COORDINATION AND REIMBURSEMENT AGREEMENT
BETWEEN
THE CITY OF FLAGSTAFF, ARIZONA
AND
BNSF RAILWAY COMPANY

This Coordination and Reimbursement Agreement (this "***Agreement***") is entered into between the City of Flagstaff, a _____ of the State of Arizona ("***City***"), and BNSF Railway Company, a Delaware corporation ("***BNSF***") as of _____ (the ***"Effective Date"***).

RECITALS

1. City, pursuant to the Arizona Constitution, Article 2, Section 17; Arizona Revised Statutes (ARS) §§12-1111(4)(5); 12-1141(7); 9-240(B)(5); Flagstaff City Code, Chapter 12-01, has notified BNSF of its intent to acquire by eminent domain certain real property of BNSF and seeks by donation in consummation of eminent domain from BNSF certain other interests in real property upon which several flood control and other related projects and improvements will be completed as described in this Agreement. These flood control and other related projects and improvements will be either: (i) designed, controlled, performed or constructed by or for the City (collectively, including furnishing of all Mitigations (defined below), performing all permitting and all utility relocation for the entire Project (defined below) except for relocation of BNSF's fiber optic lines, and performing all operation and maintenance of the finished Project as described in and in strict accordance with the O & M Agreement (defined below), (collectively, the **"*City-Led Phases*"**) or (ii) designed by the U.S. Army Corps of Engineers (the ***"Corps")*** and constructed by or on behalf of the Corps pursuant to a General License Agreement (the ***"General License")***between BNSF and the contractor(s) retained by the Corps to in order to enable or to perform this construction on behalf of the Corps ***(***the ***"Corps-Led Phases").*** These flood control and other related projects and improvements, both for the City-Led Phases and the Corps-Led Phases are described on **Exhibit "A"** attached hereto and incorporated herein. The Mitigations (defined below) are described on **Exhibit "A-1"** attached hereto and incorporated herein. Together, the projects and improvements described on **Exhibit "A"** and the Mitigations are the "***Project.***" BNSF and the City acknowledge that a fundamental tenant of this Agreement and the Project more generally is that the City shall have no responsibility, liability or indemnity obligations for the work of contractors, employees, subcontractors, or agents of the Corps, except when the Corps is acting solely as an invitee of the City, or for any failure to perform by such entities other than as may be required of City hereunder or pursuant to the Easement (defined below) or the O&M Agreement.

2. Under threat of eminent domain with respect to certain real property, BNSF has agreed to cooperate with the City by making the conveyances and donations described herein to allow the Project to proceed on the terms and conditions outlined in this Agreement.

3. The parties have previously entered into the following Preliminary Engineering Services Agreements (collectively, the ***"Preliminary Engineering Agreements"***): Rio de Flag dated as of June 16, 2020; Lone Tree Overpass dated as of January 4, 2022; Milton Underpass/BNSF Bridge dated as of April 19, 2022; and Project Review and City of Flagstaff, Arizona Federal Railroad Administration Grant Assurances March 15, 2024; pursuant to which the City has commenced engineering design of portions of the City-Led Phases of the Project and the Corps has commenced engineering design for the Corps-Led Phases of the Project, all as detailed in these Preliminary Engineering Agreements.

4. The City shall be responsible hereunder for the City-Led Phases of the Project. Except as specifically set forth herein, in the Easement, or the O&M Agreement, or as may exist under the common law, the parties acknowledge and agree that the City shall have no other liability or responsibility whatsoever for the Corps-Led Phases of the Project.

5. Upon completion of initial construction of each Corps-Led Phase and each City-Led Phase other than the Mitigations, City will assume and be responsible for all maintenance and operation of the Project other than the rail facility portions of the Mitigations. This operation and maintenance will be conducted pursuant to this Agreement and the O&M Agreement for all Corps-Led Phases and pursuant to this Agreement and the individual Construction and Maintenance Agreements (each, a ***"CMA"***) for the relevant segment of the City-Led Phases.
6.

AGREEMENT

In consideration of the matters outlined in the Recitals, and other good and valuable consideration exchanged, the sufficiency of which the parties acknowledge, the parties agree as follows:

1. The Recitals set forth above are incorporated into this Agreement as operative provisions.

2. The overall schedule for the Project, broken out by phases (the ***"Schedule"***), is set forth on **Exhibit "B"** attached hereto and incorporated herein. The term of this Agreement shall be perpetual for so long as the City-Led Phases of the Project exist, or any Easement is in effect.
3. The parties agree that BNSF and the City must execute concurrently herewith that certain easement for Phase 4 of the Corps-Led Phases of the Project (the ***"Corps Phase 4 Easement"***) in form and substance as attached hereto as part of **Exhibit "C"** and incorporated herein. The parties agree that BNSF and the City must execute concurrently herewith that certain easement for Phase 5 of the Corps-Led Phases of the Project (the ***"Corps Phase 5 Easement"***) in form and substance as attached hereto as part of **Exhibit "C"** and incorporated herein. The parties agree that BNSF and the City must execute concurrently herewith the O&M Agreement addressing post-completion operation and maintenance of all of the Corps-Led Phases of the Project in the form attached as part of **Exhibit "C"** and incorporated herein (the **"*O&M Agreement").*** The parties further acknowledge that BNSF and the Corps must

execute concurrently herewith that certain Memorandum of Understanding in form and substance satisfactory to BNSF, in its sole discretion (the ***"MOU"***). City represents and warrants to BNSF that it has secured and has met all conditions to obligate for timely expenditure sufficient grant funding to complete the City-Led Phases of the Project in accordance with the terms hereof and the Schedule. The City acknowledges that prior to the Corps or its contractor(s) commencing any work on each and every Corps-Led Phase of the Project: (i) the Corps must furnish to BNSF a certification and warranty satisfactory to BNSF, in its sole discretion, that all funding to complete such Corps-Led Phase or Phases has been secured by the Corps and allocated to the Project for timely expenditure in accordance with the Schedule, and (ii) all contractor(s) for each Corps-Led Phase to be commenced must have executed and complied to such date with their respective General License with BNSF in the form attached to the MOU. Prior to the City commencing any work on any City-Led Phase of the Project, the following other agreements, forms of which are attached hereto under **Exhibit "C"** and incorporated herein, along with any other agreements specified in any of the attached agreements, must be fully executed, with the City and its contractor(s) being unconditionally obligated to complete the work described in such agreements in accordance with the Schedule and the plans and specifications approved by BNSF pursuant to the Preliminary Engineering Agreements.

A. A Construction and Maintenance Agreement (including all exhibits thereto) (herein generically referred to as a "***CMA***") between BNSF and the City for the Lone Tree Overpass segment of the Project,
B. A CMA (including all exhibits thereto) between BNSF and the City for the (i) Milton Bridge, (ii) Florence to Walnut, and (iii) grading work for passing siding CTC construction and related facilities through Beaver and San Francisco segments of the Project (known herein as the "Downtown Mile" segment); and

C. The Purchase and Sale Agreement (s) between the City and BNSF for _____ _____.
(the ***Purchase and Sale Agreement (s))*.**

Each CMA will detail needed conveyance(s) to the City for City-Led Phases of the Project of fee title or easements, as specified, required to complete the segment(s) of the Project described in the CMA. BNSF shall convey such fee or easement(s), as applicable pursuant to the Purchase and Sale Agreement(s), in consideration of the delivery to BNSF of certain relocation proceeds and the Mitigations (defined below) which themselves are relocations proceeds and are described herein. Such grants will be made by BNSF after all pre-conditions of this Agreement and all other agreements and grants listed herein between the City and BNSF are fulfilled. For relevant segments, each CMA will also provide for the conveyance of fee title to property to BNSF where required to ensure BNSF owns all property under any rail and related improvements to be constructed as part of the Project, pursuant to deeds in the form of **Exhibit "F"** attached. If there is any conflict between the payment terms of this Agreement and any specific payment terms contained in any CMA, the specific terms of the CMA shall control.

