTIVE DATE.

18 5.3 Richland Ordinance. The Richland City of Council of City Commissioners
19 adopted Ordinance No. 17-15 on April 21, 2015. The title of the Ordinance is:

20 AN ORDINANCE OF THE CITY OF RICHLAND, WASHINGTON,
21 AUTHORIZING THE CITY MANAGER TO ACQUIRE CERTAIN REAL
22 PROPERTY INTERESTS BY NEGOTIATED VOLUNTARY PURCHASE
23 UNDER THREAT OF CONDEMNATION, BY CONDEMNATION, OR BY
24 SETTLING CONDEMNATION LITIGATION OR ENTERING
25 ADMINISTRATIVE SETTLEMENTS FOR THE PURPOSE OF EXTENDING
26 CENTER PARKWAY FROM TAPTEAL DRIVE IN RICHLAND TO GAGE
27 BOULEVARD IN KENNEWICK; PROVIDING FOR SEVERABILITY; AND
28 ESTABLISHING AN EFFECTIVE DATE.

29 5.4 Ordinance Exhibits. A true and correct copy of each Ordinance is attached to
30 this Petition as Exhibit C and is incorporated herein by this reference. The Ordinances authorize
31 and direct the City Attorneys to begin and prosecute the necessary proceedings provided by law
32 to condemn, take and appropriate the land and other property rights necessary to carry out the
33 provisions of the Ordinances.

1 6. RELIEF REQUESTED

2 Wherefore, the Cities pray that the Court enter an order:

3 6.1 Adjudicating that the use for which the property sought is a public use, that the
4 public interest requires the prosecution of this action; and that the acquisition of the property
5 described in this petition is for a public use;

6 6.2 Directing that a jury be summoned and called in the manner provided by law to
7 ascertain the just compensation to be paid for the property and property rights described herein,
8 unless a jury be waived, in which case the same determination shall be made by the Court, sitting
9 without a jury;

10 6.3 Assigning the first reasonably available trial date for the ascertaining of such
11 compensation as required by RCW 8.12.090; and

12 6.4 For such other and further relief as the Court deems just and equitable.

13
14 RESPECTFULLY SUBMITTED this 7th day of May, 2015.

15 FOSTER PEPPER PLLC; and
16 HEATHER KINTZLEY, WSBA #35520
17 City Attorney, City of Richland; and
18 LISA BEATON, WSBA #25305
19 City Attorney, City of Kennewick

20 Heather Kintzley
21 Lisa Beaton, WSBA #25305
22 Heather Kintzley, WSBA #35520
23 P. Stephen DiJulio, WSBA #7139
24 Attorneys for Petitioners
25
26

EXHIBIT B

Port of Benton, a Washington Port District: Fee Interest [Note, Port has previously granted to Cities easement interests for the Center Parkway Extension].

Tri-City Railroad Company LLC, a Washington limited liability company: Lessee (of Port of Benton)

Benton County, a political subdivision of the State of Washington: Tax claims, if any.

THE IDENTIFICATION OF INTERESTS IN PROPERTY SET FORTH ABOVE ARE FOR INFORMATIONAL PURPOSES ONLY; AND, ARE NOT A REPRESENTATION OR ACKNOWLEDGMENT OF A RESPONDENT'S SPECIFIC RIGHTS.

EXHIBIT B

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PHONE (206) 447-4400 FAX (206) 447-9700

EXHIBIT A

Port of Benton / Tri-City Railroad
Proposed Right-of-way & Utility Easement

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, more particularly described as follows:

A portion of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State).

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of $15^{\circ}12'31''$ to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South $88^{\circ}58'44''$ West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South $89^{\circ}33'21''$ East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of $01^{\circ}23'35''$, leaving said Southerly line, to its point of tangency; Thence North $01^{\circ}50'14''$ East a distance of 81.28 feet, leaving said curve, to a point on the of the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North $88^{\circ}56'20''$ East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, Thence North $01^{\circ}50'14''$ East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and

Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State), and the **TRUE POINT of BEGINNING**, said point being the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of 00°31'48"; Thence North 01°50'14" East a distance of 104.28 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.01 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 26°17'06" East; Thence Southeasterly a distance of 108.69 feet, along the arc of said curve, through a central angle of 02°46'40, along said Northerly right-of-way;

Thence South 01°50'14" West a distance of 101.21 feet, leaving said Northerly line to a point on said Southerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2342.34 foot radius non-tangent curve concave to the Northeast and having a common radius with the aforementioned curve having a 2342.34 foot radius curve; Thence Northwesterly a distance of 85.86 feet along the arc of said curve, through a central angle of 02°06'01, along said Southerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and Northerly line of said Tract "B", back to the true point of beginning.

Containing 10,270.8 square feet, more or less, according to the bearings and distances listed above and as depicted on the attached **Exhibit "A"**.

14-099d
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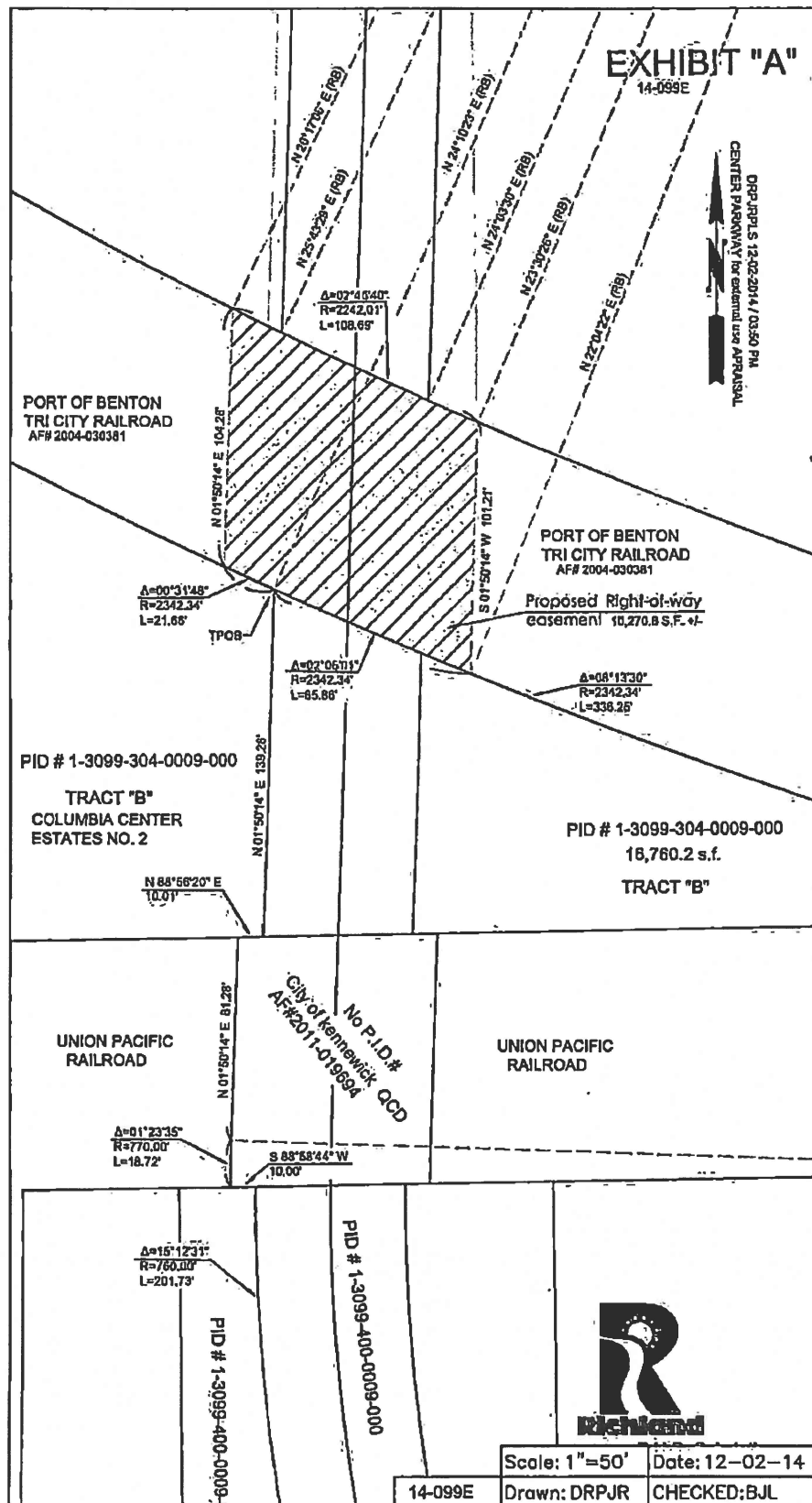


EXHIBIT C

**CITY OF KENNEWICK
ORDINANCE NO. 5592**

**AN ORDINANCE RELATING TO TRANSPORTATION FACILITIES;
AUTHORIZING THE CITY OF RICHLAND TO ACQUIRE CERTAIN REAL
PROPERTY INTERESTS BY NEGOTIATED VOLUNTARY PURCHASE UNDER
THREAT OF CONDEMNATION, BY CONDEMNATION, OR BY SETTLING
CONDEMNATION LITIGATION OR ENTERING ADMINISTRATIVE
SETTLEMENTS FOR THE PURPOSE OF EXTENDING CENTER PARKWAY
FROM TAPTEAL DRIVE IN RICHLAND TO GAGE BOULEVARD IN
KENNEWICK; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN
EFFECTIVE DATE**

WHEREAS, in order to improve mobility, meet the current and planned travel demands of the Cities of Kennewick and Richland, and satisfy the current and future requirements and goals of the City of Kennewick Comprehensive Plan, it will be necessary for the City to construct a new street segment called Center Parkway; and

WHEREAS, the planned Center Parkway crosses the municipal boundary joining the City of Richland with the City of Kennewick; and

WHEREAS, the Cities of Richland and Kennewick have entered into an interlocal agreement, dated September 18, 2001, documenting the Cities' partnership to complete Center Parkway; and

WHEREAS, the interlocal agreement, specifically Supplement No. 2 to the interlocal agreement, assigns the lead role for completing the Center Parkway project to the City of Richland, including specifically acquisition of right of way; and

WHEREAS, in its lead role the City of Richland has planned and budgeted to complete Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; and

WHEREAS, in its lead role, the City of Richland will assign staff and hire contractors as required to complete the Center Parkway project; and

WHEREAS, in order to complete the Center Parkway Project, it has been determined that several parcels of right of way must be acquired within the City of Kennewick. The required property rights are described in Exhibit 1 for the public uses of public travel and public parking; and

WHEREAS, Chapter 8.12 RCW delegates to cities the authority to use eminent domain for the purpose of condemning property for certain public needs; and

WHEREAS, the City of Richland, in its lead role, has commissioned appraisals to determine the fair market value of the properties and will negotiate in good faith with the owners of the properties authorized to be acquired with the intent of reaching agreements for the voluntary acquisition of the property for fair market value; and

WHEREAS, in the event voluntary negotiated agreements are not reached, eminent domain proceedings will be required to complete the required acquisitions; and

WHEREAS, the intent of the Cities' interlocal agreement and Supplement No. 2 is that the City of Richland will administer processes, including eminent domain proceedings, on behalf of the Cities of Richland and Kennewick for completion of the required property acquisitions; and

WHEREAS, the intent of the Cities' interlocal agreement is that the Cities will own and operate the portions of the completed Center Parkway within their municipal boundaries; and

WHEREAS, the funds necessary to acquire the property by voluntary purchase or to pay just compensation adjudged due after condemnation, shall be paid from City of Richland funds;
NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF KENNEWICK, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Public Use and Necessity Declared. The City of Kennewick City Council finds construction of the Center Parkway Project to be a public use, specifically the construction of public streets and public parking. Further, the City Council finds construction of the Center Parkway Project to be necessary and in the best interests of the citizens and motorists within the City of Kennewick.

Section 2. Richland Authorized. The City of Richland, as Agent on behalf of the City of Kennewick, is hereby authorized to negotiate, prepare and execute such agreements as are customary and necessary for the acquisition of the real property interests described in Exhibit 1, said property to be used for the public use of construction of the Center Parkway Project. Execution of such final agreements by the City of Richland shall occur only after approval by the Richland City Council at an open public meeting.

Section 3. Settlement. The City of Richland is further authorized, as Agent on behalf of the City of Kennewick, to settle condemnation litigation or enter administrative settlements (a settlement in lieu of initiating condemnation litigation) for the acquisition of the real property interests described in Exhibit 1. Such settlements shall be made only upon the recommendation of legal counsel, for amounts deemed to be a reasonable estimation of fair market value, and shall be subject to final approval by the Richland City Council at an open public meeting.

Section 4. Condemnation Proceedings Authorized. In addition to the authority granted to the City of Richland in Sections 2 and 3 above; the City of Richland is hereby authorized to initiate condemnation proceedings as Agent on behalf of the City of Kennewick, and directed to prosecute the actions and proceedings necessary to acquire the properties and property rights described in the attached Exhibit 1. The City of Richland shall promptly provide copies of all pleadings to the Kennewick City Attorney.

Section 5. Property Descriptions. The City of Richland is additionally authorized to make minor amendments to the legal descriptions of properties described in the attached Exhibit 1 as may be necessary to correct scrivener's errors or to conform any legal description to the precise boundaries of the property actually acquired for construction of the Center Parkway Project.

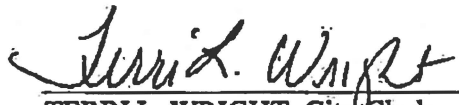
Section 6. Funds. The funds necessary to acquire the property by purchase or to pay just compensation adjudged due after condemnation shall be paid from the City of Richland's Capital Improvement Plan funds.

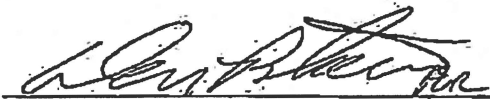
Section 7. Severability. Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 8. Effective Date. This ordinance shall take effect five days from and after its approval, passage and publication as required by law.

PASSED BY THE CITY COUNCIL OF THE CITY OF KENNEWICK, WASHINGTON, this 14th day of April, 2015, and signed in authentication of its passage this 14th day of April, 2015.

Attest:

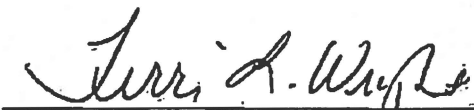

TERRI L. WRIGHT, City Clerk


STEVE C. YOUNG, Mayor

ORDINANCE NO. 5592 filed and recorded in the office of the City Clerk of the City of Kennewick, Washington this 15th day of April, 2015.

Approved as to form:


LISA BEATON, City Attorney


TERRI L. WRIGHT, City Clerk

DATE OF PUBLICATION 4-18-15

EXHIBIT 1

Property Descriptions

All of PID # 1-3099-400-0010-000:

That Portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29, lying south of the Union Pacific Railroad right of way, defined as follows: Beginning at the Southwest corner of said subdivision; Thence South $89^{\circ}23'43''$ East along the South line thereof 686.76 Feet to a point in the West line of the East 615.9 Feet of the said subdivision; Thence North $00^{\circ}15'13''$ West along said West line 350 feet to the TRUE POINT OF BEGINNING; Thence continuing North $00^{\circ}15'13''$ West, 170.18 feet to a point which is 200 feet South of the South right of way line of the Union Pacific Railroad; Thence South $89^{\circ}22'17''$ West: Parallel with said right of way line, 80 feet; Thence South $00^{\circ}15'13''$ East, 168.46 Feet to a point which is 350 feet from the South line of said subdivision: Thence South $89^{\circ}23'43''$ East parallel with said South line 80 feet to the True Point of Beginning. Containing 13,543.7 square feet, more or less, according to the bearings and distances listed above.

Portion of PID # 1-3099-401-0192-001:

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

A portion of Lot 1 of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, and the TRUE POINT of BEGINNING; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Southeasterly a distance of 48.23 feet, along the arc of said curve through a central angle of $03^{\circ}38'09''$, leaving said Northerly line to a point of reverse curve, to the beginning of a 490.00 foot radius tangent curve to the right; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of $01^{\circ}22'28''$, back to the true point of beginning. Containing 497.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Lot 1 of Short Plat No.192 as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 90.21 feet along the Southerly line of said Lot, to the beginning of a 460.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $85^{\circ}56'01''$ West; and the TRUE POINT OF BEGINNING; Thence Northwesterly a distance of 114.93 feet along the arc of said curve, through a central angle of $14^{\circ}18'53''$, leaving said Southerly line of said Lot 1, to the beginning of a 790.00 foot radius tangent reverse curve, concave to the Northeast, having a radial bearing of North $71^{\circ}37'09''$ East; Thence Northwesterly a distance of 57.44 feet along the arc of said curve, through a central angle of $04^{\circ}09'58''$, to a point on a Northerly line of said Lot 1; Thence North $88^{\circ}58'02''$ East leaving said curve to the beginning of a 760.00 foot radius non-tangent curve, concave to the Northeast, having a common with the aforementioned 790.00 foot radius curve; Thence Southeasterly a distance of 48.23 feet along the arc of said curve, through a central angle of $03^{\circ}38'09''$, leaving said Northerly line of said Lot 1, to the beginning of a 490.00 foot radius tangent reverse curve, concave to the Southwest, having a radial bearing of South $71^{\circ}37'09''$ West; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of $01^{\circ}22'28''$, to a point on the Westerly line of a Parcel described by Parcel Identifications number (P.I.D.) 1-3099-400-0010-000, records of said County and State; Thence South $00^{\circ}41'35''$ East leaving said curve, along said Westerly line, to a point on said Southerly line of said Lot 1; Thence North $89^{\circ}48'03''$ West a distance of 11.07 feet along said Southerly line, back to the true point of beginning. Containing 3,882.37 square feet, more or less, according to the bearings and distances listed above.

Portion PID# 1-3099-400-0009-000:

A portion of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot

radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1, and the TRUE POINT of BEGINNING; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence North 88°58'44" East a distance of 60.02 feet along said Southerly line to the beginning of a 700.00 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of South 89°24'34" East; Thence Southeasterly a distance of 202.04 feet along the arc of said curve, through a central angle of 16°32'14", to a point on the Southerly line of said P.U.D. Substation Parcel; Thence South 88°58'02" West a distance of 45.30 feet, leaving said curve, back to the true point of beginning. Containing 12,112.8 square feet, more or less, according to the bearings and distances listed above.

Portion of PID# 1-3099-304-0009-000:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South

89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Southeasterly a distance of 64.51 feet along the arc of said curve, through a central angle of 01°34'41", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 112.53 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence South 88°56'20" West a distance of 60.08 feet along said right-of-way, back to the true point of beginning. Containing 7,544.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South

89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 6.49 feet along the arc of said curve, through a central angle of 00°09'32", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 142.04 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 6.01 feet along said right-of-way, back to the true point of beginning.

Together With: Beginning at the aforementioned true point of beginning; Thence North 88°56'20" East a distance of 60.08 feet along said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B", to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 112.53 feet to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°35'42" East; Thence Southeasterly a distance of 29.87 feet along the arc of said curve, through a central angle of 00°43'34", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 100.71 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 28.04 feet along said right-of-way, back to the true point of beginning. Containing 3,828.3 square feet, more or less, according to the bearings and distances listed above.

**A portion of Port of Benton and Tri-City Railroad right-of-way – No PID# assigned
Street Crossing & Utility Easement:**

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying within, Port of Benton and Tri-City Railroad right-of-way, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a

central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), to the TRUE POINT of BEGINNING; said point being at (Station 16+39.17 at 30.00' Left as shown on Center Parkway Right-of-way Plans) and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of 00°31'48"; Thence North 01°50'14" East a distance of 108.98 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.34 foot radius non-tangent curve, concave to the Northeast, and having a radial bearing of North 25°47'06" East; Thence Southeasterly a distance of 107.63 feet, along the arc of said curve, through a central angle of 02°45'00", along said Northerly right-of-way; to a point on the proposed Easterly proposed right-of-way of Center Parkway; Thence continuing along said curve and Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way Southeasterly a distance of 0.67 feet, along the arc of said curve, through a central angle of 00°01'02", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 106.921 feet leaving said Northerly right-of-way to a point on said Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, said point is also lying on a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°04'22" East; Thence Northwesterly a distance of 85.86 feet along the arc of said curve through a central angle of 02°06'01" back to the true point of beginning. Containing 10,792.0 square feet, more or less, according to the bearings and distances listed above.

