OVERPASS AGREEMENT

BNSF File No.: BF-20627137
Mile Post 343-344.2
Line Segment 7200
U.S. DOT Number 980614N
Seligman Subdivision

This Agreement **("Agreement")**, is executed to be effective as of [_____,____] **("Effective Date")**, by and between **BNSF RAILWAY COMPANY**, a Delaware corporation **("BNSF")** and the **CITY OF FLAGSTAFF**, a political subdivision of the State of Arizona **("City")**.

RECITALS:

WHEREAS, BNSF owns and operates a line of railroad in and through the City of Flagstaff, State of Arizona; and

WHEREAS, the City and BNSF are parties to that certain Coordination and Reimbursement Agreement dated as of _____ (the **"CRA"**) pursuant to which the parties have agreed to terms and conditions to govern the several flood control and other projects that will be completed as described in the CRA, referred to collectively in the CRA as the **"Project;"**

WHEREAS, one of the elements of the Project requested by the City to _____(Insert purpose and description of work here) as (described or depicted or both) indicated on **Exhibit A,** attached hereto and incorporated herein (the "**Lone Tree Overpass Segment**").

WHEREAS, City desires to construct a new crossing at separated grades to be known as the Lone Tree Road Overpass, D.O.T. No. 980614N.

NOW, THEREFORE, in consideration of the recitals and the mutual covenants and agreements of the parties contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Article I INCORPORATION

The Recitals are incorporated into this Agreement as operative provisions. This Agreement is entered into pursuant and subject to all terms of the CRA. All terms and conditions of the CRA are incorporated into this Agreement and govern all activities related to the Lone Tree Overpass Segment as described herein.

ARTICLE II SCOPE OF WORK

1) The Lone Tree Overpass Segment includes, without limitation, _____(Insert any further description of scope needed)_____ any and all work related to the construction of the proposed [New Road Name] Overpass (hereinafter referred to as the **"Structure"**), more particularly described on the **Exhibit A**, which is attached hereto and incorporated herein, including, but not limited to, any and all changes to telephone, telegraph, signal and electrical lines and appurtenances, temporary and permanent track work, fencing, grading, alterations to or new construction of drainage facilities, preliminary and construction engineering and contract preparation. During construction of the Structure, rail traffic will be temporarily relocated on a shoofly in the existing Right of Way. Additionally, temporary controls during construction must comply with Section 8A-08, "Temporary Traffic Control Zones" of the Manual of Uniform Traffic Control Devices ("**MUTCD**"), U.S. Department of Transportation.

City must also install and maintain fencing which will direct pedestrians around the construction site.

ARTICLE III BNSF OBLIGATIONS

1) Upon City's payment to BNSF of an administrative fee in the sum of Two Thousand Five Hundred and No/100 Dollars ($2,500), together with the Temporary Construction License Fee in the sum of $[_____] and No/100 Dollars ($_____), BNSF hereby grants to City, upon and subject to the terms and conditions set forth in this Agreement and the CRA, a temporary non-exclusive license (hereinafter called, "**Temporary Construction License**") to construct the Structure across or upon the portion of BNSF's right-of-way described further on **Exhibit A-1**, excepting and reserving BNSF's rights, and the rights of any others who have obtained, or may obtain, permission or authority from BNSF, to do the following:

A. Operate, maintain, renew and/or relocate any and all existing railroad track or tracks, wires, pipelines and other facilities of like character upon, over or under the surface of said right-of-way;

B. Construct, operate, maintain, renew and/or relocate upon said right-of-way, without limitation, such facilities as the BNSF may from time to time deem appropriate, provided such facilities do not materially interfere with the City's use of the Structure;

C. Otherwise use or operate the right-of-way as BNSF may from time to time deem appropriate, provided such use or operations does not materially interfere with the City's use of the Structure; and

D. Require the City or its contractor to execute a Temporary Construction Crossing Agreement, for any temporary crossing requested to aid in the construction of this Project.

Unless agreed by the Parties in advance of its expiration in writing to extend the term, the term of the Temporary Construction License begins on the Effective Date and ends on the earlier of (i) completion of the Structure, or (ii) 24 months following the Effective Date. The Temporary Construction License and related rights given by BNSF to City in this provision are without warranty of title of any kind, express or implied, and no covenant of warranty of title will be implied from the use of any word or words herein contained. The Temporary Construction License is for construction of the Structure only and shall not be used by City for any other purpose. City acknowledges and agrees that City shall not have the right to use the Temporary Construction License for any other purpose than construction. In the event City is evicted by anyone owning, or claiming title to or any interest in said right-of-way, BNSF will not be liable to City for any damages, losses or any expenses of any nature whatsoever. Subsequent to the date of this Agreement, BNSF shall not grant rights to any others that would impair or interfere with the rights granted to City herein.

Upon City's payment to BNSF of the additional sum of $[_____] and No/100 Dollars ($_____), such payment to be made within thirty (30) days of issuing the Notice to Proceed pursuant to Article IV, Section 16 of this Agreement, and provided further that City is in compliance with the term and conditions of this Agreement and the CRA, BNSF will grant to City, its successors and assigns, an easement (hereinafter called, the "**Easement**") to enter upon and use that portion of BNSF's right-of-way as is necessary to use and maintain the Structure, substantially in the form of **Exhibit B** attached to this Agreement. If City fails to pay BNSF within the thirty day time period set forth in the preceding sentence, BNSF may stop construction of the Project until full payment is received by BNSF.

2) BNSF will furnish all labor, materials, tools, and equipment for railroad work required for the construction of the Lone Tree Overpass Segment, such railroad work and the estimated cost thereof being as shown on **Exhibit D** attached hereto and made a part hereof. In the event construction on the Lone Tree Overpass Segment has not commenced within six (6) months following the Effective Date due to acts or omissions of the City and not BNSF, BNSF may, in

its sole and absolute discretion, revise the cost estimates set forth in said **Exhibit D**. In such event, the revised cost estimates will become a part of this Agreement as though originally set forth herein. Any item of work incidental to the items listed on **Exhibit D** not specifically mentioned therein may be included as a part of this Agreement upon written approval of City, which approval will not be unreasonably withheld. Construction of the Lone Tree Overpass Segment must include the following railroad work by BNSF:

A. Procurement of materials, equipment and supplies necessary for the railroad work;

B. Preliminary engineering, design, and contract preparation;

C. Furnishing of flagging services during construction of the Lone Tree Overpass Segment of the Project as required and set forth in further detail on **Exhibit C;**

D. Furnishing engineering and inspection as required in connection with the construction of the Lone Tree Overpass Segment;

E. Providing a contract project coordinator, at City's expense, to serve as a project manager for the Lone Tree Overpass Segment;

F. If required, construction of a temporary pedestrian at-grade crossing and installation of automatic warning devices, at City's expense.

3) BNSF will do all railroad work set forth in Article III, Section 2 above on an actual cost basis, when BNSF, in its sole discretion, determines it is required by its labor agreements to perform such work with its own employees working under applicable collective bargaining agreements.

4) City agrees additionally to reimburse BNSF for work of an emergency nature caused by or related to City or City's contractor in connection with the Lone Tree Overpass Segment of the Project which BNSF deems is reasonably necessary for the immediate restoration of railroad operations, or for the protection of persons or BNSF property. Such work may be performed by BNSF without prior approval of City and City agrees to fully reimburse BNSF for all such emergency work.

5) BNSF may charge City for insurance expenses, including self-insurance expenses, but only to the extent such expenses cover the cost of Employer's Liability (including, without limitation, liability under the Federal Employer's Liability Act) in connection with the construction of the Lone Tree Overpass Segment of the Project. Such charges will be considered part of the actual cost of the Project.

6) During the construction of the Lone Tree Overpass Segment of the Project, BNSF will send City progressive invoices detailing the costs of the railroad work performed by BNSF under this Agreement. City must reimburse BNSF for completed force-account work within thirty (30) days of the date of the invoice for such work. Upon completion of the Lone Tree Overpass Segment of the Project, BNSF will send City a detailed invoice of final costs, segregated as to labor and materials for each item in the recapitulation shown on Exhibit D. Pursuant to this section and Article V, Section 7 herein, City must pay the final invoice within ninety (90) days of the date of the final invoice. BNSF will assess a finance charge of .033% per day (12% per annum) on any unpaid sums or other charges due under this Agreement which are past its credit terms. The finance charge continues to accrue daily until the date payment is received by BNSF, not the date payment is made or the date postmarked on the payment. Finance charges will be assessed on delinquent sums and other charges as of the end of the month and will be reduced by amounts in dispute and any unposted payments received by the month's end. Finance charges will be noted on invoices sent to City under this section.

ARTICLE IV CITY OBLIGATIONS

1) City must furnish to BNSF plans and specifications for the Lone Tree Overpass Segment of the Project. Four sets of said plans (reduced size 11" x 17"), together with two copies of calculations, and two copies of specifications in **English Units**, must be submitted to BNSF for approval prior to commencement of any construction. BNSF will give City final written approval of the plans and specifications substantially in the form of **Exhibit E,** attached to this Agreement and made a part hereof. Upon BNSF's final written approval of the plans and specifications, said plans and specifications will become part of this Agreement and are hereby incorporated herein. Any approval of the plans and specifications by BNSF shall in no way obligate BNSF in any manner with respect to the finished product design and/or construction. Any approval by BNSF shall mean only that the plans and specifications meet the subjective standards of BNSF, and such approval by BNSF shall not be deemed to mean that such plans and specifications meet applicable regulations, laws, statutes or local ordinances and/or building codes.

2) City must make any required application and obtain all required permits and approvals for the construction of the Lone Tree Overpass Segment and the Project.

