

**LEASE OF RAIL OPERATIONS
AND REAL AND PERSONAL PROPERTY**

**BY AND BETWEEN
THE CITY OF TACOMA AND
WRL LLC**

**PROJECT NO. 2021-112
LEASE NO. L186**

The Lease of Rail Operations and Real and Personal Property (“Agreement”) is entered into as of October 1, 2021, (the “Effective Date”) between the City of Tacoma (“City”) – a first class City under the laws of the State of Washington, by and through the Tacoma Rail Mountain Division, a division of the City of Tacoma– Department of Public Works, hereinafter referred to as “Lessor”, and WRL LLC, a Washington limited liability company and hereinafter referred to as “Lessee”. Each of Lessor and Lessee are sometimes referred to herein individually as a “Party” and collectively as the “Parties”.

WHEREAS, Lessor is owner of the Premises as described herein together with certain rail, ties, ballast, switches, grade crossings, bridges, signs, warning devices, signals, improvements and other appurtenances located on the Premises (collectively Appurtenances), which are located in Pierce County, State of Washington, and

WHEREAS, Lessor uses the Premises and Appurtenances to provide common carrier freight rail service and to store railcars, and

WHEREAS, Lessor has certain obligations to manage the Premises and Appurtenances, and said obligations may include the potential sale of the Premises and Appurtenances at a future date, and

WHEREAS, Lessee will operate a common carrier railroad, agrees to transfer common carrier obligations to provide service to an existing customer located within the area defined herein, and desires to acquire, pursuant to the terms and conditions of this Agreement, certain designated operating rights and responsibilities on the Premises as defined below, and

WHEREAS the Parties believe it would be mutually advantageous if Lessee leased the Premises and Appurtenances from Lessor for the purposes stated herein.

NOW, THEREFORE, for and in consideration of the covenants herein contained, it is agreed between the Parties hereto as follows:

ARTICLE I
DEFINITIONS

SECTION 1.1 **Definitions.** Any term set forth herein that is defined and set forth in Exhibit “B”, attached hereto and by this reference incorporated herein, shall have the meaning as set forth in said Exhibit “B”.

ARTICLE II
RIGHTS AND RESPONSIBILITIES AND FEES

SECTION 2.1 **Grant by Lessor.** Except to the extent expressly provided otherwise in this Agreement, Lessor shall grant to Lessee, on the Effective Date of this Agreement, subject to the terms and conditions set forth in this Agreement, a lease of the Premises and Appurtenances in the following rail corridor:

That portion of the Tacoma Rail Mountain Division right of way acquired from Weyerhaeuser Company by Quit Claim Deed recorded under Pierce County Auditor’s File No. 9508180647, records of Pierce County, Washington, lying between the North line of railroad right of way sold to WRL LLC, by Quit Claim Deed recorded under Pierce County Auditor’s File No. 201909090221, records of Pierce County, Washington, and the North line of the South Half of the Northeast Quarter of the Northeast Quarter of Section 21, Township 17 North, Range 2 East, W.M., in Pierce County Washington (Approximately TRMW Mile Post No. 27.8C).

Situate in the Pierce County, State of Washington; and as further shown in Exhibit “A” attached hereto and by this reference incorporated herein.

The foregoing shall be referred to as the “Premises”.

SECTION 2.2 **Purpose and Authorized Uses.**

- (a) Lessor authorizes Lessee to use and occupy the Premises and Appurtenances for the sole and exclusive purpose of providing freight railroad transportation services, railcar storage and other ancillary uses thereto in a manner consistent with applicable Common Carrier obligations, together with maintaining the Premises, including the tracks, land and improvements located upon Premises as set forth herein.

- (b) The Lessee shall not make any improvements to the Premises or Appurtenances (Improvements) without first requesting and obtaining prior written approval by Lessor. If approved, all Improvements made by the Lessee to the Premises shall be done without cost to Lessor and shall be consistent with the Lessee’s use stated herein. Notwithstanding the above, the Lessee may ask as part of its request above that the Lessor reimburse the Lessee for costs related to the Improvements. Approval of such reimbursement shall be at the sole discretion of the Lessor. Any consideration of reimbursement by Lessor will only occur if

Lessee provides to Lessor a detailed cost breakdown, and an estimated depreciation schedule, if applicable, of the Improvements at the time the Lessee seeks prior written approval for construction of the improvements. All approved reimbursement shall be made according to Section 3.4 herein.

SECTION 2.3 Lessee's Railroad Operation-Related Agreements.

Lessee shall, subject to the terms of this Agreement, administer all records and shall be entitled to all rents or revenues relating to railroad operational agreements (such as freight railroad transportation services, railcar storage agreements, revenue, or car hire agreements) that Lessee enters into during the term of this Agreement or any extension thereof. Lessee agrees to notify Lessor of all such agreements in a timely manner ("Lessee's Railroad Operation-Related Agreements"). In the event Lessee enters into any Railroad Operation-Related Agreement, such agreement shall provide for automatic termination thereof upon termination or expiration of this Agreement unless Lessor shall have provided written election to assume and bear all rights and obligations under such agreement upon the expiration or termination of the term of this Agreement. All rights granted by Lessee to a third party with respect to the Premises, Appurtenances and Improvements shall be subject to and limited by the terms and conditions of this Agreement and shall be subordinate to the rights of the City in and to the Premises, Appurtenances and Improvements.

SECTION 2.4 Prohibited Uses. All uses not consistent with the Authorized Uses set forth herein shall be prohibited. Prohibited Uses shall also include but shall not be limited to the following:

- (a) With the exception of routine rehabilitation and maintenance or emergency response cleanup for derailments or other emergencies as may be required by the terms of this Agreement or Governmental Bodies, all construction activities, property development or other subsurface disturbance shall be prohibited unless approved in writing by Lessor as outlined in Subsection 2.2(b) herein.
- (b) In no event shall Lessee either conduct or suffer to be conducted tie treating, waste treatment, or any underground storage tanks.
- (c) In no event shall Lessee provide or allow passenger rail service without Lessor's prior written approval.
- (d) With the exception of the rail transportation of hazardous materials consistent with Environmental and Transportation Laws and Lessee's common carrier obligations or any activity otherwise expressly authorized by this Agreement, Lessee shall perform no Hazardous Activities on or about the Premises.
- (e) No rights to utilize the Improvements or any other operating rights over the Premises may be granted to any other rail carrier.
- (f) In no event shall Lessee build, or allow to be built, a rail line, extension or spur

on, extending into, off of, or along the Premises without Lessor's prior written approval as outlined in Subsection 2.2(b) herein.

