

CLARK COUNTY STAFF REPORT

DEPARTMENT: Public Works/Chelatchie Prairie Railroad

DATE: November 8, 2016

REQUESTED ACTION: Authorize the County Manager to sign the North Line Sublease Agreement between Clark County and the Battle Ground, Yacolt and Chelatchie Prairie Railroad Association

Consent Hearing County Manager

PUBLIC WORKS GOALS:

- Provide safe and efficient transportation systems in Clark County
- Create and maintain a vibrant system of parks, trails and green spaces
- Continue responsible stewardship of public funds
- Promote family-wage job creation and economic development to support a thriving community
- Maintain a healthy, desirable quality of life
- Increase partnerships and foster an engaged, informed community
- Cultivate a nimble, responsive work force
- Make Public Works a great place to work

BACKGROUND

This represents an update to the expiring lease with the same association. The segment of the Clark County Chelatchie Prairie Railroad from Milepost 18.7 to Milepost 33.1 will be subleased to the Battle Ground, Yacolt and Chelatchie Prairie Railroad Association for a term of eleven (11) years with two optional renewal terms of five (5) years each to operate passenger excursion trains and other ancillary passenger-related activities. Clark County will retain freight rights.

COUNCIL POLICY IMPLICATIONS

This request has no council policy implications.

ADMINISTRATIVE POLICY IMPLICATIONS

This request has no administrative policy implications.

COMMUNITY OUTREACH

The Railroad Advisory Board concurs with the sublease agreement.

BUDGET IMPLICATIONS

This request has no budget implications.

DISTRIBUTION:

Board staff will post all staff reports to The Grid. <http://www.clark.wa.gov/thegrid/>

Attachments: Sublease Agreement

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BK*

PW14-126

JBS

Jerry Barnett, PE
Railroad Coordinator
Public Works

Heath H. Henderson

Heath H. Henderson, PE
Public Works Director/County Engineer

Mark McCauley

APPROVED: _____
CLARK COUNTY, WASHINGTON
BOARD OF COUNTY COUNCILORS

DATE: NOV. 8, 2016

SR# SR 230-16



APPROVED: _____
Mark McCauley, County Manager

DATE: _____

NORTH LINE SUBLEASE AGREEMENT
By and between Clark County, Washington
and the Battle Ground, Yacolt and Chelatchie Prairie Railroad Association
Dated June 6, 2006

This North Line Sublease Agreement ("Sublease Agreement") and its attachments are by and between Clark County ("County"), a Washington municipal corporation, and the Battle Ground, Yacolt, and Chelatchie Prairie Railroad Association, ("BYCX"), a Washington _____ ("The Parties").

WHEREAS, Clark County is the owner of the lines of standard gauge railroad and other related properties and property rights from North Vancouver (MP 0.0) in Vancouver, Washington, to Chelatchie, Washington, (Approximately MP 33.1), including several spur lines, yard and passing tracks and connections (*See Attachments*); and

WHEREAS, in a Lease Agreement dated December 20, 2004, Clark County leased an interest in the entire rail line, associated facilities and structures, operating rights and track maintenance responsibilities to a common carrier railroad, and subsequently in February 2012 this lease was assigned to a different common carrier railroad, now known as Portland Vancouver Junction Railroad (PVJR), for the purposes of operating and maintaining freight railroad, management of associated properties, and development of a dinner train; and

WHEREAS, the assignment of the lease to PVJR included related agreements, and a Memorandum of Understanding dated September 20, 2005, to allow a leaseback of the North Line to the County, with a coordinating sublease of the North Line from the County to BYCX, for the purposes of using, upgrading, and maintaining the track and operating a passenger excursion train and/or other passenger-related programs was one such related agreement; and

WHEREAS, CCC 2.33A.160 limits leases of county property to no longer than ten (10) years unless the Board of County Councilors determines the extension of any lease beyond that ten (10) years is in the public's best interest; and

