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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

7 IN AND FOR THE COUNTY OF CLARK

8 CLARK COUNTY, a Washington
9 municipal corporation,

10 Plaintiff,

11 v.

12 PORTLAND VANCOUVER JUNCTION
13 RAILROAD, LLC, a Washington limited
liability company,

14 Defendant.

No.

COMPLAINT FOR
DECLARATORY JUDGMENT,
BREACH OF CONTRACT, AND
INJUNCTIVE RELIEF

15 Plaintiff Clark County (the “County”) alleges as follows:

16 **I. PARTIES**

17 1. The County is a municipal corporation within the State of Washington.

18 2. Defendant Portland Vancouver Junction Railroad, LLC (“PVJR”) is, upon
19 information and belief, a Washington limited liability company with its principal place of
20 business in Bellevue, Washington.

21 **II. JURISDICTION AND VENUE**

22 3. This Court has jurisdiction in this matter pursuant to chapter 7.24 RCW and
23 chapter 2.08 RCW.

1 be in the best public interest, real property necessary to the support or
2 expansion of an adjacent facility may be leased to the lessee of the
3 adjacent facility for a term to expire simultaneously with the term of the
4 lease of the adjacent facility, but not to exceed thirty-five (35) years;
5 PROVIDED further, that when the [BOCC] determines it to be in the best
6 public interest, where the property to be leased is improved or is to be
7 improved, and the value of the improvement is or will be at least equal to
8 the value of the property to be leased, the county may lease such property
9 for a term not to exceed thirty-five (35) years; PROVIDED further, that
10 where the property to be leased is to be used for major airport, industrial
11 or commercial or county fair purposes, requiring extensive improvements,
12 the county may lease such property for a term equal to the estimated
13 useful life of the improvements, but not to exceed fifty (50) years.

8 10. Under CCC 2.33A.180, certain property transactions are “exempted from the
9 provisions of Sections 2.33A.130 through 2.33A.170.” CCC 2.33A.180(8) is titled “Limited-Use
10 Parcels – Restrictive Characteristics” and provides that “[p]roperty determined to be surplus to
11 the immediate needs of the county, but which because of its location, configuration or other
12 characteristic is especially and uniquely suitable for a particular quasi-public use requiring
13 special legal, financial or technical qualifications, all as determined by the county council, may
14 be sold or leased through a public request for proposal process.”

15 11. In addition to the property procedures set forth in Chapter 2.33A of the CCC, the
16 Clark County Charter (“Charter”) contains provisions limiting franchises. Section 8.9 of the
17 Charter provides:

18 All franchises granted by the council shall be for a fixed term not to exceed
19 twenty-five (25) years. No exclusive franchise shall be granted for the use of any
20 street, road or public place. All franchises shall be subject to the power of
21 eminent domain and right of the council or people acting through initiative or
22 referendum to repeal, amend or modify the franchise in the public’s interest.
23 Every ordinance granting a franchise shall contain a reservation of these rights. In
a proceeding under eminent domain, the franchise itself shall have no value.

12. The Chelatchie Prairie Railroad (“Railroad”) is an approximately 33-mile short
line that stretches diagonally across the County. The Railroad is southwest Washington’s only
operating short line railway and dates back to the late nineteenth century.

1 13. The County purchased the Railroad in the 1980s for commercial, tourist, and
2 recreational purposes. After acquiring ownership of the Railroad, the County sought bids from
3 qualified rail operators to provide freight service. In 1987, the County selected the Lewis &
4 Clark Railway to be the rail service provider for the line. The County and Lewis & Clark
5 Railway subsequently entered a lease agreement, which was renewed in 1994 for an additional
6 10-year term, to expire in 2004.

7 14. On or about February 20, 2004, County staff and Columbia Basin Railroad
8 Company, Inc. (“CBRR”) entered into an interim lease under which CBRR would provide
9 passenger and common carrier freight service on a portion of the Railroad south of Battle
10 Ground. At that time, the Battle Ground, Yacolt, and Chelatchie Prairie Railroad Association
11 (“BYCX”) was providing passenger excursion services, including an annual Christmas train
12 program, on the line segment north of Battle Ground (the “North Line”) under a separate lease
13 with the County. While the interim lease with CBRR was in effect, the County was in the
14 process of negotiating a long-term lease with CBRR for the Railroad, with the intent that BYCX
15 would continue to operate some or all of its programs on the North Line either as a lessee
16 directly with the County or as a lessee with CBRR.

17 15. On or about November 30, 2004, the BOCC approved a general request from
18 Clark County Public Works to authorize the Director of Public Works to negotiate and execute a
19 final lease agreement with CBRR and, if needed, to negotiate and execute a lease extension
20 agreement with BYCX. No lease terms accompanied the request.

21 16. On or about December 20, 2004, County staff and CBRR entered into a Railroad
22 Lease Agreement “Lease” for the purpose of operating and maintaining the Railroad and in the
23

1 future potentially managing the associated properties and developing a dinner train. A copy of
2 the Lease is attached hereto as **Exhibit A**.

3 17. Specifically, the Lease was executed by County Director of Public Works Peter
4 Capell. The signature of County Deputy Prosecuting Attorney Curt Wyrick also appears on the
5 signature page under the notation “Approved as to form only.” The BOCC did not approve the
6 Lease.

7 18. Section 2.A of the Lease specifies that the Lease includes all 33 miles of the
8 Railroad including track, track material, wires, pipes, conduits, poles, guys, bridges, switches,
9 buildings, culverts, signals, scales and related structures, all ancillary and direct or contiguous
10 rail operating yards, facilities, plants, appurtenances located on or adjacent to the Railroad, and
11 all real estate necessary to the operation of the rail service.

12 19. Section 2.A of the Lease provides that the Lease has “an initial term of thirty (30)
13 years commencing on the Transfer Date, which initial term shall be renewed for two additional
14 renewal terms of thirty (30) years each, at the sole and exclusive option of Lessee, for a total of
15 ninety (90) years, or the maximum allowed under Clark County Code Section 2.33A, but not,
16 under any circumstances, to be less than a total of 50 years, unless and until otherwise terminated
17 as provided below...”

18 20. Section 2.B of the Lease governs rent. That section provides that there is “[n]o
19 charge for the first 1,000 carloads per calendar year” and “[n]o charge for the first 25,000
20 passengers per calendar year.” Starting at 1,001 carloads, the Lease provides a stepped system of
21 rent (\$10 per carload for 1,001 to 2,000 carloads, \$20 per carload for the next 3,000 carloads, and
22 \$30 per carload for each carload in excess of 5,000 carloads per calendar year). Similarly, the
23

1 Lease establishes a charge of \$0.75 per passenger for 25,001 to 50,000 passengers and \$1.50 per
2 passenger for each passenger in excess of 50,000 passengers per calendar year.

3 21. Under Section 2.C of the Lease, the County has a right of access to any County
4 property adjoining the leased premises, subject to certain conditions. Moreover, the County has,
5 subject to certain notice and other conditions, “full and unrestricted access to the Leased
6 Premises as Lessor deems necessary to investigate or remediate environmental conditions for
7 which Lessor is or may be alleged to be liable at law or under this Agreement.”

8 22. Under Section 2.C.4 of the Lease, the “Clark County Auditor may at any
9 reasonable time during regular working hours enter the premises of the Lessee to inspect the
10 records of Lessee referenced in Sections 2.B, 2.D, 2.E, 3.B, 4.E, 5.E, and 5.F of this Lease. The
11 Auditor shall have access to any and all such records regardless of where they are located, and
12 the Lessee shall promptly make copies of such records available to the Auditor, upon the
13 Auditor’s request and at the Lessor’s expense....” Those records include:

- 14 a. “[A]ccurate and thorough records of the carloads and passengers” transported and
15 accountings of each month’s activity (Lease Section 2.B);
- 16 b. Accounting of the payment of all required fees, permits, licenses, and taxes necessary
17 to operate and maintain the Railroad Freight Service (Lease Section 2.D);
- 18 c. Accounting of the payment of all payroll taxes, use, sales, income, or other forms of
19 taxes, fees, licenses, excises, or payments required by any city, federal or state
20 legislation that are now or may during the term of the Lease be enacted as to all
21 persons employed by the Lessee and as to all duties, activities, and requirements by
22 the Lessee in performance of the work pursuant to the Lease (Lease Section 2.E);
23

- 1 d. Documents related to proposed property-related transactions and agreements (Lease
2 Section 3.B);
- 3 e. Lists of rail related equipment and materials (Lease Section 4.E);
- 4 f. “Adequate maintenance records for the Leased Premises during the Term to permit a
5 determination of the existing maintenance level for the Leased Premises at any given
6 point in time” including “track profiles for the Leased Premises, inspection reports,
7 reports of materials removed, scrapped, redeployed or installed new, and other such
8 maintenance records” (Lease Section 5.E); and
- 9 g. Records of construction/removal of materials comprising the Leased Premises (Lease
10 Section 5.F).

11 23. Under Sections 4.A and 4.B of the Lease, “Lessee shall have the exclusive
12 possession of, and use of any and all rights and licenses in, the Leased Premises solely for the
13 purpose of providing Rail Freight Service and for such other purposes as may be related thereto”
14 and “Lessee shall have the exclusive right and responsibility to provide Rail Freight Service to
15 and from points on the Leased Premises.” However, under Section 4.A of the Lease, the County
16 “retains the right to inspect any and all Leased Premises, upon twenty-four (24) hours notice” for
17 the purpose of “verifying Lessee’s compliance with the terms and conditions of this Agreement.”

