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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket No. FD 36560, BNSF Railway Company—
Lease Exemption—Union Pacific Railway Company**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a public version of BNSF Railway Company's Petition of Exemption under 49 U.S.C. § 10502, with appropriate redactions that the Board can place in its docket. We are concurrently filing a Motion for Protective Order, along with a highly confidential version of the Petition of Exemption to be filed under seal.

The filing fee of \$8,100 was paid using pay.gov. Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
Attorney for BNSF Railway Company

FILED
November 9, 2021
SURFACE
TRANSPORTATION BOARD

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November 9, 2021
SURFACE
TRANSPORTATION BOARD

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36560

BNSF RAILWAY COMPANY
—LEASE EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

PETITION FOR EXEMPTION

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Dated: November 9, 2021

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36560

BNSF RAILWAY COMPANY
—LEASE EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

PETITION FOR EXEMPTION

BNSF Railway Company (“BNSF”) hereby petitions the Surface Transportation Board (the “Board”), pursuant to 49 U.S.C. § 10502(a) and the applicable rules at 49 C.F.R. Part 1121, for an exemption from the prior review and approval provisions at 49 U.S.C. §§ 11323-11325 for BNSF to lease for maintenance, construction, repair and renewal purposes approximately 25 miles of rail line owned by Union Pacific Railroad Company (“UP”) located between Sterling, CO, in the vicinity of UP’s Milepost 56.71 to Union, CO, in the vicinity of UP’s Milepost 81.1, on UP’s Julesburg Subdivision (the “Line”). A map showing the Line is attached as Exhibit A.

A redacted public version of the Lease Agreement is attached as Exhibit B. BNSF has filed a Motion for a Protective Order to protect the confidentiality of the commercial terms of the agreement. A copy of the highly confidential version of the agreement is being filed separately under seal.

As demonstrated below, exemption of this transaction is warranted under the relevant standards of Section 10502.

BACKGROUND

BNSF and UP have agreed to enter into a lease to allow BNSF to occupy UP's property for the purposes of maintenance, construction, repair, and renewal of the track and appurtenant structures and facilities on the Line (the "Lease"). Concurrently with this Petition, BNSF is filing a Verified Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(7) for trackage rights over the Line (the "Trackage Rights Agreement"). BNSF and its predecessors have operated over the Line since 1900 and pursuant to the most recent trackage rights agreement since 1951. *See Chi., Burlington & Quincy R.R. Co. Trackage Rights*, FD 17482 (ICC served Dec. 18, 1951).

The Lease will modify certain roles and responsibilities that were assigned to the BNSF and UP under the Trackage Rights Agreement. The Lease will permit maintenance responsibilities of the Line to shift to BNSF, the sole user of the Line, and produce a more efficient rail operation by streamlining maintenance activity.

ARGUMENT

The Lease is subject to prior review and authorization by the Board. *See* 49 U.S.C. § 11323(a)(2). However, the Board must exempt the Lease from these prior review and authorization requirements if the Board finds that the application of the requirements:

- (1) is not necessary to carry out the transportation policy of [49 U.S.C. § 10101]; and

(2) either—(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502(a). In enacting Section 10502, Congress intended that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. *See* H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980); H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

The Board, pursuant to Section 10502, has previously exempted from the prior approval requirements of Sections 11323-25 similar lease exemptions. *See, e.g., BNSF Ry. Co.—Lease Exemption—Union Pac. R.R. Co.*, FD 36222 (STB served Oct. 11, 2018) (“*2018 Lease Exemption*”); *BNSF Ry. Co.—Lease Exemption—Union Pac. R.R. Co., et al*, FD 35895, *et al* (STB served Apr. 20, 2015) (“*2015 Lease Exemption*”). As discussed below, the Board should grant this Petition and exempt the Lease for the same reasons.

A. The Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to carry out the rail transportation policy of Section 10101.

With respect to the first prong of the Section 10502(a) exemption standard, it is clear that the Board need not apply the prior approval requirements of Sections 11323-25 to its evaluation of the Lease in order to carry out the transportation policy of Section 10101. The scope of the Board’s analysis under this first prong is a “function of the relationship between the section from which exemption is sought,” here [§§ 11323-25], and the Rail Transportation Policy enumerated in § 10101.”

Alaska Survival v. STB, 705 F.3d 1073, 1083 (9th Cir. 2013) (quoting *Vill. of Palestine v. ICC*, 936 F.2d 1335, 1338-39 (D.C. Cir. 1991)).

1. Consistent with the standard in Section 11324(d), the Lease will have no adverse competitive impacts.

Unless the Board grants this Petition, BNSF must file an application seeking Board authority to enter into the Lease. *See* 49 U.S.C. § 11324(a); 49 C.F.R. Part 1180. Because the Lease does not involve the merger or control of two Class I railroads, the Board would need to approve any such application *unless* the Board were to find *both* that:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

In transactions subject to Section 11324(d), the Board focuses primarily on the anticipated competitive effects of the proposed transaction. *See, e.g., Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co.*, FD 35873, slip op. at 14 (STB served May 15, 2015). The Board “must approve” any such application “unless there will be adverse competitive impacts that are both ‘likely’ and ‘substantial.’” *Id.* Even if the Board does make such findings, the Board “may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions.” *Id.*

The Lease will have no adverse competitive impacts. As discussed above, the Lease is intended to streamline maintenance activity over the Line by permitting BNSF, the sole user of the Line, access to perform maintenance responsibilities. Aside from streamlining maintenance over the Line, the transaction will have no adverse impact on commercial or operational access to the Line. In fact, the lease agreement specifically states that nothing contained in the lease will “amend, change or supersede the commercial access . . . terms as provided for in the Trackage Rights Agreement.” Therefore, the Lease meets the otherwise applicable approval standards set forth in Section 11324(d).

2. Detailed scrutiny of the Lease is not necessary to carry out the rail transportation policy of Section 10101.

Because the Lease is consistent with the otherwise applicable standard in Section 11324(d) and will have no adverse competitive impacts, the Board need not subject the Lease to the prior approval requirements of Sections 11323-25 in order to carry out the rail transportation policy of Section 10101.