WHEREAS, the Board determines a lease of eleven (11) years is in the public's best interest;

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

Section SL1. *Definition of the Premises Subject to Sublease.*

The portion of the track and related properties to be subleased shall be the segment of the rail located north of the derail devices (to be relocated) in Heisson, to the end of the line in Chelatchie Prairie, from Milepost 18.7 to Milepost 33.1, and includes the following, to the extent that it pertains to the Rail Services defined herein: rights-of-way, track, track materials, wires, pipes, conduits, poles, guys, bridges, switches, buildings, shops, culverts, signals, scales and related structures, fixtures, easements, licenses, improvements, all ancillary and direct or contiguous rail operating yards, facilities,

plants, appurtenances located on or adjacent to the railway, and all real property and property rights necessary. This portion of the track shall herein be referred to as the "North Line."

Section SL2. *Term of Leaseback.*

County agrees to sublease BYCX, and BYCX agrees to lease from County, on the terms and conditions set forth in this Agreement, the North Line, for an initial term of eleven (11) years from the effective date of this Agreement, with two optional renewal terms of five (5) years each, at the sole and exclusive option of BYCX, for a total of twenty-one (21) additional years, unless and until otherwise terminated as provided herein.

Section SL3. *Scope of Sublease - Use Limited to Passengers.*

This Leaseback governs operating rights on the North Line of passenger excursion trains and other ancillary passenger-related activities on the North Line, together with the coordinating responsibilities defined herein, except the rights retained by County in Section SL4 below.

Section SL4. *County's Retained Rights.*

(a) *Right of Access.* County reserves unto itself or its agents, assigns, or designees, the right of access to the North Line, and any property or facility adjoining the North Line, as necessary to conduct freight and passenger operations defined herein, when exercised in a manner that does not unreasonably interfere with BYCX's intended use of the North Line, as described in subsection (d) below. County also reserves the right to allow its agents, assigns, or designees to develop a Track Upgrade Program and Dinner Train Program on the North Line.

(b) *Freight Rights.* County's agents, assigns, or designees shall exclusively serve all freight customers, and retains all federal Surface Transportation Board common carrier freight rights and obligations. BYCX shall assist and cooperate as necessary in affixing signatures or providing documentation necessary for any permits, applications, notices, pleadings, affidavits, or licenses required by local, state, and federal agencies. The right to collect rents, licensing or usage fees, or any other income whatsoever from the Railroad Freight Service shall inure solely to the benefit of County or its assigns.

(c) *Track Upgrade and Dinner Train.* BYCX acknowledges that PVJR intends to begin track upgrades and operation of a dinner train on the North Line, and that PVJR reserved the right to do so in their leaseback agreement with County. The scheduling of track upgrades and dinner train operations shall be subject to the conditions defined in section (d) below.

(d) *Right to Resolve Scheduling Conflicts.* This section governs scheduling priorities. In the event PVJR and BYCX are attempting to simultaneously operate trains or vehicles on the North Line, or make upgrades or conduct maintenance on the North Line that would interfere with passenger or freight train operations, PVJR shall be responsible to establish and operate a dispatch system and track repair and upgrade protocol to resolve any conflicts. The system shall meet all dispatch standards required by the Federal Railroad Administration and Surface Transportation Board, and the policy shall endeavor to give priority to BYCX and all scheduled passenger movements for any existing printed or publicized passenger schedules to the extent possible and practicable. PVJR shall avoid unscheduled or non-emergency track upgrades or repairs that will conflict with passenger schedules. Ultimate priority for scheduling of track work or freight operations shall remain with PVJR in the



event of an unforeseen, safety-related, or emergency-related conflict.

(e) *Right to Inspect.* County retains the right to inspect any and all of the Premises, upon twenty-four (24) hours' notice and at County's sole expense, for the purpose of verifying compliance with the terms and conditions of this Sublease Agreement.


