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**Before the
Surface Transportation Board**

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STB Finance Docket No. 34936

Port of Moses Lake – Construction Exemption – Moses Lake, Washington

Northern Columbia Basin Railroad Project

Petition to Reopen

FILED
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SURFACE TRANSPORTATION BOARD

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Petition to Reopen

The Port of Moses Lake (“Port”) hereby petitions the Surface Transportation Board (“Board” or “STB”) to reopen the above-captioned proceeding, in which the Board authorized a rail construction project in Grant County, Washington. Reopening is sought so that the Board can continue its consideration of the project under the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”) to evaluate the minor project modifications proposed by the Port, and for other reasons explained herein. The project will facilitate economic development and expanded use of freight rail transportation in Grant County, and the Port requests that the Board reopen this proceeding in order to authorize the project modifications described below and enable participation of the Federal Railroad Administration (“FRA”) in light of federal funds awarded to the Port for the project. In support hereof, the Port states as follows:

I. Background.

The Port is the proponent behind the Northern Columbia Basin Railroad Project (“NCBRP”), which involves track construction, acquisition, and operation of an approximately 11-mile rail corridor in and near the city of Moses Lake, in Grant County, Washington. The Port operates the Grant County International Airport (“GCIA”) and is chartered to foster economic development at GCIA and the surrounding port district area, which includes the city of Moses Lake. The NCBRP is one of the means by which the Port seeks to promote economic development on industrial lands near GCIA and on land zoned for industry along Wheeler Road. Another purpose of the NCBRP is to move rail traffic out of downtown Moses Lake.

The NCBRP has three components. Segment 1 involves construction of approximately 4.5 miles of new track from a connection with a rail line of the Columbia Basin Railroad Company, Inc. (“CBRW”) in the Wheeler neighborhood on the east side of Moses Lake to a connection with a different rail line of CBRW just west of the Parker Horn (Crab Creek) water crossing. Segment 2 involves construction of approximately 3.1 miles of new track from the existing CBRW line to the eastern side of the GCIA. Segment 3 involves acquisition and rehabilitation of approximately 3 miles of CBRW track that connects Segments 1 and 2. A Project Location Map, Exhibit ES.1 from the Final Environmental Assessment (dated May 8, 2009) is attached.

As part of moving this project forward, the Port filed a Petition for Exemption with the Board in STB Finance Docket Nos. 34936 and 34936 (Sub-No. 1) on August 14, 2008, seeking an exemption from the prior approval requirements of 49 USC § 10901 for the NCBRP. While Docket No. 34396 involves the rail line construction necessary for the NCBRP, Docket No.

34396 (Sub-No. 1) involves the rail line acquisition component of the project – which is not at issue in this Petition to Reopen.

In conjunction with the Washington State Department of Transportation (“WSDOT”), the Board conducted an environmental review in this proceeding, published a Final Environmental Assessment (dated May 8, 2009), and granted the requested exemption in a decision served August 27, 2009 in the two STB Finance Dockets listed above.¹

Board authorization of the NCBRP coincided with a significant economic downturn which slowed implementation of the project. The downturn and delay also hampered the Port’s efforts to secure funding sources. In the years since Board authorization, land development has occurred in the vicinity of the authorized rail line, meaning that certain minor route modifications would be advisable to reduce the impact of the rail line on existing land uses and to better fulfill the objectives of the NCBRP.

In 2015, the Project received state funding which facilitated progress on the NCBRP. In the Fall 2017, the Port obtained \$9.9 million from the U.S. Department of Transportation (“USDOT”) pursuant to the FASTLANE program for the NCBRP. The Port is now ready to implement the NCBRP. In order to reduce environmental and other impacts, as well as increase the effectiveness of the project, the Port would like to make minor modifications to the rail line alignment previously authorized by the Board.

¹ As part of the authorization decision, the Board also imposed a Programmatic Agreement (“PA”) as a condition of the exemption. See STB Decision (Aug. 27, 2009), slip op. at 9 and Appendix B (mitigation measure #6). The PA originally had a term of ten (10) years (until August 27, 2019), but the parties are seeking to extend the PA and add FRA as a party pursuant to the terms of the agreement. See also Programmatic Agreement at Sections VII and X.

