

May 25, 2016

240767

VIA E-FILING

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
May 25, 2016
Part of
Public Record

RE: **STB FD 36017**, *Washington & Idaho Railway – Petition for Declaratory Order*
Spokane County's Opposition to Washington & Idaho Railway's Petition for
Declaratory Order; Verified Statement and Affidavit of John Pederson; and
Verified Statement and Affidavit of Christopher Emch.

Dear Ms. Brown:

Enclosed please find for filing in the above-captioned matter the following documents:

- Spokane County's Opposition to Washington & Idaho Railway's Petition for Declaratory Order;
- Verified Statement and Affidavit of John Pederson; and
- Verified Statement and Affidavit of Christopher Emch.

Please let me know if you have any questions regarding this matter. We appreciate your assistance.

Sincerely,



Christopher G. Emch

CGE:joa

cc: Counsel of Record for the Parties

Docket No. FD 36017

BEFORE THE
SURFACE TRANSPORTATION BOARD

**WASHINGTON & IDAHO RAILWAY
PETITION FOR DECLARATORY ORDER**

**SPOKANE COUNTY'S OPPOSITION TO
WASHINGTON & IDAHO RAILWAY'S
PETITION FOR DECLARATORY ORDER**

CONTAINS COLOR AT EXHIBIT A

James P. Emacio, WSBA #4862
Chief Civil Deputy
Office of the Spokane County
Prosecuting Attorney
1115 W. Broadway Avenue
Spokane, WA 99260
(509) 477-2874
jemacio@spokanecounty.org

P. Stephen DiJulio, WSBA #7139
Christopher G. Emch, WSBA #26457
Stephanie G. Weir, WSBA #41722
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
(206) 447-4400
steve.dijulio@foster.com
chris.emch@foster.com
stephanie.weir@foster.com

Counsel for Spokane County

Dated: May 25, 2016

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION.....	1
II. FACTUAL AND PROCEDURAL BACKGROUND	3
III. STANDARD OF REVIEW	6
IV. DISCUSSION AND AUTHORITIES	6
A. WIR’s Petition is Speculative, Premature and Not Ripe for Review by the STB	6
B. WIR Failed to Serve or Seek Relief from Necessary Parties.	9
C. WIR Does Not Provide Sufficient Evidence to Determine Whether All Activities at the Proposed Transload Facility Constitute “Transportation.”	11
D. WIR Does Not Provide Sufficient Evidence to Determine Whether All Activities at the Proposed Transload Facility will be “by a Rail Carrier.”	12
E. Provisions Contained in Spokane County’s Zoning Code Are Directed at Health and Public Safety and Will Not Unreasonably Interfere with Railroad Operations.	14
V. CONCLUSION.....	17

GLOSSARY

Commerce	Washington State Department of Commerce
County	Spokane County
Futurewise	A non-profit public interest corporation
ICCTA	Interstate Commerce Commission Termination Act, 49 U.S.C. 10101, <i>et seq.</i>
Petition	WIR's Petition for Declaratory Order
RCW:	Revised Code of Washington
SCC	Spokane County Code
WIR or Petitioner:	Washington & Idaho Railway
Zoning Code	Chapter 14 Spokane County Code

I. INTRODUCTION

Spokane County opposes Washington & Idaho Railway's Petition for Declaratory Order and requests that the Board deny the Petition and WIR's request for expedited review. WIR's request is premature, speculative, overly broad, and lacks sufficient information and necessary details upon which the Board can reasonably base a declaratory judgment decision. The scope of activities, design, and specifics of a transload facility WIR seeks are unknown and have not been disclosed. Instead of requesting narrowly-tailored relief for a well-defined project, WIR asks the STB to abrogate Spokane County's entire regulatory authority, including authority that may properly apply to general railroad transload facilities.

WIR's Petition broadly requests that the Board determine that "*all* Spokane County zoning prohibitions" and "*the* Spokane County Zoning Code, and *all* related prohibitions or pre-construction permitting requirements" are "*all* preempted by federal law" and "categorically preempted." Petition at pp. 1, 22 (emphasis added). This request is too broad. The request is based on a vague description of a 60-acre transload facility and WIR's dissatisfaction with the County's code amendment process, which WIR instituted. No specific action by the County to block a yet-to-be disclosed transload facility, is identified.

As explained below, there are several reasons why WIR's requested relief should be denied.

First, the case is not ripe for review. The County needs sufficient information to ascertain which portions of its regulations would apply to a potential WIR facility.

Second, WIR has failed to provide sufficient information or specificity with respect to its general transload facility to enable the Board to make the necessary case-by-case determination as to whether WIR's proposed actions are, in fact, "transportation" by a "rail carrier;" or, specify the Spokane County regulations that WIR alleges prohibit or unreasonably interfere with railroad operations.

Third, WIR has failed to serve and include necessary parties in this action. WSDOT controls WIR's lease regarding the relevant main line, and Department of Commerce regulates Washington State's Growth Management Act, for which WIR is also seeking preemption.

Fourth, the relief sought by WIR exceeds the scope of ICCTA's preemption provisions. By seeking a broad declaratory order from this Board, WIR attempts to sweep in provisions within the County's code that are directed to health and public safety matters that would not unreasonably interfere with interstate commerce and, therefore, are not

preempted by ICCTA. Petition at p. 1 (emphasis added). WIR's Petition for Declaratory Order should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

The County's involvement in this case stems from WIR's proposed text amendment to the County's zoning code. WIR's proposed text amendment was not directed at a specific project. Rather, the text amendment seeks to change the County's code, which would then be potentially applicable to *all* proposals, by *any* applicant – not necessarily a rail carrier. WIR's proposed text amendment to the County's code would allow general railroad transload facilities in Large Tract Agricultural, Small Tract Agricultural, Rural Tradition, Rural Activity and Rural Conservation zones. Petition, Exhibit D at p. 1. The proposed text amendment also defined "Railroad Yard, Intermodal Transfer Site" broadly to include "*accessory uses* such as grain elevator(s) and office." Petition, Exhibit D at Attachment B, p. 1 (emphasis added).

The County processed the text amendment proposal under SCC 14.402.080(4), which included public meetings, preparation of the Staff Report for the Planning Commission, and the adoption of findings of fact, and the Planning Commissions recommendation to the Board of County Commissioners. *Id.* at pp. 1-3, Exhibit E.

The Staff Report to the Planning Commission explains the County's assessment of the applicable Review Criteria (SCC 14.402.040) and the County's Comprehensive Plan. *Id.* The County's Planning Commission considered both the text amendment and the potential use of a Conditional Use permit for a hypothetical transload facility that might be built by anyone, not specifically a rail carrier, within the County. The Planning Commission considered public comments, for and against the proposed text amendment, at one public hearing and their meeting to make a recommendation to the Board on the proposed text amendment. *Id.* at Exhibits D and E. Washington State Department of Commerce and Futurewise submitted comments in opposition to the text amendment, stating that the proposed amendment is not consistent with the State Growth Management Act (Chapter 36.70A RCW) and the County's Comprehensive Plan. *Id.* at Exhibit B. Several shippers submitted letters in support. *Id.* at Exhibit C.

On March 10, 2015, the Planning Commission recommended the approval of a revised proposed text amendment to the Board of County Commissioners. The revised text defined "Railroad Yard, Intermodal Transfer Site" more narrowly as a "site used to load freight from truck to rail car or vice versa, and the transporting of the same from the site either by short line rail or by truck transport." However, prior to action by the

Board of County Commissioners on the Planning Commission's recommendation, WIR requested postponement of action by the Board of County Commissioners on the proposed text amendment application. Verified Statement and Affidavit of John Pederson, Planning Director for Spokane County Dept. of Building and Planning ("Pederson VS") at ¶11.

To date, the only application the County has received from WIR or its agents has been for the proposed text amendment containing the overbroad language. Pederson VS at ¶13. The County did not deny WIR's proposed text amendment and has not issued a stop work order or formally blocked WIR from pursuing a specific transload project. Pederson VS at ¶14. The information contained in WIR's Petition regarding a proposed transload facility to be located on property depicted in Exhibits H and I of the Petition is the first such site- or project-specific information received by the County. Pederson VS at ¶15.

WIR leases its track from WSDOT. WIR operates on one segment, the P&L line, of the state-owned Palouse River and Coulee City Rail System, one segment of which is not currently operating, as depicted in **Exhibit A**, attached.

WIR's Petition contains several misstatements. The Spokane County Planning Commission Findings of Fact, March 10, 2015, attached as Exhibit D to the Petition is an accurate statement of the facts. Spokane

County denies all factual allegations contained in WIR's Petition unless otherwise specifically admitted in this Brief or contained in Petition Exhibit D. The County admits, acknowledges, and incorporates by reference the factual statements contained in Exhibit D to the Petition.

III. STANDARD OF REVIEW

WIR bears the burden of proof in this action. The burden of proof is on "the petitioner seeking a declaratory order from an administrative agency." *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858, 862 (8th Cir.2005) (citing 5 U.S.C. §556(d)). WIR's Petition is legally and factually incomplete and WIR cannot meet this burden.

IV. DISCUSSION AND AUTHORITIES

A. WIR's Petition is Speculative, Premature and Not Ripe for Review by the STB.

The dealings between WIR and the County in this matter have focused on WIR's proposed text amendment to the County's code. However, WIR is asking this Board to speculate as to what the County will do once presented with a site- and activity-specific project proposal. In the first case, the County must consider generally applicable textual changes to its zoning code; in the latter, the County would have the ability to make a determination on which of its regulatory authorities may be applicable based on the facts provided by a party advancing a project.

A request for a declaratory judgment is inappropriate where it would be tantamount to an advisory opinion. *See, e.g. Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 960 (1969) (Supreme Court noting that declaratory judgments are not for advisory opinions and that “[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”)(internal citation omitted). In this case, while the County acknowledged that preemption is a factor in regulating rail activity, and that a request to the STB could perhaps be made regarding a specific regulation, the County did not agree that an overly-broad request regarding the County’s codes generally would be warranted in the absence of a fact-specific project, which is what WIR is requesting here. *See, e.g.,* Petition, Exhibit G (Letter from County’s Mr. Catt, noting that “a general acquiescence to your preemption position leads to an absurdity where such facilities could be placed anywhere”).

Under ICCTA, STB jurisdiction extends to “transportation by rail carriers.” 40 U.S.C. §10501(b)(1). Courts have held that the activity in question must be “both ‘transportation’ and operated by a ‘rail carrier’” to fall within the Board’s jurisdiction. *Tex. Cent. Bus. Lines Corp. v. City of Midlotihian*, 669 F.3d 525, 530 (5th Cir.2012). “Transportation” is

defined, in relevant part, as “(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . and, (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. §10102(9)¹. “Rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. §10102(5).

While the preemption regime under ICCTA is broad, the STB has stated that “[t]his does not mean that all state and local regulations that affect railroads are preempted . . . state and local regulation is permissible where it does not interfere with interstate rail operations.” *Joint Petition for Declaratory Order—Boston & Me. Corp. & Town of Ayer*, No. 33971, 2001 WL 458685, at *5 (S.T.B.) (Apr. 30, 2001). It is also well settled, and admitted by WIR, that state and local governments retain their traditional “police powers” provided that enforcement of a particular

¹ In its Petition, WIR focuses the physical instrumentalities set out in the definition, rather than the relationship between physical instrumentalities and rail operations. This is in error. The Court in *Del Grasso* stated that the focus should be on whether specific activities facilitated the physical movement of passengers or property. *Del Grasso v. Surface Transportation Bd.*, No. 15-1069, 804 F.3d 110, 118-19 (1st Cir. 2015).

provision of general applicability does not unreasonably burden railroad activity.² *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir.2010); *Maumee & Western Railroad Corp. and RMW Ventures, LLC, Petition for Declaratory Order*, STB Finance Docket No. 34354, (S.T.B.) (March 3, 2004), 2004 WL 395835 at *2 (“State and local regulation is permitted where it does not interfere with interstate rail operations, and localities retain certain police powers to protect health and public safety.”) (internal citations omitted).

