

UPRR Folder No. _____
CDOT Project No. STA 092A-024, 17772

CONTRACT

BETWEEN THE
STATE OF COLORADO
COLORADO DEPARTMENT OF TRANSPORTATION

AND THE
UNION PACIFIC RAILROAD COMPANY

COVERING
THE CONSTRUCTION OF A
GRADE SEPARATION CROSSING STRUCTURE
ON SH 92

AT
RAILROAD MILE POST 67.66
ON THE NORTH FORK SUBDIVISION
DOT NO. 254-041G

CDOT PROJECT NO. STA 092A-024, 17772

LOCATED
5.5 MILES WEST OF HOTCHKISS,
IN DELTA COUNTY,
COLORADO

Comment [A1]: In Correspondence from UPRR they have used 67.67, Sign on Bungalow on site says 67.60 and FRA web site shows 67.66

STA 092A-024, 17772
SH 92, Delta County; UPRR
NIC No. 254-041G

UPRR Folder No. _____

CONTRACT

THIS CONTRACT, effective immediately upon the signature of the State Controller, by and between the **STATE OF COLORADO**, for the use and benefit of the Colorado Department of Transportation, Division of Engineering and Maintenance ("State"), and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation ("UPRR").

WHEREAS, authority exists in the Law and Funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in **WBS Element 17772.10.20**, Contract Encumbrance Amount **\$?????**; and

Comment [A2]: To be determined

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

WHEREAS, the State has the authority, as provided in Sections 43-1-110 and 43-4-204, C.R.S. to enter into contracts, including contracts with railroads for construction work; and

WHEREAS, the State also has the authority, as provided in Section 24-92-103, C.R.S., to solicit competitive sealed bids for construction of public projects; and

WHEREAS, the existing State Highway 92 crosses over the Union Pacific Railroad at-grade; and

WHEREAS, the State will advertise and award a construction contract to construct a New Grade Separated Structure (I-05-Z) that is defined in Article I. The general location is illustrated on **Exhibit A - Project Location Map**, attached hereto and made a part hereof; and

WHEREAS, the Existing At-Grade Crossing will be removed at the completion of the project as defined in Article I; and

WHEREAS, the State's Contractor will be required to perform the "Project Work," as defined in Article I, on UPRR property, that is necessary to complete the Project; and

WHEREAS, it is desirable, for the benefit, convenience and safety of the public using the state highway system and for the parties hereto, that the improvements provided by this Contract be accomplished; and

WHEREAS, it is in the public interest that Railroad forces perform the Railroad Work;
and

WHEREAS, the Project is a multi-phase project with a construction estimate of \$2.?? million; and

Comment [A3]: To be determined

WHEREAS, the State has estimated the cost of the theoretical grade separation structure that would be required to carry State Highway 92 over the Railroad's tracks is \$???, and UPRR's 5% share to be \$??? as shown in Exhibit H; and

Comment [A4]: TBD

Comment [A5]: TBD

WHEREAS, the Existing At-Grade Crossing and the approaches of State Highway 92 were constructed under an Existing Agreement between the State, as successor in interest to the State Highway Department of Colorado, and UPRR, as successor in interest to the Denver & Rio Grande Western Railroad Company, that is defined in Article I; and

WHEREAS, the UPRR, and the State, wish to recognize two areas of Right of Way granted to the State by the Bureau of Land Management subject to the UPRR's Right of Way granted by the Right of Way Act of 1875 as set forth in Article II, Section A, and shown in Exhibit J; and

WHEREAS, the UPRR, and the State, wish to modify the Existing Agreement as set forth in Article IV, Section F, and enter into this Agreement to cover the construction, maintenance and operation of the New Structure and roadway, and the removal of the Existing At-Grade Crossing.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, and the faithful performance thereof, the parties hereto promise and agree as follows:

**ARTICLE I
GENERAL PROVISIONS**

SECTION A. DEFINITIONS

- 1. FHWA - Federal Highway Administration
- 2. MUTCD - The Manual on Uniform Traffic Control Devices for Streets and Highways
- 3. PUC - Public Utilities Commission of Colorado
- 4. CFR - Code of Federal Regulations
- 5. CRS - Colorado Revised Statutes

6. The term "Contractor" shall mean any individual, partnership, firm, corporation or any combination thereof including their respective officers, agents, employees and their respective subcontractors including officers, agents and employees that are hired by the State to perform any Project Work.

7. The term "Existing Agreement" shall mean the agreement executed on July 30, 1940 between the State, as successor in interest to the State Highway Department of Colorado, and UPRR, as successor in interest to the Denver & Rio Grande Western Railroad Company, attached hereto as **Exhibit I**, covering the construction, use and maintenance on State Highway 92 of an at-grade crossing of the railroad tracks and the approaches to the crossing.

