EASEMENT AGREEMENT
For Phase 4 of U.S. Army Corps of Engineers Rio de Flag Project

THIS EASEMENT AGREEMENT FOR U.S. Army Corps of Engineers (**"USACE"**) Phase 4 of the Rio de Flag Project ("**Easement Agreement**") is made and entered into as of the _____ day of _____ 20__ ("**Effective Date**"), by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("**Grantor**"), and the City of Flagstaff, Arizona, a ___ of the State of Arizona ("**Grantee**").

A. Grantor owns or controls certain real property situated at or near the vicinity of Flagstaff, County of Coconino , State of Arizona, at Railroad Line Segment _____Mile Post _____, as described or depicted on **Exhibit "A"** attached hereto and made a part hereof (the "**Premises**").

B. Grantee has approached Grantor and requested the grant of a non-exclusive easement to allow the USACE contractor to use the Premises for the construction of Phase 4 of the USACE Rio de Flag Project (defined below), and to allow the continuing existence, operation and maintenance of Phase 4 of the USACE Rio de Flag Project on the Premises following construction, and Grantor has consented to grant a non-exclusive easement for such uses of the Premises in consideration of, based upon and subject to the terms and conditions set forth in this Easement Agreement and in the documents described in Recital C below.

C. USACE and Grantor have entered into that certain Memorandum of Understanding dated _____ (the **"MOU"**) describing a flood risk management project authorized by the United States Congress in and near the City of Flagstaff, Coconino County, Arizona, in Section 101(b)(3) of Water Resources Development Act of 2000 Public Law 106-541, as modified by Section 3007 of the Water Resources Development Act of 2007, Public Law 110-114 to be constructed by USACE's contractor(s) on the Premises (the **"USACE Rio de Flag Project"**). **"Phase 4 of the USACE Rio De Flag Project" is defined and described as _____.** Pursuant to the MOU, USACE will require its contractor or contractors to execute with Grantor a General License in the form attached to the MOU (the **"General License"**) prior to entry onto the Premises (or commencement of any related work if such work commences prior to any entry) to govern the performance by the contractor(s). The MOU and the General License describe in further detail the USACE Rio de Flag Project. Grantor and Grantee have entered into that certain Coordination and Reimbursement Agreement dated as of _____ concerning certain other improvements located nearby as well as the Grantee's ownership of and obligation to maintain the USACE Rio de Flag Project once it is completed (the "**CRA**"). Grantor and Grantee have entered into that certain Operating and Maintenance Agreement dated as of _____ to provide for post-completion operation and maintenance of the USACE Rio de Flag Project (the **"O&M Agreement"**).

D. The terms of the CRA that could apply to the USACE Rio de Flag Project, including, without limitation, the environmental provisions of the same, are incorporated herein as if fully set forth in this instrument and shall be in full force and effect for purposes of this Easement even if the CRA is, for whatever reason, no longer in effect. The terms of the O&M Agreement are incorporated herein as if fully set forth in this instrument.

NOW, THEREFORE, for and in consideration of the foregoing recitals which are incorporated herein, the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Section 1 Granting of Easement.

1.1 Easement Purpose. The "**Easement Purpose**" shall vary during different time periods, as described below. The Easement may only be used for the respective Easement Purposes during the specified timeframes and for no other purposes at any time whatsoever.

a) The first time period commences upon execution of this Easement Agreement (which shall not occur until both the CRA and the MOU have been fully executed) and lasts until the General License is fully executed. During this period, the Easement Purpose is solely to meet the USACE requirements for the Grantee to have a property interest in the Premises prior to USACE being able to issue requests for bids for the construction of Phase 4 of the USACE Rio de Flag Project and for the improvements properly so constructed to remain thereafter on the Premises in accordance with the terms hereof. No entry onto or other use of the Premises is allowed during this time period.

b) The second time period begins upon full execution of the General License and lasts until Phase 4 of the USACE Rio de Flag Project is completed and accepted by USACE, Grantor and Grantee for maintenance by Grantee thereafter. During this period, the General License governs all entries onto the Premises. Grantee may only enter the Premises for any purpose related to the USACE Rio de Flag Project as an invitee of the USACE contractor that has executed the General License. Thus, the Easement Purpose during this period is solely to meet the USACE requirement that Grantee have a property interest in the Premises to allow USACE to contract for the construction of Phase 4 of the USACE Rio de Flag Project in accordance with the General License and to allow for the properly constructed improvements to remain on the Premises thereafter as described below.

c) The third time period will begin once Phase 4 of the USACE Rio de Flag Project is completed, including all punchlist items or corrective action, as described in the General License, and accepted by Grantor, Grantee, and USACE for maintenance thereafter by Grantee in perpetuity in accordance with the O&M Agreement. The Easement Purpose during this period is the existence on the Premises of Phase 4 of the USACE Rio de Flag Project and the entry onto the Premises by Grantee and its maintenance contractor(s) as described in and in full compliance with the O&M Agreement to inspect, maintain, re-construct, repair, and operate the USACE Rio de Flag Project.

