

AGREEMENT NO. _____

COST REIMBURSEMENT AGREEMENT BETWEEN

THE CITY OF LOS ANGELES AND

BNSF RAILWAY

This Cost Reimbursement Agreement ("Agreement"), is entered into by and between the CITY OF LOS ANGELES, a municipal corporation ("City"), acting by and through its Board of Harbor Commissioners ("Board") and BNSF RAILWAY COMPANY, a Delaware corporation ("BNSF") (each, individually a "Party," and collectively, the "Parties")

RECITALS

WHEREAS, the proposed Southern California International Gateway Project ("SCIG Project" or "Project") is an intermodal railyard project proposed to be constructed and operated by BNSF on a 185-acre site on property located approximately 4 miles from the Port of Los Angeles ("POLA") and owned in part by the Harbor Department of the City ("LAHD"); and

WHEREAS, the City is the Lead Agency for preparation and certification under the California Environmental Quality Act ("CEQA," Public Resources Code, Section 21000 et seq.) of a final environmental impact report ("FEIR") for the SCIG Project; and

WHEREAS, the Parties previously entered into Harbor Department Agreement 2686 ("Agreement 2686") dated May 1, 2008, which provided for BNSF and City to share in the consultant's costs to prepare the environmental assessment of the proposed Project; and

WHEREAS, Agreement 2686 expired on April 30, 2011, however, until 2013, BNSF has continued to reimburse City on a voluntary basis for fifty (50) percent of the consultant's costs to prepare the environmental assessment of the proposed Project pursuant to Agreement 2686, and City has accepted such performance; and

WHEREAS, in 2013, the Board and Los Angeles City Council ("City Council") certified the SCIG Project Final Environmental Impact Report ("2013 FEIR") in compliance with CEQA, adopted Findings of Fact, a Statement of Overriding Considerations, and a Mitigation Monitoring and Reporting Program, and granted the Site Preparation and Access Agreement ("SPAA") and LAHD Permit No. 901 (collectively, the "Project Approvals") for the SCIG Project; and

WHEREAS, various third parties ("Petitioners") filed petitions for writs of mandamus against the City as Respondents and/or Defendants and BNSF as Real Party in Interest challenging the FEIR and/or Project Approvals; and

WHEREAS, on or about May 23, 2018, pursuant to the decision in *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, the Contra Costa County Superior Court, in a Peremptory Writ of Mandate following Appeal in the case *Fastlane Transportation, Inc. v. City of Los Angeles, et al.*, Contra Costa County Superior Court Case No. CIVSMN14-300 (“Writ of Mandate”), the Superior Court of California, County of Contra Costa, commanding that the Board and City Council must take appropriate actions to set aside certification of the 2013 FEIR and specified actions and approvals predicated on the certification, and to suspend project activities until the City has prepared a revised environmental analysis to correct inadequacies of the 2013 FEIR; and

WHEREAS, the Parties desire to enter into a new agreement that supersedes and replaces Agreement 2686 with respect to BNSF’s payment of the remainder of costs to prepare the Revised Environmental Analysis (defined below) to comply with the Writ of Mandate; and

NOW, THEREFORE, in reliance on the foregoing recitals and in consideration of the mutual covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

TERMS

1. RECITALS. The recitals of this Agreement set forth above are incorporated herein as terms and conditions of this Agreement.

2. ENVIRONMENTAL REVIEW AND ENTITLEMENTS. To the extent that LAHD, as the CEQA lead agency, is preparing the environmental study and documents in compliance with CEQA that are necessary to comply with the Writ of Mandate (“Revised Environmental Analysis”) for the SCIG Project, as required by law, it shall do so before the City considers discretionary entitlements for the proposed Project (“Project Documents”).

3. NO APPROVAL; NO WAIVER OF CITY’S DISCRETIONARY AUTHORITY. The Parties expressly acknowledge and agree that this Agreement does not grant BNSF or City any right or obligation to enter into any other binding agreement or amendment of agreement relative to the design, engineering, construction, development, operation, or lease related to the SCIG Project, nor obligate City to take any action to proceed with the matters described in Section 2 above or adopt or approve any Project Documents. The SCIG Project shall be subject to the discretionary review and approval of all underlying entitlements and approvals to the extent required by the law and by City’s Charter, Administrative Code, policies, rules and regulations. City retains its sole and absolute discretion to make decisions regarding the SCIG Project, including but not limited to: determination of any Project Documents’ compliance with CEQA and environmental laws related to the Project; selection and adoption of mitigation measures; whether or not to approve the Project; and whether or not to require modification of or select alternatives to the Project, including the “no project” alternative in order to comply with CEQA. Furthermore, LAHD retains its sole and unfettered discretion to undertake any studies,

peer review or inquiries it deems necessary and/or appropriate to ensure preparation of legally adequate Project Documents.

