

**INTERLOCAL AGREEMENT BETWEEN KING COUNTY AND THE PORT OF SEATTLE REGARDING EASTSIDE RAIL CORRIDOR**

This Agreement is hereby entered into by King County, a home rule charter County and political subdivision of the State of Washington (the "County"), and the Port of Seattle, a municipal corporation of the State of Washington (the "Port").

WHEREAS, the Port and County are entering into a purchase and sale agreement and a donation agreement ("Acquisition Agreements") with the BNSF Railway Co. ("BNSF") to acquire the Eastside Rail Corridor ("Subdivision"), which is a railroad corridor that includes a portion of the Woodinville Subdivision extending north approximately from mile post 5.0 in Renton, Washington to and including the railroad bridge at milepost 38.4 in Snohomish County, Washington, and a portion of the Redmond Spur extending approximately from milepost 0.0 in Woodinville south to milepost 7.3 in Redmond;

WHEREAS, at closing the Port will acquire a portion of the Subdivision subject to continuing freight railroad service (the "Freight Property"), and will acquire a portion of the Subdivision in railbanked status (the "Property"). The Freight Property is located in the Woodinville Subdivision between milepost 23.8 and milepost 38.4 in Snohomish County. The Property is located in the Woodinville Subdivision between milepost 23.8 and approximately mile post 5.0, and within the Redmond Spur between mile post 0.0 and mile post 7.3;

WHEREAS, the County has performed substantial negotiations with BNSF and due diligence regarding the Subdivision, which work is of significant benefit to the Port for its acquisition of the Subdivision;

WHEREAS, the Parties desire to convert the Property to public uses, including trail uses, following the acquisition of the Subdivision by the Port pursuant to and in accordance with 49 C.F.R. 1152.29 and Section 8(d) of the National Trails System Act (also known as the "Rails-to-Trails Act"), 16 U.S.C. 1247(d) (collectively, and as any of the foregoing may hereafter be amended or interpreted by binding judicial or administrative authority, the "Railbanking Legislation");

WHEREAS, the Port desires the County to be the Interim Trail User for the Property because the County has substantial expertise and experience in acquiring, developing, maintaining and operating public trails, and the County is willing to assume this responsibility so long as it has sufficient rights to the Property to serve as the Interim Trail User and develop, maintain and operate a public trail thereon;

WHEREAS, the Parties intend that the Property will be put to use for regional recreational trail and for other public transportation use, including but not limited to rail or other transportation purposes other than interstate freight service ("Transportation Use"), and that the intended trail use will not prevent Transportation Use on the Property, but rather will be designed and developed to accommodate Transportation Use on the Property;

WHEREAS, the Parties acknowledge and agree that any railbanking, trail use or other public purpose proposed for the Property will be subject to the authorization and jurisdiction of the Surface Transportation Board ("STB" or the "Board"). STB authorization for the intended railbanking will be obtained upon the issuance of a Notice of Interim Trail Use ("NITU") in accordance with the Board's applicable rules and procedures;

WHEREAS, to facilitate the role of the County as the Interim Trail User, the County is a party to the Acquisition Agreements for the limited purpose of securing its rights to the Property by contributing to the purchase price, acquiring a Public Multipurpose Easement (defined below) from the Port on the Property at closing, and obtaining the same rights and obligations under the Acquisition Agreements with BNSF related to the inspections, title, representations, warranties, condition of property, environmental matters, contingencies, and remedies with regard to the Public Multipurpose Easement on the Property as the County would have were it to obtain the Easement directly from BNSF under the Agreements;

WHEREAS, the Parties agree that it may be in the public interest for the County to acquire directly from BNSF certain segments of the Property at closing through a partial assignment to the County of the Port's rights and obligations in the Acquisition Agreements with BNSF;

WHEREAS, the Parties agree that if after closing the Port in good faith determines to transfer any or all of the Subdivision, that the County and other appropriate public agencies in the state should have the first opportunity to acquire such property;

WHEREAS, the Parties agree that acquisition of the Property is of substantial benefit to the region, that the Port and the County will jointly carry out a formal, multi-agency process ("Regional Process") to plan and recommend appropriate uses of the Property, and that the existing rails will be kept in place while the Regional Process considers the appropriate uses of the Property; and

WHEREAS, the parties are each authorized to enter into this Agreement pursuant to RCW 39.34 (the Interlocal Cooperation Act), RCW 39.33 (Intergovernmental Disposition of Property) and Article 11 of the Washington State Constitution.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by the parties as follows:

1. Purpose of the Agreement and relationship to Acquisition Agreements.

1.1 The purpose of this Agreement is to facilitate the acquisition, planning, development, maintenance and operation of the Subdivision for the benefit of the public, and to coordinate between the Port and the County implementation of the Acquisition Agreements.

1.2 Unless otherwise indicated, all terms used herein are defined as in the Acquisition Agreements.

2. King County and Port to Provide Negotiation and Due Diligence Materials.

2.1 The County will promptly provide to the Port copies of the following materials that have resulted from the County's significant negotiation and due diligence activities:

2.1.1 Preliminary title commitments;

2.1.2 The County's reviews of the preliminary title commitments to the extent such reviews are completed;

2.1.3 Maps and documents prepared by Pacific Northwest Title;

2.1.4 One set of GIS aerial photographs of the Subdivision prepared by the County;

2.1.5 Track maps provided from BNSF to the County;

2.1.6 One set of value section maps provided from BNSF to the County;

2.1.7 All written materials provided to the County by RL Banks and Associates;

2.1.8 The completed appraisal of the Subdivision prepared for the County by Allen Brackett Shedd Real Estate Appraisers; and

2.1.9 The completed Screening Level Environmental Review of the Subdivision prepared for the County by Camp Dresser & Mckee, Inc. ("CDM"), the associated materials provided with the Review, and any follow-up materials provided by CDM.

2.2 All materials will be provided by the County in AS IS condition, with no representation or warranty as to the accuracy or completeness of the contents of the materials.

2.3 The Port will pay the County \$500,000 for these materials at Closing.

2.4 Upon request of the County, Port will promptly provide to the County copies of materials in its possession that are comparable in nature and subject matter to the materials to be provided by the County under Section 2.1 of this Agreement and Port will receive from County reasonable compensation for such materials to be mutually agreed to by Port and County. All such materials will be provided by the Port in AS IS condition, with no representation or warranty as to the accuracy or completeness of the contents of the materials.

2.5 Under this Section 2, neither Party shall be obligated to provide any materials to the other that are attorney-client or attorney work product materials.

3. Obligations of the Port and the County relating to the Acquisition Agreements.

3.1 The County shall be the Interim Trail User under 49 C.F.R. 1152.29 and 16 U.S.C. 1247(d) for the Property, and in doing so shall assume the following obligations regarding the Property in the manner required by the Statement of Willingness to Assume Financial

Responsibility required as a condition precedent to the issuance of a NITU (the "SWAFR") in accordance with the Railbanking Legislation: (i) all responsibility for the management of the Property; (ii) all responsibility for all legal liabilities arising out of or relating to the transfer, use, possession, management, operation or control of the Property; and (iii) all other obligations arising under the NITU, the SWAFR, and/or the Railbanking Legislation as it applies to the Property (together "Railbanking Obligations").