As discussed above, the Lease will permit BNSF to maintain the Line it has operated over since 1900 with no adverse competitive impacts. Therefore, the Lease will promote a safe and efficient transportation system (49 U.S.C. § 10101(3)), foster sound economic conditions in transportation and ensure effective competition (§ 10101(5)), encourage honest and efficient management (§ 10101(9)), and promote energy conservation (§ 10101(14)). Further, an exemption from the application process of Sections 11324 and 11325 will expedite regulatory action (§ 10101(2)) and reduce regulatory barriers to entry and exit (§ 10101(7)). Other aspects of the rail

transportation policy will not be adversely affected. *See, e.g., 2018 Lease Exemption*, slip op. at 2; *2015 Lease Exemption*, slip op. at 3 (citing the same rail transportation policy provisions in approving similar petitions for exemption).

B. The Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to protect shippers from the abuse of market power, and the Lease is of limited scope.

Under the second prong of the Section 10502(a) exemption standard, in order to exempt the Lease, the Board must find *either* that (1) the Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to protect shippers from the abuse of market power, *or* (2) the Lease is of limited scope.¹ The Lease satisfies each of these standards.

As discussed above, the Lease will streamline maintenance responsibilities and permit BNSF to maintain the Line it has operated over since 1900. BNSF will continue to provide common carrier service to shippers over the Line and there will be no material change in the service provided to these shippers. The Lease simply shifts the Line's maintenance responsibilities to BNSF, the sole user of the Line. BNSF and UP do not anticipate any material changes in operations following the consummation of the Lease as the Lease is simply intended to produce more efficient rail operations by streamlining the Line's maintenance activities. In short,

¹ When the Board finds that regulation of a transaction is not necessary to protect shippers from the abuse of market power, the Board has found that it "need not determine whether the proposed transactions are limited in scope." *See, e.g., 2015 Lease Exemption*, slip op. at 4 n.3.

the Lease will have no adverse impact on the national, regional, or local rail industry.

For these reasons, regulation of the Lease is not necessary to protect shippers from the abuse of market power. *See, e.g., 2018 Lease Exemption*, slip op. at 3; *2015 Lease Exemption*, slip op. at 4. Additionally, for these reasons, and because the Line is only approximately 25 miles long, the Lease is of limited scope.²

LABOR PROTECTION

Under 49 U.S.C. § 10502(g), the Board may not use its exemption power to relieve a rail carrier of its statutory obligation to protect the interests of employees. Therefore, as a condition to granting the exemption, BNSF has no objection to the Board imposing the employee protective conditions set forth in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

INTERCHANGE COMMITMENTS

Pursuant to 49 C.F.R. § 1121.3(d), BNSF hereby certifies that the Lease does not contain a provision or agreement that may limit future interchange with a

² The Board and its predecessor have found the acquisition and operation of vastly longer rail lines to either be limited in scope or have concluded that a determination regarding the proposed transaction's scope was not needed. *See, e.g., Ind. R.R. Co.—Acquisition & Operation—Ill. Cent. R.R. Co.*, 6 I.C.C.2d 1004, 1011 (1990) (acquisition of 90.3 miles of rail line found limited in scope) (citing *Mid Mich. R.R. Co.—Purchase Exemption—The St. Joseph & Grand Island R.R. Co. Line Between St. Joseph, MO and Upland, KS*, FD 31482 (ICC served Aug. 7, 1989) (acquisition of 107.3 miles of rail line found limited in scope)); *BNSF Ry. Co.—Acquisition & Operation Exemption—Neb. Ne. Ry. Co.*, FD 35644, slip op. 3 n.3 (STB served Oct. 18, 2012) (Board concluded that it did not need to determine whether the acquisition of 120.4 miles of rail line was limited in scope because of its market power finding).

third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means. Accordingly, the disclosure requirements of 49 C.F.R. § 1121.3(d) are inapplicable.

ENVIRONMENTAL AND HISTORIC IMPACTS

Pursuant to 49 C.F.R. § 1121.3(b), this Petition must comply with environmental or historic reporting and notice requirements of 49 C.F.R. Part 1105, if applicable. In this case, none of these requirements are applicable.

BNSF is leasing the Line in order to streamline the Line's maintenance activities. Rail operations over the Line will continue as they are today. Further, Board approval is required for BNSF and UP to abandon the Line or discontinue any service over the Line, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older as a result of this transaction. Therefore, this Petition does not require an historic report under 49 C.F.R. § 1105.8(b)(1).

The Lease will not result in significant changes in carrier operations. There will not be a diversion of: (1) more than 1,000 rail carloads a year to motor carriage; or (2) an average of 50 carloads per mile per year for any part of this line to motor carriage. The Lease will not result in: (1) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the Line; (2) an increase of rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day.

The Lease will not affect a Class I or nonattainment area under the Clean Air Act. In any event, the thresholds of 49 C.F.R. § 1105.7(e)(5)(ii) will not be exceeded. Finally, the transportation of ozone depleting materials is not contemplated. Therefore, no environmental documentation is required under 49 C.F.R. § 1105.6(c)(2).

CONCLUSION

The Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to (1) carry out the rail transportation policy of Section 10101, or (2) protect shippers for the abuse of market power. Furthermore, the Lease is of limited scope. Therefore, BNSF respectfully requests that the Board, pursuant to Section 10502(a), exempt the Lease from the prior approval requirements of Sections 11323-25.

