CITY OF EL PASO, TEXAS
REQUEST FOR COUNCIL ACTION (RCA)

DEPARTMENT: **Engineering Department**
AGENDA DATE: **September 16, 2008**

CONTACT PERSON/PHONE: **Alan Shubert, Director, Engineering Dept., Phone 541-4423**
PROJECT NAME/SOLICITATION No. **BNSF Agreement -Upper Valley Drainage Phase II**

DISTRICT(S) AFFECTED: **8**

SUBJECT:

That the City Manager be authorized to sign a License Agreement between the City of El Paso, ("City") and BNSF Railway Company, a Delaware corporation, ("BNSF"), allowing the City access to BNSF right-of-way to make improvements to existing channel and drainage structures. The estimated cost for the license is $46,221, to be funded from the project.

BACKGROUND / DISCUSSION:

The license will allow the City to line an existing channel along Charl Ann just north of Country Club. The lining is part of the Upper Valley Drainage Improvements Phase II –Ocotillo/Charl Ann. The lining of the existing channel will allow for the conveyance of storm water from the area east of the railroad to the White Spur Drain and eventually into the river. Currently the water crosses the railroad and overflows the channel onto Ocotillo neighborhood. The construction for the work under this license has already been awarded, but the contractor has not been given a Notice To Proceed for this portion of the project. The downstream facilities including the crossing of Country Club are already under construction. The estimated cost consists of $15,396 for the license fee, $6,825 for the insurance contribution, and $24,000 for a BNSF flagger. The BNSF flagger is required by BNSF when you do work on their right of way. It is estimated that the work will take 40 working days at a cost of $600/per day (clause 7b). The final cost may vary depending on the actual amount of work days it takes for the work.

PRIOR COUNCIL ACTION:

The City Council awarded the contract for construction on June 14, 2008 to JAR Construction

AMOUNT AND SOURCE OF FUNDING:

The project is funded by Storm 2006 COs.

BOARD / COMMISSION ACTION:

N/A

**********REQUIRED AUTHORIZATION**********

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____
(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign a License Agreement between the City of El Paso, ("City") and BNSF Railway Company, a Delaware corporation, ("BNSF"), allowing the City access to BNSF right-of-way to make improvements to existing channel and drainage structures.

ADOPTED this the ____ day of_____, 2008.

THE CITY OF EL PASO

_____
John Cook
Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

_____
Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
R. Alan Shubert, P.E.
City Engineer

LICENSE

THIS LICENSE ("License"), made as of the ____ day of _____, 2008 ("Effective Date") by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("Licensor") and **CITY OF EL PASO**, a Texas municipal corporation ("Licensee").

NOW THEREFORE, in consideration of the mutual covenants contained herein, the parties agree to the following:

GENERAL

1. Licensor hereby grants Licensee a non-exclusive license, subject to all rights, interests, and estates of third parties, including, without limitation, any leases, licenses, easements, liens or other encumbrances, and upon the terms and conditions set forth below, to use the area of Licensor's property shown on the attached Drawing no. 3-42884, dated January 3, 2008 and revised March 36, 2008, attached hereto, marked Exhibit "A", and made a part hereof, situated at or near El Paso, County of El Paso, State of Texas, Line Segment 7300, Mile Post 1147.7 and 1147.2 ("Premises") for the purposes specified in Section 3 below.

2. Licensee shall not disturb any improvements of Licensor or Licensor's existing lessees, licensees, easement beneficiaries or lien holders, if any, or interfere with the use of such improvements.

3. Licensee shall use the Premises exclusively to concrete line an existing channel (the "Channel Improvements") and replace existing drainage structures (the "Drainage Structures") (the construction, modification and/or installation of the Channel Improvements and the replacement of the Drainage Structures to be referred to collectively as the "Work"). Licensee shall not use the Premises for any other purpose whatsoever. Licensee shall not use or store hazardous substances, as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA") or petroleum or oil as defined by applicable Environmental Laws on the Premises.