SECTION 2.5 **Removed Intentionally**

SECTION 2.6 **Rights Reserved by Lessor.**

- (a) Lessor shall retain trackage rights over and across the Premises, for the purpose of interchange with the Lessee, the BNSF Railway Company, and the Union Pacific Railroad, until such time that the STB transfer of the Common Carrier obligation is completed.
- (b) Lessor shall retain the right to utilize the Improvements over and across the Leased Premises limited to those rights reasonable and necessary to maintain compliance with Tacoma Rail Mountain Division's common carrier obligations.
- (c) With the exception of any agreements identified in Section 2.3 above, Lessor shall have the sole right and responsibility to administer all records and shall be entitled to all rents or revenues relating to property acquisition agreements, and those property leases, term leases, indefinite term leases, permits, licenses, and easements and encroachments existing on or after the effective date of this Agreement, and from the sales of property surplus to railroad operations.
- (d) Lessor shall retain the rights to any Federal or State tax credits that may be asserted related to ownership of the Premises and Appurtenances.

SECTION 2.7 **Fee.** Lessee shall pay Lessor, upon the Effective Date a fee of **ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200.00)** on or before the Effective date of this Agreement.

SECTION 2.8 **Leasehold Excise Tax/Assessments.** Lessee shall pay the Lessor as an additional charge/fee hereunder, (a) all leasehold excise tax (as required by RCW 82.29A in lieu of real property taxes) to the extent that any is determined to be due as a result of this Agreement, (b) any surface water, fire protection assessments and other governmental charges and assessments (special and general) of every kind and nature levied or assessed against the Premises, and (c) any taxes levied or assessed against the Premises in lieu of the foregoing, in whole or in part. Leasehold excise tax is calculated by the State, and assessed against leasehold interests in real property using a percentage multiplier of either the annual fee required hereunder or an imputed fair market value of the same, and as a result, Lessee shall be responsible for any increases in leasehold excise tax that result from an increase in annual fee for the Premises over the term hereof, or for increases due to an increase in the statutory rate during the term of this Agreement. If Lessee provides the Lessor with a proof of exemption from payment of leasehold excise tax issued by the Washington State Department of Revenue, then Lessee shall not be required to pay leasehold excise tax for the period that such exemption is effective. If the exemption is of limited

duration, Lessee shall be required to obtain documented renewal of such exemption and provide such to the Lessor in order to claim continued exemption under this Agreement.

SECTION 2.9 **Payment.** Payment of all fees shall be made payable to City of Tacoma Treasurer and delivered to City of Tacoma, Department of Public Utilities, PO Box 11007, Tacoma, Washington 98411, or such other address as the Department of Public Utilities may hereafter designate.

SECTION 2.10 **Penalty for Late Payments.** Payment of fees and any other payments due and payable from Lessee under this Agreement shall be subject to a late payment charge of one percent (1%) per month (twelve percent (12%) per annum).

SECTION 2.11 **Lessee's Right to Revenue.** Lessee shall be entitled to set rates, charge for services and retain all revenue derived from operating leased Premises.

ARTICLE III **TERM AND TERMINATION**

SECTION 3.1 **Effective Date and Term.** This Agreement shall become effective as of the Effective Date, and the terms hereof shall continue in effect until the 364th day after the Effective Date (the "Expiration Date"). Notwithstanding the foregoing, to the extent provided herein certain terms and conditions of this Agreement and any related provisions necessary for the enforcement and or administration thereof may survive and be enforceable beyond the term of this Agreement where expressly provided in this Agreement.

SECTION 3.2 **Termination for Material Breach.** In addition to and without prejudice to pursuit of any and all other rights and remedies available at law or in equity, Lessor and Lessee shall have the option to terminate this Agreement prior to the expiration of the full term hereof, upon thirty (30) days' written notice, in the event of a material breach by either party and failure to cure or take substantial steps to cure within thirty (30) days of written notice thereof. Material breach may include, but is not limited to, Lessee's failure to seek STB approval within fourteen (14) days of the Effective Date of this Agreement, STB's non-approval, severe service disruptions, failure to maintain adequate insurance pursuant to the terms of this Agreement, failure to maintain the track to the standards required under this Agreement, a declaration of bankruptcy or inability to pay debts when due by Lessee, or creation or maintenance of an environmental hazard or nuisance on the Premises.

SECTION 3.3 **Intentionally Deleted.**

SECTION 3.4 **Termination Obligations.**

(a) Upon the expiration or termination of this Agreement, Lessee shall vacate the

Premises and leave in place all Appurtenances and Improvements and allow Lessor to resume the provision of rail services upon the Premises.

- (b) The parties acknowledge money damages alone are insufficient to remedy a breach of the terms of this Section by Lessee, and Lessor shall have in addition to any other remedies available at law or in equity, a right of specific performance and/or injunctive relief.
- (c) Upon expiration or termination of this Agreement and/or ultimate surrender and return of the Premises, Appurtenance and Improvements to Lessor, Lessee shall ensure such Premises, Appurtenance and Improvements are surrendered to Lessor in a condition at least maintained, where required, to the standards set forth in Article IV of this Agreement. In the event Lessee fails to surrender the Premises, Appurtenance and Improvements in a condition conforming to the standards set forth in Article IV of this Agreement Lessee shall reimburse Lessor for the actual cost of performing such maintenance or rehabilitation to conform the Premises, Appurtenance or Improvements to the condition required by Article IV of this Agreement. Lessee shall have the right to a joint inspection with Lessor's representative to assess condition of property. Findings of joint inspection shall be mutually agreed upon record of condition of property at time of surrender. If conditions are identified during joint inspection that are determined to in a condition less than required under this agreement, Lessee shall have sixty (60) days to correct at Lessee's expense with Lessee's own labor force and equipment, or Lessee's contractor. Lessee shall have no liability for conditions identified in the joint inspection that were caused by Lessor.
- (d) Upon expiration or termination of this Agreement the Lessor shall reimburse Lessee for the cost, less depreciation, of any improvements placed on the Premises by Lessee pursuant to Section 2.2, provided that Lessor approved said costs and depreciation schedule as outlined in Section 2.2.