4. Before commencing any part of any City-Led Phase of the Project, City shall require each of its contractors on the Project, at its expense, to furnish to BNSF fully executed Performance and Payment Bonds in a form acceptable to BNSF issued by a surety or sureties approved by BNSF, in the amount of $125,000,000.00 as security for the faithful performance of this Agreement and all CMAs under which such contractor will be working, and for the payment of all persons or entities performing labor or furnishing materials or equipment in connection with the relevant City-Led Phases of the Project. These bonds must guarantee City's and the contractor's complete performance of the City-Led Phases in accordance with this Agreement, the relevant CMA and the plans and specifications for each segment required to be approved by BNSF pursuant to the respective CMA in strict accordance with the Schedule.

The City acknowledges that the CMAs may feature further conditions precedent to the commencement of work on any segment of any City-Led Phase; provided, however, no CMAs shall modify or amend any of the indemnity provisions of this Agreement. Unless City agrees to such conditions, no work may proceed on the Project.

5. This Agreement, each CMA and the grant of each Easement will be fully contingent upon the City's unconditional agreement to provide all of the following Mitigations in strict accordance with plans and specifications approved by BNSF in its sole discretion and pursuant to the Preliminary Engineering Agreements or otherwise in writing and the Schedule to ensure BNSF's continuous, unimpaired ability to operate safely and bi-directionally through all areas of the Project during the entire period of development and construction (the ***"Mitigations"***). In addition, each CMA will require, as a condition precedent to commencement of any work on a particular segment of the Project as described in such CMA, that certain Mitigations be fully completed prior to work on that segment commencing, all as described in such CMA. All Mitigations are in consideration of the various real property grants and conveyances BNSF will make as described in this Agreement and represent the proceeds from BNSF's relocation needed to allow the Project to proceed. The Mitigations, which are set forth below, are further described in detail on ***"*****Exhibit A-1*****"***:

a. All grading, drainage, and other work up to and including, without limitation, the placing of sub-ballast for a passing siding and relocated tracks in the locations and of the condition described on "**Exhibit A-1**" and acceptable to BNSF in its sole discretion after inspection (the ***"Passing Siding and Relocated Tracks")***;
b. Certain standby surfacing equipment and a material set at a location to be designated by BNSF and as further described on ***"*****Exhibit A-1*****"*** ;
c. Relocation of BNSF customer party specified in ***"*****Exhibit A-1*****"*** as directed by BNSF;
d. Acquisition by the City under threat of eminent domain of the Downtown Property (as defined below);
e. A passenger platform and related real property for Amtrak service on the south side of BNSF's existing mainline as further described on "**Exhibit A-1";**
f. A fully funded action plan by the City for near-term improvements to prevent grade crossing accidents and trespassers;
g. All permitting and utility relocations for all work on or related to the Project, including, without limitation, all fiber optics relocations other than of BNSF's own

fiber optic facilities, and reimbursement of any sums required to be reimbursed to relocated fiber optic companies or other utilities with any such relocations proposed to be onto BNSF's property meeting such requirements as provided herein; and

h. (Intentionally Deleted.)

i. Prompt payment in full to BNSF of all invoices from BNSF for all direct and indirect costs of all placement and construction of ballast, ties, track, signals and any related improvements for the Passing Siding and Relocated Tracks to be fully operational, as well as the relocation of all BNSF-owned fiber optic lines. Such reimbursement must be made by City in full within thirty (30) days of BNSF's delivery of each invoice. Late reimbursement payments shall bear interest at the rate of _____ per annum, pro-rated for the period for which a payment is late.

6. Except as may be provided otherwise in any CMA, City shall furnish (via its contractor(s) or otherwise) the necessary materials, superintendence, labor, tools, equipment and transportation for and shall expeditiously perform and complete (via its contractor(s) or otherwise) all work and services necessary to complete work on the City-Led Phases of the Project and deliver the Mitigations to BNSF; all in a good and workmanlike manner and in accordance with the highest generally accepted national standards of care applicable to work and services of such types and in strict conformance to the plans and specifications approved by BNSF pursuant to the Preliminary Engineering Agreements and the Schedule and in strict accordance with BNSF's construction specifications and requirements furnished to the City. Prior to delivering any proposed plans and specifications to BNSF for its review and approval, including, without limitation, any bridge plans as further described below, the City must ensure that all such plans and specifications for all City-Led Phases , whether designed by or for it , are complete and appropriate for the proposed construction depicted thereon and require construction of the standards specified herein and in accordance with all BNSF construction specifications and other requirements delivered to City and shall so mark all plans and specifications. The City shall convey to BNSF ownership and all intellectual property rights held by the City in and to the plans and specifications covering all rail-improvement Mitigations, including, without limitation, the Amtrak platform(s) described in the plans and specifications or forming part of the Mitigations. Notwithstanding anything herein to the contrary, should BNSF determine, in its sole discretion, that any portion of the Project is not being prosecuted in a proper and timely fashion as required hereunder and/or under the General License with the result that BNSF's operation, activities, the Mitigations or the drainage affecting its right-of-way, properties or facilities are negatively affected, BNSF may, but is not obligated to, call upon the bonds required hereunder and in the General License and may self-perform or have performed such work or services.

7. Indemnification and Insurance.

To the fullest extent allowed by applicable law, City shall release, indemnify, defend and hold harmless BNSF and its officers, employees, subcontractors, agents, licensees, invitees, affiliates and subsidiaries (collectively, with BNSF, the *"BNSF Indemnified Parties"*) from any and all judgments, awards, claims, demands, damages, fines or other governmental penalties of any type, and expenses (including attorneys' and experts' fees) related to: injury or death to all persons, including, without limitation, the BNSF Indemnified Parties; the City's or its contractor(s)'employees,

subcontractors, agents, or invitees (collectively, with City and its contractor(s), the *"City Persons"*); and any third party, the Corps' contractor(s) or the Corps, or any employee, subcontractor, agent or invitees of any such third party, the Corps' contractor(s) or the Corps; and/or loss and damage to property belonging to any person, or the enforcement or alleged enforcement actions, demands for investigation, and/or penalties issued by any governmental authority (collectively, *"Claims"*), arising in any manner from or relating to acts or omissions of the City, or its invitees and relating to: (i) the City-Led Phases of the Project; (ii) the City or its invitee's acts or omissions or failure to perform any obligation under this Agreement, the Easements, the O&M Agreement or any CMA; (iv) City, or its invitee's failure to comply with Laws (as defined below), or (v) the environmental condition or status of any property or right of way caused by or contributed to by City, or its invitees, EXCEPT TO THE EXTENT SUCH CLAIMS ARISE FROM OR ARE RELATED TO OR ARE ALLEGED TO ARISE FROM OR BE RELATED TO BNSF'S OWN NEGLIGENCE, OR WILLFUL MISCONDUCT.

TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW AND LIMITED BY THE TERMS ABOVE IN THIS SECTION 7, THE INDEMNIFICATION OBLIGATION ASSUMED BY CITY INCLUDES ANY CLAIMS BROUGHT AGAINST THE BNSF INDEMNIFIED PARTIES (I) UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT OR STATE-BASED WORKERS' COMPENSATION LAWS AND REGULATIONS, UNDER WHICH A CITY PERSON ALLEGES THAT HE OR SHE IS A RAILROAD EMPLOYEE AND (II) UNDER ENVIRONMENTAL LAWS, OR CLAIMS FOR STRICT LIABILITY UNDER ANY STATE OR FEDERAL STATUTE IMPOSING STRICT LIABILITY. City fully realizes that the presence of City Persons or others, on or near BNSF property involves danger and risk to such persons, including the possibility of injury or death of such persons and/or another person and damage to or loss of its own and others' property.

EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, NOTHING IN THIS AGREEMENT OR OTHER PROJECT AGREEMENTS SHALL ALTER IN ANY WAY ANY RIGHTS THE CITY MAY HAVE AGAINST BNSF UNDER COMMON LAW.

A. City shall, at its sole cost and expense, procure and maintain during the term of this Agreement the following insurance coverage:

1. <u>Commercial General Liability "CGL" Insurance</u>

a. The policy will provide a minimum coverage of $15,000,000 per occurrence and an aggregate limit of at least $ 19,000,000 but in no event will the coverage be in an amount less than the amount otherwise carried by City. 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
- Contractual Liability for an "Insured Contract" consistent with the definition under the standard ISO general liability policy form

b. The policy will include the following endorsements or language, which will be indicated on or attached to the certificate of insurance:

- The definition of "Insured Contract" will be amended to remove any exclusion or other limitation for any work being done within 50 feet of BNSF's property;
- Waiver of subrogation in favor of and acceptable to BNSF;
- Additional insured endorsement in favor of and acceptable to BNSF and include coverage for ongoing operations and completed operations;
- Separation of insureds; and
- The policy will be primary and non-contributing with respect to any insurance carried by BNSF.

c. The parties agree that the workers' compensation and employers' liability related exclusions in the CGL policy(s) are intended to apply to employees of the policy holder and will not apply to BNSF employees, contractor employees, subcontractor employees or Corps' employees.

d. No other endorsements that limit coverage with respect to City's obligations under this Agreement or Services may be included on the policy.

2. <u>Business Automobile Liability Insurance</u>.

a. The insurance will provide minimum coverage with a combined single limit of at least $1,000,000 per accident, and include coverage for, but not limited to the following:
   - Bodily injury and property damage
   - Any and all vehicles owned, used or hired

b. The policy will include the following endorsements or language, which will be indicated on or attached to the certificate of insurance:
   - Waiver of subrogation in favor of and acceptable to BNSF;
   - Additional insured endorsement in favor of and acceptable to BNSF;
   - Separation of insureds;
   - The policy shall be primary and non-contributing with respect to any insurance carried by BNSF.

3. <u>Workers Compensation and Employers Liability Insurance</u>

a. The policy will provide coverage of all City employees performing any part of the Project including coverage for, but not limited to:

- City's statutory liability under the workers' compensation laws of the state(s) in which the Project will be performed. The policy will cover all of City's employees, regardless of whether such coverage is optional under the law of that state(s).

- Employers' Liability (Part B) with limits of at least $500,000 per accident, $500,000 by disease policy limit, $500,000 by disease each employee.

b. The policy will include the following endorsements or language, which shall be indicated on or attached to the certificate of insurance:
    - Waiver of subrogation in favor of and acceptable to BNSF.

4. Professional Liability Insurance

a. Professional Liability Insurance, as will protect City from damage resulting from negligent error, omission or acts of City, its agents, officers and employees in the performance of any professional services rendered under or related to this Agreement and for which he is legally liable. Such policy of insurance shall be in an amount not less than $5,000,000 per claim.

5. Railroad Protective Insurance

The policy will name only BNSF as the Insured and will provide coverage of at least $5,000,000 per occurrence and $10,000,000 in the aggregate. The policy will be issued on a standard ISO form CG 00 35 12 04 and include the following:

- Endorsed to include the Pollution Exclusion Amendment
- Endorsed to include the Limited Seepage and Pollution Endorsement.
- Endorsed to remove any exclusion for punitive damages.
- Endorsed to include Evacuation Expense Coverage Endorsement.
- No other endorsements restricting coverage may be added.
- The original policy must be provided to BNSF and City shall not perform or allow performance of any part of the Project or work of any kind under or related to this Agreement until BNSF has reviewed and approved the policy.
- The definition of "Physical Damage to Property" will be endorsed to read: "means direct and accidental loss of or damage to all property owned by any named insured and all property in any named insured' care, custody, and control (including, but not limited to rolling stock and their contents, mechanical construction equipment or motive power equipment, railroad tracks, roadbeds, catenaries, signals, tunnels, bridges and buildings) arising out of the acts or omissions of the contractor named on the Declarations.

In lieu of providing a RPLI policy, City may participate in BNSF's Blanket Railroad Protective Liability Insurance Policy available to City or its contractor. The limits of coverage are the same as above. If City wishes to participate in the BNSF Blanket Railroad protective program, please complete the attached application and send to Marsh, USA at the address/contact information listed on the application.

- ❑ I **elect** to participate in BNSF's Blanket Policy;
- ❑ I **elect not** to participate in BNSF's Blanket Policy.

6. Other Requirements of all policies:

a. Where allowable by law, no exclusions for punitive damages may be included in any policy.

b. Only with respect to this Agreement, the O&M Agreement and any CMAs, City agrees to waive its right of recovery against BNSF for all claims and suits against BNSF. City further waives its right of recovery, and its insurers also waive their right of subrogation against BNSF for loss of its owned or leased property or property under City's care, custody or control. c. Allocated Loss Expense, including but not limited to defense costs and expenses, will be in addition to all policy limits for coverages under the insurance requirements.

d. In the event the City elects to self-insure during the term of this Agreement, the City shall maintain the same coverage levels set forth in this Agreement. If the City elects to self-insure, the City shall notify BNSF pursuant to the notice term(s) of this Agreement. In the event the City elects to self-insure, the City shall remain liable for any and all BNSF liabilities that would otherwise be covered by City's insurance in accordance with the provisions of this Agreement.

e. Prior to commencing any services or other work under this Agreement, City shall furnish to BNSF an acceptable certificate(s) of insurance from an authorized representative evidencing the required coverage(s), endorsements, and amendments.

f. City shall notify BNSF in writing at least 30 days prior to any cancellation, non-renewal, or substitution.

g. Any insurance policy shall be written by a reputable insurance company acceptable to BNSF 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.

h. If the coverage provided by any of the insurance policies required by this Agreement is purchased on a "claims made" basis, City hereby agrees to maintain coverage in force for a minimum of three years after expiration, cancellation or termination of this Agreement.

i. City agrees to provide evidence to BNSF that it has the required coverage in place at least annually or in the event of a renewal or material change of coverage.

j. City represents that this Agreement has been thoroughly reviewed by City's insurance agent(s)/broker(s), and that City has instructed them to procure the insurance coverage required by this Agreement.

k. Not more frequently than once every five years, BNSF may request the City reasonably modify the Insurance Requirements to reflect the then-current risk management practices in the railroad industry and underwriting practices in the insurance industry; City shall not unreasonably deny such request.