1.2 Grant. Grantor will grant unto Grantee, a non-exclusive easement ("**Easement**") over the Premises for the Easement Purpose specified for each different timeframe as set forth above, and incorporating all other terms of this Easement Agreement. The Easement is granted subject to any and all restrictions, covenants, easements, licenses, permits, leases and other encumbrances of whatsoever nature whether or not of record, if any, relating to the Premises; and subject to and in compliance with all applicable federal, state and local laws, regulations, ordinances, restrictions, covenants and court or administrative decisions and orders, including Environmental Laws (defined below) and zoning laws (collectively, "**Laws**").The Easement and this Easement Agreement are personal to Grantee and may not be transferred or assigned in any manner without Grantor's express prior written approval, in its sole discretion, which will include the execution by such proposed assignee or transferee of an acceptable substitute for this Easement Agreement, the CRA (if still then in force) and the O&M Agreement as any of the same relate to Phase 4 of the USACE Rio de Flag Project.

1.3 Reservations by Grantor. Grantee acknowledges that Grantor has reserved or will reserve certain rights under the General License and that the right for Phase 4 of the USACE Rio de Flag Project to exist on the Premises is governed by this Easement Agreement, the MOU and General License until completion and acceptance as described therein, and by this Easement Agreement and the O&M Agreement thereafter. If at any time during the term of the Easement, Grantor desires the use of its rail corridor in such a manner as would, in Grantor's reasonable opinion, be interfered with by Phase 4 of the USACE Rio de Flag Project, Grantor, Grantee, USACE and if Grantor so desires the USACE contractor(s) which have executed General License(s) shall, within thirty (30) days after written notice from Grantor, meet with Grantor to determine what changes in Phase 4 of the USACE Rio de Flag Project might be achievable to avoid interference with the proposed use of Grantor's rail corridor, including, without limitation, the relocation of any portion of Phase 4 of the USACE Rio de Flag Project or the construction of a new improvement to replace the old portion of Phase 4 of the USACE Rio de Flag Project. 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 to comply with any such newly enacted, adopted or applied Legal Requirement, Grantor may require modifications or relocations of parts of Phase 4 of the USACE Rio de Flag Project as may be needed to permit or support Grantor's compliance with the same. In such event Grantor and Grantee shall promptly meet and confer regarding compliance with such Legal Requirement, and Grantor may perform any such modification or relocation at Grantee's expense and shall promptly invoice Grantee for all costs thereof. Grantee shall remit payment to Grantor for invoiced costs promptly. Among the rights Grantor has reserved in the General License and which Grantor does reserve herein from the Easement are the following:

(a) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any existing pipe, power, communication, cable, or utility lines and appurtenances and other facilities or structures of like character (collectively, "**Lines**") upon, over, under or across the Premises, provided Grantor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Grantee for the Easement Purpose;

(b) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Premises, provided Grantor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Grantee for the Easement Purpose; and

(c) to use the Premises in any manner as the Grantor in its sole discretion deems appropriate, provided Grantor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Grantee for the Easement Purposes.

Section 2 **Term of Easement**. The term of the Easement is perpetual; provided, however, that if Phase 4 of the Rio de Flag Project is not completed and accepted by the Grantee, USACE and Grantor in accordance with the General License for operation and maintenance thereafter by Grantee as described in the CRA and the O&M Agreement by the end of seven (7) years after the Effective Date, the Easement may, upon Grantor's election in its sole discretion, revert to Grantor.

