

ORIGINAL



0000100235

CITY OF FLAGSTAFF  
City Attorney's Office  
David A. Womochil (015591)  
211 West Aspen Avenue  
Flagstaff, Arizona 86001  
(928) 779-7680

RECEIVED

JUL -2 2009

ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

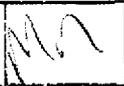
**BEFORE THE ARIZONA CORPORATION COMMISSION**

Commissioners

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP

Arizona Corporation Commission  
**DOCKETED**

JUL -2 2009

DOCKETED BY 

IN THE MATTER OF THE APPLICATION OF )  
THE CITY OF FLAGSTAFF TO UPGRADE )  
EXISTING RAILROAD CROSSINGS OF THE )  
BNSF RAILWAY COMPANY AT STEVES )  
BOULEVARD AND FANNING DRIVE IN THE )  
CITY OF FLAGSTAFF, COCONINO COUNTY, )  
ARIZONA, DOT CROSSING NOS. 025099J )  
AND 025129Y. )

DOCKET NO.  
RR-02635B-09-0075

**APPLICANT'S  
RESPONSE TO  
STAFF'S SECOND  
SET OF DATA  
REQUESTS**

The City of Flagstaff ("City") hereby submits its Response to Commission Staff's June 19, 2009 Second Set of Data Requests. Information forming the basis for the responses below was provided by the following persons:

Randy Whitaker, Project Manager  
City of Flagstaff  
211 West Aspen Avenue  
Flagstaff, AZ 86001

Rick Barrett, City Engineer  
City of Flagstaff  
211 West Aspen Avenue  
Flagstaff, AZ 86001

**CW 2.1 Please confirm if the wayside horns at Steves Boulevard and Fanning Drive have been removed pending Commission approval.**

The City has removed the wayside horns at Steves Boulevard and Fanning Drive pending approval by the Commission.

**CW 2.2      On what date were the wayside horns removed?**

City staff removed the wayside horns on May 15, 2009.

**CW 2.3      Were BNSF personnel notified of the original installation of the wayside horns? Please identify what personnel were so notified and when. Were BNSF personnel notified of the removal of the wayside horns? Please identify what BNSF personnel were so notified and when. Was BNSF approval granted for entry onto BNSF property to perform the installation and/or removal? Please provide written documentation of any such BNSF approval(s).**

The wayside horns are part of the City's quiet zone project. BNSF personnel participated as a member of the Diagnostic Team that reviewed the plans associated with the quiet zone. However, the City did not provide BNSF personnel separate notification for each specific aspect of the project. Various BNSF signal field personnel were involved in determining the location of the wayside horns. Attached is a copy of the Wayside Horn Agreement between the City of Flagstaff and BNSF.

**CW 2.4      Were BNSF personnel provided or requested by the City to be present for the installation? Please identify any BNSF personnel that were provided. Were BNSF personnel provided or requested by the City to be present for the removal? Please identify any BNSF personnel that were provided.**

As indicated in the City's response to CW 2.3 above, BNSF personnel participated in the Diagnostic Team and were aware of the specific plans related to the City of Flagstaff's implementation of its quiet zone. However, the City of Flagstaff is responsible for the installation, operation, and maintenance of the wayside horns. BNSF personnel were not required to participate in the actual installation of the wayside horns and were not present. If Commission approval is granted, BNSF personnel will be involved in the connection of the horns to the existing signal equipment.

**CW 2.5      While the wayside horns were in place, please describe in detail what measures were taken to make the traveling public aware that the wayside horns were not operational.**

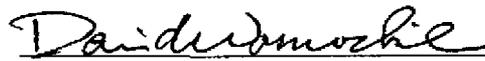
There has not been any indication that the public was aware that the horns were in place. The horns were located approximately twenty (20) feet from the existing signal equipment, and there was no signage, lights, or other markers identifying or otherwise drawing attention to the horns. No signage was placed to indicate any change in the existing signal equipment. Furthermore, it was the City's intention to cover the wayside horns and indicators so they would not be visible until final Commission approval was obtained, and then remove the covers at the end of the thirty (30) day establishment period. The City was in the process of covering the equipment when the decision was

made to remove the wayside horns completely. In addition, the trains have continued blowing their horns in the same manner as before. The public has been notified through normal means, including City Council meetings, that the City is establishing a quiet zone, that there will be a notice of establishment period, and that the quiet zone will not be effective until after that time period elapses.

**CW 2.6      While the wayside horns were in place, please describe in detail what measures were taken to make the BNSF train operators aware that the wayside horns were not operational.**

City staff did not maintain direct contact with BNSF train operators concerning the status of the wayside horn installation process. However, it is City staff's understanding that the BNSF signal and operation divisions were aware that the wayside horns did not have power and that the horns were not connected to the existing signal equipment. As explained above, the City had intended to cover the wayside horns and indicators so that they would not be visible until final Commission approval was obtained.