ARTICLE IV **MAINTENANCE**

SECTION 4.1 **Condition of Premises.** Lessee shall accept all Premises and Appurtenances "as is, where is" and "with all faults".

SECTION 4.2 **Mutually Agreed Inspection of Premises.** Within thirty (30) days of Effective Date, Lessor and Lessee will perform joint inspection of premises. It will be agreed that mutual findings of inspection will be memorialized as Attachment hereto, and shall be basis for assessment of condition at termination or expiration as outlined in Section 3.4(c).

SECTION 4.3 **Rehabilitation and Maintenance.** Lessee shall at all times, and at its sole cost and expense, maintain the Premises, Appurtenances and Improvements, and maintain, or cause to be rehabilitated and/or maintained, the

railroad trackage on the Premises to its current condition or better as of the Effective Date, including all grade crossing signals and surface, signs, located upon the Leased Premises in such safe and satisfactory condition as necessary to conform with Lessor's and industry standards and specifications, and to conform with all applicable Legal Requirements and standards promulgated by the Federal Railroad Administration and other Governmental Bodies regardless of the condition of the Premises upon transfer thereof to Lessee. Lessee shall control, maintain, and/or install all grade crossings (including the surface of all grade crossings), bridges and bridge appurtenances, right-of-way vegetation, and fencing or other structure requirements pursuant to any Legal Requirements of any Governmental Body. Additionally, Lessee's use of all grade crossings shall comply with any Legal Requirements of any Governmental Bodies. Lessee shall indemnify, defend, and hold harmless Lessor from and against all actions, claims, fines, Losses or penalties against Lessor as a result of Lessee's failure to comply with any obligations referenced in this Section 4.3.

SECTION 4.4 **Inspections by Lessor.** At all times and on reasonable advance notice to Lessee, Lessor shall have the right to enter upon the Premises and make inspections to determine compliance with the terms of this Agreement. In no event shall Lessor be obligated to make any such inspections, and Lessor 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 Lessor's conduct of inspections (or lack thereof) be deemed to result in a waiver of compliance with any terms of this Agreement by Lessee.

SECTION 4.5 **Grade Crossing and Structures Inventory and Governmental Reporting.** Lessee shall be responsible for reporting of grade crossing and structures inventory and other information as may be required by the FRA and any other Governmental Body. At the request of Lessor, Lessee shall make and/or cooperate in any filings with or notices to FRA concerning the transfer of maintenance and operating responsibility to Lessee pursuant to the terms of this Agreement.

SECTION 4.6 **New Grade Crossing.** Any voluntary installation of new grade crossings by Lessee shall require written approval of Lessor.

SECTION 4.7 **Grade Crossing Improvements or Modifications.** Lessee shall be solely responsible to maintain, improve, or modify, at Lessee's sole cost and expense, all grade crossings and grade crossing warning devices in accordance with all applicable laws, regulations, and orders of any Governmental Body. Elimination or consolidation of grade crossings may be undertaken by Lessee at any time, provided such elimination or consolidation is consistent with applicable law and that salvage of any grade crossing warning devices or other crossing installations which may be owned in whole or in part by any third party (including any Governmental Bodies) shall be coordinated with such third party. Any remaining net salvage value obtained for elimination or consolidation of grade crossings shall be remitted to Lessor.

SECTION 4.8 **Grade Crossing Agreements.** Lessee shall make no

covenants or binding agreements or representations or warranties or create any Encumbrances on the Premises for the installation, elimination, upgrade or modification of any Grade Crossings or any other structures or facilities on the Premises, where such agreements, Encumbrances, or representations or warranties may bind Lessor upon expiration or termination of this Agreement without Lessor's advance written consent. To the extent Lessor has made written commitments with any Governmental Bodies concerning the status of any Grade Crossings prior to the Effective Date of this Agreement, Lessee shall comply with such commitments.

SECTION 4.9 **Establishment of Quiet Zones.** Lessee may coordinate with Governmental Bodies concerning the establishment of Quiet Zones through the construction of Washington State Department of Transportation and FRA approved supplemental safety measures in order to reduce or eliminate the need to blow train whistles at each at-grade crossing on the Premises in the Quiet Zone, provided that any such coordination shall not commit Lessor to pay any sums or make any changes to the Premises or Encumber the Premises. In the event Lessee shall be required to make changes to the configuration of the trackage or grade crossing approaches in order to establish a Quiet Zone, advance written consent shall be required by Lessor prior to any material track configuration modifications and Lessee shall be responsible for such reconfiguration and all costs associated therewith only if Lessee initiates establishment of Quiet Zone. In no event shall Lessee Encumber the Premises with any commitments concerning establishment of a Quiet Zone, which commitments shall extend beyond expiration or termination of this Agreement, absent the advance written consent of Lessor.

SECTION 4.10 **Title to Improvements.** Lessor shall retain its ownership interests in the Premises, Appurtenances all improvements thereon, including track work and any Improvements installed by Lessee during the term hereof. Lessee shall not be entitled to compensation from Lessor for any track work performed upon the Premises except as outlined in Section 3.4(d). Lessee shall not be entitled to any salvage value of the track, ties, crossing protection or other track related materials, unless it is utilized to replace and/or improve said track, ties, crossing protection or other track related materials.

