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BEFORE THE WASHINGTON STATE

UTILITIES AND TRANSPORTATION COMMISSION HEARINGS BOARD

CITY OF SPOKANE VALLEY, a municipal corporation,

Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY (aka UPRR),

Respondent.

No. TR-210814; 210809

UNION PACIFIC RAILROAD COMPANY'S RESPONSE AND MOTION TO DISMISS CITY OF SPOKANE VALLEY'S PETITION AND COMPLAINT

I. RELIEF REQUESTED

1. Union Pacific Railroad Company ("Union Pacific"), by and through undersigned counsel, respectfully submits this Response and Motion to Dismiss (the "Response") to the Petition and Complaint filed by City of Spokane Valley (the "City") on October 25, 2021. The Utilities and Transportation Commission (the "Commission") should decline to take agency action because the Complaint violates the Commerce Clause of the U.S. Constitution, the federal ICC Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq*, and is arbitrary and unreasonable. In addition, the Petition fails to allege a public safety need as required under RCW 81.53.261. Accordingly, the Commission should dismiss the City's Complaint and deny the City's Petition.

II. BACKGROUND FACTS

2 2. Starting in August 2019, Union Pacific and the City discussed possible
3 modifications to the crossing.

4 3. On February 7, 2020, the City provided a copy of the Petition for approval of
5 crossing modifications pursuant to RCW 81.53.261. Union Pacific declined to sign a waiver of
6 hearing.

7 4. On or about June 24, 2021, Union Pacific sent the City a proposed agreement for
8 the modification titled “Public Highway At-Grade Crossing,” which set forth a clause for the City
9 to pay an amount of \$8,670 per annum for maintenance costs for the reconstruction and widening
10 of the road crossing (the “Project”). A true and correct copy of the proposed agreement is attached
11 as **Exhibit A**.

12 5. In response to proposed agreement, the City sent a letter to Union Pacific requesting
13 the removal of the maintenance costs clause. A true and correct copy of the June 30, 2021 letter is
14 attached as **Exhibit B**.

15 6. On August 4, 2021, representative of Union Pacific provided a response to the
16 City’s letter. A true and correct copy of the August 4, 2021 email is attached as **Exhibit C**.

17 7. In response to the email, the City sent a letter to Union Pacific insisting that Union
18 Pacific’s position was contrary to and noncompliant with RCW 81.53.295. A true and correct copy
19 of the August 30, 2021 letter is attached as **Exhibit D**.

20 8. On October 2, 2021, Union Pacific sent a letter to the City to advise that RCW
21 81.53.295 is inapplicable since federal funds were not allocated to this project. A true and correct
22 copy of the October 2, 2021 letter is attached as **Exhibit E**.

23 9. Ultimately, Union Pacific and the City were unable to reach an agreement regarding
24 the maintenance costs. On October 25, 2021, the City filed its Petition and Complaint with the
25

1 Commission, requesting that Union Pacific solely bear the maintenance costs associated with the
2 project.

3 III. LEGAL ISSUES

4 10. The Commission should dismiss the City’s Complaint because it (a) violates the
5 Commerce Clause of the U.S. Constitution, (b) violates the federal ICC Termination Act
6 (“ICCTA”), 49 U.S.C. § 10101 *et seq*, and (c) is arbitrary and unreasonable. Further, the
7 Commission should deny the City’s Petition because it fails to allege that modifications are
8 required for public safety.

9 IV. ARGUMENT

10 A. The City’s Complaint Violates the Commerce Clause of the U.S. Constitution

11 11. Rail transportation is an inherently interstate activity. Thus, “the courts long have
12 recognized a need to regulate railroad operations at the federal level.” *City of Auburn v. United*
13 *States*, 154 F.3d 1025, 1029 (9th Cir. 1998). Railroads are subject to one of “the most pervasive
14 and comprehensive of federal regulatory schemes.” *Chicago & N.W. Transp. Co. v. Kalo Brick &*
15 *Tile Co.*, 450 U.S. 311, 318 (1981). The Federal Government has determined that a uniform
16 regulatory scheme is necessary to the operation of the national systems. *United Transp. Union v.*
17 *Long Island R. R. Co.*, 445 U.S. 678, 688 (1982). Indeed, courts agree that when a state acquires a
18 railroad, it does so “knowing that the railroad is subject to this longstanding and comprehensive
19 scheme of federal regulation of its operations and its labor relations.” *Id.* at 689-690.

20 12. Even so, states have often tried to regulate certain aspects of railroad transportation.
21 The Supreme Court has “frequently invalidated” such efforts. *See Chicago & N.W. Transp. Co. v.*
22 *Kalo Brick & Tile Co.* For example, the Court struck down an Arizona law that imposed a
23 maximum train length of fourteen passenger cars or seventy freight cars. This state regulation
24 violated the Commerce Clause. *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 769
25 (1945). In striking down the Arizona law, the Court observed that national uniformity in such

1 regulation “is practically indispensable to the operation of an efficient and economic railway
2 system.” *Id.* at 772. The Court has since emphasized that the Commerce Clause is “a self-executing
3 limitation on the power of the States to enact laws imposing substantial burdens on such
4 commerce.” *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); *see Pike v. Bruce*
5 *Church, Inc.* 397 U.S. 137 (1970).

6 13. Union Pacific contributes to the maintenance of 284 public at-grade crossings
7 throughout the state of Washington, which exist for the benefit of local communities through which
8 Union Pacific operates. Union Pacific’s operation across these crossings consists mainly of the
9 interstate shipment of cargo. Modification of the rail-highway grade crossing is solely for the
10 public benefit and Union Pacific does not derive any ascertainable benefit from the Project.
11 Imposing 100% of maintenance costs on Union Pacific is excessive in relation to any local benefit
12 it confers, and thereby creating precedent for responsibility for future maintenance costs on similar
13 projects, imposes a substantial burden on the flow of interstate commerce and is not fair or
14 reasonable and therefore violates the Commerce Clause. Accordingly, the Commission should
15 dismiss the Complaint with prejudice.

16 **B. The City’s Complaint Violates the ICC Termination Act (“ICCTA”), 49 U.S.C. §**
17 **10501**

18 14. Congress enacted the ICCTA in 1995 to abolish the Interstate Commerce
19 Commission and empower its successor, the Surface Transportation Board (STB), to regulate rail
20 transportation in the United States. 49 U.S.C. § 10501. The ICCTA was passed in 1995, in part
21 with the purpose of expanding federal jurisdiction and preemption of railroad regulation. *Or. Coast*
22 *Scenic R.R., LLC v. Or. Dep’t of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016); *see* H.R. Rep.
23 No. 104-311 at 95 (1995) (“[C]hanges are made to reflect the direct and complete pre-emption of
24 State economic regulation of railroads.”). Through the ICCTA, “Congress intended to preempt a
25

1 wide range of state and local regulation of rail activity.” *Ass’n of Am. R.R. v. S. Coast Air Quality*
2 *Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

3 15. To that end, Congress gave the STB exclusive jurisdiction over “transportation by
4 rail carriers . . . with respect to rates, classifications, rules . . . , practices, routes, services, and
5 facilities of such carriers” and over “the construction, acquisition, operation, abandonment, or
6 discontinuance of [tracks] or facilities.” 49 U.S.C. § 10501(b). Apart from certain narrow
7 exceptions, ICCTA’s remedies are “exclusive and preempt the remedies provided under Federal
8 or State law.” *Id.* “It is difficult to imagine a broader statement of Congress’s intent to preempt
9 state regulatory authority over railroad operations.” *City of Auburn*, 154 F.3d at 1030.

10 16. State or local laws that intrude on the STB’s exclusive jurisdiction “have the effect
11 of managing or governing rail transportation” and are thus preempted. *Oregon Coast Scenic R.R.*,
12 841 F.3d at 1077 (9th Cir. 2016) (quoting *Ass’n of Am. R.R.*, 622 F.3d at 1097).

13 17. The City alleges that RCW 81.53.295 governs. Union Pacific reserves the right to
14 challenge the factual and legal merits of the City’s claims and is aware of no supporting evidence
15 that federal funding was used. However, for the purposes of this Motion, the City’s position that
16 RCW 81.53.295 applies is untenable. The statute requires railroads to bear the entire cost of
17 maintaining any crossing signals and warning devices at a railroad crossing. This statewide
18 imposition of all crossing maintenance costs on railroads like Union Pacific constitutes economic
19 regulation of rail transportation and thus intrudes on the exclusive jurisdiction of the STB in this
20 area. This imposes an unreasonable burden on railroad operations and interstate commerce. If
21 every state or locality were able to impose a similar requirement on each railroad operating within
22 its jurisdiction, the resulting burden on interstate rail operations would be substantial. States cannot
23 intrude on the uniform federal regulatory regime in this way. Accordingly, the Commission should
24 dismiss the Complaint with prejudice because RCW 81.53.295 is preempted by 49 U.S.C. §
25 10501(b).

1 C. Apportioning the Full Amount of Maintenance Costs to Union Pacific is Arbitrary
2 and Unreasonable

3 18. Apportionment of maintenance costs may not be arbitrary or unreasonable. *See*
4 *Nashville, C. & S. L. Railway v. Walters*, 294 U.S. 405 (1935). Washington courts have tried to
5 provide a just and equitable distribution of contribution based on specific facts of the case. *See*
6 *State ex rel. Seattle v. N.P.R. Co.*, 166 Wash. 437 (1932) (that the cost of the span should have
7 been apportioned between the railroads upon the basis of the widths of their respective rights of
8 way; and that the cost of the approaches should have been divided equally between the three
9 railroads concerned); *Wash. V. N. Pac. Ry. Co.*, 128 Wash. 73 (1924) (the city endeavored to
10 distribute this cost according to its judgment as to what is fair, just and reasonable).

11 19. Here, a carte blanche allocation of 100% of the maintenance costs to Union Pacific
12 is arbitrary and unreasonable.

13 D. The City's Petition Fails to Allege a Public Safety Need

14 20. RCW 81.53.261 provides in relevant part:

15 . . . he or she or it shall file with the utilities and transportation
16 commission a petition in writing, **alleging that the public safety**
17 **requires the installation of specified signals or other warning**
devices at such crossing or specified changes in the method and
manner of existing crossing warning devices.

18 The City's Petition fails to show that public safety necessitates a change to the existing
19 warning devices. Accordingly, the Commission should dismiss the Petition.

20 V. CONCLUSION

21 21. For the reasons stated above, the Commission should dismiss the City's Complaint
22 with prejudice because it (a) violates the Commerce Clause of the U.S. Constitution, (b) violates
23 the federal ICC Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq*, and (c) is arbitrary and
24 unreasonable. Further, the Commission should deny the City's Petition with prejudice because it
25 fails to allege that modifications are required for public safety.

1 DATED this 22nd day of November, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

2
3 By: /s/ Rachel Tallon Reynolds

Rachel Tallon Reynolds, WSBA #38750

Jean Y. Kang, WSBA #42074

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(206) 436-2020

Rachel.Reynolds@lewisbrisbois.com

Jean.Kang@lewisbrisbois.com

Attorneys for Respondent

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1 **DECLARATION OF SERVICE**

2 I hereby declare under penalty of perjury under the laws of the State of Washington that I
3 caused a true and correct copy of the foregoing to be served via the methods below on this 22nd
4 day of November, 2021 on the following counsel/party of record:

5 Kenneth W. Harper 6 MENKE JACKSON BEYER, LLP 7 807 N. 39 th Avenue 8 Yakima, WA 98902 9 Phone: (509) 575-0313 10 Email: kharper@mjbe.com 11 <i>Attorneys for City of Spokane Valley</i>	<input type="checkbox"/> via U.S. Mail, first class, postage prepaid <input type="checkbox"/> via Legal Messenger Hand Delivery <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-mail:
12 Washington Utilities & Transportation 13 Commission	<input checked="" type="checkbox"/> efiling.utc.wa.gov/form

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/s/ Elizabeth Pina
Elizabeth Pina, Legal Assistant
Elizabeth.Pina@lewisbrisbois.com

EXHIBIT A

PUBLIC HIGHWAY AT-GRADE CROSSING AGREEMENT

BARKER ROAD
DOT NUMBER 662526C
12.99 – SPOKANE SUBDIVISION
SPOKANE, SPOKANE COUNTY, WASHINGTON

THIS AGREEMENT ("Agreement") is made and entered into as of the ____ day of _____, 2021 ("Effective Date"), by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation, to be addressed at Real Estate Department, 1400 Douglas Street, Mail Stop 1690, Omaha, Nebraska 68179 ("Railroad") and **CITY OF SPOKANE VALLEY**, a municipal corporation or political subdivision of the State of Washington to be addressed at 10210 E. Sprague Avenue, Spokane Valley, Washington, 99206 ("Political Body").