18 24. Under Section 4.C of the Lease, “Lessee agrees to negotiate in good faith to
19 accommodate future BYCX operations; however, Lessee shall have the right, in its sole
20 discretion, to allow BYCX to operate or store any equipment or materials on the Leased
21 Premises.” Under the same section, the County further agreed that the County “may not permit
22 or approve any BYCX operations on, or entry onto, the Leased Premises....”
23

1 25. Under Section 5.B of the Lease, “Lessee shall perform or cause to be performed
2 all normal maintenance necessary to maintain the Leased Premises to its condition as of the
3 Transfer Date...provided that, in no event shall Lessee’s maintenance obligations under this
4 Lease obligate Lessee (i) to perform any maintenance, repairs or restoration of the Leased
5 Premises that is beyond the scope of normalized maintenance for a rail line in the condition set
6 forth; or (ii) to improve or maintain any portions of the Leased Premises other than to
7 accommodate continuous and uninterrupted Rail Freight Service, subject to slow ordered track in
8 the ordinary course of business and interruptions due to force majeure.” Unless a written waiver
9 is granted under section 5.D, the Leased Premises shall be maintained to the transferred
10 condition at all times by Lessee during the lease term.

11 26. Under Section 5.B.2 of the Lease, the County “shall maintain or cause to be
12 maintained all Lessor-owned public road crossings and crossing signals,” shall provide “crossing
13 signals, signs and road surfaces within the road right-of-way,” shall “provide for vegetation
14 control, surface water drainage control, fence maintenance, and public dumping pickup along the
15 project line, in accordance with the applicable laws and annual maintenance program which shall
16 identify the timing, location, and level of maintenance to be provided.” The Lessee, however,
17 must provide “rail, ties and installation in road crossing projects.”

18 27. Under Section 5.B.6 of the Lease, the County is responsible for all routine bridge
19 maintenance on the Leased Premises.

20 28. Section 5.C of the Lease contains responsibility-shifting provisions for
21 maintenance, but applies only when carloads and/or passengers exceed a certain specified
22 minimum.
23

1 29. Section 17.1 of the Lease contains a severability clause providing that “[i]n the
2 event any section, subsection, sentence, clause, or phrase contained herein shall be determined,
3 declared, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable, no
4 determination, declaration, or adjudication shall in any manner affect the other sections,
5 subsections, sentences, clauses, or phrases of this Agreement, which shall remain in full force
6 and effect...unless the invalidity of such provision has the effect of substantially impairing the
7 benefits of this transaction or frustrating the intent of the Agreement.”

8 30. After the Lease was signed, CBRR and BYCX failed to reach agreement
9 regarding BYCX’s use of the North Line for its passenger service operations. Accordingly, on
10 or about September 27, 2005, the County and CBRR entered into a Memorandum of
11 Understanding (“September 2005 MOU”) whereby the County and CBRR contemplated entering
12 a subsequent Leaseback Agreement. The County and CBRR agreed that the County would lease
13 back from CBRR the North Line (from milepost 18.7 to milepost 33.1) and then sublease the
14 North Line to BYCX for the purposes of maintaining the track and operating a passenger
15 excursion and/or other passenger related programs. Article 11 of the September 2005 MOU
16 provided that “[a]ll track-related grant funds received for use on the line will be distributed to
17 CBRR for prioritization and use,” except for grant funds available only to nonprofit entities.

18 31. On or about November 8, 2005, the County and CBRR entered into an addendum
19 (“November 2005 Addendum”) to the September 2005 MOU. The November 2005 Addendum
20 would authorize BYCX to operate a Christmas Tree Program, including Christmas tree trains, on
21 the North Line in December 2005. The November 2005 Addendum also provided for a
22 “Railroad Rezoning Program”:

23 The County agrees to initiate an economic development program for the
 railroad in 2005. The County agrees to proceed with advocacy and energy

1 to create (1) a new zoning designation, called “railroad industrial”, for an
2 area north of the current Vancouver Urban Growth Boundary and (2) rail
3 “shipper friendly” design standards for new development on property
4 abutting or near the railroad....

5 32. In June 2006, the County and CBRR entered into a North Line Leaseback
6 Agreement (“Leaseback Agreement”). Under the Leaseback Agreement, the County leased back
7 from CBRR the North Line (from milepost 18.7 to milepost 33.1) in order to then sublease the
8 North Line to BYCX for BYCS’s passenger excursion programs. Among other things, the
9 Leaseback Agreement requires that “[a]ll track-related grant funds received for use on the line
10 will be distributed in accordance with the terms and provisions described in Article 11 of the
11 [September 2005] MOU.” The Leaseback Agreement also requires that the County “initiate an
12 economic development program for the railroad as described in the Memorandum of
13 Understanding between the parties dated November 3, 2005,” “continue to proceed with
14 advocacy and energy to create a new zoning designation called ‘railroad industrial’ for an area
15 north of the current Vancouver Urban Growth Boundary, and “proceed with advocacy and
16 energy to create ‘rail shipper friendly’ design standards for new development on property
17 abutting or near the railroad properties.” The Leaseback Agreement also provides that CBRR
18 “covenants that it shall continue to negotiate in good faith with the County to accommodate
19 future BYCX operations...including operation upon or storage of equipment and materials on the
20 Leased Premises required for BYCX operations.”

21 33. On or about February 1, 2012, the Lease was assigned from CBRR to PVJR (the
22 “2012 Lease Assignment”). PVJR is currently the Lessee under the Lease.

23 34. During the term of the Lease, the County has never received rent or any other
compensation from CBRR or PVJR. Upon information and belief, the number of carloads
transported by CBRR (and later PVJR) on the Railroad has fluctuated between 69 and 853, but

1 has never reached the 1,001-carload number that would trigger payment of rent under Section
2 2.B of the Lease.

3 35. During the term of the Lease, neither CBRR nor PVJR has implemented
4 passenger service on the Railroad.

5 36. During the term of the Lease, the County has obtained grant monies for
6 maintenance and limited upgrades of the Railroad and has distributed funds from such grants to
7 CBRR and/or PVJR for use in maintaining and/or upgrading the Railroad.

8 37. During the term of the Lease, the County has expended significant County funds
9 to maintain and keep operational the Railroad.

10 38. The County initiated a review of the Lease in August 2018. During the review
11 process, the County identified significant concerns with the Lease that led the County to
12 conclude the Lease was likely unenforceable or expired.

13 39. On October 30, 2018, the County informed PVJR of the County's conclusion and
14 expressed concern that the parties were operating without a valid lease. The County proposed
15 that the parties enter a 9-month lease permitting PVJR to continue operations on the Railroad
16 while the parties explored their options moving forward.

17 40. By letter dated November 9, 2018, PVJR denied that the Lease was invalid and
18 alleged breaches by the County of its obligation to undertake bridge maintenance and of its
19 "railroad rezoning obligation." PVJR further claimed that under CCC 2.33A.180(8), the Lease
20 has a term of 90 years. Further, PVJR asserted that it had made extensive improvements to the
21 Railroad and had "invested millions of dollars to achieve a successful line," but provided no
22 elaboration or backup supporting those statements.
23

1 41. By letter dated November 30, 2018, PVJR notified the County of a bridge closure,
2 claimed the County had failed to perform bridge maintenance on a timely basis, and claimed the
3 County lacked authority to enter the leased facilities to perform repairs.

4 42. By letter dated December 3, 2018, the County reaffirmed its right and obligation
5 to conduct bridge repairs (along with other maintenance) under the Lease and indicated its
6 position that PVJR has no authority to bar the County from performing such repairs.

7 43. By letter dated December 5, 2018, the County indicated its intent to continue
8 fulfilling its obligations under the Lease until a court ruled upon it or the parties reached a
9 separate agreement. The County further requested that PVJR identify and provide supporting
10 documentation for any alleged damages, provide specific information detailing any
11 improvements PVJR and/or CBRR made to the Railroad and the estimated useful life of those
12 improvements, and provide a specific and detailed accounting of the amounts allegedly invested
13 by PVJR. To date, PVJR has not responded to this request.

14 44. In December 2018, PVJR temporarily prohibited use of the North Line required
15 for operating BYCX's Christmas train program, resulting in cancellation of a portion of the
16 program. PVJR issued a press release blaming the County for cancelling the Christmas trains.

17 45. To date, the County and PVJR have not been able to reach agreement on the term
18 or other provisions of the Lease.

19 **IV. FIRST CAUSE OF ACTION: DECLARATORY JUDGMENT**

20 46. The County re-alleges and incorporates the preceding paragraphs as though fully
21 set forth herein.

22 47. For reasons including but not limited to those stated herein, an actual dispute
23 exists between the County and PVJR regarding the Lease, which parties have genuine and

1 opposing interests, which interests are direct and substantial, and of which a judicial
2 determination will be final and conclusive.

3 48. The Lease was entered into without the approval of the BOCC. The Lease was
4 further entered into without any findings or other substantiation of the requirements necessary to
5 support a lease term longer than the 10-year limit specified in the first clause of CCC 2.33A.160.

6 49. The County is, therefore, entitled to a declaratory judgment stating that the Lease
7 is invalid and unenforceable as ultra vires.

