



Kristy D. Clark  
General Attorney

**BNSF Railway Company**  
P.O. Box 961039  
Fort Worth, TX 76161  
2500 Lou Menk Drive, AOB-3  
Fort Worth, TX 76131-2828  
(817) 352-3394  
(817) 352-2397 fax

*Kristy.Clark@BNSF.com*

**VIA E-FILE**

• October 17, 2008

Ms. Anne Quinlan, Acting Secretary  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20423-0001

**Re: STB Finance Docket No. 35164; BNSF Railway Company – Petition for Declaratory Order**

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket is BNSF's Supplemental Comments.

If you have any questions, please call me at (817) 352-3394.

Sincerely,

Kristy D. Clark  
General Attorney

KDC/js

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

STB FINANCE DOCKET NO. 35164

---

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

---

SUPPLEMENTAL COMMENTS

---

David Rankin  
Kristy Clark  
BNSF RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131-2828  
(817) 352-3394

Dated: October 17, 2008

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

STB FINANCE DOCKET NO. 35164

---

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

---

SUPPLEMENTAL COMMENTS

---

BNSF Railway Company (“**BNSF**”) hereby files these supplemental comments pursuant to the order of the Surface Transportation Board (“**Board**” or “**STB**”), served October 2, 2008 (“**October Order**”), instituting this declaratory order proceeding.

**BACKGROUND**

On July 15, 2008, BNSF filed a petition, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, requesting the Board to institute a declaratory order proceeding to terminate a controversy or remove uncertainty with respect to two track relocation projects in Oklahoma City, Oklahoma (the “**Petition**”). One of the projects will involve the relocation of the portion of BNSF’s Chickasha Subdivision located between milepost 540.15 and milepost 539.96 (“**Eastern Segment**”) in about 14 months. The other project was the near-term need to relocate a short segment of BNSF’s Chickasha Subdivision located between milepost 540.15 and milepost 541.69 (“**Middle Segment**”). BNSF is undertaking these projects at the request of the Oklahoma Department of Transportation (“**ODOT**”) to facilitate the Oklahoma City I-40 Crosstown Relocation project (“**Highway Project**”).

Comments in support of the Petition have been filed by ODOT, the Mayor of Oklahoma City and the Greater Oklahoma City Chamber. Comments in opposition to the Petition have been filed by Mr. Kessler (“**Kessler Comments**”), OnTrac and Robert Waldrop.

On August 25, 2008, BNSF filed an Amendment to the Petition, Response to Comments and Renewed Request for Expedited Handling (“**BNSF Response**”). On September 5, 2008, Mr. Kessler (“**Kessler**”) filed: (1) Kessler’s Reply to the BNSF Response (“**Kessler Reply**”); and (2) Motion to Compel and Motion to Cease and Desist (“**Kessler Motions**”). On September 24, 2008, BNSF moved to strike the Kessler Reply and the Kessler Motions (“**Motion to Strike**”).

In the October Order, the Board requested supplemental comments from BNSF by October 17, 2008, with replies due by November 6, 2008. The Board also denied Kessler’s requests for injunctive relief.

Because there is already a substantial record in this proceeding, the Board directed the parties to focus any additional comments on whether the two relocation projects: (1) would remove service to shippers, including whether they will permit continued rail service to Boardman, Inc. (“**Boardman**”);<sup>1</sup> and (2) would extend BNSF's operations into new territory. As to the two shippers located adjacent to the Eastern Segment, BNSF was specifically directed to submit a statement from ODOT confirming that the construction projects necessary for BNSF to provide direct service to Producers Co-Op Oil Mill (“**Producers**”) and Mid-States Lumber Company (“**Mid-States**”) will be undertaken. October Order slip op. at 3.

## SUPPLEMENTAL COMMENTS

### A. Rail Service To Boardman.

---

<sup>1</sup> While the Board has phrased the inquiry as one of “continued ability to serve Boardman” (October Order slip op. at 3), Boardman has not utilized rail service in over five (5) years. It is highly questionable whether Boardman can properly be deemed an existing rail customer.

In the Petition, BNSF pointed out that there are two rail customers (Producers and Mid-States) located adjacent to the Eastern Segment, that there are **no** rail customers located on or adjacent to the Middle Segment, and that the segment of the Chickasha Subdivision located between milepost 541.69 and milepost 542.91 (“**Western Segment**”) is not within the ambit of this proceeding because that section of track does not need to be relocated for the Highway Project.<sup>2</sup>

Boardman, of course, is located adjacent to the Western Segment. Nevertheless, Kessler claims that the relocation of the Middle Segment would adversely affect service to Boardman. In the Motion to Strike, BNSF explained at length why, contrary to Kessler’s contention, Boardman does not need an additional 400 feet of track to the east of its switch in order to make room for new shipments. Because Boardman only has 280 feet of storage space within its facility, and because Boardman can only load one 200-foot unit at a time, the track segment between the Boardman switch and the eastern end of the Western Segment which Kessler claims is 300 feet would be more than enough to temporarily store cars. That, of course, assumes a need to store empty cars in order to bring in new empty cars for loading. Kessler fails to explain why the first set of empty cars cannot be loaded or why a second set of empties are needed. The movements in and out of the Boardman facility postulated by Kessler are designed solely to keep a portion of BNSF’s track in the path of the Highway Project.

In the BNSF Response, BNSF mistakenly noted that Boardman’s siding was located at milepost 541.75. At one time, there existed two sidings adjacent to Boardman’s facilities: one was located at milepost 541.75 and the other at milepost 541.86. The one that remains today is actually located at milepost 541.86. Consequently, the distance between the remaining switch

---

<sup>2</sup> In the October Order, the Board specifically acknowledged that the Western Segment “is not at issue” in this proceeding. October Order slip op. at 2, note 2.

into the Boardman facility (at milepost 541.86) and the eastern end of the Western Segment (at milepost 541.69) is 911 feet, or about 200 feet more track than Kessler claims is required to provide service to Boardman. *See* Exhibit 1.

When Boardman still utilized rail service it was provided from the west over the Chickasha Subdivision. If Boardman ever decides to resume utilizing rail, service would again be provided from the west. *See* Exhibit 1 which illustrates how service to Boardman would be provided once the remaining tracks on the Middle Segment are removed. BNSF has reached a tentative arrangement with Stillwater Central Railroad, Inc. ("**Stillwater**"), for Stillwater to relocate the signal mast at the intersection of the Chickasha Subdivision and the Packingtown Lead, repair the tracks leading to Boardman, and provide service to Boardman.<sup>3</sup> BNSF, however, has developed serious doubts about Boardman's intention to ship by rail. First, it remains unclear whether Boardman willingly and knowingly participated in the fraudulent shipment which Kessler refers to as "rail car HTTX 93507".<sup>4</sup> Second, BNSF recently sent an individual from its marketing department to meet with Mr. Merry, Vice President of Boardman, to discuss Boardman's shipping needs. Rather than embracing the offered rail service, Mr. Merry was evasive and totally non-committal. Mr. Merry refused to identify a single carload of traffic that would be made available once the tracks are repaired. Consequently, BNSF has serious doubts as to Boardman's alleged desire to ship by rail.