3.2 Consistent with Section 8.1 of the Acquisition Agreements, BNSF will file a request with the STB for authorization to abandon the Property, and the County shall timely take the steps necessary to apply to the STB to become the Interim Trail User for the Property and to receive the reactivation rights at Closing, including the SWAFR, and shall at Closing and after STB approval execute a Trail Use Agreement with BNSF that includes transfer to the County of the reactivation rights for the Property.

3.3 Consistent with Section 9.2 of the Acquisition Agreements, the Port shall at Closing grant the County a Public Multipurpose Easement over the Property ("Easement") in substantially the form attached to hereto and incorporated herein as Exhibit A. The terms of the Easement shall be enforceable as a matter of contract under this Agreement, and as binding easement obligations running with the land.

3.4 Consistent with Section 2 of the Acquisition Agreements the County shall pay the Port \$1,903,000 at Closing for the Easement.

3.5 The County and Port shall participate in the implementation of the Acquisition Agreements according to their respective interests therein and in cooperation with one another. Each Party shall, upon request, share with the other, all materials concerning the Property provided to it by BNSF. Such materials will be provided in AS IS condition, with no representation or warranty as to the accuracy or completeness of the contents of the materials. Each Party shall have the right to participate in all discussions and negotiations with BNSF concerning or affecting the Property.

3.6 With regard to Section 4.3 of the Acquisition Agreements concerning the Title/Survey Inspection for the Property, the Port, with the agreement of the County, shall give timely joint notice of any objections to title, which notice shall include any objections raised by either Party.

3.7 With regard to Section 10.1 of the Acquisition Agreements concerning Port or County's default, in the event of a material default where BNSF elects to terminate the Acquisition Agreements and retain \$5,000,000 (five million dollars) of Earnest Money, Port shall be responsible for such damages if it causes such breach, County shall be responsible for such damages if it causes such breach, and if both Port and County cause such breach, each shall be responsible for damages based on each Party's relative contribution to such breach.

3.8 With regard to Section 10.2 of the Acquisition Agreements concerning BNSF's default, in the event of a material default by BNSF the Port and the County will cooperate in good faith to make a joint determination and provide notice to BNSF as to their remedy election.

If both Port and County desire to obtain specific performance of BNSF's obligations under the Acquisition Agreements, then the Parties shall together elect to obtain specific performance under Section 10.2 of the Acquisition Agreements, and each Party shall bear its own expenses to pursue such remedy. If Port desires to obtain specific performance of BNSF's obligations under the Acquisition Agreements and the County does not, then the Parties shall together elect to obtain specific performance under Section 10.2 of the Acquisition Agreements and the County shall if requested in writing by the Port participate in and support any effort to obtain specific performance, provided the Port shall pay and/or reimburse all costs and liabilities, including legal fees and expert fees, of such effort or that may result from such effort, both on behalf of itself and the County. If County desires to obtain specific performance of BNSF's obligations under the Acquisition Agreements and the Port does not, then the Parties shall together elect to terminate the Acquisition Agreements under Section 10.2 of the Acquisition Agreements.

3.9 The County shall have the right to enforce directly against BNSF the terms of the Acquisition Agreements for the Property, including without limitation issues that relate to title, condition of the property, and environmental matters. The Port may also seek to enforce the terms of the Acquisition Agreements for the Property. To the extent that both Parties seek to enforce those terms, the Port and the County shall cooperate with one another to do so, and with regard to the liability of the Port and the County on one hand and BNSF on the other hand, the Port and County will allocate liability between themselves pursuant to this Agreement and the Easement.

#### 4. Rights and Obligations of the Port and the County Regarding the Property; Planning Period.

4.1. The rights and obligations of the Port and the County regarding the Property are set forth in detail in the Easement.

##### 4.2 Planning Period.

The rights and obligations of the Parties in the Easement shall be supplemented by this Agreement as to the limited period of time between the execution of this Agreement and the joint determination of the Parties under Section 2.1.1 of the Easement. This period of time shall be referred to as the Planning Period.

4.2.1 Prior to Closing the Port and the County will jointly decide what capital improvements, such as fencing, barriers or **signage**, if any, are initially needed to address safety concerns on the Property. After Closing such capital improvements shall be carried out as set forth in Section 3.2.1 of the Easement.

4.2.2 During the Planning Period the Port and the County will not remove any existing rails on the Property.

4.2.3 During the Planning Period the County and Port may conduct surveys, mapping, geotechnical, environmental investigations or other similar activities ("Planning Activities") on any portion of the Property not subject to Transportation Use associated with the Regional Process, provided the Port shall provide the County written notice of any invasive

activities, and thereafter the Port and the County will coordinate the conduct of such activities. The County shall have the right to perform Planning Activities for any portion of the Property that is subject to Transportation Use during the Planning Period in coordination with the Transportation User.

5. Indemnification, Insurance and Hazardous Substances Liability.

Indemnification, insurance and hazardous substances liability issues related to the Property are as set forth in the Easement.

6. King County Right to Partial Assignment of Acquisition Agreements.

6.1 On or before 5:00 pm on July 1, 2008, Port may, subject to King County Council approval, assign to County all of its rights under the Acquisition Agreements to acquire the segment of the Property on the Woodinville Subdivision between approximately mile post 5.0 in Renton and mile post 11.8 in Bellevue at a point just north of the Wilburton Trestle, the Redmond Spur, or both, such that at closing the County would acquire ownership of such segments by paying to the Port a per-segment price to be determined by the appraisal by appraiser Murray Brackett of Allen Brackett Shedd Real Estate Appraisers referenced in Section 2.1.8 of this Agreement.

6.2 If the Port assigns to the County the right to purchase one or more segments of the Subdivision, then upon such assignment County shall assume all the rights and obligations of the Port vis-a-vis BNSF under the terms of the Acquisition Agreements as to such segments, and the provisions of this Agreement relating to the grant by the Port of the Easement shall not apply to any such segments.

7. Future Disposition of Subdivision.

7.1 King County Right of First Opportunity to Acquire.

After Closing, should the Port in good faith determine to offer or agree to transfer ownership of any or all of the Subdivision to any entity, the Port shall provide the County with one-hundred-twenty days notice of such determination and offer the County the right to purchase such property at an amount as determined by the appraisal prepared by appraiser Murray Brackett of Allen Brackett Shedd Real Estate Appraisers referenced in Section 2.1.8 of this Agreement, plus compounded annual interest from the date the Port acquired the Subdivision from BNSF at a rate equal to three percent per annum (the "Price"). If the County does not exercise the right to purchase such property within that period, the right to purchase such property in an amount no greater than the Price may be exercised within one hundred twenty days thereafter by any other public agency in the State authorized to provide transit, rail services or public trails. If no such agency exercises the right to purchase such property within that period, all rights of the County under this section as to that particular portion of the Subdivision shall immediately terminate, and the Port may transfer that particular portion of the Subdivision to any entity and on any terms it deems appropriate.

## 7.2 Railbanking Freight Property.

After Closing, should any entity seek to abandon or discontinue the obligations to provide freight common carrier service for any or all of the Freight Property, then Port and County shall cooperate to allow the County or another appropriate entity to seek a NITU or CITU in order to railbank such Property.

**7.3** The rights and obligations in this Section 7 shall continue in full force and effect so long as the Port continues to own all or a portion of the Subdivision.