It is improper and premature to conclude preemption of the County’s authority without a regulation-by-regulation analysis. *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238, 256-57 (3rd Cir. 2007).

B. WIR Failed to Serve or Seek Relief from Necessary Parties.

WIR did not serve or seek relief from the Washington Department of Commerce or Washington State Department of Transportation. These two parties are necessary because (1) WIR seeks a declaratory order on preemption of the State’s Growth Management Act, and (2) because the State of Washington owns the tracks that WIR currently leases to which the proposed trackage would connect. In addition, WIR seeks a

² WIR acknowledges this in their February 18, 2016 letter to the County. Petition, Exhibit F at p. 3.

declaratory order that the Washington Growth Management Act is preempted, yet WIR did not serve or include the State of Washington in this proceeding. Petition at p. 22.³

These parties are necessary for an appropriate determination of the interests raised by WIR's Petition. *See generally* 5 U.S.C. § 554(c) ("agency shall give all interested parties opportunity for ... the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit..."); Fed. R. Civ. P. 19 (requiring joinder of parties where absence of party may impair interest relating to subject of the action); *RFF Family P'ship, LP v. Link Dev., LLC*, 849 F.Supp.2d 131, 137 (D.Mass.2012) ("[g]enerally, 'all interested parties should be joined in a declaratory judgment action whenever possible,' in keeping with the purpose of the Declaratory Judgment Act to fully and finally adjudicate the controversy at issue", *quoting State Farm Mut. Auto. Ins. v. Mid-Continent Cas. Co.*, 518 F.2d 292, 296 (10th Cir. 1975)).

³ WIR recognizes that the County is bound by its obligations under the State Growth Management Act (Chapter 36.70A RCW) and the County's Comprehensive Plan. Petition at 2-3, 8. WIR also specifically noted that the Department of Commerce opposed WIR's proposed text amendment. Petition, Exhibit B at Letter 1.

C. WIR Does Not Provide Sufficient Evidence to Determine Whether All Activities at the Proposed Transload Facility Constitute “Transportation.”

Not all activities that occur at a transload facility are considered *transportation*.⁴ The definition of *transportation* “does not encompass everything touching on railroads.” *Del Grosso v. Surface Transportation Bd., supra* at 118. Activities such as “manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term ‘transportation.’” *Id.* In addition, transportation “to” a rail carrier rather than “by” a rail carrier is outside ICCTA’s grant of jurisdiction to the STB. *J.P. Rail, Inc. v. New Jersey Pinelands Com’n*, 404 F.Supp.2d 636, 651-52 (D.N.J. 2005).

Case-by-case, fact specific analysis of each proposed activity to be conducted at the proposed facility is, therefore, necessary to determine whether some or all of the proposed activities fall outside the scope of “transportation” and for which the County’s zoning and other regulatory authority would not be preempted. To make this assessment, sufficient site- and activity-specific information must be available. WIR has failed to provide such information.

⁴ WIR acknowledges this in their February 18, 2016 letter to the County. Petition, Exhibit F at p. 3.

WIR has provided very little information or specificity regarding the proposed transload facility. Indeed, WIR did not make a site specific request to the County or disclose the size or location of proposed facility to the County prior to filing its Petition. Petition, Exhibit B at p. 2. The County only learned of the proposed location when it received WIR's Petition and attached Exhibits. It is unclear from either the Petition or the information WIR provided to the County in the text amendment process what activities WIR intends to conduct at the proposed facility⁵.

Without sufficient information regarding WIR's proposed activities, it is premature to make a blanket determination that the County's zoning code is preempted for *any* activity that WIR may chose to pursue at a proposed facility.

D. WIR Does Not Provide Sufficient Evidence to Determine Whether All Activities at the Proposed Transload Facility will be "by a Rail Carrier."

Determining whether a particular activity constitutes transportation *by a rail carrier* is also a "case-by-case, fact specific determination" based on several factors. *Padgett v. Surface Transportation Bd.*, 804 F.3d 103, 107 (1st Cir. 2015). These factors include "(1) whether the rail carrier

⁵ The text amendment proposed by WIR's agent defined "Railroad Yard, Intermodal Transfer Site" broadly to include "*accessory uses* such as grain elevator(s) and office." Petition, Exhibit D at Attachment B at p. 1 (emphasis added).

holds out transloading as part of its business, (2) the degree of control retained by the [rail] carrier, (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing.” *Id.* at 108 (internal quotation marks, citations omitted).

WIR fails to present sufficient evidence, if any, regarding a number of these factors. First, WIR has presented no evidence of ownership of the proposed facility location⁶ or that it has the ability to finance, construct, and operate the facility without the significant involvement of currently unknown third parties. WIR, through its Petition, identifies a 60-acre facility at a cost likely to exceed \$10 million dollars. Petition at p. 17; Exhibit B at p. 2. This is not an insubstantial investment, particularly in an industry that WIR has characterized as suffering loss of revenue over the last three years. *See* Petition, Exhibit B at p. 2. WIR has not presented evidence that it has experience operating a transload facility or that it will retain the appropriate level of control in the event that it contracts with a third party to constitute transportation *by a rail carrier*.

Further, WIR’s lease with Washington Department of Transportation is a short-term lease. *See*, Verified Statement and Affidavit

⁶ In the Petition, WIR states that “WIR *will* own the proposed transload and adjoining trackage.” Petition at 4 (emphasis added). This statement implies that WIR does not yet own the land.

of Christopher G. Emch at ¶¶ 3-4, Exhibit A. The initial lease with WSDOT ran for a five (5) year term from June 1, 2007 and has been extended to December 31, 2017. *Id.* Section 3.1 of the lease provides that “Lessee *may* request to extend this agreement for additional five year periods, and the State *may* grant such extensions *at its sole option.*” *Id.* Given the short lease terms and WSDOT’s discretion⁷ in extending the lease, the County is justifiably concerned about the longevity of WIR’s involvement and the impact on the preemption analysis. WIR may not seek to extend or WSDOT may opt not to grant an extension to WIR’s lease. In such a case, WIR could lose its status as a “rail carrier.”

E. Provisions Contained in Spokane County’s Zoning Code Are Directed at Health and Public Safety and Will Not Unreasonably Interfere with Railroad Operations.

Despite its broad preemptive scope, ICCCTA does not preempt *all* state regulation of railroads. *Soo Line Railroad Co. – Petition for Declaratory Order*, F.D. 35850 (served Dec. 23, 2014). State and local

⁷ WSDOT has taken steps to terminate operating leases within the same state-owned Rail System in which WIR operates in the past. For example, in 2009, WSDOT served a notice of termination to Eastern Washington Gateway (EWG). *Palouse River and Coulee City Rail System*, Washington State Department of Transportation publication, available at: http://www.wsdot.wa.gov/NR/rdonlyres/3588ECA2-5D0F-40D4-923B-6807E46F2681/0/PCC_folio_Oct2009.pdf (last accessed May 23, 2016). WSDOT and EWG subsequently reached a new agreement.

regulation “is appropriate where it does not interfere with rail operations, and localities retain their reserved powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce.” Examples of state and local codes that are not preempted include electrical, plumbing, fire codes, and direct environmental regulations enacted for the protection of public health and safety. *Id.*; *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005). In addition, this Board has previously stated that:

[I]t is reasonable for states and localities to request rail carriers to: (1) share their plans with the community where they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when the construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.

Id. The stated purpose of Spokane County’s Zoning Code is “to promote and protect the public health, safety, and general welfare.” SCC 14.100.102. The Zoning Code effectuates this goal and will not unreasonably interfere with rail operations such that WIR’s request is improper by seeking to preempt the entire zoning code.

For example, the Zoning Code includes development standards such as:

- Parking design standards - parking lots shall have lighting capable of providing adequate illumination for security and safety, SCC 14.802.100;
- Parking design standards - parking lot circulation shall be designed to minimize conflicts between vehicles and pedestrians around and within parking lots and at vehicle ingress/egress points SCC 14.802.120;
- Signage Standards - all signs shall be located so that they:
 - (a) Do not interfere with vehicular/pedestrian accessibility or sight distance ... (c) Do not overhang, or are not located in any public right-of-way; SCC 14.894.119; and
- Clear View Triangle - sight obstructions, including fencing or structures, shall not be permitted within a “Clear View Triangle”; SCC 14.812.200.

Total preemption, as requested by WIR, would result in an unregulated right to build buildings and operate any activity. This is not what ICCTA provides. WIR overreaches in its Petition and the STB should properly reject the over broad application of preemption.

V. CONCLUSION

WIR fails to bear its burden of proof and improperly seeks overly broad and premature relief. WIR fails to present sufficient evidence to support a case-by-case determination that all the proposed activities constitute “transportation” or provide assurances that a “rail carrier” will in fact, conduct the proposed activities. The County’s zoning provisions that are directed to health and public safety, are of general applicability, and do not unreasonably interfere with rail operations. They should not be broadly and generally preempted.

Spokane County respectfully requests that WIR’s Petition for Declaratory Order be denied.

In the alternative, i.e. if the Board is inclined to grant WIR’s Petition, the County respectfully requests that the Board limit the relief to only those provisions of the SCC that expressly prohibit or require pre-clearance without unduly constricting the County’s police powers. The County also requests that the Board require WIR to (1) disclose its plans with the community; (2) use state or local best management practices when it constructs railroad facilities; (3) implements appropriate precautionary measures at a railroad facility, as fairly applied by the County; (4) provide representatives to meet periodically with citizen groups and the County to seek mutually acceptable ways to address local

concerns; and (5) submit any required environmental monitoring or testing information for a reasonable time. *See Green Mountain R.R. Corp. v. Vermont, supra.*

RESPECTFULLY SUBMITTED this 25th day of May, 2016.

By: 
P. Stephen DiJulio

James P. Emacio, WSBA #4862
Senior Civil Deputy
Office of the Spokane County
Prosecuting Attorney
1115 W. Broadway Avenue
Spokane, WA 99260
(509) 477-2874
jemacio@spokanecounty.org, and

FOSTER PEPPER PLLC
P. Stephen DiJulio, WSBA No. 7139
Christopher G. Emch, WSBA No. 26457
Stephanie G. Weir, WSBA No. 41722
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
steve.dijulio@foster.com
chris.emch@foster.com
stephanie.weir@foster.com
Counsel for Spokane County

SPOKANE COUNTY'S OPPOSITION
TO WIR'S PETITION FOR
DECLARATORY ORDER

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2016, a copy of the foregoing SPOKANE COUNTY'S REPLY IN OPPOSITION TO WASHINGTON & IDAHO RAILWAY'S PETITION FOR DECLARATORY ORDER was served via e-mail and U.S. mail, upon the following:

Charles H. Montange
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177
c.montange@frontier.com

Stacy Bjordahl
Parsons Burnett Bjordahl Hume
505 W. Riverside Avenue, Suite 500
Spokane, WA 99201
sbjordahl@pblaw.biz



Christopher G. Emch, WSBA #26457
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
(206) 447-4400
chris.emch@foster.com

Counsel for Spokane County

SPOKANE COUNTY'S OPPOSITION
TO WIR'S PETITION FOR
DECLARATORY ORDER

Docket No. FD 36017

BEFORE THE
SURFACE TRANSPORTATION BOARD

**WASHINGTON & IDAHO RAILWAY
PETITION FOR DECLARATORY ORDER**

EXHIBIT A
TO SPOKANE COUNTY'S OPPOSITION TO
WASHINGTON & IDAHO RAILWAY'S
PETITION FOR DECLARATORY ORDER

CONTAINS COLOR

James P. Emacio, WSBA #4862
Chief Civil Deputy
Office of the Spokane County
Prosecuting Attorney
1115 W. Broadway Avenue
Spokane, WA 99260
(509) 477-2874
jemacio@spokanecounty.org

P. Stephen DiJulio, WSBA #7139
Christopher G. Emch, WSBA #26457
Stephanie G. Weir, WSBA #41722
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
(206) 447-4400
steve.dijulio@foster.com
chris.emch@foster.com
stephanie.weir@foster.com

Counsel for Spokane County

Dated: May 25, 2016

EXHIBIT A

Map of the Palouse River and Coulee City Rail System (PCC Rail System)

Available at: <http://www.wsdot.wa.gov/freight/pcc> (last visited 5/24/16)



EXHIBIT A TO SPOKANE COUNTY'S OPPOSITION TO WIR'S PETITION FOR DECLARATORY ORDER

BEFORE THE
SURFACE TRANSPORTATION BOARD

**WASHINGTON & IDAHO RAILWAY
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT AND AFFIDAVIT OF
JOHN PEDERSON**

JOHN PEDERSON declares under penalty of perjury:

1. I am competent to testify to the matters contained herein based on my personal knowledge.

2. I am the Planning Director for Spokane County Department of Building and Planning. I have held this position in the County for over 7 years. As the Planning Director, I am responsible for supervising all current and long range planning in Spokane County consistent with the provision of chapters 36.70 and 36.70A RCW. In this capacity I oversee all changes to Spokane County comprehensive plan and its development regulations.

