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By E-Filing

246388

September 18, 2018

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
September 18, 2018
Part of
Public Record

Re: STB Finance Docket No. 36168, *Oakland Global Rail Enterprise Petition for
Declaratory Order*

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the Port of Oakland's Comments in response to the Petition for Declaratory Order filed by Oakland Global Rail Enterprise in this proceeding.

If you have any questions about this filing, please contact me.

Respectfully submitted,

Edward Fishman
Counsel for the Port of Oakland

cc: Charles A. Spitulnik, Kaplan Kirsch & Rockwell
Kathryn Kusske Floyd, Venable LLP

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
PETITION FOR DECLARATORY ORDER**

**PORT OF OAKLAND COMMENTS IN RESPONSE TO OAKLAND GLOBAL RAIL
ENTERPRISE PETITION FOR DECLARATORY ORDER**

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September 18, 2018

Filing Contains Color Images

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
PETITION FOR DECLARATORY ORDER**

**PORT OF OAKLAND COMMENTS IN RESPONSE TO OAKLAND GLOBAL RAIL
ENTERPRISE PETITION FOR DECLARATORY ORDER**

The Port of Oakland (“Port”) respectfully submits these Comments in the above-referenced proceeding. On May 23, 2018, Oakland Global Rail Enterprise, LLC (“OGRE”) filed a Petition for Declaratory Order asking the Board to rule that OGRE does not require Board approval under 49 U.S.C. § 10901 for OGRE’s proposed track construction and rehabilitation project in the vicinity of the former Oakland Army Base property in Oakland, California. On August 1, 2018, the Board issued a decision instituting a declaratory order proceeding and establishing a procedural schedule inviting Comments by September 10, 2018.¹ On September 10, 2018, the Board issued a stamp order granting the City of Oakland’s request for an extension of time to file Comments until September 18, 2018.²

For the reasons explained herein, the evidence submitted by OGRE in this proceeding does not provide a sufficient basis for the Board to make a determination about whether OGRE would require Board approval for its proposed track construction and rehabilitation activities on

¹ *Oakland Global Rail Enterprise- Petition for Declaratory Order*, STB Finance Docket 36168, slip op. at 5 (STB served Aug. 1, 2018).

² The Board staff informed us by telephone on September 10, 2018 that it would be reasonable for the Port to interpret the Board’s stamp order approval of the City of Oakland’s extension request as applicable to any Comments that the Port was planning to file in this proceeding.

Port property. This is because OGRE has not yet obtained the property rights it would need from the Port to construct any track on Port property or clarified the scope of the usage rights that it may obtain with respect to such track on Port property since negotiations between OGRE and the Port about these matters are ongoing. OGRE also has failed to substantiate its assertion that the specific track it is proposing to construct on Port property was previously used for common carrier operations by the Oakland Terminal Railroad (“OTR”). Moreover, the Board should deny any future request that OGRE may file³ for common carrier operating rights over any portion of Port property because OGRE has not obtained the property or other rights necessary to use any portion of the Port’s property for common carrier service and the Port currently has no intention of granting any such common carrier operating rights to OGRE with respect to any portion of the Port’s property.

BACKGROUND

The Port is an autonomous department of the City of Oakland created in 1927 pursuant to the Charter of the City of Oakland (the “Charter”). Article VII of the Charter vests the Board of Port Commissioners (the “Port Board”) with the complete and exclusive power to have control and jurisdiction of the Port and vests all legal title, operational control and policy decision-making in the Port Board. The Port and the Port Board owns, manages and controls Port land and rail facilities on such land and are separate and distinct from the City which owns, manages and controls City property and rail facilities thereon.

³ As explained further below, OGRE has not yet sought such operating authority from the Board but has expressed its intention to file for operating authority over all of the trackage that OGRE plans to build and/or rehabilitate as part of its proposed project once the Board rules on its Petition for Declaratory Order (“OGRE Petition”).

Both the Port and the City separately acquired portions of the former Oakland Army Base (“OAB”) property that is relevant to the issues raised in the OGRE Petition, and each of the Port and the City have separate rights, responsibilities and obligations with respect to those respective properties. The Port and the City have been working together on the redevelopment of the former OAB property with other interested stakeholders. The City is responsible for the portion of the former OAB property in what is known as the West Gateway area and the Port is responsible for the portion of the former OAB property that is adjacent to the remainder of the Port’s marine terminal and intermodal yard facility.

The Port is a non-carrier that owns various portions of yard tracks within the confines of the Port’s marine terminal and intermodal yard facility.⁴ The Port itself does not conduct any rail operations over this yard trackage, which is outside of the Board’s jurisdiction. Instead, it allows a switching contractor (OGRE’s affiliate West Oakland Pacific Railroad, LLC or “WOPR”) to provide contract switching service over the Port’s yard trackage under a switching agreement with the two Class I railroads that serve the Port’s marine terminal and intermodal yard facility (UP and BNSF).

