

**WILLMAR WYE PROJECT**  
**MASTER COOPERATION AGREEMENT**  
**BETWEEN**  
**STATE OF MINNESOTA,**  
**KANDIYOHI COUNTY,**  
**CITY OF WILLMAR, AND**  
**BNSF RAILWAY COMPANY**

This Master Cooperation Agreement (“*Master Agreement*”) is made and entered into by and between the **State of Minnesota** through its **Department of Transportation (“MnDOT”), Kandiyohi County, Minnesota (“County”), the City of Willmar, Minnesota (“City”), and BNSF Railway Company, a Delaware corporation (“BNSF”),** collectively referred to as the “*Parties.*” For the purposes of this Master Agreement, MnDOT, County, and City also may be referred to as the “*Public Partners.*”

**RECITALS**

1. Under Minnesota Statutes § 174.02, subdivision 6, the Commissioner of Transportation may enter into agreements with governmental or nongovernmental entities for research and experimentation, for sharing facilities, equipment, staff, or other means of providing transportation-related services; or for other cooperative programs that promote efficiencies in providing governmental services or that further the development of innovation in transportation for the benefit of the citizens of Minnesota; and
2. Under Minnesota Statutes § 471.59, subdivision 1, two or more governmental units may enter into an agreement to cooperatively exercise any power common to the contracting parties, and one of the participating governmental units may exercise one of its powers on behalf of the other governmental units; and
3. Under Minnesota Statutes § 465.035, any county, town, city or other public corporation may lease or convey its lands for a nominal consideration, without consideration or for such consideration as may be agreed upon to the state or to any governmental subdivision or to another public corporation for public use when authorized by its governing body; and
4. Under Minnesota Statutes § 222.26, when, in the location of any railroad, it becomes necessary to occupy any road, street, alley, or public way, the municipal corporation or other public authority owning or having charge thereof and the railroad company may agree upon the manner, terms, and conditions in and upon which the same may be used or occupied, or such corporation may appropriate so much of the same as may be necessary by condemnation proceedings under the power of eminent domain; and
5. The Parties desire to pursue a public-private partnership for the construction of a direct rail connection between two existing BNSF main track subdivisions (the “*Wye*”), construction of a rail spur to the City’s industrial park, and modification of surrounding roadways, commonly known as

the Willmar Wye Railroad Connector Project, as further depicted in **Exhibit A-1** attached and incorporated herein by reference (“**Project**”); and

6. The Parties acknowledge the benefits of the Project, specifically that (i) the direct connection and spur line will provide community and environmental benefits from the reduction of in-town train traffic and at-grade crossing occupations in the center of the City, (ii) the Project will provide BNSF with increased operational flexibility and an improved environmental footprint, and (iii) the Project will provide businesses and the City’s industrial park and other regional users increased rail service opportunities; and
7. The Parties have coordinated efforts to develop the Project, including: determining roadway and rail configurations, assessing environmental risks, acquiring right-of-way, applying for necessary regulatory approvals, and securing funding (including the award of a Transportation Investment Generating Economic Recovery grant (the “**TIGER Grant**”) in the amount of \$10,000,000); and
8. The Parties agree that the development of the Project has reached a point where the Parties desire to memorialize each Party’s roles, responsibilities, and obligations for the Project in a binding definitive agreement, this Master Agreement.

## **AGREEMENT**

NOW, THEREFORE, for mutual valuable consideration, the sufficiency of which has been agreed to by the Parties, MnDOT, County, City, and BNSF agree as follows:

### **ARTICLE I GENERAL**

#### **A. Definitions.**

1. “**Changed Condition**” means any event of force majeure, or the occurrence of fire, flood, explosion, disaster, strike, materials unavailability, delays in obtaining permits and approvals, unforeseen tasks including mitigation, that may be required by administrative or judicial decision, impacted soils or other environmental conditions encountered during construction, the need to secure permits and approvals from any public agency claiming jurisdictional authority or responsibility over regulating or permitting Project work, judicial or administrative injunctions, unexpected physical conditions, a failure of the Public Partners to construct the Railroad Portal in compliance with the parameters set forth in **Exhibit A-2**, or any other cause beyond the reasonable control of any Party, including delays and errors relating to the construction of the Project not caused by such Party.
2. “**County Transfer Agreement**” means that Transfer Agreement by and between the County and BNSF in the form attached hereto as **Exhibit D**.
3. “**Environmental Mitigation**” means measures committed to in the NEPA determination and/or specified in the plans, specification and contract documents, to mitigate the unavoidable adverse impacts of the Project to natural, cultural and/or social resources.
4. “**Grading of Rail bed/subgrade**” means all work, including structures constructed, reconstructed or installed below the ballast, rail and railroad maintenance road surfacing for the satisfactory completion of the Wye, and siding and spur track between the Morris and Marshall subdivisions.

5. “***MnDOT Transfer Agreement***” means that Transfer Agreement by and between MnDOT and BNSF in the form attached hereto as **Exhibit C**.
  6. “***NEPA***” means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), as amended.
  7. “***Property Agreements***” means the Purchase and Sale Agreement, the MnDOT Transfer Agreement and the County Transfer Agreement.
  8. “***Public Infrastructure***” means all work required to complete the Project, including without limitation all work on roadways, roadway bridges and publicly owned utilities, excluding the Railroad Infrastructure and railroad maintenance roads to be constructed, reconstructed, installed and/or relocated for the satisfactory completion of the Project.
  9. “***Public Infrastructure Cost***” means the cost associated with all Public Infrastructure, including without limitation, design and Environmental Mitigation costs.
  10. “***Purchase and Sale Agreement***” means that Purchase and Sale Agreement by and between the City and BNSF in the form attached hereto as **Exhibit B**.
  11. “***Railroad Infrastructure***” means all Grading of the Rail bed/subgrade, and construction of all track, ties, ballast, signal systems as well as subgrade and structures associated with the same that will be constructed (and/or reconstructed) for the satisfactory completion of the Railroad Infrastructure portion of the Project.
  12. “***Railroad Infrastructure Costs***” means the cost associated with all the Railroad Infrastructure that will be constructed and/or reconstructed for the satisfactory completion of the Project, including but not limited to, design and Environmental Mitigation costs necessitated by the construction of the Railroad Infrastructure.
  13. “***Railroad Portal***” means the horizontal and vertical clearance envelope to be maintained under the highway overpasses for BNSF’s construction and the Wye, as identified in **Exhibit A-2** attached hereto.
  14. “***Timeline***” means the Project Completion Timetable attached hereto as **Exhibit F**.
  15. “***Wye***” has the meaning set forth in Recital 5 of this Master Agreement.
- B. List of Exhibits.** The following exhibits to this Master Agreement are attached hereto, incorporated herein, and are otherwise made a part hereof:

**Exhibit A-1** Project Elements  
**Exhibit A-2** Railroad Portal  
**Exhibit A-3** Parcel Map and Table  
**Exhibit A-4** BNSF Reserved Access Area  
**Exhibit A-5** BNSF Access Points  
**Exhibit B** Purchase and Sale Agreement  
**Exhibit C** MnDOT Transfer Agreement

- Exhibit D** County Transfer Agreement
- Exhibit E** Utility Crossings & Future City Utility Conduit Crossings
- Exhibit F** Timeline
- Exhibit G** 45<sup>th</sup> St. MnDOT/BNSF Construction and Maintenance Agreement
- Exhibit H** Flowdown Provisions
- Exhibit I** List of Other Agreements
- Exhibit J** Map of BNSF Corridor to be surveyed

## ARTICLE II

### PURPOSE, DUTY TO COMPLETE THE PROJECT SCOPE, AND GENERAL COOPERATION

**A. Purpose of the Agreement.** The purpose of this Master Agreement is to set forth:

1. The Parties' commitment to the scope and benefits of the Project;
2. The responsibilities and obligations agreed to be undertaken by each Party with respect to the Project; and
3. A timetable for the construction of the Project.