Section 3 **No Warranty of Any Conditions of the Premises.** Grantee acknowledges that Grantor has made no representation whatsoever to Grantee concerning the state or condition of the Premises, or any personal property located thereon, or the nature or extent of Grantor's ownership interest in the Premises. Grantee has not relied on any statement or declaration of Grantor, oral or in writing, as an inducement to entering into this Easement Agreement, other than as set forth herein. GRANTOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY SUCH PROPERTY, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTOR SHALL NOT BE RESPONSIBLE TO GRANTEE OR ANY OF GRANTEE'S CONTRACTORS FOR ANY DAMAGES RELATING TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTEE ACCEPTS ALL RIGHTS GRANTED UNDER THIS EASEMENT AGREEMENT IN THE PREMISES IN AN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, INCLUDING ENVIRONMENTAL CONDITION, AND SUBJECT TO ALL LIMITATIONS ON GRANTOR'S RIGHTS, INTERESTS AND TITLE TO THE PREMISES. Grantee has inspected or will inspect the Premises, and enters upon Grantor's rail corridor and property with knowledge of its physical condition and the danger inherent in Grantor's rail operations on or near the Premises. Grantee acknowledges that this Easement Agreement does not contain any implied warranties that Grantee or Grantee's Contractors (as hereinafter defined) can successfully construct or operate the Improvements.

Section 4 **Nature of Grantor's Interest in the Premises.** GRANTOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND GRANTEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE. In case of the eviction of Grantee by anyone owning or claiming title to or any interest in the Premises, or by the abandonment by Grantor of the affected rail corridor, Grantor shall not be liable to refund Grantee any compensation paid hereunder.

Section 5 **Improvements.** Grantee shall take, in a timely manner, all actions necessary and proper to the proper and lawful operation and maintenance of Phase 4 of the USACE Rio de Flag Project, as set forth in the CRA and O&M Agreement, including such actions as may be necessary to obtain any required permits, approvals or authorizations from applicable governmental authorities.

Section 6 **Taxes and Recording Fees**. Grantee shall pay when due any taxes, assessments or other charges (collectively, "**Taxes**") levied or assessed upon the Improvements by any governmental or quasi-governmental body or any Taxes levied or assessed against Grantor or the Premises that are attributable to the Improvements. Grantee agrees to purchase, affix and cancel any and all documentary stamps in the amount prescribed by statute, and to pay any and all required transfer taxes, excise taxes and any and all fees incidental to recordation of the Memorandum of Easement. In the event of Grantee's failure to do so, if Grantor shall become obligated to do so, Grantee shall be liable for all costs, expenses and judgments to or against Grantor, including all of Grantor's legal fees and expenses.

Section 7 **Environmental.**

7.1 Compliance with Environmental Laws. Grantee shall strictly comply with all applicable Environmental Laws (as defined below). Grantee shall strictly comply with all terms of the CRA and O&M Agreement that address environmental matters. Grantee acknowledges that the provisions of the CRA and the O&M Agreement addressing environmental matters are incorporated herein by reference as fully as if set forth herein. The Parties have agreed that Grantee is responsible under this Section 7 for actions of itself and its contractors, agents, invitees and licensees, but is only responsible for breaches of Environmental Laws and other hazards and nuisances and/or breaches of the CRA or the O&M Agreement caused by or contributed to by trespassers on or about or acting in relation to the structures to be constructed as part of the USACE Rio De Flag Project.

"Environmental Law(s)" shall mean any federal, state, local, or tribal law, statute, ordinance, code, rule, regulation, policy, common law, license, authorization, decision, order, or injunction which pertains to health, safety, any Hazardous Material, or the environment (including but not limited to ground, air, water, or noise pollution or contamination, and underground or above-ground tanks) and shall include, without limitation, CERCLA 42 U.S.C. §9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq., CERCLA; the Hazardous Materials Transportation Act, 49 U.S.C. §5101 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq.; the Clean Air Act, 42 U.S.C. §7401 et seq.; the Toxic Substances Control Act, 15 U.S.C. §2601 et seq.; the Safe Drinking Water Act, 42 U.S.C. §300f et seq.; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 et seq.; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 to 136y; the Oil Pollution Act, 33 U.S.C. 2701 et seq.; and the Occupational Safety and Health Act, 29 U.S.C. 651 et seq.; all as have been amended from time to time, and any other federal, state, local, or tribal environmental requirements, together with all rules, regulations, orders, and decrees now or hereafter promulgated under any of the foregoing, as any of the foregoing now exist or may be changed or amended or come into effect in the future.

Section 8 **Default, Termination of Easement Agreement and Election for Reversion of the Easement**.

