



Arizona Department of Transportation

Intermodal Transportation Division
206 South Seventeenth Avenue Phoenix, Arizona 85007-3213



0000001411

Janet Napolitano
Governor
Victor M. Mendez
Director

March 16, 2004

Bill Higgins
State Engineer

NEW APPLICATION

ORIGINAL

Mr. Donald Thompson
Railroad Safety Supervisor
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007
602-262-5610

Arizona Corporation Commission

DOCKETED

MAR 18 2004

DOCKETED BY [Signature]

AZ CORP COMMISSION
DOCUMENT CONTROL

2004 MAR 18 P 2:37

RECEIVED

Re: BNSF File No.: 025413R
060 MA 153 H5601 01C
67th AVENUE - NORTHERN AVENUE
AAR/DOT No. 025 - 413 R1 & 025 - 413 R2

RR-02635B-04-0207

Dear Mr. Thompson:

In concept, this agreement will allow ADOT to re-align 67th Avenue by constructing an overhead structure and roadway carrying vehicular traffic over BNSF's track and both streets, Grand Avenue and Northern Avenue. The existing crossings of BNSF's single track, AAR/DOT #025-413 R1 and AAR/DOT #025-413 R2 will be modified per the State's Project Plans and Specifications. Improvements to the existing warning lights and gates at the Northern Avenue crossing intersection shall be implemented by a separate agreement.

Please furnish our office with an Opinion and Order to cover the installation and work described in the subject agreement. The Railroad Company has signed an Agreement covering the work. Please find 11 copies of this Agreement attached for your information and files.

Upon receipt of the Opinion and Order, we will send you a copy of our letter authorizing the Railroad to proceed with the work.

Respectfully,

[Signature: Elaine Mercado]

Elaine Mercado, PE
Statewide Utilities Coordinator Supervisor
Utility & Railroad Engineering Section
205 South 17th Avenue, Mail Drop 618E
Phoenix, Arizona 85007
Phone: 602 712-8689
Fax: 602 712-3229

Enc.



BNSF Cont. No. _____
BNSF File: 025413R
67th Ave/Northern Avenue
060 MA 153 H5601 01C
Agreement No. 2457-03-BNSF

THIS AGREEMENT made this _____ day of _____, 2004, between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware Corporation, hereinafter called, "BNSF", and the STATE OF ARIZONA, acting by and through its DEPARTMENT OF TRANSPORTATION, hereinafter referred to as "STATE". All lettered exhibits are incorporated and made a part of this AGREEMENT by reference and attachment regardless of designation or alphabetical order.

RECITALS:

BNSF owns and operates a line of railroad in and through the County of Maricopa, City of Glendale, Arizona.

The Arizona Department of Transportation ("STATE") proposes to re-align 67th Avenue, through the construction of a 67th Avenue overhead structure and roadway carrying vehicular traffic over BNSF's track and both streets, Grand Avenue and Northern Avenue. The intersection layout includes new connecting roadways and traffic signals to provide access to and from the new grade separated 67th Avenue. The existing 67th grade crossing of BNSF's single track, AAR/DOT # 025-413 R1 Railroad Mile Post 182.56, will be modified per STATE's PROJECT plans and specifications. The existing Northern grade crossing of BNSF's single track, AAR/DOT # 025-413 R2 Railroad Mile Post 182.56, will be modified per STATE's PROJECT plans and specifications. Improvements to the existing warning lights and gates at the Northern Avenue crossing intersection are implemented by a separate agreement—Agreement No. 1531-91-ATSF R1531CD03 which utilizes Federal Section 130 funding. The RAILROAD WORK is necessary for the PROJECT and railroad facilities are located on Railway property, therefore, STATE will fully compensate the Railway for the relocation of its facilities.

The parties hereto desire to express in writing their understanding and agreement with respect to the PROJECT and pursuant to which the STRUCTURE, connecting roadways and other improvements are to be constructed and maintained.

DEFINITIONS:

- A. AGREEMENT means this specific agreement with all attached exhibits together with all attachments incorporated by reference.
- B. UTILITY TRACS NO. means ADOT's utility relocation Accounting number utilized for the RAILROAD'S relocation work, which is **060 MA 153 H5601 01C**.
- C. CONSTRUCTION TRACS NO. means the roadway construction Accounting number utilized for ADOT construction PROJECT, which is **060 MA 153 H5601 01C**.
- D. UTILITY PROJECT NO. **NH-060-B(007)B**.
- E. EMERGENCY WORK by BNSF means work of an immediate nature required to maintain the integrity of rail service, restore railroad operations or for the protection of persons or BNSF property.
- F. PROJECT means all work of every kind and character required in connection with the construction of 67th Avenue at Grand Avenue and Northern Avenue including, but not limited to, any and all roadway improvements, changes to railroad safety devices and appurtenances, communication, signal and electrical lines and appurtenances, grading, both temporary and permanent drainage facilities, signing and striping, modification to utilities, right of way acquisition, preliminary and construction engineering, contract preparation, cuts, fills, highway pavement, retaining walls and all highway facilities at the locations shown on the STATE's project plans and specifications included herein by reference only.
- G. RAILROAD WORK means pre-engineering, engineering, management, administration, design, preparation of plans, specifications and estimate, construction labor, materials and equipment called for in the AGREEMENT, including approved changes in scope.
- H. STRUCTURE means the 67th Avenue Overhead Structure, as constructed and depicted on Exhibit "A," Sheets 1 and 2.

AGREEMENT:

ARTICLE I

IN CONSIDERATION of the covenants of the STATE hereinafter set forth, and the faithful performance thereof, BNSF agrees as follows:

1. To grant, and hereby does grant, to the STATE, its successors and assigns, upon and subject to the terms and conditions hereinafter set forth, permission and license to enter upon and use that portion of BNSF's right of way as is necessary to construct and thereafter maintain the STRUCTURE, said roadways, and facilities, as shown on said Exhibit "A," Sheets 1 and 2

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attached and made a part hereof, excepting and reserving the right to be exercised by BNSF, and by any others who have obtained, or may obtain, permission or authority from BNSF to:

- (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) From time to time to construct, operate, maintain, renew and/or relocate upon said right of way, additional facilities of the character described in subparagraph (a) of this Paragraph 1;
- (c) From time to time to construct or allow to be constructed, such facilities as BNSF deems appropriate. Such construction will not interfere with the rights granted to the STATE.
- (d) Except and reserving the right by STATE to approve any new work identified in subparagraphs (a) through (c) of this Paragraph 1 to be located beneath or within 50 feet of the STRUCTURE within BNSF right of way. The STATE reserves the right to deny said work the STATE deems detrimental to its facilities.

This right is given by BNSF without warranty of title of any kind, express or implied, and no covenant of warranty of title shall be implied from the use of any word or words herein contained. In case of the eviction of STATE by anyone owning, or claiming title to or any interest in said right of way, BNSF shall not be liable to STATE for any damage of any nature whatsoever and STATE hereby releases BNSF from such claims. The granting of similar or additional rights to third parties, subsequent to the date of this AGREEMENT, will not impair or interfere with the rights herein granted to STATE pursuant to this AGREEMENT.