Respectfully submitted,

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Dated: November 9, 2021

Exhibit A

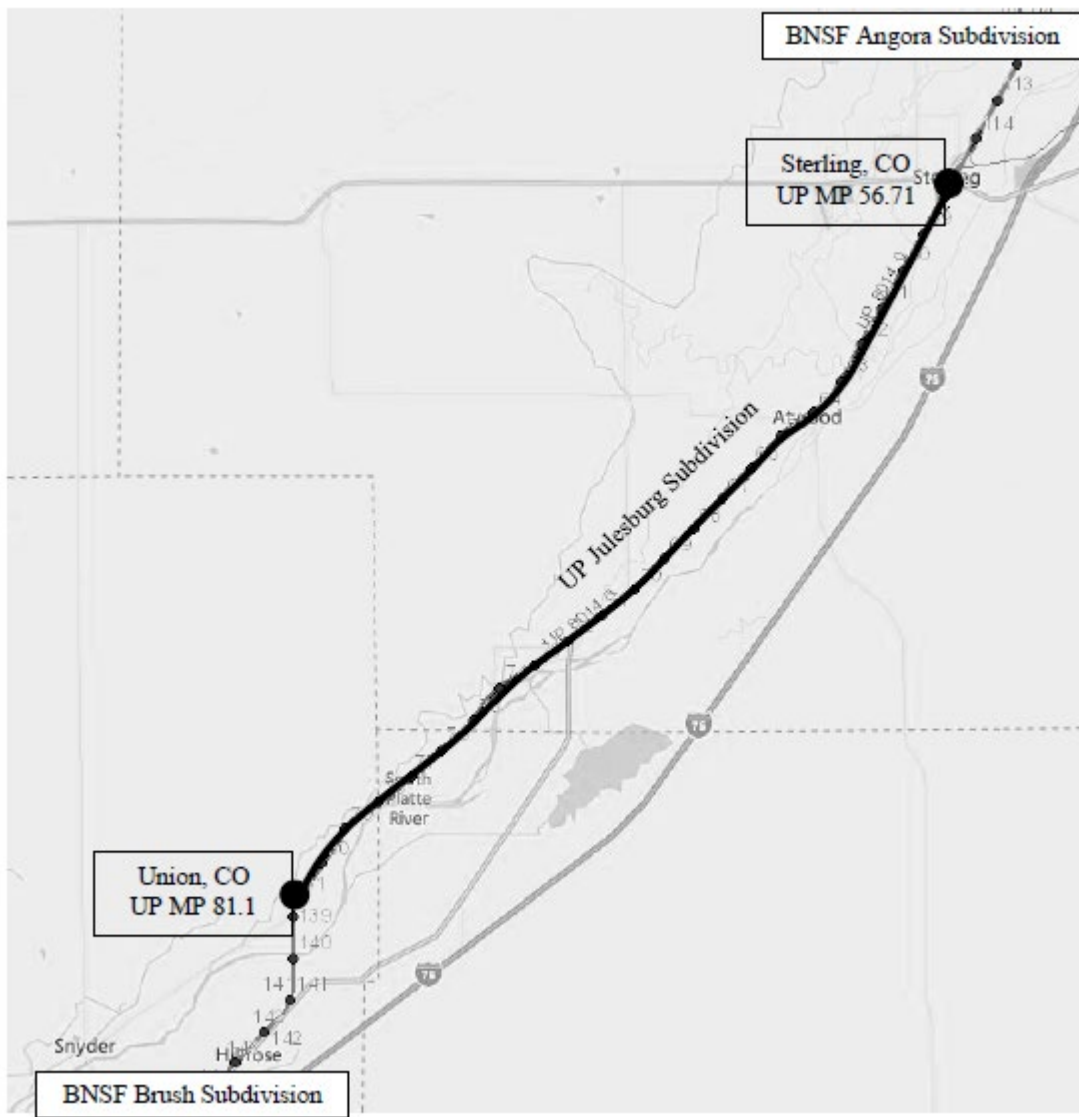


Exhibit B

Lease Agreement

LEASE AGREEMENT
BETWEEN
BNSF RAILWAY COMPANY
AND
UNION PACIFIC RAILROAD COMPANY
FOR
PROPERTY LOCATED BETWEEN
STERLING AND UNION, CO

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**LEASE AGREEMENT BETWEEN
BNSF RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY
FOR PROPERTY LOCATED
BETWEEN STERLING AND UNION, CO**

THIS LEASE (“**Lease**”) is entered into by and between **BNSF RAILWAY COMPANY**, a Delaware corporation (hereinafter called “**BNSF**”), and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation (hereinafter called “**UP**”) as of this 25th day of June, 2021 (“**Execution Date**”). BNSF and UP are sometimes referred to herein as a “**Party**” and together as “**Parties**.”

WHEREAS, Trackage Rights BNSF and UP are Parties to that certain Trackage Rights Agreement Sterling, CO to Union, CO, dated 25th of June, 2021 (“**Trackage Rights Agreement**”); and

WHEREAS, the Parties desire to modify certain roles and responsibilities that were assigned to the Parties under the Trackage Rights Agreement by entering into this Lease to allow BNSF to occupy UP property for the purposes of maintenance, construction, repair and renewal of the track and appurtenant structures and facilities thereon.

NOW THEREFORE, predicated on the terms and conditions set forth herein, BNSF and UP agree as follows:

1. LEASE DEFINITIONS

“**AAA**” shall mean American Arbitration Association.

“**Changes in and/or Additions**” and “**Additions**” and “**Betterments**” shall mean work projects, the cost of which is chargeable in whole or in part to Property Accounts (defined below) under Surface Transportation Board (STB) accounting standards in effect as of the Lease Transfer Date of this Lease.

“**Joint Trackage**” shall mean trackage located within the Leased Premises, including necessary right of way and appurtenances, signals, communications, structures, drainage ditches, fences and facilities of Parties and all Changes in and/or Additions to the Leased Premises made now or in the future that are required or desirable for the joint operation of the trains of the Parties hereto.

“**Lease Transfer Date**” shall mean thirty (30) days following BNSF’s written notice of intent to assume transfer of the leasehold described herein, including assumption of all maintenance pursuant to Section 3 of this Lease.

“Leased Premises” shall mean that UP property located between Sterling and Union, CO as more particularly described in Section 2 below and depicted on Exhibit A attached hereto and made a part hereof.

“Legal Requirements” shall mean any federal, state, local, municipal, foreign, international, multinational or other constitution, law, statute, treaty, regulation, ordinance, order, principle of common law, code, covenant or restriction.

“Lessee” shall mean the Party that has been granted the right to use the property subject to the Lease.

“Lessor” shall mean the Party that owns the property subject to the Lease.

“Liabilities” shall mean any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys’ fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise.

“Property Accounts” shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies as prescribed by the U.S. Department of Transportation Surface Transportation Board (“STB”) from time to time, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the Parties in their regular course of business.

“Third Party Agreements” shall mean all property acquisition agreements, industry track agreements, property leases, term leases, indefinite term leases, permits, licenses, easements and all other agreements concerning the Leased Premises and/or the Joint Trackage to which a party(ies) in addition to BNSF and/or UP are a party.

2. DESCRIPTIONS OF LEASED PREMISES

2.1 UP (as Lessor) shall grant to BNSF (as Lessee), as of the Lease Transfer Date, subject to the terms and conditions set forth in this Lease, a non-exclusive lease for the UP-owned trackage and associated right of way located between UP milepost 56.71 at or near Sterling, CO and UP milepost 81.1 at or near Union, CO

2.2 Property Maps and Other Information

UP shall provide to BNSF property maps in a mutually agreed upon electronic format for the Leased Premises which will depict among other things the width of the right of way. The Parties will cooperate in exchanging other records and information required for the maintenance of the Joint Trackage and Leased Premises.