This is the fifth separate time that OGRE (or its affiliate WOPR) has approached the Board seeking to obtain common carrier operating authority over some portion of trackage in the vicinity of the former OAB property.⁵ However, each of these previous filings occurred before

⁴ See *City of Oakland, A Municipal Corp. of the State of Cal. Acting By and Through Its Board of Port Comm’rs – Acquisition Exemption – Union Pac. R.R. Co.*, STB Finance Docket 33694, slip op. at 3 (STB served Aug. 13, 1999)(in this proceeding, the Port obtained a determination from the Board that its acquisition of a portion of a line of railroad from UP did not make the Port a rail carrier subject to STB jurisdiction because the Port would not conduct any operations over the line or hold itself out to the public to do so).

⁵ In total, OGRE or its affiliate has sought Board authority for common carrier rail operations or related construction activities in and around the Port of Oakland on five separate occasions: (1) *West Oakland*

OGRE (or its affiliate) obtained the necessary property and/or contract rights to implement the proposed service that was described in its filings. As a result, the previous filings were all withdrawn voluntarily by OGRE (or its affiliate). The current declaratory order proceeding filed by OGRE suffers from the same deficiency because OGRE has not yet obtained the necessary property or contract rights from the Port, the City or the two Class I railroads that provide common carrier service to and from the Port's facilities that OGRE would need to implement the planned project described in its Petition for Declaratory Order.

In fact, while negotiations between the Port and OGRE, and separate negotiations between the Port and the City, about planned rail operations and track construction activities in the area of the former OAB are ongoing, the Port has no intention at this time of granting OGRE any right to operate common carrier service over the Port's tracks or property. Therefore, the Board should refrain from granting OGRE any common carrier operating rights over the Port's property. If it turns out (contrary to the Port's expectations and present intentions) that the parties are able to negotiate mutually acceptable agreements which provide OGRE with such rights to operate as a common carrier over their respective properties, OGRE would have every opportunity at that point to request the necessary approvals from the Board once any final agreements relating to its planned rail project were established.

For similar reasons, it would be premature and unwarranted for the Board to grant OGRE's pending request for a declaratory order that it does not require Board approval for its

Pac. R.R. – Operation Exemption – Union Pac. R.R., STB Finance Docket 35639 (2012); (2) *Oakland Global Rail Enterprise, Acquisition & Operating Exemption – in Port of Oakland, Cal.*, STB Finance Docket 35807 (2014); (3) *Oakland Global Rail Enterprise – Operation Exemption – Rail Line of Union Pac. R.R.*, STB Finance Docket 35822 (2014); (4) *Oakland Global Rail Enterprise – Operation Exemption – Lines of R.R. Owned by the Port of Oakland, Cal.*, STB Finance Docket 35953 (2015); and (5) *Oakland Global Rail Enterprise – Petition for Declaratory Order*, STB Finance Docket STB Finance Docket 36168 (2018).

proposed track construction and rehabilitation activities on the Port’s property since OGRE has not yet obtained the property rights that it needs from the Port to build any track on Port property, and has not clarified the scope of any rights it may obtain to use such track on Port property. As noted above, the Port does not have any present intention of allowing OGRE to operate as a common carrier over its property. Moreover, the existing factual record in this proceeding (while remains incomplete in many respects) appears to establish that the portion of track that OGRE plans to construct on Port property in order to connect OGRE’s planned rail operations in the West Gateway area with the Port’s yard trackage (which would provide the only available physical connection for OGRE with the two Class I common carriers serving the Port) would be located on rail right-of-way that was not used by the Oakland Terminal Railway (“OTR”) as part of its historical common carrier operations. Therefore, the Board should refrain from granting OGRE’s request for a determination that it does not need Board approval to construct such track on the portion of Port property that OGRE would like to use for its proposed project until the record is sufficiently developed and ripe for the Board to make any such determination.

COMMENTS

I. The Board Should Refrain From Issuing The Declaratory Order Requested By OGRE With Respect To The Portion of Port Property That OGRE Plans To Use For Its Proposed Project

OGRE states that it is planning to “rehabilitate” approximately 22,200 feet of track within what OGRE describes as existing rail right-of-way on the former OAB property that its affiliate Oakland Bulk and Oversized Terminal (“OBOT”) is leasing from the City. OGRE states that substantially all of this planned track would be constructed and/or rehabilitated on City property,

except for an unspecified portion of its planned West Gateway Lead No. 2 track which would be constructed on Port property pursuant to an easement held by the City.⁶

OGRE asserts that it does not require construction authority from the Board under 49 USC 10901 for this proposed track construction and rehabilitation project based on the following arguments: (i) OGRE asserts that “most” of the track/right of way in question on the City’s property has been subject to ICC/STB jurisdiction since the Oakland Terminal Railway (“OTR”) filed an application for authority with the ICC in 1943 to acquire and operate that track as a common carrier serving the Outer Harbor District, and although such track reportedly has not been used since the late 1990’s, OGRE states that such track was never formally abandoned by OTR;⁷ and (ii) OGRE asserts that the remaining unspecified portion of such track/right of way which is not depicted in the maps accompanying OTR’s 1943 filing with the ICC remains subject to STB jurisdiction as “industrial track” because (according to OGRE) OTR operated over this track as part of its common carrier operations.⁸