8 50. In the alternative, the County is entitled to a declaratory judgment stating that the
9 Lease, even if initially valid, expired 10 years after the Lease was signed (December 20, 2014)
10 and is therefore currently expired.

11 51. In the alternative, the County is entitled to a declaratory judgment stating that the
12 Lease, even if initially valid, is limited to the maximum amount authorized under the Clark
13 County Code, subject to constitutional limitations.

14 52. Additionally, while the Lease grants PVJR exclusive use of and rights in the
15 leased premises and the exclusive right to provide rail freight service on the same, the County
16 has never received rent or any other compensation under the Lease, meaning PVJR (and
17 previously CBRR) has operated on the County-owned Railroad at no charge for over 14 years.
18 The County is thus further entitled to a declaratory judgment stating that the Lease is invalid and
19 unenforceable on any or all of the following grounds:

- 20 a. The Lease constitutes a gift of public funds and/or property in violation of article
21 VIII, section 7 of the Washington Constitution.

- 1 b. The Lease grants privileges to PVJR that on the same terms do not equally belong to
2 all citizens or corporations, in violation of article I, section 12 of the Washington
3 Constitution.
- 4 c. The Lease constitutes special legislation in violation of article II, section 28 of the
5 Washington Constitution.
- 6 d. To the extent the Lease provides for a term of 90 years, the Lease constitutes a
7 perpetual lease in violation of Washington public policy.
- 8 e. To the extent the Lease provides for a term of 90 years, the Lease constitutes an
9 irrevocable franchise in violation of article I, section 8 of the Washington
10 Constitution.
- 11 f. To the extent the Lease provides for a term of more than 25 years, the Lease
12 constitutes a franchise in violation of restrictions on franchise authority set forth in
13 Section 8.9 of the Clark County Charter.
- 14 g. The Lease constitutes an illusory contract that is void for failure of consideration.

15 53. Additionally, even if the Lease is deemed to be valid and/or enforceable in whole
16 or in part, and regardless of the length of its term, the County is entitled to a declaratory
17 judgment stating that the County has met or exceeded any requirement under the Lease and/or
18 the Leaseback Agreement for economic development and/or railroad rezoning.

19 54. The County is further entitled to a declaratory judgment stating that the County
20 has otherwise met and performed in good faith its obligations under the Lease.

21 55. The County, therefore, requests entry of a declaratory judgment, as well as any
22 injunctive relief that may appropriately and necessarily arise therefrom.

23

1 **VI. SECOND CAUSE OF ACTION: BREACH OF CONTRACT**

2 56. The County re-alleges and incorporates the preceding paragraphs as though fully
3 set forth herein.

4 57. Although the County does not believe that the Lease is presently or prospectively
5 enforceable for the reasons set forth herein, in the event the Lease is determined to be valid
6 and/or enforceable in whole or in part, PVJR has materially breached its obligations under the
7 Lease. The County has not attempted to eject PVJR and has honored its obligations as if the
8 Lease remained in effect pending a court ruling or new agreement. Nonetheless, PVJR, while
9 claiming the Lease is valid and fully enforceable, has refused to comply with it.

10 58. Among other things, the Lease provides rights of entry/inspection to the County
11 and further authorizes the County to inspect certain specified records of PVJR, including records
12 of track maintenance and/or improvement. PVJR has prevented the County from exercising
13 these rights, including but not limited to its right to enter the leased premises to make repairs and
14 to inspect PVJR's records.

15 59. PVJR has further breached its obligation under the Leaseback Agreement to
16 negotiate in good faith with the County to accommodate future BYCX operations.

17 60. As a direct and proximate result of PVJR's breach of the Lease, the County has
18 suffered damages in an amount to be proven at trial. Alternatively, the County is entitled to
19 specific performance of those enforceable provisions at issue.

20 **VII. THIRD CAUSE OF ACTION: INJUNCTIVE RELIEF**

21 61. The County re-alleges and incorporates the preceding paragraphs as though fully
22 set forth herein.

1 and unenforceable as an illusory contract; (x) the County has met or exceeded any requirements
2 under the Lease and/or the Leaseback Agreement for economic development and/or railroad
3 rezoning; and (xi) the County has otherwise met and performed in good faith its obligations
4 under the Lease.

5 B. That the Court find PVJR in material breach of the Lease and grant the County
6 compensatory damages in an amount to be determined at trial, or alternatively, specific
7 performance of those enforceable provisions at issue.

8 C. That the Court grant injunctive relief necessary to retain the status quo, or flowing
9 from any declaratory relief granted herein.

10 D. That the Court grant such other relief as the Court may deem just and equitable,
11 including without limitation an award of the County's reasonable attorney fees and expenses to
12 the fullest extent allowed by law or equity.

13 DATED this 15th day of March, 2019.

14 PACIFICA LAW GROUP LLP

15
16 By /s/ Matthew J. Segal

17 Matthew J. Segal, WSBA # 29797

18 Sarah S. Washburn, WSBA # 44418

19 Attorneys for Plaintiff Clark County
20
21
22
23

EXHIBIT A

RAILROAD LEASE AGREEMENT

BETWEEN

CLARK COUNTY, WASHINGTON (LESSOR)

AND

**COLUMBIA BASIN RAILROAD COMPANY, INC.
(LESSEE)**

December 20, 2004

Clark County/CBRR Lease Agreement

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Section 12 – Catastrophic Occurances

A. Event

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Section 19 – Sale of a Portion of the Real Estate of Leased Premises

Exhibit A – Line Map

Exhibit B – Legal Description

Exhibit C – Lessor's Rail Equipment, Facilities, and Materials

Exhibit D – Other Property Leases and Permits

Exhibit E – Other Rail Operations Leases

LEASE AGREEMENT

This Lease Agreement ("Agreement") between Clark County ("County" or "Lessor"), a municipal corporation located in SW southwest Washington State, and Columbia Basin Railroad Company, Inc. ("CBRC" or "Lessee"), a Washington corporation, dated as of the 20th day of December 2004.

WHEREAS, Clark County is the owner of the lines of standard gauge railroad and other properties in the state of Washington from North Vancouver (MP 0.0) in Vancouver, Washington to Chelatchie, Washington (Approximately MP 33.1), including several spur lines, yard and passing tracks and connections (the Leased Premises, as that term is more specifically defined in Section 2.A. hereof); and

WHEREAS, Clark County desires to lease an interest in the Leased Premises to CBRC, for the purpose of operating and maintaining the freight railroad, and in the future potentially managing the associated properties and developing a dinner train;

NOW, THEREFORE, in consideration of the following mutual promises, covenants and agreements, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree:

Section 1. Definitions.

For purposes of this Agreement and each of its Exhibits, the following words and phrases shall have the indicated meaning ascribed to them:

BYCX. Battleground, Yacolt, Chelatchie Prairie Railroad Association

Environmental Law. Any applicable federal, state, or local law or regulation, or applicable administrative or judicial order relating to the pollution or protection of the environment (including without limitation, those laws, regulations and orders addressing injury to or protection of real and personal property or human health, as such matters are related to protection or pollution of the environment), including without limitation

all valid and lawful requirements of courts and other governmental agencies pertaining to wildlife habitat and wetland protection; activities conducted in coastal zone areas and designated wetlands; coastal zone protection and management; stormwater discharge; underground storage tanks; pesticide storage facilities; reporting, licensing, permitting investigation, remediation and removal of emissions, discharges, Releases or threatened Releases of Hazardous Substances, chemical substances, pesticides, petroleum or petroleum products, pollutants, contaminants or hazardous or toxic substances, materials or wastes whether solid, liquid or gaseous in nature, into the Environment or relating to the manufacture, processing, distribution, use treatment, storage, disposal, transport or handling of Hazardous Substances, including, without limitation, storage of petroleum or petroleum products, pollutants, contaminants or hazardous or toxic substances, materials or wastes, whether solid, liquid or gaseous in nature.

Event of Default. Such event as shall have been deemed to have occurred under Section 11., herein.

FRA Track Safety Standards. Those several applicable requirements for specific classes of track found in 49 C.F.R. ' 213 et. seq..

Hazardous Substances. Shall mean any substance:

- (1) which is defined as a "hazardous waste", "hazardous material", "hazardous substance", "pollutant", "contaminant" or is regulated under any Environmental Law, including without limitation, the Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), Resource Conservation and Recovery Act, Clean Air Act and Insecticide, Fungicide and Rodenticide Act, and similar state and local laws; or
- (2) which contains gasoline, diesel fuel or other petroleum products or products containing petroleum hydrocarbons or volatile organic compounds; or
- (3) which contains polychlorinated biphenyls ("PCBs") or asbestos or urea formaldehyde foam insulation; or
- (4) which contains or emits radioactive particles, waves or material, including radon gas;

Leased Premises. Those premises leased to Lessee as described in and pursuant to Section 2.A. of this Agreement.

Rail Freight Service. The common carrier, contract and exempt rail service to be provided on the Leased Premises during the Term of this Agreement, which may, at Lessee's choice, include dinner train service, passenger service, or other rail related services or businesses.

Surface Transportation Board. ("STB"). Governmental agency replacing the Interstate Commerce Commission and any successor agency with jurisdiction over common carriers in interstate commerce.

Transfer Date. The date this agreement is signed by both parties, replacing the interim agreement.

Transferred Condition. FRA defined Excepted Track.

Term. The term of this Agreement as specified in Section 2.A hereof.