2. BNSF agrees this right may be transferred to the City of Glendale in part or full, when the STATE gives notice to BNSF of facilities transferred and accepted by the City of Glendale and the City of Glendale has given notice to BNSF that they have accepted the terms of this agreement. Such notice shall be upon approval and by resolution of the Transportation Board. Such notice by the STATE will clarify, if necessary, the portion of facilities the City of Glendale will acquire ownership of which permission and license from BNSF is transferred.
3. To furnish all labor, materials, tools, and equipment and do RAILROAD WORK required due to the construction of the PROJECT, such RAILROAD WORK and the estimated cost thereof being as shown in Exhibit "B" attached hereto and made a part hereof. In the event that construction of the Project has not commenced within six (6) months from the effective date of this AGREEMENT, BNSF may, in its sole and absolute discretion, revise the cost estimates set forth in Exhibit "B." In such case, BNSF shall provide to the STATE its revised cost estimates highlighting all changes that are made. Any item of work incidental to those items listed in said Exhibit "B," but not specifically mentioned therein, may be included as part of this AGREEMENT as an item of work upon written approval of STATE, if practicable and subject to applicable federal regulations, if any. Construction of the PROJECT shall include the following work by BNSF:

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- (a) The furnishing of preliminary and final engineering and contract plan preparation;
 - (b) The making of such changes in the alignment, location and elevation of its telephone, telegraph, signal and/or wire lines and appurtenances along, over or under the tracks, both temporary and permanent, as may become necessary by reason of the construction of the PROJECT;
 - (c) The furnishing of such watchmen and flaggers as may be necessary for the safety of BNSF's property and the operation of its trains during construction of the PROJECT;
 - (d) The furnishing of engineering and inspection as required for construction of the PROJECT;
 - (e) Remove, adjust, and install new gates and signals, removal and disposal of 9 linear feet of existing crossing surface and track components at the northeast corner of 67th and Northern at grade crossing;
 - (f) The installation and use of vehicular traffic control devices as necessary per the MUTCD guidelines to construct the required gates, signal lights, crossing surface material and related appurtenances. Railroad may coordinate with STATE contractor to jointly utilize those devices supplied by STATE contractor. Railroad shall supply traffic control devices when necessary in such case as scheduling will not permit joint utilization of STATE contractor's equipment.
4. To do all work provided in Article I, Paragraph 3 above with its own employees working under Railroad Labor Agreements or by contractor(s), if necessary, and on an actual cost basis.
5. BNSF is hereby authorized to include a charge, equal to the amount allowed by the Federal Highway Administration, at the time of billing, to cover the cost of BNSF's self-insurance expense covering Employer's Liability, including liability under the Federal Employer's Liability Act, for protection of its employees in connection with the construction of the PROJECT covered by this AGREEMENT. Such charge shall be considered a portion of the actual cost of the PROJECT regardless of the nature or amount of ultimate liability for injury, loss or death to BNSF's employees, if any.
6. STATE agrees to reimburse BNSF for work of an emergency nature caused by STATE or STATE's contractor, in connection with 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 STATE however, STATE reserves the right to review the cause of said work to determine payment responsibilities. If the parties cannot agree on the responsible party of the damages the matter will be resolved through arbitration. Pursuant to A.R.S. Section 12-1518, the parties shall use arbitration, after exhausting applicable administrative remedies, to resolve disputes arising out of this AGREEMENT where the sole relief sought is monetary damages

of \$100,000 or less exclusive of interest and costs.

7. Prior to submitting the first invoice to STATE, BNSF will notify STATE, in writing, of the actual BNSF construction start date. BNSF construction start date shall not be prior to receiving a notice to proceed from STATE. Prior to submitting the final invoice to STATE, BNSF agrees to notify STATE, in writing, of the actual BNSF construction completion date.
8. BNSF may submit to STATE monthly invoices for the WORK costs from the date of STATE's authorization for BNSF to proceed with the WORK. Except for the final invoice, monthly invoices shall only be submitted for costs of five hundred dollars (\$500) or more. BNSF shall, within ninety (90) days after completion of WORK, submit to ADOT detailed invoices covering the actual cost of all WORK, including applicable taxes and standard BNSF overhead and subcontracting administration lump sum fee. Invoices shall include the appropriate AGREEMENT and UTILITY TRACS numbers and shall be labeled as "Progress Invoice" or "Final Invoice", as the case may be. Costs shall be accumulated and invoiced in accordance with the Federal Acquisition Regulations. The United States Code of Federal Regulations, 23CFR 646B is incorporated into this AGREEMENT by reference.
9. BNSF shall make every effort in the design of its facilities to avoid conflicts with known underground utilities. The known location of underground utilities can be found in the STATE's supplied progress prints to BNSF of the PROJECT or by calling the STATE's design engineer Aztec Engineering @ (602) 454-0402.
10. To coordinate with the STATE's contractor with respect to construction schedule and work related items for the safe and effective progress of the work. When BNSF receives Exhibits "C" and "C-1" from the STATE's Contractor BNSF shall begin a dialog with the STATE's Contractor to mutually schedule and coordinate their respective work. BNSF and the STATE's Contractor shall identify and agree upon a "work activity schedule" suitable to both parties for the completion of BNSF and Contractor's activities, always recognizing that Contractor's work shall be scheduled around the movement of trains unless otherwise agreed to by BNSF and STATE. The "work activity schedule" shall be identified on the STATE's Contractor schedule with sufficient duration such that if BNSF were temporarily called away to address work of an emergency nature they would be able to return and complete their assignments without jeopardizing the STATE Contractor's overall schedule. A copy of BNSF's proposed construction schedule shall be given to the STATE's Engineer.
11. BNSF shall, if necessary, temporarily suspend work activity on the PROJECT to attend work of an emergency nature elsewhere in the region. BNSF will not be subject to penalties as a result of such delays. Despite any such delay, BNSF shall work as expeditiously as possible under the circumstances to complete the work. If BNSF's work is impacted by circumstances beyond its control, BNSF's schedule duration (see Paragraph 10 above) shall be extended for a period of time equal to the delay.
12. BNSF shall be given progress copies of the STATE's PROJECT plans at the 30%, 60% and 95% level along with a copy of the final PS&E submittal by the STATE's Consultant. BNSF is encouraged to make comments to the STATE's PROJECT plan with regard to BNSF

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facilities. If after review of the final PS&E submittal BNSF sees no significant changes affecting BNSF facilities from the previous submissions BNSF shall signify by letter, addressed to the STATE (see Article III, Paragraph 31), their approval of the PROJECT plan as to the impacts to BNSF facilities.

13. That STATE shall have the right to request that any BNSF Contractor or any employee of a BNSF Contractor who performs work within STATE right of way and which affects STATE's operations or facilities, be removed from STATE right of way for incompetence, neglect of duty, unsafe conduct or misconduct. In the event BNSF or its Contractor elects not to honor such request, STATE may stop the work within its right of way until the matter has been fully resolved to STATE's satisfaction. Before such action is taken the matter will be attempted to be resolved through the STATE's Engineer if the problem occurs during the initial construction or through the District Permits Supervisor if the problem occurs during a subsequent maintenance effort. STATE shall make the final determination.

ARTICLE II

IN CONSIDERATION of the covenants of BNSF herein set forth and the faithful performance thereof, STATE agrees as follows:

1. A copy of the final STATE PROJECT plans and specifications are hereby adopted and incorporated into this AGREEMENT by reference.
2. To make application to the Arizona Corporation Commission (hereinafter referred to as the "Commission") for an order authorizing construction of the PROJECT together with a copy of this AGREEMENT.
3. To make any and all arrangements to secure the location 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 found necessary to locate or relocate in any manner whatsoever due to the construction of the PROJECT except that BNSF shall have the final responsibility to locate any utilities it deems necessary for the successful completion of the RAILROAD WORK found in Article 1 Paragraphs 3a through f.
4. To provide for and maintain minimum vertical clearances as shown on Exhibit "A," Sheets 1 and 2.
5. To be solely liable for the full cost of the PROJECT as described herein and as generally shown on the PROJECT plans and said Exhibit "A," Sheets 1 and 2 except for those items of RAILROAD WORK identified to be paid for under the Federal Section 130 Program funds. A separate Agreement No. 1531-91-ATSF R1531CD03, will be prepared for this purpose.
6. To furnish all labor, materials, tools, and equipment in performing the work to be performed by STATE as hereafter provided. Construction with respect to said PROJECT shall be undertaken by STATE's Contractor and shall be performed at such times as shall not

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endanger or interfere with the safe and timely operations of BNSF's tracks and other facilities.

