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Arizona Corporation Commission

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SEP 11 2009

LAW DEPARTMENT APPROVED

Mile Post: 1.33

Line Segment: 7209 SEP 11 A 11: 20

U.S. DOT Number: 025703Y

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AZ CORP COMMISSION

DOCKET CONTROL

GRADE CROSSING SIGNAL INSTALLATION AGREEMENT

THIS GRADE CROSSING SIGNAL INSTALLATION AGREEMENT (hereinafter called, "Agreement"), is executed to be effective as of August 27, 2009, by and between the City of El Mirage, a Political Subdivision of the State of Arizona/a Municipal Corporation, herein represented and acting through its City Council (hereinafter called, "AGENCY"), and BNSF RAILWAY COMPANY, a Delaware Corporation (hereinafter called, "RAILROAD" or "BNSF");

WITNESSETH:

WHEREAS, to improve the existing Dysart Road and Thunderbird Road at-grade crossings, located at BNSF Line Segment 7209 and Milepost 1.33, and designated by D.O.T. No. 025703Y, by installation of new railroad crossing signals and activation equipment known as Dysart and Thunderbird Final Phase Improvements within an existing roadway easement and a new roadway easement across the BNSF right-of-way as indicated on the Exhibit A, attached hereto and incorporated herein; and

WHEREAS, the parties agree that RAILROAD will receive no ascertainable benefit from the installation of advance warning signs, pavement marking stop bars or crossing signal equipment (hereinafter collectively called, "Crossing Signal Equipment");

WHEREAS, the AGENCY has agreed to pay for the acquisition and installation of crossing signal equipment and the new crossing surface at Dysart Road and Thunderbird Road; and

WHEREAS, the RAILROAD agrees to purchase and install, at AGENCY'S sole expense, the crossing signal equipment and the new crossing surface described in the scope of work herein, and upon the terms and conditions set forth below.

NOW, THEREFORE, in consideration 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:

ARTICLE I - SCOPE OF WORK

1. The term "Project" as used in this agreement includes any and all work related to install new railroad crossing signals and activation equipment known as Dysart and Thunderbird Final Phase Improvements at U.S. DOT crossing 025703Y (hereinafter referred to as "Crossing") more particularly described on Exhibits A and B attached hereto and incorporated herein, including, but not limited to, any and all changes to telephone, telegraph, signal and electrical lines and appurtenances, installation of advance warning signs and pavement marking stop bars, installation of any new crossing surface, temporary and permanent track work, fencing, grading, alterations to or new construction of drainage facilities, preliminary and construction engineering and contract preparation.

ARTICLE II - BNSF OBLIGATIONS

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

1. In consideration of the faithful performance of the Agency's covenants contained herein, BNSF hereby grants to Agency, its successors and assigns, upon and subject to the terms and conditions set forth in this Agreement, a temporary non-exclusive license (hereinafter called, "Temporary Construction License") to construct the Crossing across or upon the portion of BNSF's right-of-way described further on Exhibit A-1, attached hereto

and incorporated herein, 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;
- (c) Otherwise use or operate the right-of-way as BNSF may from time to time deem appropriate.

Prior to commencing any work on BNSF's property or right-of-way, Agency must pay BNSF the sum of Zero and No/100 Dollars (\$0) as compensation for the Temporary Construction License. The term of the Temporary Construction License begins on the Effective Date and ends on the earlier of (i) substantial completion of the Structure, or (ii) eighteen (18) months following the Effective Date. The Temporary Construction License and related rights given by BNSF to Agency in this provision are without warranty of title of any kind, express or implied, and no covenant of warranty of title will be implied from the use of any word or words herein contained. The Temporary Construction License is for construction of the Crossing only and shall not be used by Agency for any other purpose. Agency acknowledges and agrees that Agency shall not have the right, under the Temporary Construction License, to use the Crossing. In the event Agency is evicted by anyone owning, or claiming title to or any interest in said right-of-way, BNSF will not be liable to Agency 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 Agency herein.

Upon receiving the payment from Agency described in the subsequent sentence and provided Agency is in compliance with the terms and conditions of this Agreement, BNSF will grant to Agency, its successors and assigns, an easement (hereinafter called, the "Easement") to enter upon and use that portion of BNSF's right-of-way as is necessary to use and maintain the Crossing, substantially in the form of Exhibit B attached to this Agreement. Agency must pay BNSF the sum of Ninety Thousand and No/100 Dollars (\$90,000.00) as compensation for the Easement within thirty (30) days of issuing a Notice to Proceed pursuant to Article III, Section 8 of this Agreement. If Agency fails to pay BNSF within the thirty day time period set forth in the preceding sentence, BNSF may stop construction of the Project until full payment is received by BNSF.

2. BNSF will furnish all labor, materials, tools, and equipment for railroad work required for the construction of the 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, reasonably 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 Agency, which approval will not be unreasonably withheld. Construction of the Project must include the following railroad work by BNSF:

- (a) Procurement of materials, equipment and supplies necessary for the railroad work;
- (b) Preliminary engineering, design, and contract preparation;
- (c) Furnishing of flagging services 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 C, attached to this Agreement and made a part hereof;
- (d) Furnishing engineering and inspection as required in connection with the construction of the Project.

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. Agency agrees to reimburse BNSF for work of an emergency nature caused by Agency or Agency's contractor in connection with the Project which BNSF reasonably deems necessary for the immediate restoration of railroad operations, or for the protection of persons or BNSF property. Such work must be performed by BNSF with prior approval of Agency, which shall not be withheld unreasonably, and Agency agrees to fully reimburse BNSF for all such emergency work.

5. BNSF may charge Agency 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. During the construction of the Project, BNSF will send Agency progressive invoices detailing the costs of the railroad work performed by BNSF under this Agreement. Agency must reimburse BNSF for completed force-account work within thirty (30) days of the date of the invoice for such work. Upon completion of the Project, BNSF will send Agency a detailed invoice of final costs, segregated as to labor and materials for each item in the recapitulation shown on Exhibit D. Pursuant to this section and Article IV, Section 7 herein, 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 its credit terms. The finance charge continues to accrue daily until the date payment is received by BNSF, not the date payment is made or the date postmarked on the payment. Finance charges will be assessed on delinquent sums and other charges as of the end of the month and will be reduced by amounts in dispute and any unposted payments received by the month's end. Finance charges will be noted on invoices sent to Agency under this section.

7. BNSF will make available and open to inspection by AGENCY, (including the legislative auditor and fiscal analyst for the AGENCY), at any reasonable time and upon thirty (30) days written notice, all cost records of BNSF specifically pertaining to the Project for a period of one (1) year from the date of the final BNSF invoice under this Agreement.

8. Upon completion of the installation of the Crossing Signal Equipment and the new crossing surface, the RAILROAD will, at its sole cost and expense, operate and maintain the Crossing Signal Equipment and the new crossing surface, from end-of-tie to end-of-tie, in proper condition.

### ARTICLE III - AGENCY OBLIGATIONS

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

1. Agency must furnish to BNSF plans and specifications for the Project. Said plans (reduced size 11" x 17"), showing the plan and profile of the roadway work on BNSF right-of-way and marked as Exhibit A, attached hereto and made a part hereof, must be submitted to BNSF for the development of railroad cost estimates.

2. Agency must make any required application and obtain all required permits and approvals for the construction of the Project.

3. Agency must acquire all rights of way necessary for the construction of the Project.

4. Agency must make any and all arrangements for the installation or relocation of wire lines, pipe lines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities other than BNSF which may be necessary for the construction of the Project.

5. Upon completion of the installation of the crossing signal equipment and the new crossing surface the BNSF will operate and maintain the Crossing Signal Equipment and the new crossing surface from end of tie to end of tie. AGENCY, based on the 2008 AREMA C&S Manual, must reimburse BNSF for Agency's share of the costs

of maintaining the Crossing Signal Equipment and the new crossing surface, as shown on Exhibit D2, based on AAR units of 124 points at \$156.36/point within thirty (30) days of the date of any invoice for such costs. In the event AGENCY fails to reimburse BNSF pursuant to this provision, finance charges will be assessed on any unpaid amounts pursuant to Article II, Sections 6 above.

6. Notwithstanding the preceding provision, if any regulations, ordinances, acts, rules or other laws subsequently passed or amended by the AGENCY or any other appropriate governmental or legislative authority increase the AGENCY'S portion of maintenance costs under this Agreement, BNSF will receive the benefit of any such regulations, ordinances, acts, rules or other laws and the AGENCY'S increased portion of maintenance costs will be incorporated into and made a part of this Agreement.

7. If a railway or a highway improvement project necessitates rearrangement, relocation, or alteration of the Crossing Signal Equipment or the new crossing surface installed hereunder, the costs for such rearrangement, relocation or alteration will be the responsibility of the party requesting such changes.

8. If the Crossing Signal Equipment installed hereunder cannot, through age, be maintained, or, by virtue of its obsolescence, requires replacement, the cost of installation of new crossing signal equipment will be negotiated by the parties hereto on the basis of the current Federal Aid Railroad Signal Program participation and applicable AGENCY at the time of such replacement is warranted.

