

**CONSTRUCTION AND MAINTENANCE AGREEMENT  
25<sup>TH</sup> STREET PEDESTRIAN BRIDGE  
BILLINGS, MONTANA**

AGREEMENT, made this \_\_\_\_ day of \_\_\_\_\_, 2014, between the **CITY OF BILLINGS**, a political subdivision of the State of Montana, hereinafter referred to as "CITY", and **MONTANA RAIL LINK, INC.**, a Montana corporation, hereinafter referred to as "RAILROAD".

WHEREAS, CITY is proposing to undertake a federal aid Community Transportation Enhancement Project MT-STPE 1099(71), CN 7546, City of Billings WO 11-10, which includes construction and maintenance of a pedestrian bridge on, along and across RAILROAD right-of-way on the Jones Junction to Spurling main line, located in the City of Billings, Yellowstone County, Montana, as is more particularly shown on the map marked as Exhibit "A" attached; and

WHEREAS, the parties want this project to be constructed in accordance with plans and specifications to be prepared by CITY; and

WHEREAS, it will be necessary for RAILROAD to perform certain work on its facilities for this project; and

WHEREAS, CITY will undertake the construction of said project with CITY funds and federal funds as are available for this purpose, and the RAILROAD will consent to the construction of said project upon the terms and conditions hereinafter stated and will receive no net benefit.

NOW, THEREFORE, in consideration of the premises herein contained, the parties agree:

I

The RAILROAD, in consideration of the sum of (\$32,600) Thirty two thousand six hundred dollars, will grant to CITY the following:

By separate instrument, an easement on its operating right-of-way, as shown and described on Exhibit "A," for the construction, maintenance and operation of a pedestrian bridge.

This instrument gives a one-year right-of-entry temporary construction easement for the areas shown hatched on the Exhibit "A," which commences prior to construction on a date specified by the CITY.

II

The CITY has provided the RAILROAD preliminary project plans and will submit final plans and specifications for concurrence and/or approval at a later date. The CITY will construct or cause to construct the pedestrian bridge and thereafter own and maintain the proposed facility. The CITY

will provide the RAILROAD with as-built plans, provided there are RAILROAD approved changes to the original design.

The CITY will present the attached Exhibit "C", contractor requirements for work on the right-of-way of the RAILROAD, to its contractor. The CITY's contractor will comply with all aspects of this attachment. There will be no equipment, manpower or work on the right-of-way of the RAILROAD prior to approval by the RAILROAD. CITY's **contractor(s) will telephone the RAILROAD's Communication Network Control Center at (800) 338-4750** (a 24-hour number), and Utilities Underground Location Center **(800) 424-5555**, to determine if underground utilities or communication facilities are buried anywhere in the area. Nothing provided in this agreement will be construed or deemed to be ratification or an adoption by the RAILROAD of either or both said plans and specifications as its own.

Should it become necessary for the RAILROAD to obtain the services of a consultant engineer or a contractor after this agreement is completed, and due to any exigency of the RAILROAD and the project, the CITY and the RAILROAD will mutually agree, in writing, as to the area of need and the RAILROAD's selection of a consultant or contractor. All work performed and cost incurred under this agreement will be in accordance with 23 Code of Federal Regulations (CFR) and 48 CFR, including but not limited to Chapter 1, Part 31, hereinafter referred to as "48 CFR" which is hereby incorporated into and made part of this agreement by reference.

### III

The CITY will reimburse the RAILROAD for the work it performs pursuant to this agreement in accordance with and subject to the terms of 23 CFR, including but not limited to Parts 1, 140 (Subpart I), 172, 646, hereafter referred to as "23 CFR" which is hereby incorporated into and made part of this agreement by reference. Payment will be made to the RAILROAD within sixty (60) days after receipt of a properly completed invoice addressed to the CITY. The RAILROAD may assign any receivables due under this Agreement, provided, however, such assignment will not relieve the assignor of any of its rights or obligations under this agreement.

The estimated cost of work, except flagging, to be performed under this agreement by the RAILROAD's forces at the expense of the CITY is shown on the detailed estimate attached as Exhibit "B" and made a part of this agreement. Force account work is to be billed separately under force account.

