

**LAW OFFICES
JAMES H. M. SAVAGE, ESQ.
22 ROCKINGHAM COURT
GERMANTOWN, MD 20874
jsavagelaw@aim.com**

**Admitted to Practice
DC & New Jersey**



**Tel: (908) 361-7097
Fax: (301) 972-5743**

243006

April 28, 2017

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

ENTERED
Office of Proceedings
May 2, 2017
Part of
Public Record

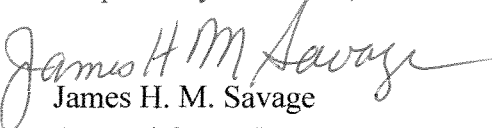
**Re: STB FINANCE DOCKET NO. 36117
LRY, LLC D.B.A. LAKE RAILWAY-- PETITION FOR DECLARATORY
ORDER — RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA**

Dear Ms. Brown:

Enclosed are an original and ten (10) copies of a Verified Petition for entry of a Declaratory Order under 4 U.S.C. §554(e) and 49 U.S.C. §721, with Appendix. Pursuant thereto, LRY, LLC ("LRY") seeks an Order staying any application which may hereinafter be filed seeking adverse discontinuance of LRY's federally licensed rail service over the Lake County, OR-owned Lake Rail Line pending disposition of LRY's Federal District Court proceeding challenging the County's termination of LRY's lease.

Pursuant to 49 C.F.R. § 1002.2(f)(58)(ii), enclosed is a check for \$1,400.00 covering the applicable filing fee. Also enclosed please find a disc containing an electronic version of the Petition, a duplicate copy of this letter and self-addressed envelope to be stamped with the filing date and returned to the undersigned. If there are any questions about this matter, please contact me directly, either by telephone (908) 361-7097 or by email jsavagelaw@aim.com.

**FEE RECEIVED
May 2, 2017
SURFACE
TRANSPORTATION BOARD**

Respectfully submitted,

James H. M. Savage
Counsel for LRY, LLC

**FILED
May 2, 2017
SURFACE
TRANSPORTATION BOARD**

Enc.
cc: James E. Bailey, III



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 36117
LRY, LLC D.B.A. LAKE RAILWAY
-- PETITION FOR DECLARATORY ORDER --
RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA**

Pursuant to 4 U.S.C. §554(e) and 49 U.S.C. §721, LRY LLC D.B.A. Lake Railway ("LRY") hereby petitions the Surface Transportation Board ("Board" or "STB") for an order staying any application which may hereinafter be filed seeking adverse discontinuance of LRY's federally licensed rail service over the County-owned Lake Rail Line pending disposition of LRY's Federal District Court proceeding challenging the County's termination of LRY's lease, and for such other and further relief as may be appropriate.

I.

The Parties

LRY is a Washington State limited liability company and federally licensed Class III freight rail carrier, having its principal place of business at 232 S.E. Oak St., Portland, OR 99323 and doing business in Lake County, OR and Modoc County, CA.

Upon information and belief, Lake County is a public entity and political subdivision of the State of Oregon having its principal administrative offices in Lakeview, OR and acting through a Board of Commissioners.

II.

Factual Background

This dispute arises out of County's service on April 12, 2017 of a letter notice terminating LRY's lease to operate the Lake Rail Line effective April 30, 2017. See, Appendix

Tab D, termination notice. LRY is aware that the subject lease contemplates the Board's adverse discontinuance authority being invoked by County in connection with lease termination. Such authority has previously been invoked by County against prior operators of this Rail Line. See, Section III, *infra*.

To protect its license, LRY on April 28, 2017 in the United States District Court for the District of Oregon, filed a Complaint seeking, *inter alia*, injunctive relief in the form of a temporary restraining order ("TRO") enjoining the County from terminating LRY's lease. See, Complaint and Motion for TRO, with attachments and exhibits.

Therefore, to preserve the *status quo* pending the disposition of LRY's concurrent Federal District Court proceeding challenging lease termination, as well as to preserve on-going service to the Rail Line's shippers in accordance with I.C.C. Termination Act goals, LRY seeks a declaratory judgment from the Board staying adverse discontinuance and for such other and further relief as the interests of justice require.

III.

Procedural History

The Rail Line was constructed and operated for many years by Southern Pacific Transportation Company ("SP"). In 1985, SP was authorized to abandon the Line. See, I.C.C. Docket No. AB-12 (Sub-No. 84), *Southern Pac. Transp. Co. - Aband. - in Modoc County, CA and Lake County, OR* (service date Oct. 20, 1985).

Lake County acquired the Line from SP after its abandonment. Through its Railroad Commission, the County contracted with The Great Western Railway Company ("GWR") to operate the Rail Line pursuant to a modified certificate of public convenience and necessity (Modified Certificate). See, I.C.C. Finance Docket No. 30777, *The Great Western Railway Co. -*

Modified Rail Certificate (service date Feb. 26, 1986).

The County terminated rail operations by GWR, effective November 1, 1997. Thereafter, the County commenced operation of the Line through its Lake County Railroad division pursuant to a Modified Certificate. See, STB Finance Docket No. 33581, *Lake County Railroad — Modified Rail Certificate* (service date April 24, 1998).

In 2007, the County leased the Rail Line to Modoc Railway and Land Company, LLC (“MR&L”) and Modoc Northern Railroad Company (“MNRR”). See, STB Finance Docket No. 34995, *Modoc Railway and Land Company, LLC — Acq. & Oper. Exempt. - in Lake County, OR* (service date Feb. 28, 2007), and STB Finance Docket No. 34996, *Modoc Northern Railroad Co.- Acq. & Oper. Exempt. - in Lake County, OR* (service date Feb. 28, 2007).

The County terminated MR&L and MNRR’s lease effective May 7, 2009 and the County resumed operation of the Line pursuant to its Modified Certificate, with LRY undertaking to act as the County's agent for providing rail service on the Line. The Board granted the County’s unopposed adverse discontinuance application in STB Docket No. AB-1035, *Lake County, Oregon — Adverse Discontinuance of Rail Service — Modoc Railway and Land Company, LLC and Modoc Northern Railroad Company* (service date Nov. 17, 2009).

On January 1, 2010 LRY’s exemption to lease and operate the Lake County-owned Rail Line took effect. See, STB Finance Docket No. 35250 (Sub-No. 1), *LRY, LLC D.B.A. Lake Railway — Lease and Operation Exemption — Rail Line in Lake County, OR* (service date Dec. 18, 2009). LRY currently leases from Lake County and operates 54.45 miles of railroad, extending from milepost 458.60 at Alturas, in Modoc County, CA to milepost 513.05, at Lakeview, OR. The agency agreement between Lake County and LRY remained in full force and effect until the lease agreement forming the subject matter of this proceeding was entered

into on November, 3, 2010. See Exhibit B, Lake County-LRY lease.

Pertinent to this proceeding for reasons set forth in the Legal Argument below, LRY separately leases from Union Pacific Railroad Company (“UP”) a contiguous segment of the Rail Line between the connection with the UP at milepost 508.00 near Perez, CA and Milepost 445.60 near MacArthur, CA, as well as rail property known as part of the Lakeview Branch from Milepost 456.89 to Milepost 458.60 at Alturas, CA. The total length of track LRY leases from UP is 64.11 miles, all of which track is within Modoc County, CA. See, STB Finance Docket No. 35250, *LRY, LLC D.B.A. Lake Railway — Lease and Operation Exemption — Union Pacific Railroad Company* (service date Dec. 18, 2009) and STB Finance Docket No. 35389, *LRY, LLC D.B.A. Lake Railway — Lease and Operation Exemption — Union Pacific Railroad Company* (service date July 30, 2010).

IV.

Legal Argument

Under 5 U.S.C. §554(e) and 49 U.S.C. §721, the Board has broad authority to issue a declaratory order to terminate controversies or remove uncertainty. *Norfolk S. Ry. - Petition for Declaratory Order*, STB Finance Docket 35701 (service date Nov. 4, 2013). The ICC Termination Act of 1995 is a comprehensive regulatory scheme. *Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). In 49 U.S.C. §10501(a), Congress has given the Board jurisdiction over "transportation by rail carrier." Section 10501(b) expressly provides that, where the Board has jurisdiction over "transportation by rail carriers," which includes the carriers' rail facilities of any kind (49 U.S.C. § 10102(9)), that jurisdiction is "exclusive," and state and local laws are categorically preempted, including in areas where attempts are made under state law to regulate matters that are regulated by the Board, such as the construction,

operation, use, and abandonment of rail lines. *Norfolk S.*, (service date Nov. 4, 2013) at 3.

The purpose of federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce in matters where the Board has exclusive jurisdiction. In such matters, "Congress chose to vest the STB with exclusive jurisdiction ... and it is 'uniquely qualified' to determine whether state law is preempted by Section 10501(b). *N.Y. & At/. Ry. Co. v. STB*, 635 F.3d 66 (2011) (citing *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639-43 (2d Cir. 2005).

Notwithstanding its exclusive jurisdiction over rail transportation, the law and Board precedents recognize that some claims and defenses in lease matters, including the validity of lease termination provisions, arise under State contract law. In such instances, the Board has exercised its jurisdiction to stay agency proceedings preserve the *status quo* pending the outcome of Federal District Court litigation. See, inter alia, STB Finance Docket No. 35981, *Finch Paper LLC - Petition for Declaratory Order* (service date Feb. 11, 2016).

Petitioner LRY seeks interlocutory relief in the form of a declaratory judgment by the Board staying adverse discontinuance pending the disposition of the concurrent Federal District Court litigation challenging the validity of the County's lease termination notice.

In support of its Petition, LRY incorporates the facts, legal arguments and exhibits set forth in the accompanying Federal Complaint and Motion for TRO as though set forth at length herein. See, Appendix.

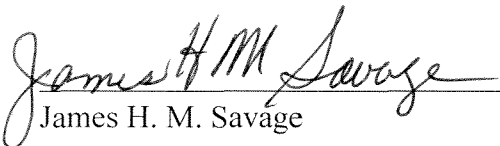
V.

Conclusion

For the above stated reasons and based upon the above cited authority, Petitioner LRY respectfully requests entry of a Declaratory Order staying adverse discontinuance until

disposition of the Federal District Court litigation including any appeals therefrom, and for such other and further relief as may be granted in the interests of justice.

Respectfully submitted,


James H. M. Savage
Counsel for LRY, LLC

Dated: April 28, 2017

SERVICE CERTIFICATION

I, James H. M. Savage, an attorney-at-law of the District of Columbia, certify that I have served this day a true copy of this petition of LRY, LLC for a declaratory order upon the following persons:

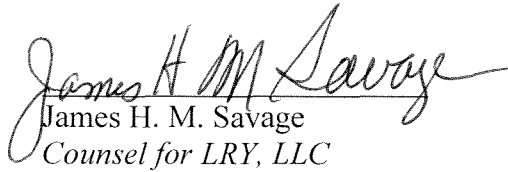
Lake County Board of Commissioners
513 Center Street
Lakeview, OR 97630

By certified mail RRR

and

James E. Bailey, III
Bailey & Yarmo, LLP
789 NW York Drive, Suite 104
Bend, OR 97701
jbailey@byllp.com
Phone: (541) 317-9000
Counsel for Lake County Board of Commissioners

By certified mail RRR and
by electronic mail


James H. M. Savage
Counsel for LRY, LLC

Dated: May 1, 2017

VERIFICATION

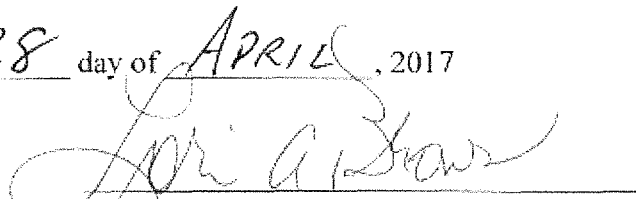
I, Paul Didelius, declare under penalty of perjury that I am the owner of LRY, LLC, that I have read the foregoing Petition for Declaratory Order, know the facts asserted therein, and that the foregoing is true and correct. Further, I verify that I am qualified and authorized to file this Petition.



Paul Didelius

Owner, LRY, LLC

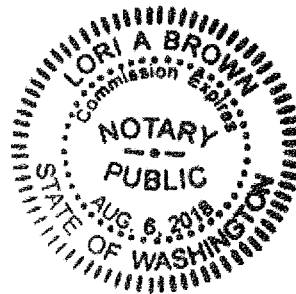
Subscribed and sworn to before me this 28 day of APRIL, 2017



Notary Public

My Commission expires:

Aug 6, 2018



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 36 117
LRY, LLC D.B.A. LAKE RAILWAY
-- PETITION FOR DECLARATORY ORDER --
RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA**

APPENDIX

James H. M. Savage
22 Rockingham Court
Germantown, MD 20874
jsavagelaw@aim.com
Tel. (908) 361-7097

Counsel for LRY, LLC

Dated: April 28, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 36 H 7
LRY, LLC D.B.A. LAKE RAILWAY
-- PETITION FOR DECLARATORY ORDER --
RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA**

INDEX TO APPENDIX

Tab A	Complaint
Tab B	TRO Motion and Memorandum of Law
Tab C	April 28, 2017 Declaration of Paul Didelius
Tab D	Didelius Exhibit 1 - April 12, 2017 Termination Notice
Tab E	Didelius Exhibit 2 - November 3, 2010 Lake County-LRY Lease and Amendments
Tab F	Didelius Exhibit 3 – Shipper statement - Cornerstone
Tab G	Didelius Exhibit 4 – November 12, 2014 Oregon-LRY Grant Agreement
Tab H	Didelius Exhibit 5 - January 3, 2017 Lake County-LRY emails
Tab I	Didelius Exhibit 6 – November 6, 2016 letter to LRY from Lake County counsel
Tab J	Didelius Exhibit 7 – Shipper statement -Cornerstone
Tab K	Didelius Exhibit 8 – Shipper statement - Collins

TAB A

David P. Rossmiller, OSB No. 983395

Email: drossmiller@bpmlaw.com

Elissa M. Boyd, OSB No. 111679

Email: eboyd@bpmlaw.com

Betts, Patterson & Mines, P.S.

111 SW 5th Avenue, Suite 3650

Portland, OR 97204

Telephone: (503) 961-6338

Facsimile: (503) 961-6339

Attorneys for Plaintiff LRY, LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

vs.

LAKE COUNTY, a political subdivision of
the State of Oregon

Defendant.

NO. 17-cv-00675

COMPLAINT

**(Breach of Contract, Unjust
Enrichment, 42 U.S.C. § 1983 and
Violation of the Due Process
Provisions of the Fifth and Fourteenth
Amendments, Declaratory Judgment
and Injunctive Relief)**

Jury Trial Requested

For its Complaint against defendant Lake County, Plaintiff LRY, LLC dba Lake
Railway (“LRY”) alleges as follows:

PARTIES

1. At all material times, LRY was a limited liability company duly organized and
existing under the laws of Oregon and was engaged in interstate commerce. LRY operates a
railroad in southern Oregon and northern California. LRY’s principal place of business is in
Lakeview, Oregon.

2. Lake County is a local government and subdivision of the State of Oregon, located in southern Oregon, with its county seat at Lakeview, Oregon.

JURISDICTION AND VENUE

3. Jurisdiction is proper in the U.S. District Court for the District of Oregon because this matter presents questions of federal law, namely violations by Lake County of 42 U.S.C. § 1983 and the Due Process provisions of the Fifth and Fourteenth Amendments to the United States Constitution, as well as interference by Lake County with the jurisdiction of the United States Surface Transportation Board (“STB”) and interstate railroad operations under the STB’s oversight and authority. Pursuant to 28 U.S.C. § 1367, the U.S. District court has supplemental jurisdiction over state law claims presented.

4. Venue is proper in the U.S. District Court of Oregon, Medford Division, because both parties are residents of Lake County, and the dispute and events that are the subject of this Complaint took place in Lake County, which is within the Medford Division of the U.S. District Court of Oregon.

COMMON ALLEGATIONS

5. LRY is a small railroad company that operates a local line between Lakeview, Oregon and Perez, California.

6. LRY’s locomotives run on about 55 miles of railroad track in Oregon and California leased from Lake County.

7. The approximately 60 miles of remaining track utilized by LRY in northern California is leased by LRY from the Union Pacific Railroad Company.

8. LRY's operation is important to the Lake County economy and services a local perlite mine and a lumber mill, hauling their products as well as agricultural products. In addition, LRY provides various railroad car storage services.

9. The section of track in LRY's service area owned by Lake County is referred to as the Lakeview Branch. Upon information and belief, Lake County purchased the section of track when the Southern Pacific abandoned service in 1985 and the railroad was operated by Great Western Railroad, Lake County, and other operators prior to LRY commencing operation in May 2009.

10. The Lake County Lease and Operating Agreement between Lake County and LRY (the "Lease") was entered into on November 3, 2010.

11. The Lease provides that LRY has, in part, leased the following:

1.01 The County hereby grants to LRY the lease, use and occupancy of the premises including the right-of-way, tracks, rails, ties, ballast, all other track materials including loose materials on the premises, signals, switches, crossties, buildings, bridges, culverts, crossing devices, signs, communication equipment, as more specifically depicted in **Exhibit A** attached hereto and incorporated herein (hereinafter referred to as the "Leased Premises," "Premises," or "Property") for LRY's exclusive use and possession for the purpose of providing rail transportation operations and services as hereinafter described in this Lease Agreement.

1.02 LRY also leases the Depot and equipment associated with the operation of the Depot as specifically itemized in **Exhibit B**.

12. Despite the right to exclusive use and possession of the lands outlined in Paragraph 1.01 of the Lease, Lake County has, without the permission or input of LRY, constructed a County evidence building on the leased property.

13. In addition, upon information and belief, Lake County tore down a fence constructed and funded by LRY on the LRY leased property because a neighboring landowner

had complained that the fence was unsightly. The fence was torn down without the consent or input of LRY.

14. Further, upon information and belief, Lake County moved the property line around the leased property without LRY's consent or input in order to create a larger school bus parking lot for Lake County.

15. The Lease further provides:

5.07 The County and not LRY shall be responsible for the cost of all capital replacements, repairs or reconstruction necessitated by: (a) such natural disasters against which insurance is not normally available; and (b) non-routine maintenance of the structural integrity of the bridges and other infrastructure of the leased premises.

5.08 The County and not LRY shall be responsible for the cost of compliance with the FRA's Bridge Safety Standards set forth at 49 C.F.R. Part 237 and any rehabilitation, reconstruction, replacements or repairs required thereunder. LRY shall, upon written approval by the County of LRY's plans for such work, undertake to perform at the County's sole cost and expense such reconstruction, replacements, and repairs and such work as necessary to comply with the FRA's Bridge Safety Standards within a reasonable time after the need to do so arises. LRY may submit to the County invoices for such work on a progressive billing basis and the County shall pay each such invoice within thirty (30) days of receipt thereof.

5.09 Once this Lease Agreement has been fully executed, the County agrees to file a letter, substantially in the form of **Exhibit D** attached hereto, with the Regional Administrator of the FRA giving notice of the assignment of bridge safety inspection and maintenance responsibility for all bridges on the Line to LRY; said letter to be filed thirty (30) days before the expected Commencement Date.

16. On or about October 25, 2016, LRY began discussions with Lake County for repairing bridges in order to keep them operative and safe. LRY provided Lake County with plans for work necessary to comply with the Federal Railroad Administration's ("FRA") Bridge Safety Standards.

17. Based on requirements of FRA regulations, LRY has had to incur the cost of weekly bridge inspections at \$800 per week and will continue to incur this cost until Lake County fulfills its obligations for bridge repair under the Lease, which will cost approximately \$275,000 and should properly be funded by Lake County, not LRY.

18. Upon information and belief, Lake County told LRY that it was not responsible for the cost of bridge repairs despite the Lease language quoted above and despite Lake County's earlier admissions that they were responsible for the costs of the bridge repairs.

19. Some time ago, a wind storm blew the doors off the depot on the leased property.

20. LRY paid \$14,220.27 to have the damage to the depot doors repaired.

21. On or about April 4, 2017 LRY sent an invoice to Lake County for the depot door repair in compliance with Paragraph 5.07 of the Lease.

22. Upon information and belief, Lake County denies that it is required to reimburse LRY for the repair of the depot doors.

23. The Lease also contains the following term:

18.02 Additions and improvements made by the County or pre-approved by County and made by LRY at the County's expense to the leased premises shall become the property of the County at the termination of this agreement.

24. The Lakeview Branch and its appurtenances were in extremely poor condition at the time LRY took control of the lands and LRY is unable to operate its trains faster than 10 MPH in most locations on the tracks in their current condition. In one location, the line is limited to 5 MPH due to sub-grade surface issues and the repair of these issues is the responsibility of Lake County. Because of the poor condition of the tracks, bridges and other elements of the leased railroad line, and because Lake County will not fund the repairs as they

are required under the lease, LRY has had to invest substantial amounts of its own money and taxpayer grant money to keep the line in condition to operate trains and to improve the line sufficiently to make it commercially viable.

25. The State of Oregon provides a lottery-backed bond initiative that, in part, invests in rail infrastructure to upgrade poor infrastructure and keep the rail lines running efficiently. The bond initiative is called *ConnectOregon*. Companies can apply to receive *ConnectOregon* grants to upgrade rail infrastructure and all grant money is provided with a requirement that the recipient pay a percentage of matching funds for the project.