#### **B. The Packingtown Lead is Not New Territory.**

---

<sup>3</sup> Stillwater would need to obtain approval from the Board prior to serving the Boardman facility.

<sup>4</sup> That shipment continues to sit in a yard in Oklahoma City accumulating demurrage charges and awaiting its true owner to step forward, pay the accrued charges and take possession of the locomotive. It appears that the locomotive is not owned by Mr. Kessler or Boardman.

In order to accommodate the Highway Project, the Middle Segment needed to be relocated slightly to the south of its original alignment. BNSF explored several options and elected to rebuild the Packingtown Lead because that option was the fastest and least expensive.

The Packingtown Lead was originally constructed more than 50 years ago by The Atchison, Topeka and Santa Fe Railway (“ATSF”), a predecessor of BNSF. The Packingtown Lead provided ATSF access to the Oklahoma City stockyards located adjacent to the Chickasha Subdivision which, at that time, was owned and operated by the St. Louis and San Francisco Railway, another predecessor of BNSF. *See* Exhibits 2 and 3. The Packingtown Lead was taken out of service after the last ATSF customer in the stockyards stopped shipping by rail. The corridor, however, was never abandoned by ATSF.

Because the Packingtown Lead corridor has been in the BNSF corporate family for over 50 years, the reconstruction of that line cannot possibly constitute an invasion of new territory. BNSF and its predecessor, ATSF, have been serving that market for over 50 years. *See Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1925); *Nicholson v. Missouri Pacific Railroad Company*, 366 I.C.C. 69, 72 (1982), *aff’d sub nom.*, *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), *cert denied*, 464 U.S. 1056 (1984). The reconstructed Packingtown Lead is being used today to handle traffic that formerly traversed the Middle Segment. *See also Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

In the Kessler Comments, Kessler claims that the relocation of the Middle Segment to the corridor of the Packingtown Lead is subject to the Board’s jurisdiction because the Packingtown Lead and the Chickasha Subdivision were “formerly” owned by different railroads. Kessler

Comments at 19. The shortcoming in Kessler's logic is that, while they were "formerly" owned by different railroads, they are currently owned by the same railroad, BNSF, and the invasion of new territory test looks at BNSF, as presently constituted, and not as fragmented rail lines "formerly" owned by the various BNSF predecessors. In fact, under Kessler's logic, no railroad that is the product of mergers could ever engage in a non-STB jurisdictional relocation project, since at least one predecessor railroad "formerly" did not service the market adjacent to the relocated line.

### **C. Rail Service to Producers and Mid-States.**

The relocation of the Eastern Segment will take place after the construction of: (1) a new railroad bridge which will elevate the Red Rock Subdivision over the Chickasha Subdivision; and (2) new industry tracks which will enable BNSF to service Producers and Mid-States directly from the Red Rock Subdivision. Once those construction projects are completed, BNSF will relocate the Eastern Segment slightly (30 to 400 feet) to the south to make room for the Highway Project. The relocated line will be used solely to handle overhead traffic. No new shippers can be accessed from the relocated line. *See* Exhibit 4.

Pursuant to the Board's request, attached as Exhibit 5 is the Verified Statement of Gary M. Ridley, Director of ODOT ("Ridley VS"), confirming that the new bridge and new industry tracks will be constructed. According to Director Ridley, ODOT has contracted with BNSF and the Muskogee Bridge Company, Inc., for the construction of the new bridge. Director Ridley also confirms that ODOT is paying for the new railroad bridge. Ridley VS at 2. Attached as Exhibit D to the Ridley VS is a photograph illustrating the progress that has been made on the new bridge.

Director Ridley further confirms that ODOT will be paying for the construction of the new industry tracks that will enable BNSF to serve Producers and Mid-States directly from the Red Rock Subdivision. BNSF completed its review of the revised design plans for the industry tracks this week and the project is progressing. ODOT currently anticipates having BNSF do all or part of the construction of the industry tracks. Ridley VS at 3.

### **CONCLUSION**

As demonstrated in the Petition and these Supplement Comments, the relocations of the Middle Segment and the Eastern Segment are not subject to the Board's jurisdiction under any of the tests or standards applied by the Interstate Commerce Commission and the Board over the years. The physical relocation of the Middle Segment does not involve an extension into or invasion of new territory, since the Packingtown Lead, at the time it was rebuilt, was an existing BNSF rail corridor. In addition, the removal of the Middle Segment does not affect service to shippers since there are no shippers located on the Middle Segment. The physical relocation of the Eastern Segment will not involve an extension into or invasion of new territory since BNSF will not be able to serve any new customers from the relocated line and the relocated line will lie merely a few feet south of its current location. In addition, the removal of the Eastern Segment from its current location will not affect service to shippers, since the two shippers located adjacent to the Eastern Segment will be served directly from the Red Rock Subdivision. Finally, the relocations of the Middle Segment and the Eastern Segment are not related to the matter of rail transportation generally, but will be undertaken to accommodate the Highway Project.

For all the foregoing reasons, BNSF respectfully urges the Board to issue an order declaring that: (1) the relocation of the Middle Segment was a project not subject to the Board's

jurisdiction; and (2) the relocation of the Eastern Segment, once the new bridge and industry tracks are constructed, will not be a project subject to the Board's jurisdiction.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kristy Clark" followed by a flourish. The signature is written over a horizontal line.

David Rankin  
Kristy Clark  
BNSF RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131-2828

Dated: October 17, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition has been served on the following entities by first class mail this 17<sup>th</sup> day of October, 2008:

Fritz Kahn  
8<sup>th</sup> Floor  
1920 N Street, N.W.  
Washington, DC 20036-1601

Edwin Kessler  
1510 Rosemont Drive  
Norman, Oklahoma 73072

Robert M. Waldrop  
1524 NW 21  
Oklahoma City, OK 73106

OnTrac  
Post Office Box 984  
Norman, OK 73070

Joseph T. Merry  
Vice President  
Boardman, Incorporated  
1135 S McKinley Avenue  
Oklahoma City, OK 73108-7012