4. TERM AND TERMINATION.

A The effective date of this Agreement ("Effective Date") shall be the date of its execution by the Executive Director following authorization of the Board and compliance with Section 245 of City's Charter. The term of this Agreement shall commence upon the Effective Date and, unless terminated earlier as provided herein, shall continue until three (3) years have lapsed from the Effective Date. Notwithstanding the foregoing, the rights and obligations concerning the reimbursement of costs set forth in this Agreement shall be deemed to be effective on date this agreement is executed by the Parties, unless and until terminated in accordance with the terms of this Agreement.

B Prior to the Termination Date, either Party may withdraw in writing from this Agreement and cancel this Agreement upon giving the other Party ten (10) working days' written notice of its election to cancel and terminate this Agreement. Should either Party so withdraw, this Agreement will terminate as of the date such notice is transmitted, with the exception of BNSF's obligations as to work performed prior to the date of any such termination, and BNSF shall remain responsible for expenses under this Agreement up to and including the effective date of termination.

5. REIMBURSEMENT OF ENVIRONMENTAL COSTS. City shall transmit to BNSF, for BNSF's approval, scopes of work and reasonably available cost/budget information for all environmental consultant and City staff services for preparation of the Revised Environmental Analysis, which approval shall not be unreasonably withheld, conditioned or delayed. Following such approval, to the extent contained within the scope of work and cost/budget information approved by BNSF as described above, BNSF shall reimburse City for One Hundred Percent (100%) of all costs incurred to prepare the Revised Environmental Analysis ("Revised Environmental Analysis Costs"). Revised Environmental Analysis Costs may be: (a) all costs and charges incurred under contracts between LAHD and third-party consultants for performance of CEQA professional services set forth in the scope of work approved by BNSF as described above for the Revised Environmental Analysis; and (b) reasonable staff time and incurred fees and costs (e.g. filing and publication fees and notice advertising costs) of LAHD personnel for performance of CEQA professional and non-professional services set forth in the scope of work approved by BNSF as described above for the Revised Environmental Analysis. City shall prepare written invoices for Revised Environmental Analysis Costs on a monthly basis following the effective date of this Agreement, and transmit the same to BNSF. The monthly invoice shall include a progress report describing the activities performed during the subject month, along with the charges associated with such activities. BNSF shall transmit payment for such invoices within forty-five (45) days of such invoices' transmittals. Absent prior written approval by BNSF, BNSF shall not be required by this Agreement to reimburse any costs other than those incurred for preparation of the Revised Environmental Analysis. LAHD staff shall include with each invoice, a report of the total amount of the budget spent through that date of invoice. When approximately 75% of the cost amount approved by BNSF has been spent or services performed which,

when invoiced, will amount to approximately 75% of the budget, City shall notify BNSF and the Parties will meet and confer about the remaining amount of work necessary to complete the Revised Environmental Analysis and the costs for the same.

6. STANDARD OF CARE. LAHD hereby represents and warrants that the work performed to complete the Project Documents shall be undertaken with the same standard of care and diligence as according to the custom and practice of LAHD in the execution of its projects. As LAHD is the lead agency and its independent judgment must apply, as provided for in Section 3 above, LAHD will determine whether the standard of care is the same as has been applied to its most recent environmental assessment work.

7. LEAD AGENCY'S INDEPENDENT JUDGMENT. The Revised Environmental Analysis must reflect the lead agency's independent judgment (CEQA Section 21082.1(c) and 14 C.C.R. Section 15084). Accordingly, the final responsibility and final authority on all questions concerning the content and quality of the Revised Environmental Analysis lies in the sole discretion of LAHD. BNSF understands and agrees that any consultant(s) employed by LAHD to perform services hereunder only owes a duty to LAHD and said consultant(s) will be accountable to LAHD alone and not to BNSF or to any other third-person or entity.

8. BREACH OF OBLIGATIONS. Actions constituting a breach of the obligations shall include, but not be limited to the failure to pay City, within forty-five days any sum due under Section 5 above. In each case, it shall be deemed a breach of the obligations imposed in this Section 8 after receipt of written notice from City and a reasonable period of time in which to cure the failure, not to exceed thirty (30) days.

9. PREPARATION OF ADMINISTRATIVE RECORD. BNSF and City acknowledge that, upon the commencement of legal Proceedings, the administrative record of proceedings relating to the preparation of the Revised Environmental Analysis and resulting Project Documents and Project Approvals must be prepared by City in compliance with all applicable laws and in accordance with reasonable procedures established by City. City shall be reimbursed by BNSF for all reasonable, actual costs associated with preparation of the administrative record, including reasonable charges for staff time.

