

RESOLUTION NO. 37059



1 WHEREAS the Department of Public Utilities, Belt Line Division
2 (dba "Tacoma Rail"), requests approval to enter an agreement with the State of
3 Washington to accept grant funds for the construction of a new railroad
4 connection on the Mountain Division at Blakeslee Junction, and

5 WHEREAS the grant agreement authorizes the expenditure of up to
6 \$7.4 million in State funds to construct a rail spur and improve track layouts,
7 and to modify the signal at the BNSF Railway ("BNSF") junction in Centralia,
8 and
9

10 WHEREAS the construction project is designed to create a new
11 connection from Tacoma Rail to the Puget Sound and Pacific ("PSAP") line at
12 Blakeslee Junction and hence a through route to the BNSF main line, and
13

14 WHEREAS the project will minimize delay on the BNSF main line,
15 improve speeds on the PSAP line in Centralia, and minimize delays to road
16 crossings at several road/rail grade crossings, and

17 WHEREAS the agreement also contemplates that the PSAP and BNSF
18 will grant to Tacoma Rail valuable long term operating rights over lines from
19 Blakeslee Junction to the new junction with the BNSF main line in Centralia,
20 and
21

22 WHEREAS it is in the best public interest to approve the proposed
23 agreement with the State of Washington for the purposes described above;

24 Now, therefore,
25
26



BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

1
2 That the proposed agreement between the Tacoma Rail and the State of
3 Washington for grant funding of a connection between Tacoma Rail and the
4 BNSF main line in Centralia is approved, and the proper officers of the City are
5 hereby authorized to execute said Agreement to be substantially in the form of
6 the proposed Agreement on file in the office of the City Clerk.

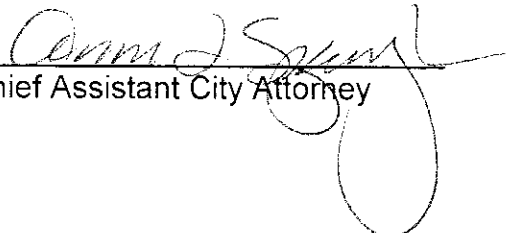
7
8 Adopted DEC 12 2006

9
10 _____
Mayor

11 Attest:

12 _____
City Clerk

13 Approved as to Form:

14
15 
16 _____
Chief Assistant City Attorney

9. **ATTORNEY CONTACT:** (Enter name of attorney with whom you've been working.)
Anne Spangler, 8218

FISCAL NOTE

Each piece of legislation that has a financial impact or creates positions authority requires a fiscal note. After preparation by departmental staff, the Office of Management, Budget, and Analysis will review the fiscal note and make any necessary revisions before transmittal to the Legal department for legislation preparation.

DEPARTMENT: CONTACT PERSON/PHONE: OMBA CONSULTANT/PHONE:

Tacoma Rail Mountain Division	Paula J. Henry / 8894	Sherri Crawford / 5816
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Is it currently budgeted? Yes No

Is this a grant? Yes No If Yes, Operating Capital

EXPENDITURES:

2007-2008

FUND NAME & NUMBER *	COST CENTER	WBS	ACCOUNT	2005-2006 EXPENDITURES
4120 Tacoma Eastern Operations & Summary fund	632800			7,400,000
TOTAL				

* General Fund: Include Department

Purpose: Construction contracts paid by Tacoma Rail Mountain Division will be reimbursed by the State.

REVENUES:

2007-2008

FUND NAME & NUMBER	COST CENTER	WBS	ACCOUNT	2005-2006 REVENUES
4120 Tacoma Eastern Operations & Summary fund	632800			7,400,000
TOTAL				

Notes:

POSITION IMPACT:

POSITION TITLE	PERMANENT/PROJECT/TEMPORARY POSITION	POSITION END DATE	2005 FTE	FUTURE FTE

Total positions created or abrogated through this legislation, including FTE impact. FTE impact for temporary employees is estimated.

57

LONG-TERM FINANCIAL IMPACT OF LEGISLATION:

SPENDING PLAN & BUDGET	2005	2006	2007	2008	2009	TOTAL
Salaries/Benefits						
Start-up						
On-going						
Maintenance & Operations						

FISCAL NOTE (CONT)

CITY CLERK USE
Request #: 11195

FUNDING SOURCE	2005	2006	2007	2008	2009	TOTAL
TOTAL						

The financial cost of not implementing the legislation:

This connection will improve speeds at the Junction with the Puget Sound and Pacific (PSAP) and Burlington Northern Santa Fe (BNSF) railroad connection in Centralia. It will minimize delays on the BNSF main line to passenger and freight traffic. The increased speeds will minimize delays to road crossings at several road/rail grade crossings.

Estimate the cost to the City if the legislation is not implemented, including the potential conflicts with regulatory requirements, cost avoidance, or other potential costs.

OTHER ISSUES:

FISCAL NOTE (CONT)

CITY CLERK USE

Request #: 11195

Capital						
TOTAL						

AGREEMENT ACTUAL COST Not to exceed \$7.4 million	ORGANIZATION: TACOMA RAIL
AGREEMENT NUMBER RR-00364	Description of Work Introduction of a connection between Tacoma Rail and the BNSF Main Line in Centralia

This AGREEMENT is made and entered into this 1st day of March, 2007 between the STATE OF WASHINGTON, hereinafter referred to as the "STATE", and the City of Tacoma, Department of Utilities, Belt Line Division, dba TACOMA RAIL

WHEREAS, the Legislature finds that freight rail systems are important elements of the STATE'S multimodal transportation system and that Washington's economy benefits from the freight rail system to ensure movement of the STATE'S agricultural, chemical, and natural resource products to local, national, and international markets; and

WHEREAS, the Legislature recognizes that the STATE, counties, local communities, railroads, labor and shippers all benefit from continuation of essential rail service and that abandonment of rail lines and rail freight service and the resultant motor vehicle freight traffic increases the burden on state highways and port roads; and

WHEREAS this AGREEMENT is intended to authorize funding for a project designed to create a new connection from TACOMA RAIL to the Puget Sound and Pacific (PSAP) line at Blakeslee Junction and hence a through route to the Burlington Northern Santa Fe (BNSF) Main Line, in addition it improves speeds at the Junction with the PSAP and BNSF connection in Centralia. This will minimize delay on the BNSF Main Line to Passenger and Freight Trains, and will increase speeds over the PSAP line in Centralia and thus minimize delays to road crossings at several road/rail grade crossings. Subject to future funding and other contingencies the project is also designed to eliminate the existing TACOMA RAIL line that runs from Blakeslee Junction to Chehalis by constructing new storage facilities elsewhere on the TACOMA RAIL network. The phasing of this project is set out in EXHIBIT A.

