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April 14, 2016

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E-Filed

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings  
April 27, 2016  
Part of  
Public Record

Re: Finance Docket No. 36001, BNSF Railway Company – Trackage Rights Exemption – State of Washington, Department of Transportation

Dear Ms. Brown:

On March 11, 2016, BNSF Railway Company filed its Verified Notice of Exemption in the above-referenced proceeding. Attached please find the redacted Trackage Rights Agreement. The un-redacted version will be filed under seal.

If you have any questions, please contact me.

Sincerely yours,

*Karl Morell*

Karl Morell

Enclosures

<b>AGREEMENT</b>  TRACKAGE RIGHTS AGREEMENT for the CENTRAL WASHINGTON BRANCH OF THE PALOUSE RIVER & COULEE CITY RAIL SYSTEM	<b>ORGANIZATION:</b>  BNSF Railway Company
	<b>ORGANIZATION:</b>  Eastern Washington Gateway Railroad Company
AGREEMENT NUMBER  <b>RRB1088</b>	<b>ORGANIZATION:</b>  State of Washington Department of Transportation

This AGREEMENT (“AGREEMENT”) is by and among the State of Washington Department of Transportation hereinafter referred to as the “STATE”, BNSF Railway Company, hereinafter referred to as “BNSF,” and Eastern Washington Gateway Railroad Company, hereinafter referred to as the “CW BRANCH OPERATOR,” collectively referred to as the “PARTIES” and individually as a “PARTY.”

**RECITALS**

WHEREAS, the STATE is the owner of the rail line between Milepost 1.0 at Cheney and Milepost 108.8 at Coulee City, Washington (the “CW BRANCH”) and an approximately 620 foot portion of the East Leg Wye Track interchange outside of BNSF’s right of way at Cheney; and

WHEREAS, pursuant to the “Eastern Washington Gateway Railroad Company and the State of Washington Operating Lease for the Provision of Freight Rail Service for the CW BRANCH” (Agreement RR 00368) dated June 4, 2007 (the “OPERATING LEASE”), the CW BRANCH OPERATOR leases, maintains and operates the CW BRANCH; and

WHEREAS, BNSF is the owner of the rail line between Milepost 0.0 and Milepost 1.0 that connects with the CW BRANCH at Milepost 1.0 (“BNSF CW BRANCH TRACKAGE”); and

WHEREAS, BNSF desires to obtain trackage rights over the CW BRANCH between Milepost 1.0 and Milepost 6.30 (hereinafter the “JOINT TRACKAGE”) for the purpose of providing rail service to the facility of Highline Grain LLC to be located at Milepost 6.30 (“HIGHLINE GRAIN”); and

WHEREAS, pursuant to Section 2.2 of the OPERATING LEASE, as amended, the CW BRANCH OPERATOR has the exclusive right to provide Freight Rail Service, as defined therein, on the CW BRANCH, and the STATE may not admit any other railroad, operator and user to any part of the CW BRANCH that would adversely impact operations without conferring with the CW BRANCH OPERATOR prior to allowing access to the CW BRANCH; and

WHEREAS, contingent upon the availability of STATE funds sufficient to construct certain capacity improvements, the STATE is willing to grant BNSF limited overhead trackage rights over the JOINT TRACKAGE for the sole purpose of providing rail service to the facility of HIGHLINE GRAIN; and

WHEREAS, the STATE has conferred with the CW BRANCH OPERATOR regarding the proposed grant of trackage rights to BNSF, and the CW BRANCH OPERATOR has advised the STATE that the STATE's grant of such trackage rights to BNSF on the terms and conditions set forth herein would not adversely impact operations on the CW BRANCH.

NOW, THEREFORE, pursuant to the above recitals that are incorporated herein as if fully set forth below and in consideration of the terms, conditions, covenants and performances contained in this AGREEMENT, or attached hereto and by this reference made a part of this AGREEMENT, IT IS MUTUALLY AGREED AS FOLLOWS:

### **SECTION I - TRACKAGE SUBJECT TO AGREEMENT**

1.1 Subject to the terms and conditions herein provided, the STATE hereby grants to BNSF the non-exclusive right to operate its trains, locomotives, cars and equipment with its own crews in its own account over the JOINT TRACKAGE as shown on EXHIBIT A, attached to and made a part of this AGREEMENT (the "TRACKAGE RIGHTS"). The JOINT TRACKAGE shall include the track structure of the STATE as described in this AGREEMENT including necessary right-of-way and all appurtenances, signals, communications and facilities of the STATE and all changes in and/or additions, including any Capacity Improvements as hereinafter provided, to said track structure now or in the future.

### **SECTION II - GENERAL CONDITIONS, CONFLICTS BETWEEN PROVISIONS**

2.1 The TRACKAGE RIGHTS granted in this AGREEMENT are subject to the terms and conditions herein. In the event there is a conflict between the terms in the body of this AGREEMENT and the EXHIBITS, then the terms contained in the body of this AGREEMENT shall prevail.

### **SECTION III – USE OF THE JOINT TRACKAGE**

3.1 BNSF's use of the JOINT TRACKAGE shall be for bridge movements only of unit trains of 75-120 cars of grain or grain products and returning unit trains of empty cars ("UNIT TRAINS") between the end points of the JOINT TRACKAGE. BNSF's use of the JOINT TRACKAGE shall be in common with the STATE and the CW BRANCH OPERATOR and any other railroad company or companies authorized by the STATE in accordance with the terms of the OPERATING LEASE to use or access the JOINT TRACKAGE, now or in the future.

3.2 The PARTIES understand and agree that BNSF shall not have the right to:

- (a) Switch industries or provide rail service to any customers located on or served via the JOINT TRACKAGE, except for UNIT TRAINS moving to or from HIGHLINE GRAIN at Milepost 6.30; or

- (b) Set out, pick up or store Equipment, as that term is defined in SECTION 8.1(b) herein, or make up or break up any trains, upon the JOINT TRACKAGE or any part thereof, except as otherwise provided in SECTION 10.15 herein; or
- (c) Serve any industry, team or house track, transload, intermodal or auto facility now existing or hereafter located along or accessible via the JOINT TRACKAGE, except HIGHLINE GRAIN at Milepost 6.30; or
- (d) Permit or admit any third party to use all or any portion of the JOINT TRACKAGE, nor have the right to detour trains of any other railroad over or upon the JOINT TRACKAGE; or
- (e) Connect with itself at any location on or along the JOINT TRACKAGE except at Milepost 1.0; or
- (f) Enter or exit the JOINT TRACKAGE at any point other than at Milepost 1.0 and Milepost 6.30, except that nothing contained herein, upon prior approval by the CW BRANCH OPERATOR, shall preclude the emergency use by BNSF of auxiliary trackage as may be designated by the CW BRANCH OPERATOR for such purpose.

3.3 BNSF agrees to perform its operations (hereinafter called "BNSF's OPERATIONS") and handle its Equipment in a manner that will not unreasonably interfere with or impair the use of the JOINT TRACKAGE by the CW BRANCH OPERATOR or other authorized entities, or with any work on or about the JOINT TRACKAGE by the STATE or its contractor.

