



MEMORANDUM OF UNDERSTANDING
Between
The Colorado Department of Transportation
And
BNSF Railway Company

THIS MEMORANDUM OF UNDERSTANDING is entered into this 31 day of June, 2013
between the Colorado Department of Transportation and the BNSF Railway Company.

Section 1: Background and Objectives

WHEREAS, the _ Department of Transportation, hereinafter called the DEPARTMENT, desires to efficiently and economically administer highway improvement projects that involve railroad properties;

WHEREAS, the BNSF Railway Company, hereinafter called the RAILROAD, desires to cooperate with the DEPARTMENT on highway improvement projects that affect railroad rights-of-way;

WHEREAS, the DEPARTMENT and the RAILROAD, jointly known as the PARTIES, recognize the mutual benefits to public safety and efficiency that result from the operation of the public highway network and the national railroad network;

WHEREAS, the PARTIES recognize the importance of maintaining the safety of the traveling public at all times, particularly when highway improvement and maintenance projects involve railroad rights-of-way;

WHEREAS, the PARTIES recognize the importance of maintaining at all times the safe, reliable, and predictable operations of the RAILROAD;

WHEREAS, both recognize that mutually identified project management and project review practices can reduce both the project review times and project review costs of projects that involve highways and railroads;

WHEREAS, both the RAILROAD and the DEPARTMENT expect, through the normal course of highway improvement and maintenance activities, that the DEPARTMENT will desire to repeatedly execute legal agreements, contracts, the approval of engineering plans, specifications, and estimates in the pursuit of an annual program of highway maintenance and improvement;

WHEREAS, the PARTIES desire to execute such agreements, contracts, engineering plans, specifications, and estimates in an expeditious and cost-effective manner while preserving the full rights of both PARTIES;

WHEREAS, both PARTIES experience staff turnover with the concurrent loss of experience that they seek to address by documenting their understandings, agreements, and mutually agreed-upon practices into a body of institutional knowledge;

WHEREAS, both PARTIES acknowledge that the other PARTY incurs significant expense in terms of staff time, professional fees, and project delays when agreements are not approved in a timely fashion.

NOW, THEREFORE, be it resolved that the DEPARTMENT and the RAILROAD enter into this MEMORANDUM OF UNDERSTANDING to commemorate and memorialize their intention to coordinate their activities involving highway and railroad project agreements to the common benefit of PARTIES, the taxpayer, and the RAILROAD'S shareholders.

Section 2: Partnering

Both PARTIES agree to operate in a cooperative fashion of Partnering, which includes both PARTIES' acknowledgment of the rights, responsibilities, and institutional obligations of the other while also attempting to positively and constructively assist the other with the development of agreements, plans, specifications, and estimates to enable the ongoing maintenance and repair of highway facilities.

Section 3: Appointment of Liaisons

- A. Both PARTIES agree to respectively appoint an employee, herein called the LIAISON, who will serve as the primary point of contact for their respective organizations and will, in regard to highway projects involving railroads, serve to coordinate all activities between the two organizations.
- B. The LIAISONS in both agencies shall agree to coordinate efforts to identify a mutually agreeable process by which all activities necessary to effectuate a highway project involving the railroads shall be identified, documented, and mutually agreed to by both PARTIES.

Section 4: Preliminary Project Notice

- A. The DEPARTMENT agrees that, as early as reasonably possible during the course of developing a highway improvement project or maintenance activity that involves a railroad right-of-way, it will give prompt notice to the RAILROAD of its proposed project or activity. This first notice shall be known as the **Preliminary Project Notice**.
- B. The **Preliminary Project Notice** will be at the stage of initially programming or officially entering into activities within the DEPARTMENT to encumber funds, receive federal approval, begin formal planning activities, or otherwise commencing the expenditure of significant staff time or preliminary development activities on a proposed highway improvement project or maintenance activity that involves a railroad property.
- C. The **Preliminary Project Notice** will include information regarding the type, location, timing, schedule, and estimated cost of the project or maintenance activity. The type, nature, and estimated

timing of RAILROAD reviews, comments, approvals, or participation requested by the DEPARTMENT will be included in the preliminary notice.

