

EMERGENCY USE PRIVATE CROSSING AGREEMENT

This emergency use **PRIVATE CROSSING AGREEMENT** ("Agreement"), effective as of the ____ day of _____, 2009, ("Effective Date") by and between **BNSF RAILWAY COMPANY**, a Delaware corporation (hereinafter called "Licensor") and the **CITY OF MOUNT VERNON**, a Washington Municipal Corporation ("City"); **SKAGIT COUNTY**, a political subdivision of the State of Washington ("County"); and **SKAGIT COUNTY FIRE PROTECTION DISTRICT NO. 3**; a Washington special purpose district and municipal corporation ("Fire Protection District") (hereinafter the City, the County, and the Fire Protection District may be collectively referred to herein as "Licensee") is for an EMERGENCY-USE Private Crossing, subject to the terms of this Agreement. Licensor and Licensee may be individually referred to herein as a "party" and may be collectively referred to herein as the "parties."

WHEREAS:

- A. Licensor and the Washington State Department of Transportation (hereinafter "WSDOT") plan to extend the railroad siding track across the Hickox Road public crossing in Mount Vernon, Washington (DOT 084737D), in order to allow freight and passenger trains to meet and pass;
- B. Once the siding project is complete, the Hickox Road crossing will be located in the middle of the active siding track and subject to frequent, unpredictable blockage and/or obstructed vision caused by parked or slow-moving trains for potentially long periods of time;
- C. Licensor petitioned the Washington Utilities and Transportation Commission (hereinafter "WUTC") to close the Hickox Crossing to vehicular and pedestrian travel once the siding project is complete, which Licensee strenuously opposed based, in part, on flooding and emergency response concerns;
- D. The WUTC has ordered that the Hickox Road public crossing shall be closed to public travel subject to its conversion to an emergency use private crossing with a secured gate for Licensee's emergency response use only;
- E. Licensee acknowledges that operation and maintenance of a private crossing with a secured gate, consistent with the recommendations of the Diagnostic Team, for Licensees' emergency use at Hickox Road is for Licensees' sole benefit as public entities with authority through their respective police powers to prepare and carry out plans for management of persons and property in the event of a disaster or emergency, and to provide for coordination of emergency management and disaster functions with other public agencies and affected private persons, corporations, and organizations, and generally to protect the public peace, health, and safety, and that the same emergency use private crossing does not provide any benefit to Licensor;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree to the following:

GENERAL

1. Licensor hereby grants Licensee a non-exclusive license, subject to all rights, interests, estates of third parties, including, without limitation, any leases, licenses, easements, liens, or other encumbrances, and upon the terms and conditions set forth below, to use an at-grade EMERGENCY-USE private crossing thirty-three feet (33 feet) wide, across the rail corridor of Licensor at or near Hickox Road in Mount Vernon, County of Skagit, State of Washington, Line Segment 50, Mile Post 65.60, DOT # 084737D. For convenience, said crossing, including crossing surface and all appurtenances thereto between the ends of railroad ties, cattle guards, farm gates or barriers, drainage facilities, traffic signs or devices, identification signs approved by Licensor, whistling posts, or other appurtenances, if any, are hereinafter collectively referred to as the "Private Crossing."
2. Licensee shall not disturb any improvements of Licensor or Licensor's existing lessees, licensees, easement beneficiaries or lien holders, if any, or interfere with the use of such improvements.
3. It is expressly stipulated that the Private Crossing is to be solely used for the purpose of EMERGENCY RESPONSE and FLOOD / DISASTER-RELATED ACTIVITIES, and is not intended for and shall not be for public use. Licensee expressly acknowledges and agrees that the Private Crossing is a strictly private one for emergency use, and is not a public, semi-public, quasi-public, or *de facto* public crossing, notwithstanding the above-referenced WUTC Order, and Licensee will take reasonable action(s) to preserve the restricted use of the Private Crossing as set forth in this Agreement and prevent its use as a public road.
4. Said EMERGENCY USE of the Private Crossing shall be permitted for the following:
 - (a) to respond to a medical or fire emergency; and
 - (b) during disaster-related activities when it is necessary to use the Private Crossing because occurrences demand immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences; for example use of the crossing for evacuation in the event of flood, earthquake or volcanic activity, flood prevention or flood response; and
 - (c) Subject to the terms of this Agreement, other emergency use(s) that may be deemed necessary by Licensee, including, but not limited to, Licensee allowing use of the Private Crossing (at Licensee's sole discretion and control) by other governmental agencies and by the employees, agents, contractors, subcontractors, and volunteers of Licensee and other such governmental agencies allowed (including, but not limited to, the United States Army Corps of Engineers, Washington National Guard, Skagit County Diking and Irrigation District No. 17, and Skagit County Diking and Drainage District No. 3) during a Flood emergency or other Disaster emergency. Such users shall be deemed agents of Licensee and bound by the terms of this Agreement for the entire duration of such emergency use, including but not limited to paragraphs 5-8 and 17-22.