WHEREAS, TACOMA RAIL has requested, and the STATE has authorized the expenditure of up to \$7.4 million in STATE funds to construct the rail spur and improve track layouts.

WHEREAS in order to perform its work under this AGREEMENT TACOMA RAIL will enter into separate contracts with BNSF and PSAP and/or others that will confirm the extent of the work to be carried out and produce a schedule for completion of the work: It will be open to inspection and oversight by the STATE to confirm their agreement to ensure that freight rail services will provide the anticipated benefit.

ORIGINAL

NOW, THEREFORE, upon terms and conditions contained in this AGREEMENT, and upon satisfaction of the contingencies identified in the scope of work, TACOMA RAIL agrees to perform the work as described in EXHIBIT A; and the STATE agrees to grant funds to TACOMA RAIL to pay for such work in accordance with the following terms and conditions:

SECTION 1 – SCOPE

The PROJECT funding will be used to assist with the railroad improvements as identified in EXHIBIT A. The PROJECT is planned in a number of PHASES and this AGREEMENT addresses funding for PHASE 1A only. Funding for only PHASE 1A of the PROJECT is so far authorized.

The STATE agrees to grant a maximum of \$7.4 m to TACOMA RAIL for the PROJECT PHASE 1A as identified in EXHIBIT A:- Included within the \$7.4m is \$2.4m specifically intended for signal modification of the BNSF junction in Centralia.

During the term of this AGREEMENT, without reimbursement from the STATE, TACOMA RAIL, at its own expense, shall remedy all defects in the performance of the PROJECT PHASE 1A and will correct all faulty workmanship of TACOMA RAIL and/or its contractors. TACOMA RAIL shall afford the STATE the benefit, to the extent received by TACOMA RAIL, of any discounts and other credits for goods and services purchased in the course of performing the PROJECT PHASE 1 A.

TACOMA RAIL's agreement to perform the work described in Phase 1A of Exhibit A is contingent on (1) an agreement by PSAP and the BNSF to grant sufficient long term operating rights necessary for completion of the PROJECT Phase 1A (minimum 20 years); (2) an agreement by PSAP and BNSF authorizing TACOMA RAIL to reconstruct the junction where PSAP track joins the BNSF main line to change the speed of the switches to increase the running speeds from 10 mph to 20 mph; (3) an agreement by PSAP and BNSF to authorize a grant or retention of a sufficient STATE contingent interest for the duration of the PROJECT consistent with RCW 47.76.250 (10); and (4) acquisition of sufficient right-of-way to construct the line identified in Phase 1A.

TACOMA RAIL's agreement to perform the work described in Phase 1B of Exhibit A is subject to satisfaction of the additional contingencies identified in Exhibit A, including but not limited to: (1) assurance of sufficient funding from the STATE or other source for the construction of approximately 28,000 feet of new siding and fair market value for TACOMA RAIL's existing rail segment from Blakeslee Junction south to Chehalis; (2) successful acquisition of an alternative location and right-of-way to replace TACOMA RAIL's existing rail segment from Blakeslee Junction south to Chehalis; (3) approval by the Surface Transportation Board for the abandonment of TACOMA RAIL's existing rail segment from Blakeslee Junction south to Chehalis; and (4) approval of the conversion of TACOMA RAIL's existing rail segment from Blakeslee Junction south to Chehalis to public ownership for trail use only.

ORIGINAL

The parties anticipate that, except for the signaling work on the BNSF junction in Centralia, the work described in PROJECT PHASE 1A will be completed on or before September 30, 2008. The parties anticipate that signaling work on the BNSF junction in Centralia will be completed on or before June 30, 2009. Upon completion of the PROJECT PHASE 1A, a joint inspection shall be made by the authorized representatives of each of the parties to determine that the work has been completed within the terms of the AGREEMENT. TACOMA RAIL may be obliged to reimburse the STATE per the terms of section VII – OBLIGATIONS TO REPAY GRANT FUNDS.

HEREAFTER reference to the term PROJECT shall mean PHASE 1A of the PROJECT only.

SECTION II – PAYMENTS TO TACOMA RAIL

Prior to initiating any work for performance hereunder, TACOMA RAIL in connection with the other interested parties (PSAP and BNSF) shall provide the STATE with the schedule for each item of work to be performed. The schedule shall be arranged in such a manner as to form a basis for comparison with monthly progress billings for work performed. In the event of a change in the method or time for performance of any work, the schedule shall be updated as to reflect the changed circumstances.

If the STATE determines that the PROJECT is not progressing in a satisfactory manner to complete the PROJECT as identified in EXHIBIT A, the STATE may refuse reimbursement to TACOMA RAIL for the whole or any part of the work performed.

Subject to the stipulations set forth in SECTION I - SCOPE of this AGREEMENT, the STATE agrees to reimburse TACOMA RAIL up to a maximum of \$7.4 m for the actual direct, and related indirect costs, incurred by TACOMA RAIL in the course of completing the PROJECT as detailed in the Exhibit A Cost Estimate. Labor, materials, or other PROJECT costs supplied by TACOMA RAIL will only be reimbursed at actual cost without markup or profit. TACOMA RAIL is responsible for providing any additional funds necessary to cover PROJECT expenses beyond the \$7.4 m maximum amount under this AGREEMENT.

The STATE reserves the right to use not less than 2% (0.02), and not more than 5% (0.05), of the grant funds for grant administration expenses. Administrative funds not used for this purpose may be made available to TACOMA RAIL prior to the expiration of this grant AGREEMENT.