(f) *Right to Amend.* County retains the right to amend this Agreement to address liability once the building is occupied or the use of the premises has changed.

Section SL5. *Termination.*

(a) *Termination for Cause.* County reserves the right to immediately cancel and terminate this Agreement in the event of:

- A material violation of this Agreement, which includes any breach of this Agreement that is deemed "material" because it substantially affects the outcomes of the rights of the parties, either economically or in the performance of duties required under this agreement.
- Any illegal behavior by action or inaction by BYCX, its employees, agents, volunteers, or association members, that causes the filing by a governmental entity or agency of a complaint, notice, order, citation, lien, or other penalty, because the behavior constitutes a violation of local, state, or federal ordinances, administrative procedures, statutes, rules, or codes.
- A Single Major Infraction, as defined in Section SL6.1
- Repetitive Minor Infractions, as defined in Section SL6. For purposes of this section, the term "repetitive" means either: (1) three infractions that remain unremedied after written notice of the infraction and a 30-day cure period, with termination becoming immediate upon the 30th day following the third infraction; or (2) five infractions, regardless of cure, that occur within a six-month period, with termination becoming immediate upon the occurrence of the fifth infraction. Cure shall require inspection of any repairs that must be made by the applicable governing authority, payment of any associated fines or fees, and a policy change and/or acknowledgement by the violator that prevents similar action or inaction from reoccurring. In the event no inspection is required, adequate cure shall be determined by County, which determination shall not be unreasonably withheld. Multiple minor infractions in one notification arising out of a single action, inaction, or occurrence shall constitute the same occurrence and shall be deemed a single minor infraction.

(b) *Termination Without Cause.* The County may, upon 11 months' advance written notice to BYCX, terminate this Sublease Agreement, but only in the event PVJR



exercises its 12-month advance notice termination option with County. The notice shall include PVJR's statement that PVJR intends to begin North Line track upgrades, expanded freight service, or dinner train services. If PVJR's track upgrades, expanded freight service, or dinner train services do not actually commence within the 12 month advance notice period, and the termination notice is deemed null and void by County, then County's notice to BYCX shall also become null and void. This provision shall not be subject to arbitration or mediation.

(c) *Termination by Expiration.* This Sublease shall terminate upon the expiration of the initial Term, unless BYCX notifies County in writing that BYCX is exercising either the first or second renewal terms, as applicable. Unless County is notified by BYCX in writing at least 45 days prior to expiration of the then current term, the Sublease shall terminate upon expiration of the term.

(d) *Termination and Renegotiation.* At the option of BYCX, in the event County's Master Lease with PVJR is terminated, this Sublease may be renegotiated between the parties, and the terms of this Sublease shall control during negotiations. If the parties are unable to reach a mutual agreement, this Sublease shall control and remain in full force and effect.

(e) *Delivery Upon Termination.* Upon termination of this Sublease for any reason, BYCX agrees to quit and deliver the rights granted herein back to County, and County agrees to take possession of the Leased Premises. Termination of this Leaseback shall not relieve either party hereto from any liability that may have attached or accrued prior to or at the date of termination of this Sublease and shall not deprive either party hereto of its rights to enforce any such liability or of the benefits of any covenants or obligations in this Sublease.

Section SL6. *Adverse Action or Inaction Constituting a Violation.*

For purposes of the tables below, "GCOR" refers to the General Code of Operating Rules, Fifth Edition, Effective April 3, 2005, and any amendments made to it during the course of this Agreement. To the extent a new edition is adopted by PVJR which amends, deletes, or adds rules, the new or amended rule shall be included in the table for which it is most closely related to similar rules in substance, not by rule number.

(a) *Minor Infractions.* Minor Infractions shall be those enumerated in Exhibit A.

(b) *Major Infractions.* Major Infractions shall be those enumerated in Exhibit B.