8.1 Grantor's Rights. If at any time USACE or the USACE Contractor, as applicable, fails properly and timely to perform its obligations under the MOU or the General License, including, without limitation, failure to finally complete Phase 4 of the USACE Rio de Flag Project within seven (7) years after the Effective Date, Grantor may, in addition to any rights under such other agreements, terminate this Easement Agreement and elect to have reversion of the Easement. If at any time Grantee, or Grantee's contractor(s), fails to properly and timely perform its obligations under the CRA, Easement Agreement or the O&M Agreement Grantor, in its sole discretion, may: (i) enforce specific performance of the unperformed obligations set forth in any of the same; (ii) at Grantee's sole cost, may arrange for the performance of such work set forth in the CRA, this Easement or the O&M Agreement as Grantor deems necessary in its sole reasonable discretion for the safety of its rail operations, activities and property, or to avoid or remove any interference with the activities or property of Grantor, or anyone or anything present on the rail corridor or property with the authority or permission of Grantor (and Grantee shall promptly reimburse Grantor for all costs of such work performed on Grantee's behalf upon receipt of an invoice for such costs); or (iii) terminate this Easement Agreement and may elect to have reversion of the Easement if Grantee either (x) fails or refuses properly to complete the remedy or cure for such failure to properly and timely perform within thirty (30) days of notice of the same from Grantor or thirty (30) days after the date the action, inaction, event or condition constituting such failure to properly and timely perform first comes to the attention of Grantee, 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 Grantor all costs and expenses associated with Grantor's curing or remedying such failure to properly and timely perform or having the same cured or remedied within thirty (30) days of receipt of an invoice from Grantor for the same; provided,

however, that in all instances and notwithstanding any of the foregoing, Grantor's right to perform at Grantee'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 Grantor, or anyone or anything present on the rail corridor or property with the authority or permission of Grantor shall be governed by the terms of the O&M Agreement and the CRA and this Section 8 shall not alter those rights. Grantor's failure to perform any obligations of Grantee or Grantee's contractors shall not alter the liability allocation set forth in the CRA, the O&M Agreement, the licenses entered by Grantee's contractors or this Easement Agreement.

8.2 Right to Elect Reversion Grantor may also, at its option, terminate this Easement Agreement and may elect to have reversion of the Easement by serving five (5) days' notice in writing upon Grantee if (i) Grantee should abandon or cease to use the Premises for the Easement Purpose or make or attempt to make any use of the Easement other than the Easement Purpose; (ii) should the USACE Rio de Flag Project be deauthorized by an act of Congress; or (iii) should any of the improvements constituting Phase 4 of the USACE Rio de Flag Project become non-functional for their intended purposes such that their carrying capacity is not sufficient to prevent a risk of scouring to Grantor's property or facilities or their strength is not sufficient to bear the weight of Grantor's operations thereon. Any waiver by Grantor of any default or defaults shall not constitute a waiver of the right to terminate this Easement Agreement and elect to have reversion of the Easement for any subsequent default or defaults, nor shall any such waiver in any way affect Grantor's ability to enforce any section of this Easement Agreement.

8.3 Effect of Termination or Expiration.. Neither termination or expiration of this Easement Agreement or the reversion of the Easement, will release Grantee from any liability or obligation under this Easement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date the Premises are restored as required by **Section 9**.

8.4 Non-exclusive Remedies. The remedies set forth in this **Section 8** shall be in addition to, and not in limitation of, any other remedies that Grantor may have under the CRA, the O&M Agreement, the MOU, or the General License at law or in equity.

Section 9 Surrender of Premises.

9.1 Removal or Securing of Improvements and Restoration. Upon termination or expiration of this Easement Agreement and/or the reversion of the Easement, Grantee shall, at its sole cost and expense, promptly perform the following:

(a) remove from the Premises and/or secure all or such portion of Phase 4 of the USACE Rio de Flag Project and all appurtenances thereto as Grantor directs at Grantor's sole discretion (and, if Grantor has consented to certain improvements being secured in place as opposed to removed, such securing must be completed by Grantee in a timeframe and in a manner approved in advance by Grantor in its sole discretion);

(b) repair and restore any damage to the Premises arising from, growing out of, or connected with the USACE Rio de Flag Project or Grantee's use of the Premises, including, but not limited to, environmental damage;

(c) remedy any unsafe conditions on the Premises created or aggravated by the USACE Rio de Flag Project or the Grantee; and

(d) leave the Premises in the condition which existed as of the Effective Date, other than any portion of the USACE Rio de Flag Project as Grantor may have approved being secured in place in accordance herewith.