**B. Duty to Complete the Project Scope.** The Parties agree that satisfactory completion of the Project includes construction of the following Project elements, upon the terms and as described in this Master Agreement and as shown and described in greater detail on **Exhibit A-1** attached hereto and incorporated herein by reference:

1. BNSF completion of the Wye track connecting the Morris subdivision main line tracks to the Marshall subdivision main line tracks;
2. BNSF completion of approximately 10,000 linear feet of Grading of Rail bed/subgrade for a future siding track, if necessary, adjacent to the Wye track;
3. The Public Partners' completion of all roadway modifications, including, but not limited to, separated grade crossings at the intersection of the Wye at relocated Trunk Highway 12 and Trunk Highway 40 including roadway improvements within the public rights of way up to the railroad corridor as shown on **Exhibit A-5**;
4. The Public Partners' conversion of an existing private road crossing to a public at-grade crossing at 45<sup>th</sup> Street and the Morris subdivision and the permanent closure and vacation of the existing at-grade crossing at existing 45<sup>th</sup> Street NW;
5. BNSF's installation of crossing warning equipment at the new 45<sup>th</sup> Street/ Morris subdivision at-grade crossing; and
6. BNSF's completion of a rail spur track, consisting of mainline turnout from the Wye and 500 linear feet of track, providing future access to the City's planned industrial park as set forth in **Exhibit A-1**.

**C. General Cooperation.** The Parties to this Master Agreement affirm that their overall goal is successful completion of the Project, consistent with the Project goals set forth in the TIGER grant application, which can be found at <http://www.dot.state.mn.us/ofrw/willmar/>. To this end, each

Party to this Master Agreement agrees to reasonably cooperate with all other Parties. Satisfactory reasonable cooperation under this Master Agreement includes, but is not limited to, timely and complete responses to requests for relevant information, documentation and approvals necessary for the timely completion of the Project, as provided in this Master Agreement.

### ARTICLE III TIGER GRANT, PROJECT DEVELOPMENT, AND PROJECT MAINTENANCE

#### A. TIGER Grant.

1. **MnDOT's Responsibilities.** In addition to its obligations under Article II of this Master Agreement, as the state's principal agency for the administration and coordination of state transportation policies and programs, MnDOT will act on behalf of the Parties as the lead agency and recipient of the TIGER Grant. As the lead agency, MnDOT will:
  - a. Be responsible for working with the lead federal regulatory agency administering the TIGER Grant, the United States Department of Transportation ("*USDOT*"), through the environmental and grant agreement process;
  - b. Be responsible for coordinating the meeting of deadlines as required under the TIGER Grant, and for monitoring the Project's compliance with applicable federal, state and local laws and regulations;
  - c. Be responsible, as the Recipient thereunder, for the performance of TIGER Grant agreement (the "*TIGER Grant Agreement*") related to the Project among MnDOT, the USDOT and the Federal Railroad Administration ("*FRA*"), and for complying with all terms and conditions of the TIGER Grant Agreement; and
  - d. Have the authority to take reasonable actions to meet the requirements of the TIGER Grant on behalf of the Public Partners, including, but not limited to, hiring consultants, meeting with regulatory agencies, setting committee meetings, public outreach, and updating public officials on Project progress.
2. **Public Partners' and BNSF's Responsibilities.** The Public Partners and BNSF acknowledge that the TIGER Grant contains reporting requirements as detailed in this Master Agreement and each Party agrees to provide all information in the Party's possession and attend meetings as reasonably necessary to successfully fulfill said reporting requirements. This obligation is in addition to each Party's obligations under Article II of this Master Agreement. The timeline for providing information and approvals, reviewing and commenting on draft reports, submitting final reports and other relevant timing matters is provided on the attached **Exhibit F**. The draft and final reports necessary to successfully fulfill the TIGER Grant reporting requirements will be produced by the Public Parties. BNSF will comment and respond to such reports as may be reasonably necessary as described on **Exhibit F**. The reports required of the Public Partners contemplated by this Master Agreement are the following:
  - a. Quarterly Project progress reports;
  - b. Monthly report;
  - c. Closeout reports;

- d. Pre-Project performance measure report(s);
- e. Interim performance measurement reports; and
- f. Project outcomes report(s).

**B. Project Development.**

1. **MnDOT's Responsibilities.** In addition to its obligations under Article II of this Master Agreement, MnDOT, on behalf of the Public Partners, will act as the lead agency in the development of the Project for the Public Infrastructure. As the lead agency, MnDOT will:
  - a. Inform the other Parties about the progress of development of the Project;
  - b. Solicit, evaluate, and incorporate input from the other Parties for the development and execution of the Project;
  - c. Be responsible for completing and submitting the environmental document for NEPA approval; and
  - d. Be responsible for completing and submitting the applications for the permits to construct the Highway Overpass Improvements (as defined in Section 2.10 of the Maintenance Agreement executed by MnDOT and BNSF (the "*Maintenance Agreement*")).
2. **Public Partners' and BNSF's Responsibilities.** In addition to each Party's obligations under Article II of this Master Agreement, the Public Partners and BNSF will:
  - a. Participate in Project meetings;
  - b. Provide input on Project components and identify concerns;
  - c. Provide any previously completed preliminary engineering work or relevant other information necessary for completing the environmental document for NEPA approval;
  - d. Be responsible for completing and submitting the applications for the permits, if any, necessary for the construction each Party's respective infrastructure; and
  - e. Provide to MnDOT copies of permits, if any, obtained by such Party, associated with the Project and necessary for MnDOT to comply with its oversight, information collection, and reporting responsibilities under the TIGER Grant Agreement.

**C. Project Maintenance.**

1. **BNSF Responsibility.**
  - a. BNSF will make all reasonable efforts to ensure the maintenance of the Railroad Infrastructure to the level of utility which exists when the Railroad Infrastructure improvements are placed in service for a period of 20 years from the date the Railroad Infrastructure is placed into service. MnDOT reserves the right, through participation in the FRA Rail State Safety Participation Program, to make reasonable inspections, consistent with such program, to ensure the Railroad Infrastructure complies with all

applicable FRA track safety standards for a period of 20 years from the date the Railroad Infrastructure is placed into service.

2. **Public Partners' Responsibility.** The Public Partners will make all reasonable efforts to ensure the maintenance of the Public Infrastructure to the level of utility which exists when the Public Infrastructure improvements are placed in service for a period of 20 years from the date the Public Infrastructure is placed into service.

**ARTICLE IV  
ACQUISITION OF LAND, EASEMENTS, RIGHT-OF-WAY AND OTHER INTERESTS FOR  
THE PROJECT**

**A. Compliance with Law and Environmental Procedures.**

1. **State and Federal Law.** Except for real property owned by a Party prior to the execution of this Master Agreement and as otherwise provided below, each Party will, to the extent applicable, follow state and federal law, including, but not limited to, Minn. Stat. §117.82, subd. 1, 42 U.S.C. 4601 et seq., and 49 C.F.R. Part 24, when acquiring real property for the Project. Each Party has or will acquire the real property necessary to complete the conveyances contemplated by the Property Agreements. To the extent the Public Partners have not already acquired to the necessary real property interests to complete such conveyances, the appropriate Party will make offers for such real property as soon as possible in order to meet the transfer closing dates in the Timeline.
2. **MnDOT's Environmental Due Diligence Process.** MnDOT must follow its Environmental Due Diligence ("**EDD**") process prior to acquiring real property. Except as provided below, each Party will cooperate and provide MnDOT access to perform EDD on its real property with reasonable notice pursuant to entry and access agreements in place or to be negotiated between BNSF and MnDOT.
3. **Application of Laws to BNSF.** The Railroad Infrastructure and associated structures contemplated in the Project are an integral part of BNSF's interstate rail system. Under the ICC Termination Act, 49 U.S.C. § 10501(b), the federal Surface Transportation Board has exclusive jurisdiction over railroad operations and facilities. Although state and local agencies generally do not have jurisdiction to compel BNSF to submit to permitting requirements as a condition of improving BNSF's interstate facilities, BNSF may voluntarily agree to comply with reasonable state and local environmental requirements in connection with railroad construction projects, however, BNSF's voluntary cooperation in no way is meant to confer jurisdiction on the state or local regulator but instead may be a by-product of BNSF's commitment to partnership with the community. BNSF retains its right to object to the application of any state or local law, including environmental or permitting requirements, and nothing in this Master Agreement shall be construed as a waiver of this right or an agreement to comply with such requirements by contract.