The STATE shall make periodic payments to TACOMA RAIL for actual costs incurred under this AGREEMENT without mark up or profit. TACOMA RAIL shall submit monthly invoices detailing work completed. Payment by the STATE shall not relieve TACOMA RAIL of any obligation to make good any defective work or material upon PROJECT completion.

Any materials salvaged under this PROJECT and not used will be stockpiled, inventoried, and sold with the proceeds credited to the PROJECT. Documentation shall include amounts salvaged, amount sold, and amount collected.

TACOMA RAIL shall conform with all provisions of 48 CFR § 31 (2003), or as subsequently amended, regarding accounting conventions. Reimbursement for overhead under this AGREEMENT will be limited to actual costs not to exceed a maximum of 165% of bare labor costs. Reimbursement for travel, subsistence, and lodging expenses will not be eligible under this AGREEMENT unless specifically approved in advance by the STATE. Preapproved air or train travel will only be reimbursed to economy class levels unless otherwise approved in advance by the STATE. TACOMA RAIL shall comply with the rules and regulations regarding travel costs in accordance with the Washington State Department of Transportation Accounting Manual M 13-82 Chapter 10 "Travel Rules and Procedures" and revisions thereto, and incorporated herein by this reference. Online access to Accounting Manual M 13-82 Chapter 10 "Travel Rules and Procedures" and Travel Reimbursement Rates with subsequent revisions are available at:

<http://www.wsdot.wa.gov/biz/travel/Rules/Chapter10TravelRules.pdf>

If online access is not available, contact the Washington State Department of Transportation headquarters office in Olympia to obtain copies of the "Travel Rules and Procedures" and any updates.

The billing for non-salary cost, directly identifiable with the PROJECT, shall be an itemized listing of the charges supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data retained by TACOMA RAIL. Copies of the original supporting documents shall be supplied to the STATE upon request. Such charges must be essential to the work conducted under this AGREEMENT. Crew travel time between normal workstation and jobsites will not be considered travel under this restriction.

SECTION III – PROGRESS PAYMENT

TACOMA RAIL will submit progress billings to the STATE for PROJECT-related work performed pursuant to EXHIBIT A. The STATE shall make payments for eligible PROJECT-related work from the previous month. The STATE will reimburse TACOMA RAIL for the billed amount within thirty (30) days of receipt of a properly completed progress billing.

The payment of any work shall not relieve TACOMA RAIL of any obligation to make good any defective work or material.

TACOMA RAIL shall receive reimbursement for actual cost of materials and their installation, less net salvage value of any material being replaced in carrying out the approved PROJECT. It is understood that TACOMA RAIL may choose to subcontract all or portions of the work. TACOMA RAIL must obtain the STATE's advanced written approval of all subcontractors it shall employ on the PROJECT.

ORIGINAL

It is agreed that STATE payments, pursuant to any TACOMA RAIL payment request, will not constitute agreement as to the appropriateness of any item, and that required adjustments, if any, will be made at the time of final STATE audit. In the event that such final STATE audit indicates an overpayment of moneys to TACOMA RAIL, TACOMA RAIL agrees to refund the overpayment to the STATE within 60 days after being billed therefore.

**SECTION IV –
MATERIALS AND MEASUREMENT**

Payment of materials purchased by TACOMA RAIL will be based on itemized supplier invoices. Payment for work completed under contract by a subcontractor of TACOMA RAIL will be based on actual cost to TACOMA RAIL with no markup for subcontracted work.

**SECTION V –
PROJECT EMPLOYMENT AND INSPECTION OF WORK**

TACOMA RAIL shall employ the services of all persons necessary to perform the PROJECT work and agrees to be responsible for the management, control, operation, construction, maintenance, and repairs that are essential to this PROJECT. The STATE may place an Engineer and/or other inspection personnel on the work site during the term of this AGREEMENT to monitor progress of the PROJECT and/or to monitor adherence to the required provisions of this AGREEMENT. TACOMA RAIL shall in conjunction with BNSF and PSAP make the site accessible to STATE inspection personnel. This may include providing transportation to remote, inaccessible work sites.

The STATE will inspect progress at the work site, as it deems appropriate. In the event that TACOMA RAIL subcontracts to obtain material, equipment, and any work necessary to perform any PROJECT-related track work, TACOMA RAIL will be responsible for certifying that all trackage work is in compliance with Federal Railroad Administration Track Standards.

**SECTION VI –
TERM**

This AGREEMENT shall become effective upon the date the last party signs the AGREEMENT. The AGREEMENT shall continue in full force until completion of the project.

**SECTION VII –
OBLIGATIONS TO REPAY GRANT FUNDS**

At the STATE's sole option, TACOMA RAIL shall be obligated to immediately repay the STATE the full amount of any grant funds paid to TACOMA RAIL up to that date, and the STATE shall be relieved from making additional payments hereunder, if TACOMA RAIL does not complete the PROJECT PHASE 1A tasks specified in EXHIBIT A by September 30, 2008; except that the work for the BNSF signal modification must be completed by June 30, 2009.

ORIGINAL

Any payment by TACOMA RAIL, to the STATE pursuant to this Section shall be payable in U.S. Funds and sent via certified mail to the STATE contact person identified in the NOTICES Section of this AGREEMENT not more than sixty (60) days from the initiating event.

**SECTION VIII –
USE AND MAINTENANCE OF PROJECT CAPITAL IMPROVEMENTS AND OTHER
EQUIPMENT PURCHASED WITH FUNDS FROM THIS AGREEMENT**

TACOMA RAIL, and any successor to TACOMA RAIL's interests in the PROJECT, shall make all necessary repairs and reasonably maintain the capital improvements and equipment purchased with the funds from this AGREEMENT so long as the STATE retains rights as specified in the CONTINGENT INTERESTS Section below. The costs of service, materials, and repairs in connection with the use and operation of the PROJECT shall be at TACOMA RAIL's expense.

**SECTION IX –
CONTINGENT INTERESTS**

TACOMA RAIL agrees that the STATE shall retain a Contingent Interest in a form consistent with RCW 47.76.250(10) in the PROJECT's capital improvements and equipment purchased with the funds from this AGREEMENT as described in EXHIBIT A until the purpose of the grant is fulfilled upon project completion.

