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11 March 2004

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

210283

Re: Yakima Interurban Lines -- Adverse Abandonment
-- in Yakima County, WA, AB 600

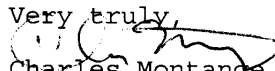
Dear Mr. Williams:

On behalf of Yakima County, City of Yakima, Town of Naches, and Yakima Interurban Lines Association ("Rail Commenters"), enclosed please find for filing in the above-captioned proceeding an original and requisite copies of a Protest and Comments.

I also enclose copies of a "statement of willingness" on behalf of Yakima County. Under 49 C.F.R. § 1002.2(e)(1), filing fees are waived for filings by local government entities. Yakima County is a local government entity. Therefore the filing fee for the "statement of willingness" is waived.

Rail Commenters may comment further in response to the Environmental Assessment issued by this agency in connection with this adverse abandonment proceeding.

Thank you for your assistance in this matter.

Very truly,

Charles Montange
for Rail Commenters

Encls.

cc. Counsel for Kershaw (ad. ab. applicant) (w/encl)
Counsel for WsDOT (w/encl.)
Counsel for Rail Commenters (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

210283

Yakima Interurban)
Lines Association --) AB 600
Adverse Abandonment --)
in Yakima County, WA)

MAR 12 2004

RECEIVED

JOINT PROTEST AND COMMENTS
AND
MOTION TO MODIFY (EXPAND) OR TO DISMISS

on behalf of

YAKIMA COUNTY,
CITY OF YAKIMA,
TOWN OF NACHES, and
YAKIMA INTERURBAN LINES ASSOCIATION

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Due: 12 March 2004

This protest and comments and motion to modify (expand) or to are made on behalf of Yakima County, City of Yakima, Town of Naches, and Yakima Interurban Lines Association (YILA) (hereinafter jointly referred to as "Rail Commenters"). Yakima County, City of Yakima, and Town of Naches encompass all the local units of government traversed by the Naches Branch, which is the rail line at issue in this proceeding. YILA, a Washington State non-profit corporation, is the owner of the Naches Branch from Milepost (MP) 2.97 (near City of Yakima) to MP 14.26 (near Town of Naches).

Washington State Department of Transportation (WsDOT) has reviewed this Joint Protest and Comments and has authorized Rail Commenters to state that WsDOT concurs in the arguments and relief sought.

Kershaw Sunnyside Ranches, Inc. (Kershaw) instituted an adverse abandonment proceeding directed at approximately one mile of the Naches Branch roughly in the middle of the portion owned by YILA.

As detailed below, Rail Commenters object to the adverse abandonment as sought by Kershaw. The abandonment as sought by Kershaw would constitute a segmentation of the Naches Branch unlawful under federal transportation law, the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA). Rail Commenters urge that the Kershaw adverse abandonment proceeding either be dismissed, or [consistent with federal rail policy, the interests of the

affected local communities, and 49 U.S.C. § 10903(e)(1)(B)] be modified to encompass the entire Naches Branch from MP 2.97 to MP 14.26. Such a modification would address the segmentation problem that otherwise bars granting any relief to Kershaw. If this proceeding is not dismissed, then Rail Commenters support railbanking under 16 U.S.C. § 1247(d) whatever portion of the Naches Branch (which Rail Commenters urge be the entire Naches Branch as owned by YILA rather than the arbitrarily defined segment proposed by Kershaw) this Board authorizes for abandonment. Railbanking the entire Naches Branch from MP 2.97 to MP 14.26 will foster restoration of rail service under plans worked out by Yakima County and the Washington State Department of Transportation (WsDOT). A "statement of willingness" on behalf of Yakima County is attached as Exhibit E to Appendix I hereto [Appendix I is the (Joint) Statement of Richard Anderwald (County Planning Director) and Vernon Redifer (County Public Works Director)].¹

I. Background

A. Plan for Rehabilitation of Naches Branch

YILA acquired the Naches Branch from MP 2.97 to MP 14.26 from Burlington Northern and Santa Fe Railroad (BNSF) in 1999. See Yakima Interurban Lines Association -- Acquisition Exemption -- BNSF, F.D. 33719, served March 4, 1999. BNSF retains

¹ Under 49 C.F.R. § 1002.2(e)(1), filing fees are waived for filings by local government entities. Yakima County is a local government entity. Therefore the filing fee for the "statement of willingness" is waived.

ownership of the Naches Branch from MP 0 at the mainline to MP 2.97, and provides service to several shippers on that portion of the Branch.

Subsequent to acquiring the line, YILA undertook its rehabilitation, employing roughly \$500,000 in secured low interest loans from WsDOT. YILA also sought to acquire equipment, employing bank loans. Unfortunately, YILA did not complete the rehabilitation, the equipment it sought to acquire has been repossessed or sold to pay off debt, and YILA has defaulted on some of its private debt. As a result, YILA is saddled with a substantial debt burden, and its only asset is the Naches Branch, against which there are now substantial liens, the bulk of which are held by WsDOT. There is currently no rail service on YILA's portion of the Naches Branch.

As may be surmised from WsDOT's past effort to accomplish the rehabilitation of this line, there is substantial potential for rail service should the line be restored to a degree sufficient to permit rail traffic to resume. The Rail Commenters support rehabilitation of the line for rail service. WsDOT is prepared to make further investment but wishes to ensure appropriate management of the additional funds. To this end, Yakima County and WsDOT have worked out a plan for the restoration of rail service on the Naches Branch. The plan (discussed more fully in Appendix I at ¶¶ 5-8 and in Appendix IV) is as follows:

Stage One. County will acquire YILA's portion of the

Naches Branch from YILA and contract with a third party to operate the line, provided that the following three conditions are met:

(a) all government and properly perfected private liens on the Naches Branch are satisfied and/or forgiven (i.e., the County is not obligated to pay any of YILA's indebtedness).

(b) County does not have a common carrier obligation (i.e., County will acquire the line only after "railbanking" or subject to an order of the STB exempting the County from common carrier obligations).

(c) YILA agrees to transfer the property to County.

Subject to appropriations from the Washington State Legislature and the negotiation of appropriate contractual documents, WsDOT has agreed in principle to supply adequate funding (estimated at approximately \$200,000) to clear the perfected private liens from the line at or by the time of closing of an acquisition of the YILA portion of the Naches Branch by the County. WsDOT will further cooperate so that the County will not be liable for any of the prior State liens. See Appendix IV ¶1.

Stage Two. County will arrange rehabilitation (either directly or through its third party contractor) of the Naches Branch from MP 2.97 to a suitable end point at Naches, subject to the following two conditions:

(a) County has acquired the line as provided in the first stage.

(b) Sufficient funds are available from WSDOT or third parties to complete rehabilitation.

Subject to appropriations and suitable contractual arrangements, WSDOT has agreed in principle to supply additional funding (estimated to be approximately \$300,000) to complete rehabilitation of the line in this second stage. App. IV ¶1.

YILA has agreed to support this plan. This agreement includes agreement in principle to transfer its entire portion of the Naches Branch to the County in accordance with the program outlined in "Stage One" above. See Appendix II (statement of Paul Edmondson for YILA).

The County already owns one rail line operated by Toppenish, Simcoe & Western Railroad, Inc. (TSWR). TSWR has expressed interest in operating the Naches Branch, including specifically pursuant to this Board's "modified certificate" regulations (49 C.F.R. § 1150.21, et seq.). See Exhibit C to Appendix I [Letter, Mr. John Hood (TSWR) to Ms. Anne Knapp (County), Feb. 27, 2004]. Rehabilitation of the line enjoys the support of key potential shippers on the line, including the lumber or lumber-related concerns which are the major potential users of the line. See Exhibit B to Appendix I.

There are additional reasons beyond restoration of rail service for preservation of this line. For example, several of the Rail Commenters are interested in possible trail use of the line. The line if converted in whole or in part to a trail would provide a welcome interurban non-motorized path between

Naches and Yakima. The line also parallels a highway leading to Mt. Rainier National Park. It thus has potential to serve both local bicycle commuters as well as recreational users visiting Yakima's wineries and going to or coming from Rainier. Indeed, some of the commenters are interested in rail with trail use, to further enhance the public benefits from the line. TSWR in its letter (App. I, Ex C) notes specifically that it is prepared to provide rail service in a rail with trail context. The Naches/Yakima corridor is also suitable for excursion rail use, which would be a ready complement to restored freight service. Finally, the line encompasses several public utilities, including a pipeline serving the City of Yakima (the City's water treatment plant is basically located between the Kershaw property and segment of rail which Kershaw seeks to abandon and the river) and telecommunications facilities. Keeping the line intact would facilitate these and other utility uses.

As indicated in the discussion under "Stage One," the County wishes to acquire YILA's portion of the Naches Branch in a fashion that does not subject the County itself to common carrier obligations. The gravamen of federal rail transportation policy is to encourage efficiency [49 U.S.C. § 10101(1)-(7) & (9)], including efficiency in STB proceedings [49 U.S.C. § 10101(15)]. Consistent with this policy, the most efficient way to facilitate the restoration of service on the Naches Branch is for this Board to expand this adverse abandonment proceeding to encompass the entire YILA portion of

the Naches Branch (i.e., MP 2.97 to end of line at MP 14.26). Then, pursuant to the "Statement of Willingness" filed by Yakima County herewith (Appendix I, Exhibit E) and YILA's consent to negotiate a railbanking agreement (Appendix II at ¶5), this Board should issue a "Certificate of Interim Trail Use" or "CITU" as provided in 49 C.F.R. § 1152.29. Once County has acquired the line pursuant to the CITU, County plans to negotiate an operating agreement with an appropriate operator, like TSWR. An operator such as TSWR in turn would apply for a modified certificate of public convenience and necessity under 49 U.S.C. § 1150.21, et seq. Either the County or its operator would manage the rehabilitation of the line employing funds provided by WSDOT or third parties.