**B. Land Conveyances.**

1. **City Conveyances to BNSF.**
  - a. Pursuant to the Purchase and Sale Agreement, the City will convey and BNSF will acquire fee simple interest in parcels of real property, identified and described therein, which, when

added with other conveyances to BNSF pursuant to the Property Agreements, will provide BNSF with a 200' wide right of way corridor for the construction of the Wye.

- b. The Parties acknowledge there may be pre-existing utilities on the real property to be conveyed to BNSF under the Purchase and Sale Agreement that conflict or are likely to conflict with the planned Railroad Infrastructure that may be identified in Subsurface Utility Engineering documents dated November 8-17, 2016 and incorporated by reference. If the City has rights or opportunity to exercise influence under an existing permit, agreement, or otherwise with such utility owners which may assist in the resolution of such utility conflicts, the City will exercise such rights or measures as required by the Purchase and Sale Agreement; provided that City is under no obligation to institute litigation, incur costs or become liable for damages associated with utility relocation, utility conflict resolution or the assertion of associated rights. All engineering designs for existing or new utility crossings of the Railroad Infrastructure (or otherwise located within BNSF's right of way) must meet BNSF's Utility Accommodation Policy.
  - c. Notwithstanding paragraph (b) above, for any utilities owned, operated, managed or controlled by the City (e.g. water, sewer and electrical utilities or cooperatives owned and/or controlled by the City), which are identified in Subsurface Utility Engineering documents dated November 8-17, 2016 and incorporated by reference (the "*City Utilities*"), the City shall be responsible for the full cost of removing such utilities or resolving any utility conflict with the planned Railroad Infrastructure. Any change, relocation or modification to such City Utilities (regardless of how minor such changes, relocations or modifications may be) must meet BNSF's Utility Accommodation Policy. The Parties acknowledge the City desires utility crossings for future City Utility usage as depicted on Exhibit E. The City will provide BNSF with engineering plans for such future utility crossings. BNSF will construct the utility crossings according to the approved engineering designs during the construction of the Railroad Infrastructure and the City agrees to pay 100% of such utility construction costs upon BNSF's request for reimbursement. The City may not withhold reimbursement for any reason except for construction not performed in accordance with the approved engineering designs. For all City Utilities, the City agrees to enter into BNSF's standard form permit agreement that provides, among other things, that the City will have ongoing responsibility for all maintenance, removal and related liabilities for the City Utilities, including any and all damages suffered by BNSF as a result of the continuing presence of the City Utilities on BNSF's property.
  - d. Notwithstanding the foregoing, the City and BNSF acknowledge that there are existing sanitary sewer pipelines crossing the real property to be conveyed by the City to BNSF, and the parties have agreed to a Pipeline Easement Agreement, to be executed and delivered pursuant to the Purchase and Sale Agreement, governing the rights of the Parties in relation to such pipelines.
  - e. Closings for the conveyance contemplated by the Purchase Agreement will take place as set forth on the Purchase Agreement and the Timeline.
2. **Conveyances between City and MnDOT.**
- a. In addition to the real property conveyed to the State pursuant to the Property Agreements, the City will convey to the State parcels of real property necessary for the State to complete the Project.



- b. The State owns a Highway Easement located in or near the City of Willmar, Kandiyohi County, State of Minnesota, dated 14 January 1955, and recorded in the Office of the Kandiyohi Recorder on 13 April 1955, in Book 351 of Misc., page 32, and as Document Number 168930 (the “**State Easement**”) and the City is the owner of the underlying fee simple estate. Prior to any conveyance to BNSF, MnDOT will convey and release to the City that portion of its interest in the State Easement that is located within the 200’ wide right of way corridor for the construction of the Wye. The Parcel included within the State Easement is depicted on Exhibit A-3 as Parcel 19.

3. **Mutual Conveyances between MnDOT and BNSF.**

- a. Pursuant to the MnDOT Transfer Agreement, MnDOT will convey to the County and the County will convey to BNSF, certain parcels of real property, which, when added with other conveyances to BNSF pursuant to the Property Agreements, will provide BNSF with a 200’ wide right of way corridor for the construction of the Wye, and BNSF will convey to MnDOT certain parcels of real property, as described in the MnDOT Transfer Agreement.
- b. Pursuant to the MnDOT Transfer Agreement, BNSF will convey to MnDOT certain easement rights for highway purposes for the Trunk Highway 40 and the Trunk Highway 12 Highway Overpass Improvements over the Wye and BNSF rail corridor, as depicted in **Exhibit A-3**. There will be no compensation between MnDOT and BNSF for the conveyances contemplated by the MnDOT Transfer Agreement other than the real property itself.
- c. The Parties acknowledge pre-existing utilities on the real property that conflict or are likely to conflict with the planned Railroad Infrastructure are identified in Subsurface Utility Engineering documents dated November 8-17, 2016 and incorporated by reference. If MnDOT has rights or opportunity to exercise influence under an existing permit, agreement or otherwise with such utility owners which may assist in the resolution of such utility conflicts, MnDOT will exercise such rights or measures prior to conveyance; provided that MnDOT is under no obligation to institute litigation, incur costs or become liable for damages associated with utility relocation, utility conflict resolution or the assertion of associated rights. All engineering designs for existing utility crossings of the Railroad Infrastructure (or otherwise located within BNSF’s right of way) must meet BNSF’s Utility Accommodation Policy.
- d. If, in the construction of the Public Infrastructure, MnDOT changes, relocates or modifies, any utility crossings or utilities that also cross or impact Railroad Infrastructure (regardless of how minor such changes, relocations or modifications may be) such utility must be constructed and completed in accordance with BNSF’s Utility Accommodation Policy. Such utility removal, crossing or modification construction contemplated by this paragraph shall be at no cost to BNSF, provided that the utility owner bears the cost for utility changes, modifications and/or relocations, consistent with Minnesota law. Subject to the foregoing and to the extent authorized by Minnesota law, MnDOT will provide good faith efforts to assist in utility relocations as reasonably necessary.
- e. The closing for the conveyances contemplated by the MnDOT Transfer Agreement will take place as set forth in the MnDOT Transfer Agreement and in material compliance with the Timeline.

- f. The real property conveyances as contemplated by the MnDOT Transfer Agreement to BNSF shall be free and clear of surface crossings except those identified as Permitted Encumbrances pursuant to the MnDOT Transfer Agreement.
4. **Conveyances Between the County and BNSF.**
- a. Pursuant to the County Transfer Agreement, the County will convey to BNSF certain parcels of real property, which, when added with other conveyances to BNSF pursuant to the Property Agreements, will provide BNSF with a 200' wide right of way corridor for the construction of the Wye, and BNSF will convey to the County certain parcels of real property as described in the County Transfer Agreement. The conveyance of real property from BNSF to County shall be made by quitclaim deed with no reservations and the conveyance of real property from County to BNSF shall be by quitclaim deed with no reservations.
- b. The real property conveyed by the County to BNSF shall be free and clear of crossings, except those identified as Permitted Encumbrances pursuant to the County Transfer Agreement.
- c. Pursuant to the MnDOT Transfer Agreement, MnDOT will convey the State Property to the County in compliance with Minn. Stat. §§ 161.43 and 161.44, and the County will in turn convey the State Property to BNSF as provided in the MnDOT Transfer Agreement.
- d. The Parties acknowledge pre-existing utilities on the real property that conflict or are likely to conflict with the planned Railroad Infrastructure are identified in Subsurface Utility Engineering documents dated November 8-17, 2016 and incorporated by reference. If the County has rights or opportunity to exercise influence under an existing permit, agreement or otherwise with such utility owners which may assist in the resolution of such utility conflicts, the County will exercise such rights or measures prior to conveyance; provided that County is under no obligation to institute litigation, incur costs or become liable for damages associated with utility relocation, utility conflict resolution or the assertion of associated rights. All engineering designs for relocation of existing utility crossings of the Railroad Infrastructure must meet BNSF's Utility Accommodation Policy. The closing for the conveyance by the County and the closing for the conveyance by BNSF, both contemplated by the County Exchange Agreement, will take place as set forth in the County Exchange Agreement and the Timeline.
- e. BNSF agrees to grant to the County a license for the construction of a new overpass of CSAH 5 or CSAH 55 over the Marshall Subdivision and a permanent aerial easement following such construction and other required approvals, without cost, provided that the County has fully funded and programmed such overpass no later than five years following the Effective Date of the Master Agreement, which grant will be conditioned on (i) the final permanent closure and vacation of the existing at-grade rail crossing at the same location, including receipt of all necessary governmental approvals for such closure (which will be obtained at the County's sole expense); (ii) the County and BNSF executing the standard BNSF agreements related to such aerial easements, including without limitation, BNSF's standard form Construction and Maintenance Agreement, which will control the construction of such overpass and evidencing such easement; and (iii) BNSF approval of the overpass improvements (including pre-construction design approval and final approval of the as-built improvements). In the event that construction of such new overpass has not

commenced within ten years following the Effective Date of this Master Agreement, BNSF's obligations as to this paragraph shall terminate.