The railroad has reviewed and inspected the materials in the field prior to signing this agreement. The salvage value of the materials, if any, to be retained by the RAILROAD is shown on the attached Exhibit "B." The railroad will dispose of all scrap from the RAILROAD's work covered in this agreement at CITY expense.

### IV

CITY and the RAILROAD will perform various items of work as follows:

#### PART A

WORK TO BE PERFORMED BY CITY OR ITS CONTRACTOR AT CITY EXPENSE:

1. Except as otherwise herein provided, furnish all plans, engineering, supervision, labor, material, supplies and equipment necessary for construction of the project, complete in all details.
2. Perform all work not specifically mentioned as work performed by the RAILROAD necessary to complete the project in accordance with plans and specifications.
3. Any work or modification which, under this contract, may be performed by the contractor will nevertheless be the obligation of CITY, and the RAILROAD will be entitled to look to CITY for full performance thereof.
4. The CITY's Contractor will provide one set of shoring plans for any excavation work within RAILROAD right-of-way or for false work adjacent to or over the tracks. These plans will be submitted to the RAILROAD through the CITY's engineer. The CITY will review the plans and provide any pertinent comments which will be forwarded to the RAILROAD for their review.
5. Replace any existing fencing that is displaced because of construction activities and/or new easement limits. Replacement fencing shall match the existing fencing. Temporary fencing shall be erected when and where existing fencing is removed during construction to keep trespassers from entering the RAILROAD right-of-way. The temporary fence must be of sturdy construction and affixed to the extents of the temporary fence opening in the existing fence so as to provide an actual obstacle against trespassers.
6. Replace to the existing line and grade all concrete removed to accommodate construction of the pedestrian bridge outside of the new bridge substructure and inside of the new fence line.
7. Should the City's contractor desire to use a portion of the RAILROAD right-of-way outside the limits of the temporary construction easement as a lay down or staging area for this project, the contractor and RAILROAD must mutually agree as to the location and extents of such use. The contractor will be required to execute a Temporary Occupancy Permit (TOP) on the RAILROAD's prescribed form and comply with all the conditions therein.

#### PART B

##### WORK TO BE PERFORMED BY THE RAILROAD AT CITY'S EXPENSE:

1. Preliminary Engineering for this project. The CITY will pay \$2,444.00 as a Lump Sum Payment for Preliminary Engineering. Preliminary Engineering includes all costs for developing this agreement.
2. Provide railroad flagging protection during construction as deemed necessary by the RAILROAD.

3. Should it become necessary to augment, move, adjust, or modify any of the RAILROAD's signal cables or systems, including Quiet Zone signals, as a consequence of this project, the CITY shall bear all costs, including engineering, fabrication, purchasing, shipping, installing, and testing of any signals changes.
4. The CITY will pay RAILROAD to remove approximately 290 linear feet of track to accommodate the construction of the pedestrian overpass. The CITY shall pay the RAILROAD for this track removal the not to exceed amount of \$4,294.00 as included in Exhibit "B."

### PART C

#### SEQUENCE OF OPERATION:

The CITY will coordinate the date and time of the pre-construction conference so that the RAILROAD's public works engineer or his designee can attend.

Any cranes or similar equipment to be used during the project must comply with the attached Exhibit "C", contractor requirements for work on the right-of-way of the RAILROAD

The CITY shall have up to six (6) hours total consisting of one, or, at most, two blocks of time when the RAILROAD shall provide a track window(s) during which no railway traffic shall route through the construction area. The track window(s) for the CITY will be coordinated to happen in conjunction with the RAILROAD's scheduled track maintenance windows in the Laurel-Billings area. As of the date of this agreement, the RAILROAD's scheduled track maintenance windows will be between the dates of June 17 – July 21, 2014. The schedule for RAILROAD's track maintenance is subject to change. The track window time(s) and date(s) shall be mutually agreed between the CITY and the RAILROAD. Flagging will be required during the track window.

It is not anticipated that any temporary construction grade crossings will be installed in the project area.