Section 2. Lease of the Premises.

A. Leased Premises. Lessor agrees to lease to Lessee and Lessee agrees to lease from Lessor, on the terms and conditions set forth in this Agreement, for an initial term of thirty (30) years commencing on the Transfer Date, which initial term shall be renewed for two additional renewal terms of thirty (30) years each, at the sole and exclusive option of Lessee, for a total of ninety (90) years, or the maximum allowed under Clark County Code Section 2.33A, but not, under any circumstances, to be less than a total of 50 years, unless and until otherwise terminated as provided below ("Term"), the following rail line:

(1) North Vancouver (MP 0.0) to Chelatchie (approx. MP 33.1)

including track, track material, wires, pipes, conduits, poles, guys, bridges, switches, buildings (including without limitation the shop in Battleground), culverts, signals, scales and related structures, all ancillary and direct or contiguous rail operating yards, facilities, plants, appurtenances located on or adjacent to the Leased Premises, and all Real Estate necessary to the

operation of the rail service. Attached as Exhibit A, is a map on which the Leased Premises are shown. Attached as Exhibit B, are legal descriptions pertaining to the Leased Premises which may be filed by Lessee in Clark County, in which the Leased Premises are located, except to the extent expressly provided herein.

B. Rent. Except as provided below, the annual rent for Lessee's leasing of the Leased Premises shall be:

No charge for the first 1,000 carloads per calendar year;

\$10 per carload for the next 1,000 carloads (1,001 to 2,000 carloads) per calendar year, with the exception of aggregate products and other natural resource related products;

\$20 per carload for the next 3,000 carloads (2,001 to 5,000 carloads) per calendar year, with the exception of aggregate products and other natural resource related products;

\$30 per carload for each carload in excess of 5,000 carloads per calendar year, with the exception of aggregate products and other natural resource related products;

The per carload fee will be \$5 per carload for all aggregate products and other natural resource related products.

In addition, Lessee shall pay the following rent for each passenger transported on the Leased Premises who pays Lessee for the transportation:

No charge for the first 25,000 passengers per calendar year;

\$.75 per passenger for the next 25,000 passengers (25,001 to 50,000) per calendar year;

\$1.50 per passenger for each passenger in excess of 50,000 passengers per calendar year.

Rent shall be paid no later than the last day of the month after the month that

the Lessee's obligation to pay rent begins. For example, if the 1,001st carload is transported on March 15, rent shall be due no later than April 30, and on the last day of each subsequent month.

Lessee shall maintain accurate and thorough records of the carloads and passengers it transports, and will provide (by email or other method of its choosing) an accounting of each month's activity to Lessor no later than the 15th day of the following month.

Once payments are triggered by an increase in the freight carloads above 1000 carloads per year, the commencement of passenger operations, or ten years from the signing of this agreement, per car and per passenger fees will be increased or decreased according to the following formula.

The per car fee shall be adjusted annually as of January 1 in the then current year, once such adjustments are triggered, based on the changes in the RCAF (U) and (A) during the previous two years. These increases or decreases shall be determined by using the two formulas published by the "STB" commonly known as the Rail Cost Adjustment Factor, unadjusted for productivity "RCAF (U)" and the Rail Cost Adjustment Factor, adjusted for productivity "RCAF (A)".

Example

RCAF (U) First Quarter 2010=	1.025 (2.5 percent)
RCAF (U) First Quarter 2011=	1.055 (5.5 percent)
Increase =	2.93 percent
Less one percentage point	1.93 percent tentative escalation

RCAF (A) First Quarter 2010=	0.517 (1.7 percent)
RCAF (A) First Quarter 2011=	0.522 (2.2 percent)
Increase =	1.01 percent

Increase in RCAF (A) less than tentative escalation, tentative escalation is used on cars as of January 1, 2012. If the increase in the RCAF (A) were greater than the tentative escalation, the increase in the RCAF (A) would be used as of January 1, 2012.

C. Lessor Rights. Lessor reserves unto itself and others the right of access

(but not including the right to operate trains or other vehicles or rolling stock on the trackage leased to Lessee, except as set forth in this Section 2.C) to any Lessor property adjoining the Leased Premises, except that the foregoing rights shall not be exercised in a manner that unreasonably interferes with Lessee's use of the Leased Premises, and shall be subject to, requirement that any person as a condition to entering the property to exercise such rights, sign release forms releasing Lessee from liability for injury to or death of such persons arising out of Lessee's railroad operations, but such releases shall not relieve Lessee from the consequences of gross negligence or willful or wanton misconduct. Lessor shall enforce the foregoing condition, through Lessor's agents, contractors or third parties seeking to enter the property to exercise such rights.

Lessor shall have at all times, with prior, written notice to Lessee, full and unrestricted access to the Leased Premises as Lessor deems necessary to investigate or remediate environmental conditions for which Lessor is or may be alleged to be liable at law or under this Agreement, at Lessor's sole expense (except to the extent that liability for the expense in question is allocated to Lessee under Section 6. hereof), provided that

1. Lessor shall not exercise the foregoing rights in a manner that unreasonably interferes with Lessee's use of the Leased Premises;
2. Lessor shall require all employees and agents, as a condition to entering the property to exercise such rights, to sign release forms releasing Lessee from liability for injury to or death of such persons arising out of Lessee's railroad operations, but such releases shall not relieve Lessee from the consequences of gross negligence or willful or wanton misconduct; and,
3. Lessor shall not commence remediation without first providing Lessee with a description of the work to be undertaken and consulting with Lessee regarding the manner in which work is to be performed. Lessor shall enforce the foregoing condition upon Lessor employees, agents, contractors or third parties seeking to enter the property to exercise such rights. Lessee shall have the right to have representatives accompany representatives of Lessor in the exercise of the rights granted in this Section 2.C..

4. The Clark County Auditor may at any reasonable time during regular working hours enter the premises of the Lessee to inspect the records of Lessee referenced in Sections 2.B, 2.D, 2.E, 3.B, 4.E, 5.E, and 5.F of this Lease. The Auditor shall have access to any and all such records regardless of where they are located, and the Lessee shall promptly make copies of such records available to the Auditor, upon the Auditor's request and at the Lessor's expense. Lessor shall limit disruption of Lessee's normal day-to-day operations in obtaining such records. Lessor shall not be entitled to take possession of the originals of any documents. Nothing in this Lease shall be construed to require Lessee to divulge any information, which would be in violation of the Interstate Commerce Act or related federal regulations.

D. **Taxes and Other Charges.** Lessee shall be responsible for the payment of and bearing the costs of all required fees, permits, licenses, and taxes necessary to operate and maintain the Railroad Freight Service. Lessor shall assist and cooperate in application for permits and licenses required by state, federal agencies and other governmental agencies. Lessee shall assume all real property taxes, leasehold taxes, so called public improvement and maintenance charges, special assessments, ad valorem taxes, and assessments.

Lessee may deduct up to 50% of the rent payable under Section 2.B. to offset any taxes or fees payable, or previously paid under this Section 2.D., as long as the total of such deductions does not exceed the total taxes and fees paid or payable under this Section 2.D..

Lessee agrees to pay directly, or by mutual agreement of the parties to Lessor, all utility or utility related charges, or any other expense which relate directly or indirectly to the providing of utilities to the Leased Premises, except as modified by this Lease. [Lessor agrees to pay directly those utility charges related to the illumination and signalization of public road crossings along the project line.]

E. **Social Security, Railroad Retirement, and Other Taxes.** Lessee assumes full responsibility for the payment of all payroll taxes, use, sales, income, or other forms of taxes, fees, licenses, excises, or payments required by any city, federal or state legislation which are now or may during the term of

this agreement be enacted as to all persons employed by Lessee and as to all duties, activities, and requirements by Lessee in performance of the work pursuant to this Lease and shall assume exclusive liability therefore, and meet all requirements thereunder pursuant to any rules and regulations that are now and may be promulgated in connection therewith.

F. **Independent Contractor.** Lessee, including its directors, officers, employees, agents or other representatives is an independent contractor and in no way shall be deemed to be an affiliate, partner, joint venturer or associated in any manner whatsoever with Lessor except as an independent contractor under the terms of this Lease.

G. **Termination.**

1. **Lessee Right.** Lessee has the right at any point during the initial lease or two renewal periods to terminate the lease with twelve (12) months prior written notice to Lessor.
2. **Term.** This Lease shall terminate upon the expiration of the final Term, unless Lessee notifies Lessor in writing that Lessee will not exercise either the first or second renewal terms. Unless otherwise notified by Lessee in writing at least one year prior to expiration of the then current term, the Lessor agrees the renewal terms will automatically take effect at the expiration of the previous term.
3. **Default.** In the event that this Agreement is terminated pursuant to written notice under Section 11 hereof, the party in default shall bear any and all costs in obtaining the necessary discontinuance or abandonment authority or exemption with respect to the Leased Premises (including, without limitation, reasonable attorneys' fees and the cost of any labor protective conditions imposed by the STB in connection with such abandonment or discontinuance).
4. **Order.** This lease shall terminate on any order by the STB, court, arbitrator or other administrative agency that terminates Lessee's authority or ability to provide common carrier freight service over the Leased Premises.

