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December 5, 2005

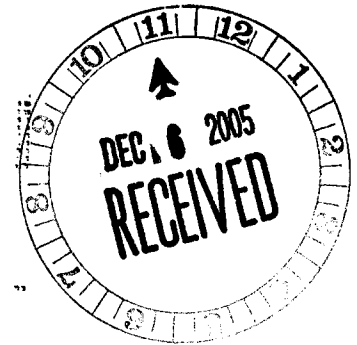
**VIA FACSIMILE: (202) 565-9019
AND OVERNIGHT DELIVERY**

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K. Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

DEC 06 2005

Part of
Public Record



Re: **Finance Docket No. 34794**
BNSF Railway Company –
Acquisition and Operation Exemption – State of South Dakota

Dear Secretary Williams:

Enclosed for filing in the public record of the above-captioned proceeding are ten copies of a redacted version of both the Settlement Agreement and an amendment thereto for this proceeding.

Please feel free to contact me should you have a question. Thank you for your assistance on this matter.

Respectfully submitted,

Michael J. Barron, Jr.

MJB: arw

Enclosures.

cc: Adrian L. Steel, Jr., Esq.

**Settlement Agreement
Between BNSF Railway Company and
The State of South Dakota**

This Agreement is made and entered into this 25th day of April, 2005 ("Effective Date"), by and between BNSF Railway Company, formerly known as The Burlington Northern and Santa Fe Railway Company, a Delaware Corporation, duly qualified to do business in the State of South Dakota, hereinafter referred to as "BNSF" and the State of South Dakota, a body politic by and through its South Dakota State Railroad Board, and South Dakota Department of Transportation hereinafter called "State".

RECITALS

WHEREAS, the State and BNSF are involved in legal proceedings in the federal and state courts of South Dakota and before the U.S. Department of Transportation Surface Transportation Board ("STB") concerning various rights and obligations of the parties hereto and others under certain agreements between and among the parties and others, and the State and BNSF desire to settle and resolve said litigation and legal proceedings among other things; and

WHEREAS, the State and BNSF have entered into an Operating Agreement, dated July 10, 1986, as amended on August 7, 1991, hereinafter "Operating Agreement" concerning operation of certain lines referred to herein as the "Core Lines" or "Core"; and

WHEREAS, the parties have agreed to transfer ownership of certain properties covered by the Operating Agreement to BNSF and terminate the Operating Agreement pursuant to the terms and conditions of this Agreement;

NOW THEREFORE, in consideration of the mutual covenants set forth hereinbelow and for other good and valuable consideration, and upon the terms and conditions contained herein, BNSF and the State do hereby mutually agree as follows:

Section 1. Rights to Be Granted to DME and State Concerning Aberdeen Access to the Britton Line

(a) Subject to mutual written agreement of third parties (i.e., Dakota Minnesota & Eastern (DME), Dakota Missouri Valley & Western (DMVW), South Dakota Railroad Authority (SDRA), or Marshall County Railroad Authority (MCRRA)) if necessary and further subject to all other terms and conditions set forth in this Agreement, BNSF will permit DME and the operator of the State-owned trackage between Aberdeen and Kidder, SD (the "Britton Line") to interchange with each other at Aberdeen on BNSF-owned trackage without restrictions for traffic which originates or terminates on the Britton Line.

(b) Subject to mutual written agreement of third parties (i.e., DME, DMVW, SDRA, or MCRRA) if necessary, BNSF will permit DME and the operator of the Britton Line to interchange with each other at Aberdeen on BNSF owned trackage for traffic

originating or terminating on DME in South Dakota, moving to or from points served by Canadian Pacific's network as it exists as of the Effective Date of this Agreement in (1) North Dakota (not including DMVW or CP-affiliated shortlines) other than to or from industries which are currently (as the effective date of this Agreement) jointly served by CP and BNSF (e.g., industries at Valley City and Minot) and (2) Canada (including, but not limited to, Canadian export ports and CP-affiliated shortlines), subject to the following terms:

(i) These rights extend only to movements of agricultural commodities (STCC 01 and 20), fertilizers, ethanol, bentonite, and forest products.

(ii) These rights do not extend to movements of coal or any commodity not listed in section (i) above absent advance written waiver of BNSF.

(iii) For North Dakota points, these rights will also exclude any unit train movements, unit trains being defined as trains of [REDACTED] cars or more of a single commodity moving from a single origin to a single destination pursuant to a single bill of lading.

(c) No trackage for railcar or rail equipment storage capacity at Aberdeen will be provided by BNSF to facilitate the interchange movements referenced in this section. Cars and trains interchanging at Aberdeen between DME and operator of the state-owned trackage between Aberdeen and Kidder, SD shall not be held in Aberdeen yard longer than a period of [REDACTED] hours from arrival to departure ("Interchange Free Time") unless otherwise approved by BNSF. Cars and trains exceeding Interchange Free Time shall, on direction by BNSF's local operating personnel, depart BNSF property immediately. Any cars or locomotives allowed to be held in Aberdeen on BNSF trackage beyond the Interchange Free Time at the discretion of BNSF local operating personnel may, at BNSF's option and without prejudice to any other rights or remedies available at law or in equity, be charged a holding fee of [REDACTED] per car per day and [REDACTED] per locomotive per day for each 24-hour period hour or fraction thereof, provided that such charges shall not apply to the extent Interchange Free Time is exceeded as a result of events of force majeure beyond the reasonable control of DME and/or the Britton Line operator or acts of BNSF. In the event Interchange Free Time is materially exceeded on [REDACTED] percent or more of all trains interchanged in Aberdeen Yard within a six-month period, BNSF may at its option and without prejudice to any other rights or remedies available at law or in equity, on 30 days' written notice and opportunity to cure, suspend rights of interchange within Aberdeen Yard until operating and/or infrastructure changes are demonstrated or additional support trackage is constructed and placed in service at no net cost to BNSF which would reasonably assure that efficient interchange operations can be reinstated. Suspension of interchange operations within BNSF's Aberdeen Yard shall not preclude the DME and the operator of the Britton Line from performing interchange on State-owned trackage as described in subsection (e) hereinbelow.

