

**DRAINAGE FACILITY & WATERWAY
AGREEMENT**

Mile Post: 224 - 226, Austin Subdivision
Location: New Braunfels, Comal County, Texas

THIS AGREEMENT ("Agreement") is made and entered into as of June 22, 2007, ("Effective Date") by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation, ("Licensor") and **CITY OF NEW BRAUNFELS**, a Texas municipal corporation to be addressed at 424 South Castell Avenue, PO Box 311747, New Braunfels, Texas 78131 ("Licensee").

RECITALS:

In order to improve drainage conditions the Licensee desires to construct a drainage facility in the vicinity of Licensor's right of way at Mile Posts 224-226 on the Austin Subdivision, located at or near New Braunfels, Comal County, Texas (hereinafter the "Premises").

The drainage facilities to be constructed by the Licensee, at Licensee's expense, on the Premises are hereinafter collectively referred to as the "Drainage Facility". The Drainage Facility and Premises are shown on the print dated April 27, 2007, marked Exhibit "A", hereto attached.

The Railroad is agreeable to the Licensee constructing, maintaining and using the Drainage Facility upon the terms and conditions set forth herein.

AGREEMENT:

NOW, THEREFORE, IT IS AGREED by and between the parties hereto as follows:

Article 1. LICENSOR GRANTS RIGHT.

In consideration of the covenants and agreements herein contained to be by the Licensee kept, observed and performed, the Licensor hereby grants to the Licensee the right to construct and thereafter, during the term hereof, to maintain and use the Drainage Facility.

Article 2. CONSTRUCTION WORK TO BE PERFORMED BY LICENSEE.

The Licensee, at its sole expense, shall construct the Drainage Facility and perform the work described in the Recitals above and/or described in Exhibit "A".

Article 3. CONSTRUCTION, MAINTENANCE AND OPERATION.

The grant of right herein made to the Licensee is subject to each and all of the terms, provisions, conditions, limitations and covenants set forth herein and in Exhibit B, hereto attached.

Article 7. IF WORK IS TO BE PERFORMED BY CONTRACTOR.

If a contractor is to do any of the work performed on the Drainage Facility or Premises (including initial construction and subsequent relocation or substantial maintenance and repair work), then the Licensee shall require its contractor to execute the Railroad's Contractor's Right of Entry Agreement. Licensee acknowledges receipt of a copy of the Contractor's Right of Entry Agreement and understanding of its terms, provisions, and requirements, and will inform its contractor of the need to execute the Agreement. Under no circumstances will Licensee's contractor be allowed onto Licensor's Premises without first executing the Contractor's Right of Entry Agreement.

Article 8. INSURANCE.

A. The Licensee, at its expense, shall obtain the insurance described in Exhibit B-1, hereto attached. The Licensee will also provide to the Licensor a Certificate of Insurance issued by its insurance carrier confirming the existence of such insurance and that the policy or policies contain the following endorsement:

Union Pacific Railroad Company is named as an additional insured with respect to all liabilities arising out of the existence, use or any work performed on or associated with the Drainage Facility located on Railroad's right of way between Mile Posts 224 on the Austin Subdivision, located at or near New Braunfels, Comal County, Texas.

B. If the Licensee named in this Agreement is a public entity subject to any applicable statutory tort laws, the limits of insurance described in Exhibit B-1 shall be the limits the Licensee then has in effect or which is required by applicable current or subsequent law, whichever is greater, a portion of which may be self-insured with the consent and approval of the Licensor.