TACOMA RAIL shall execute and deliver to the STATE all agreements, instruments and documents that the STATE requests as necessary to perfect and maintain the Contingent Interests as set forth in this Section, in a form and substance acceptable to the STATE, as a condition precedent to TACOMA RAIL's right to seek payment under this AGREEMENT. TACOMA RAIL shall make appropriate entries upon its financial statements and its books and records disclosing the STATE's Contingent Interests under this Section.

**SECTION X –
MAINTENANCE OF RECORDS AND AUDIT REQUIREMENTS**

During the progress of the work, and for a period of not less than six years from the date of final payment to TACOMA RAIL, records and accounts of TACOMA RAIL are to be kept available for inspection and audit by representatives of the STATE.

Copies of the records shall be furnished to the STATE upon request and shall be maintained in accordance with accepted job cost accounting procedures as established in 48 CFR § 31 (2003), or as subsequently amended. All costs must be supported by actual invoices and canceled checks. TACOMA RAIL agrees to comply with the audit requirements contained herein, and to impose the same requirement on any consultant, contractor, or subcontractor who may perform work funded by this AGREEMENT.

ORIGINAL

TACOMA RAIL shall maintain the following until the expiration of six years after the date of the final audit of this AGREEMENT:

- (a) Records that identify the sources and applications of funds for this AGREEMENT and contain information pertaining to outlays;
- (b) Supporting source documents;
- (c) Any records required for TACOMA RAIL to show compliance with the Control of Material and Nondiscrimination Assurances provisions of this AGREEMENT;
- (d) All documentation underlying the preparation of the financial reports;
- (e) Following notification of an amendment to state or federal regulations which takes effect during the period in which costs are allowable, any other records which are required by the notice; and
- (f) Any other records necessary to disclose fully the amount and disposition of the funds provided to TACOMA RAIL under this AGREEMENT and charged to the PROJECT, supported by documents evidencing in detail the nature and propriety of the charges, the total cost of each undertaking for which the assistance was given or used, the amount of the costs of the undertaking supplied by other sources, and other books, records, and documents needed for a full and complete verification of TACOMA RAIL's responsibilities and all payments and charges under this AGREEMENT.

In the event that any litigation, claim or audit is initiated prior to the expiration of said six-year period, the records shall be retained until such litigation, claim, or audit involving the records is complete.

SECTION XI – REPRESENTATIONS AND WARRANTIES

The following representations and warranties by the parties hereto shall be considered conditions precedent to the effectiveness of this AGREEMENT.

TACOMA RAIL represents and warrants the following:

- (a) That it is a public corporation duly organized, validly existing and in good standing under the laws of the State of Washington;
- (b) That the moneys TACOMA RAIL will derive through this AGREEMENT will be used solely for the PROJECT as defined in this AGREEMENT;
- (c) That it has the full power and authority to enter into this AGREEMENT, and to carry out the obligations, which it has hereby undertaken;
- (d) That all corporate and other proceedings required to be taken by or on the part of TACOMA RAIL to authorize its entrance into this AGREEMENT, have been or will be duly taken;
- (e) That execution of this AGREEMENT and the performance of the improvement hereunder will not violate any statute, rule, regulation, order, writ, injunction or decree of any Court, administrative agency or government body;
- (f) It is understood that the actual PROJECT costs under this AGREEMENT are based on preliminary estimates. It is the intent of the STATE to partially reimburse TACOMA RAIL for its actual PROJECT costs. It is further understood that unforeseen circumstances due to no fault of TACOMA RAIL may cause the PROJECT cost to exceed the PROJECT

estimate. It is therefore understood that if the total actual PROJECT cost is greater than the PROJECT estimate and the STATE is unable or unwilling to amend this AGREEMENT, TACOMA RAIL shall complete the PROJECT and assume the entire cost overrun;

(g) That TACOMA RAIL has not employed or retained any company or person to solicit or secure this AGREEMENT, and that it has not paid or agreed to pay any company or person, any fee, commission percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this AGREEMENT. For breach or violation of this warranty, the STATE shall have the right to terminate this AGREEMENT without liability;

(h) That TACOMA RAIL shall not engage on a full, part-time, or other basis, during the period of the AGREEMENT, any professional or technical personnel who are, or have been, at any time during the period of the AGREEMENT in the employ of the STATE without written consent of the STATE; and

(i) That TACOMA RAIL shall not extend any loan, gratuity, or gift of money in any form whatsoever to any employee, agent, or officer of the STATE nor will TACOMA RAIL rent or purchase any equipment or materials from any employee or officer of the STATE. Before final payment on this AGREEMENT by the STATE, TACOMA RAIL agrees to execute and furnish the STATE an affidavit certifying it has complied with this provision of the AGREEMENT.

SECTION XII – MUTUAL REPRESENTATIONS AND WARRANTIES

The STATE and TACOMA RAIL mutually represent and warrant the following:

- (a) That this AGREEMENT, and all EXHIBITS attached hereto contain the entire AGREEMENT of the parties;
- (b) That no term or provision in this AGREEMENT may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by both parties to this AGREEMENT;
- (c) That the laws of the State of Washington shall in all respects govern this AGREEMENT.

SECTION XIII – TERMINATION FOR FAULT

Should either the STATE or TACOMA RAIL substantially fail to perform their obligations under this AGREEMENT, and continue in such default for a period of sixty (60) days, the party not in default shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail to the party(s) in default to terminate this AGREEMENT. The exercise of such right shall not impair any other rights of the terminating party under this AGREEMENT or any rights of action against the defaulting party for the recovery of damages. For purposes of this provision, a substantial failure to perform on the part of TACOMA RAIL shall be deemed to include, but shall not be limited to, any action of TACOMA RAIL that jeopardizes its ability to perform pursuant to this AGREEMENT.

ORIGINAL

If TACOMA RAIL does not complete the PROJECT pursuant to EXHIBIT A by September 30, 2008, or complete the \$2.4 m signaling work as set out in the Exhibit A by June 30, 2009 it shall be automatically in default.