Section SL7. *Covenants.*

BYCX covenants that (1) it will not use, or allow others to use, the Premises for the storage, manufacture, reprocessing or disposal of hazardous or toxic substances as defined by state and federal law without County's prior written consent, provided that nothing in this clause shall be construed as limiting BYCX's right to store, manufacture, reprocess or dispose of hazardous materials or toxic substances in the ordinary course of business consistent with railroad industry standards; and (2) it shall comply with all federal, state, local, fire and police requirements, regulations, ordinances and laws respecting the premises, operations, and activities thereon; and (3) for the entire term of this Sublease, it will provide and maintain the insurance described in Section SL12.

County covenants that (1) it has all requisite governmental power and authority to enter into this Agreement; and (2) the execution and performance of this Sublease does not violate any known rule, regulation, order, writ, injunction or decree of any court or administrative body; and (3) no fees will be paid by BYCX to County and no compensation will be due for the uses for rail operations described herein over the North Line.

Section SL8. *Maintenance.*

(a) *Freight.* BYCX shall perform or cause to be performed all normal maintenance necessary to maintain the North Line as of the Sublease commencement date, which the parties agree is in at least a Federal Railroad Administration (FRA)-compliant condition that is suitable for 10 mile per hour freight service, for FRA Excepted Track. Under no circumstances shall track improvement and maintenance activities be permitted that degrade or remove portions of the North Line track. This requirement does not extend to the portion of track from MP 20 and the derail at roughly MP 17.7. Should this section of track become accessible during the term of this lease, BYCX will maintain that portion of the track to the same FRA standards as required for the remainder of the track.

(b) *Passengers.* BYCX shall be permitted, at its sole option, to perform or allow upgrades to the track to accommodate passenger excursions. Under no circumstances shall track improvement and maintenance activities be permitted that degrade or remove portions of the North Line track. In the event of such upgrades, the upgrades and all ongoing normal maintenance shall be maintained to an FRA-compliant condition suitable for passenger excursions upon FRA Class I track. All work shall be performed only after BYCX obtains any required permits, and if the work must be performed by a licensed contractor under any local, state, or federal law, shall be performed only by the required person or entity. Compliance with these standards shall be achieved before the track is used for passenger excursion service, including the relocation of derails from Battle Ground to Heisson.

(c) *Railroad Ties.* County and BYCX shall work cooperatively to remove certain scrap ties currently placed alongside the tracks of the north line in various locations. BYCX shall remove and transport the ties to a commonly agreed central location, and County shall subsequently supply the equipment and all other means necessary for further transport and removal of scrap ties to the appropriate disposal facility. The total number of ties paid for by the County shall not exceed the equivalent of 700 full-sized ties. No changed out crossties are to remain on the RR grade or the stockpiling of changed out crossties on County property. The disposal of used crossties must be accomplished per government rules and regulations.

In no event shall BYCX's maintenance obligations under this Leaseback obligate them to perform any maintenance, repairs or restoration of the North Line that is beyond the scope of normalized maintenance for a rail line in the conditions set forth, nor for extraordinary damage to the North Line due to acts of God or freight use by PVJR.

Section SL9. *Regulatory Requirements.*

BYCX shall comply with all applicable Federal Railroad Administration and Surface Transportation Board regulations, Washington Utilities and Transportation Commission regulations, environmental regulations, hazardous material regulations, and federal, state, and local laws,



regulations, and ordinances. All documentation related to such compliance, including but not limited to, track inspections, locomotive inspections, engineer certifications, or employee or volunteer member safety education requirements, shall be made available for inspection to County upon reasonable advance notice.

Section SL10. *Indemnifications.*

BYCX shall comply or cause others to comply in all material respects with all laws, ordinances, rules, regulations, final orders and decrees applicable to the North Line for the operations included in this Leaseback, and shall indemnify, defend, protect and hold harmless County from and against any fines or penalties levied as a result of said noncompliance.