l. If City will contract for any portion of the Project, City shall require that its contractor(s) comply with **Exhibit "C"** to each CMA and execute the agreement set forth on **Exhibit "C-1"** to such CMA with BNSF and provide the insurance and otherwise comply with the risk provisions therein.

m. If any insurance documentation provided by the City fails to meet the requirements of

this section, BNSF shall inform the City, specifically identifying any such failures, and may require an immediate cessation of work and thereafter shall provide the City a ten (10) day period to cure such failure, or such longer period as BNSF and City may agree to in writing. If the City fails to cure within such ten (10) day period or any such longer agreed-upon period, BNSF may terminate this Agreement. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of City's obligations hereunder.

n. The fact that City obtains insurance (including, without limitation, self-insurance) shall not release or diminish City's liabilities or obligations including, without limitation, the liabilities and obligations under the indemnity provisions of this Agreement. Damages recoverable by BNSF shall not be limited by the amount of the required insurance coverage.

o. In the event of a claim or lawsuit involving BNSF arising out of this Agreement, City will make the policy covering such claims or lawsuits available to BNSF.

p. If City maintains broader coverage and/or higher limits than the minimum requirements in this Agreement, BNSF requires and shall be entitled to the broader coverage and/or the higher limits. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to BNSF.

q. These insurance provisions are intended to be a separate and distinct obligation on the part of City. Therefore, these provisions shall be enforceable, and City shall be bound thereby regardless of whether or not indemnity provisions are determined to be enforceable in the jurisdiction in which the Services or other work is performed under this Agreement.

r. For purposes of this section, BNSF shall mean "Burlington Northern Santa Fe, LLC", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

8. After receiving written notice of a pending Claim from a BNSF Indemnified Party for which City is obligated to indemnify the BNSF Indemnified Parties, City shall adjust and settle the Claim, subject to BNSF's approval in its sole discretion. If City is unable to settle the Claim and the Claim results in litigation against the BNSF Indemnified Party(ies), the BNSF Indemnified Parties may forward the summons, complaint, and other process to City. After receiving the summons, complaint, and other process from the BNSF Indemnified Party, City shall appear on the BNSF Indemnified Party's(ies') behalf and defend, adjust, or settle such Claim, subject to BNSF's approval in its sole discretion.

9. If any indemnification provision in this Agreement is held to be unenforceable, then that provision will be modified to the minimum extent necessary to make it enforceable. The parties acknowledge that the indemnification obligations and assumption of liabilities set forth in this section will survive any termination or expiration of this Agreement.

10. To the fullest extent allowed by applicable law, City shall also defend, indemnify and hold harmless BNSF Indemnified Parties from all Claims to the extent arising out of or resulting from a claim or allegation that any work or services provided by the City on the City-Led Phases infringes any intellectual property right of a third party, including any services performed under the Preliminary Engineering Agreements. If any such work or services, or any portion of the same, is found to be infringing or its use is enjoined, threatened to be enjoined or the subject of an infringement claim, City shall promptly, at its sole expense: (i) secure for BNSF the right to continue to use all portions of the work and services forming any part of the City-Led Phases, including, without limitation the Mitigations, or otherwise affecting BNSF property or service, to the full extent contemplated by this Agreement; or (ii) modify or replace any actually infringing portions of the

work or services to make all portions of the same non-infringing while providing fully equivalent features and functionality.

11. City shall ensure that all work and services for any City-Led Phases on or affecting BNSF property or on property to be conveyed to BNSF hereunder upon completion of any work, including all of the same performed pursuant to any easement granted by BNSF and all work related to the Mitigations, shall be performed in a safe, diligent, skillful, and workmanlike manner and in accordance with the highest generally accepted national practices and standards applicable to work and services of the types involved. City shall require that its contractor(s) use the equipment, technical competence, financial capacity, management skills, and qualified personnel necessary to comply with the duties, responsibilities, and obligations hereunder. City warrants that the work and services for any City-Led Phases and all Mitigations will comply with all Laws, written standards, review protocols, and BNSF written standards, specifications, requirements, policies and guidelines delivered to City.

City shall have a background investigation performed in accordance with the rail industry background screening criteria defined by the eRailSafe program (outlined at http://www.erailsafe.com) and all other applicable regulatory requirements on all of City employees, who: require access to BNSF property for performance of City's obligations under this Agreement, require access to BNSF critical infrastructure, BNSF critical information systems, BNSF employees, hazardous materials that are on BNSF property or are being transported by or otherwise in the custody of BNSF, or freight in transit involving BNSF for performance of City's obligations under this Agreement; or are required by BNSF to undergo a background investigation, as determined in BNSF's sole discretion.

City shall obtain written consent from all City employees screened in compliance with the eRailSafe program to participate in the program and to release completed background information to BNSF's designee. BNSF may audit City's records to ensure compliance.

City shall not permit any City employees to perform on City's behalf without first being approved under the standards set forth in the eRailSafe program. BNSF may deny entry onto its premises or access as described in this section to any City Persons (i) who do not visibly display at all times the authorized identification badge meeting the standards set forth in the eRailSafe program, or (ii) who in BNSF's reasonable opinion, may pose a threat to the safety or security of BNSF's operations, assets or personnel.

City shall ensure that City employees are United States citizens or are legally working in the United States under a lawful and appropriate work visa or other work authorization.

Before any City Person may enter BNSF property, City, at its own expense shall and shall require all its contractor(s) and City Persons to: (1) register with Browz at http://www.bnsfcontractor.com and (2) comply with the requirements set forth above in the sections addressing eRailSafe (3) register for and complete BNSF's Contractor Safety Orientation (the "Safety Orientation"), available at http://www.bnsfcontractor.com and: (a) obtain a copy of BNSF's Safety Rules; and (b) complete and electronically submit a Safety Action Plan, (4) provide BNSF's project manager with a hardcopy of the Safety Action Plan, (5) maintain a hardcopy of the completed Safety Action Plan with each of City's and its contractor(s) on-site work groups, and (6) ensure that each City Person possesses a card certifying completion of the Safety Orientation before entering BNSF property. City shall and shall require its contractor(s) to renew the Safety Orientation annually. The parties intend that City will have ultimate responsibility for supervision, safe work methods, and practices of City contractor(s), employees, subcontractors, agents and any other City Persons.