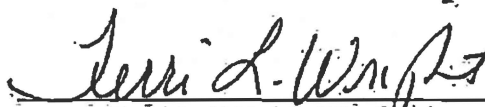
CERTIFICATION

I, Terri L. Wright, City Clerk of the City of Kennewick, Washington (the "City"), hereby certify as follows:

1. The attached copy of Ordinance No. 5592 (the "Ordinance") is a full, true and correct copy of the Ordinance duly passed at a regular meeting of the City Council of the City held at the regular meeting place thereof on the 14th day of April, 2015, as that Ordinance appears on the Minute Book of the City; and

2. A quorum of the members of the City Council was present throughout the meeting and a majority of those members present voted in the proper manner for the adoption of the Ordinance.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of April, 2015.


Terri L. Wright, City Clerk

ORDINANCE NO. 17-15

AN ORDINANCE of the City of Richland, Washington, authorizing the City Manager to acquire certain real property interests by negotiated voluntary purchase under threat of condemnation, by condemnation, or by settling condemnation litigation or entering administrative settlements for the purpose of extending Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; providing for severability; and establishing an effective date.

WHEREAS, in order to improve mobility, meet the current and planned travel demands of the Cities of Richland and Kennewick, and satisfy the current and future requirements and goals of the City of Richland Comprehensive Plan, it will be necessary for the City to construct a new street segment called Center Parkway; and

WHEREAS, the planned Center Parkway crosses the municipal boundary joining the City of Richland with the City of Kennewick; and

WHEREAS, the Cities of Richland and Kennewick have entered in an interlocal agreement, dated September 18, 2001, documenting the Cities' partnership to complete Center Parkway; and

WHEREAS, the interlocal agreement, specifically Supplement No. 2 to the interlocal agreement, assigns the lead role for completing the Center Parkway project to the City of Richland; and

WHEREAS, in its lead role, the City of Richland has planned and budgeted to complete Center Parkway from Tapteal Drive in Richland to Gage Boulevard in Kennewick; and

WHEREAS, in order to complete the Center Parkway Project, it has been determined that the City of Richland and the City of Kennewick must acquire the property and property rights described in Exhibit 1, falling within their respective jurisdictions, for the public uses of public travel and public parking; and

WHEREAS, Chapter 8.12 RCW authorizes the Cities to exercise the power of eminent domain for the purpose of condemning property for certain public needs; and

WHEREAS, the City of Richland has commissioned appraisals to determine the fair market value of the properties identified herein and will continue to negotiate in good faith with the owners of the properties authorized to be acquired with the intent of reaching agreements for the voluntary acquisition of the property for fair market value; and

WHEREAS, in the event voluntary negotiated agreements are not reached, eminent domain proceedings will be required to complete the required acquisitions; and

WHEREAS, the funds necessary to acquire the property by voluntary purchase or to pay just compensation adjudged due after condemnation shall be paid from City of Richland funds.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Richland as follows:

Section 1. Public Use and Necessity Declared: The City of Richland City Council finds construction of the Center Parkway Project to be a public use, specifically the construction of public streets and public parking. Further, the City Council finds construction of the Center Parkway Project to be necessary and in the best interests of the citizens and motorists within the City of Richland.

Section 2. Agency Acknowledged: Pursuant to interlocal agreement and ordinance, the City of Kennewick has delegated to the City of Richland the authority to initiate and prosecute any action necessary, including condemnation, to acquire the property and property rights described in attached Exhibit 1 that are located within the City of Kennewick. The City of Richland accepts this delegation of authority.

Section 3. City Manager Authorized: The City Manager is hereby authorized to negotiate and prepare such agreements as are customary and necessary for the acquisition of the real property interests described in Exhibit 1, said property to be used for the public use of construction of the Center Parkway Project. Execution of such final agreements by the City Manager shall occur only after approval by the Richland City Council at an open public meeting.

Section 4. Settlement: The City Manager is further authorized to settle condemnation litigation or enter administrative settlements (a settlement in lieu of initiating condemnation litigation) for the acquisition of the real property interests described in Exhibit 1. Such settlements shall be made only upon the recommendation of legal counsel, for amounts deemed to be a reasonable estimation of fair market value, and shall be subject to final approval by the Richland City Council at an open public meeting.

Section 5. Condemnation Proceedings Authorized: In addition to the authority granted to the City Manager in Sections 3 and 4 above, the City Manager may further authorize the City Attorney to commence any such condemnation proceedings as may be useful or necessary to acquire the properties and property rights described in the attached Exhibit 1, to include prosecuting condemnation actions as the Agent of the City of Kennewick as directed in City of Kennewick Ordinance No. 5592.

Section 6. Property Descriptions: The City Manager is additionally authorized to make minor amendments to the legal descriptions of properties described in the

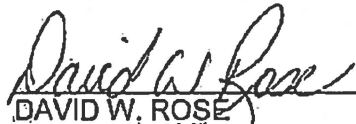
attached Exhibit 1 as may be necessary to correct scrivener's errors or to conform any legal description to the precise boundaries of the property actually acquired for construction of the Center Parkway Project.

Section 7. Funds: The funds necessary to acquire the property by purchase or to pay just compensation adjudged due after condemnation shall be paid from the City of Richland's Capital Improvement Plan funds.

Section 8. Severability: Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

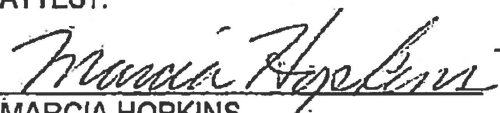
Section 9. Effective Date: This ordinance shall take effect the day following its publication in the official newspaper of the City of Richland.

PASSED by the City Council of the City of Richland, at a regular meeting on the 21st day of April, 2015.



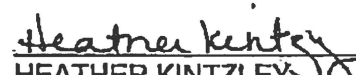
DAVID W. ROSE
Mayor

ATTEST:



MARCIA HOPKINS
City Clerk

APPROVED AS TO FORM:



HEATHER KINTZLEY
City Attorney

Date Published: April 26, 2015

EXHIBIT 1

Property Descriptions

Portion of PID# 1-3099-300-0001-007

That portion of the West ½ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East of the Willamette Meridian, City of Richland, Benton County, Washington, described as follows:

Beginning at the Northeast corner of Parcel 1 of Record of Survey No. 2966, as recorded in Volume 1 of Surveys on Page No. 2966, records of said County and State; Said corner is lying on the Southerly right-of-way of Tapteal Drive as shown on said Survey; Thence North 69°56'55" West a distance of 230.22 feet along the Northerly line of said Parcel and said Southerly right-of-way, to the Northwest corner of said Parcel 1, and the **TRUE POINT of BEGINNING**, and the beginning of a 30.00 foot radius tangent curve to the left; Thence Southwesterly a distance of 48.19 feet along the arc of said curve through a central angle of 92°01'52" along the Westerly line of said Parcel 1, to the beginning of a 700.00 foot radius tangent compound curve to the left; Thence Southwesterly a distance of 227.91 feet along the arc of said curve through a central angle of 18°39'16", along the Westerly line of said Parcel 1, to its point of tangency. (Said point of tangency is lying North 00°38'03" West from the Northwest corner of Parcel 2 of said Record of Survey No. 2966); Thence South 00°38'03" East a distance of 325.26 feet along the Westerly line of said Parcel 2, to a point on the Northerly right-of-way of the Port of Benton / Tri-City Railroad, (formerly A.E.C. Hanford Works Railroad), and the beginning of a 2242.34 foot radius non-tangent curve having a radial bearing of North 23°02'06" East; Thence Northwesterly along said right-of-way a distance of 91.76 feet along the arc of said curve through a central angle of 02°12'15" to the Southeast corner of Record of Survey No. 3241 as recorded in Volume 1 of Surveys on Page No. 3241, records of said County and State; Thence North 01°50'14" East a distance of 294.65 feet, leaving said Northerly right-of-way, to the Northeast corner of said Record of Survey No. 3241, said corner is also the East/ Southeasterly corner of Record of Survey No. 3245, records of said County and State; Thence continuing North 01°50'14" East a distance of 29.53 feet along the Easterly line of said Record of Survey No. 3245, leaving the Northeast corner of said Record of Survey No. 3241, to the beginning of a 770.00 foot radius tangent curve to the right; Thence Northeasterly a distance of 221.92 feet along the arc of said curve and said Easterly line of said Record of Survey No. 3245, through a central angle of 16°30'48" to the beginning of a 30.00 foot radius tangent reverse curve to the left; Thence Northwesterly a distance of 46.23 feet along the arc of said curve and said Easterly line of said Record of Survey No. 3245 to its Northeast corner, through a central angle of 88°17'57", to a point on said Southerly right-of-way of Tapteal Drive; Thence South 69°56'55" East a distance of 130.07 feet leaving said Record of Survey No. 3245, back to the true point of beginning.

Containing 43,421.0 square feet, more or less, according to the bearings and distance s listed above.

All of PID # 1-3099-400-0010-000

That Portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29, lying south of the Union Pacific Railroad right of way,

defined as follows: Beginning at the Southwest corner of said subdivision; Thence South 89°23'43" East along the South line thereof 686.76 Feet to a point in the West line of the East 615.9 Feet of the said subdivision; Thence North 00°15'13" West along said West line 350 feet to the TRUE POINT OF BEGINNING; Thence continuing North 00°15'13" West, 170.18 feet to a point which is 200 feet South of the South right of way line of the Union Pacific Railroad; Thence South 89°22'17" West: Parallel with said right of way line, 80 feet; Thence South 00°15'13" East, 168.46 Feet to a point which is 350 feet from the South line of said subdivision; Thence South 89°23'43" East parallel with said South line 80 feet to the True Point of Beginning. Containing 13,543.7 square feet, more or less, according to the bearings and distances listed above.

Portion of PID # 1-3099-401-0192-001

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

A portion of Lot 1 of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, and the TRUE POINT OF BEGINNING; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Southeasterly a distance of 48.23 feet, along the arc of said curve through a central angle of 03°38'09", leaving said Northerly line to a point of reverse curve, to the beginning of a 490.00 foot radius tangent curve to the right; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of 01°22'28", back to the true point of beginning. Containing 497.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Lot 1 of Short Plat No.192 as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 90.21 feet along the Southerly line of said Lot, to the beginning of a 460.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 85°56'01" West; and the TRUE POINT of BEGINNING; Thence Northwesterly a distance of 114.93 feet along the arc of said curve, through a central angle of 14°18'53", leaving said Southerly line of said Lot 1, to the beginning of a 790.00 foot radius tangent reverse curve, concave to the Northeast, having a radial bearing of North 71°37'09" East; Thence Northwesterly a distance of 57.44 feet along the arc of said curve, through a central angle of 04°09'58", to a point on a Northerly line of said Lot 1; Thence North 88°58'02" East leaving said curve to the beginning of a 760.00 foot radius non-tangent curve, concave to the Northeast, having a common with the aforementioned 790.00 foot radius curve; Thence Southeasterly a distance of 48.23 feet along the arc of said curve, through a central angle of 03°38'09", leaving said Northerly line of said Lot 1, to the beginning of a 490.00 foot radius tangent reverse curve, concave to the Southwest, having a radial bearing of South 71°37'09" West; Thence Southeasterly a distance of 11.75 feet along the arc of said curve, through a central angle of 01°22'28", to a point on the Westerly line of a Parcel described by Parcel Identifications number (P.I.D.) 1-3099-400-0010-000, records of said County and State; Thence South 00°41'35" East leaving said curve, along said Westerly line, to a point on said Southerly line of said Lot 1; Thence North 89°48'03" West a distance of 11.07 feet along said Southerly line, back to the true point of beginning. Containing 3,882.37 square feet, more or less, according to the bearings and distances listed above.

Portion PID# 1-3099-400-0009-000

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Southerly of the Union Pacific Railroad, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1, and the TRUE POINT of BEGINNING; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence North 88°58'44" East a distance of 60.02 feet along said Southerly line to the beginning of a 700.00 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of South 89°24'34" East; Thence Southeasterly a distance of 202.04 feet along the arc of said curve, through a central angle of 16°32'14", to a point on the Southerly line of said P.U.D. Substation Parcel; Thence South 88°58'02" West a distance of 45.30 feet, leaving said curve, back to the true point of beginning. Containing 12,112.8 square feet, more or less, according to the bearings and distances listed above.

Portion of PID# 1-3099-304-0009-000

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03"

West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Southeasterly a distance of 64.51 feet along the arc of said curve, through a central angle of 01°34'41", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 112.53 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence South 88°56'20" West a distance of 60.08 feet along said right-of-way, back to the true point of beginning. Containing 7,544.3 square feet, more or less, according to the bearings and distances listed above.

Together with a temporary construction easement lying within said parcel described as follows:

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying Northerly of the Union Pacific Railroad, and Southerly of the Port of Benton and Tri-City Railroad Company LLC, right-of-way described as follows:

A portion of Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State, more particularly described as follows:

Beginning at South $\frac{1}{4}$ corner of said Section 30; Thence South $89^{\circ}48'03''$ East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North $00^{\circ}41'35''$ West a distance of 350.02 feet along said West line; Thence North $89^{\circ}48'03''$ West a distance of 0.86 feet, leaving said West line; Thence continuing North $89^{\circ}48'03''$ West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South $86^{\circ}11'43''$ West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of $13^{\circ}12'06''$ to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North $00^{\circ}41'35''$ West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South $88^{\circ}58'02''$ West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North $75^{\circ}15'18''$ East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of $15^{\circ}12'31''$ to a point on the Southerly line of the Union Pacific Railroad right-of-way; Thence South $88^{\circ}58'44''$ West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South $89^{\circ}33'21''$ East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of $01^{\circ}23'35''$, leaving said Southerly line, to its point of tangency; Thence North $01^{\circ}50'14''$ East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2; Thence North $88^{\circ}56'20''$ East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line, to the TRUE POINT of BEGINNING; Thence North $01^{\circ}50'14''$ East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North $24^{\circ}10'23''$ East; Thence Northwesterly a distance of 6.49 feet along the arc of said curve, through a central angle of $00^{\circ}09'32''$, along said Northerly and Southerly lines; Thence South $01^{\circ}50'14''$ West a distance of 142.04 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North $88^{\circ}56'20''$ East a distance of 6.01 feet along said right-of-way, back to the true point of

beginning.

Together With: Beginning at the aforementioned true point of beginning; Thence North 88°56'20" East a distance of 60.08 feet along said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B", to the TRUE POINT of BEGINNING; Thence North 01°50'14" East a distance of 112.53 feet to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°35'42" East; Thence Southeasterly a distance of 29.87 feet along the arc of said curve, through a central angle of 00°43'34", along said Northerly and Southerly lines; Thence South 01°50'14" West a distance of 100.71 feet, leaving said lines, to a point on said Northerly line of the Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B"; Thence North 88°56'20" East a distance of 28.04 feet along said right-of-way, back to the true point of beginning. Containing 3,828.3 square feet, more or less, according to the bearings and distances listed above.

**A portion of Port of Benton and Tri-City Railroad right-of-way – No PID# assigned
Street Crossing & Utility Easement**

A portion of the Southwest ¼ of the Southeast ¼ of Section 30, Township 9 North, Range 29 East, W.M., City of Kennewick, Benton County, Washington, lying within, Port of Benton and Tri-City Railroad right-of-way, described as follows:

Beginning at South ¼ corner of said Section 30; Thence South 89°48'03" East a distance of 686.76 feet along the South line of said Section 30, to a point on the West line of the East 615.90 feet of said subdivision; Thence North 00°41'35" West a distance of 350.02 feet along said West line; Thence North 89°48'03" West a distance of 0.86 feet, leaving said West line; Thence continuing North 89°48'03" West a distance of 60.13 feet to the beginning of a 490.00 foot radius non-tangent curve, concave to the Southwest, having a radial bearing of South 86°11'43" West; Thence Northwesterly a distance of 112.90 feet along the arc of said curve, through a central angle of 13°12'06" to a point on the Easterly line of said Lot 1, of Short Plat No. 192, as recorded in Volume 1 of Short Plats on Page No. 192, records of said County and State; Thence North 00°41'35" West a distance of 57.72 feet along said Easterly line, to a corner of said Lot 1; Thence South 88°58'02" West a distance of 16.62 feet, along a Northerly line of said Lot 1, and the Southerly line of a P.U.D. Substation Parcel, to the beginning of a 760.00 foot radius non-tangent curve concave to the Northeast, having a radial bearing of North 75°15'18" East; Thence Northwesterly a distance of 201.73 feet along the arc of said curve, through a central angle of 15°12'31" to a point on

the Southerly line of the Union Pacific Railroad right-of-way; Thence South 88°58'44" West a distance of 10.00 feet along said Southerly line, and the beginning of a 770.00 foot radius non-tangent curve, concave to the Southeast, having a radial bearing of South 89°33'21" East; Thence Northerly a distance of 18.72 feet along the arc of said curve, through a central angle of 01°23'35", leaving said Southerly line, to its point of tangency; Thence North 01°50'14" East a distance of 81.28 feet, leaving said curve, to a point on the Northerly line of said Union Pacific Railroad right-of-way, and the Southerly line of said Tract "B" of the Plat Alteration of Columbia Center Estates No. 2, as recorded in Volume 14 of Plats, on Page No. 74, records of said County and State; Thence North 88°56'20" East a distance of 10.01 feet, along said Northerly right-of-way and said Southerly line; Thence North 01°50'14" East a distance of 139.26 feet, to the Northerly line of said Tract "B", and the Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, (see Memorandum of Lease recorded under Auditor's File No. 2004-030381, records of said County and State.), to the **TRUE POINT of BEGINNING**; said point being at (Station 16+39.17 at 30.00' Left as shown on Center Parkway Right-of-way Plans) and the beginning of a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 24°10'23" East; Thence Northwesterly a distance of 21.66 feet along the arc of said curve through a central angle of 00°31'48"; Thence North 01°50'14" East a distance of 108.98 feet, leaving said Northerly and Southerly lines, and said curve, to a point on the Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way, and the beginning of a 2242.34 foot radius non-tangent curve, concave to the Northeast, and having a radial bearing of North 25°47'06" East; Thence Southeasterly a distance of 107.63 feet, along the arc of said curve, through a central angle of 02°45'00", along said Northerly right-of-way; to a point on the proposed Easterly proposed right-of-way of Center Parkway; Thence continuing along said curve and Northerly line of said Port of Benton and Tri-City Railroad Company LLC, right-of-way Southeasterly a distance of 0.67 feet, along the arc of said curve, through a central angle of 00°01'02", along said Northerly right-of-way; Thence South 01°50'14" West a distance of 106.921 feet leaving said Northerly right-of-way to a point on said Southerly line of the Port of Benton and Tri-City Railroad Company LLC, right-of-way, said point is also lying on a 2342.34 foot radius non-tangent curve, concave to the Northeast, having a radial bearing of North 22°04'22" East; Thence Northwesterly a distance of 85.86 feet along the arc of said curve through a central angle of 02°06'01" back to the true point of beginning.

Containing 10,792.0 square feet, more or less, according to the bearings and distances listed above.

CERTIFICATION

I, Marcia Hopkins, City Clerk of the City of Richland, Washington (the "City"), hereby certify as follows:

1. The attached copy of Ordinance No. 17-15 (the "Ordinance") is a full, true and correct copy of the Ordinance duly passed at a regular meeting of the City Council of the City held at the regular meeting place thereof on the 21 day of April, 2015, as that Ordinance appears on the Minute Book of the City; and

2. A quorum of the members of the City Council was present throughout the meeting and a majority of those members present voted in the proper manner for the adoption of the Ordinance.

IN WITNESS WHEREOF, I have hereunto set my hand this 21 day of April, 2015.



Marcia Hopkins, City Clerk

STB Docket No. NOR 42163

Appendix 3

45301
EB

SERVICE DATE – SEPTEMBER 14, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35915

TRI-CITY RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER

Digest:¹ The Board finds that the condemnation and acquisition by Kennewick, Wash., and Richland, Wash., of a portion of a railroad right-of-way for an at-grade crossing that would bisect both a line of railroad and a railroad siding is preempted under 49 U.S.C. § 10501(b).

Decided: September 12, 2016

On March 19, 2015, Tri-City Railroad Company, LLC (TCRY), filed a petition for declaratory order requesting that the Board find that the efforts of Kennewick, Wash., and Richland, Wash. (together the Cities), to condemn and acquire a portion of a railroad right-of-way for an at-grade street crossing are preempted by 49 U.S.C. § 10501(b). TCRY claims that the proposed at-grade crossing would unreasonably interfere with its current and future railroad operations. In response, the Cities argue that their condemnation action is not preempted because this dispute involves a routine crossing that would not impede railroad operations or pose undue safety risks.

For the reasons discussed below, the Board concludes that an at-grade crossing at the proposed location would unreasonably interfere with TCRY's present and future railroad operations on one of the tracks at issue and that, therefore, condemnation of the railroad right-of-way to permit construction of an at-grade crossing at that location pursuant to state law is preempted under § 10501(b).