⁶ OGRE explains that a segment of the West Gateway Lead No. 2 track that OGRE is proposing to build would be located on land owned by the Port but over which the City has an easement. OGRE Aug. 21 Response at 7. As noted above, OGRE does not have the property rights necessary to construct any portion of this West Gateway Lead No. 2 track on the Port’s property. The City did have a temporary easement from the Port to perform some ongoing preparatory work on this portion of Port property as part of the OAB redevelopment project, but that temporary easement expired and no permanent easement allowing OGRE to proceed with any track construction on the Port’s property has been negotiated by the parties. Moreover, the existing evidentiary record appears to establish that this portion of Port property where OGRE intends to build a part of its West Gateway Lead No. 2 is not part of the track or right-of-way that was previously operated by OTR.

⁷ In its Petition for Declaratory Order, OGRE initially claimed that all of the track it was proposing to “rehabilitate” was part of the historical line of railroad that OTR obtained ICC authority to acquire and operate in 1943. See OGRE July 16 Reply at 5. After the City raised questions about this claim and other inconsistencies in OGRE’s prior filings and in response to the Board’s questions, OGRE crafted its current position that only some portion of that track constituted OTR’s line of railroad and the remainder of that track should be considered ancillary spur track subject to the Board’s jurisdiction under 49 U.S.C. 10906.

⁸ In response to questions raised by the Board in this proceeding, OGRE’s Response included a map which purports to show which portion of this historical track was covered by OTR’s 1943 ICC filing and

In its Reply dated June 29, 2018, the City raised concerns about the adequacy of the evidentiary record and a number of factual questions about OGRE's claim that its track "rehabilitation" project on City property would occur only within existing right-of-way previously operated by OTR as part of its common carrier operations.⁹ The City advised the Board to avoid reaching any conclusions on OGRE's request for declaratory order until the Board clarified the regulatory status of the tracks and/or right-of-way which historically occupied the area around the former OAB that OGRE is proposing to use for its proposed project (and how those historical tracks and/or right of way align with OGRE's proposed project). The City also submitted maps from OTR's 1943 filing with the ICC which appear to indicate that significant portions of the track that OGRE is planning to reconstruct in the West Gateway area would not be within the right-of-way previously operated by OTR.¹⁰ Finally, the City expressed its view that all or substantial portions of the historical track in question may have been used by industries in the Outer Harbor District area to move their own goods and therefore would qualify as "private" track which would be exempt from STB jurisdiction (which could mean that, if OGRE was planning to reconstruct track in areas of the West Gateway which were previously occupied by such private track, OGRE would need STB construction authority under 49 USC § 10901 for such work).

which portion was not covered by that acquisition and operation filing. See OGRE Aug 21 Response at Exh. 2. This map does not include any milepost designations, specific points of reference or other indications of the length of the track that OGRE believes was within or outside the scope of OTR's 1943 application.

⁹ Reply of the City of Oakland, California, *Oakland Global Rail Enterprise – Authority to Operate a Rail Line in Oakland, CA – Petition for Exemption from 49 U.S.C. § 10901*, STB Finance Docket 36168 (June 29, 2018)("City Reply").

¹⁰ City Reply at 2, Exh. 1.

It is important to recognize that OGRE's filings to date in this proceeding do not address the historical use by OTR of any of the specific trackage or right-of-way in the vicinity of the proposed track that OGRE is planning to construct on Port property. OGRE's filings focus only on the proposed track that it is planning to build or rehabilitate in the West Gateway area. Based on its review of the evidentiary materials submitted by OGRE and the City, the Port agrees with the City that there remains substantial ambiguity in the record about whether OGRE's proposed track construction and rehabilitation activities in the West Gateway area would occur within right-of-way that previously had been operated by the OTR as part of its common carrier service.¹¹ However, the maps and other evidentiary materials submitted into the record by OGRE and the City appear to establish that the portion of Port property that OGRE plans to use to build a portion of its West Gateway Lead No. 2 track (which would connect the West Gateway area with the Port's intermodal terminal yard) is not part of the property which was previously operated by OTR as a common carrier. This can be pieced together from the following maps and other historical information which has been submitted into the record in this proceeding and are described in greater detail below.

OGRE's proposed track reconstruction project would extend from the area of the former OAB referred to as the West Gateway in an easterly direction over property now owned by the City and then curve southwards to OGRE's proposed connection with existing trackage owned by the Port that extends in a southwesterly direction and expands into the ladders of yard

¹¹ The Port takes no position in these Comments on whether Board approval would be required for OGRE's planned track construction and rehabilitation activities in the West Gateway area on property owned by the City.

trackage that are part of the Port's Manifest Yard and Support Yard.¹² This generally can be seen from the map dated 6/23/2015 that OGRE submitted as Exhibit 2 to its Petition for Declaratory Order.¹³ The portion of proposed trackage in the upper right corner of the map, within the diagonal box under the reference to EBMUD, shows the curved area of trackage referred to above which would connect OGRE's proposed trackage in the Western Gateway area with the Port's yard trackage that extends southwesterly and provides the only connection to the interstate rail network through UP.