(d) Rights provided under this Section 1 shall apply to DME and MCRRA (and MCRRA's contract operator) at no additional charge, insurance or liability requirements, beyond that provided under applicable law and/or in DME's existing trackage rights agreement with BNSF, in the case of DME, and the BNSF-State Donation Agreement, in the case of MCRRA or its operator.

(e) In the event that DME and MCRRA, by and through its third party operator, elect to interchange cars on the State-owned trackage north of Aberdeen in lieu of interchange on BNSF's trackage at Aberdeen Yard, BNSF shall permit them to utilize BNSF's trackage at Aberdeen to accommodate the through movement of such trains for interchange beyond Aberdeen on State-owned trackage; provided such through movement and interchange beyond the Interchange Access Line (as defined in the Britton Line Donation Agreement) does not allow any party to circumvent or breach, in whole or in part, the interchange restrictions specified in this Section 1.

(f) To the extent required by applicable laws and regulations, any necessary amendments to either the DME trackage rights agreement and/or the Donation Agreement which may be required to be filed with the STB shall be the responsibility of DME and MCRRA/SDRA respectively with BNSF's advance review and approval of the text of any such filings.

Section 2. Rights to Be Granted to Operators of Certain State-Owned Trackage

(a) Subject to mutual written agreement of third parties (i.e., Dakota Southern Railroad Company (DSRC), Dakota Short Line (DSL), and the applicable regional railroad authorities), if necessary, and further subject to all other terms and conditions of this Agreement, for a term of years from the Effective Date of this Agreement, BNSF will provide overhead haulage rights using BNSF's then existing train service, convertible to overhead trackage rights pursuant to the terms of Section 5, to the lessees and operators of State-owned rail lines, as defined below, currently connecting only with BNSF on the South Dakota Core, to reach and interchange with each other and all connecting rail carriers at Sioux City, Wolsey, Napa Junction, Mitchell and Aberdeen (including but not limited to DME, BNSF, CN, UP and the operator of the Britton Line) only applicable for traffic (excluding coal and intermodal traffic) originating or terminating on the State-owned rail lines connecting only with BNSF on the South Dakota Core as they currently exist in South Dakota. With respect to shipments of wheat (STCC 01-137) via intermodal rail equipment from or to points on the DSRC, BNSF may entertain proposals for haulage thereof on a case-by-case basis subject to mutually agreed terms and conditions, but shall not be obligated to provide haulage for such shipments absent mutual written agreement between the parties.

(b) For purposes of this Agreement, State-owned rail lines connecting with the South Dakota Core shall mean those rail lines intersecting the Core at Mitchell, SD, leased to the Mitchell-Rapid City Regional Railroad Authority ("MRC") and currently subleased for operation to the DSRC and at Napa, SD, leased to a regional railroad authority and currently subleased to the DSL, although not currently operated. For purposes of this Agreement, D&I Railroad Company (D&I) shall not be deemed to be a State-owned rail line connecting with the South Dakota Core.

(c) This agreement does not extend to any extensions which are or in the future may be connected from or to these State-owned rail lines connecting with the South Dakota Core, and haulage and/or trackage rights to be granted pursuant to this Section may not be used to accommodate traffic from or to any such extensions on State-owned lines.

(d) Subject to concurrence by Cenex Harvest States and further subject to all other terms and conditions of this Agreement, BNSF agrees to grant direct access to MRC and its operator DSRC via trackage rights (without trackage rights fees) for a term of [REDACTED] years from the Effective Date of this Agreement to the Mitchell, SD elevator for traffic that originates or terminates on the State-owned Mitchell-Kadoka line. If Cenex Harvest States is not agreeable to MRC/DSRC direct access, but is agreeable to access via haulage, BNSF will provide substitute haulage for the MRC/DSRC for a term of [REDACTED] years from the Effective Date of this Agreement into the Mitchell facilities at [REDACTED] per car, as adjusted pursuant to the terms of 5(a) of this Agreement.

(e) Subject to concurrence of applicable third parties, BNSF shall maintain existing lease and interchange agreements at Mitchell and Napa Junction with the third party operator of the Mitchell-Kadoka and Napa Junction-Platte Lines for so long as the applicable haulage rights/overhead trackage rights specified in Section 2(a) shall remain in place or until such time as the respective third parties may terminate such agreement(s), if earlier; provided, however, BNSF shall have a right to make reasonable adjustments to compensation terms from time to time pursuant to the terms of said agreements where applicable and/or in the event said lease terms come up for renewal; and provided further that BNSF shall maintain rights of termination in the event of material default.