- C. **Property Restrictions.** Except as expressly provided in this Master Agreement, the Property Agreements, the TIGER Grant Agreement and the respective exhibits and attachments thereto, the property acquired by BNSF relating to the Project will not be conveyed subject to restrictions of any kind, except for Permitted Restrictions. Permitted Restrictions include, but are not limited to, the TIGER Grant Agreement's Title VI assurances under 49 C.F.R. § 21.7(a)(1) that run with the land on subsequent transfers of the property or future instruments granting nonpossessory rights in the property, such as licenses, permits, and leases.
- D. **Inspection.** Each Party accepting a conveyance of real property under this Master Agreement will receive reasonable opportunity to examine the property and title to the property and to complete any necessary assessments and examinations as set forth in the appropriate Property Agreement prior to acceptance of any conveyance thereunder.
- E. **Failure to Close.** In the event that any Party fails to convey those parcels of real property as required by such party at the First Closing (as defined in the MnDOT Transfer Agreement) or at the Closing (as defined in the Purchase and Sale Agreement), then the intended Grantee of such conveyance(s) shall have the right to terminate this Master Agreement.
- F. **ALTA Survey & Title Commitments.** MnDOT will be responsible on behalf of the Public Partners for obtaining legal descriptions, an ALTA survey and title commitments (which will be certified to BNSF or name BNSF as a proposed insured thereunder), as required of the Public Partners under the Property Agreements, for the transfers of real property from the Public Partners to BNSF necessary for the 200' wide contiguous rail corridor as described in the Property Agreements. MnDOT will also be responsible for preparing the legal descriptions of the real property conveyed by BNSF to the County which includes BNSF Parcels A and B as described in the County Transfer Agreement.

MnDOT, at its sole cost and expense, shall cause to be prepared legal descriptions for all land to be conveyed to BNSF by the Public Partners for the 200' wide contiguous rail corridor, for BNSF review and approval. Within forty (40) days after the Effective Date of the MnDOT Transfer Agreement, MnDOT will enter into a contract with Bonnema Runke Stern Inc., Professional Land Surveyors ("**Surveyor**") to have the legal descriptions for such land prepared and surveyed (collectively, the "**Property Survey**"). The legal descriptions will be provided to BNSF for review and approval within ten (10) days after the contract with the Surveyor is fully executed. The land to be included in the Property Survey is depicted in **Exhibit J** as Parcels 1, 6, 7, 10, 11, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, X and Y. The Property Survey will: (i) be certified to BNSF and the Title Company (as defined in the MnDOT Transfer Agreement), (ii) reflect the actual dimensions of and the total number of gross and net acres within the land described therein, (iii) identify any rights-of-way, easements, or other Encumbrances by applicable recording reference, (iv) show the location of all improvements, (v) be conducted in accordance with the Minimum Detail Requirements and Standards for Land Title Surveys of the American Title Association and American Congress on Surveying and Mapping, and (vi) include the Surveyor's registered number and seal, the date of the survey, and a narrative certificate in form and substance reasonably acceptable to MnDOT, BNSF, Title Company and Surveyor. The legal descriptions prepared as a part of the Property Survey will be used in all of the documents set forth in the Property Agreements that require a legal description of the property. In addition to the foregoing, the Property Survey shall include the following ALTA/NSPS Table A requirements:

- (i) Monuments placed (or a reference monument or witness to the corner) at all major

corners of the boundary of the property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner;

- (ii) Gross land area ;
- (iii) Substantial features observed in the process of conducting the fieldwork (e.g., parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse);
- (iv) Location of utilities existing on or serving the surveyed property as determined by:
  - observed evidence collected pursuant to a standard ALTA survey.
  - evidence from plans requested by the surveyor and obtained from utility companies, or provided by client (with reference as to the sources of information), and
  - markings requested by the surveyor pursuant to an 811 utility locate or similar request

Representative examples of such utilities include, but are not limited to:

- Manholes, catch basins, valve vaults and other surface indications of subterranean uses;
- Wires and cables (including their function, if readily identifiable) crossing the surveyed property, and all poles on or within ten feet of the surveyed property. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the dimensions of all encroaching utility pole crossmembers or overhangs; and
- Utility company installations on the surveyed property.
- (v) Names of adjoining owners according to current tax records. If more than one owner, identify the first owner's name listed in the tax records followed by "et al.";
- (vi) Evidence of recent earth moving work, building construction, or building additions observed in the process of conducting the fieldwork;
- (vii) Proposed changes in street right of way line, if such information is made available to the surveyor by the controlling jurisdiction. Evidence of recent street or sidewalk construction or repairs observed in the process of conducting the fieldwork;
- (viii) If there has been a field delineation of wetlands conducted by a qualified specialist hired by the client, the surveyor shall locate any delineation markers observed in the process of conducting the fieldwork and show them on the face of the plat or map. If no markers were observed, the surveyor shall so state;
- (ix) Include any plottable offsite (i.e., appurtenant) easements or servitudes disclosed in documents provided to or obtained by the surveyor as a part of the survey pursuant to a standard ALTA survey.

The Property Survey shall certify that all of the parcels being conveyed by the Public Partners are contiguous to each other so that the Title Company will issue a Property Owner Policy (as defined in the MnDOT Transfer Agreement) to BNSF that includes a Contiguity Endorsement (as defined in the MnDOT Transfer Agreement). The Parties acknowledge and agree that the 200' wide contiguous corridor includes two parcels (Parcel X and Y as shown on Exhibit J) that are not owned by the Public Partners, but are owned by BNSF. The Parties agree that Parcel X and Y will be included in the Property Survey and that BNSF will obtain, at its sole cost and expense, a title commitment and comply with any requirements of the Title Company, so that the Title Company will issue a Contiguity Endorsement for the land included in the Property Survey.

The Parties agree that the Surveyor is only required to complete one field survey (the “Initial Field Survey”) prior to the First Closing (as defined in the MnDOT Transfer Agreement) and, except as set forth below or as contained in the MnDOT Transfer Agreement, is not required to perform any additional field work for any other subsequent closing. For all closings after the First Closing, the Surveyor shall only be required to re-certify the Property Survey based upon the Initial Field Survey to show new exceptions not shown by the Initial Field Survey or so that the Title Company will issue a Title Policy to BNSF with a Contiguity Endorsement. Said re-certification will occur twenty (20) days prior to each closing.

**ARTICLE V  
CONSTRUCTION AND CONSTRUCTION CONTRACT ADMINISTRATION**

**A. Railroad Infrastructure.**

1. **BNSF Responsibility.** BNSF is responsible for and will construct the Railroad Infrastructure of the Project, as follows:

- a. Plans, specifications, and bid documents;
- b. Labor, materials, equipment and oversight for construction;
- c. Flagging necessary for the construction of the Railroad Infrastructure;
- d. Construction engineering and inspection for the Railroad Infrastructure; and
- e. Construction contract administration for BNSF contracts.

(the foregoing, collectively, the “*Scope of Work*”). At the sole discretion of BNSF, any item of work incidental to the items listed above may be included as a part of the Scope of Work contemplated by this Master Agreement upon written notice to MnDOT.