3. I have worked for the County since March 11, 1985.

WIR's PROPOSED TEXT AMENDMENT

4. In August 2014, Washington and Idaho Railway (WIR) proposed a text amendment to the Spokane County Zoning Code, Chapter 14 that would allow Railroad Yard, Intermodal Transfer facilities in Rural

VERIFIED STATEMENT AND
AFFIDAVIT OF
JOHN PEDERSON

and Resource Land zones (Large Tract Agricultural, Small Tract Agricultural, Rural Traditional, Rural Activity, and Rural Conservation zones) with associated development regulations.

5. The County's Zoning Code is a generally applicable regulation that applies to all proposed development within the unincorporated area of Spokane County. Therefore, a text amendment to the County's Zoning Code would also be applicable to all proposed development within the unincorporated areas of the County.

6. The Planning Commission processed the proposed text amendment, as they would any proposed text amendment, under Spokane County Code 14.402.080(4).

7. Planning Staff prepared the "Staff Report to the Planning Commission." Attached as Exhibit D to WIR's Petition for Declaratory Order (Petition). This report explains the Planning Department staff's assessment of the applicable Review Criteria, Spokane County Code 14.402.040.

8. On February 12, 2015, the Planning Commission held a public hearing on the proposed text amendment. At this public hearing, the Planning Commission received public testimony, both for and against the proposed text amendment. The County also received written comments during the public comment period.

9. The proposed text amendment was discussed again at the February 26, 2015, Planning Commission meeting.

10. On March 10, 2015, the Planning Commission considered,
VERIFIED STATEMENT AND
AFFIDAVIT OF
JOHN PEDERSON

and ultimately decided to recommend approval of, a revised version of the proposed text amendment to the Board of County Commissioners.

11. Shortly after the Planning Commission made their recommendation, on March 6, 2015, WIR requested that the County postpone any action by the Board of County Commissioners on the proposed text amendments.

12. Because WIR requested postponing any action, the Board of County Commissioners has not made a decision on the proposed text amendment. The County has not denied WIR's proposed text amendment.

13. The County has not received any applications, other than the proposed text amendment, from WIR or its agents regarding a potential transload project.

14. The County has not issued any stop-work orders or attempted to formally block WIR from pursuing any specific transload project.

15. Until the County received WIR's Petition and Exhibits H and I to the Petition, the County had not received any information as to the location or size of any specific potential transload facility.

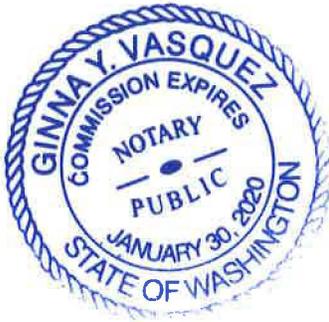
VERIFIED STATEMENT AND
AFFIDAVIT OF
JOHN PEDERSON

SIGNED AND SWORN STATEMENT

16. Pursuant to 49 CFR 1112.9:

State of Washington
County of Spokane
SS:

John Pederson, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.



Signed John Pederson
John Pederson

Ginna Y. Vasquez
Subscribed and sworn to before me this 24th day of
May, 2016.
Notary Public of St. of WA.
My Commission expires 1-30-20.

VERIFIED STATEMENT AND
AFFIDAVIT OF
JOHN PEDERSON

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2016, a copy of the foregoing VERIFIED STATEMENT AND AFFIDAVIT OF JOHN PEDERSON was served via e-mail and U.S. mail, upon the following:

Charles H. Montange
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177
c.montange@frontier.com

Stacy Bjordahl
Parsons Burnett Bjordahl Hume
505 W. Riverside Avenue, Suite 500
Spokane, WA 99201
sbjordahl@pblaw.biz



Christopher G. Emch, WSBA #26457
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
(206) 447-4400
chris.emch@foster.com

Counsel for Spokane County

VERIFIED STATEMENT AND
AFFIDAVIT OF
JOHN PEDERSON

BEFORE THE
SURFACE TRANSPORTATION BOARD

**WASHINGTON & IDAHO RAILWAY
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT AND AFFIDAVIT OF
CHRISTOPHER G. EMCH**

CHRISTOPHER G. EMCH declares under penalty of perjury:

1. I am competent to testify to the matters contained herein based on my personal knowledge.

2. I am one of the attorneys for Spokane County, in the above-captioned action.

3. In Washington & Idaho Railway's (WIR) Petition for Declaratory Order (Petition) at page 4, WIR referenced and relied on its lease with the Washington Department of Transportation for the P&L Branch of the Palouse and Coulee City Railway System (Lease), which is a public record.

4. Attached hereto as **Exhibit A** is a true and correct copy of that public record Lease referenced on page 4 of WIR's Petition, as provided to me by WIR's counsel on May 13, 2016.

VERIFIED STATEMENT AND
AFFIDAVIT OF
CHRISTOPHER G. EMCH

SIGNED AND SWORN STATEMENT

5. Pursuant to 49 CFR 1112.9:

State of Washington
County of King
SS:

Christopher G. Emch, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.



Signed Christopher G. Emch
Christopher G. Emch

Jeanniebeth O. Asuncion
Subscribed and sworn to before me this 25th day of
May, 2016.
Notary Public of State of Washington
My Commission expires 12-9-19

VERIFIED STATEMENT AND
AFFIDAVIT OF
CHRISTOPHER G. EMCH

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2016, a copy of the foregoing VERIFIED STATEMENT AND AFFIDAVIT OF CHRISTOPHER G. EMCH was served via e-mail and U.S. mail, upon the following:

Charles H. Montange
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177
c.montange@frontier.com

Stacy Bjordahl
Parsons Burnett Bjordahl Hume
505 W. Riverside Avenue, Suite 500
Spokane, WA 99201
sbjordahl@pblaw.biz



Christopher G. Emch, WSBA #26457
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
(206) 447-4400
chris.emch@foster.com

Counsel for Spokane County

VERIFIED STATEMENT AND
AFFIDAVIT OF
CHRISTOPHER G. EMCH

EXHIBIT A

WASHINGTON AND IDAHO RAILWAY, Inc.

and

THE STATE OF WASHINGTON

LEASE AGREEMENT FOR THE PROVISION
OF FREIGHT RAIL SERVICE

FOR

THE P & L BRANCH OF THE PALOUSE RIVER AND COULEE CITY RAILROAD

RR-00369

THIS LEASE AGREEMENT (Agreement) dated *June*, 2007, is entered into by and between WASHINGTON AND IDAHO RAILWAY, INC. (Lessee) and the STATE OF WASHINGTON (State), collectively "Parties" and individually "Party".

Section 1. Recitals

- 1.1 For purposes of this Agreement the State shall act by and through the Washington State Department of Transportation.
- 1.2 The State owns a rail line defined and described as:
 - 1.2.1 The P & L Line between Milepost 1.0 at Marshall and Milepost 84.05 at the Washington-Idaho State Line near Moscow, Idaho; and,
 - 1.2.2 The WIM line located between Milepost 0.0, at Palouse, and Milepost 3.85, at the Washington-Idaho State Line.
 - 1.2.3 The lines listed above are generally shown on Exhibit A and more particularly described on Exhibit A-1. The lines shall be referred to as the Rail Line in this Agreement.
- 1.3 The State is authorized to operate the Rail Line for the benefit of the public pursuant to chapter 47.76 RCW.
- 1.4 The State finds it is in the public interest to enter into an agreement with a

qualified Lessee to provide railroad freight transportation service to the public upon the terms and conditions contained herein.

- 1.5 The Lessee is qualified and willing to lease the aforesaid Rail Line from the State and to provide Freight Rail Service as defined in Section 4.1 to the public on the Rail Line upon the terms and conditions contained herein
- 1.6 The Lessee and the State further intend to work in partnership with one another and with local governments, economic development authorities, shippers and Class I railroads to develop innovative and efficient operating and shipping methods and improvements in order to provide competitive rail service for the region's rail shipping community.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the Parties agree to the following:

Section 2. Right to Provide Freight Rail Services.

- 2.1 The State hereby leases to Lessee and Lessee hereby leases from the State the Rail Line and all improvements thereon and fixtures affixed thereto, including without limitation, all tracks, rails, ties, ballast, other track materials, switches, crossings, bridges and bridge abutments, culverts, buildings, signals, crossing protection devices, communication lines and poles.
- 2.2 Lessee shall have the exclusive right to provide Freight Rail Service on the Rail Line. The State shall not admit any other railroad, operator and user to any part of the Rail Line without the prior written consent of Lessee, which consent may be withheld by Lessee for any reason at its sole discretion. Lessee shall not owe any usage fee, rental, or other fee or payment to the State for Lessee's use of the Rail Line during the term hereof. Lessee shall retain all income derived from providing Freight Rail Service on the Rail Line, and shall be responsible for any losses incurred by the Lessee.
- 2.3 The Lessee shall also have the right to use all property owned by the State of Washington that constitutes the right of way of such Rail Line that is not under lease to third Parties solely for the purposes of providing freight rail services as set forth in this Agreement.
- 2.4 In consideration for the rights granted in Subsections 2.1, 2.2 and 2.3 and contained elsewhere herein, the Lessee shall maintain the Rail Line, provide Freight Rail Service to businesses that desire to use its services, develop business along the Rail Line, and perform other obligations, all as set forth in this Agreement.

Section 3. Term.

- 3.1 The term of this Agreement shall commence as of the date first written above and shall be for an initial term of five (5) years, subject to the termination clauses contained in this Agreement. The Lessee may request to extend this Agreement for additional five year periods, and the State may grant such extensions at its sole option. The Lessee must make its request to the State in writing at least one hundred eighty (180) days prior to the expiration of the initial term or any extension of this Agreement, and the State must notify the Lessee of its decision within one hundred fifty (150) days prior to the expiration of the initial term or any extension of this Agreement. Any extension is contingent upon the Parties agreeing to an additional cyclical/programmed maintenance program for the new term as discussed in Subsection 12.1.2 and 12.6.2.
- 3.2 The Lessee shall have and hereby assumes all duties and obligations with relation to the use, repair, maintenance, existence, and operation of the Rail Line for the Lessee's purposes, including all improvements and fixtures thereto and thereon and hereafter located on the Rail Line, except matters, responsibilities and obligations assumed by the State as provided for in this Agreement. The Lessee shall forever protect, indemnify and hold harmless the State from and against any expense, cost, liability, or obligation whatsoever, which arises from or in connection with the Rail Line during the term of this Agreement, except those duties, matters, responsibilities and obligations expressly assumed by the State in this Agreement, or to the extent caused by the State's willful or negligent act or omission, violation of law or breach of Agreement during the term of this Agreement or as a result of Rehabilitation Work (as defined in Subsection 11.1) performed by or at the request of the State by a third Party contractor during the term of this Agreement or any extension hereof.