Section 3. Rights to Be Granted to D&I Railroad Co.

(a) Subject to mutual written agreement of BNSF Sioux Valley Regional Railroad Authority (SVRRA) and D&I to be negotiated in good faith and any necessary governmental approvals which may be required and further subject to all other terms and conditions of this Agreement, for a term of [REDACTED] years from the Effective Date of this Agreement, BNSF will grant D&I overhead trackage rights for aggregates originating at Dell Rapids, SD or Hawarden, IA only for interchange via Wolsey, SD and destined to points currently existing on DME in South Dakota; provided however, it is recognized that DME may transport aggregates beyond South Dakota where necessary for DME's operations. Trackage rights may be exercised by SVRRA/D&I using DME run through power and crews as may be agreed between DME and SVRRA/D&I, provided that (1) DME access will be as subcontractor for D&I, with all terms, obligations and conditions pursuant to these rights remaining the right and responsibility of D&I; and (2) in the event DME run through power or crews shall result in labor claims against BNSF, BNSF shall be fully indemnified from and against any and all such claims.

(b) Subject to mutual written agreement between BNSF and D&I to be negotiated in good faith and all other terms and conditions of this Agreement, BNSF will amend the D&I overhead trackage rights agreement to allow movement by D&I of any commodities (other than coal, forest products, building materials and/or intermodal traffic) that originates or terminates on the D&I-owned line as it currently exists between West Junction (north of Sioux Falls) and Dell Rapids to connect and interchange with all other carriers at Sioux City, IA (including but not limited to CN and UP).

(c) Subject to mutual written agreement of BNSF, SVRRA and D&I to be negotiated in good faith and all other terms and conditions of this Agreement, BNSF will amend the D&I overhead trackage rights on the Core to permit D&I (or a non Class I or Class II railroad successor operator on behalf of Sioux Valley RRA) to handle all traffic

to and from customers accessed on the State-owned Canton-Elk Point and Hawarden-Beresford lines as those lines exist as of the Effective Date to and from interchange with CN and UP at Sioux City, IA, excluding traffic moving to or from any origin, destination or customer location currently (as of the effective date of this Agreement) served or accessed by BNSF directly or indirectly, whether through reciprocal switching or via BNSF-affiliated shortline (defined as a shortline with a handling carrier agreement with BNSF). Traffic to or from Mexico or the U.S./Mexico border for transport beyond to or from points in Mexico would also be excluded from this additional access.

(d)



(e) This release of restrictions from the applicable trackage rights agreements under this Section 3 shall not extend to traffic originating or terminating on any extensions which are or in the future may be connected from or to the lines operated by D&I.

(f) Subject to concurrence of D&I, BNSF shall maintain the existing west yard lease at Sioux City IA for so long as D&I has trackage rights into Sioux City IA or until such time as D&I shall terminate such agreement, if earlier; provided, however, BNSF shall have a right to make reasonable adjustments to compensation terms from time to time pursuant to the terms of said agreement where applicable and/or in the event said lease terms come up for renewal; and provided further that BNSF shall maintain rights of termination in the event of material default.

(g) To the extent required by applicable laws and regulations, any necessary amendments to trackage rights agreements which may be required by this Section 3 and may require filing(s) with the STB, such filing(s) shall be the responsibility of D&I and/or SVRRA with BNSF's advance review and approval of the text of any such filings.

(h) In the event the owner/operator of the Canton-Elk Point line and/or D&I deem it appropriate to construct an improved connection off of the Core Line to UP and/or CN at Sioux City, BNSF shall, upon review and approval of location, construction and operating plans to ensure that no material adverse impacts to BNSF would result (i.e., material impacts on BNSF's costs, safety and service levels) as a result of such trackage being built and placed in service, consent to such connection and the construction thereto. BNSF shall not be obligated to contribute to construction of such connection unless BNSF opts to utilize that connection as well, at which point contribution will be determined on a usage basis.

Section 4. Rights to Be Granted to Shippers on DME Lines in South Dakota

For a term coterminous with that certain Grain Marketing Agreement By and Between DME and BNSF, last dated July 30, 2004, as it may be amended from time to time, governing interchange of unit trains between DME and BNSF at Florence, Minnesota (the "Florence Agreement"), BNSF agrees that DME shippers in South Dakota shall be afforded the opportunity to participate in the BNSF Shuttle program, provided that (1) these shippers meet all BNSF Shuttle criteria and (2) BNSF and DME reach mutual written agreement on terms and conditions for joint line movement and marketing arrangements. Upon DME's notice of intent to negotiate terms for specific traffic opportunities, BNSF agrees to negotiate in good faith an agreement similar in nature to the Florence Agreement applicable to South Dakota shippers. Divisions shall be negotiated in good faith between BNSF and DME on an arm's length basis taking into account then current market conditions and proposed terms of service. To the extent allowed by applicable laws and regulations, BNSF covenants with the State that for the term of the Florence Agreement, to the extent of BNSF's control over applicable rates charged, such rates and charges to be paid by South Dakota shippers for such shuttle train service contemplated under this section shall be established on the same basis as those rates and charges paid to BNSF by shippers which are similarly situated, provided that in no event shall such covenant be construed to require BNSF to disadvantage any other BNSF shippers. In no event shall BNSF be obligated to provide interim co-loading rights for potential shuttle facilities. Notwithstanding anything to the contrary, the agreement proposed in this Section 4 shall extend for a minimum term of [REDACTED] years from the date that the first shuttle train moves pursuant to the agreement, provided that if no shuttle train moves pursuant to such agreement prior to expiration of [REDACTED] years from the Effective Date hereof, then such agreement shall terminate after [REDACTED] years from the Effective Date.