C. All insurance correspondence shall be directed to:

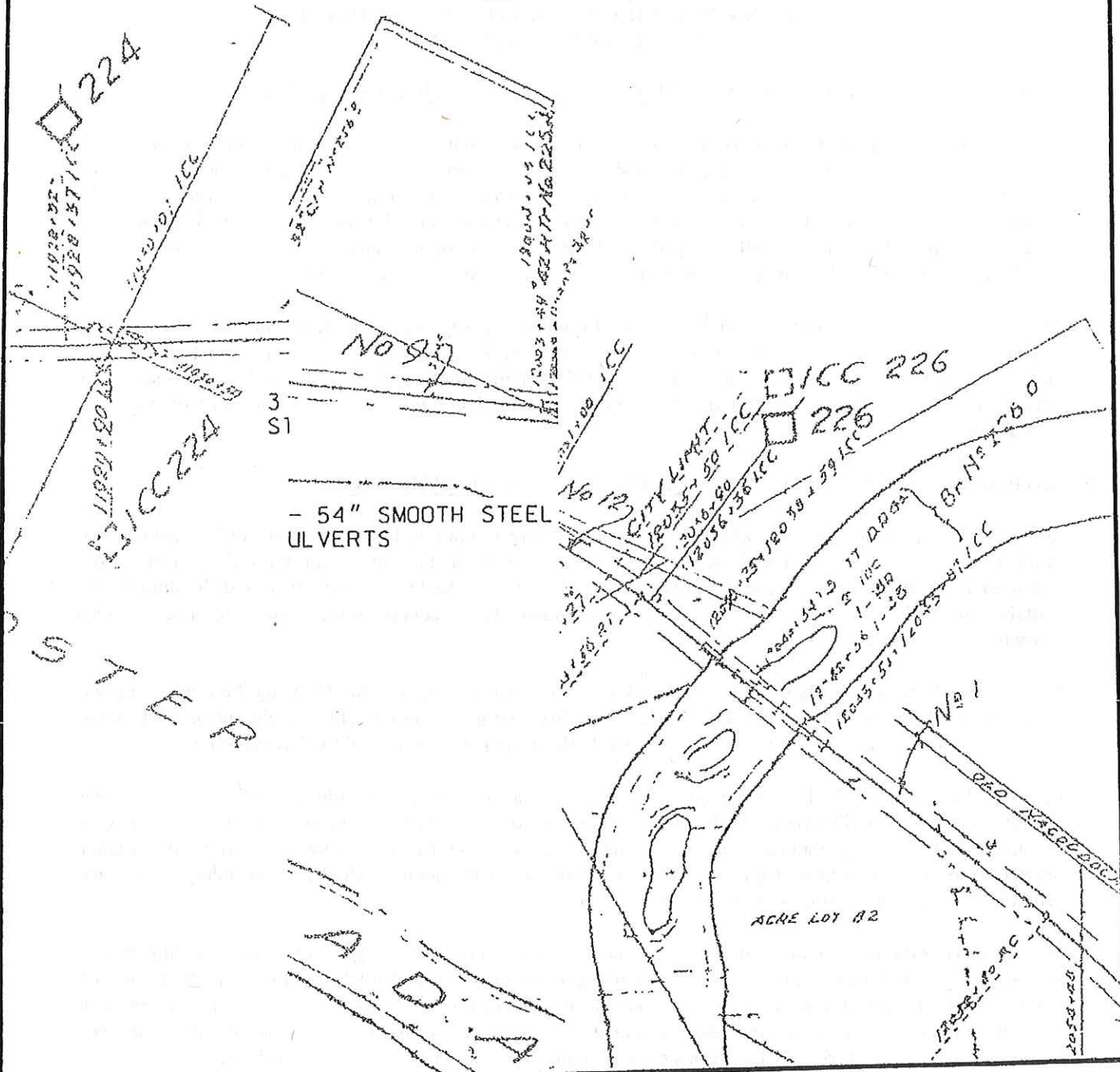
Folder No.: 02441-57
Director-Contracts
Union Pacific Railroad Company
Real Estate Department
1400 Douglas Street STOP 1690
Omaha, Nebraska 68179-1690

Article 9. SPECIAL PROVISION – RAILROAD FLAGMAN; WHEN REQUIRED; FLAGGING CHARGES.

A. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within 25 feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains, pursuant to the terms of the attached Exhibit 'B'. All expenses connected with the furnishing of said flagman shall be at the sole cost and expense of the Licensee, who shall promptly pay to Railroad all charges connected therewith, within 30 days after presentation of a bill therefore.

B. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays; two and one-half times current hourly rate for holidays.

C. Wage rates are subject to change, at any time, by law or by agreement between the Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized



- 54" SMOOTH STEEL
ULVERTS

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

EXHIBIT "A"

VION PACIFIC RAILROAD COMPANY

NEW BRAUNFELS, COMAL COUNTY, TX

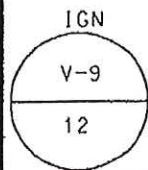
M.P. 224 to 226 - AUSTIN SUB.