B. Severance

Kershaw seeks to obtain an adverse abandonment authorization for one mile of the Naches Branch located roughly in the middle of the portion owned by YILA. So far as Rail Commenters can tell, the endpoints of the abandonment have been arbitrarily selected to be the portion of the line with respect to which Kershaw owns adjoining property. In state litigation, Kershaw has already obtained a judgment (currently under appeal) that YILA's ownership interest in that portion of the corridor is only a railroad easement. If, as contended by Kershaw, (i) there is no rail service, and (ii) YILA's property in question is only an easement, then when and if this Board issues an abandonment authorization, under Washington State law the

railroad easement will extinguish.² The remainder to the Naches Branch into Naches will be severed -- totally cut off -- from any connection to the interstate rail system. The cost to replace on an alternative route (assuming arguendo that an environmentally feasible alternative route is located) the roughly one mile of track which would be lost to a Kershaw adverse abandonment is prohibitive.³ For all these reasons, the adverse abandonment of the one mile sought by Kershaw is a de facto abandonment of the entire end of the Naches Branch.

From a rail transportation standpoint, the scope of the abandonment defined by Kershaw has no logical termini, the segment in question has no independent utility (it merely serves to connect one end of the line to the interstate network), and authorizing abandonment of the segment proposed by Kershaw forecloses any alternative to abandonment of the remainder of YILA's portion of the Naches Branch. See, e.g., Appendix II, ¶4; Appendix I, ¶9; Appendix IV, ¶3.. For example, since the main shipper on YILA's portion of the Branch is a lumber company (Layman Lumber) in Naches, the adverse abandonment sought by YILA is thus tantamount to an adverse abandonment of the line serving Naches and the main shipper on the line. If service to

² If the property is railbanked under 16 U.S.C. § 1247(d), then Washington law on easement extinguishment will not result in automatic extinguishment of the putative rail easement.

³ WSDOT estimates the construction cost alone at a number in excess of \$970,000. See Appendix IV & Att. The County estimates the land acquisition and relocation costs alone at \$280,000 (Appendix I, ¶13).

Naches is cut, as effectively proposed by Kershaw, then there would be no economic basis to restore any of the line. In short, the abandonment sought by Kershaw would render the line non-viable. In addition, since there are no adequate facilities for storage or turning of equipment on the YILA portion of the line except at Naches. The abandonment sought by Kershaw would thus render the remnant line difficult if not infeasible to operate. The Kershaw adverse abandonment of one-mile thus constitutes a segmentation that is tantamount to an abandonment of the entire YILA portion of the Naches Branch. See App. II, ¶4; App. I, ¶9; App. IV, ¶3.

II. Argument

Under 49 U.S.C. § 10903(d), this Board may authorize a rail carrier to abandon all or a part of its rail line "only if the Board finds that the present or future public convenience and necessity require or permit the abandonment" The statute also provides that "[i]n making [this] finding, the board shall consider whether the abandonment ... will have a serious, adverse impact on rural and community development." Kershaw's application is deficient and insufficient to permit this Board to make the requisite findings for the one-mile segment involved here.

A. This Proceeding either Must Be Dismissed or Modified

The one-mile adverse abandonment as sought by Kershaw Sunnyside Ranches is a segmentation unlawful under federal transportation regulatory law, NEPA and the NHPA. It cannot be

allowed in the terms sought by its applicant.

Rail Commenters have found no case on the STB website or the Lexis-Trans library in which this Board or its predecessor agency (ICC), authorized a railroad to abandon one mile in the middle of a dead-end branch line, thus severing the end of the line from any connection to the interstate network. Allowing such practice would permit applicants to ignore shipper, community, and environmental impacts by cherry-picking for abandonment proceedings only those portions of longer dead-end lines which lacked shippers and/or segment-specific environmental issues. Once those arbitrarily-defined segments were approved for abandonment, abandonment would become a foregone conclusion for the remaining remnants, despite the interests of shippers, the community and the environment in the severed remnants. This is exactly what is happening here. Although the key shipper for YILA's Naches Branch is located in Naches, and although Naches will be totally severed from connection to the interstate network should the relief sought by Kershaw be granted, the adverse abandonment application of Kershaw ignores this fact. The energy and transportation impacts are likewise totally ignored in this Board's Environmental Assessment (EA) served February 27. On the environmental side, there is an historic depot in Naches. As the Town of Naches has already indicated in a separate letter filed with this Board, Naches has received a grant for its rehabilitation from the U.S. Department of Agriculture and is

competing for additional grants. Letter, Feb. 10, 2004, G. Lighty (Naches) to V. Williams (STB). De facto abandonment of the rail line adjacent to the depot would alter the historic context of the depot in an adverse fashion, yet this impact is neither identified nor addressed either by Kershaw (the applicant) or by this agency in its EA, due to the improper segmentation.

Based on our review to date, courts have never been confronted with as egregious a segmentation case as this (where one end of a line is totally isolated) in the transportation regulatory context. Nonetheless, those cases which have addressed the lawfulness of segmentation in the rail abandonment context have indicated very clearly that STB may not simply defer to arbitrary limits on the scope of abandonment set by rail abandonment applicants. For example, in Futurex Industries, Inc. v. ICC, 897 F.2d 866, 874 (7th Cir. 1990), the court explained that applicants for abandonment authorization "may not abandon discrete segments of ... lines" which in effect "render the adjacent segments valueless." The Seventh Circuit indicated that it would not countenance "programs of total abandonment by fragmenting valuable lines into less than valuable parts. It is important that [an applicant] make a preliminary showing to the ICC that its abandonment of a segment has logical termini, has substantially independent utility, and will not foreclose future alternatives for the mainline." 897 F.2d at 874.

More specifically, the court of appeals explained that:

"When segmentation of transportation lines is involved, we consider whether the segmentation satisfies three conditions: (1) does the proposed segment have logical termini? (2) does the segment have substantially independent utility? and (3) will abandonment of the disputed segment foreclose alternate treatment of the remaining segments? The satisfaction of these three criteria tends to ensure that carriers will not abuse [the abandonment authorization process] by carving out one segment of a line in an attempt to make the remainder of the line useless and subject imminently to abandonment. We must, of course, be vigilant to detect and restrain the latter phenomenon should it appear."

897 F.2d at 872, quoted with approval in Caddo Antoine and Little Missouri R. Co. v. United States, 95 F.3d 740, 747-48 (8th Cir. 1996).⁴ The Seventh Circuit in Futurex also emphasized that the burden was on the applicant to justify segmentation when challenged. 897 F.2d at 874. The court of appeals found that the test had been met with respect to the 14.58 mile segment in question, because there was no traffic on it, traffic on each side of it could move to market independent of the segment, and abandonment of the segment would not necessitate abandonment of additional segments. 897 F.2d at 872-73.

But this stands in sharp contrast to the situation before STB with the Kershaw application. Kershaw's proposed segment lacks logical termini. Indeed, Kershaw's proposed termini have nothing to do with transportation needs, and appear to relate

⁴ In Caddo Antoine, the Eighth Circuit reversed as an improper segmentation an ICC ruling limiting a feeder line application to a segment of a line which excluded some significant shippers at the junction of the branch line with a mainline.

solely to the borders of adjoining property purportedly owned by or convenient to Kershaw. Kershaw's proposed segment does not have independent utility. The proposed abandonment segment simply permits traffic to go to and from shippers in Naches. Finally, abandonment of the proposed segment will foreclose alternate treatment not only of the severed portion of the Naches Branch at Naches, but also of the remnant connecting to the stub owned by BNSF near Yakima. App. I, ¶9; App. II, ¶ 4. In other words, if the Kershaw segment is abandoned, the remnants must be abandoned.

Since this Board takes the position that it loses jurisdiction (for example, for railbanking purposes) over pieces of rail line isolated from the interstate rail system [see RLTD Railway Corp. v. STB, 166 F.3d 808 (6th Cir. 1999)], it follows that Kershaw's adverse abandonment application must necessarily be viewed as a de facto abandonment of the severed line into Naches, as well as the unusable remnant at the Yakima end. Indeed, granting the Kershaw request forecloses any alternative to abandonment for the remainder of the Naches Branch as owned by YILA. Since the loss of the end of the line renders the entire portion of the Naches Branch owned by YILA non-viable, it follows that the adverse abandonment application must be viewed as an unlawful segmentation of (or, as explained later, as an abandonment application for) the entire length from MP 2.97 to MP 14.26.

49 U.S.C. § 10903(d) specifically requires this Board to

consider impact of an abandonment upon rural and community development in making any finding authorizing abandonment. Any bona fide analysis of rural and community development must take into account the fact that abandonment of the arbitrary one mile identified in Kershaw's application is tantamount to an abandonment of the entire Naches Branch owned by YILA. Again, the arbitrary segmentation presented by Kershaw and thus far tolerated by STB ignores the scope of the rural and community development impact of the adverse abandonment proposed by Kershaw.

In sum, under Futurex Industries, the segment proposed by Kershaw is unlawful for purposes of reviewing economic and environmental impacts. The burden is on Kershaw to show that the segment makes sense under the tests articulated in Futurex, and Kershaw has not even begun to make a showing in this respect, much less bear its burden.

