



Date: February 19, 2020

To: High-Performance Transportation Enterprise Board / Colorado Transportation Commission

From: Nicholas Farber, Director, HPTE; Andrew Gomez, HPTE General Counsel

Subject: Term Sheet Between HPTE and the Union Pacific Railroad regarding the Burnham Yard Property

Purpose

The purpose of this memo is to describe the Term Sheet between HPTE and the Union Pacific Railroad (“UPRR”) regarding the Burnham Yard Property and the terms and conditions associated with it. Note that a term sheet is a non-binding instrument commonly used in commercial transactions meant to memorialize the parties’ intent and to form the basis for negotiating a more detailed purchase and sale agreement.

Action

The HPTE Board is asked to adopt a resolution that supports the staff recommendation to approve the Term Sheet.

Background:

In July of 2019 the UPRR released a Request for Qualifications (RFQ) for the Burnham Yard Redevelopment to identify qualified teams and solicit interest in the 61-acre parcel of land beginning near 13th Avenue at its northernmost point to roughly 4th Avenue at its southernmost point in the City and County of Denver (see attached picture). The RFQ asked proposers to submit bids on one of two options for acquiring the property: 1) acquiring the entire site in fee simple in a single takedown; or 2) negotiating a transaction structure that provides a lower upfront payment to the UPRR, with some form of reserved UP interest and upside over a five to seven-year term. On August 7, 2019, CDOT submitted a proposal to purchase the property in fee simple. Towards the end of August, the UPRR responded to CDOT’s bid with a directive that it explore the possibility of partnering with a private developer and to resubmit its bid as a joint entity. HPTE carried out that request on behalf of CDOT, culminating in an Intra-Agency Agreement with CDOT in September 2019 that requested qualified developers to submit proposals that would add value to UPRR’s RFQ. Despite the developers’ best efforts and UPRR’s willingness to negotiate, CDOT and HPTE found minimal to no value added based on the proposals received. As a result, UPRR and HPTE agreed to negotiate in good faith with one another for a fee simple transaction with no third party developer.

Overview of the Term Sheet

Below is a summary of several key areas that are important for the Board to take into consideration while reviewing the attached Term Sheet, attached as **Exhibit A**.

- (1) **Price:** HPTE will pay UPRR Fifty Million Dollars (\$50,000,000.00) for approximately fifty-nine (59) acres. HPTE will borrow this amount via a Transportation Commission (“TC”) loan, which both TC and HPTE must approve via resolution at a later date. One million dollars (\$1,000,000.00) of the \$50,000,000.00 will be used as earnest money.
- (2) **Property to be Acquired:** The 59 acres of property to be acquired is subject to two easements: (1) a fifty-foot (50’) wide railroad easement and (2) a signboard easement that currently displays advertisements along US-6. Both are indicated on **Exhibit B** and depicts the area generally. The

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railroad easement will expire when the railroad track known as the consolidated main line (“CML”) is relocated. The signboard easement will expire in 2022 as part of a larger master signboard agreement UPRR has with a third party. If HPTE/CDOT wishes to terminate the signboard easement prior to 2022, HPTE/CDOT will be subject to early termination fees in an amount not to exceed \$250,000.00. After 2022, UPRR will be responsible for all costs associated with terminating the signboard agreement.

- (3) **Deed Restriction:** A deed restriction is an agreement that restricts the use of the property in some way. Here, UPRR intends to include a deed restriction that limits the property to commercial and industrial uses only. The deed restriction can be released, however, upon a showing of No Further Action (“NFA”) or other similar sign-off by a regulatory body confirming that the property can be used for residential purposes.
- (4) **Environmental Due Diligence:** UPRR and HPTE/CDOT are cooperating on a process to provide a permit that would allow CDOT/HPTE to enter the property and conduct environmental tests. Once UPRR approves HPTE/CDOT’s plan for environmental testing, HPTE will have ninety (90) days to conduct due diligence on the property. If, for any reason, HPTE determines the property is not satisfactory to HPTE, HPTE may terminate the Purchase Agreement and be entitled to its earnest money in full. HPTE/CDOT will be responsible for all costs associated with its environmental testing.
- (5) **Future Property Proceeds:** It is unlikely that all 59 acres of the property will be used for transportation purposes. Thus, in the event HPTE sells the excess parcels not used for transportation purposes, UPRR will be entitled to forty percent (40%) of any sale proceeds **after** HPTE has recouped its initial investment of \$50 million in addition to any remediation costs.