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

- (a) Design and Widening of Dysart Road;
- (b) Installation of a pavement marking stop bar in accordance with the Manual on Uniform Traffic Control Devices (hereinafter called, "MUTCD");
- (c) Installation of advance warning signs in accordance with the MUTCD
- (d) Perform all necessary grading and paving, including backfill of excavations and restoration of disturbed vegetation on BNSF's right-of-way;
- (e) Provide suitable drainage, both temporary and permanent;
- (f) Provide all barricades, lights, flagmen or traffic control devices necessary for preventing vehicular traffic from using a portion of the Crossing, during the installation of the concrete crossing surfaces, and also during the installation of the Crossing Signal Equipment.
- (g) Construct asphalt/concrete roadway surface on approaches to each track. Roadway surface will match elevation of the Main Track crossing surface and remain level to a point at least thirty (30) feet from nearest rail. Any concrete headers will be constructed no closer than 5'-6" (preferably 6'-0") from centerline of each track to provide for a minimum of 11'-0" (preferably 12'-0") opening for track and railroad crossing surface;
- (h) Job site cleanup including removal of all construction materials, concrete debris, surplus soil, refuse, contaminated soils, asphalt debris, litter and other waste materials to the satisfaction of BNSF;

10. The Agency will approve the location of the signals and signal bungalow prior to the installation by BNSF.

11. The Agency must have advanced railroad crossing signs and standard pavement markings in place at the crossing shown on Exhibit A (if the same are required by the MUTCD) prior to the acceptance of this Project by the Agency:

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

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

14. In order to prevent damage to BNSF trains and property, Agency 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, Agency 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.

15. Agency 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. The contractor will be responsible for contacting BNSF's Engineering Representative Richard Barnitz (505-767-6826) and/or the telecommunications companies and notifying them of any work that may damage these Lines or facilities and/or interfere with their service. The contractor must also mark all Lines shown on the plans or marked in the field in order to verify their locations. 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 Richard Barnitz (505-767-6826) to stop construction at no cost to the Agency or BNSF until these items are completed.
- (c) In addition to the liability terms contained elsewhere in this Agreement, the contractor hereby agrees, as an integral provision of this Agreement, to 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 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, (3) any injury to or death of any person on, within or alleged to be a result of a condition on BNSF caused by Contractor, its subcontractors, agents and/or employees property, and/or (4) any claim or cause of action for alleged loss of profits or revenue by, or loss of service by a customer or user of such telecommunication company(ies). **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF BNSF**

- (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.
- (e) Contractor shall comply, and shall require all subcontractors providing services in connection with this Agreement to comply, with BNSF's insurance requirements as set forth in Section 3 of the "Agreement between BNSF Railway Company and Contractor" attached hereto as Exhibit C-1 and incorporated herein by this reference. Contractor is required to enter into the "Agreement between BNSF Railway Company and Contractor" as a condition of this Agreement.

16. Agency must incorporate in each prime contract for construction of the Project, or the specifications therefore (i) the provisions set forth in Article III, Sections 9, 10, and 13; (ii) the provisions set forth in Article IV, Sections 3, 4, 8 and 9; and (iii) the provisions set forth in Exhibit C and Exhibit C-1, attached hereto and by reference made a part hereof.

17. Except as otherwise provided below in this Section 17, all construction work performed hereunder by Agency for the Project will be pursuant to a contract or contracts to be let by Agency, 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 it is in Agency's best interest, Agency may direct that the construction of the Project be done by day labor under the direction and control of Agency, or if at any time, in the opinion of Agency, the contractor has failed to prosecute with diligence the work specified in and by the terms of said contract, Agency may terminate its contract with the contractor and take control over the work and proceed to complete the same by day labor or by employing another contractor(s) provided; however, that any contractor(s) replacing the original contractor(s) must comply with the obligations in favor of BNSF set forth above and, provided further, that if such construction is performed by day labor, Agency will, at its expense, procure and maintain on behalf of BNSF the insurance required by Exhibit C-1.
- (e) To facilitate scheduling for the Project, Agency shall have its contractor give BNSF's Roadmaster 90 days advance notice of the proposed times and dates for work windows. BNSF and Agency's contractor will establish mutually agreeable work windows for the Project. BNSF has the right at any time to revise or change the work windows, due to train operations or service obligations. BNSF will not be responsible for any additional costs and expenses resulting from a change in work windows. Additional costs and expenses resulting from a change in work windows shall be accounted for in the contractor's expenses for the Project.

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

19. TO THE FULLEST EXTENT PERMITTED BY LAW, AGENCY HEREBY RELEASES, INDEMNIFIES, DEFENDS AND HOLDS HARMLESS BNSF, ITS AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS AND ATTORNEYS' FEES) OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON (INCLUDING, WITHOUT LIMITATION, THE EMPLOYEES OF THE PARTIES HERETO) OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART) (I) THE USE, OCCUPANCY OR PRESENCE OF AGENCY AND ITS EMPLOYEES OR AGENTS IN, ON, OR ABOUT THE CONSTRUCTION SITE, (II) THE PERFORMANCE, OR FAILURE TO PERFORM BY THE AGENCY AND ITS EMPLOYEES, OR AGENTS, ITS WORK OR ANY OBLIGATION UNDER THIS AGREEMENT, (III) THE SOLE OR CONTRIBUTING ACTS OR OMISSIONS OF AGENCY AND ITS EMPLOYEES, OR AGENTS IN, ON, OR ABOUT THE CONSTRUCTION SITE, (IV) AGENCY'S BREACH OF THE TEMPORARY CONSTRUCTION LICENSE OR EASEMENT GRANTED TO AGENCY PURSUANT TO ARTICLE II OF THIS AGREEMENT, (V) ANY RIGHTS OR INTERESTS GRANTED TO AGENCY PURSUANT TO THE TEMPORARY CONSTRUCTION LICENSE OR EASEMENT DISCUSSED IN ARTICLE II OF THIS AGREEMENT, (VI) AGENCY'S OCCUPATION AND USE OF BNSF'S PROPERTY OR RIGHT-OF-WAY, INCLUDING, WITHOUT LIMITATION, SUBSEQUENT MAINTENANCE OF THE STRUCTURE BY AGENCY, OR (VII) AN ACT OR OMISSION OF AGENCY OR ITS OFFICERS, AGENTS, INVITEES, EMPLOYEES OR ANYONE AGENCY CONTROLS OR EXERCISES CONTROL OVER.

#### 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 Exhibit A and the detailed plans and specifications approved by BNSF.
3. Agency 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 on the Project if any of the following events take place: (i) Agency (or any of its contractors) performs the Project work in a manner contrary to the plans and specifications approved by BNSF; (ii) Agency (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; (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the Project; or (iv) Agency fails to pay BNSF for the Temporary Construction License or the Easement pursuant to Article II, Section 1 of this Agreement. The work stoppage will continue until all necessary actions are taken by Agency 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 License, or (iii) the Easement, BNSF may immediately terminate the Temporary Construction License or the Easement. Any such work stoppage under this provision will not give rise to any liability on the part of BNSF. BNSF's right to stop the work is in addition to any other rights BNSF may have including, but not limited to, actions or suits for damages or lost profits. In the event that BNSF desires to stop construction work on the Project, BNSF agrees to immediately notify the following individual in writing:

Lance Calvert, City Engineer  
City of El Mirage  
P.O. Box 26  
12145 NW Grand Ave  
El Mirage, Arizona 85335  
(P) 623-876-2971  
(F) 623-933-8418

5. Agency must supervise and inspect the operations of all Agency contractors to assure 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 Agency personnel at any time during construction of the Project, BNSF has the right to stop construction (within or adjacent to its operating right-of-way). Construction of the Project will not proceed until Agency 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 Richard Barnitz, Field Engineering (505-767-6826) for appropriate corrective action.

6. Pursuant to this section and Article II, Section 6 herein, Agency 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 Agency 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.

8. The construction of the Project will not commence until Agency gives BNSF's Manager Public Projects thirty (30) days prior written notice of such commencement. The commencement notice will reference BNSF's file number 025703Y and D.O.T. Crossing No. 025703Y and must state the time that construction activities will begin.

9. In addition to the terms and conditions set forth elsewhere in this Agreement, BNSF and the Agency agree to the following terms upon completion of construction of the Project:

- (a) Agency will own and be fully responsible for repairs, maintenance, future construction or reconstruction of the Dysart and Thunderbird roadways.
- (b) Agency will maintain the elevation of the Dysart and Thunderbird roadways approaches to match the elevation on the railroad track crossing surfaces and to be no more than three (3) inches above or six (6) inches below top-of-rail elevation at a distance measured thirty (30) feet from the nearest rail.
- (c) Agency will maintain the advanced railroad crossing warning signs and pavement markings and agrees to hold harmless and indemnify BNSF for any claims, damages or losses, in whole or in part, caused by or due to the Agency's failure to maintain the advanced warning signs and markings or other requirements of the MUTCD.
- (d) Agency will do nothing and permit nothing to be done in the maintenance of the Dysart and Thunderbird roadways, which will interfere with or endanger facilities of BNSF.