9.2 Limited License for Entry. If Grantor elects to have reversion of the Easement, Grantor may direct Grantee to undertake one or more of the actions set forth in Section 9.1 above, at Grantee's sole cost, in which case Grantee shall have a limited license to enter upon the Premises to the extent necessary to undertake the

actions directed by Grantor. The terms of this limited license include all of Grantee's obligations under this Easement Agreement, the CRA and the O&M Agreement. If Grantee fails to surrender the Premises to Grantor in accordance with all provisions of this Easement Agreement upon any termination or expiration of this Easement Agreement or the reversion of the Easement, all liabilities and obligations of Grantee hereunder and under the CRA and the O&M Agreement shall continue in effect until the Premises are so surrendered.

Section 10 (Intentionally Deleted.)

Section 11 Tax Exchange. Grantor may assign its rights (but not its obligations) under this Easement Agreement to Goldfinch Exchange Company LLC, an exchange intermediary, in order for Grantor to effect an exchange under Section 1031 of the Internal Revenue Code. In such event, Grantor shall provide Grantee with a Notice of Assignment, attached as Exhibit C, and Grantee shall execute an acknowledgement of receipt of such notice.

Section 12 Notices. Any notice required or permitted to be given hereunder by one party to the other shall be delivered in the manner set forth in the CRA. In addition, notices to Grantor under this Easement Agreement shall be delivered to the following address: BNSF Railway Company, Real Estate Department, 2500 Lou Menk Drive, Ft. Worth, TX 76131, Attn: Permits, and BNSF Law Department, 2500 Lou Menk Drive, AOB -3, Fort Worth, Texas 76131_or such other address as Grantor may from time to time direct by notice to Grantee.

Section 13 Recordation. It is understood and agreed that this Easement Agreement shall not be in recordable form and shall not be placed on public record and any such recording shall be a breach of this Easement Agreement. Grantor and Grantee shall execute a Memorandum of Easement in the form attached hereto as **Exhibit "B"** (the "**Memorandum of Easement**") subject to changes required, if any, to conform such form to local recording requirements. The Memorandum of Easement shall be recorded in the real estate records in the county where the Premises are located. If a Memorandum of Easement is not executed by the parties and recorded as described above within ____ days of the Effective Date, Grantor shall have the right to terminate this Easement Agreement upon notice to Grantee.

Section 14 Miscellaneous.

14.1 All questions concerning the interpretation or application of provisions of this Easement Agreement shall be decided according to the substantive Laws of the State of **Arizona** without regard to conflicts of law provisions.

14.2 In the event that Grantee consists of two or more parties, all the covenants and agreements of Grantee herein contained shall be the joint and several covenants and agreements of such parties. This instrument and all of the terms, covenants and provisions hereof shall inure to the benefit of and be binding upon each of the parties hereto and their respective legal representatives, successors and assigns and shall run with and be binding upon the Premises.

14.3 If any action at law or in equity is necessary to enforce or interpret the terms of this Easement Agreement, the prevailing party or parties shall be entitled to reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party or parties may be entitled.

14.4 If any provision of this Easement Agreement is held to be illegal, invalid or unenforceable under present or future Laws, such provision will be fully severable and this Easement Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision is not a part hereof, and the remaining provisions hereof will remain in full force and effect. In lieu of any illegal, invalid or unenforceable provision herein, there will be added automatically as a part of this Easement Agreement a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

14.5 This Easement Agreement, the CRA and the O&M Agreement, which are both incorporated herein by this reference, are the full and complete agreement between Grantor and Grantee with respect to all matters relating to Grantee's use of the Premises, and supersedes any and all other agreements between the parties hereto relating to Grantee's use of the Premises as described herein. However, nothing herein is intended

to terminate any surviving obligation of Grantee or Grantee's obligation to defend and hold Grantor harmless in any prior written agreement between the parties.

14.6 Time is of the essence for the performance of this Easement Agreement.

Section 15. Administrative Fee. Grantee acknowledges that a material consideration for this agreement, without which it would not be made, is the agreement between Grantee and Grantor, that the Grantee shall pay upon return of this Easement Agreement signed by Grantee to Grantor's Broker a processing fee in the amount of $2,500.00 over and above the agreed upon acquisition price. Said fee shall be made payable to BNSF Railway Company by a separate check.

