

Memorandum of Understanding
Between White Pass & Yukon Route Railroad & Municipality of Skagway
Per Assembly on October __, 2017

1. **Proposed Amendment to 1968 Lease Including Environmental Remediation.** Amend the existing March 19, 1968 “tidelands” lease and the August 1, 1968 “uplands” lease (collectively, the “1968 Lease”), with the inclusion of a section relating to remediation, including related dredging of the Ore Dock basin, as follows:

- A. The annual rent under the 1968 Lease would be increased to \$250,000 per year.
- B. The term of the 1968 Lease would remain intact, so that it terminates on March 18, 2023.
- C. White Pass and the MOS would agree to split the cost of a new floating dock in a manner to be agreed upon that results in the equivalent of a 50% contribution or reimbursement by the Municipality and White Pass contributing the other 50%, and the lease amendment would specify the general design parameters for that floating dock, based on the “3B design” proposal that has been outlined by Moffatt & Nichol, for the approximate cost of \$15 million dollars (subject to bidding and mutually agreeable finalization of the design). The floating dock and ramp will meet highway heavy-load criteria needed for a roll-on roll-off design. The Municipality will incur any additional costs for fortifying the floating dock for roll-on roll-off usage. Upon execution of the lease amendment, White Pass and the MOS would diligently pursue the construction of the floating dock with a goal of having it ready for the 2019 tourist season.

D. The leased premises would be reduced to the Ore Dock area and the Broadway Dock area, which amounts to 334,862 sq. ft. The tidelands area to be covered by the amended lease shall be only the land directly beneath the existing and new Ore and Broadway docks and any current and future improvements located directly above the leased tidelands.

A. The current operations conducted by White Pass to operate the cruise terminal may be continued by White Pass through the term of the lease. The “Cruise Terminal Operator” is an entity that manages the cruise ship traffic to the Port of Skagway. Duties include making determinations on scheduling, berthing, and all cruise-related maritime operations. The Municipality has the right to further define the duties, responsibilities and rights of the “Cruise Terminal Operator” by ordinance or code amendment, **in which case such ordinance or code amendment shall apply to this lease amendment and any new lease beginning post March 18, 2023.**

E. The Cruise Terminal Operator cannot inflate fees, discriminate against, or **unduly** deny ships from an open berth.

B. The Municipality or its representative shall conduct an inspection of all premises semi-annually, before and after the cruise ship season, to observe and note the condition of and existing damage to the Premises and determine repairs and maintenance required to be performed. Responsibility of repairs and any defects shall be the sole responsibility of White Pass. The Ore Dock shall be maintained in a safe structural condition, as approved by a mutually agreed upon independent engineer, **with any repairs recommended by the independent engineer to be completed by White Pass within 60 days of the engineer’s report and solely at the expense of White Pass. In the event White Pass and the Municipality are unable to agree on an independent engineer, or are unable to agree on any repairs or maintenance recommended by the independent engineer, the Municipality shall have the right to make the repairs or maintenance recommended by the engineer and the**

Commented [RPB1]: We do not believe the municipality can agree to fund 50% of the construction without the project being subject to competitive bidding. White Pass has deleted that requirement from the last draft.

Also, we had recommended the following language in this provision:

In the event the design, funding, and Request for Bids to general contractors is not finalized by December 31, 2017, the Municipality shall have the right to proceed to build the floating dock at the sole expense of the Municipality where it deems best anywhere on the municipal tidelands, without the necessity of any further agreement with White Pass and without any interference from White Pass.

We do not know why that was deleted. We continue to recommend this provision or something similar otherwise White Pass can drag its feet on the construction and/or use the timing to later attempt to renegotiate this agreement.

Commented [RPB2]: We continue to recommend this language. Not sure why it was deleted from our earlier recommended changes or who deleted it.

Commented [RPB3]: We do not know what “unduly” means. As I read it, White Pass can deny open berths to any ship it wants any time it wants and just say they did not “unduly” deny the open berth. To us, that seems an unacceptable position for the municipality.

cost of those repairs or maintenance shall be reimbursed to the Municipality within 60 days of written notice by the Municipality to White Pass that the repairs or maintenance is complete.

Commented [RPB4]: We continue to recommend this provision—I do not know why it was deleted or who deleted it.