A similar conclusion is self-evident if one looks solely at the law governing unlawful segmentation for environmental review purposes. In general, a federally-funded or federally-licensed "project" (Kershaw's application is equivalent to a request for a federal license) is improperly "segmented" for environmental review purposes if there is so strong a "nexus" between the segments that they must be considered one project. It has long been established that in determining the nexus, courts consider matters such as geographic location and the utility of each segment independent of the other. E.g., Sierra Club v.

Callaway, 499 F.2d 982, 990 (5th Cir. 1974). Here we have already demonstrated that the one-mile segment under consideration by STB lacks independent utility, and is essentially associated with the remnant segments at each of its ends. Federal officials may not avoid the requirements of federal law by splitting what in essence is a single federal project (here, abandonment of the entire Naches Branch owned by YILA) into several segments, taking action to facilitate certain segments, and then pretending that the remaining segments are independent, merely because the applicant has not chosen to place them before the agency. Compare Named Members of San Antonio Conservation Society v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972). See also Patterson v. Exon, 415 F.Supp. 1276, 1283 (D. Neb. 1976); River v. Richmond Metropolitan Authority, 350 F.Supp. 611, 635 (E.D. Va. 1973). "[T]he rule against segmentation forbids a bifurcated treatment of a single stretch of highway arbitrarily chopped at the boundaries of a public park, or of one stretch of road where the second segment is dictated by the first, or of a single highway cut in half for purposes of analysis." Rodgers, Environmental Law 789 (West 1977) (citations omitted). Here, if STB were to allow Kershaw's illogical termini to stand, STB will have permitted its licensing process to be arbitrarily limited by the boundaries of Kershaw's adjacent property, ignoring the obvious linkages to Naches and Yakima, and effectively cutting a continuous rail line in two, rendering both remnants unusable

for the purposes intended.⁵

In short, the Kershaw application, at its most fundamental level, is an unlawful segmentation for purposes of federal transportation law, NEPA and NHPA. Unless the proceeding is modified to encompass the entire line, there is only one proper response to the application: it must be dismissed.⁶

⁵ The consequences of unlawful segmentation in the context of historic preservation and federally funded (as opposed to licensed) highway construction activities are discussed in Old Town Neighborhood Association v. Kauffman, 2002 WL 31741477 (S.D.Ind. Nov. 15, 2002) (granting preliminary injunction), rev'd in part 333 F.3d 732 (7th Cir. 2003) (modifying nature of undertaking to avoid segmentation), 2003 WL 22004870 (S.D. Ind. 2003) (issuing permanent injunction to prevent segmentation problem).

⁶ Yakima County and others of the Rail Commenters previously raised the objection of improper severance and segmentation. The gravamen of Kershaw's response is that it is only interested in Naches Branch insofar as Kershaw is an adjacent property owner. Kershaw Response to Yakima County's Objections to the Filing of Application, filed Jan. 22, 2004, at 4-5. Kershaw may have standing to file an adverse abandonment because of such an interest, but Kershaw's interest for standing purposes has nothing to do with logical termini of an abandonment for purposes of transportation law or environmental law. The scope of a party's "interest" does not define an independent unit for segmentation purposes. Nothing in Kershaw's "interest" precludes it from proposing an abandonment with logical termini. Indeed, Kershaw's arguments and showings appear to relate to the entire line, not just that adjacent to Kershaw, making it simple for Kershaw to propose logical termini, and certainly something other than a remnant at Naches isolated from the interstate rail network. In any event, any excuse for Kershaw based on its perceived narrow "interest" does not excuse the Surface Transportation Board itself to engage in unlawful segmentation.

There is one alternative to dismissal for unlawful segmentation which might be argued by Kershaw. STB may impose conditions on abandonments. 49 U.S.C. § 10903(e)(1)(B). In theory, this Board could authorize the abandonment conditioned upon Kershaw posting a bond sufficient to permit YILA or its successor in interest to purchase alternative railroad right of way and to reconstruct the railroad line displaced by granting the Kershaw adverse abandonment application. This approach

This Board has broad power to reformulate proceedings. For example, in The Land Conservancy of Seattle and King County-- Acquisition and Operation Exemption -- The Burlington Northern and Santa Fe Ry. Co., F.D. 33389; The Land Conservancy of Seattle and King County -- Abandonment Exemption -- in King County, AB 508X; The Burlington Northern and Santa Fe Ry Co.-- Abandonment Exemption -- in King County, AB 6 (Sub-no. 380X), served May 13, 1998, this Board revoked an acquisition exemption, dismissed an abandonment proceeding filed by the party which acquired a line, and (on this Board's own

would hold the railroad (and its shippers and the affected communities) harmless from the additional costs of maintaining and restoring service on the Naches Branch caused by granting the relief sought by Kershaw. It would also potentially mitigate or eliminate at least some of the adverse environmental and historic preservation impacts on the remainder of the Naches Branch flowing from what otherwise would be the de facto abandonment of the remainder of the Branch. However, no one has presented evidence that an environmentally feasible alternative route is available. In any event, the cost for a new line is composed of two elements: construction costs and land acquisition/relocation costs. WsdOT estimates the construction costs for a re-route around the proposed Kershaw abandonment at \$974,000 (App. IV, ¶3), and the County estimates the land acquisition/relocation cost for a partial re-route along the highway adjacent to Kershaw's facilities at \$280,000 (App. I, ¶13). WsdOT does not have such funds in its budget (App. IV, ¶3), and Rail Commenters have no funds for re-routing. Thus the bond posted by Kershaw would have to be an amount equal or in excess of \$1,250,000. While it would arguably be within this Board's power under Consolidated Rail Corp. v. ICC, 29 F.3d 706, 714 (D.C. Cir. 1994) (a case on which Kershaw relies) to condition the grant of Kershaw's one-mile adverse abandonment upon Kershaw's posting such a bond (and presumably making a showing that an alternative route is feasible at that price), it is not clear that Kershaw would wish to pursue such relief because the re-route so bonded would be along the highway, which Kershaw may view as unreasonably limiting its access. Nonetheless, WsdOT and Rail Commenters are prepared to entertain such a re-route if Kershaw will guarantee payment for it.

initiative) both instituted an exempt abandonment proceeding on behalf of the party which had sold the line and granted the exemption. In Southern Pacific Transportation Company-- Abandonment Exemption -- Los Angeles County, 8 I.C.C.2d 495 (1992), this Board's predecessor, faced with two petitions for exempt abandonment and a notice for an exempt abandonment filed by railroad, on the agency's own initiative instituted proceedings under which it determined that Los Angeles County Transportation Commission had acquired a common carrier obligation when it acquired underlying interests in the lines, granted an exemption for the acquisition, and then further granted an exemption from Subtitle IV requirements (including abandonment regulation), subject to execution of certain shared use arrangements in order to take advantage of the exemption from abandonment regulation.

STB's power to modify the relief sought by an applicant in an abandonment proceeding is specifically affirmed by 49 U.S.C. § 10903(e)(1)(B). That provision authorizes this Board to "approve" an "application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity." The public convenience and necessity here requires that Kershaw's abandonment application for an arbitrary one mile segment be modified to apply to the entire line owned by YILA.

Employing its broad power to modify, this Board should expand the scope of Kershaw's adverse abandonment proceeding to

encompass the entirety of YILA's portion of the Naches Branch. This presumably will require additional environmental and historic notice to the public and to interested agencies, because Kershaw's notice and analysis involved only the arbitrarily defined one-mile. It is unclear to Rail Commenters that Kershaw has any ability to undertake an environmental analysis, or any willingness to do so or to provide the requisite notice. Should this Board elect to modify this proceeding such that it is applicable to the whole line, Yakima County will undertake to provide the notice specified in § 10903(a)(3), and circulate same to the agencies which must receive notice for environmental and historic purposes. Because an improper segmentation is involved, such notice would in all events be necessary were this Board seriously to entertain the arbitrary one-mile abandonment proposed by Kershaw. STB would also have to prepare a revised EA. But the existing EA is manifestly defective anyway due to the improper segmentation.

Issuing a notice providing logical termini for the abandonment would obviate the objection of unlawful segmentation. But more to the point, it would facilitate restoration of service upon the line. Yakima County, subject to financing from WsDOT, is prepared to acquire the line so long as it can do so without incurring a common carrier obligation. If this Board expanded the abandonment proceeding to encompass the entire line, then the entire line could be "railbanked" by the

County (with the consent of YILA) pursuant to the "statement of willingness" and the YILA consent already referenced in this pleading. The County then could acquire the line without incurring a common carrier obligation and could arrange for an operator under 49 C.F.R. § 1150.21, et seq. See App. I, ¶¶5-8; App. IV, ¶¶1-2. The time, effort, and funds of the various parties to this proceeding, including STB, would not have been entirely wasted. Efficiency in federal licensing proceedings is very important in dealing with low density branch lines in rural communities such as this one.

The Rail Commenters, which encompass not only the railroad owning the line but also all the affected local governments, all support modification of this proceeding to encompass YILA's entire portion of the Naches Branch. This relief is also supported by WsDOT (Appendix IV, ¶4), the shippers (as manifest in Appendix I, Ex. B), and TSWR (Appendix I, Ex. C).

B. Post Abandonment Relief

Should this Board proceed with abandonment either of the arbitrary one-mile as defined by Kershaw, or the entire Naches Branch as owned by YILA, Rail Commenters join in requesting that this Board (a) issue a Certificate of Interim Trail Use invoking 16 U.S.C. § 1247(d) ("railbanking") and (b) exempt the proceeding from the provisions of § 10904 ("offers of financial assistance").⁷ As already indicated, railbanking the line is consistent with Yakima County's efforts, in league with WsDOT,

⁷ WsDOT concurs. App. IV ¶4.

to preserve it intact for freight rail use. All the Rail Commenters support this outcome.