BACKGROUND

Course of Proceedings. TCRY filed its petition on March 19, 2015, and the Cities filed their notice of intent to participate on March 20, 2015. Subsequently, on April 7, 2015, TCRY filed an affidavit to notify the Board that the city councils for both Kennewick and Richland had scheduled separate hearings to consider and vote upon the proposed condemnation ordinance. In a decision served on May 21, 2015, the Board instituted a proceeding and set a procedural schedule. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2 (STB served May

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

21, 2015). The Cities filed their reply to TCRY's petition on June 15, 2015, and TCRY filed a rebuttal on June 24, 2015.

On June 30, 2015, the Cities requested leave to file a reply to TCRY's rebuttal. The Board granted that request and allowed TCRY to rebut the Cities' additional filing. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2-3 (STB served Aug. 31, 2015). In addition to allowing the supplemental filings, the Board noted that the record in this docket would close on September 30, 2015. Id. at 3. The Cities filed their supplemental reply on September 15, 2015, and TCRY filed its supplemental rebuttal on September 30, 2015.

On June 17, 2016, the Cities submitted a June 16, 2016, decision by the Washington State Court of Appeals concerning an appeal of a Washington State Utilities and Transportation Commission (UTC) decision referenced by the parties in their earlier pleadings. On the same day, TCRY filed a letter in opposition noting that the Cities' pleading was filed after the closing of the record in this docket. (TCRY Letter 1, June 17, 2016.)

On June 27, 2016, TCRY filed a letter requesting that the Board expedite its decision. On June 29, 2016, the Cities filed a response in opposition to TCRY's characterization of the issues before the Board in its June 27, 2016, letter.

On July 25, 2016, the Cities submitted two decisions issued by the Washington State Court of Appeals concerning proceedings referenced by the parties in their previous pleadings.

While the record in this docket closed on September 30, 2015, the Board will accept these additional pleadings in the interest of a more complete record.²

The Controversy at Issue. TCRY is a Class III railroad with its headquarters and principal place of business in Benton County, Wash. (TCRY Pet. 4.) TCRY states that it operates as a handling carrier over, and serves as the dispatching carrier on, approximately 16 miles of track (the "line" or "mainline") and that its primary rail yard is located in Richland.³ (Id. at 4-5, 7.) The line is owned by the Port of Benton, and TCRY conducts its rail operations pursuant to a written lease agreement. (TCRY Pet. 4.) TCRY states that it moves carloads for its own customers and operates as the handling carrier for UP. (Id. at 4-5.) BNSF Railway (BNSF) also operates on the line. (Id. at 5.)

² The Board is also accepting the letter submitted on July 26, 2016, by Senator Maria Cantwell requesting an expeditious review of TCRY's petition. TCRY has moved to strike the letter on the grounds that it was not served on all parties and that it could violate the ex parte contact prohibitions of 49 C.F.R. § 1102.2. But here the Board followed its longstanding practice of posting Congressional letters on our website. Therefore, the motion to strike is denied.

³ TCRY states that it has additional operating rights on approximately 37 miles of Department of Energy-owned track and operates on 8 miles of Union Pacific Railroad (UP) track in order to facilitate interchange with UP at Kennewick. (TCRY Pet. 6.)

According to TCRY, the Cities are attempting to use Washington State law to condemn and acquire a right-of-way for a public street which would bisect TCRY's tracks. TCRY explains that the crossing, at the location being proposed, would cross both TCRY's mainline and a 1900-foot parallel track with switches at both ends, which, according to TCRY, "is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south." (*Id.* at 6-7.) TCRY has exclusive use of the parallel track. (*Id.* at 6.)

TCRY states in its petition that the proposed crossing would unreasonably interfere with current and future railroad transportation. (*Id.* at 24-25, 27, 41-43.) Specifically, TCRY argues that the proposed crossing would compromise the railroad's ability to use the parallel track for passing and staging operations, eliminate railcar storage and staging in the vicinity of the southern switch, limit its switching operations generally, and reduce its ability to use the parallel track for over-capacity storage that will be needed in light of expected volume increases. (*Id.* at 1, 24, 41-43.) In particular, TCRY states that because multiple carriers use the mainline, it is critical from an operational standpoint that it have unfettered access to the parallel track in order to set out or hold a train while another train uses the mainline. (TCRY Pet. 7, 41.) Moreover, TCRY states that it needs the parallel track for storing rail cars when the main TCRY yard reaches capacity, and it uses the switches on both ends on a daily basis. (*Id.* at 7.)

TCRY states that it lacks any alternative facility or location at which the rail activities performed on the parallel track could take place. (TCRY Pet. 24-25, 41-43; TCRY Rebuttal at 4, 27, 33.) Moreover, it presents evidence that it expects an increase in rail traffic, and as a result, is exploring expanding the length of the parallel track to 10,000 feet to accommodate unit trains on both the mainline and parallel tracks. (TCRY Pet. 7-8.) As for the mainline, it argues that the portion of the line that this crossing would bisect is one of the only locations where a unit train can be stopped to wait for operations to clear along the track or for other safety reasons. (*Id.* at 7.)

TCRY states that it handled 2,247 carloads (or two 9-car trains per day) in 2013, and that it handled 2,626 carloads (or two 10-car trains per day) in 2014. (*Id.* at 6.) TCRY expected its 2015 numbers to rise to 4,175 carloads, or two 16-car trains per day. (*Id.*) In addition, TCRY states that need for its service should continue to grow because the Preferred Freezer Plant, the largest frozen food plant in the world, was scheduled to begin operations in 2015. (*Id.* at 8.) TCRY also notes that the City of Richland has approved a development plan to construct a rail loop in the Horn Rapids Industrial Park and has entered an agreement with ConAgra Foods to develop an automated cold storage warehouse in the Horn Rapids area. (*Id.* at 16.)

In their reply to TCRY's petition, the Cities state that the proposed at-grade crossing is part of a regionally important project that extends a public street, Center Parkway, between the cities of Kennewick and Richland. (Cities Reply 1, 15.) The Cities note that they have received

state and federal funds for the project and that the proposed at-grade crossing received unanimous approval from the UTC.⁴ (*Id.* at 1-2, 15, 17-19.)

The Cities assert that the use of the trackage at issue for rail transportation would not be compromised by the Cities' grade crossing project.⁵ (*Id.* at 1.) They cite a field study that they conducted, which they claim shows no instance in which TCRY had actually used the full 1900-foot parallel track for its current operations. (*Id.* at 8-11.) The Cities also contend that TCRY's primary use of the parallel track is for the storage of rail cars, which would not require the blocking of the crossing. (*Id.* at 33.) The Cities acknowledge the new rail loop in the Horn Rapids Industrial Park and the new Preferred Freezer Plant in the area, but nevertheless claim that TCRY's carload projections are speculative and too high. (*Id.* at 8-11.)

The Cities argue that regardless of increased track usage, a crossing at the proposed location would not impact railroad operations because TCRY will continue to have right-of-way access over the crossing. (Cities Reply 32.) They also claim that any concerns of undue safety risks are unfounded because gates would prevent vehicular access when a train occupies the track within the limits of the crossing. (*Id.* at 11, 31-33.)

On rebuttal, TCRY provides additional evidence to document its need for all of its rail infrastructure to perform its current and potential future operations. TCRY states that it has begun serving as the rail services manager for the Preferred Freezer Plant, responsible for the management and dispatch of all railroads providing services to the plant. (TCRY Rebuttal 24.) TCRY states that UP sent TCRY 142 empty rail cars for storage in June 2015, prior to the opening of the Preferred Freezer Plant in July 2015, and that after this shipment, additional rail cars arrived, which resulted in both its yard and nearby industrial lead being over capacity. (*Id.* at 24-25.) TCRY also states that prior to the opening of the Preferred Freezer Plant, it staged several hundred refrigerated cars in its rail yard. (*Id.* at 25.)

TCRY further claims that if the crossing is built, it would have to comply with Kennewick Municipal Code (KMC) § 11.80.090, a local ordinance governing grade crossings, and that doing so would result in a loss in capacity to use the parallel track. (TCRY Pet. 23-24.) That ordinance provides, in relevant part, that trains must be left clear of road crossing signal

⁴ The UTC did not address § 10501(b) preemption. Following the second UTC decision issued on June 24, 2014, TCRY filed an action in Washington state court that raised preemption claims. (TCRY Pet. 21.) Subsequently, the state court proceeding was "voluntarily dismissed, without prejudice, by TCRY" so that TCRY could seek a Board determination on whether the proposed condemnation objected to by the railroad to permit this crossing is preempted under federal law. (*Id.* at 23.)

⁵ The Cities' pleadings refer to the Board as having jurisdiction over crossings. In fact, the Board has exclusive jurisdiction over "transportation" by "rail carriers," see 49 U.S.C. § 10501(b), and therefore, federal law preempts any state action, including a condemnation action for a crossing, that would unreasonably interfere with rail transportation under the Board's jurisdiction.

circuits and that, when it can be avoided (1) cars or engines must not be left standing nearer than 250 feet from a road crossing and (2) public crossings must not be blocked for more than five minutes. (*Id.* at 24.)

TCRY also argues that in addition to the KMC, the General Code of Operating Rules (GCOR) — which is a set of operating and safety rules used by most western railroads⁶ — requires that railroads should avoid (1) leaving cars, engines, or equipment standing closer than 250 feet from road crossings when there is an adjacent track and (2) blocking public crossings for more than 10 minutes. (TCRY Rebuttal 4.) TCRY claims that, given the provisions of the KMC and the GCOR and the configuration of the track, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks. (TCRY Rebuttal 30.)

The Cities respond that KMC § 11.80.090 and the GCOR are not mandatory and therefore would not reduce the railroad's capacity to conduct current and future rail operations. (Cities Supplemental Reply 11-14.) The Cities argue that, in fact, these two provisions support the Cities' position that the crossing does not interfere with railroad operations, stating that "the plain language of the provisions establish that TCRY has the flexibility to maintain its railway operations on the 1900-foot siding when the siding is needed for railway operations." (*Id.* at 12.) The Cities also note that BNSF and UP, which operate over TCRY's mainline, have not opposed the location of the proposed crossing.⁷ (Cities Supplemental Reply 7-8.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. We find it appropriate to issue a declaratory order addressing the grade crossing controversy here. As discussed below, we conclude that the proposed at-grade crossing bisecting TCRY's mainline and parallel tracks would unreasonably interfere with TCRY's current and future railroad operations on the parallel track, and therefore any state or local regulation requiring a crossing at the proposed location is preempted under § 10501(b).

The Interstate Commerce Act is "among the most pervasive and comprehensive federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Board's jurisdiction over "transportation by rail carriers" is "exclusive," and "the

⁶ According to the Federal Railroad Administration, at present, most Class I railroads in the U.S. use one of two "standard" rulebooks: the Northeast Operating Rules Advisory Committee (NORAC) rulebook or the GCOR. Conrail, Amtrak, and several commuter and short line railroads in the northeastern United States use the NORAC rulebook. The GCOR is used by every Class I railroad west of the Mississippi River, most of the Class II railroads, and numerous shortline railroads. See FRA report "Compliance with Railroad Operating Rules and Corporate Culture Influences," Oct. 1999, at 2.

⁷ TCRY responds that BNSF and UP have not intervened because they were able to reach separate agreements with the Cities to access the Horn Rapids Industrial Park. (TCRY Rebuttal 2-3.)

remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The Board’s governing statute defines “transportation” expansively to encompass not only railroad operations over the Nation’s rail network but also a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include “a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard, [or] ground used or necessary for transportation.” 49 U.S.C. § 10102(6). The purpose of § 10501(b) is to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Thomas Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff’d 812 F.3d 1141 (8th Cir. 2015); U.S. Env’tl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995). As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp. Inc. v. Ga. Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

It is well settled that the provisions of § 10501(b) preempt permitting or other laws and legal processes that would regulate rail transportation directly or that could be used to deny a railroad’s ability to conduct rail operations. See Wichita Terminal Ass’n—Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015). Courts and the Board have found that state or local actions that “have the effect of managing or governing,” and not merely incidentally affecting, rail transportation are preempted under § 10501(b). Tex. Cent. Bus Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc) (“[L]aws that have the effect of managing or governing rail transportation will be expressly preempted.”); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005) (actions by a state or local entity that directly conflict with the “exclusive federal regulation of railroads” are preempted). Federal preemption applies without regard to whether the Board actively regulates the railroad operations or activity involved. 49 U.S.C. § 10501(b)(2); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008).

The Board has stated that “routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks.” Maumee & W. R.R.—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004); see also E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012) (finding that an easement across a railroad’s property for subterranean water and sewer pipes would not unreasonably interfere with rail operations). The right to proceed under state law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks Inv. Co., 593 F.3d at 414 (rejecting railroad’s preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation) with Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (finding state property law ownership

claims preempted where such claims would directly affect the amount and type of maintenance that could be performed on a railroad right-of-way and limit the capacity of the line of railroad should it be needed for potential future active rail service); see also Maumee & W. R.R., FD 34354, slip op. at 2 (noting that preemption may shield a railroad from state eminent domain laws where the effect of those laws is an unreasonable interference with railroad operations).

The Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available, including condemnation to take property used for rail transportation for another, conflicting use that would unreasonably burden or interfere with rail use, present or future. Wichita Terminal Ass'n, FD 35965, slip op. at 5 (finding that a state court order forcing a railroad to accept a crossing at a certain location would unreasonably burden interstate commerce because it would have the effect of managing or governing property that is part of the national rail network, but that a court-ordered crossing at another location might not have such effects, in which case it would not be preempted); see also Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way preempted by § 10501(b) even if the city's proposed use of the property would have been coextensive with a prior lease); City of Lincoln v. STB, 414 F.3d 858, 861 (8th Cir. 2005) (finding a city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way preempted); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196 (STB served March 1, 2010) (finding a condemnation action to take property on which the railroad was not actively operating trains preempted when proposed condemnation would unreasonably interfere with railroad's future plans); 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (finding claims of adverse possession and prescriptive easement preempted); Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015) (finding an attempt to evict a railroad from property used as part of the interstate rail network preempted).

The Board engages in a fact-specific analysis to consider whether a proposed condemnation action would prevent or unduly interfere with railroad operations and interstate commerce. See Franks Inv. Co., 593 F.3d at 414; Wichita Terminal Ass'n, FD 35965, slip op. at 6. In conducting this analysis, the Board considers both the railroad's current and future plans. City of Lincoln, 414 F.3d at 862 (railroad's future plans can be considered because "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses."); Norfolk S. Ry., FD 35196 (finding preemption based on anticipated impact a condemnation action would have on railroad's future plans for the property).

Here TCRY asks the Board to find that state law condemnation of the right-of-way at the location of the proposed crossing is preempted by federal law. The Cities argue that takings of railroad right-of-way in circumstances such as these are not unusual or controversial and that the Board should not interfere with what they view as a routine crossing that has local support and, in their opinion, would not impinge on TCRY's operations.

The Board's decision here hinges on whether the Cities' attempt to condemn TCRY's property to create an at-grade road crossing would unreasonably interfere with and burden rail

transportation by limiting TCRY's capacity to conduct its current and future operations on the parallel track.

The Board finds that TCRY has demonstrated that the proposed at-grade crossing, which would bisect the mainline and parallel tracks, would unreasonably interfere with and burden both current and future rail transportation on the parallel track. Therefore, state law condemnation of the right-of-way for a crossing at that location is federally preempted.

With respect to current operations, the record makes clear that installation of a crossing at the proposed location would make as much as 600 feet of the 1900-foot long parallel track unusable for TCRY's switching, storage, and interchange operations. The parallel track is the only location along the 16-mile line where these essential railroad operations can be performed. TCRY, as the dispatcher for the entire length of the mainline (including UP and BNSF traffic), has demonstrated that a loss of useable parallel track would impinge on TCRY's ability to conduct its current operations. For example, TCRY explains that the current configuration of the 1900-foot track, with switches at both ends, allows TCRY to spot and store cars for various lengths of time at one end of the track while using the other end for moving and holding trains. (TCRY Rebuttal 26-28.) However, the location of the proposed crossing would require TCRY to relocate switching operations from the southern switch to the northern switch for interchange with UP at Kennewick. (TCRY Rebuttal, V.S. Foster Peterson 15.) TCRY's experts have stated that this would be an inefficient way to operate. (*Id.*) Accordingly, federal preemption applies. See Wichita Terminal Ass'n, FD 35965, slip op. at 9 (finding a crossing is federally preempted because it would unreasonably burden or interfere with the interchange of railcars).

The Cities take issue with TCRY's June 24, 2015 rebuttal testimony from TCRY's President and CEO, Randolph Peterson. They note that Mr. Peterson's statement that the proposed crossing would "drastically interfere with [TCRY's] railroad operations" is inconsistent with prior statements before the UTC in 2013 that there would be no operational interference. (Cities Supplemental Reply 9-11.) We recognize that Mr. Peterson's testimony on rebuttal could be viewed as inconsistent with prior statements made before the UTC in 2013. However, the statements to the UTC were made several years ago and do not reflect the subsequent increase in carloads handled that has taken place since 2013, or the existence of the Preferred Freezer Plant or the new rail loop. Thus, notwithstanding this testimony, the weight of the evidence demonstrates that the proposed crossing bisecting the mainline and parallel tracks would unreasonably interfere with TCRY's current and planned future operations.

TCRY has established a need for full access to the parallel track for its future operations. See City of Lincoln, 414 F.3d at 862; Norfolk S. Ry., FD 35196, slip op. at 3-4; Jie Ao & Xin Zhou, FD 35539, slip op. at 6 (finding plans for the future use of a railroad right-of-way, which were less concrete than TCRY's, an acceptable basis on which to find preemption). It is undisputed that the new Preferred Freezer Plant has begun operating and that a rail loop to support this facility has been, or soon will be, constructed in the Horn Rapids Industrial Park (located on the northern end of TCRY's line). While the parties differ on whether TCRY currently uses the entire length of the 1900-foot parallel track and how much additional rail traffic there will actually be, there is no doubt that an increase in rail capacity (i.e., the rail loop) and an additional large customer (i.e., the Preferred Freezer Plant) are likely to lead to an

increase in traffic on TCRY's line and the number of cars that will need to be staged, stored, and interchanged on the parallel track. TCRY's evidence demonstrates that unrestricted use of the entire length of the parallel track will be needed to handle the future expected influx of rail cars from new customers and to stage, pause, or hold manifest trains approaching the rail loop. (See TCRY Pet. 7, 24, 41-43; TCRY Rebuttal 26-28.) TCRY has limited capacity and system infrastructure. As TCRY notes, it received a large influx of cars in preparation for the opening of the Preferred Freezer Plant commencing operations, and this influx caused its yard and the parallel track to reach capacity. (TCRY Rebuttal 23.) While TCRY states that it has begun to explore its options for extending the parallel track (which itself suggests that the railroad cannot do with less than the entire length of the parallel track), it is unclear from the record that TCRY actually would be able to do so under the terms of its lease with the Port of Benton. In these circumstances, TCRY has shown that it needs the ability to continue full, unimpeded use of the entire parallel track to carry out its current and future operations and that losing any part of the parallel track would leave insufficient room for these operations.

The Cities also suggest that federal preemption does not apply here because the mainline and parallel tracks that the crossing would bisect are owned by the Port of Benton, and TCRY operates over the tracks pursuant to a lease. (Cities Reply 1, 41-42.) It is common, however, for railroads to hold various types of property interests in the land that constitutes their right-of-way. See, e.g., Cayuga Cty. Indus. Dev. Agency—Acquis. Exemption—Finger Lakes Ry., FD 36011 et al. (STB served July 14, 2016) (acquisitions and subleases). The Cities have proffered no evidence showing that TCRY lacks the property interest it needs to perform its current and future rail operations. As the Board explained in Norfolk S. Ry., FD 35196, slip op. at 6, the Board has jurisdiction over rail transportation regardless of whether the property on which that transportation is being conducted is owned, leased, or held in easement by the operating railroad. See also § 10102(9) (defining transportation expansively to encompass facilities of any kind related to the movement of property by rail “regardless of ownership or an agreement concerning use”).

Similarly, whether or not the parallel track is considered “siding” track, as the Cities argue (Cities Reply at 12-13), federal preemption would still apply. Under 49 U.S.C. § 10906, side track is excepted from Board licensing, but is still within the Board's jurisdiction. *Id.* The Board and the courts have consistently found that because the Board's jurisdiction over transportation is “exclusive,” § 10501(b) preempts state law remedies without regard to whether or not the Board actively regulates activities on the particular track involved. See Pace, 613 F.3d at 1068-69 (finding state law claims related to side track preempted); Port City Props., 518 F.3d at 1188 (finding state law claims preempted even though the Board does not actively regulate spur and side track). Here TCRY has shown that the parallel track is used to support rail operations subject to the Board's jurisdiction, §§ 10102(6), 10102(9), and that the proposed crossing would unduly interfere with TCRY's ability to perform its current and future operations on that track. Accordingly, federal preemption applies.