Although OGRE never specifically explains to the Board where it is proposing to connect the planned trackage from the West Gateway area on City property to the Port's existing trackage on Port property, it is the Port's understanding that OGRE is proposing to build and connect West Gateway Lead No. 2 track ("WGL 2") on both Port and City property to the Port's existing L1 yard track ("Port L1") in the general vicinity of the curve described above. This can be seen from the track charts that OGRE submitted as Exhibit 1 to its August 31st response to the Board. More specifically, page RR-10 of that Exhibit 1 shows this proposed connection point between OGRE's planned WGL 2 track and the Port's L1 yard track.¹⁴ As shown on page RR-10 of Exhibit 1, OGRE's planned WGL 2 track (as well as its planned West Gateway Lead No. 1 track) would extend around the curve on City property onto the Port's property (as the point

¹² The Port's trackage in this area runs parallel to the UP's trackage, which is separate from the Port's trackage by a fence demarcating the eastern edge of the Port's terminal in this area. The main connection between the Port's trackage and the UP trackage is at the southern end of the Port's rail yard (through the South Lead track) and there is also a lesser used connection with the UP on the northern end of the Port's rail yard (through the North Lead track). These connections with the UP provide the Port's trackage with access to the interstate rail network, since both UP and BNSF use the UP track connections to serve the Port and its tenants.

¹³ We have attached a copy of OGRE's map as Appendix 1 to these Comments.

¹⁴ We have attached a copy of page RR-10 of OGRE's track charts as Appendix 2 to these Comments and marked the relevant area for the Board's convenience.

demarcated on RR-10 as the boundary line between Port and City property) and then would connect (through the tracks labeled Port WGL 2 and Port WGL 1 that OGRE is proposing to build on Port property) into the Port L1 track at a point roughly parallel to UP Track No. 136.¹⁵ It is important to note that just to the right of the curved track area depicted on map RR-10 is a structure extending in a north-south direction which is labeled “Oakland Terminal RR OH Trestle.” It is the Port’s understanding that this is the old railroad bridge¹⁶ that was formerly used by the OTR as part of its Bridge Route extending from the West Gateway east towards the former Yerba Buena yard in downtown Emeryville (where the OTR interchanged with the Santa Fe and Southern Pacific). OGRE is not proposing to use any portion of that OTR trestle or points east to connect with the Port’s yard trackage (and its eventual connections with UP and BNSF).

The reference to the OTR trestle on RR-10 is important because it appears to establish that OGRE’s proposed connection of its planned WGL 2 track with the Port’s yard trackage via the Port L1 yard track would occur within right-of-way that was not operated as part of the OTR’s common carrier operation. This is confirmed by the ICC filings (and associated maps) that the City filed with the Board in its June 29, 2018 letter. As explained in Exhibit 1 to the City’s letter, which contains excerpts from the OTR’s 1943 application to the ICC, OTR was

¹⁵ The Port believes this is the portion of Port property that OGRE is referring to when it states that it would construct a portion of WGL 2 on property owned by the Port and over which the City has an easement. As noted above, the temporary easement relating to this portion of Port property has expired and, although some preparatory work on this property by the City’s construction contractor is proceeding, OGRE does not yet have rights to construct any track on Port property.

¹⁶ The Port understands that this trestle still exists and was not removed by the City after it acquired its respective portion of property from the Oakland Army Base because the OTR trestle was not part of that transaction. In contrast, various spur tracks south of that location (including spur tracks which used to exist within the right-of-way that OGRE is proposing to use to connect its WGL 2 with the Port’s L1 track) were removed by the City because they were part of the old OAB property and not part of the OTR’s operation.

seeking ICC authority to acquire and operate common carrier operating rights over trackage that extended from the West Gateway area of the Outer Harbor District over the Bridge Route in an easterly direction to the OTR's former Yerba Buena Yard in downtown Emeryville (where the OTR interchanged with the Santa Fe and Southern Pacific).¹⁷ As further explained on page 6 of that ICC filing, OTR as part of the 1943 transaction acquired a Y viaduct and trackage extending over the north leg of said viaduct to create a more efficient connection over the so-called Bridge Route between the Outer Harbor District to the west and OTR's former Yerba Buena Yard to the east. The south leg of the viaduct and any associated trackage, however, was sold to the U.S. Army and not included in OTR's 1943 acquisition.

