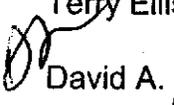


**CITY OF PEORIA, ARIZONA
COUNCIL COMMUNICATION**

CC: 9C
Amend No. _____

Date Prepared: October 01, 2007

Council Meeting Date: October 16, 2007

TO: Terry Ellis, City Manager
FROM:  David A. Moody, P. E., Engineering Director
THROUGH:  Dan Nissen, P. E., Assistant City Engineer
PREPARED BY: Richard Costa, Associate Engineer 
SUBJECT: Authorization to enter into a Grade Crossing Signal Installation Agreement between Burlington Northern Santa Fe Railroad and the City of Peoria to expand the existing 81st Avenue Burlington Northern Santa Fe Railroad roadway crossing known as Cotton Crossing. Project No. P-0012

RECOMMENDATION:

That Mayor and Council authorize staff to enter into a Grade Crossing Signal Installation Agreement (Agreement) between Burlington Northern Santa Fe (BNSF) Railroad and the City of Peoria (City) to expand the existing 81st Avenue BNSF Railroad roadway crossing (future Cotton Crossing) to include provisions for the roadway widening required as part of the roadway improvements included in the Phase II portion of the Wal-Mart Retail Center and to authorize payment to BNSF Railroad for the necessary improvements associated with completing the City obligations contained in the Agreement.

Capital Improvement Funds available for this project and subject to "Cash Reimbursement" per the Development Agreement are available in the 83rd Avenue Realignment; Railroad Crossings and Grand Avenue Intersection Project, Half Cent Sales Tax Street System Account No. 1210-0350-543001-CIPST-PW00161CO (\$1,844,089).

SUMMARY:

Project

On October 12, 2006, a Development Agreement was entered into, by and between Wal-Mart Stores Inc. and the City of Peoria which among other things establishes City and Developer obligations for payment of public infrastructure improvements including the aforementioned BNSF Railroad improvements. These Cotton Crossing roadway improvements are included as part of the total public infrastructure improvement project to be completed by Wal-Mart Stores Inc. which is currently under construction at the southeast corner of Peoria Avenue and 79th Avenue.

CITY CLERK USE ONLY:

- Consent Agenda
- Carry Over to Date: _____
- Approved
- Unfinished Business (Date heard previous: _____)
- New Business

ORD. # _____ RES. # _____
LCON# 08307 LIC. # _____
Action Date: _____

The project is currently being constructed in two separate phases. The first phase (Phase I) provides the necessary improvements to Cotton Crossing, Peoria Avenue, 79th Avenue, and Market Street which are required to obtain a certificate of occupancy from the City for the Wal-Mart retail facility which is currently scheduled to open in the fall of 2007.

Under Phase I of construction, Cotton Crossing will be temporarily terminated just north of the BNSF Railroad tracks until final execution of agreements with the railroad and subsequent Arizona Corporation Commission approvals processes are completed. The second phase (Phase II) portion of the project will extend Cotton Crossing southwesterly over the BNSF Railroad tracks tying into Grand Avenue at the existing 81st Avenue/Monroe Avenue/Grand Avenue intersection as well as construct the necessary improvements to Grand Avenue required by the Arizona Department of Transportation and the City. A brief summary of the proposed public infrastructure improvements included in both phases of this project is as follows:

- Widening of Peoria Avenue from 81st Avenue to 79th Avenue.
- Realignment of Market Street east and west of 81st Avenue to allow for connection to the new Cotton Crossing improvements including construction of a new cul-de-sac on 81st Avenue just south of Peoria Avenue adjacent to the existing fire station.
- Cotton Crossing roadway improvements from Peoria Avenue to Grand Avenue including required BNSF Railroad crossing improvements (Railroad Agreement).
- Grand Avenue and the new Cotton Crossing intersection improvements.
- Modifications to the existing alignment of the Grand Avenue frontage road at Monroe Street.
- Street lighting, traffic signals, public utility, and landscape improvements.

Railroad Agreement

The Grade Crossing Signal Installation Agreement between BNSF Railroad and the City will expand the existing 81st Avenue BNSF Railroad roadway crossing (future Cotton Crossing) to include provisions for the roadway widening required as part of the roadway improvements included in the Phase II portion of the Wal-Mart Retail Center.

This Agreement with BNSF Railroad includes the requirements and specifications that must be met by the Contractors prior to working in BNSF Right of Way (Exhibits C and C-1 to the Agreement). The Agreement also provides the City with the additional easements needed to construct and maintain the additional improvements and provide payment obligations by the City to BNSF Railroad for the costs associated with modifying the existing railroad crossing signals, flashers, and equipment.

The total estimated cost that is subject to payment to BNSF Railroad is \$1,844,089, including materials and labor (Exhibit D to the Agreement), permanent and temporary construction easement, design and construction contingencies, and City of Peoria administration costs.

A summary of the total estimated costs are as follows:

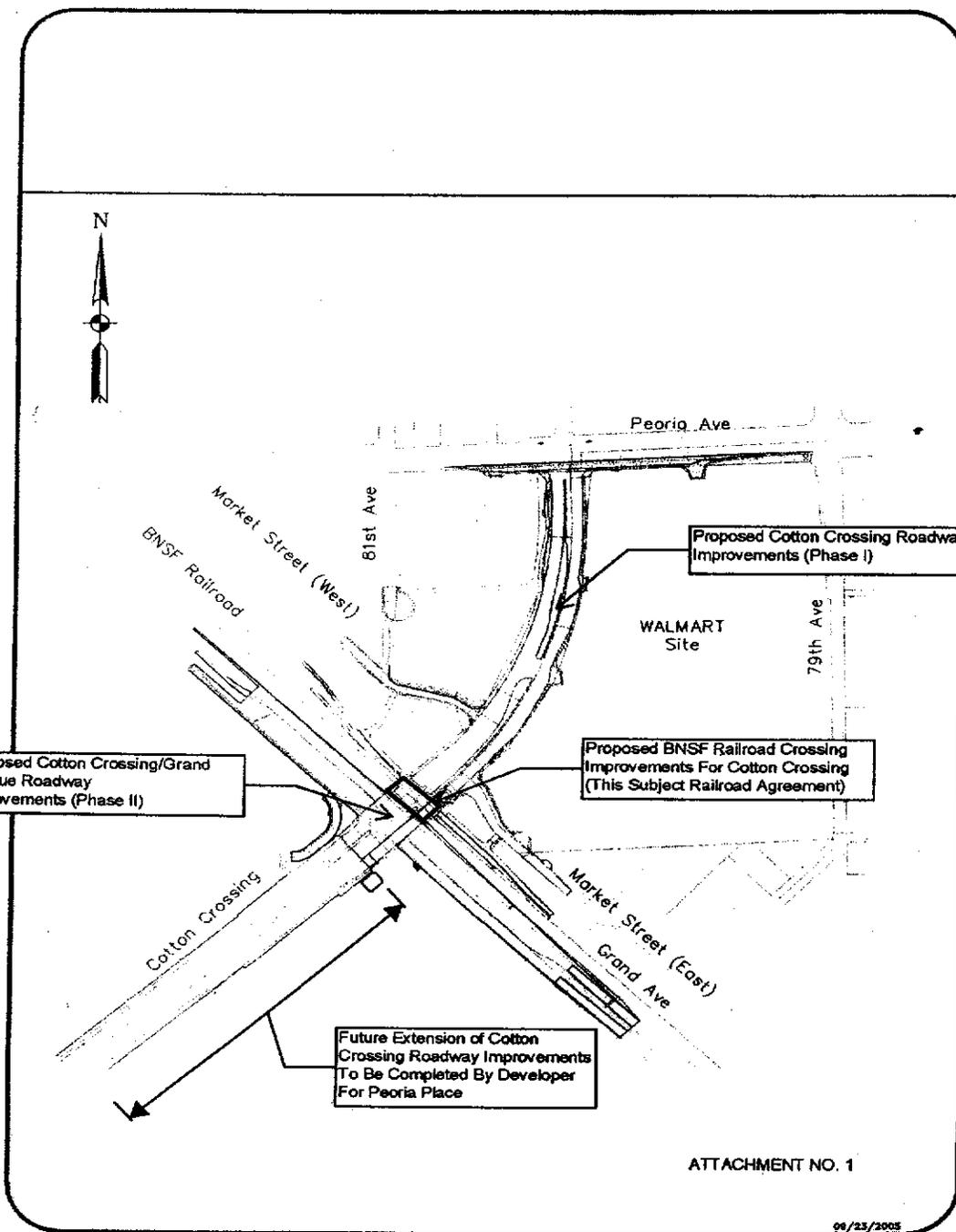
BNSF Railroad CM Agreement	\$1,606,239.00
BNSF Railroad Granted Easements to City of Peoria	\$ 61,164.00
Design & Construction Contingencies (10%)	\$ 160,624.00
City of Peoria Administration Costs (1.0%)	\$ <u>16,062.00</u>
Total	\$1,844,089.00

Based upon the Development Agreement, these costs qualify as a City cost that will ultimately be deducted from the total "Cash Reimbursement" due to the Developer as defined in § 2.1.3.1 of the Development Agreement, it is anticipated that the deduction will occur once the public infrastructure improvements included in the Development Agreement are completed and fully accepted by the City.

