



ORIGINAL NEW APPLICATION



0000048847

Arizona Department of Transportation

Intermodal Transportation Division

206 South Seventeenth Avenue Phoenix, Arizona 85007-3213

Janet Napolitano
Governor

Victor M. Mendez
Director

Sam Elters
State Engineer

April 6, 2006

Mr. Chris B. Watson
Railroad Safety Inspector
Crossing Consultant
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

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6 APR - 6 P 2:24
CORP COMMISSION
DOCUMENT CONTROL

Re: Project No. STP - 089 - (002)
089 CN 418 H5106 01C
Agreement No. 2645 - 04 - BNSF
Flagstaff-Cameron Highway
AAR/DOT No. 025 - 128S
BNSF Railway Company

RR-02635B-06-0229

Please furnish our office with an Opinion and Order to cover the changes in the railroad crossing described in the subject Agreement. The State proposes to replace the existing highway overpass structure over the BNSF tracks at Railroad Mile Post 339.85. The new structure will be constructed just west of the existing structure. The BNSF Railway Company has signed an Agreement covering the work, thirteen (13) copies of which are attached for your information and files for clarity.

After the Opinion and Order has been issued, we will send you a copy of our letter authorizing the Railroad to proceed.

Sincerely,

Michael F. Delleo, Jr., P.E.
State Railroad Liaison

Utility & Railroad Engineering Section
205 South 17th Avenue Mail Drop 618E
Phoenix, Arizona 85007
Phone 602 712-8648 Fax 602 712-3229

Enclosure



2001 Award Recipient

OVERPASS AGREEMENT

BNSF Cont. No. _____

BNSF File: 025-128S

Location: East Flagstaff Traffic Interchange

Highway: Flagstaff-Cameron Highway

Construction TRACS No. 089 CN 418 H5106 01C

Construction Project No. STP-089-(002)

AGREEMENT No. 2645-04-BNSF

AAR/DOT #025-128S RRMP 339.85

This AGREEMENT is executed to be effective as of this 14th day of March, 2006 ("Effective Date"), by and between BNSF RAILWAY COMPANY, a Delaware corporation ("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:

WHEREAS, BNSF owns and operates a line of railroad in and through the City of Flagstaff, County of Coconino, STATE of Arizona; BNSF and STATE entered into an Agreement dated the 24th day of January, 1967, identified as Agreement No. 343-67-RR, BNSF's Agreement No. AT124614, which granted the right to construct, maintain and use the highway crossing of the BNSF right-of-way and over its tracks, located approximately 4.5 miles easterly of Flagstaff, in Coconino County, STATE of Arizona, now designated as AAR/DOT #025-128S RRMP 339.85. The STATE proposes to construct a new overpass STRUCTURE to be identified as AAR/DOT# 025-128S RRMP 339.85 on B-40 (Country Club Drive) located adjacent to the existing structure. Upon completion of the construction of the new overpass the existing structure shall be removed and the right-of-way granted by AGREEMENT No. 343-67-RR shall be abandoned. The crossing designation of AAR/DOT #025-128S will be transferred to the new STRUCTURE.

The STATE has requested of the BNSF the right to construct, maintain and use the proposed highway crossing of the BNSF right-of-way and over its tracks as shown on Exhibit A, Sheet 1. The new STRUCTURE is expected to span approximately 500 feet and pass over BNSF facilities. The existing BNSF facilities will not require modification; however, the STATE will require access to the BNSF property for completion of the PROJECT, and as BNSF has facilities located on BNSF property, the STATE will fully compensate BNSF for the furnishing of watchmen and flagging as may be necessary for the safety of BNSF's property and the operation of trains during the construction of the PROJECT. In addition, the STATE has requested the right to use the portion of the BNSF right-of-way as shown on Exhibit A, Sheet 3, temporarily during the course of construction. The STATE has also requested a Temporary Construction License for the construction of a drainage structure, as shown on Exhibit A, Sheet 4, as well as a permanent Drainage Area Easement to maintain the drainage structure.

It is anticipated that this PROJECT will impact the existing BNSF Operations and Maintenance driveway that currently provides access from US 66. This driveway includes a drainage structure across the existing Fanning Drive Wash. The driveway and crossing will be reconstructed as part of this PROJECT as shown on Exhibit A, Sheet 3.

BNSF and STATE agree that Agreement No. 343-67-RR, BNSF's Agreement No. AT124614, will be cancelled upon completion of this PROJECT and the signing of this AGREEMENT.

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. CONSTRUCTION TRACS NO. means the roadway construction accounting number utilized for ADOT Construction Project, which is 089 CN 418 H5106 01C.
- C. CONSTRUCTION PROJECT NO. **STP- 089-C (002)**.
- D. 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.
- E. PROJECT means all B-40 (Country Club Drive) overpass work of every kind and character required in connection with the construction of 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.
- F. RAILROAD WORK means pre-engineering, engineering, management, administration, design, preparation of plans, specifications and estimate, flagging, construction labor, materials and equipment called for in the AGREEMENT, including approved changes in scope.
- G. STRUCTURE means the B-40 (Country Club Dr.) overpass STRUCTURE, as constructed and depicted on Exhibit A, Sheets 1 through 4.

ARTICLE I – SCOPE OF WORK

This project entails the realignment of Country Club Road over the BNSF railroad tracks with a new four-lane overpass STRUCTURE. Temporary traffic controls during construction must be in compliance with Section 8A-5, "Traffic Controls During Construction and Maintenance" of the Uniform Traffic Control Devices Manual, U.S. Department of Transportation.

ARTICLE II – BNSF OBLIGATIONS

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

1. In consideration of the faithful performance of the STATE's covenants contained herein, BNSF hereby grants to STATE, its successors and assigns, upon and subject to the terms and conditions set forth in this AGREEMENT, a permanent easement to maintain and operate the overpass STRUCTURE, a temporary non-exclusive license (hereinafter called "Temporary Construction License") to construct the overpass STRUCTURE and to work in the BNSF right-of-way in the vicinity of the BNSF Operation and Maintenance Road, a Temporary Construction License to construct a drainage structure and a permanent Drainage Area Easement to maintain the drainage structure across or upon the portion of BNSF's right-of-way described further on Exhibit A, 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 affect the operation and integrity 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 affect the operation and integrity of the STRUCTURE;
 - d. The term of the Temporary Construction Licenses begins on the Effective Date and ends on the earlier of (i) substantial completion of the PROJECT, or (ii) three (3) years following the Effective Date. The Temporary Construction Licenses and related rights given by BNSF to STATE, at no cost, 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 Licenses are for construction of the PROJECT only and shall not be used by STATE for any other purpose. In the event STATE is evicted by anyone owning, or claiming title to or any interest in said right-of-way, BNSF will not be liable to STATE for any damages, losses or any expenses of any nature whatsoever. The granting of similar rights to others, subsequent to the date of this AGREEMENT, will not impair or interfere with the rights granted to STATE herein.