RECITALS:

By instrument dated February 17, 2017, the Union Pacific Railroad Company and the Political Body entered into an agreement (the "Original Agreement") covering the construction, use, maintenance and repair of an at grade public road crossing over Barker Road, DOT Number 662526 C at Railroad's Milepost 12.99 on Railroad's Spokane Subdivision at or near Spokane, Spokane County, Washington.

The Political Body now desires to undertake as its project (the "Project") the reconstruction and widening of the road crossing that was constructed under the Original Agreement. The road crossing, as reconstructed and widened is hereinafter the "Roadway" and the portion of the Railroad's property where the Roadway crosses the Railroad's property is the "Crossing Area."

The right of way granted by Union Pacific Railroad to the Political Body under the terms of the Original Agreement or a separate document is not sufficient to allow for the reconstruction and widening of the Roadway. Therefore, under this Agreement, the Railroad will be granting additional rights to the Political Body to facilitate the reconstruction and widening of the Roadway. The portion of Railroad's property that Political Body needs to use in connection with the Roadway (including the right of way area covered under the Original Agreement or in a separate document) is shown on the print marked **Exhibit A** and also shown in the detailed plans marked **Exhibit A-1**, with each exhibit being attached hereto and hereby made a part hereof (the "Crossing Area")

The Railroad and the Political Body are entering into this Agreement to cover the above.

AGREEMENT:

NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

Section 1. EXHIBIT B

The general terms and conditions marked **Exhibit B**, are attached hereto and hereby made a part hereof.

Section 2. RAILROAD GRANTS RIGHT

For and in consideration **FORTY FIVE THOUSAND NINE HUNDRED FOUR DOLLARS AND EIGHTY FOUR CENTS (\$45,904.84)** to be paid by the Political Body to the Railroad upon the execution and delivery of this Agreement and in further consideration of the Political Body's agreement to perform and comply with the terms of this Agreement, the Railroad hereby grants to the Political Body the right to construct, maintain and repair the Roadway over and across the Crossing Area.

For purposes of advanced signal preemption, Railroad hereby grants permission and authority to Political Body and/or its Contractor (as defined below) to install the conduit with the necessary wiring on Railroad right of way on the condition that prior to performing any work on Railroad's property, Political Body shall, or shall require its Contractor to, notify the Railroad and/or enter into a right of entry agreement with Railroad, as applicable pursuant to the terms and conditions of this Agreement.

Section 3. DEFINITION OF CONTRACTOR

For purposes of this Agreement the term "Contractor" shall mean the contractor or contractors hired by the Political Body to perform any Project work on any portion of the Railroad's property and shall also include the Contractor's subcontractors and the Contractor's and subcontractor's respective employees, officers and agents, and others acting under its or their authority.

Section 4. CONTRACTOR'S RIGHT OF ENTRY AGREEMENT - INSURANCE

A. Prior to Contractor performing any work within the Crossing Area and any subsequent maintenance and repair work, the Political Body shall require the Contractor to:

- execute the Railroad's then current Contractor's Right of Entry Agreement
- obtain the then current insurance required in the Contractor's Right of Entry Agreement; and
- provide such insurance policies, certificates, binders and/or endorsements to the Railroad.

B. The Railroad's current Contractor's Right of Entry Agreement is marked **Exhibit D**, attached hereto and hereby made a part hereof. The Political Body confirms that it will inform its Contractor that it is required to execute such form of agreement and obtain the required insurance before commencing any work on any Railroad property. Under no circumstances will the Contractor be allowed on the Railroad's property without first executing the Railroad's Contractor's Right of Entry Agreement and obtaining the insurance set forth therein and also providing to the Railroad the insurance policies, binders, certificates and/or endorsements described therein.

C. All insurance correspondence, binders, policies, certificates and/or endorsements shall be sent to:

Senior Manager - Contracts
Union Pacific Railroad Company
Real Estate Department
1400 Douglas Street, Mail Stop 1690
Omaha, NE 68179-1690
UP File Folder No. 3034-86

D. If the Political Body's own employees will be performing any of the Project work, the Political Body may self-insure all or a portion of the insurance coverage subject to the Railroad's prior review and approval.

Section 5. FEDERAL AID POLICY GUIDE

If the Political Body will be receiving any federal funding for the Project, the current rules, regulations and provisions of the Federal Aid Policy Guide as contained in 23 CFR 140, Subpart I and 23 CFR 646, Subparts A and B are incorporated into this Agreement by reference.

Section 6. NO PROJECT EXPENSES TO BE BORNE BY RAILROAD

The Political Body agrees that no Project costs and expenses are to be borne by the Railroad. In addition, the Railroad is not required to contribute any funding for the Project.

Section 7. WORK TO BE PERFORMED BY RAILROAD; BILLING SENT TO POLITICAL BODY; POLITICAL BODY'S PAYMENT OF BILLS

A. The work to be performed by the Railroad, at the Political Body's sole cost and expense, is described in the Railroad's Material and Force Account Estimate dated December 8, 2020, marked **Exhibit C**, attached hereto and hereby made a part hereof (the "Estimate"). As set forth in the Estimate, the Railroad's estimated cost for the Railroad's work associated with the Project is Six Hundred Fifteen Thousand Seven Hundred Fifty Eight Dollars (\$615,758).

B. The Railroad, if it so elects, may recalculate and update the Estimate submitted to the Political Body in the event the Political Body does not commence construction on the portion of the Project located on the Railroad's property within six (6) months from the date of the Estimate.

C. The Political Body acknowledges that the Estimate does not include any estimate of flagging or other protective service costs that are to be paid by the Political Body or the Contractor in connection with flagging or other protective services provided by the Railroad in connection with the Project. All of such costs incurred by the Railroad are to be paid by the Political Body or the Contractor as determined by the Railroad and the Political Body. If it is determined that the Railroad will be billing the Contractor directly for such costs, the Political Body agrees that it will pay the Railroad for any flagging costs that have not been paid by any Contractor within thirty (30) days of the Contractor's receipt of billing.

D. The Railroad shall send progressive billing to the Political Body during the Project and final billing to the Political Body within one hundred eighty (180) days after receiving written notice from the Political Body that all Project work affecting the Railroad's property has been completed.

E. The Political Body agrees to reimburse the Railroad within thirty (30) days of its receipt of billing from the Railroad for one hundred percent (100%) of all actual costs incurred by the Railroad in connection with the Project including, but not limited to, all actual costs of engineering review (including preliminary engineering review costs incurred by Railroad prior to the Effective Date of this Agreement), construction, inspection, flagging (unless flagging costs are to be billed directly to the Contractor), procurement of materials, equipment rental, manpower and deliveries to the job site and all direct and indirect overhead labor/construction costs including Railroad's standard additive rates.

Section 8. PLANS

A. The Political Body, at its expense, shall prepare, or cause to be prepared by others, the detailed plans and specifications for the Project and the Structure and submit such plans and specifications to the Railroad's Assistant Vice President Engineering-Design, or his authorized representative, for prior review and approval. The plans and specifications shall include all Roadway layout specifications, cross sections and elevations, associated drainage, and other appurtenances.

B. The final one hundred percent (100%) completed plans that are approved in writing by the Railroad's Assistant Vice President Engineering-Design, or his authorized representative, are hereinafter referred to as the "Plans". The Plans are hereby made a part of this Agreement by reference.

C. No changes in the Plans shall be made unless the Railroad has consented to such changes in writing.

D. The Railroad's review and approval of the Plans will in no way relieve the Political Body or the Contractor from their responsibilities, obligations and/or liabilities under this Agreement, and will be given with the understanding that the Railroad makes no representations or warranty as to the validity, accuracy, legal compliance or completeness of the Plans and that any reliance by the Political Body or Contractor on the Plans is at the risk of the Political Body and Contractor.

Section 9. NON-RAILROAD IMPROVEMENTS

A. Submittal of plans and specifications for protecting, encasing, reinforcing, relocation, replacing, removing and abandoning in place all non-railroad owned facilities (the "Non Railroad Facilities") affected by the Project including, without limitation, utilities, fiber optics, pipelines, wirelines, communication lines and fences is required under Section 8. The Non Railroad Facilities plans and specifications shall comply with Railroad's standard specifications and requirements, including, without limitation, American Railway Engineering and Maintenance-of-Way Association ("AREMA") standards and guidelines. Railroad has no obligation to supply additional land for any Non Railroad Facilities and does not waive its right to assert preemption defenses, challenge the right-to-take, or pursue compensation in any condemnation action, regardless if the submitted Non Railroad Facilities plans and specifications comply with Railroad's standard specifications and requirements. Railroad has no obligation to permit any Non Railroad Facilities to be abandoned in place or relocated on Railroad's property.

B. Upon Railroad's approval of submitted Non Railroad Facilities plans and specifications, Railroad will attempt to incorporate them into new agreements or supplements of existing agreements with Non Railroad Facilities owners or operators. Railroad may use its standard terms and conditions, including, without limitation, its standard license fee and administrative charges when requiring supplements or new

agreements for Non Railroad Facilities. Non Railroad Facilities work shall not commence before a supplement or new agreement has been fully executed by Railroad and the Non Railroad Facilities owner or operator, or before Railroad and Political Body mutually agree in writing to (i) deem the approved Non Railroad Facilities plans and specifications to be Plans pursuant to Section 8B, (ii) deem the Non Railroad Facilities part of the Structure, and (iii) supplement this Agreement with terms and conditions covering the Non Railroad Facilities.

Section 10. EFFECTIVE DATE; TERM; TERMINATION

A. This Agreement is effective as of the Effective Date first herein written and shall continue in full force and effect for as long as the Roadway remains on the Railroad's property.

B. The Railroad, if it so elects, may terminate this Agreement effective upon delivery of written notice to the Political Body in the event the Political Body does not commence construction on the portion of the Project located on the Railroad's property within twelve (12) months from the Effective Date.

C. If the Agreement is terminated as provided above, or for any other reason, the Political Body shall pay to the Railroad all actual costs incurred by the Railroad in connection with the Project up to the date of termination, including, without limitation, all actual costs incurred by the Railroad in connection with reviewing any preliminary or final Project Plans.

Section 11. CONDITIONS TO BE MET BEFORE POLITICAL BODY CAN COMMENCE WORK

Neither the Political Body nor the Contractor may commence any work within the Crossing Area or on any other Railroad property until:

- (i) The Railroad and Political Body have executed this Agreement.
- (ii) The Railroad has provided to the Political Body the Railroad's written approval of the Plans.
- (iii) Each Contractor has executed Railroad's Contractor's Right of Entry Agreement and has obtained and/or provided to the Railroad the insurance policies, certificates, binders, and/or endorsements required under the Contractor's Right of Entry Agreement.
- (iv) Each Contractor has given the advance notice(s) required under the Contractor's Right of Entry Agreement to the Railroad Representative named in the Contractor's Right of Entry Agreement.

Section 12. FUTURE PROJECTS

Future projects involving substantial maintenance, repair, reconstruction, renewal and/or demolition of the Roadway shall not commence until Railroad and Political Body agree on the plans for such future projects, cost allocations, right of entry terms and conditions and temporary construction rights, terms and conditions.

Section 13. ASSIGNMENT; SUCCESSORS AND ASSIGNS

A. Political Body shall not assign this Agreement without the prior written consent of Railroad.

B. Subject to the provisions of Paragraph A above, this Agreement shall inure to the benefit of and be binding upon the successors and assigns of Railroad and Political Body.

Section 14. SPECIAL PROVISIONS PERTAINING TO AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

If the Political Body will be receiving American Recovery and Reinvestment Act ("ARRA") funding for the Project, the Political Body agrees that it is responsible in performing and completing all ARRA reporting documents for the Project. The Political Body confirms and acknowledges that Section 1512 of the ARRA provisions applies only to a "recipient" receiving ARRA funding directing from the federal government and, therefore, (i) the ARRA reporting requirements are the responsibility of the Political Body and not of the Railroad, and (ii) the Political Body shall not delegate any ARRA reporting responsibilities to the Railroad. The Political Body also confirms and acknowledges that (i) the Railroad shall provide to the Political Body the Railroad's standard and customary billing for expenses incurred by the Railroad for the Project including the Railroad's standard and customary documentation to support such billing, and (ii) such standard and customary billing and documentation from the Railroad provides the information needed by the Political Body to perform and complete the ARRA reporting documents. The Railroad confirms that the Political Body and the Federal Highway Administration shall have the right to audit the Railroad's billing and documentation for the Project as provided in Section 11 of **Exhibit B** of this Agreement.

Section 15. TERMINATION OF ORIGINAL AGREEMENT

Upon the completion of the Roadway, the Original Agreement dated February 17, 2017, and identified in the Railroad's Records as Audit 284117, shall terminate and the terms and conditions of this Agreement shall govern the use, maintenance and repair of the Roadway.