8. The term "Existing At-Grade Crossing" shall mean the existing State Highway 92 at-grade crossing of the UPRR tracks and the approaches constructed on project FAS 409-D (1) pursuant to and under the Existing Agreement, Railroad Milepost 67.66 on the UPRR's North Fork Subdivision at DOT No. 254-041G west of the Town of Hotchkiss in Delta County, Colorado. This existing crossing shall be removed after the New Structure has been constructed and placed into service.

Comment [A6]: Same as note A1 on cover sheet

9. The term "New Structure" shall mean the new State Highway 92 Overpass Structure (I-05-Z) and roadway approaches near Railroad Milepost 67.66 on the UPRR's North Fork Subdivision at DOT No. 254-041G west of the Town of Hotchkiss in Delta County, Colorado.

Comment [A7]: Same as note A1 on cover sheet

10. The term "Plans" shall mean the final one hundred percent (100%) completed plans prepared for the State at its expense that are approved in writing by the UPRR's Assistant Vice President Engineering - Design, or his authorized representative covering the demolition and removal of the Existing At-Grade Crossing and the construction of the New Structure. The Plans shall include all appurtenances, associated drainage, and excavations for bents and/or abutments next to or adjacent to the UPRR's tracks.

11. The term "Project" shall mean the State's Project No. STA 092A-024, 17772 covering the removal of the Existing At-Grade Crossing and construction of the New Structure.

12. The term "Railroad Work" shall consist of the following work performed by Railroad forces: Engineering Design Review; Removal, at the end of the project, of the existing crossing pads, bungalow, gates and associated equipment; Flagging and Protective Services, if required for the Contractor.

13. The term "Project Work" shall consist of the following work performed by the Contractor: Demolition and removal of the approaches to the Existing At-Grade Crossing up to the crossing pads and the construction of the New Structure.

SECTION B. EXHIBITS

The exhibits listed below are attached hereto and made a part of this Contract:

- Exhibit A Project Location Map
- Exhibit B SH 92 over UPRR Bridge General Layout and Typical Section
- Exhibit C Form of Contractor's Right of Entry Agreement
- Exhibit D Civil Rights Exhibit
- Exhibit E Sample Option Letter
- Exhibit F UPRR's Summary Estimate
- Exhibit G Force Account Work Estimate
- Exhibit H Theoretical Structure Estimate
- Exhibit I Existing Agreement dated July 30, 1940
- Exhibit J ROW Plans and BLM Letter of Consent

The following exhibits are made a part of this Contract by reference, the same as if attached hereto:

- Exhibit K UPRR's Minimum Requirements for Overpass Structure
- Exhibit L UPRR's Inspection and Flagging with Coordination Requirements

SECTION C. REFERENCE DOCUMENTS

The following are made a part of this Contract by reference, the same as if attached hereto including any supplements or amendments thereto dated prior to the date of this Contract.

23 CFR §140.900 et.seq. (2010)

23 CFR §646.101 et. seq. (2010)

23 CFR §646.200 et. seq. (2010)

MUTCD, Dated 2009

ARTICLE II COMMITMENTS ON THE PART OF RAILROAD

SECTION A. RIGHT OF WAY

1. The State, as successor in interest to the State Highway Department of Colorado, and the UPRR, as successor in interest to the Denver & Rio Grande Western Railroad Company, (hereinafter "Railroad") entered into an agreement dated July 30, 1940, attached hereto as **Exhibit I**, covering the construction, use and maintenance on State Highway 92 of an at-grade crossing of the railroad tracks and the approaches to the crossing and granted to the State an easement within the UPRR's Right of Way that was granted by the Right of Way Act of 1875 as described in **Exhibit I** and shown on **Exhibit J**. The Existing Agreement is to remain in place except as modified in Article IV, Section F.
2. The Bureau of Land Management in March of 2013 granted to the State two areas of Right of Way within and subject to the UPRR's Right of Way granted by the Right of Way Act of 1875, as shown on **Exhibit J**. By this agreement the UPRR recognizes the States right of use and consents to the use of these two areas by the State to construct, maintain, repair and renew the New Structure in compliance with this agreement.

SECTION B. PLANS; CONSTRUCTION

1. The Plans are hereby made a part of this Contract by reference. No changes in the Plans shall be made unless the Railroad has consented to such changes in writing. The Railroad's review and approval of the Plans in no way relieves the State or the Contractor from their responsibilities, obligations and/or liabilities under this Agreement, and will be given with the understanding that the UPRR makes no representations or warranty as to the validity, accuracy, legal compliance or completeness of the Plans and that any reliance by the State on the Plans is at the risk of the State. Project special provisions affecting the interests of the UPRR are also subject to approval by the UPRR. All work under this Contract shall be performed strictly in compliance with the Plans, special provisions and any guidelines or standards furnished by the UPRR to the State for this Project. The State confirms that no work of demolition or new construction is to commence until the UPRR's Assistant Vice President Engineering - Design or his authorized representatives have given final approval of the Plans.
2. The State also confirms that when the State advertises for bids from Contractors for this Project, it will include, among other things, **Exhibit C, K and L** in its bid package and will require all Contractors awarded bids to work on this Project to comply with the Plans, provisions contained in **Exhibit C, K and L** and other guidelines or standards furnished by the UPRR to the State for this Project.