Provided STATE is in compliance with the terms and conditions of this AGREEMENT, BNSF will grant to STATE, its successors and assigns, easements (hereinafter called, the "Easements") to enter upon and use that portion of BNSF's right-of-way as is necessary to use and maintain the overpass STRUCTURE and the drainage structure, substantially in the form of Exhibit A attached to this AGREEMENT.
2. BNSF will furnish all labor, materials, tools, and equipment for RAILROAD WORK required for the construction of the PROJECT, 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 PROJECT has not commenced within six (6) months following the

Effective Date, 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 STATE, which approval will not be unreasonably withheld. Construction of the PROJECT must include the following RAILROAD WORK by BNSF:

- a. Preliminary engineering, design, and contract preparation;
 - b. Furnishing of flagging services necessary for the safety of BNSF's property and the operation of its trains during construction of the PROJECT as set forth in further detail on Exhibit D, attached to this AGREEMENT and made a part hereof.
3. BNSF will do all RAILROAD WORK set forth in Article II, 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. 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.
 5. BNSF may charge STATE for insurance expenses, including self-insurance expenses, when 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 PROJECT. Such charges will be considered part 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. BNSF may submit to STATE monthly invoices for the RAILROAD WORK costs from the date of STATE's authorization for BNSF to proceed with the RAILROAD WORK. Except for the final invoice, monthly invoices shall only be submitted for costs of five hundred dollars (\$500) or more. BNSF shall, within one hundred twenty (120) days after completion of the RAILROAD WORK, submit to STATE detailed invoices covering the actual cost of all RAILROAD WORK, including applicable taxes and standard BNSF overhead and subcontracting administration fees. Invoices shall include the appropriate AGREEMENT and CONSTRUCTION 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, 23 CFR 646B is incorporated into this AGREEMENT by reference.
 7. STATE must reimburse BNSF for completed force-account work within ninety (90) days of the date of the invoice for such work.

8. 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 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, in the form shown in Exhibit E, addressed to the STATE (see Article IV, Section 26), its approval of the PROJECT plan as to the impacts to BNSF facilities.
9. 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 III – STATE OBLIGATIONS

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

1. STATE must furnish two (2) copies of railroad-specific 100 % plans and specifications (in English Units) for the PROJECT to BNSF. 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 the plans and specifications, or construction, is structurally sound and appropriate or that such plans and specifications meet applicable regulations, laws, statutes or local ordinances and/or building codes.
2. STATE must make any required application and obtain all required permits and approvals for the construction of the PROJECT.
3. STATE must provide for and maintain minimum vertical and horizontal clearances, as required and approved by BNSF as part of the plans and specifications for the PROJECT.
4. STATE must acquire all rights-of-way necessary for the construction of the PROJECT.
5. STATE must make any and all arrangements for the installation or relocation of wire lines, pipelines 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 PROJECT.
6. STATE must construct the PROJECT as shown on the attached Exhibit A and do all work provided for in the plans and specifications for the PROJECT, except RAILROAD WORK that will be performed by BNSF hereunder. STATE must furnish all labor, materials, tools and equipment for the performance of STATE's work. The principal elements of STATE's work are as follows:

- a. Construction of the overpass STRUCTURE and drainage 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, as required for the project;
 - d. Construction of a graded Operation and Maintenance Road from the newly aligned Route 66 into the BNSF right-of-way for the purpose of maintenance access for BNSF vehicles and equipment. The STATE grants an easement to BNSF, at no cost, for the use of the Operation and Maintenance Road;
 - e. Installation and maintenance of an 8-foot high fence on the outside barrier of the side of the STRUCTURE reserved for pedestrian traffic; and
 - f. Job site cleanup including removal of all construction materials, concrete debris, surplus soil, refuse, contaminated soils, asphalt debris, litter and other waste materials to return the area to its original condition prior to the time of construction.
7. STATE's work must be performed by STATE or STATE's contractor in a manner that will not endanger or interfere with the safe and timely operations of BNSF and its facilities.
 8. In order to prevent damage to BNSF trains and property, STATE 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, STATE 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.
 9. STATE's, contractor(s), must submit four (4) copies of any plans (including two (2) 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 STATE's contractor shall comply with the BNSF Bridge Requirements set forth in Exhibit F and all applicable requirements promulgated by STATE and Federal agencies, departments, commissions and other legislative bodies. Additionally, STATE's contractor must submit for approval two (2) copies of a professionally engineered demolition plan with applicable calculations to BNSF's Manager of Public Projects. The existing B-40 (Country Club Road) Overpass will not be removed until BNSF approves contractor's demolition plan in writing.
 10. STATE must include the following provisions in any contract with its contractor(s) performing work on said PROJECT:
 - a. The contractor 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, and by field inspection. The contractor shall contact Blue Stake and have all underground facilities in the PROJECT area marked to verify their locations prior to performing any construction activity that may damage such facilities. The contractor will also be responsible for contacting BNSF's Engineering Representative and notifying him of any work that may damage these lines or facilities and/or interfere with their service. The contractor 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. Failure to mark or identify these Lines will be sufficient cause for BNSF's Engineering Representative to stop construction at no cost to the STATE or BNSF until these items are completed.
 - c. In addition to the liability terms contained elsewhere in this AGREEMENT, the contractor 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 contractor, 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 contractor, 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).
 - d. The contractor will be responsible for the rearrangement of any facilities or Lines determined to interfere with the construction. The contractor must cooperate fully with any telecommunications company (ies) in performing such rearrangements.
11. STATE must incorporate in each prime contract for construction of the PROJECT, or the specifications therefor, (i) the provisions set forth in Article III, Sections 7, 8, 9, 10, and 12; (ii) the provisions set forth in Article IV, Sections 3, 4, 5 and 8; and (iii) the provisions set forth in Exhibit C and Exhibit C-1, attached hereto and by reference made a part hereof.
12. Except as otherwise provided below in this Section 12, all construction work performed hereunder by STATE for the PROJECT will be pursuant to a contract or contracts to be let by STATE, 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 a letter agreement in the form of Exhibit C-1, and (ii) delivered to and secured BNSF's approval of the required insurance; and
 - 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. To facilitate scheduling for the PROJECT, STATE shall have its contractor give BNSF's Roadmaster at (928) 226-3972 thirty (30) days' advance notice of the proposed work activity schedule. BNSF and STATE's contractor will establish a mutually agreeable work activity schedule for the PROJECT. BNSF has the right at any time to revise or

change the work activity schedule, due to train operations or service obligations. BNSF will not be responsible for any additional costs and expenses resulting from a change in the work activity schedule.

- f. The plans and specifications for the PROJECT must be in compliance with the Bridge Requirements set forth on Exhibit F, attached to this AGREEMENT and incorporated herein.

13. STATE will give BNSF's Manager of Public Projects written notice to proceed with the RAILROAD WORK after receipt by the STATE of the Opinion and Order from the Arizona Corporation Commission. BNSF will not begin the RAILROAD WORK (including, without limitation, procurement of supplies, equipment or materials) until written notice to proceed is received from STATE.

ARTICLE IV – JOINT OBLIGATIONS

IN CONSIDERATION of the premises, the parties hereto mutually agree to the following:

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 approval prior to the commencement of any such changes or modifications.
2. The work hereunder must be done in accordance with the Bridge Requirements set forth on Exhibit F and the detailed plans and specifications approved by BNSF.
3. STATE must require its contractor(s) to reasonably adhere to the PROJECT's construction schedule for all PROJECT work. The parties hereto mutually agree that BNSF's failure to complete the RAILROAD 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 and will not subject BNSF 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 (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 affecting BNSF operations and right-of-way on the PROJECT if any of the following events take place: (i) STATE (or any of its contractors) performs the PROJECT work affecting BNSF property in a manner contrary to the plans and specifications approved by BNSF; (ii) STATE (or any of its contractors), in BNSF's opinion, prosecutes the PROJECT work in a manner which is hazardous to BNSF property, facilities or the safe and expeditious movement of railroad traffic; or (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the PROJECT. The work stoppage will continue until all necessary actions are taken by STATE, or its contractor, to rectify the situation to the satisfaction of BNSF's Division Engineer or until additional insurance has been delivered to and accepted by BNSF. In the event of a

breach of (i) this AGREEMENT, (ii) the Temporary Construction Licenses, or (iii) the Easements, BNSF may immediately terminate the Temporary Construction Licenses or the Easements. 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 BNSF desires to stop construction work affecting BNSF operations and its right-of-way on the project, BNSF agrees to immediately notify the STATE's Engineer and attempt to resolve any, and all, such issues prior to stopping work affecting BNSF operations and its right-of-way, unless a potentially unsafe or hazardous condition exists.