- D. Within 30 calendar days of receipt of the DEPARTMENT'S **Preliminary Project Notice**, the RAILROAD will respond by acknowledging the receipt of the DEPARTMENT'S notification. The RAILROAD will attempt in its response to advise the DEPARTMENT as to whether it has known intentions at the location or proximate to the location of the project or maintenance activity that would necessitate the alteration or expansion of its railroad facilities that could require a significantly different highway cross section, bridge type, bridge size and span length, vertical or horizontal clearance, substantial utility relocation, or alteration of drainage structures that could cause the highway cross section or bridge type to be significantly different from what exists at the time of the Preliminary Project Notice.
- E. The DEPARTMENT acknowledges in this MEMORANDUM OF UNDERSTANDING that such notice from the RAILROAD is a nonbinding preliminary notice for which the RAILROAD has no subsequent liability of any kind. Both PARTIES acknowledge that the RAILROAD'S plans subsequently may change during the course of the project's development and that the preliminary notice shall not restrict the RAILROAD'S ability to later provide notice of its need to alter the proposed highway cross section, bridge type, span length, span type, drainage structure, utilities, or other features of the proposed project. The DEPARTMENT acknowledges that the preliminary notice of RAILROAD intentions may be incomplete and may be subsequently altered by additional information, plans, business developments, local zoning, local development, customer requirements, or other factors that could cause the parameters of the preliminary RAILROAD notice to change.

Section 5: Preliminary Engineering Agreements

- A. Subsequent to the **Preliminary Project Notice** and prior to further development of the project or maintenance activity which could require RAILROAD review, comment, or approval, the DEPARTMENT and RAILROAD may enter into a PRELIMINARY ENGINEERING AGREEMENT. This PRELIMINARY ENGINEERING AGREEMENT shall include mutually agreeable provisions for compensating the RAILROAD for its expenses in relation to the review of plans, specifications, and estimates. Both PARTIES commit themselves to a good-faith effort to develop a mutually agreeable standard PRELIMINARY ENGINEERING AGREEMENT that can be used to efficiently and economically authorize PRELIMINARY ENGINEERING activities.
- B. The RAILROAD commits to developing a PRELIMINARY ENGINEERING estimate that compensates for the RAILROAD'S actual direct and indirect costs but that does not include profit or other costs beyond actual direct and indirect costs.
- C. The RAILROAD agrees to retain all records of its PRELIMINARY ENGINEERING costs related to such agreements for a period of at least three years unless agreed to otherwise by both parties on specific projects and to provide the DEPARTMENT access to those records for periodic audits of its costs as agreed to by both PARTIES.

Section 6: Project Tracking Process

- A. The DEPARTMENT and RAILROAD mutually agree that a Project Tracking Process will be used to inform the PARTIES, assess the status, identify pending notifications, enumerate outstanding issues, and track milestones relevant to the approval of DEPARTMENT projects that involve the RAILROAD. The Project Tracking Process will be documented and agreed to in writing by both PARTIES as an addendum to this MEMORANDUM OF UNDERSTANDING.
- B. The DEPARTMENT agrees that it will publish railroad coordination milestones for various types of projects. Few types of projects for consideration are: as follows:

- a. The construction of highway-rail grade separation projects in which highways are grade separated above or below railroad tracks on railroad rights-of-way;
 - b. Parallel encroachment projects in which parallel or adjacent highways are repaired, improved, or maintained and that encroach on or involve railroad rights-of-way; and
 - c. Safety improvement projects in which lights, gates, or other safety appurtenances are installed at highway/railroad crossings.
- C. Both PARTIES agree that the Project Tracking Process will at a minimum include a process for documenting project status at each stage of the Project Development Process for various categories of projects that involve railroad rights-of-way.
- D. The Project Tracking Process will exist in an electronic format that is accessible to both PARTIES for the mutual understanding of the status of each project under development that involves railroad rights-of-way.

Section 7: Central Repository

- A. The DEPARTMENT and RAILROAD mutually agree to have the records of all pending projects, their status, outstanding issues, expected construction dates, funding sources, and other information from the Project Tracking Process included in a Central Project Repository created by the DEPARTMENT. The Central Project Repository will be an electronic document storage and retrieval system that includes a record of all pending projects and all past projects developed since the creation of the Central Project Repository.

Section 8: Project Status Conferences

- A. The DEPARTMENT and RAILROAD mutually agree that a Project Status Conference will be conducted at a mutually agreeable time approximately every **30 days** or other mutually agreed upon schedule to discuss the status, progress, pending notifications, outstanding issues, key programs and deadlines, and other information relevant to the pending projects under development by the DEPARTMENT that involve the RAILROAD.
- B. The Project Status Conference can be conducted in person or by electronic means at the mutual consent of the PARTIES. Both PARTIES mutually agree to provide all necessary information and availability of personnel to address project status issues pertinent at the time of the Project Status Conference.