**SECTION XIV
TERMINATION FOR FAILURE OF CONTINGENCIES**

If one or more of the contingencies that are necessary to initiate the PROJECT PHASE 1A work reasonably cannot be met, TACOMA RAIL shall have the right to terminate this AGREEMENT.

**SECTION XV –
ASSIGNMENT AND SUCCESSION**

Neither the STATE nor TACOMA RAIL may assign or in any manner transfer either in whole or in part this AGREEMENT or any right or privilege granted to it hereunder, nor permit any person or persons, company or companies to share in any such rights or privileges without the prior written consent of the other party hereto, except as otherwise herein provided. Nothing in this AGREEMENT shall be construed to permit any other railway company or any other person, corporation, or association, directly or indirectly, to possess any right or privilege herein.

**SECTION XVI –
FORCE MAJEURE**

It is further understood and agreed that neither TACOMA RAIL nor the STATE, as the applicable case may be, shall be required to keep this AGREEMENT in effect during any period(s) it is prevented from doing so by governmental action, war, strikes, riots, terrorism, or civil commotion, or if the rail facilities or any portion thereof is made unserviceable by Acts of God including, but not limited to, floods, high water, or other damage by the elements.

**SECTION XVII –
NOTICES**

Any notice, request, consent, demand, report, statement or submission which is required or permitted to be given pursuant to this AGREEMENT shall be in writing and shall be delivered personally to the respective party set forth below, or if mailed, sent by certified United States mail, postage prepaid and return receipt required, to the respective parties at the addresses set forth below, or to such other addresses as the parties may from time to time advise by notice to the other party in writing. The date of personal delivery, or of execution of the return receipt in the case of delivery by certified U.S. mail, of any such notice, demand, request, or submission shall be presumed to be the date of delivery.

ORIGINAL

NOTICES IN THE CASE OF TACOMA RAIL:

Superintendent
Tacoma Rail
Attention: Paula Henry
2601 SR 509 North Frontage Rd
Tacoma, WA 98421
Phone: (253) 502-8894
Email: phenry@cityoftacoma.org

Should the above Registered Agent become unavailable, TACOMA RAIL consents to allowing the legal notices to be sent to the City Attorney for the City of Tacoma.

NOTICES IN THE CASE OF THE STATE:

Director, Freight Strategy and Policy Office
Washington State Department of Transportation
Attention: Barbara Ivanov
Mail Stop 47322
Olympia, WA 98504-7322
Phone 360-705-7931
Email: IvanovB@wsdot.wa.gov

**SECTION XVIII –
INTERPRETATION**

This AGREEMENT shall be construed liberally so as to secure to each party hereto all of the rights, privileges, and benefits herein provided or manifestly intended. This AGREEMENT, and each and every provision hereof, is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of a third party to recover by way of damages or otherwise against the parties hereto.

If any covenant or provision, or part thereof, of this AGREEMENT shall be adjudged void, such adjudication shall not affect the validity or obligation of performance of any other covenant or provision, or part thereof, which in itself is valid, if such remainder conforms to the terms and requirements of applicable law and the intent of this AGREEMENT. No controversy concerning any covenant or provision shall delay the performance of any other provisions except as herein allowed.

All remedies provided in the AGREEMENT are distinct and cumulative to any other right or remedy under this document or afforded by law or equity, and may be exercised independently, concurrently, or successively therewith.

The term "AGREEMENT" shall mean AGREEMENT Number RR-00364 and all EXHIBITS attached hereto and duly executed supplements.

ORIGINAL

Any forbearance of the parties in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of, or preclude the exercise of that or any other right or remedy hereunder.

Each party hereby agrees to immediately notify the other of any change in conditions or any other event, which may significantly affect the TERM of this AGREEMENT or the party's ability to perform the PROJECT in accordance with the provisions of this AGREEMENT.

SECTION XIX – SUBCONTRACTING

No contract between TACOMA RAIL and its contractors and/or their subcontractors, and/or material suppliers shall create any obligation or liability of the STATE with regard to this AGREEMENT without the STATE'S specific written consent to such obligation or liability notwithstanding any concurrence with, or approval of, the award, solicitation, execution, or performance of any contract or subcontract. TACOMA RAIL hereby agrees to include the provisions of this AGREEMENT in all contracts entered into by TACOMA RAIL for the employment of any individuals, procurement of any materials, or the performance of any work to be accomplished under this AGREEMENT.

SECTION XX – LAWS TO BE OBSERVED

1. **General Compliance.** TACOMA RAIL shall comply with all applicable federal, state, and local laws, rules, regulations, and orders pertaining to the PROJECT, including but not limited to 48 CFR Part 31 and 49 CFR Part 18. If any action or inaction by TACOMA RAIL results in a fine, penalty, cost, or charge being imposed or assessed on or against TACOMA RAIL and/or the STATE, TACOMA RAIL shall assume and bear any such fine, penalty, cost, or charges. In the event the STATE, for any reason, is required to pay the same, TACOMA RAIL, upon demand, shall promptly reimburse, indemnify, and hold harmless the STATE for or on account of such fine, penalty, cost or charge and shall also pay all expenses and attorney's fees incurred in defending any action that may be brought against the STATE on account thereof. TACOMA RAIL shall, in the event of any such action and upon notice thereof from the STATE, defend any such action(s) free of cost, charge and expense to the STATE.
2. **Permits and Compliance with land use and environmental laws.** TACOMA RAIL shall be responsible for obtaining all necessary permits from federal, state, and local agencies of government and compliance with land use and environmental regulations pertaining to the performance of work under this AGREEMENT.
3. **Compliance with Social Laws.** During the term of the AGREEMENT, TACOMA RAIL and its contractors, subcontractors, and lessees shall comply with all applicable STATE and FEDERAL workmen's compensation, employer's liability and safety and other similar laws applicable to TACOMA RAIL.
4. **Equal Employment Opportunity.** In connection with the execution of this AGREEMENT, TACOMA RAIL or its Contractor shall not discriminate against any employee or applicant

for employment because of race, creed, marital status, age, color, sex or national origin, or disability, except for a bona fide occupational qualification.