The criteria set forth under 49 U.S.C. § 10501(b) for granting an exemption from § 10904 are met: application of § 10904 is not needed to carry out the transportation policy of 49 U.S.C. § 10101, the transaction is limited in scope, and application of § 10904 is not needed to protect shippers from abuse of market power. Indeed, shippers are supporting the County/WsDOT plan to restore service on the line. Rail Commenters are concerned that a third party opposed to continued rail use, such as Kershaw itself, may seek to invoke § 10904 in order to acquire the line away from the County in order to prevent rail use.⁸ It is also relevant that this line is encumbered by liens totalling in excess of \$700,000 (approximately \$500,000 of which are held by WsDOT). Any OFA applicant presumably would be faced with acquisition of property subject to liens which not only exceed the probable salvage value of the track and ties, but also the liquidation value of the land if comprised chiefly of easement interests (as Kershaw claims with respect to the arbitrary mile it proposes for abandonment). This may lead OFA applicants to contend the net liquidation value for the line is zero, and this kind of

⁸ National Association of Reversionary Property Owners (NARPO) from time to time advises opponents of railbanking to employ OFA's to defeat such efforts. See NARPO article dated June 1, 2002, at internet page: home.earthlink.net/~doc156/row.htm (page 5 of 7 in a print out).

reasoning will invite exactly the kind of mis-use of the OFA process that WsDOT, Rail Commenters and bona fide rail shippers are properly concerned to prevent. Accord Appendix I ¶12. In these relatively unique circumstances, the line is not a reasonable candidate for OFA procedures. Nor are OFA procedures necessary to protect shipper interests given the WsDOT and Yakima County plan for restoration of rail service.

C. In All Events, the Narrow Relief
Sought by Kershaw Must Be Denied

As explained by the D.C. Circuit, this Board's predecessor agency "[g]enerally ... denies an adverse abandonment application if there is potential for future operations on the line and the carrier has taken reasonable steps to attract traffic." Consolidated Rail Corp. v. ICC, 29 F.3d at 711. Here YILA has sought to rehabilitate the line, with substantial support from WsDOT. Due to management difficulties, this effort has thus far been unsuccessful.

YILA, however, has agreed in principle to convey the entire line to the County for rail reactivation. See App. II. The County has agreed in principle to acquire the line for that purpose so long as adequate financing is provided by WsDOT or third parties to address liens and rail restoration. See App. I. Subject to appropriations, WsDOT has agreed in principle to provide the requisite financing. See App. IV. The key shippers on the line support this approach. See App. I, Ex. B. Under the circumstances, the adverse abandonment sought by Kershaw should not be granted. The adverse abandonment of an arbitrary

one mile of the track will not advance, and instead will undercut, efforts to keep the line intact, It will interfere with or prevent transfer to the County. Indeed, if in response to adverse abandonment authorization for the one-mile in question, YILA's real property interest automatically extinguishes, then the line will be permanently severed and efforts to maintain the line intact will be immeasurably more complicated. This in turn will have a detrimental impact on rural and community development.

In contrast, modifying the Kershaw proceeding to apply to the entire line, as long as the line is then railbanked, will assist in restoring rail service on the line. In keeping with the spirit to foster service opportunities manifest in cases such as Caddo Antoine, supra, this Board should not simply deny Kershaw's narrow application but should modify the application to cover the logical termini of the Naches Branch. As so modified, this Board should authorize railbanking, rather than abandonment, thus fostering preservation of the Branch and restoration of service.

D. Additional Information

Pursuant to 49 C.F.R. §1152.25(a)(2), Rail Commenters provide the following "additional information."

(i) Intent to offer financial assistance under § 10904. As indicated above, Rail Commenters request that this proceeding be exempted from § 10904. WsDOT supports this exemption. App. IV ¶4.

(ii) Environmental impact. As indicated above, the abandonment has been unlawfully segmented. This in turn has compromised the integrity of this Board's environmental process by failing to notify interested agencies and the public concerning the actual scope of the abandonment (namely, the entirety of the Naches Branch as owned by YILA). Since this Board relies largely on the party seeking abandonment authority (here, Kershaw) and interested agencies and individuals to supply environmental information, the improper segmentation in turn compromises the entire EA issued by this Board on February 27. The EA, for example, completely misses the historic depot and the adverse impact of the relief sought by Kershaw on that depot. See Appendix I, ¶11. The environmental condition set forth in the EA is manifestly inadequate to ameliorate this adverse impact. Among other things, under Washington law, if the rail property is federally authorized for abandonment, it may automatically revert to Kershaw. This would result in break-up of the corridor and irreparable loss notwithstanding the condition specified in the EA. The EA is also deficient for other reasons, including failure to analyze alternative routes for the Naches Branch should the Kershaw application be granted. Rail Commenters reserve the right to comment further on the EA, which they deem generally inadequate for a variety of reasons.

(iii) Impact on rural and community development. Loss of the line will have a severe detrimental impact on rural and community development. Yakima County is an important timber

producer and fosters lumber products businesses. The County also is a leading agricultural producer in the State. The County has more fruit trees than any other County in the Nation. It produces more apples, mint, winter pears and hops than any other county. It also produces peaches, apricots, cherries, wheat, beef and award-winning wines. Yakima County is Washington State's leading dairy producer. Loss of the rail line will detrimentally impact opportunities for future economic development in the corridor between Yakima and Naches. Appendix I at ¶2. In further confirmation, Yakima County Development Association supports opposes Kershaw's proposal to abandon the one-mile segment, and wishes to see preservation of the entire line. See Appendix III.

(iv) Public use conditions. A public use condition should be imposed in light of the desirability of maintaining the corridor intact, its suitability for trail use, and the various public utilities (City of Yakima and Level 3 Communications utilities) already in the corridor.⁹ Pursuant to 49 C.F.R. § 1152.29, Rail Commenters seek a public use condition for 180 days, in order to ensure opportunities exist for use of state law remedies if necessary to preserve the right of way. The public importance of corridor preservation has already been discussed.

(v) Prospective use of the right of way for interim trail

⁹ Rail Commenters are informed that Level 3, which is filing a separate protest, will provide further information on these utility interests in its filing.

and railbanking purposes. As already indicated, the entire Naches Branch is suitable for trail and railbanking purposes. See Appendix I, ¶11 and Exhibit E ("statement of willingness" to Appendix I). WSDOT supports application of the railbanking statute. App. IV, ¶4.

III. Conclusion

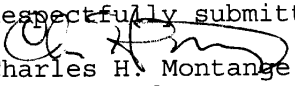
Rail Commenters oppose adverse abandonment of the arbitrarily described one mile sought by Kershaw Sunnyside Ranches in the middle of YILA's portion of the Naches Branch. The adverse abandonment proceeding, if limited to the portion of the line suggested by Kershaw, should be dismissed as an unlawful segmentation. Alternatively, the proceeding should be modified to encompass the entire line. Then the proposed abandonment at least would have logical termini. Indeed, Rail Commenters view such a modification not only as necessary for a lawful proceeding, but also (if accompanied by the railbanking remedy) as fully consistent with the plan of WSDOT and Yakima County to restore rail service on the Naches Branch, and as helpful to realization of that plan. Rail Commenters accordingly request this Board either to exercise its discretion to provide for such an expanded proceeding, or to dismiss the proceeding as an improper segmentation. Since modification of the proceeding to encompass MP 2.97 to MP 14.26 (the entire YILA portion of the Naches Branch) presumably will require additional § 10903(a)(3) notice, as well as environmental and historic notice, Yakima County agrees to initiate such notice within

twenty days of receipt of an STB order modifying the scope of the proceeding to provide for the logical termini (MP 2.97 and MP 14.26).

In all events, Rail Commenters request that STB issue a CITU rather than an abandonment authorization for either the one-mile sought by Kershaw, or the entire Naches Branch as owned by YILA, should this proceeding not be dismissed. Finally, should this proceeding not be dismissed, Rail Commenters request that this Board exempt the proceeding from the provisions of 49 U.S.C. § 10904.

As noted at the inception, WsDOT has authorized Rail Commenters to state that it concurs in Rail Commenters' arguments and the relief sought herein.

Respectfully submitted,


Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: (206) 546-3739
for Yakima County

Terry Austin
Chief Civil Deputy Pros. Atty
Yakima County Courthouse
128 North 2d St., Room 211
Yakima, WA 98901
(509) 574-1200
fax: (509) 574-1201
for Yakima County

Ray Paolella
City Attorney
City of Yakima Legal Dept.
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Yakima, WA 98901-2830
(509) 575-6030
fax: (509) 575-6160
for City of Yakima

Gregory S. Lighty
Halverson Applegate P.S.
311 North Fourth St.
P.O. 22730
Yakima, WA 98907-2715
(509) 575-6611
fax: (509) 457-2419
for Town of Naches

Paul D. Edmondson
313 North Third St.
P.O. Box 384
Yakima, WA 98901
(509) 452-7963
for Yakima Interurban
Lines Association

Appendices

- Appendix I -- Statement of Yakima County
Planning Director and Public Works Director
(with exhibits -- A: map; B: shipper letter;
C: TSWR letter; D: BOCC letter; E:
"statement of willingness")
- Appendix II -- Statement of Paul Edmondson (YILA)
- Appendix III -- Letter, Yakima County Development Association
- Appendix IV -- Statement of Stephen Anderson (WsDOT)
(email attachment version; original submitted
under separate cover by WsDOT)

Certificate of Service

I hereby certify service upon the following parties as
indicated on 11 March 04:

1. Sarah Wixson
Veikanje, Moore & Shore
405 East Lincoln Avenue
Yakima, WA 98901 (for Kershaw) (express)
2. Jeanne A. Cushman
Office of the Attorney General
Transportation and Public Construction Div.
905 Plum Street, Bldg. 3
P.O. Box 40113
Olympia, WA 98504-0113 (for WsDOT) (priority mail)

A handwritten signature in black ink, appearing to be "COA" followed by a stylized name, written over a horizontal line.