The Cities fail to show that TCRY erred in relying on the GCOR provisions providing that cars generally should not be spotted less than 250 feet from each side of the crossing. TCRY claims that, given these provisions, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks, given the configuration of the track. (TCRY

Rebuttal 30.). The record here shows that TCRY has adopted the GCOR. (See TCRY Pet., V.S. Peterson 12.) Despite the Cities' contention that the GCOR provisions are not mandatory for TCRY, the provisions of the GCOR represent industry best practices. Thus, as TCRY states, failure to establish operating rules consistent with the GCOR standards could open the railroad to potential liability it would not otherwise face. (TCRY Supplemental Rebuttal at 12-13.) In any event, federal preemption would apply here without regard to whether TCRY's operations on the parallel track comply with the GCOR standards. The courts and the Board have found that even minimal loss of railroad right-of-way is too much where, as here, the railroad objects and shows that full use of the property (e.g., the parallel track) is needed in connection with its current and future rail transportation plans. See City of Lincoln, 414 F.3d at 861 (involving loss of 20-foot longitudinal strip at the edge of a railroad's right-of-way); Norfolk S. Ry., FD 35196, slip op. at 4 ("it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses"). Having found persuasive TCRY's argument that compliance with the GCOR limits its use of the parallel track, the Board need not address the parties' arguments regarding the effect of § 11.80.090 of the KMC on railroad operations.

For the reasons discussed above, we find that the efforts of the Cities to condemn and acquire a right-of-way for an at-grade crossing at the proposed location, bisecting both the parallel and main tracks, are preempted by § 10501(b).

It is ordered:

1. TCRY's petition for declaratory order is granted to the extent discussed above.
2. TCRY's motion to strike Senator Cantwell's letter is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

VICE CHAIRMAN MILLER, commenting:

I agree that today's decision reaches the correct legal outcome, though unfortunately, I do not think it is the best possible outcome. I would have preferred that the Board require the parties to engage in mediation to determine if there was a solution that would have been mutually acceptable to both sides.

The Cities have a significant interest in building a road that will connect the two cities. The project is identified as an essential capital improvement in the Cities' Comprehensive Plan and in the Regional Transportation Plan and, if completed, would promote important public benefits, such as reducing traffic congestion, increasing access by emergency responders, and promoting economic development. The Cities have also expended a significant amount of resources in planning. The record shows that it involved years of work, including extensive

hearings and review. The project has also received federal and state funding, and appears to be supported by all state, regional, and local planning and transportation agencies.

Our decision today basically negates all of this. In my view, the Board should have exhausted all options to keep this important public project alive before reaching today's winner-take-all decision, including mediation. Mediation would have been particularly useful here. The record indicates that the Cities successfully negotiated with both UP and BNSF to obtain their consent to the proposed at-grade crossing, suggesting that a negotiated solution was not outside the realm of possibility. It also appears that the two sides, despite having been involved in years-long litigation, have never really sat down with one another to discuss a mutually-agreeable solution. In fact, the Cities state that TCRY chose not to engage in the Cities' extensive planning process for the crossing, despite being invited to participate; that TCRY submitted no comments in the planning process; and that TCRY did not attend the Washington Utilities and Transportation Commission's diagnostic meeting for the crossing. (Cities Reply 19.) The Cities also note that it was not until TRCY's rebuttal in this case that they became aware of TRCY's plans to extend the parallel track. (Cities Supplemental Reply, V.S. Rogalsky 5.) It disappoints me that TRCY did not try to work with the Cities, particularly when there might have been a way for it to protect its own interests while looking for a way to help them accomplish their goal. Perhaps had the Board required the parties to communicate, with the assistance of a Board-appointed mediator, they could have reached a solution that would have met both sides' needs.

When the Board enabled itself to force parties to engage in mediation, it stated that it "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, *wherever possible*." Assessment of Mediation & Arbitration Procedures, Docket No. EP 699, slip op. at 2 (STB served May 13, 2013) (emphasis added). However, since then, the Board has only used this power in two instances (or less than one case per year).¹ The Board needs to consider using all the tools in its toolbox, including mediation where it makes sense. This proceeding is one where it would have made sense.

This case also highlights yet again what I believe is the Board's inability to handle cases quickly under its current processes.² Today's decision comes nearly a year after the last significant filing in the case, which was made on Sept. 30, 2015. (Although there were recent filings, they merely provided updates in the related state proceeding – updates that would not

¹ The two proceedings in which the Board ordered the parties to mediate were Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141 and BNSF Ry.—Terminal Trackage Rights—Kansas City S., Docket No. FD 32760 (Sub-No. 46).

² See Petition for Rulemaking to Adopt Revised Competitive Switching, Docket EP 711, *et al.*, (STB served July 27, 2016) (Miller comment); CSX Transp., Inc.—Acquis. of Operating Easement—Grand Trunk W. R.R., Docket No. FD 35522 (STB served June 22, 2016) (Miller comment) ("The fact that parties in even the most urgent cases must still wait months before a decision is issued demonstrates the need for the Board to reconsider our internal decision-making process.").

have been necessary had the Board ruled sooner). The proceeding had been pending for so long that one party felt compelled to write a letter to the Board expressing urgency³ and a U.S. Senator felt it necessary to make an inquiry.⁴

As I have previously noted, I am frustrated by the Chairman's unwillingness to consider changes that I think would help improve timeliness.⁵ The resistance is particularly puzzling given that Congress has already had to step in and require the agency to begin filing quarterly reports on unfinished regulatory proceedings (i.e., rulemakings), forcing the agency to create deadlines for next actions and to provide explanations if those deadlines are not met. All three Board Members have expressed a belief that this reporting requirement is having a positive impact on the pace of those proceedings.⁶ If that is the case, then the Chairman should be willing to apply those same principles to our other proceedings – and we should not wait for a directive from Congress to do so.

³ See TRCY's June 27, 2016 letter.

⁴ See Senator Maria Cantwell's July 26, 2016 letter.

⁵ Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 9 (2016) (statement of Vice Chairman Deb Miller, Surf. Transp. Bd.) ("During my time as Acting Chairman, I began two initiatives to try to address these problems: setting target dates for the completion of all pending matters in our formal proceedings and creating a set of internal performance metrics to measure how the Board is performing in terms of managing its docket. It was my hope that these initiatives would be continued, but they were not."). Commissioner Begeman has also expressed frustration with the Board's pace and a desire to improve the functioning of the agency. See Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 1-2 (2016) (statement of Commissioner Ann Begeman, Surf. Transp. Bd.).

⁶ Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. (2016), video archive, at 01:47:00, available at: <https://www.youtube.com/watch?v=J9Sv9Gqgpf&feature=youtu.be&t=19m51s>, testimony of Chairman Daniel Elliott, Surf. Transp. Bd. ("First of all, I would like to start off by saying that as far as the unfinished regulatory proceeding[s] reports themselves, I think they've been excellent, I think the results speak for themselves, and you've seen things coming out of the agency at a pace that didn't occur in the past. Personally, I very much appreciate that transparency and it's created, I think, some great efficiencies at the Board that didn't exist before. So, you know, all and all, I think it's been great."). See also statement of Commissioner Begeman, at 3, and statement of Vice Chairman Miller, at 3.

STB Docket No. NOR 42163

Appendix 4

JOSIE DELVIN
BENTON COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

THE CITY OF KENNEWICK, a
Washington municipal corporation; THE
CITY OF RICHLAND, a Washington
municipal corporation,

Petitioners,

v.

PORT OF BENTON, a Washington Port
District; TRI-CITY RAILROAD
COMPANY, LLC, a Washington limited
liability company; BENTON COUNTY, a
Washington political subdivision,

Respondents.

[In re Center Parkway]

NO. 15-2-01039-2

COMBINED RESPONSE OF
PETITIONERS THE CITY OF
KENNEWICK AND THE CITY OF
RICHLAND TO MOTION FOR
ATTORNEY'S FEES AND MOTION TO
DISMISS OF RESPONDENT TRI-CITY
RAILROAD COMPANY, LLC

The City of Kennewick and the City of Richland (the "Cities") oppose TCRY's
motions for attorney's fees and to dismiss. The Cities respectfully submit this combined
memorandum of points and authorities in response.

I. INTRODUCTION

A. Summary response to motion for attorney's fees.

COMBINED RESPONSE OF PETITIONERS
TO MOTIONS FOR ATTORNEY'S FEES
AND TO DISMISS - 1

MENKE JACKSON BEYER, LLP
807 North 39th Avenue
Yakima, WA 98902
Telephone (509)575-0313
Fax (509)575-0351

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3 Respondent Tri-City Railroad Company, LLC, ("TCRY") seeks recovery of more
4 than \$150,000 in attorney's fees, expert fees, and costs despite the fact that virtually no
5 litigation has occurred in this eminent domain case. The motion of TCRY seeks the
6 recovery of attorney's fees and costs for work involved in litigating issues before the federal
7 Surface Transportation Board ("STB"). The work done in that forum did not merit recovery
8 of fees or costs in those proceedings, and should not result in any recovery of fees or costs
9 here.
10

11 TCRY misapplies RCW § 8.25.075 to the present circumstances. This statute does
12 not warrant the relief TCRY requests. TCRY's motion is not founded on any contract or
13 recognized ground in equity. TCRY's motion is improperly supported and should be denied
14 for this reason alone.
15

16 **B. Summary response to motion to dismiss.**

17 TCRY seeks dismissal of this eminent domain case on grounds that a prior decision
18 of the STB preempts this matter and deprives this Court of subject matter jurisdiction. This
19 argument assumes that this eminent domain action is necessarily tied to the facts of the
20 particular railroad crossing that was reviewed by the STB.
21

22 As shown below, however, the Cities have altered the proposed crossing in a way
23 that cures the grounds on which the STB found preemption. In addition, the circumstances
24 of TCRY's use of the rail lines at the Center Parkway crossing have changed since the STB
25 considered the matter in 2015. TCRY is correct that the Cities did not further appeal the
26 result of the STB decision arising out of the former crossing design. But TCRY overstates
27 its case in claiming that this represents an abandonment of the Cities' plans to develop an
28 appropriate crossing at Center Parkway. Where the impact on rail transportation is only a
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3 “routine non-conflicting use[], such as non-exclusive easements for at-grade road
4 crossings...[they] are not preempted so long as they would not impede rail operations or
5 pose undue safety risks.” *Maumee & Western Railroad Corp. & RMW Ventures, LLC, -*
6 *Petition for Declaratory Order*, STB Finance Docket No. 34354, (S.T.B.) (March 3, 2004,
7 2004 WL 395835 at *2).

8
9 Although the STB decision in the present matter stands for the preemption of the
10 Cities’ previous crossing design, the current crossing design has not been reviewed by the
11 STB. This Court should not accept TCRY’s implied theory that *all* crossings at Center
12 Parkway would be found by the STB to conflict with the Interstate Commerce Commission
13 Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10101, *et seq.*

14
15 The motion to dismiss is improper or at best premature.

16 **II. STATEMENT OF FACTS**

17 **A. Background summary.**

18 This condemnation action was brought jointly by the Cities pursuant to the eminent
19 domain rights conferred at Chapter 8.12 RCW. Prior to TCRY’s recent motions, filings in
20 this action consisted of a petition for condemnation (filed May 7, 2015) and an agreed
21 disclaimer of interest and order of dismissal of respondent Benton County (filed October 8,
22 2015). No matter has been litigated in this action. No rulings have been issued. No
23 discovery has occurred.

24
25 To understand how TCRY could seek recovery of more than \$150,000 in attorney’s
26 fees and costs in the absence of any significant activity in this case, it is necessary to
27 consider the extensive history between the parties, virtually all of which has involved
28 litigation in other forums.

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3 **B. Introduction to the parties.**

4 The Cities have for many years sought to extend Center Parkway across an at-grade
5 crossing of rail lines owned by the Port of Benton at a site known as the Richland Junction.
6 Declaration of Kenneth W. Harper ("Harper dec.") Ex. A, at ¶ 5. This extension would
7 enable motorists to travel along Center Parkway from Tapteal Drive in Richland toward
8 Gage Boulevard in Kennewick in a busy and growing part of both cities. Harper dec. Ex. B,
9 at p. 3; Declaration of Peter Rogalsky ("Rogalsky dec.") at Exs. A and B. The City of
10 Richland is also the owner of a railroad industrial spur track commonly known as the Horn
11 Rapids Spur. Harper dec. Ex. C, at p. 1. This trackage is located at the Horn Rapids
12 Industrial Park and is connected to the Southern Connection of the Hanford Railroad, which
13 is owned by the Port of Benton. *Id.*

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16 TCRY is a Class III railroad. Harper dec. Ex. D, at p. 2. TCRY owns or leases a
17 number of locomotives that it uses to provide rail service in the nearby vicinity. *Id.* at p. 4.
18 TCRY operates on approximately 16 miles of the Southern Connection of the Hanford
19 Railroad. *Id.* TCRY operates on this trackage as the Port of Benton's lessee pursuant to a
20 written lease agreement. *Id.*

21
22 TCRY has no fee interest in the property that the Cities seek to acquire in this action.
23 The only interest of TCRY is as a lessee of the Port. *See* Condemnation Petition at Ex. B.
24 And the only interest that the Cities seek to acquire is an easement. *Id.* at p. 1. The Cities
25 stand ready to pay just compensation to TCRY for the real property interests that they need.
26 *Id.* at p. 4.

27
28 **C. The crossing dispute.**
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3 Since at least 2001, the Cities have sought to complete the Center Parkway
4 connection. Rogalsky dec. at p. 3. An aerial view identifying this connection is helpful to
5 understand its importance. *Id.* at Ex. A. A more focused railroad study site map is also
6 useful. *Id.* at Ex. B. The Center Parkway extension is considered a major capital project by
7 the City of Richland that is needed to provide a link for emergency vehicle response and to
8 support transportation connectivity. Harper dec. Ex. E, p. 5. It will promote economic
9 development in this growing commercial area by helping establish a complete road network,
10 providing significant relief for traffic congestion, and improving access to developable
11 lands. *Id.* at Ex. A, ¶¶ 54-55.
12

13
14 In 2001, the location of the proposed Center Parkway at-grade crossing was used by
15 three railroads – BNSF Railway (“BNSF”), Union Pacific (“UP”), and TCRY – to exchange
16 railroad cars. *Id.* at Ex. C, p. 5. All three railroads initially opposed the Cities' proposed at-
17 grade crossing, but BNSF and UP no longer oppose the location of the proposed crossing.
18 *Id.* at Ex. F, p. 5. Only TCRY opposes the proposed crossing. *Id.* at Ex. G, p. 1.
19

20 By 2011, the City of Richland had negotiated agreements with BNSF and UP to
21 allow the Center Parkway project. Rogalsky dec. at p. 3. The agreement between the City
22 and BNSF did not include any monetary compensation because BNSF did not own any
23 infrastructure that would be displaced. *Id.* The agreement with UP provided \$2.1 million in
24 compensation to UP for the purpose of replacing its directly impacted infrastructure and for
25 the value of the real estate rights acquired by the City. *Id.* No agreement was reached with
26 TCRY. *Id.*
27

28 Consequently, the Cities, with Richland as lead agency, advanced the project by
29 seeking authorization from the Washington State Utilities and Transportation Commission
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3 for a new at-grade crossing. After a contested administrative process, the WUTC issued a
4 final order dated May 29, 2014, which granted the Cities' request. Harper dec. Ex. G.

5 TCRY petitioned for judicial review of the WUTC's decision. The case proceeded as
6 Benton County Superior Court cause no. 14-2-01894-8. TCRY's appeal was heard by the
7 Honorable Bruce A. Spanner. Judge Spanner issued an order dated December 9, 2014,
8 which affirmed the WUTC's decision. *Id.* at Ex. H.

9
10 TCRY appealed Judge Spanner's ruling to the Washington State Court of Appeals.
11 In a decision published in part at *Tri-City R.R. Co., LLC v. Utils. & Transp. Comm'n*, 194
12 Wn. App. 642 (2016), the Court of Appeals disagreed with TCRY's theory that the WUTC
13 exceeded its statutory authority. *Id.* at Ex. A, ¶ 28. Instead, the court held that the WUTC's
14 interpretation of its enabling statute was not unreasonable and stated that "[n]othing in the
15 plain language of the pertinent statutes supports Tri-City's argument that the commission
16 improperly considered local planning and development concerns." *Id.* The court
17 emphasized that the City of Richland had successfully negotiated with BNSF and UP to
18 remove two of the four railroad tracks that would intersect with the proposed crossing. *Id.* at
19 ¶ 7, n.4. As a result of these negotiations, the court observed, the crossing would only affect
20 half as many tracks and faced opposition by only one railroad: TCRY. *Id.*

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22
23 TCRY challenged the Court of Appeals decision with a petition for review in the
24 Washington State Supreme Court, which was denied in an order dated December 7, 2016.

25 Following Judge Spanner's affirmance of the final decision of the WUTC, the Cities
26 commenced this condemnation action with a petition filed May 7, 2015. Shortly after the
27 condemnation petition was filed, TCRY filed a petition for a declaratory order with the
28 federal Surface Transportation Board dated March 18, 2015. *Id.* at Ex. F, at p. 1. TCRY
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3 argued that the Cities' proposed crossing did not fall within the "routine crossing" exception
4 to federal preemption found at 49 U.S.C. § 10501(b). *Id.* at pp. 7-8. The "routine crossing"
5 exception to the preemption rule is based on prior STB decisions and on federal caselaw.
6 *See, e.g., Maumee & Western Railroad Corp. & RMW Ventures, LLC, - Petition for*
7 *Declaratory Order*, STB Finance Docket No. 34354, (S.T.B.) (March 3, 2004, 2004 WL
8 395835 at *2) (no preemption for routine, nonconflicting uses such as nonexclusive
9 easements for at-grade railroad crossings); *New Orleans & Gulf Coast Ry. Co. v. Barrois*,
10 533 F.3d 321, 332-34 (5th Cir. 2008) (upholding STB jurisdictional avoidance of such
11 crossing cases); *City of Sachse, Texas v. Kansas City Southern*, 564 F. Supp. 2d 649 (E.D.
12 Tex. 2008) (same).

13
14
15 TCRY's arguments before the STB were based, in part, on TCRY's operations on the
16 trackage as the handling carrier for UP.¹ Harper dec. Ex. F, at p. 2. TCRY also argued to
17 the STB that the at-grade crossing proposed by the Cities would unreasonably interfere with
18 current or planned railroad operations and thus did not qualify for the "routine crossing"
19 exception because it would bisect a 1,900-foot parallel track adjacent to the mainline. *Id.* at
20 p. 3.

21
22 The Cities' proposed crossing that was the subject of the STB litigation was a result
23 of an extensive design process performed by knowledgeable railroad professionals. *Id.* at
24 Exs. B and I. The crossing design was developed to ensure that trains would continue to
25 have the right of way over the crossing. *Id.* at Ex. I, p. 4. The crossing design included
26 gates that would block vehicular traffic whenever the tracks were in use. *Id.* In addition,
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29 ¹ A handling carrier is an agent, often a shortline railroad, not involved in the line haul of a
30 particular shipment. A handling shortline mainly exists to move cars for larger railroads.

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3 supplementary safety measures, such as a raised median, would keep drivers from
4 circumventing the gates. *Id.* The Cities argued to the STB that the crossing would have no
5 impact on the movement of freight and would not adversely impact TCRY operations. *Id.* at
6 Ex. F, p. 4. The Cities pointed out that the track owner, the Port of Benton, and both BNSF
7 and UP did not object to the crossing. *Id.* at p. 5.

8
9 However, in a decision issued September 14, 2016, the STB found that the Cities'
10 proposed crossing was preempted under 49 U.S.C. § 10501(b) because of the effect of the
11 crossing on the 1,900-foot parallel track. *Id.* at p. 7-8. The STB stated as follows:

12 The Board's decision here hinges on whether the Cities' attempt to condemn
13 TCRY's property to create an at-grade road crossing would unreasonably
14 interfere with and burden rail transportation by limiting TCRY's capacity to
conduct its current and future operations on the parallel track. *Id.*

15 In announcing its holding, the STB further stated:

16 The courts and the Board have found that even minimal loss of railroad right-
17 of-way is too much where, as here, the railroad objects and shows that full
18 use of the property (e.g., the parallel track) is needed in connection with its
current and future rail transportation plans. *Id.* at 10.