Section 4. Freight Rail Service.

- 4.1 As used in this Agreement, "Freight Rail Service" shall mean the provision of rail freight transportation service to current and future customers on or along the Rail Line and all services and functions ancillary thereto, including without limitation, moving and replacing loaded/empty and/or empty/loaded railcars, switching, interchanging with line-haul providers, operating hi-rail vehicles and Lessee sponsored business car trips over the Rail Line and providing such other rail services as are customarily provided to similar industries using rail services. The Lessee shall interchange loaded and empty railcars and other rail equipment with BNSF Railway Company "BNSF" and any additional railroad that may obtain interchange access to the Rail Line. The Lessee shall comply with all applicable rules, regulations and requirements pertaining to the interchange of railcars between rail

carriers and the terms of any interchange agreement Lessee enters into with any connecting railroad.

- 4.2 Unless otherwise agreed under paragraph 4.3, the Lessee will provide Freight Rail Service at least once every seven (7) days for each customer needing it, and more often as required to any customer shipping or receiving more than three (3) railcars per week.
- 4.3 The Lessee may develop and implement operating parameters and patterns that are conducive to market conditions and customer demands along the Rail Line for Freight Rail Service effective nineteen (19) months after the commencement of this Agreement, provided that good customer service is being achieved as determined solely by the State. During the first eighteen (18) months, Lessee may, with prior approval from the State which will not be unreasonably withheld, reduce levels of service to customers on the Rail Line based on market conditions and customer demand for service.

Section 5. Business and Operating Plans.

- 5.1 Business Plan. The Lessee shall prepare a Business Plan annually and submit it to the State. The purpose of the Business Plan shall be to describe the then current physical, operational, and financial status of the Freight Rail Service; and to list the plans to maintain and improve the condition of the Rail Line through capital expenditures during the term of this Agreement consistent with achievement of the traffic projections set forth in the Business Plan. Specifically, the Business Plan shall contain:
 - 5.1.1 An Annual Operating Plan, which shall be comprised of three subsections:
 - 5.1.1.1 Current Status Report, detailing the operational and financial status of rail operations.
 - 5.1.1.2 Annual Service Plan, detailing proposed train service, marketing efforts, new business initiatives and development efforts, and financial performance expectations of the railroad based on actual and expected rail traffic flows or deviations thereto.
 - 5.1.1.3 Condition Report describing the current condition of the track, track sub-structure, ballast and all appliances and all structures, and outlining sections of the Rail Line that are at risk for limited service or non-service via embargo, safety reasons or being removed from service due to operational restrictions or market conditions.

- 5.2 Except for calendar year 2007, the Business Plan shall be based on a calendar year. Notwithstanding Section 5.1.1, the Business Plan for calendar year 2007 shall contain only the Annual Service Plan and shall be submitted to the State by June 30, 2007. The Lessee shall submit subsequent plans by November 1 of each year beginning in 2007.
- 5.3 The Lessee shall bear all costs of preparing and submitting all Business and Operating Plans.
- 5.4 As part of the Business Plan the Lessee will agree to inform the State within ten (10) days after the end of each calendar quarter of the total number of inbound carloads delivered and the total number of outbound carloads shipped on the Rail Line during the quarter.

Section 6. Utilities.

The Lessee, at no cost or expense to the State, shall arrange for, obtain and pay all bills, charges and assessments in connection with any heat, water, electricity, sewer and other utility services required for the Lessee's use of the Rail Line.

Section 7. Taxes and Assessments.

The State shall be liable for and pay all real property ad valorem taxes and special assessments which may be levied, assessed or imposed upon the real property comprising the Rail Line owned by the State during the term of this Agreement.

Section 8. Third Party Agreements, Easements and Licenses.

The State will be responsible for all third Party agreements, easements and licenses, and shall retain all income therefrom. Prior to execution of this Agreement, the State shall provide Lessee with a list of all existing third party agreements, easements and licenses on the Rail Line. The State will consult with the Lessee before entering into any new such agreements to determine whether the agreement will have any effect on railroad operations. The State will not enter into any new agreements, easements or licenses that would interfere with Lessee's operation of the Rail Line. Notwithstanding the foregoing, Lessee shall have the unilateral right to amend existing sidetrack agreements or enter into new sidetrack agreements with customers along the Rail Line. Lessee shall provide written notice to the State of any such amended or new sidetrack agreement. No such amendments or new sidetrack agreements shall extend beyond the term of this Agreement without written consent of the State.

Section 9. Interchange Agreements.

The Lessee shall negotiate and secure interchange arrangements with BNSF at

Marshall for the interchange of loaded and empty rail cars moving to or from the Rail Line.

Section 10. Use.

- 10.1 The Lessee will use the Rail Line and any adjacent property owned by the State only for the provision of Freight Rail Service as defined in Section 4.1 unless Lessee obtains the written consent of the State to use such property for any other purpose.
- 10.2 The Lessee's management and operation of the Rail Line shall comply with all laws, rules, and regulations which apply to the operation, condition, inspection and safety of trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are being operated on the Rail Line. The Lessee shall also comply with all applicable industry standards and rules, and rules promulgated by the American Short Line and Regional Railroad Association. Lessee shall subscribe to the Interchange Rules, Car Hire and Car Service Rules of the Association of American Railroads. Upon request, the Lessee shall provide to the State all Federal Railroad Administration and Washington Utilities and Transportation Commission inspection reports, and the Lessee's reports of action taken in response to the inspections.
- 10.3 The Lessee shall adopt and follow the General Code of Operating Rules, and all other rules necessary for the Lessee to operate on joint interchange tracks with the BNSF Railway Co. at Marshall.
- 10.4 The Lessee shall use RMI or comparable software approved by the State as a car tracking and management system.

Section 11. Rehabilitation

- 11.1 The State shall be solely responsible for the cost of performing any Rehabilitation Work on the Rail Line. "Rehabilitation Work" means any reconstruction of any portion of the Rail Line, or extensive replacement or repair of ties, roadbed, ballast or bridges that would fall outside the cyclical/programmed maintenance as defined in this Agreement.
- 11.2 The Lessee and the State will jointly inspect the Rail Line no later than June 30, 2007 for purposes of cataloging pre-existing slow orders. If reasonably possible the Parties will use the inspection to identify the condition of the Rail Line and determine what Rehabilitation Work may be needed to make the Rail Line operate at current timetable speeds to improve efficiency. A report of the inspection and evaluation will be prepared by the State at State expense. The report shall include any comments, suggestions and/or analysis provided by the Lessee. If the inspection to determine

rehabilitation needs cannot be performed in conjunction with the inspection to identify slow order areas, the inspection will be performed no later than August 31, 2007.

- 11.3 The State shall control rehabilitation work funded by the State of Washington ("State Funded Rehabilitation") to be performed on the Rail Line. The State agrees to perform the State Funded Rehabilitation Work in a manner that does not unreasonably impede the Lessee's operation of railcar traffic on the Rail Line. The State and the Lessee shall each designate a project manager for any State Funded Rehabilitation Work, and both Parties agree to seek amicable solutions to any dispute arising in connection with State Funded Rehabilitation Work in accordance with a procedure to be set forth by separate agreement.
- 11.4 Nothing in this Agreement shall restrict the Lessee from providing funds or seeking funds from third Parties or other government agencies to facilitate rehabilitation and/or economic development projects in addition to any State Funded Rehabilitation Work ("Lessee Rehabilitation Projects") so long as the other terms and conditions of this Agreement are satisfied. The Lessee will notify the State of any planned Lessee Rehabilitation Projects. The Lessee will control any Lessee Rehabilitation Projects to be performed on the Rail Line subject to the approval of the State of the plans, location, scope and quality of the work.
 - 11.4.1 The Lessee and the State shall cooperate to secure the benefits of the federal tax credits signed into law as part of US House Bill HR 4520 for the Lessee or for a Rail Line customer or potential customer.
- 11.5 The Lessee agrees to keep and maintain all buildings, structures, appliances and appurtenances over which it has control or use, including those currently constituting the Rail Line and any facilities added to the property, in a reasonably safe condition for the use intended.

Section 12. Normalized Maintenance.

- 12.1 Lessee shall be solely responsible for the cost of performing all Normalized Maintenance on the Rail Line. "Normalized Maintenance" means maintenance expenses which are estimated on a "normalized" basis, or the average annual expenditure required to maintain the Rail Line at a desired level of operation and includes annual maintenance and an allowance for cyclical/programmed maintenance.

The following is a non-exclusive list of the activities included in the two categories of maintenance:

12.1.1 Annual Maintenance includes:

- Track inspections and appropriate record keeping
- Weed control
- Brush cutting
- Snow removal/Storm water maintenance and control
- Any track repairs needed to comply with Federal Railroad Administration or (FRA) laws, rules and regulations applicable to the operation of the railroad generally and specifically applicable to the FRA track class existing on the effective date of this Agreement and the FRA track class existing after rehabilitation.
- Any repairs needed to eliminate slow orders imposed during the term of the Agreement.
- Grade crossing surface repairs.
- Emergency storm/flood/fire repairs.

12.1.2 Cyclical/programmed maintenance includes:

- Cross tie/ switch tie replacements and renewals.
- Turnout repairs or replacement.
- Bridge and trestle repairs or replacement.
- Rail replacements.
- Grade crossing surface replacement and warning maintenance.
- Sub-grade and ballast placement, tamping, and lining.
- Sign replacements.
- Reconstruction of passing, setout, and yard switching tracks.
- Ditch and storm water maintenance.

- 12.2 The Lessee agrees to perform such Annual Maintenance as needed to maintain the Rail Line at its current FRA track classification (i.e., Excepted, Class I, Class II) without further deterioration of rail track infrastructure. After Rehabilitation Work is performed, Lessee will maintain the improved track facilities to the functional level existing after the work is completed.
- 12.3 The Lessee will submit to the State two (2) maintenance plans each year. The first is a spending plan that the Lessee can maintain under the level(s) of business set forth in the Business Plan for that year and the second plan would cover a maintenance plan that includes targeted upgrades and improvements in each of five (5) consecutive years that will bring the Rail Line up to timetable operation and speeds at the conclusion of the fifth year. The second maintenance plan submitted by the Lessee will be used by the State to evaluate and determine public investment opportunities (if any) for economic development and/or rehabilitation of Eastern Washington's rail infrastructure.
- 12.4 Lessee shall perform all reasonable maintenance necessary to ensure that any slow orders issued after the date the term of this Agreement begins will not remain in effect for more than two (2) consecutive calendar quarters.

12.5 Lessee shall perform maintenance and repair work on crossing surfaces necessary to comply with the Washington Utility Transportation commission laws and rules. However, the State may elect to pay for the cost of such repairs in the event funding for such purposes becomes available.

12.6 Reports.

12.6.1 The Lessee will provide written reports to the State by February 28th of each year detailing all maintenance work activities performed during the prior calendar year.

12.6.2 Within ten (10) working days after the end of each calendar quarter, the Lessee shall provide the State with a list of slow orders in effect at the end of the previous calendar quarter.

12.7 Cyclical/Programmed Maintenance

12.7.1 At a minimum, the Lessee shall replace two thousand five hundred (2500) ties per year during the first two (2) years of this Agreement, and five thousand (5000) ties per year during the ensuing three (3) years.

12.7.2 The Parties shall agree upon an additional program of cyclical and programmed maintenance before the Agreement is renewed for any additional term. Agreement must be reached on or before February 28 in the year before a term ends. The Lessee shall be responsible for implementing and paying for the maintenance program. If agreement is not reached, the term will not be extended.

12.8 All improvements shall become the property of the State upon installation, unless otherwise agreed to by and between the Parties in writing.