TO ACCOMPANY AGREEMENT WITH
CITY OF NEW BRAUNFELS, TEXAS

SCALE: 1" = 500'

OFFICE OF REAL ESTATE
OMAHA, NEBRASKA DATE: 4-27-2007

NLP FILE: 2441-57



done to the satisfaction of the Vice President-Engineering Services or his authorized representative. The Licensor shall have the right, if it so elects, to provide such support as it may deem necessary for the safety of its track or tracks during the time of construction, maintenance, repair, renewal, modification, relocation, reconstruction or removal of the Drainage Facility, and, in the event the Licensor provides such support, the Licensee shall pay to the Licensor, within fifteen (15) days after bills shall have been rendered therefor, all expense incurred by the Licensor in connection therewith, which expense shall include all assignable costs.

Section 3. NOTICE OF COMMENCEMENT OF WORK.

If an emergency should arise requiring immediate attention, the Licensee shall provide as much notice as practicable to Licensor before commencing any work. In all other situations, the Licensee shall notify the Licensor at least ten (10) days (or such other time as the Licensor may allow) in advance of the commencement of any work upon property of the Licensor in connection with the construction, maintenance, repair, renewal, modification, reconstruction, relocation or removal of the Drainage Facility. All such work shall be prosecuted diligently to completion.

Section 4. LICENSEE TO BEAR ENTIRE EXPENSE.

The Licensee shall bear the entire cost and expense incurred in connection with the construction, maintenance, repair and renewal and any and all modification, revision, relocation, removal or reconstruction of the Drainage Facility, including any and all expense which may be incurred by the Licensor in connection therewith for inspection, flagging, or otherwise.

Section 5. REINFORCEMENT, RELOCATION OR REMOVAL OF DRAINAGE FACILITY.

a) The license herein granted is subject to the needs and requirements of the Licensor in the operation of its railroad and in the improvement and use of its property, and the Licensee shall, at the sole expense of the Licensee, reinforce or encase the Drainage Facility, or move all or any portion of the Drainage Facility to such new location, as the Licensor may designate, whenever, in the furtherance of its needs and requirements, the Licensor shall find such action necessary or desirable.

b) All the terms, conditions and stipulations herein expressed with reference to the Drainage Facility on property of the Licensor in the location hereinbefore described shall, so far as the Drainage Facility remains on the property, apply to the Drainage Facility as modified, changed or relocated within the contemplation of this section.

Section 6. NO INTERFERENCE WITH LICENSOR'S OPERATION.

The Drainage Facility and all parts thereof within and outside of the limits of the property of the Licensor shall be constructed and, at all times, maintained, repaired, renewed and operated in such manner as to cause no interference whatsoever with the constant, continuous and uninterrupted use of the tracks, property and facilities of the Licensor, and nothing shall be done or suffered to be done by the Licensee at any time that would in any manner impair the safety thereof.

Section 7. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.

a) Fiber optic cable systems may be buried on the Licensor'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. Licensee shall telephone the Licensor at 1-800-336-9193 (a

when such injury, death, damage, loss or destruction grows out of or arises from the taking down of any fence or the moving or disturbance of any other property of the Licensor.

Section 10. INDEMNITY.

a) As used in this Section, "Licensor" includes other railroad companies using the Licensor's property at or near the location of the Licensee's installation and their officers, agents, and employees; "Loss" includes loss, damage, claims, demands, actions, causes of action, penalties, costs, and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from: (a) injury to or death of persons whomsoever (including the Licensor's officers, agents, and employees, the Licensee's officers, agents, and employees, as well as any other person); and (b) damage to or loss or destruction of property whatsoever (including Licensee's property and adjacent property and crops, damage to the roadbed, tracks, equipment, or other property of the Licensor, or property in its care or custody).

b) To the extent it may lawfully do so, the Licensee agrees to assume the risk of loss or damage to the Drainage Facility and to indemnify and hold harmless the Licensor from any Loss which is due to or arises from (i) the installation, construction, maintenance, repair, reconstruction, removal, use or existence of the Drainage Facility and appurtenances thereto, or any part thereof, including any break in the Drainage Facility wall or structure or any leakage, flow of water or flooding from the Drainage Facility, or (ii) Licensee's failure to comply with or perform any of the terms and conditions set forth in this Agreement, except to the extent that the Loss is caused by the sole and direct negligence of the Licensor; provided, however, that the foregoing indemnification provisions shall not apply to any claims, damages, costs and expenses that have been fully compensated for through the insurance required of Licensee in Exhibit B-1, or required of Licensee's contractor under the separate Contractor's Right of Entry Agreement.

c) Any liability of either party hereunder to one of its employees under any Workers' Compensation Act or the Federal Employers' Liability Act shall not be questioned or in any way challenged by the other party, nor shall any jury or court findings, resulting from any employee's suit against either party pursuant to any such Act(s), be relied upon or used by either party in any attempt to assert common law liability against the other.