5. Other. This Lease shall terminate on any other lawful termination of this Lease, pursuant to the terms of this Lease.

Upon termination of this Lease, for any reason, (i) Lessee agrees to quit and deliver the Leased Premises to the Lessor, unless the Lessor and Lessee shall have entered into another agreement whereby Lessee performs rail operations over the Leased Premises, and (ii) the Lessor agrees to take possession of the Leased Premises and to comply (directly or through its designee) with each of the requirements set forth in Section 2.H., unless the Lessor and Lessee shall have entered into another agreement whereby Lessee performs rail operations over the Leased Premises. Termination of this Lease shall not relieve either party hereto from any liability that may have attached or accrued prior to or at the date of termination of this Lease and shall not deprive either party hereto of its rights to enforce any such liability or of the benefits of any covenants or obligations in this Lease.

H. Assumption of Common Carrier Obligation. Upon the termination of the Lease, for any reason, the Lessor or its designee (a) shall take assignment of this Lease and assume the common carrier obligation to provide freight service of the Leased Premises, (b) shall have obtained all requisite authority from the STB, or its successor agency, to provide common carrier freight service over the Leased Premises; and (c) shall have obtained any and all authority and permits from the State of Washington, and any other federal, state or local agencies, necessary to provide common carrier freight service over the Leased Premises, and (d) shall have obtained all manpower and equipment necessary to perform common carrier freight operations over the Leased Premises; provided, that, the Lessor or its designee shall not be obligated to perform the items in this Section 2.H, if, upon the termination of this Lease, the Lessor and Lessee are parties to a new agreement whereby Lessee provides common carrier freight service over the Leased Premises. Upon the termination of the Lease, Lessee agrees to file a discontinuance and not oppose or obstruct Lessor's efforts to obtain the requisite authorities.

Section 3. Administration of Property-Related Agreements.

A. Responsibility. From and after the Transfer Date, Lessee shall administer and be responsible for all records, and shall be entitled to rentals or other income relating to track construction agreements, track leases, property

leases, permits, licenses, easements and all other such property-related agreements, except income resulting from the signboard leases acquired from BNSF in 1997. Lessor shall provide Lessee within sixty (60) days of the transfer date, copies or originals of all track construction agreements, track leases, property leases, permits, licenses, easements and all other such property-related agreements that affect, or may affect Lessee's rights under this Section 3.A..

B. Notice. Lessee agrees to provide Lessor with advance notice of each proposed property-related transaction so that Lessor can determine whether entering into any such agreement would cause a material diminution of the value of the Leased Premises or otherwise materially and adversely affect Lessor's rights under this Agreement. The property-related transactions shall be approved by Lessor, within 30 days, unless it would cause a material diminution in the value of, the Leased Premises, or would otherwise materially and adversely affect Lessor's rights under this agreement, or would materially limit the opportunities available to Lessor for compatible right of way uses. Lessee agrees that it shall use Lessee's standard form property-related agreements for all such transactions entered into after the Transfer Date. All such agreements shall be three-party agreements among Lessor, Lessee and the third party using or occupying the properties. Lessee agrees to ensure that the provisions in each agreement among Lessor, Lessee, and a third party contain liability provisions which hold Lessor harmless from liability occurring as a result of Lessee's provision of Rail Freight Service over the Leased Premises or any actions of such third party causing liability.

C. Termination. Upon termination or expiration of the term of this Agreement, all property related agreements shall be deemed automatically re-assigned to Lessor, and Lessor shall thereafter assume and bear all rights, liabilities and obligations arising or accruing thereunder after termination or expiration of the term of this Agreement.

Section 4. Possession and Use.

A. General. Except to the extent otherwise provided herein, during the Term, Lessee shall have the exclusive possession of, and use of any and all rights and licenses in, the Leased Premises solely for the purpose of providing Rail Freight Service and for such other purposes as may be related thereto.

Lessee covenants that, during the Term, it will use the Leased Premises solely for the provision of Rail Freight Service, including activities related thereto, and will not use such facilities for any other purpose without the prior, written authorization of Lessor, which shall not be unreasonably withheld. Lessee covenants that (1) it will not use, or allow others to use, the Leased Premises for the storage, manufacture, reprocessing or disposal of hazardous or toxic substances as defined by state and federal law without Lessor's prior written consent, provided that nothing in this clause (1) shall be construed as limiting Lessee's right to store, manufacture, reprocess or dispose of hazardous materials or toxic substances in the ordinary course of business consistent with railroad industry standards, (2) it will not make the Leased Premises available for use by third parties for the purpose of provision of Rail Freight Service thereover or for any other purpose without the prior written approval of Lessor, and (3) it shall comply with all federal, state, local, and police requirements, regulations, ordinances and laws respecting the Leased Premises and operations and activities thereon. Lessor retains the right to inspect any and all Leased Premises, upon twenty-four (24) hours notice and at Lessor's sole expense, for the purpose of verifying Lessee's compliance with the terms and conditions of this Agreement.

B. Rail Freight Service. During the Term, Lessee shall have the exclusive right and responsibility to provide Rail Freight Service to and from points on the Leased Premises. Lessee agrees to reasonably work with governmental agencies to establish rail related transit on Leased Premises.

C. BYCX. Lessee agrees to negotiate in good faith to accommodate future BYCX operations; however, Lessee shall have the right, in its sole discretion, to allow BYCX to operate or store any equipment and materials on the Leased Premises. Lessor, through signing this agreement, agrees to and acknowledges Lessor may not permit or approve any BYCX operations on, or entry onto, the Leased Premises, and agrees to inform BYCX of this change in status through BYCX's attorney within 10 days of the signing of this agreement.

D. Management and Operation. After Transfer, Lessee shall be responsible in its own name for the management and operation of the Rail Freight Service, including, but not limited to, the provision of locomotives, cars and other equipment, the dispatching and scheduling of trains, employment and

assignment of crews and other employees and the performance of Maintenance as provided in Section 5 hereof. Lessee shall have the exclusive authority to promulgate and adopt rules and regulations for the operation of the Rail Freight Service. Lessee shall also have exclusive responsibility for all aspects of employment relative to Lessee's performance of Rail Freight Service hereunder.

E. **Equipment.** Lessor shall provide to Lessee a list of all rail related equipment and materials, owned by the Lessor which are a part of this agreement as Exhibit C. Lessor shall also provide a list of all rail related equipment and materials stored on the Leased Premises, which are not owned by Lessor, including a description of the rail related equipment and/or materials, and name and address of the owners of these items as Exhibit D, within sixty (60) days of the signing of this agreement.

F. **Taking.** Lessor agrees that the use of the Leased Premises as a railroad by any entity other than Lessee is not a public use, and thus the Leased Premises cannot be condemned by Lessor to allow its possession or use as a railroad by any other entity other than Lessee during the term of this Lease.

In the event all or a portion of the Leased Premises is taken under the power of eminent domain exercised by any governmental or quasi-governmental authority ("Condemnation") or are conveyed in lieu thereof ("a Condemnation"), this Lease shall automatically terminate as of the date that possession and use are transferred to the Condemning Authority ("the Condemnation Date"), unless the parties agree otherwise in writing. The Lessor shall not have the right to grant the Condemning Authority possession and use of the Leased Premises without the Lessee's consent. If this Lease is terminated, Lessor and Lessee shall be released from any and all liability arising after the termination date.

In the event that Condemnation materially affects rail operations, the Lessee shall be entitled to a separate award from the condemning authority, as determined by a court, that shall take into consideration, the then fair market value of Lessee's improvements taken, plus, if this Lease terminates, the sum of (i) the then fair market value of Lessee's remaining leasehold estate (including that pertaining to any options Lessee then has to extend the Lease

term), (ii) the loss and/or cost of removal of Lessee's fixtures and equipment located in, on or about the Premises, (iii) the cost of moving and relocating Lessee's business and (iv) that portion of the interest on the total condemnation award attributable to the portion of the award payable to Lessee.

G. Reporting. Within 10 days of the end of each quarter (March 31st, June 30th, September 30th, and December 31st), Lessee shall send Lessor's clerk, Clerk of the Board of County Commissioners, a report containing freight car and passenger counts for the quarter just completed.

Section 5. Maintenance of Leased Premises.

A. Inspection. Lessee has not inspected the Leased Premises, except to the extent of performing normal track inspections from MP 0.0 to approximately MP 14.1, which condition is described as FRA Excepted Track.

B. Maintenance. During the Term, Lessee shall perform or cause to be performed all normal maintenance necessary to maintain the Leased Premises to its condition as of the Transfer Date, which condition is described as FRA Excepted Track; provided, that, in no event shall Lessee's maintenance obligations under this Lease obligate Lessee (i) to perform any maintenance, repairs or restoration of the Leased Premises that is beyond the scope of normalized maintenance for a rail line in the condition set forth; or (ii) to improve or maintain any portions of the Leased Premises other than to accommodate continuous and uninterrupted Rail Freight Service, subject to slow ordered track in the ordinary course of business and interruptions due to force majeure.

1. At any time, during the Term, Lessee may impose a lawful embargo on the Leased Premises or any portion thereof, and upon the imposition of such lawful embargo, Lessee's maintenance obligations under this Section 5 shall be suspended until the embargo is lifted.
2. The Lessor shall maintain or cause to be maintained all Lessor-owned public road crossings and crossing signals, in accordance with all applicable laws. Lessor shall provide crossing signals, signs and road surfaces within the road right-of-way. Lessor shall provide for vegetation

control, surface water drainage control, fence maintenance, and public dumping pickup along the project line, in accordance with the applicable laws and annual maintenance program which shall identify the timing, location, and level of maintenance to be provided. Lessee shall provide rail, ties and installation in road crossing projects.