26. LRY is working diligently to rehabilitate, upgrade and stabilize the infrastructure of the leased lands in part utilizing *ConnectOregon* funds. LRY invested substantial time and money to acquire four *ConnectOregon* grants that total more than \$2 million in grant funds to better the leased premises. Each of the four *ConnectOregon* applications were made with the consent and support of Lake County and Lake County itself made the application presentation to the State of Oregon of the *ConnectOregon* VI grant proposal.

27. Based on a requirement of the *ConnectOregon* IV grant that the recipient of funds maintain and operate the funded improvements for 20 years, Amendment #1 to the Lease was added and it extended the Lease to run through December 31, 2035.

28. Each of the *ConnectOregon* grants requires a percentage of the payment be matched by the grant recipient as a requirement for funding. Based in part on the requirements of Paragraphs 5.07 and 18.02 of the Lease, it is Lake County's responsibility to pay the grant match for each of the *ConnectOregon* projects.

29. LRY and Lake County came to an agreement on the payment of the recipient match for two of the *ConnectOregon* projects and those funds are not at issue in this lawsuit.

30. Upon information and belief, Lake Railway denies it is responsible to pay the matching funds for the two remaining *ConnectOregon* projects, numbers V and VI.

31. LRY will pay or has paid over \$300,000 of its own money to fund the grant matches for *ConnectOregon* V and VI.

32. The only parties to the *ConnectOregon* grant agreements are LRY and the State of Oregon through the Department of Transportation. There is no method in place for the work on the *ConnectOregon* projects to be completed if LRY were unable to complete the projects, as there is no second recipient of funds. According to the agreements, if the *ConnectOregon* projects are not completed, LRY would be required to pay back all of the grant funds it has received. Further, Lake County's actions may prevent LRY from fulfilling other obligations to the State of Oregon concerning these grants.

33. Upon information and belief, Lake County has harassed LRY and interrupted LRY's business by, under color of State law, directed Oregon Department of Transportation inspectors to perform inspections on LRY and then report back to Lake County, with the intention of disrupting and stopping LRY's operations during the days of the inspections, and with the intention of intimidating LRY's employees.

34. On December 18, 2009, the U.S. Surface Transportation Board ("STB") granted LRY an exemption to operate the Lakeview Branch pursuant to a lease with Lake County. The Exemption took effect January 1, 2010.

35. The STB is a decisionally-independent adjudicatory body organizationally housed within the U.S. Department of Transportation. The STB has broad economic regulatory

oversight of railroads, including jurisdiction over rates, service, the construction, acquisition and abandonment of rail lines, carrier mergers and interchange of traffic among carriers.

36. On April 12, 2017, Lake County sent LRY a letter purporting to terminate the Lease effective April 30, 2017. The notice admits that the termination is improper and without reasonable cause.¹

37. The improper termination is purportedly based on the following Paragraph of the Lease:

13.05 In the event the County terminates this lease agreement **without reasonable cause**, including through condemnation of all or a sufficient portion of the leased premises to prevent service to one or more LRY customers, then, in that event, the County shall pay termination costs of twenty five thousand dollars (\$25,000) to LRY as liquidated damages. (Emphasis added).

38. Even though Paragraph 13.05 provides no authority for terminating the Lease under any circumstances, and even though Lake County's reliance on this Paragraph is an admission that its actions are unreasonable and without cause, Lake County demanded in its termination letter that LRY aid it in transferring the common carrier obligations of LRY to a third party.

39. LRY is aware of no third party willing and able to take over its STB obligations.

40. The STB requires that the interstate railroads operate continually. The actions of Lake County would force a stoppage of interstate commerce until a new common carrier could be granted permission by the STB to run the railroad.

41. LRY has obligations to the STB that LRY would be forced to violate if Lake County's termination was effectuated. Upon information and belief, despite the STB's

¹ The County sent a letter on November 7, 2016 stating concerns to LRY but clearly stated that this letter "is not at this point declaring a breach or termination of the Agreement." Lake County has never asserted that the purported termination is for any valid reason under the Lease.

jurisdiction, Lake County's reasons for attempting to terminate the lease are based on Lake County's desire to control the rates charged by LRY to its shipping customers, which is outside Lake County's authority and falls under the purview of the STB.

42. In 2016 LRY secured the contractual rights to handling traffic for Red Rock Biofuels – this traffic is expected to return profits for LRY of approximately \$400,000 a year.

43. Lake County's November 7, 2016 letter referenced in footnote 1 above, demanded a copy of LRY's contract with Red Rock, potentially to determine whether an improper termination and wrongful usurpation of LRY's rights to the Red Rock contract would be cost effective for Lake County should it regain control of the track.

44. LRY's shipping customers support the continuation of their agreements with LRY and do not support the purported termination by Lake County.

45. LRY has repeatedly informed Lake County that the shipping customers want rail service to continue and that LRY's rates are acceptable to the shipping customers.

46. Although there is no provision in the Lease to allow Lake County to have any control over LRY's business transactions, Lake County has repeatedly said that the only way Lake County will rescind the termination is if LRY negotiate a long term rate with LRY's shipping customers.

47. The termination of LRY's ability to operate the Lakeview Branch would also deny LRY the full benefit of its operation of the Union Pacific tracks in northern California, and would disrupt interstate commerce. Neither Lake County nor any third party has the right to operate on the Union Pacific tracks leased by LRY, and so another operator would have no authority to move cargo to its end destination, thus disrupting the local economy and interstate commerce.

48. LRY may have obligations under the *ConnectOregon* grant agreements that it would be forced to breach if the purported termination stands, potentially causing LRY to incur millions of dollars in liabilities to the State of Oregon. Additionally, Lake County would unjustly gain the advantage of the matching funds already expended by LRY, and LRY's property rights and future economic expectancy in the extended lease would be violated.

49. The attempted arbitrary termination of the Lease has disrupted LRY's workforce and employee relations in that employees cannot be certain from day to day whether the railroad will be operating, and thus some employees have left the company.

50. LRY has purchased large quantities of ballast (crushed rock used as a bed for railroad ties and tracks) and railroad ties to maintain and upgrade the tracks on the leased premises. If forced to vacate, LRY would be damaged by being forced to expend approximately \$50,000 to transfer the materials already on the land off of the leased premises and will incur losses concerning railroad maintenance materials that have been purchased but not yet received. LRY has on site in Lake County some 3,000 railroad ties that are needed for urgent upgrade of the tracks on the leased premises, with 2,000 more ties that have already been purchased en route from Canada. In addition, 2,000 tons of ballast is on site and a rock crushing operator has already been scheduled to produce another 2,000 tons of ballast. The mobile rock crusher comes to Lake County just once a year, and the crushing contract cannot be cancelled.

FIRST CLAIM FOR RELIEF
Breach of Contract

51. Plaintiff incorporates all preceding paragraphs.

52. The Lease was entered into for good and valuable consideration.

53. Amendment #1 to the Lease that extended the lease term until 2035 was entered into in exchange for LRY's agreement to enter into the *ConnectOregon* IV agreement.

54. LRY has performed all of its obligations under the Lease and is not in breach of the Lease. No term of the Lease gives Lake County the ability to terminate the lease under the present circumstances and with very short notice. Paragraph 13.05 is not a termination provision but rather a liquidated damages provision in case of a breach by Lake County under unreasonable circumstances like condemnation of the leased premises.

55. Amendment #1 to the Lease renders Paragraph 13.05, as interpreted by Lake County, invalid and unenforceable because \$25,000 is not an amount that is reasonable in light of the anticipated harm caused by the improper termination, the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

56. Lake County acknowledged that its purported termination was a breach of contract and was unreasonable when claiming that the termination would trigger the liquidation clause of the Lease.

57. On information and belief, Lake County has breached the Lease in, at least, the following ways:

- a. By purporting to terminate the lease on an improper basis;
- b. By failing to reimburse LRY for a number of invoices Lake County owes pursuant to the Lease;
- c. By denying LRY the benefit of the Lease as amended by Amendment #1;
- d. By seizing the benefit of LRY's performance and improvements under the expectancy of the Lease; and
- e. By infringing on LRY's rights to exclusive use of the leased premises.

58. LRY has been harmed by the breach of contract in an amount to be determined at trial but no less than \$13 million.

SECOND CLAIM FOR RELIEF
Unjust Enrichment

59. Plaintiff incorporates all preceding paragraphs.

60. LRY conferred numerous benefits on Lake County including, but not limited to, obtaining, providing funding for and implementing the *ConnectOregon* grant projects that will better the leased premises (the funding for two of the four *ConnectOregon* grant projects is at issue in this lawsuit).

61. Lake County supported each of the applications for the *ConnectOregon* Grants and is aware that it has received the benefit of LRY's work and money.

62. It would be unjust to allow Lake County to retain the benefit of the *ConnectOregon* grant work that has already occurred without requiring Lake County to pay for that benefit.

THIRD CLAIM FOR RELIEF
Violation of 42 U.S.C. § 1983/Violation of the Due Process
Provisions of the Fifth and Fourteenth Amendments/Violation of Equal Protection

63. Plaintiff incorporates all preceding paragraphs.

64. LRY has a protectable property interest in the Lease and leased premises, the *ConnectOregon* grant agreements and in the control of its business and pricing.

65. Lake County, acting under color of law and through custom or policy or the action of its Board of Commissioners, deprived LRY of its property interests and committed a taking of LRY's property for public use without just compensation in violation of 42 U.S.C. § 1983.

66. LRY was denied adequate procedural protections guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitutions when Lake County arbitrarily terminated the lease, built on the leased premises without consulting or compensating LRY, tore down LRY's fencing without consulting or compensating LRY, and interfered with LRY's obligations to the STB and the State of Oregon, among other reasons.

67. Lake County's actions constitute an illegal taking in violation of the Fifth Amendment and a denial of due process under the Fifth and Fourteenth Amendments, as well as a denial of equal protection under the Fourteenth Amendment.

68. As a result of Lake County's actions, LRY is entitled to receive compensatory damages for the losses incurred through the takings in an amount to be determined at trial but no less than \$13 million, equitable relief including reinstatement of the Lease and compensation for the portion of the land covered by the lease that was taken for use by Lake County, and its reasonable attorney fees and costs pursuant to 42 U.S.C. § 1988.

FOURTH CLAIM FOR RELIEF
Declaratory Judgment

69. Plaintiff incorporates all preceding paragraphs.

70. An actual controversy exists between LRY and Lake County regarding whether Paragraph 13.05 of the Lease is a valid clause under which to terminate the Lease, whether the liquidated damages provision in that Paragraph is valid and enforceable, and whether Lake County is infringing on the jurisdiction and usurping the authority of the STB by attempting to determine the rail carrier on the Lakeview Branch and by attempting to regulate LRY's shipping rates.

71. Pursuant to 28 U.S.C. § 2201, LRY is entitled to a declaration by this Court of the proper interpretation of Paragraph 13.05 and whether the liquidated damages provision is valid and enforceable.

FIFTH CLAIM FOR RELIEF
Injunctive Relief

72. LRY has been irreparably harmed and continues to be irreparably harmed, and monetary damages alone would be inadequate to fully compensate LRY for the harm. Accordingly, LRY is entitled to temporary, preliminary and permanent injunctive relief restraining and enjoining Lake County from terminating the lease without just cause and based on an invalid liquidation clause.

WHEREFORE, Plaintiff is entitled to a temporary, preliminary, and permanent injunction enjoining Lake County from terminating the lease during the pendency of this lawsuit, along with damages in an amount to be proven at trial, as well as an award of attorney fees and costs incurred herein.

DATED this 28th day of April, 2017.

BETTS, PATTERSON & MINES, P.S.

By /s/David Rossmiller

David P. Rossmiller, OSB No. 983395

Email: drossmiller@bpmlaw.com

Elissa M. Boyd, OSB No. 111679

Email: eboyd@bpmlaw.com

Telephone: (503) 961-6338

Facsimile: (503) 961-6339

Attorneys for Plaintiff LRY, LLC

TAB B

David P. Rossmiller, OSB No. 983395

Email: drossmiller@bpmlaw.com

Elissa M. Boyd, OSB No. 111679

Email: eboyd@bpmlaw.com

Betts, Patterson & Mines, P.S.

111 SW 5th Avenue, Suite 3650

Portland, OR 97204

Telephone: (503) 961-6338

Facsimile: (503) 961-6339

Attorneys for Plaintiff LRY, LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

vs.

LAKE COUNTY, a political subdivision of
the State of Oregon

Defendant.

NO. 17-cv-00675

**PLAINTIFF'S MOTIONS FOR A
TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY
INJUNCTION**

**(ORAL ARGUMENT REQUESTED;
EXPEDITED CONSIDERATION
REQUESTED)**

LR 7-1 CERTIFICATION

Undersigned counsel for Plaintiff certify that they conferred with counsel for defendant Lake County by email and telephone message on April 26, April 27 and April 28, 2017, in an attempt to resolve the issues in this motion but were unable to reach agreement.

MOTION

Pursuant to Fed. R. Civ. P. 65, plaintiff LRY, LLC dba Lake Railway ("LRY") moves for (1) a temporary restraining order enjoining defendant Lake County (the "County") from

terminating LRY's lease effective April 30, 2017 as threatened in the County's correspondence of April 12, 2017, until LRY's motion for a preliminary injunction can be heard; and (2) a preliminary injunction enjoining defendant from terminating LRY's leasehold pending final resolution of this matter on the merits. LRY moves for an order in the form filed concurrently with this motion.

In support of its Motions for a Temporary Restraining Order and a Preliminary Injunction, LRY relies on the accompanying declaration of Paul Didelius, on the Complaint filed in this matter, and on the supporting memorandum below. A proposed form of temporary restraining order is submitted with this motion. Expedited consideration is requested.

MEMORANDUM OF POINTS AND AUTHORITIES

LRY seeks immediate injunctive relief because Lake County arbitrarily and without justification purported to terminate LRY's lease of certain Lake County premises including 55 miles of railroad tracks, even though there are 18 years remaining on the lease term.

Lake County sent LRY a letter on April 12, 2017 purporting to terminate LRY's lease of the railroad tracks effective April 30, 2017. The letter admits that the attempted termination is unreasonable and without cause when it cites paragraph 13.05 of the lease as the basis for termination. Paragraph 13.05 of the lease reads in part: "In the event the County terminates this lease agreement **without reasonable cause**" (emphasis added).

Indeed, this provision is not even a termination provision at all, but merely a purported liquidated damages clause that is invalid and unenforceable because of an amendment to the lease that extends the term of the lease from 2014 until December 31, 2035. In fact, Lake County does not purport to rely on any actual termination provision in the lease, because none of the

lease's stated justifications for termination exist and if one did, then the liquidated damages provision Lake County did rely on would not be triggered.

Lake County's actions are arbitrary and unlawful and if not enjoined, this early and unreasonable termination of the lease will cause irreparable harm to LRY. It will also cause a disruption of interstate commerce, usurp the jurisdiction of the federal Surface Transportation Board ("STB") which has sole authority over railroad carriers and rates, and will also harm the public and the economy of southern Oregon and northern California. LRY is likely to prevail on the merits of its claims against Lake County in the lawsuit LRY has filed with this Court.

FACTS

1. LRY operates an interstate shortline freight railroad in southern Oregon and northern California pursuant to a valid and enforceable lease with Lake County.

LRY is an Oregon limited liability company that operates an interstate railroad line in southern Oregon and northern California, and has its principal place of business in Lakeview, Oregon. Declaration of Paul Didelius in Support of Plaintiff's Motions for a Temporary Restraining Order and a Preliminary Injunction ("Didelius Decl."), ¶ 4. Pursuant to a license granted by the STB, LRY has operated 55 miles of railroad tracks owned by Lake County since 2009 on which LRY locomotives carry freight from Lakeview including wood products from the Collins Companies' Lakeview Sawmill, perlite from the Cornerstone Industrial Minerals Corp., USA as well as mining and agricultural products to Perez, California. *Id.*, at ¶ 5.

In addition, LRY provides various railroad car storage services. *Id.*, at ¶ 3, Ex. 2 (the "Lease"). This portion of the LRY run is referred to as the Lakeview Branch. The Lakeview Branch connects to approximately 60 STB licensed miles of tracks also leased and operated by LRY but owned by Union Pacific. Didelius Decl., ¶ 6. The 100-plus mile rail line over which

LRY operates, stood out as a monument to disrepair and underuse in 2009. *Id.*, at ¶ 7. Abandoned as a lost cause by the once-mighty Southern Pacific in the 1980s, saved from the scrap heap at the 11th hour by Lake County, but sorely neglected by a series of several successive cash strapped shortline railroad operators. From the time LRY inherited the rail line, LRY began the process of triaging the neglected rail line. Seven years and some \$700,000 in capital investment later, the Lakeview Branch is now showing the first signs of renewed life in more than 40 years. *Id.*, at ¶ 8. Despite the burden of serving two shippers with combined annual traffic of nominally 10 carloads per mile, LRY is laboring in anticipation of better days ahead.

The original term of the Lease was from November 3, 2010 through December 31, 2014. Lease, at ¶ 2. In January 2013, an addendum to the lease extended the term to December 31, 2035. *Id.*, at p. 20.

The Lease provides that LRY has, in part, leased the following:

1.01 The County hereby grants to LRY the lease, use and occupancy of the premises including the right-of-way, tracks, rails, ties, ballast, all other track materials including loose materials on the premises, signals, switches, crossties, buildings, bridges, culverts, crossing devices, signs, communication equipment, as more specifically depicted in **Exhibit A** attached hereto and incorporated herein (hereinafter referred to as the “Leased Premises,” “Premises,” or “Property”) for LRY’s exclusive use and possession for the purpose of providing rail transportation operations and services as hereinafter described in this Lease Agreement. Lease, at ¶ 1.01.

2. LRY’s investment in the Lakeview Branch has been substantial. Lake County owes money to LRY and has not contributed the County’s share of funds to repairs and improvement projects as required by the Lease.

As mentioned, the Lakeview Branch and its appurtenances were in extremely poor condition at the time LRY took control of the lands. Currently, despite the extensive work LRY has already put into repairing the track, LRY is still unable to operate its trains faster than 10 mph on the Lakeview Branch tracks in their current condition. In one place, LRY locomotives

are able to go only 5 mph to maintain safety on the tracks. Didelius Decl., ¶ 9. Again, because of the poor condition of the tracks, bridges and other elements of the leased railroad line, LRY has had to invest substantial amounts of its own money, more than \$700,000, and taxpayer grant money to pay for capital investments that should be paid by Lake County to repair the tracks. Didelius Decl., ¶ 8.

The State of Oregon provides a lottery-backed bond initiative that, in part, invests in rail infrastructure to upgrade poor infrastructure and keep the rail lines running efficiently. The bond initiative is called *ConnectOregon*. Didelius Decl., ¶ 10. Companies can apply to receive *ConnectOregon* grants to upgrade rail infrastructure and all grant money is provided with a requirement that the recipient pay a percentage of matching funds for the project. *Id.*, at ¶ 11. Were the lease to be terminated by Lake County, LRY would find itself in violation of the *ConnectOregon* requirement, and potentially exposed to a grant monies recoupment action by the State of Oregon. This alone renders the County's lease termination unduly burdensome, prejudicial and would cause LRY to sustain irreparable harm.

LRY is working diligently to rehabilitate, upgrade and stabilize the infrastructure of the leased lands in part utilizing *ConnectOregon* funds. *Id.*, at ¶ 10. LRY invested substantial time and money to acquire four *ConnectOregon* grants that total more than \$2 million in grant funds to better the leased premises. *Id.* Each of the four *ConnectOregon* applications were made with the consent and support of Lake County, and Lake County itself made the application presentation to the State of Oregon for the *ConnectOregon* VI grant proposal. *Id.*, at ¶ 12-13. Based on a requirement of the *ConnectOregon* IV grant that the recipient of funds maintain and operate the funded improvements for 20 years, Amendment #1 to the Lease was added and it extended the Lease to run through December 31, 2035. *Id.*, at p. 20.

The Lease provides:

5.07 The County and not LRY shall be responsible for the cost of all capital replacements, repairs or reconstruction necessitated by: (a) such natural disasters against which insurance is not normally available; and (b) non-routine maintenance of the structural integrity of the bridges and other infrastructure of the leased premises.

* * * * *

18.02 Additions and improvements made by the County or pre-approved by County and made by LRY at the County's expense to the leased premises shall become the property of the County at the termination of this agreement.