Following final execution of this Grade Crossing Signal Installation Agreement with BNSF Railroad, the City is required to obtain approval from the Arizona Corporation Commission (ACC) prior to construction. Based upon past experience on similar projects, the ACC approval process could take approximately 90 days to complete. BNSF Railroad has indicated that once the CM Agreement is fully executed by both parties, it could take up to one year for them to provide their equipment needed to complete their improvements. Pending ACC approval, final execution of this Agreement, award of a construction contract by the developer, and purchase and acquisition of all long lead time construction materials, construction could possibly begin around winter of 2008 to spring of 2009.

ATTACHMENTS:

1. Proposed Project Improvements Map
2. Grade Crossing Signal Installation Agreement



ATTACHMENT NO. 1

04/23/2003

Cotton Crossing, Peoria, AZ
Mile Post 180.10
Line Segment 7208
U.S. DOT Number 025405Y
SUB Phoenix

GRADE CROSSING SIGNAL INSTALLATION AGREEMENT

THIS GRADE CROSSING SIGNAL INSTALLATION AGREEMENT (hereinafter called, "Agreement"), is executed to be effective as of _____, 2007, by and between the City of Peoria, 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");

WITNESSETH:

WHEREAS, in the interest of aiding vehicular travel and public safety, the AGENCY is undertaking a project to replace railroad crossing signals and activation equipment known as the Cotton Crossing;

WHEREAS, the project Cotton Crossing is located at U.S. DOT crossing 025405Y as indicated on exhibit "A", attached hereto and incorporated herein;

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

WHEREAS, AGENCY also desires RAILROAD to widen the existing crossing surface at the Cotton Crossing with a new concrete and rubber crossing surface;

WHEREAS, the AGENCY is paying for the acquisition and installation of crossing signal equipment and the new crossing surface at the Cotton Crossing;

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 the installation of crossing signals and activation equipment at U.S. DOT crossing 025405Y 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 - RAILROAD OBLIGATIONS

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

1. The RAILROAD will, using its own labor forces under applicable labor agreements, install the Crossing

Signal Equipment, install the new crossing surface, and replace siding tracks and turnout switches at Cotton Crossing. The work will be performed at AGENCY's expense and in accordance with the MUTCD and the plans and specifications approved by AGENCY and the Federal Highway Administration. The plans and specifications are attached to this Agreement as Exhibit "B" and incorporated herein.

2. A detailed estimate of RAILROAD'S construction engineering, installation labor (including the costs, if any, of electrical service from a public utility) and material costs required for the Project are attached hereto as Exhibit "D" and incorporated herein. In the event construction for the Project has not commenced within six (6) months following the effective date of this Agreement, RAILROAD may, in its sole and absolute discretion, revise the cost estimates set forth in said Exhibit "D". In such event, the revised cost estimates will become a part of this Agreement as though originally set forth herein. Any item of work incidental to the items listed on Exhibit D not specifically mentioned therein may be included as a part of this Agreement upon written approval of AGENCY, which approval will not be unreasonably withheld.

3. RAILROAD will furnish all labor, materials, tools and equipment for the railroad portion of the work required for the construction of the Project.

4. The RAILROAD will, at AGENCY'S expense, dispose of all scrap from the RAILROAD'S work hereunder.

5. The RAILROAD will finalize and complete billing of all incurred costs under this Agreement no later than six (6) months (180 days) following installation of the Crossing Signal Equipment and the new crossing surface.

ARTICLE III - AGENCY OBLIGATIONS

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

1. AGENCY must perform, at AGENCY'S expense, the following work:

a) Installation of a pavement marking stop bar in accordance with the Manual on Uniform Traffic Control Devices (hereinafter called, "MUTCD").

b) Installation of advance warning signs in accordance with the MUTCD.

2. The AGENCY will approve the location of the signals and signal bungalow prior to installation by RAILROAD.

3. Actual costs for engineering, materials and labor (including third party charges for the installation of electrical service) associated with the installation of the Crossing Signal Equipment and the new crossing surface must be paid by the AGENCY.

4. In the event the services of a consultant are needed after execution of this Agreement due to any exigency of the RAILROAD and the Project, the AGENCY and the RAILROAD will mutually agree, in writing, as to the selection of a consultant and the applicable scope of work to be performed by such consultant. All work performed hereunder by any consultant and any resulting costs must be paid by AGENCY as a part of the costs for the Project.

5. During the installation of the Crossing Signal Equipment and the new crossing surface of, RAILROAD will send AGENCY progressive invoices detailing the costs of the work performed by RAILROAD under this Agreement. AGENCY must reimburse RAILROAD for completed force-account work within thirty (30) days of the date of the invoice for such work. Upon completion of the Project, RAILROAD 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, AGENCY must pay the final invoice within ninety (90) days of the date of the final invoice. RAILROAD 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 RAILROAD, 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.

6. The AGENCY must have advanced railroad crossing warning 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. The AGENCY assumes full responsibility for the maintenance of advanced warning signs and pavement markings and agrees to hold harmless and indemnify the RAILROAD 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.

7. The AGENCY must give RAILROAD'S Manager of Public Projects written 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.

ARTICLE IV- JOINT OBLIGATIONS

In consideration of the mutual covenants of the parties contained herein and the premises, the parties mutually agree as follows:

1. All cost records of the RAILROAD pertaining to the Project will be open to inspection and audit at any reasonable time by representatives of the AGENCY (including the legislative auditor and fiscal analyst for the AGENCY) for a period of one (1) year from the date of the final RAILROAD invoice under this Agreement.

2. 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 in proper condition.

3. 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, RAILROAD 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.

4. 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.

5. If any of the Crossing Signal Equipment is partially or wholly destroyed, then such repair and/or replacement costs must be distributed among the parties as follows:

a) In the event the RAILROAD'S sole negligence destroys or damages the Crossing Signal Equipment, RAILROAD must reimburse AGENCY for the costs to replace or repair such Crossing Signal Equipment.

b) In the event the Crossing Signal Equipment is damaged or destroyed by any other cause, AGENCY must, at its sole cost and expense, replace or repair such Crossing Signal Equipment.

6. 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.

7. This Agreement will inure to the benefit of and be binding on the parties hereto, their successors, and assigns.

8. In the event any paragraph contained in this Agreement or any item, part, or term within any particular paragraph is determined by a court of competent jurisdiction to be invalid or unenforceable, the validity of the remaining paragraphs or items will not be affected; and the rights and obligations of the parties will be construed and enforced as if this Agreement did not contain that particular paragraph or item held to be invalid or unenforceable.

9. This Agreement may be signed in counterparts, any one of which will be deemed to be an original. The parties further agree that any facsimile copy of a party's signature is valid and binding to the same extent as an original signature.

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

BNSF RAILWAY COMPANY

By: _____

Printed Name: _____

Title: _____

CITY OF PEORIA

By: _____

Printed Name: _____

Title: _____

ATTEST:

Mary Jo Kief, City Clerk

APPROVED AS TO FORM:

Stephen M. Kemp, City Attorney

Exhibit "A"- Drawing of Crossing

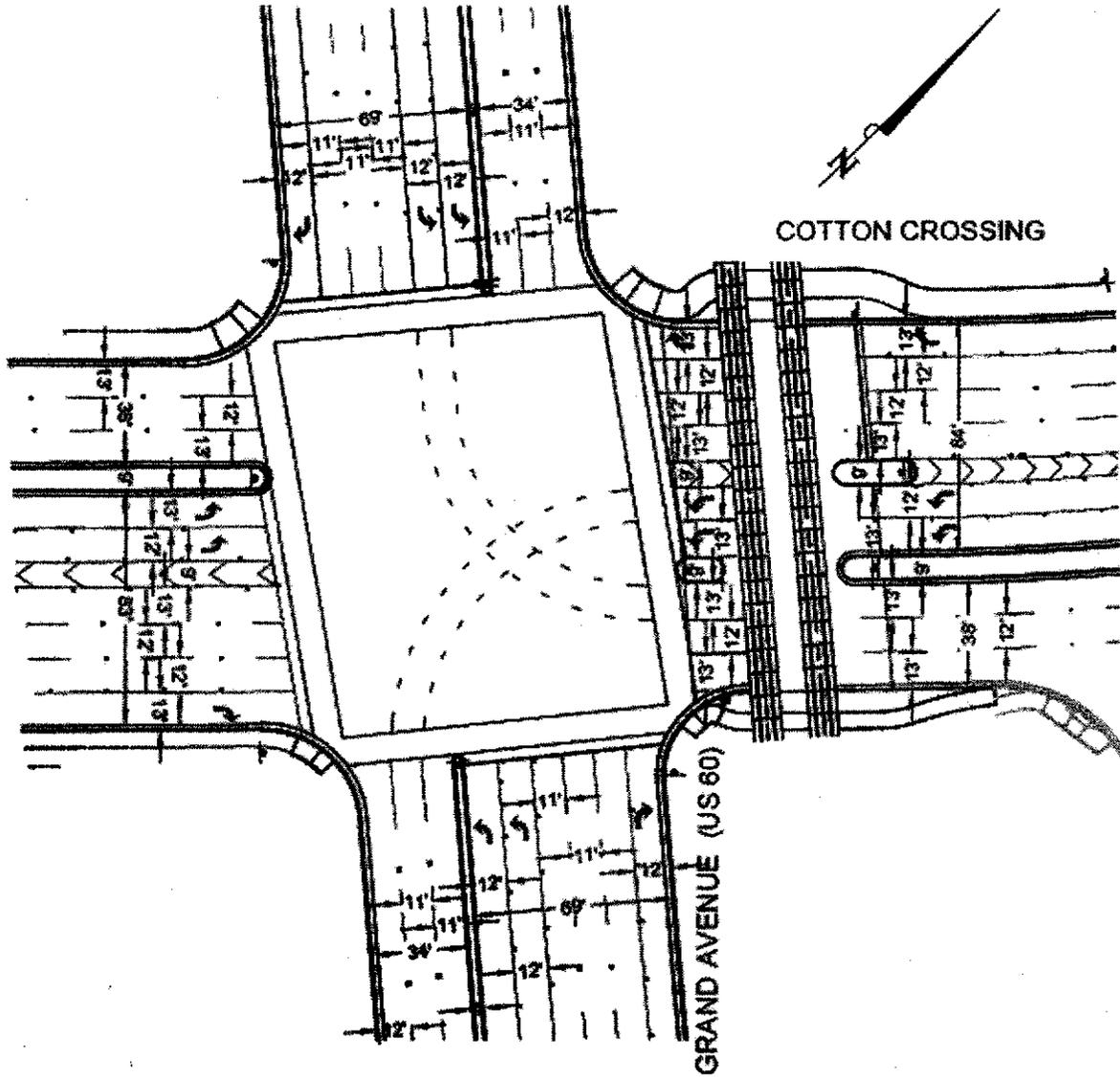


Exhibit "B" – see attached EXHIBIT B - easement

**EASEMENT AGREEMENT
FOR PEORIA AVENUE AT GRADE CROSSING
Attachment to C&M Agreement**

THIS EASEMENT AGREEMENT FOR the construction and maintenance of the Cotton Avenue at grade crossing ("**Easement Agreement**") is made and entered into as of the ____ day of _____ 2007, ("**Effective Date**"), by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("**Grantor**"), and the City of Peoria, an Arizona Municipal Corporation ("**Grantee**").

A. Grantor owns or controls certain real property situated at or near the vicinity of Peoria, County of Maricopa, State of Arizona, at Line Segment 7208, Mile Post 180.0, City Project # _____, as described or depicted on **Exhibit "A"** attached hereto and made a part hereof (the "**Premises**").

B. Grantor and Grantee have entered into that certain Construction and Maintenance Agreement dated as of _____, 2007 concerning improvements on or near the Premises (the "**C&M Agreement**").

C. Grantee has requested that Grantor grant to Grantee an easement over the Premises for the Easement Purpose (as defined below).

D. Grantor has agreed to grant Grantee such easement, subject to the terms and conditions set forth in this Easement Agreement.

NOW, THEREFORE, for and in consideration of the foregoing recitals which are incorporated herein, the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Section 1 Granting of Easement.

1.1 **Easement Purpose.** The "**Easement Purpose**" shall be for the purpose of constructing and maintaining an at grade vehicular roadway crossing as set forth in the C&M Agreement. Any improvements to be constructed in connection with the Easement Purpose are referred to herein as "**Improvements**" and shall be constructed, located, configured and maintained by Grantee in strict accordance with the terms of this Easement Agreement and the C&M Agreement.

1.2 **Grant.** Subject to the terms and conditions set forth in this Agreement, Grantor agrees to grant to Grantee, and Grantee agrees to purchase and accept from Grantor, for the sum of Sixty One Thousand One Hundred Sixty Four and No/100 Dollars (\$61,164.00), a non-exclusive Permanent easement ("**Easement**") over the Premises and a Temporary Easement for the Easement Purpose and for no other purpose. The Easement is granted subject to any and all restrictions, covenants, easements, licenses, permits, leases and other encumbrances of whatsoever nature whether or not of record, if any, relating to the Premises and subject to all with all applicable federal, state and local laws, regulations, ordinances, restrictions, covenants and court or administrative decisions and orders, including Environmental Laws (defined below) and zoning laws (collectively, "**Laws**"). Grantee may not make any alterations or improvements or perform any maintenance or repair activities within the Premises except in accordance with the terms and conditions of the C&M Agreement.

1.3 **Reservations by Grantor.** Grantor excepts and reserves the right, to be exercised by Grantor and any other parties who may obtain written permission or authority from Grantor:

- (a) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any existing pipe, power, communication, cable, or utility lines and appurtenances and other facilities or structures of like character (collectively, "**Lines**") upon, over, under or across the Premises;

- (b) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Premises; and
- (c) to use the Premises in any manner as the Grantor in its sole discretion deems appropriate, provided Grantor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Grantee for the Easement Purpose.

Section 2 **Term of Easement.** The term of the Easement, unless sooner terminated under provisions of this Easement Agreement, shall be perpetual. The term of the Temporary Easement, unless sooner terminated under provisions of this Easement Agreement, shall expire on the date that is one (1) year after the Effective Date or completion of the project, whichever occurs.

Section 3 **No Warranty of Any Conditions of the Premises.** Grantee acknowledges that Grantor has made no representation whatsoever to Grantee concerning the state or condition of the Premises, or any personal property located thereon, or the nature or extent of Grantor's ownership interest in the Premises. Grantee has not relied on any statement or declaration of Grantor, oral or in writing, as an inducement to entering into this Easement Agreement, other than as set forth herein. GRANTOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY SUCH PROPERTY, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTOR SHALL NOT BE RESPONSIBLE TO GRANTEE OR ANY OF GRANTEE'S CONTRACTORS FOR ANY DAMAGES RELATING TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTEE ACCEPTS ALL RIGHTS GRANTED UNDER THIS EASEMENT AGREEMENT IN THE PREMISES IN AN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON GRANTOR'S RIGHTS, INTERESTS AND TITLE TO THE PREMISES. Grantee has inspected or will inspect the Premises, and enters upon Grantor's rail corridor and property with knowledge of its physical condition and the danger inherent in Grantor's rail operations on or near the Premises. Grantee acknowledges that this Easement Agreement does not contain any implied warranties that Grantee or Grantee's Contractors (as hereinafter defined) can successfully construct or operate the Improvements.

Section 4 **Nature of Grantor's Interest in the Premises.** GRANTOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND GRANTEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE. In case of the eviction of Grantee by anyone owning or claiming title to or any interest in the Premises, or by the abandonment by Grantor of the affected rail corridor, Grantor shall not be liable to refund Grantee any compensation paid hereunder.

Section 5 **Improvements.** Grantee shall take, in a timely manner, all actions necessary and proper to the lawful establishment, construction, operation, and maintenance of the Improvements, including such actions as may be necessary to obtain any required permits, approvals or authorizations from applicable governmental authorities. Any and all cuts and fills, excavations or embankments necessary in the construction, maintenance, or future alteration of the Improvements shall be made and maintained in such manner, form and extent as will provide adequate drainage of and from the adjoining lands and premises of the Grantor; and wherever any such fill or embankment shall or may obstruct the natural and pre-existing drainage from such lands and premises of the Grantor, the Grantee shall construct and maintain such culverts or drains as may be requisite to preserve such natural and pre-existing drainage, and shall also wherever necessary, construct extensions of existing drains, culverts or ditches through or along the premises of the Grantor, such extensions to be of adequate sectional dimensions to preserve the present flowage of drainage or other waters, and of materials and workmanship equally as good as those now existing. In the event any construction, repair, maintenance, work or other use of the Premises by Grantee will affect any Lines, fences, buildings, improvements or other facilities (collectively, "Other Improvements"), Grantee will be responsible at Grantee's sole risk to locate and make any adjustments necessary to such Other Improvements. Grantee must contact the owner(s) of the Other Improvements notifying them of any work that may damage these Other Improvements and/or interfere with their service and obtain the owner's written approval prior to so affecting the Other Improvements. Grantee must

mark all Other Improvements on the Plans and Specifications and mark such Other Improvements in the field in order to verify their locations. Grantee must also use all reasonable methods when working on or near Grantor property to determine if any Other Improvements (fiber optic, cable, communication or otherwise) may exist. The Grantee agrees to keep the above-described premises free and clear from combustible materials and to cut and remove or cause to be cut and removed at its sole expense all weeds and vegetation on said premises, said work of cutting and removal to be done at such times and with such frequency as to comply with Grantee and local laws and regulations and abate any and all hazard of fire.

Section 6 Taxes and Recording Fees. Grantee shall pay when due any taxes, assessments or other charges (collectively, "Taxes") levied or assessed upon the Improvements by any governmental or quasi-governmental body or any Taxes levied or assessed against Grantor or the Premises that are attributable to the Improvements. Grantee agrees to purchase, affix and cancel any and all documentary stamps in the amount prescribed by statute, and to pay any and all required transfer taxes, excise taxes and any and all fees incidental to recordation of the Memorandum of Easement. In the event of Grantee's failure to do so, if Grantor shall become obligated to do so, Grantee shall be liable for all costs, expenses and judgments to or against Grantor, including all of Grantor's legal fees and expenses.

Section 7 Environmental.