Section 9: Timely Responses

- A. Both PARTIES agree that each will attempt to provide responses to questions, submittals, notices, requests, and comments within 60 calendar days. Both PARTIES agree to attempt to the best of their reasonable ability to provide responses to proposed agreements within 60days.
- B. Both PARTIES agree that they will track actual performance in the Project Tracking Process as to the response time for questions, submittals, notices, requests, comments, and proposed AGREEMENTS. These actual response times in comparison to desired response times may later be subject to discussion and process-improvement efforts by the PARTIES.

Section 10: Stages for Review of Non- Design-build Projects

Both PARTIES agree to identify the desired stages of project review and coordination that they mutually agree to for various types or categories of projects. The DEPARTMENT will submit to the RAILROAD appropriate and available engineering plans regarding projects and proposed maintenance activities at least at the milestones—as practical and appropriate for the individual projects—of:

- a. Preliminary Project Notice;
- b. 30% plan completion;
- c. 60% plan completion;
- d. 90% plan completion;
- e. Applicable agreement documents;
- f. Prior to contractor authorization; and
- g. Project completion.

Section 11: Staff Training

- A. The DEPARTMENT shall require all highway design staff and consultant engineers who serve as principal design engineers on projects that involve the RAILROAD to be familiar with and experienced in the design standards as published, if any, of the RAILROAD. The DEPARTMENT agrees to provide training to project-development personnel on the basic railroad provisions to be incorporated into the various categories of projects that involve the RAILROAD.
- B. Likewise, the RAILROAD will make available its appropriate personnel for training deemed appropriate by the DEPARTMENT staff for the RAILROAD personnel to be familiar with the processes, practices, and expectations of the DEPARTMENT.

Section 12: Escalation Procedure

- A. The RAILROAD will make all reasonable attempts to provide relevant and complete comments within 30 days to all project submittals and within 30 days on all proposed agreements.
- B. Both PARTIES agree to develop an Escalation Procedure to resolve issues that have not been resolved within the time frames stated above. This Escalation Procedure is acknowledged by both PARTIES to be a constructive and reasonable means by which issues that cannot be resolved by the DEPARTMENT and RAILROAD LIAISONS within the agreed-upon milestones can be promptly addressed. Both PARTIES acknowledge that the inability of either PARTY to meet the agreed-upon milestones does not by itself represent an act of bad faith. Also, both PARTIES acknowledge that the implementation of the Escalation Procedure to resolve an issue does not constitute a breach of the spirit of Partnering in which both have agreed to operate. Both acknowledge that the reliance on the Escalation Procedure is an efficient and timely means to resolve an issue that may involve complexities or levels of authority that cannot be addressed by the LIAISONS in a timely manner. Both Parties acknowledge that the Escalation Procedure to resolve issues may not be successful and the inability come to resolution of issues using the procedure does not constitute a breach of this agreement.

Section 13: Performance Measurement

- A. Both PARTIES agree to jointly develop a process and reporting format for compiling from the Project Tracking Process records of the desired and actual review and response times for comments, questions, engineering drawings, legal agreements, and other correspondence submitted by the DEPARTMENT to the RAILROAD and from the RAILROAD to the DEPARTMENT.

- B. Both PARTIES also agree to develop a process to track the actual review times against a desired set of review-time milestones mutually agreed upon by the Parties.
- C. Both PARTIES agree that the time frames to produce these reviews and comments will be recorded and used as the basis for measurement of the success of the Partnering process. Both PARTIES acknowledge that the measuring of such milestones is a constructive and mutually beneficial process. Both PARTIES agree to use the data for self-evaluation of their own processes, practices, procedures, training programs, business processes, and other activities that affect the highway/railroad project review process.
- D. The LIAISONS from the DEPARTMENT and the RAILROAD shall address in their monthly meetings the accuracy of the current performance measures and take continuous actions to keep the performance data current. The LIAISONS shall take steps as mutually agreed upon to meet the time frames for comments, reviews, approvals, and other actions within their respective control.

Section 14: Resourcing

- A. Both parties agree that if performance measures continue to be unacceptable and escalation is ineffective, then both parties will consider use of additional measures and resources to meet deadlines, agreed upon targets and measures.