ARTICLE V **GOVERNMENTAL APPROVALS**

SECTION 5.1 **Acquisition Approvals.** Within fourteen (14) calendar days following the Effective Date of this Agreement, Lessee, at its sole expense, shall prepare and file such documents as may be required, if any, to secure all Governmental Approvals for this transaction including without limitation any approval, or exemption from approval, of this transaction by the STB, if such approval or exemption from approval is necessary or appropriate. Lessee shall permit Lessor to review prior to filing all documents proposed by Lessee to be filed with the STB, or any other Governmental Body, to secure legal approval or exemption of this transaction.

SECTION 5.2 **Cost of Governmental Approvals.** Lessee shall bear and assume any and all expense of acquiring any required Governmental Approvals and shall indemnify, defend, and hold harmless Lessor from any actions or legal proceedings and all costs related thereto, including without limitation attorneys' fees, arising as a result of Lessee's acquisition of the leasehold interests pursuant to this Agreement and/or pursuit of any required Governmental Approvals for this transaction.

ARTICLE VI
REPRESENTATIONS AND WARRANTIES

SECTION 6.1 Lessee hereby represents and warrants to Lessor the following facts as of the date of this Agreement and as of the Effective Date of this Agreement, except where specifically noted otherwise in this Agreement:

- (a) Lessee is a limited liability corporation duly organized, validly existing and in good standing under the laws of the State of Washington and by the Effective Date of this Agreement will be qualified to do business in the State of Washington.
- (b) Lessee has or shall have acquired on or before the Effective Date all requisite authority to lease the Premises and Appurtenances and assume Lessor's rights and obligations which are conveyed to Lessee by this Agreement, to enter into this Agreement, to conduct rail freight transportation business on the Premises, and to perform all of Lessee's obligations under this Agreement.
- (c) The execution and consummation of this Agreement have been duly authorized and approved by all necessary company actions by Lessee, and immediately upon the Effective Date of this Agreement by Lessee's authorized representative, all of Lessee's obligations set forth in or referenced in this Agreement shall constitute legal, valid and binding obligations of Lessee or Lessee's successors or assigns, which obligations are enforceable in accordance with their terms against Lessee or Lessee's successors or assignees.
- (d) There is no provision in the Limited Liability Company Agreement of Lessee which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement.
- (e) The negotiations related to this Agreement have been handled by Lessee on its own behalf, without intervention of any agent or party, and in such manner as not to give rise to any valid claim by any party for any finder's fee, brokerage commission, or other similar payment in connection with any of the transactions included in this Agreement.
- (f) No representation or warranty by Lessee in this Agreement contains any

untrue statement of a material fact, nor omits any material fact that is necessary to prevent that representation or warranty from being materially misleading.

Section 6.2. Lessor hereby represents and warrants to Lessee the following facts as of the date of this Agreement and as of the Effective Date of this Agreement, except where specifically noted otherwise in this Agreement:

(a) Lessor acquired the Premises through quitclaim deed and has the right and authority to lease the premises.

ARTICLE VII **LESSEE'S INSPECTION PRIOR TO AGREEMENT**

SECTION 7.1 **Acknowledgement of Inspection.** By signing this Agreement, Lessee acknowledges that Lessee has inspected the Premises and Appurtenances, including all improvements and structures on the Premises. Lessee further acknowledges that:

- (a) No representation has been made by Lessor to Lessee concerning the state or condition of the Premises or Appurtenances, or the age of any improvements on or quality of title to the Premises;
- (b) Lessee has not relied upon any statement or declaration of Lessor with respect to the physical condition of the Premises or Appurtenances, Lessor's title to the Premises, Lessor's freight traffic volumes to or from the Premises, or any other matter, either oral or in writing, as an inducement to enter into this Agreement, other than as stated in this Agreement; and
- (c) The sole consideration for execution of this Agreement by Lessee is set forth in this Agreement.

SECTION 7.2 **Lessor's Disclaimers.** EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, **LESSOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF THE PREMISES OR APPURTENANCES, THEIR MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE PREMISES AND APPURTENANCES, OR THE CONFORMITY OF THE PREMISES AND APPURTENANCES TO THEIR INTENDED USES. LESSOR SHALL NOT BE LIABLE TO LESSEE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING STRICT LIABILITY IN TORT, WITH RESPECT TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE OF THE PREMISES AND APPURTENANCES TO THEIR INTENDED USES. LESSOR OFFERS, AND LESSEE ACCEPTS THE PREMISES AND APPURTENANCES "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION**

AND SUBJECT TO ALL LIMITATIONS ON LESSOR'S RIGHTS, INTEREST, AND TITLE TO THE PROPERTY COMPRISING THE PREMISES AND APPURTENANCES. LESSOR DOES NOT UNDERTAKE TO DEFEND LESSEE IN THE PEACEABLE POSSESSION OR USE OF THE PREMISES OR APPURTENANCES. NO COVENANT OF QUIET ENJOYMENT IS MADE.

ARTICLE VIII
INSURANCE

SECTION 8.1 The Lessee shall maintain for itself and the Lessor, throughout the entire period the Lessee operates on the Premises, adequate insurance to protect the Parties and their elected and appointed officers, agents, attorneys, and employee against all of Lessor's and Lessee's liability arising out of Lessee's operations within, on or upon, ownership of, or use of the Premises and Appurtenances, or any part thereof. This obligation shall require the Lessee to maintain insurance at least in the following amounts:

- (a) **COMMERCIAL GENERAL LIABILITY.** Insurance to cover liability, bodily injury, and property damage. The Commercial General Liability insurance shall provide coverage for any and all costs, including defense costs, and losses and damages resulting from personal injury, bodily injury and death, property damage, products liability and completed operations. Such insurance shall include blanket contractual coverage, including coverage for the Agreement as now or hereafter amended and specific coverage for the indemnity provisions set forth herein. Coverage must be written with the following limits of liability:

Bodily and Personal Injury & Property Damage
\$ 15,000,000 per Occurrence
\$ 30,000,000 aggregate

- (b) **WORKERS' COMPENSATION.** If required by law, and to the extent required by law, Lessee shall maintain during the life of this Agreement statutory required coverage limits for all employees, and in the case any work is sublet, the Lessee shall require its contractors and subcontractors similarly to provide workers' compensation insurance for all their employees to the extent required by law. The Lessee shall also maintain, during the life of this policy, employer's liability insurance to the extent Lessee is required by law to have and maintain Worker's Compensation Insurance Coverage.
- (c) **COMMERCIAL AUTO LIABILITY.** Insurance shall include owned, hired, and non-owned vehicles on an occurrence basis with coverage of at least \$1,000,000 per occurrence.
- (d) **RAILROAD ACCIDENT POLLUTION LIABILITY INSURANCE.** This insurance shall name the Lessor as an additional insured with coverage of at least \$15,000,000 per occurrence and \$30,000,000 in the aggregate.