Again, each of the *ConnectOregon* grants requires a percentage of the payment be matched by the grant recipient as a requirement for funding. Based in part on the requirements of Paragraphs 5.07 and 18.02 of the Lease, it is Lake County's responsibility to pay the grant match for each of the *ConnectOregon* projects. LRY and Lake County came to an agreement on the payment of the recipient match for two of the *ConnectOregon* projects and those funds are not at issue in this lawsuit. Didelius Decl., ¶ 14. Lake Railway denies it is responsible to pay the matching funds for the two remaining *ConnectOregon* projects, numbers V and VI. *Id.* LRY will pay or has paid over \$300,000 of its own money to fund the grant matches for *ConnectOregon* V and VI. *Id.*, at ¶ 15. The only parties to the *ConnectOregon* grant agreements are LRY and the State of Oregon through the Department of Transportation. *See, e.g.* Didelius Decl. ¶ 16, Ex. 4 at p. 1 (the "*ConnectOregon* Grant"). There is no method in place for the work on the *ConnectOregon* projects to be completed if LRY were unable to complete the projects, as there is no second recipient of funds. According to the agreements, if the *ConnectOregon* projects are not completed, LRY would be required to pay back all of the grant funds it has received. *See, e.g.* *ConnectOregon* Grant, p. 14 ¶ VII. Lake County has failed to pay the grant matches to LRY. Didelius Decl., ¶ 14.

The Lease also states:

5.08 The County and not LRY shall be responsible for the cost of compliance with the FRA's Bridge Safety Standards set forth at 49 C.F.R. Part 237 and any rehabilitation, reconstruction, replacements or repairs required thereunder. LRY shall, upon written approval by the County of LRY's plans for such work, undertake to perform at the County's sole cost and expense such reconstruction, replacements, and repairs and such work as necessary to comply with the FRA's Bridge Safety Standards within a reasonable time after the need to do so arises. LRY may submit to the County invoices for such work on a progressive billing basis and the County shall pay each such invoice within thirty (30) days of receipt thereof.

5.09 Once this Lease Agreement has been fully executed, the County agrees to file a letter, substantially in the form of **Exhibit D** attached hereto, with the Regional Administrator of the FRA giving notice of the assignment of bridge safety inspection and maintenance responsibility for all bridges on the Line to LRY; said letter to be filed thirty (30) days before the expected Commencement Date.

On or about October 25, 2016, LRY began discussions with Lake County for repairing bridges in order to keep them operative and safe. LRY provided Lake County with plans for work necessary to comply with the Federal Railroad Administration's ("FRA") Bridge Safety Standards. Didelius Decl., ¶ 17. Based on requirements of FRA regulations, LRY has had to incur the cost of weekly bridge inspections at \$800 per week and will continue to incur this cost until Lake County fulfills its obligations for bridge repair under the Lease, which will cost approximately \$275,000 and should properly be funded by Lake County, not LRY. *Id.*, at ¶ 17. Lake County told LRY that Lake County was not responsible for the cost of bridge repairs despite the Lease language quoted above and despite Lake County's separate admissions that Lake County was responsible for the costs of the bridge repairs. Didelius Decl., ¶ 18, Ex. 5.

3. Lake County sent a purported termination of lease notice to LRY on April 12, 2017 stating that LRY's right to operate on the Lakeview Branch terminates on April 30, 2017.

Paragraph 13.01 of the Lease, titled "this agreement may be terminated by either party as follows" includes all of the ways the Lease can be validly terminated. Lease, at ¶ 13.01. On November 7, 2016, Lake County sent LRY a list of complaints. Didelius Decl., ¶ 19, Ex. 6 (the "November Letter"). None of these complaints were a breach of contract on behalf of LRY and they are not the basis of the purported termination. In fact, the letter itself states, "Again, to be clear, Lake County is not at this point declaring a breach or termination of the Agreement" *Id.*, at p. 2.

Then, on April 12, 2017, Lake County sent LRY a letter purporting to terminate the Lease effective April 30, 2017. Didelius Decl., ¶ 2, Ex. 1 (the "Termination Letter"). The Termination Letter itself admits that the termination is improper and without reasonable cause when it states the termination is based on the following Paragraph of the Lease:

13.05 In the event the County terminates this lease agreement **without reasonable cause**, including through condemnation of all or a sufficient portion of the leased premises to prevent service to one or more LRY customers, then, in that event, the County shall pay termination costs of twenty five thousand dollars (\$25,000) to LRY as liquidated damages. (Emphasis added).

Paragraph 13.05 is not one of the outlined termination paragraphs, but is instead a liquidated damages paragraph. Even though Paragraph 13.05 provides no authority for terminating the Lease under any circumstances, and even though Lake County's reliance on this Paragraph is an admission that its actions are unreasonable and without cause, Lake County demanded in its termination letter that LRY aid it in transferring the common carrier obligations of LRY to a third party. *See*, Termination Letter.

Even though only the STB has authority over railroad shipping rates, Lake County has interfered with LRY's agreements with shippers and has demanded the right to approve shipping rates. Didelius Decl., ¶ 20. Prior to Lake County's sending of the purported termination letter, Lake County demanded that LRY reduce its shipping rates. *Id.* LRY is aware of no third party willing and able to take over its STB obligations. *Id.*, at ¶ 21. The STB requires that the interstate railroads operate continually. The actions of Lake County would force a stoppage of interstate commerce until a new common carrier could be granted permission by the STB to run the railroad.

LRY has obligations to the STB that LRY would be forced to violate if Lake County's termination was effectuated. Despite the STB's jurisdiction, Lake County's reasons for attempting to terminate the lease are based on Lake County's desire to control the rates charged by LRY to its shipping customers, which is outside Lake County's authority and falls under the purview of the STB. Didelius Decl., ¶ 20. LRY's shipping customers support the continuation of their agreements with LRY and do not support the purported termination by Lake County. Didelius Decl., ¶ 22, Ex. 7. LRY has repeatedly informed Lake County that the shipping customers want rail service to continue and that LRY's rates are acceptable to the shipping customers. Didelius Decl., ¶¶ 22-24, Exs. 3, 7-8.

Although there is no provision in the Lease to allow Lake County to have any control over LRY's business transactions, Lake County has repeatedly said that the only way Lake County will rescind the termination is if LRY negotiate a long term rate with LRY's shipping customers. Didelius Decl., ¶ 20.

In 2016 LRY secured the contractual rights to handling traffic for Red Rock Biofuels. Didelius Decl., ¶ 25. Lake County's Nov. 7, 2016 letter to LRY, which was close in time to

LRY's securing the Red Rock contract, sought immediate disclosure of the Red Rock contract. November Letter, p. 2. It is possible that Red Rock will be an economic "game changer" for Lake County, and that Lake County is attempting to capitalize on the Red Rock plant by usurping the rail transport rights from LRY through this purported termination.

4. Lake County's purported termination would cause disruption of interstate commerce and harm the local economy and the public.

The termination of LRY's ability to operate the Lakeview Branch would also deny LRY the full benefit of its operation of the Union Pacific tracks in northern California, and would disrupt interstate commerce. Didelius Decl., ¶ 26. Neither Lake County nor any third party has the right to operate on the Union Pacific tracks leased by LRY, and so another operator would have no authority to move cargo to its end destination, thus disrupting the local economy and interstate commerce. Didelius Decl., ¶ 6.

LRY may have obligations under the *ConnectOregon* grant agreements that it would be forced to breach if the purported termination stands, potentially causing LRY to incur millions of dollars in liabilities to the State of Oregon. *See, ConnectOregon Grant*. Additionally, Lake County would unjustly gain the advantage of the matching funds already expended by LRY, other capital improvements funded by LRY, and LRY's property rights and future economic expectancy in the extended lease would be violated.

5. Lake County's arbitrary actions and purported termination are causing and will cause additional harm.

The attempted arbitrary termination of the Lease has disrupted LRY's workforce and employee relations in that employees cannot be certain from day to day whether the railroad will be operating, and thus some employees have left the company. Didelius Decl., ¶ 27.

LRY has purchased large quantities of ballast (crushed rock used as a bed for railroad ties and tracks) and railroad ties to maintain and upgrade the tracks on the leased premises. If forced to vacate, LRY would be damaged by being forced to expend approximately \$50,000 to transfer the materials already on the land off of the leased premises and will incur losses concerning railroad maintenance materials that have been purchased but not yet received. Didelius Decl., ¶ 28. LRY has on site in Lake County some 3,000 railroad ties that are needed for urgent upgrade of the tracks on the leased premises, with 2,000 more ties that have already been purchased en route from Canada. *Id.* In addition, 2,000 tons of ballast is on site and a rock crushing operator has already been scheduled to produce another 2,000 tons of ballast. The mobile rock crusher comes to Lake County just once a year, and the crushing contract cannot be cancelled. *Id.*

ARGUMENT

Fed. R. Civ. P. 65 governs the issuance of preliminary injunctions and temporary restraining orders. Courts apply the preliminary injunction factors in deciding whether to grant a temporary restraining order. *See Stuhlbarg Int'l Sales Co. v. John D. Brushy & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

The Supreme Court's decision in *Winter*, however, did not disturb the Ninth Circuit's alternative "serious questions" test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the

other two elements of the *Winter* test are also met.” *Id.* at 1132. Thus, a preliminary injunction may be granted “if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest.” *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012) (citing *Alliance for the Wild Rockies*).

The Court should grant this motion for a TRO and Lake County should further be required to show cause as to why a preliminary injunction should not issue against it because LRY’s Complaint and the supporting declaration meet all four of the *Winter* factors. LRY is likely to prevail on the merits of its claim against Lake County, and there is strong likelihood that LRY will be irreparably harmed if Lake County is not enjoined from violating the Lease, its violations of due process and its interference with the interstate jurisdiction of the STB. Further, the balance of equities weigh in LRY’s favor, and an injunction is in the public interest.

I. LRY is likely to prevail on the merits of its claims because Lake County’s actions constitute an unreasonable and arbitrary breach of the lease.

A. LRY has pleaded sufficient facts to prevail on its claim that Lake County wrongfully terminated the Lease.

LRY has alleged facts in its Complaint that entitle it to relief for Lake County’s purported termination of the Lease. The termination is invalid under the terms of the Lease itself, and also constitute an unlawful Taking by government of private property rights.

Indeed, Lake County makes the case against itself with its own letter purporting to terminate the Lease. The Lease provision cited by Lake County in its April 12 letter purporting to terminate LRY’s leasehold – Paragraph 13.05 – provides no grounds or justification for a termination of the lease under any circumstances, and by citing it Lake County admits that it is acting without justification and, as Paragraph 13.05 says, “without reasonable cause.” LRY has

shown sufficient facts to demonstrate that it is likely to prevail on its claim that Lake County's termination of the Lease is improper.

To establish a breach of contract claim, the plaintiff must allege and prove: (1) the existence of a contract, (2) its relevant terms, (3) the plaintiff's full performance and lack of breach, (4) the defendant's breach, (5) resulting in damage to the plaintiff. *Fleming v. Kids & Kin Head Start*, 71 Or.App. 718, 721 (1985)(setting forth the elements of a contract claim).

In its Complaint and in the supporting evidence to LRY's Motions, LRY alleges the existence of a contract, the Lease. LRY alleges its own full performance and lack of breach, and alleges Lake County's breach of terms of the Lease. Further, LRY alleges that it has been damaged by the breach and is entitled to an injunction restraining any violation or further violation.

As explained in the Facts section above, not only is the purported Lease termination without cause and a breach of the Lease terms, Lake County has also been improperly engaged in attempts to dictate shipping rates on the Lakeview Branch, and appears to be attempting to seize LRY's rights in the leasehold to gain the benefit of LRY's expenditures and efforts and also to seize LRY's future profits for itself or some potential third party operator. Lake County's attempts at determining rates and undermining the federally approved railroad carrier operating on the Lakeview Branch violates federal preemption. The Interstate Commerce Commission Termination Act of 1995 (Pub.L. No. 104-88, 109 Stat. 803), which enables the federal Surface Transportation Board and provides it authority over railroad carriers, transportation and rates, contains an express preemption provision that precludes actions like those of Lake County.

ICCTA states:

The jurisdiction of the [Surface Transportation] Board over

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. 49 U.S.C. § 10501(b); see also *id.* § 10102(9) (defining “transportation,” in part, as “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use”).

Through the ICCTA, Congress “intended to preempt a wide range of state and local regulation of rail activity. *Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096–97 (9th Cir. 2010).

In addition, Lake County’s actions violate the Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), provides: “[N]or shall private property be taken for public use, without just compensation.” Lake County is attempting to take LRY’s past work and expenditures with only a minimal payment of \$25,000, terminate its current operating rights, and deny LRY the benefit of future profits of between \$5.4 million and \$12.9 million. Further, Lake County’s actions deny LRY due process and equal protection of the law.

B. The Liquidated Damages provision of the Lease cited by Lake County in its purported termination letter is unreasonable in that it is grossly disproportionate to the actual damages and is thus unenforceable.

Paragraph 13.05 of the Lease is not grounds for termination but rather is a liquidated damages provision that is unenforceable because of the amendment of the lease that extends the term to 2035. A contract provision for liquidated damages is valid if it is designed to provide just

compensation for the injured party in the event of a breach; if it does not provide just compensation, however, it is unenforceable as a penalty. *Wright v. Schutt Construction*, 262 Or. 619, 623 (1972).

The test is whether:

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. *Illingworth v. Bushong*, 61 Or. App. 152, 155, *aff'd*, 297 Or. 675 (1984).

To satisfy the first requirement, there must be a genuine pre-estimate of the injury; that is, the parties must make an honest and good faith effort to arrive at an accurate estimate. *Dean Vincent, Inc. v. McDonough*, 281 Or. 239, 246 (1978). A showing that the liquidated damages are “grossly disproportionate” to actual damages is evidence that the estimate was not reasonable. *Illingworth* at 155.

Here, the actual damages that LRY has suffered and will suffer because of Lake County’s actions dwarf the \$25,000 liquidated damages figure in the Lease. If the \$25,000 figure was valid at the beginning of the Lease in 2010 in light of the circumstances at that time and when the term was four years, it certainly is not valid at present when LRY is facing damages of \$700,000 in improvements LRY has made to the railroad line that would be lost and unjustly enrich Lake County, the potential for LRY to have to repay \$2 million to the State of Oregon concerning *ConnectOregon* grants that are conditioned on LRY as recipient maintaining the lease, and more than \$12.6 million for lost profits and expectancy under the remaining term of the Lease. Indeed, one motive for the County’s actions may be the anticipated opening of the Red Rock biomass fuel plant in Lake County, and a desire by the County to terminate LRY to deny it the benefit of the

remaining 18 years of the Lease and seize the benefits, for itself or some other potential operator, of LRY's upgrades to the line as well as future profits.

C. LRY will suffer irreparable harm if Lake County is not enjoined from arbitrarily terminating the Lease.

A temporary restraining order and preliminary injunction enjoining Lake County from arbitrarily terminating the Lease are necessary to avoid irreparable harm to LRY, to prevent Lake County from interfering with the STB's jurisdiction and authority, and to prevent disruption in railroad shipping in southern Oregon and northern California.

A plaintiff is not required to show actual harm at the preliminary injunction stage, although LRY has in fact shown actual harm. A plaintiff must establish only that irreparable harm is likely. *Alliance for the Wild Rockies*, 632 F.3d at 1131. LRY has shown actual current harm and future economic losses, but even intangible injuries qualify as irreparable harm. *See e.g. Stuhlberg Int'l Sales Co., Inc. v. John D. Brush and Co. Inc.*, 240 F.3d 832, 841 (9th Cir. 2001); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

D. The balance of hardships tips sharply toward LRY and the public interest is likely to be harmed if Lake County's attempt to terminate the Lease is not enjoined.

The final two elements of the *Winter* test are that the balance of hardships tip in favor of the plaintiff, and the injunction is in the public interest. LRY's motion and evidence meet those standards.

If Lake County is allowed to terminate the Lease, LRY faces great current and future harm, as explained above. However, if Lake County is not allowed to terminate the Lease, the status quo continues and Lake County faces no harm. The injunction would be in the public interest because terminating the Lease would usurp exclusive federal control of rail

transportation, disrupt interstate commerce and the local economy, and throw LRY's employees out of work. In addition, if LRY no longer has any rights to operate the track, the shipping customers would have no method to transport their products to market because LRY is the only railroad permitted to operate the Lakeview Branch and the UP tracks in Northern California.

CONCLUSION

For the Reasons explained above, LRY is likely to prevail on the merits of its claim against Lake County, and would be irreparably harmed if an injunction does not issue. Further, the balance of equities tip in LRY's favor, and the public would be harmed if Lake County's actions are not enjoined.

DATED this 28th day of April, 2017.

BETTS, PATTERSON & MINES, P.S.

By /s/David Rossmiller

David P. Rossmiller, OSB No. 983395

Email: drossmiller@bpmlaw.com

Elissa M. Boyd, OSB No. 111679

Email: eboyd@bpmlaw.com

Telephone: (503) 961-6338

Facsimile: (503) 961-6339

Attorneys for Plaintiff LRY, LLC

TAB C

David P. Rossmiller, OSB No. 983395

Email: drossmiller@bpmlaw.com

Elissa M. Boyd, OSB No. 111679

Email: eboyd@bpmlaw.com

Betts, Patterson & Mines, P.S.

111 SW 5th Avenue, Suite 3650

Portland, OR 97204

Telephone: (503) 961-6338

Facsimile: (503) 961-6339

Attorneys for Plaintiff LRY, LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

LRY, LLC dba LAKE RAILWAY, an
Oregon LLC,

Plaintiff,

vs.

LAKE COUNTY, a political subdivision of
the State of Oregon

Defendant.

NO. 17-cv-00675

**DECLARATION OF PAUL
DIDELIUS IN SUPPORT OF
PLAINTIFF'S MOTIONS FOR A
TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY
INJUNCTION**

I, Paul Didelius, under penalty of perjury do hereby declare:

1. I am the Managing Member of plaintiff LRY, LLC dba Lake Railway ("LRY").

The matters set forth in this declaration are true to the best of my knowledge, information and belief.

2. Attached to this declaration as **Exhibit 1** is a true copy of the letter purporting to terminate the LRY/Lake County Lease that I received from James Bailey through attorney Martin Hansen on April 12, 2017.

3. Attached to this declaration as **Exhibit 2** is a true copy of the lease between LRY and Lake County including the two Amendments to the lease.

4. LRY is an Oregon limited liability company that operates an interstate railroad line in southern Oregon and northern California, and has its principal place of business in Lakeview, Oregon.

5. LRY currently hauls perlite for the Cornerstone Industrial Minerals Corp., USA, lumber for the Collins Companies' Lakeview Sawmill and agricultural products. In addition, LRY provides various car storage services.

6. LRY has a current lease agreement with Union Pacific Railroad Company for exclusive rights to approximately 60 miles of track between Alturas, California and Perez, California.

7. At the time LRY began operating the rail line in 2009, which included the Lake County track known as the Lakeview Branch, the track was in disrepair and was underused.

8. LRY has spent some \$700,000 in capital investment to triage the rail line that includes the Lake County track.

9. In its current condition, the track only allows for train traffic at 10 mph in most locations. In one location, locomotives are able to go only 5 mph to maintain safety on the tracks.

10. LRY has been granted four *ConnectOregon* grants which are lottery-backed grants from the State of Oregon. The *ConnectOregon* funds are to invest in rail infrastructure to upgrade poor infrastructure and keep the rail lines running efficiently. The funds granted to LRY total more than \$2 million.

11. One requirement of the *ConnectOregon* grants is that the recipient of funds pay a percentage of the cost in matching funds.

12. LRY applied for each of the four *ConnectOregon* grants with the consent and support of Lake County.

13. Lake County, on behalf of LRY, made the application presentation to the State of Oregon of the *ConnectOregon* VI grant proposal.

14. LRY and Lake County have agreements in place on two of the *ConnectOregon* projects and the funding for the match on these two projects is not at issue. However, Lake County denies it is responsible for the funding of the match portion on *ConnectOregon* V and VI.

15. LRY has been forced to expend over \$300,000 to fund the *ConnectOregon* V and VI grants.

16. Attached to this declaration as **Exhibit 4** is a true copy of the *ConnectOregon* V agreement.

17. LRY has been discussing the need for bridge repairs with the Lake County Commissioners since at least October 25, 2016. LRY has also provided the County with the anticipated cost of bridge repairs, which is approximately \$275,000. In addition, Federal Railroad Administration regulations have required LRY to conduct weekly bridge inspections at a cost to LRY of \$800 a week.

18. Attached to this declaration as **Exhibit 5** is a true copy of emails between Lake County Commissioners and representatives of LRY, including me, dated January 3, 2017.

19. Attached to this declaration as **Exhibit 6** is a true copy of a letter emailed to me on November 7, 2016 from Lake County's attorney, James E. Bailey, III.

20. In numerous correspondence with me and representatives of LRY in April 2017, the County Commissioners and their attorney have stated that they would rescind the termination of the LRY/Lake County lease if LRY will come to an agreement with its shipping customers on rates that are satisfactory to the shipping customers. Even prior to the termination letter, the County Commissioners were pressuring LRY lower its shipping rates.

21. LRY is unaware of any third party who is able and willing to take over LRY's obligations with the federal Surface Transportation Board.

22. Attached to this declaration as **Exhibit 7** is a true copy of an email from Bruce Addington, the owner of Cornerstone, the leading shipper using the Lake County rail line, stating that Cornerstone would like continued service at an agreed rate.

23. Attached to this declaration as **Exhibit 8** is a true copy of an email chain between me and Eric Schooler, the President of Collins, another shipper using the Lake County rail line, stating that Collins would like continued service at an agreed rate.

24. Attached to this declaration as **Exhibit 3** is a true copy of an text message chain between Bruce Addington and the CFO of LRY, Robert Didelius, stating that Cornerstone would like continued service at an agreed rate.