Witness the execution of this Easement Agreement as of the date first set forth above.

GRANTOR:

BNSF RAILWAY COMPANY, a Delaware corporation

By: _____
Name: _____
Title: _____

GRANTEE:

_____,
a _____

By: _____
Name: _____
Title: _____

EXHIBIT "A"

Premises

EXHIBIT "B"

MEMORANDUM OF EASEMENT

THIS MEMORANDUM OF EASEMENT is hereby executed this _____ day of_____, 20__, by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("**Grantor**"), whose address for purposes of this instrument is 2500 Lou Menk Drive, Fort Worth, Texas 76131, and the City of Flagstaff, a _____ of the State of Arizona ("**Grantee**"), whose address for purposes of this instrument is _____, which terms "Grantor" and "Grantee" shall include, wherever the context permits or requires, singular or plural, and the heirs, legal representatives, successors and assigns of the respective parties:

WITNESSETH:

WHEREAS, Grantor owns or controls certain real property situated in Coconino County, Arizona as described on **Exhibit "A"** attached hereto and incorporated herein by reference (the "**Premises**');

WHEREAS, Grantor and Grantee entered into an Easement Agreement, dated _____, 20__ (the "**Easement Agreement**") which set forth, among other things, the terms of a non-exclusive easement to be granted by Grantor to Grantee over and across the Premises (the "**Easement**"); and

WHEREAS, Grantor and Grantee desire to memorialize the terms and conditions of the Easement Agreement of record.

For valuable consideration the receipt and sufficiency of which are hereby acknowledged, Grantor does grant unto Grantee and Grantee does hereby accept from Grantor a non-exclusive Easement for the Easement Purpose over and across the Premises.

The Easement Purpose shall vary during different time periods, as described below. The Easement may only be used for the respective Easement Purposes during the specified timeframes only and for no other purposes at any time whatsoever.

a) The first time period commences upon execution of this Easement Agreement (which shall not occur until both the CRA and the MOU (as described in the Easement Agreement) have been fully executed) and lasts until the General License (as described in the Easement Agreement) is fully executed. During this period, the Easement Purpose is solely to meet the U.S. Army Corps of Engineers ("**USACE**") requirement for the Grantee to have a property interest in the Premises prior to USACE being able to issue requests for bids for the construction of Phase 4 of the USACE Rio de Flag Project and for the improvements properly so constructed to remain thereafter on the Premises in accordance with the terms hereof. No entry onto or other use of the Premises is allowed during this time period.

b) The second time period begins upon full execution of the General License and lasts until Phase 4 of the USACE Rio de Flag Project is completed and accepted by USACE, Grantor and Grantee for maintenance by Grantee thereafter. During this period, the General License governs all entries onto the Premises. Grantee may only enter the Premises for any purpose related to the USACE Rio de Flag Project as an invitee of the USACE contractor that has executed the General License. Thus, the Easement Purpose during this period is solely to meet the USACE requirement that Grantee have a property interest in the Premises to allow USACE to contract for the construction of Phase 4 of the USACE Rio de Flag Project in accordance with the General License and to allow for the properly constructed improvements to remain on the Premises thereafter as described below.

c) The third time period will begin once Phase 4 of the USACE Rio de Flag Project is completed, including all punchlist items or corrective action, as described in the General License, and accepted by Grantor, Grantee, and USACE for maintenance thereafter by Grantee in perpetuity in accordance with the O&M Agreement (described in the Easement Agreement). The Easement Purpose during this period is the existence on the Premises of Phase 4 of the USACE Rio de Flag Project and the entry onto the Premises by Grantee and its maintenance contractor(s) as described in and in full compliance with the O&M Agreement to inspect, maintain, re-construct, repair, and operate the USACE Rio de Flag Project.

