

Memorandum

To: Finance, Expenditure & Legal Subcommittee

From: Eric Williams

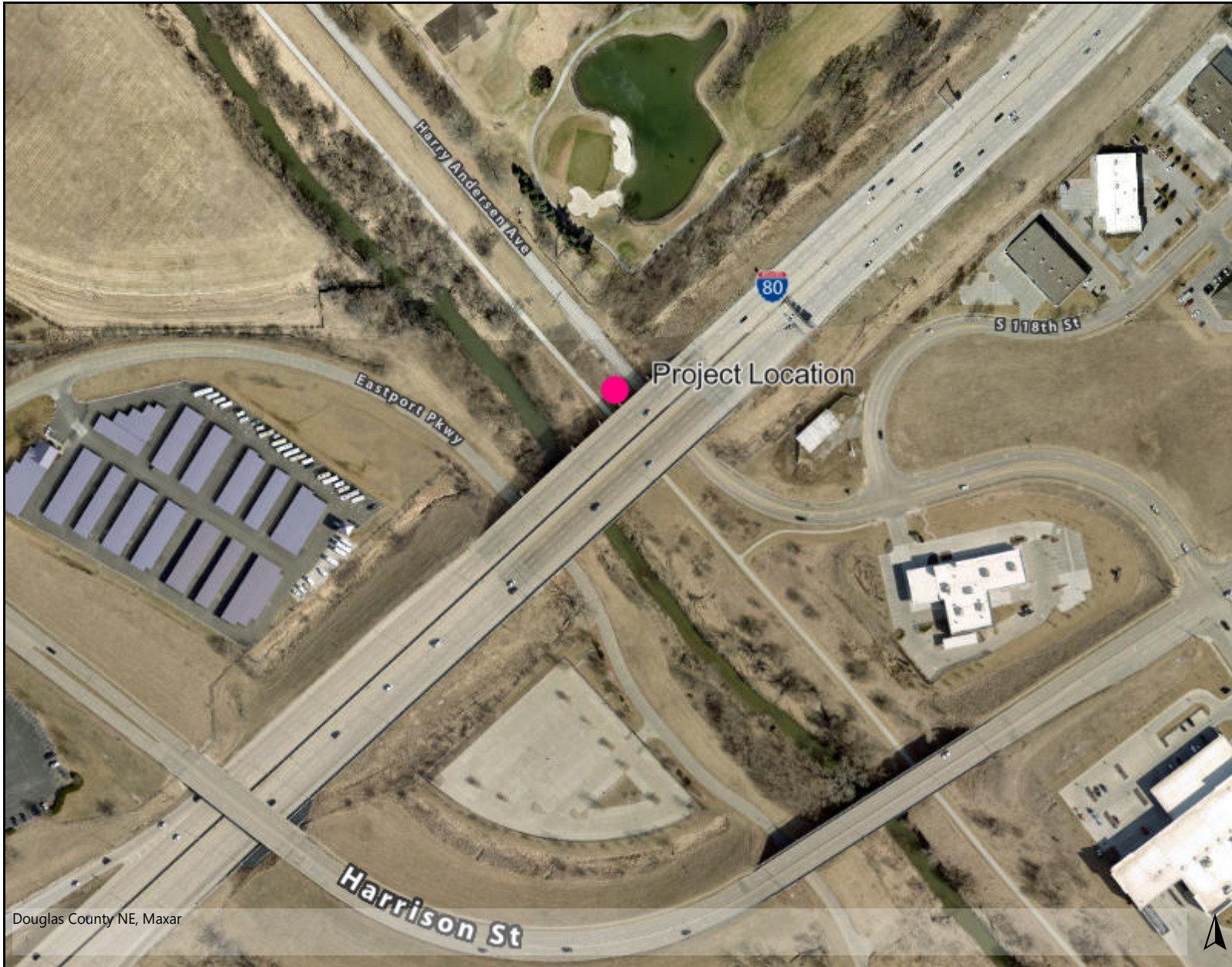
Date: August 1, 2024

RE: License Agreement with NDOT for I-80 Widening

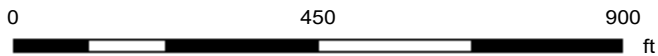
The District purchased a former railroad corridor and in 2018 completed a section of West Papio Trail from Giles Road to Q Street. The trail is operated by the cities of Omaha and La Vista and the underlying property rights are held by the District according to a ruling by the Surface Transportation Board.