SECTION 8.2 The required insurance must be obtained and maintained for the entire period the Lessee operates on the Premises and such requirements shall survive termination of this Agreement. If the Lessee, its contractors, or subcontractors do not have the required insurance, the Lessor will require such entities to stop operations until the insurance is obtained and approved.

SECTION 8.3 Certificates of Insurance reflecting evidence of the required insurance and approved by the Lessor's Risk Manager for the GENERAL LIABILITY, POLLUTION LEGAL LIABILITY, and policies described above, shall be sent to:

City of Tacoma dba Tacoma Rail
c/o Real Property Services
3628 South 35th Street
Tacoma, WA 98409

The certificate shall be filed on or before the Effective Date of the Agreement, and annually thereafter, and as provided in Section 8.5 below. All coverage shall be listed all on one certificate with the same expiration dates.

SECTION 8.4 Policies providing insurance coverage as required by this Section shall be issued by companies authorized to do business under the laws of the State of Washington.

SECTION 8.5 Lessee shall within 24 hours provide Lessor with written notice in the event an insurance carrier providing coverage required by this Section notifies Lessee of its intent to terminate insurance coverage, terminates coverage or fails to renew insurance coverage. In that event, the Lessee shall furnish, at least 30 days prior to the expiration of the date of such insurance coverage, a certificate of insurance as proof that equal and like coverage required by this Section has been or will be obtained prior to any such lapse or termination of insurance coverage during the balance of the period of the Agreement.

SECTION 8.6 The Lessor reserves the right, during the term of the Agreement, to require any other insurance coverage or adjust the policy limits as it deems reasonably necessary utilizing sound risk management practices and principals based upon the loss exposures and common practices of short lines railroads. Lessee shall have up to ninety (90) days to procure additional required insurance. .

SECTION 8.7 Each insurance policy required pursuant to this Agreement shall be primary and non-contributing as respects any coverage maintained by Lessor and shall include an endorsement reflecting the same. Any other coverage maintained by Lessor shall be excess of this coverage herein defined as primary and shall not contribute with it. The certificate of insurance must reflect that the above wording is included in all such policies.

SECTION 8.8 Each insurance policy obtained pursuant to this Agreement shall be issued by financially sound insurers who may lawfully do business in the State of Washington with a financial rating at all times during coverage of no less than an “A XII” in the latest edition of “Best’s Key Rating Guide” published by A.M. Best Company. In the event that at any time during coverage, the insurer does not meet the foregoing standards, Lessee shall give prompt notice to the Lessor and shall seek coverage from an insurer that meets the foregoing standards. The Lessor reserves the right to change the rating or the rating guide depending upon the changed risks or availability of other suitable and reliable rating guides.

SECTION 8.9 Commercial general liability insurance policies and coverage obtained pursuant to this Agreement shall include an endorsement deleting all exclusions for work or incidents occurring within 25 feet or any distance from a railroad track or railroad property, or on, over, or under a railroad track and shall have no exclusions for explosions or collapse.

SECTION 8.10 Insurance policies required pursuant to this Agreement shall have no non-standard exclusions unless approved of by the Lessor’s Risk Manager or designee.

SECTION 8.11 Commercial general liability insurance policies obtained pursuant to this Agreement shall name the Lessor as an additional insured without limitation, pursuant to an endorsement approved of by the Lessor’s Risk Manager or designee.

SECTION 8.12 Lessee and Lessee’s Contractors’ insurers, through policy endorsement, shall waive their rights of subrogation against the Lessor for all claims and suits. The certificate of insurance must reflect this waiver of subrogation rights endorsement.

SECTION 8.13 If coverage is purchased on a “claims made” basis, then the Lessee shall warrant continuation of coverage, either through claims made policy renewals or the purchase of an extended discovery period, for not less than three (3) years from the date of termination of this agreement.

SECTION 8.14 Policies and coverage required herein may include a deductible and/or self-insured retention not to exceed to \$50,000.00; provided, however, that as to any loss or damage arising out of Lessee’s operations, on or upon, or use of the Premises, or that would otherwise be covered by any coverage as required herein, if Lessee elects to obtain insurance coverage subject to any deductible and/or self-insured retention, Lessee shall itself directly pay, in lieu of insurance coverage for the deductible or self-insured retained limit exposure, any and all Lessor liabilities that would otherwise in accordance with the provisions of this Agreement, be covered by Lessee’s insurance if Lessee had elected not to have its insurance coverage subject to a deductible and/or self-insured retention amount. Such direct coverage by Lessee shall be in an amount equal to the amount of Lessee’s actual deductible and/or self-

insured retention amount. The self-insured retained limit payment obligation on the part of Lessee shall not be subject to off-set, set-off or reduction by operation of any claim by the Lessee against the Lessor, or any claim of comparative fault on the part of the Lessor.