Section 13. Inspection.

The Lessee shall allow a semi-annual joint inspection of the Rail Line by representatives of the State upon reasonable advance notice for 2007 and 2008, and annual joint inspections thereafter. Appropriate representatives from both the State and the Lessee shall participate in and cooperate with the joint inspection(s) via hi-rail or other suitable means of railroad track inspection. The State may perform more frequent inspections of the Rail Line at its election at any time during the term of the Agreement so long as the following conditions are met: (1) The State provides reasonable advance notice to the Lessee; (2) The State complies with all reasonable safety requirements of the Lessee or as required by law applicable to the Rail Line; (3) The State obtains the appropriate authorizations from the Lessee to be on the designated portions of the Property, such as track warrants; (4) The Lessee

will be allowed to participate in any inspection; and (5) the inspections are planned and coordinated with the Lessee to minimize any interference with Lessee's operations on the Rail Line.

Section 14. Assignment.

Assignment of this Agreement may occur only with the written consent of the State. To obtain the State's consent to such an assignment, the Lessee will provide written notice to the State of its desire to assign this Agreement, including a letter signed by an authorized officer of the intended assignee stating that the assignee agrees to such assignment and agrees to be bound by all the terms of such assignment and the approvals and evidences required by this Agreement. The prospective assignee shall provide the State all documents reasonable and necessary for the State to determine whether the prospective assignee has the financial, operational, business and maintenance capability to perform the terms of this Agreement at the same level or better than the Lessee. This Agreement will be binding upon and inure to the benefit of successors and assigns of the State and successors and permitted assigns of the Lessee. The State agrees that it will not unreasonably withhold its consent to the assignment of this Agreement, and will within thirty (30) days issue its written consent or provide in writing its reason for not giving consent to the assignment.

Section 15. Liability.

- 15.1 The Lessee hereby acknowledges that all activities arising out of or in any way connected with its use of the Rail Line are solely for its benefit and the Lessee hereby hold harmless and agrees to indemnify the State, its successors and assigns, officers, agents, and employees from all liability (except to the extent caused by the intentional or negligent acts or omissions, violations of law or breach of contract by State, which shall result in no liability by the Lessee), whether arising from suits, actions, causes of action, claims or demands of any character whatsoever.
- 15.2 To the extent that the Lessee owes the State a duty of indemnity under this Agreement, the Lessee shall indemnify, protect, defend and hold harmless the State, its successors and assigns, its officers, agents and employees, from and against all liability, cost, claims, suits, causes, causes of action, judgments or any expense whatsoever (including attorney fees and costs of defense) for any personal injury or property damage, however and to whomever caused, arising out of or in connection with its use of the property by anyone other than the State during the term of this Agreement; provided, however, that the Lessee's indemnity obligations under this Agreement will be limited, if applicable, by any legal or statutory cap limiting the State's legal or equitable liability to any Party for which the Lessee would owe the State a duty of indemnity hereunder.

15.3 This indemnification shall survive the termination of this Agreement.

Section 16. Insurance

To comply with its indemnity obligations under Subsection 15.2, Lessee, at Lessee's cost and expense, shall procure or cause to be procured and maintain or cause to be maintained, during the continuance of this Agreement, railroad operating and liability insurance covering liability assumed by the Lessee under this Agreement with a limit of not less than Twenty Five Million Dollars (\$25,000,000) single limit for personal injury per occurrence and single limit for property of Five Million Dollars (\$5,000,000) for damage per occurrence, such limits to be reviewed by the State every five (5) years during the term of this Agreement and any extensions of it. At five (5) year intervals, the State and the Lessee shall meet and confer in good faith to determine whether modifications should be made to the insurance requirement. The Lessee shall furnish to the State certificates of insurance evidencing the above coverage in the form of a policy (or policies) at the time of execution of this Agreement. Such insurance shall contain a contractual liability endorsement which will cover the obligations assumed under this Agreement and an endorsement naming the State as "additional insured." In addition, such insurance shall contain notification provisions under which the insurance company agrees to give thirty (30) days' written notice to the State of any change in or cancellation of the policy. These endorsements and notice provisions shall be stated on the certificate of insurance provided to the State.

Section 17. Surface Transportation Board Approvals

17.1 Prior to initiation of Rail Freight service on the Rail line, the Lessee hereby warrants and represents to the State that the Lessee has secured all necessary orders or approval, if any, from the Surface Transportation Board ("STB") and all other appropriate governmental or regulatory authorities, orders approving or authorizing the Lessee to enter into this Agreement and to conduct railroad operations on the Rail Line according to the terms and provisions hereof, or exempting the Lessee from the requirement of obtaining such approval and authorization. The Parties understand and agree that the entry of an order of the STB approving and authorizing or exempting this transaction and the railroad operations of the Lessee according to the terms and conditions hereof is a condition precedent to the obligations of either Party hereunder.

17.2 Lessee will not seek authority or an exemption therefrom from the STB or other governmental or regulatory authority to discontinue Freight Rail Service over all or any portion of the Rail Line unless this Agreement is terminated or the Lessee has cause to terminate this Agreement pursuant to the termination provisions of this Agreement.

17.3 The Lessee's actions and plans for responding to embargoes or service

interruptions shall be set forth in the Annual Operating Plan and any amendment thereto.

Section 18. Termination

18.1 Grounds for Termination.

18.1.1 Termination by Election – Except as otherwise provided in this Agreement, the State and Lessee may not terminate this Agreement by election except by mutual consent prior to December 31, 2008. Thereafter, either Party may terminate this Agreement by election if the number of revenue carloads is less than two thousand four hundred (2400) for any calendar year during the term of this Agreement or any extension thereof. The election must be exercised during the month of January following the calendar year in which the number of revenue carloads was less than two thousand four hundred (2400). Termination will be effective May 31 of that year.

18.1.2 Termination by Breach – So long as the Lessee is not in breach of any material terms and conditions of this Agreement and the Lessee continues to provide rail service on the Rail Line, unless otherwise agreed to by and between the Parties, the State shall not have a right to terminate this Agreement prior to its natural expiration (whether of the initial term or any renewal or extension hereof) except as otherwise provided in Subsection 18.1.1. However, in the event that the Lessee breaches a material term or condition of this Agreement, or without the State's consent, ceases to provide Freight Rail Service on any portion of the Rail line for more than fifteen (15) days when there is a bona fide demand for service, the State shall give Lessee written notice of that fact. If within sixty (60) days of receipt of such notice, the Lessee has not cured such breach, or if the Lessee has not taken all reasonable steps toward effecting such cure, and the Lessee has not reinstated Freight Rail Service, then the State shall have the right to take possession of the Rail Line, and this Agreement will terminate.

18.2 The Lessee, upon termination of this Agreement, shall have three (3) months to remove all personal property and improvements placed by it on the Rail Line, except those improvements that the State paid for and desires to retain and any Rehabilitation Work, which shall become the property of the State. If the Lessee fails to so remove its property within the time allotted, the State may take possession of any remaining personal property or, the State may remove any remaining personal property at the expense of the Lessee, subject to offset by any net salvage proceeds actually received by the State. The Lessee's obligation to pay the costs of removal shall survive termination of this Agreement.

- 18.3 Termination of this Agreement by the Lessee which results in cessation of operations shall result in an obligation of the Lessee to reasonably make available operating data (including, but not limited to car tracing, shipper identification and rates, and accounting records) to the State or the State's designee at State's expense.
- 18.4 Termination of this Agreement shall not relieve either Party hereto from any obligation under this Agreement arising prior to termination.

Section 19. Notices.

All notices, demands, requests or other communications which may be or are required to be given, served or sent by either Party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent:

If intended for the Lessee, by mailing by registered or certified mail, return receipt requested, with postage prepaid, or by reputable overnight courier, addressed to Lessee at:

Stan Patterson, President
Washington and Idaho Railway, Inc.
10615 S.Scribner Rd.
Cheney, Wa. 99004

If intended for the State, by mailing by registered or certified mail, return receipt requested, with postage prepaid, or by reputable overnight courier, addressed to the State at:

State Rail and Marine Director
Washington State Department of Transportation
P.O. Box 47407
Olympia, WA 98504-7407

Each notice, demand, request or communication mailed by registered or certified mail to either Party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication is either received by the addressee or refused by the addressee upon presentation. Either Party may change the name of the recipient of any notice, or his or her address, at any time by complying with the foregoing procedure.

Section 20. Events Constituting Default

- 20.1 Any of the following events shall constitute a default by Lessee hereunder:

- 20.1.1 The failure of Lessee to submit the Business Plan required under Subsection 5.1 or the Annual Operating Plan required under Subsection 5.1.1 or the material non-performance by Lessee of any maintenance required under Section 12, or the failure to adequately perform any other material term, covenant or condition of this Agreement which is not cured within sixty (60) days after written notice from the State.
- 20.1.2 Any affirmative act of insolvency by the Lessee, or the filing by the Lessee of any petition under any bankruptcy, reorganization, insolvency, or moratorium law, or any law for the relief of, or relating to, debtors.
- 20.1.3 The filing of any involuntary petition under any bankruptcy statute against the Lessee, or the appointment of any receiver or trustee to take possession of the property of the Lessee.
- 20.1.4 The suspension or revocation of the Lessee's federal, state or local regulatory authority to operate Freight Rail Service on the Rail Line.
- 20.1.5 The Lessee's committing waste or allowing the attachment of any lien on the Rail Line which is not cured within ninety (90) days; provided, however, if the Lessee in good faith contests a lien, it shall have such additional time to cure as is reasonable under the circumstances.

Section 21. Rights on Default

On the occurrence of any of the events of default listed in Section 20, the State may terminate this Agreement by written notice to the Lessee and, in addition, may take any other action or exercise any additional remedy available to the State at law or equity.

Section 22. Obligations of the Lessee Upon Termination

In case of termination by the State or the Lessee pursuant to any provision of this Agreement, the Lessee's obligations on termination shall be governed by the provisions of Section 18 hereof.

Section 23. Amendment

No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing signed by both Parties hereto.

Section 24. Clean Air and Water

In performing Freight Rail Services hereunder, the Lessee shall comply with all applicable standards, orders, or requirements issued under: (i) the Clean Air Act (42 USC 7414 *et seq.*), and any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Clean Air Act or Executive Order 11738 or any applicable implementation plan as described in sections 110 (d), 111 ©, 111 (d) or 112 (d) of the Clean Air Act; (ii) the Clean Water Act (33 USC 1318 *et seq.*) and any enforceable limitation, control, condition, prohibition, standard, or other requirement promulgated under the Clean Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency (“EPA”) or by the State under an approved program, as authorized by section 402 of the Clean Water Act (33 USC 1342), or by local government to ensure compliance with pretreatment regulations as required by Section 307 of the Clean Water Act; and, (iii) the EPA regulations (40 CFR). All violations shall be reported by The Lessee to the FRA and to the U.S. EPA Assistant Administrator for Enforcement (EN-329). The Lessee shall hold harmless, indemnify and defend the State from any claims, costs, damages, fines or other penalties arising from any violation of the provisions of this Section 24 in the performance of Freight Rail Service on the Rail Line, regardless of the absence of negligence or other malfeasance by the Lessee. This provision shall survive the termination of this Agreement for any reason.

For purposes of this Section 24, the term “facility” means any building, plant, installation, structure, location, or site of operations, owned, leased, or supervised by the Lessee or a subcontractor of Lessee, used in the performance of this lease. When a location or site of operations contains or includes more than one building, plant, installation or structure, the entire location or site shall be deemed to be a facility except when the Administrator, or a Designee, of the Office of Federal Activities, EPA, determines that independent facilities are co-located in one geographical area.