## 8. Regional Planning Process for BNSF Corridor.

The Port and the County will cooperate in good faith with one another to jointly carry out a formal, multi-agency process to plan and recommend appropriate uses of the Property.

## 9. Agreement Contingency.

This Agreement is contingent on Closing as required by the Acquisition Agreements. If the Acquisition Agreements are terminated without the Closing having occurred, this Agreement will terminate, except that it will continue in full force and effect as to any obligations or disputes that arose under the Acquisition Agreements or under this Agreement prior to or as part of such termination.

## 10. Duration.

This Agreement shall continue in effect so long as the Port owns all or a portion of the Property and the County is the Interim Trail User and holder of the Easement for all or a portion of the Property. If this Agreement expires under this Section 10, it will only be partially terminated. In such case, the Agreement will continue in full force and effect as to any obligations or disputes that arose prior to such expiration and it will continue in full force and effect as to the terms of Section 7.

## 11. Administration and Identification of Contacts.

This Agreement shall be administered by Rod Brandon, Director of Environmental Sustainability, Office of the King County Executive and Joe McWilliams, Managing Director, Real Estate and Property Management, which shall be contacted as follows:

### County:

Office of the King County Executive  
701 Fifth Avenue, Suite 3210  
Seattle, WA 98104  
Attn: Rod Brandon, Director of Environmental Sustainability  
Fax No. 206-296-0194

port:

Port of Seattle  
 Real Estate and Property Management  
 P.O. Box 1209  
 Seattle, WA 98111  
 Attn: Joe McWilliams, Managing Director  
 Fax No. 206-728-3722

## 12. Dispute Resolution.

12.1 Any claim, dispute or other matter in question arising out of or related to this Agreement, including any inability of the Parties to make joint determinations as called for by this Agreement ("Disputes") shall be exclusively subject to the following alternative dispute resolution procedure as a condition precedent to the institution of legal or equitable proceedings by either party. This requirement cannot be waived except by an explicit written waiver signed by the Parties.

12.2 The Parties shall negotiate in good faith and use their best efforts to resolve any Disputes that may develop under this Agreement. The Port's Chief Executive Officer (or his/her designee) and the King County Executive (or his/her designee) along with any staff or technical persons any of the Parties desire, shall meet within seven (7) days after written request from either party and attempt to resolve a Dispute. The Parties may agree to extend the time provided for in this Section for an additional seven (7) days.

12.3 If a Dispute is not resolved under the procedure set forth in Section 12.2, or within such additional time as the Parties mutually agree, then the Parties shall endeavor to resolve a Dispute by mediation with a mediator agreed to by the Parties. A Party shall submit a request for mediation in writing to the other Party. Mediation shall proceed in advance of legal or equitable proceedings. Any contractual or statutory deadlines as between the Parties, including without limitation statutes of limitation, shall be tolled pending mediation for a period of 60 (sixty) days from the date of the mediation request, unless tolled for a longer period by agreement of the parties. Final authority for settlement may be subject to the approval of the Parties respective legislative bodies.

12.4 The Parties shall not commence litigation on a Dispute unless the Dispute has been properly raised and considered in the above mediation procedure. The Parties shall share equally on the costs of the mediation. Any mediation under this Agreement shall be held in King County, Washington. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

12.5 If Port or County reasonably determine that circumstances require immediate action to prevent or mitigate significant damage to or loss of the Property, then such Party may pursue any immediate remedy available at law or in equity without having to follow these alternative dispute resolution procedures in this Section, and then pursue such alternative dispute resolution procedures.

12.6 This Section 12 shall not apply to any dispute between the Parties that also relates to a dispute with BNSF.

13. General Terms and Conditions.

13.1 Headings. The headings in this Agreement are for convenience only and shall not be deemed to expand, limit, or otherwise affect the substantive terms of this Agreement.

13.2 Neutral Authorship. Each party has been represented by counsel in connection with the negotiation, execution and delivery of this Agreement. Each of the provisions of this Agreement has been reviewed and negotiated, and represents the combined work product of both parties hereto. No presumption or other rules of construction which would interpret the provisions of this Agreement in favor of or against the party preparing the same will apply in connection with the construction or interpretation of any of the provisions of this Agreement.

13.3 Records, Audits, and Inspections. During the term of this Agreement, each party's books, records and other materials related to any matters covered by this Agreement and not otherwise privileged shall be subject to inspection, review, and/or audit by the other party at the inspecting party's sole expense. Such books, records and other materials shall be made available for inspection during regular business hours within a reasonable time of the request.

13.4 Assignment. Neither party may assign its rights under this Agreement or any interest therein without the other party's prior written approval.

13.5 Governing Law; Jurisdiction and Venue; Attorneys' Fees. The laws of the State of Washington shall govern the interpretation and enforcement of this Agreement. The parties agree that the Superior Court in King County, Washington, shall be the sole and exclusive venue for any action or legal proceeding for an alleged breach of any of the terms and conditions set forth herein, or to enforce, protect, determine or establish any term, covenant or provision of this Agreement or the rights hereunder of either party; and the parties hereby agree to submit to the personal jurisdiction of said court. If either party brings such an action or legal proceeding, the prevailing party shall be entitled to recover from the non-prevailing party, as part of such action or proceedings, or in a separate action brought for that purpose, reasonable attorneys' fees and costs, expert witness fees and court costs, including those incurred upon appeal, as may be fixed by the court.

13.6 Severability. If any provision of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable unless striking such provision materially alters the intention of the parties. If a court finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.


13.7 Non-Waiver. The failure of either party to enforce any provision of this

Agreement shall not be construed as a waiver or limitation of that party's right subsequently to enforce and compel strict compliance with every provision of this Agreement.

13.8 Entire Agreement; Relation to Easement and Acquisition Agreements. This Agreement, the Acquisition Agreements and the Easement set forth the entire agreement between the Parties with respect to the subject matter hereof, and are intended by the Parties to be read in harmony with one another. There are no understandings or agreements between the parties respecting the subject matter hereof, written or oral, other than as set forth in those documents. If, however, there is any conflict between this Agreement and the Easement, the Easement shall control. And if there is any conflict between this Agreement and the Acquisition Agreements, this Agreement shall control. This Agreement may be amended by the mutual written agreement of the Parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed.

KING COUNTY

  
\_\_\_\_\_  
Ron Sims  
King County Executive


May 12, 2008  
Dated

Approved as to Form:

By:   
\_\_\_\_\_  
Senior Deputy Prosecuting Attorney

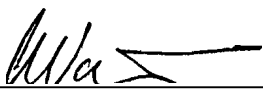
5 / 12 / 08  
Dated

PORT OF SEATTLE

  
\_\_\_\_\_  
Tay Yoshitani  
Port of Seattle Chief Executive Officer

5/12/08  
Dated

Approved as to Form:

By:   
\_\_\_\_\_  
General Counsel

5/12/2008  
Dated

Recording Requested By And  
When Recorded Return to:

**Exhibit A to Interlocal**

King County

Seattle, WA

**PUBLIC MULTIPURPOSE EASEMENT**

Grantor: Port of Seattle

Grantee: King County

Legal Description (abbreviated): \_\_\_\_\_, Additional legal(s) on Page \_\_\_\_.