12. City warrants that all materials, supplies and equipment installed, used, or incorporated into the work and services for all City-Led Phases and all Mitigations will meet BNSF's specifications and will comply with all applicable Laws. Without relieving City of its obligation to provide BNSF with products and completed operations insurance coverage hereunder, City further warrants that such materials, supplies, equipment, services and construction work forming any part of the City-Led Phases, including, without limitation, the Mitigations, will be and remain free from defects in material and workmanship for the earlier of (i) two years from the date of BNSF's final acceptance of all Mitigations or (ii) one year after revenue service for freight of all tracks and related facilities provided in whole or in part by City. City shall, promptly and at City's expense, make any necessary repairs or corrections, or replacements of parts, to any of the materials, supplies, equipment, services or construction work forming any part of the City-Led Phases, including, without limitation the Mitigations, after receipt of BNSF's notice that such action is required for the City-Led Phases or any part thereof, including, without limitation, the Mitigations, to function as intended. The foregoing warranty and requirements is in addition to and not in derogation of City's responsibility for operation and maintenance of the Project as set forth in the Operation and Maintenance Agreement. 13. To the extent any chemical products are used for any City-Led Phases on BNSF property, or any property to be conveyed to BNSF pursuant to this Agreement, or are used in a manner that may otherwise result in exposure to BNSF and its employees, City will use and require use of or provide products on BNSF's approved product list (which shall be provided to the City and its contractors who have entered into agreements with BNSF no later than thirty (30) days after the Effective Date if to City and no later than thirty (30) days after execution of its agreement with BNSF if to a City contractor) or, for products not on the list, City will and will require its contractor(s) to work with BNSF to obtain approval through the BNSF Product Approval Assessment Process managed by the BNSF Industrial Hygiene Department, before such products are brought onto BNSF property. If requested by BNSF, City shall promptly provide safety information related to any products provided or utilized on or affecting BNSF property or property to be conveyed to BNSF pursuant to this Agreement during the performance of any work or services for any City-Led Phases, including, without limitation, the Mitigations. The following materials and substances are strictly prohibited from BNSF property or property to be conveyed to BNSF pursuant to this Agreement: chlorinated solvents, recalcitrant industrial-organic solvents as specifically identified by BNSF, Poison by Inhalation or Toxic by Inhalation (***"PIH, TIH"***) materials, anhydrous ammonia and any products that are known based on a review of applicable safety data sheets by any City Person to contain per-and polyfluoroalkyl substances (commonly referred to as ***"PFAS"***) (including perfluorooctane sulfonate (***"PFOS"***) and perfluorooctanioic acid ***("PFOA"***)).

If any City Person discovers the release of any hazardous material, hazardous waste, hazardous substance, oil, petroleum product, or other deleterious material ("***Hazardous Material***"), including but not limited to any non-containerized commodity or material, on or adjacent to BNSF's property, property to be conveyed to BNSF hereunder, or the Mitigations, or in or near any surface water, swamp, wetlands, or waterway, on or adjacent to BNSF's property while performing work, services or Mitigations, City shall immediately: (a) notify BNSF of such discovery by calling BNSF's Resource Operations Center at (800) 832-5452; (b) take safeguards necessary to protect all City Persons, BNSF Indemnified Parties, and third parties; and (c) exercise due care with respect to the release, including taking all appropriate measures under the circumstances to minimize the impact to BNSF property, facilities or operations of such release. If stained soil, odors, or environmentally impacted material is found during any work, activities must stop until the BNSF Manager Environmental Remediation ("***MER"***) has approved continuation of activities. City shall have appropriate equipment and training to minimize and/or respond to spills and releases. Except as set forth in this paragraph, and notwithstanding anything to the contrary herein, the City shall have no liability or responsibility for any Hazardous materials existing on property owned or controlled by

BNSF (***"Pre-Existing Condition"***). To be clear, if the City discovers any Pre-Existing Condition or contamination, it shall immediately inform BNSF as specified above, shall take safeguards necessary to protect all City Persons, BNSF Indemnified Parties and third parties, and shall exercise due care with respect to the release, including taking all appropriate measures under the circumstances to minimize the impact to BNSF property, facilities or operations of such release, and so long as City complies with the foregoing, the City shall have no liability or responsibility to further investigate or remediate any such Pre-Existing Contamination.

All products, materials, and wastes discovered, used or generated for any City-Led Phases shall be appropriately stored, staged, and managed using best management practices so as not to impact the surrounding areas, nearby waterways, or wetlands, and shall not be placed in ditches, areas susceptible to flooding or accumulation of water, or near stormwater drains or outfalls. City shall not treat, dispose, release, or exacerbate a release of any Hazardous Materials on BNSF property, property to be conveyed to BNSF hereunder, the Mitigations or adjacent property. All waste materials discovered or generated by City Persons while performing work, services or the Mitigations, including but not limited to any excavated soils, impacted soils, piping, asphalt, concrete, sludge, and electronic waste, shall be properly characterized, staged, handled, managed, stored, transported, and removed or disposed of in compliance with all Laws by City and in coordination with BNSF's Manager of Environmental Operations ("***MEO"***) or BNSF's MER; provided, however, in the event City or any City Persons discover soil impacted with Hazardous Materials (which City or City Persons have not generated), the City's obligations with respect to such impacted soils is limited to excavation and proper disposal of such impacted soils in the immediate area of or abutting or connected to the discovered impacted soils and the City shall not be required to conduct any sampling or other investigation to further delineate the extent of impacts to areas not abutting or connected to the discovered impacted soils; and further provided, the City shall have no liability or responsibility with respect to discovery of any impacted groundwater except if the City or City Persons is or are responsible for a release of Hazardous Materials to the groundwater. . In connection with any City-Led Phases, City shall manage, in coordination with BNSF's MEO, any treated wood encountered or involved in the work, services or Mitigations on property owned or controlled by BNSF. City is responsible to know the permitted and/or approved boundaries of work, services and Mitigations. Performing activities outside those boundaries by any City Person is prohibited. Containers must remain closed (except when removing or adding material) and be labeled with the contents and any legally-required hazard communication information. External dumpsters must be covered, except when adding waste. Appropriate and approved dust control practices shall be used to minimize blowing soil or dust. City shall not wash parts, equipment, or vehicles within BNSF property, property to be conveyed to BNSF pursuant to this Agreement or the Mitigations.

To the extent waste, including but not limited to any excavated soils, impacted soils, piping, asphalt, concrete, sludge, and electronic waste, or Hazardous Materials are generated by City or City Persons as part of its work or services, final disposition and site selection shall be at BNSF's sole discretion, unless otherwise approved by BNSF in writing. Neither City nor its contractor(s) may execute any documents relating to the recycling or disposal of any waste or Hazardous Materials on behalf of BNSF without prior written authorization from BNSF's General Director Environmental, or his duly authorized representative.

For any importation of off-site soil or aggregate materials by any City Person under this Agreement onto BNSF property or property to be conveyed to BNSF hereunder, City shall require such City Persons source the materials from a BNSF-approved supplier under contract or provide a certification of clean material.

No parts, vehicle, or equipment washing is allowed on the BNSF property, property to be conveyed to BNSF hereunder or the Mitigations.

Prior to any City Person commencing any demolition or renovation activities, including but not limited to removal of any load-bearing member, City shall (i) confirm that an asbestos evaluation has been completed, by a properly licensed individual, for the building, bridge, and/or any structures or components to be disturbed; (ii) contact the BNSF MEO if no asbestos evaluation has been performed and refrain from any work until one is completed; (iii) confirm with the BNSF MEO that asbestos abatement or removal was completed if any asbestos, asbestos containing material ***("ACM")***, or presumed ACM (***"PACM"***) was identified in the evaluation and may be disturbed during City-Led Phases activities; (iv) ensure all applicable pre-work notifications have been filed with the appropriate governmental agency within regulatory timeframes; and (v) ensure appropriately-licensed personnel are onsite for the work, services and Mitigations. For all demolitions for any City-Led Phases, regardless of the presence of asbestos, City is responsible for ensuring the National Emission Standards for Hazardous Air Pollutants (***"NESHAP"***) 10-working day notice has been timely filed.

If any City Persons will perform any sampling, abatement, removal, or disturbance of asbestos, ACM, or PACM as part of the work, services or Mitigations, such work shall be conducted by appropriately licensed personnel or contractors certified in the state where the work, services and Mitigations will occur. City shall not otherwise sample, remove, abate, disturb, or cause to be disturbed, any asbestos, ACM, or PACM. If during the work on any City-Led Phases on or adjacent to BNSF property, property to be conveyed to BNSF pursuant to this Agreement or the Mitigations, asbestos or ACM is discovered, detected, or suspected, all such demolition or renovation work must cease and the BNSF MEO shall be notified immediately.