3. LESSEES’ OBLIGATIONS

Notwithstanding any provision to the contrary herein or in the Trackage Rights Agreement (as amended herewith) and in addition to all obligations under same:

A. Maintenance

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Public Works Projects

Unless otherwise agreed in writing, the cost and expense, to the extent not reimbursed or funded by public entities or other third parties, of any and all public works projects, including but not limited to grade crossing projects, involving the Joint Trackage and/or the Leased Premises shall be apportioned between Lessor and Lessee based on the expense allocation prescribed by the Trackage Rights Agreement. During the Term hereof, Lessor shall transfer to Lessee any such public funds received by Lessor, but not expended on such public works projects for use by Lessee solely for the specified purpose(s); provided, however, upon expiration or termination of this Lease, all such public funds transferred to Lessee, but not expended, shall be returned to Lessor.

D. Control of Operations

Dispatching control shall be governed by the terms of the Trackage Rights Agreement and the dispatching protocols established between the Parties.

4. PARTIES' RETAINED RIGHTS

4.1 Commercial Access and Compensation and Expense Allocation

Nothing herein contained in this Lease shall amend, change or supersede the commercial access or compensation terms as provided for in the Trackage Rights Agreement.

4.2 Access to Property

Lessor hereby grants access to Lessee by right of entry at all times to the Leased Premises as outlined in Section 2 above for the purposes of construction, maintenance, repair and renewal of the Joint Trackage and/or the Leased Premises on the following conditions:

A. Each Party shall be responsible for the activities of its own employees while on and along the Joint Trackage and/or the Leased Premises; provided that the allocation of Liabilities and indemnity for loss or damage to persons or property, including injury or death shall be as set forth in Section 3 above.

B. Employees of each Party shall comply with all applicable laws and regulations while on the Leased Premises.

4.3 Lessors' Retained Rights

A. All rights granted to Lessee hereunder are subject and subordinate to the prior and continuing right of Lessor: i) to operate trains over and on the Joint Trackage and/or the Leased Premises; ii) to construct, maintain, repair, renew, use, operate, change, modify or relocate the track and fixtures connected to the Joint Trackage and/or the Leased Premises; and iii) to allow to be constructed upon its right of way such other facilities and to use its right of way in any manner, each as Lessor in its sole discretion deems appropriate, provided Lessor uses commercially reasonable efforts to avoid material interference with the use of the Joint Trackage and/or the Leased Premises for the purposes described herein and/or in the Trackage Rights Agreement.

B. At all times Lessor shall have the right to enter upon the Leased Premises without notice to Lessee for any purpose whatsoever so long as it does not interfere with Lessee's safe and efficient maintenance of the Joint Trackage and/or the Leased Premises, including making inspections to determine compliance with the terms of this Lease. In no event shall Lessor be obligated to make any such inspections, and Lessor shall not be liable for any failure to make any such inspections or failure to identify and/or cure observable defects upon making any such inspections.

4.4 Lessees' Retained Rights

On and after the Lease Transfer Date, Lessee shall be entitled to: i) continue to operate trains over and on the Joint Trackage and/or the Leased Premises subject to the terms of the Trackage Rights Agreement; ii) use and occupy the Joint Trackage and/or the Leased Premises for the purpose of constructing, upgrading, maintaining, repairing, modifying and renewing the Joint Trackage and/or the Leased Premises, including the tracks, land required for railroad operations, and improvements located upon the Leased Premises subject to the provisions of this Lease, including, but not limited to, the provision of Section 3.B. This Lease is granted expressly subject to all rights, interest, and estates of third parties in and to the Leased Premises, whether of record or not.

4.5 Agreements with Third Parties

A. Lessor shall retain, administer and be responsible for all records and shall be entitled to all rents or revenues relating to Third Party Agreements. In the exercise of any rights under this Lease, Lessee shall abide by any obligations and conditions affecting the Leased Premises and set forth in said agreements to the extent Lessee is provided notice of the existence and contents of such agreements.

B. Lessor shall within 45 days after the Lease Transfer Date provide Lessee with Geographic Information System ("GIS") attribute data for all known Third Party Agreements affecting the Leased Premises. Periodically during the Term of this Lease, Lessor will update the GIS data to reflect any and all changes made to its records in a format, file and location mutually agreeable to both Parties.

C. Lessee may obtain detailed information necessary for proper maintenance of the Leased Premises that may be contained in Third Party Agreements by contacting:
UP Real Estate Contracts: 402-544-8600

D. Lessee shall not enter into any Third Party Agreements, independently from Lessor, for the use of the Leased Premises except as otherwise provided below. After the Execution Date Lessor may encumber, assign all or part of its rights in or grant rights in the Leased Premises directly or indirectly without notice to or consent of Lessee so long as any such action shall not materially interfere with Lessee's use of the Leased Premises for the purposes leased herein and such action otherwise is consistent with the terms of the Trackage Rights Agreement and this Lease.

E. Lessee shall be responsible for providing any protective flagging service required by third parties performing work in or around the Leased Premises and shall enter into agreements with third parties for such services.

F. Subject to Lessor's prior review and approval, Lessee shall have the right to execute any agreements concerning installation, maintenance, repair, construction or renewal of grade crossing warning devices or equipment or any grade crossing reconfiguration

projects covering any grade crossings on the Joint Trackage and/or the Leased Premises, as well as the administration of those entered into during the Term of this Lease. Any indemnities included in any prospective agreements, amendments and/or supplements shall include indemnity coverage for both Lessee and Lessor.

G. Right of entry may be provided to third parties by formal agreement provided however, that any indemnities therein shall extend to both Lessor and Lessee. Lessor shall have sole charge of entering into any right of entry agreements with third parties at Lessor's sole discretion for performance of any environmental studies or activities associated with any sale or lease of Lessors property. Either Lessor or Lessee may enter into all other temporary right of entry agreements with third parties.

5. TERM AND TERMINATION

5.1 Effective Date and Term

A. This Lease is conditioned upon and becomes effective upon the effective date contained in the necessary Governmental Approvals (as defined in subsection 7.1 below) consenting to or authorizing the lease contained hereunder ("Effective Date")

B. Unless earlier terminated, this Lease shall remain in effect from the Effective Date for a term coterminous with the Trackage Rights Agreement (the "**Term**"). In the event the Trackage Rights Agreement for any segment of the Joint Trackage and Leased Premises terminates prior to the end of the Term of this Lease, this Lease will terminate for that respective segment. Upon termination or expiration of the Term of all or part of this Lease, maintenance responsibilities shall revert to the terms of the Trackage Rights Agreement as if this Lease had not existed. Any Liabilities incurred during the term of this Lease shall survive its termination.