3.4 BNSF trains operating on the JOINT TRACKAGE shall be limited based on length, horsepower per trailing ton, gross weight on the rail, and any other restrictions or requirements of the CW BRANCH OPERATOR in effect that govern operations on the JOINT TRACKAGE, provided that BNSF's performance of UNIT TRAIN service is conditioned on maintenance and rehabilitation of the JOINT TRACKAGE to enable safe operation at 286,000 pound gross weight on the rail, such rehabilitation to be funded as provided in SECTION 5.1 herein.

3.5 BNSF shall not permit or admit any third party to the use of all or any portion of the JOINT TRACKAGE, nor under the guise of doing its own business, contract or make any agreement to handle as its own trains, locomotives, cabooses or cars of any such third party which in the normal course of business would not be considered the trains, locomotives, cabooses or cars of BNSF, or in any other way provide haulage service to others on or over the JOINT TRACKAGE.

3.6 Nothing herein shall prohibit BNSF from interchanging traffic to the CW BRANCH OPERATOR for transportation by the CW BRANCH OPERATOR over the JOINT TRACKAGE, including traffic moving in UNIT TRAINS to or from HIGHLINE GRAIN; provided, however, that BNSF shall provide the CW BRANCH OPERATOR with a minimum of sixty (60) days' notice prior to electing to interchange UNIT TRAINS.

## **SECTION IV - ADDITIONAL LIMITATIONS**

4.1 The CW BRANCH OPERATOR hereby acknowledges that the STATE has conferred with it, and agrees that the grant of the TRACKAGE RIGHTS to BNSF as provided herein will not adversely impact operations on the CW BRANCH, provided that BNSF complies with the terms and conditions of this AGREEMENT. BNSF and the CW BRANCH OPERATOR each agree to conduct their respective operations and handle their respective trains and Equipment on the JOINT TRACKAGE in a manner that will not unreasonably interfere with or impair the use of the JOINT TRACKAGE by the other PARTY or any other authorized user of the JOINT TRACKAGE.

## **SECTION V - CONTINGENCIES - CAPACITY IMPROVEMENTS**

5.1 This AGREEMENT shall be contingent upon parties other than the CW BRANCH OPERATOR securing funding for and completion of certain Capacity Improvements on the JOINT TRACKAGE as defined in EXHIBIT B attached to and made a part of this AGREEMENT, including but not limited to upgrading the JOINT TRACKAGE to enable safe operation at 286,000 pound gross weight on the rail, (hereinafter referred to as "STATE's CAPACITY IMPROVEMENTS"). The STATE's CAPACITY IMPROVEMENTS shall be determined to have been completed based on a joint inspection of the JOINT TRACKAGE by, and the agreement of, all PARTIES. The TRACKAGE RIGHTS granted in this AGREEMENT shall not take effect unless and until such funding has been obtained and the STATE's CAPACITY IMPROVEMENTS have been completed, the BNSF's CAPACITY IMPROVEMENTS defined in EXHIBIT C attached to and made a part of this AGREEMENT have been completed, and BNSF has obtained all GOVERNMENT APPROVALS as provided in SECTION 7.1.

5.2 The STATE is under no obligation to seek funding for the STATE's CAPACITY IMPROVEMENTS. Funding for the STATE's CAPACITY IMPROVEMENTS may be made available by the STATE or any organization that is not a PARTY to this AGREEMENT. Nothing in this AGREEMENT obligates the STATE to reimburse any PARTY or organization that provides funding for the STATE's CAPACITY IMPROVEMENTS.

5.3 This AGREEMENT shall further be contingent upon the completion of certain Capacity Improvements to the BNSF CW BRANCH TRACKAGE (hereinafter referred to as "BNSF's CAPACITY IMPROVEMENTS") by BNSF. The BNSF's CAPACITY IMPROVEMENTS are further defined in EXHIBIT C attached to and made a part of this AGREEMENT. BNSF's CAPACITY IMPROVEMENTS shall be determined to have been completed based on a joint inspection and the agreement of, all PARTIES. BNSF is under no obligation to complete BNSF's CAPACITY IMPROVEMENTS until the STATE's CAPACITY IMPROVEMENTS have been completed and HIGHLINE GRAIN is certified as a grain shuttle loading facility.

5.4 In the event a connection track or tracks (hereinafter referred to as "BNSF CONNECTION TRACK(S)") is requested or needed by BNSF to utilize the TRACKAGE RIGHTS granted to BNSF herein, BNSF shall construct, maintain, repair and renew, at BNSF's sole expense, the portion of the BNSF CONNECTION TRACK(S) located on the right-of-way or property of BNSF. BNSF shall own those portions of the BNSF CONNECTION TRACK(S) which connect to or are adjacent to the JOINT TRACKAGE and which are located on the right-of-way or property of BNSF.

5.5 If any portion of the BNSF CONNECTION TRACK(S) shall be constructed on the STATE'S property or right-of-way, at the request of the STATE, BNSF shall construct such portion at its sole cost and expense. The STATE shall own those portions of the BNSF CONNECTION TRACK(S) which are located on the STATE's property or right-of-way.

5.6 Any portion of the BNSF CONNECTION TRACKS located on the STATE'S property or right-of-way shall, upon completion, become part of the JOINT TRACKAGE as defined in this AGREEMENT.

## **SECTION VI - COMPENSATION**

6.1 Subject to the terms and conditions of this AGREEMENT, the STATE shall grant BNSF use of the JOINT TRACKAGE in exchange for compensation from BNSF (hereinafter referred to as "COMPENSATION"). COMPENSATION shall be defined in EXHIBIT D attached hereto and made a part of this AGREEMENT.

## **SECTION VII - TERM**

7.1 The TRACKAGE RIGHTS granted in this AGREEMENT are contingent upon and become effective only if the necessary GOVERNMENT APPROVALS, as defined in SECTION 11.1 herein, consenting to or authorizing the TRACKAGE RIGHTS granted hereunder are obtained. In the event the STATE's CAPACITY IMPROVEMENTS and/or the BNSF's CAPACITY IMPROVEMENTS are completed after the necessary GOVERNMENT APPROVALS have been obtained, the latest of the dates shall be the effective date of the TRACKAGE RIGHTS granted in this AGREEMENT.

7.2 Unless terminated earlier pursuant to the terms and conditions set forth herein, this AGREEMENT shall remain in effect for so long as the Eastern Washington Gateway Railroad Company remains the CW Branch Operator pursuant to the OPERATING LEASE or for an initial period of twenty (20) years from the EXECUTION DATE as defined in the concluding paragraph of this AGREEMENT (hereinafter referred to as the "TERM").

7.3 In the event that the OPERATING LEASE with Eastern Washington Gateway Railroad Company expires or is terminated within the initial period of twenty (20) years from the EXECUTION DATE of this AGREEMENT, then the STATE and BNSF will use reasonable efforts to reach agreement with the successor CW Branch Operator to maintain this AGREEMENT on the same or substantially similar terms.

7.4 Upon termination or expiration of the TERM of this AGREEMENT, within sixty (60) days following such termination or expiration, BNSF, at its sole cost and expense, shall seek authority or exemption from the Surface Transportation Board ("STB") to discontinue its TRACKAGE RIGHTS over the JOINT TRACKAGE. BNSF shall be solely responsible for any protective condition or benefits imposed by any judicial, regulatory or governmental body for the benefit of BNSF's employees or otherwise required to be paid to such employees under a BNSF collective bargaining or other agreement, howsoever arising, including as a consequence of the termination or expiration of this AGREEMENT or BNSF's discontinuance of operations on the JOINT TRACKAGE.