~~F.~~

G.F. There are currently seven subleases or other agreements between White Pass and third parties related to the use of the area encompassed by the 1968 Lease. Upon execution of the 1968 Lease amendment, White Pass will assign these subleases and other agreements to the Municipality. For the period of the lease amendment through the end date of those sublease and agreements, and any extensions of those leases and agreements through March 18, 2023, the Municipality will remit to White Pass the current amount of revenue in each currently existing sublease or agreement and no more and no less. If the Municipality voluntarily chooses to terminate any of the currently existing subleases and agreements prior to 2023, the Municipality will still be subject to the make whole provision for that specific sublease or agreement through March 18, 2023. The Municipality shall not be subject to the make whole provision if, after good faith negotiations, the current holder of the sublease or agreement refuses to enter an extension of the current sublease or agreement to March of 2023. **The Municipality shall not be subject to the make whole provision in the event of default on the lease by the sublessee, including but not limited to, default on the sublease payment.** The Municipality may also negotiate new leases with the current sublessees in an amount greater than the current lease payments to White Pass, and in that event, the Municipality shall be entitled to the amount above the current lease payments. The lease amendment shall specifically state that any current subleases or agreements shall not be extended by White Pass. The existing subleases or agreements are with: AIDEA, AML, CLAA, Harbor, Harbor Flowage, NOAA, and TEMSCO. Between the date the subleases are transferred to the Municipality and March 18, 2023, White Pass shall remain wholly liable for any and all injuries, including death, property damage, and for any and all environmental incidents, occurring on the areas currently under sublease as between any third party and the Municipality.

H.G. The lease amendment would incorporate tenant and environmental “defend and indemnify” obligations from White Pass to at least the same extent and in the same manner as those provisions in the lease that were the subject of Ordinance No. 15-18 voted on by the voters in Skagway. White Pass shall agree to maintain a minimum of \$5,000,000 in general liability insurance, with the Municipality named as an additional insured, and at least \$10,000,000 in pollution and environmental insurance coverage, with the Municipality named as an additional insured.

H.H. The lease amendment would provide that the Municipality and White Pass would share Ore Dock use rights on the following basis: (i) cruise ships would have docking priority rights in all instances; (ii) White Pass would receive all revenues and fees related to cruise ship docking, disembarking, and embarking, and excluding Commercial Passenger Vessel (CPV) fees, and excluding any passenger fees that may be enacted by the Municipality; and (iii) the Municipality would receive Ore Dock revenues and fees in relation to all non-cruise ship docking, disembarking, embarking, loading, and unloading. The lease amendment will include a provision that the Municipality and White Pass shall share responsibility for repairs and

maintenance of the Ore Dock. As between White Pass and the Municipality, White Pass shall bear all responsibility for any damage to the Ore Dock caused by any cruise ship and the Municipality shall bear all responsibility for any damage to the Ore Dock caused by any ship other than a cruise ship and White Pass shall have no responsibility for damage to the Ore Dock caused by any ship other than a cruise ship, and the Municipality shall have no responsibility for damage to the Ore Dock caused by any cruise ship or cruise ship related vessel. White Pass and the Municipality will meet once a month during the tourist season and twice during the winter to discuss scheduling and operations, or as often as either may agree to meet.

~~I. White Pass and the Municipality agree to consider changes in easements that help to facilitate commercial or industrial advancement that does not interfere with current railway operations or with the goals and plans for the port by the Municipality.~~

~~J. The Municipality shall grant easements to White Pass that will be covered in a separate agreement.~~

~~K.J.~~ The lease shall not be sold, transferred, or assigned without the written consent of the Municipality, and if the sale, transfer or assignment is to an LLC, each member of the LLC shall sign a guarantee of performance of the Lease in accordance with SMC 16.02.160(D). ~~Approval of the sale, transfer, or assignation cannot be unreasonably withheld.~~ If the Municipality invokes SMC 16.02.160(D) and requires that each member of the LLC to which the lease is being sold, transferred, or assigned to sign a guarantee of performance for the lease and these amendments, such action by the Municipality shall be deemed reasonable and not challengeable by White Pass or the entity to which there is an intent to sell, transfer, or assign. Breach of this condition by White Pass shall constitute a default and entitle the Municipality to immediately cancel and terminate the 1968 lease and these amendments, and terminate any new lease ratified and approved by the voters, in the sole discretion of the Municipality, and any legal action taken by the Municipality to enforce this provision and/or to terminate the lease or new lease, shall entitle the Municipality to full costs and attorneys' fees from White Pass, and will immediately void any provisions related to payment to White Pass for any improvements on the leased premises in the lease amendments or new lease. In the event of such default and legal action by the Municipality, the Municipality shall immediately have full ownership and rights of use to any and all improvements then existing on the lease premises, without payment to White Pass.