- (e) It is expressly understood by Agency and BNSF that any right to install utilities will be governed by a separate permit or license agreement between the parties hereto.
- (f) BNSF will, at its sole cost and expense, operate and maintain the Crossing Signal Equipment, Crossing Signal Control House, and the new crossing surfaces, from end-of-tie to end-of-tie, in proper condition.
- (g) Notwithstanding the preceding provision, if any regulations, ordinances, acts, rules or other laws subsequently passed or amended by the Agency or any other governmental or legislative authority increase the Agency's portion of maintenance cost under this Agreement, BNSF will receive the benefit of any such regulations, ordinances, acts, rules or other laws and the Agency's increased portion of maintenance costs will be incorporated into and made a part of this Agreement.
- (h) If a railway or highway improvement project necessitates rearrangement, relocation, or alteration of the Crossing Signal Equipment, Crossing Signal House, or the new crossing surface installed hereunder, the costs for such rearrangement, relocation or alteration will be the responsibility of the party requesting such changes.
- (i) If the event any of the Crossing Signal Equipment is partially or wholly destroyed by Agency or any one Agency controls or over whom Agency exercises control, then Agency must reimburse BNSF for the costs of such repair and/or replacement of the Crossing Signal Equipment.
- (j) If the Crossing Signal Equipment and/or Crossing Signal House installed hereunder cannot, through age, be maintained, or by virtue of its obsolescence, requires replacement, the cost of installation of the new crossing signal equipment and/or new crossing signal house will be negotiated by the parties hereto on the basis of the current Federal Aid Railroad Signal Program participation and applicable Agency at the time of such replacement is warranted.

10. Agency must notify and obtain prior authorization from BNSF's Manager of Public Projects before entering BNSF's right-of-way for maintenance purposes. If the construction work hereunder is contracted, Agency must require its prime contractor(s) to comply with the obligations set forth in Exhibit C and Exhibit C-1, as the same may be revised from time to time. Agency will be responsible for its contractor(s) compliance with such obligations.

11. Any books, papers, records and accounts of the parties hereto relating to the work hereunder or the costs or expenses for labor and material connected with the construction will at all reasonable times be open to inspection and audit by the agents and authorized representatives of the parties hereto, as well as the State of Arizona and the Federal Highway Administration, for a period of one (1) year from the date of the final BNSF invoice under this 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 one (1) year of the Effective Date, this Agreement will become null and void.

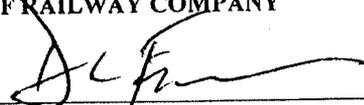
14. Neither termination nor expiration of this Agreement will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration.

15. 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.



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

BNSF RAILWAY COMPANY

By:  8/27/09

Printed Name: DAVID L. FREEMAN

Title: VP-ENGINEERING

CITY OF EL MIRAGE

By: 

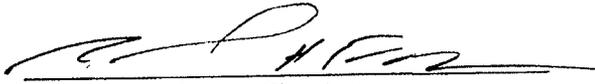
Printed Name: FREDERICK WATERMAN III

Title: MAYOR CITY OF CHICAGO

Attest:

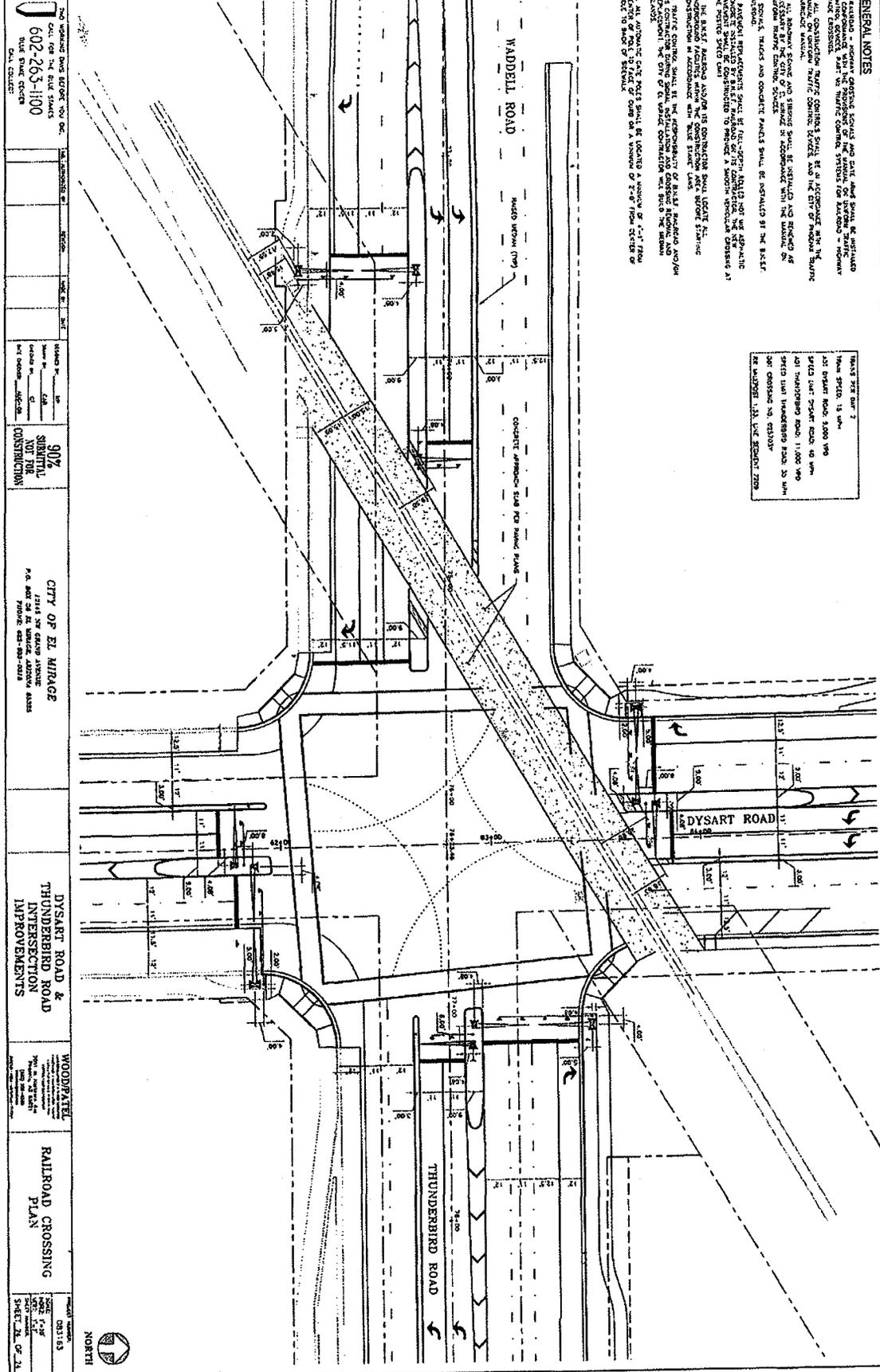
  
FOR Richard Saathoff, City Clerk

Approved as to form:

  
Richard H. Flaaen, City Attorney

**Exhibit "A"**

(See attached drawing)



**GENERAL NOTES**

1. EXISTING AND PROPOSED ROADWAY AND GUT AND DRAIN BE RECONSTRUCTED TO MEET THE REQUIREMENTS OF THE ARIZONA DEPARTMENT OF TRANSPORTATION AND THE ARIZONA DEPARTMENT OF WATER RESOURCES.
2. ALL CONSTRUCTION SHALL BE IN ACCORDANCE WITH THE ARIZONA DEPARTMENT OF TRANSPORTATION AND THE ARIZONA DEPARTMENT OF WATER RESOURCES.
3. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
4. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
5. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
6. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
7. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
8. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
9. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.
10. ALL ROADWAY STRUCTURES SHALL BE INSTALLED AND FINISHED AS SHOWN ON THESE PLANS.