Assessor's Tax Parcel ID# \_\_\_\_\_

Reference Nos. Of Documents Released or Assigned: \_\_\_\_\_

Project [Area]: \_\_\_\_\_

Parcel [#]: \_\_\_\_\_

This easement is granted this \_\_\_\_ day of \_\_\_\_\_, 2008, by the PORT OF SEATTLE a Washington State municipal corporation ("Grantor"), to KING COUNTY, a home rule charter county and political subdivision of the State of Washington ("Grantee").

**WITNESSETH**

**RECITALS**

1. Grantor and Grantee executed a Purchase and Sale Agreement and Donation Agreement ("Acquisition Agreements") with BNSF Railway Company ("BNSF"), by and through which BNSF agreed to convey a rail corridor with rails in place, known as the Woodinville Subdivision ("Subdivision"), to Grantor. In the Acquisition Agreements, Grantee received a right of first opportunity to purchase portions of the Subdivision from Grantor.
2. Grantee has been approved as an Interim Trail User by the Surface Transportation Board ("STB") for the purpose of "railbanking" the Property, and Grantee is accordingly subject to certain legal obligations related to the Property, which are referred to herein as the "Railbanking Obligations." The Railbanking Obligations consist of those obligations imposed through Section 8(d) of the National Trails System Act, also known as the Rails-to-Trails Act, 16 U.S.C. 1247(d), and 49 C.F.R. 1152.29 (collectively, and as any of the foregoing may hereafter be amended or interpreted by binding judicial or administrative authority, the "Railbanking Legislation"), the Notice of Interim Trail Use ("NITU") for the Property issued by the STB; the Trail Use Agreement ("TUA") entered into between BNSF and Grantee for the Property under which Grantee agrees to accept, exercise, and fulfill all

of the legal rights, duties, and obligations of an Interim Trail User, and the Statement of Willingness to Accept Financial Responsibility ("SWAFR"). Under the TUA, Grantee has also received BNSF's rail service reactivation rights and/or obligations for the Property as approved by the STB.

3. Grantor desires Grantee to be the Interim Trail User for the Property because Grantee has substantial expertise and experience in acquiring, developing, maintaining and operating public trails, and Grantee is willing to assume this responsibility so long as it has sufficient rights to the Property to serve as the Interim Trail User for purposes of the Railbanking Legislation.

4. Prior to the closing on the Acquisition Agreements ("Closing"), Grantor and Grantee separately entered into an Interlocal Agreement ("Interlocal") regarding their mutual rights and obligations concerning the Property. The Interlocal is premised on the Parties' intent that the Property be used for regional recreational trail and other transportation purposes, including but not limited to rail or other transportation purposes other than interstate freight service ("Transportation Use").

5. It is anticipated that such Transportation Use will be carried out by a Third Party Operator ("TPO") with rights granted by separate agreement affecting or relating to the Property ("TPO Agreements").

6. The Parties intend that if interstate freight service should be reactivated in the future, such service should be able to be integrated with and not necessarily displace the Parties' intended regional trail and Transportation Uses.

7. The Parties agree that acquisition of the Property is of substantial benefit to the region because of its potential for use for regional recreational trail use and Transportation Use, and therefore the Interlocal includes a binding commitment to undertake a formal, multi-agency process to plan and recommend appropriate uses of the Property ("Regional Process").

8. Grantor and Grantee intend that the development of a public trail authorized by this Easement will not prevent Transportation Uses on the Property, but rather will be designed and developed to accommodate Transportation Uses.

NOW, THEREFORE, the PORT OF SEATTLE and KING COUNTY, in consideration of each other's duties and obligations under this Easement, the Acquisition Agreements, the TUA, and the Interlocal, and all of them, and in exchange for the other good and valuable consideration described therein, the sufficiency of which is hereby acknowledged, do hereby agree as follows:

## TERMS AND CONDITIONS

### 1. Overview of Grantee's Easement Rights

Grantor grants to Grantee, its successors and assigns, a non-exclusive, perpetual easement ("Easement") over, under, through, along and across certain parcels of land situated in King County, Washington, as legally described in Exhibit "A" attached hereto and incorporated herein (the "Property") solely for the following purposes:

**1.1** To develop, operate, maintain, repair and improve a public hard- and/or soft-surface regional trail for public pedestrian, bicycle, or other non-motorized uses ("Trail") over a portion of the Property to be designated by Grantor and Grantee in a future amendment to this Easement ("Trail Area"), in accordance with Section 2.1.1 below; and

**1.2** To carry out Grantee's Railbanking Obligations over the full width and length of the Property.

**1.3** Grantee's Easement rights shall be subject to all preexisting fully executed recorded or unrecorded easements, leases, permits, franchises, occupancy agreements, licenses or other agreements demising space in, providing for the use or occupancy of, or otherwise similarly affecting or relating to the Property in favor of Puget Sound Energy for facilities/utilities that are physically located on or in the Property at the time this Easement is granted ("PSE Instruments"). If any such PSE Instruments are renewed or extended, such renewal or extension shall be subject to this Easement.

**1.4.** Any TPO Agreement shall be subject to this Easement.

### 2. Grantee's Trail Use Rights

This Easement gives Grantee the right to, at Grantee's sole cost and expense, develop, operate, maintain, repair and improve a Trail upon commencement of "Trail Development". For purposes of this Easement, "Trail Development" means the initial construction or any substantial re-construction of a Trail. Trail Development shall commence on the date that Grantee specifies to Grantor, in writing, as the date for breaking ground in a particular, identified segment of the Trail Area. In the event Grantee fails to break ground within five (5) days of the specified date, Trail Development shall not be deemed to have commenced until Grantee provides a new date in writing to Grantor, *provided*, if Grantee has broken ground in a segment in accordance with the requirements of Section 2.1.7 but without having provided Grantor written notice of the date, Grantee may cure the lack of notice at any time for such segment such that Trail Development shall be deemed to have commenced for such segment on the date Grantee broke ground as determined by Grantee's construction contracts.

## **2.1 Scope of Trail Use Upon Commencement of Trail Development**

**2.1.1** Grantor and Grantee will jointly determine, after the completion of and in consideration of the recommendations of the Regional Process, the appropriate location and size of the Trail Area. Grantee may initiate negotiation of the joint determination through written notice to Grantor no sooner than the earlier of the completion of the Regional Process or one (1) year after Closing. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within eighteen (18) months after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3. After the joint determination as to the location and size of the Trail Area is made, Grantor and Grantee shall amend this Easement to incorporate a legal description of the Trail Area, and if thereafter the Trail Area is moved consistent with the terms of this Easement, Grantor and Grantee will further amend this Easement to incorporate a revised legal description of the Trail Area. Grantor and Grantee agree that under generally applicable trail development standards for regional trails, the Trail Area will generally range from 10 feet in width to 30 feet in width depending on the Parties' joint determination as to the uses to be undertaken on the Property, and the physical constraints of the Property. The Parties acknowledge that the Trail Area could be wider than 10 to 30 feet in width where additional width is needed to accommodate all necessary slopes for cuts and fills for the Trail; to install abutments, pilings, or other structural elements of trail bridges or tunnels; to allow grade or other physical separation of the Trail and any active rail lines on the Property; or to install storm water drainage or detention facilities or other facilities required by a permitting agency in support of or as mitigation for the Trail. Grantor and Grantee further agree that the location and size of the Trail Area will accommodate, and not prevent, future Transportation Use of the Property.