SUBJECT TO THE CONDITIONS AND LIMITATIONS IN THIS SECTION 13, IN ADDITION TO THE RELEASE OF LIABILITY AND INDEMNITY PROVISIONS OF THIS AGREEMENT, IF ANY CITY EMPLOYEE, OR INVITEE FAILS TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION 13, TO THE EXTENT ALLOWED BY LAW, CITY SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS BNSF AND THE BNSF INDEMNIFIED PARTIES FROM ANY AND ALL FINES, PENALTIES, AND CLAIMS, INCLUDING WITHOUT LIMITATION ANY PERSONAL INJURY CLAIMS, ENFORCEMENT OR RELATED PROCEEDINGS, AND CITY SHALL BE RESPONSIBLE AT ITS SOLE COST AND EXPENSE FOR INSPECTION, REMEDIATION, AND ABATEMENT OF THE DISTURBED AREA AND INTERRUPTION OF USE OR SERVICE OF THE AFFECTED AREA EXCEPT TO THE EXTENT CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF BNSF. 14. City shall deliver the City-Led Phases, work, services and Mitigations to BNSF free from all claims and liens. City shall ensure that its contractor(s)s and other persons who furnish labor, services, or materials in connection with the City-Led Phases work, services or Mitigations are paid promptly and must obtain conditional lien waivers at each payment and a final lien waiver upon completion of all work, services and Mitigations. Should any lien be filed against any BNSF property related to any activities by or for City hereunder, or related to any taxes that are the responsibility of City, City must promptly pay and discharge the same. If City fails to do so in a timely manner, BNSF may pay and discharge any such lien or claim and City must promptly reimburse BNSF its costs associated with doing so, even if there is a dispute between City and its contractor(s) or person asserting the claim or lien. To the fullest extent allowed under applicable law, City shall indemnify and defend BNSF against any loss or damage BNSF may suffer or become liable for in connection with any claim or lien for any City-Led Phases.

15. BNSF shall have the right to inspect all Mitigations in progress at any time upon reasonable advance notice to City and its contractor(s). With respect to any City-Led Phases, upon receiving written notice from BNSF, City shall remove any services, work or materials found unacceptable by

BNSF in its sole discretion, and promptly rebuild or replace the same to BNSF's satisfaction in its sole discretion at no cost to BNSF. Any failure of BNSF to disapprove or reject any City-Led Phase services, work, materials or Mitigations will not constitute an acceptance of such services, work, materials or Mitigations. BNSF may require any defective work or material on a City-Led Phase or a Mitigation to be taken out and rebuilt or replaced at the expense of City at any time within two years from the earlier of (i) the date of final acceptance of all the Mitigations by BNSF or (ii) the date of full entry into revenue service for freight of all tracks and related facilities provided in whole or in part by City. This right will not waive any other rights at law or in equity BNSF has with respect to any defective or substandard materials or workmanship.

16. As relates only to any action or inaction by City or its invitees and regarding any City-Led Phase, City shall ensure BNSF's ability to perform continuous, unimpaired bi-directional operation on its Seligman Subdivision between MP 342 and MP 345 during all phases of the development and construction of the City-Led Phase. In addition to bonds required herein, various insurance and credit enhancement products may be specified in any individual CMA to support these obligations. Any determination of interruption or impairment will be made by BNSF in its sole and absolute discretion. Should BNSF's continuous, unimpaired, bi-directional train operation be impaired by activities or omissions of the City, or its invitees or should BNSF suffer any claim, loss or liability related to such activities or omissions (collectively "Operational Delays"), then to the extent any Operational Delays are caused by acts or omissions of the City or its invitees, and only to the extent allowed by law, the City will be liable to BNSF for all train and freight or passenger delay damages, fines, penalties, losses, damages, lost profits of BNSF, costs incurred by BNSF to reroute trains, claims (formal or informal), actions, suits, demands, costs, liabilities, injuries, charges, cleanups, removals or remediations of materials, judgments, fines, fees (including, without limitation, reasonable attorneys' fees) and expenses of every character (including, without limitation, amounts paid under any state or federal workers compensation law, and costs of investigation, defense expenses at arbitration, trial or appeal and without institution of arbitration or suit, and, with respect to damage or destruction of property, cleanup, repair and replacement expenses) of any nature arising from, in connection with or incidental or related to among other things, loss or destruction of or damage to property (including real property and improvements thereon, and personal property, including injury or death to animals, and including property of the parties and of third parties) and injury to and death of persons (including officers, directors, agents, employees, contractors, invitees, licensees, customers, passengers or patrons of any of the parties or third parties.

In addition to its right to receive damages as described above, BNSF may, in cases of train delay or operational impairment, upon _____ (__) days' notice to City, enter upon any Project area of any City-Led Phases, or other property of the City where any City-Led Phases are being conducted, to complete or correct any element of any City-Led Phases (including, without limitation, any Mitigation) or other item related to any element of City-Led Phases that is not being completed in accordance with the plans and specifications approved by BNSF pursuant to the Preliminary Engineering Agreements or the milestones set forth in the Schedule or in the manner as otherwise required hereunder and which is causing or contributing to train or operational disruption, impairment or delays. Should BNSF exercise this right to enter and complete any work on any City-Led Phases, BNSF shall invoice the City the actual costs of the same, and City shall promptly reimburse BNSF all costs incurred, or labor and overhead rates assessed (if work is performed with BNSF's own forces).

17. BNSF shall retain exclusive authority to manage, direct, and control all activity related to passenger or freight rail service, including, without limitation, the operations of all trains and rail equipment, the movement and speed of the same, and the right to expand capacity within any BNSF right of way. City agrees that it will have no right to enter, use or possess any portion of any property

of BNSF or to construct, maintain or operate any improvements, facilities or structures except to the extent provided for in the Easements, any CMA or the O&M Agreement. City acknowledges that the Corps' contractor(s) will have no right to enter, use or possess any portion of any property of BNSF or to construct, maintain or operate any improvements, facilities or structures except to the extent provided for in the MOU, Easements and the General Licenses.

18. The parties acknowledge that various permits at the local, state and federal levels will be required for the Project. City shall prepare first drafts of the applications and all supporting materials for all such permits, and shall be responsible for obtaining the same in a timely manner to comply with the Schedule. BNSF will have the right to review and consent to, in its sole discretion, all designs and other materials contained in all such permit applications that relate to or could in any way affect BNSF or its operations or property, as determined by BNSF in its sole discretion, before any applications are submitted, including without limitation any operations and maintenance plans related to flood control. To facilitate the foregoing, the parties will include a permitting schedule as part of the Schedule, setting forth the deadlines by when City must submit all such permits and materials to BNSF for its review and approvals, as well as the timeframes by which BNSF must respond with its approvals or required changes. BNSF's written approval(s) of all such permits or materials, in its sole discretion, must be obtained by City before any work on the relevant phase or segment of the Project can commence. City shall thereafter update and maintain all applicable permits, as required by Law and shall be responsible for all future obligations, including maintenance, and any expenses thereto related to any permits, the Project, or Mitigations. In no event shall BNSF be responsible for compliance with or obligations under any permits.