Section 11. WAIVER OF BREACH.

The waiver by the Licensor of the breach of any condition, covenant or agreement herein contained to be kept, observed and performed by the Licensee shall in no way impair the right of the Licensor to avail itself of any remedy for any subsequent breach thereof.

Section 12. AGREEMENT NOT TO BE ASSIGNED.

The Licensee shall not assign this Agreement, in whole or in part, or any rights herein granted, without the written consent of the Licensor, and it is agreed that any transfer or assignment or attempted transfer or assignment of this Agreement or any of the rights herein granted, whether voluntary, by operation of law, or otherwise, without such consent in writing, shall be absolutely void and, at the option of the Licensor, shall terminate this Agreement.

Section 13. SUCCESSORS AND ASSIGNS.

Subject to the provisions of Section 12 hereof, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, executors, administrators, successors and assigns.

EXHIBIT C

**Union Pacific Railroad
Insurance Requirements**

Licensee shall, at its sole cost and expense, (except for Railroad Protective Liability Insurance required in Paragraph D), procure and maintain in effect during the term of this Agreement the following insurance coverage. Licensee shall procure and maintain, or cause to be procured and maintained by its contractor, at its sole cost and expense, Railroad Protective Liability Insurance coverage described in Paragraph D during any period of construction, maintenance, repair or reconstruction work.

A. **Commercial General Liability** insurance. Commercial general liability (CGL) with a limit of not less than \$2,000,000 each occurrence and an aggregate limit of not less than \$4,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

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

- Contractual Liability Railroads ISO form CG 24 17 10 01 (or a substitute form providing equivalent coverage) showing "Union Pacific Railroad Company Property" as the Designated Job Site.

B. **Business Automobile Coverage** insurance. Business auto coverage written on ISO form CA 00 01 (or a substitute form providing equivalent liability coverage) with a combined single limit of not less \$2,000,000 for each accident.

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

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

C. **Workers Compensation and Employers Liability** insurance. Coverage must include but not be limited to:

- Licensee's and/or Licensee's contractor's statutory liability under the workers' compensation laws of the state where the Wireline is located.
- Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 disease policy limit \$500,000 each employee.

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

RESOLUTION NO. 2007-R 30

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEW BRAUNFELS, TEXAS, AUTHORIZING THE CITY MANAGER TO ENTER INTO A DRAINAGE FACILITY AND WATERWAY AGREEMENT WITH THE UNION PACIFIC RAILROAD COMPANY TO CONSTRUCT A DRAINAGE FACILITY FOR THE CHURCH HILL IMPROVEMENT PROJECT AT MILE POST 224-226 ON THE AUSTIN SUBDIVISION IN NEW BRAUNFELS, COMAL COUNTY, TEXAS

WHEREAS, the City of New Braunfels, Texas, desires to enter into an agreement with Union Pacific Railroad for the construction of a drainage facility for the Church Hill Improvement Project at Mile Post 224-226 on the Austin Subdivision in New Braunfels, Comal County, Texas; and

WHEREAS, the City Council of the City of New Braunfels, Texas has received said proposed agreement before it and has given it careful review and consideration; and

WHEREAS, it is considered that the best interests of the City of New Braunfels will be served by the acceptance of said agreement; and

WHEREAS, the City agrees to pay the one time Licensing Fee in the amount of Ten Thousand Dollars (\$10,000.00) in accordance with the Union Pacific Railroad Company agreement; and

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NEW BRAUNFELS, TEXAS:

THAT, the City Manager is authorized to execute the agreement for the construction of a drainage facility for the Church Hill Improvement Project at Mile Post 224-226 on the Austin Subdivision in New Braunfels, Comal County, Texas.

ADOPTED AND APPROVED this 9th day of July 2007.

City of New Braunfels, Texas



BRUCE BOYER, Mayor

Attest:




MICHAEL A. RESENDEZ, City Secretary