SECTION C. CIVIL RIGHTS

The UPRR, in the prosecution of the work herein prescribed, will adhere to the requirements of the Civil Rights **Exhibit D**, and will include the provisions of the said Civil Rights Exhibit in every subcontract; including procurement of materials and leases of equipment, unless exempt by the Regulations, orders or instructions issued pursuant thereto.

SECTION D. RAILROAD WORK; BILLING SENT TO STATE.

1. **Flagging.** The UPRR will be providing plan review, inspection, and flagging protection if needed during the Project. Labor charges for any Railroad Work performed by UPRR forces will be in accordance with the then current working agreements between the UPRR and its employees and are subject to UPRR’s standard direct and indirect labor costs and additives costs as identified in 23 CFR Part 140 Subpart I. The UPRR’s current estimated daily cost of flagging is One Thousand Five Hundred Dollars (\$1,500.00) based on an eight (8) hour day. The flagging costs are for a normal business day and do not include weekends, overtime or holiday pay. The UPRR has agreed to directly bill the Contractor for flagging costs. The bills submitted by the UPRR to the Contractor shall reference the Project Number. The State agrees to withhold ten percent (10%) of the estimated flagging costs as retainage until the Railroad has been paid in full for its final bill for flagging and other costs owed by the Contractor to the Railroad. The UPRR’s estimated flagging costs are set forth in **Exhibit F**. The parties agree that the State’s estimate of <??> days of Railroad flagging as set forth in **Exhibit F** is an estimate of flagging days required for the demolition of the existing at-grade crossing and the construction of the New Structure.

Comment [A8]: TBD

(b) **Force Account Railroad Work.** The work to be performed by Railroad forces to remove, at the end of the project, the existing crossing pads, bungalow, gates and associated equipment listed in **Exhibit F** is described in the **Railroad’s Force Account Estimate** dated Month-day, 2013, marked as **Exhibit G** (the “Estimate”). As set forth in the Estimate, the Railroad’s force account work associated with the removal of the existing crossing pads, bungalow, gates and associated equipment is estimated to cost <??>. The State agrees to pay the Railroad for all such actual costs within thirty (30) days of receipt of billing.

Comment [A9]: TBD

Comment [A10]: TBD

2. **Railroad’s Billings to the State.** The UPRR shall bill the Contractor for flagging and the State for all other Railroad Work. The UPRR shall bill based on all actual costs incurred by the UPRR in performing the Railroad Work. Actual costs shall be determined in accordance with 23 CFR Part 140, Subpart I and will include indirect and direct labor additives.

3. **Final Bills Within One Year of Project Completion.** The UPRR shall send progressive billings to the State for Railroad Work prepared by the UPRR and send a final bill to the State within one (1) year following completion of the Project. The State shall provide the UPRR with written notice of the completion of the Project, thus marking the beginning of the one-year period. If the UPRR does not present its final billing to the State as described herein within such one-year time period, as required by 23 CFR §140.922 (2010), then previous payments to the UPRR for the Railroad Work may be considered as

final and complete reimbursement for such work and the State may close out the Project with no further financial obligation.

4. Contract Option Letter. In the course of constructing the Railroad Work, should UPRR have reasonable belief that UPRR's cost estimate identified in **Exhibit F** will be exceeded, UPRR is authorized to stop work until sufficient additional funds are made available by the State. The State may from time to time in a form substantially equivalent to that in **Exhibit E**, and bearing the approval of the State Controller or his designee, make more funds available on this contract. The funds availability letter shall not be deemed valid until it shall have been approved by the State Controller or such assistant as he may designate.

SECTION E. RAILROAD'S RELATIONS WITH STATE'S CONTRACTOR

1. Insurance - Notice to State. The State agrees that it will not authorize any Contractor to enter upon or perform any work contemplated by this Contract across or adjacent to the UPRR's property unless or until the insurance specified in the UPRR's Contractor's Right of Entry Agreement marked **Exhibit C**, shall be delivered to and accepted by the UPRR. The insurance shall be kept in full force and effect during the times any Project Work is being performed across or adjacent to UPRR property by any Contractor. The UPRR shall endeavor to notify the State within twenty (20) calendar days following delivery of said certificates and policies of insurance to the UPRR, whether said insurance has been accepted or rejected.

