

EXPIRES  
Nov 30, 2015

## FIRST RENEWAL TRACK LEASE AND OPERATING AGREEMENT

### PARTIES

THIS FIRST RENEWAL TRACK LEASE AND OPERATING AGREEMENT ("First Renewal Agreement"), dated as of December 1, 2010, by and among the State of Oklahoma, acting through its administrative agency, Oklahoma Department of Transportation (collectively the "STATE"), Blackwell Industrial Authority ("BIA") and Blackwell Northern Gateway Railroad Company ("RAILROAD").

### RECITALS

A. STATE purchased certain properties and lines of railroad, hereinafter described, in the State of Oklahoma (hereinafter "Oklahoma Properties"), from the Central Kansas Railway, L.L.C. ("CKR") and, in the initial Track Lease and Operating Agreement dated November 30, 2005 ("Initial Track Lease"), leased said properties and lines to RAILROAD for RAILROAD's occupation, use, management, operation, maintenance and rehabilitation under terms and conditions satisfactory to STATE and RAILROAD as defined therein.

B. BIA purchased certain properties and lines of railroad, hereinafter described, in the State of Kansas and in the Town of Blackwell, Oklahoma (hereinafter "BIA Properties"), which are a continuation of STATE's trackage and together form the line from Wellington, Kansas, to Blackwell, Oklahoma. BIA, in the Initial Track Lease, leased said BIA Properties to RAILROAD for RAILROAD's occupation, use, management, operation, maintenance and rehabilitation under terms and conditions satisfactory to BIA and RAILROAD as defined therein.

C. RAILROAD continues to desire to occupy, use, manage, maintain and rehabilitate said properties and line and to operate rail freight service thereon, in accordance with the terms and conditions of this First Renewal Agreement.

D. RAILROAD, STATE and BIA desire that this First Renewal Agreement supersede and replace in its entirety the Initial Track Lease.

E. In consideration of the foregoing and other good and valuable consideration, intending to be legally bound, the parties hereto enter into this First Renewal Agreement setting forth terms and conditions for RAILROAD's continued occupation, use, management, operation, maintenance and rehabilitation of the aforesaid Oklahoma and BIA Properties.

## **SECTION 1: LEASED PROPERTIES**

*Section 1.01* On the Commencement Date as defined in Section 2.01 herein, STATE and BIA agree to let and demise to RAILROAD the following Oklahoma and BIA Properties ("Leased Properties") as described below:

### **DESCRIPTION OF LEASED PROPERTIES**

That portion of the former Atchison, Topeka and Santa Fe Railway, "Blackwell Subdivision" acquired by STATE and BIA as described more particularly in Sections 1.02 and 1.03 below. The Leased Properties are also described as the lines of railroad beginning at Milepost 0.09 at Wellington, Sumner County, Kansas, and extending southerly to the end of track at approximately Milepost 35.35 at Blackwell, Kay County, Oklahoma, and from approximately Milepost 127.0 to approximately Milepost 125.0 in Blackwell, a total distance of approximately 37.26 miles, consisting of all track structures and necessary right-of-way and all appurtenances thereof and including, but not necessarily limited to rail and fastenings, switches and frogs, ties, ballast, roadbed, embankment, other structures or things necessary for support of the track and entering into construction and operation thereof, hereinafter called "TRACK". STATE, BIA and RAILROAD acknowledge and agree that the mileposts set forth above are intended to represent a correction of the mileposts set forth in the Initial Track Lease and are not intended to represent a change in the scope of the Leased Properties. RAILROAD acknowledges that STATE and BIA only own and have the authority to lease to RAILROAD the Leased Properties described in Sections 1.02 and 1.03 below.

*Section 1.02* The Leased Properties shall include all properties and lines of railroad between the above mileposts acquired by STATE pursuant to a Contract for Sale of Railroad Lines between STATE and CKR dated June 21, 1997 ("CKR Sale Contract - STATE") the endpoints of which are depicted on the valuation maps attached hereto as Exhibit "A". More

particularly, the Leased Properties shall include all properties and lines of railroad defined in the subject CKR Sale Contract - STATE as the "Properties" and shall not include any properties and lines of railroad excluded from the Properties acquired by STATE under said CKR Sale Contract - STATE. P

*Section 1.03* The Leased Properties shall also include all properties and lines of railroad between the above mileposts acquired by BIA pursuant to an Agreement for Acquisition of Railroad between Blackwell and STATE dated July 23, 1997 ("CKR Sale Contract - BIA"), the endpoints of which are depicted on the valuation maps attached hereto as Exhibit "B". More particularly, the Leased Properties shall include all properties and lines of railroad defined in the subject CKR Sale Contract - BIA as the "Properties" and shall not include any properties and lines of railroad excluded from the properties acquired by BIA under said CKR Sale Contract - BIA.