Section 25. Hazardous Materials

25.1 If the performance of this Agreement creates any solid or hazardous wastes (e.g., the removal of any materials from the trains that require disposal), said waste shall be properly disposed of in accordance with Federal, state and local laws, at the expense of the Lessee. In no event shall the State be identified as the generator of the wastes. The Lessee shall notify the State of any such hazardous wastes and the State shall receive a copy of the results of any tests conducted on the wastes. The Lessee shall hold harmless, indemnify and defend the State from any claims, costs, damages, fines or other penalties arising from the disposal of any wastes created by the performance of this Agreement, regardless of the absence of negligence or other malfeasance by the Lessee. This provision shall survive the termination of this Agreement for any reason.

25.2 At no time during the term of this Agreement shall the Lessee, without the

prior written consent of the State, maintain, treat, dispose of, store or have on the Rail Line, or permit any other party to have, maintain, treat, dispose of, or store on the Rail Line, anything which is classified by federal, state or local authorities as a Hazardous Substance or Hazardous Waste or which requires a permit for the storage, treatment, disposal, handling or maintenance of it from any government authority. This excludes (1) transport or storage of materials by or on rail as long as said transport or storage complies with the Hazardous Materials Transportation Act, 49 USC Section 1801, *et seq.*, and (2) petroleum products, lubricants, antifreeze and such other materials that may be normally consumed in the daily operations of a railroad.

- 25.3 The Lessee further agrees to indemnify and hold the State harmless from all costs, expenses, liabilities, demands, claims, causes of action at law or in equity whatsoever arising from its, or any of its contractors, treatment, disposal, storage, maintenance or handling of any Hazardous Material or Hazardous Waste on the Rail Line during the term of this Agreement, including, but not limited to, the cost of clean-up, environmental damage assessments, defense and reasonable attorney's fees. The State agrees to cooperate in the prosecution and collection of all costs, expenses, liabilities, demands, and claims, associated with any treatment, disposal, storage, maintenance or handling of any Hazardous Material or Hazardous Waste on the Rail Line, including, but not limited to, the cost of clean-up, environmental assessments, defense and reasonable attorney's fees, prior to occupancy by the Lessee, against any identified responsible Party. The Parties acknowledge that the inclusion of this indemnification and hold harmless provision shall in no manner whatsoever evidence a waiver, consent or permission by the State for the Lessee to violate the provisions of Section 24. This provision shall survive the termination of this Agreement for any reason.

Section 26. Public Records

The State is a state agency subject to the Public Disclosure requirements in chapter 42.17 RCW, and chapter 42.56 RCW. This Agreement and any records, data or other information received or used by the State in the course of this Agreement shall become a public record as defined in RCW 42.17.020(41). Any specific information that is claimed by the Lessee to be confidential or proprietary must be clearly identified as such by the Lessee. To the extent consistent with chapters 42.17 and 42.56 RCW, *et seq.*, the State will maintain the confidentiality of all such information marked confidential or proprietary. If a request is made to view the Lessee's information, the State will notify the Lessee of the request and the date that such records will be released to the requester unless the Lessee obtains a court order enjoining disclosure, the State will release the requested information on the date specified.

Section 27. Entire Agreement

This Agreement constitutes the entire agreement between the Lessee and the State and no other representations, warranties or agreements, either oral or written will be binding upon the Lessee and the State.

Section 28. Governing Law

This Agreement shall be governed and construed in accordance with the laws of the State of Washington. Venue of any action hereunder shall be in Thurston County Superior Court, Washington.

Section 29. Compliance With Applicable Laws.

The Lessee, subject to federal preemption, as applicable, shall comply with all statutes, laws and ordinances of all federal, state and local governments or other governmental authorities, regulatory authorities and commissions, foreseen and unforeseen, ordinary as well as extraordinary, for the entire term of this Agreement.

Section 30. Warranty of Signature

The State warrants to the Lessee that the person executing this Agreement for the State is fully authorized to sign this Agreement for the State and to bind the State to the terms of this Agreement. The Lessee warrants to the State that the person executing this Agreement for the Lessee is fully authorized to sign this Agreement for the Lessee and to bind the Lessee to the terms of this Agreement.

Section 31. Disputes

31.1 Any disputes relative to obligations, remedies, or performance of this Agreement shall be resolved by the President of Lessee and the Secretary of WSDOT or their designees at a meeting to be held at the offices of WSDOT in Olympia, Washington within ten (10) days of written submission of the dispute by one party to the other. In the event the dispute is not so resolved at such meeting, the dispute shall be resolved by neutral binding arbitration under the rules and regulations (but not the administration unless otherwise agreed) of the American Arbitration Association ("AAA").

31.2 Subject to written agreement to the contrary, arbitration shall be held in accordance with the Commercial Rules of the AAA in effect at the time of the arbitration; provided however, that to the extent that the AAA Rules are inconsistent with the terms of this Agreement or other terms of this Agreement are more specific than the AAA Rules, the terms of this Agreement will govern. Unless otherwise agreed in writing, discovery and motion practice shall be permitted, and the Federal Rules of Civil Procedure and the Federal Rules of Evidence shall govern all such motion practice and discovery, the exchange of exhibits, witness lists and work papers, and the presentation of evidence by expert witnesses.

31.3 The question or controversy shall be submitted for arbitration to a single competent, disinterested arbitrator, if the Parties are able to agree upon such single arbitrator within thirty (30) days after the Party requesting arbitration notifies the other Party of such request. If a single arbitrator cannot be agreed upon within such thirty (30)-day period, a board of three arbitrators shall be used. The Party initiating the arbitration shall state in writing the question(s) to be submitted for decision and nominate a person to act as its Party-appointed arbitrator. The receiving Party shall appoint its Party-appointed arbitrator within thirty (30) days of receipt of such notice and also provide any notice of claims or defenses it wishes to have adjudicated. Thereafter, the first and second arbitrators shall select a third arbitrator, but if the arbitrators shall be unable to agree upon such a third arbitrator within a period of thirty (30) days from the day of appointment of the second arbitrator, the third arbitrator shall be appointed by the AAA or other neutral entity or process if mutually agreed upon in writing.

31.4 Upon selection of the board or appointment of the single arbitrator, the arbitrator or board shall proceed with diligence to inquire into the questions or controversies. A hearing shall be held within one hundred eighty (180) days of appointment of the board or single arbitrator, and the arbitrator or board shall state its decision and award, in writing, within thirty (30) days of the final submission by the Parties, which decision and award, when delivered to both Parties, shall be final and binding. Judgment may be entered upon such decision and awarded in any court of competent jurisdiction.

31.5 Each Party shall bear its own expenses incurred in connection with arbitration under this Section, including any expenses associated with its appointed arbitrator in the case of arbitration before a three-member panel. The Parties shall share equally the expenses associated with the services of the single, disinterested arbitrator in the case of a one-member panel and/or the third neutral member of the three-member panel, as the case may be.

Section 32. Consequential Damages

UNDER NO CIRCUMSTANCES SHALL STATE OR LESSEE HAVE ANY LIABILITY TO THE OTHER PARTY, THEIR EMPLOYEES, AGENTS AND REPRESENTATIVES, FOR ANY CONSEQUENTIAL, INCIDENTAL, OR OTHER INDIRECT LOSS OR DAMAGES, PUNITIVE, OR EXEMPLARY DAMAGES OR COSTS HOWSOEVER CAUSED.

Section 33. Headings

The headings in this Agreement are for ease of reference only and shall not be used to construe or interpret the provisions of this Agreement.

Section 34. Attorney's Fees.

Should it become necessary for State or Lessee to engage in arbitration or other legal proceedings as may be necessary for the purpose of enforcing this Agreement for the purpose of recovering damages or otherwise, each Party, except as otherwise

provided in Subsection 32.5 above shall be responsible for its own costs, attorneys' fees and any other reasonable expenses incurred in connection with those legal proceedings.

Section 35. Counterparts

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

Section 36. Miscellaneous

36.1 NONDISCRIMINATION

36.1.1 To the extent applicable, the Lessee shall comply with the regulations for compliance with Title VI of the Civil Rights Act of 1964 (42 USC Section 2000d, et. seq) and 23 CFR Section 710.405(b).

36.1.2 Contracting: the Lessee shall not create barriers to open and fair opportunities for all businesses including MWBE's to participate in all State contracts and to obtain or compete for contracts and subcontracts as sources of supplies, equipment, construction, and services. In considering offers from and doing business with subcontractors and suppliers, the Lessee shall not discriminate on the basis of race, color, creed, religion, sex, age, nationality, marital status, or the presence of any mental, or physical disability in an otherwise qualified disabled person.

36.2 WORKERS RIGHT TO KNOW

Except where such matters are regulated by the FRA, Lessee shall comply with the requirements of WAC 296-62-054 of the State of Washington Department of Labor and Industries regarding worker awareness of hazardous substances in the work environment. WAC 296-62-054 requires among other things that all manufacturers or distributors of hazardous substances must include with each delivery completed Material Safety Data Sheets (MSDS) for each hazardous material. Additionally, each container must be labeled with:

- The identity of the hazardous material,
- Appropriate hazardous warnings, and
- Name and address of the chemical manufacturer, importer, or other responsible Party.

Labor and Industries may levy appropriate fines against employers for noncompliance. It should be noted that OSHA Form 20 is not acceptable in lieu of this requirement unless it is modified to include appropriate

information relative to "carcinogenic ingredients" and "routes of entry" of the product(s) in question.

36.3 GIFTS AND GRATUITIES

In accordance with RCW 43.19.1937 and 1939 and RCW 42.52.150 and 160, it is unlawful for any person to directly or indirectly offer, give or accept gifts, gratuities, loans, trips, favors, special discounts, services, or anything of economic value in conjunction with state business practices to another to refrain from submitting a proposal. Further RCW 43.19.1937 and the Ethics in Public Service Law, chapter 42.52 RCW prohibits state officers or employees from receiving, accepting, taking or seeking gifts (except as permitted by RCW 42.52.150) if the officer or employee participates in contractual matters relating to the purchase of goods or services.

36.4 FORCE MAJEURE

36.4.1 Neither Party shall be liable to the other or deemed in default under this Agreement if and to the extent that such Party's performance of this Agreement is prevented by reason of force majeure. The term "force majeure" means an occurrence that is beyond the control of the Party affected and could not have been avoided by exercising reasonable diligence. Force majeure shall include acts of God, war, riots, strikes, fire, floods, epidemics, or other similar occurrences.

36.4.2 If either Party is delayed or its performance is prevented by force majeure, said Party shall provide written notification within forty-eight (48) hours. The notification shall provide evidence of the force majeure to the satisfaction of the other Party. Such delay shall cease as soon as practicable and written notification of same shall be provided. The time of completion for a requirement under this Agreement shall be extended by contract modification for a period of time equal to the time that the results or effects of such delay prevented the delayed Party from performing in accordance with this Agreement.

Section 37. Independent Contractor

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

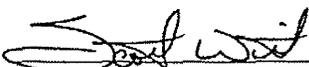
Section 38. Severability

If any term or provision hereof is or becomes invalid or unenforceable, the Lessee and the State shall in good faith negotiate to replace the invalid or unenforceable term or

provision with a term or provision which is valid and enforceable, and which comes as close as possible to expressing the intention of the invalid or unenforceable term or provision. The validity or enforceability of the remainder of the Agreement shall not be affected by the invalidity or unenforceability of any provision if the remainder conforms to the terms and requirements or applicable law and the intent of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this lease to be duly executed under seal by their duly authorized representatives.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

By: 

Title: State Rail + Marine Director

Date: 7/10/07

ATTEST:

WASHINGTON AND IDAHO RAILWAY, Inc.

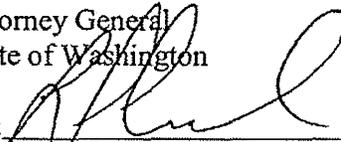
By: 

Title: President

Date: 7-6-07

Approved as to form:

Robert M. McKenna
Attorney General
State of Washington

By: 

I. Scott Lockwood
Assistant Attorney General

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

FIRST AMENDMENT TO LEASE AGREEMENT

THIS FIRST AMENDMENT TO LEASE AGREEMENT ("Amendment") is entered into as of this 1st day of July 2007 by and between WASHINGTON AND IDAHO RAILWAY, INC. (Lessee) and the STATE OF WASHINGTON (State), collectively "Parties" and individually "Party," to modify Lease Agreement RR-00369 ("Lease Agreement").