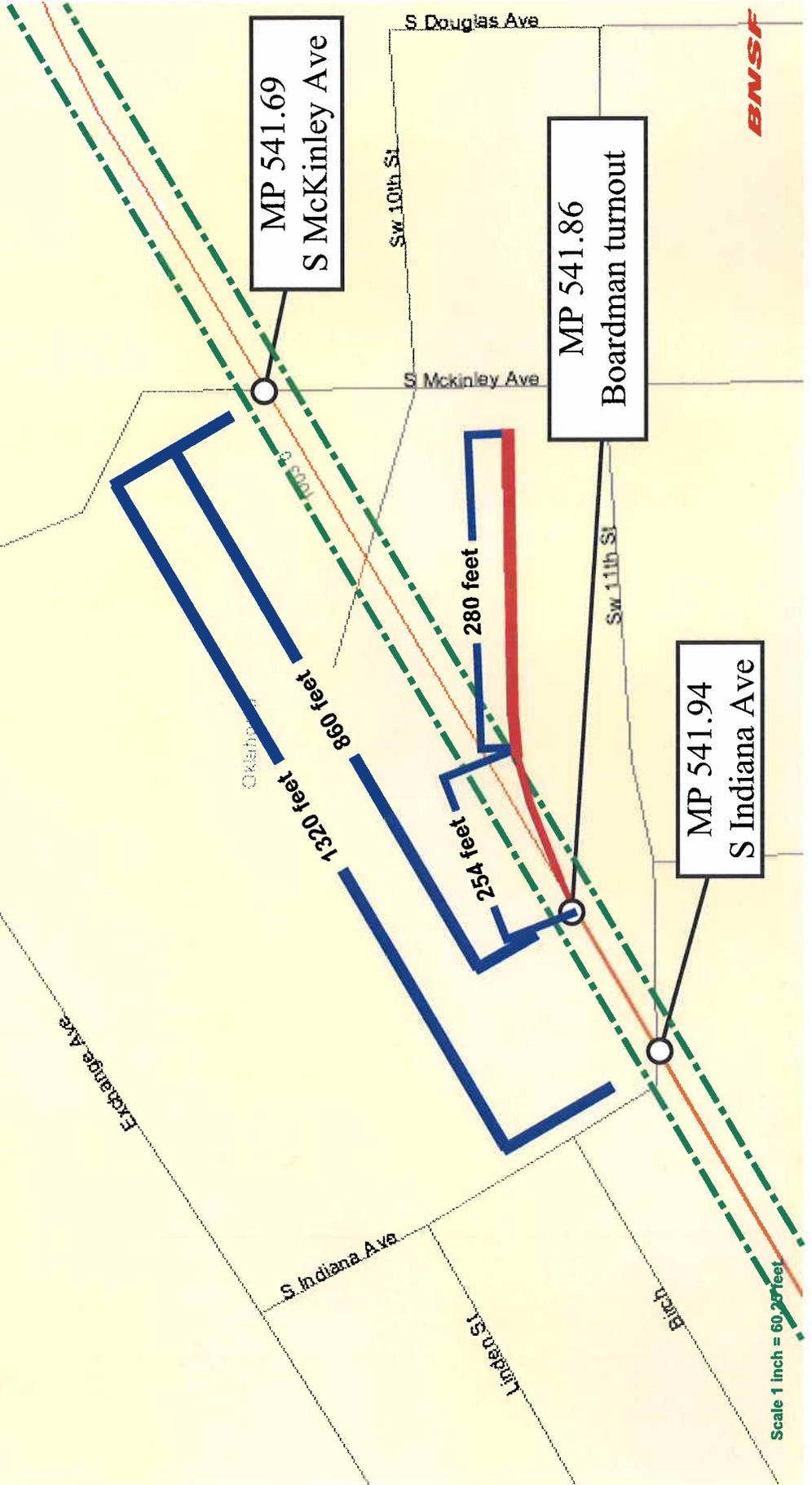
  
\_\_\_\_\_



EXHIBIT 1B

 BNSF Right of Way

 BNSF Spur used to serve Boardman Inc.



Scale 1 inch = 60.25 feet

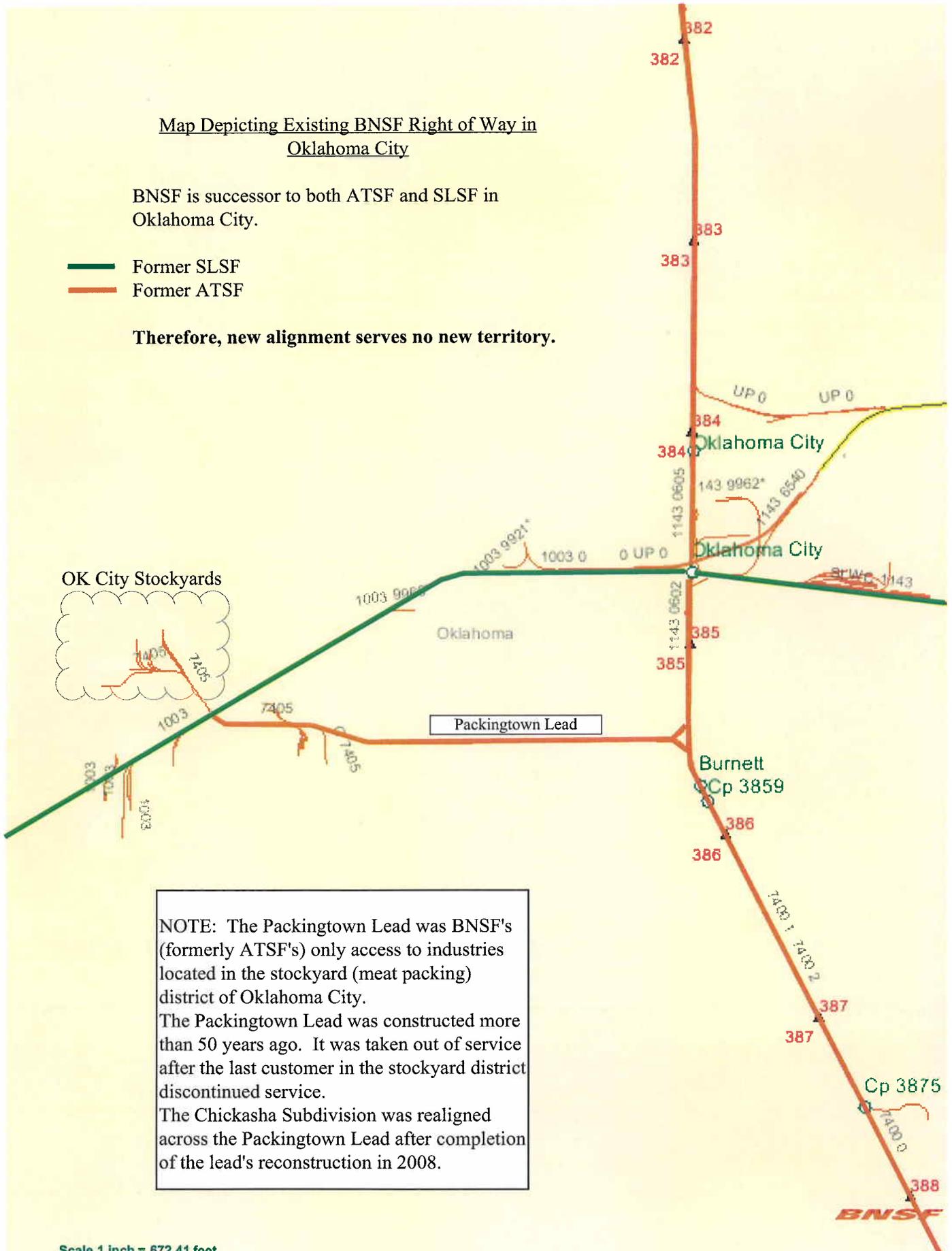
**EXHIBIT 2**

Map Depicting Existing BNSF Right of Way in  
Oklahoma City

BNSF is successor to both ATSF and SLSF in  
Oklahoma City.