Section 15: Annual Meeting

- A. The DEPARTMENT and the RAILROAD agree to meet with appropriate personnel in a joint meeting at least annually to identify successful practices and process-improvement opportunities. Both PARTIES will convene at a mutually agreed upon time and location. Each PARTY will identify agenda topics that it believes are pertinent to the continuous improvement of the project-review and project-approval process. Both PARTIES agree to provide the necessary and relevant personnel to discuss and advance adoption of continued innovations, practices, processes, agreements, standards, and specifications that can result in the continued improvement of the project review process.
- B. Both PARTIES agree to produce minutes of the annual joint meeting that clearly identify areas of possible process improvement. The identification of follow-up activities shall be noted with the identification of individuals assigned to pursue the process improvements.
- C. Both PARTIES commit themselves to an ongoing effort of Continuous Improvement, which is hereby defined as an iterative series of steps that are taken with the intention to further reduce the cost, time, and administrative effort of the Project Review Process without reducing the quality of engineering plans, legal agreements, audit records, infrastructure conditions, or public safety while meeting the legal requirements of both PARTIES.
- D. The Annual Meeting will be approached by both PARTIES as a forum for the identification of Continuous Improvement opportunities. Both PARTIES also agree to use the Annual Meeting to identify any changes in statutes, regulation, and DEPARTMENT or RAILROAD processes that could affect the agreed-upon Project Review Process.

Section 16: Standard Agreements

- A. The RAILROAD and the DEPARTMENT mutually agree to take good-faith efforts to develop a series of STANDARD PROJECT AGREEMENTS. These STANDARD PROJECT AGREEMENTS will incorporate the usual and customary legal provisions and protections that both PARTIES would reasonably expect to include in such agreements that are required to effectuate construction and maintenance activities of roadways highways which involve railroads. The PARTIES mutually agree to

develop these STANDARD AGREEMENTS to reduce their costs, to reduce legal review times, to standardize their approaches, and to generally streamline the development of agreements necessary for the effectuation of highway/railroad construction projects and maintenance activities.

- B. The PARTIES expect to attempt to develop for their mutual benefits the following agreements:
- a. A MASTER AGREEMENT that includes standard provisions and protections which address insurance requirements, preliminary engineering, indemnification, due notice, contractor requirements, flagging, and other provisions that are usually and customarily common to all projects;
 - b. A PRELIMINARY ENGINEERING AGREEMENT that includes standard contractual provisions for the authorization of preliminary engineering activities and for the payment, audit, and review of the subsequent engineering activities;
 - c. A RESURFACING AGREEMENT that includes the usual and customary provisions necessary for the conduct of highway resurfacing projects that affect highway/railroad grade crossings;
 - d. A GRADE SEPARATION AGREEMENT that includes usual and customary provisions common to legal agreements necessary for the construction of highway structures that separate a highway over a railroad right-of-way;
 - e. A GRADE CROSSING SAFETY AGREEMENT that includes the usual and customary provisions necessary to effectuate a project to improve the safety of a highway-railroad grade crossing by means of installation of warning lights, safety gates, or other devices;

Section 17: Update of Memorandum

- A. Both PARTIES agree to review the provisions of this MEMORANDUM OF UNDERSTANDING on a biennial basis, or sooner at the request of either PARTY.
- B. Both PARTIES agree to make good-faith efforts to amend, rescind, and append provisions as mutually identified for the continuous improvement of the highway/railroad agreement process, as necessitated by the adoption of new statutes, regulations, business practices, market conditions, or other factors.

Section 18: Preemption and Exclusivity

- A. Nothing in this MEMORANDUM OF UNDERSTANDING is to be interpreted as abrogating, supplanting, invalidating, amending, or otherwise altering any statute, regulation, contract, policy, executive order, labor agreement, court decree, or other binding requirement on either the DEPARTMENT or the RAILROAD. Nothing in this MEMORANDUM OF UNDERSTANDING shall be construed to obligate either PARTY to any contract, expense, liability, obligation, contingency, or liability not expressed in this MEMORANDUM OF UNDERSTANDING.
- B. Both PARTIES acknowledge that this MEMORANDUM OF UNDERSTANDING is a statement of intent to clarify the roles, responsibilities, practices, and schedules that both desire to pursue in order to mutually and continually improve the highway/railroad project review process.

Signed as follows:

RAILROAD

DEPARTMENT

By (Name):



By:



Lyn Hartley, Director of Public Projects

Timothy J. Harris, PE, Chief Engineer

Date

6-31-13

Date

8/1/13