**SECTION VIII - LIABILITY**

8.1 For purposes of this AGREEMENT, the following definitions shall apply:

- (a) **“Loss and/or Damage”** shall mean injury to or death of any person, and loss or damage to any property, which arises out of an incident occurring on the JOINT TRACKAGE and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment. Loss and/or Damage shall be reduced by any amount recovered from third parties.
- (b) **“Equipment”** shall mean (i) trains, locomotives, cars and cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the JOINT TRACKAGE, and (iii) vehicles and machinery that, at the time of an occurrence, are on the JOINT TRACKAGE, or the right-of-way for such tracks, for the purpose of the maintenance or repair thereof or the clearing of wrecks thereon.
- (c) **“Track Caused Derailment”** means a derailment, collision or other incident directly resulting from track conditions caused by defects in the JOINT TRACKAGE, including, but not limited to, wide gauge, excessive cross level, joint pull apart, thermal expansion and broken rails.
- (d) References to BNSF, the CW BRANCH OPERATOR and the STATE shall include their respective directors, officers, agents and employees.

8.2 In the event of a Track Caused Derailment for which the CW BRANCH OPERATOR is not otherwise reimbursed by a third party,



8.3 Except as provided in SECTION 8.2 for Track Caused Derailment(s), as between the PARTIES hereto only, Loss and/or Damage shall be borne by the PARTIES as follows:

- (a) **BNSF involved, CW BRANCH OPERATOR not involved**

Except as provided in SUBSECTIONS (d) and (e) below, whenever any Loss and/or Damage occurs with the Equipment in the possession or in the account of, BNSF being involved, without the Equipment in the possession or in the account

of, the CW BRANCH OPERATOR being involved, BNSF shall assume all liability for and release, indemnify, defend and hold harmless the CW BRANCH OPERATOR and the STATE from and against such Loss and/or Damage.

(b) **CW BRANCH OPERATOR involved, BNSF not involved**

Whenever any Loss and/or Damage occurs with the Equipment in the possession or in the account of, the CW BRANCH OPERATOR being involved, without the Equipment in the possession or in the account of, BNSF being involved, liability for such Loss and/or Damage shall be governed by the provisions of the OPERATING LEASE.

(c) **BNSF and CW BRANCH OPERATOR involved**

Except as provided in SUBSECTIONS (d) and (e) below, whenever any Loss and/or Damage occurs with the Equipment in the possession or in the account of, both BNSF and the CW BRANCH OPERATOR being involved, BNSF and the CW BRANCH OPERATOR shall separately assume all liability for Loss and/or Damage to its own Equipment and its own directors, officers, agents, and employees or persons in its own care and custody and shall equally assume all liability for all other Loss and/or Damage including, but not limited to, Loss and/or Damage to third parties. BNSF and the CW BRANCH OPERATOR shall release, indemnify, defend and hold harmless each other and the STATE for their respective portions of the Loss and/or Damage.

(d) With respect to any Loss and/or Damage arising under SUBSECTIONS 8.2(a) and 8.2(c) herein, and notwithstanding the provisions of those subsections, whenever any Loss and/or Damage occurs as a result of the fault, failure, negligence, misconduct, nonfeasance or misfeasance of the STATE or any third party contractor or invitee of the STATE, to the extent permitted by law, the STATE shall assume liability therefor and shall release, indemnify, defend and hold harmless BNSF and the CW BRANCH OPERATOR from and against such Loss and/or Damage.

(e) Notwithstanding the provisions of SUBSECTION 8.2(c) herein, either BNSF or the CW BRANCH OPERATOR shall assume and bear all liability for Loss and/or Damage if such Loss and/or Damage is caused by the acts or omissions of its employee or any person under its custody and control who is under the influence of drugs or alcohol.

8.4 The indemnification obligation assumed by a PARTY under this AGREEMENT shall include indemnity for an indemnified PARTY's affiliates and shall also include indemnity for strict liability resulting from violation or alleged violation of any legal requirements including, without limitation, the Federal Employer's Liability Act or state based worker's compensation laws and regulations, the Occupational Safety and Health Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Water Act, the Oil Pollution Act, the Locomotive Inspection Act and the Safety Appliance Act.

8.5 Notwithstanding the foregoing, no PARTY hereto shall be liable for or indemnify any other PARTY against any punitive or exemplary damages resulting from the acts, omissions, or conduct of such other PARTY.

8.6 For purposes of SECTION 8 herein, a pilot furnished by the CW BRANCH OPERATOR pursuant to SECTION 10.12(iii) herein shall be considered as a person in the care and custody of BNSF while such person is on duty as a pilot on a BNSF train. The CW BRANCH OPERATOR shall be solely responsible for payment of compensation and benefits to such pilot and for compliance with any state reporting requirements regarding such pilot. BNSF shall not exercise any control whatsoever over the employment, discharge, compensation of, or services rendered by, such pilot.

8.7 In the case of Loss and/or Damage suffered by an employee of BNSF or the CW BRANCH OPERATOR, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability, or other law, and any PARTY is required to pay said compensation in installments over a period of time, such PARTY shall not be released from paying any such future installments by reason of the expiration or other termination of this AGREEMENT.

#### SECTION IX - INSURANCE

9.1 To comply with its indemnity obligations under SECTION VIII herein, BNSF, at BNSF'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 BNSF under this AGREEMENT with a limit of not less than [REDACTED] [REDACTED] single limit for personal injury per occurrence and single limit for property of [REDACTED] for damage per occurrence, such limits to be reviewed by the STATE every five (5) year intervals, the STATE and BNSF shall meet and confer in good faith to determine whether modifications should be made to the insurance requirement. BNSF shall furnish to the STATE and to the CW BRANCH OPERATOR a certificate(s) or other evidence of insurance from an authorized representative evidencing the above coverage in the form of a policy (or policies) at the time of execution of this AGREEMENT. Such insurance shall contain contractual liability which will cover the obligations assumed under this AGREEMENT and an endorsement naming the STATE and the CW BRANCH OPERATOR as "additional insureds." In addition, such insurance shall contain notification provisions under which the insurance company agrees to give thirty (30) calendar days' written notice to the STATE and the CW BRANCH OPERATOR of any material change in or cancellation of the policy. These endorsements and notice provisions shall be stated on the certificate of insurance provided to the STATE and the CW BRANCH OPERATOR. BNSF shall furnish to the STATE and the CW BRANCH OPERATOR certificates of insurance or a letter of self-insurance from an authorized individual evidencing the above coverage within thirty (30) days of execution of this AGREEMENT and annually thereafter. Such insurance shall include coverage for:

- (i) Property damage liability which shall include but not be limited to, damage or destruction of any and all property including public liability, bill of lading and foreign line rolling stock;
- (ii) Seepage and pollution coverage, including without limitation, coverage applicable in the event of railroad accident derailment or overturn; and

- (iii) Evacuation expense coverage.