2. State's Construction Contract Requirements. In conformity with the requirements of 23 CFR, Part 646, Subpart B and Part 140, Subpart I, the UPRR agrees to furnish the State detailed information set forth in Article III, Section A, paragraph 5 hereinafter, which data shall be included in the State's Construction Contract Provisions for the Project.

3. Railroad's Right to Stop Work. If the Contractor shall prosecute the Project Work across or adjacent to the UPRR property contrary to the Plans, the provisions of **Exhibit C, K and L** or other guidelines or standards furnished to State, or if the Contractor shall prosecute the Project Work in a manner deemed hazardous by the UPRR to its property and facilities, or if the insurance prescribed in Article III, Section B, paragraph 3 hereof shall be cancelled during progress of said work, the UPRR shall have the right to stop the Project Work across or adjacent to UPRR property until the acts or omissions of such Contractor have been fully rectified to the satisfaction of the UPRR's Assistant Vice President Engineering – Design or his railroad representatives, or until additional insurance has been delivered to and accepted by the UPRR's insurance department. Such work stoppage shall not give rise to or impose upon the UPRR any liability to the State or any Contractor. In the event the UPRR shall stop the Project Work herein provided, the UPRR agrees to give immediate notice thereof, in writing, to the Chief Engineer, Colorado Department of Transportation 4201 East Arkansas Ave., Denver, CO 80222.

**ARTICLE III
COMMITMENTS ON THE PART OF THE STATE**

SECTION A. STATE ACTIVITIES

1. Advertisement for Bids - Contract. The State will advertise the invitation for bids and enter into a construction contract with the lowest responsible bidder for the Project Work across or adjacent to the UPRR's property. The State will include the Plans, **Exhibit C, K and L** and other guidelines or standards furnished to the State in its bid solicitation document package for the construction contract.

2. Construction by the State. The State shall perform, or cause to be performed, in a manner acceptable to the UPRR, all Project Work across and adjacent to the UPRR's property in compliance with the Plans, **Exhibit C, K and L** and any guidelines or standards furnished by the UPRR.

3. Supervision by the State. The State shall maintain supervision over the operations of its Contractor while performing Project Work across or adjacent to the UPRR's property. The responsibility of the State for supervision of the Project shall not be lessened or otherwise affected by the UPRR's approval of the Plans or by the UPRR's collaboration in performance of any work, or by the presence at the work site of the UPRR's representatives, or by compliance by the State or the Contractor with any requests or recommendations made by such representatives. If a representative of the UPRR is assigned to the Project, the State and the Contractor will give due consideration to suggestions and recommendations made by such representative for the safety and protection of the UPRR's property and operations. However, at all times such Contractor shall be considered an independent contractor and not an employee of the State.

4. Utilities. The State's construction contract will include provisions that the Contractor take such measures as the UPRR and the State may agree upon in writing respecting any utilities located upon the UPRR's right of way as hereinafter provided. It is understood and agreed that the owner of any utility, located on the UPRR's property, retains the right to move, repair, recondition or relocate the same at the State's expense. The State shall require that if, during progress of the Project Work, the Contractor shall discover any utility that has a right to be on the UPRR's right of way, but that is not specifically mentioned and provided for elsewhere in the Plans, which utility must be moved, repaired, reconditioned or relocated because of this Project, the Contractor shall initiate immediate notice thereof to the State and the UPRR, and the State will furnish directions respecting the same; but, unless otherwise agreed upon between the State and the UPRR, the State will authorize the Contractor to make only such temporary or emergency repairs as may be required to protect and safeguard the utility and the property of the UPRR prior to commencement of work thereon by the owner of the utility or the UPRR. When such operations are undertaken by the owners of the utility or the UPRR, the State will require the Contractor to cooperate to the extent that ample protection of such work will be

provided, to the end that the entire Project contemplated by this Contract may be expedited. The terms "utility" and "utilities" as used herein include all properties and facilities of any person, firm or corporation constituting any part of the utility system, including, but not limited to, pipe lines, wire lines, fiber optic lines, tube lines, water and gas mains, electrical conduits, sewer pipes, overhead wiring, and supporting structures and appurtenances. All proposed and relocated utilities are subject to the prior review and approval of the UPRR's Vice President Engineering - Design or his authorized representatives and shall comply with the UPRR's standard specifications and requirements, including, without limitation, American Railway Engineering and Maintenance-of-Way Association ("AREMA") standards and guidelines.

5. Protective Services (Specifications for Construction). In consideration of the requirements of 23 CFR, Part 646, Subpart B, and Part 140, Subpart I, the State agrees that any contract awarded to any Contractor as herein provided will include in the specifications for construction the following general information:

a. The provisions of this Contract applicable to the protective services the UPRR may require during the performance of the Project Work across or adjacent to the UPRR property.

b. The prime Contractor will be required to enter into a Contractor's Right of Entry Agreement with the UPRR, **Exhibit C**, and all subcontractors will be required to have signed an endorsement by the prime Contractor's insurance company.

c. The times and manner in which the UPRR will submit its billings to the State.