ARTICLE IX INDEMNITY

SECTION 9.1 To the fullest extent permitted by law, lessee shall, indemnify, defend, and hold harmless the Lessor and the Lessor's successors, assigns, legal representatives, officers (elected or appointed), employees, and agents (collectively, "Indemnitees") from, and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments, and expenses (collectively "Claims"), (including, but not limited to claims for court costs, attorneys' fees, and costs of remedial investigations, feasibility studies, removal and remediation and associated reporting, environmental mitigation and/or restoration, and governmental oversight costs), other environmental costs , including natural resource damages (collectively "Liabilities") of any nature, kind, or description, of any person or entity, directly or indirectly, arising out of, resulting from, or related to:

- (a) lessee's occupation and use of the Premises, Appurtenances and Improvements;
- (b) lessee's operation of the railroad;
- (c) any act or omission of Lessee or Lessee's agents under the terms of this agreement.

SECTION 9.2 To the fullest extent permitted by law, Lessor shall indemnify, defend, and hold harmless the Lessee and the Lessee's successors, assigns, legal representatives, officers (elected or appointed), employees, and agents (collectively, "Indemnitees") from, and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments, and expenses (collectively "Claims"), (including, but not limited to claims for court costs, attorneys' fees, and costs of remedial investigations, feasibility studies, removal and remediation and associated reporting, environmental mitigation and/or restoration, and governmental oversight costs), other environmental costs , including natural resource damages (collectively "Liabilities") of any nature, kind, or description, of any person or entity, directly or indirectly, arising out of, resulting from, or related to:

- (a) use of the Premises, Appurtenance and Improvements by Lessor;
- (b) any act or omission of Lessor or Lessor's agents under the terms of this Agreement;

SECTION 9.3 Lessee agrees that the use of the Premises, as contemplated by this agreement, shall not in any way subject the Lessor to claims that the Lessor is other than a common carrier for purposes of environmental and transportation laws.

Lessee agrees to indemnify, defend, and hold harmless the Indemnitees against any Liabilities asserted against any Indemnitee under the Federal Employees Liability Act ("FELA") whenever employees of Lessee or any of its agents, invitees, contractors claim or allege they are employees of any Indemnitee.

SECTION 9.4 Upon written notice from the Lessor, Lessee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this agreement for which Lessee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Lessee shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

SECTION 9.5 The Lessee waives immunity under RCW Title 51 and affirms that the Lessor and the Lessee have specifically negotiated this provision, as required by RCW 4.24.115, to the extent it may apply.

ARTICLE X **HAZARDOUS MATERIALS**

SECTION 10.1 **Intent Of Parties.** In full recognition of the foregoing, Lessor and Lessee agree that it is the express intent of the Parties that Lessee shall have no liability for any pre-existing Environmental Condition or related liability, claim or obligation arising there from, nor shall Lessee be required to take any action in regards to such matter, except as provided in this Agreement. Any liability regarding Hazardous Materials arising during the term of this Agreement will be controlled by this Section X of this Agreement.

SECTION 10.2 **Obligation To Abide By Laws.** The Parties shall at all times perform under this Agreement in strict compliance with all Environmental and Transportation Laws as the same may presently exist or may hereafter be enacted, promulgated, or amended, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, as amended (CWA), the Oil Pollution Act, the Hazardous Materials Transportation Act, and CERCLA. In no case shall Lessee be responsible for any pre-existing liability, claim or obligation or anything arising there from nor shall Lessee be required to take any action in regards to such matter, except as provided in this Agreement.

SECTION 10.3 Hazardous Materials Or Railcars Brought On

Premises. Any materials containing Hazardous Materials or railcars containing Hazardous Materials brought onto the Premises at Lessee's direction shall be handled, kept, and stored in compliance with all Environmental and Transportation Laws. If Lessee fails to keep, store, dispose, handle, treat these materials and substances in compliance with all Environmental and Transportation Laws, Lessee agrees to be solely responsible for all resulting liability, costs, and expenses.

SECTION 10.4 Release of Hazardous Materials. Lessee shall

immediately report all releases of Hazardous Materials to the environment on or around the Premises to the appropriate regulatory agency and to Lessor, and seek all necessary assistance from its emergency services contractor. Lessee shall use best efforts to promptly respond to any such release, violation, inspection, condition, or activities affecting the Premises. Lessee shall promptly respond to the Lessor's request for information regarding such releases, conditions, or activities.

SECTION 10.5 Notice. If the Lessor has notice from Lessee or otherwise of

a release by Lessee or violation of Environmental and Transportation Laws on or around the Premises during the term of this Agreement and the act or omission of Lessee or its employees, agents, contractors, subcontractors, guests, licensees or invitees was a cause of the release or violation, the Lessor may require Lessee, at Lessee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises.

SECTION 10.6 Environmental Indemnification by Lessee. Lessee shall

indemnify, defend, and hold harmless the Lessor from and against any and all claims, demands, damages, losses, liens, liabilities, penalties, fines, lawsuits and other proceedings, costs, and expenses (including investigation costs and attorneys' fees and disbursements), that arise out of (a) the inaccuracy of the representations and warranties of Lessee contained in this Article X of this Agreement, (b) Lessee's failure to fully comply with, or breach of, any covenant or obligation of Lessee under this Article X of the Agreement, or (c) any act or omission of Lessee or its employees, agents, contractors, subcontractors, guests, licensees, or invitees that results in a release or exacerbation of any Hazardous Substances on or near the Premises, as those terms are defined in this Agreement and by applicable law. The obligation of Lessee to indemnify, defend, and hold harmless the Lessor shall include, but shall not be limited to, all Environmental Costs, investigation costs, environmental response and remedial costs, other cleanup costs, environmental consultants' fees, attorneys' fees, fines and penalties, laboratory testing fees, claims by third parties and governmental authorities for damages, fees, fines, and penalties, including but not limited to natural resource damages, and the Lessor's expenses. Provided, however, notwithstanding anything to the contrary, the obligation of Lessee to indemnify, defend, and hold harmless the Lessor shall not apply to any Environmental Conditions to the extent caused by the act or omission of the Lessor or its employees, agents, contractors, subcontractors, guests, licensees, or invitees. If an Environmental Conditions caused by the act or omission of the Lessor or its employees, agents, contractors, subcontractors, guests, licensees, or

invitees or an existing Environmental Condition on or around the Premises prior to the Effective Date of this Agreement is exacerbated by the act or omission of Lessee or its employees, agents, contractors, subcontractors, guests, licenses, or invitees, Lessee shall indemnify, defend, and hold harmless the Lessor only to extent of the actual damage caused by Lessee actions .