9.2 BNSF, at its sole option, may comply with these insurance requirements through a program of self-insurance. Any self-insured retention or other financial responsibility for claims shall be covered directly by BNSF in lieu of insurance. Any and all STATE liabilities that would otherwise, in accordance with the obligations of this AGREEMENT, be covered by BNSF's insurance will be covered as if BNSF elected not to include a deductible, self-insured retention or other financial responsibility for claims.

9.3 The STATE and the CW BRANCH OPERATOR acknowledge that on the EXECUTION DATE of this AGREEMENT, the OPERATING LEASE requires that the CW BRANCH OPERATOR procure or cause to be procured and maintain or cause to be maintained, during the continuance of the OPERATING LEASE, railroad operating and liability insurance covering liability with a limit of not less than [REDACTED] single limit for personal injury per occurrence and single limit for property of [REDACTED] for damage per occurrence. Prior to the commencement of services governed by this AGREEMENT, such insurance shall contain contractual liability which will cover the obligations assumed under this AGREEMENT and an endorsement naming BNSF as "additional insured." In addition, such insurance shall contain notification provisions under which the insurance company agrees to give thirty (30) calendar days' written notice to BNSF of any material change in or cancellation of the policy. These endorsements and notice provisions shall be stated on the certificate of insurance provided to BNSF. The CW BRANCH OPERATOR shall furnish to BNSF certificates of insurance evidencing the above coverage in the form of a policy (or policies) within thirty (30) days of execution of this AGREEMENT and annually thereafter. Such insurance shall include coverage for:

- (i) Property damage liability which shall include but not be limited to, damage or destruction of any and all property including public liability, bill of lading and foreign line rolling stock;
- (ii) Seepage and pollution coverage, including without limitation, coverage applicable in the event of railroad accident derailment or overturn; and
- (iii) Evacuation expense coverage.

9.4 Any insurance policy procured by the CW BRANCH OPERATOR shall be written by a reputable insurance company authorized to do business in the State of Washington and meeting the requirements of Section 16 of the OPERATING LEASE.

Failure to provide evidence of the coverage as required by this SECTION IX shall entitle, but not require, any PARTY other than the PARTY that failed to provide such evidence of coverage to terminate this AGREEMENT immediately. Acceptance of a certificate that does not comply with this SECTION shall not operate as a waiver of any PARTY's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by any PARTY shall not be deemed to release or diminish the liability of such PARTY including, without limitation, liability under the indemnity provisions of this AGREEMENT. Damages recoverable by any other PARTY shall not be limited by the amount of the required insurance coverage.

In the event of a claim or lawsuit arising out of this AGREEMENT, the PARTIES will make available any required policy covering such claim or lawsuit.

These insurance provisions are intended to be a separate and distinct obligation on the part of each PARTY. Therefore, these provisions shall be enforceable and the PARTIES shall be bound thereby regardless of whether or not indemnity provisions are determined to be enforceable in the jurisdiction in which the work covered hereunder is performed.

**SECTION X - MAINTENANCE, INSPECTIONS, ADDITIONS,  
OPERATION, AND CONTROL**

10.1 The STATE and BNSF acknowledge that under the OPERATING LEASE, the CW BRANCH OPERATOR has the right and the responsibility to perform all normalized maintenance (hereinafter referred to as "NORMALIZED MAINTENANCE") and repair of the CW BRANCH including the JOINT TRACKAGE. The CW BRANCH OPERATOR shall perform all responsibilities as assigned in the OPERATING LEASE. The CW BRANCH OPERATOR shall invoice and subject to SECTION 10.1 (a), (b) and (c), the STATE shall reimburse the CW BRANCH OPERATOR for all costs incurred by the CW BRANCH OPERATOR for the performance of NORMALIZED MAINTENANCE of the JOINT TRACKAGE.

- (a) The STATE is only responsible to reimburse for NORMALIZED MAINTENANCE of the JOINT TRACKAGE to the level allowed by COMPENSATION that is generated by this AGREEMENT.
- (b) The PARTIES acknowledge the STATE must receive appropriation authority from the legislature in order to be able to reimburse for NORMALIZED MAINTENANCE of the JOINT TRACKAGE. Absent appropriation authority, the STATE has no obligation or responsibility for reimbursement for NORMALIZED MAINTENANCE of the JOINT TRACKAGE.
- (c) The PARTIES further acknowledge that reimbursement for NORMALIZED MAINTENANCE under SECTION 10.1 of this AGREEMENT shall be reduced by the CW BRANCH OPERATOR's minimum maintenance obligation for NORMALIZED MAINTENANCE as defined in the OPERATING LEASE between the STATE and the CW BRANCH OPERATOR. Nothing in this AGREEMENT shall absolve the STATE of its responsibility for "REHABILITATION WORK" as defined in Section 11 of the OPERATING LEASE.
- (d) Within thirty (30) days after the end of each calendar month, the CW BRANCH OPERATOR shall invoice the STATE for all costs incurred by the CW BRANCH OPERATOR for the performance of NORMALIZED MAINTENANCE of the JOINT TRACKAGE during such calendar month as reduced pursuant to SUBSECTION 10.1(c) above. Subject to SECTION 10.1(a) and (b), the STATE shall pay the CW BRANCH OPERATOR's invoice within sixty (60) days of the STATE's receipt of such invoice.

10.2 At all times and on reasonable advance notice to the CW BRANCH OPERATOR, BNSF shall have the right to inspect the JOINT TRACKAGE to determine compliance with the terms of this AGREEMENT. In no event shall BNSF be obligated to make any such inspections, and BNSF shall not be liable for any failure to make any such inspections or failure to identify any matters which are not in compliance with this AGREEMENT. In no event shall the conducting of inspections be deemed to result in a waiver of compliance with any terms of this AGREEMENT by any Party.

- (a) The STATE and the CW BRANCH OPERATOR will perform a semi-annual joint inspection of the JOINT TRACKAGE with representatives of the STATE upon reasonable advance notice for calendar years 2016 and 2017, and annual joint inspections thereafter. Appropriate representatives from both the STATE and the CW BRANCH OPERATOR shall, and authorized representative from BNSF may attend, participate in and cooperate with the joint inspection(s) via hi-rail or other suitable means of railroad track inspection. Inspection of the JOINT TRACKAGE by the STATE does not relieve the CW BRANCH OPERATOR from the rights and responsibilities as defined in its OPERATING LEASE with the STATE. The STATE may perform more frequent inspections of the JOINT TRACKAGE at its election at any time during the term of this AGREEMENT as provided in the OPERATING LEASE.

10.3 Except as provided in this Section 10.3, the CW BRANCH OPERATOR shall keep and maintain the JOINT TRACKAGE in accordance with Federal Railroad Administration Class 2 Standards capable of safely handling UNIT TRAINS with rail cars of up to and including 286,000 pound gross weight on the rail. In the event that COMPENSATION generated by this AGREEMENT is not authorized by the legislature and not provided to the CW BRANCH OPERATOR, the CW BRANCH OPERATOR may perform such reduced level of maintenance on the JOINT TRACKAGE as consistent with the funding that is available so long as the JOINT TRACKAGE (1) shall not be less than Federal Railroad Administration Class 1 Standards and (2) shall be capable of safely handling UNIT TRAINS with rail cars of up to and including 286,000 pound gross weight on the rail.