5. Licensee shall contact and notify Licensor's Resource Operations Call Center (ROCC) at 1-800-832-5452 (Option 1) PRIOR to opening the gate and traversing the tracks, to determine the appropriate route of access based on the likelihood of trains using the siding track and, if the appropriate route of access is by way of the Private Crossing, to permit the Resource Operations Call Center to give Licensor's dispatcher and/or any nearby train crews notice that Licensee intends to traverse the tracks. Licensee shall identify the caller and agency (e.g., Skagit County Fire Protection District No. 3), notify Licensor's Resource Operations Call Center that the DOT crossing number is 084737D, and explain the type of emergency and the expected duration of use of the Private Crossing. Licensee may fulfill this obligation either directly or as part of 911 dispatch protocol. BNSF warrants that the ROCC will provide timely responses regarding train operations and/or blockage of the crossing when contacted by Licensee or its designees, so that Licensee can minimize emergency response delays. BNSF shall provide notice to Licensee in accordance with this Agreement in the event the Resource Operations Call Center number or crossing numbers change.
6. In the event that a flood / disaster-related emergency or a major fire or mass casualty incident requires the gate to remain open for an extended period of time, Licensee agrees to contact BNSF to request a flagger, (or Licensee shall provide a qualified flagger at Licensee's own cost and expense), who shall direct vehicular and pedestrian traffic though the Private Crossing for the entire duration of the Private Crossing's use.
7. Licensee shall refrain from using the Private Crossing in the event that:
 - (a) Licensee does not communicate with the Licensor's Resource Operations Call Center so as to comply with the requirements set forth in paragraph 5, above;
 - (b) said Private Crossing is wholly or partially blocked by a train on either track, or a train obstructs the view of either track in either direction and Licensee cannot obtain confirmation from the BNSF Resource Operations Call Center that no trains will enter or obstruct the crossing; or
 - (c) in the event of a flood / disaster-related emergency or a major fire or mass casualty incident where the gate must remain open for an extended period of time, Licensee is unable to procure or provide a qualified flagger to direct vehicular and pedestrian traffic.
8. This Agreement shall bind all parties, their heirs, successors and assignees, and the agents, employees, and lessees of the parties, heirs, successors and assignees.
9. In the event that any emergency arises out of Licensee's use of the Private Crossing, including but not limited to a vehicle stalled in the tracks, Licensee shall immediately call the Resource Operations Call Center at 1-800-832-5452 and supply the DOT number (084737D) to the same.

TERM

10. This Agreement shall commence upon the mutual execution by the parties (and shall take effect as of the Effective Date) and continue indefinitely, subject to the terms of Paragraphs 35 and 36.

COSTS

11. Licensor agrees to pay the following per WUTC Order:
 - (a) Actual cost of removal of existing warning devices at the Hickox Crossing; and
 - (b) Actual cost of modifying and maintaining the Private Crossing between and including the outermost railroad tracks to the outermost part of railroad ties; and
 - (c) Actual cost of designing and installing an EMERGENCY-USE automatic gate on both sides of the tracks at the Private Crossing; consistent with the Diagnostic Team recommendations; and
 - (d) Actual cost of the design, construction, and installation of a cul-de-sac turnaround at both sides of the Private Crossing (including, but not limited to, the cost of any necessary real property acquisition related thereto); and
 - (e) Actual cost for the upgrade of safety features at the Stackpole Road at-grade crossing as set forth in the WUTC Order; and
 - (f) Actual cost for improvements to alter intersection turning radii at Stackpole Road and Dike Road as set forth in the WUTC Order; and
 - (g) Actual cost to design, construct, and install any necessary safety measures proposed by the diagnostic team and adopted by the WUTC, as set forth in the WUTC Order.