No portion of the RAILROAD's coach (business car) track nearest the Billings Depot will be removed to accommodate construction. When not required by RAILROAD for passenger car use, the track may be locked and tagged out to allow CITY or its contractor to be foul of the track during construction.

The schedule of work for the pedestrian overpass (including the abutments and structures appurtenant thereto) shall accommodate RAILROAD's unrestricted use of its coach (business car) track near the Billings Depot for passenger car use. As of the date of this agreement, RAILROAD has scheduled one visit to that coach track for several days sometime between August 15-September 3, 2014. RAILROAD will provide at least 48 hours (during business days) notice to CITY for arrival and departure times of passenger cars for the said track. RAILROAD has the authority to add or delete passenger car usage of the said track with the notice to CITY contained herein. RAILROAD will not be responsible for costs to the CITY or its contractor for changes, modifications or delays due to RAILROAD's usage, including usage during additional times outside of August 15-September 3, 2014, of

its coach track. During RAILROAD's use of the coach track by passenger cars, CITY or its contractor shall abide by the clearances for people, equipment, and materials as listed in Exhibit "C" attached.

## V

All work to be done by the CITY or its contractor on the RAILROAD's right-of-way will be done in a manner satisfactory to the RAILROAD and will be performed so as not to unnecessarily interfere with the movement of trains or traffic upon the track. The CITY will require its contractor to take precautions to avoid damage to or interfere with the RAILROAD's track or trains and to notify the RAILROAD, as per Exhibit "C," whenever the contractor is about to perform work on, or adjacent to its track to enable the RAILROAD to furnish flagging and other necessary protective services and devices to ensure the safety of railway operations. The RAILROAD can furnish such flagging and protective services and devices that, in its judgment, are necessary to ensure the safety of railway operations, and the CITY will reimburse the RAILROAD for the cost thereof. Whenever safeguarding of the trains or traffic of the RAILROAD is mentioned in this agreement, it is intended to include all permitted users of the RAILROAD's track.

## VI

The RAILROAD will endeavor to submit on a monthly basis progress bills for flagging and other protective services and devices during the progress of the work contemplated by this agreement. The progress bills will contain the date and hours worked per day. The RAILROAD will submit a final and complete billing for flagging and other protective services within one hundred twenty (120) days after being notified of the completion of the project by the CITY. The attached Exhibit "C," which is made a part hereof, is a statement of conditions when flagmen, protective services and devices will be furnished by the RAILROAD. Railroad flagging is to be billed under a separate railroad flagging account.

The RAILROAD may submit progress bills to the CITY during the progress of the work included in this agreement for the actual cost of services and expenses incurred by the RAILROAD. The CITY will reimburse the RAILROAD for the actual cost and expense incurred in connection with said work.

It is further agreed that the final and complete billing of all incurred costs will be made by the RAILROAD at the earliest practical date and that a final audit and review will be made by the CITY. Records are to be available to the CITY or their authorized representatives for audit during the contract period and for a period of three (3) years from the date of final payment.

## VII

**All contracts between CITY and a contractor**, for the construction provided for, or maintenance work on the pedestrian bridge within the RAILROAD right-of-way, shall include language that specifies the contractor is responsible to the RAILROAD, including its affiliated RAILROAD companies, and its tenants for all damages, which includes the loss of net revenue and attorney's fees for any unscheduled delay to freight or passenger trains that is caused by the contractor's negligence, failure to comply with its requirements under this agreement, failure to

properly coordinate its work with the RAILROAD or any cause not attributable to the RAILROAD, but arising from the contractor's activities that affect RAILROAD's ability to meet its customer service obligations. Contractor will be billed for all economic losses including but not limited to loss of revenue, attorney's fees, and contractual penalties resulting from train delays, caused by the contractor, or its subcontractors performing work under the project identified herein. RAILROAD agrees that it will not perform any act which would unnecessarily cause train delay. Contractor is not responsible for any train delay resulting from a general slow order issued by the RAILROAD through this project which is unrelated to the project.

Any disruption to train traffic may cause delays to multiple trains at the same time for the same period. Depending on the length of the disruption caused by the contractor, or its subcontractors performing work under the project identified herein, the cost for damages billed to the contractor can approach \$14,000 per hour (in 2010 dollars).