3) City must provide for and maintain minimum vertical and horizontal clearances, as required in **Exhibit C** and as approved by BNSF as part of the plans and specifications for the Lone Tree Overpass Segment of the Project.

4) City must acquire all rights of way necessary for the construction of the Lone Tree Overpass Segment of the Project.

5) City must make any and all arrangements, in compliance with BNSF's Utility Accommodation Manual (http://www.bnsf.com/communities/faqs/pdf/utility.pdf), for the installation or relocation of wire lines, pipe lines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities other than BNSF which may be necessary for the construction of the Lone Tree Overpass Segment of the Project.

6) City must construct the Lone Tree Overpass Segment of the Project as shown on the attached **Exhibit A** and do all work provided for in the plans and specifications for the Lone Tree Overpass Segment of the Project("**City's Work**"), except railroad work that will be performed by BNSF hereunder. City must furnish all labor, materials, tools and equipment for the performance of City's Work. The principal elements of City's Work are as follows:

A. Construction of the Structure;

B. All necessary grading and paving, including backfill of excavations and restoration of disturbed vegetation on BNSF's right-of-way;

C. Provide suitable drainage, both temporary and permanent;

D. Installation of a gate in the fence along the [_____] boundary of BNSF's right of way in order to provide BNSF with permanent access for maintenance purposes;

E. Temporary Installation of K-Rail (Jersey) barriers and chain link fencing along [_____] Avenue between the tracks and the traveled roadways;

F. Construction and removal of a temporary pedestrian roadway detour crossing of the tracks, including chain link fence;

G. Provide appropriate pedestrian control during construction;

H. Design and construction of a permanent paved roadway across the Structure along the [_____] track to be used for access to BNSF property located [_____] of [_____];

I. Installation and maintenance of an 8-ft. high fence and/or concrete combination (throw fence) on the outside barrier of the Structure;

J. Job site cleanup including removal of all construction materials, concrete debris, surplus soil, refuse, contaminated soils as set forth in the CRA, asphalt debris, litter and other waste materials to the satisfaction of BNSF;

K. [_____] **[add additional items as necessary]**

7) City must apply and maintain said D.O.T. Crossing number TBD, and the Arizona Corporation Commission Crossing number [_____] in a conspicuous location on the Structure.

8) City's Work must be performed by City or City's contractor in a manner that will not endanger or interfere with the safe and timely operations of BNSF and its facilities.

9) For any City Work or future inspection or maintenance, either routine or otherwise, performed by contractors or subcontractors on behalf of the City, City shall require the contractors and subcontractors to comply with the provisions of the attached **Exhibit C** and execute the agreement attached hereto as **Exhibit C-1**. Prior to performing any future maintenance with its own personnel, City shall: comply with all terms of the CRA; comply with all of BNSF's applicable safety rules and regulations; require any City employee performing maintenance to complete the safety training program at the BNSF's Internet Website " www.BNSFContractor.com "; notify BNSF when, pursuant to the requirements of **Exhibit C**, a flagger is required to be present; procure, and have approved by BNSF's Risk Management Department, Railroad Protective Liability insurance.

10) City must require its contractor(s) to notify BNSF's Roadmaster at least thirty (30) calendar days prior to requesting a BNSF flagman in accordance with the requirements of **Exhibit C** attached hereto. Additionally, City must require its contractor(s) to notify BNSF's Manager of Public Projects thirty (30) calendar days prior to commencing work on BNSF property or near BNSF tracks.

11) City or its contractor(s) must submit four (4) copies of any plans (including two sets of calculations in **English Units**) for proposed shoring, falsework or cribbing to be used over, under, or adjacent to BNSF's tracks to BNSF's Manager of Public Projects for approval. The shoring, falsework or cribbing used by City's contractor shall comply with the BNSF Requirements for construction of Grade Separation Projects set forth on **Exhibit F** and all applicable requirements promulgated by state and federal agencies, departments, commissions and other legislative bodies. If necessary, City must submit for approval two (2) copies of a professionally engineered demolition plan, as set forth in **Exhibit G**, with applicable calculations to BNSF's Manager of Public Projects.

12) City must include the following provisions in any contract with its provider(s) performing work on said Project:

A. The Provider is placed on notice that fiber optic, communication and other cable lines and systems (collectively, the "**Lines**") owned by various telecommunications companies may be buried on BNSF's property or right-of-way. The locations of these Lines have been included on the plans based on information from the telecommunications companies. The Provider will be responsible for contacting BNSF and the telecommunications companies and notifying them of any work that may damage these Lines or facilities and/or interfere with their service. The Provider must also mark all Lines shown on the plans or marked in the field in order to verify their locations. The Provider must also use all reasonable methods when working in the BNSF right-of-way or on BNSF property to determine if any other Lines (fiber optic, cable, communication or otherwise) may exist.

B. The City and its Provider will be responsible for the rearrangement of any facilities or Lines determined to interfere with the construction. The City and its Provider must cooperate fully with any telecommunications company(ies) in performing such rearrangements.

C. Failure to mark or identify these Lines will be sufficient cause for BNSF to stop construction at no cost to the City or BNSF until these items are completed.

D. In addition to the liability terms contained elsewhere in this Agreement, the Provider hereby indemnifies, defends and holds harmless BNSF for, from and against all cost, liability, and expense whatsoever (including, without limitation, attorney's fees and court costs and expenses) arising out of or in any way contributed to by any act or omission of Provider, its subcontractors, agents and/or employees that cause or in any way or degree contribute to (1) any damage to or destruction of any Lines by Provider, and/or its subcontractors, agents and/or employees, on BNSF's property or within BNSF's right-of-way, (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on BNSF's property or within BNSF's right-of-way, and/or (3) any claim or cause of action for alleged loss of profits or revenue by, or loss of service by a customer or user of such telecommunication company(ies). **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR NEGLIGENCE OF BNSF.**

13) City must require compliance with the obligations set forth in this Agreement, including **Exhibit C** and **Exhibit C-1**, and incorporate in each prime contract for construction of the Lone Tree

Overpass Segment of the Project, or the specifications therefor (i) the provisions set forth in Article IV and V; and (ii) the provisions set forth in **Exhibit C**, **Exhibit C-1**, and **Exhibit F** attached hereto and by reference made a part hereof.

14) Except as otherwise provided below in this Section 14, all construction work performed hereunder by City for the Lone Tree Overpass Segment of the Project will be pursuant to a contract or contracts to be let by City, and all such contracts must include the following:

A. All work performed under such contract or contracts within the limits of BNSF's right-of-way must be performed in a good and workmanlike manner in accordance with plans and specifications approved by BNSF;

B. Changes or modifications during construction that affect safety or BNSF operations must be subject to BNSF's approval;

C. No work will be commenced within BNSF's right-of-way until each of the prime contractors employed in connection with said work must have (i) executed and delivered to BNSF an agreement in the form of **Exhibit C-1**, and (ii) delivered to and secured BNSF's approval of the required insurance; and

D. To facilitate scheduling for the Project, City shall have its contractor give BNSF's representative [BNSF Engineering Contact] ____ weeks advance notice of the proposed times and dates for work windows. BNSF and City's contractor will establish mutually agreeable work windows for the Project. BNSF has the right at any time to revise or change the work windows, due to train operations or service obligations. BNSF will not be responsible for any additional costs and expenses resulting from a change in work windows. Additional costs and expenses resulting from a change in work windows shall be accounted for in the contractor's expenses for the Project.

E. The plans and specifications for the Lone Tree Overpass Segment of the Project must be in compliance with the BNSF Requirements for construction of Grade Separation Projects set forth on **Exhibit F**, attached to this Agreement and incorporated herein.

15) City must advise the appropriate BNSF Manager of Public Projects, in writing, of the completion date of the Lone Tree Overpass Segment of the Project within thirty (30) days after such completion date. Additionally, City must notify BNSF's Manager of Public Projects, in writing, of the date on which City and/or its Contractor will meet with BNSF for the purpose of making final inspection of the Lone Tree Overpass Segment of the Project.

16) City must give BNSF's Manager of Public Projects written notice to proceed ("**Notice to Proceed**") with the railroad work after receipt of necessary funds for the Project. BNSF will not begin the railroad work (including, without limitation, procurement of supplies, equipment or materials) until written notice to proceed is received from City.

ARTICLE V JOINT OBLIGATIONS

1) All work contemplated in this Agreement must be performed in a good and workmanlike manner and each portion must be promptly commenced by the party obligated hereunder to perform the same and thereafter diligently prosecuted to conclusion in its logical order and sequence. Furthermore, any changes or modifications during construction which affect BNSF will be subject to BNSF's written approval prior to the commencement of any such changes or modifications from the [BNSF Engineering Contact].

2) The work hereunder must be done in accordance with the BNSF Requirements for construction of Grade Separation Projects set forth on **Exhibit F** and the detailed plans and specifications approved by BNSF.

3) City must require its contractor(s) to reasonably adhere to the Project's and the Lone Tree Overpass Segment's construction schedule for all Lone Tree Overpass Segment of the Project work. The parties hereto mutually agree that BNSF's failure to complete the railroad work or the City's failure to complete the City's Work in accordance with the construction schedule due to inclement weather or unforeseen railroad emergencies will not constitute a breach of this Agreement by BNSF or the City, respectively, and will not subject BNSF or the City, respectively, to any liability. Regardless of the requirements of the construction schedule, BNSF reserves the right to reallocate the labor forces assigned to complete the railroad work in the event of an emergency to provide for the immediate restoration of railroad operations of either (BNSF or its related railroads) or to protect persons or property on or near any BNSF owned property. BNSF will not be liable for any additional costs or expenses resulting from any such reallocation of its labor forces. The parties mutually agree that any reallocation of labor forces by BNSF pursuant to this provision and any direct or indirect consequences or costs resulting from any such reallocation will not constitute a breach of this Agreement by BNSF.