-  Former SLSF
-  Former ATSF

**Therefore, new alignment serves no new territory.**

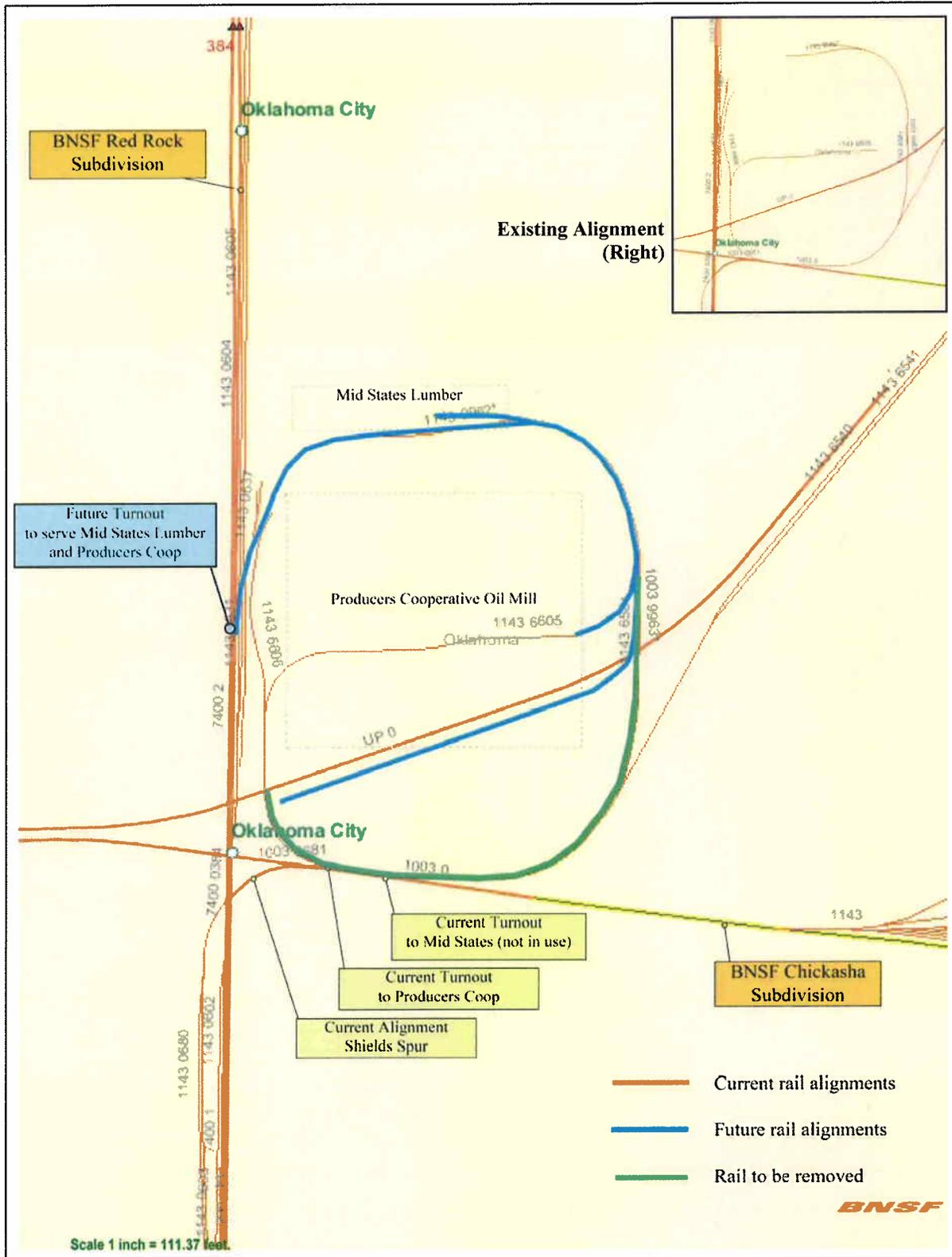


### EXHIBIT 3



Scale 1 inch = 672.41 feet.

EXHIBIT 4



Before the

**SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35164

**BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER**

---

**VERIFIED STATEMENT OF  
GARY M. RIDLEY**

My name is Gary M. Ridley. I am currently the Director of the Oklahoma Department of Transportation (“ODOT”), having been appointed in August of 2001. In my position, I am personally familiar with the Oklahoma City I-40 highway project, and with the relocation projects of BNSF Railway Company (“BNSF”) that are the subject of this proceeding. I have reviewed the Board’s decision served October 2, 2008 (the “October 2 Decision”), and am providing this statement in order that BNSF can provide it to the Board as required by the October 2 Decision.

As set forth more fully in my letter to the Board dated July 31, 2008 (filed on August 4, 2008), ODOT is currently in the midst of the realignment and reconstruction of the Interstate 40 Crosstown Expressway (the “I-40 highway project”) as it crosses through Oklahoma City. The planning for this project began in 1995, and involved the conduct of a Major Investment Study/Environmental Impact Statement in which public (Federal and State agencies), private (affected railroads and shippers), and citizen advocacy groups had input. The Federal Highway Administration issued its Record of Decision (environmental clearance) for the preferred alternative in May, 2002. Planning and construction has been moving forward under the approved plan since that time.

In order for the for the I-40 highway project to continue as planned, certain segments of BNSF's Chickasha Subdivision must be relocated as described by BNSF in its petition for declaratory order filed in this proceeding. The relocations will allow the highway project to continue as planned, will not eliminate service to any railroad customers, and will not extend BNSF's reach into any new territories. (BNSF already serves the Oklahoma City area through its network of existing lines.)

The highway project and the BNSF relocations have been planned in particular to preserve service to the two existing customers that are located adjacent to the "eastern" segment of the Chickasha Subdivision. This will be accomplished through the two projects that the Board referenced in its October 2 Decision -- the construction of a railroad bridge over the planned highway, and the reconfiguration of the sidetracks serving the two customers.