4. In case of the eviction of Licensee by anyone owning or claiming title to or any interest in the Premises, Licensor shall not be liable to refund Licensee any compensation paid hereunder or for any damage Licensee sustains in connection therewith.

5. Any contractors or subcontractors performing work on the Premises, or entering the Premises on behalf of Licensee shall be deemed servants and agents of Licensee for purposes of this License.

TERM

6. This License shall commence on the Effective Date and shall continue in perpetuity, subject to prior termination as hereinafter described.

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COMPENSATION

7. (a) Licensee shall pay Licensor, prior to the Effective Date, the sum of Fifteen Thousand Three Hundred Ninety Six and No/100 Dollars ($15,396.00) as compensation for the use of the Premises.

(b) Licensee agrees to reimburse Licensor (within thirty (30) days after receipt of bills therefor) for all costs and expenses incurred by Licensor in connection with Licensee's use of the Premises, including but not limited to the furnishing of Licensor's flaggers and any vehicle rental costs incurred. The cost of flagger services provided by Licensor, when deemed necessary by Licensor's representative, will be borne by Licensee. 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, Licensor and unemployment insurance, public liability and property damage insurance, health and welfare benefits, transportation, meals, lodging and supervision. Negotiations for Licensor 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 flaggers will be used to calculate the actual costs of flagging pursuant to this paragraph.

(c) All invoices are due thirty (30) days after the date of invoice. In the event that Licensee shall fail to pay any monies due to Licensor within thirty (30) days after the invoice date, then Licensee shall pay interest on such unpaid sum from thirty (30) days after its invoice date to the date of payment by Licensee at an annual rate equal to (i) the greater of (a) for the period January 1 through June 30, the prime rate last published in *The Wall Street Journal* in the preceding December plus two and one-half percent (2 1/2%), and for the period July 1 through December 31, the prime rate last published in *The Wall Street Journal* in the preceding June plus two and one-half percent (2 1/2%), or (b) twelve percent (12%), or (ii) the maximum rate permitted by law, whichever is less.

COMPLIANCE WITH LAWS

8. (a) Licensee shall observe and comply with any and all laws, statutes, regulations, ordinances, orders, covenants, restrictions, or decisions of any court of competent jurisdiction ("Legal Requirements") relating to the use of the Premises.

(b) Prior to entering the Premises, Licensee shall and shall cause its contractor to comply with all Licensor's applicable safety rules and regulations. Prior to commencing any work on the Premises, Licensee shall complete and shall require its contractor to complete the safety-training program at the following Internet Website "http://contractororientation.com". This training must be completed no more than one year in advance of Licensee's entry on the Premises.

DEFINITION OF COST AND EXPENSE

9. For the purpose of this License, "cost' or "costs" "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used.

RIGHT OF LICENSOR TO USE

10. Licensor excepts and reserves the right, to be exercised by Licensor and any other parties who may obtain written permission or authority from Licensor:

    (a) to maintain, renew, use, operate, change, modify and relocate any existing pipe, power, communication lines and appurtenances and other facilities or structures of like character upon, over, under or across the Premises;

    (b) to construct, maintain, renew, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Premises; or

    (c) to use the Premises in any manner as the Licensor in its sole discretion deems appropriate, provided Licensor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Licensee for the purpose specified in Section 3 above.

Licensor agrees to use reasonable efforts to notify Licensee of any activities of Licensor on the Premises that could materially interfere with Licensee's use of the Premises for the purpose specified in Section 3 above; provided, however, no liability shall attach to Licensor for Licensor's failure to provide such notice.

LICENSEE'S OPERATIONS

11. (a) Licensee shall notify Licensor's Roadmaster, 805 S. Santa Fe, El Paso, Texas 79901 at telephone (915) 534-2366 or cell phone (915) 892-3400, at least five (5) business days prior to entering the Premises and prior to entering the Premises for any subsequent routine maintenance thereon (if applicable). After completion of use of the Premises for the purpose specified in Section 3, Licensee shall notify Licensor in writing that such use has been completed. Licensee shall notify Licensor's Roadmaster listed above as soon as practicable should there be an emergency or maintenance or repair that requires immediate access to the Premises and shall promptly thereafter follow up with written notice of such entry.