4) BNSF will have the right to stop construction work on the Project if any of the following events take place: (i) City (or any of its contractors) performs the Lone Tree Overpass work in a manner contrary to the plans and specifications approved by BNSF; (ii) City (or any of its contractors), in BNSF's opinion, prosecutes the Lone Tree Overpass work in a manner that is hazardous to BNSF property, facilities or the safe and expeditious movement of railroad traffic; (iii) the insurance described in the attached **Exhibit C-1** is canceled during the course of the Project; or (iv) City fails to pay BNSF for the Temporary Construction License or the

Easement pursuant to Article III, Section 1 of this Agreement. The work stoppage will continue until all necessary actions are taken by City or its contractor to rectify the situation to the satisfaction of BNSF's Division Engineer or until proof of additional insurance has been delivered to and accepted by BNSF. In the event of a breach of (i) this Agreement, (ii) the Temporary Construction License, (iii) the Easement, or (iv) the CRA, BNSF may immediately terminate the Temporary Construction License. Any such work stoppage under this provision will not give rise to any liability on the part of BNSF. BNSF's right to stop the work is in addition to any other rights BNSF may have including, but not limited to, actions or suits for damages or lost profits. In the event that BNSF desires to stop construction work on the Project, BNSF agrees to immediately notify the following individual in writing:

_____
_____
_____

5) City must supervise and inspect the operations of all City contractors to ensure compliance with the plans and specifications approved by BNSF, the terms of this Agreement and the CRA and all safety requirements of BNSF. If BNSF determines that proper supervision and inspection are not being performed by City personnel at any time during construction of the Lone Tree Overpass Segment of the Project, BNSF has the right to stop construction (within or adjacent to its operating right-of-way). Construction of the Project will not proceed until City corrects the situation to BNSF's reasonable satisfaction. If BNSF feels the situation is not being corrected in an expeditious manner, BNSF will immediately notify for appropriate corrective action.

6) Pursuant to this Section 6 and Article III, Section 6 herein, City must reimburse BNSF in full for the actual costs of all work performed by BNSF under this Agreement (including taxes, such as applicable sales and use taxes, business and occupation taxes, and similar taxes).

7) All expenses detailed in statements sent to City pursuant to Article III, Section 6 herein will comply with the terms and provisions of the Title 23 U.S. Code, Title 23 Code of Federal Regulations, and the Federal-Aid Policy Guide, U.S. Department of Transportation, as amended from time to time, which manual is hereby incorporated into and made a part of this Agreement by reference. The parties mutually agree that BNSF's preliminary engineering, design, and contract preparation costs described in Article III, Section 2 herein are part of the costs of the Lone Tree Overpass Segment and the Project even though such work may have preceded the date of this Agreement.

8) The parties mutually agree that neither construction activities for or related to the Structure, nor future maintenance of the Structure once completed, will be permitted during the fourth

quarter of each calendar year. Emergency work will be permitted only upon prior notification to BNSF's Network Operations Center (telephone number: 800 832-5452). The parties hereto mutually understand and agree that trains cannot be subjected to delay during this time period.

9) Subject to the restrictions imposed by Article V, Section 8 above, the construction of the Lone Tree Overpass Segment of the Project will not commence until City gives BNSF's Manager of Public Projects thirty (30) days prior written notice of such commencement. The commencement notice will reference D.O.T. Crossing No. TBD and must state the time that construction activities will begin.

10) In addition to the terms and conditions set forth elsewhere in this Agreement and in the CRA, including, but not limited to, the terms and conditions stated in **Exhibit F**, BNSF and City agree to the following terms upon completion of construction of the Project:

A. City will own and maintain, at its sole cost and expense, the Structure, the highway approaches, and appurtenances thereto, lighting, drainage and any access roadways to BNSF gates installed pursuant to this Agreement. BNSF may, at its option, perform maintenance on the Structure in order to avoid conflicts with train operations. BNSF will notify City prior to performing any such maintenance on the Structure. In the event such maintenance involves emergency repairs, BNSF will notify City at its earliest opportunity. City must fully reimburse BNSF for the costs of maintenance performed by BNSF pursuant to this subsection.

B. City must, at City's sole cost and expense, keep the Structure painted and free from graffiti.

C. City must provide BNSF with any and all necessary permits and maintain roadway traffic controls, at no cost to BNSF, whenever requested by BNSF to allow BNSF to inspect the Structure or to make emergency repairs thereto.

D. It is expressly understood by City and BNSF that any right to install utilities will be governed by a separate permit or license agreement between the parties hereto.

E. To the extent practicable, City must keep the Structure and surrounding areas clean and free from birds, pigeons, scavengers, vermin, creatures and other animals.

If City (including its contractors and agents) performs (i) alterations or modifications to the Structure, or (ii) any maintenance or other work on the Structure with heavy tools, equipment or machinery at ground surface level horizontally within 25'-0" of the centerline of the nearest track, or (iii) any maintenance or other work outside the limits of the deck of the Structure vertically above the top of the rail, then City or its contractors and/or agents must procure and maintain the insurance coverage as set forth in the CRA.

11) City hereby grants to BNSF, at no cost or expense to BNSF, a permanent right of access from City property to BNSF tracks for maintenance purposes.

12) City must provide one set of as built plans (prepared in **English Units**) to BNSF, as well as one set of computer diskettes containing as built CAD drawings of the Structure and identifying the software used for the CAD drawings. The "as built plans" must comply with the BNSF Requirements for construction of Grade Separation Projects set forth on **Exhibit F** and depict all information in BNSF engineering stationing and mile post pluses. The "as built plans" must also include plan and profile, structural bridge drawings and specifications, and drainage plans. All improvements and facilities must be shown.

13) Subject to the restrictions imposed by Article V, Section 8 above and in accordance with the requirements of Article IV, Section 9 above, City must notify and obtain prior authorization from BNSF's Manager of Public Projects before entering BNSF's right-of-way for **INSPECTION OR MAINTENANCE** purposes, and the BNSF Manager of Public Projects will determine if flagging is required.

14) In the event that BNSF shall deem it necessary or desirable in the future, in the performance of its duty as a common carrier, to raise or lower the grade or change the alignment of its tracks or to lay additional track or tracks or to build other facilities in connection with the operation of its railroad, BNSF shall, at its expense, have full right to make such changes or additions, provided such changes or additions do not change or alter the Structure herein proposed to be constructed and provided further, however, that should it become necessary or desirable in the future to change, alter, widen or reconstruct the Structure to accommodate railroad projects, the cost of such work, including any cost incidental to alteration of railroad or highway facilities made necessary by the alteration of the Structure shall be borne solely by BNSF, or if the City is agreeable, divided between BNSF and City in such shares as may be mutually agreed to by the parties hereto..

15) City may, at City's sole expense, alter or reconstruct the highway components of the Structure if necessary or desirable, due to traffic conditions or pedestrian or other recreational traffic, provided, however, that any such alteration or reconstruction must receive BNSF's prior written approval as evidenced by either a supplement to this Agreement, or execution of a new agreement that provides for the termination of this Agreement. Furthermore, any alteration or reconstruction of the highway components of the Structure will be covered by a Commission Order.

16) Except with respect to any attorney-client privileged information or documents, any books, papers, records and accounts of the parties hereto relating to the work hereunder or the costs or expenses for labor and material connected with the construction will at all reasonable times be open to inspection and audit by the agents and authorized representatives of the parties

hereto, as well as the State of and the Federal Highway Administration, for a period of three (3) years from the date of final BNSF invoice under this Agreement .

17) The covenants and provisions of this Agreement are binding upon and inure to the benefit of the successors and assigns of the parties hereto. Notwithstanding the preceding sentence, City may not assign any of its rights or obligations hereunder without the prior written consent of the other party.

18) In the event construction of the Lone Tree Overpass Segment of the Project does not commence within 24 months of the Effective Date, this Agreement will become null and void.

19) Neither termination nor expiration of this Agreement will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration.

20) To the maximum extent possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement is prohibited by, or held to be invalid under, applicable law, such provision will be ineffective solely to the extent of such prohibition or invalidity and the remainder of the provision will be enforceable.

21) (Intentionally Deleted.)

22) Any notice provided for herein or concerning this Agreement (a “Notice”) must be in writing and sent by overnight courier and is deemed given on the business day of delivery if delivered before 5 pm on a business day, otherwise on the next business day and shall be sent to the parties at the following addresses:

BNSF: BNSF's Manager Public Projects

_____

_____

City: _____

_____

_____

23. In the event of any conflict between the terms of this Agreement and the terms of the CRA, the CRA shall control.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and attested by its duly qualified and authorized officials as of the day and year first above written.

BNSF RAILWAY COMPANY

By: _____

Printed Name: _____

Title: _____

WITNESS:

_____

CITY

CITY [COUNTY] OF _____

By: _____

Printed Name: _____

Title: _____

WITNESS:

_____

Exhibit A

[Insert drawing of the Project and/or Structure]

Exhibit B
Insert pro forma exhibit B, A1 & B1
EASEMENT AGREEMENT

EXHIBIT "C"

CONTRACTOR REQUIREMENTS

1) General

A. The Contractor must cooperate with BNSF RAILWAY COMPANY, hereinafter referred to as "Railway" where work is over or under on or adjacent to Railway property and/or right-of-way, hereafter referred to as "Railway Property", during the construction of _____ _____ _____.