PLAN SCALE: 1" = 40'
SECTION SCALE: 1" = 4'
VERTICAL CURVE: 100'
GRADE: 1.0%
ADDITIONAL NOTES: SEE SHEET 2B

**Exhibit "B" - Easement**  
(Please see attached easement documents)

Wood, Patel & Associates, Inc.  
(480) 834-3300  
www.woodpatel.com

May 2, 2008  
WP # 083163  
Page 1 of 3  
See Exhibit "A"

**PARCEL DESCRIPTION**  
**Dysart Road & Thunderbird Road**  
**Proposed Roadway Easement – El Mirage**

A parcel of land lying within Sections 10, 11 and 15, Township 3 North, Range 1 West, of the Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

Commencing at the southeast corner of said Section 10, a brass cap flush, from which the east quarter corner of said Section 10, a City of El Mirage brass cap flush, bears North 00°05'21" West, (basis of bearing), a distance of 2637.65 feet, said southeast corner being the **POINT OF BEGINNING**;  
**THENCE** along the south line of said Section 10, North 89°15'48" West, a distance of 26.16 feet, to the southeasterly right-of-way line of the California, Arizona and Santa Fe Railway Company described in Book 325 of Deeds, page 225, Maricopa County Records (M.C.R.);  
**THENCE** leaving said south line, along said southeasterly right-of-way line, South 59°35'18" West, a distance of 33.48 feet, to the west line of the east 55 feet of said Section 15;  
**THENCE** leaving said southeasterly right-of-way line, along said west line, North 00°07'02" East, a distance of 17.32 feet, to the south line of said Section 10;  
**THENCE** leaving said south line, along the west line of the east 55 feet of said Section 10, North 00°05'21" West, a distance of 92.76 feet, to the northwesterly right-of-way line of the California, Arizona and Santa Fe Railway Company described in Book 321 of Deeds, page 279, M.C.R.;  
**THENCE** leaving said west line, along said northwesterly right-of-way line, North 59°35'42" East, a distance of 63.71 feet, to the east line of said Section 10;  
**THENCE** leaving said northwesterly right-of-way line, along said east line, South 00°05'21" East, a distance of 8.88 feet, to the northwesterly right-of-way line of the California, Arizona and Santa Fe Railway Company described in Book 326 of Deeds, page 21, M.C.R.;  
**THENCE** leaving said east line, along said northwesterly right-of-way line, North 59°34'50" East, a distance of 75.31 feet, to the southwest corner of Rancho El Mirage Plaza as shown on the Final Plat recorded in Book 837, page 1, M.C.R., and the east line of the west 65 feet of said Section 11;  
**THENCE** leaving said northwesterly right-of-way line, along said east line, South 00°05'21" East, a distance of 86.89 feet, to the southeasterly right-of-way line of said California, Arizona and Santa Fe Railway Company;  
**THENCE** leaving said east line, along said southeasterly right-of-way line, South 59°34'50" West, a distance of 75.31 feet, to said east line of said Section 10;

**Parcel Description**  
**Dysart Road & Thunderbird Road**  
**Proposed Roadway Easement – El Mirage**

May 2, 2008  
WP # 083163  
Page 2 of 3  
See Exhibit "A"

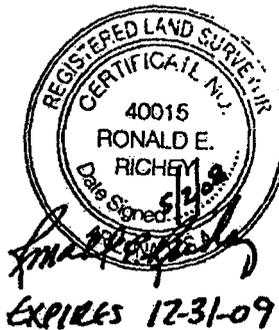
**THENCE** leaving said southeasterly right-of-way line, along said east line, South 00°05'21" East, a distance of 29.94 feet, to the **POINT OF BEGINNING**.

Containing 0.2733 acres, or 11,906 square feet of land, more or less.

Subject to existing rights-of-way and easements.

This parcel description is based on client provided information and is located within an area surveyed by Wood, Patel & Associates, Inc. during the month of January, 2008 and any monumentation noted in this parcel description is within acceptable tolerance (as defined in Arizona Boundary Survey Minimum Standards dated 02/14/2002) of said positions based on said survey.

Y:\Parcel Descriptions\083163 Dysart Road & Thunderbird Road - Proposed Right-of-Way (L01) 05-02-08.doc



EAST 1/4 CORNER OF  
SECTION 10, T.3N., R.1W.  
CITY OF EL MIRAGE  
BRASS CAP FLUSH

LINE	BEARING	DISTANCE
L1	N89°15'48"W	26.16'
L2	S59°35'18"W	33.48'
L3	N00°07'02"E	17.32'
L4	N00°05'21"W	92.76'
L5	N59°35'42"E	63.71'
L6	S00°05'21"E	8.88'
L7	N59°34'50"E	75.31'
L8	S00°05'21"E	86.89'
L9	S59°34'50"W	75.31'
L10	S00°05'21"E	29.94'

CALIFORNIA, ARIZONA AND  
SANTA FE RAILWAY COMPANY  
BOOK 321 OF DEEDS,  
PAGE 279, M.C.R.

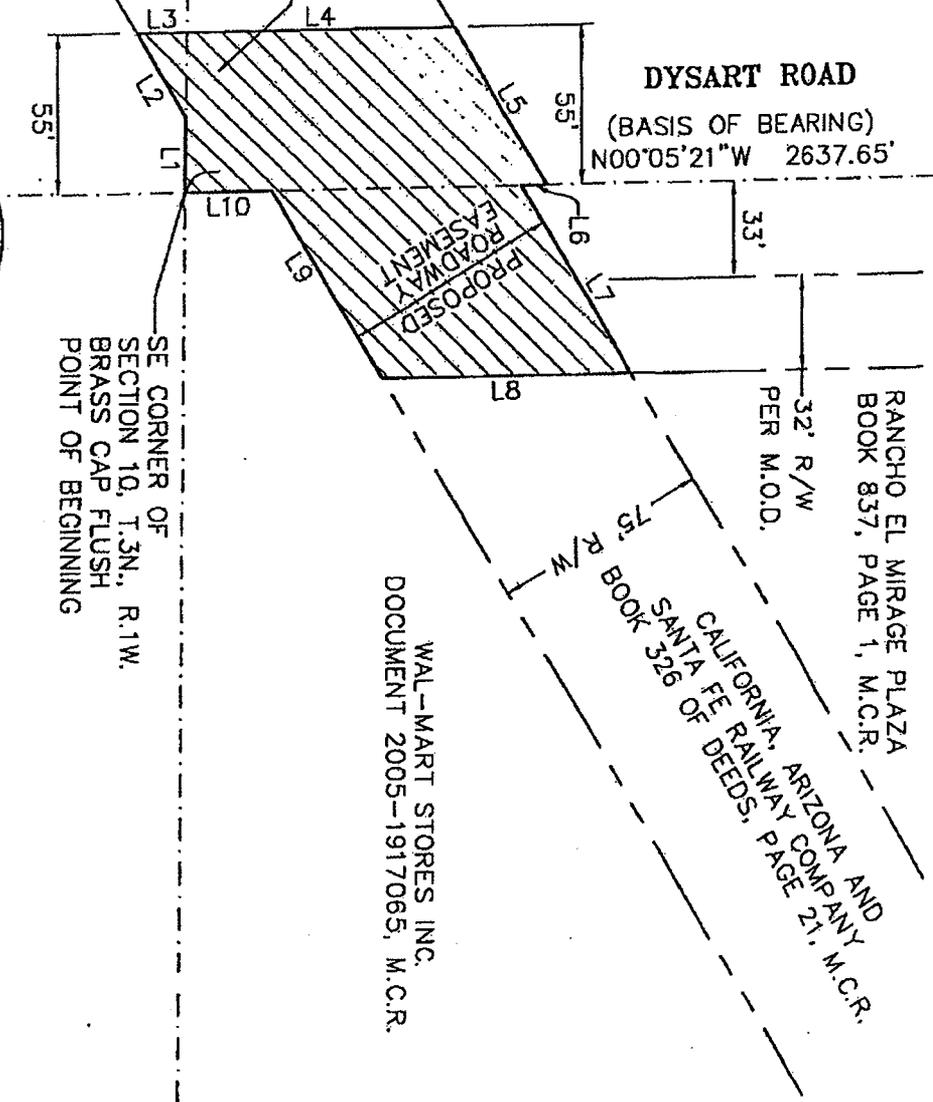
CALIFORNIA, ARIZONA AND  
SANTA FE RAILWAY COMPANY  
BOOK 325 OF DEEDS,  
PAGE 225, M.C.R.

M.O.D.—MAP OF DEDICATION FOR  
RANCHO EL MIRAGE PLAZA  
BOOK 733, PAGE 4, M.C.R.

**WOOD/PATEL**

1855 North Stapley Drive  
Mesa, AZ 85203  
Phone: (480) 834-3300  
Fax: (480) 834-3320  
PHOENIX • MESA • TUCSON • GOODYEAR

**DYSART ROAD**  
(BASIS OF BEARING)  
N00°05'21"W 2637.65'

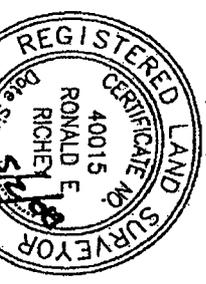


RANCHO EL MIRAGE PLAZA  
BOOK 837, PAGE 1, M.C.R.

CALIFORNIA, ARIZONA AND  
SANTA FE RAILWAY COMPANY  
BOOK 326 OF DEEDS, PAGE 21, M.C.R.

WAL-MART STORES INC.  
DOCUMENT 2005-1917065, M.C.R.