Section 16. SIGNAL MAINTENANCE COSTS

A. Effective as of the Effective Date of this Agreement, the Political Body, in addition to maintaining at its sole cost and expense the portion of the Roadway described in Section 2 of **Exhibit B**, agrees to pay to Railraod the sum of Eight Thousand Six Hundred Seventy Dollars (\$8,670) per annum, payable annually in advance, as payment for Railroad's maintenance of the railroad crossing warning signals as outlined in **Exhibit F** that are to be installed by the Railroad at the Crossing Area as shown in the Signal Schematic labeled **Exhibit E**.

B. The above annual fee is based on the number of current signal units at the Crossing Area. Effective on the first anniversary of this Agreement and on the anniversary date of each subsequent one year period, the annual fee will be increased at a rate based on the American Association of Railroad's (AAR) signal unit cost index. Such changes in the maintenance fee may be made by the Railroad by means of automatic adjustment in billing. The signal unit base for the annual fee may be re-determined by the Railroad at any time subsequent to the expiration of five (5) years following the date on which the annual rental was last determined or established. Such changes in the maintenance fee may be made by means of automatic adjustment in billing.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the Effective Date first herein written.

UNION PACIFIC RAILROAD COMPANY
(Federal Tax ID #94-6001323)

By: _____
Printed Name: _____
Title: _____

ATTEST:

CITY OF SPOKANE VALLEY

[City Clerk] [County Clerk]

By: _____
Printed Name: _____
Title: _____

(Seal)

Pursuant to Resolution/Order No. _____
dated: _____, 20__ hereto attached

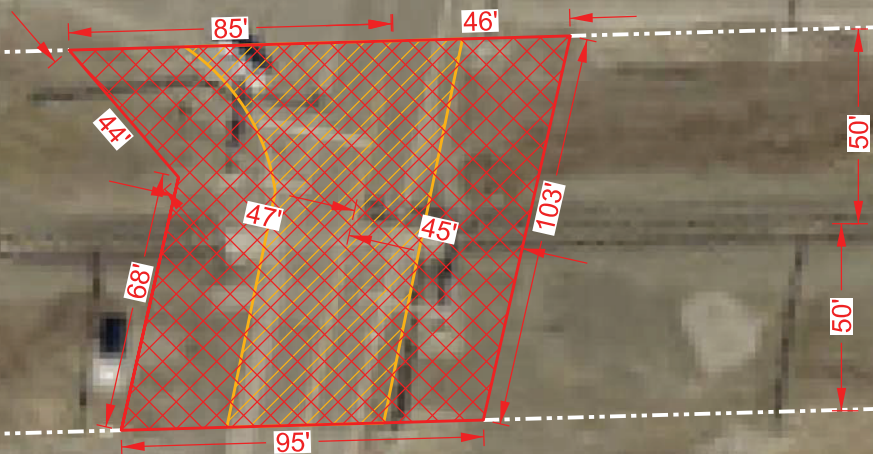
**EXHIBIT A
TO
PUBLIC HIGHWAY AT GRADE CROSSING AGREEMENT**

Exhibit A will be a print showing the Crossing Area (see Recitals)






EUCLID AVE.

BARKER RD.



CROSSING AREA: 10,120 SQ.FT. / 0.23 AC. +/-
 EXISTING CROSSING AREA: 4,578 SQ.FT. / 0.11 AC. +/-

LEGEND:

- CROSSING AREA 
- EXISTING CROSSING AREA 
- UPRRCO. R/W OUTLINED 

NOTE: BEFORE YOU BEGIN ANY WORK, SEE AGREEMENT FOR FIBER OPTIC PROVISIONS.

EXHIBIT "A"

UNION PACIFIC RAILROAD COMPANY

SPOKANE, SPOKANE COUNTY, WA

M.P. 12.99 - SPOKANE SUB.

SIRR/WA/V-1/7
SCALE: 1" = 50'

OFFICE OF REAL ESTATE
OMAHA, NEBRASKA DATE: 4-13-2020

DSK FILE: 3034-86

CADD FILENAME	0303486
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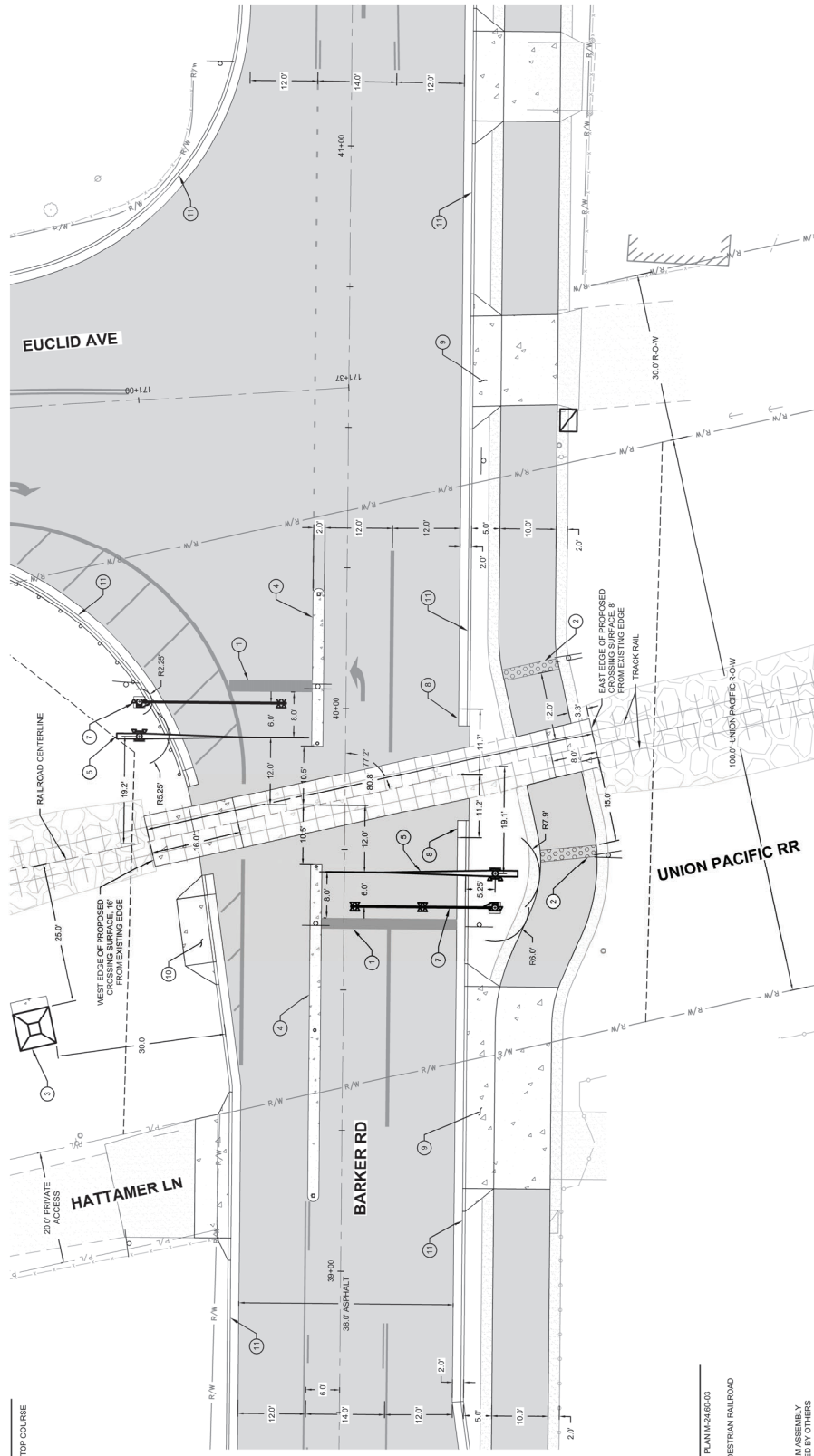
SCAN FILENAME	AERIAL PRINT
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**EXHIBIT A-1
TO
PUBLIC HIGHWAY AT GRADE CROSSING AGREEMENT**

Exhibit A-1 will be the detailed plans of the Crossing Area (see Recitals)

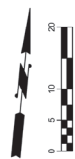
LEGEND

	CRUSHED SURFACE TOP COURSE
	CONCRETE
	ARTERIAL HMA



KEYNOTES

- 1 15.0' STOP BAR, PER WSDOT STANDARD PLAN R-24-B0-03 W/ 2.0'
- 2 2 x 10' DETECTABLE WARNING SURFACE, PEDESTRIAN RAILROAD CROSSING, WSDOT STD PLAN F-5, 10-02
- 3 SIGNAL CABINET
- 4 8" HIGH CEMENT CONCRETE MEDIAN
- 5 ACTIVE TRAFFIC CONTROL DEVICE - GATE ARM ASSEMBLY (ARM LENGTH = 35'), PROVIDED AND INSTALLED BY OTHERS
- 6 NOT USED
- 7 ACTIVE TRAFFIC CONTROL DEVICE - CANTILEVER ASSEMBLY WITH FLASHERS, PROVIDED AND INSTALLED BY OTHERS
- 8 CURB TERMINATION, CITY STD PLAN S-R02
- 9 TYPE 1 CONCRETE APPROACH SEPARATED SIDEWALK, SPOKANE VALLEY STD PLAN R-110 RAMP DEPTH = E SIDEWALK DEPTH + 10'
- 10 CEMENT CONCRETE DRIVEWAY TYPE 4, WSDOT STD PLAN F-8-10-04 AND F-8-10-05 DEPTH = 5'
- 11 CURB & BUTTER TYPE B, SPOKANE VALLEY STD PLAN R-102



NO.	DATE	REVISIONS DESCRIPTION	BY	

CITY OF SPOKANE VALLEY
 COMMUNITY & PUBLIC WORKS DEPARTMENT
 10210 EAST SPRAGUE AVENUE
 SPOKANE VALLEY, WA. 99216
 (509) 720-5000

DRAWN BY: JAM
 DESIGNED BY: JAM
 EXHIBIT
 JULY 1, 2020

0313 BARKER - UNION PACIFIC CROSSING
UNION PACIFIC RR CROSSING LAYOUT
 BARKER RD / UNION PACIFIC
 CROSSING, SPOKANE VALLEY, WA
 MP 0012.99, DOT 662526C

SHEET **1**

**EXHIBIT B
TO
PUBLIC HIGHWAY AT GRADE CROSSING AGREEMENT**

SECTION 1. CONDITIONS AND COVENANTS

A. The Railroad makes no covenant or warranty of title for quiet possession or against encumbrances. The Political Body shall not use or permit use of the Crossing Area for any purposes other than those described in this Agreement. Without limiting the foregoing, the Political Body shall not use or permit use of the Crossing Area for railroad purposes, or for gas, oil or gasoline pipe lines. Any lines constructed on the Railroad's property by or under authority of the Political Body for the purpose of conveying electric power or communications incidental to the Political Body's use of the property for highway purposes shall be constructed in accordance with specifications and requirements of the Railroad, and in such manner as not adversely to affect communication or signal lines of the Railroad or its licensees now or hereafter located upon said property. No nonparty shall be admitted by the Political Body to use or occupy any part of the Railroad's property without the Railroad's written consent. Nothing herein shall obligate the Railroad to give such consent.

B. The Railroad reserves the right to cross the Crossing Area with such railroad tracks as may be required for its convenience or purposes. In the event the Railroad shall place additional tracks upon the Crossing Area, the Political Body shall, at its sole cost and expense, modify the Roadway to conform with all tracks within the Crossing Area.

C. The right hereby granted is subject to any existing encumbrances and rights (whether public or private), recorded or unrecorded, and also to any renewals thereof. The Political Body shall not damage, destroy or interfere with the property or rights of nonparties in, upon or relating to the Railroad's property, unless the Political Body at its own expense settles with and obtains releases from such nonparties.

D. The Railroad reserves the right to use and to grant to others the right to use the Crossing Area for any purpose not inconsistent with the right hereby granted, including, but not by way of limitation, the right to construct, reconstruct, maintain, operate, repair, alter, renew and replace tracks, facilities and appurtenances on the property; and the right to cross the Crossing Area with all kinds of equipment.

E. So far as it lawfully may do so, the Political Body will assume, bear and pay all taxes and assessments of whatsoever nature or kind (whether general, local or special) levied or assessed upon or against the Crossing Area, excepting taxes levied upon and against the property as a component part of the Railroad's operating

property.

F. If any property or rights other than the right hereby granted are necessary for the construction, maintenance and use of the Roadway and its appurtenances, or for the performance of any work in connection with the Project, the Political Body will acquire all such other property and rights at its own expense and without expense to the Railroad.

SECTION 2. CONSTRUCTION OF ROADWAY

A. The Political Body, at its expense, will apply for and obtain all public authority required by law, ordinance, rule or regulation for the Project, and will furnish the Railroad upon request with satisfactory evidence that such authority has been obtained.