C. Notwithstanding any provision to the contrary either Party shall have the right to terminate this Lease at any time on not less than one year's written notice. In the event this Lease is terminated prior to expiration of its term such termination shall not trigger early termination of the Trackage Rights Agreement which shall continue in effect for any remaining term thereof.

5.2 Rights and Responsibilities at Termination

A. Upon termination or expiration of the Term of this Lease, subject to any right that may exist pursuant to the Trackage Rights Agreement, Lessee shall be required to:

- i. Surrender possession of the properties free and clear of any encumbrances imposed or caused to be accrued by Lessee or resulting from Lessee's possession of the Leased Premises after the Lease Transfer Date; provided, however, any Changes in and/or Additions to the Leased Premises shall remain on the Leased Premises; and

ii. Promptly and expeditiously initiate and with commercially reasonable efforts prosecute to conclusion any regulatory or other governmental application, petition, or proceeding to obtain any necessary governmental approvals to effect a discontinuance and/or termination of the terms of this Lease. In the event Lessee fails to initiate or obtain approval to discontinue service over the Leased Premises, Lessee hereby grants Lessor an irrevocable power of attorney to initiate and prosecute to conclusion in Lessee's name and at Lessee's sole expense any regulatory or other governmental application, petition, or proceeding to obtain any necessary Governmental Approvals to effect a discontinuance of service, abandonment and/or termination of service by Lessee. In no event shall Lessee oppose any such action by Lessor. Lessor's initiation of such action shall not waive any other rights or remedies available at law or in equity to Lessor, nor shall such action by Lessor relieve Lessee of any obligations under this Agreement.

B. Except as provided for in 5.2.A.i above, Lessee, at its expense, shall remove or remediate from the Leased Premises all obstructions, contamination caused by or arising from the use of the Leased Premises for Lessee's purposes, other property not belonging to Lessor or a third party, located thereon, and in no event shall any part of the Leased Premises be in any worse a condition than it was as of the Lease Transfer. If Lessee fails to perform such removal and restoration, or if the work performed by Lessee is unsatisfactory to Lessor, Lessor may, without prejudice to any other rights or remedies, perform the work at Lessee's expense. Lessee shall indemnify Lessor in the event any rehabilitation or cost or expense is required to upgrade the Leased Premises to the condition specified in this subsection 5.2.

C. The provisions of subsection 5.2 shall survive termination or expiration of the Term of this Lease.

6. TITLE TO IMPROVEMENTS

Lessor shall retain ownership of the Leased Premises and all improvements existing as of the Execution Date. Except as may be otherwise provided for in subsections 3.B.ii and 3.B.iii, or as may otherwise be agreed to in writing by the Parties, title to improvements made as Changes in and/or Additions to the Leased Premises during the term of this Lease shall remain with the Lessor.

7. REGULATORY APPROVAL

7.1 Acquisition Approvals

Lessee shall be responsible to file, pursue, and obtain all governmental authority of applicable governmental agencies or departments, including but not limited to the STB (hereinafter collectively called "**Governmental Approvals**") as may be required, if any, as a result of its rights obtained under this Lease, including responsibility for all filing fees and costs, and other expenses

(including attorneys' fees) in connection with such filings. Lessor shall have an opportunity to review and comment on all such filings prior to submission thereof by Lessee.

7.2 Cost of Governmental Approvals

Except as provided in section 7.4, Lessee shall assume and bear any and all expense resulting from the acquisition of any such governmental authority, including, without limitation, labor protection obligations arising as a result of such authority or by virtue of the existence of this Lease, and Lessee shall indemnify, defend and hold harmless Lessor from any actions, legal proceedings or claims and all costs related thereto (including without limitation attorneys' fees) arising as a result of this Lease or pursuit of any required governmental authority.

7.3 Abandonment or Discontinuance Approvals

Lessee (or Lessor in the case of an early termination by Lessor) shall bear and assume any and all expense of any Governmental Approvals to be required for any abandonment or discontinuance by Lessee which are authorized or required under this Agreement. In no event shall Lessee have any authority to dispose of any interests in the Leased Premises pursuant to railbanking procedures of the National Trails Systems Act or any other voluntary procedure for the disposition of railroad rights of way in the course of any abandonment or discontinuance proceeding or under any other circumstances without the advance written consent of Lessor. In the event any Offer of Financial Assistance requires the disposition of the Leased Premises, Lessor may, upon written election, require that Lessee: i) seek a voluntary dismissal of the abandonment or discontinuance proceedings; ii) subject to applicable laws and regulations, continue the proceedings and arrange through the regulatory procedures for the assignment of its leasehold interests only; or iii) continue the proceedings and arrange for the disposition of the entirety of the Leased Premises for the fair market value, with all proceeds therefrom to be paid to Lessor.

7.4 Labor Protection

Each Party agrees that all costs and payments, including, without limitation, reasonable attorneys' fees and costs, in any way related to, connected with or arising out of claims or grievances made by or on behalf of its own employees pursuant to employee protective conditions imposed by the STB as a condition of that agency's approval of this Lease ("**Labor Claims**") shall be borne by the employing party.

Each Party handling any Labor Claims shall attempt to use best efforts to resolve such Labor Claims in good faith and in a reasonably favorable and timely manner for the collective benefit of the Parties and shall notify, advise and consult the other Party with respect to any such Labor Claims. If either Party shall consider the expense of Labor Protection for its employee(s) to be unacceptable, such Party may terminate this Lease on 30 days' written notice.

Notwithstanding any provision to the contrary herein neither Party shall furlough any employees as a direct result of this Lease, accordingly, any Labor Claims which may arise associated with furloughed employees shall be the sole responsibility of the employing Party.

8. COMPLIANCE WITH LAWS

8.1 Lessee shall be responsible for obtaining, without expense to Lessor, all necessary real property rights and public authority and permission, including applicable permits, for the maintenance and operation of the Leased Premises provided Lessee obtains prior written consent from Lessor.

8.2 Lessee further agrees that it will exercise its rights and fulfill its obligations hereunder in full compliance with all Legal Requirements relating to the use of the Leased Premises.