SE CORNER OF  
SECTION 10, T.3N., R.1W.  
BRASS CAP FLUSH  
POINT OF BEGINNING



APPROVED  
Ronald E. Richley  
REGISTERED LAND SURVEYOR  
NO. 40015  
STATE OF ARIZONA  
EXPIRES 12-31-09

**EXHIBIT "A"**

DYSART ROAD & THUNDERBIRD ROAD  
PROPOSED ROADWAY EASEMENT

EL MIRAGE  
05-02-08  
WP# 083163  
PAGE 3 OF 3  
NOT TO SCALE

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3163L01-DB\DWG\3163L01.DWG

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Parcel name: 3163L01

North: 949398.4060000 East : 570518.4640000  
Line Course: N 89-15-48.0946 W Length: 26.16010142  
North: 949398.74232593 East : 570492.30606065  
Line Course: S 59-35-17.8574 W Length: 33.48308175  
North: 949381.79285591 East : 570463.42990735  
Line Course: N 00-07-01.8574 E Length: 17.32032618  
North: 949399.11314586 East : 570463.46533124  
Line Course: N 89-15-48.0986 W Length: 0.00249864  
North: 949399.11317799 East : 570463.46283281  
Line Course: N 00-05-21.0119 W Length: 92.75742558  
North: 949491.87049123 East : 570463.31847359  
Line Course: N 59-35-41.9845 E Length: 63.71226443  
North: 949524.11584776 East : 570518.26835641  
Line Course: S 00-05-21.0119 E Length: 8.87908307  
North: 949515.23677544 East : 570518.28217501  
Line Course: N 59-34-50.0000 E Length: 75.30741270  
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Line Course: S 59-34-50.0000 W Length: 75.30741270  
North: 949428.34371217 East : 570518.41740762  
Line Course: S 00-05-21.0119 E Length: 29.93774843  
North: 949398.4060000 East : 570518.46400001

Perimeter: 509.76052340 Area: 11,905.68162179 sq. ft. 0.27331684 acres

Mapcheck Closure - (Uses listed courses, radii, and deltas)  
Error Closure: 0.00000001 Course: S 84-55-13.4117 E  
Error North: -0.000000001 East : 0.000000010  
Precision 1: 50,976,052,340.00000000

Wood, Patel & Associates, Inc.  
(480) 834-3300  
www.woodpatel.com

May 2, 2008  
WP # 083163  
Page 1 of 3  
See Exhibit "A"

**PARCEL DESCRIPTION**  
**Dysart Road & Thunderbird Road**  
**Proposed Roadway Easement - Surprise**

A parcel of land lying within Sections 10 and 15, Township 3 North, Range 1 West, of the Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

Commencing at the southeast corner of said Section 10, a brass cap flush, from which the east quarter corner of said Section 10, a City of El Mirage brass cap flush, bears North 00°05'21" West, (basis of bearing), a distance of 2637.65 feet;

**THENCE** along the south line of said Section 10, North 89°15'48" West, a distance of 55.00 feet, to the west line of the east 55 feet of said Section 15 and the **POINT OF BEGINNING**;

**THENCE** leaving said south line, along said west line, South 00°07'02" West, a distance of 17.32 feet, to the southeasterly right-of-way line of the California, Arizona and Santa Fe Railway Company as described in Book 325 of Deeds, page 225, Maricopa County Records (M.C.R.);

**THENCE** leaving said west line, along said southeasterly right-of-way line, South 59°35'18" West, a distance of 111.51 feet, to the south line of the north 75 feet of said Section 15;

**THENCE** leaving said southeasterly right-of-way line, along said south line, North 89°15'48" West, a distance of 113.21 feet;

**THENCE** leaving said south line, South 00°44'12" West, a distance of 5.00 feet, to the south line of the north 80 feet of said Section 15;

**THENCE** along said south line, North 89°15'48" West, a distance of 40.00 feet;

**THENCE** leaving said south line, North 00°44'12" East, a distance of 5.00 feet, to the south line of said north 75 feet of said Section 15;

**THENCE** along said south line, North 89°15'48" West, a distance of 40.12 feet, to the northwesterly right-of-way line of said California, Arizona and Santa Fe Railway Company described in Book 325 of Deeds, page 225 M.C.R.;

**THENCE** leaving said south line, along said northwesterly right-of-way line, North 59°35'18" East, a distance of 145.00 feet, to the south line of said Section 10;

**THENCE** leaving said northwesterly right-of-way line, along said south line, South 89°15'48" East, a distance of 9.65 feet, to the northwesterly right-of-way line of the California, Arizona and Santa Fe Railway Company described in Book 321 of Deeds, page 279, M.C.R.;

**THENCE** leaving said south line, along said northwesterly right-of-way line, North 59°35'42" East, a distance of 179.34 feet, to the west line of the east 55 feet of said Section 10;

**Parcel Description**  
**Dysart Road & Thunderbird Road**  
**Proposed Roadway Easement -- Surprise**

May 2, 2008  
WP # 083163  
Page 2 of 3  
See Exhibit "A"

**THENCE** leaving said northwesterly right-of-way line, along said west line, South 00°05'21" East, a distance of 92.76 feet, to the **POINT OF BEGINNING**.

Containing 0.4966 acres, or 21,630 square feet of land, more or less.

Subject to existing rights-of-way and easements.

This parcel description is based on client provided information and is located within an area surveyed by Wood, Patel & Associates, Inc. during the month of January, 2008 and any monumentation noted in this parcel description is within acceptable tolerance (as defined in Arizona Boundary Survey Minimum Standards dated 02/14/2002) of said positions based on said survey.

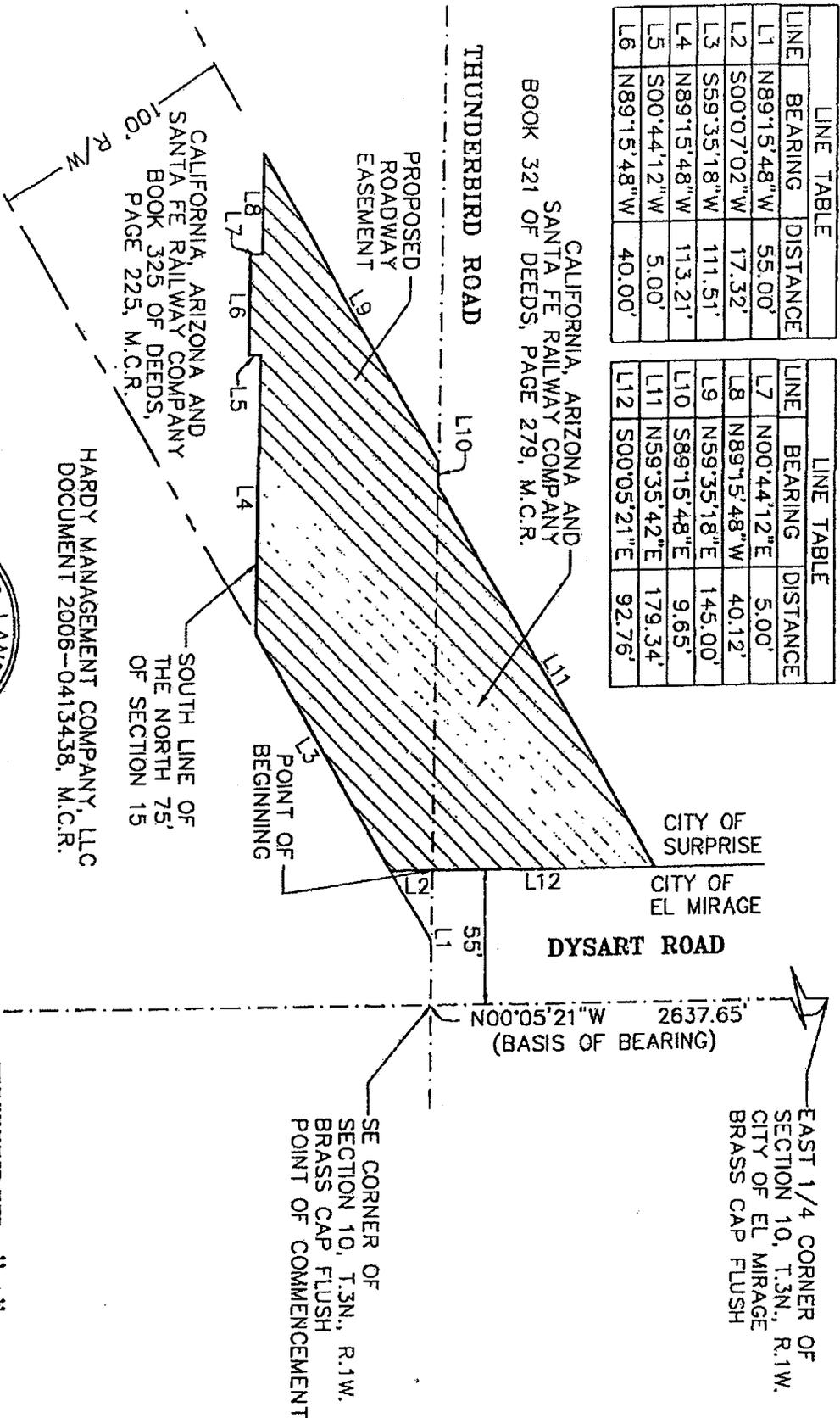
Y:\Parcel Descriptions\083163 Dysart Road & Thunderbird Road - Proposed Right-of-Way (L02) 03-02-08.doc



**EXPIRES 12-31-09**

LINE	BEARING	DISTANCE
L1	N89°15'48"W	55.00'
L2	S00°07'02"W	17.32'
L3	S59°35'18"W	111.51'
L4	N89°15'48"W	113.21'
L5	S00°44'12"W	5.00'
L6	N89°15'48"W	40.00'

LINE	BEARING	DISTANCE
L7	N00°44'12"E	5.00'
L8	N89°15'48"W	40.12'
L9	N59°35'18"E	145.00'
L10	S89°15'48"E	9.65'
L11	N59°35'42"E	179.34'
L12	S00°05'21"E	92.76'



**WOOD/PATEL**  
 1855 North Stapley Drive  
 Mesa, AZ 85203  
 Phone: (480) 834-3300  
 Fax: (480) 834-3320  
 PHOENIX • MESA • TUCSON • GOODYEAR



EXPIRES 12-31-09

HARDY MANAGEMENT COMPANY, LLC  
 DOCUMENT 2006-0413438, M.C.R.