II. Legal Framework.

A. Reopening at the Board.

The Board may reopen a proceeding at any time due to material error, new evidence, or substantially changed circumstances. 49 USC 1322(c). See also 49 CFR 1115.4. Petitions to reopen may be sought at any time,² and should meet the requirements set forth in 49 CFR 1115.3(c) and (d). To warrant reopening for new evidence, the evidence must be “newly available, and not just newly presented”³ or newly-discovered.⁴ Reopening is not warranted based on alleged new evidence if the “same substance” in the evidence “could have been brought before [the Board] previously.”⁵ To warrant reopening for changed circumstances, “there must be a changed circumstance that could materially affect the prior decision.”⁶ For example, changed circumstances have been found sufficient to warrant reopening of a rail line discontinuance proceeding when the only shipper on the line changed its position and opposed discontinuance, thus potentially materially affecting the Board’s analysis in the case.⁷

B. Supplementation of an Environmental Assessment.

Environmental review of major federal actions can be supplemented due to changes in the proposed action, significant new circumstances, or when the agency determines supplementation would further the purposes of such review. 40 CFR 1502.9(c). More

² 49 CFR 1115.4.

³ Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc., STB Docket No. 35110, slip op. at 4 (served June 22, 2011) (“FDOT”) (citations omitted).

⁴ Allegheny Valley Railroad Company – Petition for Declaratory Order, STB Docket No. 35239, slip op. at 7 (served April 19, 2013) (citations omitted).

⁵ Tongue River Railroad – Construction and Operation – Western Alignment, STB Docket No. 30186 (Sub-No. 3), slip op. at 13 (served June 15, 2011) (quotation and citation omitted).

⁶ FDOT, STB Docket No. 35110, slip op. at 4 (served June 22, 2011) (citations omitted).

⁷ Pioneer Industrial Railway Company – Alternative Rail Service – Central Illinois Railroad Company, STB Docket No. 34917, slip op. at 8 (served Jan. 12, 2007).

specifically, under the Board's environmental review regulations, an Environmental Assessment may be supplemented "where appropriate." 49 CFR 1105.10(b).⁸

III. New Evidence and Substantially Changed Circumstances Warrant Reopening for the Limited Purpose of (1) Evaluating the Minor Modifications and (2) Facilitating FRA Participation.

A. The minor modifications warrant limited reopening.

Environmental review of any proposed action includes evaluation of the effect of the proposed project on existing land uses. For the NCBRP, the Environmental Assessment found only one commercial property that would need to be relocated as a result of the project.⁹ However, additional land development has occurred along the proposed rail line, meaning that minor modifications are needed to the route in order to avoid relocation of several new commercial enterprises. Moreover, new development near the end of Segment 2 also warrants a minor route modification in order to ensure that the NCBRP can access the businesses that would make use of rail service, thereby fulfilling one of the objectives of the rail project.

In conjunction with these minor modifications, additional slight adjustments will reduce impacts of the rail project on the environment and the local community. In particular, a slight adjustment westward of the western end of Segment 1 will avoid buildings and reduce the acreage of wetlands affected. Other adjustments to Segment 1 will enable the rail line to cross local roads at right angles, rather than diagonally, thus improving visibility and increasing safety, and otherwise reduce local impacts.. Minor modifications to Segment 2 will better reach existing

⁸ For example, in one recent abandonment case, a Final Environmental Assessment was issued in October 2014, "concluding the environmental review process." Norfolk Southern Railway Company – Abandonment Exemption – In the City of Hopewell, VA, STB Docket No. AB-290 (Sub-No. 364X), slip op. at 2-3 (served Oct. 30, 2014). To address a late-received comment and a new issue, a Supplemental Final Environmental Assessment was subsequently developed in 2015. See decision served February 23, 2015 in the same proceeding.

⁹ See Preliminary Environmental Assessment at 5-22 (November 2008).

and future development in GCIA, minimize impacts and slightly reduce the necessary track for construction. **Exhibits A and B** to this Petition, show the minor modifications to Segments 1 and 2 to be studied in the Supplemental EA along with the alignment approved in 2009.