10. SURVIVAL. The obligations imposed in this Agreement shall survive any decision invalidating the Project Approvals, including, but not limited to, decisions by any governmental agency or judicial decision.

11. NO CONFIDENTIALITY OF THIS AGREEMENT. The Parties may reveal all or part of this Agreement to others as required by law.

12. ASSIGNMENTS. BNSF may not assign its rights or obligations under this Agreement to any third party but may assign the entire Agreement to any subsidiary or affiliate of BNSF approved by City. Any assignment by BNSF shall not relieve BNSF from its duties hereunder. Any prohibited assignment or purported assignment shall be null and void, and BNSF shall bear sole responsibility for any consequences resulting from

such prohibited or purported assignment. LAHD may not assign its rights or obligations under this Agreement.

13. APPLICABLE LAW. This Agreement shall be governed by and construed under the laws of the State of California without regard to conflicts of laws principles. Any action or proceeding arising out of or related to this Agreement shall be filed and litigated in the state or federal courts located in the County of Los Angeles, State of California, in the judicial district mandated by applicable court rules.

14. COUNTERPARTS. This Agreement may be executed in two or more counterparts, each of which will be deemed to be an original copy and all of which, when taken together, will be deemed to constitute one and the same document, which shall be binding and effective as to each of the Parties hereto. A facsimile shall be deemed to be an original.

15. NOTICES. Any notice or correspondence to be provided by either Party shall be in writing and dispatched by first class mail, registered or certified mail, postage prepaid, return receipt requested, or by electronic facsimile transmission followed by delivery of a "hard" copy, or by personal delivery (including by means of professional messenger service or courier service or by U.S. Postal Service). A notice shall be deemed to have been given, (i) in the case of first class, registered or certified mail, when delivered or the first attempted delivery on a business day, or (ii) in the case of expedited prepaid delivery and facsimile, upon the first attempted delivery on a business day. The following addresses shall serve as the locations to which notices and other correspondences relating to this Agreement between BNSF and LAHD shall be sent:

To BNSF: BNSF Railway Company
Marisa Blackshire
3770 E. 26th Street
Los Angeles, CA 90058

With a copy to: BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131

To LAHD: City of Los Angeles Harbor Department
425 S. Palos Verdes Street
San Pedro, CA 90733-0151
Attn: Director, Environmental Management

With a copy to: Office of the City Attorney
425 S. Palos Verdes Street
San Pedro, CA 90733-0151
Attn: General Counsel

16. AMENDMENTS. Any amendments or modifications to this Agreement must be agreed to by all Parties and must be in writing. Any such modifications are subject to all applicable Approval processes required by, without limitation, City's Charter and City's Administrative Code. This Agreement constitutes the entire agreement between the Parties as to its specific subject matter, and supersedes all prior discussions, negotiations, and agreements, whether oral or written, if any, as to the specific subject matter of this Agreement only. Any amendment to this Agreement, including an oral modification supported by new consideration, must be reduced to writing and signed by both Parties before it will be effective. Both Parties have had equal opportunity in drafting of this Agreement. The usual construction of an agreement as to the drafting Party shall not apply to this Agreement.

17. SEVERABILITY. If any provision of this Agreement is deemed invalid or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

18. LEGAL CAPACITY AND AUTHORIZATION. Each person executing this Agreement warrants that he or she has the capacity set forth on the signature pages with full authorization to execute this Agreement on behalf of the entity they are signing on behalf of, and further represents that all necessary approvals have been obtained to execute and implement this Agreement.

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IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date to the left of their signatures.

THE CITY OF LOS ANGELES, by its
Board of Harbor Commissioners


Dated: _____

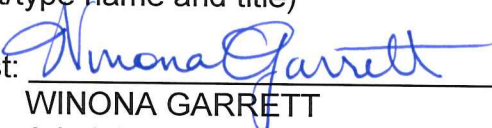
By _____
EUGENE D. SEROKA
Executive Director

Attest: _____
AMBER M. KLESGES
Board Secretary

BNSF RAILWAY COMPANY
A Delaware Company

Dated: October 9, 2018

By: 
JOHN D. LOVENBURG
Vice President Environmental
(Print/type name and title)

Attest: 
WINONA GARRETT
Administrative Assistant
(Print/type name and title)

APPROVED AS TO FORM AND LEGALITY

_____, 2018
MICHAEL N. FEUER, City Attorney
JANNA B. SIDLEY, General Counsel

By: _____
Joy M. Crose, Asst. General Counsel

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