B. The Contractor must execute and deliver to the Railway duplicate copies of the Exhibit “C-1” Agreement, in the form attached hereto, obligating the Contractor to provide and maintain in full force and effect the insurance called for under Section 3 of said Exhibit “C-1”. Questions regarding procurement of the Railroad Protective Liability Insurance should be directed to Rosa Martinez at Marsh, USA, 214-303-8519.

C. The Contractor must plan, schedule and conduct all work activities so as not to interfere with the movement of any trains on Railway Property.

D. The Contractor's right to enter Railway's Property is subject to the absolute right of Railway to cause the Contractor's work on Railway's Property to cease if, in the opinion of Railway, Contractor's activities create a hazard to Railway's Property, employees, and/or operations. Railway will have the right to stop construction work on the Project if any of the following events take place: (i) Contractor (or any of its subcontractors) performs the Project work in a manner contrary to the plans and specifications approved by Railway; (ii) Contractor (or any of its subcontractors), in Railway’s opinion, prosecutes the Project work in a manner which is hazardous to Railway property, facilities or the safe and expeditious movement of railroad traffic; (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the Project; or (iv) Contractor fails to pay Railway for the Temporary Construction License or the Easement. The work stoppage will continue until all necessary actions are taken by Contractor or its subcontractor to rectify the situation to the satisfaction of Railway’s Division Engineer or until additional insurance has been delivered to and accepted by Railway. In the event of a breach of (i) this Agreement, (ii) the Temporary Construction License, or (iii) the Easement, Railway may immediately terminate the Temporary Construction License or the Easement. Any such work stoppage under this provision will not give rise to any liability on the part of Railway. Railway’s right to stop the work is in addition to any other rights Railway may have including, but not limited to, actions or suits for damages or lost profits. In the event that Railway desires to stop

construction work on the Project, Railway agrees to immediately notify the following individual in writing:

_____

_____

_____

_____

E. The Contractor is responsible for determining and complying with all Federal, State and Local Governmental laws and regulations, including, but not limited to Environmental Laws (as defined below) and health and safety laws and regulations. The Contractor hereby indemnifies, defends and holds harmless Railway for, from and against all fines or penalties imposed or assessed by Federal, State and Local Governmental Agencies against the Railway which arise out of Contractor's work under this Agreement.

F. The Contractor must notify **City** at (_____) _____ and Railway's Manager Public Projects, telephone number (_____)_____ at least thirty (30) calendar days before commencing any work on Railway Property. Contractor's notification to Railway must refer to Railway's file _____.

G. For any bridge demolition and/or falsework above any tracks or any excavations located with any part of the excavations located within, whichever is greater, twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 2 horizontal to 1 vertical slope beginning at eleven (11) feet from centerline of the nearest track, both measured perpendicular to center line of track, the Contractor must furnish the Railway five sets of working drawings showing details of construction affecting Railway Property and tracks. The working drawing must include the proposed method of installation and removal of falsework, shoring or cribbing, not included in the contract plans and two sets of structural calculations of any falsework, shoring or cribbing. For all excavation and shoring submittal plans, the current "BNSF-UPRR Guidelines for Temporary Shoring" must be used for determining the design loading conditions to be used in shoring design, and all calculations and submittals must be in accordance with the current "BNSF-UPRR Guidelines for Temporary Shoring". All submittal drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. All calculations must take into consideration railway surcharge loading and must be designed to meet American Railway Engineering and Maintenance-of-Way Association

(previously known as American Railway Engineering Association) Coopers E-80 live loading standard. All drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor must not begin work until notified by the Railway that plans have been approved. The Contractor will be required to use lifting devices such as, cranes and/or winches to place or to remove any falsework over Railway's tracks. In no case will the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.

H. Subject to the movement of Railway's trains, Railway will cooperate with the Contractor such that the work may be handled and performed in an efficient manner. The Contractor will have no claim whatsoever for any type of damages or for extra or additional compensation in the event his work is delayed by the Railway.

2) Contractor Safety Orientation

A. No employee of the Contractor, its subcontractors, agents or invitees may enter Railway Property without first having completed Railway's Engineering Contractor Safety Orientation, found on the web site www.BNSFContractor.com**. The Contractor must ensure that each of its employees, subcontractors, agents or invitees completes Railway's Engineering Contractor Safety Orientation through internet sessions before any work is performed on the Project. Additionally, the Contractor must ensure that each and every one of its employees, subcontractors, agents or invitees possesses a card certifying completion of the Railway Contractor Safety Orientation before entering Railway Property. The Contractor is responsible for the cost of the Railway Contractor Safety Orientation. The Contractor must renew the Railway Contractor Safety Orientation annually. Further clarification can be found on the web site or from the Railway's Representative.**

3) Railway Requirements

A. The Contractor must take protective measures as are necessary to keep railway facilities, including track ballast, free of sand, debris, and other foreign objects and materials resulting from his operations. Any damage to railway facilities resulting from Contractor's operations will be repaired or replaced by Railway and the cost of such repairs or replacement must be paid for by the City.

B. The Contractor must notify the Railway's Project Engineer _____ at (_____)_____ and provide blasting plans to the Railway for review seven (7) calendar days prior to conducting any blasting operations adjacent to or on Railway's Property.

C. The Contractor must abide by the following temporary clearances during construction:

- 15’-0” Horizontally from centerline of nearest track
- 21’-6” Vertically above top of rail
- 27'-0" Vertically above top of rail for electric wires carrying less than 750 volts
- 28'-0" Vertically above top of rail for electric wires carrying 750 volts to 15,000 volts
- 30'-0" Vertically above top of rail for electric wires carrying 15,000 volts to 20,000 volts
- 34'-0" Vertically above top of rail for electric wires carrying more than 20,000 volts

D. Upon completion of construction, the following clearances shall be maintained:

- 25’ Horizontally from centerline of nearest track
- 23’ 6” Vertically above top of rail

E. Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the Railway and to the City and must not be undertaken until approved in writing by the Railway, and until the City has obtained any necessary authorization from the State Regulatory Authority for the infringement. No extra compensation will be allowed in the event the Contractor's work is delayed pending Railway approval, and/or the State Regulatory Authority's approval.

F. In the case of impaired vertical clearance above top of rail, Railway will have the option of installing tell-tales or other protective devices Railway deems necessary for protection of Railway operations. The cost of tell-tales or protective devices will be borne by the City.

G. The details of construction affecting the Railway's Property and tracks not included in the contract plans must be submitted to the Railway by **(Agency)** for approval before work is undertaken and this work must not be undertaken until approved by the Railway.

H. At other than public road crossings, the Contractor must not move any equipment or materials across Railway's tracks until permission has been obtained from the Railway. The Contractor must obtain a "Temporary Construction Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railways tracks. The temporary crossing must be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor will be constructed and, at the completion of the project, removed at the expense of the Contractor.

I. Discharge, release or spill on the Railway Property of any hazardous substances, oil, petroleum, constituents, pollutants, contaminants, or any hazardous waste is prohibited and Contractor must immediately notify the Railway's Resource Operations Center at

1(800) 832-5452, of any discharge, release or spills in excess of a reportable quantity. Contractor must not allow Railway Property to become a treatment, storage or transfer facility as those terms are defined in the Resource Conservation and Recovery Act or any state analogue.

J. The Contractor upon completion of the work covered by this contract, must promptly remove from the Railway's Property all of Contractor's tools, equipment, implements and other materials, whether brought upon said property by said Contractor or any Subcontractor, employee or agent of Contractor or of any Subcontractor, and must cause Railway's Property to be left in a condition acceptable to the Railway's representative.

4) Contractor Roadway Worker on Track Safety Program and Safety Action Plan

A. Each Contractor that will perform work within 25 feet of the centerline of a track must develop and implement a Roadway Worker Protection/On Track Safety Program and work with Railway Project Representative to develop an on track safety strategy as described in the guidelines listed in the on track safety portion of the Safety Orientation. This Program must provide Roadway Worker protection/on track training for all employees of the Contractor, its subcontractors, agents or invitees. This training is reinforced at the job site through job safety briefings. Additionally, each Contractor must develop and implement the Safety Action Plan, as provided for on the web site www.BNSFContractor.com, which will be made available to Railway prior to commencement of any work on Railway Property. During the performance of work, the Contractor must audit its work activities. The Contractor must designate an on-site Project Supervisor who will serve as the contact person for the Railway and who will maintain a copy of the Safety Action Plan, safety audits, and Material Safety Datasheets (MSDS), at the job site.

B. Contractor shall have a background investigation performed on all of its employees, subcontractors and agents who will be performing any services for Railroad under this Agreement which are determined by Railroad in its sole discretion **a)** to be on Railroad's property, or **b)** that require access to Railroad Critical Infrastructure, Railroad Critical Information Systems, Railroad's Employees, Hazardous Materials on Railroad's property or is being transported by or otherwise in the custody of Railroad, or Freight in Transit involving Railroad.

i) The required background screening shall at a minimum meet the rail industry background screening criteria defined by the e-RAILSAFE Program as outlined at www.erailsafe.com, in addition to any other applicable regulatory requirements.

ii) Contractor shall obtain written consent from all its employees, subcontractors or agents screened in compliance with the e-RAILSAFE Program to participate in the

Program on their behalf and to release completed background information to Railroad's designee. Contractor shall be subject to periodic audit to ensure compliance.

iii) Contractor subject to the e-RAILSAFE Program hereunder shall not permit any of its employees, subcontractors or agents to perform services hereunder who are not first approved under e-RAILSAFE Program standards. Railroad shall have the right to deny entry onto its premises or access as described in this section above to any of Contractor's employees, subcontractors or agents who do not display the authorized identification badge issued by a background screening service meeting the standards set forth in the e-RAILSAFE Program, or who in Railroad's opinion, which may not be unreasonable, may pose a threat to the safety or security of Railroad's operations, assets or personnel.

iv) Contractors shall be responsible for ensuring that its employees, subcontractors and agents are United States citizens or legally working in the United States under a lawful and appropriate work VISA or other work authorization.