7.1 **Compliance with Environmental Laws.** Grantee shall strictly comply with all federal, state and local environmental Laws in its use of the Premises, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Toxic Substances Control Act (collectively referred to as the "**Environmental Laws**"). Grantee shall not maintain a "treatment," "storage," "transfer" or "disposal" facility, or "underground storage tank," as those terms are defined by Environmental Laws, on the Premises. Grantee shall not handle, transport, release or suffer the release of "hazardous waste" or "hazardous substances", as "hazardous waste" and "hazardous substances" may now or in the future be defined by any Environmental Laws.

7.2 **Notice of Release.** Grantee shall give Grantor immediate notice to Grantor's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Grantee's use of the Premises. Grantee shall use its best efforts to promptly respond to any release on or from the Premises. Grantee also shall give Grantor immediate notice of all measures undertaken on behalf of Grantee to investigate, remediate, respond to or otherwise cure such release or violation.

7.3 **Remediation of Release.** In the event that Grantor has notice from Grantee or otherwise of a release or violation of Environmental Laws which occurred or may occur during the term of this Easement Agreement, Grantor may require Grantee, at Grantee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises. If during the construction or subsequent maintenance of the Improvements, soils or other materials considered to be environmentally contaminated are exposed, Grantee will remove and safely dispose of said contaminated soils. Determination of soils contamination and applicable disposal procedures thereof, will be made only by an agency having the capacity and authority to make such a determination.

7.4 **Preventative Measures.** Grantee shall promptly report to Grantor in writing any conditions or activities upon the Premises known to Grantee which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Grantee's reporting to Grantor shall not relieve Grantee of any obligation whatsoever imposed on it by this Easement Agreement. Grantee shall promptly respond to Grantor's request for information regarding said conditions or activities.

7.5 **Evidence of Compliance.** Grantee agrees periodically to furnish Grantor with proof satisfactory to Grantor that Grantee is in compliance with this **Section 7**. Should Grantee not comply fully with the above-stated obligations of this **Section 7**, notwithstanding anything contained in any other provision hereof, Grantor may, at its option, terminate this Easement Agreement by serving five (5) days' notice of termination upon

Grantee. Upon termination, Grantee shall remove the Improvements and restore the Premises as provided in **Section 9**.

Section 8 **Default and Termination.**

8.1 **Grantor's Performance Rights.** If at any time Grantee, or Grantee's Contractors, fails to properly perform its obligations under this Easement Agreement, Grantor, in its sole discretion, may: (i) seek specific performance of the unperformed obligations, or (ii) at Grantee's sole cost, may arrange for the performance of such work as Grantor deems necessary for the safety of its rail operations, activities and property, or to avoid or remove any interference with the activities or property of Grantor, or anyone or anything present on the rail corridor or property with the authority or permission of Grantor. Grantee shall promptly reimburse Grantor for all costs of work performed on Grantee's behalf upon receipt of an invoice for such costs. Grantor's failure to perform any obligations of Grantee or Grantee's Contractors shall not alter the liability allocation set forth in this Easement Agreement.

8.2 **Abandonment.** Grantor may, at its option, terminate this Easement Agreement by serving five (5) days' notice in writing upon Grantee if Grantee should abandon or cease to use the Premises for the Easement Purpose. Any waiver by Grantor of any default or defaults shall not constitute a waiver of the right to terminate this Easement Agreement for any subsequent default or defaults, nor shall any such waiver in any way affect Grantor's ability to enforce any section of this Easement Agreement.

8.3 **Effect of Termination or Expiration.** Neither termination nor expiration will release Grantee from any liability or obligation under this Easement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date the Premises are restored as required by **Section 9**.

8.4 **Non-exclusive Remedies.** The remedies set forth in this **Section 8** shall be in addition to, and not in limitation of, any other remedies that Grantor may have under the C&M Agreement, at law or in equity.

Section 9 **Surrender of Premises.**

9.1 **Removal of Improvements and Restoration.** Upon termination of this Easement Agreement, whether by abandonment of the Easement or by the exercise of Grantor's termination rights hereunder, Grantee shall, at its sole cost and expense, immediately perform the following:

- (a) remove all or such portion of Grantee's Improvements and all appurtenances thereto from the Premises, as Grantor directs at Grantor's sole discretion;
- (b) repair and restore any damage to the Premises arising from, growing out of, or connected with Grantee's use of the Premises;
- (c) remedy any unsafe conditions on the Premises created or aggravated by Grantee; and
- (d) leave the Premises in the condition which existed as of the Effective Date.

9.2 **Limited License for Entry.** If this Easement Agreement is terminated, Grantor may direct Grantee to undertake one or more of the actions set forth above, at Grantee's sole cost, in which case Grantee shall have a limited license to enter upon the Premises to the extent necessary to undertake the actions directed by Grantor. The terms of this limited license include all of Grantee's obligations under this Easement Agreement. Termination will not release Grantee from any liability or obligation under this Easement Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination, or, if later, the date when Grantee's Improvements are removed and the Premises are restored to the condition that existed as of the Effective Date. If Grantee fails to surrender the Premises to Grantor upon any termination of the Easement, all liabilities and obligations of Grantee hereunder shall continue in effect until the Premises are surrendered.

Section 10 Liens. Grantee shall promptly pay and discharge any and all liens arising out of any construction, alterations or repairs done, suffered or permitted to be done by Grantee on the Premises or attributable to Taxes that are the responsibility of Grantee pursuant to **Section 6**. Grantor is hereby authorized to post any notices or take any other action upon or with respect to the Premises that is or may be permitted by Law to prevent the attachment of any such liens to any portion of the Premises; provided, however, that failure of Grantor to take any such action shall not relieve Grantee of any obligation or liability under this **Section 10** or any other section of this Easement Agreement.

Section 11 Tax Exchange. Grantor reserves the right to assign this Easement Agreement to Apex Property & Track Exchange, Inc. ("**Apex**"). Apex is a qualified intermediary within the meaning of Section 1031 of the Internal Revenue Code of 1986, as amended, and Treas. Reg. § 1.1031(k)-1(g), for the purpose of completing a tax-deferred exchange under said Section 1031. Grantor shall bear all expenses associated with the use of Apex, or necessary to qualify this transaction as a tax-deferred exchange, and, except as otherwise provided herein, shall protect, reimburse, indemnify and hold harmless Grantee from and against any and all reasonable and necessary additional costs, expenses, including, attorneys fees, and liabilities which Grantee may incur as a result of Grantor's use of Apex or the qualification of this transaction as a tax-deferred transaction pursuant to Section 1031. Grantee shall cooperate with Grantor with respect to this tax-deferred exchange, and upon Grantor's request, shall execute such documents as may be required to effect this tax-deferred exchange.

Section 12 Notices. Any notice required or permitted to be given hereunder by one party to the other shall be delivered in the manner set forth in the C&M Agreement. Notices to Grantor under this Easement shall be delivered to the following address: BNSF Railway Company, Real Estate Department, 2500 Lou Menk Drive, Ft. Worth, TX 76131, Attn: Permits, or such other address as Grantor may from time to time direct by notice to Grantee.

Section 13 Recordation. It is understood and agreed that this Easement Agreement shall not be in recordable form and shall not be placed on public record and any such recording shall be a breach of this Easement Agreement. Grantor and Grantee shall execute a Memorandum of Easement in the form attached hereto as Exhibit "B" (the "Memorandum of Easement") subject to changes required, if any, to conform such form to local recording requirements. The Memorandum of Easement shall be recorded in the real estate records in the county where the Premises are located. If a Memorandum of Easement is not executed by the parties and recorded as described above within 30 days of the Effective Date, Grantor shall have the right to terminate this Easement Agreement upon notice to Grantee.

Section 14 Miscellaneous.

14.1 All questions concerning the interpretation or application of provisions of this Easement Agreement shall be decided according to the substantive Laws of the State of **Texas** without regard to conflicts of law provisions.

14.2 In the event that Grantee consists of two or more parties, all the covenants and agreements of Grantee herein contained shall be the joint and several covenants and agreements of such parties. This instrument and all of the terms, covenants and provisions hereof shall inure to the benefit of and be binding upon each of the parties hereto and their respective legal representatives, successors and assigns and shall run with and be binding upon the Premises.

14.3 If any action at law or in equity is necessary to enforce or interpret the terms of this Easement Agreement, the prevailing party or parties shall be entitled to reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party or parties may be entitled.

14.4 If any provision of this Easement Agreement is held to be illegal, invalid or unenforceable under present or future Laws, such provision will be fully severable and this Easement Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision is not a part hereof, and the remaining provisions hereof will remain in full force and effect. In lieu of any illegal, invalid or unenforceable provision herein, there will be added automatically as a part of this Easement Agreement a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

14.5 This Easement Agreement is the full and complete agreement between Grantor and Grantee with respect to all matters relating to Grantee's use of the Premises, and supersedes any and all other agreements between the parties hereto relating to Grantee's use of the Premises as described herein. However, nothing herein is intended to terminate any surviving obligation of Grantee or Grantee's obligation to defend and hold Grantor harmless in any prior written agreement between the parties.

14.6 Time is of the essence for the performance of this Easement Agreement.

14.7 The terms of the C&M Agreement are incorporated herein as if fully set forth in this instrument which terms shall be in full force and effect for purposes of this Easement even if the C&M Agreement is, for whatever reason, no longer in effect.