The Nebraska Department of Transportation (NDOT) plans construction of an additional westbound lane on Interstate 80 which will include widening of the bridge structure over the West Papio Creek and trail. NDOT has requested access to District property during construction as described in the attached agreement.

- **Management recommends that the Subcommittee recommend to the Board of Directors that the General Manager be authorized to execute the Right of Way License Agreement with the Nebraska Department of Transportation for construction of improvements to the Interstate 80 highway bridge, subject to changes deemed necessary by the General Manager and approved as to form by District Legal Counsel.**



Douglas County NE, Maxar



Please contact Douglas County GIS for map questions (gis@douglascounty-ne.gov)

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This map is a user generated static output from an Internet mapping site and is for reference only. Data on this map may or may not be accurate, current, or otherwise reliable. It is for informational purposes only, and may not be suitable for legal, engineering, or surveying purposes. Do NOT use property lines from this website for plan submissions.

Legend

RIGHT OF WAY LICENSE AGREEMENT

This Trail License Agreement (the “**Agreement**”) is entered into on this _____ day of _____, 2024 (the “**Effective Date**”), by and between the Papio-Missouri River Natural Resources District (“**Licensors**”), and State of Nebraska, Department of Transportation (the “**Licensee**”). Licensors and Licensee may each hereinafter be referred to as a “**Party**” and collectively as the “**Parties**.”

PRELIMINARY STATEMENTS

A. Pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (the “**Trails Act**”), the Surface Transportation Board (“**STB**”) Decision in STB Docket No. AB-33 (Sub-No. 260X) (the “**Trails Use Decision**”) and that certain Purchase and Sale Agreement (the “**Trails Use Agreement**”) dated October 20, 2010 by and between Union Pacific Railroad Company (“**UPRC**”) and Licensors, Licensors acquired UPRC’s interest in and to the right-of-way in Douglas and Sarpy Counties, Nebraska, extending from Milepost 19.4 to Milepost 22.1 on UPRC’s Industrial Lead (the “**Right-of-Way**”) and became the Trails Act “trail sponsor” of the Right-of-Way. The Right-of-Way is generally located southwest of the intersection of Q Street and Harry Andersen Avenue, Omaha, Nebraska.

B. Sometime prior to October of 2010, and working directly with the UPRC, Licensee previously constructed a highway bridge structure (which carries Interstate 80 highway traffic over the Right-of-Way) within the Right-of-Way, including the installation of bridge piers and a highway structure above the Right-of-Way. Licensee now desires to access, design, construct, maintain, operate, inspect and repair additional bridge pier structures and overhead highway structures within the Right-of-Way (the “**Improvements**”) to continue to provide highway transportation throughout the State of Nebraska. Licensee understands and agrees that it will be responsible for the on-going maintenance of the existing highway bridge structure and Improvements at no cost to the Licensors.

C. To accomplish the construction of the needed new highway bridge Improvements, Licensee wishes to license that portion of the Right-of-Way that is depicted and more particularly described on **Exhibits** attached hereto and incorporated herein by reference (the “**Licensed Premises**”) access, design, construct, maintain, operate, inspect and repair the Improvements within the Licensed Premises and to otherwise use the Licensed Premises for such other purposes and subject to the terms and conditions described and set forth in this Agreement, and Licensors wish to grant such use to Licensee subject to the terms and conditions described and set forth in this Agreement.

D. Licensee may have property interests to the Right-of-Way prior to the Trails Use Decision. Each Party reserves all potential claims of property interests in the Right-of-Way and the act of entering into this Agreement shall not serve as a waiver or foreclosure of those rights nor an acknowledgement of the other Party’s property interests or priority of any such property interests.