**EXHIBIT "A"**  
 DYSART ROAD & THUNDERBIRD ROAD  
 PROPOSED ROADWAY EASEMENT -  
 SURPRISE  
 05-02-08  
 WP# 083163  
 PAGE 3 OF 3  
 NOT TO SCALE  
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 3163L02-DB\DWG\3163L02.DWG

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Parcel name: 3163L02

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North: 949381.79285591 East : 570463.42990735  
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North: 949325.34390733 East : 570367.26002765  
Line Course: N 89-15-48.0946 W Length: 113.20951928  
North: 949326.79937940 East : 570254.05986486  
Line Course: S 00-44-11.9054 W Length: 5.00000000  
North: 949321.79979264 East : 570253.99558263  
Line Course: N 89-15-48.0946 W Length: 40.00000000  
North: 949322.31405048 East : 570213.99888853  
Line Course: N 00-44-11.9054 E Length: 5.00000000  
North: 949327.31363724 East : 570214.06317076  
Line Course: N 89-15-48.0946 W Length: 40.11847247  
North: 949327.82941822 East : 570173.94801398  
Line Course: N 59-35-17.8574 E Length: 144.99599381  
North: 949401.22783682 East : 570298.99404698  
Line Course: S 89-15-48.0946 E Length: 9.64809317  
North: 949401.10379663 East : 570308.64134276  
Line Course: N 59-35-41.9845 E Length: 179.34215246  
North: 949491.87049120 East : 570463.31847360  
Line Course: S 00-05-21.0119 E Length: 92.75742558  
North: 949399.11317796 East : 570463.46283281  
Line Course: S 89-15-48.0986 E Length: 0.00249864  
North: 949399.11314583 East : 570463.46533125

Perimeter: 758.90739366 Area: 21,630.09695816 sq. ft. 0.49655870 acres

Mapcheck Closure - (Uses listed courses, radii, and deltas)  
Error Closure: 0.00000004 Course: S 07-22-33.2827 E  
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Precision 1: 18,972,684,841.25000000

**EXHIBIT "C"**

**CONTRACTOR REQUIREMENTS**

## 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 City of El Mirage's Dysart and Thunderbird Final Phase Improvements.
- 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". Questions regarding procurement of the Railroad Protective Liability Insurance should be directed to Rosa Martinez at Marsh, USA, 214-303-8519.
- 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. Railway will have the right to stop construction work on the Project if any of the following events take place: (i) Contractor (or any of its subcontractors) performs the Project work in a manner contrary to the plans and specifications approved by Railway; (ii) Contractor (or any of its subcontractors), in Railway's opinion, prosecutes the Project work in a manner which is hazardous to Railway property, facilities or the safe and expeditious movement of railroad traffic; (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the Project; or (iv) Contractor fails to pay Railway for the Temporary Construction License or the Easement. The work stoppage will continue until all necessary actions are taken by Contractor or its subcontractor to rectify the situation to the satisfaction of Railway's Division Engineer or until additional insurance has been delivered to and accepted by Railway. In the event of a breach of (i) this Agreement, (ii) the Temporary Construction License, or (iii) the Easement, Railway may immediately terminate the Temporary Construction License or the Easement. Any such work stoppage under this provision will not give rise to any liability on the part of Railway. Railway's right to stop the work is in addition to any other rights Railway may have including, but not limited to, actions or suits for damages or lost profits. In the event that Railway desires to stop construction work on the Project, Railway agrees to immediately notify the following individual in writing:

Lance E. Calvert, P.E.  
Public Works Director  
City of El Mirage  
P.O. Box 26  
12145 NW Grand Avenue  
El Mirage, AZ 85335  
(623) 876-2971  
Fax: (623) 933-8418  
lcalvert@cityofelmirage.org

- 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 the City of El Mirage and Railway for, from and against all fines or penalties imposed or assessed by Federal, State and Local Governmental Agencies against the City of El Mirage or Railway which arise out of Contractor's work under this Agreement.

- **1.01.06** The Contractor must notify the City of El Mirage Engineer's Department at 623-876-2971 and Railway's Manager Public Projects, telephone number 909-386-4472 at least thirty (30) calendar days before commencing any work on Railway Property. Contractor's notification to Railway, must refer to Railroad's file 025703Y.
- **1.01.07** For any bridge demolition and/or falsework above any tracks or any excavations located with any part of the excavations located within, whichever is greater, twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 2 horizontal to 1 vertical slope beginning at eleven (11) feet from centerline of the nearest track, both measured perpendicular to center line of track, the Contractor must furnish the Railway five sets of working drawings showing details of construction affecting Railway Property and tracks. The working drawing must include the proposed method of installation and removal of falsework, shoring or cribbing, not included in the contract plans and two sets of structural calculations of any falsework, shoring or cribbing. For all excavation and shoring submittal plans, the current "BNSF-UPRR Guidelines for Temporary Shoring" must be used for determining the design loading conditions to be used in shoring design, and all calculations and submittals must be in accordance with the current "BNSF-UPRR Guidelines for Temporary Shoring". All submittal drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. All calculations must take into consideration railway surcharge loading and must be designed to meet American Railway Engineering and Maintenance-of-Way Association (previously known as American Railway Engineering Association) Coopers E-80 live loading standard. All drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor must not begin work until notified by the Railway that plans have been approved. The Contractor will be required to use lifting devices such as, cranes and/or winches to place or to remove any falsework over Railway's tracks. In no case will the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.
- **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 Contractor.
- **1.03.02** The Contractor must notify the Railway's Division Superintendent Mr. Paul Thomas at 602-382-5828 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 City of El Mirage and must not be undertaken until approved in writing by the Railway, and until the City of El Mirage 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 Contractor.
  
- 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 City of El Mirage 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 Construction Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railways tracks. The temporary crossing must be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor will be constructed and, at the completion of the project, removed at the expense of the Contractor.
  
- 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 1(800) 832-5452, of any discharge, release or spills in excess of a reportable quantity. Contractor must not allow Railway Property to become a treatment, storage or transfer facility as those terms are defined in the Resource Conservation and Recovery Act or any state analogue.
  
- 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.

#### **1.04A Contractor Roadway Worker on Track Safety Program and Safety Action Plan**

- 1.04.01 Each Contractor that will perform work within 25 feet of the centerline of a track must develop and implement a Roadway Worker Protection/On Track Safety Program and work with Railway Project Representative to develop an on track safety strategy as described in the guidelines listed in the on track safety portion of the Safety Orientation. This Program must provide Roadway Worker protection/on track training for all employees of the Contractor, its subcontractors, agents or invitees. This training is reinforced at the job site through job safety briefings. Additionally, each Contractor must develop and implement the Safety Action Plan, as provided for on the web site [www.contractororientation.com](http://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.

#### **1.04B Contractors and Employees**

Contractor shall have a background investigation performed on all of its employees, subcontractors and agents who will be performing any services on railroad property under this Agreement.

The background screening shall at a minimum meet the criteria defined by the e-RAILSAFE program outlined at <http://www.e-railsafe.com> in addition to any other applicable regulatory requirements. The e-RAILSAFE program uses rail industry background screening standards.

Contractor shall obtain consent from all employees screened in compliance with the e-RAILSAFE program criteria to release completed background information to BNSF. Contractor shall be subject to periodic audit to ensure compliance.

Contractor shall not permit any of its employees, subcontractors or agents to perform services on property hereunder who are not approved under e-RAILSAFE program standards. Railroad shall have the right to deny entry onto its premises to any of Contractor's employees, subcontractors or agents who do not display the authorized identification badge issued by a background screening service meeting the standards set forth for the e-RAILSAFE program or who pose a threat, in Railroad's reasonable opinion, to the safety or security of Railroad's operations. Contractors shall ensure its employees, subcontractors and agents are United States citizens or legally working in this country under a work VISA.

#### **1.05 Railway Flagger Services:**

- **1.05.01** The Contractor must give Railway's Roadmaster (602-920-7600) 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 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 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, upon inspection by Railway's Representative, other conditions warrant.
  - **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** Flagger services will be performed by qualified Railway flaggers.
- **1.05.03a** Flagger 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 will be borne by the Contractor. The estimated cost for one (1) flagger is approximately between \$800.00-\$1,600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The estimated cost for each flagger includes vacation allowance, paid holidays, Railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, vehicle, transportation, meals, lodging, radio, equipment, supervision and other costs incidental to performing flagging services. Negotiations for Railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. **THE FLAGGING RATE IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF FLAGGING PURSUANT TO THIS PARAGRAPH.**
- **1.05.03d** The average train traffic on this route is 1 freight trains per 24-hour period at a timetable speed 10 MPH and 0 passenger trains at a timetable speed of 0 MPH.