Appendix I

BEFORE THE SURFACE TRANSPORTATION BOARD

YAKIMA INTERURBAN LINES)
ASSOCIATION, ADVERSE ABAN-) AB 600
DONMENT IN YAKIMA COUNTY)

VERIFIED STATEMENT OF RICHARD ANDERWALD
DIRECTOR OF PLANNING, YAKIMA COUNTY
AND
VERN REDIFER
DIRECTOR OF PUBLIC WORKS, YAKIMA COUNTY

We, Richard Anderwald and Vern Redifer, make this Verified Statement on behalf of Yakima County for filing in the above-captioned proceeding.

1. I, Richard Anderwald, am the Director of Planning for Yakima County. This Verified Statement is based on my personal knowledge, or upon knowledge and information gathered for me by my staff, including Anne Knapp, Long Range Planning Division Manager and other Yakima County staff, or by consultants retained by the County to assist the County.
2. I, Vern Redifer, am the Director of Public Works for Yakima County. This Verified Statement is based on my personal knowledge, or upon knowledge and information gathered for me in a fashion similar to that stated in paragraph 1.
3. This proceeding involves the so-called Naches Branch from Milepost 2.97, at Fruitvale, to Milepost 14.26 at Naches, all in Yakima County Washington. Fruitvale is essentially coterminous with the City of Yakima. The County has identified two key shippers who wish to use the line. A map showing the approximate location of each such shipper is attached as Exhibit A. Toppenish, Simcoe, and Western Railroad, which operates on a County owned railroad elsewhere in the County, has indicated that it believes that the line will be viable if rehabilitated on the basis of existing shippers. A letter/petition from each of these shippers supporting preservation of the line for rail and other compatible public purposes are included in Exhibit B. The

shippers would employ the line for wood products if rail service were provided at reasonable rates. The shippers identified by the County are as follows:

- a) Layman Lumber Company, P.O. Box 235 Naches, WA
- b) Nepa Pallets, 51 N. Mitchell Drive, Yakima, WA

Yakima County has an important timber and mining industry, but it is also a major agricultural producer. The County has more fruit trees than any other county in the United States, and produces more apples, mint, winter pears, and hops than any other county. In addition, the County produces peaches, apricots, cherries, wheat, beef, and award-winning wines. Yakima County is also the State's leading dairy producer. Loss of the rail line would have a serious adverse effect upon opportunities for future economic development, especially in the corridor between Yakima and Naches. This is an important corridor. The line is strategically located in a productive valley leading ultimately to a western entrance to Mt. Rainier National Park.

Brief History of Line

- 4. This branch was acquired by Yakima Interurban Lines Association (YILA) from Burlington Northern & Santa Fe Railroad (BNSF) pursuant to F.D. 33719, served March 4, 1999. At the time that YILA expressed interest in acquiring the line, the County also expressed interest. For reasons of speed, BNSF chose to deal with YILA.
- 5. Acknowledging the important benefits to rail shippers from preserving the line, the Washington Department of Transportation (WSDOT) made approximately \$500,000 available to YILA to rehabilitate the line in the form of low interest loans. In addition, YILA secured approximately \$200,000 in private loans and trade credit from a commercial bank and suppliers. YILA undertook rehabilitation activities. Due to unfortunate management decisions, the County understands that YILA lost considerable funds in efforts to secure locomotives and to administer various contracts. Rehabilitation of the line was suspended when funds ran out. Rail service cannot be provided on the line in its current condition. However, this does not mean that the line is unimportant for rail purposes or other public purposes or that it should be abandoned.

Plan for Rehabilitation

- 6. In partnership with WSDOT, Yakima County has developed a plan to restore service on the line. WSDOT administers a rail program on a fiscal year basis commencing each July. In the event the Surface Transportation Board (STB) issues decisions consistent with preservation of the Naches Branch in accordance with the plan set forth herein, WSDOT is prepared to seek appropriations and allocate sufficient funds to Yakima County (a) to acquire the entire Naches Branch from YILA and (b) to provide for continuation of

rehabilitation activities. On the same basis, Yakima County is prepared to acquire the Naches Branch from YILA in the event (i) WSDOT supplies sufficient funds to permit the acquisition free and clear of any valid private liens, (ii) the State forgives all valid State liens on the property or otherwise agrees to hold the County harmless from satisfying those liens, and (iii) the County is properly authorized by STB to acquire the property without itself assuming a common carrier obligation. Once the County acquires the Naches Branch, the County will contract with an operator to provide rail service, and either the County or the operator will arrange for rail rehabilitation.

7. There are two basic means by which WSDOT and Yakima County may implement this plan, both of which require certain relief from STB. In the first approach, this adverse abandonment proceeding would be modified to encompass the entire Naches Branch rather than one mile in the middle of it. Yakima County (and perhaps other entities as well) would submit "statements of willingness" invoking 16 U.S.C. Section 1247 (d) (railbanking). YILA has advised the County that it would consent to negotiate a railbanking agreement with the County. Assuming STB accordingly issued a railbanking order (here, a "Certificate of Interim Trail Use" or "CITU"), the County would negotiate a railbanking agreement under which it would contract to acquire YILA's interests subject to sufficient financing allocated by the State for acquisition purposes. The County would then contract with an operator which would apply for a "modified certificate of public convenience and necessity" ("modified PCN") under 49 C.F.R. Subsection 1150.21, et seq. to operate the line. The County may also employ portions or all of the Naches Branch for trail use (rail with trail). This approach has been employed successfully elsewhere in the State of Washington. The second approach would be required if this adverse abandonment proceeding were not expanded to encompass the entire line. That is, it would apply if either (a) this Board denies the pending adverse abandonment, or (b) allows the adverse abandonment but only as to the one mile of line identified by Kershaw, thus severing the two ends of the line. Under the second approach, the County and YILA would railbank the one mile in question (if this Board granted Kershaw's adverse abandonment application as to that mile) and then petition for an exemption from common carrier and abandonment obligations in the event the County acquires the line. If STB granted this petition, then County would negotiate to acquire all YILA's interests in the Naches Branch, including operational rights, subject to appropriate financing from the State. Once the County acquired all such rights, the County might railbank the entire asset and arrange for an operator pursuant to 49 C.F.R. SS 1150.21, et seq. as under the first approach.
8. The County has already been in communication with potential operators for the Naches Branch. Attached hereto as Exhibit C is a letter from Toppenish, Simcoe & Western Railroad expressing interest in serving as operator.

9. In sum, the County has what it and WSDOT believe is a sound roadmap for dealing with the Naches Branch. The County understands that WSDOT prefers government ownership of the line at this time. The County is prepared to acquire the line from YILA provided (i) sufficient financial assistance from the State is available so the line may be acquired free and clear of private liens at no cost to County, (ii) State liens are effectively forgiven, and (iii) the County is not itself subject to common carrier obligations. The County would prefer to see the entire line railbanked pursuant to 16 U.S.C. SS 1247(d) and operated pursuant to STB's modified PCN program. YILA has indicated to the County that it will cooperate in implementing this plan. Implementation of the plan is dependent upon the outcome of this proceeding. Attached as Exhibit D is a letter from the Board of County Commissioners in support of this plan and in opposition to break up of the line.

Opposition to Adverse Abandonment of One Mile Segment

10. The County opposes abandonment of one mile in the middle of the line as sought by Kershaw. Abandonment of one mile in the middle of the line amounts to de facto abandonment of the entire line. The major shippers on the line are located in Naches. They cannot be served if one mile is eliminated in the middle of the line. Moreover, the only storage track and facility to turn equipment is located at Naches. This would render service even for shippers on the City of Yakima side of the line uneconomic or infeasible. Allowing abandonment of one mile in the middle is tantamount to abandonment of the entire Naches Branch. The abandonment proposed by Kershaw has no logical beginning point or ending point, and would cut through the middle of the dead-end branch. The proposed abandonment has no independent utility or meaning, and basically requires the abandonment of the remaining remnants of the Branch. This severely prejudices review of the impacts of the abandonment, is unhelpful to the County's efforts to acquire and rehabilitate the line, and also is prejudicial to affording meaningful post-abandonment environmental, historic, and economic conditions to ameliorate adverse impacts of the abandonment, because the actual abandonment is far broader than what Kershaw purports to put before the Surface Transportation Board. The Board either should deny the abandonment, or expand the abandonment to encompass the entire line.
11. In the event this Board expands the abandonment to encompass the entire line, the County wishes to "railbank" the entire line. A "statement of willingness" for that purpose is attached as Exhibit E. Since the "statement" is filed on behalf of a unit of government, the filing is fee exempt under 49 C.F.R. SS 1002.2(e). In the event this Board does not expand the abandonment to encompass the entire line, and instead allows the abandonment of the one mile sought by Kershaw, then the County wishes to "railbank" that mile, pursuant to the "statement of willingness" attached as Exhibit E. As already indicated, preservation of the entire line through implementation of 16 U.S.C. SS 1247(d) is consistent with the plan developed by WSDOT and the County to

preserve and to rehabilitate the line for rail service. The County in fact believes that preservation and rehabilitation of the Naches Branch would be expedited and more efficiently accomplished if this Board were to expand the current proceeding to encompass the entire line, authorize it for railbanking, and allow County acquisition to move forward.