5) Railway Flagger Services

A. The Contractor must give BNSF's Scheduling Agent (BNSFScheduling@wilsonco.com) a minimum of thirty (30) calendar days advance notice when flagging services will be required so that the Scheduling Agent can make appropriate arrangements (i.e., obtain availability and cost estimate for three (3) approved vendors for selection). If flagging services are scheduled in advance by the Contractor and it is subsequently determined by the parties hereto that such services are no longer necessary, the Contractor must give the Scheduling Agent ten (10) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements.

B. Unless determined otherwise by Railway's Project Representative, protective flagging services will be required when Contractor's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:

i) When, upon inspection by Railway's Representative, other conditions warrant.

ii) When any excavation is performed below the bottom of tie elevation, if, in the opinion of Railway's representative, track or other Railway facilities may be subject to movement or settlement.

iii) When work in any way interferes with the safe operation of trains at timetable speeds.

iv) When any hazard is presented to Railway track, communications, signal, electrical, or other facilities either due to persons, material, equipment or blasting in the vicinity.

v) Special permission must be obtained from the Railway before moving heavy or cumbersome objects or equipment which might result in making the track impassable.

C. Flagging services will be performed by qualified Railway flaggers.

i) Flagging crew generally consists of one employee. However, additional personnel may be required to protect Railway Property and operations, if deemed necessary by the Railways Representative.

ii) Each time a flagger is called, the minimum period for billing will be the eight (8) hour basic day.

iii) The cost of flagger services provided by the Railway will be borne by City and invoiced through BNSF's Scheduling Agent. The estimated cost for one (1) flagger is approximately between $1,200.00-$2,000.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The estimated cost for each flagger includes vacation allowance, paid holidays, Railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, vehicle, transportation, meals, lodging, radio, equipment, supervision, scheduling and other costs incidental to performing flagging services. Negotiations for Railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. **THE FLAGGING RATE IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF FLAGGING PURSUANT TO THIS PARAGRAPH.**

The cost of **inspector coordinator services** provided by the railway will be borne by **Contractor**. The estimated cost for inspector coordinator services is approximately $1,200 per day. The contractor shall reimburse the railroad for actual costs of inspection services.

iv) The average train traffic on this route is _____ freight trains per 24-hour period at a timetable speed _____ MPH and _____ passenger trains at a timetable speed of _____ MPH.

6) Contractor General Safety Requirements

A. Work in the proximity of railway track(s) is potentially hazardous where movement of trains and equipment can occur at any time and in any direction. All work performed by contractors within 25 feet of any track must be in compliance with FRA Roadway Worker Protection Regulations.

B. Before beginning any task on Railway Property, a thorough job safety briefing must be conducted with all personnel involved with the task and repeated when the personnel or task changes. If the task is within 25 feet of any track, the job briefing must include the Railway's flagger, as applicable, and include the procedures the Contractor will use to protect its employees, subcontractors, agents or invitees from moving any equipment adjacent to or across any Railway track(s).

C. Workers must not work within 25 feet of the centerline of any track without an on track safety strategy approved by the Railway's Project Representative. When authority is provided, every contractor employee must know: (1) who the Railway flagger is, and how to contact the flagger, (2) limits of the authority, (3) the method of communication to stop and resume work, and (4) location of the designated places of safety. Persons or equipment entering flag/work limits that were not previously job briefed, must notify the flagger immediately, and be given a job briefing when working within 25 feet of the center line of track.

D. When Contractor employees are required to work on the Railway Property after normal working hours or on weekends, the Railway's representative in charge of the project must be notified. A minimum of two employees must be present at all times.

E. Any employees, agents or invitees of Contractor or its subcontractors under suspicion of being under the influence of drugs or alcohol, or in the possession of same, will be removed from the Railway's Property and subsequently released to the custody of a representative of Contractor management. Future access to the Railway's Property by that employee will be denied.

F. Any damage to Railway Property, or any hazard noticed on passing trains must be reported immediately to the Railway's representative in charge of the project. Any vehicle or machine which may come in contact with track, signal equipment, or structure (bridge) and could result in a train derailment must be reported immediately to the Railway representative in charge of the project and to the Railway's Resource Operations Center at 1(800) 832-5452. Local emergency numbers are to be obtained from the Railway

representative in charge of the project prior to the start of any work and must be posted at the job site.

G. For safety reasons, all persons are prohibited from having pocket knives, firearms or other deadly weapons in their possession while working on Railway's Property.

H. All personnel protective equipment (PPE) used on Railway Property must meet applicable OSHA and ANSI specifications. Current Railway personnel protective equipment requirements are listed on the web site, www.BNSFContractor.com**,** however, a partial list of the requirements include: a) safety glasses with permanently affixed side shields (no yellow lenses); b) hard hats; c) safety shoe with: hardened toes, above-the-ankle lace-up and a defined heel; and d) high visibility retro-reflective work wear. The Railway's representative in charge of the project is to be contacted regarding local specifications for meeting requirements relating to hi-visibility work wear. Hearing protection, fall protection, gloves, and respirators must be worn as required by State and Federal regulations. **(NOTE – Should there be a discrepancy between the information contained on the web site and the information in this paragraph, the web site will govern.)**

I. THE CONTRACTOR MUST NOT PILE OR STORE ANY MATERIALS, MACHINERY OR EQUIPMENT CLOSER THAN 25'-0" TO THE CENTER LINE OF THE NEAREST RAILWAY TRACK. MATERIALS, MACHINERY OR EQUIPMENT MUST NOT BE STORED OR LEFT WITHIN 250 FEET OF ANY HIGHWAY/RAIL AT-GRADE CROSSINGS OR TEMPORARY CONSTRUCTION CROSSING, WHERE STORAGE OF THE SAME WILL OBSTRUCT THE VIEW OF A TRAIN APPROACHING THE CROSSING. PRIOR TO BEGINNING WORK, THE CONTRACTOR MUST ESTABLISH A STORAGE AREA WITH CONCURRENCE OF THE RAILWAY'S REPRESENTATIVE.

J. Machines or vehicles must not be left unattended with the engine running. Parked machines or equipment must be in gear with brakes set and if equipped with blade, pan or bucket, they must be lowered to the ground. All machinery and equipment left unattended on Railway's Property must be left inoperable and secured against movement. (See internet Engineering Contractor Safety Orientation program for more detailed specifications)

K. Workers must not create and leave any conditions at the work site that would interfere with water drainage. Any work performed over water must meet all Federal, State and Local regulations.

L. All power line wires must be considered dangerous and of high voltage unless informed to the contrary by proper authority. For all power lines the minimum clearance between the lines and any part of the equipment or load must be; 200 KV or below - 15 feet; 200 to 350

KV - 20 feet; 350 to 500 KV - 25 feet; 500 to 750 KV - 35 feet; and 750 to 1000 KV - 45 feet. If capacity of the line is not known, a minimum clearance of 45 feet must be maintained. A person must be designated to observe clearance of the equipment and give a timely warning for all operations where it is difficult for an operator to maintain the desired clearance by visual means.

7) Excavation

A. Before excavating, the Contractor must determine whether any underground pipe lines, electric wires, or cables, including fiber optic cable systems are present and located within the Project work area. The Contractor must determine whether excavation on Railway's Property could cause damage to buried cables resulting in delay to Railway traffic and disruption of service to users. Delays and disruptions to service may cause business interruptions involving loss of revenue and profits. Before commencing excavation, the Contractor must contact **BNSF's Field Engineering Representative (_____).** All underground and overhead wires will be considered HIGH VOLTAGE and dangerous until verified with the company having ownership of the line. **It is the Contractor's responsibility to notify any other companies that have underground utilities in the area and arrange for the location of all underground utilities before excavating.**

B. The Contractor must cease all work and notify the Railway immediately before continuing excavation in the area if obstructions are encountered which do not appear on drawings. If the obstruction is a utility and the owner of the utility can be identified, then the Contractor must also notify the owner immediately. If there is any doubt about the location of underground cables or lines of any kind, no work must be performed until the exact location has been determined. There will be no exceptions to these instructions.

C. All excavations must be conducted in compliance with applicable OSHA regulations and, regardless of depth, must be shored where there is any danger to tracks, structures or personnel.

D. Any excavations, holes or trenches on the Railway's Property must be covered, guarded and**/**or protected when not being worked on. When leaving work site areas at night and over weekends, the areas must be secured and left in a condition that will ensure that Railway employees and other personnel who may be working or passing through the area are protected from all hazards. All excavations must be back filled as soon as possible.

E. Excavations and restoration must be conducted in accordance with all applicable Legal Requirements and the environmental provisions of Section 8.

F. All fill materials to be imported to Railway's property shall be certified clean fill or from a Railway-approved source, and must otherwise be suitable for its intended purpose as backfill material. Supporting documentation shall be provided to Railway upon request.

G. Contractor must meet the appropriate compaction requirements for all fills and will be responsible for settlement of all fills, erosion, and embankments that may occur as a result of the placement fill.

8) Environmental Requirements:

A. Contractor must comply with all Environmental Laws (as defined below). Contractor must not maintain a "treatment," "storage," "transfer" or "disposal" facility, or "underground storage tank," as those terms are defined by Environmental Laws, on the Railway Property or the right of way. Contractor will not handle, transport, release or suffer the release of Hazardous Materials (as defined below).