Witness the execution of this Easement Agreement as of the date first set forth above.

GRANTOR:

BNSF RAILWAY COMPANY, a Delaware corporation

By: _____
Name: _____
Title: _____

GRANTEE:

CITY OF PEORIA,
An Arizona municipal corporation

By: _____
Name: _____
Title: _____

Law Department Approved

EXHIBIT "A"

Premises

EXHIBIT "A"

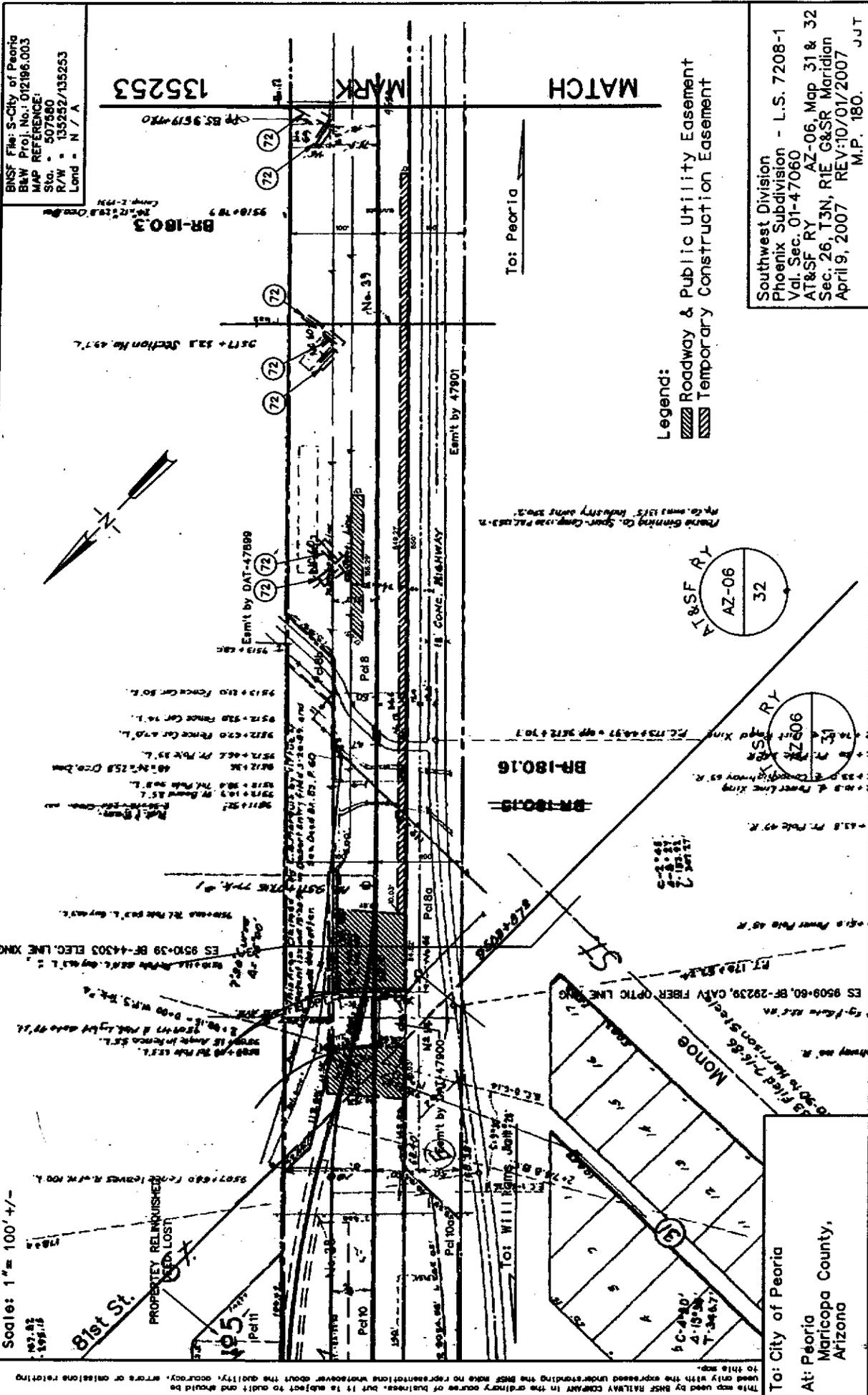
BNSF File: S-City of Peoria
 B&W Proj. No.: 012196.003
 MAP REFERENCE:
 Sta. - 507680
 R/W - 135252/135253
 Land - - N / A

Scale: 1" = 100' +/-

NS, SE
 1595.15

81st St.
 195
 105
 100
 95
 90
 85
 80
 75
 70
 65
 60
 55
 50
 45
 40
 35
 30
 25
 20
 15
 10
 5
 0

PROPERTY RELINQUISHED
 AREA LOST



This map used by BNSF RAILWAY COMPANY in the ordinary course of business, but it is subject to audit and should be used only with the expressed understanding the BNSF makes no representations whatsoever about the quality, accuracy, errors or omissions relating to this map.

Legend:
 [Hatched Box] Roadway & Public Utility Easement
 [Dashed Box] Temporary Construction Easement

Southwest Division
 Phoenix Subdivision - L.S. 7208-1
 Val. Sec. 01-47060
 AT&SF RY AZ-06, Map 31 & 32
 Sec. 26, T3N, R1E G&SR Meridian
 April 9, 2007 REV:10/01/2007
 M.P. 180. J.J.T.

To: City of Peoria
 At: Peoria
 Maricopa County,
 Arizona

DRAWING NO. 3-40838

EXHIBIT "B"

Memorandum of Easement

THIS MEMORANDUM OF EASEMENT is hereby executed this _____ day of _____, 20____, by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("**Grantor**"), whose address for purposes of this instrument is 2500 Lou Menk Drive, Fort Worth, Texas 76131, and the City of Peoria, an Arizona municipal corporation ("**Grantee**"), whose address for purposes of this instrument is _____, which terms "**Grantor**" and "**Grantee**" shall include, wherever the context permits or requires, singular or plural, and the heirs, legal representatives, successors and assigns of the respective parties:

WITNESSETH:

WHEREAS, Grantor owns or controls certain real property situated in Peoria, Maricopa County, Arizona as described on **Exhibit "A"** attached hereto and incorporated herein by reference (the "**Premises**");

WHEREAS, Grantor and Grantee entered into an Easement Agreement, dated _____ (the "**Easement Agreement**") which set forth, among other things, the terms of an easement granted by Grantor to Grantee over and across the Premises (the "**Easement**"); and

WHEREAS, Grantor and Grantee desire to memorialize the terms and conditions of the Easement Agreement of record.

For valuable consideration the receipt and sufficiency of which are hereby acknowledged, Grantor does grant unto Grantee and Grantee does hereby accept from Grantor the Easement over and across the Premises.

The term of the Easement, unless sooner terminated under provisions of the Easement Agreement, shall be perpetual. The term of the Temporary Easement, unless sooner terminated under provisions of this Easement Agreement, shall expire on the date that is one (1) year after the Effective Date or completion of the project, whichever occurs. Provisions regulating the use and purposes to which the Easement shall be limited, are set forth in detail in the Easement Agreement and Grantor and Grantee agree to abide by the terms of the Easement Agreement.

All the terms, conditions, provisions and covenants of the Easement Agreement are incorporated herein by this reference for all purposes as though written out at length herein, and both the Easement Agreement and this Memorandum of Easement shall be deemed to constitute a single instrument or document. This Memorandum of Easement is not intended to amend, modify, supplement, or supersede any of the provisions of the Easement Agreement and, to the extent there may be any conflict or inconsistency between the Easement Agreement or this Memorandum of Easement, the Easement Agreement shall control.

Law Department Approved

Exhibit "B"

IN WITNESS WHEREOF, Grantor and Grantee have executed this Memorandum of Easement to as of the date and year first above written.

GRANTOR:

BNSF RAILWAY COMPANY, a Delaware corporation

By: _____
Name: _____
Title: _____

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

This instrument was acknowledged before me on the _____ day of _____, 200____, by _____ (name) as _____ (title) of **BNSF RAILWAY COMPANY**, a Delaware corporation.

Notary Public

(Seal)

My appointment expires: _____



BRADY • AULERICH & ASSOCIATES, INC.

Civil Engineering • Land Surveying
Construction Staking

C.E. Aulerich	P.L.S.
Dennis H. Brady	P.L.S.
Brent L. Henderson	P.E.
Robert N. Hermon	P.E./P.L.S.
John R. Colling	P.L.S.
Greg Rugland	R.L.S.