**SECTION XXI –
INDEPENDENT CONTRACTOR**

TACOMA RAIL shall be deemed an independent contractor for all purposes and the employees of TACOMA RAIL or any of its contractors, subcontractors, lessees and the employees thereof, shall not in any manner be deemed the employees or agents of the STATE.

**SECTION XXII –
SAFETY AND LIABILITIES**

1. **Safety.** TACOMA RAIL shall do all things necessary and proper for the safe operation of the PROJECT and shall comply with all regulations prescribed by law or any public authority with respect thereto for the safety of the public or otherwise.
2. **Personal Liability of Public Officers.** No officer or employee of the STATE or TACOMA RAIL shall be personally liable for any act, or failure to act, in connection with this AGREEMENT, it being understood that in such matters they are acting solely as agents of the STATE or TACOMA RAIL.
3. **Responsibility for Damage.** The STATE, Transportation Commission, Secretary of Transportation, and all officers and employees of the STATE including, but not limited to, those of the Department of Transportation shall not be responsible in any manner for: any loss or damage to the work or any part thereof; for any loss of material or damage to any of the materials or other things used or employed in the performance of the work; for any injury to or death of any persons, either workers or the public, or for damage to the public for any cause due to the intentional acts or negligence of TACOMA RAIL or its workers, or anyone employed by it.
4. **Indemnification.** TACOMA RAIL shall indemnify and hold the STATE and all its officers and employees harmless from, and shall process and defend at its own expense all claims, demands, or suits at law or equity arising out of this AGREEMENT caused by the performance or failure to perform by TACOMA RAIL and/or its subcontractors of any and all duties prescribed by, or incidental to its performance under, this AGREEMENT; provided that nothing herein shall require TACOMA RAIL to indemnify or hold the STATE harmless against claims, demands, or suits based solely upon the negligent conduct of the STATE, its officers or employees; and provided further that if the claims, demands or suit is caused by or results from the concurrent negligence of (a) TACOMA RAIL's agents or employees and (b) the STATE's agents or employees, and involves those actions covered by RCW 4.24.115, this indemnity provision with respect to claims or suits based upon such negligence shall be valid and enforceable only to the extent of TACOMA RAIL's negligence or the negligence of TACOMA RAIL's agents or employees.

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**SECTION XXIII –
NO WAIVER OF STATE’S RIGHTS**

The STATE shall not be precluded or stopped by any measurement, estimate, or certificate made either before or after the completion and acceptance of the work and payment therefore from showing the true amount and character of the work performed and materials furnished, or from showing that any such measurement, estimate, or certificate is untrue or incorrectly made, or that the work or materials do not conform in fact to the AGREEMENT. Neither the grant of an extension of time nor acceptance of, or payment for, the whole or any part of the work by the STATE shall bar the STATE from seeking recovery for damages or of any money wrongfully or erroneously paid to TACOMA RAIL. A waiver of any breach of contract shall not be held to be a waiver of any other or subsequent breach.

**SECTION XXIV –
VENUE**

In the event that any party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this AGREEMENT, the parties hereto agree that any such action shall be initiated in the Superior Court of the State of Washington, situated in Thurston County.

**SECTION XXV –
COMPLETE AGREEMENT**

This document and referenced attachments contains all covenants, stipulations and provisions agreed upon by the parties. No agents, or representative of either party has authority to make, and the parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein. No changes, amendments, or modifications of the terms hereof shall be valid unless reduced to writing and signed by the parties as an amendment to this AGREEMENT.

**SECTION XXVI–
EXECUTION OF ACCEPTANCE**

The parties adopt all written statements, representations, warranties, covenants, and EXHIBITS to this AGREEMENT.

**SECTION XXVII –
AMENDMENT**

This AGREEMENT and any provisions hereof may only be amended by written agreement of the parties.

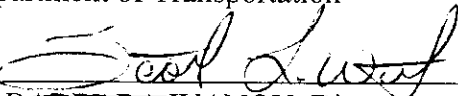
ORIGINAL

SECTION XXVIII -
COUNTERPARTS

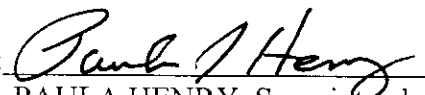
This AGREEMENT may be executed in two counterparts, each of which shall be deemed to be an original having identical legal effect.

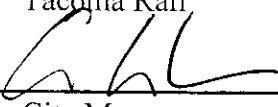
IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT the day and year last written below.

STATE OF WASHINGTON
Department of Transportation

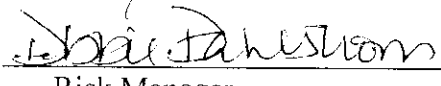
By:  Date: 2/27/07
SCOTT WIT BARBARA IVANOV, Director - STATE RAIL & MARINE OFFICE
Office of Freight Strategy and Policy

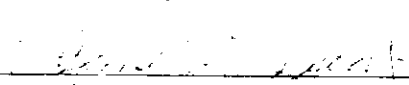
TACOMA RAIL

By:  Date: 1/30/07
PAULA HENRY, Superintendent,
Tacoma Rail

By:  Date: 1/31/07
City Manager

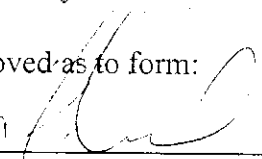
By:  Date: 1/2/07
Finance Director

By:  Date: 1/30/07
Risk Manager

By:  Date: 2/2/07
Assistant City Attorney

By:  Date: 1-31-07
City Clerk

Approved as to form:

By:  Date: 3/1/07
Scott Lockwood
Assistant Attorney General
State of Washington

Any modification, change or revision to this AGREEMENT requires the further approval as to form of the Office of the Attorney General.

ORIGINAL

EXHIBIT A

PROJECT DESCRIPTION COST ESTIMATE LEGAL DESCRIPTION

Project Description

PHASE 1A:

A new lead will be constructed from the TACOMA RAIL line north of Blakeslee Junction that will join the aforementioned line to the PSAP line that runs from Aberdeen to join the BNSF Main line at a triangle in Centralia.