2. **Start of Rail Track Construction.** BNSF will not start construction of the Railroad Infrastructure in the area of the Highway Overpass Improvements until substantial completion, as defined by MnDOT, of the Highway Overpass Improvements over the real property on which the Wye will be constructed. Notwithstanding the foregoing and the Timeline, BNSF may construct the Grading for the Rail bed/subgrade concurrent with the roadway subgrade construction if the Grading for the Rail bed/subgrade construction:

- a. Occurs outside of the areas depicted in **Exhibit A-4**;
- b. Does not unreasonably interfere with the Public Partners’ roadway construction in other areas of the Project, as reasonably determined by the MnDOT project manager; and
- c. Does not unreasonably interfere with MnDOT’s construction traffic control plan.

3. **Rail Siding.** BNSF will complete grading work suitable for the future construction of a 10,000 foot rail siding in conjunction with and adjacent to the Wye. BNSF will report average daily train traffic over the Wye on an annual basis for five years following activation of the new rail line. MnDOT has identified a theoretical capacity of the Wye track at 12 trains per day. BNSF’s annual reporting on average daily traffic volume enables the Public Partners to compare actual train activity versus that threshold. In the event annual average daily traffic

volume exceeds the 12 trains per day theoretical capacity during the reporting period, the Parties agree to meet to discuss the network conditions leading to the threshold being exceeded and, if jointly determined to be necessary, implement operational or other measures to direct movement of train traffic over the Wye rather than the Willmar Terminal.

4. **Direction, Supervision and Inspection of Construction.** BNSF will direct and supervise all construction activities performed under the construction contract(s) for the Railroad Infrastructure. As required by Subsection 6 below, BNSF will coordinate with the other Public Partners for the performance of all inspection functions in connection with any contract construction performed by or for a Public Partner under this Master Agreement. BNSF will have the exclusive right to determine whether BNSF's construction contractor has satisfactorily performed the contract construction under this Master Agreement, including for any Public Partner.
5. **Contract Administration and Construction Changes.** BNSF will be responsible for the contract administration of any construction contract(s) for the Railroad Infrastructure. BNSF may make changes in the plans and contract construction and will enter into any necessary addenda, change orders and supplemental agreements with BNSF's contractor(s) that are necessary to cause the contract construction to be performed and completed in a satisfactory manner.
6. **MnDOT Review.**
  - a. Upon reasonable request, for the limited purposes of fulfilling its monitoring and reporting obligations as defined in the TIGER Grant Agreement and this Master Agreement, MnDOT may review, at its own cost and expense, engineering drawings, plans, and other construction contract documents for the construction of the Railroad Infrastructure before construction, as applicable, of the Railroad Infrastructure. Nothing in this paragraph shall be interpreted as granting MnDOT any (i) authority concerning the form or content of BNSF's engineering drawings, plans, and other construction contract documents, or (ii) rights to any other BNSF records of documents not specifically created for the construction of the Railroad Infrastructure to the extent the records or documents are not necessary for the monitoring or reporting requirements under the TIGER Grant Agreement or this Master Agreement.
  - b. MnDOT may review, at its own cost and expense, the construction of the Railroad Infrastructure in order to: (i) monitor BNSF's compliance with applicable statutes and regulations; (ii) monitor BNSF's compliance with the terms and conditions of this Master Agreement; (iii) fulfill its monitoring and reporting obligations as defined in the TIGER Grant Agreement; and (iv) monitor Project performance goal achievement in accordance with the Timeline. MnDOT will utilize standard protocol and process established between MnDOT and BNSF for entering BNSF property, including providing reasonable notice prior to accessing any BNSF property and will comply with all BNSF safety and equipment requirements including, but not limited to, the use of personal protective equipment while on BNSF property and satisfactory completion of any screening and training that may be required by BNSF prior to entry.
7. **Scheduling and Satisfactory Completion of the Project.**
  - a. BNSF will perform all other acts and functions necessary to cause the construction contract for the Railroad Infrastructure to be completed in a satisfactory manner and in material

compliance with the Timeline. MnDOT will submit to BNSF, for BNSF's review, all plans and specifications for the Public Infrastructure that is located on BNSF's real property or that may affect BNSF's existing Railroad Infrastructure or operations. BNSF will review such plans and/or specifications and will provide comments in its ordinary course of business, but in no case longer than 30 days after of receipt of said plans and/or specifications. If comments are not provided within 30 days, BNSF will be deemed to have waived its opportunity to comment, assuming no material change to the plans and/or specifications of the Railroad Portal. The Parties will work together to resolve any disagreements.

- b. Notwithstanding the foregoing, the failure of BNSF to perform, in whole or in part, any of the obligations of BNSF under this Master Agreement, by reason of a Changed Condition shall be excused; provided, that BNSF shall promptly begin or continue work when the Changed Condition(s) abate and complete the work. If a Changed Condition has delayed work so that the Project cannot be completed in the time or manner contemplated in this Master Agreement, BNSF need not proceed with completion of work until the Parties have amended the applicable Project scope, the Timeline, and/or this Master Agreement in a manner that will reasonably permit the Project to be completed in a revised and defined manner, and/or in compliance with the revised Timeline. In the event of a claimed Changed Condition, BNSF shall promptly notify and consult with MnDOT as to how to proceed pursuant to the provisions of this Master Agreement under the circumstances presented by the Changed Condition.

8. **Railroad Infrastructure Ownership.** The Railroad Infrastructure will consist of improvements to BNSF's rail network that will become a permanent part of BNSF's working capital. The Public Partners acknowledge and agree that none of the Public Partners will receive, and are not entitled to, any specific goods or services from BNSF or its affiliates in return for any payments by any of the Public Partners to BNSF in connection with this Master Agreement except for the express obligations of BNSF set forth herein. Title to all Railroad Infrastructure improvements made under the Project, including materials after installation, shall be vested in BNSF, as and when made.

## **B. Public Infrastructure.**

### **1. Public Partner Responsibilities.**

- a. The Public Partners are responsible for creating all plans, specifications, and bid documents for the Public Infrastructure of the Project.
- b. MnDOT is responsible for obtaining all labor, materials, equipment and performing oversight for construction of the Public Infrastructure and ensuring that the Highway Overpass Improvements (as defined in the Maintenance Agreement) are constructed in conformance with the plans and specifications reviewed and accepted by BNSF pursuant to the Maintenance Agreement. MnDOT will advertise for proposals and award to the successful responsible proposer a construction contract for the Public Infrastructure. MnDOT is responsible for contract administration for all contracts relating to the Public Infrastructure.
- c. MnDOT is responsible for transferring (i) those portions of the existing Highway 12 right of way not being conveyed to BNSF under the MnDOT Transfer Agreement and conveying such portions to another public partner, who will open it as a public right of way that will

provide access to BNSF to the Wye as shown on **Exhibit A-5**; and (ii) releasing the existing highway easement (a) over the portions of the existing State Highway 40 right of way that falls within the real property to be conveyed to BNSF pursuant to the Property Agreements and (b) over the portions of State Parcel A (as defined in the Transfer Agreement) that falls within the real property to be used by BNSF for construction of the Wye. The County is responsible for vacating the portions of the existing CSAH 55 right of way that falls within the real property to be conveyed to BNSF pursuant to the Property Agreements or which is presently owned by BNSF.