EXHIBIT A

**LEGAL DESCRIPTION: ROADWAY AND PUBLIC UTILITY EASEMENT,
PARCEL 1**

A portion of the Northwest quarter of Section 26, Township 3 North, Range 1 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, more particularly described as follows:

Beginning at the Point of Beginning of that certain parcel described in Docket 13138, Pages 752 thru 759, Maricopa County Records;

thence North 46° 03' 39" West, along the Southerly right-of-way line of the Atchison Topeka and Santa Fe Railroad, a distance of 16.63 feet to a point on the West line of the Northeast quarter of the said Northwest quarter of Section 26, from which a ¾" iron pipe at the Southwest corner of said Northeast quarter of the Northwest quarter of Section 26 bears South 01° 02' 57" East, a distance of 212.62 feet;

thence continuing North 46° 03' 39" West, a distance of 43.40 feet;

thence North 48° 25' 19" East, a distance of 40.38 feet to a point on said West line of the Northeast quarter of the Northwest quarter of Section 26, from which a brass cap (flush) monument at the Northwest corner of said Northeast quarter of the Northwest quarter of Section 26 bears North 01° 02' 57" West, a distance of 1048.74 feet;

thence continuing North 48° 25' 19" East, a distance of 48.41 feet to a point on the Northerly right-of-way line of said Atchison Topeka and Santa Fe Railroad;

thence South 45° 15' 49" East, along said Northerly right-of-way line, a distance of 44.59 feet to a point on the arc of a non-tangent curve concave to the Northwest, a radial line of said curve through said point having a bearing of South 67° 58' 09" East, said point being a common point of that parcel described in said Docket 13138, Pages 752 thru 759;

thence along the perimeter of said parcel described in Docket 13138, Pages 752 thru 759, Southwesterly along the arc of said curve, to the right, having a radius of 117.00 feet, with a chord of South 32° 57' 23" West, 44.35 feet, and a central angle of 21° 51' 03" for an arc distance of 44.62 feet to a point of tangency;

thence continuing along said perimeter, South 43° 52' 54" West, a distance of 44.36 feet to the Point of Beginning.

Containing an area of 4,863 square feet or 0.1116 acres more or less.





BRADY • AULERICH & ASSOCIATES, INC.

Civil Engineering • Land Surveying
Construction Staking

C.E. Aulerich
Dennis H. Brady
Brent L. Henderson
Robert N. Herman
John R. Colling
Greg Rugland

P.L.S.
P.L.S.
P.E.
P.E./P.L.S.
P.L.S.
P.L.S.

LEGAL DESCRIPTION

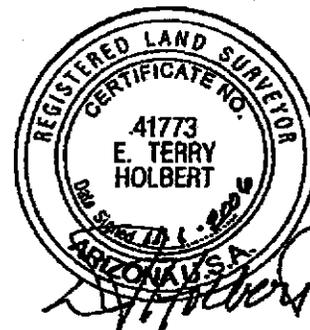
PARCEL 2

BEING A PORTION OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 26, TOWNSHIP 3 NORTH, RANGE 1 EAST, GILA AND SALT CREEK BASE AND MERIDIAN, STATE OF ARIZONA, COUNTY OF MARICOP BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Commencing at the Northwest Corner of said Northeast Quarter of the Northwest Quarter thence South along the west line thereof SOUTH 01°02'57" EAST 1105.66 feet to a point on the South Right-of-Way of the AT&SF Railroad; Thence departing said west line and along said South Right-of-Way SOUTH 46°03'39" EAST 82.63 feet to the point of beginning and through the following five (5) courses:

- 1) Continuing along said South Right-of-Way SOUTH 46°03'39" EAST 84.62 feet;
- 2) Thence departing said South Right-of-Way NORTH 48°25'19" EAST 79.64 feet to a point 5 feet distant and parallel, measured at right angles from the North Right-of-Way line of said Railroad;
- 3) Thence NORTH 45°15'19" WEST 94.57 feet to a point on a curve, concave northwesterly, having a radius of 183.00 feet from which point the radius bears NORTH 57°53'44" WEST;
- 4) Thence along said curve through a Central Angle of 11°26'38" an arc length of 36.55 feet;
- 5) Thence SOUTH 43°52'54" WEST 44.43 feet to the point of beginning.

Containing 7071 square feet or 0.16 acres, more or less



PAGE 2 OF 3



BRADY AULERICH & ASSOCIATES, INC.
 1030 E. Guadalupe Road
 Tempe, Arizona 85283
 Phone (480) 839-4000 Fax (480) 345-9259

PAGE 3 OF 3 PAGES

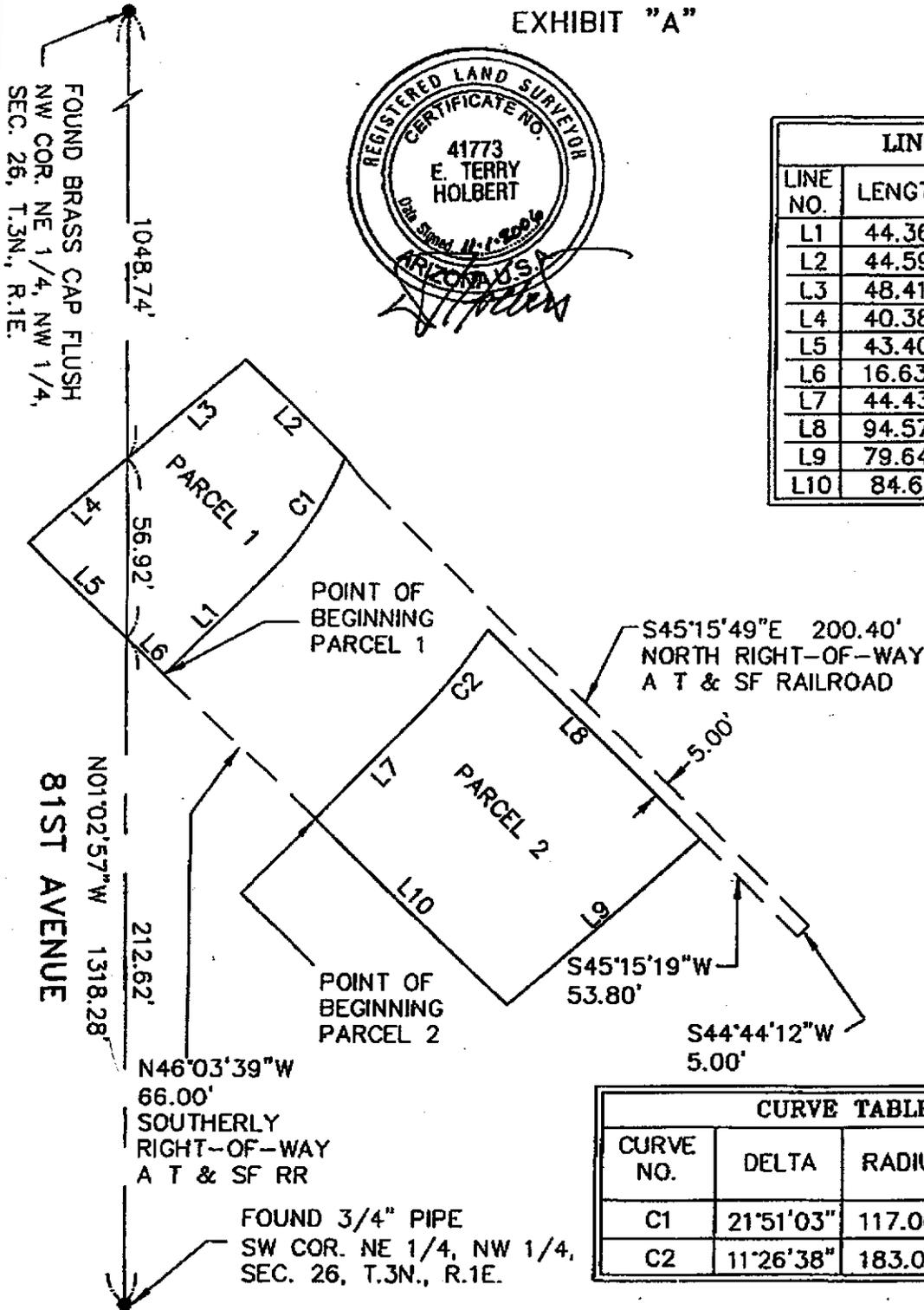
PROJECT: PEORIA CENTER STATION

DATE: 03/30/2006

EXHIBIT "A"



LINE TABLE		
LINE NO.	LENGTH	BEARING
L1	44.36'	S43°52'54"W
L2	44.59'	S45°15'49"E
L3	48.41'	S48°25'19"W
L4	40.38'	S48°25'19"W
L5	43.40'	S46°03'39"E
L6	16.63'	S46°03'39"E
L7	44.43'	N43°52'54"E
L8	94.57'	S45°15'49"E
L9	79.64'	S48°25'19"W
L10	84.62'	N46°03'39"W



CURVE TABLE			
CURVE NO.	DELTA	RADIUS	LENGTH
C1	21°51'03"	117.00'	44.62'
C2	11°26'38"	183.00'	36.55'



BRADY • AULERICH & ASSOCIATES, INC.

Civil Engineering • Land Surveying
Construction Staking

C.E. Aulerich	P.L.S.
Dennis H. Brady	P.L.S.
Brent L. Henderson	P.E.
Robert N. Hermon	P.E./P.L.S.
John R. Colling	P.L.S.
Greg Rugland	R.L.S.