## **SECTION 2: LEASE TERM; TERMINATION OF INITIAL TRACK LEASE**

*Section 2.01* This First Renewal Agreement shall become effective as of December 1, 2010 (the "Commencement Date" herein), after it has been signed by all parties hereto. Unless this First Renewal Agreement is terminated earlier in accordance with Section 13 hereof, RAILROAD shall have and hold the Leased Properties unto itself, its successors and assigns for a term beginning on the Commencement Date and extending through November 30, 2015 ("Initial Term").

*Section 2.02* Should RAILROAD desire to continue to lease the Leased Properties for terms subsequent to the Initial Term of this First Renewal Agreement, it shall so notify STATE and BIA not less than nine (9) months prior to the end of such Initial Term and each succeeding Term

(collectively, the "Term"). During the three (3) month period immediately following receipt of such notice, STATE shall negotiate exclusively with RAILROAD to establish contractual arrangements for each subsequent Term. If STATE, BIA and RAILROAD are unable to reach and enter into a new agreement during said three (3) month period, STATE and BIA may, at their sole option, seek agreement with others, including RAILROAD, for lease or sale of the Leased Properties. If STATE, BIA, and RAILROAD do not enter into any new agreement or any extensions of this First Renewal Agreement by the end of the Initial Term or any subsequent Term, RAILROAD shall vacate the Leased Properties in accordance with Section 13.03 hereof.

*Section 2.03* STATE and BIA shall not sell all or any portion of the Leased Properties except as provided herein:

- (a) STATE agrees that it will not sell all or any portion of the Leased Properties owned by STATE without first offering to sell such properties to BIA. If within ninety (90) days after the date STATE offers in writing to sell such properties to BIA, STATE and BIA are unable to reach agreement on the terms of such sale, STATE shall offer to sell such properties to RAILROAD on terms determined in accordance with Section 2.03(c).
- (b) BIA agrees that it will not sell all or any portion of the Leased Properties owned by BIA without first offering to sell such properties to STATE or its designee. If within ninety (90) days after the date BIA offers in writing to sell such properties to STATE, BIA and STATE are unable to reach agreement on the

terms of such sale, BIA shall offer to sell such properties to RAILROAD on terms determined in accordance with Section 2.03(c).

- (c) RAILROAD's purchase of all or any portion of the Leased Properties under this Section 2.03 shall be on terms reasonable and customary in the railroad industry for the sale of an unabandoned line of railroad, including closing on the purchase within the later of ninety (90) days after agreement on the purchase price, thirty (30) days after receipt of the appraised price, or fifteen (15) days after receipt of authority or an exemption from the STB for RAILROAD to purchase the Leased Properties. The purchase price shall be as agreed by RAILROAD and STATE or BIA as the case may be, or in the absence of agreement, at a price equal to the greater of (a) going concern value, or (b) net liquidation value, of the Leased Properties at that time, as established by an independent appraiser having experience in valuing railroad properties. The going concern value and net liquidation value of the Leased Properties shall be determined in accordance with valuation standards set out in decisions of the United States Surface Transportation Board ("STB"). The independent appraiser shall be a person agreed upon by RAILROAD and STATE or BIA as the case may be, or, in the absence of agreement, a person recommended by the General Counsel of the Association of

American Railroads, Washington, D.C. The appraiser shall be required to provide his/her determination of the purchase price within thirty (30) days. The cost of the appraisal shall be born one-half by RAILROAD and one-half by STATE and BIA as the case may be. It is understood by the parties hereto that any agreement made for the purchase of the Leased Properties will include a provision that requires that RAILROAD provide to STATE and/or BIA the option of first refusal to repurchase the Leased Properties at the best price offered by any prospective buyer thereafter. If RAILROAD proposes to salvage or abandon the Leased Properties, then STATE and/or BIA shall have the right to repurchase the Leased Properties at the then net liquidation value.

*Section 2.04* On the Commencement Date of this First Renewal Agreement, the Initial Track Lease shall terminate, provided however, that such termination shall not relieve or release any party hereto from any obligation incurred prior to the termination thereof.