Options / Decision Matrix

1. **Staff Recommendation:** Approve the Term Sheet. Upon execution, UPRR will provide HPTE with an initial draft of the Purchase Agreement within fourteen (14) days.
2. Do not approve the Term Sheet. Reject the Term Sheet, explaining that Staff should work to revise certain provisions in the agreement. Staff will return in March with revised conditions for approval.

Attachment

Attachment A: Term Sheet

Attachment B: UPRR Sale Area

Term Sheet

Purchase and Sale Agreement between the Colorado High-Performance Transportation Enterprise (“HPTE”) and the Union Pacific Railroad Company (“UP”) for Burnham Yard Property

This Term Sheet sets forth the basic terms on which UP and HPTE will endeavor to enter into a purchase and sale agreement (“Purchase Agreement”) related to the approximately 61 acre property commonly known as Burnham Yard in Denver, Colorado (“Burnham Yard”).

1. Parties: HPTE, as purchaser, and UP, as seller. HPTE will work with the Colorado Department of Transportation (“CDOT”) throughout the purchase transaction, but HPTE will acquire the Property (defined below).
2. Real Property to be Acquired.
 - a. The portion of Burnham Yard to be acquired by HPTE consists of approximately 59 acres of property in the City and County of Denver, as such property is generally depicted and labeled as “Sale Area” and “Sale Area with 50’ Wide Reserved Railroad Easement” on Exhibit A to this Term Sheet (the “Property”). For clarification, the Property does not include the approximately 2.2 acre portion of Burnham Yard that is currently leased to Martin Marietta Materials, Inc., as such property is generally depicted and labeled as “Excluded Parcel 2.2 Acres +/-” on Exhibit A.
 - b. In addition to other matters of record, UP will retain and the Property shall be subject to (i) a UP-reserved railroad easement over that portion of the Property generally depicted and labeled as “Sale Area with 50’ Wide Reserved Railroad Easement” on Exhibit A, and (ii) a UP-reserved signboard easement over that portion of the Property generally depicted and labeled as “Signboard Easement Reserved” on Exhibit A, which easement shall include the right to serve the signboard with power and reasonably rights of ingress and egress to and from the signboard and power facilities.
 - c. The UP-reserved railroad easement shall expire upon completion of the relocation of the railroad track commonly known as the consolidated main line.
 - d. With regard to the UP-reserved signboard easement, the parties understand that the signboard contract is part of a master agreement that expires in 2022. If, before the expiration of the master agreement, HPTE determines that the signboard easement will interfere with HPTE/CDOT’s projects on the Property or any other development of the Property, HPTE may notify UP and UP will take the necessary steps to terminate the signboard contract and remove the signboard. In such event, HPTE will pay to UP the applicable signboard withdrawal fees and discounted fair market value of the signboard revenue stream, as determined by UP with appropriate back up information, which payment shall not in any event exceed \$250,000.00. UP shall exclude the signboard contract from the master agreement

if it elects to renew the master agreement after its expiration in 2022. At any time after 2022, HPTE may provide notice to UP to terminate the signboard easement and UP will terminate the signboard contract and remove the signboard at UP's sole cost and expense.

3. Purchase Price. The purchase price ("Purchase Price") for the Property shall be Fifty Million and No/100 Dollars (\$50,000,000.00). The Purchase Price shall be paid in cash at Closing.
4. Earnest Money. HPTE will cause to be deposited \$1,000,000.00 (the "Earnest Money Deposit") within three (3) business days after execution of purchase agreement for the Property (the "Purchase Agreement"). The Earnest Money Deposit will be held by Stewart Title ("Title Company") in an interest-bearing account, and any interest thereon shall be applied to the Purchase Price at Closing.
5. Early Access to Property. Pursuant to the terms of a separate non-disclosure agreement ("NDA") between UP and HPTE, UP and HPTE are cooperating on a process to provide a survey permit to CDOT for early access to the Property for (i) non-intrusive investigations and (ii) for purposes of preparing an environmental sampling plan (the "Work Plan") for the Property. At such time as CDOT has prepared the Work Plan and the Work Plan has been approved by UP, the parties anticipate that UP will issue a Contractor's Right of Entry to allow for CDOT's implementation of the Work Plan, including approved intrusive testing.
6. Delivery of Documents.
 - a. Pursuant to the NDA, UP has or will provide to HPTE (in electronic share file format or otherwise), through the State Attorney General's Office, copies of documents in the possession of UP related to the Property that are: (i) non-confidential and non-proprietary real property documents disclosed by UP's Standard Real Estate Search; (ii) valuation maps covering the UP Property that are in the records of UP's Real Estate Department in Omaha, Nebraska, which location is where valuation maps are stored and maintained in the ordinary course of UP's business; and (iii) environmental studies or reports relating to the UP Property that are in the records of UP's Environmental Management Group in Omaha, Nebraska, which locations are where environmental studies and reports are stored and maintained in the ordinary course of UP's business (collectively, all materials listed in (i) through (iii) above are referred to herein as the "Property Materials"). "UP's Standard Real Estate Search" means the following procedure: UP's Real Estate Department (a) determines the location of the property in question and converts the information into a data base inquiry which is run against UP's Real Estate Management System data base to generate a list of documents affecting the property in question as revealed by the data base, and (b) searches for the listed documents in the Real Estate Department records in Omaha, Nebraska, which location is where documents in UP's Real Estate Management System data base are stored and maintained in the ordinary course of UP's business. UP will continue