19 The Cities appealed the STB's decision to the Ninth Circuit Court of Appeals.
20 Proceedings in the Ninth Circuit were stayed pending mediation efforts. Ultimately, the
21 appeal was withdrawn and dismissed in an order dated November 2, 2017.

22
23 **D. The Cities' proposed relocated parallel track.**

24 As the Ninth Circuit appeal remained pending, the City of Richland developed an
25 alternative crossing proposal that would permit extension of Center Parkway while at the
26 same time assuring that no user of the Port's railroad lines, including TCRY, would
27 experience any operational impairment. Rogalsky dec. at p. 4. The alternative crossing
28 would address the concerns raised by the STB because it would preserve the full capacity
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3 and utility of the parallel track while allowing for the routine installation of the Center
4 Parkway connection across only the railroads' main track. This was not a configuration
5 addressed in the STB's preemption decision. The City of Richland's new proposal would
6 relocate the parallel track several hundred feet to the north (railroad west) at the City's sole
7 expense, so that the southern switch of the parallel track would be to the north of the
8 proposed Center Parkway at-grade crossing. *Id.* The northern switch would be relocated an
9 equivalent distance to the north, maintaining the parallel track's full 1,900-foot original
10 capacity, and keeping that track entirely out of the path of any highway crossing. *Id.*

11
12 The City of Richland's consulting engineering firm determined that the relocation
13 plan is feasible and that there is sufficient right-of-way to accommodate the proposed track
14 modifications. *Id.* In December 2016, the City shared its proposal with the Port of Benton.
15 *Id.* at Ex. C. The City asked the Port to gather comments from all parties involved with the
16 affected trackage, including not only the Port but also BNSF, UP, and TCRY. *Id.* at Ex. C,
17 p. 2. Various revisions were made to the relocation plan in order to accommodate comments
18 of BNSF and UP. *Id.* at Ex. C, D, and E. TCRY refused to provide any substantial design-
19 related comments. *Id.* at p. 3.

20
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22 After these revisions were reviewed, the Port stated in a letter dated July 17, 2017,
23 that its Commission "determined the proposed modifications to the Port's passing track will
24 improve the safety, utility and efficiency of the Port Railroad and the proposed
25 modifications would mitigate the impacts which an at-grade crossing for Center Parkway
26 crossing might have upon railroad operations." *Id.* at Ex. F.

27
28 **E. TCRY's termination as an agent and handling carrier for UP.**

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3 The decision of the STB regarding preemption was based on the physical
4 arrangement of the parallel track and the proposed at-grade crossing. The STB decision was
5 also based on TCRY's "current and future railroad operations" which, at that time, included
6 TCRY's role as an agent and handling carrier for UP. Harper dec. Ex. F, at pp. 1, 2.
7

8 TCRY submitted evidence to the STB showing that a considerable volume of the
9 total rail traffic arising from the Horn Rapids Spur was delivered by TCRY as UP's handling
10 agent. *Id.* at p. 10. The STB accepted TCRY's evidence that TCRY expected an increase in
11 rail traffic and that this increased traffic would further impact TCRY's need for operations
12 on the parallel track. *Id.* at Ex. F, at p. 3.
13

14 More recently TCRY has been informed by UP—and TCRY has in turn informed the
15 City of Richland—that TCRY will no longer serve as UP's agent and handling carrier.
16 Rogalsky dec. at Ex. G. The only access that TCRY had to the Horn Rapids Spur was
17 pursuant to TCRY's status as a handling carrier for UP. Harper dec. Ex. D, at p. 5.
18

19 III. LEGAL ARGUMENT

20 TCRY's request for attorney's fees encompasses extensive litigation undertaken by
21 TCRY in proceedings outside this condemnation action. TCRY's legal work in this
22 condemnation action consists of little more than the fee request itself.
23

24 No substantive issue has been presented to the Court in this condemnation action.
25 No issue in this condemnation action has been decided. Circumstances relating to the
26 proposed Center Parkway at-grade railroad crossing have changed following the
27 proceedings in the WUTC, the Court of Appeals, and the STB. The proposal to relocate the
28 parallel track at the City of Richland's expense has been deemed acceptable by the track's
29 owner, the Port of Benton, and by BNSF and UP. Although the STB found the former
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3 crossing design to result in preemption under federal law, no tribunal has heard or decided
4 any challenge to the new proposed crossing with relocation of the parallel track.

5 Additionally, changes in the business decisions of UP mean that TCRY's future rail
6 operations will likely be different because it will no longer be the handling carrier for UP.
7
8 Key factors upon which the STB previously found federal preemption no longer pertain.

9 TCRY has not recovered any of its attorney's fees or litigation costs in any of the
10 prior proceedings. No authority supports TCRY's attempt to recover those expenditures in
11 this condemnation action. This result is not authorized by Washington's eminent domain
12 statutes.

13 Additionally, TCRY has failed to properly support its request for attorney's fees.

14
15 **A. The motion to dismiss fails because this eminent domain action has not been**
16 **preempted.**

17 TCRY argues that the Cities have abandoned this case because the Cities did not
18 further prosecute their appeal of the STB decision arising out of the former crossing design
19 for Center Parkway. In this way, TCRY seeks to justify its claim for attorney's fees based
20 on RCW § 8.25.075(1)(b). As the statement of facts above shows, the Cities have not
21 abandoned this case.

22 TCRY also argues that the STB decision is a final adjudication that the condemnor
23 cannot acquire the real property by condemnation. RCW § 8.25.075(1)(a). According to
24 TCRY, the STB decision requires that this case be dismissed due to federal preemption
25 under ICCTA, citing 49 U.S.C. § 10501(b). But the STB decision itself says no such thing.
26 Instead, the STB engaged in a "fact-specific analysis" of the crossing that was put forth by
27 the Cities in 2015. Harper dec. Ex. F, at p. 7. The Cities' former proposal, not this eminent
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3 domain action itself, was found to “unduly interfere with TCRY’s ability to perform its
4 current and future operations on that track.” *Id.* at 9.

5 **1. Standard of review for preemption analysis.**

6 “There is a strong presumption against preemption and [s]tate laws are not
7 superseded by federal law unless that is the clear and manifest purpose of Congress.”
8 *Stevedoring Servs. of America, Inc. v. Eggert*, 129 Wn.2d 17, 24, 914 P.2d 737 (1996)
9 (internal quotations omitted). Although ICCTA contains a broad statement of preemption in
10 favor of railroad operations, this “preemption does not completely remove any ability of
11 state or local authorities to take action that affects railroad property.” *Maumee*, STB
12 Finance Docket No. 34354, at *2. “To the contrary, state and local regulation is permissible
13 where it does not interfere with interstate rail operations, and localities retain certain police
14 powers to protect public health and safety.” *Id.* “Thus, acquisition of an easement by
15 eminent domain to permit a crossing of railroad track in connection with construction of a
16 new public street would not implicate [preemption] unless it would prevent or unreasonably
17 interfere with railroad operations.” *Id.*

18
19 In the context of a specific condemnation proposal, the issue of preemption is
20 analyzed on an “as-applied” basis rather than as a categorical or per se matter. *Union Pac.*
21 *R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 679 (7th Cir. 2011). This is because “a
22 condemnation is not a rule of general applicability because each instance necessarily varies
23 with the facts of the case and the specific property subject to the condemnation.” *Union*
24 *Pac. R.R. Co.*, 647 F.3d at 679-80.

25 These principles were applied to a modified grade separation design in *City of*
26 *Sachse, Texas v. Kansas City Southern*, 564 F. Supp. 2d 649 (E.D. Tex. 2008). In *City of*

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3 *Sachse*, the court noted that a “mundane structure such as a railroad grade crossing” would
4 not be completely preempted by ICCTA. *City of Sachse*, 564 F. Supp. 2d at 656. It was
5 impossible for the court to analyze the “as-applied” test in that case because an “adjusted
6 design” for the crossing had been proposed in order to meet certain safety concerns raised by
7 an earlier design -- but the adjusted design was not then properly before the court. *Id.* At
8 the same time, the design that was properly before the court had also not been addressed
9 regarding its safety risks. *Id.* The court held that ICCTA preemption could not exist on that
10 record. *Id.*

11
12 Here, the current design before the court accompanies these pleadings. Rogalsky
13 dec. at p. 4. This design has not been considered by the STB and this Court will not have an
14 adequate record to conclude that ICCTA categorically applies. This Court also will not be
15 able to determine that as-applied preemption fits here. And under the doctrine of primary
16 jurisdiction, this Court should refrain from venturing any opinion on preemption in order to
17 allow the STB to determine its view of the issue. Courts have repeatedly applied the
18 doctrine of primary jurisdiction in the context of ICCTA preemption because the STB has
19 particular expertise in deciding matters affecting transportation policy. *See Elam v. Kansas*
20 *City Southern R.R. Co.*, 635 F.3d 796, 809-10 (5th Cir. 2011).

21
22
23 **2. Standard of review for CR 12(b)(1) motion to dismiss.**

24 A motion to dismiss for lack of subject matter jurisdiction brought pursuant to CR
25 12(b)(1) may be either facial or factual. *Outsource Servs. Mgmt., LLC v. Nooksack Bus.*
26 *Corp.*, 172 Wn. App. 799, 806-07, 292 P.3d 147 (2013). Where a motion to dismiss under
27 CR 12(b)(1) is facial, appellate review is de novo. *Outsource*, 172 Wn. App. at 807. But
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3 where it is factual, the trial court must weigh evidence to resolve disputed jurisdictional facts
4 and appellate review will be under the clear error standard. *Id.*

5 Here, there has been no proceeding to resolve the facts of the City's current proposed
6 crossing design on TCRY. Circumstances of the design, and its effect on TCRY operations,
7 will likely be disputed. Whether the new design triggers ICCTA preemption must be
8 determined on an as-applied basis. The matter is proper for review by the STB, not this
9 Court. Dismissal for lack of subject matter jurisdiction due to ICCTA preemption that has
10 not yet been found by the STB would be premature. The motion to dismiss should be
11 denied.
12

13 **B. Washington's eminent domain statutes do not provide a right to recovery of**
14 **attorney's fees under these circumstances.**

15 TCRY's claim to attorney's fees is based on RCW § 8.25.075(1), which states, in
16 pertinent part, as follows:
17

18 (1) A superior court having jurisdiction of a proceeding instituted by a
19 condemnor to acquire real property shall award the condemnee costs
including reasonable attorney fees and reasonable expert witness fees if:

20 (a) There is a final adjudication that the condemnor cannot acquire the real
21 property by condemnation[.]

22 TCRY argues that the decision of the STB constitutes a determination that the Cities may
23 not proceed with their proposed condemnation for want of jurisdiction, due to express
24 federal preemption. TCRY's argument is wrong.

25 First, the STB decision states nothing about the jurisdiction of this Court. The STB's
26 finding of preemption was a matter based on the particular facts before the STB and the
27 arguments made by TCRY in the STB proceedings. 49 U.S.C. § 10501(b).
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3 Second, TCRY's reasoning based on the actual holding of the STB is fallacious in
4 several respects. TCRY's argument is misguided and should be rejected.

5 **1. The decision of the STB has no bearing on the fee-awarding terms of**
6 **RCW § 8.25.075(1)(a).**

7 The basis for consideration of an award of attorney's fees under Washington law
8 must be considered. A court has no power to award attorney's fees in the absence of
9 contract, statute, or recognized ground in equity providing for attorney's fees. *Wagner v.*
10 *Foote*, 128 Wn.2d 408, 416 (1996).

11 The federal eminent domain counterpart for the Washington statute "has been strictly
12 construed as creating only a narrow exception to the general rule of nonrecovery of litigation
13 expenses." *Daviscourt v. Peistrup*, 40 Wn. App. 433, 443 (1985) (citing *United States v.*
14 *410.69 Acres of Land*, 608 F.2d 1073, 1076 (5th Cir. 1979)).

15 The STB's preemption decision is not the same thing as "a final adjudication that the
16 condemnor cannot acquire the real property by condemnation." RCW § 8.25.075(1)(a).

17 The only basis upon which the STB ruled in finding preemption was the specific
18 crossing proposed by the Cities and challenged by TCRY in 2015. Harper dec. Ex. F, at 5.
19 The underlying premise of the federal scheme of preemption arising from 49 U.S.C. §
20 10501(b) is based on the possibility that a proposed crossing may impede rail operations or
21 pose undue safety risks. There is no preemption—and no effect on a state law
22 condemnation action to take real property after paying just compensation—where a crossing
23 will not unreasonably burden or interfere with rail use.

24 The STB stated that its role required it to engage "in a fact specific analysis to
25 consider whether a proposed condemnation action would prevent or unduly interfere with
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3 railroad operations and interstate commerce." *Id.* at 7. The STB observed that its "decision
4 here hinges on whether the Cities' attempt to condemn TCRY's property to create an at-
5 grade crossing would unreasonably interfere with and burden rail transportation by limiting
6 TCRY's capacity to conduct its current and future operations on the parallel track." *Id.* at 7-
7
8 8. The STB conducted a detailed analysis of the specific proposed at-grade crossing in
9 relation to TCRY's claimed railroad operations. *Id.* at 8-9.

10 The key point is that the STB's finding of preemption was based on the crossing
11 proposed *at that time* and its impact on TCRY's operations as they existed *at that time*. The
12 Cities are now proposing an alternative configuration for the crossing. There has been no
13 finding of preemption by the STB related to this alternative crossing design.
14

15 The operations of TCRY now are not the same as they were when TCRY was the
16 handling agent for UP, as presented to the STB in 2015. Because the extent of TCRY's
17 operations on the track is a key component of analyzing whether a proposed crossing would
18 prevent or unduly interfere with railroad operations, there is no basis for assuming that the
19 STB's finding of preemption would apply to the present circumstances.
20

- 21 **2. Only this Court, and not the STB, could make a determination that**
22 **constitutes a "final adjudication that the condemnor cannot acquire the**
real property by condemnation."

23 The STB's decision had nothing to do with the condemnation powers of the Cities
24 under Washington's eminent domain statutes. The STB decision did not, for instance, find
25 that the Cities lacked statutory authorization to commence this petition, nor did the STB find
26 any other defect in the manner by which the Cities invoked eminent domain.
27

28 The argument of TCRY in support of its fee motion seems to assume that the STB
29 asserted jurisdiction over this eminent domain proceeding. Of course this is not true. TCRY
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3 has elected to support its motion with a bare assertion of entitlement to fees under RCW §
4 8.25.075(1)(a). TCRY has skipped a step in claiming its right to fees and cannot sustain its
5 argument on this point.

6 **C. The STB matter was not an eminent domain proceeding.**

7
8 The terms of RCW § 8.25.075(1) focus on a “final adjudication” in a condemnation
9 proceeding, which has not occurred in this matter. When TCRY filed its petition with the
10 STB, the purpose was to obtain a determination on federal preemption. But the preemption
11 ruling is not the same as a final adjudication by this Court. And the basis of the STB’s
12 preemption decision has been superseded by later events, including the Cities’ proposed
13 parallel track relocation plan.

14
15 Washington courts have refused attempts to expand RCW § 8.25.075(1) into
16 circumstances beyond its plain text. For instance, an attempt to obtain attorney’s fees
17 incurred for work done prior to a condemnation petition was denied in *Port of Grays Harbor*
18 *v. Citifor, Inc.*, 123 Wn.2d 610, 617 (1994). In another case, a request for attorney’s fees
19 that arose from a claim for relocation benefits was also denied because it did not relate to an
20 eminent domain proceeding. *Union Elevator & Warehouse Co. v. State ex rel. Dep’t of*
21 *Transp.*, 152 Wn. App. 199, 208-211 (2009), *reversed on other grounds*, 171 Wn.2d 54
22 (2011). And in *City of Seattle v. McCoy*, 112 Wn. App. 26, 30 (2002), the court held that a
23 drug nuisance abatement action was not a proceeding “to acquire real property” as
24 contemplated by RCW § 8.25.075(1). As a result, the court sided with Seattle and denied
25 the request for attorney’s fees and costs. *McCoy*, 112 Wn. App. at 32.

26
27 TCRY cites no case that would support an expansive reading of the fee recovery
28 statute. Applying the same analysis used by the foregoing authorities, the STB decision is
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3 outside the scope of the eminent domain statute on attorney's fees. The STB petition was
4 not an action in eminent domain, was not filed by the Cities, and was not a proceeding
5 instituted to acquire real property.

6 **D. The attorney's fees that TCRY seeks to recover were not incurred in these**
7 **proceedings.**

8 **1. The work claimed by TCRY was done in other proceedings.**

9 The Court can observe by its own review of the file that TCRY has performed no
10 substantial work in this case. Yet, the affidavit of TCRY's counsel in support of its fee
11 request claims approximately 645 hours of attorney time expended. Affidavit of TCRY
12 Counsel at Ex. A. TCRY's counsel provides a "spreadsheet" of time entries, but there is no
13 evidence that the exhibit is actually a contemporaneous time record, rather than a later
14 compilation prepared for this fee litigation. In any event, virtually all the time claimed by
15 TCRY's counsel was spent litigating matters before the STB. The STB is not "a superior
16 court having jurisdiction of a proceeding instituted by a condemnor to acquire real
17 property." RCW § 8.25.075(1).
18
19

20 TCRY was not entitled to recover—and did not recover—any attorney's fees before
21 the WUTC, the Court of Appeals, or the STB. Nothing cited by TCRY supports the notion
22 that work for which there was originally no fee recovery could nevertheless provide an
23 opportunity to bootstrap a fee recovery into a condemnation proceeding.
24

25 **2. This Court did not preside over the ancillary proceedings.**

26 TCRY's motion presents a problem for this Court. Having presided over none of the
27 proceedings out of which TCRY's fee request originates, this Court cannot be in a position
28 to determine the reasonableness of the fees incurred. This Court has little or none of the
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3 context of those ancillary proceedings. TCRY's extremely limited legal analysis in support
4 of its fee motion does nothing to bridge this gap. Where none of the ancillary proceedings
5 themselves would support a recovery of reasonable attorney's fees, and none were
6 proceedings over which this Court had jurisdiction, the request of TCRY based on RCW §
7 8.25.075(1) should be denied.
8

9 **E. The fee request is improperly supported.**

10 TCRY attempts to recover extensive attorney's fees arising out of proceedings that
11 were never before this Court, and with which this Court has little or no familiarity. Even if
12 TCRY had a right to the recovery of attorney's fees, its motion makes it nearly impossible
13 for this Court to assess the reasonableness of the attorney's fees requested in a manner
14 consistent with Washington law.
15

16 TCRY compounds the problem because TCRY provides no supporting detailed
17 information to document its request for reasonable attorney's fees. Counsel for TCRY
18 supplies an affidavit that reproduces a chart of timekeeper initials, description of work, and
19 hours expended. But TCRY's counsel provides no further explanatory information.
20 Affidavit of TCRY Counsel at 2. This independently supports denial of the motion.
21

22 TCRY requests attorney's fees based on the lodestar approach. Under this method a
23 court must first determine whether counsel expended a reasonable amount of time on the
24 case. *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998). A court should exclude wasteful or
25 duplicative hours and any hours spent on unsuccessful claims or theories. *Mahler*, 135
26 Wn.2d at 434. The attorney seeking fees is required to provide reasonable documentation of
27 work performed to enable a court to make this calculation of the number of hours. *Wash.*
28 *State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 335 (1993).
29

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3 According to *Mahler*, an attorney requesting fees must provide "contemporaneous
4 records documenting the hours worked." *Mahler*, 135 Wn.2d at 434. "Courts should not
5 simply accept unquestioningly fee affidavits from counsel." *Id.* at 434. An attorney seeking
6 a fee award "must provide contemporaneous records documenting the hours worked." *Id.*
7 The party requesting fees bears the burden of proving the reasonableness of the fees. *Id.* at
8 433-34. "Casual after-the-fact estimates of time expended on a case are insufficient to
9 support an award of attorneys' fees." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675
10 F.2d 1319, 1327 (D.C. Cir. 1982).
11

12 Based on the way TCRY has brought this motion and insufficiently supported it,
13 this Court has inadequate information on the work done in the ancillary case, cannot
14 compare the work done by each of the parties, and cannot compare the fee request with the
15 issues at controversy in that case.
16

17 Reasonable fees that may be recovered in an appropriate case are only the fees an
18 attorney would charge his or her client based on sufficiently detailed contemporaneous time
19 records. *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983). The inadequacy of the supporting
20 declaration of TCRY's counsel requires that the Court deny the request for fees.
21

22 IV. CONCLUSION

23 Whatever the effect of the STB's preemption determination on facts that were
24 presented to the STB in 2015, this condemnation action remains viable. It has not been
25 abandoned by the Cities. The Court should deny TCRY's motions.
26

27 DATED this 15th day of May, 2018.

28 MENKE JACKSON BEYER, LLP
29 

30 COMBINED RESPONSE OF PETITIONERS
TO MOTIONS FOR ATTORNEY'S FEES
AND TO DISMISS - 20

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COMBINED RESPONSE OF PETITIONERS
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STB Docket No. NOR 42163

Appendix 5

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 11 2018

FILED ² 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

THE CITY OF KENNEWICK, a
Washington municipal corporation; THE
CITY OF RICHLAND, a Washington
municipal corporation,

Petitioners,

vs.