### **SECTION 3: LEASE RENTAL**

*Section 3.01* Beginning on the Commencement Date, RAILROAD agrees to pay rent to STATE and BIA, for the use of the Leased Properties at the rate of twelve percent (12%) of revenues generated from rail operations on the Leased Properties or derived directly from other uses of the Leased Properties not requiring a related investment by RAILROAD (6% to STATE, 6% to BIA). "Revenues" for this purpose shall include, without limitation, customer switching charges, demurrage (net of car-hire

expenses), property lease income, car storage income, and charges for late payment by customers. Rent shall be adjusted annually in accordance with generally accepted accounting principles and confirmed in RAILROAD's annual report. Rent shall be considered delinquent if not paid within thirty (30) days of the date payment is due. If RAILROAD fails to pay any installment of rent and such payment delinquency continues for ten (10) days, interest at twelve percent (12%) simple interest shall be added to any such overdue installment to the date of payment.

*Section 3.02* Unless another date is agreed to in writing by STATE, BIA, and RAILROAD, rent shall be due to STATE and BIA sixty (60) days after the annual anniversary date of the Commencement Date.

#### **SECTION 4: RAIL SERVICE**

*Section 4.01* Beginning on the Commencement Date and throughout the Term of this First Renewal Agreement, RAILROAD agrees to operate rail freight service on the Leased Properties as necessary to accommodate the reasonable needs of its customers consistent with prudent business practices in the railroad industry. RAILROAD shall operate all rail freight service with its own employees and with its own or leased locomotives and other equipment, unless otherwise agreed to in writing by STATE and BIA.

*Section 4.02* It is the intent of the parties hereto that RAILROAD shall exercise its best efforts to provide competitive interline rail service on the Leased Properties. In that regard, RAILROAD agrees to establish appropriate tariff and service arrangements applicable to all customers and commodities via any and all connecting carriers.

## **SECTION 5: RIGHTS OF RAILROAD**

- Section 5.01* RAILROAD hereby acquires the right to provide and operate rail freight service on the Leased Properties.
- Section 5.02* RAILROAD hereby acquires the right to manage the Leased Properties and agrees to do so in a prudent, fair, equitable and businesslike manner, considering the interests of the parties hereto and the public interest, and all revenues and expenses therefrom shall accrue to RAILROAD.
- Section 5.03* RAILROAD hereby acquires the right to promote the use of the Leased Properties for lawful non-railroad purposes, consistent with STATE and BIA's right, title and interest and the public interest in the Leased Properties, subject to STATE and BIA approval of any such use which requires material construction or modification.
- Section 5.04* In conjunction with its transportation activities, RAILROAD hereby acquires the right, subject to STATE and BIA's concurrence, to remove, replace or relay elements of the track or track structure in the interest of cost and/or operating efficiency, provided that a continuous and useful transportation facility is maintained. Proceeds from any salvaged materials shall be paid to STATE and BIA if not used by RAILROAD for purchase of materials in support of maintenance or rehabilitation of the Leased Properties. Improvements made by RAILROAD to the right-of-way, track and related structures as part of any rehabilitation project or through normal maintenance, whether treated as capital expenditures or operating expenses under Internal Revenue Service accounting rules, and whether paid for with proceeds of salvaged materials, with STATE or BIA funds or with RAILROAD funds, shall become property of STATE and BIA.



**SECTION 6: MAINTENANCE**

*Section 6.01* RAILROAD shall, during the term of this First Renewal Agreement and at its sole cost and expense, maintain, whether treated as capital expenditures or operating expenses under Internal Revenue Service accounting rules, the Oklahoma and BIA Properties in at least the condition in which it finds them upon the Commencement Date hereof.

*Section 6.02* Any segment of the Leased Properties which on the Commencement Date hereof exceeds the Class I track safety standards of the Federal Railroad Administration ("FRA") shall be maintained by RAILROAD, during the Initial Term and any succeeding Term of this First Renewal Agreement and at RAILROAD's sole cost and expense, in at least the condition in which RAILROAD finds said segment upon the Commencement Date hereof.

*Section 6.03* RAILROAD shall, during the term of this First Renewal Agreement and at its sole cost and expense, maintain the Oklahoma and BIA Properties to not less than FRA Class I track standards, except for any segment which upon the Commencement Date of this First Renewal Agreement, does not meet FRA Class I track standards. Such "Excepted Track" segments shall be upgraded to meet at least FRA Class 1 track standards by RAILROAD, during the term of this Agreement, consistent with availability of funds and on a schedule agreeable to the STATE, BIA and the RAILROAD.