8.3 Lessee will comply with all federal, state and local laws, rules, regulations and ordinances controlling air, water, noise, hazardous waste, solid waste, or other pollutants. Lessee at its own expense shall make all modifications, repairs, or additions to the leased premises, install and bear the expense of any and all structures, devices, or equipment, and implement and bear the expense of any remedial action which may be required under such laws, rules, regulation, ordinances, or judgments ("**Environmental Remedial Actions**") to the extent such Environmental Remedial Actions were proximately caused by one or more acts of Lessee on or after the Lease Transfer Date. Lessee will not dispose of any toxic substances, environmental pollutants or wastes or any kind, whether hazardous or not, on the Leased Premises.

9. DEFAULT

9.1 If Lessee creates or maintains any condition, including without limitation, any environmental condition, on or about the Leased Premises, that in Lessor's reasonable judgment interferes with or endangers the operations of Lessor, and within thirty (30) days after receiving written notice of such condition from Lessor Lessee shall not have addressed or begun to diligently address the condition, or in the case of any unauthorized assignment of this Lease, Lessor may, at its option, terminate this Lease by serving thirty (30) days' notice in writing upon Lessee.

9.2 Any waiver by Lessor of any default or defaults shall not constitute a waiver of the right to terminate this Lease for any subsequent default or defaults, nor shall any such waiver in any way affect Lessor's ability to enforce any section of this Lease.

9.3 The remedies set forth in this section shall be in addition to, and not in limitation of, any other remedies that Lessor may have at law or in equity.

9.4 In no event shall any default of any of the covenants or agreements in this document affect the Lessee's right to operate freight trains over the corridors pursuant to the terms of the Trackage Rights Agreement, except to the extent any such default otherwise qualifies as a default under said Trackage Rights Agreement.

10. ASSIGNMENT AND SUBLEASE

Lessee shall not assign this Lease, in whole or in part, or any interest herein, or grant a security interest in any improvements on the Leased Premises, or sublet, and no heir, executor, administrator, receiver, master, sheriff, trustee in bankruptcy, or other assignee by operation of law shall assign or sublet, without the express prior written consent of Lessor. Notwithstanding any provision to the contrary, no consent shall be required for assignment that occurs as a result of a sale or transfer of all or substantially all of Lessee's assets pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority. Any permitted assignee shall assume in writing all of Lessee's continuing and existing or thereafter arising obligations, Liabilities, and indemnities under this Lease. Subject to the foregoing provisions, the terms of this Lease shall bind and inure to the benefit of the Parties, their successors and permitted assigns.

11. PROPERTY AND AD VALOREM TAXES

Lessor shall continue to be responsible for the timely payment of all property, Ad Valorem, franchise and special taxes or fees imposed by the United State of America or any state political subdivision thereof, municipality, or other governmental authority upon the property it owns that is subject to this Lease.

12. APPLICABLE LAW

This Lease shall be governed by and construed in accordance with the laws of the State of Colorado.

13. DISPUTE RESOLUTION

[REDACTED]

[REDACTED]

If intended for BNSF:

Assistant Vice President Contracts and Joint Facilities
BNSF Railway Company
2600 Lou Menk Drive
Fort Worth, TX 76131
or
Email: OPRDLJointFacilities@BNSF.com

If intended for UP:

General Director Joint Facilities
Union Pacific Railroad Company
1400 Douglas Street – Stop 1180
Omaha, NE 68179

Notice of address change may be given any time pursuant to the provisions of this Section.

15. MISCELLANEOUS

15.1 Interpretation

The terms of this Lease have been negotiated on an arm's length basis, and in no event shall this Lease be construed against the initial drafting Party. The captions of the various sections of this Lease are for convenience only and are not to be considered in the interpretation hereof.

15.2 Waiver and Amendments

This Lease may not be modified or amended except by an instrument in writing signed by both Parties. No waiver of rights under this Lease shall be effective unless it is made in writing and signed by the waiving party. The waiver by Lessor of the breach of any provision herein by Lessee shall in no way impair the right of Lessor to enforce that provision for any subsequent breach thereof.

15.3 Severability

The invalidity or unenforceability of any provision of the Lease shall not affect or impair any other provision.

15.4 Integration

This Lease is the full and complete agreement between Lessor and Lessee with respect to all matters relating to the maintenance, construction, repair and renewal of the Leased Premises and supersedes all other agreements between the Parties hereto with the exception of the Trackage Rights Agreement that shall remain in effect between the Parties. Nothing herein is intended to

terminate any surviving obligation of Lessee or Lessee's obligation to defend and hold Lessor harmless in any prior written agreement between the Parties.

15.5 Conflicts in Agreements

Except as may be expressly provided otherwise herein, while this Lease and the Trackage Rights Agreement are both in full force and effect, the provisions of the Trackage Rights Agreement shall continue to apply to the Parties. In the event of a conflict between the Trackage Rights Agreement and this Lease, with respect to the maintenance, construction, repair and renewal of the Joint Trackage and/or the Leased Premises, the terms of the Trackage Rights Agreement shall govern.

15.6 No Joint Venture

Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of principal and agent, or of partnership, or of joint venture between the Parties hereto, it being understood and agreed that neither the method of computation of rent nor any other provision herein, nor any acts of the Parties hereto, shall be deemed to create any relationship other than the relationship of landlord and tenant.

[Signature page follows]

IN WITNESS WHEREOF, authorized representatives of the Parties have executed this Lease as of the date referenced hereinabove.

BNSF RAILWAY COMPANY

By: Paul Duncan
Printed: Paul Duncan
Title: VP Service Design

UNION PACIFIC RAILROAD COMPANY

By: John W. Turner
Printed: John W. Turner
Title: VP Network Planning & Ops.