25. When Red Rock Biofuels begins operations in Lakeview, Oregon, LRY has secured the contractual rights to handle the rail shipping traffic of Red Rock product.

26. If LRY no longer controlled the Lakeview Branch, it would also deny LRY the full benefit of its operation of the Union Pacific tracks in northern California, and would disrupt interstate commerce.

27. It has been reported to me that some LRY employees have quit their jobs in response to the arbitrary termination of the Lease.

28. It would cost at least \$50,000 to transfer the following maintenance of way materials already on the land off of the leased premises: LRY has on site in Lake County some 3,000 railroad ties with 2,000 more ties that have already been purchased en route from Canada; and 2,000 tons of ballast is on site and a rock crushing operator has already been scheduled to produce another 2,000 tons of ballast. The mobile rock crusher comes to Lake County just once a year, and the crushing contract cannot be cancelled.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 28th day of April, 2017.

By 
Paul Didelius

TAB D

BAILEY & YARMO, LLP

ATTORNEYS AT LAW

Attorneys:

James E. Bailey, III
Aron D. Yarmo

Assistants:

Joni McCarthy

Email:

jbailey@byllp.com
ayarmo@byllp.com
jonilyn@byllp.com

April 12, 2017

Martin Hansen
Francis Hansen & Martin LLP
1148 NW Hill St.
Bend, OR 97703

Via Email

Re: Lake County and Lake Railway

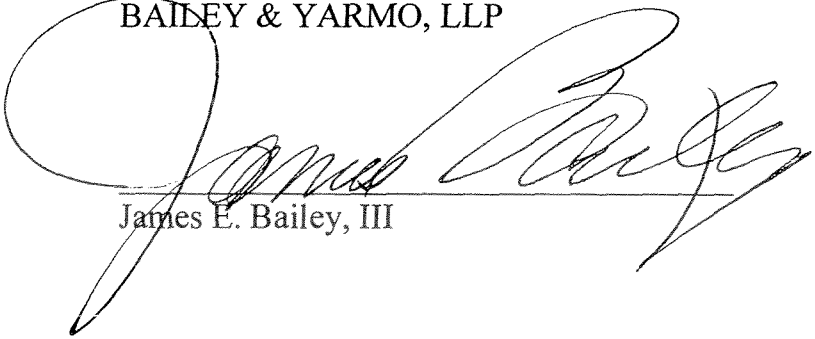
Dear Mr. Hansen:

The Lake County Board of Commissioners has directed me to inform you that the County is exercising its right to terminate the lease with Lake Railway under Section 13.05 of the Lake Railway Lease Agreement. Termination of the Lease will be effective as of April 30, 2017 at which time Lake County will forward \$25,000 to Lake Railway as called for under Section 13.05.

In connection with the termination, Lake County expects Lake Railway to carry out its obligations under Section 13.04.

Yours truly,

BAILEY & YARMO, LLP



James E. Bailey, III

JEB/jlm

TAB E

LAKE COUNTY LEASE

LEASE & OPERATING AGREEMENT

THIS LEASE AND OPERATING AGREEMENT (hereinafter known as "Lease" or "Lease Agreement"), made this 3rd day of NOVEMBER, in the year 2010, between the **LAKE COUNTY** (hereinafter known as "County"), having its principal offices at the Lake County Administration Building, 513 Center Street, Lakeview OR 97630, and the **LRY, LLC D.B.A. LAKE RAILWAY, an Oregon LLC** (hereinafter known as "LRY") having its principal offices at 499 Railex Road, Burbank, WA 99323.

WHEREAS, the LRY desires to provide common carrier railroad freight transportation service on the rail line depicted in the Map attached as **Exhibit A**, and identified as part of the Lakeview Branch of the former Modoc Subdivision of the Union Pacific Railroad between Milepost 458.60 at Alturas, CA and Milepost 512.30 at Lakeview, OR, a distance of 53.70 miles.

WHEREAS, the County wishes to lease the premises described hereinafter for the purpose of securing common carrier railroad freight transportation service from a third party operator in accordance with Federal Surface Transportation Board Regulations (STB); all in accordance with and subject to such terms and conditions as set forth in this Lease Agreement between the County and LRY; and

WHEREAS, one of the most key elements in providing for such rail services is the awarding of a contract to a highly qualified third-party operator, who shall undertake to perform and discharge all of the required obligations and responsibilities, and to render the performance required by a third-party operator including, but not limited to, the marketing, rehabilitation, maintenance, and operation of the railroad; and

WHEREAS, the County entered into a May 12, 2009 agency agreement with LRY to act as the County's third-party agent-operator in accordance with the terms and conditions thereof; and

WHEREAS, the Parties intend that upon execution of this Lease Agreement, said Lease Agreement shall supersede their existing agency agreement such that the prior agency agreement shall immediately terminate and be of no further effect; and

WHEREAS, LRY will be fully responsible for high quality personalized service in the operation of said rail lines, to include rental and lease administration and other matters as set forth in this agreement between the parties, and in addition shall assume all liability for the operation of said property, and LRY will be further responsible for all routine maintenance and for the control and upkeep of all vegetation and grass, and for the general upkeep of the railroad property; and

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein the parties agree as follows:

1. LEASE OF THE PREMISES

1.01 The County hereby grants to LRY the lease, use and occupancy of the premises including the right-of-way, tracks, rails, ties, ballast, all other track materials including loose materials on the premises, signals, switches, crossties, buildings, bridges, culverts, crossing devices, signs, communication equipment, as more specifically depicted in **Exhibit A** attached hereto and incorporated herein (hereinafter referred to as the "Leased Premises," "Premises," or "Property") for LRY's exclusive use and possession for the purpose of providing rail transportation operations and services as hereinafter described in this Lease Agreement.

1.02 LRY also leases the Depot and equipment associated with the operation of the Depot as specifically itemized in **Exhibit B**.

1.03 LRY also leases those items of rolling stock specifically itemized in **Exhibit C**.

1.04 LRY assumes full responsibility for the property identified herein "AS IS, WHERE IS".

2. TERM AND EXTENSIONS

Unless another date is agreed upon by the Parties, the term of this Lease Agreement shall take effect on the first day of the first month following the date this Lease Agreement is fully executed, and terminate December 31, 2014 unless terminated prior thereto pursuant to the provisions of this lease agreement or extended to a date thereafter in accordance with the terms of this agreement. Provided that the terms of this Lease Agreement have been faithfully performed by LRY during the aforementioned period, the County and LRY, by mutual agreement, may exercise an option to renew this lease agreement for up to three (3) additional five (5) year periods. Such option shall be exercised in writing by each party not later than thirty (30) days prior to the date of expiration.

3. RENT

3.01 LRY shall pay to the County rent for the leased premises in the amount of \$3,000 (three thousand) dollars per month for five years for a total of \$36,000 (thirty six thousand) dollars per twelve month period.

3.02 LRY's obligation to pay rent commences on the Lease Agreement effective date and continues for the entire term of the Lease Agreement subject to the provisions of this Lease Agreement providing for early termination under **Section 13.01** or rescission due to Force Majeure under **Section 13.01 (c)**.

3.03 LRY's first rent payment shall become due on the first business day of the

third month after the Lease Agreement effective date. LRY's final rent payment shall become due on the first day of the third month after the Lease Agreement terminates.

3.04 On or after January 1, 2012, the Parties may reevaluate the Line revenues, and, if the Line revenues are greater than 130% or less than 70% of Line revenues for 2010 (except revenues from Ruby Pipeline traffic) the Parties may negotiate the monthly rental rate on a *pro rata* basis.

4. OPERATING AUTHORITY

LRY acknowledges that it has obtained STB authority to commence operations by filing a "class exemption" under 49 C.F.R. 1150.31 in the proceeding captioned STB Finance Docket Number 35250 (Sub-No. 1) LRY, LLC D.B.A. Lake Railway-Lease and Operation Exemption-Rail Line in Lake County, OR, which exemption became effective January 1, 2010, and LRY further agrees not to terminate service without filing as appropriate either an application or petition to discontinue service under 49 U.S.C 10903 and the underlying regulations at 49 C.F.R. 1152 *et seq.*

5. CONDITION, INSPECTION AND MAINTENANCE OF LEASED PREMISES

5.01 The County makes no representations or warranties as to the condition of the Leased Premises as of the date of this Lease Agreement and, except as provided elsewhere herein, LRY assumes full responsibility for the Leased Premises on the date hereof "AS IS, WHERE IS".

5.02 The Parties agree to participate in a joint inspection of the Leased Premises prior to the Commencement Date and to exchange inspection reports within forty-eight (48) hours of completing the inspection. The inspection reports shall at minimum specify the current condition of the track, roadbed and bridges on the Line, and shall list defects, exceptions and irregularities noted during the inspection. Any discrepancy between the conditions identified in the Parties' inspection reports shall be resolved in favor of the report noting the greater defect, exception or irregularity. As part of the joint inspection:

(a) The Parties will identify the areas of the Leased Premises where repairs necessary to bring the Track to FRA Class 1 condition exceed the limits of ordinary maintenance ("FRA-excepted track"). LRY shall thereafter endeavor to restore such FRA-excepted track to Class 1 condition on an on-going basis. After consulting with and approval by County, LRY may invoice against the County Rail Account 50% of materials costs only over \$1,500 per calendar quarter to return portions of FRA-excepted track to Class 1 condition.

(b) The Parties will identify spur or side tracks of the Leased Premises eligible to be declared surplus to current or anticipated future needs. Pursuant to SECTIONS 7.01 (vii)

and 9, LRY may salvage any such surplus for purposes of replacing defective rail on mainline or in-use side tracks.

5.03 LRY agrees to maintain the leased premises to not less than the condition it was in on the Commencement Date as provided in **SECTION 5.02**, normal wear and tear excepted; provided that in the event that any portion of the leased premises is upgraded to an FRA Class track higher than that specified in this SECTION during the term of the lease, LRY shall be responsible to maintain the leased premises to that higher standard throughout the remainder of the lease.

5.04 In the course of LRY or its contractors conducting any maintenance or emergency repairs upon, appurtenant to or otherwise affecting the leased premises, it shall be the responsibility of LRY to notify the State Utility Notification Center and to comply with all rules and regulations thereof..

5.05 In the course of the County or its contractors conducting any maintenance or emergency repairs upon, appurtenant to or otherwise affecting the leased premises, it shall be the non-delegable responsibility of the County to notify the State Utility Notification Center and to comply with all rules and regulations thereof; and it shall be the further responsibility of the County to notify LRY, and for the County to exercise reasonable diligence to safeguard LRY, its licensee or invitees from undue danger or hazard created as a result of the County's maintenance or emergency repairs...

5.06 LRY shall be responsible to provide to the County a quarterly Maintenance Report identifying all maintenance and inspections performed during previous quarter year.

5.07 The County and not LRY shall be responsible for the cost of all capital replacements, repairs or *reconstruction* necessitated by: (a) such natural disasters against which insurance is not normally available; and (b) non-routine maintenance of the structural integrity of the bridges and other infrastructure of the leased premises.

5.08 The County and not LRY shall be responsible for the cost of compliance with the FRA's Bridge Safety Standards set forth at 49 C.F.R. Part 237 and any rehabilitation, reconstruction, replacements or repairs required thereunder. LRY shall, upon written approval by the County of LRY's plans for such work, undertake to perform at the County's sole cost and expense such reconstruction, replacements, and repairs and such work as necessary to comply with the FRA's Bridge Safety Standards within a reasonable time after the need to do so arises. LRY may submit to the County invoices for such work on a progressive billing basis and the County shall pay each such invoice within thirty (30) days of receipt thereof.

5.09 Once this Lease Agreement has been fully executed, the County agrees to file a letter, substantially in the form of **Exhibit D** attached hereto, with the Regional Administrator of the FRA giving notice of the assignment of bridge safety inspection and

maintenance responsibility for all bridges on the Line to LRY; said letter to be filed thirty (30) days before the expected Commencement Date.

6. REGULATORY ADMINISTRATIVE SERVICES

6.01 LRY shall diligently prepare and file all reports, returns, and information required in connection with LRY's operation of the leased premises by any and all federal, state and local governmental regulatory and taxing authorities with jurisdiction over the leased premises. LRY shall also submit to the County a copy of LRY's annual report to the Oregon Secretary of State.

6.02 LRY shall provide the County with a detailed written report on rail traffic at least quarterly.

6.03 LRY shall provide the County with written quarterly and annual reports detailing the accounting of revenues and expenses generated in the operation of the leased premises. LRY shall utilize generally accepted accounting procedures for recording said revenues and expenses.

6.04 LRY shall provide to the County at least an annual written report on LRY's efforts to increase freight traffic on the leased rail line.

6.05 The County reserves the right to audit LRY's statements, and LRY agrees to make its records available for auditing purposes during normal business hours on no less than three (3) business days advance notice. Should LRY fail to comply with this provision the County may consider LRY to be in default of its obligations under this agreement.

6.06 LRY shall provide to the County any and all reports generated or issued by third parties which pertain to the leased premises within three (3) business days of LRY's receipt of such materials. LRY shall further provide to the County any and all reports pertaining to the physical condition of the leased premises issued by agencies having regulatory authority regarding track, bridge crossing, and signal inspections conducted by the Oregon Department of Transportation, the Federal Railroad Administration, and any other appropriate agencies within three (3) business days of LRY's receipt of such materials.

6.07 LRY shall indemnify and hold the County harmless against any penalty and/or damages resulting from LRY's failure to file or maintain any such reports, returns, or information. The County shall likewise indemnify and hold LRY harmless against any penalty and/or damages resulting from the County's failure to file any such reports, returns, or information.

7. COMPENSATION OF LRY

7.01 As compensation for all services rendered by LRY in the operating the rail line, LRY shall collect, for its use and benefit, the revenues generated by any permissible use of said leased premises. The following shall be considered permissible uses of the leased premises:

- (i) Operating Revenue derived from charging customers for the transportation of freight on the rail lines;
- (ii) Operating Revenue derived from charging tenant rail companies for Trackage Rights;
- (iii) Operating Revenue derived from charging customers for special non-freight rail movements;
- (iv) Operating Revenue derived from rail car storage;
- (v) Operating Revenue derived from any future Passenger Rail Service;
- (vi) Non-operating Revenues derived from short-term Sub-leases, Licenses and/or salvage of surplus railroad assets. Such sub-leases or licenses shall be limited to those integrally connected with rail transportation related services and activities and subject to the condition that any buildings or structures placed on the premises will be non-permanent in nature. All sub-leases and licenses are subject to the prior approval of the County, which shall not be unreasonably withheld. As used herein, surplus railroad assets shall be defined as equipment and material not essential to the use of the line for railroad operations. Under no circumstance may LRY salvage any part of the rail line without the prior written approval of the County, which approval may be withheld at the discretion of the County.
- (vii) In accordance with SECTION 9, revenues derived from the salvage activities authorized in SECTION 5.02(b) only.

However, such compensation will be exclusive of any surcharges or sharing of revenues as contained in Section 9 of this agreement.

7.02 As compensation for improving the leased premises, upon LRY submitting the appropriate proof, the County will reimburse LRY for the actual cost of reasonable and necessary track rehabilitation work on the Rail Line in an amount not exceeding the monthly rent collected by the County pursuant to **Section 3.01**. Reimbursement of LRY will be provided from any County Rail Account funds remaining after the County's railroad related administrative and overhead expenses have been satisfied.

7.03 As used in **Section 7.02**, the County's railroad related administrative and overhead expenses shall be defined as those costs directly attributable to the County's ownership of the subject rail line, but shall not include personnel costs, depreciation cost.

8. COMPENSATION OF LAKE COUNTY FOR PASSENGER RAIL SERVICE

8.01 The parties agree that LRY shall be permitted, but shall not be required, to provide passenger rail service on the Rail Line.

8.02 In the event LRY provides passenger rail service on the Rail Line, LRY shall remit Ten Percent (10%) of any net operating revenues derived by LRY from such rail service to the County..

9. SUB-LEASES AND LICENSES

9.01 The parties agree that LRY shall be allowed to sub-lease or grant licenses to use the leased premises.

9.02 Revenue sharing.

(a) In the event LRY sub-leases or licenses the use of the leased premises, LRY shall remit Ten Percent (10%) of any revenue collected from such uses to the County.

(b) In the event LRY salvages any portion of the leased premises pursuant to SECTION 5.02(b), unless otherwise agreed upon in writing, LRY shall remit Eighty Percent (80%) of the net salvage proceeds to the County Rail Account.

9.03 LRY shall be solely responsible for billing and collecting non-operating revenue from its sub-lessees and licensees; and LRY shall deposit the County's portion of all such revenue into a dedicated interest-bearing bank account, which bank account shall be the exclusive property of the County. Any funds deposited by LRY into this account will be used by the County solely and exclusively for the purpose of funding LRY's rehabilitation of and capital improvements to the leased premises. LRY may not incur expenses against this account without prior written approval of the County.

9.04 LRY agrees to make a good faith effort to collect all non-operating receivables due and owing from its sub-lessees and licensees. However, LRY shall under no circumstance be liable to the County for the County's share of uncollected receivables remaining after LRY has made a good faith effort at collection. The County shall have the right, but not the obligation, to collect receivables remaining uncollected for more than six (6) months. In the event the County exercises its right under this Section, the County shall be entitled to retain Thirty Three Percent (33%) of all amounts so collected, including interest, plus the County's reasonable collection costs and statutory attorneys fees.

9.05 In the event that this Lease Agreement is terminated, any fundAccounts remaining in the aforesaid account shall remain the property of the County.

10. INSURANCE

10.01 During the term of this agreement LRY shall obtain and maintain insurance on

the leased premises including, but not limited to, all property including tracks, side tracks, and spurs located upon said leased premises. This insurance coverage will also include a provision that there will be no lapse of coverage under any circumstances. The insurance shall include coverage to replace or restore any loss or damage to property upon the leased premises, and shall also include coverage for liability, including any liability to third parties, which are not the subject of this agreement.

10.02 The County shall be named on all insurance as an additional insured. LRY shall file with the County insurance certificates naming the County of Lake as an additional insured as stated herein prior to LRY's commencement of operation of the County's rail lines. Coverage for the County shall also include the County, its officers, agents, employees, servants and assigns. Each insurance policy maintained pursuant to this agreement shall contain a provision that such policy shall not be cancelled or modified unless the County is notified at least thirty (30) days prior to such cancellation or modification. Railroad liability insurance provided by LRY for the County shall be in an amount not less than Five Million Dollars (\$5,000,000) per occurrence and shall bear not less than a Twenty Five Thousand Dollars (\$25,000) per occurrence self-insured retention clause.

11. UTILITIES

LRY shall pay, when due, all utility charges arising from LRY's use and operation of the leased premises.

12. TAXES

It is understood and agreed that LRY's liability for assessments, taxes or other governmentally imposed levies shall be in addition to the monthly rental amount.

13. TERMINATION

13.01 This agreement may be terminated by either party as follows:

(a) On or at any time prior to the Lease Effective Date if any substantive condition unacceptable to County or to LRY is imposed in the regulatory approvals or exemptions contemplated by **Section 4** of this Lease for LRY's lease and operation of the Leased Premises;

(b) Upon the occurrence of a Default as provided in **Section 24**;

(c) Upon thirty (30) days' written notice for service interruptions as a consequence of an event of force majeure, a lawful embargo, condemnation, or the taking of sufficient portions of the leased premises by eminent domain to prevent continuation of service to one or more customers; or.

(d) Upon thirty (30) days' notice to County, following LRY's obtaining all necessary regulatory approvals or exemptions to permit LRY to abandon or discontinue rail operations.

13.02 In the event of termination as provided in **Section 13.01** above, future rental shall be abated as of the date this Lease is terminated and no equity in title shall be deemed to have been accumulated by LRY. LRY shall be liable for, and pay to County, all rent accruing prior to the date of such termination.

13.03 In the event this Lease is terminated, LRY shall cooperate with County and/or its designee in obtaining operating rights equivalent to those enjoyed by LRY. LRY shall reassign all LRY Agreements affecting the Leased Premises to County.

13.04 In the event of termination of this Lease, the County shall have the right to initiate termination proceedings before the Surface Transportation Board in LRY's name, and LRY shall cooperate with the County and its third-party operator designee in arranging for the transfer of the common carrier obligation in an orderly manner so as not to disrupt service to customers of the Rail Line. Upon any termination resulting from a Default by LRY, County or its designee may immediately re-enter and take possession of the Leased Premises by providing ten (10) days written notice to LRY that this Lease will be terminated. County or its designee at County's discretion may immediately begin operation over the Leased Premises if LRY ceases operation on the Leased Premises.

13.05 In the event the County terminates this lease agreement without reasonable cause, including through condemnation of all or a sufficient portion of the leased premises to prevent service to one or more LRY customers, then, in that event, the County shall pay termination costs of twenty five thousand dollars (\$25,000) to LRY as liquidated damages.

14. RETURN OF LEASE PREMISES

Upon the termination of this agreement, LRY shall return the leased premises to the County in the condition it was at the effective date of this Lease Agreement as specified in **SECTION 5.02**, or to the condition to which it has been improved during the lease term, normal wear and tear excepted. LRY's liability under this Section, if any, shall be limited to the reasonable cost of restoring the leased premises to its prior condition.