EXHIBIT A

LEGAL DESCRIPTION: ROADWAY AND PUBLIC UTILITY EASEMENT

A portion of the Southeast quarter of the Northwest quarter of Section 26, Township 3 North, Range 1 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, more particularly described as follows:

Commencing at a ¾" pipe at the Northwest corner of said Southeast quarter of the Northwest quarter of Section 26, from which the Northeast corner of said Southeast quarter of the Northwest quarter of Section 26 bears North 89° 10' 33" East, a distance of 1326.93 feet;

thence North 87° 10' 33" East, along the North line of said Southeast quarter of the Northwest quarter of Section 26, a distance of 391.54 feet to the Northeasterly corner of that certain parcel described in Docket No. 13138, Page 745, Maricopa County Records;

thence South 46° 03' 39" East, a distance of 50.83 feet to the Point of Beginning, said point also being the Southeasterly corner of said parcel described in Docket 13138, Page 745;

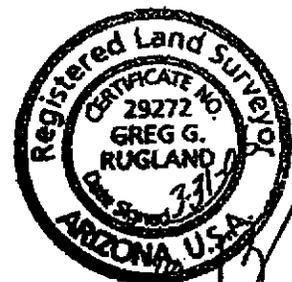
thence continuing South 46° 03' 39" East, a distance of 154.06 feet along the Northerly right-of-way line of the Atchison Topeka and Santa Fe Railroad;

thence South 43° 56' 21" West, a distance of 13.00 feet;

thence North 46° 03' 39" West, parallel to and 13.00 feet Southerly of said Northerly railroad right-of-way, a distance of 166.29 feet to a point on the Easterly line of said parcel described in Docket 13138, Page 745;

thence North 87° 10' 50" East, along said Easterly line, a distance of 17.85 feet to the Point of Beginning.

Containing an area of 2,082 square feet or 0.0478 acres more or less.





BRADY AULERICH & ASSOCIATES, INC.

1030 E. Guadalupe Road

Tempe, Arizona 85283

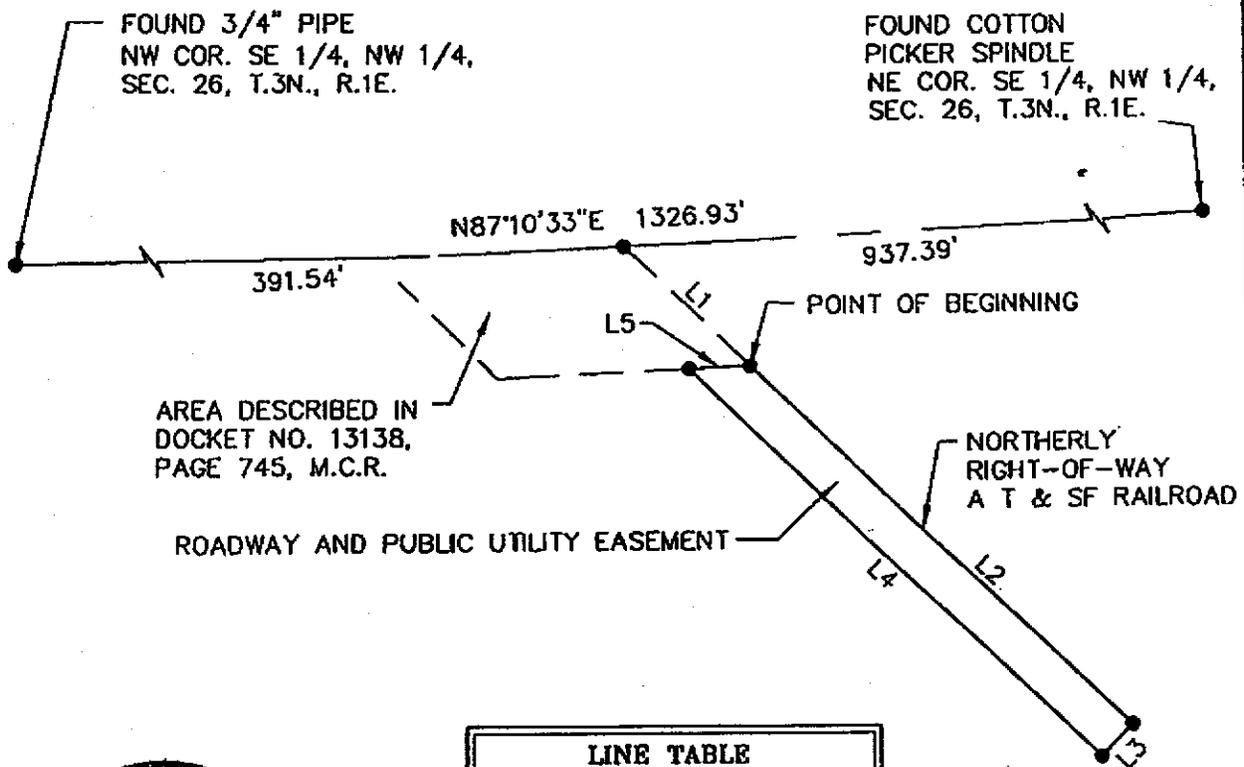
Phone (480) 839-4000 Fax (480) 345-9259

PAGE 2 OF 2 PAGES

PROJECT: PEORIA CENTER STATION

DATE: 03/30/2006

EXHIBIT "A"



LINE TABLE		
LINE NO.	LENGTH	BEARING
L1	50.83'	S46°03'39"E
L2	154.06'	S46°03'39"E
L3	13.00'	S43°56'21"W
L4	166.29'	N46°03'39"W
L5	17.85'	N87°10'50"E



N.T.S.



BRADY • AULERICH & ASSOCIATES, INC.

Civil Engineering • Land Surveying
Construction Staking

C.E. Aulerich	P.L.S.
Dennis H. Brady	P.L.S.
Brent L. Henderson	P.E.
Robert N. Hermon	P.E./P.L.S.
John R. Colling	P.L.S.
Greg Rugland	R.L.S.

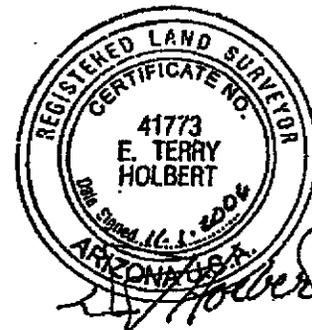
LEGAL DESCRIPTION

A TEMPORARY CONSTRUCTION EASEMENT, 10 FEET WIDE, OVER AND ACROSS A PORTION OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 26, TOWNSHIP 3 NORTH, RANGE 1 EAST, GILA AND SALT CREEK BASE AND MERIDIAN, STATE OF ARIZONA, COUNTY OF MARICOPA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Commencing at the Northwest Corner of said Northeast Quarter of the Northwest Quarter thence South along the west line thereof SOUTH 01°02'57" EAST 1,105.66 feet to a point on the South Right-of-Way of the AT&SF Railroad; Thence departing said west line and along said South Right-of-Way SOUTH 46°03'39" EAST 167.25 feet to the point of beginning the SOUTHERLY LINE OF SAID TEMPORARY CONSTRUCTION EASEMENT, 10 FEET WIDE:

Thence continuing along said South Right-of-Way, SOUTH 46°03'39" EAST 850.00 feet;
Thence leaving said South Right-of-Way at right angles NORTH 43°55'37" EAST, 10.00 feet to a point 10.00 feet distant and parallel from said south line;
Thence along said parallel line NORTH 46°04'23" WEST 849.21 feet;
Thence leaving said parallel line SOUTH 48°25'19" WEST, 10.03 feet to the point of beginning.

Containing 8,496 square feet or 0.20 acres, more or less.



BRADY AULERICH & ASSOCIATES, INC.
1030 E. Guadalupe Road
Tempe, Arizona 85283
Phone (480) 839-4000 Fax (480) 345-9259



PAGE 2 OF 2 PAGES

PROJECT: PEORIA CENTER STATION

DATE: 03/08/2006

EXHIBIT "A"



FOUND BRASS CAP FLUSH
NW COR. NE 1/4, NW 1/4,
SEC. 26, T.3N., R.1E.

1,105.66'

81ST AVENUE

N01°02'57"W

1318.28'

N46°03'39"W
167.25'

NORTH RIGHT-OF-WAY
A T & SF RR

S48°25'19"W
10.03'

SOUTH
RIGHT-OF-WAY
A T & SF RR

POINT OF
BEGINNING
TCE

FOUND 3/4" PIPE
SW COR. NE 1/4, NW 1/4,
SEC. 26, T.3N., R.1E.