EXHIBIT A

TRACK CHART OF LEASED PREMISES

Engineering Plan View Details:

- Track Alignment:** The main track runs horizontally. A vertical track crosses it from the bottom. The intersection is marked with a circle and labeled "BNSF".
- Stationing:**
 - Along the main track: 81.10, 80.22, 80.52, 80.55.
 - Along the vertical track: 81.10, 81.10 = 138.66 BNSF.
- Notes:**
 - * SWITCH AT MP 81.10 REMOVED FROM SERVICE OCTOBER 24, 1994
 - ** TRK. RTS. GRANTED TO BNSF RR I.C. APPROVED ABANDONMENT M.P. 81.10 TO 56.32 9-9-1900
- Labels:**
 - "BNSF" (multiple locations)
 - "UNION NJA46 81.10" (yellow highlighted)
 - "PRIVATE" (above the intersection)
 - "JULIESBURG SUBDIVISION" (yellow highlighted)
 - "CONSTRUCTED 1982 COLORADO CENTRAL R.R. CO." (top left)
 - "80" (diamond symbol)
- Table (Right Side):**

SPEED	CURVE	RAIL	SIMN	TIES	SURF. LINE
50			135 2014 135 2014	2005	2010



01\07 north plot\pognn\lulnburg sub\pognn\ju.ESBURC SUB\11\ju.ESBURC SUB\11\pognn.ogn

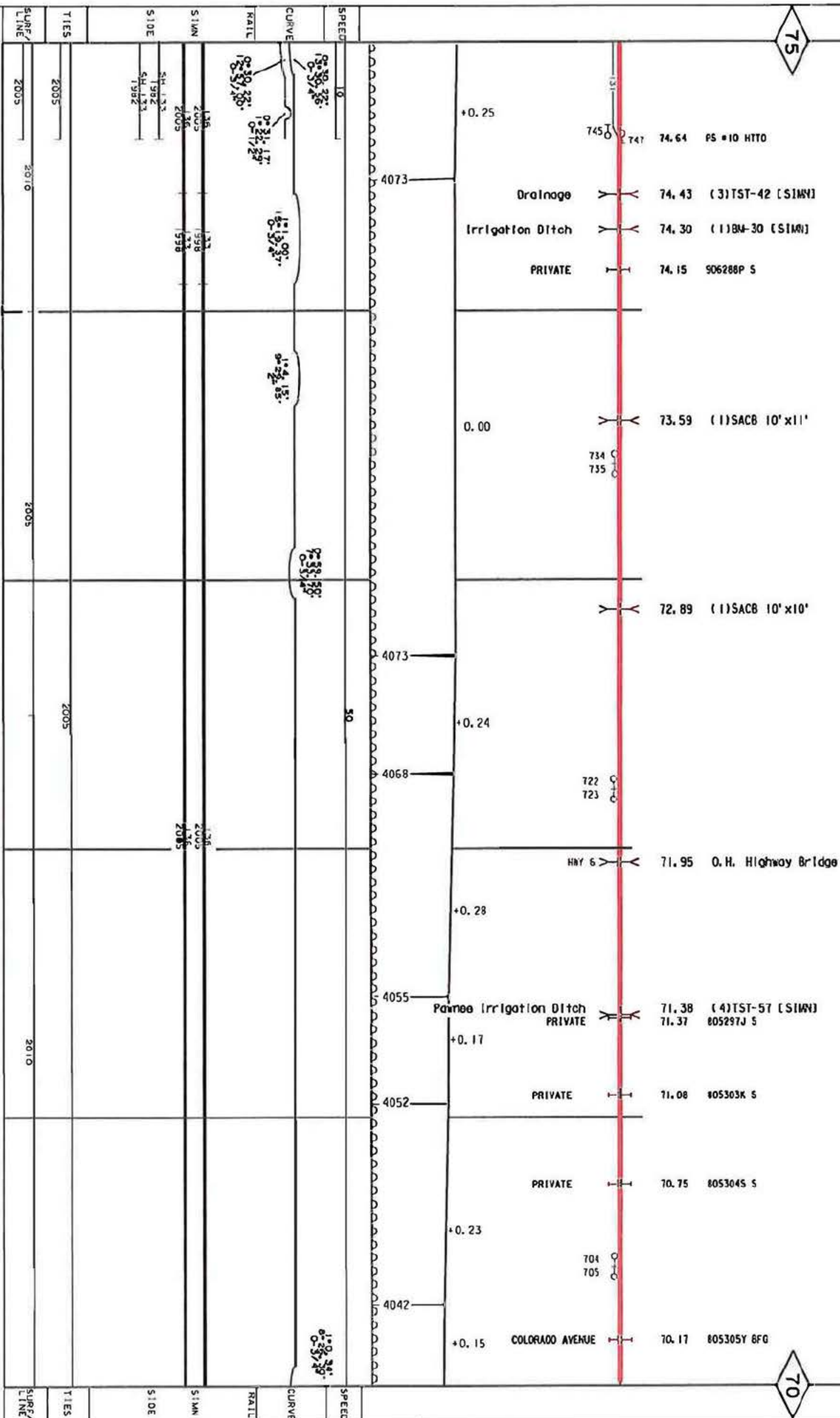
TRK. RTS. GRANTED TO BNSF RR 1, C. C. APPROVED ABANDONMENT M. P. 81.10 TO 56.32, 9-9-1900

JULESBURG SUB

5

75

70



LAST UPDATED 03/09/2017

2107 NORTH PLATTE AVENUE, DENVER, CO 80202 JULESBURG SUB\JULESBURG SUB-II-Regen-Gen

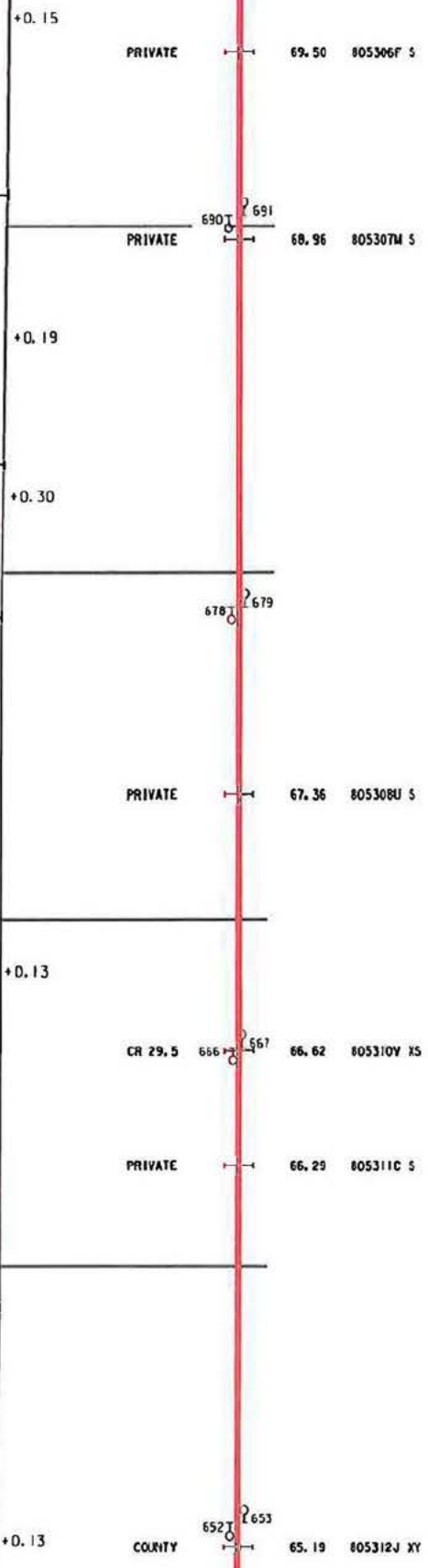
CONSTRUCTED 1882 COLORADO CENTRAL R. R. CO. TRK. R.T.S. GRANTED TO BNSF RR I. C. C. APPROVED ABANDONMENT M. P. 81.10 TO 56.32, 9-9-1900