Section 1: Recitals

- 1.1 The State owns a rail line that runs from near Colfax to Pullman ("Pullman Segment"). It is described as that portion of the Colfax-Moscow line of the PV Hooper Branch of the Palouse River and Coulee City Railroad located between Milepost 2.0, approximately 2.0 miles east of Colfax, and Milepost 18.7, at Pullman.
- 1.2 The Pullman Segment is no longer accessible via the PV Hooper Branch because a fire destroyed a trestle over the Palouse River near Colfax.
- 1.3 The Pullman Segment is only accessible via the P & L Branch, which is operated by the Lessee pursuant to a lease granted by the State dated June 1, 2007 and designated as RR-00369.
- 1.4 The State finds it is in the public interest to modify the Lease Agreement to include use of the Pullman Segment. The inclusion of the Pullman Segment in the Lease Agreement is currently the only economically and operationally practical way the Pullman Segment can be used for the benefit of the public, and is currently the only reasonably practical way to provide mandatory maintenance for the Pullman Segment.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the Parties agree as follows:

Section 2. The Lessee is hereby granted the exclusive right to operate the Pullman Segment on the same terms and conditions contained in the Lease Agreement except as follows:

- 2.1 The term of the Lease Agreement for operation of the Pullman Segment shall be one year from July 1, 2007. The term may be extended by mutual agreement in one year increments beginning July 1, 2008. If the parties have not agreed in writing to extend the Pullman Segment of the Lease Agreement more than 30 days prior to the end of a term, the Pullman Segment of the Lease Agreement will terminate at the end of the term.

- 2.2 The State may terminate the Lease Agreement for operation of the Pullman Segment at its convenience on 30 days written notice given to Lessee.
- 2.3 The State may remove 1 mile segments of the Pullman Segment from the Lease Agreement beginning at Mile Post 2.0 at the State's convenience on 30 days written notice given to Lessee.
- 2.4 If the Lease Agreement is terminated in total, or the Pullman Segment portion of the Lease Agreement is terminated, or portions of the Pullman Segment are removed from the Lease Agreement, the Lessee shall remove equipment, cars and all other property not belonging to the State from the Pullman Segment, or applicable portions thereof, by the termination date.
- 2.5 The parties acknowledge that stored railroad cars can subjectively disturb adjacent property owners. The Lessee shall store cars on the Pullman Segment in a manner that minimizes such impacts. The State retains the right to direct the Lessee to move stored cars from a specific location to another location if it determines in its sole discretion that the movement will lower negative impacts to adjacent property owners. If such direction is given, the Lessee will move the cars as directed as soon as reasonably possible, but no later than ten days after receiving written direction.
- 2.6 The Washington State Department of Fish and Wildlife informed the State that long strings of stored cars can create a harmful barrier for deer attempting to access the Palouse River. Accordingly, the Lessee will "break" existing strings of cars as directed by the State if the State determines that problems for deer exist at specific locations. When the Lessee stores additional cars after July 1, 2007, the Lessee shall provide a space of at least one car between strings of the additional cars. Strings shall be no longer than 800 feet.
- 2.7 The maintenance requirements of the Lease Agreement shall apply to the Pullman Segment. However, the Parties shall review operational and maintenance needs for the Pullman Segment by August 31, 2007, with the purpose of amending the maintenance requirements as needed to take into account the specific needs of the Pullman Segment. If agreement cannot be reached on such amendment by September 30, 2007, the maintenance terms of the Lease Agreement shall continue to apply to the Pullman Segment.

Section 3. All terms and conditions in the Lease Agreement not inconsistent with this Amendment shall apply to the Pullman Segment. This

Amendment shall be attached to the Lease Agreement as an addendum.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

By: Scott Witt

Title: State Rail & Marine Director

Date: 7/10/07

WASHINGTON AND IDAHO
RAILWAY, INC.

By: [Signature]

Title: President

Date: 7-6-07

Approved as to form:

Robert M. McKenna
Attorney General
State of Washington

By: [Signature]

L. Scott Lockwood
Assistant Attorney General

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

SECOND AMENDMENT TO LEASE AGREEMENT

THIS SECOND AMENDMENT TO LEASE AGREEMENT ("Second Amendment") by and between WASHINGTON AND IDAHO RAILWAY, INC. (Lessee) and the STATE OF WASHINGTON (State), collectively "Parties" and individually "Party," modifies Lease Agreement RR-00369 ("Lease Agreement").

Section 1: Recitals

- 1.1 The State owns a rail line that runs from near Colfax to Pullman ("Pullman Segment"). It is described as that portion of the Colfax-Moscow line of the PV Hooper Branch of the Palouse River and Coulee City Railroad located between Milepost 2.0, approximately 2.0 miles east of Colfax, and Milepost 18.7, at Pullman.
- 1.2 The Pullman Segment is no longer accessible via the PV Hooper Branch because a fire destroyed a trestle over the Palouse River near Colfax.
- 1.3 The Pullman Segment is only accessible via the P & L Branch, which is operated by the Lessee pursuant to a lease granted by the State dated June 1, 2007 and designated as RR-00369 ("Agreement").
- 1.4 Amendment No. 1, effective July 1, 2007, added the Pullman Segment to the property covered by the original Agreement. Amendment No. 1 terminated on June 30, 2008.
- 1.5 The State has determined that it is in the public interest to modify the Lease Agreement to authorize the continued use of the Pullman Segment by the Lessee. The inclusion of the Pullman Segment in the Lease Agreement is currently the only economically and operationally practical way the Pullman Segment can be used for the benefit of the public, and is currently the only reasonably practical way to provide mandatory maintenance for the Pullman Segment.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the Parties agree as follows:

Section 2. The Lessee is hereby granted the exclusive right to continue to operate the Pullman Segment on the same terms and conditions contained in the original Lease Agreement and Amendment No. 1 except as follows:

- 2.1 The term of the Lease Agreement for operation of the Pullman Segment is hereby extended from June 30, 2008 to May 31, 2011. The term may be further extended by mutual agreement in one year

increments beginning June 1, 2011. Since Amendment No. 1 expired on June 30, 2008, this Amendment No. 2 is intended to apply to all work and services performed by the Lessee between July 1, 2008 and the date of execution of this Amendment No. 2. If the parties have not agreed in writing to extend the Pullman Segment of the Lease Agreement more than 30 days prior to the end of a term, the Pullman Segment of the Lease Agreement will terminate at the end of the term.

- 2.2 The State may terminate the Lease Agreement for operation of the Pullman Segment at its convenience on 30 days written notice given to Lessee.
- 2.3 The State may remove 1 mile segments of the Pullman Segment from the Lease Agreement beginning at Mile Post 2.0 at the State's convenience on 30 days written notice given to Lessee.
- 2.4 If the Lease Agreement is terminated in total, or the Pullman Segment portion of the Lease Agreement is terminated, or portions of the Pullman Segment are removed from the Lease Agreement, the Lessee shall remove equipment, cars and all other property not belonging to the State from the Pullman Segment, or applicable portions thereof, by the termination date.
- 2.5 The parties acknowledge that stored railroad cars can subjectively disturb adjacent property owners. The Lessee shall store cars on the Pullman Segment in a manner that minimizes such impacts. The State retains the right to direct the Lessee to move stored cars from a specific location to another location if it determines in its sole discretion that the movement will lower negative impacts to adjacent property owners. If such direction is given, the Lessee will move the cars as directed as soon as reasonably possible, but no later than ten days after receiving written direction.
- 2.6 The Washington State Department of Fish and Wildlife informed the State that long strings of stored cars can create a harmful barrier for deer attempting to access the Palouse River. Accordingly, the Lessee will "break" existing strings of cars as directed by the State if the State determines that problems for deer exist at specific locations. When the Lessee stores additional cars after July 1, 2007, the Lessee shall provide a space of at least one car between strings of the additional cars. Strings shall be no longer than 800 feet.
- 2.7 The maintenance requirements of the Lease Agreement shall apply to the Pullman Segment.

Section 3. All terms and conditions in the Original Lease Agreement, and Amendment No. 1, not inconsistent with this Amendment No. 2 shall apply to the Pullman Segment. This Amendment shall be attached to the Lease Agreement as an addendum.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

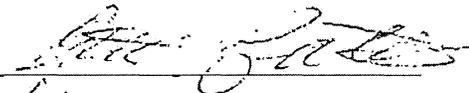
By: 

Name: SCOTT W. WILLIAMS

Title: STATE RAIL & MARINE DIRECTOR

Date: 12/17/09

WASHINGTON AND IDAHO
RAILWAY, INC.

By: 

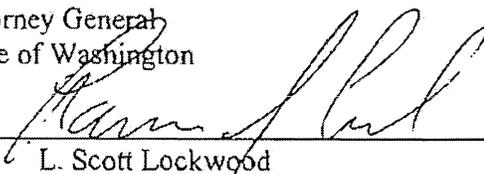
Name: Gary Patterson

Title: President

Date: 12-2-09

Approved as to form:

Robert M. McKenna
Attorney General
State of Washington

By: 

Date: 12/16/2009

L. Scott Lockwood
Assistant Attorney General

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



AMENDMENT NO. 3

**To
Washington and Idaho Railway, Inc.
And
The State of Washington**

**Operating Lease for the Provision
Of Freight Rail Service
For
The P&L Branch**

RR-00369

This AMENDMENT No. 3 ("Amendment") dated as of 6.21.12 (the "Amendment Effective Date") by and between the State of Washington acting by and through its Department of Transportation, Rail and Marine Division ("WSDOT"), and the Washington and Idaho Railway, Inc. ("Railroad"), collectively "Parties" and individually "Party"..

WHEREAS, the WSDOT is authorized by applicable State law to enter into this Amendment No. 3 to Agreement No. RR-00369 ("Agreement") on the terms and conditions hereinafter set forth. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Agreement.

NOW, THEREFORE, the Parties hereto agree to amend the Agreement as follows:

1. **Section 3.1** is amended with the following: WSDOT is hereby issuing the Railroad a 90-day extension to the current operating lease agreement. The new term for this lease extension commences on June 5, 2012 and terminates on September 3, 2012. Any further extension will be based upon the Railroads meeting the requirements of this amendment to WSDOT's satisfaction, and will be granted at WSDOT's sole discretion.
2. **Section 12.7** is amended with the following: The Railroad shall reconcile the number of ties installed under the current operating lease by June 22, 2012. WSDOT has determined the number of ties owed by the Railroad to be 18,933. The Railroad shall submit verifiable documentation supporting the purchase and installation of the 18,933 ties and WSDOT shall perform a field inspection verifying the ties have been installed on the P&L Branch. The Railroad shall notify WSDOT when the tie installation activities commence. Once reconciled, WSDOT and the Railroad may elect to then assign a dollar value to the remaining ties, such that the Railroad fulfills their maintenance obligation through other work, as mutually agreed upon. All such work to be completed on or before September 3, 2012.
3. The Railroad shall provide letters of support to WSDOT from all shippers on the P&L Branch no later than July 20, 2012.
4. The Railroad shall provide WSDOT with the following operator deliverables;
 - a. Inbound and Outbound Carload information – quarterly (received by June 22)
 - b. Maintenance Plan –covering targeted upgrades and improvements (received by June 29)
 - c. Slow Order Report – list all slow orders in effect at the end of the previous quarter (received by June 22)

5. The Railroad and WSDOT shall jointly schedule three (3) conference calls during the extension period to review the status on the obligations contained herein.
6. In the event of a conflict between the terms of this Amendment #3 and any prior agreement, the terms of this amendment shall take precedence.