7. To construct the PROJECT as shown on the PROJECT plans and Exhibit "A," Sheets 1 and 2 and do all work provided for in the plans and specifications for the PROJECT, except such work that BNSF herein agrees to do. Principal elements of work to be performed by STATE in the construction of the PROJECT are as follows:
 - (a) The design and construction of the 67th Avenue re-alignment and overhead structure at Grand Avenue and Northern Avenue;
 - (b) The providing of suitable drainage, both temporary and permanent;
 - (c) The providing of necessary grading and paving;
 - (d) The providing of necessary engineering and staking for the STRUCTURE;
 - (e) The providing of all barricades, lights, flaggers or traffic control devices necessary for detouring vehicular traffic on the PROJECT.
 - (f) The providing, in writing, to BNSF of the total time required from start of all pre-empt cycles of highway traffic control signals or advance warning signal until arrival of the train at the street/highway rail crossing.
 - (g) The providing to BNSF the connection between the street/highway traffic control signals to the contact terminals furnished by BNSF.
8. To incorporate into the prime contract for construction of the PROJECT, or the specifications therefore, the provisions set forth in this Article II, Paragraphs 6, 9, 10, 11, 12, 13 and in Article III, Paragraphs 3, 4, 5, 6, 8, 9 and the provisions entitled "Railroad Relations and Insurance", "Agreement between BNSF and the Contractor" as set forth in BNSF standard Exhibits "C" and "C-1," attached hereto and by reference made a part hereof.
9. To require its contractor(s) to notify BNSF's Roadmaster at least fifteen (15) business days in advance of commencing work on BNSF property or near BNSF's tracks, when requesting a BNSF flagger to protect said contractor's work on BNSF property or near BNSF's tracks to prevent interference with or damage to BNSF's trains and property pursuant to the requirements set forth in said Exhibit "C."
10. To require its contractor(s) to coordinate their work each day with BNSF's operations, prior to commencing any construction activity, by contacting BNSF's Roadmaster.
11. To require its contractor(s) to furnish BNSF's Director of Structures at 4515 Kansas Avenue, Kansas City, KS. 66106, for approval, five copies of plans and two sets of calculations for any falsework, shoring, or cribbing proposed to be used over, under, or adjacent to BNSF's tracks. The requirements for submission of shoring or cribbing plans are outlined in greater

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detail in said Exhibit "C." The use of such shoring or cribbing shall conform to the standard side clearances required by the Commission. In case the use of such shoring will impair said clearance, STATE will ensure that application is made to the Commission, for approval of such impairment during the period of construction of the Project.

12. The STATE agrees to include the following provisions in its contract with any contractor performing work on said PROJECT:

- (a) Fiber optic cable systems owned by various telecommunication companies may cross or run parallel in BNSF's rail corridor. The contractor shall be responsible to contact BNSF and/or the telecommunications companies to determine whether there are any fiber optic cable systems located within the Project boundaries that could be damaged or their service disrupted due to the construction of the PROJECT. The contractor shall also pothole all lines either shown on the plans or marked in the field in order to verify their locations. The contractor shall also use all reasonable methods when working in the BNSF rail corridor to determine if any other fiber optic lines may exist.
- (b) Failure to notify, pothole or identify these lines shall be sufficient cause for the STATE Engineer to stop construction at no cost to the STATE or BNSF until these items are completed. Costs for repairs and loss of revenues and profits due to damage to these facilities through negligent acts by the contractor shall be the sole responsibility of the contractor. The contractor shall indemnify and hold the STATE and BNSF harmless against and from all cost, liability and expense arising out of or in any way contributed to these negligent acts of the contractor.
- (c) The telecommunication companies shall be responsible for the rearrangement of any facilities determined to interfere with the construction. The contractor shall cooperate fully with any company performing these rearrangements.

13. That, except as hereinafter otherwise provided, all work to be performed hereunder by STATE in the construction of the PROJECT will be performed pursuant to a contract or contracts to be let by STATE and all such contracts shall provide:

- (a) That all work performed thereunder, within the limits of BNSF's right of way shall be performed in a good and workmanlike manner, and in accordance with plans and specifications. Those changes or modifications during construction that affect safety or BNSF's operations shall also be agreed to by both parties.
- (b) That all materials utilized in the construction of the Structure shall be new and of good quality, free from material defects and be in accordance with the plans and specifications.
- (c) That no work, including the construction of this PROJECT and/or any subsequent maintenance, shall be commenced within BNSF's right of way until each of the prime contractors employed by the STATE in connection with said work shall have (i) executed and delivered to BNSF a letter agreement in the form of Exhibit "C-1," and (ii) delivered to and secured BNSF's approval of the required insurance by said Exhibit "C-1." Work

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by STATE personnel shall follow guidelines established in Article III, Paragraph 12.

- (d) If the STATE's Contractor defaults his obligation under his contract with the STATE for any reason his replacement shall be responsible to comply with all related obligations to BNSF as contained in the original contract between the STATE and the first Contractor.
 - (e) That BNSF shall have the right to request that any STATE Contractor or any employee of a Contractor who performs work within BNSF's right of way and which affects BNSF's operations or facilities, be removed from BNSF's right of way for incompetence, neglect of duty, unsafe conduct or misconduct. In the event STATE or its contractor elects not to honor such request, BNSF may stop work within its right of way until the matter has been fully resolved to BNSF's satisfaction. Before such action is taken the matter will be attempted to be resolved through the BNSF Roadmaster if the problem occurs during the initial construction or during a subsequent maintenance efforts. BNSF shall make the final determination.
 - (f) STATE's agents, contractors, representatives and invitees shall wear the current BNSF Personal Protective Equipment ("PPE") when on the BNSF's rail corridor. BNSF PPE shall meet applicable OSHA and ANSI specifications. Existing BNSF PPE requirements are (i) safety glasses with permanently affixed side shields, no yellow lenses; (ii) hard hats with high visibility orange cover; (iii) safety shoes with hardened toe, above the ankle lace up and a defined heel; and (iv) high visibility orange vests. Hearing protection, fall protection and respirators will be worn as required by state and federal regulations.
 - (g) That STATE shall supervise the operations of all STATE's Contractors through the use of inspectors who are qualified to inspect the type of work being performed. Furthermore, if at any time during construction, BNSF discovers that any STATE inspection personnel are not properly inspecting the construction of BNSF facilities, BNSF shall have the right to request STATE to arrange for the immediate replacement of the inspection personnel who are not performing proper inspections.
14. STATE will reimburse BNSF for the actual cost of WORK, subject to STATE's right to audit BNSF costs, including any changes approved by STATE. The estimated cost of the WORK is set forth in Exhibit "B." STATE is not responsible for any costs which are betterments or enhancements to BNSF's WORK. The parties agree that the items listed on Exhibit "B" (except for any items identified to be paid by BNSF) do not constitute betterments or enhancements within the meaning of this AGREEMENT.
15. STATE agrees to pay BNSF the invoiced amount within ninety (90) days of receipt, provided BNSF has complied with all conditions of this AGREEMENT.
16. The STATE will provide one electronic diskette copy of the Exhibit "A," Sheets 1 and 2 for BNSF's use.

ARTICLE III

IN CONSIDERATION of the premises, it is mutually agreed as follows:

1. That all work contemplated in this AGREEMENT shall be performed in a good and workmanlike manner in accordance with the plans and specifications. Each portion shall be promptly commenced by the parties hereto obligated to do the same and thereafter diligently prosecuted to conclusion in its logical order and sequence. Furthermore, any changes or modifications during construction that affect the RAILROAD WORK obligated by BNSF shall be agreed to by both parties in writing and attached as an amendment to this AGREEMENT.
2. That such work as defined in the plans, specifications and this AGREEMENT is subject to the Commission's approval, with minimum clearances of not less than those specified by the Commission, or as otherwise authorized by the Commission for BNSF's tracks at this location.
3. In the event of an unforeseen railroad emergency, BNSF reserves the right to reallocate all or a portion of its labor forces assigned to perform the RAILROAD WORK when BNSF believes such reallocation is necessary to provide for the immediate restoration of railroad operations of BNSF or its affiliates or to protect persons or property on or near any BNSF owned property or any related railroad. BNSF will reassign such labor forces to again perform the Railroad Work when, in its sole but good faith opinion, such emergency condition no longer exists. BNSF will not be liable for any additional costs or expenses of the Project resulting from any such reallocation of its labor forces. The parties further agree that such reallocation of labor forces by BNSF and any direct or indirect results of such reallocation will not constitute a breach of this AGREEMENT by BNSF.
4. The STATE Contractor shall conduct his work in a safe and orderly manner and according to the plans and specifications. The STATE Contractor shall at no times hinder the safe operation of BNSF facilities nor shall he allow the railroad required insurance to lapse at any time. That if any STATE Contractor shall prosecute the PROJECT work in a manner that BNSF deems to be hazardous to its property, facilities or the safe and expeditious movement of its traffic, or the insurance described in Exhibit "C-1" hereof shall be canceled during the course of the PROJECT, then BNSF shall have the right to stop the work, within BNSF right of way, until the acts or omissions of such STATE Contractor have been fully rectified to the satisfaction of BNSF's Division Engineer, or additional insurance has been delivered to and accepted by BNSF. Such work stoppage shall not give rise to or impose upon BNSF any liability to STATE. The right of BNSF to stop the work, within BNSF right of way, is in addition to any other rights BNSF may have which include, but are not limited to, actions for damages or lost profits. In the event that BNSF shall desire to stop work in BNSF right of way, BNSF agrees to give immediate notice thereof in writing to those individuals set forth in Paragraph 31 of this Article III.