Respectfully submitted this 1st day of July, 2009 by:



David Womochil  
Senior Assistant City Attorney  
City of Flagstaff

Original and thirteen (13) copies of the foregoing were mailed this \_\_\_\_ day of July, 2009, first class postage prepaid, to:

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

Copies of the foregoing mailed this \_\_\_\_ day of July, 2009 to:

Mark Bolton  
Fennemore Craig  
3003 North Central Avenue, Suite 2600  
Phoenix, AZ 85012  
Attorney for BNSF Railway Company

Randy Whitaker, Project Manager  
City of Flagstaff  
211 West Aspen Avenue  
Flagstaff, AZ 86001

Melvin V. Thomas, Manager Public Projects  
BNSF Railway Company  
740 East Carnegie Drive  
San Bernardino, CA 92408-3571

Robert Travis, PE, State Railroad Liaison  
Utilities & Railroad Engineering Section  
Arizona Dept. of Transportation  
205 South 17<sup>th</sup> Avenue, Mail Drop 618E  
Phoenix, AZ 85007

Traffic Records Section  
Arizona Dept. of Transportation  
206 South 17<sup>th</sup> Avenue, Mail Drop 064R  
Phoenix, AZ 85007

Janice Alward, Chief Counsel  
Legal Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

Brian Lehman, Chief  
Railroad Safety Section  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

Arizona Reporting Service, Inc.  
2200 North Central Avenue, Suite 502  
Phoenix, AZ 85004-1481

Lyn Farmer  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007-2927

Harry Steelman, Project Manager  
Amtrak  
810 N. Alameda Street  
Los Angeles, CA 90012

By: \_\_\_\_\_

# WAYSIDE HORN AGREEMENT

THIS WAYSIDE HORN AGREEMENT (hereinafter called, this "Agreement"), is entered into effective as of December 1, 2008, by and between BNSF Railway Company, a Delaware Corporation (hereinafter called, "BNSF"), and the City of Flagstaff, a municipal corporation, (hereinafter called, the "Agency").

## WITNESSETH

WHEREAS, BNSF has grade crossings warning devices located at the intersections of Steves Boulevard and Fanning Drive, as indicated on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, the Agency is installing within the BNSF right-of-way property its automated horn system pursuant to the requirements of 49 CFR Part 222, (hereinafter called, "Wayside Horn System") with the existing automatic grade crossing warning devices shown on Exhibit "A" subject to the mutual covenants contained in this Agreement;

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

## AGREEMENT

### 1. PURPOSE

The purpose of this Agreement is as follows: provide for the ownership, installation and maintenance by Agency or its contractor of the Wayside Horn System and other related improvements at the Steves Blvd (DOT #025099J) and Fanning Drive (DOT #025129Y) at-grade crossings.

### 2. SCOPE OF WORK

- a. The Agency must provide BNSF in writing with the total preempt cycle time required from the start of the preempt cycle of Wayside Horn until the arrival of the train at the highway-rail crossing.
- b. BNSF will provide an interface box with contact terminals, at Agency's expense on the side of the railroad instrument cabin.
- c. Agency or its contractor will place all necessary cable and conduit and horn confirmation signage ("Confirmation X") on Railroad property in accordance with Exhibit "A", attached to and made a part of this Agreement.
- d. The Agency or its contractor will connect the Wayside Horn System control signals to the contact terminals in the interface box including all necessary cable and conduit.
- e. ~~BNSF will provide flagging services, at Agency's sole expense, necessary to protect BNSF train operations or BNSF property as set forth in more detail on Exhibit "C" attached to and made a part of this Agreement.~~
- f. The Agency or its contractor must install the new Wayside Horn System.
- g. An estimate of the actual costs for BNSF work (excluding flagging, which will depend upon contractor's activities) is shown on Exhibit "B" attached to and made a part of this Agreement. In the event installation of the improvements has not commenced within six (6) months following the effective date of this Agreement, BNSF may, in its sole and absolute discretion, revise the cost estimates set forth on Exhibit B. If the cost estimates are revised, 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 B not specifically mentioned therein may be

included as a part of this Agreement upon written approval of the Agency, which approval will not be unreasonably withheld.