15. COMPLIANCE WITH GOVERNING LAW

LRY shall comply with all laws, statutes, ordinances, rules, orders, regulations and requirements of the federal, state and local governments that are applicable to the leased premises and LRY's operation of the rail line. LRY shall not use or permit the leased premises to be used for any illegal purposes, nor shall LRY conduct its operations for any illegal purposes.

16. NOTICE TO LRY OF COUNTY'S INTENT TO INSPECT & REPAIR

16.01 The County, its agents, or representatives shall have the right to enter upon the leased premises during normal business hours upon three (3) business days advance written notice to LRY to inspect and examine the leased premises. Said right shall be subordinate to LRY's paramount right to control safe access to its rail right-of-way. LRY's consent to provide access shall not unreasonably be withheld.

16.02 The County, its agents, or representatives shall notify LRY of any necessary maintenance, repairs, or alternations. LRY has the right to be present for any inspection. If such maintenance, repairs or alterations are LRY's obligation pursuant to the provisions contained herein and should LRY fail to make such repairs and alterations, the County may, after reasonable notice to LRY and an opportunity for LRY to remedy such condition, may make such repairs or alterations that may be necessary for the proper use, safety and preservation of the leased premises. The County may charge all reasonable costs and expenses incurred by making such repairs or alterations to LRY up to the limit of LRY's annual rental cost of the leased premises, which amount shall be credited to LRY's account.

If the cost of such maintenance, repairs or alterations are not LRY's obligation pursuant to this agreement, the County shall, after reasonable notice from LRY, make or secure such financial provision as appropriate for such maintenance, repairs, or alterations.

The County shall have the option of refusing to make such provision. If the County does not make such financial provision, LRY may, at its option, terminate this lease. This paragraph shall not be deemed a covenant by the County, and should not be construed as creating an obligation on the part of the County to make any inspection or repairs.

17. NOTICE OF CASUALTY

LRY shall give immediate notice to the County of any fire damage, personal injury, property damage or other casualty occurring upon the leased premises.

18. ALTERATIONS AND IMPROVEMENTS TO THE LEASED PREMISES

18.01 Except as otherwise provided herein, LRY shall make no alterations, additions, obstructions, encumbrances or improvement to the leased premises without the prior written consent of the County, which consent shall not be unreasonably withheld.

18.02 Additions and improvements made by the County or pre-approved by County and made by LRY at the County's expense to the leased premises shall become the property of the County at the termination of this agreement.

18.03 Additions and improvements pre-approved by County and made by LRY at its own expense may be removed from the leased premises provided the removal process would not impair the utility of the premises. Upon termination of this Lease, the County or its designee may purchase such improvements at cost less depreciation; PROVIDED,

HOWEVER, that if LRY receives and is willing to accept a bona fide offer to purchase any such improvement(s), LRY shall notify County and County shall have the right to purchase the said improvement for the same price offered to LRY within sixty (60) days of County's receipt of such notice, with the County being allowed an additional thirty (30) day grace period to consummate the transaction provided the County has timely exercised its right to notify LRY of its intent to purchase.

18.04 The County shall reimburse LRY for the net depreciated value of pre-approved additions and improvements made by LRY which cannot be removed without damaging the premises at cost less depreciation.

18.05 LRY shall not make any alterations to the leased premises that are inconsistent with the intended use of the leased premises in accordance with this agreement.

19. LIMITATIONS ON NON-OPERATING REVENUE SOURCES

LRY shall not place nor permit to be placed any signs, structures, or other non-operating revenue sources of any kind upon or about the leased premises without the prior written consent of the County, which consent shall not unreasonably be withheld. Any non-operating revenues sources including signs and structures permitted by the County shall at all times conform to all applicable laws, ordinances or regulations. Notwithstanding the foregoing, LRY may without the consent of the County, place and maintain such signs as are necessary for the safe operation of railroad service or to the operation of grade crossings, bridges, and other facilities on the leased premises. LRY shall not enter into any sub-lease agreement, license agreement or any other form of agreement with any third-party that extends beyond the remaining term of LRY's lease with the County, without prior written consent of the County, which consent shall not be unreasonably withheld..

20. RELEASE, HOLD HARMLESS & INDEMNIFICATION

20.01 Release.

(a) Before the Lease Effective Date, the County, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges LRY, their employees, agents, officers, successors and assigns, and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, punitive damages, losses, costs, liabilities and expenses, including attorney's fees in any way arising out of or connected with the known or unknown, pre-existing physical or environmental condition of the leased premises (including, without limitation, any contamination in, on, under or adjacent to the leased premises by any hazardous or toxic substance or material), or any federal, state or local law, ordinance, rule or regulation applicable thereto (including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response,

Compensation and Liability Act, and the Resource Conservation and Recovery Act) including, without limitation, personal injury to or death of persons whomsoever including employees, agents or contractors of the County or any third-party, and damage to property of County or any third-party.

(b) LRY, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges the County, its constituent agencies, their employees, agents, officers, successors and assigns, and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, punitive damages, losses, costs, liabilities and expenses, including attorney's fees in any way arising out of or connected with the known or unknown, physical or environmental condition of the leased premises occurring between the Lease Effective Date and the Lease Termination Date, (including, without limitation, any contamination in, on, under or adjacent to the leased premises by any hazardous or toxic substance or material), or any federal, state or local law, ordinance, rule or regulation applicable thereto (including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act) including, without limitation, personal injury to or death of persons whomsoever including employees, agents or contractors of the County or any third-party, and damage to property of County or any third-party. The foregoing provision shall apply only if the damages are incurred as a result of LRY's use of the leased premises during the term of this lease or any hold over period and shall include all damages incurred that are attributable to a LRY use which exacerbates a preexisting condition on the leased premises and all damages attributable to the actions of any third party during the term of the lease or any hold over period.

(c) From and after the Lease Termination Date, the County, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges LRY, their employees, agents, officers, successors and assigns, and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, punitive damages, losses, costs, liabilities and expenses, including attorney's fees in any way arising out of or connected with subsequently occurring, known or unknown, physical or environmental condition of the leased premises (including, without limitation, any contamination in, on, under or adjacent to the leased premises by any hazardous or toxic substance or material), or any federal, state or local law, ordinance, rule or regulation applicable thereto (including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act) including, without limitation, personal injury to or death of persons whomsoever including employees, agents or contractors of the County or any third-party, and damage to property of County or any third-party.

20.02 Environmental Laws. During the term of the lease, LRY will comply with all federal, state, and local laws, rules, regulations, and ordinances controlling air, water,

noise, hazardous waste, solid waste, and other pollution or relating to the storage, transport, release, or disposal of hazardous materials, substances, waste, or other pollutants. LRY at its own expense will make all modifications, repairs, or additions to the leased premises, install and bear the expense of any and all structures, devices, or equipment, and implement and bear the expense of any remedial action which may be required under any such laws, rules, regulations, ordinances, or judgments. During the term of this lease, LRY will properly dispose of all wastes of any kind, whether hazardous or not, deposited on the leased premises.

20.03 Environmental Indemnity.

(a) Before the Lease Effective Date, the County shall, to the maximum extent permitted by law, indemnify, defend and save harmless LRY, its affiliates, their employees, agents, officers, successors and assigns, from and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, fines, punitive damages, losses, costs, liabilities and expenses, including attorney's fees (collectively, "costs"), in any way arising out of or connected with the known or unknown, pre-existing physical or environmental condition of the leased premises (including, without limitation, any contamination in, on, under or adjacent to the leased premises by any hazardous or toxic substance or material), or any federal, state or local law, ordinance, rule or regulation applicable thereto (including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act), and including, without limitation, personal injury to or death of persons whomsoever including employees, agents or contractors of the County or any third party, and damage to property of the County or any third party.

(b) LRY shall, to the maximum extent permitted by law, indemnify, defend and save harmless the County, its constituent agencies, their employees, agents, officers, successors and assigns, from and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, fines, punitive damages, losses, costs, liabilities and expenses, including attorney's fees (collectively, "costs"), in any way arising out of or connected with the known or unknown, physical or environmental condition of the leased premises occurring between the Lease Effective Date and the Lease Termination Date (including, without limitation, any contamination in, on, under or adjacent to the leased premises by any hazardous or toxic substance or material), or any federal, state or local law, ordinance, rule or regulation applicable thereto (including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act), and including, without limitation, personal injury to or death of persons whomsoever including employees, agents or contractors of the County, LRY or any third party, and damage to property of the County, LRY or any third party. The foregoing provision shall apply only if the costs are incurred as a result of LRY's use of the leased premises during the term of this lease or any hold over period and shall include all costs incurred that are attributable to a LRY use which exacerbates a preexisting condition on

the leased premises and all costs attributable to the actions of any third party during the term of the lease or any hold over period.

(c) From and after the Lease Termination Date, the County shall, to the maximum extent permitted by law, indemnify, defend and save harmless LRY, its affiliates, their employees, agents, officers, successors and assigns, from and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, fines, punitive damages, losses, costs, liabilities and expenses, including attorney's fees (collectively, "costs"), in any way arising out of or connected with the known or unknown, subsequently arising physical or environmental condition of the leased premises (including, without limitation, any contamination in, on, under or adjacent to the leased premises by any hazardous or toxic substance or material), or any federal, state or local law, ordinance, rule or regulation applicable thereto (including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act), and including, without limitation, personal injury to or death of persons whomsoever including employees, agents or contractors of the County, LRY or any third party, and damage to property of the County, LRY or any third party. The County's obligations shall exclude the obligation to indemnify LRY for damage caused by LRY's own negligent acts or omissions during the lease term.

20.04 General Indemnity.

(a) LRY shall protect, defend, hold harmless, and indemnify and reimburse the County from and against any and all liability, claims, suits, penalties, fines, expenses, damages, losses and costs, including attorney's fees (collectively, "cost", incurred by or assessed against the County and/or its constituent agencies, due to or resulting from personal injuries, death, or property loss or damage arising during or from LRY's use, occupancy or maintenance of the leased premises after the Lease Effective Date, or as a result of LRY's breach of, or from its failure to comply with, any provisions of this lease, even if the cost (i) results in whole or in part from a violation or alleged violation of any federal, state or local law or regulation by the County or the County's agents, including, but not limited to, the Federal Employers' Liability Act ("FELA"), the Safety Appliance Act, the Locomotive Inspection Act, and the Occupational Safety And Health Act ("OSHA") or (ii) is caused in whole or in part by the negligence *per se*, or strict liability of the County; provided, however, that all costs including costs for any personal injuries, death or property loss, or damages arising in connection with toxic waste or environmental conditions, shall be governed by the provisions of **SECTIONS 20.01, 20.02 and 20.03.**

(b) Notwithstanding the provisions of paragraph (a) above, the County shall defend, indemnify and hold LRY harmless for all liabilities caused by the County's gross negligence, illegal conduct or criminal conduct, or by third parties over whom LRY exercises no control. Additionally, the County shall hold LRY harmless for any license or other third party rights granted by it over the leased premises.

20.05 Notice of Violations. LRY will promptly furnish County written notice of any and all (i) releases of hazardous wastes or substances of which it becomes aware which occur during the term of this lease whenever such releases are required to be reported to any federal, state, or local authority, and (ii) alleged water or air permit condition violations, and (iii) any notification received by LRY alleging any violation of any state, federal or local statute, ordinance, ruling, order or regulation pertaining to environmental protection and/or hazardous material, handling, transportation or storage. to the extent practicable, such written notice will identify the substance releases, the amount released, and the measures undertaken to clean up and remove the released material and any contaminated soil or water, will identify the nature and extent of the alleged violation and the measures taken to eliminate the violation, and will certify that LRY has complied with all applicable regulations, orders, judgments or decrees in connection therewith, or the date by which such compliance is expected. LRY will also provide County with copies of any and all reports made to any governmental agency which related to such releases or such alleged violations during the term of this lease.

21. RESERVED

22. NON-ASSIGNABILITY

LRY shall not assign, mortgage, or hypothecate this agreement, nor sublet or sublease any part of the leased premises, nor permit the leased premises to be occupied or used for any purpose other than those uses contemplated herein, except as: (a) may be agreed upon by the County in writing; (b) may result from condemnation of all or part of the leased premises; or (c) may result from the legally enforceable rights of others to have easements on the leased premises. Nothing herein shall prohibit assignment of this Lease Agreement within LRY's corporate family.

23. WAIVER

The failure of any party hereto to enforce at any time any of the provisions of this Lease or to exercise any right or option which is herein provided shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this Lease or any part hereof or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Lease shall be held to be a waiver of any other or subsequent breach.

24. DEFAULT

24.01 The following shall constitute Default on the part of LRY:

(a) Failure by LRY to make payments of rent or other amounts due and payable for any reason arising in connection with this Lease or LRY's operation over the Leased Premises, and such failure continues for thirty (30) days following receipt of written notice as provided hereunder..

(b) Filing by LRY of a petition for bankruptcy, reorganization or arrangement by LRY of an assignment for the benefit of creditors, or if this agreement shall pass to another party by virtue of any court proceeding or operation of law, or be placed in receivership, or otherwise should LRY avail itself of the protection afforded pursuant to the Bankruptcy Reform Act or any similar proceeding, which petition is not dismissed within thirty (30) days.

(c) Failure by LRY in the performance of any terms, conditions, or covenants contained herein, which default results in the disruption of the railroad services as provided for in this agreement, and such failure continues for thirty (30) days following receipt of written notice as provided for hereunder. .

24.02 The Following shall constitute Default on the part of the County:

(a) Failure by the County in the performance of any terms, conditions, or covenants contained herein, which default results in the impairment of LRY's ability to provide the railroad services as provided for in this agreement, and such failure continues for thirty (30) days following receipt of written notice as provided for hereunder.

24.03 Upon the occurrence of any breach of any term hereof the injured party shall notify the breaching party in writing and specify the breach and what corrective action is desired to cure the breach. If, upon the expiration of thirty (30) days from the receipt of said notice, the breach has not been cured (or, if such breach cannot be cured within 30 days, steps have not been taken to effect such cure and pursued with all due diligence within said period) and is a material breach, the injured party shall have the right, at its sole option, to cure the breach if possible and be reimbursed by the breaching party for the cost thereof, including any and all reasonable attorney's fees, and for any reasonably foreseeable consequential damages. Nothing herein shall prevent the injured party from resorting to any other remedy permitted under this Lease or at law or equity, including seeking damages and/or specific performance, as shall be necessary or appropriate to make the injured party whole in the premises. Failure of the injured party to demand or enforce a cure for breach in one instance shall not be deemed a waiver of its right to do so for any subsequent breach by the breaching party.

25. FORCE MAJEURE

LRY shall have no obligation to provide service over any portion of the leased

premises when prevented from so doing as a result of any act of nature, public authority, strikes, riots, civil disturbance, labor disputes, threats or acts of terrorism, or threats or acts of war; PROVIDED, HOWEVER, LRY shall use reasonable best efforts to take whatever action reasonably necessary or appropriate to resume operations at the earliest reasonable date unless damage or destruction of the leased premises requires major reconstruction or renovation, in which event LRY will exercise reasonable diligence in performing such reconstruction or renovation at County's expense as provided herein.

26. CONDEMNATION AND EASEMENTS

If at any time during the term of this agreement the leased premises or any part thereof or any interest therein shall be taken under eminent domain or condemnation, or if a suit or other action shall be instituted for the taking or condemnation of the leased premises to a governmental or other public authority, agency, or body then this agreement at the option of LRY may terminate immediately.

27. GENERAL NOTICE

All notices required pursuant to this Agreement shall be in writing and addressed to the parties at their respective addresses as set forth below. All such notices shall be deemed duly given if personally delivered or if deposited in the United States mail, registered or certified, return receipt requested. This section shall not be construed as waiving proper service of process. Notice to each party will be to the following:

COUNTY OF LAKE:

Board of Commissioners
513 Center Street
Lakeview, OR 97630

LRY, LLC:

Paul Didelius
499 Railex Road
Burbank, WA 99323

With copy to counsel:

James Bailey, Esq.
Bailey & Yarmo, LLP
780 NW York Drive – Suite 104
Bend, OR 97701
Tel. (541) 317-9000
Fax (541) 389-0159

James H. M. Savage, Esq.
John D. Heffner, PLLC
1750 K Street, NW – Suite 200
Washington, DC 20006
Tel. (202) 296-3333
Fax (202) 296-3939

28. SECTION AND PARAGRAPH HEADINGS

Section and paragraph heading in this agreement are for ease of reference only and shall have no bearing on the construction or interpretation of this agreement.

29. ENTIRE AGREEMENT

This agreement and the exhibits and attachments set forth all the covenants, provisions, agreements, conditions and understandings between the parties and all prior covenants, promises, agreements, conditions or understandings, either oral or written, between the parties are hereby superseded and shall have no further effect. No modification or addition to this agreement shall be binding or effective unless executed in writing as an amendment to this instrument and signed by the parties.

30. SEVERABILITY

If any provision of this agreement is held to be illegal, the remainder of the agreement shall remain operative and in full force and effect.

31. GOVERNING LAW, ARBITRATION, AND FORUM

This agreement and all rights of the parties thereunder shall be governed and construed in accordance with applicable Federal law and the laws of the State of Oregon. Any dispute arising out of this agreement under State law shall be submitted to arbitration under the Oregon Uniform Arbitration Act, ORS 36.600 and brought in Circuit Court in Lake County, Oregon. Any dispute arising out of this agreement under Federal law shall be submitted to arbitration under the Federal Arbitration Act and shall be brought in the United States District Court for the District of Oregon.

32. ENTRY INTO FORCE

This agreement will not enter into force until STB approval and agreement by the parties on the form and content of all exhibits identified herein.

33. COUNTERPARTS

This agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

34. MUTUAL COOPERATION

The parties agree to mutually co-operating with each other's good faith efforts to obtain grant monies and Accounting from outside sources and programs for the purpose of improving the leased premises; and further requiring each party to make such good faith efforts upon the other party's timely and reasonable request.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year written on page one of this agreement.

LAKE COUNTY
BOARD OF COMMISSIONERS


By: Ken Kestner

Title: Chair


By: DAN SHOUN

Title: Member


By: Brad Winters

Title: Member

LRY, LLC



By: Paul Didelius

Title: Owner

APPROVED AS TO FORM:



James Bailey
Lake County Counsel

APPROVED AS TO FORM:



John D. Heffner, PLLC
By: James H. M. Savage
Of Counsel

AMENDMENT TO NOVEMBER 3, 2010 "LEASE & OPERATING AGREEMENT"

RECITALS:

WHEREAS, Lake County (the County) and Lake Railway (LRY) desire to avail themselves of the advantages of qualifying for the Connect Program/State of Oregon (the Program);

WHEREAS, the Program requires a commitment by the recipient of funds under the Program to maintain and operate the funded improvements for 20 years,

WHEREAS, the term of current Lease and Operating Agreement must be amended to run until December 31, 2035 in order to meet the requirements of the Program,

NOW, THEREFORE, the County and LRY agree to amend Section 2 of the Lease and Operating Agreement that currently exists between the parties such that if LRY receives funding from ODOT from the Program the term of the Lease and Operating Agreement will be extended to December 31, 2035. If funding is not received, the original term of the lease will remain in force.

IN WITNESS, THEREOF, the parties hereto have set their hands and seals the day and year noted below.

LAKE COUNTY
BOARD OF COMMISSIONERS

Absent

By: Ken Kestner

Title: Chair Date: 1-29-13

Brad Winters

By: Brad Winters

Title: Member Date: 1-29-13

Dan Shoun

By: Dan Shoun

Title: Member Date: 1-29-13

APPROVED AS TO FORM:

James Bailey
James Bailey
Lake County Counsel

LRY, LLC

Paul Didelius

By: Paul Didelius

Title: Owner Date: 1-30-2013

APPROVED AS TO FORM:

John D. Heffner, PLLC
John D. Heffner, PLLC
By: James H. M. Savage
Of Counsel

AMENDMENT #2

LEASE & OPERATING AGREEMENT

WHEREAS, Lake County (the County) and Lake Railway, LLC (LRY) desire to amend certain practical matters addressed in the November 3, 2010 'Lease and Operating Agreement' to encourage operational stability and address certain financial concerns related to the long-term operation of this vital infrastructure.

NOW, THEREFORE, the County and LRY agree to amend Section 3.0 of the aforementioned Lease and Operating Agreement. Subject to annual review each January, LRY agrees to pay to the County rent for the leased premises. The quarterly rental rate will be the greater of 1% (one percent) of the previous calendar quarter's gross freight revenue generated on the County owned rail line or \$3,000 (three thousand dollars) per quarter, payable in equal monthly installments.

NOW, THEREFORE, the County and LRY agree to amend Exhibit C. Lake County recognizes the investment of \$57,498 made by LRY to bring the County – owned GP-700 Locomotive back into operational condition and compliance. Lake County agrees to sell this locomotive to LRY for \$1,000. Lake County has the first right of refusal to repurchase this locomotive at \$58,498 reduced ratably over the period of the lease using the straight-line method.

NOW, THEREFORE, the County agrees to assume any liability associated with the requirements described in Section 21 (page 7) of the Connect Oregon IV Grant Agreement No. 28688.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year noted below.