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5. That during the construction of the PROJECT the STATE's Contractor will not deposit any material or debris onto railroad property that, in the opinion of BNSF, would hinder railroad operation or be unsafe to railroad operation.
6. That all existing BNSF maintenance roadways will remain open at all times during construction.
7. That the STATE will reimburse BNSF in full for the actual cost of all work performed by BNSF pursuant to this AGREEMENT. All expenses incurred by BNSF and billed to STATE pursuant to Article I, Paragraph 8, hereof, shall be in accordance with and subject to the terms and provisions of the Federal Highway Administration Manual, as amended or revised. STATE agrees to reimburse all of BNSF's preliminary engineering and contract preparation costs as described in Subparagraph (a) of Article I, Paragraph 3 hereof, notwithstanding the fact that such work may have preceded the date of this AGREEMENT.
8. That the BNSF's Manager Public Projects will be given a notice to proceed when the Opinion and Order has returned from the Arizona Corporation Commission. That the construction of the PROJECT, on BNSF right of way, shall not be commenced until STATE's Contractor shall have given not less than thirty (30) working days prior written notice to BNSF's Manager Public Projects, making reference to BNSF's file number 025413R, which notice shall state the time that operations for construction of the Project, on BNSF right of way, shall commence.
9. The construction of said PROJECT shall be performed and affected in such a manner as not to interfere with the safe and timely operation of locomotives, trains, cars and on-track maintenance equipment, over BNSF's tracks.
10. It is expressly understood that the right to install utilities is restricted to the placement of underground utilities beneath BNSF's track located a minimum of fifty (50) feet from abutments, piers, piles, or footings. Under no circumstances will utilities be allowed to hang from said Structure. All utility crossings within the limits of the licensed area will be covered by separate agreements between BNSF and each of the owners of the utilities. No major highway drainage outfall points will discharge onto BNSF property.
11. That after completion of the construction of said PROJECT as hereinabove described:
 - (a) BNSF will, at its sole cost and expense, maintain its roadbed, track, and all other railroad facilities;
 - (b) STATE will own and, at its sole cost and expense, maintain the STRUCTURE, the roadway approaches, ramps, lighting, drainage and all appurtenances thereto;
 - (c) STATE will, at its sole cost and expense, maintain the D.O.T. Crossing placards in good readable condition;
 - (d) The City of Glendale will be fully responsible for repairs, maintenance, future

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construction or reconstruction of facilities within the present right of way of 67th Avenue and Northern Avenue and outside of the limits of Grand Avenue's right of way until any change in the jurisdiction of the roadway under the terms of the existing crossing agreement.

(e) Responsibility and license to access STRUCTURE may be transferred to the City of Glendale per Article I, Paragraph 2.

12. The STATE shall have the right to maintain the STRUCTURE and its roadway facilities. Before entering upon BNSF's right of way for maintenance purposes to maintain said STRUCTURE and roadway facilities, by STATE personnel, STATE shall notify BNSF's Manager of Public Projects to obtain prior authorization. If work is contracted, STATE will require its prime Contractor(s) to comply with the obligations in favor of BNSF set forth in Exhibits "C" and "C-1," as may be revised from time to time.
13. The BNSF shall have the right to maintain the facilities owned by BNSF and constructed with this Project.
14. That if 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 have full right to make such changes or additions, provided such changes or additions do not change or alter the STRUCTURE or highway facilities, provided further, however, that should it become necessary or desirable in the future to change, alter, widen or reconstruct the STRUCTURE or highway facilities to accommodate railroad projects, the cost of such work, including any cost incidental to alteration of STRUCTURE or highway facilities made necessary by the alteration of the railway facilities, shall be paid by BNSF. Before making any such changes, alterations or reconstruction of the STRUCTURE or highway facilities, BNSF shall provide to the STATE copies of the plans and specifications and receive the STATE's written approval prior to commencement of work.
15. That if State shall deem it necessary or desirable, in the future, due to traffic conditions, to alter or reconstruct the Structure or facilities herein contemplated, it shall have full right to do so, the cost of which shall be paid by the STATE. If however, such alteration or reconstruction shall encroach further upon BNSF's right of way to a greater extent than is contemplated by the plans and specifications for the PROJECT, the STATE shall seek written consent of BNSF, and the execution of a supplement to this Agreement or the completion of a separate agreement.
16. All of the covenants and provisions of this AGREEMENT shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, except that no party may assign any of its rights or obligations hereunder without the prior written consent of the other party. Except, responsibility and license to access facilities may be transferred to the City of Glendale per Article I, section 2.

17. Nothing contained in this AGREEMENT shall be construed as obligating the STATE to undertake the actual construction of the PROJECT until such time as it deems appropriate. In the event that construction of the PROJECT has not begun for a period of three (3) years from the date of this AGREEMENT, this AGREEMENT shall become null and void.
18. The acceptance date of this AGREEMENT shall be the day which the last party executes the AGREEMENT.
19. In the event conditions or circumstances require a change in the scope of BNSF's RAILROAD WORK on the PROJECT as set forth in this AGREEMENT including Exhibits "A," Sheets 1 and 2 and on the PROJECT plans, each party shall agree in writing to the changes, including payment responsibilities prior to doing the work. STATE shall not be responsible for any costs associated with any change in the scope of RAILROAD WORK until STATE approves the change in writing. The proposed schedule for completion of RAILROAD WORK shall be adjusted to accommodate the change in scope and the time necessary for STATE to process the change request.
20. STATE approval is required for any invoice total which exceeds the cost estimate set forth in Exhibit "B" plus any approved changes by more than ten percent (10%). Invoices which exceed the original or revised estimated cost by more than ten percent (10%) without prior written approval shall be returned to BNSF pending resolution.
21. BNSF shall reimburse STATE, within ninety (90) days of receiving written notification, for any amounts STATE disallows as a result of its audit. Any audit exceptions with which BNSF disagrees shall be paid to STATE, under protest, subject to resolution by STATE and BNSF through compromise, arbitration or adjudication as provided for in this AGREEMENT.
22. Neither party to this AGREEMENT agrees to indemnify the other party or hold harmless the other party from liability hereunder. However, if the common law or a statute provides for either a right to indemnify an/or a right to contribution to any party to this AGREEMENT, then the right to pursue one or both of these remedies is preserved.
23. The parties shall use arbitration after exhausting applicable administrative remedies to resolve disputes arising out of this AGREEMENT where the sole relief sought is monetary damages of \$100,000 or less exclusive of interest and costs, as provided in A.R.S. § 12-1518.
24. This AGREEMENT is subject to the provisions of Chapter 1 of Title 35, Arizona Revised Statutes.
25. BNSF shall comply with all applicable provisions of Executive Order 75-5, "Non-Discrimination in Employment by Government Contractors and Subcontractors".
26. All parties hereby are put on notice that this AGREEMENT is subject to cancellation by the Governor pursuant to A.R.S. § 38-511.

Agreement # 2457-03-BNSF
BNSF File No. 025413R

27. In accordance with A.R.S. § 35-214, all books accounts, reports, files and other records relating to this AGREEMENT shall be subject at reasonable times to inspection and audit by ADOT for five (5) years after the receipt of final payment. At STATE's discretion said inspection and audit may be held at BNSF's office during normal business hours. STATE shall conduct its inspection and audit at its expense, including BNSF's audit costs.
28. This AGREEMENT, including any schedules, exhibits or attachments hereto, constitutes the entire AGREEMENT between the parties, and no understanding or obligation not expressly set forth herein shall be binding upon them. No modification, amendment or alteration of this AGREEMENT shall be valid unless it is in writing and signed by both parties.
29. This AGREEMENT shall be governed by the laws of the State of Arizona.
30. The waiver by either party of any breach or failure to provide full performance under any of the terms or conditions of this AGREEMENT shall not be construed as a waiver of any other term or condition, or of any subsequent breach of the same or any other term or condition.
31. Any notice provided for or concerning this AGREEMENT shall be in writing and be deemed sufficiently given when sent by certified mail, return receipt requested, to the parties at the following addresses:

The Burlington Northern and
Santa Fe Railway Company:

BNSF's Vice President, Engineering
2600 Lou Menk Drive
Fort Worth, Texas 76131

The Burlington Northern and
Santa Fe Railway Company:

BNSF's Manager Public Projects
740 East Carnegie Drive
San Bernardino, CA 92408

State of Arizona

Arizona Department of Transportation
Utility & Railroad Section
Attn: Engineer – Manager
205 South 17th Avenue – Mail Drop 618E
Phoenix, Arizona 85007

32. The following Exhibits are incorporated and made a part of this AGREEMENT:
- (a) Exhibit "A," Sheets 1 and 2 - Identification of STATE facilities within BNSF right of way for which BNSF is giving STATE access onto BNSF right of way to construct and maintain STATE facilities in perpetuity.
 - (b) Exhibit "B" - Itemized cost estimate of RAILROAD WORK obligated to STATE.
 - (c) BNSF supplied standard Exhibits "C" and "C-1."
 - (d) STATE's PROJECT plans and specifications for project No. 060 MA 153 H5601 01C are incorporated by reference only.