ARTICLE XI **LIENS AND ENCUMBRANCES**

In no event shall Lessee cause any Encumbrance against the Premises, Appurtenances or Improvements. Lessee shall promptly pay and discharge any and all Encumbrances, including liens, which arise out of any actions or omissions of Lessee, (including without limitation, liens which arise out of any construction, alterations or repairs done, suffered or permitted to be done by Lessee on the Premises) and shall indemnify Lessor against any Loss, liability or expense incurred by Lessor on account of such liens. Lessor is hereby authorized to post any notices or take any other action upon or with respect to the Premises, Appurtenance or Improvements that is or may be permitted by law to prevent the attachment of any interests in and to the Premises, Appurtenance or Improvements by any Governmental Body or third party claiming rights to the Premises, Appurtenance or Improvements; provided, however, that actions or failure of Lessor to take any such actions shall not relieve Lessee of any obligation or liability under this Section or any other Section of this Agreement. If, because of any act of omission of Lessee, any mechanic's lien or other lien, Encumbrance, charge or order for the payment of money shall be filed against Lessor or any portion of the Premises, Appurtenance or Improvements, Lessee shall, at its own expense, cause the same to be discharged of record within thirty (30) days after written notice thereof from Lessor to Lessee, and Lessee shall indemnify and save harmless Lessor against and from all costs, liabilities, penalties, and claims, including legal expenses, relating therefrom.

Notwithstanding anything above, Lessee may withhold payment of any claim in connection with a good-faith dispute over the obligation to pay, as long as Lessor's property interests are not jeopardized. If a lien is filed as a result of nonpayment, Lessee shall, within ten (10) days after knowledge of the filing, secure the discharge of the lien or deposit with Lessor cash or sufficient corporate surety bond or other surety satisfactory to Lessor in an amount sufficient to discharge the lien plus any costs, attorney fees, and other charges that could accrue as a result of a foreclosure or sale under the lien.

ARTICLE XII **ASSIGNMENT AND SUBLEASE**

Lessee shall not assign this Agreement, in whole or in part or any interest herein, or grant a security interest in any buildings or improvements on the Premises, or sublet, and no heir, executor, administrator, receiver, master, sheriff, trustee in bankruptcy, or other assignee by operation of law shall assign or sublet, without the express prior written consent of Lessor, which consent shall not be unreasonably withheld. Any

permitted assignee, of Lessee's or Lessor's rights under or property acquired by this Agreement, shall assume in writing all of Lessee's continuing and existing or thereafter arising obligations under the Agreement, and under any then effective contract assigned by Lessor to Lessee, in whole or in part, in accordance with the terms of this Agreement, which obligations are related to the property or rights involved in the assignment.

In the event the Lessor sells the Premises to a third party, Lessor shall have the express right to assign this Agreement to said third party without consent of the Lessee.

ARTICLE XIII
MISCELLANEOUS

SECTION 13.1 **Utilities.** Lessee shall be responsible for the payment of all utilities on and after the Effective Date and shall defend, indemnify and hold harmless Lessor from and against any such charges. Lessee's liability for utilities begins with first billing cycle after the Effective Date. There shall be no proration between Lessor and Lessee of utility bills applicable to the Premises. Lessee shall be required to notify all providers of utilities for the Premises and arrange to switch over all utilities to Lessee's own account.

SECTION 13.2 **Notices.** Unless otherwise expressly agreed to between the Parties, all notices which may be or are requested to be given pursuant to this Agreement shall be in writing and deemed to have been duly given to the required Party five business days after having been posted in a properly sealed and correctly addressed envelope, postage prepaid or when hand delivered or when delivered by a nationally recognized overnight mail delivery service, to the Party and at the address specified below:

TO LESSOR:
Superintendent
Tacoma Rail
2601 SR 509 N Frontage Road
Tacoma, WA 98421

With a copy to:
City of Tacoma dba Tacoma Rail
c/o Real Property Services
3628 South 35th Street
Tacoma, WA 98409

IF TO LESSEE:
WRL LLC
709 N. 10th Ave
Walla Walla, Washington 99362
Attn: Paul Didelius

Either party hereto may change its address or addressee to which notices are to be given by providing written notice of the change to the other party.

SECTION 13.3 **Choice of Law.** The Agreement shall be governed by and construed in accordance with the laws of the State of Washington without recourse to any principles of Conflicts of Laws, and the Lessee agrees that any action brought relative to enforcement of this Agreement shall be initiated in the Superior Court of Pierce County, and shall not be removed to a federal court, except as to claims over which the Superior Court of Pierce County has no jurisdiction. Removal to federal court shall be to the Federal Court of the Western District of Washington, at Tacoma.

SECTION 13.4 **Severability.** In the event that any of the provisions of this Agreement, or portions or applications hereof, are held to be unenforceable or invalid by a court of competent jurisdiction, Lessor and Lessee shall negotiate an equitable adjustment to the provisions of this Agreement with a view toward effecting to the extent possible the original purpose of this Agreement, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

SECTION 13.5 **Amendment.** This Agreement may not be modified or amended except by an instrument in writing signed by both Lessor and Lessee.

SECTION 13.6 **Binding Effect.** Subject to the provisions of Article XIV, this Agreement shall be binding upon each of the Parties and their respective successors, legal representatives and permitted assigns, and shall inure to the benefit of each of the parties, and their respective successors, legal representatives and permitted assigns.

SECTION 13.7 **No Waiver.** Except as may be expressly provided otherwise in this Agreement, no failure on the part of either Party or any of its agents to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy hereunder or thereunder shall operate as a waiver thereof; nor shall any single or partial exercise by either party or any of its agents of any right, power or remedy hereunder or thereunder preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

SECTION 13.8 **No Third Party Beneficiaries.** This Agreement is made and intended for the benefit of the Parties hereto and their respective successors and permitted assigns and for no other parties.