10.4 In the event that BNSF or the CW BRANCH OPERATOR desires that the JOINT TRACKAGE be improved to a condition in excess of the standard set forth in this SECTION, or desires that other changes in and/or additions to be made to the JOINT TRACKAGE, said improvements or changes and/or additions shall be funded in advance solely by and shall be made by the PARTY requesting the improvements, changes and/or additions. Thereafter, such improvements, changes in and/or additions to the JOINT TRACKAGE shall be made by the CW BRANCH OPERATOR, become part of the JOINT TRACKAGE and shall be maintained by the CW BRANCH OPERATOR in compliance with this AGREEMENT, The STATE retains the right to approve and perform improvements.

10.5 In the event that the STATE, as required by this AGREEMENT, or from time to time in its sole discretion, desires to make changes in and/or additions to or retirements from the JOINT TRACKAGE, it shall notify BNSF and the CW BRANCH OPERATOR in writing. Such changes in and/or additions to the JOINT TRACKAGE shall become a part of the JOINT TRACKAGE or in the case of retirements shall be excluded from the JOINT TRACKAGE.

10.6 The CW BRANCH OPERATOR shall have the exclusive right and obligation to perform all construction, maintenance, repair and renewal of the JOINT TRACKAGE. The CW BRANCH OPERATOR shall make reasonable efforts to ensure that BNSF is given a minimum of ten (10) calendar days advance notice of such construction, maintenance, repair and renewal work. The STATE retains the right to approve and perform all "Rehabilitation Work" as defined in the OPERATING LEASE in a manner that does not unreasonably impede the CW BRANCH OPERATOR's operation of railcar traffic on the JOINT TRACKAGE.

10.7 The TRACKAGE RIGHTS granted hereunder shall give BNSF access to and joint use of the JOINT TRACKAGE. The management and operation (including dispatching) and NORMALIZED MAINTENANCE of the JOINT TRACKAGE shall, at all times, be under the exclusive direction and control of the CW BRANCH OPERATOR. Additionally the movement of all Equipment over and along the JOINT TRACKAGE shall be in accordance with such reasonable operating rules as the CW BRANCH OPERATOR shall from time to time institute (including, without limitation, the General Code of Operating Rules) except BNSF and the CW BRANCH OPERATOR shall be treated equally in the management, operation (including dispatching) and maintenance of the JOINT TRACKAGE. BNSF shall at BNSF's sole cost and expense, obtain, install and maintain necessary communication equipment to allow BNSF's Equipment to communicate with the CW BRANCH OPERATOR's dispatching and signaling facilities. The CW BRANCH OPERATOR shall provide BNSF with one hundred and twenty (120) days prior written notice of the adoption or implementation of new communication or signaling systems on the JOINT TRACKAGE which have not generally been adopted in the railroad industry as of the date of such written notification.

10.8 If the use of the JOINT TRACKAGE shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, no PARTY shall have or make any claim against any other PARTY for loss, damage or expense caused by or resulting solely from such interruption or delay.

10.9 The STATE and/or the CW BRANCH OPERATOR may from time to time substitute any track or tracks included in the JOINT TRACKAGE and delineated on EXHIBIT A to this AGREEMENT as long as BNSF is provided with a continuous route of equal utility for the operations of its Equipment between the termini of the JOINT TRACKAGE. When substitute tracks are used as provided herein, the terms and conditions of this AGREEMENT shall apply to BNSF's access and use of such substitute tracks as if all movement had been made over the JOINT TRACKAGE.

10.10 Unless provided otherwise in this AGREEMENT, BNSF shall be responsible for furnishing, at its sole cost and expense, all labor, fuel, train supplies and other supplies necessary for the operation of its Equipment over the JOINT TRACKAGE.

10.11 Unless provided otherwise in this AGREEMENT, BNSF shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in BNSF's account on the JOINT TRACKAGE, and the CW BRANCH OPERATOR shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in the CW BRANCH OPERATOR's account on the JOINT TRACKAGE. Except as may be specifically provided for in this AGREEMENT, nothing contained herein is intended to change practices with respect to the interchange of traffic between BNSF and the CW BRANCH OPERATOR.

10.12 Except as otherwise may be provided in this AGREEMENT, BNSF shall operate its Equipment over the JOINT TRACKAGE with its own employees.

- (i) BNSF shall be responsible for ensuring that its employees are certified and qualified in compliance with legal requirements and shall ensure that all its employees engaged in or connected with BNSF's OPERATIONS pursuant to this AGREEMENT shall, at all times, be in compliance with legal requirements. Unless provided otherwise in the AGREEMENT, pending qualification of train and engine crews of BNSF or as requested by BNSF thereafter, the CW BRANCH OPERATOR shall furnish a pilot to assist in operating trains of BNSF on, over or along the JOINT TRACKAGE.
- (ii) Upon request of BNSF and at BNSF's sole cost and expense, the CW BRANCH OPERATOR shall qualify one or more of BNSF's supervisory officers as pilots and such supervisory officer or officers so qualified shall further qualify employees of BNSF engaged in or connected with BNSF's OPERATIONS on, over or along the JOINT TRACKAGE.
- (iii) Pursuant to a separate agreement, the CW BRANCH OPERATOR shall upon the request of BNSF, provide pilots for the BNSF trains operating on the JOINT TRACKAGE.

10.13 If any employee of BNSF shall neglect, refuse or fail to abide by the CW BRANCH OPERATOR's rules, instructions and restrictions governing the operation on, over or along the JOINT TRACKAGE or legal requirements, such employee shall upon written request of the CW BRANCH OPERATOR, be prohibited by BNSF from working on, over or along the JOINT TRACKAGE. If either PARTY shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of BNSF, then upon such notice presented in writing, the CW BRANCH OPERATOR and BNSF shall promptly hold a joint investigation in which the PARTIES concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees participating in such investigation. The joint investigation shall be conducted in accordance with the terms and conditions of schedule or labor agreements between BNSF and its employees. If, in the judgment of the CW BRANCH OPERATOR, the result of any investigation warrants that an employee of BNSF be withdrawn from service on, over or along the JOINT TRACKAGE, then BNSF shall withdraw such employee from such service upon the CW BRANCH OPERATOR's written request for withdrawal. BNSF releases, indemnifies, defends and holds the CW BRANCH OPERATOR harmless from and against any and all claims and expenses arising from or related to any withdrawal pursuant to this SECTION X.

10.14 If the disciplinary action is appealed by an employee of BNSF to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on, over or along the JOINT TRACKAGE.

10.15 If any Equipment of BNSF is bad ordered en route on the JOINT TRACKAGE and it is necessary that it be set out, and only light repairs to the Equipment are required, then such bad ordered Equipment shall be promptly repaired and removed from the JOINT TRACKAGE by

BNSF. The CW BRANCH OPERATOR may, upon request of BNSF and at BNSF's sole cost and expense, furnish the required labor and materials and perform light repairs to make such bad ordered Equipment safe for movement.