Agreement # 2457-03-BNSF
BNSF File No. 025413R

FORT WORTH, TX
 SCALES: AS NOTED
 ARIZONA DIV.
 PHOENIX SUBDIVISION
 DATE: FEBRUARY, 2003

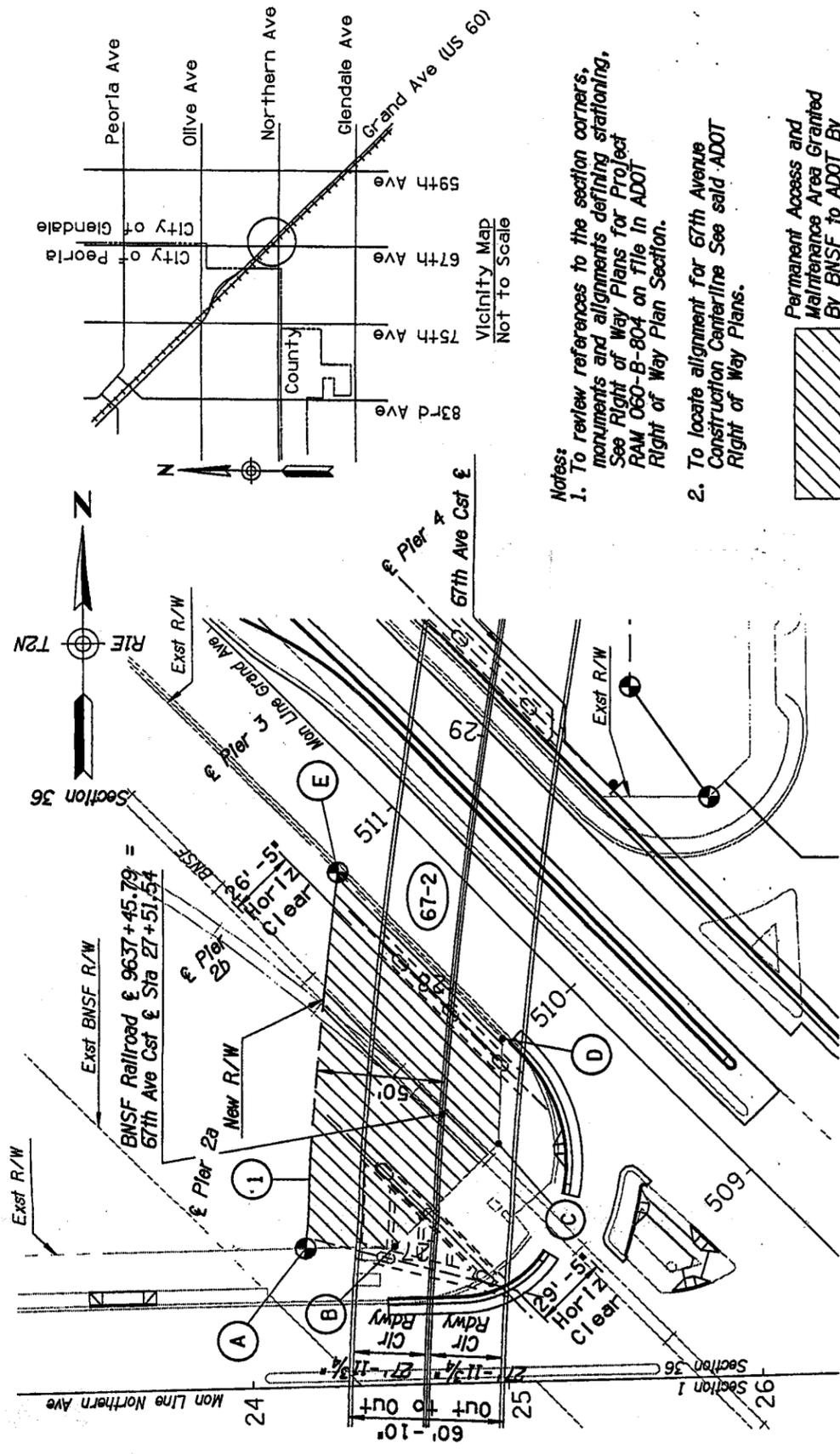
CRAIG HILL
 VICE PRESIDENT ENGINEERING & MECHANICAL
 DESCRIPTION APPROVED

Code	OFFSET	STATION	CENTERLINE
A	50.00'L + POC	26+94.12	67
B	15.29'L + POC	26+97.07	67
C	22.93'R + POC	27+40.84	67
D	21.04'R + POC	27+82.51	67
E	50.00'L + POC	28+39.42	67

PC Sta	20+64.53
PT Sta	29+11.85
PI Sta	24+93.08
Δ	21°10'58"
D	2°30'00"
T	428.55'
L	847.31'
R	2291.83'
EXT	39.72'

1	R=2341.83	L=148.47'
	Center=928828.02, 614989.01	

67 = 67th Avenue Cst &

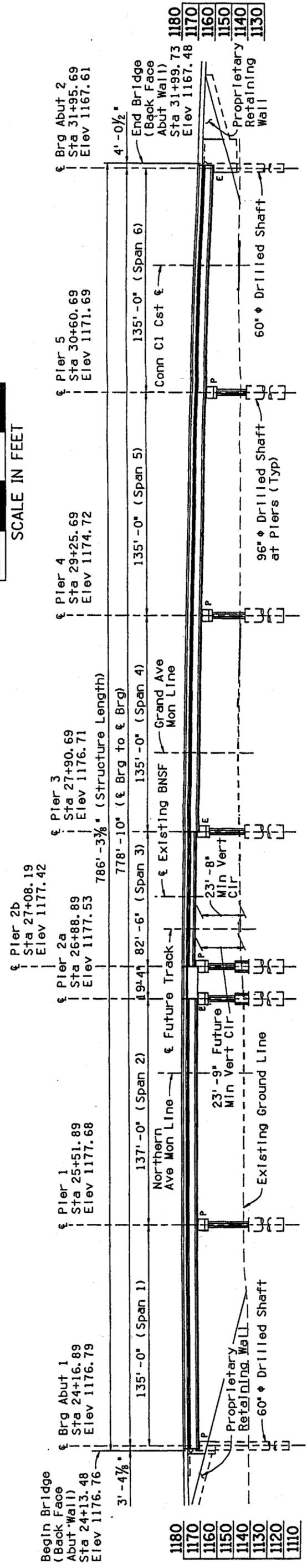


Notes:
 1. To review references to the section corners, monuments and alignments defining stationing. See Right of Way Plans for Project RAM 060-B-804 on file in ADOT Right of Way Plan Section.
 2. To locate alignment for 67th Avenue Construction Centerline See said ADOT Right of Way Plans.

Permanent Access and Maintenance Area Granted By BNSF to ADOT By This Agreement.