B. If Contractor discovers any hazardous waste, hazardous substance, petroleum or other deleterious material, including but not limited to any release of Hazardous Materials non-containerized commodity or material, on or adjacent to Railway's Property, in or near any surface water, swamp, wetlands or waterways, while performing any work under this Agreement, Contractor must immediately: (a) notify the Railway's Resource Operations Center at 1(800) 832-5452, of such discovery: (b) take safeguards necessary to protect its employees, subcontractors, agents and/or third parties: and (c) exercise due care with respect to the release, including the taking of any appropriate measure to minimize the impact of such release. Contractor must also give Railway prompt notice of all measures undertaken to investigate, remediate, or respond to any aforementioned condition.

C. If Railway has notice from Contractor or otherwise of a release or violation of Environmental Laws arising in any way with respect to the work which occurred or may occur during the term of this Agreement, Railway may require Contractor, at Contractor's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Railway's Property.

D. If during the construction or subsequent maintenance of the work or Structures, or any other soil-disturbing activities, soils or other materials considered to be environmentally impacted are encountered, Contractor will stop work immediately and notify Railway. After consultation with Railway, Contractor shall, at Contractor's expense, characterize any such impacted soils. Upon receiving sampling results, Contractor shall, at Contractor's expense, in consultation with Railway, manage, remove, and/or dispose any such impacted soils

offsite at an appropriately-licensed facility in accordance with Environmental Laws. Soil characterization and applicable disposal requirements, shall be in accordance with applicable federal, state, and local Environmental Laws or in consultation with an agency having the capacity and authority to make such a determination.

E. All soils and materials to be removed from the Railway Property or right of way must be properly characterized, managed, transported, and disposed of at an appropriately-licensed facility, at Contractor's expense, in accordance with all Environmental Laws. Contractor shall be the "Generator" of any and all such materials and waste, as such term is defined in Environmental Laws.

F. Notwithstanding anything in this Section 1.08, Contractor understands that Railway has no duty or obligation to monitor Contractor's use of the property or right of way to determine Contractor's compliance with Environmental Laws, it being solely Contractor's responsibility to ensure that Contractor's use is compliant. Regulatory plans and a minimum of two (2) years of records/inspections shall be readily available. Contractor shall promptly provide the same to the Railroad upon request.

G. "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.

H. "Hazardous Material(s)" shall include but shall not be limited to any substance, material, or waste that is regulated by any Environmental Law or otherwise regulated by any federal, state, local, or tribal governmental authority because of toxic, flammable, explosive, corrosive, reactive, radioactive or other properties that may be hazardous to human health or the environment, including without limitation asbestos and asbestos-containing

materials, radon, petroleum and petroleum products, urea formaldehyde foam insulation, methane, lead-based paint, polychlorinated biphenyl compounds, hydrocarbons or like substances and their additives or constituents, pesticides, agricultural chemicals, and any other special, toxic, or hazardous (i) substances, (ii) materials, or (iii) wastes of any kind, including without limitation those now or hereafter defined, determined, or identified as “hazardous chemicals,” “hazardous substances,” “hazardous materials,” “toxic substances,” or “hazardous wastes” in any Environmental Law.

9) Personal Injury Reporting

A. The Railway is required to report certain injuries as a part of compliance with Federal Railroad Administration (FRA) reporting requirements. Any personal injury sustained by an employee of the Contractor, subcontractor or Contractor's invitees while on the Railway's Property must be reported immediately (by phone mail if unable to contact in person) to the Railway's representative in charge of the project. The Non-Employee Personal Injury Data Collection Form contained herein is to be completed and sent by Fax to the Railway at 1(817) 352-7595 and to the Railway’s Project Representative no later than the close of shift on the date of the injury.

NON-EMPLOYEE PERSONAL INJURY DATA COLLECTION

(If injuries are in connection with rail equipment accident/incident, highway rail grade crossing accident or automobile accident, ensure that appropriate information is obtained, forms completed and that data entry personnel are aware that injuries relate to that specific event.)

Injured Person Type:

- ☐ Passenger on train (C)
- ☐ Non-employee (N) *(i.e., emp of another railroad, or, non-BNSF emp involved in vehicle accident, including company vehicles)*
- ☐ Contractor/safety
- ☐ Contractor/non-safety sensitive (G)
- ☐ Volunteer/safety sensitive (H)
- ☐ Volunteer/other non-safety sensitive (I)
- ☐ Non-trespasser (D) - to include highway users involved in highway rail grade crossing accidents who did not go around or through gates
- ☐ Trespasser (E) - to include highway users involved in highway rail grade crossing accidents who went around or through gates
- ☐ Non-trespasser (J) - Off railroad property

If train involved, Train ID:

_____

Transmit attached information to Accident/Incident Reporting Center by:
Fax 1-817-352-7595 or by Phone 1-800-697-6736 **or email to:** Accident-Reporting.Center@BNSF.com

Officer Providing Information:

_____ _____ _____
(Name) (Employee No.) (Phone #)

REPORT PREPARED TO COMPLY WITH FEDERAL ACCIDENT REPORTING REQUIREMENTS AND PROTECTED FROM DISCLOSURE PURSUANT TO 49 U.S.C. 20903 AND 83 U.S.C. 490

Contract Number: BF-20162127

NON-EMPLOYEE PERSONAL INJURY DATA COLLECTION

Please complete this form and provide to the BNSF supervisor, who will input this information into the EHS Star system. For questions, call (817) 352-1267 or email Safety.IncidentReporting@BNSF.com.

Accident City/State: _____ Date: _____ Time: _____

County: _____ Temperature: _____ Weather: _____
(if non-BNSF location)

Name (Last/First/MI): _____

Age: _____ Gender (if available): _____

Company: _____

eRailsafe Badge Number: _____ Expiration Date: _____

BNSF Contractor Badge Number: _____ Expiration Date: _____

Injury: _____ Body Part: _____
(e.g., laceration) (e.g., hand)

Description of accident (including how accident occurred, potential cause, etc.):

_____

_____

Work activity in progress at time of accident: _____

Tools, machinery, or hazardous materials involved in accident: _____

_____

Treatment:

- ☐ First Aid Only
- ☐ Required Medical Treatment
- ☐ Other Medical Treatment: _____

Dr. Name: _____ Date: _____

Dr. Street Address: _____ City: _____ State: _____ Zip: _____

Hospital Name: _____

Hospital Street Address: _____ City: _____ State: _____ Zip: _____

Diagnosis: _____

THIS REPORT IS PART OF BNSF'S ACCIDENT REPORT PURSUANT TO THE ACCIDENT REPORTS STATUTE AND, AS SUCH SHALL NOT "BE ADMITTED AS EVIDENCE OR USED FOR ANY PURPOSE IN ANY SUIT OR ACTION FOR DAMAGES GROWING OUT OF ANY MATTER MENTIONED IN SAID REPORT…." 49 U.S.C. § 20903. See 49 C.F.R. § 225.7(b).

Contract Number: BF-20162127

EXHIBIT "C-1"

Agreement Between

BNSF RAILWAY COMPANY

and the

CONTRACTOR

Railway File: _____

Agency Project: _____

Account Name, a/an State or Country of Formation Type of Organization (hereinafter called "Contractor"), has entered into an agreement (hereinafter called "Agreement") dated _____, 20__, **[***Drafter's Note: insert the date of the contract between the City and the Contractor here]** with **[Drafter's Note: insert the name of the City here]** for the performance of certain work in connection with the following project:_____. Performance of such work will necessarily require Contractor to enter **BNSF RAILWAY COMPANY** (hereinafter called "Railway") right of way and property (hereinafter called "Railway Property"). The Agreement provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for **[insert City name here]** (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

Accordingly, in consideration of Railway granting permission to Contractor to enter upon Railway Property and as an inducement for such entry, Contractor, effective on the date of the Agreement, has agreed and does hereby agree with Railway as follows:

1) RELEASE OF LIABILITY AND INDEMNITY

A. Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway's and Contractor's officers and employees, and for loss and damage to property

belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railway's property or right-of-way. **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF RAILWAY, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENSIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

B. THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR INCLUDES ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST RAILWAY UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE LOCOMOTIVE INSPECTION ACT, WHENEVER SO CLAIMED.

C. Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

D. In addition to any other provision of this Agreement, in the event that all or any portion of this Article shall be deemed to be inapplicable for any reason, including without limitation as a result of a decision of an applicable court, legislative enactment or regulatory order, the parties agree that this Article shall be interpreted as requiring Contractor to indemnify Railway to the fullest extent permitted by applicable law. **THROUGH THIS AGREEMENT THE PARTIES EXPRESSLY INTEND FOR CONTRACTOR TO INDEMNIFY RAILWAY FOR RAILWAY'S ACTS OF NEGLIGENCE.**

E. It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement survive any termination of this Agreement.

2) TERM

A. This Agreement is effective from the date of the Agreement until (i) the completion of the project set forth herein, and (ii) full and complete payment to Railway of any and all sums or other amounts owing and due hereunder.

3) INSURANCE

Contractor shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

A. Commercial General Liability "CGL" Insurance

i) The policy will provide a minimum of $5,000,000 each occurrence and an aggregate limit of at least $10,000,000 but in no event less than the amount otherwise carried by the provider. Coverage must be purchased on a post 2004 ISO occurrence form or equivalent and include coverage for, but not limited to, the following:

(1) Bodily Injury and Property Damage

(2) Personal Injury and Advertising Injury

(3) Fire legal liability

(4) Products and completed operations

ii) This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

(1) definition of "Insured Contract" will be amended to remove any exclusion or other limitation for any work being done within 50 feet of RAILWAY's property.