~~L.K.~~ The remediation section of the lease amendment will specify that the remediation would be to Alaska Department of Environmental Conservation ("ADEC") standards. The remediation would be pursuant to a scope of work prepared by Golder Associates and approved by the ADEC. The remediation section of the lease amendment shall have a specific provision that in the event the ADEC has not provided a closure letter or other written confirmation that the ADEC approved remediation scope of work has been completed and approved by ADEC or has been removed from ADEC's list of contaminated sites on or before March 18, 2023 subject only to ongoing monitoring requirements. ~~White~~ Pass shall remain wholly and solely liable to complete the remediation, as between White Pass and the Municipality, at the sole expense of White Pass or its sublessees, subtenants, or other contractually related entities, without further contribution from the Municipality. ~~providing White Pass has permission and~~

Commented [RPB5]: This provision remains a mystery to me as I do not know what the Assembly's plans are for the North end of the Ore Dock. We are concerned about accepting unlimited liability for damage to the North end without knowing what use is going to be made of the North end.

Commented [RPB6]: We continue to recommend this provision and not the White Pass draft—as White Pass has drafted this provision, the municipality would be required to grant any easement demanded by White Pass.

Commented [RPB7]: This provision obligates the municipality to agree to any easement demanded by White Pass. We cannot imagine why the municipality would agree to such a provision.

We continue to recommend the following language:

White Pass and the Municipality agree to consider changes in easements that help to facilitate commercial or industrial advancement that does not interfere with current railway operations **or with the goals and plans for the port by the Municipality.**

Commented [RPB8]: We continue to recommend against agreeing to the "unreasonable withheld" language.

Commented [RPB9]: We do not recommend agreeing to the White Pass change here. We continue to recommend the following language:

The remediation section of the lease amendment shall have a specific provision that in the event the ADEC has not provided a closure letter or other written confirmation that all remediation has been completed and approved by ADEC on or before March 18, 2023, White Pass shall remain wholly and solely liable to complete the remediation, as between White Pass and the Municipality, at the sole expense of White Pass or its sublessees, subtenants, or other contractually related entities, without further contribution from the Municipality.

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BETWEEN WHITE PASS & MUNICIPALITY OF SKAGWAY
Per Assembly on October __, 2017
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~~access by ADEC and AIDEA respectively, as well as sufficient time to mitigate contamination when access is granted.~~

~~M.L.~~ The remediation would be funded with a \$2,750,000 contribution from White Pass and a \$1,500,000 contribution from the Municipality. The Municipality's contribution to remediation shall be capped at \$1,500,000. To the extent that, after initial site excavation, it was determined that the required scope of work will be more than \$4,250,000, White Pass and the Municipality will jointly pursue funding from other potentially responsible parties as identified by ADEC. **In the event legal action is necessary to obtain cooperation and/or funding from any other potentially responsible party or parties, White Pass shall pay the full costs and attorneys' fees associated with that legal action.**

~~M.~~ The execution of this lease amendment, including the remediation section, is a condition precedent to the Municipality entering a new lease with White Pass, even if a new lease is ratified by the Assembly and approved by the voters.