## **1.06 Contractor General Safety Requirements**

- **1.06.01** Work in the proximity of railway track(s) is potentially hazardous where movement of trains and equipment can occur at any time and in any direction. All work performed by contractors within 25 feet of any track 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 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 25 feet of the centerline of any track without an on track safety strategy approved by the Railway's Project Representative. When authority is provided, every contractor employee must know: (1) who the Railway flagger is, and how to contact the flagger, (2) limits of the authority, (3) the method of communication to stop and resume work, and (4) location of the designated places of safety. Persons or equipment entering flag/work limits that were not previously job briefed, must notify the flagger immediately, and be given a job briefing when working within 25 feet of the center line of track.
- **1.06.04** When Contractor employees are required to work on the Railway Property after normal working hours or on weekends, the Railroad's representative in charge of the project must be notified. A minimum of two employees 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 1(800) 832-5452. Local emergency numbers are to be obtained from the Railway representative in charge of the project prior to the start of any work and must be posted at the job site.
- **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](http://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 OR TEMPORARY CONSTRUCTION CROSSING, WHERE STORAGE OF THE SAME WILL OBSTRUCT THE VIEW OF A TRAIN APPROACHING THE CROSSING. PRIOR TO BEGINNING WORK, THE CONTRACTOR MUST ESTABLISH A STORAGE AREA WITH CONCURRENCE OF THE 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 Field Engineering Representative (Richard Barnitz, 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 1(800) 832-5452, of such discovery; (b) take safeguards necessary to protect its employees, subcontractors, agents and/or third parties; and (c) exercise due care with respect to the release, including the taking of any appropriate measure to minimize the impact of such release.

### **1.09 Personal Injury Reporting**

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

**NON-EMPLOYEE PERSONAL INJURY DATA COLLECTION**

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

1. Accident City/St \_\_\_\_\_ 2. Date: \_\_\_\_\_ Time:  
County: \_\_\_\_\_ 3. Temperature: \_\_\_\_\_ 4. Weather  
(if non-Railway location)
5. Social Security # \_\_\_\_\_
6. Name (last, first, mi) \_\_\_\_\_
7. Address: Street: \_\_\_\_\_ City: \_\_\_\_\_ St. \_\_\_\_\_ Zip: \_\_\_\_\_
8. Date of Birth: \_\_\_\_\_ and/or Age \_\_\_\_\_ Gender: \_\_\_\_\_  
(if available)
9. (a) Injury: \_\_\_\_\_ (b) Body Part: \_\_\_\_\_  
(i.e. (a) Laceration (b) Hand)
11. Description of Accident (To include location, action, result, etc.): \_\_\_\_\_

12. Treatment:  
? First Aid Only  
? Required Medical Treatment  
? Other Medical Treatment

13. Dr. Name \_\_\_\_\_ 30. Date: \_\_\_\_\_
14. Dr. Address:  
Street: \_\_\_\_\_ City: \_\_\_\_\_ St: \_\_\_\_\_ Zip: \_\_\_\_\_
15. Hospital Name: \_\_\_\_\_
16. Hospital Address:  
Street: \_\_\_\_\_ City: \_\_\_\_\_ St: \_\_\_\_\_ Zip: \_\_\_\_\_
17. Diagnosis: \_\_\_\_\_

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

LAW DEPARTMENT APPROVED

**EXHIBIT "C-1"**

EXHIBIT "C-1"

Agreement  
Between  
BNSF RAILWAY COMPANY  
and the  
CONTRACTOR

BNSF RAILWAY COMPANY  
Attention: Manager Public Projects

Railway File: 025703Y  
Agency Project: \_\_\_\_\_

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated \_\_\_\_\_, 200\_\_ with the City of El Mirage, AZ for the performance of certain work in connection with the following project: Dysart and Thunderbird Final Improvements. 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 City of El Mirage (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 LOCOMOTIVE 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.

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

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:
- ◆ 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:

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 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 4A. 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 4B. CONTRACTORS AND EMPLOYEES**

Contractor shall have a background investigation performed on all of its employees, subcontractors and agents who will be performing any services on railroad property under this Agreement.

The background screening shall at a minimum meet the criteria defined by the e-RAILSAFE program outlined at <http://www.e-railsafe.com> in addition to any other applicable regulatory requirements. The e-RAILSAFE program uses rail industry background screening standards.

Contractor shall obtain consent from all employees screened in compliance with the e-RAILSAFE program criteria to release completed background information to BNSF. Contractor shall be subject to periodic audit to ensure compliance.

Contractor shall not permit any of its employees, subcontractors or agents to perform services on property hereunder who are not approved under e-RAILSAFE program standards. Railroad shall have the right to deny entry onto its premises to any of Contractor's employees, subcontractors or agents who do not display the authorized

identification badge issued by a background screening service meeting the standards set forth for the e-RAILSAFE program or who pose a threat, in Railroad's reasonable opinion, to the safety or security of Railroad's operations.

Contractors shall ensure its employees, subcontractors and agents are United States citizens or legally working in this country under a work VISA.

#### 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 \$382.20 per hour per incident. **THE RATE THEN IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF TRAIN DELAY PURSUANT TO THIS AGREEMENT.**

Contractor and its subcontractors must give Railway's representative (Richard Barnitz - 505-767-6826) four 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.

Sign and return to the Railway two original copies of this Agreement, which, upon execution by Railway, will constitute an Agreement between us.

\_\_\_\_\_  
(Contractor)

**BNSF Railway Company**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Manager Public Projects

Contact Person: \_\_\_\_\_  
Address: \_\_\_\_\_

Accepted and effective this \_\_\_\_ day of 20 \_\_.

City: \_\_\_\_\_ State: \_\_\_ Zip: \_\_\_\_\_  
Fax: \_\_\_\_\_  
Phone: \_\_\_\_\_  
E-mail: \_\_\_\_\_

**Exhibit "D"**

SIGNAL ESTIMATE: \$1,299,776  
TRACK ESTIMATE: \$

**TOTAL ESTIMATE RAILROAD COSTS: \$1,394,529**  
(SEE ATTACHED ESTIMATES)



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AC POWER SERVICE	1.0 EA N	5,000	
CONTRACT DIRECTIONAL BORING	1.0 LS N	18,000	
CONTRACT ENGINEERING	1.0 LS N	12,000	
CONTRACT SIGNS	1.0 LS N	8,000	
FILL DIRT	10.0 CY N	250	
SURFACE ROCK	150.0 CY N	3,750	
		<hr/>	
TOTAL OTHER ITEMS COST		47,000	47,000
			<hr/>
PROJECT SUBTOTAL			1,255,201
CONTINGENCIES			125,520
BILL PREPARATION FEE			13,808
			<hr/>
GROSS PROJECT COST			1,394,529
LESS COST PAID BY BNSF			0
			<hr/>
TOTAL BILLABLE COST			1,394,529

**EXHIBIT D2**  
**Yearly Maintenance Costs based on AAR Units**  
**(please see attached Exhibit D2 and attached 2008 AREMA C&S Manual)**

## EXHIBIT D2

### Dysart and Thunderbird (DOT# 025703Y) Final Phase Improvements Yearly Maintenance Costs Breakdown based on AAR Units

Base Maintenance Cost/AAR Point: \$156.36

<i>Dysart/Thunderbird - 025703Y - CURRENT Crossing AAR Units</i>			
AAR Item	AAR Point value	Quantity on crossing	Total AAR points/item
Recorder	2	1	2
Comm. Device	1	1	2
Gate Mechanism	8	4	32
Constant Warning	10	1	10
Crossing Mast w/1 set lights	2	5	10
Additional Lights (on Cants)	1	5	5
Shunts	1	2	2
<b>Total AAR Points</b>			<b>63</b>
<b>Total Maintenance Cost/Yr</b>			<b>\$9,850.68</b>

<i>Dysart/Thunderbird - 025703Y - PROPOSED Crossing AAR Units</i>			
AAR Item	AAR Point value	Quantity on crossing	Total AAR points/item
Recorder	2	1	2
Comm. Device	1	1	1
Gate Mechanism	8	12	96
Constant Warning	10	1	10
Crossing Mast w/1 set lights	2	20	40
Additional Lights (on Cants)	1	34	34
Island Circuit	2	1	2
Shunts	1	2	2
<b>Total AAR Points</b>			<b>187</b>
<b>Total Maintenance Cost/Yr</b>			<b>\$29,239.32</b>

<p><b>Total Maintenance costs due by City (Proposed - Current):</b></p>	<p><b>\$19,388.64</b></p>
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**Recommended Table of Signal and Interlocking Units and Interpretations**  
Revised 2004 (7 Pages)

**Purpose**

This manual part recommends relative Signal and Interlocking unit values used for division of costs in joint facility and other agreements.