    (b) In performing the work described in Section 3, Licensee shall use only public roadways to cross from one side of Licensor's tracks to the other.

12. (a) Under no conditions shall Licensee be permitted to conduct any tests, investigations or any other activity using mechanized equipment and/or machinery, or place or store any mechanized equipment, tools or other materials, within twenty-five (25) feet of the centerline of any railroad track on the

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Premises unless Licensee has obtained prior written approval from Licensor. Licensee shall, at its sole cost and expense, perform all activities on and about the Premises in such a manner as not at any time to be a source of danger to or interference with the existence or use of present or future tracks, roadbed or property of Licensor, or the safe operation and activities of Licensor. If ordered to cease using the Premises at any time by Licensor's personnel due to any hazardous condition, Licensee shall immediately do so. Notwithstanding the foregoing right of Licensor, the parties agree that Licensor has no duty or obligation to monitor Licensee's use of the Premises to determine the safe nature thereof, it being solely Licensee's responsibility to ensure that Licensee's use of the Premises is safe. Neither the exercise nor the failure by Licensor to exercise any rights granted in this Section will alter the liability allocation provided by this License.

(b) Licensee shall, at its sole cost and expense and subject to the supervision of Licensor's Roadmaster, locate, construct and maintain the channel and drainage structures in such a manner and of such material that it will not at any time be a source of danger to or interference with the present or future tracks, roadbed and property of Licensor, or the safe operation of its railroad. If at any time Licensee shall, in the judgment of Licensor, fail to perform properly its obligations under this paragraph, Licensor may, at its option, itself perform such work as it deems necessary for the safe operation of its railroad, and in such event Licensee agrees to pay, within fifteen (15) days after bill shall have been rendered therefor, the cost so incurred by Licensor, but failure on the part of Licensor to perform the obligations of Licensee shall not release Licensee from liability hereunder for loss or damage occasioned thereby.

13. During the construction and any subsequent maintenance performed on the channel and drainage structures, Licensee shall perform such work in a manner to preclude damage to the property of Licensor, and preclude interference with the operation of its railroad. The construction of the channel and drainage structures shall be completed within one (1) year of the Effective Date. Upon completion of the construction of the channel and drainage structures and after performing any subsequent maintenance thereon, Licensee shall, at Licensee's own cost and expense, restore Licensor's premises to their former state as of the Effective Date of this License.

14. If at any time during the term of this License, Licensor shall desire the use of its rail corridor in such a manner as would, in Licensor's reasonable opinion, be interfered with by the channel and drainage structures, Licensee shall, at its sole expense, within thirty (30) days after receiving written notice from Licensor to such effect, make such changes in the channel and drainage structures as in the sole discretion of Licensor may be necessary to avoid interference with the proposed use of Licensor's rail corridor, including, without limitation, the relocation of the existing or the construction of a new channel and drainage structures.

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15. (a) Prior to Licensee conducting any boring work on or about any portion of the Premises, Licensee shall explore the proposed location for such work with hand tools to a depth of at least three (3) feet below the surface of the ground to determine whether pipelines or other structures exist below the

surface, provided, however, that in lieu of the foregoing, the Licensee shall have the right to use suitable detection equipment or other generally accepted industry practice (e.g., consulting with the Underground Services Association) to determine the existence or location of pipelines and other subsurface structures prior to drilling or excavating with mechanized equipment. Upon Licensee's written request, which shall be made thirty (30) business days in advance of Licensee's requested entry on the Premises, Licensor will provide Licensee any information that Licensor's Engineering Department has in its possession concerning the existence and approximate location of Licensor's underground utilities and pipelines on the Premises. Prior to conducting any such boring work, the Licensee will review all such material. Licensor does not warrant the accuracy or completeness of information relating to subsurface conditions and Licensee's operations will be subject at all times to the liability provisions herein.