Section 5. Additional Terms Applicable to Increased or New Access Rights

(a) Where new overhead haulage rights are provided for in this Agreement (excluding haulage under the terms of Section 2(d) of this Agreement), BNSF will provide such haulage for loaded or empty movement of cars between points shown at industry-standard terms at a rate of [REDACTED] per loaded car mile for 1-2500 loaded cars and [REDACTED] per loaded car mile for loaded cars over 2500 cars; provided, however, these rates shall not apply to high, wide, or dimensional cars or cars requiring special handling as described hereinbelow, and haulage rates for any such cars shall be subject to mutual written agreement of the parties.



(b) Where new overhead trackage rights are to be granted (including without limitation the new trackage rights for D&I aggregate movements to DME pursuant to Section 3(a), but not including the D&I's trackage rights between West Junction and Sioux City (as amended in Section 3 herein) which shall be subject to the compensation

terms of D&I's existing trackage rights agreement) such overhead trackage rights will be provided at a charge of [REDACTED] per loaded or empty car mile. This same charge, as adjusted, shall also apply to any overhead trackage rights converted from overhead haulage rights pursuant to Section 2. Locomotives will be counted at a rate of two cars for compensation calculation purposes. [REDACTED]

(c) Except to the extent provided otherwise in subsection (d) hereinbelow, election to convert overhead haulage to overhead trackage rights shall be made in writing at least 180 days' in advance of commencement of overhead trackage rights and may not be made until at least one calendar year of operations pursuant to haulage having occurred. The carrier(s) obtaining access rights over BNSF pursuant to this agreement may elect overhead haulage or overhead trackage rights on a lane-specific basis; provided, that overhead trackage rights will not be permitted for any lane with an annual volume of less than [REDACTED] loaded and empty cars on a lane-specific basis; and provided further, however, that this volume restriction shall not apply in the event of invocation of election to convert to trackage rights pursuant to the terms of section (d) hereinbelow. Upon authorized exercise of election of overhead trackage rights, overhead trackage rights shall be implemented, subject to any necessary governmental approvals which shall be the responsibility of the applicable third party to obtain at the time of election to convert to trackage rights. Any costs to BNSF for any changed service conversion, including but not limited to necessary and reasonable changes required in infrastructure, will be borne by carriers or parties other than BNSF prior to commencement of the service conversion.

(d) BNSF will negotiate with the applicable carrier(s) exercising overhead haulage or trackage rights reasonable terms and conditions for such rights consistent with BNSF and industry standard terms and conditions for overhead haulage and overhead trackage rights, including among other things, negotiation of reasonable service standards (as outlined hereinbelow) with an applicable "cure" period for haulage arrangements, Force Majeure relief, and suitable data exchange requirements for overhead haulage and trackage rights traffic. In the event BNSF has received electronic receipt of necessary car availability data at least 24 hours prior to the scheduled departure of a BNSF scheduled general merchandise train from its origin terminal, as such schedules may be adjusted from time to time, BNSF shall arrange to provide haulage on said scheduled general merchandise train, provided, that if the volume of cars proposed for haulage would result in the train exceeding maximum train length under applicable operating rules and regulations, the cars shall move on the next available general merchandise train. Failure to meet the service standard [REDACTED] out of every [REDACTED] requests for haulage service will entitle the applicable carrier to elect to convert to overhead trackage rights upon delivery and receipt of 30 days' written notice of substantial service failures and BNSF's failure to cure such failures during said 30 day period. Liability for loss, damage, injury, or death (including with limitation liability for loss or damage to lading or equipment) resulting from a carrier's exercise of new overhead haulage or new overhead trackage rights to be

granted pursuant to the terms of this Agreement) shall be the responsibility of said carrier. Except to the extent expressly provided otherwise in this Agreement, the terms of existing agreements between BNSF and such carriers are not intended to be modified or amended by this Agreement. Car hire for new overhead haulage or new overhead trackage rights cars moving in the account of a carrier exercising overhead haulage or trackage rights shall be the responsibility of the carrier exercising haulage or trackage rights under this Agreement. Minimum insurance requirements for overhead haulage involving haulage of any cars of hazardous materials or any overhead trackage rights shall include, among other things, at least [REDACTED] USD railroad liability policy, with BNSF to be an additional named insured. Minimum insurance requirements for overhead haulage involving haulage solely of non hazardous materials shall include, among other things, at least [REDACTED] USD railroad liability policy, with BNSF to be an additional named insured. Notwithstanding any provision to the contrary in this Agreement or in any other agreement between BNSF and DSRC, minimum railroad liability insurance requirements for exercise of trackage rights or haulage to/from the Mitchell elevator pursuant to Section 2(d) for non-hazardous materials shall be [REDACTED] per occurrence.