6. Advance Warning Protection. The State will require its Contractor to furnish, maintain and install advance warning signs or barricade protection which may be required for the duration of the Project Work for the protection of the UPRR's facilities and the work contemplated hereunder.

7. State's Payment of Billing from Railroad. State shall pay UPRR for all actual costs incurred by UPRR in performing the Railroad Work including UPRR's preliminary engineering, if any, and standard, direct and indirect labor additives within forty-five (45) days of State's receipt of billing from the UPRR.

SECTION B. STATE'S CONSTRUCTION CONTRACTOR ACTIVITIES

1. Contractor's Defaults and Omissions. To the extent authorized by law, the State shall require its Contractor to correct or eliminate any defaults or omissions of the Contractor for all Project Work performed relative to this Contract.

2. Contractor's Operations. In consideration of the premises and of the rights granted to the State in Article II, Section A hereof, the State hereby agrees to include in its

construction contract provisions which require the Contractor to keep and perform the following covenants, conditions and stipulations:

a. Notice. The State will require all contractors to provide to the UPRR the notifications that are required in the UPRR's Contractor's Right of Entry Agreement.

b. Contractor's Methods and Procedures. Unless methods and procedures are otherwise provided for in the construction plans and specifications approved by the UPRR and the State, the Contractor and the UPRR shall agree, in advance of the Contractor performing the Project Work, upon methods and procedures covering all construction across or adjacent to the UPRR property and, when required by the UPRR, the Contractor shall submit such proposals in writing. The Contractor shall at all times keep covered all pits or openings near or under tracks, except during the time required for actual operations in making such pits or openings and performing work therein. Provisions of this paragraph shall not be construed as relieving the Contractor of or subjecting the UPRR or the State to any responsibility or liability for the Contractor's operations, methods and procedures. The Contractor shall not pile or store any material nor park any equipment closer than twenty-five (25) feet of any track centerline unless authorized by the UPRR's designated representative. The Contractor shall also abide by the following minimum temporary clearances during the course of construction:

- (i) 12' - 0" horizontal from centerline of track
- (ii) 21' - 0" vertically above top of rail

For construction clearance less than listed above, local operating unit review and approval is required.

c. No Interference with Railroad's Operations. The Contractor will cooperate with the officers and the authorized representatives of the UPRR and its tenants to the end that the Contractor's work will be begun, conducted, and completed in such manner as to cause no interference whatsoever with the safety or the continuous and uninterrupted use and operation of the tracks, wire lines and other facilities belonging to the UPRR or its tenants.

d. Contract and License. The State will require in its Contract with its Contractor performing Project Work under the State's Project on the UPRR properties pursuant to this Contract that its Contractor will enter into UPRR's Contractor's Right of Entry Agreement with the UPRR in the attached form marked **Exhibit C**, and containing the covenants, conditions, and stipulations set forth therein.

3. Contractor's Insurance. The State shall require its Contractor to furnish to the State the certificate, policies and endorsements of insurance as described in the Contractor's Right of Entry Agreement, and the State shall deliver the same directly to the UPRR. All certificates and policies of insurance required hereunder shall comply with the requirements of 23 CFR, Part 646, Subpart A and as set forth in the Contractor's Right of Entry Agreement. Such insurance coverage shall be for:

- a. All damages arising out of bodily injuries to or death of one or more persons.
- b. All damages arising out of injury to or destruction of property.
- c. The Contractor shall not be allowed to enter upon or perform any Project Work on the UPRR's property unless or until the aforesaid Contractor's Right of Entry Agreement has been executed by the Contractor and the insurance shall have been accepted in writing by the UPRR. All such insurance shall be kept in full force and effect during all times the Contractor is performing any such work on or adjacent to the UPRR's property.
4. Clearances. The State shall include provision in its construction contract which requires its Contractor to abide by all clearance requirements as described in the Contractor's Right of Entry Agreement and in the plans and specifications approved by the UPRR.
5. Temporary Crossings. The State shall include provisions in its construction contract that the Contractor shall only cross the UPRR's tracks and right of way at existing open public crossings and that temporary contractor haul road crossings will only be allowed if absolutely necessary for the Project. If the Contractor, in good faith, believes that alternate public access cannot be utilized, then the Contractor shall submit design plans for the temporary crossing to the UPRR's Assistant Vice President Engineering – Design or his authorized representative. The UPRR will then review such design plans and the need for the temporary crossing. If, in the sole discretion of the UPRR, a temporary crossing is needed for the Project, the UPRR will advise the Contractor if the design plans for the temporary crossing are acceptable and shall also provide to the Contractor a UPRR cost estimate for the UPRR's installation and removal of the temporary crossing. If a temporary crossing is needed, the Contractor shall first execute the UPRR's Contractor's Road Crossing Agreement providing for the Contractor to be responsible for all costs and expenses in the UPRR's installation and removal of the Contractor's road crossing and any restoration costs involving the UPRR's ballast or other track structure material.
6. Delay to Trains. The State will require its Contractor to furnish, maintain and install, during performance of the Project Work, all advance warning signs or barricade protection that are expressly required by the UPRR for the duration of the Project Work. The State shall also require the Contractor to pay the UPRR for all train delay costs incurred by the UPRR resulting from a Contractor exceeding the agreed upon track construction window periods.
7. Protection of Fiber Optic Cable System. The State agrees to include the following provisions in its contract with any contractor performing any Project Work on the UPRR's property:

“Fiber optic cable systems may be buried on the Union Pacific's property. Protection of the fiber optic cable systems is of extreme importance since any

break could disrupt service to users resulting in business interruption and loss of revenue and profits. The Contractor shall telephone Union Pacific during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour number for emergency calls) to determine if fiber optic cable is buried anywhere on Union Pacific's premises within the limits of the project. If it is, the Contractor shall telephone the telecommunications companies involved, arrange for a cable locator and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on Union Pacific's premises.”

8. Subcontractors. The State will require its Contractor to be and remain primarily liable and responsible to the UPRR for all acts or omissions of any subcontractor as described in the Contractor's Right of Entry Agreement.

SECTION C. STATE OBLIGATIONS

1. Obligation to Railroad's Tenants. The UPRR shall have no obligation with respect to removing, relocating, or reinstalling the facilities of its lessees or licensees, required to be removed, relocated or reinstalled incidental to the State's construction. The State, at its expense, shall make all arrangements with the lessees and/or licensees, which arrangements shall be subject to the approval of the UPRR.

The State shall ensure that prior to any work within the UPRR's right of way, a fully executed Contractor's Right of Entry Agreement must be in place and advance notice for Railroad Flagging must be requested per terms of the Contractor's Right of Entry Agreement.

2. Coordination of Work. CDOT's Region 3 Resident Engineer, Ron Alexander, P.E., 2424 N. Townsend Avenue, Montrose, CO 81401, phone 970-683-6420, is designated to coordinate the Railroad Work and the Project Work provided for herein. The Program Engineer is Jason Smith, P.E., 222 South 6th Street, Room 317, Grand Junction, CO 81501, phone 970-683-6208. The Resident Engineer or their designee shall arrange with UPRR a mutually acceptable date that the Railroad Work can begin and shall issue a written notice to proceed to UPRR for said work.

3. Maintenance. Upon completion of construction of the Project Work, the State will maintain, repair, renew, and reconstruct, at the State's expense, the entire New Structure in accordance with the State's standard maintenance procedures. These maintenance requirements do not impose upon the State any responsibility for care or maintenance of pre-existing drainage not affected by or directly related to the Project Work herein described, nor for care or maintenance of the UPRR's roadbed, communication and signal lines, tracks and appurtenances.

SECTION D. PUC APPLICATION AND APPROVAL

Comment [A11]: To be submitted after C&M language and ROW issues have been agreed upon

The State has made application to the PUC for its approval of the Project and for approval of the continuing maintenance provisions agreed to by the parties. The parties shall cooperate in presenting all matters involved to the PUC in connection with the application. The provisions of this Contract pertaining to the performance of the Railroad Work shall not become effective until approval thereof has been obtained from the PUC.

**ARTICLE IV
ADDITIONAL PROVISIONS**

SECTION A. NO PARTICIPATION BY RAILROAD IN ANY PROJECT COSTS

Pursuant to the provisions of 23 CFR §646.210, the State confirms that this Project is of no ascertainable net benefit to the UPRR and that the UPRR shall not be required to share in any Project costs or costs involving the demolition of the Existing Structures or the construction of the New Structure.

SECTION B. FINANCIAL PROVISIONS

1. Contract Amount. The total encumbrance for this Project is \$???. The State's maximum financial obligation under this Contract is currently limited to that total encumbrance amount. The State will budget, appropriate and make funds available to pay the UPRR for additional work under this Project as long as the additional work is legitimate and the UPRR has communicated with the State Resident Engineer to allocate more funds. The UPRR must communicate with the State before the work is performed if practicable. Additional work is work that falls under the definition of "UPRR Work" contained in Article II, Section D, and includes increases in costs of "Railroad Work" due to labor and materials. It is specifically agreed that UPRR labor costs can include as additives, prorated equipment costs as specified in 23 CFR §140.910. The State shall not be responsible for any unauthorized extra work. Extra work is work that does not fall under the definition of "Railroad Work" contained in Article I, Section A.