With respect to the two specific questions raised by the Board with respect to ODOT's role in the BNSF proposed relocations:

(1) New Railroad Bridge. Attached as Exhibits A and B, respectively, are excerpts of the contracts (without exhibits) with BNSF and with Muskogee Bridge Company, Inc., covering construction of the railroad bridge. Also attached as Exhibit C is an excerpt from the I-40 Crosstown Relocation -- Revised Financial Plan, 2008 Update ("2008 Update") submitted by ODOT to Federal Highway Administration which shows the construction of the temporary railroad bridge and the permanent railroad bridge as part of the highway project (Work Package 1.1A and Work Package 1.1B). ODOT is paying for the construction of the railroad bridge as part of the highway project. Attached as Exhibit D is a photograph taken by ODOT on or about September 1, 2008 which shows the progress of the construction of the new railroad bridge. In the forefront is the permanent double-tracked bridge that is being constructed by ODOT's

contractor. In the background is the temporary bridge that has been constructed to allow BNSF to continue operating while the permanent bridge is being constructed and preliminary highway site preparation work is being done.

(2) **Realigned Industrial Tracks.** The contract with BNSF, Exhibit A, and the 2008 Revised Financial Plan, Exhibit C (Work Project 1.1B) also covers replacement of the industrial tracks serving the two existing shippers. ODOT has agreed to pay for the construction of the realigned tracks. It is currently anticipated that BNSF (as opposed to a third-party contractor) will do all or part of the construction under a "force account" agreement with ODOT under which ODOT will pay for the construction. Revised design plans were submitted to BNSF by ODOT at the end of September and are expected to be finalized soon. Once the plans are finalized, the contracts for the construction can be entered into by ODOT. In the meantime, one shipper, Midstates Lumber is receiving substituted service by transload from BNSF's North Yard. The other shipper, the Cotton Seed Mill continues to receive, and will continue to receive rail service from the existing rail facility until the new industrial track is completed.

Because of the nature and condition of the existing highway bridge in Oklahoma City, there is a critical need for traffic to be removed from the highway bridge and for the I-40 highway project to continue to proceed as designed and approved without further delay. ODOT and BNSF have taken every precaution to ensure that the I-40 highway project will not affect rail service to existing customers in Oklahoma City. ODOT urges the Board to expeditiously find that BNSF's proposed relocations of the middle and eastern segments are exempt from Board jurisdiction.

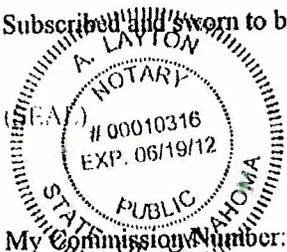
I hereby verify under penalty of perjury, that the foregoing Verified Statement is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on October 10, 2008.

  
Gary M. Ridley, Director

STATE OF OKLAHOMA     )  
  ) §  
COUNTY OF OKLAHOMA    )

Subscribed and sworn to before me this 10<sup>th</sup> day of October, 2008.



  
Notary Public

My Commission Number: 00010316  
My Commission Expires: June 19, 2012

**VERIFIED STATEMENT OF  
GARY M. RIDLEY**

**EXHIBIT A**

**AGREEMENT**

**BETWEEN**

**BNSF RAILWAY COMPANY**

**AND**

**THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA**  
**(Acting for and on behalf of the State of Oklahoma)**

**March 19, 2007**

This Agreement includes the following elements of railroad improvements herein after called the "WORK" to be constructed in connection with the reconstruction and relocation of the I-40 Crosstown Project, Oklahoma City, Oklahoma County, Oklahoma: 1) Replacement of access industrial track between the Red Rock Subdivision and the Cotton Oil Seed Mill and lumber yard, and 2) Replacement of BNSF mainline tracks including the permanent BNSF railroad structure over Interstate 40, the Union Pacific Railroad, and the BNSF Watco Connection, and 3) Removal of the existing temporary shoo fly bridge after the permanent BNSF bridge becomes operational. These elements of the construction project are located in the Oklahoma City area. The items are shown on an Exhibit indicating their location along with a complete description of the scope of work.

**Federal Aid Project No. OKCY-XTWN-(049)TI**  
**Job Piece No.17428(61) Oklahoma County**

**Within the limits of Federal Aid Project No. OKCY-XTWN(002)**  
**Job Piece No.17428(21) Oklahoma County**

This AGREEMENT, entered into the day and year last below written, the "EFFECTIVE DATE", by and between the BNSF Railway Company, hereinafter called the "RAILWAY", and the Department of Transportation of the State of Oklahoma, hereinafter called the "STATE".

### RECITALS

The STATE proposes to reconstruct I - 40 in Oklahoma City which will require the Interstate highway to cross under the RAILWAY's tracks and right of way, known as the Red Rock Subdivision, in the Section, Township and Range as shown on Exhibit "A", attached hereto and made a part hereof. The WORK will consist of the replacement of the RAILWAY's north/south mainline including a new structure to carry the two tracks of the Red Rock Subdivision over relocated I-40, the Union Pacific Railroad, and the BNSF Watco Connection; the construction of a replacement access track between the Red Rock Subdivision and the Cotton Oil Seed Mill and lumber yard, as well as the removal of the existing temporary shoofly bridge and temporary tracks once the permanent BNSF bridge is operational. Any off-site track work within the Cotton Oil Seed Mill is specifically excluded from this AGREEMENT.

The RAILWAY and the STATE agree to construct the WORK which will be located on RAILWAY's right-of-way in the Sections, Townships and Ranges as shown on Exhibit A attached hereto and made a part hereof.

The WORK will be constructed in accordance with the plans, estimates and specifications which, subsequent to the written approval of the RAILWAY and the STATE, will become a part of this AGREEMENT.

It is agreed that each of the parties hereto will perform certain elements of the WORK as hereinafter provided.

### AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, RAILWAY and STATE hereby agree as follows:

### ARTICLE I

In consideration of the covenants of the STATE hereinafter contained and the faithful performance thereof, the RAILWAY agrees:

1. To license or permit solely to the extent of its right, title, and interest, without compensation other than the faithful performance by the STATE, of all the terms of this AGREEMENT by them required to be performed, including existing

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed in duplicate counterparts, each of which shall be considered as an original by the duly authorized officers, as of the dates below indicated.

BNSF RAILWAY COMPANY

By: Margaret C Fox

Its: VP Engineering

Date: 3-29-07

STATE OF Texas  
CITY OF Tarrant / Ft. Worth

Subscribed and sworn to before me this 5<sup>th</sup> day of April, 2007.

Laura M. McCree  
Notary Public

(SEAL)

My commission expires:

09/30/08

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA

(Acting for and on behalf of the State of Oklahoma)

BY: David Stet

TITLE: Asst. Chief Engineer

DATE: 4/6/07

Reviewed and Approved as to Form and Legality

[Signature]  
General Counsel

04/06/07  
Date

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed in duplicate counterparts, each of which shall be considered as an original by the duly authorized officers, as of the dates below indicated.