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*Section 6.04* RAILROAD shall, throughout the Initial Term of this First Renewal Agreement and within ninety (90) days after the Commencement Date and each successive annual anniversary thereof, prepare and submit for STATE's approval, a detailed maintenance program covering RAILROAD's maintenance activities for that year. Said maintenance

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program shall include, but shall not be limited to, a crosstie replacement schedule, a surfacing and alignment schedule, highway grade crossing improvements, grade crossing surfaces and signal warning devices, bridges, culverts and other structures (including the removal of debris from all bridges, piers, pilings and abutments); right-of-way clearing and vegetation control, and sub-roadbed. Upon execution of this First Renewal Agreement, the responsibility for compliance with the FRA Bridge Safety Standards set forth at 49 C.F.R. Part 237 shall be assigned to RAILROAD requiring the adoption of a Bridge Maintenance Program by RAILROAD in accordance with applicable FRA rules and regulations. RAILROAD agrees that bridge safety, grade crossing surfaces and grade crossing warning devices will be given a high priority in RAILROAD's maintenance program.

*Section 6.05* If STATE and RAILROAD disagree concerning any part of RAILROAD's determination of the appropriate level of maintenance, it is agreed by and between the parties that an inspection by a qualified representative of the FRA shall be arranged and such representative shall inspect those segments or portions of track in dispute and his findings in this regard shall be binding upon the parties.

*Section 6.06* The parties shall at least once annually, jointly inspect the Leased Properties to determine whether they have been maintained in accordance with this First Renewal Agreement.

*Section 6.07* Nothing herein shall preclude RAILROAD, at its sole cost and expense from maintaining the Leased Properties to a standard higher than the minimum herein stipulated.

**SECTION 7: INDUSTRIAL SPUR CONSTRUCTION AND MAINTENANCE**

*Section 7.01* Subject to the provisions of Section 7.02 hereof, the costs of materials and construction of new industrial spurs shall be borne by the industry or industries involve. That portion of any such spur which is located upon the Leased Properties shall become the property of the STATE and BIA. Plans and specifications for any new industrial spur shall be approved by STATE and BIA prior to the beginning of construction.

*Section 7.02* At RAILROAD's option, an industry may recover material and construction costs for that portion of a spur located upon the Leased Properties pursuant to an agreement with RAILROAD providing for such cost recovery based upon a rebate of a reasonable percentage of rail freight charges over a period not to exceed five (5) years. STATE and BIA shall deduct from RAILROAD's Revenues that are subject to rent under Section 3.01, any amounts so refunded.

**SECTION 8: CONTROL OF RAIL FREIGHT OPERATIONS**

*Section 8.01* RAILROAD shall have management and control of the operations and maintenance of the Leased Properties and shall control the admission and exit of engines and trains and the movement of the same thereover. Cars, trains and employees, while on the Leased Properties, shall be subject to the rules, timetables, regulations and orders of RAILROAD then in effect. All operating personnel of RAILROAD, prior to operating any locomotive or other track mounted equipment, shall be qualified in accordance with applicable FRA rules and regulations.

*Section 8.02* All rules, timetables, regulations and orders governing operations on and along the Leased Properties shall be promulgated by RAILROAD from time to time, and shall be fair, reasonable, uniform and in compliance with

all Federal and State law, rules and regulations. If requested by STATE or BIA, a copy of all such rules, timetables, regulations and orders shall be provided by RAILROAD to STATE and BIA. Rates, tariff and other commercial arrangements shall be subject only to such Federal and State regulations as may exist covering railroads generally, there being no intent by this First Renewal Agreement to create any unique regulations.

*Section 8.03* RAILROAD may, with the consent of STATE and BIA, allow use of the Leased Properties by other railroads for rail freight operations and may enter into agreements with other railroads for such use. Payments from such other railroads for such use shall accrue to RAILROAD, and shall be included in the calculation of RAILROAD's Revenues under Section 3.01 hereof.

## **SECTION 9: INSURANCE AND INDEMNIFICATION**

*Section 9.01* RAILROAD shall secure and maintain in effect at all times during the term of this First Renewal Agreement a public liability insurance policy or policies which shall provide coverage of not less than \$5,000,000.00 for injury or death of one or more persons in any one (1) accident (or occurrence) arising out of RAILROAD's use and occupation of the Leased Properties. Such policy or policies may contain deductible provisions not greater than \$50,000.00 for any single accident (or occurrence). Such policy or policies shall be issued by a reputable insurance company authorized to do business in the State of Oklahoma or authorized to issue policies effective in the State of Oklahoma or shall be issued through Lloyd's of London. STATE and BIA shall each be named as an additional insured under all such policies. Certificates of insurance shall be delivered to STATE and BIA as proof of compliance with this Section. The certificates shall provide that they shall not be terminated, cancelled or materially modified without ten (10) days written notice to STATE and BIA.