B. Except as may be otherwise specifically provided herein, the Political Body, at its expense, will furnish all necessary labor, material and equipment, and shall construct and complete the Roadway and all appurtenances thereof. The appurtenances shall include, without limitation, all necessary and proper highway warning devices (except those installed by the Railroad within its right of way) and all necessary drainage facilities, guard rails or barriers, and right of way fences between the Roadway and the railroad tracks. Upon completion of the Project, the Political Body shall remove from the Railroad's property all temporary structures and false work, and will leave the Crossing Area in a condition satisfactory to the Railroad.

C. All construction work of the Political Body upon the Railroad's property (including, but not limited to, construction of the Roadway and all appurtenances and all related and incidental work) shall be performed and completed in a manner satisfactory to the Assistant Vice President Engineering-Design of the Railroad or his authorized representative and in compliance with the Plans, and other guidelines furnished by the Railroad.

D. All construction work of the Political Body shall be performed diligently and completed within a reasonable time. No part of the Project shall be suspended, discontinued or unduly delayed without the Railroad's written consent, and subject to such reasonable conditions as the Railroad may specify. It is understood that the Railroad's tracks at and in the vicinity of the work will be in constant or frequent use during progress of the work and that movement or stoppage of trains, engines or cars may cause delays in the work of the Political Body. The Political Body hereby assumes the risk of any such delays and agrees that no claims for damages on account of any delay shall be made against the Railroad by the State and/or the Contractor.

SECTION 3. INJURY AND DAMAGE TO PROPERTY

If the Political Body, in the performance of any work contemplated by this Agreement or by the failure to do or perform anything for which the Political Body is responsible under the provisions of this Agreement, shall injure, damage or destroy any property of the Railroad or of any other person lawfully occupying or using the property of the Railroad, such property shall be replaced or repaired by the Political Body at the Political Body's own expense, or by the Railroad at the expense of the Political Body, and to the satisfaction of the Railroad's Assistant Vice President Engineering-Design.

SECTION 4. RAILROAD MAY USE CONTRACTORS TO PERFORM WORK

The Railroad may contract for the performance of any of its work by other than the Railroad forces. The Railroad shall notify the Political Body of the contract price within ninety (90) days after it is awarded. Unless the Railroad's work is to be performed on a fixed price basis, the Political Body shall reimburse the Railroad for the amount of the contract.

SECTION 5. MAINTENANCE AND REPAIRS

A. The Political Body shall, at its own sole expense, maintain, repair, and renew, or cause to be maintained, repaired and renewed, the entire Crossing Area and Roadway, except the portions between the track tie ends, which shall be maintained by and at the expense of the Railroad.

B. If, in the future, the Political Body elects to have the surfacing material between the track tie ends, or between tracks if there is more than one railroad track across the Crossing Area, replaced with paving or some surfacing material other than timber planking, the Railroad, at the Political Body's expense, shall install such replacement surfacing, and in the future, to the extent repair or replacement of the surfacing is necessitated by repair or rehabilitation of the Railroad's tracks through the Crossing Area, the Political Body shall bear the expense of such repairs or replacement.

SECTION 6. CHANGES IN GRADE

If at any time the Railroad shall elect, or be required by competent authority to, raise or lower the grade of all or any portion of the track(s) located within the Crossing Area, the Political Body shall, at its own expense, conform the Roadway to conform with the change of grade of the trackage.

SECTION 7. REARRANGEMENT OF WARNING DEVICES

If the change or rearrangement of any warning device installed hereunder is necessitated for public or Railroad convenience or on account of improvements for either the Railroad, highway or both, the parties will apportion the expense incidental

thereto between themselves by negotiation, agreement or by the order of a competent authority before the change or rearrangement is undertaken.

SECTION 8. SAFETY MEASURES; PROTECTION OF RAILROAD COMPANY OPERATIONS

It is understood and recognized that safety and continuity of the Railroad's operations and communications are of the utmost importance; and in order that the same may be adequately safeguarded, protected and assured, and in order that accidents may be prevented and avoided, it is agreed with respect to all of said work of the Political Body that the work will be performed in a safe manner and in conformity with the following standards:

A. **Definitions.** All references in this Agreement to the Political Body shall also include the Contractor and their respective officers, agents and employees, and others acting under its or their authority; and all references in this Agreement to work of the Political Body shall include work both within and outside of the Railroad's property.

B. **Entry on to Railroad's Property by Political Body.** If the Political Body's employees need to enter Railroad's property in order to perform an inspection of the Roadway, minor maintenance or other activities, the Political Body shall first provide at least ten (10) working days advance notice to the Railroad Representative. With respect to such entry on to Railroad's property, the Political Body, to the extent permitted by law, agrees to release, defend and indemnify the Railroad from and against any loss, damage, injury, liability, claim, cost or expense incurred by any person including, without limitation, the Political Body's employees, or damage to any property or equipment (collectively the "Loss") that arises from the presence or activities of Political Body's employees on Railroad's property, except to the extent that any Loss is caused by the sole direct negligence of Railroad.

C. **Flagging.**

(i) If the Political Body's employees need to enter Railroad's property as provided in Paragraph B above, the Political Body agrees to notify the Railroad Representative at least thirty (30) working days in advance of proposed performance of any work by Political Body in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such thirty (30) day notice, the Railroad Representative will determine and inform Political Body whether a flagman need be present and whether Political Body needs to implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by Railroad, Railroad will bill

Political Body for such expenses incurred by Railroad. If Railroad performs any flagging, or other special protective or safety measures are performed by Railroad, Political Body agrees that Political Body is not relieved of any of its responsibilities or liabilities set forth in this Agreement.

(ii) The rate of pay per hour for each flagman will be the prevailing hourly rate in effect for an eight-hour day for the class of flagmen used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health and welfare, supplemental sickness, Railroad Retirement and unemployment compensation, supplemental pension, Employees Liability and Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect at the time the work is performed. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays, and two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized governmental agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, Political Body shall pay on the basis of the new rates and charges.

(iii) Reimbursement to Railroad will be required covering the full eight-hour day during which any flagman is furnished, unless the flagman can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by the flagman following the flagman's assignment to work on the project for which Railroad is required to pay the flagman and which could not reasonably be avoided by Railroad by assignment of such flagman to other work, even though Political Body may not be working during such time. When it becomes necessary for Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements, Political Body must provide Railroad a minimum of five (5) days notice prior to the cessation of the need for a flagman. If five (5) days notice of cessation is not given, Political Body will still be required to pay flagging charges for the five (5) day notice period required by union agreement to be given to the employee, even though flagging is not required for that period. An additional thirty (30) days notice must then be given to Railroad if flagging services are needed again after such five day cessation notice has been given to Railroad.

D. **Compliance With Laws.** The Political Body shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work. The Political Body shall use only such methods as are consistent with safety, both as concerns the Political Body, the Political Body's agents and employees, the officers, agents, employees and property of the Railroad and the public in general. The Political Body (without limiting the generality of the foregoing) shall comply with all applicable state and federal occupational safety and health acts and regulations. All Federal

Railroad Administration regulations shall be followed when work is performed on the Railroad's premises. If any failure by the Political Body to comply with any such laws, regulations, and enactments, shall result in any fine, penalty, cost or charge being assessed, imposed or charged against the Railroad, the Political Body shall reimburse, and to the extent it may lawfully do so, indemnify the Railroad for any such fine, penalty, cost, or charge, including without limitation attorney's fees, court costs and expenses. The Political Body further agrees in the event of any such action, upon notice thereof being provided by the Railroad, to defend such action free of cost, charge, or expense to the Railroad.

E. **No Interference or Delays.** The Political Body shall not do, suffer or permit anything which will or may obstruct, endanger, interfere with, hinder or delay maintenance or operation of the Railroad's tracks or facilities, or any communication or signal lines, installations or any appurtenances thereof, or the operations of others lawfully occupying or using the Railroad's property or facilities.

F. **Supervision.** The Political Body, at its own expense, shall adequately police and supervise all work to be performed by the Political Body, and shall not inflict injury to persons or damage to property for the safety of whom or of which the Railroad may be responsible, or to property of the Railroad. The responsibility of the Political Body for safe conduct and adequate policing and supervision of the Project shall not be lessened or otherwise affected by the Railroad's approval of plans and specifications, or by the Railroad's collaboration in performance of any work, or by the presence at the work site of the Railroad's representatives, or by compliance by the Political Body with any requests or recommendations made by such representatives. If a representative of the Railroad is assigned to the Project, the Political Body will give due consideration to suggestions and recommendations made by such representative for the safety and protection of the Railroad's property and operations.

G. **Suspension of Work.** If at any time the Political Body's engineers or the Vice President-Engineering Services of the Railroad or their respective representatives shall be of the opinion that any work of the Political Body is being or is about to be done or prosecuted without due regard and precaution for safety and security, the Political Body shall immediately suspend the work until suitable, adequate and proper protective measures are adopted and provided.

H. **Removal of Debris.** The Political Body shall not cause, suffer or permit material or debris to be deposited or cast upon, or to slide or fall upon any property or facilities of the Railroad; and any such material and debris shall be promptly removed from the Railroad's property by the Political Body at the Political Body's own expense or by the Railroad at the expense of the Political Body. The Political Body shall not cause, suffer or permit any snow to be plowed or cast upon the Railroad's property during snow removal from the Crossing Area.

I. **Explosives.** The Political Body shall not discharge any explosives on or in the vicinity of the Railroad's property without the prior consent of the Railroad's Vice

President-Engineering Services, which shall not be given if, in the sole discretion of the Railroad's Vice President-Engineering Services, such discharge would be dangerous or would interfere with the Railroad's property or facilities. For the purposes hereof, the "vicinity of the Railroad's property" shall be deemed to be any place on the Railroad's property or in such close proximity to the Railroad's property that the discharge of explosives could cause injury to the Railroad's employees or other persons, or cause damage to or interference with the facilities or operations on the Railroad's property. The Railroad reserves the right to impose such conditions, restrictions or limitations on the transportation, handling, storage, security and use of explosives as the Railroad, in the Railroad's sole discretion, may deem to be necessary, desirable or appropriate.

J. **Excavation.** The Political Body shall not excavate from existing slopes nor construct new slopes which are excessive and may create hazards of slides or falling rock, or impair or endanger the clearance between existing or new slopes and the tracks of the Railroad. The Political Body shall not do or cause to be done any work which will or may disturb the stability of any area or adversely affect the Railroad's tracks or facilities. The Political Body, at its own expense, shall install and maintain adequate shoring and cribbing for all excavation and/or trenching performed by the Political Body in connection with construction, maintenance or other work. The shoring and cribbing shall be constructed and maintained with materials and in a manner approved by the Railroad's Assistant Vice President Engineering - Design to withstand all stresses likely to be encountered, including any stresses resulting from vibrations caused by the Railroad's operations in the vicinity.

K. **Drainage.** The Political Body, at the Political Body's own expense, shall provide and maintain suitable facilities for draining the Roadway and its appurtenances, and shall not suffer or permit drainage water therefrom to flow or collect upon property of the Railroad. The Political Body, at the Political Body's own expense, shall provide adequate passageway for the waters of any streams, bodies of water and drainage facilities (either natural or artificial, and including water from the Railroad's culvert and drainage facilities), so that said waters may not, because of any facilities or work of the Political Body, be impeded, obstructed, diverted or caused to back up, overflow or damage the property of the Railroad or any part thereof, or property of others. The Political Body shall not obstruct or interfere with existing ditches or drainage facilities.

L. **Notice.** Before commencing any work, the Political Body shall provide the advance notice to the Railroad that is required under the Contractor's Right of Entry Agreement.

M. **Fiber Optic Cables.** Fiber optic cable systems may be buried on the Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Political Body shall telephone the Railroad during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except

holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried anywhere on the Railroad's premises to be used by the Political Body. If it is, Political Body will telephone the telecommunications company(ies) involved, arrange for a cable locator, and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on the Railroad's premises.

SECTION 9. INTERIM WARNING DEVICES

If at anytime it is determined by a competent authority, by the Political Body, or by agreement between the parties, that new or improved train activated warning devices should be installed at the Crossing Area, the Political Body shall install adequate temporary warning devices or signs and impose appropriate vehicular control measures to protect the motoring public until the new or improved devices have been installed.

SECTION 10. OTHER RAILROADS

All protective and indemnifying provisions of this Agreement shall inure to the benefit of the Railroad and any other railroad company lawfully using the Railroad's property or facilities.

SECTION 11. BOOKS AND RECORDS

The books, papers, records and accounts of Railroad, so far as they relate to the items of expense for the materials to be provided by Railroad under this Project, or are associated with the work to be performed by Railroad under this Project, shall be open to inspection and audit at Railroad's offices in Omaha, Nebraska, during normal business hours by the agents and authorized representatives of Political Body for a period of three (3) years following the date of Railroad's last billing sent to Political Body.