BYCX agrees to release, indemnify, defend and hold harmless County, its officers, officials, employees and agents from and against any and all liability, loss, damage, expense, action and claim, including reasonable attorneys' fees (together, "Losses") incurred by BYCX, its officers, employees and agents, that arise out of or are connected to: (i) the performance of rail operations, maintenance, and other activities performed by BYCX or its authorized agents or sublessees; or (ii) a breach of any covenants, representations or warranties set forth in this Sublease; or (iii) a breach of the maintenance requirements set forth herein. This indemnification shall include any and all bodily injury claims brought by employees, volunteers, passengers, contractors, or other users of the services of BYCX, to the extent such injuries occurred in connection with the performance of rail operations over the Premises. However, BYCX shall not be responsible for, and shall have no obligation to indemnify, defend or hold harmless County with respect to any Losses that arise out of or are connected to the gross negligence or willful misconduct of County, its agents, employees, successors, parent companies, officers, directors, or assigns, or that result from the exacerbation of an act, omission or condition that causes a failure to exercise due care in mitigating the effect of such act, omission or condition.

County shall be responsible for and agrees to release, indemnify, defend and save harmless BYCX, its officers, directors, employees, elected officials, and agents from and against any and all Losses incurred by County, its officers, directors, elected officials, employees and agents that arise out of or are connected to the freight operations that PVJR maintains rights to operate under their separate Leaseback, and any act, omission or condition arising out of or related to the gross negligence or willful misconduct of County, its officers, directors, employees, and agents.

If each party bears some responsibility for the same claim, each party's responsibility to address and resolve the claim shall be in proportion to the extent of its role in contributing to the Claim.

Section SL11. *Warranties.*

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

- (a) It shall have the full power and authority to enter into this Agreement.
- (b) All approvals and other proceedings required to be taken by or on the part of BYCX to authorize the signators to enter into this Agreement and its Exhibits have been or will be duly taken by the Transfer Date.

- (c) This Agreement has been executed and delivered in accordance with its terms and conditions, and constitutes a valid and legally binding obligation, enforceable in accordance with its terms, except as such enforceability may be limited by: (i) bankruptcy, insolvency, reorganization, and similar laws; and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefore may be brought.
- (d) No provision of this Agreement or any Exhibit hereto conflicts with, violates or contravenes any statute, law, rule, regulation, order, writ, injunction or decree or other determination of any court, authority or governmental body as of the date hereof, and no provision of this Agreement or any Exhibit hereto will conflict with, violate or contravene any mortgage, lien, lease or agreement. nor is any provision hereof or any Exhibit hereto voidable or unenforceable (nor will it be such) by reason of any provision of, or lack of consent under, any indenture or agreement or instrument to which the parties are bound or affected.
- (e) No third party beneficiary is intended. This Agreement shall not be deemed to confer upon or give any party except BYCX and the County any remedy, claim, liability, reimbursement, cause of action or other right. It is understood that notwithstanding the Leaseback by and between County and PVJR, that BYCX's rights and responsibilities are specifically limited to those described herein.

Section SL12. *Notices.*

Forms and Timing of Notice. All notices or other communications shall be valid in the following forms:

- (a) Hard copy, in writing, sent by U.S. mail, certified return receipt requested, postage prepaid, upon delivery; or
- (b) Hard copy, in writing, delivered in person at the location and to the persons specified herein, upon delivery; or
- (c) Electronic copy, delivered via facsimile or email, with confirmation of delivery produced by the facsimile or email system, but not deemed "delivered" until actually received by the intended recipient; or
- (d) Hard copy, in writing, delivered by national courier service such as UPS or Federal Express, with signature required, upon delivery.

Location for Delivery. Delivery as specified above must be made to the persons specified herein, or to their duly authorized representative, unless notice of a change of address is given pursuant to the provisions of this section.