3. Lessee shall have salvage rights to all materials removed from the Leased Premises in the course of Lessee-funded maintenance requiring in-kind replacement materials. Lessor shall have salvage rights to all materials removed from the Leased Premises in the course of Lessor-funded maintenance requiring in-kind replacement materials.
4. Lessor and Lessee agree that Lessee's maintenance responsibilities, if any, do not extend to extraordinary damage to Leased Premises which are due to acts of God or which are beyond the normal maintenance and improvements as required by this Lease. The parties agree that in the event of such extraordinary damage or maintenance requirements they will work together to fund and repair the damage and/or maintenance.
5. All maintenance activities on public road crossings shall be coordinated between the Lessor and Lessee in order to protect the safety of the general public and rail traffic.
6. Lessor shall be responsible for all routine bridge maintenance on Leased Premises.
7. All improvements to the Leased Premises shall become the property of Lessor, unless otherwise agreed to by both parties.

C. Maintenance Transfer. Lessor and Lessee shall assume responsibility to provide the maintenance of the Leased Premises as described in Section 5.B. for each year following a year during which no more than 1,500 carloads are transported.

1. For any year following a year that between 1,501 and 2,000 carloads are transported, Lessee shall have responsibility to provide the maintenance of the Leased Premises described in Section 5.B. except for bridges, grade crossings and signal equipment, which shall be maintained by

Lessor. For the purposes of "Maintenance Transfer", both parties agree that 1,150 freight cars per year and 50,000 passengers a year will trigger the equivalent maintenance responsibilities as 1,501 freight carloads.

2. For any year following a year that more than 2,000 carloads are transported, Lessee shall have responsibility to provide the maintenance of the Leased Premises described in Section 5.B. except for grade crossings and signal equipment, which shall be maintained by Lessor. Neither the Lessor nor the Lessee shall be required to spend more than \$150,000 to repair or improve any one bridge. For the purposes of "Maintenance Transfer", both parties agree that 1,750 freight cars per year and 50,000 passengers a year will trigger the equivalent maintenance responsibilities as 2,001 freight carloads.

D. **Waivers.** Lessee may identify from time to time Lessor trackage or other structures which it wishes to maintain at less than the transferred condition applicable to such facility or structure. Upon such notice, Lessor shall reasonably determine whether it is willing to permit Lessee to maintain such facility or structure in less than the transferred condition. Except as provided in elsewhere in the agreement, unless a written waiver of the applicable Standard of Maintenance is granted by Lessor with respect to any particular facility or structure, the Leased Premises shall be maintained to the transferred condition at all times during the Term.

E. **Records.** Lessor and Lessee agree to maintain adequate maintenance records for the Leased Premises during the Term to permit a determination of the existing maintenance level for the Leased Premises at any given point in time. The parties understand and agree that such records shall include track profiles for the Leased Premises, inspection reports, reports of materials removed, scrapped, redeployed or installed new, and other such maintenance records.

F. **Materials.** Lessee may construct or relocate industrial leads, sidings, yard switches and facilities, and other rail infrastructure so as to enable Lessee to serve new and existing rail customers on or accessible from the Leased Premises. All such construction shall conform with applicable law, and shall become part of the Leased Premises. Lessee agrees that it shall not

remove any of the existing materials comprising the Leased Premises and replace same with materials of inferior quality without the advanced consent of Lessor, which shall not be unreasonably withheld. Lessor's consent to remove track material or other parts of the Leased Premises in the course of Lessee's performance of ordinary and routine maintenance shall not be necessary when (i) any materials removed from the Leased Premises are to be, and in fact are, subsequently replaced by materials of equal or superior quality, in which event Lessee may retain and dispose of, for its own account, any of the materials so removed, and (ii) the materials removed were installed by Lessee during the Term and were not replacement materials.

G. **Compliance with Laws.** Lessee agrees to comply in all material respects with all laws, ordinances, rules, regulations, final orders and decrees applicable to the Leased Premises, and shall indemnify, defend, protect and hold harmless Lessor from and against any fines or penalties levied against Lessee or Lessor as a result of Lessee's noncompliance with said laws, ordinances, rules, regulations, final orders and decrees.

Section 6. Liability and Insurance.

A. **Allocation of Liability.** The liability of the parties hereto, as between themselves, shall be apportioned as follows,

1. Lessee shall be responsible for and agrees to release, indemnify, defend and save harmless the Lessor, its officers, employees and agents from and against any and all liability, loss, damage, expense, action and claim, including reasonable attorneys' fees (together, "Losses") incurred by the Lessor, its officers, employees and agents that arise out of or are connected to (i) the performance of rail operations, maintenance, and other Lessee activities, by Lessee over the Leased Premises during the Term, or (ii) a breach by Lessee of any of its covenants, representations or warranties set forth in this Lease. Except as otherwise set forth in Section 6.A.(2) hereof, Lessee specifically agrees to be responsible for and to indemnify and hold harmless the Lessor from any and all bodily injury claims brought by employees of Lessee, to the extent such injuries occurred in connection with the employee's performance of rail operations over the Leased Premises, and expressly waives its immunity under the Washington Industrial

Insurance Act. Notwithstanding the foregoing in this Section 6.A.(1), Lessee shall not be responsible for, and shall have no obligation to indemnify, defend or hold harmless with respect to, any Losses to the extent such Losses (x) arise out of or are connected to the gross negligence or willful misconduct of the Lessor, or (y) result from the exacerbation of an act, omission or condition existing prior to the Term, unless Lessee had actual knowledge about such act, omission or condition, and Lessee failed to exercise due care in mitigating the effect of such act, omission or condition.

2. The Lessor shall be responsible for and agrees to release, indemnify, defend and save harmless Lessee, its officers, directors, shareholders, employees and agents from and against any and all Losses incurred by Lessee, its officers, directors, shareholders, employees and agents that arise out of or are connected to (i) the maintenance of or use by the Lessor of the Leased Premises (or any portion thereof) during the Term, such as for recreational or public utility purposes, (ii) a breach by the Lessor of any of its covenants, representations or warranties set forth in this Lease, (iii) an act, omission or condition existing prior to the Term, except to the extent Lessee is responsible under Section 6.A.(1)(y) for the exacerbation of such act, omission or condition, or (iv) a claim by LINC or BYCX against the Lessor and/or Lessee asserting any contractual or regulatory right to possess the Leased Premises or to perform common carrier operations over the Leased Premises. Notwithstanding the foregoing, the Lessor shall not be responsible for any Losses to the extent such Losses arise out of or are connected to the gross negligence or willful misconduct of Lessee.

B. Environmental Claims.

1. Responsibility for Environmental Claims (as defined in subsection 4 below) shall be borne as follows:
 - a. Lessor shall fully address and resolve Environmental Claims arising from:
 - (i) Environmental conditions existing on the Leased Premises

prior to the date of this Lease;

- (ii) The use of or presence upon the Leased Premises by Lessor or its employees, agents, licensees, or contractors from and after the date of this Lease unless such Environmental Claims arise from Lessee's negligence, in which event Lessee shall be liable as set forth in subsections (b) or (c) below, or;
 - (iii) Lessor's failure, or that of its employees, agents, licensees, or contractors, to comply with its obligations under this Lease when such failure is a contributing cause to such Environmental Claims.
- b. Lessee shall fully address and resolve Environmental Claims arising from:
 - (i) Environmental conditions existing on the Leased Premises demonstrably shown to have occurred during the term of this Lease, and which were caused by the actions of Lessee;
 - (ii) The use of or presence upon the Premises by Lessee or its employees, agents, licensees, or contractors from and after the date of this Lease unless such Environmental Claims arise from Lessor's negligence, in which event Lessor shall be liable as set forth in subsections (a) or (c); or
 - (iii) Its failure, or that of its employees, agents, licensees, or contractors, to comply with its obligations under this Lease when such failure is a contributing cause to such Environmental Claims.
- c. If each party bears some responsibility for the same Environmental Claim, each party's responsibility to address and resolve the Claim shall be in proportion to the extent of its role in contributing to the Claim.

2. If either party is solely responsible for an Environmental Claim, it shall release the other party from all responsibility to address and resolve such Claim and shall defend, indemnify, protect, and save harmless the other party from and against such Claim, including all attorneys' fees and other costs incurred to defend against such Claim.
3. In the event any cleanup, response, removal or remediation of any environmental condition is required by a governmental entity (hereinafter collectively referred to as "Response Action"), Lessee shall permit Lessor and its contractors access to the Leased Premises consistent with the terms of Section 2.C of this Lease. Lessor shall have the right, but not the obligation, to conduct reasonable inspections of a Response Action by Lessee. Each party shall provide the other with all information reasonably requested by the other regarding each Response Action or Environmental Claim for which either is responsible.
4. The term "Environmental Claim" means any cleanup, response, removal, or remediation required by a governmental entity, related to any environmental conditions affecting the air, soil, surface waters, ground waters, streams, sediments and similar environmental conditions caused by, resulting from, arising out of, or occurring in connection with, this Lease.