**2.1.2** At the conclusion of the earlier of the joint determination process or the eighteen (18) month period for negotiating the joint determination as set forth in Section 2.1.1 herein, and prior to commencement of Trail Development but no later than five (5) years after Closing, Grantee may at its sole discretion elect not to proceed with Trail Development and may take action to terminate this agreement and request STB approval to transfer or terminate Grantee's Interim Trail User status and Railbanking Obligations on one-hundred and twenty (120) days written notice to Grantor. In the event of such notice, Grantor may engage a substitute Interim Trail User consistent with all current and future STB requirements, and Grantee shall cooperate fully and as necessary to support such effort. If Grantee fails to exercise this option to terminate within the earlier of five (5) years after Closing or prior to Trail Development, the Grantee's option to terminate under this Section 2.1.2 is forever waived without further action by either party. Upon approval by the STB of the transfer of Grantee's Interim Trail User status and Railbanking Obligations or the termination of Grantee's Interim Trail User status and Railbanking Obligations, the Easement shall, at Grantor's written option, be assigned to a replacement Interim Trail User or terminated. Upon such assignment or termination, Grantor shall pay Grantee for its Easement rights in the amount of \$1,903,000.

**2.1.3** Grantor and Grantee will jointly determine, after completion of and in consideration of the Regional Process, the appropriate timeline for the development of the Trail. Grantee may develop the Trail in phases. At the time jointly determined by Grantor and Grantee, but no later than five (5) years after Closing, Grantee shall have the right to commence Trail Development in the Trail Area as to any segment of the Trail Area for which Grantee notifies Grantor in accordance with Section 2 above.

**2.1.4** Grantee shall have the right to use the Trail Area for all purposes necessary or incidental to Grantee's installation, construction, ownership, use, operation, maintenance, inspection, repair, replacement, renovation, improvement, removal and enhancement of a Trail, including, but not limited to, the rights of ingress and egress across the surface of the Property, provided, such ingress and egress shall not interfere with any Transportation Use on the Property, if any; the right to use motorized vehicles for the improvement, construction, alteration, repair, maintenance and operation of a Trail and for emergency purposes; the right to install, construct, operate, maintain, modify, repair, replace, improve, remove and use the Trail Area for any Trail-related purposes as Grantee may now or hereafter deem appropriate, including the addition, removal or replacement of Trail improvements at Grantee's election, either in whole or in part with either like or different improvements. All Trail-related improvements of any kind that are now or hereafter acquired, constructed or installed by Grantee, at Grantee's sole cost and expense within the Trail Area shall be and shall at all times remain the property of Grantee.

**2.1.5** Grantee's rights under this Easement include the further right to temporarily stage equipment and material on the Property in and around the Trail Area as reasonably necessary to construct, operate, maintain, improve, or remove the Trail, provided, such temporary staging shall not interfere with any Transportation Use on the Property, if any; and further provided, that Grantee shall not commence such temporary staging on the Property until Grantee has prepared a restoration plan for the affected portions of the Property, the surface of which shall be restored, at Grantee's sole cost and expense, as nearly as possible to the condition in which it existed prior to construction, or to such other condition as the Grantor and Grantee may agree.

**2.1.6** Grantee may construct, operate, and maintain Trail crossings over, under, or across any railroad tracks or other transportation facilities on the Property, provided that such crossings shall be consistent with applicable law, trail or crossing design standards and shall not interfere with any Transportation Uses on the Property, and provided further that Grantee shall be responsible for performing and paying for Custodial Activities as defined in this Easement as to any of the crossing improvements, but not to the railroad tracks or other transportation facilities in the area of the crossing.

**2.1.7** At least ninety (90) days prior to the commencement of any Trail Development or any other activity related to Trail Development, Grantee shall provide Grantor with (i) a copy of all plans and specifications for such proposed Trail Development and (ii) a plan for coordinating the proposed Trail Development with any then current or reasonably foreseeable Transportation Uses or other uses by Grantor on the Property. Grantee shall not commence any such Trail Development construction, work or activity

unless and until Grantor agrees in writing to the proposal, which shall not be unreasonably withheld, conditioned or delayed.

**2.1.8** Grantee shall, at its sole cost and expense, comply with all stormwater requirements for Trail Development to the extent any such requirements are applicable to Grantee's Trail Development, including, but not limited to: (i) Grantee shall be the sole applicant for any Washington State construction stormwater general permit for Trail Development, and shall be liable for any fines or other liability that derives from non-compliance with any such permit; (ii) Grantee shall be the applicant for any construction stormwater permits for Trail Development required by any local jurisdiction that the Property is located in, and shall be responsible for any costs associated with drainage review by any such local jurisdiction; (iii) Grantee shall perform its own drainage reviews and pay all drainage review fees required under King County Code for Trail Development for sections of the Property located within Grantee's jurisdiction; (iv) Grantee shall have all maintenance obligations for any drainage facilities it constructs for Trail Development pursuant to this Easement; and (v) Grantee shall provide Grantor with copies of all correspondence between Grantee and Washington State or any local jurisdiction related to construction stormwater permits associated with Grantee's activities under this Easement.

**2.1.8.1** Grantee acknowledges and agrees that Grantor is bound under its Municipal Stormwater Permit ("Permit") and that the Property is subject to the Permit terms. Grantee agrees to cooperate with Grantor in Grantor's compliance of its obligations under the Permit including, but not limited to, Grantor's right to inspect the Property, map pipes on the Property, provide stormwater education and enforce Permit provisions.

## **2.2 Trail Use and Transportation Use of Property**

**2.2.1** Grantee understands, acknowledges, and agrees that Grantor or a TPO may undertake Transportation Use of the Property outside of the Trail Area. Outside of the Trail Area, and except as set forth in this Easement, Grantee shall not take any action on or in the Property to limit such Transportation Uses or to limit ingress and egress to any part of the Property for such Transportation Use, unless such action is specifically approved in writing by Grantor.

**2.2.2** If Grantor or any TPO is required, or may desire at any time, or from time to time to engage in any Transportation Use or to add to or to improve railroad infrastructure or other Transportation Use facilities in the Trail Area, or to change the grade or location of any railroad infrastructure or other Transportation Use facilities in the Trail Area (collectively "Transportation Infrastructure Change"), and such change would unreasonably interfere with Grantee's then existing or future development of the Trail Area, including but not limited to trail crossings of Transportation Use facilities in the Property in accordance with the rights granted under this Easement, or Grantee's then existing or future development of the Trail Area would interfere with the Transportation Use related to the Transportation Infrastructure Change, then Grantor or such TPO may make such change in its facilities in the Trail Area, and Grantor and Grantee will jointly determine a new Trail Area location to replace the affected portion of the Trail Area and any Trail or Trail-related

improvements. If Grantee elects to replace any Trail or Trail-related improvements in the relocated Trail Area, such replacement shall be at Grantee's sole cost. Any such relocation shall occur within the Property and any affected Trail Area shall be relocated in a location that is consistent with the standards in Section 2.1.1 and that is consistent with Grantee's Railbanking Obligations; **provided**, that if there is no reasonably practicable alternative for such relocation within the Property consistent with Section 2.1.1, then such relocation on the Property may be to standards less than required by Section 2.1.1 so long as the Parties make a good faith effort to allow for a Trail Area no less than ten feet in width and the relocation meets the minimum standards necessary to satisfy Grantee's Railbanking Obligations.