These minor modifications warrant reopening of the proceeding for several reasons. The additional land development that has occurred along and near the proposed rail line could not have been taken into account during the earlier environmental review. It qualifies as new evidence, not merely newly-discovered evidence.¹⁰ In December 2017, the Port and representatives of the Board's Office of Environmental Analysis ("OEA") began discussions regarding the alignments and subsequently agreed that supplementation of the Environmental Assessment is appropriate here. Thus, reopening of this proceeding is necessary for the limited purpose of enabling the Board to consider the Supplemental Environmental Assessment that is currently underway. Obviously, the Supplemental Environmental Assessment also qualifies as new evidence and substantially changed circumstances because it did not exist in 2008 and 2009, and could not have been considered in the August 2009 decision. The Board has previously reopened cases for limited purposes related to updated environmental review. See, e.g., Missouri Central Railroad Company – Abandonment Exemption – In Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, MO, STB Docket No. AB-1068 (Sub-No. 3X) (served Aug. 11, 2015) (reopening proceeding to impose new conditions recommended by Office of Environmental Analysis in Supplemental Final Environmental Assessment). The circumstances surrounding the project modifications indicate that the Board

¹⁰ Allegheny Valley Railroad Company – Petition for Declaratory Order, STB Docket No. 35239, slip op. at 7 (served April 19, 2013) (The Board's practice is only to accept new evidence, not newly-discovered evidence.).

should exercise its discretion under 40 CFR 1502.9(c) and 49 CFR 1105.10(b) and supplement the Environmental Assessment previously prepared in this proceeding.

B. Limited reopening is warranted to facilitate Federal Railroad Administration involvement due to the USDOT funding.

As mentioned above, the Port applied for and received federal funding from the USDOT under the FASTLANE grant program. In particular, the Port was awarded \$9.9 million¹¹ under the Small Project Fiscal Year 2017 Fostering Advancements in Shipping and Transportation for the Long-term Achievement of National Efficiencies (FASTLANE) grants, which are authorized by the Nationally Significant Freight and Highway Projects program of the Fixing America's Surface Transportation Act (the "FAST Act").¹² The FASTLANE grant funding is for final design/engineering, construction, and related activities.

On behalf of the USDOT, the FRA is administering the FASTLANE grant funding received by the Port for the NCBRP. The grant of federal money from the USDOT qualifies as a major federal action under NEPA, thereby requiring environmental analysis by the FRA. In light of the minor modifications and NEPA analysis also required by FRA, OEA and FRA have been working together. FRA staff have been working with the Port and the OEA in developing the framework for the environmental review that will occur as part of the Supplemental Environmental Assessment.

It is appropriate for the Board and FRA to coordinate their duties under NEPA and the NHPA and create a single Supplemental Environmental Assessment. As the Board knows, federal agencies have been directed to coordinate their environmental review and produce one

¹¹ See FASTLANE 2017 Annual Report at <https://www.transportation.gov/buildamerica/infragrants/FY17report>.

¹² See Public Law 114-94. Starting in Fiscal Year 2018, the FASTLANE program was replaced by the similar Infrastructure Rebuilding America (INFRA) grant program.

single Record of Decision whenever possible.¹³ FRA and Board OEA staff formally agreed that the Board would be the lead agency for purposes of NEPA and NHPA, and that the FRA would be a cooperating agency.

Again, the receipt of federal funding by the Port for the NCBRP constitutes new evidence because the funds were only awarded in 2017. Moreover, the need for the FRA to participate in environmental review is a changed circumstance that also warrants reopening for the limited purpose of considering the Supplemental Environmental Assessment currently being developed.

C. Unlike the Tongue River case, reopening is warranted here.

The circumstances facing the Board here are significantly different than those in an earlier rail construction case where the petitioner's reopening request was denied. In that earlier case, the petitioner asserted that the authorized alignment (the Four Mile Creek Alternative) was not feasible, and sought to replace it with a wholly new alignment (the Western Alignment) never previously raised. Reopening was denied because the petitioner had earlier told the Board that it had already performed an "exhaustive review of possible routings" and the preferred alignment and the Four Mile Creek Alternative were the "only possible alignments."¹⁴ The Board also noted that it was the railroad petitioner itself who had originally proposed the Four Mile Creek Alternative.¹⁵

The petitioner failed to describe any changed circumstance that would warrant reopening, such as "a recent change in topography or terrain of the area or the removal of some past obstacle

¹³ See Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects", issued at 82 Fed. Reg. 40463 (Aug. 24, 2017).