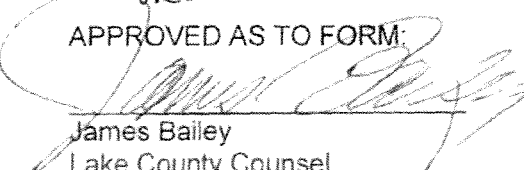
**LAKE COUNTY
BOARD OF COMMISSIONERS**


By: Ken Kestner
Title: Chair Date: 15 May '13

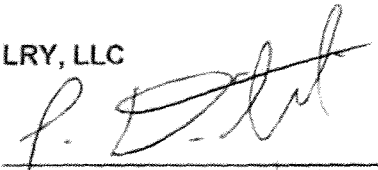

By: Brad Winters
Title: Chair Date: 5-15-13


By: Dan Shoun
Title: Chair Date: 5-15-13
Vice

APPROVED AS TO FORM:


James Bailey
Lake County Counsel

LRY, LLC


By: Paul Didelius
Title: Owner Date: 8/16/13

TAB F

Verizon LTE

9:13 AM

20%

< 23

BA

i

Bruce

Don't you need the \$500 surcharge to work on the rail line?

I think that if you can get rid of the hill and leave the surcharge in place and spend the money on the road this will work long term.

Ditching the hill will drop the costs maybe 10-15% and I would pass the savings to you immediately. So most of the surcharge will be around for a while. We need to catch up on rail and ties.

My point is I know I can't raise revenue, so I'm trying to lower costs for both of us. Unfortunately we have a hill to climb, but we're chipping away.

And it won't be forever

The \$500 surcharge is fine. The \$1,000 surcharge is not economic! Keep working on this and I will keep shipping and paying the agreed to \$525 beyond April 30th.

Excellent.



iMessage



TAB G

GRANT AGREEMENT
CONNECTOREGON V
OREGON DEPARTMENT OF TRANSPORTATION
MULTIMODAL TRANSPORTATION FUND PROGRAM 2014
Project Name: Lakeview Customer Spurs: Expansion, Safety, Efficiency

This Agreement is made and entered into by and between the **State of Oregon**, acting by and through its Department of Transportation, hereinafter referred to as “ODOT,” and **LRY**, a Limited Liability Company, acting by and through its management, hereinafter referred to as “Recipient,” both hereinafter referred to individually or collectively as “Party or “Parties.”

1. **Effective Date.** This Agreement shall become effective on the date this Agreement is fully executed and approved as required by applicable law. Unless otherwise terminated or extended, Grant Funds under this Agreement shall be available for Project Costs incurred on or before five years after the Effective Date (Availability Termination Date). No Grant Funds are available for any expenditures before the Effective Date or after the Availability Termination Date. ODOT’s obligation to disburse Grant Funds under this Agreement shall end as provided in Section 6.b.iv of this Agreement.
2. **Agreement Documents.** This Agreement consists of this document and the following documents:
 - a. Exhibit A: **Project Description, Key Milestones, Schedule and Budget**
 - b. Exhibit B: **Recipient Requirements**
 - c. Exhibit C: **Subcontractor Insurance**
 - d. Exhibit D: **Memorandum of Agreement and Acknowledgement of ODOT Assistance**
 - e. Exhibit E: **Application and documents provided by Recipient to ODOT prior to the execution of the Agreement.**

Exhibits A through E are incorporated by reference into this Agreement. Exhibits A through D are attached hereto. In the event of a conflict between two or more of the documents comprising this Agreement, the language in the document with the highest precedence shall control. The precedence of each of the documents comprising this Agreement is as follows, listed from highest precedence to lowest precedence: this Agreement without Exhibits; Exhibit D; Exhibit A; Exhibit B; Exhibit C; Exhibit E.

3. **Project Cost; Grant Funds; Match.** The total Project Cost is estimated at \$979,600. In accordance with the terms and conditions of this Agreement, ODOT shall provide Recipient Grant Funds in an amount not to exceed \$783,680 or eighty (80) percent of the total eligible Project Costs, whichever is less, of eligible Project Costs described in Section 6 hereof. Recipient shall provide matching funds for all Project Costs as described in Exhibit A. ODOT will withhold five (5) percent of the Grant Funds to be distributed as provided in Section 6.c.

ODOT/Recipient
Agreement No. 30151

4. Project:

- a. **Use of Grant Funds.** The Grant Funds shall be used solely for the Project described in Exhibit A and shall not be used for any other purpose. No Grant Funds will be disbursed for any changes to the Project unless such changes are approved by ODOT by amendment pursuant to Section 11.c hereof.
- b. **Project Change Procedures.**
 - i. If Recipient anticipates Project key milestones will be delayed by more than ninety (90) days from the key milestones shown in Exhibit A, Recipient shall submit a Request for Change Order (Form 734-2648), the form of which is hereby incorporated by reference, to ODOT's Project Liaison as soon as Recipient becomes aware of any possible delay. The Request for Change Order must be submitted prior to the milestone completion date shown in Exhibit A. The fillable form can be downloaded on-line at the following address: <http://www.oregon.gov/ODOT/HWY/LGS/online.shtml>.
 - ii. Recipient shall not proceed with any changes to Project scope or delivery schedule prior to the execution of an amendment to this Agreement executed in response to ODOT's approval of a Request for Change. A Request for Change Order may be rejected at the discretion of ODOT. ODOT may choose to request review by the Oregon Transportation Commission.

5. Progress Reports.

- a. **Monthly Reports.** Recipient shall submit monthly progress reports to ODOT using the *ConnectOregon* Monthly Progress Report (Form 734-2668), attached by reference and made a part of this Agreement. ODOT will appoint a Project Liaison after execution of this Agreement and provide Recipient with the contact information. Progress reports must be submitted to ODOT Project Liaison and ODOT's *ConnectOregon* Program Manager by the first Wednesday of each month. The fillable form can be downloaded on-line at the following address: <http://www.oregon.gov/ODOT/HWY/LGS/online.shtml>.
- b. **Final Report.** Recipient shall submit a written report to ODOT's *ConnectOregon* Program Manager that identifies the number of jobs created or retained both during construction and after Project completion, as a direct result of this Project. The report must also include the number of jobs projected in the application. This report must also include data on the methodology that measures the Project's success as described in the grant application. The report must be received and approved by ODOT within eighteen (18) months after the completion of Project. Recipient's obligation to provide this report will survive expiration of this Agreement. Recipient shall use ("Final Report" Form 734-2947), which also must be signed by Recipient. The form is available at: <http://www.oregon.gov/ODOT/HWY/LGS/online.shtml>.

ODOT/Recipient
Agreement No. 30151

6. Disbursement and Recovery of Grant.

- a. **Disbursement Generally.** ODOT shall reimburse eligible costs incurred in carrying out the Project, up to the Grant Fund amount provided in Section 3. Reimbursements shall be made by ODOT within forty-five (45) days of ODOT's approval of a request for reimbursement from Recipient. Requests for Reimbursement will identify the Project, Agreement number, Project start and end date, the request for reimbursement number or the account number or both, and itemize all expenses as well as provide a detailed breakdown of Project Costs expended and Grant Funds reimbursed to date, and the amount of undisbursed Grant Funds. Requests for Reimbursement shall be submitted monthly for any month for which Recipient seeks reimbursement of Eligible costs. Eligible costs are the reasonable and necessary costs incurred by the Recipient, or under a subagreement described in Section 9 of this Agreement, in performance of the Project and that are not excluded from reimbursement by ODOT, either by this Agreement or by exclusion as a result of financial review or audit.
- b. **Conditions Precedent to Disbursement.** ODOT's obligation to disburse Grant Funds to Recipient is subject to satisfaction, with respect to each disbursement, of each of the following conditions precedent:
 - i. ODOT has received funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow ODOT, in the exercise of its reasonable administrative discretion, to make the disbursement.
 - ii. Recipient is in compliance with the terms of this Agreement, including without limitation completion of all prerequisites for reimbursement provided in Exhibit B.
 - iii. Recipient's representations and warranties set forth in Section 7 hereof are true and correct on the date of disbursement with the same effect as though made on the date of disbursement.
 - iv. Recipient has provided to ODOT a request for reimbursement in accordance with Section 6.a. Recipient must submit its final request for reimbursement following completion of the Project and no later than ninety (90) days after the earlier of completion of the Project or the Availability Termination Date. Failure to submit the final request for reimbursement within ninety (90) days after the completion of the Project or the Availability Termination Date could result in non-payment.
- c. **Retainage.** ODOT will withhold five percent retainage from the amount paid pursuant to each reimbursement request and shall release this retainage to Recipient as the following conditions are met:
 - i. Eighty percent (80%) of the five percent retainage shall be released to Recipient upon final project acceptance by ODOT.

ODOT/Recipient
Agreement No. 30151

ii. Twenty percent (20%) of the five percent retainage shall be released to Recipient upon approval by ODOT of the report described in Section 5.b of this Agreement. In accordance with Administrative Rule OAR 731-035 and Oregon Laws 2013, Chapter 723 (House Bill 5008) ODOT may not pay and the Recipient forfeits the amount under this paragraph if the Recipient does not submit the report required by Section 5.b on or before the due date. Recipient acknowledges and agrees that Recipient may not apply for another *ConnectOregon* grant during the next application cycle if Recipient fails to submit the report required by Section 5.b on or before the due.

d. **Recovery of Grant Funds.** Any Grant Funds disbursed to Recipient under this Agreement that are expended in violation of one (1) or more of the provisions of this Agreement (“Misexpended Funds”) or that remain unexpended on the earlier of the Availability Termination Date or termination of this Agreement must be returned to ODOT. Recipient shall return all Misexpended Funds to ODOT promptly after ODOT’s written demand and no later than fifteen (15) days after ODOT’s written demand. Recipient shall return all Unexpended Funds to ODOT within fourteen (14) days after the earlier of the Availability Termination Date or termination of this Agreement.

7. **Representations and Warranties of Recipient.** Recipient represents and warrants to ODOT as follows:

- a. **Organization and Authority.** Recipient is duly organized and validly existing under the laws of the State of Oregon and is eligible to receive the Grant Funds. Recipient has full power, authority and legal right to make this Agreement and to incur and perform its obligations hereunder, and the making and performance by Recipient of this Agreement (1) have been duly authorized by all necessary action of Recipient and (2) do not and will not violate any provision of any applicable law, rule, regulation, or order of any court, regulatory commission, board, or other administrative agency or any provision of Recipient’s Articles of Incorporation or Bylaws, if applicable, (3) do not and will not result in the breach of, or constitute a default or require any consent under any other agreement or instrument to which Recipient is a party or by which Recipient or any of its properties may be bound or affected. No authorization, consent, license, approval of, filing or registration with or notification to any governmental body or regulatory or supervisory authority is required for the execution, delivery or performance by Recipient of this Agreement.
- b. **Binding Obligation.** This Agreement has been duly executed and delivered by Recipient and constitutes a legal, valid and binding obligation of Recipient, enforceable in accordance with its terms subject to the laws of bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors’ rights generally.
- c. **No Solicitation.** Recipient’s officers, employees, and agents shall neither solicit nor accept gratuities, favors, or any item of monetary value from contractors, potential contractors, or parties to subagreements. No member or delegate to the Congress of the United States or State of Oregon employee shall be admitted to any share or part of this Agreement or any benefit arising therefrom.

ODOT/Recipient
Agreement No. 30151

- d. **No Debarment.** Neither Recipient nor its principals is presently debarred, suspended, or voluntarily excluded from any federally-assisted transaction, or proposed for debarment, declared ineligible or voluntarily excluded from participating in this Agreement by any state or federal agency. Recipient agrees to notify ODOT immediately if it is debarred, suspended or otherwise excluded from this federally assisted transaction for any reason or if circumstances change that may affect this status, including without limitation upon any relevant indictments or convictions of crimes.
- e. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties set forth in this Agreement or implied by law.

8. Records Maintenance and Access; Audit.

- a. **Records, Access to Records and Facilities.** Recipient shall make and retain proper and complete books of record and account and maintain all fiscal records related to this Agreement and the Project in accordance with all applicable generally accepted accounting principles, generally accepted governmental auditing standards and state minimum standards for audits of municipal corporations. Recipient shall ensure that each of its subrecipients and subcontractors complies with these requirements. ODOT, the Secretary of State of the State of Oregon (Secretary) and their duly authorized representatives shall have access to the books, documents, papers and records of Recipient that are directly related to this Agreement, the funds provided hereunder, or the Project for the purpose of making audits and examinations. In addition, ODOT, the Secretary and their duly authorized representatives may make and retain excerpts, copies, and transcriptions of the foregoing books, documents, papers, and records. Recipient shall permit authorized representatives of ODOT, and the Secretary to perform site reviews of the Project, and to inspect all vehicles, real property, facilities and equipment purchased by Recipient as part of the Project, and any transportation services rendered by Recipient.
- b. **Retention of Records.** Recipient shall retain and keep accessible all books, documents, papers, and records, that are directly related to this Agreement, the funds or the Project for a minimum of six (6) years, or such longer period as may be required by other provisions of this Agreement or applicable law, following the Availability Termination Date. If there are unresolved audit questions at the end of the six-year period, Recipient shall retain the records until the questions are resolved.
- c. **Expenditure Records.** Recipient shall document the expenditure of all Grant Funds disbursed by ODOT under this Agreement. Recipient shall create and maintain all expenditure records in accordance with generally accepted accounting principles and in sufficient detail to permit ODOT to verify how the Grant moneys were expended.

ODOT/Recipient
Agreement No. 30151

9. Recipient Subagreements and Procurements

a. Subagreements. Recipient may enter into agreements with sub-recipients, contractors or subcontractors (collectively, “subagreements”) for performance of the Project.

- i. All subagreements must be in writing, executed by Recipient and must incorporate and pass through all of the applicable requirements of this Agreement to the other party or parties to the subagreement(s). Use of a subagreement does not relieve Recipient of its responsibilities under this Agreement.
- ii. Recipient shall require all of its contractors performing work under this Agreement to name ODOT as a third party beneficiary of Recipient’s subagreement with the Contractor and to name ODOT as an additional obligee on contractors’ bonds.
- iii. Recipient agrees to provide ODOT with a copy of any signed subagreement upon request by ODOT. Any substantial breach of a term or condition of a subagreement relating to funds covered by this Agreement must be reported by Recipient to ODOT within ten (10) days of its being discovered.

b. Subagreement indemnity; insurance.

- i. Recipient’s subagreement(s) shall require the other party to such subagreements(s) that is not a unit of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless ODOT and its officers, employees and agents from and against any and all claims, actions, liabilities, damages, losses, or expenses, including attorneys’ fees, arising from a tort, as now or hereafter defined in ORS 30.260, caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of the other party to Recipient’s subagreement or any of such party’s officers, agents, employees or subcontractors (“Claims”). It is the specific intention of the Parties that ODOT shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of ODOT, be indemnified by the other party to Recipient’s subagreement(s) from and against any and all Claims.
- ii. Any such indemnification shall also provide that neither Recipient’s subrecipient(s), contractor(s) nor subcontractor(s), nor any attorney engaged by Recipient’s subrecipient(s), contractor(s) nor subcontractor(s) shall defend any claim in the name of ODOT or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State may, at any time at its election, assume its own defense and settlement in the event that it determines that Recipient’s subrecipient is prohibited from defending the State, or that Recipient’s subrecipient is not adequately defending the State’s interests, or that an important governmental principle is at issue or that it is in the best interests of the State to do so. The State reserves all rights to pursue claims it may have against Recipient’s subrecipient if the State of Oregon elects to assume its own defense.

- iii. Recipient shall require the other party, or parties, to each of its subagreements that are not units of local government as defined in ORS 190.003 to obtain and maintain insurance of the types and in the amounts provided in Exhibit C to this Agreement.
- c. **Procurements.** Recipient shall make purchases of any equipment, materials, or services for the Project under procedures that comply with Oregon law, including all applicable provisions of the Oregon Public Contracting Code and rules, ensuring that:
 - i. all applicable clauses required by federal statute, executive orders and their implementing regulations are included in each competitive procurement;
 - ii. all procurement transactions are conducted in a manner providing full and open competition;
 - iii. procurements exclude the use of statutorily or administratively imposed in-state or geographic preference in the evaluation of bids or proposals (with exception of locally controlled licensing requirements);

10. Termination

- a. **Termination by ODOT.** ODOT may terminate this Agreement effective upon delivery of written notice of termination to Recipient, or at such later date as may be established by ODOT in such written notice, if:
 - i. Recipient fails to perform the Project within the time specified herein or any extension thereof or commencement, continuation or timely completion of the Project by Recipient is, for any reason, rendered improbable, impossible, or illegal; or
 - ii. ODOT fails to receive funding, appropriations, limitations or other expenditure authority sufficient to allow ODOT, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement; or
 - iii. Federal or state laws, rules, regulations or guidelines are modified or interpreted in such a way that the Project is no longer allowable or no longer eligible for funding under this Agreement; or
 - iv. The Project would not produce results commensurate with the further expenditure of funds; or
 - v. Recipient takes any action pertaining to this Agreement without the approval of ODOT and which under the provisions of this Agreement would have required the approval of ODOT.
- b. **Termination by Recipient.** Recipient may terminate this Agreement effective upon delivery of written notice of termination to ODOT, or at such later date as may be established by Recipient in such written notice, if:

ODOT/Recipient
Agreement No. 30151

- i. The requisite local funding to continue the Project becomes unavailable to Recipient;
 - ii. Federal or state laws, rules, regulations or guidelines are modified or interpreted in such a way that the Project is no longer allowable or no longer eligible for funding under this Agreement.
 - iii. ODOT fails to make payments due in accordance with this Agreement.
- c. **Termination by Either Party.** Either Party may terminate this Agreement upon at least ten (10) days' notice to the other Party and failure of the other Party to cure within the period provided in the notice, if the other Party fails to comply with any of the terms of this Agreement.
- d. **Rights upon Termination; Remedies.** Any termination of this Agreement shall not prejudice any rights or obligations accrued prior to termination. The remedies set forth in this Agreement are cumulative and are in addition to any other rights or remedies available at law or in equity.

11. GENERAL PROVISIONS

- a. **Indemnity.** **RECIPIENT SHALL INDEMNIFY AND DEFEND ODOT AND ITS OFFICERS, EMPLOYEES AND AGENTS FROM AND AGAINST ALL CLAIMS, SUITS, ACTIONS, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES OF ANY NATURE WHATSOEVER ARISING OUT OF, OR RELATING TO THE INTENTIONAL MISCONDUCT, OR RECKLESS OR NEGLIGENT ACTS OR OMISSIONS OF RECIPIENT OR ITS OFFICERS, EMPLOYEES, SUBCONTRACTORS, OR AGENTS UNDER THIS AGREEMENT.**

ODOT shall reasonably cooperate in good faith, at Recipient's reasonable expense, in the defense of a covered claim. Recipient shall select counsel reasonably acceptable to the Oregon Attorney General to defend such claim and all costs of such counsel shall be borne by Recipient. Counsel must accept appointment as a Special Assistant Attorney General under ORS Chapter 180 before such counsel may act in the name of, or represent the interests of, ODOT, its officers, employees or agents. ODOT may elect to assume its own defense with an attorney of its own choice and its own expense at any time ODOT determines important governmental interests are at stake. ODOT agrees to promptly provide Recipient with notice of any claim that may result in an indemnification obligation hereunder. Subject to the limitations noted above, Recipient may defend such claim with counsel of its own choosing provided that no settlement or compromise of any such claim shall occur without the consent of ODOT, which consent shall not be unreasonably withheld, conditioned or delayed.

- b. **Dispute Resolution.** The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly

ODOT/Recipient
Agreement No. 30151

selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.

- c. **Amendments.** This Agreement may be amended or extended only by a written instrument signed by both Parties and approved as required by applicable law.
- d. **Duplicate Payment.** Recipient is not entitled to compensation or any other form of duplicate, overlapping or multiple payments for the same work performed under this Agreement from any agency of the State of Oregon or the United States of America or any other party, organization or individual.
- e. **No Third Party Beneficiaries.** ODOT and Recipient are the only Parties to this Agreement and are the only Parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly or indirectly, to a third person unless such a third person is individually identified by name herein and expressly described as an intended beneficiary of the terms of this Agreement.
- f. **Notices.** Except as otherwise expressly provided in this Agreement, any communications between the Parties hereto or notices to be given hereunder shall be given in writing by personal delivery, facsimile, email or mailing the same, postage prepaid, to Recipient Contact or ODOT Contact at the address or number set forth on the signature page of this Agreement, or to such other addresses or numbers as either Party may hereafter indicate pursuant to this Section 11.f. Any communication or notice personally delivered shall be deemed to be given when actually delivered. Any communication or notice delivered by facsimile shall be deemed to be given when receipt of the transmission is generated by the transmitting machine, and to be effective against ODOT, such facsimile transmission must be confirmed by telephone notice to ODOT Contact. Any communication by email shall be deemed to be given when the recipient of the email acknowledges receipt of the email. Any communication or notice mailed shall be deemed to be given when received.
- g. **Governing Law, Consent to Jurisdiction.** This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") between ODOT (or any other agency or department of the State of Oregon) and Recipient that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Marion County in the State of Oregon. In no event shall this section be construed as a waiver by the State of Oregon of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the eleventh amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum.
- h. **Compliance with Law.** Recipient shall comply with all federal, state and local laws, regulations, executive orders and ordinances applicable to the Agreement or to the

ODOT/Recipient
Agreement No. 30151

implementation of the Project, including without limitation as described in Exhibit B. Without limiting the generality of the foregoing, Recipient expressly agrees to comply with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.