Grantee may, at its sole cost, relocate any affected Trail or Trail-related improvements off the Property. At least one hundred twenty (120) days before Grantor may take any action that would require a joint determination under this Section 2.2.2, it shall initiate negotiation of such joint determination through written notice to Grantee accompanied by a detailed description of its proposed action. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within one hundred twenty (120) days after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3 to make the joint determination of the new Trail Area location and to seek all available remedies, and Grantor or TPO may make such Transportation Infrastructure Change even if the joint determination has not been made. "Reasonably practicable" as used in this Easement shall mean capable of being implemented in a reliable and effective manner including consideration of cost. When considering cost, an alternative shall not be considered reasonably practicable if the incremental costs of the alternative are substantially disproportionate to the incremental degree of benefits provided by the alternative.

**2.2.3** If a portion of the Property is subject to Transportation Use when Grantee commences Trail Development within the Trail Area, then Grantee shall be responsible for installing barriers to separate such portion of the Property from the Trail Area. If Grantor or a TPO commences Transportation Use of a portion of the Property that is adjacent to a portion of Trail Area where Trail Development has commenced, then Grantor or TPO shall be responsible for installing barriers separating such portion of the Property from the Trail Area. Grantee and Grantor (or TPO if designated by Grantor) shall jointly determine the type and scope of barriers (e.g. jersey barriers, fencing, or grade separation) or other measures reasonably needed to separate the Trail Area from the Transportation Use, which barriers shall at a minimum meet any applicable regulatory standards; **provided**, that after initial barrier installation is completed, Grantee shall be responsible, at Grantee's sole cost and expense, to inspect, maintain and replace any barriers or other measures that will separate the Trail Area from the Transportation Use. Before either Party may take any action that would require a joint determination under this Section 2.2.3, it shall initiate negotiation of such joint determination through written notice to the other Party accompanied by a detailed description of the proposed barriers. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within ninety (90) days after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3.

### **2.3. Grantor's Retained Rights to the Trail Area**

**2.3.1** Grantor retains the right to use and allow others to use the Trail Area in any manner that does not unreasonably interfere with Grantee's easement rights and is consistent with the terms of this Easement.

**2.3.2** Grantor may make improvements in the Trail Area, including surface or subsurface improvements that are not part of, and do not relate to, Grantee's Trail (collectively, "Other Improvements"), *provided*, that Grantor shall coordinate with Grantee to (i) prevent unreasonable interference with Grantee's Easement rights, (ii) ensure reasonable integration of the Trail and Transportation Uses on the Property, (iii) prevent any health or safety risk; (iv) avoid or minimize to the greatest practicable extent any disruption to Trail uses; and (v) restore the Trail Area to a condition substantially similar to that existing prior to the alteration. Such Other Improvements may not cause the Trail Area to be relocated.

**2.3.3** Grantee shall reasonably cooperate with PSE to site future PSE facilities authorized under PSE Instruments, or future fully executed instruments in which Grantor grants an interest in the Property to PSE, within the Trail Area if such facilities can reasonably collocate within the Trail Area with Grantee's Trail use.

**2.3.4** At least ninety (90) days prior to the commencement of any construction or substantial reconstruction of Other Improvements by Grantor in the Trail Area, Grantor shall provide Grantee with (i) a copy of all plans and specifications for such proposed Other Improvements and (ii) a plan for coordinating the proposed Other Improvements with Grantee's use of the Trail Area. Grantor shall not commence any such construction unless and until Grantee agrees in writing to the proposal, which shall not be unreasonably withheld, conditioned or delayed.

### **3. Railbanking Obligations On the Property**

This Easement gives Grantee the right to carry out all Railbanking Obligations, including Custodial Activities, over the full width and length of the Property.

#### **3.1 Custodial Activities and Transportation Use**

**3.1.1** "Custodial Activities" are those activities that a Property owner would reasonably take to manage the Property in order to keep the Property in a physical condition suitable for its use, to maintain the physical integrity of the Property, to prevent health and safety hazards, and to manage public access in a manner appropriate for the Property's use, which may range from allowing public access to prohibiting such access, depending on circumstances. Custodial Activities include both "Routine Maintenance" and "Capital Improvements." "Routine Maintenance" includes, but is not limited to, inspecting the property, litter and garbage pick up, brush and hazardous tree trimming or removal, drainage maintenance or repair, and fencing or signage maintenance. "Capital Improvements" includes capital investments in the Property that go beyond Routine Maintenance, including, but not

limited to, the installation of fences, barriers, or signs, or the repair of a wash-out on the Property. Custodial Activities do not include any activities related to granting or managing easements, leases, permits, franchises, occupancy agreements, licenses or other agreements demising space in, providing for the use or occupancy of, or otherwise similarly affecting or relating to the Property, which activities shall be the sole responsibility of Grantor.

**3.1.2** A Transportation Use is undertaken when Grantor or a TPO begins to use the Property for the operation of a Transportation Use; and a Transportation Use is terminated when such use ceases and (a) the Grantor or a TPO notifies Grantee in writing that such use will not resume for a period of at least ninety (90) days, or (b) when Grantee notifies Grantor in writing that it has determined, in good faith and upon reasonable investigation, that such use will not resume for a period of at least ninety (90) days. Both Grantor and Grantee have a duty to notify each other as in subsections 3.1.2(a) and (b) if they become aware that Transportation Use has terminated.

**3.1.3** "Trail-Side Area" means an area between the Trail Area and the Property boundary that is not being used for Transportation Use.

### **3.2 Custodial Activities Performance and Cost Allocation**

Custodial Activities will be performed and paid for in the following manner depending on the uses present on the Property:

**3.2.1** In any portion of the Property where there Trail Development has not commenced and there is no Transportation Use, Grantee shall be responsible for performing all Custodial Activities. Grantor shall compensate Grantee for the actual cost and expense of performing Routine Maintenance. Should more than Routine Maintenance be needed to carry out Custodial Activities, Grantor and Grantee will jointly decide what Capital Improvements are needed to address any such conditions identified by Grantor or Grantee. Grantor will pay Grantee the actual cost and expense of carrying out such Capital Improvements. Grantee shall make such Capital Improvements. Either Party may initiate negotiation of a joint determination under this Section 3.2.1 through written notice to the other Party accompanied by a detailed description of the identified condition and proposed Capital Improvements. Thereafter the Parties shall negotiate in a good faith and reasonable manner to reach agreement. The joint determination shall be made within ninety (90) days after the initiation of negotiation. If the joint determination is not made within that time, either Party may start Dispute Resolution under Section 4.3. Either party may start Dispute Resolution earlier if circumstances require a shorter time to make a joint determination in order to prevent or mitigate significant damage to or loss of the Property.

**3.2.2** In any portion of the Property where Trail Development has commenced but there is no Transportation Use, Grantee shall be responsible for performing and paying for all Custodial Activities.

**3.2.3** In any portion of the Property where Trail Development has commenced and there is Transportation Use, Grantee shall be responsible for performing

and paying for all Custodial Activities inside the Trail Area, inside any Trail-Side Area, and inside any portion of the Property used by Grantee under Sections 2.1.5 of this Easement. Grantor or the TPO undertaking Transportation Use shall be responsible for performing and paying for all Custodial Activities on the remainder of such Property.