BNSF RAILWAY COMPANY

By: Gregory C Fox

Its: VP Engineering

Date: 3-29-07

STATE OF Texas  
CITY OF Tarrant / Ft. Worth

Subscribed and sworn to before me this 5<sup>th</sup> day of April, 2007.

Laura M. McCree  
Notary Public

(SEAL)

My commission expires:

09/30/08

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF  
OKLAHOMA

(Acting for and on behalf of the State of Oklahoma)

BY: David Stueb

TITLE: Asst. Chief Engineer

DATE: 4/6/07

Reviewed and Approved as to Form and Legality

[Signature]  
General Counsel

04/06/07  
Date

**VERIFIED STATEMENT OF  
GARY M. RIDLEY**

**EXHIBIT B**

PROJECT: OKCY-XTWN(002)HP  
COUNTY: OKLAHOMA  
17428 21

Section 1 of 1 <sup>2</sup>  
*YKA*

# CONTRACT

FOR  
HIGHWAY CONSTRUCTION



STATE OF OKLAHOMA  
DEPARTMENT OF TRANSPORTATION

MAY 11 2007

20

**CONTRACT**

070139

**THIS CONTRACT AND AGREEMENT** made and entered into this MAY 18 2007, between the Oklahoma Department of Transportation, acting for and on behalf of the Oklahoma Department of Transportation, the Party of the First Part, hereinafter called the State, and

**MUSKOGEE BRIDGE COMPANY, INC.**

P. O. DRAWER 798  
MUSKOGEE, OK 74402  
918-683-3051

A Corporation Organized Under the Laws of the State of **OKLAHOMA**

acting as an independent contractor and doing business under the firm name and style of **MUSKOGEE BRIDGE COMPANY, INC.**, the Party of the Second Part, hereinafter call the Contractor.

**WITNESSETH**, That for and in consideration of the payment to be made as hereafter set forth, the Contractor hereby agrees to furnish all tools, equipment, materials, and labor to build and complete Oklahoma Department of Transportation  
**PROJECT NO.: OKCY-XTWN(002)HP**

**COUNTY: OKLAHOMA CO.**

**HIGHWAY NO.: I-40**

**LENGTH: 0.000000 MILES**

**DESCRIPTION: GRADE, DRAIN, RAILROAD AND BRIDGE**

**LOCATION: I-40 CROSSTOWN: FOR BNSF RED ROCK AND COTTON SEED MILL LOOP  
IN OKLAHOMA CITY.**

as shown on the plans to be built at the unit prices bid by said Contractor, for the respective estimated quantities aggregating approximately

**Fourteen Million Five Hundred Eighty-Five Thousand Six Hundred Thirty-Nine Dollars and Twenty-Five Cents --- ( \$ 14,585,639.25 )** in accordance with the plans on file with the Oklahoma Department of Transportation at Oklahoma City, Oklahoma, designated as

**PROJECT NO.: OKCY-XTWN(002)HP**

and with the Oklahoma Department of Transportation Standard Specifications for Highway Construction, with the Proposal filed with the Oklahoma Department of Transportation on **April 26, 2007** ; each of which is made a part hereof as though copied in full herein; and with the Special Specifications and Special Provisions attached hereto; and to the entire satisfaction of the Oklahoma Department of Transportation, and when Federal Funds are involved, subject to the inspection at all times, and the approval of the Federal Agency having charge of Federal Aid Highway Funds in accordance with the Laws of the State of Oklahoma, and the rules and regulations of such Federal Agency made pursuant to the Act of Congress approved July 11, 1916 (39 Stat. 335) entitled, "An Act to Provide That the United States Shall aid States in the Construction of Rural Post Roads, and for other purposes," and subsequent Acts of Amendment.

It is agreed and understood between the parties hereto that the Contractor agrees to accept and the State agrees to pay for the work at the price stipulated in the Proposal, such payment to be in lawful money of the United States and the payment shall be made at the time and in the manner set forth in the specifications and as further provided herein.

It is further agreed and understood between the parties hereto that, in the event of any claim, dispute or litigation concerning any item or condition of this contract, the party incurring any cost or attorney fee in defense or prosecution of such claim, dispute or litigation shall bear all such costs and attorney fees.

The CONTRACTOR shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred in the construction of this project during the contract period and for three (3) years from the date of execution of the final estimate for payment under this Contract. All such records and materials shall be made available at CONTRACTOR's offices at all reasonable times for inspection by the DEPARTMENT and the State Auditor and Inspector, and, where funds for the project are provided by any agency of the Federal Government, by representatives of that agency, the Federal Highway Administration and the United States Department of Transportation. Copies of all such records and materials shall be furnished to the DEPARTMENT if requested.

The State represents that if Federal funds are included it has a contract with the Federal Government whereby the Federal Government agrees to pay its pro rata share of the cost of the work in accordance with the plans, specifications and estimates, and as the work progresses; and payment of such share of the cost of this project will be made by the State as payments are received from the Federal Government pursuant to said contract.

It is here stated and understood that the "Federal share obligation" clause just set forth is for the purpose of compliance with the provisions of the Oklahoma Constitution, Article X, section 23, as amended, and the provisions of said clause and does not in any way change or affect the usual and customary way and manner in which progressive or final estimates are computed and paid.

The Contractor agrees, for the consideration above expressed, to begin work on the date designated by the Engineer. Time is of the essence of this Contract. The contract time and rates of liquidated damages applicable to this contract are set forth in contract provisions which are a part of this contract.

It is further agreed that the Contractor shall execute and file good and sufficient performance and statutory bond with the Oklahoma Department of Transportation as required by law, and that said contractor shall comply with the Workmen's Compensation Law and shall file a Certificate of Workmen's Compensation and General Liability Insurance with the Oklahoma Department of Transportation, or if the Contractor carries his own Compensation Insurance when he shall file with the Oklahoma Department of Transportation a copy of the order authorizing him to carry his own insurance.

In Witness Whereof, the Director, Oklahoma Department of Transportation, or his authorized designee, pursuant to an award of contract made by or under the direction of the Oklahoma Transportation Commission and pursuant to authority vested in him by the Oklahoma Transportation Commission, has hereunto subscribed his name, and the said Contractor has properly executed the same.

Signed, sealed and delivered at Oklahoma City, Oklahoma, the day and year first set forth.