Comment [A12]: TBD

2. Cost to the Railroad. Pursuant to 23 CFR part 646.210(b)(3), it is determined that on projects for the elimination of existing grade crossings at which active devices are in place the railroad share of the project costs shall be 5 (five) percent. The Railroads 5 percent share, as shown on **Exhibit H**, is \$???

Comment [A13]: TBD

SECTION C. CANCELLATION

In the event delays or difficulties arise in securing necessary approvals, or in acquiring necessary right of way, or in settling damages or damage claims, or for any other reason within twelve (12) months of agreement execution by either party, which, in the opinion of the State render it impracticable to utilize funds from the current appropriation for the construction of the

Project, then at any time before actual construction is started pursuant to proper approval or authority, the State may serve formal notice of cancellation upon the UPRR and this Contract shall thereupon become null and void. In the event of any such cancellation the State shall reimburse the UPRR for all related preliminary engineering costs or other costs incurred by the UPRR prior to the effective date of termination.

The UPRR, if it so elects, may recalculate and update any UPRR estimate submitted to the State based on anticipated actual costs that will be incurred by the UPRR in the event the State does not commence construction on the portion of the Project located on the UPRR's property within six (6) months from the date of any such estimate.

The UPRR, if it so elects, may terminate this Contract effective upon delivery of written notice to the State in the event the State does not commence construction on the portion of the Project located on the UPRR's property within twelve (12) months from the scheduled start up of Project Work that will involve work on the UPRR's property.

SECTION D. TERM

This Contract shall become effective as of the date first herein written and shall continue in full force and effect for as long as the New Structure remains on the UPRR's property and the Permanent License described in Article II, Section A, remains in effect.

SECTION E. SUCCESSORS AND ASSIGNS

All of the covenants and provisions hereof shall insure to the benefit of and be binding upon the parties hereto, their successors and assigns.

SECTION F. MODIFICATION OF EXISTING AGREEMENT

The Existing Agreement shall remain in effect upon completion of the Project, subject to the provisions of this agreement applicable to the New Structure that shall supersede and replace the similar provisions of the Existing Agreement applicable to the Existing Structure.

SECTION G. SIGNATURE AUTHORITY

The UPRR and the State each represent and warrant that they have taken all actions that are necessary or that are required by their procedures, bylaws, or applicable law, to legally authorize the undersigned signatories to execute this Contract on behalf of the UPRR and the State.

SECTION H. EXCEPTIONS TO SPECIAL PROVISIONS

The State and the UPRR agree that Section I, Special Provisions, is hereby amended in the following particulars:

1. The parties hereto agree that the final sentence of paragraph 4, Independent

Contractor. (4 CCR 801-2), of Section I, Special Provisions, is replaced with the following:

"Contractor shall provide and keep in force such types of Workers' Compensation Insurance, in the amounts required by law (and provide proof of such insurance, if such insurance is required by law, when requested by the State) and Unemployment Compensation Insurance, if required by law, in the amounts required by law, and shall be solely responsible for the acts of the Contractor, its employees, and agents."

2. The parties hereto agree that the first sentence of paragraph 6, Choice Of Law, of Section I, Special Provisions, is replaced with the following:

"The laws of the State of Colorado and rules and regulations issued pursuant thereto, to the extent not preempted by federal law, shall be applied in the interpretation, execution, and enforcement of this Contract."

3. The parties hereto agree that paragraph 10, Vendor Offset, (§§CRS 24-30-202 (1) & 24-30-202.4) shall apply to this Contract, to the extent not preempted by federal law.

SECTION I. SPECIAL PROVISIONS Revised 01/01/09

1. Controller's Approval. (CRS §24-30-202(1)).

This contract shall not be valid until it has been approved by the Colorado State Controller or designee.

2. Fund Availability. (CRS §24-30-202(5.5)).

Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

3. Governmental Immunity.

No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671 et seq., as applicable now or hereafter amended.

4. Independent Contractor.

Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither Contractor nor any agent or employee of Contractor shall be deemed to be an agent or employee of the State. Contractor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall not pay for or otherwise provide such coverage for Contractor or any of its agents or employees. Unemployment insurance benefits will be available to Contractor and its employees and agents only if such coverage is made available by Contractor or a third party. Contractor shall pay when

due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this contract. Contractor shall not have authorization, express or implied, to bind the State to any agreement, liability or understanding, except as expressly set forth herein. Contractor shall (a) provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, (b) provide proof thereof when requested by the State, and (c) be solely responsible for its acts and those of its employees and agents.

5. Compliance with Law.

Contractor shall strictly comply with all applicable federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.

6. Choice of Law.

Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this contract, to the extent capable of execution.

7. Binding Arbitration Prohibited.

The State of Colorado does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this contract or incorporated herein by reference shall be null and void.

