

WEST OHIO AVENUE/BNSF CROSSING
US DOT 003523P, MP 88.10
ROADWAY SURFACING AGREEMENT

This Roadway Surfacing Agreement (“Agreement”) is entered into effective as of March 2014 (“Effective Date”), by and between CITY OF FOUNTAIN, municipal corporation duly organized as a home-rule city under Article XX of the State of Colorado (“City”) and BNSF RAILWAY COMPANY (“Railway”), a Delaware corporation.

WHEREAS, Railway operates a freight transportation system by rail with operations throughout the United States and Canada including the City of Fountain West Ohio Avenue Crossing US DOT 003523P at Mile Post 88.10; and

WHEREAS, City desires to reconstruct existing roadway curb, gutter, sidewalk and pavement approach grades to better match BNSF Railway track grades and to construct 3.5 feet wide by 12 inch high raised center median approach islands to deter vehicle operators from driving around existing railroad automatic gates at the crossing adjacent to and upon Railway’s right of way, and City is willing to perform such services.

NOW, THEREFORE, in consideration for Railway entering this Agreement with City and granting City permission to enter upon the Premises (defined herein), City agrees with Railway as follows:

SECTION 1. SCOPE OF SERVICES

City shall perform the following services, hereinafter described as “Work”: reconstruct existing roadway curb, gutter, sidewalk and pavement approach grades to better match BNSF Railway track grades and to construct 3.5 feet wide by 12 inch high raised center median approach islands to deter vehicle operators from driving around existing railroad automatic gates at the crossing adjacent to and upon Railway’s right of way. These street improvements will extend approximately 235 feet westerly and 140 feet easterly of the BNSF railroad crossing. City improvements will match up to existing railroad track concrete panel elevations. Reconstructed Portland Cement concrete sidewalks having zero height curb facing will terminate a minimum 6 feet from the nearest rail or 4 feet from existing track crossing surface panels with full depth asphalt paved walkway transitions to the track crossing panels. City will remove and replace existing curb, gutter and sidewalk at each crossing quadrant with ADA compliant tactile raised dome warning panels/signage in advance of the existing crossing gates..

Performance of the Work will necessarily require City to enter Railway’s right of way and property (“Premises”). City agrees that no work shall be commenced on the Premises until (i) this Agreement is executed by both City and Railway; and (ii) Railway approves the insurance required to be maintained by City hereunder.

SECTION 2. PAYMENT OF COSTS

City shall be responsible for payment of all costs of the Work performed under this Agreement.

SECTION 3. RELEASE OF LIABILITY AND INDEMNITY

To the extent permitted by law and not otherwise, City hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including reasonable attorneys' fees), for injury or death to all persons, including Railway's and City's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from City's or any of City's subcontractors' acts or omissions performing the “Work”. **THE LIABILITY ASSUMED BY CITY 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 SOLE NEGLIGENCE OF RAILWAY.**

THE INDEMNIFICATION OBLIGATION ASSUMED BY CITY 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.

To the extent permitted by law, City 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 City under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to City, in writing, of the receipt or dependency of such claims and thereupon City 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 City, and City, 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 shall survive any termination of this Agreement. Notwithstanding all of the foregoing, this Agreement is subject to limitations imposed by Colorado law on the City's ability to indemnify the Railroad as required herein.

SECTION 4. INSURANCE.

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

- A. Commercial General Liability Insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limited to, the following:
 - ◆ Bodily Injury and Property Damage
 - ◆ Personal Injury and Advertising Injury
 - ◆ Fire legal liability
 - ◆ Products and completed operations

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

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

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

- B. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:
 - ◆ Bodily injury and property damage
 - ◆ Any and all vehicles owned, used or hired
- C. Workers Compensation and Employers Liability Insurance. This insurance shall include coverage for, but not limited to:

- ◆ City’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. This insurance shall name only the Railroad as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy shall be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement
- ◆ 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

In lieu of providing a Railroad Protective Liability Policy, Licensee may participate in Licensor’s Blanket Railroad Protective Liability Insurance Policy available to Licensee or its contractor. The limits of coverage are the same as above. The cost is \$ _____.

I elect to participate in Licensor’s Blanket Policy;

I elect not to participate in Licensor’s Blanket Policy.