(b) For all bores greater than 26-inch diameter, and at a depth less than 10.0 feet below bottom of rail, a soil investigation will need to be performed by the Licensee and reviewed by Licensor prior to construction. This study is to determine if granular material is present, and to prevent subsidence during the installation process. If the investigation determines in Licensor's reasonable opinion that granular material is present, Licensor may select a new location for Licensee's use, or may require Licensee to furnish for Licensor's review and approval, in its sole discretion a remedial plan to deal with the granular material. Once Licensor has approved any such remedial plan in writing, Licensee shall, at its sole cost and expense, carry out the approved plan in accordance with all terms thereof and hereof.

16. Any open hole, boring or well constructed upon Premises by Licensee shall be safely covered and secured at all times when Licensee is not working in the actual vicinity thereof. Following completion of that portion of the work, all holes or borings constructed on the Premises by Licensee shall be:

(a) filled in to surrounding ground level with compacted bentonite grout; or

(b) otherwise secured or retired in accordance with any applicable Legal Requirement. No excavated materials may remain on the Premises for more than ten (10) days, but must be properly disposed of by Licensee in accordance with applicable Legal Requirements.

17. Upon completion of the Work or upon termination or expiration of this License, whichever shall occur first, Licensee shall, at its sole cost and expense:

(a) remove all of its equipment from the Premises;

(b) remove any or all of the Channel Improvements and Drainage Structures, as directed by Licensor in writing, at Licensor's sole discretion when given 30 days' notice by Licensor ;

(c) report and restore any damage to the Premises arising from, growing out of, or connected with Licensee's use of the Premises;

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(d) remedy any unsafe conditions on the Premises created or aggravated by Licensee; and

(e) leave the Premises in the condition which existed as of the Effective Date of this License.

18. Licensee's on-site supervision shall retain/maintain a fully-executed copy of this License at all times while on the Premises.

LIABILITY

19. (a) TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE SHALL RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS LICENSOR AND LICENSOR'S AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS (COLLECTIVELY, "INDEMNITEES") FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION, REMOVAL AND REMEDIATION AND GOVERNMENTAL OVERSIGHT COSTS) ENVIRONMENTAL OR OTHERWISE (COLLECTIVELY "LIABILITIES") OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):

(i) THIS LICENSE, INCLUDING, WITHOUT LIMITATION, ITS ENVIRONMENTAL PROVISIONS,

(ii) ANY RIGHTS OR INTERESTS GRANTED PURSUANT TO THIS LICENSE,

(iii) LICENSEE'S OCCUPATION AND USE OF THE PREMISES,

(iv) THE ENVIRONMENTAL CONDITION AND STATUS OF THE PREMISES CAUSED BY OR CONTRIBUTED BY LICENSEE, OR

(v) ANY ACT OR OMISSION OF LICENSEE OR LICENSEE'S OFFICERS, AGENTS, INVITEES, EMPLOYEES, OR CONTRACTORS, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER,

EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTED TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNITEE. THE ONLY LIABILITIES WITH RESPECT TO WHICH LICENSEE'S OBLIGATION TO

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INDEMNIFY THE INDEMNITEES DOES NOT APPLY ARE LIABILITIES TO THE EXTENT PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF AN INDEMNITEE.

(b) **FURTHER, TO THE FULLEST EXTENT PERMITTED BY LAW, NOTWITHSTANDING THE LIMITATION IN SECTION 19(a), LICENSEE SHALL NOW AND FOREVER WAIVE ANY AND ALL CLAIMS, REGARDLESS WHETHER BASED ON STRICT LIABILITY, NEGLIGENCE OR OTHERWISE, THAT LICENSOR IS AN "OWNER", "OPERATOR", "ARRANGER", OR "TRANSPORTER" WITH RESPECT TO THE CHANNEL AND DRAINAGE STRUCTURES FOR THE PURPOSES OF CERCLA OR OTHER ENVIRONMENTAL LAWS. TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE WILL INDEMNIFY, DEFEND AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL SUCH CLAIMS REGARDLESS OF THE NEGLIGENCE OF THE INDEMNITEES. LICENSEE FURTHER AGREES THAT THE USE OF THE PREMISES AS CONTEMPLATED BY THIS LICENSE SHALL NOT IN ANY WAY SUBJECT LICENSOR TO CLAIMS THAT LICENSOR IS OTHER THAN A COMMON CARRIER FOR PURPOSES OF ENVIRONMENTAL LAWS AND EXPRESSLY AGREES TO INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FOR ANY AND ALL SUCH CLAIMS. IN NO EVENT SHALL LICENSOR BE RESPONSIBLE FOR THE ENVIRONMENTAL CONDITION OF THE PREMISES.**