10.16 If Equipment of BNSF shall become derailed, wrecked, or otherwise disabled while upon the JOINT TRACKAGE, it shall be re-railed or cleared by the CW BRANCH OPERATOR, except that employees of BNSF may, with the CW BRANCH OPERATOR's permission, re-rail BNSF's derailed Equipment on the JOINT TRACKAGE whenever use of motorized on or off track Equipment is not required and prior permission was granted by the CW BRANCH OPERATOR. Any re-railing of Equipment by BNSF shall be subject to, and BNSF agrees to follow directions of, the CW BRANCH OPERATOR. The CW BRANCH OPERATOR reserves the right to determine whether to re-rail or clear Equipment of BNSF when, in the sole judgment of the CW BRANCH OPERATOR, the CW BRANCH OPERATOR deems it advisable to do so to minimize delays and interruptions to train movements. The reasonable cost and expenses of re-railing or clearing derailed, wrecked, or disabled Equipment and any loss or damage incidental thereto shall be borne by the PARTY allocated responsibility under this AGREEMENT.

10.17 If it becomes necessary to make repairs to or adjust or transfer the lading of a crippled or defective car in order to move it off of the JOINT TRACKAGE, the CW BRANCH OPERATOR shall have the right but not the obligation to perform such work. For such service, BNSF shall pay the CW BRANCH OPERATOR a reasonable charge therefor which shall be comparable to the charge assessed by BNSF for such service.

10.18 If by reason of any mechanical failure or for any other cause not resulting from an accident or derailment, Equipment of BNSF becomes stalled or unable to proceed under its own power, or if in emergencies crippled or otherwise defective cars are set out of BNSF's trains on the JOINT TRACKAGE, the CW BRANCH OPERATOR shall have the right but not the obligation to furnish motive power or such other assistance as may be necessary to haul, help, or push such Equipment, or to properly move the disabled Equipment off the JOINT TRACKAGE. For such service, BNSF shall pay the CW BRANCH OPERATOR a reasonable charge therefor, which shall be comparable to the charge assessed by BNSF for such service.

10.19 BNSF, at the STATE's request, shall be responsible for reporting to the STATE the statistical data as defined in EXHIBIT E of this AGREEMENT attached to and made a part of this AGREEMENT.

## **SECTION XI - GOVERNMENTAL OR REGULATORY APPROVALS**

11.1 BNSF shall be responsible for obtaining, at BNSF's sole cost and expense, the consent, approval or authority of applicable governmental agencies or departments, including, but not limited to the STB (hereinafter collectively referred to as "GOVERNMENT APPROVALS") necessary for BNSF's OPERATIONS pursuant to this AGREEMENT. In the event any applications, petitions or filings by the STATE are required for BNSF to obtain the necessary GOVERNMENT APPROVALS pursuant to the preceding sentence, then the STATE will cooperate with BNSF, undertake and diligently prosecute any applications, petitions or filings by the STATE at BNSF's expense.

11.2 In the event BNSF is unable to obtain the GOVERNMENT APPROVALS necessary for BNSF's OPERATIONS within one hundred and twenty (120) calendar days of the EXECUTION DATE of this AGREEMENT, this AGREEMENT shall expire. The STATE and the CW BRANCH OPERATOR shall each have the right, but not the obligation, to review any BNSF applications, petitions, filings or requests for the GOVERNMENT APPROVALS described in this SECTION XI. BNSF shall provide the STATE and the CW BRANCH OPERATOR with advance written copies of any such applications, petitions, filings or requests, and provide the STATE and the CW BRANCH OPERATOR with a reasonable period of time to review and comment on such applications, petitions, filings or requests. The PARTIES further agree that BNSF's obtaining of such advance GOVERNMENT APPROVALS is a fundamental condition to the effectiveness of this AGREEMENT without which the use of the JOINT TRACKAGE set forth herein shall not be granted to BNSF and, in such event, this AGREEMENT shall expire.

## SECTION XII - NOTICES

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

If intended for the STATE:

Director, Freight Systems Division  
Washington State Department of Transportation  
310 Maple Park Avenue SE  
P.O. Box 47342  
Olympia, WA 98504-7342

If intended for the BNSF:

AVP Contract and Joint Facilities  
2600 Lou Menk Drive  
P.O. Box 961034  
Fort Worth, TX 76161-0034  
Email: [OPRDLJointFacilities@bnsf.com](mailto:OPRDLJointFacilities@bnsf.com)

If intended for the CW BRANCH OPERATOR:

Treasurer  
Eastern Washington Gateway Railroad Company  
620 Kruk Street  
Lemont, IL 60439  
Email: [t.klimczak@usrp-ltd.com](mailto:t.klimczak@usrp-ltd.com)

### SECTION XIII - LAWS TO BE OBSERVED

13.1 BNSF and the CW BRANCH OPERATOR shall comply with all applicable federal, state, and local laws, rules, regulations, and orders pertaining to operations on the JOINT TRACKAGE, including but not limited to 49 CFR Parts 200 through 286 and WAC 480-62 and any applicable state or federal environmental, labor, employer liability and safety and similar law applicable to BNSF or the CW BRANCH OPERATOR respectively. If any action or inaction by the BNSF or the CW BRANCH OPERATOR results in a fine, penalty, cost, or charge being imposed or assessed on or against BNSF or the CW BRANCH OPERATOR and/or the STATE, BNSF shall assume and bear any such fine, penalty, cost, or charge caused by its action or inaction, and the CW BRANCH OPERATOR shall assume and bear any such fine, penalty, cost or charge caused by its action or inaction. In the event the STATE, for any reason, is required to pay the same, the responsible PARTY, upon demand, shall promptly reimburse, indemnify, and hold harmless the STATE for or on account of such fine, penalty, cost or charge and shall also pay all expenses and attorney's fees incurred in defending any action that may be brought against the STATE on account thereof. The responsible PARTY shall, in the event of any such action and upon notice thereof from the STATE, defend any such action(s) free of cost, charge and expense to the STATE.

13.2 In connection with this AGREEMENT, no PARTY shall discriminate against any employee or applicant for employment because of race, creed, marital status, age, color, sex or national origin, or disability, except for a bona fide occupational qualification.

13.3 If the performance of this AGREEMENT by BNSF or the CW BRANCH OPERATOR 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 PARTY that creates the solid or hazardous waste. In no event shall the STATE be identified as the generator of the wastes. The BNSF or CW BRANCH OPERATOR 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 PARTY creating the waste shall hold harmless, indemnify and defend the STATE and the non-offending PARTY, 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 PARTY creating the waste. This provision shall survive the termination of this AGREEMENT for any reason.

13.4 At no time during the TERM of this AGREEMENT shall BNSF, without the prior written consent of the STATE, maintain, treat, dispose of, store or have on the JOINT TRACKAGE, or permit any other party to have, maintain, treat, dispose of, or store on the JOINT TRACKAGE, 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. The obligations of the CW BRANCH OPERATOR and the STATE with respect to the maintenance, treatment, disposal or storage on the JOINT TRACKAGE of a Hazardous Substance or Hazardous Waste are set forth in the OPERATING LEASE.

## **SECTION XIV – APPLICABLE LAW/VENUE**

14.1 This AGREEMENT and any claims, disputes or controversies arising hereunder shall be governed by and construed in accordance with the laws of the State of Washington. Any court action brought pursuant to this AGREEMENT must be filed in state court in Spokane County, Washington or in federal district court in the United States District Court for the Eastern District of Washington.