E. Other Requirements:

Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

City 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 provisions, waive their right of subrogation against **Railroad** for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. City 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 City’s care, custody or control.

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

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

With the exception of Railroad Protective Liability Insurance, City is allowed to self-insure without the prior written consent of **Railroad**. Any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by City in lieu of insurance. Any and all **Railroad** liabilities that would otherwise, in accordance with the provisions of this **Agreement**, be covered by City’s insurance will be covered as if City elected not to include a deductible, self-insured retention or other financial responsibility for claims.

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

shall be indicated on the certificate of insurance. Upon request from **Railroad**, a certified duplicate original of any required policy shall be furnished. City 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 shall be written by a reputable insurance company acceptable to **Railroad** and authorized to do business in the state(s) in which the service is to be provide.

City represents that this **Agreement** has been thoroughly reviewed by City's insurance agent(s)/broker(s), who have been instructed by City to procure the insurance coverage required by this **Agreement**.

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

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

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

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

SECTION 5. PROTECTION OF RAILWAY FACILITIES AND RAILWAY FLAGGER SERVICES

A. The City shall give a minimum of at least thirty (30) calendar days notice to David Phillips, the Railways Roadmaster at telephone (719) 549-3528, in advance of when flagging services will be required to bulletin the flaggers position and shall provide five (5) working days notice to the Roadmaster to abolish the position per union requirements.

B. Railway flagger and protective services and devices will be required and furnished when City's work activities are located over or under of and within twenty-five (25) feet measured horizontally from center line of the nearest track and when cranes or similar equipment positioned outside of 25-foot horizontally from track center line that could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:

(1). When in the opinion of the Railway's representative, it is necessary to safeguard the Premises , employees, trains, engines and facilities.

(2). 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.

(3). When work in any way interferes with the safe operation of trains at timetable speeds.

(4). 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.

(5). Special permission must be obtained from the Railway before moving heavy or cumbersome objects or equipment which might result in making the track impassable.

C. Flagging services will be performed by qualified Railway flaggers. The estimated cost for one (1) flagger is \$800.00-\$1600 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 City hereunder shall be used to calculate the actual costs of flagging pursuant to this paragraph.

(1) A flagging crew generally consists of one employee. However, additional personnel may be required to protect the Premises and operations, if deemed necessary by the Railway's representative.

(2) Each time a flagger is called, the minimum period for billing shall be the eight (8) hour basic day.

(3) The cost of flagger services provided by the Railway, when deemed necessary by the Railway's representative, will be borne by the City. Invoices shall be paid within 30 days of the date of the invoice.

SECTION 6. INDEPENDENT CONTRACTOR

In the performance of the Work under this Agreement, City and any subcontractors retained by the City will be considered as independent contractors. Neither City nor any of its employees, subcontractors, agents or servants will be considered as employees of Railway in any respect. City shall have the exclusive right and duty to control the work of its employees. All persons employed by City or any of its subcontractors in the performance of this Agreement shall be the sole employees of City or its subcontractors. City will be given general directions and instructions regarding the Work to be rendered under this Agreement; however, direct supervision of City's employees will be City's responsibility and obligation.

SECTION 7. GENERAL PROVISIONS

A. APPROPRIATION OF FUNDS BY THE CITY COUNCIL. Any and all payments by the City under the provisions of this Agreement after calendar year 2014 set forth above is subject to appropriation of funds by the City Council.

B. LAW/SEVERABILITY. The laws of the State of Colorado, the Fountain City Charter, laws and ordinances shall govern the construction, interpretation, execution and enforcement of this Agreement. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement.

C. IMMUNITY ACTS. This Agreement shall not be construed to include an express or implied waiver of any of the rights, claims and defenses available to the City under the Colorado Governmental Immunity Act, C.R.S. §24-10-101, et seq., or the Federal Tort Claims Act and implementing regulations,

LAW DEPARTMENT APPROVED

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

CITY OF FOUNTAIN

BNSF Railway Company

By _____
Name: Jed P. Detsys
Title: Mayor

By A. J. Amparan
Name: A. J. AMPARAN
Title: Mgr Public Projects

ATTEST:

Joney L. Carneal
~~Sylvia Mascarenas, City Clerk~~
Joney Carneal Deputy