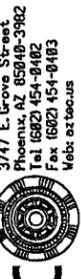
LOCATION PLAN



ELEVATION ALONG CST &
 Stations, Dimensions and Elevations given along Cst &

EXHIBIT "A"

ATTACHED TO AGREEMENT BETWEEN
 THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
 AND
 ARIZONA DEPT. OF TRANSPORTATION



3747 E. Grove Street
 Phoenix, AZ 85048-3982
 Tel (602) 454-9482
 Fax (602) 454-9483
 Web: aztecus

Grand Avenue, Maricopa County, Arizona

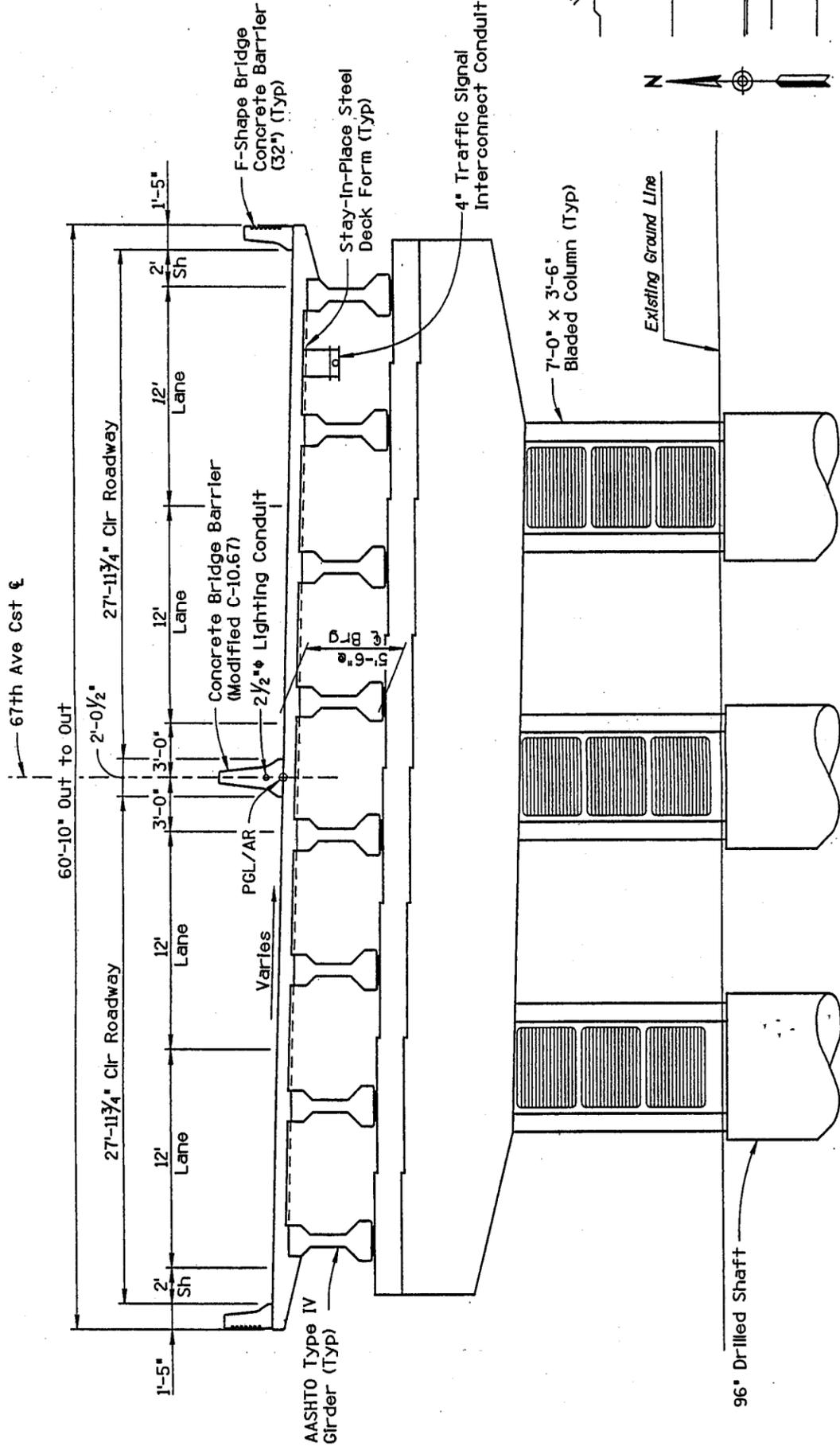
Description: 67th Avenue Underpass
 Right-of-Way Requirements

EXHIBIT "A"

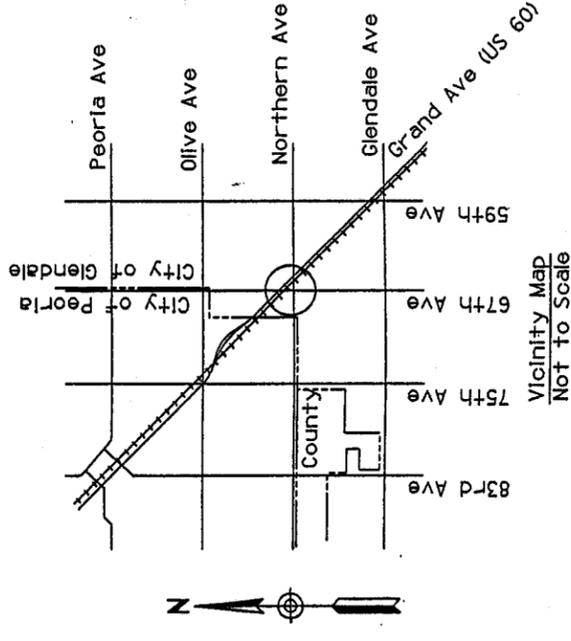
ATTACHED TO AGREEMENT BETWEEN
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
AND
ARIZONA DEPT. OF TRANSPORTATION

FORT WORTH, TX
SCALES: AS NOTED
ARIZONA DIV.
PHOENIX SUBDIVISION
DATE: FEBRUARY, 2003

CRAIG HILL
VICE PRESIDENT ENGINEERING & MECHANICAL
DESCRIPTION APPROVED



TYPICAL SECTION OVER BNSF
Not to Scale



3747 E. Camel Street
Phoenix, AZ 85046-9982
Tel: (602) 454-9482
Fax: (602) 454-9483
Web: aztecusa.com

Grand Avenue, Maricopa County, Arizona

Description: 67th Avenue Underpass
Typical Section

SHEET 2 OF 2

EXHIBIT "B"

SUMMARY OF COSTS

67th Avenue/Northern Avenue.

RR Track and flagging protection @ 67 th Ave	\$60,824
RR Signal remove, adjust, and install @ 67 th Ave	\$234,713
RR Signal Hut Relocation (No detail available)	\$4,000
<hr/>	
Total Estimate of Cost by State to BNSF	\$299,537

TO PHOENIX

EASTWARD APPR. 3090'
50 MPH

MINIMUM 120'