12. Licensee agrees to pay the following:
 - (a) Licensee's entire expense resulting from the necessity to utilize the Private Crossing during a flood / disaster-related emergency or a major fire or mass casualty incident, including but not limited to the cost of flagger services provided by the Railway. The cost for one (1) flagger will be the current BNSF flagger wage actually paid by BNSF at the time of performance for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The cost for each flagger includes vacation allowance, paid holidays, Railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, transportation, meals, and lodging if incurred by BNSF for flagging work at the Private Crossing during a flood / disaster-response event. Nothing in this section shall be construed to limit Licensee's obligations as set forth elsewhere in this Agreement, including but not limited to Sections 17, 21 and 23.
 - (b) Licensee shall maintain, at its own expense, the automatic gates at the Private Crossing, and shall notify BNSF's Resource Operations Call Center as soon as reasonably possible prior to such maintenance or repair so that the Resource Operations Call Center can notify Licensor of work near the right-of-way.
 - (c) Licensee responsible for applicable portion(s) Hickox Road shall maintain, at its own expense, the roadway (to end of railroad ties) and related roadway drainage in a manner acceptable to Licensor, and safe for use by any vehicles or

equipment. Prior to such construction or maintenance, five (5) days advance notice must be given to Licensor's Roadmaster at 1200 D Street, Bellingham, WA 98225, telephone, (360) 922-1401. Licensee's maintenance responsibilities per this Section 12(b) do not include any of the duties, costs, or expenses to be borne by Licensor pursuant to Section 11, above.

13. Licensee is responsible for notifying Licensor in writing of any need for upgrading the vehicular traffic control devices, gate or signs at or near the Private Crossing.

COMPLIANCE WITH LAWS

14. The parties shall observe and comply with any and all laws, statutes, regulations, ordinances, orders, covenants, restrictions, or decisions of any court of competent jurisdiction ("Legal Requirements") relating to the construction, maintenance, and use of the Private Crossing.

DEFINITION OF COST AND EXPENSE

15. For the purpose of this Agreements, "cost" or "costs" or "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used.

RIGHT OF LICENSOR TO USE

16. Licensor excepts and reserves the right, to be exercised by Licensor and any other parties who may obtain written permission or authority from Licensor the following uses; provided however, that such uses do not unreasonably interfere with the use of the Private Crossing by Licensee for the purpose specified in Section 3 above:
 - (a) to maintain, renew, use, operate, change, modify and relocate any existing pipe, power, communication lines and appurtenances and other facilities or structures of like character upon, over, under or across the Private Crossing;
 - (b) to construct, maintain, renew, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Private Crossing; or
 - (c) to use the Private Crossing in any manner as the Licensor in its sole discretion deems appropriate.

LICENSEE'S OPERATIONS

17. Licensee shall not allow debris or any obstructions whatsoever to accumulate on or in the rail flange ways of said Private Crossing by virtue of vehicles, equipment, machinery or persons crossing thereover. If any such debris or obstruction lands on or accumulates at the Private Crossing, Licensee shall immediately give notice to both Licensor's Resource Operations Call Center at 1-800-832-5452 and Licensor's Roadmaster at 1200 D Street, Bellingham, WA 98225, telephone, (360) 922-1401 for removal or cleanup. Licensee shall notify Licensor's Resource Operations Call Center and Roadmaster that DOT crossing number is 084737D. Licensee shall notify the required

parties even if Licensee is unsure whether the same debris or obstruction presents a safety hazard to persons, vehicles or trains. If Licensor agrees that removal or cleanup is necessary, the entire expense resulting therefrom shall be borne by Licensee, including but not limited to the cost of flagger services provided by the Railway.