(c) **TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE FURTHER AGREES, REGARDLESS OF ANY NEGLIGENCE OR ALLEGED NEGLIGENCE OF ANY INDEMNITEE, TO INDEMNIFY, AND HOLD HARMLESS THE INDEMNITEES AGAINST AND ASSUME THE DEFENSE OF ANY LIABILITIES ASSERTED AGAINST OR SUFFERED BY ANY INDEMNITEE UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT ("FELA") WHENEVER EMPLOYEES OF LICENSEE OR ANY OF ITS AGENTS, INVITEES, OR CONTRACTORS CLAIM OR ALLEGE THAT THEY ARE EMPLOYEES OF ANY INDEMNITEE OR OTHERWISE. THIS INDEMNITY SHALL ALSO EXTEND, ON THE SAME BASIS, TO FELA CLAIMS BASED ON ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS, INCLUDING BUT NOT LIMITED TO THE SAFETY APPLIANCE ACT, THE LOCOMOTIVE INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.**

(d) Upon written notice from Licensor, Licensee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity relating to any matter covered by this License for which Licensee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Licensee shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

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PERSONAL PROPERTY WAIVER

20. ALL PERSONAL PROPERTY, INCLUDING, BUT NOT LIMITED TO, FIXTURES, EQUIPMENT, OR RELATED MATERIALS UPON THE PREMISES WILL BE AT THE RISK OF LICENSEE ONLY, AND NO INDEMNITEE WILL BE LIABLE FOR ANY DAMAGE THERETO OR THEFT THEREOF, WHETHER OR NOT DUE IN WHOLE OR IN PART TO THE NEGLIGENCE OF ANY INDEMNITEE.

INSURANCE

21. Licensee shall, at its sole cost and expense, procure and maintain during the life of this License 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 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 endorsements, which shall be indicated on the certificate of insurance:

- The employee and workers compensation related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- 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 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:

- Licensee'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.

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D. **Railroad Protective Liability Insurance**. This insurance shall name only the Licensor as the Insured with coverage of at least $2,000,000 per occurrence and $6,000,000 in the aggregate. The coverage obtained under this policy shall only be effective during the initial installation and/or construction of the Channel Improvements and Drainage Structures. **THE CONSTRUCTION OF THE CHANNEL IMPROVEMENTS AND DRAINAGE STRUCTURES SHALL BE COMPLETED WITHIN ONE (1) YEAR OF THE EFFECTIVE DATE.** If further maintenance of the channel and drainage structures is needed at a later date, an additional Railroad Protective Liability Insurance Policy shall be required. 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 Licensor prior to performing any work or services under this License.

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 $ 6,825.00.

- ☐ I **elect** to participate in Licensor's Blanket Policy;

- ☐ I **elect not** to participate in Licensor's Blanket Policy.

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.

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

Licensee's insurance policies through policy endorsement, must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by Licensor. 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 endorsement and shall name Licensor and Staubach Global Services - RR, Inc. as additional insureds with respect to work performed under this License. Severability of interest and naming Licensor and

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Staubach Global Services - RR, Inc. as additional insureds shall be indicated on the certificate of insurance.

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

Prior to commencing the Work, Licensee shall furnish to Licensor an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Licensor 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. In the event of a claim or lawsuit involving Licensor arising out of this License, Licensee will make available any required policy covering such claim or lawsuit.