¹⁴ Tongue River Railroad Company – Rail Construction and Operation – Ashland to Decker, Montana, STB Docket No. 30186 (Sub-No. 2), slip op. at 5 (served Dec. 1, 1997).

¹⁵ Tongue River Railroad, STB Docket No. 30186 (Sub-No. 2), slip op. at 5 (served Dec. 1, 1997).

that prevented it from introducing the Western Alignment earlier.”¹⁶ Moreover, the Board stated that its decisions cannot function as “changed circumstances,” such that the petitioner could reasonably avoid serious consideration of the Four Mile Creek Alternative only after the Board’s decision authorizing that alternative instead of the petitioner’s preferred alignment.¹⁷

Similarly, reopening was not warranted due to new evidence. The petitioner introduced studies, analyses, and reports showing that the Four Mile Creek Alternative was not economically feasible due to steep grades, long running times, maintenance expense, and fuel consumption requirements.¹⁸ The Board found that this evidence was not new: it “could have and should have been developed and presented earlier.”¹⁹

The circumstances in the Tongue River proceeding are markedly different than those facing the Board with the Port’s pursuit of the NCBRP. First, the new evidence and changed circumstances that exist here (land development, federal funding, role of the FRA) are genuinely new facts that did not exist during the prior environmental review in 2008 and 2009. In contrast, the proponent in the Tongue River case could have, but did not, describe the problems with the Four Mile Creek Alternative earlier. The proponent also could have proposed the Western Alignment earlier. Unlike the petitioner in the Tongue River case, the Port meets the standards for reopening in 49 USC 1332(c) and 49 CFR 1115.4.

¹⁶ Tongue River Railroad, STB Docket No. 30186 (Sub-No. 2), slip op. at 6 (served Dec. 1, 1997).

¹⁷ Tongue River Railroad, STB Docket No. 30186 (Sub-No. 2), slip op. at 6 (served Dec. 1, 1997).

¹⁸ The desired Western Alignment was 11.6 miles shorter than the authorized Four Mile Creek Alternative.

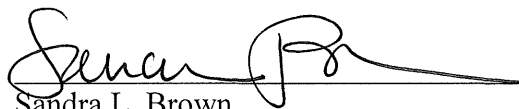
¹⁹ Tongue River Railroad, STB Docket No. 30186 (Sub-No. 2), slip op. at 7 (served Dec. 1, 1997).

IV. Conclusion and Request for Relief.

A Supplemental Environmental Assessment is appropriate here given the minor project modifications proposed by the Port to address developments that occurred since the project was permitted and to assist with coordination with FRA in the environmental review for federal funding. OEA staff and the FRA have already agreed that supplementation of the prior Final Environmental Assessment is similarly appropriate. In light of the minor project modifications, the role of the FRA, and the preparation of a Supplemental Environmental Assessment, reopening of this proceeding is warranted.

Consequently, the Port respectfully requests that the Board reopen this proceeding for the limited purpose of conducting review of the minor project modifications under NEPA and NHPA, as described in the Supplemental Environmental Assessment that will be created. The Port also requests that the Board authorize the modifications to be implemented as part of the project.