## **SECTION XV - DISPUTE RESOLUTION**

15.1 If at any time a question or controversy shall arise between any of the PARTIES hereto in connection with this AGREEMENT upon which those PARTIES cannot agree, an affected PARTY shall have the right to require a meeting of designated representatives of the involved PARTIES with authority to settle the matter within thirty (30) days of written notice of a desire to meet. If such question or controversy cannot be resolved within thirty (30) days of the meeting of such PARTIES, then the aggrieved PARTY may demand arbitration. Unless other procedures are agreed to by the involved PARTIES, arbitration shall be governed by the rules and procedures set forth in this SECTION XV. The PARTIES intend that any dispute arising out of this AGREEMENT that cannot be resolved through negotiation as provided above must be resolved through binding arbitration as set forth in this SECTION XV.

15.2 If the PARTIES to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one PARTY of its desire for arbitration to the other PARTIES, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any PARTY (the notifying PARTY) may notify the other PARTIES (the noticed PARTIES) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed PARTIES shall appoint arbitrators and notify the notifying PARTY in writing of such appointment. Should the noticed PARTIES fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the American Arbitration Association, which shall designate said appointment from the CPR Panel of Distinguished Neutrals, or other similar body of competent neutral arbitrators which may be agreed upon between the PARTIES, upon application by a PARTY after ten (10) days' written notice to the other PARTIES. The arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a PARTY, be appointed in the same manner hereto before stated.

15.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give the PARTIES reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as a PARTY may submit with witnesses required to be sworn, and hear arguments of counsel or others. In no event shall the arbitrator(s) have authority to award indirect, special, consequential, punitive or exemplary damages. If an arbitrator declines or fails to act, the PARTY (or PARTIES in the case of a single arbitrator) by whom the arbitrator was chosen or the American Arbitration Association, as the case may be, shall appoint another to act in the arbitrator's place.

15.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all PARTIES to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court in the United States of America having jurisdiction thereof and enforced as between the PARTIES without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under this AGREEMENT shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, a PARTY shall forthwith comply with said first decision or award immediately after receiving it.

15.5 Each PARTY to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all PARTIES to the arbitration.

15.6 The PARTIES may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

15.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points (or the maximum interest allowed by applicable law, if lower), shall be applied to any and all arbitration awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. For purposes of this SECTION XV, the term "PRIME RATE" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

#### **SECTION XVI - COMPLETE AGREEMENT**

16.1 This AGREEMENT and referenced EXHIBITS contain all of the covenants, stipulations and provisions agreed upon by the PARTIES. No agent, or representative of any PARTY has authority to make, and the PARTIES shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein.

#### **SECTION XVII - EXHIBITS**

17.1 All EXHIBITS to this AGREEMENT are incorporated into and made a part of this AGREEMENT as if set forth herein.

#### **SECTION XVIII - ASSIGNMENT**

18.1 Except as part of a sale of all or substantially all of the rail lines of BNSF, BNSF shall not assign or transfer this AGREEMENT or any of its rights hereunder to any person, firm or corporation without obtaining the prior written consent of the STATE and the CW BRANCH OPERATOR.

**SECTION XIX - AMENDMENT**

19.1 Any PARTY may request changes in these provisions. Such changes that are mutually agreed upon shall be incorporated as written amendments to this AGREEMENT. No variation or alteration of the terms of this AGREEMENT shall be valid unless made in writing and signed by authorized representatives of the PARTIES hereto prior to beginning or continuing any work to be covered by the amendment.

**SECTION XX - COUNTERPARTS**

20.1 This AGREEMENT may be executed in three (3) counterparts, each of which shall be deemed to be an original having identical legal effect.

IN WITNESS WHEREOF, the PARTIES hereto have executed this AGREEMENT as of the date signed last by the PARTIES below ("EXECUTION DATE").

**STATE OF WASHINGTON  
Department of Transportation**

By: Ron Pate  
Ron Pate  
Director  
WSDOT Freight Systems Division

Date: 4/5/16

**BNSF Railway Company**

By: Dell Ward  
Title: VP, Network Strategy

Date: 3/15/16

**Eastern Washington Gateway Railroad Company**

By: Daniel K. Ruedie  
Title: President

Date: 4/4/16

Approved as to form:  
[Signature]

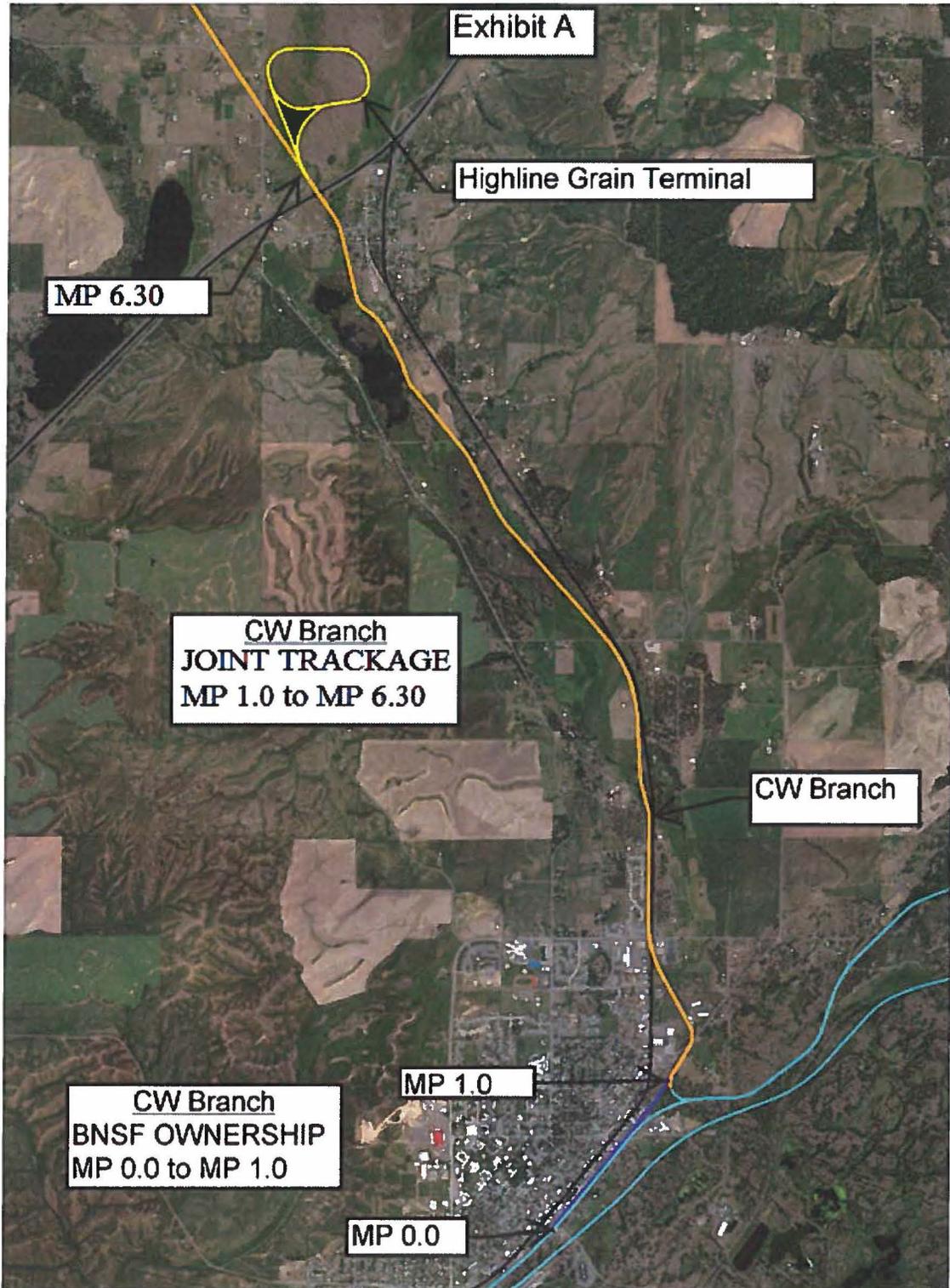
By: Scott Lockwood  
Scott Lockwood  
Assistant Attorney General  
State of Washington