5. STATE must supervise and inspect the operations of all STATE contractors to ensure compliance with the plans and specifications approved by BNSF, the terms of this AGREEMENT and all safety requirements of the BNSF Railroad. If BNSF determines that proper supervision and inspection is not being performed by STATE personnel at any time during construction of the PROJECT, BNSF has the right to stop construction (within its operating right-of-way). Construction of the PROJECT will not proceed until STATE 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 the STATE's Engineer for appropriate corrective action.
6. Pursuant to this section and Article II, Section 6 herein, STATE must, out of funds made available to it for the construction of the PROJECT, reimburse BNSF in full for the actual costs of all work performed by BNSF under this AGREEMENT.
7. All expenses detailed in statements sent to STATE pursuant to Article II, Section 6 herein will comply with the terms and provisions of the Federal Aid Highway Program Manual, 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 II, Section 2 herein are part of the costs of the Project even though such work may have preceded the date of this Agreement and are included in the overhead rates of BNSF.
8. The parties mutually agree that no construction activities for the PROJECT, nor future maintenance of the STRUCTURE, once completed, that by mutual agreement of the parties have the potential to impact BNSF facilities and operations within BNSF's right-of-way, 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. In addition to the terms and conditions set forth elsewhere in this AGREEMENT, BNSF and STATE agree to the following terms upon completion of construction of the PROJECT:
 - a. STATE will own and maintain, at its sole cost and expense, the STRUCTURE, the highway approaches, and appurtenances thereto. BNSF will maintain the Operation and Maintenance Road granted to BNSF by STATE as shown in Exhibit A. If BNSF should discover, in the future, that the STRUCTURE should need repair, and, in the opinion of BNSF, a potential hazard exists to BNSF facilities and operations if repairs are not made, BNSF shall bring such matter to the attention of the STATE at the address shown in Article IV, Section 26 for consideration.

- b. The STATE shall have the right to maintain the STRUCTURE, roadway facilities and drainage structure. Before entering upon BNSF's right-of-way for maintenance purposes, by STATE personnel, STATE shall notify BNSF's Manager, Public Projects. Prior written authorization by BNSF's Manager Public Projects will be required for entry into the BNSF right of way during the fourth quarter of each calendar year. STATE is not obligated to execute BNSF's Exhibits C and C-1 nor obtain additional insurance. STATE will abide by the flagging safety requirements set forth in Exhibit C. 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.
- c. It is expressly understood by STATE and BNSF that any right to install utilities will be governed by a separate permit or license agreement between the parties hereto.
- d. If STATE's contractor, agents or BNSF, on behalf of STATE, 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 STATE's contractors and/or agents must procure and maintain the following insurance coverage:

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

- Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93).
- Endorsed to include the Limited Seepage and Pollution Endorsement.
- Endorsed to remove any exclusion for punitive damages.
- No other endorsements restricting coverage may be added.
- The original policy must be provided to the Railroad prior to performing any work or services under this Agreement.

As used in this paragraph, "**Railroad**" means "Burlington Northern Santa Fe Corporation", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

In lieu of providing a Railroad Protective Liability Policy, STATE's contractor and/or agents may participate in BNSF's Blanket Railroad Protective Liability Insurance Policy **if available**. The limits of coverage are the same as above.

10. 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 highway facilities, provided further, however, that should it become necessary or desirable in the future to change, alter, widen or reconstruct the highway facilities to accommodate railroad projects, the cost of such work, including any cost incidental to alteration of highway facilities made necessary by the alteration of the railway facilities, shall be divided between BNSF and STATE in such shares

as may be mutually agreed to by the parties hereto, subject to Legislative approval. Before making any such changes, alterations or reconstruction of the 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.

11. If State shall deem it necessary or desirable, in the future, due to traffic conditions, to alter or reconstruct the 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.
12. 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, neither party hereto may assign any of its rights or obligations hereunder without the prior written consent of the other party.
13. In the event construction of the PROJECT does not commence within three (3) years of the Effective Date, this AGREEMENT will become null and void.
14. BNSF's Manager, Public Projects will be given a notice to proceed when the Opinion and Order has returned from the Arizona Corporation Commission to the STATE. 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 025-128S which notice shall state the time that operations for construction of the Project, on BNSF right-of-way, shall commence. Work as defined in the plans, specifications and this AGREEMENT is subject to the Commission's approval.
15. STATE approval is required for any invoice total which exceeds the cost estimate set forth in Exhibit D 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.
16. 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.
17. 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.
18. 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.
19. This AGREEMENT is subject to the provisions of Chapter 1 of Title 35, Arizona Revised Statutes.

20. BNSF shall comply with all applicable provisions of Executive Order 75-5, "Non-Discrimination in Employment by Government Contractors and Subcontractors".
21. All parties hereby are put on notice that this AGREEMENT is subject to cancellation by the Governor pursuant to A.R.S. § 38-511.
22. 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 STATE 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.
23. 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.
24. This AGREEMENT shall be governed by the laws of the State of Arizona.
25. 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.
26. 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:

BNSF 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

27. The following Exhibits are incorporated and made a part of this AGREEMENT:
 - a. Exhibit A, Sheets 1 through 4 - Identification of STATE facilities within BNSF right-of-way for which BNSF is giving STATE easements in BNSF right-of-way to construct and maintain STATE facilities.
 - b. Exhibits B-1 and B-2 - Easement granted to BNSF by STATE and Easements granted to STATE by BNSF.
 - c. BNSF-supplied standard Exhibits C and C-1.
 - d. Exhibit D - Itemized cost estimate of RAILROAD WORK obligated to STATE.
 - e. Exhibit E – BNSF Final Approval of Plans and Specifications (Sample Letter).
 - f. Exhibit F – BNSF Bridge Requirements.

- g. STATE'S PROJECT plans and specifications for Project No. 089 CN 418 H5106 01C are incorporated by reference only.
28. 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.
29. 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.
30. This AGREEMENT (including exhibits and other documents, manuals, etc. incorporated herein) is the full and complete AGREEMENT between BNSF and STATE with respect to the subject matter herein and supersedes any and all other prior agreements between the parties hereto.

IN WITNESS WHEREOF, STATE has caused this AGREEMENT to be executed and attested by its duly qualified and authorized officials, and BNSF has executed this AGREEMENT, both as of the day and year first above written.

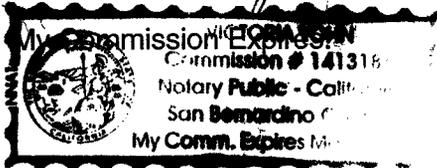
By: [Signature]
Title: Megan T. McIntyre
Manager Public Projects
Date: 3-14-06

VICTOR MENDEZ, DIRECTOR
[Signature]
By: Bruce Vana, P.E., Engineer – Manager
Utility And Railroad Engineering Section
Date: 1-26-06

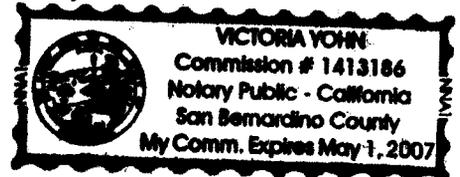
ACKNOWLEDGEMENT BY RAILROAD

STATE OF California)
COUNTY OF San Bernardino) SS

The foregoing instrument was acknowledged before me this 14th day of March, 2006, by Megan T. McIntyre, the Mgr Public Projects on behalf of the corporation.



[Signature]
Notary Public



ACKNOWLEDGEMENT BY STATE

STATE OF ARIZONA)
) SS
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this 26 day of January, 2006, by Bruce Vana, P.E., Engineer-Manager, Utility and Railroad Engineering, Arizona Department of Transportation.