NOW THEREFORE, expressly subject to the terms of the Preliminary Statements, in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

ARTICLE 1

GRANT

1.1 License. In consideration for Licensee to access, design, construct, maintain, operate, inspect and repair bridge pier structures and overhead highway structures existing within the Right-of-Way as of the date of this Agreement and the Improvements and other covenants of Licensee set forth herein,

Licensor hereby grants a license to Licensee for the Term and authorizes Licensee and/or Licensee's contractors to:

- (a) Enter upon and exit from the Licensed Premises to access, design, construct, maintain, operate, inspect and repair bridge pier structures and overhead highway structures that is along the Licensed Premises as depicted and more particularly described on **Exhibit A** attached hereto and incorporated herein by reference; and
- (b) Provide, on a non-exclusive basis, pedestrian and vehicular access to the Improvements on the Licensed Premises.

1.2 Rights Retained by Licensor. Licensor hereby reserves the right with respect to the Licensed Premises to oversee the ultimate operation, maintenance and management of the Right-of-Way. Notwithstanding anything to the contrary, to preserve the Right-of-Way for interim trail use/rail banking under the Trails Act, Licensor shall retain ultimate control and responsibility over the Right-of-Way, including, but not limited to: (x) managing the Right-of-Way, (y) any legal liability arising out of the transfer or use of the Right-of-Way from UPRC to Licensor (unless Licensor is immune from liability, in which case Licensor shall retain ultimate responsibility for potential liability arising out of such transfer or use) and (z) the payment of any and all taxes that may be levied or assessed against the Right-of-Way. Licensor and Licensee hereby understand, acknowledge and agree that use of the Right-of-Way, or any part thereof, including, but not limited to, the Licensed Premises, is subject to the possible future reconstruction and reactivation of the Right-of-Way for rail service.

1.3 Services. Subject to Section 1.2 of this Agreement, Licensee shall, at no cost to Licensor: (a) install, construct, operate, maintain and repair the Improvements on the Licensed Premises in a reasonable manner mutually satisfactory to the Parties; (b) return the grading in accordance with the existing conditions prior to use of the Licensed Premises and to a reasonable manner mutually satisfactory to the Parties; and (c) remove and replace any concrete areas in the Right-of-Way which were damaged by the Licensees or its contractors.

1.4 Approvals. Licensee's installation, construction, or alteration of the Improvements shall require Licensor's express, written approval, which shall not be unreasonably withheld, conditioned or delayed, before such installation, construction, or alteration may occur. Licensor's approval for the installation, construction, or alteration of the Improvements shall require a two-step process; a preliminary approval and a final approval. Initially, Licensee shall submit a preliminary design to the Licensor for Licensee's proposed construction or alteration. Within thirty (30) days, following Licensee's submission of all information necessary for Licensor's consideration, Licensor shall inform Licensee whether the preliminary design is approved. Thereafter, if Licensee's preliminary design is approved by Licensor, Licensee shall submit a final, detailed design to Licensor. Within thirty (30) days following Licensee's submission of all information necessary for Licensor's consideration, Licensor shall inform Licensee whether the final design is approved. Should Licensee elect to construct any portion of the project in phases, Licensee shall submit the necessary information and plans to the Licensor in advance of the construction of each individual phase.

ARTICLE 2

TERM

2.1 Term. The term of this Agreement shall begin as of the Effective Date and shall continue until the Ninety Ninth (99th) year anniversary of the Effective Date. Notwithstanding anything to the contrary, this Agreement shall:

(a) Terminate automatically and without the need for any further action by any Party or other party if rail service on the Right-of-Way is reactivated pursuant to the Trails Act.

(b) Be deemed an absolute nullity and void *ab initio* in the event any Governmental Body with appropriate authority and jurisdiction deems this Agreement to violate the Trails Act in a manner that would cause the Licensor to lose its interest in all or any part of the Right-of-Way and/or for the Right-of-Way to be abandoned.

ARTICLE 3

FEE

3.1 License Fee. In lieu of a cash payment, the Parties agree that the consideration is the Parties' agreement to comply with the terms hereof.