12. Wholly apart from rail service restoration, the County desires to preserve the rail line for a variety of additional public purposes, including (a) trail use, (b) use as a utility corridor, (c) historic preservation, (d) excursion rail, and (e) public open space. The line parallels a busy portion of a highway which serves as one of the scenic approaches to a major National Park. Conversion of the line to trail use or rail with trail use, not only would enhance safe bicycle commuting opportunities for local residents, but also foster recreational opportunities to visitors to Yakima and bicycle visitors to and from Rainier National Park. The line is currently employed as a utility corridor not only by Level 3 Communications but also by City of Yakima. The Town of Naches has received a grant to restore and to develop the old depot adjacent to the line in Naches and conservation of the line will serve historic preservation goals, especially in connection with the depot restoration effort. Finally, urban sprawl has impacted the area of the line all the way from Yakima to the one mile of line for which Kershaw seeks an adverse abandonment authorization. Preservation of open space on an increasingly congested stretch of highway is a desirable goal. Thus, the County would support and would seek railbanking of the line under 16 U.S.C. SS 1247(d) even if the County did not have plans to restore rail service to the line in cooperation with WSDOT.
13. In the event this Board grants the adverse abandonment application as to the one mile sought by Kershaw (or grants adverse abandonment authorization for the entire line), Yakima County is concerned that third parties such as Kershaw may attempt to file "offers of financial assistance" ("OFA's"), not to restore service, but to thwart the efforts of WSDOT and the County to restore service. Efforts by WSDOT to allocate financial assistance to the County for acquisition of the line and for rehabilitation of the line will be derailed if portions of the line (such as the one mile at issue here) are acquired by some entity other than the County pursuant to the OFA eminent domain statute. In any event, due to the roughly \$700,000 in liens on the line, the only feasible way to ensure service restoration is through the plan developed by the County and WSDOT. Only the WSDOT/County plan offers a means to forgive the State liens and deal with the private liens in a fashion compatible with restoration of service. Since this is an adverse abandonment proceeding, the County feels that it is especially important for this Board to prevent miss use of the OFA process. The County accordingly supports an order exempting this proceeding from OFA procedures.

14. The County does not feel that an alternative route around Kershaw is feasible at this time. According to staff estimates, at least some of the property Kershaw seeks to have abandoned must still be used, at least 2500 feet of new track would have to be constructed, and a house would have to be removed. We estimate the acquisition and relocation costs for the property alone would be \$280,000 or more. The cost would be higher if more right of way must be acquired. This cost does not include costs of roadbed preparation, construction of new track, and so on. The grant which the County expects to receive from WSDOT, although adequate for purposes of acquiring YILA's interests and for rehabilitating the line in its current status, would not be adequate if a new right of way had to be acquired or constructed as required if Kershaw's proposed abandonment were granted. This is, among other things, another reason that Kershaw's proposed abandonment amounts to an abandonment of the entire line.

Pursuant to 28 U.S.C. SS 1746, I declare under penalty of perjury that the foregoing is true and correct.


RICHARD F. ANDERWALD
DIRECTOR OF PLANNING

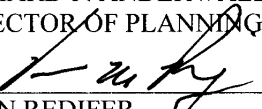
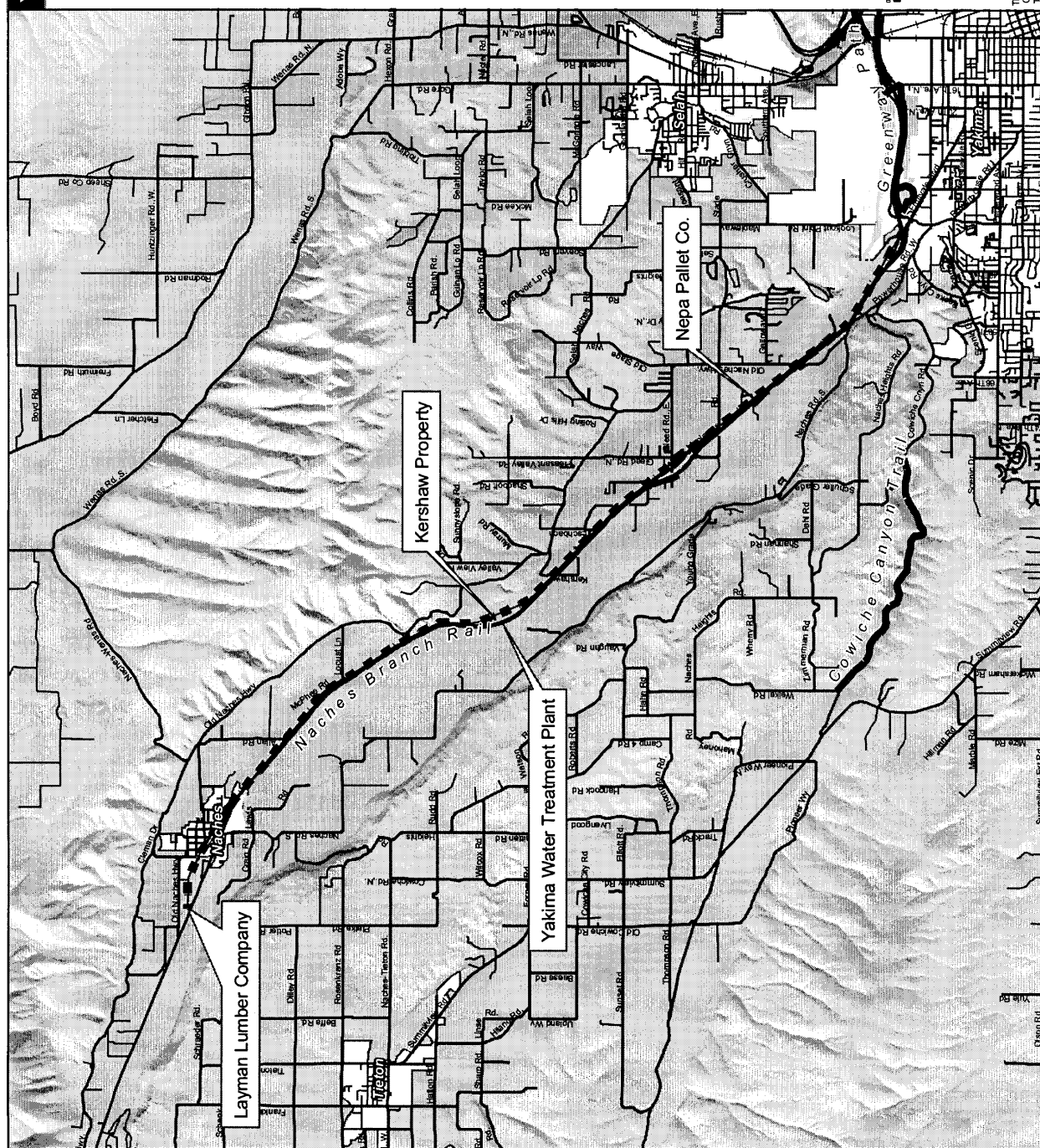

VERN REDIFER
DIRECTOR OF PUBLIC WORKS

Exhibit A

GEOGRAPHIC INFORMATION SERVICES

-  Naches Branch Rail
 Cowiche Canyon Trail
 Greenway Path
 City Limits



Copyright (C) 2004 Yakima County
This map was derived from several databases. The
County cannot accept responsibility for any errors.
Therefore, there are no warranties for this product.

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Exhibit B

March 3, 2004

Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, Northwest
Washington, D.C. 20423

Re: Yakima Interurban Lines Association
Adverse Abandonment in Yakima County, AB 600

Dear Mr. Secretary:

We, the undersigned, are shippers on the Naches Branch From MP 2.97 (Fruitvale, near Yakima) to MP 14.26 (Naches), the line is owned by Yakima Interurban Lines Association (YILA).

We looked forward to rehabilitation of the line by YILA, employing funds from Washington Department of Transportation (WaDOT) subsequent to YILA's acquisition of the line from BNSF in 1999. Unfortunately, management problems arose such that work was not completed. We continue to support rehabilitation of the line for freight rail purposes, and expect and wish to make use of the line should it be rehabilitated.

It is our understanding that Yakima County and WaDOT have developed a plan for re-establishment of rail service line on the line. Under that plan, WaDOT would allocate sufficient funds to the County to permit the County to acquire the line clear of private liens. State liens would be forgiven. The County would acquire the line after "railbanking" pursuant to 16 U.S.C. 1247(d), or pursuant to orders of the Surface Transportation Board (STB) exempting the County itself from common carrier obligations. The County would then contract with an operator to provide rail service. WaDOT would make reasonable funds available to complete rehabilitation.

We do not support adverse abandonment of one mile in the middle of the line as sought by Kershaw Sunnyside Ranches, Inc. in this proceeding. Adverse abandonment of one mile in the middle of the line would amount to abandonment of YILA's entire portion of the Naches Branch. The adverse abandonment proceeding therefore either should be dismissed, or should be expanded to encompass the entire property owned by YILA.

Anything that this Board authorizes for abandonment pursuant to this proceeding should be preserved under 16 U.S.C. 1247(d) ("railbanking") so that it may be acquired by Yakima County pursuant to the plan developed by WaDOT and Yakima County. In the event this Board allows any adverse abandonment, we accordingly support "railbanking". We also support an exemption from "offer of financial assistance" ("OFA") procedures, in order better to facilitate implementation of the WaDOT and County effort to preserve the line.