My Commission Expires:
11-20-2008

[Signature]
Notary Public

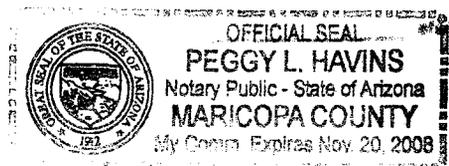
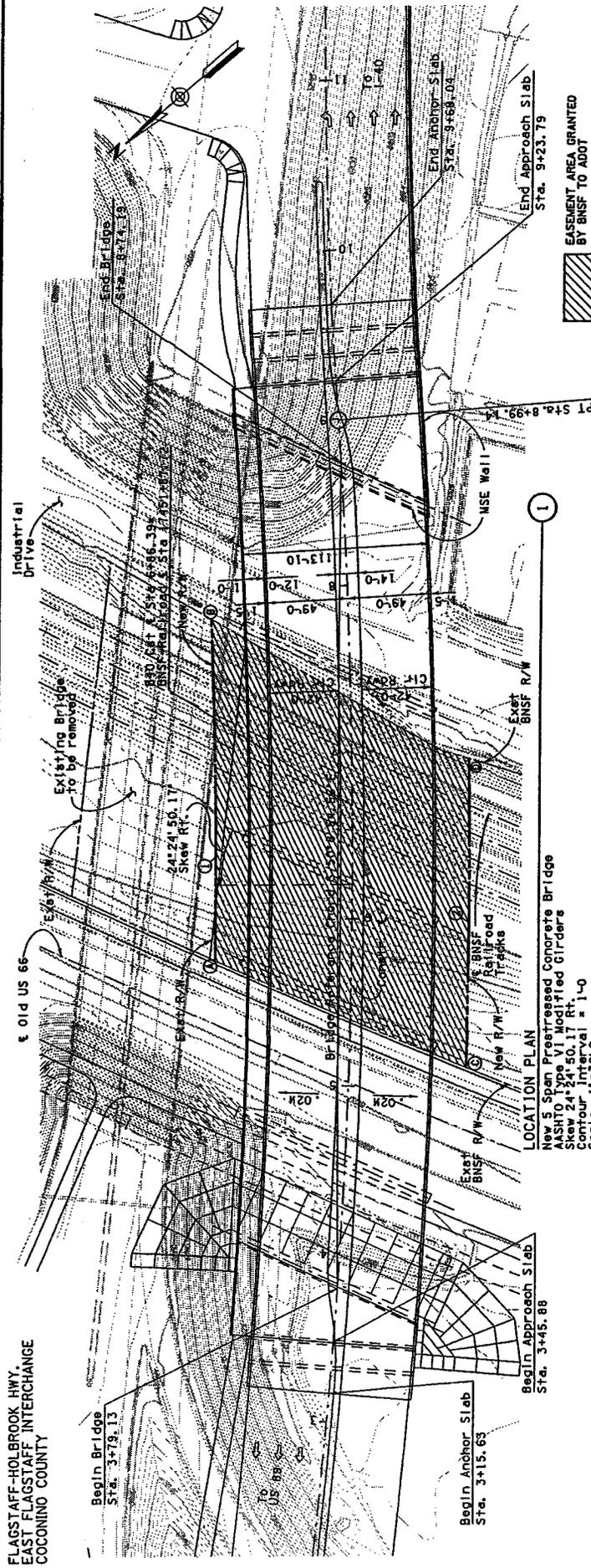


Exhibit A

**TEMPORARY CONSTRUCTION LICENSES, EASEMENTS, DRAINAGE STRUCTURE AND
OVERPASS STRUCTURE**

FLAGSTAFF-HOLBROOK HWY.
EAST FLAGSTAFF INTERCHANGE
COCONINO COUNTY



STATION-OFFSET TABLE

STATION	OFFSET
① 6+74.20	83.41'
② 7+83.84	83.41'
③ 8+33.01	70.70'
④ 8+94.32	70.70'

RADIUS DATA TABLE

R	E
① 3442.45'	204.69'
② 3596.59'	194.95'

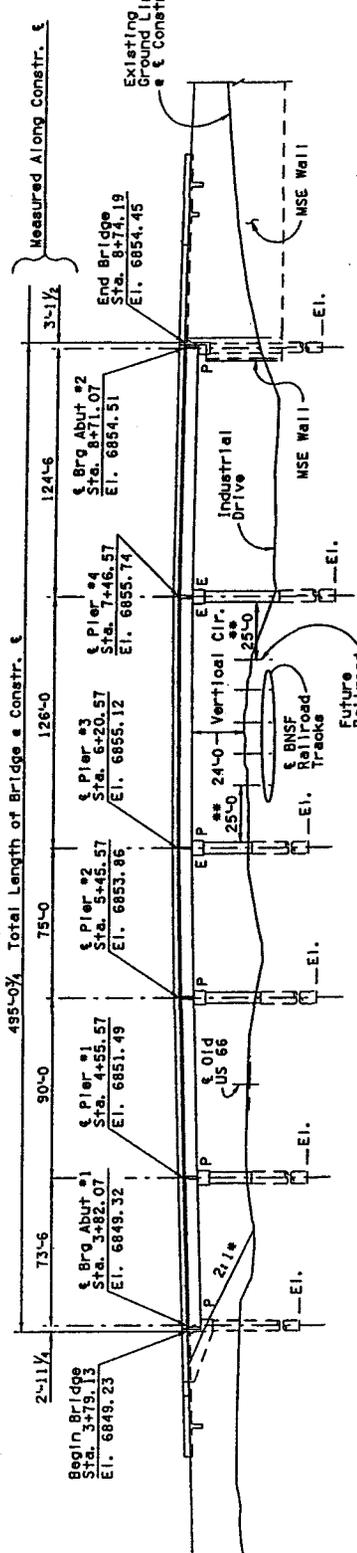


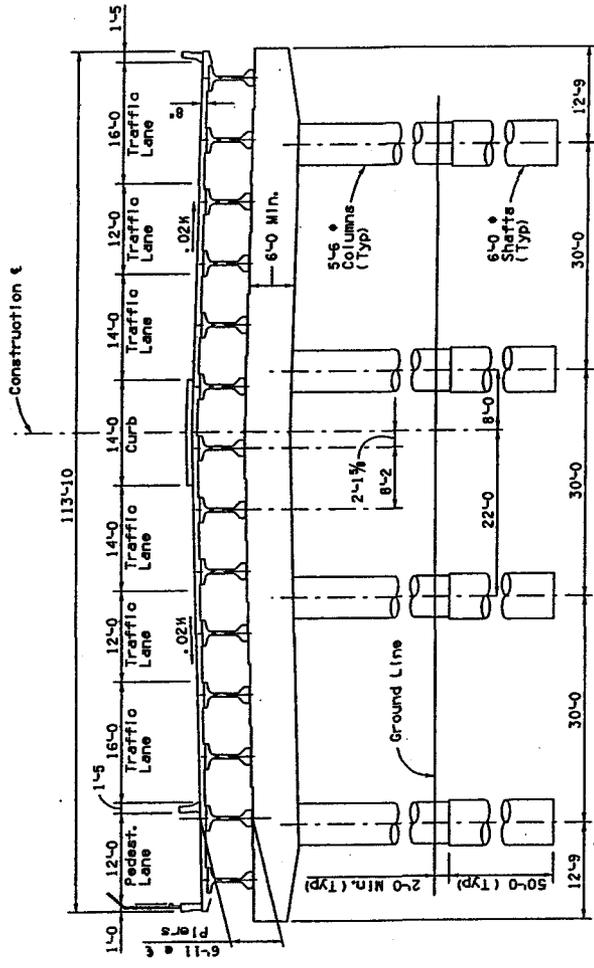
EXHIBIT "A"