*Section 9.02* RAILROAD agrees, and shall require all persons entering upon or performing work on the Leased Properties under any agreement with RAILROAD ("Contractors") to agree to hold harmless and indemnify STATE and BIA, their officers, agents, servants and employees from and against any liability, loss, claim or expense for bodily injury or death to any persons or damage to any property (including property of or under the control of RAILROAD, STATE or BIA) arising out of any act or omission of such Contractor on or in connection with the Leased Properties irrespective of the fault, failure or negligence (other than sole negligence) of STATE or BIA. RAILROAD shall also require any such person to secure and maintain in effect at all times during the performance of such work on the Leased Properties a contractual liability insurance policy insuring such person against liability under this Section 9.02. RAILROAD shall provide to STATE or BIA a copy of such policies or certificates of such insurance upon request.

*Section 9.03* RAILROAD shall hold harmless and indemnify STATE and BIA, their officers, agents, servants and employees, against any liability, loss, claim or expense for damage to property (including property of or under the control of RAILROAD, STATE or BIA) or for personal injury to or death of any person where such property damage, personal injury or death shall arise out of any act or omission of RAILROAD in its performance of its rights, responsibilities and duties under this First Renewal Agreement and irrespective of the fault, failure or negligence (other than sole negligence) of STATE or BIA in the performance of its rights, responsibilities and duties under this Agreement. This Section 9.03 is intended solely to define the rights and duties of the parties as between themselves for the occurrences described in this Section, and RAILROAD shall not by any reason of this Section, become liable to any other party. RAILROAD shall secure and maintain in effect at all times during the Term of this First Renewal Agreement a contractual liability insurance policy insuring

RAILROAD against any liability under this Section 9.03, and shall provide to STATE and BIA, as soon as practicable after the Commencement Date, a copy of such insurance policy or a certificate of such insurance.

*Section 9.04* RAILROAD shall indemnify defend, save, and hold harmless the STATE and BIA, their officers, agents, servants and employees, against any claim or action in law or in equity for any loss, expenses, or damages to property (including but not limited to property of or under control of RAILROAD, STATE or BIA) or for personal injury to or death of any person resulting from any release of any hazardous substance or waste where such release shall arise out of any act or omission of RAILROAD, its employees, Contractors, sub-lessees, permittees, licensees or invitees, in its performance of its rights, responsibilities and duties under this First Renewal Agreement. In the event any hazardous substance or waste release occurs during RAILROAD's occupation of the Leased Properties, RAILROAD shall be solely responsible for all contamination cleanup and disposal costs that may be incurred as a result of said release. RAILROAD shall secure, and maintain in effect at all times during the term of this First Renewal Agreement, public liability insurance policies which shall provide coverage of not less than \$5,000,000.00 for injury to or death of one or more persons in any hazardous substance or waste release, and for property damage, including but not limited to the costs of testing for monitoring, removal, containment, treatment, detoxification or neutralization of contaminated materials. STATE and BIA shall be named as an additional insured under all such policies. Certificates of insurance shall be delivered to STATE and BIA as proof of compliance with the terms of this provision within thirty (30) days after the effective date of this First Renewal Agreement. The certificates shall provide that the policies of insurance shall not be terminated, cancelled or otherwise materially modified without a minimum of ten (10) days written notice to

the STATE and BIA.

*Section 9.05* It is mutually recognized by the parties hereto that pursuant to a settlement of the action in United States District Court for the Western District of Oklahoma brought by the State of Oklahoma on behalf of Miles Tolbert, Secretary of the Environment as Trustee of National Resources and the Oklahoma Department of Environmental Quality against Phelps Dodge Corporation, Cyprus Amax Minerals Company, Blackwell Zinc Company, Inc., City of Blackwell, Blackwell Industrial Authority, BNSF Railway Company and the Oklahoma Department of Transportation, [a portion of the Leased Properties may be subject to environmental remediation during the Term of this First Renewal Agreement.] The principal responsible parties in such action were Phelps Dodge Corporation as successor in interest to Cypress Amax Minerals Company and Blackwell Zinc Company, Inc., and BNSF Railway Company. The STATE, BIA and the City of Blackwell were named solely due to subsequently acquired property interests and are not participating in the cost of remediation. The Railroad shall have no participation in the expense or resolution of such action except as entry on the Leased Properties may be required for monitoring of contaminants and for the active pursuit of remediation efforts. It is anticipated that interference with railroad operations will be minimal but any necessary activities by governmental agencies, principal responsible parties or designated Contractors done in conjunction with site remediation shall be permitted upon reasonable notice and shall be allowed to proceed without hindrance. Such entry upon the Leased Premises shall be without cost to the party requiring access, the STATE, BIA, or the City of Blackwell. RAILROAD shall have no responsibility direct, or indirect, for any damages which occurred, or any remediation which may be required, for environmental damage which occurred prior to the Commencement Date of the Initial Track Lease.