50' MIN

The Burlington Northern & Santa Fe Railway Company

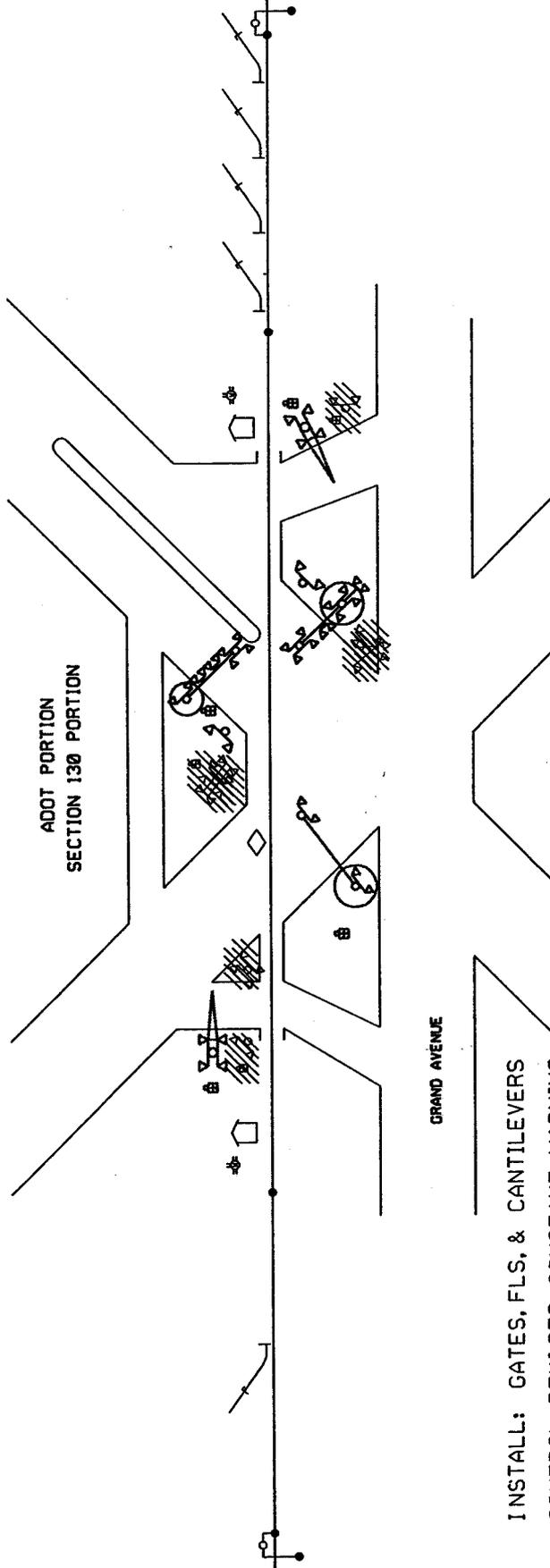
WESTWARD APPR. 3090'
50 MPH

TO ASH FORK

50' MIN

67 TH AVENUE

NORTHERN AVENUE



INSTALL: GATES, FLS, & CANTILEVERS
 CONTROL DEVICES: CONSTANT WARNING

FLASH OUT **BOLD - IN**

SALVAGE: NONE

- INSTRUMENT HOUSE
- ⊕ BELL
- ⊖ METER
- CROSSING CONTROL CONNECTIONS
- △ UNIDIRECTIONAL CROSSING CONTROL
- ◇ BIDIRECTIONAL CROSSING CONTROL
- ⊕ COUPLER OR TERMINATION
- () GUARD RAIL

Warning device placement:
 Clearance to C.L. Track = Min. 12', Max. 20'
 Edge of Road to C.L. Foundation:
 Min. 4'1" with curb,
 Min. 8'1" without curb,
 Max. 12'
 25' Min. to C.L. of Track
 30' Min. to Edge of Road
 LED
 LED
 LED
 Cantilever Jury Mast LED

House Clearance:
 Front Lights:
 Back and Side Lights:
 Cantilever Jury Mast

BNSF RAILWAY CO.
 GLENDALE, AZ.
 67TH & NORTHERN AVENUE
 LS 7208 PHOENIX SUBDIVISION
 M.P 182.56 SOUTHWEST DIVISION
 DOT# 025 413 R
 KANSAS CITY
 NO SCALE DATE: 12/08/02
 FILE: 7208182-56Y2.DGN MJ/TLP

EXHIBIT "B"

TOTAL OTHER ITEMS COST	49,160	49,160
PROJECT SUBTOTAL		212,314
CONGINGENCIES		21,231
BILL PREPARATION FEE		1,168
GROSS PROJECT COST		234,713
LESS COST PAID BY BNSF		0
TOTAL BILLABLE COST		234,713
		=====

EXHIBIT "B"

FORM APPROVED
BY VP-LAW

EXHIBIT "C"

CONTRACTOR REQUIREMENTS

1.01 General

- **1.01.01** The Contractor shall cooperate with **THE BURLINGTON NORTHERN AND SANTA FE 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 67th Ave/Maryland Avenue.
- **1.01.02** The Contractor shall 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 2 of said Exhibit "C-1".
- **1.01.03** The Contractor shall plan, schedule and conduct all work activities so as not to interfere with the movement of any trains on Railway Property.
- **1.01.04** 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.
- **1.01.05** 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 and regulations (including but not limited to the Resource Conservation and Recovery Act, as amended; the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA), and health and safety laws and regulations. The Contractor shall be responsible for and indemnify and save Railway harmless from 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.
- **1.01.06** The Contractor shall notify the State of Arizona's Engineer and Railway's Manager Public Projects, telephone number (505) 767-6845 at least thirty (30) working days before commencing any work on Railway Property. Contractors notification to Railway, shall refer to Railroad's file 025413R.
- **1.01.07** For any falsework above any tracks or any excavations located, whichever is greater, within twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 1 ½ 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 shall furnish the Railway five sets of working drawings showing details of construction affecting Railway Property and tracks. The working drawing shall 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. All calculations shall take into consideration railway surcharge loading and shall 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 shall be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor shall not begin work until notified by the Railway that plans have been approved. The Contractor shall 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 shall the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.

- **1.01.08** 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 shall 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.

1.02 Agreement

- **1.02.01** No employee of the Contractor, its subcontractors, agents or invitees shall enter Railway Property without first having completed Railway's Engineering Contractor Safety Orientation, found on the web site www.contractororientation.com. The Contractor shall ensure that each of its employees, subcontractors, agents or invitees have received Railway's Engineering Contractor Safety Orientation through internet sessions conducted by the or through the Contractor before any work is performed on the Project. The Contractor shall ensure that each of its employees, subcontractors, agents or invitees have verification that they have completed the Safety Orientation and that every employee of the Contractor, its subcontractors, agents or invitees have a card, in his or her possession, that is properly signed and dated certifying that they have received the Safety Orientation before entering Railway Property. The Contractor is responsible to pay the cost of the Safety Orientation. It is required that the Safety Orientation be renewed annually. Further clarification can be found on the web site or from the Railway's Representative.

1.03 Railway Requirements

- **1.03.01** The Contractor shall 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 shall be paid for by the Agency.
- **1.03.02** The Contractor shall notify the Railway's General Manager, Greg White at (505) 864-4988 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.
- **1.03.03** The Contractor shall abide by the following clearances during construction:
 - ◆ 25'-0" Horizontally from centerline of nearest track
 - ◆ 23'-3 1/2" Vertically above top of rail (Temporary Falsework Clearance may be reduced to 21'-6" subject to Railway and Public Utilities Commission approval)
 - ◆ 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
- **1.03.04** Any infringement within State statutory clearances due to the Contractor's operations shall be submitted to the Railway and to the State of Arizona and shall not be undertaken until approved in writing by the Railway, and until the State of Arizona 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.
- **1.03.05** In the case of impaired vertical clearance above top of rail, Railway shall 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 shall be borne by the Agency.
- **1.03.06** The details of construction affecting the Railway's Property and tracks not included in the contract plans shall be submitted to the Railway by State of Arizona for approval before work is undertaken and this work shall not be undertaken until approved by the Railway.
- **1.03.07** At other than public road crossings, the Contractor shall not move any equipment or materials across

Railway's tracks until permission has been obtained from the Railway. The Contractor shall obtain a "Temporary Private Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railways tracks. The temporary crossing shall be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor shall be at the expense of the Contractor.

- **1.03.08** 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 shall 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 shall 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.
- **1.03.09** The Contractor upon completion of the work covered by this contract, shall 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 shall cause Railway's Property to be left in a condition acceptable to the Railway's representative.

1.04 Contractor Roadway Worker on Track Safety Program and Safety Action Plan

- **1.04.01** 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 shall develop and implement the Safety Action Plan, as provided for on the web site www.contractororientation.com, which shall be made available to Railway prior to commencement of any work on Railway Property. During the performance of work, the Contractor shall audit its work activities. The Contractor shall designate an on-site Project Supervisor who shall serve as the contact person for the Railway and who shall maintain a copy of the Safety Action Plan, safety audits, and Material Safety Datasheets (MSDS), at the job site.

1.05 Protection of Railway Facilities and Railway Flagger Services:

- **1.05.01** The Contractor shall give a minimum of thirty (30) working days notice to Jim Grage, the Railways Roadmaster, at (602) 382-5803, in advance of when flagging services will be required to bulletin the flaggers position and shall provide five (5) working days notice to the Roadmaster to abolish the position per union requirements.
- **1.05.02** Unless determined otherwise by Railway's Project Representative, Railway flagger and protective services and devices will be required and furnished when Contractors 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:
 - **1.05.02a** When in the opinion of the Railway's Representative it is necessary to safeguard Railway's Property, employees, trains, engines and facilities.
 - **1.05.02b** 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.
 - **1.05.02c** When work in any way interferes with the safe operation of trains at timetable speeds.
 - **1.05.02d** 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.
 - **1.05.02e** Special permission must be obtained from the Railway before moving heavy or cumbersome objects

or equipment which might result in making the track impassable.

- **1.05.03** Flagging services will be performed by qualified Railway flaggers.
- **1.05.03a** 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.
- **1.05.03b** Each time a flagger is called, the minimum period for billing shall be the eight (8) hour basic day.
- **1.05.03c** The cost of flagger services provided by the Railway, when deemed necessary by the Railway's representative, will be borne by the State of Arizona. The estimated cost for one (1) flagger is \$500.00 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, transportation, meals, lodging and supervision. 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 shall be used to calculate the actual costs of flagging pursuant to this paragraph.
- **1.05.03d** 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.