Reviewed and Approved as to FORM and LEGALITY

STATE OF OKLAHOMA, Oklahoma Department of Transportation  
(Party of the First Part)

W  
GENERAL COUNSEL  
5-16-7  
DATE

By: [Signature]  
DIRECTOR - Oklahoma Department of Transportation

MUSKOGEE BRIDGE COMPANY, INC.  
(Party of the Second Part)

ATTEST [Signature]  
Secretary of Corporation

By: [Signature]  
An Individual - A Member of the Firm - Vice President

(SEAL)

ACKNOWLEDGMENT

State of OKLAHOMA SS  
County of MUSKOGEE

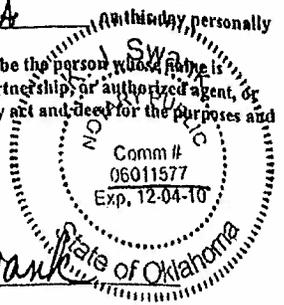
Before me, the Undersigned, a Notary Public, in and for the State of OKLAHOMA,  
appeared MIKE WEBB, know to me to be the person whose name is subscribed to the foregoing instrument as the market thereof, whether as an individual, a member of said co-partnership, or authorized agent, or officer of said Corporation, and acknowledged to me that he/she executed the same as his/her free and voluntary act and deed for the purposes and consideration therein expressed, and in the capacity therein set forth.

Witness my hand and seal of office this 8th day of May, 2007

My commission expires 12-04-10

(SEAL)

[Signature]  
Notary Public

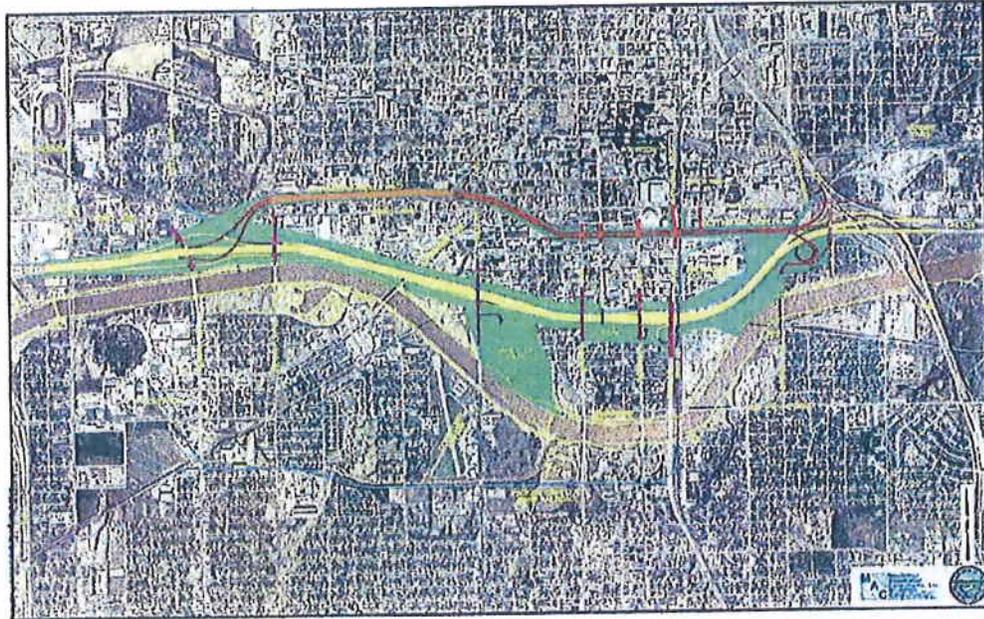


**VERIFIED STATEMENT OF  
GARY M. RIDLEY**

**EXHIBIT C**

**ODOT Project No. HPPIY-1211-0(002) 000H  
I-40 Crosstown Expressway Relocation  
From I-44 on the West to I-35 / I-235 on the East  
Oklahoma City, OK**

**Revised Financial Plan  
2008 Update**



**February 2008**

**Submitted by  
the Oklahoma Department of Transportation**

---

ODOT Project No. HPPIY-1211-0(002) 000H  
I-40 Crosstown Expressway Relocation  
From I-44 on the West to I-35 / I-235 on the East  
Oklahoma County

Revised Financial Plan 2008 Update

LETTER OF CERTIFICATION

The Oklahoma Department of Transportation in June 2007 developed an Initial Financial Plan for the I-40 Crosstown Expressway Relocation Project as described in the project's Environmental Impact Statement and agreed upon with the Federal Highway Administration as recommended by the USDOT FHWA Oklahoma City Office and in accordance with the terms of SAFETEA-LU. The plan provides detailed cost estimates to complete the project and the estimates of financial resources to be utilized to fully finance the project. As of December, 2007, the Department has encumbered \$259 million for this \$602 million project. In year of expenditure dollars, this estimate totals \$624 million. The anticipated balance of federal funds designated by Congress specifically for this project is required to complete this critical project. Timely completion of this critical roadway is imperative to remove traffic from the existing fracture critical bridge which is continuing to deteriorate.

The cost data in this Revised Financial Plan 2008 Update provides an accurate accounting of costs incurred as of December 2007 and includes a realistic estimate of future costs based on estimates from the project plans and expected construction cost escalation factors. While the estimates of financial resources rely upon assumptions regarding future economic conditions and demographic variables, they represent realistic estimates of available monies to fully fund the project.

We believe the Revised Financial Plan 2008 update provides an accurate basis upon which to schedule and fund the I-40 Crosstown Expressway Relocation Project. The Department will continue to review and update the financial plan on an annual calendar year basis.

To the best of our knowledge and belief, the Revised Financial Plan 2008 Update, as submitted herewith, fairly and accurately presents the financial position of the I-40 Crosstown Expressway Relocation Project, its cash flows, and expected schedule for the project's construction period. The financial forecasts in the Revised Financial Plan 2008 Update are based on our judgment of the expected project conditions and our expected course of action. We believe that the assumptions underlying the Revised Financial Plan 2008 Update are reasonable and appropriate. Further, we have made available significant information that we believe is relevant to the Revised Financial Plan 2008 Update and, to the best of our knowledge and belief, the documents and records supporting the assumptions are appropriate.

  
Director  
Oklahoma Department of Transportation

5-27-08  
Date

### Work Package Breakdown

Please note that these work packages were developed from the functional plans based on the project's Environmental Impact Statement. These projects are subject to change in size, scope or content. Any reconfiguration will be based upon field conditions, schedule changes or funding constraints. ODOT needs the flexibility over the duration of this multi-year project to adjust, if necessary, to react to the demands of the dynamics of the contractors, site conditions or funding constraints.