ARTICLE 4

USE

4.1 Use. Licensee shall occupy and use the Licensed Premises only for the purposes set forth in Section 1.1 of this Agreement (the "**Permitted Use**"). Licensee shall provide and maintain all necessary licenses and permits legally necessary to carry out and/or engage in the Permitted Use.

ARTICLE 5

LIMITATION OF LIABILITY

5.1 Indemnification. The Licensee shall indemnify and hold the Licensor harmless from and against all liability and damages relating to the Improvements, including but not limited to the design, construction, operation, or maintenance of the Improvements, and against all demands, causes of action, and claims arising therefrom, except as may be caused by the negligence or willful conduct of the Licensor. In so agreeing to this indemnity clause, Licensee does not waive any privileges, rights, defenses, procedural safeguards, claim prerequisites, or immunities it has under the State Tort Claims Act., Neb. Rev. Stat. § 81-8,209, et seq., and other Nebraska statutes and laws, including, but not limited to Neb. Rev. Stat. § 14-804, et seq. Further, Licensee does not agree to pay for any attorney fees, costs, or expenses for legal counsel not employed by Licensee.

5.2 Limitation of Responsibility. Notwithstanding any other provision of this Agreement to the contrary, in no event shall either Party be liable to the other Party or any other party for any consequential, incidental, punitive, exemplary, treble, special or indirect damages of any kind, including any loss of future revenue, income, or profits, diminution of value or multiples of earnings, arising out of or related to this Agreement, in each case, whether arising in contract, warranty, tort, strict liability, by operation of law, or otherwise.

ARTICLE 6

CONDITION OF LICENSED PREMISES

6.1 AS-IS. Licensor's agreement to allow Licensee to use the Licensed Premises is on an "as-is" basis. Licensee has inspected and agreed to use the Licensed Premises in the condition it is in at the commencement of this Agreement and acknowledges and agrees that Licensor has made no representations

or warranties in connection therewith including, without limitation, any representation or warranty of merchantability or fitness for a particular purpose.

6.2 Requirements. Licensee agrees that each replacement, alteration, improvement or addition to or removal from the Licensed Premises (collectively an “**alteration**”) shall be performed in a good and workmanlike manner. Licensee shall not be obligated to remove such alterations at the end of the Term. Licensee shall not make any material alteration(s) without the express, written consent of Licensor, as detailed above in § 1.4.

ARTICLE 7

DAMAGE OR DESTRUCTION

Immediately upon the occurrence of any damage or destruction to the Licensed Premises by casualty, Licensee shall immediately give notice of such damage or destruction to Licensor. Under no circumstances, regardless of the extent of the damage or destruction, shall Licensor have any obligation to repair or restore the Licensed Premises. No damage or destruction shall permit Licensee to surrender this Agreement or shall relieve Licensee from its compliance, observation or performance of its covenants, obligations, terms, or conditions under this Agreement. Licensee shall have no claim against Licensor for any damage suffered by reason of any such damage or destruction.

ARTICLE 8

DEFAULT

8.1 Licensee’s Default. The occurrence of any of the following shall constitute a default (a “**Default**”) by Licensee under this Agreement: (a) Licensee effects or attempts to effect a transfer of any type (including, but not limited to, a sublicense), all or any part of the Licensed Premises, without the prior written consent of Licensor (b) Licensee fails to perform any provision of this Agreement and such failure is not cured within thirty (30) days after written notice thereof is given to Licensee (or immediately if the failure involves a hazardous or dangerous condition that may present immediate danger as determined by Licensor in Licensor’s sole discretion), (c) any action or inaction that is a default and/or violation under (i) the Trails Use Decision, (ii) the Trails Use Agreement and/or (iii) the Trails Act, (d) Licensee’s failure, for any reason, and such failure is not cured within thirty (30) days after written notice thereof is given to Licensee, to construct and/or cause to be constructed the Improvements as agreed to by the Parties.