ATTACHMENT TO AGREEMENT BETWEEN THE
 BNSF RAILWAY CO.
 AND
 ARIZONA DEPT. OF TRANSPORTATION

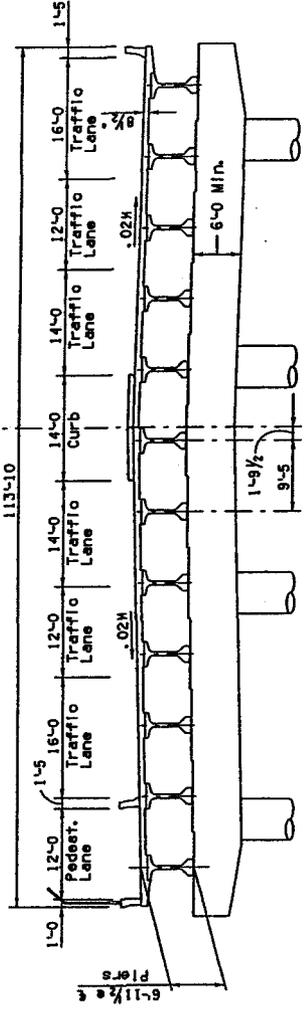
DMJM HARRIS
 2777 E. CAMELBACK ROAD SUITE 200
 PHOENIX, AZ. 85016-4302 (602) 337-2777

Coconino County, Arizona

DESCRIPTION: COUNTRY CLUB DR OR OP
 GENERAL PLAN



TYPICAL SECTION 1
 14 AASHTO Type VI Modified Girders @ 8'-2" Spacing
 Span 4 shown, span 5 similar
 Scale: 1/8" = 1'-0"



TYPICAL SECTION 2
 12 AASHTO Type VI Modified Girders @ 9'-5" Spacing
 Span 3 shown, span 1 and 2 similar
 Scale: 1/8" = 1'-0"

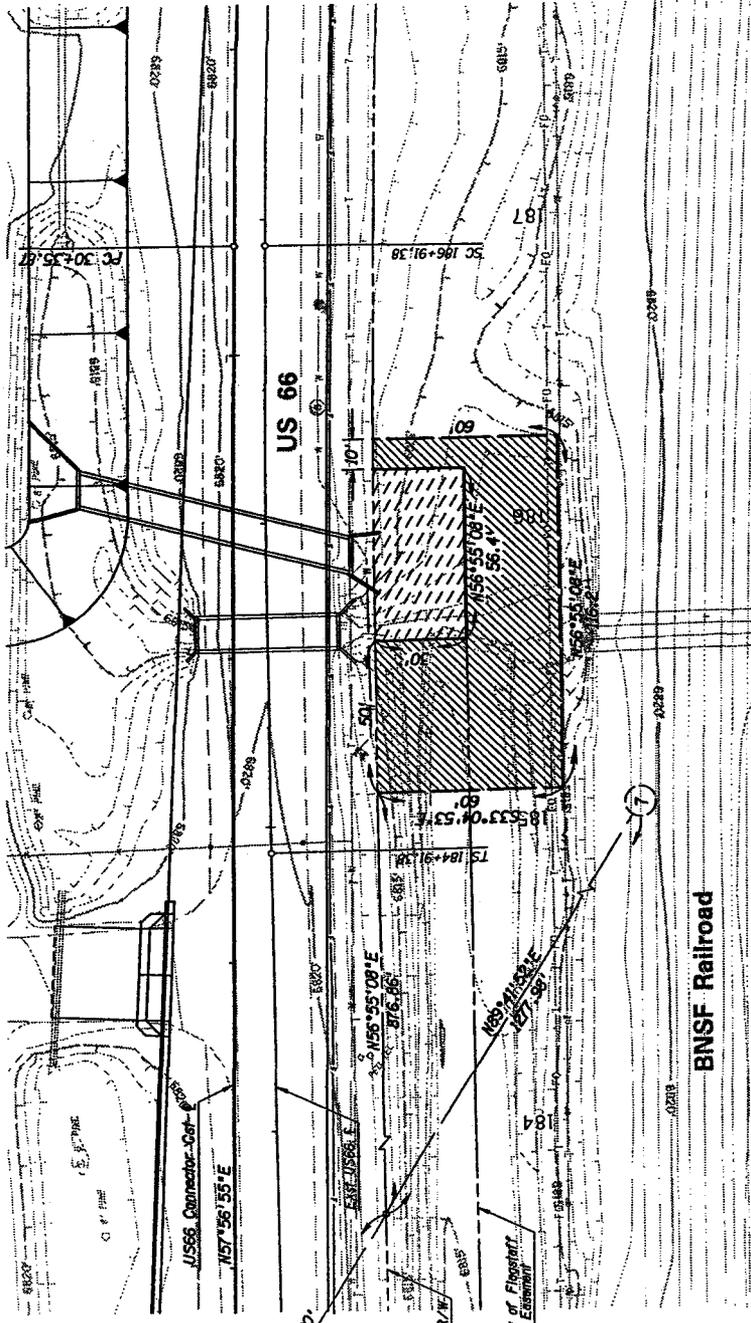
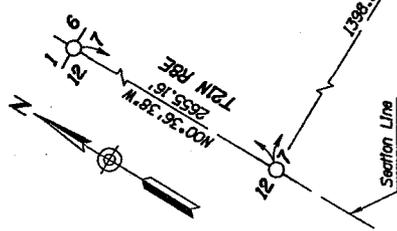


EXHIBIT "A"
 ATTACHMENT TO AGREEMENT BETWEEN THE
 BNSF RAILWAY CO. AND
 ARIZONA DEPT. OF TRANSPORTATION

DESCRIPTION: COUNTRY CLUB RD. OP
 TYPICAL SECTION SHEET 2 OF 4

DMJM#HARRIS
 2777 E. CAMELBACK ROAD SUITE 200
 PHOENIX, AZ. 85016-4302 (602) 337-2777

Coconino County, Arizona



TEMPORARY CONSTRUCTION LICENSE

DRAINAGE AREA EASEMENT GRANTED BY BNSF TO ADOT

Coconino County, Arizona
 DMJM HARRIS
 2777 E. CAMELBACK ROAD SUITE 200
 PHOENIX, AZ. 85016-4302 (602) 337-2177

EXHIBIT "A"
 ATTACHMENT TO AGREEMENT BETWEEN THE
 BNSF RAILWAY CO.
 AND
 ARIZONA DEPT. OF TRANSPORTATION

SHEET 4 OF 4



Exhibit B-1

EASEMENT

KNOW ALL MEN BY THESE PRESENTS, that the STATE OF ARIZONA, by and through its Department of Transportation, for consideration of Zero and No/100 Dollars (\$0.00), does hereby grant to THE BNSF RAILWAY COMPANY (formerly Burlington Northern Santa Fe Railway Company), a Delaware corporation, whose address for purposes of this instrument is 2500 Lou Menk Drive, Fort Worth, Texas 76131-2830, an EASEMENT over that certain real property situated in Coconino County, Arizona, as set forth in the following described INGRESS – EGRESS Easement for Operation and Maintenance Road; and whereas said STATE OF ARIZONA, through its Department of Transportation, as Grantor, for Zero and No/100 Dollars (\$0.00) to it paid by THE BNSF RAILWAY COMPANY, Grantee, and the promises of the Grantee hereinafter specified, does hereby remise, release and quitclaim unto the Grantee, subject to the terms and conditions hereinafter set forth, an EASEMENT for the purpose of maintaining and operating the Operation and Maintenance Road for no other purpose, located at in the vicinity of Railroad Mile Post 339.85, over, upon and across the premises, situated in the City of Flagstaff, County of Coconino, State of Arizona, described as follows

LEGAL DESCRIPTION

DESCRIPTION FOR INGRESS – EGRESS EASEMENT FOR OPERATION AND MAINTENANCE ROAD:

That portion of Lots 9 and 10, Section 7, Township 21 North, Range 8 East of the Gila and Salt River Meridian, Coconino County, Arizona, as shown on the attached Exhibit "A" sheet 3 of 4, described as follows:

Commencing at an aluminum cap marking the West quarter corner of said Section 7, being South 0°36'38" East 2655.16 feet from a 1972 Bureau of Land Management (BLM) brass cap marking the Northwest corner of said Section 7;

thence along the East – West mid section line of said Section 7, North 89°41'52" East 1398.90 feet to the existing southeasterly right of way line of U.S. Highway 66 (FLAGSTAFF – HOLBROOK HIGHWAY), also being the existing northwesterly right of way line of the BNSF Railway;

thence along said existing southeasterly right of way line, North 56°55'08" East 51.56 feet to the POINT OF BEGINNING;

thence continuing along said southeasterly right of way line, North 56°55'08" East 244.90 feet;

thence from a Local Tangent Bearing of North 49°53'53" West, along a curve to the Left, having a radius of 95.00 feet, a length of 139.03 feet;

thence South 46°15'14" West 107.94 feet;

thence along a curve to the Right, having a radius of 25.00 feet, a length of 74.50 feet;

thence North 36°59'24" East 142.16 feet to the southerly curb of the proposed said U.S. Highway 66 Connector road;

thence along said proposed southerly curb, from a Local Tangent Bearing of North 62°27'24" West, along a curve to the Right, having a radius of 246.35 feet, a length of 50.19 feet;

thence South 36°59'24" West 139.00 feet;

thence along a curve to the Left, having a radius of 75.00 feet, a length of 183.32 feet to the POINT OF BEGINNING.

SUBJECT to the rights of a multi-use path to be constructed across the parcel described above and any existing or new utilities easements across said parcel.

The foregoing EASEMENT is made subject to and upon the following express conditions:

1. To existing interests in the above-described premises to whomsoever belonging and of whatsoever nature and any and all extensions and renewals thereof, including but not limited to underground pipe line or lines, or any type of wire line or lines, if any.
2. The EASEMENT across STATE land is granted for the purpose of ingress and egress by BNSF to certain real property belonging to BNSF and for this purpose only. BNSF shall not store any equipment within the EASEMENT, occupy or use the EASEMENT for any purpose not compatible with the rights here given. BNSF shall provide for the future maintenance of said Operation and Maintenance Road in a manner and form comparable to the roadway as completed by the STATE and presented to BNSF. BNSF shall not, through its maintenance activities, obstruct the natural or pre-existing flow of drainage from neighboring lands. Any operations taken by BNSF to alter the location or composition of the roadway or drainage characteristics of the land shall be approved by the STATE and conducted at the expense of BNSF.
3. If during the subsequent maintenance of said Operation and Maintenance Road, soils or other materials considered to be environmentally contaminated are exposed, BNSF will remove and safely dispose of said contaminated soils. BNSF shall indemnify, protect and defend the STATE from any and all liability, claims or demands, if any, which arise as a result of exposure and/or removal of said contaminated soils or materials. Determination of soils contamination and applicable disposal procedures thereof, will be made only by an agency having the capacity and authority to make such a determination.
4. The STATE and BNSF have entered into that certain Overpass AGREEMENT dated as of March 14, 2006 concerning the Premises (the "Overpass AGREEMENT"). The conditions of this instrument shall be in full force and effect for purposes of this EASEMENT even if the Overpass AGREEMENT is, for whatever reason, no longer in effect.
5. BNSF or its contractor(s) shall telephone Blue Stake at (800) 782-5348 to determine if utilities are buried anywhere on the premises; and if so, BNSF or its contractor(s) will contact the Telecommunications Company(ies) involved, and make arrangements with the Telecommunications Company(ies) for protection of the utilities prior to beginning any work on the premises.
6. The EASEMENT shall be cancelled and revert back to the control of the STATE if not used for its intended purpose by BNSF for a continuous period of 5 years.

7. The STATE does not warrant its title to said premises nor undertake to defend BNSF in the peaceable possession, use or enjoyment thereof; and the grant herein made is subject to all outstanding rights or interest of others, including the tenants and licensees of BNSF.
8. This EASEMENT shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns and successors of the STATE and BNSF.

TO HAVE AND TO HOLD THE SAME, together with all the hereditaments and appurtenances thereunto belonging to BNSF use and enjoyment for the purposes aforesaid and for no other purpose whatsoever subject to the terms and conditions hereinbefore stated.

Exhibit B-2

EASEMENT

KNOW ALL MEN BY THESE PRESENTS, that the BNSF RAILWAY COMPANY (formerly Burlington Northern Santa Fe Railway Company), a Delaware corporation, whose address for purposes of this instrument is 2500 Lou Menk Drive, Fort Worth, Texas 76131-2830, does hereby grant to the STATE OF ARIZONA, by and through its Department of Transportation, for consideration of Zero and No/100 Dollars (\$0.00), EASEMENTS over that certain real property situated in Coconino County, Arizona, as set forth in the following described Overpass STRUCTURE and Drainage Easements; and whereas said BNSF RAILWAY COMPANY, as Grantor, for Zero and No/100 Dollars (\$0.00) to it paid by the STATE OF ARIZONA, by and through its Department of Transportation, Grantee, and the promises of the Grantee hereinafter specified, does hereby remise, release and quitclaim unto the Grantee, subject to the terms and conditions hereinafter set forth, EASEMENTS for the purpose of maintaining and operating the Overpass STRUCTURE and the Drainage STRUCTURE and for no other purpose, located at Railroad Mile Post 339.85, hereinafter called the East Flagstaff Traffic Interchange, over, upon and across the premises, situated in the City of Flagstaff, County of Coconino, State of Arizona, described as follows, to-wit:

DESCRIPTION FOR OVERPASS STRUCTURE ROADWAY EASEMENT:

That portion of the Burlington Northern and Santa Fe (BNSF) Railroad shown on the attached Exhibit "A" sheet 1 of 4, located within the Southeast quarter of the Northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) and the Southwest quarter of the Northeast quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 7, Township 21 North, Range 8 East of the Gila and Salt River Meridian, Coconino County, Arizona, which lies between the existing westerly right of way line of U.S. Highway 89 and Cross Road "B" (FLAGSTAFF – CAMERON HIGHWAY) and the following described line:

Commencing at a 2 inch aluminum cap on a $\frac{1}{2}$ inch rebar labeled #22258 marking the East quarter corner of said Section 7, being North 89°41'52" East 2654.94 feet from a 2 inch aluminum cap on a $\frac{1}{2}$ inch rebar labeled #22258 marking the Center of said Section 7;

thence along the East – West mid section line of said Section 7, South 89°41'52" West 1684.82 feet to the existing right of way centerline of said U.S. Highway 89 and Cross Road "B";

thence along said existing right of way centerline, North 43°46'57" West 862.22 feet;

thence South 46°13'03" West 147.80 feet to the POINT OF BEGINNING on said westerly right of way line of U.S. Highway 89 and Cross Road "B";

thence South 54°55'16" West 16.19 feet;

thence North 43°46'36" West 57.81 feet;

thence from a Local Tangent Bearing of North 53°09'41" West, along a curve to the Right, having a radius of 3596.59 feet, a length of 334.87 feet to the POINT OF ENDING on the existing southeasterly right of way line of U.S. Highway 66 (FLAGSTAFF – HOLBROOK HIGHWAY).