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

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

Not more frequently than once every five years, Licensor 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 Licensee, Licensee shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming Licensor as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Licensor to the same extent and under the same terms and conditions as Licensee is required to release, defend and indemnify Licensor herein.

Failure to provide evidence as required by this Section 21 shall entitle, but not require, Licensor to terminate this License immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Licensee's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by Licensee shall not be deemed to release or diminish the liability of Licensee including,

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without limitation, liability under the indemnity provisions of this License. Damages recoverable by Licensor shall not be limited by the amount of the required insurance coverage.

For purposes of this Section 21, Licensor shall mean "Burlington Northern Santa Fe Corporation", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

ENVIRONMENTAL

22. (a) Licensee shall strictly comply with all federal, state and local environmental laws and regulations 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, CERCLA (collectively referred to as the "Environmental Laws"). Licensee shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws on the Premises. Licensee shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws on or about the Premises.

(b) Licensee shall give Licensor immediate notice to Licensor'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 Licensee's use of the Premises. Licensee shall use the best efforts to promptly respond to any release on or from the Premises. Licensee also shall give Licensor immediate notice of all measures undertaken on behalf of Licensee to investigate, remediate, respond to or otherwise cure such release or violation.

(c) In the event that Licensor has notice from Licensee or otherwise of a release or violation of Environmental Laws arising in any way with respect to the Channel Improvements and/or Drainage Structures which occurred or may occur during the term of this License, Licensor may require Licensee, at Licensee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises or Licensor's right-of-way.

(d) Licensee shall promptly report to Licensor in writing any conditions or activities upon the Premises known to Licensee 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 Licensee's reporting to Licensor shall not relieve Licensee of any obligation whatsoever imposed on it by this License. Licensee shall promptly respond to Licensor's request for information regarding said conditions or activities.

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ALTERATIONS

23. Licensee may not make any alterations of the Premises or permanently affix anything to the Premises or any buildings or other structures adjacent to the Premises without Licensor's prior written consent.

NO WARRANTIES

24. **LICENSOR'S DUTIES AND WARRANTIES ARE LIMITED TO THOSE EXPRESSLY STATED IN THIS LICENSE AND SHALL NOT INCLUDE ANY IMPLIED DUTIES OR IMPLIED WARRANTIES, NOW OR IN THE FUTURE. NO REPRESENTATIONS OR WARRANTIES HAVE BEEN MADE BY LICENSOR OTHER THAN THOSE CONTAINED IN THIS LICENSE. LICENSEE HEREBY WAIVES ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE PREMISES OR WHICH MAY EXIST BY OPERATION OF LAW OR IN EQUITY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, HABITABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

QUIET ENJOYMENT

25. **LICENSOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND LICENSEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE.**

DEFAULT

26. If default shall be made in any of the covenants or agreements of Licensee contained in this document, or in case of any assignment or transfer of this License by operation of law, Licensor may, at its option, terminate this License by serving thirty (30) days' notice in writing upon Licensee. Any waiver by Licensor of any default or defaults shall not constitute a waiver of the right to terminate this License for any subsequent default or defaults, nor shall any such waiver in any way affect Licensor's ability to enforce any Section of this License. The remedy set forth in this Section 26 shall be in addition to, and not in limitation of, any other remedies that Licensor may have at law or in equity.

LIENS

27. Licensee 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 Licensee on Premises. Licensor is hereby authorized to post any notices or take any other action upon or with respect
to Premises that is or may be permitted by law to prevent the attachment of any such liens to Premises; provided, however, that failure of Licensor to take any such action shall not relieve Licensee of any obligation or liability under this Section 27 or any other Section of this License.