<u>Item No.</u>	<u>Description</u>	<u>Relative Unit Value</u>
<b>A. <u>Wayside Signal Devices</u></b>		
1.	Signal inoperative arm or light .....	1
2.	Signal complete with mast, blade or light, inoperative .....	2
3.	*Signal, three aspects, semaphore or light .....	6
4.	*Signal, two aspects, semaphore or light .....	4
5.	*Signal, one aspect, semaphore or light .....	2
6.	*Signal, each additional aspect .....	2
7.	*Signal, mechanical operated, manual block, train order, or railroad grade crossing signal, two or three aspects .....	4
8.	*Smashboards, mechanical or power .....	4
9.	*Marker light, operated .....	2
10.	*Grade signal, semaphore or light .....	2
11.	Railroad grade crossing gate, per gate	
	a. Mechanical .....	4
	b. Power .....	6

\*Each semaphore arm, light signal, or marker to be counted separately.

**B. Track, Switch and Derail Devices**

1.	Switch with two points or derail	
	a. Mechanical .....	4
	b. Power .....	8
2.	Single slip switch with two points	
	a. Mechanical .....	4
	b. Power .....	8
3.	Double slip switch with four points	
	a. Mechanical .....	8
	b. Power .....	12
4.	Movable point frog with one or two points	
	a. Mechanical .....	4
	b. Power .....	8
5.	Movable point frog with four points	
	a. Mechanical .....	8

b.	Power.....	16
6.	Derail, pipe connected to switch and operated thereby .....	4
7.	Spring switch	
a.	Buffer .....	1
b.	Mechanical facing point lock .....	4
8.	Switch and lock movement, mechanical .....	4
9.	Switch circuit controller, signal or highway-rail grade crossing warning device .....	1
10.	Snow removal device, controlled or automatic, per pair of switch points .....	2
11.	Switch point helper	
a.	Mechanical.....	1
b.	Power.....	4

**C. Movable Bridge Devices**

1.	Facing point lock or movable bridge lock or rail lock	
a.	Mechanical.....	2
b.	Power.....	6
2.	Facing point lock, or movable bridge lock or rail lock operated with another unit.....	1
3.	Movable bridge circuit controller or pipe coupler	
a.	Mechanical.....	4
b.	Power.....	8
4.	Movable Bridge circuit controller or pipe coupler operated with another unit .....	2
5.	Auxiliary circuit controller or movable bridge wedge, latch, lift rail, etc	1
6.	Proximity switch detector or infrared detector for movable bridge wedge, latch, lift rail, etc. (per detector).....	2

**D. Track Occupancy Detection Devices**

1.	Non-coded track circuit (dc or ac/dc) .....	2
2.	Coded track circuit	
a.	Relay equipment .....	4
b.	Electronic equipment.....	2
3.	Superimposed circuit on track circuit .....	2
4.	Auxiliary track instrument for train detection .....	2
5.	Motion sensitive track circuit to continuously detect rate and direction of motion (constant warning).....	10
6.	Motion sensitive track circuit to continuously detect direction of motion .....	6
7.	Presence detector.....	2
8.	Train control inductor or loop circuit.....	1
9.	Bonded rail joints, per mile each rail .....	1

10.	Transponder, active .....	1
<b>E. <u>Locking Devices</u></b>		
1.	Electric lever lock applied to a mechanical lever.....	1
2.	Electric lock on hand-operated switch or railroad crossing gate .....	2
3.	Electric lock applied to units C.1, C.2, or B.7 .....	1
4.	Manual operated time lock applied to a mechanical lever, hand operated switch and to units C.1, C.2, or B.7.....	1
<b>F. <u>Highway-Rail Grade Crossing Warning Devices</u></b>		
1.	Signal, bell-type, with or without reflectorized signs, per mast.....	1
2.	Signal, flashing light type (one pair), with or without bell or reflectorized signs, per mast .....	2
3.	Additional pair of flashing lights, illuminated "stop" sign, auxiliary illuminated sign or rotating "stop" disc .....	1
4.	Mechanical flagman (wig-wag) .....	4
5.	Each automatic gate mechanism, arm up to 26 ft.....	8
6.	Each automatic gate mechanism, arm over 26 ft.....	10
7.	Manual gate, per mast	
	a. Mechanical.....	1
	b. Power.....	2
8.	Radio data link, per unit .....	1
9.	Preemption circuit.....	2
<b>G. <u>Classification Yard Devices</u></b>		
1.	Car retarder including operating mechanism per rail foot of braking length per rail.....	1
2.	Weigh rail.....	1
3.	Radar unit .....	2
4.	Weather station.....	4
<b>H. <u>Indicators and Detector Device</u></b>		
1.	Wayside track occupancy or switch position.....	2
2.	Yard track .....	4
3.	Third rail clearance, per instrument .....	2
4.	Switch or derail position, target or light .....	1
5.	Fence, slide, falling rock, or slump per 100 ft.....	2
6.	High water or fire, per installation .....	1
7.	Dragging equipment, per detector .....	2
8.	Clearance, high wide load.....	1
9.	Hot bearing or wheel system .....	25

**Part 1.3.2**

10.	Hot bearing and wheel system.....	30
11.	Automatic equipment identification system.....	15
12.	Wheel sensor.....	1
13.	Wheel impact system.....	8
14.	Radio annunciator for train inspection.....	1
15.	Photo electric cell, per unit.....	1
16.	Highway vehicle detector, per detection zone.....	2

**I. Traffic Control Devices**

1.	Control function or Lever including circuit, within interlocking.....	1
2.	Control function or Lever including circuits, between interlockings.....	2
3.	Code unit for remote control.....	1
4.	Carrier unit.....	1
5.	Radio data link, per unit.....	1
6.	Control operators work station.....	20
6a.	Additional controls and/or indications.....	1
7.	Mechanical locking bed, per units of five levers.....	2
8.	Approach locking per track per direction.....	2
9.	Time locking per track per direction.....	1

**J. Back Up Power Supply Systems**

1.	Generator, per increments of 5 KVA.....	1
2.	Solar panel system, per increments of 2 KVA.....	1
3.	Uninterrupted power supply system, per increments of 3 KVA.....	1
4.	Battery and charger, per set.....	1

**K. Wires, Working Conductors (between instrument housings)**

1.	Pole line open wire, two wire each circuit per mile.....	2
2.	Aerial cable, one pair wires per mile.....	1
3.	Underground cable or wires, two pairs per mile.....	1

**L. Miscellaneous Devices**

1.	Operations recorder or data logger.....	2
2.	Air compressor for switch and retarder control.....	2

INTERPRETATIONS**A. Wayside Signal Devices:**

1. Signal inoperative arm or light: an inoperative arm light or marker on a mast on which there are operative arms and for which no separate control is required.
2. Signal, complete with mast, blade, or light inoperative: a signal mast on which there are no operative arms and all arms, lights or markers being in a fixed position.
3. Signal, three aspects, semaphore or light: a three-position signal, such as a signal displaying red, yellow, or green aspect; each aspect has a value of 2 units.
4. Signal, two aspects, semaphore or light: a two-position signal, such as a signal displaying red or green aspect; each aspect has a value of 2 units.
5. Signal, one aspect, semaphore or light: a one-position operative signal.
6. Signal, each additional aspect where there may be a four position signal; that is, one displaying red, yellow, green or lunar white, or one displaying red, yellow, flashing yellow or green or one displaying four rows of lights. No aspect should be counted twice unless it is displayed both steady and flashing.
7. Marker light, operated: a separate control with marker light displayed.

**B. Track, Switch and Derail Devices:**

1. Derail, pipe connected to switch and operated thereby: derail and pipe connections only. Does not include the switch machine.
2. Switch and lock movement, mechanical: a switch operating mechanism usually applied to hand-operated switch or derail.

**D. Track Occupancy Detection Devices:**

1. Non-coded track circuit: includes continuous ac, dc or audio frequency track circuit.
2. Coded track circuit: a coded track circuit, ac or dc or audio frequency regardless of the number of codes. Reversal of coded track for movement in opposite direction where same equipment is used does not change unit

**Part 1.3.2**

value. Where duplicate equipment is used in reversing track circuits, then each direction will count separately. Where coded ac also provides cab signal circuit if the frequency is the same.

3. Superimposed circuit or track circuit: additional form of energy superimposed on a track circuit.

**F. Highway-Rail Grade Crossing Warning Devices:**

1. Highway-rail grade crossing signal, flashing light type (one pair of flashing lights), with or without bell or reflectorized signs, per mast. A mast with two flashing light units only in the direction of traffic, with or without inoperative auxiliary signs, and takes into consideration control circuits.
2. Additional pair of flashing lights, illuminated STOP sign, auxiliary illuminated sign or rotating STOP disc: a pair of backlights, an extra crossarm with one pair of lights or illuminated NO TURN sign.
3. Each gate mechanism, automatic arm up to 26 ft. includes light or lights attached.
4. Each gate mechanism, automatic arm over 26 ft. includes light or lights attached.

**I. Traffic Control Device:**

1. Control function or lever, including circuit within interlocking: the control function or traffic lever that checks the movement of the train through the interlocking at the time it is being made. Not tied in with adjacent interlockings.
2. Control function or lever, including circuits between interlockings: the control function or traffic lever and associated circuits check the block and opposing signals at the next interlocking/block station. This control function or lever and associated circuits hold traffic in one direction until the route for which they were established is clear.