Additionally the current alignment of the PSAP track where it joins the BNSF main line and currently in the ownership of the BNSF will be reconstructed to allow the TACOMA RAIL services to make this connection at a higher speed than the junction currently allows. This will involve making changes to the speed of the switches increasing the running speeds from 10 m.p.h. to 20 m.p.h. and rehabilitate the Skookumchuck River bridge

PSAP and BNSF will grant TACOMA RAIL long term operating rights over the line from Blakeslee Junction to the new junction with the BNSF main line in Centralia and retain the STATE's contingent interest for the duration of the project consistent with RCW 47.76.250 (10).

PHASE 1B

Phase 1B is intended to relocate TACOMA RAIL's track structure from Blakeslee Junction south to Chehalis to an alternative location to be determined by mutual agreement between the STATE and TACOMA RAIL. If funding for 28,000 feet of new siding and fair market value for the designated property is provided by the STATE and/or other parties, on or before July 1, 2009 TACOMA RAIL, upon Tacoma City Council approval, agrees to submit to the Surface Transportation Board the segment of track from Blakeslee Junction south to Chehalis for abandonment. If this track segment is abandoned the section is to revert to public ownership for trail use only. This phase is subject to further investigation and requires funding that is not currently approved as part of PHASE 1A above. It is neither implied nor confirmed that the additional PHASE will be carried out. If funding does become available a separate agreement will be drawn up between the STATE and TACOMA RAIL setting out the terms of interpretation.

PHASE 2, PHASE 3 and PHASE 4

Phases 2, 3 and 4 are intended to address siding storage capacity on BNSF and PSAP and freight train and passenger train delays on the BNSF line at Centralia.

ORIGINAL

All the above phases mentioned will improve freight services movements through the area in the vicinity of Blakeslee Junction and minimize delay to freight services, bringing improvements to TACOMA RAIL and giving alternative routes to the Port of Tacoma.

These later phases are subject to further investigation and requires funding that is not currently approved as part of PHASE 1A above. It is neither implied nor confirmed that the additional PHASES will be carried out. If funding does become available a separate agreement will be drawn up between the STATE and the parties involved setting out the terms of interpretation.

Bid documents will be routed for approval by the Washington State Department of Transportation Freight Strategy and Policy Office prior to publication.

A copy of the Plans and Specifications for the PROJECT will be on file in the Washington State Department of Transportation Freight Strategy and Policy Office and by reference is made part of this AGREEMENT.

ORIGINAL

COST ESTIMATE

**CONSTRUCTION OF TWO JUNCTIONS
CENTRALIA - BLAKESLEE JUNCTION
COST ESTIMATE**

ITEM	DESCRIPTION	QUANTITY	UNIT PRICE	TOTAL
1	Roadway Items	1	\$157,000	\$157,000
2	Mob & Bond	1	\$216,088	\$216,088
3	Rail Contractor	1	\$3,587,634	\$3,587,634
4	Other including Construction costs	1	\$726.047	\$726.047
5	Other project items	1	\$31,500	\$31,500
6	Railroad Items	1	\$545,575	\$545,575
7	Tacoma Rail Management Fee		\$120,000	\$120,000
8	Sub Total			\$5,383,844
9	Tax	8%	\$430,788	\$5,814,552
10	Contingency	20%	\$1,162,910	\$1,162,910
11	Total Estimated Costs			\$6,977,462