This is all shown in the maps which were submitted as part of the City's Exhibit 1 and Exhibit 2. In fact, the map that was submitted as part of the City's Exhibit 2 shows the Bridge Route, the North Leg and South Leg of the Y track after the end of the OTR trestle, and the location of the trackage that OTR was acquiring to operate as a common carrier. This map, which we have attached hereto and marked for ease of reference as Appendix 3, shows that OTR obtained common carrier rights to operate from the West Gateway area east to its former Yerba Buena Yard but did not obtain any rights to operate on the South Leg of the Y track in the vicinity of the curve area where OGRE is proposing to build its connection with the Port's yard trackage. This map appears to be consistent with the statement in the ICC application that the U.S. Army had acquired the properties south of the Bridge Route trestle, and it is the Port's understanding that those specific spur tracks which used to exist in the curve area of OGRE's

¹⁷ The Yerba Buena yard was located well to the east of the Port and former OAB property and no longer exists. OTR also acquired authority from the ICC in 1943 to operate from the Outer Harbor District east over a route into downtown Oakland where it interchanged with the Sacramento Northern at 40th Street and Shafter Avenue. This trackage into downtown Oakland also no longer exists.

planned connection were likely owned and used by the U.S. Army as spur or industrial tracks for moving property around the warehouses that still existed on that portion of the Oakland Army Base.

In addition to the indications in the evidentiary record that OTR did not operate over the track that OGRE is seeking to reconstruct on Port property, OGRE has failed to submit any evidence explaining whether it acquired any property and/or contractual rights from OTR itself. OGRE has failed to explain whether OTR remains in existence as a legal entity (although the record reflects that OTR was owned at one point by the predecessors of the UP and BNSF). OGRE also fails to submit any evidence explaining what happened to the rights that it claims were exercised by OTR historically to operate in the West Gateway area or within other portions of the former OAB property.

Moreover, it would be premature for the Board to grant OGRE's pending request for a declaratory order that it does not require Board approval for its proposed track construction and rehabilitation activities on the Port's property since OGRE has not yet obtained the property rights that it needs from the Port to build any track on Port property, and has not clarified the scope of any rights it may obtain to use such track on Port property. As noted above, the Port does not have any present intention of allowing OGRE to operate as a common carrier over its property. Therefore, given the uncertainty surrounding the property and/or contractual rights that OGRE may ultimately obtain with respect to any track that it seeks to build on Port property, and given the evidence in the historical record that such track was not operated by the OTR as part of its common carrier operations, the Board should refrain from issuing the determination sought by OGRE until such time as these issues have been clarified and are ripe for disposition.

II. The Board Should Deny Any Future Request From OGRE for Common Carrier Operating Rights Over Any Portion of the Port's Property

OGRE is seeking a declaratory order from the Board in this proceeding about its planned track construction and rehabilitation activities. OGRE has stated that once the Board provides clarity on whether Board approval is required for those activities, OGRE plans to file a petition seeking authority to operate as a common carrier over all of the trackage that it constructs (or reconstructs).¹⁸ Specifically, OGRE states that it would seek STB authority under 49 USC § 10901 to operate as a common carrier over the following segments of track: (i) 60,760 feet of track on Port property;¹⁹ (ii) 22,220 feet of track that will be “rehabilitated” by OGRE and is located on City property;²⁰ and (iii) 13,000 feet of track which includes City-constructed rail crossings and UP/BNSF track.²¹ Although not clearly stated in OGRE’s filings in this proceeding, it is the City’s understanding that OGRE intends to provide rail service over the tracks that OGRE plans to build on City property in the West Gateway area, over the West Gateway Lead No. 2 track that OGRE wants to build on Port property in order to establish a physical connection with the Port’s yard trackage (and its connection with the Class I common carriers serving the Port’s facilities), and then over a substantial (but unspecified) portion of the Port’s yard trackage to the connection with the interstate rail network at the south end of the Port.

¹⁸ OGRE Petition at 5 n. 16.

¹⁹ As noted further below, the Port does not know specific Port trackage OGRE is referring to in this statement. The entire total linear footage of Port trackage in the vicinity of the former OAB (and which generally runs in a north-south direction adjacent to the UP trackage on the outside of the Port’s intermodal yard) is only about 30,000 feet. Therefore, the Port is confused by OGRE’s statement that it plans to operate over approximately 60,000 feet of Port trackage.

²⁰ We presume this includes the portion of the West Gateway Lead No. 2 that OGRE would like to construct on the Port’s property, although OGRE does not clarify whether this portion of track is included in the 22,000 feet.

²¹ OGRE has not made it clear what specific track is included in this 13,000 foot area or whether it has rights from the City, UP or BNSF to use such track for its planned purposes.