8. Software Piracy Prohibition. (Governor's Executive Order D 002 00).

State or other public funds payable under this contract shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Contractor hereby certifies and warrants that, during the term of this contract and any extensions, Contractor has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Contractor is in violation of this provision, the State may exercise any remedy available at law or in equity or under this contract, including, without limitation, immediate termination of this contract and any remedy consistent with federal copyright laws or applicable licensing restrictions.

9. Employee Financial Interest/Conflict Of Interest. (CRS §§24-18-201 and 24-50-507).

The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this contract. Contractor

has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of Contractor's services and Contractor shall not employ any person having such known interests.

10. Vendor Offset. (CRS §§24-30-202 (1) and 24-30-202.4).

Subject to CRS §24-30-202.4 (3.5), the State Controller may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for: **(a)** unpaid child support debts or child support arrearages; **(b)** unpaid balances of tax, accrued interest, or other charges specified in CRS §39-21-101, et seq.; **(c)** unpaid loans due to the Student Loan Division of the Department of Higher Education; **(d)** amounts required to be paid to the Unemployment Compensation Fund; and **(e)** other unpaid debts owing to the State as a result of final agency determination or judicial action.

11. Public Contracts For Services. (CRS §8-17.5-101).

Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c), Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor **(a)** shall not use E-Verify Program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed, **(b)** shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, **(c)** shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and **(d)** shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the contracting State agency, Institution of Higher Education or political subdivision a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and shall comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the contracting State agency, institution of higher education or political subdivision may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.

12. Public Contracts With Natural Persons. (CRS §24-76.5-101).

Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she **(a)** is a citizen or otherwise lawfully present in the United States pursuant to federal law, **(b)** shall comply with the provisions of CRS §24-76.5-101 et seq., and **(c)** has produced one form of identification required by CRS §24-76.5-103 prior to

the effective date of this contract.

SECTION J: STATEWIDE CONTRACT MANAGEMENT SYSTEM

If the maximum amount payable to Contractor under this Contract is \$100,000 or greater, either on the Effective Date or at anytime thereafter, this **§J** applies.

Contractor agrees to be governed, and to abide, by the provisions of CRS §24-102-205, §24-102-206, §24-103-601, §24-103.5-101 and §24-105-102 concerning the monitoring of vendor performance on state contracts and inclusion of contract performance information in a statewide contract management system.

Contractor's performance shall be subject to Evaluation and Review in accordance with the terms and conditions of this Contract, State law, including CRS §24-103.5-101, and State Fiscal Rules, Policies and Guidance. Evaluation and Review of Contractor's performance shall be part of the normal contract administration process and Contractor's performance will be systematically recorded in the statewide Contract Management System. Areas of Evaluation and Review shall include, but shall not be limited to quality, cost and timeliness. Collection of information relevant to the performance of Contractor's obligations under this Contract shall be determined by the specific requirements of such obligations and shall include factors tailored to match the requirements of Contractor's obligations. Such performance information shall be entered into the statewide Contract Management System at intervals established herein and a final Evaluation, Review and Rating shall be rendered within 30 days of the end of the Contract term. Contractor shall be notified following each performance Evaluation and Review, and shall address or correct any identified problem in a timely manner and maintain work progress.

Should the final performance Evaluation and Review determine that Contractor demonstrated a gross failure to meet the performance measures established hereunder, the Executive Director of the Colorado Department of Personnel and Administration (Executive Director), upon request by the Colorado Department of Transportation, and showing of good cause, may debar Contractor and prohibit Contractor from bidding on future contracts. Contractor may contest the final Evaluation, Review and Rating by: **(a)** filing rebuttal statements, which may result in either removal or correction of the evaluation (CRS §24-105-102(6)), or **(b)** under CRS §24-105-102(6), exercising the debarment protest and appeal rights provided in CRS §§24-109-106, 107, 201 or 202, which may result in the reversal of the debarment and reinstatement of Contractor, by the Executive Director, upon showing of good cause.

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THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

UNION PACIFIC RAILROAD COMPANY

By _____

STATE OF COLORADO
JOHN W. HICKENLOOPER, GOVERNOR

By _____
Timothy J. Harris, P.E.
Chief Engineer

APPROVED:
JOHN W. SUTHERS, Attorney General

By _____
Kathryn Young, Asst. Attorney General

CRS 24-30-202 requires that the State Controller approve all state contracts. This Contract is not valid until the State Controller, or such assistant as he may delegate, has signed it. Except for preliminary engineering review performed by the Railroad or a Railroad contractor as set forth in this Contract, the Railroad is not authorized to begin performance until the Contract is signed and dated below. Except for preliminary engineering review performed by the Railroad or a Railroad contractor as set forth in this Contract, if performance begins prior to the date below, the State may not be obligated to pay for goods and/or services provided.

State Controller
Robert Jaros, CPA, MBA, JD

By _____
CDOT Controller

Date