- h. The Agency must pay BNSF for the actual costs of any work performed by BNSF under this Agreement within thirty (30) days of the date of the invoice for such work, including flagging costs. During the construction of the improvements, BNSF may send Agency progressive invoices detailing the costs of the railroad work performed by BNSF under this Agreement. Upon completion of the improvements and all associated work, BNSF will send Agency a detailed invoice of final costs including flagging costs, segregated as to labor and materials for each item in the recapitulation shown on Exhibit B. Agency must pay the final invoice within ninety (90) days of the date of the final invoice. BNSF will assess a finance charge of .033% per day (12% per annum) on any unpaid sums or other charges due under this Agreement which are past our credit terms. The finance charge continues to accrue daily until the date payment is received by BNSF, not the date payment is made or the date postmarked on the payment. ~~Finance charges will be assessed on delinquent sums and other charges as of the end of the month and will be reduced by amounts in dispute and any unposted payments received by the month's end.~~ Finance charges will be noted on invoices sent to Agency under this section.

### 3. CONSTRUCTION AND MAINTENANCE

- a. BNSF will operate and maintain, at its expense, the necessary relays and the other materials required to preempt the Wayside Horn System with the grade crossing warning devices.
- b. BNSF will operate and maintain, at its expense, the grade crossing warning devices up to the contact terminals in the interface box.
- c. The Agency or its contractor must, at the Agency's expense, install the Way-Side Horn System up to and including connection to the contact terminals in the interface box including all necessary cable and conduit.
- d. Following installation of the Wayside Horn System, the Agency will own, operate and maintain, at its expense, the Wayside Horn System up to and including connection to the contact terminals in the in the interface box including all necessary cable and conduit. When any such maintenance requires BNSF flagging or changes to BNSF contact terminals, Agency or its designate shall pay BNSF for all costs associated with such work
- e. The Agency shall maintain the Wayside Horn System in a good and operative condition and in accordance with all applicable laws and regulations, including without limitation Appendix E of 49 CFR Part 222.
- f. Through this Agreement, BNSF does not waive any rights it may have under existing federal law to sound the locomotive horn in case of emergency, when the Wayside Horn System is malfunctioning, when active grade crossing warning devices have malfunctioned, when roadway workers are present or when grade crossing warning systems are temporarily out of service during inspection, maintenance, or testing of the system or as is otherwise necessary in the sole opinion of BNSF.
- g. In the event Agency defaults on any of its obligations hereunder, including without limitation, Agency's obligation to maintain the Wayside Horn System in good and operative condition, BNSF, may, at its option, remove the Wayside Horn System at the sole cost and expense of Agency. Upon removal of the Wayside Horn System, BNSF shall resume sounding the locomotive horn at the Steves Blvd (DOT #025099J) and the Fanning Drive (DOT #025129Y) at-grade crossings.

### 4. PROTECTION OF UNDERGROUND SYSTEMS

- a. Agency and its contractor is placed on notice that fiber optic, communication and other cable lines and systems (collectively, the "Lines") owned by various telecommunications or utility companies may be buried on BNSF's property or right-of-way. The Agency or its contractor must contact appropriate personnel to have the Lines located and make arrangements with the

owner of the Lines regarding protective measures that must be followed prior to the commencement of any work on BNSF's property. The Agency or its contractor will be responsible for contacting BNSF's Engineering Representative (Richard Barnitz at 505-767-6826) and the telecommunications or utility companies and notifying them of any work that may damage these Lines or facilities and/or interfere with their service. The Agency or its contractor must also mark all Lines in order to verify their locations. Agency or its 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 Lines will be sufficient cause for BNSF's Engineering Representative to stop construction at no cost to BNSF until these items are completed.
- c. In addition to the liability terms contained elsewhere in this Agreement and to the fullest extent provided by law, Agency and its contractor hereby indemnify, defend and hold 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 Agency or its contractor, subcontractors, agents and/or employees that cause or in any way or degree contribute to: (1) any damage to or destruction of any Lines 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 (a) any telecommunications or utility company, (b) Agency's contractor or subcontractors, or (c) Agency, and (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 telecommunications or utility company(ies). **THE LIABILITY ASSUMED BY AGENCY OR ITS CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF BNSF.**
- d. Agency or its contractor will be responsible for the rearrangement of any facilities or Lines determined to interfere with the installation or construction of the improvements. Agency and/or its Contractor must cooperate fully with any telecommunications or utility company(ies) in performing such rearrangements.

5.

#### INDEMNIFICATION

Agency hereby indemnifies, defends and holds harmless BNSF for, from and against any and all claims, suits, losses, damages, costs and expenses for injury to or death to third parties or BNSF's officers and employees, and for loss and damage to property belonging to any third parties (including damage to the property of BNSF officers and employees), to the extent caused by the negligence of the Agency or any of its employees, agents or contractors. The Agency also releases BNSF from and waives any claims for injury or damage to the Agency's highway traffic control signals, the Wayside Horn System, or other equipment which may occur as a result of any of the work provided for in this Agreement or the operation or the maintenance thereafter of any of the Agency's highway Wayside Horn System, the traffic control signals, cables, connections at and about the grade crossing.