PORT OF BENTON, a Washington Port
district; TRI-CITY RAILROAD
COMPANY, LLC, a Washington limited
liability company; BENTON COUNTY, a
Washington political subdivision,

Respondents.

[In re Center Parkway]

No. 15-2-01039-2

RESPONDENT TRI-CITY
RAILROAD COMPANY LLC'S
MOTION TO DISMISS –
JURISDICTION

MOTION

Respondent Tri-City Railroad Company LLC ("TCRY") moves the Court for an Order of Dismissal pursuant to CR 12(b)(1) for want of subject matter jurisdiction. Congress has vested the Surface Transportation Board ("STB") with exclusive jurisdiction over matters concerning railroads and railroad operations. 49 U.S.C. § 10501(b). Pursuant to that authority, the STB ruled on September 12, 2016 that the above-captioned matter is preempted as a matter of federal law,

MOTION TO DISMISS -1

KSB LITIGATION, P.S.
221 NORTH WALL ST., STE 210
SPOKANE, WA 99201
PHONE (509) 624-8988 FAX (509) 474-0358

1 depriving this Court of jurisdiction. (See September 12, 2016 Decision in Docket # FD 35915
2 ("Decision"), attached as an appendix to this Brief) Though Petitioners sought review of the
3 STB's Decision by the Ninth Circuit, Petitioners abandoned that appeal. (See Order Granting
4 Petitioner's Motion to Voluntarily Dismiss Petition for Appeal, attached to this Brief as an
5 appendix) Since the STB's Decision is now final, TCRY requests that this Court dismiss the
6 instant suit.
7

8 This motion is brought pursuant to CR 12(b)(1), and is supported by the subjoined
9 memorandum, as well as the Decision.

10 ARGUMENT

11
12 CR 12(b)(1) sets forth a defense for "lack of jurisdiction over the subject matter[.]"
13 "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than
14 enter an order of dismissal." *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control*
15 *Auth.*, 98 Wn. App. 121, 123–24, 989 P.2d 102 (1999).

16 Preemption of state law is a purely jurisdictional issue. *International Longshoremen's*
17 *Ass'n v. Davis*, 476 U.S. 380, 391, 106 S.Ct. 1904, 1912, 90 L.Ed.2d 389 (1986). Congress'
18 power to preempt state law is derived from the Supremacy Clause of article 6 of the federal
19 constitution. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824); *see also Goodwin v.*
20 *Bacon*, 127 Wn.2d 50, 57, 896 P.2d 673 (1995).
21

22 Here, Congress vested the STB with exclusive jurisdiction over matters concerning
23 railroads and railroad operations. 49 U.S.C. § 10501(b). Pursuant to that authority, concerning
24 this particular case and Petitioners' invocation of their condemnation authority under state law
25 vis-à-vis the proposed Center Parkway at-grade crossing at issue, the STB ruled on September
26 12, 2016 that the above-captioned matter is preempted as a matter of federal law. Consequently,
27

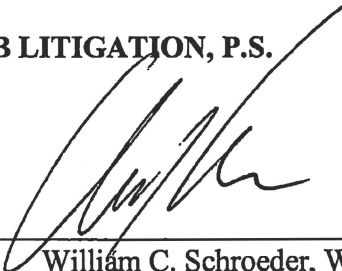
1 this Court is deprived of jurisdiction, and as a matter of law this Court "may do nothing other
2 than enter an order of dismissal." *Inland Foundry Co.*, 98 Wn. App. at 123-24.

3 **CONCLUSION**

4
5 For the foregoing reasons TCRY requests that this Court dismiss the above-captioned
6 matter for want of jurisdiction, as a matter of law

7 DATED this 10th day of May, 2018.

8 **KSB LITIGATION, P.S.**

9
10
11 By: 

12 William C. Schroeder, WSBA No. 41986
13 Attorneys for Respondent Tri-City
14 Railroad Company, LLC
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2018, I caused to be served a true and correct copy of the foregoing **Motion to Dismiss**, by the method indicated below and addressed to the following:

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Menke Jackson Beyer, LLP
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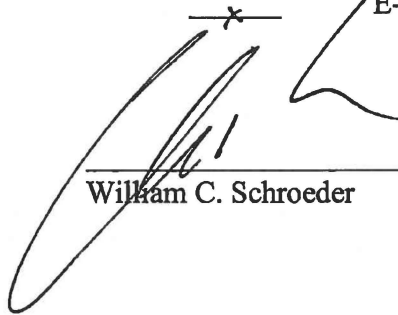
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William C. Schroeder

SERVICE DATE – SEPTEMBER 14, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35915

TRI-CITY RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER

Digest:¹ The Board finds that the condemnation and acquisition by Kennewick, Wash., and Richland, Wash., of a portion of a railroad right-of-way for an at-grade crossing that would bisect both a line of railroad and a railroad siding is preempted under 49 U.S.C. § 10501(b).

Decided: September 12, 2016

On March 19, 2015, Tri-City Railroad Company, LLC (TCRY), filed a petition for declaratory order requesting that the Board find that the efforts of Kennewick, Wash., and Richland, Wash. (together the Cities), to condemn and acquire a portion of a railroad right-of-way for an at-grade street crossing are preempted by 49 U.S.C. § 10501(b). TCRY claims that the proposed at-grade crossing would unreasonably interfere with its current and future railroad operations. In response, the Cities argue that their condemnation action is not preempted because this dispute involves a routine crossing that would not impede railroad operations or pose undue safety risks.

For the reasons discussed below, the Board concludes that an at-grade crossing at the proposed location would unreasonably interfere with TCRY's present and future railroad operations on one of the tracks at issue and that, therefore, condemnation of the railroad right-of-way to permit construction of an at-grade crossing at that location pursuant to state law is preempted under § 10501(b).

BACKGROUND

Course of Proceedings. TCRY filed its petition on March 19, 2015, and the Cities filed their notice of intent to participate on March 20, 2015. Subsequently, on April 7, 2015, TCRY filed an affidavit to notify the Board that the city councils for both Kennewick and Richland had scheduled separate hearings to consider and vote upon the proposed condemnation ordinance. In a decision served on May 21, 2015, the Board instituted a proceeding and set a procedural schedule. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2 (STB served May

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

21, 2015). The Cities filed their reply to TRCY's petition on June 15, 2015, and TCRY filed a rebuttal on June 24, 2015.

On June 30, 2015, the Cities requested leave to file a reply to TCRY's rebuttal. The Board granted that request and allowed TCRY to rebut the Cities' additional filing. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2-3 (STB served Aug. 31, 2015). In addition to allowing the supplemental filings, the Board noted that the record in this docket would close on September 30, 2015. Id. at 3. The Cities filed their supplemental reply on September 15, 2015, and TCRY filed its supplemental rebuttal on September 30, 2015.

On June 17, 2016, the Cities submitted a June 16, 2016, decision by the Washington State Court of Appeals concerning an appeal of a Washington State Utilities and Transportation Commission (UTC) decision referenced by the parties in their earlier pleadings. On the same day, TCRY filed a letter in opposition noting that the Cities' pleading was filed after the closing of the record in this docket. (TCRY Letter 1, June 17, 2016.)

On June 27, 2016, TCRY filed a letter requesting that the Board expedite its decision. On June 29, 2016, the Cities filed a response in opposition to TCRY's characterization of the issues before the Board in its June 27, 2016, letter.

On July 25, 2016, the Cities submitted two decisions issued by the Washington State Court of Appeals concerning proceedings referenced by the parties in their previous pleadings.

While the record in this docket closed on September 30, 2015, the Board will accept these additional pleadings in the interest of a more complete record.²

The Controversy at Issue. TCRY is a Class III railroad with its headquarters and principal place of business in Benton County, Wash. (TCRY Pet. 4.) TCRY states that it operates as a handling carrier over, and serves as the dispatching carrier on, approximately 16 miles of track (the "line" or "mainline") and that its primary rail yard is located in Richland.³ (Id. at 4-5, 7.) The line is owned by the Port of Benton, and TCRY conducts its rail operations pursuant to a written lease agreement. (TCRY Pet. 4.) TCRY states that it moves carloads for its own customers and operates as the handling carrier for UP. (Id. at 4-5.) BNSF Railway (BNSF) also operates on the line. (Id. at 5.)

² The Board is also accepting the letter submitted on July 26, 2016, by Senator Maria Cantwell requesting an expeditious review of TCRY's petition. TCRY has moved to strike the letter on the grounds that it was not served on all parties and that it could violate the ex parte contact prohibitions of 49 C.F.R. § 1102.2. But here the Board followed its longstanding practice of posting Congressional letters on our website. Therefore, the motion to strike is denied.

³ TCRY states that it has additional operating rights on approximately 37 miles of Department of Energy-owned track and operates on 8 miles of Union Pacific Railroad (UP) track in order to facilitate interchange with UP at Kennewick. (TCRY Pet. 6.)

According to TCRY, the Cities are attempting to use Washington State law to condemn and acquire a right-of-way for a public street which would bisect TCRY's tracks. TCRY explains that the crossing, at the location being proposed, would cross both TCRY's mainline and a 1900-foot parallel track with switches at both ends, which, according to TCRY, "is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south." (Id. at 6-7.) TCRY has exclusive use of the parallel track. (Id. at 6.)

TCRY states in its petition that the proposed crossing would unreasonably interfere with current and future railroad transportation. (Id. at 24-25, 27, 41-43.) Specifically, TCRY argues that the proposed crossing would compromise the railroad's ability to use the parallel track for passing and staging operations, eliminate railcar storage and staging in the vicinity of the southern switch, limit its switching operations generally, and reduce its ability to use the parallel track for over-capacity storage that will be needed in light of expected volume increases. (Id. at 1, 24, 41-43.) In particular, TCRY states that because multiple carriers use the mainline, it is critical from an operational standpoint that it have unfettered access to the parallel track in order to set out or hold a train while another train uses the mainline. (TCRY Pet. 7, 41.) Moreover, TCRY states that it needs the parallel track for storing rail cars when the main TCRY yard reaches capacity, and it uses the switches on both ends on a daily basis. (Id. at 7.)

TCRY states that it lacks any alternative facility or location at which the rail activities performed on the parallel track could take place. (TCRY Pet. 24-25, 41-43; TCRY Rebuttal at 4, 27, 33.) Moreover, it presents evidence that it expects an increase in rail traffic, and as a result, is exploring expanding the length of the parallel track to 10,000 feet to accommodate unit trains on both the mainline and parallel tracks. (TCRY Pet. 7-8.) As for the mainline, it argues that the portion of the line that this crossing would bisect is one of the only locations where a unit train can be stopped to wait for operations to clear along the track or for other safety reasons. (Id. at 7.)

TCRY states that it handled 2,247 carloads (or two 9-car trains per day) in 2013, and that it handled 2,626 carloads (or two 10-car trains per day) in 2014. (Id. at 6.) TCRY expected its 2015 numbers to rise to 4,175 carloads, or two 16-car trains per day. (Id.) In addition, TCRY states that need for its service should continue to grow because the Preferred Freezer Plant, the largest frozen food plant in the world, was scheduled to begin operations in 2015. (Id. at 8.) TCRY also notes that the City of Richland has approved a development plan to construct a rail loop in the Horn Rapids Industrial Park and has entered an agreement with ConAgra Foods to develop an automated cold storage warehouse in the Horn Rapids area. (Id. at 16.)

In their reply to TCRY's petition, the Cities state that the proposed at-grade crossing is part of a regionally important project that extends a public street, Center Parkway, between the cities of Kennewick and Richland. (Cities Reply 1, 15.) The Cities note that they have received

state and federal funds for the project and that the proposed at-grade crossing received unanimous approval from the UTC.⁴ (Id. at 1-2, 15, 17-19.)

The Cities assert that the use of the trackage at issue for rail transportation would not be compromised by the Cities' grade crossing project.⁵ (Id. at 1.) They cite a field study that they conducted, which they claim shows no instance in which TCRY had actually used the full 1900-foot parallel track for its current operations. (Id. at 8-11.) The Cities also contend that TCRY's primary use of the parallel track is for the storage of rail cars, which would not require the blocking of the crossing. (Id. at 33.) The Cities acknowledge the new rail loop in the Horn Rapids Industrial Park and the new Preferred Freezer Plant in the area, but nevertheless claim that TCRY's carload projections are speculative and too high. (Id. at 8-11.)

The Cities argue that regardless of increased track usage, a crossing at the proposed location would not impact railroad operations because TCRY will continue to have right-of-way access over the crossing. (Cities Reply 32.) They also claim that any concerns of undue safety risks are unfounded because gates would prevent vehicular access when a train occupies the track within the limits of the crossing. (Id. at 11, 31-33.)

On rebuttal, TCRY provides additional evidence to document its need for all of its rail infrastructure to perform its current and potential future operations. TCRY states that it has begun serving as the rail services manager for the Preferred Freezer Plant, responsible for the management and dispatch of all railroads providing services to the plant. (TCRY Rebuttal 24.) TCRY states that UP sent TCRY 142 empty rail cars for storage in June 2015, prior to the opening of the Preferred Freezer Plant in July 2015, and that after this shipment, additional rail cars arrived, which resulted in both its yard and nearby industrial lead being over capacity. (Id. at 24-25.) TCRY also states that prior to the opening of the Preferred Freezer Plant, it staged several hundred refrigerated cars in its rail yard. (Id. at 25.)

TCRY further claims that if the crossing is built, it would have to comply with Kennewick Municipal Code (KMC) § 11.80.090, a local ordinance governing grade crossings, and that doing so would result in a loss in capacity to use the parallel track. (TCRY Pet. 23-24.) That ordinance provides, in relevant part, that trains must be left clear of road crossing signal

⁴ The UTC did not address § 10501(b) preemption. Following the second UTC decision issued on June 24, 2014, TCRY filed an action in Washington state court that raised preemption claims. (TCRY Pet. 21.) Subsequently, the state court proceeding was "voluntarily dismissed, without prejudice, by TCRY" so that TCRY could seek a Board determination on whether the proposed condemnation objected to by the railroad to permit this crossing is preempted under federal law. (Id. at 23.)

⁵ The Cities' pleadings refer to the Board as having jurisdiction over crossings. In fact, the Board has exclusive jurisdiction over "transportation" by "rail carriers," see 49 U.S.C. § 10501(b), and therefore, federal law preempts any state action, including a condemnation action for a crossing, that would unreasonably interfere with rail transportation under the Board's jurisdiction.

circuits and that, when it can be avoided (1) cars or engines must not be left standing nearer than 250 feet from a road crossing and (2) public crossings must not be blocked for more than five minutes. (*Id.* at 24.)

TCRY also argues that in addition to the KMC, the General Code of Operating Rules (GCOR) — which is a set of operating and safety rules used by most western railroads⁶ — requires that railroads should avoid (1) leaving cars, engines, or equipment standing closer than 250 feet from road crossings when there is an adjacent track and (2) blocking public crossings for more than 10 minutes. (TCRY Rebuttal 4.) TCRY claims that, given the provisions of the KMC and the GCOR and the configuration of the track, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks. (TCRY Rebuttal 30.)

The Cities respond that KMC § 11.80.090 and the GCOR are not mandatory and therefore would not reduce the railroad's capacity to conduct current and future rail operations. (Cities Supplemental Reply 11-14.) The Cities argue that, in fact, these two provisions support the Cities' position that the crossing does not interfere with railroad operations, stating that "the plain language of the provisions establish that TCRY has the flexibility to maintain its railway operations on the 1900-foot siding when the siding is needed for railway operations." (*Id.* at 12.) The Cities also note that BNSF and UP, which operate over TCRY's mainline, have not opposed the location of the proposed crossing.⁷ (Cities Supplemental Reply 7-8.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. We find it appropriate to issue a declaratory order addressing the grade crossing controversy here. As discussed below, we conclude that the proposed at-grade crossing bisecting TCRY's mainline and parallel tracks would unreasonably interfere with TCRY's current and future railroad operations on the parallel track, and therefore any state or local regulation requiring a crossing at the proposed location is preempted under § 10501(b).

The Interstate Commerce Act is "among the most pervasive and comprehensive federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The Board's jurisdiction over "transportation by rail carriers" is "exclusive," and "the

⁶ According to the Federal Railroad Administration, at present, most Class I railroads in the U.S. use one of two "standard" rulebooks: the Northeast Operating Rules Advisory Committee (NORAC) rulebook or the GCOR. Conrail, Amtrak, and several commuter and short line railroads in the northeastern United States use the NORAC rulebook. The GCOR is used by every Class I railroad west of the Mississippi River, most of the Class II railroads, and numerous shortline railroads. See FRA report "Compliance with Railroad Operating Rules and Corporate Culture Influences," Oct. 1999, at 2.

⁷ TCRY responds that BNSF and UP have not intervened because they were able to reach separate agreements with the Cities to access the Horn Rapids Industrial Park. (TCRY Rebuttal 2-3.)

remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The Board’s governing statute defines “transportation” expansively to encompass not only railroad operations over the Nation’s rail network but also a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include “a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard, [or] ground used or necessary for transportation.” 49 U.S.C. § 10102(6). The purpose of § 10501(b) is to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Thomas Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff’d 812 F.3d 1141 (8th Cir. 2015); U.S. Envtl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995). As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp. Inc. v. Ga. Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

It is well settled that the provisions of § 10501(b) preempt permitting or other laws and legal processes that would regulate rail transportation directly or that could be used to deny a railroad’s ability to conduct rail operations. See Wichita Terminal Ass’n—Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015). Courts and the Board have found that state or local actions that “have the effect of managing or governing,” and not merely incidentally affecting, rail transportation are preempted under § 10501(b). Tex. Cent. Bus Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc) (“[L]aws that have the effect of managing or governing rail transportation will be expressly preempted.”); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005) (actions by a state or local entity that directly conflict with the “exclusive federal regulation of railroads” are preempted). Federal preemption applies without regard to whether the Board actively regulates the railroad operations or activity involved. 49 U.S.C. § 10501(b)(2); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008).

The Board has stated that “routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks.” Maumee & W. R.R.—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004); see also E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012) (finding that an easement across a railroad’s property for subterranean water and sewer pipes would not unreasonably interfere with rail operations). The right to proceed under state law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks Inv. Co., 593 F.3d at 414 (rejecting railroad’s preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation) with Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (finding state property law ownership

claims preempted where such claims would directly affect the amount and type of maintenance that could be performed on a railroad right-of-way and limit the capacity of the line of railroad should it be needed for potential future active rail service); see also Maumee & W. R.R., FD 34354, slip op. at 2 (noting that preemption may shield a railroad from state eminent domain laws where the effect of those laws is an unreasonable interference with railroad operations).

The Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available, including condemnation to take property used for rail transportation for another, conflicting use that would unreasonably burden or interfere with rail use, present or future. Wichita Terminal Ass'n, FD 35965, slip op. at 5 (finding that a state court order forcing a railroad to accept a crossing at a certain location would unreasonably burden interstate commerce because it would have the effect of managing or governing property that is part of the national rail network, but that a court-ordered crossing at another location might not have such effects, in which case it would not be preempted); see also Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way preempted by § 10501(b) even if the city's proposed use of the property would have been coextensive with a prior lease); City of Lincoln v. STB, 414 F.3d 858, 861 (8th Cir. 2005) (finding a city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way preempted); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196 (STB served March 1, 2010) (finding a condemnation action to take property on which the railroad was not actively operating trains preempted when proposed condemnation would unreasonably interfere with railroad's future plans); 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (finding claims of adverse possession and prescriptive easement preempted); Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015) (finding an attempt to evict a railroad from property used as part of the interstate rail network preempted).

The Board engages in a fact-specific analysis to consider whether a proposed condemnation action would prevent or unduly interfere with railroad operations and interstate commerce. See Franks Inv. Co., 593 F.3d at 414; Wichita Terminal Ass'n, FD 35965, slip op. at 6. In conducting this analysis, the Board considers both the railroad's current and future plans. City of Lincoln, 414 F.3d at 862 (railroad's future plans can be considered because "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses."); Norfolk S. Ry., FD 35196 (finding preemption based on anticipated impact a condemnation action would have on railroad's future plans for the property).