(e) Any grant of new overhead haulage or new or expanded overhead trackage rights shall be conditioned upon retention of a remedy of cancellation in the event of unauthorized movements occur in violation of commodity, commercial, or geographic restrictions under this Agreement. BNSF's right of cancellation shall be subject to a 15 day notice and 7 day opportunity to cure and appropriate arbitration provisions for resolution of any disputes with respect thereto. BNSF's cancellation rights shall be granted and may be exercised without prejudice to any other rights or remedies available to BNSF at law or in equity.

(f) Wherever access rights granted herein result in operations on BNSF lines, such operations shall be subject to BNSF's exclusive management, dispatch control, compliance with BNSF operating rules, compliance with BNSF and industry standard electronic data exchange requirements, and reasonable arbitration, and liability and insurance requirements satisfactory to BNSF.

(g) Wherever access rights granted herein result in transport of dead-in-tow locomotives on or over BNSF lines shall be subject to the operating restrictions and all terms and conditions contained in BNSF's dead-in-tow locomotive tariff in effect at the time of transport. Notwithstanding any provision to the contrary, BNSF transport of all dead-in-tow locomotives, whether pursuant to haulage or otherwise shall be at BNSF tariff rates.

(h) Wherever access rights granted herein result in operations on BNSF lines (whether via haulage or trackage rights) of any transport of high, wide, or dimensional cars or cars or equipment subject to special handling provisions such as weight, speed, or clearance restrictions or accommodations shall require advance approval of local BNSF operating personnel. In the event such movement(s) is approved, the movement thereof shall be in accordance with all BNSF operating and mechanical rules and restrictions in effect at the time of the proposed transport and any additional commercial or liability conditions applicable to such movements generally on BNSF's system.

(i) New trackage rights and haulage rights granted pursuant to this Agreement shall be provided on a nondiscriminatory basis, and BNSF will treat the trains/cars of

other parties on an equal basis with BNSF cars/trains of the same or similar type volume and commodity moving over the same route.

(j) Prior to initial commencement of operations via overhead haulage or new or expanded overhead trackage rights, BNSF and carriers obtaining access to the South Dakota Core will consult on volumes to be moved on a lane-specific basis, methods of operation and interchange, and necessary changes in infrastructure, if any, to permit unobstructed operations for both BNSF and overhead haulage or overhead trackage rights tenants.

(k) Any capital investment or access to existing BNSF facilities or facilities of third parties needed to safely and effectively implement any of the rights granted pursuant to this Agreement shall ensure that BNSF operations are not materially interfered with over any of its lines and shall be a condition of the access rights granted under this Agreement. If, in BNSF's reasonable discretion, BNSF determines, based on consultation with applicable carriers, that certain infrastructure improvements or investments should be made to accommodate the access rights granted under this Agreement without unreasonably interfering with or negatively impacting BNSF's operations or cost structure, such improvements, expenditures or investments shall be made at no expense to BNSF (including any tax expense or liability which might result from such improvement, expenditure or investment) and shall be made prior to commencement of the applicable exercise of rights pursuant to this Agreement; provided, however, if BNSF and the applicable carriers cannot agree as to the reasonable necessity for a particular improvement, that issue shall be subject to appropriate arbitration provisions for resolution of any disputes with respect thereto.

(l) The access rights and obligations to be granted under this Agreement extend to the successors and assigns of BNSF and owner/operators of the State-owned rail lines obtaining overhead haulage and/or overhead trackage rights access to the South Dakota Core; provided, however, overhead haulage or overhead trackage rights provided pursuant to Sections 2 and 3 of this Agreement may not be assigned to any other Class I or Class II rail carrier, including DME and its successors and assigns, without BNSF's advance written consent; provided, however, this non-assignment provision shall not apply to D&I's Core Line rights and obligations under existing operating and trackage rights to the extent they existed prior to the Effective Date of this Agreement. BNSF shall not withhold consent to assignment to any Class III railroad operator, a governmental entity or political subdivision, or any entity unaffiliated with railroads. Subject to concurrence of third parties, where necessary, terms will be formally agreed to in necessary agreements between BNSF, the State of South Dakota, the applicable Regional Railroad Authority, and the operators of the State-owned rail lines obtaining overhead haulage and/or overhead trackage rights access to the South Dakota Core.

(m) Any rail carrier exercising overhead haulage or new or expanded overhead trackage rights granted pursuant to this Agreement shall be subject to reasonable record retention and audit provisions (subject to appropriate confidentiality assurances) sufficient to confirm compliance with the terms of the relevant overhead haulage or overhead trackage rights agreements. In the event any affected party (other than BNSF) shall demand an independent audit in lieu of an audit using BNSF personnel or consultants, such independent audit shall be accommodated in lieu of performance thereof with BNSF resources, provided that the party(ies) demanding an independent

audit (in lieu of an internal BNSF audit at no expense to such party) shall share equally the expense of an independent consultant/auditor.

Section 6. Core Purchase Price and Transfer Terms

(a) Subject to and conditioned upon receipt of necessary governmental approvals (including an unconditional exemption or grant of authority by the STB for BNSF to acquire the Core), BNSF and the State agree to the purchase and sale of the Core and transfer of ownership by quitclaim deed in a form that complies with Article VIII, Section 19 of the South Dakota Constitution, and is sufficient for recordation.. The Core will be transferred AS IS WHERE IS and the State disclaims any representations or warranties, whether express or implied as to the condition, merchantability, fitness for any purpose, or quality of title or workmanship of the Core.