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08 SEP 15 AM 9:35

TERMINATION

28. This License may be terminated by Licensor, at any time, by serving thirty (30) days' written notice of termination upon Licensee. This License may be terminated by Licensee upon execution of Licensor's Mutual Termination Letter Agreement then in effect. Upon expiration of the time specified in such notice, this License and all rights of Licensee shall absolutely cease. The Licensee shall not be responsible for damage to the Licensor's right of way that occurs or otherwise arises after the termination of the License to the extent such damage is caused by failure to maintain the Drainage Structures after the License's termination. Notwithstanding the foregoing or anythjng contained herein to the contrary, Licensee acknowledges and agrees that the foregoing sentence does not release Licensee or waive in any respect Licensee's responsibility to meet its obligations during the term of this License with respect to the Drainage Structures, including without limitation its maintenance and indemnity obligations.

29. If Licensee fails to surrender to Licensor the Premises, upon any termination of this License, all liabilities and obligations of Licensee hereunder shall continue in effect until the Premises are surrendered. Termination shall not release Licensee from any liability or obligation, whether of indemnity or otherwise, resulting from any events happening prior to the date of termination.

ASSIGNMENT

30. Neither Licensee, nor the heirs, legal representatives, successors or assigns of Licensee, nor any subsequent assignee, shall assign or transfer this License or any interest herein, without the prior written consent and approval of Licensor, which may be withheld in Licensor's sole discretion.

NOTICES

31. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice of such change in address.

If to Licensor: Staubach Global Services - RR, Inc.
3017 Lou Menk Drive, Suite 100
Fort Worth, TX 76131
Attn: Licenses/Permits

with a copy to: BNSF Railway Company
P.O. Box 961050
Fort Worth, TX 76161-0050
Attn: Manager – Land Revenue Management

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08 SEP 15 AM 9:35

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08 SEP 15 AM 9:35

If to Licensee: City of El Paso
2 Civic Center Plaza, 4th Floor
Engineering Department
El Paso, Texas 79901

With a copy to: EPWU
1154 Hawkins
El Paso, Texas, 79925
Attn: Storm Water Utility Manager

SURVIVAL

32. Neither termination nor expiration will release either party from any liability or obligation under this License, 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 when the Premises are restored to its condition as of the Effective Date.

RECORDATION

33. It is understood and agreed that this License shall not be recorded in the Real Property Records of El Paso County.

APPLICABLE LAW

34. All questions concerning the interpretation or application of provisions of this License shall be decided according to the laws of the State of Texas.

SEVERABILITY

35. To the maximum extent possible, each provision of this License shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this License shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this License.

INTEGRATION

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

MISCELLANEOUS

37. In the event that Licensee consists of two or more parties, all the covenants and agreements of Licensee herein contained shall be the joint and several covenants and agreements of such parties.

38. The waiver by Licensor of the breach of any provision herein by Licensee shall in no way impair the right of Licensor to enforce that provision for any subsequent breach thereof.

39. All provisions contained in this License shall be binding upon, inure to the benefit of, and be enforceable by the respective successors and assigns of Licensor and Licensee to the same extent as if each such successor and assign was named a party to this License.

40. Staubach Global Services – RR, Inc. is acting as representative for BNSF Railway Company.

IN WITNESS WHEREOF, this License has been duly executed, in duplicate, by the parties hereto as of the day and year first above written.

BNSF RAILWAY COMPANY
P.O. Box 961050
Fort Worth, Texas 76161-0050

By: _____
Dalen Wintermute
Manager – Land Revenue Management

CITY OF EL PASO
2 Civic Center Plaza, 4th Floor
El Paso, Texas 79901

By: _____
Joyce Wilson
Title: City Manager

Approved as to form:

Cynthia Osborn
Assistant City Attorney

Approved as to content:

R. Alan Shubert
City Engineer

CITY CLERK DEPT.
08 SEP 15 AM 9:35

TRACKING NO. 08-35420

EXHIBIT "A"