19. A material default hereunder, under the O&M Agreement, an Easement or any CMA (as determined by BNSF in its sole discretion) will constitute a default hereunder and under all CMAs, the Easements and the O&M Agreement, with BNSF entitled, among all other remedies available under this Agreement, the Easements and the O&M Agreement or at law or in equity, (i) to enforce specific performance of any unfulfilled obligation; (ii) to stop the performance of work on any or all City-Led Phases of the Project as BNSF may elect, in its sole discretion, whether such work is being performed by the City or its contractor(s), and/or (iii) to enter and perform any work including, without limitation, any maintenance, repair or corrective work, to have been performed by the City or its contractor(s) and invoice the relevant party as described in herein, in the CMA or the O&M Agreement; provided, however, BNSF shall not be entitled to invoice the City for the same work under each of this Agreement, the O&M Agreement, an Easement or any CMA, rather BNSF is entitled to a single reimbursement for each default not multiple recoveries for a single default. Further, should BNSF elect (i) enforce specific performance; (ii) to stop work on any City-Led Phase of the Project pursuant to this Agreement, or any CMA, or (iii) to enter to perform any work, including, without limitation, any maintenance, repair or corrective work, on any element of any segment of the Project, then BNSF shall have the right to stop work on all or any other City-Led Phases of the Project as BNSF may elect, in its sole discretion. BNSF may also terminate any Easement for such a default as described in this section if City or City Persons either (x) fail or refuse properly to complete the remedy or cure for such breach within thirty (30) days of notice of the same from BNSF or thirty (30) days after the date the action, inaction, event or condition constituting such breach first comes to the attention of City or any City Person, whichever is earlier (provided, however, that the Parties may agree, each in their sole discretion, to allow a longer period for completion of such remedy or cure); or (xx) fails to fully reimburse BNSF all costs and expenses associated with BNSF's curing or remedying such breach or having the same cured or remedied within thirty (30) days of receipt of an invoice from BNSF for the same; provided,

however, that in all instances and notwithstanding any of the foregoing, BNSF's right to perform at City's sole cost and expense any work of an emergency nature related to the immediate restoration or protection and safety of: railroad operations, activities and property; other persons and property; or as needed to avoid or remove any interference with the activities or property of BNSF, or anyone or anything present on the rail corridor or property with the authority or permission of BNSF shall be governed by the terms of the CMAs and the O&M Agreement and this Section 19 shall not alter those rights.

20. City timely and properly shall maintain and repair in perpetuity all segments of the Project as necessary or appropriate to ensure compliance with the approved plans and specifications and the proper function of each such segment beginning as soon as its contractor(s) or the Corps' contractor(s), as applicable to a given segment, leave the work sites, all as further described in the CMAs and the O&M Agreement. Provisions binding the City to such maintenance and repair will be included in all easements and conveyances granted for each segment of the Project. All such operation and maintenance work shall be subject to all provisions of this Agreement, the CMAs and the O&M Agreement otherwise governing (i) the City Led Phases; (i) all City Persons' activities; and (iii) the Project.

21. As part of the Project, BNSF will be required to relocate from certain real property, as further depicted on **Exhibit "D"** attached hereto and incorporated herein (the ***"Downtown Property"***). The City and BNSF agree that this relocation and the acquisition under threat of eminent domain by the City is to be subject to a separate Relocation Agreement between them in the form attached hereto as **Exhibit "E"** and incorporated herein. City will not be allowed to commence any work on any portion of the City-Led Phases, nor will the Corps' contractor(s) with respect to the Corps-Led Phases until the conveyance of the Downtown Property is complete and closed and the full payment of the award in lieu of eminent domain acquisition is received by BNSF.

22. As part of the Project, the City will acquire any real property necessary for the construction of a passenger service platform satisfactory to BNSF and the National Rail Passenger Corporation, in each such party's reasonable discretion, at the location generally described on **Exhibit "A,"** and the parcel of property depicted on **Exhibit "A" as (purple parcel).** Upon completion of the construction of such passenger service platform, and inspection and acceptance of the same by BNSF, the City promptly shall convey the acquired property and the platform to BNSF pursuant to an instrument of conveyance as described in the Purchase and Sale Agreement for such parcel.

23. BNSF shall furnish City a listing of all licensees, easements holders, lessees and other known users which, to the best actual knowledge of BNSF's Director, Corporate Real Estate, occupy any BNSF property that will be affected by the Project. BNSF's furnishing of any such information is without warranty of any kind, as to accuracy or completeness, all of which are hereby and will be disclaimed, regardless of how arising, including, without limitation, by operation of law. City and its contractor(s) will be required to field verify all such locations and installations prior to commencing or allowing the Corps or its contractor(s) to commence any work on any portion of the Project. . City shall be solely responsible for any needed relocations of all license holders, easement holders, lessees or other users, provided, however,

that BNSF shall perform the relocation of its own fiber optic lines at City's expense. Should City desire to relocate any such parties onto other BNSF property, BNSF shall have the right to approve, in advance in writing, the location and characteristics of any such relocation, in its sole discretion. Among other things, any utility relocation onto any property of BNSF must comply with BNSF's then-current Utility Accommodations Policy and be the subject of a license agreement on BNSF's then-current standard from entered into by the relocated party.

24. The City is not relying on any agreement or statement of BNSF not expressly contained within this Agreement. City has determined on its own, and has secured assurances from the Corps that it has determined on its own, to proceed in pursuing the Project in any manner either such party chooses to do, without reliance on BNSF cooperation, statements, materials, or representations other than as is expressed in this Agreement. Whenever BNSF is entitled hereunder to approve or otherwise pass upon or make determination on a matter, such review, approval, disapproval or determination is to be made in BNSF's sole discretion.

25. The parties shall conduct monthly coordinating meetings during the duration of the Project construction. As part of such meetings, any issues of which it is aware or reasonably should be aware that could lead to a claim being made by any party against BNSF must be raised and, if related to the conduct of the City or any of its invitees, addressed by City. City shall also notify BNSF as soon as it has notice but in any event agrees that it shall notify BNSF at least ___ (_) days prior to any bonds required hereunder or under a CMA for any City-Led Phases or the O&M Agreement being terminated.

26. In consideration of the full and proper performance of all obligations imposed upon it by this Agreement and all CMAs, and of the Corps' contractor's full and proper performance of its work pursuant to the General License Agreement, should it commence any such work, BNSF shall reduce the amounts the City owes to BNSF pursuant to Subsection 5(i) above by the amount of Eleven Million Five Hundred Thousand Dollars ($11,500,000).

27. Should City need to enter BNSF property once the Corps' contractor is no longer on site, but before the Project is completed and accepted by the City and BNSF, then either the City must itself comply with **Exhibit C** and **Exhibit C-1** in the form attached to the CMAs for any such entry onto a Corps-Led Phase, or, should the City desire to have a contactor make such entry, the City must comply with **Exhibit C** in the form attached to the CMAs and such contractor must execute **Exhibit C-1** in the form attached to the CMAs with BNSF.

28. City acknowledges that the Corps may periodically enter upon the Easement for purposes of inspecting the Corps-Led Phases of the Project after construction is complete and agrees that all such entries shall be made as invitees of a City contractor under its General License or, if the City does not have a contractor, the City hereunder and/or under the O&M Agreement, which will require among other things, that City provide flagging protection for all such entries at City's expense.