to provide any Property Materials not already provided to HPTE during the Due Diligence Period.

- b. In the event CDOT or HPTE receive a Colorado Open Records Act (CORA) request for environmental records that are in the custody and control of the State's Attorney General's Office, CDOT and HPTE shall follow the relevant provisions of the NDA.
7. Due Diligence. HPTE shall have ninety (90) days after UP's approval of the Work Plan and CDOT's receipt of the Contractor's Right of Entry ("Due Diligence Period") to conduct its due diligence review of the Property. UP shall provide to HPTE and CDOT a point of environmental contact for questions and to discuss sampling protocol and procedure. If for any reason (or no reason) the Property is not satisfactory to HPTE, HPTE may terminate the Purchase Agreement and shall be entitled to the return of the Earnest Money Deposit. Should inclement weather preclude access to the Property during the 90-day due diligence for more than seven (7) consecutive days, HPTE may extend the Due Diligence Period for the number of days during which access has been precluded. HPTE will be solely responsible at its cost for any remediation caused by HPTE's investigations on the Property during the Due Diligence Period.
8. Title and Survey. Within five (5) days following execution of the Purchase Agreement, UP shall furnish to HPTE a commitment for title insurance in the amount of the Purchase Price and any existing survey of Burnham Yard that is identified in connection with UP's Standard Real Estate Search. The Title Company shall also provide HPTE with copies of all documents shown on Schedule B-2 of the commitment. UP, at HPTE's cost, is causing an updated boundary survey to be performed to identify the Property, the Signboard Easement Reserved and the Sale Area with 50' Wide Reserved Railroad Easement. HPTE, at its cost, shall have the right to arrange for an updated ALTA or boundary survey of the Property (and additional Property elements). HPTE shall have until the end of the Due Diligence Period to review title.
9. Environmental Condition of the Property. HPTE and UP understand that the Purchase Agreement will allocate responsibility between the parties regarding the environmental condition on and about the Property. As of the date of this Term Sheet, the parties do not have sufficient information regarding the environmental condition. It is anticipated that the environmental testing and review performed by HPTE and UP will inform the manner of allocating responsibility between the parties for the environmental condition, and that agreeing on such allocation is a material condition to either party's willingness to move forward with the Purchase Agreement.
10. Deed Restriction. The parties acknowledge that the deed conveying the Property to HPTE will include a restriction on use that limits the use of the Property to commercial and industrial uses and will expressly prohibit certain uses (including residential, lodging, and educational uses). The deed will include a process whereby UP will release such use restrictions upon demonstration to UP that CDOT has received a no further Action ("NFA") or similar sign off from the Colorado Department of Public Health and Environment (or other applicable regulatory body) confirming that the Property can be

used for residential purposes. The deed will include a provision that the successor to HPTE's interest under the deed will be required to affirmatively ratify and join in the UP release.