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## **SECTION 10: EASEMENTS LEASES AND LICENSES**

*Section 10.01* Continuing upon the Commencement Date hereof, all easements, leases, licenses or other agreements affecting the use of the Leased Properties, except as reserved by CKR in the CKR Sale Contract shall continue to be marketed and administered by RAILROAD; provided, no final license or easement shall be delivered by RAILROAD until said license or easement has been approved and executed by STATE and BIA. RAILROAD shall base rental charges for leases covering the use of portions of the Leased Properties by third parties on approximate local fair market values and shall assess them in a consistent, nondiscriminatory manner. RAILROAD's standard form of lease, including the methodology to be used for determining lease rentals and calculating periodic lease rental adjustments, shall be approved by STATE prior to use and shall be utilized by RAILROAD for all leases, including renewals of those leases in existence on the Commencement Date. All income derived therefrom shall accrue to RAILROAD and is subject to the provisions of Section 3 of this First Renewal Agreement.

*Section 10.02* The provisions of Section 10.01 notwithstanding, STATE reserves the exclusive right to grant easements for public road crossings. RAILROAD shall not be required to share in the costs and expenses of providing the physical public road crossing surface or any associated warning devices on any such easement granted by STATE unless agreed to, in advance and in writing, by RAILROAD and STATE.

## **SECTION 11: MEDIATION AND CONCILIATION**

*Section 11.01* Any dispute or difference of opinion arising between any of the parties hereto, or the failure of the parties hereto to agree as to matters arising out of this First Renewal Agreement shall, at the request of any party, be



handled under procedures of mediation and conciliation under the auspices of a mediator selected by agreement of the parties. If the parties involved in the dispute are unable to agree upon the person to be appointed as mediator within thirty (30) days of the request for mediation, said parties shall request the appointment of a mediator by the Chairman of the STB or, if the Chairman is unwilling, by the FRA Administrator. Each party involved shall bear its own legal fees, costs and expenses, including without limitation, the cost of its expert witnesses. The fees and expenses of any mediator incurred in performing the duties hereunder shall be shared equally by the parties involved.

## **SECTION 12: EVENTS OF DEFAULT**

*Section 12.01* The following shall be Events of Default:

- (a) Failure by RAILROAD to make payments of rent when due, and such failure continues for thirty (30) days following written demand therefor.
- (b) Filing of a petition for bankruptcy, reorganization or arrangement of RAILROAD pursuant to the Bankruptcy Reform Act or any similar proceeding, and such petition is not dismissed within thirty (30) days.
- (c) Any party breaches any provision of this First Renewal Agreement and fails to act to cure such breach within ninety (90) days after written notice of such breach from another party. ✍
- (d) Upon the expiration of ninety (90) days' written notice that a party has been prevented from fulfilling its obligations under this First Renewal Agreement as a result of legislative, judicial or other governmental action.

## **SECTION 13: TERMINATION**

*Section 13.01* This First Renewal Agreement may be terminated by either party as follows:

- (a) Upon any occurrence of Default as provided for in Section 12 hereof.
- (b) At any time from the Commencement Date upon one hundred eighty (180) days written notice to the other party.
- (c) At any time by written mutual agreement of the parties hereto.

*Section 13.02* In the event of termination as provided in Section 13.01, future rent shall be abated as of the date this First Renewal Agreement is terminated and RAILROAD vacates the Leased Properties, and no equity in title shall be deemed to have been accumulated by RAILROAD. Rent for the lease year through termination shall be paid within thirty (30) days after RAILROAD vacates the Leased Premises. RAILROAD shall not be entitled to recover any rent paid prior to, and through, such termination; provided however, that RAILROAD shall be entitled to recover any overpayment of rent during the previous lease year which is supported by a final accounting report.