(2) Waiver of subrogation in favor of and acceptable to RAILWAY; and

(3) Additional insured endorsement in favor of and acceptable to RAILWAY and

include coverage for ongoing operations and completed operations; and

(4) Separation of insureds; and

(5) The policy will be primary and non-contributing with respect to any insurance carried by RAILWAY.

iii) It is agreed that the workers' compensation and employers' liability related exclusions in the Commercial General Liability insurance policy(s) required herein are intended to apply to employees of the policy holder and shall not apply to ***Railway*** employees.

iv) No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy with regard to the work being performed under this agreement.

B. <u>Business Automobile Insurance</u>

i) 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:

(1) Bodily injury and property damage

(2) Any and all vehicles owned, used or hired

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

(1) Waiver of subrogation in favor of and acceptable to RAILWAY;

(2) Additional insured endorsement in favor of and acceptable to RAILWAY;

(3) Separation of insureds;

(4) The policy shall be primary and non-contributing with respect to any

insurance carried by RAILWAY.

C. Workers Compensation and Employers Liability Insurance

i) Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

(1) Contractor's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.

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

ii) This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

(1) Waiver of subrogation in favor of and acceptable to Railway.

D. Railroad Protective Liability insurance

i) Railroad Protective Liability insurance naming only the ***Railway*** as the Insured with coverage of at least $5,000,000 per occurrence and $10,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 12 04 and include the following:

(1) Endorsed to include the Pollution Exclusion Amendment

(2) Endorsed to include the Limited Seepage and Pollution Endorsement.

(3) Endorsed to remove any exclusion for punitive damages.

(4) No other endorsements restricting coverage may be added.

(5) The original policy must be provided to the ***Railway*** prior to performing any work or services under this Agreement.

(6) Definition of "Physical Damage to Property" shall 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 arising out of the acts or omissions of the contractor named on the Declarations.

In lieu of providing a Railroad Protective Liability Policy, Licensee may participate (if available) in Railway's Blanket Railroad Protective Liability Insurance Policy.

E. <u>Other Requirements:</u>

i) Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages.

ii) Contractor agrees to waive its right of recovery against ***Railway*** for all claims and suits against ***Railway***. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against ***Railway*** for all claims and suits. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against ***Railway*** for loss of its owned or leased property or property under Contractor's care, custody or control.

iii) Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

iv) Contractor is not allowed to self-insure without the prior written consent of ***Railway.*** If granted by ***Railway***, any self-insured retention or other financial responsibility for claims shall be covered directly by Contractor in lieu of insurance. Any and all ***Railway*** liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by Contractor's insurance will be covered as if Contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

v) Prior to commencing services, Contractor shall furnish to ***Railway*** an acceptable certificate(s) of insurance from an authorized representative evidencing the required coverage(s), endorsements, and amendments. The certificate should be directed to the following address:

BNSF Railway Company
c/o CertFocus
P.O. Box 140528
Kansas City, MO 64114
Toll Free: 877-576-2378
Fax number: 817-840-7487
Email: BNSF@certfocus.com
www.certfocus.com

vi) Contractor shall notify Railway in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration.

vii) Any insurance policy shall be written by a reputable insurance company acceptable to Railway 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.

viii) If coverage is purchased on a "claims made" basis, Contractor hereby agrees to maintain coverage in force for a minimum of three years after expiration, cancellation or termination of this Agreement. Annually Contractor agrees to provide evidence of such coverage as required hereunder.

ix) Contractor represents that this Agreement has been thoroughly reviewed by Contractor's insurance agent(s)/broker(s), who have been instructed by Contractor to procure the insurance coverage required by this Agreement.

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

xi) If any portion of the operation is to be subcontracted by Contractor, Contractor shall require that the subcontractor shall provide and maintain insurance coverage(s) as set forth herein, naming Railway as an additional insured, and shall require that the subcontractor shall release, defend and indemnify

Railway to the same extent and under the same terms and conditions as Contractor is required to release, defend and indemnify Railway herein.

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

xiii) The fact that insurance (including, without limitation, self-insurance) is obtained by Contractor shall not be deemed to release or diminish the liability of Contractor including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railway shall not be limited by the amount of the required insurance coverage.

xiv) In the event of a claim or lawsuit involving Railway arising out of this agreement, Contractor will make available any required policy covering such claim or lawsuit.

xv) These insurance provisions are intended to be a separate and distinct obligation on the part of the Contractor. Therefore, these provisions shall be enforceable and Contractor shall be bound thereby regardless of whether or not indemnity provisions are determined to be enforceable in the jurisdiction in which the work covered hereunder is performed.

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

4) SALES AND OTHER TAXES

A. In the event applicable sales taxes of a state or political subdivision of a state of the United States are levied or assessed in connection with and directly related to any amounts invoiced by Contractor to Railway (“Sales Taxes”), Railway shall be responsible for paying only the Sales Taxes that Contractor separately states on the invoice or other billing documents provided to Railway; *provided, however,* that (i) nothing herein shall preclude Railway from claiming whatever Sales Tax exemptions are applicable to amounts Contractor bills Railway, (ii) Contractor shall

be responsible for all sales, use, excise, consumption, services and other taxes which may accrue on all services, materials, equipment, supplies or fixtures that Contractor and its subcontractors use or consume in the performance of this Agreement, (iii) Contractor shall be responsible for Sales Taxes (together with any penalties, fines or interest thereon) that Contractor fails to separately state on the invoice or other billing documents provided to Railway or fails to collect at the time of payment by Railway of invoiced amounts (except where Railway claims a Sales Tax exemption), and (iv) Contractor shall be responsible for Sales Taxes (together with any penalties, fines or interest thereon) if Contractor fails to issue separate invoices for each state in which Contractor delivers goods, provides services or, if applicable, transfers intangible rights to Railway.

B. Upon request, Contractor shall provide Railway satisfactory evidence that all taxes (together with any penalties, fines or interest thereon) that Contractor is responsible to pay under this Agreement have been paid. If a written claim is made against Contractor for Sales Taxes with respect to which Railway may be liable for under this Agreement, Contractor shall promptly notify Railway of such claim and provide Railway copies of all correspondence received from the taxing authority. Railway shall have the right to contest, protest, or claim a refund, in Railway's own name, any Sales Taxes paid by Railway to Contractor or for which Railway might otherwise be responsible for under this Agreement; provided, however, that if Railway is not permitted by law to contest any such Sales Tax in its own name, Contractor shall, if requested by Railway at Railway's sole cost and expense, contest in Contractor's own name the validity, applicability or amount of such Sales Tax and allow Railway to control and conduct such contest.

C. Railway retains the right to withhold from payments made under this Agreement amounts required to be withheld under tax laws of any jurisdiction. If Contractor is claiming a withholding exemption or a reduction in the withholding rate of any jurisdiction on any payments under this Agreement, before any payments are made (and in each succeeding period or year as required by law), Contractor agrees to furnish to Railway a properly completed exemption form prescribed by such jurisdiction. Contractor shall be responsible for any taxes, interest or penalties assessed against Railway with respect to withholding taxes that Railway does not withhold from payments to Contractor.

5) ENVIRONMENTAL

i) Contractor shall strictly comply with all Environmental Laws (as defined below). Contractor shall not maintain a "treatment," "storage," "transfer" or

"disposal" facility, or "underground storage tank," as those terms are defined by Environmental Laws, on the Railway Property or the right of way. Contractor will not handle, transport, release or suffer the release of Hazardous Materials (as defined below) on or about the Premises. Small quantities of diesel fuel, engine oil, and hydraulic fluids used in the operation of Contractor's equipment shall not be deemed a violation of this Section 5.

ii) Contractor shall give Railroad immediate notice to Railroad's Resource Operations Center at (800) 832-5452 of any release of Hazardous Materials on, from, or affecting the Premises. Contractor shall immediately respond to any release on or from the Premises. Any violation of Environmental Laws or any inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Contractor's use of the Premises must be immediately reported to Railroad at EnvironmentalLeases@bnsf.com. Contractor also shall give Railroad prompt notice of all measures undertaken on behalf of Contractor to investigate, remediate, respond to or otherwise cure a release or violation.

iii) If Railway has notice from Contractor or otherwise of a release or violation of Environmental Laws caused by Contractor or arising in any way with respect to Contractor's work which occurred or may occur during the term of this Agreement, Railway may require Contractor, at Contractor's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Railway's Property.

iv) If during the construction or subsequent maintenance of the work or Structures, or any other soil-disturbing activities, soils or other materials considered to be environmentally impacted are encountered, Contractor will stop work immediately and notify Railway. After consultation with Railway, Contractor shall characterize any such impacted soils. Upon receiving sampling results, Contractor shall, in consultation with Railway, manage, remove, and/or dispose any such impacted soils offsite at an appropriately-licensed facility in accordance with Environmental Laws. Soil characterization and applicable disposal requirements, shall be in accordance with applicable federal, state, and local Environmental Laws or in consultation with an agency having the capacity and authority to make such a determination.

v) All soils and materials to be removed from the Railway Property or right of way must be properly characterized, managed, transported, and disposed of at an appropriately-licensed facility in accordance with all Environmental Laws. Either Contractor or Agency shall be the "Generator" of any and all such materials and waste, as such term is defined in Environmental Laws.

vi) All fill materials to be imported to Railway's property shall be certified clean fill or from a Railway approved source, and supporting documentation shall be provided to Railway upon request.
Contractor shall promptly report to Railroad in writing any conditions or activities upon the Railroad Property known to Contractor which create a risk of harm to persons, property or the environment and shall take all reasonable actions necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Contractor's reporting to Railroad shall not relieve Contractor of any obligation whatsoever imposed on it by this Agreement. Contractor shall promptly respond to Railroad's request for information regarding said conditions or activities.