(b) BNSF agrees to acquire the Core for at price of [REDACTED] in U.S. funds, as adjusted for apportioned closing costs, rental prorations and any other deductions agreed upon pursuant to this Agreement, to the extent any of the foregoing may apply.

(c) The annual BNSF rental paid to the State for the Core would be prorated [REDACTED]

(d) Parcels already sold or in the process of being sold [REDACTED] by the State would be carved out/deducted from the purchase price based on the actual sale price (to be negotiated at arm's length based on the fair market value).

(e) Except to the extent expressly provided otherwise herein, BNSF's acquisition of the Core shall be subject to any encumbrances against the property except that the State shall warrant that no encumbrances exist which would deprive BNSF of the use and enjoyment of the property as a railroad.

(f) From and after the Effective Date of this Agreement the State shall not create any new encumbrances on the properties to be acquired. From and after the Effective Date, except to the extent expressly provided herein, the State shall not grant or renew any rights (other than renewal of existing leases and licenses (1) where such renewal would extend the term for 1 year or less on any lease or license which has already been effect for at least five years or more prior to the Effective Date; or (2) where such renewal applies to any "carve out" properties which are acquired by the State pursuant to the terms of Section 7.), release or discharge any liabilities or obligations of any parties related to the Core properties, or sell, convey, lease, license, or mortgage any part of said properties without BNSF's written consent.

[REDACTED]

(h) Unless the parties mutually agree in writing otherwise, Closing shall occur at a mutually agreed date no later than 15 days after the later of (1) the date all implementing agreements contemplated by this Agreement are finalized and executed; or (2) the date unconditional STB approval for BNSF to acquire the Core shall be effective. Within 5 business days after Closing, the parties shall file dismissal motions contemplated in Section 9(e).

Section 7. Reservation or Transfer of Certain Leased Properties

(a) Subject to mutual written agreement between the State and BNSF on certain properties to be identified which are deemed to be not necessary for BNSF's operating requirements and future expansion needs, and provided that the State provides its written identification of proposed "carve-out" properties no later than 30 days prior to the closing of the transaction for the Core, the parties may agree to reserve certain properties unto the State pursuant to the terms of this Section 7.

(b) A carve out of a proposed parcel will not be allowed, if in BNSF's sole judgment, the proposed carve-out is required by BNSF for current or future operating purposes.

(c) ~~The purchase price of the reserved~~ The purchase price of the reserved carve-outs from the Core sale transaction will be based on the appraised value as established through an independent appraisal process, and will be deducted from the purchase price prior to transfer. BNSF will consider, but will not be required, to process any further carve-outs after the Core Line transaction is closed between BNSF and the State. BNSF disclaims any representations or warranties, whether express or implied as to the condition, merchantability, fitness for any purpose, or quality of title or workmanship of the properties to be "carved out" of the transaction. The State reserves said "carve out" properties as may be agreed upon AS IS WHERE IS. To the extent the State shall receive any indemnity from any such third party acquiring the carve-out properties from the State in any subsequent transaction, the State shall ensure that such indemnities shall also extend to BNSF as well as the State, and BNSF shall be named as an express third party beneficiary of any such indemnity commitment.

(d) It shall be a condition of this Agreement and a condition of Closing that all overhead trackage rights or any other third party rights (as referenced in Article 3 of the Operating Agreement) previously granted by the State without the advance written consent of BNSF shall be voided or deemed void and of no effect. The State shall provide written certification or unqualified opinion of counsel to BNSF that all such rights known to the State upon a reasonable inquiry have been voided prior to Closing (including without limitation those rights granted to SVRRA in January, 2005, trackage rights granted to the MRC/DSRC in December, 2004, and any trackage rights agreement proposed, offered, or executed with DME prior to the date of such Certification). Subject to the foregoing, all other leases, licenses, permits, and related agreements (to the extent they apply to the properties to be acquired by BNSF pursuant to this Agreement) not otherwise reserved unto the State or voided shall be deemed prospectively assigned to BNSF as the date of Closing.

(e) Each party shall bear its own Closing costs. Costs of escrow shall be shared equally.

(f) To the extent BNSF or the State shall, pursuant to any terms of this Agreement, grant a conveyance to any party(ies), if any, such conveyances shall be made by quitclaim deed only.

Section 8. DME Business Cars

(a) BNSF agrees to permit DME to move its business cars via Wolsey interchange on the Core Line to Sioux Falls subject to reasonable advance notice and coordination with BNSF personnel. Subject to availability of capacity for BNSF's own business needs, BNSF will further allow DME business cars to be placed on and utilize sidings near the DME headquarters at Sioux Falls for a period of no more than 5 business days (subject to available capacity constraints) at any given time unless BNSF local operating personnel approve, in their sole discretion, a longer holding period. BNSF and DME shall mutually agree on the liability, insurance, operating and other terms associated with the business car movement, provided, however, the insurance requirements shall be not more than [REDACTED]. Each movement shall be subject to the terms of an industry standard temporary trackage rights agreement, the form of which shall be mutually agreed as between BNSF and DME. Although the term of each temporary trackage rights agreement shall be no more than one year, BNSF covenants with the State, that for a term of 10 years from the Effective Date, BNSF shall accommodate requests to establish new temporary trackage rights arrangements each year. In no event shall BNSF be required to establish permanent trackage rights. Unless otherwise mutually agreed as between BNSF and DME, the trackage rights fee and adjustment thereof shall be as set forth in Section 5(b) of this Agreement.