Here TCRY asks the Board to find that state law condemnation of the right-of-way at the location of the proposed crossing is preempted by federal law. The Cities argue that takings of railroad right-of-way in circumstances such as these are not unusual or controversial and that the Board should not interfere with what they view as a routine crossing that has local support and, in their opinion, would not impinge on TCRY's operations.

The Board's decision here hinges on whether the Cities' attempt to condemn TCRY's property to create an at-grade road crossing would unreasonably interfere with and burden rail

transportation by limiting TCRY's capacity to conduct its current and future operations on the parallel track.

The Board finds that TCRY has demonstrated that the proposed at-grade crossing, which would bisect the mainline and parallel tracks, would unreasonably interfere with and burden both current and future rail transportation on the parallel track. Therefore, state law condemnation of the right-of-way for a crossing at that location is federally preempted.

With respect to current operations, the record makes clear that installation of a crossing at the proposed location would make as much as 600 feet of the 1900-foot long parallel track unusable for TCRY's switching, storage, and interchange operations. The parallel track is the only location along the 16-mile line where these essential railroad operations can be performed. TCRY, as the dispatcher for the entire length of the mainline (including UP and BNSF traffic), has demonstrated that a loss of useable parallel track would impinge on TCRY's ability to conduct its current operations. For example, TCRY explains that the current configuration of the 1900-foot track, with switches at both ends, allows TCRY to spot and store cars for various lengths of time at one end of the track while using the other end for moving and holding trains. (TCRY Rebuttal 26-28.) However, the location of the proposed crossing would require TCRY to relocate switching operations from the southern switch to the northern switch for interchange with UP at Kennewick. (TCRY Rebuttal, V.S. Foster Peterson 15.) TCRY's experts have stated that this would be an inefficient way to operate. (*Id.*) Accordingly, federal preemption applies. See Wichita Terminal Ass'n, FD 35965, slip op. at 9 (finding a crossing is federally preempted because it would unreasonably burden or interfere with the interchange of railcars).

The Cities take issue with TCRY's June 24, 2015 rebuttal testimony from TCRY's President and CEO, Randolph Peterson. They note that Mr. Peterson's statement that the proposed crossing would "drastically interfere with [TCRY's] railroad operations" is inconsistent with prior statements before the UTC in 2013 that there would be no operational interference. (Cities Supplemental Reply 9-11.) We recognize that Mr. Peterson's testimony on rebuttal could be viewed as inconsistent with prior statements made before the UTC in 2013. However, the statements to the UTC were made several years ago and do not reflect the subsequent increase in carloads handled that has taken place since 2013, or the existence of the Preferred Freezer Plant or the new rail loop. Thus, notwithstanding this testimony, the weight of the evidence demonstrates that the proposed crossing bisecting the mainline and parallel tracks would unreasonably interfere with TCRY's current and planned future operations.

TCRY has established a need for full access to the parallel track for its future operations. See City of Lincoln, 414 F.3d at 862; Norfolk S. Ry., FD 35196, slip op. at 3-4; Jie Ao & Xin Zhou, FD 35539, slip op. at 6 (finding plans for the future use of a railroad right-of-way, which were less concrete than TCRY's, an acceptable basis on which to find preemption). It is undisputed that the new Preferred Freezer Plant has begun operating and that a rail loop to support this facility has been, or soon will be, constructed in the Horn Rapids Industrial Park (located on the northern end of TCRY's line). While the parties differ on whether TCRY currently uses the entire length of the 1900-foot parallel track and how much additional rail traffic there will actually be, there is no doubt that an increase in rail capacity (i.e., the rail loop) and an additional large customer (i.e., the Preferred Freezer Plant) are likely to lead to an

increase in traffic on TCRY's line and the number of cars that will need to be staged, stored, and interchanged on the parallel track. TCRY's evidence demonstrates that unrestricted use of the entire length of the parallel track will be needed to handle the future expected influx of rail cars from new customers and to stage, pause, or hold manifest trains approaching the rail loop. (See TCRY Pet. 7, 24, 41-43; TCRY Rebuttal 26-28.) TCRY has limited capacity and system infrastructure. As TCRY notes, it received a large influx of cars in preparation for the opening of the Preferred Freezer Plant commencing operations, and this influx caused its yard and the parallel track to reach capacity. (TCRY Rebuttal 23.) While TCRY states that it has begun to explore its options for extending the parallel track (which itself suggests that the railroad cannot do with less than the entire length of the parallel track), it is unclear from the record that TCRY actually would be able to do so under the terms of its lease with the Port of Benton. In these circumstances, TCRY has shown that it needs the ability to continue full, unimpeded use of the entire parallel track to carry out its current and future operations and that losing any part of the parallel track would leave insufficient room for these operations.

The Cities also suggest that federal preemption does not apply here because the mainline and parallel tracks that the crossing would bisect are owned by the Port of Benton, and TCRY operates over the tracks pursuant to a lease. (Cities Reply 1, 41-42.) It is common, however, for railroads to hold various types of property interests in the land that constitutes their right-of-way. See, e.g., Cayuga Cty. Indus. Dev. Agency—Acquis. Exemption—Finger Lakes Ry., FD 36011 et al. (STB served July 14, 2016) (acquisitions and subleases). The Cities have proffered no evidence showing that TCRY lacks the property interest it needs to perform its current and future rail operations. As the Board explained in Norfolk S. Ry., FD 35196, slip op. at 6, the Board has jurisdiction over rail transportation regardless of whether the property on which that transportation is being conducted is owned, leased, or held in easement by the operating railroad. See also § 10102(9) (defining transportation expansively to encompass facilities of any kind related to the movement of property by rail “regardless of ownership or an agreement concerning use”).

Similarly, whether or not the parallel track is considered “siding” track, as the Cities argue (Cities Reply at 12-13), federal preemption would still apply. Under 49 U.S.C. § 10906, side track is excepted from Board licensing, but is still within the Board's jurisdiction. *Id.* The Board and the courts have consistently found that because the Board's jurisdiction over transportation is “exclusive,” § 10501(b) preempts state law remedies without regard to whether or not the Board actively regulates activities on the particular track involved. See Pace, 613 F.3d at 1068-69 (finding state law claims related to side track preempted); Port City Props., 518 F.3d at 1188 (finding state law claims preempted even though the Board does not actively regulate spur and side track). Here TCRY has shown that the parallel track is used to support rail operations subject to the Board's jurisdiction, §§ 10102(6), 10102(9), and that the proposed crossing would unduly interfere with TCRY's ability to perform its current and future operations on that track. Accordingly, federal preemption applies.

The Cities fail to show that TCRY erred in relying on the GCOR provisions providing that cars generally should not be spotted less than 250 feet from each side of the crossing. TCRY claims that, given these provisions, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks, given the configuration of the track. (TCRY

Rebuttal 30.). The record here shows that TCRY has adopted the GCOR. (See TCRY Pet., V.S. Peterson 12.) Despite the Cities' contention that the GCOR provisions are not mandatory for TCRY, the provisions of the GCOR represent industry best practices. Thus, as TCRY states, failure to establish operating rules consistent with the GCOR standards could open the railroad to potential liability it would not otherwise face. (TCRY Supplemental Rebuttal at 12-13.) In any event, federal preemption would apply here without regard to whether TCRY's operations on the parallel track comply with the GCOR standards. The courts and the Board have found that even minimal loss of railroad right-of-way is too much where, as here, the railroad objects and shows that full use of the property (e.g., the parallel track) is needed in connection with its current and future rail transportation plans. See City of Lincoln, 414 F.3d at 861 (involving loss of 20-foot longitudinal strip at the edge of a railroad's right-of-way); Norfolk S. Ry., FD 35196, slip op. at 4 ("it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses"). Having found persuasive TCRY's argument that compliance with the GCOR limits its use of the parallel track, the Board need not address the parties' arguments regarding the effect of § 11.80.090 of the KMC on railroad operations.

For the reasons discussed above, we find that the efforts of the Cities to condemn and acquire a right-of-way for an at-grade crossing at the proposed location, bisecting both the parallel and main tracks, are preempted by § 10501(b).

It is ordered:

1. TCRY's petition for declaratory order is granted to the extent discussed above.
2. TCRY's motion to strike Senator Cantwell's letter is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

VICE CHAIRMAN MILLER, commenting:

I agree that today's decision reaches the correct legal outcome, though unfortunately, I do not think it is the best possible outcome. I would have preferred that the Board require the parties to engage in mediation to determine if there was a solution that would have been mutually acceptable to both sides.

The Cities have a significant interest in building a road that will connect the two cities. The project is identified as an essential capital improvement in the Cities' Comprehensive Plan and in the Regional Transportation Plan and, if completed, would promote important public benefits, such as reducing traffic congestion, increasing access by emergency responders, and promoting economic development. The Cities have also expended a significant amount of resources in planning. The record shows that it involved years of work, including extensive

hearings and review. The project has also received federal and state funding, and appears to be supported by all state, regional, and local planning and transportation agencies.

Our decision today basically negates all of this. In my view, the Board should have exhausted all options to keep this important public project alive before reaching today's winner-take-all decision, including mediation. Mediation would have been particularly useful here. The record indicates that the Cities successfully negotiated with both UP and BNSF to obtain their consent to the proposed at-grade crossing, suggesting that a negotiated solution was not outside the realm of possibility. It also appears that the two sides, despite having been involved in years-long litigation, have never really sat down with one another to discuss a mutually-agreeable solution. In fact, the Cities state that TCRY chose not to engage in the Cities' extensive planning process for the crossing, despite being invited to participate; that TCRY submitted no comments in the planning process; and that TCRY did not attend the Washington Utilities and Transportation Commission's diagnostic meeting for the crossing. (Cities Reply 19.) The Cities also note that it was not until TRCY's rebuttal in this case that they became aware of TRCY's plans to extend the parallel track. (Cities Supplemental Reply, V.S. Rogalsky 5.) It disappoints me that TRCY did not try to work with the Cities, particularly when there might have been a way for it to protect its own interests while looking for a way to help them accomplish their goal. Perhaps had the Board required the parties to communicate, with the assistance of a Board-appointed mediator, they could have reached a solution that would have met both sides' needs.

When the Board enabled itself to force parties to engage in mediation, it stated that it "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, *wherever possible*." Assessment of Mediation & Arbitration Procedures, Docket No. EP 699, slip op. at 2 (STB served May 13, 2013) (emphasis added). However, since then, the Board has only used this power in two instances (or less than one case per year).¹ The Board needs to consider using all the tools in its toolbox, including mediation where it makes sense. This proceeding is one where it would have made sense.

This case also highlights yet again what I believe is the Board's inability to handle cases quickly under its current processes.² Today's decision comes nearly a year after the last significant filing in the case, which was made on Sept. 30, 2015. (Although there were recent filings, they merely provided updates in the related state proceeding – updates that would not

¹ The two proceedings in which the Board ordered the parties to mediate were Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141 and BNSF Ry.—Terminal Trackage Rights—Kansas City S., Docket No. FD 32760 (Sub-No. 46).

² See Petition for Rulemaking to Adopt Revised Competitive Switching, Docket EP 711, *et al.*, (STB served July 27, 2016) (Miller comment); CSX Transp., Inc.—Acquis. of Operating Easement—Grand Trunk W. R.R., Docket No. FD 35522 (STB served June 22, 2016) (Miller comment) ("The fact that parties in even the most urgent cases must still wait months before a decision is issued demonstrates the need for the Board to reconsider our internal decision-making process.").

have been necessary had the Board ruled sooner). The proceeding had been pending for so long that one party felt compelled to write a letter to the Board expressing urgency³ and a U.S. Senator felt it necessary to make an inquiry.⁴

As I have previously noted, I am frustrated by the Chairman's unwillingness to consider changes that I think would help improve timeliness.⁵ The resistance is particularly puzzling given that Congress has already had to step in and require the agency to begin filing quarterly reports on unfinished regulatory proceedings (i.e., rulemakings), forcing the agency to create deadlines for next actions and to provide explanations if those deadlines are not met. All three Board Members have expressed a belief that this reporting requirement is having a positive impact on the pace of those proceedings.⁶ If that is the case, then the Chairman should be willing to apply those same principles to our other proceedings – and we should not wait for a directive from Congress to do so.

³ See TRCY's June 27, 2016 letter.

⁴ See Senator Maria Cantwell's July 26, 2016 letter.

⁵ Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 9 (2016) (statement of Vice Chairman Deb Miller, Surf. Transp. Bd.) ("During my time as Acting Chairman, I began two initiatives to try to address these problems: setting target dates for the completion of all pending matters in our formal proceedings and creating a set of internal performance metrics to measure how the Board is performing in terms of managing its docket. It was my hope that these initiatives would be continued, but they were not."). Commissioner Begeman has also expressed frustration with the Board's pace and a desire to improve the functioning of the agency. See Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 1-2 (2016) (statement of Commissioner Ann Begeman, Surf. Transp. Bd.).

⁶ Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. (2016), video archive, at 01:47:00, available at: <https://www.youtube.com/watch?v=J9Sv9Gqgpf&feature=youtu.be&t=19m51s>, testimony of Chairman Daniel Elliott, Surf. Transp. Bd. ("First of all, I would like to start off by saying that as far as the unfinished regulatory proceeding[s] reports themselves, I think they've been excellent, I think the results speak for themselves, and you've seen things coming out of the agency at a pace that didn't occur in the past. Personally, I very much appreciate that transparency and it's created, I think, some great efficiencies at the Board that didn't exist before. So, you know, all and all, I think it's been great."). See also statement of Commissioner Begeman, at 3, and statement of Vice Chairman Miller, at 3.

FILED

UNITED STATES COURT OF APPEALS

NOV 02 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THE CITY OF KENNEWICK, a Washington
municipal corporation and THE CITY OF
RICHLAND, a Washington municipal
corporation,

Petitioners,

TRI-CITY RAILROAD COMPANY,

Intervenor,

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,

Respondents.

No. 16-73595

STB No. FD-35915
Surface Transportation Board

ORDER

Petitioners' motion to dismiss this petition voluntarily (docket #28) is
granted. Fed. R. App. P. 42(b). This order shall act as and for the mandate of this
court.

FOR THE COURT:

By: Chris Goelz
Circuit Mediator

3/20/17

STB Docket No. NOR 42163

Appendix 6

JAN 11 2019

FILED

WJ3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

THE CITY OF KENNEWICK, a
Washington municipal corporation; THE
CITY OF RICHLAND, a Washington
municipal corporation,

Petitioners,

v.

PORT OF BENTON, a Washington Port
District; TRI-CITY RAILROAD
COMPANY, LLC, a Washington limited
liability company; BENTON COUNTY, a
Washington political subdivision,

Respondents.

[In re Center Parkway]

NO. 15-2-01039-2

~~[PROPOSED]~~ ORDER DENYING
MOTION TO DISMISS OF
RESPONDENT TRI-CITY RAILROAD
COMPANY, LLC

This matter came on for hearing on January 11, 2019, on the motion of respondent Tri-City Railroad Company, LLC, ("TCRY") to dismiss for want of subject matter jurisdiction. The petitioners were represented by their counsel of record, Kenneth W. Harper and Menke Jackson Beyer, LLP. TCRY was represented by its counsel of record, William C. Schroeder and KSB Litigation, P.S.

ORDER DENYING MOTION
TO DISMISS - 1

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1
2
3 The Court considered the following documents and evidence in ruling upon TCRY's
4 motion:

- 5 1. Respondent Tri-City Railroad Company LLC's Motion to Dismiss –
6 Jurisdiction, dated May 10, 2018;
- 7 2. Combined Response of Petitioners the City of Kennewick and the City of
8 Richland to Motion for Attorney's Fees and Motion to Dismiss of
9 Respondent Tri-City Railroad Company, LLC, dated May 15, 2018;
- 10 3. Declaration of Peter Rogalsky, P.E., in Response to Motion for Attorney's
11 Fees and Motion to Dismiss of Respondent Tri-City Railroad Company,
12 LLC, dated May 15, 2018;
- 13 4. Declaration of Kenneth W. Harper in Response to Motion for Attorney's
14 Fees and Motion to Dismiss of Respondent Tri-City Railroad Company,
15 LLC, dated May 15, 2018;
- 16 5. Respondent Tri-City Railroad Company LLC's Reply Re: Motion to
Dismiss, dated December 7, 2018; and
- 17 6. ...

18 The Court heard oral argument and was otherwise fully apprised of the facts and
19 issues presented and now therefore finds and concludes:

- 20 1. The Court has subject matter jurisdiction over these continuing eminent
21 domain proceedings;
- 22 2. The decision of the Surface Transportation Board in Docket No. FD 35915,
23 dated September 14, 2016, reached a conclusion of federal preemption regarding a proposed
24 at-grade crossing that is no longer the at-grade crossing associated with these continuing
25 eminent domain proceedings.

26 Based on the foregoing IT IS ORDERED, ADJUDGED AND DECREED:

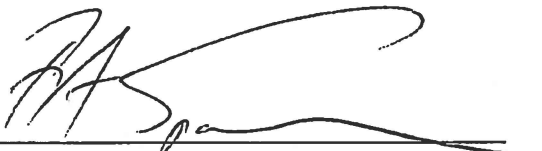
- 27 1. TCRY's motion to dismiss is DENIED;

28
29
30 ORDER DENYING MOTION
TO DISMISS - 2

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2. This matter should proceed to a determination of public use and necessity as provided by applicable law, including RCW 8.12.090.

DATED THIS 11th day of January, 2019.


HON. BRUCE A. SPANNER
SUPERIOR COURT JUDGE

Presented by:

MENKE JACKSON BEYER, LLP


By: _____
KENNETH W. HARPER
WSBA# 25578
Attorneys for petitioners

Approved as to form and content; notice of presentation waived:

KSB LITIGATION, P.S.


By: _____
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ORDER DENYING MOTION
TO DISMISS - 3

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STB Docket No. NOR 42163

Appendix 7

No. 36588-3-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

THE CITY OF KENNEWICK, a Washington
municipal corporation; THE CITY OF RICHLAND,
a Washington municipal corporation,

Respondents,

v.

TRI-CITY RAILROAD COMPANY, LLC,
a Washington limited liability company,

Petitioner,

PORT OF BENTON, a Washington Port district;
BENTON COUNTY, a Washington political subdivision,

Others.

TCRY MOTION FOR DISCRETIONARY REVIEW

William J. Schroeder, WSBA #7942	Philip A. Talmadge, WSBA #6973
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1. Identity of Petitioner

The petitioner Tri-City Railroad Company, LLC (“TCRY”) asks this Court to accept review of the decision designated in Part 2.

2. Decision

The trial court entered an order on January 11, 2019 denying TCRY’s motion to dismiss the petition of the Cities of Richland and Kennewick (“Cities”) to condemn certain railroad right-of-way property owned by TCRY in those municipalities even though the federal Surface Transportation Board (“STB”) found the Cities’ condemnation action was preempted under 49 U.S.C. § 10501(b). App. 182-84.

3. Issue Presented for Review

Where the STB has found that the Cities’ proposed condemnation of TCRY railroad right-of-way is preempted under 49 U.S.C. § 10501(b), can the Cities escape the preemptive effect of federal law over railroad activities by allegedly changing the property subject to condemnation without the amendment of their original condemnation in the Benton County Superior Court?

4. Statement of the Case

After the enactment of condemnation ordinances in the respective city councils, on May 5, 2015, the Cities commenced condemnation proceedings against TCRY, seeking an easement across tracks leased by TCRY which run along the border between the two cities. App. at 1-33. The cities sought to construct an at-grade crossing, extending Center

Parkway over the tracks to connect Tapteal Drive in Richland to Gage Boulevard in Kennewick. *Id.*

TCRY did not approve of the crossing. The proposed crossing would bisect the only parallel track section in the area, seriously compromising TCRY's ability to use the parallel track for passing and staging operations, switching, railcar storage and staging, including over-capacity storage expected to be needed in the future. App. at 40-41. There was no alternative area for these important operations to take place. In fact, TCRY expected to quintuple the length of the parallel track in the near future, increasing its size from 1,900 square feet to 10,000 square feet, due to expected volume increases along the route. App. at 41.

On March 19, 2015, TCRY filed a petition for a declaratory order asking the STB to find that the Cities' effort to condemn and acquire a portion of TCRY's railroad right-of-way for an at-grade street crossing was preempted by 49 U.S.C. § 10501(b). App. at 39. TCRY argued that the proposed at-grade crossing would unreasonably interfere with its current and future railroad operations. App. at 40-41. The STB agreed with TCRY concluding that an at-grade crossing at the proposed location would unreasonably interfere with TCRY's "present and future railroad operations on one of the tracks at issue and, therefore, condemnation of the railroad

right-of-way to permit construction of an at-grade crossing in that location pursuant to state law was preempted under § 10501(b).” App. at 39.