*Section 13.03* Subject to the requirements of law, in the event of any termination of this First Renewal Agreement, RAILROAD shall vacate the Leased Properties in an orderly manner. STATE shall require any new operator of the Leased Properties to file for authority or an exemption from the STB for a change in operators pursuant to 49 CFR 1150.31(a)(3) or 49 CFR 1150.41(c) as appropriate. If there will be no new operator, STATE shall so notify RAILROAD in writing, and RAILROAD shall promptly apply to the STB, or any successor agency, for authority or an exemption to discontinue operations, and if it fails to do so, hereby grants a power of attorney to STATE or BIA to do so in RAILROAD's name at RAILROAD's expense. Upon any termination resulting from an Event of

Default by RAILROAD, STATE, or BIA, at any time thereafter may re-enter and take possession of the Leased Properties by affording written notice to RAILROAD specifying such Event of Default and that this First Renewal Agreement has terminated. RAILROAD hereby expressly waives, so far as permitted by law, the service of any notice of intention to enter or reenter provided for in any statute, or of the institution of legal proceedings to that end, and RAILROAD hereby waives any and all rights of redemption, re-entry or repossession there may be under law which arises out of this First Renewal Agreement and the enforcement of the provisions hereof by STATE or BIA. The terms "enter", "re-enter", "entry", "re-entry" as used in this First Renewal Agreement are not restricted to their technical legal meanings.

#### **SECTION 14: AUDITS**

*Section 14.01* RAILROAD understands and agrees that its financial and other records pertaining to RAILROAD's use, management and occupation of the Leased Properties are subject to State and/or Federal audit and that such records are to be prepared in accordance with generally accepted accounting principles and maintained in auditable condition for a period of not less than three (3) years after preparation of the records. RAILROAD warrants and agrees to make all such records available to STATE or BIA, at the offices of RAILROAD within fifteen (15) days after RAILROAD's receipt of request to audit such records.

#### **SECTION 15: TAXES**

*Section 15.01* Railroad properties owned by STATE are exempt from ad valorem taxation of real property under the Oklahoma Constitution. In the event the Oklahoma Constitution is amended or lawfully construed to permit real property ad valorem taxes to be assessed by any taxing jurisdiction

authorized to assess and/or collect ad valorem taxes against the Oklahoma Properties, including right-of-way and other lands and improvements thereto, RAILROAD shall bear the burden of such taxes.

*Section 15.02* Nothing herein shall be construed to relieve RAILROAD from any liability to pay taxes assessed against its motive power, rolling stock or other equipment, or, any other personal property owned by RAILROAD.

*Section 15.03* RAILROAD shall bear the burden of all appropriate taxes which are assessed against the BIA Properties.

#### **SECTION 16: COMPLIANCE WITH LAW**

*Section 16.01* RAILROAD agrees to comply with all provisions of law, and RAILROAD will not knowingly do, or permit to be done, upon or about the Leased Properties, anything forbidden by law or ordinances. RAILROAD further agrees to secure all necessary governmental authority for its operation of the Leased Properties.

#### **SECTION 17: FORCE MAJEURE**

*Section 17.01* RAILROAD shall have no obligation to operate over any portion of the Leased Properties during any period when it is prevented or hindered from operating by acts of God, public authority, strikes, riot, labor disputes, or any other cause beyond its control.

#### **SECTION 18: DEFEASANCE**

*Section 18.01* RAILROAD shall not make any use of the Leased Properties inconsistent with STATE's and BIA's right, title and interest therein and which may cause the right to use and occupy the Leased Properties to revert to any

party other than the STATE or BIA. So long as the Leased Properties are sufficient to permit RAILROAD to operate a continuous line of railroad between the termini described in Section 1, this First Renewal Agreement shall not be affected by any determination, whether by judicial order, decree or otherwise, that ownership of any portion of the Leased Properties is vested in a person other than STATE or BIA, and there shall be no abatement of rent on account of such determination.

**SECTION 19: REPRESENTATIONS AND WARRANTIES**

*Section 19.01* STATE represents and warrants that:

- (a) It has full statutory power and authority to enter into this First Renewal Agreement and to carry out the obligations of STATE hereunder.
- (b) Its execution of and performance under this First Renewal Agreement do not knowingly violate any statute, rule, regulation, order, writ, injunction or decree of any court, administrative agency or governing body.

*Section 19.02* BIA represents and warrants that:

- (a) It has full statutory power and authority to enter into this First Renewal Agreement and to carry out the obligations of BIA hereunder.
- (b) Its execution of and performance under this First Renewal Agreement do not knowingly violate any statute, rule, regulation, order, writ, injunction or decree of any court, administrative

agency or governing body.