- d. MnDOT is responsible for the cost of all flagging necessary for the construction of the Public Infrastructure, including, but not limited to, in connection with the conversion of the private road crossing to a public at-grade crossing at 45<sup>th</sup> Street and the Wye and the installation of crossing warning equipment related thereto as provided in the MnDOT/BNSF Construction and Maintenance Agreement attached hereto as **Exhibit G**.
  - e. Upon completion of the Highway Overpass Improvements, MnDOT is responsible for job site cleanup on its temporary construction easements and permanent easements on BNSF right of way. Job site cleanup includes, but is not limited to, removal of the following items: construction materials, concrete debris, surplus soil, contaminated soils, asphalt debris, litter and other waste materials. MnDOT is not responsible for removal of any of the foregoing items of job site cleanup existing prior to MnDOT's construction of the Public Infrastructure. MnDOT will complete job site cleanup by or upon the date of the release of the reserved access areas set forth in the Timeline.
2. **Direction, Supervision and Inspection of Construction.** MnDOT will direct, supervise, and complete all construction activities performed under the construction contract for the Public Infrastructure in accordance with the Timeline. MnDOT will coordinate with the other Public Partners for the performance of all construction engineering and inspection functions in connection with the contract construction for the Public Infrastructure. MnDOT will have the exclusive right to determine whether MnDOT's construction contractor has satisfactorily performed the contract construction for the Public Infrastructure.
  3. **Contract Administration and Construction Changes.** MnDOT will be responsible for the contract administration of all construction contract(s) for the Public Infrastructure. MnDOT may make changes in the plans and contract construction and will enter into any necessary addenda, change orders and supplemental agreements with MnDOT's contractor that are necessary to cause the contract construction to be performed and completed in a satisfactory manner.
  4. **BNSF Reviews.**
    - a. BNSF will, at its own cost and expense, review engineering drawings for the Highway Overpass Improvements as design progresses and approve the dimensions of the Railroad Portals. BNSF will supply MnDOT with the track grades necessary for MnDOT to design the Railroad Portal. BNSF will perform and communicate its review in a timely manner, and the failure of BNSF to so complete its review will be considered a Changed Condition hereunder. Under no circumstances shall lack of BNSF comment on MnDOT design of the Highway Overpass Improvements constitute its approval of such designs or of the finished construction of the Highway Overpass Improvements.



- b. BNSF may review, at its own cost and expense, the construction of the Public Infrastructure, including finish grades and the clearances established by the Railroad Portals. BNSF will not be responsible for ensuring the construction of the Highway Overpass Improvements complies with design documents or notifying MnDOT or its contractors of discrepancies in construction. MnDOT will have the exclusive right and obligation to determine whether MnDOT's construction contractor has satisfactorily performed the contract construction for the Highway Overpass Improvements, except that final clearance provided by such Railroad Portals or any component of the Public Infrastructure that materially affects the planned Railroad Infrastructure, which shall be determined by MnDOT with confirmation from BNSF. A deviation in the dimensions of the Railroad Portals from the BNSF approved plans will be considered a Changed Condition. BNSF will comply with MnDOT's policy on visiting construction sites, including, but not limited to, the use of personal protective equipment.

5. **Scheduling and Satisfactory Completion of the Project.**

- a. The Public Partners will perform all other acts and functions necessary to cause the construction contract(s) for the Public Infrastructure to be completed in a satisfactory manner and in material compliance with Timeline.
- b. Notwithstanding the foregoing, the failure of MnDOT to perform, in whole or in part, any obligations of the Public Partners under this Master Agreement, by reason of a Changed Condition shall be excused; provided, that MnDOT shall promptly begin or continue work when the Changed Condition(s) abate and complete the work. If a Changed Condition has delayed work so that the Project cannot be completed in the time or manner contemplated in this Master Agreement and the Timeline, MnDOT need not proceed with completion of work until the Parties have amended the applicable Project scope, the Timeline, and/or this Master Agreement in a manner as will reasonably permit the Project to be completed in that revised manner, and/or in compliance with the revised Timeline. In the event of a claimed Changed Condition, MnDOT shall promptly notify and consult with BNSF as to how to proceed pursuant to the provisions of this Master Agreement under the circumstances presented by the Changed Condition.

C. **Construction Schedule and Progress Coordination.** The Parties shall form a joint working group to work together in good faith to complete the Project as contemplated in this Master Agreement and in accordance with the Timeline. Each Party shall designate a representative (or representatives) for such joint working group and the representatives shall establish a schedule for monthly joint meetings during the planning and construction of the Project, which such meetings may occur in person or through electronic or telephonic means as agreed by the representatives. The joint working group, among other things, shall coordinate timelines and milestones for the Project, review the status of the Parties' respective obligations under this Master Agreement, share information relating to Project budgets and reimbursements, coordinate and develop consensus among the Parties for communications and responses for information requests and reporting to the FRA and other stakeholders, and undertake such other cooperative efforts as agreed to among the representatives in furtherance of the Project and this Master Agreement. At all monthly meetings of this joint working group, a representative of each Public Partner shall be tasked with recording minutes of the meeting to be distributed among the representatives and further distributed by the representatives to their respective organizations as needed.

D. **Operations.** The Parties hereto agree that none of the Public Infrastructure improvements on or over BNSF real property or the Railroad Infrastructure will be placed into service until BNSF (i)

reviews the Public Infrastructure and accepts the dimensions of the Railroad Portal, generally in accordance with the Timeline or within ninety (90) calendar days following a request for such review and acceptance by MnDOT therefor, and (ii) has received a Property Owner Policy for a 200' wide right of way corridor on which the Wye will be constructed, that includes a Contiguity Endorsement as provided in this Master Agreement.

- E. Maintenance of the Highway Overpass Improvements.** All future maintenance, replacement or work in the Highway Overpass Improvements will be governed by the Easement Agreements, as defined in the MnDOT Transfer Agreement, and documents referenced therein.
- F. Material Terms; Survival; Non-Merger with Deed.** The parties agree that terms of this Master Agreement will not be deemed to have merged into the Property Agreements or the deed(s) or easements to be granted thereunder, and terms of this Master Agreement which, by their nature, must survive the conveyance of the properties in order to give effect to their meaning and intent will survive independent of and not be merged.

## **ARTICLE VI FINANCIAL RESPONSIBILITIES**

### **A. General.**

1. All internal staff costs incurred by BNSF and the Public Partners associated with developing the TIGER application and delivering the Project prior to the execution of this Master Agreement will not be considered Project costs. Such costs are not considered a part of a party's financial contribution to the Project and are not eligible for reimbursement.
2. The following costs shall be considered financial contribution to the project, but are not eligible for reimbursement:
  - a. costs associated with development of the TIGER application and preliminary NEPA documentation;
  - b. preliminary engineering costs;
  - c. costs associated with project development subsequent to grant award and prior to execution of this Master Agreement; and
  - d. costs of real estate acquisitions made in furtherance of the Project subsequent to development of the TIGER application and prior to execution of this Master Agreement.
3. Costs incurred subsequent to execution of this Master Agreement shall be considered financial contribution to the project and are eligible for reimbursement consistent with the terms of this Master Agreement.
4. All costs associated with correcting work, completing incomplete work, or changing work developed as a part of and funded by the TIGER Grant will be the responsibility of BNSF for Rail Infrastructure components and the responsibility of the Public Partners for Public Infrastructure components.
5. Except as otherwise set forth herein or in the Property Agreements or any other applicable agreements between the Parties listed on **Exhibit I** attached hereto (the "***Other Agreements***"),

each Party will be responsible for the costs of Environmental Mitigation due to impacts arising out of the construction of respective Party's infrastructure or facilities.

6. The Parties agree that at the completion of the Project and disbursement of final TIGER Grant funds, a reconciliation may be required prior to Project closeout to properly administer the allocations set forth in Section B, Paragraph 3 and Section C, Paragraph 3, below.

**B. Railroad Infrastructure Costs.**

1. BNSF is responsible for all Railroad Infrastructure Costs associated with the Project.
2. BNSF will be responsible for costs associated with all maintenance of signal equipment constructed at the at-grade crossing at 45<sup>th</sup> Street as provided in the MnDOT/BNSF Construction and Maintenance Agreement associated with such crossing, attached hereto as **Exhibit G.**
3. BNSF shall be entitled to 45% (forty-five percent) of the total amount of TIGER Grant funds actually distributed for the Project, as determined by the terms of the TIGER Grant Agreement, for reimbursement of its project costs to pay for the construction elements of the Rail Infrastructure, according to the terms of this Master Agreement and the TIGER Grant Agreement.
4. The conveyances of real property among the Parties to accomplish the Railroad Infrastructure will be controlled by the Property Agreements.