C. Insurance. During the Term, Lessee shall procure and furnish to Lessor a policy of public liability and property damage liability insurance as herein provided, or certificate with respect thereto, under the terms of which the insuring agreements of the policy are extended to cover the liability assumed by Lessee hereunder. For the freight railroad, the public liability insurance shall provide for an aggregate limit of not less than Five Million Dollars (\$5,000,000) for all damages arising out of the bodily injuries to or death of persons and for all damages to or destruction of property. For any passenger operations, the public liability insurance shall provide for an aggregate limit of Five Million Dollars (\$5,000,000) more than the then current freight liability insurance, for all damages arising out of the bodily injuries to or death of persons and for all damages to or destruction of property. (For example, a dinner train starting in year 1 of this agreement would require a Ten Million Dollars (\$10,000,000) policy. Not more frequently than once every five (5)

years, Lessor may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry. The Lessor, its officers and employees shall be additional named insured. Copies of Certificates of all policies are to be given to the Lessor. The following clause shall be made a part of said policies:

It is agreed that, in the event of material change or cancellation, this company shall give 10 days written notice to the Lessor, whose address is 1300 Franklin Street, Vancouver, Washington 98666-9810

Section 7. Labor.

If any employee shall as a result of this Agreement (a) have a valid claim under employee protection arrangements under applicable orders of the STB, or (b) elect to make a claim against his or her employer/railroad pursuant to any other employee protections arrangement, the parties agree that the employer/railroad shall be solely responsible for any costs of labor protection for its employee(s).

Section 8. Approvals.

1. **Government Approval as Condition Subsequent.** Promptly after the execution and delivery of this Agreement, Lessee shall be responsible for preparing and filing with any federal, state or local regulatory agency or department having jurisdiction over the transaction contemplated in this Agreement, in whole or in part, all applications, petitions, requests, notices or any other filings, and Lessee shall do and take all such actions necessary and prudent to obtain the requisite approvals, other authorizations or exemptions from such approvals to permit consummation of the entire transaction contemplated by this Agreement at the earliest practicable date. Securing appropriate federal, state or local regulatory agency or department approvals, other authorizations or exemptions from approvals of the transaction contemplated by this Agreement constitutes a condition which must be satisfied or the Agreement may be terminated as set forth below.

2. **Termination.** In order to satisfy the condition precedent to commencement of operations under this Lease Agreement set forth above, the parties shall have received from each federal, state or local regulatory agency or department of competent jurisdiction any approval or other authorization or exemption necessary to permit the transaction contemplated by this Agreement to be lawfully carried out; provided, however, that any terms or conditions placed upon such approval or other authorization or exemption that materially affect the rights and obligations established by the Agreement or any Exhibit hereto must be acceptable to both parties in the exercise of reasonable judgment. Either party may terminate this Agreement in its entirety prior to Transfer without penalty if such imposed terms or conditions are reasonably unacceptable to the party upon whom they are imposed. Lessor agrees to support any and all Lessee requests for governmental approvals or exemptions from approvals, including support for any appeals taken with respect to administrative or judicial approvals required hereunder.

Section 9. Representations and Warranties of Lessor.

Lessor represents and warrants as of the date of execution of this Agreement, as of the Transfer Date and thereafter during the Term (except to the extent expressly provided otherwise below) the following:

1. It shall have the full power and authority to enter into this Agreement;
2. All approvals and other proceedings required to be taken by or on the part of Lessor to authorize Lessor to enter into this Agreement and its Exhibits have been or will be duly taken by the Transfer Date;
3. This Agreement has been executed and delivered by Lessor in accordance with its terms and conditions, and constitutes a valid and legally binding obligation of Lessor, enforceable against Lessor in accordance with its terms, except as such enforceability may be limited by (i) bankruptcy, insolvency, reorganization, and similar laws, and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefore may be brought;

4. No provision of this Agreement or any Exhibit hereto conflicts with, violates or contravenes any statute, law, rule, regulation, order, writ, injunction or decree or other determination of any court, authority or governmental body as of the date hereof, and no provision of this Agreement or any Exhibit hereto will conflict with, violate or contravene any mortgage, lien, lease or agreement of Lessor, nor is any provision hereof or any Exhibit hereto voidable or unenforceable (nor will it be such) by reason of any provision of, or lack of consent under, any indenture or agreement or instrument to which the Lessor is a party or by which it is bound or affected.
5. Subsequent to the execution hereof, Lessor will not take any action without the written consent of Lessee, which shall not be unreasonably withheld or delayed, that will further encumber the Leased Premises or any portion thereof, or that will cause any material diminution in or adversely affect the interests of Lessee in the Leased Premises or in their condition and serviceability for use as an operating railroad;
6. As of the Transfer Date, Lessor has sufficient title to the Leased Premises to permit its continued use as a freight railroad, and the rights granted from Lessor to Lessee shall be sufficient to allow Lessee to conduct Rail Freight Service on the Leased Premises substantially as those operations have been conducted prior to the Transfer Date and as contemplated in this Agreement and the Related Agreements;
7. Lessor has not granted to any third party the right to conduct rail freight operations or rail passenger or commuter operations on the Leased Premises. Except to the extent contained in the agreements identified in Exhibit E hereto, Lessor has not entered into any agreement that would require Lessee to pay any allowance to any third party, supply equipment to any third party, or incur any expense not incurred in the ordinary course of providing rail common carrier service; and
8. There are no actions, suits, or proceedings pending, or to Lessor's knowledge threatened, against Lessor or any of its property in any court or before any governmental agency, which, if adversely determined, could prohibit or delay the consummation of the transactions

contemplated herein and in the Section 3.A. documents, or that would adversely affect Lessee's ability to conduct operations (by materially increasing Lessee's costs or otherwise) as contemplated herein and in the Section 3.A. documents.

9. To the best of Lessor's knowledge, (a) the Leased Premises do not contain, (b) no activity on the Leased Premises has produced, and (c) the Leased Premises has not been used in any manner for the storage, discharge, deposit or dumping of hazardous substances, whether in the soil, ground water or otherwise.

It is recognized by both Lessor and Lessee, for each and every section of this agreement, BYCX has claimed a leasehold interest on the portion of the Leased Premises north of Battle Ground (Approx. MP 14.2 to MP 33.1), and that the Lessor (Clark County) disputes this claim. All representations and warranties of Lessor shall survive Transfer and remain true and in effect during the term of this Agreement.

Section 10. Representations and Warranties of Lessee.

Lessee represents and warrants as of the date of execution of this Agreement and thereafter during the Term:

1. It is a corporation duly organized and validly existing in the state of Washington and is in good standing, and is duly qualified to do business in the state of Washington and in any other jurisdiction where the utilization of Leased Premises requires such qualifications;
2. It shall have the full power and authority to enter into this Agreement and, upon obtaining appropriate regulatory authority or exemption, to carry out the functions which it has undertaken under this Agreement;
3. All corporate and other proceedings required to be taken by or on the part of Lessee to authorize Lessee to enter into this Agreement and to perform the Rail Freight Service have been or will be duly taken prior to Transfer;
4. This Agreement has been executed and delivered by Lessee in

accordance with its terms and conditions, and constitutes a valid and legally binding obligation of Lessee, enforceable against Lessee in accordance with its terms, except as such enforceability may be limited by (i) bankruptcy, insolvency, reorganization and similar laws affecting the enforcement of creditor's rights generally, and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefore may be brought;

All representations and warranties of Lessee shall survive the date of Transfer and remain true and in effect during the Term.

Section 11. Default.

1. **Events of Default.** Should either Lessor or Lessee substantially fail to perform its obligations under this Agreement and continue such failure to perform for a period of forty-five (45) days, the other party may issue written notice by certified mail to the non-performing party, notwithstanding any waiver by the party giving notice of any prior breach thereof, of the intent of the party giving notice to terminate this Agreement. If the non-performing party continues such failure to perform for forty-five (45) days after receiving such notice of intent and neither party has elected to submit the matter to binding arbitration pursuant to Section 13. hereof, an Event of Default shall be deemed to have occurred and the party not in default shall have the right, at its option to terminate this Agreement by issuing the party in default written notice of termination. The exercise of such right shall be in addition to, and shall not constitute a waiver of, any other legal or equitable rights of the terminating party. For purposes of this provision, a substantial failure to perform on the part of Lessee shall be deemed to include failure to make full and timely payments to or for the account of Lessor as required hereunder, the Lessee failing to procure or retain the insurance having the aggregate policy limit required pursuant to Section 6.C. hereof, the Lessee being adjudicated as bankrupt or insolvent, appointment of a receiver for any part of the property of Lessee, making a general assignment by Lessee for the benefit of creditors, the filing of a petition under bankruptcy or insolvency laws or any law relating to the relief of debtors (which petition is not dismissed within sixty (60) days

after having been filed), allowing meritorious liens to accrue against Leased Property for more than 120 days, and the failure of Lessee to maintain the Leased Premises to the requisite Standard of Maintenance as required of Lessee outlined in Section 5. For purposes of this provision, a substantial failure on the part of Lessor shall be deemed to include the unreasonable withholding of consent requested in accordance with this Agreement, including the Exhibits, and the failure to provide the maintenance to the Leased Premises as required of Lessor outlined in Section 5. Notwithstanding any provision herein to the contrary, the parties agree that noncompliance with law that does not materially affect the business or operations of either party hereto shall not be the basis for a default hereunder.

2. **Settlement.** Upon termination in accordance herewith, Lessor and Lessee shall settle all accounts, including payments in lieu of taxes, divisions of rates and adjustments thereto, as of the date of transfer of possession to Lessor or Lessor's designee. Lessee shall have a reasonable period of time to remove its personal property from the Leased Premises, including its locomotives.