For Clark County
PO Box 5000
Vancouver, WA 98666-5000
Attention: Clerk of the Board of County Councilors



For BYCX
1207 NE 2nd Circle
Battle Ground, WA 98604
Attention: Douglas Auburg

For PVJR
14205 SE 36th St.
Suite 100
Bellevue, WA 98006
Attention: Eric Temple

Section SL13. *Insurance.*

BYCX shall be required to provide general liability, automobile liability, and property damage insurance in an amount not less than \$1 million. The coverage for general liability insurance shall increase to an amount not less than \$4 million during any passenger-related programs operating on the North Line. The County reserves the right to increase the coverage amount for general liability insurance to an amount not greater than \$5 million for passenger-related programs utilizing a steam locomotive. These coverages shall include a Contractual Liability Endorsement and shall be required to protect the County, the PVJR, and BYCX. The County and PVJR, its agents and employees, shall be named as additional insured with the right to written notice of cancellation. The maximum amount of the deductible for each of the coverages shall be \$5,000, except that this maximum amount can be increased with prior written approval of the County.

Section SL14. *Miscellaneous Provisions.*

(a) *Governing Law.* This Agreement and any attached Exhibits shall be construed and enforced in accordance with the laws of the state of Washington, except to the extent inconsistent with, or governed by, any other laws of the United States of America or rules or regulations thereunder. Venue shall be Clark County.

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

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

(d) *Titles.* The headings and titles to provisions contained herein are for convenience only, and do not modify or affect the rights and the duties of the parties to this Agreement.



(e) *Entire Agreement.* This Agreement, and the Exhibits hereto, represent the entire agreement between the parties, and all previous communications, understandings, or agreements between the parties are hereby abrogated and withdrawn except as provided herein.

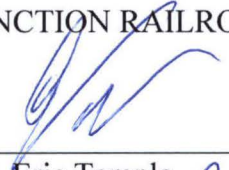
(f) *Counterparts.* This Sublease may be executed simultaneously in counterparts, each of which shall be deemed an original, but both of which together shall constitute one and the same instrument. By executing this Sublease in counterparts and sending them to the other party via facsimile, the sending party intends to be bound.

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

BYCX: BATTLE GROUND, YACOLT, CHELATCHIE PRAIRIE RAILROAD ASSOCIATION

By: _____
Name: _____
Its: _____

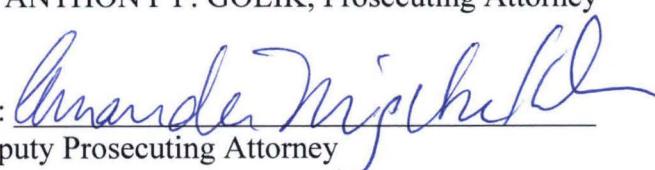
PVJR: PORTLAND VANCOUVER JUNCTION RAILROAD LLC:

By:  _____ 10/6/2016
Name: Eric Temple *President*
Its: _____

COUNTY: BOARD OF COUNTY COUNCIL, CLARK COUNTY, WASHINGTON


Mark McCauley, County Manager

APPROVED AS TO FORM ONLY: ANTHONY F. GOLIK, Prosecuting Attorney

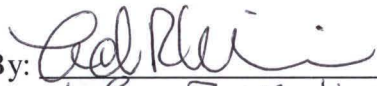
By: 
Deputy Prosecuting Attorney

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

BYCX: BATTLE GROUND, YACOLT, CHELATCHIE PRAIRIE RAILROAD ASSOCIATION

By: 
Name: TED R. WILLIAMS
Its: PRESIDENT,

PVJR: PORTLAND VANCOUVER JUNCTION RAILROAD LLC:

By: _____
Name: Eric Temple
Its: _____

COUNTY: BOARD OF COUNTY COUNCIL, CLARK COUNTY, WASHINGTON

Mark McCauley, County Manager

APPROVED AS TO FORM ONLY: ANTHONY F. GOLIK, Prosecuting Attorney

By: _____
Deputy Prosecuting Attorney