18. It is specifically understood that cables, pipelines, and other electric and/or fiber optic transmission lines may be on, about along, or under the Private Crossing and Licensee agrees that under no circumstances will Licensee dig in or disturb the surface of the Private Crossing without the express written consent of Licensor.
19. Licensee agrees to keep the Private Crossing gate closed and secured except when being opened to allow the access permitted in the Agreement upon said rail corridor.
20. To the extent reasonably possible (and excepting trespassers), Licensee shall not allow members of the public or other unauthorized persons to use the Private Crossing and Licensee shall not grant authority to any third party to use the Private Crossing, except as such use relates to emergency response or disaster related events and is conducted at Licensee's direction and supervision. Licensee agrees that for the purposes of this agreement all persons using the Private Crossing shall be deemed the agents or invitees of the Licensee (excepting trespassers).
21. Licensee shall, at its sole cost and expense, perform all activities on and about the Private Crossing in such a manner as not at any time to be a source of danger to or interference with the existence or use of present or future tracks, roadbed or property of Licensor, or the safe operation and activities of Licensor. If ordered to cease using the Private Crossing at any time by Licensor's personnel due to any hazardous condition, Licensee shall immediately do so. Notwithstanding the foregoing right of Licensor, the parties agree that Licensor has no duty or obligation to monitor Licensee's use of the Private Crossing to determine the safe nature thereof, it being solely Licensee's responsibility to monitor Licensee's use of the Private Crossing. Neither the exercise nor the failure by Licensor to exercise any rights granted in this Section will alter the liability allocation provided by this Agreement.
22. If at any time during the term of this Agreement, Licensor shall desire the use of its rail corridor in such a manner as would, in Licensor's reasonable opinion, be interfered with by the Private Crossing, Licensor shall provide Licensee with 60 days advance written notice of Licensor's intent to make a change to the Private Crossing. Licensor shall be allowed to make such changes in the Private Crossing as in the sole discretion of Licensor may be necessary to avoid interference with the proposed use of Licensor's rail corridor, including, without limitation, the relocation of the existing or the construction of a new Private Crossing; provided however, that (1) all reasonable costs relating to any changes requested by the Licensor under this paragraph including costs to relocate or construct a new Private Crossing shall be borne solely by the Licensor; (2) such changes or relocations shall be planned and constructed in such a manner as to minimize any interruptions in Licensee's ability to cross the rail corridor to the extent reasonably possible.

LIABILITY / INDEMNITY

23. Each party agrees to be responsible for and accept liability for claims and damages relating to or arising from its own wrongful or negligent acts or omissions, including those

by its elected officials, officers, agents, or employees, to the fullest extent allowed by law, and further agrees to save, indemnify, defend, and hold harmless the other parties to this Agreement from any liability for the first party's wrongful or negligent acts or omissions. It is further provided that no liability shall attach to either party by reason of entering into this Agreement except as expressly provided herein.

PERSONAL PROPERTY INDEMNIFICATION

24. Except as provided in paragraphs 12 and 19, all personal property, including, but not limited to, fixtures, equipment, or related materials in or upon the Private Crossing will be at the risk of the party owning the personal property and no other party will be liable for any damage thereto or theft thereof, unless due to the sole negligence of the other party.

INSURANCE

25. Each Licensee agrees to and shall, at its sole cost and expense, procure and maintain insurance coverage, or self retained insurance limits, not less than the coverage limits or amounts currently in place, throughout the term of this Agreement.

ENVIRONMENTAL

26. (a) Licensee shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Private Crossing, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA (collectively referred to as the "Environmental Laws"). Licensee shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws on the Private Crossing. Licensee shall not release oil or hazardous substances, as defined by Environmental Laws on or about the Private Crossing.
- (b) Licensee shall give Licensor immediate notice to Licensor's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Private Crossing, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Licensee's use of the Private Crossing. If a release of a hazardous substance on or from the Private Crossing is directly caused by Licensee, then Licensee shall use the best efforts to promptly respond to any release on or from the Private Crossing, and Licensee also shall give Licensor immediate notice of all measures undertaken on behalf of Licensee to investigate, remediate, respond to or otherwise cure such release or violation.

ASSIGNMENT

27. Neither Licensee, nor the heirs, legal representatives, successors or assigns of Licensee, nor any subsequent assignee, shall assign or transfer this Agreement or any interest herein, without the prior written consent and approval of Licensor, which may be withheld in Licensor's sole discretion; Provided, however, this restriction shall not apply to the merger, annexation, or consolidation of any Licensee with another municipal corporation.

NOTICES

28. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party not less than thirty (30) days' advance written notice of such change in address.