- i. **Insurance; Workers' Compensation.** All employers, including Recipient, that employ subject workers who provide services in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Employer's liability insurance with coverage limits of not less than \$500,000 must be included. Recipient shall ensure that each of its subrecipient(s), contractor(s), and subcontractor(s) complies with these requirements. Recipient shall obtain and maintain insurance covering ODOT of the same types and in the same amounts provided in Exhibit C to this Agreement.
- j. **Independent Contractor.** Recipient shall perform the Project as an independent contractor and not as an agent or employee of ODOT. Recipient has no right or authority to incur or create any obligation for or legally bind ODOT in any way. ODOT cannot and will not control the means or manner by which Recipient performs the Project, except as specifically set forth in this Agreement. Recipient is responsible for determining the appropriate means and manner of performing the Project. Recipient acknowledges and agrees that Recipient is not an "officer", "employee", or "agent" of ODOT, as those terms are used in ORS 30.265, and shall not make representations to third parties to the contrary.
- k. **Severability.** If any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if this Agreement did not contain the particular term or provision held to be invalid.
- l. **Counterparts.** This Agreement may be executed in two or more counterparts (by facsimile or otherwise), each of which is an original and all of which together are deemed one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart.
- m. **Integration and Waiver.** This Agreement, including all Exhibits, constitutes the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. The delay or failure of either party to enforce any provision of this Agreement shall not constitute a waiver by that party of that or any other provision. Recipient, by the signature below of its authorized representative, hereby acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms and conditions.

ODOT/Recipient
Agreement No. 30151

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

The Oregon Transportation Commission at its August 2014 meeting approved the *ConnectOregon V* project application list and delegated authority to the Director of the Oregon Department of Transportation to enter into project agreements.

LRV, a Limited Liability Company, by and through its management

By Robert Didelius
(Legally designated representative)

Name Robert Didelius
(printed)

Date 10/20/14

By _____

Name _____
(printed)

Date _____

**APPROVED AS TO LEGAL
SUFFICIENCY**

(If required in Recipient process)

By N/A
Recipient's Legal Counsel

Date _____

Recipient Contact:

Robert Didelius, General Manager
LRV
337 Grain Terminal Road
Burbank WA 99323
Phone: 360-448-0371
robd@lakerail.com

STATE OF OREGON, by and through its
Department of Transportation

By [Signature]
Director

Date 11-12-14

APPROVAL RECOMMENDED

By [Signature]
Freight Planning Program Manager

Date 11/10/14

By [Signature]
Active Transportation Section Manager

Date 11/10/14

APPROVED AS TO LEGAL SUFFICIENCY

By Keith L. Kutler, Assistant Attorney General, by
e-mail dated August 12th, 2014

ODOT Contact:

Carol Olsen, *ConnectOregon* Program Manager
ODOT - Active Transportation Section
555 13th Street NE
Salem, OR 97301
Phone: 503-986-3327
carol.a.olsen@odot.state.or.us

EXHIBIT A
Project Description, Key Milestones, Schedule and Budget
Agreement No. 30151
Application Number: 4R0334
Project Name: Lakeview Customer Spurs: Expansion, Safety, Efficiency

A. PROJECT DESCRIPTION

The Project includes replacement of deteriorated 75-pound-per-yard rail and switches. New trackage will be built to provide new capacity for placing railcars for loading. A new turnout will be installed and a new spur added. A second new turnout and spur will be constructed to allow LRY to store and load its maintenance of way hopper car for transporting ballast for track maintenance.

The Project will replace five 75-pound switches with 110-pound or heavier switches and install two new 110-pound or heavier switches. In the aggregate, approximately 2,200 feet of new track will be constructed at various locations in Lakeview and 1,000 feet of existing 75-pound rail will be upgraded to heavier steel and about one-third of the existing tie population supporting the renovated rail will be renewed.

B. PROJECT KEY MILESTONES AND SCHEDULE

Project has six (6) Key Milestone(s). Key Milestones are used for evaluating performance on Project and determining level of compensation for completed work as described in the Agreement. Key Milestones cannot be changed without an amendment to the Agreement. Recipient may shift the estimated Grant Funds shown below between milestones without an amendment to the Agreement, but shall not, under any circumstances, exceed the "Total Not To Exceed Grant Fund Allocation." Recipient shall report changes to the Estimated Amounts corresponding to each Key Milestones, shown below, in Recipient's Monthly Report to the ODOT Project Liaison.

If Recipient anticipates Project Key Milestones will be delayed by more than ninety (90) days, Recipient shall submit a Request for Change Order, as described in Section 4(b) of the Agreement, to the ODOT Project Liaison as soon as Recipient becomes aware of any possible delay. The Request for Change Order must be submitted prior to the Key Milestone completion date shown in this Exhibit.

The anticipated start date of Project is: 10/31/2014

The estimated completion date of Project is: 10/31/2015

Table 1: Key Milestones

Key Milestone	Description	Estimated Due Date
1	Scoping and planning	N/A
2	Right of way and land acquisition	N/A
3	Permits	3/31/2015
4	Final plans/bidding engineering documents	3/31/15
5	Construction contract award	3/31/15
6	Project completion	10/31/15

Table 2 – Funding Breakdown

A	Total Not To Exceed Grant Fund Allocation	\$783,680	
B	ConnectOregon V twenty (20) percent required match	\$195,920	
C	ConnectOregon V Total		\$979,600
D	Other Funds In Addition to twenty (20) percent Required Match	\$0	
E	Total Project Funding		\$979,600

ODOT/Recipient
Agreement No. 30151

EXHIBIT B

Recipient Requirements

- I.** Recipient shall comply with all applicable requirements of ORS 367.080 to 367.086, OAR chapter 731, Division 35. Failure by Recipient to comply with these requirements will subject Recipient to the sanctions as described in OAR735-035-0080.
- II.** Recipient shall comply with ORS 280.518, which requires any economic development program financed with proceeds from the state lottery to display a sign in a conspicuous location on Project site or specify in the program information that Project is financed with proceeds from the state lottery. ODOT will provide standard signage as appropriate. If Recipient chooses to make a custom sign, Recipient must obtain written approval from ODOT's ConnectOregon Program Manager to use its custom sign and Recipient shall be responsible for the cost of such custom signage. If Project site is remote and a sign would not be visible to the public, Recipient shall provide proof to ODOT's ConnectOregon Program Manager that Recipient has specified in its program information that Project is financed with proceeds from the state lottery.
- III.** Recipient shall comply with all applicable provisions of ORS 279C.800 to 279C.870 pertaining to prevailing wage rates and including, without limitation, that workers on the Project shall be paid not less than rates in accordance with ORS 279C.838 and 279C.840 pertaining to wage rates and ORS 279C.836 pertaining to having a public works bond filed with the Construction Contractors' Board.
- IV.** Recipient acknowledges and agrees that, whenever 839-025-0230(4) requires ODOT as the public agency providing public funds for a project that is a public work under ORS 279C.800(6)(a)(B) to pay the fee required under ORS 279C.825, ODOT will calculate and pay the fee and deduct the amount of the fee from Recipient's Grant Funds under this Agreement.
- V.** Recipient shall notify ODOT's Project Liaison and ODOT's ConnectOregon Program Manager in writing when any contact information changes during the term of this Agreement.
- VI.** Recipient must provide matching funds in an amount equal to twenty (20) percent of the eligible Project Costs. Matching funds must be used for elements necessary for implementation of Project, including land, excavation, permits, engineering, payroll, special equipment purchase, rental or lease. Recipient is responsible for all costs in excess of the Grant Funds.
- VII.** Recipient shall pay back all of the Grant Funds to ODOT if Project is not completed in accordance with, or consistent with Exhibit A and Exhibit E, as each may be amended. Recipient obligations for Recovery of Grant Funds are provided in Section 6.d of this Agreement.

ODOT/Recipient
Agreement No. 30151

- VIII.** Recipient and ODOT's Project Liaison shall, upon completion of all on-site work for the Project, perform an on-site review. Once review is completed, the ODOT Project Liaison may recommend acceptance of Project by signing the ConnectOregon "Recommendation of Acceptance" (Form 734-2649), which also must be signed by Recipient. The form is available at: <http://www.oregon.gov/ODOT/HWY/LGS/online.shtml>.
- IX.** Recipient shall, at its own expense, maintain and operate Project upon completion and throughout the useful life of Project at a minimum level that is consistent with normal depreciation or service demand or both. ODOT and Recipient agree that the useful life of Project is defined as twenty (20) years. Recipient has, by submitting its application for this ConnectOregon V grant, represented and certified to sufficient funds and to its ability to operate and maintain Project. Recipient agrees to require any successor owner of the Project property to comply with this requirement. Failure to comply with this requirement may be remedied by Recipient or its successor in interest by (a) restoring the property to the uses(s) required by this Agreement or (b) repayment of expended funds. In the event repayment of expended funds is required, the amount determined using the Straight Line Depreciation (SLD) method must be repaid to ODOT. The SLD is calculated by taking the grant amount divided by twenty years. ODOT may conduct site reviews of the Project as provided in Section 8.a of this Agreement throughout the useful life of the Project. This paragraph shall survive any expiration or termination of this Agreement.
- X.** Recipient shall, upon execution of this Agreement and as a condition to this Agreement, complete and file with the appropriate County Clerk, "Memorandum of Agreement and Acknowledgment of ODOT Assistance", substantially in the form of Exhibit D attached hereto and by this reference made a part hereof. Recipient shall provide confirmation of this filing by forwarding to ODOT's ConnectOregon Program Manager a notarized copy of the recorded Memorandum of Agreement and Acknowledgment of ODOT Assistance. By means of said acknowledgment of Recipient's financial obligations, the continued use of said property for public purposes, and the maintenance of the facility or service at a level consistent with normal depreciation or demand or both is recognized and attached to the property as conditions. Any interest in said property by ODOT is proportional to the state participation in Project. While in default of conditions of this Agreement, Recipient will be ineligible to receive state funds from any ODOT-administered program for any project on a street, road or property. The Memorandum of Agreement and Acknowledgment of ODOT Assistance shall remain in place for the useful life of Project. ODOT acknowledges that such interest shall not be deemed a lien, mortgage, deed of trust or other security instrument or interest granted by Recipient for security purposes. The useful life of Project is defined as twenty (20) years. Reimbursement to Recipient will not be made until the Recipient receives a letter from the ConnectOregon Program Manager indicating that the conformed copy of the Memorandum of Agreement and Acknowledgment of Assistance has been received. Recipient may have additional obligations to meet in prior to receiving reimbursement for construction costs identified in this Agreement.

ODOT/Recipient
Agreement No. 30151

XII. Recipient shall provide pre-construction Project photographs within thirty (30) days of the execution of this Agreement. Recipient shall provide Project photographs thirty (30) days after Project is completed. These photographs must be provided to the ODOT Project Liaison and ODOT's ConnectOregon Program Manager.

XIII. Additional requirements

A. Prerequisites for Reimbursement of Construction Costs

1. **Matching Funds.** Recipient shall provide documentation of having secured the matching funds prior to any construction costs (labor and material) being considered eligible for reimbursement or reimbursed from Grant Funds. The matching funds must be available and committed for the duration of Project. Recipient shall provide this documentation to ODOT's *ConnectOregon* Program Manager.

B. Requirements for Rail Projects

1. **Drawings.** Recipient shall submit a project location map or drawing satisfactory to ODOT showing the location of new switches and track to be installed and switches and track to be replaced to ODOT's *ConnectOregon* Program Manager. Project costs will not be reimbursed until a location map or drawing satisfactory to ODOT has been received by ODOT's *ConnectOregon* Program Manager.
2. **Materials List.** Recipient shall, prior to construction, submit a materials list and proposed construction schedule to ODOT's *ConnectOregon* Program Manager. Project costs will only be reimbursed through the design phase of Project until the materials list and proposed construction schedule have been submitted to ODOT's *ConnectOregon* Program Manager. Recipient must submit a Request for Change Order and a revised materials list if there are substantial changes to the scope of work.
3. **Standards.** Recipient shall, for design and construction, follow standards that meet or exceed American Railway Engineering and Maintenance-of-Way Association's standards. Recipient shall ensure that any continuous welded rail used on the Project meets or exceeds Federal Railroad Administration standards.
4. **Construction Schedule.** Recipient shall, once construction has begun on Project, submit a monthly construction schedule at the same time Recipient submits the monthly report detailed above under Section 5.a of this Agreement.
5. **Final Materials List.** Recipient shall, once project has been completed and prior to inspection, submit a final materials list to the ODOT Project Liaison for use by the ODOT Inspector during the final inspection.

EXHIBIT C

Subagreement Insurance Requirements

GENERAL.

Recipient shall require in its first tier subagreements with entities that are not units of local government as defined in ORS 190.003, if any, to: i) obtain insurance specified under TYPES AND AMOUNTS and meeting the requirements under ADDITIONAL INSURED, "TAIL" COVERAGE, NOTICE OF CANCELLATION OR CHANGE, and CERTIFICATES OF INSURANCE before performance under the subagreement commences, and ii) maintain the insurance in full force throughout the duration of the subagreement. The insurance must be provided by insurance companies or entities that are authorized to transact the business of insurance and issue coverage in the State of Oregon and that are acceptable to ODOT. Recipient shall not authorize work to begin under subagreements until the insurance is in full force. Thereafter, Recipient shall monitor continued compliance with the insurance requirements on an annual or more frequent basis. Recipient shall incorporate appropriate provisions in the subagreement permitting it to enforce compliance with the insurance requirements and shall take all reasonable steps to enforce such compliance. In no event shall Recipient permit work under a subagreement when Recipient is aware that the contractor is not in compliance with the insurance requirements. As used in this section, "first tier" means a subagreement in which the Recipient is a Party.

TYPES AND AMOUNTS.

- i. **WORKERS COMPENSATION.** Insurance in compliance with ORS 656.017, which requires all employers that employ subject workers, as defined in ORS 656.027, to provide workers' compensation coverage for those workers, unless they meet the requirement for an exemption under ORS 656.126(2). Employers liability insurance with coverage limits of not less than \$500,000 must be included.
- ii. **COMMERCIAL GENERAL LIABILITY.** Commercial General Liability Insurance covering bodily injury, death, and property damage in a form and with coverages that are satisfactory to ODOT. This insurance shall include personal injury liability, products and completed operations. Coverage shall be written on an occurrence form basis, with not less than the following amounts as determined by ODOT:

Bodily Injury, Death and Property Damage:

\$1,000,000 per occurrence (for all claimants for claims arising out of a single accident or occurrence).

- iii. **AUTOMOBILE Liability Insurance: Automobile Liability.** Automobile Liability Insurance covering all owned, non-owned and hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits for "Commercial General Liability" and "Automobile Liability"). Automobile Liability Insurance must be in not less than the following amounts as determined by ODOT:

Bodily Injury, Death and Property Damage:

\$1,000,000 per occurrence (for all claimants for claims arising out of a single accident or occurrence).

- iv. **ADDITIONAL INSURED.** The Commercial General Liability Insurance and Automobile Liability insurance must include ODOT, its officers, employees and agents as Additional Insureds but only with respect to the contractor's activities to be performed under the Subcontract. Coverage must be primary and non-contributory with any other insurance and self-insurance.
- v. **"TAIL" COVERAGE.** If any of the required insurance policies is on a "claims made" basis, such as professional liability insurance, the contractor shall maintain either "tail" coverage or continuous "claims made" liability coverage, provided the effective date of the continuous "claims made" coverage is on or before the effective date of the Subcontract, for a minimum of twenty-four (24) months following the later of : (i) the contractor's completion and Recipient's acceptance of all Services required under the Subcontract or, (ii) the expiration of all warranty periods provided under the Subcontract. Notwithstanding the foregoing twenty-four (24) month requirement, if the contractor elects to maintain "tail" coverage and if the maximum time period "tail" coverage reasonably available in the marketplace is less than the twenty-four (24) month period described above, then the contractor may request and ODOT may grant approval of the maximum "tail " coverage period reasonably available in the marketplace. If ODOT approval is granted, the contractor shall maintain "tail" coverage for the maximum time period that "tail" coverage is reasonably available in the marketplace.
- vi. **NOTICE OF CANCELLATION OR CHANGE.** The contractor or its insurer must provide 30 days' written notice to Recipient before cancellation of, material change to, potential exhaustion of aggregate limits of, or non-renewal of the required insurance coverage(s).
- vii. **CERTIFICATE(S) OF INSURANCE.** Recipient shall obtain from the contractor a certificate(s) of insurance for all required insurance before the contractor performs under the Subcontract. The certificate(s) or an attached endorsement must specify: i) all entities and individuals who are endorsed on the policy as Additional Insured and ii) for insurance on a "claims made" basis, the extended reporting period applicable to "tail" or continuous "claims made" coverage.

The Recipient shall immediately notify ODOT of any change in insurance coverage.

ODOT/Recipient
Agreement No. 30151

After recording, return to:

EXHIBIT D

MEMORANDUM OF AGREEMENT AND ACKNOWLEDGEMENT OF ODOT ASSISTANCE

[State Recording Authority: ORS 93.710 and ORS 205.130(2)]

Agreement Number: 30151

Project Name: Lakeview Customer Spurs: Expansion, Safety, Efficiency

Grant Agreement No. 30151 ("Grant Agreement") between the LRY, a Limited Liability Company and the State of Oregon, Department of Transportation (ODOT) was executed on _____. Pursuant to Exhibit B, Section VII, of the Grant Agreement, upon the recording of this document, the LRY, a Limited Liability Company will receive Grant Funds for Project described in the Grant Agreement. The property and assets under the jurisdiction of the LRY, a Limited Liability Company will be improved with the assistance from the State of Oregon, Department of Transportation, in accordance with the terms of the Grant Agreement. Such assistance will be provided to LRY, a Limited Liability Company, in reimbursement of costs associated with the Lakeview Customer Spurs: Expansion, Safety, Efficiency project. The use and disposition of said property is subject to the terms of the Grant Agreement, copies of which may be obtained from the Director of ODOT. A description of the improved property is attached.

LRY, a Limited Liability Company

By: _____
(Name of person)

(Notary Stamp)

Title: _____

State of Oregon: County of _____

Signed or attested before me on _____ by _____
(Name of person) (Date)

_____ My commission expires on _____.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION

By: _____
McGregor Lynde

(Notary Stamp)

Title: Active Transportation Section Manager

Signed or attested before me on _____ by _____
(Name of person) (Date)

_____ My commission expires on _____.

Oregon Department of Transportation; 555 13th Street NE, Salem, OR 97301-4178.

TAB H

Redacted



From: **Brad Winters** <bwinters@co.lake.or.us>
Date: Tue, Jan 3, 2017 at 4:04 PM
Subject: RE: need a response from County on bridges
To: Rob Didelius <robd@frontierrail.com>, David Berman <dberman@co.lake.or.us>
Cc: Dan Shoun <dshoun@co.lake.or.us>, Ken Kestner <kkestner@co.lake.or.us>, Paul Didelius <pd@lakerail.com>

Rob, I have looked at the inspection reports and it seems that some of the repairs could be done by your crew under normal maintenance if this is a possibility please let us know and we could work out the cost. We need to use your knowledge as an operator of your top priority for bridge maintenance as you know were limited on funds so we need to start with the most critical bridges first. Dave has put in for a grant that if awarded could fund some of the needed repairs and as you well know we will always try to leverage dollars from connect Oregon so lets hope it gets funded at the level the Governor put in her budget. The grant Dave put in for should be awarded this fall I'm hopeful we will be selected as a recipient. Would you give me your opinion and knowledge of asking for a waiver under 49 C.F.R. 237.9 are we at the point we need to ask for a waiver to gain some time while were applying for grants if so do you apply for the waiver or do we.

Bradley J Winters

Lake County Commissioner

513 center street

Lakeview OR 97630

Office 541-947-6005

Cell 541-219-1894

Lake County where we make things happen.

From: Rob Didelius [mailto:robd@frontierrail.com]
Sent: Tuesday, January 3, 2017 12:42 PM
To: David Berman <dberman@co.lake.or.us>
Cc: Brad Winters <bwinters@co.lake.or.us>; Dan Shoun <dshoun@co.lake.or.us>; Ken Kestner <kkestner@co.lake.or.us>; Paul Didelius <pd@lakerail.com>
Subject: Re: need a response from County on bridges

Dave,

The bridge inspection report lists all the priority repair items. You and I looked at this together about a month ago. It starts on page # 9 of the document (which is actually page 12 of the PDF). Please let us know the plan here. Please keep Paul copied on the distribution.