The Easement is perpetual; provided, however, that if Phase 4 of the USACE Rio de Flag Project is not completed and accepted by the Grantee, the U.S. Army Corps of Engineers and Grantor as described in the Easement Agreement for operation and maintenance thereafter by Grantee as described in the Easement Agreement by the end of seven (7) years after the Effective Date of the Easement Agreement, the Easement may, upon Grantor's election in its sole discretion, revert to Grantor. Further, if at any time USACE or the USACE Contractor, as applicable, fails properly and timely to perform its obligations under the MOU (as described in the Easement Agreement) or the General License other than the failure to finally complete Phase 4 of the USACE Rio de Flag Project within seven (7) years after the Effective Date, Grantor, Grantee and USACE shall meet and confer as described in the MOU, and Grantor may, in addition to any rights under such other agreements, terminate the Easement Agreement and elect to have reversion of the Easement. If at any time Grantee, or Grantee's contractor(s), fails to properly and timely perform its obligations under the CRA, Easement or the O&M Agreement Grantor, in its sole discretion, may: (i) enforce specific performance of the unperformed obligations, (ii) at Grantee's sole cost, may arrange for the performance of such work as Grantor deems necessary in its reasonable discretion for the safety of its rail operations, activities and property, or to avoid or remove any interference with the activities or property of Grantor, or anyone or anything present on the rail corridor or property with the authority or permission of Grantor (and Grantee shall promptly reimburse Grantor for all costs of such work performed on Grantee's behalf upon receipt of an invoice for such costs) or (iii) terminate the Easement Agreement and may elect to have reversion of the Easement if Grantee either (x) fails or refuses properly to complete the remedy or cure for such failure to properly and timely perform within thirty (30) days of notice of the same from Grantor or thirty (30) days after the date the action, inaction, event or condition constituting such failure to properly and timely perform first comes to the attention of Grantee, 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 Grantor all costs and expenses associated with Grantor's curing or remedying such failure to properly and timely perform or having the same cured or remedied within thirty (30) days of receipt of an invoice from Grantor for the same; provided, however, that in all instances and notwithstanding any of the foregoing, Grantor's right to perform at Grantee'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 Grantor, or anyone or anything present on the rail corridor or property with the authority or permission of Grantor shall be governed by the terms

of the O&M Agreement and the CRA and this Section 8 shall not alter those rights. Grantor's failure to perform any obligations of Grantee or Grantee's contractors shall not alter the liability allocation set forth in the CRA, any licenses executed by Grantee's contractor(s) or the O&M Agreement.

Grantor may also, at its option, elect to have reversion of the Easement by serving five (5) days' notice in writing upon Grantee if (i) Grantee should abandon or cease to use the Premises for the Easement Purpose or make or attempt to make any use of the Easement other than the Easement Purpose; (ii) should Phase 4 of the USACE Rio de Flag Project be deauthorized by an act of Congress; or (iii) should any of the improvements constituting Phase 4 of the USACE Rio de Flag Project become non-functional for their intended purposes such that their carrying capacity is not sufficient to prevent a risk of scouring to Grantor's property or facilities or their strength is not sufficient to bear the weight of Grantor's operations thereon. Any waiver by Grantor of any default or defaults shall not constitute a waiver of the right to terminate the Easement Agreement and elect to have reversion of the Easement for any subsequent default or defaults, nor shall any such waiver in any way affect Grantor's ability to enforce any section of the Easement Agreement.

The Easement is personal to Grantee and may not be transferred or assigned in any manner without Grantor's express prior written approval, in its sole discretion, which will include the execution by such proposed assignee or transferee of an acceptable substitute for the Easement Agreement, the CRA (if still then in force) and the O&M Agreement as any of the same relate to Phase 4 of the USACE Rio de Flag

All the terms, conditions, provisions and covenants of the Easement Agreement are incorporated herein by this reference for all purposes as though written out at length herein, and both the Easement Agreement and this Memorandum of Easement shall be deemed to constitute a single instrument or document. This Memorandum of Easement is not intended to amend, modify, supplement, or supersede any of the provisions of the Easement Agreement and, to the extent there may be any conflict or inconsistency between the Easement Agreement or this Memorandum of Easement, the Easement Agreement shall control.

END OF PAGE – SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, Grantor and Grantee have executed this Memorandum of Easement to as of the date and year first above written.

GRANTOR:

BNSF RAILWAY COMPANY, a Delaware corporation

By: _____
Name: _____
Title: _____

STATE OF TEXAS §
§
COUNTY OF TARRANT §

This instrument was acknowledged before me on the _____ day of _____, 20__, by _____ (name) as _____(title) of **BNSF RAILWAY COMPANY**, a Delaware corporation.

_____
Notary Public

My appointment expires:_____

(Seal)

GRANTEE:
_____,
_____

By: _____
Name: _____
Title: _____

STATE OF _____ **§**
§
COUNTY OF _____ **§**

This instrument was acknowledged before me on the _____ day of _____, 20__, by _____ (name) as _____(title) of _____, a _____.

_____
Notary Public

My appointment expires:_____

(Seal)