SECTION 12. REMEDIES FOR BREACH OR NONUSE

A. If the Political Body shall fail, refuse or neglect to perform and abide by the terms of this Agreement, the Railroad, in addition to any other rights and remedies, may perform any work which in the judgment of the Railroad is necessary to place the Roadway and appurtenances in such condition as will not menace, endanger or interfere with the Railroad's facilities or operations or jeopardize the Railroad's employees; and the Political Body will reimburse the Railroad for the expenses thereof.

B. Nonuse by the Political Body of the Crossing Area for public highway purposes continuing at any time for a period of eighteen (18) months shall, at the option of the Railroad, work a termination of this Agreement and of all rights of the Political Body hereunder.

C. The Political Body will surrender peaceable possession of the Crossing Area and Roadway upon termination of this Agreement. Termination of this Agreement shall not affect any rights, obligations or liabilities of the parties, accrued or otherwise, which may have arisen prior to termination.

SECTION 13. MODIFICATION - ENTIRE AGREEMENT

No waiver, modification or amendment of this Agreement shall be of any force or effect unless made in writing, signed by the Political Body and the Railroad and specifying with particularity the nature and extent of such waiver, modification or amendment. Any waiver by the Railroad of any default by the Political Body shall not affect or impair any right arising from any subsequent default. This Agreement and Exhibits attached hereto and made a part hereof constitute the entire understanding between the Political Body and the Railroad and cancel and supersede any prior negotiations, understandings or agreements, whether written or oral, with respect to the work or any part thereof.

EXHIBIT C

TO

PUBLIC HIGHWAY AT GRADE CROSSING AGREEMENT

Exhibit C (if applicable) will be Railroad's Material and Force Agreement Estimate.

EXHIBIT C

ESTIMATE OF FORCE ACCOUNT WORK BY THE UNION PACIFIC RAILROAD COMPANY

DESCRIPTION OF WORK: Engineering and other related services for work to be performed within railroad right of way. This includes railroad flagging services, project and construction management during construction activities in railroad right of way. All necessary railroad services will be billed at actual cost.

DATE:

12/8/2020

LOCATION:

**Barker Rd, 662526C
Spokane Valley**

SUBDIVISION

Spokane

STATE:

WA

DESCRIPTION	LABOR	MATERIAL	UP %0	Agency % 100	TOTAL
ENGINEERING					
Construction Management	\$ 25,000	\$ -	\$ -	\$ 25,000	\$ 25,000
UPRR CONSTRUCTION					
Signal	\$ 265,898	\$ 139,958	\$ -	\$ 405,856	\$ 405,856
Surface	\$ 97,269	\$ 55,633	\$ -	\$ 152,902	\$ 152,902
FLAGGING / INSPECTION SERVICES					
RATE (per day)	\$ 1,600				
Estimated # Days of Flagging	20	\$ 32,000	\$ -	\$ 32,000.00	\$32,000
TOTAL PROJECT:	\$ 421,767	\$ 195,591	\$ -	\$ 615,758	\$615,758

TOTAL ESTIMATED COST:

\$615,758

**THE ABOVE FIGURES ARE ESTIMATES ONLY AND SUBJECT TO FLUCTUATION.
IN THE EVENT OF AN INCREASE OR DECREASE IN THE COST OR QUANTITY OF
MATERIAL OR LABOR REQUIRED, THE RAILROAD WILL BILL FOR ACTUAL
COSTS AT THE CURRENT RATES EFFECTIVE THEREOF.**

Flagging may be performed by a third-party contractor. Any flagging performed by a third-party contractor will be billed at said third-party contractor rate not included in the above estimate. Alternatively, the Agency may enter into a separate agreement with third-party contractor and will be responsible for all actual costs incurred.

EXHIBIT D
TO
PUBLIC HIGHWAY AT-GRADE CROSSING AGREEMENT

CONTRACTOR'S
RIGHT OF ENTRY AGREEMENT

THIS AGREEMENT is made and entered into as of the _____ day of _____, 20_____, by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation ("Railroad"); and _____, a _____ corporation ("Contractor").

RECITALS:

Contractor has been hired by _____ to perform work relating to _____

_____ (the "work"), with all or a portion of such work to be performed on property of Railroad in the vicinity of Railroad's Milepost _____ on Railroad's _____ [Subdivision] [Branch] [at or near DOT No. _____] located at or near _____, in _____ County, State of _____, as such location is in the general location shown on the print marked **Exhibit A**, attached hereto and hereby made a part hereof, which work is the subject of a contract dated _____ between Railroad and _____.

Railroad is willing to permit Contractor to perform the work described above at the location described above subject to the terms and conditions contained in this Agreement

AGREEMENT:

NOW, THEREFORE, it is mutually agreed by and between Railroad and Contractor, as follows:

ARTICLE 1 - DEFINITION OF CONTRACTOR.

For purposes of this Agreement, all references in this agreement to Contractor shall include Contractor's contractors, subcontractors, officers, agents and employees, and others acting under its or their authority.

ARTICLE 2 - RIGHT GRANTED; PURPOSE.

Railroad hereby grants to Contractor the right, during the term hereinafter stated and upon and subject to each and all of the terms, provisions and conditions herein contained, to enter upon and have ingress to and egress from the property described in the Recitals for the purpose of performing the work described in the Recitals above. The right herein granted to Contractor is limited to those portions of Railroad's property specifically described herein, or as designated by the Railroad Representative named in Article 4.

ARTICLE 3 - TERMS AND CONDITIONS CONTAINED IN EXHIBITS B, C AND D.

The terms and conditions contained in **Exhibit B**, **Exhibit C** and **Exhibit D**, attached hereto, are hereby made a part of this Agreement.

ARTICLE 4 - ALL EXPENSES TO BE BORNE BY CONTRACTOR; RAILROAD REPRESENTATIVE.

A. Contractor shall bear any and all costs and expenses associated with any work performed by Contractor, or any costs or expenses incurred by Railroad relating to this Agreement.

B. Contractor shall coordinate all of its work with the following Railroad representative or his or her duly authorized representative (the "Railroad Representative"):

C. Contractor, at its own expense, shall adequately police and supervise all work to be performed by Contractor and shall ensure that such work is performed in a safe manner as set forth in Section 7 of **Exhibit B**. The responsibility of Contractor for safe conduct and adequate policing and supervision of Contractor's work shall not be lessened or otherwise affected by Railroad's approval of plans and specifications involving the work, or by Railroad's collaboration in performance of any work, or by the presence at the work site of a Railroad Representative, or by compliance by Contractor with any requests or recommendations made by Railroad Representative.

ARTICLE 5 - SCHEDULE OF WORK ON A MONTHLY BASIS.

The Contractor, at its expense, shall provide on a monthly basis a detailed schedule of work to the Railroad Representative named in Article 4B above. The reports shall start at the execution of this Agreement and continue until this Agreement is terminated as provided in this Agreement or until the Contractor has completed all work on Railroad's property.

ARTICLE 6 - TERM; TERMINATION.

A. The grant of right herein made to Contractor shall commence on the date of this Agreement, and continue until _____, unless sooner terminated as herein provided, or at such time as Contractor has completed its work on Railroad's property, whichever is earlier. Contractor agrees to notify the Railroad Representative in writing when it has completed its work on Railroad's property.

B. This Agreement may be terminated by either party on ten (10) days written notice to the other party.

ARTICLE 7 - CERTIFICATE OF INSURANCE.

A. Before commencing any work, Contractor will provide Railroad with the (i) insurance binders, policies, certificates and endorsements set forth in **Exhibit C** of this Agreement, and (ii) the insurance endorsements obtained by each subcontractor as required under Section 12 of **Exhibit B** of this Agreement.

B. All insurance correspondence, binders, policies, certificates and endorsements shall be sent to:

Union Pacific Railroad Company

[Insert mailing address]

Attn: _____
Folder No. _____

ARTICLE 8 - DISMISSAL OF CONTRACTOR'S EMPLOYEE.

At the request of Railroad, Contractor shall remove from Railroad's property any employee of Contractor who fails to conform to the instructions of the Railroad Representative in connection with the work on Railroad's property, and any right of Contractor shall be suspended until such removal has occurred. Contractor shall indemnify Railroad against any claims arising from the removal of any such employee from Railroad's property.

ARTICLE 9- ADMINISTRATIVE FEE.

Upon the execution and delivery of this Agreement, Contractor shall pay to Railroad _____ Dollars (\$_____) as reimbursement for clerical, administrative and handling expenses in connection with the processing of this Agreement.

ARTICLE 10 - CROSSINGS; COMPLIANCE WITH MUTCD AND FRA GUIDELINES.

A. No additional vehicular crossings (including temporary haul roads) or pedestrian crossings over Railroad's trackage shall be installed or used by Contractor without the prior written permission of Railroad.

B. Any permanent or temporary changes, including temporary traffic control, to crossings must conform to the Manual of Uniform Traffic Control Devices (MUTCD) and any applicable Federal Railroad Administration rules, regulations and guidelines, and must be reviewed by the Railroad prior to any changes being implemented. In the event the Railroad is found to be out of compliance with federal safety regulations due to the Contractor's modifications, negligence, or any other reason arising from the Contractor's presence on the Railroad's property, the Contractor agrees to assume liability for any civil penalties imposed upon the Railroad for such noncompliance.

ARTICLE 11.- EXPLOSIVES.

Explosives or other highly flammable substances shall not be stored or used on Railroad's property without the prior written approval of Railroad.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement in duplicate as of the date first herein written.

UNION PACIFIC RAILROAD COMPANY

By: _____
Title: _____

(Name of Contractor)

By: _____
Title: _____

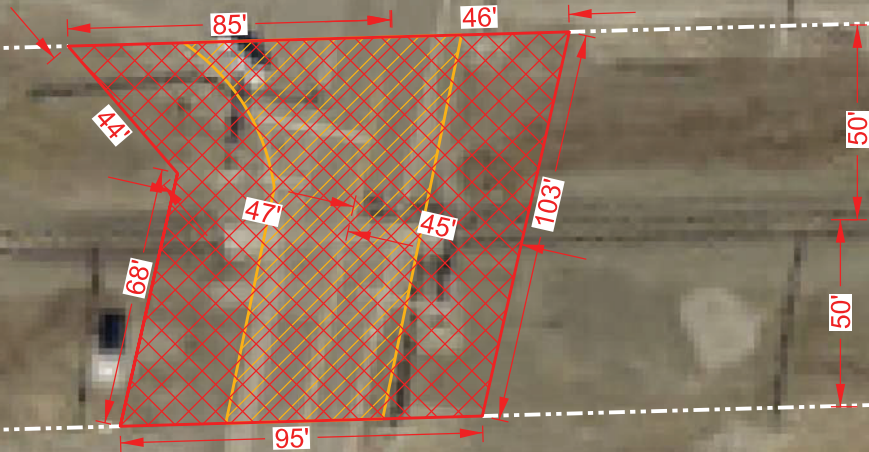
EXHIBIT A

Exhibit A will be a print showing the general location of the work site.






EUCLID AVE.

BARKER RD.



CROSSING AREA: 10,120 SQ.FT. / 0.23 AC. +/-
 EXISTING CROSSING AREA: 4,578 SQ.FT. / 0.11 AC. +/-

LEGEND:

- CROSSING AREA 
- EXISTING CROSSING AREA 
- UPRRCO. R/W OUTLINED 

NOTE: BEFORE YOU BEGIN ANY WORK, SEE AGREEMENT FOR FIBER OPTIC PROVISIONS.

EXHIBIT "A"

UNION PACIFIC RAILROAD COMPANY

SPOKANE, SPOKANE COUNTY, WA

M.P. 12.99 - SPOKANE SUB.

SIRR/WA/V-1/7
SCALE: 1" = 50'

OFFICE OF REAL ESTATE
OMAHA, NEBRASKA DATE: 4-13-2020

DSK FILE: 3034-86

CADD FILENAME	0303486
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SCAN FILENAME	AERIAL PRINT
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EXHIBIT B
TO
CONTRACTOR'S RIGHT OF ENTRY AGREEMENT

Section 1. NOTICE OF COMMENCEMENT OF WORK - FLAGGING.

A. Contractor agrees to notify the Railroad Representative at least ten (10) working days in advance of Contractor commencing its work and at least thirty (30) working days in advance of proposed performance of any work by Contractor in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such thirty (30)-day notice, the Railroad Representative will determine and inform Contractor whether a flagman need be present and whether Contractor needs to implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by Railroad, Railroad will bill Contractor for such expenses incurred by Railroad, unless Railroad and a federal, state or local governmental entity have agreed that Railroad is to bill such expenses to the federal, state or local governmental entity. If Railroad will be sending the bills to Contractor, Contractor shall pay such bills within thirty (30) days of Contractor's receipt of billing. If Railroad performs any flagging, or other special protective or safety measures are performed by Railroad, Contractor agrees that Contractor is not relieved of any of its responsibilities or liabilities set forth in this Agreement.