11. Conditions Precedent to Closing. HPTE's and UP's obligation to close on the purchase of the Property shall be conditioned upon the following, together with such other conditions agreed upon by the parties:
 - a. Approval of the acquisition by CDOT's Transportation Commission and HPTE Board of Directors.
 - b. UP's management approval.
12. Closing. Subject to the satisfaction of the conditions precedent, it is anticipated that the closing ("Closing") of the acquisition shall occur within thirty (30) days after the expiration of the Due Diligence Period. UP shall quitclaim all of its right, title and interest in the Property to HPTE by quitclaim deed.
13. Assignment of Security Contract. UP currently has a master contract with a security company for the provision of security services at the Property. If requested by HPTE, UP (at no additional cost to UP) will coordinate with CDOT to arrange for the security company to continue to provide services to CDOT after Closing.
14. Future Property Proceeds.
 - a. HPTE currently estimates that its proposed environmental remediation activities will cost approximately \$7,000,000.00.
 - b. With respect to any sales to a third party of any portion of the Property that will not be used by HPTE/CDOT for transportation purposes ("Remnant Parcels"), HPTE will pay to UP forty percent (40%) of the gross proceeds received from all sales in excess of the sum of (i) the Purchase Price and (ii) CDOT's actual environmental remediation costs (together, the "Gross Proceeds Floor"), subject to a cap of \$11 million in total payments to UP. In calculating the Gross Proceeds Floor, HPTE may not include in CDOT's environmental remediation costs any such costs that are passed on to a third party purchaser of a Remnant Parcel.
 - c. The obligation to pay UP under this section shall commence upon the first sale of any Remnant Parcel where, after taking into account the total gross proceeds from the sale of all Remnant Parcels prior to the date thereof, such total gross proceeds exceeds the Gross Proceeds Floor. The Purchase Agreement will set forth the mechanism for HPTE to provide UP with evidence of HPTE's expenditures.
15. Purchase Agreement. The Purchase Agreement will set out in detail the terms and conditions of the acquisition and will incorporate, without limitation, the terms of this Term Sheet together with other terms and conditions, representations, warranties, covenants and indemnities the parties deem necessary or desirable.

16. Real Estate Commission. UP and HPTE agree that no real estate broker or salesperson has been utilized or retained for the transaction described in this Term Sheet. UP will indemnify, defend and hold the other harmless from the claims of any other brokers, as more fully set forth in the Purchase Agreement.
17. Closing Costs. UP will be responsible for the costs of the extended coverage title insurance policy. HPTE shall be responsible for any additional endorsements to the title policy, fees and expenses to update survey, documentary fees and recording fees. The remaining closing fees and expenses will be divided between the parties in accordance with customary practice. HPTE and UP shall each pay the fees and expenses of their respective legal counsel incurred in connection with the acquisition.
18. Assignment. HPTE shall have the right on or before the Closing Date to assign its rights and obligations hereunder and under the Purchase Agreement to an affiliate of HPTE (which term will be defined in detail in the Purchase Agreement); provided that such assignment and assumption is made in accordance with the provisions of the Purchase Agreement and HPTE shall not be relieved of its liabilities and obligations under the Purchase Agreement.
19. Ongoing Regulatory Cooperation. UP and HPTE shall provide reasonable cooperation to one another as necessary in any required state or federal regulatory proceedings associated with UP's abandonment of any common carrier obligation on the Property, if the same is required.
20. Non-Binding Term Sheet: This Term Sheet is only intended to set forth general understandings and agreements of the parties and to provide the basis for negotiating the Purchase Agreement. Except for Paragraphs 22 and 23 below, this Term Sheet is not a binding commitment or agreement between the parties to purchase or sell the Property until the Purchase Agreement, which must be in form and content satisfactory to each party and its counsel, has been executed by the parties. This Term Sheet does not obligate either party to proceed to the completion of an agreement. Further, this Term Sheet does not obligate the parties hereto to negotiate, in good faith or otherwise, toward the execution and delivery of the Purchase Agreement. If the parties fail to enter into the Purchase Agreement on or before thirty (30) days from acceptance of this Term Sheet, this Term Sheet shall be of no further force or effect except with respect to the agreements set forth in Paragraphs 22 and 23 below.
21. Drafting of Purchase Agreement. UP will provide HPTE with an initial draft of the Purchase Agreement, within fourteen (14) days after the full execution of this Term Sheet.
22. Confidentiality. From and after the execution of the acceptance of this Term Sheet up to the closing of the acquisition, UP and HPTE shall maintain the confidentiality of the negotiations regarding the acquisition. The foregoing will not restrict or otherwise affect the right of HPTE or UP to make or permit any disclosure: (i) to any affiliate of HPTE or UP; (ii) to any prospective assignee of HPTE or any affiliate of such assignee; (iii) to consultants, legal advisors, financial institutions, business associates, investors and others, provided such disclosure is not intended for broad dissemination to the public; (iv) to the

extent such information shall be or have otherwise become publicly available other than as a result of a disclosure by HPTE or UP; and (v) as may be required by law. In the event that HPTE terminates the Purchase Agreement prior to the Closing, this confidentiality provision shall survive such termination by HPTE.