DESCRIPTION FOR DRAINAGE EASEMENT:

That portion of the Burlington Northern and Santa Fe (BNSF) Railroad located within the Southeast quarter of the Northwest quarter (SE¼NW¼) of Section 7, Township 21 North, Range 8 East of the Gila and Salt River Meridian, Coconino County, Arizona, as shown on the attached Exhibit "A" sheet 4 of 4, which lies between the existing southeasterly right of way line of U.S. Highway 66 (FLAGSTAFF – HOLBROOK HIGHWAY), also being the existing northwesterly right of way line of the BNSF Railway and the following described line:

Commencing at an aluminum cap marking the West quarter corner of said Section 7, being South 0°36'38" East 2655.16 feet from a 1972 Bureau of Land Management (BLM) brass cap marking the Northwest corner of said Section 7;

thence along the East – West mid section line of said Section 7, North 89°41'52" East 1398.90 feet to said existing southeasterly right of way line of U.S. Highway 66;

thence along said existing southeasterly right of way line, North 56°55'08" East 926.86 feet to the POINT OF BEGINNING;

thence South 33°04'53" East 30.00 feet;

thence North 56°55'08" East 56.40 feet;

thence North 33°04'53" West 30 feet, more or less, to the POINT OF ENDING on said existing southeasterly right of way line.

RESERVING, however, unto BNSF, its successors and assigns, the right to construct, place, operate, maintain, alter, repair, replace, renew, improve and remove communication lines above, below and on the surface of the premises, including transmission by conduit, fiber optics, cable, wire or other means of electricity, voice data, video, digitized information, or other materials or information, track and railroad facilities in any such manner as does not unreasonably interfere with STATE use of the premises for said construction of a highway overpass and drainage structure, and further reserving unto BNSF, its successors and assigns, all right and privilege of ingress and egress to said premises as BNSF, its successors and assigns may require to investigate and remediate environmental contamination and hazards, and further reserving the right and privilege to use said land for any and all purposes not inconsistent with the use thereof for said highway purposes and drainage structure.

The foregoing EASEMENTS are made subject to and upon the following express conditions:

1. To existing interests in the above-described premises to whomsoever belonging and of whatsoever nature and any and all extensions and renewals thereof, including but not limited to underground pipe line or lines, or any type of wire line or lines, if any.
2. Any and all cuts and fills, excavations or embankments necessary in the construction, maintenance, or future alteration of said highway overpass and drainage structure shall be made and maintained in such manner, form and extent as will provide adequate drainage of and from the adjoining lands and premises of BNSF; and wherever any such fill or embankment shall or may obstruct the natural drainage from such lands and premises of BNSF, the STATE shall construct and maintain such culverts or drains as may be requisite to preserve such natural and pre-existing drainage, and shall also wherever necessary, construct extensions of existing drains, culverts or ditches through or along the premises of BNSF, such extensions to be of adequate sectional dimensions to preserve the present flowage of drainage or other waters, and of materials and workmanship equally as good as those now existing.
3. The STATE shall bear the cost of removal, relocation or reconstruction of any and all right-of-way fences, telephone or telegraph poles, or other facilities, the removal, relocation or reconstruction of which may be made necessary by reason of the use of said premises for said highway purposes.
4. The STATE shall, at its own cost and expense, make adjustment with industries or other lessees of BNSF for buildings or improvements that may have to be relocated, reconstructed or destroyed by reason of the construction and maintenance of said highway overpass and drainage structure on said premises.
5. If during the construction or subsequent maintenance of said highway overpass and drainage structure, soils or other materials considered to be environmentally contaminated are exposed, the STATE will remove and safely dispose of said contaminated soils. The STATE shall indemnify, protect and defend BNSF from any and all liability, claims or demands, if any, which arise as a result of exposure and/or removal of said contaminated soils or materials. Determination of soils contamination and applicable disposal procedures thereof, will be made only by an agency having the capacity and authority to make such a determination.
6. BNSF and the STATE have entered into that certain Overpass AGREEMENT dated as of March 14, 2006 concerning the Premises (the "Overpass AGREEMENT"). The conditions of this instrument shall be in full force and effect for purposes of these EASEMENTS even if the Overpass AGREEMENT is, for whatever reason, no longer in effect.
7. The STATE or its contractor(s) shall telephone BNSF's Communication Network Control Center at **(800) 533-2891** (a 24-hour number) to determine if fiber optic cable is buried anywhere on the premises; and if so, the STATE or its contractor(s) will contact the Telecommunications Company(ies) involved, and make arrangements with the Telecommunications Company(ies) for protection of the fiber optic cable prior to beginning any work on the premises.
8. BNSF does not warrant its title to said premises nor undertake to defend the STATE in the peaceable possession, use or enjoyment thereof; and the grant herein made is subject to all outstanding rights or interest of others, including the tenants and licensees of BNSF.
9. These EASEMENTS shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns and successors of BNSF and the STATE.

TO HAVE AND TO HOLD THE SAME, together with all the hereditaments and appurtenances thereunto belonging to the STATE for public use and enjoyment for the purposes aforesaid and for no other purpose whatsoever subject to the terms and conditions hereinbefore stated.

IN WITNESS WHEREOF, the said **THE BNSF RAILWAY COMPANY** has caused this instrument to be signed by its authorized officer, and the corporate seal affixed on the 4th day of April, 2006.

**ARIZONA DEPARTMENT OF
TRANSPORTATION**

By: Bruce Vana

Bruce Vana, P.E.
Engineer-Manager
Utility and Railroad Engineering Section

BNSF RAILWAY COMPANY

By: D. P. Schneider

D. P. Schneider
General Director Real Estate



Attest: Patricia Zbichowski
By: Patricia Zbichowski
Patricia Zbichowski
Assistant Secretary

PROJECT: U 089-C-801
089 CN 418 H5106 02R

SECTION: East Flagstaff T.I.

PARCEL: 3-1354
CR 3/4/05

Exhibit C

EXHIBIT "C"
CONTRACTOR REQUIREMENTS

1.01 General

- **1.01.01** 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 East Flagstaff Traffic Interchange, East Flagstaff, Arizona.
- **1.01.02** 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".
- **1.01.03** The Contractor must 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 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.
- **1.01.06** The Contractor must notify the State of Arizona's Engineer at ⁶⁰²⁻712-8648 and Railway's Manager Public Projects, telephone number (909) 728-8855 at least thirty (30) calendar days before commencing any work on Railway Property. Contractor's notification to Railway, must refer to Railroad's file East Flagstaff Traffic Interchange (025-128S).
- **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 must furnish the Railway five (5) 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 (2) sets of structural calculations of any falsework, shoring or cribbing. 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.

- **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 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.

1.02 Contractor Safety Orientation

- **1.02.01** 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.contractororientation.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.

1.03 Railway Requirements

- **1.03.01** 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 Agency.
- **1.03.02** The Contractor must notify the Railway's Superintendent of Operations Larry Kreger at (928)289-7273 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 must abide by the following temporary clearances during construction:
 - 15' 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
- **1.03.04** Upon completion of construction, the following clearances shall be maintained:
 - 25' Horizontally from centerline of nearest track
 - 23'-3 1/2" Vertically above top of rail
- **1.03.05** Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the Railway and to the State of Arizona and must 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.
- **1.03.06** 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 State of Arizona.
- **1.03.07** The details of construction affecting the Railway's Property and tracks not included in the contract plans must be submitted to the Railway by the State of Arizona for approval before work is undertaken and this work must not be undertaken until approved by the Railway.

- **1.03.08** 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 Private 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 at the expense of the Contractor.
- **1.03.09** 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 (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.
- **1.03.10** 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.

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

- **1.04.01** Each Contractor that will perform work within twenty-five (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.contractororientation.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.

1.05 Protection of Railway Facilities and Railway Flagger Services:

- **1.05.01** The Contractor must give Railway's Roadmaster Bill Bergemeier (telephone: 928-226-3812) a minimum of thirty (30) calendar days advance notice when flagging services will be required so that the Roadmaster can make appropriate arrangements (i.e., bulletin the flagger's position). 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 Roadmaster five (5) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to 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 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 twenty-five (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 will 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 \$1000.00 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 will be used to calculate the actual costs of flagging pursuant to this paragraph.
- **1.05.03d** The average train traffic on this route is 83 freight trains per 24-hour period at a timetable speed 55 MPH and 2 passenger trains at a timetable speed of 55 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 twenty-five (25) feet of any track must be in compliance with FRA Roadway Worker Protection Regulations.
- **1.06.02** 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 twenty-five (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 must not work within twenty-five (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 twenty-five (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 must 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 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 (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.