JULESBURG SUB

4

70

65



4034
4027
4020
4007

SPEED	50
CURVE	1°20'30" 6-25-30'
RAIL	
SIGN	2005
TIES	2005
SURF LINE	2005

SPEED	50
CURVE	1°36' 1-36'
RAIL	
SIGN	2014
TIES	2014
SURF LINE	2014

TRK. RTS. GRANTED TO BNSF RR I.C.C. APPROVED ABANDONMENT M.P. 81.10 TO 56.32, 9-9-1900

★ M.P. 81.1 200' NORTH PLAQUE
MARKING SITE OF FIRST
WHITE SETTLER'S HOUSE
IN LOGAN COUNTY 1871.

65

60

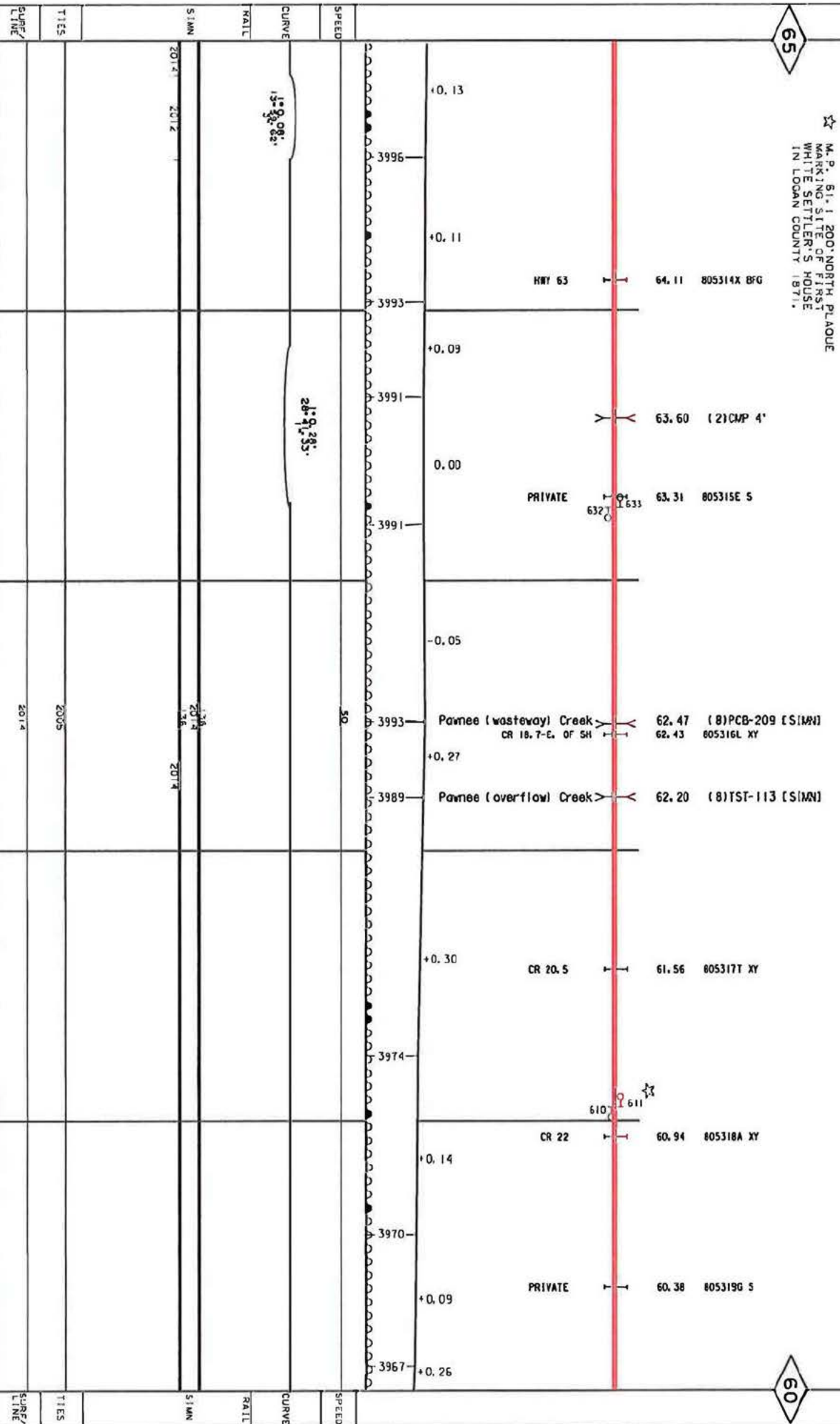




EXHIBIT B

PID# 117110 JULESBURG SUB MP 56.32 - 81.10				
SEGMENT	TRACK TYPE	MP FROM	MP TO	
4115	SIMN	56.320	57.000	
4115	SIMN	57.000	58.000	
4115	SIMN	58.000	59.000	
4115	SIMN	59.000	60.000	
4115	SIMN	60.000	61.000	
4115	SIMN	61.000	62.000	
4115	SIMN	62.000	63.000	
4115	SIMN	63.000	64.000	
4115	SIMN	64.000	65.000	
4115	SIMN	65.000	66.000	
4115	SIMN	66.000	67.000	
4115	SIMN	67.000	68.000	
4115	SIMN	68.000	69.000	
4115	SIMN	69.000	70.000	
4115	SIMN	70.000	71.000	
4115	SIMN	71.000	72.000	
4115	SIMN	72.000	73.000	
4115	SIMN	73.000	74.000	
4115	SIMN	74.000	75.000	
4115	SIMN	75.000	76.000	
4115	SIMN	76.000	77.000	
4115	SIMN	77.000	78.000	
4115	SIMN	78.000	79.000	
4115	SIMN	79.000	80.000	
4115	SIMN	80.000	81.000	
4115	SIMN	81.000	81.100	