8.2 Licensor’s Remedies. In the event of a Default, Licensee agrees that Licensor shall be entitled to all remedies available at law or in equity as a result thereof including, without limitation, the right to dispossess Licensee from the Licensed Premises or, to the extent permitted by law, without the power of law. In the event of a Default pursuant to Section 8.1(c), this Agreement shall be deemed to have been an absolute nullity and void *ab initio*.

ARTICLE 9

SUCCESSORS AND ASSIGNS

9.1 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties and, except as provided herein, their respective successors and assigns. Licensee may not assign this Agreement or any rights or obligations hereunder (by operation of Law or otherwise) without the prior written consent of Licensor, which may be withheld in Licensor’s sole and absolute discretion, and any attempted assignment without such consent shall be void *ab initio* and of no legal effect. In the

event Licensee seeks to sell, transfer or otherwise convey the Licensee Property to any other Person, Licensee and its successors and assigns shall, as a condition to the effectiveness of such sale, transfer or other conveyance, require that such other Person enter into a Right of Way License Agreement with Licensor on substantially the same terms contained in this Agreement unless Licensor waives such requirement in a signed writing. Upon any permitted assignment under this **Article 9** hereunder, references in this Agreement to such assigning party hereto shall also apply to any such assignee unless the context otherwise requires.

ARTICLE 10

GENERAL PROVISIONS

10.1 Notices. All consents, notices, requests, agreements or other communications under this Agreement must be in writing to be effective and shall take effect (or shall be deemed to have been given or delivered, as the case may be): (a) on the business day sent, when delivered by hand, or by electronic mail transmission (with receipt of confirmation), during the normal business hours of the recipient and (b) on the business day following the business day of sending, if delivered by an internationally recognized overnight courier, in each case, to such Party at its address (or number) set forth below or such other address (or number) as the Party may specify by notice.

If to Licensor: Papio-Missouri River Natural Resources District
Attn: John Winkler, General Manager
8901 S. 154th Street
Omaha, NE 68138-6222

If to Licensee: State of Nebraska
Department of Transportation
Attn: Right-of-Way Engineer
1600 Nebraska Parkway
P.O. Box 4759
Lincoln, NE 68509-4759

10.2 No Real Property Interest. Licensee acknowledges and agrees that this Agreement conveys no real property interest in or to the Licensed Premises or any other portion of Licensor's property and shall not be recorded in the public records in any manner.

10.3 Governing Law; Submission to Jurisdiction; Waiver of Jury Trial.

(a) This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska without regard to the laws of the State of Nebraska or any other jurisdiction that would call for the application of the substantive laws of any jurisdiction other than the State of Nebraska.

(b) The Parties agree that the appropriate, exclusive and convenient forum (the "**Forum**") for any disputes between the Parties arising out of or related to this Agreement or the transactions contemplated hereby shall be in Lancaster County, Nebraska. The Parties irrevocably submit to the jurisdiction of such courts solely in respect of any disputes arising out of or related to this Agreement or the transactions contemplated hereby.

(c) Nothing in this Agreement or in any other agreement between the Parties shall be construed as a waiver of all or any part of, or as in any way limiting, the sovereign immunity afforded to Licensor or Licensee pursuant to Applicable Law.

10.4 Entire Agreement; Amendment. This Agreement contains the entire agreement between the Parties with respect to the transactions contemplated herein, supersedes all prior contracts and negotiations, if any, and this Agreement may not be amended, supplemented or discharged except by the written consent of each Party.

10.5 Waiver. The terms and provisions of this Agreement may be waived, or consent for the departure therefrom may be granted, only by a written document executed by the Party granting such waiver or giving such consent. No such waiver or consent shall be deemed to be or shall constitute a waiver or consent with respect to any other terms or provisions of this Agreement, whether or not similar. Each such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it was given or granted, and shall not constitute a continuing waiver or consent. No failure or delay by a Party to exercise any right, power or remedy under this Agreement, and no course of dealing between the Parties, shall operate as a waiver of any such right, power or remedy of the Party. No single or partial exercise by a Party of any right, power or remedy under this Agreement, nor any abandonment or discontinuance of steps to enforce any such right, power or remedy, shall preclude such Party from any other or further exercise thereof or the exercise of any other right, power or remedy under this Agreement. The election of any remedy by a Party shall not constitute a waiver of the right of such Party to pursue other available remedies. No notice to or demand on a Party not expressly required under this Agreement shall entitle the Party receiving the notice or demand to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the Party giving the notice or demand to any other or further action in any circumstances without the notice or demand.