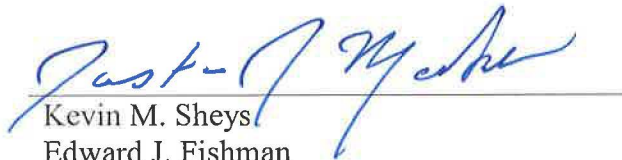
Although any OGRE request for common carrier operating authority is not before the Board in this declaratory order proceeding,²² it is imperative for the Board to understand that OGRE does not yet have (and may never obtain) the rights that it would need to operate over any portion of the Port's trackage, that negotiations between OGRE and the Port about OGRE's proposed use of the Port's property or trackage (and separate negotiations between the Port and the City about the OAB redevelopment project) are still ongoing, and that the Port at this time has no intention of allowing OGRE to operate as a common carrier over any portion of Port trackage or property. The Port is a non-carrier which does not engage in any type of rail operations, and the yard trackage that the Port has constructed is non-carrier trackage that lies entirely within the Port's marine terminal and intermodal yard facility and is used by OGRE's affiliate West Oakland Pacific Railroad ("WOPR") to provide contract switching service under a switching services agreement with UP and BNSF (the two Class I railroads that provide common carrier service to the Port's facilities). If the Port reaches any agreement to provide OGRE with rights to use any portion of Port trackage or property for rail operations, it would be pursuant to a similar contract switching agreement. Thus, since OGRE has not obtained the property and/or contract rights necessary to use any portion of the Port's trackage or property and the Port has no intention at this time of granting common carrier operating rights to OGRE with respect to any portion of the Port's trackage or property, OGRE's request for authority from the Board to operate as a common carrier would be both premature and unwarranted.

²² We note that OGRE's declaratory order petition was captioned as "Authority to Operate a Rail Line in Oakland, CA – Petition for Exemption From 49 U.S.C. § 10901" even though OGRE's declaratory order request only relates to its proposed track construction activities.

CONCLUSION

For the reasons explained above, the existing evidentiary record in this proceeding provides an insufficient basis for the Board to issue the declaratory order requested by OGRE with respect to any portion of the Port's property given that OGRE has not yet secured the property and/or contractual rights necessary to construct and operate over the track that it is planning to build on Port property and given the indications in the historical record that such track was not used by OTR as part of its common carrier operations. Moreover, the Board should deny any future request by OGRE for common carrier operating authority over any portion of Port property or trackage (unless and until such time as OGRE acquires the necessary property or other rights to use the Port's trackage and property in this manner).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Just - J Marks", is written over a horizontal line.

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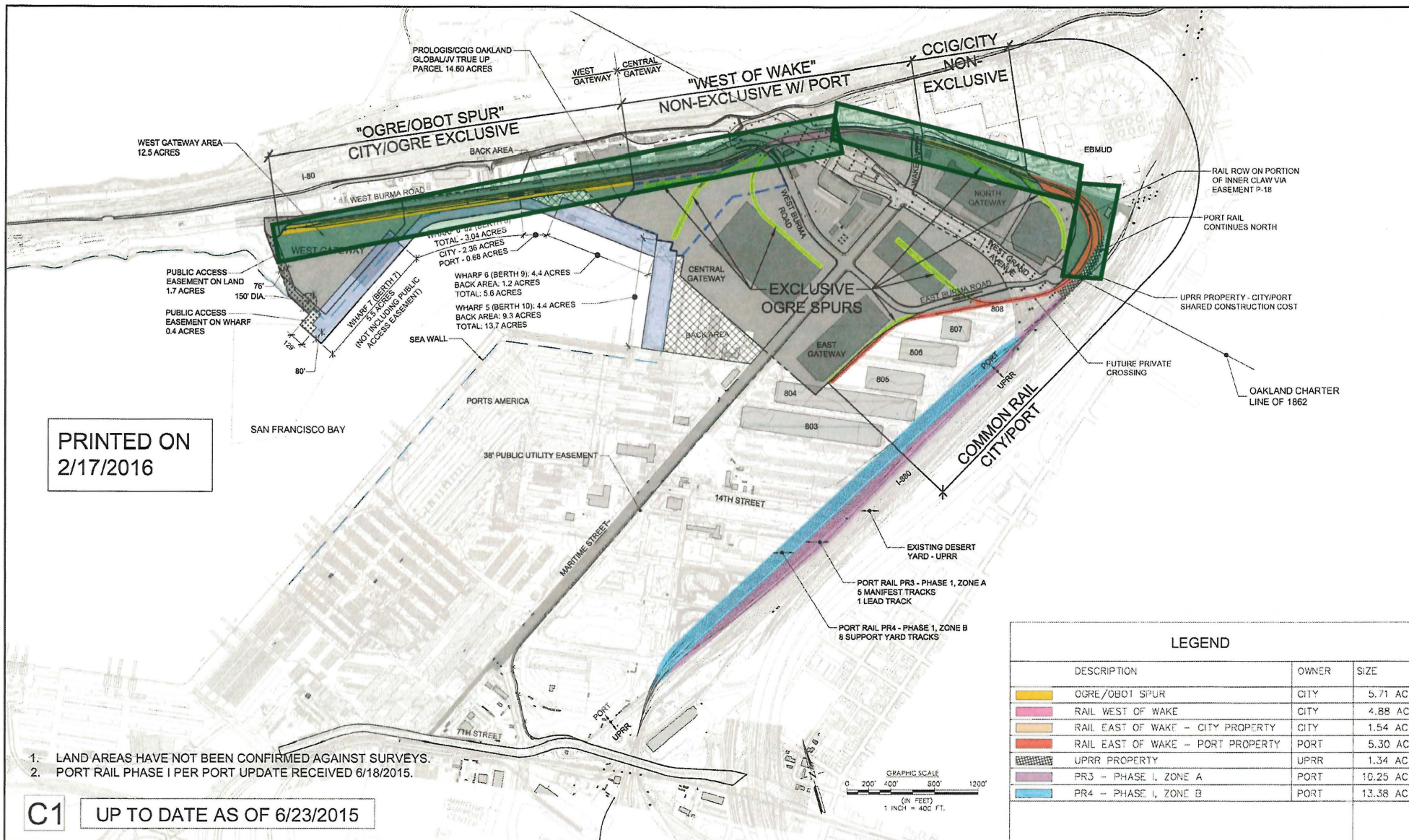
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Counsel for the Port of Oakland