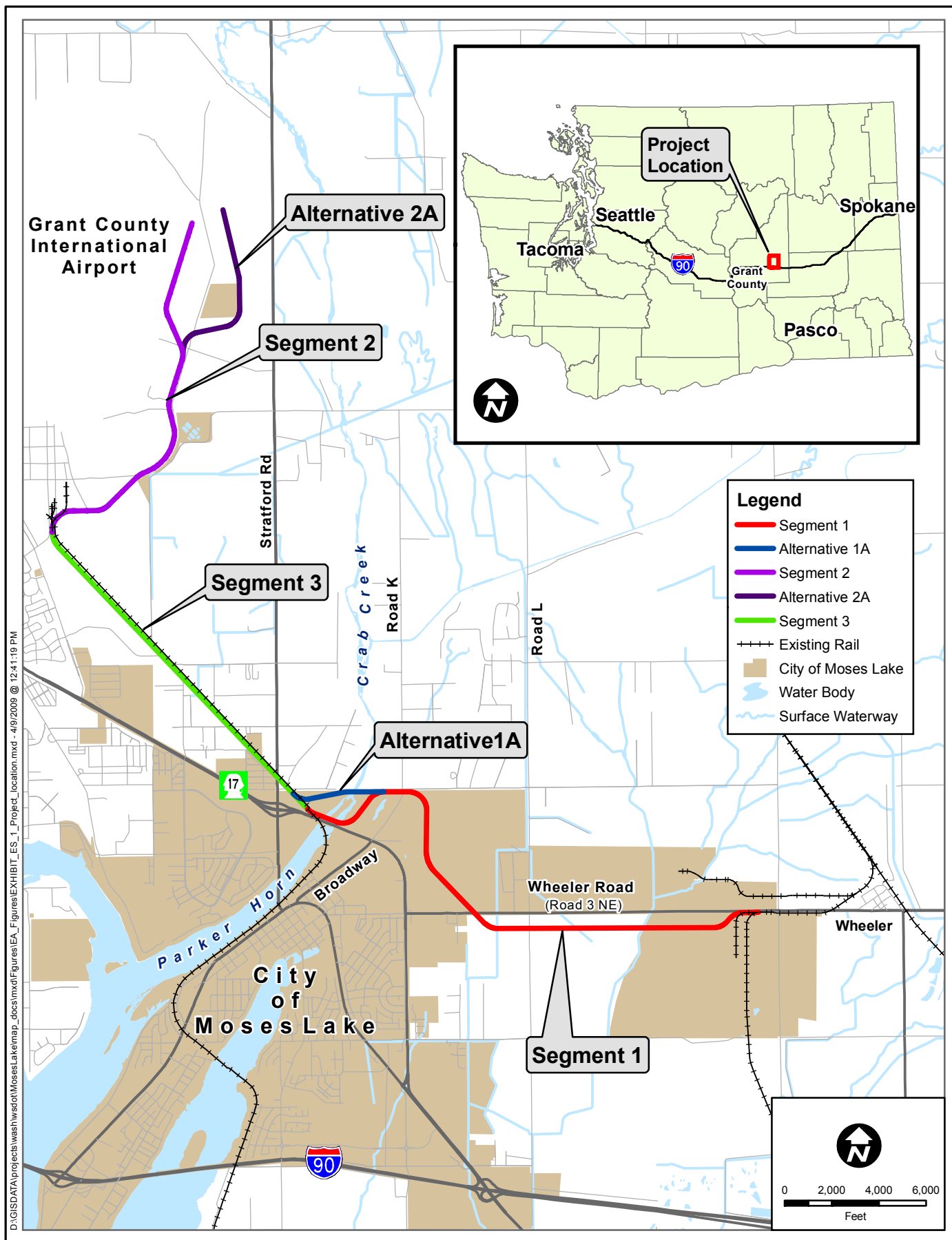
Respectfully submitted,

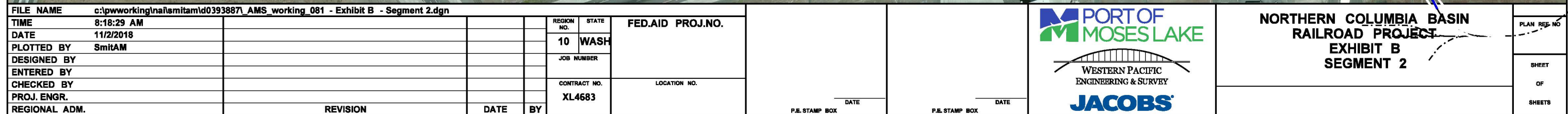
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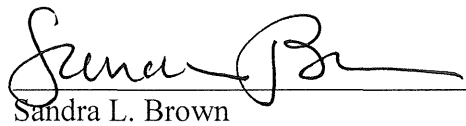
November 2, 2018





CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2018, that there are no current parties of record in FD No. 34936 shown on the Surface Transportation Board's Service List.


Sandra L. Brown