- b. To the fullest extent permitted by law, Agency hereby releases, indemnifies, defends and holds harmless BNSF and BNSF's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, employees and agents for, from and against any and all claims, suits, liabilities, losses, damages, costs and expenses (including, without limitation, attorneys fees and court costs) for injury to or death to Agency employees, agents or representatives arising out of, resulting from or related to any act or omission of Agency or any work performed on or about BNSF's property or right-of-way, including without limitation, the installation and maintenance of the Wayside Horn System by the Agency. **THE LIABILITY ASSUMED BY THE AGENCY IN THIS PROVISION 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 RAILROAD, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT**

**TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT OF BNSF.**

- c. "Agency further agrees to release, indemnify and hold harmless BNSF for damages resulting from any labor claims under BNSF's collective bargaining agreements (and including attorneys' fees and court costs and expenses, if the subject of litigation) brought as a consequence of Agency's installation or maintenance of the Horn System, or otherwise from implementation of the terms of this Agreement."
- d. The Agency further agrees, at its expense, in the name and on behalf of BNSF, that it will adjust and settle any claims made against BNSF and will appear and defend any suits or actions at law or in equity brought against BNSF on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by the Agency under this Agreement for which BNSF is alleged to be liable. BNSF will give notice to the Agency in writing of the receipt of pendency of such claims and thereupon the Agency must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against BNSF, BNSF may forward the summons and complaint or process in connection therewith to the Agency, and the Agency must defend, adjust or settle such suits and protect, indemnify, and save harmless BNSF 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.

**6. AGENCY CONTRACTOR REQUIREMENTS**

- a. While on or about BNSF property, Agency and its contractors must fully comply with BNSF's "Contractor Requirements" set forth in Exhibit "C" attached to and made a part of this Agreement. The "Contractor Requirements" include clearance requirements and personal protective equipment requirements. Agency and its contractors will be responsible for becoming familiar with BNSF's "Contractor Requirements". Prior to entering BNSF property, Agency's Contractor must execute Exhibit C-1 attached to and made a part of this Agreement.
- b. Prior to entering BNSF property, each person providing labor, material, supervision or services connected with the work to be performed on or about BNSF property must complete the safety training program (hereinafter called "BNSF Contractor Safety Orientation") at the following internet website: "contractororientation.com". Agency must ensure that each of its contractors, employees, subcontractors, agents or invitees completes the BNSF Contractor Safety Orientation before any work is performed under this Agreement. Additionally, Agency must ensure that each and every contractor, employee, subcontractor, agent or invitee possesses a card certifying completion of the BNSF Contractor Safety Orientation prior to entering BNSF property. Agency must renew the BNSF Contractor Safety Orientation annually.
- c. Prior to entering BNSF property, Agency or its contractors must prepare and implement a safety action plan acceptable to BSNF. Agency must audit compliance with the plan during the course of Agency's work. A copy of the plan and audit results must be kept at the work site and will be available for inspection by BNSF at all reasonable times.

**7. INSURANCE**

Agency and/or its contractor must, at Agency and contractor's 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 limited 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:
- ◆ 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
- e. Other Requirements:

All policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certification of insurance must reflect that no exclusion exists.

Agency 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. Agency 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 Agency's care, custody or control.

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

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) 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.

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

Prior to commencing the Work, Agency 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.

Ebix BPO  
PO Box 12010-BN  
Hemet, CA 92546-8010  
Fax number: 951-766-2299

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 provided.

Agency represents that this *Agreement* has been thoroughly reviewed by Agency's insurance agent(s)/broker(s), who have been instructed by Agency to procure the insurance coverage required by this *Agreement*. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above. The fact that insurance (including without limitation, self-insurance) is obtained by Agency will not be deemed to release or diminish the liability of Agency 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."

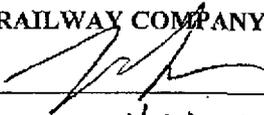
If any portion of the operation is to be subcontracted by Agency, Agency must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming *Railroad* as an additional insured, and requiring that the subcontractor release, defend and indemnify *Railroad* to the same extent and under the same terms and conditions as Agency 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 Agency's obligations hereunder.

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

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

BNSF RAILWAY COMPANY

By: 

Printed Name: Melvin Thomas

Title: Manager Public Projects

CITY OF FLAGSTAFF

By: 

Printed Name: Kevin Burke

Title: City Manager

ATTEST:

Laura Matthews for  
CITY CLERK

APPROVED AS TO FORM:

David Womodi for  
CITY ATTORNEY