(b) Movement of DME business cars (and locomotives transporting same) shall be conditioned upon inspection and satisfaction of BNSF personnel that such cars meet BNSF's mechanical and operating policies and rules and restrictions applicable to such equipment and that the cars are in a condition suitable for safe and efficient operations on BNSF's lines. For purposes of this agreement, business cars shall mean the private, not-for-hire passenger cars owned or leased by DME. In no event shall these rights extend to trackage rights for freight operations.

(c) Notwithstanding any provision to the contrary, in no event shall BNSF be required to facilitate the movement of DME business cars under hire to any party other than DME without BNSF's advance written consent, nor shall the trackage rights be used to accommodate any passenger service without BNSF's advance written consent; provided, however, DME may have invitees of DME (but not invitees paying consideration to DME or any other party for the privilege of riding in said cars) enter and occupy DME cars and equipment where any such persons have executed BNSF's standard right of entry/release of liability agreement in advance thereof.

Section 9. Miscellaneous

(a) All terms related to agreements between BNSF and third parties or agreements among BNSF, the State, and relevant third parties are subject to and conditioned upon mutual written agreement among said parties.

(b) [REDACTED]

(c) [REDACTED]

(d) As of the date of Closing the Operating Agreement shall be deemed terminated. All rights and obligations which accrued prior to such termination, except to the extent same shall have been amended or discharged pursuant to this Agreement shall survive and be enforceable for the applicable statute of limitations period.

(e) Closing shall be conditioned upon completion of all implementing agreements contemplated by this Agreement and receipt of unconditional written consent of DMVW to fully settle and resolve *BNSF v. DMVW* and *State of South Dakota v. BNSF and DMVW* (federal court actions in Aberdeen). Once Closing occurs, the parties agree to join with all other necessary parties in joint stipulations for dismissal to dismiss with prejudice the federal court actions in Aberdeen and *BNSF v. State of South Dakota* (state court action in Pierre). Pending fulfillment of all conditions of Closing and Closing on the Core properties, the parties would file a joint motion to hold the federal state court actions in abeyance (unless the parties mutually agree to an alternative arrangement as circumstances may require). In the event any agreement contemplated to be negotiated under this Agreement cannot be finalized for any reason and/or there is no dismissal of all pending actions within six months of the Effective Date of this Agreement, the terms of this Agreement and any other implementing agreements negotiated with any party referenced herein shall be deemed null and void and of no effect. The terms of any such implementing agreements shall not commence until and shall be conditioned upon the date all actions are finally dismissed and the State and BNSF have mutually released one another pursuant to this agreement.

(f) Upon execution of all agreements contemplated by the Settlement Agreement, the State shall withdraw its request for conditions in the pending STB proceeding (Finance Docket Number 34645) governing BNSF proposed acquisition of the Core. The State shall file in support of an unconditional acquisition and shall actively solicit the support of other third parties which have filed in support of the State to withdraw any support of the conditions proposed by the State. The State shall also request expedited and unconditional approval of the exemption to acquire the Core. Unconditioned STB authority to acquire the Core shall be a condition of settlement and a condition of Closing. Pending execution of all implementing agreements contemplated by this Agreement, the parties shall file a joint request that the STB proceeding be held in abeyance for a reasonable period of time to allow completion of the implementing agreements.

(g) Neither party admits or denies liability or concedes any issue of interpretation under any relevant agreements currently the subject of litigation or other

legal proceedings. Terms of settlement are considered confidential, subject to applicable federal and state laws, necessary disclosures to third parties to effect the intent and purposes of the agreement, and any necessary or appropriate disclosures to federal regulatory authorities for securities and corporate governance reporting or for obtaining any necessary permits or approvals required by this agreement. Subject to advance coordination between the parties, nothing herein shall preclude either party from issuing a press release which references the general provisions of the settlement agreement, provided that they shall not reveal specific rates or charges or other commercial terms of this Agreement, except to the extent mutually agreed otherwise.

(h) South Dakota law shall govern any disputes under this Agreement, and any disputes shall be finally resolved pursuant to neutral binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association.

(i) The parties agree to execute such other and further documents and to undertake such acts as shall be reasonable and necessary (including, without limitation, negotiation in good faith with relevant third parties certain implementing agreements as contemplated herein) to carry out the intent and purposes of the settlement.

(j) Upon fulfillment of all conditions of settlement and dismissal/conclusion of the STB proceedings and dismissal of the court actions in accordance with the terms of settlement, the parties shall have mutually released and discharged one another from all claims, actions, demands, causes of action, or damages which were the subject of the prior litigation or which could have been brought in said actions or proceedings.

(k) In the event written consent of the Board of Directors of BNSF Railway Company or the Board of its holding company, Burlington Northern Santa Fe Corporation shall be required pursuant to BNSF's corporate governance rules, BNSF shall pursue same in good faith and with due diligence. All terms of settlement shall be subject to and conditioned upon receipt of any such approvals, which approvals may be withheld in the Board's sole and absolute discretion for any reason or no reason whatsoever. All terms of settlement shall be subject to and conditioned upon the State's receipt of any necessary governmental approvals, which approvals may withheld for any reason or no reason whatsoever, provided the State shall pursue same in good faith and with due diligence.