If to Licensor: Jones Lang LaSalle
3017 Lou Menk Drive, Suite 100
Fort Worth, TX 76131
Attn: Licenses/Permits

with a copy to: BNSF Railway Company
2500 Lou Menk Drive. – AOB3
Fort Worth, TX 76131
Attn: Senior Manager Real Estate

[[with a copy to: FILL IN ADDITIONAL ADDRESS OF REGIONAL JONES LANG LASALLE OFFICE IF DOCUMENT IS ORIGINATING FROM THAT OFFICE**]]**

If to Licensee: Notice to Licensee MUST be simultaneously provided to ALL THREE (3) ADDRESSES BELOW:

City of Mount Vernon

City of Mount Vernon Fire Department
Attn: Fire Chief
PO BOX 809
910 Cleveland Avenue
Mount Vernon, WA 98273

With a copy to: City of Mount Vernon City Attorney's Office
Attn: City Attorney
PO Box 809
910 Cleveland Avenue
Mount Vernon, WA 98273

Skagit County Fire Protection District No.3

Attn: Chief
P.O. Box 753
Conway, WA 98238

Skagit County

Public Works Department
Attn: County Engineer
1800 Continental Place
Mount Vernon, WA 98273

SURVIVAL

29. Neither termination nor expiration will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration or, if later, the date when the Private Crossing is restored to its condition as of the Effective Date.

RECORDATION

30. This Agreement is a matter of public record and is subject to public disclosure pursuant applicable laws (including, but not limited to RCW 42.56), and may be recorded by any party to this Agreement.

APPLICABLE LAW AND VENUE

31. All questions concerning the interpretation or application of provisions of this Agreement shall be decided according to the substantive laws of the State of Washington without regard to conflicts of law provisions. In the event that any litigation should arise concerning the construction or interpretation of any of the terms of this Agreement, the venue of such action of litigation shall be in the Superior Court of the State of Washington in and for the County of Snohomish.

SEVERABILITY

32. To the maximum extent possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this Agreement.

NO THIRD PARTY BENEFICIARIES

33. This Agreement is not intended to nor does it create any third party beneficiary or other rights in any third person or party, including, but not limited to, any agent, contractor, subcontractor, consultant, employee, volunteer, or other representative of either party, members of the general public, and/or property owner(s) and/or residents in the vicinity of the Private Crossing.

TREATMENT OF ASSETS AND PROPERTY

34. No fixed assets or personal or real property will be jointly or cooperatively, acquired, held, used, or disposed of pursuant to this Agreement, except for the Private Crossing's electronic gates and cul-de-sacs, which will be paid for by Licensor but used and maintained by Licensee.

TERMINATION

35. In the event that Licensor alleges that Licensee has defaulted or breached this Agreement and such breach of default is material to this agreement, or there no longer

exist roadway approaches to the Private Crossing, then Licensor may elect to seek termination of this Agreement. Termination will not occur unless there exists a finding that the Licensee is in material breach of this agreement and a judicial order adopting such finding in Snohomish County Superior Court is entered terminating the License.

- 36. If this Agreement is terminated in accordance with Paragraph 35 (above), the parties shall be liable only for performance rendered or costs incurred in accordance with the terms of this Agreement prior to the effective date of termination. Termination shall not release Licensee from any liability or obligation, whether of indemnity or otherwise, resulting from any events happening prior to the date of termination.

MISCELLANEOUS

- 37. The waiver by one party to this agreement of the breach of any provision herein by another party shall in no way impair the rights to enforce that provision for any subsequent breach thereof.
- 38. The Agreement may be changed, modified, amended or waived only by subsequent written agreement duly executed by the parties hereto.

IN WITNESS WHEREOF, this License has been duly executed, in duplicate, by the parties hereto as of the day and year first above written.

BNSF RAILWAY COMPANY

Jones Lang LaSalle
its Attorney in Fact
3017 Lou Menk Drive, Suite 100
Fort Worth, TX 76131

By: _____

Title: _____

CITY OF MOUNT VERNON, WA

By: _____

Title: _____

Approved as to form:

City Attorney

SKAGIT COUNTY

Dated this _____ day of _____, 2009

BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON

KENNETH A. DAHLSTEDT, Chairman

SHARON D. DILLON, Commissioner

RON WESEN, Commissioner

Recommended:

By: _____
Department Head

By: _____
Budget & Finance Director

Approved as to Indemnification:

By: _____
Risk Manager

Approved as to Form:

By: _____
Deputy Prosecuting Attorney

Attest:

Clerk of the Board

SKAGIT COUNTY FIRE PROTECTION DISTRICT NO. 3

By: _____

Title: _____

Approved as to form:

Attorney for Skagit County Fire Protection District No.3