SECTION 13.9 **Integration.** The Exhibits referenced in this Agreement and attached hereto are specifically made a part of this Agreement by reference. This Agreement together with its Exhibits embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings and agreements (whether oral or written) concerning the subject matter hereof. Any other prior or contemporaneous agreements, understandings, representations or statements, whether oral or written, relating to this transaction are

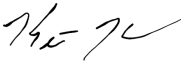
merged herein. The headings and titles to provisions in this Agreement are for convenience only and shall not be deemed to modify or affect the rights or duties of the parties. All rights and obligations of the parties set forth in this Agreement are integral parts of this Agreement. The consideration inducing the parties to enter into this Agreement includes all of the commitments by Lessor to Lessee, and by Lessee to Lessor, as set forth in this Agreement. The terms of this Agreement have been arrived at after considerable arms length negotiation and mutual review of the parties.

SECTION 13.10 Survival of Indemnities. Unless expressly provided otherwise, all obligations of any indemnity under this Agreement shall survive expiration or termination of this Agreement.


IN WITNESS WHEREOF the parties hereto have executed this document as of the day and year first above written.

CITY OF TACOMA

WRL, LLC

By: 

Kurtis D. Kingsolver, P.E.
Public Works Director/City Engineer


By: 

Paul Didelius,
Managing Member

Approved By:


By: 

Dale King
Tacoma Rail Superintendent

By: 

Andrew Cherullo
Finance Director

APPROVED AS TO FORM:

By: 

Christopher Bacha
Chief Deputy City Attorney



EXHIBIT B

"Encumbrance" shall mean any charge, claim, condition, equitable interest, lien, option, pledge, security interest, mortgage, right of way, easement, encroachment, servitude, right of first option, right of first refusal or similar restriction, including any restriction on use, voting (in the case of any security or equity interest), transfer, receipt of income or exercise of any other attribute of ownership.

"Environment" shall mean soil, land surface or subsurface strata, surface waters (including navigable waters and ocean waters), groundwater, drinking water supply, stream sediments, ambient air (including indoor air), plant and animal life and any other environmental medium or natural resource.

"Environmental Conditions" shall mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, releasing, placing, or disposing of Hazardous Materials on, from, or about the Premises other than in compliance with applicable Environmental and Transportation Laws. The term "Environmental Conditions" includes, but is not limited to, the presence of Hazardous Materials on, from, or about the Premises attributable to the operation of any storage tanks, oil/water separators, or in-ground hydraulic lifts or hoists, and associated equipment.

"Environmental Costs" shall mean any and all judgments, damages, penalties, fines, costs, liabilities, obligations, losses, or expenses (including, without limitation, reasonable attorneys' fees and expenses of counsel) arising from or incurred in connection with Environmental Conditions, including, but not limited to, those relating to the presence, investigation, or remediation of Hazardous Materials.

"Environmental and Transportation Laws" shall mean the laws and regulations identified in this Section XII of this Agreement, and all other federal, state (including Washington State and various subdivisions and agencies thereof), or local laws, regulations, rules, permit requirements, or orders relating to Hazardous Substances, as the same may presently exist or may hereafter be enacted, promulgated, or amended.

"FRA" shall mean the Federal Railroad Administration or its successor agency (ies).

"Governmental Approval" shall mean any consent, license, registration or permit issued, granted, given or otherwise made available by or under the authority of any Governmental Body or pursuant to any Legal Requirement.

"Governmental Body" shall mean: (i) any state, county, city, town, borough, village, district or other jurisdiction; (ii) any federal, state, local, municipal or other government; (iii) any governmental or quasi-governmental authority of any nature (including any agency, branch, department, board, commission, court, tribunal or other entity exercising governmental or quasi-governmental powers); (iv) any body exercising, or

entitled or purporting to exercise, any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; (v) the Surface Transportation Board (STB); or (vi) any official of any of the foregoing.

"Hazardous Activity" shall mean the distribution, generation, handling, importing, management, manufacturing, processing, production, refinement, Release, storage, transfer, transportation, treatment or use (including any withdrawal or other use of groundwater) of Hazardous Materials into the Environment and any other act, business, operation or anything that increases the danger, or risk of danger, or poses an unreasonable risk of harm, to persons or property on or off the Premises.

"Hazardous Materials" shall mean any (1) hazardous waste as defined in the federal Resource Conservation and Recovery Act, as amended (42 U.S.C. §6901, et seq.) (RCRA), and regulations promulgated thereunder, and WAC 173-303, Washington State Dangerous Waste Regulations; (2) hazardous substance as defined in the federal Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. §9601, et seq.) (CERCLA), and regulations promulgated thereunder; (3) petroleum or liquid petroleum or wastes; and (4) any other toxic or hazardous substances or pollution that may be regulated from time to time by federal, state, or local Environmental and Transportation Laws.

"Legal Requirement" shall mean any federal, state, local, municipal, foreign, international, multinational or other constitution, law, ordinance, principle of common law, code, regulation, statute or treaty.

"Losses" shall mean all costs, expenses, fees or liabilities of, or in any way related to: (a) any violation of Legal Requirement including Environmental Law; (b) any damage to property, the environment or to natural resources; (c) any bodily injury or death of any person; or (d) the breach of any contract. Losses shall include, but not be Sited to, all costs of claims, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, court costs, and attorney, consultant and expert witness fees.

"Offer of Financial Assistance" shall mean an offer to purchase the Premises through the abandonment and/or discontinuance proceedings pursuant to the terms of and regulations promulgated pursuant to 49 U.S.C. Section 10904, or its successor statutes, all as may be amended from time to time.

"Release" shall be defined as provided in 42 U.S.C. 9601 and RCW 70.105D.020. In the event a conflict exists between the two definitions, the broader definition shall apply. For purposes of this Agreement, the term release shall also include a threatened release.

"STB" shall mean the U.S. Department of Transportation, Surface Transportation Board and its successor agency(ies).