29. Any and all cuts and fills, excavations or embankments necessary in the construction of any City-Led Phases or the maintenance or future alteration of any Phase of the Project shall be made and maintained in such manner, form and extent as will provide adequate drainage of and from the adjoining lands and premises of BNSF; and wherever any such fill or embankment shall or may obstruct the natural and pre-existing drainage (existing prior to the making of such fill or

embankment) from such lands and premises of BNSF, City shall construct and maintain such culverts or drains as may be requisite to preserve such natural and pre-existing drainage and as approved by BNSF in its discretion after review of proposed plans and specifications, and shall also wherever necessary, construct extensions of existing drains, culverts or ditches through or along the premises of BNSF or the City as approved or required by BNSF in its discretion after review of proposed plans and specifications, such extensions to be of adequate sectional dimensions to preserve the then-present flowage of drainage or other waters, and of materials and workmanship equally as good as those now existing or existing upon completion and final acceptance of the Project. In the event any construction, repair, maintenance, work or other use of property by the City described above will affect any Lines, fences, buildings, improvements or other facilities (collectively, "**Other Improvements**"), City will be responsible at City's sole risk to locate and make any adjustments necessary to such Other Improvements. City must contact the owner(s) of the Other Improvements notifying them of any work that may damage these Other Improvements and/or interfere with their service and obtain the owner's written approval prior to so affecting the Other Improvements. City must mark all Other Improvements on the plans and specifications and mark such Other Improvements in the field in order to verify their locations. City must also use all reasonable methods when working on or near BNSF's property to determine if any Other Improvements (fiber optic, cable, communication or otherwise) may exist. During such work, the City agrees to keep the BNSF property free and clear from combustible materials and to cut and remove or cause to be cut and removed at its sole expense all weeds and vegetation on said premises, said work of cutting and removal to be done at such times and with such frequency as to comply with City and local laws and regulations and abate any and all hazard of fire.

30. If at any time during the term of the Easement, BNSF desires the use of its rail corridor in such a manner as would, in BNSF's reasonable opinion, be interfered with by any of the improvements forming part of the City-Led Phases of the Project, City and BNSF shall, within thirty (30) days after written notice from BNSF, meet to determine what changes in such improvements forming part of the City-Led Phases might be achievable to avoid interference with the proposed use of BNSF's rail corridor, including, without limitation, the relocation of any portion of such City-Led Phases or the construction of a new improvement to replace the old portion of such City-Led Phases. If at any time during the term of the Easement following completion and acceptance by the City of the Corps-Led Phases of the Project, BNSF desires the use of its rail corridor in such a manner as would, in BNSF's reasonable opinion, be interfered with by any of the improvements forming part of the Corps-Led Phases of the Project, City and BNSF shall, within thirty (30) days after written notice from BNSF, meet to determine what changes in such improvements forming part of the Corps-Led Phases might be achievable to avoid interference with the proposed use of BNSF's rail corridor, including, without limitation, the relocation of any portion of such Corps-Led Phases or the construction of a new improvement to replace the old portion of such Corps-Led Phases. Should a new applicable law, statute, regulation, ordinance, order, covenant, restriction or decision of a court of competent jurisdiction (each, a **"Legal Requirement"**) be adopted, enacted or applied, or a new operational requirement be required or desirable to comply with any such newly enacted, adopted or applied Legal Requirement, BNSF may require modifications or relocations of parts of the City-Led Phases or the Corps-Led Phases for which City has the maintenance obligation as may be needed to permit or support BNSF's compliance with the same. In such event BNSF and City shall promptly meet and confer regarding compliance with such Legal Requirement, and BNSF may perform any such modification or relocation at City's expense and shall promptly invoice City for all costs thereof. City shall remit payment to BNSF for invoiced costs promptly. City acknowledges that BNSF has reserved certain additional rights in the Easement.

31. If all or any portion of the Corps-Led Phases of the Project is de-commissioned, is no longer authorized or is no longer functioning in that its carrying capacity is not sufficient to prevent a risk

of scouring to BNSF's property or facilities or its strength is not sufficient to bear the weight of BNSFs operations thereon, or if the Corps consents to the removal or de-commissioning of the same, the Parties along with the Corps will meet and confer about how to stabilize or remove any portions remaining on BNSF Property, which will be done at the City's expense to BNSF's satisfaction. Following any such stabilization, BNSF may elect to have the Easement related to such portion of the Corps-Led Phases of the Project revert to BNSF, and title to any remaining improvements conveyed to BNSF, or may elect that the City must continue to operate and maintain or restore or replace any remaining improvements pursuant to the O&M Agreement. Should BNSF elect to have all or any portions of the Corps-Led Phases of the Project removed in such circumstances, the removal will be accomplished by the City at its expense and in accordance with the Easement and the O&M Agreement. Following such removal, the portion of the Easement on which no portions of the Corps-Led Phases of the Project remain shall revert to BNSF.

32. Should BNSF exercise its right to suspend or terminate the work under any of the CMAs issued hereunder, BNSF will notify the City as soon as reasonably practical. The Parties will within thirty (30) days meet and confer. The City shall require its contractor(s) involved in any such suspension or termination promptly to comply with BNSF's requests, including, without limitation, by producing root cause analyses related to any occurrence or condition, reviewing safety plans, amending safety plans, providing correction plans and timelines, and conducting after-action reviews. BNSF shall have the right, but not the obligation, in its sole discretion, to take no exception to the results of all requested productions and actions by the City contractor(s). Until BNSF has issued its notice of No Exception, the City's contractor(s) will not be allowed to return to the BNSF Property. Such notice by BNSF is not and shall not be deemed an approval or endorsement of any of the contents or plans so produced but is only reflective of BNSF's consent to allow access to the BNSF Property to resume. The City contractor and the City will remain entirely and solely responsible for the appropriateness of any such contents or plans. If BNSF has terminated access by any City contractor, BNSF may determine, in its sole discretion whether to issue a new Agreement Between BNSF Railway and the Contractor (**Exhibit C-1** to the CMAs) to the affected City contractor following such meet and confer and correction process.

If BNSF terminates a City contractor and does not agree, in its sole discretion following the meet and confer process described above, to issue another Agreement Between BNSF and the Contractor (**Exhibit C-1** to the CMAs) to the same City contractor, City shall promptly secure another contractor to complete the City-Led Phases of the Project and shall require that such new contractor enter into a new Agreement Between BNSF Railway and the Contractor (**Exhibit C-1** to the CMAs) with BNSF. Should City fail to or delay beyond ____ to obtain a new contractor and have the new Agreement Between BNSF and the Contractor (**Exhibit C-1** to the CMAs) executed, BNSF may at its election in its sole discretion complete or secure the un-completed portions of the City-Led Phases of the Project and charge all costs and expenses of performing the same to the City. The City shall reimburse BNSF all such costs and expenses within thirty (30) days of receiving an invoice for the same.

33. **List of Exhibits**

Exhibit "A" Project Description, by Segment
Exhibit "A-1" Mitigations
Exhibit "B" Project Schedule, by Segment and Phase
Exhibit "C" Forms of CMA(s), Easements to City, O &M Agreement, Lone Tree Overpass CMA, Downtown Mile

Exhibit “D” Depiction of the Downtown Property
Exhibit “E” Relocation Agreement
Exhibit "F” Form of Conveyance to BNSF

City of Flagstaff, a _____ of the State of Arizona

By:_____

Printed Name: _____

Title: _____

BNSF Railway Company, a Delaware corporation

By: _____

Printed Name: _____

Title: _____