Date: 4/5/16

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

**EXHIBIT A**

**JOINT TRACKAGE of the CW BRANCH**



**EXHIBIT B**

**STATE'S CAPACITY IMPROVEMENTS  
on the  
JOINT TRACKAGE**

**CW Branch Rehabilitation (MP 1 to MP 6.30)**

Crosstie replacement – 7,550 Each  
Rail Replacement – 26,649 T.F. (115# CWR)  
Ballast Distribution – 7,624 Tons  
Surface Line and Dress – 23,244 T.F.  
Ditching – 9,298 L.F.  
Undercut – Approx. 3,500 L.F.  
Culvert Replacement – 142 L.F.  
Bridge Repairs – 15 T.F. (MP 1.38)  
Reconstruct Crossing Track – 596 T.F.

Crossing 066316U – 196 T.F. – Concrete (Cheney/Spokane)	Crossing Panel L=152 T.F.
Crossing 066319P – 64 T.F. – Concrete (Paradise)	Crossing Panel L=32 T.F.
Crossing 066320J – 72 T.F. – Concrete (Rodeo)	Crossing Panel L=40 T.F.
Crossing 066321R – 67 T.F. – Concrete (Jensen)	Crossing Panel L=32 T.F.
Crossing 066322X – 69 T.F. – Timber (Meadow Lake)	Crossing Panel L=32 T.F.
Crossing 066223E – 72 T.F. – Concrete (Med Lk/4 LK)	Crossing Panel L=40 T.F.
Crossing 066325T – 56 T.F. – Timber (Harris)	Crossing Panel L=24 T.F.

**EXHIBIT C**  
**BNSF'S CAPACITY IMPROVEMENTS**  
**on the**  
**BNSF CW BRANCH TRACKAGE**

**MP 0 to MP 1.00 (BNSF Owned)**

<i>Description</i>	<i>Quantity</i>
<b>Rail</b>	
MP 0 to MP 0.34	80 weld kits
MP 0.34 to MP 1.00	6,920 feet
<b>Crossings</b>	
066315M FULL REHAB	48'
<b>Ties</b>	
MP 0 to MP 1.00	400 Cross Ties & 128 Switch Ties
<b>Surface</b>	
MP 0 to MP 1.00	1.0 Miles
Ballast	1.0 Miles
<b>Turnouts</b>	
MP 0 to MP 1.00	7 Total Turnouts (3 #9s 4 #11s)

**Wye Track (BNSF Owned Portion)**

<i>Description</i>	<i>Quantity</i>
<b>Ties</b>	
Wye Track	125 Cross Ties & 50 Switch Ties
<b>Curve Blocks</b>	
Wye Track	250

**EXHIBIT D**  
**COMPENSATION**  
**For use of the**  
**JOINT TRACKAGE**

BNSF agrees to pay the STATE [REDACTED] (hereinafter referred to as the "PER CAR RATE") for each loaded car delivered to and/or pulled from HIGHLINE GRAIN.

BNSF shall remit to the STATE the PER CAR RATE compensation on a quarterly basis for its access to and use of the JOINT TRACKAGE. The PER CAR RATE, is all inclusive and BNSF shall not be charged any utilities, taxes, interest rental, depreciation, ordinary and programmed (capital) maintenance and/or operating expenses. All charges as specified in this AGREEMENT are payable for each quarter and shall be due thirty (30) days following the end of each quarter (April 30<sup>th</sup>, July 31<sup>st</sup>, October 31<sup>st</sup>, and January 31<sup>st</sup>). In the event BNSF shall fail to pay any monies due to the STATE within thirty (30) days following the end of each quarter then BNSF shall pay interest on such unpaid sum at an annual rate equal to twelve percent (12%).

The PER CAR RATE shall be adjusted July 1, 2016 and each July 1 thereafter, using 100 percent of the AAR's Annual Indexes of Chargeout Prices and Wage Rates (1977=100), for the Western District and specifically by the Material Prices, Wage Rates and Supplements Combined (excluding fuel) ("Index") for the year 2014, which shall be used as the base year, compared to the calendar year immediately prior to the year in which the change is to be made effective. Thus, the percentage change from the year 2014 to the year 2015 will be used to adjust the charge July 1, 2016.

Additionally, in calculating adjustments, (i) all published values will be rounded to a thousandth of an index point; (ii) all percent change calculations will be rounded to a tenth of a percent; and (iii) the PER CAR RATE will be rounded to the nearest whole cent. The PARTIES agree that the rounding rule used will be that any fraction less than one-half will be dropped, while any fraction equal to or greater than one-half will be rounded up to the next higher value.

In the event the AAR Railroad Cost Recovery Index (Western District Index of Material Prices, Wage Rates and Supplements Combined (excluding fuel)) ceases to be published the PARTIES shall determine a suitable substitute index. The substitute index shall be the index that most closely matches the AAR Railroad Cost Recovery Index (Western District Index of Material Prices, Wage Rates and Supplements Combined (excluding fuel)). The substitute index shall be used for the remainder of the TERM of the AGREEMENT. If the PARTIES cannot agree on a substitute index within ninety (90) days after the cancellation of the AAR Railroad Cost Recovery Index (Western District Index of Material Prices, Wage Rates and Supplements Combined (excluding fuel)), either BNSF or the STATE may submit the matter to be determined by Dispute Resolution as described in SECTION XV.

The PER CAR RATE shall be adjusted up or down depending on the AAR Railroad Cost Recovery Index (Western District Index of Material Prices, Wage Rates and Supplements Combined (excluding fuel)) changes, but under no circumstances shall the PER CAR RATE ever decrease below [REDACTED]

Nothing herein shall prohibit the CW BRANCH OPERATOR from time to time requesting from BNSF an increase in the PER CAR RATE other than the annual adjustment provided for herein. Such request shall be based on data on the actual costs incurred by the CW BRANCH OPERATOR to maintain the JOINT TRACKAGE.

## **EXHIBIT E**

### **STATISTICAL DATA**

BNSF shall furnish to the STATE for all loaded UNIT TRAINS operated over the JOINT TRACKAGE a statement providing:

- 1.) BNSF train symbol;
- 2.) Car Number;
- 3.) Car Initial;
- 4.) Origin Location;
- 5.) Origin Date;
- 6.) Service Period;
- 7.) Car Weight; and
- 8.) Car Contents or Standard Transportation Commodity Code (STCC).

The statement shall be furnished to the STATE on or before the fifteenth (15<sup>th</sup>) day of each month by BNSF for the UNIT TRAINS operated over the Joint Trackage for the preceding month.