~~O.N.~~ In the event White Pass has not completed the remediation such that ADEC has provided a closure letter on or before March 18, 2013, White Pass shall pay the Municipality the sum of \$10,000,000 as reasonable liquidated damages on or before April 18, 2023. The lease amendment shall have language making the liquidated damages provision enforceable and such that it is a violation of the current lease and the amendment for White Pass to challenge or oppose complying with the liquidated damages provision. In the event the municipality files an action to enforce the liquidated damages provision due to failure of White Pass to pay the liquidated damages on or before April 18, 2023, White Pass shall pay the full, actual attorneys fees and costs of the municipality in that action. In addition to the liquidated damages provision, the lease amendment shall provide that in the event White Pass has not completed the remediation such that ADEC issues a closure letter on or before March 18, 2023, the municipality shall immediately assume title and ownership of all improvements and assets located on the leased premises then owned by White Pass or any successor of White Pass, without further action by the municipality to effect that ownership, and White Pass shall immediately vacate the leased premises on or before April 18, 2023. In the event the municipality files an action in court to enforce the provision providing immediate ownership of the improvement and assets, or files an action to remove White Pass or its successor from the leased premises, or both, due to failure of White Pass to vacate the premises on or before April 18, 2023, White Pass shall pay the full, actual attorneys fees and costs of the municipality in that action. This provision shall be independent of and in addition to the liquidated damages provision.

Commented [RPB10]: We recommend not agreeing to this last provision. AIDEA is a sublessee and cannot deny White Pass access to conduct remediation. I do not know what it means for ADEC to "deny access," that does not make sense.

Commented [RPB11]: This is an important provision to leave in, otherwise the provision of seeking contribution from other parties is meaningless and the municipality will end up either bearing the costs of the lawsuit or bearing the costs of completing the remediation.

Commented [RPB12]: I have given this situation considerable thought. It seems to me if the municipality wants to insure the clean-up by the end of the lease, we cannot enter any agreement that does not have a liquidated damages provision and an immediate ownership of the assets clause in the event White Pass does not complete the remediation.

2. **New Lease Agreement.** White Pass and the MOS would enter into a new lease that would relate to the period after the 1968 Lease term:

- A. The term of the new lease will be for fifteen (15) years, beginning on March 19, 2023, and ending on March 19, 2038.
- B. The leased premises would be the Ore Dock area and the Broadway Dock area. The tidelands area to be covered by the new lease shall be only the land directly beneath the existing Ore and Broadway docks and any current and future improvements located directly above the leased tidelands.
- C. The annual lease payments shall increase by 3.5% annually as follows:
- 2023: \$250,000
 - 2024: \$258,750
 - 2025: \$267,806.25
 - 2026: \$277,179.47
 - 2027: \$286,880.75
 - 2028: \$296,921.58
 - 2029: \$307,313.83
 - 2030: \$318,069.82
 - 2031: \$329,202.26
 - 2032: \$340,724.34
 - 2033: \$352,649.69
 - 2034: \$364,992.43
 - 2035: \$377,767.16
 - 2036: \$390,989.02
 - 2037: \$404,673.63
 - 2038: \$418,837.21
 - TOTAL: \$5,242,757.44

White Pass will be the cruise terminal operator and commits to work in concert with the Municipality in a communicative and collaborative scheduling process. The "Cruise Terminal Operator" is an entity that manages the cruise ship traffic to the Port of Skagway. Duties include making determinations on scheduling, berthing, and all cruise-related maritime operations. **The Municipality has the right to further define the duties, responsibilities, and rights of the "Cruise Terminal Operator" by ordinance or code amendment, in which case such ordinance or code amendment shall apply to this lease amendment and any new lease beginning post March 18, 2023.**

- D. ~~The Municipality has the right to further define the duties, responsibilities and rights of the "Cruise Terminal Operator" by ordinance or code amendment.~~ The Cruise Terminal Operator cannot inflate fees, discriminate against, or ~~unduly~~ deny ships from an open berth.
- E. The new lease shall provide that the Municipality will reimburse White Pass, with Assembly approval of capital improvements, unless a new lease is negotiated on or before 2038, for capital (other than maintenance or repair) improvements according to the following schedule:

Commented [RPB13]: It remains our position that the term, area of the leased premises and revenues are all matters of policy for the Assembly.

Commented [RPB14]: We continue to recommend the following provision be included if the municipality funds 50% of the floating dock as this appears to be required by the code.