Dated: September 18, 2018

Appendix 1

[Exhibit 2 from the OGRE May 23, 2018
Petition for Declaratory Order]



Appendix 2

[Exhibit 1, Page RR-10 from the OGRE
August 21, 2018 Response to STB Questions]

Aug 29, 2017 - 10:02am, Plotted By: BKELLY
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PORT OF OAKLAND



CITY OF OAKLAND

OAKLAND GLOBAL

"one vision, one team, one project"

HDR ENGINEERING, INC.
925-974-2500
2121 N. CALIFORNIA BLVD, SUITE 475
WALNUT CREEK, CA 94596

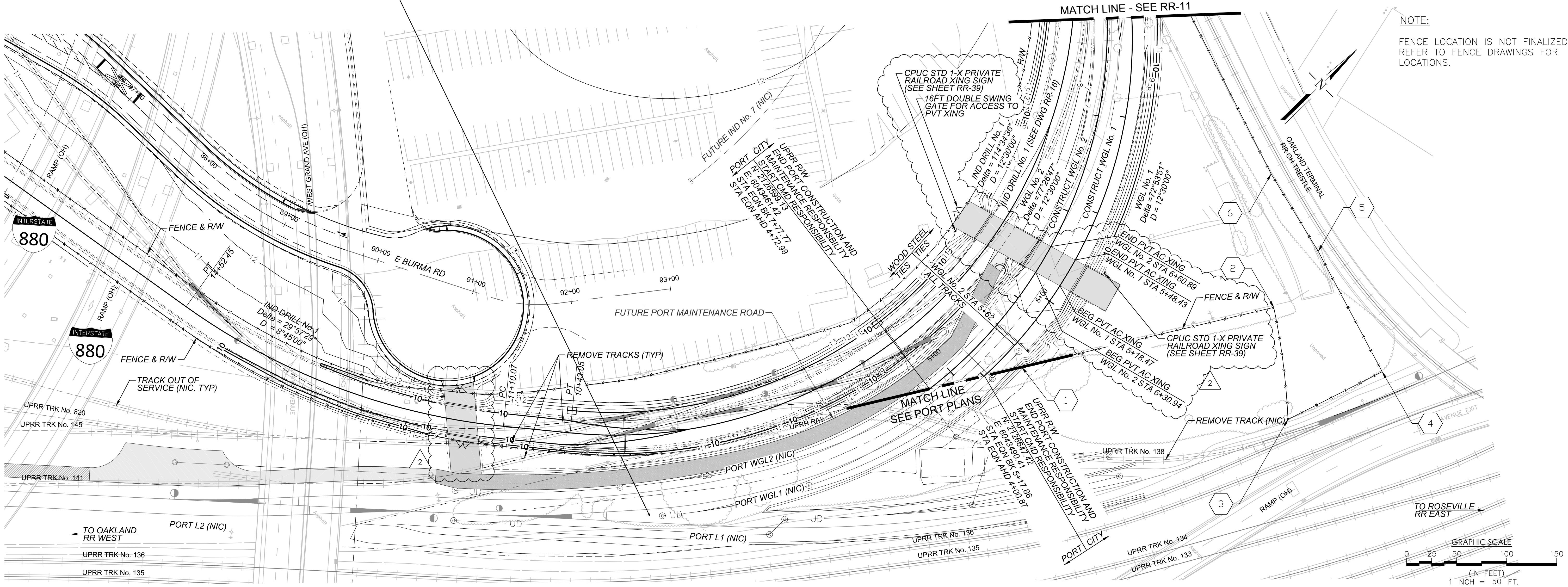
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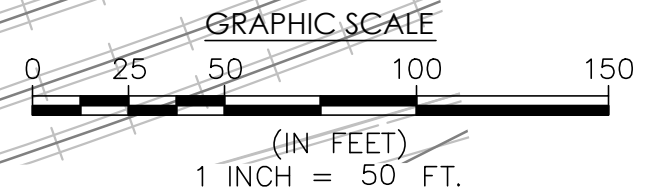
PROJECT INFO.