B. The rate of pay per hour for each flagman will be the prevailing hourly rate in effect for an eight-hour day for the class of flagmen used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health and welfare, supplemental sickness, Railroad Retirement and unemployment compensation, supplemental pension, Employees Liability and Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect at the time the work is performed. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays, and two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized governmental agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, Contractor (or the governmental entity, as applicable) shall pay on the basis of the new rates and charges.

C. Reimbursement to Railroad will be required covering the full eight-hour day during which any flagman is furnished, unless the flagman can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by the flagman following the flagman's assignment to work on the project for which Railroad is required to pay the flagman and which could not reasonably be avoided by Railroad by assignment of such flagman to other work, even though Contractor may not be working during such time. When it becomes necessary for Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements, Contractor must provide Railroad a minimum of five (5) days notice prior to the cessation of the need for a flagman. If five (5) days notice of cessation is not given, Contractor will still be required to pay flagging charges for the five (5) day notice period required by union agreement to be given to the employee, even though flagging is not required for that period. An additional thirty (30) days notice must then be given to Railroad if flagging services are needed again after such five day cessation notice has been given to Railroad.

Section 2. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED

A. The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Railroad to use and maintain its entire property including the right and power of Railroad to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, roadways, signal, communication, fiber optics, or other wirelines, pipelines and other facilities upon, along or across any or all parts of its property, all or any of which may be

freely done at any time or times by Railroad without liability to Contractor or to any other party for compensation or damages.

B. The foregoing grant is also subject to all outstanding superior rights (whether recorded or unrecorded and including those in favor of licensees and lessees of Railroad's property, and others) and the right of Railroad to renew and extend the same, and is made without covenant of title or for quiet enjoyment.

Section 3. NO INTERFERENCE WITH OPERATIONS OF RAILROAD AND ITS TENANTS.

A. Contractor shall conduct its operations so as not to interfere with the continuous and uninterrupted use and operation of the railroad tracks and property of Railroad, including without limitation, the operations of Railroad's lessees, licensees or others, unless specifically authorized in advance by the Railroad Representative. Nothing shall be done or permitted to be done by Contractor at any time that would in any manner impair the safety of such operations. When not in use, Contractor's machinery and materials shall be kept at least fifty (50) feet from the centerline of Railroad's nearest track, and there shall be no vehicular crossings of Railroads tracks except at existing open public crossings.

B. Operations of Railroad and work performed by Railroad personnel and delays in the work to be performed by Contractor caused by such railroad operations and work are expected by Contractor, and Contractor agrees that Railroad shall have no liability to Contractor, or any other person or entity for any such delays. The Contractor shall coordinate its activities with those of Railroad and third parties so as to avoid interference with railroad operations. The safe operation of Railroad train movements and other activities by Railroad takes precedence over any work to be performed by Contractor.

Section 4. LIENS.

Contractor shall pay in full all persons who perform labor or provide materials for the work to be performed by Contractor. Contractor shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of Railroad for any such work performed. Contractor shall indemnify and hold harmless Railroad from and against any and all liens, claims, demands, costs or expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished. If Contractor fails to promptly cause any lien to be released of record, Railroad may, at its election, discharge the lien or claim of lien at Contractor's expense.

Section 5. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.

A. Fiber optic cable systems may be buried on Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Contractor shall telephone Railroad during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried anywhere on Railroad's property to be used by Contractor. If it is, Contractor will telephone the telecommunications company(ies) involved, make arrangements for a cable locator and, if applicable, for relocation or other protection of the fiber optic cable. Contractor shall not commence any work until all such protection or relocation (if applicable) has been accomplished.

B. In addition to other indemnity provisions in this Agreement, Contractor shall indemnify, defend and hold Railroad harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of any act or omission of Contractor, its agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on Railroad's property, and/or (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on Railroad's property. Contractor shall not have or seek recourse against Railroad for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using Railroad's property or a customer or user of services of the fiber optic cable on Railroad's property.

Section 6. PERMITS - COMPLIANCE WITH LAWS.

In the prosecution of the work covered by this Agreement, Contractor shall secure any and all necessary permits and shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work including, without limitation, all applicable Federal Railroad Administration regulations.

Section 7. SAFETY.

A. Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of the work performed by Contractor. Contractor shall be responsible for initiating, maintaining and supervising all safety, operations and programs in connection with the work. Contractor shall at a minimum comply with Railroad's safety standards listed in **Exhibit D**, hereto attached, to ensure uniformity with the safety standards followed by Railroad's own forces. As a part of Contractor's safety responsibilities, Contractor shall notify Railroad if Contractor determines that any of Railroad's safety standards are contrary to good safety practices. Contractor shall furnish copies of **Exhibit D** to each of its employees before they enter the job site.

B. Without limitation of the provisions of paragraph A above, Contractor shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job.

C. Contractor shall have proper first aid supplies available on the job site so that prompt first aid services may be provided to any person injured on the job site. Contractor shall promptly notify Railroad of any U.S. Occupational Safety and Health Administration reportable injuries. Contractor shall have a nondelegable duty to control its employees while they are on the job site or any other property of Railroad, and to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage, drug or other substance that may inhibit the safe performance of any work.

D. If and when requested by Railroad, Contractor shall deliver to Railroad a copy of Contractor's safety plan for conducting the work (the "Safety Plan"). Railroad shall have the right, but not the obligation, to require Contractor to correct any deficiencies in the Safety Plan. The terms of this Agreement shall control if there are any inconsistencies between this Agreement and the Safety Plan.

Section 8. INDEMNITY.

A. To the extent not prohibited by applicable statute, Contractor shall indemnify, defend and hold harmless Railroad, its affiliates, and its and their officers, agents and employees (individually an "Indemnified Party" or collectively "Indemnified Parties") from and against any and all loss, damage, injury, liability, claim, demand, cost or expense (including, without limitation, attorney's, consultant's and expert's fees, and court costs), fine or penalty (collectively, "Loss") incurred by any person (including, without limitation, any Indemnified Party, Contractor, or any employee of Contractor or of any Indemnified Party) arising out of or in any manner connected with (i) any work performed by Contractor, or (ii) any act or omission of Contractor, its officers, agents or employees, or (iii) any breach of this Agreement by Contractor.

B. The right to indemnity under this Section 8 shall accrue upon occurrence of the event giving rise to the Loss, and shall apply regardless of any negligence or strict liability of any Indemnified Party, except where the Loss is caused by the sole active negligence of an Indemnified Party as established by the final judgment of a court of competent jurisdiction. The sole active negligence of any Indemnified Party shall not bar the recovery of any other Indemnified Party.

C. Contractor expressly and specifically assumes potential liability under this Section 8 for claims or actions brought by Contractor's own employees. Contractor waives any immunity it may have under worker's compensation or industrial insurance acts to indemnify the Indemnified Parties under this Section 8. Contractor acknowledges that this waiver was mutually negotiated by the parties hereto.

D. No court or jury findings in any employee's suit pursuant to any worker's compensation act or the Federal Employers' Liability Act against a party to this Agreement may be relied upon or used by Contractor in any attempt to assert liability against any Indemnified Party.

E. The provisions of this Section 8 shall survive the completion of any work performed by Contractor or the termination or expiration of this Agreement. In no event shall this Section 8 or any other provision of this Agreement be deemed to limit any liability Contractor may have to any Indemnified Party by statute or under common law.

Section 9. RESTORATION OF PROPERTY.

In the event Railroad authorizes Contractor to take down any fence of Railroad or in any manner move or disturb any of the other property of Railroad in connection with the work to be performed by Contractor, then in that event Contractor shall, as soon as possible and at Contractor's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed. Contractor shall remove all of Contractor's tools, equipment, rubbish and other materials from Railroad's property promptly upon completion of the work, restoring Railroad's property to the same state and condition as when Contractor entered thereon.

Section 10. WAIVER OF DEFAULT.

Waiver by Railroad of any breach or default of any condition, covenant or agreement herein contained to be kept, observed and performed by Contractor shall in no way impair the right of Railroad to avail itself of any remedy for any subsequent breach or default.

Section 11. MODIFICATION - ENTIRE AGREEMENT.

No modification of this Agreement shall be effective unless made in writing and signed by Contractor and Railroad. This Agreement and the exhibits attached hereto and made a part hereof constitute the entire understanding between Contractor and Railroad and cancel and supersede any prior negotiations, understandings or agreements, whether written or oral, with respect to the work to be performed by Contractor.

Section 12. ASSIGNMENT - SUBCONTRACTING.

Contractor shall not assign or subcontract this Agreement, or any interest therein, without the written consent of the Railroad. Contractor shall be responsible for the acts and omissions of all subcontractors. Before Contractor commences any work, the Contractor shall, except to the extent prohibited by law; (1) require each of its subcontractors to include the Contractor as "Additional Insured" in the subcontractor's Commercial General Liability policy and Business Automobile policies with respect to all liabilities arising out of the subcontractor's performance of work on behalf of the Contractor by endorsing these policies with ISO Additional Insured Endorsements CG 20 26, and CA 20 48 (or substitute forms providing equivalent coverage; (2) require each of its subcontractors to endorse their Commercial General Liability Policy with "Contractual Liability Railroads" ISO Form CG 24 17 10 01 (or a substitute form providing equivalent coverage) for the job site; and (3) require each of its subcontractors to endorse their Business Automobile Policy with "Coverage For Certain Operations In Connection With Railroads" ISO Form CA 20 70 10 01 (or a substitute form providing equivalent coverage) for the job site.

EXHIBIT C
TO
CONTRACTOR'S
RIGHT OF ENTRY AGREEMENT

Union Pacific Railroad Company
Insurance Provisions For
Contractor's Right of Entry Agreement

Contractor shall, at its sole cost and expense, procure and maintain during the course of the Project and until all Project work on Railroad's property has been completed and the Contractor has removed all equipment and materials from Railroad's property and has cleaned and restored Railroad's property to Railroad's satisfaction, the following insurance coverage:

- A. Commercial General Liability insurance.** Commercial general liability (CGL) with a limit of not less than \$5,000,000 each occurrence and an aggregate limit of not less than \$10,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

The policy must also contain the following endorsement, which must be stated on the certificate of insurance:

- Contractual Liability Railroads ISO form CG 24 17 10 01 (or a substitute form providing equivalent coverage) showing "Union Pacific Railroad Company Property" as the Designated Job Site.
- Designated Construction Project(s) General Aggregate Limit ISO Form CG 25 03 03 97 (or a substitute form providing equivalent coverage) showing the project on the form schedule.

- B. Business Automobile Coverage insurance.** Business auto coverage written on ISO form CA 00 01 10 01 (or a substitute form providing equivalent liability coverage) with a combined single limit of not less \$5,000,000 for each accident and coverage must include liability arising out of any auto (including owned, hired and non-owned autos).

The policy must contain the following endorsements, which must be stated on the certificate of insurance:

- Coverage For Certain Operations In Connection With Railroads ISO form CA 20 70 10 01 (or a substitute form providing equivalent coverage) showing "Union Pacific Property" as the Designated Job Site.
- Motor Carrier Act Endorsement - Hazardous materials clean up (MCS-90) if required by law.

- C. Workers' Compensation and Employers' Liability insurance.** Coverage must include but not be limited to:
- Contractor's statutory liability under the workers' compensation laws of the state where the work is being performed.
 - Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 disease policy limit \$500,000 each employee.

If Contractor is self-insured, evidence of state approval and excess workers compensation coverage must be provided. Coverage must include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

The policy must contain the following endorsement, which must be stated on the certificate of insurance:

- Alternate Employer endorsement ISO form WC 00 03 01 A (or a substitute form providing equivalent coverage) showing Railroad in the schedule as the alternate employer (or a substitute form providing equivalent coverage).

- D. Railroad Protective Liability insurance.** Contractor must maintain "Railroad Protective Liability" (RPL) insurance written on ISO occurrence form CG 00 35 12 04 (or a substitute form providing equivalent coverage) on behalf of Railroad as named insured, with a limit of not less than \$2,000,000 per occurrence and an aggregate of \$6,000,000. The definition of "JOB LOCATION" and "WORK" on the declaration page of the policy shall refer to

this Agreement and shall describe all WORK or OPERATIONS performed under this agreement. Contractor shall provide this Agreement to Contractor's insurance agent(s) and/or broker(s) and Contractor shall instruct such agent(s) and/or broker(s) to procure the insurance coverage required by this Agreement. A BINDER STATING THE POLICY IS IN PLACE MUST BE SUBMITTED TO RAILROAD BEFORE THE WORK MAY COMMENCE AND UNTIL THE ORIGINAL POLICY IS FORWARDED TO UNION PACIFIC RAILROAD.