**3.2.4** In any portion of the Property where there is Transportation Use but Trail Development has not commenced, Grantor or the TPO undertaking Transportation Use shall be responsible for performing and paying for all Custodial Activities.

### **3.3 Cost Allocation Framework to be Implemented by Contract**

Grantor and Grantee shall separately contract to implement the cost allocation framework set forth in Section 3.2, and such contract may be revised from time to time as the Parties may agree.

### **3.4 Custodial Activities Following Termination of Transportation Use**

If and when Transportation Use is terminated on a segment of the Property consistent with Section 3.1.2 of this Easement, then Grantee shall resume performing Custodial Activities for such segment if requested to do so by Grantor in writing or if Grantee elects to do so in written notice to Grantor.

**3.5** The Property shall be subject to the Railbanking Obligations. In the event Grantee determines that it is no longer reasonably practicable to carry out Railbanking Obligation because of actions taken by Grantor or any other entity using or claiming ownership of the Property, then Grantee, after unsuccessfully engaging in the dispute resolution process pursuant to Sections 4.3.1 and 4.3.2, may notify the STB that Grantee will no longer serve as the Interim Trail User for all or a portion of the Property, and request that Grantee's Railbanking Obligations be extinguished as to the identified land pursuant to the Railbanking Legislation. If Grantee seeks extinguishment of its Railbanking Obligations as to all or a portion of the Property, Grantee shall, if requested by Grantor, cooperate to transfer, as to the identified land, its Interim Trail User status and its interest in this Easement to a replacement Interim Trail User. As to any portion of the Property for which Railbanking Obligations are terminated, Grantor or a replacement Interim Trail User may acquire from Grantee its Easement rights in exchange for an amount equal to a pro rata share of the County's payment \$1,903,000 to the Port for the Easement, plus compounded annual interest on that amount from the date of the grant of this Easement at a rate equal to three percent per annum.

**3.6** The Parties recognize and agree that a portion of the Property between milepost 10.6 and 11.25 ("Wilburton Segment") has not been subject to Interim Trail Use and the Railbanking Obligations, but rather was abandoned with the approval of the STB prior to Grantor's acquisition of the Property. The Wilburton Segment is a critical link in the maintenance of the remainder of the Property in compliance with the Railbanking Obligations. Therefore, the Wilburton Segment is subject to the terms of this Easement and shall be deemed to be and treated under this Easement as if it was subject to Interim Trail

Use and the Railbanking Obligations, including specifically, but without limitation, the requirement to keep ownership of the Wilburton Segment intact and available with the remainder of the Property for reactivated interstate freight rail service.

#### **4. Other Terms and Conditions.**

##### **4.1. Reactivation of Interstate Rail Service Under the Railbanking Legislation**

**4.1.1** Grantor and Grantee understand, acknowledge and agree that if the STB receives a request to use all or any portion of the Property for federally regulated interstate freight rail service, then Grantor and Grantee may each be required to, and will if so required, make available some or all of their respective interests in the Property to accommodate reactivated freight rail service.

**4.1.2** Grantor and Grantee agree that if the STB receives a request for approval to use the Property for reactivated freight rail service, then Grantor and Grantee will cooperate in order to cause the party making such request, including Grantor or Grantee if either makes the request, (a) to bear all costs to restore or improve the Property for reactivated freight rail service; (b) to bear responsibility to take all steps necessary before the STB and any other regulatory agency, governmental or quasi-governmental body having jurisdiction over such work, to cause the relevant NITU to be vacated; and (c) to compensate Grantor and Grantee for the fair market value of any and all of their respective rights or interests in the Property, or in improvements thereon that may be destroyed, lost, compromised, or otherwise reduced in value or function when the Property or any portion of it is put to use for reactivated freight rail service.

**4.1.3** Grantor will indemnify, hold harmless, and defend Grantee, its officers, employees, agents and contractors from all costs or liability arising out of or relating to Grantor's failure to make available its interests in the Property to accommodate reactivated freight rail service in compliance with the Railbanking Obligations.

**4.1.4** Grantee will indemnify, hold harmless, and defend Grantor, its officers, employees, agents and contractors from all costs or liability arising out of or relating to Grantee's failure to make available its interests in the Property to accommodate reactivated freight rail service in compliance with the Railbanking Obligations.

##### **4.2 Insurance, Indemnification, and Hazardous Substances**

###### **4.2.1 Grantee As Additional Insured for Transportation Use**

Grantor shall require any entity utilizing the Property for Transportation Uses to name Grantee as an additional insured on any insurance policy maintained by the entity or required under the applicable TPO Agreement.

###### **4.2.2 Indemnification by Grantor**

Without in any way limiting the provisions of Section 4.2.5, and subject to the provisions of Subsection of 4.2.3.1, Grantor will indemnify, hold harmless, and defend Grantee, its officers, employees, agents and contractors from all liability arising out of or relating to the transfer, condition, use, possession, management, operation, or control of the Property, including without limitation public access, the Custodial Activities, Transportation Uses, and challenges to Grantor's authority to acquire or own the Property.

#### **4.2.3 Indemnification by Grantee**

**4.2.3.1** Without in any way limiting the provisions of Section 4.2.5, Grantee will indemnify, hold harmless and defend Grantor, its officers, employees, agents and contractors from all liability arising out of or relating to Grantee's, its officers, employees, agents or contractors' negligence in the exercise of Grantee's rights and obligations under this Easement.

**4.2.3.2** Grantee agrees to defend, indemnify and hold Grantor harmless from any and all claims, causes of action, regulatory demands, changes in permits and/or regulatory requirements for the Property, liabilities, fines, penalties, losses, costs and expenses (including attorneys' fees, costs and all other reasonable litigation expenses when incurred and whether incurred in defense of actual litigation or in reasonable anticipation of litigation), arising from stormwater discharges caused by Grantee's exercise of its Trail rights and obligations on the Property under Section 2.1 of this Easement.

#### **4.2.4 Indemnification for Transportation Use**

Grantor shall require any entity utilizing the Property for rail-based or fixed guideway Transportation Uses to indemnify, hold harmless and defend Grantee from any and all obligations imposed by Railroad Unemployment Insurance Act (45 U.S.C.A. §§ 351 et seq.), Railroad Retirement Act (45 U.S.C. §231 et seq.), Railway Labor Act (45 U.S.C. Sec. 151 et. seq.), Federal Employers Liability Act (45 U.S.C. Sec 51 et. seq.), common carrier obligations pursuant to (49 U.S.C. Sec. 10101 et. seq.), and any Federal rail safety legislation, that arise from such Transportation Use of the Property.