In the event the floating dock is constructed as set out in the lease amendment with a 50% contribution from the Municipality, the Municipality shall have the right to have the leased premises, including the Municipality improvement of 50% of the floating dock, re-appraised in accordance with SMC 16, and if that re-appraisal results in a rental rate under Title 16 more favorable to the Municipality than the above rental amounts, the new rental rate will be immediately implemented upon January 1 of the year immediately following the re-appraisal, and shall continue to be the base rate for all subsequent years and for any future re-appraisals under Title 16.

Commented [RPB15]: We continue to recommend this language and do not know why it was deleted or who deleted it.

- Before: no reimbursement
- 2029: 10%
- 2030: 20%
- 2031: 30%
- 2032: 40%
- 2033: 50%
- 2034: 60%
- 2035: 70%
- 2036: 80%
- 2037: 90%
- 2038: 100%

The new lease will contain a provision that defines “capital improvement” mutually agreed upon by the Municipality and White Pass in at least the same manner as defined in the lease that was the subject of Ordinance No. 15-18, or in a manner more favorable to the Municipality. At the end of the lease term in 2038, the Municipality receives all tidelands assets, including the Ore and Broadway docks in their improved states, without any further payment to White Pass. Upon termination of the lease in 2038, the Ore and Broadway docks, and any improvements, shall be in good and safe condition, as certified by an independent engineer, and White Pass shall make any and all repairs determined necessary by the independent engineer within 60 days of the termination of the lease. In the event White Pass does not complete those repairs within 60 days of the termination of the lease, and legal action is necessary by the Municipality, White Pass shall pay all costs and fees associated with that action, including expert fees.
~~At the end of the lease term in 2038, the Municipality receives all tidelands assets, including the Ore and Broadway docks in their improved states.~~

Commented [RPB16]: We continue to recommend this provision.

G.F. The Municipality shall grant easements to White Pass that will be covered in a separate agreement.

H.G. The new lease will have provisions similar to the 1968 Lease amendment described above in relation to ship revenue, Ore Dock sharing, Ore Dock damage, and tenant indemnity and environmental indemnity obligations from White Pass.

H.H. The new lease will have the “defend and indemnify” provisions previously agreed upon by White Pass and the Municipality to at least the same extent and in the same manner as those provisions in the lease that was the subject of Ordinance No. 15-18 voted on by the voters in Skagway. White Pass shall agree to maintain a minimum of \$5,000,000 in general liability insurance, with the Municipality named as an additional insured, and at least \$10,000,000 in pollution and environmental insurance coverage, with the Municipality named as an additional insured.

H.I. The lease shall not be sold, transferred, or assigned without the written consent of the Municipality, and if the sale, transfer or assignment is to an LLC, each member of the LLC shall sign a guarantee of performance of the Lease in accordance with SMC 16.02.160(D). Approval of the sale, transfer, or assignment cannot be unreasonably withheld. If the Municipality invokes SMC 16.02.160(D) and requires that each member

of the LLC to which the lease is being sold, transferred, or assigned to sign a guarantee of performance for the new lease, such action by the Municipality shall be deemed reasonable and not challengeable by White Pass or the entity to which there is an intent to sell, transfer, or assign. Breach of this condition by White Pass shall constitute a default and entitle the Municipality to immediately cancel and terminate the 1968 lease and these amendments, and terminate any new lease ratified and approved by the voters, in the sole discretion of the Municipality, and any legal action taken by the Municipality to enforce this provision and/or to terminate the lease or new lease, shall entitle the Municipality to full costs and attorneys' fees from White Pass, and will immediately void any provisions related to payment to White Pass for any improvements on the leased premises in the lease amendments or new lease. In the event of such default and legal action by the Municipality, the Municipality shall immediately have full ownership and rights of use to any and all improvements then existing on the lease premises, without payment to White Pass.

- J. ~~The new lease will include a provision that the term of the new lease will not commence if White Pass as not fully complied with the remediation provisions in the amendment, including having received a closure letter from ADEC on or before March 18, 2023.~~
- K. ~~The new lease will have a provision for liquidated damages in the event of future contamination or any environment spill or event occurring during the term of the new lease with the same provisions as Section N above for the amendment. the Municipality has not received a closure notice or other written confirmation from ADEC that the ADEC approved scope of work has been completed or the site has been removed from ADEC's list of contaminated sites regarding the cleanup and remediation of the Skagway Ore Basin before May 18, 2023.~~

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