ATTACHED TO CONTRACT BETWEEN

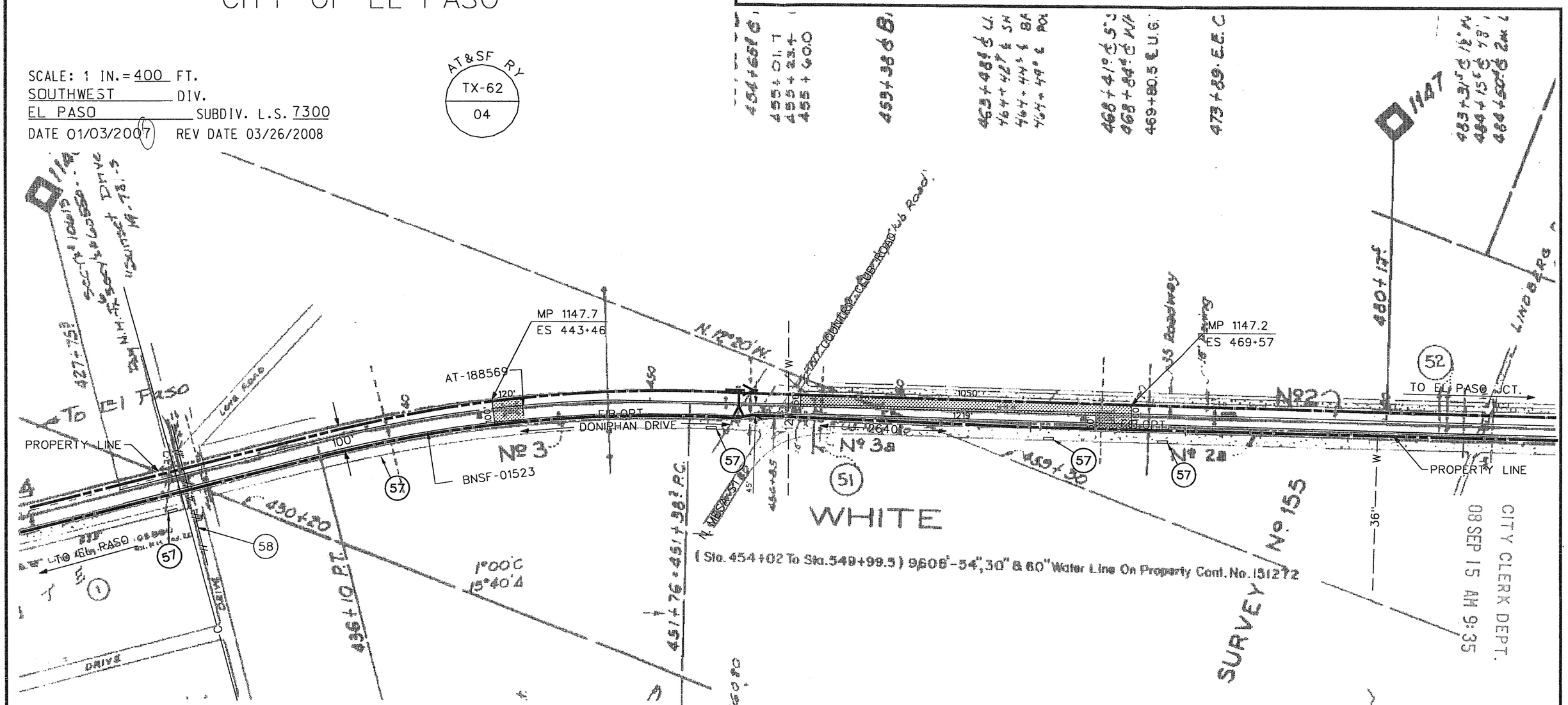
BNSF RAILWAY COMPANY

AND

CITY OF EL PASO

SCALE: 1 IN. = 400 FT.
SOUTHWEST DIV.
EL PASO SUBDIV. L.S. 7300
DATE 01/03/2007 REV DATE 03/26/2008

AT&SF RY
TX-62
04



DESCRIPTION:

TWO PARCEL OF LAND CONTAINING A TOTAL OF 85,530 SQ. FT. (1.963 A.C.) MORE OR LESS TO CONCRETE LINE EXISTING CHANNEL AND REPLACE EXISTING DRAINAGE STRUCTURES SHOWN SHADED.

NEAR EL PASO
COUNTY OF EL PASO
STATE OF TX

KLC

DRAWING NO. Z-42884