Section 12. Catastrophic Occurrences.

A. **Event.** This provision governs the rights and obligations of the parties under circumstances in which Lessee's performance of Rail Freight Service under this Agreement is prevented by an event beyond its control, and which is without the fault or negligence of Lessee or any of its employees, which shall include without limitation acts of God, explosions, fires, vandalism, flood, or any other severe weather disturbance. The parties agree that, if such an event shall occur which substantially impairs Lessee's ability to provide Rail Freight Service, thereby impairing Lessee's ability to perform its obligations, including payment obligations, under this Agreement, Lessee shall use due diligence to continue to perform its obligations hereunder, provided that if Lessee should fail to perform any such obligation due to such event, such failure shall not be deemed to be an event of default under Section 11 hereof so long as such failure is due to that event and Lessee exercised due diligence to reestablish performance. In the event of loss or damage to the Leased Premises which is covered by property insurance, Lessee agrees to make any necessary claims for insurance proceeds and use such proceeds to repair the damaged Leased

Premises or to defray the expenses incurred as a result of making the repair.

B. Rights and Obligations. In the event of loss or damage to the Leased Premises described above, not covered by, or in excess of insurance coverage, Lessee shall not be responsible for repairs in excess of such limits, provided however, that Lessee shall consult with Lessor as to the most prudent business decision for Lessee and Lessor concerning expending additional funds for such repairs taking into account the net cash flow that would be available from revenues from the traffic which would be lost to Lessee if such repairs are not made. If the payments for repairs to the Leased Premises are in excess of the funds Lessee is required or willing to expend for such purpose, Lessee may (i) seek additional funds from Lessor or others, make necessary repairs and continue to perform Rail Freight Service, (ii) terminate this Agreement in accordance with Section 2.G. and remit all insurance claims to Lessor, or (iii) embargo, and/or discontinue service on, the affected lines (provided that Lessee shall give prior notice to and receive consent from Lessor prior to embargoing or seeking to discontinue a line, which consent shall not be unreasonably withheld). If Lessee has not elected to take action under (i), (ii) or (iii) hereof, Lessee shall, at Lessor's option, (a) discontinue service and abandon that portion of the Leased Premises severed by the catastrophic damage, (b) discontinue service on that portion of the Lease Premises severed by the catastrophic damage, or (c) operate that portion of the Leased Premises severed by the catastrophic damage as an island without connection to the remainder of the Leased Premises upon such conditions as may be mutually agreed to by Lessee and Lessor, provided that in any such event, Lessee shall continue to operate the remainder of the Leased Premises in accordance with this Agreement, including its Exhibits. The severed portion of the Leased Premises that will not be operated by Lessee shall thereupon be excluded from the Leased Premises and this Agreement. Lessor shall be under no obligation to expend funds for repairs to the Leased Premises, except as required by its responsibility to maintain the Leased Premises, as outlined in Section 5.

Section 13. Arbitration.

- 1. Binding.** In the event of a dispute with respect to any material term or condition of this Agreement that may give rise to an event of default under Section 11 hereof, and to the extent provided otherwise in this

Lease, either party may elect to submit such dispute to binding arbitration in accordance with this Section 13.

2. **Process.** If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement upon which the parties cannot agree, such question or controversy shall be submitted to and settled by a single competent and disinterested arbitrator if the parties to the dispute are able to agree upon such single arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party. Otherwise, the party demanding such arbitration (the demanding party) shall notify the other party (the noticed party) in writing of such demand, stating the question or questions to be submitted for decision and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the demanding party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District in which the headquarters office of the demanding party is located upon application by the demanding party after ten (10) days' written notice to the noticed party. The arbitrators so chosen, shall select one additional arbitrator to complete the board. If they fail to agree upon an additional arbitrator, the same shall, upon application of any party, be appointed by said judge in the manner heretofore stated.
3. Upon selection of the arbitrator(s), said arbitrator(s) shall with reasonable diligence determine the questions as disclosed in said notice of demand for arbitration, shall give all parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as they deem reasonable or as either party may submit with witnesses required to be sworn, and may hear arguments of counsel or others. If any arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom he was chosen or said judge shall appoint another to act in his place.
4. After considering all the evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state

such decision or award in writing which shall be final, binding and conclusive on all parties to the arbitration when delivered to them. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

5. Each party to the arbitration shall pay the compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, and exhibits and counsel. The compensation, cost and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by both parties. The arbitrator or arbitrators shall determine whether, and to what extent, either party shall pay the attorneys' fees incurred by the other, depending on whether, and to what extent, either party prevailed in the arbitration.
6. The books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator(s). The arbitration proceedings shall be governed by the rules of the American Arbitration Association, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure Rules 26-37.

Section 14. Notices.

All notices or other communications hereunder shall be in writing and shall be deemed duly given, if sent by Federal Express or other overnight national courier service, or delivered in person or by certified or registered mail, return receipt requested, first class, postage prepaid or by national courier service such as Federal Express to the persons specified herein as entitled to receive such notice, or to their duly authorized representative, unless notice of a change of address is given pursuant to the provisions of this section.

For the Lessor: Clark County

1300 Franklin

Vancouver, WA 98666
Attention: Clerk of the Board of County Commissioners

For the Lessee: Columbia Basin Railroad Company, Inc.
111 S. 33rd St.
Suite 200
Yakima, WA 98901
Attention: President

The date of any such notice shall be the date of delivery as prescribed in this Section.

Section 15. Governing Law.

This Agreement, and all of those agreements attached hereto as Exhibits, shall be construed and enforced in accordance with the laws of the state of Washington, except to the extent inconsistent with, or governed by, any other laws of the United States of America or rules or regulations thereunder.

Section 16. Amendment.

No modification or amendment to this Agreement or any of its Exhibits shall be effective unless and until such modification, addition or amendment is reduced to a writing executed by authorized officers or agents of each party.

Section 17. Interpretation.

1. **Severability.** In the event any section, subsection, sentence, clause, or phrase contained herein shall be determined, declared, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable, no determination, declaration, or adjudication shall in any manner affect the other sections, subsections, sentences, clauses, or phrases of this Agreement, which shall remain in full force and effect as if the section, subsection, sentence, clause, or phrase declared, determined or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable was not originally a part thereof, unless the invalidity of such provision has the effect of substantially impairing the benefits of this transaction or

frustrating the intent of the Agreement.

2. **Titles.** The headings and titles to provisions contained herein are for convenience only, and shall not be deemed to modify or affect the rights and the duties of the parties to this Agreement.
3. **Entire Agreement.** This Agreement, and the Exhibits hereto, represent the entire agreement between the parties, and all previous communications, understandings, or agreements between the parties are hereby abrogated and withdrawn except as provided herein.
4. **Incorporation of Exhibits.** All Exhibits referred to in this Agreement are hereby incorporated and made a part of this Agreement.

Section 18. Assignment.

This Agreement and each of the Exhibits hereto shall be binding upon and inure to the benefit of the successors and assigns of each party; provided that (i) no assignment or transfer of this Agreement shall be effected by Lessee without the prior written consent of Lessor, which consent shall not be unreasonably withheld or delayed. In the event that Lessor consents to an assignment of this Agreement by Lessee, such an assignment shall not be valid until a duplicate executed copy of such assignment, and a written acceptance thereof by the assignee agreeing to assume and perform all of the terms, covenants, conditions and provisions of this Agreement provided herein to be performed by the assignor shall have first been delivered to both parties, and no assignment shall release the Lessee from performing any of its obligations under the Agreement or from any liabilities under this Agreement except upon agreement of Lessor.

Lessor acknowledges that Lessee intends to transfer its entire right, title and interest in this Lease Agreement to a new legal entity not yet created, which will be wholly or substantially owned by Lessee. Lessor consents in advance to this assignment.

Section 19. Sale of a Portion of the Real Estate of Leased Premises.

In the event that (i) Lessor sells a portion of the Real Estate of the Leased

Premises to a third party, or (ii) Lessor sells the entire Real Estate of the Leased Premises to more than one purchaser, then (A) such sale(s) shall be subject to this Lease, and (B) Lessor shall require, as a condition of the sale, that this Lease be amended so that Lessee shall deal with only one landlord for the purposes of this Lease, and that its liability hereunder not be increased as a result of more than one party having an ownership interest in the Leased Premises. Notwithstanding the foregoing, in the event that, during the Term, Lessor sells all or a portion of the Real Estate of the Leased Premises, this Agreement and the Exhibits thereto shall remain in full force and effect according to their terms. Additionally, Lessee shall have the right of first refusal to purchase any portion of the Leased Premises which Lessor may choose to sell. This right of first refusal allows Lessee to match the price, terms, and conditions of the sale or lease of any portion of the Leased Premises, the Lessor may negotiate with a third party.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first appearing above.

LESSOR: CLARK COUNTY

Peter Capell

BY PETER CAPELL

TITLE PUBLIC WORKS DIRECTOR

DATE DEC 20, 2004

APPROVED AS TO FORM ONLY:

Scott D. [Signature]
Deputy Prosecuting Attorney

LESSEE: COLUMBIA BASIN RAILROAD COMPANY, INC.

Eric Temple

BY Eric Temple

TITLE Vice President

DATE Dec. 20, 2004