1.06 Contractor General Safety Requirements

- **1.06.01** 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 shall be in compliance with FRA Roadway Worker Protection Regulations.
- **1.06.02** Before beginning any task on Railway Property, a thorough job safety briefing shall 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).
- **1.06.03** Workers shall 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.
- **1.06.04** When Contractor employees are required to work on the Railway Property after normal working hours or on weekends, the Railroad's representative in charge of the project must be notified. A minimum of two employees shall be present at all times.
- **1.06.05** 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.
- **1.06.06** Any damage to Railway Property, or any hazard noticed on passing trains shall 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 shall 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 shall be posted at the job site.

- **1.06.07** 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.
- **1.06.08** All personnel protective equipment (PPE) used on Railway Property shall meet applicable OSHA and ANSI specifications. Current Railway personnel protective equipment requirements are listed on the web site, www.contractororientation.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 Railroad'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 shall 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 shall govern.)**
- **1.06.09** The Contractor shall 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 shall not be stored or left temporarily at highway/rail at-grade crossings, where storage of the same will interfere with the sight distances of motorists approaching the crossing. Prior to beginning work, the Contractor shall establish a storage area with concurrence of the Railroad's representative.
- **1.06.10** 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)
- **1.06.11** Workers must not create and leave any conditions at the work site that would interfere with water drainage. Any work performed over water shall meet all Federal, State and Local regulations.
- **1.06.12** 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 shall 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 shall 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.

1.07 Excavation

- **1.07.01** 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 Projects 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 any excavation commences, the Contractor must contact the Railway's Signal Supervisor and Roadmaster. All underground and overhead wires must be considered HIGH VOLTAGE and dangerous until verified with the company having ownership of the line. It is also 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.
- **1.07.02** 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 shall also notify the owner immediately. If there is any doubt about the location of underground cables or lines of any kind, no work shall be performed until the exact location has been determined. There shall be no exceptions to these instructions.

- **1.07.03** All excavations shall be conducted in compliance with applicable OSHA regulations and, regardless of depth, shall be shored where there is any danger to tracks, structures or personnel.
- **1.07.04** 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.

1.08 Hazardous Waste, Substances and Material Reporting

- **1.08.01** If Contractor discovers any hazardous waste, hazardous substance, petroleum or other deleterious material, including but not limited to any 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 shall 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.

1.09 Personal Injury Reporting

- **1.09.01** 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

INFORMATION REQUIRED TO BE COLLECTED PURSUANT TO FEDERAL REGULATION. IT SHOULD BE USED FOR COMPLIANCE WITH FEDERAL REGULATIONS ONLY AND IS NOT INTENDED TO PRESUME ACCEPTANCE OF RESPONSIBILITY OR LIABILITY.

1. Accident City/St _____ 2. Date: _____ Time: _____
County: _____ 3. Temperature: _____ 4. Weather _____
(if non-Railway location)
5. Social Security # _____
6. Name (last, first, mi) _____
7. Address: Street: _____ City: _____ St. _____ Zip: _____
8. Date of Birth: _____ and/or Age _____ Gender: _____
(if available)
9. (a) Injury: _____ (b) Body Part: _____
(i.e. (a) Laceration (b) Hand)
11. Description of Accident (To include location, action, result, etc.): _____
12. Treatment:
? First Aid Only
? Required Medical Treatment
? Other Medical Treatment
13. Dr. Name _____ 30. Date: _____
14. Dr. Address:
Street: _____ City: _____ St: _____ Zip: _____
15. Hospital Name: _____
16. Hospital Address:
Street: _____ City: _____ St: _____ Zip: _____
17. Diagnosis: _____

**FAX TO
RAILWAY AT (817) 352-7595
AND COPY TO
RAILWAY ROADMASTER FAX**

FORM APPROVED
BY VP-LAW

EXHIBIT "C-1"

**Agreement
Between
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
and the
CONTRACTOR**

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
Attention: Manager Public Projects

Railway File: RR File No. 025413R
Agency Project: Agreement 2457-03-BNSF, 060 MA 155 H5601 01C

Gentlemen:

The undersigned, hereinafter referred to as Contractor, has entered into a contract (the "Contract") dated _____, 2003, with _____ for the performance of certain work in connection with the following project: _____. Performance of such work will necessarily require contractor to enter THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("Railway") right of way and property ("Railway Property"). The Contract provides that no work shall be commenced within Railway Property until the Contractor employed in connection with said work for State of Arizona shall have executed and delivered to Railway an Agreement, in the form hereof, and shall have provided insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by other than the Owner, General Partner, President or Vice President of Contractor, evidence is furnished to you herewith certifying that the signatory is empowered to execute this Agreement for the Contractor.

Accordingly, as one of the inducements to and as part of the consideration for Railway granting permission to Contractor to enter upon Railway Property, Contractor, effective on the date of the Contract, has agreed and does hereby agree with Railway as follows:

Section 1. RELEASE OF LIABILITY AND INDEMNITY

Contractor agrees to release Railway from any claims arising from the performance of this Agreement which Contractor or any of its employees, subcontractors, agents or invitees could otherwise assert against Railway, regardless of the negligence of Railway, except to the extent that such claims are proximately caused by the willful misconduct or gross negligence of Railway.

Contractor shall indemnify and hold 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 failure to perform any obligation hereunder. **THE LIABILITY ASSUMED BY CONTRACTOR SHALL 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 WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR SHALL INCLUDE 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 BOILER INSPECTION ACT, WHENEVER SO CLAIMED.

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it shall adjust and settle all claims made against Railway, and shall, 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 shall give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor shall 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, shall 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.

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

Section 2. TERM

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

Section 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 insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limit to the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

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

- ◆ It is agreed that any workers' compensation exclusion does not apply to *Railroad* payments related to the Federal Employers Liability Act or a *Railroad* Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.
- ◆ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Any exclusions related to the explosion, collapse and underground hazards shall be removed.

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

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

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

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

- ◆ Arizona's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
 - ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.
- D. Railroad Protective Liability insurance naming only the **Railroad** as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy Shall be issued on a standard ISO form CG 00 35 10 93 and include the following:
- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
 - ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
 - ◆ Endorsed to remove any exclusion for punitive damages.
 - ◆ No other endorsements restricting coverage may be added.
 - ◆ The original policy must be provided to the **Railroad** prior to performing any work or services under this Agreement

Other Requirements:

All policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

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

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

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

Contractor is not allowed to self-insure without the prior written consent of **Railroad**. If granted by **Railroad**, any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by contractor in lieu of insurance. Any and all **Railroad** 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.

Prior to commencing the Work, contractor shall furnish to **Railroad** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify **Railroad** in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. Upon request from **Railroad**, a certified duplicate original of any required policy shall be furnished.

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

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

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

If any portion of the operation is to be subcontracted by contractor, contractor shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming *Railroad* as an additional insured, and shall require that the subcontractor shall release, defend and indemnify *Railroad* to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify *Railroad* herein.

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

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

For purposes of this section, *Railroad* shall mean "Burlington Northern Santa Fe Corporation", "The Burlington Northern and Santa Fe Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS

The Contractor will observe and comply with all the provisions, obligations and limitations to be observed by Contractor which are contained in the specifications of the Contract, entitled EXHIBIT "C", CONTRACTOR REQUIREMENTS, and shall include, 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.

Section 5. TRAIN DELAY

Contractor shall be responsible for and shall indemnify Railway, including its affiliated railway companies, and its tenants for 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 Railway Work. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment, Contractor will be billed per freight train hour at an average rate of (____) with annual adjustments per hour per train as determined from Railway's record. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

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 shall be 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 subcontractors.

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. Damages for train delay for certain trains may be as high as \$50,000.00 per incident.

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

Kindly acknowledge receipt of this letter by signing and returning to the Railway two original copies of this letter, which, upon execution by Railway, shall constitute an Agreement between us.

(Contractor)

By: _____

Name: _____

(Title)

Address _____

City: _____ State: _____ Zip: _____

**The Burlington Northern and Santa Fe
Railway Company**

By: _____

Name: _____

Manager Public Projects

Accepted and effective this ____ day of 20__.