#### **4.2.5 Hazardous Substances**

**4.2.5.1** The Parties are acquiring their respective interests in the Property through the Acquisition Agreements. Section 6 and 7 of the Acquisition Agreements spells out the obligations of BNSF, Grantor and Grantee with regard to Hazardous Substances and Environmental Laws. These Sections are also included within the Deed for the Property. Section 7(e) says that the Section 7 obligations running from BNSF to Grantor and Grantee, and the Section 7 rights running to BNSF from Grantor and Grantee, will be allocated as between Grantor and Grantee in the manner separately agreed to by Grantor and Grantee. The liability for Hazardous Substances generally and the allocation as between the Grantor and Grantee referenced in Section 7 shall be as follows:

Grantor: Port of Seattle  
Grantee: King County

**4.2.5.2** Grantor shall be responsible for the Remediation of, and shall indemnify, defend and hold harmless Grantee, its officers, employees, agents and contractors from all liability arising out of the discovery of Hazardous Substances released on the Property before or after Closing, and the Grantor shall be entitled to all rights running from BNSF under Section 7 and shall be subject to all obligations running to BNSF under Section 7, except that:

(a) Grantee shall be responsible for the Remediation of, and shall indemnify, defend and hold harmless Grantor, its officers, employees, agents or contractors from all liability arising out of Hazardous Substances released on the Property by the Grantee, its officers, employees, agents or contractors after Closing, and

(b) Grantee shall be responsible for the Remediation of, and shall indemnify, defend and hold harmless Grantor, its officers, employees, agents and contractors, from all liability arising out of Hazardous Substances released after Closing by third parties within the Trail Area related to the development, operation, maintenance or use of the Trail; and

(c) Grantee shall be entitled to the rights running from BNSF under Section 7 and shall be subject to the obligations running to BNSF under Section 7 to the extent that the Hazardous Substances at issue are discovered within the Trail Area as a result of Grantee's Trail Development on the Property, in which case the Grantee shall be entitled to the pro rata share of any costs paid by BNSF to Remediate such Hazardous Substances within the Trail Area, and shall be responsible for carrying out and bearing the costs of Remediation of such Hazardous Substances within the Trail Area.

**4.2.5.3** In the event Hazardous Substances are discovered on the Property, Grantor and Grantee shall promptly give notice to the other Party of such discovery and shall in good faith cooperate with one another to carry out the terms of this Agreement. Each Party shall have the right to enforce directly against BNSF the terms of the Acquisition Agreements relating to Hazardous Substances. To the extent that both Parties seek to enforce those terms, the Grantor and Grantee shall also in good faith cooperate with one another to do so.

**4.2.5.4** In the event a dispute arises between the Grantor and Grantee as to the allocation of rights and obligations between each other relating to Section 7 of the Acquisition Agreements and Grantor and Grantee are also in a dispute with BNSF under Section 7, or in the event a dispute arises between Grantee and the Grantor only as to Hazardous Substances under this Easement, but does not involve Section 7 of the Acquisition Agreements, then in either case Grantor and Grantee as between each other shall be bound to resolve the dispute through the Arbitration provisions of Section 10.4 of the Acquisition Agreements.

**4.2.6** Each party agrees that its obligations under this Section 4.2 extend to any claim, demand, and/or cause of action brought by or on behalf of any employees, or agents. For this purpose, each party, by mutual negotiation, hereby waives, with respect to the other party only, any immunity that would otherwise be available against such claims

under the Industrial Insurance provisions of Title 51 RCW, but only to the extent necessary to indemnify the other party.

### **4.3 Dispute Resolution**

Any claim, dispute or other matter in question arising out of or related to this Easement, including any inability of Grantor and Grantee to make joint determinations called for by this Agreement ("Disputes") shall be exclusively subject to the following alternative dispute resolution procedure as a condition precedent to the institution of legal or equitable proceedings by either party. This requirement cannot be waived except by an explicit written waiver signed by the Parties.

#### **4.3.1 Informal Process**

The Parties shall negotiate in good faith and use their best efforts to resolve any Disputes that may develop under this Agreement. The Port's Chief Executive Officer (or his/her designee) and the King County Executive (or his/her designee) along with any staff or technical persons any of the Parties desire, shall meet within seven (7) days after written request from either party and attempt to resolve a Dispute. The Parties may agree to extend the time provided for in this Section for an additional seven (7) days.

#### **4.3.2 Mediation**

If a Dispute is not resolved under the procedure set forth in Section 4.3.1, or within such additional time as the Parties mutually agree, then the Parties shall endeavor to resolve a Dispute by mediation with a mediator agreed to by the Parties. A Party shall submit a request for mediation in writing to the other Party. Mediation shall proceed in advance of legal or equitable proceedings. Any contractual or statutory deadlines, including without limitation statutes of limitation, shall be tolled pending mediation for a period of 60 (sixty) days from the date of the mediation request, unless tolled for a longer period by agreement of the parties. Final authority for settlement may be subject to the approval of the Parties' respective legislative bodies.

#### **4.3.3 Right to Litigate Contingent on Prior Effort to Mediate**

The Parties shall not commence litigation on a Dispute unless the Dispute has been properly raised and considered in the above mediation procedure. The Parties shall share equally in the costs of the mediation. Any mediation under this Agreement shall be held in King County, Washington. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

#### **4.3.4 Immediate Action**

If Grantee or Grantor reasonably determine that circumstances require immediate action to prevent or mitigate significant damage to or loss of the Property, then such Party may pursue any immediate remedy available at law or in equity without having to follow

these alternative dispute resolution procedures in this Section, and then pursue such alternative dispute resolution procedures.

#### **4.3.5 Matters Not Subject to Alternative Dispute Resolution**

This Section on alternative dispute resolution procedures shall not apply to any dispute between the Parties that also relates to a dispute with BNSF or any dispute between the Parties concerning Hazardous Substances. This Section on alternative dispute resolution shall also only apply to Disputes between the original Grantor and Grantee, and not to their respective heirs, legal representatives, successors and assigns, or TPOs, unless such parties to a Dispute agree to alternative dispute resolution, except that this Section will apply to any Disputes between Grantor and Grantee and their respective heirs, legal representatives, successors and assigns or TPOs (if applicable) related to Sections 2.1.1, 2.2.2, 2.2.3 and 3.2.1.

**4.3.6** In addition to the specific remedies set forth in this Easement, and except for the limitations on remedies for Hazardous Substances set forth in Section 4.2.5 of this Easement, Grantor and Grantee, following the alternative dispute resolution procedure called for herein, shall be entitled to all remedies in law or equity. Further, should the Grantor and Grantee be unable to make any joint determination called for by this Agreement and be unable to resolve the Dispute through the alternative dispute resolution procedure called for herein, then Grantor and Grantee agree that a Court shall have the authority to decide the terms of the joint determination in question.

#### **4.4 Litigation Regarding Title; Encroachments**

**4.4.1** Grantor makes no warranty of title as to the Property or the Easement. If Grantor or Grantee receives any written document or lawsuit challenging or questioning Grantor's title to any portion of the Property, then within ten (10) business days of receipt the receiving Party shall transmit to the other Party a copy of such document. Grantor and Grantee shall in good faith cooperate and confer with one another as to the appropriate response to any such challenge in order to carry out the Parties' intended uses of the Property as expressed in the Easement.

**4.4.2** Should either Party identify an unauthorized encroachment on the Property, such party shall reasonably promptly notify the other in writing, and the Parties shall in good faith cooperate and confer with one another as to the appropriate action to take with regard to the encroachment in order to carry out the Parties' intended uses of the Property as expressed in the Easement.

#### **4.5 Taxes**

**4.5.1** Grantee shall be solely responsible to pay on a current basis any taxes and assessments related to the Property, if any, including without limitation real property ad valorem taxes, special benefit assessments and other governmental impositions (collective "Taxes") that may apply to its interests in the Property, its activities upon the Property, or its