- **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 must 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 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.)**
- **1.06.09** 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, where storage of the same will interfere with the sight distances of motorists approaching the crossing. Prior to beginning work, the Contractor must 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 must 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 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.

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 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 Project Engineer Richard Barnitz (telephone: 505-767-6826). 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.**
- **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 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.

- **1.07.03** 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.
- **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 must immediately: (a) notify the Railway's Resource Operations Center at (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 (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 _____**

EXHIBIT "C-1"

**Agreement
Between
BNSF RAILWAY COMPANY
and the
CONTRACTOR**

**BNSF RAILWAY COMPANY
Attention: Manager Public Projects
740 E. Carnegie Drive
San Bernardino, CA 92408**

**Railway File: East Flagstaff Traffic Interchange (025-128S)
Agency Project: Agreement 2645-04-BNSF, 089 CN 418 H5106 01C**

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated March 14, 2006, with the State of Arizona for the performance of certain work in connection with the following project: East Flagstaff Traffic Interchange, East Flagstaff, Arizona. Performance of such work will necessarily require contractor to enter BNSF RAILWAY COMPANY ("Railway") right of way and property ("Railway Property"). The Contract provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for ADOT (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 Contract, has agreed and does hereby agree with Railway as follows:

Section 1. RELEASE OF LIABILITY AND INDEMNITY

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 INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

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 BOILER INSPECTION ACT, WHENEVER SO CLAIMED.

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.

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

Section 2. TERM

This Agreement is effective from the date of the Contract 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.

Section 3. INSURANCE

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

- ◆ It is agreed that any workers' compensation exclusion does not apply to **Railroad** payments related to the Federal Employers Liability Act or a **Railroad** Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.
- ◆ The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Any exclusions related to the explosion, collapse and underground hazards must 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 must contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

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

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

- ◆ ADOT'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 Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to remove any exclusion for punitive damages.
- ◆ No other endorsements restricting coverage may be added.
- ◆ 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) must not contain an exclusion for punitive damages and certificates of insurance must 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 is primary and non-contributing with respect to any insurance carried by **Railroad**. The certificate of insurance must reflect that the above wording is included in evidenced policies.

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) must include a severability of interest endorsement and **Railroad** must be named as an additional insured with respect to work performed under this agreement. Severability of interest and naming **Railroad** as additional insured must 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 must 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 must 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) must 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 must be indicated on the certificate of insurance. Upon request from **Railroad**, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

BNSF RISK MANAGEMENT
2500 Lou Menk Drive AOB-1
Fort Worth, TX 76131-2828
Fax: 817-352-7207

Any insurance policy must 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 must 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 must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming *Railroad* as an additional insured, and requiring that the subcontractor 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 will entitle, but not require, *Railroad* to terminate this *Agreement* immediately. Acceptance of a certificate that does not comply with this section will not operate as a waiver of contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by contractor will 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* will not be limited by the amount of the required insurance coverage.

For purposes of this section, *Railroad* means "Burlington Northern Santa Fe Corporation", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS

The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Contract, and the Contractor Requirements set forth on Exhibit "C" attached to the Contract 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.

Section 5. TRAIN DELAY

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.

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.

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.

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 its subcontractors must give Railway's representative Richard Barnitz (telephone 505-767-6826) six (6) 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.

Contractor and subcontractors must 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 (2) original copies of this letter, which, upon execution by Railway, will constitute an Agreement between us.

(Contractor)

BNSF Railway Company

By: _____
Printed Name: _____
Title: _____

By: 
Name: Megan McIntyre
Title: Manager Public Projects

Contact Person: _____
Address: _____

Accepted and effective this March 14th day of 2006

City: _____ State: _____ Zip: _____
Fax: _____
Phone: _____
E-mail: _____

EXHIBIT D

East Flagstaff Traffic Interchange

Summary of Costs

Flagging

\$114,514

Exhibit E

Date: 3-14-06

Mr. Bruce Vana
Engineer-Manager
Utility and Railroad Section
Arizona Department of Transportation
205 S. 17th Avenue, Room 357, Mail Stop 618E
Phoenix, AZ 85007

Re: Final Approval of Plans and Specifications dated March 1, 2005, drafted by DMJM Harris (hereinafter called, the "Plans and Specifications")

Dear Mr. Vana:

This letter serves as BNSF Railway Company's ("BNSF") final written approval of the Plans and Specifications covering the construction of the East Flagstaff Traffic Interchange. This final written approval is given to the Arizona Department of Transportation ("STATE") pursuant to Article III, Section 1, of that certain Overpass AGREEMENT between BNSF and STATE, dated March 14, 2006. If the Plans and Specifications are revised by STATE with regard to BNSF facilities, subsequent to the date set forth above, this letter shall no longer serve as final written approval of the Plans and Specifications and STATE must resubmit said Plans and Specifications to BNSF for final written approval.

Regards,



Megan T. McIntyre
Manager Public Projects

Exhibit F

BNSF Bridge Requirements

BRIDGE DESIGN, PLANS & SPECIFICATIONS:

Except for the design of temporary falsework and shoring, BNSF review of the STRUCTURE plans will be limited to the vertical and horizontal clearances, sight distance for existing train signals, foundation dimensions and drainage characteristics as they relate to existing and future tracks. BNSF will not review structural design calculations for the permanent STRUCTURE unless a member or members are influenced by railroad live loads.

Temporary falsework and shoring plans and calculations must be reviewed and approved by BNSF prior to beginning construction. Temporary construction clearances must be no less than 15 feet measured horizontally from the centerline of the nearest track and 21 feet-6 inches measured vertically from the top of rail of the most elevated track to the bottom of lowest temporary falsework member. STATE regulatory agencies may have more restrictive requirements for temporary railroad clearances.

For the permanent STRUCTURE, the STATE will submit plans showing the least horizontal distance from the centerline of existing and future tracks to the face of the nearest member of the proposed STRUCTURE. The location of the least horizontal distance must be accurately described such that BNSF can determine where it will occur in both the horizontal and vertical plane. If the permanent member is within 25 feet of the nearest track (or future track), collision walls shall be incorporated into the permanent STRUCTURE design according to American Railway Engineering and Maintenance Association Manual of Recommended Practice - Chapter 8 - Article 2.1.5.

For the permanent STRUCTURE, the STATE will submit plans showing the least vertical clearance from top of the most elevated rail of existing and future tracks to the lowest point of the proposed STRUCTURE.

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

BRIDGE MAINTENANCE:

The STATE will be responsible for maintenance and repair of the STRUCTURE including the earth retention components, embankment slopes, erosion control, surface drainage, fencing, deck drains, landscaping, paint, walkways, handrails, lighting, and other improvements associated with the PROJECT.

Fencing and other pedestrian access controls within BNSF's right-of-way and incorporated into the PROJECT shall be designed and maintained by the STATE. Trespasser control shall be the responsibility of the STATE.

BRIDGE INSPECTION:

The STATE will conduct periodic structural inspections. In the event of an earthquake, fire, flood, damage from vehicular impacts or other emergent situations, the STATE will provide an immediate inspection by qualified personnel and notify BNSF of damage that may affect safe passage of trains. If necessary the STATE will embargo weights or provide lane closures or other such measures to protect the structural integrity of the STRUCTURE such that there can be continuous safe passage of trains until repairs are made.

BRIDGE ALTERATIONS:

Except as provided otherwise by this AGREEMENT, there will be no alterations made to the STRUCTURE that will alter the railroad vertical or horizontal clearances provided by the original design. Pipelines will not be added or attached to the STRUCTURE without first submitting a crossing license application to BNSF for approval.