**C. Public Infrastructure Costs.**

1. The Public Partners are responsible for all Public Infrastructure Costs associated with the Project.
2. The Public Partners will be responsible for all of the material, equipment and labor costs to install the signal system, as specified in the MnDOT/BNSF Construction and Maintenance Agreement attached hereto as **Exhibit G.** for the at-grade crossing at 45<sup>th</sup> St. The Public Partners agree to provide, to the BNSF Manager Evidence Preservation, Project documentation and records in their reasonable possession relating to the use of Federal funds for any work relating to a crossing under this Master Agreement as are agreed to between the parties including: any project applications; any letters of approval and/or authorization forms (e.g., PR-1240 or the equivalent); any and all payment Voucher forms requesting Federal reimbursement (e.g., PR-20 or the equivalent) or any other such project authorization or funding records as BNSF may request from time to time. Such records will be provided to BNSF on a mutually agreeable schedule or within two (2) months after such records are generated or received or requested by BNSF.
3. MnDOT shall be entitled to 55% (fifty-five percent) of the total amount of TIGER Grant funds actually distributed for the Project, as determined by the terms of the TIGER Grant Agreement, to pay for Public Infrastructure Costs allowable for reimbursement under the terms of this Master Agreement and the TIGER Grant Agreement.

#### **D. Reimbursement for Railroad Infrastructure Costs**

1. **Reimbursement.** MnDOT will reimburse for all allowable costs incurred by the BNSF under this Master Agreement as follows:
  - a. ***Compensation.*** BNSF will be reimbursed a total of 45% (forty-five percent) of the total amount of TIGER Grant funds actually distributed for the Project, as determined by the terms of the TIGER Grant Agreement, for allowable Railroad Infrastructure costs. BNSF shall be entitled to an initial reimbursement of a maximum of \$4,500,000.00, subject to reconciliation upon closeout, to properly align with 45% (forty-five percent) of the total amount of TIGER Grant funds. Determination of allowable costs will be made in accordance with applicable Federal cost principles, including, but not limited to, 2 C.F.R. Part 200 Subpart E and the terms of the TIGER Grant. Disallowed costs are those charges determined not to be allowed in accordance with applicable Federal cost principles, including, but not limited to, 2 C.F.R. Part 200 Subpart E and the terms of the TIGER Grant.
  - b. ***Total Obligation.*** The total obligation of MnDOT for all compensation and reimbursements to BNSF under this Master Agreement will not exceed 45% (forty-five percent) of the amount of TIGER Grant funds actually distributed for the Project, as determined by the terms of the TIGER Grant Agreement. BNSF is responsible for all costs exceeding this amount.
2. **Request for Reimbursement.**
  - a. ***Requests.*** MnDOT will promptly reimburse BNSF after BNSF presents an itemized request for reimbursement for allowable costs incurred for or related to the Project, as provided in this Master Agreement. BNSF will submit requests for reimbursement to MnDOT at regular intervals and not more frequently than once per month and must meet all of the following requirements:
    - i. Requests for reimbursement must only be submitted by BNSF for allowable costs incurred to carry out the Project.
    - ii. Requests for reimbursement must be broken out by task as reasonably required in the Grant Agreement. Requests for reimbursement documentation must indicate total cost of services and amount of funds requested.
    - iii. BNSF may request reimbursements by drawing down its full share of the TIGER Grant before meeting any match under the TIGER Grant by expending its own funds.
    - iv. MnDOT may provide procedural information to BNSF on requesting reimbursements, if such information is communicated to MnDOT by the FRA.
    - v. BNSF must report any salvaged rail and materials as program income under 49 C.F.R. 18.25.
    - vi. BNSF will apply the deductive method as described in 49 C.F.R. 18.25 unless otherwise instructed by FRA. BNSF will report program income on each request for reimbursement so MnDOT may document program income on federal financial reports.

- b. ***Federal funds.*** BNSF is responsible for compliance with the applicable laws and regulations attached hereto as **Exhibit H** (the “***Flowdown Provisions***”). BNSF accepts full financial responsibility for any requirements imposed by BNSF’s failure to comply with such requirements. BNSF will provide all necessary information which BNSF reasonably has or should have for MnDOT to complete quarterly progress reports and quarterly Federal Financial Reports by the deadline imposed by FRA. FRA and MnDOT retain the right to audit or inspect all documentation and planning work.
3. **Conditions of Payment.** All services provided by BNSF under this Master Agreement must be performed in accordance with the Flowdown Provisions and the Scope of Work. BNSF will not receive reimbursement for work performed in violation of applicable law or for work that is not performed within the Scope of Work.
4. **Payment.** MnDOT will make undisputed reimbursement payments to BNSF for work performed by or on behalf of BNSF no later than thirty (30) days after receipt of the invoice from BNSF for work on the Project. If an invoice is incorrect, defective or otherwise improper, MnDOT will notify BNSF within ten (10) days after receipt of such invoice. MnDOT will pay any undisputed portion of such invoice no later than thirty (30) days after receipt of the invoice. If any portion of the invoice is in dispute, the Parties will reconcile the dispute and MnDOT will pay any portion of the disputed amount as mutually agreed by the parties within thirty (30) days of receipt of an invoice showing the reconciliation.
5. **Financial Reconciliation.** According to MnDOT policy for grants over \$50,000, MnDOT may conduct a financial reconciliation of BNSF’s expenditures on the Project annually until the closeout of the TIGER Grant award. MnDOT will provide all the necessary forms and documentation that needs to be completed by BNSF. A financial reconciliation involves reconciling BNSF’s supporting documentation of costs such as purchase orders, receipts and other records related to the Project. BNSF will be given no less than 30 days notice prior to the reconciliation review.
6. **Closeout.** In accordance with 2 CFR 200.343, MnDOT will close out the award provided for the TIGER Grant, when all applicable administrative actions and required work provided for in this Master Agreement have been completed. BNSF shall submit all final claims and required reports to MnDOT within ninety (90) days after substantial completion of the Project. BNSF will have thirty (30) calendar days from receipt of a final audit during closeout to respond to the audit. Failure to respond to the audit within thirty (30) calendar days may be deemed acceptance of the audit findings by BNSF, after which MnDOT may proceed to final closeout of the TIGER Grant. Upon completion of the final audit during closeout, MnDOT will reimburse BNSF any unpaid balance. If the final audit during closeout determines that MnDOT has over reimbursed BNSF through partial reimbursements, BNSF will promptly refund the amount over reimbursement upon receiving an invoice from MnDOT, provided, however, that BNSF shall have the right to challenge the results of such audit, and in the event of such a challenge, the Parties will meet to resolve any such discrepancies.

## **ARTICLE VII APPLICABLE FEDERAL LAWS AND REGULATIONS**

### **A. Procurements and Third Party Contracts.**

1. **Federal Procurement Requirements.** The terms and conditions of the Flowdown Provisions that are part of the TIGER Grant Agreement are set forth in **Exhibit H**, will apply to the Parties

and to any subcontractor engaged by any Party to do work on the Project. Each Party shall incorporate the Flowdown Provisions in the contract with any such subcontractor.

- B. Other Applicable Federal Laws and Regulations.** Each Party assures and certifies, with respect to the TIGER Grant, that it will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they apply to such Party and the Party's application, acceptance, and use of Federal funds for this Project. Performance under this Master Agreement shall be governed by and in compliance with the list of Flowdown Requirements, as applicable to the type of organization of a Party.

## **ARTICLE VIII OTHER AGREEMENTS**

- A. Cooperative Construction Agreements.** The Public Partners may enter into various other cooperative construction agreements amongst each other to further define their respective financial responsibilities with each other for the Project. Such agreements will not impose any restrictions or requirement on BNSF.
- B. Jurisdictional Roadway Transfers.** MnDOT and the other Public Partners will enter into separate agreements from this Master Agreement for the transfer of jurisdictional roadway authority and responsibility on various parts of the Project.