1. Shipper's Business Name:

Katherine P. Kratzer

Address:

P.O. Box 235 Naches, WA 98937

By: Katherine P. Kratzer

Title: President

* * * * *

2. Shipper's Business Name:

Address:

By:

Title:

* * * * *

3. Shipper's Business Name:

Address:

By:

Title:

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YAKIMA COUNTY PLANN

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STB
March 1, 2004
Page 2

Anything that this Board authorizes for abandonment pursuant to this proceeding should be preserved under 16 U.S.C. 1247(d) ("railbanking") so that it may be acquired by Yakima County pursuant to the plan developed by WaDOT and Yakima County. In the event this Board allows any adverse abandonment, we accordingly support "railbanking". We also support an exemption from "offer of financial assistance" ("OFA") procedures, in order better to facilitate implementation of the WaDOT and County effort to preserve the line.

1. Shipper's Business Name:

Katherine B. Krager

Address: _____

By: _____

Title: _____

* * * * *

2. Shipper's Business Name:

Napa Pallet & Container Co., Inc

Address:

51. N MITCHELL, YAKIMA, WA

By:

Patrick Sherry

Title:

Vice President

* * * * *

3. Shipper's Business Name: _____

Address: _____

By: _____

Title: _____

Exhibit C



Toppenish, Simcoe & Western Railroad, Inc.

3650 Branch Road P.O. Box 277 Wapato, WA 98951

(509) 877-1276 FAX: (509) 877-4268

February 27, 2004

Ms. Anne Knapp
Planning Department
Yakima County Courthouse Room 417
128 N. 2nd Street
Yakima, WA 98901

Re: Yakima Interurban Lines Association - -
Adverse Abandonment - - in Yakima County, WA AB 600

Dear Ms. Knapp:

This is to confirm our conversation. Toppenish, Simcoe & Western Railroad (TSWR) currently provides rail service on a line from White Swan to Toppenish, a distance of approximately 23 miles in Yakima County. TSWR has very carefully considered rail service over the Naches Branch between Yakima and Naches.

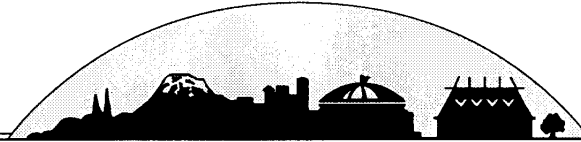
We understand that the County wishes to acquire the line free and clear of liens using funds provided by the Washington Department of Transportation. We further understand that the County wishes to "railbank" the line so that it is eligible for operation without risk of common carrier obligations on the County pursuant to STB's regulations found at 49 C.F.R. § 1150.21, et seq. Under those regulations, only a third party operator would have common carrier obligations, not the county government. TSWR is qualified, willing and able to contract with the County to provide rail service over the Naches Branch in accordance with § 1150.21 et seq. should the County acquire the line from YILA. Viability of the line would be enhanced if the portion of the line retained by Burlington Northern and Santa Fe Railway Company (BNSF), namely MP 0 to MP 2.97, were also included in the transaction, but this is not a condition of our interest. We would also be prepared to provide rail service in a rail with trail operation should the line be railbanked under 16 U.S.C. § 1247 (d).

TSWR supports the County's efforts to keep the Naches Branch intact and to restore rail service over the Branch. We oppose abandonment of one mile in the middle of the Branch that cuts off the major shipper on the Branch and is equivalent to a de facto abandonment of the entire YILA portion of the Branch.

Respectfully submitted,

John E. Hood
Gen Mgr.

Exhibit D



BOARD OF

YAKIMA COUNTY

COMMISSIONERS

★ District One
James M. Lewis

★ District Two
Ronald F. Gamache

★ District Three
Jesse S. Palacios

March 8, 2004

Hon. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Yakima Interurban Lines Association
Adverse Abandonment in Yakima County, AB 600

Dear Mr. Secretary:

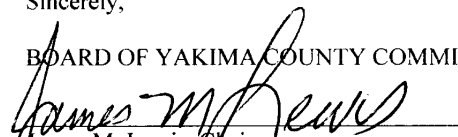
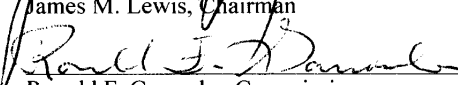
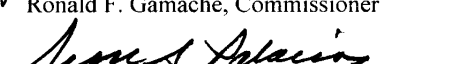
This letter is on behalf of the Board of County Commissioners of Yakima County. The Board opposes breakup of the portion of the Naches Branch owned by Yakima Interurban Lines Association (YILA, that is MP 2.97 to MP 14.26), and supports preservation of that line of railroad for freight rail service and for other compatible public purposes, including trail and utility use. The County thus opposes adverse abandonment of one mile in the middle of YILA's portion of the Naches Branch.

Yakima County and Washington State Department of Transportation (WSDOT) have developed a plan for rehabilitation of the line. Basically, the plan involves WSDOT allocating sufficient funds for the County to acquire the line free and clear of liens. Provided the County did not itself incur common carrier obligations, the County would then acquire the line from YILA, and arrange directly or through an operator for rail rehabilitation and for rail operation. The County supports "rail banking" the entire Naches Branch as currently owned YILA as soon as possible in order to facilitate this plan.

Other statements filed on behalf of the County will articulate the County's interests and position more fully.

Sincerely,

BOARD OF YAKIMA COUNTY COMMISSIONERS


James M. Lewis, Chairman

Ronald F. Gamache, Commissioner

Jesse S. Palacios, Commissioner

G:\Long Range\Projects\Naches Rail\Williams. Ltr.doc

Exhibit E

BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association)
Adverse Abandonment in Yakima County) AB 600
Wa)

**STATEMENT OF WILLINGNESS TO ASSUME
FINANCIAL RESPONSIBILITY**

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 U.S.C. 101502 and 49 CFR 1152.29, Yakima County ("County" or "Interim Trail User"), is willing to assume full responsibility for management of, for any legal liability arising out of (unless the user, if the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned and operated by Yakima Interurban Lines Association. The property extends from Mile Post 2.97 (at Fruitvale) to Mile Post 11.29 (at Naches) in Yakima County, Wa, a distance of approximately 11.29 miles. The right-of-way is part of, or encompasses, a line proposed for abandonment in Docket AB-600. A map depicting the property is attached.

County acknowledges that use of the right-of-way is subject to the users continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad on the same date it is being served on the Board.

Name

Title

Assistant Public Works Director

Appendix II

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BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Assoc.,	}	No. AB 600
Adverse Abandonment		
Yakima County, WA		

VERIFIED STATEMENT OF PAUL D. EDMONDSON
ATTORNEY FOR RAILROAD
YAKIMA INTERURBAN LINES ASSOCIATION

I, Paul D. Edmondson, make this Verified Statement on behalf of Yakima Interurban Lines Association (YILA) for filing in the above proceeding.

1. I am a past president of YILA and am currently legal counsel for YILA. This Verified Statement is based upon my personal knowledge, or upon knowledge and information gathered for me in my official capacity.

2. YILA is a Washington State non profit corporation. YILA acquired the Naches Branch railroad line from MP 2.97 (within Yakima, WA) to MP 14.26 (just West of Naches, WA) from Burlington Northern Santa Fe Railroad pursuant to a notice of exemption in F.D. 33719, served March 4, 1999. YILA's sole remaining asset at this time is the Naches Branch corridor. The track has been operated under excepted status. After acquisition of the line YILA obtained substantial economic assistance from the Washington State Department of Transportation (WSDOT) to rehabilitate the line. Unfortunately, the immediate past president of YILA, entrusted with rehabilitation activities, did not complete the project. WSDOT maintains a lien of approximately \$515,000.00 on the line. In addition, there are private liens in an amount approximating \$200,000.00.

3. YILA is prepared to transfer all its ownership interests in the Naches Branch line to Yakima County if, by the time of closing or at closing, the private and public liens are compromised or satisfied, or otherwise lifted from the property so that it may be conveyed free and clear of liens.

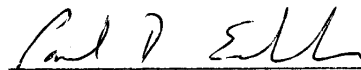
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12 Yakima County and WSDOT have developed a plan under which this can occur.
13 Under this plan WSDOT (subject to appropriations and appropriate contractual
14 arrangements) will provide funds for the County to acquire the line from
15 YILA. The anticipated funding is expected to be sufficient to satisfy
16 all properly perfected liens on the premises. Liens held by the State
17 will be removed. Since the County itself does not wish to have any
18 common carrier obligations, the line must be "railbanked" under 16 U.S.C.
19 Section 1247(d) and then operated by a third party pursuant to this Board's
20 modified certificate procedures codified at 49 C.F.R Section 1150.21 et. seq.
21 (Alternatively, the County may petition for an exemption from common carrier
22 status for itself.) Subject to negotiation of final contracts, YILA supports
23 this plan and intends to cooperate in its implementation. YILA believes that
24 the line is commercially viable as a freight rail line once rehabilitated
25 and under County ownership.