vii) Notwithstanding anything in this Section 5, the parties agree that BNSF has no duty or obligation to monitor Contractor's use of the property or right of way to determine Contractor's compliance with Environmental Laws, it being solely Contractor's responsibility to ensure that Contractor's use is compliant. Regulatory plans and a minimum of two (2) years of records/inspections shall be readily available. Contractor shall promptly provide the same to the Railroad upon request.

viii) "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.

ix) "Hazardous Material(s)" shall include but shall not be limited to any substance, material, or waste that is regulated by any Environmental Law or otherwise regulated

by any federal, state, local, or tribal governmental authority because of toxic, flammable, explosive, corrosive, reactive, radioactive or other properties that may be hazardous to human health or the environment, including without limitation asbestos and asbestos-containing materials, radon, petroleum and petroleum products, urea formaldehyde foam insulation, methane, lead-based paint, polychlorinated biphenyl compounds, hydrocarbons or like substances and their additives or constituents, pesticides, agricultural chemicals, and any other special, toxic, or hazardous (i) substances, (ii) materials, or (iii) wastes of any kind, including without limitation those now or hereafter defined, determined, or identified as "hazardous chemicals," "hazardous substances," "hazardous materials," "toxic substances," or "hazardous wastes" in any Environmental Law.

6) EXHIBIT "C" CONTRACTOR REQUIREMENTS

A. The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Agreement, and the Contractor Requirements set forth on Exhibit "C" attached to the Agreement and this Agreement, including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site. Contractor shall execute a Temporary Construction Crossing Agreement or Private Crossing Agreement (http://www.bnsf.com/communities/faqs/permits-real-estate/), for any temporary crossing requested to aid in the construction of this Project, if approved by BNSF.

7) TRAIN DELAY

A. Contractor is responsible for and hereby indemnifies and holds harmless Railway (including its affiliated railway companies, and its tenants) for, from and against all damages arising from any unscheduled delay to a freight or passenger train which affects Railway's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be billed, as further provided below, for the economic losses arising from loss of use of equipment, contractual loss of incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, or subcontractors, or by the Railway performing work under this Agreement. Railway agrees that it will not perform any act to unnecessarily cause train delay.

B. For loss of use of equipment, Contractor will be billed the current freight train hour rate per train as determined from Railway's records. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

C. Additionally, the parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts between Railway and its customer(s). Under these arrangements, if Railway does not meet its contract service commitments, Railway may suffer loss of performance or incentive pay and/or be subject to penalty payments. Contractor is responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to a train delay caused by Contractor or its subcontractors.

D. The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. The rate then in effect at the time of performance by the Contractor hereunder will be used to calculate the actual costs of train delay pursuant to this agreement.

E. Contractor and its subcontractors must give Railway's representative (_____) _____ (__) weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.

F. Contractor and subcontractors must plan, schedule, coordinate and conduct all Contractor's work so as to not cause any delays to any trains.

SIGNATURE PAGE FOLLOWS

Contract Number: BF-20162127

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed by its duly authorized officer the day and year first above written.

BNSF RAILWAY COMPANY	**Account Name**
Signature:_____	Signature:_____
Printed Name:_____	Printed Name:_____
Title: Manager Public Projects	Title:_____
Date:_____	Date:_____

Accepted and effective this _____day of 20__.

Contact Person:_____

Address:_____

City:_____

State:_____ Zip:_____

Fax:_____

Phone:_____

E-mail:_____

EXHIBIT D

[Insert Cost Estimate(s) for Railroad Work here]

Contract Number: BF-20162127

Exhibit E

[Public Projects Manager's letterhead]

Date: _____

Mr./Ms. _____
_____ [Name of City Here]
_____ [Address for City]
_____

Re: Final Approval of Plans and Specifications dated _____, 20__, drafted by _____ **[insert name of architecture or engineering firm here]** **(hereinafter called, the "Plans and Specifications")**

Dear _____:

This letter serves as BNSF RAILWAY COMPANY's ("BNSF") final written approval of the Plans and Specifications covering the construction of _____ **[insert description of the project here]**. This final written approval is given to _____ **[insert name of City here]** ("City") pursuant to Article IV, Section 1 of that certain Underpass Agreement between BNSF and City, dated _____, 20__. If the Plans and Specifications are revised by City subsequent to the date set forth above, this letter shall no longer serve as final written approval of the Plans and Specifications and City must resubmit said Plans and Specifications to BNSF for final written approval.

Regards,

_____
[Public Projects Manager's Name]

Contract Number: BF-20162127

Exhibit F

Bridge Requirements

BRIDGE DESIGN, PLANS & SPECIFICATIONS:

Bridge design calculations will be submitted to BNSF for review and approval. Design calculations will be summarized on a cover sheet to state the design dead load, design live load and amount of impact and any secondary loads considered. Bridge design by other than a BNSF pre-approved consultant will be subject to a third party design check at the City's expense.

For railroad bridges and culverts over waterways, BNSF will be provided with the Hydrology and Hydraulic design criteria, calculations and site specific data, including electronic data utilized in computer simulation modeling. Design considerations should include future land use changes that would increase the volume, velocity or sediment transport characteristics of the streambed flows. Design shall include sediment transport calculations and erosion control mitigation measures if necessary.

Bridge plans will be submitted to BNSF for review and approval at the 30%, 60% and 90% stage of design. The final set of plans must be approved by BNSF prior to letting of bids for the Project.

Prior to issuing any invitation to bid on construction of the Structure, the City should conduct a pre-bid meeting where prospective Contractors have the opportunity to communicate with BNSF personnel as to the site specific train speeds, train density, and general safety requirements for men and equipment working near live tracks. Any invitation to bid and specifications for the Structure and the Project must be submitted to BNSF for review and approval prior to letting of bids for the Project.

BRIDGE CONSTRUCTION:

After awarding the bid, but prior to the Contractor entering BNSF right of way, the City should conduct a pre-construction meeting with BNSF personnel in attendance to reiterate the safety requirements of construction activity adjacent to live tracks.

During construction, BNSF will require an experienced Quality Control Inspector to be present during certain critical times of the Project, including but not limited to: driving foundation piles, erecting falsework, construction of shoring and retaining walls, placing concrete, placing soil backfill and compaction processes. Certain components, normally produced off site, will require a QC inspector to be present, including the production of precast concrete components and steel fabrication. The QC inspector will provide reports to BNSF including pile driving records, concrete compressive test records, and

other such reports requested by BNSF. QC Inspection services can be provided by the City subject to acceptance by BNSF. If the QC services provided are not acceptable, BNSF will provide an independent QC Inspection service to supplement the deficiencies. The City shall reimburse BNSF for all costs of supplemental QC Inspection services.

Within 90 days of the conclusion of the Project and final acceptance by BNSF, the City will provide BNSF with a complete electronic set of the bridge plans labeled “As Built”. Those plans will reflect any and all deviations from the original plans that occurred during construction. The “As Built” plans will be submitted in Micro Station *.dgn electronic format (preferred) or AutoCAD *.dwg format. Electronic plans are to be submitted in the original format used for CAD plan preparation and not converted to another format prior to submission. The plans must show dimensioned locations of existing and relocated utilities.

BRIDGE MAINTENANCE:

BNSF will be responsible for maintenance of the track and ballast over the bridge and the earth embankment approaches. The City will be responsible for maintenance of the structural components of the bridge, including deck waterproofing and paint.

For bridges over roadways, the City will maintain the roadways under the bridge including signs, pedestrian walkways, fences, drains, landscaping, earth retention components, embankment slopes, erosion control, surface drainage, paint, walkways, handrails, lighting and other improvements associated with the Project. The City will be responsible to post highway vertical clearance signs and maintain such signs to reflect potential future pavement profile elevation changes. Clearance signs, traffic control signals or other signs should not be attached to a load-carrying member of the railroad bridge.

For railroad bridges over waterways, the City will be responsible for all aspects of channel maintenance across BNSF’s right-of-way, including toe of slope erosion control where the railroad embankment meets the streambed. The City will be responsible for debris removal that may accumulate at bridge piers as well as silt removal, local and general scour and remediation and streambed lateral migration and streambed degradation remediation.

Fencing and other trespass controls within BNSF’s right-of-way and incorporated into the Project shall be designed and maintained by the City. Graffiti removal will be the responsibility of the City.

BRIDGE INSPECTION:

BNSF will conduct annual routine structural inspections of railroad bridges over public roadways and waterways at no cost to the City. The City shall provide traffic control under those bridges spanning roadways to enable BNSF personnel or representatives to safely conduct the annual inspections. For routine annual inspections, BNSF will give the public City 7 days advance notice of traffic control requirements. In the event of an earthquake, fire, flood, damage from vehicular impacts or other

emergent situations, the City will provide traffic control in roadways to allow immediate inspection by BNSF personnel or representatives. Traffic control will include lane closures or other such measures to allow BNSF personnel, contractors and equipment to be safely positioned under the superstructure.

Upon the conclusion of the BNSF inspection, the City will be notified of items in need of repair. If the City does not complete the repairs requested by BNSF within a reasonable time period, BNSF personnel and/or contractors will perform the repairs and invoice the City for the entire cost of such repairs. Regardless of the nature or cause of such maintenance and repairs, traffic control will be provided by the City at no cost to BNSF to allow safe access to the bridge.

Contract Number: BF-20162127

EXHIBIT G

_____ Avenue Grade Separation Project
Estimated Total Project Cost