10.6 Counterparts. This Agreement may be executed in counterparts, both of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A signature delivered by facsimile or other similar electronic transmission (including email) shall be considered an original signature. Any Person may rely on a copy or reproduction of this Agreement, and an original shall be made available upon a reasonable request.

10.7 Further Assurances. From time to time, at the reasonable request of either Party and without further consideration, the other Party shall execute and deliver such reasonable additional documents and take all such further action as may be necessary or appropriate to consummate and make effective, in the most expeditious manner practicable, the transactions contemplated by this Agreement or to carry out the terms of this Agreement.

10.8 Severability. Each provision of this Agreement shall be considered severable, and if for any reason any provision of this Agreement is determined to be illegal, invalid or unenforceable or contrary to any existing or future Law, the illegality, invalidity or unenforceability shall not impair the operation of or affect those portions of this Agreement that are valid. In lieu of each such illegal, invalid or unenforceable provision, there shall be added automatically as a part of this Agreement a provision as similar in terms to such illegal, invalid or unenforceable provisions as may be possible and be legal, valid and enforceable.

10.9 No Third Party Beneficiaries. Nothing contained in this Agreement shall create or be deemed to create any rights or benefits in any third parties.

10.10 Headings and Captions. The headings and captions of the various articles and sections of this Agreement are for convenience of reference only and shall in no way modify or affect the meaning or construction of any of the terms or provisions of this Agreement.

10.11 Expenses. Except as otherwise specifically set forth in this Agreement, each Party shall pay its respective fees and expenses (including the fees of any attorneys, accountants, appraisers or others engaged by the Party) in connection with the preparation or enforcement of, or of any requests for consents under, this Agreement, including any amendments or waivers to this Agreement.

10.12 Non-Discrimination. Licensee and its agents shall not discriminate against any employee or applicant for employment, to be employed in the performance any work related to the Permitted Use, with respect to his/her hire, tenure, terms, conditions, or privileges of employment, because of his or her race, color, religion, sex, disability, or national origin.

10.13 Employee Verification. Licensee shall use a federal immigration verification system to determine the work eligibility status of new employees or subcontractors physically performing construction and/or maintenance with respect to the Improvements. A federal immigration verification system means the electronic verification of the work authorization program authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1324a, known as the E-Verify Program, or equivalent federal program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work eligibility status of newly hired employees.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

LICENSOR:

PAPIO-MISSOURI RIVER NATURAL RESOURCES
DISTRICT

By: _____
Name: John Winkler
Title: General Manager

STATE OF NEBRASKA)
) SS
COUNTY OF SARPY)

On this _____ day of _____ 20____, before me, a Notary Public in and for said County, personally came the above named JOHN G. WINKLER, General Manager of the Papio-Missouri River Natural Resources District, and he acknowledged the execution of the above Right of Way License Agreement as his voluntary act and deed and the voluntary act and deed of said District.

WITNESS my hand and Notarial Seal the date last aforesaid.

Notary Public

LICENSEE:

STATE OF NEBRASKA, DEPARTMENT OF
TRANSPORATION

BY:

STATE OF NEBRASKA)
) SS
COUNTY OF LANCASTER)

On this _____ day of _____, 20____, before me, a Notary Public in and for said County, personally came _____ to me personally known to be the respective officer of said THE STATE OF NEBRASKA and the identical person whose name is affixed to the foregoing instrument, and acknowledged the execution thereof to be their respective voluntary act and deed and the voluntary act and deed of THE STATE OF NEBRASKA.

WITNESS my hand and Notarial Seal the day and year last above written.

Notary Seal:

NOTARY PUBLIC