*Section 19.03* RAILROAD represents and warrants that:

- (a) It is a corporation duly organized, validly existing, and in good standing under the laws of the State of Oklahoma and is lawfully authorized to do business in the State of Oklahoma.
- (b) It has full power and authority to enter into this First Renewal Agreement and to carry out the obligations hereunder.

## **SECTION 20: MISCELLANEOUS PROVISIONS**

*Section 20.01* Entire Agreement. Except for any agreement between BIA and RAILROAD of the same date as this First Renewal Agreement, this First Renewal Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, and no modification of this First Renewal Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

*Section 20.02* Notices. All notices, demands, requests, or other communications which may be or are required to be given, served or sent by any party to another party pursuant to this First Renewal Agreement shall be in writing and shall be deemed to have been properly given or sent:

- (a) If intended for STATE, by mailing registered or certified mail, return receipt requested, with postage prepaid, addressed to STATE at:

State of Oklahoma  
Department of Transportation  
200 Northeast 21st Street  
Oklahoma City, Oklahoma 73105  
Attn: Director

- (b) If intended for BIA, by mailing registered or certified mail, return receipt requested, with postage prepaid, addressed to BIA at:

Blackwell Industrial Authority  
P. O. Box 150  
120 S. Main Street  
Blackwell, Oklahoma 73631  
Attn: Darrel Grossardt, Chairman

- (c) If intended for RAILROAD, by mailing registered or certified return receipt requested, with postage prepaid, addressed to RAILROAD at:

Blackwell Northern Gateway Railroad  
Company  
620 Kruk Street  
Lemont, Illinois 60439  
Attn: Treasurer

Each notice, demand, request or communication which shall be mailed by registered or certified mail to any party hereto in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication shall be either received by the addressee or refused by the addressee upon presentation.

*Section 20.03* Binding Effect. This First Renewal Agreement shall be binding upon and inure to the benefit of STATE, BIA and RAILROAD, and shall be binding upon the successors and assigns of RAILROAD, subject to the limitations hereinafter set forth. RAILROAD may not assign its rights under this First Renewal Agreement or any interest herein, or attempt to have any other person, firm or corporation assume its rights or obligations under this First Renewal Agreement without the prior written consent of STATE and BIA.

*Section 20.04* Severability. If the fulfillment of any provision hereof or any transaction related hereto shall involve transcending the limit of validity prescribed by law, then the obligation to be fulfilled shall be reduced to the limit of such validity; and if any clause or provision herein contained operates or would prospectively operate to invalidate this First Renewal Agreement or in whole or in part, then such clause or provision only shall be held ineffective, as through not herein contained, and the remaining terms of this First Renewal Agreement shall remain operative and in full force and effect.

*Section 20.05* Governing Law. This First Renewal Agreement shall be governed and construed in accordance with the law of the State of Oklahoma. RAILROAD's operations under this First Renewal Agreement shall also comply with the applicable provisions of Federal law and the applicable rules, regulations and policies of any agency thereof.

*Section 20.06* Non-Collusion. The officer or duly authorized agent of RAILROAD which has executed this First Renewal Agreement on behalf of RAILROAD warrants and affirms that he is fully aware of the facts and circumstances surrounding the making of this First Renewal Agreement and has been personally and directly involved in the proceedings leading to the procurement of this First Renewal Agreement, and that neither RAILROAD nor anyone subject to RAILROAD's directions or control has paid, given, donated, or agreed to pay, give or donate any money or other things of value, either directly or indirectly, to any officer or employee of STATE or BIA in procuring this First Renewal Agreement.



IN WITNESS WHEREOF, the parties hereto have caused this First Renewal Agreement to be duly executed on their behalf, as of the 1<sup>st</sup> day of December, 2010.

APPROVED AS TO FORM  
AND LEGALITY

David Allen Wiley  
General Counsel

STATE OF OKLAHOMA DEPARTMENT  
OF TRANSPORTATION

David Streb  
DAVID STREB, Director of Engineering

Dated: 2/4/11

WITNESS:

Scott Nauer  
SCOTT NAUER, Secretary  
JEFFREY N. ZABEL-SYMONS  
BLACKWELL INDUSTRIAL AUTHORITY

BLACKWELL NORTHERN GATEWAY  
RAILROAD COMPANY

John Howell  
JOHN HOWELL, President

Dated: February 4, 2011

ATTEST:

\_\_\_\_\_  
Secretary

BLACKWELL INDUSTRIAL  
AUTHORITY

Darrel Grossardt  
DARREL GROSSARDT, Chairman

Dated: 2-4-11