(l) No amendments to this Agreement shall be effective except amendments in writing signed by both parties. The terms of this Agreement shall merge and supersede all prior understandings of the parties, whether oral or written, concerning the subject matter hereof.

(m) In carrying out any of the provisions of this Agreement, or in exercising any power or authority granted hereunder or within the scope of this Agreement, there shall be no liability upon any employees of the State, or their authorized members or representatives, either personally or as officials of the State, it being understood that in all such matters they act solely as agents and representatives of the State.

(n) BNSF and the State shall equally divide any costs of court which may be assessed (excluding any award of attorneys' fees or costs of any individual party) by the

federal district court in the Britton Line litigation as a condition of abeyance and/or dismissal of the federal court litigation.

In Witness Whereof, authorized representatives of the parties have executed this Agreement as of the Effective Date.

ACCEPTED AND AGREED:

BNSF Railway Company

By: _____
Its: _____

ACCEPTED AND AGREED:

**State of South Dakota, by and through its
Department of Transportation**

By: _____
Its: _____

South Dakota State Railroad Board

By: _____
Its: Chairman

Approved by: _____
M. Michael Rounds
Governor
State of South Dakota

First Amendment to Settlement Agreement

This First Amendment to that certain Settlement Agreement Between BNSF Railway Company and The State of South Dakota, dated April 25, 2005 ("Original Agreement"), is entered into this 22nd day of November, 2005.

WHEREAS, the State of South Dakota ("State") and BNSF Railway Company ("BNSF") have agreed to amend the Original Agreement as follows:

- I. Section 6(b) of the Original Agreement shall be superseded in its entirety to read as follows:

"(b) BNSF agrees to acquire the Core for a purchase price of [REDACTED] in U.S. funds, less [REDACTED], for properties reserved out of the sale pursuant to Sections 6(d), 7(a) and 7(c) and mutual agreement of the parties, for a total gross purchase price of [REDACTED]. Funds to be paid by BNSF at closing shall include:

Gross Purchase Price

Operating Agreement Rental prorated to August 25, 2005*

Rental Settlement pursuant to Section 9(c)

Net amount

(not including any mutually agreed closing cost deductions)

* Prorated rentals for the period of January 1, 2005, through August 25, 2005, shall be subject to audit by the State and/or BNSF for a period of three years from the date of Closing on the Core transaction and, where appropriate, an accounting for audit adjustments pursuant to the terms of the Operating Agreement. So much of the terms of the Original Agreement necessary to administer the calculation, audit, and dispute resolution, if any, pertaining to rentals due and owing for the period January 1, 2005, through August 25, 2005, shall survive termination of the Original Agreement. Rentals for any time period prior to January 1, 2005, shall be deemed settled and shall not be subject to audit or adjustment by either the State or BNSF.

- II. The Original Agreement shall have the following new Section 10 added as follows:

Section 10. Abandonment and Multiple Offers of Financial Assistance

For a term coterminous with the last remaining Trackage Rights Agreement entered into pursuant to this Agreement, in the event BNSF, or its successor assigns, seeks authority before the Surface Transportation Board (or its successor agency), whether by application or exemption to abandon all or any portion of the railroad operating property comprising the Core, and the State and other parties file Offers of Financial Assistance (pursuant to 49 U.S.C.10904 as amended from time to time) to purchase that portion of the Core right of way proposed to be abandoned, to the extent allowed

by applicable law, BNSF shall choose the State as the purchaser of the property proposed to be abandoned, so long as the State's monetary Offer of Financial Assistance meets or exceeds the monetary Offer of any other party offering financial assistance, and provided further, in no event shall this section be construed or applied in a manner that would deprive BNSF of receiving the minimum constitutional value for its property.

- III. The third sentence of Section 9(e) of the Original Agreement shall be superseded in its entirety by the following substitute sentence:

"In the event there is no closing and dismissal of all referenced litigation on or before December 15, 2005, the terms of this Agreement, as amended herein, and any other implementing agreements negotiated with any party referenced herein shall be deemed null and void and of no effect."

IV.



- V. Subject to Section III above, this First Amendment shall become effective as of the Effective Date and shall remain in effect for a term coterminous with the Original Agreement.
- VI. Except as expressly provided otherwise herein, nothing herein shall amend or supplement the terms of the Original Agreement.

In Witness Whereof, authorized representatives of the parties have executed this First Amendment as of the dates written hereinbelow.

ACCEPTED AND AGREED:

EXECUTED BY BNSF RAILWAY COMPANY THIS 22nd DAY OF NOVEMBER 2005.

By: 

Peter J. Rickershauser
Vice President – Network Development

EXECUTED BY STATE THIS 22nd DAY OF NOVEMBER, 2005. State of South Dakota by
the DEPARTMENT OF TRANSPORTATION.

By: _____

Printed: _____

Title: _____

In Witness Whereof, authorized representatives of the parties have executed this First Amendment as of the dates written hereinbelow.

ACCEPTED AND AGREED:

EXECUTED BY BNSF RAILWAY COMPANY THIS 22nd DAY OF NOVEMBER 2005.

By: _____

Peter J. Rickershauser

Vice President - Network Development

EXECUTED BY STATE THIS 22nd DAY OF NOVEMBER, 2005. State of South Dakota by the DEPARTMENT OF TRANSPORTATION.

By:  _____

Printed: Judith M. Payne

Title: Secretary