MARKET STREET

RR TRACKS

N46°04'23"W

N46°04'23"W

849.21'

850.00'

N43°55'37"E
10.00'



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 Cotton Crossing.
- **1.01.02** The Contractor must execute and deliver to the Railway duplicate copies of the Exhibit "C-1" Agreement, in the form attached hereto, obligating the Contractor to provide and maintain in full force and effect the insurance called for under Section 3 of said Exhibit "C-1".
- **1.01.03** The Contractor must plan, schedule and conduct all work activities so as not to interfere with the movement of any trains on Railway Property.
- **1.01.04** The Contractor's right to enter Railway's Property is subject to the absolute right of Railway to cause the Contractor's work on Railway's Property to cease if, in the opinion of Railway, Contractor's activities create a hazard to Railway's Property, employees, and/or operations.
- **1.01.05** The Contractor is responsible for determining and complying with all Federal, State and Local Governmental laws and regulations, including, but not limited to environmental laws and regulations (including but not limited to the Resource Conservation and Recovery Act, as amended; the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA), and health and safety laws and regulations. The Contractor hereby indemnifies, defends and holds harmless Railway for, from and against all fines or penalties imposed or assessed by Federal, State and Local Governmental Agencies against the Railway which arise out of Contractor's work under this Agreement.
- **1.01.06** The Contractor must notify the City of Peoria at 623-773-7951 and Railway's Manager Public Projects, telephone number (909) 386-4472 at least thirty (30) calendar days before commencing any work on Railway Property. Contractors notification to Railway, must refer to Railroad's file 025405Y.
- **1.01.07** For any falsework above any tracks or any excavations located, whichever is greater, within twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 1 ½ horizontal to 1 vertical slope beginning at eleven (11) feet from centerline of the nearest track, both measured perpendicular to center line of track, the Contractor must furnish the Railway five 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. All calculations must take into consideration railway surcharge loading and must be designed to meet American Railway Engineering and Maintenance-of-Way Association (previously known as American Railway Engineering Association) Coopers E-80 live loading standard. All drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor must not begin work until notified by the Railway that plans have been approved. The Contractor will be required to use lifting devices such as, cranes and/or winches to place or to remove any falsework over Railway's tracks. In no case will the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.
- **1.01.08** Subject to the movement of Railway's trains, Railway will cooperate with the Contractor such that the work may be handled and performed in an efficient manner. The Contractor will have no claim whatsoever for any type of damages or for extra or additional compensation in the event his work is delayed by the Railway.

1.02 Contractor Safety Orientation

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

1.03 Railway Requirements

- **1.03.01** The Contractor must take protective measures as are necessary to keep railway facilities, including track ballast, free of sand, debris, and other foreign objects and materials resulting from his operations. Any damage to railway facilities resulting from Contractor's operations will be repaired or replaced by Railway and the cost of such repairs or replacement must be paid for by the Agency.
- **1.03.02** The Contractor must notify the Railway's Division Superintendent Larry Kreger at (928) 289-7273 and provide blasting plans to the Railway for review seven (7) calendar days prior to conducting any blasting operations adjacent to or on Railway's Property.
- **1.03.03** The Contractor must abide by the following temporary clearances during construction:
 - 15' Horizontally from centerline of nearest track
 - 21'-6" Vertically above top of rail
 - 27'-0" Vertically above top of rail for electric wires carrying less than 750 volts
 - 28'-0" Vertically above top of rail for electric wires carrying 750 volts to 15,000 volts
 - 30'-0" Vertically above top of rail for electric wires carrying 15,000 volts to 20,000 volts
 - 34'-0" Vertically above top of rail for electric wires carrying more than 20,000 volts
- **1.03.04** Upon completion of construction, the following clearances shall be maintained:
 - 25' Horizontally from centerline of nearest track
 - 23'-3 1/2" Vertically above top of rail
- **1.03.05** Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the Railway and to the City of Peoria and must not be undertaken until approved in writing by the Railway, and until the City of Peoria 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 Agency.
- **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 City of Peoria for approval before work is undertaken and this work must not be undertaken until approved by the Railway.
- **1.03.08** At other than public road crossings, the Contractor must not move any equipment or materials across Railway's tracks until permission has been obtained from the Railway. The Contractor must obtain a "Temporary Private Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railways tracks. The temporary crossing must be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor will be at the expense of the Contractor.

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

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

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

1.05 Protection of Railway Facilities and Railway Flagger Services:

- **1.05.01** The Contractor must give Railway's Roadmaster (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 and protective services and devices will be required and furnished when Contractor's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:
 - **1.05.02a** When in the opinion of the Railway's Representative it is necessary to safeguard Railway's Property, employees, trains, engines and facilities.
 - **1.05.02b** When any excavation is performed below the bottom of tie elevation, if, in the opinion of Railway's representative, track or other Railway facilities may be subject to movement or settlement.
 - **1.05.02c** When work in any way interferes with the safe operation of trains at timetable speeds.
 - **1.05.02d** When any hazard is presented to Railway track, communications, signal, electrical, or other facilities either due to persons, material, equipment or blasting in the vicinity.
 - **1.05.02e** Special permission must be obtained from the Railway before moving heavy or cumbersome objects or equipment which might result in making the track impassable.
- **1.05.03** Flagging services will be performed by qualified Railway flaggers.
 - **1.05.03a** Flagging crew generally consists of one employee. However, additional personnel may be required to protect Railway Property and operations, if deemed necessary by the Railways Representative.

- **1.05.03b** Each time a flagger is called, the minimum period for billing will be the eight (8) hour basic day.
- **1.05.03c** The cost of flagger services provided by the Railway, when deemed necessary by the Railway's representative, will be borne by the City of Peoria. The estimated cost for one (1) flagger is \$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, transportation, meals, lodging and supervision. Negotiations for Railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. The flagging rate in effect at the time of performance by the Contractor hereunder will be used to calculate the actual costs of flagging pursuant to this paragraph.
- **1.05.03d** The average train traffic on this route is 13 freight trains per 24-hour period at a timetable speed 25 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, however, a partial list of the requirements include: a) safety glasses with permanently affixed side shields (no yellow lenses); b) hard hats c) safety shoe with: hardened toes, above-the-ankle lace-up and a defined heel; and d) high visibility retro-reflective work wear. The Railroad's representative in charge of the project is to be contacted regarding local specifications for meeting requirements relating to hi-visibility work wear. Hearing protection, fall protection, gloves, and respirators must be worn as required by State and Federal regulations. **(NOTE - Should there be a discrepancy between the information contained on the web site and the information in this paragraph, the web site will govern.)**

- **1.06.09** The Contractor must not pile or store any materials, machinery or equipment closer than 25'-0" to the center line of the nearest Railway track. Materials, machinery or equipment must not be stored or left within 250 feet of any highway/rail at-grade crossings, where storage of the same will interfere with the sight distances of motorists approaching the crossing. Prior to beginning work, the Contractor must establish a storage area with concurrence of the Railroad's representative.
- **1.06.10** Machines or vehicles must not be left unattended with the engine running. Parked machines or equipment must be in gear with brakes set and if equipped with blade, pan or bucket, they must be lowered to the ground. All machinery and equipment left unattended on Railway's Property must be left inoperable and secured against movement. (See internet Engineering Contractor Safety Orientation program for more detailed specifications)
- **1.06.11** Workers must not create and leave any conditions at the work site that would interfere with water drainage. Any work performed over water must meet all Federal, State and Local regulations.
- **1.06.12** All power line wires must be considered dangerous and of high voltage unless informed to the contrary by proper authority. For all power lines the minimum clearance between the lines and any part of the equipment or load must be; 200 KV or below - 15 feet; 200 to 350 KV - 20 feet; 350 to 500 KV - 25 feet; 500 to 750 KV - 35 feet; and 750 to 1000 KV - 45 feet. If capacity of the line is not known, a minimum clearance of 45 feet must be maintained. A person must be designated to observe clearance of the equipment and give a timely warning for all operations where it is difficult for an operator to maintain the desired clearance by visual means.

1.07 Excavation

- **1.07.01** Before excavating, the Contractor must determine whether any underground pipe lines, electric wires, or cables, including fiber optic cable systems are present and located within the Project work area. The Contractor must determine whether excavation on Railway's Property could cause damage to buried cables resulting in delay to Railway traffic and disruption of service to users. Delays and disruptions to service may cause business interruptions involving loss of revenue and profits. Before commencing excavation, the Contractor must contact BNSF's Field Engineering Representative (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"

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

BNSF RAILWAY COMPANY
Attention: Manager Public Projects

Railway File: _____

Agency Project: _____

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated _____, 2007, with the City of Peoria for the performance of certain work in connection with the following project: Cotton Crossing. 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 the City of Peoria (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

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

Section 1. RELEASE OF LIABILITY AND INDEMNITY

Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway's and Contractor's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railway's property or right-of-way. **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF RAILWAY, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

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

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the

event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

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

Section 2. TERM

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

Section 3. INSURANCE

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

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

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

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

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

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

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

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

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

- ◆ Arizona's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

D. Railroad Protective Liability insurance naming only the *Railroad* as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

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

Other Requirements:

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

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

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

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

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

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

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

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

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

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

If any portion of the operation is to be subcontracted by contractor, contractor must require that the subcontractor provide and

maintain the insurance coverages set forth herein, naming *Railroad* as an additional insured, and requiring that the subcontractor release, defend and indemnify *Railroad* to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify *Railroad* herein.

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

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

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

Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS

The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Contract, and the Contractor Requirements set forth on Exhibit "C" attached to the Contract and this Agreement, including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site.

Section 5. TRAIN DELAY

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

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

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

The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. Damages for train delay for certain trains may be as high as \$50,000.00 per incident.

Contractor and its subcontractors must give Railway's representative (four) 4 weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.

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

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

(Contractor)

BNSF Railway Company

By: _____
Printed Name: _____
Title: _____

By: _____
Name: _____
Manager Public Projects

Contact Person: _____
Address: _____

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

Accepted and effective this _____ day of 2007.

Exhibit "D" – Cost Summary

<u>Cost Item</u>	<u>Cost</u>
Track 1 Rebuilding	\$ 213,963
Track 2 Rebuilding	\$ 156,331
Turnout Relocation	\$ 526,241
Signal Installation	\$ 709,704
<u>TOTAL</u>	\$ 1,606,239

EXHIBIT "D" – TRACK 1 REBUILDING

IS ON FILE IN THE

OFFICE OF THE CITY CLERK