**The CITY's contractor and subcontractors shall plan, schedule, coordinate and conduct all contractor's work so as to not cause any delays to any trains.**

## VIII

All contracts between the CITY and its contractor, for the construction provided for, or maintenance work on the pedestrian bridge within the RAILROADS's right-of-way, will require the contractor to indemnify, defend and hold harmless the RAILROAD and any other railroad company occupying or using the RAILROAD's right-of-way, or line of railroad, against all loss, liability and damage, including attorney's fees, arising from activities of the contractor, its forces or any of its subcontractors or agents, and will further provide that the contractor will carry insurance of the kind and amount hereinafter specified:

A. Commercial General Liability Insurance. This insurance must contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post-2004 ISO occurrence form or equivalent and include coverage for, but not limited to the following:

- Bodily Injury and Property Damage
- Personal Injury and Advertising Injury
- Fire Legal Liability
- Products and Completed Operations

This policy must also contain the following endorsements, which must be indicated on the certificate of insurance:

- It is agreed that any workers' compensation exclusion does not apply to railroad payments related to the Federal Employers Liability Act or a Railroad Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers' Compensation, disability benefits, or unemployment compensation law or similar law.

- The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.

**No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy.**

B. Business Automobile Insurance. This insurance must contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- Bodily injury and property damage
- Any and all vehicles owned, used or hired

C. Worker's Compensation and Employers Liability insurance including coverage for, but not limited to:

- Contractor's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

**A Certificate of Insurance must be provided to the RAILROAD prior to commencement of work.**

Additionally, the contractor will furnish to the RAILROAD:

D. Railroad Protective Liability Insurance naming only the RAILROAD as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The policy must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93).
- Endorsed to include the Limited Seepage and Pollution Endorsement.
- Endorsed to remove any exclusion for punitive damages.
- No other endorsements restricting coverage may be added.
- Be written to provide coverage for all physical and structural assets of the RAILROAD (including but not limited to bridges, trestles, tunnels, tracks, overpasses, underpasses, roadbed, and crossings).
- The original policy must be provided to the RAILROAD prior to performing any work or services under this Agreement.

**The RAILROAD is to be provided with a separate Railroad Protective Policy.**

Other Requirements:

Contractor agrees to waive its right of recovery against RAILROAD for all claims and suits against RAILROAD. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against RAILROAD for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against RAILROAD for loss of its owned or leased property or property under Contractor's care, custody or control.

Contractor's insurance policies through policy endorsement, shall include wording which states that the policy is primary and non-contributing with respect to any insurance carried by RAILROAD. The certificate of insurance must reflect that the above wording is included in all applicable policies described herein.

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) shall include a Separation of Insureds endorsement and RAILROAD shall be named as an additional insured with respect to work performed under this agreement. Separation of Insureds and naming RAILROAD as additional insured shall be indicated on the certificate of insurance.

Prior to commencing the Work, Contractor shall furnish to RAILROAD an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify RAILROAD in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving RAILROAD arising out of this agreement, Contractor will make available any required policy covering such claim or lawsuit.

Any insurance policy shall be written by a reputable insurance company acceptable to RAILROAD or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

Contractor represents that this Agreement has been thoroughly reviewed by Contractor's insurance agent(s)/broker(s), who have been instructed by Contractor to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

Not more frequently than once every five years, RAILROAD may ask to reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

Failure to provide evidence as required by this section shall entitle, but not require, RAILROAD to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by Contractor shall not be deemed to release or diminish the liability of Contractor including, without

limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by RAILROAD shall not be limited by the amount of the required insurance coverage.

ALL certificates of insurance required for contractor performed construction and/or maintenance work will be forwarded to the RAILROAD at the following address:

MONTANA RAIL LINK, INC.  
Office of the Chief Engineer  
P.O. Box 16390  
Missoula, MT 59808-6390  
(406) 523-1440 office  
(406) 523-1529 fax

If the CITY, its contractor, subcontractors, or agents, in the performance of the work herein provided for or by the failure to do or perform anything for which it is responsible under the provisions hereof, shall damage or destroy any property of the RAILROAD, such damage or destruction shall be corrected by the CITY in the event its contractor or the insurance carriers fail to repair or restore the same.