-Rob

On Tue, Jan 3, 2017 at 12:35 PM, David Berman <dberman@co.lake.or.us> wrote:

Rob,

I have not been on Vacation . I am working on funding as we speak for repairing bridges. The only inspection that we have received and we are paying for is the one that LRY had done. We do have a engineering company getting ready to do another inspection this year. I am not sure what bridges need Immediate attention. I will have to get back to you on that. I am thinking if you know what bridges that need attention it would be much appreciated that you let the county know which ones they are so we can get a contractor out there to get them repaired.

Thanks

David

From: Rob Didelius [mailto:robd@frontierrail.com]
Sent: Tuesday, January 3, 2017 12:15 PM
To: David Berman <dberman@co.lake.or.us>
Cc: Paul Didelius <pd@lakerail.com>; David Hutton <dhutton@gmail.com>; Brad Winters <bwinters@co.lake.or.us>; Dan Shoun <dshoun@co.lake.or.us>; Ken Kestner <kkestner@co.lake.or.us>
Subject: need a response from County on bridges

David,

I'm assuming you've been on vacation, but as soon as you are able, we need to discuss bridges. Several items were identified in the bridge inspection report as needing to be fixed asap or at least monitored on a frequent basis until fixed. The other option is to take the these bridges out of service until fixed.

Can you please give you an update to when these were last inspected by the County, if you had any findings when you inspected them, and when you plan on fixing? If we are to continue running over these bridges before they are repaired, we need more information as soon as possible.

Thank you,
Rob Didelius
(360)448-0371

TAB I

BAILEY & YARMO, LLP

ATTORNEYS AT LAW

Attorneys:

James E. Bailey, III
Aron D. Yarmo

Assistants:

Joni McCarthy

Email:

jbailey@byllp.com
ayarmo@byllp.com
jonilyn@byllp.com

November 7, 2016

Paul Didelius
LRY, LLC
337 Grain Terminal Road
Burbank, WA 99323

Via Email: pd@lakerail.com

Re: Lake County and Lake Railway

Dear Mr. Didelius:

Lake County has asked me to convey its concerns over the recent operations of Lake Railway. While there have been interruptions of service and lapses in operation that have negatively affected Lake County businesses, it appears that Lake Railway has either breached or come very close to breaching the Lease and Operating Agreement.

For instance, Section 1.01 sets the goal of the agreement as being “for the purpose of providing rail transportation operations and services...” recent events call into question whether that purpose is actually being accomplished in a realistic sense.

Section 5.03 requires Lake Railway to maintain the condition of the line in the condition it was on the Commencement Date. Recent interruptions of service and derailments raise the concern that the condition of the line has actually deteriorated below the condition on the Commencement Date.

Section 6.06 requires that Lake Railway provide a variety of written reports to Lake County in a timely manner. It appears that this has never been done, and that Lake Railway has only referred Lake County a “dropbox” location and only when Lake County has asked for the reports. This failure appears to be a breach of the Lease & Operating Agreement.

Section 24.01 states that any disruption of service in violation of the Agreement constitutes a default of the Agreement and allows Lake County to terminate the Agreement. I also note that even if Lake Railway conducts its operations in a manner

November 7, 2016

Page 2

that technically avoid a breach of the Agreement, Section 13.05 allows Lake County to terminate the Agreement “without reasonable cause.”

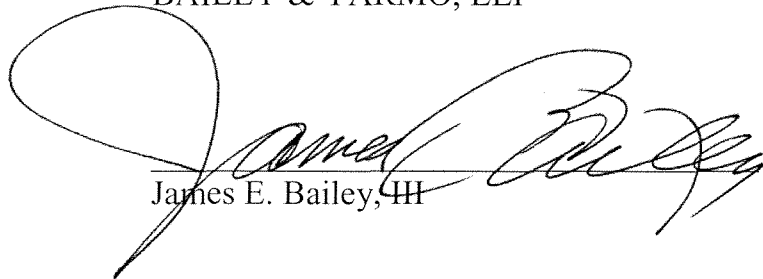
Again, to be clear, Lake County is not at this point declaring a breach or termination of the Agreement, but Lake County is notifying Lake Railway of its concerns regarding the level of quality of operations.

Finally, as part of the obligation to provide a copy of the contract it concluded with Red Rocks Biofuels. This is something that Section 6.05 requires be produced since it is a record of Lake Railway and goes directly to the nature of the operation of the railway as related to cargo and the condition of the line to safely move cargo. Please provide us with a copy of your contract with Red Rocks.

Lake County is hopeful that the above concerns can be addressed quickly such that both sides can continue to provide effective rail service to the County’s businesses. We look forward to continuing to work positively with Lake Railway on all rail service issues.

Yours truly,

BAILEY & YARMO, LLP

A handwritten signature in black ink, appearing to read "James E. Bailey, III", is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long, sweeping tail.

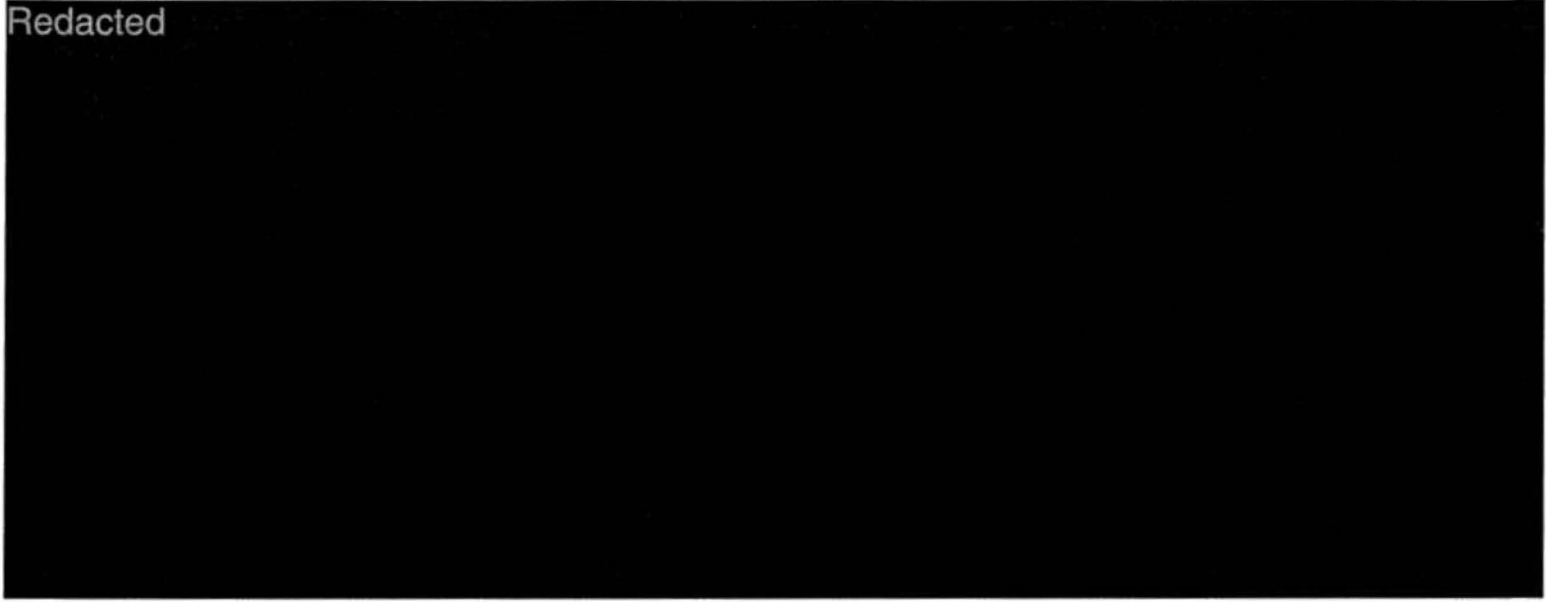
James E. Bailey, III

JEB/jlm

c: Board of Commissioners (Fax: (541) 947-5775)

TAB J

Redacted



From: **Bruce Addington** <bruceaddington@yahoo.com>

Date: Tue, Apr 18, 2017 at 6:23 AM

Subject: Continued shipments on the LRY

To: Rob Didelius <robd@frontierrail.com>, Paul Didelius <pd@lakerail.com>

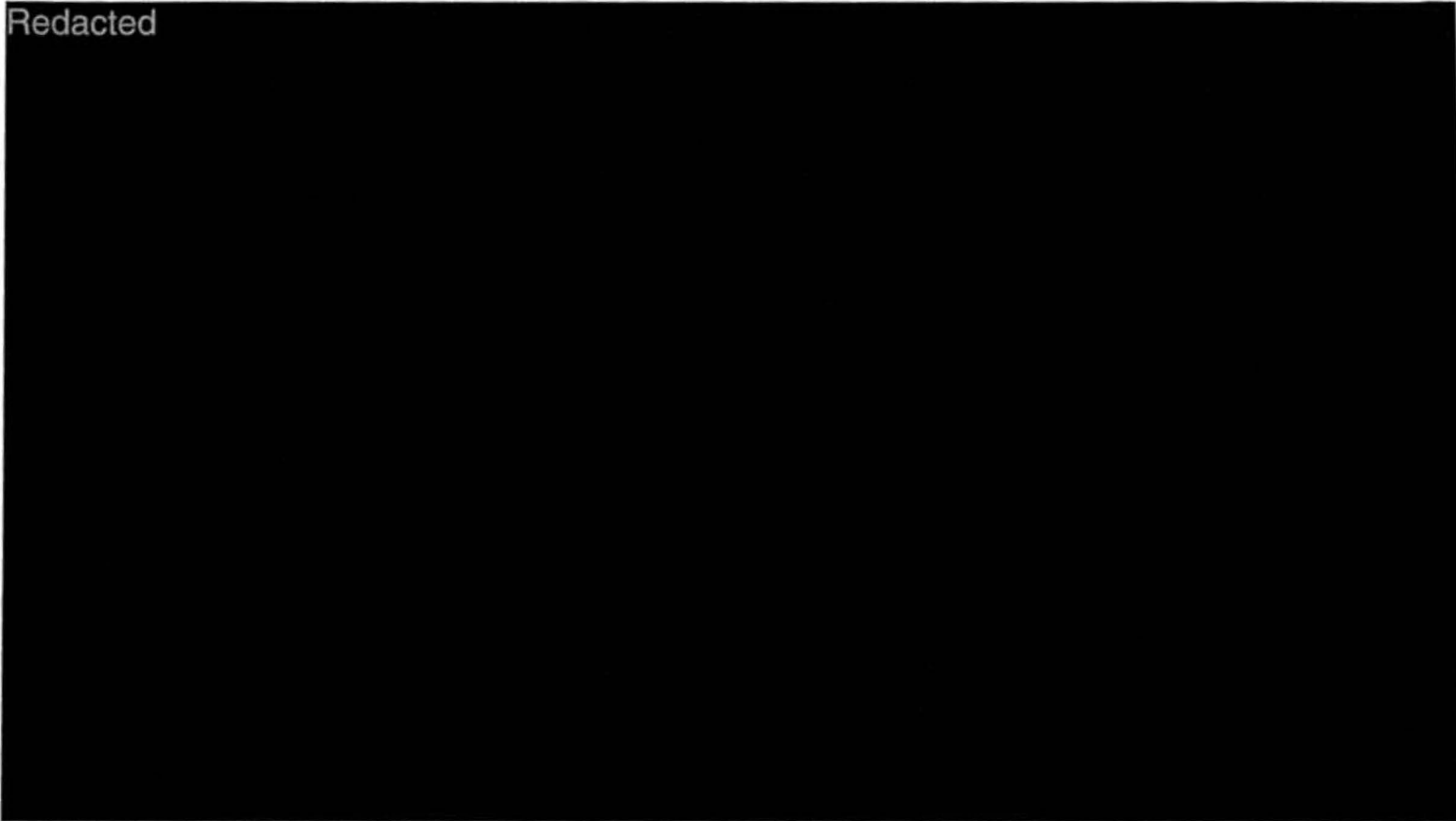
Cc: Bobbie Hickey <cornerstonemineral@centurytel.net>, David Dooley <david@cornerstonemineral.com>, Robert Addington <addingtonrr@hotmail.com>, Erik Addington <eaddington@gmail.com>

Good Morning Rob, As we discussed yesterday Cornerstone is in agreement to continue shipping ore on the LRY from our Lakeview load-out. The agreed upon surcharge of \$525. per car is something that we can live with.

Be mindful that if this surcharge increases we may be forced to reevaluate the economics of this operation. Thank you for your communication and your efforts to keep the shipments moving. Bruce

TAB K

Redacted



From: **Paul Didelius** <pd@frontierrail.com>
Date: Mon, Apr 17, 2017 at 2:34 PM
Subject: Re: Lake Rwy
To: "Schooler, Eric" <ESchooler@collinsco.com>, Rob Didelius <robd@frontierrail.com>

Eric - thank you for your specific response. My original email to you included their letter. We are working to ensure we can service your current needs.

Paul Didelius
for LRY

On Mon, Apr 17, 2017 at 1:59 PM, Schooler, Eric <ESchooler@collinsco.com> wrote:

Paul: I guess I didn't really specify the time, but yes I meant to say Collins would want and expect service in May. At this time I don't know the status of the Termination demand? Do you have additional information? Eric

From: Paul Didelius [<mailto:pd@frontierrail.com>]
Sent: Monday, April 17, 2017 1:18 PM
To: Schooler, Eric; Rob Didelius
Cc: Broadfoot, Larry
Subject: Re: Lake Rwy

Eric, thank you very much for this.

I specifically need to know if you are wanting rail service to / from Collins in May, or not, or if you can't answer that.

Based upon what I'm seeing from Rob you have a real opportunity on your chips as well here.

Thanks,
Paul Didelius

for LRY

On Mon, Apr 17, 2017 at 12:05 PM, Schooler, Eric <ESchooler@collinsco.com> wrote:

Paul and Rob:

Collins Lakeview Sawmill is a producer of "commodity" softwood lumber. Commodity buyers are looking for a few key things when purchasing lumber:

- Price
- Service
- Quality
- Relationship with the Seller (salesperson)

Railroads are an important part of two of the keys to selling our products, Price and Service. Since our "commodity" lumber can be purchased from many other suppliers, customers generally buy the best price point available and demand on time delivery. If we cannot deliver the required price or service we cease to be viable! The Lake Rail line is one avenue to our world of customers.

Collins is agreeable to raising the current \$500/car surcharge to \$525/car for a period of time to be reviewed later. Service needs to be continued uninterrupted or our Rail customers will go elsewhere.

Respectfully submitted:

Eric Schooler, Pres

The Collins Companies

From: Paul Didelius [mailto:pd@frontierrail.com]
Sent: Monday, April 17, 2017 6:58 AM
To: Rob Didelius
Cc: Schooler, Eric
Subject: Re: Lake Rwy

Eric:

I am not trying to bully things here, but presuming Easter weekend (hope you had a great one) has slowed things down a bit, and here checking in that we can today get what we are needing. Later this morning I have several calls with two teams of attorneys and with April 30 bearing down on LRY, and a real need to potentially pivot our staff to things other than a primary focus on customers, we really need up or down on my email to you of the 13th. A non-answer we will also understand as a certain answer as well, just FYI.

To recap where we are via phone conversation of mid-Friday:

- You indicated at \$1000 surcharge per car the chips are a loser, and your primary sales product of lumber is a wash with your trucking costs - but you might enjoy more fluid market delivery if you trucked these loads into Klamath area which has more than weekly outbound connection to UP and BNSF networks..
- I requested what is a number that worked for you - at least for the month of May you would maintain what you at present want of us (service).
- I am hearing Rob indicate if you are willing consider maintaining your use of our company he can, via a credit on the lumber, see that your net experience is less than \$1000.
- I'd like to see you come to us with a number between \$500 and \$1000 that you can live with for a while, and what 'while' that is you'd like us to consider. As Rob put it, at \$500 per car we are rapidly making progress on our deficit situation relative our critical vendors.
- On chips the crux of the matter is you don't have enough space at the plant to avoid creating a lot of extra handling (and extra communication requirements between our parties which seem to be a struggle at some level mutually). Rob is indicating again if you can give us some direction on pricing here we can even participate in this investment by building the extra capacity for you at a number no other contractor can come close to.

Now, based upon that we've established with you a conversation with some positive / forward movement, Rob agreed to get your plant spotted with new empties. I think you can understand with April 30 bearing down on us, I am quite concerned we not continue to expend funds on customers lacking payment on current outstanding

bills! At present, lacking clarity we're again in a situation where I've instructed our forces to not place additional empties at your plant.

So:

On filling your request for empty rail cars: We may have empties available for your current request/s.

Given current uncertainty imposed upon us by Lake County's actions - and that we have no written response from you (up or down on reasonable questions I brought to you on this email of April 13) - we must at this time require pre-payment of all outstanding charges, and pre-payment of charges related to current service requests, which we will generate invoice for as per current request charge applicability.

We apologize for the inconvenience.

If we can get some clarity - I don't see where we could not ease or discuss easing of this situation.

Please work on this with your people as a priority issue for this morning. We are basically talking at least the month of May, if that's what you are willing to indicate as to wanting LRY service. If you are interested in anything more, that's great too. Or neither - at this point just need your answers here.

Thanks much -

Paul Didelius

for LRY LLC

On Thu, Apr 13, 2017 at 4:49 PM, Rob Didelius <robd@frontierrail.com> wrote:

Eric,

Thanks again for your time today. If you are telling me that \$500 per car was workable and I'm seeing that we're making significant progress towards our AP hole at \$500 per car, then I think we'd both be fools not to look for a deal here. As far as service goes, we're hitting interchange every week. We'll continue to deliver that consistency you need to effectively sell lumber.

On the chip side, it's obviously more complicated, but I do believe that if you and I spent just a little time here we could solve things. I'm willing to start by copying you on a daily report of where chip cars are. Dee and Co. should already be getting this report in their email each morning. That said, I do admit that the quality of information in this report hasn't always been exemplary. I'll audit the report myself when I'm in Lakeview (roughly on a monthly basis). The report's quality will quickly improve.

As for building chip track capacity at Lakeview, I really think that it can be done economically. Dee never even got a price quote. Let's at least get an estimate out of somebody before a decision is made, I'll make some calls. I'm sure that I could convince Paul to give you the needed rail (if relations with the County were to calm down just a bit). Then all of a sudden, you save us the double handling, we don't have to charge you for the double handling, and Dee's got empty chip cars where he needs them. Why would we not at least look into this?

We appreciate your time and look forward to hearing from you tomorrow.

-Rob Didelius
(360)448-0371

On Thu, Apr 13, 2017 at 12:58 PM, Paul Didelius <pd@frontierrail.com> wrote:

I'll call you and we can call him? Or do you need to call me first?

Thx

P

----- Forwarded message -----

From: **Paul Didelius** <pd@frontierrail.com>

Date: Thu, Apr 13, 2017 at 12:52 PM

Subject: Re: Lake Rwy

To: "Schooler, Eric" <ESchooler@collinsco.com>

Can call you then.

On Thu, Apr 13, 2017 at 12:37 PM, Schooler, Eric <ESchooler@collinsco.com> wrote:

2:00pm today? Eric

Sent from my mobile.

On Apr 13, 2017, at 12:16 PM, Paul Didelius <pd@frontierrail.com> wrote:

When is a good time? I am available for a call today anytime until 3:30.

Thank you,
Paul Didelius

On Thu, Apr 13, 2017 at 8:03 AM, Schooler, Eric <ESchooler@collinsco.com> wrote:

Mr. Didelius; please forward a phone # and I will call to discuss this new situation. Or call me at 503-826-5221. Eric Schooler

From: Paul Didelius [<mailto:pd@frontierrail.com>]
Sent: Thursday, April 13, 2017 6:57 AM
To: Schooler, Eric
Cc: Rob Didelius; Helen Didelius; James H. M. Savage, Esq.; Broadfoot, Larry; Brown, Dee
Subject: Fwd: Lake Rwy

Mr. Schooler - good morning.

Please note the following communication we received yesterday from Lake County.

This raises a host of significant problems for us - and indirectly our commercial situation with Collins.

Obviously we are reviewing our legal options and will be formulating, at some expense, our next steps.

At this point it would be helpful for you and I if you can advise me on the following:

1. Was Collins aware of this action / details as noticed now by County?
2. Should I understand this represents Collin's desire of / direction to LRY - That LRY subsequent to April 30, 2017 no longer present in Lakeview OR its services - specifically to handle empty car placements or load originations at Collin's plant there?

I appreciate this basic guidance related to our service here and yours.

Regards,

Paul Didelius / LRY LLC

----- Forwarded message -----

From: **Martin Hansen** <meh@francishansen.com>
Date: Wed, Apr 12, 2017 at 10:16 AM
Subject: Fwd: Lake Rwy
To: "robd@frontierrail.com" <robd@frontierrail.com>, "pd@frontierrail.com" <pd@frontierrail.com>, Kathy Sweeney <kathy@francishansen.com>

Sent from my iPhone

Begin forwarded message:

From: Jim Bailey <jbailey@byllp.com>
Date: April 12, 2017 at 10:10:35 AM PDT
To: Martin Hansen <meh@francishansen.com>
Subject: Lake Rwy

Martin,

Please see the attached letter terminating the Lease between Lake County and Lake Rwy effective April 30.

Jim Bailey

Bailey & Yarmo, LLP

Ph: 541-317-9000

Fx: 541-389-0159