## **ARTICLE IX GENERAL PROVISIONS**

- A. Conflict Resolution.** If a dispute should arise between or among the Parties to this Master Agreement with respect to this Master Agreement or any of its provisions, the Parties involved agree to attempt to settle such dispute through the use of a mediator mutually acceptable to the Parties involved in the dispute prior to initiation of any legal action with respect to this Master Agreement, any of its provisions, its enforcement or both.
- B. Liability.** Except as provided in writing by or through a separate agreement relating to matters contemplated herein, each Party will be responsible for its own acts and omissions, the acts and omissions of its employees, consultants, contractors and the results thereof to the extent authorized by law. The Parties will not be responsible for the acts and omissions of others and the results thereof. The liability of the MnDOT is governed by Minnesota Statutes, Section 3.736, and other applicable law. The liability of the other Public Partners is governed by the Municipal Tort Claims Act in Minnesota Statutes, Chapter 466, and other applicable law. The Parties expressly agree that they do not contractually waive any limitations on liability or other immunities or defenses available to them by statute or common law, for activities undertaken pursuant to this Master Agreement.
- C. Insurance.** The various agreements entered into in order to effectuate this Master Agreement will contain terms and conditions for provision of adequate insurance coverage for the Parties during construction of the Project.
- D. Employees.** All employees of each Party and all persons engaged by each Party in the performance of any work or services required or provided for herein to be performed by each party will not be considered employees of any other Party and that any and all claims that may or might arise under the Worker's Compensation Act or the Unemployment Compensation Act of the State of Minnesota on behalf of said employees while so engaged, and any and all claims made by any third parties as

a consequence of any act or omission on the part of said employees while so engaged, on any of the work or services provided to be rendered herein, will in no way be the obligation or responsibility of any other Party.

- E. Applicable Provisions of Law.** Except as otherwise provided herein, the Parties agree to comply with applicable provisions of Minnesota state law, federal law and regulations and of any applicable local ordinances which will be considered a part of this Master Agreement as though fully set forth herein.
- F. Amendments.** Any alterations, variations, modifications, or waivers of provisions of this Master Agreement will only be valid when they have been reduced to writing as an amendment to this Master Agreement signed by the Parties hereto.
- G. Severability.** To the maximum extent possible, each provision of this Master Agreement will be interpreted in such a manner as to be effective and valid under applicable law. The provisions of this Master Agreement will be deemed severable. If any part of this Master Agreement is rendered void, invalid, or unenforceable, such rendering will not affect the validity and enforceability of the remainder of this Master Agreement unless the parts which are void, invalid or otherwise unenforceable will substantially impair the value of the entire Master Agreement with respect to the Parties. One or more waivers by a party of any provision, term, condition or covenant will not be construed by the other Parties as a waiver of a subsequent breach of the same by other Parties.
- H. Assumption; Assignment.** The covenants and provisions of this Master Agreement are binding upon and inure to the benefit of the successors and assigns of the parties hereto. Notwithstanding the preceding sentence, a Party may neither assign nor transfer any rights or obligations under this Master Agreement without the prior written consent of the other Parties. There are no third party beneficiaries of this Master Agreement.
- I. Survival of Terms.** All clauses which impose obligations continuing in their nature and which must survive in order to give effect to their meaning will survive the expiration or termination of this Master Agreement, including, without limitation, the following clauses: Art. III.C. Project Maintenance; Art. V.A.3 Rail Siding; Art. IX.A. Conflict Resolution; Art. IX.B. Liability; Art. IX.D. Employees; Art. IX.K. Governing Law; Jurisdiction; Venue; Art. IX.N. State Audits; Art. IX.O. Government Data Practices; and Art. IX.R. Force Majeure.
- J. Exhibits.** Exhibits A thru J are attached and incorporated into this Master Agreement.
- K. Governing Law; Jurisdiction; Venue.** Minnesota law, without regard to its choice-of-law provisions, governs the validity, interpretation and enforcement of this Master Agreement. Venue for all legal proceedings arising out of this Master Agreement, or its breach, must be in the appropriate state or federal court with competent jurisdiction in Ramsey County, Minnesota. Except for the venue selection for any litigation arising out of or in connection with this Master Agreement as set forth above, nothing in this Master Agreement shall be deemed a waiver by BNSF of the preemptive effect of any federal or state law, regulation, or ruling. **NOTHING IN THIS MASTER AGREEMENT WILL BE DEEMED A WAIVER BY BNSF OF ANY PREEMPTION RIGHTS THAT MAY BE AVAILABLE TO IT UNDER ANY FEDERAL OR STATE LAW (WHETHER CREATED BY STATUTE, RULE, COMMON LAW OR ANY OTHER MANNER). AS USED IN THIS MASTER AGREEMENT, THE PHRASES “APPLICABLE FEDERAL AND STATE LAW”, “APPLICABLE FEDERAL OR STATE LAW”, AND ANY DERIVATION THEREOF SHALL MEAN THAT STATE LAW SHALL NOT APPLY IF SUCH STATE LAW IS PREEMPTED BY FEDERAL LAW.**

**L. Notices.** Any notice or demand, which may or must be given or made by a Party, under the terms of this Master Agreement or any statute or ordinance, must be in writing and shall be sent certified mail or delivered in person to the other Parties as follows:

MnDOT: Paul Rasmussen  
Project Manager - Engineer Principle  
2505 Transportation Road  
Willmar, MN 56201

County: Larry Kleindl  
County Administrator  
2200 23<sup>rd</sup> St. NE Suite 2020  
Willmar, MN 56201

City: Ike Holland  
Willmar City Administrator  
333 Southwest 6<sup>th</sup> St.  
Willmar, MN 56201

BNSF: Dustin Almaguer  
BNSF Railway Company  
2301 Lou Menk Drive, GOB 3W  
Fort Worth, TX 76131-2830

**M. Contract Administration.** In order to coordinate the activities of the Parties so as to accomplish the purposes of this Master Agreement, the following individuals, or their designees or successors will manage this Master Agreement on behalf of the Parties.

MnDOT: Paul Rasmussen  
Project Manager - Engineer Principle  
2505 Transportation Road  
Willmar, MN 56201

County: Mel Odens  
Public Works Director  
1801 Highway 12 E.  
Willmar, MN 56201

City: Sean Christensen, P.E.  
Willmar City Engineer  
333 Southwest 6<sup>th</sup> St.  
Willmar, MN 56201

BNSF: Dustin Almaguer  
BNSF Railway Company  
2301 Lou Menk Drive, GOB 3W  
Fort Worth, TX 76131-2830

**N. State Audits.** Under Minnesota Statutes § 16C.05, subdivision 5, each Party's books, records, documents, and accounting procedures and practices relevant to this Master Agreement are subject



to examination by MnDOT and the State Auditor or Legislative Auditor, as appropriate, for a period of six years from the end of this Master Agreement, unless preempted by federal law.

- O. Government Data Practices.** Unless preempted by federal law, each party must comply with the applicable provisions of the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to data provided under this Master Agreement, and as it applies to data created, collected, received, stored, used, maintained, or disseminated by each party under this Master Agreement. The civil remedies of Minnesota Statutes §13.08 apply to the release of the data referred to in this clause by any party to this Master Agreement.
- P. Term of the Master Agreement.** This Master Agreement will take effect upon execution by all of the Parties and by proper state officials (the “*Effective Date*”) and will remain in effect until all obligations have been satisfactorily completed.
- Q. Termination.** The Parties to this Master Agreement may mutually agree to cancel this Master Agreement prior to its expiration.
- R. Time of the Essence; Force Majeure.** Time is of the essence in the performance of the parties obligations under this Agreement and the Timeline. No Party will be responsible to the other Parties for a failure to perform under this Master Agreement (or a delay in performance), if such failure or delay is due to a force majeure event. A force majeure event is an event beyond a party’s reasonable control, including but not limited to, unusually severe weather, fire, floods, other acts of God, labor disputes, acts of war or terrorism, government “shutdowns” or public health emergencies.
- S. Entire Agreement.** This Master Agreement and the Other Agreements (including exhibits and other documents incorporated herein) is the full and complete agreement between the Parties with respect to the subject matter herein and supersedes any and all other prior agreements between the parties hereto.

**THE REMAINDER OF THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY.**

**BNSF RAILWAY COMPANY**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**KANDIYOHI COUNTY**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**CITY OF WILLMAR**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**MINNESOTA DEPARTMENT OF TRANSPORTATION**

STATE ENCUMBRANCE VERIFICATION

By: \_\_\_\_\_

Date: \_\_\_\_\_

SWIFT Contract #: \_\_\_\_\_

SWIFT PO #: \_\_\_\_\_

COMMISSIONER OF TRANSPORTATION

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

MNDOT CONTRACT MANAGEMENT

By: \_\_\_\_\_

Date: \_\_\_\_\_