- E. Umbrella or Excess insurance.** If Contractor utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.
- F. Pollution Liability insurance.** Pollution liability coverage must be included when the scope of the work as defined in the Agreement includes installation, temporary storage, or disposal of any "hazardous" material that is injurious in or upon land, the atmosphere, or any watercourses; or may cause bodily injury at any time.

If required, coverage may be provided in separate policy form or by endorsement to Contractors CGL or RPL. Any form coverage must be equivalent to that provided in ISO form CG 24 15 "Limited Pollution Liability Extension Endorsement" or CG 28 31 "Pollution Exclusion Amendment" with limits of at least \$5,000,000 per occurrence and an aggregate limit of \$10,000,000.

If the scope of work as defined in this Agreement includes the disposal of any hazardous or non-hazardous materials from the job site, Contractor must furnish to Railroad evidence of pollution legal liability insurance maintained by the disposal site operator for losses arising from the insured facility accepting the materials, with coverage in minimum amounts of \$1,000,000 per loss, and an annual aggregate of \$2,000,000.

Other Requirements

- G.** All policy(ies) required above (except worker's compensation and employers liability) must include Railroad as "Additional Insured" using ISO Additional Insured Endorsements CG 20 26, and CA 20 48 (or substitute forms providing equivalent coverage). The coverage provided to Railroad as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 26, and CA 20 48 provide coverage for Railroad's negligence whether sole or partial, active or passive, and shall not be limited by Contractor's liability under the indemnity provisions of this Agreement.
- H.** Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless the law governing this Agreement prohibits all punitive damages that might arise under this Agreement.
- I.** Contractor waives all rights of recovery, and its insurers also waive all rights of subrogation of damages against Railroad and its agents, officers, directors and employees. This waiver must be stated on the certificate of insurance.
- J.** Prior to commencing the work, Contractor shall furnish Railroad with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Agreement.
- K.** All insurance policies must be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state where the work is being performed.
- L.** The fact that insurance is obtained by Contractor or by Railroad on behalf of 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 from Contractor or any third party will not be limited by the amount of the required insurance coverage.

EXHIBIT D
TO
CONTRACTOR'S RIGHT OF ENTRY AGREEMENT

MINIMUM SAFETY REQUIREMENTS

The term "employees" as used herein refer to all employees of Contractor as well as all employees of any subcontractor or agent of Contractor.

I. Clothing

- A. All employees of Contractor will be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing, or free use of their hands or feet.

Specifically, Contractor's employees must wear:

- (i) Waist-length shirts with sleeves.
 - (ii) Trousers that cover the entire leg. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching.
 - (iii) Footwear that covers their ankles and has a defined heel. Employees working on bridges are required to wear safety-toed footwear that conforms to the American National Standards Institute (ANSI) and FRA footwear requirements.
- B. Employees shall not wear boots (other than work boots), sandals, canvas-type shoes, or other shoes that have thin soles or heels that are higher than normal.
- C. Employees must not wear loose or ragged clothing, neckties, finger rings, or other loose jewelry while operating or working on machinery.

II. Personal Protective Equipment

Contractor shall require its employees to wear personal protective equipment as specified by Railroad rules, regulations, or recommended or requested by the Railroad Representative.

- (i) Hard hat that meets the American National Standard (ANSI) Z89.1 – latest revision. Hard hats should be affixed with Contractor's company logo or name.
- (ii) Eye protection that meets American National Standard (ANSI) for occupational and educational eye and face protection, Z87.1 – latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, etc.
- (iii) Hearing protection, which affords enough attenuation to give protection from noise levels that will be occurring on the job site. Hearing protection, in the form of plugs or muffs, must be worn when employees are within:
 - 100 feet of a locomotive or roadway/work equipment
 - 15 feet of power operated tools
 - 150 feet of jet blowers or pile drivers
 - 150 feet of retarders in use (when within 10 feet, employees must wear dual ear protection – plugs and muffs)
 -
- (iv) Other types of personal protective equipment, such as respirators, fall protection equipment, and face shields, must be worn as recommended or requested by the Railroad Representative.

III. On Track Safety

Contractor is responsible for compliance with the Federal Railroad Administration's Roadway Worker Protection regulations – 49CFR214, Subpart C and Railroad's On-Track Safety rules. Under 49CFR214, Subpart C, railroad contractors are responsible for the training of their employees on such regulations. In addition to the instructions contained in Roadway Worker Protection regulations, all employees must:

- (i) Maintain a distance of twenty-five (25) feet to any track unless the Railroad Representative is present to authorize movements.
- (ii) Wear an orange, reflectorized workwear approved by the Railroad Representative.
- (iii) Participate in a job briefing that will specify the type of On-Track Safety for the type of work being performed. Contractor must take special note of limits of track authority, which tracks may or may not be fouled, and clearing the track. Contractor will also receive special instructions relating to the work zone around machines and minimum distances between machines while working or traveling.

IV. Equipment

- A. It is the responsibility of Contractor to ensure that all equipment is in a safe condition to operate. If, in the opinion of the Railroad Representative, any of Contractor's equipment is unsafe for use, Contractor shall remove such equipment from Railroad's property. In addition, Contractor must ensure that the operators of all equipment are properly trained and competent in the safe operation of the equipment. In addition, operators must be:
 - Familiar and comply with Railroad's rules on lockout/tagout of equipment.
 - Trained in and comply with the applicable operating rules if operating any hy-rail equipment on-track.
 - Trained in and comply with the applicable air brake rules if operating any equipment that moves rail cars or any other railbound equipment.
- B. All self-propelled equipment must be equipped with a first-aid kit, fire extinguisher, and audible back-up warning device.
- C. Unless otherwise authorized by the Railroad Representative, all equipment must be parked a minimum of twenty-five (25) feet from any track. Before leaving any equipment unattended, the operator must stop the engine and properly secure the equipment against movement.
- D. Cranes must be equipped with three orange cones that will be used to mark the working area of the crane and the minimum clearances to overhead powerlines.

V. General Safety Requirements

- A. Contractor shall ensure that all waste is properly disposed of in accordance with applicable federal and state regulations.
- B. Contractor shall ensure that all employees participate in and comply with a job briefing conducted by the Railroad Representative, if applicable. During this briefing, the Railroad Representative will specify safe work procedures, (including On-Track Safety) and the potential hazards of the job. If any employee has any questions or concerns about the work, the employee must voice them during the job briefing. Additional job briefings will be conducted during the work as conditions, work procedures, or personnel change.
- C. All track work performed by Contractor meets the minimum safety requirements established by the Federal Railroad Administration's Track Safety Standards 49CFR213.
- D. All employees comply with the following safety procedures when working around any railroad track:
 - (i) Always be on the alert for moving equipment. Employees must always expect movement on any track, at any time, in either direction.

- (ii) Do not step or walk on the top of the rail, frog, switches, guard rails, or other track components.
 - (iii) In passing around the ends of standing cars, engines, roadway machines or work equipment, leave at least 20 feet between yourself and the end of the equipment. Do not go between pieces of equipment if the opening is less than one car length (50 feet).
 - (iv) Avoid walking or standing on a track unless so authorized by the employee in charge.
 - (v) Before stepping over or crossing tracks, look in both directions first.
 - (vi) Do not sit on, lie under, or cross between cars except as required in the performance of your duties and only when track and equipment have been protected against movement.
- E. All employees must comply with all federal and state regulations concerning workplace safety.

**EXHIBIT E
TO
PUBLIC HIGHWAY AT GRADE CROSSING AGREEMENT**

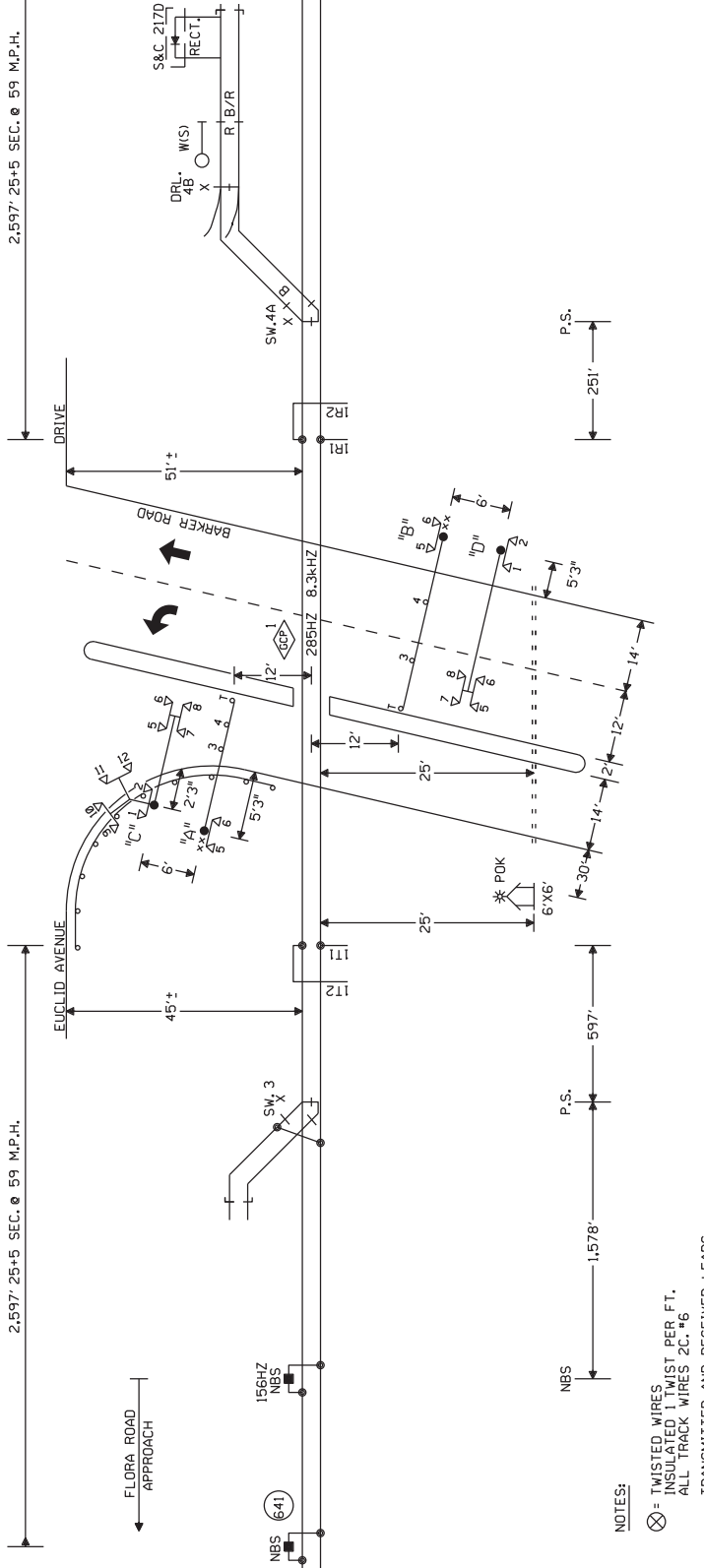
Exhibit E will be signal design schematic

PRIME WARNING TIME = 25 SECONDS

TO BNSF CONNECTION

2.597' 25+5 SEC. @ 59 M.P.H.