### I-40 Mainline Projects:

- **Canal Bridge Project:** Construct eastbound and westbound I-40 mainline bridges, Union Pacific Railroad shoofly, UPRR interim connection and UPRR Bridge over the location of the future extension of the City of Oklahoma City Oklahoma River Canal.
- **Work Package 1.1A:** Construct temporary structure M-T1 for Burlington Northern & Santa Fe Railroad (BNSF) mainline crossing above Union Pacific Railroad (UPRR) and new I-40 alignment.
- **Work Package 1.1B:** Construct permanent structure M-T for BNSF mainline with associated track work, and Cotton Seed Mill railroad turnout. Remove BNSF shoofly Bridge MT-1 (constructed in WP 1.1A).
- **Work Package 1.1C:** Remove existing Shields Boulevard embankment for environmental remediation. Construct grading and paving for Shields Boulevard south of existing bridge. Construct I-40 mainline and UPRR grading from Sta. 222+63 to Sta. 242+15. Remove existing Shields Boulevard Bridge. Construct Lee Street RCB Structure M-O. Construct crossovers and switch UPRR to existing Chickasha Lead tracks west of Shields. Construct NB portion of Shields Blvd Bridge M-S1.
- **Work Package 1.2:** Remove Walker Avenue and Robinson Street railroad underpasses. Construct SB portion of Shields Blvd Bridge M-S1 and Shields side bridges M-S2, M-S3. Construct Walker and Robinson Avenue roadway and bridges M-P, M-R and M-R1 with retaining walls and drainage structures. Construct grade and drain for I-40 mainline Sta. 174+13 to 222+63. Re-construct E.K. Gaylord under existing I-40 Bridge. Construct permanent UPRR mainline Sta. 133+06 to 180+37 including railroad force account work, WATCO Connection and Phase II of the Cotton Seed Mill railroad industry tracks. Construct roadway grading for Sta. 174+13 to 212+00. Construct associated retaining walls.
- **Work Package 1.3:** Construct paving, lighting and signing for I-40 mainline and ramps Sta. 174+13 to 212+00.
- **Work Package 1.4:** Construct grade-separated pedestrian crossing over I-40 Mainline and permanent UPRR tracks.
- **Work Package 2.1:** Construct Exchange Ave. Bridge M-M. Construct Western Avenue's Bridges M-N1 and M-N2, grade and drain for Western Avenue roadway and construct associated retaining walls. Construct UPRR permanent mainline tracks. Construct RCB Bridge M-L. Construct sanitary sewer relocation.
- **Work Package 2.2:** Construct roadway grading for I-40 mainline and ramps Sta. 123+00 to 174+13 and associated retaining walls.
- **Work Package 2.3:** Construct roadway pavement and associated barrier walls for I-40 Mainline Sta. 123+00 to 174+13.

- **Work Package 3.1:** Construct grade and drain for EB and WB I-40 Mainline, ramps and associated retaining walls, Frontage Road A grading east of Agnew and Frontage Road B grading east of Sta. 97+00. Close Pennsylvania Avenue. Re-construct north end of Pennsylvania Avenue River Bridge M-K. Construct Penn Ave. Bridge M-J over I-40. Construct grading for ramps C, D, E and partial grading for Ramp F. Construct grading for EB Off Ramp from Sta. 79+00 to Bridge M-G. Construct grading for Penn Ave. south of Bridge M-I. Construct Agnew Bridges M-D and M-E. Construct south portion of RCB Bridge M-H. Construct Sanitary Sewer except for Reno and along Railroad. Construct Penn. Avenue water line.
- **Work Package 3.1A:** Construct grade, drain and temporary surfacing for May Ave. Construct Retaining Walls 1 and 1A, grade and temporary pavement north side of existing WB I-40. Construct temporary crossovers on existing I-40 mainline. Construct phase I of I-40 mainline Bridge M-A over May Ave
- **Work Package 3.2:** Shift EB and WB I-40 traffic to existing WB lanes of I-40. Construct grade and drain for EB I-40 Mainline and Frontage Roads A and B from Sta. 42+04 to Agnew. Construct I-40 Bridge M-B over May Avenue. Construct west end of Flyover Bridge M-G without approach slabs.
- **Work Package 3.3:** Construct south phase of Bridge M-A over May, Bridge M-C over Agnew (and East Approach Slab), Bridge M-I over UPRR mainline, North portion of Bridge M-H, Retaining Walls 44 & 45 (North portion of Penn.), Retaining Wall 3, and West Approach Slab of Bridge M-C. All work after traffic is switched to the new I-40 alignment: demolish existing I-40 alignment from Agnew to Penn. Construct grading and paving for WB I-40 from Beginning of Project to Agnew, grading and paving Frontage Road B west of 91+00, and pave Frontage Road B east of Sta. 91+00.
- **Work Package 3.4:** Construct south Phase II of I-40 mainline Bridge M-A over May, Bridge M-C over Agnew (and East Approach Slab), Bridge M-I over UPRR mainline, North portion of Bridge M-H, Retaining Walls 44 & 45 (North portion of Penn.), Retaining Wall 3, and West Approach Slab of Bridge M-C. All work after traffic is switched to the new I-40 alignment: demolish existing I-40 alignment from Agnew to Penn. Construct grading and paving for WB I-40 from Beginning of Project to Agnew, grading and paving Frontage Road B west of 91+00, and pave Frontage Road B east of Sta. 91+00. Construct UPRR mainline including railroad force account work. Move UPRR operations to new mainline tracks.
- *Note: For Work Package 4.1, see page 12, Local Access Projects.*
- **Work Package 4.2:** Construct roadway grading and pavement for I-40 Mainline between Canal Bridge and existing I-40. Construct Bridge I-B, Boulevard east of Bridge I-B and Ramp Q. Construct associated retaining walls.
- **Work Package 4.3:** Phase I - Construct east ends Ramps O and P, detours A, B and C, temporary ramp P detour, and crossovers E and S. Construct associated retaining walls for bridges, ramps and mainline. Phase II - Demolish existing I-40 east of railroad, construct roadway grading and surfacing for remaining EB and WB I-40 Mainline and Ramps O, P and Y. Construct Bridge I-I. Construct associated retaining walls.

**Off-Site Railroad Projects:**

- **Work Package 6.1:** Construct BNSF Railroad Off-site railroad tracks.
- **Work Package 6.2:** Construct UPRR Off-site railroad tracks.

**Corridor Wide Projects:**

- **Work Package 7.1:** Corridor wide concrete staining of bridges and retaining walls.

**Local Access Projects:**

- **Work Package 1.5:** Construct grade-separated BNSF crossing over Boulevard.
- **Work Package 3.5:** Construct westbound Boulevard fly over Bridge M-F, eastbound Boulevard Bridge M-G north of Pier 7, and associated ramps and retaining walls.
- **Work Package 4.4:** Construct Ramps S & T, Bridges I-D, I-E, I-F, I-G and associated retaining walls.
- **Work Package 4.5:** Remove old I-40 Crosstown Bridge structure. Construct at grade multi-lane roadway on old I-40 Crosstown Bridge alignment from E.K. Gaylord to Bridges I-A. Construct Bridges I-A and I-C. Re-construct Oklahoma Ave. from existing I-40 alignment to Reno Ave. Construct associated retaining walls.
- **Work Package 5.1:** Overlay and re-stripe existing I-40 mainline from Penn Ave. to west of Western Ave. Construct Bridges B-A, B-B, B-C & B-D over Western and Classen. Construct at grade multi-lane roadway on old I-40 Crosstown Bridge alignment from east of Classen to E.K. Gaylord. Construct associated retaining walls.

**VERIFIED STATEMENT OF  
GARY M. RIDLEY**

**EXHIBIT D**