#### IX

Upon completion of the work herein stated, the CITY will require its contractor to leave the RAILROAD right-of-way in a condition satisfactory to the RAILROAD.

#### X

The CITY agrees that in removing snow from said pedestrian bridge facility, it will perform such removal in a manner as not to deposit the snow or debris on or near the roadbed or tracks of the RAILROAD. It is expressly forbidden to use deicing material of any type on the pedestrian bridge.

Any snow or debris deposited on or near the roadbed or track sections by actions of the CITY will be removed by the RAILROAD with such costs of removal billed against the CITY. The RAILROAD agrees to notify the CITY of any ongoing problem in this area.

#### XI

Upon completion of the pedestrian bridge, the CITY will own and maintain the pedestrian bridge facility and all appurtenances thereto. The CITY at their expense will be responsible for all future maintenance, repair, improvement, modification or replacement, as needed, based upon prevailing warrants, federal aid guidelines and conditions of said pedestrian bridge. The CITY, or its contractor, at CITY's expense, will perform inspections of the pedestrian bridge structure per CITY's prevailing bridge inspection standards. If railroad flagging is needed during the CITY's inspection,

the CITY will contact the RAILROAD's Roadmaster to schedule flagging per RAILROAD requirements. The flagging needed for the CITY's inspections shall be at the CITY's expense.

After inspection, if either party, the CITY or the RAILROAD, determines maintenance needs to be performed, the other party will be notified and a field review will be scheduled.

The CITY agrees that it will do nothing and permit nothing to be done in the maintenance of the pedestrian bridge facility which will interfere with or endanger facilities of the RAILROAD. The RAILROAD may make changes in or additions to its facilities within the limits of the pedestrian bridge facility; provided the usefulness thereof, and the purpose of said pedestrian bridge facility will not thereby be impaired.

## XII

Neither party will do nor permit anything to be done to reduce the horizontal and vertical clearances provided by the approved plans; provided, however, that the RAILROAD reserves the right to make such ballast raises as, in its opinion, may be justified.

## XIII

In the event said pedestrian bridge facility shall, at any time, cease to be used by the public or otherwise become vacated or abandoned, the rights and benefits of the CITY under this agreement shall immediately cease, and the CITY shall remove said highway facility at its own cost and expense. To facilitate the CITY's removal of the highway facility, the RAILROAD will issue to the CITY, at no cost or expense, a permit to accomplish said removal. If after a reasonable time the CITY has not removed the facility, the RAILROAD, after providing the CITY a minimum of 60 days prior notification, may remove said facility at the expense of the CITY.

## XIV

All notices, billings, payments, and other required communications ("Notices") to the Parties shall be in writing, and shall be addressed respectively as follows:

If to CITY:                      City of Billings  
   Public Works Department  
   2224 Montana Ave. – 2<sup>nd</sup> Floor  
   Billings, MT 59101  
   Telephone     (406) 657-8230  
   Fax                 (406) 237-6291

If to RAILROAD:                MONTANA RAIL LINK, INC.  
   Office of the Chief Engineer  
   P. O. Box 16390  
   Missoula, MT 59808-6390  
   Telephone     (406) 523-1440  
   Fax                 (406) 523-1529

All notices shall be given: (i) by personal delivery to the Parties, or (ii) by electronic communication, with a confirmation sent by mail, or (iii) by mail. All notices shall be effective and shall be deemed delivered: (i) if by personal delivery on the date of delivery if delivered during normal business hours, and, if not delivered during normal business hours, on the next business day following delivery, (ii) if by electronic communication on the next business day following receipt of the electronic communication, or (iii) if solely by mail on the next business day after actual receipt. Any Party may change its address by notice to the other Parties.

**XVI**

This agreement will be binding on the parties hereto, their successors and assigns.

**MONTANA RAIL LINK, INC.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**CITY OF BILLINGS**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Attest: \_\_\_\_\_

*Draft - For Review*