RAIL PLAN
TRACK PLAN AND PROFILE
CITY OF OAKLAND, ALAMEDA COUNTY, CALIFORNIA

DRAWING NO.				
RR-10				
SHEET 8 OF 85				
SCALE: 1" = 50'				
DATE: 08/28/2017				
REV	DATE	COMMENT	CHECKED BY	C.O.O.
10/14/2015		FRC #67 - BLDG-991 AND RAIL RELATED REV.	MRS	
04/29/2015		FRC #46 - PLAN CHANGES DUE TO UPDATED RAIL	MRS	FK
09/24/2014		CONSTRUCTION SET	MRS	FK

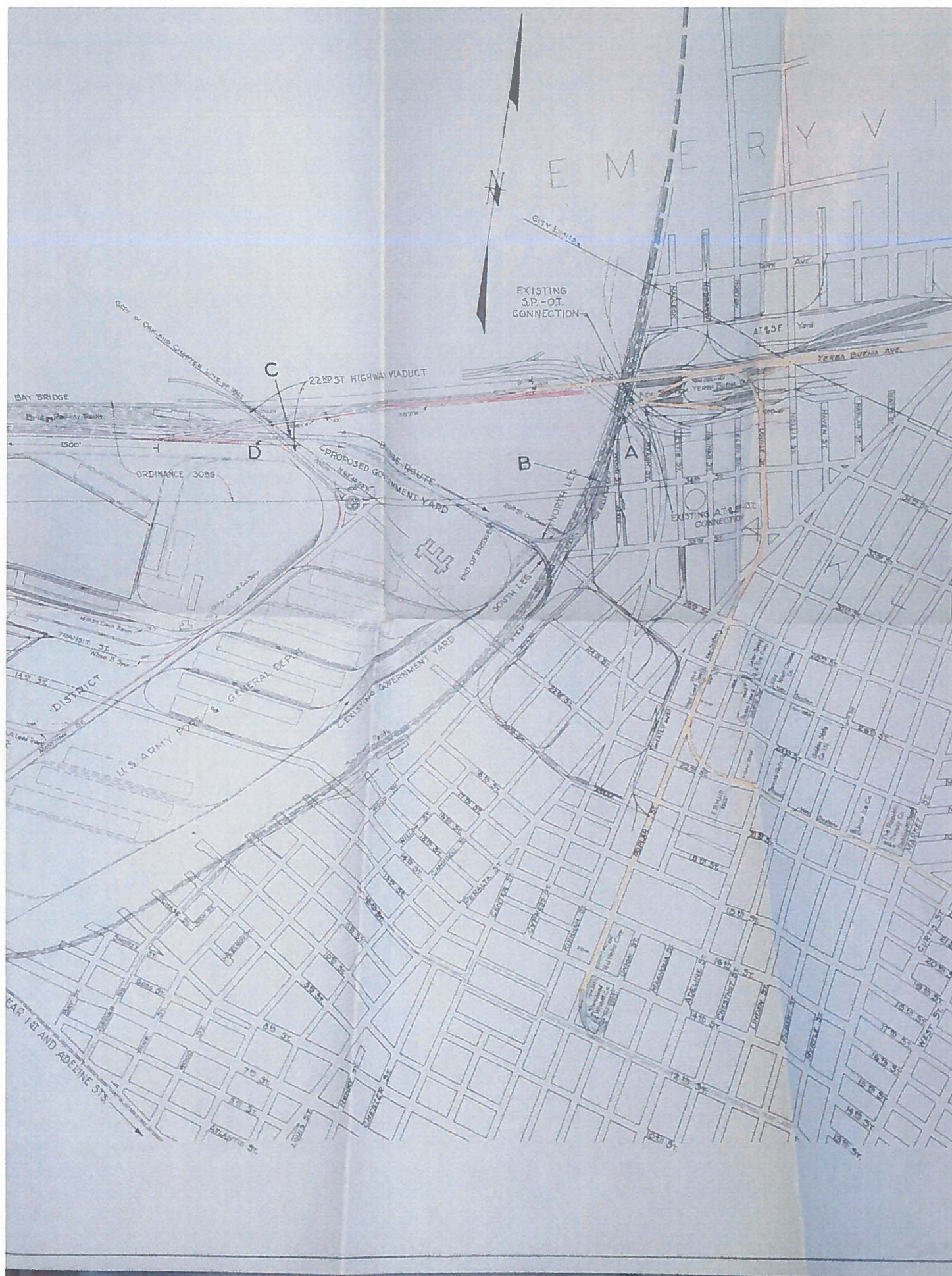


NOTE:
FENCE LOCATION IS NOT FINALIZED.
REFER TO FENCE DRAWINGS FOR
LOCATIONS.



Appendix 3

[Excerpt from Exhibit 2 of the June 29, 2018
Reply of the City of Oakland]



CERTIFICATE OF SERVICE

I certify that on September 18, 2018, a true copy of the foregoing Port of Oakland Comment was served via email upon the following counsel of record:

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