The STB’s September 12, 2016 decision (Dkt. No. FD 35915) specifically stated:

[W]e conclude that the proposed at-grade crossing bisecting TCRY’s mainline and parallel tracks would unreasonably interfere with TCRY’s current and future railroad operation on the parallel track, and therefore *any state or local regulation requiring a crossing at the proposed location* is preempted under § 10501(b).

App. at 43 (emphasis added). The Cities appealed the STB decision to the Ninth Circuit. App. at 88. They later abandoned that appeal. *Id.*

Undeterred by the STB’s ruling, the Cities attempted to circumvent it by altering their proposal. Despite the fact that the STB found that an at-grade crossing “at the proposed location” was preempted, the Cities pushed forward with their attempt to condemn an easement at the location and proposed to “relocate the parallel track several hundred feet to the north.” App. at 88-89. TCRY did not support this proposal.

Importantly, the Cities did not file a new condemnation petition, pass a new city ordinance, or otherwise formally enact this new plan. This plan was never submitted to the STB, who already ruled that the easement at that location was preempted. Nor did the new plan adequately account for future volume along the track or the potential need to expand the parallel

track in the future, which were important considerations for the STB previously.

Because the Cities abandoned their appeal and the STB's decision was final, TCRY filed a motion to dismiss the Cities' condemnation petition as federally preempted on May 10, 2018. App at 64-67. However, the trial court, the Honorable Bruce Spanner, agreed with the Cities that the "new plan" governed and denied TCRY's motion to dismiss on January 11, 2019. App. at 183.¹ TCRY sought discretionary review by this Court.

5. Argument Why Review Should Be Granted

This Court is fully aware of the criteria governing discretionary review and TCRY will not repeat them here. RAP 2.3(b). The trial court committed obvious error, rendering further proceedings useless. RAP 2.3(b)(1).

(A) The Trial Court Erred in Failing to Honor the STB Decision that the Cities' Condemnation Action Against TCRY Was Federally-Preempted

¹ After the Cities dismissed their appeal in the Ninth Circuit of the STB's decision on preemption, TCRY filed a motion for costs and fees pursuant to RCW 8.25.075(1)(a) and/or (b), because it had achieved a "final adjudication that the condemnor cannot acquire the real property by condemnation" and "the proceeding [was] abandoned by the condemnor." App. at 34-38. The Cities submitted a response to TCRY's argument for fees along with their argument on the motion to dismiss. App. 81-101. However, for procedural reasons, the motion for fees was not noted for a hearing and has not yet been ruled on by the trial court.

Congress vested the STB with *exclusive* jurisdiction over matters concerning railroads and railroad operations. 49 U.S.C. § 10501(b). That statute states in pertinent part:

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is *exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(emphasis added).

Preemption of state law is a jurisdictional issue. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391, 106 S. Ct. 1904, 1912, 90 L. Ed. 2d 389 (1986). Congress's power to preempt state law is derived from the Supremacy Clause of the United States Constitution. *Goodwin v. Bacon*, 127 Wn.2d 50, 57, 896 P.2d 673 (1995).

Here, Congress vested the STB with *exclusive* jurisdiction over matters concerning railroads and railroad operations. 49 U.S.C. § 10501(b). Pursuant to that authority, the Cities' effort to exercise their condemnation

authority under state law regarding the Center Parkway at-grade crossing is preempted, just as the STB ruled on September 12, 2016. That careful, considered ruling was the result of a detailed evidentiary hearing, after the STB considered numerous filings, arguments and authorities from all parties. App. at 39-50. Consequently, the trial court was deprived of jurisdiction to proceed and, as a matter of law, it should have entered an order of dismissal. *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999), *review denied*, 141 Wn.2d 1007 (2000).

The trial court committed obvious error by refusing to recognize these preemption principles, and by falling for the Cities' argument that the condemnation petition had changed. That argument fails for several reasons.

First, the Cities' condemnation action which the trial court refused to dismiss is the same petition the STB expressly deemed preempted by federal law. The Cities abandoned their appeal of that decision and have not amended their petitions or adopted new ordinances describing the new "lots, parcels of land and property" they would need to condemn to forcibly move the parallel track and TCRY's operations according to the new plan. RCW 8.12.060.

Second, even if they did refile their petitions to reflect the new plan, the matter could not go forward. The STB is the arbiter of preemption and has already ruled that “*any* state or local regulation requiring a crossing *at the proposed location* is preempted.” App. at 43 (emphasis added). The Cities abandoned their appeal of that decision before the Ninth Circuit, therefore making the STB’s decision *final*.

Indeed, this new plan was only devised *after* the STB board ruled against the Cities on preemption. The Cities cannot be allowed to skirt the final judgment of the STB by informally tweaking their plan after losing before the STB and abandoning their appeal. At the very least, the STB is the only authority who could potentially evaluate this new plan (once formally enacted) at the same location it previously deemed preempted, *not the superior court*.² But the Cities took no action to pursue their amended plan before the STB.

² TCBY does not concede that the new plan may necessarily be readdressed by the STB. The Cities failed to propose this eleventh-hour alternative plan to the STB and abandoned their appeal. The new plan also fails to address TCRY’s future needs (including possible expansion of the track) which was already considered by the STB and served as part of the basis for its ruling that condemnation at the proposed location is preempted. For example, the STB was persuaded by TCRY’s arguments that other locations along the 16-mile line were inadequate or inefficient. App. at 46. That is why the STB concluded that “*any* state or local regulation requiring a crossing *at the proposed location* is preempted under § 10501(b).” App. at 43. Principles of *res judicata*, estoppel, or the general need for the finality of judgments are at play in this dispute.

Pursuant to the Supremacy Clause, the trial court erred in failing to dismiss the Cities' petition as a matter of law. The trial court obviously erred in refusing to dismiss the petition.

(B) Further Proceedings in This Case Would Be Useless

TCRY meets the "effects prong" of RAP 2.3(b)(1). An issue of preemption, like other gateway issues in litigation such as jurisdiction,³ venue,⁴ or the application of a statute of limitations,⁵ is a prime candidate for discretionary review. In fact, in numerous cases, Washington appellate courts have granted discretionary review to address a federal preemption issue. *E.g., Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015) (whether local minimum wage ordinance was preempted by federal statutes); *Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628 (2001), *rev'd*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003) (application of federal statute on confidentiality of accident reports).

It would be a monumental waste of the trial court's and the parties' time and resources to pursue further proceedings in this case where the

³ *E.g., Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967) (long-arm jurisdiction).

⁴ *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 577-78, 573 P.2d 1316 (1978) (party claiming error as to venue must seek discretionary review); *Youker v. Douglas Cty.*, 162 Wn. App. 448, 460, 258 P.3d 60, *review denied*, 173 Wn.2d 1002 (2011) (same).

⁵ *E.g., State v. LG Electronics, Inc.*, 186 Wn.2d 1, 375 P.3d 636 (2016); *Chadwick Farms Owners Ass'n, LLC v. FHC LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009).

Cities' condemnation petition is preempted, as already determined by the STB. That is precisely why discretionary review exists.

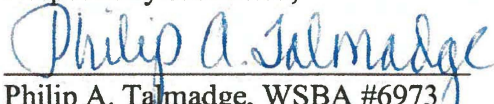
6. Conclusion

This case involves obvious error committed by the trial court in addressing federal preemption under 49 U.S.C. § 10501(b). The trial court's errors render further trial court proceedings useless. RAP 2.3(b)(1).

This Court should grant review and reverse the trial court's order denying dismissal of the Cities' condemnation petition. On reversal, the Court should remand the case with instructions to the trial court to address TCRY's motion for fees pursuant to RCW 8.25.075(1)(b). Costs on appeal, including reasonable attorney fees, should be awarded to TCRY.

DATED this 8th day of March 2019.

Respectfully submitted,



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STB Docket No. NOR 42163

Appendix 8

*Renee S. Townsley
Clerk/Administrator*

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*The Court of Appeals
of the
State of Washington
Division III*



April 18, 2019

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CASE # 365883
City of Kennewick, et al v. Port of Benton, et al
BENTON COUNTY SUPERIOR COURT No. 152010392

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling, **May 20, 2019**. The answer, if any, to a Motion to Modify will be due **10 days** after the motion is served on the answering party. The moving party may submit a written reply to the answer to the motion to modify no later than **3 days** (excludes Saturdays, Sundays, and legal holidays) after the answer is served on the moving party. RAP 17.4(e).

No. 365883

Please file the original; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

A handwritten signature in cursive script, reading "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:bar

C: Honorable Bruce A. Spanner

The Court of Appeals

of the

State of Washington

Division III

FILED

Apr 18, 2019

Court of Appeals

Division III

State of Washington

CITY OF KENNEWICK, et al.,

Respondents,

v.

TRI-CITY RAILROAD COMPANY,
et al.,

Petitioner.

No. 36588-3-III

COMMISSIONER'S RULING

Tri-City Railroad Company (Railroad) seeks discretionary review of the Benton County Superior Court's January 11, 2019 Order that denied its motion to dismiss, for lack of subject matter jurisdiction, the Cities of Kennewick and Richland's (Cities) eminent domain proceedings. The Railroad relied on the September 14, 2016 decision of the Surface Transportation Board (Board) that had concluded the Cities' proposed at-grade crossing of the Railroad's tracks was federally pre-empted. The superior court held as a matter of law that because the Cities subsequently proposed a different plan, which is

No. 36588-3-III

“no longer the at-grade crossing associated with these continuing eminent domain proceedings,” the Board’s preemption decision did not apply, and it had jurisdiction to conduct a public use and necessity hearing for the new plan. Order at 2.

The preemption issue arose in the following context: The Cities had filed condemnation proceedings in 2015 to acquire through eminent domain certain railroad property to construct a crossing that would link two of the Cities’ streets. The proposed crossing would impact a parallel track, which the Railroad contended would interfere with its operations. The Railroad petitioned the Board, which has exclusive jurisdiction to decide questions of interference with railroad operations, to declare that federal law preempted the Cities from condemning that property.

The provisions of §10501(b) preempt laws and legal processes that would regulate rail transportation directly or indirectly in a manner that impacts the railroad’s ability to conduct rail operations. The Board on September 12, 2016, held, as follows: “[A]n at-grade crossing at the proposed location would unreasonably interfere with [the Railroad’s] present and future railroad operations *on one of the tracks at issue* and that, therefore, condemnation of the railroad right-of-way to permit construction of an at-grade crossing at that location pursuant to state law is preempted under §10501(b).” (Emphasis added.) Motion, Appendix at 39.

The Cities initially appealed that decision, but later abandoned its appeal.

The Cities then proposed to relocate the railroad's parallel track, which the Board had determined the earlier proposal had interfered with, several hundred feet to the north. The Cities did not submit the new proposal to the Board. In the Railroad's view, the Board had "already ruled that the easement at that location was preempted." Motion at 3. Therefore, the Railroad moved in superior court to dismiss the condemnation proceedings as federally preempted.

The superior court held that a "new plan" governed, and it denied the Railroad's motion to dismiss for lack of subject matter jurisdiction.¹

The Railroad contends that when the Board ruled that federal law preempted the Cities' proposed crossing, the superior court lost jurisdiction and should have dismissed the Cities' petition for condemnation. 98 Wn. App. 123. The Railroad quotes from the Board's decision to the effect that "*any* state or local regulation requiring a crossing *at the proposed location* is preempted." (Emphasis added.) App. at 43. Therefore, the Railroad argues that, at a minimum, the Cities had to at least have the Board evaluate the

¹The Order states, as follows: "1. The Court has subject matter jurisdiction over these continuing eminent domain proceedings; 2. The decision of the Surface Transportation Board in Docket No. FD 35915, dated September 14, 2016, reached a conclusion of federal preemption regarding a proposed at-grade crossing *that is no longer the at-grade crossing associated with these continuing eminent domain proceedings*. Based on the foregoing IT IS ORDERED, ADJUDGED AND DECREED: 1.TCRY's [the Railroad's] motion to dismiss is DENIED; 2. This matter should proceed to a determination of public use and necessity as provided by applicable law, including RCW 8.12.090." (Emphasis added.)

No. 36588-3-III

new plan, not the superior court. Since preemption is a gateway issue, the Railroad's position is that the superior court committed obvious error that renders further proceedings useless under RAP 2.3(b)(1) when it denied its motion to dismiss for lack of jurisdiction. And, this Court should accept discretionary review.

However, the Railroad focusses on only a narrow portion of its quote from the Board's decision. The Board's full sentence is, "[a]s discussed below, we conclude that *the proposed at-grade crossing bisecting [the Railroad's] main line and parallel tracks would unreasonably interfere with [the Railroad's] current and future railroad operations on the **parallel** track*, and therefore any state or local regulation requiring a crossing at the proposed location[,] is preempted under § 10501(b)." (Emphasis added.) Motion, Appendix at 43.

The Cities contend their new proposed crossing cures the grounds on which the Board found preemption. The description of the proposed new plan found at Supplemental Appendix D indicates that the parallel track will be relocated from the area impacted by the crossing. The declaration of Peter Rogalsky, the City of Richland's Public Works Director, states, as follows:

15. During 2016, the City developed an alternative crossing proposal that would permit extension of Center Parkway while at the same time assuring that no user of the Port's railroad lines, including [the Railroad], would experience any operational impairment.

16. The alternative crossing would address the concerns raised by the STB

in its decision because *it would preserve the full capacity and utility of the parallel track* while allowing for the routine installation of the proposed Center Parkway connection across only the railroads' single main track.

17. In summary, *the City of Richland proposed to relocate the parallel track several hundred feet to the north (railroad west) at the City's sole expense, so that the southern switch of the parallel track would be to the north of the proposed Center Parkway at-grade crossing.* Plans depicting the City's initial iteration of this proposal can be found at Exhibit C of this declaration. *The northern switch would be relocated an equivalent distance to the north, maintaining the parallel track's full 1,900-foot original capacity, and keeping that track entirely out of the path of any highway crossing.*

18. The City of Richland's consulting engineering firm determined that the entire siding relocation plan is feasible and that *there is sufficient right-of-way to accommodate the proposed track modifications.*

19. In December 2016, the City shared its proposal with the Port of Benton as set forth in Exhibit C of this declaration. The City asked the Port to gather comments from all parties involved with the affected trackage, including not only the Port but also BNSF and UP, and [the Railroad].

20. Various revisions were made to the relocation plan in order to accommodate substantive comments of BNSF and UP with a final proposal transmitted to the Port of Benton dated June 2, 2017, as set forth in Exhibit E of this declaration. [The Railroad] provided minor initial input but was unwilling to further participate in the design process.

21. After these further revisions were reviewed, the Port stated in a letter dated July 17, 2017, that its Commission has "determined the proposed modifications to the Port's passing track will improve the safety, utility and efficiency of the Port Railroad and the proposed modifications would mitigate the impacts which an at-grade crossing for Center Parkway crossing might have upon railroad operations." A copy of the Port's letter can be found at Exhibit F of this declaration.

Answer, Supplemental Appendix D at 3-5.

The Railroad counters at Motion at 7, fn2 that “[t]he new plan also fails to address [the Railroad’s] future needs (including possible expansion of the track) which was already considered by the STB and served as part of the basis for its ruling that condemnation at the proposed location is preempted. For example, the STB was persuaded by [the Railroad’s] arguments that other locations along the 16-mile line were inadequate or inefficient.”

A reading of the Board’s findings certainly supports the argument that the original proposal would interfere with present and future operations. But does the Board’s finding that “[t]he parallel track is the only location along the 16-mile line where these essential railroad operations can be performed” refer to the present configuration, or does it mean that a relocation of the entire parallel track to a location on the 16-mile line that is somewhat farther north, also would not work? I.e., would moving the parallel track north interfere with current or future operations? The Board’s findings in this regard are, as follows:

[The Railroad] has demonstrated that *the proposed at-grade crossing, which would bisect the mainline and parallel tracks*, would unreasonably interfere with and burden both current and future rail transportation on the parallel track. Therefore, state law condemnation of the right-of-way for a crossing at that location is federally preempted.

With respect to current operations, the record makes clear that installation of a crossing at the proposed location would make as much as 600 feet of the 1900-foot long parallel track unusable for [the Railroad’s] switching, storage, and interchange operations. The parallel track is the only location along the 16-

mile line where these essential railroad operations can be performed. [The Railroad], as the dispatcher for the entire length of the mainline (including UP and BNSF traffic), has demonstrated that a loss of useable parallel track would impinge on [its] ability to conduct its current operations. For example, [the Railroad] explains that the current configuration of the 1900-foot track, with switches at both ends, allows [it] to spot and store cars for various lengths of time at one end of the track while using the other end for moving and holding trains. ([Railroad] Rebuttal 26-28.) However, the location of the proposed crossing would require [the Railroad] to relocate switching operations from the southern switch to the northern switch for interchange with UP at Kennewick. ([The Railroad's] Rebuttal, V.S. Foster Peterson 15.) TCRY's experts have stated that this would be an inefficient way to operate. (Id.) Accordingly, federal preemption applies.

. . . [The Railroad] has established a need for full access to the parallel track for its future operations. . . . While [the Railroad] states that it has begun to explore its options for extending the parallel track (which itself suggests that the railroad cannot do with less than the entire length of the parallel track), it is unclear from the record that [the Railroad] actually would be able to do so under the terms of its lease with the Port of Benton. In these circumstances, [the Railroad] has shown that it needs the ability to continue full, unimpeded use of the entire parallel track to carry out its current and future operations and that losing any part of the parallel track would leave insufficient room for these operations.

(Emphasis added.) (Some citations omitted.) App. at 46-47.

In these circumstances, this Court cannot say that the superior court committed obvious error sufficient to support discretionary review under RAP 2.3(b)(1) when it interpreted the Board's decision as *not* to preclude the newly proposed plan. The Board's finding that "[t]he parallel track is the only location on the 16-mile line where these essential railroad operations can take place" does *not* necessarily mean that if the parallel track is moved and its entire length restored, those essential operations, currently and in

No. 36588-3-III

the future, also cannot take place. Indeed, a reading of the Board's decision leaves a distinct impression that the Board was addressing only the plan at the original location when it held the condemnation proceedings were federally pre-empted. *See* italicized portions of the quote from the Board's decision, set out above. And, this Court found no authority to support the proposition that once preempted, always preempted. In any event, the Railroad still has the option to present the new plan to the Board for a declaration on preemption, so that further proceedings are not useless. The latter is also a requirement under RAP 2.3(b)(1).

Whether the Cities have taken the formal steps to enact their new plan is a separate issue from the preemption issue.

Accordingly, IT IS ORDERED, the Railroad's motion for discretionary review is denied.

A handwritten signature in black ink, appearing to read 'Monica Wasson', is written over a horizontal line.

Monica Wasson
Commissioner

STB Docket No. NOR 42163

Appendix 9

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CITY OF KENNEWICK, a
Washington municipal corporation;
THE CITY OF RICHLAND, a
Washington municipal corporation,

Petitioners,

v.

SURFACE TRANSPORTATION
BOARD and UNITED STATES OF
AMERICA,

Respondents.

TRI-CITY RAILROAD COMPANY,

Intervenor,

No. 16-73595

STB NO. FD-35915

Surface Transportation Board

MOTION TO VOLUNTARILY
DISMISS APPEAL

Pursuant to Federal Rule of Appellate Procedure 42(b), Petitioners City of Kennewick and City of Richland (“Cities”) hereby move the Court for an order dismissing the above-captioned appeal.

MOTION TO VOLUNTARILY DISMISS APPEAL - 1

Respectfully submitted this 1st day of November, 2017.

/s Christopher G. Emch

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Christopher G. Emch, WSBA #26457
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Attorneys for Petitioners The City of Kennewick and The City of Richland

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2017, I caused to be served a true and correct copy of the foregoing document, by the method indicated below and addressed to the following:

Barbara A. Miller Craig M. Keats Office of the Surface Transportation Board 395 E Street, SW Washington, DC 20423 E-Mail: Barbara.Miller@stb.gov <i>Respondent Surface Transportation Board</i>	☒ CM/ECF Service ☐ U.S. Registered Mail ☐ E-Mail ☐ Hand Delivery
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/s Christopher G. Emch
Christopher G. Emch

MOTION TO VOLUNTARILY DISMISS APPEAL - 3

CERTIFICATE OF SERVICE

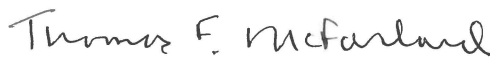
I hereby certify that on May 13, 2019, I served the foregoing Complaint And Petition For Preliminary Injunction Under 49 U.S.C. § 1321(b)(4) by e-mail on the following:

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