26 4. YILA opposes the adverse abandonment purportedly of one mile of track
27 sought by Kershaw Sunnyside Ranches, Inc. in this proceeding. If this
28 Board authorizes abandonment of the one mile of line as sought by Kershaw
29 in this proceeding, the remainder of the Naches Branch into the Town of
30 Naches and beyond will be severed from the interstate rail network causing
31 economic damage to a county with double digit unemployment. Indeed, since
32 facilities do not exist for turning equipment except at Naches, WA, the
33 adverse abandonment sought by Kershaw amounts to an abandonment of the
34 entire Naches Branch as owned by YILA. The adverse abandonment sought by
35 Kershaw is thus not an abandonment of a mere mile of track, but an abandon-
36 ment of at least the entire Western end of the Branch into Naches, WA.
37 If this Board allows the abandonment proceeding to continue in this fashion,
38 then the Board must expand the proceeding to cover the entire Naches
39 Branch Line owned by YILA. Indeed, unless and until the adverse abandonment
40 application is expanded to cover the entire line, it constitutes an unlawful
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11 segmentation of the line and is therefore fatally defective.
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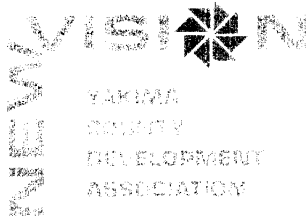
13 5. In order to support the plan of the County and WSDOT to preserve
14 the line for rehabilitation and restoration of rail service, YILA supports
15 and hereby consents to application of 16 U.S.C. Section 1247(d) (negotiation
16 of a trail use and railbanking agreement) should the County file a
17 "Statement of Willingness" as provided in 49 C.F.R. Section 1152.29. This
18 consent also applies in the event this Board expands this proceeding to cover
19 the entire Naches Branch Line as owned by YILA. This Board either must
20 dismiss this proceeding as an unlawful segmentation or expand it to cover
21 the entire line as owned by YILA for the reasons discussed above.

22 Pursuant to 28 U.S.C. Section 1746 I declare under penalty of perjury
23 that the foregoing is true and correct.
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26  N.S.B.A.
3634
27 PAUL D. EDMONDSON
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30 DATED: March 3, 2004.
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Appendix III



March 8, 2004

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20432

Dear Secretary Williams:

Recently Kershaw Sunnyside Ranches filed an adverse abandonment petition with the Surface Transportation Board. The Yakima County Development Association is opposed this abandonment which affects a section of the Naches Branch rail line owned by Yakima Interurban Lines Association (YILA).

There are several businesses along this line that would like to see the line rehabilitated for freight rail service. These companies can generate enough rail traffic to warrant operating the line. In addition, there are several viable industrially zoned tracts of land along the line that could accommodate new businesses that need rail served properties. For these reasons, it is premature to abandon any section of the line at this time.

Yakima County and Washington State Department of Transportation (WSDOT) have developed a realistic plan to rehabilitate the line. Basically, the Plan involves WSDOT allocating sufficient funds for the County to acquire the line free and clear of liens. Provided the County did not itself incur common carrier obligations, the County would then acquire the line from YILA and arrange rail rehabilitation and service directly or through an operator.

Our organization would ultimately like to see the line "railbanked" so that freight rail service is maintained and other uses are possible (trails, utility corridors, etc.). This process seems like the logical route to reactivate the line and ensure that the entire easement is preserved for public use in the future.

Other statements filed on behalf of the County will more fully articulate the County's interest and position. Thank you for your consideration of support of freight mobility and economic development in Yakima County.

Sincerely,

David McFadden
President

Appendix IV

SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association

NO. AB-600

Adverse Abandonment
Yakima County, WA

DECLARATION OF STEPHEN
ANDERSON ON BEHALF OF
WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION

I, Stephen Anderson, am the Rail Services Manager for the Rail Division of the Washington State Department of Transportation (WSDOT). I make this Declaration on the basis of my personal knowledge and of information gathered for me by my staff in our official capacities. I am making this Declaration on behalf of WSDOT for use by Yakima County in the above-referenced proceeding.

1. As indicated in the Joint Protest and Comments of Yakima County, *et al.*, Yakima County and WSDOT have developed a plan for rehabilitation of the Naches Branch as currently owned by Yakima Interurban Lines Association. Subject to appropriation from the Legislature and mutually agreeable contractual arrangements, WSDOT will provide an estimated \$200,000.00 in financial assistance for Yakima County to acquire Yakima Interurban Lines Association's interest in the Naches Branch and to clear the public and private liens on the title. WSDOT will assist with the legal and title work to convey the property free and clear to Yakima County. Subject to appropriation and mutually agreeable contractual arrangements, WSDOT will provide an estimated \$300,000.00 to complete rehabilitation of the Naches Branch. WSDOT calculates that these sums should be adequate both for acquisition and completion of rehabilitation.

DECLARATION OF STEPHEN
ANDERSON ON BEHALF OF
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

2. WSDOT supports Yakima County's plan to acquire the line pursuant to an exemption from common carrier obligations, or pursuant to a railbanking order under 16 U.S.C. §1247(d), and then to arrange for an operator to provide freight common carrier service on the Naches Branch (pursuant to a modified certificate of public convenience and necessity under 49 C.F.R. § 1150.21 *et seq.* if the Naches Branch is railbanked). WSDOT has analyzed the potential for freight shipment on the Naches Branch, including discussions with shippers in the area, and has concluded that operation of the line for freight rail purposes is feasible under this plan.

3. WSDOT supports implementation of the plan to restore freight rail service on the Naches Branch. The Washington Legislature states its intentions and creates the state freight rail program with the following findings:

[T]he economy of the state will be best served by a policy of maintaining and encouraging a healthy rail freight system by creating mechanisms that keep rail freight lines operating if the benefits of the service outweigh the cost. Recognizing the implications of this trend for freight mobility and the state's economic future, the legislature finds that better freight rail planning, better cooperation to preserve rail lines, and increased financial assistance from the state are necessary to maintain and improve the freight rail system within the state.

Revised Code of Washington 47.76.200

WSDOT opposes adverse abandonment of one mile in the middle of the Naches Branch as sought by Kershaw Sunnyside Farms. The one mile which Kershaw seeks to have abandoned is necessary to the operation of the entire Naches Branch. If the mile were abandoned, the remainder of the Naches Branch would have to be abandoned. WSDOT has performed a rough estimate of the cost for reconstruction of approximately one mile of track if the line has to be re-routed around the area which Kershaw has proposed for abandonment. The calculations are found on the attached spreadsheet. WSDOT estimates the cost of reconstruction to be

approximately \$974,480.00, assuming (without benefit of thorough investigation) no environmental impediments exist on the alternative property. That amount of money far exceeds the funds WSDOT expects to have available for rehabilitation of the Naches Branch, confirming that the one mile abandonment proposed by Kershaw is tantamount to abandonment of the entire Naches Branch. The end points for the abandonment as proposed by Kershaw are therefore deceptive and lack logical support and would constitute a defacto abandonment of the entire Naches Branch if granted.

4. WSDOT supports Yakima County's suggestion that the abandonment proceeding incorporate logical end points (i.e. the entire Naches Branch as owned by Yakima Interurban Lines Association); that the entire Naches Branch as owned by Yakima Interurban Lines Association be railbanked; that the Naches Branch be exempted from "offer of financial assistance" procedures; and that the Yakima County/WSDOT plan for rail rehabilitation be implemented. WSDOT concurs with Yakima County that the Surface Transportation Board either dismiss the entire proceeding as an unlawful segmentation, or modify the proceeding to apply to the entire Naches Branch as owned by the Yakima Interurban Lines Association. Should abandonment authorization be granted for the entire Naches Branch, then the Board should enter a Certificate of Interim Trail Use for the Naches Branch in response to the Declaration of Willingness filed by Yakima County and the consent to negotiate filed by Yakima Interurban Lines Association. This result will assist in preserving the line and restoring it to freight rail service.

I declare under penalty of perjury that the foregoing is true and correct.



Stephen M. Anderson
Rail Services Manager, Rail Office
Public Transportation & Rail Division
Washington State Department of Transportation

DATED this 11th day of March, 2004.

DECLARATION OF STEPHEN
ANDERSON ON BEHALF OF
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

Naches Branch Spreadsheet
Estimated Costs to Reroute Segment of Line

UNIT COSTS SHEET	5-Mar-04	Naches Reroute Estimate		
	UNITS	UNIT COST	QUANTITY	TOTAL COST
I. EARTHWORK				
1. Clear and Grub	ACRE	\$500	6	\$3,000
2. Embankment	CY	\$20	0	\$0
3. Excavation	CY	\$10	4000	\$40,000
4. Rock Excavation	CY	\$50	0	\$0
5. Subballast	CY	\$12	2500	\$30,000
6. Ballast	CY	\$16	1500	\$24,000
II. TRACK CONSTRUCTION				
1. Ties (7 x 9 #3 Indus.)	EA	\$80	3000	\$240,000
2. Rail				
a. Relay rail - 90 lb.	NT	\$300	10	\$3,000
c. Tie plates and spikes	EA	\$10	3000	\$30,000
d. Anchors	EA	\$3	1500	\$3,750
4. Culvert Crossings				
a. Major Culverts (>36" Diameter)	LF	\$80	0	\$0
b. Minor Culverts (<36" Diameter)	LF	\$40	100	\$4,000
5. Other Drainage	LS	\$ 10,000.00	1	\$10,000
III. ROADWAY				
1. At-Grade Crossing				
a. Concrete Panels	TF	\$500	20	\$10,000
b. Crossing Signals	EA	\$100,000	0	\$0
IV. UTILITY RELOCATION/ADJUSTMENT				
1. Misc. utility lines	LF	\$50	\$280	\$264,000
2. Highway guardrail protection	LF	\$15	\$280	\$79,200
		ITEMS SUBTOTAL		\$661,750
V. MOBILIZATION (8% of Items Subtotal)	LS		1	\$52,940
		CONSTRUCTION SUBTOTAL		\$714,690
VI. CONTINGENCIES (30%)	LS			\$107,204
VII. ENVIRONMENTAL MITIGATION (20%)	LS	By others		
VIII. ENGINEERING/ADMINISTRATION (7%)	LS			\$50,028
IX. CONSTRUCTION MANAGEMENT (6%)	LS			\$43,953
X. RIGHT OF WAY	ACRE	By others		
XI. TAX (8.2%)				\$58,602
		TOTAL		\$974,480