TO EASTPORT



CONNECTS TO M.P. 12.08

CONNECTS TO M.P. 13.04

NOTES:

- ⊗ TWISTED WIRES INSULATED IN TRENCH. ALL TRACK WIRES 2C.#6
- TRANSMITTER AND RECEIVER LEADS TO BE SEPARATED BY AT LEAST 12" IN TRENCH.
- RECOMMENDATION NOT EXCEED MANUFACTURER'S
- TO DC FOUNDATION TO BE AT SAME ELEVATION AS THE SURFACE OF THE TRAVELED WAY & NO MORE THAN 4" ABOVE THE SURFACE OF THE GROUND.
- ALL BUNGALOW WIRING TO BE #16 AWG FLEX UNLESS OTHERWISE SPECIFIED EXCEPT ALL GROUND WIRE TO BE #6 AWG FLEX OR LARGER.
- ALL WIRING IN GATE MECHANISM TO BE #10 "AWG FLEX". REFER TO UP STANDARD DWG FOR BUNGALOW GROUNDING.
- PORTABLE GENERATOR EXTENSION CORD FOR 240V TO 240V IS PROVIDED AS WELL AS A 120V TO 240V ADAPTER.
- ALL LIGHTS TO BE 12" ROUNDELS.
- ===== 4" X 70' CONDUIT

LIGHTS: LED LIGHTS
CANT "C": 25'
CANT "D": 25'

xx = BELL
○ = GUARD RAIL

TRK 1 ISLAND DISTANCE 144' MINIMUM 120' REQUIRED

PREFERRED ISLAND WIRE CONNECTIONS ARE A MINIMUM 50' FROM EDGE OF ROAD

OFFSET AND ISLAND DISTANCES TO BE VERIFIED BY FIELD

W(S) ← ○ → E(N)

DATE: 10/06/20

DES: NST

CHK: SWP

A.P.E.: 56786

MODIFICATIONS MADE WITHOUT APPROVAL FROM THE OFFICE OF SIGNAL DESIGN

D. A. LAST LEVEL CHECKED
LAST LEVEL MOD THIS TYPICAL
LAST LEVEL BY DESIGNER
CHANGED FROM TYPICAL?

DV
DV
Y

DATE: 10/06/20

DES: NST

CHK: SWP

A.P.E.: 56786

UNION PACIFIC RAILROAD
SPOKANE, WASHINGTON
BARKER ROAD
SPOKANE SUBDIVISION

SH. 1

DOT 662626C

M.P. 12.99

ID: 08801299.IX

DTL of ANP Engineering - Signal Omaha, Nebraska

NEW SHEET

**EXHIBIT F
TO
PUBLIC HIGHWAY AT GRADE CROSSING AGREEMENT**

Exhibit F will be Annual Signal Maintenance Fees

**AREMA UNIT STATEMENT OF RAILROAD HIGHWAY GRADE CROSSING SIGNALS
ESTIMATED MAINTENANCE COSTS**



BUILDING AMERICA®

**FOR PID # 116720
BY THE UNION PACIFIC RAILROAD**

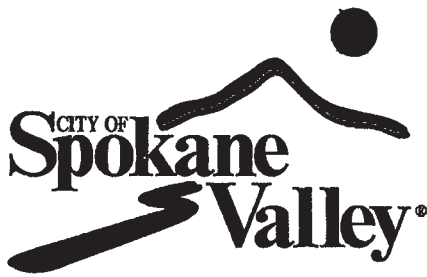
STREET	<u>Barker Road</u>
TOWN	<u>Spokane, WA</u>
MILEPOST	<u>12.99</u>
SUBDIVISION	<u>Spokane</u>
AAR/DOT NO.	<u>662526C</u>
WORK ORDER#	<u>56786</u>

DESCRIPTION	VALUE	QUANTITY	UNITS
NON-CODED TRK. CIRCUIT (Standalone AFTAC or Ring 10)	2	0	0
SUPERIMPOSED CIRCUIT(AFTAC) / DETECTION LOOP	2	0	0
HIGHWAY GRADE CROSSING SIGNAL (FRONT LIGHTS)	2	5	10
ADDITIONAL PAIR OF LIGHTS (OTHER THAN FRONT LIGHTS)	1	6	6
GATE MECHANISM, AUTOMATIC WITH ARM UP TO 26 FT	8	2	16
GATE MECHANISM, AUTOMATIC WITH ARM OVER 26 FT	10	0	0
GCP/HXP (constant warning device, per track circuit)	15	1	15
EXIT GATE MANAGEMENT SYSTEM RACK*	10	0	0
MOVEMENT DETECTOR (PMD)	6	0	0
MOVEMENT DETECTOR (STANDBY UNIT)	3	0	0
RADIO DATA LINK, PER UNIT	1	0	0
PREEMPTION CIRCUIT	2	0	0
DATA RECORDER	1	0	0
REMOTE MONITORING DEVICE (SEAR, ETC)*	2	1	2
BONDED RAIL JOINTS (per mile, each rail, single bonded)	1	0	0
BATTERY AND CHARGER (per set)	1	2	2
TOTAL UNIT COUNT			51
PAVEMENT RESTORATION COSTS			(Actual)
	Annual Maintenance Cost at \$170/Unit		\$8,670

*UP supplied Unit Value

#####

EXHIBIT B



OFFICE OF THE CITY ATTORNEY

CARY P. DRISKELL - CITY ATTORNEY

10210 East Sprague Avenue ♦ Spokane Valley, WA 99206
(509)720-5105 ♦ Fax: (509)720-5095 ♦ cityattorney@spokanevalley.org

June 30, 2021

Casey J. Moore
Union Pacific Railroad – Real Estate
1400 Douglas Street, STOP 1690
Omaha, NE 68179

Re: Barker Road Public Highway At-Grade Crossing Agreement

The City of Spokane Valley appreciates the efforts of your staff members to develop a draft Union Pacific (UP) Public Highway At-Grade Crossing Agreement (the Agreement) on Barker Road (DOT 662526C). Unfortunately, the City cannot agree to Section 16, and related, to Exhibit F, relating to requiring the City to pay on-going maintenance costs for UP's crossing signals on Barker Road.

The City does not pay UP for such costs at any other crossing in the City, and there is no agreement we can find that would require us to assume such costs. We understand that UP had a similar issue arise recently with Spokane County, that Spokane County was unable to initially resolve it with UP, and so filed a petition with the Washington State Utilities and Transportation Commission (UTC). Following that filing, we further understand that UP and Spokane County were able to come to an amicable resolution of the issues, essentially with UP removing that requirement from the agreement.

The City respectfully requests that UP similarly remove Section 16 and Exhibit F from the Agreement, and if this is done, we should be able to get the remainder of the Agreement completed in short order. If UP is unwilling to do so, the City will have no choice except to file petition with the UTC and proceed with that course of action. We would prefer not to have to file the petition, but we do not have any funding to pay for such costs, and don't believe they are costs we should pay.

We look forward to hearing from you in the very near future, and hope we can resolve this quickly. Thank you for your consideration.

Very truly yours,


Cary P. Driskell

CPD

c: Gloria Mantz
Rob Lochmiller
Ellis Mays
Peggy J. Ygbuhay

EXHIBIT C

Cindy Maley

From: Mays, Ellis <EMays@benesch.com>
Sent: Wednesday, August 4, 2021 12:35 PM
To: Gloria Mantz
Cc: Robert Lochmiller; Peggy Ygbuhay
Subject: RE: 3034-86 - Barker Road Widening Project - DOT 662526C - Spokane, WA

[EXTERNAL] This email originated outside the City of Spokane Valley. Always use caution when opening attachments or clicking links.

Gloria,

I am following up on recent phone conversation.

After review of the City's request dated June 30, 2021 for further consideration of Section 16, Signal Maintenance Costs, of the draft Construction and Maintenance agreement sent to the City on June 24, 2021, UPRR is not agreeable with removal of this section. Specifically, in reference to the referenced County project, the Barker Road project scope is not of the same type and therefore that determination does not apply. Differences at this location include roadway widening to accommodate an additional lane of travel and pedestrian treatments. Furthermore the type of railroad traffic control devices is unchanged except for the additional length of said devices to cover the roadway configuration changes.

Please let me know if you have any additional questions.

Thanks,

Ellis Mays

Public Project Manager

emays@benesch.com

mobile: 402-427-4231 office: 916-774-7165

3017 Douglas Boulevard, Suite 300, Roseville, CA 95661

For new public project requests: [Union Pacific Public Project Request](#)

For new utility crossing/permit: [Union Pacific Utility Crossing/Permit](#)



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From: Gloria Mantz <gmantz@spokanevalley.org>

Sent: Thursday, July 22, 2021 10:35 AM

To: Peggy Ygbuhay <pygbuhay@up.com>; Casey Moore <cjmoore@up.com>

Cc: Mays, Ellis <EMays@benesch.com>; Robert Lochmiller <rlochmiller@spokanevalley.org>; Paul Rathgeber

EXHIBIT D

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August 30, 2021

Casey J. Moore
Union Pacific Railroad - Real Estate
1400 Douglas Street, STOP 1690
Omaha, NE 68179

via email and U.S. Mail

Ellis Mays, Public Project Manager
Alfred Benesch & Company
3017 Douglas Boulevard, Suite 300
Roseville, CA 95661

Peggy J. Ygbuhay
Union Pacific Railroad
Senior Manager and Public Projects Engineer
10031 Foothills Blvd.
Roseville, CA 95747

Paul D. Rathgeber
Union Pacific Railroad
Director of Industry and Public Projects
24125 Old Aldine Westfield Road
Spring, TX 77373

RE: Barker Road Public Highway At-Grade Crossing Agreement

Dear Mr. Moore, Mr. Mays, Mr. Rathgeber and Ms. Ygbuhay:

This firm has been retained by the City of Spokane Valley in connection with the Barker Road Public Highway At-Grade Crossing Agreement. By way of reference, I am attaching a June 30, 2021, letter from City Attorney Cary P. Driskell to Mr. Moore as well as the August 4, 2021, response to that letter in the form of an email from Mr. Mays.

RCW 81.53.295 provides that Union Pacific ("UP") must bear the "entire cost" of signal maintenance costs. Section 16 of the draft Public Highway At-Grade Crossing Agreement, which shifts these costs to the City, is inconsistent with RCW 81.53.295.

Casey J. Moore, Ellis Mays, Paul Rathgeber, Peggy Ygbuhay
Union Pacific Railroad
August 30, 2021
Page 2

In response to Mr. Driskell's letter of June 30, 2021, the City hoped that UP might explain by reference to some legal authority its insistence that Section 16 remain in the draft agreement. Mr. Mays' responsive email of August 4, 2021, appears to be in error. While it is accurate that this project involves "roadway widening to accommodate an additional lane of travel and pedestrian treatments" and that "the type of traffic control devices is unchanged except for the additional length of said devices," these factors have no connection to allocation of post-construction maintenance costs. UP cites no authority that would excuse compliance with RCW 81.53.295.

The City has been coordinating this project with UP for over two years and requesting a crossing agreement for more than a year. Please consider this a respectful final request to remove Section 16 and Exhibit F from the draft agreement.

If UP cannot or will not accommodate this request, the City will file a complaint with the UTC and proceed with that course of action. The City will take this step only reluctantly, and certainly wishes to avoid further expense and delay in resolving this matter.

~~Very truly yours~~



Kenneth W. Harper

cc: Cary P. Driskell, City Attorney, City of Spokane Valley
Gloria Mantz, Engineering Manager, City of Spokane Valley

EXHIBIT E



BUILDING AMERICA®

Via email only: kharper@mjbe.com

Mr. Kenneth W. Harper
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902

October 2, 2021

*RE: Barker Road Public Highway At-Grade Crossing Agreement –
Apportionment of Maintenance Costs*

Dear Mr. Harper:

I am writing in response to your August 20, 2021, letter regarding Barker Road Public Highway At-Grade Crossing Agreement for DOT# 662526C at Milepost 12.99 on Union Pacific's Spokane Subdivision in Spokane, Washington ("Barker At-Grade Crossing").

Union Pacific disagrees that RCW 81.53.295 prohibits the apportionment of maintenance cost to the City of Spokane Valley ("City"). Rather, RCW 81.53.295 is relevant only where the City has petitioned the Washington Utilities and Transportation Commission ("UTC") to make a finding that public safety necessitates a change to the existing warning devices at a railroad crossing and when the UTC orders such changes.

Union Pacific is well within its rights to negotiate an apportionment of the signal maintenance—up to and including that the City fully pay for such maintenance. RCW 81.53.261 expressly states that:

Nothing in this section shall be deemed to foreclose the right of the interested parties to enter into an agreement, franchise, or permit arrangement providing for the installation of signals or other warning devices at any such crossing or for the apportionment of the cost of installation and maintenance thereof, or compliance with an existing agreement, franchise, or permit arrangement providing for the same.

Additionally, RCW 81.53.295 is applicable only when there are federal funds allocated to the project, which is not the case here. Even if RCW 81.53.295 were applicable, the *entire* allocation of maintenance costs to Union Pacific violates the Fourteenth Amendment Due Process Clause. Rail-highway grade crossings are for the public benefit,

and Union Pacific does not derive any ascertainable benefit from the at-grade crossing work. Therefore, apportionment of maintenance costs may not be arbitrary or unreasonable. See *Nashville, C. & S. L. Railway v. Walters*, 294 U.S. 405 (1935). A mandatory allocation of 100% of the maintenance costs to Union Pacific is arbitrary and capricious.

Additionally, states are largely preempted from regulating rail transportation in the United States, as Congress has included express preemptions in the Interstate Commerce Commission Termination Act (“ICCTA”) and the Federal Rail Safety Act (“FRSA”). See 49 U.S.C. §§ 10501, 20106(a). RCW 81.53.295’s allocation of 100% of maintenance costs on Union Pacific imposes an unreasonable burden on railroad operations and interstate commerce, contrary to the mandated uniform federal regulatory regime emplaced under ICCTA and FRSA.

Union Pacific has prioritized the Barker At-Grade Crossing and it fully expects that further discussions will result in narrowing and ultimately resolving the parties’ differences. Union Pacific looks forward to your response and making progress on the Barker At-Grade Crossing and reaffirms its commitment to work jointly with the City. Ellis Mays serves as the City’s primary contact. If you have further legal questions or correspondence, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Josephine S. Jordan".

Josephine S. Jordan
Counsel for Union Pacific Railroad