ORIGINAL

CONSENSUS PLAN TO REDUCE CENTRALIA/CHEHALIS ROAD & RAIL CONGESTION

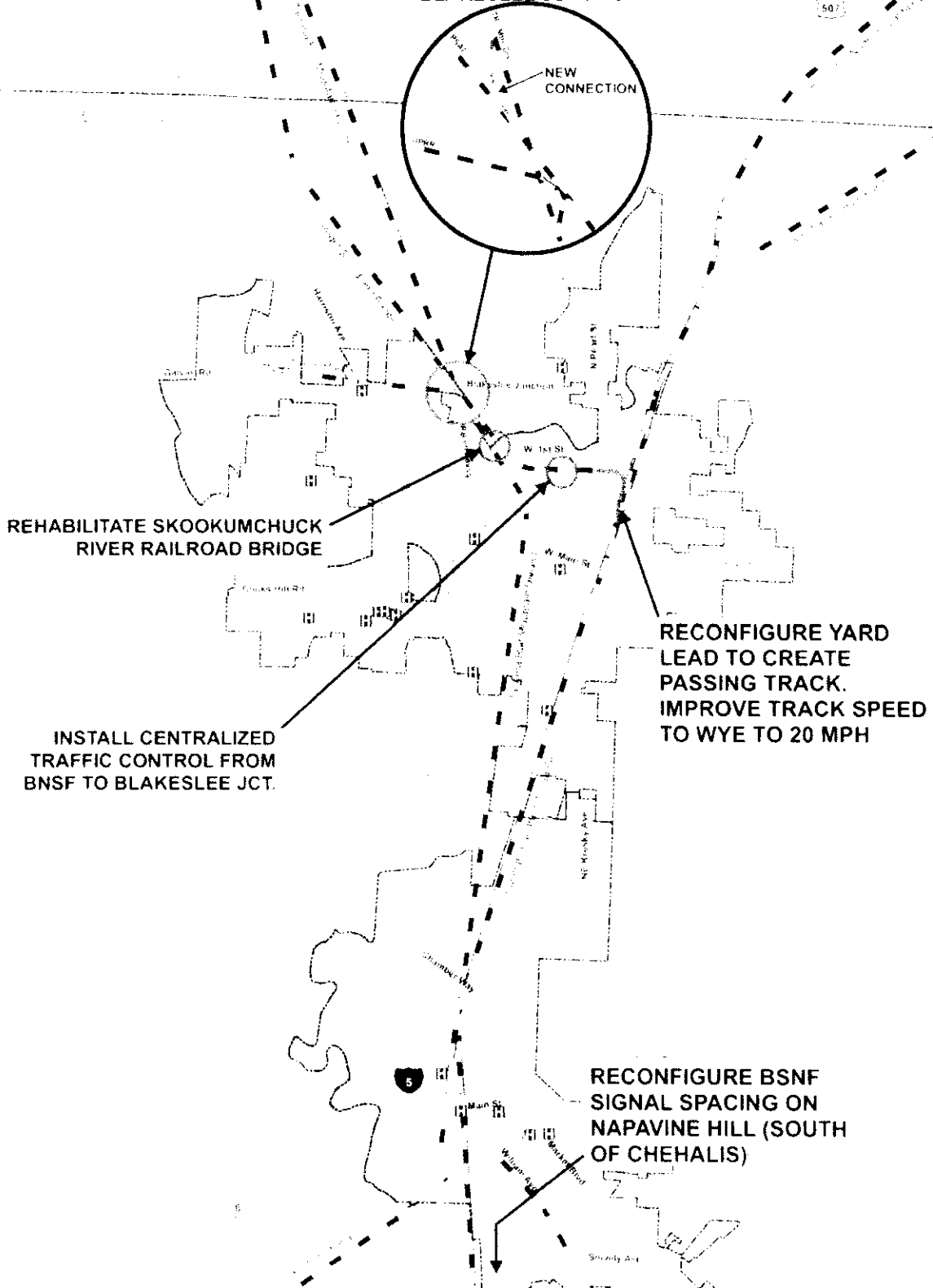
PHASE 1A

DECEMBER 2006



Washington State
Department of Transportation

NEW PSAP/TACOMA RAIL
CONNECTION AT
BLAKESLEE JUNCTION



ORIGINAL

CONSENSUS PLAN TO REDUCE CENTRALIA/CHEHALIS ROAD & RAIL CONGESTION

PHASES 1B - 4

DECEMBER 2006



Washington State
Department of Transportation

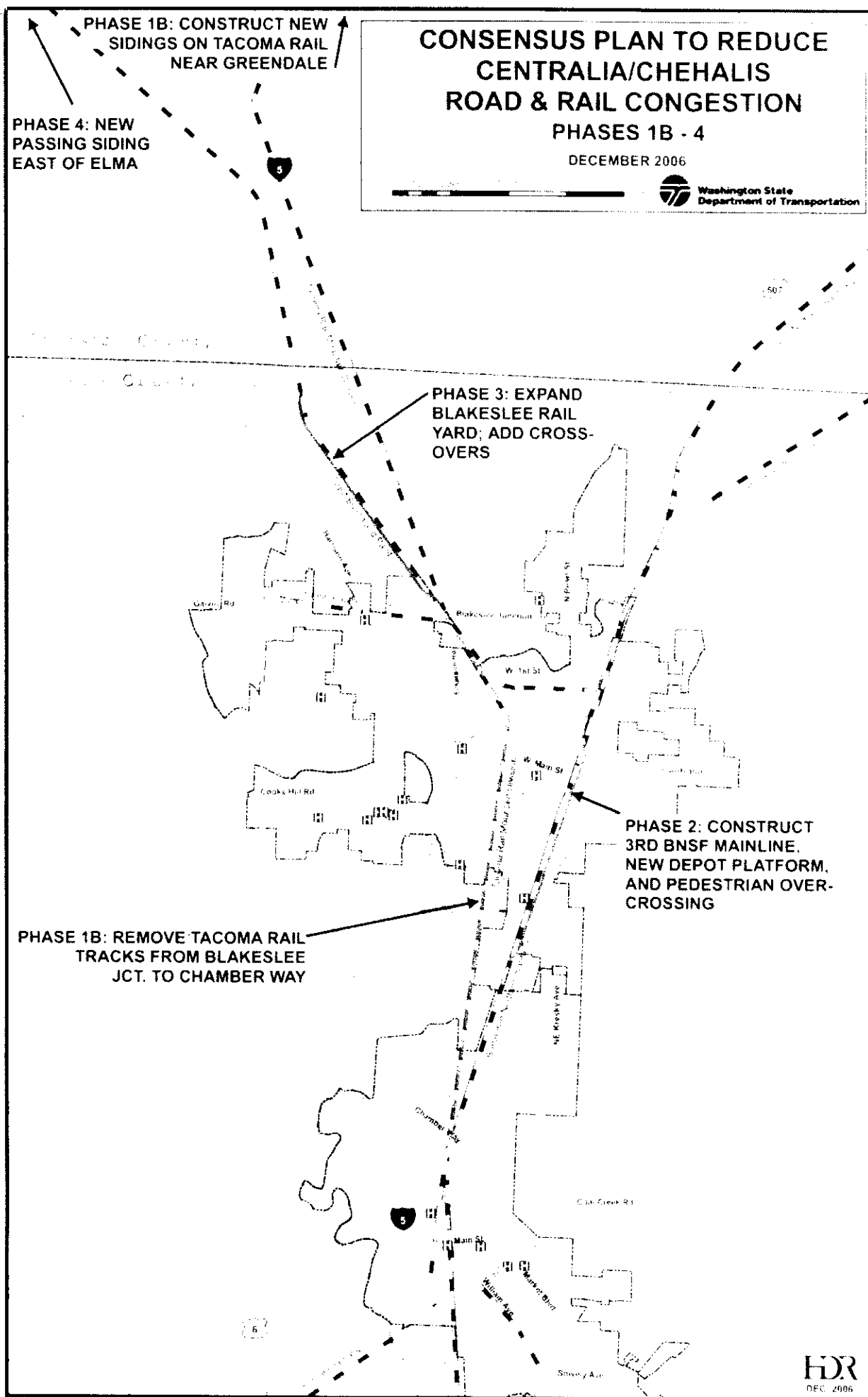
PHASE 1B: CONSTRUCT NEW
SIDINGS ON TACOMA RAIL
NEAR GREENDALE

PHASE 4: NEW
PASSING SIDING
EAST OF ELMA

PHASE 3: EXPAND
BLAKESLEE RAIL
YARD; ADD CROSS-
OVERS

PHASE 2: CONSTRUCT
3RD BNSF MAINLINE,
NEW DEPOT PLATFORM,
AND PEDESTRIAN OVER-
CROSSING

PHASE 1B: REMOVE TACOMA RAIL
TRACKS FROM BLAKESLEE
JCT. TO CHAMBER WAY



ORIGINAL