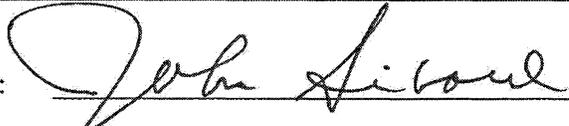
IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed by their duly authorized officers.

WASHINGTON AND IDAHO RAILWAY, Inc.

By:  Date: 6.21.12

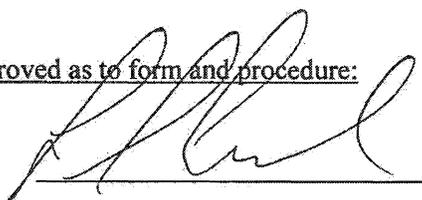
Stan Patterson, President

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

By:  Date: 6/27/12

John Sibold, Director
State Rail & Marine

Approved as to form and procedure:

By:  Date: 6/29/12

Scott Lockwood
Attorney, Washington State Department of Transportation

AMENDMENT NO. 5

**To
WASHINGTON AND IDAHO RAILWAY, Inc.
And
The State of Washington**

**Operating Lease for the Provision
Of Freight Rail Service
For
The P&L Branch**

RR-00369

This AMENDMENT No. 5 ("Amendment") dated as of January 1, 2013 (the "Amendment Effective Date") by and between the State of Washington acting by and through its Department of Transportation, Freight Systems Division ("WSDOT"), and the WASHINGTON AND IDAHO RAILWAY, INC. ("Railroad"), collectively "Parties" and individually "Party".

WHEREAS, the WSDOT is authorized by applicable State law to enter into this Amendment No. 5 to Agreement No. RR-00369 ("Agreement") on the terms and conditions hereinafter set forth. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Agreement.

NOW, THEREFORE, the Parties hereto agree to amend the Agreement as follows:

- 1. Section 2.2**, the second sentence is revised to read: The State shall not admit any other railroad, operator and user to any part of the Rail Line that would adversely impact operations without conferring with the Railroad prior to allowing access to the Rail Line.
- 2. Section 3.1** the following sentence is added at the end of said section: The Parties agree to extend the Agreement through December 31, 2017. All notifications identified in Section 3.1 shall be applicable for the renewed Agreement term.
- 3. Section 4.2 is replaced with the following:** Freight Rail Service shall be documented by Lessee in the Annual Service Plan defined in Section 5.1.1.2. WSDOT may contact customers individually or collectively to monitor customer satisfaction regarding the Railroad's Freight Rail Service performance.
- 4. Section 5. Business and Operating Plans**, is amended by adding the following at the end of said sections:
 - 5.1.1.2** The Annual Service Plan shall include a current list of customers receiving freight rail service on the Rail Line.
 - 5.1.1.3** The Railroad shall provide to the State an inventory of buildings, structures, appliances and appurtenances, as referred to in Section 11.6. The Condition Report will be submitted as part of the first maintenance plan described in Section 12.3
- 5. Section 5 Business and Operating Plans**, is revised to read as follows:

5.2 The Lessee shall submit the Business Plan by December 1 of each year of this Agreement. The business Plan shall be based on a calendar year.

6. **Section 7. Taxes and Assessments**, is revised to read as follows: The Lessee shall be liable for and pay all taxes assessed against Lessee as its operating property in accordance with Chapter 84.12 RCW during the term of this Agreement.

7. **Section 8** is revised to read as follows: The State will be responsible for all third party agreements, easements, licenses and permits and shall retain all income therefrom. The State will consult with the Lessee before entering into any new such agreements to determine whether the agreement will have any effect on railroad operations. The State will not enter into any new agreements, easements, licenses or permits that would interfere with Lessee's operation of the Rail Line. Notwithstanding the foregoing, Lessee shall have the unilateral right to amend existing sidetrack agreements or enter into new sidetrack agreements with customers along the Rail Line. Lessee shall provide written notice to the State of any such amended or new sidetrack agreement. No such amendments or new sidetrack agreements shall extend beyond the term of this Agreement without written consent of the State.

8. **Section 10. Use**, is replaced in its entirety with the following:

10.2 The Lessee's management and operation of the Rail Line shall comply with all federal and state laws, rules, and regulations which apply to the operation, condition, inspection and safety of the Rail Line, including, but not limited to, 49 CFR Parts 200 through 286, and WAC 480-62. The Lessee shall also comply with all applicable industry standards and rules, and rules promulgated by the American Short Line and Regional Railroad Association. Lessee shall subscribe to the Interchange Rules, Car Hire and Car Service Rules of the Association of American Railroads. Quarterly the Lessee shall provide the State all Federal Railroad Administration and Washington Utilities and Transportation Commission inspection reports, and the Lessee's report of action taken in response to the inspections.

9. **Section 10. Use**, is amended to include the following new section:

10.5 The Parties acknowledge that stored railroad cars can negatively impact adjacent property owners. The Lessee shall store cars in a manner that minimizes such impacts. The State retains the right to declare segments of the Rail Line unavailable for railroad car storage. The State will make said declaration in consultation with Lessee. Once the declaration is made, Lessee will have ten (10) days to remove any railcars currently stored on that segment of the Rail Line. Rail Line Segments will be defined from a starting to an ending milepost.

10. **Section 11.3** is amended to include the following:

State shall have the right, but not the obligation, to perform State Funded Rehabilitation.

11. **Section 11.4.1** is deleted in its entirety.

12. **Section 12.3** is replaced in its entirety with the following:

The Lessee will submit to the State two (2) Maintenance Plans each year.

The first is a spending plan that the Lessee can maintain under the level(s) of business set forth in the Business Plan for that year and will be developed in conjunction with the State/Lessee semi-annual track inspection. This Annual Maintenance Plan is due by May 31 of each year. The second plan includes targeted upgrades and improvements in each of three (3) consecutive years that will bring the Rail Line up to timetable operation and speeds at the conclusion of the third year. The second maintenance plan submitted by the Lessee will be used by the State to evaluate and determine public investment opportunities (if any) for economic development and/or rehabilitation of Eastern Washington's rail infrastructure. This Upgrade Plan will be included in the business plan submitted annually by November 1.

13. Section 12.4 is replaced in its entirety with the following;

Lessee shall perform all reasonable maintenance necessary to ensure that any slow orders will not remain in effect for more than two (2) consecutive calendar quarters and prioritized as mutually agreed upon based on the State/Lessee semi-annual track inspections.

14. Section 12.7 Cyclical/Programmed Maintenance is replaced in its entirety with the following:

12.7 Deferred Cyclical/Programmed Maintenance

12.7.1 Lessee's Deferred Cyclical/Programmed Maintenance is defined as 18,933 ties. WSDOT confirms that as of December 31, 2012, Lessee has purchased and installed 16,433 ties on the Rail Line. In order to meet its obligations as defined in Section 12 of this Agreement, the Lessee or its designated contractor, shall replace two thousand five hundred (2500) ties on the Rail Line with priority installation to those points on the Rail Line that are currently in excepted track status as identified in Exhibit A to this Amendment by June 1, 2013. The Lessee has contracted with, and prepaid in full the amount of \$37,500 to Double C Railroad Service, Inc to complete the Deferred Cyclical/Program Maintenance. It is incumbent on Railroad to ensure contractor completes maintenance on time.

12.7.2 Beginning in 2013 and for each calendar year thereafter, the Lessee shall expend 25% of Lessee's ("Gross Operating Revenue") for Normalized Maintenance as defined in Section 12.1. Under no circumstances shall the amount spent on Normalized Maintenance be less than \$345,000 per calendar year. This expenditure shall be called ("Operator's Maintenance Contribution"). Gross Operating Revenue shall be defined as all monies collected by Lessee for Lessee's performance of transportation services including but not limited too: freight bill revenues or linehaul charges for all revenue carloads (including complete on-line hauls, Rule 11, through rates, or those shipments that are part of a unit train operation), demurrage, loaded and empty railcar storage, intra-plant and intra-terminal switching, net equipment per diem and all other surcharges and accessorial charges as published in Freight Tariff WIR 8000 or as part of a private, confidential service or rate agreements between Lessee and shippers or consignees located on the Rail Line. All monies collected by Lessee for transportation services performed by another Railroad as part of a division of revenues shall be excluded from Gross Operating Revenue. All monies collected by BNSF Railway or other connecting carriers on behalf of Lessee for services performed by Lessee shall be included in the calculation of Gross Operating Revenue.

For purposes of determining annual Operator's Maintenance Contribution, Lessee shall submit to WSDOT, no later than April 15 of each year of this Agreement, signed and audited tax statements from the previous calendar year along with all other documentation necessary to determine Gross Operating Revenue. WSDOT will notify Lessee of the Operator's Maintenance Contribution for that year no later May 1st. Valid expenses that count towards Operator's Maintenance Contribution will be those incurred by the Lessee during each calendar year (January 1st until December 31st). For purposes of verifying expenditures, Lessee will submit paid invoices to WSDOT quarterly and will be required to have all receipts submitted to WSDOT no later than 60 calendar days following the end of the calendar year.

12.7.3 The expenditures for Normalized Maintenance shall be distributed such that 80% is expended to maintain from MP 1 to MP 66 of the Rail Line, and the remainder is expended to maintain from MP 66 to MP 84 of the Rail Line and the "Pullman Segment" as described in the First Amendment to RR-00369.

12.7.4 Specific areas of work will be determined jointly between the State and the Lessee and will be included as part of the Annual Maintenance Plan

12.7.5 The Railroad shall notify WSDOT, at least ten (10) days prior to the commencement of any maintenance work performed by the Railroad under Section 12.7, except in the case of emergency storm, flood, derailment or fire repair. In the case of emergency, Lessee shall notify WSDOT within three (3) hours of the emergency. Emergency is defined as any occurrence that causes operational closure for more than 24 hours.

12.7.6 The Railroad shall, on a monthly basis, provide verifiable, documentary evidence to support all expenditures required under Section 12.7. These may include, but are not limited to, payroll information and invoices for materials and equipment.

12.7.7 The Railroad shall promptly notify freight rail service customers of any maintenance activities that interrupt freight rail service. Such notification will be provided in advance of such maintenance whenever feasible but not later than 12 hours after maintenance commences.

15. Section 16, third sentence is revised to read as follows:

On, or before, January 1 and annually thereafter, the Railroad shall furnish to WSDOT certificates of insurance evidencing the above coverage in the form of a policy (or policies) at the time of execution of this Agreement. At no time, and under no circumstance, shall Lessee conduct any operation on any portion of the State owned Rail Line without maintaining in effect the insurance coverage specified in this Section 15.

16. Section 18, Termination, is amended to include the following new section:

18.5 Upon expiration or termination of this Agreement Lessee shall immediately file for discontinuance of its service on the Rail Line with the Surface Transportation Board. In the event that Lessee does not promptly file for discontinuance of its service Lessee specifically authorizes the State to file for such discontinuance on its behalf and to reimburse the State for the legal fees and all expenses related to such filing.

17. Section 19. Address of the Lessee is revised as follows:

Stan Patterson, President
Washington and Idaho Railway, Inc.
PO Box 275
Rosalia, WA 99170

18. Section 24.2, the USC code referenced in the last sentence is revised to 49 USC Chapter 51. 20.
Except as expressly modified by the terms of this Amendment, the Agreement remains unmodified and in full force and effect. This Amendment may be executed in multiple counterparts.

IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed by their duly authorized officers.

WASHINGTON AND IDAHO RAILWAY, Inc.

By:  _____

Date: Sept 6 2013

Stan Patterson, President

By:  _____

Date: Sept 6, 2013

Mike Williams, Co-owner

By:  _____

Date: Sept. 6, 2013

John Garner, Co-owner

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

By: _____

Date: _____

Ron Pate, Director
State Rail Division

Approved as to form and procedure:

By: _____

Date: _____

Scott Lockwood
Attorney, Washington State Department of Transportation