23. Exclusive Dealing. As an inducement to HPTE to proceed with performing due diligence and negotiating the terms of the Purchase Agreement, UP hereby agrees with HPTE that until the earlier to occur of (i) the termination of this Term Sheet, or (ii) the date that is sixty (60) days after the date of this Term Sheet, UP shall deal exclusively with HPTE in respect of the matters set forth herein and shall take no action, directly or indirectly, which could impair the ability of UP to complete the acquisition, including without limitation, entering into, negotiating, soliciting or knowingly encouraging or participating in any negotiations or discussions relating to any sale of the Property to any third party other than HPTE.
24. Counterparts; Facsimile Signatures. This Term Sheet may be executed in counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument. Facsimile signatures hereon shall be deemed originals for all purposes.

Executed as of _____, 2020.

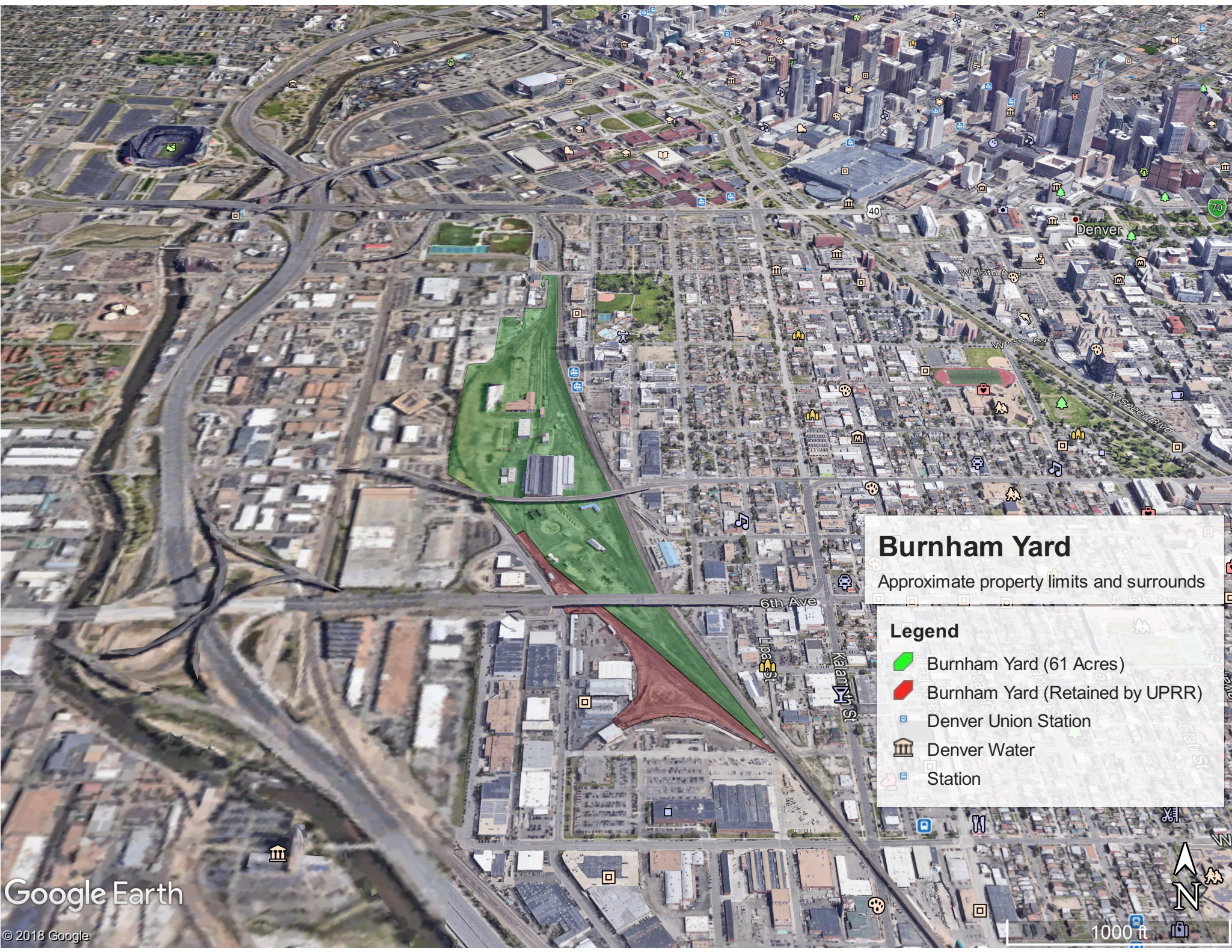
Union Pacific Railroad Company

By: _____

Name: Chris D. Goble

Its: Assistant Vice President – Real Estate





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Burnham Yard

Approximate property limits and surrounds

Legend

-  Burnham Yard (61 Acres)
-  Burnham Yard (Retained by UPRR)
-  Denver Union Station
-  Denver Water Station

